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**COMPARATIVE INTERNATIONAL LAW**

*Boris N. Mamlyuk & Ugo Mattei*

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INTRODUCTION

Shortly over a decade ago, two very exciting developments in the fields of international law and comparative law (respectively) whizzed past one another. The first, in the field of international law, was the publication of a now-classic 1999 symposium issue by the American Journal of International Law (“AJIL”) where representatives of seven different methods or approaches to international law wrote upon a single issue using their approach.1 This was meant to illustrate the wealth of insights to be gained from various interdisciplinary, critical, or other approaches to common international law problems.2 In comparative law, an event of parallel proportions was the Centennial World Congress of Comparative Law, held in New Orleans in 2000 to commemorate the opening of the first World Congress on Comparative Law in Paris in 1900.3 The 2000 New Orleans conference drew leading comparativists from the world over to assess the state of the discipline, to examine comparative law’s successes and failures in the twentieth century, and to outline the most pressing areas for inquiry for the coming years.

The two symposia could not have shared more disparate fates. The AJIL symposium issue, edited by Steven Ratner and Anne-Marie Slaughter, became a bestseller (by standards of American legal scholarship), commanding several subsequent reissues from 2004 forward. It remains in print, offering a menu of methodologies for internationalists depending on taste and intellectual or political bend.4 The Ratner/Slaughter book has become a desktop reference for students and practitioners eager to acquaint themselves with realism in international relations or looking for a quick primer on Third World Approaches to International Law (“TWAIL”). By contrast, the comparative law symposium issue went, by and large, unnoticed outside the discipline. This is regrettable, but not for the familiar Cinderella reasons.5

2. See id.
Ten years on, a group of scholars are now undertaking the delicate task of weaving together the fields of comparative law and international law. Recently, a conference organized by a progressive group of doctoral law students (the Toronto Group) presented a panel exploring the field of comparative international law (“CIL”), or national approaches to public international law and governance. These conferences are indicative of surging interest in, and potential misuse of, traditional comparative law techniques, vocabularies, and projects.

In effort to seize on this moment and guide the methodological and substantive discussion on CIL towards emancipatory ends, it is vital to address three fundamental issues, or what we shall call roots (the history of CIL); pitfalls (intellectual traps for the unwary sojourner exploring CIL); and politics (or the ineluctable moral, distributive, and participatory consequences of CIL projects). We explore these three issues mindful of a constellation of historical factors that have contributed to the rise of CIL. Principal among these was the collapse of the Union of Soviet Socialist Republics (“USSR”) twenty years ago and the ostensible elimination of not only socialist law from the grand family of legal systems, but also of socialist international law from the mindset of international lawyers and practitioners.

Section I begins with an examination of the history of CIL, choosing the creation of the Soviet Union and the concomitant creation of “Soviet international law” as the starting point of our inquiry. This Section explores the important cross-fertilization between the two disciplines (comparative law and international law) during the period. Section II analyzes several important methodological paths available to CIL scholars, including focusing on the study of comparative international legal histories, CIL institutional histories, and the study of the diffusion of norms or dominant ideologies. Section III concludes by exploring the implications of such a study and suggests analytical frameworks for prospective CIL projects.


I. ROOTS: BRIEF HISTORY OF CIL

A common misconception in CIL is that this nascent field is the intellectual product of advances in critical approaches to international law, or what has elsewhere been called new approaches to international law (“NAIL”) or ‘newstream,’9 and more recently still, TWAIL.10 This sentiment is heard in any number of conference presentations.11 As a threshold matter, it is factually incorrect. CIL is not the product of the past decade. As an academic discipline in the West, the course “comparative approaches to international law” was taught in the 1970s at University College London by eminent Russian law scholar William E. Butler.12 An edited work on international law in comparative perspective was published thirty years ago by Butler in 1980.13 Twenty-five years ago, Butler also delivered a series of lectures on the field at the Hague Academy of International Law.14 His contributions to the methodology of CIL below are discussed below.

Even the term is far from new. Aside from Butler’s use of comparative approaches to international law, CIL can be traced to the early 1960s to describe the competing Western and Soviet international legal orders.15 The term was recently suggested for the process of comparing interna-
tional treaties and provisions, but the more traditional and commonsense use is the one proposed by McWhinney, Butler, and others to describe, in very general terms, competing approaches to international law, institutions, and governance. This is an important clarification, for as discussed below, terminological issues are some of the most central fields of debate in comparative law.

Furthermore, as will be explored, CIL also existed earlier as a discipline in other national traditions. Below, this Article surveys the origins of CIL in the early twentieth century without any claim regarding earlier origins of this sub-field. In fact, subsequent histories will surely place the start of CIL much further in the annals of history (and introduce parallel CIL traditions in the same temporal plane). But, for the present purposes, the chosen periodization is sufficient to illustrate the promises and major blindspots inherent in such a study.

16. Markku Kiikeri, Comparative Legal Reasoning and European Law 305 (2001) (uses the term to mean the “comparison of international treaties and their provisions” but this is assuredly not the best use for such a broad term); Anthea Roberts, Comparative International Law? The Role of National Courts in Creating and Enforcing International Law, 60 Int’l & Comp. L.Q. 57 (2011) (using the term “comparative international law” to refer to the way academics, practitioners and national courts seek to identify and interpret international law by engaging in comparative analyses of various domestic court decisions).

17. Edward McWhinney used comparative international law to describe not merely intra-bloc rivalry over competing international law ‘systems’ during the Cold War, but to describe the divergent evolution of other systems of international law, such as: (1) traditional international law in the sense of custom-based rules and general treaty law; (2) UN law, UNSC and UNGA resolutions and decisions of the ICJ; (3) ‘regional’ international law; and (4) Socialist international law. See Edward McWhinney, Operational Methodology and Philosophy for Accommodation of the Contending International Legal Systems, 50 Va. L. Rev. 36 (1964). “The operational problem for the present-day international lawyer who is genuinely concerned with the attempt to accommodate the contending legal systems may in some sense seem to reduce to an exercise in comparative law—comparative international law, if one wishes to be precise.” Id. at 54. McWhinney believed that by doing comparative international law, a U.S. and Soviet legal task force could find a ‘common core’ of international law where there is or is likely to be broad consensus and to separate and quarantine areas of controversy and divergence.

18. This is a heuristic choice, not a concrete historical claim. Comparative international law can be said to have started earlier, perhaps as early as the very creation of classic European international law in the seventeenth century, and the attempts by peripheral non-European states to appropriate or create alternative visions of international law. See, e.g., Arnulf Becker Lorca, Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation, 51 Harv. Int’l L.J. 475, 521 (2010) (arguing that in the process of appropriating Western international law, elite non-Western international law jurists created a “particularistic universalism” conception of the international order).
A. The Interwar Period and Start of Alternatives

World War I (“WWI”) and the formation of the League of Nations traditionally signify the start of modern international law. This period also coincides with arguably the most significant historical events of the twentieth century, the Bolshevik Revolution and the formation of the Russian Soviet Federative Socialist Republic (“RSFSR”), and later the development of the Soviet Union. The two moments are of course intimately interrelated, and their linkages and nuances have been fought over by historians, political scientists, and sociologists ever since. The moments also had great significance for the three disciplines at issue here (public international law, comparative law, and CIL).

To the field of international law in the West, the Russian revolution signified a challenge. From its inception, the USSR squarely charged the architects of the League system and the Versailles Treaty with imperialist aims and threatened, quite bluntly, to demolish the international legal order by a series of worldwide workers’ revolutions. Inspired by the Marxist tradition, the Soviet state proposed an alternative domestic and global governance model that absolutely rejected longstanding classic liberal notions regarding private property, free trade, the organic class system (itself originating in the Aristotelian tradition, but rationalized by vulgarized interpretations of Charles Darwin’s natural selection theory), and so on. To traditional comparative law scholars, the Russian revolution produced a great family of law—the socialist legal system—that would go on to influence dozens of national domestic legal orders through direct imposition, indirect transplant, and law and development schemes. As discussed below, the Soviet state introduced a concrete programmatic proposal for the world’s colonized peoples and exploited workers. From its inception, it offered solidarity, material aid, and organizational resources to national liberation movements in opposition to European imperial powers. Equally important, it offered a theoretical and strategic alternative to the predominant global legal order. These developments stretched traditional disciplinary bounds, creating new fields (international political economy) but also for the first time, putting comparative law and international law into tension with one another. Whereas traditionally, comparative law rested on the assumption of legal pluralism and early twentieth century international law rested on an assump-

19. Again, this is not the place to discuss the relevance of 1492, 1648, 1815, 1885 or other dates potentially integral to the development of international law. That lively debate is better held elsewhere.
20. See infra note 57.
22. See infra text accompanying notes 242–51.
tion of universality, these bright distinctions no longer held true. From this point forward, the need for CIL (defined as the study of alternative approaches to dominant governance paradigms) was born.

B. A Historical Taxonomy

How is CIL different from traditional comparative law, or traditional international legal theory, or the study of international legal history(ies)?

In its most basic form, CIL, like basic comparative law, intends to satisfy our base instinct to catalog, shelf, sort, and understand. CIL is simply another form of legal taxonomy, built on the premise that its unique form of classification will facilitate an improved understanding of the law. CIL offers a chance to take stock of an increasingly pluralized and fractionalized global legal order, the ever-more complex maze of international, regional, and bilateral agreements, both hard and soft. As Emily Sherwin has observed, significant benefits can result from a useful categorization of the law:

[O]rganisation of law into categories . . . facilitate[s] legal analysis and communication of legal ideas. . . . [A] comprehensive formal classification of law provides a vocabulary and grammar that can make law more accessible and understandable to those who must use and apply it. It assembles legal materials in a way that allows observers to view the law as a whole law. This in turn makes it easier for lawyers to argue effectively about the normative aspects of law, for judges to explain their decisions, and for actors to coordinate their activities in response to law.25

25. Emily Sherwin, Legal Positivism and the Taxonomy of Private Law, in Structure and Justification in Private Law 103, 119 (Charles Rickett & Ross Grantham eds., 2008) (internal citations omitted); see also Mattei, Three Patterns, supra note
A perfect taxonomy of international legal orders, then, offers a coherent way to sort among them, to distinguish patterns and commonalities, and to observe faultlines. There is a reason, after all, why René David and Rudolf Schlesinger’s systems and families analysis continues to offer very rough, but useful, guidance fifty years on.\textsuperscript{26} In its most elementary form, for instance, breaking legal systems into common law, Islamic law, civil law, and socialist (and now post-socialist) law is a useful pedagogical heuristic, indispensable for introducing students to different traditions despite the variances within the ‘families.’

Of course, comparativists know all too well that building a perfect framework for the world’s legal systems is not only exceedingly difficult, but may in fact be impossible. Attempts to construct grand comparative law narratives on ostensibly objective criteria have been shown to mask and replicate traditional historical infelicities.\textsuperscript{27} Thankfully, with the accelerating move away from the nation-state as the fundamental jurisdictional unit of comparison—Germany’s liability rules for nuisance\textsuperscript{28} versus South Africa’s giving way to micro-level anthropological studies and ethnographies of decision making and adjudication processes\textsuperscript{29}—there are fewer and fewer calls for a perfectly coherent taxonomy, at least from the ranks of academic comparativists.\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{24} at 6 (“Taxonomy plays an important role in transferring knowledge from one area of the law to another.”)
\item \textsuperscript{26} Compare Rudolf B. Schlesinger, Comparative Law: Cases, Texts, Materials (1950), with Ugo Mattei, Teemu Ruskola, Antonio Gidi, Schlesinger’s Comparative Law (7th ed., 2009) [hereinafter Schlesinger’s Comparative Law].
\item \textsuperscript{27} See, e.g., Annelise Riles, Encountering Amateurism: John Henry Wigmore and the Uses of American Formalism, in Rethinking the Masters of Comparative Law 94, 118 (Annelise Riles ed., 2001) [hereinafter Riles, Encountering Amateurism] (discussing early comparativist John Henry Wigmore’s attempt to analyze the Japanese legal system as a whole, what Riles refers to as “legal corporeology”).
\item \textsuperscript{28} See, e.g., Timothy Swanson & Andreas Kontoleon, Nuisance, 2 Encyclopedia of L. & Econ. 380, 396 (2008).
\item \textsuperscript{29} See generally Laura Nader, The Life of the Law: Anthropological Studies (2001) (discussing dispute settlement mechanisms in indigenous Zapotec communities); see also infra text accompanying notes 327–29.
\end{itemize}
Moreover, just as international law is undergoing a “turn to history” for theoretical inspiration, comparative law has also sought to make a “turn to politics” (and to history) to seek out direction and purpose. The conscientious wings of both disciplines, it seems, are essentially living out the story of the prodigal child returning home after realizing the world was far more complex than they had imagined. Naturally, since both have been out in the world, it makes sense to swap notes, exchange stories, find shared experiences, and identify common enemies they met along the road. To close the metaphor, however, it is important to realize that there may not be any difference between the comparativist, the internationalist, and the comparative internationalist. They may all have traveled the same path, seen the same patterns, and returned home the same way, simply at different times. Taxonomies allow us to share these experiences. The taxonomic function of CIL, therefore, is not to stake out a new line of intellectual inquiry in the field of public international law, but rather, to map out ongoing and related intellectual projects within comparative law and international law and to bring them together to a coterminous end.

Proceeding on this general plane, the modest role of a comparative international lawyer, therefore, should be that of a liaison, a networker, or a matchmaker. Comparative international lawyers are not meant to be legal philosophers or great legal historians weaving tales of how nations used to solve functionally equivalent legal problems in unique ways by reference to archives or diplomatic histories. Rather, they are institution builders, conference organizers, and networkers. They are strategists, advisors, and diplomats who intuitively understand that every Finnish Yearbook of International Law, Israeli Yearbook of International Law, and Palestine Yearbook of International Law contains subtly (or radically) distinct approaches to identical problems; that state practice varies even in similar international fora because of differences in legal culture, language, and mentalité. As is shown in the Section on methodological minima, CIL practitioners should aspire to embrace plurality among the world’s legal systems, not to gloss over it. Consistent with the general

32. See generally Rethinking the Masters of Comparative Law (Annelise Riles ed., 2001) [hereinafter Rethinking the Masters] (a collection of works discussing modern comparative law issues through a historical lens of the development of comparative law).
33. Id.
34. As to why they ventured on the road out alone and not side by side, that is a matter for another day.
35. See infra Section II.B.
Hippocratic-like oath of the now ordinary comparativist, the goal of the CIL lawyer must be limited, to be interdisciplinary without claiming interdisciplinarity, to understand and to translate foreign approaches to international norms and institutions without seeking to transform them.

Three historical figures, Evgeny A. Korovin, John N. Hazard, and W.E. Butler help illustrate this spirit.

1. Evgeny A. Korovin & Socialist International Law

In the history of Soviet approaches to international law, an often overlooked, but very important early figure is Evgeny A. Korovin (1892–1964). Unlike the eminent Soviet legal theorist Evgeny Pashukanis—whose contributions to Marxist legal theory have stood the test of time—Korovin has been perennially neglected by Western scholars, who view him as a chameleon and whose career is seen as apologetic and mercurial, partly because he escaped Stalin’s purges. The late American comparativist and Sovietologist John N. Hazard, for instance, remarked that “no . . . praise of Korovin as a pioneer ever appeared from any official pen.” This is surprising, as Korovin was one of the leading international lawyers in the Soviet Union, a Soviet member of the American Society of International Law, and charged with expounding Soviet legal theory

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36. See generally Annelise Riles, Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity, 1994 U. ILL. L. REV. 597 (1994). Riles argues that claim of interdisciplinarity has lost much of its rhetorical force, but that interdisciplinary scholarship is helpful in that it discloses tension between “reflexive and normative modes of engagement with legal problems.” Id. at 597.


38. Stunningly, for instance, Piers Beirne’s Revolution in Law: Contributions to the Development of Soviet Legal Theory, 1917-1938 (Piers Beirne ed., 1990), does not have a single mention of Korovin. Cf. Zofia Maclure, Soviet International Legal Theory—Past and Present, 5 FLETCHER F. 49, 49–54 (1981) (providing a good summary to Korovin’s work). Grewe offers one citation of Korovin’s Das Völkerrecht (International Law of the Transition Period) for the proposition that a “fundamental conception of communism [was] that the existing international legal order was only a provisional and transitory system of practical intercourse between socialist and capitalist states.” WILHELM H. GREWE, EPOCHS OF INTERNATIONAL LAW 594 (internal citation omitted). For Grewe’s retelling of the Soviet transition period (1919–1939), see id. at 604–05.


40. In Memoriam, supra note 37; Maclure, supra note 38, at 51, 53.

to American scholars. 42 For the first decade of his career as an international lawyer, Korovin’s writing was interpreted as the official pronouncement of the Soviet state. 43 No less of an authority than Vladimir E. Grabar 44 had called Korovin “the leading Soviet international law theorist.” 45 Yet until now, little has been known about his life.

Korovin was born in 1892 in Moscow to a middle-class family. 46 His father was a doctor and the head of the First Moscow Society on Sobriety, an anti-alcoholism clinic and advocacy group. 47 He was a prodigious student and assisted his father with publications. 48 By age twelve, Korovin began translating the poetry of French poets Lemaitre, Mallarmé, and Gautier. 49 Details about his student life in Moscow are unclear, though an unpublished autobiography may reveal more about his formative years. 50 Korovin graduated from Moscow State University in 1915 51

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43. L. Ratner, Mezhdunarodnoe Pravo v Marksistkom Osveshchenii [International Law in Marxist Light], 6 SOVETSKOE GOSUDARSTVO [SOVIET STATE] 128, 130 (1935) (acknowledging that the only scholarship available to foreign observers on Soviet international law was Korovin’s, leading to the misconception that his scholarship represented the official Soviet doctrine).

44. Vladimir E. Grabar (1865–1956) was one of the leading Russian international law scholars, whose career spanned both the Imperial and Soviet eras. Among his principal works was The History of International Law in Russia (1647–1917) (W.E. Butler trans., 1990). See W.E. Butler, Introduction to Perestroika and International Law 1, 1–2 (W.E. Butler ed., 1990) [hereinafter PERESTROIKA].


47. Id.

48. Id.

49. Id.

50. The standard biography from the Institute of Soviet Law does not provide details on this period of his life. See Evgeny Alexandrovich Korovin, 1 SOVETSKOE GOSUDARSTVO I PRAVO [SOVIET STATE & L.] 133 (1965); see also W.E. Butler, Soviet International Legal Education: The Pashukans Syllabus, 2 REV. SOCIALIST L. 79, 85, n.34 (1976) (describing the unpublished autobiography). Korovin’s personal papers are
during the height of Russia’s campaign in WWI. It is unclear what his position was during the war or during the revolutionary period, but it is known that he began teaching in Moscow shortly after the revolution.  

By 1923 (at age 31), Korovin was a full professor of law at Moscow State University and an assistant of the Institute of Soviet Law (Institut Sovekogo Prava) of the Russian Association of Scientific Institutes of the Social Sciences the predecessor of the Institute of State and Law of the Soviet Academy of Sciences. With respect to his international credentials, and language skills, there is indication that Korovin read English and possibly German, was fluent in French, and monitored Western literature on Soviet law.

His earliest works on international law are a series of articles in the journal Sovetskoe Pravo, from the very first issue in 1922. Between 1922 and 1924, Korovin published articles on the principle of most favored nations, League of Nations, rebus sic stantibus, and diplomatic recognition of the Soviet Union by other nations. By the end of the 1920s, following the reorganization of the legal research institutes and law faculties, Korovin was elevated to a professorship in international law at Moscow State University, and taught international law and international relations at a large number of Moscow institutes of higher learning, including the Moscow Juridical Institute and the Moscow Diplomatic Academy.


51. See In Memoriam, supra note 37.
52. Id.  
54. See Letter from John N. Hazard to Walter S. Rogers, Dir. of the Inst. of Current World Affairs (Nov. 24, 1934).
60. See In Memoriam, supra note 37.
In 1924, the year of Lenin’s death and the year Pashukanis published his influential *General Theory of Law and Marxism*, Korovin published *International Law of the Transition Period*. The initial print run was 5,000 copies, significant for the first Soviet attempt to formulate a theory of international law and international relations. In 1924, Korovin published a short work on Soviet treaties, *International Conventions and Acts of the New Era*. One year later, he published a teaching manual, *Contemporary Public International Law*, which is likely the first CIL textbook. In 1929, a second edition of *International Law of the Transition Period* was translated into German. In addition, between 1924–1928, Korovin published close to ten articles and book reviews on international law in the journal *Sovetskoe Pravo*.

Korovin’s corpus of early work is important to our study for several reasons. First, as one of the two leading authorities on international law during the 1922–1939 period, he had a tremendous influence on an entire generation of Soviet international law scholars and practitioners. The wide distribution of his works and the large print runs and reissues signify that Korovin’s theories, despite being criticized by the Pashukanis camp, were actually quite widely read and taught. Second, Korovin’s work offers the first glance into early Soviet comparative law, for Korovin routinely relied on ‘bourgeois’ examples and Western legal sys-

65. Е.А. КОРОВИН, *СОВРЕМЕННОЕ МЕЖДУНАРОДНОЕ ПУБЛИЧНОЕ ПРАВО* [CONTEMPORARY INTERNATIONAL PUBLIC LAW] (1926) [hereinafter КОРОВИН, CIPL].
tems to make his point about Soviet legal theory. John Hazard, who regularly met with Korovin in the course of his studies at the Moscow Juridical Institute, noted that Korovin was the first to introduce the study of Anglo-American law to Russia through his lectures on the topic in the early 1930s.

Korovin devoted great energy to the study of English and American law, going so far as to translate the 1872 California Code into Russian. To some, Korovin’s comparative work may not seem rigorous and may appear to contain mostly Marxist-inspired platitudes about Western legal systems. For instance, Korovin taught that English law, though it was capitalist in function, was in actuality, feudal in form—though why this distinction mattered was not clear to Hazard. The Whigs and the propertied class controlled the courts in England, Korovin taught, they vigorously maintained the archaic form of the judicial system, adding to the mystique and “hypnosis of law.” However, not having studied in England, Korovin’s observations were derived from his own interpretation of secondary texts.

Nevertheless, despite the understandable opposition to bourgeois jurisprudence and amateuristic comparisons, Korovin actually allowed for the introduction and transplantation of foreign legal concepts and systems into the Soviet Union. Korovin pointed out that the 1934 Soviet Civil Code, for instance, was modeled on the Swiss Civil Code and was compiled in just five months at the Intitute of Soviet Law. Likewise, Korovin introduced elements from the German legal academy to influence Russian law teaching, both substantively and with respect to teaching method. Korovin was deeply familiar with the three reigning

68. See, e.g., Korovin, The Second World War, supra note 42, at 747–48; Mintauts Chakste, Soviet Concepts of the State, International Law and Sovereignty, 43 AM. J. INT’L L. 21, 31 (1949); Malksoo, supra note 67, at 226 (quoting a passage from Korovin explaining the break of Soviet international law from that of Europe).
69. John N. Hazard, Fragments of Lectures on the History of International Relations 29 (unpublished manuscript) (on file with the Bakhmeteff Archive, Columbia University Library System) [hereinafter Hazard, Fragments].
70. Id.
71. Id.
72. Id.
73. Id.
74. The term ‘amateurism’ is by now a term of art in comparative law, and should not be read as derogatory. It refers to lack of language skills, or improper definition of the subject of study in comparative projects. See, e.g., Riles, supra note 27, at 94–100, 104 (pointing out Wigmore’s deficient language skills), 118 (discussing legal systems analysis and legal corporeology).
75. Hazard, Fragments, supra note 69, at 36.
76. Id. at 29.
scientific’ schools of international law of the time—the natural law tradition, the historical school (Savigny), and the school of Rudolf von Jhering—and was especially influenced by the third, as this represented to Korovin the closest approximation of the realist theory of international law and international relations.\(^77\) Korovin saw that Jhering “looked at law as the juridical defense of interests” and that law was, at its core, political strength, though he criticized Jhering for failing to see the class nature of law despite having read Marx.\(^78\)

To understand the value of Korovin’s work, it is important to appreciate that he was the first to apply Marxism to international law\(^79\) and the first to offer a critical comparison of Western international law with the emerging Soviet system.\(^80\) A brief overview of two of his un-translated works illustrates his scholarly contributions.

*International Law of the Transition Period* opens by explaining the novelty of the task: the first attempt, in Russian or international literature, to study problems of international law in the transition period between capitalism and communism.\(^81\) For the Soviets, the core problem of the transition period was how to open daily diplomatic-level interactions with representatives of the Western powers without compromising the Soviet rejection of bourgeois law and the Soviet repudiation of the “legal inheritance” (read: debt) of the Tsarist and Kerensky governments.\(^82\) In these first negotiations between the West and representatives of the Soviet Republic, Korovin admits, Soviet diplomats reverted to a familiar (or what he calls, ‘stereotypical’) ‘phraseology’ and reliance on ‘commonly accepted’ bases of international law, going so far as to rely on Imperial Russian treaties in support of Soviet agendas.\(^83\) Therefore, one of the first problems Korovin sought to address was the continuity in forms between capitalist and communist international legal orders.\(^84\)

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77. Id. at 29–32.
78. Id. See generally RUDOLF VON IHERING, LAW AS A MEANS TO AN END (Isaac Husik trans., Macmillan 1921) (1914) (a great work by the legal philosopher Ihering, considering how purpose is the foundation of legal systems).
79. See KOROVIN, ILTP, supra note 63, at 28–35.
80. See KOROVIN, CIPL, supra note 65.
81. See KOROVIN, ILTP, supra note 63, at 1.
82. Id. at 5.
83. Id. Korovin later successfully defended his position of maintaining continuity of terminology between the Russian and Soviet periods on practical grounds. Since the Soviet interpretation of such terms would be qualitatively different from bourgeois interpretations, it made no difference what terms were used. See also KOROVIN, CIPL, supra note 65.
84. See KOROVIN, ILTP, supra note 63.
Secondly, notwithstanding Soviet diplomats’ use of the familiar language and concepts of bourgeois international law, Western diplomats began to lodge steady protests that, despite Soviet willingness to negotiate, the USSR was violating customary law, particularly with respect to the repudiation of the Kerensky and Tsarist debt. Korovin immediately saw this as proof of his earlier indeterminacy theory. That is, despite the use of common forms and attempts to agree on substantive points, international jurists on both sides of the negotiating table would be able to interpret their obligations in radically different ways. Rather than use international law substantively or “on the merits,” Korovin realized the immense practical applicability of his indeterminacy critique. In what he called legal instrumentalism, Korovin openly argued for elastic legal standards as a way to both undermine the bourgeois concept of law and to afford the young Soviet state room to operate in a hostile foreign environment.

Unlike Pashukanis, it seems Korovin was not concerned with theorizing an internally coherent Marxist social order; his goal, rather, was to apply a Marxist critique to existing international law and institutions and to provide a guide for Soviet practice. Korovin was fully aware of the difficulty of reconciling Marxism with law and legal institutions and devised his transition theory to accommodate both law and its eventual disappearance. But he elided these subtleties, beginning, like Lenin before him, with the axiom that where there is society there is law (где оно где есть)
shchezhitie—tam pravo). To Korovin, this maxim is not only the product of legal dialectics, but constituted a sociological fact. Thus, international law and diplomacy were necessaries so long as states existed. More concretely, as long as the USSR was surrounded by imperialistic states with whom it remained necessary to have relations, such relations would need to be grounded in a legal basis. To Korovin, it was scholastic to theorize the essence of law, when in actuality—after realizing that all law is politics and strength—it was important to assure the USSR’s place in the world by way of legal mechanisms. The only remaining question was of substance and adapting legal instruments to attain Soviet interests.

Korovin’s main thesis is that international law was a temporary compromise between the USSR and other states in different stages of economic development on the road to a world revolution. The implications of this compromise were dire: “as long as the U.S.S.R. is surrounded by capitalist states,” declares Korovin, “it must remain in legal ‘isolation’—it cannot become either an object or subject of the bourgeois trapeze.” This required the negation of practically all fundamental international law concepts, including the sources of international law, and its subjects,

91. Korovin, Towards a Reexamination, supra note 89.
92. See Korovin, ILTP, supra note 63, at 6.
93. The “capitalist encirclement” theory was, in the view of American diplomats, incompatible with a desire for permanent peaceful coexistence. See George F. Kennan, Memoirs, 1925–1950, at 547 (1967) (Excerpts from a Telegraphic Message from Moscow, dated February 22, 1946, quoting Stalin’s remarks to a delegation of American workers: “In course of further development of international revolution, there will emerge two centers of world significance: a socialist center, drawing to itself the countries which tend toward socialism, and a capitalist center, drawing to itself the countries that incline towards capitalism. Battle between these two centers for command of the world economy will decide fate of capitalism and of communism in the entire world.” Id. (emphasis added)).
94. The word for ‘relations’ in Russian is further divided into multiple variants (vzaimootnoshenie, otnoshenie, snoshenie). Vzaimootnoshenie refers to interrelations; otnoshenie is relations generally, whereas snoshenie means something between interaction and contact. See W.E. Butler, Russian-English Legal Dictionary 27, 145, 210 (2001).
95. See Macuere, supra note 38, at 53.
96. For a different restatement of the transition theory, see I.A. Isaev, Istoriya Gosudarstva I Prava Rossii [History of State and Law in Russia] (1996); see also I.A. Isaev, Topos I Nomos: Prostranstva Prawoporiadkov [Space Law and Order] 348 (2007) (“A Russian federation was conceptualized as a transition stage on the way to an eventual political union, a period during which people would trounce national (ethnic) differences, and progress towards world revolution.”).
97. See Korovin, ILTP, supra note 63, at 44.
objects, and institutions.98 To Korovin, even the most entrenched sources of international law—treaties—were unreliable as objective determinants of state conduct.99 Korovin routinely pointed out the indeterminacy of particular treaties, showing that the same terms were used by opposing parties to signify contradictory concepts.100

At the same time, Korovin was a consummate realist and pragmatist. Mindful of political disagreements as potential roadblocks to cooperation, he outlined a dualistic system of international law in which countries could agree on apolitical matters (for instance, international public health and epidemics, defense of international historical monuments, or artwork), while maintaining intellectual opposition on other issues.101 Korovin’s title for the former category was international administrative law,102 a theory that continues to have purchase with respect to completely uncontroversial sub-fields of international law, such as international laws concerning postal carriage.103 Korovin was also the author of the Soviet tripartite theory of international law, which divided international law into three camps: law between socialist states,104 law between capitalist states vis-à-vis each other, and law between socialist states and capitalist states.105 Perhaps most importantly, Korovin realized the tremendous practical and theoretical value to be gained from devising a theory of perpetual transition, although he never formally identified it as such.

98. The chapters are: (1) International law in the system of Soviet law, (2) International law of the transition period in the history of international relations, (3) Essence and nature of international law of the transition period, (4) The state as the subject of international law, (5) Organs of international relations, (6) International treaties, (7) Main issues in the law of war, (8) Conclusion. See KOROVIN, ILTP, supra note 63.
99. Id. at 15–16; see also Chakste, supra note 68, at 27.
100. Korovin gives as an example the negotiations between Richard von Kühlmann and Trotsky leading to the Brest-Litovsk treaty. KOROVIN, ILTP, supra note 63, at 13. The meanings of terms like ‘self-determination’ and ‘peace without annexation,’ were self-determined by parties to the negotiations. In other words, socialist/Russian negotiators attached their own meanings to these terms, without reference to or belief in universal meanings or principles attached to them.
101. Id. at 15.
102. See id.; KOROVIN, CIPL, supra note 65.
103. See KOROVIN, CIPL, supra note 65.
104. The idea of an independent international law between socialist states is not different from the idea of an international law proper as law “between (European) states that shared similar ideas about statehood and its social functions.” MARTIi KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS 282 (citing Pillet’s Le droit international public and distinguishing between European states versus non-European entities based on the fact that non-Europeans lacked the advanced degree of civilization necessary to understand the idea of State functions).
105. See Maclure, supra note 38, at 52.
This theory of perpetual transition effectively underpinned the theory (or at least, the ethos) of Soviet exceptionalism until the collapse of the USSR.106 It is striking that in the whole corpus of Korovin’s work there is absolutely no indication that socialism would arrive at any proximate date or that the length of the transition even mattered. Similar to Pashukanis, it seems Korovin understood that socialist international law would exist so long as the USSR remained obligated to negotiate and deal with capitalist states.107 As Korovin wrote in his preface to *International Law of the Transition Period*, the five year experience of war and agreements between the socialist Soviet state and capitalist states was an insignificant period of time in the realm of international relations.108 Transition was going to take a long time; accordingly, socialist international law could remain in a state of permanent transition, similar to the notion of ‘permanent exception’ popularized by Carl Schmitt and his contemporary appropriators and critics.109

Korovin’s book *Contemporary Public International Law* reiterates many of the themes of *International Law of the Transition Period* but is much more heavily criticized, possibly because of its intended use as a teaching manual.110 David Levin, a disciple of Pashukanis at the Communist Academy, attacked Korovin precisely for ignoring larger theoretical questions.111 “From a theoretical point of view,” Levin wrote, “the book is lacking a Marxist methodology and even evidences a certain dogmatism.”112 According to Levin, Korovin limited himself to “traditional dogmatic formulation of the main theoretical questions pertaining to international law (resembling any regular bourgeois work).”113 Levin especially criticized Korovin’s treatment of the USSR as a quasi-subject

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106. The extent to which the Soviet Union claimed exceptional status in international law after WWII is open to debate. However, for examples of late Soviet exceptionalist rhetoric in the waning days of the USSR, see G.I. Tunkin, *Politics, Law and Force in the Interstate System*, 219 Recueil des Cours 227, 292, 337 (1989) [hereinafter Tunkin, *Politics*].

107. See Maclure, supra note 38, at 52–55.


110. Compare Korovin, CIPL, supra note 65, with Korovin, ILTP, supra note 63.


113. Id.
under international law, simultaneously bound by international treaties, and at the same time, because of the unique extraterritorial class nature of the Soviet experiment, resembling something of a proletarian movement rather than a traditional territorial state. Contrary to Korovin, Levin argued that:

Practically speaking, the USSR, as the only socialist state, is required to guard itself from the capitalist world by way of legal barriers (sovereignty, equality) and at the same time uphold the international law form of statehood even more intensively than bourgeois states, which, in the period of imperialism lose much of their significance.

Yet Levin’s view, which would come to dominate Soviet international legal theory from the mid-1930s until the zenith of ‘classical’ Soviet international law in the post-WWII period, portrayed a gross misunderstanding of the strategic implications of Korovin’s indeterminacy and transition theories.

Pashukanis disciples also criticized Korovin in a series of articles in the *Encyclopedia of State and Law*. In the realm of international law, the main disagreement was that Korovin claimed the Soviet Union could create new international legal forms. According to Hazard, the Pashukanis camp “argued that Korovin was philosophically wrong [because] the international law being applied by Soviet diplomats could not be something new. International law could be only what it had been under the influences of capitalism.” But these aspects of the debate missed the broader basis of disagreement—namely, whether there was a tactical advantage to the Soviets in claiming the existence of an exceptional outlook on international law. To the Pashukanis camp, this argument was a non-starter, as all state relations mirrored relations between commodity owners, whether or not those relations occurred between capitalist states and ostensible ‘socialist’ ones. Therefore, the notion of socialist international law, as somehow unique from general international law, was a logical impossibility. To Korovin, however, comparing competing international law traditions to one’s own offered a useful frame for a prolonged attack on the competing system.

114. *Id.* at 227.
115. *Id.*
116. *See Chakste, supra note 68, at 24; see, e.g., infra text accompanying note 120.*
Contemporary Public International Law was, in other words, the first large-scale attempt by a Soviet jurist to present a systematic critique of the Western view of international law. For all the critical insight, the ultra-leftist Pashukanis camp\(^{119}\) missed the brilliant advance that Korovin made. Read together, *International Law of the Transition Period* and *Comparative Public International Law* describe how, despite being bitter ideological foes, two states modeled on radically different economic models could, and would, coexist in parallel universes and cooperate with each other on matters of common concern. This tremendous insight would, of course, go on to form the basis for the doctrine of coexistence\(^{120}\) and, eventually, the doctrine of permanent peaceful coexistence after the Cuban Missile Crisis.\(^{121}\) However, perhaps partly because of the rapid development of international law in the USSR and the West after World War II (“WWII”), Korovin’s contributions to peaceful coexistence were never credited.

Yet, here was a comparative international lawyer, *par excellence*, who had resisted the common Marxist urge to draw caricatures of Western models and institutions,\(^{122}\) to perform simple comparison by contrast, or to define himself solely in opposition to an imagined bourgeois foe, rather than a realistic assessment of a powerful adversary.\(^{123}\) Though he was subject to intense criticism at home and abroad, Korovin’s stance offers three lessons for the understanding of CIL. First, Korovin’s experience shows that it was possible to set aside ideological disagreements with representatives of competing systems in an effort to build institutional links with rival theoretical and political schools. Second, as Korovin demonstrated, CIL could reveal inner tensions within the competing system, serving as a useful base for critique. Lastly, Korovin’s CIL


\(^{123}\) See, e.g., KOROVIN, ILTP, supra note 63, at 1; JOHN N. HAZARD, *RECOLLECTIONS OF A PIONEERING SOVIETOLOGIST* 24 (2d ed. 1987) [hereinafter HAZARD, RECOLLECTIONS] (stating that Pashukanis argued that all law was bourgeois).
work evidences the pitfalls from corporeological accounts of a competing system, highlighting the need for narrow subject inquiry and methodological rigor.

2. John N. Hazard & Comparative Law

Unlike Korovin, John N. Hazard (1909–1995) is familiar to most comparative law scholars, Russian law experts, and American internationalists. Hazard’s contribution to the field of CIL is indebted to Korovin, as much of his scholarship draws upon the letters and notes he wrote while auditing Korovin’s international law courses at the Moscow Juridical Institute from 1934–1937. These materials, now preserved in the Bakhmeteff Archive at the Columbia University Library, not only provide a glimpse into how international law was taught in 1930s Soviet Union, they also shed an important light on method and methodology when thinking about CIL.

Hazard’s career as a Sovietologist began following his graduation from Harvard Law School in 1934 when he was sent to Moscow as an Institute of Current World Affairs fellow to attend, and report on, Russian law courses. Hazard took three courses related to international law while a student, all under Korovin: introduction to international law; history of international relations; and public international law. Beyond the class notes, Hazard also provided brief sketches of Korovin in correspondence with his supervisors in the U.S. Hazard’s initial impression of Korovin was that he was a “scholarly man[,] . . . well-schooled in the Marxist attitude, and the reasons given by the authorities for [Soviet foreign policy decisions].” In addition to classes, Hazard met with Korovin on a weekly basis in the latter’s home, learning Russian and allowing Korovin to practice his English language skills.

Hazard began his long and prolific scholarly career while still in Moscow, publishing articles in the Columbia Law Review and the Ameri-

125. See Hazard, Fragments, supra note 69.
126. Schachter, supra note 124, at 584.
127. See HAZARD, RECOLLECTIONS, supra note 123.
128. Schachter, supra note 124, at 584.
129. Letter from John N. Hazard to Walter S. Rogers, Dir. of the Inst. of Current World Affairs (Nov. 4, 1934) (discussing the introduction of a course on the history of the development of international law, the first of its kind in Russia).
can Journal of International Law. After returning from Moscow in 1937, Hazard enrolled in a doctorate program at Chicago University, studying comparative law under the supervision of Max Rheinstein. In 1938, Hazard publicized the expulsion of Pashukanis and the ensuing attempts to “cleanse” Soviet international law of his impure theories. After completing his doctoral training at Chicago in 1939, Hazard joined a law firm in New York City, but with the outbreak of WWII he took a position with the U.S. government, where he was assigned to the Soviet desk in the Division of Defense Aid Reports. As part of his duties, he helped negotiate the conditions under which the Soviet Union became a major recipient of the Lend-Lease program.

Hazard ultimately became deputy director of the Soviet branch of the Lend-Lease Administration, gaining the friendship of America’s post-war foreign policy elite, among them George Kennan, Dean Acheson, and Averell Harriman. As an expert on the USSR, Hazard accompanied Vice President Henry Wallace on his secret mission to China in May, 1944 through Eastern Siberia. The following year he was chosen as an expert on Soviet law to assist Justice Robert Jackson in preparing the prosecution of Nazi leaders to be brought before an international tribunal for war crimes. These experiences gave Hazard an unmatched command of not only Russian law, but also the inner workings of diplomacy, international courts, and institutions.

After WWII, Hazard entered the legal academy at Columbia University, where he remained until his death. Columbia so prized his background that it offered him the rare honor of a tenured position to start. He immediately drew on his Moscow training (and notes) to prepare teaching manuals for his students at Columbia. His post-War publications ran the gamut from public law and Soviet constitutional theory, criminal law, family law, and of course, Soviet international relations and international law.

133. Schachter, supra note 124, at 584.
134. See Hazard, Cleansing, supra note 132, at 244.
136. Schachter, supra note 124, at 584.
137. Id. at 585.
138. Id.
139. Id.
140. Id.
141. See Hazard, Pioneer, supra note 135.
142. See id.
For the purposes of this Article, the most striking aspect of Hazard’s work on Soviet international law was its sincere attempt to project a neutral view on the Soviet position and its philosophical origins. Hazard’s writings on Marxism showed deep sensitivity for the inner tensions and political pressures in which the Soviet jurists were working. He plainly understood the irreconcilable positions taken by Soviet scholars in defense of party decisions and he could sense the personal disenchantment those scholars felt when they had to renounce their positions weeks, months, or years later. Hazard’s mindfulness of these tensions was both descriptive and analytical. He understood the paradox of so-called ‘Marxist law’—that any law, as such, would mimic the logic of capital relations—but Hazard also understood the intellectual, institutional, and historical web that made exposing this precarious symmetry impossible for the Soviet jurists, including the later Pashukanis.

Precisely because of these sentiments, and in the heightened atmosphere of McCarthyism, it was even feared Hazard had “gone native” and was complicit in the global communist conspiracy to overthrow the U.S. “from within.” He was investigated by the House Un-American Activities Committee, but was ultimately cleared. Paradoxically, following this episode, the USSR would not issue Hazard an entry visa to the Soviet Union, a fact he did not reveal publicly to many people. A victim of the hyper-politicization of the disciplines of international and comparative law in the Cold War period, Hazard’s experience teaches a practical lesson confronting potential CIL scholars today—despite best attempts to find a neutral, objective, or ‘scientific’ base for comparison, it is always possible to expose an underlying set of existing legal/political traditions or perhaps even an ideological taint.

It is not surprising, therefore, that Hazard read with optimism the anonymous leading article in the September 1956 Sovetskoe Gosudarstvo

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143. See, e.g., Hazard, The Soviet Union and International Law, supra note 117 (carefully discussing the development of Soviet interest in international law).
144. See id.; see also Hazard, Cleansing, supra note 132, at 244, 248.
146. See id.; see also MEDFORD STANTON EVANS, BLACKLISTED BY HISTORY: THE UNTOLD STORY OF SENATOR JOE MCCARTHY AND HIS FIGHT AGAINST AMERICAN ENEMIES 169 (2007); STEPHEN F. COHEN, RETHINKING THE SOVIET EXPERIENCE: POLITICS & HISTORY SINCE 1917, at 17 (1985).
To the scholarship of international law, Hazard hoped that a reexamination would put an end to the spinning of “fine theories,” and focus work on “specific problems” rather than the core “problem of the conflict between states of differing economic systems.” Hazard understood how little good would flow from setting up ‘clashes of civilizations,’ from feeding into the mania of communism versus capitalism, good versus evil, us versus them. Thus, he focused his life’s work on debunking these myths, on teaching several generations of scholars to think critically about the Soviet ‘other,’ and to understand the inner tensions, conflicts, and incongruities within the Soviet system through as pragmatic, realistic, and apolitical a lens as possible. This was the great lesson he learned from the American realist school of the 1930s under Manley O. Hudson and Roscoe Pound, and the Soviet realist school of Korovin; it was perfectly fine to immerse oneself in the ‘Other’s’ legal culture, to establish institutional and professional links between warring systems, and to conceptualize the nature and functions of international institutions (like the League of Nations) from radically different perspectives.

3. W.E. Butler’s CIL Jurisprudence

The third pivotal figure in the development of CIL in the twentieth century is eminent Russian law scholar, Professor William E. Butler. The author of more than one hundred books (monographs, edited works, and translations) and over three thousand total publications (and counting) on Soviet, Russian, and Commonwealth of Independent State (“CIS”) law, Butler hardly needs introduction to most international and comparative lawyers. A quick biography and overview of his main works on CIL helps contextualize the methodological discussion that follows.

Butler was born in Minnesota in 1939 and completed his undergraduate studies at American University’s School of International Service in

149. Id. at 388.
152. For instance, Hazard developed a strong professional relationship with G.I. Tunkin who would go on to become the leading Soviet international lawyer of the post-WWII era. See id.

Understanding Butler’s institutional and academic lineage is vital, for it explains the similarities in comparative approaches of the three exemplary CIL scholars.

In 1967 and 1968, Butler began teaching as a lecturer on the Soviet portion of a Harvard course titled “Soviet, Chinese and Western Approaches to International Law.” The heavily subscribed course was co-taught by Jerome Cohen and Hungdah Chiu (on Chinese approaches), Harold Berman and Butler (on Soviet approaches), and Richard R. Baxter (on American approaches). Employing a combination of textual analysis and functionalism from the point of departure of a standard U.S. international law syllabus, the experts on Soviet and Chinese law would draw on foreign doctrinal and practice materials to answer how each nation would approach the given topic. In 1970, Butler was elevated to a readership in comparative law at University College London ("UCL"), and from 1975, he led a graduate-level seminar, “compara-

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156. Id.
157. Id.
159. W.E. BUTLER, Acknowledgements, in INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE, supra note 12, at vii.
162. Butler, Justice in Russia, supra note 161, at 440.
163. Id.
164. Id.
tive approaches to international law.\textsuperscript{166} The UCL course was not heavily subscribed and was only offered intermittently for five or six years.\textsuperscript{167}

Butler’s subsequent CIL work built directly on these teaching experiences. In 1977, Butler selected essays on CIL for publication in a stand-alone volume, *International Law in Comparative Perspective* (“ILCP”), the first English-language work on comparative approaches to international law.\textsuperscript{168} *ILCP* brought together seventeen works, including essays by McDougal, Schwarzenberger, and Gutteridge,\textsuperscript{169} and offered a valuable introduction to the comparative method as applied to international law, especially with respect to comparative histories of international law. Butler went on to develop his own indispensable methodological insights, drawing on and rejecting many of the theories proposed by these very scholars.

Butler openly rejected the artificial divide set by the earlier interwar generations of comparativists and internationalists.\textsuperscript{170} Thus, Butler rejected as anachronistic Gutteridge’s and other comparativists’ disinclination to engage with either private or public international law.\textsuperscript{171} The posture of pre-WWII international lawyers was similarly antediluvian, Butler argued.\textsuperscript{172} Because of the mainstream international law preoccupation with nation states, formalist reliance on treaties for positive law, and overarching spirit of universality, there was hardly a need to study how states internalized international obligations, or exhibited general principles.\textsuperscript{173} In addition to being factually counterintuitive, such postures undermine the idea of custom as a traditional source of international law.

Butler also rejected the pragmatic, policy-oriented, comparative style of the American legal realists because it constrained the potential scope of inquiry to only like systems.

\textsuperscript{166} Butler, *International Law and the Comparative Method*, supra note 12, at 29 n.17.
\textsuperscript{168} W.E. Butler, *Acknowledgements, in International Law in Comparative Perspective*, supra note 12, at vii.
\textsuperscript{169} Id. at v, vi.
\textsuperscript{170} See W.E. Butler, *Introduction, in International Law in Comparative Perspective*, supra note 12, at 1–2.
\textsuperscript{171} Id. at 1; see also H.C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study & Research* (2d ed. 1949) [hereinafter Gutteridge, *Comparative Law*] (explaining the origins and meaning, purposes, and value of comparative law).
\textsuperscript{172} See W.E. Butler, *Introduction, in International Law in Comparative Perspective*, supra note 12, at 2.
\textsuperscript{173} Id. at 1.
Comparison has been viewed primarily as a means, or technique, to be employed in the service of law reform, in the proper application of foreign law by the courts, in the international harmonization or unification of private law, and the like. Although it need not necessarily do so, this orientation has contributed to an emphasis on studying those legal orders reasonably proximate in levels of development and sophistication . . . . 174

To Butler, postwar politics meant that CIL would have to engage in far broader socio-legal comparisons, going beyond realist functionalism to encompass a number of related fields. 175 Butler called this a form of “know thine enemy syndrome . . . the need to comprehend the basic philosophical, historical, sociological, and political premises of a foreign legal system.” 176 Accordingly, purpose driven CIL meant going beyond ‘hard’ comparisons between, say, American and Soviet foreign affairs law. CIL study had to embrace the ancillary fields of legal theory, culture, and profession in the respective states. 177 The key methodological challenge was identifying the purposive strategy—the why behind the comparative project—which would reveal what needed to be compared.

Like the Ratner/Slaughter collection, 178 *International Law and the Comparative Method* sought to present a menu of methodological approaches for studying how Soviets understood international law and, equally if not more important, how Soviets investigated the study of international law in the West. 179 The proper scope of CIL, in Butler’s opinion, was not limited to one approach, but included, when appropriate, the study of the legal profession, legal language, the obstacles (real or anticipated) to municipal effectuation of international legal arrangements, 180 comparison of international legal histories, or how nations developed to have distinct approaches to given international institutions. 181 In sum, Butler emphasized the experimental and non-dogmatic nature of comparison and embraced the overarching spirit of “hoped for broader cooperation, dialogue, and exchange.” 182

Set against pre-Cold War and immediate post-WWII geopolitical realities, Butler’s perspective on CIL was indeed forward thinking. Decoloni-
zation, the end of the Vietnam War (1975), the waning of détente against the USSR, and the Soviet invasion of Afghanistan (1979) made it vitally important to understand how other states intended to use existing international process to gain stronger positions in the global power race. Butler was completely right to reject the universalism/absolutism of the interwar period—Gutteridge’s comparative style and Lauterpacht’s international sensibility—as “inadequate and obsolete.” He was also right to reject the righteous post-WWII policy-oriented jurisprudence that sought to advance a personal conception of the good life against all others. In this sense, Butler’s approach to CIL was similar to Hazard’s in that it rejected the spinning of “fine theories,” or grand narratives, regarding the development of either Soviet or Western international law doctrine.

But in dismissing the earlier crude methodologies, Butler’s articulated replacement method was fraught with uneasy inner tensions. This is evident in several points. First, there is inevitable role conflict between Butler’s archetypal scholarly comparativist—the substantive knowledge seeker—and the pragmatic policy comparativist—who understands that “these matters . . . are of more than academic or historical concern” and who has a duty to inform policy makers of what she knows about the foreign legal culture in question. Second, while Butler seems comfortable with the idea of regional or even continental approaches to international law, he is also intimately conscious of the localized and culturally contingent training process for would-be international lawyers. Yet, Butler is silent on how a would-be CIL scholar should divine regional trends from particularized sources (language, culture, history, etc.).

*International Law in Comparative Perspective* was followed in the early 1980s by yet another innovative project with significant ramifications.

188. *Id.* at 36.
189. The conflict between the comparativist as an objective knowledge seeker and the comparativist as a policy advisor is a longstanding debate in comparative law literature. See *Rethinking the Masters*, supra note 32, at 5–18.
191. *Id.* at 34.
for CIL. “In late 1983 a groundbreaking Protocol of Cooperation [“Direct Link”] was concluded between the Faculty of Laws, University College London . . . and the prestigious Institute of State and Law [“ISL”] of the USSR Academy of Sciences.” Together, Professor Vladimir N. Kudriavtsev (ISL) and Butler arranged for a series of symposia between representatives of the common law and socialist law traditions to take place in London and Moscow, with the hosting side paying the reasonable conference costs. The cooperation agreement led to a series of academic visits over the next eight years and colloquia on a range of substantive topics. Naturally, the colloquia covered the topics of comparative and international law and the status of these disciplines in the respective countries. Authors from both sides submitted concrete comparative studies on substantive issues and offered thoughts on methodological questions confronting the two disciplines.

Different methodological approaches were also offered in Butler’s 1990 edited work discussing the impact of perestroika on international law. The approaches can be loosely labeled as, *inter alia*, Soviet positivist/functionalist (G.I. Tunkin), Critical Legal Studies and literary theory (J.A. Carty), systems analysis (D.I. Feldman), and a recurring policy-based methodology. Yet even in the collection of articles on perestroika and international law, the essays are divergent, and there is


196. See id.

197. See id.

198. PERESTROIKA, supra note 44. Perestroika (literally, restructuring) refers to a historical period in late Soviet history (1985–1991) marked by radical economic liberalization and political reorganization in the USSR, which ultimately led to the collapse of the Soviet Union.

199. See G.I. Tunkin, On the Primacy of International Law in Politics, in PERESTROIKA, supra note 44, at 5.


no consensus on what comparative method as applied to international law really means. By 1990, at least five different concepts, defined by their goals, were evoked to explain CIL: (1) comparison of various systems of international law in different historical epochs—the *historicist* goal, (2) identifying common values and general legal principles common to all people/nations—the *universalist* mission, (3) comparison of international organizations and institutions in their lawmaking or implementation aspects—the *institutionalist* goal, (4) drawing upon comparative method in a Marxist framework to compare international legal rules in relation to different social or economic systems—the *Marxist* approach, and (5) to simply understand and classify different approaches to international law—the *taxonomic* approach.202

It is immediately apparent that none of the above branches of CIL represent a comparative research or analytical methodology; rather, they represent an expanded or alternative domain for traditional comparative study.203 What, then, does a CIL methodology actually entail? What did CIL scholars actually need to do?

Butler’s own suggestions can be found in his 1985 Hague Lectures on the topic of comparative approaches to international law.204 To Butler, the project entailed nothing short of a grand meta-narrative that would include:

The historical experience of a state in coming into being and in the patterns and mode of diplomatic relations with others; its geopolitical frontiers; its cultural, political, economic and ancestral links with foreign entities; its sense of political, religious, or ideological mission; its

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203. In this way, comparative international law is no different from basic comparative law. Comparative international law simply applies existing comparative method to study the diverse approaches to international law. That these differing approaches exist is taken as given. This pluralism of outlooks on international law and institutions is derived logically from plurality of national approaches to substantive legal fields, ethics, values, etc. In other words if it is taken as given the complexity and indeterminacy of a single language in a given domestic legal system and the guaranteed protection of philosophical and moral pluralism in many societies, the permutation of hundreds of languages, cultures, conflicting legal systems and ontological views produces literally thousands of competing approaches to international law. Every person, group, and state are thus entitled to a unique interpretation of international law; however, the great many of these views become irrelevant from the standpoint of more powerful interpreters. For an excellent summary of how theoretical pluralism operates, along with a comprehensive review of comparative law literature, see generally Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* 40–68 (2d ed. 2006).

capacity to exert military, economic, or political influence over other States either directly or through emulation and inspiration; its techniques of formulating and executing foreign policy; together with its political, administrative, economic and legal institutions, concepts of law and methods of legal reasoning and discourse are all components, amongst others, of a national style in international law; . . . a comparative perspective [is] essential.205

To comparativists, the above list evokes Zweigert & Kötz’s famous invocation of Rabel, demanding that future comparativist compare all possible factors affecting the law.206 But how does one make sense of these factors and influences? Is there a rank, an order of importance, or method for including everything? Butler (like Hazard and Korovin before him) does not offer a conceptual flowchart or cascading guide for how to assess influences such as economic constraints versus legal culture or political versus historical influences.207 It may be impossible to rank these complex influences, or it may be contingent on a number of other factors; besides, each comparativist would likely employ his own preferred rank. However, the actual methodology for CIL is precisely the hoped for “broader cooperation, dialogue, and exchange” that Butler advocated.208 As Butler wrote in the introduction to the first work product of the Direct Link between the UCL and ISL,

[Legal studies originating in bilateral symposia of the nature described here are a veritable genre of legal literature of their own, to be measured against the past, the tenor of the times, the constraints inherent in the medium, and the possible unexploited possibilities of that medium. Direct links hold out the promise of collaborative or sustained legal research over an extended period of time, if required. . . . It remains for the parties concerned to make the most of the opportunity.]209

205. Id. at 81.
207. Cf. Peter Decruz, Comparative Law in a Changing World 235–39 (2d ed. 1999) (offering a flowchart for comparative analysis, including the need to: (1) “Identify the problem and state it as precisely as possible,” (2) Identify the jurisdictions being compared and their legal families, (3) Decide what primary sources of law you will need, (4) Gather the relevant materials, (5) Organize materials according to the legal philosophy and ideology of the system being investigated, (6) “Map out the possible answer to the problem,” (7) Analyze the intrinsic value of the legal principles, (8) Form conclusions).
Put another way, what Butler and his counterparts at the ISL orchestrated in their Direct Links was CIL. Or to rephrase it in anthropological terms, by meeting his Soviet counterparts, Butler was building an expert ethnography\(^{210}\) of Soviet international lawyers and, by extension, gaining a clearer appreciation for the broadly conceived complexities of Soviet approaches to international law. As noted legal anthropologist Laura Nader would argue, Butler’s immersion worked partly because he was not borrowing “decontextualized and dehydrated” research methodologies,\(^{211}\) but rather embarking on a good faith encounter that simply happened to work.\(^{212}\) Like Korovin and Hazard before him, Butler was living out the method\(^{213}\) of CIL by going beyond his encyclopedic knowledge of Soviet doctrine, going beyond the positive law, in favor of face-to-face engagement, by hosting an earnest conversation or clash between the leading representatives of two apparently disparate systems. The full import (and Butler’s influence as chief choreographer) of this particular CIL project deserves greater study, but for the time being, this Article considers CIL in the post-Cold War context.

C. Post-Cold War Fragmentation in Comparative Law & International Law

The lessons to be drawn from the above biographical histories may seem intuitive, perhaps even banal. Indeed, the moral thus far is rather general—we should realize that different ‘systems’ (nations, states, peoples, cultures, etc.) view things differently, and we should approach the study of these differences with an open mind. But, the deeper claim is that contemporary CIL has much to learn from the first generation of CIL in the Cold War era. So, why is it important to situate the current revival of CIL against the larger backdrop of the Cold War (and interwar) theoretical debates? Why has the emerging CIL discipline chosen to overlook twentieth century CIL projects involving Soviet approaches? This is doubly confusing when viewed in light of the recent revival of Marxist approaches to international law.\(^{214}\) How can Marxists neglect non-Pashukanian Soviet approaches, and why do leading critical voices con-


\(^{211}\) Id. at 199 (discussing common failures of interdisciplinarity).

\(^{212}\) Id. at 193.

\(^{213}\) See William Twining, *Comparative Law and Legal Theory: The Country and Western Tradition*, in COMPARATIVE LAW IN GLOBAL PERSPECTIVE 21, 57 (Ian Edge ed., 2000) (noting that “serious comparative study is more like a way of life than a method”).

done this ignorance? Are these strategic choices, ways to avoid appearing orthodox or pro-Soviet? Or is a deeper ambivalence towards the Soviet legacy at play?

Because answers to the latter questions (concerning why crits and Marxists avoid engaging with Soviet Approaches to International Law (“SAIL”) would dwell on the speculative at this stage), those questions are left for a later date. But to explore the central claim of this Article—that, for good or bad, Soviet approaches continue to matter—it is important to briefly survey the state of international law in the post-Cold War era and to highlight several perennial challenges, starting with the immediate post-1989 era.

Even before the dissolution of the Soviet Union in December 1991, a number of scholars (in the West and the Soviet bloc) anticipated the radical impact perestroika would have on international law. Without delving too far into the literature, it is sufficient to point out the most significant development—namely, the Soviet concession and willingness to ascribe to a monist, unitary international legal order. This took the form of multiple changes, including the removal of objections to compulsory International Court of Justice jurisdiction under six international human rights agreements, attempts to establish direct links with a number of international economic organizations, and the incorporation of international legal standards—general principles of international law—into domestic legislation as normative and substantive justifications for reform.


218. Id. at 245.


220. Perestroika, supra note 44, at 1–3.
The West interpreted these sweeping reforms as the end to international law and institutions serving as ideological battlegrounds.\(^\text{221}\) Around the early 1990s, many shared a sincere hope that the United Nations ("UN") would finally evolve into what its framers had hoped—the conscience of the world and a forum for the peaceful resolution of international disputes.\(^\text{222}\) For example, at the UN Security Council, the Soviet cooperation with the U.S. over Iraq’s invasion of Kuwait\(^\text{223}\) was seen as ushering in a new era of international security cooperation.\(^\text{224}\) With the ideological confrontation in the past, G.I. Tunkin enthusiastically praised *perestroika* for renewing faith in hope, progress, and most importantly, *reason* as the universal basis for a universal international law.\(^\text{225}\) With the final collapse of the USSR\(^\text{226}\) and Russia’s peaceful withdrawal of troops from the majority of former Soviet republics (with the exception of small ‘peacekeeping’ contingents in territories like Moldova, Ukraine, and several other states),\(^\text{227}\) it certainly seemed plausible that international law was entering a new epoch.

Faith in neo-Kantian Reason as the basis for a perpetual peace did not last long, however. By the late 1990s, with NATO’s bombing raids in the former Yugoslavia,\(^\text{228}\) a string of attacks directed against the U.S. and other states,\(^\text{229}\) and the eruption of ethnic conflicts in Central Asia, Europe, Africa, and elsewhere,\(^\text{230}\) the world suddenly seemed far more cha-


\(^{225}\) See Tunkin, *Politics, supra* note 106, at 337.


\(^{227}\) Id.

\(^{228}\) See *NATO’s Role in Kosovo, N. ATL. TREATY ORG.* (July 15, 1999), http://www.nato.int/kosovo/history.htm.


\(^{230}\) See Thomas S. Szayna, *Potential for Ethnic Conflict in the Caspian Region, in FAULTLINES OF CONFLICT IN CENTRAL ASIA AND THE SOUTH CAUCASUS* (Olga Oliker & Thomas S. Szayna eds., 2003); see also Kikkawa Gen, *Preventing Ethnic Conflicts: A Reconsideration of the Self-Determination Principle, in CONTAINING CONFLICT: CASES IN*
otic, bloody, and lawless than ten years prior. With the start of the Bush presidency, phrases like “new world order,” “American exceptionalism,” “lawless world,” and “collapse of multilateralism” echoed the broader sentiment that international law was again in crisis. Thus, one of the enduring challenges for post-Cold War international law has been the inability to develop a working multilateral framework for ensuring global security.

A second crisis in international law, broadly speaking, was bound up in the “human rights boom” of the 1990s and 2000s. These debates can be found in the contestations over the creation of the International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, and International Criminal Court; the fiery debates over universal jurisdiction; jus cogens norms; and doctrinal wars over the application of legal categories like “war crimes,” genocide, and “crimes against humanity” to what we can all agree was mass murder around the world.

Third, over the past twenty years, international law was maturing into a highly complex patchwork of new separate sub-fields of international law in practice—from international environmental law, to international criminal law, to international economic law (itself further fractionalized into various subspecialties)—alongside conventional categories like international humanitarian law. The academic discipline of international law evolved symbiotically with these developments in public and private international law, even providing the impetus for, and generating, sev-

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231. See, e.g., PHILIPPE SANDS, LAWLESS WORLD 8–22 (2005).


233. See id. at 150.


237. John H. Barton & Barry E. Carter, Symposium, International Law and Institutions for a New Age, 81 GEO. L.J. 535 (1993) (discussing the emergence and new academic importance of subsets of international law, such as international economic law,
eral sub-fields. This process of substantive fragmentation went hand in hand with institutional fragmentation, theoretical disaggregation, and growing tolerance for political pluralism. Some have even described this as a split between American and European approaches to international law, the split itself now amenable to CIL analysis.

These three conflicts—unilateralism vs. multilateralism, particularism vs. universalism in human rights discourse, and fragmentation—are but three main faultlines, of many. But the main commonality between the three is the systematic exclusion of a number of global stakeholders, actors, voices, or more simply, communities in the overall international law agenda. The disconnect between the wishes of acting global elites and the hordes of anti-war and environmental rights protesters is palpable. The principal anxiety of non-governing elites is that international law is rapidly mushrooming somewhere in Geneva, New York, Brussels, or the Hague, but without their knowledge or participation and in a routine way that has become almost mechanical. There are no venues for political contestation, and thus, international law just is; as it is made, so it continues to exist.

238. These sub-fields are mainly in the international environmental law arena, where states and private corporate actors are often loathe to act. “Globally, no central organization is coordinating environmental efforts. The United Nations Environmental Program (UNEP) is the formal institution in the area, but it lacks any effective power to investigate and has no dispute resolution mechanisms.”


240. See Guglielmo Verdirame, ‘The Divided West’: International Lawyers in Europe and America, 18 EUR. J. INT’L L. 553, 555 (2007) (comparatively reviewing recent scholarship and noting “[t]hat the works of American and European international lawyers could be so different as to reach or even cross the threshold of comparability is, in itself, a valuable if somewhat unsettling finding . . . .”).


242. There is a sense of “deepening insinuation of international law into the internal affairs of sovereign states . . . . [that raises] sharp questions about the status of this emerging body of law.” Jeremy Rabkin, International Law vs. the American Constitution—Something’s Got to Give, NAT’L INT., Spring 1999, at 30.
Herein lay at least four answers to why contemporary CIL must be situated against the Cold War international law debates. First, at their theoretical core, the Cold War debates were about political participation, redistributive outcomes of trade regimes, and rights to unique forms of economic development, religious, and cultural pluralism. Decolonization and national liberation movements of the 1960s and 1970s were a direct result of these theoretical debates. Second, and perhaps more importantly, these debates had a concrete procedural/participatory aspect. Decolonization was not simply about national liberation; it was also about acquiring a seat at the UN General Assembly, about participating in the debates, about acquiring possible international law making powers. Similarly, in the interwar period, the participatory debate centered on the role of the League of Nations as either a nest for imperialist hawks, or as a venue for the dynamic expansion of the international community.

Of course, the Cold War international law debates were also about traditional spheres of influence, re-colonization, dependency theories, and new forms of economic and military protectorates for the newly independent states. Empowering decolonized states and giving them a voice at the UN General Assembly was acceptable so long as it did not dilute the power of the UN Security Council members. So the call to

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243. See Sam Marullo, Political, Institutional, and Bureaucratic Fuel for the Arms Race, 7 Soc. F. (SPECIAL ISSUE) 29, 35–48 (Mar. 1992) (examining the true underpinnings to the end of the Cold War through a Sociological lens).


245. While collective security was one of the greater goals of the League of Nations, if not the primary goal, many of those who were “not so disposed towards schemes of cooperative defense” celebrated the League’s failure in this regard. C.G. Fenwick, The “Failure” of the League of Nations, 30 Am. J. Int’l L. 506, 506 (1936).

246. Although the League of Nations suffered from a “failure of collective security,” other aspects of the League “concerned with the organization and administration of social and economic activities, including the International Labor Bureau,” were unaffected. Id.

247. For example, scholars debated whether or not the end of the Cold War would bring “a return to the shifting alliances and instabilities of the multipolar era that existed prior to World War II” or a “great power society” where international coordination would rely on “economic liberalism and political democracy” rather than the threat of force. James M. Goldgeier & Michael McFaul, A Tale of Two Worlds: Core and Periphery in the Post-Cold War Era, 46 Int’l Org. 467, 467–68 (1992).

248. The Security Council has been criticized as a “hegemony of the industrialized north,” essentially “the ruling oligarchy of the United Nations,” with only limited decision-making powers granted to the General Assembly. Albert Venter, Reform of the Unit-
return to twentieth century theoretical debates should not be seen as a
return to the actual political or intellectual postures of that time. But
there is something vital and inspiring about how the twentieth century
was pregnant with substantive and structural alternatives to the dominant
post-WWII international legal order.

Third, these debates on procedural aspects had corollary substantive
components. How decisions were made at the UN related directly to the
question of what decisions would be considered, which related directly to
the functions of international law. Who is international law for? What is
the correct balance between free trade and local labor laws? What is the
best way to regulate the movement of capital, goods, and labor? Why do
we need to restrict the power of states or multinational corporations?
These are the questions the Cold War was ostensibly fought over, good
questions to which there are still no satisfactory answers. The past twenty
years also produced new challenges, such as how to define the values of
intergenerational equity and biosphere preservation in non-
anthropocentric terms; and the proper balance between the threats posed
by global terrorist networks, traditional doctrines of criminal liability,
and evolving standards of international criminal law.

CIL should seek to address these challenges by reference to different
national, ethnic, religious, and historical approaches to international law
and governance. Unfortunately, doing so is not as simple as opening a
foreign international law textbook and searching for different approach-
es.249 While humans share certain uniting traits and universal aspirations,
and different tribes of humans answer the above questions in radically
different ways, where the answers are located is not at all evident. CIL
can unlock where and how we find at least some answers to these ques-
tions.

Fourth, it is a geo-political fact that China has emerged as a new super-
power.250 It has its own deep history, traditions, languages, and unique
approach to international law. The lessons of Cold War CIL are directly
relevant to our understanding of this new reality. The USSR and China
share remarkable similarities: they are self-proclaimed socialist states,

249. See, e.g., Bilahari Kausikan, An Asian Approach to Human Rights, 89 AM. SOC’Y
INT’L L. PROC. 146, 146 (1995) (describing the complexity of and comparing different
approaches to human rights in Japan and India).

250. “After three decades of spectacular growth, China passed Japan in the second
quarter to become the world’s second-largest economy . . . . The milestone . . . is the most
striking evidence yet that China’s ascendance is for real and that the rest of the world will
have to reckon with a new economic superpower.” David Barboza, China Passes Japan
with unitary political hierarchies and centralized academic organizations (especially at the highest echelons and in fields like international law). New analysts approaching China’s international law doctrine are likely to be encumbered by similar misconceptions to those felt by an earlier generation of Sovietologists—‘background’ notions about a hyper-politicized judiciary or academy (the familiar refrain of ‘telephone justice’ or ‘telephone doctrine’), rampant, across-the-board abuse of human rights, a covert imperial agenda, and so on. By situating our approaches to Chinese international law against the earlier experience with Soviet international law, lessons can be teased out that may help to diffuse the alarmist tendencies now gaining steam.251

Traditional comparative law has much to offer on how to deal with these four contemporary challenges. Indeed, scholars have already started down this path.252 At the centennial summit in New Orleans in 2000, for instance, Mathias Reimann wrote of the need for comparative law to take on transnational issues, including global and regional trade organizations, the EU, and similar bodies.253 In the ensuing ten years, to be fair, comparativists did not rush to engage with what Reimann called ‘vertical comparisons.’254 This likely had less to do with a lack of methodological tools or familiarity with international law and institutions, as with a general feeling of inertia. It is safe to say that the discipline of comparative law in the U.S. during the Bush era was dispirited and disorganized.255

251. See id.; see also discussion infra Section III.
252. Ugo Mattei, Comparative Law and Critical Legal Studies, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 816, 831 (Mathias Reimann & Reinhard Zimmermann eds., 2006) [hereinafter THE OXFORD HANDBOOK OF COMPARATIVE LAW] (“The diversity of the Critical Legal Studies network’s constituency and the current collapse of disciplinary boundaries have made it clear that we need to rethink the relationship between comparative and international law—incidentally a view widely shared by scholars outside the network as well.”) [hereinafter Mattei, Critical Legal Studies].
254. These themes were picked up and elaborated in law and society circles in Europe and elsewhere. See, e.g., Roger Cotterrell, Transnational Communities and the Concept of Law, 21 RATIO JURIS 1, 3 (2008) (describing the ongoing process of global legal pluralization as the multiplication of international institutions, norms and dispute resolution processes, but without a “single discursive arena in which legal reasoning takes place”).
255. This statement is based on the self-reflection of the authors, rather than an assessment of others’ work. Furthermore, even in the discipline’s dejected periods, it is not correct to claim that “it [is] hard to find much well-done comparative-law work.” COMPARATIVE LEGAL STUDIES, supra note 9, at 351. Though Kennedy credits the Common Core project, of which the authors are a part, he overlooks the dramatic cumulative growth of smaller-scale substantive comparative law projects, and the exciting growth of
What purpose was there, for instance, to study the traditional justice systems of Iraq or Afghanistan if the American leaders openly spoke of imposing democratization and modernization reforms?

Whether as a result of the 2008 presidential election in the U.S., or a constellation of other reasons, many in the discipline are optimistic again. The publication in 2009 of the seventh edition of Schlesinger’s *Comparative Law* furthers the diversification of the traditional civil/common law divide by introducing a much broader horizontal scope of inquiry. The new casebook also embraces Reimann’s call for ‘vertical comparisons,’ though it stops short of mixing international and comparative law for pedagogical reasons. Additionally, one positive result of the global financial crisis and its aftermath is the more aggressive pursuit of global harmonization by comparative lawyers. Ralf Michaels recently wrote of the need for comparative lawyers to take on the World Bank’s linear and grossly deficient Doing Business project. One of America’s leading comparative lawyers and legal anthropologists, Annelise Riles, organized a large conference to explore ‘techniques of hope’ in the broadest sense. And in 2009, the International University College of Turin led a collaborative project on global legal standards which had, as its aim, to suggest alternative models of development inspired by traditions and concerns of the global political, geographic, and economic “periphery.”

International law is also converging on this path. Led by David Kennedy and his newstream, critical international law theorists are again asking

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257. *Id.* at 8–13; see also Reimann, supra note 253, at 1116–17.
the difficult questions: why do law and development projects go south (geographically, metaphorically, pejoratively)?; what is the role of global elites in turning a blind eye to the world’s dispossessed states and peoples?; what can international lawyers do to break the familiar intellectual cycles of crisis/progress, center/periphery, ‘us’ vs. ‘them’?261 In a related stream of inquiry, a group of international lawyers calling itself TWAIL, led by Antony Anghie and B.S. Chimni, also seeks to revive a number of long-ignored interests, not just from the Global South, but also the interests of repressed indigenous groups in the Global North.262 TWAIL is concerned principally with questions of imperialism, neo-imperialism, and modern continuities of longstanding patterns of exploitation.263 Bridging these two groups is an emerging third stream, roughly called national traditions in international law, which seeks to explore particular national or pre-national traditions or outlooks on international law. The next Section surveys these efforts in the context of the emerging field of CIL and asks what lessons CIL can draw from these diverse, yet interrelated, streams.

II. PITFALLS: WHAT CAN COMPARATIVE LAW & INTERNATIONAL LAW LEARN FROM EACH OTHER?

A. Mapping the Field

At this point, it is necessary to take a step back and define several broad terms and categories used above and in the remainder of the Article. There is no longer any question that different nations conceptualize and interpret international norms differently. As referenced above, the existence of national yearbooks of international law, national associations of international law, and national international law journals, may evidence, at the very least, a desire to stake out a ‘national doctrinal iden-

261. Newstream, also known as NAIL (“new approaches to international law”) is a broad term used to describe non-traditional approaches to international law, especially as pertains to the history of the development of international law and its institutions. See David Kennedy, A New Stream of International Law Scholarship, 7 Wis. Int’l L.J. 1 (1989) [hereinafter Kennedy, New Stream]; see also Deborah Z. Cass, Navigating the Newstream: Recent Critical Scholarship in International Law, 65 Nordic J. Int’l L. 341, 342–45 (1996).


263. See Anghie, Imperialism, supra note 262, at 6–12.
tity’ or offer a space for the publication of scholarship arising from the
territorial boundaries of a given state that may not ‘rise’ to the standards
of ‘elite’ international law publications. National yearbooks also serve
the functional purpose of documenting a given state’s treaty practice,
national case law concerning international law questions, and related
notes. Furthermore, many national international law yearbooks and
journals also publish in the local language, which provides an important
outlet outside the English-language dominated ‘elite’ international law
journals.

At its most basic level, CIL simply entails the textual comparison of
different doctrinal positions on a given international law topic. As an
example, to get a good idea of how scholars in Canada and scholars in
Russia interpret maritime obligations and boundaries in the Arctic, it is
fair to turn to the Canadian and Russian yearbooks/journals of interna-
tional law, respectively. Presumably, the texts need to be translated into a
common language before an individual can compare the similarities and
differences of the scholars’ positions. Of course, this form of analysis is
identical to the age-old process of treaty interpretation or discourse anal-
ysis and represents the very essence of what legal attachés do on a daily
basis. Thus, though this is clearly a comparison between different na-
tions’ laws, such work falls within the discipline of international law as
opposed to CIL. Similarly, the process of ascertaining general principles
of international law, though also CIL in the strict sense, does not fall
within a new conception of CIL.

Rather, this Article is concerned with the abuse of, and suspicious of
the ambiguity in, terms such as ‘Anglo-American tradition of interna-
tional law,’ Nigerian approaches to international law, Third World ap-
proaches to international law, Indian approaches, etc., as well as terms
used in the brief historical overview above, such as “general international
law,” the West, “socialist international law,” “Soviet international law,”
etc.

1. Why (and is it Possible to) Study Different Traditions in International
Law?

At first blush, national approaches or ‘national traditions’ in interna-
tional law appears to be a tautological misnomer. If it is international
law, it is meant to be law between nations, and presumably the nation at

264. See infra text accompanying notes 338–42; see also Mattei, Critical Legal Stud-
ies, supra note 252, at 833.
265. Jan Stepan & Frank C. Chapman, National and Regional Yearbooks of Interna-
266. Id. at 20.
issue is a constituent part of that law. For this reason, international law scholars have constantly sought to clarify the term or to discard it altogether, with suggestions like "transnational law,"267 "global" or "world" law,268 or "global governance."269 Insofar as the term is fixed in the field’s popular and professional imaginations, it simply must be dealt with. However, there has never been a clearly defined sense of what it means to have a national approach to international law.

For instance, it has always been exceedingly difficult to say whether America has a national tradition in international law. To illustrate, who in the American legal academy could summarize the main tenets of the American approach to international law? Even assuming such a brave step were taken, for every such enunciation by, say, Anne-Marie Slaughter or W. Michael Reisman, one could point to a countervailing summation by, say, Jack Goldsmith or David Kennedy.270 The point is, within the American society of international law scholars, there are a sufficient number of diametrically opposed positions that it becomes impossible to brand one position dominant or orthodox.271 Even in moments of relative

267. See, e.g., Philip Jessup, Transnational Law 2 (1956).
accord within any given academic circle in either international law or comparative law, basic concepts can remain indeterminate or ambiguous, or can be usurped. For example, the adoption of the term “Bush doctrine” to refer to the right to use force preemptively when faced with a threat or risk of threat, was disparaged by those inside the last administration because the term quickly grew to signify anything from ‘the war on terror,’ to waterboarding, to good-old imperialism.

Furthermore, doctrinal positions are dynamic and change rather quickly. They seem to routinely adapt to new political needs, economic challenges, and personal preferences or animosities. Thus, assuming it was possible to chart out the doctrinal positions of the twenty leading American international lawyers at time $A$, several weeks or months later, the matrix will not hold.

In response to the temptation to observe national legal systems as wholes, or what Riles calls “legal corporeology,” comparative lawyers learned a long time ago that they need to narrow the scope of their study. Yet even with narrowed approaches, issues of terminology, translation, and expertise will continue to trouble the field. As explained above, the first generation of CIL scholars (Korovin, Hazard, Butler) intuitively sought to limit the scope of their respective inquiries, but even so, the problem of legal corporeology was a persistent hurdle. Unless one attacked the global legal web from a rigorously Marxist materialist framework—at which point CIL is useless except to show shades of gradation, or how inequitable one state’s view of the global order is versus another’s—socialist and Western legal families were sufficiently variegated such that discussion of Soviet or ‘bourgeois’ international law had to be heavily qualified or contextualized in an effort to avoid devolving to overbroad clichés of either one or the other.

lish Contribution?, in PERESTROIKA, supra note 44, at 41 (suggesting the existence of a unique English contribution to international law).


274. Riles, Encountering Amateurism, supra note 27, at 118.

275. Id. (discussing the need to avoid panaromic views of legal systems).


277. See MIÉVILLE, supra note 214, at 60 (“quickly . . . dispens[ing] with . . . the ‘official’ theories of international law of the erstwhile Soviet Bloc”).
Several examples help highlight the contingent nature of statehood and other international political identities, such as regional groups, and identity-based groups or movements.

a. The Myths of Regional Laws & Asian Approaches

As mentioned above, over the past decades, scholars associated with the TWAIL movement have begun reviving the idea of regional approaches to international law and global governance. B.S. Chimni has gone so far as to claim that “the Asian approach to international law has in its core been articulated by TWAIL.”278 The idea of a collective ‘Asian’ approach to public international law or human rights,279 and distinct Asian-state approaches to international law was first popularized during the formal decolonization period of the 1960s and 1970s.280 Contemporary international law scholarship on the Asian-values debate can be historical (as in studies on ancient Indian conceptions of international law),281 or it may focus on religious commonalities between people in Asia (such as Frederick Tse-shyang Chen’s writings on the Confucian approach to world order and international law).282 More recently, the discussion on shared aspirations and common cultural values has been grounded in quasi-anthropological assertions about a deep Asian spiritualism, historical practice of non-violence, and inner respect for the environment.283

These essentialized conceptions of ‘Asia’ or particular Asian nations are problematic for several reasons. The most obvious is geographic.284

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279. See, e.g., Kausikan, supra note 249, at 146.
283. See generally RODA MUSHKAT, INTERNATIONAL ENVIRONMENTAL LAW AND ASIAN VALUES: LEGAL NORMS AND CULTURAL INFLUENCES (2004) (examining the extent to which Asian cultural relativism influences interpretation of the norms of international environmental law and the application of these norms in the region).
India offers the best example in this respect. The product of colonialism, India is a veritable jigsaw puzzle of mixed ethnicities, language groups, religious groups and class factions. As a political body, it is an amalgamation of former principalities, carved into sometimes arbitrary federal units,285 with a number of unresolved border disputes with China286 and Pakistan. Nonetheless, it is tempting to view it as a unitary state with an easily identifiable ‘Third World’ voice. But the notion of an Indian approach to international law, bracketed within a Third World approach, is not dissimilar from the way the Indian ‘brand’ is attached to a single style of music, dance, and cuisine in the West. These national brands, whether food or approaches to international law, are meaningless; just as south Indian cuisine is different from Gujаратi cuisine, so too, is it difficult to categorize a single Indian approach to international law.

Although prefatory remarks in “national approaches” literature often acknowledge the vast cultural and intellectual pluralism within a country [or region], the exclusion of these sub-national, sub-regional, or separatist voices from a supposedly empirical study has a dangerous consequence: it validates one particular view as dominant to the exclusion of the other.288 The same problem inheres when we imagine ‘Chinese ap-

285. Consider the case of Bengal, which was partitioned from the former British colony of India in 1905 pursuant to Lord Curzon’s order. The partition was annulled in 1911. Bengal was again partitioned in 1947 following India’s independence into two provinces, the predominantly Hindu West Bengal, and the predominantly Muslim East Bengal. From 1947 until 1971, East Bengal was a province of Pakistan pursuant to the Mountbatten Plan and the India Independence Act of 1947. In 1971, East Bengal became Bangladesh following the Bangladesh Liberation War. See Tayyab Mahmud, Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier, 36 BROOK. J. INT’L L. 1 (2010) (analyzing the historical strife that accompanies the demarcation of borders to create new sovereign nations); see also 14 BANGLADESH, THE NEW ENCYCLOPEDIA BRITANNICA 718–19 (15th ed. 2005).


288. Cf. Fabri, supra note 284, at 10. Fabri discusses the geographical and political inclusion/exclusion bias inherent in the formulation of a ‘European’ approach to international law, but nonetheless suggests the possibility of an ambivalent dualistic European approach:

However, a European approach necessarily competes with a plurality of rather diverse national approaches and it therefore presupposes the possibility of discovering enough unity despite the diversity, or within the diversity, and progressing towards more unity. This is the internal aspect. But there also is an external aspect, and if we acknowledge the idea of a European approach, we must also acknowledge that the external aspect carries a certain number of specifici-
proaches to international law,’ except it is compounded by an already-
strong instinct to presuppose internal coherence and crystalline
consistency in international law doctrine that emanates from the mainland.289
Just as the misplaced confidence in the ‘official’ Soviet position drowned
out legitimate alternative positions, so in the context of China, the notion
of a ‘Chinese approach to international law’ presupposes centrality of
control over the means of intellectual production and doctrinal uniformity.
290 In other words, by indulging in the fantasy of a singular Chinese
take on international law, the voices of opposition movements within the
mainstream or heterodox positions slightly off the beaten track are si-
lenced, paradoxically reinforcing the dominance of the presumed majori-
ty opinion.

b. The Study of ‘Other’ Traditions in International Law & Comparative
Law

Critical streams in comparative and international law are, of course,
aware of the exclusion of the Derridean ‘other’ within mainstream narra-
tives.291 Sometimes, the exclusion is the function of good faith igno-
rance.292 Scholars simply have not thought to ask (or do not have time to
ask) what Moldavian jurists think of the Transdnestrian conflict, or what
Somali jurists think of the concept of universal jurisdiction and the Inter-
national Criminal Court in the context of piracy. However, many times
the exclusion is purposeful, a way to shield plunder, guilt, and legal lia-

bility.293

Over the past ten years, figures associated with various critical streams
in international and comparative law have started to expose longstanding

Id.

289. See, e.g., Jacques de Lisle, China’s Approach to International Law: A Historical
of China’s approach to international law).

290. Id. at 275.

291. See the excellent collection of essays in INTERNATIONAL LAW AND ITS OTHERS
(Anne Orford ed., 2006) [hereinafter INTERNATIONAL LAW AND ITS OTHERS]. For a good
introduction to legal deconstruction, more generally, see J. M. Balkin, Deconstructive

292. See Antony Anghie, On Critique and the Other, in INTERNATIONAL LAW AND ITS
OTHERS, supra note 291, at 389.

293. See, e.g., UGO MATTEI & LAURA NADER, PLUNDER: WHEN THE RULE OF LAW IS
ILLEGAL (2008) (exploring a number of global examples when the law is utilized to im-
pose injustice).
regional legal groupings as utterly contingent and artificial. The trailblazing work in this respect is Jorge Esquirol’s project to uncover the ‘myth of Latin American law.’ In a series of influential articles, Esquirol analyzes the work of Rene David to expose the contingency of regional constructs and their appropriation by powerful agents. More trenchant attacks on the (f)utility of regional or identity-based interpretations of international law can be seen in the Asian values debate, which expose both the contingency of political and/or regional constructs and also raise the dual questions of identity and authority/authenticity. Identity concerns the question of who is legitimately entitled to speak on behalf of a group or nation. Authority/authenticity, on the other hand, refers to the degree of legitimacy/credibility attached to a given “voice” by its audience.

294. See, e.g., Ruskola, supra note 284.
295. See Jorge Esquirol, Continuing Fictions of Latin American Law, 55 FLA. L. REV. 41, 42 (2003). For discussion of how Esquirol’s work helps to deconstruct broader regional and national narratives, see David Kennedy, The Methods and the Politics, in COMPARATIVE LEGAL STUDIES, supra note 9, at 416 n.106.
296. See Esquirol, supra note 295, at 42.
297. Ruskola, supra note 284, at 3.
299. Authenticity can be established or lost on strength of expertise, such as command of terminology, language and translation skills, and substantive background knowledge of a culture, ethnic group, or nation. See, e.g., Chiu, supra note 276, at 485–86. On textual authenticity versus authority, see DOMINICK LAÇAPRA, RETHINKING INTELLECTUAL HISTORY: TEXTS, CONTEXTS, LANGUAGE 53–60 (1983). Authenticity—as it pertains to the authentic/‘official’/‘mainstream’/dominant interpretations of contemporary international law—is directly relevant in both of the above meanings. See id. at 254 (discussing ‘authentic’ Marxist tradition). The authors expand on LaCapra’s dichotomy and use authenticity in its everyday sense (fake vs. authentic) as well as the broader sense of ‘identity, propriety and authenticity’ which is established by reference to a pure opposite ‘other,’ in this case imperialist, Chinese, feminist, Third World, or indigenous orders. With respect to the former, authenticity is important for very practical reasons. In writing a comparative legal history, a comparativist is not dealing with ‘international law’ but rather what is left of international law—the writings of jurists, old codes, constitutions, and textbooks. See Pierre Legrand, “Il n’y a pas de hors-texte:’” Intimations of Jacques Derrida as Comparatist-at-Law, in DERRIDA AND LEGAL PHILOSOPHY 125 (Peter Goodrich, Florian Hoffman, Michel Rosenfeld, & Cornelia Vismann eds., 2008); Lorca, supra note 18, at 479 n.6 (quoting Arnold McNair, Aspects of State Sovereignty, 26 BRIT. Y.B. INT’L L. 6, 6 n.1 (1949) (noting that “most history of international law is either a history of its literature, or a history of international relations . . . . [and] [i]t is difficult to find much history of the content, that is, the actual rules of law as applied in practice”)).
An instructive illustration of the interwoven issues of identity and authenticity can be in the persona of even the most mainstream international law scholars, such as Rosalyn Higgins, the former President of the International Court of Justice from 2006 to 2009. For instance, discussing the issue of whether it is any more difficult for her to be critical in the Israel case concerning the construction of the wall in the Palestinian territory because she is Jewish, Higgins flatly responded that she did not think so, stressing that she judged the case as an international lawyer and not with regard to her background. She explains, “I also think that the fact you happen to be Jewish doesn’t mean you think that everything the State of Israel does is right.” Yet when the UK Foreign Office put her name forward for election to the court, it should be remembered, there were fears that some countries in the UN would not vote for a Jewish woman. While Judge Higgins dismisses such concerns, saying “I don’t think I have ever been perceived as Rosalyn Higgins, the Jewish international lawyer—and I hope not Rosalyn Higgins, the woman international lawyer,” how credible is this act of detachment in the eyes of her audience? Conversely, if she had claimed to speak as a feminist ‘voice’ on international law, to what extent would this act pass muster? The takeaway from this example—along with the myths of Latin American law, or Asian approaches to international law—is to beware of putative oracles speaking on behalf of a given international law tradition; to beware of one’s own doctrinal views being mischaracterized as falling into a rival international law tradition; and lastly, to understand that group-based international legal theory taxonomies (including in some ways the present one) are by and large useless to the individuals who actually drive policy, manage exports and imports, or re-negotiate sovereign debt.

