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SOCIOECONOMIC RIGHTS IN THE INDIAN CONSTITUTION: TOWARD A BROADER CONCEPTION OF LEGITIMACY

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INTRODUCTION

The Indian Constitution contains “Directive Principles of State Policy” that require the state to pursue socioeconomic justice. These principles are explicitly nonjusticiable under the Constitution. However, the Indian Supreme Court (“Supreme Court” or “Court”) has interpreted the right to life under Article 21 of the Constitution to protect a right to “live with dignity.” It has since held that directive principles pertaining, inter alia, to food, shelter, and a decent livelihood are essential to human dignity and are therefore judicially enforceable rights.

Much scholarship has been devoted to the Supreme Court’s jurisprudence in this area, focusing mostly on the judiciary’s role in a constitutional democracy. These works either criticize

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1. Directive principles include, inter alia, working toward providing free education and improving nutritional standards. See INDIA CONST. arts. 36–51.

2. “Socioeconomic justice” broadly refers to what Professor Michelman describes as “social rights” or policies aimed at the “satisfaction of certain material needs or wants, or access to the means of satisfaction.” Such rights or policies include the provision or access to a minimum adequate standard of living, food, and shelter. See generally Frank I. Michelman, The Constitution, Social Rights, and Liberal Political Justification, in EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE 21–24 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

3. See INDIA CONST. art. 37 (stating that directive principles “shall not be enforceable by any court”).


the Court for “judicial activism” or applaud it for proactively defending the rights of the poor and marginalized.\(^6\)

This Article analyzes socioeconomic rights in India from a Rawlsian perspective, which illuminates a neglected aspect of this debate. While addressing concerns of judicial overreach, I argue that the Supreme Court’s reasoning for locating justiciable socioeconomic rights in the Indian Constitution raises a more fundamental concern: it threatens the Constitution’s legitimacy.

The Article has five parts. Part I sets forth the theoretical framework, which is grounded in John Rawls’s liberal principle of legitimacy. This principle states that political power is justified only when it is exercised in accordance with a constitution that all citizens would accept assuming they are rationally self-interested and reasonable.\(^7\) It then discusses Professor Frank Michelman’s recent work, which draws on Rawlsian theory to examine what makes a constitution legitimate in a liberal state.

In *The Constitution, Social Rights and Liberal Political Justification*, Michelman questions the wisdom of conferring constitutional status on socioeconomic rights.\(^8\) He makes a positive case for including socioeconomic rights in a constitution, which must overcome two major objections.\(^9\) The first is a “democratic objection,” where broad “social citizenship rights” would leave “no leading issue . . . untouched” in the political sphere.\(^10\) Imag-

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8. See Michelman, *supra* note 2. While Michelman uses the term “social rights,” this paper refers to the same set of rights as “socioeconomic rights” to convey a broader understanding of their scope and impact.

9. *Id.* at 23–24.

10. *Id.* at 30–33.
ine a constitution that includes enforceable rights to housing, food, and clean water. Such a constitution would constrain policy choices in any area involving the allocation and distribution of resources, including taxation, trade, immigration, and education. In extreme cases, representative democracy would be rendered meaningless, as elected representatives would not be able to make “the most basic choices of political economy.”11

Conferring constitutional status on socioeconomic rights also invites a “contractarian objection.”12 Social contractarians believe that a constitution is legitimate if rational citizens, acting reasonably, can understand its terms and agree to be governed by them.13 To accept a constitution’s terms, citizens must be able to determine whether their government actually abides by constitutional principles. If they cannot make this determination, they may not regard the constitution as a legitimate “basis for political rule.”14

However, it is difficult to gauge if a government fulfills socioeconomic rights. Take, for instance, the right to adequate housing. What if the government provides free housing to 90% of those living in poverty? Does it therefore “violate” this right vis-à-vis the remaining 10%? Because socioeconomic rights require positive action by the government, including the provision of entitlements, the extent to which the government “complies” with these rights depends on an individual citizen’s views of distributive justice. This sort of indeterminacy is potentially fatal for contractarian legitimacy, as citizens cannot determine when their government violates socioeconomic rights.15 Rawls avoids this difficulty by defining a legitimate constitutional scheme as one that includes certain constitutionally essential civil and political rights.16 Judicial and policy decisions with respect to socioeconomic rights are held to a lesser standard—what Rawls referred to as the “constraint of public reason.”17

11. Id. at 33.
12. Id. at 35–37.
13. Id. at 35.
14. See id. at 36.
15. See id. at 36.
16. Id. at 38.
17. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 90 (Erin Kelly ed., 2001) [hereinafter RAWLS, JUSTICE AS FAIRNESS]; RAWLS, POLITICAL
Part II describes the drafting and enactment of the Indian Constitution. Unlike the U.S. Constitution, which is silent on the issue of socioeconomic justice, or the South African Constitution, which enumerates justiciable socioeconomic rights, India’s Constitution takes a middle ground. It does not contain enforceable socioeconomic rights, but includes instead “Directive Principles of State Policy.” The framers of the Indian Constitution placed fundamental rights and directive principles in Part III and Part IV of the Constitution, respectively. They empowered the Supreme Court to enforce fundamental rights through Article 32, but specified in Article 37 that directive principles are not justiciable. Nevertheless, these principles “give a certain inflection to political public reason” to guide legislators toward the progressive realization of socioeconomic justice.

Giving socioeconomic guarantees this nonjusticiable status should have avoided both the democratic and contractarian objections. When directive principles do not legally bind elected officials, but guide them toward improving socioeconomic conditions, then no serious democratic objection arises. And, if representatives make policy decisions reflecting their honest judgment of how to best pursue socioeconomic justice and they are willing to fully and transparently explain their votes to citizens—that is, they fulfill the constraint of public reason—then

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19. See India Const. arts. 38–47.
20. See India Const. arts. 12–51. See also Granville Austin, The Indian Constitution: Cornerstone of a Nation 50–83 (1966) [hereinafter Austin, The Indian Constitution].
21. See India Const. art. 32 (guaranteeing the right of individual citizens “to move the Supreme Court by appropriate proceedings for the enforcement of [fundamental] . . . rights”).
22. Id. art. 37.
23. Michelman, supra note 2, at 39.
the contractarian objection does not arise.\textsuperscript{24} In practice, though, India’s constitutional experience has given rise to both objections.

Part III surveys the evolving constitutional status of socioeconomic rights. Over the past forty years, the Indian Supreme Court has moved away from its early precedents and understanding of the Indian Constitution. It has ruled that the Constitution confers on citizens enforceable socioeconomic rights that, if violated, can be redressed in court. Under this prevailing interpretation, India faces serious democratic and contractarian objections to its basic constitutional framework.

Part IV discusses the democratic objection in light of the Indian Supreme Court rulings on socioeconomic rights. The Court has required both central and state governments to adopt specific distributive policies.\textsuperscript{25} These include giving mid-day meals to schoolchildren, improving the public food supply distribution system, and providing shelter, food, and sanitation to the homeless.\textsuperscript{26}

This robust exercise of judicial review prevents elected officials from deliberating, negotiating, and crafting policies concerning socioeconomic justice. The Court does not simply declare socioeconomic policies unconstitutional, but creates and enforces its own policy solutions.\textsuperscript{27} In several cases, the Court has essentially dictated policies to elected officials that allocate resources to assist disadvantaged communities. It has even instituted timelines for the completion of these policies, which it enforces through interim orders.\textsuperscript{28} This sort of policymaking is precisely what the democratic objection opposes, as it appears to seriously undermine representative democracy.

For Rawls, however, a robust form of judicial review might be acceptable in some societies. He stated that judicial review “can

\textsuperscript{24} Id. at 37–38; see also Rawls, Justice as Fairness, supra note 17, at 89–94.

\textsuperscript{25} See, e.g., PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India).

\textsuperscript{26} See Lauren Birchfield & Jessica Corsi, Between Starvation and Globalization: Realizing the Right to Food in India, 31 Mich. J. Int’l L. 691, 694, 700 (2010); Singh, supra note 5, at 35.


\textsuperscript{28} See id.; PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India).
perhaps be defended given certain historical circumstances and conditions of political culture.” 29 India is beset with such chronic inequality, poverty, and malnourishment that its elected representatives have been unable or unwilling to improve, 30 leaving the Supreme Court to remedy these conditions. In other words, justice might require the Court’s intrusion into matters usually assigned to the elected branches given these political and historical circumstances.

Part V addresses the contractarian objection to justiciable socioeconomic rights in India. Article 21 of the Indian Constitution states, “No person shall be deprived of his life . . . except according to procedure established by law.” 31 The Indian Supreme Court has held that socioeconomic guarantees are judicially enforceable by interpreting this provision to encompass a broader right to “live with dignity.” 32 It has since held that rights to adequate food, education, and shelter, inter alia, are essential for citizens to live with dignity and are justiciable under Art. 21. 33

Through this capacious reading of Article 21, the Indian Supreme Court has essentially shoehorned socioeconomic guarantees into a “constitutionally essential” civil right. This judicial sleight of hand makes the right to life indeterminate under the Indian Constitution, as a right to “live with dignity” could extend to a range of guarantees that rational citizens could not reasonably foresee and therefore could not endorse. More troublingly, the Court does not explain how it gets past the clear textual command in Article 37 of the Constitution, which plainly states that directive principles “shall not be enforceable by any court.” 34

29. RAWLS, POLITICAL LIBERALISM, supra note 7, at 240.
31. INDIA CONST. art. 21.
34. INDIA CONST. art. 37.
Rawls called the Supreme Court the “exemplar of public reason”\textsuperscript{35} to convey that it has a greater obligation than other branches of government to justify its decisions with transparent and clearly articulated reasons that are acceptable to all rational and reasonable citizens. When it fails to set forth such reasons, as with its expansive interpretation of Article 21, citizens might not assent to be governed by the Constitution, as they could not know with any clarity or certainty what this constitutionally essential right requires and therefore could not determine if it is being met.

The Article concludes by highlighting some analytical insights into Indian Constitutional law that emerge from its theoretical framework. It also suggests that a legitimate constitutional system requires more than acceptable institutional arrangements that allow for desirable political outcomes—it demands honesty and clarity in the reasoning employed by public institutions on matters of basic justice and constitutional essentials.

I. THEORETICAL FRAMEWORK

A. Justice as Fairness

This Article is grounded in John Rawls’s theory of justice as fairness that he articulated in \textit{A THEORY OF JUSTICE} and refined in his later work.\textsuperscript{36} Justice as fairness rests on three basic premises. First, it is framed for a democratic society—a society that has a “fair system of social cooperation between citizens regarded as free and equal.”\textsuperscript{37} Here, Rawls adopts a “thick” conception of democracy, beyond mere majoritarian democracy. He describes the idea of society as a fair system of social cooperation that has at least three essential features: (1) social cooperation is guided by publicly recognized rules and procedures, and not simply socially coordinated activity; (2) social cooperation involves fair terms of cooperation that each participant should accept, provided everyone else accepts them, and includes an idea of reciprocity wherein participants that follow

\textsuperscript{35} Rawls, Political Liberalism, supra note 7, at 231.

\textsuperscript{36} See generally John Rawls, A Theory of Justice (rev. ed. 1999); Rawls, Justice as Fairness, supra note 17.

\textsuperscript{37} See Rawls, Justice as Fairness, supra note 17, at 39.
the established rules benefit in a manner specified by a public and agreed-upon standard; (3) social “cooperation also includes the idea of each participant’s rational advantage, or good. The idea of rational advantage specifies what it is that those engaged in cooperation are seeking to advance” in terms of their own good.38 By “free and equal persons,” Rawls means, “in virtue of their two moral powers (a capacity for a sense of justice and for a conception of the good) and the powers of reason (of judgment, thought, and inference connected with these powers), persons are free.”39 He assumes here that citizens have “these powers to the requisite minimum degree to be fully cooperating members of society,” which makes them equal.40

A second premise of justice as fairness is that it considers the basic structure of society as the “primary subject of political justice.”41 In other words, it focuses on political and social institutions and “how they fit into one unified system of cooperation.”42 These institutions include the political constitution, independent judiciary, economic institutions such as competitive markets, and the family.43 The basic structure, then, “is the background social framework” within which all of society’s individual and collective activities take place.44

The third premise is that justice as fairness is a form of political liberalism that aims to justify the coercion of the state over free and equal citizens in society.45 This is a difficult task because of the “fact of reasonable pluralism”—the fact that citizens in any democratic society hold a diverse range of reasonable, comprehensive doctrines.46 Rawls asks, if reasonable pluralism always exists, and political power in a democracy is the collective power of free and equal citizens, on what basis can citizens (through their elected representatives) legitimately exercise coercive power over their fellow citizens?47

38. Id. at 6.
39. RAWLS, POLITICAL LIBERALISM, supra note 7, at 18–19.
40. Id. at 19.
41. RAWLS, JUSTICE AS FAIRNESS, supra note 17, at 10.
42. Id. at 40.
43. Id. at 10.
44. Id.
45. See generally id. at 18–24, 40.
46. Id. See also RAWLS, POLITICAL LIBERALISM, supra note 7, at 58–66.
47. See RAWLS, JUSTICE AS FAIRNESS, supra note 17, at 40–41.
The answer for Rawls is the liberal principle of legitimacy.\textsuperscript{48} The principle holds that “political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in light of their common human reason.”\textsuperscript{49} In determining what these “constitutional essentials” might be, and in addressing questions of basic justice, Rawls argues that we should only appeal to principles that all citizens could rationally and reasonably endorse.\textsuperscript{50}

Rawls set forth an elaborate thought experiment to deduce these principles. He begins with the “original position,” where representatives of a society convene to decide upon its basic constitutional structure. These representatives are normal cooperating members of society who, despite differences in ability and socioeconomic standing, are free and equal in their ability to exercise their two moral powers to at least the requisite minimum degree.\textsuperscript{51} Representatives negotiate the basic structure behind a “veil of ignorance [where they] . . . are not allowed to know” their social positions or the comprehensive doctrines of the individuals they represent.\textsuperscript{52} The “veil” also prevents representatives from knowing their constituents’ sex, race, ethnic group, strength, intelligence, and other “native endowments.”\textsuperscript{53} When choosing which principles to adopt, representatives are limited to the same body of general facts and the same information about the “general circumstances of society.”\textsuperscript{54} Under these constraints, representatives deliberate from an equal position and under fair terms of social cooperation to agree on

\textsuperscript{48} See id. at 41.

\textsuperscript{49} Id.

\textsuperscript{50} Id. at 41, 6–7 (“[R]easonable persons are ready to propose, or to acknowledge when proposed by others, the principles needed to specify what can be seen by all as fair terms of cooperation. Reasonable persons also understand that they are to honor these principles, even at the expense of their own interests.”) (emphasis added); id. at 7 (“[I]t may be that some have a superior political power or are placed in more fortunate circumstances . . . it may be rational for those so placed to take advantage of their situation . . . but unreasonable all the same.”) (emphasis added).

\textsuperscript{51} See RAWLS, POLITICAL LIBERALISM, supra note 7, at 22–28.

\textsuperscript{52} RAWLS, JUSTICE AS FAIRNESS, supra note 17, at 15.

\textsuperscript{53} Id.

\textsuperscript{54} Id. at 86–87.
principles of political justice for the basic structure—put otherwise, justice as fairness.\textsuperscript{55}

What emanates from the original position is one of Rawls’s most seminal contributions: the two principles of justice that specify basic rights and liberties and regulate economic and social inequalities in the basic structure.\textsuperscript{56} The first principle holds that “[e]ach person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.”\textsuperscript{57} For Rawls, the first principle is constitutionally essential,\textsuperscript{58} meaning that the liberal principle of legitimacy cannot be satisfied if a society’s basic law—its Constitution—does not meet the criteria of the first principle.

The first principle of justice requires that democratic societies put in place a basic set of fundamental rights available to all citizens. These rights include the “freedom of thought and liberty of conscience[,] political liberties” (such as the right to vote), freedom of association, rights and liberties associated with the integrity of the person, and the rights and liberties specified by the rule of law.\textsuperscript{59} It also includes a “social minimum” to be provided to all citizens.\textsuperscript{60} This list is neither exclusive nor exhaustive. Rawls merely specifies a minimal set of fundamental rights with which any just society must abide, but leaves it to individual societies to work out the specific contours of those rights. Imagine, for instance, two democratic societies that constitutionally protect the right to free speech, but the first prohibits hate speech, while the second does not. The scope of this fundamental right is therefore broader in the second society than the first. Still, the restriction on free speech in

\textsuperscript{55} Id. at 16, 87.
\textsuperscript{56} Id. at 41–42.
\textsuperscript{57} Id. at 42.
\textsuperscript{58} Id. at 46.
\textsuperscript{59} Id. at 44.
\textsuperscript{60} RAWLS, POLITICAL LIBERALISM, supra note 7, at 166, 228–29 (noting that it is constitutionally essential for the state to provide a “social minimum” providing for satisfaction of citizens’ “basic” material needs to the extent required to enable them to take effective part in political and social life).
the first society is reasonable and does not necessarily violate the first principle.\textsuperscript{61}

The second principle of justice requires that “[s]ocial and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society.”\textsuperscript{62} The first clause requires formal equality—that is, there should be no discrimination in the selection process for public offices and social positions. It also requires that all citizens have a “fair chance” to attain these offices or positions.\textsuperscript{63} The second clause, commonly referred to as the “difference principle,” essentially imposes a distributive policy on society. When tackling social and economic inequality, this principle requires society to distribute resources to the greatest benefit of its least privileged members.\textsuperscript{64}

Crucially, for the purposes of this Article, Rawls does not consider the second principle of justice—which concerns socioeconomic justice—constitutionally essential.\textsuperscript{65} He specified that the first principle is prior to the second not only in his taxonomy, but also in terms of importance and application.\textsuperscript{66} The second principle is only to be implemented within a setting of background institutions created by a constitution, whose essentials are set out in the first principle.\textsuperscript{67} Therefore, the first principle must be fully satisfied before the application of the second principle.\textsuperscript{68}

The two principles are also to be applied at different stages of a society’s development. The first principle applies “at the stage of the constitutional convention,” as it is “more urgent” to settle

\textsuperscript{61} See Jeremy Waldron, \textit{Dignity and Defamation: The Visibility of Hate}, 123 \textit{Harv. L. Rev.} 1596, 1597 (2010) (noting that democratic states such as England, Canada, France, Denmark, Germany, and New Zealand all prohibit hate speech, while the United States does not; and, drawing on Rawlsian theory, arguing that hate speech regulation is compatible with democratic legitimacy).

\textsuperscript{62} \textit{Rawls, Justice as Fairness}, supra note 17, at 42–43.

\textsuperscript{63} \textit{Id.} at 43.

\textsuperscript{64} \textit{Id.} at 52.

\textsuperscript{65} \textit{See id.} at 46.

\textsuperscript{66} \textit{See id.} at 43, 46–47.

\textsuperscript{67} \textit{Id.} at 46.

\textsuperscript{68} \textit{Id.} at 46–47.
constitutional essentials than to determine policies of economic and social justice.\textsuperscript{69} In contrast, the second principle applies “at the legislative stage and it bears on all kinds of social and economic legislation, and on the many kinds of issues arising at this point.”\textsuperscript{70} This lag in the application of the second principle stems not only from Rawls’s view that the constitutional essentials of the first principle are more important than the distributive justice required by the second principle, but also from his belief that “[i]t is far easier to tell whether . . . [constitutional] essentials are realized.”\textsuperscript{71} He noted a crucial difference between the principles is that while “it seems possible to gain agreement on what . . . [constitutional] essentials should be,” the realization of the second principle is “always open to reasonable differences of opinion . . . [it] depend[s] on inference and judgment in assessing complex social and economic information.”\textsuperscript{72}

Here, Rawls seems to have anticipated the contractarian objection to placing economic and social rights within a constitution.\textsuperscript{73} Recognizing that rational citizens, acting reasonably, will likely disagree on the appropriate allocation and distribution of resources, Rawls defers decisions of socioeconomic justice to the legislative process.\textsuperscript{74} At that point, a society’s basic constitutional structure is in place, including a political framework that can effectively tackle these complex, information-driven policy questions.

\begin{footnotes}
\item[69] Id. at 48–49.
\item[70] Id. at 48.
\item[71] Id. at 49.
\item[72] Id. at 48–49. See also Frank I. Michelman, \textit{Poverty in Liberalism: A Comment on the Constitutional Essentials}, 60 \textit{DRAKE L. REV.} 1001, 1016–19 (2012) [hereinafter Michelman, \textit{Poverty in Liberalism}] (noting that the placement of socioeconomic justice within the second principle does not degrade its importance but rather leaves it to a more suitable process).
\item[73] See Michelman, supra note 2, at 23.
\item[74] See \textit{RAWLS, JUSTICE AS FAIRNESS}, supra note 17, at 48.
\end{footnotes}
B. The Constraint of Public Reason

1. A Shift in Rawlsian Thought

In his later writings, John Rawls moved away from the comprehensive doctrine he set out in A THEORY OF JUSTICE.75 A THEORY OF JUSTICE sought to improve on the work of social contractarians like Kant and Rousseau to create a superior theory to the “dominant tradition of utilitarianism.”76 To that end, it promulgated the “theory of justice as fairness as a comprehensive doctrine.”77 Recognizing the fact of reasonable pluralism—that citizens in any democratic society hold a diverse range of comprehensive doctrines—Rawls’s later work regards a society adhering to a single comprehensive doctrine as impossible to create.78 Rawls therefore introduces the idea of “overlapping consensus” to formulate a more realistic, well-ordered society.79 This concept reconciles the fact of reasonable pluralism with Rawls’s view that all citizens must agree on the same political conception of justice to have a well-ordered society. Since citizens will not be able to agree on a single comprehensive view, citizens should instead aim for a reasonable overlapping consensus of this political conception despite conflicting moral, religious, and philosophical views within a society.80 In other words, the political conception of justice as fairness can be a “shared point of view” even though citizens do not affirm it for the same reasons.81

In this pluralistic society, there must be reasonable grounds for communication among citizens with different (and sometimes conflicting) reasons for endorsing justice as fairness as a political conception of justice. In particular, there must be agreement on the guidelines of public inquiry and on the criteria as to what information and knowledge is relevant in dis-

76. Id.
77. Id.
78. RAWLS, POLITICAL LIBERALISM, supra note 7.
79. See RAWLS, JUSTICE AS FAIRNESS, supra note 17, at 32. See also RAWLS, POLITICAL LIBERALISM, supra note 7, at 133–72.
80. RAWLS, JUSTICE AS FAIRNESS, supra note 17, at 32.
81. Id.
cussing questions of basic justice and constitutional essentials.  

Enter the constraint of public reason—it is the means through which societies faced with reasonable pluralism can conform to the liberal principle of legitimacy. Since each citizen has an equal share of political power, that power should be exercised in ways that all citizens can publicly endorse in light of their own reason. Public reason therefore requires that citizens present publicly acceptable reasons to each other for their political views, at least with regard to basic justice and constitutional essentials. Citizens must also be willing to “listen to others” and display “fair-mindedness in deciding when accommodations to their views should reasonably be made.”

Public reason extends to all public discourse pertaining to basic justice and constitutional essentials, but not to other political questions. It also does not constrain personal deliberations about political questions or the discussion of such questions within associations such as churches and universities. As for its subjects, public reason applies to the public acts, pronouncements, and deliberations of elected officials, the decision making of judges, and to political discourse among ordinary citizens when, for instance, they exercise their right to vote or engage in public advocacy.

Rawls did not precisely specify the content of public reason. He stated that it includes “general beliefs and reasoning found in common sense, and the methods and conclusions of science, when not controversial.” He added that while comprehensive religious and philosophical doctrines can be introduced and discussed so that citizens better understand each other’s views, these doctrines are not public reasons and therefore cannot

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82. See id. at 89; Rawls, Political Liberalism, supra note 7, at 214.
83. See Rawls, Justice as Fairness, supra note 17, at 90–91.
84. See id. at 90. See also Bruce Ackerman, Political Liberalisms, 91 J. Phil. 364, 366 (1994) (referring to Rawls’s conception of public reason as representing one of the “most important breaks” from Rawls’s earlier work and exhibiting an “overriding commitment to public dialogue”).
85. Rawls, Political Liberalism, supra note 7, at 217.
86. Id. at 214.
87. Id. at 215.
88. See id. 213–16.
89. Rawls, Justice as Fairness, supra note 17, at 90.
form the basis for public discourse on matters of basic justice and constitutional essentials.90 Citizens (including elected representatives and judges) must instead advocate for the laws and public policies they favor using general knowledge and ways of reasoning that all other citizens can access using their common powers of reason.91

2. Public Reason and the Supreme Court

Among the various institutions in a well-ordered democratic society, Rawls singled out the Supreme Court to play a “special role” in the application of public reason.92 He noted that a constitutional democracy is dualist in nature: it contains both ordinary (legislative) and higher (constitutional) law.93 Because the Supreme Court is the final arbiter on questions of constitutional law, it plays an important role in preventing erosion in this higher law by “transient majorities or . . . by organized and well-situated narrow interests skilled at getting their way.”94

The Court therefore acts as an anti-majoritarian institution toward ordinary law or legislation. Yet, as Rawls made clear, it is not anti-majoritarian with regard to the higher, constitutional law. More specifically, when its decisions reasonably fit with the text of the Constitution, constitutional precedents and political understandings of the Constitution, the Court is not anti-majoritarian.95 Thus, Supreme Court justices must employ public reasons to explain and justify their decisions to a greater extent than society expects from legislative and executive officials.96

Rawls referred to the Supreme Court as the “exemplar of public reason” because the Court may not employ any other sort of reason in discharging its constitutional duty.97 While ordinary citizens and elected representatives confront all sorts

90. Id.
91. See id.
92. See RAWLS, POLITICAL LIBERALISM, supra note 7, at 216.
93. See id. at 233; See also Frank I. Michelman, Justice as Fairness, Legitimacy and the Question of Judicial Review: A Comment, 72 FORDHAM L. REV. 1407, 1408 (2004) [hereinafter Michelman, Justice as Fairness].
94. RAWLS, POLITICAL LIBERALISM, supra note 7, at 233.
95. Id. at 234, 236.
96. See id. at 216.
97. Id. at 216, 235.
of political questions that do not concern basic justice and constitutional essentials—and therefore do not fall under the constraint of public reason—Supreme Court justices are tasked with trying to articulate the best interpretation of the Constitution. They seek to do this through reasoned opinions that cannot invoke their own (or anyone else’s) moral or philosophical beliefs, but must be grounded in political values that reflect their best understanding of the public conception of justice. 98 They must justify their decisions with public reasons and fit them into “a coherent constitutional view over the whole range of their decisions.” 99 As a result, the idea of public reason applies “more strictly” to judges, particularly to Supreme Court justices, than to other members of society. 100

Rawls was careful to clarify, however, that in marking out the Supreme Court for an exemplary role in this context, he did not intend to defend the practice of judicial review. 101 He instead noted, rather ambiguously, judicial review “can perhaps be defended given certain historical circumstances and conditions of political culture.” 102 Part IV, infra, applies this claim to the Indian context, and considers whether political and historical factors justify the Indian Supreme Court’s heavy-handed exercise of judicial review.

C. Socioeconomic Rights as Constitutional Rights

The final component of this Article’s theoretical framework is to connect Rawlsian political theory to legal constitutional theory. Here, it draws on the scholarship of Professor Frank Michelman, who has contributed several academic papers on

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98. Id. at 236.
99. Id. at 235.
100. RAWLS, POLITICAL LIBERALISM, supra note 7, at 234.
101. See id. at 240.
102. Id. But see Michelman, Justice as Fairness, supra note 93, at 1413.

To say . . . that justice as fairness can take judicial review or leave it, depending on the circumstances, is not to equivocate; it is rather to take a stand. Judicial review being neither always required by justice nor always excluded by justice (so goes Rawls’s claim), the question of having it or not is a pragmatic one to be made with certain justice-related concerns in view.

Id.
the intersection of these two fields. The focus in much of this scholarship is constitutional legitimacy. In particular, Michelman examines the extent to which constitutional law and the practice of judicial review can be legitimate in light of substantive disagreements among citizens in a democratic society on major questions of political justice.

In The Constitution, Social Rights and Liberal Political Justification, Michelman addresses the effects of constitutional socioeconomic rights on a constitution’s legitimacy. As an initial matter, he notes that part of the debate over whether it is wise to confer constitutional status on socioeconomic guarantees turns on substantive disagreements. For instance, not everyone believes that a moral and just society must include constitutional rights to food, adequate housing, or other means of social support. Yet, even those who are morally convinced that socioeconomic guarantees should be given constitutional status must overcome certain non-substantive objections to make a persuasive case for such constitutionalization.

The most common non-substantive objection to granting socioeconomic guarantees constitutional protection pertains to the judiciary’s role in enforcing socioeconomic rights. The concern is that courts will be “unable to make convincingly crisp assessments of the government’s compliance or non-compliance with social rights guarantees, or to fashion apt and pointed re-


104. See Balkin, supra note 103, at 485–86.

105. Michelman, supra note 2.

106. Id. at 22.

107. Id.
medial orders . . . without getting themselves disastrously mixed up in matters beyond their province and their ken."  

While this is a valid concern, the terms of the debate would be incomplete if the concern is solely (or even primarily) with the judiciary’s proper role in a separation of powers framework and its institutional competence. As Michelman points out, the judiciary can play a “useful, if modest, role[] in the promotion of distributive aims of social guarantees.” Alternatively, if courts are barred from adjudicating questions of socioeconomic justice, it “would not be a good argument against constitutionalization in the sight of anyone who believes that a morally legitimate political regime must include a visible, effective commitment” to certain positive entitlements provided by the state.

In Michelman’s view, even if we accept the above two points, the positive case for constitutional socioeconomic rights is not complete. He ventures beyond judiciary-related concerns and sets out two more non-substantive objections to the constitutionalization of socioeconomic rights. First, he lays out a “democratic objection”—namely that the placement of socioeconomic rights in a Constitution will unduly constrain democratic decision making, regardless of whether courts are involved in enforcing these rights. Second, there is a “contractarian objection” that opposes constitutionalization on the ground that socioeconomic rights would be so indeterminate that rational citizens, acting reasonably, could not agree to be governed by a constitution that included such rights. On this view, the inclusion of socioeconomic rights in a constitution defeats one of the fundamental purposes of a constitution—to provide liberal political legitimacy to coercive laws and acts of the state.

Michelman suggests that both objections are manageable. He says: (1) that their force depends on how sweepingly (or specifically) socioeconomic rights are couched; (2) that the contractarian objection is mitigated by the constraint of public reason;

108. Id. at 22–23.
109. Id. at 23.
110. Id.
111. Id.
112. Id.
113. Id.
114. See id. at 23, 35.
and (3) that the democratic objection is only grave if we accept a narrow conception of democracy.\footnote{115}

1. The Democratic Objection

The democratic objection asserts that placing socioeconomic guarantees in a constitution would excessively restrict democratic policymaking on a range of issues. William Forbath provides a “dramatic” illustration of this objection in his proposal of constitutional rights to “social citizenship.”\footnote{116} Going beyond what he refers to as “welfare rights” (rights to a minimum amount of money or of basic necessities for work), Forbath proposes constitutional rights to social citizenship that provide assurances so one can make a decent living through forms of social participation that provide the opportunity for self-improvement, material interdependence, and security for all.\footnote{117} Though Forbath does not define the exact contours of such rights, they seem to affect a number of policy areas including spending on public works, union and industrial policy, tax laws and policies, workplace health and safety, immigration laws, and trade policy.\footnote{118} Thus, if socioeconomic rights are conceived as constitutional rights to social citizenship, there might not be a single issue on the political agenda left untouched.\footnote{119}

Michelman contrasts these vast social citizenship rights to Section 26 of the South African Constitution, which requires the government to take reasonable measures toward the progressive realization of adequate housing for all citizens.\footnote{120} In

\begin{footnotes}
\footnote{115. See id. at 23–24, 37–38.}
\footnote{117. See Forbath, Constitutional Welfare Rights, supra note 116, at 1827 (“Centered on decent work, livelihoods, and social provision, [the social citizenship tradition] . . . read[s] the promise of the Antislavery and Reconstruction Amendments in ‘Free Labor’ terms, as a guarantee of opportunities for self-improvement and a measure of material independence and security for all.”); Michelman, supra note 2, at 31.}
\footnote{118. See Michelman, supra note 2, at 32; W.E. Forbath, Caste, Class and Equal Citizenship, 98 MICH. L. REV. 1, 49 (1999).}
\footnote{119. Michelman, supra note 2, at 32–33.}
\footnote{120. See id. at 31–33; S. AFR. CONST., 1996, § 26.}
\end{footnotes}
Government of the Republic of South Africa v. Grootboom, the South African Constitutional Court held that government-housing measures did not meet the reasonableness standard set forth under Section 26 and ordered the government to submit revised plans for judicial review.121

Here, as in many other cases before the South African Constitutional Court, the court required socioeconomic policies to meet a not-too-burdensome reasonableness standard and did not formulate its own solutions when the government failed to meet that standard.122 This approach does not unduly interfere with democratic policymaking. By contrast, Forbath’s social citizenship rights would seem to remove many issues from the policymaking agenda, or constrain the choices available to policymakers to a potentially intolerable extent in a representative democracy. Thus, the strength of the democratic objection turns, in part, on the way socioeconomic rights are couched in a constitution.

Even if constitutional socioeconomic rights are couched broadly as in Forbath’s conception, they still might be democratically acceptable. Assuming that policymakers in the elected branches take the constitution seriously and constitutional rights figure prominently in their policymaking, it might still be useful to include broad socioeconomic rights in a constitution to “give a certain inflection to political public reason.”123 In this scenario—where the judiciary plays no role—elected officials would be forced to exercise judgment on how to make political choices that are conducive to social citizenship for all. This requires moving away from the traditional definition of democracy as “a series of free-for-all contests of normatively unregulated preferences” toward a fuller conception of democracy as “the practice by which citizens communicatively form, test, exchange, revise and pool their constitutional-interpretive

121. See Government of the Republic of South Africa v. Grootboom 2001 (1) SA 46 (CC) at ¶ 93 (S. Afr.).
123. Michelman, supra note 2, at 39. See also RAWLS, POLITICAL LIBERALISM, supra note 7, at 212–20.
judgments, only counting them as required to obtain . . . the institutional settlements a country needs.”

If democracy is defined in these broad and idealistic terms, and if socioeconomic rights are couched narrowly (as in South Africa), the democratic objection poses little threat to constitutional legitimacy. The Indian Supreme Court, however, has interpreted the Indian Constitution to include expansive socioeconomic rights that the judiciary can enforce in a manner that undermines democratic policymaking. This strong form of judicial review is perhaps only defensible in light of India’s history and political culture.

2. The Contractarian Objection

The contractarian objection focuses on the difficulty of measuring government compliance with socioeconomic rights. Social contractarians maintain that a citizen will only agree to abide by a constitution—which provides the government coercive power to compel her to act in prescribed ways and the ability to make policy choices with which she disagrees—if she sees other citizens and her government also complying with this constitution. This ability to observe others abiding by the constitution is essential. It allows each citizen to confirm that the con-

124. Michelman, supra note 2, at 40 (acknowledging that this is a “pretty idealistic view of democracy” but noting that “the idea of liberal justice or liberal legitimacy within any possible system of positive legal ordering” seems to depend on this view).

125. See, e.g., SUPREME COURT ORDERS ON THE RIGHT TO FOOD: A TOOL FOR ACTION 3–7 (2005), available at http://www.righttofoodindia.org/orders/interimorders.html [hereinafter A TOOL FOR ACTION] (showing how a case on the Right to Food in six Indian states has expanded to include all Indian states as respondents and how the Court’s orders have been enforced through a number of interim orders and specific policy directions to elected governments). But see Vishaka v. State of Rajasthan, A.I.R. 1997 S.C. 3011 (India) (drafting legal guidelines to protect women from sexual harassment in the workplace in light of “a vacuum of existing legislation,” but stating that these guidelines would be superseded by duly enacted legislation in this area).

126. See infra Section V; RAWLS, POLITICAL LIBERALISM, supra note 7, at 240. See also Michelman, Justice as Fairness, supra note 93, at 1408.

127. See Michelman, supra note 2, at 35–36.
stitution’s provisions, entailing commitments that make it universally acceptable, are in fact real.\textsuperscript{128}

However, it might not be possible to identify when others, including the government, comply with constitutionally mandated socioeconomic rights. Imagine two societies that have enacted constitutional rights to sufficient food. In one society, the government passes laws aimed at increasing agricultural production, improving the food distribution system, and giving food stamps to everyone living below the poverty line. These provisions will take ten years to supply adequate food to all citizens, but will provide a sustainable food supply thereafter. In the second society, the government only passes one law that mandates the immediate distribution of sufficient food to all citizens living below the poverty line. Yet, food supplies are limited, and in the long-term there will not be adequate food production to supply everyone in need. In this hypothetical scenario, one society has adopted laws that will gradually but sustainably provide food for all, while the other provides food immediately to every citizen in need at the cost of long-term food security. Does one society comply with the right to food while the other does not? If so, which one? Isn’t it plausible that both (or neither) have fulfilled this right? It seems that one cannot decisively say if such a right is or is not being satisfied.\textsuperscript{129}

According to the contractarian objection, this “raging indeterminacy” prevents rational citizens, acting reasonably, from determining when their government complies with or violates socioeconomic rights.\textsuperscript{130} Constitutional legitimacy is therefore threatened, as citizens will not consent to be governed by a constitution when they cannot observe their government abiding by what should be universally accepted constitutional commitments.\textsuperscript{131}

Socioeconomic rights, as this argument goes, lack the “transparency” of civil and political rights.\textsuperscript{132} They cannot be “more-or-less detectably . . . realised (or not) at any given moment.”\textsuperscript{133}

\textsuperscript{128} See \textit{id.} at 36.
\textsuperscript{129} See \textit{id.}
\textsuperscript{130} See \textit{id.} at 35–36.
\textsuperscript{131} \textit{Id.} at 36.
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.}
Traditionally, civil and political rights, including, inter alia, the right to the freedom of speech, freedom of assembly, due process, and equal protection were referred to as “negative rights.” This is because civil and political rights protect individual liberty against state intrusion. Socioeconomic rights concern distributive justice. They require the government to provide positive entitlements to satisfy material needs or wants, or to provide access to the means of satisfaction.

The distinction between these two sets of rights has been criticized in the academic literature. Critics argue that the distinction is artificial because these rights interact in important ways. In particular, they point out that those suffering from serious want or need cannot effectively exercise civil and political rights. It is of little value to an individual dying of starvation or thirst, for instance, to have a constitutional right to vote.

Nevertheless, the contractarian objection relies on this distinction. It depends on the premise that it is significantly more difficult to gauge compliance with or violations of socioeconomic rights than of civil and political rights. This perceived indeterminacy of socioeconomic rights also factored into Rawls’s decision to defer questions of socioeconomic justice to the legislative process after the constitutional essentials (including a scheme of basic liberties or negative rights) are decided.


135. See Michelman, supra note 2, at 22.


137. See Michelman, supra note 2, at 36.

138. Rawls, Justice as Fairness, supra note 17, at 48 (noting that determining if the second principle is fulfilled is “always open to reasonable differences of opinion . . . [it] depend[s] on inference and judgment in assessing complex social and economic information”). See also Michelman, Justice as Fairness, supra note 93 at 1409–10.
Still, constitutionalized socioeconomic rights are not fatal to contractarian legitimacy under Rawlsian theory. Under Rawls’s liberal principle of legitimacy, a constitution is only legitimate if all its citizens, who are rationally self-interested and reasonable, consent to be governed by its essentials. Since socioeconomic rights are not part of the scheme of “constitutionally essential” negative rights, reasonable minds can disagree as to their implementation, but must express their views pursuant to the constraint of public reason. Thus, citizens and public institutions must be willing to explain and defend their views on matters of socioeconomic justice, in a manner that reflects their honest best judgments on how to ensure socioeconomic justice for all. This “eases the strain on constitutional contractarians” because policy choices in this realm would simply have to accord with some conception of a complete, legitimate constitutional agreement that all rational citizens, acting reasonably, would accept. However, if citizens cannot reasonably maintain confidence that their policymaking institutions are fulfilling the constraint of public reason, then the “extant system of positive legal ordering is unjust.”

Thus, the move to public reason allows a range of distributive policies and laws to be acceptable from a contractarian perspective. This is particularly true if socioeconomic guarantees are given the status of “directive principles” rather than “rights.” These principles would guide public decision making on matters of socioeconomic justice, but leave it to elected representatives to fashion the most effective laws and policies.

The following section shows how the drafters of the Indian Constitution sought to avoid this contractarian difficulty by addressing socioeconomic justice through non-binding “Di-

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139. See Michelman, supra note 2, at 37–38.
140. RAWLS, JUSTICE AS FAIRNESS, supra note 17, at 41.
141. Id. at 38; see RAWLS, POLITICAL LIBERALISM, supra note 7, at 214.
142. Michelman, supra note 2, at 38.
143. Id.
144. Id.
145. See id. at 37–39. Cf. Michelman, Poverty in Liberalism, supra note 72, at 1017–19 (noting that instead of making most socioeconomic rights constitutionally essential, Rawls attached great importance to transparency in the adjudication of these rights as the means to effectively pursue justice).
rective Principles of State Policy” that would “give a certain inflection to political public reason.”

II. THE FRAMING OF THE INDIAN CONSTITUTION

A. Directive Principles and Article 21

India gained independence from British rule in 1947 and adopted a Constitution in 1950, which remains in force today. The drafting of the Constitution began prior to independence with the formation of a Constituent Assembly that began its work in December 1946. Their final product, a sprawling document of more than 300 articles and twelve schedules, balanced “negative” protections of individual liberty from government interference with “positive” guidelines for socioeconomic justice. Thus, Part III of the Constitution, entitled “Fundamental Rights,” sets forth a list of justiciable rights, including the rights to life, freedom of speech, and freedom of religion that was modeled largely on the American Bill of Rights. Part IV of the Constitution, by contrast, contains “Directive Principles of State Policy”—nonjusticiable economic and social provisions to be progressively realized by the Indian state. As Granville Austin put it, Part IV “set forth the humanitarian precepts that were . . . the aims of the Indian Social Revolution.”

According to Austin, the Indian Constitution was, at its core, a “social document.” He noted that the Constituent Assembly sought to design a Constitution that would bring about social revolution in India. This ambitious goal had its roots in the struggle for independence, as the Indian National Congress was founded primarily to demand rights for Indian citizens

146. Michelman, supra note 2, at 39.
147. See INDIA CONST.
150. See id. at 219; AUSTIN, THE INDIAN CONSTITUTION, supra note 20, at 55.
151. AUSTIN, THE INDIAN CONSTITUTION, supra note 20, at 75.
152. Id. at 50.
153. Id. at 26–27, 50.
from the British Raj. It set forth these demands in various resolutions, including the Constitution of India Bill (1895), the Commonwealth of India Bill (1925), and the Karachi Resolution (1931). The Karachi Resolution was the first public demand for positive rights toward greater socioeconomic justice. The Resolution proclaimed, “in order to end the exploitation of the masses, political freedom must include the real economic freedom of the starving millions.”

Austin and others have argued that members of the Constituent Assembly (or “framers”) placed such high value on socioeconomic justice that they did not differentiate between Parts III and IV of the Constitution in terms of importance. However, the members disagreed as to whether the directive principles should be justiciable. Before the Constituent Assembly was formed, the most significant writing on this issue was the Sapru Report of 1945, which outlined a scheme of fundamental rights intended to alleviate the fears of minority groups. The Sapru Report’s most significant contribution was to distinguish between justiciable and nonjusticiable rights, even though it was in the context of minority protections with no mention of negative and positive rights.

B.N. Rau, one of the principal architects of Part IV, adopted the distinction between justiciable and nonjusticiable rights and applied it to the drafting of the Constitution. Rau was a member of the Drafting Committee, for which he assembled a set of precedents that the committee could draw on for ideas.

154. See id. at 50–54; Mate, supra note 149, at 224–25.
155. See Austin, The Indian Constitution, supra note 20, at 56; Mate, supra note 149, at 225.
156. Austin, The Indian Constitution, supra note 20, at 56 (referencing the Resolution on Fundamental Rights and Economic and Social Change, adopted in Karachi in March 1931) (internal quotation marks omitted).
158. See Austin, The Indian Constitution, supra note 20, at 57.
159. See id.; Mate, supra note 149, at 226.
Rau relied heavily on the Irish constitutional model, which included Directive Principles of State Policy. He believed India should emulate the Irish model by setting out positive rights “in the nature of moral precepts for the authorities of the State.”

Other members of the Drafting Committee felt that this approach did not go far enough. They believed the Indian Constitution should include justiciable socioeconomic rights. K.M. Munshi, for instance, put forth draft lists of the “Rights of Workers” and “Social Rights,” which included the right to a living wage and protections for women and children. B.R. Ambedkar, who famously rose from disadvantaged beginnings—he belonged to a scheduled (untouchable) caste—to become the Chairman of the Drafting Committee, favored an extensive set of rights for members of minority communities, particularly the scheduled castes. He also pushed for a social scheme to nationalize all major industries that would take effect ten years after the Constitution was adopted. Similarly, Drafting Committee member K.T. Shah believed that even if directive principles were initially nonbinding, they should become justiciable after a specified time. He also believed that all natural resources and key industries should become property of the state.

These views reflect the deep-seated socialist beliefs of many Constituent Assembly members, which largely derived from the negative association between British imperialism and capitalism. As ex-colonial subjects, the framers were wary of replacing British capitalists—who were widely seen as exploiting Indian resources for the benefit of the home country—with homegrown Indian capitalists. They also believed that India’s very survival rested on their ability to bring about a rapid

161. Id. at 22.
162. See Austin, The Indian Constitution, supra note 20, at 78.
163. Id.
164. Id.
165. Id. at 79.
166. Id.
167. See id. at 60.
168. See id. at 60–61.
socioeconomic transformation among the poverty-stricken “masses.” Jawaharlal Nehru, India’s first Prime Minister, stated that the first task of the Constituent Assembly was “to free India through a new constitution, to feed the starving people, and to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself.” If the Assembly failed to bring about this social revolution, Nehru warned “all our paper constitutions will become useless and purposeless . . . if India goes down, all will go down.”

Still, despite their strong socialist leanings, the Drafting Committee—and eventually the Constituent Assembly—adopted the Irish model that separated justiciable fundamental rights from non-enforceable directive principles. There appear to be two separate motivations behind this decision. First, the framers wanted to leave some discretion to the legislature on matters of socioeconomic justice, rather than tie their hands with binding constitutional provisions. Ambedkar’s social scheme, other proposals for enforceable rights, and time-bound provisions toward greater socioeconomic justice were rejected on these grounds. Ambedkar eventually came around to support nonbinding directive principles, believing that future legislatures would be compelled to fulfill their mandate or “answer for them before the electorate at election time.”

A second motivation to separate justiciable fundamental rights from nonenforceable directive principles was Assembly members’ skepticism of the judiciary and desire to minimize its impact on social legislation. B.N. Rau visited the United States in 1947 where he met with U.S. Supreme Court Justice Felix Frankfurter. Frankfurter, a noted proponent of judicial

169. See id.  
171. AUSTIN, THE INDIAN CONSTITUTION, supra note 20, at 27 (referencing the Constituent Assembly Debates) (internal quotation marks omitted).  
172. Id. at 79–80; RAU, supra note 160, at 21.  
173. Id. at 78.  
174. Id. (referencing Constituent Assembly Debates).  
176. See Mate, supra note 149, at 221; AUSTIN, THE INDIAN CONSTITUTION, supra note 20, at 103.
restraint, generally opposed U.S. Supreme Court decisions that struck down legislative or executive acts. In his view, wide-ranging judicial review was not only burdensome to the judiciary, but also undemocratic for allowing a few unelected judges to invalidate laws and orders issued by elected officials. Frankfurter strongly influenced Rau, who convinced the Drafting Committee to remove the word “due process” from Article 21 of the Constitution. As a result, the final version of Article 21 reads, “No person shall be deprived of his life or personal liberty except according to procedure established by law”. Thus, under the original understanding of Article 21, the Indian state may deprive individuals of life or liberty as long as it follows some legal process, the content or fairness of which lies outside the domain of judicial review.

Additionally, the Constituent Assembly adopted the judicial conservatism of their former British rulers. According to Rajeev Dhavan, the British took pains “to ensure that the courts of the Raj were not empowered to question governmental action.” “Judges were selected for their conservatism, loyalty and independence,” creating a judiciary that was a “safe institution.” The British therefore created a tradition of judicial passivity that was passed on to the Constituent Assembly members. For instance, Ambedkar expressed the framers’ general view that the judiciary should remain independent from political interference but should nonetheless limit its review of government policies. He stated before the Assembly, “the judiciary is engaged in deciding issue(s) between citizens, and very rarely be-


But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties . . . To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.

Id.

178. See Mate, supra note 149, at 221. See also Dhavan, supra note 175, at 313 (stating that the drafters of the Indian Constitution were “[f]earful of the American New Deal experience”).

179. See Mate, supra note 149, at 222.

180. INDIA CONST. art. 21. (emphasis added).

181. Dhavan, supra note 175, at 313.

182. Id.
between citizens and Government. Consequently, the chances of influencing the . . . judiciary by the government are very remote.\textsuperscript{183}

Thus, Ambedkar, Rau, and the other drafters were not proponents of a strong judiciary. They were wary of New Deal jurisprudence from the United States,\textsuperscript{184} and were steeped in the British tradition of judicial conservatism. This influenced the drafting of Article 21 and probably influenced the drafting of the directive principles as well. Though most (if not all) of the framers had strong socialist convictions, they agreed in the end to separate justiciable rights (Part III) from non-binding directive principles (Part IV). The drafting of Parts III and IV therefore do not reflect the framers’ socialist views as much as their twin desires to defer to the legislature on matters of socioeconomic justice and to limit the power and reach of the judiciary.

To clearly separate these two Parts of the Constitution, the framers placed unambiguous textual commands to indicate that fundamental rights in Part III are justiciable, but that directive principles in Part IV are not. Article 32 of the Constitution guarantees the right of individual citizens “to move the Supreme Court by appropriate proceedings for the enforcement” of fundamental rights.\textsuperscript{185} Article 37, though, states that directive principles “shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the

\textsuperscript{183} Id. (internal quotation marks omitted).