Of course, these issues of identity and authority/authenticity are not new to comparative law. One of the great achievements of comparative law is that it has finally developed operational methodologies and techniques to identify these issues and address them. Both are useful to


301. For the advisory opinion in the case, see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).


303. Id.

304. See, e.g., Mitchel de S.-O.-L’E. Lasser, The Question of Understanding, in COMPARATIVE LEGAL STUDIES, supra note 9, at 197, 205, 237. Lasser’s contributions, particularly with respect to the ‘official’/unofficial divide are extremely relevant to the
break down what could be called “methodological path-dependence”—the idea of the nation-state as the default and most-useful category for thinking about transnational social phenomena,305 including the discipline of international law.306 And as shown above, identity and authenticity critiques also allow the demystification of the notion that given groups of scholars represent a particular minority,307 or other marginal voices.308

Thus far, the critiques of regional or identity-based approaches to international law suggest that the normative challenge for CIL scholars who want to do something with CIL aside from just classification is not to create an alternative perspective on international law, but rather to recognize a plurality of existing perspectives. Second, if the national pluralism thesis is accepted, then the task of CIL becomes to articulate these myriad national perspectives on international law. But here a problem presents itself. The deconstruction of the nation state as a coherent intellectual model logically facilitates the further deconstruction and pluralization of the nation-state’s constituent communities, whether they are ethnic, geographic, or class-based.309 But, if all of these categories, too, are contingent and potentially unstable, then all that is left are the writings of particular jurists, or at most, networks of scholars working in common intellectual affinity with one another. Should the task of CIL be limited to studying the differences between these theoretical schools, or deconstruction of complex texts (i.e., a 2008 Iranian international law treatise written by a figure with unclear ties to the ruling regime) and conflicting or compound identity-based arguments.

305. Cotterrell calls it “methodological nationalism” but this terminology may be misleading. See Cotterrell, supra note 254, at 4.

306. Id. at 4–5.

307. In this respect, see INTLAWGRRLS, http://intlawgrrls.blogspot.com (last visited Jan. 15, 2010), a blog co-authored by a number of influential female international law scholars, subtitled “voices on international law, policy and practice” and further subtitled “it’s our world, after all.” Id. The purpose of the blog seems to facilitate discussion and the dissemination of ideas. Diane Marie A Mann, IntLawGrrls’ Heartfelt Hello, INTLAWGRRLS (Feb. 10, 2007, 9:23 PM), http://intlawgrrls.blogspot.com/2007/02/intlawgirls-heartfelt-hello.html (“Women now have a hand in our world’s affairs: think Albright and Arbour, del Ponte and Higgins, Ginsburg and Rice. Yet our voices remain faint, in backrooms and in the blogosphere. IntLawGrrls—women who teach and work in international law, policy and practice—hope to change all that. We embrace foremothers’ names to encourage crisp commentary, delivered at times with a dash of sass.”). To what extent blogs such as this purposefully include or exclude certain other groups, or can be said to represent an identity-based ideological or political agenda, is altogether unclear.

308. See INTERNATIONAL LAW AND ITS OTHERS, supra note 291.

confederations of scholars? The answer, perhaps, is yes, but with important methodological nuances.

2. CIL as the Study of Norm Diffusion?

With the difficulty of identifying the subject of study (states, national groups, etc.), perhaps it is better for CIL to focus on the object (the actual norms in question), focusing its inquiry on the processes of norm diffusion across jurisdictions.\(^{310}\) First, is it possible to study the process of transplantation of entire “theories” or models of international law from one state to another? This question is closely related to the question of the appropriate scope of CIL inquiry that was addressed above.\(^{311}\) Second, is there still value to be gained from studying broad patterns of norm diffusion, transplants, and receptions? In brief, the answer to both questions is yes. There is great value to understanding how legal transplants transcend geographical, linguistic, and political boundaries and penetrate seemingly foreign terrains.\(^{312}\) This can be done by analyzing the transmission agents, whether legal education reforms, direct imposition (like World Bank structural adjustment policies), or internalized perceptions of “lack” (of a robust legal system) by the local legal elites in a given state.\(^{313}\)

However, moving from the local to the global, from micro- to macro-level comparisons is seemingly counterintuitive. At the very least, it goes against the grain of developments in comparative law over the past two decades that have moved into more sophisticated models of micro-level transplants and techniques of monitoring localized reception.\(^{314}\) On the

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311. See supra text accompanying notes 174–82.

312. See Michele Graziaidei, Comparative Law as the Study of Transplants and Receptions, in The Oxford Handbook of Comparative Law, supra note 252, at 441, 442–43.


314. Often, this has been practiced by scholars employing law and economics analysis in a transnational setting. See, e.g., Mathias M. Siems, Legal Originality, 28 Oxford J. Legal Stud. 147 (2008) (identifying original approaches to legal research); see also Mathias M. Siems, Legal Origins: Reconciling Law & Finance and Comparative Law, 52 McGill L.J. 55, 78–81 (2007); Sanjai Bhagat & Roberta Romano, Empirical Studies of Corporate Law, in 2 Handbook of Law and Economics 945 (A. Mitchell Polinsky &
other hand, there is no theoretical hurdle to comparing such macro concepts as “international legal theory” or “approaches to governance.” It is theoretically possible to do functional micro-comparison\textsuperscript{315} of a macro-concept like “public international law.”\textsuperscript{316} So long as there is no pretense about capturing universal truths,\textsuperscript{317} macro-comparisons of social phenomena like the appropriation of foreign theoretical constructs may actually be useful. In fact, recent CIL scholarship—such as Arnulf Becker Lorca’s comparative study of the notion of universality in European and peripheral international law—explicitly rests on a functionalist method.\textsuperscript{318}

The transplantation of vague notions like “international law” or “rule of law” is also important because they often act as theoretical lodestars towards which subsequent micro-level reforms are geared.\textsuperscript{319} Thus, in the context of traditional legal transplant studies, CIL projects can facilitate a keener understanding of vertically-imposed reasons for particular domestic reforms.\textsuperscript{320} Where nations feel compelled to reform domestic legal orders to bring them into line with global legal standards, CIL can shed light on the process of norm diffusion in these contexts.

As with CIL projects focusing on national approaches or identity-based approaches, CIL projects analyzing norm diffusion also run the risk of amateurism and corporeology. Additionally, both types of CIL projects


\textsuperscript{315} Ralf Michaels, The Functional Method of Comparative Law, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, supra note 252, at 339, 341; see also ZWEIGERT & KÖTZ, supra note 206, at 4–5 (discussing micro versus macro comparisons).

\textsuperscript{316} Michele Graziadei, The Functionalist Heritage, in COMPARATIVE LEGAL STUDIES, supra note 9, at 110 (arguing that subjects as large as ‘law’ or ‘religion’ can be investigated in functional terms).

\textsuperscript{317} Id. at 112.

\textsuperscript{318} Lorca, supra note 18, at 483 (“Section three explores the diversity of legal regimes in the three aforementioned ideal types and argues that the functional equivalences between them explain a common pattern of appropriation in the semi-periphery.”) (emphasis added).

\textsuperscript{319} Far from being an academic exercise, studying the diffusion of vague notions carries significant foreign policy overtones. Consider Attorney General Eric Holder’s recent claim that “the rule of law is one of the United States’ greatest exports.” Written Testimony by Eric Holder, Attorney General, to U.S. Senate Judiciary Committee, U.S. DEP’T OF JUSTICE (Nov. 18, 2009), http://www.justice.gov/ag/testimony/2009/ag-testimony-0911181.html.

\textsuperscript{320} See, e.g., Mamlyuk, Legal Harmonization, supra note 88 (describing how the post-Soviet transformation to monism in Russian international legal theory necessitated vertical and horizontal legal harmonization reforms in the IP sector).
can be attacked on the basis of false objectivity, the notion that the CIL project itself is not merely an intellectual quest for knowledge or understanding, but carries a particular political agenda. Even if scholars are careful to assume the political dimension of their comparative project and bring the assumption to the fore, essentially offering a disclaimer of their political/ideological commitments, there is always an implicit undisclosed cultural and ideological bias that comes with the comparativist. Likewise, the idea that CIL can offer some sort of non-contextualized truth, or a method of perceiving truth about competing approaches to international law, vastly misconstrues the capacity and function of the comparative endeavor.

B. Methodological Minima for CIL

Having answered the core methodological question—whether it is valuable to speak of CIL as a disciplinary bridge between comparative method and international law—this Article proceeds with an outline of what can be called methodological minima and maxima. As a heuristic, the table below offers one way to conceptualize the functional unit (or range) perhaps most appropriate for CIL analysis.


322. See David Kennedy, The Methods and the Politics, in Comparative Legal Studies, supra note 9, at 345. “[C]omparatists are sensitive to ‘accusations’ that their work might have anything one could regard as a politics. To my ears, their sensitivity on this point can seem so extreme that it is hard to think of it as fully ingenuous.” Id. at 349. Kennedy goes on to probe the ideological heart of comparative law by deconstructing the discipline’s history. For an earlier position on comparative law and hegemony, see Ugo Mattei, Some Realism About Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction, 50 Am. J. Comp. L. 87 (2002). For an example of the self-congratulation and claim of objectivity at issue, see Zweigert & Kötz, supra note 206, at 3 (“[B]y the international exchanges which it requires, comparative law procures the gradual approximation of viewpoints, the abandonment of deadly complacency, and the relaxation of fixed dogma.”).

323. See Winterton, supra note 321, at 81.
The idea here is that existing methods already inhabit the wide range of what would ordinarily fall into the sweeping category of CIL, were such a discipline to take hold. With respect to positive law, comparative law and public/private international law probably already provides the techniques necessary to account for differences across jurisdictions. At this upper extreme, there is also a conceptual limit to CIL study, which is the notion of regional approaches, such as European approaches to international law, Asian approaches to international law, or North American approaches to international law.

The lower limit in CIL inquiry is an individual’s writings on international law and particular schools of international law. If the work of two or more scholars shares sufficient similarity, it becomes possible to group it within a larger ‘project’ or ‘tradition,’ and so forth. For this reason, monikers like the Vienna Circle, Frankfurt School, New Haven approach, Trento/Torino Common Core, Harvard CLS, or the Toronto Group, have a more or less reliable, or at least familiar, referent. Scholars
who become affiliated with these and similar projects share a professional network, may share general political sensibilities, and at the very least, meet with one another and cite each other’s work.324

But between these two extremes lies a gulf of contested territory. Moving from the top down, the next possible field is CIL as the study of similarities and difference between two (or more) national approaches to international law and institutions. But even the most basic and familiar categories in international law—the nation-states—blur at close range.325 Adding the temporal dimension, the dynamic evolution of norms and doctrinal positions across a relatively short time span, shows that attempts to capture group narratives are but a single frame in a moving picture of interpretations (the views of several leading jurists), with the plot changing mid-frame to reflect political or substantive priorities.326

Moreover, as discussed above, there is nothing inherently different about comparing how two given foreign ministries react to the introduction of a new international norm from the traditional functionalist method used in drawing comparisons about domestic legal orders.327

The next possible candidate for CIL study is a comparison of domestic processes and structures of making decisions about international law and international relations. This can be done by reference to cases, treatises, and other materials that explain how a given policy position is developed. In a way, this form of CIL amounts to a variant of McDougal’s processual jurisprudence, an attempt to capture how decisions are made within the respective country’s foreign policy apparatus.328 This form of CIL presupposes, however, that a systemic account of these myriad aspects of social reality is possible; or, alternatively, that scholars could agree on the proper methodological basis for such an empirical study. If McDougal’s “disciplined and contextual” policy analysis329 ultimately failed to offer a predictive capacity for understanding one state’s actions

324. Mattei, Critical Legal Studies, supra note 252, at 829.
326. See id.
327. See supra Section II.A.
under international law, it is hardly an appropriate analytical or descriptive methodology for comparison among multiple actors.330 This leads to the space between the opinions of individual international law scholars and international law processes, or the domain of doctrinal schools and ‘soft’ international law institutions.331 In the Authors’ view, this is the most proper domain for CIL inquiry for at least three reasons. First, this is the proper domain by basis of exclusion: traditional public international law and comparative law already occupy the discursive space for discussing similarities and differences in positive law across jurisdictions. Traditional discourse analysis already exists to analyze the similarities and divergences between individual doctrinal positions.332 However, there is little work on comparison of institutional projects in international law—or the comparison of the coordinated output of legal research institutes, legal centers, and funded research projects.333

To make the abstract more concrete, a perfect example of an institutional project currently afoot that is in dire need of the type of CIL analysis envisioned here is the work of the Asian Society of International Law, and its most recent project, the Asian Journal of International Law (“Asian Journal”).334 More specifically, what is the historical significance of the publication of the first issue of the new publication in January 2011? Perhaps it exemplifies the assertion of Asia overcoming the West in economic and even intellectual terms? Is there a commonality of political outlooks among the editors? Does this move signify a new theoretical posture or the emergence of a new network, coalition, or cluster of


331. The term “‘soft’ international law institutions” is used here to refer generally to legal actors, which encompasses networks of scholars, law school research centers, legal think tanks, but also what is conventionally thought of as actual legal actors in the international arena, such as diplomats.


333. See, e.g., Fabri, supra note 284, at 3 (“[T]he question of the necessity for a European approach to international law is political in the sense that it is necessarily connected to a project. Giving an answer thus equates to siding with or against the project, more or less consciously and with more or less nuances. However, I do not believe this should be voiced within this article.”) (emphasis added).

scholars with a shared scholarly agenda? Why is the journal being published by Cambridge University Press, and why is it limited to English language contributions, as a practical convenience—“rather than political endorsement”—as the editors assert, or perhaps to ensure the highest levels of scholarship through the ‘double-blind peer-review’ process?335

Presumably, a legal journal is founded to fill a theoretical or structural void left by pre-existing publication fora, to publish work not being accepted elsewhere, that may be too controversial or non-topical, of a higher or lesser caliber than that published elsewhere, or as a challenge to existing frameworks. In remembering the Soviet interwar experience, it should be recalled that Pashukanis founded the Communist Academy and the legal journal *Revolution in Law (Revoliutsiia Prava)* as a direct challenge to not only the heir of the Imperial-era Russian Academy of Sciences (which became the Soviet Institute of State and Law) but also as a way to undermine the work of Korovin’s *Journal of Soviet Law (Sovetskoe Pravo)*. This was not only a political posture; it was as much an expression of theoretical opposition as of institutional rivalry for political favor and research funding. Similarly, Hazard’s choice of Columbia University was not merely a personal convenience, it represented an institutional choice with significant consequences—the opportunity to establish a Russian legal studies center336 and to attract research funding from individuals and institutions in an intensely charged political climate.337 Similarly, it is possible that Butler’s choice of London for the home of the Vinogradoff Institute338 also reflected strategic considerations—a more or less neutral ground on which to develop the Direct Link—rather than mere chance. Perhaps the alternative, setting up the ‘Link’ directly between the U.S. and Moscow, would have been seen in the early 1980s as a quasi-official bilateral move not only by the respective parties, but also by outside observers. Alternating research conferences between Moscow and London may have been more palatable to both the Soviet and Western scholars, freeing them to engage intellectually with one another.

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336. The institute that Hazard was involved with was the Russia Institute at Columbia, since renamed the Harriman Institute. It was founded in 1946 with support from the Rockefeller Foundation. See History, Harriman Inst., http://www.harrimaninstitute.org/about/history.html (last visited Jan. 16, 2011).

337. To recall the investigations by the House Un-American Activities Committee, see supra text accompanying note 146.

Accordingly, while at first blush the question of the Asian Journal may appear esoteric, upon closer examination, it is indicative of an important institutional development in international law. Taking the stated purpose of the new Asian Journal at its word, the focus of the journal is intended to cover ‘Asian’ approaches in a broad fashion:

The regional focus of the Journal is broadly conceived. Some articles may focus specifically on Asian issues; others will bring one of the many Asian perspectives to bear on issues of global concern. Still others will be of more general interest to scholars, practitioners, and policymakers located in or working on Asia.339

Yet browsing through the list of eminent contributors to the inaugural issue, one is struck by both the Western-centered nature of the contributions, and the Western origins or the authors.340 Reflecting on the earlier discussion regarding the oft-stated goals of new legal research networks or new journals—as the intellectual homes of alternative frameworks, or as venues for the publication of otherwise unconventional scholarship—it is highly unlikely that the contributions of Koskenniemi, Farer, or Charlesworth could not find voice in any of the usual elite publication channels.341 Instead, considering the sum of the outward indicia—the theme of the Tokyo conference establishing the journal,342 the dissemination of the call for submissions to Ivy League U.S. law schools and top-flight European schools, the caliber of contributors to the inaugural issue, the publication venue—one gets the sense that the Asian Society of International Law is seeking to replicate the success of the European Society of International Law, to project relevance to the outside world, to declare that “we too, matter!” Regardless of the merits or likely success of such an endeavor, it represents a concerted effort by a group of scholars who already have significant personal intellectual cachet, and who have

340. Id. Only two out of the eight contributors can be said to be scholars, practitioners, or policymakers located in or working on Asia.
341. Id. Without speculating on the actual reasons for the inclusion of these highly esteemed international law publicists in the inaugural issue of the Asian Journal versus other scholars, it seems somewhat strange that a majority of the invited articles had practically nothing to do with the ostensible main purpose of the Asian Journal, which is to represent Asian approaches to international law. An Asian Journal of International Law, 1 Asian J. Int’l L. 1, 2 (2011) (“The Asian Journal of International Law aspires to cultivate a conversation between scholars, practitioners, and policy-makers located in or interested in Asia.”).
now sought to give voice to a particular thought through collective action.

CIL, if it is to have any relevance and recognized disciplinary space, can offer a sophisticated and empirically grounded analysis of these and related historical phenomena. Of course, scholars can take an active and creative approach by organizing these respective conferences, journals, networks, and think tanks. Yet, whether the actual research methodology adopted is professional immersion, collaboration, and/or institutional convergence, the goal of the individual should be to expose the political agenda of the given network. Additionally, if the scholar is the creative agent, the goal should be to set a common agenda, to force participants to make the tragic choices of being in or out, of being part of the presumed (and hopefully expressly identified) problem, or being part of the (hopefully expressly and programmatically identified) solution.

What should be clear, the CIL method being proposed here is not a systematic, objective driven encounter. It is empirical in the sense of collecting institutional data derived from institutional records, systematic surveys, semi-structured interviews, and ethnographic-style observation. But it is subjective *prima facie*, with the express goal not of collecting samples, per se, but of building political linkages between international lawyers. It is a knowledge quest, yes, but more importantly, it is an exercise in building political participation. For, by promoting academic exchange and research collaboration, the goal is collaboration and participation in and of itself. The CIL scholar is unable to transcend her own cultural habitus and immerse herself entirely in the mindset of the foreign internationalist. And that is not the point. The point is twofold: first, to develop working relationships and common projects with the foreign internationalist camp; second, to get a basic understanding of that foreign mindset to be able to present it to one’s students.

III. METHODS: CIL AS STUDY OF COMPETING METHODS?

As an alternative to the comparative analysis of ‘soft’ international law actors and institutions discussed above, CIL is also accurately described as the study of competing comparative methods. For instance, CIL can entail the study of the impact of Soviet comparative law in the making of

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344. See text accompanying notes 154–212.

345. Or, more ideally, to be able to attract a foreign internationalist to teach students how they perceive international law.
Western comparative law. Though a full study is outside of the scope of the present Article, this Section introduces the cross-fertilization between Soviet and Western comparative law in spite of the strident claims of incomparability by Soviet bloc comparativists. The Section closes with a discussion on the uses of CIL scholarship and anticipated relevance for those outside of academic circles.

John Quigley’s book on the positive influence of Soviet legal theory on the development of global international law and the Western domestic legal order is a good example of the farthest to which Western scholars acknowledge the influence of Soviet law outside of the socialist bloc. Quigley’s central claim is that “[d]espite its rejection of Soviet concepts, the West absorbed many of them,” offering examples ranging from women’s suffrage rights, women’s rights in family law, decolonization, and a host of other positively perceived historical developments. A logical outgrowth of Quigley’s central thesis is that by rejecting Soviet exceptionalism and charging the Soviet Union with nihilism, Western international law learned the effectiveness and utility of exceptionalist rhetoric.

It should be noted that a comparative law tradition as a distinct discipline did not exist in Soviet jurisprudence. From the inception of Soviet legal theory in the 1920s, there was an ambivalent relationship with the comparative legal method. On the one hand, comparison was in-
dispensable to understand the peculiar features of the bourgeois states so as to analyze and heighten the contrast between the Soviet Union and the West.\textsuperscript{351} Comparative law, for instance, was included in the lesson plans for law faculties, though it was not taught as a separate course to students.\textsuperscript{352} John N. Hazard’s lecture notes from courses at Moscow’s Juridical Institute indicate that descriptive contrastive comparison to bourgeois practice was common in practically every course.\textsuperscript{353}

On the other hand, comparison was seen as superfluous to international law due to the objective/universal nature of historical rules.\textsuperscript{354} It was logically unnecessary to have a comparative law discipline since the competing bourgeois systems would inevitably self-destroy and become historical relics.\textsuperscript{355} For this reason, comparative law scholarship declined in the Soviet Union from the mid-1930s.\textsuperscript{356} Following WWII, when Ger-

Muromtsev (“Iurisprudentsiita I Sotsiologiia”—S. Muromtsev). Id. at 9. However, research has not shown whether the early Soviet jurists relied on Muromtsev or Kovalevsky for their comparative method.

\textsuperscript{351} Saidov, supra note 21, at 82.

\textsuperscript{352} See id.

\textsuperscript{353} John N. Hazard, Letters and Course Notes on Korovin’s International Law 26 (discussing work of League of Nations with respect to Bulgaria, Greece, Italy, China, Japan, etc.) (unpublished manuscript) (on file with the authors).

\textsuperscript{354} From the liberal side, the universal nature of justice was the same reason offered by one of the masters of English comparative law, H.C. Gutteridge, for maintaining a disciplinary divide between comparative and international law. Gutteridge, Comparative Law, supra note 171, at 60; H.C. Gutteridge, Comparative Law and the Law of Nations, in International Law in Comparative Perspective 13 (W.E. Butler, ed., 1980). In the words of Gutteridge:

If by the law of nations or public international law we understand the principles of justice, which by the common consent of mankind, should govern relations between states or nations, the employment of the comparative method would at first sight appear to be excluded, because rules which are avowedly universal in character do not lend themselves to comparison.

Id. at 13. Gutteridge saw the intersection of comparative and international law as the process of inquiring into the existence of ‘‘general,’ ‘universal’ or ‘common to civilized nations’’ principles and the formulation of methodologies for ascertaining these principles. Id.

\textsuperscript{355} See Saidov, supra note 21, at 82.

\textsuperscript{356} See id. at 83. However, Saidov is unclear regarding the cause of the decline: “[T]here were moments of decline in the use of the comparative law method connected with underestimating the role of quasi-scientific methods and a denial of any moment of succession in socialist law.” Id. This is curious because with the defeat of Pashukanis and his disciples and the adoption of stability of laws, Soviet legal scholarship was supposed to assume a less determinist stance. Thus, comparative law should have remained. Several likely explanations for the disappearance of comparative law from 1930–1960 include the general decline of interest in the discipline in Europe, though this is not supported by
man émigrés brought comparative law to U.S. law schools\textsuperscript{357} and comparative law became a distinct (though troubled) discipline, interest in comparative law in Soviet scholarship was not as pronounced as in the West. To illustrate, Soviet scholars Iu. Ia. Baskin and D.I. Feldman, in their 1980 essay on *Comparative Legal Research and International Law*, cite Szabo’s 1969 article on comparative law and the 1967 Soviet translation of René David’s *Major Legal Systems of the World* as the extent of Soviet literature on the subject.\textsuperscript{358}

More recent research reveals that a distinct Soviet comparative law style emerged in the 1960s as a result of attempts by Uzbek jurists to apply a comparative method to legal systems of the fifteen Soviet republics. It was a harmonization project similar to the Common Core project,\textsuperscript{359} but markedly different in that it began from the assumption of harmonized legal systems and sought to identify divergent streams.\textsuperscript{360} According to Butler, comparative law began to take on a disciplinary character (similar to that in the West) in the mid-1980s, led by the contributions of the Uzbek scholars.\textsuperscript{361}

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\textsuperscript{357} For an excellent retelling of the émigré story, see Curran, supra note 23, at 9–14.


\textsuperscript{360} By 1975, there was a textbook on comparative law in socialist countries. See A.A. Tille, *SOTSIALISTICHESKOE SRAVNITEL'NOE PRAVOVEDENIE* [SOCIALIST COMPARATIVE LAW] (1975). One theory why Baskin and Feldman downplayed the role of comparative research in the USSR was probably to maintain the façade of a unitary socialist legal order, which the USSR on a federal level and vis-à-vis other socialist states certainly lacked.

\textsuperscript{361} See W.E. Butler, *Editor’s Introduction* to Saidov, supra note 21, at 1. The formal agreement between W.E. Butler’s Vinogradoff Institute in London and the Institute of State and Law of the Soviet Academy of Sciences (Protocol of Cooperation), most likely, had a greater and more direct influence on the development of comparative law in the last years of the USSR than one may assume from reading Butler’s modest accounts of these efforts and his role in them. The results of the first conference under the agreement be-
Curiously, a review of Soviet literature reveals a lack of a functionalist or fact-based comparative methodology for studying the bourgeois international law tradition, aside from pure oppositions derived from Soviet historical-materialism method. The only comparative method per se was Marxist-Leninist dialectics, which supposedly gave a model for contrasting different state and legal systems. In a way, historical dialectics can be compared to the method of comparative legal history, but the methods are different in a basic way: Marxist historical dialectics was a historically determinist method, whereas traditional comparative legal history was avowedly anti-determinist. This is one reason, for instance, why historical materialism—while providing an excellent framework for deconstructing Soviet/Russian international legal history and for framing

tween the Anglo-American and Soviet academies was the collection of essays published in Comparative Law and Legal System, supra note 193. Reading these collections with the hindsight of history and against the backdrop of scholarship on both sides of the curtain, one is struck by the magnitude of Butler’s pioneering and enormously successful attempt to bridge the two legal systems. These important bilateral conferences on comparative law, international law, law of the sea, and other substantive fields are discussed throughout this Article. Surprisingly, Butler, as a true master in the field of comparative law, international law, and Soviet/Russian/CIS law, his mammoth scholarly contributions, and his continuing work as jurist, statesman, scholar, practitioner, and mediator have not received their proper due from the new generation of comparativists. See Rethinking the Masters, supra note 32 (no acknowledgement of the Hazard, Berman, or Butler tradition of comparative law; one citation of Harold J. Berman on the topic of Max Weber; two citations of John Hazard, one as a founder of the International Committee for Comparative Law, the other in Jorge Esquirol’s discussion of the legacy of Rene David, citing the co-authored work Soviet Law between David and Hazard). This may be due to Butler’s failure to engage in the theoretical brouhaha on the pages of the American Journal of Comparative Law, preferring to do comparative law, rather than theorize comparative law (though his contributions to comparative law method have been immense). Or, it could simply reflect the general disdain of the profession’s mainstream for Soviet or Russian studies. Nonetheless, the canon is incomplete without acknowledging the doctrinal and practical contributions of Hazard, Berman, and Butler. For a sample of Hazard’s classic comparative project, see John N. Hazard, Communists and Their Law: A Search for the Common Core of the Legal Systems of the Marxist Socialist States (1969); John N. Hazard, Soviet Law and Western Legal Systems: A Manual for Comparison (rev. 2d ed., 1970). The project is not without its faults and is open to the critique of amateurism (Hazard cites Wigmore and David for panoramic reviews of the other major world systems), but the analysis of Russian sources is superb. Berman’s later work, and lastly, Butler’s, is remarkably more nuanced and sophisticated.

364. See id. at 711–12.
a comprehensive legal history—fails to answer normative or prescriptive questions.  

The Soviet comparative law of the 1980s was not a big improvement over the prior comparison-by-contrast method. Soviet literature resorted to familiar clichés about bourgeois law: “bourgeois comparativists do not conceal the fact that the principal aim of comparative jurisprudence consists of spreading the legal systems of the different capitalist states everywhere.” However, Western comparative law was the one discipline where the critique was completely inapposite during Soviet times. Western comparativists like Hazard, Berman, and Butler spent entire careers trying to understand and compare the Soviet system to other systems in the spirit of cooperation, mutual understanding, and rapprochement. To the extent they critiqued Soviet law, their critiques were wholly legitimate. One could hardly say (other than in the utmost abstract sense) that they were involved in a grand comparative imperial project. The major contribution of a Marxist critique of ‘bourgeois’ comparative law was that “bourgeois comparativists . . . contrast only the forms of legal phenomena, paying no attention to essential social bonds, and subsequently

365. This is a reference to Soviet hist-mat. Marcuse’s social determinism theory, for instance, sought to return Marxism to its true path by reinstalling individual responsibility over historical events. Individual action, and social action as only a collection of individual actions, is the only way to realize transcendent historical possibilities. Faith in automatic historical progression is insufficient. See, e.g., HERBERT MARCUSE, AN ESSAY ON LIBERATION 63 (1969).

366. Baskin & Feldman, supra note 358, at 92 (citing Kazimirchuk, supra note 362, without any supporting citation of Western comparative work).

367. The history of the discipline, though with its own blindspots and complicity in violence, is noticeably softer than the history of international law, if only in rhetoric. H.C. Gutteridge, for instance, was highly critical of eighteenth century continental jurists who, in promoting universal adoption of Grotian natural law as the basis for the law of nations, had undermined the pioneering work of Montesquieu, who had brought to fruition a notion, advanced by Leibnitz, to survey and analyze scientifically the laws of the world. According to Gutteridge, “the effort to secure recognition for the law of nature carried with it a tendency to slur over the differences existing between the laws of individual nations and to belittle their importance.” GUTTERIDGE, COMPARATIVE LAW, supra note 171, at 12; cf. ZWEIGERT & KÖTZ, supra note 206, at 36 (referencing Rabel’s warning, which may have been said in jest, that upon explorations in foreign territory, “comparatists may come upon ‘natives lying in wait with spears’ . . .’”); David J. Gerber, Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language, in RETHINKING THE MASTERS, supra note 32, at 190. These are all classic examples.

368. Whether comparativists were involved in a civilizing or imperial project following the collapse of the Soviet Union is another matter. W.E. Butler’s extensive law reform, privatization, and consulting work throughout the 1990s in the CIS is noteworthy. In fact, most established Sovietologists were involved in one way or another in post-Soviet legal reform.
carry over the conclusions derived to essential relations.\footnote{369} The essential relations, of course, referred to the legal form, the fundamental nature and function of law, both domestic and international. But other than raising the critique, the late Soviet jurists did not explore it further so as not to undermine the then-reached compromise of permanent peaceful coexistence or reopen the theoretical debates of the interwar period. The Soviet CIL method was left to comparing the qualitatively different nature of Soviet treaties with fellow socialist states,\footnote{370} divining general principles of law for ICJ Article 38,\footnote{371} comparing domestic implementation regimes,\footnote{372} and studying the work of international institutions. Still, the method was invoked and practiced until the demise of the USSR.

CONCLUSION

CIL cannot be reduced to a set of fundamental unifying legal principles, methodological approaches, or disciplinary aspirations. Rather, just as the dominant characteristic of comparative law has been (by and large) by \textit{ad hoc} muddling through, or sampling of, how different legal cultures solve difficult legal problems, so has much of international law scholarship looking at national or regional traditions been of a diffuse character.\footnote{373} But this apparent and likely doctrinal incoherence does not mean that CIL must lack a conceptual or political core.

Since its birth at the dawn of modernity, international law has always been presented as a discipline with an open universalistic vocation. Because of this flavor it has been contrasted with comparative law, a discipline that, to the contrary, rejects any form of universalism, being in the core business of locating and analyzing differences. Coherently with these intellectual premises, the system of international law, being a universal edifice claiming a global scope, cannot be compared with any other system for the simple reason of the lack of alternatives.

Today, these modern assumptions are questioned. On the one hand, we now know that comparative law alternates between “contrastive” phases, with emphasis on differences, and “integrative” phases, with emphasis on analogies. During the integrative phases, claims of universalism are not absent in this discipline. On the other hand, in recent years, because of the emphasis of the role of interpreters in the making of the law, the assumed universalism in international law has been questioned by a vari-

\footnotetext{369}{Baskin & Feldman, \textit{supra} note 358, at 92.}\
\footnotetext{370}{\textit{Id.} at 94.}\
\footnotetext{371}{\textit{Id.} at 95; Statute of the International Court of Justice art. 38.}\
\footnotetext{372}{Baskin & Feldman, \textit{supra} note 358, at 96.}\
ety of new approaches to international law. In this view, international law is not the same as interpreted in the core and in the periphery, in Western and non-Western countries, in dominant or in resistant settings. Hence it becomes possible to compare one vision of international law with another vision, and such an effort claims its own academic identity as one of the comparative disciplines, namely comparative international law.

In this new vision not only it is likely that the two disciplines may benefit from each other, but also that a dialogue between the two can produce important results in terms of overall legal civilization. Indeed, today there is more than one radically alternative approach to international law; approaches that consider the current international legal edifice as hopelessly flawed, a hypocritical cover up of a relationship of power that is entirely characterized by the law of the stronger. Such approaches believe that a different international legal order, genuinely alternative to the status quo and based on democracy and respect, is not only highly desirable but also necessary in a global political system that is conducting the world to the final catastrophe. This alternative vision, much less grounded in State entities and much more on global people’s movements, itself makes a global critical claim and consequently finds it very difficult to coexist intellectually with the current status quo based on the rhetoric of the rule of law.

This Article sought to contribute to the understanding of the current clash of radically alternative views about the international legal order and to contribute in the first steps of the newborn discipline of comparative international law by telling the story of a time in which not only a completely alternative narrative of international law was available, but also in which its own claim to universalism was credible and supported by a powerful legal economic political and military apparatus. In this story, Soviet international law and “capitalist international law” found a way to coexist in a turbulent political environment. This is a story of responsibility of a global scholarly community that has contributed with the force of reason to overcome, at least in part, the reasons of force. The birth of comparative international law, or at least its first significant archeological layer, must be located in this story and must be fully appreciated to


375. MATTEI & NADER, supra note 293, at 2–3.
make sense of the development of a line of inquiry and of scholarly action called “comparative international law.”
HUMAN RIGHTS AND REMEDIAL EQUILIBRATION: EQUILIBRATING SOCIO-ECONOMIC RIGHTS

Margaux J. Hall
David C. Weiss*

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INTRODUCTION

Those who work in the field of international human rights understand a practical reality: human rights law guarantees fundamental, universally agreed-upon rights, except when it doesn’t. Whereas human rights represent normative truths, efforts to create remedies for human rights violations confront an onerous task of making legal norms a practical reality. To translate identified right to improved reality, human rights advocates must overcome the practical limitations of the world they seek to improve. Inept, inefficient, under-resourced, or iniquitous governments incapable of, or perhaps even opposed to, assisting citizens’ realization of their human rights are a near-constant hurdle. Therefore, under the standard account of human rights definition and realization, articulating what constitutes a particular human right is relatively easy in comparison to the more practical and onerous task of ensuring that governments or private actors do not impair—and that they in fact advance—an individual’s or group’s realization of a defined right. Human rights theorists thus recognize a classic gap between rights and remedies. 1

This analytical gap between rights and remedies is perhaps most commonly seen in discussions of socio-economic rights, which are second generation rights2 constricted, even more than civil or political rights, by practical and budgetary realities. The adjudication of socio-economic rights violations has been characterized as a jurisprudence of deficiencies, viewed by many human rights advocates as all-too-often defined by shortcomings and missed opportunities. Recently, for example, when the Constitutional Court of South Africa refused to define or endorse a minimum core content of the right of access to sufficient water in Mazibuko v. City of Johannesburg3—reversing what human rights advocates


viewed as important progress towards making a socio-economic right tangible for South Africans—many advocates lamented yet another setback in their quest to make rights a practical reality. Some have argued that for a country with as progressive a Constitution as South Africa to refuse to articulate a baseline, minimum content to a Constitutional right (to, in turn, give that right tangible meaning) was a great disappointment.

This Article, however, attaches a different meaning to Mazibuko. It argues that what was actually evident in Mazibuko, as in many other cases involving the adjudication of socio-economic rights, was a phenomenon that is hardly foreign: remedial deterrence. The practice of remedial deterrence is well-established in U.S. constitutional law. When the Supreme Court ordered that segregated schools in the South be desegregated “with all deliberate speed,” those paradoxical words came to represent the constant tension in American jurisprudence between the world of the ideal, sounding in foundational rights, and the world of the real, implicating practical remedies. Similarly, this Article explains that in Mazibuko, as well as many other human rights cases (and socio-economic rights cases in particular), the very nature of the right at issue was a product of tangible, practical concerns about implementation of attendant remedies. From this perspective, the traditional understanding of encapsulable human rights—as distinct from the remedies they implicate—is incorrect.

Thus, this Article argues that the picture is at once simpler and more nuanced than the conventional account of human rights would have us

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6. See infra note 34 and accompanying text (defining remedial deterrence).


8. Remedial deterrence is, of course, not limited in U.S. jurisprudence to Brown and its progeny. As discussed below, the concept is powerfully evident in recent cases regarding the provision of healthcare services in California’s prison system. See infra notes 238–41 and accompanying text.
believe. Those who view human rights as universal, agreed-upon norms and separately inquire about practical, remedial fixes—as this Article claims most commentators in fact do—are missing a critical complexity in the interplay between rights and remedies. Recognizing this nuance enables commentators and tribunals to shed light not only on the remedies available to those whose rights have been violated, but also on the content of human rights themselves. Yet understanding rights and remedies together can also be simpler, allowing commentators to set aside some of the formalistic distinctions they have created to understand human rights, particularly socio-economic rights.

The conventional understanding of human rights parallels the decades-long prevailing view of U.S. constitutional rights. Writing about U.S. constitutional law in the 1970s, for example, Lawrence Sager, Ronald Dworkin, and others, have explained the tension between separable rights and remedies, spurred by the obvious divide between desegregation rights and desegregation remedies in Brown v. Board of Education and its progeny. A range of commentators have sought to make descriptive claims of a divided rights-remedy landscape, oftentimes recognizing deficiencies in U.S. courts’ process of identifying purist rights, but corrupting such rights upon translating them into practical remedies.

However, this view of separable rights and remedies has been persuasively attacked in the domestic context. Daryl Levinson, for example, critiques the U.S. constitutional legal theory of “rights essentialism,” a practice that commences with judicial recognition of a purist constitutional value. Under the rights essentialist model, the normative task of “essentializing” is reserved for the judiciary, which is uniquely equipped to intuit the true meaning of constitutional values like due process, liberty, or equality. These values are corrupted, the essentialist account

11. For example, Paul Gewirtz, to a lesser extent, analyzed the discord between rights and remedies. See Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585, 591–92 (1983).
13. See infra Section IV.C.
15. See Owen Fiss, The Supreme Court, 1978 Term, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 51 (1979) [hereinafter Fiss, Forms of Justice]. Fiss emphasizes
goes, when they must be translated into remedies. In this essentialist view, remedies inhabit a more pragmatic and functional world, in which the constraints of economic, social, political, and other pressures temper ideals. Levinson and others have pushed back on this essentialist model. They underscore the great disconnect between rights essentialism discourse and the true character of constitutional adjudication, claiming that a more perspicuous view of U.S. constitutional law reveals a dynamic and bi-directional remedial process—wherein considerations of remedies affect rights determinations and vice versa. This argument builds on the notion of “remedial deterrence,” which holds that courts are dissuaded from recognizing a particular right because of the necessary remedy they would have to institute. Levinson further develops this concept by discussing “remedial equilibration”—in a nutshell, the notion that constitutional rights are affected by, and are indivisible from, remedies.

Surprisingly, unlike U.S. constitutional law and areas of private law such as contracts, in which commentators have argued for a more thoughtful understanding of the nuanced relationship between rights and remedies and then a better equilibration of the two, commentators have devoted scant academic effort to analyzing the interdependent roles of rights and remedies in human rights discourse. In the socio-economic rights context, for example, academics have exhaustively debated whether courts have employed weak- versus strong-form review of legislative action that has led to alleged rights deprivations (as well as whether courts should recognize a minimum core of rights from which one cannot structural reform litigation and its propensity to establish rights as pure truths, while remedies are reserved to a subservient and secondary role. See id.

16. Rights essentialist scholars have observed that courts often reserve the pragmatic task of allocating remedies to elected officials—to a congress that is accustomed to tempering its ideals in light of pragmatic and policy-based constraints.

17. See Levinson, supra note 14, at 884. Levinson first defined “remedial equilibration” with respect to U.S. constitutional adjudication.

18. The incongruous relationship between rights and remedies that Levinson has argued against in U.S. constitutional law does not exist in all areas of U.S. law, such as in contract law’s premise of an efficient breach, in which the costs of compliance with a commitment outweigh the benefits of holding steadfast to that same commitment. Contract liability rules are not seen as prohibiting breach, with remedies serving to enforce this prohibition. See id. at 859. Instead, this Article understands contractual obligations as the dividing line between performing or breaching at a particular price—the price being the remedy of damages or, in certain instances, specific performance. See id.

19. Perhaps the closest discussion to that presented in this Article is the compelling argument made by Sonja Starr, who also has considered remedial deterrence in the context of human rights, but has focused exclusively on international criminal courts and their unique institutional constraints. See Starr, supra note 1.
However, these commentators do not appear to have made any serious efforts to discredit the prevailing rights essentialism that permeates descriptive accounts of socio-economic rights. Though acknowledging the prevailing human rights debates, this Article argues that academics and practitioners working in human rights law must more closely investigate the overly-simplistic theory of judicial rights essentialism. The related claim is that this investigation must occur before commentators can overcome the prevailing, constrictive understanding of human rights and erect a more resonant, harmonious view of the jurisprudence of rights and remedies, in which rights and remedies are inevitably interdependent and mutually defining.

In some ways, this Article’s primary claim should be unsurprising. Law mediates—it accepts compromise as unavoidable given that law both idealizes and seeks pragmatism in a world filled with constraints. Therefore, applying remedial equilibration to human rights, arguably, clarifies how courts confronted with the daunting task of having to remedy human rights deprivations oftentimes engage in an artful exercise of remedial deterrence. Remedial equilibration makes clear that these courts balance a variety of interests in order to achieve a tempered remedy that is loosely calculated to optimize a range of interests.

In addition, while the Article addresses human rights broadly, its core insight is a particularly important component of a proper descriptive understanding of socio-economic rights adjudication. The focus here frequently returns to socio-economic rights for two reasons, one practical and the other theoretical. Both reasons relate to the fact that such rights are already aspirational and accepting of many forms of compromise in their progressive realization. If, for example, a concrete right to equal treatment is subject to remedial deterrence and is, therefore, not immediately enforceable, how much more so is a more amorphous socio-economic right that must be achieved “progressively”—by no clearly determined speed or pathway—subject to the same fate? Thus, the practical reason for focusing on socio-economic rights is that to the extent that theorists (or practitioners) are uncomfortable with thinking about human rights as being inherently limited by an attendant remedy, such discomfort should be lessened in the context of socio-economic rights in which compromises recognizing limited resources are already commonplace.

Second, remedial deterrence fits more squarely within the theoretical framework that adjudicatory bodies use to consider socio-economic rights. Put another way, once commentators more fully recognize reme-

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20. See discussion infra Part III.
dial deterrence as an exacting force within the adjudication of socio-
-economic rights, they can direct their attention to more fruitful analytical
endeavors, such as clearly articulating to a reviewing court—and having
the court acknowledge and reiterate in turn—the variety of interests at
stake and the attendant costs in adjudicating a right. Because this interac-
tion is more likely to occur in the socio-economic rights context, a se-
cond goal of this Article is to begin the task of more thoughtfully under-
standing the rights-remedies relationship in socio-economic rights juris-
prudence.

Finally, in discussing the interplay of rights and remedies with socio-
economic rights, further insights may be gleaned about the applicability
of remedial equilibration in all forms of human rights adjudication. For
example, as the understanding of remedial equilibration and socio-
economic rights becomes more robust, there may be further insights into
other types of human rights, such as civil and political rights, and it is for
this reason that this Article alludes to human rights more broadly in
much of its discussion.

The Article proceeds as follows. Part I describes rights essentialism,
remedial deterrence, and remedial equilibration, laying the groundwork
for later claims that these concepts are sorely lacking in human rights—
and particularly socio-economic rights—discourse. Part II demonstrates
that rights essentialism pervades the conventional understanding of so-
cio-economic rights in both “minimum core” and “reasonableness” dia-
logues. Despite impassioned debates regarding the “minimum core” ver-
sus “reasonableness” approaches to rights, the two competing concep-
tions ultimately suffer from similar deficiencies in that both seek to iden-
tify pure and idealistic rights that are separate from remedies.

Turning to remedies, Part III explores various conceptions of remedies,
ranging from strong-form review to weak-form review, all of which fol-
low a uni-directional path of causation, wherein the already identified
and defined right leads to a particular remedy which is, in turn, often-
times tempered by political or economic realities. This path-dependent,
“define the right, apply the remedy” thinking proceeds from an essential-
list view of rights that separates rights from remedial considerations.
Therefore, Part IV offers an alternative way in which rights and remedies
can be “equilibrated,” or harmonized, highlighting several examples of
remedial deterrence—or more broadly remedial equilibration—moving
from U.S. constitutional law to human rights jurisprudence. Finally, Part
V explores the implications of such a new and perspicuously framed ap-
proach, with an emphasis on understanding that remedial concerns per-
meate efforts to define the content of socio-economic rights; reconsider-
ing the institutional division of labor between branches of government if
courts alone do not define rights; finding the proper place for courts in this new understanding of human rights; and recognizing the importance of judicial transparency and candor as courts and international tribunals seek to create more resonance between rights and remedies. Ultimately, this Article begins the task of more thoughtfully understanding the rights-remedies relationship in human rights—and particularly socio-economic rights—jurisprudence.

I. RIGHTS ESSENTIALISM, REMEDIAL DETERRENCE, AND REMEDIAL EQUILIBRATION

“Rights essentialism” is one of the most basic and long-standing characterizations of constitutional adjudication. Rights essentialism assumes a specific order of events in courts’ application of constitutional rules. Under rights essentialism, judges first identify a pure right with intrinsic value. Judges may understand the value of the right based on the right’s connection to some privileged and respected source, such as the right’s articulation in the Constitution—the supreme law of the land. Courts are uniquely empowered to discern such rights, perhaps because of their relative insulation from political pressures or because of their enhanced ability to discern legal principles.

Next, under rights essentialism, the pure right is subsequently distorted and diminished when it confronts the practical certainties of the world. Rights essentialism thus creates an attendant institutional division of labor between rights and remedies. It holds that remedies are “contingent facts,” requiring superior fact-finding as well as interest and cost-benefit balancing. Balancing interests and costs and benefits, in turn, requires political accountability to those with relevant interests. Therefore, the legislative and executive branches typically guide the implementation of rights. Under rights essentialism, courts properly defer to these branches to do so.

21. See Levinson, supra note 14, at 858 (deeming a certain way of evaluating constitutional rights, “rights essentialism”).
22. Id. at 858.
23. Id. at 861.
24. Id.
25. See id.
26. See id.
27. Those with relevant interests may include the parties before a court adjudicating an alleged rights deprivation, as well as other persons or groups who may be affected positively or negatively by the court’s rendered decision.
28. For example, in Mazibuko, the legislature in South Africa adopted a significant piece of legislation three years after the country achieved democracy—the Water Services Act (the “Act” or the “Water Services Act”)—to help provide tangible meaning to
As Daryl Levinson astutely points out, the core assumptions of rights essentialism seem strange when stated expressly and contextually. The notion of such a rigid institutional division of labor appears unconvincing given that multiple branches of government help shape policies and practices, such as those ensuring access to water, education, or healthcare. Furthermore, the conception of an austere divide between rights and remedies seems overly simplistic given that definitions of rights and remedies continue to evolve, like the dynamic world they occupy. Yet, the rights essentialism conception is a viable and prevalent one in scholarly analysis. Despite its wide disconnect from the actual practice of rights adjudication, the scholarly approach and characterization have endured as deeply ingrained in the conventional conception of human rights law. This Article contests the assumptions underlying the rights essentialist account.

In *Marbury v. Madison*, the Supreme Court explained the bedrock legal principle that where there is a right, there is also a remedy. Despite this legal maxim, institutional constraints and collateral costs may undermine the enforcement of rights. In some instances, overwhelming costs may make it impractical or infeasible for courts to institute a particular remedy. Courts may avoid these costs by creating procedural hurdles that prevent adjudication of the legal claim, narrowing their interpretation of the substantive basis of a legal right, or requiring a heightened showing in order to prove a substantive rights violation. All of these responses, individually and collectively, comprise what is known as “remedial deterrence.” In its most simplistic articulation, remedial deterrence takes place when the costs of a remedy deter a court from realizing people’s constitutional right to have access to a basic water supply. See generally *City of Johannesburg v. Mazibuko* 2009 SACLR LEXIS 12, at *10–12, *17–18 (S. Afr.).

30. See *id.* at 858.
31. See *id.*
32. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162–63 (1803) (quoting Blackstone in his statement that “it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded.”).
33. See, e.g., Levinson, *supra* note 14, at 884–85 (providing, as an example, that if the structural reform of prisons will require too much judicial oversight, one might expect to see courts respond to this challenge by narrowing the associated substantive right by, for example, requiring a showing of “deliberate indifference” of prison officials).
34. See *id.* Levinson’s formative article evaluated the effects of remedial deterrence on the interpretation of rights, as seen through structural reform litigation under U.S. constitutional law. This Article analyzes “remedial deterrence” in the context of socioeconomic rights adjudication.
a right. Unlike in the rights essentialist account, under remedial deterrence, rights do not exist in a distinct realm from remedies; rather, when courts fail to defend a right by providing a remedy, they necessarily alter the right itself.

As applied to human rights adjudication, courts may engage in remedial deterrence when they avoid providing a tangible remedy to a rights deprivation because of the collateral costs—whether economic, social, political, or otherwise. As foreign courts and international tribunals grapple with providing tangible relief to broad-sweeping socio-economic rights, such as the rights to health, education, and housing, the collateral costs can be quite high. One might, then, expect to find a heightened incidence of remedial deterrence in exactly these types of rights-vindicating operations that will require large outlays of capital and other resources on the part of government. Perhaps, as a consequence of the economic challenges of providing for socio-economic rights as well as the ingrained conception of these rights as second generation rights, commentators and practitioners may be more accepting of remedial deterrence in the socio-economic rights context (as compared to the civil and political rights context).

Internationally or domestically, remedial deterrence is unavoidable. Despite attempts to insulate courts from political and other pressures, courts inevitably confront pragmatic limitations preventing them from instituting overly costly remedies. Moreover, a fully effective and comprehensive remedy may be unavailable for a range of reasons. The enterprise of providing a full remedy is complex. Courts may confront multiple remedial goals that require conflicting programs of action. For example, a court adjudicating a violation of the right to health may have the goal of vindicating the harm to the applicant before the court—a task that may require accounting for a history of deprivations of the right to health and other interrelated rights. The court may also have the goal of achieving an equitable and non-discriminatory approach to the right to health

35. See Starr, supra note 1, at 695.
36. See, e.g., Levinson, supra note 14, at 858.
37. See Lisa J. Laplante, The Law of Remedies and the Clean Hands Doctrine: Exclusive Reparation Policies in Peru’s Political Transition, 23 AM. U. INT’L L. REV. 51, 56–57 (2007). In considering the statement that “where there is a right there is a remedy”—or ubi ius ibi remedium—Sonja Starr has critiqued this “full remedy rule,” or at least the strongest version of it, noting that “strong remedial rules actually undermine effective rights enforcement in some areas.” Starr, supra note 1, at 708.
38. See supra note 2.
40. See Gewirtz, supra note 11, at 593–94.
Instrumental deficiencies may also contribute to remedial deterrence. Real-world limitations may make it impossible to create a perfect remedy. Courts frequently confront imperfect knowledge about social institutions, complicated analyses of how to effect change in these institutions, a dependency on other branches of government and actors to help effect a remedial program, and unanticipated changes that alter the factual background against which courts must prescribe a remedy. As a result, even if a full remedy can ultimately be achieved, a victim may already have suffered the complete extent of harm before the full remedy becomes available, and a court may adjust the right accordingly to account for this limitation.

In contrast to rights essentialism, the theory of remedial deterrence does not maintain that courts sidestep realizing a right, which remains uncorrupted despite the failure to realize it in the real world. Rather, as courts refrain from vindicating a right, under remedial deterrence they necessarily affect the very nature of the right. Remedial deterrence thus lacks the disconnect that characterizes rights essentialism. Rights and remedies exist, in this view, as part of a symbiotic relationship. This understanding is also a central tenet of “remedial equilibration”—in a nutshell, the notion that constitutional rights are affected by, and are indistinguishable from, remedies. Daryl Levinson first defined “remedial equilibration” as encompassing various forms of interrelationships between rights and remedies, with the most obvious form being that of “remedial deterrence”—i.e. that rights can be shaped by the very nature of the remedy that will be applied if a court determines that the right has been violated. Under this most-recognized form of interrelationship, courts shape the definition of a right when they craft a remedy. If a de facto interpretation of a particular socio-economic right requires that government officials take a certain course of action, such as expanding access to a drug or granting social support services to a category of persons, then

41. See id.
42. See id. at 596.
43. See id.
44. See id. at 598 (noting that rights are dependent on remedies for their very existence).
45. See id. at 862.
46. See Levinson, supra note 14, at 884. Levinson first defined “remedial equilibration” with respect to U.S. constitutional adjudication.
47. See id. at 884–85.
48. See id. at 884.
one may expect that a court will find any *de jure* governmental program that runs afoul of these guidelines to be unconstitutional.49

Further, in an exercise Levinson describes as “remedial incorporation,” a remedy may also affect a right when the right itself incorporates a remedy, as in the case of an equitable remedy like an injunction.50 Preventive injunctions are oftentimes prophylactic instruments that require a certain course of governmental conduct. Consider the following hypothetical example: In adjudicating a violation of the right to health, a court may order the government to take a specific course of action in order to provide appropriate health care. In issuing this prophylactic remedy, however, the court also broadens the scope of the substantive right to include an entitlement to the same prophylactic remedy—the prescribed type of health care services. Many courts have such powers. The Constitutional Court of South Africa, for example, has emphasized in its jurisprudence that it has broad remedial authority, which allows it to issue supervisory injunctions.51 In this way, rights and remedies operate in a symbiotic manner. Finally, Levinson offers “remedial substantiation.” In the most basic sense, remedial substantiation recognizes that the monetary value of a right is oftentimes simply the value of the remedy the court will offer if it finds that the right was violated.52

Examples of structural reform litigation in the United States illustrate the significance of considering the line of causation as running from remedies to rights rather than only from rights to remedies.53 As seen domestically in California’s recent prison reform litigation, concerns about the practical availability of remedies will routinely impact rights, as courts redefine rights in light of anticipated remedial limitations.54 Thus, in a series of rulings addressing challenges to conditions in California’s prisons, the U.S. District Court for the Northern District of California engaged in remedial incorporation when it first expanded prisoners’ rights to medical care to include a preventive injunction that ordered the California Department of Corrections and Rehabilitation (“CDCR”)

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49. See id. (applying this line of analysis to domestic structural reform litigation).
50. See id. at 885.
51. See *Minister of Health v. Treatment Action Campaign 2002 (5) SA 721 (CC)* paras. 96–114 (S. Afr.). The court emphasized, “Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant ‘appropriate relief.’ It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of section 172(1)(a) a court may also ‘make any order that is just and equitable.’” Id. para. 101.
52. See Levinson, supra note 14, at 887.
53. See id. at 884.
54. See id.
to provide a minimum threshold of medical care. Three years later, the court found that appalling conditions remained despite its preventive injunction, after balancing the range of interests, the court placed the CDCR health care delivery system in receivership, thereby influencing the ultimate value and character of the prisoners’ underlying right to medical care.

Remedial equilibration is important because it offers an alternate, more holistic view of human rights jurisprudence in which rights and remedies operate in a symbiotic relationship. When one views human rights law—and socio-economic rights in particular—through this new lens, the heretofore accepted doctrinal foundation cracks, yielding room for more analysis of the interplay between rights and remedies. This new theoretical understanding of socio-economic rights is also more conceptually analogous to areas of private law in which rights and remedies are an operative single package. For example, contract law presumes an efficient breach that occurs where the costs of upholding a commitment exceed the benefits of maintaining the commitment. Contract liability rules do not forbid contractual breach; similarly, remedies enforce no such prohibition. Instead, contractual obligations allow for an efficient breach. A person upholds contractual obligations at a certain price—the price being the remedy of damages or, in certain instances, specific performance. The analogy between human rights law and private law cannot and should not be perfect, as there are important distinctions between the two. The optimum level of breach for human rights may be zero or close to zero, whereas such limitations may not surround private law entitlements. Nonetheless, private law can provide an important theoretical frame of reference from which to challenge long-standing conceptions of the rights and remedies divide in human rights jurisprudence.

Viewing human rights in this progressive way has other important implications. Once commentators and theorists understand the powerful role that remedial deterrence plays in adjudicating human rights in both national courts and international tribunals, they can focus attention on more rewarding, practical endeavors, such as those discussed in Part V. Thus, the Article turns to socio-economic rights to set the stage for remedial equilibration in human rights.

57. See Levinson, supra note 14, at 859.
58. Id.
59. Id.
II. THEORIES OF SOCIO-ECONOMIC RIGHTS

Practitioners, commentators, judges, and theorists often laud socio-economic rights as pure, essentialist entities insulated from the trade-offs typically recognized in public policy. Indeed, socio-economic rights express important, normative values that the international community and state actors have subsequently enacted in national constitutions and international treaties. But, concomitantly, the jurisprudence of socio-economic rights is often characterized by imprecision and obscurities. Despite the fact that socio-economic rights embody universal values, the rights have had a regrettable indeterminate practical content. In other words, commentators and practitioners understand and celebrate socio-economic rights as the embodiment of universally agreed-upon norms, as well as a normative good, but taking the outer lines the rights provide and coloring in the remedies has proven difficult. In the face of such indeterminacy, multiple actors have attempted to bring analytical rigor to bear, arguing for competing conceptions of the basic socio-economic rights and freedoms to which all people are entitled.

There are two primary, competing conceptions of socio-economic rights: one embracing a resolute “minimum content” of rights and the other defining rights according to what is “reasonable.” Both are analytically deficient, however, in that they assume that rights exist in a conceptual silo and devote insufficient attention to remedies. Despite the sig-

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64. See infra notes 199–280 and accompanying text.
significant debates over the competing conceptions of socio-economic rights, both of the prevailing conceptions also lack any self-consciousness regarding their own propensities to “essentialize” rights, and both neglect to consider the powerful ways in which the rights are influenced by, and in turn influence, remedies.65

A. The “Minimum Core”

A long-running goal of commentators and tribunals examining socio-economic rights has been to define the rights’ “minimum core.” The min-

65. Although not intending to diminish the importance of cultural rights, this Article does not extend its analysis to this category of rights. First, as a practical matter, this Article aims to debunk a rigid distinction between the two leading conceptions of socio-economic rights, and fewer debates have focused on propounding a conception of cultural rights, making the argument less valuable in that context. The wealth of human rights case law and academic discourse to date has been centered on social and economic rights, with cultural rights largely unexplored. See, e.g., JESSICA ALMQVIST, HUMAN RIGHTS LAW IN PERSPECTIVE: HUMAN RIGHTS, CULTURE AND THE RULE OF LAW ch. 3 (2005) (discussing how human rights law has been inadequate in addressing issues related to culture); Asbjorn Eide, Cultural Rights as Individual Human Rights, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 169, 289 (Asbjorn Eide, Catarina Krause & Allen Rosas eds., 2d ed. 2001) (assessing the Universal Declaration of Human Rights and the ICESCR and related commentary, and concluding that cultural rights appears as “almost a remnant category” of rights); Katharine G. Young, The Minimum Core of Economic and Social Rights: A Concept in Search of Content, 33 YALE J. INT’L L. 113, 119 (2008). Although this neglect calls for further treatment, critical theory may well need to separate characterizations of social and economic rights from those of cultural rights based upon the distinct political challenges that they pose. See NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE (2003); see also Andreas Huyssen, Natural Rights, Cultural Rights, and the Politics of Memory, HEMISPHERIC INST. OF PERFORMANCE & POLITICS, http://hemi.nyu.edu/hemi/en/hemisphere-62/huyssen (last visited Feb. 25, 2011). This is especially true given that the challenges of social and economic rights are typically those of addressing redistribution of resources, whereas cultural rights address and recognize the rights of certain groups of individuals. See Young, supra note 65, at 119. Furthermore, from a pragmatic standpoint, social and economic rights dialogue is centered on the individual—the rights of each individual are recognized irrespective of group affiliation. However, the expression of cultural rights may require an emphasis on the minority group and may ultimately harm individual rights by creating or maintaining distributions of resources that are facially unequal. See id. at 119–20 (providing an example of how women operating in the private sphere may confront the consequences of this living tension); see also SUSAN MOLLER OKIN, IS MULTICULTURALISM BAD FOR WOMEN? in IS MULTICULTURALISM BAD FOR WOMEN 7, 9 (Joshua Cohen, Matthew Howard & Martha Nussbaum eds., 1999). Analysis is limited to the ways in which rights and remedies have been incongruously defined in the context of redistributing resources on an individual basis, and, therefore, discussion of how rights and remedies are defined and realized in the context of cultural rights is reserved for a later date.
imum core articulation seeks to ascertain, or in some cases prescribe, the minimum content that comprises a particular right. As one commentator notes, “it is a concept trimmed, honed, and shorn of deontological excess.” Minimum core adherents theorize that by articulating a concrete minimum content to a certain right, it is possible to achieve maximum gains in realizing the right, as deviations will be more easily ascertained. Yet, the view of socio-economic rights as containing a minimum core—like any other conception of socio-economic rights—has its limitations, leading commentators to provide a wealth of criticism.

Critics argue that those who believe they can discern a discrete content of a particular socio-economic right envision a precision that simply does not exist. Others criticize that through the act of defining a concrete minimum threshold for a right, proponents of the minimum core forsake broader goals of socio-economic rights, which are to aim for more than a bare minimum, and inappropriately lead judges to make utilitarian trade-offs. Critics similarly maintain that a minimum core conception of socio-economic rights focuses unfair attention on developing countries and their shortfalls while giving a free-ride to many middle- and high-income countries that have been underperforming by their own relative standards. But despite the criticisms, the minimum core conception of socio-

66. See generally Young, supra note 65. Young’s article canvases the various dominant conceptions of the minimum core of social and economic rights and ultimately concludes that all of the conceptions fail to deliver a determinate core of rights.
67. See id. at 113.
71. See MATTHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 152 (1995). Certain scholars have tried to resolve this tension by articulating a state-specific core minimum, as well as an absolute core minimum. See, e.g., Craig Scott & Philip Alston, Adjudicating Constitutional Priorities in a Transnational Context a Comment on Soobramooney’s Legacy and Grootboom’s Promise, 16 S. AFR. J. HUM. RTS. 206, 250 (2000) (noting that “Canada’s core minimum will go considerably beyond the absolute core minimum while Mali’s may go no further than this absolute core”).
economic rights remains influential and, really, one of the two ways most tribunals and commentators conceptualize such rights. The following Sections outline the background of the “minimum core” conception, its theoretical progeny, and its criticisms, before proceeding to analyze minimum core discourse based upon its failure to consider remedial interactions and interdependencies.

1. The Minimum Core—Background

The concept of the “minimum core” has historical connections to constitutional principles. It inherits its structure from German basic law, which protects the essential content of a constitutional right from potential limitation. Many constitutions include structural references to a core, pure, or essential component of a right that cannot be infringed or derogated, either as part of the articulated constitutional right itself or via a constitutional limitation clause.

The United Nations Committee on Economic and Social Rights (“the Committee”) was the first international body to articulate the notion of a minimum core and it powerfully did so beginning in the early 1990s, analogizing the minimum core to a conception of strict liability. The Committee states in its General Comment 3:

[A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is prima facie, failing to discharge its obligations under the Covenant.

The Committee’s early pronouncements, therefore, firmly established that a State Party prima facie derogates socio-economic rights when it

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72. See Young, supra note 65, at 124. Young also notes that scholars such as Esin Orucu have traced the core rights formulation to the Turkish Constitution of 1961. Id.

73. See id. at 124; see also Fons Coomans, Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context, in JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS: EXPERIENCES FROM DOMESTIC SYSTEMS 1, 9–13 (Fons Coomans ed., 2006) (providing an overview of employment of the minimum conception of socio-economic rights of countries such as India, Hungary, and Spain). But see generally City of Johannesburg v. Mazibuko, 2009 SACLR LEXIS 12 at *10–12, *17–18 (S. Afr.) (firmly rejecting the conception of a minimum core for the right to water under the South African Constitution but, nonetheless, reaching a closer conception to the minimum core than most other courts in their adjudication of rights).

disregards their “essential” components. Further, in promulgating its General Comment on the right to the highest attainable standard of health under Article 12 of the International Covenant on Economic, Social and Cultural Rights (“the Covenant”), the Committee states that “a State party cannot, under any circumstances whatsoever, justify its non-compliance with . . . core obligations . . . which are non-derogable . . . .”75 Many human rights advocates have adopted this understanding of socio-economic rights, arguing that this conception is the most immediate and enforceable way in which to achieve their realization.76 Indeed, the minimum core concept does hold appeal in that it purports to establish rigor and accountability for government action that some observers may otherwise see as absent. Yet despite the superficial appeal of this essentialist view of socio-economic rights, the minimum core conception is tragically ineffectual at resolving the inherent tensions, challenges, and limitations in the implementation of social and economic rights.77

In a more optimistic view, the minimum core approach retains some redeeming value. Notably, this conception of socio-economic rights can provide a common platform from which states can embark on the “progressive realization” of these rights as outlined under international law. Under the Covenant, for example, the larger goal of providing for the right to health is one that is to be achieved “progressively,” taking into account the institutional and economic limitations of the State Party. Article 2 of the Covenant imposes a duty on a State Party to take steps “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”78 Under this more nuanced view, the minimum core may lay a foundation for a State Party’s journey in progressively meeting its legal commitment to provide for social and economic rights.

Further, the minimum core content of a particular right may also foretell the steps the progressive realization effort should follow. This influ-

76. These advocates have also argued that the minimum core concept provides an important benchmark against which both citizens and interested international parties can measure a government’s performance and hold it accountable for its results. See Young, supra note 65, at 115; see also Theunis Roux, Understanding Grootboom—A Response to Cass Sunstein, 12 CONST. FORUM 41, 46–47 (2002).
77. See Young, supra note 65, at 115 (calling the minimum core conception “hopelessly incompatible in practice”).
78. ICESCR, supra note 61, art. 2.
ence is apparent in the principle of non-discrimination that applies immediately to a State Party’s provision of social and economic rights, such as the right to health. The Committee emphasizes that “while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. . . . [Of these] is the ‘undertaking to guarantee’ that relevant rights ‘will be exercised without discrimination.’”79 Hence, under Article 12 of the Covenant, a State Party need not provide for the complete right to health at the outset, but it cannot discriminate in its provision of health services. In this sense, the minimum core—although it does not intrinsically describe the path a state must follow in realizing social and economic rights—outlines principles that must apply across the journey.80

2. The Minimum Core—Theoretical Progeny

The minimum core conception has generated significant definitional debate, being subdivided into different articulations of what precisely constitutes this minimum core of socio-economic rights. Commentators categorize competing definitions of the minimum core of rights under the belief that by better understanding the content of socio-economic rights, the international community can then discern the optimal means to realize those rights.81 These analyses have largely been limited to examining rights as aspirational truths, leaving others to grapple with the practical limitations of rights realization in resource-limited states. Importantly, as explained in this Section, despite the distinctions between the minimum core definitions, all of the leading explanations adopt a myopic approach

79. General Comment No. 3, supra note 74.

80. One could argue that the minimum core, in fact, incorporates a distinct, independent right to non-discrimination, akin to the right equal protection under U.S. constitutional law. The authors think the minimum core concept is, instead, most significant for mandating a core of the right that must be exercised without discrimination because the Covenant does not allow no progress to be made in providing health while, in turn, requiring that if progress is made it be done in a non-discriminatory manner—a position that would be more consistent with a pure and independent equal protection right. Instead, it requires that some services be provided immediately and others be provided—or realized—progressively, and it holds that in progressively realizing this right, states are bound by a principle of non-discrimination. See ICESCR, supra note 64, art. 2. As such, it goes beyond a pure non-discrimination or equal protection right.

of essentializing rights while disregarding the attendant and interconnected remedies.

One theoretical approach to the minimum core conception of socio-economic rights proceeds by seeking to understand the “essential minimum” of a particular right. Proponents of this approach query the essential minimum elements of a right by virtue of their relationship to a particular foundational norm. Notably, what begins as a purportedly rigorous methodology quickly reduces to a normative exercise, through which foundational norms like life, survival, or dignity are propounded as fundamentally important. The minimum core is then defined as a tiered hierarchy of rights, with a nucleus that is the foundational norm; other socio-economic rights outside the nucleus become important as derivatives of this foundational norm.

Examples of this approach are illustrative. The Human Rights Committee addresses preventive health care and nutrition policies through the lens of the foundational right to life. In a General Comment, the Human Rights Committee notes that the “inherent right to life” cannot be considered in a restrictive manner, but rather, the protection of this right requires that State Parties take positive measures to decrease infant mortality and increase life expectancy, especially in addressing malnutrition and disease epidemics.

Within foreign domestic courts’ socio-economic rights jurisprudence, the “essentialist” model has gained traction as well. India’s courts, for example, have defined the minimum core of socio-economic rights relative to a central norm—the minimum necessary for survival and basic needs. The Supreme Court of India has made no express reference to a minimum core, yet the Court regularly uses language referring to the es-

82. Young, supra note 65, at 126–40.
83. See id.
84. See id.
85. See id.
87. See id. “The Committee has noted that the right to life has been too narrowly interpreted. The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States Parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.” Id. ¶ 5.
sential minimum of a right and that which is minimally required.88 In People’s Union for Civil Liberties v. Union of India, for example, the Court sternly addressed starvation deaths that had taken place in India despite the State’s excess food stocks.89 It ordered all State governments and the Union of India to immediately enforce food schemes to the poor in order to ensure the right to food, a derivative of and requisite for the right to life.90 Indeed, the Court found that the right to food followed from the fundamental “right to life” enshrined in Article 21 of the Indian Constitution.91 In another case before the Supreme Court of India, the Court similarly explained the right to emergency health care as forming an integral part of the fundamental right to life.92

More recently, the Constitutional Court of Columbia reviewed twenty-two tutela actions brought in response to alleged violations of the constitutional right to health.93 The tutela is a special constitutional writ introduced in the Colombian Constitution of 1991.94 Through the writ, any citizen can directly request that a judge protect a fundamental right when the state violates the right and when no other legal action can effectively prevent the violation.95 The Colombia Constitutional Court reviews a small proportion of the voluminous tutela actions adjudicated by lower courts.96 Astoundingly, more than 300,000 tutela actions have been adjudicated by lower courts each year, with 36% of these related to the right

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88. See People’s Union for Civil Liberties v. Union of India & Ors., (1997) 1 S.C.C. 301 (India).
89. Id.; see also People’s Union for Civil Liberties v. Union of India, Writ Petition (Civil) No. 196 of 2001 (India) (Nov. 28, 2001, interim order) (establishing a constitutional right to food).
90. See generally Young, supra note 65; see also People’s Union for Civil Liberties v. Union of India & Ors., Writ Petition (Civil) No.196 of 2001—Commentary, ESCR-Net, http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=401033 (last visited Feb. 25, 2011); Chowdhury, supra note 81, at 9–10 (discussing Indian jurisprudence in this area).
91. See People’s Union, Writ Petition (Civil) No. 196 of 2001.
94. See Yamin & Parra-Vera, supra note 93.
95. See id.
96. See id.
to health.\textsuperscript{97} In a broad and remarkable ruling in 2008, the Colombia Constitutional Court, after reviewing twenty-two *tutela* cases that were representative of various recurrent violations of rights, ordered remedies in all of the individual cases and ordered the government—including the Ministry of Social Protection and the health supervision and regulation agencies—to modify regulations and to expeditiously provide resources to bolster the health system.\textsuperscript{98} Significantly for the purposes of this Article, the Court identified the right to health as a fundamental right based on its nexus to the right to life.\textsuperscript{99} In making this analytical move, the Court embraced an essentialist theoretical approach to socio-economic rights, in which the right to health becomes fundamental based on its link to the intrinsic, undeniable right to life.\textsuperscript{100}

Other minimum core advocates within this theoretical approach argue for a more aspirational minimum core that goes beyond providing only what is required for basic needs, survival, and life. Some may more ambitiously look to the minimum core that is required for dignity or human flourishing.\textsuperscript{101} Such an approach appeals to the goals of the human rights movement, which did not intend to provide persons with only the bare minimum for survival, but rather affirmed “faith in fundamental human rights, in the dignity and worth of the human person” and “determined to promote social progress and better standards of life in larger freedom.”\textsuperscript{102} Indeed, such an articulation—no doubt more robust than that defined under the survival/minimum needs approach—could help advance human rights more fully. Furthermore, a broader definition of the minimum core—drawn in relation to dignity and flourishing—may also allow for a more participatory approach, wherein persons can assist in articulating what it means to them to lead a dignified life. Of course, the criticism of such an essentialist approach—whether tied to narrower foundational norms such as the right to life or bolder norms such as the right to flourish or to lead a life of dignity—is that by linking socio-economic rights

\textsuperscript{97} See id. (information is based on data provided by the Colombian Ombudsman’s Office for 2005).

\textsuperscript{98} See id.

\textsuperscript{99} See id.

\textsuperscript{100} See Young, supra note 65, at 126–40 (explaining the nature of such essentialist inquiries).

\textsuperscript{101} See, e.g., id. But see Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 4 (2008) (arguing that the use of dignity as a benchmark for minimum core obligations fails to provide a principled basis for judicial decision-making since there is marginal common understanding of what dignity substantively requires within or across jurisdictions).

within the “core” to such foundational norms, one may actually narrow rather than enlarge the range of rights that are ultimately protected.\textsuperscript{103} In other words, rights that are intrinsically important, but that are not linked to the foundational norm, might exist on the periphery, outside of the protected core. And more broadly, such an approach is myopic for its failure to consider the critical way in which even normative rights are shaped by remedial considerations.\textsuperscript{104}

A second theoretical approach to the minimum core is one built upon a notion of consensus.\textsuperscript{105} This approach seeks to identify the consensus-based content of a minimum core—i.e. the precise boundaries of a mutually accepted minimum core. Advocates of this approach proceed to identify key elements of the core based upon a range of more or less definite considerations, such as “wider agreement,” “extensive experience [and] . . . examin[ation],” and the “synthesis of . . . jurisprudence.”\textsuperscript{106} They do so by invoking legal documents that codify specific obligations accompanying socio-economic rights, such as human rights treaties and the jurisprudence that has evolved thereunder.\textsuperscript{107} They look to the concluding observations and comments that treaty body committees issue to State Parties during periodic reporting sessions in order to further understand the scope of the commonly-recognized “core.”\textsuperscript{108}

\textsuperscript{103.} See Young, supra note 65, at 127.\textsuperscript{104.} See infra notes 219–74 and accompanying text.\textsuperscript{105.} See Young, supra note 65, at 140–51.\textsuperscript{106.} See id. Young cites the following sources as exemplars of these approaches, respectively: Sage Russell, \textit{Minimum State Obligations: International Dimensions, in Exploring the Core Content of Economic and Social Rights: South African and International Perspectives} 11 (Danie Brand & Sage Russell eds., 2002); General Comment No. 3, supra note 74, ¶ 10; Scott Leckie, \textit{The Right to Adequate Housing, in Economic, Social and Cultural Rights}, 512 (Scott Leckie & Anne Gallagher eds., 2006).\textsuperscript{107.} See Young, supra note 65, at 142 (citing Geraldine Van Bueren, \textit{Of Floors and Ceilings: Minimum Core Obligations and Children, in Exploring the Core Content of Economic and Social Rights: South African and International Perspectives} 159, 183–84 (Danie Brand & Sage Russell eds., 2002)).\textsuperscript{108.} As an example of States Parties’ reports helping to elucidate the minimum core, Philip Alston, chairperson of the Human Rights Committee in 1991, suggested that the normative content of the rights to food, housing, health, and education could be clarified “through the examination of States Parties’ reports . . . . [T]he approaches adopted by States themselves in their internal arrangements (and explained in their reports to the Committee) will shed light upon the norms, while the dialogue between the State and the Committee will contribute further to deepening the understanding . . . .” Philip Alston, \textit{The Committee on Economic, Social and Cultural Rights, in The United Nations and Human Rights: A Critical Appraisal} 473, 491 (Philip Alston ed., 1992).
This approach also considers the work of ratifying states that have implemented domestic legal measures to protect social and economic rights in accordance with their international commitments.\(^{109}\) For example, a state may ratify the International Covenant on Economic, Social and Cultural Rights, and subsequently adopt domestic legislation requiring itself to provide health care on a non-discriminatory basis, in accordance with Article 2 and General Comment 3 of the Covenant.\(^{110}\) That the substantive content of non-discrimination is seen through a multitude of State Parties that ratified the Convention—as well as various parties’ enactment of domestic non-discrimination laws in accordance with the Convention—supports the argument that the nucleus of consensus includes the principle of non-discrimination.

Consensus as to the minimum core may ultimately be impacted by notions of constitutional borrowing, as articulated by Frank Michelman, wherein one country’s constitutional and legal industry might effectively “export” influence to other countries, which as a consequence adopt this approach.\(^{111}\) Theories of borrowing and transplantation of law permeate many academic theorists’ approaches to comparative constitutional law.\(^{112}\) No doubt, these approaches—to the extent that they are brought to bear—could contribute to the formulation of an ultimate “consensus” approach, albeit with its own share of potential weaknesses.

For example, some commentators criticize the consensus approach for leading to conservative and abstract conceptions of rights, as polarized conceptions of socio-economic rights lead nations to only mutually agree upon a narrow “core.”\(^{113}\) Constitutional borrowing may exacerbate these problems. Others refer to this as the “lowest common denominator” implication of the consensus approach, whereby the minimum core is mutually defined as the lowest level of rights protections to which states can agree.\(^{114}\) Indeed, borrowing from another familiar setting in international law, “[a]s a long-standing criticism of the treaty system makes clear, the requirement for consensus across different legal systems will impede a norm’s progress and development.”\(^{115}\) The result of this least common

\(^{109}\) See id.

\(^{110}\) General Comment No. 3, supra note 74.


\(^{112}\) Id. at 1758 (noting that “the discourses on borrowing and transplantation . . . have been a central preoccupation of theorists of comparative constitutional law”).

\(^{113}\) See, e.g., Young, supra note 65, at 148.

\(^{114}\) See id. at 147.

denominator implication is a bias toward maintaining the status quo and understanding rights in uncontroversial ways. This bias stands in direct tension with the goals of “progressive realization” embodied in most articulations of socio-economic rights. Further, the notion of true consensus itself leads to the paradoxical outcome that if a marginal few refuse to consent to a particular conception, then their voices ultimately define—and narrow—the consensus articulation of the minimum core. Thus, when adhering to a consensus understanding, the quixotic, potentially transformative conceptions of socio-economic rights evaporate from the minimum core in the absence of universal consensus.

In practice, this second consensus-based approach has similarities to the first, “essential minimum” approach. Both approaches aspire to identify a “core of certainty and a penumbra of doubt.” It is foreseeable that both approaches could yield overlapping results, as the United Nations Millennium Development Goals, the World Health Organization, and other international standards and standard-setting agencies define the essential minimum of a right with respect to a foundational principle (such as the minimum health care needed for living or flourishing) and with an eye toward consensus-based understandings of social and economic rights. Yet, in the process of delineating this common nucleus upon which “all” can agree, questions of large import emerge: does the debate regarding the appropriate methodology of defining rights detract from the arguably more important questions regarding what the content should be? Which voices comprise the consensus-forming nucleus, and are marginalized voices included and provided a platform? Is the notion of a resolute core of rights necessarily a “shifting concept”? And, criti-

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116. See id. at 141 (citing H.L.A. HART, THE CONCEPT OF LAW 123 (2d ed. 1994)).

117. Perfect consensus, of course, is a theoretical ideal that is inhibited by the practical realities of geopolitics. See M.R. HAFEZNIA, PRINCIPLES AND CONCEPTS OF GEOPOLITICS (2006) (describing “geopolitics to mean a branch of political geography” and “the study of reciprocal relations between geography, politics and power and also the interactions arising from combination of them with each other”); see also COLIN S. GRAY & GEOFFREY SLOAN, GEOPOLITICS, GEOGRAPHY, AND STRATEGY 1 (1999) (“By geopolitical, I mean an approach that pays attention to the requirements of equilibrium.”) (quoting HENRY KISSINGER, THE WHITE HOUSE YEARS 914 (1979)). Power, political, and geographical dynamics affect official policy agreements between nations, as certain voices—historically, those of developed and Western nations—are more resonant in the debate. The “compromise” that leads towards consensus can oftentimes be justly seen as a product of coercion, rather than mutually-negotiated agreement. See Young, supra note 65, at 149. And relatedly, without a true diversity of voices impacting the debate, the “consensus” outcome raises legitimacy concerns.

118. See, e.g., EXPLORING THE CORE CONTENT OF ECONOMIC AND SOCIAL RIGHTS: SOUTH AFRICAN AND INTERNATIONAL PERSPECTIVES (2002). One might query whether, normatively, there are advantages, in fact, to having a “shifting” conception of the mini-
cal to the analysis here, what role do remedies play in shaping this common nucleus under consensus-based or essentialist approaches?

Young points to a third theoretical approach to defining the content of socio-economic rights that looks at the “minimum obligation” of states under a minimum core approach. As she astutely recognizes, this third conception, growing in popularity, relies upon and integrates the foundational justifications seen in the previous two approaches.119 For better or worse, the reference to “minimum obligations” could be understood as an attempt to evade the challenging questions regarding how theorists define and justify the core content of socio-economic rights. Under this approach, states are obligated to act, rather than to merely think and question.120 To this end, the Committee has articulated “core obligations” that State Parties must assume in order to fulfill their commitments under the Covenant and has thereby demarcated what will be clear violations of the Covenant.121 Thus, a benefit of this third conception of core obligations is that it tackles the challenge of adjudicating socio-economic rights violations. The minimum core obligations become the minimum area of social and economic rights that are protected and enforceable through the judicial system.122 Yet the third theoretical approach to defining social and economic rights also falls prey to similar challenges as in the first two outlined approaches, as explained below.

3. Criticisms of the Minimum Core

One of the central weaknesses of the minimum core conception is based in the entire operation of articulating a baseline “minimum”—of unraveling complex bundles of rights into their discrete parts in a minimum core of rights. As countries develop, one might hope that economic and social progress would translate into new, revamped, and more stringent expectations of states with respect to their citizens.

119. See Young, supra note 65, at 151.

120. See id.

121. See General Comment No. 3, supra note 74 (“In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State Party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.”); see also Audrey R. Chapman, A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights, 18 HUM. RTS. Q. 23 (1996).

122. See Young, supra note 65, at 158 (“The focus on justiciability is thus more attentive, like the Committee’s General Comments, to the institutional competence of the body articulating the minimum core . . . .”).
Hohfeldian operation. Such an operation is antithetical to the very nature of socio-economic rights, which are interrelated and suffer concomitant violations, and as explained in the later parts of this Article, are ultimately defined in correspondence with remedies.

Therefore, one must question whether the entire endeavor to define the minimum core of certain socio-economic rights narrows, rather than enlarges, the range of socio-economic rights. For example, in the essential minimum approach, by connecting rights’ definitions to a grounded notion such as the right to life, does one undermine the broader human rights goal of achieving social and economic progress for all persons? One might also question whether this endeavor to define a “minimum core” of rights is rooted in a false sense of determinacy, particularly as applied to relatively broad, subjective rights. Is there truly a determinate content to a foundational norm such as “dignity” or “flourishing” under an “essence” approach? Is it any easier to identify the resolute content of the right to health in any meaningful way through a consensus-based approach? Does pointing to states’ minimum obligations to meet such a right to health obviate the need to finally define the precise content?

In short, each of these approaches to the minimum core endeavors to create an objective definition of a complicated socio-economic right that includes largely context-dependent minimum requirements. As Amartya Sen notes, line-drawing leads to inherent, inevitable arbitrariness that

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123. See Lawrence C. Becker, The Moral Basis of Property Rights, in PROPERTY 187, 190 (J. Roland Pennock & John W. Chapman eds., 1980) (describing Wesley Newcomb Hohfeld’s conceptions of property as containing constituent rights); see also Craig Anthony Arnold, The Reconstitution of Property: Property as a Web of Interests, 26 HARV. ENVTL. L. REV. 281 (2002) (recasting Hohfeld’s conception of property in a new metaphor where property is not a disintegrated entity, but rather is a set of interests—including responsibilities, as well as rights—and with people, groups, and entities sharing in objects of those interests).

124. See Young, supra note 65, at 127.

125. For example, query whether the right to health would require emergency obstetric care as part of its minimum core. From a needs-based essentialist approach, emergency obstetric care is certainly connected to the right to life and broader concepts like dignity and flourishing, as deprivations of such emergency care lead to maternal mortality. See Margaux J. Hall, Using International Law to Promote Millennium Health Targets: A Role for the CEDAW Optional Protocol in Reducing Maternal Mortality, 28 WIS. INT’L L. J. 74, 75 (2010) (highlighting the interconnection between women’s deprivation of their right to health through emergency obstetric care and their deprivation of their right to life, and offering a potential remedy to such deprivations through the Convention on the Elimination of All Forms of Discrimination Against Women Optional Protocol). Yet, despite the linkages between the right to health and right to life, emergency obstetric care might fall short of consensus, and of becoming a minimum obligation for states, under those theoretical approaches to the minimum core.
extends beyond natural variety found in regions or groups of persons.\textsuperscript{126} Sen’s concerns are not just theoretical; the Constitutional Court of South Africa has struggled with the tensions in such line drawing around rights guaranteed in the constitution,\textsuperscript{127} as have many other constitutional courts adjudicating socio-economic rights.

\textbf{B. Alternatives to the \textquotedblleft Minimum Core\textquotedblright—Assessing the Reasonableness of Government Action}

In practice, efforts to define the core of particular socio-economic rights have been strained and generally unsuccessful, if not outright rejected. The Constitutional Court of South Africa, for example, has been deliberate in articulating the contours of various socio-economic rights that are broadly provided in the country’s bold constitution; yet the forced efforts to define the contents of particular socio-economic rights have been particularly evident in the progeny of cases the Court has adjudicated.\textsuperscript{128}

As alluded to earlier, the Court’s approach was recently evident in \textit{Mazibuko and Others v. City of Johannesburg}, in which applicants asked the Court to define the minimum content of the right to water under the Constitution of South Africa.\textsuperscript{129} The \textit{Mazibuko} applicants asked the Court to define the minimum amount of water required to live a life of dignity, rather than a “mere minimum content” to the right to water.\textsuperscript{130} The Court explained that the applicants made “in effect, an argument similar to a minimum core argument though it is more extensive because it goes beyond the minimum. The applicants' argument is that the proposed amount (50 litres per person per day) is what is necessary for dignified human life.”\textsuperscript{131} The Court pointed out that the requested “minimum” was actually more than a baseline minimum: “[the applicants] expressly reject the notion that it is the minimum core protection required by the

\begin{itemize}
\item \textsuperscript{126} See Amartya Sen, \textit{Poverty and Famines: An Essay on Entitlement and Deprivation} 12 (1982) (emphasizing that even the requirements for human survival are not clear-cut; they have an “inherent arbitrariness that goes well beyond . . . groups and regions”).
\item \textsuperscript{127} See, e.g., \textit{Mazibuko v. City of Johannesburg} 2009 (3) SA 592 (CC) (S. Afr.) (grappling with the difficulty of defining a discrete content to the right of access to water under the Constitution); \textit{Minister of Health v. Treatment Action Campaign} 2002 (5) SA 721 (CC) (S. Afr.) (determining whether restrictions in access to a drug violate the right to health care services).
\item \textsuperscript{128} See, e.g., sources cited supra note 127.
\item \textsuperscript{129} See supra notes 3–5 and accompanying text.
\item \textsuperscript{130} \textit{Mazibuko}, 2009 (3) SA 592 (CC) para. 56.
\item \textsuperscript{131} \textit{Id.}
\end{itemize}
right.” The Court responded to the applicants’ “minimum-plus” request by firmly rejecting the notion of a “minimum core” in South Africa’s Constitution.

In this recent rejection of the notion of a “minimum core,” the Mazibuko Court emphasized that certain rights—although guaranteed in the Constitution—will not be realized immediately and instead must be subject to “progressive realization.” The Mazibuko Court found that the Constitution of South Africa “requires the state to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources. It does not confer a right to claim sufficient water from the state immediately.” This reasonableness analysis enabled the Court to adjudicate the fact-specific and case-specific circumstances surrounding the government’s alleged failure to fulfill rights guaranteed in the Constitution.

The Court described the history of South Africa’s enactment of its Constitution, set against the backdrop of massive deprivations in a newly post-apartheid country. Presuming the drafters did not expect that the state would be able to “furnish citizens immediately with all the basic necessities of life,” the Court explained, “[t]he fact that the state must take steps progressively to realise the right implicitly recognises that the right of access to sufficient water cannot be achieved immediately.” In essence, the Court identified the right available in the immediate term as one tempered by the practical realities of a newly post-apartheid South Africa, a right that was ultimately subordinated to (and less than) the pure ideal of the right.

The important consideration for the Court was whether the new government was taking its responsibilities seriously—“to ensure that the state continues to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life.” The Mazibuko Court, as in previous cases such as Grootboom and Treatment Action Campaign, looked to whether the government’s conduct was “reasonable.”