\textsuperscript{184} The drafters were likely aware and wary of the U.S. Supreme Court’s move toward incorporating the Bill of Rights against the states through the Fourteenth Amendment. See, e.g., Betts v. Brady, 316 U.S. 455, 474–75 & n.1 (1942) (Black, J., dissenting); Adamson v. California, 332 U.S. 46, 68–123 (1947) (Black, J., dissenting); Palko v. Connecticut, 302 U.S. 319 (1937). For an overview of New Deal jurisprudence, see Kurt T. Lash, The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal, 70 Fordham L. Rev. 459, 460 (2001) (noting that the New Deal judicial revolution “extended well beyond the political goals of the New Deal Democrats” and that the Court spoke of applying the Bill of Rights against the states as early as 1937). See also Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193, 1196–97 (1992) (describing the various judicial philosophies that informed the incorporation debate).

\textsuperscript{185} INDIA CONST. art. 32. Article 226 extends this right to the High Courts. Id. art. 226.
State to apply these principles in making laws.” 186 This rule clearly prevents the judiciary from enforcing directive principles against the Indian State.

B. Standing (Locus Standi) Requirements for Article 32

Article 32 is the primary mechanism in the Indian Constitution to redress violations of fundamental rights. Ambedkar referred to it as the heart and soul of the Constitution, emphasizing its vital role in preventing government from encroaching upon individual rights.187

Article 32 empowers the Indian Supreme Court to grant a range of remedies.188 It provides that the Court may issue “directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari” as it deems appropriate in a given case.189 Article 32 also states that citizens may move the Supreme Court for the enforcement of a right through “appropriate proceedings.”190 This grants the Court some discretion to determine the procedure through which citizens may bring petitions alleging fundamental rights violations.191

In the Court’s early jurisprudence, the phrase “appropriate proceedings” was construed narrowly to permit only those individuals whose rights had been directly infringed to bring suit.192 Much like the framers who were strongly influenced by British notions of judicial conservatism, the Supreme Court borrowed from the Anglo-American legal tradition to adopt strict standing (or locus standi) requirements under Article 32.193

186. Id. art. 37.
188. India Const. art. 32.
189. Id.
190. Id.
192. See Craig & Deshpande, supra note 187, at 357.
193. See id.
In Chiranjit Lal v. Union of India (1951), the Court held that a shareholder of a company did not have standing under Article 32 to petition the Court to enforce a corporation’s right to hold and dispose of property under Article 19(1)(f) of the Constitution. The Court noted that a corporation and its shareholders are separate entities, and therefore only the corporation could properly bring this claim.

Similarly, in G.C. College Silchar v. Gauhati University (1973), petitioners challenged a resolution by a Gauhati University’s Academic Council to retain English and introduce the native language (Assamese) as the languages of instruction. The petitioners claimed that this resolution violated their rights under Articles 29 and 30 (allowing minorities to enroll in any educational institution of their choice and preventing the state from discriminating against minorities in academic admissions, respectively) of the Constitution. Prior to this resolution, the university had used Bengali alongside English to help students understand the content of English-language lectures. Despite the fact that one petitioner was a Bengali-speaking student, the Court found that “the impugned resolution does not presently affect the petitioners.” Thus, it held that the petitioners lacked standing to file this petition.

These cases evince a broader pattern in the Court’s early jurisprudence to deny standing under Article 32 unless petitioners could demonstrate that an impugned law had directly harmed them. However, as the following section shows, the Court would later relax its standing requirements to allow any person to move for the enforcement of the fundamental rights of other individuals and groups too disadvantaged to file petitions themselves.

195. Id.
197. See id. ¶ 1.
198. See id. ¶ 4.
199. Id.
200. Id.; see also Craig & Deshpande, supra note 187, at 358.
201. See Craig & Deshpande, supra note 187, at 357–58.
III. EVOLVING CONSTITUTIONAL INTERPRETATIONS, PROCEDURAL INNOVATIONS AND THE JUDICIARY’S EXPANDING ROLE

This Section will show how the Indian Supreme Court’s jurisprudence with respect to both Article 21 and Article 32 has transformed dramatically since the early years of the Indian republic. At the time of their adoption, Articles 21 and 32 of the Indian Constitution were construed narrowly. Drawing from Justice Frankfurter and the British views of judicial restraint, Article 21 was carefully drafted to exclude any mention of “due process” in favor of the phrase “procedure established by law.”203 This sought to avoid the “substantive due process” doctrine that emerged in the United States, and permitted the government to deprive citizens of life or liberty as long as it acted pursuant to a duly enacted law. Similarly, relying on American and British jurisprudence, the Supreme Court’s early cases imposed strict standing requirements on petitioners under Article 32.204 Thus, only petitioners directly harmed by a disputed law could petition the Court to redress violations of the fundamental rights enshrined in Part III of the Constitution.

Over time, Article 21 has not only evolved toward American-style due process,205 but has also been read to encompass the right to “live with dignity,”206 which includes socioeconomic rights. Meanwhile, Article 32 standing requirements have been relaxed through the development of public interest litigation (“PIL”).207 These changes allow any citizen to petition the Court to redress fundamental rights violations suffered by disadvantaged individuals or groups. The advent of PIL has also brought about a series of procedural innovations that give the

203. See INDIA CONST. art. 21. See Mate, supra note 149, at 222; Dhavan, supra note 175, at 313.
204. See Craig & Deshpande, supra note 187, at 357–59.
205. See Mate, supra note 149, at 218.
207. See Cunningham, supra note 202, at 498; Craig & Deshpande, supra note 187, at 359–65.
courts greater authority in monitoring and enforcing rights-protective schemes.208 These substantive and procedural developments in the law have fundamentally altered the judiciary’s role within the Indian constitutional framework. In particular, there has been an increase in (1) the range of rights that courts can enforce; (2) the number of people that are permitted to file (and are affected by) petitions alleging fundamental rights violations; and (3) the extent to which the courts can supervise the implementation of their orders. Together, these developments vest a great deal of additional authority in the judiciary at the expense of democratic decision making in the elected branches of government.

A. The Evolution of Article 21

1. Early Cases

In its early years, the Indian Supreme Court remained faithful to the original understanding of Article 21. In the first major case to examine Article 21, *Gopalan v. State of Madras* (1950), the Supreme Court declined to adopt an expansive interpretation.209 In *Gopalan*, the primary issue was whether certain provisions of the Preventative Detention Act of 1950 violated Articles 13, 19, and 21 of the Indian Constitution.210 The petitioner, who was detained pursuant to this Act, drew on the U.S. Constitution to argue that the Court should interpret Article 21 in line with American jurisprudence on the Fifth and Fourteenth Amendments.211 Writing for the Court, Chief Justice Kania rejected this argument, noting, inter alia, that the word “liberty” in Article 21 means merely “personal liberty,” whereas in the American context, liberty has a more expansive meaning.212 The Chief Justice also looked to the Constituent Assembly debates to establish that the words “due process” were intentionally omitted in favor of the more government-
friendly “procedure established by law.” Thus, the Court held that Article 21 permitted the state to deprive an individual of liberty as long as it did so pursuant to a “procedure prescribed by the law of the state.”

The *Gopalan* Court’s interpretation of Article 21, which rejected broad interpretations of “liberty” and analogies to American due process, was later challenged and rejected. The move away from *Gopalan* began in the landmark case *Keshavananda Bharati Sripadaragalvaru v. State of Kerala* (1973). While this case did not address the meaning of Article 21, it had lasting implications on constitutional interpretation generally. *Keshavananda* held that amendments to the Constitution are invalid if they violate the “basic structure” of the Constitution. Article 368 of the Indian Constitution permits amendments if they are adopted by a two-thirds majority in both houses of Parliament. However, according to Justice Khanna in *Keshavananda*, the words “this Constitution” and “the Constitution shall stand amended” that appear in Article 368 are evidence of a constitutional identity that the legislature did not have the authority to alter. For instance, an amendment abolishing the Supreme Court would be invalid, as it would fundamentally alter the separation of powers framework of the Constitution.

For the purposes of this Article, *Keshavananda* is significant for three reasons. First, it replaced the framer’s model of parliamentary supremacy with a form of judicial supremacy, signaling a change in the allocation of power among branches of

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213. See id. at 111–12.
218. See INDIA CONST. art. 368.
Second, it paved the way for future cases that describe the content of the Constitution’s “basic structure,” in which the Supreme Court equates fundamental rights with directive principles in terms of their importance. For instance, in *Minerva Mills Ltd. v. Union of India* (1980), Justice Chandracchud stated that Parts III and IV of the Constitution act “like a twin formula for achieving a social revolution which is the ideal . . . the visionary founders of the Constitution set before themselves.” This laid the foundation for the Supreme Court to rule that Article 21 includes socioeconomic rights within its ambit. Finally, *Keshavananda* provided the impetus for many of the laws and constitutional amendments passed during the era of Emergency Rule.

### 2. Emergency Rule and Its Aftermath

Emergency Rule (1975–77) was declared by Prime Minister Indira Gandhi to allow her to remain in power and rule by executive decree following widespread calls for her resignation. In 1975, Mrs. Gandhi was convicted by the Allahabad High Court for election fraud in the 1971 general elections. In the face of strong pressure to resign, Mrs. Gandhi declared a state of emergency in June 1975. Her regime then suspended habeas corpus, severely restricted civil liberties and the freedom of the press, and sought to weaken the judiciary.

In fact, Mrs. Gandhi’s administration had openly attacked the judiciary prior to declaring Emergency Rule. In reaction to the *Keshavananda* decision in 1973, Mrs. Gandhi went against tradition and installed her own pro-government nominee—who had dissented in *Keshavananda*—as Chief Justice of

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220. See Mehta, *supra* note 216, at 180. *But see* Khosla, *The Indian Constitution*, *supra* note 191, at 155–60 (arguing that *Keshavananda*’s impact has been exaggerated in the academic literature).


223. See Mate, *supra* note 149, at 243.

224. *See id.*

the Supreme Court, ahead of three more senior justices.\textsuperscript{226} This sort of political manipulation of the judiciary increased during Emergency Rule, as Mrs. Gandhi’s regime transferred judges from one High Court to another as punishment for ruling against the central government.\textsuperscript{227}

The Emergency Rule era also witnessed the passage of four constitutional amendments that were designed to limit the judiciary’s power.\textsuperscript{228} The most controversial was the Forty-second Amendment, which prohibited judicial review of the disputed 1971 election, overturned \textit{Keshavananda} by barring the Supreme Court from reviewing constitutional amendments, and required a two-third majority of Court benches to hold statutes unconstitutional.\textsuperscript{229} Even more radically, the Forty-second Amendment gave the nonjusticiable directive principles in Part IV of the Constitution precedence over the fundamental rights in Part III.\textsuperscript{230} Ostensibly, this amendment was supposed to vindicate the framers’ vision for social revolution, but in reality it permitted the government to detain thousands of political opponents without charge and impose an authoritarian socialist vision on the country that the framers, with their reverence for democracy, would never have supported.\textsuperscript{231}

Fortunately, Emergency Rule ended less than two years later in March 1977. Mrs. Gandhi finally called for elections and her Indian National Congress Party was defeated by the opposition Janata Party.\textsuperscript{232} The Janata Party moved quickly to rescind the controversial constitutional amendments passed by Mrs. Gandhi’s regime, and also repealed the Emergency Rule era laws that suppressed free speech and suspended habeas corpus.\textsuperscript{233}

Emergency Rule still left a lasting impression on the status of directive principles under the Indian Constitution. After the


\textsuperscript{227} See Dhavan, \textit{supra} note 175, at 316.

\textsuperscript{228} See Mate, \textit{supra} note 149, at 243.

\textsuperscript{229} \textit{Id.}

\textsuperscript{230} See Austin, \textit{supra} note 222, at 324–25.

\textsuperscript{231} See Austin, \textit{supra} note 222, at 325.

\textsuperscript{232} See Mate, \textit{supra} note 149, at 244.

\textsuperscript{233} See \textit{id.}
repeal of the Forty-second Amendment—which had, inter alia, overruled Keshavananda and made directive principles superior to fundamental rights—the Supreme Court relied on Keshavananda to hold that directive principles and fundamental rights are equivalent parts of the “basic structure” of the Constitution. In making this bold claim, the Court, much like Mrs. Gandhi’s regime, cited the need for social revolution. It drew inspiration from the framers, quoting Nehru for the proposition that while fundamental rights are “static,” directive principles “represent a dynamic move towards a certain objective.” The Court did not put forth any legal reasons to explain why directive principles should be placed on the same footing as fundamental rights. Nevertheless, it did not merely declare that Parts III and IV of the Constitution were equivalent, but actually ruled in a series of cases that the directive principles were justiciable under the right to life in Article 21.

3. Maneka Gandhi and the Right to “Live with Dignity”

The Supreme Court’s landmark decision in Maneka Gandhi v. Union of India (1978) dramatically expanded the meaning of Article 21. Maneka Gandhi, Prime Minister Indira Gandhi’s daughter-in-law, alleged that the ruling Janata government had illegally seized her passport pursuant to the Passport Act of 1967. She argued that the Act contained no procedural guidelines for how to seize a citizen’s passport, and even if such a procedure existed, “it was arbitrary and unreasonable” and therefore violated, inter alia, Article 21 of the Constitution. Writing for the Court, Justice Bhagwati construed the phrase “personal liberty” in Article 21 broadly to bring within its am-

236. See Mehta, supra note 216, at 198 (“Other than a hortatory appeal to the need for a social revolution, the court did not advance reasons for why the directive principles are an expression of the equal standing of free and independent citizens in the same way that fundamental rights are.”).
238. See id. at 622.
239. Id.; see also Mate, supra note 149, at 245–46; Khosla, supra note 214, at 84.
bit the right to travel abroad. He said “[t]he expression ‘personal liberty’ in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man.” These rights include the right to equality under Article 14 and the right to freedom (including freedom of speech and to practice any profession) under Article 19. Justice Bhagwati further observed that the relevant statute did not provide a reasonable opportunity for the petitioner “to be heard in advance before impounding a passport.” He therefore argued that principles of “natural justice” and fairness had to be read into Article 21 so as “to invest law with fairness.”

The Court held that the Act arbitrarily deprived petitioner of personal liberty under Article 21. Through its decision, the Court implicitly overruled Gopalan by adopting a due process standard drawn from the Fifth and Fourteenth Amendments of the U.S. Constitution. Despite the framers’ purposeful omission of the words “due process,” the Court here expanded the meaning Article 21—and thereby expanded its own authority—to require the government to show not only that a deprivation of life or liberty is conducted pursuant to a procedure established by law, but also that this procedure is reasonable and not “arbitrary, fanciful, or oppressive.”

The Maneka Gandhi judgment also set the stage for a further expansion of Article 21 that would embrace socioeconomic principles as justiciable rights. Justice Bhagwati hinted at this development in his majority opinion:

Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow of unimpeded and impartial justice (social, economic and politi-

241. Id. at 670.
242. Id. at 629.
243. Id.
244. Id. at 671.
245. See Mate, supra note 149, at 249; Sathe, supra note 187, at 55–56. But see Khosla, supra note 214, at 84 (stating that Maneka did not overrule Gopalan).
246. Khosla, supra note 214, at 84; Mate, supra note 149, at 248.
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cal), freedom (not only of thought, expression, belief, faith and worship, but also of association, movement, vocation or occupation as well as of acquisition and possession of reasonable property), or equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups and classes), and of fraternity (assuring dignity of the individual and the unity of the nation).

Such broad rights-protective language signaled the Court’s expanding approach to fundamental rights. This excerpt makes a powerful rhetorical case for the interconnectedness of various rights, which the Court would go on to implement through the right to life in Article 21.

Socioeconomic rights were included within the ambit of Article 21 in Francis Coralie Mullin v. Union Territory of Delhi (1981). In this case, the Supreme Court had to determine whether a detainee held in preventative detention had the right to meet with his lawyer and family. While the case only raised this narrow issue, the Court, led by Justice Bhagwati, saw an opportunity to further expand the meaning of Article 21. It held that the right to life includes a broader right to “live with human dignity.” This included “the bare [necessities] of life such as nutrition, clothing, and shelter.” In adopting this expansive interpretation, Justice Bhagwati made clear his belief in a flexible, adaptive reading of the Constitution. In his view, “[A] constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes.”

The Supreme Court would follow this interpretative approach in later cases to hold that the right to life includes, inter alia, the rights to education, food, shelter, health and medical

249. Id. at 518.
250. Id. at 529.
251. Id. at 517.
care,\textsuperscript{255} and a livelihood.\textsuperscript{256} Thus, a range of justiciable socio-economic rights has been realized since the *Francis Coralie* decision. To accomplish this feat, the Supreme Court substantively relied on an expansive reading of Article 21 where, despite the clear language in Article 37 stating that directive principles are not judicially enforceable,\textsuperscript{257} the right to life was held to encompass a right to live with dignity and therefore many of the directive principles.

This substantive change in the law expanded the Court’s authority to strike down legislation as incompatible with fundamental rights. Procedural changes—particularly with regard to standing requirements—also contributed to broadening judicial authority. These procedural modifications permit a greater number of citizens to bring claims of fundamental rights violations and empower the Court to actively monitor the implementation of its remedial schemes.

**B. The Development of Public Interest Litigation (PIL)**

PIL arose in response to a fundamental change in the Indian judiciary during the 1980s and 1990s in which the courts took an active role in promoting socioeconomic justice.\textsuperscript{258} The Supreme Court facilitated this process by instituting procedural changes, which allowed (and encouraged) public interest organizations to file petitions on behalf of disadvantaged groups to hold the government accountable for large-scale violations of fundamental rights.

PIL was a fundamentally new sort of litigation. It moved away from the traditional model of winner-take-all contests between two parties (or interests), where the judge acted as a passive referee, and courts focused on providing compensation


\textsuperscript{257} See *India Const.* art. 37.

\textsuperscript{258} See *Cunningham, supra* note 202, at 494–96. *See also* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (describing a similar transformation in American law); See Baxi, *supra* note 6, at 108–11 (preferring the term “social action litigation” to differentiate the Indian and American experiences).
for past wrongs. Under the PIL paradigm, lawsuits involve a number of affected individuals or groups, judges assume an active role in shaping litigation, and courts order various forms of relief in addition to compensation, including prospective relief that is monitored and reevaluated from time to time after litigation ends.

The Indian Supreme Court developed PIL in the post-Emergency Rule era through a series of procedural innovations. The adoption of more liberal standing rules was one of the most significant innovations. Recall that the Court’s early cases imposed strict standing requirements that permitted only individuals directly affected by an impugned law to file petitions under Article 32 of the Constitution. However, Article 32 does not require this restrictive approach, as it sets forth the right of individual citizens to petition the Supreme Court via “appropriate proceedings” to enforce fundamental rights.

The Court’s interpretation of “appropriate proceedings” would shift over time toward the provision of greater social justice. The transformation began in Fertilizer Corporation Kamgar Union v. Union of India (1981). In this case, the Chief Justice’s majority opinion hewed to the traditional view that standing under Article 32 should remain primarily with those individuals whose rights had been directly affected. However, Justice Iyer, joined by Justice Bhagwati, wrote a concurring opinion that adopted a much broader approach. In their view, “locus standi must be liberalized to meet the challenges” facing a developing country like India.

This approach later prevailed in S.P. Gupta v. Union of India (1982). The petitioners in this case brought a number of claims alleging government interference with the judiciary. For

259. See Cunningham, supra note 202, at 494; Chayes, supra note 258, at 1282–83.
260. See Cunningham, supra note 202, at 494.
261. See supra Part II.B; see also Chowdhuri v. Union of India, (1951) S.C.R. 869 (India); G.C. College Silchar v. Gauhati University, A.I.R. 1973 S.C. 761 (India).
262. INDIA CONST. art. 32.
264. See id. at 65.
265. Id. at 66–71; Craig & Deshpande, supra note 187, at 358.
instance, they challenged a policy that gave judges only short-
term appointments, which they claimed had perverse effects on
judicial independence.\textsuperscript{267} The Indian Government objected to
this writ petition on the grounds that the petitioners were not
the judges themselves.\textsuperscript{268} As a result, the government argued
they had not been directly injured by this policy and lacked
standing to file a petition under Article 32.\textsuperscript{269} The Court reject-
ed this argument in a majority opinion written by Justice
Bhagwati.\textsuperscript{270} According to Justice Bhagwati, traditional stand-
ing rules were no longer appropriate because they developed
“when private law dominated the legal scene and public law
had not yet been born.”\textsuperscript{271} “Public law” here refers to landmark
cases like \textit{Maneka Gandhi} and \textit{Francis Coralie}—Justice
Bhagwati wrote the majority opinion in both cases—that trans-
formed the meaning of Article 21 to take into account the social
and economic conditions of the public at large.\textsuperscript{272} Thus, to adapt
to this new era of public law, the Court rejected the traditional
view of standing and recognized the right of any member of the
public to petition for redress of a wrong to a “person or to a de-
terminate class of persons . . . (who) by reason of poverty, help-
lessness or disability or socially disadvantaged position” cannot
approach the Court themselves.\textsuperscript{273} \textit{S.P. Gupta} empowered citi-
zens to file claims of fundamental rights violations on behalf of
others less fortunate, a monumental change from the original
rule requiring direct injury to petition the Court under Article
32.

According to Craig and Deshpande, in their seminal article
on the rise of PIL, two major themes emerge from the Court’s
reasoning for this radical shift in standing rules.\textsuperscript{274} First, the
Court sought to exercise a greater degree of judicial review over

\begin{itemize}
  \item \textsuperscript{267} \textit{Id.} at ¶ 3.
  \item \textsuperscript{268} \textit{See id.} at ¶ 7; Craig & Deshpande, \textit{supra} note 187, at 359.
  \item \textsuperscript{269} \textit{See Craig & Deshpande, \textit{supra} note 187, at 359.}
  \item \textsuperscript{270} \textit{See S.P. Gupta v. President of India, (1982) 2 S.C.R. 365 (India).}
  \item \textsuperscript{271} \textit{Id.} at ¶ 14.
  \item \textsuperscript{272} \textit{See Maneka Gandhi v. Union of India, (1978) 2 S.C.R. 621 (India); see}
generally Mullin v. Adm’r, Union Territory of Delhi, (1981) 2 S.C.R. 516 (In-
dia).
  \item \textsuperscript{273} \textit{S.P. Gupta v. President of India, (1982) 2 S.C.R. 365, ¶ 17 (India);}
Cunningham, \textit{supra} note 202, at 499 (internal citations omitted).
  \item \textsuperscript{274} Craig & Deshpande, \textit{supra} note 187, at 361.
\end{itemize}
the actions of elected authorities. By adopting looser standing rules, the Court enabled the public to hold authorities accountable to the judiciary and not simply to the “sweet will” of the authorities themselves.\textsuperscript{275}

A second and more innovative theme in the Court’s reasoning is that standing rules had to be changed “because the very purpose of the law itself was undergoing a transformation. It was being used to foster social justice by creating new categories of rights.”\textsuperscript{276} This is closely linked to the simultaneous transformation in the Court’s interpretation of Article 21. Justice Bhagwati explicitly made this connection in his \textit{S.P. Gupta} opinion. He noted that fundamental rights were “practically meaningless . . . unless accompanied by social rights necessary to make them effective and really accessible to all.”\textsuperscript{277} By “social rights,” Justice Bhagwati meant the directive principles in Part IV of the Indian Constitution, which he believed were inextricably linked to the fundamental rights in Part III.\textsuperscript{278} This is evident in the following passage:

More and more frequently the conferment of . . . socio-economic rights and imposition of public duties on the State and other authorities for taking positive action generates situations in which single human action can be beneficial or prejudicial to a large number of people, thus making entirely inadequate the traditional scheme of litigation as merely a two-party affair. For example, the discharge of effluent in a lake or river may harm all who want to enjoy its clean water; emission of noxious gas may cause injury to large numbers of people who inhale it along with the air, defective or unhealthy packaging may cause damage to all consumers of goods and so also illegal raising of railway or bus fares may affect the entire public which wants to use the railway or bus as a means of transport.\textsuperscript{279}

Thus, for Justice Bhagwati, the traditional model of litigation was inadequate to protect the public interest from individual acts that harmed large swathes of the population. He therefore

\textsuperscript{275} \textit{Id.} (internal quotation marks omitted).
\textsuperscript{276} \textit{Id.}
\textsuperscript{278} \textit{See id.; See} \textit{INDIA CONST.} art. 37; Craig \& Deshpande, \textit{supra} note 187, at 361.
gave an instrumental justification for liberalizing standing rules—they permitted the Court to give broader (and, in Bhagwati’s view, proper) meaning to Part III of the Constitution, by supplementing fundamental rights with directive principles.

Justice Bhagwati’s approach was enforced in Bandhua Mukti Morcha v. Union of India (1984). Here, a public interest organization petitioned to eradicate bonded labor. Though Article 23 of the Indian Constitution prohibits forced labor, the government argued that bonded labor did not violate any fundamental rights. Once again writing for the majority, Justice Bhagwati dismissed this argument, relying primarily on the right to life in Article 21. He reaffirmed that Article 21 protected the right to live with dignity, which included the right to live free from exploitation. To support this broad interpretation, Justice Bhagwati drew on various directive principles (Articles 39, 41, and 42) that he said provided the “life breath” to Article 21.

Additionally, the Morcha case further entrenched the liberal standing requirements adopted in the S.P. Gupta case—it allowed a nongovernmental organization (“NGO”) not directly affected by bonded labor to bring a claim under Article 32. Justice Bhagwati even went so far as to suggest that PIL was nonadversarial. In fact, he encouraged the government to “welcome public interest litigation because it would [allow the government] . . . to examine whether the poor and down-trodden are getting their social and economic entitlements.” Justice Bhagwati would later describe PIL as a sort of “collaborative” litigation, where the petitioner, the government, and the Court work together rather than as adversaries to determine the best solutions to major social problems.

281. Id. at 102; Craig & Deshpande, supra note 187, at 362.
283. See id.; Craig & Deshpande, supra note 187, at 362.
285. Id.
286. Id.; Craig & Deshpande, supra note 187, at 362–63.
288. Cunningham, supra note 202, at 504 (referencing Justice Bhagwati’s interview with FRONTLINE).
C. The Indian Judiciary Today: Judges as Policymakers

In the spirit of “collaborative” litigation, the Supreme Court in *Morcha* and later cases devised further procedural innovations to give the judiciary a more substantial role in monitoring and enforcing the implementation of judicial orders. The Supreme Court appoints special commissions to conduct fact-finding, propose remedies, and monitor compliance with its orders. For instance, the *Morcha* Court appointed a special commission to investigate facts on its behalf. The Commission was ordered to prepare a report of its findings that “would furnish prima facie evidence of the facts and data . . . It would be entirely for the Court to determine what weight to attach to the facts and data.”

Other procedural innovations of the Supreme Court include: “epistolary jurisdiction” where courts treat a letter from a state detainee or prisoner as a writ petition under Article 32; and “continuing mandamus,” which, in cases like *Morcha*, allows the Court to enforce its orders on a continuous basis even after litigation ends. Generally, the mechanism for enforcement is a series of interim orders, which allows the Court not only to keep track of whether government schemes meet judicial guidelines, but also to instruct the government on how to execute those schemes.

An example of how closely the Court supervises the implementation of its orders is the ongoing “Right to Food” litigation. In April 2001, the People’s Union for Civil Liberties (“PUCL”) filed a writ petition under Article 32 of the Indian Constitution alleging that the Government of India, the Food Corporation of

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292. Id. at 111–12; see also Cunningham, supra note 202, at 506.
India (“FCI”), and six state governments had violated the right to life of millions of Indian citizens under Article 21. When the petition was filed, India was experiencing a severe drought leading to high rates of poverty and malnutrition. The petitioners argued that these government officials and the FCI had failed to provide adequate food supplies and employment to the affected population, which they were required to under the Famine Code of 1962. According to petitioners, since adequate food is a necessary condition to sustain life, these state actors had an affirmative duty to provide and distribute food to citizens affected by the drought. This argument drew from the Supreme Court’s interpretation of Article 21 in Francis Coralie, where it held that the right to life encompassed a right to “live with dignity.”

On November 28, 2001, the Supreme Court issued an interim order recognizing certain food schemes as legal entitlements under Article 21. It also gave the central and state governments specific orders on how to implement those schemes. For instance, the Court instructed state governments “to complete the identification of BPL [below poverty line] families, issuing of cards and commencement of distribution of 25 kgs. grain per family per month latest by 1st January, 2002.” Additionally, it directed the central and state governments to provide “every child in every Government and Government assisted Primary Schools with a prepared mid day meal with a minimum content


297. See Colin Gonsalves et al., RIGHT TO FOOD: COMMISSIONS REPORTS, SUPREME COURT ORDERS, NHRC REPORTS (2d ed. 2005) (reporting that in Rajasthan, one of the worst-affected states, 50% of children were malnourished and half of the state’s population lived below the poverty line).

298. PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India); Birchfield & Corsi, supra note 26, at 697–98.


302. Id.
of 300 calories and 8–12 grams of protein each day of school for a minimum of 200 days.\(^{303}\)

In an interim order issued on May 2, 2003, the Court went even further to engage in “something strikingly close to law-making.”\(^{304}\) To facilitate the proper distribution of grain supplies, the Court issued directions to the government on how to regulate the issuance of licenses to distributors. These directions are formulated much like a statute would be. They require

(1) Licensees, who (a) do not keep their shops open throughout the month during the stipulated period, (b) fail to provide grain to BPL families strictly at BPL rates and no higher, (c) keep the cards of BPL households with them, (d) make false entries in the BPL cards, (e) engage in black-marketing or siphoning away of grains to the open market and hand over such ration shops to such other person/organizations, shall make themselves liable for cancellation of their licenses. The concerned authorities/functionaries would not show any laxity on the subject.\(^{305}\)

Today, more than a decade after it began, the “Right to Food” litigation continues with the Court issuing regular interim orders directing the government how to implement its schemes and instituting timelines for the completion of those schemes.\(^{306}\) Over time, the litigation has grown to include all Indian state governments as respondents.\(^{307}\) Its scope has also expanded to cover a range of issues not directly related to the right to food, including urban poverty, the right to work, and even general issues of transparency and accountability in government implementation.\(^{308}\)

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303. Id.
306. See Birchfield & Corsi, supra note 26, at 699–701.
307. See A TOOL FOR ACTION, supra note 125, at 3 (2005).
308. Id. at 4.
IV. JUDICIAL POLICYMAKING AND THE DEMOCRATIC OBJECTION

The judiciary, led by the Supreme Court, has transformed itself into a significant policymaking institution since the Constitution’s adoption in 1950. The effect of this transformation is clear: the separation of powers framework set forth in the Constitution has been weakened. The Court has sought to replace the division of powers among three branches of government “with a ‘unitarian’ claim of formal judicial supremacy.”309

This supremacy emerged out of both substantive and procedural developments in the Indian Supreme Court’s jurisprudence. The directive principles in Part IV of the Constitution were drafted as nonjusticiable guidelines, but have become justiciable rights under the right to “live with dignity” in Article 21. 310 This has enabled the Supreme Court to adjudicate cases pertaining to socioeconomic rights. The concurrent development of PIL led to relaxed standing rules, the appointment of special commissions, and other procedural innovations that allow the Court to take on a greater range of cases and to craft policy schemes that affect large numbers. Thus, PIL-related procedural changes, combined with an expansive substantive interpretation of the right to life, have fundamentally transformed the judiciary’s role under the Indian Constitution.

The “Right to Food” litigation exemplifies this transformation and shows how the Supreme Court has become a major player in formulating national socioeconomic policy. As of 2005, the Court in that case had issued forty-four interim orders and appointed two Commissioners charged with “monitoring and reporting to this Court of the implementation by the respondents of the various welfare measures and schemes.”311 This sort of judicial policymaking calls forth a serious democratic objection. The Court today constrains democratic decision making on a wide range—and potentially indefinite—set of policy issues.

309. Mehta, supra note 6, at 72.
311. A TOOL FOR ACTION, supra note 125, at 7. The Supreme Court has passed a number of interim orders since 2005. For a representative list, see Legal Action: Supreme Court Orders, RIGHT TO FOOD CAMPAIGN http://www.righttofoodindia.org/orders/interimorders.html (last updated Feb. 28, 2013) [hereinafter Supreme Court Orders].
leading many commentators to declare it the “most powerful court in the world.”

The Court’s role in Indian political life is difficult to square with a Rawlsian liberal conception of democracy. It is important to note this conception does not necessarily envision a strict separation of powers. In fact, Michelman does not rely on (nor even accept) the standard separation of powers trope, in which legislatures make policy choices without regard to law and courts appear later to review the legality of legislative action. In fact, he argues that the democratic objection, which grows out of this view, “trades on a particular, contestable and indeed poor, conception of democracy.” Thus, society need not accept this narrow conception of separation of powers or the idea that norms should not be considered part of constitutional law simply because they are not enforced by courts. In fact, Michelman puts forth a different conception—one in which constitutional law figures prominently in the “conduct of public affairs,” constraining the acts of the executive and legislature.

This view relies on a framing of socioeconomic guarantees as directive principles guiding legislative action toward certain societal goals, and not as judicially enforceable rights. Even if courts are kept away from adjudicating socioeconomic rights, there is still value in placing these rights within a Constitution. The value lies in a subtle but important effect that constitutional status confers—it would create a “certain pressure on the frame of mind” of citizens and their representatives to consider principles of socioeconomic justice in their deliberations.

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312. Alexander Fischer, *Higher Law Making as a Political Resource: Constitutional Amendments and the Constructive Fragmentation of Sovereignty in India, in Sovereignty and Diversity* 186 (Miodrag Jovanović & Kristin Henriard eds. 2008) (pointing out that both Upendra Baxi and S. P. Sathe have referred to the Indian Supreme Court as the “most powerful in the world”); Sathe, *supra* note 187, at 89 (“None of the political players have protested against judicial intrusion into matters that essentially belonged to the executive. Some feeble whispers are heard, but they are from those whose vested interests are adversely affected.”).
313. See Michelman, *supra* note 2, at 33.
314. *Id.* at 39.
315. *Id.* at 33.
316. *Id.*
and public policy decisions. These principles would not overly constrain democratic policymaking but give a “certain inflection to political public reason.”

This is exactly what the framers of the Indian Constitution had in mind when they separated fundamental rights from directive principles and explicitly made the latter nonjusticiable. However, the Indian judiciary, led by the Supreme Court, fundamentally altered the original Constitutional framework. The “Right to Food” litigation illustrates at least three ways in which the Supreme Court increased its own power and decision-making influence.

First, as a result of its expansive reading of Article 21, the Court can enforce a greater number of rights than it could in the early years of the republic. When the Court first declared a right to “live with dignity,” it stated that it included “the bare necessities of life such as . . . nutrition, clothing, and shelter” over the head. However, the Court placed no limiting principle on this right, and this interpretation grows ever more expansive over time. The “Right to Food” litigation is emblematic of that growth—it began as a case about the supply and distribution of food to famine-affected populations, but now encompasses issues of homelessness, maternity, and child development.

In another recent case, the Supreme Court declared that even the “right to sleep” falls within the ambit of Article 21. According to the Court, “[s]leep is essential . . . to maintain the delicate balance of health necessary for its very existence and survival.” Adequate sleep is therefore an important aspect of

317. Id. at 39.
318. Id.
319. See INDIA CONST. art. 37; see supra Part II.
321. See id.
322. See A TOOL FOR ACTION, supra note 125, at 4; Supreme Court Orders, supra note 311 (listing interim orders on homelessness, the National Maternity Benefit Scheme, and the Integrated Child Development Scheme).
human dignity “without which the existence of life itself would be in peril.”324

Cases like this suggest that the right to “live with dignity” has potentially infinite scope. It calls to mind W.E. Forbath’s right to “social citizenship” that would provide assurances to all citizens that they can make a decent living through forms of social participation that provide the opportunity for self-improvement, material interdependence, and security for all.325 As Michelman noted, such a broadly conceived right would leave “no leading [political] issue . . . untouched.”326 This is the core of the democratic objection—when constitutional rights are couched in some of the widest imaginable terms, as they are by the Indian Supreme Court, the Constitution unduly restricts democratic decision making on a range of issues.327

By contrast, the South African Constitution couches its socio-economic rights in much narrower terms. It includes judicially enforceable rights to a clean environment, housing, food, water, social security, and education.328 Faced with this finite, enumerated list of socioeconomic rights, the South African Constitutional Court is much more constrained than its Indian counterpart. For instance, it could not recognize a “right to sleep.” Moreover, with regard to the rights to housing, food, water, and social security, the South African Court requires only that the government take reasonable measures toward the progressive realization of these rights for all citizens.329 The Indian Supreme Court, however, is not so constrained—it has not set forth a clear standard of review for socioeconomic policies, giving it a greater license to intervene as it sees fit.

A second way in which the Indian Supreme Court has increased its influence on socioeconomic policy is through new, accommodating procedural requirements under Article 32, including “epistolary jurisdiction” and relaxed standing rules.


325. See Forbath, Constitutional Welfare Rights, supra note 116, at 1827.

326. Michelman, supra note 2, at 33.

327. See id. at 30–33.


329. See Michelman, supra note 2, at 31; S. AFR. CONST., 1996, §§ 26, 27.
This has transformed the Court into a forum where social movements, led by NGOs, can voice their grievances on behalf of large segments of the population, and in the process, obtain relief against the government. As Upendra Baxi put it, “People now know that the Court has constitutional power of intervention, which can be invoked to ameliorate their miseries.”

For example, take the “Right to Food” litigation; PUCL, an NGO, filed a petition under Article 32 of the Constitution on behalf of thousands affected by famine, even though the NGO was not itself directly affected. Over time, the case expanded to include all Indian states as respondents, meaning that the Supreme Court’s interim orders could potentially impact all Indian citizens.

Finally, a third and related means toward greater policymaking authority for the Indian Supreme Court is a series of procedural innovations; this includes the continuing mandamus and the appointment of special commissions that enable it to monitor compliance with its orders. The “Right to Food” litigation has continued for more than eleven years, with the Court having issued forty-four interim orders by 2005 and several more since then. More strikingly, the Court instructed both central and state governments on how to allocate resources under various socioeconomic policy schemes and instituted timelines for their completion. The Court also appointed special commissioners to monitor and report whether government actors are complying with the Court’s orders.

Together, these developments illustrate the judiciary’s rise as a policymaking institution and call forth a serious democratic objection. The fact that socioeconomic rights are couched in very broad terms under Article 21 is problematic in the Indian context, but need not be per se. For instance, say the Indian

330. Baxi, supra note 6, at 108.
332. See A TOOL FOR ACTION, supra note 125, at 4.
333. See id. at 4–7; Supreme Court Orders, supra note 311 (listing several recent interim orders).
335. See A TOOL FOR ACTION, supra note 125, at 4–7.
Supreme Court continued to locate a number of rights within the right to “live with dignity,” but instead of formulating and enforcing its own policy prescriptions to remedy violations of those rights, it simply held government policies to a reasonableness standard. In this scenario, a “constitutionally declared right . . . of social citizenship would leave just about every major issue of public policy still to be decided.” 336 This would mitigate (if not eliminate) the democratic objection, as the court would leave it to the elected branches of government to make socioeconomic policy and would confine itself to simply judging the constitutionality of those policies under a relatively lenient standard of review. This is the approach adopted by the South African Constitutional Court. 337 Compared to South Africa, socioeconomic rights in India have been couched in very broad and obtuse terms by the Indian Supreme Court. The Court has not specified or placed any limiting principle on the rights that could be inferred under the “right to live with dignity.” It has also failed to establish a standard to review government socioeconomic policies. 338 Together, these developments give the Court wide latitude to shape socioeconomic policy at the expense of democratic deliberation and compromise. Going forward, the Indian Supreme Court would lessen the democratic objection if it were to clearly prescribe limits on the “right to live with dignity” and set forth a standard of review for socioeconomic policy schemes. However, this seems unlikely in light of judicially-created procedural innovations at every stage of litigation that have allowed the Court to transform itself into a policymaking institution capable of affecting change on a large scale. 339 As the “Right to Food” litigation shows, the Indian Su-

337. See, e.g., Gov’t of the Republic of S. Afr. v. Grootboom, 2001 (1) SA 46 (CC) (S. Afr.).
338. See Mehta, supra note 6, at 72 (“[E]ven as the Supreme Court has established itself as a forum for resolving public-policy problems, the principles informing its actions have become less clear.”); KHOSLA, THE INDIAN CONSTITUTION, supra note 191, at 129 (arguing that the Supreme Court has adopted neither a “minimum core” or reasonableness standard, but instead operates on a “conditional social rights model” that examines only the implementation of government schemes, not their content).
339. See Cunningham, supra note 202, at 522–23 (“[V]olunteer social activists are allowed standing, a simple letter can be accepted as a writ petition,
The Supreme Court, unlike its South African counterpart, does not simply declare government socioeconomic policy schemes unconstitutional, but issues specific directions for how to fix those schemes that it enforces with interim orders. In light of Michelman’s proposed solution to the democratic objection—to move beyond courts and toward representative democracy informed by directive principles and constrained by public reason—the Indian Supreme Court’s approach of first locating socioeconomic rights in the Constitution and then vigorously enforcing them is democratically problematic.

Nevertheless, drawing from Rawls, even the Court’s strong exercise of judicial review is perhaps defensible “given certain historical circumstances and conditions of political culture” in India. While Rawls did not elaborate on what he meant here, he suggests that the need for judicial review (and perhaps also its scope) varies among societies based on “justice-related concerns.” Thus, even in its strongest form, judicial review might be justified where the elected branches of government do not provide citizens with a “social minimum,” or violate the “difference principle” by failing to distribute resources to the greatest benefit of a society’s least-privileged members.

A full discussion of the history and politics of socioeconomic justice in India is beyond the scope of this Article, but one’s initial impression is that judicial review might be justified in light of certain facts. Historically, India has struggled with chronic poverty and malnourishment, which have not improved much over time. This lack of improvement is widely attribut-

the court itself will . . . [establish] the facts through commissions, and whenever possible the case will move swiftly to the issue of remedy.”).

340. See A TOOL FOR ACTION, supra note 125, at 4–7.

341. See RAWLS, POLITICAL LIBERALISM, supra note 7, at 240.

342. Michelman, Justice as Fairness, supra note 93, at 1413.

343. See RAWLS, POLITICAL LIBERALISM, supra note 7, at 166, 228–29 (providing that the state must provide a “social minimum” providing for satisfaction of citizens’ “basic” material needs to the extent required for them to take effective part in political and social life).

344. See RAWLS, JUSTICE AS FAIRNESS, supra note 17, at 49–52.

345. For a comprehensive overview, see C.J. NIRMAL, HUMAN RIGHTS IN INDIA: HISTORICAL, SOCIAL AND POLITICAL PERSPECTIVES (2002).

346. See Dreze, supra note 30, at 1723 (noting that a 1998–1999 study found that 47% of all Indian children were undernourished and 52% of all
ed to rampant corruption at all levels of government. Studies on the right to food and the right to health have concluded that government schemes in these areas have failed because of bribery, rent seeking, and other corrupt practices.

With respect to the right to food, the Supreme Court appointed a Committee headed by former Justice Wadhwa to investigate the Public Distribution System (“PDS”). The PDS was initiated to ensure that adequate food reached poorer segments of Indian society at subsidized prices. The Committee, however, found that most of the food released at subsidized rates never reaches its intended recipients. It concluded that the impact of the PDS is “virtually non-existent on the ground and as a result, malpractices abound to the great discomfiture of the common man.”

Thus, the elected branches do not effectively provide a social minimum for many of its citizens, nor a just system of distribution. At first glance, then, historical circumstances and political conditions in India appear to justify the Supreme Court’s robust exercise of judicial review, even though it has increasingly limited democratic decision making.

More fundamentally, such dysfunction in representative government calls into question the institutional assumptions on which the democratic objection is based. As David Landau argues, the idea that the legislature should operate in a separate

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347. See C. RAJ KUMAR, CORRUPTION AND HUMAN RIGHTS IN INDIA 2–3 (2011) (arguing that corruption in India “undermines the very social fabric, and the political and bureaucratic structure of the Indian society . . . [it] violates the constitutional foundations of Indian democracy”).


349. See WADHWA COMMITTEE REPORT, supra note 348.

space from the judiciary assumes, inter alia, that the legislature is responsive to popular will, attuned to constitutional values, and has greater capacity than the judiciary—assumptions that do not apply in developing countries like India.351 The judiciary’s role therefore should be judged in its institutional context. In India, this means accepting that the judiciary acts as a political institution that gains democratic legitimacy by exercising policymaking as well as judicial power.352

V. The Contractarian Objection to Constitutional Socioeconomic Rights in India

The Indian Supreme Court has assumed an increasingly prominent role in the formulation and enforcement of socioeconomic policy through both substantive and procedural shifts in its jurisprudence. But has it set forth publicly acceptable reasons to justify its decisions to relax procedural requirements under Article 32 of the Constitution and to make socioeconomic rights justiciable under Article 21? This is the central question posed by the contractarian objection. It shifts our focus from the Court’s role in India’s constitutional framework to the legitimacy of its decision-making process.

The contractarian objection begins with the premise that a constitution’s legitimacy requires, at a minimum, that rational citizens (acting reasonably) understand its terms and can agree to be governed by them.353 If citizens cannot understand the terms or are unable to determine if their government or fellow citizens are complying with constitutional principles, they will not regard the constitution as a legitimate source of political authority.354

To put this objection in the context of socioeconomic rights, recall that Rawls clearly differentiates between the first principle of justice that sets out a scheme of basic liberties that are “constitutionally essential,” and the second principle, which

353. See Michelman, supra note 2, at 35.
354. See id. at 36.
pertains to non-constitutionally essential questions of social and economic policy. A constitutional system can be *legitimate* if it complies with a range of basic liberties, but nonetheless *unjust* for failing to pursue socioeconomic justice.

While the second principle is not constitutionally essential, it nonetheless pertains to what Rawls calls “basic justice” and is therefore governed by the constraint of public reason. This requires citizens and their public institutions to present each other with publicly acceptable reasons for their political views, to be willing to listen to others, and to display “fair-mindedness in deciding when accommodations to their views should reasonably be made.”

The constraint of public reason applies more stringently to the Supreme Court. In many democratic societies, including India’s, the Supreme Court is the final arbiter of constitutional interpretation. Its justices must articulate the best interpretation of the Constitution through reasoned opinions that are grounded in political values that reflect their best understanding of the public conception of justice. Unlike ordinary citizens or their elected representatives who deliberate on a range of policy issues, the justices are concerned with the higher (constitutional) law and matters of basic justice, and therefore must only use public reasons to explain their decisions. The need for the Court to explain its decisions through public reasons is heightened with regard to socioeconomic rights. These rights “lack the trait of transparency,” as it is difficult to measure if they are being realized at any given moment. This lack of transparency accounts for one of the primary distinctions between the first and second principles. Rawls believes that in comparison to the second principle, “it is far easier to tell

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359. See id. at 216, 231.
360. Id. at 236.
361. See id. at 216, 234.
whether . . . [Constitutional] essentials are realized.” He states that the realization of the second principle is “always open to reasonable differences of opinion . . . [it] depend[s] on inference and judgment in assessing complex social and economic information.” Thus, Rawls argues that the first principle should apply “at the stage of the constitutional convention,” while issues of socioeconomic justice should be decided by elected representatives after the basic constitutional structure is in place. In essence, this is the structure adopted by the framers of the Indian Constitution. They set forth a scheme of basic liberties in Part III of the Constitution, followed by nonjusticiable Directive Principles of State Policy in Part IV. The Indian Supreme Court altered this constitutional structure by interpreting Articles 21 and 32 to make socioeconomic rights justiciable and allow the Court to assume a central role in their enforcement.

As the “exemplar of public reason,” the Supreme Court’s decisions must reasonably comport with the text of the Constitution, constitutional precedents, and political understandings of the Constitution to articulate “a coherent constitutional view over the whole range of their decisions.” If its decisions do not meet these criteria, citizens might lose confidence that public reason applies to decisions of socioeconomic justice and the “extant system of positive legal ordering is unjust.” More broadly, if citizens cannot understand what constitutionally essential provisions require, they will doubt the legitimacy of the whole constitutional system.

363. Rawls, Justice as Fairness, supra note 17, at 49. See also Michelman, Poverty in Liberalism, supra note 72, at 1016 (“It is more urgent, Rawls proposes, to settle constitutionally the framework of ‘just political procedure’—in which he includes guaranteed personal and political liberties—than it is to settle matters of economic justice, fairness, and distribution. And that is all the more so, he adds, given the relative non-transparency of judgment regarding satisfaction of that latter part of justice.”).
364. Rawls, Justice as Fairness, supra note 17, at 48.
365. See id. at 48.
366. See India Const. §§ 12–51; Austin, The Indian Constitution, supra note 20, at 50–83.
368. Michelman, supra note 2, at 38.
369. See id.
With respect to Article 32, the Court’s decisions appear to fit within the constraint of public reason. As a preliminary matter, the text of Article 32 sets forth a flexible standard rather than a fixed rule that allows the Court some interpretive discretion. It states that citizens may petition the Supreme Court via “appropriate proceedings” to obtain relief for violations of fundamental rights. As discussed in Part III, supra, the term “appropriate proceedings” originally limited standing to petitioners directly affected by a challenged law. Yet, over time the Court loosened this requirement to accommodate petitions from any member of the public on behalf of disadvantaged individuals or groups. This interpretation is within the bounds of public reason because the phrase “appropriate proceedings” clearly sets forth a standard rather than a rule. All mainstream theories of constitutional interpretation, with the exception of what Jack Balkin calls “original expected application,” would accept that the phrase “appropriate proceedings” can (or even should) evolve over time.