132. Id.
133. Id.
134. Id. para. 58.
135. Id. para. 57.
136. Id. para. 59.
137. Id.
138. Id. para. 58.
139. Id. para. 59.
140. See Minister of Health v. Treatment Action Campaign 2002 (5) SA 721 (CC) (S. Afr.) (adjudicating whether section 27 of the Constitution of South Africa guaranteeing the right to health provides a self-standing and independent positive right, and determin-
The Court’s pronouncement was to the surprise and dismay of many human rights advocates—and minimum core advocates—who saw Mazibuko as a significant setback in their efforts to delineate and realize socio-economic rights. Many advocates have found that the “reasonable” analysis provides an almost impermeable shield through which government’s shortfalls are recast as successes and progress in the right direction. Yet, paradoxically, the South African approach to socio-economic rights, framed in a “reasonable” analysis, has remained one of the most successful approaches in defining a more determinate content to socio-economic rights.

Notably, tensions abound on both the “minimum core” and “reasonableness” ends of the human rights realization endeavor. The “reasonableness” approach undoubtedly provides wide latitude for government to delay and sequence implementation of policy programs with broad discretion. Yet, the Mazibuko applicants’ desire to obtain a prescription for the “minimum core” of the right to water to enable a person to live a “dignified human life” was surely riddled with tensions as well. It is difficult for a court to quantify what constitutes a dignified human life in a purely metric sense, measured by gallons per day. Further, what would be the cost to a court’s own legitimacy if it were to require the state to provide beyond its pragmatic means or political will? The Constitutional Court discerningly described limitations on its power to adjudicate such issues in a constitutional democracy:

[O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for

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142. See Mazibuko, 2009 (3) SA 592 (CC) para. 59.

143. There are undoubtedly core human needs that a definition of the right to water would recognize under a hypothetically ideal definition, in order for the right to have any effect. But how is a court to determine, for example, the distance a house must be located from a potable water source in order to meet the need, and how should these be considered in light of socio-economic factors and constraints that can interfere with the rights’ realization?
the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.144

The Court went on to articulate that judges are ill placed to make determinations of what constitutes “sufficient water” for both institutional and democratic reasons.145 It in turn emphasized its regard for the other branches of government in their policy-making decisions.146

The meaning of these statements and their implications are revisited below,147 but first the role of remedies in socio-economic rights jurisprudence must be examined. The following Sections’ analysis seeks to demonstrate the strong influence of remedies on socio-economic rights in cases like Mazibuko. In other words, despite the fact that no remedy was awarded to the Mazibuko applicants, remedial considerations, including those concerning institutional capacity and democratic accountability, influenced the very nature of the right itself, perhaps in ways more important than if the content of the right was indeed conceived in a vacuum.

III. THEORIES OF SOCIO-ECONOMIC REMEDIES

Scholars and advocates criticize courts that recognize socio-economic rights while limiting the meaning of the promises contained therein.148 This Section probes the criticized rights-remedies divide to understand and question its normative basis, thus canvassing various characterizations of socio-economic rights interpretation—including the role of the judiciary in reviewing the implementation of constitutional rights in a strong- or weak-form manner. Strong-form review and weak-form review are ways of structuring judicial review of legislative action.149 Under strong-form review, courts have the general authority to interpret the constitution and the rights therein.150 Under weak-form review, courts can evaluate legislation to determine its constitutionality; however, the

144. Mazibuko, (3) SA 592 (CC) para. 61.
145. Id. paras. 61, 65.
146. Id. paras. 62, 65.
147. See discussion infra Section IV.C.
150. See id. at 2784.
legislature has room to reenact—and ultimately displace—judicial interpretations of the constitution, thereby depriving courts of having the ultimate “say” on the definition of rights. In identifying these dual types of scrutiny of legislative action, it is clear that neither method seeks consonance between socio-economic rights and remedies. Rather, both seek to analyze and characterize the dissonance in this space, largely by defining which institutions retain more power to define rights and their limitations. Although strong-form structure of review comes closer to harmonizing or equilibrating rights and remedies, it nonetheless falls short because of practical constraints that make an idealistic right unattainable and because it proceeds down a restrictive one-way street in which rights are taken as established entities, from which remedies ultimately flow.

This Article offers an alternative conception of rights and remedies. In order to lay the groundwork to do so, this Section highlights theories surrounding the purpose of remedies. It then assesses the traditional “rights essentialist” characterization of remedies that accepts and expects discord between pure rights and tainted remedies. An alternative conception is proposed that seeks to “equilibrate” rights and remedies by recognizing that rights are defined in accordance with desired and expected remedial outcomes. Relying on remedial equilibration in U.S. constitutional law, formative socio-economic rights opinions are considered through this new lens, noting the importance of transparency in regards to remedial deterrence. Not all areas of the law have such a disconnect between rights and remedies, and the Article briefly provides a few examples of other areas in private law where such a disconnect is not evident, focusing on distinctions between socio-economic rights jurisprudence and areas of private law like contract and property.

One of the best settings in which to explore the remedial landscape in socio-economic rights jurisprudence is, again, through the cases from the Constitutional Court of South Africa. Just as the Constitutional Court has been one of the courts to most successfully define a resolute content to socio-economic rights, it has also fostered an innovative form of enforcing these rights. Commentators widely debate the approach the Constitutional Court has taken, with some viewing it as a weak-form review of rights enforcement and others as a strong-form review of rights enforcement.

151. See id. at 2785–86.
152. Daryl Levinson first introduced the transformative notion of “equilibrating” rights and remedies in his article, Rights Essentialism and Remedial Equilibration, which assessed the relationship of rights and remedies through examples from U.S. structural reform litigation. See generally Levinson, supra note 14.
A. Weak-Form Review

Mark Tushnet characterizes the Constitutional Court of South Africa’s socio-economic rights enforcement as a “weak form” review that allocates significant discretion to the legislature to enforce socio-economic rights based on the significant budgetary implications of such enforcement decisions. In such weak-form judicial review, courts may defer to the actions of the executive or legislative branches, assuming that these branches’ policy determinations are the most effective mechanism for enforcing rights.

Even more pragmatically, Cass Sunstein emphasizes that the enforcement of constitutional rights is a costly endeavor, as all constitutional rights have budgetary implications. Sunstein’s argument resonates with the decision in Khosa v. Minister of Social Development, in which the state failed to provide reasonable budgetary or financial reasons why it could not extend social and economic services to residents. In the absence of a reasonable cost-motivated explanation, the Court ruled, the government’s exclusion was unreasonable.

Sunstein implicitly accepts a rights-remedies divide, arguing that in enforcing rights, courts focus their attention on the reasonableness of governmental behavior. Sunstein thus likens constitutional rights adjudication in South Africa to administrative law approaches, which evaluate policies of other branches of government in order to determine whether those policies are reasonable. Insofar as all constitutional rights depend upon state expenditures for their protection, the decision to involve and


154. See id.

155. See Cass R. Sunstein, Why Does the American Constitution Lack Social and Economic Guarantees?, 56 Syracuse L. Rev. 1, 7 (2005) (“All constitutional rights have budgetary implications . . . It follows that insofar as they are costly, social and economic rights are not unique.”); see also Ray, supra note 148, at 151 (noting that the distinction between socio-economic and civil and political rights, in this sense, is unhelpful as all rights implicate state expenditures); Marius Pieterse, Coming to Terms with Judicial Enforcement of Socio-Economic Rights, 20 S. Afr. J. Hum. RTS. 383, 389–90 (2004) [hereinafter Pieterse, Coming to Terms] (noting that financial and resource constraints also affect the enforcement of civil and political rights).

156. See generally Khosa v. Minister of Social Development 2004 (6) BCLR 569 (CC) (S. Afr.).

157. See id.


159. See id.
delegate decision-making authority to an accountable, elected legislature is a tacit acceptance of weak-form review.

Weak-form review allows for more flexible remedial rules that evaluate contextual elements, accepting less than complete remedies in light of other social goals.160 Under Paul Gewirtz’s dual characterization of remedial approaches, weak-form review most closely aligns with the conception of “Interest Balancing,” wherein the effectiveness of a remedy for a particular victim is just one consideration in selecting a remedy (albeit a critical one, particularly in the context of civil and political rights).161 Put another way, following Gewirtz’s understanding, courts consider and temper their remedial programs by considering other societal interests, including those of individuals outside the immediate litigation.162

Evidence for the Constitutional Court of South Africa employing weak-form review in its analysis of legislative action (or inaction) is plentiful. In Treatment Action Campaign, the Court emphasized that the Constitution granted the Court broad remedial authority, including the power to grant supervisory injunctions.163 While clarifying the existence of these broad remedial powers, the Court declined to exercise them, rejecting the lower Court’s decision to grant a bold injunction, and noting instead that “[t]he government has always respected and executed [the] orders of this Court. There is no reason to believe that it will not do so in the present case.”164 Similarly, the recent Mazibuko decision affirms weak-form characterizations of the Constitutional Court’s review given the Court’s reluctance to enforce a resolute right of access to water under the Constitution beyond what the government had provided.165

The weak-form approach has not been without its detractors. Many in South Africa criticize the Constitutional Court’s deferential approach, viewing the Court as adopting an overly narrow view of its role and thereby failing to provide real meaning to the rights guaranteed in the Constitution.166 Some commentators attack the “reasonableness” model, arguing that the Constitutional Court’s approach has allowed government

161. See Gewirtz, supra note 11, at 591–92.
162. See id.
163. See Minister of Health v. Treatment Action Campaign 2002 (5) SA 721 (CC) paras. 96–114 (S. Afr.).
164. Id. para. 129.
165. Mazibuko v. City of Johannesburg 2009 (3) SA 592 (CC) para. 9 (S. Afr.).
166. See, e.g., Danie Brand, The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or What Are Socio-Economic Rights For?, in RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION 41 (Henk Botha et al. eds., 2003); Liebenberg, supra note 62, at 22.
intransigence and has deprived rights of any tangible meaning. Other scholars point out that all that is left is the mere promise of “reasonable” government action, without even any priority setting. Indeed, the Mazibuko Court considered the broader interests of all persons in South Africa when it decided that the government had reasonably provided for the constitutional right of access to water for the applicants. The Court balanced costs to parties outside the specific piece of litigation before it. In its introductory remarks it stated that “[t]he case needs to be understood in the context of the challenges facing Johannesburg as a City,” a City that it noted has 3.2 million people residing in one million households. The Court continued, “It can be seen that there is much to be done to ‘[i]mprove the quality of life of all citizens,’ an important goal set by the preamble of our Constitution.” Mazibuko thereby framed its legal analysis in light of broader pragmatic and policy-based considerations of the welfare of the numerous residents of the City of Johannesburg, many of whom continually suffer from resource deprivations.

A range of other pragmatic and institutional considerations, beyond those expressly articulated in the opinion, may have affected the Mazibuko Court’s analysis. Commentators have engaged in a robust debate as to how strong the Court’s enforcement could have actually been without undermining its own legitimacy and competency. Of course, it is important to note that simply characterizing the Court’s review as having a weak-form structure provides only a narrow insight into its ruling. In considering remedial alternatives, the Court ultimately defined the practical scope of the right to water as well.

168. See, e.g., Pieterse, Coming to Terms, supra note 155, at 383; Roux, supra note 76, at 51. One could also characterize the Court’s rulings as reflecting a Dworkinian, pragmatic, policy-based analysis that takes into account the welfare or goals of the political community as a whole. See Ronald Dworkin, Law’s Empire 220–21 (1986) [hereinafter Dworkin, Law’s Empire].
169. See Mazibuko, (3) SA 592 (CC) para. 7.
170. See id.
171. See id. (emphasis added).
172. See id.
173. See, e.g., Rosalind Dixon, Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form, 5 Int’l J. of Con. L. 391, 393 (2007) (arguing that weak form judicial review is necessary in socio-economic rights adjudication in the beginning in order for the court to be counted as fully legitimate); Pieterse, Coming to Terms, supra note 155.
Such an “interest balancing” approach does not aim to harmonize rights and remedies. It proceeds by taking the essence of a constitutional right as a given, which is then tempered by practical considerations. In this manner, “interest balancing” provides only a shallow interpretation of the nuanced interplay between rights and remedies. This approach oversimplifies; it focuses entirely on the remedial program that follows from the existence of a particular, pure right, without considering how remedies alter that very right.

Some scholars assuage this oversimplification. Rosalind Dixon, for example, explores the territory of the rights-remedies divide and proposes a solution of “constitutional dialogue,” which “favors a weaker approach, requiring courts to adopt either weak rights or weak remedies, depending on the circumstances of the particular country and case.”174 Dixon’s “dialogue” approach has the advantage of looking at both rights and remedies, and of seemingly rejecting the strict line of causation wherein rights are defined in order to achieve ends, and remedies then submit to practical economic, social, and political constraints. Yet, ultimately, Dixon’s approach also fails to achieve consonance in this arena because it cannot provide a detailed account of how remedies actually inform the content of rights. Indeed, little analysis to date has tried to reexamine the universe of socio-economic rights jurisprudence to focus a lens on the relationship between rights and remedies and how remedial considerations ultimately shape the nature of the right.175

B. Strong-Form Review

Under a strong-form structure of review, a court’s constitutional interpretations are authoritative and binding on other governmental branches, at least in the short- and medium-term.176 Courts may order that the government enact specific changes to a program or policy, or at times issue a structural injunction to ensure compliance with their constitutional interpretation.177 An example of this stronger-form of review can be seen in the Constitutional Court of South Africa’s cases Treatment Action Cam-

174. Dixon, supra note 173, at 393 (emphasis added) (promoting a theory of constitutional dialogue between courts and legislatures regarding constitutional norms).
175. See Levinson, supra note 14, at 884.
176. See Tushnet, Alternative Forms of Judicial Review, supra note 149, at 2784.
177. See Ray, supra note 148, at 154. Ray embraces the notion of a polycentric review of rights, wherein a court shares interpretive authority with the executive and legislative branches and is willing to respect those branches’ constitutional interpretations even when they differ from the court’s own. See id.
In Treatment Action Campaign, the Court found that the state had breached its obligations under Section 27 of the Constitution regarding the right to health care by restricting provision of the nevirapine drug when it had the resources to provide it more broadly. The Court ordered the government to take specific action to make the drug more available.

In Khosa, the Court rejected as unreasonable the government’s argument that excluding permanent South African residents from the socio-economic assistance that the country provides to citizens was justified for financial reasons under Section 27(2) of the Constitution. The government failed to supply the Court with data regarding the number of permanent residents that would qualify for social assistance should the citizenship restriction be lifted, or the attendant costs that would go along with such a change. In the absence of such data, the Court inserted its own estimated cost analysis to determine that any increase in cost to the government for the inclusion of permanent residents in social assistance programs was negligible, at less than 2% of total expenditures. One academic notes the following:

[W]hen there is strong evidence the government has failed—either deliberately, as in TAC [Treatment Action Campaign], or through serious incompetence, as in Khosa—to make policy choices through a rational and deliberate process, the Court will take a much more direct role and give much less deference to the justifications put forth by the government in support of its chosen policy.

Many minimum core advocates are also proponents of strong-form review, through which courts take a more direct and affirmative role in enforcing socio-economic rights. Under the strongest-form of review, judges could engage in purist “rights maximizing” exercises, in which the only question the court would ask once finding a rights violation is what remedy would most effectively vindicate the victim, with effectiveness being defined as the successful elimination of the adverse conse-

179. See generally Khosa v. Minister of Social Development 2004 (11) BCLR 1169 (CC) (S. Afr.).
180. See generally Minister of Health, 2002 (5) SA 721 (CC).
181. See generally id.
182. See generally Khosa, 2004 (11) BCLR 1169 (CC).
183. See id. para. 61.
184. See id. paras. 62, 81–82.
quences of the rights violation. The remedial enterprise under such review is limited to considerations of the right at stake and the requisite steps to make the victim whole again. Stated simply, under the “rights maximizing” model, a remedial program stops when nothing more is feasible. A court is limited by the very definition of a right; a court cannot order a remedy beyond the scope of the right to which the individual was entitled.

A range of academic literature highlights the limits of strong-form review. The strongest form of review can forsake other competing interests, interpretations, and values, including the needs of those persons not party to the litigation at hand but who will be affected by the outcome. Strong-form review also risks exceeding institutional constraints, particularly in environments with limited resources. In recent years, Professor Brian Ray has embraced a tempered notion of strong-form review—what he describes as a “polycentric” review of rights. Under Ray’s polycentric form of review, a court shares interpretive authority with the executive and legislative branches; the court considers those branches’ constitutional interpretations even when they differ from the court’s own.

The strong-form of review comes closest to achieving consonance between rights and remedies. It is more, but not wholly, successful in this

186. See Gewirtz, supra note 11, at 591–92. Gewirtz framed the “rights maximizing” approach in the context of two fundamentally distinct remedial approaches to providing an equitable remedy, where both approaches are limited by the definition of the right. See id.

187. See id. at 601 (noting that “the justification for any remedial limit is simple: Nothing more is possible”).

188. See id. at 592.


190. See Mark V. Tushnet, Weak-Form Judicial Review and “Core” Civil Liberties, 41 Harv. C.R.-C.L.L. Rev. 1, 4–5 & n.11 (2006) (describing how the Supreme Court of Canada, under a weak-form of review considers other interests, beyond those of the party before the Court through its multi-stage test for determining when a rights violation is “demonstrably justified.”). The Supreme Court of Canada invokes “a form of proportionality test,” through which courts are required to balance the interests of society with those of individuals and groups. See id.; see also Tushnet, Weak Courts, Strong Rights, supra note 189, at 31 (noting that strong-form review disallows disagreement about what fundamental rights prohibit or protect).


192. See id.
endeavor as compared with weak-form review. But strong-form review ultimately fails because it proceeds by first finding a violation of a right and then seeking direct enforcement of a remedy, and, as this Article argues, under such an approach rights and remedies lack harmony. Strong-form review conceptualizes a one-way street of causation, in which rights affect remedies, and not the reverse. Under such a view, remedies are connected to rights in so far as they are a product of the rights. The strong-form analysis is thus limited to making remedies align with established rights. Further, strong-form review has limited success because it confronts the practical realities of a resistant, multidimensional world that prevents the institution of a perfect remedy. Thus, the strong-form academic analysis of socio-economic rights jurisprudence ultimately fails to astutely describe the full relationship between rights and remedies; it does not evaluate how courts redefine rights as they contemplate and institute remedies.

IV. RIGHTS-REMEDIES EQUILIBRATION

A. Rights-Remedies Harmonization in Other Areas of Law

Seeking to re-conceptualize the relationship between rights and remedies is a useful and not unfamiliar endeavor. Other areas of law have long considered rights and remedies as functionally inseparable. For example, contract law anticipates notions of an efficient breach in which, despite a party’s clearly established obligations under a contract, it may breach the contract because the costs of performance outweigh the costs of damages for breach. Oliver Wendell Holmes instructs that “[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.” He elaborates, “[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way [i.e. via a remedy] by judgment of the court;—and so of a legal right.” Another illustration is in Coase-ian theory, which academics, practitioners, and courts have applied to a wide spectrum of areas in private law including

193. See Gewirtz, supra note 11, at 501–92 (noting the presence of such limitations even under a “rights maximizing” approach).
194. See Levinson, supra note 14, at 858.
195. See Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 462 (1897).
196. Id.
197. Id. at 458.
torts, property, and environmental law.\textsuperscript{198} Under this theory, the individual with the right is oftentimes not as important as how the law can best protect the right to facilitate efficient transfers.\textsuperscript{199} Coase predicts that individuals may trade and sell rights in the marketplace, with the market reaching the efficient result (with the assistance of properly calibrated legal rules).\textsuperscript{200} This well-established notion in private law regarding anticipated breaches of a right—or trading ownership of a right—is entirely foreign to socio-economic rights jurisprudence.

Certainly, there are important distinctions between these private law examples and those under constitutional law, which protect sacred rights such as the right to due process of law or—in the case of human rights—the rights to health, water, or more essentially, life. The optimum level of breach for some of these rights may be zero or quite close to zero.\textsuperscript{201} Trading ownership of these rights to facilitate efficient transfers is likely both infeasible and offensive. Nevertheless, these private law examples provide a helpful doctrinal lens through which to view the disconnect between rights and remedies in socio-economic rights jurisprudence. But before putting into action what Levinson proposes—an “equilibration” of rights and remedies, as he describes it in the domestic context—it is important to explore the fundamental premises underlying rights and remedies.

\textbf{B. Theories of the Function of Remedies}

In his formative examination into remedial resistance in American constitutional law and the \textit{Brown v. Board of Education}\textsuperscript{202} desegregation remedies, Gewirtz emphasizes that “[t]he function of a remedy is to ‘realize’ a legal norm, to make it a ‘living truth.’”\textsuperscript{203} Gewirtz likens remedies to “the hard stuff of recalcitrant reality” that, although as important to jurisprudence as idealized rights, are relegated to a far less glamorous existence.\textsuperscript{204} As Daryl Levinson artfully describes, in much of constitutional discourse “[r]ights occupy an exalted sphere of principle, while remedies are consigned to the banausic sphere of policy, pragmatism,

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\textsuperscript{198} See Ronald Coase, \textit{The Problem of Social Cost}, 3 J.L. \& ECON. 1 (1960) (noting that legal rules are justified by their ability to allocate rights to the most efficient right bearer).

\textsuperscript{199} See Levinson, supra note 14, at 859.

\textsuperscript{200} See generally Coase, supra note 198.

\textsuperscript{201} Levinson, supra note 14, at 859.


\textsuperscript{203} Gewirtz, supra note 11, at 587 (citing Cooper v. Aaron, 358 U.S. 1, 20 (1958) (“Our constitutional ideal of equal justice under law is thus made a living truth.”)).

\textsuperscript{204} Id. at 587.
and politics. Under the “rights essentialist” model discussed earlier, remedies are affected by rights. Causation runs from rights to remedies because rights are defined instrumentally to achieve their end goals. Remedies also temper rights aspirations—and one might validly worry that rights will be corrupted by the practical realities of remedies. Rights essentialist proponents leave room for such a consequence. In fact, they predict that pure rights will be corrupted by exactly this remedial exercise. The interest in individual redress must at times yield to other factors.

Ronald Dworkin is perhaps most closely associated with the essentialist view of constitutional rights, having distinguished arguments of principal that establish an individual right from arguments of policy that intend to establish a collective goal. In Dworkin’s conception, policy arguments consider the welfare of political goals of a broader community; they can account for practical or empirical concerns. For example, in the policy argument could consider the risks of racial backlash and potential unenforceability of a remedial program. In more recent U.S. constitutional cases regarding health care provision to prisoners, the policy argument can consider the costs of improving health care for prisoners, as well as the competing societal welfare goal of devoting limited resources to other underserved populations.

Arguments of principle, in contrast to policy-based arguments, affirm the primacy of individual rights, and these arguments, in Dworkin’s view, “trump” pragmatic policy considerations. In turn, under princi-
ple-based arguments, elected officials have primary authority to effect policy decisions because they have the institutional ability to most effectively consider competing interests within the community and balance these interests. On the other hand, judges have primary authority to effect principle-based decisions because they are best situated to theorize about moral ends and have the advantage of being somewhat insulated from political pressures.

C. An Alternative View—Rights Equilibration

Rights essentialism, while well-situated historically in academic analysis, is not the only way in which to approach rights-remedies analysis. Other scholars embrace a more tempered approach to rights essentialism, viewing remedial imperfection as unavoidable but rejecting the stark line of “[p]ure rights, dirty remedies.” Gewirtz finds a permeable wall between rights and remedies: The prospect of actualizing rights through a remedy—the recognition that rights are for actual people in an actual world—makes it inevitable that thoughts of remedy will affect thoughts of right, that judges’ minds will shuttle back and forth between right and remedy.

Gewirtz, therefore, focuses a lens on remedies for racial segregation in public schools in the United States: with the Court’s famous and paradoxical ordering of “all deliberate speed” to desegregate schools, the Supreme Court allowed remedial imperfection, in response to what many viewed as the risk of white racial backlash. Levinson, like Gewirtz, points out that under an alternative “rights equilibration” theory, rights are not first discerned as noble principles; rather, they are “inevitably shaped by, and incorporate, remedial concerns.” Remedies cannot be sharply separated from rights, and rights interpretation is stymied, or bolstered, by the imposition of remedies. In the context of constitutional rights, Levinson articulates three ways in which rights are influenced by and interconnected with remedies. The following Section proceeds by explaining these three forms of rights-remedies relations and demonstrating how each is present in socio-

217. See Levinson, supra note 14, at 872 (theorizing about the logical ends of Dworkin’s essentialist arguments and the appropriate division of labor).
218. See id.
219. Gewirtz, supra note 11, at 678.
220. See id. at 678–79.
221. See id. at 877 (citing Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955)).
222. Levinson, supra note 14, at 873.
223. See id. at 884–89.
economic rights jurisprudence. The Section then sets the stage for Part V, which discusses the implications of, and potential constraints surrounding, such a new and harmonious view of rights and remedies.

1. Remedial Deterrence

First, under the doctrine of “remedial deterrence,” rights can be affected by the nature of the remedy that would be required if the right were to be violated. In the classic example of *Brown v. Board of Education*, a de facto interpretation of the right to equal education would require courts to maintain race-conscious desegregation systems, potentially including busing programs and other supervisory programs, in order to ensure that schools maintained racial proportionality. Gewirtz points to white racial groups’ resistance to a de facto remedy as an influencing factor in the Court’s limitation of the right to equal education. “[T]he Court made clear that this transition [to a public education system free from racial discrimination] would not have to be immediate. *Brown II* approved an imperfect remedy—delayed desegregation—and did so because of feared white resistance.”

The Court’s resulting instruction to district courts to “enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases” was characterized by ambiguity. The words “deliberate” and “speed” reflected distinct and differing courses of action, and the use of the word “all” further intensified the ambiguity. The confounding order of “all deliberate speed” imposed delay and resulted not only in effective remedial relief being postponed for some persons in the plaintiffs’ class; it also meant that certain members of the plaintiffs’ class would never receive effective remedial relief because the remedy would be instituted after they had endured full and direct harm by being required to attend segregated schools.

*Brown II* was, therefore, a classic example of remedial deterrence, an exercise which has many modern-day forms as well. Courts may engage in remedial deterrence based upon considerations of institutional constraints and public perceptions. Courts frequently perceive undesirable remedial consequences and, in turn, construct the associated right in such...
a way as to avoid achieving those undesired consequences. Gewirtz powerfully argues that a court may consider in its remedial deliberations a wide range of interests, except for those interests that are opposed to the nature of the very right. In the context of school desegregation, courts should not, then, consider white resistance to equal education in their deliberations because this involves an objection to the very nature of the right. This limitation remains a prudent guide-post, and as discussed below, can serve as an important constraint on remedial deliberation in the context of socio-economic rights.

More recent domestic examples of remedial deterrence are plentiful, perhaps none more prominent and timely than challenges to the conditions of confinement in California’s prison system consolidated in Coleman v. Schwarzenegger. In a series of orders over a number of years, the Coleman court issued only incremental relief in the face of continued constitutional violations. Only after the constitutional violations persisted for fifteen years—and after having placed the entire California prison system in federal receivership—did the court finally issue a prisoner relief order, having clearly been deterred from ordering more dramatic action due to the state’s budgetary constraints and the difficulty of solving problems related to conditions in American prisons. The court appeared to recognize the heavy-handed nature of its order. However, the court noted that it had considered ordering prison construction, expansion of medical facilities, and additional hiring, among other remedies, but that, quite simply, the litigation’s history “demonstrates even more starkly the impossibility of establishing a constitutionally adequate mental health care delivery system at current levels of crowding.”

Moving from domestic examples, remedial deterrence is also prevalent in socio-economic rights jurisprudence. Constitutional cases adjudicating

229. See Levinson, supra note 14, at 885. Levinson offered other examples of such remedial deterrence in structural reform litigation in the United States.
230. See Gewirtz, supra note 11, at 606–07.
231. See id.
232. See discussion infra Section V.C.
235. Id. at *2 (subsequently noting that ordering a remedy such as a prisoner release is a “remedy of last resort”). The percentage reduction in total inmates the court ordered, according to California officials, would require release of 46,000 inmates. David G. Savage, U.S. Supreme Court to Rule on California Inmate Release, L.A. TIMES, June 15, 2010.
236. Coleman, 2009 WL 2430820, at *70.
socio-economic rights perspicuously balance a variety of interests—at the societal, economical, political, and institutional levels. The complexities of remedial deliberation undermine arguments that a complete remedial program, making the victim whole, is theoretically and pragmatically possible.\textsuperscript{237} Complete remedies may be unavailable because of multiple and competing interests that the court must necessarily weigh in deciding upon and instituting a remedy. Complete remedies may also be unavailable because of pragmatic limitations on remedies.\textsuperscript{238}

Oftentimes, multiple remedial goals exist that thwart endeavors to implement an idealized remedy. Particularly when rights violations have continued over a prolonged time, there may be more than one remedial goal.\textsuperscript{239} The attainment of one legally relevant remedial goal may obfuscate—or prevent—the attainment of another. For example, in providing for the right to education, one goal may be non-discrimination, as embodied under international covenants and national constitutions,\textsuperscript{240} while another may be redressing harms to children resulting from a history of status-based \textit{de facto} or \textit{de jure} disadvantage. More broadly, in socio-economic rights jurisprudence, there are often a range of remedial goals, such as vindicating the rights of the particular petitioner and promoting society-wide equality and non-discrimination, including by assuaging historical biases.\textsuperscript{241} In the case of developing countries in particular, relevant remedial goals often include economic development, building the capacity of multiple branches of government, and reinforcing institutional competence and accountability.\textsuperscript{242}

\textsuperscript{237} See Gewirtz, \textit{supra} note 11, at 593.

\textsuperscript{238} See \textit{id.}

\textsuperscript{239} See \textit{id.} at 594.

\textsuperscript{240} See International Convention on the Rights of the Child, 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.”); \textit{Constitution of the Republic of Ghana} 1992, art. 17 (“A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.”). Notably, many human rights instruments at the national and international levels provide space for amelioration of past harms—thereby allowing for some forms of discrimination.

\textsuperscript{241} See, e.g., Gewirtz, \textit{supra} note 11, at 594 (providing an analogous example in the context of school desegregation efforts in the U.S.).

Remedial deterrence is uniquely useful in socio-economic rights jurisprudence, helping to explain the lack of a clear bifurcation between the allegedly contradictory “interest balancing” and “rights maximizing” approaches. Courts may face barriers to instituting a particular remedy, such as practical infeasibility in light of financial constraints. “Interest balancing” courts regularly engage in balancing, and the remedial effectiveness for victims becomes just one of the factors relevant to the balancing process. Even “rights maximizing” courts may confront unavoidable limits on achieving a perfect remedy, and hence may have to balance a range of factors in order to achieve the closest-to-perfect remedy for the victim.

Advocates who point to a specific, most effective remedy often base their judgments on a normative conception of “most effective.” Multiple remedial goals often exist, and perhaps certain remedial goals are prioritized. For example, rights, such as those of equality and non-discrimination, may be seen as “second-order” rights in the sense that they grant equality and non-discrimination in relation to the dominant typology of rights. On the other hand, as Frank Michelman astutely notes, the pendulum of rights hierarchies may well swing in the other direction in the case of certain nations. Principles of non-discrimination are ingrained in the fabric of modern South Africa; the Constitution that justices of the Constitutional Court of South Africa are

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243. See generally Gewirtz, supra note 11. But see generally Starr, supra note 1 (arguing for a switch in international criminal courts to “interest balancing” from “rights maximizing” and viewing a clear distinction between the two frameworks in the context of safeguarding international criminal defendants’ procedural rights).

244. See Gewirtz, supra note 11, at 591.

245. See id.

246. See id. at 592.

247. See id. at 619–20 (noting that this may require a ranking of various, competing goals—an exercise that rests on normative principles in and of itself).

248. See Catharine A. MacKinnon, Women’s Status, Men’s States, in ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 1, 1–14 (2006) (arguing that international conventions such as CEDAW that grant women equality of rights, while achieving some advances, ultimately limit women to what men as the dominant group need, and thus are ineffectual at dealing with women-specific issues such as pregnancy).

“charged to implement is, beyond all question, committed to deleting the stamp of apartheid from South African social, economic, and political life.”250 When this hierarchy—or subordination—of rights exists, the consequence may well be that the associated remedial goals receive less weight than other goals. Nonetheless, multiple legally relevant remedial goals can exist and be in tension, and the strategies for completely remedi- ing the associated harms may be at odds.

Further, where—as in many instances of socio-economic rights litigation—a class-based lawsuit is brought, the individual litigants themselves may have irreconcilable conflicts. Theoretically, a fully effective remedy would require that each member of the class of victims receive a complete remedy. However, ongoing problems of evolving membership of a class, and different contextual and historical experiences with respect to the right (among other considerations) may implicate and prevent a full remedy. This may also mean that some persons who suffer a rights violation may never receive a remedy at all, as the remedial program—for example, the coverage of certain illnesses as part of a country’s commitment to the right to health—is instituted after they have suffered the consequences of the rights deprivation, which in this example, may be illness or even death.251

Remedial imperfection is, of course, unavoidable.252 Courts must respond to this reality by making choices about how to distribute imperfections in remedial alternatives. In practice, courts respond through a balancing process as they determine which goals require assessing the relative value and harm associated with the lot of legally relevant interests and goals to achieve compromise.253

The balancing exercise is not incongruous with the normative goals of the human rights enterprise. Just as there is no perfect remedy, there is oftentimes no obvious “human rights” approach. Courts may find some level of balancing necessary in order to account for an individual’s circumstances and for systemic rights violations requiring broader solutions. Many human rights themselves involve such a balancing process. Balancing is inherent in the principle of “progressive realization,” through which a state must “take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate

250. See id.
251. See Gewirtz, supra note 11, at 612 (arguing this was true with the Brown II remedy, through which some persons in the affected class ultimately received no remedy).
252. See id. at 594–95.
253. See id.
This principle accepts that some rights—like the right to health or the right to education—may be difficult to fully achieve in the short-term, and that pragmatic, resource-based constraints may limit states’ progress.

Courts, therefore, often balance the normative goals of the right at hand with the government’s chosen program of progressively realizing a right. In the case of South Africa, the Constitutional Court ultimately determines whether the government’s chosen course of conduct is “reasonable” by balancing and weighing the requirement of “progress” in realizing rights with the various costs of such progress. Such costs commonly include not only the economic costs of implementing certain solutions—such as improved education, health, housing, or water—but also a range of other costs that are more difficult to quantify, including opportunity costs of diverted institutional resources; impacts on legitimacy and progress and institution-building within other branches of government; public resistance and opposition impacting the legitimacy and success of the judicial process; and third party costs to parties beyond those directly in the litigation.

Importantly, this analysis does not simply proceed from right to remedy, wherein a pure ideal of a right is defined, and then a tempered remedy is ultimately offered. What Mazibuko and many other cases make clear is that the very nature of the right is implicated by the court’s anticipation of the associated remedy. One may read Mazibuko as an example of a Court accepting a less-than-perfect remedy. Yet, under more careful analysis, the Constitutional Court’s approach appears to be more nuanced and ultimately more balanced. The Mazibuko Court stated, “The fact that the state must take steps progressively to realise the right implicitly recognises that the right of access to sufficient water cannot be achieved immediately. That the Constitution should recognise this is not surprising.” The Court acknowledged the pragmatic constraints on the implementation of a complete right of access to sufficient water and in so doing, narrowed the foundational right of access to sufficient water, and it did so with reference to the very Constitution that granted such a right.

254. See ICESCR, supra note 61, art. 2.
256. Mazibuko v. City of Johannesburg 2009 (3) SA 592 (CC) para. 58 (S. Afr.).
Mazibuko is, therefore, an example of remedial deterrence in the presence of practical impossibility. The cost of impossibility in meeting a right of access to sufficient water necessarily curbed the very definition of the right. The Court’s decision to treat the right in this manner was instrumental and critical, not only because of resource constraints, but importantly, as a means of maintaining the very legitimacy of the Court by not exceeding its institutional and political ability to articulate the meaning and implementation of rights.

The remedy that a court would mandate should a right be found to have been violated inherently implicates socio-economic rights. As a consequence, the idealized nature or content of the right is inconsequential, from a practical perspective, when there are institutional factors that will limit it. Instead, the right is defined as it is operationalized.257

2. Rights Incorporating Remedies

The second way in which remedies influence and are interconnected with rights is that the right itself may incorporate a remedy. This is commonly seen in prophylactic remedies such as injunctions that order a specific course of conduct.258 Rights may be constructed to have a built-in prophylactic remedy. Again, in the U.S. context, Gewirtz focuses on the injunction as an “extraordinary remedial weapon” that “evolved to carry out the courts’ agenda, that agenda could not have emerged and been taken seriously unless an instrument of equity was at hand to help achieve it.”259 Although the basic goal of an injunction is to enjoin the enforcement of unconstitutional laws and to prohibit new constitutional violations—as well as to eliminate continuing effects of past violations—in practice, injunctions themselves involve a balancing process.260 Indeed, a necessary predicate to a court providing an injunctive decree is

257. The Committee on Economic, Social and Cultural Rights has increasingly embraced this approach, whereby institutional constraints shape the contours of the rights. This exercise has links to legal realist approaches propounded by Oliver Wendell Holmes, Louis Brandeis, and Roscoe Pound, among others, that accept limitations on law as a product of pragmatic imperfections. See, e.g., WILLIAM FISHER, MORTON HOROWITZ, & THOMAS REED, AMERICAN LEGAL REALISM (1993) (providing a selection of pre-legal realist and legal realist essays).
258. See Levinson, supra note 14, at 885.
259. Gewirtz, supra note 11, at 587.
260. See id. at 589 (referencing the formulation of the injunction seen in Louisiana v. United States, 380 U.S. 145, 154 (1965) (“[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.”)).
the balanced determination that “the harm is sufficient to justify the remedial costs.”

The California prison litigation cases, *Plata v. Schwarzenegger* and *Coleman v. Schwarzenegger*, are more modern examples of courts defining a right in a prophylactic manner in order to include a remedy. There, the reviewing courts found that the CDCR’s medical services were inadequate and in violation of the Eighth Amendment (and other federal laws), and the plaintiffs negotiated a stipulation for injunctive relief through which the CDCR was required to provide “only the minimum level of medical care required under the Eighth Amendment.” The court thus expanded the prisoners’ rights to medical care to include a preventive injunction that ordered the CDCR to provide a minimum threshold of medical care.

When the court conducted an evidentiary hearing three years after this judicial ruling and found that appalling conditions remained in the CDCR facilities, the court again engaged in a careful balancing act and ultimately ordered that the CDCR medical health care delivery system be placed in receivership, a rights-remedy interplay the Supreme Court will now review.

In the foreign context, this relationship between right and remedy was also apparent in the socio-economic rights arena in Colombia’s Constitutional Court ruling under Decision T-760 that compelled government authorities to modify regulations that caused structural problems in the country’s health care system. There, the Court ordered that the government update, clarify, and unify health insurance coverage plans, and expedite the transfer of resources into the health care system and the evaluation and supervision of private companies involved in providing health care-related services. In so doing, the Court altered the very definition of the right to health under the Colombian Constitution to include this prophylactic remedy that demanded institutional change.

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261. See Owen Fiss, *The Jurisprudence of Busing*, 39 LAW & CONTEMP. PROBS. 194 (1975); see also DAN DOBBS, HANDBOOK ON THE LAW OF REMEDIES §§ 2.4–2.5 (1973) (providing an overview of discussions of balancing in cases of equity).


263. See sources cited supra note 262.

264. See *id.*


266. See *Decision T-760 of 2008*, supra note 93.

267. See *id.*

268. See *id.*
The Constitutional Court of South Africa has also noted that it has broad remedial powers to which it is entitled under the Constitution, including powers to grant supervisory injunctions in instances where the government does not meet its constitutional obligations. Interestingly, when petitioners before the Court litigate violations of socio-economic rights, potential supervisory injunctions themselves may be subject to balancing and a court determination that the harm outweighs the costs of instituting an equitable injunction.

3. Remedies Impacting the Value of Rights

Lastly, rights are shaped by remedial concerns in so far as the monetary value of a right is oftentimes no more than what a court would provide should the right be violated. This third consideration is perhaps the most obvious. In domestic jurisprudence, this would mean that courts would limit their remedies for inadequate prison conditions to only fixing those problems that are constitutionally insufficient.

The practical value of a right thus becomes its attendant remedy. In Treatment Action Campaign, the practical value of the right to health under the South African Constitution was what the judiciary was willing to do once the right was violated—i.e. the value of the order to provide nevirapine without discrimination. In cases like Mazibuko, on the other hand, the practical value of the right to water remains unclear because the necessary predicate—that there in fact be a rights violation—was not found by the Court.

V. IMPLICATIONS OF A MORE HARMONIOUS VIEW OF RIGHTS AND REMEDIES

In reexamining human rights and remedies through this new lens, a relationship of mutual dependency and symbiosis becomes evident. From this view, rights and remedies operate together in mutually affirming ways against the backdrop of a necessarily imperfect geopolitical reality. There are several important implications of such an approach.

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269. See Minister of Health v. Treatment Action Campaign 2002 (5) SA 721 (CC) paras. 96–114 (S. Afr.).
270. Gewirtz, supra note 11, at 589 (noting that injunctive relief itself can involve balancing).
272. See id. at 888.
274. Mazibuko v. City of Johannesburg 2009 (3) SA 592 (CC) para. 58 (S. Afr.).
275. See Levinson, supra note 14, at 914.
A. Rejecting Rights Essentialism

First, this new “equilibrated” theory of rights and remedies in the human rights context calls into question basic notions of “essentialist” theory. This Article maintains that at least some human rights are not determined by abstract judicial interpretation of legal text, legislative history, or values, but rather, include the same pragmatic policy-based considerations that have always been acknowledged in the world of remedies. This result is not entirely surprising, as the entire endeavor of defining a “minimum content” to socio-economic rights, as discussed above, is riddled with such pragmatic and policy-based concerns. “Minimum core” proponents from various camps have latched on to a variety of norms—including consensus and a notion of practical needs for “life,” “survival,” or “dignity”—in order to define a content to this minimum core of rights. But, in reality, sub-constitutional policy concerns infiltrate socio-economic rights definitions. Remedial equilibration suggests that remedial concerns will routinely infiltrate rights considerations and that rights are inevitably less pure and less ideal than essentialist theories acknowledge.

As a consequence of this Article’s claims, rights cannot be under- (or over-) enforced, despite what many human rights advocates and commentators may believe. The traditional view that pure rights are corrupted and diminished when translated into remedies cannot be correct if courts define rights in a practical way with respect to remedies (as they arguably do). Rights are defined to operate in the real world, subject to a range of limitations. As such, Levinson cleverly and soundly articulates a significant insight of remedial equilibration that aptly applies to realizing socio-economic rights—that “rights do not spring into existence fully formed and self contained, like Athena from the head of Zeus.” Mazibuko is just one recent example of this, but various other examples abound, inside and outside the arena of socio-economic rights. Judges

276. See id. at 920.
277. See supra Part II.
278. See Levinson, supra note 14, at 924.
279. Id. at 926.
280. See, e.g., Occupiers of 51 Olivia Road v. City of Johannesburg 2008 CCT 24/07, 2000 (11) BCLR 1169 (CC) (S. Afr.) (requiring that the government consult persons affected by its policy decisions and then publicly report on that consultative process, rather than imposing a direct remedy pertaining to the right to housing under the Constitution); Prosecutor v. Rwamakuba, Case No. ICTR 98-44C-PT, Decision on Defense Motion for Stay of Proceedings, ¶ 26 (June 3, 2005) (rejecting the “right” to a speedy trial despite the defendant having been held for seven years); Barayagwiza v. Prosecutor, Case No. ICTR 97-19-AR72, Decision (Prosecutor’s Request for Review or Reconsideration),
define rights—be they rights under the U.S. Constitution or the International Covenant on Economic, Social and Cultural Rights—by considering the tangible world that they themselves live in and its related constraints.

B. Rethinking Institutional Boundaries and the Role of Courts

Second, a harmonious view of rights and remedies in human rights doctrine challenges the traditional view of institutional division of labor, which holds that defining rights is the role of courts alone—or at least that courts can and should define an irreducible minimum for rights (which legislatures can ratchet up)—while remedies are developed through multi-branch collaborative processes. Some scholars have tossed aside this theory of “court-fixation,” rejecting the overly simplistic notion that constitutional rights are for courts, and courts exclusively, to define and place into action.281 Under this view, both courts and legislatures play a role in defining rights, and both do so with consideration of remedial limitations.282 For example, if a court decides that the full, ideal right to health is unattainable in a timely manner—based on practical, political, or other limitations—it may avoid finding a rights violation for procedural or other reasons. It may also further explicate the scope or content of a certain right as to not include exactly what the petitioners are asking for. In so doing, the court provides lucidity as to the content of the specific right. At the same time, when a legislature drafts legislation that provides pro forma penalties—for example, heightened penalties for health facilities that are found to have discriminated in access to health care—then the legislature is prescribing heightened damages beyond the actual damages that would otherwise have been awarded. Such a statutory regime by the legislative branch no doubt expands the scope of the right at hand; its practical value is greater based on legislative action.

Similarly, both courts and legislatures define the scope and availability of remedies. As described earlier, courts may define rights to include prophylactic remedies.283 Or courts may, through remedial deterrence,
consider rights and remedies concomitantly as the nature of a right is defined with respect to remedial considerations. The legislature may help foster a domestic legal regime that makes a right practical in the real world. As it fosters and defines the boundaries of such a domestic legal regime, it affects the nature of the right that will ultimately be available to people.

While recognizing the roles of other branches of government, courts play a critical role in the “equilibration” exercise and are well-situated to do so, especially in the human rights context. Courts regularly engage in balancing. Although balancing is a normative task, there are limitations on judicial abuses of this freedom. One potential limitation is the notion that the true benefit of the right and the goal of undoing effects of the right’s violation should be given paramount weight. Concomitantly, interests in direct opposition to the nature of the right should not play a role in balancing.284 By mediating between the ideal and the real, courts obstruct “perfect theories” that idealize general notions of justice or economic behavior.285 However, law exists in every-day, messy reality as its primary realm.286 As Justice Frankfurter once said of the Constitution, courts must read such law with the “gloss which life” puts upon it.287 In so doing, courts effectively weigh the compendium of rights and a range of costs and constraints. Courts seem particularly well-suited to make these inquiries in the human rights context, which are often even more justice-focused than other judicial inquiries.

C. Affirming Judicial Candor and Transparency

Lastly, having considered the scope of courts’ role in the equilibration exercise, considering rights and remedies as necessarily interrelated also leads to conclusions about the manner in which courts should undertake their role. Specifically, judicial transparency and candor are critical in such an approach. Courts have not always been candid about gaps between rights and remedies.288 Judicial subterfuge is damaging and may be seen in certain contexts as a legitimizing device that fails to correct

284. See Gewirtz, supra note 11, at 606–07.
285. See id. at 680.
286. See id.
287. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).
288. See Gewirtz, supra note 11, at 674 (emphasizing that “any gap between right and remedy, between the ideal embodied in our rights and the reality of what courts can deliver in a particular case, should be candidly acknowledged rather than concealed by subterfuge”).
harmful social conditions. Gewirtz articulates the concerns that accompany a candid detailing of the right-remedy divide: “If judges come to feel free about separating issues of remedy from issues of rights, they might articulate rights too broadly, by removing from their deliberations about the right certain practical constraints that properly play some role in defining those rights.”

In practice, this may be the growing concern of human rights advocates who lament the gap that exists between boldly declared rights and a dearth of “rights-realizing” remedies. However, Gewirtz believes that the concerns about exacerbating the right-remedy gap may be minimized because “the pressures are all in the other direction: Judges will always be reluctant to advertise that they are delivering less than the ‘right,’ and therefore will be far more likely to trim the right to fit the remedy than to exaggerate the right.” Gewirtz’s implicit reference to the process of rights equilibration acknowledges another benefit of this approach. By aligning rights and remedies in a symbiotic relationship, judges close the analytical expanse between rights and remedies. Particularly in the international human rights process, which often threatens the control of a state’s political branches, judicial transparency and candor remain critically important throughout, as a means of legitimizing a court’s actions, as well as building a sense of social awareness regarding the practical limitations that thwart the attainment of more pure, ideal versions of rights. Courts ultimately can assist with institution building by so doing, as they can allow citizens to help articulate and understand the content of human rights, and especially socio-economic rights, and the pace at which those rights can be appropriately realized.

CONCLUSION

The concept of remedial deterrence has received considerable academic attention with respect to understanding U.S. constitutional legal norms and, more recently, human rights law as applied by international criminal tribunals. The concept recognizes that judges may be less willing or less likely to recognize a violation of a right because of pragmatic constraints, and because a remedy may seem unviable. However, scholars have not

289. See id. at 673–74 (citing GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 173 (1982)).
290. Id. at 674.
291. Id.
292. For example, considerations of inapposite timing, unfamiliarity with alternatives, or a hesitance to mandate—or “legislate”—from the bench, may contribute to an ultimate finding that a right was not violated.
extended such insights to the area of human rights and socio-economic rights in particular.

Notwithstanding the lack of attention and the oftentimes reductionist arguments that have occupied legal discourse in this space, there is a clear relationship between rights and remedies in the human rights arena. This Article rejects rights essentialism and demonstrates the folly of solely focusing on defining, for example, socio-economic rights as either characterized by a firm and resolute minimum core of rights, versus a more flexible, but some would allege ineffectual, “reasonable” governmental course of action. Further, although many commentators have worked to characterize and adjudge “strong” versus “weak” forms of judicial review, the interplay between human rights and remedies is actually far more nuanced and resistant to such rigid classifications. For example, the highest courts in South Africa and Colombia have taken steps toward defining a minimum core of socio-economic rights, ordering bold remedial steps and requiring “reasonable” government action, respectively.293 Judicial balancing takes place in all remedial determinations, and in many instances it enhances the realization of rights. This Article, therefore, rejects simplistic categorization of judicial approaches as either “rights maximizing,” or else “interest balancing” and (as certain rights advocates would argue) necessarily rights-compromising.

Finally, the important emphasis for courts and commentators is in questioning the stark divide that exists between rights and remedies, despite the inevitable truth that considerations of one intrinsically weigh upon the determination of the other. A satisfying and effectual approach to adjudicating “human rights” and “human remedies” necessitates a unified and equilibrated analysis of the two. A more unified and “equilibrated” approach yields a view of socio-economic rights and remedies that holds enormous potential to foster creative and virtuous cycles of growth and measurable results in “progressively realizing” socio-economic rights.

ANGLO-AMERICAN CHOICE OF LAW AND THE RECOGNITION OF FOREIGN SAME-SEX MARRIAGES IN ISRAEL—ON RELIGIOUS NORMS AND SECULAR REFORMS

Yuval Merin*

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INTRODUCTION

Since the repeal of Israel’s sodomy law more than two decades ago, Israeli gay men and lesbians, as well as same-sex couples and their families, have gained wide protection and recognition in various legal fields. However, while a growing number of countries are in the process of lifting the ban on same-sex marriage, there is no legal option to even consider such a reform in the state of Israel.

Unlike other Western nations, which began regarding and regulating marriage as a secular civil right as early as the eighteenth and nineteenth centuries,1 Israel is the only democratic country whose laws of marriage and divorce are still governed exclusively by religious law. Notwithstanding the otherwise liberal and secular Israeli legal system, matters of marriage and divorce of the members of each of the recognized religious communities in Israel2 are adjudicated by their respective religious tribunals and are subject to substantive religious laws.3 For Jewish Israelis,

1. The transition from religious law to the regulation of marriage as a secular civil right had begun in the 18th and 19th centuries with the end of the Church’s monopolistic jurisdiction and the introduction of civil marriage. See Amnon Rubinstein, The Right to Marriage, 3 IVUNEI MISHPAT 433, 433 (1973) (Isr.).

2. Today, besides the Jewish community, there are thirteen Recognized Religious Communities in Israel: the Muslim, Eastern Orthodox, Latin Catholic, Gregorian Armenian, Armenian Catholic, Chaldean Uniate, Greek Catholic-Melkite, Maronite, Syrian Orthodox, Druze (since 1962), Episcopal-Evangelical (since 1970) and Bahá’í (since 1971) communities. The last two do not have their own religious tribunals. For a list of the Recognized Religious Communities, see Palestine (Amendment) Order in Council, 1939, in THE PALESTINE GAZETTE 459, 465 (1939) (adding the Second Schedule to the Palestine Order in Council, 1922–1947).

3. Israel inherited the exclusive application of religious laws in matters of marriage and divorce from the Ottoman Empire’s millet (religious community) system. See Ariel Rosen-Zvi, Family and Inheritance Law, in INTRODUCTION TO THE LAW OF ISRAEL 75, 75 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995); see also Amnon Rubinstein, Law and Religion in Israel, 2 ISR. L. REV. 380, 384 (1967). Under Ottoman rule, the recognized religious communities were granted autonomy in matters of personal status. Rubinstein, supra note 3. This system was largely preserved by the British Mandate rule and later adopted by the Israeli legislature with certain amendments. Id. at 385; Rosen-Zvi, supra note 3. Israel’s preservation of the status quo in the field of personal status is usually explained as having been intended to avoid conflict between the secular political parties and the religious ones. See Rosen-Zvi, supra note 3. Accordingly, Section 2 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953 provides that: “Marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law.” Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713–1953, 7 LSI 139, § 2 (1952–1953) (Isr.). Regarding the application of religious law to members of other religious communities in Israel, see Palestine Order in Council, 1922, arts. 52, 54 & 64, in 2 LAWS OF PALESTINE 420, 432–34 (Moses Doukhan ed., 1934). Since the Ottoman rule and up to the present day, the exclusive authority to conduct marriages and noti-
the law that governs in matters of personal status is the Jewish law as interpreted by Orthodox Judaism. According to Orthodox Jewish law, same-sex relationships are “completely forbidden” and are regarded “as a sin and an abomination.” In keeping with this view, same-sex marriage is not even considered as a forbidden category under Israeli law; it is simply nonexistent. Moreover, since political religious parties have been part of every government in Israel and have always had a balancing power in any coalition, it is highly improbable that the Israeli legislature will be inclined to provide an arrangement for non-religious, civil marriage, even for opposite-sex couples.

Same-sex couples are not the only group of Israeli citizens and residents adversely affected by the lack of an option to marry in a civil ceremony and by the exclusive application of religious law in matters of marriage and divorce. Many opposite-sex couples are also excluded from the Israeli institution of marriage due to a long list of religious restrictions and impediments. Although attempts to establish a compre-
hensive alternative system for Israelis who cannot or do not wish to undergo a religious marriage have largely been unsuccessful, opposite-sex couples ineligible for religious marriage may benefit, in the future, from a civil partnership registry, which would accord those couples most (but not all) of the rights and responsibilities associated with marriage. This partial solution, however, would not apply to Israeli same-sex couples, who would be obliged to continue traveling outside of Israel in order to realize their basic right to marriage. Moreover, since marriage recognition is one of the most undeveloped fields of Israeli private international law, and since Israel lacks a statutory choice of law rule regarding the validity of the foreign marriages of its residents and nationals, it is unclear whether those foreign marriages would be recognized under the Israeli conflict of laws.

The Israeli Rabbinical courts interpret Jewish law as universally applicable and refuse to apply principles of private international law. Other religious tribunals hold the same view. Thus, the religious tribunals would flatly reject recognition of foreign civil marriages of couples who lack capacity under their respective religious law. However, the recognition of a foreign marriage may also arise—as an incidental question—in the civil family courts, which have concurrent jurisdiction over some of the incidents of marriage, such as maintenance obligations, and exclusive jurisdiction in other fields of family law, such as succession. The Israeli civil courts have always regarded the principles of private international law as having precedence over all domestic legislation, including the laws of marriage and divorce. Therefore, unlike the religious tribunals,


7. On March 15, 2010, the Israeli legislature passed a limited civil union bill, reserved only for Israeli opposite-sex couples “with no officially defined religion.” See Rebecca Anna Stoil, Knesset Passes Civil Union Bill, JERUSALEM POST (Mar. 16, 2010), http://www.jpost.com/Home/Article.aspx?id=171084. The civil union law may be expanded in the future to include other groups of Israeli opposite-sex couples who are unable to marry under religious law. See Michael Toiba & Dan Izenberg, Civil Unions Law to be Implemented Next Week, JERUSALEM POST (Nov. 4, 2010, 3:24 AM), http://www.jpost.com/Israel/Article.aspx?id=193934.

8. See CA 191/51 Skornik v. Skornik 8(1) PD 141 [1954] (Isr.) (“[Religious] law knows no bounds or limits and applies to a person from his birth until his death in all matters affecting his personal status, without any reference to the place where, or the time in which, an occurrence may have taken place.”).

9. See id.

10. See id. at 179.
the civil courts may consider the recognition of a foreign same-sex marriage on its merits.

The Israeli Supreme Court, perceiving the matter as raising intricate questions of religion-state relations, has consistently refrained from deciding the validity or recognition under Israeli law of foreign civil marriages of opposite-sex couples ineligible for marriage in Israel (let alone same-sex couples). In 2006, the Supreme Court finally accorded full recognition to foreign civil marriages of Israeli Jewish couples who were eligible for religious marriage in Israel, but decided to undergo a civil ceremony abroad. In doing so, the Court held that such marriages were valid by virtue of the English rules of private international law, but declined to state which rules should apply in other circumstances, leaving the matter for further consideration. Additionally, Israeli courts are not bound to apply English rules of private international law in cases of lacunae, and since the decision was limited to couples who qualify for religious marriage, it remains to be seen whether a same-sex marriage performed outside of Israel will be fully recognized by the Israeli courts.

The Israeli Supreme Court has, however, developed two legal mechanisms that accord some of the rights associated with marriage to those couples whose foreign civil marriages are not yet recognized in Israel. The first mechanism, which was also applied to the foreign marriages of Israeli same-sex couples, mandates the registration of the foreign civil marriage (valid in the place of celebration) in the Israeli Population Registry, notwithstanding the couple’s capacity to marry in Israel according to their personal religious laws. The second mechanism—regarded as “partial recognition” or the “marriage incidents” approach—is the recognition of various incidents of the foreign civil marriage, while avoiding the question of validity. Both mechanisms, however, are limited and unsatisfactory solutions, as they grant the couples very few of the rights associated with marriage, leaving them uncertain of their status and of their rights and obligations vis-à-vis one another.

11. See infra Part II.
12. HCJ 2232/03 A. v. Tel-Aviv-Jaffa Rabbinical Court (2) IsrLR 245 [2006].
13. See infra Part III.
14. In the past, Israeli courts were instructed to defer to English common law in cases of lacunae. However, since 1980, by virtue of the Foundations Law Act, the courts are permitted to draw analogies from any foreign case law. See infra Part III.
16. See HCJ 143/62 Funk-Schlesinger v. Minister of Interior 17(1) PD 225 [1963] (Isr.).
17. See infra Part II.B.
The question of whether marriages of Israeli same-sex couples abroad would be fully recognized raises complex legal problems insolvable under current Israeli positive law. First, since the courts have thus far declined to decide which choice of law rules should apply in cases involving couples ineligible for religious marriage, it is unclear which of the two competing systems of private international law in the field of marriage recognition apply in such circumstances: the rule of the place of celebration (lex loci celebrationis), which is the principal rule in the United States, or the personal law system, practiced in England and most of Continental Europe. Second, even if Israel adopts a choice of law rule that enables the recognition of a foreign same-sex marriage, it is still unclear whether or not courts would ultimately deny recognition of such marriages as contrary to public policy.

This Article purports to answer the abovementioned questions. Part II of the Article discusses the existing alternatives to the full recognition of a foreign same-sex marriage (registration and “marriage incidents”), and examines the legal and practical distinctions between those alternatives on the one hand, and full recognition on the other hand. Drawing on comparative law, the remainder of the Article discusses the likelihood of recognition of foreign same-sex marriages under Israeli law.

Part III analyzes the developments in Israeli choice of law jurisprudence regarding the recognition of marriages celebrated outside the jurisdiction. It concludes that Israeli positive law does not regulate the matter and that the lacuna should be filled by resort to comparative law. Accordingly, Part IV discusses the various systems of private international law in the field of marriage recognition and examines which of the competing choice of law rules is most appropriate—in light of the unique social and legal situation in Israel—for determining the validity of foreign marriages conducted by Israeli same-sex couples as well as opposite-sex couples ineligible for religious marriage in Israel. This Part of the Article also examines the policy objectives of the choice of law rules in the field of marriage recognition and critically contrasts the English personal law system with the American principle of lex loci celebrationis.

Based on the scope and application of the public policy exception in comparative law, Part V proposes several preliminary guidelines for the appropriate scope and interpretation of Israel’s external public policy in matters of personal status. For this purpose, the article delineates the underlying rationales and objectives of the various marital impediments imposed by Israeli domestic religious law. This Part also examines whether religious norms (which are exclusively applied in matters of marriage and divorce within Israel) should also be considered in the
framing of the public policy exception. The Article concludes that courts could and should fully recognize foreign marriages of Israeli same-sex couples and that recognition of those marriages is not contrary to Israeli public policy.

II. ALTERNATIVES TO THE RECOGNITION OF FOREIGN SAME-SEX MARRIAGES

Despite the lack of full recognition and validation of certain foreign civil marriages, the Israeli Supreme Court provides two legal mechanisms in order to accord some marital benefits to those couples: registration of foreign civil marriages in the Israeli Population Registry and recognition of various incidents of the foreign marriage. Both these mechanisms, as well as their applicability to the foreign marriages of same-sex couples, are discussed below.

A. Registration of Foreign Civil Marriages

In the 1961 case of Funk-Schlesinger v. Minister of Interior, a Belgian Christian woman and an Israeli Jewish man, who were ineligible for marriage in Israel due to the prohibition on interfaith marriages, married in a civil ceremony in Cyprus. Upon their return, and on the basis of the Cypriot marriage certificate, the wife, Mrs. Funk-Schlesinger, applied to be registered as “married” in the Israeli Population Registry. The Minister of Interior claimed that under the applicable rules of private international law the spouses were not married, and thus refused the application. The Supreme Court mandated the registration of the Cypriot marriage in the Israeli Population Registry, notwithstanding the couple’s ineligibility to marry in Israel. The court reasoned that the purpose of the Registry is the collection of statistical data, and that the registration of marital status is merely an administrative procedure which does not constitute even \textit{prima facie} evidence of its validity.

The court further reasoned that the registration official had no judicial power and that his function was limited to collecting statistical material for the purpose of maintaining the register of residents. Therefore, when the official is requested to register a foreign marriage, he has no authority or discretion to inquire into the couple’s capacity to marry in

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18. HCJ 143/62 Funk-Schlesinger v. Minister of Interior 17(1) PD 225 [1963] (Isr.).
19. \textit{Id}.
20. \textit{Id}.
21. \textit{Id}.
22. \textit{Id}. at 249.
23. \textit{Id}. at 244.
Israel or into the validity of the foreign marriage under Israeli law. “[T]he question of the validity of the ceremony that took place is a multifaceted one and examining the validity of the marriage falls outside the scope of the Population Registry.”24 The court concluded that once the registration official is presented with an authenticated marriage certificate, he is obliged to register the couple as married unless he questions its authenticity.25 Hence, according to the rule established in Funk-Schlesinger, the registration official must enter any information provided by applicants into the Population Registry, unless it is manifestly incorrect (e.g., if the official is asked to register a 20 year-old man as being 5 years of age).

Courts have followed the Funk-Schlesinger decision consistently over the years in a variety of circumstances. Accordingly, in the 2000 case of Brenner-Kaddish v. Minister of Interior, a lesbian couple requested their registration in the Population Registry as the dual mothers of the biological child of one of them (born via artificial insemination), who was adopted by the other while the couple was living in California.26 The registration official refused the request, arguing that the existence of two parents of the same-sex was biologically impossible, and therefore the requested registration would be manifestly incorrect.27 The Supreme Court applied the Funk-Schlesinger rule and mandated the registration of each of the spouses as the “mother” of the child in accordance with the foreign adoption decree.28 In doing so, the Court rejected the State’s argument regarding the incorrectness of the registration and implied that the State’s position was in fact a pretext for its disapproval of adoptions in the context of a same-sex family.29 Even though the Court refrained from taking a position as to the validity of the foreign adoption order under Israeli law, it held that for the purpose of registration, the foreign adoption order should be presumed valid unless declared otherwise by a competent court.30 Thus, in the absence of any contention with regard to the correctness of the details presented by the applicants, and since recognition of the foreign decree is not a prerequisite for its registration, the official must register the couple as requested.31

24. Id. at 252.
25. Id.
27. Id.
28. Id.
29. Id.
30. Id.
31. Id. at 376–77. The State had requested a further hearing of the case arguing that unlike marriage, which is a mere administrative act, a foreign adoption order—being a
In 2006, in the case of *Ben-Ari v. Director of Population Administration*, the Israeli Supreme Court was faced, for the first time, with the question of whether the *Funk-Schlesinger* rule should also apply to the foreign marriages of Israeli same-sex couples. The case involved five same-sex couples, citizens and residents of Israel, who had undergone civil marriage ceremonies in Toronto, in accordance with Canadian law. Upon their return to Israel, the couples applied for registration as “married” at the Population Registry. The registration official refused the applications, stating that “marriages of this kind are not legally recognized in the State of Israel, and therefore it is not possible to register them in the [Registry].” The couples thus petitioned the Supreme Court, arguing that the refusal to register their marriages was unlawful.

The petitioners argued that the *Funk-Schlesinger* precedent, which until that time had been applied only to the foreign civil marriages of opposite-sex couples, should also apply to the marriages of same-sex couples. In response, the State argued that a distinction should be drawn between registration of a foreign marriage—notwithstanding its validity—that satisfies the existing, basic “legal framework” of marriage in Israel, and registration of a marriage that is inconsistent with this legal framework. According to the State, since the legal framework of marriage in Israel relates only to a marriage between a man and a woman, and since there is no recognized legal framework of marriage between two persons of the same sex, the *Funk-Schlesinger* rule should be limited to the registration of the marriages of opposite-sex couples.

The Supreme Court rejected the State’s arguments and ordered the registration official to enter the foreign same-sex marriages in the popula-

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32. HCJ 3045/05 Ben-Ari v. Director of Population Administration (2) IsrLR 283 [2006].
33. *Id.* ¶ 1.
34. *Id.*
35. *Id.* ¶ 1–2. Since the Supreme Court had consistently refused to rule on the validity of foreign civil marriages of Israeli couples ineligible for marriage in Israel, the petitioners in *Ben-Ari* sufficed with requiring the registration of their foreign marriages and did not apply for those marriages to be given validity in Israel.
36. *Id.* ¶ 2.
37. *Id.* ¶ 3.
38. *Id.*
The Court held that for the limited purpose of registration, no distinction should be drawn between the foreign marriages of opposite-sex couples and those of same-sex couples:

The population registry was not intended to decide the question of the existence or absence of legal frameworks; the registration official is not competent to determine whether there is a recognized ‘legal framework’ or merely a ‘social framework with a certain legal significance’; the register provides statistical data with regard to personal events (such as birth, death, marriage and divorce), not legal constructions that have passed the discerning scrutiny of the registration official. It is not right that the legal struggle concerning personal status should take place in the field of registration.

The Court stressed that under Funk-Schlesinger, the registration of a couple as “married” in the Population Registry is merely an administrative act that has no bearing on the legal validity of the marriage in Israel, and again, that registration of the personal status does not constitute even *prima facie* evidence of its correctness.

Since the Ben-Ari ruling, Israeli same-sex couples who marry abroad are routinely registered in the Population Registry. Despite the Registry’s limited legal force, the Israeli authorities, in practice, rely on the registration for the purpose of granting various spousal benefits, without inquiring into the validity of the marriage in Israel. Thus, Israeli couples who marry abroad and register as “married” upon their return—including same-sex couples—may benefit from a few of the rights that flow from the institution, such as social security, taxation, and the like. However, the registration of the foreign marriage is a partial and inadequate solution.

40. *Id.* ¶ 17.
41. *See id.* ¶ 7. Section 2 of the Population Registry Law sets out the items of information concerning Israeli residents that should be registered in the Population Registry (including family name, date of birth, etc.). *See Population Registry Law, 5725–1965, 19 LSI 288 (1964–1965) (Isr.). Section 2(7) provides that the Registry should also include the personal status of the resident. *Id.* § 2(7). Section 3 provides that “The registration at the Registry, any copy or extract thereof and also any certificate that was given under this law shall constitute *prima facie* evidence of the correctness of the registration items set out in paragraphs (1) to (4) and (9) to (13) of section 2.” *Id.* § 3. Note that paragraph (7) is not among those items for which registration constitutes *prima facie* evidence of correctness.
First, given that registration does not constitute even prima facie evidence of a marriage’s validity, the authorities may decide, at any given time, to change their policy and cease relying on the registration or make exceptions for various circumstances. Second, registration has limited practical implications in that it only entails the de facto recognition of the marriage by third parties. However, registration has no legal bearing on the other two aspects of the legal regulation of marriage: the rights and obligations between the spouses during the marriage, and the dissolution of the marriage. As far as these aspects of marriage are concerned, registration does not entail any personal status, even de facto, and thus affords no control over that status. Therefore, same-sex Israeli couples of the same religion who marry in Canada and return to Israel less than a year later cannot divorce each other either in Israel or in Canada nor can they change their registration from “married” in the Ministry of Interior. Only full recognition of these marriages for the purpose of divorce could resolve the paradoxical obstacle faced by same-sex couples who wish to dissolve their foreign marriages.

Thus, although the registration of marriage bears a few practical advantages as mentioned above, there are significant differences between the administrative act of registering a personal status and the judicial act of recognizing the validity of the foreign marriage. In light of these differences, it is clear that the registration of marriages does not replace the need for judicial ruling regarding their essential validity.

43. Same-sex couples belonging to the same recognized religion certainly cannot initiate divorce proceedings in the religious tribunals in Israel, which have exclusive jurisdiction over the matter. Nonetheless, there is no apparent reason why the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law should not apply to the annulment of same-sex marriages (where both are residents and citizens of Israel) where the couple is of different religions or without religious affiliation. The authority to dissolve a marriage of that sort rests with the Family Court, which is authorized to annul marriages in accordance with the law of the place of celebration (Sec. 5 of the same law). See Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729–1969, 23 LSI 274 § 5 (1968–1969) (Isr.); see also Talia Einhorn, Same-Sex Family Unions in Israeli Law, 4 UTRECHT L. REV. 222, 233–34 (2008).

44. Although foreign residents and citizens are allowed to marry in Canada, in order for a Canadian court to obtain jurisdiction over divorce proceedings, Canadian law requires a minimum of one year of residency in Canada prior to the initiation of the proceeding. See Divorce Act, R.S.C. 1985, c. 3, §3(1) (Can.).

45. Section 19(C) of the Population Registry Law provides that a change in the registration of an item shall be recorded in accordance with a “public certificate” that testifies to the change. Population Registry Law, 5725–1965, 19 LSI 288 §19(C) (1964–1965) (Isr.). The relevant “public certificate” in cases of divorce is a domestic or a foreign divorce decree. Since same-sex Israeli residents cannot obtain such a decree, see supra note 43, they are unable to change their registration.
The Court in *Ben-Ari* repeatedly stressed that the case involved only the question of the registration official’s authority, and not the question of the validity of the marriage.\(^{46}\) In this respect, the Court noted that when the question of “recogniz[ing] a marriage between two persons of the same sex that took place outside Israel . . . . arises, it will be examined in accordance with [the] accepted rules of private international law.”\(^{47}\) Before turning to consider the applicable rules of private international law in such circumstances, however, it is useful to first examine another mechanism employed by the Supreme Court in cases concerning the legal implications of civil marriages conducted abroad—the “marriage incidents” approach. This solution constitutes a middle-ground between the mere registration of the foreign marriage and the full recognition of its validity.

### B. The “Marriage Incidents” Approach

For nearly forty years, the Israeli Supreme Court compelled the Ministry of Interior to register the foreign marriages of Israeli citizens and residents, but refrained from ruling on the question of their full or partial validity. During the last decade, the Supreme Court developed an additional mechanism, the “marriage incidents” approach, which allows certain couples married in civil ceremonies abroad to obtain various rights associated with marriage.

This approach stems from the distinction between marriage as a status and the incidents of marriage.\(^{48}\) It is employed by judicial recognition of certain rights flowing from the foreign marriage without conferring the full status of marriage.\(^{49}\) Except for instances in which the validity of the

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46. HCJ 3045/05 Ben-Ari v. Director of Population Administration (2) IsrLR 283 [2006]. As the Court stated: “[T]he question before us is not whether a marriage between persons of the same sex, which took place outside Israel, is valid in Israel. . . . The question before us is whether the registration official—whose authority is prescribed in the Population Registry Law . . . —acted within the scope of his authority when he refused to register the marriage of the two men in the register.” Id. at 286–87.

47. *Id.* ¶ 22.

48. “‘Incidents of marriage’ refer to each of the specific benefits, rights, or responsibilities flowing to a married couple based on their marital status,” such as government benefits, property rights and the like. Barbara J. Cox, *Using an “Incidents of Marriage” Analysis When Considering Interstate Recognition of Same-Sex Couples’ Marriages, Civil Unions, and Domestic Partnerships*, 13 Widener L.J. 699, 718–19 (2004).

49. On this approach in the United States context, see *In re Estate of Shippy*, 678 P.2d 848, 850 (Wash. Ct. App. 1984). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 11, intro. note (1971) (“In law, a status can be viewed from two standpoints. It can be viewed as a relationship which continues as the parties move from state to state, or it can
marriage as such is the principal question (e.g., a suit for a declaratory judgment to directly recognize the marriage), the majority of legal proceedings concerning marriages performed outside the jurisdiction seek to obtain one of the rights deriving from marriage, such as spousal support, inheritance or division of property. In the latter cases, the question of the marriage’s validity arises only as an incidental question in determining the remedy to be granted.

In such cases, the court may first decide the incidental question of the marriage’s validity and then, upon finding a valid marriage, grant the remedy. Alternatively, it may decide whether to grant the remedy as an independent matter, without ruling on the validity of the marriage. Courts in the United States and England traditionally viewed the question of marital status as a prerequisite to a ruling on the various rights flowing from such status. Accordingly, courts customarily ruled first and foremost on the question of the marriage’s validity, and based on that ruling, rendered their decision on the remedy sought. This approach was based on the viewpoint that the incidents of marriage are inseparable from the status itself, and thus the entire set of rights and obligations entailed in the status are dependent upon its recognition.

However, this concept of recognition as controlling all the incidents flowing from marital status could lead to an “all-or-nothing” approach to the recognition of foreign marriages that are inconsistent with accepted views of marriage in a given forum. For this reason, courts in the United States have begun to adopt an interim approach which allows the court to grant remedial relief. Even when a marriage (valid under the foreign law of the country of celebration) would not be recognized under the forum’s choice of law rules or due to its public policy, the court may still “recognize” the marriage as valid for the particular purpose of grant-

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53. See id.
54. Id.
55. Id. at 567–68.
ing a remedy. In accordance with this approach, United States courts have granted certain rights associated with the status of marriage in many cases of polygamous and incestuous marriages, which are otherwise considered contrary to public policy.

According to Israeli law, a recognized marriage is not a necessary precondition for granting various rights traditionally considered to derive from marital status, and unmarried Israeli couples may acquire some of those rights via cohabitation. The rights accorded to cohabitant partners do not derive from the status of marriage, nor are they dependent upon it. Applying the same approach to foreign civil marriages, the Israeli Supreme Court has more than once treated the availability of the remedy sought as independent from the question of the marriage’s general validity.

This approach was first implemented in the *Jane Doe* affair, which concerned an opposite-sex Jewish Israeli couple who married in a civil ceremony in Paraguay, in accordance with Paraguayan laws. The spouses were consequently registered as married in the Israeli Population Registry, and when their relationship broke down, the wife petitioned the family court for spousal support. The family court held that Israeli law does not recognize such marriages and thus rejected the petition.

On appeal to the Supreme Court, the wife claimed that she was entitled to spousal support since the marriage should be recognized under Israeli private international law. In keeping with its long-standing and consistent position of refraining from deciding whether foreign civil marriages can be recognized in Israel, the Supreme Court chose not to rule.

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57. See id.

58. In these matters courts consider the nature of the remedy sought and the case-specific circumstances, and typically examine whether granting the remedy would run counter to the rationale that prevents the marriage from being recognized by the forum. For instance, awarding inheritance rights in cases of incestuous marriages is not considered to contradict the aims of the prohibition on recognizing these marriages, as the prohibition is seen as intended, among other things, to prevent the couple from engaging in acts of sexual intimacy. See id.

59. Non-marital cohabitation has long been recognized by the Israeli legislature for various purposes (mainly in the field of social rights). See Shahar Lifshitz, *A Potential Lesson from the Israeli Experience for the American Same-Sex Marriage Debate*, 22 BYU J. Pub. L. 359, 362 (2008). Over the years, the Supreme Court has expanded the institution to include additional rights associated with marriage. See id. at 362–63.

60. CA 8256/99 Doe v. Doe 58(2) PD 213 [2003] (Isr.).

61. Id.

62. Id.

63. Id.

64. Id. at 221.
on the validity of the marriage.\textsuperscript{65} Instead, the Court held that appellant’s entitlement to spousal support could be based on the contractual approach employed in the field of cohabitation.\textsuperscript{66} The Court held that the existence of civil contractual obligations between the parties did not depend upon recognition of their marriage in Israel.\textsuperscript{67}

\[\text{The explicit non-recognition of the marital status [indeed] negates the civil benefits deriving from it, and which do not exist without it. That said, non-recognition of a marriage as status does not serve to negate the civil benefits which are not derived from the status or depend upon it, and which have an independent existence by virtue of the civil law.}\]

In implementing the contractual approach, the Court held that couples married in a civil ceremony abroad should be considered as cohabitant partners who had entered an implied contract to live together as married—a contract which includes, \textit{inter alia}, “civil” spousal support obligations, whose duration and amount are determined according to the principle of good faith.\textsuperscript{69} The Court emphasized that its ruling was limited to factually similar circumstances.\textsuperscript{70} In such cases, contract law may be applied to determine the spouses’ mutual obligations. The content of those obligations will be dependent upon the existence of a contract.\textsuperscript{71} In the absence of a contract, the court will determine the rights and obligations of the parties according to the principle of good faith.\textsuperscript{72}

The Supreme Court implemented the “marriage incidents” mechanism in a number of additional cases. For instance, in 2006 the court held that a woman who had been married in a civil ceremony in Romania was entitled to inherit half of her deceased husband’s estate even absent full recognition of the validity of their foreign marriage.\textsuperscript{73} Similar to the case of \textit{Jane Doe}, the court confined its discussion to the validity of the marriage for the sole purpose of the issue of inheritance, signaling the understanding that the claim for a right deriving from a foreign marriage could be regarded as an independent question from that of the full validity of the marriage itself.\textsuperscript{74} The Court held that the term “spouse,” as conceived in Inheritance Law, is not limited to those who marry according to reli-

\begin{footnotesize}
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\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Id.}
\item \textsuperscript{67} \textit{Id.} at 224.
\item \textsuperscript{68} \textit{Id.} (author’s translation from the Hebrew).
\item \textsuperscript{69} \textit{Id.} at 231–32.
\item \textsuperscript{70} \textit{Id.}
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} \textit{Id.}
\item \textsuperscript{73} CAF 9607/03 X v. Y. (2006), Takdinet Legal Database (by subscription) (Isr.).
\item \textsuperscript{74} \textit{Id.} ¶ 14.
\end{itemize}
\end{footnotesize}
igious law, and further, foreign civil marriages that are valid in the place of celebration meet the standards set out in Inheritance Law. As the court states: “The family unit established consequent to the civil marriage, and the interests of its members, deserve the support and protection of the legal system in general, and the laws of inheritance in particular.”

Indeed, the application of the “marriage incidents” approach to foreign civil marriages has contributed to the legal regulation of several aspects of the mutual rights and obligations of spouses during marriage. It would appear that there is no reason to refrain from applying this solution to the foreign marriages of same-sex couples as well, thereby according them various rights associated with marriage (such as spousal support and inheritance) without recognizing the validity of their marriage for other purposes. Nevertheless, the fact-sensitive “marriage incidents” approach has engendered a lack of uniformity in the manner in which the Israeli courts resolve the disputes arising between spouses married in civil ceremonies abroad, creating a sort of internal “limping marriage” whereby the marriage may be regarded as valid for one purpose but not for another. Furthermore, according to this approach, the spouses are required to petition the courts each and every time there is a disagreement between them, without either party having any reasonable level of certainty about their rights and obligations vis-à-vis one another. Oftentimes, the spouses are likely to discover that they are entitled to relief based on their foreign marriage in one area but not in another. Therefore, this mechanism does not provide a dependable solution to most of the problems encountered by couples who perform a civil marriage ceremony outside of Israel.

Moreover, it seems that the Supreme Court erred in choosing to refrain from ruling on the full validity of the foreign marriages in the cases discussed above and should have adopted an approach similar to that employed in the United States, where the marriage incidents solution is utilized only in cases where the marriage is found invalid according to the forum’s choice of law rules or in violation of public policy. The Israeli Supreme Court’s unwillingness to rule on a controversial issue that is the subject of a heated public debate, and not because these marriages are invalid under the applicable laws. In the U.S., on the other hand, the “marriage incidents” method is implemented only fol-

75. Id. ¶¶ 17–20.
76. Id. ¶ 19.
78. See PÅLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, supra note 56.
courts should thus first make an effort to reach a favorable resolution regarding the full validity of the foreign marriage. Only when a court fails to do so should it make a decision to permit or deny the enjoyment of a particular incident attached to marital status independently from the validity of the marriage for other purposes. Accordingly, the next Part examines the possibility of recognizing foreign civil marriages as valid under Israeli conflict of laws principles.

III. RECOGNITION OF OPPOSITE-SEX FOREIGN CIVIL MARRIAGES UNDER ISRAELI PRIVATE INTERNATIONAL LAW

The legal solutions proposed to date—the “marriage incidents” approach and the registration of foreign civil marriages of those ineligible for marriage in Israel—are neither adequate nor satisfactory and they do not replace the need to rule on the question of full recognition of these marriages. However, the question of which choice of law rule applies to the recognition of foreign civil marriages of Israeli opposite-sex couples ineligible for marriage in Israel—not to mention same-sex couples—has yet to be answered. In the absence of original Israeli legislation or judicial precedent in the matter, some claimed that the solution could be found in Article 47 of the Palestine Order in Council over the Land of Israel of 1922, enacted during the British Mandate and later incorporated into Israeli law, where it remains in force today. Article 47 confers jurisdiction upon the civil courts in matters of personal status in respect of “persons in Palestine” according to the “personal law” applicable to the parties. The Supreme Court has held that the “personal law” of Israeli citizens and residents is their religious law.

Over the years both scholars and Israeli Supreme Court justices expressed varied positions on the effect of Article 47 on the choice of law issue. The prevailing view interpreted the Article as an internal directive regarding the marriage and divorce of Israeli citizens within the borders.
According to this view, Israel lacks a statutory choice of law rule regarding the validity of marriages of its residents and nationals contracted abroad, and the matter is thus considered a lacuna. Others argued for the interpretation of Article 47 as a choice of law rule for marriage recognition, referring to the national law as the connecting factor. This complex interpretive question remained unresolved for a long period of time.

Given the vague language of Article 47, it was unclear whether courts would interpret it as an internal directive or as a choice of law rule for marriage recognition. The question first arose in *Skornik v. Skornik*, where the Supreme Court considered the validity of a civil marriage between Jewish spouses who wed while residents and citizens of Poland. Upon their immigration to Israel, both spouses lost their Polish citizenship and became stateless. When conflict arose between them, the husband sued for the return of property, claiming that the marriage could not be recognized under Israeli law. In response, the wife filed a defense and counter-sued her husband for spousal support, arguing that their foreign marriage was valid in Israel by virtue of the English rules of private international law which were still in effect at the time. All three justices addressed the question of the marriage’s validity as a preliminary and incidental question. The majority rejected the husband’s interpretation of Article 47 as a choice of law rule and held that:

> The provision in Article 47 is a provision of the municipal internal law, and does not form an exception to the rule which I have stated: that private international law takes precedence in its application over municipal internal law. The provision in Article 47 is also subject to the rules of private international law.

Once the majority determined that Israeli law lacked a statutory choice of law rule for marriage recognition, they referred to Article 46 of the Order in Council, which directed the courts to apply English common law in the case of a lacuna. Given that under English common law, capacity to marry was decided based on the couple’s domicile at the time of the ceremony, the majority held that the foreign marriage of the *Skornik* couple

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82. See, e.g., CA 191/51 Skornik v. Skornik 8(1) PD 141 [1954] (Isr.).
83. See id.
84. See infra notes 95–97 and accompanying text.
85. CA 191/51 Skornik v. Skornik 8(1) PD 141 [1954] (Isr.).
86. Id. at 146.
87. Id.
88. Id.
89. Id. at 179.
90. Id.
should be recognized in Israel since it was valid in Poland. 91 In fact, even the dissenting justice, Justice Agranat, held that the marriage was valid, but unlike his colleagues, he based his ruling on Article 47 of the Order in Council, interpreting it as a choice of law rule for marriage recognition. 92 Accordingly, Justice Agranat held that the personal law that should be applied to determine the validity of marriages performed outside of Israel is the law of the couple’s nationality at the time of the marriage ceremony. 93 Since both spouses were Polish citizens at the relevant time, and their marriage was valid according to Polish law, Justice Agranat recognized their marriage as valid in Israel. 94

Relying on the dissenting opinion in the Skornik case, a few Israeli scholars claimed that Article 47 should be interpreted as a rule of private international law, so that the religious law of Israeli nationals would govern the formal and essential validity of their marriages. 95 According to these scholars, as long as Jewish religious law prescribes that a Jew can be married only in a certain manner, the provision applies to the person whether the marriage takes place within the state of Israel or beyond its borders. 96 This approach, although based upon the interpretation of Article 47 as a choice of law rule, is in fact a pretext for rejecting the application of private international law for the recognition of marriages performed by Israeli citizens and residents outside the jurisdiction. According to this interpretation, Israeli domestic law has universal applicability, such that the internal system of compulsory religious marriage applies also to marriages taking place abroad by Israeli residents and nationals. 97

91. Id. at 161.
92. Id. at 166.
93. Id.
94. Id. at 166–67.
95. See, e.g., Shava, Civil Marriages Celebrated Abroad, supra note 42, at 319; see also A. V. Levontin, On Marriages and Divorces Out of the Jurisdiction 95 (1957). A similar position was expressed by Goadby: “The validity in substance of a marriage contracted by Palestinians, whether in Palestine or abroad, depends, it is submitted, upon the personal (religious) law of each party. . . . Thus a marriage contracted abroad though valid according to the lex loci celebrationis both in form and substance might be held invalid in Palestine on the ground that it was substantially unlawful by the religious law of one or both of the parties.” Frederic M. Goadby, International and Inter-Religious Private Law in Palestine 152 (1926) (first emphasis added).
96. See Levontin, supra note 95, at 95, 114.
97. The advantage of the position that Jewish religious law should have universal application is that it may validate religious marriages performed in countries whose laws permit only civil marriage ceremonies. This interpretation has been applied by the Israeli courts only in cases where the resort to religious law would validate the foreign marriage; however it was not implemented in cases where religious law would invalidate the foreign marriage. See CA 5016/91 Shaulian v. Shaulian 49(5) PD 387, 392 [1996] (Isr.).
This interpretive approach, which maintains that domestic law (i.e., Jewish religious law) should have extra-territorial application in all circumstances, thus denying the application of private international law, is unprecedented and was never adopted by any legal system the world over. Indeed, the religious tribunals claim that Jewish religious law has universal, retroactive, and exclusive application, and completely reject the rules of private international law. The Israeli civil courts, on the other hand, consider the rules of private international law to prevail over the application of religious law, and where a foreign element is involved—such as foreign nationality or place of celebration—view the rules of domestic law (including religious law) as subordinate to those of private international law.

Still, on more than one occasion judges in Israel’s lower civil courts have held that Article 47 should be interpreted as a choice of law rule so that the validity of foreign marriages of Israeli citizens were determined in accordance with the laws of their religion. Other lower court judges, however, have applied the majority opinion in the Skornik case (although that case dealt with spouses who were citizens and residents of a foreign country at the time of their marriage ceremony), deferring to the English choice of law rules in order to verify the validity of marriages between spouses who were residents and citizens of Israel at the time the foreign

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98. This approach is in fact akin to the “Lex Fori solution,” which is an alternative to private international law. According to the above solution, even where a foreign element is involved, the local law must be applied, and foreign law should never be applied. See Amos Shapira, Comments on the Nature and Purpose of Private International Law, 10 IYUNEI MISHPAT 275, 281–83 (1984) (Isr.) [hereinafter Shapira, Comments]. This approach is informed not only by the assumption of the lex fori’s universal application, but also by considerations of convenience and efficiency (among them the familiarity with the local law of all parties involved and the difficulty of proving the foreign law), as well as considerations of justice and reasonableness (the application of forum’s public policy considerations and accepted notions of justice and reasonableness of the local society). See id. However it must be emphasized that no legal system in the world has adopted the Lex Fori solution in a systematic and comprehensive way. The actual manner in which the Lex Fori has been applied, in order to prevent the application of foreign law, is via the “public policy” exception.


100. Id.

marriage ceremony took place. Accordingly, for a long period of time, the controversy regarding the appropriate interpretation of Article 47 was not resolved and it remained unclear which choice of law rules should apply in cases involving the foreign marriages of Israeli citizens and residents.

Finally, in 2006, this debate came to an end in the case of A. v. Tel-Aviv-Jaffa Regional Rabbinical Court (“A. v. The Rabbinical Court”). The case involved a petition for divorce brought by an Israeli Jewish couple, who were eligible to marry in Israel according to religious law, but decided to marry in a civil ceremony in Cyprus. The Supreme Court was faced, yet again, with the question of the appropriate interpretation of Article 47. The Court flatly rejected the position that Article 47 should be interpreted as a choice of law rule and unequivocally adopted the position expressed by the Skornik majority. Accordingly, the Court held that Article 47 is an internal directive regarding the marriage and divorce of Israeli citizens within the borders of Israel. It thus took more than half a century for the obiter dictum of the majority Justices in Skornik to become a binding precedent.

The Supreme Court went on to hold, based on basic principles of private international law, that a distinction must be made between the formal validity of a marriage and the capacity of the parties to marry. It classified the nature of the marriage ceremony—whether religious or civil—as part of the question of form, properly governed by the law of the place of celebration, the lex loci celebrationis. As far as essential validity is concerned, the Court held only that foreign marriages of couples eligible to marry in Israel are recognized according to the English rules of private international law, refraining from deciding whether this rule applies to foreign marriages of couples who lack capacity under religious law.

Given the rejection of the interpretation of Article 47 as a choice of law rule, and in light of the limited scope of the precedent set in A. v. The Rabbinical Court, the question of which choice of law rule applies to

102. See, e.g., CC (Jer) 2/85 Kleidman v. Kleidman, PM 5747(b) 377 (1987) (Isr.). For an explanation of English choice of law rules in this context, see discussion infra Part IV.B.
103. HCJ 2232/03 A. v. Tel-Aviv-Jaffa Regional Rabbinical Court (2) IsrLR 245 [2006].
104. Id. ¶ 1.
105. Id. ¶ 26.
106. Id.
107. See id. ¶ 24.
108. Id.
109. Id. ¶ 26.
foreign marriages of Israeli residents and citizens prevented from marrying in Israel under religious law, including same-sex couples, became a lacuna. It is unclear whether the courts, when faced with this issue, will fill the void by resort to the English rules of private international law, or whether they will consider adopting choice of law rules practiced in other jurisdictions as well. Some of the English rules of private international law were incorporated into Israeli law in the past via Article 46, which stipulated that Israeli courts were directed to apply the English common law as the main source for filling the gaps in Israeli law.110 For instance, the majority in the 1954 Skornik case applied Article 46 and deferred to the English rules of private international law.111

Indeed, in the past, by virtue of Article 46, courts usually filled the gap created by the absence of statutory or judge-made private international law rules in the Israeli legal system by deferring to English common law.112 Nonetheless, in 1980 the legislature repealed this Article, which had been the formal channel for the absorption of English law since the initiation of Israel, through the passage of the Foundations of Law Act.113 Since 1980, the Act instructs the courts to fill in lacunae by case law, analogy and “the principles of freedom, justice, equity and peace of Israel’s heritage.”114 Thus, although Israeli courts are no longer obligated to apply English law in cases of lacunae, they are still permitted to draw analogies from English or, since 1980, any other foreign case law.115

The Supreme Court’s holding in A. v. The Rabbinical Court, recognizing the marriage under examination in accordance with the English rules of private international law, was limited to the circumstances of that case—Jewish spouses eligible for marriage under religious law who married abroad.116 In that scenario, the decision of which choice of law rule to apply bore no significance to the outcome—each rule led to recognition of the foreign marriage. For this reason, the Supreme Court did not see fit to construct a new choice of law rule for marriage recognition, and

111. CA 191/51 Skornik v. Skornik 8(1) PD 141, 160–61, 180 [1954] (Isl.).
114. Id. § 1; see also Rhona Schuz, Private International Law at the End of the Twentieth Century: Progress or Regress?, in ISRAELI REPORTS TO THE XV INTERNATIONAL CONGRESS OF COMPARATIVE LAW 145, 152 & n.18 (Alfredo Mordechai Rabello ed., 1999).
115. See Barak, supra note 112.
116. See HCJ 2232/03 A. v. Tel-Aviv-Jaffa Regional Rabbinical Court (2) IsrLR 245 [2006].
sufficed with referring to the rule that had applied to the issue in the past (by virtue of Article 46), declining to decide which choice of law rule should apply in other circumstances. This case was an “easy” one, as the parties were both eligible for marriage in Israel according to Jewish religious law and since even the Rabbinical Court was willing to recognize the validity of their foreign civil marriage for certain purposes. The question of the applicable choice of law rule for marriage recognition will arise at its full intensity once the courts are faced with a case involving spouses who are ineligible for marriage in Israel, particularly same-sex couples. When this question arises, it would be inappropriate for the Israeli courts to mechanically apply the English rules of private international law. Instead, the courts should be at liberty to select the choice of law rule most appropriate for marriage recognition in Israel.

Indeed, Israeli courts increasingly tend to compare the English and American choice of law rules and adopt the more suitable rule among the two.

IV. DETERMINING THE PROPER CHOICE OF LAW RULE FOR THE RECOGNITION OF FOREIGN SAME-SEX MARRIAGES

A. Policy Objectives of the Choice of Law Rules for Marriage Recognition

In investigating the most appropriate choice of law rule for ruling on the validity of civil marriages conducted abroad by Israeli citizens and residents who are ineligible for religious marriage, including same-sex couples, it is important to first examine the policy objectives which choice of law rules in the field of marriage recognition should seek to achieve. These findings enable a subsequent examination of the rules that promote the aforementioned interests in the most fitting manner.
Within the context of formulating choice of law rules, modern private international law aspires to configure rules that arrive at a just result and which attribute considerable weight to general policy considerations. There are five principal policy objectives which choice of law rules in the field of marriage recognition should seek to advance.

(1) The presumption in favor of the validity of marriage: The fundamental policy of private international law in the field of marriage recognition is the principle of validating foreign marriages in order to preserve family ties and to give effect to the parties' intention to create a binding marital bond. According to this principle, preference should be given to choice of law rules that would validate the marriage over rules that would lead to non-recognition of the foreign status.

These approaches were harshly criticized and it appears that they do not promote, in any meaningful way, the policy objectives that choice of law rules for marriage recognition should seek to promote. The following list is based primarily on T.C. Hartley, The Policy Basis of the English Conflict of Laws of Marriage, 35 MOD. L. REV. 571, 571–73 (1972); see also Alan Reed, Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules, 20 N.Y.L. SCH. J. INT'L & COMP. L. 387, 388–90 (2000). Most of the policy objectives mentioned in this list also appear as factors to be considered in choice of law proceedings under Section 6 of the Restatement (Second) of Conflict of Laws (including the interest in protecting the expectations of the parties, as well as considerations of certainty and uniformity). See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

The fundamental principle of private international law according to which marriages valid in the place of celebration should, wherever possible, be held valid everywhere, was also recognized in Israeli jurisprudence. See, e.g., CA 191/51 Skornik v. Skornik 8(1) PD 141, 178 [1954] (Isr.) (“If . . . we follow this course, and lay down the law in these terms, we shall also remain faithful to the principle—a widely-accepted principle in this branch of the law—that it is the duty of the judge who investigates the question of the validity of a marriage to do his best, so far as the law enables him so to do, to hold a marriage valid, and not invalid.”).

Another interest that may be relevant in this context is the interest in universal recognition of vested rights. See Shapira, Comments, supra note 98, at 283–84. It should be noted, however, that the “vested rights theory” is quite controversial and its influence is gradually diminishing. See Kurt Siehr, A Statute on Private International Law for Israel, in ISRAEL AMONG THE NATIONS 353, 357–58 (Alfred E. Kellermann, Kurt Siehr & Talia Einhorn eds. 1998). That said, and despite the erosion of the “vested rights theory,” it appears that in the field of family law (as opposed to other legal fields, such as contracts and torts) the protection of vested rights is still a relevant and important consideration.
(2) The protection of the reasonable expectations of the parties: It would be unjust to breach the expectations of the parties by deferring to a law that the parties could not reasonably have contemplated—particularly so when the parties reasonably relied on the application of a certain law and conducted their lives accordingly.\(^\text{126}\)

(3) Convenience, Simplicity and Efficiency: These considerations typically support the application of the forum law with which the parties involved are most familiar.\(^\text{127}\)

(4) Certainty, Stability and Uniformity: “[P]arties should know [with certainty], or be able to ascertain, without the necessity of litigation, the applicable law.”\(^\text{128}\) According to these considerations, choice of law principles should be clear, definite, and absent of any element of ambiguity or flexibility.\(^\text{129}\) Likewise, choice of law rules should seek to promote the international uniformity of status as much as possible and thereby promote legal stability and certainty.\(^\text{130}\) Consequently, it would not be fitting to apply the law of the forum where it is likely to lead to “limping” marriages.\(^\text{131}\)

(5) Comity and International Cooperation: For reasons of comity and state interest in international relations,\(^\text{132}\) the choice of law rules of the forum should give due regard to the interests of a foreign country and give effect to its judgments and administrative decisions.\(^\text{133}\) In order to encourage international cooperation, a choice of law rule that promotes these interests is preferable.\(^\text{134}\)

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\(^{126}\) Reed, supra note 123, at 388–89; Hartley, supra note 123, at 571–72.

\(^{127}\) See Hartley, supra note 123, at 571. The application of foreign law is liable to be complex and complicated, as foreign law is considered a “fact” that typically requires proof by experts. Id. The requirement of proving foreign law could thus prolong the proceedings and cause uncertainty. Id.

\(^{128}\) Reed, supra note 123, at 389.

\(^{129}\) See id.

\(^{130}\) The best way to promote the uniformity of status is to apply the choice of law rules that have earned wide international recognition. See Hartley, supra note 123, at 572. On the importance of the uniformity of status, see Henderson v. Henderson, 87 A.2d 403, 408 (Md. 1952); Leszinske v. Poole, 798 P.2d 1049, 1054 (N.M. Ct. App. 1990).

\(^{131}\) See Reed, supra note 123, at 390.

\(^{132}\) See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court S. Dist. Iowa, 482 U.S. 522, 543 n. 27 (1987) (“Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states”); see also Hilton v. Guyot, 159 U.S. 113, 163–64 (1895) (“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.”).

\(^{133}\) See Hartley, supra note 123, at 572–73.

\(^{134}\) Schuz, supra note 114, at 147.
In order to formulate an appropriate choice of law rule, an attempt must be made, to the extent possible, to advance all of the above goals.\textsuperscript{135} It is doubtful whether it is possible to formulate a single choice of law rule that will fully promote all of the interests, though, as some of the policy considerations are likely to conflict with one another and each may lead to the adoption of a different choice of law rule. Such is the case, for instance, regarding the considerations of certainty, uniformity and international cooperation (policies 4 and 5 above), which normally would point to the application of the foreign law, whereas considerations of convenience and efficiency (policy 3 above) usually weigh in favor of domestic law.\textsuperscript{136}

Choice of law rules in the field of marriage recognition can thus be designed to promote a number of goals that are not necessarily consistent with one another. The relative weight given to each of the interests and the balance between them is likely to vary from one legal system to another. Indeed, as is further elaborated below, the emphasis on different rationales and policy considerations has led to the formulation of two distinct systems for marriage recognition.

\textbf{B. The Personal Law System vs. The Principle of Lex Loci Celebrationis}

It is customary to distinguish, for purposes of marriage recognition, between the formal validity (“marriage formalities”) and the essential validity of the marriage (“marriage essentials”).\textsuperscript{137} Although the nature and scope of the requirements that are considered “marriage formalities” may vary from one country to another, the term usually refers to the legal sufficiency of the ceremony itself as well as the “related procedures required for the valid celebration of a marriage,” including the need for license and witnesses, registration requirements, and the like.\textsuperscript{138} All of the requirements to which the parties must adhere in terms of their legal capacity to marry each other, such as minimum age and lack of affinity, belong to the “marriage essentials” category.\textsuperscript{139} As far as the form of

\textsuperscript{135} See Reed, \textit{supra} note 123, at 391.

\textsuperscript{136} Hartley, \textit{supra} note 123, at 573.

\textsuperscript{137} LYNN D. WARDLE & LAURENCE C. NOLAN, \textit{FUNDAMENTAL PRINCIPLES OF FAMILY LAW} 216 (2002).

\textsuperscript{138} Reed, \textit{supra} note 123, at 392; \textit{see also} P. M. NORTH & J. J. FAWCETT, CHESHIRE AND NORTH’S PRIVATE INTERNATIONAL LAW 572–86 (12th ed. 1992).

\textsuperscript{139} See PÅLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, \textit{supra} note 56, at 164. Certain countries “subdivide essentials into categories that distinguish between defects that render a marriage void \textit{ab initio} and those which render the marriage merely voidable . . . .” Lynn D. Wardle, \textit{International Marriage and Divorce Regulation and Recognition: A Survey}, 29 FAM. L.Q. 497, 500 (1995) [hereinafter Wardle, \textit{International}}
marriage is concerned, the universally accepted rule of conflicts is that all aspects of formal validity are governed by the *lex loci celebrationis*. As to the substantive conditions of marriage, there are two prevailing choice of law rules: the personal law of the parties and the law of the place of celebration.

Until the middle of the nineteenth century, English courts drew no distinction between the formal and the essential validity of foreign marriages, holding that in both aspects the validity of a marriage depended on the *lex loci celebrationis*. The basic concept held by the English courts up to that time was that marriages valid where celebrated are valid everywhere, subject to the requirement that the marriage did not violate the public policy of the forum. Since some of the marital prohibitions imposed by English law during the nineteenth century were stricter than those imposed by neighboring European countries, English couples who lacked capacity to marry often attempted to evade the local prohibition by marrying on a brief trip abroad and then returning to England. As the choice of law rule simply referred to the *lex loci celebrationis*, such marriages were routinely validated. However, in the 1861 case of

Marriage]. While “[e]ssentials are necessary for a valid marriage [and the] violation of those . . . prohibitions . . . may . . . render the marriage invalid, . . . [f]ormalities are legal requirements the violation of which may be punished, but generally will not affect the validity of the marriage.” *Id.*

140. LEONARDO PALSSON, MARRIAGE AND DIVORCE IN COMPARATIVE CONFLICT OF LAWS 173 (1974) [hereinafter PALSSON, MARRIAGE AND DIVORCE IN COMPARATIVE CONFLICT OF LAWS]; *see also* NORTH & FAWCETT, *supra* note 138, at 572 (“There is no rule more firmly established in private international law than that which applies the maxim *locus regit actum* to the formalities of a marriage, i.e. that an act is governed by the [law of the] place where it is done.”).

141. *See* PALSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 56, at 89. “The personal law system includes two different rules for determining personal law: [one is] *lex patriae* (the law of one’s nationality) and [the other is the] *lex domicilii* (the law of one’s domicile). *Lex patriae* . . . is the traditional choice of law rule for marriage recognition in most of Continental Europe,” while *lex domicilii* “is the choice of law rule for marriage recognition in England, in many commonwealth countries, and in some Latin American countries.” *See* WARDLE & NOLAN, *supra* note 137, at 216–17.


145. *See* Adams, *supra* note 144, at 110–11. For instance, English couples frequently evaded “the provisions of Lord Hardwicke’s Marriage Act, 1753, which required parental
Brook v. Brook, the House of Lords, wishing to prevent further attempts to evade domestic prohibitions, decided to draw a distinction between capacity and form, and held that while the form is to be governed by the *lex loci celebrationis*, capacity should be governed by the law of the domicile.

The case concerned “a man and his deceased wife’s sister, both . . . domiciled in England,” who attempted to evade the domestic prohibition on their marriage by performing the ceremony in Denmark, which allowed such marriages. Based on the aforementioned distinction, since the parties lacked capacity to marry each other under English law, the House of Lords denied recognition of the marriage. Since the *Brook* court did not specify the exact manner in which the parties’ domicile should be determined, English courts developed three distinct theories to that effect: the intended matrimonial home theory (attributed to Cheshire), the most real and substantial connection theory, and the dual consent for underage marriages, by marrying in Scotland where consent was not required.” Id. at 111. Upon their return to England, their marriages were usually recognized. Id.; see e.g., Middleton v. Janverin, (1802) 161 Eng. Rep. 797, 799; 2 Hag. Con. 437, 443–44 & 444 n. (discussing Compton v. Bearcroft (Ct. Del. 1769) (Eng.)); Simonin v. Mallac, (1860) 164 Eng. Rep. 917, 924; 2 Sw. & Tr. 67, 83 (“Compton v. Bearcroft is therefore an authority to this extent, that a marriage contracted by English domiciled subjects abroad, where it is not prohibited by English law, will not be held bad because the parties have gone thither to evade the necessity of complying with certain conditions that would have been imposed upon them in England.”).


147. See id. at 710; 9 H.L. Cas. at 207–08; see also Sottomayor v. De Barros, [1877] 3 P.D. 1 at 5 (Eng.) (“The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile . . . .”).

148. Adams, * supra* note 144, at 111–12. Marriages between relatives of such affinity were prohibited at the time in England by virtue of “Lord Lyndhurst’s Marriage Act, 1835, [which] rendered void a marriage between persons within prohibited degrees of consanguinity and affinity that were stricter than those in other European countries.” Id. at 111. Only in 1907 did England enact a special law allowing such marriages (the Deceased Wife’s Sister’s Marriage Act of 1907). See *Morris, McClean & Beevers, supra* note 143, at 214 & n.90.

149. See *Brook*, 11 Eng. Rep. at 705; 9 H.L. Cas. at 193.

150. See Reed, * supra* note 123, at 396–400. According to this theory, “the parties’ capacity to marry is determined by the law of their intended matrimonial [domicile].” Id. at 396. Although the intended matrimonial home test has some advantages (such as the promotion of the validity of marriages), it is “inherently uncertain,” and its prospective nature renders it impractical. See id. at 397–98.

151. See id. at 400–02. This theory directs courts to the legal system “that has the most real and substantial connection with the marriage” and it “allows consideration of a multiplicity of relevant factors embracing domicile, nationality, residence, . . . and place of
domicile theory (attributed to Dicey). This last theory is the one most commonly applied by the English courts.

Seemingly, the main argument in support of applying the personal law (whether determined by domicile or by nationality) in matters of capacity is that questions of status should be the concern of the country in which a person’s life is centered. According to this approach, the country holding the most significant interest in determining the substantive conditions for creating a valid marriage is the one to which the parties hold the most substantial connections. The House of Lords in

152. See id. at 393–96. According to the dual domicile theory, “[c]apacity to marry is governed by the law of the parties’ ante-nuptial domiciles: each party must have capacity [to marry], according to the law of his or her domicile at the time of the ceremony, to marry the other.” Id. at 393. The “primary justification [for this theory] is that it promotes certainty” and that “a person’s status is a matter of public concern to the country to which he belongs at the time of marriage . . . .” Id. at 394. However, as Reed points out, this approach “runs counter to the policy objective of presuming in favor of upholding the validity of a marriage” since: “The cumulative nature of the test, looking at both parties’ ante-nuptial domiciliary laws, greatly increases the likelihood of the marriage being declared invalid, than if a single determinative law were applied.” Id. at 395.


154. In the Continent it is also customary to distinguish between form and capacity to marry, and to apply the law of the place of celebration in matters of form. However, unlike English law, which refers to domicile in matters of capacity, the customary choice of law rule in the Continent refers to the law of the couple’s nationality. See Palsson, Marriage in Comparative Conflict of Laws, supra note 56, at 89–91.

155. See, e.g., Pugh v. Pugh, [1951] P. 482 at 491 (Eng.) (“It must be remembered that personal status and capacity to marry are considered to be the concern of the country of domicile.”).

156. Palsson, Marriage in Comparative Conflict of Laws, supra note 56, at 93. From this perspective it seems that the personal law system referring to the domicile of the parties is preferable to that which refers to their nationality. Indeed, the current trend in private international law is to use domicile rather than nationality (especially in immigration states). On this topic, see Michael Bogdan & Eva Ryrstedt, Marriage in Swedish Family Law and Swedish Conflicts of Law, 29 Fam. L.Q. 675, 679–80 (1995). The most widely used connecting factor in Israeli statutory choice of law rules is domicile, especially in the field of personal status. For example, the law of the common domicile of the parties is the primary connecting factor under both Section 5 of the Dissolution of Marriage (Jurisdiction in Special Cases) Law and Section 17(a) of the Family Law Amendment (Maintenance) Law. See Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729–1969, 23 LSI 274, § 5 (1968–1969) (Isr.); Family Law Amendment (Maintenance) Law, 5719–1959, 13 LSI 73, § 17(a) (1958–1959) (Isr.); seealso Spouses (Property Relations) Law, 5733–1973, 27 LSI 313, § 15 (1972–1973) (Isr.); Capacity and Guardianship Law, 5722–1962, 16 LSI 106, § 77 (1961–1962) (Isr.).
Brook v. Brook\textsuperscript{157} based its use of domicile as determinant of the parties’ capacity on the concept that the law of the country with which the parties are most connected at the time of the ceremony should apply in all matters vital to the preservation of the fundamental features of its marriage institution, and that the parties should not be allowed to evade any prohibitions imposed by their domicile’s law.\textsuperscript{158} In the words of the House of Lords:

There can be no doubt of the general rule, that ‘a foreign marriage, valid according to the law of a country where it is celebrated[,] is good everywhere.’ But while the forms of entering into the contract of marriage are to be regulated by the \textit{lex loci contractus}, the law of the country in which it is celebrated, the essentials of the marriage depend upon the \textit{lex domicilii}, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated.\textsuperscript{159}

As indicated by the decision in \textit{Brook}, the consideration that lies at the heart of the English choice of law system, as far as marriage recognition is concerned, is that the country of domicile bears the most significant interest in setting the essential conditions required to create a valid marriage, even when the ceremony is performed in a foreign country in accordance with that country’s laws.\textsuperscript{160}

The decision of the House of Lords to abandon the principle of \textit{lex loci celebrationis} with respect to the parties’ capacity to marry was harshly criticized, and rightfully so. Professor Beale, for one, called the decision “an ignorant error.”\textsuperscript{161} Justice Sussman of the Israeli Supreme Court concurred with Beale’s critique,\textsuperscript{162} and added:

\begin{quote}
160. \textit{See} id.
161. Beale, \textit{supra} note 142, at 386. The decision to apply the law of domicile in matters of capacity was criticized by the lower courts in England as well. \textit{See}, e.g., Sotomayor v. De Barros, [1879] 5 P.D. 94 at 100 (Eng.) (“But I trust that I may be permitted without disrespect to say that the doctrine thus laid down has not hitherto been ‘well recognized.’ On the contrary, it appears to me to be a novel principle, for which up to the
When the Israeli court decides to elect a choice of law rule [for marriage recognition], we will not necessarily adopt the English rule. Indeed, as for myself, I see no obligation to rectify an English precedent which even if born by mistake, is now accepted law in England . . . . Should the English rule meet our needs, we will accept it as law in Israel. However, it is possible that the American rule will be deemed more appropriate.163

Indeed, the English choice of law rule for marriage recognition, as formulated by the 
Brook court, is inconsistent and incoherent. The rule does not make a distinction between couples domiciled in England at the time of their foreign marriage and couples who had married while domiciled in a foreign country and later immigrated to England. Since the prevalent approach is that capacity to marry is governed by the law of the parties’ domicile at the time of the ceremony (the dual domicile theory), marriages of couples who immigrate to England following their wedding ceremony are commonly recognized (subject to public policy considerations), even though the marriage would have been prohibited under English law. The rule validates these marriages even though England is the country with which the parties have the most connections during their marriage. This flaw reveals that the rule for marriage essentials was nothing more than a disguised prohibition of evasion.164 The main concern of the court in 
Brook was not with the formulation of a coherent choice of law rule for marriage recognition, but rather with halting attempts to evade the English marital restrictions.165 While preventing evasion “may be a valid concern,” it is immaterial as an “underlying rationale” for choice of law rules.166

Moreover, the English rule was designed to promote social, cultural and moral interests that embody the forum’s fundamental concept of its marriage institution, and as such, to give effect to domestic prohibitions placed on certain types of marriages, such as incestuous marriages, mar-

162. HCJ 143/62 Funk-Schlesinger v. Minister of Interior 17(1) PD 225, 254 [1963] (Isr.).
163. Id.
164. See Adams, supra note 144, at 113.
165. As the 
Brook court stated: “It is quite obvious that no civilised state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions.” 
Brook, 11 Eng. Rep. at 712; 9 H.L. Cas. at 212.
166. Adams, supra note 144, at 114.
marriages of minors, and the like. 167 Without minimizing the significance of
the forum’s public interests (which reflect its “internal” public policy168),
these considerations should not play a part in the formulation of choice
of law rules for marriage recognition. Such rules should be designed ac-
cording to the fundamental principles of private international law, and
local public interests, including the interest in preventing evasion, should
be taken into consideration only within the context of an “external” pub-
clic policy exception.169 The limitations imposed on the parties’ capacity
to marry are a clear matter of “internal” public policy, and where a for-
eign element is involved, it is fitting that limitations be examined within
the framework of the exception expressly designed for that purpose.170
By virtue of the public policy exception, the court is authorized to deny
recognition of marriages that are inconsistent with the core social, cultur-
al, and moral values of the forum. Although the public policy exception
is also recognized under English law,171 the court in Brook (as well as
subsequent case law) did not even consider the option to invoke it in or-
der to deny recognition of the marriage in question.172
In addition to the aforementioned weaknesses, the most significant dis-
advantage of the English rule for marriage recognition is that it com-
pletely bars—without leaving any discretion to the court—the option of
recognizing a marriage that was conducted in violation of any of the re-
quirements for marriage capacity prescribed by the law of the parties’
domicile. The court is denied any discretion to consider the seriousness

167. Based on the English case law, there are scholars who also classify moral, reli-
gious, and cultural considerations as part of policy objectives which choice of law rules
in the field of marriage recognition should seek to achieve. See, e.g., Reed, supra note
123, at 387–90; see also Hartley, supra note 123, at 571–72.
168. For a discussion of the distinction in private international law between “internal”
public policy and “external” public policy, see infra Part V.A.
169. Id.
170. According to Kurt Siehr: “The preference of domestic law over foreign law is a
coloured one, tainted by prejudice, habit and other human frailties. In conflicts law one
must get rid of them. Conflicts law does not need to defend domestic law against foreign
intrusions . . . . If foreign law violates basic values of domestic law, the general clause of
public policy assures that such a law will not be applied in domestic courts.” Siehr, supra
note 125, at 364.
171. NORTH & FAWCETT, supra note 138, at 128.
172. Had the court in Brook applied the law of the place of celebration to the issue of
capacity (as it was applied to the formalities of the marriage), it could have invalidated
the marriage as contrary to external English public policy. Once the House of Lords had
elected to adopt a choice of law rule which refers to the parties’ domicile in matters of
capacity, see Brook v. Brook, (1861) 11 Eng. Rep. 703; 9 H.L. Cas. 193, the invocation
of the English public policy exception became relevant only in instances where the par-
ties were domiciled in a foreign country at the time of the marriage.
of the breach of the relevant norm under the circumstances of the case, the differences between the various restrictions laid down by the laws of the forum, the different rationales the restrictions are based on, and the degree of the necessity of each of them for the preservation of the fundamental values of the forum’s marriage institution. Moreover, the personal law system does not place adequate weight on the interests of validating foreign marriages, protecting the parties’ expectations, and promoting uniformity of status and international cooperation.

The view held by the legal systems that have adopted the lex loci celebrationis as their choice of law rule for marriage essentials, and particularly by the US legal system, is utterly different. The United States has always maintained the original English rule for marriage recognition, whereby a marriage was held to be governed in its entirety by the lex loci celebrationis. Accordingly, courts in the United States (and in other countries that have adopted the same rule) apply only one choice of law rule in terms of both form and substance. The lex loci celebrationis rule normally ensures that a marriage valid where entered into will be held valid in the forum as well.

In the United States, the rule as reflected in the Restatement (Second) of Conflict of Laws is subject to two main exceptions: the public poli-

173. See Pålsson, Marriage and Divorce in Comparative Conflict of Laws, supra note 140, at 23.
175. Pålsson, Marriage in Comparative Conflict of Laws, supra note 56, at 4. It should be noted in this context that the American conflict law on marriage has evolved predominately on the basis of interstate, rather than international conflicts situations. Id. That said, the same rules that were developed in the context of interstate recognition are usually also applicable in the context of the recognition of marriages performed in foreign countries. D. Marianne Blair & Merle H. Weiner, Family Law in the World Community 371 (2003); Pålsson, Marriage and Divorce in Comparative Conflict of Laws, supra note 140, at 23.
176. See Ferret v. Ferret, 237 P.2d 594, 602 (N.M. 1951); In re May’s Estate, 114 N.E.2d 4, 6 (N.Y. 1953); Henderson v. Henderson, 87 A.2d 403, 408 (Md. 1952); Sutton v. Warren, 51 Mass. (10 Met.) 451, 452 (1845). Various states within the United States codified this rule. See, e.g., N.M. Stat. Ann. § 40-1-4 (West 1978) (stipulating that: “All marriages celebrated beyond the limits of this state, which are valid according to the laws of the country wherein they were celebrated or contracted, shall be likewise valid in this state, and shall have the same force as if they had been celebrated in accordance with the laws in force in this state.”).
177. Restatement (Second) of Conflict of Laws § 283(2) (1971).
The doctrine and evasion statutes. These exceptions are based on the view that the state where the parties are domiciled, referred to as “the state of the most significant relationship,” is “[t]he state primarily concerned [with] the existence of the marital status.” When these exceptions are implicated in a case, the court applies the law of the forum, which invalidates the foreign marriage. However, these exceptions have been narrowly interpreted and the interest in upholding foreign marriages usually prevails. The most prominent feature of the United States conflict law in the field of marriage recognition is the policy of validation, thus, exceptions that prevent recognition are applied only under rare circumstances.

It appears that the place of celebration principle for both form and capacity, which promotes the policy of validating marriages, is increasingly preferred over the personal law system in private international law. For instance, the Hague Convention on Celebration and Recognition of the Validity of Marriages of 1978 stipulates the *lex loci celebrationis* as the

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178. For a discussion of the public policy exception, see *infra* Part V. Marriage evasion statutes exist today in thirteen states in the United States. Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 Tex. L. Rev. 921, 923 & n.2 (1998). According to these laws, “marriages of persons who travel elsewhere in order to avoid their home state’s marriage restrictions” are declared void. *Id.* at 923. For instance, the law in Arizona stipulates that: “Parties residing in this state may not evade the laws of this state relating to marriage by going to another state or country for solemnization of the marriage.” *Ariz. Rev. Stat. Ann.* § 25–112(C) (1956). However, the exception was interpreted quite narrowly, and in most cases United States courts refrained from applying evasion statutes and upheld the marriage in reliance on the *lex loci celebrationis*. Pålsson, *Marriage in Comparative Conflict of Laws*, supra note 56, at 29. “The prevailing view [of the courts] . . . is that . . . evasion . . . is immaterial in determining the validity of the marriage and does not change the operation of the usual conflicts rule . . . . [Thus, e]ven in the minority of cases where an evasionary marriage was struck down, . . . . [the main reason for not recognizing the marriage was] that the domiciliary prohibition was based on a strong public policy, which would in itself . . . have been sufficient to compel invalidation of the marriage.” *Id.*; see also Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 Wis. L. Rev. 1033, 1074–82 (1994); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L.J. 1965, 1969–70 (1997).


180. See *id.* at 8–9.

181. *Id.* Even in personal law countries the public policy exception is usually interpreted quite narrowly. See, e.g., North & Fawcett, supra note 138, at 128–29.

182. Scoles et al., supra note 52, at 548 n.2.
choice of law rule in terms of both form and capacity. Article 9 of that Convention states: “A marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States, subject to the provisions of this Chapter.”

Nonetheless, the place of celebration rule is not without its disadvantages. First, the rule may allow the parties to evade various marriage impediments imposed by their personal law, which reflect the values of the community to which they belong, simply by taking a short trip to another country for the mere purpose of getting married. Second, the place of celebration might be completely random, and the parties may lack any connection to it whatsoever. When “the parties do not intend to establish their matrimonial home in the country in which they marry, the interest of that country in their marital status is merely [temporary, whereas] . . . . the interests of the country with which the parties are more permanently connected, whether by domicile or by nationality,” should bear much heavier weight.

In sum, the main disadvantage of the lex loci celebrationis as a choice of law rule with respect to the parties’ capacity to marry is that it does not adequately address the interests of the country in which the spouses conduct their lives. However, this disadvantage could be adequately addressed with a public policy exception that serves to protect and sustain the vital public interests of the forum. The application of the lex loci celebrationis rule does not necessarily lead to the recognition of marriages


184. Convention on Marriages, supra note 183, art. 9. The Israeli legislature has also adopted the law of the place of celebration as the choice of law rule in a number of statutes, and has thus recognized (for limited purposes) civil marriages conducted outside of Israel and valid according to the law of the place of celebration. See Penal Law, 5737–1977, Special Volume LSI 55, § 178(1) (1977) (Isr.) (stipulating the applicable choice of law rule for establishing the crime of polygamy); see also Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729–1969, 23 LSI 274, § 5(a)(4) (1968–1969) (Isr.).

185. For a discussion of this argument as a reason to reject the place of celebration rule, see Menashe Shava, The Nature and Scope of Jewish Law in Israel as Applied in the Civil Courts as Compared with its Application in the Rabbinical Courts, 5 Jewish L. Ann. 3, 19–20 (1985).

186. PÅLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, supra note 56, at 5.
that stand in contrast with the fundamental values of the forum. As discussed infra in Part V, by virtue of the external public policy doctrine, even legal systems that employ the lex loci celebrationis for marriage essentials may opt not to recognize foreign marriages valid in the place of celebration when the marriage is of residents who are ineligible to marry according to their personal law.

Moreover, the considerable advantages of the place of celebration rule clearly outweigh its weaknesses. In contrast to the personal law system, the principle of lex loci celebrationis properly promotes the chief policy objectives which choice of law rules in the field of marriage recognition should seek to achieve. The rule promotes, first and foremost, the focal policy of validating marriages. It is consistent with the reasonable expectations of the parties. The considerations of convenience, simplicity, and efficiency also support the adoption of the lex loci celebrationis principle. Since the rule does not distinguish between form and substance, it is clear and simple to apply. All aspects of the foreign marriage are governed by a single law, thereby avoiding the problematic distinctions and other difficulties involved in applying the personal law system, such as cases in which the parties are subject to different personal laws. The principle of lex loci celebrationis also promotes the interest of comity and international cooperation. As Justice Sussman stated in the Funk-Schlesinger case:

Any country that wishes to live in harmony with the family of nations must relinquish the implementation of some of its laws when a foreign element arises and intervenes in a legal action . . . . Just as we demand that other nations recognize Israeli law, we must not disqualify a transaction which is governed by a foreign law that is different from our

187. Indeed, referring to the personal law of the parties with respect to the substance of marriage may also serve to promote convenience, simplicity, and efficiency in that it renders any need to examine the rules of foreign legal systems virtually unnecessary. Despite this, the personal law system may also cause various complications, particularly when the parties have different domiciles at the time of the marriage. For discussion of the difficulties involved in the implementation of each of the approaches taken under English law in order to determine the personal law of the parties, see supra notes 150–152. Furthermore, whether or not choice of law rules can engender convenience and efficiency, the importance of these considerations should not be overstated, particularly with respect to the determination of personal status and especially in the field of private international law, which involves, by its very nature, complex and unusual situations.

188. Given that the place of celebration principle, as opposed to the personal law system, examines the event rather than the parties themselves, it resolves the difficulty that derives from the need to ensure that the applicable law is appropriate for both parties. See Schuz, supra note 114, at 156–57.
own. To the extent that choice of law jurisprudence refers us to a foreign law, Israeli law must yield.189

The principle also promotes legal certainty, stability, and predictability, and prevents limping marriages. Even if the extent of the need for certainty and stability is liable to change from one legal field to another, there is no doubt that these considerations are essential in the field of personal status.190

The policy objectives of the choice of law rules for marriage recognition are thus best advanced by the principle of the law of the place of celebration. Adoption of this rule in Israel is arguably also required in light of the unique legal and social situation. In the words of the then Chief Justice Barak in the matter of A v. The Rabbinical Court:

Thousands of Jews who are citizens and residents of Israel wish to marry by means of a civil marriage that takes place outside Israel. This is a social phenomenon that the law should take into account. [In the past, some Supreme Court Justices] expressed the opinion in obiter remarks that with regard to the validity of marriages that take place outside Israel between Israeli citizens or residents, it is sufficient that they are valid according to the law of the place where they were contracted, even if the spouses are not competent to marry under their personal law. Within the framework of the petition before us, we do not need to make a decision with regard to this position, and we need only adopt the more moderate position that the marriage is valid if the couple are competent to marry under their personal law and the marriage ceremony took place within the framework of a foreign legal system that recognizes it.191

Admittedly, the adoption of the personal law system for marriage recognition in England—as well as in other Western countries—ultimately did not seriously undermine the fundamental policy of validation. Given the small number of impediments imposed by English law on the capacity of the parties to marry, courts recognize the majority of foreign marriages between English residents.192

In contrast, the application of the personal law system in Israel—which imposes a long list of marital impediments—will severely infringe upon the right to family life of many groups in the Israeli population, particu-

189. HCJ 143/62 Funk-Schlesinger v. Minister of Interior 17(1) PD 225, 256 [1963] (Isr.).
190. See Shapira, Comments, supra note 98, at 288.
191. HCJ 2232/03 A. v. Tel-Aviv-Jaffa Regional Rabbinical Court (2) IsrLR 245, ¶ 26 [2006] (internal citations omitted).
192. For a discussion of the restrictions that English law imposes on the capacity of the parties to marry, see infra Part V.
larly same-sex couples and opposite-sex couples lacking capacity to marry in Israel. Thus, it would appear that given the special situation in Israel, and in light of the constitutional status of the right to family life and marriage, a choice of law rule that invalidates, a priori, all foreign marriages of Israeli couples who are ineligible for religious marriage, should not be adopted. Opting for the place of celebration rule in Israel will lead to the proper result of recognizing foreign civil marriages, subject to public policy considerations. Thus, the adoption of the lex loci celebrationis principle would also be consistent with the modern “consequentialist theory” of conflicts law, which dictates that the appropriate choice of law rule is that which leads to the just result. Adopting this principle, however, would not entail recognition of all marriages performed outside of Israel even though valid under the lex loci celebrationis, since, again, this rule is subject to a public policy exception.

V. THE PUBLIC POLICY EXCEPTION AND THE RECOGNITION OF FOREIGN MARRIAGES

A. Ordre Public Externe in the Field of Marriage Recognition—Interpretative Criteria

The doctrine of public policy, a fundamental principle of private international law, is used as a barrier to the recognition of a foreign act that contradicts key social interests of the forum. Public policy is a flexible concept with no exhaustive definition, embodying the vital public interests and basic values of the particular society. Accordingly, its mean-

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193. The Israeli Supreme Court has held that the right to family life—which encompasses the right of an individual to belong to a family unit, the right of a couple to marry and live together, the right to bear children, the right of parents to raise their children and care for them, and the right of children to grow up with their parents—is grounded in the constitutional rights to privacy, self-fulfillment, and dignity and liberty, as enshrined in the Basic Law: Human Dignity and Liberty. See CA 7155/96 John Doe v. Attorney General 51(1) PD 160, 175 [1997] (Isr.); see also HCJ 7052/03 Adalah v. Minister of the Interior (May 14, 2006), Takdinet Legal Database (by subscription) (Isr.).


195. In the words of Chief Justice Barak in the case of Efrat v. Director of Population Registry, Ministry of Interior: “Public policy’ encompasses the central and essential values, interests and principles that a given society at a given time wishes to uphold, preserve and develop . . . . Public policy is the legal tool by means of which society expresses its credo. With this it creates new normative frameworks and prevents the introduction of undesirable normative arrangements into existing frameworks.” HCJ 693/91 Efrat v. Director of Population Registry, Ministry of Interior 47(1) PD 749, 779 [1993] (Isr.) (author’s translation from the Hebrew).
ing and scope may vary from one jurisdiction to another. The content of public policy in a given country is also liable to change over time as legal and social changes affect the fundamental views of society.¹⁹⁶ For the purposes of private international law, it is customary to differentiate between “internal public policy” (ordre public interne), which embodies local values and interests that are superseded by the rules of private international law, and “external public policy” (ordre public externe), which consists of basic local principles and interests on vital issues and takes precedence over the regular rules of private international law.¹⁹⁷

External public policy, then, concerns fundamental principles and superior interests of society and the state. The scope of the doctrine in private international law is substantially narrower than in domestic law.¹⁹⁸ Differences between domestic and foreign law, alone, certainly do not justify application of the public policy doctrine.¹⁹⁹ According to both Anglo-American and Israeli private international law, the exception may be invoked only when implementation of the foreign law would yield

¹⁹⁶. See Amos Shapira, Recognition and Enforcement of Foreign Judgments In Personam in Israel, 3 Tel. Aviv U. Stud. L. 171, 189 (1977) [hereinafter Shapira, Recognition]. The doctrine of public policy was explicitly incorporated into a number of statutory provisions of Israeli private international law. For instance, the Foreign Judgments Enforcement Law of 1958 stipulates that “a foreign judgment shall not be declared enforceable if its enforcement is likely to prejudice the sovereignty or security of Israel” and the court may refuse to declare a foreign judgment enforceable if its content contradicts Israeli public policy. See Foreign Judgments Enforcement Law, 5718–1958, 12 LSI 82, §§ 3(3), 7 (1957–1958) (Isr.); see also Succession Law, 5725–1965, 19 LSI 58, § 143 (1964–1965) (Isr.) (stating that the applicable foreign law will be disregarded if it discriminates on the basis of race, religion, sex or ethnic origin, or contradicts Israel’s public policy).

¹⁹⁷. See Shapira, Recognition, supra note 196, at 190. In the words of the Court in the Funk-Schlesinger case: “[T]here are exceptional cases in which the granting of validity to foreign law and to the result deriving from it will greatly impair the public order by which we live, and only when a foreign law stands in contrast with the sentiment of justice and morality of the Israeli public, will we deny its application.” HCJ 143/62 Funk-Schlesinger v. Minister of Interior 17(1) PD 225, 256 [1963] (Isr.) (author’s translation from the Hebrew).


¹⁹⁹. Justice Cardozo famously remarked: “We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.” Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 201 (N.Y. 1918); see also Alex Mills, The Dimensions of Public Policy in Private International Law, 4 J. Private Int’l L. 201, 212 (2008) (“An English court will ordinarily apply foreign law or recognize and enforce a foreign judgment even if the result is different from that which would be reached under English law, and probably even if the cause of action is unknown to English law.”).
abhorrent and intolerable results that infringe on the social and public order of the forum state.\textsuperscript{200} Since the Supreme Court of Israel has fully recognized civil marriages conducted abroad by Israeli citizens and residents eligible for marriage in Israel, it follows that the mere fact of conducting a civil marriage ceremony does not violate the external public policy of Israel.\textsuperscript{201} The question that has yet to be answered is whether the essential recognition of foreign marriages of same-sex couples, as well as opposite-sex couples ineligible for marriage in Israel, conflicts with one of the fundamental principles reflected in Israel’s external public policy, or whether the marital impediments imposed by domestic law only reflect Israel’s internal public policy. In order to answer this question, this Article turns first to the solutions employed by other jurisdictions and then examines whether the unique characteristics of the regulation of marriage within Israel has implications for its external public policy.

Over the years, English and American courts have formulated a number of guiding principles regarding the interpretation of external public policy in the field of marriage recognition.\textsuperscript{202} As previously discussed, the fundamental policy of private international law in the field of marriage recognition is the validation of foreign marriages.\textsuperscript{203} Accordingly, courts in both the United States and England usually interpret external public policy quite narrowly.\textsuperscript{204} This interpretation of the public policy exception is not only based on the principle of validation, but also on the

\textsuperscript{200} See, e.g., Cheni v. Cheni, [1965] P. 85 at 98–99 (Eng.).

\textsuperscript{201} See HCJ 2232/03 A. v. Tel-Aviv-Jaffa Regional Rabbinical Court (2) IsrLR 245 [2006].

\textsuperscript{202} Despite the local nature of public policy, there has been a growing trend to expand the doctrine so that appropriate legal concepts derived from foreign private and public law are often applied in the forum. For instance, in 2000 the Court of Justice of the European Communities held in Krombach v. Bamberski that the examination shall be conducted according to European public policy, and that the judgments of state courts will be examined by this criterion. See Case C-7/98, Krombach v. Bamberski, 2000 E.C.R. I-1935. Specifically, the court noted: “Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State.” Id. ¶ 23.

\textsuperscript{203} See Wardle, International Marriage, supra note 139, at 514 (“Clearly the predominant policy among nations today is to prefer marriage, and to impose relatively few conditions on marriage. Likewise, there appears to be a presumption in favor of recognizing foreign marriages, as a general rule. Accommodating personal autonomy seems to be a stronger part of marriage policy today than in the past.”).

\textsuperscript{204} See Pålsson, Marriage in Comparative Conflict of Laws, supra note 56, at 8–9, 13.
understanding that a broad interpretation of the doctrine is likely to lead to redundancy of the rules of private international law. 205 This approach is also evident by the language of the exception in the Restatement (Second) of Conflict of Laws:

A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage. 206

The Restatement leaves the task of defining the content and scope of public policy in the hands of the courts.

In order to determine whether the recognition of a foreign marriage violates the “strong” public policy of the state to which the parties hold the majority of connections, United States courts typically examine a number of factors. 207 First, the courts usually examine whether the given marriage is deemed void or merely voidable under the law of the state which is asked to recognize it, based on the view that voidable marriages are not likely to be found to violate a strong public policy. 208 Second, the courts usually inquire whether entry into the type of marriage under consideration violates the forum state’s penal statutes; if it does, recognition

205. See Morris, McClean & Beevers, supra note 143, at 54.
206. Restatement (Second) of Conflict of Laws § 283(2) (1971). In the absence of legislation on the question of the validity of marriages conducted outside the forum, the American courts refer to the general principles of private international law, including the Restatement. The choice of law rule stipulated in the Restatement was incorporated into the laws of about half of the states in the United States. Koppelman, supra note 178, at 981. The accepted definition of public policy under English law is as follows: “English courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English Law.” 1 Dicey and Morris on the Conflict of Laws 81 (Lawrence Collins et al. eds., 13th ed. 2000). For a detailed discussion of the public policy exception in England, see North & Fawcett, supra note 138, at 128–37.
207. Blair & Weiner, supra note 175, at 378–79.
208. Thus, for instance, most United States courts held that their relevant statutes regarding nonage only made a marriage voidable and therefore did not reflect a strong enough public policy to invalidate a foreign marriage contracted by local domiciliaries. See Pålsson, Marriage in Comparative Conflict of Laws, supra note 56, at 71. Accordingly, in the majority of cases such marriages (valid under the lex loci celebrationis) were upheld even when the parties conducted their marriage in a foreign country with the clear intention of evading the prohibition in their home state, and even where the home state had a marriage evasion statute for foreign marriages of local domiciliaries. See, e.g., State v. Graves, 307 S.W.2d 545 (Ark. 1957); see also Pålsson, Marriage in Comparative Conflict of Laws, supra note 56, at 70–71.
may be found to violate a strong public policy. 209 Third, the courts may undertake a comparative examination of the manner in which other countries view marriages of the kind at issue, verifying whether the prohibition is deemed contrary to public policy in the majority of states or only in a few of them. 210 An additional factor frequently considered is the specific “purpose for which the determination regarding the validity of the marriage is being made.” 211

However, a careful examination of the relevant case law shows that none of the aforementioned factors has alone been regarded as decisive in determining the validity of foreign marriages. 212 On the whole, the policy of validation usually prevails, and even the accumulation of a number of factors does not necessarily lead to the invalidation of the foreign marriage by virtue of the public policy exception. For instance, the mere fact that the marriage is void under the law of the forum has rarely served, on its own, as a basis for finding a violation of strong public policy. 213 The rare cases in which US courts applied the exception were those where, in addition to the marriage being void under the laws of the forum, it contravened a criminal sanction considered odious by the common consent of nations, such as bigamy or incest. 214 Even in cases of this sort, the courts have occasionally been reluctant to invalidate the foreign marriage. 215 English case law reveals a similar approach. 216

209. Blair & Weiner, supra note 175, at 378.
210. Id.
211. Id.; see, e.g., In re Dalip Singh Bir’s Estate, 188 P.2d 499 (Cal. Dist. Ct. App. 1948). In the case of In re Dalip Singh Bir’s Estate, a California appellate court recognized a polygamous marriage, holding “that it would not violate public policy to recognize both marriages and divide a decedent’s estate between his two surviving wives, whom he had legally married in India and who still both resided there, particularly where both wives agreed to equal division and there were no other interested parties.” Blair & Weiner, supra note 175, at 378.
212. See Blair & Weiner, supra note 175, at 378–79.
215. Pålsson, Marriage in Comparative Conflict of Laws, supra note 56, at 21–22, 76; see also Leszinske v. Poole, 798 P.2d 1049 (N.M. Ct. App. 1990) (mother’s marriage to her uncle, valid in the place of celebration, did not preclude award of custody to mother, despite state penal statute indicating that incestuous marriages were contrary to public policy).
216. See, e.g., Cheni v. Cheni, [1965] P. 85 (Eng.). As the Cheni case demonstrates, recognition of marriages performed outside of England (and valid under the personal laws of the parties) between relatives whose degree of affinity does not constitute the criminal offense of incest (as defined in English law) does not violate English public policy, despite the prohibition on the performance of such marriages in England itself. Id.; cf. Mohamed v. Knott, [1969] 1 Q.B. 1 (Eng.) (recognition of a marriage performed...
These Anglo-American criteria for interpreting the scope of external public policy in the field of marriage recognition developed through case law and mostly relate to the three limitations on the right to marriage shared by all Western nations—nonage, polygamy, and incest—and on the various policy considerations underlying each of them. Notwithstanding the prohibition on same-sex marriage, which is gradually eroding, the three aforementioned impediments are the only restrictions on the capacity to marry that remain as absolute prohibitions in both England and the United States (as in most other Western nations). Although Israeli law imposes a host of additional restrictions on capacity, deriving from the exclusive application of religious law to matters of marriage and divorce, the criteria formulated in Anglo-American case law can also be of assistance in identifying and formulating the boundaries of Israel’s external public policy. The above criteria embody the view that the application of the exception may be justified only in extreme and exceptional cases, where recognition of the marriage would adversely affect the overall societal interest in that it would violate fundamental principles and widely accepted vital moral values. This insight should also guide the Israeli courts in the application of the public policy exception.

B. Israel’s Public Policy and the Tension Between Secular Law and Religious Norms

The unique question that arises under Israeli law is whether the exclusive application of religious law in matters of marriage and divorce should impact the content of Israel’s external public policy. In order to answer this question, it is useful to classify the capacity restrictions imposed by Israeli religious law into three main categories. The first includes restrictions that could be justified by secular-democratic rationales, including nonage, polygamy, and incest. The second category

in Nigeria between an adult and a 13 year-old girl, despite this type of marriage being prohibited in England); Morris, McClean & Beevers, supra note 143, at 213–17.

217. As stated by the House of Lords in the matter Radwan v. Radwan: “[I]t is an oversimplification of the common law to assume that the same test . . . applies to every kind of incapacity—non age, affinity, prohibition of monogamous contract by virtue of an existing spouse, and capacity for polygamy. Different public and social factors are relevant to each of these types of incapacity . . . .” Radwan v. Radwan, [1973] Fam. 35 at 51.

218. See infra Part V.C.


220. See supra note 6 and infra note 222.

221. The minimum age of marriage according to Jewish law is 13 for boys and 12.5 for girls. The Marriage Age Law of 1950 stipulates that the minimum age of marriage is 17.
includes restrictions whose rationale may be regarded as “purely religious,” including, \textit{inter alia}, prohibitions on marriages of persons “disqualified for religious marriage” and on interfaith marriages.\textsuperscript{222} The third category includes the prohibition on same-sex marriages—a prohibition that may be regarded as a “semi-religious” impediment.\textsuperscript{223}

Although religious laws mandate all the marital impediments in Israel, the restrictions classified under the first category above could also be rationalized by secular-democratic considerations, and they should not be regarded as reflecting only religious norms. Alongside the religious prohibitions on nonage, polygamy, consanguinity, and affinity, Israeli secular law imposes criminal sanctions on incest, entry into bigamous marriages, and marriages of minors.\textsuperscript{224} The Israeli legislature, which is reluctant to directly intervene in religious marriage laws, has limited its intervention to the imposition of criminal sanctions on the entry into marriages that it wished to prevent, without asserting a position on their validity.\textsuperscript{225} Accordingly, if a marriage were valid under the personal law of the parties but violated criminal law, the criminal sanctions would be imposed without invalidating the marriage itself.

However, rendering these religious impediments as criminal offenses no doubt strengthens the secular Israeli public policy regarding those prohibitions. It would thus appear that as far as this first category of impediments is concerned, there is no tension between the religious and secular laws. The main objective of those prohibitions is to sustain fun-

\textsuperscript{222} “Under Jewish Law, a marriage between a Jew and a non-Jew is \textit{void ab initio}.” Merin, \textit{The Right to Family Life}, supra note 6, at 135. The category of persons “disqualified for religious marriage . . . . includes, \textit{inter alia}, the prohibition against the marriage of a \textit{Kohen} (a descendant of the ancient priestly caste) to a divorced woman, to a \textit{chulutzah} (a widow released from a levirate marriage), or to a convert.” \textit{Id.} at 135–36. Although such marriages are prohibited, Jewish law regards them as retroactively valid, but requires the couple to divorce one another. \textit{See id.} at 136.

\textsuperscript{223} For further discussion of this category, see \textit{infra} Part V.C.

\textsuperscript{224} Sections 176 and 351 of the Penal Law specify bigamy and incest, respectively, as criminal offenses. \textit{See} Penal Law, 5737–1977, Special Volume LSI 55, 93 (1977) (Isr.). Section 2 of the Marriage Age Law specifies a criminal sanction against a man or woman who marries a girl or a boy under the age of seventeen, respectively. \textit{See Marriage Age Law, 5710–1950, 4 LSI 158, § 2 (1949–1950) (Isr.).}

damental values and to protect the weaker parties, and they reflect the overall societal interest. These three restrictions are shared by all Western nations, without exception, and they will certainly remain intact even if Israel enacts an arrangement for civil marriage. In light of the rationales behind these three prohibitions, and in reliance on the criteria formulated in Anglo-American law, the recognition of marriages entered into in violation of these prohibitions may, subject to the individual circumstances of the case, be found to violate Israel’s external public policy.

Aside from the three restrictions shared by all Western countries, Israeli law imposes a long list of additional unique restrictions on the right to marry, deriving from the exclusive application of religious law to matters of marriage and divorce. Within this context, the question that arises is whether external Israeli public policy should only reflect secular norms (such as the norms underlying the prohibitions listed in the first category) or whether it should also reflect the “purely religious” norms included in the second category.

First, it should be noted that most legal systems invoke public policy specifically in order to avoid the application of foreign laws that restrict the freedom of marriage on religious grounds. Although, unlike all

226. The rationale behind the requirement for a minimum age of marriage “is that the free consent of the [parties] is a prerequisite for marriage, and that it is necessary to establish a minimum age in order to ensure that this consent is, in fact, given freely. Another reason [for minimum age] is the need to guarantee a stable married life and the view that such stability can only be guaranteed if the two spouses are mature enough to be fully aware of their obligations within the family context.” Merin, The Right to Family Life, supra note 6, at 125. The prohibition against bigamy and polygamy is based on the principle of equality between the sexes and is designed to uproot sexist customs accepted in various traditional societies. See id. at 128. The prohibition against incestuous marriages on grounds of consanguinity and affinity should not be regarded as a religious norm either, since “it is accepted in all civilized societies and has rational justifications that suffice on their own . . . . [O]ne of the explanations for this prohibition is based on genetics and the fear that children born to [blood related couples] are liable to be afflicted with various genetic defects . . . . [T]he genetic concern does not justify prohibitions based on relations by marriage and, in this matter, it seems that the rationale stems from psychological and sociological considerations.” Id. at 127–28.

227. Pålsson, Marriage in Comparative Conflict of Laws, supra note 56, at 338. This approach is reflected in the 2005 Resolution of the Institute of International Law, regarding the use of the public policy exception in the context of recognition of foreign marriages. See Inst. of Int’l Law, Resolution: Cultural Differences and Order Public in Family Private International Law § B(1) (2005), available at http://www.idi-iii.org/idiE/resolutionsE/2005_kra_02_en.pdf. According to the Institute’s Resolution, “States shall guarantee respect for freedom of marriage. This means that, for the purposes of private international law, States shall invoke public policy against foreign laws that restrict that freedom on racial or religious grounds, and recognize the validity of
other Western countries, the institution of marriage in Israel is regulated exclusively by religious law, it seems that civil courts in Israel have also refrained from taking religious norms into consideration in determining and formulating Israeli public policy. The Supreme Court has held more than once that it determined Israeli internal public policy according to "the accepted views of the enlightened public," and that "public policy in Israel must not be identified with the legal policy of religious law." The Supreme Court also held that public policy "is aimed at the public at large [encompassing] its diversity, various opinions, beliefs, and religions," and that it is formed in accordance with the conventional wisdom of the "enlightened public," in consideration of the complexity and pluralism of Israeli society. Accordingly, the Supreme Court stated (albeit in dictum) that even if a certain type of marriage is considered forbidden or a sin under religious law, that alone will not render the marriage as violating Israeli internal public policy.

The Supreme Court has thus made a distinction between the public policy of religious law (applied in the religious tribunals) and the public policy of Israeli law in general (applied in civil courts), never regarding itself as bound by the views of religious law even with regard to Israeli internal public policy. In accordance with this view, civil courts have applied secular public policy—that based upon the freedom of conscience and the freedom to marry—even in matters of personal status. Such was the case, for instance, when the Supreme Court recognized a private marriage ceremony in Israel of an opposite-sex couple "disqualified for religious marriage," despite the fact that this was clearly a matter of marriage and divorce subject to Jewish law and that the Rabbinical Court does not recognize private marriage ceremonies. It was not religious, but rather, secular considerations that guided the court in this matter.

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230. Id. § A(3).
231. Id. (referring to the example of interfaith marriages).
ter—including the degree of legitimacy of impeding freedom of religion and the degree of protection afforded to the freedom to marry. Moreover, in the context of the discussion regarding the private marriages of couples “disqualified for religious marriage,” the Court expressed explicit disapproval of the religious prohibition on marriages of this sort, stating that it was a “ritualistic-religious” impediment inconsistent with the fundamental values of a democratic state.

Similarly, the Supreme Court’s approach regarding the religious prohibition on interfaith marriages is also based on secular considerations, rather than religious norms. This is the case despite the fact that unlike the marriages of couples “disqualified for religious marriage,” which under Jewish law are prohibited beforehand but valid a posteriori, marriages between Jews and non-Jews are void ab initio. Unlike the position taken regarding the private marriage ceremonies performed in Israel by couples “disqualified for religious marriage,” however, the Supreme Court refuses to recognize the private marriages of interfaith couples.

Nonetheless, it seems that the Court would have reached a different conclusion had it been faced with a petition to recognize a civil marriage ceremony of an interfaith couple performed outside of Israel. This is because the Supreme Court is apparently of the view that the public controversy over the introduction of civil marriage within Israel (which would result in allowing interfaith marriages) cannot justify, in and of itself, the invalidation of interfaith marriages when they are conducted in a foreign country. Indeed, this position is clearly stated in the notable dictum of Justice Sussman in the Funk-Schlesinger case:

233. See sources cited id.
234. HCJ 80/63 Gurfinkel v. Minister of Interior 17 PD 2048, 2089 [1963] (Isr.) ("[The prohibition on marriages of a Cohen and a divorcee] is religious-ritualistic given that it is based on ancient concepts regarding the superior status of the Cohen. The imposition of a prohibition of this sort on a non-believer is difficult to reconcile with the freedom of conscience and the freedom of action that it entails.") (author’s translation from the Hebrew).
235. See, e.g., CA 373/72 Tapper v. State of Israel 28(2) PD 7, 12–13 [1974] (Isr.). Muslim law, on the other hand, allows a Muslim man to marry a non-Muslim woman. See SHIFMAN, supra note 221, at 188.
236. CA 373/72 Tapper v. State of Israel 28(2) PD 7 [1974] (Isr.). The case involved a petition to recognize the private marriage ceremony in Israel of an interfaith couple (a Jewish Israeli man and a Christian Swiss woman). Id. The couple argued that the Court should adopt the English institution of common law marriage, and thereby recognize their private ceremony. Id. The Court did not in any way disapprove of interfaith marriages as such. Rather, it rejected the petition because it perceived the adoption of the institution of common law marriage as standing in contrast with Israeli public policy, depicting it as “a medieval religious institution which has become obsolete.” Id. at 12–13.
238. CA 373/72 Tapper v. State of Israel 28(2) PD 7, 9 [1974] (Isr.).
The fact that Jewish religious law considers interfaith marriages void does not, in itself, compel the secular court to reach the same conclusion when it decides the question according to a foreign law. Only if the court reaches the conclusion that the marriage is offensive to Israeli external (international) public policy, that is if such a marriage is so offensive to public policy that it should be considered void irrespective of wherever it has been celebrated, and then the court should give it no effect.

However, religious impediments to marriage, important as they may be, should not be decisive in such cases. The Israeli public is divided into two camps—one which observes religious law or most of its commands, and another which emphasizes the difference between a state abiding by the rule of law and a state abiding by religious law [halakha]. The views of these two groups are entirely at odds with each other. Israeli public policy does not dictate that the judge will compel one camp to follow the views of the other. Life demands tolerance towards the other and showing consideration for differing views. Therefore, the yardstick of the judge must be the balance of all views prevailing in the public.239

This statement, written in 1963, reflects the position of the “enlightened Israeli public” on this issue to this day. It would thus appear that the recognition of foreign civil marriages of opposite-sex couples who are ineligible for marriage within Israel due to “purely religious” impediments is not in conflict with Israel’s external public policy. Thus, one is left with one remaining issue—whether a distinction should be drawn for the purposes of external public policy between the religious prohibitions on marriages of opposite-sex couples and the prohibition against same-sex marriages.

C. Same-Sex Marriage and the Public Policy Exception

Orthodox Judaism does not perceive same-sex marriage as a forbidden category—it is simply nonexistent.240 Moreover, same-sex relations are subject to harsh and extreme condemnation under Orthodox Judaism.241 Therefore, the recognition of a foreign same-sex marriage is undoubtedly contrary to the public policy of religious law in Israel.242 Unlike the reli-

239. HCJ 143/62 Funk-Schlesinger v. Minister of Interior 17(1) PD 225, 256–57 [1963] (Isr.).
240. See SHIFMAN, supra note 221, at 183.
241. The Conservative and the Reform movements hold a much more lenient approach toward same-sex unions. See supra note 5.
242. Given the separation of religion and state, United States courts have taken a very different approach. See, e.g., Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407 (Conn.
gious prohibitions on certain types of marriages between opposite-sex couples, though, most Western countries, including Israel, do not perceive the prohibition against same-sex marriage as a “purely religious” impediment. Despite the fact that a growing number of jurisdictions have opened the institution of marriage to same-sex couples, the majority of Western countries—notwithstanding their legal definition of marriage as a civil-secular right—still prohibit such marriages. Therefore, as opposed to the Israeli prohibitions on interfaith marriages and on the marriages of opposite-sex couples “disqualified for religious marriage,” the prohibition against same-sex marriages may very well remain intact even if Israel decides to introduce the option of civil marriage. It would seem that the common view—both in Israel and in the majority of Western countries—is that the state could justify the prohibition against same-sex marriage not only on the basis of religious convictions, but also on the basis of “secular” rationales. It is therefore fitting to classify the prohibition as a “semi-religious impediment.”

As discussed supra in Part V.B., in the context of the configuration of Israel’s public policy, the Israeli civil courts do not view themselves bound by religious norms and interests. The question must be posed, then, whether the recognition of same-sex marriages performed abroad by Israeli residents and citizens is contrary to Israeli secular public poli-

2008). In Kerrigan, the Supreme Court of Connecticut rejected the argument that opening up of marriage to same-sex couples would infringe upon the freedom of religion, stating: “[R]eligious autonomy is not threatened by recognizing the right of same sex couples to marry civilly. Religious freedom will not be jeopardized by the marriage of same sex couples because religious organizations that oppose same sex marriage as irreconcilable with their beliefs will not be required to perform same sex marriages or otherwise to concede same sex marriage or relations. Because, however, marriage is a state sanctioned and state regulated institution, religious objections to same sex marriage cannot play a role in our determination of whether constitutional principles of equal protection mandate same sex marriage.” Id. at 475.

243. The countries and districts that have thus far opened the institution of marriage to same-sex couples are: the Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Iceland, Portugal, Argentina, Mexico City, and five states in the United States (Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire) as well as the District of Columbia. See Timeline of Gay and Lesbian Marriage, Partnership or Unions Worldwide, UK GAY NEWS, www.ukgaynews.org.uk/marriage_timeline.htm (last updated Dec. 23, 2010). Many other countries have recognized same-sex couples through the establishment of marriage-like institutions (such as “civil unions” and “registered partnerships”), which accord those couples many of the rights associated with marriage, including: Denmark, Finland, New Zealand, Australia, Hungary, Switzerland, England, Ireland, France, Germany, Austria, the Czech Republic, Luxembourg, Slovenia, and a number of states in the United States (including New Jersey, Oregon, Washington, Hawaii, and Nevada). See id.
cy. Even though the prohibition against same-sex marriage is ostensibly also based on secular considerations, it is difficult to ascertain any rational liberal justifications for the prohibition. In fact, it appears that the “secular” arguments proffered by opponents of same-sex marriage—both in Israel and in the majority of the Western world—constitute a pretext for prejudice against gay men and lesbians.

The most common argument offered to justify the prohibition on same-sex marriages is a definitional-moral-traditional argument, according to which marriage, by its very nature, is and has always been limited to a union between a man and a woman. Therefore, as the argument goes, since the institution of marriage was historically rooted in the need to foster procreation, same-sex couples do not fall within the realm of the definition of marriage, and their inclusion in the institution would be detrimental to its very stability as the fundamental organ for the existence and survival of the human race.

The main flaw of the above argument is that it disregards the considerable social and legal changes in the perception and the characteristics of marriage that have taken place over the last few decades—namely, the shift in the concept of marriage from a patriarchal property arrangement for the purpose of procreation, with specific gender roles assigned to each of the partners, to a unitive institu-

244. See William N. Eskridge, Jr., The Case for Same-Sex Marriage 87–104 (1996).
245. See, e.g., George W. Dent, Jr., The Defense of Traditional Marriage, 15 J.L. & Pol. 581, 593–97 (1999); Stephen Macedo, Homosexuality and the Conservative Mind, 84 Geo. L.J. 261, 268–70 (1995) (offering a critical assessment of the conservative case for discrimination against homosexuals, including the procreation argument); Lynn D. Wardle, A Critical Analysis of Constitutional Claims for Same-Sex Marriage, 1996 BYU L. Rev. 1, 33–35 (1996) [hereinafter Wardle, A Critical Analysis]; James Q. Wilson, Against Homosexual Marriage, in Same-Sex Marriage: The Moral and Legal Debate 137 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997). This concept has led to the adoption of the various federal and state Defense of Marriage Acts (“DoMA”), whose constitutionality has recently been challenged. See, e.g., Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d (D. Mass 2010) (holding that DoMA’s prohibition against extending federal benefits to gay couples in Massachusetts—including filing a joint income-tax return or claiming spousal Social Security benefits—is unconstitutional, reasoning that the Act was driven solely by animus against gay people, which could not serve as a legitimate basis for government action); see also Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 998, 1002 (N.D. Cal. 2010) (striking down California’s voter-approved ban on same-sex marriage, and thereby rejecting defendant’s argument that same-sex marriage would damage traditional marriage, holding that: “Tradition alone . . . cannot form a rational basis for a law [under the Equal Protection Clause]. The ‘ancient lineage’ of a classification does not make it rational. Rather, the state must have an interest apart from the fact of the tradition itself . . . . [M]oral disapproval, without any other asserted state interest, has never been a rational basis for legislation.”) (second alteration in original) (internal citations and quotation marks omitted).
tion whose regulation is primarily aimed at furthering the emotional and economic relationship between the spouses on equal terms.\textsuperscript{246} The definitional argument thus ignores the fact that marriage is a changing institution whose religious, sexist, and patriarchal characteristics are fading more and more as time passes.\textsuperscript{247} Moreover, modern family law clearly differentiates between the regulation of the parent-child relationship and of that between the partners themselves, and the state regulates and encourages procreation and child-rearing in contexts that have nothing to do with marriage.\textsuperscript{248}

The definitional argument also ignores the transformations that have taken place in the structure of the modern family and the growing legal recognition of “post-modern” families. This is reflected, inter alia, in the abandonment of most distinctions that were once commonly made between parental rights of married opposite-sex couples and those of cohabiting partners (of whatever sexual orientation) as well as in the changing assumptions regarding the best interest of the child.\textsuperscript{249} The “defini-


\textsuperscript{247} See id.

\textsuperscript{248} See, e.g., Single Parent Families Law, 5752–1992, SH No. 147 (Isr.). The Constitutional Court of South Africa has perhaps been the most persuasive in articulating this shift away from connecting marriage and procreation:

From a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy.

Nat’l Coal. for Gay & Lesbian Equal. v. Minister of Home Affairs 2000 (2) SA 1 (CC) para. 51 (S. Afr.).

\textsuperscript{249} Legal changes made to that effect in Israel include the Supreme Court’s decision to repeal the restrictions placed on the access of single women (including lesbians) to artificial insemination and in vitro fertilization services. See HCJ 2078/96 Weiss v. Minister of Health (Feb. 11, 1997) (unpublished) (Isr.). Similarly, the Supreme Court has also allowed for same-sex second-parent adoptions. See CA 10280/01 Yaros-Hakak v. Attorney-General 59(5) PD 64 [2005] (Isr.). The argument that the sexual orientation of same-sex parents could harm their children has been refuted by an abundance of scientific research showing that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by opposite-sex parents. See, e.g., Rachel H. Farr, Stephen
tional” argument is thus based on a conservative worldview that opposes social change of any kind and purports to maintain the traditional gender-role dichotomy and to preserve the patriarchal and heterosexist attributes of traditional marriage.

An additional common argument against allowing marriages of same-sex couples is the “slippery slope” argument, according to which the recognition of same-sex marriage would lead to, and even justify, the recognition of the marriages of minors, incestuous marriages, and polygamy. This argument is also tenuous. In certain religious circles same-sex relationships are indeed perceived as no less abhorrent than incest. However, under secular public policy, a clear distinction must be drawn between the prohibition against same-sex marriage on the one hand and the prohibitions against marriages of minors, incestuous marriages, and polygamous marriages, on the other hand. As previously discussed, the purpose of the latter prohibitions is the preservation of fundamental values such as the principle of gender equality and the protection of weaker parties. These considerations are not at all applicable to same-sex partners (who are single, adult, and unrelated to one another) and cannot justify the prohibition on their marriages.253 This view was clearly expressed by the New York Appellate Division in Martinez v. County of Monroe, in which the court held that despite the inability of same sex couples to marry within the State of New York, principles of comity compelled recognition of a marriage celebrated in Canada by a same-sex couple residing in New York.254 As the court stated: “[The natural law]
exception has generally been limited to marriages involving polygamy or incest or marriages ‘offensive to the public sense of morality to a degree regarded generally with abhorrence,’ and that cannot be said here.\textsuperscript{255}

Moreover, as opposed to the criminal sanctions imposed by Israeli law on incest and on the entry into marriages involving minors and polygamy, not only did the legislature repeal Israel’s sodomy law more than two decades ago\textsuperscript{256} and provide extensive protections against discrimination on the basis of sexual orientation,\textsuperscript{257} but the Israeli courts have also accorded same-sex couples wide recognition and comprehensive protection in a variety of legal fields. For instance, same-sex couples have been recognized as “cohabitant partners” for the purpose of employment law, as well as for purposes of inheritance and immigration.\textsuperscript{258}

Furthermore, in the \textit{Ben-Ari} case, in which the Supreme Court ordered the registration of the marriage in Canada of an Israeli same-sex couple, it refrained from holding that the marriage was in conflict with Israeli

\textsuperscript{255} Martinez, 850 N.Y.S.2d at 743 (quoting \textit{In re May’s Estate}, 114 N.E.2d 4, 7 (N.Y. 1953)). It should be noted that the legal situation in this regard is different in England, since the barrier for recognizing foreign same-sex marriages of English residents is the choice of law rule for the essential validity of the marriage (which refers to the law of the parties’ domicile) and not the public policy exception. However, the English civil partnership law of 2004, which established a pseudo-marriage institution for same-sex couples, stipulates that same-sex marriages performed in a foreign country by English residents will be recognized in England as “civil unions” (although not as marriage for all intents and purposes). See Wilkinson v. Kitzinger, [2006] EWHC (Fam) 2022 (Eng.); Civil Partnership Act 2004, 2004, c. 33, §§ 212–18 (UK). For an analysis of the English civil partnership law, see Kenneth McK. Norrie, \textit{Recognition of Foreign Relationships Under the Civil Partnership Act 2004}, 2 J. PRIVATE INT’L L. 137 (2006).

\textsuperscript{256} The sodomy law was repealed in 1988, as part of a general reform of the Israeli Penal Law. See Penal Law (Amendment No. 22), 5748–1988, 42 LSI 57 (1987–1988) (Isr.).


public policy. Indeed, in that case the Court refrained from making any ruling on the validity of same-sex marriages performed in Canada, noting: “There is no application before us to recognize a marriage between two persons of the same sex that took place outside Israel. When this question arises, it will be examined in accordance with [the] accepted rules of private international law.” However, the Court regarded the State’s argument—according to which a foreign marriage should not be recognized unless it constitutes a “legal framework” of marriage that is recognized in Israel—as one that was really based upon public policy considerations. Accordingly, the rejection of the “legal framework” argument in the *Ben-Ari* case suggests that when the Supreme Court is faced with a petition to fully recognize a foreign same-sex marriage, it will refrain from holding that such recognition violates Israel’s external public policy.

Given the characteristics of Israel’s external public policy in the field of marriage recognition and the criteria for its application, and considering the degree of recognition and protection afforded by Israeli law to same-sex couples and their families, the recognition of a foreign same-sex marriage should not be viewed as contrary to Israel’s external public policy. Application of the Anglo-American criteria for determining whether recognition of a foreign marriage violates the strong public policy of the forum also indicates that the prohibition on same-sex marriage within Israel does not reflect a strong enough public policy for the invalidation of such marriages when performed in a foreign country. As discussed, the mere fact that the marriage is deemed void by the law of the forum does not, in and of itself, lead to the application of the exception. The Anglo-American public policy exception has usually been utilized only when the void marriage was also performed in violation of the forum’s penal statutes. Even in such cases, some United States courts have been reluctant to apply the exception.

The Israeli courts should thus adopt the approach taken by the New York Appellate Court in the *Martinez* case, which held that recognition of a marriage between two people of the same sex does not give rise to moral repugnance, and that absent an explicit statutory prohibition on the
recognition of same-sex marriages performed in a foreign country\textsuperscript{265} (as opposed to the prohibition on same-sex marriages within the State of New York),\textsuperscript{266} the recognition of such marriages does not violate the state’s public policy.\textsuperscript{267}

CONCLUSION

Israeli domestic law in the field of marriage and divorce severely infringes upon the ability of many Israeli citizens and residents to fully realize their right to family life, including same-sex couples and opposite-sex couples ineligible to marry in Israel due to restrictions imposed by religious law. The proper solution for ensuring the right of every individual to marry, free of the shackles of religious law, is the introduction of civil marriage in Israel. However, such a solution is not expected in the foreseeable future. Under the current legal regime, couples prohibited from marrying in Israel are forced to travel abroad in order to realize their fundamental rights. The lack of recognition of marriages contracted abroad between persons ineligible for marriage within Israel due to religious impediments aggravates the infringement of their basic right to family life.

The Israeli Supreme Court has utilized over the years two mechanisms in order to accord some of the rights of marriage to couples ineligible for religious marriage in Israel who performed a civil marriage ceremony abroad—the registration mechanism and the “marriage incidents” approach—but to date, the Court has refrained from ruling on the validity of those marriages. These alternative solutions are limited and insuffici-

\textsuperscript{265} As opposed to the majority of states in the United States, New York has not enacted a law which bars the recognition of out of state same-sex marriages (a Defense of Marriage Act). See Martinez v. County of Monroe, 850 N.Y.S.2d 740, 743 (N.Y. App. Div. 2008); Leonard, supra note 254.

\textsuperscript{266} See Hernandez v. Robles, 855 N.E.2d 1 (2006) (holding that New York Domestic Relations Law does not authorize issuance of licenses for marriages of same-sex partners, although the statute does not, on its face, expressly forbid such marriages). However, in the Martinez case, the Appellate Division held that it should not be concluded from the court’s holding in Hernandez that the recognition of same-sex marriages performed outside of New York violates public policy, as Hernandez is limited to the holding that the Domestic Relations Law did not violate the New York State Constitution. See Martinez, 850 N.Y.2d at 743. See also Kimberly N. Chehardy, Note, Conflicting Approaches: Legalizing Same-Sex Marriage Through Conflicts of Law, 8 Conn. Pub. Int. L.J., Spring 2009, at 131, 151–54.

\textsuperscript{267} Martinez, 850 N.Y.2d at 743 (“[T]he place for the expression of the public policy of New York is in the Legislature, not the courts. The Legislature may decide to prohibit the recognition of same-sex marriages solemnized abroad. Until it does so, however, such marriages are entitled to recognition in New York.”).
cient, as they accord the couple very few of the rights associated with marriage, leaving them uncertain of their status and of their rights and obligations vis-à-vis one another, as well as toward third parties. Although by virtue of the registration of the foreign marriage and the recognition of some of its incidents the couple may enjoy a few of the rights associated with marriage, their foreign marriage is largely unrecognized.

All Western legal systems accept the fundamental principle that where a foreign element is involved, the rules of private international law supersede domestic law. Based on this premise, and given the absence of a statutory choice of law rule for the recognition of marriages conducted outside of Israel, this Article attempts to propose criteria for the adoption of a choice of law rule that will correspond to the unique social and legal conditions prevalent in the State of Israel. The critical comparison between the two main choice of law systems for marriage recognition (the United States and England), as well as the examination of the different ramifications of the application of each of them in Israel, have led to the conclusion that the American choice of law rule referring to the lex loci celebrationis in matters of capacity is the one most appropriate for adoption in Israeli law.

The American rule is preferable, despite some of its flaws, since it best promotes the policy objectives of the choice of law rules in the field of marriage recognition, particularly in light of its emphasis on the policy of validation. The American rule serves to preserve family ties and stability and gives effect to the parties’ intentions; it also promotes certainty, convenience and predictability, as well as the uniformity of status, thereby preventing “limping marriages.”268 The adoption of the place of celebration rule is also preferable considering the injustice caused by the exclusive application of religious law, whereby ancient rituals serve to deprive large groups of the Israeli population of the fundamental right of marriage. The English rule, on the other hand, was largely designed in order to prevent English domiciliaries from evading the prohibitions prescribed by their personal law, thereby emphasizing the moral and cultural interests of the forum rather than the general principles of private international law.269 This is not to suggest that the social interests of the forum in maintaining the core aspects of its marriage institution should be disregarded; rather, those interests should be considered within the public policy exception, which was explicitly designed for that purpose.

Accordingly, should the American choice of law rule be adopted in Israel, as suggested herein, it would not follow that all foreign marriages of

268. See supra Part V.A.
269. See supra Part IV.B.
couples ineligible for marriage in Israel would be recognized under Israeli law, even though complying with the *lex loci celebrationis*. Some of those marriages may still be deemed invalid by virtue of the public policy exception. However, this Article argues that public policy should not be invoked against marriages performed in circumvention of the forum’s internal religious or semi-religious prescriptions. The public policy exception should instead be interpreted narrowly, as protecting only democratic, secular, rational, and liberal values, including the principle of equality, as well as the right to family life and freedom of conscience. Therefore, marriages of two single adults who are not related to one another, including same-sex couples, should be fully recognized under the Israeli conflict of laws.
NORMATIVE MODELING FOR GLOBAL ECONOMIC GOVERNANCE: THE CASE OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

Edward S. Cohen*

INTRODUCTION

The United Nations Commission on International Trade Law (“UNCITRAL”) was created by the General Assembly in 1966 and given a mandate to “to further the progressive harmonization and unification of the law of international trade.” In contrast to the emphasis placed on public law in the works of institutions such as the World Trade Organization (“WTO”), UNCITRAL’s focus is on private international law, defined as “the laws applicable to private parties in international transactions.” After approximately two decades of small accomplishments and little recognition, however, UNCITRAL has emerged as an increasingly significant player in shaping the law and politics of international trade. Its work product—model laws, legislative guides, contractual and arbitration rules, and conventions—is increasingly influential in

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2. Id.
shaping the law of global commerce. Moreover, UNCITRAL engages in sustained cooperation with other public and private international organizations involved in shaping the legal frameworks of national and global commerce and investment.

The aims of this Article are threefold: to present an overview of UNCITRAL and its role, explain how and why it has increased its presence in shaping international economic law, and explore how UNCITRAL’s work and structure can help advance an understanding of the legal construction of the global political economy. The Article argues that UNCITRAL, as an institution, is best understood as a “site” for normative modeling through which legal norms, principles, and standards for the global political economy are articulated. At stake in UNCITRAL’s work is influence over the definition of normative standards that shape legal rules throughout the global economy, definitions over which actors with political, economic, and professional stakes compete intensely to control. These actors include states, corporate and industry representatives, legal experts and professionals, and other public and private international organizations. Without significant institutional resources of its own, UNCITRAL acts only when it is mobilized or “enrolled” by these actors.

Two features of UNCITRAL’s practice—the variety of forms through which it articulates legal norms and the unique political structures through which it works—make it increasingly attractive to resource-rich actors attempting to mold the law that governs contemporary international commerce. These features also enable UNCITRAL to draw simultaneously on political and technical standards of legitimacy for its work, further increasing its value for these actors. Increasingly, however, claims about the legitimacy of UNCITRAL’s work as global standards of law have come under internal and external critiques. The dynamics of these


5. See id.

6. A normative model may be defined as “a prescriptive model which evaluates alternative solutions to answer the question, ‘what is going on?’ and suggests what ought to be done or how things should work according to an assumption or standard.” BUSINESSDICTIONARY.COM, http://www.businessdictionary.com/definition/normative-model.html (last visited Oct. 15, 2010).


8. See discussion infra Part IV.
claims and criticisms provide insight into larger questions regarding the substance and control over the legal rules governing global commerce.

I. NORMATIVE MODELING IN GLOBAL GOVERNANCE

In their magisterial work on the regulation of the global economy, Braithwaite and Drahos note that the constitution of business regulation on the global level is a complex process involving various agents, mechanisms, and locations. The key agents in this process are major states, large corporate organizations, certain international institutions, key business organizations, and legal and business professionals acting in organizations or as individual “policy entrepreneurs.” With rare exceptions, these actors share the ability to mobilize significant resources to engage mechanisms to advance their priorities and to catalyze projects for structuring the global political economy. The most important of these mechanisms include military and economic coercion, reciprocal adjustment, systems of reward, and modeling. The central pattern is one in which various agents employ a number of mechanisms that interact with one another to shape the “contest of principles” governing the scope and direction of specific areas of regulation. These contests play out in a variety of locations, or “sites,” where regulations are defined and enforced. These locations span the transnational, international, state, regional, and local level and can be of a public, private, or hybrid character. Given the variety and shifting nature of sites of regulatory practice, the most effective actors are ones that are able to “forum shift” among these sites, galvanizing support and advancing a common regulatory project.


11. See generally Braithwaite & Drahos, supra note 9, at 27–28, 475–06.

12. See id. at 532–49.


14. Saskia Sassen, Territory, Authority, Rights 69–70 (2006) (referring to “global cities” as key sites for innovation in the global economy. More generally, a “site” can refer to any institutional context for rule or law-making, interpretation, and enforcement.)

Normative modeling, in which actors attempt to define principles, standards, and rules that guide regulatory practices, plays a particularly important role in shaping global business law and regulation, one that is often unrecognized.\textsuperscript{16} Such modeling is identified as an “important” mechanism of globalization in every field of business regulation as analyzed by Braithwaite and Drahos—a status few other mechanisms can claim.\textsuperscript{17} But special care is needed in discussing normative modeling, as discussions of this process often begin with flawed assumptions.\textsuperscript{18} Here, it is necessary to clarify three important starting points for this discussion.

First, the process or mechanism of normative modeling should be understood as one that takes place simultaneously with, and often as part of, an attempt to use other mechanisms of regulatory globalization.\textsuperscript{19} Thus, coercive power and/or strategies of economic reward are often embodied in attempts at normative modeling, and advocates of particular normative models often try to engage actors with coercive or reward-based resources to help advance their agendas for shaping dominant models in a given area of regulation. As Braithwaite and Drahos put it, “modeling is patterned according to configurations of power.”\textsuperscript{20} In order to capture this interaction, they draw on the concept of “enrollment,” which refers to the ways actors using different mechanisms are continually looking to mobilize each other to pursue projects of mutual interest.\textsuperscript{21} In the specific context of international economic law, one can follow Susan Sell by understanding this process as one in which power can be mobilized through law and vice-versa.\textsuperscript{22}

The second point is that normative modeling is usually driven by transnational coalitions, linking state power, private interests, and specif-

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\item 16. See Braithwaite & Drahos, supra note 9, at 539–43.
\item 17. Id. at 539.
\item 18. Id. at 19–20. The term “norms” is used here as the most general category for describing the structure of a model for laws and regulations, within which principles, standards, and guidelines are sub-categories. Id.
\item 20. Braithwaite & Drahos, supra note 9, at 583.
\item 21. Id. at 32.
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ic (in this case legal) expertise. 23 Scholars often emphasize, with good reason, the role of formal public institutions and organizations as the main vehicles through which norms are articulated, enforced, and legitimized. 24 But norms develop and consolidate in a variety of sites, as normative entrepreneurs 25 continually search for vehicles onto which they can attach their preferred models, principles, and rules. Thus, in the area of international economic law, norms can be modeled and diffused through standard contracts, 26 common practices in markets and industries, 27 the work of law firms and bar associations, 28 court decisions, 29 and legal scholarship, 30 as well as through the activities of public institutions at the national and international levels. 31 Normative entrepreneurs, who may be located in public, private, or expert positions, work continually to engage various mechanisms to enroll a variety of actors and sites into specific modeling projects. 32


25. See KINGDON, supra note 10. The role of normative (and/or policy) entrepreneurs is discussed in detail in BRAITHWAITE & DRAHOS, supra note 9, at 18–26.


31. See id.; see also JARROD WIENER, GLOBALIZATION AND THE HARMONIZATION OF LAW (1999).

32. Although the focus of this Article is on the work of one public institution, UNCITRAL’s role in normative modeling cannot be fully understood unless it is placed in the context of these and other settings in which norms are developed and diffused. Indeed, it is the manner in which UNCITRAL’s products and processes fit in with these dynamics of normative modeling in private international law that made it an increasingly influential site in the development of commercial law.
The final starting point is the recognition of the role of legitimacy in the fate of normative modeling projects for the global economy. In his classic and still widely influential essay, Mark Suchman defines legitimacy as “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.” While actors and coalitions invest in legal norms to advance their power and interests, the success of specific legal rules, standards, codes, and principles depends on their ability to claim some kind of legitimacy independent of these actors’ motivations.

In the context of global economic governance, legal rules and regimes are usually justified in two ways. One approach is political, emphasizing the scope of affected interests incorporated into the processes by which models are developed and adopted. In this approach, legal regimes are considered legitimate to the extent that they are acceptable to the agents most impacted by their operation and the extent to which they conform to widely accepted principles of regulation. The other approach is a technical one, in which regimes are judged by the sophistication of their drafting, their likelihood of attaining the regulatory ends desired, and the involvement of leading experts in their development. In the context of private international law, for example, legal regimes are often justified by their proven ability to facilitate the mobility of capital and encourage investment that produces increases in wealth.

34. For a systematic analysis of this relationship, and of the role of international legal discourse in constituting and shaping legitimacy claims, see Friedrich V. Kratochwil, Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs (1989).
35. This Article employs the distinction between “political” and “technical” legitimacy claims because it conforms to the language used by the participants in UNCITRAL’s work, and serves best to illuminate the forms in which emerging challenges to the legitimacy of this work have been articulated and advanced. But see Suchman, supra note 33, at 577–84 (distinguishing between “pragmatic,” “moral,” and “cognitive” forms of legitimacy claims).
36. This notion is equivalent to Majone’s classic definition and discussion of “procedural legitimacy.” See Giandomenico Majone, Regulatory Legitimacy, in Regulating Europe 291–94 (Jeremy Richardson ed., 1996).
37. See id.
38. Id. at 294 (although Majone categorizes this dimension as “substantive legitimacy”).
39. See, e.g., Harold S. Burman, The Commercial Challenge in Modernizing Secured Transactions Law, 8 UNIF. L. REV.347 (2003) (Burman is Assistant Legal Advisor for Private International Law in the U.S. Department of State, and has been the U.S. repre-
cle postulates that UNCITRAL’s work has proven itself amenable to both kinds of legitimacy claims, and this has been a key factor in its growing influence and the willingness of resource-rich actors to invest in its work.

Legitimacy claims, however, are fluid and always subject to contestation and change. As understandings of legitimacy evolve, claims that were once unchallenged come under pressure from old and new actors as well as the institutions that utilize them. Two kinds of processes that generate these challenges are especially relevant to the case of UNCITRAL. First, initially shared understandings of the way an institution works can be shattered as the evolution of the institution gradually transforms its patterns of operation and/or its work product begins to move in directions unanticipated by and unacceptable to key actors. Second, the growing interactions between different sites in the field of global business regulation and the degree to which any particular site conforms to a given understanding of what makes the rule-making legitimate can generate challenges to these accepted understandings. Both kinds of processes are currently at work in the context of UNCITRAL, raising key questions regarding the larger process of the constitution of legal regimes for global commerce.


40. See Suchman, supra note 33.

41. Id. at 585–99 (recognizing these dynamics and identifying the challenge of “legitimacy management” as central to the success of any organization). In effect, this Article suggests that UNCITRAL is now engaged in just such management.