The Court is also quite clear in its reasoning on this question of interpretation. For instance, in Bandhua Mukti Morcha, Justice Bhagwati states,

There is no limitation in regard to the kind of proceeding envisaged in clause (1) of Article 32 except that the proceeding must be “appropriate” and this requirement of appropriateness must be judged in the light of the purpose for which the...
proceeding is to be taken, namely, enforcement of a fundamental right.375

He goes on to state that the framers "did not lay down any particular form of proceeding . . . nor did they stipulate that such proceeding should conform to any rigid pattern or straight jacket," since this would be "self-defeating because it would place enforcement of fundamental rights beyond the reach of the common man."376 This justification depends on the very plausible premise that the framers knew that an open-ended provision was necessary in "a country like India, where there is so much of poverty, ignorance, illiteracy, deprivation and exploitation."377

Justice Bhagwati also described the changing nature of litigation, where "Public Interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government."378 Here, Justice Bhagwati defends the Court’s evolving interpretation of Article 32 on the grounds that “appropriate proceedings” should be interpreted according to the purpose of the litigation in question, and the purpose of public interest litigation, particularly in a country like India, is to allow ordinary citizens to approach the Court to hold the government accountable on matters of social justice.

While this justification does not lessen (and might even reinforce) the democratic objection,379 it overcomes the contractarian objection. The Court has interpreted Article 32 in a manner consistent with the text that recognizes the framers’ broader goals of social revolution,380 as well as the real need for PIL in India. This fulfills the constraint of public reason: the Court’s reasoning is transparent, clearly articulated, and is accessible to all Indian citizens in light of their own reasons.381

The Court’s reasoning with regard to Article 21 is more problematic. The Court has interpreted the right to life expansively

376. Id.; See also Craig & Deshpande, supra note 187, at 364 (“The justification given by Bhagwati, J for reading Article 32 in this manner is clear and forthright.”).
378. Id.
379. See supra Part IV.
380. See Austin, The Indian Constitution, supra note 20, at 26–27, 50.
381. See Rawls, Justice as Fairness, supra note 17, at 90–91.
to include a right to “live with dignity,” which includes a range of socioeconomic rights. However, the structure of the Indian Constitution clearly demarcates fundamental rights in Part III and directive principles in Part IV. More importantly, Article 37 of the Constitution states that directive principles “shall not be enforceable by any court” even though these principles are “fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.” Unlike Article 32, which uses a flexible standard, Article 37 sets forth a clear rule. The text of Article 37 is unambiguous and does not permit any deviation. Indeed, no major theory of constitutional interpretation would endorse a judicial interpretation of a bright-line rule that deviates from the plain meaning of the language of the text.

The Indian Supreme Court therefore has a heavy burden in justifying its deviation from the text of Article 37. In the seminal cases that transformed the meaning of Article 21 into a broader right to live with dignity, the Court’s reasoning is inadequate—it either sidesteps or completely ignores the clear textual command of Article 37.

In Maneka Gandhi, which first set out a broader interpretation of Article 21, the Court included substantial dicta about the right to life without providing any justification for these pronouncements. It says, for instance, that fundamental rights in Part III of the Constitution “represent the basic values cher-

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383. INDIA CONST. art. 37.
384. See, e.g., Jack M. Balkin, Fidelity to Text and Principle, in THE CONSTITUTION IN 2020, at 12 (Jack M. Balkin & Reva B. Siegel eds., 2009) (“The Constitution’s text contains determinate rules (the president must be thirty-five, there are two houses of Congress), standards (no ‘unreasonable searches and seizures,’ a right to a ‘speedy’ trial), and principles (‘freedom of speech,’ ‘equal protection’). . . . Adopters use fixed rules because they want to limit discretion.”); STRAUSS, supra note 374, at 7 (“Many provisions . . . are quite precise and leave no room for quarreling, or for fancy questions about interpretation.”); Post & Siegel, supra note 374, at 378 (“There may be constitutional provisions of which it can be said . . . that ‘an important—perhaps the important—function of law is its ability to settle authoritatively what is to be done.’”) (quoting Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 HARV. L. REV. 1359, 1377 (1997) (emphasis in original)).
ished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent.”

It then builds on these broad assertions in *Francis Coralie*, proclaiming that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

As with the excerpt from *Maneka Gandhi*, this definition of the right to life appears to be invented out of whole cloth, without reference to any precedent, constituent assembly debate, or other source of law. Moreover, both the *Maneka Gandhi* and the *Francis Coralie* decisions fail even to mention Article 37, much less explain how the Court got past the plain meaning of Article 37 when it reinterpreted Article 21 to make socioeconomic rights justiciable.

Justice Bhagwati provided some hints as to the Court’s reasoning on this issue in the *Bandhua Mukti Morcha* case. First, he acknowledges that directive principles “are not enforceable in a court of law,” and the Court therefore cannot compel the government to pass laws or executive orders to meet socioeconomic goals. Still, he adds that if the state has already passed legislation impacting socioeconomic justice, state actors “can certainly be obligated to ensure observance of such legislation for inaction on the part of the State in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 21.”

The distinction drawn here is illusory. Article 37 does not merely state that courts cannot compel the state to pass laws

389. *Id.*
or orders; it flatly prohibits the enforcement of directive principles. Justice Bhagwati does not put forth evidence to support his view that Article 37 is not intended to apply to judicial review of existing laws. Further, even if the Court is permitted to review existing laws affecting socioeconomic policy, it has never clearly stated (in this case or otherwise) exactly to what standard the government is held. Additionally, as the “Right to Food” litigation demonstrates, the Court does not confine itself to a “reasonableness” or “minimum core” standard, but actually imposes its own policy prescriptions and timelines for completion on elected officials.

Justice Bhagwati’s opinion in Bandhua Mukti Morcha also states that certain directive principles (Articles 39, 41, and 42) provide Article 21 with its “life breath.” These articles direct the state to secure, inter alia, a fair economic system, adequate livelihood, education, public health access, and humane working conditions for all citizens. According to Justice Bhagwati, these principles constitute “the minimum requirements which must exist in order to enable a person to live with human dignity.” The Court therefore implies a degree of interplay between Parts III and IV of the Constitution. It uses the directive principles to determine the scope and meaning of fundamental rights. Thus, Part IV of the Constitution is not justiciable on its own, but plays an important role in defining what the “right to life” encompasses.

This reasoning is flawed in light of the clear language in Article 37 prohibiting courts from enforcing directive principles.

390. See generally id.; Mehta, supra note 6, at 74 (“The Court has helped itself to so much power . . . without explaining from whence its own authority is supposed to come.”); Cunningham, supra note 202, at 512 (noting that in several cases the Court has granted relief to petitioners and issued specific directions to the government before deciding whether it has jurisdiction).


393. See INDIA CONST. arts. 39, 41, 42.


395. See Craig & Deshpande, supra note 187, at 366 (“Part IV becomes of seminal importance in determining the more precise meaning which . . . [fundamental] rights should have when concrete specification has to be given concerning their enforcement. The judicial approach therefore rejects any rigid division between liberty and the worth of liberty.”).
Rather than enforcing them directly, the Supreme Court essentially sidesteps this provision by enforcing the directive principles through a right to “live with dignity” in Article 21. Moreover, the Court does not place any limits on the scope of this right. While the Francis Coralie case lists only a few rights, including the rights to adequate nutrition, food, and shelter, the Court has since inferred that Article 21 protects the right to education, the right to a clean environment, and even rights that do not appear in the directive principles, such as the right to sleep.

Through its disregard for the text of Article 37 and its capacious interpretation of Article 21, the Indian Supreme Court renders important Constitutional provisions inscrutable to Indian citizens. However, this contractarian objection was not inevitable. The Indian Supreme Court could have avoided this result by producing well-reasoned and circumscribed judgments. As discussed earlier, South Africa does not face this problem because its constitutional court is limited to enforcing clearly defined, narrowly couched socioeconomic rights that are enumerated in the South African Constitution. The Indian Constitution, by contrast, lists directive principles that are explicitly nonjusticiable under Article 37. The Indian Supreme Court has not explained how it moved past Article 37’s plain meaning. There is no articulated standard of judicial review or limit to the scope of the right to life under Article 21. The Court therefore fails to meet the constraint of public reason in its judgments on socioeconomic rights.

The right to “live with dignity” is indeterminate; any number of positive entitlements might be deemed essential to human dignity, and any government policy in this area might be ruled unconstitutional for reasons that rational and reasonable citizens could not discern or predict with any certainty. Thus, citizens may no longer accept the Constitution as a legitimate source of political authority.

399. See Right to Sleep Case, supra note 323, at 76.
CONCLUSION: TOWARD A BROADER CONCEPTION OF LEGITIMACY

Since the adoption of the Indian Constitution in 1950, the judiciary, led by the Supreme Court, has greatly increased its policymaking authority. The Court not only expanded the meaning of Article 21 to make socioeconomic rights justiciable under the Constitution, but also oversaw several modifications to fundamental rights litigation under Article 32. Three significant changes emerge from the Court’s approach: (1) the judiciary can enforce a greater number of rights; (2) through relaxed standing rules, public interest groups and concerned citizens may file petitions under Article 32; and (3) courts have become significant players in formulating and enforcing socioeconomic policy. The first change is substantive, the latter two are procedural.

This Article has set forth two objections to these changes. The democratic objection arises from the Court’s transformation into a policymaking institution such that there is potentially no issue of public policy that it cannot reach or government scheme that it cannot review. The contractarian objection is narrower—it asks whether the reasons put forward by the Court to justify its decisions on socioeconomic rights meet the constraint of public reason.

The Article’s theoretical framework offers at least two major benefits as a lens through which to examine socioeconomic rights in India. First, it distinguishes between two sorts of critiques: (1) those pertaining to the Supreme Court’s role in India’s constitutional framework, and (2) those involving the Court’s substantive interpretation of the Constitution and the resulting problem with legitimacy. This distinction is potentially useful in light of the current literature in this area. While some scholars elide this distinction by criticizing the Supreme Court’s policymaking role in terms of legitimacy, others focus only on the democratic objection.

401. See generally Craig & Deshpande, supra note 187; Cunningham, supra note 202.
402. See, e.g., Mehta, supra note 6, at 71–72, 79–82 (discussing both the rise of PIL and the “legitimacy of judicial intervention” as part of the same phenomenon); Jamie Cassels, Judicial Activism and Public Interest Litigation in India: Attempting the Impossible, 37 AM. J. COMP. L. 495, 509 (1989).
The democratic objection implicates both the substantive and procedural changes described above, as the Court today does not simply adjudicate on a greater number of issues, but has become the central forum for social movements and public interest organizations to affect far-reaching policy changes with regard to socioeconomic justice.404

The contractarian objection, though, forces us to distinguish among the substantive and procedural changes in the Court’s jurisprudence. While all three changes contribute to the democratic objection, the contractarian objection only arises in response to substantive changes—namely, the Court’s broad reading of Article 21 (and disregard for Article 37) to make socioeconomic rights justiciable. As discussed, the Court’s interpretation of Article 21 is not justified by the text or clearly explained in the Court’s opinions and therefore fails to meet the constraint of public reason.

However, the procedural changes are not problematic from a contractarian perspective. The Court’s expansive interpretation of Article 32 is reasonable under this provision’s open-ended language. The Court’s decisions to allow a wider class of citizens to file writ petitions, to allow special commissions to undertake fact-finding, or to empower courts to issue and enforce detailed interim orders are also explained with clear and publicly accessible reasons. Thus, while many look at these substantive and procedural changes as coterminous elements within the broader development of PIL, the contractarian view shows that they are distinct in this important respect.

A second benefit of this Article’s theoretical framework is that it steps back from analyzing the political effects of Su-

The court has been charged not only with exceeding its institutional capacity, but with reversing constitutional priorities, usurping both legislative and administrative functions, violating the rule of law, riding roughshod over traditional rights and succumbing to the corrupting temptations of power. Such criticisms are ordinarily couched in the language of legitimacy.

Id.

403. See, e.g., Khosla, supra note 214, at 56–57 (noting that while the term “judicial activism has become commonplace in evaluations of the Court’s functioning” and has spawned a “wide-ranging body of literature,” this literature has not effectively engaged with what “judicial activism” means).

404. See Baxi, supra note 6, at 107–11.
preme Court judgments to examine the process of the Court’s decision making. The current academic literature on socioeconomic rights under the Indian Constitution is concerned primarily with the effects of Supreme Court judgments on, inter alia, the Court’s legitimacy, India’s separation of powers framework, and Indian society at large. Those who defend the Court’s exercise of judicial review have relied on the failure of elected representatives to improve socioeconomic conditions to justify the Court’s intervention into matters of policy. Others, echoing the democratic objection, have criticized what they believe is the judiciary’s usurpation of legislative and executive authority. Their disagreement appears to rest on di-

405. See, e.g., Mehta, supra note 6, at 80 (“What legitimizes judicial activism and makes it an exertion not of mere power, but of just authority? One possible answer is that judicial activism is justified to the extent that it helps to preserve democratic institutions and values.”); Sathe, supra note 187, at 88–89 (arguing that the Supreme Court “is not equipped with the skills and the competence to discharge functions that essentially belong to other coordinate bodies of government. Its institutional equipment is inadequate for undertaking legislative or administrative functions.”); Sripati, supra note 6, at 135 (“The Court’s crucial directives to the government and appointment of individuals as commissions of enquiry enhance the political visibility of human rights violations, serve to ignite effective legislative action, raise public consciousness and create opportunities for individuals and institutions to make meaningful contributions for the realization of constitutional values.”).

406. See, e.g., Upendra Baxi, Judicial Discourse: Dialectics of the Face and the Mask, 35 J. INDIAN L. INST. 1, 12 (1993) (characterizing judicial activism as “a struggle for the recovery of the Indian Constitution” and arguing that forceful judicial intervention had led to accountability in governance).

I do not mean . . . to suggest that the Supreme Court is the sole agency to safeguard and advance human rights in a democratic society like India . . . it is nonetheless a crucial agency, sometimes perhaps—in the light of a corrupt and an errant executive, an irresponsible Parliament—a virtually indispensable one for the protection of human rights in India.

Sripati, supra note 6, at 135–36.

407. See, e.g., Sathe, supra note 187, at 88 (“After surveying Indian Supreme Court caselaw, we arrive at the conclusion that the Court has clearly transcended the limits of the judicial function and has undertaken functions which really belong to either the legislature or the executive.”); SRI KRISHNA AGRAWALA, PUBLIC INTEREST LITIGATION IN INDIA 37 (1986).

India being a welfare state, legislation already exists on most matters . . . If the Court states enforcing all such legislation under the
vergent views as to the appropriate role of the judiciary in a
democratic society—views that probably cannot be reconciled.
Even from the Rawlsian perspective, it is open to interpreta-
tion whether the Indian Supreme Court’s robust use of judicial
review is justified in Indian society, though a strong case can
be mounted for the Court in light of historical and political cir-
cumstances.  
By looking at the Supreme Court’s decisions on socioeconomic
rights through the lens of public reason, this Article has fo-
cused on whether the Court’s decision-making process is wor-
thy of acceptance by Indian citizens. And, in short, it might not
be worthy: the Court fails to provide clear and transparent rea-
sions to justify its interpretations of Articles 21 and 37. As a
result, Indian citizens could not understand constitutionally
essential provisions with any clarity or conviction, which might
prevent them from assenting to be governed under this Consti-
tution. The Court’s judgments in this area therefore threaten
the legitimacy of the present constitutional order.
This article’s claim that the legitimacy of the Indian constitu-
tional order is threatened by the Supreme Court’s enforcement
of socioeconomic rights might appear counterintuitive. After
all, it seems to conflict with the fact that the Court is one of the
few Indian public institutions that shows the will and the ca-
pacity to actually improve the lot of the least privileged mem-

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spacious plea that non-enforcement is violative of article 21, perhaps
no state activity can be spared from the purview of the Supreme
Court as a PIL matter. Its logical extension could mean the taking
over of the total administration of the country from the executive by
the Court.

Id.  
408. See RAWLS, POLITICAL LIBERALISM, supra note 7, at 240; see supra Part
IV.  
409. Interestingly, Supreme Court justices have invoked Rawls outside the
socioeconomic rights context to justify broad rights-based constitutional inter-
pretations and judicial intervention. See, e.g., Soshit v. Union of In-
Principle” to argue in favor of preferential treatment for Scheduled
Castes and Scheduled Tribes in the Railway Administration); State of U.P. v.
Bisht, (2007) 6 S.C.C. 586 (India) (Sinha, J., concurring) (invoking public rea-
son in a consumer protection dispute to argue against judicial restraint and
for a greater role for the Court in this area).
bers of society.\textsuperscript{410} The Supreme Court enjoys widespread support among Indian citizens who approach the Court in large numbers to obtain various sorts of relief against the government.\textsuperscript{411} The public also views the judiciary as one of the least corrupt state institutions.\textsuperscript{412} Moreover, Supreme Court judgments on socioeconomic rights have brought about positive change—the “Right to Food” litigation, for instance, provides midday meals to schoolchildren across India.\textsuperscript{413}

From a broader perspective, taking a social contractarian view of the Indian Constitution presents an opportunity to rethink our conception of legitimacy. Specifically, in the context of socioeconomic rights, this view proposes that a legitimate constitutional system demands not only acceptable institutional arrangements and policy-related outcomes, but also that public institutions, particularly the Supreme Court, are held to a strict, process-based standard—they must present clear and transparent reasons for their decisions that are accessible to all citizens in light of their common reason.

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\item[\textsuperscript{410}] See Baxi, \textit{supra} note 6, at 107 (“For too long, the apex constitutional court had become ‘an arena of legal quibbling for men with long purses.’ Now, increasingly, the Court is being identified by justices as well as people as the ‘last resort for the oppressed and the bewildered.”).
\item[\textsuperscript{411}] See Nick Robinson, \textit{Structure Matters: The Impact of Court Structure on Indian and U.S. Supreme Courts}, 61 AM. J. COMP. L. 101, 104–06 (2012) (noting that the Indian Supreme Court has been dubbed the “people’s court” and is one of the most accessible—and therefore overloaded—highest courts in the world).
\item[\textsuperscript{412}] \textit{India Ninth-Most Corrupt Country: Survey}, ECON. TIMES (Dec. 10, 2010), \textit{available} at \texttt{http://articles.economictimes.indiatimes.com/2010-12-10/news/27614571_1_corrupt-country-transparency-international-petty-corruption} (reporting that the Indian public views political parties, the police, parliament, and civil servants as more corrupt than the judiciary); A. Abdulraheem, \textit{Corruption in India: An Overview}, 59 SOCIAL ACTION 351 (2009), \textit{available} at \texttt{http://www.isidelhi.org.in/saissues/articles/artoct09.pdf} (noting that a survey conducted by Transparency International reported that 58% of Indian respondents identified politicians to be the most corrupt state actors, 45% felt that the government was ineffective in addressing corruption in the country, but only 3% believed the judiciary was corrupt).
\item[\textsuperscript{413}] See \textit{A Tool for Action}, \textit{supra} note 125, at 15–19.
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ENFORCING INTERNATIONAL LAW: STATES, IOS, AND COURTS AS SHAMING REFERENCE GROUPS

Professor Sandeep Gopalan* and Dr. Roslyn Fuller†

INTRODUCTION

Does international law ("IL") impose meaningful constraints on state behavior? Unabated drone strikes by the dominant superpower in foreign territories, an ineffective United Nations ("U.N."), and persistent disregard for international law obligations—e.g., the continued killing of citizens by states with an obligation to protect—suggest that the skeptics have won the debate about whether international law is law in the sense in which the term is commonly understood and whether it affects state behavior. This Article argues that such a conclusion would be in error because it grossly underestimates the complex ways in which IL affects state behavior. The scholars who claim that the lack of coercive power in IL deprives it of the attributes necessary for it to have the force of law err in imagining that the types of physical coercion typically used in domestic law enforcement are the only types of coercion available for the enforcement of legal rules.

Incarceration is not the only type of coercion available for law enforcement. Granted, depriving the offender of his liberty by

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confining him in jail has severe expressive, deterrent, retributive, and incapacitative effects, but other punishments can achieve the same purposes and be just as coercive. If these alternative punishments can be shown to achieve the aforementioned effects, the central argument against IL being law in the strict conventional sense fails. This Article aims to do this by focusing on a relatively neglected kind of sanction in IL—shaming. The authors show that IL is enforced by states, courts, and international organizations by the imposition of shame sanctions on offenders and that these sanctions affect state behavior in the same ways that traditional coercive sanctions do.

The emphasis on shaming is not new to legal scholarship: criminal law scholars, among others, have produced a rich vein of literature on shame sanctions. In contrast, IL scholars have largely passed over the concept, although some have suggested that shaming may have a positive role in ensuring compliance with international law. This is surprising since shaming is


The various influences that induce compliance with human rights norms are cumulative, and some of them add up to an underappreciated means of enforcing human rights, which has been characterized as “mobilizing shame.” Intergovernmental as well as governmental policies and actions combine with those of NGOs and the public media, and in many countries also public opinion, to mobilize and maximize public shame.

Id. at 24.
pervasive in IL and matches up well with the cost-benefit type of prerequisites typically employed in the design of sanctions and incentives.\(^7\) Moreover, both the impossibility of establishing a centralized system of traditional law enforcement methods for IL in the foreseeable future and the moral roots of many IL norms ought to make the study of shaming worthwhile.

Shaming, as it is used in this Article, refers to a deliberate attempt to negatively impact a state, regime, or leader’s reputation by publicizing and targeting violations of international law norms.\(^8\) Psychology literature contains rich material on shame, particularly as it relates to similar emotions such as guilt and embarrassment. For instance, Tangney and Miller write that “[w]hen experiencing shame, people felt physically smaller and more inferior to others; they felt they had less control over the situation. Shame experiences were more likely to involve a sense of exposure (feeling observed by others) and a concern with others’ opinions of the event.”\(^9\) In experimental settings, shame was seen to be an intense, painful emotion involving feelings of “moral transgression,” responsibility, and regret.\(^10\) In other words, shaming can produce effects similar to other kinds of coercion.

IL actors have employed shaming to achieve coercive outcomes. Some of these shaming methods include labeling a state as an offender, creating a reputation as a bad actor and non-cooperator, marginalizing or expelling the state from international organizations, causing economic damage, shunning by other states, and mobilizing domestic public opinion against the offending regime or leader.\(^11\) Coercion is employed against

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7. Wexler, supra note 4, at 564 (“[o]ne advantage of shaming penalties, as compared to incarceration, is their cheapness”).
8. See Chad Flanders, Shame and the Meanings of Punishment, 54 CLEV. ST. L. REV. 609, 610 (2006) (“most scholars agree that shaming punishments involve the deliberate public humiliation of the offender[]”).
10. Id.
11. See generally Katherine Butler, Pakistan Told to Reform or Face Isolation, INDEPENDENT (Oct. 19, 1999), http://www.independent.co.uk/news/world/asia/pakistan-told-to-reform-or-face-isolation-739976.html (discussing how Pakistan was removed from the U.K. Commonwealth following a military coup); Richard Dowden, Blair Fails to Reach Commonwealth Agreement on Zimbabwe Exclusion, INDEPENDENT (Dec. 6, 2003), available at
offenders with the objective of obtaining norm-conforming behavior in the future, and as a signaling device for other observers to show that breaching IL norms can be costly.

Criminal law scholarship shows that shame sanctions are most effective in tightly knit societies with shared norms.\textsuperscript{12} If the ideal condition—a normative framework that is precise in terms of obligations and enforcement—is indicative of requisite criteria, the landscape for the enforcement of international law norms reveals a high degree of heterogeneity amongst nation states in terms of both normative frameworks and enforcement models. This suggests that shaming is unlikely to be effective. However, this facile conclusion is undermined by conditions that make shaming powerful despite the lack of precision in obligation and enforcement: complex webs of networked linkages between states that create co-dependent relationships akin to tight-knit local communities. Buttressing these co-dependent links between nation states are the shared epistemic, religious,\textsuperscript{13} ethnic, gender,\textsuperscript{14} economic, and language


\textsuperscript{13} See Jeff Haynes, \textit{Transnational Religious Actors and International Politics}, 22 THIRD WORLD Q. 143, 143–58 (2001). Co-religionists have acted beyond national borders on numerous occasions:

Pope Benedict has condemned the violence against Christians in Orissa but also deplored the killing of the [Laxmananda]. On [August 28th], Italy's Foreign Ministry said it will summon India's ambassador to demand “incisive action” to prevent further attacks against Christians. A statement issued after a cabinet meeting also said Italy would ask France, the current EU president, to take up the issue at a future meeting of foreign ministers.


bonds. Together, these forces result in shared commitments to many IL norms despite deep divergences in domestic laws.  

For example, all participants in the international law system support, at a minimum, the condemnation of torture, slavery, piracy, genocide, prostitution, and narcotic drugs. Extracting from ratification records for IL instruments, state
practice, and publicly articulated commitments, it is possible to compose a shared normative framework for the international community.\textsuperscript{22} It has been claimed that this community is one of "civilized nations," suggesting a moral element to the impetus for cooperation.\textsuperscript{23} Even formalized manifestations of this community, such as the U.N., support this idea.\textsuperscript{24}

Apart from communities of nation states, regimes and their leaders are also part of several networks, whether they are international organizations such as the U.N., regional organizations such as the European Union, or clubs of allied regimes such as the Organisation for Economic Co-operation and Development ("OECD") and North Atlantic Treaty Organization ("NATO"). When a state or leader is a member of a community or network characterized by interdependence, other members are able to direct evaluative opinions about them, which may be esteem enhancing or detracting. Such communities will be referred to as shaming reference groups. As rational actors, states and their leaders will behave in ways calculated to maximize esteem and minimize shame with reference to the applicable normative framework by supporting norms, adhering to them, reacting against breaches, championing new norms, etc. Whether the actor accepts a norm or not, at a minimum the reference group's imposition of a shame sanction can make the commission of the offending act costly to the actor. Even if the state or regime is impervious to shame and not amenable to norm-conforming behavior in the future, the very process of shaming has the effect of establishing and cementing the asserted norm for non-offenders—not a trivial function in IL because it is a discipline where norms are created in a dynamic non-linear structure and are constantly evolving.\textsuperscript{25}


\textsuperscript{23} See Statute of the International Court of Justice art. 38, para. 1(c), June 26, 1945, 33 U.N.T.S. 993.


\textsuperscript{25} Professor Kahan argues that sham ing has the effect of shaping preferences. If individuals are shamed for contravening a particular asserted norm, other observers will modify their own behavior to fit that asserted norm. \textit{Alternative Sanctions}, supra note 5, at 639.
Although states are the principal IL actors, shaming is also attractive at the level of individual actors who are mainly agents of states: leaders of nation states, the primary component of this category, tend to belong to those sections of society most sensitive to reputational damage. For example, if the state is a democracy, political leaders have to prioritize voter reactions to their behavior, and reputational damage at the international level might be leveraged by opponents in electoral contests. Even in non-democratic states, leaders have to balance various constituencies and power groups to retain their own power. Thus, shame external to the state has the potential to disrupt the balance of power in a non-democratic state and strengthen the non-democratic leader’s internal opponents. Shaming also has functional consequences for a leader: his reputation affects his ability to enter into business transactions and attract foreign investment—essential measures of successful governance in the global economy. In addition, evidence suggests that leaders from democratic and non-democratic states are eager to join multilateral organizations and gain positions in them to buttress their domestic standing. For all of these reasons, shame sanctions have constraining power for leaders of nation states at the individual level.

Part I of this Article shows how the conceptual work on shaming is applicable to IL. Part II develops a structure for shaming in IL by identifying the relevant targets for shaming, the enforcers of the sanction, and the conditions for imposing the sanction. Part II further analyzes several examples of states, regimes, and individuals being shamed by international organizations and by domestic courts in the United Kingdom (“U.K.”), the United States, Germany, and Canada. It further illustrates that enforcement of IL norms via shaming affects state behavior in ways similar to traditional coercive sanctions. Part III develops the notion of a shaming reference group, advancing some examples of networks that meet the necessary conditions, including supranational organizations such as the EU, and networks of domestic courts. The Article then concludes.

Criminal law scholars have engaged in extensive analysis of shaming sanctions. At the definitional level, “[s]haming is the process by which citizens publicly and self-consciously draw attention to the bad dispositions or actions of an offender, as a way of punishing him for having those dispositions or engaging in those actions.”27 Scholars offer examples ranging from the media releasing the names of men who solicit prostitutes,28 to the special license plates required for people convicted of driving under the influence of alcohol.29 In addition, courts occasionally shame offenders as part of the sentencing process.30

27. Kahan & Posner, supra note 5, at 368.
30. See, e.g., United States v. Gementera, 379 F.3d 596, 598, 607 (9th Cir. 2004) (holding that the requirement that a convict wear a signboard proclaiming his guilt was “reasonably related to the legitimate statutory objective of rehabilitation”); United States v. Coenen, 135 F.3d 938, 939, 946 (5th Cir. 1998) (requiring a person convicted of transmission of child pornography to publish notice in the official journal of the parish was within the district court’s broad discretion to protect); United States v. Schechter, 13 F.3d 1117, 1118–19 (7th Cir. 1994) (requiring the defendant to notify all future employers of the defendant’s past tax offenses was not an abuse of its broad discretion to protect the public); People v. McDowell, 130 Cal. Rptr 839, 842–43 (Cal. Ct. App. 1976) (requiring that purse thief who used tennis shoes to approach his victims quietly and flee swiftly wear tap shoes “should foster rehabilitation and promote the public safety”); Goldschmitt v. Florida, 490 So. 2d 123, 124–26 (Fla. Dist. Ct. App. 1986) (requiring a defendant to place a sticker that read “CONVICTED D.U.I.—RESTRICTED LICENSE” is not “sufficiently humiliating to trigger constitutional objections”); Ballenger v. Georgia, 436 S.E.2d 793, 794–95 (Ga. Ct. App. 1993) (court refused to interfere with trial court’s broad discretion in imposing a condition requiring the offender “to wear a fluorescent pink plastic bracelet imprinted with the words ‘D.U.I. CONVICT’”). Contra People v. Hackler, 16 Cal. Rptr. 2d 681, 686–87 (Cal. Ct. App. 1993) (striking down on appeal a requirement that a shoplifting offender wear a t-shirt whenever he left the house that read on the front, “My record plus two six-packs equals four years” and on the back, “I am on felony probation for theft,” on the ground that the objective was to “public[ly] ridicule and humiliat[e], rather than to foster rehabilitation”); People v. Johnson, 528 N.E.2d 1360, 1361–62 (Ill. App. Ct. 1988) (requiring a DWI of-
For criminal law scholars, shaming is the means by which negative emotions aroused by the offender are expressed.31 This is often done by an agent acting presumptively to enforce the shaming sanction on behalf of a group.32 Deterrence is central to such shaming because it is calculated to show other members of the community that offending can be costly.33 Given the absence of a fair process or prior community consent, some enforcers might be overly aggressive in shaming offenders and thereby deter too much. Consequently, individuals might forsake otherwise valid conduct for fear of being targeted. For example, fear of religious fanatics who both assert the need for particular clothing as an article of religious belief and police those who do not comply might coerce women into wearing religious garments like the burka even in secular countries.

Proponents of shaming in criminal law do not claim that shaming is purely deterrence-based. For them, it also serves the retributive function of punishment.34 Aside from meeting these objectives of punishment, shaming is more cost-effective because the burden is delegated to the community, making expenditures for the establishment of an administrative structure

31. See Skeel, supra note 12, at 1814–16.

32. See id. (arguing that when judges administer shaming sanctions, they often reflect the emotions of the affected group).

33. [N]otification results in shaming the offender, thereby effecting some amount of retribution. This suffering “serves as a threat of negative repercussions [thereby] discourag[ing] people from engaging in certain behavior.” It is, therefore, also a deterrent. There is no disputing this deterrent signal; the notification provisions are triggered by behavior that is already a crime, suggesting that those who consider engaging in such behavior should beware.

34. Flanders, supra note 8, at 612. See also Alternative Sanctions, supra note 5, at 631, 637.
unnecessary. Shaming also provides bite to other sanctions. For example, a fine alone may not be effective if the offender is able to pay it without suffering any material infringement of the lifestyle to which he is accustomed. However, when the stigma added by shame in addition to having incurred the fine is considered, such a sanction may be considerably more effective than is apparent at first glance.

Critics argue that shaming has debilitating negative effects. They claim that offenders might form subcommunities that explicitly embrace the offender’s wrongs and defy the majority’s norms. Criminal activity is celebrated in such subcommunities and shaming has no effect on behavior. Gangs and terrorist organizations are examples of such subcommunities. Some scholars also claim that individual offenders may be treated differently because of the intervention of extraneous factors. Similarly, states are sometimes treated differently for the violation of the same IL norm. For example, India and Pakistan were treated more charitably than North Korea after testing nuclear weapons. These two states had greater geopolitical clout and were therefore not punished harshly for these ac-

35. See Alternative Sanctions, supra note 5, at 641.
36. Id at 630–49. This problem persists in most areas where fines are the standard punishment. For example, a fine would have been a rather weak sanction when applied to Martha Stewart because of her vast financial resources, whereas shaming can strike at a commodity that might not be so easily replaceable—her reputation.
38. Braithwaite writes that a possible result of extending shaming is that “[offenders may] associate with others who are perceived in some limited or total way as also at odds with mainstream standards.” John Braithwaite, Crime, Shame and Reintegration 67 (1989).
40. See Braithwaite, supra note 38, at 65–66 (discussing the prevalence of criminal gangs, motorcycle gangs, “and other groups which transmit criminal subcultures”).
41. See Uttara Choudhury, Seven Years after Going Nuclear, India and Pakistan Thriving, DEFENCETALK (June 2, 2005), http://www.defencetalk.com/seven-years-after-going-nuclear-india-and-pakistan-thriving-3001/ (“Based on the experiences of India and Pakistan since they tested nuclear weapons in 1998, North Korea could be forgiven for thinking the price of carrying out an atomic test is worth paying.”).
tions, whereas states such as North Korea and Iran continue to be treated harshly. \(^{42}\) Inequality and disproportionality are problems that bedevil even traditional sanctions and therefore are not fatal objections to shaming.

Other critics of shame sanctions claim that the purported costs and benefits of shaming are not as significant as proponents make them out to be. \(^{43}\) These critics refer to the cost of establishing reputations and maintaining them, as well as the dissipation of these expenditures when reputations are tarnished without visible gain. \(^{44}\) Further, shaming entails its own cost—the cost of engaging in the conduct embodying moral disapproval, whether it is the foregoing of otherwise profitable interactions, or the cost of conveying the disapproval in another manner. \(^{45}\) For example, if the United States and other nations desired to shame China for human rights violations (e.g. the suppression of Falun Gong) \(^{46}\) and chose to stop importing cheap commodities from that country, consumers would have to pay higher prices, existing business relationships would be disrupted, rogue companies that chose to defy the sanctions would have to be policed, countries that had not participated in the shaming would engage in opportunistic behavior, and so on, making the shaming costly to the enforcers. \(^{47}\)

As previously noted, shaming works best in tight-knit communities and some critics have thus argued that diverse communities do not offer conditions conducive to effective shaming because of the lack of social interdependence; \(^{48}\) social heterogeneity creates problems of definition pertaining to the kinds of offenses that might engender a feeling of shame. \(^{49}\) Moreover, the scale of large communities necessarily results in a large

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44. See Massaro, *Shame and Criminal Law*, supra note 5, at 1938.
46. For relevant background information, see THOMAS LUM, CONG. RESEARCH SERV., RL 33437, CHINA AND FALUN GONG (2006).
47. See generally Skeel, *supra* note 12 (providing a similar example in the corporate law context).
49. *Id.* at 1923. Thus, even if a particular community could theoretically impose shame on an offender, a given judge’s particular method of accomplishing that goal may still be off the mark.
volume of communications about shaming, creating an “over-
load.” The volume problem is an even larger one in IL due to
the number of actors and their potential interactions, but this
need not be overstated if the relevant community is the sham-
ing reference group. This group would be discrete enough for
communication costs to be sufficiently low and for offenses to
be observable.

In addition, and in contrast to the individual level interac-
tions relevant in domestic criminal law, nation states are
extremely interdependent. Commercial and trade linkages are so
strong that no state can afford to ignore other states without a
cost. This price might take the form of, inter alia, lost develop-
mental aid and grants, withdrawal of foreign direct invest-
ment, the flight of foreign institutional investors from the
state’s stock markets (causing security prices to fall), the de-
cline and possible collapse of a state’s currency, the embargo
of contracts with companies based in the offending state (caus-
ing the companies to lose out on profitable transactions
abroad), restrictions on the repatriation of capital to that
state, restrictions on travel to and from that state, and the

50. Id. at 1930.
51. See Rich Nielsen, Rewarding Human Rights? Selective Aid Sanctions
Against Repressive States, INT’L STUD. Q. (forthcoming 2013) (manuscript at
2–3). Nielsen’s study found that aid donors withdraw aid when repressive
acts are publicized in the media. Id. at 9.
52. See Emilie M. Hafner-Burton, Trading Human Rights: How Preferen-
tial Trade Agreements Influence Government Repression, 59 INT’L ORG. 593,
53. See Not Open for Business: Despite Elections, Investor Risk Remains
High in Burma, CONFLICT RISK NETWORK 5 n.22 (Apr. 2012), http://endgenocide.org/images/uploads/downloads/burma-not-open-for-
business.pdf.
54. See Iran Arrests 50 over Currency Decline, YAHOO! NEWS (Oct. 24,
2012), available at http://news.yahoo.com/iran-arrests-50-over-currency-
decline-122538312—finance.html.
55. See Curt Anderson, Judge Blocks Fla. Cuba, Syria Business Ties Law,
fla-cuba-syria-business-ties-law.
56. U.S. Government Eases Sanctions Against Burma, SIDLEY AUSTIN LLP
Against-Burma-07-12-2012/. See Council Decision 2012/635/CFSP, art. 4,
2012 O.J. (L 282/58).
57. See, e.g., Press Release, Council of the European Union, Human Rights
Violations: Council Tightens Sanctions Against Iran (Mar. 23, 2012),
suspension and expulsion of that state from international and regional organizations.\textsuperscript{58}

The heterogeneity objection has some teeth for a different reason—in a heterogeneous society it is difficult to define what behaviors attract shame sanctions. There are differences between nation states in regards to conduct that can be the subject of shame due to variations in national legal systems, normative structures, cultures, and moral ideas. The effect of these variations may be somewhat mitigated because, notwithstanding differences between domestic audiences about whether a state’s conduct is shameful, as long as the state has to engage with another state where it is so viewed, shaming will have a constraining effect. Thus, even though the citizens of the offending state and its leader do not regard the conduct as shameful, the very process of interaction with others who do, and express blame for such conduct, means that the state must experience some shame. A rational state might determine that such conduct has low utility and cease to engage in it. An example of such behavior is Libya’s response to the Pan-Am dispute found in Part II of this Article.

Other scholars have developed critiques focusing on the lack of procedural fairness in the deployment of shame sanctions.\textsuperscript{59} Predicated on a well-developed strain of constitutional jurisprudence establishing basic fairness protections for offenders,\textsuperscript{60} these critics claim that shaming fails the test of fairness. The critics’ argument falls into four parts: the enforcers are not neutral judges charged with legal obligations to ensure that the offender is considered innocent until proven guilty, the offender is not afforded an opportunity to defend himself adequately, there is no protection against coercion, and there is no guaran-


\textsuperscript{60} See, e.g., id. at 93 & n.251.
that precedent is considered or that punishment is proportionate to the wrong committed.61

For these critics, fairness requires the adjudicative process to adhere to a system of rule-based protections for the accused and for the ensuing punishment to be restrained by well-defined boundaries. The first part of the objection—fairness in adjudication—need not be fatal for shaming sanctions. While it is acknowledged that the lack of a tribunal can lead to a politicization of shaming as an enforcement mechanism, this cannot lead to the conclusion that it is always politicized or useless. Indeed, shaming becomes particularly useful when a given state refuses to submit itself to the adjudication of any tribunal, thereby attempting to place itself above the law. Moreover, the shaming reference group is capable of achieving acceptable levels of adjudicative neutrality, thus giving an opportunity for the accused state to defend itself, protecting against illegal coercion and taking account of precedent.

The second objection—lack of proportionality in punishment—is more difficult because of at least two different problems: delegation and dispersion. Punishment is delegated to other actors who do not always have a legal obligation to enforce it, meaning that the sanction can be empty in some instances. Dispersion refers to the multiplicity of actors in the enforcer group, resulting in different actors enforcing the punishment to varying degrees, potentially over-punishing some offenders and under-punishing others, and creating incentives for free-riding.62 Even worse, unpredictable enforcement of the primary sanction and uncontrollable secondary effects might have disproportionate consequences for some accused even without a finding of guilt.63

II. A FRAMEWORK FOR SHAMING IN INTERNATIONAL LAW

This Article attempts to develop a structure for the application of shaming in IL that accommodates the objections advanced in the domestic context and satisfies the demands of

61. Cf. id.
62. See Whitman, supra note 5, at 1088.
63. The suicide of a prosecutor who allegedly solicited a person he believed to be thirteen years of age following a Dateline NBC sting operation is a sobering reminder of the dangerous consequences. See Tim Eaton, Prosecutor Kills Himself in Texas Raid over Child Sex, N.Y. TIMES (Nov. 6, 2006), http://www.nytimes.com/2006/11/07/us/07pedophile.html.
theoretical coherence. The first challenge in the IL context pertains to the target of the shaming sanction. Who is to be shamed? Is it the state, its citizens, the regime, or a combination of all three?

A. Shaming the State

The principle of shaming the state is based on commonly understood notions of enterprise liability.64 As is the case with collectively organized forms of business, such as corporations, liability is imposed on the collective body that bears responsibility for the actions of its agents. Enterprise liability externalizes the cost of monitoring when the conduct is at the micro-level, with attendant asymmetries of knowledge, resources, and information between enforcers and offenders.65 The prospect of liability creates incentives for the entity to invest in monitoring the conduct of its agents.66 In the case of large modern companies, when agents engage in bad conduct, they are disciplined by their superiors and the chain of responsibility for monitoring stops with shareholders.

Transposing this idea at the level of the state, when public officials act in breach of their legal obligations, shame is imposed on the state, negatively affecting its self-image. There may be internal and external aspects to this shame depending upon the depth of a state’s sense of identity. Under ideal conditions, for a state with a strong sense of identity and attendant conceptions of national pride, the imposition of a shame sanction triggers internal consequences. These might be manifested by exercises in self-reflection,67 formalized institutional processes aimed at establishing the truth and identifying offenders,68

64. See Skeel, supra note 12, at 1816.
66. See Skeel, supra note 12, at 1829–32.
structural reforms, corrective legislation, punishment for offenders, reparations for victims, and apologies. In other circumstances, whether it is because a state does not have a strong sense of identity and national pride, or because a state that possesses these attributes denies wrongdoing, shaming has largely external consequences.

Under either scenario, shaming at the entity level creates incentives for better monitoring and law abidance. In some cases, such incentives might result in greater investment in the promotion of good conduct (e.g., improving the training of police or military personnel, or employing more lawyers in the defense hierarchy to ensure that operational decisions are undertaken with reference to IL) or in the monitoring function (e.g., recording equipment for custodial interrogations, anti-corruption


70. See Liz Beavers, England back in Mineral County, CUMBERLAND TIMES (Mar. 25, 2007), http://times-news.com/archive/x1540389540; Graner Gets 10 Years for Abu Ghraib Abuse, NBC NEWS (Jan. 16, 2005), http://www.msnbc.msn.com/id/6795956.UNiWfnfeeu5 (following an abuse scandal at Abu Ghraib prison in Iraq, several U.S. military personnel serving at the prison were convicted on multiple charges by court martial and incarcerated).

71. For example, Maher Arar, a Syrian-Canadian who was subjected to rendition in Syria after Canadian officials suspected him of terrorist activities, was awarded CDN$10.5 million in damages from the Canadian government following a public inquiry. Josh Tapper, Barack Obama Should Apologize to Maher Arar, Rights Groups Say, TORONTO STAR (May 22, 2012), http://www.thestar.com/news/canada/2012/05/22/barack_obama_should_apologize_to_maher_arar_rights_groups_say.html.


73. Libya’s oil industry, for example, was hit hard by U.N. sanctions imposed after the bombing of two commercial airplanes in the late 1980s. By 2001, the total cost of these sanctions to the Libyan economy was estimated to be US$18 billion by the World Bank and US$33 billion by the Libyan government. Ray Takeyh, The Rogue Who Came in from the Cold, 80 FOREIGN AFF. 62, 64 (2001). Sanctions against the Ian Smith regime in Rhodesia succeeded in making the country wholly dependent on trade with apartheid-era South Africa. Robert O. Matthews, From Rhodesia to Zimbabwe: Prerequisites of a Settlement, 45 INT’L J. 292, 301 (1990). Once Western countries managed to disrupt that trading relationship, the Rhodesian economy was brought to its knees. Id. at 327.
staff, and human rights commissions), while in other cases it translates into greater resources for enforcement (e.g., more police, courts, and prisons). In theory, the net result from the operation of these incentives is that a state acts rationally to minimize the probability of being punished because it cares about the negative consequences of shaming.

The evidence is less clear. Other things being equal, shaming sanctions appear to be imposed less frequently on stronger states than weaker states. Authors who have studied shaming by the United Nations Human Rights Commission (“UNHRC”) write that despite numerous attempts to censure China between 1991 and 2001, none proved to be successful. The study examined other variables that predicted when a state would become a target for shaming at the UNHRC. States seen to be more cooperative than others or those that made a greater contribution to common objectives were unsurprisingly less likely to be targeted by other states.

Extrapolating from the evidence, the difficulty of punishing the powerful relative to the weak is not necessarily a problem as long as punishment is attempted. The authors claim that IL affects state behavior in ways that matter for law, not that all states consistently receive equal punishment. In other words, it suffices for the authors’ model that states are targeted when violations are observed, because it is then clear that norms are being validly asserted and evaluative opinions about the offender’s conduct are being made by the shaming reference group. The ultimate success of prosecution and the degree of

74. See James H. Lebovic & Erik Voeten, The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR, 50 INT’L STUD. Q. 861, 879 (2006). During the Cold War, “a state with average capabilities was able to escape sanctions or to keep the charges against it confidential [43]% of the time; a state with capabilities one standard deviation above the mean (equivalent to Austria or Morocco) avoided more than confidential treatment [63]% of the time.” Id. at 878. The effect is only slightly less pronounced in the post-Cold War period where the values are 25% and 42%, respectively. Id.

75. See id. at 866. As the ability of Saudi Arabia and China to escape condemnation indicates, there is still good reason to be suspicious of the impartiality of the UNHCR’s public shaming process. See id. at 884.

76. During the Cold War period, a state with a perfect attendance record in the U.N. General Assembly (“UNGA”) was nearly half as likely as a country that participated only 50% of the time to have a public resolution adopted against it. Id. at 878.
punishment imposed is a function of a number of factors, not the least of which are the availability of convincing proof and the power and resources possessed by the defendant—no different from domestic law enforcement.

Shaming at the entity level is necessary because states are the primary actors in IL and regularly make promises or other contractual commitments to each other. While states might adhere to these commitments for any number of reasons, coercive enforcement is necessary if these commitments are to be regarded as legally binding. Therefore, a key test of these commitments is whether there is enforcement in practice. Lebovic and Voeten’s study examined the consequences for states that ratified the International Covenant on Civil and Political Rights (“ICCPR”) and found that “[d]uring the Cold War, targeted states that ratified the ICCPR treaty were more than twice as likely (a mean predicted probability of 0.79 vs. 0.33) to be shamed by public resolution than were other states.” It seems that when states ratify pieces of international law, they create a set of contractual expectations about their subsequent conduct. The architecture of a particular international legal instrument sets the contours for the legal obligations assumed by the ratifying state and provides criteria for other states to make evaluative judgments about whether behavior matches up with performance expectations.

77. Id. at 878. “[C]ommitting publicly to uphold a set of human rights norms does carry political consequences: states that have made a formal promise are held to a higher standard than states that have not done so,” Id.
78. The study by Lebovic and Voeten revealed that members that signed and ratified the ICCPR treaty judge target states that also committed to the treaty more harshly than states that did not and conclude that shaming practices in the UNHRC are based, in part, by a desire to hold states accountable for their commitments. . . . [C]ountries that ratified the ICCPR treaty do not appear to share characteristics, e.g., human rights records, that explain the precipitous rise in the probability of a vote to punish a target when the target and voter are both parties to the ICCPR treaty.

Id. at 882.
79. “[S]tates did not get favorable treatment from the commission merely by paying lip service to important principles.” Id. at 885. To the contrary, the acts of signing and ratifying a treaty or achieving formal membership within IOs seem to contribute directly toward reputation-building in the international community. See id. If these agreements and memberships matter, it is in “rais[ing] expectations when members of the community evaluate[] the
A complicating factor for shaming at the entity level is its politicization.\textsuperscript{80} This is particularly problematic at the multilateral organization level when there is capture by partisan interests. One study of practice at the UNHRC found that during the Cold War, alignment with the United States greatly increased the prospect that countries would be subject to severe sanctions.\textsuperscript{81} This likelihood declined after the Cold War, but states were more likely to favor countries with similar alliances and to oppose countries with dissimilar alliances.\textsuperscript{82} This conclusion is further reinforced by the impact of a convergence in domestic ideology.\textsuperscript{83}

While the authors acknowledge that politicization is problematic for shaming in IL, it is fairly endemic in all international relations and need not be a fatal objection. Japan’s foreign aid policy is a good example of politicization. Japan has been particularly transparent about using its foreign economic aid program to influence the behavior of other states. This extends to whether or not a recipient state votes in the U.N. General Assembly (“UNGA”) in conformity with Japanese foreign policy objectives. France is another example: one study found that the average developing country voted in the same direction as France 64% of the time in the UNGA.\textsuperscript{84} One standard deviation in voting behaviour, an increase to voting with France 73\% of the time, resulted in a 96\% increase in foreign aid to that country.\textsuperscript{85} Similarly, a standard deviation in voting in favor of the United States resulted in an increase of U.S. aid by 78\% to the country voting the “right” way, while one standard deviation in voting in favor of Japanese policies resulted in a staggering 345\% increase in Japanese foreign aid to that nation.\textsuperscript{86}

\textsuperscript{80} “[F]oreign policy positions, as measured by [votes] in the UNGA, has a significant and strong influence over whether a state voted \textit{not} to punish other (hence, the negative coefficients) in both the Cold War and post-Cold War periods.” \textit{Id.} at 883.