42. See David Szablowski, Transnational Law and Local Struggles, Mining, Communities and the World Bank 292–93 (2007). This is often referred to as a situation of “interlegality,” which Szablowski defines as “the overlapping or ‘intertwined’ action of different legal orders upon a single social situation.” Id. For the centrality of this phenomenon in the literature on transnational legal pluralism, see Gralf-Peter Calliess & Peer Zumbansen, Rough Consensus and Running Code: A Theory of Transnational Private Law (2010) (describing and analyzing various law-making regimes in the transnational arena).
II. UNCITRAL: HISTORY AND WORK

A. The Origins of UNCITRAL

The impetus behind the creation of UNCITRAL, in 1966, must be put into two different contexts: the history of private law harmonization since the 1890s, and the changing political economy of international trade in the mid-1960s. The project to “harmonize” or “unify” private international commercial law emerged in the 1890s, as a by-product of the intensifying economic interchanges of that period, sometimes called the “first wave” of globalization. It was a project driven by legal academics, jurists, and politicians almost exclusively from the world of Continental European “civil law” states. The idea behind this project was the contention that diversity of legal rules and procedures in such fundamental areas as contracts, property, and jurisdiction acts as a hindrance to deeper economic interaction across the states. It was argued that by “harmonizing” or “unifying” law in these key areas, economic integration would be facilitated, which in turn would lead to more peaceful relationships between states.

The immediate impact of this project was limited, but it did leave both an institutional and programmatic legacy. The institutional legacy was the formation of the Hague Conference on Private International Law in 1893 and of the International Institute for the Unification of Private

43. The following discussion, which is part of a larger research project by the Author on the politics of private international law, draws on the study of UNCITRAL documents, interviews with participants, observation of UNCITRAL Working Groups, and on a small but growing body of scholarly work which is presented in subsequent notes. Interviews with UNCITRAL Officials and participants were, in most cases, conducted on the agreement that the individuals would not be named, but that their position could be indicated in ways that did not compromise the confidentiality of the views expressed. This Article follows that practice.


45. CUTLER, supra note 44, at 207–11.

46. Id.

47. Note that “harmonization” of law means adjusting the rules of different legal systems so that they follow the same substantive principles in specific areas, even if they remain distinctive in some features; “unification” means that different states agree to adopt exactly similar rules in specific areas of law, usually through international conventions. See David. W. Leebron, Lying Down With Procrustes: An Analysis of Harmonization Claims, in 1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FAIR TRADE? 41 (Jagdish Baghwati & Robert E. Hudec eds., 1996).

Law ("UNIDROIT") in 1926, which created stable fora through which experts and government officials could sustain the project over time and extend the scope and depth of their own networks of interested parties. Both institutions remain active today and indeed are involved in increasingly substantial cooperation with each other and with UNCITRAL. Perhaps more importantly, the discourse and institutions created in this period generated a stable core of personnel and ideas that sustained the project of harmonization/unification, and established the basic framework for thinking about the value, purposes, and strategies for such projects.

The second part of the context of UNCITRAL’s formation was the changing politics and economics of the post-World War II global system. On the one hand, by the mid-1960s, the quickly increasing number of newly independent “developing” states began to take an active presence in multilateral discussions of issues surrounding the structure of the international economy. Much of this activity focused on the United Nations ("UN") system, which offered access and voice unavailable to these states in other contexts. In the General Assembly, Economic and Social Council ("ECOSOC"), and especially the UN Commission on Trade and Development ("UNCTAD"), developing states began pushing an aggressive program demanding aid and investment from developed states and criticizing key structural elements of the international economic order. At the same time, the United States began to engage deeply in these debates at the multilateral level, perceiving this as a necessary aspect of the Cold War era competition for influence among the newly independent states. The US and its allies, however, faced structural impediments with...
the existing UN agencies. The one state/one vote rule, the dominance of critical perspectives in UNCTAD, and the general politicization of the debates in most UN fora limited US influence and led to a search for alternative institutional arenas in which to advance its interests in promoting a generally capitalist, market-oriented development agenda.55

UNCITRAL was created in response to this dilemma, though its emergence was rather circuitous.56 The starting point was the adoption, in 1958 by a United Nations diplomatic conference, of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”).57 The New York Convention marked the first time that the US government, and key elements of the US legal community, played an active role in advancing the reformation and harmonization of elements of private commercial law as a tool for furthering global economic integration.58 The quick adoption and initial success of the New York Treaty led the US and key European and Latin American states to explore the notion of creating a formal institution to incorporate the harmonization/unification project within the UN system.59

In 1965, the Secretary General commissioned a study of the need for and potential of a UN Commission to advance this project,60 led by Clive Schmitthoff—the leading British authority on the law of international trade—and including legal experts from developed and developing states.61 The resulting “Schmitthoff Report”62 formed the basis for a con-

55. See CUTLER, supra note 44; see also Interview with U.S. Officials active in UNCITRAL’s work, in Washington, D.C. (Sept. 21, 2004) [hereinafter Sept. 21 Interview].

56. See generally CUTLER, supra note 44 (providing an overview of this process).


59. See CUTLER, supra note 44.

60. For example, the harmonization and unification of the law of international trade.


sensus that led to the creation of UNCITRAL by the General Assembly in December, 1966.63 At its foundation, UNCITRAL was given the responsibility to oversee the further development of the New York Convention and to explore other areas where legal harmonization seemed possible.64 The first Chair of the Commission was John Honnold, an American legal expert with significant connections to the harmonization/unification expert community.65

The consensus leading to UNCITRAL was the product of a unique confluence of interests that led a number of actors to invest resources in the creation of a new organization. For key non-European states—the US, some developing states, and even the Soviet bloc—UNCITRAL provided a forum for advance commercial law reform projects outside of the West European-dominated fora of the Hague and UNIDROIT.66 For the US and its allies in some key developing states in particular, UNCITRAL offered a forum in which they could pursue market-oriented legal change outside of the heavily “politiced” and confrontational UNCTAD environment.67 For the legal experts committed to the harmonization project, UNCITRAL most likely presented an opportunity to revive their fortunes by attaching their work to the wider legitimacy of the UN system. In effect, UNCITRAL was the result of a decision by the US and key developed and developing states that the project of private law harmonization/unification could be used to advance their development projects, but only if pursued in a new, more inclusive, and differently structured organizational context.68 UNCITRAL’s creation, then, amounted to the creation of a new forum to allow the pursuit of a forum-shifting strategy.69

64. Id.
65. This alliance between key states and a cohesive international network of legal experts has been central to all of UNCITRAL’s subsequent work. More generally, the harmonization project can be seen (in Sassen’s terms) as a residual “capability” created for one set of purposes but then mobilized for the creation of a different type of regime. See Sassen, supra note 14, at 37–38.
67. See id.; see also Spero & Hart, supra note 53.
68. See Cutler, supra note 44; see also Spero & Hart, supra note 53.
B. Forms of Work

How does UNCITRAL “do” normative modeling? UNCITRAL’s current understanding of its mission mixes the mandate to “harmonize” and “unify” law with an emphasis on the development and understanding of commercial law that embodies “best practice” standards for the promotion of trade and investment across national borders in the context of divergent legal traditions.70 As the organization’s “Frequently Asked Questions” (“FAQ”) page asserts:

“Harmonization” and “unification” of the law of international trade refers to the process through which the law facilitating international commerce is created and adopted. International commerce may be hindered by factors such as the lack of a predictable governing law or out-of-date laws unsuited to commercial practice. The United Nations Commission on International Trade Law identifies such problems and then carefully crafts solutions which are acceptable to States having different legal systems and levels of economic and social development.71

UNCITRAL’s goal is to become one of the leading, authoritative international bodies in this area and to advance standards that are widely accepted by states and private agents in the global economy.72 In order to accomplish these goals, UNCITRAL generates four different types of work products:73

1. The generation of a multilateral treaty (known as a “Convention”), which is adopted by the Commission and then put out for ratification by states. By signing and then approving such a Convention, a state commits to changing aspects of domestic law to conform to a common international approach; it can do this by applying the exact same provisions (unification) or by adopting rules that embody a general set of principles (harmonization).

71. See UNCITRAL FAQ, supra note 1.
72. See id.; see also UNCITRAL GUIDE, supra note 4, at 1–3.
73. UNCITRAL breaks down its work into a greater number of categories and organizes them differently. See UNCITRAL GUIDE, supra note 4. This Article highlights these four types of work products because they are the most important forms in which UNCITRAL articulates legal norms and they have the most impact on international commercial law.
2. The promulgation of a “Model Law” that states can adopt or use to reform specific elements of commercial law within their jurisdictions, such as insolvency or sales contracts. These models tend to reflect a general consensus on the key principles and structures that should govern an area of commercial law across legal systems and can be more or less flexible.

3. The development of a “Legislative Guide” to aid states in the development or reform of a particular area of commercial law. These are less specific and structured than Model Laws; they are developed either to aid in the interpretation of a model law or to address an area where it proves too difficult to resolve the distinctions between national legal systems into a common structure. In addition, Legislative Guides are at times used by other international and regional institutions (especially lending banks and agencies) as part of the conditions for aid to specific states.

4. The “Model Rules” for use by private commercial actors in the design of contracts, in those areas where states allow businesses autonomy to construct their own rules of action.74

This variety of strategies allows UNCITRAL the flexibility to approach particular areas of law in ways most likely to gain support from member states and private actors and thus secure the legitimacy and authority of the institution.

These tools and strategies emerged over time through a process of trial and error. In its first few years of existence, UNCITRAL focused primarily on organizing itself, defining key directions for work, and identifying important constituencies that would support that work.75 It was only in the mid-1970s that it began to generate a series of work products that addressed substantial issues in international commercial law.76 The two most important and successful of these were the Convention on Contracts for the International Sale of Goods (“CISG”) (1980)77 and the UNCITRAL Arbitration Rules (1976).78

74. See generally id. A fifth approach is the development of “Legal Guides” to clarify the issues presented in attempts to harmonize or “modernize” particular areas of law. While important as part of the effort to develop common understandings of legal questions, these Guides are usually part of the process of working towards the development one of the other four instruments.

75. See Block-Lieb & Halliday, Harmonization and Modernization, supra note 52, at 481–88.

76. See infra notes 73–74 and accompanying text (citing the most important of these products).


The CISG provides a common model for contracts involving commerce across national jurisdictions. It has been ratified by seventy-four states, varying from key developed economies to a variety of developing economies across the world.\textsuperscript{79} The CISG addresses the classic “conflicts of law” problem in international commerce, which has been at the heart of the harmonization movement from its beginnings.\textsuperscript{80} A number of subsequent Conventions, in such areas as international payments and the transport of goods by sea, address similar problems. The negotiations of such multilateral Conventions, which aim to harmonize law directly through a binding treaty, illustrate UNCITRAL’s use of the traditional method of the harmonization movement.\textsuperscript{81}

The Arbitration Rules are designed as a means for private parties to incorporate into contracts the designation of arbitration as the dispute resolution mechanism of choice. They are now one of the most commonly used arrangements in international commercial arbitration.\textsuperscript{82} This work was a natural outcome of UNCITRAL’s role as the guardian of the New York Convention, but also amounted to a new strategy for shaping commercial law. Instead of focusing on changing state-promulgated rules, the Arbitration Rules attempt to shape commercial law by influencing legal practice “on the ground” through the promulgation of rules private parties are free to incorporate into their contracts, but that are ultimately enforced by states through the New York Convention.\textsuperscript{83} The success of the Arbitration Rules demonstrated the potential for such a strategy and bolstered UNCITRAL’s authority in the area of commercial arbitration.\textsuperscript{84}

\textsuperscript{79} See CISG, supra note 77.

\textsuperscript{80} See id.; see also Joseph Lookofsky, UNDERSTANDING THE CISG 1 (3d ed., 2008) (providing an overview and in-depth analysis of the CISG).

\textsuperscript{81} Cutler, supra note 44, at 207–25.

\textsuperscript{82} See William K. Slate II et al., UNCITRAL: Its Workings in International Arbitration and a New Model Conciliation Law, 6 CARDOZO J. CONFLICT RESOL. 73, 78–82 (2004). Other important commercial arbitration rules include those of the International Chamber of Commerce (“ICC”) and the rules promulgated by specialized institutions such as the London Court of Arbitration (“LCIA”), the Stockholm Chamber of Commerce, and the American Arbitration Association. Id. The UNCITRAL Rules have also become, along with the rules of the International Centre for Settlement of Investment Disputes (“ICSID”) of the World Bank, one of the two major frameworks for investor-state dispute arbitration. See discussion infra Parts II–IV.

\textsuperscript{83} Slate et al., supra note 82, at 82–88, 106.

\textsuperscript{84} UNCITRAL has recently issued a revised version of the Arbitration Rules, designed to incorporate developments in the intervening decades. See G.A. Res. 31/98, supra note 78 (as revised in 2010), available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-e.pdf. It should be noted that UNCITRAL itself does not conduct or supervise arbitra-
C. From Harmonization to “Modernization” of Law

After the completion of the CISG and the Arbitration Rules, the Secretariat and select members identified other areas of commercial law—such as property, insolvency, and credit—that were within UNCITRAL’s ambit to address. After some initial consideration in the late 1970s, however, UNCITRAL concluded that the political and technical challenges of addressing such issues were too great. 85 But this context changed in the 1980s and 1990s, allowing UNCITRAL to significantly broaden the scope of its work and thus its importance as an institution. 86 While UNCITRAL participants seem surprised and even bemused 87 by this development, in retrospect it can be hypothesized that changing patterns of the global political economy created this opening. The spread of broadly neo-liberal, market-opening norms and projects, the growing focus on national institutions and rules as “non-tariff” barriers in trade politics, a growing concern with the “rule of law,” and the impact of all of these in shifting development strategies helped to put a whole range of issues of national commercial law on the agenda of international institutions and induced states to engage (albeit hesitantly) in projects aimed at establishing global legal standards. 88 Importantly, the deepening integration of markets, production, and investment flows “on the ground” seemed to make more pressing the action to coordinate legal and policy responses to the regulatory and crisis-management challenges that they presented. 89

This proved a crucial turning point for UNCITRAL. In the early 1990s, key actors in the initiative to deepen global economic integration and

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85. See Buxbaum, supra note 39, at 321–22 (referring to the results of UNCITRAL’s discussion of the issue in the late 1970s: “The completed report, however, suggested that the divergence among legal systems was then too great to permit unification in the area . . . As a result, UNCITRAL concluded that unification was not at that time feasible, and postponed its work in the area of security law.”); see also Spiros V. Bazinas, UNCITRAL’s Work in the Field of Secured Transactions, in EMERGING FINANCIAL MARKETS AND SECURED TRANSACTIONS 211, 211–18 (Joseph J. Norton & Mads Andenas eds., 1998).
86. Buxbaum, supra note 39, at 322.
87. Regarding the issue of secured transactions in particular, see Burman, supra note 39 (“In the mid-1990s, the accepted wisdom in the field had placed several areas in the ‘impossible’ list, consigned to the dustbin because of deep differences in legal traditions, the uses of commercial law, and legislative and cultural differences in changing longstanding law. Secured finance was near the top of that list.”).
89. See WIENER, supra note 31, at 17–18; see also Leebron, supra note 47.
create new frameworks to secure this project—in particular, a coalition led by the US, sectors of the financial and investment communities, and legal professionals engaged in the reform of commercial law—were looking for new opportunities and sites through which they could advance their work.\textsuperscript{90} The initial success of UNCITRAL’s limited agenda, they believed, justified investing resources to incorporate it into efforts at commercial law reform that went well beyond the traditional areas and strategies of legal harmonization.\textsuperscript{91} By the late 1990s, UNCITRAL’s work had expanded to include such areas as insolvency, electronic commerce, secured transactions, government procurement, and the role of private financing in infrastructure projects.\textsuperscript{92}

The form and self-understanding of UNCITRAL’s work changed as well. In light of the reach and complexity of the legal work UNCITRAL now undertook, it needed to shift its focus away from the bulky and often difficult to negotiate Conventions, and take advantage of the alternative and more recently developed tools of model laws and legislative guides to help shape the direction of national law reform.\textsuperscript{93} These could be offered as standards of legal best-practices, circulating among key actors to hopefully shape legal reform efforts in more indirect but effective ways than formal Conventions. By the late 1990s, the use of model laws and legislative guides became the preferred mode of operation for UNCITRAL in such key areas as Insolvency and Secured Transactions law.

More generally, UNCITRAL’s understanding of its mission was transformed into one of promoting modernization and reform of commercial law in all of its aspects.\textsuperscript{94} Indeed, the theme of UNCITRAL’s fortieth anniversary Congress in 2007 was “Modern Law for Global Com-

\begin{itemize}
\item \textsuperscript{90} See sources cited infra note 91 and accompanying text. This interpretation is confirmed by an interview with a UNCITRAL official. Interview with UNCITRAL Official, in Vienna, Austria (Sept. 6, 2005) [hereinafter Sept. 6 Interview].
\item \textsuperscript{91} See Burman, supra note 39; see also Terence C Halliday & Bruce G. Carruthers, Globalizing Law: Political Influence in the Legal Construction of Markets by the UN 1–4 (2003) (unpublished manuscript), available at http://www.allacademic.com/meta/p107001_index.html [hereinafter Halliday & Carruthers, Globalizing Law]; see also Sept. 6 Interview, supra note 90.
\item \textsuperscript{92} See UNCITRAL GUIDE, supra note 4.
\item \textsuperscript{94} On the evolution of these strategies in the context of insolvency law, see Block-Lieb & Halliday, Harmonization and Modernization, supra note 52.
\end{itemize}
merce.” As this title and the proceedings indicated, UNCITRAL currently sees its mission extending well beyond, and taking a different shape than, the classic program of legal harmonization/unification. What do “modernization” and “reform” mean in this context? While never clearly explained in official documents, participants share the understanding that the current role of UNCITRAL is to develop and diffuse principles and rules of commercial law that are most appropriate to the promotion and deepening of global economic integration as it has taken form since the late 1970s. This “mission” is supported by the belief that there are certain particularly effective and “efficient” commercial legal


96. This interpretation is based on observations and reports of the Congressional proceedings. See Nicholas Michel, Under-Sec’y-Gen. for Legal Affairs, The Legal Counsel, Opening Address at Modern Law for Global Commerce: Congress to Celebrate the 40th Annual Session of UNCITRAL (July 9, 2007), available at http://www.uncitral.org/pdf/english/congress/USG_Michel.pdf.

97. E-mail correspondence between author and UNCITRAL Official (Dec. 21, 2005) (on file with author); see also id. Particularly important are Jernej Sekolec’s comments, at the time the Secretary of UNCITRAL. See Jernej Sekolec, Commentary, Congressional Roundtable on Process and Methods of International Rule-Making, (July 9, 2007) (on file with author).

98. Throughout UNCITRAL’s deliberations and personal interviews with participants and officials, the idea of “efficiency” has been used in a number of related but distinct ways. The most common usage is to suggest that legal rules and frameworks are most efficient if they are most successful at attracting investment to a given national economy. This is often explained in a manner drawn from the literature on the competition of legal regimes, with the added note that the efficiency of a legal regime is equivalent to its competitiveness in attracting the support of actors in financial markets. The presence of private investment, in this approach, indicates that investors believe in the superiority of the legal regime for protection of investor rights (this claim was often used by supporters of U.S. legal models who claimed that these proved most efficient at generating capital for private investment, at least prior to the current economic crisis). At other times, though, the claim of efficiency is articulated more broadly as the likelihood that a given legal regime will promote economic growth in a given economy, though it seems to be understood that the generation of private investment is central to that growth. A third and usually minor theme in the discussion of efficiency emphasizes reducing the costs and complexity of a legal regime, which would then encourage and facilitate greater private economic activity. The ultimate hope and claim is that UNCITRAL can use its broad representation and mobilization of expertise to identify the most efficient—and thus “advanced”—legal models and present them in a form attractive to those aiming at legal reform.
structures that will better allow all states, especially developing states, to participate effectively in the global economy.99 By creating useful models and guides that embody these structures with the legitimacy of international support, the hope is that UNCITRAL can play a key role in shaping a positive evolution in the world’s commercial law systems.100

An example of this kind of process is UNCITRAL’s work on Insolvency law. Faced with the increasing challenge of insolvencies that involve corporations with assets in a number of states, in 1997 UNCITRAL developed a “Model Law on Cross Border Insolvency.”101 This development aimed at helping states harmonize legal frameworks to smooth the work of addressing these complex issues. As insolvency became an increasingly central issue for advanced and developing states, and a key aspect of commercial law reform efforts, UNCITRAL then took on the more daunting task of developing a “modern” framework for the whole spectrum of insolvency law.102 Despite the deep differences between legal orders, this task succeeded in the promulgation of a Legislative Guide on Insolvency Law, in 2004.103 This Guide has been a significant success, and is frequently used as a reference and model by national, regional (the EU), and international (IMF, World Bank) actors as they develop more robust and “modern” insolvency structures.104

III. EXPLAINING UNCITRAL’S SUCCESS

On the basis of this type of work, UNCITRAL has emerged as the leading public international institution for the development and diffusion of norms in private commercial law. Although the Hague Conference and UNIDROIT remain active—and all three have begun to work more cooperatively in recent years—UNCITRAL has become the most influential of the group, able to mobilize more support and to shape the agen-

99. See Burman, supra note 39.
100. See Buxbaum, supra note 39.
103. See Halliday, supra note 70; Halliday & Carruthers, The Recursivity of Law, supra note 102.
da for international commercial law reform. How can this success be explained? As previously suggested, UNCITRAL is best conceptualized as a “site” rather than an organization, which can be mobilized by different public and private actors working in and through its structure. The key question, then, is why resource-rich actors, such as states, private businesses, other international institutions, and professional networks, have chosen to invest resources in UNCITRAL.

There are two key parts to the answer. The first derives from the structure of the world of private international commercial legal practice, in which UNCITRAL’s strategy for developing normative models and principles to be diffused in varied and subtle ways proves particularly effective. The second part of the answer is the particular structure and working methods of UNCITRAL, which distinguish it from most other international organizations in ways that can both empower resource-rich actors and allow them to reach agreements that may not be possible in other contexts.

A. Where and How Does UNCITRAL Fit in Private International Law?

The world of private international commercial law is plural, multi-layered, and dynamic. It is shaped by two key principles: the existence of multiple and often overlapping legal regimes covering particular areas of commercial practice; and significant contractual autonomy for private contracts.

105. These claims are supported by interviews with a variety of participants in international commercial law reform and harmonization efforts. This argument should be put in context. First, it is a judgment of the relative impact of UNCITRAL, UNIDROIT, and the Hague Conference as the three public institutions devoted primarily to private commercial law reform at the international level. It is not meant to compare UNCITRAL’s import with that of private bodies that work on commercial law—i.e., the ICC, or the other public international organizations, such as the Organization of Economic Cooperation and Development (“OECD”), the World Bank, the Basle Committee—which can powerfully shape private commercial law even though this is not their primary task. Second, it is a judgment focusing on the development of norms, not the success of their implementation in particular contexts.

106. See Braithwaite & Drahos, supra note 9, at 52–62 (using a similar approach in formulating the question of why resource-rich actors, such as states, private businesses, other international institutions, and professional networks, chose to invest resources in particular law making projects and institutions).

actors aiming to shape the law that governs their relationships.\textsuperscript{108} The evolution of international commercial law is driven by a dynamic process in which actors, and especially networks of actors, in the field—states, corporations, professionals, firms and associations—constantly compete to shape the substance of law across a variety of law-making and law-applying sites.\textsuperscript{109} National codes, standard industry practices, contractual innovations developed by law firms, and interpretive traditions can be adopted or discarded by commercial agents in the pursuit of business priorities.\textsuperscript{110} As a result, different agents and institutions work continually to try to shape the choices of private and public actors, whether to increase their own profit, prestige, and influence on conceptions of proper legal practice (private corporations, law firms, arbitral institutions, bar associations, legal experts), secure the cohesion and stability of commercial practice (industry associations), or to order commercial practice in ways that advance national and global priorities (states).\textsuperscript{111} The most successful agents or networks are able to work simultaneously in a number of fora to shape the direction of commercial legal practice according to their own goals and priorities.\textsuperscript{112}

How does UNCITRAL fit into this context? The key is UNCITRAL’s move away from a focus on standard harmonization treaties and toward the development of flexible formats in which its work is developed and presented.\textsuperscript{113} The “technologies” of model laws, legislative guides, and model rules are much more fluid and flexible than those of formal conventions. It is easier for resource-rich actors to get their preferences embodied in such statements of global legal standards than in formal treaties, and they can then use these products to shape the behavior of public and private actors in a variety of nuanced ways.\textsuperscript{114} As a result,

\begin{itemize}
\item \textsuperscript{109} Nygh, supra note 108; Zhang, supra note 108, at 560–61.
\item \textsuperscript{110} See generally Braithwaite & Drahos, supra note 9; see also sources cited supra note 108; discussion supra Part II.
\item \textsuperscript{111} See Contractual Certainty in International Trade (Volkmar Gessner ed., 2009); Sigrid Quack, Who Fills the Legal “Black Holes” in Transnational Governance? Lawyers, Law Firms and Professional Associations as Border-Crossing Regulatory Actors, in Global Governance and the Role of Non-State Actors 1, 81–100 (Gunner Folke Schuppert ed., 2006).
\item \textsuperscript{112} Cohen, Constructing Power Through Law, supra note 15, at 794.
\item \textsuperscript{113} Id.; see also sources cited supra notes 106–108.
\item \textsuperscript{114} See Susan Block-Lieb & Terence Halliday, Incrementalisms in Global Lawmaking, \textit{32 Brook. J. Int’l L.} 851, 855 (2007) [hereinafter Block-Lieb & Halliday, Incrementalisms in Global Lawmaking].
\end{itemize}
UNCITRAL’s work product is more useful for actors or networks that need normative “tools” that can be advanced in different forms and, to different degrees, in the varying contexts in which legal norms are developed and enforced. For instance, supporters of the Model Law and Legislative Guide on Insolvency can advance them through a variety of strategies, which include, *inter alia*, convincing commercial actors and industry associations to lobby their home states to reform the law, encouraging international and regional lending institutions to incorporate these standards as conditions on lending capital to states, training legal professionals from developing states to advocate legal reform consistent with these principles, and advancing these norms via the various informal international financial policy-making bodies.\(^{115}\) In the same regard, UNCITRAL’s Legislative Guide on Secured Transactions is emerging as a reference for national and international institutions promoting the reform of credit and property law in emerging market states and, thus, serves as a vehicle through which supporters can enroll these institutions.\(^{116}\) Because these are not formal treaties, their audience is not limited to states, nor must they be adopted *in toto* to exert significant influence on the development of commercial law.\(^ {117}\) They are thus more useful for agents attempting to structure legal practice in the fluid fields of private international law, allowing them to widely and subtly spread a set of common standards and principles.

As presented above, UNCITRAL’s work is evidence that the Commission is an increasingly valuable and important institution or site through which resource-rich actors can invest in the shaping of international commercial law. Its products constitute respected and influential statements of existing global standards and principles of commercial law and provide a crucial vehicle for all actors in this area, while UNCITRAL’s flexibility provides key tools or technologies for navigating the fluid and varied area of commercial law. The value and impact of UNCITRAL’s work comes as much from its functionality, as from its formal promulgation, and the innovative use of legal norm technologies make its products much more useful to actors who possess the resources to advance their adoption in the variety of private and public international law contexts.

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\(^{117}\) See Susan Block-Lieb & Terence Halliday, *Incrementalisms in Global Lawmaking*, supra note 114; see also Block-Lieb & Halliday, *Legitimation and Global Lawmaking*, supra note 93, at 72.
B. The Structure and Political Dynamics of UNCITRAL

UNCITRAL’s success is also due to its structure as a site of normative development, which has a number of unique features.118 These features facilitate the “enrollment” of the institution by agents of legal modeling and enhance the perceived legitimacy of its work.119 The basic features of UNCITRAL are straightforward.120 It is organized as a general commission that sets broad policy directions, a set of Working Groups that carry out much of the institution’s work, and a Secretariat that supports this work and links it with the broad policy goals of the commission.121 Its membership is elected by the UN General Assembly and is distributed across five regional groupings: Africa, Asia, Eastern European, Latin America/Caribbean, Western Europe and Other.122 Since 2004, sixty states have been members of the Commission, though for most of its history, UNCITRAL had only thirty-six permanent members.123 Each year, the entire Commission meets in a plenary session, which rotates between the UN headquarters in Vienna and New York.124 The Commission is served by a relatively small secretariat of legal experts/officers, which is part of the UN Office of Legal Affairs but has been based in Vienna since 1979.125

Each Working Group is assigned a specific area of work126—which changes when the Commission identifies new priorities—and is open to representatives from all member states. Moreover, each Group chooses a

118. See discussion infra Parts III.B–IV and accompanying notes.
119. UNCITRAL GUIDE, supra note 4, at 3–7; UNCITRAL FAQ, supra note 1.
120. See sources cited supra note 119; see also Kelly, supra note 3, at 3–9.
123. UNCITRAL, Member States History, supra note 122.
124. See UNCITRAL GUIDE, supra note 4.
125. As of August, 2010, there were fourteen permanent legal officers, including a division director of the U.N. Office of Legal Affairs, who serves as Secretary of UNCITRAL. E-mail correspondence between author and Sprios Bazinas, Senior Legal Officer, UNCITRAL Secretariat (Aug. 24, 2010) (on file with author).
Chair from participating delegations, and is assigned a legal officer from the Secretariat as its secretary. The Working Groups operate on the basis of “consensus” rather than voting, in which the Chair determines when a particular proposal or understanding embodies the preponderance of opinion among the state delegations. The dynamics of the Working Groups are crucial to shaping UNCITRAL’s work and they are characterized by the following features:

1. While all member states are eligible to participate in each Group, only a relatively small set of states do so actively. Active states tend to be the same across the Groups, of which the US, France, Canada, and Germany, are usually the most prominent, although this list is not complete and there can be significant variations across Groups. The membership of the delegations chosen to participate in the Working Groups varies. The most active delegations involve representatives directly from the government ministries whose responsibilities include private international law generally and UNCITRAL in particular, and often include legal experts from academia and/or private practice, while the less active and influential are comprised of members of the state’s UN mission.

2. Various non-state actors are able to participate in the work of the Groups and often do so actively, though they do not have voting authority. Indeed, in some Groups, these actors are as well-prepared and active participants as the major state delegations. There are generally two kinds of non-state actors. The first are organizations of professionals with a broad concern for commercial law or expertise in a specific area of law—for example, the International Chamber of Commerce (“ICC”) and the American Bar Association. The second type of non-state actor are organizations of private business actors who play a central role in the areas of commerce likely to be affected by the proposals of the Group—such as the Commercial Finance Association.

127. While voting is possible, it is avoided for fear of clarifying and hardening differences between members, and thus hindering the ability to make progress on the work of the Group. As one might guess, the determination of the “consensus” of a Group can be the source of much controversy, and has indeed become the focus of a current debate, which will be discussed in more detail below. See UNCITRAL GUIDE, supra note 4.


with the work on secured transactions and the International Federation of Insolvency and Restructuring Professionals ("INSOL")\textsuperscript{[131]} with the work on insolvency. The participation of these actors goes beyond involvement in actual discussions. They actively consult with state delegations in the development of proposals, sponsor and participate in conferences dedicated to advancing and shaping the work of each Group,\textsuperscript{[132]} and are regularly solicited for expert advice by the legal experts of the Secretariat, to whom they often submit draft proposals for the Groups to consider.\textsuperscript{[133]}

3. Other significant regional and international organizations—whether they are part of the UN System\textsuperscript{[134]} or outsiders\textsuperscript{[135]}—are also able to attend discussions and are at times active in the behind the scenes work on key projects.\textsuperscript{[136]}

As a result, while the decisions of each Working Group (and UNCITRAL generally) are in the hands of state delegations, the actual work of each Group often takes the form of a relatively smooth interaction between state and non-state actors working on common problems. In light of the efforts made to include a variety of public and private actors, it is important to note the lack of transparency that attends much of UNCITRAL’s work. There is a paradox here. On the one hand, UNCITRAL is a public institution that is open to the participation of all UN members and that regularly publicly publishes reports and press re-


\textsuperscript{132} For a listing of the most important of these conferences or colloquia, see UNCITRAL Colloquia, U.N. COMM’N ON INT’L TRADE LAW, http://www.uncitral.org/uncitral/en/commission/colloquia.html (last visited Feb. 25, 2011).

\textsuperscript{133} As noted in the discussion, infra, individual experts often serve on the delegations of member states. See source cited supra note 128.

\textsuperscript{134} Such as the International Monetary Fund, the World Bank, and the World Intellectual Property Organization (“WIPO”).

\textsuperscript{135} Such as the World Trade Organization, the Organization for Economic Cooperation and Development, and the Organization of American States.

\textsuperscript{136} For example, when the question of the use of intellectual property as security for lending emerged during the development of the Legislative Guide on Secured Transactions by UNCITRAL’s Working Group VI, the Commission began sustained discussions with WIPO officials for expert advice and to ensure that the proposals of the two groups moved in the same direction. For an account of this cooperation, see G.A. Res. A/CN.9, ¶¶ 2–3, U.N. Doc. A/CN.9/WG/VI/WP.39/Add.3 (July 20, 2009).
leases on its work (both in print and on its website). And, unlike other private international law-making institutions such as UNIDROIT and the Hague Conference, non-governmental organizations are actively encouraged to participate in UNCITRAL’s deliberations. On the other hand, a variety of subtle and not always intentional strategies work to limit its exposure beyond the small world of Working Group participants and direct constituencies. Access to the Working Groups’ meetings by Non-Governmental Organizations (“NGOs”) or observers is limited by the Secretariat to organizations considered to have relevant legal expertise in the specific area of work; in practice, this means organizations of expert practitioners and affected businesses. Members of these Groups, both states and non-state actors, rarely publicize the work of UNCITRAL beyond the same scope of actors believed to have a substantial interest and support for its work. There is little if any attempt to inform or involve in the work of the Groups potentially interested organizations outside of the world of commerce or commercial law—in such areas as consumer protection, sustainable development, labor, or human rights. As a result, for all practical purposes, UNCITRAL works behind a curtain of opacity.

What is the benefit of UNCITRAL’s sometimes opaque working structure? It provides a uniquely accommodating context in which resource-rich actors and networks can advance legal reform projects and work out stable understandings of legal principles with limited oversight. While the Commission is able to set and correct the overall direction of the Groups’ work, it leaves much of the detail and specific direction in the hands of the latter, and there has been little conflict between the Commission and UNCITRAL’s Working Groups. As a result, networks of interested and resourceful actors can use the Working Groups as a forum within which to elaborate, evaluate, and advance projects of legal norm definition and thus advance their own goals of legal reform. According to participants, UNCITRAL’s most successful work—in the areas of arbi-

137. See UNCITRAL GUIDE, supra note 4, at 4. On the approach of the other private international law institutions, see Hague Conference, supra note 48; see also UNCITRAL GUIDE, supra note 4.
139. In rare cases, such as the issue of investor-state arbitration discussed below, a Working Group will ask the Commission for specific guidance. In this case, the Group accepted and acted on the subsequent guidance with little debate (though the guidance followed the preferences indicated by the Group itself). See UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the Work of its Fiftieth Session, U.N. Doc. A/CN.9/669 (Mar. 9, 2009).
tration, insolvency, and contractual engineering—is the product of such consensual negotiation among public and private experts.\textsuperscript{140} Moreover, the working methods of the institution contribute to bolstering the legitimacy claims made for its products.\textsuperscript{141} From this perspective, the active role of legal specialists and commercial actors is needed to make the work relevant, and their participation in the Working Groups is a further guarantee of the quality and usefulness of UNCITRAL’s legal products. Evidence from such areas as insolvency and arbitration indicate that this argument is indeed a significant one in shaping the reception of UNCITRAL’s work.\textsuperscript{142} It is this unique structure, then, that provides the other central reason that resource-rich actors have invested in UNCITRAL as a tool of commercial legal construction and change since the 1980s.

C. Questions of Power and Legitimacy

UNCITRAL’s increased prominence raises questions about the impact of power relationships in shaping its work and the extent to which these relationships underlie claims of its legitimacy. UNCITRAL participants and officials offer two arguments to support the value and legitimacy of the institution’s structure and the resulting legal products. On the one hand, supporters cite the broad spectrum of states involved in the organization, representing all major legal traditions and levels of economic development, and the consensus-based working method as signs of political legitimacy.\textsuperscript{143} They claim that these characteristics ensure that UNCITRAL’s legal products represent not the specific issues or agendas of certain states, but the considered judgment of the international community.\textsuperscript{144} The result, they suggest, is that UNCITRAL’s work can claim unique weight and status as normative models in the international system.\textsuperscript{145} On the other hand, supporters emphasize the unique ways in which UNCITRAL incorporates expert knowledge into its deliberations;

\textsuperscript{140} Interview with Senior UNCITRAL Officials, in Vienna, Austria (Sept. 6–7, 2005); Interview with Members of State and Observer Delegations to Meeting of Working Group VI, in N.Y.C., N.Y. (Jan. 25–26, 2005); Interview with Members of Observer Delegations to UNCITRAL 40th Anniversary Congress, in Vienna, Austria (July 9–10, 2007).

\textsuperscript{141} See Kelly, supra note 3.

\textsuperscript{142} See Block-Lieb & Halliday, Harmonization and Modernization, supra note 52; see also Block-Lieb & Halliday, Legitimation and Global Lawmaking, supra note 93; Halliday, supra note 70; Slate et al., supra note 82 (discussing the arbitration aspect with respect to UNCITRAL’s work).

\textsuperscript{143} Sept. 6 Interview, supra note 90.

\textsuperscript{144} Id.

\textsuperscript{145} Id.
this allows its products to carry the stamp of advanced, impartial, technical expertise, rather than the limits of pure political compromise. In both ways, claims about the working methods of UNCITRAL are crucial to narratives of its legitimacy. But there remains both a tension as well as an interdependence between the narratives of political balance and professional expertise.

What holds these narratives together? It is the notion that UNCITRAL’s structure and methods work effectively to negate the influence of unequal political power on its products. The combination of broad representation and a rule of consensus, as the first narrative suggests, means that one or a few powerful actors cannot impose their norms on the institution and its work. As a result, the second narrative explains, states are constrained to find legal principles, models, and norms that follow the most “advanced” legal thinking and practice in the world of international commerce. Of course, there are always elements of conflict and contention in the process of developing legal products, but the combination of political balance and the input of expertise accord solutions that are acceptable to all states. Moreover, the combined narrative potentially suggests that the political balance ensured by the working methods pushes legal experts and state delegations to advance commercial law in ways that make technical solutions workable within a variety of legal traditions and systems. UNCITRAL’s work in insolvency and secured transactions law has, in fact, attempted to do just this, consciously producing principles or models that can be adjusted to different legal contexts. Together, these narratives support the value of UNCITRAL

146. See, e.g., Block-Lieb & Halliday, *Legitimation and Global Lawmaking*, supra note 93, at 13; Sept. 6 Interview, supra note 90; Sept. 21 Interview, supra note 55.

147. See Burman, supra note 39.

148. For a discussion of the products of UNCITRAL’s work, see UNCITRAL GUIDE, supra note 4, at 1.

These instruments are negotiated through an international process involving a variety of participants, including member States of UNCITRAL, which represent different legal traditions and levels of economic development; non-member States; intergovernmental organizations; and non-governmental organizations. Thus, these texts are widely acceptable as offering solutions appropriate to different legal traditions and to countries at different stages of economic development.

as a context for problem solving, rather than a forum for the mobilization
of power. 150

How well do these narratives fit the actual work and impact of
UNCITRAL over the past two decades? As noted earlier, UNCITRAL’s
work in this period centered on the promotion of the broad neo-liberal
agenda of market opening and regulation that has dominated the global
political economy since the 1980s. Many of UNCITRAL’s crucial con-
stituencies widely support this agenda, 151 but that is not to suggest that
the agenda is simply the outcome of consensual agreement on the most
“modern” or “advanced” legal thinking. As a site of normative modeling
mobilized by transnational coalitions, during this period, UNCITRAL’s
work has been led by a generally cohesive coalition dedicated to advanc-
ing US-based, or common law models, of law as the preferred standards
for the global economy. 152 Across a variety of areas of commercial law,
this transnational coalition has dominated the agenda-setting of the
Working Groups and taken the initiative in advancing normative models
for “modern” commercial law. The following factors, shaping the global
political economy more generally, facilitated the success of this project
within UNCITRAL:

1. Beginning in the 1980s, the construction of the global commercial
order was overwhelmingly driven by US corporations and markets,
which brought with them US models of legal practice as the preferred

150. As such, this narrative suggests that UNCITRAL’s work promotes the ideal of the
“rule of law” rather than arbitrary power, and draws on the centrality of this norm in con-
temporary international relations. For an excellent review of the history and ambiguities
of the “rule of law” concept and ideal, see BRIAN Z. TAMANAH, ON THE RULE OF LAW:
HISTORY, POLITICS, THEORY 1, 1–6 (2004). But cf. THE NEW LAW AND ECONOMIC
DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., 2006)
(criticizing the link between the “rule of law” and international economic development
projects).

151. These include key business and professional associations, such as the Interna-
tional Chamber of Commerce (“ICC”), the American Bar Association (“ABA”), the Interna-
tional Association of Restructuring, Insolvency, and Bankruptcy Professionals
(“INSOL”), the Commercial Finance Association (“CFA”), and the International Bar
Association (“IBA”), as well as major public international institutions, such as the IMF,
the World Bank, and the European Bank for Reconstruction and Development
(“EBRD”), and, of course, the major states involved in shaping UNCITRAL’s work,
particularly the U.S. See generally Cohen, Constructing Power Through Law, supra note
15; Cohen, The Harmonization of Private Commercial Law, supra note 104; see also
Block-Lieb & Halliday, Harmonization and Modernization, supra note 52; Block-Lieb &
Halliday, Legitimation and Global Lawmaking, supra note 93; Halliday, Pacewicz, &
Block-Lieb, supra note 128.

152. See Cohen, Constructing Power Through Law, supra note 15; see also Halliday &
Carruthers, Globalizing Law, supra note 91; Macdonald, supra note 30, at 635–45.
way of doing business. As a result, the key legal dynamic during this period was the spreading influence of these US-based normative models across the sites of commercial law. The direction of UNCITRAL’s work, inevitably, reflected this trend.

2. During the same period, the US state was able to draw on its economic and geopolitical resources to exercise “structural power” over the global economic order. Participating in the global economy meant adjusting to this power. The participants in UNCITRAL were constrained to do so in the same manner as all the major international economic institutions.

3. In the world of commercial legal expertise, this same era was one in which US legal ideas and models—especially those associated with the “law and economics” movement—diffused quickly throughout legal expert networks around the world. This was partly the result of the need for expertise in US law (and, thus, the structural power noted above), the growth of global law firms based in the US, and also because of active efforts of the US legal community to spread its models through legal reform work. As a result, the trend of opinion among commercial legal experts represented in the work of UNCITRAL became heavily biased towards US models.

The interesting twist, in light of this political economy, is that the dominance of US-based actors and models in UNCITRAL is not complete, and UNCITRAL’s influence and legitimacy depend on maintaining some check on any one dominant power. In certain areas of work the US-led coalitions encountered opposition from advocates of competing models of legal principles and practice, representing different national traditions and interests or Continental civil law concepts and practices more gener-

153. See Braithwaite & Drahos, supra note 9, at 539–46.
154. Susan Strange, States and Markets 1, 236–37 (2d ed., 1988) (illustrating the concept of structural power in this context); Susan Strange, The Persistent Myth of Lost Hegemony, 41 Int’l Org. 551, 553–57 (1987); see also Sassen, supra note 14 (presenting a more contemporary examination of the same phenomenon).
155. See Halliday & Carruthers, Globalizing Law, supra note 91.
156. See Spencer Weber Waller, The Law and Economics Virus 1, 1–5 (2008) (unpublished manuscript), available at http://works.bepress.com/spencer_waller/3/ (discussing the law and economics movement, spreading from the U.S. to “other legal jurisdictions so that an increasing number of countries are creating, analyzing, and enforcing law with an eye toward its economic consequences . . . .”).
158. See Sept. 6 Interview, supra note 90; see also Block-Lieb & Halliday, Incrementalisms in Global Lawmaking, supra note 114.
ally.\textsuperscript{159} As a result, many of UNCITRAL’s more important legal products, such as its work in insolvency and secured transactions, embody compromises that attempt to identify fundamental legal principles that can be adapted to different legal traditions.\textsuperscript{160}

It is in this context that the claims to legitimacy surrounding UNCITRAL’s working methods take on their importance. By allowing all resource-rich actors to participate, requiring the reaching of consensus, and avoiding much transparency, these methods facilitate the process of compromise and give all participants an interest in advancing the resulting products of each Working Group. This judgment is affirmed by participants and observers alike.\textsuperscript{161} The working structure of UNCITRAL, it seems, has accommodated US leadership while forcing the kinds of compromises that allow its products to be accepted as statements of a broader international normative consensus on commercial law.\textsuperscript{162} Combined with its innovations in the technologies of normative modeling, UNCITRAL has emerged as an institution whose work is supported by a wide scope of resource-rich actors and is, thus, of significant prestige and influence in shaping the commercial legal norms of the contemporary global economy.

IV. EMERGING CONFLICTS AND THE FUTURE OF UNCITRAL

Over the past four years, UNCITRAL’s success has generated an emerging critical dialogue regarding its work, from inside and outside of the organization. This dialogue takes form and focus in two critiques centered on UNCITRAL’s working methods: one arising from debates internal to the institution and one offered by external actors demanding

\begin{itemize}
  \item \textsuperscript{159} See, e.g., Cohen, The Harmonization of Private Commercial Law, supra note 104 (discussing secured transactions law in the context of competing legal principles, in opposition to US-based models).
  \item \textsuperscript{160} See Block-Lieb & Halliday, Harmonization and Modernization, supra note 52 (discussing UNCITRAL’s work in the field of insolvency law); see also Halliday & Carruthers, The Recursivity of Law, supra note 102, at 1185–86; Cohen, Constructing Power Through Law, supra note 15 (discussing UNCITRAL’s work in the field of secured transactions law).
  \item \textsuperscript{161} See Sept. 6 Interview, supra note 90; see also Sept. 21 Interview, supra note 55; see generally Block-Lieb & Halliday, Legitimation and Global Lawmaking, supra note 93; Kelly, supra note 3.
  \item \textsuperscript{162} This dynamic is similar to the tension between “authority” and “legitimacy” that Koppell identifies as central to all global governance organizations. See KOPPELL, supra note 107, at 31–67 (exploring how the need for legitimacy leads many powerful actors (especially states) to accept outcomes that diverge to a degree from their immediate preferences).
\end{itemize}
inclusion into its work. These critiques, in turn, embody and illustrate the two forms of emergent challenges to the institution’s legitimacy narratives, discussed above. These challenges originate internally with active agents dissatisfied with the procedural and substantive direction in which UNCITRAL has moved and from outside the institution, resulting from the unintended use of UNCITRAL’s work product by agents outside of the traditional world of private commercial law. The responses of UNCITRAL and its key actors illustrate an attempt at what Suchman calls “legitimacy management,” and their direction and relative successes will determine the future of the institution.

The internal critique concerns the influence of non-state actors—particularly legal professionals and organized interests—on the work of the Groups and the Secretariat. In May, 2007, the French government circulated a memo (the “French memo”) suggesting that these actors exercise too much influence over the deliberations of the Groups, steering their work in directions counter to the goals of many participating states as well as exerting too much influence over the work of the Secretariat. The French memo highlights two aspects of this influence. First, it suggests that the ways in which the “consensus” procedure is used in the Working Groups often gives too much weight to the views of non-state actors, as chairs and participants tend to give the views of these actors the same weight as those of states. Second, the French memo criticizes what it believes is an over-reliance on non-state experts and interests in shaping work themes, drafting proposals, and otherwise dominating the “behind the scenes” work of the Secretariat. It also attacks the perceived use of experts and non-state actors in these ways by some states to advance their agendas.

The French memo raises two kinds of issues regarding the manner in which UNCITRAL operates. On the one hand, it amounts to a not-too-subtle swipe at the working methods of the US and some of its allies, who work closely with non-state actors to define the agenda, shape alter-

163. See discussion infra Part IV.
164. See supra text and accompanying notes 36–41.
165. See discussion infra Part IV.
166. Suchman, supra note 33, at 594.
167. See id.
169. Id. ¶ 3–4.
170. See Kelly, supra note 3, at 10–15 (detailing France’s challenge of UNCITRAL’s work methods, specifically with respect to “UNCITRAL’s general lack of procedures for its ‘legislative’ process” as well as concerns regarding “consensus and participation.”).
natives, and mobilize support for their own legal agendas. On the other hand, the French document takes issue with the broader implications of the relationships between states, private actors, and experts that define the operation of the institution. According to this position, the lack of clear boundaries between public and private actors threatens the legitimacy of UNCITRAL’s work by both weakening the control of sovereign states over UNCITRAL’s work—the only actors able to claim any authority to make rules that govern the actions of citizens and institutions—and creating the appearance of the manipulation of UNCITRAL, under the guise of impartial international law-making, to impose rules that benefit only interested parties. 171

The solution suggested by the French government is to establish clearer boundaries between the role of states and non-state actors through changing or clarifying the rules governing consensus, limiting the participation of non-state actors in public deliberations, and exerting more supervision over the role of non-state actors in the development of agenda items and substantive proposals. 172 This approach has been resisted by the US and its allies, who believe that UNCITRAL’s current working methods best facilitate the organization’s ability to work smoothly and to generate products likely to be supported by key public and private agents. 173 At this point, discussion continues regarding ways of clarifying UNCITRAL’s operating rules without fundamentally changing its actual work.

The external critique of UNCITRAL is currently not much more than a set of murmurs, but it pushes in a different direction. 174 This argument centers on the absence of any significant “civil society” presence in the work of UNCITRAL, which is at odds with much of the current work of the UN and indeed of some of the other major institutions involved in shaping the rules of international trade and investment. 175 In this debate,

171. See UNCITRAL, France’s Observations, supra note 168, ¶¶ 6–7.
172. Id. ¶¶ 5–8.
174. See, e.g., Cohen, The Harmonization of Private Commercial Law, supra note 104 (providing an example from the field of secured transactions law).
175. Consider, for example, the manner in which the World Bank has increasingly opened up its deliberations to consultations with various NGOs and the growing dialogue between the WTO and the NGO community. See Szabowski, supra note 42; see, e.g., John S. Odell & Susan K. Sell, Reframing the Issue: The WTO Coalition on Intellectual Property and Public Health, 2001, in Negotiating Trade: Developing Countries in the WTO and NAFTA 85, 85–114 (2006).
the Center for International Environmental Law ("CIEL") and the International Institute for Sustainable Development ("IISD"), both NGOs based in Geneva and Canada respectively, are two of the most vocal critics. Offering their critiques in the context of the ongoing work of Working Group II, to revise and update the UNCITRAL Arbitration Rules, their argument centers on the increasing use of the rules in investor-state arbitrations, particularly in the context of bi-lateral investment treaties that usually specify arbitration as the preferred means for dispute resolution. In this case, the adoption of UNCITRAL products in an increasingly controversial area of public international law—where the dynamics of political conflict and organizational participation are quite different than in private commercial law—has opened up UNCITRAL’s rules and processes to unanticipated challenges.

While not disputing the appropriateness of the current process for promulgating purely “private” arbitration rules, the CIEL/IISD position argues that the use of UNCITRAL rules in disputes to which states are parties means that these rules have significant impacts on the use of state power and authority, and thus on various groups in a state—such as consumers, workers, taxpayers, and public institutions—whose interests are directly affected by public policy decisions. But key features of these rules that may be appropriate for purely private commercial arbitrations—the general lack of transparency in arbitration processes, the limits on who can be involved in arbitration, the lack of publicity of decisions—are not appropriate when states and the public and sectoral interests affected by their policy choices are involved. This position suggests not only that some modification of the rules themselves is required, but also that the process of rule-making requires the involvement of organi-

176. CTR. FOR INT’L ENVTL. LAW & INT’L INST. FOR SUSTAINABLE DEV. (CIEL), REvisING THE UNCITRAL ARBITRATION RULES TO ADDRESS STATE ARBITRATIONS (Feb. 2007) [hereinafter REvisING THE UNCITRAL ARBITRATION RULES].
177. See id. at 3; see also CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2007) (broadly describing the current system of investor state arbitration); see generally GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007); U.N. CONFERENCE ON TRADE AND DEV., INVESTOR-STATE DISPUTES ARISING FROM INVESTMENT TREATIES: A REVIEW, UNCTAD/ITE/IIT/2005/4, U.N. Sales No. E.06.II.D.1 (2005).
178. See REvisING THE UNCITRAL ARBITRATION RULES, supra note 176, at 4 (“Arbitrations brought by an investor against a State under the terms of a treaty . . . differ significantly from commercial arbitrations involving only private parties because the former implicate the public interest in ways the latter do not.”).
zations that can represent the interests of the various publics whose fate is implicated in the results of public investor-state arbitrations.\textsuperscript{179}

This initiative takes a different direction than that of the French government. Rather than attempting to reassert state control over the work of UNCITRAL, the CIEL/IISD position argues that a legitimate process for international law-making must include the representatives of the diverse groups of interests and publics affected by the process and a broader set of experts and expertise.\textsuperscript{180} By implicitly rejecting the ability of states alone to provide this representation, it suggests an alternative approach to securing legitimacy for international institutions in the context of the evolving relationships between the public, private, and expert power and authority in the global context.

The fate of this initiative, though, remains uncertain. CIEL/IISD initially advanced this argument in 2007, in the context of a request for observer status at the then upcoming sessions of Working Group II.\textsuperscript{181} Despite their status as registered NGOs by ECOSOC, which required approval of their participation under UN rules, UNCITRAL initially rejected this request on the basis that neither group had “relevant” expertise in the area of arbitration law.\textsuperscript{182} After convincing the UNCITRAL secretariat to reverse this decision, CIEL and IISD attended the February, 2008 session of the Working Group, where they presented a proposal to include special rules for transparency in investor-state arbitrations in the revised UNCITRAL rules. While garnering the support of the UN Special Representative on Business and Human Rights,\textsuperscript{183} the proposal led to substantial debate over its appropriateness. The Group eventually decided not to pursue the issue and instead submitted it to the Commission

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\textsuperscript{179} Id. In this context, the CIEL/IISD position notes the manner in which the ICSID Arbitration Rules specifically address this issue, provide for more public information and access for investor-state arbitrations, and use these as a model for suggested reforms in the UNCITRAL rules. For further analysis of the ICSID Rules, see sources cited supra notes 176–177; see also Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).

\textsuperscript{180} REVISING THE UNCITRAL ARBITRATION RULE, supra note 176, at 9–14.

\textsuperscript{181} Id.; Telephone Interview with IISD Representative at the February 2008 Working Group Meeting (Oct. 29, 2007); Interview with State and Observer Delegation Members at the February 2008 Working Group Meetings (Feb. 5–7, 2008); see also Letter to Nicholas Michel, Under-Sec’y-Gen. for Legal Affairs and the Legal Counsel of the U.N., CIEL-IISD (Jan. 30, 2007) (on file with author) [hereinafter Letter to Nicholas Michel].

\textsuperscript{182} See Letter to Nicholas Michel, supra note 181.

meeting that summer for resolution. 184 With the support of key states, particularly Canada, the Commission instructed the Working Group to return to the issue once it had completed revising the “purely commercial” aspects of the arbitration rules. 185

Both the internal and external critiques pose fundamental challenges to the work of UNCITRAL. From different directions, both positions threaten to upend a delicate balance between the power and influence of states, key international business interests and associations, and expert communities that have been essential to the operation and success of the institution in its current form. To return to terminology introduced earlier, UNCITRAL has become an important “site” of commercial law-making for the global economy because of the ways in which it has been mobilized by a set of complex public-private-expert networks to advance a particular agenda for commercial law. 186 This does not mean that the ultimate authority over UNCITRAL is not in the hands of the member states, but that its success in advancing an agenda for legal reform has depended upon states working with and through such networks. A reassertion of state-centrality, as the French proposal demands, could damage these relationships and probably weaken the effectiveness and impact of the institution as an advocate for the kind of commercial legal reform it has pursued over three decades. 187 In such circumstances, it is likely that key states that have supported this agenda will reduce their investment in UNCITRAL, as would the business and expert networks on which these states have depended for their success. 188

A move towards more transparency and the involvement of a wider range of NGOs and interests, as the CIEL/IISD suggests, would also change the dynamics of the institution, but in a somewhat different, perhaps more fundamental, direction. By breaking open the relative opacity and “below the radar” status of UNCITRAL, it would make it less amenable for relatively closed networks of power and expertise to use it as a site for developing law with minimal public oversight. In essence, it would reshape the institution in a model more common among international institutions in the UN system, which would likely make it both

185. See id.
186. See discussion supra Part III.
187. UNCITRAL, France’s Observations, supra note 168, ¶¶ 6–7.
188. See, e.g., UNCITRAL, U.S. Response, supra note 173. A senior official in the U.S. delegation to UNCITRAL suggested in an interview, on the condition of anonymity, that the U.S. might shift its resources away from the institution and work in other law-making capacities if the French proposal (or a similar proposal) succeeded.
more transparent and less “effective” in generating norms and rules for international commercial law. Once again, it is likely that such a development would lead key actors to shift resources into other fora in the pursuit of their agendas. Ultimately, UNCITRAL’s fate will depend upon its ability to productively manage and incorporate these legitimacy challenges.

CONCLUSION

UNCITRAL’s success in shaping the world of commercial law over the past three decades is an important, if neglected, story for the study of how international institutions shape the legal frameworks for global commerce. UNCITRAL’s ability to insert itself innovatively in the world of commercial law-making, to re-create itself as a forum in which the most “modern” and “advanced” norms for commercial law are defined, and the persuasiveness with which it has justified its working methods as the product of a combination of political consensus and technical “expert” authority are all essential aspects of its emergence as a key vehicle for normative modeling in global economic governance. Together, these factors have created conditions in which most powerful actors in the area of international commercial law have decided to invest significant resources in shaping UNCITRAL’s work and sustaining the authority of the institution and its work product. As a result, UNCITRAL is now an important player in shaping the practices of transnational commercial law in such fields as arbitration, insolvency, investment, and secured transactions.

UNCITRAL’s work has been held together by a shared (but not always uncontested) commitment to developing new or “modernized” legal norms that promote greater market and financial integration in the global economy as well as the desire of most actors to preserve the flexibility and opaqueness of its working arrangements. To be sure, this cohesion is now coming under some strain, as are all the institutions working in the field of global economic governance, and the outcome of these challenges are uncertain. But it is worthwhile to emphasize two lessons to be learned, or questions that are posed, by UNCITRAL’s success:

189. See KARNS & MINGST, supra note 88, at 95–145 (describing the UN system); see also THOMAS G. WEISS ET AL., THE UNITED NATIONS AND CHANGING WORLD POLITICS 173–228 (2d ed., 1994); KOPPEL, supra note 107 (arguing that more procedural transparency and “due process” can hinder the effectiveness of international institutions).

190. See generally discussion supra Parts I–III.

191. See id.; see also Block-Lieb & Halliday, Incrementalisms in Global Lawmaking, supra note 114.
1. UNCITRAL has successfully constructed an account of its legitimacy that preserves a unique balance between political consensus and technical legal expertise. Underlying this account, though, is the assumption that the matters of private international commercial law are of little relevance to constituencies beyond states, international organizations, affected industries, and technical legal experts. Or, if there is a broader impact, it is the role of states to incorporate these in their decisions on the substance of UNCITRAL’s work. This has enabled the institution to limit participation in its deliberations in ways that are unavailable to many institutions of public international law. But commercial law can and does have significant impact on a variety of civil society constituencies—for example, communities, workers, and social movements—that have had little voice in its operations.† As the developments surrounding investor-state arbitration indicate, the growing impact of UNCITRAL’s work may be forcing it deal more directly with these constituencies. The ways this will impact UNCITRAL’s structure, operation, work product, and ultimately, its claims to legitimacy, will prove a key test of its ability to continue to adapt to a changing global political context.

2. The structure of private international law-making, as illustrated by UNCITRAL’s evolution, raises some troubling issues regarding the role of power in the normative modeling that informs global economic governance. This observation takes off from Braithwaite and Drahos’ argument that normative modeling can be a mechanism whereby relatively resource-poor actors exert disproportionate impact on global governance.† The example of UNCITRAL, however, seems to suggest that the more plural, flexible, and multi-layered the structure of governance, the more that resource-rich actors are at an advantage in shaping the content and application of rules and norms. The exercise of real power over time in global governance requires the ability to be present and active at a number of sites and to simultaneously mobilize various agents and coalitions behind a common agenda that is pursued across different fora. In addition to being required by the plural and fluid ways in which governance takes place, this kind of forum-shifting ability allows its possessors to work around potential opposition that emerges in only one arena. At the international level, it seems clear that only the most resource-rich actors possess these abilities over time and

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†92. See generally Braithwaite & Drahos, supra note 9; see also Calliess & Zumbansen, supra note 42; Wai, Transnational Private Law, supra note 39, at 471, 477–85 (2005); Wai, Transnational Liftoff, supra note 39, at 209, 212–13, 233–39, 256–58 (2002).

†93. Braithwaite & Drahos, supra note 9, at 593–94.
across issue areas. To the extent that the governance of the global economy continues to evolve in more fluid and plural forms, careful thought must be given to the implications of this pattern for the design of institutions through which rules and norms are made, diffused, and enforced, and for the ability to uphold claims to legitimacy made by these institutions.

194. See Cohen, Constructing Power Through Law, supra note 15; see also Drahos, supra note 15; Sell & Prakash, supra note 23. A similar argument has been made with great force, in the context of the debate regarding the “fragmentation” of international law, in Eyal Benvenisti & George W. Downs, The Empire’s New Clothes: Political Economy and the Fragmentation of International Law, 60 STAN. L. REV. 595 (2007).
LEVELING THE PLAYING FIELD: A SEPARATE TAX REGIME FOR INTERNATIONAL ATHLETES

Andrew D. Appleby*

INTRODUCTION

Taxation of international athletes is a failure. The lack of a single, consistent regime results in substantial enforcement difficulties for tax administrators as well as a massive compliance burden and potential double taxation for athletes. International athletes’ unique characteristics necessitate a separate tax regime. Athletes are extremely mobile and transient taxpayers and are often among the most highly compensated individuals in the world. They can earn substantial sums of money during very short periods in a particular country. And athletes often have vast freedom to decide where to reside and where to perform. The difficulties associated with international taxation of athletes receives heightened attention every couple of years due to the publicity and broad participation of the Olympics or the World Cup.1 However, the implications of this broken tax system run very deep due to the increasing commercialization and popularity of professional sports around the globe.

The majority of high-paying professional sporting events take place in the United States and Western Europe, although several quickly-growing countries, such as Brazil and China, will likely play a larger role in the near future.2 As most sports fans may expect, the New York Yankees—the evil empire—are the highest paying team in the world, with its starting players averaging $7 million per year.3 Surprisingly, however, the second and third highest paying sports teams in the world are Spanish soccer teams—Real Madrid and Barcelona—whose starting players average over $6 million.4 The British soccer team, Chelsea, is next, fol-

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1. See discussion infra Parts VI and VII.


3. Id.
owed by five U.S. basketball teams rounding out the top ten.\textsuperscript{5} Importantly, players on these teams are citizens and residents of many different countries.

Independent athletes pose even greater tax difficulties, and their earnings can be even higher than team athletes. In 2009, Tiger Woods reached a record $1 billion in career earnings and is a perfect example of an athlete with diverse character and sources of income.\textsuperscript{6} He has income “from prize money, appearance fees, endorsements, bonuses, and his golf course design business.”\textsuperscript{7} Further, his income comes from sources in dozens of countries. And top earning athletes are not just American. Rivaling Tiger Woods is the German Formula One driver Michael Schumacher, who had career earnings of over $700 million by 2009.\textsuperscript{8}

Despite the high stakes, each country has struggled to apply and adapt its own tax regime to international athletes. The tangled web of disparate and inconsistent tax systems is a nightmare for tax administrators and athletes alike. Even among countries with a treaty provision addressing athletes, there is still a crucial lack of uniformity in taxing international athletes.\textsuperscript{9}

This Article begins in Part I with an overview of international taxation of athletes, focusing generally on bilateral tax treaties and the characterization of an athlete’s income. Parts II–VII examine how six significant countries tax international athletes: the United States, the United Kingdom, Germany, Spain, Brazil, and China. This examination principally compares each country’s withholding regimes and characterization of income.\textsuperscript{10} Part VIII presents the justifications for, and benefits of, a separate international tax regime for athletes. This Part concludes with a proposal for a regime that is simple, effective, efficient, and extremely beneficial for both tax administrators and athletes.

\textsuperscript{5} Id.


\textsuperscript{7} Id.

\textsuperscript{8} Id.

\textsuperscript{9} See discussion \textit{infra} Parts II–VII.

\textsuperscript{10} Many countries require payors to withhold tax when they make a payment to ensure that the tax is collected. Countries often use withholding when it is difficult to enforce a tax liability, such as when the taxpayer is a non-resident in that country for a very short time. Thus, withholding becomes an important part of an international athlete tax regime. See discussion \textit{infra} Parts II–VII.
I. OVERVIEW: INTERNATIONAL TAXATION OF ATHLETES

Any discussion of an international tax regime for athletes centers on bilateral tax treaties and the characterization of income. The first step, though, is to define the term “athlete.”

The terms “sportsmen” and “athlete” are effectively interchangeable and defined very broadly. An athlete is “an individual who engages in some physical or mental activity which is exercised as an end in itself, usually in line with certain rules and in certain forms of organization designed specifically for it.”

An athlete must actually be involved in a public performance. In addition to “participants in traditional athletic events,” the term athlete also covers golfers, jockeys, soccer players, cricketers, tennis players, and racing drivers. Thus, the broad definition of “athlete” allows countries to address these taxpayers in bilateral tax treaties.

A. Bilateral Tax Treaties

The taxation of athletes and entertainers is so important that most bilateral tax treaties include a provision specifically addressing them. Despite established model treaties, there is still a significant lack of uniformity amongst bilateral tax treaties. Further, the treaty network for

11. Although athletes are often grouped with entertainers for tax treaty purposes, this Article addresses solely the taxation of athletes. Entertainers can be more difficult to define and present a different set of challenges. Further, sports are a common thread throughout the world and can unite nations unlike other forms of entertainment.


15. OECD MODEL TAX CONVENTION 2008, supra note 14, at 223. Also included in Article 17 are those who participate in billiards, chess, and bridge. Id. Generally, those employed by governments will be included in the “athlete” definition. Id. at 226.
most countries—even global trade leaders—is not comprehensive. Nevertheless, the core concepts underlying most bilateral tax treaties are sufficiently similar regarding the international taxation of athletes.

1. OECD Model Convention

The most widely-accepted model income tax treaty is the Organisation for Economic Co-operation and Development ("OECD") Model Convention. In addition to a provision directly addressing the income of athletes, the OECD model also addresses two other pertinent income classifications: business profits and dependent personal services. Athletes that are not employed by a team—such as golfers—provide “independent personal services,” which treaties classify as business profits. Athletes that are employed by a team—such as baseball players—provide “dependent personal services.” Income from independent and dependent personal services inherently requires different treatment. Thus, treaties utilize separate provisions to comprehensively address the taxation of business and employment income.

a. Article 7: Business Profits

Article 7 addresses the taxation of an individual’s or company’s business income. A business is subject to taxation only in its country of residence, unless it has a permanent establishment in another country. A permanent establishment is a fixed place of business or an agent acting on behalf of a nonresident. If a nonresident has a permanent establishment in the source country, the country in which the income is earned, the nonresident is subject to tax in that source country to the extent of business profits attributable to the permanent establishment. Therefore,

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16. For instance, the U.S. only has income tax treaties with approximately sixty countries, and Brazil is not one of them. See United States Income Tax Treaties—A-Z, IRS.GOV (May 3, 2010), http://www.irs.gov/businesses/international/article/0,,id=96739,00.html.
19. Essentially, individuals performing independent personal services are “self-employed.”
20. For example, it is much easier for an employer to withhold tax for employees performing dependent personal services because of their regular, often long-term, employment and availability of employee information.
22. Id. art. 5. An agent generally must have authority to bind the business as well. Id.
23. Id. art. 7, para. 2.
in the absence of an athlete-specific provision, athletes that provide independent personal services—such as golfers, runners, and tennis players—would only be taxed in the source country if they had a permanent establishment in that country.

b. Article 15: Dependent Personal Services

Article 15 addresses the taxation of an individual’s employment income. In the absence of an athlete-specific provision, Article 15 would apply to athletes that perform services as employees, generally as a part of a team—such as soccer, baseball, football, and basketball players. Employment income is taxable in the source country if the employment occurs in the source country, unless: (1) the employee is in the source country no more than 183 days in any twelve-month period; (2) the salary is paid by or on behalf of a nonresident employer; and (3) the salary is not borne by a permanent establishment or fixed base of the employer in the source country. Therefore, many employees can avoid taxation in a foreign country even if they perform services in that country, as long as they satisfy the above requirements.

c. Article 17: Artistes and Sportsmen

Unfortunately for athletes, Article 17 eliminates most of the benefits provided in Articles 7 and 15. Under Article 17, paragraph 1, “Notwithstanding the provisions of Articles 7 and 15, income derived by a resident of a Contracting State as . . . a sportsman, from his personal activities as such exercised in the [source country], may be taxed in that [source country].” Thus, non-athletes can often avoid being subject to taxation in the source country, however athletes’ performance-related income will be subject to taxation in the source country.

Article 17 also has a provision that attempts to prevent “loan-out” corporations, or entities that furnish athletes’ services and collect their compensation, from undermining the Article’s intention. In that regard, paragraph 2 states:

“[w]here income in respect of personal activities exercised by . . . a sportsman in his capacity as such accrues not to the . . . sportsman him-
self but to another person, that income may, notwithstanding the provisions of Articles 7 and 15, be taxed in the [country] in which the activities of the . . . sportsman are exercised.\(^{28}\)

Regardless of whether the athlete is compensated directly or through a “loan-out” corporation, Article 17 governs and explicitly overrides Articles 7 and 15.\(^{29}\) Therefore, an athlete’s personal service income, “whether accruing to the athlete or to another entity, is attributed to and taxed in the country where the personal services were performed or exercised—the source country.”\(^{30}\)

The source country can tax only the athlete’s “earnings derived from performances in the source country.”\(^{31}\) For example, if an athlete receives a salary, the source country may only tax the income that is properly allocable to that source country.\(^{32}\) There are a variety of allocation methods and imperfect information exchange, which makes allocation difficult in many situations. Whether an athlete’s income is related to his athletic performance and falls under Article 17 or is not related to his athletic performance and falls under a different Article depends on the characterization of the income. Thus, characterization of income is crucial for athletes in the treaty context, and for several other reasons discussed in Part I.B.

2. United States Model Income Tax Convention

In 1945, the U.S. first adopted an “Artiste and Athlete” provision in a tax treaty with the U.K.\(^{33}\) However, the U.S. dropped the provision due to the Senate Foreign Relations Committee’s concerns that the “Athlete” provision discriminated against a small group of individuals.\(^{34}\) Eventually, the U.S. overcame these concerns and included an “Artiste and Athlete” provision in a subsequent U.S.-U.K. Treaty and in the U.S. Model Income Tax Convention, now Article 16.\(^{35}\) The adoption of an “Artiste
and Athlete” provision that specifically denies athletes favorable tax treatment reflects the U.S. belief that some athletes “took advantage of the interaction of the treaty and domestic tax rules to avoid taxation” in both the source and residence countries. 36

The U.S. overcame the aforementioned discrimination concerns by implementing an income threshold for the Article 16 “Artiste and Athlete” provision. 37 Thus, Article 16 only applies to an athlete if he earns above the threshold amount, which differs depending on the other contracting country, but is currently $20,000 in the U.S. Model Treaty. 38 Aside from the income threshold, Article 16 in the U.S. Model Treaty functions in essentially the same way as Article 17 in the OECD Model Treaty.

3. Multilateral Tax Treaties

A global, multilateral tax treaty is the ideal resolution of the double tax problem. 39 Although multilateral tax treaties are exceedingly rare, the OECD recognizes that such an agreement may be possible for “particular purposes.” 40 In the past, multilateral tax treaties have either focused on a region with common interests or a specific area of taxation. For example, five Scandinavian countries formed the Nordic Convention on Income


37. The threshold “reflects the view that cultural exchanges should be encouraged, and that . . . athletes should not be singled out for special adverse tax treatment.” Bennett Susser, Note, Achieving Parity in the Taxation of Nonresident Alien Entertainers, 5 CARDOZO ARTS & ENT. L.J. 613, 632 (1986).


40. OECD MODEL TAX CONVENTION 2008, supra note 14, at I-12. Multilateral tax treaties are rare because it is extremely difficult for countries with conflicting interests and policies to reach an agreement.
and Capital, and eight Caribbean countries formed a broad multilateral income tax convention. In contrast, the countries of the European Union have entered into an agreement addressing transfer pricing, and the countries of the EU and OECD—including the U.S.—have entered into an agreement for mutual administrative assistance, called the Convention on Mutual Administrative Assistance in Tax Matters (“MAAT”). Thus, a multilateral tax treaty is feasible if it focuses on a targeted area of taxation.

B. Characterization of Income

Athletes often earn many different types of income, “the characterization and source of . . . [which] can pose considerable difficulties.” Characterization of income is crucial for athletes because different types of income are taxed differently under treaties and often at very different rates depending on the taxing country. Further, the definition of domestic-source income varies from country to country and is affected by the characterization of the income.

Before comparing how various countries characterize income, it is useful to begin with general treaty characterization principles. Whether an athlete’s income falls under the Athlete provision, Article 16 in the U.S. Model Treaty and Article 17 in the OECD Model Treaty, depends on the extent to which the income is connected with the athlete’s actual performance. Each model treaty uses a different standard to determine when income is sufficiently connected with the athlete’s actual performance. Under the OECD Model, Article 17 applies if there is a “direct link” be-


44. See id. at 70.

45. OECD Model Tax Convention 2008, supra note 14, art. 17; U.S. Dep’t of the Treasury, United States Model Income Tax Convention, 1 Tax Treaties (CCH) art. 16 (Nov. 15, 2006).
between the income and the athlete’s public exhibition. Under the U.S. Model, Article 16 will apply if the income is “predominantly attributable to the performance itself.” However, determining whether an athlete’s income is connected with the athlete’s performance is only the first step. The income must also be characterized, generally as personal service income or royalty income.

1. Actual Performance Income

The first classification of income covers compensation for an athlete’s actual performance of personal services. This classification includes “all income connected with a performance by the entertainer, such as appearance fees, award or prize money, and a share of the gate receipts.” The text of both model treaties limits Article 16/17 to an athlete performing services in his capacity as an athlete. Thus, if an athlete were performing personal services as a banker or security guard, for instance, Article 16/17 would not apply. Likewise, if an event organizer cancels the event, any cancellation fee paid to the athlete falls outside Article 16/17 and instead falls under the personal services provisions in Articles 7 or 14/15. Additionally, where an individual is performing a dual-role, such as a player-coach, both the OECD and U.S. Models apportion the income from the activities.

2. Endorsement, Image Rights & Sponsorship Income

In addition to income from actually performing in athletic events, athletes usually receive endorsement or image rights income and sponsorship income. An athlete earns endorsement income when a manufacturer pays the athlete to use his name or image to promote or advertise the manufacturer’s products. Outside the U.S., endorsement income is generally referred to as image rights income. An athlete earns sponsorship income...
income when a company pays the athlete to display the company’s name or logo while the athlete is performing. 56

Under the OECD, endorsement, image rights, or sponsorship income, “which is related directly or indirectly to performances or appearances” in a given country, falls within Article 17 as income derived from personal activities as a sportsmen. 57 If the income is not directly or indirectly related to a performance but is still considered personal service, the income will fall under Articles 7 or 15. 58 If the income is simply from licensing intellectual property, these royalties generally fall under OECD Article 12, which allocates all the income to the country of residence. 59

Regarding the U.S. Model, its Technical Explanation provides two examples of endorsement and sponsorship income that are predominantly attributable to the performance itself. First, a “fee paid to a performer for endorsement of a performance in which the athlete will participate . . . [is] so closely associated with the performance itself that it normally would fall within Article 16 [of the U.S. Model].” 60 Second, “a sponsorship fee paid by a business in return for the right to attach its name to the performance would be so closely associated with the performance that it would fall under Article 16 as well.” 61 However, as with the OECD, if the endorsement or sponsorship income is not predominantly attributable to the performance itself, the income will fall under Articles 7, 12, or 14 of the U.S. Model Treaty.

3. Signing Bonus Income

A signing bonus is a payment made to an athlete upon joining a team. 62 Different countries characterize and allocate signing bonus income using very different rules. Signing bonuses can be characterized as payment for entering into a non-compete agreement, as payment for services previously rendered, or as payment for services to be rendered in the future. Each of these types of income can be taxed differently. Additionally, several countries—such as the U.S. and Canada—have had great internal difficulty characterizing signing bonus income. 63 Thus, athletes often

56. Id.
57. Id.
58. Id.
60. U.S. MODEL TECHNICAL EXPLANATION, supra note 14, at 51.
61. Id.
62. GUIDE ON SPORTSPERSON TAXATION IN CERTAIN RELEVANT JURISDICTIONS 144 (Félix Plaza Romero ed., 2008) [hereinafter GUIDE ON SPORTSPERSON TAXATION].
63. See discussion infra Part II.B.3.
have diverse types of income, which countries can characterize and tax in very different ways.

II. UNITED STATES: TAXATION OF INTERNATIONAL ATHLETES

The United States is the pinnacle of professional sports. The U.S. produces the bulk of the world’s best athletes and hosts most of the world’s top professional leagues and sporting events. The U.S. is home to top professional leagues and events in tennis, golf, baseball, football, basketball, auto racing, horse racing, soccer, poker, boxing, mixed martial arts, and more. These unparalleled opportunities attract many of the best athletes from around the world, and generate exorbitant amounts of income. Thus, the IRS and U.S. Treasury continually target athletes for tax examinations, and created the Project on Foreign Athletes and Entertainers (“FAE”) in 2008 to focus on athletes’ tax compliance. Because of these professionals’ potentially high income and transient nature, the IRS plans to continue its strict scrutiny of foreign athletes.

The U.S. taxes its citizens and resident aliens on their worldwide income, regardless of the geographical source. The U.S. generally taxes nonresident aliens only on their U.S.-source income; however, U.S.-source income that is effectively connected with a U.S. trade or business will be taxed differently than income that is not connected at all with a U.S. trade or business. Further, the U.S. utilizes a foreign tax credit system to reduce double-taxation for its citizens and residents; however, the system has various limitations. Thus, the U.S. tax regime is complicat-


66. IRS Focus on Foreign Athletes & Entertainers, IRS.GOV (May 3, 2010), http://www.irs.gov/businesses/small/international/article/0,,id=176176,00.html

67. See Sandler, supra note 39, at 149.

68. See discussion infra Part II.A.2.

69. See I.R.C. §§ 901–908 (2010). Under a foreign tax credit system, a country gives its citizens and residents a credit against their domestic tax liability for tax paid to a foreign jurisdiction. For a discussion of the application of the foreign tax credit to athletes, see Carole C. Berry, Taxation of U.S. Athletes Playing in Foreign Countries, 13 MARQ. SPORTS L. REV. 1, 11–25 (2002).
ed for athletes and hinges on both residency and the characterization of income.

A. Taxation of Nonresident Athletes

The U.S. taxes various foreign athletes differently depending on whether there is a treaty in place with the athlete’s country of residence.\(^{70}\) When there is no treaty in place, the Internal Revenue Code (“I.R.C.”) governs the tax treatment of the foreign athlete and is much more complex than the tax codes of other countries.\(^{71}\) Under the I.R.C., an athlete’s tax liability depends on various factors, including residency, connection to a U.S. trade or business, and strict withholding.

1. Definition of Nonresident

The decisive first step is to determine whether the foreign athlete is a resident or nonresident alien under the I.R.C. This determination often results in vastly different tax consequences for the athlete. A foreign individual qualifies as a resident if the individual satisfies either one of two tests: the “Permanent Residency Test” or the “Substantial Presence Test.”\(^{72}\) Under the “Permanent Residency Test,” any foreign individual who applies for an alien registration card (a green card) during the calendar year is a resident alien for tax purposes.\(^{73}\) Under the “Substantial Presence Test,” any foreign individual is a resident alien for tax purposes if the individual is present in the U.S. for at least: (1) thirty-one days during the calendar year, and (2) a total of 183 days or more during the current year and two preceding calendar years combined.\(^{74}\)

The U.S. does provide an important exception to the aforementioned residency rule to encourage athletes to participate in charitable events.\(^{75}\) A professional athlete’s time spent competing in a “charitable sports event” does not count as time spent in the U.S. when calculating the “Substantial Presence Test.”\(^{76}\) Many U.S. tour events contribute their profits to charities or have charitable status themselves—such as the U.S.

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70. See generally I.R.C. §§ 901–908.
71. See id.
72. I.R.C. § 7701.
73. I.R.C. § 7701(b)(1)(A)(i). This test is also known as the Green Card Test.
74. I.R.C. §§ 7701(b)(1)(A)(ii), (b)(3). There is also an exception where the foreign athlete can qualify as a nonresident if he was present in the U.S. for less than 183 days during the taxable current year and can establish a “tax home” in a foreign country with which he had a closer connection than with the U.S. I.R.C. § 7701(b)(3)(B).
76. See I.R.C. §§ 274(l)(1)(B), 7701(b)(5)(A)(iv) for definition of “charitable sports events.”
Golf Association and U.S. Tennis Association—thus enabling foreign athletes to avoid resident status under the “Substantial Presence Test.”

If the foreign individual meets neither of the two tests and has not elected resident treatment, the individual is a nonresident alien for tax purposes.

2. Taxable Income of a Nonresident

The U.S. taxes resident aliens on their worldwide income, regardless of source, in essentially the same way as U.S. citizens. However, the U.S. taxes nonresident aliens much differently. Nonresident aliens are taxed in two ways: on U.S.-source income that is effectively connected with a trade or business and U.S.-source income that is not effectively connected with a trade or business. Income that is effectively connected with a U.S. trade or business is taxed, after deductions, at the same graduated rates applicable to U.S. citizens and resident aliens. Performance of personal services in the U.S., either as an employee or independent contractor, is considered a U.S. trade or business. Related income—such as salary, fees, wages, compensation, bonuses, and prize winnings—is, thus, effectively connected with a U.S. trade or business and is U.S.-source income. This income is subject to tax at progressive rates that peak at 35%.

However, income that is not effectively connected with a U.S. trade or business is taxed at a final flat rate of 30% on the total amount of gross income. Generally, passive investment income falls into this category and is subject to the flat withholding tax. Naturally, nonresidents are not subject to U.S. taxation on non-U.S. source income.

78. See, e.g., I.R.C. §§ 871, 906.
79. I.R.C. § 871(b)(1). Deductions that are related to both a U.S. trade or business and a non-U.S. trade or business may be apportioned. I.R.C. § 873(a). Of course, the athlete will need to file a tax return to claim deductions. See Sandler, supra note 39, at 157.
81. See I.R.C. § 871(b)(1). However, there is a de minimis exception where this income is not taxable in the U.S. if the nonresident alien was temporarily present in the U.S. for less than ninety total days during the taxable year and earned gross U.S.-source service income of less than $3,000 during the taxable year. See I.R.C. §§ 864(b), 861(a)(3). Additionally, if the nonresident performs services for a non-U.S. employer, the income is not effectively connected with a U.S. trade or business. I.R.C. § 861(a)(3).
82. I.R.C. § 1(j)(2).
83. I.R.C. § 871(a).
84. Income that is not effectively connected with a U.S. trade or business generally falls into the category of Fixed, Determinable, Annual, or Periodical (“FDAP”) income.
3. Withholding

The U.S. requires that tax be withheld on all income paid to nonresidents for their personal services, however the withholding rate depends on whether the nonresident is an employee or independent contractor. If the nonresident is an employee, the employer must withhold at ordinary graduated rates just like it does for U.S. employees. However, if the nonresident is an independent contractor, the payor must withhold at a flat 30% rate. The IRS strictly enforces the withholding of nonresident athletes’ income even if the income may be exempt from U.S. taxation under the code or a treaty.

4. Treaties

As mentioned above, the U.S. has an income threshold for the Athlete article in its treaties. This threshold complicates matters because it is often impossible to determine if an athlete will exceed the threshold until the end of the year. If the athlete exceeds the income threshold he will be taxed under the treaty, but if the athlete does not exceed the income threshold he will be taxed under the I.R.C. Thus, the source country can withhold and later refund the tax if applicable, however, this treatment necessitates that the athlete file a tax return, sometimes in several different countries.

B. Characterization of Income

After the complex residency determination is complete, the athlete must next determine the character of his income. The U.S. has struggled with characterizing athletes’ income for at least fifty years. In 1994, the IRS issued a Market Segment Study on Foreign Athletes and Entertainers, which provides roughly three hundred pages of guidance regarding

85. See I.R.C. § 1441(a).
86. See I.R.C. § 3121(d).
87. I.R.C. § 1441(a). For independent personal service income that is effectively connected with a U.S. trade or business, the withholding tax is not final and the nonresident can file a tax return to claim deductions.
88. See I.R.S. & U.S. DEP’T OF TREASURY, WITHHOLDING TAX ON NONRESIDENT ALIENS AND FOREIGN ENTITIES 1, 6 (2010).
89. See discussion supra Part I.A.1.c.2.
90. The cases below, such as the Armour case from the 1950s, illustrate this difficulty. See discussion infra Part II.B.2.
income characterization, ultimately recognizing that there is no “clear cut” answer.91

1. Athletic Performance Income

There is generally little controversy over characterizing personal service income for athletic performances. The difficulty lies with allocating the income if the athlete performs in multiple countries. Personal service income is sourced where the performance takes place.92 If an athlete is employed by a team and performs both inside and outside the U.S., the performance income “must be allocated and apportioned between U.S. and foreign sources of income.”93 The “allocation is generally based on the number of days that the athlete is present in the U.S.”94

2. Endorsement & Sponsorship Income

Endorsement and sponsorship income pose a challenge as they can be characterized as either royalties or personal service income. The U.S. taxes and sources these types of income in a very different manner. Royalty income earned by nonresidents is not effectively connected with a U.S. trade or business and is, thus, subject to a final 30% gross withholding tax.95 Additionally, absent a treaty, royalties are sourced in the place of use.96 Allocating royalty payments based on place of use can be difficult. The athlete’s contract may specify an allocation, although that is unlikely to completely satisfy the IRS. Depending on the circumstances, royalty income can also be allocated based on percentage of gross product sales or advertising expenses in the U.S. compared to total global sales or expenses, or based on the number of days the athlete plays in the U.S. compared to days played abroad.97 On the other hand, as stated above, personal service income is taxed on a net basis at graduated rates and sourced in the place of performance.98

91. See generally I.R.S. MARKET SEGMENT STUDY ON FOREIGN ATHLETES AND ENTERTAINERS (Training 3153-102 (10-94); TPDS 83777C) 95 TAX NOTES INT’L 3–41 (1994) [hereinafter I.R.S. MARKET SEGMENT STUDY].
93. See SANDLER, supra note 39, at 153; Winnie, supra note 43, at 72.
95. See GUIDE ON SPORTSPERSON TAXATION, supra note 62, at 145.
96. I.R.S. § 861(a)(4). Under the U.S. Model Treaty, royalties are sourced to the country of residence.
Characterizing income as royalty or personal service requires a factual analysis. Royalties are generally based on the use of an athlete’s name, likeness, or signature. If the income is based on a percentage of sales, the income is generally a royalty. If the athlete is required to perform services—such as acting in a commercial or making a public appearance—the income is generally personal service. However, endorsement contracts often include elements of both, and thus, require an analysis of the athlete’s degree of active participation to determine the correct character of the income. Both the language of the contract and the underlying substance of the transaction must be evaluated.

If an endorsement contract includes compensation for both future royalties and future personal services, the compensation must be apportioned between the two. If there is a lump sum payment at the beginning of the contract, it will be apportioned based on the apportionment of the first year’s compensation under the contract.

Two Tax Court cases addressed whether an endorsement payment was royalty or personal service income. In *Thomas D. Armour*, a golfer licensed his name to a golf ball maker, and the Tax Court held that the income was a royalty. In *Kramer*, a manufacturer paid a tennis player to use his name for the sale of tennis equipment. However, under the endorsement/sponsorship contract, the player also agreed to wear the tennis company’s logo during matches and to make promotional appearances. In this particular situation, the Tax Court allocated 70% of the income to royalties and 30% to personal services.

In 1999, the IRS released a Technical Advice Memorandum that evaluated the characterization and allocation of endorsement income. Essentially, endorsement income is personal service income if it is “closely and proximately related” to the athlete’s U.S.-based performance. The IRS gives two examples on this subject. In the case of a golfer, endorsement payments for him to drive a particular type of car and appear at auto dealerships is not related to the golfer’s performance, whereas wearing

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100. See Winnie, supra note 43, at 81.
101. Id.
104. See id.
107. Id.
108. Id. at 783.
110. Id. Thus, the income would fall under the athlete provision of U.S. treaties.
a corporate logo on his visor during a tour event is related to his performance.\textsuperscript{111} In the case of a tennis player, endorsement payments for the use of his name or likeness on store displays is not related to the tennis player’s performance, whereas using a certain type of racket is related to his performance.\textsuperscript{112} The IRS also recognized that it may require examining comparable third-party contracts to allocate between personal service and royalty income.\textsuperscript{113} Although the IRS has provided some guidance, properly characterizing endorsement and sponsorship income is still challenging and uncertain.

3. Signing Bonus Income

The U.S. has struggled mightily with characterizing and allocating signing bonus income. Generally, a payment is signing bonus income if it is consideration for signing a contract and is not based on previously rendered services.\textsuperscript{114} Otherwise, the income is likely personal service income and will result in different tax treatment.

The controversy surrounding signing bonuses began when the U.S. withheld tax when a Venezuelan baseball player signed a minor-league contract with a U.S. club to play for a Latin American team.\textsuperscript{115} International soccer players challenged the tax treatment and the IRS issued a controversial Revenue Ruling.\textsuperscript{116} The IRS initially concluded that an agreement that does not require a player to perform any services is essentially a covenant not to compete and that the bonus is consideration for the non-compete agreement.\textsuperscript{117} Because the bonus is not compensation for personal services performed and not effectively connected with a U.S. trade or business, the U.S. portion of the gross bonus income is subject to a flat 30\% U.S. withholding tax.\textsuperscript{118}

The IRS later retracted its position regarding the Venezuelan player and issued perplexing guidance. The IRS distinguished the Latin American baseball players’ contracts from the international soccer players’

\begin{thebibliography}{9}
\bibitem{111} \textit{Id.} at 11.
\bibitem{112} \textit{Id.} at 12.
\bibitem{113} \textit{Id.}
\bibitem{114} See \textit{Winnie, supra} note 43, at 72.
\bibitem{115} See I.R.S. Chief Counsel Advisory 200219011, 2002 WL 968661 (May 10, 2002).
\bibitem{117} \textit{Id.}
\bibitem{118} Winnie, \textit{supra} note 43, at 72. The apportionment of the bonus income between U.S. and foreign sources must be reasonable under the circumstances. I.R.S. Rev. Rul. 74–108, 1974–1 C.B. 248 \textit{supra} note 116. The apportionment for a non-compete agreement will be based on where the athlete gave up the right to play for another team. See Winnie, \textit{supra} note 43, at 81.
\end{thebibliography}
contracts based on *when* the signing bonus was paid.\footnote{119} If the bonus was paid before the player had entered into an employment agreement, as was the case with the soccer players, the payment was an inducement to sign and thus consideration to enter into a non-compete agreement.\footnote{120} If the bonus was paid after the player had entered into an employment agreement, it was not a true signing bonus but, rather, advance payment for personal services.\footnote{121} In 2004, the IRS revoked the Revenue Ruling and now essentially all signing bonuses are considered wages, which are personal service income.\footnote{122} If a payment is made “in connection with the establishment of the employer-employee relationship,” the payment will be taxed as wages.\footnote{123} Although it took the U.S. thirty years, it now has a clear and logical position regarding signing bonus characterization. The difficulty characterizing signing bonus income was a result of the complexities of the U.S. tax regime. Many other countries have not struggled to characterize signing bonus income, but they have complexities and difficulties of their own.

### III. United Kingdom: Taxation of International Athletes

The United Kingdom is also an established leader in professional leagues and sporting events. The U.K. is home to some of the best professional soccer leagues in the world, and hosts world-class events in tennis, golf, cricket, rugby, and polo.\footnote{124} Like the U.S., the U.K. faced tax compliance difficulties regarding athletes.\footnote{125} In 1986, the U.K. implemented a withholding regime for athletes because the country felt it was losing substantial tax revenue, estimated at upwards of £75 million annually.\footnote{126}
A. Taxation of Nonresident Athletes

The U.K. generally taxes its residents on their worldwide income and nonresidents only on U.K. source income. The U.K. admittedly treats nonresident athletes differently than resident athletes, and even nonresidents in general. Further, athletes who are residents but are not domiciled in the U.K., face different taxation. Generally, the U.K. will only tax its non-domiciled residents on foreign income and capital gains on a remittance basis—that is, only income that is remitted to the U.K. However, the 2008 Finance Bill limited this beneficial tax treatment. Under the new law, if an individual is a non-domiciled resident for seven of the past nine years, the individual must pay an annual £30,000 fee in addition to tax on any income remitted to the U.K.

1. Definition of Nonresident

The U.K. classifies individuals as residents if they either: (1) spend 183 days or more in a taxable year in the U.K., or (2) visit the U.K. regularly and spend, on average, at least 91 days per year in the U.K. (evaluated over a four year period). Under the second test, if the individual intends to spend at least 91 days per year in the U.K., the individual will be a resident starting in the first tax year. If not, the individual will only become a resident when he has satisfied the test in the past four years, thus becoming a resident in the fifth tax year. As in the U.S., it is sometimes beneficial for an athlete to be considered a resident instead of

129. See id. Thus, non-domiciled residents avoid worldwide taxation imposed on residents generally.
130. Finance Act, 2008, c.9, § 809 (Eng.); see generally GUIDE ON SPORTSPERSON TAXATION, supra note 62.
131. Finance Act, 2008, c.9, § 809 (Eng.); GUIDE ON SPORTSPERSON TAXATION, supra note 62, at 129–35.
132. GUIDE ON SPORTSPERSON TAXATION, supra note 62, at 134–35. Recently the U.K. changed its law, that determines the number of days spent in the country. Under the new law, an individual is considered present in the U.K. for each day where the individual was present in the U.K. at midnight. HM REVENUE & CUSTOMS, 2008 BUDGET NOTE 102 (Mar. 12, 2008), available at http://www.hmrc.gov.uk/budget2008/master-notes.pdf; GUIDE ON SPORTSPERSON TAXATION, supra note 62, at 135.
133. See sources cited supra note 132.
Thus, tax planning opportunities for athletes are abundant in both the U.S. and the U.K.

2. Taxable Income of a Nonresident

The U.K. has a schedular income tax system, thus, all income must be traced to a specific type of source to determine the extent of taxation. Generally, the income of athletes who play for a team will be classified as employment income, while the income of independent athletes will be classified as self-employed “trade or profession” income. Trade or profession income is generally subject to lower social security taxes and more generous business expense deductions. Income that in any way derives, directly or indirectly, from the performance of the athletic activity is included as trade or profession income. Both employment income and self-employed trade or profession income are generally subject to progressive rates that currently peak at 40%, but may rise to 50% in the next few years.

3. Withholding

In the U.K., tax is withheld on employment income under a Pay As You Earn system. However, no tax is generally withheld on self-employed trade or profession income, which often allowed athletes to avoid tax in the U.K. In response, the U.K. enacted a notoriously expansive withholding tax regime for nonresident athletes. The U.K. requires that a flat tax of the basic rate, currently 20%, be withheld from any payment made to a nonresident athlete in connection with any U.K. performance. The U.K. applies this withholding regime very broadly,
as “[a]ny payer who makes a payment to any person, which in any way arises directly or indirectly from a UK appearance by a non resident entertainer must deduct tax at the basic rate.”\textsuperscript{143} The withholding is not a final tax, but it is uncommon for athletes to file a tax return.\textsuperscript{144} The marginal tax rate is likely much higher than the withholding rate and the U.K. has no other means to enforce compliance except through a withholding regime.\textsuperscript{145} An athlete can file an application to waive or reduce the withholding tax, but it is often impractical because of the athlete’s uncertain income and the Foreign Entertainers Unit’s (“FEU”) detailed requirements.\textsuperscript{146} Thus, the U.K. has attempted to cope with the inherent difficulties of applying its tax regime to international athletes, which has resulted in an overly complex and discriminatory regime that has discontented both tax administrators and athletes.

\textbf{B. Characterization of Income}

The majority of the characterization issues in the U.K. revolve around whether the athlete’s income falls within the withholding regime. This determination requires a number of steps, as detailed below.

\textbf{1. Athletic Performance Income}

An athlete falls into the special withholding regime if they perform as an “entertainer” in any kind of “sport.”\textsuperscript{147} For these purposes, a sport is any activity of a physical kind performed by an athlete, which is, or may be, made available to the public, whether for payment or not.\textsuperscript{148} The athlete’s activities fall into the withholding regime if they are performed in his character as an athlete or “in connection with a commercial occasion.”\textsuperscript{149} Commercial occasion is not clearly defined, but includes all advertising, sponsorship, and endorsement activities.\textsuperscript{150} Payments for these

\textsuperscript{143} \textsc{Guide to Paying Foreign Entertainers}, supra note 127.
\textsuperscript{144} \textsc{Sandler}, supra note 39, at 140.
\textsuperscript{145} Id. The U.K. does not have a “sailing permit” enforcement mechanism like the U.S. Id.
\textsuperscript{146} See id.
\textsuperscript{147} Income Tax (Entertainers and Sportsmen) Regulations, 1987, S.I. 1987/530, s. 2 (U.K.); see also \textsc{Sandler}, supra note 39, at 137.
\textsuperscript{148} See sources cited supra notes 149, 151.
\textsuperscript{149} Income Tax (Entertainers and Sportsmen) Regulations, 1987, S.I. 1987/530, s. 6(2) (U.K.); see also \textsc{Sandler}, supra note 39, at 138.
\textsuperscript{150} Income Tax (Entertainers and Sportsmen) Regulations, 1987, S.I. 1987/530, s. 6(2), (3) (U.K.).
activities fall into the withholding regime so long as the payments are in any way derived directly or indirectly from the athletic performances.\footnote{151} The FEU interprets these activities very broadly, and provides examples of activities that fall into the withholding regime, including: “appearance fees, achievement bonus, exhibition income, box office percentage, TV rights, broadcasting/media fees, tour income, tournament winnings, prize money, advertising income, merchandising income, endorsement fees, and film fees.”\footnote{152} Further, payments made to loan-out companies also fall into the withholding regime.\footnote{153}

2. Endorsement, Image Rights & Sponsorship Income

Image rights are not separate intellectual property in the U.K.\footnote{154} Thus, the U.K. generally characterizes image rights payments to nonresident athletes as personal service income and, thus, avoids much of the controversy in the U.S. system.\footnote{155} Nonresident athletes can generally avoid U.K. tax on image rights only if those rights do not form a part of their activity in the U.K.—i.e., the rights are not sourced in the U.K.\footnote{156} In the 2006 Andre Agassi case, the House of Lords clarified the application of the athlete withholding regime to sponsorship income.\footnote{157} The House of Lords held that a sponsorship payment from a nonresident company to a nonresident athlete was taxable in the U.K.\footnote{158} This broad decision essentially allows the U.K. to tax all sponsorship payments that relate to a performance in the U.K., regardless of the residence of the payor or athlete. Thus, avoiding U.K. tax on sponsorship income is very difficult for nonresident athletes.

\footnote{151} See Income and Corporation Taxes Act, 1988, c.1 §§ 555, 556 (U.K.). \footnote{152} HM Revenue & Customs, FEU50: A Guide to Paying Foreign Entertainers, supra note 127. \footnote{153} Sandler, supra note 39, at 138. \footnote{154} See Guide on Sportsperson Taxation, supra note 62, at 131–32. The U.K. imposes a withholding tax on some royalties, but not the type generally relevant to athletes. See Sandler, supra note 39, at 135–36. \footnote{155} Guide on Sportsperson Taxation, supra note 62, at 131–32. Although licensing of image rights (by the employer or independent athlete) are generally subject to the 17.5% VAT. Id. at 132–33. \footnote{156} See id. at 132. \footnote{157} Agassi v. Robinson, [2006] UKHL 23, [17] (appeal taken from Eng.). \footnote{158} Id. (Agassi wore the sponsor’s logo while playing in the U.K.).
IV. GERMANY: TAXATION OF INTERNATIONAL ATHLETES

Germany has the largest economy in the EU and the fourth largest in the world. Germany is also the most populated country in the EU. Germany hosts myriad athletic events, including soccer, Formula One racing, tennis, cycling, golf, rugby, and basketball. Germany has a controversial withholding regime for nonresident athletes. Income of nonresident athletes is subject to a final 15% withholding tax on gross income. In several circumstances, the nature of Germany’s final gross withholding tax—as compared with the U.K.’s withholding tax—has been held incompatible with the European Convention.

A. Taxation of Nonresident Athletes

German residents are taxed on their worldwide income, and nonresidents are taxed only on German-source income. Due to recent challenges to Germany’s athlete withholding regime, nonresident athletes who are residents of a European Economic Area (“EEA”) country can elect to be taxed under a parallel withholding regime.

1. Definition of Nonresident

Compared to other countries—particularly the U.S.—Germany has a very simple, yet fact-based, definition of residency. Germany considers an individual a resident if his “domicile” or “habitual place of abode” is in Germany. Germany defines “domicile” as a home or dwelling at the disposal of the taxpayer that is maintained long-term. Germany defines


160. FACTS ABOUT GERMANY, supra note 159.


162. EStG § 50a(2). Prior to January 1, 2009, Germany imposed a progressive withholding tax with the top rate of 20%. IBFD, COUNTRY ANALYSIS, INDIVIDUAL TAXATION, GERMANY (2009) [hereinafter IBFD, GERMANY]. In 1996, Germany increased the rate to a flat 25%, but began lowering it after reportedly receiving a letter from Michael Jackson threatening to boycott Germany. Jorg-Dietrich Kramer, Taxation of Nonresident Artists and Athletes in Germany, 42 TAX NOTES INT’L 41 (2006).

163. See discussion infra Parts IV.A–B.

164. SANDLER, supra note 39, at 84.

165. IBFD, GERMANY, supra note 162, § 1.1.
a habitual place of abode as a location where an individual is physically present for a continuous period of more than six months in a calendar year. \(^{166}\)

2. Taxable Income of a Nonresident

It is generally irrelevant in Germany whether a nonresident athlete is an employee or independent performer, as both are subject to the same athlete withholding regime. \(^{167}\) Athletes are also subject to the German VAT on income from performances and image rights, however they will often qualify for the “zero-arrangement” and thus avoid any VAT liability. \(^{168}\) For non-athletes, the German income tax act has separate provisions for independent service income, independent business income, employment income, and royalties. \(^{169}\) Nonresidents outside the athlete withholding regime, which encompasses athletes’ nonathletic income, are taxed on a progressive basis with a top marginal rate of 45%. \(^{170}\) There is also a solidarity surcharge of 5% that is added to the income tax of both athletes and mere mortals in Germany. \(^{171}\)

3. Withholding

The aspect that truly sets Germany apart is its special withholding regime for nonresident athletes. \(^{172}\) Gross income of nonresident athletes is subject to a final 15% withholding tax. \(^{173}\) This withholding tax applies to income in excess of €250 that is derived from performances in Germany or from the exploitation of performances in Germany. \(^{174}\) The withholding is applied to the athlete’s gross income including reimbursements for expenses, such as travel. \(^{175}\) Germany allows no deductions under the

\(^{166}\) Sandler, supra note 39, at 84; see also EStG § 1(1). Short interruptions are not taken into account. IBFD Germany, supra note 162, at § 1.1.

\(^{167}\) See IBFD, Germany, supra note 162.

\(^{168}\) See Sandler, supra note 39, at 95, 97.

\(^{169}\) EStG §§ 18, 15, 19. The difference between independent service income and independent business income is that the latter is subject to German municipal trade tax. See generally Kramer, supra note 162. An athlete’s income is generally considered independent business income. See id.

\(^{170}\) IBFD, Germany, supra note 162, § 1.9.1.1.

\(^{171}\) Id. § 2.3.

\(^{172}\) Sandler, supra note 39, at 88; EStG § 50a.

\(^{173}\) EStG § 50a(2).

\(^{174}\) Id.

\(^{175}\) See id.
withholding tax, and the tax is final. Further, it requires that the tax be withheld even if there is an applicable treaty that would reduce or eliminate the tax, although in that case, the tax may be refunded. Image rights income is distinguished from personal service income in Germany, however it is also subject to the same 15% withholding tax.

However, if the nonresident athlete is a citizen and resident of an EEA country, the athlete may elect to deduct expenses related to the athletic income directly at the withholding stage. In that case, the withholding tax rate is 30% of the net payments to the athlete, or 30% of the gross income reduced by the elected deductions. The impetus behind this election was the 2003 Gerritse case where the ECJ held that Germany’s withholding tax violated the freedom of services principle because German residents were taxed on their net income and other EU residents were taxed on their gross income. There are still questions as to whether the withholding regime violates other EC freedoms.

**B. Characterization of Income**

The primary issue in Germany is determining if the nonresident athlete’s income is from services related to the athletic performance. If so, the income falls under the aforementioned athlete withholding regime and gross income is taxed at 15%. However, if the income is not from related services, it is considered trade or business income and will likely avoid German taxation unless the athlete has permanent establishment in Germany. In 2004, the German Federal Finance Court clarified that an athlete’s personal service income that is unrelated to his athletic activity falls outside the withholding regime and is trade or business income. In this case, the net income would be subject to progressive rates up to

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176. Sandler, *supra* note 39, at 88. Although no deductions are allowed, the tax may be refunded if the athlete’s directly connected expenses exceed 50% of the gross receipts. Kramer, *supra* note 162; EStG § 50(5) no. 3.

177. Sandler, *supra* note 39, at 93; EStG § 50d.

178. EStG §§ 50a(1), (2).

179. EStG § 50a(3).

180. EStG § 50a(2).


182. See Kramer, *supra* note 162.

183. Sandler, *supra* note 39, at 85. Because the German athlete withholding regime taxes an athlete’s income at the same 15% rate regardless of characterization, the primary issue is whether the income falls into the German athlete withholding regime. Id.

184. Id. at 85 (the assumption is that there is an applicable tax treaty).

185. See Kramer, *supra* note 162; Bundesfinanzhof [BFH] [Federal Tax Court] Jan. 28, 2004, I R 73/02 (Ger.).
Thus, it may be much more beneficial for an athlete to fall into one regime or the other, depending on his circumstances, so athletes need to plan carefully. It is also possible that the athlete could use a foreign loan-out corporation for income not related to the athletic performance and thus avoid German tax, subject to economic substance concerns. Additionally, royalties are subject to a withholding tax of 25%, however this rate is often reduced through tax treaties.

V. SPAIN: TAXATION OF INTERNATIONAL ATHLETES

While Germany is a seasoned host of myriad athletic events, Spain is quickly becoming a global leader in producing world-class athletes and athletic events. Spanish athletes now grace the upper echelons of many sports, including basketball, tennis, and golf. Spain has one of the world’s best soccer leagues and has explosive growth in its professional basketball leagues.

One of the reasons for Spain’s dramatic ascent in professional sports is its special tax laws designed specifically for athletes. The generous Spanish tax laws provide a “very attractive tax regime for foreign athletes.” Specifically, these tax benefits allow Spanish teams to offer larger salaries and attract top foreign athletes and, thus, produce superior sporting events.

A. Taxation of Nonresident Athletes

Spain has a final gross withholding regime like Germany, however, Spain applies this regime to all nonresidents. Also, like Germany,
Spain’s withholding regime was deemed inconsistent with the European Convention and required modification for residents of the EU.\footnote{See infra text accompanying note 201.}

1. Definition of Nonresident

An individual is a Spanish resident if they satisfy any of three tests:

“(1) . . . [the individual] spends more than 183 days in Spain in the calendar year;

(2) [t]he center of [the individual’s] economic interests is located in Spain; or

(3) . . . [the] center of [the individual’s] vital interests is in Spain.”\footnote{GUIDE ON SPORTSPERSON TAXATION, supra note 62, at 120.}

Further, if a Spanish citizen transfers his residence to a tax haven country, he will be taxed as a Spanish resident for the four years following the transfer.\footnote{Id. at 120.}

Spain also enacted the preferential “Beckham Law,” which allows a new Spanish resident to elect either resident or nonresident tax treatment for the year of the move and the following five years.\footnote{Bazo, supra note 138; GUIDE ON SPORTSPERSON TAXATION, supra note 62, at 121.} Thus, the resident has the choice of progressive rates up to 43% on net income or a final flat rate of 24% on gross income (under the withholding regime).\footnote{Law Governing Income of Natural Persons art. 93 (B.O.E. 2006, 285) (Spain). Additionally, the nonresident status subjects the individual to wealth tax only on Spanish property instead of worldwide property. GUIDE ON SPORTSPERSON TAXATION, supra note 62, at 121. See id. at 121–22.} To qualify for the election, the resident must: (1) not have been a Spanish resident in the ten years prior to the move; (2) have moved to Spain as a consequence of employment; (3) effectively perform work in Spain, for a Spanish resident; and (4) not be exempt from nonresident income tax.\footnote{Law Governing Income of Natural Persons art. 14 (B.O.E. 2006, 285) (Spain). The nonresident tax is officially titled: “Impuesto sobre la Renta de No Residentes (IRNR).” See Real Decreto Legislativo (R.C.L., 2004, 5/2004) (Royal Decree Law}

2. Taxable Income of a Nonresident & Withholding

Under the Spanish withholding regime, nonresidents are subject to a final flat rate of 24% on gross income from Spanish sources.\footnote{If the}
athlete’s income derives, directly or indirectly, from the athlete’s performance, that income falls within the withholding regime regardless of characterization.\textsuperscript{200} However, a nonresident who is a resident of an EU member state may elect to be taxed as a Spanish resident, so long as they earn at least 75\% of their annual worldwide income in Spain.\textsuperscript{201}

In addition to the withholding tax on nonresidents’ employment and personal service income, Spain imposes a final flat 24\% withholding rate on gross image rights income regardless of characterization as personal service or royalty income, or the athlete’s residence status.\textsuperscript{202} However, the withholding rate will likely differ for nonresidents if there is an applicable tax treaty. If such a treaty exists, the character of the image rights income is crucial.

\textbf{B. Characterization of Income}

Although image rights income characterization is only necessary for nonresident athletes in the treaty context because of the nonresident withholding regime, this characterization is very important for Spanish resident athletes for the reasons described below.

\textbf{1. Resident Athlete’s Image Rights Income}

Spain characterizes image rights income as either personal service income or royalty income.\textsuperscript{203} Regardless of the characterization, image rights income is taxed at the resident athlete’s marginal rate, which peaks at 43\%.\textsuperscript{204} However, if the income is characterized as personal service income, the resident athlete can deduct certain expenses.\textsuperscript{205}

Recently, most image rights licensing in Spain has been accomplished through corporate intermediaries.\textsuperscript{206} The payments to the intermediary are subject to taxation at a maximum corporate rate of 30\% instead of

\begin{footnotesize}
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\item \textsuperscript{200} An athlete’s income may be taxed under the resident regime if the income is not derived from athletic performance and the athlete has a permanent establishment in Spain. IBFD, \textit{COUNTRY ANALYSIS, INDIVIDUAL TAXATION, SPAIN}, § 7.3.1.3 [hereinafter IBFD, SPAIN].
\item \textsuperscript{201} This election is a result of the ECJ’s decision in \textit{Schumacker} (C-279/93). See IBFD, \textit{SPAIN, supra} note 200, § 7.3.1.2.
\item \textsuperscript{202} Law Governing Income of Natural Persons art. 25(1)(f) (B.O.E. 2006, 285) (Spain). \textit{GUIDE ON SPORTSPERSON TAXATION, supra} note 62, at 119.
\item \textsuperscript{203} Spain uses the terms “economic activity income” and “income from movable capital.” \textit{GUIDE ON SPORTSPERSON TAXATION, supra} note 62, at 115.
\item \textsuperscript{204} Id.
\item \textsuperscript{205} Id. at 115–16
\item \textsuperscript{206} Id. at 116.
\end{itemize}
\end{footnotesize}
43% for an individual.\textsuperscript{207} These arrangements are specifically allowed under Spanish law.\textsuperscript{208} If the resident athlete’s employer makes image rights payments, the arrangement must satisfy the 85/15 rule.\textsuperscript{209} This rule mandates that the resident athlete’s employment income be at least 85% of his total athletic income, that is, employment income plus the image rights income the employer pays to the corporate intermediary.\textsuperscript{210} Thus, as long as no more than 15% of the resident athlete’s total compensation from the employer is subject to taxation at the favorable corporate rate, the arrangement is permitted.\textsuperscript{211} If the image rights payments come from an entity other than the athlete’s employer, the entire image rights payment can be made to the corporate intermediary.\textsuperscript{212}


As mentioned above, the characterization of images rights income is crucial to determine the tax consequences under a treaty. However, the Spanish National Appellate Court has inconsistently characterized image rights income recently.\textsuperscript{213} In one case, the Court held that image rights income was a general royalty, subject to a 15% withholding tax under most treaties.\textsuperscript{214} In another case, the Court held that image rights income was more akin to licensing a copyright and, thus, qualified for the preferential withholding rate of 0–5% under most treaties.\textsuperscript{215} And in yet another case, the Court held that image rights income was business income, which may be subject to no withholding tax under most treaties depending on the circumstances.\textsuperscript{216} Thus, there is considerable uncertainty as to how Spain will characterize image rights income, which can result in very different tax liabilities and makes planning difficult.

\textsuperscript{207} Id. at 117. However, the corporation’s licensing of the image rights is subject to a 16% VAT. Id. at 119.
\textsuperscript{208} See id.
\textsuperscript{209} Id. at 117.
\textsuperscript{210} Id. The “employment income” can include personal services and image rights income, so long as it is taxed at the individual’s rate. See id.
\textsuperscript{211} Id. at 117. This arrangement can net almost 2% more after-tax income, which may equate to substantial amounts for professional athletes. Id.
\textsuperscript{212} Id. at 117–18.
\textsuperscript{213} Id. at 120.
\textsuperscript{214} Id.
\textsuperscript{215} Id. (Opinions dated Sept. 25, 2007 and May 4, 2007).
\textsuperscript{216} Id. at 120 n.1 (Opinion dated July 18, 2007). If the income recipient was resident of another country and did not have a permanent establishment in Spain, there would be no Spanish withholding tax on the income.
VI. BRAZIL: TAXATION OF INTERNATIONAL ATHLETES

Brazil’s ever-growing economy is the eighth largest in the world. Additionally, Brazil accounts for almost half the total population, land mass, and economic output of South America. Brazil is widely regarded as producing the world’s best soccer players, such as Pele, Ronaldo, and Ronaldinho. Additionally, Brazilian Jiu Jitsu has become increasingly popular and many Brazilians dominate the ranks of mixed martial arts.

It is interesting to note how Brazil taxes sports-related employers. Generally, employers are subject to substantial payroll and social security taxes. However, since 1997, Brazil has been creating special rules for soccer clubs because so many were run poorly and amassed enormous tax debts. In 2006, Brazil created the “Club Mania Law,” which essentially exempts soccer clubs from taxation through 2011 and implements a lottery to help soccer clubs pay their tax debts.

A. Taxation of Nonresident Athletes

Like the aforementioned countries, Brazil taxes its residents on worldwide income, regardless of source. And like Germany and Spain, Brazil taxes all nonresidents on Brazilian-source income through a final withholding tax regime.

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217. Gross Domestic Product 2009, supra note 159 (Brazil had the eighth largest gross domestic product in the world in 2009); Matthew S. Poulter, My Client’s Going to Brazil: A U.S. Practitioner’s Guide to Brazilian Limitadas Under the New Civil Code, 11 SW. J. L. & TRADE AM. 133, 134 (2005) (stating that Brazil “possesses large and well-developed agricultural, mining, manufacturing, and service sectors . . . and represents almost half of South America in total population, territory and economic output.”).  
218. See id.  
220. Id.  
221. See GUIDE ON SPORTSPERSON TAXATION, supra note 62, at 27. These total payroll and social security taxes can total over 47%. Id.  
222. Id. at 27.  
223. Lei No. 11.345, de 14 de Setembro de 2006, Diário Oficial Da União [D.O.U.], de 15.09.2006 (Braz.) (amended at Lei. No. 11.505, de 18 de Julho de 2007, D.O.U., de 19.7.2007). See also GUIDE ON SPORTSPERSON TAXATION, supra note 62, at 27–28. Football clubs are subject only to a 1% payroll tax and 5% social security tax (based on sport event revenue). Normal Brazilian corporations face an income tax of roughly 25%, a profits tax of 9%, and payroll taxes of up to 47%. Id.  
225. See discussion infra Parts VI.A.–B.
1. Definition of Nonresident

In comparison to other countries, Brazil’s definition of nonresident is straightforward. Brazil defines a resident as an individual who either lives permanently in Brazil, has a permanent visa in Brazil, or has a temporary visa in Brazil.226

2. Taxable Income & Withholding

Brazil requires withholding on personal service, sponsorship, and image rights payments for both residents and nonresidents.227 However, the rules are quite different for nonresidents. For residents, tax is withheld at progressive rates for all income sources; however, the top rate of 27.5% applies at a fairly low income threshold, at least for most athletes.228 For nonresidents, personal service income is treated differently than sponsorship or image rights income. For personal service income of nonresidents, tax on gross income is withheld at a final flat 25% rate.229 This rate also applies to any payments made to a tax haven jurisdiction, such as the Cayman Islands.230 For sponsorship or image rights income of nonresidents, tax is withheld at a final flat 15% rate.231

Further, any Brazilian resident that makes royalty payments to nonresidents is subject to a 10% contribution tax (Contribuição Intervenção no Domínio Econômico or “CIDE”).232 It is unclear whether image rights payments fall into this category and are thus subject to the 10% CIDE, and Brazilian tax authorities have yet to provide relevant guidance.233 The CIDE does not apply to personal services or sponsorship payments,

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226. See Instrução Normativa No. 208, de 27 de Setembro de 2002, D.O.U. de 11.3.2004. (Braz.). If the individual has a temporary visa, they will not become a resident until: (1) arrival date if visa is for employment, (2) after 184 days in Brazil, or (3) the date they obtain a permanent visa or employment. GUIDE ON SPORTSPERSON TAXATION, supra note 62, at 24.


228. GUIDE ON SPORTSPERSON TAXATION, supra note 62, at 25. The top rate currently applies if income exceeds approximately $18,000 per year. However, taxes are assessed on a monthly basis, which may impact athletes if their income is concentrated into a short period of time.

229. Decreto No. 3.000, de 26 de Marcha de 1999, D.O.U., 3 (685, 1) de 17.4.1999 (Braz.); GUIDE ON SPORTSPERSON TAXATION, supra note 62, at 26.


231. Decreto No. 3.000, de 26 de Marcha de 1999, D.O.U., 3 (710, 1) de 17.4.1999 (Braz.); GUIDE ON SPORTSPERSON TAXATION, supra note 62, at 26.

232. GUIDE ON SPORTSPERSON TAXATION, supra note 62, at 26 (explaining, “[t]he CIDE rate . . . is owed by the Brazilian party which pays the royalties, not the recipient of the payment.”).

233. Id.
however. And of course, although treaties can reduce these withholding rates, the U.S. does not have a treaty with Brazil.

B. Characterization of Income

Brazil imposes income tax on its residents identically regardless of whether their income is from personal service, sponsorship, or image rights. However, as detailed above, Brazil taxes nonresidents differently based on the character of their income.

1. Endorsement, Image Rights & Sponsorship Income

Brazil taxes nonresidents at 25% for personal service income and 15% for royalty income. However, because royalty income, which includes sponsorship and image rights income, is subject to the 10% CIDE, the effective tax rate is identical regardless of the characterization. Some athletes have assigned their image rights to an intermediary corporation, which is subject to net taxation at only 14.53%, instead of a top rate for residents of 27.5% and a flat gross rate of 25% for nonresidents. However, Brazilian tax authorities have strictly scrutinized and penalized these arrangements.

VII. CHINA: TAXATION OF INTERNATIONAL ATHLETES

China has the world’s third largest economy and largest population. Sports—particularly soccer, golf, badminton, and ping pong—are very popular in China. Basketball may now be the most popular sport in China due to the meteoric success of Yao Ming in the NBA. However, professional athletics are relatively new to China. Thus, complex commercial tax arrangements are still relatively rare in China outside basketball and soccer.

234. Id.
235. Id. at 23.
236. Id.
237. See id, at 23–25.
238. Id. at 25.
242. GUIDE ON SPORTSPERSON TAXATION, supra note 62, at 32.
243. Id.
A. Taxation of Nonresident Athletes

China has a very unique method for taxing all nonresidents. Although the definition of a nonresident is fairly straightforward, China taxes nonresidents on broader sources of income as they spend more time in China.244

1. Definition of Nonresident

Generally, an individual is a Chinese resident if the individual holds a habitual residence in China or spends more than one year in China.245 However, resident status and subsequent taxation is different for residents of a country that have a treaty with China, depending on how long the individual stays in China.246

2. Taxable Income of a Nonresident in the Treaty Context

Nonresidents are subject to tax on incrementally broader sources as they spend more time in China. If the individual is in China for less than 183 days, they are subject to Chinese tax only on income related to China and paid by Chinese entities.247 If the individual is in China between 183 days and one year, they are also subject to Chinese tax on income related to China and paid by foreign entities.248 If the individual is in China for more than one year and less than five years, they are also subject to Chinese tax on income related to foreign countries and paid by Chinese entities.249 And finally, if the individual is in China for five years or more, they are also subject to Chinese tax on income related to foreign countries and paid either by foreign or Chinese entities.250

B. Characterization of Income

In China, income characterization is extremely important. China taxes employment income, personal service income, and royalties differently. Further, China divides personal service income into business income and professional services income.251

244. Id. at 31–35; see discussion infra Parts VII.A.–B.
245. GUIDE ON SPORTSPERSON TAXATION, supra note 62, at 34. Habitual residence is based on familial and economic interests in China. Id.
246. Id. at 34–35.
247. Id. at 34.
248. Id.
249. Id.
250. Id.
251. Id. at 34–35.
1. Athletic Performance Income

China taxes employment income at progressive rates up to 45\%.\footnote{252} However, China classifies independent personal services of athletes as professional services income.\footnote{253} China taxes professional services income at a flat rate of 20\%, although China can increase the rate up to 40\% if the payment is abnormally large.\footnote{254} Additionally, China does not allow deductions for business expenses related to employment or professional services income, but rather, allows a standard monthly deduction.\footnote{255}

2. Endorsement & Sponsorship Income

In China, image rights income is characterized as either professional service or royalty income. Image rights income generally qualifies as professional service income if the athlete attends commercial activities.\footnote{256} If the image rights income is professional service, it is subject to a flat income tax of 20\%, with the possibility of an increase to 40\%.\footnote{257} If the image rights income is a license fee, it is treated as a royalty and subject to a flat withholding tax of 20\%, although this rate is generally reduced to 10\% under China’s tax treaties.\footnote{258} Regardless of the classification, the image rights income is also subject to a 5\% business tax.\footnote{259} Thus, there is incentive to structure compensation arrangements as licensing of image rights.

The use of corporate intermediaries for image rights licensing is prevalent in China, and explicitly allowed under Chinese law.\footnote{260} Although the Chinese corporate income tax rate is 25\%, there are still several benefits to using a corporate intermediary.\footnote{261} First, the corporation may have larger deductions than the individual (including any salary paid to the individual) and, thus, may have an effective tax rate lower than the 20\%
individual royalty rate. Second, corporations allow for flexibility and consolidation if the athlete is licensing to multiple sources or engaged in other commercial endeavors. Finally, under the pre-2008 Income Tax Code, it was common practice for local tax bureaus to allow Chinese companies to adopt a deemed-profit-rate tax method, and then pay tax at a 10% to 20% rate. Thus, corporate intermediaries are still prevalent in Chinese image rights licensing.

VIII. ANALYSIS: A MULTILATERAL REGIME FOR THE INTERNATIONAL TAXATION OF ATHLETES

As the foregoing comparative analysis illustrates, six of the most important and sophisticated countries in the world have struggled to apply and adapt their own tax regime to athletes. It is extremely difficult, even for a tax attorney, to decipher these alternate tax regimes in multiple countries, let alone effectively navigate the various withholding and characterization traps. This tangled web of disparate and inconsistent tax systems is a nightmare for tax administrators and athletes alike. A separate international athlete tax regime must balance the goals of both the tax administrator and the athlete. The tax administrator’s goal is to obtain a fair share of tax revenue from the athlete’s performance income. The athlete’s goal is to minimize the risk of double taxation and the compliance burden. And simplicity is a concept that both tax administrators and athlete taxpayers can appreciate.

A. Justifications for a Separate Regime

There are several justifications for a separate tax regime for international athletes. International athletes’ unique characteristics result in unparalleled diversity of income character and source, and present significant enforcement difficulties. The lack of a universal regime leads to inconsistency and distorts taxpayer behavior. Further, a separate tax regime would aid developing countries and act as a stepping stone for international tax harmonization.

262. See id.
263. Id.
264. See Evans, supra note 17, at 297–98; see also Winnie, supra note 43, at 70.
265. “Taxpayers should not care where their income tax is paid provided it is paid only once (probably in accordance with the marginal rates in the State of residence).” Sandler, supra note 39, at 347.
266. See generally Evans, supra note 17; Sandler, supra note 39; Winnie, supra note 43.
1. Diversity of Income

As detailed above, athletes have extremely diverse types of income, which can be very difficult to characterize. Athletes also have diverse sources of income. An international athlete may perform and promote products in scores of countries in a very short time. And an athlete’s diversity of character and source of income grows with his popularity. Technology has only exacerbated the complexity of determining both the character and source of an athlete’s income. For instance, an athlete endorsing a product in an internet advertisement can literally be viewed in every country in the world, which makes the proper allocation of that income virtually impossible. The only effective way to cope with the realities of today’s athletic income is to implement a separate international tax regime for athletes.

2. Enforcement & Information Exchange

Due to athletes’ diverse income and transient nature, it is extremely difficult for tax authorities to obtain the necessary information and then collect tax revenue. Information exchange between countries’ tax administrators can be exceedingly difficult, particularly when several different languages or developing countries are involved. Many developing countries may not keep detailed records or even sufficiently identify taxpayers. Often, lower-income athletes fail to report income, either intentionally or unintentionally, and higher-income athletes utilize sophisticated tax planning strategies to minimize or avoid taxation. Further, tax liabilities are frequently discovered after the athlete has squandered his riches and lost the ability to pay. The solution is a multilateral agreement that includes information exchange and administrative assistance provisions. The EUMAAT illustrates that a multilateral agreement providing for information exchange is feasible and beneficial.

In addition to challenging tax administrators, the current environment imposes a massive compliance burden on international athletes. Prominent sports agent and tax attorney Leigh Steinberg describes the current environment as an “accounting nightmare.” Tax complexities can lead

267. Technology also raises jurisdictional concerns, as there may be a question whether a requisite degree of contact exists to justify a certain country taxing an athlete’s income. See Winnie, supra note 43, at 83–84.
268. See Evans, supra note 17, at 325.
269. See id.
270. The EUMAAT illustrates how a substantially large group of countries, which speak many languages, can come together and share information to aid tax compliance.
to public relations disasters for both athletes and tax administrators. International athletes are some of the highest-profile taxpayers in the world and in order to maintain taxpayer morale, tax authorities cannot let them get away with not paying their fair share of tax. On the other hand, international athletes are essentially their own marketing brand and they need to avoid bad publicity, or it can cost them millions in lost endorsements. History is littered with examples, such as German Steffi Graf, Brazilian Helio Castroneves, and plenty of American athletes. Generally, sports fans do not care if the tax underpayment was intentional or not—the athlete is quickly labeled a “tax cheat.” Thus, both tax administrators and athletes stand to benefit a great deal from a simplified universal tax regime.

3. Consistency

In addition to adding substantial complexity, the current inconsistent tax treatment of athletes distorts behavior. Inconsistent tax treatment gives an athlete strong financial incentive to reside or perform in certain countries. When a country—such as Spain—gives athletes tax preferences so its leagues can attract better athletes, it creates a race to the bottom, whereby athletes reside and perform in countries with the most favorable tax treatment. For instance, many top soccer stars are lured to Spain instead of the U.K. because of the favorable Spanish tax laws. One analyst estimates that in order to pay a soccer player £50,000 after taxes, a U.K. soccer club would have to pay £100,000 whereas a Spanish soccer club would only have to pay £66,000. The result is a potential tax revenue loss of £20 million for the U.K., and a loss of any revenues that would have stemmed from having the world’s top players performing in the U.K. A consistent international tax regime would significantly aid parity in each sport.

Some may argue that a separate regime for athletes would violate horizontal equity because it would treat athletes differently than other service professionals, such as lawyers. However, athletes and other service professionals

274. See, e.g., id.
275. See Bazo, supra note 138.
277. Id.
278. See Winnie, supra note 43, at 79 (citing Daniel Sandler, The Taxation of International Entertainers and Athletes 347 (1995)). The principle of horizontal
professionals are not similarly situated taxpayers. Athletes’ diversity of income character and source, ability to generate substantial sums during very short stays, and worldwide publicity make athletes a unique class of taxpayers. Thus, a separate tax regime for athletes is proper and would add much-needed consistency in international sports.

4. Aiding Developing Countries

Virtually all lucrative athletic events take place in developed countries—primarily in the U.S. and Western Europe.279 There are many reasons why these source countries should receive tax revenue; primarily, because they provide the legal, commercial, and physical infrastructure that make the sporting events possible. However, many athletes that compete in these sporting events are citizens of developing countries, many of which do not have tax treaties with the U.S. or other OECD countries.280 Thus, these developing countries are deprived of tax revenue, even though they often cultivate and prepare the athlete for elite competition. For example, U.S. professional baseball is full of Dominican and Cuban players,281 and the world’s most successful distance runners hail from Kenya and Ethiopia.282 Further, many of these developing countries do not have sufficient legal systems or technology to effectively tax anyhow.283 An international athlete tax regime can allocate revenues to such deserving developing countries and help advance their legal infrastructure.

equity demands that similarly situated taxpayers be taxed similarly. Horizontal equity works to prevent arbitrary discrimination. For example, a lawyer making a certain salary should be taxed in the same way as if that lawyer were instead a doctor making the same salary. Id.


280. See Winnie, supra note 43.

281. In 2010, almost 28% of Major League Baseball players, and almost 50% of minor league baseball players, were foreign-born. The Dominican Republic has the highest number of citizens in U.S. baseball. Percentage of Foreign-Born Major League Baseball Players Dips Slightly from Last Year, ESPN.COM (Apr. 6, 2010), http://sports.espn.go.com/mlb/news/story?id=5060822.


283. See Winnie, supra note 43, at 86.
5. A Stepping Stone Toward International Tax Harmonization

A multilateral tax agreement could act as a stepping stone toward international tax harmonization. In fact, any universal international agreement in the area of taxation would be a step in the right direction. Such an agreement could also be a first step toward a general tax treaty between the U.S. and Brazil. The capital export neutrality goal of the U.S. and capital import neutrality goal of Brazil have prevented agreement thus far.\(^{284}\) However, if both countries are a party to a multilateral tax treaty targeted at a narrow area of taxation, they will share common ground and have an open dialogue that may lead to broader treaties in the future. The same concept could be true for other Central and South American countries with which the U.S. has largely failed to engage in tax treaties. A multilateral treaty would be a monumental first step toward tax harmonization and developing new economic relationships among all countries.\(^{285}\)

B. Proposal: A Multilateral International Athlete Tax Regime

The key to a separate international athlete tax regime is a multilateral agreement between all the world’s major countries. Although universal involvement may sound unattainable, if the most economically powerful countries initiate this narrow, targeted agreement and propose fair tax principals, both developed and developing countries will stand to benefit and have little reason to abstain. An international athlete tax regime should incorporate a flat tax, a central withholding agency, and simplified allocation methods.

1. Flat Tax

The foundation of an international athlete tax regime is a flat tax. The flat tax would provide much needed simplicity and consistency. The regime’s flat tax would eliminate “exemptions, loopholes, and targeted breaks with a system that is so simple that the international athlete could file his taxes on a postcard size form.”\(^{286}\) The simplicity of the flat tax would benefit both tax administrators and international athletes.

\(^{284}\) See supra notes 222–25 and accompanying text. Brazil is very quickly becoming one of the most economically powerful nations in the world, and Brazil is arguably the most important nation with which the U.S. has failed to engage in a tax treaty. Id.

\(^{285}\) Furthermore, by agreeing to compromise in the area of taxation, the U.S. may improve its image and aid in further cooperation in the future.

\(^{286}\) Winnie, supra note 43, at 86.
From an administrative standpoint, most major countries already employ some type of flat tax for nonresident athletes, as illustrated above.287 Most importantly, the flat tax would apply consistently to all the athlete’s related income, thus obviating the very problematic income characterization.288 Personal service income would be taxed in exactly the same manner as royalty income. All income directly or indirectly related to the athlete’s performance would fall into this regime, which would remove the often difficult determination of tax treatment under bilateral treaties.289

Another benefit of the flat tax is that it levels the playing field for all countries and all athletes. The flat tax would prevent the race to the bottom, currently exemplified between Spain and the U.K. Uniformity would prevent tax law from distorting athletes’ decisions on where to reside and where to perform. And the flat tax, under a universal tax regime, would treat all athletes the same, thus it is fair and horizontally equitable within this specialized group of taxpayers.290

The international athlete tax regime should impose a significant flat tax rate.291 A rate of approximately 30% represents a practical compromise292 and should appease most countries and athletes.293 The flat tax should be a final tax on the athlete’s gross income, but after applying a standard deduction, much like the Chinese system.294 Because athletes would significantly reduce their expenses under the new regime, business expense deductions would not be as important as they are currently. Athletes who

287. See discussion infra Parts I–VII.
288. “[T]here is no need to differentiate between types of income at all . . . .” Sandler, supra note 39, at 347.
289. As an illustration of this difficulty, the recent OECD proposed changes to its Article 17 commentary, focusing heavily on determining which activities are related to the performance and thus fall within Article 17. Org. for Econ. Co-Op. and Dev. (OECD), Discussion Draft on the Application of Article 17 (Artistes and Sportsmen) of the OECD Model Tax Convention 4–6 (Apr. 23, 2010–July 31, 2010), available at http://www.oecd.org/dataoecd/31/15/45058769.pdf.
290. Although the flat tax would violate vertical equity, ability to pay is generally not a concern with athletes and a de minimis exception can further alleviate ability to pay concerns, and also encourage cultural exchange.
291. The withholding rate should be set at “full rate” close to the corporate tax rate. See Sandler, supra note 39, at 347.
292. As discussed above, most developed countries have progressive rates from 0% to 45%. See discussion supra Parts I–VI.
293. This 30% flat tax should be the only tax levied on the athlete’s relevant income. Thus, the athlete should not be subject to VAT, social security, or employment taxes.
294. This deduction could be limited to a dollar amount or percentage of gross income, or a combination of both like the Chinese system. A 20% deduction would likely satisfy countries and athletes.
are currently taxed at lower rates would still likely benefit overall, as the new regime would prevent double taxation and drastically reduce legal and accounting expenses.\textsuperscript{295} And even countries that currently impose a higher effective tax rate would likely increase revenues due to significantly improved compliance.

2. Central Withholding Agency

The international athlete tax regime should establish a Central Withholding Agency (“CWA”) to further simplify administration for both countries and athletes.\textsuperscript{296} Any entity that pays an athlete would withhold the flat tax and submit it to the CWA.\textsuperscript{297} The payor would also submit information related to the payment such as the athlete’s identification number and relevant country or countries involved.\textsuperscript{298} Importantly, by providing a centralized withholding infrastructure, the CWA will relieve all of the parties involved, especially developing countries, of the administrative burden that is often difficult to overcome.

The CWA would alleviate the need for international athletes to file any tax returns relating to their athletic income.\textsuperscript{299} The CWA would automatically calculate the standard deduction based on the athlete’s yearly gross income and, if necessary, simply send the athlete a check at the end of the year.\textsuperscript{300} Additionally, the CWA would automatically determine whether an athlete satisfied the \textit{de minimis} exception, and if so, would send the athlete a complete refund check.

3. Allocation

The final component of the international athlete tax regime is the allocation of tax revenues. Simplicity and fairness should dictate this allocation. The CWA should allocate the collected revenue 50% to the source country and 50% to the combined countries of citizenship and resi-

\textsuperscript{295} Athletes may even significantly reduce travel/living expenses because they would not need to try to avoid certain tax regimes.
\textsuperscript{296} The CWA would be funded through a small percentage of the overall athlete tax revenue.
\textsuperscript{297} Assuming the payment is made to the athlete relating at least indirectly to his performance as an athlete.
\textsuperscript{298} The CWA can assign each athlete a unique taxpayer identification number to avoid publicity concerns.
\textsuperscript{299} Athletes will still need to comply with their residence country’s tax laws for income unrelated to their athletic performance.
\textsuperscript{300} If the standard deduction is simply a percentage of gross income with no limitation, it could be deducted at the source and the CWA would not need to send any checks.
dence. Thus, if the athlete is resident of a country other than his country of citizenship, each should be allocated 25%.

Under this allocation structure, the CWA still needs to determine the source of the athlete’s income. This determination will be much easier due to free information exchange and a central repository in the CWA. Additionally, the CWA can uniformly determine how to allocate the tax revenue if multiple source countries are involved. The result is a simple, consistent, and fair allocation of athletes’ tax revenue.

CONCLUSION

The purpose of this Article was threefold. First, to compare how six significant countries currently deal with the inherent problems of taxing extremely mobile, transient, high-income taxpayers with diverse income. Second, to illustrate that each country takes a very different—and often very convoluted—approach that has resulted in confusing, complex, and inconsistent regimes. And finally, to propose a solution that will benefit tax administrators and athletes alike.

International athletes’ unique characteristics necessitate a separate tax regime. A single, consistent regime would eliminate substantial enforcement difficulties for tax administrators as well as massive compliance burdens and potential double taxation for athletes. This Article presents a rough blueprint for a feasible regime that is simple, effective, efficient, and extremely beneficial for both tax administrators and athletes. Now the sports world will have to wait and see if any countries are willing to play ball.

301. See Bazo, supra note 138.
302. The CWA will not have the conflicting interests of a country’s own tax authority. Additionally, countries will have less motivation to challenge source determinations because they will likely receive some portion of the tax revenue, unlike the current all-or-nothing system.
DEFINING AGGRESSION: AN OPPORTUNITY TO CURTAIL THE CRIMINAL ACTIVITIES OF NON-STATE ACTORS

INTRODUCTION

In 1999, the United Nations ("U.N.") passed resolution 1267, which created the “Al-Qaida and Taliban Sanctions Committee” tasked with monitoring sanctions placed against the Taliban.¹ Two years after the sanctions were put into place, terrorists belonging to and associated with Al-Qaida hijacked four United States airplanes in furtherance of a terrorist attack that would forever be remembered as “9/11.”² Since 2001, the U.N. has passed seven additional resolutions modifying the sanctions regime to include individuals and entities associated with Osama bin Laden, Al-Qaida, and the Taliban.³ Yet, between September 2001 and March 2004, Al-Qaida was accredited for seven additional terrorist attacks.⁴

A possible reason why U.N. sanctions have had a limited effect on Al-Qaida is because Al-Qaida is a non-state actor (“NSA”). The term NSA has a variety of different meanings; spanning from rebels and terrorists to businessman and religious groups.⁵ The intuitive definition of a NSA is quite simple: any person or group that is not a state.⁶ However, this Note is particularly interested in the category of NSAs defined as “armed


². Hijacked airliners were flown into the Twin Towers and the Pentagon, claiming about 3,000 lives. An additional plane was believed to be heading towards the White House, but crashed outside of Pittsburgh. In Depth: September 11 What Happened?, CBC NEWS ONLINE (Sept. 11, 2007), http://www.cbc.ca/news/background/sep11/index.html (last visited Jan. 15, 2011).

³. Resolutions 1390(2002), 1455(2003), 1526(2004), 1617(2005), 1735(2006), and 1822(2008) were all passed so that sanctions would apply to designated individuals and groups associated with Osama bin Laden and/or the Taliban, irrelevant of their location. Security Council Committee Concerning Al-Qaida and Taliban, supra note 1.


⁵. See Andrew Clapham, Non-State Actors, in POST CONFLICT PEACE-BUILDING: A LEXICON 200, 200 (Vincent Chetail ed., 2009).

⁶. See id.
groups that operate beyond state control.” This type of NSA includes, but is not limited to rebels, local milita nts, vigilantes, warlords, and civil defense forces. Al-Qaida falls into this category of armed groups because they are an international terrorist organization that does not depend on the support of a political state. Yet, Al-Qaida is just one example; the International Institute of Strategic Studies’ armed conflict database currently lists eighty-four different NSA groups in the Middle East and North Africa alone.

The problem that NSAs present to the international community is exemplified by Al-Qaeda: despite a slew of U.N. sanctions, Al-Qaida has persisted in terrorist activity. International humanitarian and human rights laws have been similarly ineffective with policing the criminal activities of NSAs. This is troubling because the international climate has grown less state-centered, with increasing influence from NSAs. As the threat presented by NSAs expands, it is imperative that the international community recognize the changing dynamic of conflicts, internal and international, and adapt its laws accordingly.

One such opportunity to shape the laws of armed conflicts arose in 2010, when the Assembly of State Parties ("ASP") to the International Criminal Court ("ICC") met to review the Rome Statute and define the

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7. Caroline Holmqvist, Engaging Armed Non-State Actors in Post-Conflict Settings, in SECURITY GOVERNANCE IN POST-CONFLICT PEACEBUILDING 45, 45 (Alan Bryden & Heiner Hanggi eds., 2005) (discussing the importance of including NSAs in peace talks once a conflict has concluded).
8. Id.
12. Id. at 2.
13. See id.
“crime of aggression.” Although not the formal definition, aggression refers to the legality of resorting to force. This conference was significant, because how the crime is defined will determine whether NSAs, like Al-Qaida, can be prosecuted for attacks like 9/11. As it stands, Al-Qaida would have escaped prosecution. The adopted definition focuses entirely on state action, and reads in pertinent part:

[T]he planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

Though the amendment was passed in 2010, the ICC may only exercise jurisdiction over this crime subject to another vote to be held after January 1, 2017. Going forward with such a definition would be a mistake. As the High-Level Panel on Threats, Challenges, and Change stated, “the norms governing the use of force by non-state actors have not kept pace with those pertaining to states.” With the laws of war continually growing outdated, adding such a provision to the Rome Statute is like placing a fresh brick atop a crumbling foundation.

Part I of this Note provides a background of the international laws governing conflicts, particularly those relating to NSAs. Part II criticizes the current international framework for conflict resolution. Specifically, Part II discusses why international law is too outdated to properly handle modern conflicts and how developments in international criminal law make it the best avenue for enforcing laws against NSAs. Part III focuses

18. Id. art 15(2).
19. In a speech delivered before the General Assembly in September 2003, the Secretary-General of the U.N. announced that the member states needed to come to an agreement on the nature of the threats to collective security. With this goal in mind, the Secretary-General convened a panel including eminent persons to provide a comprehensive view on this subject, as well as advice on how to move forward. The results of this panel were presented to the General Assembly on December 2, 2004. The Secretary-General, Report of the High-Level Panel on Threats, Challenges, and Change, ¶ 159, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter High-Level Panel Report].
on the Rome Statute and particularly the 2010 review. Given that this review amended the Rome Statute to define the crime of aggression, this Note discusses the implications and shortcomings of this amendment. Lastly, Part IV argues that by passing a state-focused definition of aggression, the international community missed a critical opportunity to reign in the illegal activities of NSAs.

I. INTERNATIONAL LAW AND CONFLICT RESOLUTION

According to its preamble, the goal of the U.N. is to promote global peace, “reaffirm faith in fundamental human rights,” establish conditions under which justice can flourish, and “promote social progress and better standards of life.”

It logically follows that the U.N. Charter charges the Security Council with the goal of restoring and maintaining global peace and security, while not aggravating the situation. So although the U.N. is an assembly of nations, to meet their responsibilities the U.N. must have certain tactics at its disposal for dealing with the threats presented by NSAs. In this vein, in 2006 the U.N. published a set of guidelines entitled “Humanitarian Negotiations with Armed Groups.” The manual lists international humanitarian law, international human rights law, and international criminal law as the three principle branches that frame the discussion for humanitarian negotiations with NSAs. While criminal and humanitarian laws are specific to conflicts, international human rights law provides certain universal rights guaranteed to all people. The guidelines of such negotiations are of special interest to this discussion since international humanitarian law is often used synonymously to describe the laws of war or proscribe appropriate conduct dur-

21. Id. art. 39.
22. Article 40 of the U.N. Charter states:

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Id. art. 40.

24. Id. at 30.
25. Id. at 33.
ing wartime. Thus, adherence to international humanitarian law is closely related to conflict resolution.

To avoid confusion, it is worth noting the difference between the terms “humanitarian principles” and “international humanitarian law.” In general, humanitarian principles refer to alleviating human suffering wherever it may be found. This term comes from, and is the focus of the International Committee of the Red Cross. On the other hand, international humanitarian law is a set of rules which seeks to “limit the effects of armed conflicts.” To this extent, it looks to protect those that were not involved in, or are no longer involved in armed conflicts, and restricts the methods and tactics used to carry out a war. This area of law is comprised of a number of treaties, as well as custom. At its core, those treaties are the Geneva Convention of 1949, which binds nearly every state in the world, and the additional protocols of 1977. Of these treaties, the ones specific to NSAs are Common Article 3 of the Geneva Conventions, and Protocol Additional II. Additionally, customary international humanitarian law is a set of rules and norms that has arisen out of regular practice, creating a general belief that such practice should be adhered to as a matter of law.

It is important to remember that treaty-based international humanitarian law was enacted by states. Thus, in theory, NSAs are expected to follow and adhere to a set of rules and guidelines that they had no part in creating. To complicate matters further, NSAs are typically involved in

27. See Jean Pictet, The Fundamental Principles of the Red Cross: Commentary, ICRC (1979) (discussing the purpose of the Red Cross, a non-governmental organization that was founded to “bring[] assistance without discrimination to the wounded on the battlefield”).
28. Id.
30. Some agreements specify the protection of children, or forbid the use of specific weapons and tactics. Id.
34. Id.
35. Id. at 32 (pointing out that even if a state is not a signatory to a given treaty, it is still expected to adhere to the principle of not targeting buildings that are essential to civilian survival, such as water treatment plants).
36. See Sassòli, supra note 11, at 6.
fighting against the state that enacted the law that is supposed to bind them and by definition, are illegal in said state. It logically follows that where the law was created with the problems and goals of only one party in mind, these laws will be less effective. Given the vast number of NSAs around the world, and the fact that by their nature, it is impossible to predict which NSAs will exist in the future, lack of participation by NSAs in international treaties is unlikely to change. Furthermore, it is improbable that there will be any future conferences regarding this area of law, as the codification of international humanitarian laws has largely been completed.

Customary international humanitarian law is considered binding on both sides of a conflict, irrelevant of ratification, and enjoys a higher degree of legitimacy. Dubbed the “Marten’s Clause,” one of the most important rules of customary international humanitarian law comes from the preamble of Additional Protocol II. It declares that “in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.” So since customary international humanitarian law exists without formalized treaties, a nation’s or individuals’ approval of the law is theoretically immaterial to its application.

37. Id. at 7.
38. See id. at 6 (discussing that at least psychologically, people might have an easier time accepting a set of laws if they were involved or represented in the creation of the laws).
39. The Hague Conventions were in 1907, the Geneva Conventions were in 1949, and the Additional Protocols were enacted in 1977. Thus, there has not been a new treaty of international humanitarian law in forty-two years. See generally Humanitarian Negotiations Manual, supra note 23, at 30; see also Jean-Marie Henckaerts, Binding Armed Opposition Groups Through Humanitarian Treaty Law and Customary Law, 27 COLLEGIUM (SPECIAL ISSUE) 123, 128 (2003) [hereinafter Henckaerts, Binding Armed Opposition Groups] (discussing how involving NSAs in future treaties is not a likely remedy to the problem of NSAs being unrepresented in the treaties that currently govern international humanitarian law).
Much like international humanitarian law, international human rights law is composed mostly of treaties, declarations, and covenants, which are signed and ratified by states. The goal of these treaties and covenants is to define the “universal, interdependent and indivisible entitlements of individuals.” Unlike international humanitarian law, these laws are applicable during both peace and wartime, and can never be suspended. Another difference is that international human rights laws only impose responsibility on the state to its citizens, and as such, only the state is capable of violating human rights laws. An opposing view is that although NSAs cannot be a party to the existing treaties, its members are expected to adhere to them and will be prosecuted accordingly for violations. Thus, much like international humanitarian law, international human rights law excludes NSAs from the process, but expects them to abide by the results.

Of the three, international criminal law provides the most effective foundation for holding NSAs accountable for their international crimes. This branch of law imposes criminal sanctions in an effort to protect a certain international order, or basic core values that pierce state borders. Although international criminal law initially took aim at states housing international criminals, over time the focus has shifted to individual criminal responsibility. Despite this focus on individual

43. These, among others, include the Universal Declaration of Human Rights (1948) and the International Covenants on Civil and Political Rights (1966). Humanitarian Negotiations Manual, supra note 23, at 33.

44. Id.

45. Henckaerts, Humanitarian Law, supra note 40, at 196.


47. See The High Commr’t for Human Rights, The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, ¶ 18, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2003/64 (Dec. 27, 2002) [hereinafter The Right to a Remedy] (discussing the right to a remedy for persons victimized by human rights violations, and finding such remedies are only available when the perpetrator is a state actor).

48. See Humanitarian Negotiations Manual, supra note 23, at 33 (acknowledging that it is the state’s responsibility to enforce international human rights law, but NSAs can be prosecuted for their violation under applicable national law, or international criminal law).

49. “International crimes,” does not necessarily have the same connotation as “international criminal law.” As used here, it simply refers to any violation of international law.


51. Id. at 4; see also Rome Statute of the International Criminal Court art. 25(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (providing in pertinent part that
sibility, international criminal law still shares the same structure as other fields of international law; individuals can only be prosecuted for violating a law to which their state was a member.\textsuperscript{52} International criminal law is derived from the general principles of international law, agreements by states on particular activities, and commonly recognized principles of national law.\textsuperscript{53} Although treaty-based international criminal law is found in several agreements,\textsuperscript{54} this Note focuses on the Rome Statute.

The Rome Statute holds special importance because it is considered the most comprehensive substantive piece of international criminal law and, in effect, codifies all of the “core crimes.”\textsuperscript{55} Furthermore, it is the instrument which created the ICC, the first permanent, international court.\textsuperscript{56} The ICC was created to promote the rule of law and was given “the power to exercise its jurisdiction over persons for the most serious crimes of international concern.”\textsuperscript{57} Moreover, the Rome Statute provides the ICC with a list of sources of law to apply.\textsuperscript{58} This is unique to the ICC because founding documents for other international criminal laws were focused on national state law.\textsuperscript{59} On the other hand, Article 21 of the Rome Statute declares itself first among sources of law for the court to apply.\textsuperscript{60} This bears special importance to NSAs because the Rome Statute establishes jurisdiction over individual\textsuperscript{61} and specifically addresses non-international conflicts.\textsuperscript{62} Thus, given its focus on individuals, and jurisdiction over

\textsuperscript{52} Mégret, supra note 16, at 5.
\textsuperscript{53} Humanitarian Negotiations Manual, supra note 23, at 34.
\textsuperscript{55} Mégret, supra note 16, at 7.
\textsuperscript{56} Humanitarian Negotiations Manual, supra note 23, at 35.
\textsuperscript{57} It further provides that the court will assume a complementary role to national criminal courts, and that the jurisdiction and functioning of the court is to be governed by the statute. Rome Statute, supra note 51, art. 1.
\textsuperscript{58} Id. art. 21.
\textsuperscript{59} See Mégret, supra note 16, at 6.
\textsuperscript{60} Only after applying the Rome Statute, “Elements of Crimes and its Rules of Procedure and Evidence,” may the ICC look to pertinent treaties and rules from international law. Last amongst applicable law for the ICC are general principles that the court derives from national laws of legal systems around the world, particularly the states that might normally exercise jurisdiction. See Rome Statute, supra note 51, art. 21.
\textsuperscript{61} Id. art 1.
\textsuperscript{62} Article 8(2)(c) provides in sum and substance:
NSAs, the ICC and amendments to the Rome Statute bear a special importance to the future of conflict resolution in the context of NSAs. Although the laws are in place, they must still be enforced. Historically, international criminal law has been uniquely vulnerable to claims criticizing it for this very failure.63 One reason for this problem is that strong international criminal law enforcement is typically linked to the strength of the organization behind it.64 In this vein, the ICC has benefited substantially from backing by a coalition of “like minded” States.65 Although the U.S. has been critical of the ICC, it has received support from the European Union as well as a number of Latin American and African States.66 Moreover, the U.N. even acknowledged that “[i]n the area of legal mechanisms, there have been few more important recent developments than the Rome Statute creating the International Criminal Court.”67 Further U.N. support for the ICC is found in the Relationship Agreement between the International Criminal Court and the United Nations, adopted in 2004.68 The preamble of this agreement recognizes the important role played by the ICC, and states the U.N.’s desire to establish a “mutually beneficial relationship.”69

Another reason that international criminal law stands out amongst other branches of international law is International Military Tribunals (“IMTs”). An IMT is typically created by the same treaty that put into

In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely . . .

Id. art. 8(2)(c).
Article 8(2)(f) further provides:

. . . It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized groups or between such groups.

Id. art. 8(2)(f).
64. For instance, one reason that the prohibition on slave traffic in the 19th century was successful is that Britain threw its weight behind the prohibition, and threatened to use British forces to patrol the Atlantic to enforce the ban. Id.
65. Id.
66. Id.
69. Id. pmbl.
force a given set of laws. Historically, these tribunals were created ad hoc to adjudicate a specific situation and were limited either in territory, time, or personally. For example, the Nuremberg IMT was created by the London Charter of the International Military Tribunal. It was created in the wake of World War II with the specific purpose of trying crimes stemming from that war. Although the Rome Statute’s creation of the ICC is technically considered an IMT in the same regard as tribunals before it, it stands out as the only one established permanently and given universal jurisdiction.

II. THE OUTDATED INTERNATIONAL MODEL

One of the chief issues that the international community has with policing NSAs is repercussions. Punishment is important, because as discussed in this Section, NSAs may not recognize the laws as applicable to them. To adequately appreciate the shortcomings of the global system and the international laws governing war, the discussion should begin with the founding of the U.N. and its Charter. The preamble immediately evidences why the U.N. has problems dealing with NSAs: although the purpose of the U.N. is promoting global peace, the Charter was enacted by an assembly of governments. Furthermore, the U.N. has since ad-

71. Id.
73. Id. art. 6.
74. Méret, supra note 16, at 27; see also Rome Statute, supra note 51, art. 1 (stating that the court is “hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern . . .”).
75. See Clapham, supra note 46, at 511 (discussing the various arguments for why NSAs are bound by international law, and the responses those arguments will likely receive from the NSAs); see also Sassoli, supra note 11, at 3–6 (discussing how NSAs might respond to various arguments about being bound by international humanitarian or human rights laws).
76. The preamble of the U.N. Charter reads in pertinent part:

To save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

To reaffirm faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
mitted that the primary goal of its creation was state security. Thus, although the nations that gathered for the first assembly of the U.N. agreed to the Charter, the various NSAs the Charter hopes to govern did not. So the U.N., acting as peace keeper for the globe, is challenged to monitor the actions of a variety of groups who never authorized it to exercise power over them.

The current architecture of international law is poorly equipped to prevent or resolve conflicts involving NSAs. The problem with the laws governing conflict resolution is that although the international reality grows more focused on NSAs, international laws remain focused on state responsibilities. Moreover, even where the rules apparently apply to the NSA, there is seldom an actual international forum for the aggrieved party to seek relief and invoke the NSA’s responsibility. This is largely because the laws of war predate the recent explosion of NSAs onto the global stage. As neither international humanitarian nor international criminal law has seen development since 1998, meaningful change does not happen often.

Even politicians that applaud the U.N.’s successes stress that if the U.N. is to meet the challenges of providing collective security in the

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To establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

To promote social progress and better standards of life in larger freedom.

U.N. Charter pmbl.

77. Anand Panyarachun, Chairman of the High-Level Panel on Threats, Challenges, and Change, highlighted this problem in his report which was presented by the Secretary-General of the U.N. to the General Assembly. High-Level Panel Report, supra note 19, synopsis.

78. U.N. Charter, pmbl.

79. Sassoli, supra note 11, at 1–2 (arguing that not only are most of the international rules state-centered, but the implementation mechanisms are even more so).

80. This is true regardless of whether the aggrieved party is an individual, an injured State, an international organization, or a third party State. See id. at 2.


82. Anand Panyarachun, the former Prime Minister of Thailand and the Chairman of the High-Level Panel on Threats, Challenges, and Change, starts his report to the Security Council by applauding the U.N. for past successes, and insisting it has been more successful than people give it credit for. High-Level Panel Report, supra note 19, transmittal letter.

83. At its founding, the U.N. thought of collective security as a collective response by its members should the security of a state be put in jeopardy. High-Level Panel Report, supra note 19, synopsis.
21st century, major changes are needed.\(^\text{84}\) This is partially because the proliferation of NSAs has led observers to believe the importance of the state is diminishing.\(^\text{85}\) For a demonstration of this fact, one only has to glance at a breakdown of the conflicts that have plagued the world between 1946 and 2002. In 1946 there were two inter-state wars as opposed to ten ongoing civil wars,\(^\text{86}\) While the number of inter-state wars has never eclipsed six in a given year, the number of civil wars rose to fifty-two in 1992, before settling down to thirty in 2002.\(^\text{87}\) Considering that the number of civil wars today is much higher than it was when the U.N. was founded, it would be foolish to keep shaping international law in its 1945 image.

To understand why NSAs present such a challenge to the U.N., it is important to consider the effectiveness of the laws discussed above. Part A of this Section examines the U.N.’s use of sanctions and discusses why they are an ineffective means of attaining compliance from NSAs. Next, Part B discusses how the failures of international humanitarian law and international human rights law stem from their being inapplicable. Finally, Part C argues that of the three, international criminal law provides the best hope for policing the criminal activities of NSAs.

\textit{A. To Sanction, or Not to Sanction?}

No proper discussion of the penalties associated with disregarding international law would be complete without an overview of U.N. based sanctions. Following the Cold War, “peacemaking, peacekeeping and post-conflict peacebuilding in civil wars [became] the operational face of the United Nations in international peace and security.”\(^\text{88}\) During this same time period, the U.N. has turned to the use of sanctions with increasing frequency.\(^\text{89}\) Its power to implement sanctions stems from Chapter VII of the U.N. Charter, which governs actions in response to a

\(^{84}\) High-Level Panel Report, supra note 19, transmittal letter.


\(^{86}\) See High-Level Panel Report, supra note 19, fig.1.

\(^{87}\) See id. fig.1.

\(^{88}\) Id. ¶ 84.

\(^{89}\) For example, the United Nations imposed sanctions on Iraq to force it out of Kuwait, to compel Serbia to stop aiding the Bosnian rebels, and to topple the Haitian military. See generally Renee B. Agress et al., The Effects of Economic Sanctions on Internal Conflict: The Capacity and Preferences of Domestic Groups in Target States (paper presented at the annual meeting of Southern Political Science Association, Jan. 6, 2005); see also Robert A. Pape, Why Economic Sanctions Do Not Work, 22 INT’L SEC. 90 (1997).
breach of the peace. Specifically, Article 41 provides for the use of measures not involving force, “[including] complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

At the discretion of the U.N. Security Council, sanctions can be broken up into two categories: mandatory and voluntary. While voluntary sanctions are imposed at the discretion of the state, mandatory sanctions are binding international law, and states must enact legislation to put them into effect. This is because Article 24(1) of the U.N. Charter states that the Security Council’s responsibility is to maintain international peace and security, and to this extent, grants the Security Council power to act on behalf of the other states. Furthermore, Article 25 of the Charter provides that members of the U.N. “agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” While both brands of sanctions are at the U.N.’s disposal, the literature, as well as this Note, focuses on mandatory sanctions. In the years spanning 1991 to 1994, the U.N. Security Council imposed mandatory sanctions eight times, as opposed to twice between 1945 and 1990.

Yet, sanctions in general are a questionable practice and are particularly ineffective in the case of NSAs. Despite the U.N.’s turning to sanc-

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90. U.N. Charter ch. VII.
91. U.N. Charter art. 41. The Security Council also has the power to call on the parties involved to comply with the measures it deems necessary. Id. art. 40. The Security Council is also allowed to call for the use of force if it deems Article 41 measures to be inadequate. Id. art. 42.
93. Since the sending state has the right to ignore voluntary sanctions, it becomes much more difficult to keep track of voluntary sanctions. Additionally, it is difficult to determine the effectiveness of voluntary sanctions, since the discretionary element implies that they will not be applied uniformly. See id.
94. Id.; see also U.N. Charter arts. 24, 25.
96. Id. art. 25.
97. Voluntary sanctions have largely been ignored by literature on sanctions for a variety of reasons. Among them is that the term “sanctions” typically refers to mandatory sanctions. Furthermore, it is empirically easier to leave out voluntary sanctions because mandatory sanctions provide clearer data. See Charron, supra note 92, at 8.
98. Pape, supra note 89, at 90.
tions with increasing frequency, it is still unclear how frequently sanc-
tions actually bring about the desired changes in the target regime. Although proponents typically argue that sanctions can be as effective as military force, the first wave of research indicated that they were not. Logic dictates that the purpose behind sanctions is that the eco-
nomic burden placed on the sanctioned nation’s population will cause
those citizens to grow dissatisfied with their government. This would
in turn cause the nation’s citizens to place internal pressure on the regime
to make the necessary changes desired by the U.N., leading to the lifting
of the sanctions. Although recent studies have shown sanctions to be
more successful, that is largely because the definition of “success” has
been modified in a way that makes failure impossible. One economic
analyst, David Baldwin, argues that whenever the target of attempted
influence is forced to pay any price for noncompliance, the sanctions
should be considered at least partially successful. Yet, this is blatantly
a circular definition of success. If a sanction is the imposition of some
burden on a country, and success is defined as burdening a noncompliant
country, every instance of a sanction must be, by definition, a success.
Baldwin’s definition is further flawed because it judges when “attempt-
ated” influence is successful. Clearly, when success is attained by attempt-
ing something, it is not very difficult to achieve this standard. The prob-
lem with such an over-inclusive definition is that it clouds the real issue
of whether desired changes actually resulted from the sanctions.

In avoiding the trap of defining sanctions too broadly, it is important to
distinguish between economic pressure and economic sanctions. Eco-
nomic pressure tends to refer to one of three strategies: (1) economic
sanctions, (2) trade wars, and (3) economic warfare. Of the three,

100. Although reasonable people might differ on how effective war is as an “instru-
ment of policy,” it is hard to argue for unnecessary wars. As such, the argument goes that sanctions present a more humane alternative to resolving conflicts. See Pape, supra note 89, at 91 (citing DAVID A. BALDWIN, ECONOMIC STATECRAFT, 373 (1985)).
101. The first major wave of research done on the effectiveness of sanctions occurred
102. Agress, supra note 89, at 1.
103. Under this view, economic sanctions might cause the citizens of a nation to en-
gage in activities such as strikes, demonstrations, riots, and maybe even civil war. See id.; see also Pape, supra note 89, at 94.
104. Pape, supra note 89, at 95.
105. Id. (citing DAVID A. BALDWIN, ECONOMIC STATECRAFT, 373 (1985)).
only economic sanctions seek to lower the economic well-being of a target for the purpose of coercing the target to change its political behavior. So while some lump all three categories under the term economic sanctions, this is ill-advised. What policy-makers are actually interested in is when economic pressure brings about desired policy changes. If the barometer for success remains focused on bringing about an actual regime or policy change, then the results remain less optimistic. Historically, U.N. sanctions regimes that target intrastate conflicts tend to place the bulk of the sanctions against the state, despite the fact that the focus of the literature is on the importance of targeted sanctions and sanctioning individuals and entities. In a case study of various sanctions regimes, regimes involving intrastate conflicts were in place longer than those involving interstate conflicts. Furthermore, of the civil wars occurring between 1993 and 2003 that triggered U.N.-led mediation, settlement resulted only about twenty-five percent of the time. As such, when sanctions are considered in an appropriate context, their effectiveness when NSAs are involved is questionable at best.

A possible explanation for why NSAs are not as responsive to sanctions is that they do not have the same responsibilities to their ‘citizens’

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107. A trade war is when a state threatens to, or actually inflicts, economic harm against another state in an attempt to persuade the other state to agree to terms that are more favorable to the coercing state. JOHN A. CONYBEARE, TRADE WARS: THE THEORY AND PRACTICE OF INTERNATIONAL COMMERCIAL RIVALRY 3–6 (1987).

108. Economic warfare is the strategic weakening of a target’s economy to in turn afflict its military capabilities. This is typically done during a peacetime arms race or during war. Pape, supra note 89, at 94.

109. Id.

110. Id.

111. Placing economic pressure on a state carries one or both of two purposes: punishing the target by depriving them of some material good, or making the target comply with some goal that the punishing parties feel is important. As achieving both these goals will not always be possible, it is imperative for the policy-maker to determine which one is more important. See Galtung, supra note 101, at 379.

112. Pape, supra note 89, at 95; see also Galtung, supra note 101, at 380 (pointing out that merely punishing a person is not likely to cause that person to comply with a given set of goals).

113. A sanction regime refers to the totality of Security Council resolutions creating, altering, or terminating sanctions that target a particular group or state. Charron, supra note 92, at 4.

114. Id. at 15.

115. Intrastate conflicts are confined within the borders of one state. Id. at 3.

116. Interstate conflicts involve two or more countries. Id at 3, 16.

117. High-Level Panel, supra note 19, ¶ 86.
as an actual government. Often times, breeding discontent with the ruling government might actually be their goal. Thus, the dissatisfaction with the regime that the U.N. is hoping to foster by sanctioning the state may be the very same goal as the NSA’s. This is evidenced by the fact that sanctions placed on regimes that had pre-existing political or economic problems were of limited effect. Historically, these targeted regimes frequently stood to gain from persisting with their illegal activities. Some extremist groups actually stand to gain from regional instability resulting from conflicts, since state collapse or the emergence of ungoverned regions can create safe havens for NSAs. Intuitively, it makes little sense for an organization that is dedicated to illegal activity to start adhering to the law simply because the U.N. has asked them to. Sanctions are an exercise of international law, and criminals, by the nature of their name, are law breakers.

B. IHL and IHRL: Do They Even Apply?

Hoping that NSAs will adhere to given rules or principles falsely presupposes that they are actually bound by them. This is the biggest problem with holding NSAs responsible for violating international human rights law. International human rights law binds states, and this becomes the focus of the argument when NSAs enter the picture. Even prominent defenders of human rights admit there are good reasons that international human rights law does not apply to NSAs. For instance, human rights activist Liesbeth Zegveld acknowledges that it is inappropriate to hold NSAs responsible for violating international human rights

118. For instance, NSAs are unlikely to have the capacity to provide their members with certain rights like the access to courts. See Clapham, supra note 46, at 502.
119. This is the logical implication of a situation where the NSA is a rebel group seeking to challenge the State’s power. See id. at 511.
120. Agress, supra note 89, at 11.
121. In some cases, warlords generate such a degree of profit from their economic networks, that they can actually withstand the economic sanctions. That is, it is more profitable for the warlords to persist in spite of the sanctions than to listen to the U.N. See id. at 11.
124. There is some support indicating that NSAs do have human rights obligations, but the majority of the support stems from international soft law bodies, pronouncements of NGOs, and scholarly writing. See Sassòli, supra note 11, at 3.
law, as these are rights that people hold exclusively against the state.\textsuperscript{125} While some scholars argue that NSAs have responsibilities under human rights law because some of them have elements of government authority,\textsuperscript{126} this argument still leaves the door open for rebel groups that do not take on such authority to circumvent these obligations.\textsuperscript{127}

Despite the fact that the Universal Declaration of Human Rights says that “everyone has duties to the community,”\textsuperscript{128} the traditional view is that human rights laws bind states, not individuals.\textsuperscript{129} A report from the U.N. Economic and Social Council admitted that although all parties felt that NSAs should be responsible for violations of international humanitarian law and international criminal law, some felt that only states could violate international human rights law.\textsuperscript{130} As such, the Council found it important to proceed with caution, so as not to mistakenly suggest that NSAs may be accountable under international human rights law.\textsuperscript{131} If the U.N. does not believe that NSAs should be held accountable for violations of human rights laws, there is little reason to think that the NSAs will take the prerogative and bind themselves to these laws.

On the question of whether international humanitarian law binds NSAs, those that argue in the affirmative point to Common Article 3 of the Geneva Conventions.\textsuperscript{132} Specifically, Article 3 includes the wording “each Party to the conflict shall be bound to apply, as a minimum, the following provisions.”\textsuperscript{133} At face value, this indicates that NSAs should

\textsuperscript{125} Clapham, supra note 46, at 503 (citing Liesbeth Zegveld, Accountability of Armed Opposition Groups in International Law, 49–51 (2002)).

\textsuperscript{126} Id. at 502 (citing Christian Tomuschat, The Applicability of Human Rights Law to Insurgent Movements, in Krisensicherung und Humanitärer Schutz—Crisis Management and Humanitarian Protection 573–91, 588 (Horst Fisher et al. eds., 2004)) (arguing that in some instances, elements of government authority might fall into the hands of a rebel movement).

\textsuperscript{127} See id. at 502 (pointing out that it is a well-known principle that governments and international organizations are reluctant to admit that rebel groups are acting in a government-like way).


\textsuperscript{129} William A. Schabas, Punishment of Non-State Actors in Non-International Armed Conflict, 26 Fordham Int’l L. J. 907, 908 (2003).

\textsuperscript{130} The Right to a Remedy, supra note 47, ¶ 18.

\textsuperscript{131} Principle 3 of the report sought to distinguish between international humanitarian and human rights law, and between state actors and NSAs. The report admits that legal and administrative measures may not always be sufficient for prevention purposes. Id. ¶¶ 14–21.

\textsuperscript{132} See Sassoli, supra note 11, at 3.

\textsuperscript{133} Geneva Conventions Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316.
be bound by international humanitarian law. However, that claim also completely overlooks reasoning from the perspective of NSAs for why they are not. Specifically, arguments that they are bound to international treaties may be rejected by parties that had no role in the process of their enactment.\footnote{Clapham, supra note 46, at 511; see also Sassòli, supra note 11, at 17.}

Some scholars argue that it is a simple matter of the NSAs being a component of a state which accepted a treaty and, as such, are compelled to abide by said treaty.\footnote{This idea suggests that the state has accepted a rule and is bound by that rule. In turn, the state is made up of not only the government, but of the entire population including both individuals and collective groups. See Eric David, \textit{International Humanitarian Law and Non-State Actors: Synopsis of the Issue}, 27 COLLEGIUM (SPECIAL ISSUE) 27, 35 (2003).} However, arguments that they should be bound by national laws are irrelevant considering many NSAs refuse to acknowledge the state’s legitimacy to make laws in the first place.\footnote{Id.; cf. David, supra note 135, at 35–36 (arguing that international humanitarian law applies to national liberation movements where they seek to be recognized as the legitimate government).} While some NSAs may be coerced to follow international laws if they have aspirations of becoming the governing state, many others are simply content with gaining control over specific areas or the opportunity to “run organized criminal activity.”\footnote{See Henckaerts, \textit{Binding Armed Opposition Groups}, supra note 39, at 128.} Thus, it intuitively follows that where a group’s specific goal is to violate a given set of laws, they are both aware of the repercussions and are either not concerned, or are willing to accept them. In either scenario, where the law’s purpose is to prevent violation by parties who refuse to accept its legitimacy, it is destined to fail.

There is, however, the argument that since customary international humanitarian law is founded on practice and is applicable against everyone, the fact that NSAs did not ratify these customary laws is irrelevant.\footnote{Yet currently, only state activities can create customary international law. The activities of NSAs are only considered when they succeed in becoming the ruling government of their state. Thus, this argument is defective because it still tries to pigeon hole NSAs in a set of laws they have no part in creating. Whether the laws are signed on paper}
and created formally or enacted in a de facto manner, they are still a creation of states. Furthermore, even if the argument to give customary law universal recognition is accepted, this still overlooks the fact that when the laws are applicable to NSAs, there is seldom a forum to enforce the laws against them. As the next Section points out, the creation of such forums is one reason why international criminal law is so important for holding NSAs accountable for breaking the law.

C. The Best Hope

Given that the antiquity of the law is one of the problems with policing NSAs, international criminal law is particularly interesting because of the recent opportunity for development. When the Rome Statute was put into force on July 1, 2002, it included a predestined review. For this purpose, from May 31 to June 10, 2010, Kampala, Uganda hosted a conference for the ASP to the ICC. One item on the agenda at this review was establishing a legal definition for the crime of aggression. Prior to this review, the Rome Statute failed to define the term aggression, making jurisdiction over the crime inoperable. Although the ASP drafted an amendment defining the crime, the court cannot exercise this jurisdiction until January 1, 2017 at the earliest. Since international criminal law is arguably the most capable branch of law at dealing with NSAs, the ASP missed a unique opportunity to update the legal mechanisms governing conflicts by adopting a state focused definition of aggression. One reason international criminal law stands out from international humanitarian and human rights law is because at its core, it is criminal law. Unlike the other two branches of law, criminal law is implicitly applied against people that disagree with it. The emergence of international criminal law is related to the rise of a strong central international power in the same way that national criminal law is linked to the rise of the state.

For example, in a local government, laws criminalizing murder and arson

141. Sassoli, supra note 11, at 2.
142. Rome Statute, supra note 51.
143. This review is planned to include, but not be limited to, “the list of crimes contained in article 5,” and is to be open to “those participating in the ASP.” Id. art. 123.
145. Also planned for Uganda is: a discussion of the court’s performance thus far, a review of article 124 which allows nations to postpone the court’s exercise of jurisdiction over war crimes, and two amendments to the Rome Statute proposed by Belgium and Mexico. Id.
146. Id.
147. See Rome Statute Amendments, supra note 17, art. 15.
are created by the public for the welfare of the public, irrelevant of how murderers and arsonists feel about them. Expanding this idea to the international context, international criminal law represents certain values that the international community holds with such esteem that they “transcend its typical value neutrality.” Since this area of law is geared to criminalize individual misconduct, there is no reason it cannot criminalize the misconduct of individuals not associated with the state. Where the argument that NSAs never agreed to the treaties might effectively explain why international humanitarian or human rights law do not apply, the idea of international criminal law is to police individuals, not the states. Thus, there are no legal or logical problems with criminalizing aggression by NSAs; the only obstacle comes from the actual definition. In contrast to the typical pattern of state-centered international law, defining aggression under international criminal law means individuals can be charged with the crime.

For this reason, the definition of aggression adopted by the ASP to the Rome Statute limits the powers of the branch of law most effective at policing NSAs. In contrast to the laws of international armed conflicts, parallel laws in internal armed conflicts were poorly developed until the 1990s. Prior to the Rwanda and Yugoslavia tribunals, there was no international treaty even imposing criminal responsibility on individuals not associated with the state, let alone actually holding them accountable.

149. This usually results from a “densification” of the international system. In such a situation certain principles become so prized that they “pierce through the sovereign veil” and criminalize conduct that would traditionally be left entirely to national governments. See id. at 2–3.
152. As a general principle, international criminal law seeks to protect the international community from the acts of specific individuals. Thus, there is nothing in the functioning of this branch of law that would restrain a court from prosecuting a NSA for a particular crime. See Cassese, supra note 150, at 846.
153. Id. (arguing that crime of aggression should be applicable to NSAs, since the body of law that is defining the crime is already focused on individuals).
155. These tribunals, established in the early 1990s, will be discussed in detail, infra Part III.
156. There is a distinction between responsibility and accountability. Responsibility refers to when a law is applicable to a given person, whereas accountability refers to actually enforcing the laws after a person violates them. Without first establishing responsi-
NSAs for violating international criminal law, the Rome Statute has empowered the ICC to enforce similar rules.\textsuperscript{157} As such, the jurisprudence flowing from the Rwanda and Yugoslavia tribunals, as well as the definition of war crimes under the Rome Statute are accredited as predominant reasons for the merger of the laws of international armed conflicts and the laws governing non-international conflicts.\textsuperscript{158} Currently, with limited exceptions, there is at least a presumption that the laws of international armed conflict apply to internal conflicts.\textsuperscript{159}

In this manner, international criminal law has actually been used as a vehicle of enforcement for other branches. Genocide,\textsuperscript{160} crimes against humanity and war crimes are among the crimes listed under the Rome Statute.\textsuperscript{161} Crimes against humanity are the widespread targeting of civilians for acts of murder, enslavement, torture, etc.\textsuperscript{162} War crimes are in turn defined as any grave violation of the Geneva Conventions of 1949.\textsuperscript{163} The U.N. has explicitly found that genocide is a violation of human rights,\textsuperscript{164} and acts such as torture and enslavement have been called human rights violations by the International Covenant on Civil and Political Rights.\textsuperscript{165} Additionally, since the Geneva Conventions of 1949 is one of the central treaties of international humanitarian law,\textsuperscript{166} war crimes are clearly also a violation of humanitarian law. Thus, the ICC has recognized that at least certain violations of international humanitarian accountability, there can be no accountability. See Liesbeth Zegveld, \textit{Accountability of Non-State Actors in International Law}, 27 Collegium (Special Issue) 153, 153–54 (2003).

\textsuperscript{157} Id. at 155; see also Rome Statute, supra note 51, art. 28.

\textsuperscript{158} Internal armed conflicts implicitly involve NSAs, and armed conflicts implicitly involve the use of force. Thus, developments in this area of law provide analogous support for how the use of force by NSAs should be treated in an international setting. Kolb \& Hyde, supra note 154, at 259–60.

\textsuperscript{159} These exceptions are the status of combatants and prisoners of war, and the laws of occupied territories. Id. at 259.

\textsuperscript{160} In sum and substance, this crime is defined as an act of violence committed with “intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” Rome Statute, supra note 51, art. 6.

\textsuperscript{161} Id. art. 5.

\textsuperscript{162} Id. art. 7.

\textsuperscript{163} Id. art. 8.

\textsuperscript{164} The U.N. has also found that the crimes which constitute genocide might also qualify as crimes against humanity or war crimes, depending on the context in which they are committed. Office of the Special Advisor on the Prevention of Genocide http://www.un.org/preventgenocide/adviser/genocide.shtml (last visited Feb 22, 2011).


an and human rights law are criminal. The Commission on Human Rights has also formally acknowledged that individual responsibility for human rights violations should be pursued by criminal courts. The implication of this recognition is that while scholars debate whether those branches of law apply to NSAs, the ICC already stands as an institute capable of prosecuting NSAs for those violations.

As such, international criminal law has become arguably the main vehicle used for ensuring NSAs are held accountable for international crimes. Examples include a UK conviction of an Afghan warlord for torture. Further evidence is offered by the Rwanda and Yugoslavia tribunals’ prosecution of members from various NSAs accused of committing crimes against humanity. The aforementioned tribunals claimed their first successful conviction of a leader of a non-state group in 1999. To date, Yugoslavia has adjudicated 121 cases (both NSAs and state actors) while Rwanda has adjudicated 49. As such, both courts are recognized as an important step in holding NSAs accountable for international crimes. Furthermore, the ICC should build on what these other IMTs have started. As the Rome Statute’s entry into force in 2002 marked an important step in deterring war crimes, the ICC has the opportunity to expand on the success of past tribunals because its reach is not limited territorially or by time.