\textsuperscript{81} \textit{Id.} at 878.

\textsuperscript{82} \textit{Id.} at 883.

\textsuperscript{83} \textit{Id.} at 882.


\textsuperscript{85} \textit{Id.}

\textsuperscript{86} \textit{Id.}
Such beneficence has also been used to coerce other states into compliance with the favored agenda of the donor. Japan is alleged to have dispatched a delegation to Geneva shortly before the 2004 World Trade Organization (“WTO”) General Council meeting in an effort to coerce weaker states to conform to its platform. Asian countries in receipt of Japanese aid were reportedly told that if they contravened vital Japanese objectives at the Council meeting—having the so-called three Singapore issues (investment, competition, and transparency in government procedure) dropped from the agenda—Japan’s support for the development of their infrastructure could be at risk.87

Most notoriously of all, Japan uses its clout to punish and reward weak states for their stance vis-à-vis the whaling industry. At the International Whaling Commission (“IWC”), Japan not only pays members of the IWC to vote in its interests, it also pays nations to join the organization via its Overseas Development Assistance program.88 For each 10% increase in the number of votes a recipient state cast in favor of Japan at the IWC between 1999 and 2004, it received an increase of US$2.10 per capita in aid.89 When a nation votes in Japan’s interests at the IWC, it receives an economic reward in the form of development aid; when a nation fails to conform to this behavior, it is punished by having aid withheld. Thus, far from using its clout to enforce compliance with IL, Japan punishes states that comply more fully with what many would regard as positive developments in international environmental law, namely the protection of endangered species.

It is thus necessary to employ caution in sifting between behavior that seeks to move states into compliance with a third state’s foreign policy objectives, and that which seeks to move them into compliance with IL norms. The former will often simply deprive the recalcitrant state of a covetable good,

88. Ofer Eldar, Vote-Trading in International Institutions, 19 Eur. J. Int’l L. 3, 35 (2008). Chief recipients include “St. Lucia, St. Vincent, St. Kitts and Nevis, Grenada, Dominica and Antigua, and Barbuda,” all of which vote with Japan on virtually every issue before the IWC. Id.
whereas the latter will usually explicitly link economic harm or reputational damage to a violation of IL. Shaming is more likely to do the latter.

Despite the above examples of politicization in international relations, states are not as hypocritical as might have been expected in imposing shame sanctions on other states. At least one study found that states with good domestic records were more liable to shame other states at the UNHRC than states with poor records for human rights protections at the domestic level. This did not hold true when there was a strong history of religious or ethnic conflict between states.

B. Shaming at Work: Libya and Sri Lanka

Shaming at the entity level has an additional problem: unsatisfactory determination of responsibility for wrongdoing and punishment without identifying the actual offenders. This is illustrated by the treatment of Libya following the Lockerbie incident. On September 21, 1988, a bomb was placed on Pan Am flight 103, travelling from London to New York. The bomb exploded as the plane flew over Lockerbie, Scotland, “killing all 259 people on board and eleven on the ground.” The victims were mainly American and British nationals. After nearly two decades of low-level military attacks and counter-attacks between the United States and Libya, the latter was not held in high esteem in the Western world and international suspicion gravitated towards it.

Following a prolonged investigation, indictments for murder were issued by both the United States and Scotland against Abdelbaset al-Megrahi and Lamin Khalifa Fhimah (both Liby-

The Lockerbie case provides useful material for the study of IL enforcement, as the resulting shaming directed at Libya was very much cast in terms of IL violations. If al-Megrahi and Fhimrah were responsible for the bombings and if they were acting under orders from the Libyan State, there was a breach of the 1971 Montreal Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation.\footnote{See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 10, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 178.} Assuming the suspects acted on their own volition, a breach of Article 11 of the 1971 Convention would arise. The states affected by the bombings—the United States, U.K., and France—are all permanent members of the U.N. Security Council (“S.C.”). As such, they utilized their position to ensure that any ambiguities about whether a breach of IL had occurred were addressed.

Working together, the United States, U.K, and France were able to convince the S.C. to pass several resolutions. S.C. Res. 731 qualified the Lockerbie incident as an act of “international terrorism” that constituted a threat to international peace and security, and also referred to earlier Resolutions 286 and 635, which obligated states to refrain from interfering with international civil aviation.\footnote{S.C. Res. 731, pmbl., U.N. Doc. S/RES/731 (Jan. 21, 1992) (the preamble starts by stating that “[d]eeply disturbed by the world-wide persistence of acts of international terrorism in all its forms. . .”). Paragraph 2 rebukes the Libyan government for failing to “cooperate fully in establishing responsibility for the terrorist acts referred to above against Pan-Am flight 103.” Id. ¶ 2. Finally, Paragraph 3 provides that the Libyan government act in such a way “so as to contribute to the elimination of international terrorism.” Id. ¶ 3.} S.C. Res. 748 added to this with an interpretation of Article 2(4) of the U.N. Charter to the effect that
“every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force.” Resolution 748 also specifically stated that Libya’s failure to cooperate (by refusing to extradite al-Megrahi and Fhirmah) “constitute[d] a threat to international peace and security.” Resolution 748, instituted under Chapter VII, demanded compliance with (non-binding) Resolution 731, which had in turn demanded that Libya comply with the United States’ and U.K.’s requests for the suspects’ extradition.

Resolution 748 also imposed sanctions on Libya, which were to last until compliance was achieved. These included denying overflight rights to aircraft flying to or from Libya, denying Libya any aircraft or parts thereof, denying arms or arms training, and curtailing diplomatic activity. These sanctions were later tightened via S.C. Resolution 883. Whether or not Libya was in violation of the 1971 Montreal Convention, it was now certainly in violation of international law in the form of S.C. Resolution 748.

This in itself points to a state’s desire to be seen not as unilaterally imposing what they view as “right” via methods such as shame, but as agents of law enforcement within a legal framework. Shame is thus very much a tool of IL enforcement. That the goal of the United States, the U.K., and France in passing S.C. resolutions on the topic was to alter the legal parameters of the incident is confirmed by the fact that they explicitly referred to this alteration as the only relevant law during later proceedings before the International Court of Justice (“ICJ”).

102. Id.
103. Id.
104. See S.C. Res. 731, supra note 100, ¶ 3.
105. S.C. Res. 748, supra note 101, ¶¶ 4–6(a).
Libya also adopted a legalistic stance on the issue, turning to the ICJ\textsuperscript{108} and asking the court to declare that it had complied with all of its obligations under the Montreal Convention, affirm that the United States and U.K. were obliged to desist from using force or the threat thereof against it, and grant temporary relief.\textsuperscript{109} The court declined the plea for temporary relief,\textsuperscript{110} but eventually determined that it had jurisdiction and that the case centered on differing interpretations of Articles 7 and 11 of the Montreal Convention.\textsuperscript{111} The court did not take S.C. Resolutions 748 and 883 into consideration when determining its jurisdiction, as these resolutions had been passed after Libya filed the case.\textsuperscript{112}

The legal basis of the case against Libya was thus weaker than the United States and U.K. had hoped it would be.\textsuperscript{113} This, however, was at best a Pyrrhic victory for Libya, as it had already very much been “tried in the press” and its international reputation was in tatters. Firmly cast in the role of “rogue State,” Libya was increasingly isolated by erstwhile trading partners, such as Germany and Italy, and left bereft of a superpower patron after the collapse of the Soviet Union,\textsuperscript{114} while Western states rolled out the red carpet to revolutionary figures such as Yasser Arafat and Nelson Mandela—both of whom had received considerable aid from Gaddafi at the lowest

\textsuperscript{110} See Libya v. United States, Provisional Measures, 1992 I.C.J. at 127.
\textsuperscript{111} Aerial Incident at Lockerbie, Preliminary Objections, 1998 I.C.J. ¶¶ 28, 32, 35.
\textsuperscript{112} Id. ¶¶ 37, 43, 44.
\textsuperscript{113} See id. ¶ 38.
\textsuperscript{114} Takeyh, supra note 73, at 63, 64.
points of their struggles, and neither of whom were less violent in pursuing their goals.

To compound the issue, Libya continued to refuse to extradite the two suspects to the United States or U.K., claiming the suspects would not receive a fair trial. Libya did offer to extradite them to Malta (where the bomb was set in motion), an offer that was rejected on the grounds that Malta’s geographic proximity to Libya would render it subject to improper influence. In 1994, Libya offered to hand over al-Megrahi and Fhirmah for trial under Scottish law in the Netherlands; this too was initially rejected. However, as third nations began to voice objections to the U.N. sanctions against Libya, the United States and U.K. thawed in their attitudes.

Under these conditions, Gaddafi reached a compromise with the United States and U.K. by which they would accept a trial under Scottish law in the Netherlands. U.N. monitors would be stationed in the Scottish prison should the suspects be convicted and subsequently serve their sentences there, and it was rumored that the prosecution would agree in advance not to attempt to trace orders for a bombing to Gaddafi himself. Furthermore, the trial would be conducted by a judge, not jury. This deal was accepted and al-Megrahi and Fhirmah were duly handed over in 1999, while the U.N. suspended sanctions against Libya via S.C. Resolution 1192. Al-Megrahi was convicted and Fhirmah was acquitted.

115. Id. at 64.
118. Id.
119. Id.
120. Id.
121. Id.
122. Id.
123. Id.
124. Id.
was not entirely convincing, and the judgment itself was heavily criticized, but the decision allowed all nations involved to move on from the incident.

Although U.N. sanctions were suspended in 1999, Libya—which had suffered an estimated US$18 billion in lost revenue while they were in place—wanted them cancelled. To achieve this, it agreed to pay US$2.7 billion in compensation to the victims’ families, to be released in several tranches. The first tranche would come with the cancellation of U.N. sanctions, and these were duly lifted on September 12, 2003. Libya never admitted guilt for the Lockerbie bombings, but issued a letter to the U.N. in 2003 stating that it “accept[ed] responsibility for the actions of its officials.” The United States, U.K., and Libya also removed the pending ICJ decision from the


128. Takeyh, supra note 73, at 64.


130. UN Lifts Sanctions Against Libya, GUARDIAN (Sept. 12, 2003), http://www.theguardian.com/uk/2003/sep/12/lockerbie.libya.

court’s docket through a joint statement in 2003. In 2005, American energy companies began investing in Libya and full diplomatic relations were restored in 2006.

The result seems to be that even absent convincing evidence about Libya’s responsibility for the Lockerbie bombing, the state experienced the full external consequences of a shame sanction. This is a powerful example of the coercive power of shaming, all the more so if Libya was in fact innocent. Not only was Libya coerced by shaming, the enforcer states may have succeeded in deterring other states contemplating similar terrorist actions by making the action extremely costly. If Libya was in fact responsible, the case provides a good example of shaming as an effective tool to enforce IL rules following the correct identification of the offender through a law enforcement framework.

Sri Lanka offers another example of IL enforcement vis-à-vis shaming. Following the conclusion of the military campaign commenced under the leadership of President Mahinda Rajapaksa against the Liberation Tigers of Tamil Eelam (“LTTE”), which resulted in over 40,000 civilian deaths, thousands of Tamils continue to be housed in temporary camps. Camp conditions are horrific both in physical and human rights terms; many are allegedly being held incommunicado for suspected links with the LTTE. In addition, there are allegations that the media has been intimidated through killings, torture, disappearances and detentions.

133. A History of Libya’s Ties with the US, supra note 94.
136. Id.
The government’s vociferous denials of wrongdoing have been dented by video and other evidence of troops executing bound captives;\(^{138}\) a U.N. expert confirmed that a mobile phone video showing one such killing was genuine after three forensic experts viewed the footage.\(^{139}\) There is evidence that some of these gross abuses were authorized at the highest levels of command: Amnesty International Asia Program Director Sam Zarifi claimed that execution orders had been issued by the defense secretary, who is also the president’s brother.\(^{140}\) A 2009 U.S. State Department report documented that Sri Lankan government forces shelled civilian areas and caused deaths before the expiry of a publicly announced ceasefire.\(^{141}\) Captives and combatants who sought to surrender were allegedly slaughtered.\(^{142}\) The report also documented cases of disappearances and killings in custody.\(^{143}\) A similar report has been issued by Amnesty International.\(^{144}\)

The international community has repeatedly called upon Rajapaksa to remedy human rights violations.\(^{145}\) After its pleas were ignored, the EU suspended the Generalised System of
Preferences Plus (“GSP+”) for Sri Lanka. The GSP+ concessions are extremely important as goods from countries accorded GSP+ are offered reduced tariffs when entering the EU market. Sri Lanka’s suspension was based on a European Commission investigation concluding that Sri Lanka was in breach of the International Covenant on Civil and Political Rights, the Convention against Torture, and the Convention on the Rights of the Child. The EU’s actions in this instance carried some punch: imports from Sri Lanka under GSP+ amounted to €1.24 billion in 2008 and the Sri Lankans depend heavily on the EU because it is their largest export market. This is not the only tool in the EU’s box; it could suspend Sri Lanka from GSP+ treatment altogether despite there being no human rights requirements under that scheme.

The EU was not alone in shaming Sri Lanka. The UNHRC voted in March 2012 to urge Sri Lanka to investigate human rights violations. This was in response to a desperate campaign, both of persuasion and intimidation, launched by the Sri Lankans to stop the passage of the resolution. The resolution also encouraged “the [Sri Lankan] government to implement the recommendations of its own Lessons Learnt and Reconciliation Commission.” The Sri Lankan government lobbied foreign states via telephone calls and meetings and tried to intimidate civil rights groups travelling to the meeting. Why would Sri Lanka engage in such acts if shaming is not powerful?

149. EU Temporarily Withdraws GSP+ Trade Benefits from Sri Lanka, supra note 146.
150. Even under the reformed GSP rules, suspension of Sri Lanka remains well within the EU’s possibilities. See Council Regulation 978/2012, art. 8, 2012 O.J. (L 303) 6.
153. Id.
This is not the only instance of such behavior. In May 2009, the EU sought to initiate a resolution against Sri Lanka at the UNHRC by calling a special session.\textsuperscript{154} Sri Lanka, in a smart procedural tactic, tabled its own resolution before the EU could make its proposal, ensuring that Sri Lanka’s resolution would be the basis for negotiation.\textsuperscript{155} It lobbied other states and defeated the EU’s amendments.\textsuperscript{156} These and other actions show that the Sri Lankan government is acutely aware of the coerciveness of shaming and acts aggressively to resist the imposition of shame sanctions just as it might resist traditional sanctions.

In sum, shaming the state comports with familiar notions of attributive liability. As is the case with the traditional punishments imposed on entities under domestic law, shaming entails similar but nonfatal objections: partisanship, sensitivity to economic and power influence, flaws in identification of actual offenders, and lack of proportionality.

C. Shaming the Regime, Government, or Ruler

Shaming the regime or government, rather than the state at the entity level, may be necessary when the latter is either incongruent with blame for the wrong or when shaming the entity is ineffective. Several reasons for this divergence exist. First, the relationship between the offending public officials and the citizens of the state is likely to be quite attenuated. Under such circumstances, imposing shame on the state is both unfair and ineffective: unfair because the sanction punishes innocent people and ineffective because there is no congruence between the offender and the citizenry. In other words, the average citizen is unlikely to experience shame due to the actions of a small number of public officials over whom he has little direct control and whose actions he may not have initially approved. This is exacerbated in states where the regime is in power without popular support. Second, the heterogeneity in many modern states makes it difficult to find sufficient congruity of interests

\begin{itemize}
\item \textsuperscript{155} Id.
\item \textsuperscript{156} Karen Smith, The European Union and the Politics of Legitimization at the United Nations, 18 EUR. FOREIGN AFF. REV. 63, 75–76 (2013).
\end{itemize}
within a domestic population for strong feelings of identity to exist. Even where such strong national identities exist, these may not always inure to the benefit of a ruling group. For example, many Middle Eastern states possess strong Islamic identities, but there is a division between the regime and the population where issues involving international relations are concerned.

Some of the conceptual difficulties to shaming the state as an entity can be resolved by shaming the responsible regime instead. Even so, fairness requires that shame should be restricted to the individual offenders rather than extended to the entire government. For example, shaming the Iraqi government for its invasion of Kuwait in 1991 would punish people who either had nothing to do with the invasion or who had objected to it. Given that dissent and resignation from the government were not realistic options for individuals in the government for fear of Saddam Hussein, shaming the Iraqi government as a whole would be particularly cruel.

One response might be to limit shaming to the ruler when the decision is made by him or at his behest. This has the virtue of protecting innocent actors from undeserved punishment. However, for such shaming to be effective, the state has to be ruled by an individual with real decision-making authority and power over subordinates. In an ideal scenario, shaming triggers both an internal and external response by the ruler. The response is internal in the sense that the ruler experiences moral shame and undertakes corrective action to punish wrongdoers, compensate victims, and prevent future occurrences because he genuinely believes that the conduct is wrongful.\textsuperscript{157} In less ideal conditions, the response might be purely external: faced with the shame sanction, the ruler takes some action to assuage external actors while continuing to covertly condone or ignore the wrong. These externally directed actions might be accompanied by denials of any wrongdoing.\textsuperscript{158}

Shaming the ruler comes with its own set of incentive effects. A rational ruler will factor in the cost of shaming before engaging in any conduct with international implications. If the bene-


\textsuperscript{158} Id.
fits of the conduct exceed the potential cost from the shaming, the probability of detection, or a combination of both, the rational ruler might engage in that action. If the cost exceeds the benefits, a rational ruler will forego the action. A rational ruler might also attempt to hide misconduct by lower level functionaries, because it is only when the misconduct receives widespread public scrutiny that responsibility shifts from lower level officials to the ruler with the prospect of shaming. Thus, one of the unintended consequences of shaming the ruler might be to create incentives for suppressing information about wrongs committed by lower level officials.

The coercive power of shaming at the individual level is variable. For example, rulers with strong claims to moral or ethical leadership, whose grip on power is infirm, who need good


161. Religious leaders in particular, such as the Pope or Dalai Lama, could be susceptible to shaming in this sense. While Vatican officials initially reacted sluggishly to a stream of sex abuse scandals, plummeting approval ratings and religious disenfranchisement seem to have prompted more appropriate reactions. See id. In a recent interview, the Vatican’s top official on the issue, Monsignor Charles Scicluna, admitted that the Catholic Church had been in denial over the issue of clerical sexual abuse, characterized the denial as “a primitive coping mechanism,” and announced that the Church would be holding a four-day symposium on the matter in the near future. Philip Pullella, Denial No Option in Sexual Abuse Scandal: Vatican, REUTERS (Feb. 3, 2012), http://www.reuters.com/article/2012/02/03/us-vatican-abuse-idUSTRE8121F420120203. Scicluna also acknowledged the Church’s duty to cooperate with civil authorities in investigations. Id.

162. For example, when Mohamed Nasheed was forced to resign as President of the Maldives on February 7, 2012 and a “political crisis” resulted, the Commonwealth supported Nasheed’s call for early elections to clarify the situation and suspended the country from the Commonwealth Ministerial Action Group (the organization’s human rights observatory) on the grounds that the country was itself currently “under scrutiny by the Group itself.” Maldives Crisis: Commonwealth Urges Earlier Elections, BBC NEWS (Feb. 23, 2012), http://www.bbc.co.uk/news/world-asia-17135582. In the initial days following the bloodless coup, when relative power positions were still unclear, the new President, Mohamed Waheed, seemed responsive to the Commonwealth’s criticism. See Peter Griffiths, Commonwealth Suspends Maldives
reputations to join regional associations or trade groups,163 who need to attract international investment,164 who need loans from multilateral lending agencies,165 and who need support

from Rights Group, Seeks Elections, REUTERS (Feb. 23, 2012), http://in.reuters.com/article/2012/02/22/maldives-commonwealth-idINDEE81L0JO20120222; Maldives Crisis, supra. Once Waheed had somewhat consolidated his grip on power, he pushed elections back from late 2012 to July 2013, a date still several months ahead of his own original schedule. Maldives President Waheed Hassan Sets Elections for 2013, BBC NEWS (Apr. 18, 2012), http://www.bbc.co.uk/news/world-asia-17762963. This may have been due to the fact that the Maldives continued to experience episodes of civil unrest. See Will Jordan, The Maldives: Mired in Presidential Intrigue, AL-JAZEERA (Sept. 4, 2012), http://www.aljazeera.com/indepth/features /2012/09/20129116544631378.html.

163. In this context, one could consider Turkey’s long-running efforts to join the EU, which have required it to undertake a number of human rights-related reforms, such as abolishing the death penalty, increasing linguistic rights for minorities, and passing a new penal code aimed at curtailing gender-based violence and other serious inequalities. Helena Smith, Human Rights Record Haunts Turkey’s EU Ambitions, GUARDIAN (Dec. 13, 2004), http://www.guardian.co.uk/world/2004/dec/13/eu.turkey1. See CODE CRIMINAL [C. CRIM.], arts. 3(2), 46, 102, 122 (Turk.). According to the Turkish Minister for European Affairs, Egeman Bagis, “[s]ince 2011, Turkey has adopted 320 laws and 1,555 secondary regulations to harmonise its national legislation with the EU acquis,” while “[t]he Turkish government maintains that the new constitution being drafted by a parliamentary committee will comply with EU standards.” Menekse Tokyay, Turkey’s EU Bid Faces Opportunities and Challenges in 2013, SETIMES.COM (Dec. 24, 2012), http://setimes.com/cocoon/setimes/mobile/en_GB/features/setimes/articles/201 2/12/24/reportage-01.

164. Libya, for example, eventually agreed to extradite two suspects in the Pan-Am bombing and to pay compensation to the victims’ families following a decades-long shame campaign spearheaded by the United States and the U.K. Key Facts: Libya Sanctions, supra note 95. The removal of sanctions that followed permitted Libya to normalize its aviation industry and to attract much needed foreign investment to fully exploit its oilfields. See John H. Donboli & Farnaz Kashefi, Doing Business in the Middle East: A Primer for U.S. Companies, 38 CORNELL INT’L L.J. 413, 450–51 (2005); Jad Mouawad, Libya Tempus Executives with Big Oil Reserves, N.Y. TIMES (Jan. 2, 2005), http://www.nytimes.com/2005/01/02/business/02libya.html.


166. Israel, for example, enjoys a human rights record that is far from spotless, but also takes care not to endanger support from its key allies: the United States, the U.K., and Germany. Examples include complex and rigorous rules regarding targeted assassination (intended to minimize civilian casualties), see generally HCJ 769/02 Pub. Comm. Against Torture in Isr. v. State of Isr. 46 I.L.M. 375 [2005] (Isr.), efforts to keep its nuclear weapons program low-key, and efforts to comply with provisions of the Geneva Conventions mandating civilian protection, such as leaflet drops warning Gaza residents to keep away from Hamas buildings before air raids. See Olga Kazan, Israeli Army Drops Warning Leaflets on Gaza, WASH. POST BLOG (Nov. 15, 2012, 8:50 AM), http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/15/israeli-army-drops-warning-leaflets-on-gaza/.

167. In 2008, Robert Mugabe was stripped of his honorary British knighthood that had been bestowed upon him in 1994 “as a mark of revulsion at the abuse of human rights and abject disregard for the democratic process in Zimbabwe over which President Mugabe has presided.” Mugabe Is Stripped of Knighthood as ‘a Mark of Revulsion,’ SCOTSMAN (June 25, 2008), http://www.scotsman.com/news/uk/mugabe-is-stripped-of-knighthood-as-a-mark-of-revulsion-1-1077561. In close temporal proximity, Mugabe was stripped of several honorary degrees he had been awarded by Western universities in the 1980s and 1990s. See, e.g., Paul Kelbie, Edinburgh University Revokes Mugabe Degree, G UARDIAN (July 14, 2007), http://www.theguardian.com/uk/2007/jul/15/highereducation.internationaleducationnews; Michigan State Revokes Mugabe’s Honorary Degree, DIVERSE (Sept. 16, 2008), http://diverseeducation.com/article/11685. This does not seem to have had much impact on Mugabe, as his chief spokesperson George Charamba is quoted as saying “[Mugabe] does not lose sleep over threats. . . . Honorary degrees are exactly that, an unsolicited honor from the giver. If anything, those Western universities improved their international profile by associating themselves with the president.” Angus Shaw, Mugabe Not Both ered by Moves to Strip Honorary Degrees, BOSTON.COM (Apr. 25, 2007), http://www.boston.com/news/education/higher/articles/2007/04/25/mugabe_not_bothered_by_moves_to_strip_honorary_degrees/.

168. Hugo Chavez was a good example of such a figure. Chavez is perhaps most infamous for “leading the ‘Bolivarian revolution’ against the ‘empire’ (i.e., the United States).” Hugo Chávez’s Rotten Legacy, ECONOMIST (Mar. 9, 2013), http://www.economist.com/news/leaders/21573106-appeal-populist-autocracy-has-been-weakened-not-extinguished-hugo-ch%C3%A1vez-rotten. At a press conference on August 2, 2012, Chavez denounced European nations for funding Syrian rebels/terrorists in the ongoing conflict in that country. Venezuela’s President Hugo Chavez Criticizes West over Syria, G UARDIAN (Aug. 2, 2012), http://www.guardian.co.uk/world/video/2012/aug/02/venezuela-
ternal justifications for their actions are unlikely to be responsive to shaming. These effects are exacerbated if the ruler is also from a powerful country with substantial bargaining power. Under such circumstances, a ruler is likely to be less responsive to shame sanctions because of the strategic or economic importance of his country.


169. For example, the Taliban destroyed the irreplaceable Bamiyan Buddhas in 2001 due to “a religious obligation to destroy idols,” despite an international outcry that included several countries, including Iran, offering to purchase the historical statues. Alex Spillius, Taliban Ignore All Appeals to Save Buddhas, TELEGRAPH (Mar. 5, 2001), http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/1325119/Talibann-ignore-all-appeals-to-save-Buddhas.html.

170. China and Russia have both been able to use their permanent seats on the Security Council to avoid action on Tibet and Chechnya, respectively. See Abdul Rahman Al-Rashed, With Chechnya and Tibet in Mind, AL ARABIYA (Oct. 3, 2012), http://www.alarabiya.net/views/2012/10/03/241553.html. Despite the personal popularity for the Dalai Lama and the Tibetan cause in many Western States, China’s rising importance has ensured that the issue has slipped off the international agenda. See Kim Arora, Dalai Lama’s Popularity Is Key to Tibet Cause, TIMES OF INDIA (Mar. 12, 2011), http://articles.timesofindia.indiatimes.com/2011-03-12/india/28683445_1_kalon-tripa-karmapa-lama-tibetans.

Even so, unless the ruler has egregious criminal tendencies,\footnote{Examples of this type of ruler include Idi Amin of Uganda and Pol Pot of Cambodia. Idi Amin’s rule has been described as “a synonym for barbarity,” and Amin himself as “possess[ing] a kind of animal magnetism,” which he wielded “with sadistic skill.” Patrick Keatley, \textit{Obituary: Idi Amin}, \textit{GUARDIAN} (Aug. 17, 2003), http://www.theguardian.com/news/2003/aug/18/guardianobituaries/print. Amin attributed God-like powers to himself and exhibited such irrational behavior that some foreign leaders who had contact with him came to conclude that he was “a dangerous, unbalanced man.” \textit{Id.} Amin was ruthless in dealing with real and imagined political opposition, and his reign caused the deaths of an estimated 300,000 people, \textit{id.}, for often erratic reasons and via sadistic methods such as beating them to death with sledge hammers. \textit{See \textit{Death of a Buffoon and Killer}}, \textit{SCOTSMAN} (Aug. 17, 2003), http://www.scotsman.com/news/international/death-of-a-despot-buffoon-and-killer-1-1292740. Pol Pot, who ruled Cambodia from 1975–1979 as leader of the Khmer Rouge, went so far in his effort to force Cambodia into his idea of a Communist country as to kill all intellectuals, a term so widely interpreted at times as to include anyone who wore glasses or spoke a foreign language. \textit{Pol Pot: Life of a Tyrant}, \textit{BBC NEWS} (Apr. 14, 2000), http://news.bbc.co.uk/2/hi/asia-pacific/78988.stm. His many ill-conceived policies, which included emptying all urban areas and forcing Cambodians to continually use the pronoun “we” instead of “I,” resulted in the deaths of up to 25% of the population. \textit{Pol Pot’s Cambodia: A Dark Century’s Blackest Cloud}, \textit{ECONOMIST} (Nov. 4, 2004), http://www.economist.com/node/3352737.} he will be responsive to shaming on a scale that varies from weakly responsive to strongly responsive. If the ruler enjoys widespread domestic support and has a weak opposition,\footnote{Robert Mugabe of Zimbabwe provides a helpful example. Support for Mugabe’s chief opposition, the Movement for Democratic Change (“MDC”), fell from 38% in 2010 to only 20% in mid-2012. Lydia Polgreen, \textit{Less Support for Opposition in Zimbabwe, Study Shows}, \textit{N.Y. TIMES}, Aug. 22, 2012, at A10. The MDC has faced many challenges, including attempting to pacify a diverse supporting base of its own and a leadership weakened by treason accusations and Mugabe’s populist policies, such as accelerated land redistribution. \textbf{CHRIS MAROLENG, \textit{SITUATION REPORT: ZIMBABWE’S MOVEMENT FOR DEMOCRATIC CHANGE: BRIEFING NOTES 2–4} (2004), \textit{available at} http://dspace.cigilibrary.org/jspui/bitstream/123456789/31353/1/ZIMMAY04.pdf.} or is a dictator without any resistance, he will be weakly responsive to shaming at best. Similarly, if the ruler thrives on challenging the dominant international structure or is leading a revolutionary government fighting against claimed injustices perpetrated by foreign actors, shame has little chance of succeeding unless members of that state’s shaming reference
group participate.\(^{174}\) To the contrary, shaming by dominant international actors in such cases serves to establish that ruler’s reputation for fearlessness and in some cases can be effectively utilized to buttress his or her position amongst his domestic constituency.\(^{175}\)

This sort of impotency can have disturbing consequences. Perversely, the international community’s attempts at punishing those who violate international norms might bring to power the very sorts of rulers who have the greatest tendency to violate those norms. A state’s population might elect individuals they perceive to be most hostile to a dominant power that is a proponent of such IL norms in an attempt to signal resistance, and shaming in such circumstances becomes counterproductive. One example of this is the case of former Chancellor Schroeder of Germany, who was trailing in opinion polls before masterfully employing his opposition to U.S. policies in Iraq to stage a stunning victory.\(^{176}\)

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174. Slobodan Milosevic, for example, always positioned himself as the defender of the Serbian people against foreign aggression. See Wife Hails Milosevic the ‘Freedom Fighter,’ BBC News (Sept. 7, 2001), http://news.bbc.co.uk/2/hi/europe/1529200.stm. In a 2001 BBC interview following his extradition to face war crimes charges at The Hague, Milosevic’s wife Mira Markovic proclaimed, “I don't feel any shame. On the contrary, I’m proud of my people and I am sure that throughout its history it pursued—as far as wars are concerned—a defence policy.” Id. Mrs. Markovic blamed Western powers for the bloodshed in the former Yugoslavia and claimed that Mr. Milosevic was an inspiration to “many poor, small and humiliated nations throughout the world.” Id. Milosevic himself phoned Fox News from his cell to give a live interview where he stated, “I'm proud for everything I did in defending my country and my people.” Milosevic Gives TV Interview from Cell, BBC News (Aug. 24, 2001), http://news.bbc.co.uk/2/hi/europe/1507660.stm.

175. The most recent example of this is Mr. Hugo Chavez, the former president of Venezuela, who made his global reputation almost entirely on being anti-United States. He seems to have profited from this reputation, and U.S. attempts at shaming were impotent when applied to him. Another example is Mr. Ahmedinejad of Iran. See generally sources cited and accompanying text supra note 168.

Notwithstanding these features, shaming at the regime level offers valuable insights. Burma offers a helpful case study. Until 1988, Burma was ruled under a one-party military-socialist system. In the wake of political upheaval that year, General Saw Maung seized power and formed a ruling council that implemented a capitalist society, albeit under military control. Following this unexpected electoral outcome, the military refused to cede power and placed the NLD’s General-Secretary, Aung San Su Kyi, under house arrest. Over the next twenty years, the ruling military junta was accused of a host of grave violations of basic human rights including forced labor, the use of child soldiers, forced relocation, summary executions, torture and the rape of women and girls, particularly of members of ethnic minorities.

From 1991, the UNGA passed a steady stream of resolutions on Burma, mainly focused on addressing democratization, human rights, and the release of political prisoners. Although these resolutions often employed “soft” diplomatic terms, such as the expression “of grave concern,” there were also examples of language that was clearly pejorative and expressive of a

178. Id. at 208. It was around this time that the country was officially renamed “Myanmar.” Burma Takes Another Name: Now, the Union of Myanmar, N.Y. TIMES (June 20, 1989), http://www.nytimes.com/1989/06/20/world/burma-takes-another-name-now-the-union-of-myanmar.html.
179. Lim, supra note 177, at 208.
180. Id. at 208–09.
value judgment regarding the junta’s conduct, such as “condemning” or “deploring” their actions.\textsuperscript{184} For instance, UNGA Resolution 56/231, adopted in 2001, “[d]eploring the continued violations of human rights in Myanmar, including extrajudicial, summary or arbitrary executions, enforced disappearances, rape, torture, inhuman treatment, forced labour, including the use of children, forced relocation and denial of freedom of assembly, association, expression, religion and movement.”\textsuperscript{185}

Other international organizations also repeatedly condemned human rights abuses in Burma,\textsuperscript{186} with the International Labour Organization (“ILO”) going so far as to “urge” its members in late 2000 to impose sanctions on Burma unless it improved its track record on forced labor.\textsuperscript{187} This ultimatum, yielded results: Burma “allowed the ILO to open an office in [its territory] in 2002” and agreed on a plan of action to end forced la-


\textsuperscript{185} G.A. Res. 56/231, supra note 184, ¶ 4. The resolution also stated that the UNGA “[d]eplores the continued violations of human rights, in particular those directed against persons belonging to ethnic and religious minorities, including summary executions, rape, torture, forced labour, forced porterage, forced relocations, use of anti-personnel landmines, destruction of crops and fields and dispossession of land and property.” Id. ¶ 18.


The World Bank also sought to put pressure on the junta by cutting off lending to Burma and tying any minor loans to a willingness to institute reforms.189

Individual states also took action against the regime. The initial sanctions, which were put in place between 1988 and 1990, were explicitly linked to violations of internationally recognized workers’ rights and drug trafficking laws.190 Despite several attempts to formulate legislation imposing tougher sanctions (e.g., the failed 1995 Free Burma Act),191 comprehensive legislation on this point was only passed in 2003 in the form of the Burmese Freedom and Democracy Act, 2003 (“BFDA”), which banned imports from Burma/Myanmar,192 froze assets of top officials,193 and prohibited granting them visas.194 It also mandated that the United States block “soft loans” to Burma at the IMF and World Bank.195

In contrast to other U.S. domestic sanction legislation, the provisions of the BFDA have never been waived. The legislation was put in force indefinitely and cannot be repealed until “measurable and substantial progress” has been made on preventing internationally recognized human rights violations (such as forced labor, the conscription of child soldiers, and rape), forming a democratic government, releasing all political prisoners, and improving the protection of freedom of speech, freedom of the press, freedom of association, and freedom of religion.196 Further, the Burmese junta must reach a peaceful settlement with the NLD, other democratic forces, and Burma’s ethnic minorities.197

The EU worked in tandem with the United States on the issue of Burma, imposing an arms embargo and refusing all aid

188. Id.
189. Id. at 477–78.
190. Id.
193. § 4, 117 Stat. at 867.
194. § 6, 117 Stat. at 867.
195. § 5, 117 Stat. at 867.
196. § 3(A)–(B), 117 Stat. at 866. See also Ewing-Chow, supra note 182, at 157–58.
197. § 3(B)(v), 117 Stat. at 866.
except for humanitarian assistance. In 1996, the EU adopted a Common Position on Myanmar, which also introduced a visa ban for senior Burmese officials, and in 1997, further strengthened its sanctions by suspending Burma from the GSP program. In 2000, the EU imposed a freeze on assets held abroad by persons related to the Burmese government. Shaming by the United States and EU has come at severe economic cost to Burma: as a Least Developed Country (a status it has “enjoyed” since 1987), Burma would otherwise be entitled to (and, of course, in need of) significant financial assistance.

While the West took coercive steps, Burma’s neighbors, acting through the Association of Southeast Asian Nations (“ASEAN”), preferred what they termed “constructive engagement”—a method of encouraging reform in Burma in a less confrontational manner. However there was an element of shame even here: in 2006, the year that Myanmar would have been entitled to chair ASEAN, the other members convinced the junta to waive that right. In the Burmese face-based culture, this has massive shame implications.

The evidence seems to support the view that shaming was not especially effective until 2007, when the junta’s repressive crackdowns on the “Saffron Revolution” led by Buddhist monks brought renewed attention and strong criticism from inter-

198. Council Common Position (EC) No. 96/635 of 28 Oct. 1996, art. 5(a)(ii), 1996 O.J. (L 287) 1, 2 (these measures were reaffirmed to as they were “already adopted”).
199. Id. art. 2(b)(i).
201. Ewing-Chow, supra note 182, at 159.
202. See id. at 154.
203. Lim, supra note 177, at 209.
204. Id. at 211.
205. See generally David Yau-Fi Ho, On the Concept of Face, 81 AM. J. SOC. 867 (1998) (discussing the concept of face in general); Joo Yup Kim & Sang Hoon Nam, The Concept and Dynamics of Face: Implications for Organizational Behavior in Asia, 9 ORG. SCI. 522, 523 (1998) (discussing how the concept of face explains behavior in many Asian cultures).
206. The immediate result was widespread news coverage. See, e.g., Andrew Buncombe & Peter Popham, Burma: Inside the Saffron Revolution, INDEPENDENT (Sept. 27, 2007), http://www.independent.co.uk/news/world/asia/burma-inside-the-saffron-
national figures. In 2008, Laura Bush, then First Lady of the United States, called the violent crackdown on democracy protestors in Burma a “shameful response,” while Secretary of State Condoleezza Rice condemned the military junta as “one of the worst regimes in the world’ for its record on human rights and free speech.” Significantly, ASEAN stopped its face-saving efforts with Burma and expressed in no uncertain terms “revulsion” at the repression of protests. This term “revulsion” appears to be the strongest language ever officially used in relation to the situation in Burma.

While a Security Council Resolution calling on Burma’s government to stop military attacks against civilians in ethnic minority regions and transition to democracy was vetoed by China and Russia in 2007, attention continued to focus on Burma throughout 2008 at the U.N. when Human Rights Council Resolution 7/31 expressed “deep concern” at the violent repres-
sion of protests\(^{211}\) and “[s]trongly deplored\(^{d}\) the ongoing systematic violations of human rights and fundamental freedoms of the people of Myanmar.”\(^{212}\) It also urged the government of Burma to receive a Special Rapporteur.\(^{213}\) The report of one of the Rapporteurs, issued a few months later, focused on violations of the Universal Declaration of Human Rights, such as Article 19 (freedom of expression).\(^{214}\) The report also considered Articles 9, 10, 11, 19, 20, and 21 of the Universal Declaration to be implicated in the case of Aung San Suu Kyi,\(^{215}\) and found that the excessive use of force to quell protests in September 2007 (which, according to the report, led to thirty-one deaths) contravened Article 29(2) and (3) of the Universal Declaration.\(^{216}\) The report also estimated the number of political prisoners to be 1,900.\(^{217}\)

The ruling junta was not impervious to shaming. It reacted periodically in predictable ways. On October 24, 2007, the day after the U.N. humanitarian coordinator in Burma, Charles Petrie, released a statement critical of the junta’s handling of the protests, the Burmese Ministry of Foreign Affairs issued a protest note.\(^{218}\) The note stated that “the United Nations statement was ‘unprecedented’ and ‘very negative’ and complained that Myanmar officials were not notified in advance of its publication.”\(^{219}\) Shortly thereafter, on November 2, the junta ordered Petrie’s expulsion from the country.\(^{220}\) In a letter dated


\(^{212}\) Id. ¶ 1.

\(^{213}\) Id. ¶ 2.


\(^{215}\) Id. ¶ 29.

\(^{216}\) Id. ¶ 45.

\(^{217}\) Id. ¶ 27.


\(^{219}\) Id. The letter added, “[t]he government of the Union of Myanmar does not want Petrie to continue to serve in Myanmar, especially at this time when the cooperation between Myanmar and the United Nations is crucial.” Id.

\(^{220}\) Id.
November 5, 2007 and addressed to the U.N. Secretary-General, the government attacked the shamers:

countries that initiated the draft resolution . . . did so only to channel the domestic political process in the direction of their choosing and not to promote human rights per se . . . There should be no double standards or politicization of human rights issues.221

The letter blamed the “relentless negative media campaign” for Burma becoming “an emotive issue” and attacked the veracity of claims concerning human rights violations.222 It outlined several areas of progress achieved by Burma in cooperation with the ILO, attempting to create a reputation as a cooperator state.223 In reaction to UNGA Resolution 65/241,224 Burma “appreciated those that had voted against the text despite the serious pressure and threats imposed by some States. Still, the ‘heavy-handed approach’ used by some countries had made it difficult for many delegations to vote against the ill-thought-out resolution.”225 Similarly, in response to UNGA Resolution 60/233,226 Burma’s representative “categorically reject[ed] the allegations and accusations.”227

Burma’s leaders were, moreover, not merely subject to shaming directed from other states. The cause of the NLD had long been a popular one in the public consciousness of many Western nations.228 As a result, the junta occasionally found itself

221. Memorandum, Permanent Representative of Myanmar to the U.N. Secretary General, Memorandum on the Situation of Human Rights in the Union of Myanmar, ¶¶ 5, 29, A/C.3/62/7 (Nov. 5, 2007).
222. Id. ¶¶ 15, 33.
223. See generally id.
226. See generally G.A. Res. 60/233, supra note 183.
targeted by shaming actions from private pressure groups. Realizing that the junta may not be responsive, these groups engaged in secondary shaming against Western companies for “doing business” with Burma.

In 2004, the Burma Campaign UK published the names of thirty-seven companies transacting business with Burma in an action referred to in the press as “naming and shaming,” with those on it reportedly belonging to “a dirty list.” Those named included several high-profile companies,

including Rolls Royce, . . . Lloyds of London, . . . and SWIFT, the financial messaging network partly owned by British firms. . . . Tony Blair [then-Prime Minister of the U.K.] . . . urged British companies to boycott Burma voluntarily, pointing to the suppression of democracy, human rights abuses, the use of forced labour and the oppression of minorities.

These tactics had some success, persuading “at least twenty firms—most notably British American Tobacco—to exit Burma” in 2004. The military junta was thus not only subjected to direct shaming actions, but was also susceptible to others refusing to have dealings with them because of shame directed at those third parties. This is an example of effective secondary shaming, in which high social and economic costs deter third parties from cooperating with a norm violator, thus isolating the norm violator and discouraging third parties from engaging in similar behavior.

Until recently, however, the effect of such sanctions remained uncertain. When U.N. Secretary-General Ban Ki-Moon visited Burma in mid-2009, the ruling council refused to allow a meeting with the opposition leader. Ki-Moon did, however, procure a pledge from Senior General Than Shwe that elections

230. Id.
231. Id.
232. Id.
233. Id.
would be held in 2010 and that they would be “free and fair.”

According to Ki-Moon’s report, “[t]he Government intended to implement all appropriate recommendations proposed by the Secretary-General, including on such matters as amnesty for prisoners and technical assistance for the elections.” Reaction to this report within the Security Council was mixed, although the vast majority of statements reflected a strong feeling that Burma should comply with the U.N.’s requests. Several powerful states, including the U.K. and France, sent a clear message that their impatience with Burma was increasing and that if reforms did not materialize “the international community must react firmly.” Resolution 64/238, which followed about five months after Ki-Moon’s visit, was even more critical in its language than previous resolutions had been: “The General Assembly . . . strongly condemns the ongoing systematic violations of human rights and fundamental freedoms of the people of Myanmar.”

Whether owing to the international pressure, or for other reasons, the junta decided to hold elections in 2010. Several contributing factors need to be taken into consideration in order to appreciate the situation in its full context. The crackdown on Burma’s protesting monks was a major source of contention between the junta’s two most powerful generals, Than Shwe and Maung Aye, who have been locked in a power struggle for decades. Win Min, Looking Inside the Burmese Military, 48 ASIAN SURV. 1018, 1032 (2008). It is possible that the increasingly geriatric Than Shwe (the more powerful of the two) plans to use the elections (which contain built-in military privileges) to retain influential positions for himself and his cronies for the remainder of his life. Id. at 1035–36. Than Shwe has already suffered two mild strokes, while Maung Aye has had prostate cancer and Prime Minister Thein Sein already has a pacemaker. Id. at 1034. It is unlikely that they could continue to retain effective military control for much longer and may feel vulnerable to a putsch or other radical takeover. A gradual transition to democracy may be the safest course for the elderly junta members.

Another possible contributing factor to Burma opening up could be the purging of Khin Nyunt (the junta’s No. 3 General) in 2004. Id. at 1028. Khin Nyunt was the junta’s “diplomat,” both masterminding and executing working relationships with ASEAN, the NLD, China, international organizations, and Burma’s various armed ethnic groups. See id. at 1029–32. Indeed, it was only after Khin Nyunt was sacked that ASEAN became increasingly frustrat-
dent Thein Sein (a former military commander) was elected and proceeded to usher in a period of political liberalization, freeing Aung San Suu Kyi,241 releasing a number of political prisoners,242 and relaxing censorship laws.243 As a reward for this behavior, U.S. Secretary of State Hilary Clinton visited the country in December 2011.244 Shortly after Clinton’s visit, approximately 600 political prisoners were released from Burmese jails and a peace agreement was signed with the Karen ethnic group.245 In 2012, a by-election was held for forty-five parliamentary seats, forty-three of which were won by the NLD, including a seat for Suu Kyi, who entered parliament on May 2, 2012.246 Simultaneously, the United States loosened some of its restrictions on investment in Burma,247 while the EU instituted a temporary lift on sanctions.248


248. Hodal, supra note 243.
The release of Aung San Suu Kyi and other political prisoners from arrest, as well as their ability to travel, significantly influenced a major point of Western policy on Burma for over twenty years. In September 2012, Suu Kyi made a historic visit to Western Europe and the United States, collecting several important human rights prizes that had been awarded to her in absentia. Concurrent to her visit, Burma announced the release of some 500 political prisoners on humanitarian grounds. These actions prompted the EU to consider reinstating Burma’s preferential trading status. Suu Kyi’s visit to the United States coincided with President Thein Sein’s visit to the U.N. Headquarters in New York in September 2012. Asked whether the government was afraid of being upstaged by Suu Kyi, Minister Aung Min reportedly replied that the government was not worried about the attention devoted to Suu Kyi and that they were “very proud” of her work. The minister then compared Burma to post-apartheid South Africa, with Suu Kyi playing the role of Mandela and the current Burmese government playing the role of the South African de Klerk government. Two days prior to these comments, the United States had agreed to lift measures that blocked Burma’s president and the speaker of its lower house of parliament from holding U.S. assets.

Relations appeared to be improving further still as U.S. President Obama visited Burma in November 2012. During Obama’s visit, President Thein Sein showed certain sensitivity to issues of national pride and shame, specifically speaking of

249. See, e.g., Beaumont, supra note 228.
251. Id.
253. Id.
254. Id.
255. Id.
the relationship between the United States and Burma as being “based on mutual . . . respect” and stating that human rights in Burma would have “to be aligned with international standards.” The Obama administration showed considerable recognition of the cultural importance attached to saving face during the president’s visit, and decided to “soften the blow” on the junta’s pride by undertaking such actions of demonstrative respect as visiting important Burmese cultural and religious sites. This stance has been reinforced by other actors within the U.S. political decision-making process, which indicate that these actors also recognize the importance of shaming/non-shaming behavior in encouraging IL compliance. Then House Minority Leader and previous sponsor of sanctions on Burma, Mitch McConnell, announced in May 2013 that he would not seek the renewal of sanctions on Burma as it “would be a slap in the face to Burmese reformers.”

By making it apparent that compliance with international standards will not set off a further round of shame and condemnation but that non-compliance would, the administration has succeeded in wielding shame as an enforcement measure to significant effect. As a result, positive steps continue to be taken in relation to Burma’s compliance with international human rights standards, including Thein Sein’s visit to the U.K. in July 2013, during which he met with Prime Minister David Cameron and pledged that “by the end of this year, there will be no prisoners of conscience in Myanmar.”

Thus, while far from ideal, the situation in Burma has undergone a dramatic change in the past four years and the goals that were set by the shaming sanctions (release of political prisoners, elections, peace with ethnic rebels) have largely borne fruit. What is more, it can be observed that these changes have been brought about in a carefully calibrated lockstep with the easing of sanctions against the nation.

257. Id.
258. See id.
D. Enforcement of Shaming Sanctions

Critics who argue that IL is not real law emphasize the lack of centralized machinery for its enforcement. They set out IL in marked contrast to domestic law, where the legal system provides policemen, courts, and prisons to enforce the law and mete out punishment. The enforcement machinery problem does not disappear merely because we are dealing with shaming rather than other types of coercive sanctions. Even in domestic criminal law, shaming is closely aligned to the court system and is imposed after a judicial finding of responsibility for the wrong. When transposed into the IL context, the absence of a court with universal jurisdiction creates difficulties because there are no agencies with authority to make determinations of responsibility that satisfy the requirements of authority, neutrality, and legitimacy. But this fails to tell the entire story.

1. International Organizations

The absence of a world court system with binding adjudicative power does not mean that there is no adequate enforcement mechanism for shaming. International Organizations ("IOs") are capable of performing the adjudicative function to a degree sufficient to meet the requirements of authority, neutrality, and fairness. The U.N. offers a complex example.