169. Id.
170. Id.
171. Zegveld, supra note 156, at 155.
172. Eleven people were acquitted, sixty-one were sentenced, thirteen were referred to national jurisdictions for prosecution, and thirty-six had their indictments withdrawn or are deceased. Key Figures of ICTY Cases, Int’l Criminal Tribunal for the Former Yugoslavia, http://www.icty.org/sections/TheCases/KeyFigures (last visited Jan. 15, 2011).
175. Id.
At present, the ICC is monitoring four situations: The Democratic Republic of Congo, The Central African Republic, Uganda, and Darfur, Sudan. Of a combined thirteen cases in these four situations, the ICC has five of their targets in custody, either standing or awaiting trial. Although the outcomes of these cases are far from determined, the fact that these men have been removed from the arena where they committed an assortment of horrifying crimes is a positive step. That they will be forced to face justice is even more reason to applaud the efforts and potential of the ICC.

III. THE 2010 FALLOUT: THE CRIME OF AGGRESSION

In 2010, the ASP to the Rome Statute met to review the ICC and amend the Rome Statute. Article 5 of the Rome Statute gives the ICC jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and aggression. However, while the court exercises authority over the first three crimes, Article 5(2) provides that the ICC will only exercise jurisdiction over aggression after it is defined. Created at the same time as the Rome Statute’s enactment, a Special Working Group (“SWG”) was tasked with filling this void. In 2008, a discussion paper was distributed by the SWG containing its proposed definition of aggression. The definition that passed in 2010 is identical to the one distributed in 2008 and establishes the elements of the crime as: (1) the planning, preparation, initiation or execution of the use of armed force, (2) a crime conducted by an individual who has a high-level of control over the political or military actions of a state, and (3) committed against another sovereign state. The two most disappointing aspects of this amendment are that it focuses exclusively on individuals in a policy-
making capacity and restricts the crime of aggression to something only states are capable of.

Given the current international climate, this amendment falls short of meeting the goals of the original Rome Statute and international criminal law in general and fails to keep up with the reality of evolving conflict patterns. Part A of this Section discusses the impact of a working definition of aggression and which parties will be implicated by the new definition. Next, Part B points out that this definition steps away from the norms and principles which have governed international criminal law practically since its creation.

A. Aggression: What’s in a Word?

Formally defining the act of aggression under the Rome Statute puts the initiation of military action within the purview of the law. Aggression differs from other war crimes because it is a crime of _jus ad bellum_, while the others are crimes of _jus in bello_. whereas the latter refers to criminal violations during the execution of a war, the former refers to criminal violations in initiating a war. Thus, even if a state was to conduct a military operation in a legal manner, its mere initiation might be against the law. This idea is not new; dating back to the Nuremberg IMT, aggression was called the “mother of all crimes.” Furthermore, the U.N. General Assembly met specifically to define the crime, highlighting the importance of a definition for the “most serious and dangerous form of the illegal use of force.” The General Assembly adopted a definition of aggression in 1974.

In adopting the 2010 amendment on aggression, the ASP missed a valuable opportunity to improve the laws policing NSAs. By enacting an amendment defining the crime of aggression, the ICC will finally be able to exercise the inoperable jurisdiction it has held since 2002. This is contingent on approval by the State Parties to the Rome Statute come Jan 1, 2017. Rome Statute Amendments, supra note 17, art 15(2).
use of force by NSAs\textsuperscript{190} while improving the international community’s ability to hold NSAs accountable for humanitarian violations. Yet, the definition which was accepted overlooks the reality that NSAs are increasingly responsible for acts violating international laws. As the High-Level Panel on Threats, Challenges, and Change stated, “[t]he norms governing the use of force by non-state actors have not kept pace with those pertaining to states.”\textsuperscript{191} Thus, the question that must be considered is whether aggression is a crime that only states are capable of committing. With this question in mind, an examination of past conflicts indicates that the amendment, if approved in 2017,\textsuperscript{192} will lead to undesirable outcomes.

For instance, activities of terrorist groups indicate that NSAs are capable of using armed force on an international level. Article 51 of the U.N. Charter provides for the use of self-defense when a state suffers an armed attack.\textsuperscript{193} Using self-help measures is allowed so long as the Security Council has not taken action yet.\textsuperscript{194} Although the Security Council never explicitly approved of the U.S. attack on Afghanistan, there is little doubt that the 9/11 terrorist act was of sufficient gravity to constitute an armed attack under the U.N. Charter.\textsuperscript{195} Thus, it is evident that at least some NSAs are capable of using armed force on an international level. Yet, while the purpose of criminalizing aggression is to police the initiation of force, using the new definition retrospectively evidences that members of Al-Qaida would escape responsibility for criminal aggression. Given that the resultant damages are the same, it is difficult to accept such an outcome.

On the other hand, humanitarian intervention\textsuperscript{196} might be a criminal act. Again looking to the past, in 1999 the North Atlantic Treaty Organization (“NATO”) bombed Yugoslavia without authority from the U.N.

\textsuperscript{190} High-Level Panel, supra note 19, ¶ 159.
\textsuperscript{191} Id.
\textsuperscript{192} Rome Statute Amendments, supra note 17, art 15(2).
\textsuperscript{193} “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” U.N. Charter art. 51.
\textsuperscript{195} Id. at 353.
Security Council.\textsuperscript{197} This was defended by former U.S. President Clinton as “just and necessary,” and done in reaction to ethnic cleansing of Albanians in the Serbian province of Kosovo.\textsuperscript{198} Despite such rationalizations, NATO is an organization of states, this type of bombing is actually listed as an example of unlawful aggression,\textsuperscript{199} and Yugoslavia was a sovereign state.\textsuperscript{200} As such, NATO’s efforts to end the ethnic cleansing\textsuperscript{201} may very well have constituted criminal aggression.\textsuperscript{202} Whether unilateral humanitarian intervention should ever be justified is a controversial issue and most scholars and states believe it should not.\textsuperscript{203} This Note makes no attempt to weigh in on that debate, but criminalizing humanitarian intervention while simultaneously tying the ICC’s hands with regards to large-scale terrorist attacks hardly seems like a consistent way of policing the use of armed force.

In the same manner that the new amendment is under-inclusive, there is an argument that including NSAs under the crime of aggression might have undesirable consequences. Mainly, there is concern about how developments in criminalizing aggression might affect the right to armed struggle.\textsuperscript{204} The right to armed struggle refers to people under “occupation, apartheid, and alien domination,” and their ability to use armed force against a suppressive regime.\textsuperscript{205} Ignoring that whether there is a right to armed struggle is contested by some,\textsuperscript{206} this is not a compelling

\begin{footnotesize}
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\item[197.] Gavin Murray-Miller, Beyond Tragedy: NATO’s Intervention in the Former Yugoslavia 20–21 (unpublished thesis, California State University, Fresno) (on file with California State University, Fresno, History Department).
\item[198.] Id. at 21 (justifying the humanitarian intervention in Kosovo against claims that it was merely an act of the U.S. and NATO exporting their own ideals).
\item[199.] “Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.” ICC Discussion Paper, supra note 182, art. 8 bis(2)(b).
\item[200.] See Murray-Miller, supra note 197, at 22.
\item[201.] See id. at 20.
\item[202.] Murphy, supra note 196, at 366–367 (arguing that if the ICC does not prosecute attacks like NATO’s incursion into Kosovo as aggression under the SWG’s definition of the crime, they will in a sense be showing approval of unilateral humanitarian intervention).
\item[203.] Id. at 345.
\item[205.] See id.
\item[206.] See High-Level Panel Report, supra note 19, ¶ 160 (discussing the major stopping points for coming to an agreement for a definition of terrorism).
\end{enumerate}
\end{footnotesize}
reason to have a blanket exclusion of NSAs from the crime of aggression. The ICC has a built in discretionary valve; it can only hear cases for “the most serious crimes.”

Additionally, the new definition of aggression is restricted to acts “which by its character, gravity and scale, constitutes a manifest violation of the Charter of the [U.N.]” The use of threshold language like ‘most serious’ in the Rome Statute and ‘manifest violation’ in the amendment indicates that the ICC will be allotted discretion in prosecution. Thus, it is imaginable that if a liberation movement were to come to the ICC’s attention, they could choose to not prosecute them for aggression. Since the right to armed struggle is presently unimpeded by the U.N. Charter or Resolution 3314, there is no reason to think that discretionary prosecution under the ICC would impact this right. Thus, whereas the ICC can work around an over-inclusive definition covering all NSAs, an under-inclusive definition completely carving out NSAs leaves the court no say in the matter.

Another potential problem with recognizing NSAs as capable of aggression is the implications on the right to self-defense. Recognizing something as an act of aggression implies an armed attack occurred, and an armed attack typically implicates reprisal under Article 51 of the U.N. Charter. Since a NSA exists within the boundaries of a state, there is concern about retaliation against a state that houses the NSA, but who was not involved in the attack. Ignoring that the U.S.’s reaction to 9/11 already suggests the legality of such responses, which is not necessarily a bad outcome. One state’s sufferance of another’s sovereignty requires that each polices the activities of its residents that might harm civilians within and without its borders.

\[\text{207. Rome Statute, supra note 51, art. 1.}\]
\[\text{208. Rome Statute Amendments, supra note 17, art 8(1).}\]
\[\text{209. Rome Statute, supra note 51, art. 1.}\]
\[\text{210. Rome Statute Amendments, supra note 17, art 8(1).}\]
\[\text{211. Kahn, supra note 204, at 2 (arguing that despite the developments associated with the war on terror, international law has not formally “repudiated the right to armed struggle”).}\]
\[\text{212. Under the SWG’s proposed definition of aggression, the crime involves the use of armed force. See ICC Discussion Paper, supra note 182, art 8 bis(2).}\]
\[\text{213. U.N. Charter art. 51 (the occurrence of an armed attack is the necessary trigger to justify a state engaging in self defense).}\]
\[\text{215. See id.}\]
tional law is that when one state fails to protect its neighbors from criminal activity stemming from within that state’s borders, it forfeits its right to have its sovereignty respected.\footnote{See id.}

While such a principle might seem unduly harsh, it could in fact serve a positive purpose. For instance, states may be discouraged from acquiescing in the illegal activities of NSAs within their borders.\footnote{See id. at 4.} Where a state knows it will be the target of retaliatory self-defense, it might be motivated to take decisive steps to actively circumvent NSAs suspected of engaging in the illegal use of force.\footnote{See id.}

To prevent such situations, many states have provisions in their criminal codes forbidding the state’s citizens from engaging in aggressive acts against other sovereign states.\footnote{Japan makes it a crime to prepare or plot to “wage war privately upon a foreign State.” Austria’s criminal code forbids anyone on its soil from undertaking in acts to “change the constitution of a foreign state or to divide territory which is part of a foreign state by force or threat of force.” Sweden forbids a person from, “by violent means or foreign aid, [causing] a danger of the Realm being involved in a war or other hostilities.” Joachim Gewehr, Defining Aggression for the International Criminal Court: A Proposal (Jan. 2003) (unpublished L.L.M. dissertation, University of Cape Town) (on file with University of Cape Town).} Furthermore, there is still the threshold issue. Including NSAs in the definition of criminal aggression would not automatically trigger the right to self-defense against all NSAs; the ICC has discretion to charge an individual of committing the crime. In a situation where the ICC does not charge a NSA with committing aggression, armed conflicts under Article 51 would not be implicated. Thus, the normative framework of the ICC is equipped to handle the potential dangers of finding NSAs capable of aggression.

\textbf{B. State vs. State . . . Really?}

Given that both international criminal law and the Rome Statute focus on the individual, irrelevant of his or her affiliation, this amendment’s focus on the state is contradictory to international criminal law. The Rome Statute declares it “shall apply equally to all persons without any distinction based on official capacity.”\footnote{Rome Statute, supra note 51, art. 27(1).} Yet, the SWG insisted on keeping the “control or direct” requirement as part of the definition, claiming it coincides with the Nuremberg and Tokyo IMTs.\footnote{See Kevin Jon Heller, Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression, 18 EUR. J. OF INT’L L. 477, 479 (2007).} However, the actual
case law flowing from these tribunals tells a different story.\textsuperscript{223} The jurisprudence of international tribunals and courts as well as relevant practice indicates that NSAs can incur criminal responsibility, both independently and through the grounds of command responsibility.\textsuperscript{224} It is an anomaly that this amendment defines aggression as a crime that is committed not only by states, against states, but also only by individuals in “a position effectively to exercise control over or to direct the political or military action of a State.”\textsuperscript{225}

Both historically and today, the prime subject of international criminal law is the individual.\textsuperscript{226} The Nuremburg Trials famously pointed out that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”\textsuperscript{227} Not only was the use of “abstract entities” presumably a reference to states, but this dictum is often cited as the birth of contemporary international criminal law.\textsuperscript{228} Furthermore, the Nuremberg IMT provided that the crime of aggression could be committed by people not formally associated with the Nazi party,\textsuperscript{229} and that “Hitler could not make aggressive war by himself. He had to have cooperation of statesman, military leaders, diplomats, and businessman.”\textsuperscript{230} Clearly the inclusion of businessman with statesman and military leaders shows the Nuremberg IMT was not preoccupied with state actors, let alone exclusively with high level leaders. By restricting the focus of an international crime under the purview of the ICC in accordance with the 2010 amendment, the very principles on which international criminal law was founded are put into question.

Following World War II, the Statutes of the Nuremburg and Tokyo IMTs were amongst the first to take aim at making the initiation of mili-

\textsuperscript{223} See id.
\textsuperscript{224} See Torture by Non-State Actors, supra note 168 (comparing the international frameworks of international humanitarian, human rights, and criminal law, and their application to NSAs).
\textsuperscript{225} ICC Discussion Paper, supra note 182, 8 bis(1).
\textsuperscript{226} See Mégret, supra note 16, at 4.
\textsuperscript{228} It is also believed that the founding principle of the Nuremberg IMT is the punishment of the individual, not the associated state. See Mégret, supra note 16, at 4.
\textsuperscript{229} See Heller, supra note 222, at 480.
tary conflicts an international crime. Specifically, the Statute for the Nuremberg IMT described “crimes against the peace” as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participating in a common plan or conspiracy for the accomplishment of the foregoing.” This definition is particularly interesting because, in addition to explicitly using the term “aggression,” it does not mention the state, nor does it reference rank. Thus, comparing the definition found in the Statute of the Nuremberg IMT against the one in the 2010 amendment indicates that the ICC is stepping away from principles elucidated by the Nuremberg IMT.

A more liberal reading of the Nuremberg IMT’s definition is evidenced by the successful prosecution of Artur Greiser for crimes against the peace. While serving as one of the leaders of the Nazi party in Danzig, Greiser and other Danzig Leaders worked in conjunction with the Central German Authorities to plan, direct, and execute attacks against Poland. He was prosecuted by the Supreme National Tribunal of Poland, which relied on various elements of International Law, including the Statute of the Nuremberg IMT. Despite linking Greiser to Hitler as a co-conspirator, the Tribunal also held that his violations of international law were a result of “Hitler’s orders,” and came as a result of “direct and indirect orders from the accused.” The Tribunal’s finding that Greiser violated international law by acting on Hitler’s orders seems to implicitly signal that they did not consider him acting in the capacity of a policymaker. In the context of the new definition, the conviction of Artur Greiser shows that international criminal law has long committed itself to


232. Nuremberg IMT, supra note 72, art. 6(a).


234. Sources of law that the Tribunal relied on included: international treaties, the Covenant of the League of Nations, the Statute of the Nuremberg IMT, and a non-aggression pact signed between Germany and Poland in 1934. Id.


236. Although the court did not directly address the issue of policy-maker, the fact that the court found that Greiser carried out Hitler’s orders implies that he was not responsible for the policies behind such orders. See Drumbl, supra note 231, at 11.
holding the individual responsible for their own actions, rather than just targeting the relevant policy-maker through command responsibility.

Further evidence on the Nuremberg IMT’s liberal stance on defining aggression is provided by the prosecution of two NSAs. Although both men were acquitted, Hjalmar Schacht\textsuperscript{237} and Albert Speer\textsuperscript{238} were both businessmen prosecuted for crimes against the peace.\textsuperscript{239} In both cases, the IMT specifically stated that private economic actors could be responsible for the crime of aggression.\textsuperscript{240} Schacht was only acquitted because the prosecution failed to prove he had actually taken part in the Nazi Party’s plan to wage aggressive war, or that he had knowledge that his work to rearm Germany was part of such a plan.\textsuperscript{241} Similarly, Speer was acquitted because he began his work after the war had commenced, so he could not have been part of the conspiracy to wage aggressive war.\textsuperscript{242} What both have in common is that they were acquitted because the prosecution failed to prove elements of the crime charged, not because of their status as private economic actors. While neither man belonged to a non-state armed group, both were recognized as capable of committing the crime of aggression while serving in a non-government capacity.\textsuperscript{243}

International law following the Nuremberg IMT also indicates that NSAs can commit the crime of aggression. The principles established by the Nuremberg IMT were reaffirmed two months later when the Allied Powers enacted Control Council Law No. 10 ("CCL 10").\textsuperscript{244} CCL 10 was meant to codify the underlying principles of the IMT judgments,\textsuperscript{245} while establishing additional IMTs in the occupied German zones under U.S.

\begin{footnotes}
\textsuperscript{237} Schacht was the President of the Reichbank from 1933–1939, Minister of economics from 1934–1937, and Plenipotentiary General for War Economy from 1935–1937. However, he began to lose authority in 1936, had no important government position by 1939, and was in a concentration camp from 1944 until the end of the war. Secretariat, Historical Review of Developments Relating to Aggression, 38–49, U.N. Doc. PCNICC/2002/WGCA/L.1 (Jan. 24, 2002) [hereinafter Historical Review].
\textsuperscript{238} Speer became the "Reich Minister of Armaments and a member of the Central Planning Board in 1942." \textit{Id.} at 41.
\textsuperscript{239} These two men are accredited for being the most responsible for Germany’s rearmament. See Heller, \textit{supra} note 222, at 480.
\textsuperscript{240} \textit{Id.}
\textsuperscript{241} Thus, given that the crime has a \textit{mens rea}, it is the prosecution’s job to prove every element. So although Schacht participated in the rearmament, the prosecution could not show he had subjective knowledge of the purpose of the rearmament. See \textit{id.} at 481.
\textsuperscript{242} \textit{Id.}
\textsuperscript{243} See \textit{id.} at 480; see also Historical Review, \textit{supra} note 237, at 39, 41.
\textsuperscript{244} CCL 10 was passed two months after the IMT defendants were sentenced. Heller, \textit{supra} note 222, at 482.
\textsuperscript{245} \textit{Id.}
\end{footnotes}
and French control. In this vein, the definitions for “crimes against the peace” were very similar under the Nuremberg IMT and CCL 10, with the latter arguably taking an even more liberal approach. CCL 10 stated that the actions listed, which constituted waging aggressive war, were non-exhaustive. The law provided that the crime of aggression could be committed by a person who “held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.” Since the Nuremberg IMT found NSAs were capable of committing the crime of aggression, it logically follows that CCL 10’s more expansive definition does as well. Moreover, the fact that the terms “co-belligerents or satellites” are listed in addition to Germany and its allies provides further evidence that the crime encompassed NSAs.

The results of the post-World War II IMTs reached beyond the Allied Powers, and were formally indoctrinated by the U.N. On December 11, 1946, the U.N. passed Resolution 95, which affirmed the “principles of the international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.” As such, all states that were party to the U.N. at that time accepted the definitions provided by the Nuremberg IMT, as well as how such definitions were interpreted.

Between the IMTs relating to World War II and the creation of the ICC are the International Criminal Tribunal for Rwanda (“ICTR”) and the International Criminal Tribunal for Former Yugoslavia (“ICTFY”). Prior to 1990, the question of command responsibility for the leaders of NSAs had never come before an international tribunal. In the Aleksovski case of 1999, the ICTFY ignored arguments that command responsi-

246. See id.; see also Historical Review, supra note 237, at 44.
247. See Historical Review, supra note 237, at 44.
248. Id. at 45.
251. See Cassese, supra note 150, at 842.
253. In The Prosecutor v. Zlatko Aleksovski, the accused was a prison warden, who was responsible for subjecting prisoners to “excessive and cruel interrogation, physical and psychological harm, forced labour (digging trenches), in hazardous circumstances, being used as human shields and some were murdered or otherwise killed.” Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgment, ¶ 5 (Int’l Crim. Trib. for the Former Yugoslavia June 25, 1999) [hereinafter Aleksovski, Case No. IT-95-14/1-T], available at http://www.unhcr.org/refworld/pdflid/4146e8ba2.pdf.
bility could only apply to people in official roles. The court held that “superior responsibility is thus not reserved for official authorities,” and instead extended liability to an individual “acting de facto as a superior.” Furthermore, the court paid no attention to whether the conflict was internal or international, and thus ignored whether the accused was a state actor. Although neither of these tribunals took aim at the crime of aggression, they are important for demonstrating that historically, international criminal law has not discriminated based on state affiliation.

Moving the focus to the 2010 amendment’s definition, while some might point to the U.N.’s definition of aggression as support for the state focused approach, this argument is unconvincing. To begin with, the U.N. definition passed into law in 1974, pre-dating the Rome Statute by twenty-four years. When the U.N. definition and the new definition are held side-by-side, they are nearly identical. In fact, Section two, Article eight of the SWG’s discussion paper cites directly to U.N. General Assembly Resolution 3314. Yet, it is worth noting that the assembled states that initially enacted the original Rome Statute did not utilize the U.N. definition. When the Rome Statute was being drafted, the Resolution 3314 definition was considered by some as a mere political guide, unsuitable for prosecution purposes.

Furthermore, Resolution 3314 was passed in an era when newly formed states were worried about the abuses of colonialism. These nations were concerned with interference by the major world powers that took place during the Cold War. Since the passing of U.N. Resolution

254. See Zegveld, supra note 156, at 154.
255. Aleksovski, Case No. IT-95-14/1-T, ¶ 76.
256. See Zegveld, supra note 156, at 154–55.
257. This definition, adopted in 1974, defines aggression as “the use of armed force by a state against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.” G.A. Res 3314 (XXIX), supra note 187, art. 1.
259. Compare G.A. Res. 3314 (XXIX), with Rome Statute Amendments, supra note 17, art 8(2).
260. “Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression.” ICC Discussion Paper, supra note 182, art. 8 bis(2).
262. Specifically, the resolution was passed in 1974, during the Cold War. During this time, many states found themselves threatened by the pressures of Soviet and U.S. influence. See Murphy, supra note 196, at 5.
263. Id.
3314, the U.N. itself has been critical of the inadequacies of the laws governing NSAs. In a General Assembly meeting of the U.N., it was admitted that when they were founded in 1945, the major concern was to prevent the outbreak of another World War. Now, however, the High-Level Panel on Threats, Challenges, and Change has recognized that in the decades to come, the threats facing the world go beyond “states waging aggressive war,” and include dangers like internal wars, terrorism, and transnational criminal organizations. Furthermore, these threats stem from both NSAs as well as states. When the U.N. has implicitly acknowledged the weaknesses of their definition of aggression, it is nonsensical for the ASP to turn around and adopt identical language as its own. Rather than ensuring the norms governing NSAs in the conflict context remain up to par with states, the ASP chose to maintain an inadequate status quo.

IV. IMPROPER DEFINITION: AN OPPORTUNITY MISSED

By enacting the 2010 amendment to the Rome Statute, the international community has missed a critical opportunity to improve the laws policing NSAs. In 1974, the U.N. proffered several reasons for why it was exigent to define aggression: 1) deterrence of aggression, 2) simplifying identification of the crime, 3) simplifying measures for suppressing aggression, and 4) facilitating the protection of the rights and lawful interests of victims. The proliferation of NSAs and the threat they pose to collective security make these reasons just as, if not more, relevant today. Part A of this Section criticizes the ASP for embracing an outdated definition of criminal aggression, virtually mimicking the one adopted by the U.N. in 1974, while completely ignoring the shifting dynamic of international conflicts. This Section further points out that this is problematic because opportunities to update international law do not come frequently. Part B focuses on why the amendment’s definition is inferior to other potential definitions that better align themselves with the norms of international criminal law. Finally, Part C points out that excluding NSAs from this definition undermines both the goals of the U.N. and of criminalizing aggression.

264. At the initial creation of the U.N., the founding members considered collective security in the traditional sense. That is, aggression against one would provoke a unified response against the perpetrator. See High-Level Panel Report, supra note 19, synopsis.
265. Id. (urging that “[t]he central challenge for the twenty-first century is to fashion a new and broader understanding . . . of what collective security means . . .”).
266. Id.
A. As the World Turns . . .

In a world where the boundaries of statehood continually evaporate, both in business and conflicts, the amendment’s definition seems to completely ignore international trends. Confining the crime of aggression to conflicts between states commits the ICC’s jurisdiction over the crime to the same shortcomings that already plague international law. The failings of international humanitarian laws have often been pinpointed to their being highly state-centric, despite the evolving non-state order. 268 Furthermore, in 2008, the U.S. Department of Defense’s National Defense Strategy described an environment “defined by a global struggle against a violent extremist ideology that seeks to overturn the international state system.” 269 It makes little sense to focus the crime of aggression on states, when aggression seeking the explicit overthrow of statehood has become, at least from the U.S.’s purview, the world’s largest problem.

Although the term NSA as used in this article admittedly encompasses a broader array of groups than those discussed by the U.S. Department of Defense, 270 those groups that were discussed offer an appropriate example. Much like the threats of Communism and Fascism which threatened the global order in the past, the violent extremists of today not only reject international law, but look to overthrow it. 271 These groups explicitly reject ideas like borders and state sovereignty. 272 Conversely, without principles like state sovereignty, the very notion of an international community that comes together to create law is undermined.

This problem has existed for decades, and the only new development about conflicts between a state and a NSA is the frequency with which they occur. Napoleon’s campaigns in Spain during the 19th century, German forces that occupied the Balkans during World War II, the conflict between Britain and Ireland, and the ongoing fighting between Israel and the Occupied Palestinian Territories are all examples of such con-

270. The Department of Defense report was largely concerned with reacting to the proliferation of terrorist organizations, citing the 9/11 attacks in its introduction, and discussing violent extremist ideology that is not necessarily applicable to all NSAs. Although terrorist organizations fall within the purview of the term NSA, as the term is used in this Note it encompasses a broader range of groups. Id.
271. See id.
272. See id.
flicts. However, those are examples spread across hundreds of years. Today, one need only pick up a newspaper to see several such conflicts around the globe. Just nine days after the Bali Bombing on October 12, 2002, fourteen people were killed in a suicide bombing in Israel. Meanwhile, Mounir El Motassadeq, a suspected member of Al-Qaida operating in Hamburg, was standing trial in Germany as an accomplice to the 9/11 attacks. As the number of incidents involving NSAs increases, so does the frequency with which the legal system must deal with them. Yet the 2010 amendment’s definition neither attempts to predict future problems, nor does it react to emerging ones; instead, ASP chose to react to problems that faced the U.N. thirty-five years ago.

Further recognition of the threat presented by NSAs can be gleaned from developments in the laws of war. According to the Yugoslavia tribunal, the laws of armed conflict have shifted from protecting state sovereignty to protecting human rights. The African Union signed the Non-Aggression Common Defense Pact, defining aggression as the use of armed force by a state, an organization of states, or non-state actors.

274. Id. at 16.
275. The bombing took place at a bar in the town of Kuta, killing 202 people and injuring 209. The group thought to be responsible was Jemaah Islamiyah, an Islamist group linked to Al-Qaida. Other Indonesian officials believe that Al-Qaida was directly responsible.
276. On October 21, 2002, fourteen people were killed as the result of a suicide bombing. The attack was carried out by an explosive-laden Jeep.
277. Mounir El Motassadeq was initially charged on August 29, 2002, and was convicted for complicity in the 9/11 attacks on February 18, 2003.
278. See KOLB & HYDE, supra note 154, at 258.
Additionally, countries like France have restructured their armies to be better suited for asymmetric warfare, rather than traditional warfare where the assembled forces of two or more states confront each other. Thus, as the landscape of war continues to change, it is important that the rules governing warfare do likewise.

Discussions by the U.N. also support including NSAs under the definition of aggression. It is worth noting that since adopting Resolution 3314, the U.N. Security Council has specifically condemned a NSA for committing the crime of aggression. Security Council Resolution 405 condemned the mercenary group which attacked Benin on January 17, 1977, for “the act of armed aggression.” This resolution makes no reference to a state sponsor. The International Law Commission viewed the coup in the Comoros Islands in a similar vein. The coup was conducted by mercenaries not affiliated with any state, causing the commission to fear they would not be guilty of aggression under a state-centered definition. Additionally, the U.N. recognized that the norms governing the use of force by NSAs have not kept up with their state-centered equivalents. This report, compiled by the Chair of the High-Level Panel on Threats, Challenges and Change called on the U.N. to “achieve the same degree of normative strength concerning non-state use of force as it has concerning state use of force.”

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280. Asymmetric warfare typically refers to situations where well-trained regular troops are pit against poorly trained irregular troops. Rogers, supra note 273, at 15.

281. Id. at 16.


286. See id.

287. High-Level Panel Report, supra note 19, ¶ 159.

288. Id.
It was a mistake to allow an opportunity to address these issues pass because it is not often that the laws governing conflicts see meaningful change. Given the complexity of the issues involved and the countless interests represented, enacting an international treaty takes a long time. This is evident from the four year gap between the establishment and entering into force of the Rome Statute, as well as the seven year gap between the court’s creation and the first review. Furthermore, it was not until twenty-nine years after the passage of the U.N. Charter that a definition to aggression was added. Thirty years later, the norms governing NSAs in a conflict context are still criticized by the U.N. As such, since the ASP to the Rome Statute adopted a definition of aggression without addressing NSAs, it may be years, if not decades, before another opportunity presents itself. As a result, the international community is committed to dealing with NSAs who engage in unlawful force, without adequate dispute resolution mechanisms.


The accepted definition of aggression represents a missed opportunity for the international community for two reasons. The definition restricts prosecution to individuals who “exercise control over or [] direct the political or military action of a state.” Thus, the ICC will have no jurisdiction over NSAs, regardless of their capacity, and as such, will not be able to levy any sort of judgment against the organization with which a suspected criminal is involved. To fully appreciate the shortcomings of

289. The Geneva Conventions were adopted in 1949. Twenty-eight years passed before the two Additional Protocols were adopted. Since 1977, no new additions have been made to that branch of law. Humanitarian Negotiations Manual, supra note 23, at 30. See also Henckaerts, Binding Armed Opposition Groups, supra note 39, at 128 (pointing out that as far as international humanitarian law is concerned, formalizing it into treatises is all but over).
292. Rome Statute, supra note 51, art. 123.
293. See G.A. Res 3314 (XXIX), supra note 187.
294. High-Level Panel Report, supra note 19, ¶ 159.
295. Rome Statute Amendments, supra note 17, art 8(1).
296. See id.
this definition, it is important to consider the implications of an alternate definition.

In this regard, the accepted definition of aggression steps away from the foundations of international criminal law, rather than looking to them as a guideline. The Nuremberg IMT not only took aim at the crime of aggression, but defined it in a manner substantially different than the ASP.\(^{297}\) For starters, the statute took aim specifically at individuals and further explained that an individual’s position will not factor into the question of guilt.\(^{298}\) Moreover, although the statute was meant to prosecute war criminals in the aftermath of World War II,\(^{299}\) the statute actually took aim specifically at NSAs. Where the IMT found an individual was associated with an illegal group or organization, it empowered the IMT to declare that they were criminal organizations.\(^{300}\) This in turn allowed the state harboring such organizations to treat any known affiliates as criminals and prosecute them accordingly.\(^{301}\) In such further prosecutions, the criminal nature of the organization was not considered and the IMT’s decision was taken as final.\(^{302}\)

It is clear that this statute meant to take aim at individuals and the groups they were associated with, irrelevant of state affiliation. In a modern context, if a definition similar to the one utilized by the Nuremberg IMT replaced the 2010 amendment, it would vastly improve the ICC’s power over NSAs. Not only would the court be allowed to hear the cases of individuals brought before them, but a successful prosecution would trigger state jurisdiction over criminals that happen to be part of the same organization. Theoretically, if the Nuremberg IMT’s definition applied, the ICC could prosecute a member of Al-Qaida who was involved in the 9/11 attack, irrelevant of his status as a policy-maker. Furthermore, if the prosecution was successful, it would trigger criminal status in every nation that Al-Qaida is located. Given that Al-Qaida has known affiliations in the Philippines, Eritrea, Algeria, Afghanistan, Chechnya, Tajikistan, Kashmir, Somalia, and Yemen, this would be a

\(^{297}\) Nuremberg IMT, supra note 72, art. 6(a); cf ICC Discussion Paper, supra note 182.
\(^{298}\) Although the fact that a person was only acting under orders might be considered as a mitigating factor, it had no bearing on actual guilt. See Nuremberg IMT, supra note 72, arts. 6, 7.
\(^{299}\) See Heller, supra note 222, at 480.
\(^{300}\) Nuremberg IMT, supra note 72, art. 9.
\(^{301}\) Id. art. 10.
\(^{302}\) Although the group/organization would be allowed to bring an appeal to the IMT questioning its criminality, until such an appeal was won, the issue was sealed. See id.
major accomplishment. In addition to being responsible to the ICC, national courts in those nations would have jurisdiction over Al-Qaida members, and the question of the group’s criminal nature would be pre-decided. Conversely, under the new definition, if the ICC managed to get a hold of the person directly responsible for the 9/11 attacks, they would not be able to prosecute him, let alone his underlings or foreign associates.

C. Undermining its Own Goals

It is important to remember that changes to the Rome Statute not only affect the ICC, but also have implications for the U.N. Both the U.N. and the ICC have recognized the goal of reaching a “mutually beneficial relationship,” formalized in an agreement between both parties. The agreement dictated that the two entities should cooperate closely in furtherance of performing their respective responsibilities. This relationship is evidenced by the Security Council’s right to refer cases to the ICC and the U.N.’s obligation to provide the ICC with documents relevant to a given case. Implicit to such a symbiotic relationship is that fulfillment of the goals of one party benefits the other. While updating the norms that govern the use of force by NSAs is a U.N. interest, it is a goal that the ASP to the Rome Statute had an opportunity to accomplish. Furthermore, the effects of this relationship have already been recognized. The report from the High-Level Panel on Threats, Challenges and Change points out that early indications showed that the Security Council’s willingness to use its power under the Rome Statute might deter parties from violating laws of war. The report argued that the U.N.’s role in preventing wars would be improved by developing the legal regimes and dispute resolution mechanisms. Because of this, the

303. Hayes et al., supra note 9 (highlighting the complexity of Al-Qaida’s infrastructure).
304. Negotiated Relationship Agreement, supra note 68.
305. Id. art. 3.
306. Rome Statute, supra note 51, art. 13(b) (listing “a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council . . .” as one way in which the ICC can exercise jurisdiction).
307. The U.N. commits itself “to cooperate with the Court and to provide the Court such information or documents as the Court may request pursuant to article 87, paragraph 6, of the Statute.” Negotiated Relationship Agreement, supra note 68, art. 15.
308. See High-Level Panel Report, supra note 19, ¶ 159.
309. See id. ¶ 90.
310. See id. ¶ 89.
Rome Statute is one of the most important recent developments in terms of legal mechanisms.\textsuperscript{311}

With the ramifications on the U.N. and global community in mind, a definition of aggression that excludes NSAs undermines the purpose of criminalizing the act. This is particularly troubling because states and NSAs are equally capable of the threats a definition of aggression seeks to avert. Surely, where the goals of the U.N. were to deter, identify, and suppress aggression,\textsuperscript{312} the source of the aggression should be irrelevant. A NSA that has the capabilities of using force on the global scale can just as easily threaten peace and national security as a state entity.\textsuperscript{313}

Even in purely internal conflicts, aggression by NSAs can undermine a state government, with the resultant instability creating a threat to international peace and security.\textsuperscript{314} An armed attack carried out by a NSA is still an armed attack, and the threat presented to a nation’s security is in no way lessened because it stems from an entity not recognized by international law.\textsuperscript{315} For example, in 1974, under Resolution 3314, the U.N. highlighted the existence of weapons of mass destruction as a reason for why defining aggression was so important.\textsuperscript{316} Incidentally, a report to the U.N. General Assembly thirty years later highlighted that amongst the challenges facing collective security was the possibility of NSAs obtaining nuclear or biological weapons.\textsuperscript{317} Given the gravity of the crime of aggression, ignoring NSAs’ very real capabilities of carrying out criminal aggression is simply inconsistent with the goals of the U.N. and the ASP to the Rome Statute.

Similarly, if by defining aggression the goal is to protect victims’ rights and access to remedies,\textsuperscript{318} the state-centered approach is again, counterintuitive. The 1974 resolution reaffirmed a duty that states not use armed force to deprive people of their rights and freedoms or disrupt the territorial integrity of a victim state.\textsuperscript{319} Yet, the High-Level Panel on

\textsuperscript{311} See id. ¶ 90.
\textsuperscript{312} See G.A. Res 3314 (XXIX), supra note 187.
\textsuperscript{313} See Printer, supra note 194, at 348 (highlighting the damage that a NSA such as a terrorist organization is capable of causing).
\textsuperscript{314} See Rayfuse, supra note 285, at 59–60.
\textsuperscript{315} YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 204 (4th ed. 2005) (discussing that to qualify as an armed attack under the U.N. Charter, an attack must be carried out against a state, not necessarily by a state); see also Printer, supra note 194, at 348.
\textsuperscript{316} G.A. Res 3314 (XXIX), supra note 187.
\textsuperscript{317} See High-Level Panel Report, supra note 19, ¶ 112 (discussing specifically, the danger of a terrorist organization acquiring weapons of mass destruction).
\textsuperscript{318} See G.A. Res 3314 (XXIX), supra note 187.
\textsuperscript{319} Id.
Threats, Challenges, and Change reports that the ideals behind terrorism are an attack on the U.N.’s respect for human rights. Additionally, the report cites the rise of civil wars as the predominant form of warfare as evidence that new states face crises of capacity and legitimacy. Recognizing these facts evidences that NSAs are capable of causing the very problem a definition of aggression hopes to avert. Thus, given the victim oriented nature of this goal, it is irrational to think the victim would be concerned with whether the person violating his rights had state association. It is hard to rectify affording a villager in some Bosnian valley certain protections from having his rights violated by a foreign aggressor, but denying them to civilians living in a valley plagued by internal conflict.

Considering that NSAs fall outside the scope of the U.N. Charter, it is even more imperative to hold them criminally responsible under international law. As discussed above, the idea of international criminal law is to punish crimes that pierce state value-neutrality. It logically follows that if the U.N.’s purpose is to maintain peace and promote national security, then groups bent on undermining those principles should be the focus, not the exception. Yet, for example, Al-Qaida is considered the first instance of a sophisticated terrorist network, and has publicly stated that the U.N. is one of its enemies and stands as an obstacle to its goals. Such declarations are not hollow rhetoric as Al-Qaida was responsible for attacks against ten members of the U.N. across four continents between 1999 and 2004. Ignoring such groups is an acquiescence of a threat to international stability, something that the U.N. hopes to avoid, and is an interest of the ASP to the Rome Statute in defining aggression.

321. The Panel uses the term “new states” to refer to states that emerged in the second half of the U.N.’s existence. Id. ¶¶ 2–3.
322. Id.
323. KOLB & HYDE, supra note 154, at 68 (arguing that common civilians, who are likely going to be the victims of criminal aggression, should be afforded the same rights irrelevant of who their assailant is).
324. The U.N. Charter was enacted by, and governs the states party to it. By definition, NSAs are excluded. See supra Part II.
326. See Printer, supra note 194, at 350.
327. High-Level Panel Report, supra note 19, ¶ 146.
328. Id.
329. Id.
330. See Printer, supra note 194, at 350 (arguing that if a NSA is going to seek to use force on a global scale, maintaining global peace and security demand that the U.N.’s policies govern that group’s actions).
aggression. Given the “piercing state value-neutrality” principle for defining an activity as an international crime, if the ASP to the Rome Statute finds that endangering one of the founding principles of the U.N. does not constitute such a crime, it is difficult to imagine what does.

In updating the laws governing the use of force, the goal should be creating parity between states and NSAs. Instead, holding NSAs outside the scope of criminal aggression presents a problem of symmetry. There is no question that once a state has been attacked by a NSA such as a terrorist, that state will be bound by the U.N. Charter. Specifically, Article 51 of the Charter allows the use of force in self-defense if an armed attack occurs. Since a state could target a NSA under this article as it does not limit the targets of lawful self-defense, this would mean one party to the conflict has to conduct hostilities within the scope of a set of laws, while the other does not. This double standard does not make sense; the U.N. should work towards establishing normative rules concerning the use of force by NSAs that match state equivalents. Just as there is no question that the U.S. was bound by Article 51 of the Charter following 9/11, it is agreed that the attacks carried out by Al-Qaeda were of severe enough quality to constitute an armed attack, triggering retaliation under Article 51. The new definition formally recognizes that in the ensuing conflict between the U.S. and Al-Qaida, one party was bound by all relevant laws of the U.N. Charter, whereas the other remains an anomaly in international jurisprudence.

CONCLUSION

Regulating criminal activity and ensuring collective security is one of the chief goals of the international community. Yet, it is a problem that grows more complex with the proliferation of NSAs and is compounded by the fact that laws governing these groups are an anachronism of international law. Branches of law such as international humanitarian and human rights law are a holdover from a time when the most pressing concern of the international community was the outbreak of another

331. Drumbl, supra note 231, at 14 (claiming the four interests involved in defining aggression are stability, security, human rights, and sovereignty).
332. See High-Level Panel Report, supra note 19, ¶ 161.
333. See Printer, supra note 194, at 351 (pointing out that Article 51 of the U.N. Charter does not limit the targets of lawful self defense).
334. See U.N. Charter art. 51.
335. See id.; see also Printer, supra note 194, at 351.
336. See High-Level Panel Report, supra note 19, ¶ 159.
337. Printer, supra note 194, at 353.
338. Id.
world war and, as such, focus entirely on the state.\textsuperscript{339} The U.N. itself was created under the daunting shadow of World War II and was essentially a direct response to the catastrophic event.\textsuperscript{340} Thus, it is not surprising that many of the principles formalized by its charter completely ignore the threats created by NSAs.

Going forward, it is important to recognize the weaknesses of the present legal framework so that future laws do not succumb to the same problems. Of the three principle branches of international law associated with armed conflicts, two arguably do not apply to NSAs. International human rights law is recognized as only incurring state responsibility\textsuperscript{341} and NSAs can properly contest international humanitarian law as inapplicable because they had no part in its enactment.\textsuperscript{342} International criminal law alone has managed to pierce state borders by targeting individuals rather than abstract, collective entities.\textsuperscript{343}

Given an international climate where some of the most pressing dangers stem from terrorism and transnational criminal organizations, it is important to preserve international criminal law’s role in prosecuting NSAs. In the realm of international criminal law, there is no more important establishment than the ICC. The ICC is the first and only permanent international court that is the functional equivalent of the transient IMTs of the past.\textsuperscript{344} The Rome Statute, which empowers and confers jurisdiction to the ICC, explicitly targets NSAs as capable of committing three of the four recognized crimes: war crimes, crimes against humanity, and genocide.\textsuperscript{345} The fourth crime, aggression, was undefined until 2010.

The definition of aggression agreed on by the ASP to the Rome Statute is nonsensical on numerous levels, the most basic of which is that it contradicts the principles of international criminal law. Starting with the IMTs following World War II through those established to prosecute the atrocities in Yugoslavia, international criminal law has focused on the individual, irrelevant of state association. The amendment definition makes aggression the lone crime for which the ICC cannot prosecute NSAs.

Moreover, in adopting a criminal definition of aggression, the ASP to the Rome Statute apparently ignored the problems afflicting the present

\begin{footnotesize}
\begin{enumerate}
\item See High-Level Panel Report, supra note 19, synopsis.
\item See id.
\item See supra Part II.B.
\item See id.
\item See Torture by Non-State Actors, supra note 168.
\item Humanitarian Negotiations Manual, supra note 23, at 35.
\item See Rome Statute, supra note 51, arts. 5(1), 25(2).
\end{enumerate}
\end{footnotesize}
and future in favor of combatting the issues of the past. The goals of defining aggression are to police the unlawful use of armed force, preserve collective security, and provide relief for victims of unlawful aggression. Yet when considering these reasons, it is patently clear that a NSA is just as much a threat as a state actor. The growth of organizations such as Al-Qaida clearly demonstrates that in the modern era, NSAs are capable of disrupting international security in the same manner as states. Furthermore, it is clear that any victim-based reasons should see no distinction in state-affiliation. If a group of villagers lose their home or loved ones as a result of the unlawful use of force, the legal affiliation of those who caused their loss is likely a distant afterthought.

Thus, when the ASP to the Rome Statute gathered in 2010 it had a unique opportunity to update international law. A proper definition of aggression would have improved the legal mechanisms for policing NSAs for their international crimes. It could also have helped eliminate the disparities between the laws of armed conflict as they apply to states and NSAs. Instead, these opportunities were missed and there is no telling when there will be another such chance.

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CALL A SPADE A SPADE: BARRIERS TO HARMONIZATION AND CONFLICTING MESSAGES IN EUROPEAN UNION INTERNET GAMBLING POLICY

INTRODUCTION

Internet gambling laws are rapidly changing in the European Union. On September 8, 2009, the European Court of Justice issued a ruling that placed yet another roadblock to the prospect of uniformity across the European Union in internet gambling laws.¹ In Liga Portuguesa de Futebol Profissional v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, the Court ruled that a Member State may prohibit outside operators from offering games of chance via the internet within their own territory.² This decision followed a decades-long distinct line of case law that fell on the conservative side of the internet gambling issue, upholding state monopolies.³ However, there is currently a moderate shift in mentality across the European Union to open up Member States’ borders. For example, France recently decided to end its internet gambling monopoly.⁴ The European Court of Justice also finally declined to uphold national legislation based on social policy justifications against internet gambling in Winner Wetten GmbH v. Mayor of Bergheim.⁵ As of July 2010, at least twenty-five internet gambling cases were pending in the European Court of Justice.⁶ This suggests an air of uncertainty to the status of longstanding state monopolies in internet gambling who may soon be forced to face outside competition.

The European Union is home to a vast array of legislation and points of view on the issue of internet gambling.⁷ In 1992, there was hopeful discussion on the idea of harmonization at the European Union level, but

². Id. ¶ 73.
³. See discussion infra Part I.D.
⁴. See discussion infra Part III.C.
⁵. Case C-409/06, Winner Wetten GmbH v Bürgermeister der Stadt Bergheim, 2010 ECJ CELEX NO. 606J0409 (Sept. 8, 2010).
those talks were largely fruitless.\textsuperscript{8} As of 2009, thirteen countries out of the European Union’s twenty-seven Member States support internet gambling, while seven bar the activity.\textsuperscript{9} The remaining seven either restrict the activity to state monopolies or heavily regulate it.\textsuperscript{10} For example, the United Kingdom currently regulates its entire gambling system through the Gambling Act of 2005.\textsuperscript{11} France also recently liberalized its laws by relaxing its state monopoly and allowing private companies to offer internet gambling to its citizens.\textsuperscript{12} The Netherlands, on the other hand, completely bans internet gambling outside its state monopoly\textsuperscript{13} while Poland just finished the process of doing so.\textsuperscript{14} These variations across the European Union are the impetus to many cases in the European Court of Justice today.

The world of internet gambling is now a vast one. The popularity of poker, in particular, exploded during the advent of internet gambling and televised poker games.\textsuperscript{15} Today, the World Series of Poker is one of the most watched sporting events in the United States.\textsuperscript{16} Its popularity has spread to the internet where millions of players log on to lay bets and play online poker from the comfort of their own homes. Currently, there is essentially a ban on internet gambling in the United States that originates from the 2006 Unlawful Internet Gambling Enforcement Act (“UIGEA”).\textsuperscript{17} This Act specifically prohibits the transfer of funds from

\begin{itemize}
\item \textsuperscript{9} Stacking the Deck, supra note 7.
\item \textsuperscript{10} Id.
\item \textsuperscript{11} Gambling Act, 2005, c. 19 (U.K.).
\item \textsuperscript{12} Max Colchester, \textit{France Opens Gambling to Wider Competition}, WALL ST. J., June 9, 2010, at B8.
\item \textsuperscript{13} A Stacked Deck, THE ECONOMIST, July 18, 2009, at 77 [hereinafter A Stacked Deck].
\item \textsuperscript{14} April Gardner, \textit{Poland Parliament Approves Gambling Ban}, CASINO GAMBLING WEB (Nov. 21, 2009), http://www.casinogamblingweb.com/gambling-news/gambling-law/poland_parliament_approves_gambling_ban_54828.html.
\item \textsuperscript{16} ESPN contracted with Harrah’s Interactive Entertainment to air the tournament until April 2018. \textit{ESPN to Televise WSOP Events Through ’18 Under New Deal}, SPORTS BUSINESS DAILY (Aug. 18, 2009), http://www.sportsbusinessdaily.com/article/132629.
\end{itemize}
financial institutions to gambling websites. Internet users in the United States, however, still manage to log on and gamble through offshore accounts. Additionally, it remains a controversial issue in Congress.

The popularity of online gambling extends beyond the United States to the rest of the world, especially across the Atlantic Ocean to the European Union. In fact, the World Series of Poker Europe held its inaugural competition in London in 2007. In Europe alone, the gross profit from

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18. Id. Banks were required to enforce the statute on June 1, 2010. Originally, the date for enforcement was December 1, 2009, but Representative Barney Frank successfully convinced the Obama administration to push back the federal crackdown date. US Treasury, Fed Delay Internet Gambling Ban 6 Mos, REUTERS (Nov. 27, 2009, 12:03 PM), http://www.reuters.com/article/idUSWEQ00361620091127.

19. This scheme is no longer a safe route because federal authorities are seizing bank accounts affiliated with internet gambling and money laundering. Van Smith, Feds in Maryland Seize Six More Bank Accounts Tied to Laundering Gambling Proceeds, BALTIMORE CITY PAPER BLOG (Sept. 24, 2009), http://www.citypaper.com/digest.asp?id=19013. In fact, Gary S. Kaplan, the founder of Betonsports Pte, an internet gambling website, was sentenced to fifty-one months in prison for violating the UIGEA. Betonsports earned $1.25 billion in 2004. Ninety-eight percent of that revenue came from American clients online. Benjamin Israel & Andrew M. Harris, Betonsports’s Kaplan Gets 51 Months in Gambling Case, BLOOMBERG (Nov. 2, 2009, 7:47 PM), http://www.bloomberg.com/apps/news?pid=20601087&sid=aIL5eQ3701Kg&pos=7.

20. Representative Barney Frank (D-MA) and Senator Robert Menendez (D-NJ) have introduced separate legislation softening the rules on internet gambling. In September 2009, Senator Ron Wyden, a Democrat from Oregon, proposed an amendment to legalize and tax internet gambling to fund the then controversial healthcare reform plan from the Obama administration to the Senate Finance Committee. Revenues from the tax would be used to fund low-income families to purchase health insurance. Eric Zimmermann, Wyden: Use Gambling Revenue to Pay for Healthcare, THE HILL (Sept. 21, 2009, 1:49 PM), http://thehill.com/blogs/briefing-room/news/59615-wyden-use-gambling-revenue-pay-for-healthcare. Under pressure, however, Senator Wyden withdrew the amendment no more than thirty-six hours later. Dan Cypra, Senator Wyden Withdraws Proposal to Use Internet Gambling to Fund Health Care, POKER NEWS DAILY (Sept. 25, 2009), http://www.pokernewsdaily.com/senator-wyden-withdraws-proposal-to-use-internet-gambling-to-fund-health-care-5181. At a Ways and Means Committee hearing in May 2010, Representative Frank said, “We are talking about a decision by adults to do what they want to do with their own money,” as he pushed for a bill to legalize internet gambling. Another bill that was in front of the House required people to declare their earnings in their taxes and sets a 0.25% tax on wagers of all federally licensed bets. In the background as the 111th Congress considered these bills was the $1.4 trillion budget deficit.

online betting amounts to five billion dollars a year. 22 Forty percent of all
online wagers come from Europeans, proving its popularity among Eu-
ropeans. 23 However, the inconsistency in laws across the European Un-
ion prevents access by many people, affecting commerce and the free-
dom of services guaranteed under Article 49 of the Treaty of Rome,
which is also known as the Treaty of the European Economic Commu-
nity. 24

Part I of this Note presents the existing law in the European Union, in-
cluding the relevant rights in the Treaty of Rome and the gambling case
law resulting from the conspicuous lack of uniformity across the Member
States. Part II discusses the current barriers to harmonization and how the
policing of consumer morality is actually a guise for state-interested tax
purposes. Without the ability to adapt to evolving technology, the Euro-
pean Court of Justice will arguably continue to perpetuate such legisla-
tion. Finally, Part III analyzes whether harmonization is a workable goal
by first looking at existing gambling regulations and then surveying the
options of the European Union in terms of future regulation. It concludes
that while complete harmonization is unlikely, some level of mutual rec-
ognition of other Member States’ laws could lead to better control of
monopolies in furtherance of the European Union’s goal of a single mar-
ket system with freedom of trade.

I. EUROPEAN UNION LAW

The European Union consists of twenty-seven Member States. 25 Its
structure parallels the three-branch structure of the United States. 26 The
European Commission is its executive arm while its legislative arm con-
sists of the European Parliament and the Council of the European Un-
ion. 27 The European Court of Justice is the judicial branch that adju-
dicates on European Union law. 28 But significant modification to the Euro-
pean Union pillar structure finally appears to be approaching. 29 After an

24. Treaty Establishing the European Economic Community, Mar. 25, 1957, availa-

25. Id.
26. The European Union refers to each of the arms as “pillars.” RALPH FOLSOM,
27. Id.
28. Id. at 71.
29. Dan Bilefsky & Stephen Castle, Way is Clear to Centralize Europe’s Power, N.Y.
eight-year uphill battle, the Czech Republic recently signed the Treaty of Lisbon, making it the last Member State to ratify it.\textsuperscript{30} The ratification of the twenty-seven Member States brought the Treaty into force.\textsuperscript{31} In general, the Treaty of Lisbon seeks to increase the European Union’s clout internationally while adding a presidential-post position.\textsuperscript{32} Despite this upcoming change, European law will still develop from the set of treaties that established the existence of the European Community and applicable case law from the European Court of Justice.\textsuperscript{33} Decisions from the European Court of Justice will be analyzed more closely in terms of the European Union’s unique arrangement of a single market system. In this system, European Union laws apply with equal force to each of the Member States.\textsuperscript{34} The obligations of all the various countries under the treaties and how they resolve their legislative inconsistencies under the Court of Justice is a noteworthy issue that is discussed below.\textsuperscript{35}

\textbf{A. The Treaty of Rome and the Freedom to Services}

The Treaty of Rome established the European Economic Community in 1957.\textsuperscript{36} It set out a goal to create a common market in the European community.\textsuperscript{37} The Treaty of Rome primarily dictates this single market system.\textsuperscript{38} Under The Maastricht Treaty, the European Union was formally created in 1992.\textsuperscript{39} Ten years later, the euro currency replaced other national currencies.\textsuperscript{40} One of the hallmarks of the European Union under

\begin{itemize}
\item \textsuperscript{30}  Id.
\item \textsuperscript{31}  Id. The Treaty entered into force and became official law on December 1, 2009.
\item \textsuperscript{32}  Id.
\item \textsuperscript{33}  FOLSOM, supra note 26, at 71.
\item \textsuperscript{34}  Id. at 34–47.
\item \textsuperscript{35}  European lawmakers proclaimed the importance of internet access in 2009. While they did not declare it to be a fundamental right, they found it to be “an essential tool to exercise fundamental rights and freedoms.” Kevin J. O’Brien, E.U. Leaders Bolster Internet Access Protections, N.Y. TIMES (Nov. 5, 2009), http://www.nytimes.com/2009/11/06/technology/internet/06net.html (internal quotation marks omitted). This development could affect the issue of internet gambling in the future. Id.
\item \textsuperscript{36}  Consolidated Version of the Treaty Establishing the European Communities, Nov. 10, 1997, 1997 O.J. (C 340) 1 [hereinafter EC Treaty].
\item \textsuperscript{37}  Id.
\item \textsuperscript{38}  Id.
\item \textsuperscript{39}  Treaty on the European Union, July 29, 1992, 1992 O.J. (C 191).
\end{itemize}
the Treaty of Rome is its guarantee of the free movement of goods, capital, persons, and services in the European Union’s internal market.41 Article 49 of the Treaty of Rome, also known as the Treaty of the European Economic Community, provides for the freedom of services.42 This freedom to provide services across European borders is a vital one to nonresidents and includes the entire tourism industry.43 Article 50 of the Treaty lists activities that are considered “services.”44 It describes “services” as possessing a commercial, industrial character.45 In essence, this freedom gives a “limited right of temporary entry into another Member State.”46 Generally, discrimination based upon nationality or

41. FOLSOM, supra note 26, at 137.
42. EC Treaty, supra note 36, art. 49. Article 49 states:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.

Id.

43. FOLSOM, supra note 26, at 168.
44. EC Treaty, supra note 36, art. 50. Article 50 states:

Services shall be considered to be ‘services’ within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

‘Services’ shall in particular include:

(a) activities of an industrial character;
(b) activities of a commercial character;
(c) activities of craftsmen;
(d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

Id.

46. FOLSOM, supra note 26, at 168.
nonresidence is prohibited if there is a restriction to the freedom of service.\textsuperscript{47} However, this freedom is subject to certain public policy, security, and health exceptions.\textsuperscript{48}

The European Court of Justice places internet gambling under the category of “services.”\textsuperscript{49} As a result, it gives much leeway to each Member State to conveniently categorize and justify any restriction under a public policy exception. For this reason, legislation prohibiting or restricting internet gambling is generally upheld under Article 49, while state-operated gambling monopolies continue to take advantage of their market power in their own territory.

**B. The Treaty of Rome and the Freedom to Establishment**

Perhaps because of the failure of internet gambling websites to overcome the public policy exception to the freedom of services guarantee under the Treaty of the European Economic Community, gambling institutions turned instead to a different freedom to defend their position—the freedom to establishment. Under the Treaty of Rome, this freedom is thought to take precedence over the freedom to provide services.\textsuperscript{50} Article 43 of the Treaty of Rome articulates this freedom,\textsuperscript{51} which gives professionals the right to create a business establishment as a self-employed person in another Member State.\textsuperscript{52} However, the European

\footnotesize{\textsuperscript{47} Id.  
\textsuperscript{48} See discussion infra Part II.  
\textsuperscript{50} Case C-243/01, Opinion of Mr. Advocate General Albert delivered on 13 March 2003 on Criminal Proceedings against Piergiogio Gambelli and Others, 2003 E.C.R. I-13031, ¶ 76.  
\textsuperscript{51} EC Treaty, supra note 36, art. 43. Article 43 states:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Id.  
\textsuperscript{52} FOLSOM, supra note 26, at 162.}
Union does not consider a server hosting a website to be an establishment. Moreover, technology is regarded as neutral and sales are seen as “passive” rather than “active,” weakening the argument that a server is an establishment. But the expansion of internet usage today and the increase of economic activity online call for a broader interpretation of these freedoms from the Court. It is only natural for the Court to progress with the evolution of technology.

C. Discrimination and Proportionality

In its examination of the present case law, the European Court of Justice utilizes an analysis of both discrimination and proportionality. The idea of discrimination can be seen in Article 12 of the Treaty establishing the European Economic Community. This principle of non-discrimination is a fundamental right in European Union law within the Community. When faced with national legislation, it is first necessary for a court to decide whether the legislation in question is discriminatory in nature. In general, the establishment of a monopoly is most likely discriminatory. This is of particular interest to internet gambling because most of the State sport regulators at issue can be characterized as monopolies. Therefore, the market effects of these legislations that enable monopolies are often a focal point.

53. Vlaemminck & De Wael, supra note 8, at 181.
54. Id.
55. It is similar to the Due Process and Equal Protection analysis and standards of review of the United States.
56. EC Treaty, supra note 36, art. 12. Article 12 states:

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.

58. Case C-243/01, Opinion of Mr. Advocate General Albert delivered on 13 March 2003 on Criminal Proceedings against Piergiorgio Gambelli and Others, 2003 E.C.R. I-13031, ¶ 92. This was the issue in the WTO of Antigua v. United States. See discussion infra Part II.A.
60. Id. ¶ 22.
61. Id.
There are two ways to view the discriminatory effects of a monopoly.\textsuperscript{62} For Member States that have such monopolies, they argue that there is no discriminatory effect because both national and foreign economic operators are barred in the same way.\textsuperscript{63} On the other hand, automatic exclusion because of nationality is arguably blatant discrimination.\textsuperscript{64} In addition, indirect discrimination is also prohibited under Community law.\textsuperscript{65} If the Court deems legislation discriminatory, it would be considered an obstacle to the freedom of establishment under the Treaty, breaching Community law.\textsuperscript{66}

Whether such legislation is considered discriminatory or not, the European Court of Justice still requires a proportionality analysis.\textsuperscript{67} This judicial touchstone originates from German public law\textsuperscript{68} and is currently a guarantee inherent in Community law.\textsuperscript{69} The analysis summarizes the conditions required for legislation to be justified. Legislation must “be justified by imperative requirements in the general interest; they must be suitable for securing attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.”\textsuperscript{70} The Court is typically critical when determining what is “necessary.”\textsuperscript{71} Restrictions must be proportional to legislative objectives.\textsuperscript{72} However, the Court recognizes the protection of consumers as a valid justification in terms of general interest.\textsuperscript{73} As the following case law demonstrates, this justification overrides proportionality concerns when discussing internet gambling law across Europe.

\begin{itemize}
\item \textsuperscript{62} Id. ¶ 93.
\item \textsuperscript{63} Id.
\item \textsuperscript{64} Id.
\item \textsuperscript{65} Id. ¶ 94.
\item \textsuperscript{66} Id. ¶ 97.
\item \textsuperscript{67} The EC Treaty appended a Protocol laying out the ways to adhere to the principles of proportionality and subsidiarity. See Protocol on the Application of the Principles of Subsidiarity and Proportionality, 2004 O.J. (C 310) 207.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Opinion of Mr. Advocate General on Gambelli, 2003 E.C.R. I-13031, ¶ 91.
\item \textsuperscript{71} Horst, supra note 68, at 195.
\item \textsuperscript{73} See, e.g., Case C-275/92, Her Majesty’s Customs & Excise v. Schindler, 1994 E.C.R. I-01039, ¶ 58.
\end{itemize}
D. The Evolution of Internet Gambling Case Law in the European Court of Justice

The European Court of Justice has a relatively abundant collection of case law on internet gambling. The seminal case decided in 1992, Her Majesty’s Customs and Excise v. Schindler, concerned a United Kingdom law prohibiting a German company from advertising its lottery services and selling tickets in the region. 74 The European Court of Justice concluded in Schindler that lotteries fell under the “services” provision of Article 49 in the Treaty establishing the European Community. 75 Furthermore, they concluded that the legislation in the United Kingdom blocked these services, but that they were justified due to social policy. 76

In 1999, when a gambling case arose for the second time, the Court in Laara, Cotswold, Microsystems Ltd. & Oy Transatlantic Software Ltd. v. Kihlakunnansyytaja & Suomen Valtio (Finnish State) extended the ruling in Schindler to apply to slot machines. 77 The next relevant case was Questore di Verona v. Zenatti, where the defendant argued that past case law was not applicable because betting on sporting events, the activity in question there, was a game of informed prediction and not a game of chance, like the lottery or slots. 78 The Court, however, did not find this argument persuasive and argued that regardless of the “chance element” or morality question, taking bets still qualifies as economic activity and therefore falls under the “services” chapter of the Treaty. 79 Subsequent cases from the European Court of Justice took the same position, always relying on the justification of social policy to validate the barrier to the freedom of services. 80

For example, in Criminal Proceedings against Gambelli, Italian law forbade anybody from accepting bets from Italian citizens without an Italian license. 81 Gambelli and others were agents of a U.K. betting company when criminal sanctions were taken against them. 82 In this operation, a bettor would notify the person in the agency of his or her bets. 83

74. Id.
75. Id. ¶ 37.
76. Id. ¶¶ 62–63.
79. Id. ¶¶ 18–19.
82. Id. ¶ 10.
83. Id. ¶ 11.
That person in the agency would forward the acceptance of the bet via the internet to the British bookmaker. After receiving a confirmation back via the internet, the bettor pays the amount owed into a special foreign account. This method of collecting and forwarding bets violated an Italian law that protected the Italian monopoly on sports betting, or CONI. This was the first instance that the Court dealt with a criminal sanction in gambling. The Court ruled that the criminal sanctions were a restriction on the freedom of services and the freedom of establishment but ultimately left the question up to the national court to decide if the data transfer centers in question were permanent enough to be protected by the freedom of establishment.

_Procuratore della Repubblica v. Placanica_ dealt with the same legislation as in _Gambelli_. Again, these “data transmission centers” collected and paid out bets. The Public Prosecutor of Italy brought criminal proceedings against Mr. Placanica, an operator of a data transmission center. The Court of Justice, however, ruled once and for all that Articles 43 and 49 preclude criminal prohibitions, closing the chapter on that particular Italian law. Many found that this ruling was favorable for private online gaming operators and that it further fueled the clash between state monopolies and private operators.

In 2009, the European Court of Justice issued a ruling in _Liga Portuguesa de Futebol Profissional v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa_ that involved, more specifically, the issue of internet gambling. Portugal prohibits games of chance that are not regulated by the State. Through a grant of power through legislation, San-

84. _Id._
85. _Id._
86. _Id._
88. _Id._ ¶ 76.
90. _Id._ ¶ 23.
91. _Id._ ¶ 26.
92. _Id._ ¶ 71.
95. _Id._ ¶ 3.
ta Casa, the State Gaming Department, organizes these games of chance, or ‘jogos sociais.’ 97 Bwin is an online gambling operation that offers games of chance on its website. 98 Its servers are located in Gibraltar, and therefore, it has no establishment in Portugal. 99 Bets are placed on the website and information is displayed in real time, enabling gamblers to interactively place bets during the sporting event. 100 Santa Casa eventually imposed fines on Bwin and Liga, the collection of professional football 101 teams who placed links to Bwin on its website, for violating administrative offenses. 102 The European Court of Justice went through the standard analysis under the Treaty of Rome. 103 Because Bwin carried on its activities solely on the internet, the Court found that there was no violation under the freedom of establishment. 104 Instead, the Court focused on the freedom of services under Article 49, 105 finding that the legislation restricted this fundamental freedom, but that it was justified by public policy concerns. 106

Late in 2010, the European Court of Justice took a surprising turn in a series of judgments by taking a stricter stance on social policy justifications. It ruled in Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim that national legislation placing restrictions on betting companies but allowing the “intensive advertising” of state monopolies “did not effectively contribute to limiting betting activities in a consistent and systematic manner.” 107 The “intensive advertising campaigns” contradicted social policy concerns and therefore did not justify the infringement of Articles 43 and 49. 108 Subsequently, in Criminal Proceedings against Ernst Engelmann, the Court found that Article 43 “must be interpreted as precluding legislation of a Member [S]tate under which games of chance may be operated in gaming establishments only by operators

96. Id. ¶ 5.
97. Portuguese for “games of a social nature.”
99. Id. ¶ 21.
100. Id. ¶ 23.
101. “Football” around the world is actually the sport Americans know as soccer.
103. Id.
104. Id. ¶ 46.
105. Id. ¶ 48.
106. Id. ¶ 56.
107. Case C-409/06, Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim, 2010 ECJ CELEX NO. 606J0409 (Sept. 8, 2010), ¶ 69.
108. Id.
whose seat is in the territory of that Member State.”\textsuperscript{109} It also called for “transparency” in competitive procedures in the market in accordance with the principle against discrimination.\textsuperscript{110}

These recent developments do not necessarily mean an upheaval is on the way. The majority of the case law concerning gambling still follows a conservative path. But the Court appears more vigilant now. Public policy matters and state tax advantages continue to impede Community-wide regulation. Furthermore, it is unlikely that the Court of Justice will change its outlook without more assistance from the legislative body of the European Union. These barriers are further analyzed in the following section.

II. BARRIERS TO HARMONIZATION

The single market of the European Union provides for the idea of a free exchange of goods and services without barriers to trade. Internet gambling laws appear to run in contrast to that single market idea. The idea is not a novel one though. There were many rumors in the 1990’s that the European Commission planned to harmonize national gambling laws.\textsuperscript{111} The European Commission carried out a study to decide this issue.\textsuperscript{112} Ultimately, they stopped any plans to standardize gambling at the European Union level when the European Council decided not to regulate at a EU Summit in Edinburgh in 1992.\textsuperscript{113} Nevertheless, the idea is still debated today.

The European Commission has several options in this ongoing discussion.\textsuperscript{114} Their two main options include mutual recognition or harmonization.\textsuperscript{115} Any step toward regulating the gambling industry, however, faces several barriers. First, the European Court of Justice generally (until recently) takes a liberal approach to the public policy exceptions and allows state restrictions even though they conflict with the freedom to services. Second, the European Union is unlikely to ever be open to the idea of harmonization if Member States are financially benefiting from large tax advantages of having state-run monopolies in this area of internet gambling. Both these barriers need to be overcome in order to work to-

\begin{itemize}
  \item \textsuperscript{109} Case C-64/08, Criminal Proceedings against Ernst Engelmann, 2010 ECJ CELEX NO. 608J0064 (Sept. 9, 2010), ¶ 40.
  \item \textsuperscript{110} Id. ¶ 58.
  \item \textsuperscript{111} Vlaemminck & De Wael, supra note 8, at 177.
  \item \textsuperscript{112} Id.
  \item \textsuperscript{113} Id.
  \item \textsuperscript{114} Id.
  \item \textsuperscript{115} Id. at 178.
\end{itemize}
ward any sort of regulatory scheme within the European Union. They are each discussed in turn below.

A. Social Policy/Public Morals

States are the “chief guardians of morality.”\textsuperscript{116} The law of nations calls upon states “to protect the health, safety, and welfare of its citizens.”\textsuperscript{117} Therefore, states are afforded a plethora of power as “chief guardians.” Gambling is generally considered a state issue and one that is subject to much scrutiny. Internet gambling’s biggest barrier is the social stigma that is attached to the activity. For this reason, such legislation restricting the freedom of trade, which would normally be unlawful, is tolerated. The Court in \textit{Schindler} alluded to this social policy in upholding restrictive trade legislation.\textsuperscript{118} Three main concerns of governments concerning internet gambling in general include:

the prevention of crime and protection of consumers against fraud;
avoidance of the stimulation of demand for gambling and of the consequent moral and financial harm to participants and to society in general; and the interest in ensuring that gambling activity is not organized for personal or commercial profit but solely for charitable, sporting or other good causes.\textsuperscript{119}

Some studies suggest that internet gambling can be ten times more addictive than other types of betting.\textsuperscript{120} Other research, however, argues that internet gambling is not any worse than land-based gambling.\textsuperscript{121} There is also a concern of manipulation or cheating between players with online poker.\textsuperscript{122} Even so, compulsive gambling is a valid impulse-control dis-

\begin{footnotesize}
\begin{enumerate}
\item[117.] Id.
\item[118.] Case C-275/92, Her Majesty’s Customs and Excise v. Schindler, 1994 E.C.R. I-01039, ¶ 63.
\item[120.] Kate Devlin, \textit{Internet Gambling ‘Can be 10 Times More Addictive Than Other Forms’}, \textit{The Telegraph} (Sept. 17, 2009), http://www.telegraph.co.uk/health/healthnews/6198482/Internet-gambling-can-be-10-times-more-addictive-than-other-forms.html.
\end{enumerate}
\end{footnotesize}
order. But more research and studies are needed in the area to determine whether internet gambling actually causes addiction or merely attracts individuals who already have a penchant to addiction. Moreover, there are plenty of other activities, such as alcohol consumption, that are subject to the same addictive tendencies yet remain legally regulated. Regardless, the Advocate General for the European Court of Justice is concerned with individuals compulsively squandering away their hard-earned disposable income in the “hope of merely contingent rewards.” For this reason, Member States are allowed to protect their citizens “to maintain order in society.” As a result, the public morals justification is one that is constantly brought up when defending protectionist policies.

In fact, it is this same justification that the United States used in its defense against Antigua and Barbuda (“Antigua”) in its case before the World Trade Organization (“WTO”). This was the first time the “public morals” argument was raised before the WTO. Antigua claimed that legislation from the United States, including the UIGEA, violated the General Agreement on Trade Services (“GATS”), a treaty under the WTO. The WTO declined to accept public moral concern as justification, and in January 2007, the WTO ruled that the United States did

124. George T. Ladd & Nancy M. Petry, Disordered Gambling Among University-Based Medical and Dental Patients: A Focus on Internet Gambling, 16 PSYCHOLOGY OF ADDICTIVE BEHAVIORS 76, 78–79 (2002).
126. Id. ¶ 61.
128. Other justifications include: gambling is a staple activity of organized crime and the supply of gambling into private homes and workplaces creates health risks. Executive Summary of the First Written Submission of the United States, WT/DS285 (Nov. 14, 2003).
129. It was invoked for the second time by China in their appeal before the WTO in regards to media restriction issues. John W. Miller, China Cites ‘Morals’ in its WTO Appeal, WALL ST. J., Sept. 23, 2009, at A9.
131. US WTO Violations and Internet Gambling: an important issue with wider ramifications, ERIKA MANN MEP (July 22, 2009), http://erikamann.com/themen/Handelspolitik/diewto/Gambling%20WTO. In July 2010, Antigua requested the help of the Caribbean Community for settlement discussions after
violate its treaty obligations by not offering full access to Antigua based online gambling companies. In June 2007, Antigua filed for trade sanctions totaling $3.4 billion because the United States had not made changes to its legislation. The European Union also wanted compensation for its restrictions.

The involvement of the European Commission provides an interesting outlook in terms of its treatment toward non-Union entities versus treatment within the European Union community. The European Commission issued a report on June 10, 2009 confirming the allegations from Antigua. The report stemmed from a complaint from the Remote Gambling Association, a London-based trade association. In the report, the European Commission condemns the discriminatory policy of the United States and its use of public morals as justification. It is only logical for the European Union to follow the same mode of analysis in reviewing the policies of its Member States. This idea is reinforced by the fact that the European Union’s legislative body is already publicly criticizing the actions of other countries that are using the same justifications used by Members States. In order to keep its standing as a reputable voice in

a stalemate with the United States in the matter. The Prime Minister stated that the Antigua economy has suffered because of the delay in action. Antigua Enlists CARICOM Support for Internet Gambling Dispute, GOV’T OF JAMAICA (July 6, 2010), http://www.jis.gov.jm/officePM/html/20100706T150000-0500_24583_JIS_ANTIGUA_ENLISTS_CARICOM_SUPPORT_FOR_INTERNET_GAMBLING_DISPUTE.asp.

134. Id.
136. Id. at 6.
137. US WTO Violations and Internet Gambling: an important issue with wider ramifications, ERIKA MANN MEP (July 22, 2009), http://erikamann.com/themen/Handelspolitik/diewto/Gambling%20WTO.
138. The dissonance in policy was also apparent in U.S. politics when President Obama visited China in 2009 and denounced China’s censorship of the internet. However, the Obama administration has not changed its policy with regards to the WTO ruling on Antigua. Larry Rutherford, Obama Tells China Not to Censor the Internet-But Supports US Internet Censorship, CASINO GAMBLING WEB (Nov. 17, 2009), http://www.casinogamblingweb.com/gambling-news/gambling-law/obama_tells_china_not_to_censor_the_internet_but_supports_us_internet_censorship_54803.html.
the world, the European Commission and the European Court of Justice should resolve this inconsistency in policy and voice. Otherwise, it runs the risk of facing skepticism from the world abroad.

B. State Monopolies and Tax Benefits: Protecting the Public Purse

Member States argue that their restrictive legislation is in the best interests of their consumers. With the overwhelming concern over public morals, it is unlikely that these restrictions will be lifted anytime soon. However, the media is starting to realize the hypocrisy of these laws.139 While Member States ban outside gambling operators, most have state monopolies of their own.140 Monopolies are a legal barrier because they prevent the establishment of services from other Member States.141

The façade of public morals does not resolve the inconsistency in treatment between state and foreign operators.142 “In both America and Europe, local gambling monopolies are allowed to offer the same sorts of bets that are outlawed if placed with firms abroad.”143 “This suggests that the prohibitionist governments’ main aim is to protect the revenue that they earn from their state-approved gambling monopolies.”144 For example, gambling winnings are taxed at twenty-nine percent in the Netherlands, where internet gambling is prohibited.145 Alternatively, British firms who operate legally in the United Kingdom generally pay a mere one percent tax in Gibraltar.146 Currently, the Prime Minister of Poland is trying to ban all outside gambling casinos, as well as internet gambling.147 While it claims the motive is for the protection of young people, the Polish government also plans to raise taxes on the remaining casinos that exist legally under Polish law.148

What actually drives Member States’ policies is a hard issue to determine. The European Court of Justice recognized this difficulty in its case law.149 It held in Zenatti that economic grounds alone are not enough to

139. See, e.g., Stacking the Deck, supra note 7.
140. Id.
141. Vlaemminck & De Wael, supra note 8, at 178.
142. See, e.g., Stacking the Deck, supra note 7.
143. Id.
144. Id.
146. Id.
148. Id.
149. Case C-275/92, Her Majesty’s Customs & Excise v. Schindler, 1994 E.C.R. I-01039, ¶ 60: It is “not without relevance[.] . . . that lotteries may make a significant con-
justify restrictive measures.\textsuperscript{150} “A Member State has the right to protect its citizens from the perceived evils of widespread gambling; [but] it does not have the right to give itself a monopoly on legal gambling principally to make money.”\textsuperscript{151} Unwilling to take a stand on the issue, the Court remanded the case to the national court of Italy to decide it instead.\textsuperscript{152}

III. IS HARMONIZATION ACHIEvable?

At least eighty-five jurisdictions around the world regulate some form of internet gambling.\textsuperscript{153} As discussed earlier, the European Union has two options if they wish to regulate internet gambling: complete harmonization or mutual recognition. With mutual recognition, a gaming operator can provide services to all European Union Member States as long as they comply with their own country’s regulations.\textsuperscript{154} Harmonization, on the other hand, requires the replacement of all the different national rules with a single set of European Union rules.\textsuperscript{155}

In order to determine whether harmonization can work, Member States that regulate gambling should first be explored more closely. Their successes and failures can shed light on whether regulation can function to serve its purpose. If successful, these regulations could possibly be expanded to a macroeconomic level and applied to the European Union to address the question. However, the barriers previously discussed may prove to be too cumbersome to negotiate and overcome.

\textit{A. Complete Regulation in the United Kingdom}

The United Kingdom completely regulates its gambling sector through its Gambling Act of 2005.\textsuperscript{156} The Act covers not only the lottery and ca-

\begin{itemize}
  \item \textsuperscript{150} Case C-67/98, Questore di Verona \textit{v.} Zenatti, 1999 E.C.R. I-7289, ¶ 36.
  \item \textsuperscript{152} Id.
  \item \textsuperscript{153} David O. Stewart, \textit{An Analysis of Internet Gambling and its Policy Implications}, AM. GAMING ASS’N WHITE PAPER SERIES, at 4 (2006).
  \item \textsuperscript{154} Vlaeminck & De Waele, \textit{supra} note 8, at 178.
  \item \textsuperscript{155} Id.
  \item \textsuperscript{156} Gambling Act, 2005, c. 19 (U.K.). The objectives of the Act include:
    \begin{itemize}
      \item (a) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime,
      \item (b) ensuring that gambling is conducted in a fair and open way, and
    \end{itemize}
sinos, but also the realm of internet gambling.157 The State witnessed significant changes from this regulation as it replaced legislation dating as far back as 1845.158 The Act created the Gambling Commission, which is the regulating body on behalf of the Department for Media, Culture, and Sport.159 It has the power to levy fines, withdraw licenses, bring prosecution, seize goods, and suspend or void bets.160

While it was hailed as a monumental achievement in the gambling world, this drastic overhaul in gambling policy is presently revealing its faults. Part of the Act stipulates which casinos may advertise in the United Kingdom.161 The Gambling Commission initially required online casinos to be on a “white-list” in order to advertise in the United Kingdom.162 Complying with Community principle, all countries in the European Union were automatically placed on the white-list.163 However, the Gambling Commission recently has halted all white-list activity while the Gambling Act undergoes review.164 Because of the higher-than-average tax rates in the United Kingdom, large online gambling operators are moving offshore to places like Gibraltar and Malta where taxes are much lower.165 There is a concern that these white-listed companies are receiving unfair advantages because they are able to advertise in the United Kingdom but are not subject to the same tax requirements imposed by the Gambling Commission.166

While this may be a valid concern, this movement offshore is simply basic supply-and-demand economics. It is rational for a company to lo-
cate where it can achieve the greatest tax benefit. Bigger competition issues arise, though, when countries start blocking companies who take advantage of such tax conditions. This is the kind of discriminatory attitude the European Court of Justice should take greater interest in. It is uncertain how profitable the Act has been for the United Kingdom so far but any efforts to control foreign operators might obfuscate its true revenue potential.

B. Sweden and State-Sponsored Poker

In 2006, Sweden decided to launch a state-sponsored, regulated domestic poker website. It became the first state-owned internet poker site in the world. Svenska Spel is the state lottery company that took part in this plan. Upon its launch, it was a rapid success, becoming one of the fifteen most visited poker sites in the world within six weeks. “Evidently, there was pent-up demand for a regulated Swedish poker site.” Although the website prominently displayed messages urging players to “play responsibly,” there was public criticism toward government involvement with such a morally questionable website. Nonetheless, the Supreme Administrative Court found this website and the accompanying regulation to be compatible with European Union law.

C. What Does This Mean for the European Union?

“[T]he basic focus of the European Community is the elimination of barriers to trade between Member States.” Article 95 of the Treaty Establishing the European Community expresses the goal of a single, unified common market within the European Union. The Member

168. Id.
169. Id.
170. Id. at 111.
171. Id.
172. Id.
173. Id. at 112 (referring to the Swedish Case: Regeringsrätten, Mål nr 5819-01 Wermdö Krog / Lotteriinspektionen (2004)).
175. EC Treaty, supra note 36, art. 95. Article 95 states:

1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid
States inched closer to this goal when the euro became the legal tender and currency to several Member States of the European Union on January 1, 2002.\textsuperscript{176} As a result, trade among the European Community increased by seventy-three percent.\textsuperscript{177} Movement toward free trade is generally desired when it comes to commerce.\textsuperscript{178} Opening the internet gambling market would bring about significant revenue for the European Union. However, there are significant obstacles for harmonization to work, making it an unlikely option in the near future.

The United Kingdom model shows how regulation is possible within a single state and Sweden represents a different kind of state involvement. But the prospect of bringing uniform internet gambling laws to the European Union appears impractical at the moment. Laws vary too much and Member States are too concerned with their tax revenues to completely forego their favorable national regulations. For example, France opened up its online gambling market in online poker, sports betting, and horse racing when the French Parliament passed legislation to license private companies in April 2010.\textsuperscript{179} Previously, there were only two govern-

\begin{quote}
4. If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 30, provisional measures subject to a Community control procedure.
\end{quote}

\textit{Id.}

\textsuperscript{176} \textit{ALT\textsc{man} & \textsc{pol\textsc{a}ck}, supra note 174, § 28.1.}

\textsuperscript{177} \textit{Id.}

\textsuperscript{178} “In general, if any branch of trade, or any division of labour, be advantageous to the public, the freer and more general the competition, it will always be the more so.” \textsc{Adam Smith}, \textsc{An Inquiry Into the Nature and Causes of the Wealth of Nations} II.2.106 (Edwin Cannan ed., 5th ed. 1904), \textit{available at} http://www.econlib.org/library/Smith/smWN.html.


\begin{quote}
\textit{down by law, regulation or administrative action in Member \textsc{St}ates which have as their object the establishment and functioning of the internal market.}
\end{quote}
ment-run monopolies controlling internet gambling. France planned to tax these private companies two percent for online poker bets and seven and a half percent for sports bets. However, an amendment that was formerly proposed to the legislation also stipulated that companies based in areas where taxes are lower, such as Gibraltar, would not be able to receive licenses. This protectionist policy is undoubtedly discriminatory to these offshore companies. Another strange proviso in the legislation prohibited games of luck. In spite of this, sports betting and horse racing are included and considered games of skill. It will be interesting to see the reaction from offshore companies and any legal action that might come about from this amendment. As long as the European Court of Justice allows countries to enact discriminatory legislation for the “benefit of society” there is unlikely to be any progress toward harmonization.

However, the second option of mutual recognition provides a more practical step in this area. The principle states that if internet gambling services are provided in one Member State, then all users should be able to access those services from other Member States. Member States would be able to continue to regulate their own country’s systems and tax as they wish. This requires Member States to lift their bans on internet gambling, but compromises could be made in allowing these services to cross borders.

IV. CONCLUSION

There are certainly benefits to regulating internet gambling. A Congressional report estimated that the regulation of internet gambling in the United States could bring in nearly forty-two billion dollars in revenue over the next ten years. One can only imagine the revenue that could be collected from the European Union.

181. Collson, supra note 179.
182. Goodwin, supra note 180.
184. Id.
185. Mauldin, supra note 45, at 437.
But the barriers to harmonization are burdensome. The European Court of Justice generally allows for the violations of the freedom to service and the freedom to establishment so long as the Member State claims in good faith public policy and public morals to justify the discriminatory legislation. It is uncertain how this point of view will change in the near future in light of recent judgments. An Advocate General of the European Court of Justice reiterated the view that states are allowed to use monopolies to protect their citizens.\textsuperscript{187} His opinion is not a binding one, but since the Court generally falls in line with the opinion of the Advocate General it is an early indication on how the Court of Justice will rule in a pending internet gambling case.\textsuperscript{188} However, considering the European Commission’s position on the “public morals” defense, it would be prudent for the Court of Justice to follow suit and reconsider its importance. This cohesion of policy is necessary for the European Union and follows the policy of the WTO. But the protection of a state’s public purse is an issue that will not be defeated easily. Member States earn far too much tax revenue from operating state monopolies to relinquish those rights.

For these reasons, complete harmonization, although critical to the European Union’s idea of a single market, is not likely to be endorsed by the entire Community. The next option of mutual recognition, however, is a more plausible alternative. If Member States can agree to freely recognize each other’s services, then tax revenues can still be collected by each state and competition can continue. This alternative may solve the United Kingdom’s problem by reevaluating its high taxes and therefore keeping domestic companies inland.

Regulation of internet gambling is possible. Both the United Kingdom and Sweden provide examples of this. The expansion of such regulation at the European Union level is a challenging idea, but one that is necessary to the idea of a single market. With increasing commerce over the internet and money constantly being transferred to offshore accounts, it is advantageous to regulate this activity. After all, internet gambling is a multi-billion dollar industry. Because of the readily accessible nature of the World Wide Web, gamblers are capable of finding different outlets to


place their bets regardless of legality. Thus, the current state of internet gambling laws in the European Union is inconsistent and irreconcilable with the fundamental objective of a single market. The previously discussed barriers should diplomatically be overcome by mutually recognizing each Member State’s competition. This type of minimal harmony is essential and provides a small step to further the single market goal of the Community, a basic tenet upon which the European Union was founded.

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* B.A., New York University (2007); J.D., Brooklyn Law School (expected 2011). I owe all my successes in life to my parents—the two hardest working and most generous people I know. Thank you to my amazing family and dear friends for your never-ending love and support. I am also grateful to the editorial staff for your patience and help with this Note. All errors are my own.
THE NEED FOR UNIFORM LEGAL PROTECTION AGAINST CULTURAL PROPERTY THEFT: A FINAL CRY FOR THE 1995 UNIDROIT CONVENTION

INTRODUCTION

In 1911, Vincenzo Peruggia shocked the world when he stole Leonardo da Vinci’s Mona Lisa from the Louvre museum in Paris, marking one of the world’s first major art thefts. Almost a century later, in 2007, “five armed and masked thieves walked into a museum while it was open on [a] Sunday afternoon” and stole four pieces of art within five minutes. In 2008, the world witnessed even more dramatic art crime, including “a stolen Caravaggio that turned out to be a fake, gun-wielding thieves and under-the-table ransoms, and something of a real-life Thomas Crown affair.”

Since the disappearance of the Mona Lisa, cultural property theft has become an increasingly prevalent crime in many countries despite inconsistent and often misleading statistics. Thefts range from large-scale museum thefts to smaller thefts from galleries, private homes, and religious buildings. France, for example, with “more than 1,200 museums across

2. The museum is located in Nice, France.
3. Maia de la Baume, Four Masterworks Stolen From a French Museum, N.Y. Times, Aug. 7, 2007, at E2. The police reported that the stolen works were Claude Monet’s “Cliffs Near Dieppe,” Alfred Sisley’s “Lane of Poplars at Moret-sur-Loing,” and Jan Brueghel the Elder’s “ Allegory of Water” and “Allegory of Earth.” The French police were able to recover these pieces in June of 2008. French Police Recover Stolen Monet Painting, MSNBC (June 4, 2008), http://www.msnbc.msn.com/id/24973627.
5. For a discussion concerning issues with art theft statistics, see Mark Durney, Art Theft Statistics: Valuable Tools in Need of Reliable Measures, 1 Cultural Heritage & Arts Rev. 13 (2010). Durney explains that “there have been few comprehensive efforts to collect and interpret statistics,” and statistics “only present a reflection of the incidents registered with, or reported to law enforcement.” Id. at 13. In addition, INTERPOL’s data between 2003 and 2008 reflects a decrease in the number of thefts reported by certain countries, yet the data is incomplete and thus somewhat misleading. Id. at 14.
6. See generally Fincham, Lex Originis Rule, supra note 1, at 112.
the country as well as hundreds of churches [with] valuable works of
art,” faces an astonishing amount of art crime each year, constantly
prompting authorities to contemplate increases in security and methods
deterrence. Further, cultural property theft creates additional
problems when it is “perpetrated by or on behalf of organized crime syndi-
cates and used to fund other illicit activities, such as drugs or arms
trades.”

Today in France, one of the most art-rich and most art-theft-
plagued countries, almost 38,000 works of art are missing, “of which
3,444 are known to have been destroyed and 145 reported stolen,” with
the remainder simply lost or unreported.