The consequences of the U.N. employing shame sanctions are likely to be different, depending on whether the enforcer is the Security Council or the UNGA. Given that the UNGA is comprised of all the nations of the world with equal voting power, which is usually deployed in a partisan manner,\(^\text{261}\) it is unlikely that there will be agreement on anything but the most egregious violations of international law. In addition, the presence of a significant number of countries with unelected leaders also makes it unlikely that many acts that would be regarded as shameful by liberal democracies will be so viewed by countries ruled by such individuals. Even when such states participate in shaming, it might be disingenuous or even hypocritical, and a means to uphold the appearance of conforming to international norms.

Despite these problems, the UNGA does engage in shaming, although this might only provide a weak constraint on states. If the Security Council engages in shaming, the net effect is unlikely to be much better because of the veto power enjoyed by the permanent members.\textsuperscript{262} Recent examples, such as the difficulty in imposing sanctions on Iran due to opposition from China and Russia,\textsuperscript{263} suggest that the Security Council may not be particularly well suited to impose shame sanctions except for the most egregious violations involving states bereft of superpower support.

Aside from the U.N., states have membership in a number of other small and large international organizations. Membership in these IOs commits states to engage in cooperative activities within a defined legal framework, which is typically provided by the constitution of the IO.\textsuperscript{264} There is well-developed scholarship showing the cooperative benefits of membership that is of salience for shaming. For example, Robert Axelrod writes that, "[i]f the players can observe each other interacting with others, they can develop reputations; and the existence of reputations can lead to a world characterized by efforts to deter bullies."\textsuperscript{265}

Shaming by IOs follows similar contours. Their constitutional documents set out a mission and organizational goals,\textsuperscript{266} and

\begin{itemize}
  \item \textbf{(a)} Achieve greater unity and solidarity between the African countries and the peoples of Africa;
  \item \textbf{(b)} Defend the sovereignty, territorial integrity and independence of its Member States;
  \item \textbf{(c)} Accelerate the political and socio-economic integration of the continent;
  \item \textbf{(d)} Promote and defend African common positions on issues of interest to the continent and its peoples;
  \item \textbf{(e)} Encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;
\end{itemize}

\textsuperscript{262} See U.N. Charter art. 23, para. 1.
\textsuperscript{266} For example, the Constitutive Act of the African Union lists the following objectives:
repeated interactions between member states enable the creation of reputations about whether states meet those goals. If a state acquires a reputation as an offender, other states and the IO’s executive machinery can impose shame sanctions in increments ranging from cautionary warnings to expulsion from membership. In some cases, a state that is targeted for sanctions might relinquish membership rather than face expulsion to deflect shame. In 2003, for example, Zimbabwe quit its membership of the Commonwealth after a decision to suspend its membership (initially made in 2002) was maintained indefinitely as a response to the nation’s unfair elections.

Shaming at the IO level also includes adjudicative tribunals set up by treaty regimes. The proliferation of such tribunals, such as those in the international investment law area, means that some of the process-type objections advanced against

(f) Promote peace, security, and stability on the continent;
(g) Promote democratic principles and institutions, popular participation and good governance;
(h) Promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments;
(i) Establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;
(j) Promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;
(k) Promote co-operation in all fields of human activity to raise the living standards of African peoples;
(l) Coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union;
(m) Advance the development of the continent by promoting research in all fields, in particular in science and technology;
(n) Work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.

Constitutive Act of the African Union, supra note 264, art. 3.


268. Zimbabwe Quits Commonwealth, BBC NEWS (Dec, 8, 2003), http://news.bbc.co.uk/2/hi/africa/3299277.stm. “Mr. Mugabe had earlier threatened to leave the 54-nation group if the country was not ‘treated as an equal.’”
shaming have much less bite. These tribunals have authority delegated by states via bilateral or multilateral treaties and are required to follow formal legal processes analogous to domestic tribunals. They have the ability to make the necessary findings of fact antecedent to shaming.

2. States

States are likely to be the principal enforcers of shame sanctions. Given the opportunities for repeated interactions in an interdependent world, evaluative opinions by a state about another state’s derogation from IL norms is important. Not only does it matter to the two states, but it also matters to third-party states because it reinforces the norm and conveys information about the desirability of the offender state as a cooperative partner.

States regularly make evaluative opinions about other states. Some have the resources to make elaborate justifications and provide evidence for those opinions in a legal manner. One example is the U.S. State Department’s annual human rights reports. These reports have received harsh criticism as being partisan. As acknowledged by Professor Kahan in a recantation from his earlier position, partisanship is a major problem for shaming. The United States has also been accused of hypocrisy.

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271. See George Gedda, After Abu Ghraib: The U.S. Human Rights Agenda, 81 Foreign Service J. 48 (2004). Gedda noted that William Schulz, executive director of Amnesty International USA, remarked on the occasion of the February release of the State Department’s annual human rights report . . . : “The content of this report has little correspondence with the administration’s foreign policy; indeed, the U.S. is increasingly guilty of a ‘sincerity gap,’ overlooking abuses by allies and justifying action against foes by post-facto references to human rights. In response, many foreign governments will choose to blunt criticism of their abuses by increasing cooperation with the U.S. war on terror rather than by improving human rights.” Id.
273. The Los Angeles Times wrote in conjunction with a diplomatic offensive by the Bush administration in Argentina:
engage in shaming are severely debilitating and suggest that neutrality, or a perception thereof, is important if shaming sanctions are to work.

This is not to say that shaming by individual states should be ignored altogether. Some states will be persuaded by the U.S. State Department’s reports, and it must ultimately fall to a process of reinforcement by validation to determine if the state being shamed is indeed deserving of punishment. There is nothing stopping Iran and Venezuela from issuing shaming reports of their own. If members of the international community believe these reports are the products of serious investigation and research, they will be credible. On the other hand, if they are merely propaganda, they are likely to be ignored. While Kahan’s criticisms regarding partisanship may have some salience in the criminal law due to the existence of incarceration as a viable alternative, the absence of better alternatives in IL means that shaming has currency despite these difficulties.

3. Domestic Enforcement of IL

a. Domestic Courts

The gap in enforcement caused by the absence of a world court system with binding jurisdiction can be bridged by domestic courts. While sovereign states can claim that they are not subservient to foreign courts, the same claim cannot be held about the state’s own domestic courts. If, as a growing body of case law shows, domestic courts enforce IL norms against their governments, the criticism about IL lacking coercive enforcement recedes.

With regards to shaming being the coercive sanction for the enforcement of IL, the criticism about the absence of an adjudicative agency to make a finding of responsibility loses sting. Critics might still argue that domestic courts are not sufficient-

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Critics were quick to assail Washington’s human rights record, citing abuses at the Abu Ghraib prison in Iraq and at the U.S. detention center in Guantanamo Bay, Cuba, and the U.S.-led invasion of Iraq. All have fanned anti-U.S. sentiment in a region where Washington’s previous interventions and alliances with military dictatorships remain fresh in the collective memory.

ly neutral adjudicators against their own governments because they are but organs of the same government. This objection is objectively refutable. Because the adjudication is public and observable, and follows the processes typical of judicial dispute resolution, neutrality can be assessed in the same way as is standard for purely domestic adjudication where the government is frequently a litigant. Moreover, judges and lawyers are obligated to follow the same rules in cases involving the application of IL rules against the home state as they are required to do in domestic cases. If these checks are sufficient for domestic adjudication to satisfy the test of neutrality and procedural fairness in order to be legitimate and credible, surely the same principle applies when the case involves the application of IL rules.

The domestic enforcement of IL rules shows that shaming is effective—not by judges intervening in foreign policy decisions or by compelling the state to act against its self-interest, but by enforcing IL norms on a domestic level and employing “shaming”-idealistic language when referencing such IL norms. This serves to bring the government behavior into compliance with those norms. Some examples are presented below.

1. United States

Despite political opposition and criticism from many quarters, U.S. courts have referenced IL norms in a number of recent cases. In Hamdi v. Rumsfeld, the highest court in the United States stated, “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” The U.S. Supreme Court bolstered this view with reference to the Geneva and Hague Conventions, stating, “It is a clearly established principle of the law of war that detention may last no longer than active hostilities,” unless the prisoner is either being

275. Id. at 536 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)).
lawfully prosecuted or serving a sentence resulting from such a prosecution.\textsuperscript{277}

The Court also used language that calls on moral norms:

[I]t is . . . vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.\textsuperscript{278}

The Court then included a similar quotation from United States v. Robel:\textsuperscript{279} “It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.”\textsuperscript{280}

The Court was unwilling to cede ground to the government because of the limits of the separation of powers doctrine:

[W]e necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. . . . [U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions. . . . [I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for

\textsuperscript{277} Id. at 520–21 (citing Jordan J. Paust, \textit{Judicial Power to Determine the Status and Rights of Persons Detained Without Trial}, 44 \textit{Harv. Int’l L.J.} 503, 510–11 (2003)).

\textsuperscript{278} Id. at 532.

\textsuperscript{279} United States v. Robel, 389 U.S. 258 (1967).

\textsuperscript{280} \textit{Hamdi}, 542 U.S. at 532 (citing \textit{Robel}, 389 U.S. at 264)).
his detention by his government, simply because the Executive opposes making available such a challenge.\footnote{Hamdi, 542 U.S. at 535–37.}

In \textit{Boumediene v. Bush},\footnote{Boumediene v. Bush, 553 U.S. 723 (2008). The case was brought by “enemy combatants” being held at Guantanamo Bay. \textit{Id.} at 732. All were non-citizens of the United States who had filed a writ of habeas corpus. The United States’ Detainee Treatment Act and Military Commissions Act had stated that those held at Guantanamo Bay were not entitled to habeas corpus. \textit{Id.} at 734. The question before the Court was thus whether a constitutional guarantee of habeas corpus existed and extended to noncitizens. \textit{Id.} at 732. The Court found that in cases where habeas corpus was denied an adequate alternative had to be provided. \textit{Id.} at 732–33.} the Court reiterated that

\begin{quote}
[the Nation’s] basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. . . . To hold that the political branches have the power to switch the Constitution on or off at will . . . [would lead to a regime in which they], not this Court, say “what the law is.”\footnote{Id. at 765 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).}
\end{quote}

In \textit{Hamdan v. Rumsfeld},\footnote{Hamdan v. Rumsfeld, 548 U.S. 557 (2006). This case concerned a Yemeni national captured in Afghanistan and held at Guantanamo Bay. \textit{Id.} at 566.} the U.S. Supreme Court made further extensive references to international treaties and mechanisms in its decision.\footnote{See \textit{id.} at 628.} The U.S. government argued that the Geneva Conventions did not apply to the case because the conflict in question existed between the United States and al-Qaeda, rather than between the United States and Afghanistan.\footnote{Id. at 629.} Since al-Qaeda was not a contracting party to the Geneva Conventions, its members did not enjoy their protection.\footnote{Id.} The Court did not feel compelled to pronounce on this question because

\begin{quote}
there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories. Article 3 . . . provides that in a “conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum,” certain provisions protecting
\end{quote}
“[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by . . . detention.” . . . [I]t prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

The Court considered the commentaries on the Geneva Conventions and a treatise of the Red Cross to determine whether a military tribunal was a “regularly constituted court” as used in Common Article 3.

If Hamdi asserted judicial power in keeping executive power in check, Munaf v. Geren went in the opposite direction: the U.S. Supreme Court decided that whether or not individuals (in this case American citizens) could be transferred into Iraqi custody was a matter for the executive to decide. According to the Court,

the [United States] explains that, although it remains concerned about torture among some sectors of the Iraqi Government, the State Department has determined that the Justice Ministry—the department that would have authority over Munaf and Omar—as well as its prison and detention facilities have “generally met internationally accepted standards for basic prisoner needs.” The Solicitor General explains that such determinations are based on “the Executive’s assessment of the foreign country’s legal system and . . . the Executive[s] ability to obtain foreign assurances it considers reliable.” The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government’s ability to speak with one voice in this area.

This is a retrograde decision for the shaming argument because the Court is restrained based upon a strict view of the separa-

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292. Id. at 704–05.
293. Id. at 702 (citing Brief for Federal Parties at 47, Munaf, 553 U.S. 674 (No. 06-1666); Reply Brief for Federal Parties at 23, Munaf, 553 U.S. 674 (No. 06-1666)).
tion of powers doctrine. It defers because “the other branches possess significant diplomatic tools and leverage the judiciary lacks,”294 and because it does not see itself as a member of the shaming reference group.

These cases together show the judiciary reaching for IL norms, not to enforce them in the way it would typically enforce a domestic law norm, but rather as an aspirational goal, the breach of which would entail shame and therefore mixed results. On balance, the U.S. courts have not embraced IL norms as readily as might have been expected by external audiences and thereby not gained the status as norm entrepreneurs that U.S. courts have enjoyed in constitutional law adjudication.

2. The United Kingdom

Case law from the U.K. also exhibits this tension between the executive and the judiciary, with the latter referring to foreign law and IL norms to hold the former in check. Once again, in the context of the war on terror, the recent case of Binyam Mohamed295 saw the Supreme Court using shaming language against an executive that had some complicity in torture:

[T]he use of torture by a state is dishonourable, corrupting and degrading the State which uses it and the legal system which accepts it. . . .

The prohibition on state torture under this Convention and in customary international law . . . is now established as a peremptory norm or a rule of jus cogens, from which derogation by states through treaties or rules of customary law not possessing the same status is not permitted. . . .

Although there may be a debate as to the use of information obtained through torture or cruel, inhuman and degrading treatment in averting serious and imminent threats to na-

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294. Munaf, 553 U.S. at 702 (quoting Omar v. Harvey, 479 F.3d 1, 20 & n.6 (2007) (dissent)).
295. R (Mohamed) v. Sec’y of State for Foreign and Commonwealth Affairs, [2008] EWHC (Admin) 2048, [2009] 1 W.L.R. 2579 (Eng.). Binyam (or Binyan) Mohamed was an Ethiopian citizen and U.K. resident who had been arrested in Pakistan on suspicion of involvement in terrorist activities. Id. ¶¶ 7–14. He alleged that following his arrest, he was tortured in both Afghanistan and Morocco at the behest of the U.S. military. Id. ¶¶ 26–37. British intelligence officers were alleged to have been complicit in Mohammed’s detention, encouraging him to co-operate with his jailers and supplying them with questions for him to answer. Id. ¶ 87.
tional security, it is a principle at the heart of our systems of justice that evidence of involuntary confessions obtained by such means are inadmissible at a trial.296

In Binyam, the court relied on R v. Horseferry Road Magistrates Court ex p Bennett297 to declare the international character of certain basic tenets of the rule of law:

Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is . . . no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court . . . respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is . . . an insular and unacceptable view.298

The court is clearly making an evaluative judgment about norms that transcend its own jurisdiction. It is then using that judgment to make a finding about the conduct of its own government. The language used is highly shame-based as shown by the use of words like “abhorrence.”

Other recent cases involving rendition have also required U.K. courts to use shaming language. In Regina (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 2),299 the House of Lords noted:

There are allegations, which the US authorities have denied, that Diego Garcia or a ship in the waters around it have been used as a prison in which suspects have been tortured. The idea that such conduct on British territory, touching the hon-

296. Id. at [142], [147].
297. R v. Horseferry Road Magistrates Court, Ex parte Bennett, [1994] 1 A.C. 42 (H.L.) (Eng.).
298. R (Mohamed), [2008] EWCH (Admin) at [147], [2009] 1 W.L.R. at 2637 (quoting Horseferry Road Magistrates Court, [1994] 1 A.C. at [68]).
of the United Kingdom, could be legitimated by executive fiat, is not something which I would find acceptable.\footnote{Id. at [35].}

Lord Bingham consulted foreign case law and IL norms in \textit{A (FC) and Others (FC) v. Secretary of State for the Home Department, A and Others, (FC) and Others v. Secretary of State for the Home Department} (Conjoined Appeals),\footnote{A v. Sec'y of State for the Home Dep't, [2005] UKHL 71, [2006] 2 A.C. 221.} opining that

\begin{quote}
[t]here can be few issues on which international legal opinion is more clear than on the condemnation of torture. Offenders have been recognised as the “common enemies of mankind” (\textit{Demjanjuk v. Petrovsky} 612 F. Supp. 544 (1985), 566, Lord Cooke of Thorndon has described the right not to be subjected to inhuman treatment as a “right inherent in the concept of civilisation” (\textit{Higgs v. Minister of National Security} [2000] 2 AC 228, 260), the Ninth Circuit Court of Appeals has described the right to be free from torture as “fundamental and universal” (\textit{Siderman de Blake v. Argentina} 965 F. 2d 699 (1992), 717) and the UN Special Rapporteur on Torture (Mr Peter Kooijmans) has said that “If ever a phenomenon was outlawed unreservedly and unequivocally it is torture” (Report of the Special Rapporteur on Torture, E/CN.4/1986/15, para 3).\footnote{Id. at [33]. The Special Rapporteur also cited Article 41 of the International Law Commission’s draft articles on Responsibility of States for Internationally Wrongful Acts (November 2001) and the advisory opinion of the International Court of Justice on the \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}. Id. at [34].}
\end{quote}

Lord Bingham also detailed the type of legal authority that might be persuasive—implicitly supporting the idea of a shamming reference group comprised of a network of courts applying similar processes and norms:

\begin{quote}
The authorities relied on by . . . Lord Hope . . . and Lord Rodger . . . to support their conclusion are of questionable value at most. In \textit{El Motassadeq}, a decision of the Higher Regional Court of Hamburg of 14 June 2005, the United States Department of Justice supplied the German court, for purposes of a terrorist trial proceeding in Germany with reference to the events of 11 September 2001, with summaries of statements made by three Arab men. There was material suggesting that the statements had been obtained by torture, and the
German court sought information on the whereabouts of the witnesses and the circumstances of their examination. The whereabouts of two of the witnesses had been kept secret for several years, but it was believed the American authorities had access to them. The American authorities supplied no information, and said they were not in a position to give any indications as to the circumstances of the examination of these persons. Two American witnesses who attended to give evidence took the same position. One might have supposed that the summaries would, without more, have been excluded. But the German court, although noting that it was the United States, whose agents were accused of torture, which was denying information to the court, proceeded to examine the summaries and found it possible to infer from internal evidence that torture had not been used. This is not a precedent which I would wish to follow.303

Lord Bingham seems to be saying that in order to determine if state behavior is shameful, not all foreign judicial findings are alike. It is only findings made by a court in the shaming reference group that follows similar norms that are persuasive. In his opinion, Lord Hoffman, who agreed with Lord Bingham, said this case was of “great importance . . . for the reputation of English law,”304 again establishing the notion of a network of domestic courts as a shaming reference group by implying that English courts and English law would only enjoy a good reputation if IL norms were properly applied.

A recent case brought by surviving Mau Mau fighters against the British Government is also likely to offer key insights on shaming by domestic courts.305 The case stems from allegations that torture and severe forms of physical and sexual abuse were systematically perpetrated against Mau Mau rebels and their supporters in the 1950s.306 The British government initially took the stance that Kenya, and not Britain, was liable

303. Id. at [60].
304. Id. at [99].
305. The case has been subject to two preliminary judgments: the first concerning whether Kenya or the United Kingdom is the appropriate defendant, Mutua v. Foreign & Commonwealth Office, [2011] EWHC 1913, [2], and the second concerning whether or not the case should be time-barred on the grounds that, due to the significant time lapse between perpetration of the crimes and the present proceedings, a fair trial is no longer possible. Mutua v. Foreign & Commonwealth Office, [2012] EWHC 2678, [2].
for the Mau Mau claims as the successor state to the colonial administration in Kenya. The Kenyan government strongly objected to this argument, stating that it

[did] not accept liability for the torture of Kenyans by the British colonial regime. In no way can the Kenyan Republic inherit the criminal acts and excesses of the British colony and then the British Government. . . . Kenya fully supports this case . . . [and] calls on the British Government to lessen the costs of litigation by simply admitting liability.308

The Kenyan position has been supported by activists who have deployed shaming language against the British defense:

Archbishop Desmond Tutu and Sir Nigel Rodley, the British member of the UN Human Rights Committee . . . sent an open letter to the British Foreign Secretary, David Miliband in which they state[d that] . . . this [attempt to pass liability to Kenya] represents an intolerable abdication of responsibility. Britain’s insistence that international human rights standards should be respected by governments around the world will sound increasingly hollow if the door is shut in the face of these known victims of British torture.309

In the High Court, at the preliminary stage, Justice McCombe said, “[I]f the allegations are true (and no doubt has been cast upon them by any evidence before the court), the treatment of these claimants was utterly appalling.” 310 He found that “[t]he evidence shows that those new materials [referring to British documents revealing practices of torture] were removed from Kenya upon independence precisely because of their potential to embarrass the UK Government.”311 The court also quoted from a preceding judgment:

That word honour, the deep note which Blackstone strikes twice in one sentence, is what underlies the legal technicalities of this appeal. The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it. When judicial torture was routine all

308. *Id.*
309. *Id.*
311. *Id.* at [130].
over Europe, its rejection by the common law was a source of national pride and the admiration of enlightened foreign writers such as Voltaire and Beccaria. In our own century, many people in the United States, heirs to that common law tradition, have felt their country dishonoured by its use of torture outside the jurisdiction and its practice of extra-legal “rendition” of subjects to countries where they would be tortured.\textsuperscript{312}

Further, “the rejection of torture by the common law has a special iconic importance as the touchstone of a humane and civilised legal system.”\textsuperscript{313}

Justice McCombe was unstinting in his employment of shaming in the case before him:

[I]t may well be thought strange, or perhaps even “dishonourable”, that a legal system which will not in any circumstances admit into its proceedings evidence obtained by torture should yet refuse to entertain a claim against the Government in its own jurisdiction for that government’s allegedly negligent failure to prevent torture which it had the means to prevent, on the basis of a supposed absence of a duty of care.\textsuperscript{314}

Justice McCombe also recognized that the U.K. had a duty to refrain from torture under Article 14 of the U.N. Convention against Torture. While noting that this convention had entered into force many years after the events in question had occurred, McCombe nonetheless considered it “an echo of principles” long recognized under IL, particularly those in the European Convention on Human Rights, which was in force from 1950.\textsuperscript{315}

In this case, the British Government eventually responded positively to these shaming efforts. Instead of appealing Justice McCombe’s second decision in the matter (in which he had rejected the U.K.’s argument that the passage of time precluded the feasibility of a full trial)\textsuperscript{316} as it initially declared its plans

\textsuperscript{312} Id. at [153] (quoting A v. Sec’y of State for the Home Dep’t, [2005] UKHL 71, [82] [2006] 2 A.C. 221) (emphasis added).
\textsuperscript{313} Id.
\textsuperscript{314} Id. at [154].
\textsuperscript{315} Id.
\textsuperscript{316} See Mutua v. Foreign & Commonwealth Office, [2012] EWHC 2678, [91].
to be,\textsuperscript{317} the government agreed to pay £19.9 million in compensation to 5,228 surviving victims and pledged to support the construction of a memorial in Nairobi to the victims.\textsuperscript{318} Moreover, while sidestepping a direct apology, the government has itself adopted shaming language to describe the incidents which took place. Foreign Secretary William Hague stated that “[t]he British government sincerely regrets that these abuses took place and that they marred Kenya’s progress towards independence. Torture and ill-treatment are abhorrent violations of human dignity that we unreservedly condemn.”\textsuperscript{319} The Mau Mau Veterans Association welcomed this statement as “a beginning of reconciliation.”\textsuperscript{320}

3. Canada

Shaming by domestic courts in reliance upon foreign and IL sources is not only an Anglo-American phenomenon. The Canadian Supreme Court decision in \textit{Suresh v. Canada}\textsuperscript{321} shows similar techniques being employed. Suresh was a fundraiser for the Tamil Tigers and had originally been granted refugee status in Canada.\textsuperscript{322} The court held that Suresh was entitled to a fair procedure: “[W]e find that . . . Suresh made a \textit{prima facie} case showing a substantial risk of torture if deported to Sri Lanka, and that his hearing did not provide the procedural safeguards required to protect his right not to be expelled to a risk of torture or death.”\textsuperscript{323} According to the court,

\begin{itemize}
\item \textsuperscript{318} Greg Sheridan, \textit{Britons Compensate Kenyans for Mau Mau Torture}, Australia (June 7, 2013), http://www.theguardian.com/world/britons-compensate-kenyans-for-mau-mau-torture/story-e6frg6so-1226659001324.
\item \textsuperscript{319} \textit{Id.}
\item \textsuperscript{320} Ian Johnston, \textit{50 Years on, UK Agrees to Compensate Kenyans Tortured During Colonial Rule}, NBC News (June 6, 2013), http://worldnews.nbcnews.com/_news/2013/06/06/18800690-50-years-on-uk-agrees-to-compensate-kenyans-tortured-during-colonial-rule.
\item \textsuperscript{321} \textit{Suresh v. Canada} (Minister for Citizenship and Immigration), [2002] S.C.R. 3 (Can.).
\item \textsuperscript{322} \textit{Id.} para. 1.
\item \textsuperscript{323} \textit{Id.} para. 6.
\end{itemize}
[t]he inquiry into the principles of fundamental justice is informed not only by Canadian experience and jurisprudence, but also by international law, including *jus cogens*. This takes into account Canada’s international obligations and values as expressed in “[t]he various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms.”324

The court was not willing to defer to the executive branch and allow it to transfer Suresh to a foreign state:

[T]he guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government’s participation and the deprivation ultimately effected. We reaffirm that principle here. At least where Canada’s participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada’s participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else’s hand.325

The court refused to accept the fig leaf of Canada’s involuntary participation in torture:

[W]e cannot pretend that Canada is merely a passive participant. That is not to say, of course, that any action by Canada that results in a person being tortured or put to death would violate s. 7. There is always the question . . . of whether there is a sufficient connection between Canada’s action and the deprivation of life, liberty, or security.326

In *Suresh*, the Canadian Supreme Court employed a familiar device to bring IL norms home:

International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada’s international obligations *qua* obligations; rather, our concern is with the

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324. *Id.* para. 46 (quoting United States v. Burns, [2001] 1 S.C.R. 7, paras. 79–81 (Can.)).
325. *Id.* para. 54.
326. *Id.* para. 55.
principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.\textsuperscript{327}

The court concluded that “international law rejects deportation to torture, even where national security interests are at stake” and that this norm “best informs the content of the principles of fundamental justice under s. 7 of the \textit{Charter},”\textsuperscript{328} In reaching this conclusion it drew upon treaty instruments and the complete lack of support for torture at the international level as evidenced in the absence of administrative procedures sanctioning torture, statements by states, and scholarly work.\textsuperscript{329}

\textit{Suresh} is a particularly interesting example of shaming because the court implicitly recognizes the notion of a shaming reference group by making distinctions between states based on their human rights records and the relative weight that should be given to promises made by public officials:

[i]n evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the assurances, the government’s record in complying with its assurances, and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government’s ability to control its security forces.\textsuperscript{330}

This idea finds resonance in the case of \textit{AS and DD (Libya) v. Secretary of State for the Home Department},\textsuperscript{331} where the court cited the European Court of Human Right’s (“ECtHR”) insistence that diplomatic assurances be closely examined, ultimately finding that it was acceptable for the U.K. to reject such assurances offered by Libya on the grounds that Gaddafi and his government did not enjoy a track record of reliability.\textsuperscript{332}

\textsuperscript{327}. \textit{Id.} para. 60.
\textsuperscript{328}. \textit{Id.} para. 75.
\textsuperscript{329}. \textit{See id.} paras. 61–75.
\textsuperscript{330}. \textit{Id.} para. 125.
\textsuperscript{331}. \textit{AS & DD (Libya) v. Sec’y of State for the Home Dep’t}, [2008] EWCA (Civ) 289.
\textsuperscript{332}. \textit{Id.} at [68–82].
4. Germany

In German legal thought, the idea of shame is somewhat different than that held in the Anglo-Saxon common law tradition. In Germany, it is often thought that to break the law is in itself tantamount to having acted shameful. To accuse someone of breaking the law, to find them guilty of breaking the law, or to remind them of an occasion where they broke the law would in many instances be equivalent to causing that person to experience some level of shame (depending on the severity of the breach). There is thus virtually no need to characterize unlawful behavior as shameful—it is already shameful by virtue of being unlawful.

Nonetheless, a strong example of what could be considered “additional” shaming is provided by the unlikely source of the German Federal Administrative Court (“BVerwG”) in its judgment of June 21, 2005. The decision of the United States and U.K. to proceed with the second Iraq War without a Security Council resolution, thus rendering such a war illegal under IL, was one that mystified and offended many Germans. The court’s decision was reflective of this attitude.

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333. One of the authors was educated in Germany, but would also like to thank Professor Dr. Georg Nolte and his staff at the Humboldt-Universität zu Berlin for their insights into this issue. The views expressed are, of course, only the authors’ own.


The case concerned a German military officer who refused to work on an IT project in the army on the grounds that completing the project would further military operations in Iraq, something that would have conflicted with his conscience as the war was, in his opinion, an illegal act of aggression (Angriffskrieg). The IT project in question involved an overhaul of the German army’s software systems in order to allow for better integration within NATO, and to facilitate better interoperational capabilities with the armed forces of other nations, specifically the United States and other EU states, on multinational missions. The officer’s concerns arose, inter alia, from the fact that Germany permitted American and British planes overflight rights during the second Iraq War, allowed them to use facilities within Germany (including substantial foreign-operated army bases), and dispatched German warplanes to monitor Turkish airspace.

At the time of the officer’s refusal, the war in Iraq had just commenced. However, it was foreseeable that the war could continue for many years and the completed IT project would make all of the aforementioned tasks easier. Throughout the process, the position of the German army was based partly on the stance that the officer’s assessment of the legal situation


337. BVerwGE 1 (15).
338. BVerwGE 1 (17–8).
339. He began his action on March, 20 2003, the same day that the invasion of Iraq began. BVerwGE 1 (17).
340. See id. at 16.
that the war in Iraq was an illegal act of aggression was incorrect, and/or that the work he had been assigned would not directly or indirectly aid the war.\textsuperscript{341} It is noteworthy that, even in this phase, several other army personnel took a sympathetic view of the officer's disruptive behavior,\textsuperscript{342} including both his refusal to work on the project\textsuperscript{343} and appearing at his workplace dressed as a civilian with a white rose affixed to his clothing.\textsuperscript{344}

Eventually, the on-site legal advisor applied to the Ministry of Defense for an official opinion on the legality of the war, which was duly delivered.\textsuperscript{345} The ministry's paper did not explicitly state that the war was illegal, but stated that Germany "rejected" military action against Iraq and "regretted" that Iraq's disarmament was not being pursued peacefully.\textsuperscript{346} The paper further stated that Germany would not participate in the war, but that it would maintain its duties under NATO, which included those actions which the officer complained of.\textsuperscript{347} Under these circumstances, the officer could not reconcile his work in the army with his conscience and thus refused to obey his orders concerning the IT integration until the German Constitutional Court decided on the matter.\textsuperscript{348} The soldier was then transferred to another project while the army's disciplinary lawyer commenced proceedings against him.\textsuperscript{349} Again, a certain leniency toward the soldier in question would seem apparent in that the official state prosecutors asked the military lawyers to set aside the case on the grounds that due to the media attention the possible illegality of the war in Iraq had received, the

\begin{thebibliography}{99}
\bibitem{341} Id. at 19.
\bibitem{342} Id. at 17–20.
\bibitem{343} Id.
\bibitem{344} Id. at 17, 22. The white rose was the symbol of the society of the Scholl-Siblings, young dissidents executed by the Nazis for their pacifist views. BVERWGE 1 (21).
\bibitem{345} Id. at 80.
\bibitem{346} Id. at 19.
\bibitem{347} Id. at 19.
\bibitem{348} Id. at 21 (an excerpt from the soldier's letter to the German Chancellor, the implication being that if the Bundesverfassungsgericht [Federal Constitutional Court] decided that the war was legal, he would then be able to have a clear conscience about his actions).
\bibitem{349} BVERWGE 1 (23).
\end{thebibliography}
soldier could not be faulted for having reached the conclusions that he did. This plea, however, was unsuccessful.

In the ensuing disciplinary process, the soldier appealed to the BVerwG on the grounds that he was obeying his conscience, which is constitutionally protected by Article 4(1) of the German Basic Law, and that he had the right to be assigned work that did not require him to disobey his conscience. Despite the fact that it is an administrative court, not normally seized of constitutional or international matters, the BVerwG showed itself not only willing to entertain the soldier’s conscience argument, but also showed an intense interest in the question of whether the war in Iraq was illegal, as German soldiers are not required to obey orders that are contrary to international law.

Of the BVerwG’s 126-page decision, twenty-one pages dealt exclusively with the legality of the Iraq War and Germany’s participation in it. In its treatment of the issue, the court managed to rake over numerous facts, which were potentially embarrassing to the United States. Inter alia, the court reiterated the ICJ interpretation of the prohibition on the use of force used in its Nicaragua decision (a decision which went against the United States) and discussed the failed attempts to secure a new resolution against Iraq at the Security Council, before remarking that the content of the resolution depended on what was included in the final text. This implied that whatever the United States representatives “thought” S.C. Resolution 1441 allowed them to do was irrelevant. The court also quoted an interview given by Paul Wolfowitz, former President of the World Bank, in the magazine Vanity Fair. In the interview, Wolfowitz said that the weapons of mass destruction (“WMD”) case for war against Iraq had been invented for public consumption (as all sectors of the population recognized taking control of these WMD as a legitimate military objective) and because it would allow the U.S. administration to overcome “bureaucratic resistance” to the war, before recalling that U.N.

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350. Id. at 23.
351. Id.
352. Id. at 25.
353. Id. at 34.
354. Id. at 72.
355. Id. at 77.
356. Id.
General-Secretary Kofi Annan had labeled the war “an illegal act.”\textsuperscript{357}

The court found that there were “serious misgivings under international law about the legality of the war,”\textsuperscript{358} described U.S. and U.K. actions as “offensive, military battle actions,”\textsuperscript{359} and stated that “any state that uses force contrary to the U.N.-Charter is breaking military law and committing an act of aggression.”\textsuperscript{360} The court added a considerable edge to its criticism by pointing out that under the laws of neutrality, Germany may have had the affirmative duty to intern United States and British soldiers found on its territory in order to prevent them from participating in the war.\textsuperscript{361} Despite its extensive research into the legality of the war, the court did not check whether the IT project in question was contributing to the war efforts; they decided that it was sufficient that the soldier in question had understandable reasons for fearing that it might.\textsuperscript{362}

Having thoroughly delegitimized U.S. and U.K. actions, the court proceeded to criticize German complicity. In its strongest critique of the German government, the court stated that when the soldier joined the army (approximately thirty years prior), he could not have been expected to prepare himself for the possibility that a German government, constitutionally bound to observe the principles of law and justice, would ever decide to take supportive military action in favor of the United States and its allies in a war that was questionable under IL.\textsuperscript{363} The statement clearly implies that a serious deterioration in ethical and legal standards had occurred.

The court also made repeated references to the fact that decisions of conscience, such as the one under examination, were oriented on the categories of “good and evil.”\textsuperscript{364} While this is an oft-repeated formula when examining cases involving freedom of conscience, the court was unflinching in the use of this language, which made clear that “good” and “evil” were at stake.

\begin{footnotes}
\item[357] Id. at 79–80.
\item[358] Id. at 71.
\item[359] Id. at 72.
\item[360] Id. at 73.
\item[361] Id. at 84.
\item[362] Id. at 96.
\item[363] Id. at 98–99.
\item[364] Id. at 99.
\end{footnotes}
The court’s strong language in condemning the actions in Iraq was matched only by its congratulatory words for the soldier concerned. The latter part of the judgment dripped praise for the soldier, at one point extolling his “courage” in explaining his disagreement with the war to his colleagues, and at others praising his serious and thoughtful conduct throughout the investigation.

Perhaps most interestingly of all, the court specifically admitted that the fact that the soldier was influenced by religious as well as legal considerations did not harm his case, because the idea “in a democratic rule of law State, that a necessary connection between law and morality exists or should exist, is at least understandable.”

Despite the use of strong shaming language, the judgment was seen by some as an exercise in judicial restraint, attributable to the court not wanting to open up unintended consequences with regards to the constitutionality of German supportive actions or the potential criminal liability of government officials from what had started as such a limited question (freedom of conscience). However, the court technically only needed to determine whether there was enough legal uncertainty that an officer could be placed into a state of needing to exercise his own conscience on the matter. That the court also considered whether the war on Iraq was illegal has been viewed by some as a possible warning to the German government “to prevent similar actions from happening in the future.”

The authors agree with this assessment. The sympathetic treatment the soldier received from many (although not all) of his superiors, the court’s unstinting praise, as well as the fact that the court was composed of three judges and two military officers acting as volunteer judges (a mechanism often used in Germany when the question at hand demands particular expertise in an area), all point to a German establishment deeply

365. Id. at 101–02.
366. Id. at 101–02.
367. Id. at 102.
369. Id. at 38–39.
370. Id. at 41.
unhappy with the government’s supportive role in the war and willing to make a strong statement, demonstrating in the process the shame experienced as a result of the nation’s complicity in the war.

Any shaming of the United States and U.K. was likely neither per se intended nor avoided. The court’s attitude primarily seems to have been that it was merely applying the law; it could hardly be faulted for reiterating facts that were entirely true or for reiterating basic axioms of international law, regardless of the embarrassment caused. While the Court engaged in considerable use of shame-oriented reasoning, the true “master shamer” in this particular process was the German soldier who managed to bring the full light of the court system to bear on the German government’s covert military support for a war that contravened IL, simply by refusing to work on a software project.

B. Other Domestic Adjudication

Agencies other than courts may also enforce IL rules at the domestic level, and may employ shaming as a component of this enforcement. Commissions of inquiry are commonly used in this context. Consider the example of the Arar Inquiry. This inquiry arose out of the arrest of Maher Arar, a Syrian-born Canadian.\footnote{COMM’N OF INQUIRY INTO ACTIONS OF CAN. OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 9 (2006) [hereinafter COMM’N OF INQUIRY REPORT], available at http://www.pch.gc.ca/cs-kc/arar/Arar_e.pdf.} In 2002, on his way back to Canada from a vacation in Tunisia, Arar was stopped at JFK airport in New York City and arrested by U.S. officials who had been informed by the Canadian federal police that he was a terrorist.\footnote{Id. at 13–15; Jonathon Gatehouse, \textit{Maher Arar’s Mind Cannot Forget}, MACLEAN’S (Sept. 8, 2011), http://www2.macleans.ca/2011/09/08/the-mind-cannot-forget; \textit{RCMP Chief Apologizes to Arar for ‘Terrible Injustices’}, CBC NEWS (Sept. 28, 2006), http://www.cbc.ca/news/canada/story/2006/09/28/zaccardelli-appearance.html; \textit{The Unfinished Case of Maher Arar}, N.Y. TIMES, Feb. 17, 2009, at A26.} Arar was transported to Syria, where he was held in custody for nearly a year.\footnote{COMM’N OF INQUIRY REPORT, supra note 371, at 9.} He was held in deplorable conditions and beaten for the
first few weeks of his imprisonment.\textsuperscript{374} Unable to withstand this treatment, Arar made false confessions.\textsuperscript{375}

Arar’s plight gained attention from influential Canadians even before his release.\textsuperscript{376} As a result, his eventual return to Canada was accompanied by a media outcry and the Canadian government set up an inquiry headed by Judge Dennis O’Connor.\textsuperscript{377} This inquiry concluded that “[t]he RCMP provided American authorities with information about Mr. Arar that was inaccurate, portrayed him in an unfairly negative fashion and overstated his importance.”\textsuperscript{378} Further,

\begin{quote}
[s]ome Canadian officials did operate under the ‘working assumption’ that Mr. Arar had been tortured. . . . [A]ll Canadian officials dealing with Mr. Arar . . . should have proceeded on the assumption that he had been tortured during the initial stages of his imprisonment and . . . that the “statement” he had made to the SMI had been the product of that torture.\textsuperscript{379}
\end{quote}

Judge O’Connor’s inquiry also resulted in a number of recommendations for government agencies involved in anti-terrorism work. Recommendation 12 is salient: “[w]here Canadian agencies become aware that foreign agencies have made improper use of information provided by a Canadian agency, a formal objection should be made to the foreign agency and the foreign minister of the recipient country.”\textsuperscript{380} Recommendation 13 further requires the Department of Foreign Affairs to provide country reports about human rights practices to the relevant agencies,\textsuperscript{381} and Recommendation 14 requires the agencies to review their practices with regard to sharing information with countries “with questionable human rights records.”\textsuperscript{382}

\begin{flushright}
\textsuperscript{375} See COMM’N OF INQUIRY REPORT, supra note 371, at 57.
\textsuperscript{376} See id. at 40.
\textsuperscript{377} Id. at 1–2; RCMP Chief Apologizes to Arar for ‘Terrible injustices,’ supra note 372.
\textsuperscript{378} COMM’N OF INQUIRY REPORT, supra note 371, at 57, 13.
\textsuperscript{379} Id. at 33–34.
\textsuperscript{380} Id. at 344.
\textsuperscript{381} Id. at 344–45.
\textsuperscript{382} Id. at 345.
\end{flushright}
Specifically, directions are required for “eliminating any possible Canadian complicity in torture, avoiding the risk of other human rights abuses and ensuring accountability.” The inquiry also recommended that Canada “register a formal objection with the governments of the United States and Syria concerning their treatment of Mr. Arar.”

Following the publication of this report, the Canadian government issued a formal apology to Arar and awarded him CDN$10.5 million in compensation. Arar’s case was taken up by Amnesty International with a major campaign and, despite the U.S. government’s refusal to acknowledge any wrongdoing, several members of the U.S. Congress made individual apologies to Mr. Arar in 2007.

III. THE SHAMING REFERENCE GROUP

The preceding discussion about the internal and external dimensions of shame and criticisms about procedural fairness and partisanship all point to the importance of actors with whom the offender feels a sense of community as a necessary condition for the effectiveness of shaming. We call this the shaming reference group. An offender is only likely to experience shame if it suffers a loss of reputation relative to its standing within its shaming reference group. This group need not be static: it could include national and international

383. Id. at 345.
384. Id. at 361.
387. Id.; The Unfinished Case of Maher Arar, supra note 372.
389. “[S]anctions imposed by relatives, friends or a personally relevant collectivity have more effect on criminal behavior than sanctions imposed by a remote legal authority . . . because repute in the eyes of close acquaintances matters more to people than the opinions or actions of criminal justice officials.” BRAITHWAITE, supra note 38, at 69.
390. See, e.g., R v. Horseferry Road Magistrates Court, Ex parte Bennett, [1994] 1 A.C. 42 (H.L) at [67] (Eng.).
courts, international and intergovernmental organizations, nation states and their leaders, international NGOs, and domestic constituencies of the relevant state.

The authors’ notion of the shaming reference group is built upon insights from the psychology scholarship about the importance of “affective connection” with external actors who might observe the event. As Tangney and Miller note, “although shame is no more ‘public’ than guilt in terms of the actual structure of the eliciting situation, when feeling shame, people’s awareness of others’ reactions may be somewhat heightened.”

This means that a properly identified shaming reference group has potency for the enforcement of IL norms via shaming. Some examples of shaming reference groups are provided below.

A. The European Union

The EU serves as a shaming reference group for both structural and historical reasons. Structurally, EU treaties expressly create inter-linkages and transnational accountability institutions that require member states to be responsive to shaming. For example, U.K. courts are better able to resist executive pressure to deport terror suspects because of the existence of the ECHR.

Consider the case of Saadi v. Italy. In 2002, Nassim Saadi was arrested in Italy and placed in detention for several years while proceedings, in which he stood accused of several crimes including international terrorism, took place. The case under Italian law proved complex and after approximately four years of proceedings, Saadi was released from detention. However,

Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself.

Id.

391. Tangney et al., supra note 9, at 1261.
394. Id. ¶¶ 11–17.
395. Id. ¶ 31.
during the period of his detention, a Tunisian court had found him guilty of terrorism offenses (membership in a terrorist organization and incitement to terrorism) in absentia and sentenced him to twenty years imprisonment.\footnote{Id. \¶ 29.}

Following Saadi’s release, Italy desired to deport him to Tunisia.\footnote{Id. \¶ 32.} Saadi contended that there was a real threat that he would be tortured if this course of action were to be implemented.\footnote{Id. \¶ 35.} Although the Italian courts issued a stay on his deportation,\footnote{Id. \¶¶ 41–43.} Saadi also requested a stay from the Strasbourg court.\footnote{Id. \¶¶ 51–52.} The Strasbourg court decided that deporting Saadi would breach Article 3 of the European Convention of Human Rights, citing its own previous cases, Soering v. UK\footnote{Soering v. United Kingdom, App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989).} and Chahal v. UK,\footnote{Chahal v. United Kingdom, 22 Eur. Ct. H.R. 1831 (1996). Chahal was a radical Sikh living in the U.K. who was charged with conspiring to murder the Prime Minister of India. Id. \¶¶ 19, 23.} which prohibited deportation when there was a real risk of torture or inhumane or degrading treatment to the deportee at the proposed destination.\footnote{See Saadi, 49 Eur. H.R. Rep. \¶¶ 124–49.}

The U.K. joined the proceedings in Saadi as a third-party intervener.\footnote{Id. \¶ 7.} Both the U.K. and Italy argued that the court should amend its doctrine on Article 3 of the convention—developed in Chahal—to allow deporting states to consider the danger the potential deportee posed to the public in balancing their own security against their duty to prevent torture under the convention.\footnote{See id. \¶¶ 113–16, 122.} The court was not persuaded; it held that a person’s conduct is irrelevant to the absolute prohibition contained in Article 3 and that “balancing” security with the likelihood of a deportee being tortured was “misconceived”—declaring these to be two different goods or values which do not stand in any relationship to each other that could be “balanced.”\footnote{Id. \¶ 139.}
The case is significant because the U.K. pushed hard to have the court acknowledge the existence of a post-9/11 world in which it was necessary to drastically re-interpret the convention’s prohibition on torture. The court also refused to endorse the U.K. and Italy’s view that mere diplomatic assurances that a suspect would not be tortured sufficed to allow a convention state to deport a suspect in good faith. The immediate aftermath of the Saadi opinion offers a classic illustration of how the shaming reference group works. The U.K. Court of Appeal endorsed the Saadi decision at the earliest opportunity in AS and DD (Libya) v. Secretary of State for the Home Department, citing the ECHR’s insistence on close scrutiny of diplomatic assurances. The court found that it was reasonable to conclude that the assurances offered to the U.K. by Libya in AS and DD were inadequate as Gaddafi and his government did not enjoy a track-record of reliability. Due to the ECHR’s interpretation of Article 3, unlike the courts in Canada and the United States, British courts cannot submit to pressure from the executive to perform a balancing act between security needs and the prohibition on torture.

The shaming reference group can also serve both as a source of norms and as a source of monitoring, interpretation, and enforcement. For example, in A & Others v. Secretary of State for the Home Department, an appeal was brought by nine foreign nationals who were suspected of involvement in terrorism but were not charged with any crime. The U.K. had detained these individuals at Belmarsh Prison under s. 23 of the Anti-terrorism, Crime and Security Act 2001 because they could not be deported. This provision empowered the government to

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407. See id. ¶ 148. The Court specifically stated that such assurances “would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention.” Id.
408. AS & DD (Libya) v. Sec’y of State for the Home Dep’t, [2008] EWCA (Civ) 289, [68].
409. See id. at [73]. The Court also discussed the precise evidence regarding the past and possible future unreliability of the Libyan government. Id. at [68]–[82].
411. Id. at [1]–[3].
412. Id. at [2].
detain suspected international terrorists pending deportation, despite the fact that removal from the U.K. was temporarily or indefinitely prevented in derogation of Article 5 of the European Convention on Human Rights. The government claimed that this was necessary to combat the national security threat posed by al-Qaeda terrorists.

The House of Lords, by a majority of eight to one, accepted that al-Qaeda terrorism represented a serious threat to the life of the nation, but seven of the eight law lords who accepted this premise nevertheless concluded that s. 23 was not strictly required by the exigencies of the situation. These same judges also concluded that s. 23 was incompatible with Article 14 of the European Convention on Human Rights because of the way it discriminated between nationals and non-nationals. The derogation permitting permanent detention of non-nationals treated them more harshly than nationals. Absent the possibility of deportation, it lost its character as an immigration provision and hence constituted unlawful discrimination.

In Binyam, the court relied upon domestic norms and IL norms to shame both its own government and a key ally—the United States:

415. Id. at [54].
416. Id. at [44].
417. Id. at [68].
418. Id.
419. See id. at 159.
420. See supra text accompanying note 296.
421. Id.
422. The Court referred to torture as being the subject of the “abhorrence,” id. at [143], and “revulsion,” id. at [147(v)], of the entire legal system, and of “cruel, inhumane or degrading treatment” as being “the subject of international . . . stigmatism,” id. at [143]. In addition, the Court stated that when it is practiced as part “of state policy it is a particularly ugly phenomenon,” id. at [142(i)]. The court also referred to an American judgment, which called torturers “the enem[ies] of all mankind,” id. at [142(ii)] (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980)), as well as a previous judgment of the Privy Council which referred to confessions obtained by torture as having no place in any “civilised society.” Id. at [147(v)] (quoting Wong Kam-ming v. R, Lord Hailsham [1980] 1 A.C. 247, 261 (P.C.)). The court added that the UK Government facilitated the interrogation of BM for part of the period . . . in the knowledge of the reports of the interviews at Karachi which contained information relating to his detention and
The U.S. Government has refused to provide any information as to BM’s location during the period between May 2002 and May 2004. The fact that no explanation has been provided to date (despite the disclosure in the earlier proceedings) is a matter of serious concern in relation to the practical operation of the disclosure procedures before the US military commissions.

To leave the issue of disclosure to the processes of the military commission . . . would be to deny to BM a real chance of providing some support to a limited part of his account and other essential assistance to his defence. To deny him this at this time would be to deny him the opportunity of timely justice in respect of the charges against him, a principle dating back to at least the time of Magna Carta and which is so basic a part of our common law and of democratic values.

The language in these cases again rises well beyond the application of legal rules to invocations of honor and shame. When other courts or institutions in the EU refer to such decisions in their own judgments, the shaming reference group gets solidified by an iterative process where norms are refined and applied.

B. Network of Domestic Courts

Courts, particularly those that share common legal families or legal traditions—whether those are the byproduct of colonialism, treaty regimes, or membership in international organizations—are part of epistemological networks. They reference and cite each other’s opinions, thereby transplanting foreign law and IL norms into their respective domestic legal systems. When litigation involves the conduct of a state or regime, these courts act as a shaming reference group in several ways. First, they observe the application of norms by other courts and note this record in their own judgments. Second, and ancillary to this recording function, they make evaluative judgments about
treatment and to which we have referred at para 87. It is also significant that his detention incommunicado was unlawful under the law of Pakistan.

Id. at [147(vi)].

423. Id. at [147(xi–xii)]. The court also said “the unreasoned dismissal by the US Government of BM’s allegations as ‘not credible’ as recorded in the letter of 22 July 2008 is, in our view, untenable, as it was made after consideration of almost all the material provided to us.” Id. at [147(x)].
the proceedings and decisions of foreign courts in applying IL norms. Third, because they are conscious of being subjected to similar treatment by other foreign courts, they are likely to be constrained by a desire to apply IL norms correctly or, at a minimum, explain derogations from such norms in the form of plausible legal arguments.

To be sure, courts are idiosyncratic in selecting the courts to which they refer and follow no particular hierarchy in deciding which decision is more persuasive when there is a division between different courts on the issue. This has generated predictable criticism about activism and partisanship by judges.424 Critics have called for domestic courts to ignore foreign law in resolving domestic disputes, arguing that doing so is an undemocratic transplantation of foreign values outside of the legislative process.425 In the United States, there have even been efforts to pass legislation in order to take away the power of courts to refer to foreign law.426 Whether they expressly refer to foreign cases in their judgments or not, it is clear that the networks and epistemological communities that lawyers and judges share satisfy the conditions necessary for them to constitute a shaming reference group.

The practice of domestic courts on the reference to foreign law varies. U.S. courts seem to largely reference international law rather than foreign law.427 The courts of Canada often reference other courts, mainly from the U.K.,428 but on at least one occasion it referenced Israel when debating non-refoulement in relation to suspected terrorists.429 Even when these courts

428. See, e.g., Charkaoui v. Canada (Minister for Citizenship and Immigration), [2007] 1 S.C.R. 350 (Can.).
429. In Suresh, in contemplating the deportation of a member of the Liberation Tamil Tigers of Eelam to Sri Lanka (where he claimed he would, as a member of an armed opposition group, face torture at the hands of the gov-
come to conclusions that are different from the foreign cases referred to, the discursive process has shaming implications.

For example, in recent terrorism cases, Canada and the United States rely on Article 3 of the Convention against Torture (“CAT”), which they seek to interpret in a manner that is not conducive to achieving the CAT’s goals. These courts have whittled down the CAT’s main purpose by finding that only a “risk” of torture is not sufficient to prevent deportation, or that other concerns, such as security, need to be taken into consideration when considering deportation to a state in which the deportee may be tortured. In addition, these courts consider whether or not their executives have been able to obtain “diplomatic assurances” that the receiving state will not torture the deportee. These devices recast the issue as one of “balancing.”

In the United States, the issue of non-refoulement was sidestepped by the Supreme Court, which pointed out that there was no likelihood (only a possibility) that the suspects would be tortured in the receiving country, but also (similar to Canada) that it was for the executive to determine whether there was a risk of torture. There was no discussion of IL in their findings and the issue of non-refoulement was given quite cursory treatment. At the same time, the Supreme Court has insisted fully on its jurisdiction regarding Guantanamo Bay, and has also made clear that it is its responsibility to ensure that the United States is living up to the standards it has set for itself.

The Canadian Supreme Court noted that “the Supreme Court of Israel sitting as the High Court of Justice and the House of Lords have rejected torture as a legitimate tool to use in combating terrorism and protecting national security.” Suresh v. Canada (Minister for Citizenship and Immigration), [2002] S.C.R. 3, para. 74 (Can.) (citing H.C. 6536/95; Hat’m Abu Zayda v. Israel General Security Service, 38 I.L.M. 1471 (1999)); Sec’y of State for the Home Dep’t v. Rehman, [2001] 3 W.L.R. 877, para. 54.

431. Id.
433. See id. at 702 (stating that “[t]he Judiciary is not suited to second-guess such determinations” in reference to whether or not a deportee is likely to be tortured at their destination).
and to ensure compliance with obligations of international law in that respect.\footnote{434}{For example, in Hamdan, the Court examined international law in great detail, explicitly refusing to accept the government’s argument that the Geneva Conventions did not apply to the “war on terrorism.” See Hamdan v. Rumsfeld, 548 U.S. 557, 625–35 (2006).}  

In the Canadian Supreme Court case of Charkaoui,\footnote{435}{Charkaoui v. Canada (Minister for Citizenship and Immigration), [2007] 1 S.C.R. 350 (Can.).} the court decided that it was not permissible to detain foreign nationals for alleged terrorism-related activities based on undisclosed information.\footnote{436}{Id. para. 139.} In doing so, the court also compared several Canadian anti-terrorism measures to the British Anti-Terrorism Act, employing the somewhat circuitous reasoning that the British Anti-Terrorism Act had itself been based on certain aspects of Canadian law and practice.\footnote{437}{Id. paras. 80–87.} The decision also cited a number of foreign court decisions, including Rasul v. Bush\footnote{438}{Id. para. 90.} and Silvenko v. Latvia.\footnote{439}{For example, at paragraph 124 of its judgment, the Court states \textit{these conclusions are consistent with English and American authority}. Canada, it goes without saying, is not alone in facing the problem of detention in the immigration context in situations where deportation is difficult or impossible. Courts in the United Kingdom and the United States have suggested that detention in this context can be used only during the period where it is reasonably necessary for deportation purposes: \textit{R v. Governor of Durham Prison, ex parte Singh}, [1984] 1 All E.R. 983 (Q.B.).} It seems essential for the court to justify its conclusions with numerous references to American and English court decisions.\footnote{440}{The Court devoted several paragraphs of its decision to analyzing the British decision A v. Secretary of State for the Home Department, in which several breaches of the ECHR were determined before the Court concluded, \textit{the finding in Re A of breach of the detention norms under the European Convention on Human Rights was predicated on the U.K. Act’s authorization of permanent detention. The IRPA, unlike the U.K. legislation under consideration in Re A, does not authorize indefinite detention and, interpreted as suggested above, provides an}}
U.K. courts take a more eclectic approach to the reference of foreign legal authorities. For example, in *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, the case concerned a British national who had been captured in Afghanistan and held in Guantanamo Bay. The litigants sought to compel the British government to take all possible steps to release Abbasi from the “legal blackhole” that was Guantanamo. The court mentioned the shared legal tradition of the United States and U.K. and made numerous references to the decisions of the European courts, ultimately concluding that Abbasi had no rights under the ECHR or international law to diplomatic assistance from the U.K. It also stressed that Abbasi’s case had been taken up by the Inter-American Commission and that the Foreign and Commonwealth Office would likely be unable to help the matter further than the Commission would. The decision demonstrated a willingness of the court to rely on both foreign courts and international bodies to ensure that a degree of protection commensurate with its own standards would be implemented.

**C. Other International Organizations**

As previously noted, IOs serve as shaming enforcers. They also serve as a shaming reference group. One example is the Inter-American Commission on Human Rights. In the context of Guantanamo Bay, the Commission has urged the United States to clarify the status of the inmates and to conduct investigations into accusations of treatment that may amount to torture or other inhumane and degrading treatment, on the grounds that the United States is obligated to prevent such treatment. Throughout its report, the Commission empha-
sized that U.S. action did not suffice to comply on any of the contentious points and left no doubt that the fate of the Guantanamo detainees was in no way up to the United States alone to decide. The United States categorically denied the allegations of torture, but felt the need to justify this denial by substantiating its own safeguards in this respect, including numerous ongoing judicial proceedings.447

CONCLUSION

States adhere to IL for a variety of reasons, including the threat of being shamed. This Article has demonstrated that the conceptual work on shaming is applicable to IL and that understanding the precise architecture for the application of shaming enriches our conception of IL. Further, the authors proposed a structure for shaming in IL by identifying the relevant targets for shaming, the enforcers of the sanction, and the conditions for imposing them. It has been demonstrated that enforcement of IL norms affects state behavior in ways similar to traditional coercive sanctions and that states invest considerable effort to avoid shaming.

The analysis showed several examples of states, regimes, and individuals being shamed by international organizations and by domestic courts in the U.K., United States, Germany, and Canada. These courts did not enforce IL as they would normally enforce domestic law, but rather called upon the state’s sense of shame to get the regime to modify its behavior. While the record of the courts is patchy and idiosyncratic, recent case law indicates a growing willingness to reference IL norms and more systematic study is necessary in order to fully understand the role of national courts in enforcing IL. In the final part of the paper, we developed the notion of a shaming reference group, advancing some examples of networks that meet the necessary conditions, including supranational organizations like the European Union and networks of domestic courts. It is hoped that the framework offered will inspire other scholars to study shame sanctions in IL in a more exhaustive manner, expanding on our case studies and developing on the acknowledged limitations of partisanship, definition, delegation, and dispersion to propose models that advance the understanding of how IL is enforced with non-traditional legal sanctions.

447. Id. at 673–74.
LEGAL AND ECONOMIC DEVELOPMENT WITH SUI GENERIS CHINESE CHARACTERISTICS: A SYSTEMS THEORIST'S PERSPECTIVE

Dr. Xiao Li*

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INTRODUCTION

The astonishing and persisting economic growth without a sound rule of law scheme in China has long been observed as an intriguing but troublesome mismatch. The myth can largely be attributed to the inapplicability in China of the deterministic causal relationship between economic development and the rule of law, a conviction generally held by scholars of law and economics. The premise of such a line of reasoning is

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1. Apart from economists, quite a large number of legal scholars have devoted their research to this issue. Representative works include RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW (2002); JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 86 (Randal Peerenboom ed., 2010); RANDALL PEERENBOOM, CHINA MODERNIZES: THREATS TO THE WEST OR MODEL FOR THE REST? 34 (2007); Donald C. Clarke, Legislating for a Market Economy in China, in CHINA’S LEGAL SYSTEM: NEW DEVELOPMENTS, NEW CHALLENGES 13, 14 (Donald C. Clarke ed., 2008); ULRIC KILLION, MODERN CHINESE RULES OF ORDER: PARADOX OF LAW AND ECONOMICS 189 (2007); STANLEY LURMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 102 (2002); Yongqin Wang, Understanding Economic Development and Institutional Change: East Asian Development Model Reconsidered with Implications for China, 16 J. CHINESE POL. SCI. 47, 48 (2011).

2. This understanding first starts from the differentiation between common law regimes and civil law regimes. According to the Legal Origin theory, common law regimes tend to have better performance in capital markets and economic development in general. For a brief but apt summary, see John Ohnesorge, China’s Economic Transition and the New Legal Origins Literature, 14 CHINA ECON. REV. 485, 487 (2003). For legal origin theory, see Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, The Economic Consequences of Legal Origins, 46 J. ECON. LITERATURE 285, 298 (2008). According
the existence of a simplistic, linear causal relationship between a country’s institutional framework and its observed economic performance. In essence, the separation of power among the legislature, the judiciary, and the executive administration sets up a sound framework in which the necessary, if not sufficient, conditions for healthy economic development are said to be in place. Economic development without such a framework is seemingly in conflict with this traditional wisdom.

Along with such a line of reasoning, development must occur through a dramatic shift, as happened when the Soviet Union and its former satellites abandoned communism, and replaced it with the democratic legal framework of the dominant Western
to La Porta et al., “legal origins—broadly interpreted as highly persistent systems of social control of economic life—have significant consequences for the legal and regulatory framework of the society, as well as for economic outcomes.” Id. at 326.

3. For a critical review of the Legal Origin theory, see Ruth Aguilera & Cynthia Williams, “Law and Finance”: Inaccurate, Incomplete, and Important, 6 BYU L. REV. 1413 (2009), and the three fallacies—“the extrapolation fallacy” (by extending a conclusion at micro-levels to complex systems), “the transmission problem” (the unclear consequential link between legal origin, company law, and stock markets), and “the exogeneity paradox” (the assumption that legal institution can be separated)—identified by Professor Katharina Pistor. See Katharina Pistor, Rethinking the “Law and Finance” Paradigm, 6 BYU L. REV. 1647, 1648–62 (2009).

4. This can largely be attributed to the then widely promoted Washington Consensus, which was coined by John Williamson and targeted reform policies for Latin America. Among the ten original themes, the final theme is “The legal system should provide secure property rights without excessive costs and make these available to the informal sector.” As stated by Williamson: “Shortly after I had written my 1989 paper, I began to get interested in the transition from communism to a market economy that was then in its early stages. It soon became clear that institutional issues were, or at least should be, at the heart of the transition, and that one of the most critical actions was defining property rights.” See John Williamson, Senior Fellow, Inst. for Int’l Econ., The Washington Consensus as Policy Prescription for Development, A Lecture in the Series “Practitioners of Development” 11 (Jan. 13, 2004). Criticism against the Washington Consensus has long been in existence. See David Rodrik, Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank’s Economic Growth in the 1990s: Learning from a Decade of Reform, 44 J. Econ. Lit. 973, 973–74 (2006); Charles Gore, The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries, 28 WORLD DEV. 789 (2000).
economies. This process of transformation was conducted at a huge cost and the long-term implications are still too early to tell.

In stark contrast to the aforementioned transformation, China follows an alternative “evolutionary” approach, which is “piecemeal, partial, incremental, [and] often experimental.” While the efficacy of the Chinese approach has been made manifest in Chinese economic development over the past thirty years, its incongruence with the generally accepted theory of law and economics scholars presents some interesting areas for analysis.

To understand this phenomenon, legal scholars have been approaching it from a combination of backgrounds in sociology, economics, and political science. Among those approaches, recent developments in Systems Theory, the Complexity Theor-


6. The bleak picture can be observed in Theodore Gerber & Michael Hout, More Shock than Therapy: Market Transition, Employment, and Income in Russia, 1991–1995, 104 Amer. J. Soc. 1, 3–6 (1998). But see generally Vladimir Popov, Shock Therapy Versus Gradualism Reconsidered: Lessons from Transition Economies after 15 Years 1 (Ctr. for Econ. & Fin. Res. at New Econ. Sch., Working Paper No. 68, 2006). The author first separated the transformation period into two stages: the transformational recession, and the recovery and the process of economic growth. Several factors contributed to the former recession, which include the distortions in industrial structure, trade patterns accumulated during the period of central planning, and the collapse of state institutions during transition period. As the ill-effects of the former factors gradually disappeared in the recovery stage, the positive effects of the ongoing liberalization on economic growth became apparent. Still, the author admonished that “institutional capacity and reasonable macroeconomic policy” are prerequisites for successful economic growth.


8. See Niklas Luhmann, A Sociological Theory of Law (Martin Albrow ed., Elizabeth King & Martin Albrow trans., 1985); Gunther Teubner, Law as
and the Complex Adaptive System (CAS) theory\textsuperscript{10} are of special relevance. The adaptation of the Systems Theory from biology to social science has long been credited to Niklas Luhmann, who developed two key concepts—operational closure and structural coupling—to understanding the autopoietic development of a social system.\textsuperscript{11} For a systems theorist, a system is embedded within an environment composed of other systems.\textsuperscript{12} Due to the internal operational closure and the struct-

\begin{quote}


10. JOHN H. MILLER & SCOTT E. PAGE, \textit{COMPLEX ADAPTIVE SYSTEMS: AN INTRODUCTION TO COMPUTATIONAL MODELS OF SOCIAL LIFE} (2007); YIN SHAN & ANG YANG, \textit{APPLICATIONS OF COMPLEX ADAPTIVE SYSTEMS} (2008). The general thesis is that social systems can be deemed CASs.

11. See the following discussion in Part I.

12. According to Luhmann, society as a system is subdivided into subsystems by a principle of functional differentiation:

One can describe a society as functionally differentiated as soon as it develops its main subsystems with a view towards specific problems which then will have to be resolved within the frame of every corresponding functional system. This implies to renounce to a fixed hierarchy among functions . . . Instead of such a hierarchy . . . one should establish the rule according to which every system takes its own function to take precedence over others and then conceives of others functional systems—and in fact of society as a whole—as its environment.

tural coupling with the external environment, a system must be studied within a network of systems. An inference can accordingly be drawn that co-evolution of a system and its environment is an inherent feature of the Systems Theory.

Alternatively, the Complexity Theory and the CAS theory supplement our understanding of the autopoiesis of systems by exploring the complexity of the co-evolution process. For Holland, CASs are “systems that involve many components that adapt or learn as they interact.” In a similar vein, Ruhl deems a CAS something “comprised of a macroscopic, heterogeneous set of autonomous agents interacting and adapting in response to one another and to external environment inputs.” It thus follows that social systems, including the legal system, the

Croatia, Sept. 14–18, 2009), available at http://www.u-picardie.fr/~LaboERSI/travaux/fichiers/T595.pdf (quoting and translating from NIKLAS LUHMANN, POLITIQUE ET COMPLEXITÉ 43–44 (1990), translated from SOZIOLÓGICA DE LA AUFKÄRUNG 4: BEITRÄGE ZUR FUNKTIONALEN DIFFERENZIERUNG DER GESELLSCHAFT (1987)). For Seidl, “[f]unctional systems constitute environment for each other.” This is because each system has its own language of a set of binary code and reproduces by self-reference. And “[t]he different systems are merely structurally coupled to each other, i.e. their structures are adjusted to each other in such a way as to allow them to react to their respective operations.” See David Seidl, LUHMANN’S THEORY OF AUTOPOIETIC SOCIAL SYSTEMS 14 (Ludwig-Maximilians-Universität München Munich Sch. of Mgmt., Working Paper No. 2004-2, 2004). For the purpose of this article, the political system, legal system, and economic system are subsystems of the social system. Each of the three constitutes the part of the environment of some other subsystem of the social system. To facilitate discussion in this article, we assume that the social system constitutes the political system, the legal system, and the economic system only.

13. See generally Seidl, supra note 12.
15. J.B. Ruhl, Law’s Complexity: A Primer, 24 GA. ST. U. L. REV. 885, 887 (2008). For Rihani, Complex Adaptive Systems share the following traits: “They have active internal elements that furnish sufficient local variety to enable the system to survive as it adapts to unforeseen circumstances. The systems’ elements are lightly but not sparsely connected. The elements interact locally according to simple rules to provide the energy needed to maintain stable global patterns, as opposed to rigid order or chaos. Variations in prevailing conditions result in many minor changes and a few large mutations, but it is not possible to predict the outcome in advance.” See SAMIR RIHANI, COMPLEX SYSTEMS THEORY AND DEVELOPMENT PRACTICE UNDERSTANDING NON-LINEAR REALITIES, 80 (2002).
economic system, and the political system can be termed as CASs. According to these theories, the co-evolution process places CASs almost always at the edge of chaos, though emergence of order may spontaneously occur. However, internal attractors and attractor basins capture the chaos, indicating


17. The chaos however is only the appearance. Chaos may “exist at detailed levels” but an order may emerge at the global level. Rihani, supra note 15, at 7. As the chaos increases, emergence of qualities unforeseen at the level of individual elements of the system come into existence. In fact, some orderly qualities may be observed, as occurs with swarms of fireflies that will flash at the same time and same frequency. On this, Strogatz observes: “For reasons we don’t yet understand, the tendency to synchronize is one [of] the most pervasive drives in the universe, extending from atoms to animals, from people to planets.” See Steven Strogatz, Sync: The Emerging Science of Spontaneous Order 14 (2003).
that a system is capable of stabilizing itself. Such dynamic equilibriums of CASs are the result of continuing feedback or learning processes between agents within a system, and between a system and its environment. In turn, the sustainable

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18. The development path of complex systems is captured by attractors, “the closed set of states a system repeatedly traverses when at equilibrium.” See Cliff Hooker, *Introduction to Philosophy of Complex Systems*, in *PHILOSOPHY OF COMPLEX SYSTEMS*, supra note 16, at 3, 24. Three types of attractors have been identified: (1) point attractors—equilibrium points where the system will tend to and then stop; (2) cyclical attractors—as what the pendulum does between two points; and (3) strange chaotic attractors in non-linear complex systems—the development path always distinct from the past path, an unpredictable evolutionary process that is decided by initial conditions. The strange chaotic attractors are thus relevant to the current study. For organized complex systems, there are a large number of attractors, which are similar but not identical. Rihani, *supra* note 15, at 8, 78–80. However, the difference between attractors is within specific limits.

In general, a disturbance to a system at equilibrium will lead the system into one of three situations: (1) stay put within the current attractor basin; (2) be pushed to another attractor basin but of the same fitness landscape; or (3) transform to another attractor basin of a new fitness landscape. Though internal variations happen all the time, the system remains stable in the sense that it does not escape the attraction of existing attractors of the existing fitness landscape, or the picture of the whole system cannot easily change into another global pattern attracted by another set of attractors. If the latter happens, the structure of the system changes. Thus, it is the existence of these attractors that explains the emergence of order in seemingly chaotic systems. See Hooker, *supra*, at 23–25.


Still, it must be mentioned that some minor variation may initiate a catastrophe through which the current equilibrium state of the system will shift into a totally different state with a new set of attractors. The intriguing issue is we cannot know beforehand which variation at what time will lead to the catastrophe. Accordingly, catastrophes are generally not welcomed in our discussion.

19. In Luhmann’s words, this is a recursive reference process, including both the internal self-reference and the external structural coupling between the system and its environment. Specifically, “[c]ommunication comes about
growth of a system is decided not only by the quality of the system on its own but also, more importantly, by the compatibility of the system with those other systems that make up its environment. The importance of such an understanding is at least twofold. First, the co-evolution between and among systems seriously constrains the application of the traditional wisdom that operates under the presumption that there is a simplistic, linear one-way causal relationship to be identified. Second, the role of a regulator in CASs is better deemed an adaptive manager who is good at understanding and responding to the dynamic and continuing learning process of the elements within systems.\textsuperscript{20}

The application of such theories to China demands an understanding of the sui generis Chinese characteristics: Confucianism, Chinese Communist Party (“CCP” or the “Party”) control, and strong, centralized government control, which reveal a distinctive configuration of the autopoiesis of Chinese systems. In contrast to the rather strong operational closure of the legal system in Western countries, the Chinese legal system has a relatively weak internal operational closure and a strong, but nearly one-way, structural coupling in which it is subjugated to both the economic system (at least during the fast growth period) and the political system.\textsuperscript{21} With such a configuration of autopoiesis, the Chinese legal system has been adapting on dual track schemes and via experiments, yielding meaningful experiences that can be put to use on a wider scope. Additionally, the adaptive efficiency of China’s system requires strong compatibility among different systems. Indeed, both the dominant CCP control and strong central government control have largely been employed to support economic growth. Specifically, deregula-

\textsuperscript{20} Even though Ruhl is describing the recent development in American court management, the quotation is applicable to the trial-and-error style adaptive walk. See J.B. Ruhl & Robert L. Fischman, \textit{Adaptive Management in the Courts}, 95 MINN. L. REV. 424, 428 (2010).

\textsuperscript{21} See \textit{infra} Part II.
tion to local governments, which provides opportunities to apply trial-and-error techniques, is put to effective use by strong central and CCP control in coupling or learning between patches of the system. Effective and efficient learning processes may accordingly have been achieved for the whole system. Retrospectively, the government has largely realized its role as an adaptive manager of CASs.

The structure of the Article is as follows. Part I will give a brief introduction to the systems theories. Next, Part II will describe sui generis Chinese Characteristics. This background information will then be used to apply the Systems Theory to the adaptation of Chinese legal systems in Part III, and show in Part IV how the compatibility among different systems has contributed to persistent economic growth in China over the past thirty years.

I. THEORETICAL BACKGROUND

A. The Systems Theory

By adapting the autopoiesis of organizations in biology, Niklas Luhmann develops the Systems Theory for social science. For biologists, autopoiesis implicates both self-reference and self-reproduction of elements of biological organizations. Self-reference refers to a development process relying on the interactions among and between internal constituent elements of an organization; self-reproduction is a concomitant result of

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22. “Patch” has a special meaning in Complexity Theory. The idea is attributed to Stuart Kauffman, who created this concept in his book. STUART KAUFFMAN, AT HOME IN THE UNIVERSE 252–57 (2000). Patches are decision-making units of a complex adaptive system, which do not overlap but are coupled with each other. In China, the provinces can appropriately be deemed patches, which is similar to the well-known models of “competitive federalism.” For an application of the patching theory to decision making, see David Post & David Johnson, “Chaos Prevailing on Every Continent”: Towards a New Theory of Decentralized Decision-Making in Complex Systems, 73 CHI.-KENT L. REV. 1055 (1998).

23. See supra note 5.

this self-referential process. Viewed from this feature alone, organizations are autopoietic in that they are operationally closed.

In social science, Luhmann defines a system through the process of delineating a system from its environment, which is comprised of a number of other systems. Within a system, a program using a language of a binary code dictates the operation of the elements of the system. Interactions between a system and its external environment are achieved by structural coupling, meaning the communication of information or learning in social science. Given that a system is embedded within its environment, structural coupling provides important information conduits between a system and its environment.

It shall be noted that both internal and external pressures may initiate a coupling process. For instance, abrupt envi-

25. For Luhmann, "[s]ocial systems can only reproduce themselves by (always self-referential) communication." See Niklas Luhmann, The Unity of the Legal System, in AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 16 (Gunther Teubner ed., 1987). Also, for Luksha, “By all means, self-reproduction must be self-referential, because it (a) requires system to operate on itself, (b) requires a system to maintain a representation (or some kind of description) of itself.” Pavel Luksha, Society as a Self-Reproducing System, 2 J. SOCIOCYBERNETICS 13, 15 (2001).

26. See the translation by Julien Broquet, supra note 12. The delineation of a social system and its environment hinges upon the operational closure of the system in which the binary code is employed. Accordingly, a social system cannot communicate with its environment but can only be structurally adjusted through structural coupling with the other subsystems in the environment.

27. The binary code can be understood in positive and negative terms. For instance, in law the binary code is legal or illegal; in politics, power or not in power; and in economics, possession or non-possession, or payment or non-payment.

28. Luhmann differentiates a social system from the other living systems by emphasizing communication, which is a synthesis of selection of information, and utterance. See Niklas Luhmann, SOCIAL SYSTEMS 142 (Timothy Lenoir & Hans Ulrich Gumbrecht eds., John Bednarz, Jr. & Dirk Baecker trans., 1995). In essence, “the autopoiesis of social systems, i.e. the reproduction of communications through communications.” Seidl, supra note 12, at 9. See also Gunther Teubner, The Two Faces of Janus: Rethinking Legal Pluralism, 13 CARDOZO L. REV. 1443 (1992).

Environmental changes may demand changes within a system, or the intensive conflicts within a system may change the environment within which the system is embedded. Hence, a system both influences and is influenced by its environment. What is emphasized by systems theorists, however, is that external information must be digested by the internal elements to achieve autonomous self-reproduction. Thus, even though systems theorists juxtapose structural coupling with operational closure, the former serves the latter and the importance of structural coupling may easily be downplayed.

The Systems Theory approach departs from the focus of the traditional wisdom on the simplistic, linear causal relationship to a network study by considering any given system merely as a part of some greater network. Also, taking into account coevolution requires a continuing reflexive regulatory approach, according to which the regulator must be proactively responsive to the information communicated in the co-evolution process. In other words, too much inflexibility will lead to a rigid regulatory framework that is unsuitable to the dynamic co-evolution process.


31. For instance, how decision making in one nation leads to changes to the world system, as shown by the ramifications of the case of William Marbury v. James Madison, 5 U.S. 137 (1803), in the US.

32. In contrast with the biological reproduction of individuals, Luhmann argues that a social system reproduces itself by self-reference, but emphasizes the role of communication: “Social systems use communication as their particular mode of autopoietic reproduction. Their elements are communications which are recursively produced and reproduced by a network of communications and which cannot exist outside such a network.” Niklas Luhmann, The Autopoiesis of Social Systems, in Sociocybernetic Paradoxes Observation, Control and Evolution of Self-Steering Systems 172, 174 (Felix Geyer & Johnannes van der Zouwen eds., 1986).
B. The CAS Theory

1. Complexity

While the Systems Theory identifies two key qualities of a social system—operational closure within the system and structural coupling between the system and the other systems in the environment—the recent development of the CAS Theory helps us better understand the complexity of the co-evolution between a system and its environment. The study on the complexity of a system starts from the observation of chaos at the detailed levels of a system. For activities of systems at detailed levels, simple deterministic biology, physics, and chemistry rules play their due roles. However, once such rules repeat numerous times, tiny differences in the initial situation


Although we make a conceptual distinction between a ‘system’ and its ‘environment’ it is important to note that there is no dichotomy or hard boundary between the two . . . in the sense that a system is separate from and always adapts to a changing environment. The notion to be explored is rather that of a system closely linked with all other related systems within an ecosystem . . . . Within such a context change needs to be seen in terms of co-evolution with all other related systems, rather than as adaptation to a separate and distinct environment.

Id. at 29–30.

Still, it must be noted that complex theory itself is full of complexity. Despite the exponential development for the past thirty years or so, Hooker observes that “there is no unified science of complex systems . . . the empirical domain of complex systems is itself complex—at this time irreducibly complex!” Hooker, supra note 18, at 3–90, 5.


35. See Robert Bishop, supra note 34.
will be amplified and lead to huge differences in the end results.\footnote{This is not to say that the difference cannot be suppressed, for amplification can be either positive or negative. See Hooker, \textit{supra} note 18, at 24.} Likewise, a minute disturbance to the normal development process may also lead to unexpected results.\footnote{See RIHANI, \textit{supra} note 15, at 80.} The randomness of the end results is called chaos, which is sensitive to the initial conditions of a system.\footnote{Id.}

The above line of reasoning may also be applied to social science studies, as evidenced by the ability of human beings to learn from the past in planning for the future. Indeed, the autopoiesis of a social system is achieved through such a continuous ongoing information communication process, in which agents “recursively use the results of previous steps and anticipate future ones.”\footnote{Niklas Luhmann, \textit{Operational Closure and Structural Coupling: The Differentiation of the Legal System}, 13 CARDOZO L. REV. 1419, 1424 (1992).} As amplification of tiny differences of the initial states during the development process is normal, the application of the traditional linear thinking in social science may accordingly be constrained.

However, chaos does not provide the whole picture of the co-evolution of a system and its environment. Complexity theorists also note that the emergence of qualities unforeseen at the level of individual elements of a system come into existence as the chaos develops.\footnote{Rihnani, \textit{supra} note 15, at 7. For a brief history of emergence and its implication on social science studies, see Peter A. Corning, \textit{The Re-emergence of Emergence, and the Causal Role of Synergy in Emergent Evolution}, 185 SYNTHESSE 295 (2012).} The unanticipated quality may well appear in an orderly way, or, to use the language of complexity theorists, an order may emerge at the global level despite chaotic localities.\footnote{Id.} For instance, synchronization has been widely observed in both nature and in human society.\footnote{See text accompanying note 17 \textit{supra}. For example, some orderly quality has already been observed in swarms of fireflies, which will flash in the same place at the same time and with the same frequency. For a recent introduction to the application of sync, see Johan Suykens & Grigory Osipov, \textit{Introduction to Focus Issue: Synchronization in Complex Networks}, 18 CHAOS, 037101-1, at -1 to -4 (2008).} Alternatively,
the development process of a system may also be discontinuous and subject to critical situations, where a minimal perturbation of the situation may give rise to an abrupt catastrophe to the whole system.\(^{43}\) Thus, the unpredictable complexity of a dynamic system can be seen as a result of chaos and of how systems and environments are affected by such chaos.

Throughout the ever-changing development process of a system, intermediary states between total chaos and complete order are the norm.\(^{44}\) In fact, a system is at the edge of chaos most of the time.\(^{45}\) This may not necessarily be inimical for the development of a system. A system at equilibrium does not have sufficient energy to engender changes in response to alterations in its environment and may thus degrade into death.\(^{46}\) Nor is it desirable that a system is in total chaos, as these scenarios are typically characterized by a failure to function as an organized system as a result of a proliferation of uncertainty. An appropriate combination of chaos, emergence, and catastrophe thus helps the system keep an adaptable healthy status.\(^ {47}\)

Too few states produce unvarying order and too many create chaos: both are dead ends. Poised between the two regimes, complexity is the zone where self-organization allows new stable patterns to emerge and evolve without compromising the survival of the entire system. In all cases the system must

\(^{43}\) For a specific discussion of chaos, emergence, and catastrophe and their application in understanding environmental law and the broader law-and-society system, see J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-up Call for Legal Reduc

\(^{44}\) This idea is widely attributed to Chris Langton, *Computation at the Edge of Chaos: Phase Transitions and Emergent Computation*, 42 PHYSICA D 12 (1990). See also Ruhl, supra note 18, at 1418.

\(^{45}\) See Langton, supra note 44; Ruhl, supra note 18, at 1418.

\(^{46}\) See Rihani, supra note 15, at 80.

\(^{47}\) Fryer contends that the most productive state is at the edge of chaos, where maximum variety and creativity provides possibilities of behavior. See Peter Fryer, *A Brief Description of Complex Adaptive Systems and Complexity Theory*, TROJAN MICE http://www.trojanmice.com/articles/complexadaptablesystems.htm (last visited Aug. 24, 2013).
have some variety to give it flexibility to withstand unexpected shocks, but limits on variety are also necessary to avoid chaos.48

In sum, chaos cannot be avoided. Instead, it is internalized into the dynamic governance scheme of a system. The unanticipated emergence of quality at the level of a system implies that a whole system cannot be intuitively understood simply through the identification of individual elements. Accordingly, it is inadvisable to make ex ante projections of the development of a whole system on the basis of our knowledge of individual elements or any subsystem only. Instead, the non-linear interaction characteristic of co-evolution should be introduced to liberate us from the established constraints of traditional wisdom.

2. Adaptability

The second characteristic of a social system is its adaptability. In order to describe the adaptation at detailed levels, Stuart Kauffman introduced the concept of fitness landscapes, which consist of all possible survival strategies (trajectories) of agents within a system.49 Normally, the fitness landscape of an agent is full of peaks, valleys, and planes, indicating that the development path of the agent is not always a simple upward slope to the maximum of the system.50 However, because no agent has a “God’s eye view of its entire fitness landscape,”51 an agent spends most of his time searching for the local extremum, which may not necessarily be the global maximum.52 In addition,
given that the coevolution between a system and the environment the system is embedded in, the fitness landscape is said to have a fluid nature.\footnote{Rihani, supra note 15, at 82.} In turn, a search for a nearby peak may itself be time consuming and risky, as moving out of the current niche may court further unexpected risks; for instance, falling into a low-point or simply running on vast plateaus, both of which are worse than the option to remain at its current level. In other words, neither is it effortless for an agent to climb up to a local extremum, nor is it an easy decision for an agent to move out of the niche and search for a higher peak once he stays on a local peak.\footnote{Ruhl, supra note 18, at 1456–57.}

One inference from the above understanding is that if it is unknown when and where we can find the global peak, more meaningful trials by agents shall be promoted to achieve the more efficient and effective adaptation of the system as a whole. Given that the sensitivity to the initial situation largely limits the efficacy of a learning process from a foreign environment, it is advisable to promote the learning process between agents with similar, if not identical, initial situations.

Such understanding can conveniently be observed in how the trial-and-error approach to introducing new policies has been gradually institutionalized in China. For instance, private initiatives to get rid of poverty initially succeeded in rural China.\footnote{Cheng-Gang Xu, The Institutional Foundations of China’s Reforms and Development 45–46 (Ctr. for Econ. Res. Discussion Paper No. DP7654, May 2008), available at http://ssrn.com/abstract=1547574.} Cosseted by the local and central governments, the initial successful efforts largely invigorated similar experimentation across the whole country.\footnote{Id. at 15–17.} In consequence, Township and Village Enterprises (“TVEs”) in rural China contributed to economic growth, a result that Deng Xiaoping and his cohorts had not foreseen.\footnote{In a meeting with the guests from Yugoslavia on June 12, 1987, Deng said: “The greatest achievement that was totally unexpected is that rural enterprises [both TVEs and private enterprises] have developed.” Yingyi Qian, The Process of China’s Market Transition, 1978–1998: The Evolutionary, Historical, and Comparative Perspectives, in China’s Deep Reform: Domestic Politics in Transition 229, 237 (Lowell Dittmer & Guoli Liu eds., 2006); see}
were realized, the Chinese central government introduced new policies by promoting the successful experiences within larger areas.58

On the whole, CAS theorists observe that the adaptation path of a system is set by attractors, which refer to “the closed set of states a system repeatedly traverses at equilibrium,”59 and attractor basins, which refer to “the wider set of states [a system] can pass through while still returning to its attractor.”60 Each system may have different states of equilibrium but each state of equilibrium has its own idiosyncratic combination of attractors and attractor basins.61 The change of a system from one equilibrium state to another is not easy, as the existence of such attractors and attractor basins makes it hard for the system to escape the attraction of existing attractors.62 Indeed, even though internal variations happen all the time, a system remains stable in the sense that the whole system cannot easily shift into another global pattern attracted by another set of attractors or attractor basins.63

Due to the existence of attractors and attractor basins, a CAS is resilient in the sense that a system has the ability to absorb disturbances and reorganize so as to stay in the same basin of attraction.64 Resilient CASs have adaptive capacities, a concept

also Ying Fan, N. Chen & D.A. Kirby, Chinese Peasant Entrepreneurs: An Examination of Township and Village Enterprises in Rural China, 34 J. SMALL BUS. MGMT. 72 (1996). As Deng admitted, the result “just came out of nowhere.” MICHAEL ELLMAN, SOCIALIST PLANNING 72 (Phyllis Dean et al. eds., 2d ed. 1989).

59. See supra text accompanying note 18.
60. See Hooker, supra note 18, at 24. Hooker employs an example of a ball rolling in a basin. The point at the bottom where the ball may stop is a point attractor. If the ball keeps running around the basin wall without falling into a point at the bottom, then there is a cyclic attractor. A strange chaotic attractor exists in a non-linear complex system; the famous one is Lorenz’s butterfly effect.
61. Indeed, “the attractor landscape is the system’s dynamical signature.” See Hooker, supra note 18, at 24.
62. See supra text accompanying note 18.
63. Id.
which refers to the ability of a system to “sense threats to system equilibrium and respond by changing resilience strategies without changing fundamental attributes of the system.”65 In comparison with the traditional wisdom that law provides certainty, conceptualizing a legal system as a CAS emphasizes how to improve a legal system’s ability to adapt to the ever-changing external environment.66

Since different systems have different resilience and adaptive capacities, adaptability will vary from system to system.67 The less adaptable or the stickier a system is, the longer period of time it requires to adapt to a new environment.68 Among the three systems (legal, political, and economic) being discussed in this Article, the stickiest system is the political system due to the fact that China is still a party state. Conversely, the economic system is the least sticky system.

The implication of such a realization is two-fold. First, the varying adaptability between systems with different degrees of stickiness may contribute to undesirable catastrophes and to the collapse of the whole system.69 Thus, the sticky political

66. Id. at 1387–91.
67. Gerard Roland, Understanding Institutional Change: Fast-Moving and Slow-Moving Institutions, 38 STUD. COMP. INT’L DEV. 109 (2004). For Roland, the cultural system is the stickiest one, and the legal system and the political system follow in sequence. But since China is a party state, the political system is stickier than the legal system.
68. Id.
69. See XUEYI LU, PEILIN LI & GUANGJIN CHEN (陆学艺,李培林,陈光金 主编), 2013 NIAN ZHONGGUO SHEHUI XINGSHI FENXI YU YUCE SHEHUI WENXIAN CHUBAN SHE (2013 年中国社会形势分析与预测, 社会科学文献出版社) [2013 CHINA SOCIETAL ANALYSIS AND FORECAST] (2012). According to their report, despite the achievement until the Eighteenth National Congress of the CCP, [At this decisive stage, China needs to further adjust the economic structure, boost domestic consumption, find solutions to growing income inequality, and prevent the rebound of widening income gap. On the other hand, government also needs to pay more attention to adjust the deficiency of the current employment structure, mitigate the tension of labor relationship, and rely on innovative strategies to cope
system may have to be adaptable to the new environment so that sustainable economic growth can be achieved. Second, the time lag may provide opportunities to develop different systems in sequence.\(^70\) A government may take advantage of the time lag to devote its efforts in developing its economy while passively carrying out reforms of the stickier political system so long as the delay in reform does not degrade the environment. However, the government must take advantage of the time lag tactically, without allowing the political system to drag the greater environment into catastrophe.\(^71\)

### C. Institutional Compatibility

In essence, both the Systems Theory and the CAS Theory assume an adaptable coevolution between a system and its environment. As shown, the Systems Theory emphasizes operational closure with structural coupling supplementing information from the outside, while the Complexity Theory focuses on the details of adaptation between a system and its environment.\(^72\)

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\(^70\) Camilo Olaya, *System Dynamics Philosophical Background and Underpinnings*, in 1 COMPLEX SYSTEMS IN FINANCE AND ECONOMETRICS 812, 813 (Robert Meyers ed., 2011 ed. 2010).


\(^72\) International Society for the Systems Sciences (“ISSS”) defines a system as “a family of relationships between its members acting as a whole.” Matthew Shapiro et al., *The Primer Toolbox*, ISSS.ORG (last visited Aug. 25, 2013), www.issss.org/primer/toolbox.htm. Professor Forrester pointed out, “The con-
The research derived from the foregoing theories thus deviates from the traditional wisdom that focuses on decision making by rational individuals to a new perspective on a network study that considers any given system as a part of some bigger network. A change to any part of the network will thus effect the situation of other aspects of the network and engender unexpected implications on the situation of the whole network. On this point, the argument of Professor Ruhl is pertinent:

The fact of coevolution in dynamical systems is the ultimate demise of reductionism. No one component can be extracted from the system, studied in isolation of the system, altered to fit whatever ideal is in operation for the system, and then inserted back into the system with the expectation that we can predict the subsequent behavior of either the component or the system. The alterations of the one component’s schema and structure will reverberate through the system, causing other components to alter their schema and structures, with who knows what as the end result.\footnote{See Ruhl, supra note 18, at 1471 n.245.}

Such understandings may press us for alternative ways to achieve the ultimate objective of the CAS study, which is to determine how to achieve the sustainable growth of the whole system.\footnote{See Ruhl, supra note 18.} Due to the coevolution among systems that constitute an environment, the adaptive capacity of the environment as a whole depends on the compatibility among systems with different adaptive capacities. The objective of how to achieve the sustainable growth of the whole system is then transformed into how to achieve institutional adaptability by building up compatibility of the systems. Different from the prior thinking, efforts shall not be devoted only to improving the resilience and

cept of a system implies interaction and interdependence.” See Jay W. Forrester, Industrial Dynamics, 347–48 (1961) (quoted in Olaya, supra note 70, at 815). Empirical evidence also indicates the interrelationships between and among systems shall be the right target. For instance, in Haggard and Tiede’s study of the relationship between economic development and the rule of law, they warn that future studies should pay more attention to the complementarities among rule of law institutions. See Stephan Haggard & Lydia Tiede, The Rule of Law and Economic Growth: Where Are We?, 39 World Dev. 673 (2011).
adaptive capacity of any independent component system. Rather, compatibility among systems is also, if not more, important to achieve the sustainable growth of the whole system. Given that every CAS is always at the edge of chaos, a dynamic compatibility between systems within an environment is accordingly required.

A relevant study here is the research of Davis on the relationship between institutional flexibility and economic growth.\textsuperscript{75} Davis argues that institutional arrangements must be flexible to accommodate “continual institutional learning and adaptation.”\textsuperscript{76} Davis first differentiates between institutional quality and institutional flexibility, which refers to the ability of creating new institutional arrangements according to environmental development.\textsuperscript{77} Davis found that improvement in institutional quality may have “an immediate but temporary” positive impact on economic growth whereas improvement in institutional flexibility will lead to “a gradual but persistent” economic growth.\textsuperscript{78} Thus, in comparison with institutional quality, institutional flexibility is more meaningful for sustainable economic growth. Good economic institutions, according to Davis, may be sufficient to maintain the economy at a given level but do not necessarily create high or even positive growth rates of economy.\textsuperscript{79} In addition, Davis observes that “countries with high quality but inflexible institutions will be rich and stagnant, while countries with low quality but flexible institutions will be poor and dynamic.”\textsuperscript{80}

For Davis, an emphasis on institutional quality indicates a static view of the institutional environment, which is in conflict with the ever-changing reality of the world.\textsuperscript{81} In comparison, the focus on institutional flexibility shall in turn attract aca-

\textsuperscript{76} Id. at 318.
\textsuperscript{77} Id.
\textsuperscript{78} Id. (discussing the positive effects of institutional flexibility on the economies of Europe and the United States and the negative effects arising from the lack of institutional flexibility).
\textsuperscript{79} Id. at 307.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 306.
demic attention to the “flexible institutional matrix that will adjust in the context of evolving technological and demographic changes.”82 Institutional arrangements of a society shall accordingly be established with an objective to achieve adaptive efficiency—“the ability of [a society] to adjust flexibly in the face of shock and evolve institutions that effectively deal with altered reality.”83 This emphasis on dynamic institutional flexibility thus corresponds to the systems theorists’ focus on the coevolution among and between systems.

II. THE SUI GENERIS CHINESE CHARACTERISTICS

Chinese social systems have long been labeled with Chinese characteristics, a clear indicator of autopoiesis of the Systems Theory. According to Professor Zhang, Chinese characteristics refer to two points: Chinese in terms of culture and Socialist in terms of legal and political systems.84 In essence, these can be characterized as both Confucian culture and the dominance of the Chinese Communist Party. However, to explore the relationship between law and economic development, a third characteristic was also identified; i.e., the unique central-local relationship.85 Each trait will be discussed in sequence.

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82. Id.
83. Douglass North, Understanding the Process of Economic Change 13 (Mercatus Ctr. of George Mason Univ., Forum Series on the Role of Insts. in Promoting Econ. Growth, June 24, 2003), available at http://pdf.usaid.gov/pdf_docs/Pnacx402.pdf. But notice North then deemed China an intriguing exception, for China “does not have the rule of law, it has a political dictatorship; it does not have secure property rights—all of which have under girded the development of the United States and the [W]estern world.” Id. at 21.
85. I interpret Professor Zhang’s assertion that China is socialist in terms of legal and political systems to mean that the political system, which entails the legal system, is dominated by the CCP. Furthermore, the way that the legal regime interacts with economic policy is defined by a unique relationship between local and central government.
A. Confucianism

The first Chinese characteristic is Confucianism. According to Confucianism, moral virtues are better governance guidelines than laws.86 The contrasting philosophy in China is Legalism, according to which formal rules shall be set up beforehand and strictly enforced afterwards.87 Under the guidelines of Legalism, rulers are merely professionals who enforce predetermined laws.88 Predictability and uniformity are thus commended merits of Legalism. However, Legalism’s rigidity attracts vehement criticisms from Confucians, who hold that predetermined rules are doomed to be incomprehensive and unable to deal with the varieties of social life.89 Moreover, laws require

86. JIAPAN CHEN, CONFUCIUS AS A TEACHER 266–71 (1994).
88. This is the criticism by Han against Confucianism. For Confucianists,

If you try to guide the common people with coercive regulations and keep them in line with punishments, the common people will become evasive and will have no sense of shame. If, however, you guide them with virtue and keep them in line by means of ritual, the people will have a sense of shame and will rectify themselves.

in Analects 2.3; but Han says:

When a sage governs a state, he does not wait for people to be good in deference to him. Instead, he creates a situation in which people find it impossible to do wrong. If you wait for people to be good in deference to you, you will find that there are no more than ten good people within the borders of your state. But if you create a situation in which people find it impossible to do wrong, the entire state can be brought into compliance. In governing, one must use what works in most cases and abandon what works in only a few cases. Therefore, the sage does not work on his virtue, he works on his laws.

Quoted in Eric Hutton, Han Feizi’s Criticism of Confucianism and Its Implications for Virtue Ethics, 5 J. MORAL PHIL. 423, 428 (2008).
89. ‘Li’ is a concept with a wide range of meaning, which may include: 1) the narrowest—ritual or rites; (2) the broader—proper conduct; (3) all the institutions and relationships. Thus, Bodde argues that “li, in short, constitute both the concrete institutions and the accepted modes of behavior in a civilized state.” And “fa is a model or standard imposed from above (the heaven), to
human beings to set up and enforce them, such that the ideal sought by legalists may be distorted by the people who construct the system.\textsuperscript{90} The conquest of Confucianism over Legalism dates back to the Han Dynasty and shows that governance by laws has historically been downplayed by governance by virtues in China.\textsuperscript{91}

What is embedded in Confucianism is the impetus to coordinate the interrelationship between individuals.\textsuperscript{92} For Professor Lin, such understanding can be readily identified in one key element of Confucianism represented by the Chinese character “仁.”\textsuperscript{93} The word itself is defined as “a good interpersonal relationship that is universally valid between two random persons.”\textsuperscript{94} In the words of systems theorists, such an objective can be interpreted as an attempt to constrain chaos to a reasonable extent so as to avoid catastrophes. Thus, Confucianism promotes a shift in focus from rational independent individuals to the interrelationship between individuals, an approach which is inherently in compliance with the Systems Theory approach.

The application of Confucianism in practice is guanxi, a widely recognized norm of conduct, which is pervasive in social
and economic life. Economically, guanxi helps to reduce transaction costs in repeated games. The implications of guanxi in economic activities shall not be deemphasized as transactions are more often made in China on the basis of guanxi affiliations than on arm’s length principles. Considering the high frequency of transactions in a fast growing economy, the binding effect of such relational contracts is evident once disputes arise; whereby contractual parties may first seek compensation through long-term contractual relationships set up on guanxi to redress losses incurred at an earlier time.

Within such a context of extensive self-enforcing, interlinked relational contracts, the function of the rule of law may in practice be circumscribed given the preference of agents to seek recourse through such norms as guanxi. The subconscious preference to avoid being present at courts may also be partly explained by the widely welcomed and long-established tradition of mediation as an important alternative dispute resolution method in China. Moreover, the inefficient and non-independent judiciary system may also lead disputants to the recourse on non-judiciary solutions.