Although cultural property theft in France is particularly noticeable,
France exemplifies only a small part of an expanding global problem,
and most countries have at some point been plagued by this problem and
have sought to address it through various treaties or legislation. Several
international treaties provide guidelines for the implementation of cultur-
ality laws; however, despite these treaties’ potential for success,
law enforcement agencies and private organizations throughout the world
are “limited by imperfect information and unclear guidelines.” As a
result, countries maintain their own legislation instead of relying on an
international regime, and no uniform law has been implemented. How-
ever, though some national legislation comports with existing treaty rec-
Commendations, the lack of uniformity among nations often results in in-
consistent and inadequate regulation. While the importance of protect-

7. France Plans Tighter Security After Art Thefts, REUTERS (Sept. 13, 2007),
8. Charney, Art Crimes of the Year, supra note 4. The article further claims that art
crime “has become the third-highest-grossing world criminal trade over the past 40
years.” Id.
9. Adam Sage, Artful Dodgers: Men from the Ministries Mislay Heritage of France,
TIMES ONLINE (Jan. 13, 2009), http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/visual_arts/article5622
135.ece.
10. As mentioned before, because France has so many museums, galleries and
churches, it is particularly prone to art theft. This Note only uses France as an example of
how one small country can be so affected by this problem.
11. Molly A. Torsen, Note, Fine Art in Dark Corners: Goals and Realities of Interna-
tional Cultural Property Protection as Switzerland Implements the 1970 UNESCO Con-
vention, 8 GONZ. J. INT’L L. 1, 2 (2005).
12. For example, the U.S. has implemented legislation in accordance with an interna-
tional treaty protecting cultural property, but it has also implemented a criminal statute.
See Convention on Cultural Property Implementation Act, infra note 86, and National
13. The UNESCO Convention does not require that member countries implement all
provisions of the treaty. Rather, countries are free to choose which provisions and guide-
ing cultural property is not in dispute, theft remains an increasing international problem.

Throughout the past century, international efforts have become increasingly focused on protecting cultural property, namely through international treaties. In 1970, the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property\textsuperscript{14} was implemented in order to provide protection of cultural property during peacetime.\textsuperscript{15} The UNESCO Convention was relatively well received and widely ratified, and the U.S., for example, implemented cultural property laws both in accordance with and independent of the UNESCO framework. However, the UNESCO Convention was somewhat short-lived, as the International Institute for the Unification of Private Law (“UNIDROIT”) created a new treaty intended to replace the UNESCO Convention: the 1995 Convention on Stolen or Illegally Exported Cultural Objects,\textsuperscript{16} which to date remains the most recent international treaty concerning cultural property.

Although many large market countries, such as the United States, are still not signatories, this Note recognizes the potential of the UNIDROIT Convention for providing a successful, uniform framework through which cultural property can be protected. As the UNIDROIT Convention allows no reservations except those expressly stated within the treaty, countries must implement all or none of the provisions, resulting in a uniform law among member countries that could protect cultural property and minimize the problems that arise from inconsistent or comprehensive regulation. Thus, this Note maintains that countries must work collectively and promote the creation of uniform law, as provided by the UNIDROIT Convention, in order to successfully decrease theft and protect cultural property.


\textsuperscript{16} International Institute for the Unification of Private Law, Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention].
Part I distinguishes cultural property theft from other art crimes and surveys its effects on the international community. Part II examines the developments of the international treaties mentioned above, comparing them and examining how they define cultural property. Parts III and IV provide an analysis of the UNESCO Convention and the U.S. implementing legislation, focusing specifically on how each has been unsuccessful in several respects. Finally, Part V addresses the UNIDROIT Convention, concluding that global accession to the treaty, and thus implementation of uniform international law, is the most realistic hope for success in decreasing cultural property theft. Although some countries have expressed concern over certain aspects of the treaty and critics argue that widespread implementation is unlikely, its clear guidelines provide a uniform framework for the protection of cultural property that is of utmost importance. As such, despite its lack of extensive support to date, the treaty may provide the best available solution to this ongoing worldwide problem, and countries should support the protection of cultural property by signing on to the UNIDROIT Convention.

17. Four different art crimes will be defined, but the focus of this Note is on cultural property theft and its effects throughout the international community. Each of the different art crimes mentioned have slightly different effects, but the solution proposed in this Note, namely encouraging countries to accede to the UNIDROIT Convention, would have an effect on all art crimes.

18. This Note does not fully discuss the 1954 Hague Convention, which was implemented for the protection of cultural property during wartime. Because the 1954 Hague Convention is not fully applicable today and has been largely replaced by the UNESCO Convention, it is not relevant to the discussion here. See further explanation infra note 34.

19. This Note discusses only the legislation that has resulted in the U.S. from the UNESCO Convention: the Convention on Cultural Property Implementation Act. As many market countries, including the U.S., have still declined to ratify the UNIDROIT Convention, there is no implementing legislation to discuss at this point.


21. Although scholars and critics have made many suggestions to help minimize art theft internationally, the UNIDROIT Convention appears to have the greatest potential for success.

22. See discussion infra Part V.

23. While the examination and analysis within this Note focus mainly on the U.S. legislation with respect to cultural property, this Note recognizes that similar problems plague almost all other legal systems.
I. ART CRIME: A HISTORICAL BACKGROUND

The FBI estimates that the art market faces losses of up to six billion dollars per year from the “looming criminal enterprise” of art crime. Vandalism, forgery, antiquities looting, and art theft are the four main art crimes affecting the market today, and although they encompass various sub-categories, they are all “premeditated criminal activities” that target cultural property. Art vandalism, broadly characterized by destruction of art, is an act of violence targeting specific objects that “the public holds dear.” Art forgery, or art deception, “encompasses a range of confidence tricks that involve the premeditated misattribution of art for profit.” Although art forgery has historically been part of a smaller market, art forgery cases have also been known to extend to “high-profile, multi-million dollar forgeries . . . [and] mass market fakes.” Antiquities looting, which accounts for up to seventy-five percent of all art crime, deals with objects taken from both the ocean and land that are not accounted for and do not appear on stolen art databases or registries. This crime is often particularly difficult to trace and control, as “countries strain to keep native artifacts within their national borders, [while] the international demand for antiquities pulls them into the art market.”

Art theft, or cultural property theft, which is the subject of this Note, is one of the most troublesome art crimes plaguing the international art market. Historically, cultural property theft has had a different influence on the art market than other art crimes, as the high-profile nature of art makes it almost impossible to sell in the regular market. Despite many attempts to decrease the amount of crime, many countries have faced “a flourishing of dramatic and devastating instances of art theft,” making it

27. Charney, Buyer Beware, supra note 25.
29. Charney, Buyer Beware, supra note 25.
“one of the most prolific international crimes.” Further, although international efforts have consistently attempted to decrease illicit art trade and deter theft of cultural property, “[c]ompeting national policies of art-importing and art-exporting countries have weakened attempts to gain world support for international agreements governing stolen property cases.” While the UNESCO Convention and the subsequent UNIDROIT Convention have attempted to better protect cultural property, making theft “a clear violation of international law,” cultural property theft remains a problem.

Cultural property theft, on both a small and large scale, leads to even more complex and long-term problems, specifically when cultural property disputes arise between “an original owner and a subsequent good-faith possessor.” Default laws that apply to real property also apply to art theft cases, and unfortunately, “these rules regularly offer little or no assistance, [so] many claimants have resorted to seeking resolution of their claims through non-legal means.” Specifically, these legal rules often treat cultural property the same way they treat any object, without regard to the special importance or value of the property. Even more problematic is that, although some disputes actually proceed to litigation, resolving the issues can prove difficult as “both parties are often relative innocents” and the “lack of harmony [between the laws of separate legal systems] not only ensures that no overarching policy choices will be furthered, but it also prevents parties from anticipating legal outcomes.”

33. Claudia Fox, Comment, The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property, 9 AM. U. INT’L L. & POL’Y 225, 229 (1993). Fox discusses the UNIDROIT Convention pre-ratification. However, several provisions changed as drafts were proposed, and the final treaty, as of 1995, is different in certain respects.
34. Again, this Note focuses on both the UNESCO and UNIDROIT Conventions, but it does not delve into an explanation of the Hague Convention. For a relevant discussion, see id. at 246–48.
35. Cutting, supra note 20, at 949.
36. Fincham, Lex Originis Rule, supra note 1, at 111.
37. Id. at 112.
38. However, the UNIDROIT Convention provides a new status for cultural property, separating it from regular goods. See infra note 44.
39. Fincham, Lex Originis Rule, supra note 1, at 113–14 (explaining that “[u]nderlying each dispute are the competing claims of two relative innocents, making it ‘impossible for the law to mete out exact justice’”). Fincham also discusses that the “default legal rules” dealing with these situations “have created a myriad of potential out-
Although criminal laws are rarely successful in deterring cultural property theft, attempts to solve the issues surrounding cultural property still tend to ignore other potential solutions and instead hone in on how criminal law may affect or decrease illicit trade. Accordingly, a more uniform system, in many major market countries such as the U.S., is necessary in order to increase progress and significantly reduce illicit trade and theft. As it addresses all of these issues, the UNIDROIT Convention would harmonize law among member states, create a separate status for cultural property, and provide a uniform system through which to protect cultural property.

II. A BACKGROUND ON INTERNATIONAL CULTURAL PROPERTY AGREEMENTS AND DEFINING CULTURAL PROPERTY

International law has historically focused on the importance of maintaining and protecting cultural property, yet despite this concern, many legal systems have still failed to significantly decrease theft. Different international treaties have “shaped and governed” how countries protect cultural property, yet these treaties are by no means infallible and problems constantly arise. The UNESCO Convention was one of the first major treaties to pose solutions for protecting cultural property, and it

comes; which ultimately makes securing historic sites, and safeguarding collections from theft more difficult.” Id.


41. Id. at 599, stating that “[w]ithout a well-ordered system which allows dealers and purchasers to deal in legitimate objects, the criminal penalties [of the U.S.] will never serve their stated goal . . . .” Although the context of the article is limited to a comparison with the U.K., a more well-ordered system could better serve all countries.

42. As will be discussed throughout this Note, a great deal of international treaties and national legislation exist, but various flaws have prevented their success.

43. Katherine D. Vitale, Note, The War on Antiquities: United States Law and Foreign Cultural Property, 84 NOTRE DAME L. REV. 1835, 1838 (2009). However, Vitale focuses mainly on how the U.S. law regarding cultural property has been shaped by the UNESCO Convention.


The General Conference concluded that international cooperation was one of the most efficient ways to protect each country’s cultural property from the dangers that could result from the illicit transfer of such property. Therefore, parties to the convention agreed to oppose all illicit import, export, and transfer of ownership of cultural property . . . .
mandated that member parties “protect the cultural property of other member states through national legislation and international cooperation.”\(^{45}\) However, despite its guidelines for implementing potentially successful legislation, the UNESCO Convention has proved largely unsuccessful, and, as a result, in 1995 UNIDROIT formulated the UNIDROIT Convention with the intent to replace the earlier UNESCO Convention.\(^{46}\) Although these two treaties have been met with both criticism and praise, neither treaty has been ratified by many large market countries.\(^{47}\) Despite this reception, however, the UNIDROIT Convention requires uniform law among member parties, which will likely prove far more successful in the international market than the UNESCO Convention has proven.

One benefit of adopting the uniform law under UNIDROIT is the clarification of the definition of cultural property. Currently, international treaties and national legislation provide varying classifications,\(^{48}\) and pinpointing one definition is often difficult as it can be “tempting to define cultural property as including only chattels, limited to art and historic relics.”\(^{49}\) Cultural property possesses both objective and subjective qualities, making a universal definition of the term even more problematic.\(^{50}\) For example, some cultures might consider very untraditional works of art to be “culturally significant,” while others might not recognize any cultural or artistic value in those particular objects.\(^{51}\) Thus, defining cul-

\(^{45}\) Vitale, supra note 43, at 1839.


\(^{47}\) As of January 2011, the U.S. and many other market countries are still not signatories to the UNIDROIT Convention, but the U.S. is a party to the UNESCO Convention.

\(^{48}\) See Spencer A. Kinderman, Comment, The UNIDROIT Draft Convention on Cultural Objects: An Examination of the Need for a Uniform Legal Framework for Controlling the Illicit Movement of Cultural Property, 7 Emory Int’l L. Rev. 457, 465–67 (1993). Although “stolen” and “illegally exported” cultural property are often classified within one category, this Note is concerned with art theft and thus focuses on the issues surrounding stolen cultural property.

\(^{49}\) Edward M. Cottrell, Comment, Keeping the Barbarians Outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property, 9 Chi. J. Int’l L. 627, 628 (2009). Cottrell further explains that this limited view of cultural property is “clearly inadequate” and far too limited, as it would neglect all types of immovable pieces of cultural heritage, such as “the Parthenon, cave drawings, [and] the Bamiyan Buddhas.” Id.

\(^{50}\) Kinderman, supra note 48, at 515–16.

\(^{51}\) Id. Kinderman provides an example:
tural property subjectively and giving “states complete deference to define objects that possess ‘cultural significance’” allows for a serious lack of uniformity. In defining “cultural property,” the UNESCO Convention focuses on whether “an object possesses one of several universally recognized ‘cultural’ characteristics.” Specifically, it states, “the term ‘cultural property’ means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science.” Somewhat similarly, the UNIDROIT Convention defines cultural objects as “those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.” These two definitions contain the same list of cultural property sub-categories, yet UNIDROIT attempts to create a more uniform definition between member states by eliminating the language of the UNESCO Convention that permits “each State” to assign importance to specific cultural objects. This is particularly important as it eliminates the potential for subjective definitions, instead providing a more consistent framework through which cultural property may be classified by each signatory.

III. 1970 UNESCO CONVENTION

Importation of illegally obtained artifacts became increasingly problematic in the 1960s, and thus the UNESCO Convention “was the end

[C]onsider a rock that is an item of extreme religious importance to the natives of a small Pacific island. The rock itself does not possess any overt artistic characteristics; to any other culture it is just a rock. Yet, on a subjective level it possesses great cultural significance to the islanders.

Id. at 516.
52. Id.
53. Id. at 515.
54. UNESCO Convention, supra note 14, art. 1 (emphasis added). More specifically, Article 1 lists eleven categories of cultural property, including several subcategories.
55. UNIDROIT Convention, supra note 16, art. 2. The Annex to the UNIDROIT Convention lists the same categories of “cultural property” as are listed in the UNESCO Convention. Id. annex.
56. John Henry Merryman, The Public Interest in Cultural Property, 77 CAL. L. REV. 339, 341 (1989). This Note does not discuss archaeological pieces, although this category of cultural property is extremely expansive. While several expansive definitions exist, most scholars and critics refer to cultural property as “objects that embody the culture—principally archaeological, ethnographical and historical objects, works of art, and architecture,” but the category can also include “almost anything made or changed by man.” Id.
57. See Phelan, supra note 44, at 33.
product of a long line of efforts to stop the pillaging and looting of archaeological sites, and the theft of cultural property of extreme importance.\textsuperscript{58} The treaty focuses on garnering international cooperation to ensure that cultural property remains in its origin country or is lawfully exported,\textsuperscript{59} and it “envisions cultural property as a part of a national cultural heritage”\textsuperscript{60} that must be protected. The main tenet of the UNESCO Convention is to “give international effect to national” issues through a list of “non-self-executing obligations” that demand national implementing legislation by each member party.\textsuperscript{61} Thus, the Preamble to the treaty “propounds the legal principle that cultural property belongs to humankind and involves the moral obligation of all nations to protect human cultural heritage.”\textsuperscript{62} Further, stating as one of its considerations “that it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export,”\textsuperscript{63} the UNESCO Convention aims to create a framework through which member parties can enact legislation that protects cultural property.\textsuperscript{64} Although it has received much criticism and has not been overly successful, the UNESCO Convention remains the “primary international instrument that addresses the international movement of, and market in, cultural materials.”\textsuperscript{65}

The UNESCO Convention provisions are each aimed toward providing expansive protection of cultural property, and, as mentioned earlier, Article 1 allows member states to designate specific items of cultural importance.\textsuperscript{66} Article 3 mandates that “the import, export or transfer of ownership of cultural property effected contrary to the provisions adopt-

\textsuperscript{58} Lehman, supra note 46, at 539 (quoting Lyndel V. Prott, International Control of Illicit Movement of the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives, 10 SYRACUSE J. INT’L L. & COM. 333, 339 (1983)).
\textsuperscript{59} See Phelan, supra note 44, at 33.
\textsuperscript{60} Id. at 34.
\textsuperscript{61} Kurt G. Siehr, Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Cultural Objects, 38 VAND. J. TRANSNAT’L L. 1067, 1077 (2005). Siehr quotes the treaty, stating that it obliges “the state parties ‘to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported’ and ‘to recover and return any such cultural property imported.’” Id. (quoting UNESCO Convention, supra note 14, arts. 7(a), 7(b)(ii)).
\textsuperscript{62} Lehman, supra note 46, at 540.
\textsuperscript{63} UNESCO Convention, supra note 14, pmbl.
\textsuperscript{64} See Fox, supra note 33, at 248–49.
\textsuperscript{66} See UNESCO Convention, supra note 14, art. 1.
ed under this Convention by the States Parties thereto, shall be illicit," and Article 6 further imposes upon parties an “obligation to introduce an authorization certificate that would accompany an item of cultural property being exported and that would show that the export of the item in question was authorized.” Interestingly, when Articles 3 and 6 are read together, they “should have significant bite, for their combined result make it illegal for any state party to import any work of art or any other item of cultural property unless the export of that item was specifically authorized by the state of origin party.”

Despite its many signatories and the UNESCO Convention’s attempt at clear prohibition of “the importation of cultural property illegally exported or stolen from a foreign nation,” the treaty has had a marginal effect. First, many provisions are “mere rhetoric and thus impose no real requirements on signatories.” Article 2 is particularly demonstrative of this problem, as it generally requires that “the states signing the Convention will oppose illicit import, export, and other types of transactions ‘with the means at their disposal.’” Further, Article 2 “essentially sets forth the principle that illicit trade in cultural property is undesirable, that it deprives source countries of their cultural heritage and rightful property, and that international cooperation is an effective means of controlling the problem,” yet no substantive requirements are provided. As a result, there has been little international motivation to implement UNESCO

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67. Id. art. 3.

   The States Parties to this Convention undertake: (a) To introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations; (b) to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned export certificate; (c) to publicize this prohibition by appropriate means, particularly among persons likely to export or import cultural property.

UNESCO Convention, supra note 14, art. 6.
69. Edwards, supra note 68, at 928.
70. Fox, supra note 33, at 249.
71. Kinderman, supra note 48, at 460.
73. Id. at 480 (citing UNESCO Convention, supra note 14, art. 2).
74. Id.
Convention legislation in response to theft and illegal export of cultural property.\textsuperscript{75}

In addition, many scholars argue that the UNESCO Convention favors source nations too heavily, so many market nations\textsuperscript{76} declined to ratify it.\textsuperscript{77} These large market countries are not signatories “because of a general reluctance to restrict their art markets”\textsuperscript{78} and negatively impact their economies, but “without the presence of some international source of law binding the art-market nations . . . art-exporting countries have little chance of combating the problem of the illicit trade in works of art.”\textsuperscript{79} Thus, the imbalance between large and small market member countries impacts the potential for the UNESCO Convention to succeed.

Further, although many countries have domestic cultural property laws, the laws do not always successfully deal with cultural property theft because they are inconsistent and ignore the international scale of the crime. This problem is further perpetuated by the UNESCO Convention framework, which, rather than promoting “adherence to a uniform set of laws . . . permits individual countries to maintain their own import and export regulations as well as laws regarding restitution of stolen property.”\textsuperscript{80} At least in part, the failure of the UNESCO Convention to demand a uniform framework of law has contributed to a lack of improvement in the protection of cultural property.\textsuperscript{81} Perhaps most importantly is that the UNESCO Convention, unlike the UNIDROIT Convention, does not require that member parties implement all of the treaty’s provisions. Accordingly, the treaty allows for creation of widely differing legislation, which in turn perpetuates the problem of cultural property theft.

Although it has faced criticism,\textsuperscript{82} positive attributes of the UNESCO Convention are noteworthy. For example, although it may favor source

\textsuperscript{75} Kinderman, supra note 48, at 461.
\textsuperscript{76} The U.S. is an exception.
\textsuperscript{79} Lenzner, supra note 72, at 479.
\textsuperscript{80} Lehman, supra note 46, at 543 (citing Kinderman, supra note 48, at 470).
\textsuperscript{81} However, this failure to require a uniform law is perhaps why so many countries have agreed to sign on, knowing that they can implement legislation independent of the legislation of other countries. This creates a type of cycle that can only be avoided by implementing uniform law. See generally Kinderman, supra note 48.
\textsuperscript{82} Vitale, supra note 43, at 1842. For example, some critics argue that the UNESCO Convention is a “failure because too few of the States Parties to the Convention adopted implementing national legislation . . . [and] [t]oday, critics point to the fact that the 1970
countries, the treaty does permit “market countries and source countries to communicate and cooperate for the protection and return of cultural property through diplomatic channels and domestic legislation,” and it has facilitated several “successful repatriations of cultural property.” Further, some major market countries have ratified the treaty and created implementing legislation, including Germany, France, and the United Kingdom, demonstrating a desire to better protect their cultural heritages. The U.S. is one of the market nations to also ratify the treaty, and its implementing legislation remains in effect today. However, despite some of the UNESCO Convention successes, its shortcomings demand further consideration.

Generally, while the UNESCO Convention may have been successful in some respects, it does not provide for uniform law, allows member parties to maintain individual regulations, does not require acceptance of all provisions, and has not been regarded positively or ratified by many market nations. As such, the UNIDROIT Convention as a whole provides a greater potential for successfully deterring and decreasing cultural property theft.

IV. UNITED STATES PROTECTION OF CULTURAL PROPERTY: THE CONVENTION ON CULTURAL PROPERTY IMPLEMENTATION ACT

Although cultural property theft is a problem throughout the global market, U.S. law is particularly important because the U.S. is one of the largest consumers of cultural property. Two statutes in the U.S. address individuals who deal in stolen cultural property: the National Stolen Property Act (“NSPA”) and the Archaeological Resources Protection

83. While some scholars believe that this is a positive aspect of the UNESCO Convention, others disagree. This Note focuses on this disagreement, arguing that uniform law would be much more effective in protecting cultural property than allowing for individual domestic legislation.
85. Id.
87. Lehman, supra note 46, at 543.
88. See Vitale, supra note 43, at 1842.
89. See Cutting, supra note 20, at 944.
Act ("ARPA"), and both were implemented to "prosecute individuals who buy, sell, or otherwise deal in cultural property stolen or illegally exported from a foreign state." Although some critics argue that the two statutes conflict with the U.S. implementation of the UNESCO Convention, courts have found this argument unpersuasive and the statutes are still in effect.

However, the main U.S. law focused on cultural property protection is the U.S. UNESCO Convention implementing legislation, the Convention on Cultural Property Implementation Act ("CPIA"), which was passed primarily because Congress recognized that "the United States was ripe for illegal import of items of cultural property." Although the U.S. ratified the treaty in 1972, it did not pass the CPIA until 1983, though it was the first market nation to implement the UNESCO Convention. Before it became a party to the treaty, the U.S. had not significantly addressed the problems concerning cultural property theft and illegally exported cultural property, but currently the NSPA, ARPA, and CPIA exist as the primary means for dealing with cultural property theft in the U.S.

The CPIA provisions were designed to parallel the main goals of the UNESCO Convention, and one of the most notable aims of the CPIA is the prohibition against any "import of cultural material identified as stolen from an institution in another state party to the UNESCO Convention."

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94. Id.; see also United States v. Schultz, 333 F.3d 393 (2d Cir. 2003); Fincham, Federal Criminal Penalties, supra note 40, at 618, explaining that "Schultz raised three arguments in support of his appeal . . . (2) the enactment of the Cultural Property Implementation Act of 1983 preempts the prosecution under the NSPA . . ." but "the Second Circuit Court of Appeals found the arguments unpersuasive." Id.
97. Id. at 1842 n.44.
98. Lehman, supra note 46, at 539.
99. Although the NSPA and ARPA legislation are extremely important for the protection of cultural property in the U.S., this Note focuses on the international treaties in place and their resulting legislation. Thus, a discussion of these two statutes is not included.
100. Vitale, supra note 43, at 1844. Vitale states that the three purposes of CPIA are to prohibit the import of documented cultural material stolen from the museum or similar institution of a state party to the [Convention]; to assist in that property’s recovery and return if it is found in the United States; and to apply specific import controls to archaeological or ethnological materials that compose a part of a state’s cultural patrimony in danger of being pillaged.

Id.
Additionally, an important result of the CPIA has been the creation of the Cultural Property Advisory Committee (“CPAC”).102 This committee, comprised of cultural property professionals,103 convenes when a country requests U.S. assistance in protecting its cultural property under the UNESCO Convention.104 The CPAC reviews requests from countries seeking import restrictions, and it makes recommendations regarding the laws for import and export of cultural property.105 Some scholars assert that the CPAC is the CPIA’s “most effective [element] insofar as it fosters continuing study, debate and vigilance over the legal landscape as it relates to cultural property.”106

However, aside from the CPAC, the CPIA has faced much criticism and it has not had a noticeably significant effect on cultural property protection. First, although it purports to reflect the main tenets of the UNESCO Convention, the CPIA only implements Articles 7 and 9.107 Although Articles 7108 and 9109 are significant provisions, the U.S. deci-

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101. Torsen, supra note 11, at 8.
103. See Torsen, supra note 11, at 10 (“The CPAC, which is comprised of museum professionals, archaeologists, anthropologists, gallery owners, and other people affiliated with cultural property professions, is a very powerful entity and its recommendations are usually determinative.”).
104. Id.
105. See Vitale, supra note 43, at 1846.

In order to enter into a bilateral agreement, the President or his designee must make four determinations: (1) that the cultural patrimony of the foreign state is in jeopardy; (2) that the foreign state has attempted to protect its cultural patrimony; (3) that import controls on the objects requested by the foreign state would substantially benefit the deterrence of their pillage; and (4) that import controls are “consistent with the general interest of the international community in the interchange of cultural property among nations.

Id. (citing 19 U.S.C. § 2602(a)).
106. Torsen, supra note 11, at 10.
107. See Lenzner, supra note 72, at 487.
108. Article 7 states:

The States Parties to this Convention undertake: (a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States; (b) (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the
sion to only implement these two articles demonstrates the potential for problems to arise among nations who choose to implement different provisions; for example, one can foresee instances in which countries’ non-UNESCO provisions conflict with other countries’ UNESCO-implementing provisions, or vice versa. Further, among several other noteworthy “deficiencies” is the concern that the statute as a whole restricts the United States’ assistance under the CPIA to countries that have similar UNESCO Convention implementing legislation.110 As a result, many countries that might benefit from the CPIA are banned from receiving any U.S. assistance under the statute because they have not ratified the treaty.111 Further, the language of the CPIA suggests that it only applies to state-run museums, allowing “private institutions [to] escape scrutiny.”112 Finally, although the CPIA “establishes clear policy regarding cultural property imported into the United States,” providing at least some notice to foreign states regarding “steps they need to take in order

109. Article 9 states:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

UNESCO Convention, supra note 14, art. 7.

108. Article 9 states:

States concerned, provided that such property is documented as appertaining to the inventory of that institution; (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.


110. Torsen, supra note 11, at 9.

111. See id. for a further discussion on this aspect of the CPIA.
to obtain U.S. protection of their cultural property;”
the statute has
made little progress in truly decreasing the amount of crime.

The U.S. “inconsistent treatment of cultural property” is noticeable
through its varying legal remedies. Although the CPIA, through
UNESCO guidelines, attempts to protect cultural property, it has been
seriously criticized, especially because it ignores other UNESCO Con-
vention provisions and “applies only to property imported from certain
nations.” Although the importance of protecting cultural property is
clear to national policymakers and the international community, domes-
tic “laws are [as] strikingly inconsistent” as international legal reme-
dies. Accordingly, the U.S. should serve as a model to other countries by
recognizing the importance of uniform international law, which the
UNIDROIT Convention promotes, while also encouraging member par-
ties to work together to protect cultural property.

V. 1995 UNIDROIT CONVENTION

After the UNESCO Convention proved unsuccessful in many respects,
UNESCO requested that UNIDROIT draft a new, “more efficient” and
effective treaty. In 1986, UNIDROIT began to reexamine the issues
addressed by the UNESCO Convention and to “propose the adoption of
uniform laws throughout all states regarding cultural property.” Stating
as one of its purposes “to study means and methods for modernizing,
harmonizing, and coordinating private and in particular commercial law
as between States and groups of States,” UNIDROIT formulated the
1995 UNIDROIT Convention, with key goals “to return cultural property
to its rightful owners and to reduce the profitability of illicit traffic in
art.”

The UNIDROIT Convention aims to “enhance [the UNESCO Conven-
tion’s] effectiveness by ensuring that all states, civil and common law
jurisdictions alike, apply a uniform body of cultural property law.” The

114. See Cutting, supra note 20, at 960.
115. Id. at 969.
116. Id.
117. Id. at 944.
118. See Siehr, supra note 61, at 1078. “Also, this Convention does not formulate an
independent supranational policy of international art trade, restricts itself to the interna-
tional enforcement of national export prohibitions, and, of course, entitles the bona fide
 possessor to reasonable compensation under Article 6.” Id.
120. Fincham, Lex Originis Rule, supra note 1, at 133 n.124.
121. Lehman, supra note 46, at 543.
122. Kinderman, supra note 48, at 461.
treaty is designed such that all countries with implementing legislation will follow the uniform law dictated by the provisions of the treaty, as member countries must implement all of the provisions.\textsuperscript{123} As such, the treaty aims to harmonize “private laws of various states so as to reduce the harmful effects that occur when laws conflict,”\textsuperscript{124} and the preamble to the UNIDROIT Convention emphasizes this determination, stating as its aim “to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States.”\textsuperscript{125} Accordingly, “the most likely result for those who ratify will be that the wide assortment of laws currently governing ownership rights in cultural property will be preempted and substantially harmonized in a single source.”\textsuperscript{126} Thus, the greatest strength of the UNIDROIT Convention is its goal of creating a uniform body of international law through “harmonization” of international law, and, if widely implemented, the treaty would likely provide an innovative and successful means of protecting cultural property.\textsuperscript{127}

\textbf{A. UNIDROIT Convention Text and Format}

The UNIDROIT Convention is divided into several chapters consisting of separate articles, and the organization is clearer than that of the UNESCO Convention so its provisions are easier to understand and thus potentially easier to apply.\textsuperscript{128} The UNIDROIT Convention provides the framework for a uniform law among all member parties, meaning that once laws are implemented in accordance with the treaty and harmonized into one source, dictated by the treaty, parties affected by cultural proper-

\begin{itemize}
\item \textsuperscript{123} See UNIDROIT Convention, supra note 16, art. 18.
\item \textsuperscript{124} Fincham, \textit{Lex Originis Rule}, supra note 1, at 133.
\item \textsuperscript{125} UNIDROIT Convention, supra note 16, pmbl. One clause of the preamble states:

\begin{quote}
DETERMINED to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States, with the objective of improving the preservation and protection of the cultural heritage in the interest of all.
\end{quote}

\textit{Id.}

\item \textsuperscript{126} Lehman, supra note 46, at 545.
\item \textsuperscript{127} Fincham, \textit{Lex Originis Rule}, supra note 1, at 134. The UNIDROIT Convention “recognizes the inherent difficulty in relying on developing nations to police their own borders and archaeological sites.” \textit{Id.}
\item \textsuperscript{128} See Kinderman, supra note 48, at 504.
\end{itemize}
ty theft could likely “consult this single source to determine the legality and prudence of certain transactions under consideration.”

Article 1 of the UNIDROIT Convention discusses the scope of the treaty, marking a significant departure from the UNESCO Convention’s treatment of cultural property. Rather than combining all cultural property into one category, as the UNESCO Convention does, the UNIDROIT Convention uses Article 1 to divide its application into the distinct categories of “stolen objects” and “cultural objects illegally removed” from a country, recognizing “that these two areas, while closely related, pose distinct problems.” This distinction also represents an important movement toward improving the laws because it gives a special status to cultural property, seen in Article 2, separating it from objects of little or no cultural significance. As discussed earlier, Article 2 defines cultural property and includes a list of categories in the Annex to the Convention that cover all objects that can be classified as cultural property. The

129. Lehman, supra note 46, at 545.
130. Kinderman, supra note 48, at 504–05; see UNIDROIT Convention, supra note 16, art. 1. Article 1 states that “[t]his Convention applies to claims of an international character for: (a) the restitution of stolen cultural objects; (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage . . . .” Id.
131. Id. at 505.
132. See UNIDROIT Convention, supra note 16, art. 2.
133. See id. annex. “Cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.” Id. The Annex lists:

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
(ii) original works of statuary art and sculpture in any material;
(iii) original engravings, prints and lithographs;
(iv) original artistic assemblages and montages in any material;
definition eliminates “vague” or “overbroad” definitions of what is protected, as it includes only chattels, but the most notable aspect of the definition of cultural property is that it “validates cultural property as a unique type of property subject to distinctive property laws.” Further, the UNIDROIT Convention, unlike the UNESCO Convention, does not allow each state to designate its own items of cultural significance, as it provides an extensive definition of cultural property that helps to maintain uniformity.

Chapter II, “Restitution of Stolen Cultural Objects,” discusses what constitutes a stolen cultural object, the requirements of due diligence in returning stolen objects, statutes of limitations, and compensation to the possessor. Article 3(2) explains that a stolen cultural object for purposes of the Convention shall include an object “which has been unlawfully excavated or lawfully excavated but unlawfully retained.” As will be discussed in detail below, Article 3 requires “the possessor of a cultural object which has been stolen [to] return it,” reversing the common assumption that a bona fide purchaser will attain good title. Rather, Article 4 provides for restitution to good faith purchasers who exercise due diligence, but there is no option to retain good title. The due diligence requirement is, however, broad, and UNIDROIT mandates that

(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; (i) postage, revenue and similar stamps, singly or in collections;

(j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments.

Id.

135. Phelan, supra note 44, at 45.
136. See UNIDROIT Convention, supra note 16, annex.
137. See id. ch. II. This Chapter contains Articles 3 and 4, which both deal exclusively with stolen cultural objects.
138. Id. art. 3(2).
139. See infra Part V.C.
140. UNIDROIT Convention, supra note 16, art. 3(1).
141. Lenzner, supra note 72, at 496.
142. Article 4(1) states:

The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.

UNIDROIT Convention, supra note 16, art. 4(1).
all “circumstances of the acquisition” be considered, further encouraging judicial discretion. In addition, Article 3 provides for a three-year statute of limitations “from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.” Further, Article 3(5) permits a member state to extend the statute of limitations to seventy-five years or “such longer period as is provided in its law,” allowing the requirement to also fall within a country’s discretion. Thus, although the treaty requires that a signatory implement all provisions, some discretion will be permitted.

With a structure parallel to that of Chapter II, Chapter III provides provisions concerning the return of illegally exported cultural property, defined as a cultural object which has been temporarily exported from the territory of the requesting State, for purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit.

This distinction between stolen and illegally exported cultural property provides a more comprehensive and thorough way of dealing with cultural property, as it provides provisions that cover broader situations. Further, in contrast to the Article 3 demand that a possessor of stolen cultural property return it, Article 5(1) explains that a “Contracting State

143. Article 4(4) states:

In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.

Id. art. 4(4).

144. Id. art. 3(3).

145. Id. art. 3(5).

146. Id. art. 5(2).

147. See, however, id. ch. III, for a list of provisions regarding the return of illegally exported cultural objects (this Chapter contains Articles 5, 6 and 7). Further, “[a]lthough the UNESCO Convention addresses the restitution of cultural property exported contrary to a state’s legislation, no standard exists to determine precisely which types of property constitute works of ‘great cultural significance.’” Kinderman, supra note 48, at 508–09. In addition, see UNIDROIT Convention, supra note 16, ch. III, for the articles that address illegally exported cultural objects.
may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State.”148 This recognizes the need for member states to work together to ensure that cultural property is protected to the highest possible extent, adding to the variety of situations for which UNIDROIT accounts.

Finally, Chapters IV and V provide general and final provisions, respectively. Article 8 of Chapter IV explains where claimants may bring suit, providing that a

claim under Chapter II and a request under Chapter III may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States.149

Further, Chapter IV includes a provision that expands another UNESCO Convention limitation by allowing “private parties [in addition to member states] to initiate restitution” of “stolen or illegally exported objects.”150 Also noteworthy, as mentioned before, is Article 18, which requires member parties to accept all of the UNIDROIT Convention provisions, stating that “[n]o reservations are permitted except those expressly authorised [sic] in this Convention.”151 Through this final requirement, member parties can be certain that their laws will be uniform with any other countries that ratify the Convention, and thus the overall structure of the treaty supports the creation of uniform international law.

B. UNIDROIT Convention Criticism

Some weaknesses may explain why many market countries have declined to ratify the UNIDROIT Convention.152 The main criticism is of Article 18, ironically, which is written such that “if states were wary of certain provisions of the Convention, they could not sign on to other provisions which they found effective.”153 Essentially, because the treaty allows “no reservations,”154 potential member states are concerned with committing to each provision without the ability to eliminate any provi-

148. Id. art. 5(1).
149. Id. art. 8(1).
150. See Fincham, Lex Originis Rule, supra note 1, at 134; see also UNIDROIT Convention, supra note 16, art. 8. Article 2 also demonstrates how both member states and private parties may request restitution of stolen or illegally exported objects. Id. art. 2.
151. UNIDROIT Convention, supra note 16, art. 18.
152. See Fincham, Lex Originis Rule, supra note 1, at 139
153. Id.
154. UNIDROIT Convention, supra note 16, art. 18.
sions that they find problematic. However, the provision demands consideration of the UNESCO Convention’s failure to promote adherence to uniform law, and countries must recognize the importance of maintaining consistent regulations and legislation. As this lack of uniformity was one of the fatal flaws of the UNESCO Convention, the need for Article 18 of the UNIDROIT Convention is clear. Further, because some UNIDROIT Convention provisions permit and even encourage judicial discretion, the treaty is not as absolute as it seems. As this provision specifically ensures the creation of uniform law, it is necessary in order for the treaty to provide a successful framework for protecting cultural property and decreasing theft.

In addition, some critics argue that two of the treaty’s provisions, Chapter II Article 3(2) and Chapter III Article 5(3), appear to conflict, raising questions as to the intended meaning of each provision. The relevant portion of Article 3(2) states, “a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.” Article 5(3) is more detailed and provides that the court or authority of a member country “shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs” one of four enumerated “interests,” in effect establishing a “limited right of return.” First, Article 3(2) “is arguably unnecessary because, like Article 5(3), it provides for return, but, unlike Article 5(3), it is an all-

155. See Lehman, supra note 46, at 543.
156. See id.
157. See Fincham, Lex Originis Rule, supra note 1, at 139.
158. UNIDROIT Convention, supra note 16, art. 3(2). The full text reads: “For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.”
159. The full provision provides:

The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests: (a) the physical Preservation of the object or of its context; (b) the integrity of a complex object; (c) the preservation or information of, for example, a scientific or historical character; (d) the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State.

160. Fincham, Lex Originis Rule, supra note 1, at 139.
encompassing, streamlined return provision.”161 Another concern with Article 3(2) is that it provides no protection where a compelling interest conflicts with the enforcement of certain “foreign ownership declarations,”162 and it only requires member parties to recognize foreign ownership declarations in certain circumstances.

Although these are legitimate criticisms with respect to the treaty, Article 3(2) applies only to “excavated” objects and not objects falling within “the terms of a source nation’s generic ownership law.”163 This means that many cultural objects will not fall within the broad reach of Article 3(2),164 perhaps mitigating some concerns. There are also no specifications as to what provision a country must choose in litigation, so it is hopeful that countries will be free to apply Article 5(3)165 where there are “legitimate international interests” at stake, as the limited right of return laid out in Article 5(3) is an “idea with great promise.”166 In addition, since Article 4 provides for restitution to good faith purchasers, there is some additional protection in certain circumstances.167 Finally, it is important to note that these two provisions fall under separate chapters that deal with defining and regulating separate categories of cultural property168 that earlier treaties failed to distinguish—stolen cultural objects and illegally exported cultural objects.169 This distinction follows naturally from the UNIDROIT Convention ideal of consistently promoting international interests, and the treaty promotes these interests and is comprehensive by covering both categories of cultural property.

Some critics of the UNIDROIT Convention have also argued that implementing legislation could bring rise to complex litigation,170 noting the issues that might arise from creating a uniform framework while still

161. Id. at 140.
162. Id. Fincham’s example: “[W]hen a source nation does nothing to police the antiquities trade itself, has not made its national ownership declaration sufficiently clear, or has only selectively enforced its ownership.” Id. (citing Peru v. Johnson, 720 F. Supp. 810 (C.D. Cal. 1989)).
164. Id.
165. Id. at 339.
166. Fincham, Lex Originis Rule, supra note 1, at 139.
167. See UNIDROIT Convention, supra note 16, art. 4.
168. See id. chs. II, III.
169. Fincham, Lex Originis Rule, supra note 1, at 139.
allowing for concurrent private action. However, other scholars argue that some of these criticisms seem “unfair and exaggerated,” and hopefully the uniform framework among member parties will ensure that private actions are not inconsistent with public results. Essentially, the UNIDROIT Convention simply allows for private parties, in addition to member states, to bring suits, but this does not conflict with the tenet of maintaining uniform law as provided through the treaty. Rather, it recognizes that both individuals and member states may need to bring actions, ensuring wider protection of cultural property while maintaining similar, uniform laws throughout the member states. As such, many provisions of the UNIDROIT Convention simply expand upon some of the successful provisions of the UNESCO Convention while eliminating the problematic provisions. If market countries ratify the UNIDROIT Convention and embrace a system of uniform law, the potential for protection would increase dramatically and the criticisms would hopefully disappear.

C. Why UNIDROIT: Advantages

The potential for protecting cultural property through uniform law and reconciling the “differences between civil and common law nations” outweighs the shortcomings of the UNIDROIT Convention. First, as mentioned earlier, the uniform law provided by the UNIDROIT Convention would most likely ensure that the “motley assortment of laws currently governing ownership rights in cultural property will be preempt-
ed,” harmonizing laws among all nations.176 Although the treaty does not explicitly state that national laws will be preempted, the creation of uniform law would most likely demand this result, especially because countries would presumably follow the newly implemented legislation.

Another advantage of the UNIDROIT Convention is that it ensures maximum protection of cultural property, as several provisions encourage judicial discretion in certain instances by listing important considerations or pointing to the applicable law of a contracting state.177 Further, countries can be assured that the treaty is in their best interests because the UNIDROIT Convention states that “[n]othing in this Convention shall prevent a Contracting State from applying any rules more favourable [sic] to the restitution or the return of stolen or illegally exported cultural objects than provided for by this Convention.”178 Thus, these provisions provide assurance that courts would retain discretion in determining how to proceed in certain cases, and thus the treaty promotes uniform law without being unrealistically absolute.

Further, many other principles of the UNIDROIT Convention mark significant changes from the UNESCO Convention that will serve to decrease cultural property theft. For example, one of the most important departures from the UNESCO Convention is that UNIDROIT expands the pool of claimants permitted to initiate restitution for stolen cultural property to include private individuals in addition to member states.179 In response to the “new, insidious black market for cultural property,” UNIDROIT follows through with “a new legislative response . . . that recognizes individuals, not states, as the primary actors in cultural property theft.”180 This will ensure greater protection of cultural property by widening the class of potential claimants and hopefully decreasing the number of thefts that occur in general. Further, the treaty mandates that a

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176. Lenzner, supra note 72, at 491–92. Lenzner’s comment was written prior to the final draft of the UNIDROIT Convention, but the final treaty still provides no explicit provision concerning preemption. See also Lehman, supra note 46, at 545.
177. See UNIDROIT Convention, supra note 16, arts. 3(5), 4(4), 9.
178. Id. art. 9; see also Lenzner, supra note 72, at 491 n.117 (explaining that one concern with respect to this provision is that forum shopping may result). However, although it is arguable that this could contradict the requirement of uniform law, allowing for the use of other rules may not necessarily diminish the main requirement of uniform law. If the UNIDROIT Convention were widely implemented, there would be a general framework of uniform law among member countries, yet judges would have discretion in certain cases. This would hopefully ensure a greater protection of cultural property.
179. See UNIDROIT Convention, supra note 16.
180. Cutting, supra note 20, at 949.
“bona fide purchaser of stolen objects will not receive good title,” requiring the purchaser to return the object in exchange for reasonable compensation as long as the purchase was made in good faith. As both of these provisions protect possessors and good faith purchasers, albeit in different ways, they have the potential to significantly deter cultural property theft, or at least provide appropriate restitution.

Chapter II of the UNIDROIT Convention encompasses specific guidelines for dealing with stolen cultural property, restitution, and compensation to good faith purchasers, and these provisions provide fair and reasonable protection for all parties involved in cultural property disputes. However, a particularly important requirement of the UNIDROIT Convention is that it places an extremely important focus on the return of stolen cultural property. Aiming to ensure restitution in all cases by requiring “cultural property to be returned even if a theft cannot be firmly established,” Article 3(1) commands that a “possessor of a cultural object which has been stolen shall return it.” Regardless of the good faith of the purchaser or any other circumstances, the possessor is obligated to return the object, subject to a three-year statute of limitations for bringing a claim for restitution. This provision is thorough in that it protects original owners by requiring possessors to return stolen cultural property, but it also “insures some security for the possessor by setting the limitations period” within which “the original owner can bring a claim.”

In addition, Article 4 mandates that a possessor who is required to return stolen property shall be entitled to “fair and reasonable compensa-

181. Fincham, Lex Originis Rule, supra note 1, at 134 (citing UNIDROIT Convention, supra note 16, art. 4(5): “The possessor shall not be in a more favorable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.”).
182. See id. at 135. Fincham explains that this good faith requirement “could act to deter illicit trade, by requiring each purchaser to police their own acquisitions.” Id.
183. Id. at 134. Fincham further explains that the UNIDROIT Convention discusses how the theft does not need to be proven in order for a state to demand return of an object; rather, the state must simply claim that the object was illegally exported. Id. at 134 n.128 (citing UNIDROIT Convention, supra note 16, art. 5).
184. UNIDROIT Convention, supra note 16, art. 3(1).
185. This is discussed in Article 4 of the UNIDROIT Convention. Id. art. 4.
186. Id. art. 3(3).
187. Fox, supra note 33, at 257–58.
188. Bengs, supra note 77, at 530.
tion provided that the possessor neither knew nor ought reasonably to have known that the object was stolen.” 189 This provision is particularly relevant to encouraging civil law nations to become signatories, as in “civil law nations the good faith purchaser is allowed to retain the stolen property” while the UNIDROIT Convention is focused primarily on “securing the return of stolen cultural property.”190 Since this difference between the law of civil nations and the law required by the UNIDROIT Convention is somewhat dramatic, “[p]roviding reasonable compensation serves to reduce the shock of transition from complete protection of the good faith purchaser to almost no protection.”191 Thus, UNIDROIT seems to strike a fair balance between certain aspects of common law and civil law rules.

Article 4 also states that the possessor must “prove that it exercised due diligence when acquiring the object” 192 in order to obtain compensation, but the “intentionally vague” language of the provision encourages judicial discretion, again demonstrating how the treaty requires uniform law without being too extreme.193 This clause and the “fair and reasonable compensation” requirement are both somewhat vague, allowing for more judicial discretion depending on the circumstances of the theft. Further, since the good faith purchaser receives no protection in a common law jurisdiction, the UNIDROIT Convention requirement of due diligence “would, therefore, be an unexpected bonus to the current possessor.”194 This provision as a whole is potentially successful in that it would arguably increase due diligence of parties acquiring cultural objects, expand the protection that is currently afforded to cultural property owners, and ensure restitution in appropriate cases.

Through its provisions, specifically in Articles 3 and 4, the UNIDROIT Convention is “consistent with existing international law and U.S. domestic law,” and provides “an equitable solution to the complex issues involved in art theft cases.”195 Although the criticisms of the

189. UNIDROIT Convention, supra note 16, art. 4(1).
190. Bengs, supra note 77, at 529.
191. Id.
192. UNIDROIT Convention, supra note 16, art. 4(1).
193. See Fox, supra note 33, at 262 (explaining that “[t]he UNIDROIT Convention does not give much guidance in determining the amount of compensation to be paid. The Convention’s language is intentionally vague to allow judicial discretion in assessing the factors which may determine a fair and reasonable amount”). Fox also explains that this concept is consistent with U.S. law. Id. at 266; see also Guggenheim v. Lubell, 569 N.E.2d 426 (N.Y. 1991); Autocephalous Greek Orthodox Church v. Goldberg & Feldman Fine Arts, 717 F. Supp. 1374 (S.D. Ind. 1989).
194. Bengs, supra note 77, at 529.
195. Fox, supra note 33, at 266.
UNIDROIT Convention are not without merit, the treaty “takes significant steps toward reconciling existing tensions between market and source nations, and between the civil and common law countries by protecting both the rights of the original owner and of the bona fide purchaser.” Because there are often conflicting rights, the UNIDROIT Convention’s attempt at reconciling those conflicts, harmonizing private law, and creating a uniform body of international law is a huge step toward protecting cultural property. Although there is no flawless international treaty protecting cultural property, the UNIDROIT Convention “provides a glimmer of hope for increased regulation of a market that has become a virtual free-for-all” and may be the closest the international community will see.

VI. CONCLUSION

Although the importance of cultural property demands laws that will truly protect it, there is currently no legal system that has effectively done so. While the UNESCO Convention ignores the need for uniform law and permits individual countries to maintain varying domestic laws concerning stolen cultural property, domestic laws still do not provide adequate protection. Further, since cultural property theft has historically been regulated on the domestic scale, many countries have resisted the movement toward a more uniform, international system of regulation like the one set forth in the UNIDROIT Convention.

However, recognizing the need for uniform law is imperative, and implementing the UNIDROIT Convention “would confirm the special status of cultural property and, hopefully, would provide the additional impetus currently needed for adequate international cooperation in the preservation and protection of the world’s cultural treasures.” Further, it would provide a means of deterring cultural property theft without severely complicating the art market, as it successfully expands upon the positive provisions of the UNESCO Convention while eliminating the unsuccessful ones. The problem of stolen cultural property has to date “been unchecked due to the lack of an effective international agreement,” and the UNIDROIT Convention provides a uniform, international framework for protection. Although arguments have been made that the lack of “sufficient ratification and application” is a sign of the

196. Id.
197. Lenzner, supra note 72, at 500.
198. Phelan, supra note 44, at 57.
199. See Fox, supra note 33, at 265.
200. Lehman, supra note 46, at 548.
UNIDROIT Convention’s failure, more widespread ratification, at least in the near future, seems more plausible than ratification of a new treaty. As such, the next step in the right direction toward protecting cultural property is large market country implementation of the UNIDROIT Convention and thus implementation of a widely uniform international law.

“Nations, both market and source, need to adopt a spirit of compromise regarding cultural property regulation,” and the “UNIDROIT Convention provides a framework for that compromise.” This compromise is particularly important, as both market and source countries should recognize and acknowledge the innovative approaches of the UNIDROIT Convention for protecting cultural property through uniform law. Although the criticisms are not “a surprising reaction to any effort to seriously modify the art trade,” the UNIDROIT Convention solutions for protecting cultural property are unparalleled, and the creation of uniform law is the primary highlight.

As discussed throughout this Note, no treaty or national legislation has proven successful in dealing with stolen cultural property and its effects. As members of the international community have created successful “international regimes to deal with other areas,” cultural property laws “should be addressed in a similar manner.” Cultural property theft is a global problem that has yet to noticeably decline, as a truly successful framework for protection has not been implemented. Although countries have natural reservations against implementing new legislation that might seriously affect their legal systems, cultural property theft is not a self-regulating area and now is the time to address it. Large market countries should support ratification of the UNIDROIT Convention and its uniform framework, which, despite criticism, still appears to have potential for long-term success in deterring and decreasing cultural property theft.

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203. Fincham, Lex Originis Rule, supra note 1, at 134.
204. Kinderman, supra note 48, at 461.

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CROSSING BORDERS: A TRIPS-LIKE TREATY ON QUARANTINES AND HUMAN RIGHTS

Police officers with guns cannot make people obey a quarantine. In order for this to work, it has to be collaborative. They have to trust the government.1

INTRODUCTION

In the spring of 2009, the emergence and spread of a new influenza, H1N1, better known as the “swine flu,” raced rapidly around the globe, scaring, infecting, and killing.2 China, having experienced a serious outbreak of SARS only seven years prior, responded vigilantly by using extreme measures, which arguably infringed on basic human rights.3 News stories surfaced in the United States about perfectly healthy foreigners in China forced into quarantine for multiple days due to minor coughs, runny noses, slight temperatures, or even after showing no symptoms at all.4 For example, during this period a school trip consisting of twenty-one students and three teachers from a Maryland private school turned into a week-long quarantine in China simply because of one feverish passenger on the group’s flight from the United States.5 All of the students and teachers on the trip were free of flu symptoms.6 Public health is traditionally a national responsibility.7 Governments are responsible for running their own health care systems, managing

4. See, e.g., Ariana Eunjung Cha, Caught in China’s Aggressive Swine Flu Net: Quarantine Measures Keep Cases Down But Virtually Imprison Healthy Travelers, WASH. POST, May 29, 2009, at A1. After landing in China, medical officials boarded Miguel Gomez’s plane, and with a temperature that was only .3 degrees above normal, he was deemed a public health threat and rushed by ambulance to a quarantine facility. He was found not to be ill, but spent three days quarantined in an infectious disease ward nonetheless. He did not see any uncovered faces the entire time. His meals were pushed through a small hole. Doctors in biohazard suits sampled his blood, swabbed his throat, and took his temperature every few hours. Id.
6. Id.
hospitals, adopting public health legislation, deciding on ethical standards of medical personnel, and approving the use and control of medicine.  

However, many health problems cannot be contained within national borders, such as the spread of infectious disease. Early cooperation was mainly to protect “civilized nations” from tropical diseases. Then, in 1948, the World Health Organization (“WHO”) was created in order to assist all countries in preventing and fighting epidemics. 

Today, health related agencies such as the Center for Disease Control and Prevention (“CDC”) recognize that “[t]he concept of ‘domestic’ as distinct from ‘international’ health is . . . no longer germane to infectious diseases in an era in which commerce, travel, and ecological change are intertwined on a truly global scale.” Therefore, preventing the spread of disease is not simply a nation-by-nation concern. Globalization has launched international health related issues into the global political agenda. Due to advances in modern technology, it is possible to travel across the world in a few hours. In 2008, airplanes carried almost one billion people across international borders. Global travel contributes to the spread of infectious diseases, thus necessitating that public health problems be addressed at the international level.

In addition, changes in political, social, and environmental factors increase the development and spread of infectious disease on a worldwide level. For example, population growth leads to overcrowding in cities.

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8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
14. Rosario M. Isasi & Thu Minh Nguyen, The Global Governance of Infectious Diseases: The World Health Organization and the International Health Regulations, 43 ALBERTA L. REV. 497, 499 (2005) (stating that “only a few urgent public health risks or emergencies remain solely within the purview of national or state authorities”).
18. Id. at 1335–36.
Overcrowded and overpopulated cities create unsanitary living conditions, the type of environment in which diseases thrive.\textsuperscript{19} Political instability, which may force people to relocate, is another factor that causes diseases to spread because diseases are introduced into populations with no prior exposure.\textsuperscript{20}

On the international level, there is a lack of harmonization in how countries respond to the threat of infectious disease. Some of these responses, arguably, impinge on fundamental human rights. One basic human right is the right to health.\textsuperscript{21} “Under this positivistic human rights framework, government possesses an obligation, within the constraints of its resources, to provide an environment conducive to the public’s health and well-being.”\textsuperscript{22} However, the protection of both public health and other human rights are not always in harmony.\textsuperscript{23} For example, another basic human right is the freedom of movement.\textsuperscript{24} While quarantine methods restrict the freedom of movement, it may be used in the interest of public health.

According to the CDC, quarantine is defined as: “the separation and restriction of movement of persons who, while not yet ill, have been exposed to an infectious agent and therefore may become infectious.”\textsuperscript{25} It is a method used to stop infectious diseases from spreading.\textsuperscript{26} While the use of quarantine may be useful in preventing the spread of disease, locking up an individual against his or her will may, in some situations, violate their freedom of movement. Therefore, there is an obvious friction between the right to health and the right to movement. In order to reduce this friction, the WHO should implement a multilateral agreement to ensure that quarantine measures may not be used until a certain level of emergency is reached.

Part II of this Note discusses how the WHO has attempted to prevent the spread of infectious disease and the WHO’s International Health Regulations (“IHR”) on quarantine. Part III focuses on basic human rights analyzed in light of the use of quarantine. Part IV discusses some of the most recent global outbreaks of disease and how certain countries

\begin{thebibliography}{9}
\bibitem{footnote19} Id.
\bibitem{footnote20} Id.
\bibitem{footnote22} Id.
\bibitem{footnote23} Id.
\bibitem{footnote24} Id. at 3.
\bibitem{footnote25} \textit{Fact Sheet on Isolation and Quarantine}, Ctrs. for Disease Control & Prevention (May 3, 2005), http://www.cdc.gov/ncidod/sars/isolationquarantine.htm [hereinafter \textit{Quarantine Fact Sheet}].
\bibitem{footnote26} Id.; see also Public Health Service Act, 42 U.S.C. § 264 (2002).
\end{thebibliography}
have responded, specifically focusing on the responses of the United States and China to the swine flu. Next, this Note offers advice on how international states can join together to help prevent the spread of disease while keeping in mind the basic human right to movement. Parts V and VI of this Note propose an agreement for the WHO to administer that follows the basic principles of the World Trade Organization’s (“WTO”) Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”). The human right to health and the human right to movement may sometimes be at odds with one another, and this proposed framework would ensure that both could be accomplished with as little friction as possible.

The TRIPS agreement is a multilateral agreement that protects intellectual property rights on an international level.\(^{27}\) The agreement sets out minimum standards of protection for each Member State, deals with the enforcement of these standards, and sets out dispute settlement procedures for when these standards are violated.\(^{28}\) These aspects of a multilateral agreement are attractive because they help ensure that governments do not act arbitrarily, and if there is a violation of standards, there is a form of relief. It would be possible to use minimum standards to help mitigate the friction between the right to health and the right to movement by including the point at which a violation of human rights is necessary or appropriate, mandating that the government must only impose on the right to movement when certain criteria regarding the disease and the country’s population are met. Criteria would include factors such as the percentage of population infected, the seriousness of the disease, or the rate at which the disease is spreading.

An enforcement and dispute settlement mechanism is also necessary in order for a multilateral agreement, such as the one proposed, to work effectively. For example, if the school group from Maryland was quarantined before certain factors or criteria were met in terms of the seriousness of the disease, then the United States could bring an action against China to a dispute settlement panel. If, on the other hand, the disease were serious enough for quarantine to be an available option, then the Chinese government would be permitted to act as they did. This would give individuals a sense of security because there would be proof that restorative measures are necessary due to the severity of the situation. While quarantine methods may violate the right to movement, a Member


\(^{28}\) Id.
State’s government would only be permitted to infringe upon this fundamental right when the situation is sufficiently severe to meet certain minimum standards.

II. THE WHO’S ATTEMPT TO DEVELOP AN INTERNATIONAL SYSTEM TO HELP PREVENT THE SPREAD OF INFECTIOUS DISEASE

Due to the nature of contagious diseases and the way in which different countries are constantly interacting, there is a need for cooperation among countries to prevent the spread of disease.29 Before efforts were made on an international level to control infectious disease, the power lay entirely within each sovereign state.30 Efforts to create an international system to help prevent the spread of disease began when the WHO was created.

The WHO is a multilateral organization specializing in international health matters.31 It was established in 1948 when the International Health Conference adopted its Constitution, which was then signed by sixty-one states.32 The WHO “is responsible for providing leadership on global health matters, shaping the health research agenda, setting norms and standards, articulating evidence-based policy options, providing technical support to countries and monitoring and assessing health trends.”33 The WHO operates as a regulatory agency over nations.34 The organization has power, according to the WHO Constitution, to enact laws including “sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease.”35 Article 1 of the WHO

34. Esty, supra note 29, at 1550.
Constitution states that “attainment by all peoples of the highest possible level of health” is a main objective. Article 2 states that the purpose is to “stimulate and advance work to eradicate epidemic, endemic, and other diseases . . . .” Article 2 further states that the organization’s duties include proposing regulations and agreements, and making recommendations in regards to international health. Thus, the organization has an extensive legal basis to develop international law.

In 1969, the WHO adopted the original version of the IHR. After the 2003 SARS outbreak, the world’s governments recognized the need for a unified and coordinated system of defense against public health threats. The IHR of 2005, which came into force on June 15, 2007, was a landmark for the WHO because it set out a new framework to detect and respond to public health emergencies. The IHR defines its purpose as: “to prevent, protect against, control, and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.”

The IHR of 2005 drastically changed the notification requirements of States on health related matters. Previously, Parties were required to

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36. WHO Constitution, supra note 35, art. 1.
37. Id. art. 2(g).
38. Id. art. 2(k).
41. Id.
42. See World Health Org. [WHO], The International Health Regulations 2005: IHR Brief No. 1 (2005), available at www.who.int/ihr [hereinafter IHR Brief No. 1]. The purpose of the IHR was to enhance national and global public health security. Id.
44. “States” refers to WHO Member States and Non-Member State Parties who have agreed to be bound by the provisions. See WHO, The International Health Regulations (2005): IHR Brief No. 2 (2005), available at http://www.who.int/ihr/ihr_brief_no_2_en.pdf [hereinafter IHR Brief No. 2].

All countries which are Members of the United Nations may become members of WHO by accepting its Constitution. Other countries may be admitted as members when their application has been approved by a simple majority vote of the World Health Assembly. Territories which are not responsible for the conduct of their international relations may be admitted as Associate Members upon application made on their behalf by the Member or other authority responsible for their international relations. Members of WHO are grouped according to regional distribution (193 Member States).
notify the WHO of cases of yellow fever, cholera, and the plague; now, a Party is required to report to the WHO any event that may be considered a “public health emergency of international concern.” Factors considered in making this decision include seriousness, unexpectedness or unusualness, significant risk of spreading internationally, and significant risk of international travel or trade restrictions. The purpose of this non-disease specific notification requirement is to expand the IHR to include new risks so that public health emergencies can be detected early. Parties are required to keep their surveillance systems for national health at a certain functional level and are required to inform the WHO of any evidence of health risks outside their own country that may cause a disease to spread. Under the IHR, the WHO may request information regarding activities within the country, and the country must respond in a timely manner.

III. THE USE OF QUARANTINE AS A METHOD TO PREVENT THE SPREAD OF DISEASE DESPITE POSSIBLE INFRINGEMENT ON THE HUMAN RIGHT TO MOVEMENT

International human rights law promotes individuals’ rights against government negligence or intrusion throughout the world. The right to health is fundamental, and the 1946 Constitution of the WHO states, “[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, re-
The preamble defines health as “a state of complete physical, mental, and social well-being not merely the absence of disease or infirmity.” The Universal Declaration of Human Rights (“UDHR”), adopted in 1948, was a first attempt at creating a standard on the international level to promote human rights. The basic principle of the declaration is that “[a]ll human beings are born free and equal in dignity and rights.” The UDHR addresses the basic right to freedom of movement, and Article 13 claims: “Everyone has the right to freedom of movement and residence within the borders of each State. Everyone has the right to leave any country, including his own, and to return to his country.” The WHO’s Constitution acknowledges the basic human right to health, and since health is a human right, States have an absolute obligation to promote and defend that right. However, tension exists over how to enforce these rights on a national and international level. The outbreak of infectious disease creates situations in which governments may have to limit some human rights in order to ensure the human right to health. The WHO widely acknowledges that the exercise of fundamental rights, specifically freedom of movement, may be limited for reasons including public health and controlling the spread of infectious disease.

53. WHO Constitution, supra note 35, pmbl.
54. Id.
56. UDHR art. 1.
57. GOSTIN & LAZZARINI, supra note 21, at 3; UDHR, supra note 55, art. 13. The WHO stated that any country bound by the Regulations may not refuse entry into its territory if a person fails to provide medical records stating that he or she does not carry the AIDS virus. GOSTIN & LAZZARINI, supra note 21, at 21. However, many countries have disregarded this regulation and prevent people from entering who either have, or who are suspected to have, the disease. Id. at 3.
58. “The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social conditions.” WHO Constitution, supra note 35, pmbl.
59. GOSTIN & LAZZARINI, supra note 21, at 28.
60. See id. at 32.
The use of quarantine is problematic because it infringes upon a person’s basic fundamental right to freedom of movement. Forced confinement under quarantine raises many human rights issues including:

1. discrimination against carriers of the disease;
2. the deprivation of liberty inherent in the imposition of public health measures without establishing that the person creates a significant health risk to society;
3. the failure to maintain the privacy of health information; and
4. the failure of governments to disseminate relevant public health information.

Focusing on issue number two, it is clear that unless it is determined that a society is at risk, it is possible that the use of quarantine may lead to an unwarranted deprivation of liberty.

Dating back to as early as the sixth century, quarantine is one of the oldest tools used to protect individual states from the spread of epidemics. Quarantine restricts the movement of persons who have been exposed to an infectious agent and therefore may become infectious, although have not yet become ill. In contrast, isolation is “the separation of persons known to have an infectious disease from others who are not infected, in order to reduce contact and stop the spread of illness.” However, the two are often used interchangeably. Quarantine dates back to when authorities began to quarantine ships in order to prevent infected cargo and people from spreading the disease into the country of import. By the nineteenth century, quarantine became a universal and widespread method of preventing the spread of disease, and Europe, Asia, and America all used quarantine in their seaports to prevent the importation of disease through trading. However, quarantine is infamous for poor treatment and cruelty, as travelers “faced involuntary isolation based on arbi-

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63. See GOSTIN & LAZZARINI, supra note 21, at 3; see also UDHR, supra note 55, art. 13.
65. See Asher, supra note 61, at 158.
68. Id.
69. Reis, supra note 66, at 532.
70. SCHEPIN & YERMAKOV, supra note 66, at 24–25.
Article 3 of the 2005 IHR states: “[t]he implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons.” 72 Conforming with basic humans rights is therefore implicit within the execution of the entire IHR. Article 31 of the 2005 IHR deals with health measures relating to entry of travelers and states:

If there is evidence of an imminent public health risk, the State Party may, in accordance with its national law and to the extent necessary to control such a risk, compel the traveler to undergo or advise the traveler, pursuant to paragraph 3 of Article 23, to undergo: (a) the least invasive and intrusive medical examination that would achieve the public health objective; (b) vaccination or other prophylaxis; or (c) additional established health measures that prevent or control the spread of disease, including isolation, quarantine or placing the traveler under public health observation. 73

Therefore, under Article 31, a Member State may not arbitrarily force a traveler into quarantine. Only if there is an imminent public health risk may a Member State compel a traveler to be quarantined. However, this provision is not as helpful and beneficial as it may seem because a country can simply classify a situation as an “imminent public health risk” whenever it feels the need to do so.

Article 32 of the 2005 IHR pertains to the treatment of travelers. It states:

In implementing health measures under these Regulations, States Parties shall treat travelers with respect for their dignity, human rights and fundamental freedoms and minimize any discomfort or distress associated with such measures, including by: (a) treating all travelers with courtesy and respect; (b) taking into consideration the gender, sociocultural, ethnic or religious concerns of travelers; and (c) providing or arranging for adequate food and water, appropriate accommodation and clothing, protection for baggage and other possessions, appropriate medical treatment, means of necessary communication if possible in a language that they can understand and other appropriate assistance for

73. Id. art. 31(2).
travelers who are quarantined, isolated or subject to medical examinations or other procedures for public health purposes.\textsuperscript{74}

While Article 32 is helpful in that it describes how travelers must be treated when compelling a traveler to undergo quarantine, it still does not address exactly when quarantine measures may be used. There must be an “imminent public health risk,”\textsuperscript{75} but there is no definitive explanation as to what that entails.

Historically, the WHO has been less than aggressive in using its powers, failing to use its authority to the full extent.\textsuperscript{76} Generally, the WHO issues nonbinding recommendations rather than instituting regulations.\textsuperscript{77} The regulations that were promulgated by in the IHR do not have much influence because of the WHO’s “contracting out” provision that allows states to opt out of legal obligations, if so desired.\textsuperscript{78} Therefore, Member States can easily escape liability if they are unwilling to follow certain regulations.\textsuperscript{79}

The government of the People’s Republic of China decided that the IHR would apply to the entire territory and did not utilize the “contract out” provision.\textsuperscript{80} In order to apply the IHR, the government had to revise the Frontier Health and Quarantine Law of the People’s Republic of China.\textsuperscript{81} The revision helped develop the capacity for rapid response to a public health emergency; it created the technology for the required surveillance, reporting and notification of public health emergencies, and formulated an information-sharing device in order to implement the IHR.\textsuperscript{82}

The United States accepted the IHR as well, but with some reservations.\textsuperscript{83} It implemented the IHR in accordance with the United States Constitution, “to the extent that the implementation of these obligations comes under the legal jurisdiction of the Federal Government.”\textsuperscript{84} The

\begin{itemize}
  \item \textsuperscript{74} Id. art. 32.
  \item \textsuperscript{75} Id. art. 31.
  \item \textsuperscript{77} Id. at 98.
  \item \textsuperscript{78} Id. at 98–99 (stating that “[t]his ‘contracting out’ provision was intended as a solution to the earlier problem of states’ inconsistent subscriptions to various laws under the treaty system”).
  \item \textsuperscript{79} Id. at 99.
  \item \textsuperscript{80} WHO, IHR 2005, supra note 72, app. 2.
  \item \textsuperscript{81} Id.
  \item \textsuperscript{82} Id.
  \item \textsuperscript{83} Id.
  \item \textsuperscript{84} Id.
\end{itemize}
government “reserves the right to assume obligations under these Regulations in a manner consistent with its fundamental principles of federalism.”

Since both China and the United States have accepted these regulations, both countries seem to respect dignity, freedom, and human rights. However, the regulations do not address the control of the spread of disease, nor do they provide the power to enforce compliance. Disease continues to spread, regardless of state’s respect for human rights.

IV. EMERGING INFECTIOUS DISEASES

Emerging infectious diseases (“EIDs”) are defined as “diseases of infectious origin whose incidence in humans has increased within the past two decades or threatens to increase in the near future.” This includes new diseases that have never been identified before as well as previously known diseases that have resurfaced. Outbreaks of the HIV/AIDS virus, SARS, and most recently, the swine flu/H1N1 influenza resulted in the deaths of millions of individuals worldwide.

A. Recent Outbreaks

i. HIV/AIDS

HIV/AIDS is considered one of the most destructive pandemics in recent times, killing over twenty-five million people in the past twenty-five years. Currently, about thirty-three million people are living with the disease around the world. The virus attacks white blood cells, leaving the immune system significantly weakened so the body is unable to fight...
off infection. HIV can be transmitted through blood, semen, vaginal fluids, or breast milk. Transmission is possible through either intimate contact or sharing intravenous instruments. Countries have used quarantine and restricted international travel in order to try to prevent the spread of the disease. Since it is now known that HIV does not spread via casual contact, the use of quarantine and restriction on travel has widely been abandoned. However, some countries still permit people infected with HIV to be isolated.

ii. SARS

Cases of Severe Acute Respiratory Syndrome ("SARS") emerged in 2002 as the first new infectious disease to surface in the twenty-first century. Symptoms of SARS typically include high fever, body aches, headache, and overall discomfort, and most patients develop pneumonia after a dry cough emerges. SARS is thought to spread from person to person by respiratory droplets produced when an infected person coughs or sneezes. The droplets can be propelled up to three feet onto another's mucous membrane of the mouth, nose, or eyes.

The mortality rate for SARS is about eleven percent. After the first human case was confirmed in November of 2002 in southern China, the government initially tried to contain information about the outbreak. The disease then spread to Hong Kong, Vietnam, Canada, and Singapore. According to the WHO, 8,098 people were infected with SARS during the 2003 outbreak. The SARS epidemic showed the world that

94. Id. at 275.
95. Id.
96. Id.
97. GABLE ET AL., supra note 67, at 23. For example, in the Philippines, the AIDS Prevention and Control Act of 1998 § 37 explicitly prohibits using isolation or quarantine against those with HIV. Id. at 24.
98. Id. at 23.
99. Schloenhardt, supra note 93, at 277.
101. Id.
102. Id. It is also possible that the SARS virus is airborne spread, but this is not yet known. Id.
103. Schloenhardt, supra note 93, at 278.
104. Id.
105. Id. at 279.
106. CDC, SARS Information, supra note 100.
a highly contagious disease could spread over thousands of miles within hours.107

In the countries most severely affected by the SARS epidemic, including China, Hong Kong, Vietnam, Canada, Taiwan, and Singapore, quarantine and isolation were commonly used.108 In these countries, most of the hundreds of thousands of people who were quarantined voluntarily entered into home quarantine.109 For example, according to the CDC, only a small number of people in Canada required a legal order to cooperate with quarantine restrictions, and almost all of the people who were asked to follow quarantine restrictions willingly did so.110 In Toronto, 0.1 percent of the individuals subject to mandatory quarantine were forced to comply due to mandatory orders.111 In Asia, resistance to quarantine met extremely harsh enforcement.112 For example, in China, individuals who resisted compliance with quarantine orders were threatened with imprisonment, death sentences, or being barricaded in buildings.113

Since there was limited incidence of SARS in the United States during the 2003 outbreak, the CDC in the United States did not recommend the use of quarantine,114 nor did the CDC force anyone into isolation or quarantine.115 However, the United States may not be so lucky the next time an epidemic breaks out. The SARS outbreak can be viewed as a wake-up call for countries to ensure proper preparation for the next crisis.116 In the wake of SARS, scholars have taken into consideration whether current laws and values in the United States would support using traditional public health measures in an epidemic, including extensive quarantine measures.117

108. Id.
109. Id. at 189.
111. Reis, supra note 66, at 531.
112. Id.
113. Id. at 531–32 (citing Mike Mitka, SARS Thrusts Quarantine into the Limelight, 290 JAMA 1696 (2003)).
114. Quarantine Fact Sheet, supra note 25.
116. Reis, supra note 66, at 530.
117. See Rothstein, supra note 107, at 175–76.
iii. Swine Flu/H1N1 Influenza

The swine flu, or H1N1 influenza, was first detected in the United States in April of 2009.\(^\text{118}\) Symptoms typically include fever, cough, sore throat, runny nose, chills, fatigue, headache, and body aches.\(^\text{119}\) The swine flu spread worldwide, and on June 11, 2009, the WHO stated that a pandemic was underway.\(^\text{120}\) The pandemic alert level was raised to a Phase 6 due to the spread of the virus, not the severity of it.\(^\text{121}\) On October 24, 2009, President Obama declared the swine flu epidemic a national emergency in the United States.\(^\text{122}\)

\(^{118}\) Questions and Answers: 2009 H1N1 Flu ("Swine Flu") and You, CTRS. FOR DISEASE CONTROL & PREVENTION, (Feb. 10, 2010), http://www.cdc.gov/h1n1flu/qa.htm.

\(^{119}\) Id.

\(^{120}\) Id.

\(^{121}\) WHO Pandemic Declaration: A Pandemic is Declared, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/h1n1flu/who/ (last visited Feb. 18, 2011).


NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, including sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 et seq.) and consistent with section 1135 of the Social Security Act (SSA), as amended (42 U.S.C. 1320b-5), do hereby find and proclaim that, given that the rapid increase in illness across the Nation may overburden health care resources and that the temporary waiver of certain standard Federal requirements may be warranted in order to enable U.S. health care facilities to implement emergency operations plans, the 2009 H1N1 influenza pandemic in the United States constitutes a national emergency. Accordingly, I hereby declare that the Secretary may exercise the authority under section 1135 of the SSA to temporarily waive or modify certain requirements of the Medicare, Medicaid, and State Children’s Health Insurance programs and of the Health Insurance Portability and Accountability Act Privacy Rule throughout the duration of the public health emergency declared in response to the 2009 H1N1 influenza pandemic. In exercising this authority, the Secretary shall provide certification and advance written notice to the Congress as required by section 1135(d) of the SSA (42 U.S.C. 1320b-5(d).

Id.
By November 1, 2009, over 199 countries and territories reported confirmed cases of the H1N1 virus. During this time period, the United States experienced intense and ongoing transmission of the illness, which “continue[d] . . . without evidence of peak in activity.” In Europe and Asia, the transmission continued to increase across boarders. The WHO actively monitored the spread of the disease. China employed quarantine methods in attempt to stop the spread of the H1N1 virus. However, some believed that this response was disproportionate to the threat. Since Chinese authorities are still criticized for not responding promptly enough during the outbreak of SARS in 2003, the authorities knew the importance of monitoring and accordingly responded powerfully to the swine flu outbreak through quarantining. China’s response illustrated a clear difference in response tactics between China and the United States.

In the United States, factors such as “rugged individualism, self-reliance, nonconformity, and independence are highly valued.” Since this is what American society is based upon, it does not seem as though such arbitrary isolation and quarantine measures similar to those taken in China would be as likely to occur in the United States. This is why a uniform set of minimum standards that clearly illustrates when a Member State may act in a way that violates the human right to movement is necessary. The WHO should use the TRIPS agreement as a guide to create this international standard, as the TRIPS agreement contains many of the same types of provisions that a successful international health agreement would require.

124. Id.
125. Id.
126. Id.
128. Id.; see also Bill Meyer, Swine Flu Quarantine: The Chinese Biohazard Suits Mean You Won’t Make it to the Wedding, CLEVELAND.COM (May 18, 2009), http://www.cleveland.com/world/index.ssf/2009/05/the_chinese_biohazard_suits_me.htm l (American tourists were forced into quarantine in a Chinese hotel room for seven days simply because their plane had a two-hour layover in Cancun, Mexico. They never showed any symptoms.).
130. Rothstein, supra note 107, at 182.
131. Id. at 190.
V. THE TRIPS AGREEMENT: A POSSIBLE GUIDE FOR CREATING A MULTILATERAL INTERNATIONAL HEALTH REGULATION AGREEMENT

The TRIPS agreement is a multilateral agreement that protects international intellectual property rights. It has been called “the most ambitious international intellectual property convention ever attempted.” The TRIPS agreement does not require that all countries have identical rules on protection of intellectual property. Members are simply required to comply with certain minimum standards, and they may implement in their law more extensive protection if so desired, as long as these protections do not contravene the agreement. This creates a uniform minimum level of protection for intellectual property rights. It recognizes that there are different ways to protect intellectual property rights, but establishes a mandatory minimum level of protection that WTO members are obligated to provide.

The TRIPS agreement also contains a national treatment standard, mandating that a Member State must accord the same protection to foreigners as accorded to its own nationals. This encourages a system of non-discrimination because a WTO Member may not treat other WTO Members less favorably than it treats its own nationals with regard to intellectual property protection. TRIPS also contains a most-favored-nation treatment standard. This means that Member States are required to give equal treatment to nationals of all trading partners in the WTO, and one partner may not be treated more “favorably” than another.

TRIPS Part III, the enforcement section, details the procedures and remedies that are available to rights holders in the event of violation. The enforcement provisions are divided into five sections, including a “General Obligations” section, a section regarding civil and administrative procedures and remedies, a section on border measures, and a sec-

132. TRIPS Overview, supra note 27.
135. Id.
137. Pulmano, supra note 133, at 263.
139. Pulmano, supra note 133, at 263.
140. Id. at 264.
141. TRIPS FAQ, supra note 134.
tion on criminal procedures. Article 41.1 states that “Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement.” Enforcement procedures must be “fair and equitable” and may not be “unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.”

In order to enforce requirements under TRIPS, the WTO’s Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”) enables parties to bring a claim against another party in front of a “single unified nucleus” called the Dispute Settlement Body (“DSB”). The DSU describes a structured procedure for dispute resolution under the WTO. After the DSB makes a decision and issues recommendations for action on the part of the parties, the DSU continues to observe the losing party’s steps to ensure compliance with the recommendations.

It is evident that the drafters of the TRIPS agreement recognized the inherent difficulties faced by certain countries in implementing all of the TRIPS requirements. Therefore, TRIPS allows developing countries a longer transition period for bringing their legislation and practices into conformity with the TRIPS requirements than for developed countries. Thus, all Members have time to ensure that they are complying with TRIPS before they can be brought to the DSB for failure to comply. These TRIPS concepts, while only relating to international intellectual property protection, may be analogized into the world of international health regulation in order to help prevent the spread of disease while limiting the amount of arbitrary and discriminatory violations on the right to movement.

VI. A PROPOSED MULTILATERAL HEALTH AGREEMENT

In order to eradicate epidemics and other diseases while respecting individuals’ basic human rights, complete cooperation with the proposed multilateral health agreement is vital. The WHO Constitution grants the
WHO power to create quarantine requirements,\textsuperscript{149} and Article 3 of the 2005 IHR states that its regulations must be read in compliance with human rights.\textsuperscript{150} Thus, the WHO has the power to introduce mandatory requirements in relation to quarantine measures, though these requirements must comply with fundamental human rights. The WHO should exercise this power and not only ensure compliance with human rights but also help prevent countries from unfairly denying individuals their human rights. The WHO should implement specific and exact circumstances under which a Member State may infringe upon human rights by using a method such as quarantine. The WHO should implement an agreement, similar to the TRIPS agreement, including provisions that specifically describe types of minimum standards that all countries must follow when implementing quarantine measures. This proposed agreement should also have enforcement provisions similar to the provisions in TRIPS, and the WHO should create its own version of the WTO’s DSU where cases of agreement violations could be heard. Additionally, there should be a monitoring system to ensure that the recommendations made are complied with, and if not complied with, then alternate remedies could be made available. The WHO should be more aggressive and use its authority to the full extent. What purpose does an organization such as the WHO have if it does not utilize its power?

The global society should be thought of as one entity, especially in the context of public health. In the United States, there are procedural and substantive due process requirements with regard to quarantine.\textsuperscript{151} If a government action impedes on a fundamental right, the courts apply strict scrutiny, and the action will be upheld only if it is “necessary to promote a compelling or overriding governmental interest.”\textsuperscript{152} However, in China, perhaps due to the SARS outbreak in 2003, the country was quick to act with their quarantine measures. Thousands of Americans were quarantined in the spring and summer of 2009 in China, and many American citizens feared travel to this part of the world.\textsuperscript{153} In the United

\textsuperscript{149} WHO Constitution, supra note 35, art. 21(a).
\textsuperscript{150} WHO, IHR 2005, supra note 72, art. 3.
\textsuperscript{151} See generally Michelle A. Daubert, Comment, Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights, 54 BUFF. L. REV. 1299 (2007).
\textsuperscript{152} Id. at 1314.
\textsuperscript{153} See Martia Cook, China Journal: My 4 Days in Quarantine, CBS NEWS (June 30, 2009, 10:32 AM), http://www.cbsnews.com/blogs/2009/06/30/world/worldwatch/entry5125362.shtml (“And ultimately, the most frustrating feeling is the awareness that I should NOT be here. I AM PERFECTLY WELL! There’s nothing wrong with me. I feel fine. Yet, I’m being treated as an ill patient!”).
States, federal law gives the President the power to declare a national emergency, a power that expands the government’s power and ability to impose restrictions on human rights. However, it is worth emphasizing that a situation calling for restrictions on human rights must be declared an emergency. The United States declared the swine flu/H1N1 outbreak a national emergency over a year after the first sign of the disease, and only then could measures such as quarantine be used. China, on the other hand, reacted quickly, and countless healthy travelers were subjected to quarantine measures.

The great discrepancy in response time between China and the United States is evidence that more stringent and specific requirements are needed to streamline exactly when governments should be able to impose measures on individuals that violate their human rights. In certain situations, quarantine measures may in fact help prevent the spread of disease. Therefore, in order to strike a balance between preventing the spread of disease on both the national and international level, and protecting human rights, there must be a unified set of minimum standards that all countries must follow to justify an infringement on human rights.

The minimum standards in this proposed agreement must be extremely specific, so that a Member State knows exactly when it is able to take actions that infringe upon individuals’ freedom of movement. A surveillance system in each Member State is essential to creating a feasible agreement. Surveillance is “the systematic collection, analysis, interpretation, and dissemination of selected health information.” Surveillance is necessary in order to monitor disease outbreaks. Since the 2005 IHR enhances surveillance and notification system requirements, the WHO is already capable of collecting the necessary data to determine when the infringement on the right to movement is warranted. However, with surveillance, especially mandatory testing and screening, comes issues of consent and privacy. While this may be the case, mandatory testing and screening may be a beneficial tradeoff because if Member States have accurate data, they are less likely to take unnecessary or arbitrary responses. Under the proposed agreement, all measures taken in response to a threat would be absolutely necessary to prevent the spread of the disease.

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156. Quarantine Fact Sheet, supra note 25.
157. Gable et al., supra note 67, at 3.
158. IHR Brief No. 2, supra note 44.
159. Gable et al., supra note 67, at 3–4.
Once a Member State has all of the data necessary, the Member must turn to the minimum standards provisions of the proposed agreement to ensure that the situation is a serious enough emergency that warrants limiting the right to movement. Vague phrases that have been used in the past, such as “an imminent public health risk,” must be given clear and precise definitions, as agreed upon by a panel of medical experts. One key factor to be considered in determining the level of emergency is the percentage of the population already infected and in how long a period of time. This will give the Member State an accurate and realistic view on the severity of the disease and its contagious nature. Only once the severity and contagious nature of a disease reach a certain level, which will be determined by medical experts prior to the implementation of this proposed agreement, may a Member use a method that impinges on the right to movement. Therefore, if this proposed agreement was in force during 2009 when the Chinese government was quarantining thousands of foreigners in fear of the swine flu, then China would be deemed to have violated the agreement if the severity did not meet the criteria necessary to use such measures.

Additionally, the proposed agreement would include a provision that resembles the national treatment provision in TRIPS. This would help prevent the possibility of a country imposing irrational and discriminatory quarantine measures against citizens of another country in fear that they are more likely to be carrying the disease. Upon learning that the first carrier of the swine flu was from Mexico, the Chinese government imposed far more disturbing measures against Mexican foreigners in China than any other known foreigner or national. This is not to say that the proposed provision would absolutely bar a Member State from using these measures if they were reasonable and justifiable. However, this flexibility would be clearly stated and described in the agreement. Additionally, the fact that Members could bring other Members to a dispute settlement board for violating the agreement would deter Members from targeting certain foreigners without reason in fear of the repercussions.

161. See TRIPS Agreement, supra note 142, art. 3 (“Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property . . .”).
162. See, e.g., Andrew Browne, China Forces Dozens of Mexican Travelers Into Quarantine, WALL ST. J., May 4, 2009 (“The A/H1N1 flu outbreak is leading to a potential diplomatic row between China and Mexico, as Chinese health authorities round up and quarantine scores of Mexicans—only one of whom is thus far reported to be sick—as they fly in on business and holiday trips.”).
While implementing a set of minimum standards may be difficult on Member States due to the fact that the efficiency of a country’s national health system is dependent on many factors, including political, social, and economic positions,\textsuperscript{163} the only actual requirement is the implementation of surveillance systems adequate enough to determine an accurate count of cases of a disease. Further, the proposed agreement will contain a provision similar to TRIPS Article 67, which encourages developed countries to assist developing and least-developed countries to comply by providing technical and financial aid.\textsuperscript{164} Developed members will be encouraged to assist developed and least-developed countries in order to get their surveillance systems in proper, working order. Also, as TRIPS has transition period provisions,\textsuperscript{165} the proposed agreement will also have a transition period to give Members the time needed to make the necessary changes to their national surveillance systems.

If individuals are assured that extreme measures will not be arbitrary and will only be used when completely necessary for the overall public good, then there will likely be less resistance when measures must be taken. Building trust between a government and its residents and visitors is essential to harmonize the protection of the concurrent rights to health and movement. Trust can be established by implementing a set of minimum standards that all Members must follow to prevent arbitrary infringement of human rights. Further, the enforcement mechanism would ensure that if these standards were to be violated, there would be repercussions.\textsuperscript{166}

CONCLUSION

There is friction between the right to health and the right to movement because in order to prevent the spread of infectious disease, it is often necessary to quarantine those who are ill or who have been exposed to the illness. In furtherance of balancing the right to movement with dis-

\textsuperscript{163} See Beigbeder, supra note 7.
\textsuperscript{164} TRIPS Agreement, supra note 142, art. 67 (“In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members.”).
\textsuperscript{165} Id. art. 65.
\textsuperscript{166} This proposed agreement, as is, would be implemented by the WHO. However, in order for this agreement to work, there must be mechanisms to back it up, such as the dispute settlement body, as described above, which would take time and money to develop. An alternative proposal, beyond the scope of this Note, is to incorporate this health issue into the WTO, which already has many of the mechanisms necessary in order for this agreement to be successful.
ease prevention, the WHO should implement a multilateral agreement containing sections that resemble certain provisions of the TRIPS agreement. The proposed agreement should specifically state the level of emergency, as determined by a panel of medical experts, at which a Member State may use measures that infringe upon human rights, specifically the right to movement, in order to prevent the spread of a disease. The level of emergency during which it would be acceptable to use methods that infringe the right to movement through quarantine methods must be equivalent throughout all Member States so that certain countries do not deny human rights more arbitrarily than others. While it may take time to implement such an agreement, and while it may be difficult, this agreement is necessary in order to strike a balance between the right to movement and disease prevention. It will also create trust in the government if individuals know that their human rights may only be infringed upon when necessary for the public good.

The right to health and the right to movement are basic fundamental rights that every person in this world should be afforded with as little governmental restriction as possible. However, when government regulation is necessary for the greater public good, some basic rights may be sacrificed but only in a way that is unified throughout the world as governed by the WHO. This unified system would not allow human rights to be infringed until a certain level of emergency is reached, and if this proposed agreement had been in effect before the most recent swine flu outbreak, it is likely that significantly fewer people would have been forced into unnecessary quarantine throughout the world. This framework, if adopted, will help minimize the unnecessary and arbitrary infringement of human rights going forward.

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