In effect, the emphasis of guanxi throughout the history of China promotes a value-based and norm-driven governance

95. Meling Wong, Guanxi Management as Complex Adaptive Systems: A Case Study of Taiwanese ODI in China, 91 J. BUS. ETHICS 419, 419–21 (2010). Wong argues that guanxi is bound to the five fundamental relationships, i.e., wulune—emperor-subject, father-son, husband-wife, elder-younger siblings, and friend-friend. In other words, Wong thinks that all guanxi can be interpreted in wulune.


97. Wong, supra note 95, at 421.

98. This is because initial loss may well be recovered and surpassed by the benefits to be acquired in future contracts.


100. This refers to alternative dispute resolution and political solutions such as xinfang (letters and visits), or even protests before the government office building. For letters and visits, see Carl Minzner, Xinfang: An Alternative to Formal Chinese Legal Institutions, 42 STAN. J. INT’L L. 103 (2006).
structure.\textsuperscript{101} It should also be noted that the strong sinicization that stubbornly persisted throughout the history of mainland China may, to this day, effectively shield China from external efforts for a change to Western culture.\textsuperscript{102} In fact, despite the “onslaught of new legal and commercial regimes,” guanxi practices have even been flourishing in business transactions.\textsuperscript{103} Hence, the long-established informal norms of guanxi continue to have an important role in social activities in China. Nevertheless, these important informal norms shall not be employed to minimize the role of law, but rather to seek the right combination between the soft norm and the hard law.\textsuperscript{104}

B. The Dominance of the CCP

The second characteristic is the dominance of the CCP control, which can be reflected in both the omnipresence of the CCP and the hierarchical Nomenklatura personnel management system.

1. The Omnipresence of the CCP

The structure of the Chinese political system is better described as a hierarchical structure with the leading CCP on the top and several democratic parties playing consultative roles and showing full support for the leadership of the CCP.\textsuperscript{105}


\textsuperscript{102} See generally HENRY KISSINGER, ON CHINA (2011).


\textsuperscript{105} Official introduction to the political system of China:

China’s political system is a system of multi-party cooperation and political consultation under the leadership of the Communist Party of China (CPC). The system was established and developed jointly by the CPC and other democratic parties in their longtime commitments to China’s revolution, its construction and reforms. The system has become a basic political system in contemporary China.
Within such a political governance structure, the omnipresence of the CCP is apparent in a number of ways. First, the CCP is the most populous party with more than 82.6 million party members at the end of 2011. CCP members occupy the majority of the National People’s Congress (“NPC”) at different levels. Though most non-party members may select to be representatives of the Chinese People Political Consultation Conference (“CPPCC”), their roles are subject to the leadership of the CCP. Also notable is the recently promoted The CPC-Led Multi-party Cooperation and Political Consultation System, CRIENGLISH (Sept. 30, 2007), http://english.people.com.cn/90002/92169/92211/6275039.html.


107. From the eighth to tenth NPC, the proportion of the CCP among the representatives of the National People’s Congress has been around 70%. Considering that the representatives of National People’s Congress are selected from the representatives of Local People Congress, the ratio of CCP among the representatives of Local People’s Congress is much higher. See Jiajun Qiu (邱家军), Renda Daibiao Xuanju Zhong Zhengzhi Baguan Quan de Yunxing Weidu (人大代表选举中政治把关权的运行维度) [The Dimension of the Political Check in Electing Representatives of the National People’s Congress], 6 FU DAN ZHENG ZHI XUE PING LUN (《复旦政治学评论》) [FUDAN UNIV. POL. SCI. REV.] (Mingming Chen ed., 2008). This is the case even though a ratio of 65% was inserted in Zhonggong Zhongyang Guanyu Zuo Hao Difang Geji Renda Huanjie Gongzuo de Tongzhi (中共中央关于做好地方各级人大换届选举工作的通知) [Notification on Carrying out Election at Expiration of Office Terms] (in September 1992), CPC (Sept. 24, 1992), available at http://www.e-cpcs.org/newsinfo.asp?Newsid=10117.

108. This has been maintained through a series of documents from the party. The widely referred to sources include the Opinion of the CCP Central Regarding the Insisting on and Perfecting the System of Multiparty Co-Operation and Political Consultation under the Leadership of the CCP in 1989 and the Opinion of the CCP Central Regarding the Further Strengthening of the System of Multiparty Co-operation and Political Consultation under the Leadership of CCP 2005. Zhonggong Zhongyang Guanyu Jianchi he Wanshan Zhongguo Gongchandang Lingdao de Duodang Hezuo he Zhengzhi Xieshang Zhidu de Yijian (中共中央关于坚持和完善中国共产党领导的多党合作和政治协商制度的意见) [Opinion of the CCP Central Regarding the Insisting on and Perfecting the System of Multiparty Co-Operation and Political Consultation under the Leadership of the CCP in 1989], available at http://cpc.people.com.cn/GB/64107/65708/65722/4444523.html; Zhonggong Zhongyang Guanyu Jinyibu Jiaqiang Zhongguo Gongchandang Lingdao de
“Three-Represents,” meaning that the CCP represents (1) society’s most advanced productive forces; (2) advanced culture; and (3) the needs and interests of the greatest majority of the Chinese population.\textsuperscript{109} This shows that the Party has become more inclusive and expansive than ever in attracting elites with different backgrounds across different classes of society.\textsuperscript{110} Second, the CCP’s presence is felt in social life through the CCP Constitution, which dictates the establishment of branches of the Party wherever there are three party members in any organization, be it a joint venture, a law firm, a private company, or institutions in the judicial system.\textsuperscript{111} Third, there is a hierarchical structured Political-Legal Committee under the CCP Committees at different levels.\textsuperscript{112} The members of such com-


\textsuperscript{111} See Constitution of Communist Party of China, supra note 109, art. 29. Primary Party organizations are formed in enterprises, rural areas, government organs, schools, research institutes, communities, social organizations, companies of the People’s Liberation Army, and other basic units where there are at least three full Party members.

\textsuperscript{112} See SUSAN V. LAWRENCE & MICHAEL F. MARTIN, CONG. RESEARCH SERV., R41007, \textit{UNDERSTANDING CHINA’S POLITICAL SYSTEM} (2012), available at
mittees are heads of judiciary organs at different levels, and because judiciaries are supervised by and are responsible for NPC at different levels, the influence of the CCP may in fact undermine the independence of the judicial system.\textsuperscript{113}

Given the omnipresence of the Party, economic agents in China proactively follow an “if you can’t beat them, join them” approach by seeking opportunities to be elected or attracted as a representative either of the People’s Congress at different levels or of the CPPCC.\textsuperscript{114} This is a mutually beneficial process. For economic agents, joining in the club with elites who hold strong powers in accumulating and distributing resources provides them with a better chance to take advantage of more insider information.\textsuperscript{115} Thus, the Party can conveniently achieve the

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\textsuperscript{113} See Fu Hualing, Autonomy, Courts and the Politico-Legal Order in Contemporary China, in THE ROUTLEDGE HANDBOOK OF CHINESE CRIMINOLOGY 76–88 (Liqun Cao, Ivan Y. Sun, & Bill Hebenton eds., 2013).
\textsuperscript{114} Currently there is no specific law on CPPCC. However, the preamble to the Constitution of the PRC (XIANFA, 宪法) states:

The Chinese People’s Political Consultative Conference, a broadly based representative organization of the united front which has played a significant historical role, will play a still more important role in the country’s political and social life, in promoting friendship with other countries and in the struggle for socialist modernization and for the reunification and unity of the country.


\textsuperscript{115} Empirical evidence shows that political connections bring additional benefits to entrepreneurs. Wu et al. found that private firms with politically connected managers perform better and receive more tax benefits from local governments than those without such managers. In addition, politically connected managers are more likely to be assigned to underperforming local State Owned Enterprises. See Wenfeng Wu, Chongfeng Wu, Chunyang Zhou & Jun Wu, Political Connections, Tax Benefits and Firm Performance: Evidence from China, 31 J. ACCT. & PUB. POL’Y 277 (2012); Hong Bo, Political Appointments of Managers in China (Univ. of London Working Paper, 2009), available at http://csf.kiep.go.kr/download.doo?type=e&att_seq_n=2377.
\end{flushleft}
political objective of diversified representation of the people and can concurrently enhance its control of the Party.116

Alternatively, the omnipresence of the Party transforms potential political conflicts between the different parties into those between different factions within the Party.117 It is thus reasonable to worry that the intensive conflicts within the Party may lead to its collapse. However, the fact is that short of a hegemonic faction, a rational choice for factions is to cooperate with each other for common benefits. Furthermore, internal improvement and alternation of party leaders help the CCP to avoid the closed style of government observed in Muslim countries and sidestep the potential pitfalls of democracies where the opposing parties do not contribute to meaningful debates, but merely debate to oppose.118 Last but not least, the collective leadership also forestalls the one-man leadership of the past by promoting “considerable bargaining and maneuvering for factional advantage.”119 In other words, neither the similarity among different factions within the Party is strong enough to lead the system into a dying equilibrium, nor is the difference between factions strong enough to lead the system into total chaos.120 Instead, efficiency and rationality in decision making may still be enhanced under the one party control system by

116. This is further enhanced in the recent Opinions issued by the CCP Central. See Zhonggong Zhongyang Guanyu Jiaqiang Xinxingshi Xia Dangwai Daibiao Renshi Duiwu Jianshe de Yijian (中共关于加强新形势下党外代表人士队伍建设的意见) [Opinion of the CCP Central Committee regarding the Further Strengthening the Construction of Non-CCP Personnel under the New Situation in 2012]; Zhonggong Zhongyang Guanyu Jinyibu Jiaqian Dangguan Rencai Gongzuo de Yijian (中共中央关于进一步加强党管人才工作的意见) [Opinion of the CCP Central Committee regarding the Further Strengthening the Work of Control of Talents by the CCP], available at http://cpc.people.com.cn/BIG5/n/2012/0926/c64387-19120321.html.


118. Id.

119. LAWRENCE & MARTIN, supra note 112.

120. This is not to say that internal democracy has already achieved its desired efficacy. For instance, self-monitoring has been far from satisfactory, which in turn seriously undermines the efficacy of the internal democracy.
both expanding the wide coverage of party members and promoting internal democracy within the Party.\footnote{See Zheng, \textit{supra} note 117.}

2. The Nomenklatura System

The dominance of the CCP is further enhanced by the institutionalized Nomenklatura system. Transplanted from the former Soviet Union, the Nomenklatura system refers to the institutional arrangements on personnel management through which the Party has the power to decide the list of potential candidates for key positions, both in the government and the party’s own hierarchy, as well as to nominate qualified personnel.\footnote{John Burns, \textit{China’s Nomenklatura System}, 36 PROBS. COMMUNISM 36, 36 (1987).} Since 1980, the system has been extended to party committees at lower levels.\footnote{Central Committee Organization Department, “Notice on the Repromulgation of the Job Title List of Cadres Managed by the Party Central Committee, 1980,” in which the Party committees at lower levels were also required to do the same. See Burns, \textit{supra} note 122, at 37.}

The Nomenklatura system covers a wide range of personnel—from political positions to positions in judiciary organs, academic institutions, and enterprises.\footnote{For a list of the job titles covered, see Burns, \textit{supra} note 122 at 42–45. A relevant concept is \textit{BianZhi}, which is usually translated as “establishment.” The two concepts are different. \textit{BianZhi} clarifies what departments and positions are included in an administrative setup whereas the Nomenklatura system tells which job titles are under the party control. See Kjeld Brødsgaard, \textit{Cadre and Personnel Management in the CPC}, 10 CHINA: INT’L J. 69, 76 (2012).} For instance, judges in the judiciary system and directors of state-owned enterprises (“SOEs”) are all covered by the Nomenklatura scheme.\footnote{For the list of job titles covered by the Nomenklatura System, see Burns, \textit{supra} note 122 at 42–45.} On the one hand, they are party members and regulated by the Nomenklatura scheme.\footnote{See Burns, \textit{supra} note 122; see also Hon S. Chan, \textit{Cadre Personnel Management in China: The Nomenklatura System, 1990–1998}, 2004 CHINA Q. 703 (2004).The so-called cadres must be “both red and professional,” or both politically adamant and technically professional (you hong you zhuan, 又红又专). See Fengcheng Yang (楊凤城), \textit{Guanyu “You Hong You Zhuan” Wenti de Lishi Pingjia} (关于“又红又专”问题的历史评价) [A Historical Review of the} On the other hand, they must per-
form their specific professional functions either in courts or in the SOEs.\textsuperscript{127} In turn, the promotion of such personnel is made on the basis of both their professional performance and their contribution to the Party.\textsuperscript{128} Thus, by integrating the Party’s policies into the performance evaluation criteria of people under the scheme, the Nomenklatura scheme can effectively enhance the control of the Party on both the economic and legal system.

The extensiveness and effectiveness of the Party control through the Nomenklatura scheme can easily be identified in the following diagram:\textsuperscript{129}

\begin{figure}
\centering
\includegraphics[width=0.5\textwidth]{diagram.png}
\caption{The Chinese Power Pyramid}
\end{figure}

Source: Kjeld Brødsgaard, Cadre and Personnel Management in the CPC (2012).


127. \textit{See generally} Chan, \textit{supra} note 126.


129. \textit{See} Brødsgaard, \textit{supra} note 124, at 75.
As shown, non-party leaders cannot be found in ranks higher than the Bureau Level. It is fair to say that the Nomenklatura system today helps the Party achieve a highly controlled personnel administration system with an extensive coverage, the role of which cannot be minimized due to “its importance for the Party patronage and social stability.” A combined reading of the omnipresence of the Party and the Nomenklatura system tells us that a unified central leadership with a level-by-level hierarchical structure has been institutionalized not only within the Party but also in the wider administrative system of government.

3. Adaptation of the Party

The omnipresence of the Party and the strong personnel control under the Nomenklatura system not only helps to establish and uphold the leading position of the political system among the three systems of China, but also fosters a very strong operational closure of the CCP-dominated political system. Internally, the structural coupling of the political system with the other two systems shows a one-way radiation. As shown in the Constitution, the single-party controlled political system demands both a national economy dominated by state-owned economy and a legal system serving the policies and interests of the Party. Conversely, the influence of the economic and legal systems on the reform of the political system is limited.

Externally, the structural coupling of the Chinese political system with the political system of other countries is rather

130. Despite a short break during the Cultural Revolution period, the scheme has long been in existence. During the period of the Cultural Revolution, the intensive conflict within the party incapacitated the functioning of the system. John P. Burns, "Downsizing" the Chinese State: Government Retrenchment in the 1990s, 175 CHINA Q. 775, 802 (2003).
132. See XIANFA, pmbl., arts. 1, 5, 6 (1982) (China).
weak and again manifests itself in a one-way mode by radiating outward. In fact, the experience of the former Soviet Union during the transition at the end of the 1980s taught China a lesson on how not to act—the Soviet Union’s abrupt and simple change of its system without a complementary socio-political environment resulted in a bitter experience.

It is true that the development of the legal and economic systems may impose more intensive pressure on substantive reform of the political system. Still, the amount of delay needed to effect changes may also save enough time for the Party to reform from within. In fact, the Party has been undergoing adaptable reform. For instance, inner-party democracy has been promoted ever since Mao’s era and deemed the “lifeblood of the Party.” By introducing such measures as multi-candidate

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134. This is in the sense that the structure of the Chinese political system is stubbornly resistant to external pressures. The Chairman of the National People’s Congress Standing Committee, Bangguo Wu, stated that China will not follow the Western path and would prefer a “no political change” policy. See Zheng Yongnian, Where Does the Chinese Communist Party Go from Here?: Challenges and Opportunities, 10 CHINA: INT’L J. 84, 85 (2012). Professor Zheng argues that the CCP is rather open internally but closed externally. The internal openness is achieved by intra-party democracy.

135. See generally Popov, supra note 6.

136. As quoted by Li, a survey of 80,000 people conducted by the Organization Department of the CCP in 2008 showed that one third of the Chinese populace was not happy with the way the CCP leaders were selected or the performance of the CCP leaders. See Cheng Li, Intra-Party Democracy in China: Should We Take It Seriously?, CHINA LEADERSHIP MONITOR, Fall 2009, at 12, available at http://media.hoover.org/sites/default/files/documents/CLM30CL.pdf.

137. For that, Nathan’s summarization is apt:

[F]our aspects of the CCP regime’s institutionalization: 1) the increasingly norm-bound nature of its succession politics; 2) the increase in meritocratic as opposed to factional considerations in the promotion of political elites; 3) the differentiation and functional specialization of institutions within the regime; and 4) the establishment of institutions for political participation and appeal that strengthen the CCP’s legitimacy among the public at large.


138. The phrase was introduced on the 16th Party Congress in 2002. For a critical review of the Inner-Party Democracy, see Joseph Fewsmith, Inner-Party Democracy: Development and Limitations, CHINA LEADERSHIP
elections, decision making by votes, and institutionalized management of the cadres, it is expected to achieve a more transparent Party life.\textsuperscript{139} In addition, the collective leadership invigorates dynamic factional politics, with the result that internal democracy may lead to greater institutionalization of the inner-party democracy, thus further enhancing the Party’s control.\textsuperscript{140} As one professor observed, “China has not moved away from socialism, but has rather kept the socialist brand and applied it in a more expansive way.”\textsuperscript{141}

The end result of such a nearly single-direction structural coupling may well be a stultified political system, which may further hinder or destroy the progress made in the economic system and the legal system. For instance, even though political and social reform had already begun since the 16\textsuperscript{th} CCP Congress in 2002, the reform is to a large extent aimed at supplementing or complementing the results achieved by economic reform and perfecting the environment for economic reform.\textsuperscript{142} However, as Premier Wen once warned: “Without the success of political structural reform, it is impossible for us to fully insti-

\textsuperscript{139} See generally Zheng, supra note 134.  
\textsuperscript{140} See Li, supra note 136, at 7–8.  
\textsuperscript{141} See Zhang, supra note 84, at 53.  
\textsuperscript{142} This is still the case after the promulgation of the Resolution on Several Key Issues in Comprehensively Deepening the Reform on the third Plenum of the Eighteenth CCP Committee. See Zhuoyuan Zhang, The Key to Comprehensively Deepen the Reform is the Reform of Economic System, CHINA SOC. SCI. TODAY, Nov. 27, 2013, available at http://www.csstoday.net/xueshuzixun/guoneixinwen/86239.html. Even though a radical political reform was not possible, as what happened in the former Soviet Union, the reform in political system has been introduced at times when the political system severely constrains the development of economy.
tute economic structural reform.”\textsuperscript{143} Viewed from this perspective, the adaptation of the political system is relatively passive rather than proactive.\textsuperscript{144}

C. The Symbiosis of Strong Central Control and Gradual De-regulation

Strong central control is the third sui generis Chinese characteristic to address. At the time when the country was founded, the objective to develop heavy industry, the necessity to guarantee agricultural provisions and supplies, and the requirement to supply public goods all made centralization both economically and politically indispensable.\textsuperscript{145} However, the heavy workload at the central government and the unnecessary complications arising from the information asymmetry under the command economy led to decentralization in 1957.\textsuperscript{146} However, serious
coordination failures called for centralization again only two years later. The ensuing economic stagnation reignited efforts to decentralize in the 1970s and, in turn, the investment boom arising from discretions at local levels resulted in another round of centralization.

As before, the re-centralized governance structure was again identified as one of the main obstacles to economic development at the beginning of reform. Deregulation had since been promoted to liberate productivity. As one main technique to deregulation, fiscal reform carried out in 1980 required local governments to seek the fiscal balance on their own. Local governments then began to do their utmost to promote economic development, resulting in self-contained and sufficiently diversified provincial economies, which indicate that intensive competition among different provinces may persist.

By invigorating local economies through inter-provincial competition, deregulation has contributed to astonishing econ-
nomic growth. However, the imbalance between the central and local governments imposed a serious threat on the authority of the central government, and centralization was re-ordered in 1994. Indeed, the whole picture is better understood as “cycles of centralization and deregulation,” throughout which the central government has been holding the ultimate say on the timing and extent of deregulation. Thus, even though deregulation to local governments can be seen as a main feature of recent administrative reform, local discretion has always been subject to review from the strong center.

Considering the discretion enjoyed by local governments, the power of the central government is of special importance in China. First, strong central control provides an effective mechanism for structural coupling between local governments, which enjoy discretion that provides many opportunities for experimentation. This strong central control can limit the effects of experiments within the constraints established by the central government, enabling successful experiences to be extended to a wider scope, with negative effects arising from unsuccessful experiments accordingly limited to experiment points. Second, the central control aids in fighting against unpredictable crises, a feature that is especially important given the fitness landscape of a fast growing economy. For instance,

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153. See Lin et al., supra note 146, at 484–86.
154. Shen et al., supra note 145, at 8–11.
157. See Sebastian Heilmann, Maximum Tinkering under Uncertainty: Unorthodox Lessons from China, 35 MOD. CHINA 450, 457 (2009). But see Cai & Treisman, supra note 156. According to Cai and Treisman, it is the competition at the center among factions with different ideological predispositions and local connections rather than the competition among locals that explains the economic growth. This view however does not change the argument that it is the trials at the local level that provide the dynamic to adapt to a point of efficiency.
the CCP Politburo met in October 2008, immediately after the collapse of Lehman Brothers, and released its economic stimulus package worth 4 trillion RMB in November 2008. An effective control from the central government thus secures the effective intervention required for speedy effective solutions. Third, a strong central government is essential for achieving the objective of fast growth per se, in terms of accumulating and distributing resources in a weak market economy while securing a stable environment for the adaptation of the whole system. For instance, the highly centralized planned economy helped China at the foundation of the country build its heavy industry, guarantee supply and procurement of grain, and provide public goods. Similarly, it is also the strong central control that transferred the wealth accumulated from the TVEs to avoid widespread unemployment for numerous employees of the SOEs, thus saving time for the ensuing reforms. Likewise, a strong central control is also necessary for securing a stable environment, in which the country can initiate and continue its economic reforms. Thus, the strong central control in combination with the gradual deregulation to local governments provides a suitable strategy to achieve the adaptive efficiency of the whole system.

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160. See Lin et al., *supra* note 145.
III. IMPLICATIONS ON THE ADAPTATION OF THE LEGAL SYSTEM

A. Adaptation of the Legal System

1. Adaptation with the Dominant Political system

In stark contrast to the checks and balances scheme in the West, analyzing China’s one-party political system is integral to understanding Chinese legal development. Since the immediate and overarching political system overshadows the legal and economic development, the structural coupling between the political system and the legal system is almost always one way. In fact, the paramount dominance of the Party in the judiciary system can be observed in terms of finance, personnel, and operation.\(^{163}\) For instance, local governments finance local courts, and most members of the Adjudicative Committee in each court, a Committee which is in charge of influential cases, are CCP members.\(^{164}\) In combination with long-established social \textit{guanxi}, the intrusion of politics seriously undermines the independence of the court system.\(^{165}\)

Alternatively, the lack of confidence in the judiciary system drives disputants directly to the government for a solution. As the populace inherently thinks the government is the ultimate settler of disputes, the populace may intentionally sidestep the legal system.\(^{166}\) This is especially true when cases deal with


\(^{166}\) The letter and visit is one field example. For a critical view of the letter and visit in China, see Minzner, \textit{supra} note 100, at 105; see also Carl Minzner, \textit{China’s Turn Against Law}, 59 AM. J. COMP. L. 935, 938 (2011).
sensitive sociopolitical and socioeconomic issues.\footnote{Fu and Peerenboom tried to tell the difference between political cases (“directly challenging the authority of the ruling regime”), politically sensitive cases (“affect[ing] socio-political stability, economic growth, international recognition or reputation or the broad public interest”) and labor cases (using collective and different dispute resolution procedures). Fu Yulin \& Randall Peerenboom, \textit{A New Analytical Framework for Understanding and Promoting Judicial Independence in China}, in Judicial Independence in China: Lessons for Global Rule of Law Promotion 95–133 (Randall Peerenboom ed., 2010).} Additionally, the Party’s policies may easily be integrated into laws and regulations wherever ambiguous existing laws and regulations leave opportunities for the Party to intervene.\footnote{Id. at 96–97.} In combination with these elements, the Nomenklatura scheme and the increasingly expansive party membership enhance the enforceability in social life of Party policies, which may in fact function as a “living constitution.”\footnote{Id.} Just as one scholar properly argues, the Chinese legal system can only be appropriately understood with its indispensable political element.\footnote{Ugo Mattei, \textit{Three Patterns of Law: Taxonomy and Changes in the World’s Legal Systems}, 45 Am. J. Comp. L. 5 (1997).}

Thus, in comparison with the rather autonomous nature of legal systems in Western society, the operational closure of the legal system within China may have to be constrained, if not handicapped, by its nearly one-way structural coupling with the leading political system.

Besides, the dominance of the political system in China also implies a delicate adaptation of the legal system. The recently promoted Three-Supremes—meaning “the supremacy of the Party, the supremacy of popular interests, and the supremacy of the Constitution and law”—within the judiciary system can be cited as a revealing example here.\footnote{Taisu Zhang, \textit{The Pragmatic Court: Reinterpreting the Supreme People’s Court of China}, 25 Colum. J. Asian L. 1, 4–5 (2012).} As an echo to the Three-Represents and the pursuit to establish a harmonious state, the president of the Supreme People’s Court proffered the Three Supremes.\footnote{The phrase derived its origin from a speech by the then President Jintao Hu at a National Conference on Political-Legal Work convened by the CCP’s central Political-Legal Committee. President Hu said: “In their work, the grand judges and grand procurators shall always regard as supreme the par-}
merely describes the established dominance of the political system among the three systems, as the supremacy of the Party has always been placed in the front. But on the other hand, the three-supremacy reveals how the Chinese judiciary system responds delicately to the current environment with a strong Party control and strong economic performance. Indeed, the inclusion of the supremacy of the Constitution and law can only be deemed politically expedient within an environment with stringent political constraints. At the very least, the supremacy of laws has successfully been maintained and, more importantly, juxta-posed with the other two supremacies, thereby securing a niche for the legal system in the Party state.

The dominant political system may also contribute to special features in the lawmaking process. It is observed that legal development in China has more often than not been the product of CCP administrative policies.\(^\text{173}\) Laws are introduced only when opportunities mature, such that it is usually the case that “economic necessity drove policy reform,” leading legislation to legitimatize successful experiences and to further supplement the institutional predilection for the economic development.\(^\text{174}\) For instance, foreign trade had been promoted in practice ever since the open door policy was introduced, whereas the Foreign Trade Law was only promulgated a decade later in 1994.\(^\text{175}\)

This approach, whereby policy leads legislation, is also apparent in the evolution of laws on SOEs. SOEs, originally known as State Run Enterprises (“SREs”), had long been deemed gov-
ernment organs rather than independent legal persons. In order to reform those inefficient SREs, the state introduced a series of administrative policies to enhance the autonomy of the SREs, policies which consummated in the Decision of the Central Committee of the Chinese Communist Party on Several Issues Concerning the Reform of the Economic System in 1984. Even though productivity had generally improved among SREs, state subsidies still supported many inefficient SREs. It is thus no wonder that the Enterprise Bankruptcy Law ("EBL") mainly targeting SREs was not introduced until 1986, two years after the policy was first explored in a northeastern city.

177. See Yueh, supra note 173, at 102–03.
178. Yiping Huang, Wing Thye Woo & Ron Duncan, Understanding the Decline of China’s State Sector, 9 MOST: Econ. J. on E. EUR. & THE SOVIET UNION 1, 5 (1999). Huang et al. observed that the initial efforts to promote autonomy of and introduce more initiatives of managers were largely ineffective by measuring the size of total factor productivity ("TFP") growth. In fact, the total losses of industrial SOEs rose from 4.2 billion yuan in 1978 to 34.9 billion yuan in 1990 and 72.7 billion yuan in 1996; an astonishing annual growth rate of 17 percent between 1978 and 1996. It is widely estimated that, in the 1990s, about one third of SOEs made explicit losses and another one-third made implicit losses.
179. This refers to the nationally well-known bankruptcy of Shenyang Anti-Explosion Equipment Factory in 1984. Article 1 of the law tells the importance of the law to the SRE reform:

This Law is devised to meet the need for development of the socialist planned commodity economy and economic system reform, to promote the operation of all-people owned enterprises, to strengthen the economic responsibility system and democratic administration of all-people-owned enterprises, to improve management, to enhance economic efficiency, and to protect the legal rights and interests of creditors and debtors.

For the law and brief comment, see Douglas G. Boshkoff & Yongxin Song, China’s New Bankruptcy Law: A Translation and Brief Introduction, 61 Am. Bankr. L.J. 359, 359–62 (1987); see also Mark E. Monfort, Reform of the
The Contract Responsibility System, a supplementary measure to promote productivity, through which managers reached a contract with the state, was first experimented and then promoted nationwide by the enactment of the Provisional Regulations on Contracting Management System in SOEs in 1988.\(^{180}\)

The importance of all such efforts was to cultivate a common understanding that SOEs are separate legal persons with their own autonomy.\(^ {181}\) With such efforts, the opportunity to introduce a law on SREs became mature. The Law on Industrial Enterprises Owned by the Whole People (“LIEOWP”) was then passed in 1988 despite the fact that SOEs, as the main organization form, had been in existence ever since the foundation of the country.\(^ {182}\)

With experience accumulated in the development of the private economy and related foreign investment, the Company Law of 1993 further facilitated the corporatization of SOEs, through which most small and medium sized SOEs had been privatized.\(^ {183}\) By the time the SOE reform had gone through the phase of “Grasp the Big and Let the Small Go,” inefficient small and

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\(^{180}\) By such a system, the CEO or leader of the SO, who was the legal representative of the SOEs, signed contracts with the government, the basic principle of which were stipulated in \(^5\) of the Provisional Regulation, i.e., to “lock the minimum amount of profit for the SOEs to pay to the State,” and entitle SOEs “to keep the remaining profit, but [remain] liable for paying the fixed amount to the State even if [the] SOEs have not made satisfactory profit.” For a more detailed discussion, see Cindy Schipani & Junhai Liu, Corporate Governance in China: Then and Now, 2002 Colum. Bus. L. Rev. 1, 8–11 (2002).

\(^{181}\) See Yueh, supra note 173, at 102–03.

\(^{182}\) Section Two of the Law on Industrial Enterprises Owned by the Whole People reads: “The property of the enterprise shall be owned by the whole people (equivalent to the notation of ‘State’), and shall be operated and managed by the enterprise with the authorization of the State in line with the principle of the separation of ownership and managerial authority.” Zhonghua Remin Gonheguo Quanmin Suoyou Zhi Gongye Qiye Fa (中华人民共和国全民所有制工业企业法) [Law on Industrial Enterprises Owned by the Whole People] (promulgated by the Standing Comm. Nat’l People’s Cong., April 13, 1988, effective Aug. 1, 1988), ch. II, art. 2.

\(^{183}\) While Western scholars usually employ the word privatization, corporatization is used in China.
medium sized SOEs had already failed at the efficient use of assets and labor.\footnote{184} As a result, the narrow application of the EBL of 1986 became increasingly outdated.\footnote{185} The Bankruptcy Law was then revamped in 2006, reflecting not only the change of the attitude of the government towards the SOE reform but also the requirements of a developing private economy and more intensive foreign related investment.\footnote{186}

The above examples show that policies, compared with laws, are good at applying the experimental approach and facilitating the learning process. However, a side effect of this first approach to administrative policy is that laws necessary for a free market economy may not be introduced easily. For instance, a well-defined property law has long been claimed as a precondition to economic development, yet the introduction of the Property Law was not possible until 2007, almost thirty years after the open door policy was introduced in 1978, due to the ideological constraints on the protection of private properties.\footnote{187}

Also, as a key law in setting up a free market, the Anti-Trust

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\footnote{184. The policy was introduced in 1997 at the 15th Communist Party Congress, Naughton summarized succinctly: “In ’letting the small go,’ policy-makers were giving local governments much greater authority to restructure their own firms and, in particular, to privatize or close down some of them . . . . [L]ocal government-run factories were not only much smaller than those of the central government, but also much more exposed to competitive pressures and consequently much less profitable. In fact, in the mid-1990s all of the state-owned small and medium enterprises put together were losing money.” BARRY NAUGHTON, THE CHINESE ECONOMY: TRANSITIONS AND GROWTH 301–02 (2007). For empirical evidence of the policy, see Samuel Ho, Paul Bowles, & Xiaoyuan Dong, “Letting Go of the Small”: An Analysis of the Privatisation of Rural Enterprises in Jiangsu and Shandong, 39 J. DEV.STUD. 1 (2003).

\footnote{185. As the economy was still strictly a command economy from the central government and state-owned enterprises were the main organization form, the law emphasizes the goal of imposing responsibilities on persons responsible for business failure rather than the equitable and efficient distribution of assets. See Boshkoff & Song, supra note 179, at 361.

\footnote{186. See Yueh, supra note 173, at 119–20. This also refers to the bankruptcy of Shenyang Anti-Explosive Equipment Factory in 1984.

Law (“ATL”)\textsuperscript{188} was only introduced fourteen years after the introduction of the Unfair Competition Law. It is not to say that anti-trust issues had not been in existence when China first introduced the Unfair Competition Law, but instead that strong political resistance from the vested interest groups successfully postponed the introduction of the ATL, which aimed to achieve the anti-administrative monopoly among SOEs.\textsuperscript{189} Consequently, despite the prioritization of economic goals, an inactive political system is still able to postpone the introduction of laws necessary for a free market economy.

Nevertheless, as the market economy develops further, intrusions of the political system into the functioning of the legal system, and the negative effects associated with such activity, may well be retreating. Indeed, when Peerenboom studied the implications of the strong role of the Party on the development of Chinese administrative law before China was admitted to the WTO, he observed that “[r]ather, the Party’s main relevance to administrative law lies in its ability to promote or obstruct further political and legal reforms that would strengthen the legal system, but could also lead to the demise of the Party or to a drastic reduction in its power.”\textsuperscript{190}

After the accession of China to the WTO, structural coupling with the international world further improved the development of the Chinese legal system.\textsuperscript{191} In order to perform its obliga-


\textsuperscript{189} While the local protectionism was not successfully curbed in the former UCL, the ATL, with a special target at anticompetitive (local) government actions, is at least on paper a powerful dose on (administrative) monopoly to secure a competitive socialist market economy on a historically state-controlled market. See Salil K. Mehra & Meng Yanbei, Against Antitrust Functionalism: Reconsidering China’s Antimonopoly Law, 49 Va. J. INT’L L. 379 (2009).


\textsuperscript{191} See Julia Ya Qin, Trade, Investment and Beyond: The Impact of WTO Accession on China’s Legal System, 191 CHINA Q. 720, 724–37 (2007).
tions as a member of the WTO, both substantive and procedural administrative laws have already gone through a series of revisions. More importantly, the conception of due process and rule of law has increasingly been accepted in the administrative system. In addition, the development of specialized markets, such as product factor markets, especially the financial markets, may dictate a stronger role of law due to stronger coupling of the national economy with the established institutional environment of the West. For instance, to comply with the WTO rules, China set up the China Banking Regulatory Commission, 


194. A unique character accompanying the astonishing economic growth is the rather pessimistic development in the financial market. The economic development in China can mainly be attributed to the development of (international) trade. But the incompatible development in financial markets, especially the development of the securities market, may again remind us of the legal origin theories proffered by Rafael La Porta et al. See supra note 2. See also Thorsten Beck, Asli Demirguc-Kunt & Ross Levine, Law and Finance: Why Does Legal Origin Matter?, 31 J. COMP. ECON. 653 (2003). Beck et al. summarized that the current theories on why legal origin matters for financial development can be categorized into two groups, i.e., the political channel (starting by looking at the relationship between investors and the state and then at the implications on the development of property rights and financial markets), and the adaptability channel (the ability of the legal system to adapt to the increasing demands of financial development). According to Beck et al., the adaptability of a legal system to the evolving economic conditions matters more for the development of the financial market. See id. at 654–55.
the China Security Regulatory Commission, and the China Insurance Regulatory Commission, providing an institutional base for financial market reform in China, and by issuing detailed regulations, these regulatory authorities are better prepared for the reform of the Chinese capital market.195

2. Adaptation on the Dual Track

For the past thirty years, one apparent characteristic of the development of the Chinese legal system was the existence of dual track systems, which made possible a trial-and-error approach. One example of the dual track exists in substantive laws regulating economic activities involving foreign parties and those for domestic participants. For instance, Economic Contract Law 1981 and Foreign Parties Related Economic Contract Law 1985 were only unified into the Unified Contract Law in 1999.196 Also, the Joint Venture Law (“JVL”) introduced the company as an organizational form for the purpose of attracting foreign investment in 1979, whereas Chinese Company Law (“CCL”) was only introduced in 1993.197 Detailed rules on the establishment and annual reviews of companies with foreign investment were also introduced so that the JVL could be under scrutiny.198 The dual track in law conveniently drew a line be-

195. For example, the newly introduced Qualified Foreign Institutional Investors (“QFII”) regulations not only permit foreign investors to invest in Chinese securities markets but also help to improve the corporate governance of listed companies. See Weihua Wu, Are Qualified Foreign Institutional Investors Real Investors or Speculators: Evidence from China (May 10, 2011) (unpublished article) (on file with author), available at http://ssrn.com/abstract=2056056.


198. See Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Fa Shishi Tiaoli (中华人民共和国中外合资经营企业法实施条例) [Regulations for
between laws for domestic agents and those for overseas investors, and the experiences accumulated from foreign companies were later successfully transplanted to the CCL 1993.\textsuperscript{199} Even though revisions of the CCL were made in 2005, special regulations on Joint Ventures as stipulated in the JVL still enjoy priority whenever there is a conflict between the JVL and the CCL 2005.\textsuperscript{200}

Likewise, a similar dual track scheme can be found in arbitration regarding commercial disputes. In the past, the China International Economic and Trade Arbitration Commission and China Maritime Arbitration Commission were devised to deal with arbitration for disputes involving foreign parties, whereas the Economic Contracts Arbitration Commission with its domestic divisions controlled the domestic arbitration.\textsuperscript{201} Considering the deficient court system, arbitration has long been preferred as an alternative to court proceedings.\textsuperscript{202} Such delineation is also apparent in domestic contracts, where Article 218 of the CCL 2005 states that “The limited liability companies and joint stock limited companies invested by foreign investors shall be governed by this Law. Where there are otherwise different provisions in any law regarding foreign investment, such provisions shall prevail.”\textsuperscript{Id.}


\textsuperscript{200} Chinese Company Law [C. CIV.], art. 218 (China), translated in \textit{CHINA: COMPANY LAWS AND REGULATIONS HANDBOOK} (International Business Publications rev. ed. 2012). Article 218 of the CCL 2005 states that “The limited liability companies and joint stock limited companies invested by foreign investors shall be governed by this Law. Where there are otherwise different provisions in any law regarding foreign investment, such provisions shall prevail.”\textsuperscript{Id.}


\textsuperscript{202} The dual track scheme was relaxed only quite recently, when both types of arbitration institutions were allowed to arbitrate both international and domestic cases.
tion between related domestic and foreign arbitration secures a niche for arbitration of international disputes, while at the same time requiring the maintenance of a separate domestic arbitration practice. Learning between tracks thus helps to improve domestic arbitration practices, and arbitration centers in China are now all allowed to docket international cases.\footnote{203}

Apart from the above foreign-domestic double track, China’s dual track also exists in laws regulating the state owned sector and those on the private sector. It must be realized that the existence of a private economy was not recognized in law until 1988, almost ten years after the economic reform.\footnote{204} The delineation was employed not only to explore the viability of the development of a private economic sector, but also to help the then loss-suffering SOEs through a difficult time by transfer-


\footnote{204. The First Amendment to the Constitution of 1982 was made in the first Plenary Session of the 7th National People’s Congress in 1988. M. Ulric Killion, China’s Amended Constitution: Quest For Liberty and Independent Judicial Review, 4 Wash. U. Glob. Stud. Rev. 43, 45 (2005). A new paragraph was attached to Article 11, which reads, “The State permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy. The State protects the lawful rights and interests of the private sector of the economy, and exercises guidance, supervision and control over the private sector of the economy.” Xianfa art. 11, §1 (1988).}
ring profits from the private sector and providing job opportunities for a large number of displaced employees of the SOEs at the beginning of the reform.\(^{205}\) As large-scale unemployment was successfully avoided, both the macroeconomic goals and social stability had been maintained, a key element that contributed to the efficacy of the gradual approach in China.\(^{206}\)

In sum, the merit of the dual track system is that the co-existence of both the old and the new makes possible a guided structural coupling, which can easily be set up between systems under the two tracks. Such an approach not only helps to locate the merits of systems under each track but also facilitates the digestion of those merits between tracks, benefiting the search for an appropriate growth trajectory for the whole system. What cannot be downplayed in such a dual track system is the importance of the adaptive manager role of the government or regulatory authority, which acts as a valve switcher for the structural coupling and as the environment stabilizer so that the intended learning and digesting can become reality.

3. Adaptation in Fast Transition

Laws in a fast growing economy are usually introduced as political expediencies. One revealing example will be helpful here. For instance, prioritized economic goals of local governments led to serious concerns of weak protection for employees, and in order to address these concerns and pacify large-scale social unrest, the new Labor Contract Law ("LCL") was introduced at the beginning of 2008.\(^{207}\) Nevertheless, ever since the LCL was

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\(^{205}\) See Gang, supra note 161, at 115.

\(^{206}\) See Yueh, supra note 173, at 10.

\(^{207}\) Before the introduction of Labour Contract Law in 2008, the Labour Law 1994 was the main reference. However, underpayment, or no payment of employees, or the fraudulent and manipulative conduct of employers was the norm. See Anita Chan, Labor Standards and Human Rights: The Case of Chinese Workers under Market Socialism, 20 HUM. RTS. Q. 886, 891–93 (1998). The introduction of the LCL 2008 seriously constrains illegal acts such as non-payment of wages in the private sector, especially for migrant workers, which was increasingly acute and courted criticism from different sectors of the society. See Sean Cooney, Making Chinese Labour Law Work: The Prospects for Regulatory Innovation in the People’s Republic of China, 30 FORDHAM INT’L L.J. 1050, 1053–54 (2006). For a general but percipient review
in consultation stages, employers have complained about the “overprotection” of employees. The increasing cost for labor protection has since been a serious concern for Small- and Medium-sized Enterprises (“SMEs”), which contribute the most to the employment agenda of the country but are the most hard-pressed to afford due protection to their employees.

Indeed, creative reactions from the employers had immediate effects on employees. Immediately before the law came into effect, employees were laid off across the country or were fired and re-employed through employment agencies at lower wages. Alternatively, employers may choose to relocate to other...
areas with lower wage levels. Due to the increased labor costs associated with the LCL and the intense competition for limited employment opportunities, employees may have no choice but to accept lesser contractual terms, which defeats a major intended protection under the LCL. Even worse, the law was promulgated just one year before the onset of the world financial crisis, such that SME employers that have long functioned in labor intensive export processing industries were further aggravated as a downturn in international markets is reorienting those SME exporters to seek an increasing share of the domestic market.

At the same time, employees are increasingly conscious of their legal rights. Empirical data show that labor disputes

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213. See id. at 248–50.
have increasingly been brought to courts and arbitration tribunals, and that the number of cases with a plaintiff involving more than ten employees has also been on the upward trend ever since the promulgation of the LCL. Employees may intentionally postpone signing the legally required employment contracts by dragging the negotiation process until the one-year period terminates. Employees may also collectively threaten


217. Article 82 of the LCL reads:

If an employer fails to conclude a written labor contract with an employee after the lapse of more than one month but less than one year as of the day when it started using him, it shall pay to the worker his monthly wages at double amount.

If an employer fails, in violation of this Law, to conclude with an employee a labor contract without fixed term, it shall pay to the employee his monthly wage at double amount, starting from the date on which a labor contract without fixed term should have been concluded.


While it is true that it is usually employers that intentionally drag along the negotiation process and lead to the break-up of the negotiation process, employees may also intentionally take advantage of the law to compromise the interests of employers, especially SMEs. See Liang Da (梁达), Jinfang Guyi bu Qian Laodong Hetong de Shuangbei Gongzi Zhuanjia (谨防故意不签劳动合同的“双倍工资专家”) [Attention Shall Be Paid to “Double-Wage Specialists” Employees Who Intentionally Declined to Sign the Employment Contracts], 152 YIAN SHUOF (《以案说法》) [LAW & CASES] 40 (2010), Xu Chen & Fei Liu (陈旭与刘菲), Laodong Zhe Daoode Fengxian yu Shuang Bai Gongzi Zhipei Zeren Paichu (劳动者道德风险与双倍工资支配责任排除) [Moral Risks of Workers and the Avoidance of Duty to Pay Double-Wage], 24 PEOPLE’S JUDICATURE (CASES) (《案例研究》) 75 (2010). There is no clear stipulation on such issues in LCL. See Yefang Qian & Hongxia Zheng, Shall Double-Wage Compensation Be Applied
to bring their disputes to arbitration tribunals if there is no increase in wages, signaling social unrest and incremental pressure from local governments on the employer.\textsuperscript{218}

As a result, local governments have been struggling to strike the right balance between the implementation of the labor law and the strong initiative to pursue economic growth within a stable social environment.\textsuperscript{219} Such a goal is not uncommon to a fast growing economy, which is keen on further economic growth whereas the success of growth can lead to hindrances in the form of an increase in the importance of social concerns.\textsuperscript{220} A decision, however, has to be made before potentially negative effects develop into catastrophes and shift the whole system to a different fitness landscape with unimaginable uncertainties. Indeed, the current alternative to China’s growth is decelerated economic development with increasingly serious consideration of social concerns.\textsuperscript{221} Hence, even though economic growth is still of importance in the current development agenda, the newly introduced draft of the ECL apparently disregards the
negative concerns for economic growth and prioritizes the social concern of employees.\footnote{For comments referred to on the NPC official website, see \textit{New Labour Law Means Better Image but at Higher Cost}, \textit{Xinhua News Agency} (Jan. 2, 2008) (China), available at \url{http://www.npc.gov.cn/englishnpc/news/Legislation/2008-01/02/content_1387865.htm}. The draft of the Amendment to the Labor Contract Law has been brought to the National Peoples’ Congress Standing Committee for discussion on June 26, 2012. Improving the benefits for employees is one of the key issues for revision. See \textit{China Amending Labor Law to Protect Contractors}, \textit{Xinhua News Agency} (June 27, 2012) (China), \url{http://www.npc.gov.cn/englishnpc/news/Legislation/2012-06/27/content_1726582.htm}.}

\textbf{B. The Relevance of Rule of Law}

One evident observation to be made is that the Western idea of employing rule of law as a governance tool to constrain the supremacy of the government has long been a foreign concept to Chinese culture. According to Professor Orth, rule of law as a second feature was initially introduced to counterbalance the supremacy of the central government, which historically was the chief feature of political institutions of England.\footnote{At least at that time, the concept was not common to Western legal philosophy. See John Orth, \textit{Exporting the Rule of Law}, 24 N.C.J. INT’L L. \& COM. REG. 71 (1998).} With separation of powers in place in the political system, rule of law is effectively employed in the West to place limitations on the different branches of government.

However, the absence of the separation of powers in the political system of China does not provide a suitable context for transplanting Western-style rule of law.\footnote{This is also the reason why Professor Randall Peerenboom proffered the division of the thick and the thin rule of law. See \textit{Peerenboom, China’s Long March Toward Rule of Law}, \textit{supra} note 1, at 3-6.} As described earlier, the dominance of Confucianism over Legalism since the Han dynasty indicates that rule by man historically dominated over rule by law in China.\footnote{See Tan \textit{supra} note 91.} While a strengthening of the rule of law system was advocated for upon the death of Mao Zedong, it was introduced with a strong communist ideological objective to
serve party control. Moreover, this system was dismantled almost completely during the Cultural Revolution, and immediately after the collapse of the Gang of Four, when rule by law was introduced to legitimize the new leadership, maintain the social order, and enhance the control of the Party. The western conception of rule of law is thus merely an academic topic with no practical observance in China.

Besides, China remains cautious in pursuing the complete acceptance of Western-style rule of law after experiences accrued with foreign jurisdictions as a product of structural coupling. For instance, the experiences of geographically and culturally proximate Asian countries indicate that a dual track system with the coexistence of both a well-developed commercial law system and stringent constraints on civil and political rights is a much more achievable objective for developing China. Additionally, China continues to work on building its sui generis legal system within a socialist framework. Thus, it is not unfair to say that skepticism of rule of law informs Chinese culture.

In sum, the configuration of the operational closure and the structural coupling of the Chinese legal system present a different picture from that of the West. For one thing, the operational closure of the Chinese legal system is enhanced by its


228. See Fu & Peerenboom, supra note 167, at 110.

229. Bangguo Wu, the top legislator of China, in his work report of the Standing Committee of the National People’s Congress delivered at the second plenary meeting of the first session of the 12th NPC at the Great Hall of the People in Beijing, capital of China, announced that “We will comprehensively advance law-based governance of the country, and enhance the important role that the rule of law plays in national governance and social management.” China’s Top Legislator Vows to Push ‘Rule of Law,’ Keep Power in Check, Xinhua News Agency (Mar. 8, 2013), available at http://english.people.com.cn/90785/8159917.html.

long-established Confucian culture and the modern socialist ideology. For another, given the strong outward radiating effect of the Chinese political system, the independence of the Chinese legal system cannot be achieved alone. While the further development of the economic system does require a favorable co-evolution of the legal system, such positive effects are still within the ambit of the socialist political system. Given that “changes in formal law matter where prevailing cultural norms say that formal law matters,” a foolhardy transplantation of new laws or the audacious unconditional acceptance of rule of law without consideration of the underlying legal tradition and the institutional arrangements may just do a disservice.

IV. COMPATIBLE SYSTEMS TO ACHIEVE SUSTAINABLE GROWTH

A. The Role of Law

For the purposes of economic development, laws function as both positive and negative constraints. As positive constraints, laws and regulations facilitate economic development by introducing favorable laws and regulations, by providing suitable dispute resolution, and by training more legal professionals. For example, at the very beginning of Chinese economic reform, the focus of legal reform was on the laws of attracting foreign investment, which provide more certainty than those on other domestic legal relationships. In addition, the Constitution was amended in 1988 to accommodate new economic development, such as when changes to Article 10 relaxed a long restricted land policy and spurred foreign investment activities in China by permitting that “the land-use right may be assigned in accordance with the provisions of the law.”

mentary in comparison with Western law, these efforts, in combination with the political environment, served the purpose of economic development effectively.

Alternatively, laws and regulations may restrict economic growth. For instance, the introduction of Law on Environment Protection\textsuperscript{235} and the mandatory disclosure requirement of environmental issues for publicly listed companies\textsuperscript{236} not only reflect the incremental serious concern for environmental issues but also function as negative constraints on the single-minded pursuance of economic growth without due consideration of environmental responsibility. In combination with tax preferential treatments, the introduction of such laws may significantly direct fresh investment to cleaner industries.\textsuperscript{237}


\textsuperscript{237} Tax preferential treatments can be located in Art. 36. Press Release, Ministry of Fin. of the People’s Republic of China, Notice on Preferential Treatments for Software Enterprises, by the Ministry of Finance and the Na-
Laws also play an important role in curbing the race to the bottom arising from deregulation. Unregulated competition among local governments in searching for global maximums may not be suitable for a fast growing economy. This is not only due to the complexity of a natural evolution process but also because of the spillover of costs across local boundaries. For instance, short-sighted focus on local economies after the decentralization in 1988 only led local governments to fragment the national market into closed, stagnant patches.238 The Unfair Competition Law was introduced in 1993 with a specific purpose of curbing the then notorious regionalism within the country.239

B. The Supplementary Nomenklatura System

The political system and the legal system may supplement each other in function. For instance, Hoff and Stiglitz argued that the lack of a serious political demand for the rule of law contributes to the postponed establishment of rule of law in post-communist societies.240 According to this thesis, resource

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238. Shen et al., supra note 145, at 31.
239. Article 30 of the Anti-Unfair Competition Law (1993) states that

If the government or its departments violate Article 7 of this Law to force the others to purchase the commodities from the pointed manager, limit the others make a fair competition, or limit commodities to transfer between regions, the senior government shall order to correct these mistakes; If the fact is serious, the same level government organ or the senior government organ shall administratively punish the person who bear the direct responsibility.


240. Karla Hoff & Joseph Stiglitz, After the Big Bang? Obstacles to the Emergence of the Rule of Law in Post-Communist Societies, 94 AM. ECON. REV. 753 (2004). The power to control can be both positive and negative. Positive in the sense of wealth accumulation and negative in the sense of stripping the accumulated assets of others.
controllers make both economic and political choices to safeguard their own earned interests. By using their political power to strip the assets of others, resource controllers can achieve resource accumulation similar to that which would be possible by making positive economic decisions under a sound system of rule of law. The political institution favorable to those vested interest groups may thus resist the introduction of rule of law into the country.

The implication of this understanding is that a strong political institution at least supplements, if not replaces, the rule of law in accumulating and distributing resources. The applicability of such a thesis can similarly be observed in China, where the Nomenklatura scheme has long been employed in practice as a tool to redress the deficiency of both the legal system and the political system. For instance, when Clark and others studied the weak role of formal legal institutions in China, especially a weak scheme on property rights, they found the importance of non-legal institutions to be strong. In order to attract investment and retain investors, local governments compete in providing preferential arrangements. In fact, due to the authority given to judges, and the extent of their discretion in ruling, the enforcement of court decisions in a socialist polit-

241. Id.
242. Id.
244. Apart from Professor Clarke, discussed below, other scholars also identify the important role of the Nomenklatura scheme in achieving political stability and economic growth. See Hon, supra note 126.
245. Clarke, et al., supra note 203. But notice that Clarke et al. also point out the stronger than expected role of law in transactions: “in the area of transactions of goods and services, we present new data that show that the legal system is more important than might be assumed, given the enormous emphasis that personal and social relationships have played in the literature discussing markets in China.” Id. at 376.
246. For instance, more preferential tax treatment may be offered by the local governments to attract foreign investment.
247. The triple discretion in courts identified by Professor Woo is just one example of how the legal system coevolves with its environment. The first discretion is discretion on facts, discretion which is conducive to locate substantive solutions to conflicts between parties. Discretion on facts however is
ical legal system is “neither a neutral, technical issue, nor an automatic consequence of law,” and both under- and over-enforcement is possible according to the policy demands. In other words, the deficiency of the judiciary system may largely be supplemented by the existing Nomenklatura scheme.

In parallel, when Wang and others compared the regional variations of Foreign Direct Investment (“FDI”) within China, they found that good economic fundamentals, or “factors contributing to a higher rate of return on investment,” may play a more important role in attracting new investment. They also found that government officials with long-term career visions and concern of self-reputation also help to attract FDI in a weak legal system. In fact, a political and administrative environment favorable to overseas investors is seen as especially desirable when it is accompanied by a weak legal system. Similarly, Professor Zheng also observed that “[a]t the practical level, the protection of capital and property rights at various levels in the Chinese government surpassed the rule of law.”

The efficacy of employing the existing Nomenklatura scheme as a way to achieve the intended reform objectives shall not be underestimated. Once the economic performance of the area administered by the local officials was included among the criteria of performance evaluation, thereby making a difference to the increasing consciousness of law and technology development.

The second discretion is self-interested discretion, by which personal relations and non-legal factors are considered and balanced. This is what happens in renqing cases or guanxi cases. The third discretion is ideological discretion, where politically sensitive cases will be readily decided by following ideological principles such as the four fundamental principles (as stipulated in Constitution 1982: “adherence to the socialist road, to the people’s democratic dictatorship, to the leadership of the Communist Party, to Marxist-Leninist-Mao Zedong Thought”). The last discretion has the least freedom to change. See Margaret Woo, Law and Discretion in Contemporary Chinese Courts, in The Limits of the Rule of Law in China 163, 165–72 (Karen Turner, James Feinerman & Kent Guy eds., 2000).

248. See Castellucci, supra note 163, at 59.
250. Id. at 21.
251. Id. at 17–22.
252. See Zheng, supra note 144, at 6.
the career path of local officials, the lack of rule of law may provide chances for both over- and under-protection in comparison with the protection provided in formal law. In fact, the initial single-minded pursuit of economic prosperity may lead the government to intentionally support formal enforcement via arbitration or to threaten potential government sanctions. Clark and others argue that the “political structure itself has served as an alternative to the formal legal system in providing a reasonable degree of security to certain non-state investors at the local level.”

Later, when the early fervor for economic growth cooled down to include more social concerns, the Nomenklatura system was again employed to achieve the intended reform objective. For instance, even though environmental protection law has long been introduced, its enforcement is still far from satisfactory. Personal interests, either in terms of finance, political promotion, or even bribery, all lead to its ineffective enforcement at local levels. Nevertheless, when environmental protection is included among the political performance assessment formula, serious consideration of environmental issues by local governments may become a reality.

Hence, within an institutional environment with a leading political system dominated by a single party, the Nomenklatura scheme supported by the Party has been effectively employed to

254. Clarke et al., supra note 203, at 400.
supplement the deficient legal system for the purpose of economic development. If it is true, according to the theory of Hoff and Stiglitz, that the political elites in developing countries, in comparison with their counterparts in developed countries, have more institutional specific investment and benefit more from the established institution, it will be hard for developing countries to establish a new institution so as to counteract those vested interests. A more feasible choice is to take advantage of the existing institutional arrangements. Such a realization also suggests that the role of the legal system in a country prioritizing economic development is linked more to the flexibility of the legal system to adapt to the local institution than to the attributes of the legal system per se. In other words, the compatibility of the function of the different systems within an institutional environment may be more important than the quality of any individual system.

C. The Importance of the Strong Central Control

The coexistence of a strong central control and the well-established Nomenklatura system facilitates an efficient learning process for the whole system. For one thing, deregulation to local governments provides bountiful opportunities for maximum regulation “tinkering” at local levels whereas the strong central control intentionally encourages or cossets such creativity. For instance, the three main experiments at local levels that contributed to past economic success, i.e., the house-hold responsibility system from Fengyang in 1978, the Special Economic Zone in Guangdong and other coastal areas, and the SOE reforms in Sichuan and Hunan, all secured vigorous support from the central government in their initial stages.

For another, the hierarchical structure under strong central control provides an adaptable institutional framework for the

258. Gilson & Milhaupt, supra note 253, at 238.
261. See Cai & Treisman, supra note 156, at 514–19.
experiences accumulated within experimental localities to be transmitted to other regions upon success. Given the detrimental implications brought by the unregulated free competition between provinces, structural coupling between local governments is thus of special importance to achieve sustainable economic growth.\textsuperscript{262} In practice, effective structural coupling can be achieved in several ways. First, by introducing administrative measures or issuing party orders, the results of local experiments can be shared across the nation.\textsuperscript{263} Second, coupling can be enhanced by personnel movement of government officials between municipalities.\textsuperscript{264} Former experience accumulated by government officials either at other provinces or at the central government may also be employed across boundaries. Third, by intentionally introducing laws, limitations on inter-provincial structural coupling may at least be constrained.\textsuperscript{265}

The ultimate effect is that local diversity may calculatedly be promoted, but within the constraints or the grid established by the central government. Viewed from that perspective, policymakers at higher levels may accordingly function as gatekeepers and advocates for useful, locally generated innovations.\textsuperscript{266} Thus, the combination of inter-provincial competition and strong central control provides an appropriate institution for China to achieve the adaptive efficiency of the whole system.


\textsuperscript{263} Id.

\textsuperscript{264} This is can be attributed to the Nomenklatura system, through which the central government may dispatch and move personnel according to the plan of the national economy as a whole. For the role of Nomenklatura system in Chinese economic development, see Hongbin Li & Li-an Zhou, \textit{Political Turnover and Economic Performance: The Incentive Role of Personnel Control in China}, 89 J. PUB. ECON. 1743 (2004).


\textsuperscript{266} See Heilmann, \textit{supra} note 157, at 457.
For this, Professor Heilmann’s remark is pertinent: “It is precisely the dialectical interplay between dispersed local initiative and central policy making—maximum tinkering under the shadow of hierarchy—that has made China’s economic governance so adaptive and innovative from 1978 to 2008.”

In consequence, distortions from a free market economy may be partially redressed by a strong political (administrative) system in practice. Such understanding indicates that a totally “laissez-faire” market economy in combination with a well-established rule of law may not be compatible with the socialist economy in China. In fact, structural coupling with the economic systems in other countries also shows that the role of government intervention is necessary. The intermittent financial and/or economic crises at least provide evidence that a free market economy pursued in the West is not without its detriments. To the Chinese government, the invisible market hand must be balanced with the indispensable visible hand of the government. The fate of a national economy is thus dependent not on whether the invisible hand of the market is strong enough to function freely but on how the two hands in cooperation can achieve the objective.

In essence, the key issue here is that the decision-making process is no longer an ex ante “process of setting rigid standards based on comprehensive rational planning,” but an ongoing process of “experimentation using continuous monitoring, as-

267. Id. at 458.
269. See Gilson & Milhaupt, supra note 253.
sessment, and recalibration.” Viewed from this perspective, the central government or the party plays an important role of manager in guiding the adaptive walk.

D. Dynamic Compatibility to Achieve Sustainable Growth

A review of economic growth in China shows that the Chinese government intentionally takes advantage of existing conditions for the purpose of achieving institutional flexibility. The deficient legal system had partially been redressed by the political and administrative system. As stated earlier in this article, the “meta-rights—access or rights to property rights” under the unique Chinese political and administrative system clearly counterbalanced the lack of protection for property rights under the property law. In other words, a deficient legal system, an indicator of low institutional quality, does not necessarily indicate a lack of institutional flexibility for the whole system. For instance, the continuing local experiments were only possible without legal constraints. At the beginning of reform, policy experimentation at local levels could be carried out as long as a report was approved by the central government that the intended experiments were in compliance with the spirit of the central policy. Thus, the deficient legal institution may have enhanced institutional flexibility by promoting competition among local governments, a key contributor to the economic growth in China.

The legal system is just one important component of the meta governance, the aim of which is to achieve the sustainable growth of whole system. The past experience of China at least

271. Even though Ruhl is describing the recent development in American court management, the quotation is applicable to the trial-and-error style adaptive walk. See Ruhl, supra note 20, at 428.
272. This thus corresponds to the argument of de Soto, who argues that what matters in the economic development of the United States is not “property rights per se but meta-rights—access or rights to property rights.” Davis, supra note 75, at 308.
273. Hao Wu & Tianli Wen, supra note 217, at 37.
274. Id.
275. See Jianxing Yu & Zijing He, The Tension Between Governance and State-Building, 16 J. CHINESE POL. SCI.1 (2011). The current focus on governance study shows that both the anarchy of exchange as in the market mechanism and the hierarchical administrative structure as in a firm or a
showed that the compatibility among systems were more important than the quality of any one within the environment. Still, the compatibility itself is due to the co-evolution of subsystems within the system and that of the systems constituting the environment of the system. For instance, as the Chinese market becomes more integrated with the rest of the world, we observe incremental pressures on China to adapt its administrative system to international practices, as evidenced by China’s need to reform, if not reschedule, its administrative system of government in order to meet the requirements for accession to the WTO.\textsuperscript{276} As the domestic economy further develops, the State Council even claimed at the end of 2012 that the government shall withdraw itself from matters in which either citizens or the market are capable of self-regulating, and prohibit pre-imposed administrative review for items which can be reviewed \textit{ex post} or through other administrative measures.\textsuperscript{277} While it is still a slogan at this stage, the pronouncement of such principles indicates that the government has been managing to adapt the system to the development of the market economy.

\begin{quote}
state may overshadow the importance of governance, a concept which should jump out of the traditional constraints of both the free market and the hierarchical style. Rather, governance emphasizes self-organization, a horizontal network and partnership, and “refers to mechanisms and strategies of co-ordination in the face of complex reciprocal interdependence among operationally autonomous actors, organizations, and functional systems.” \textit{Id.} at 3. Moreover, the current governance study “indicates that a one-track approach favoring one over the other is inadequate to guide or explain the practice of governance today.” \textit{Id.} But the authors leave open the question of how China can transition from an authoritarian government to the governance they define in the article.


\textsuperscript{277} Guowuyuan Guanyu Diliupi Quxiao he Tiaozheng Xingzheng Shenpi Xiangmu de Jueding ([国务院关于第六批取消和调整行政审批项目的决定] [Decision by the State Council to Revoke and Adjust Projects under Administrative Approval (the Sixth Batch)], (promulgated by the St. Council, Oct. 10, 2012) (China), available at http://www.gov.cn/zwgk/2012-10/10/content_2240096.htm.)
However, one set configuration of compatible subsystems is only suitable for a given fitness growth mode, which is captured by one set of attractors and attractor basins. Once a new growth mode is introduced, the whole system will escape from the capture of the existing attractors and attractor basins and a new configuration suitable for the new growth mode will be required. Recent evidence shows that China is moving on a new growth mode, according to which a moderate growth rate will be pursued with a focus on developing a consumption-led growth mode and improving social welfare.\textsuperscript{278} Such a shift indicates that the initial compatibility among and between the political (administrative) system, the economic system, and the legal system, which are suitable to single-minded economic growth, may need to be changed. In consequence, as the market economy further develops, the legal system may become more autonomous and the configuration of the autopoiesis of the legal system may change accordingly. Still, it is noteworthy that no less emphasis should be imposed on comprehensive reform—a mindset suitable to achieve the adaptive efficiency of the whole system.\textsuperscript{279}

\textbf{CONCLUSION}

The pursuance of a comprehensive reform package \textit{per se} reveals that the Chinese government has long been following a systems view of the reform process. The above discussion reveals that it is the compatibility among the systems and the supplementary roles played by the other systems that partly redress the deficiency of the Chinese legal system and may accordingly provide a better explanation for the persisting economic development in China. This is not a single-direction simplistic linear determination but a networked non-linear co-evolution with a strong sensitivity to the initial conditions of the systems in concern. The current economic success within the existing environment may thus persist, rather than collapse, on the condition that adaptable coevolution among the sub-systems can be successfully achieved. In other words, the compatibility of a system with the other systems in its environment may be

\begin{footnotesize}
279. See Hao Wu & Tianli Wen, \textit{supra note} 217, at 44.
\end{footnotesize}
more important than the quality of any individual system in concern.

Alternatively, Chinese development is not a result of a well-designed plan but an adaptive management process—a continuing recursive process of learning from field experience and using that information to guide further development. Due to the fast speed of transition, unexpected effects are the norm but are overseen by China’s strong central control. On the whole, the Chinese government largely functions as an effective adaptive manager.

It is worth noting that the evolution of the market economy in the West is a natural evolutionary development process whereas the development of the market economy in China is an artificial short cut. If the gradual adaptation process is long enough to accommodate the Western-style evolution process, a more pro-Western style rule of law could be expected. However, the fact remains that a span of thirty years may be too short a period to achieve that purpose. Conversely, the recent successful economic experience of China may reinforce the development path of those sticky elements of the existing institution. If, however, the sticky political system becomes more incompatible with the other systems, the widely commended economic feat will soon yield unexpected catastrophes, a result the government will try its best to avoid.

ENFORCEMENT OF SECURITIES LAW
IN THE GLOBAL MARKETPLACE:
CROSS-BORDER COOPERATION IN
THE PROSECUTION OF
TRANSNATIONAL HEDGE FUND
FRAUD

Junsun Park*

INTRODUCTION: THE GROWTH OF HEDGE FUND FRAUD

Over the last few decades, the global hedge fund industry has
grown at a surprising rate.1 In 2007, more than 10,000 hedge
funds ran their business in the global marketplaces, and they
collectively managed US$2.150 trillion.2 Although the hedge
fund industry declined in 2008 due to the financial crisis, its
recovery is well in progress now.3 Indeed, the number of hedge
funds in operation in 2010 reached 9500, and their total assets
under management were US$1.920 trillion.4

As the hedge fund industry has expanded, securities law viola-
tions by hedge fund managers have also increased.5 Such se-

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1. George Sami, Comment, A Comparative Analysis of Hedge Fund Regu-
lation in the United States and Europe, 29 NW. J. INT’L L. & BUS. 275, 275
(2009).
2. MARKO MASLAKOVIC, THECITYUK, HEDGE FUNDS 2 (2011), available at
3. See id. at 1.
4. Id. at 1–2.
5. Linda Chatman Thomsen et al., Hedge Funds: An Enforcement Per-
spective, 39 RUTGERS L.J. 541, 555–56 (2008); see also Paul M. Jonna, Com-
ment, In Search of Market Discipline: The Case for Indirect Hedge Fund Reg-
Securities law violations can significantly impair the integrity of the market and threaten the confidence of investors. In recent years, the U.S. Securities and Exchange Commission (“U.S. SEC” or “SEC”) has filed a number of enforcement actions against hedge funds and their managers. For example, in 2009 the SEC and the U.S. Department of Justice (“U.S. DOJ” or “DOJ”) initiated their enforcement proceedings against Raj Rajaratnam, a hedge fund manager, for insider trading. As one of the biggest insider trading rings on record, his fraud produced millions of dollars in illegal benefits. Moreover, Rajaratnam’s scheme affected securities from various major companies, including Google, Hilton, and Intel to name a few. In light of these negative effects, securities regulators have called for strict enforcement for hedge fund fraud.

Despite the need for strict enforcement, securities regulators often face difficulties in combating hedge fund fraud. Hedge funds can make fraudulent schemes more difficult to detect due
to the complexity of the fund structures and operations.\textsuperscript{12} Indeed, as the hedge fund industry has expanded beyond borders, securities fraud involving hedge funds has also become transnational.\textsuperscript{13} For instance, even if hedge fund managers are working in the United States or United Kingdom ("U.K."), the hedge funds themselves are often located in tax havens of less-regulated countries.\textsuperscript{14} Furthermore, certain managers operate both domestic and offshore funds at the same time.\textsuperscript{15}

In order to respond to the global expansion of securities fraud, including hedge fund fraud, domestic securities regulators must act transnationally.\textsuperscript{16} With no single regulatory scheme to govern all global markets, each country has sought to apply its domestic laws extraterritorially to combat transnational securities fraud;\textsuperscript{17} however, in order to enforce domestic securities laws that reach extraterritorially, regulators need to secure assistance from foreign authorities.\textsuperscript{18} Because enforcement of law is limited within a territory, domestic regulators cannot generally use their enforcement power within the terri-


\textsuperscript{15} See Lhabitant, supra note 14, at 108–11 (explaining mirror structures and master-feeder structures).


\textsuperscript{17} See id. at 90–91.

tory of other countries. The regulators, therefore, have to obtain cooperation from other countries, particularly when they enforce their own laws against fraud involving cross-border transactions.

Recognizing the territorial limits on enforcement power, many jurisdictions provide a legislative framework for authorizing domestic securities regulators to assist foreign authorities. Based on these pieces of legislation, securities regulators entered into international networks to execute cross-border assistance. Popular networks for international securities enforcement include Memoranda of Understanding (“MOUs”) and Mutual Legal Assistance Treaties (“MLATs”). Since 1982, the SEC has signed a number of bilateral MOUs with different foreign authorities. Since 2002, the International Organization of Securities Commissions (“IOSCO”) also has promoted a multilateral MOU (“IOSCO MMOU” or “MMOU”), listing ninety-seven authorities as full signatories. In addition to the MOUs, the United States currently has a number of MLATs with vari-


20. HICKS, supra note 18, § 11:53; see also Sec. & Futures Comm’n, supra note 18, at 7.

21. Felice B. Friedman et al., Taking Stock of Information Sharing in Securities Enforcement Matters, 10 J. FIN. CRIME 37, 40–41 (2002); see also Hicks, supra note 18, § 11:54.

22. Friedman et al., supra note 21, at 41.


26. IOSCO MMOU: Current Signatories - 97, IOSCO, http://www.iosco.org/library/index.cfm?section=mou_siglist (last visited Nov. 12, 2013) [hereinafter Current Signatories]. Currently, twenty-three authorities “have committed to seeking the legal authority necessary to enable them to become full signatories to the IOSCO MMOU.” Id.
ous foreign countries. Despite these efforts, current network mechanisms promoting cooperation have not been effective in combating multinational hedge fund fraud. In particular, although many securities regulators across the world have sought to cooperate through international networks, defects in the network mechanisms themselves and a lack of domestic legal authority impede effective cooperation among regulators.

In seeking how to overcome these obstacles, this article will explore ways that promote international cooperation in detecting, investigating, and prosecuting cross-border hedge fund fraud. In particular, it will describe the trends toward globalization of hedge fund fraud. Next, it will discuss how to enforce national securities laws cooperatively by using international network mechanisms. Finally, this study will provide recommendations for reforming the international securities enforcement system, thereby achieving more effective cooperation in combatting hedge fund fraud.

I. AN ANALYSIS OF RECENT ENFORCEMENT ACTIONS REGARDING HEDGE FUNDS AND THEIR MANAGERS

A. Overview

Securities fraud schemes employed by hedge fund managers are not unique to the hedge fund context. Most commonly, securities violations committed by hedge fund professionals fall into traditional fraud categories; however, hedge fund managers are more easily enticed to employ fraudulent schemes


28. 2003 SEC STAFF REPORT, supra note 5, at 73.

29. See id. at 73–74; Thomsen et al., supra note 5, at 555.
because they have the motive and ability to do so. For example, they routinely handle a large amount of money, employ high risk investment strategies, are compensated based on their performance, operate funds largely at their discretion, have close connections with other financial entities, and have a favorable environment to engage in misrepresentation. Possible violations may include misappropriation of funds, insider trading, and market manipulation.

Hedge funds tend to make fraudulent schemes more difficult to detect due to the complexity of the fund structures and operations. Most importantly, as the hedge fund industry has expanded beyond national borders, securities fraud involving hedge funds has also become transnational. For example, although many hedge fund managers work in the United States or U.K., the hedge funds themselves are often located outside these countries in order to maximize the tax benefits and lower regulatory compliance costs. Furthermore, certain managers operate both domestic and offshore funds at the same time. Such multinational hedge funds are generally set up as a mirror structure or a master-feeder structure. In the course of the operation, the multinational fund managers conduct for-

31. See 2003 SEC Staff Report, supra note 5, at 73.
32. Strohmenger, supra note 30, at 533.
33. Thomsen et al., supra note 5, at 558; see also Wulf Alexander Kaal, Hedge Fund Regulation by Banking Supervision – A Comparative Institutional Analysis 24 (2006).
34. See 2003 SEC Staff Report, supra note 5, at 73; see also Thomsen et al., supra note 5, at 557, 567; Douglas L. Hammer et al., U.S. Regulation of Hedge Funds 273 (2005).
35. Pearson, supra note 12, at 175.
36. See Thomsen et al., supra note 5, at 558–59.
37. See id. at 542.
38. See Pearson, supra note 12, at 175–76.
39. See Hedge Funds in the Crosshairs, supra note 13.
40. See Pearson & Pearson, supra note 14, at 26–27 & n.145 (quoting Fin. Servs. Auth., supra note 14, at 6); see also 2003 SEC Staff Report, supra note 5, at 10; see also Fin. Servs. Auth., supra note 14, at 6; see also Lhabitant, supra note 14, at 87–88.
41. Lhabitant, supra note 14, at 108–11 (explaining mirror structures and master-feeder structures).
42. See id.
eign or cross-border transactions. Furthermore, hedge fund managers often use Internet communication and networking to expand their businesses worldwide.

Given the circumstances, securities fraud committed by hedge fund managers has become largely transnational. The trend toward the internationalization of hedge fund frauds has become particularly evident in enforcement actions targeting misappropriation, insider trading, and market manipulation.

B. Misappropriation and Hedge Funds

Misappropriation of funds entails “the application of another’s property or money dishonestly to one’s own use.” Motives to misappropriate hedge funds may vary among managers. Some may manage the funds in a legitimate manner at the beginning of their operation, deciding later to employ a fraudulent scheme when encountering financial difficulty. Others, however, may create a hedge fund entity solely for the purpose of misusing investors’ money for their own sake.

If so inclined, hedge fund managers are able to commit misappropriation because they operate with a large amount of money in day-to-day investment. Furthermore, managers can avoid investors’ surveillance simply by misrepresenting the profitability of the funds. Investors may not suspect misappropriation if the fund looks profitable on paper. For this reason, when managers misappropriate hedge fund assets, they
usually then misrepresent fund operations to conceal the evidence.51 To that end, the managers may fabricate the fund’s appearance by using false documentation.52 The misrepresentation enables the managers to disguise their violations and to deceive investors into remaining in the fund.53

A typical misappropriation involving hedge funds may become more complicated with hedge funds that are globally organized and thereby involve foreign or cross-border transactions.54 For example, in a master-feeder structure, investors put their money into a domestic or offshore feeder fund, and the feeder funds then reinvest the money in a master fund.55 Conversely, in redemption of shares, a master fund pays a domestic or offshore feeder fund for shares, and the feeder funds then repay individual investors.56

Regardless of whether hedge funds are globally organized, their managers may transfer money to foreign bank accounts after misappropriation.57 This transaction can be designed to facilitate other fraudulent schemes, including money laundering.58 In particular, the money laundering scheme enables the managers to conceal the source of the money and use it for their own purpose, avoiding regulatory nets.59

C. Insider Trading and Hedge Funds

Unlawful insider trading involves “buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, while in possession of material, nonpublic information about the security.”60 In recent years, many insider

51. 2003 SEC STAFF REPORT, supra note 5, at 74; see also Thomsen et al., supra note 5, at 560, 567.
52. 2003 SEC STAFF REPORT, supra note 5, at 74; see also Thomsen et al., supra note 5, at 560, 567.
53. See Thomsen et al., supra note 5, at 559.
55. Id. at 109.
56. Id. at 109–10.
58. See, e.g., id.
59. See, e.g., id. at 13–15.
trading cases have involved hedge funds and their managers. The SEC also has considered “hedge fund insider trading as a top priority” for its enforcement program. This results from concerns that high-risk investment strategies and performance-based compensation of hedge funds may entice managers to devise insider trading schemes. Also, in day-to-day operations, hedge funds develop close relationships with corporate clients and investment bankers who possess material non-public information. This operational environment enables hedge fund managers to obtain inside information.

One major concern involves the investment strategies employed by hedge fund managers. These strategies usually contain various high-risk techniques. In order to reduce the investment risks, hedge fund managers may seek to obtain information regarding financial events. In some instances, the managers may trade on material information that is available to them, but not yet disclosed to the public. For example, a hedge fund manager employing an event-driven strategy might make transactions based on nonpublic information regarding


64. Strohmenger, supra note 30, at 533.

65. See NAGY ET AL., supra note 61, at 467; Thomsen et al., supra note 5, at 578–81; Pearson, supra note 12, at 175.


67. Strohmenger, supra note 30, at 533.


69. See Strohmenger, supra note 30, at 533.
corporate “bankruptcies, reorganizations, and mergers.”  

Indeed, hedge funds that function as lenders or substantial investors in a corporation may receive information in their capacity that has not been shared with the general public.71

Another concern is that performance-based compensation of hedge funds can also induce managers to commit illegal insider trading.72 Because performance is closely related to compensation in hedge funds, managers might trade on inside information in order to increase their personal income.73 In addition, high water marks and hurdle rates designed to limit performance fees might pressure managers enough to consider insider trading.74 Under the provision of high water marks, each term fund managers have to achieve a better profit than the previous one in order to receive a performance fee.75 Under the provision of hurdle rates, they must make more profits than the “minimum investment performance.”76 In these circumstances, managers are pressured to perform, which could lead them to commit insider trading.77

A final concern is that the operational environments of hedge funds enable the managers to obtain confidential information from investors or brokerage firms.78 Hedge fund investors not only have the ability to commit insider trading, but also the motivation.79 Some investors work as officials in other corporations, frequently dealing with corporate inside information.80 Such investors might deliver corporate information to their fund managers,81 aiming to benefit the funds that they invest

70. President’s Working Group on Fin. Mkt., Hedge Funds, Leverage, and the Lessons of Long-Term Capital Management 3 (Apr. 1999); Thomsen et al., supra note 5, at 578.
71. Thomsen et al., supra note 5, at 578–79; see also Strohmenger, supra note 30, at 533.
72. Strohmenger, supra note 30, at 533.
73. See id.
74. See 2003 SEC Staff Report, supra note 5, at 62–63.
75. Id. at 62.
76. Id. at 63.
77. See Strohmenger, supra note 30, at 533.
78. See Nagy et al., supra note 61, at 467; Thomsen et al., supra note 5, at 578–81; Pearson, supra note 12, at 175.
79. See Thomsen et al., supra note 5, at 578–79.
80. See id. at 578.
81. Id.
in. In light of their access and motives, hedge fund investors as corporate officials have great potential for insider trading.Outside entities assisting hedge funds also have the capacity and motive to be involved in insider trading. In particular, a number of investment banks provide prime brokerage services to hedge funds. While working with "public companies, mutual funds, and other hedge funds," investment banks usually handle nonpublic information. Furthermore, many seek to maintain hedge fund clients because hedge funds trade regularly and frequently, which enables the banks to collect large amounts of service fees. Thus, in order to maintain good relationships with hedge fund clients, investment bankers might transfer nonpublic information to those clients.

In light of such risks, it is not surprising that the SEC has recently initiated a number of enforcement proceedings against hedge fund managers for insider trading. Regulators, however, may face difficulties when investigating insider trading during the enforcement process. These complications typically arise because of the international aspects of hedge fund operations. For example, a hedge fund manager can globally organize hedge fund entities, employ overseas transactions, transfer money across borders, invest in foreign securities, and work with foreign persons or entities.

82. See id.
83. See Nagy et al., supra note 61, at 467; see also Thomsen et al., supra note 5, at 580.
84. Thomsen et al., supra note 5, at 580.
85. Id.
86. Id.
87. Id.
88. Id.; see also Strohmenger, supra note 30, at 534.
89. Thomsen et al., supra note 5, at 555.
93. See, e.g., id. at 11, 40 (describing the investment in a Canadian company’s stock).
94. See, e.g., id. at 39; Lyon Complaint, supra note 90, at 10.
Market manipulation refers to “intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.” Typically manipulative conduct might involve circulating false information and using deceptive trading practices. Such manipulative schemes are often attractive to hedge fund managers because they can falsify their performance by maneuvering markets in their favor. Because performance is directly related to compensation, managers are enticed to trade manipulatively in order to increase their income. In addition, hedge fund managers have the ability to manipulate markets due to their strategic trading activities as well as due to the large amount of fund money at their discretionary use. This operational environment enables managers to exploit fund investment for their manipulative trading. For example, a hedge fund manager may invest the fund in stock, using various trading techniques in order to maneuver the price of the stock. Then, he directs the fund to buy the stock at the raised price. Finally, the manager can fabricate his performance based on the manipulative transactions.

Similar to the situations in misappropriation and insider trading, a typical manipulation case may become more complicated with hedge funds that are globally managed. Many hedge fund managers in the course of day-to-day business invest funds in foreign markets and, in doing so, frequently

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95. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976); see also Nagy et al., supra note 61, at 615.
97. Thomsen et al., supra note 5, at 617.
98. See id.
99. See Pearson, supra note 12, at 174, 176.
100. See 2003 SEC Staff Report, supra note 5, at 73; see also Hammer et al., supra note 34, 273.
102. See, e.g., id.
103. See, e.g., Ficeto Complaint, supra note 44, at 4.
104. See, e.g., id.
105. See Pearson, supra note 12, at 175–76 (discussing difficulties in enforcing insider trading regulation).
communicate with overseas professionals, making their activities difficult to detect and prosecute. A more serious concern is that some managers violating securities laws may intentionally make their schemes transnational in order to avoid regulatory detection.

II. INTERNATIONAL COOPERATION IN INVESTIGATING AND PROSECUTING SECURITIES FRAUD

A. Domestic Legislation Enabling Enforcement Cooperation

In order to respond to the global expansion of securities fraud, including hedge fund fraud, domestic securities regulators must act transnationally. With no single regulation to govern all global markets, each country has sought to apply its domestic laws extraterritorially to combat transnational securities fraud. In the United States, the SEC and the DOJ can currently apply the antifraud provisions of U.S. securities laws to certain overseas transactions. The U.S. Supreme Court discarded the effects and conduct tests in *Morrison*, yet Congress, immediately after this decision, enacted a provision in the Dodd-Frank Act re-authorizing the SEC and the DOJ to use these two tests. Although national securities laws extend extraterritorially, the ability to gather facts and evidence of a violation, and the ability to prosecute that violation, is not guaranteed. Because enforcement of law is limited within a territory, domestic regulators generally cannot use their en-

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106. See, e.g., Ficeto Complaint, supra note 44, at 4–5, 8, 45–51 (addressing the Internet communication between a trader in Canada and a trader in the United States).
108. See id. at 90–91.
111. See Dodd-Frank Act § 929P(b); see also HICKS, supra note 18, § 11:50.
112. See INT’L BAR ASS’N, supra note 19, at 9–10; see also Sec. & Futures Comm’n, supra note 18, at 6, 7.
Thus, securities regulators should cooperate with each other to successfully enforce national securities laws.\textsuperscript{114} For this reason, many countries have established provisions authorizing their securities regulators to provide cross-border assistance. For example, the United States has Section 21(a)(2) of the Securities Exchange Act (“Exchange Act”);\textsuperscript{115} Switzerland has Article 38 of the Federal Act on Stock Exchange and Securities Trading (“Stock Exchange Act”);\textsuperscript{116} and Article 42 of the Federal Act on the Financial Market Supervision Act (“Financial Market Supervision Act”);\textsuperscript{117} Canada has Sections 11(1)(b), 126, 143.10(1), and 153 of the Ontario Securities Act;\textsuperscript{118} the U.K. has Sections 169 and 354 of the Financial Services and Markets Act of 2000;\textsuperscript{119} Hong Kong has Section 186 of the Securities and Futures Ordinance;\textsuperscript{120} and South Korea has Article 437 of the Financial Investment Services and Capital Markets Act (“Financial Investment Act”).\textsuperscript{121} These provisions enable domestic securities regulators to obtain evidence located abroad, thereby overcoming the obstacles to enforcing laws.

\textsuperscript{113} INT'L BAR ASS'N, supra note 19, at 9–10.

\textsuperscript{114} See Hicks, supra note 18, §11:53; see also Sec. & Futures Comm’n, supra note 18, at 7.


\textsuperscript{121} FINANCIAL INVESTMENT SERVICES AND CAPITAL MARKETS ACT art. 437 (S. Kor.), available at http://www.fsc.go.kr/eng/Lr/list03.jsp?menu=0203&bbsid=BBS0087 (last visited Oct. 17, 2013).
against transnational securities fraud.\textsuperscript{122} With no single regulator to govern the global financial market,\textsuperscript{123} securities regulators can most effectively combat globalized securities fraud by cooperating with one another.\textsuperscript{124}

\textbf{B. International Networks for Enforcement Cooperation}

The aforementioned legislation enables securities regulators to assist foreign counterparts in enforcing domestic laws.\textsuperscript{125} The execution of this assistance allows for certain arrangements among nations.\textsuperscript{126} Although ad hoc arrangements can be used by regulators in a particular case, prearranged international networks are more common.\textsuperscript{127} Popular networks for international securities enforcement include MOUs, particularly those that are bilateral and multilateral, and MLATs.\textsuperscript{128} MOUs are nonbinding arrangements allowing regulators to share information and to provide assistance to their foreign counterparts.\textsuperscript{129} Because of their flexibility, MOUs are increasingly considered key tools for transnational cooperation among securities regulators.\textsuperscript{130} By contrast, MLATs are less flexible because establishing MLATs involves complicated procedures, such as diplomatic negotiation and legislative ratification.\textsuperscript{131} As treaties, MLATs are legally binding agreements and typically

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\textsuperscript{122} See Friedman et al., \emph{supra} note 21, at 41.
\textsuperscript{123} See Chang, \emph{supra} note 16, at 90.
\textsuperscript{124} See SEC International Enforcement Assistance, \emph{supra} note 25.
\textsuperscript{125} See Friedman et al., \emph{supra} note 21, at 40 (stating that the legislation enables securities regulators to share information freely with their foreign counterparts).
\textsuperscript{126} See id.
\textsuperscript{127} See SEC International Enforcement Assistance, \emph{supra} note 25.
\textsuperscript{128} See Office of Int’l Affairs, \emph{supra} note 23, at 3–4.
\textsuperscript{130} See Roberta S. Karmel & Claire R. Kelly, \emph{The Hardening of Soft Law in Securities Regulation}, 34 Brook. J. Int’l L. 883, 885, 894 (2009); see also Di-nah Shelton, \emph{Soft Law}, in \textit{Routledge Handbook of International Law} 68, 75 (David Armstrong ed., 2009) (describing the increasing importance of “soft law,” which includes “any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behavior”).
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require regulators to provide assistance to each other in criminal matters.\textsuperscript{132} In recent years, countries have relied largely on such international networks to promote cooperation in securities enforcement.\textsuperscript{133}

1. Memoranda of Understanding (MOUs)

a. Bilateral MOUs

i. Overview

MOUs refer to “regulator-to-regulator arrangements regarding information sharing and cooperation in securities matters.”\textsuperscript{134} These arrangements are memorialized in nonbinding agreements.\textsuperscript{135} Since 1982, the SEC has signed bilateral MOUs on enforcement cooperation with a number of authorities from different jurisdictions, including Argentina, Australia, Brazil, Canada, Chile, France, Germany, Hong Kong, Israel, Italy, Japan, Jersey, Mexico, the Netherlands, Norway, Portugal, Singapore, Spain, Switzerland, and the U.K.\textsuperscript{136} The United States concluded MOUs with Switzerland in 1982\textsuperscript{137} and 1987,\textsuperscript{138} Canada in 1988,\textsuperscript{139} the U.K. in 1991,\textsuperscript{140} and Hong Kong in 1995.\textsuperscript{141}


\textsuperscript{133} Although countries can use the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Convention or Convention), this mechanism suffers a number of problems all its own. Greene, supra note 131, at 639–40 (listing the limitations of using the Hague Convention); Beard, supra note 129, at 272.

\textsuperscript{134} \textit{DIV. OF ENFORCEMENT, SEC}, supra note 27, § 3.3.6.3.

\textsuperscript{135} Beard, supra note 129, at 274.


\textsuperscript{137} Memorandum of Understanding, U.S.-Switz., Aug. 31, 1982, available at http://www.sec.gov/about/offices/oia/oia_bilateral/switzerland.pdf [hereinafter 1982 U.S.-Switz. MOU] (Memorandum of Understanding between the United States Securities and Exchange Commission and the Government of Switzerland). As the first MOU for global enforcement cooperation, the 1982 MOU signed by the United States with Switzerland is historically important. Each part of this MOU demonstrates how difficult enforcement cooperation was in the early stage. The United States has modeled other MOUs on this first MOU with some revision. \textit{MARVIN G. PICKHOLZ, SECURITIES CRIME} § 4:45 (11th ed. 2012). Given these circumstances, analyzing the 1982 MOU be-
tween the United States and Switzerland can be useful to understanding other MOUs’ contents and to finding ways of overcoming their problems. This chapter, therefore, includes analysis of the 1982 MOU, even though “[t]his MOU has now been replaced by [the 1987 MOU].” David Chaikin, The Impact of Swiss Principles of Mutual Assistance on Financial and Fiscal Crimes, 16 REVENUE L.J. 192, 196 n.13 (2006), available at http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1173&context=rlj &sei-re-dir=1#search=%221982%20MEMORANDUM%20UNDERSTANDING%20GOVERNMENT%20SWITZERLAND%22.


ii. Scope of Assistance

Whether a domestic regulator can successfully prosecute an international fraud case depends largely on the assistance that can be obtained from foreign authorities. If foreign authorities can provide assistance by leveraging their own domestic power, a domestic regulator can prosecute international fraud as effectively as a local case. On the other hand, if foreign authorities so requested are restricted from using their power fully, a domestic regulator may be unable to obtain crucial pieces of evidence.

Given the crucial importance of substantial transnational assistance, most MOUs, including those signed by the United States with Switzerland, Canada, the U.K., and Hong Kong, define the scope of assistance. Under the 1982 MOU between


144. See id.; see also Sec. & Futures Comm’n, supra note 18, at 7.

the United States and Switzerland, the Swiss Bankers’ Association was able to provide information to the SEC, bypassing Swiss bank secrecy laws.146 If certain conditions were met, asset freezing assistance was also available under this MOU.147 This assistance was limited to insider trading investigations; thus it was not available for most securities law violations.148 Nevertheless, since the exchange of diplomatic notes between the United States and Switzerland in 1993, this narrow scope of assistance has been expanded to include various securities law violations.149

The MOUs signed by the United States with Canada, the U.K., and Hong Kong recognize a broad range of assistance in gathering evidence.150 In particular, these agreements call for “the fullest mutual assistance,”151 requiring that authorities assist each other in (1) “providing . . . information in the files of the requested [a]uthority,”152 (2) “taking the evidence of persons,”153 and (3) “obtaining documents from persons.”154 Such assistance is governed by “the laws of the jurisdiction of the requested [a]uthority.”155 The scope of assistance agreed upon by these three countries is reflected in the IOSCO MMOU.156

146. 1982 U.S.–Switz. MOU, supra note 137, pt. III, para. 1; Agreement XVI of the Swiss Bankers’ Association, supra note 145, art. 4.
147. Agreement XVI of the Swiss Bankers’ Association, supra note 145, art. 9, para. 1.
149. SEC NEWS DIGEST, supra note 138, at 2; 1993 U.S.-Switz. Notes, supra note 138, at 1 (Letter from Warren Christopher, Sec’y of State, to Carlo Jagmetti, Ambassador of Switzerland).
151. U.S.-Can. MOU, supra note 139, art. 2, para. 2(a).
152. Id. art. 2, para. 2(b).
153. Id. art. 2, para. 2(c). MOUs signed by the U.S. with the U.K. and Hong Kong also have similar provisions. See U.S.-U.K. MOU, supra note 140, pt. II, para. 6; U.S.-H.K. MOU, supra note 141, para. 3.1.2.
154. U.S.-U.K. MOU, supra note 140, pt. IV, para. 13(a). MOUs signed by the U.S. with Canada and Hong Kong also have similar provisions. See U.S.-Can. MOU, supra note 139, art. 5, para. 3; U.S.-H.K. MOU, supra note 141, para. 3.4.3.
155. Int’l Org. of Sec. Comm’ns, Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information art. 7(b), May 2002, available at
Such a broad range of assistance in information sharing is necessary, but not sufficient, to establish an effective international enforcement mechanism.\textsuperscript{157} In particular, assistance in freezing assets is also indispensable to combating international securities fraud, for if wrongdoers can enjoy the proceeds of their fraudulent activities even after they are detected, the deterrent function of securities laws is decreased.\textsuperscript{158} In light of the importance of freezing assets, it is problematic that the MOUs signed by the United States with Canada, the U.K., and Hong Kong do not explicitly provide for assistance in this regard.\textsuperscript{159}

\textit{b. International Organization of Securities Commissions Multilateral MOU (IOSCO MMOU)}

\textit{i. Overview}

IOSCO was established in 1983 to promote regulatory cooperation in global securities markets.\textsuperscript{160} It started with only eleven members—all of them North and South American securities regulators.\textsuperscript{161} Later, from 1984 onward, non-American regulators also began to enter IOSCO.\textsuperscript{162} Accordingly, with the constant expansion of its membership, it has admitted securities regulators from more than one hundred countries, involving over 95% of global securities markets.\textsuperscript{163} IOSCO now functions as a primary governmental cluster to promote interna-
tional cooperation in the context of securities regulation. 164 In particular, IOSCO has promoted a Multilateral Memorandum of Understanding since 2002. 165 The purpose of this MMOU is to “facilitate cross-border enforcement and exchange of information among international securities regulators.” 166 In recent years, a significant number of regulators have signed the IOSCO MMOU, 167 and they have frequently employed the MMOU mechanisms for their enforcement cooperation. 168

164. See id.; see also Brummer, supra note 162, at 338.
165. IOSCO Historical Background, supra note 160.
166. Id.
167. Currently, ninety-seven authorities are listed as signatories in Appendix A of the MMOU. Current Signatories, supra note 26.
ii. Scope of Assistance

Article 7 of the IOSCO MMOU provides signatories with the ability to use its complete domestic power.\textsuperscript{169} A requested signatory can thus choose from among three types of assistance to execute, depending on the request.\textsuperscript{170} First of all, if a requesting authority is seeking information in the possession of a requested authority, the latter can comply under the MMOU by simply sending the information to the former.\textsuperscript{171} On the other hand, if a requesting authority is seeking information that a requested authority does not have, the latter can use its investigative power to obtain the documents and then send them to the former.\textsuperscript{172} Furthermore, in some instances, a requested authority can compel a particular person to make statements or give testimony.\textsuperscript{173}

The MMOU also specifies types of information that can be shared.\textsuperscript{174} The ability to obtain key information is crucial to succeeding in securities investigations.\textsuperscript{175} Indeed, many authorities investigating securities fraud seek a broad range of information regarding investments, brokerage, transactions, and management.\textsuperscript{176} Plenty of information can be obtained from entities regulated by a requested authority,\textsuperscript{177} but certain information is accessible only through unregulated entities.\textsuperscript{178} For example, an authority investigating market manipulation or insider trading usually requests bank records in order to track money involved in fraud.\textsuperscript{179} Thus, in order to successfully combat market manipulation and insider trading, a requested authority must secure the ability to demand from unregulated

\begin{footnotesize}
\begin{enumerate}
\item[169.] IOSCO MMOU, \textit{supra} note 156, art. 7(a).
\item[170.] \textit{See id.} arts. 7(b), 9.
\item[171.] \textit{Id.} arts. 7(b)(i), 9(a).
\item[172.] \textit{Id.} arts. 7(b)(ii), 9(b).
\item[173.] \textit{Id.} arts. 7(b)(iii), 9(c).
\item[174.] \textit{See id.} art. 7(b)(ii).
\item[175.] \textit{See Carvajal & Elliott, supra} note 142, at 15.
\item[176.] \textit{Id.}
\item[177.] \textit{Id.} at 15.
\item[178.] \textit{Id.} at 16.
\item[179.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
entities information that it can then deliver to a requesting authority.\textsuperscript{180}

For this reason, the MMOU provides that an authority can share not only information obtained from a regulated entity, but also records received from an unregulated one, namely, a bank.\textsuperscript{181} Article 7 stipulates that signatory authorities can perform a mutual exchange of (1) “contemporaneous records sufficient to reconstruct all securities and derivatives transactions, including records of all funds and assets transferred into and out of bank and brokerage accounts relating to these transactions”;\textsuperscript{182} (2) “records that identify: the beneficial owner and controller, and for each transaction, the account holder; the amount purchased or sold; the time of the transaction; the price of the transaction; and the individual and the bank or broker and brokerage house that handled the transaction”;\textsuperscript{183} and (3) “information identifying persons who beneficially own or control non-natural persons organized in the jurisdiction of the requested authority.”\textsuperscript{184}

Despite these provisions, authorities have in recent years sought a range of information broader than what the MMOU requires they share while investigating insider trading and market manipulation.\textsuperscript{185} In particular, authorities often find crucial evidence of insider trading from telephone conversations and Internet service history,\textsuperscript{186} which are not made available under any explicit provision of the IOSCO MMOU.\textsuperscript{187}

\begin{flushleft}
\textsuperscript{180} Id.
\textsuperscript{181} See IOSCO MMOU, supra note 156, arts. 7(b)(ii), 9(b).
\textsuperscript{182} Id. art. 7(b)(ii).
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} See CARVAJAL & ELLIOTT, supra note 142, at 16; see, e.g., United States v. Rajaratnam, 802 F. Supp. 2d 491, 499–500, 502, 507–12, 514–16 (S.D.N.Y. 2011) (showing that telephone conversations, instant messages, and emails exchanged between defendants revealed that the defendants committed insider trading).
\textsuperscript{186} See CARVAJAL & ELLIOTT, supra note 142, at 16; see, e.g., Rajaratnam, 802 F. Supp. 2d at 499–500, 502, 507–12, 514–16.
\textsuperscript{187} See generally IOSCO MMOU, supra note 156, art. 7(b)(ii).
\end{flushleft}
2. Mutual Legal Assistance Treaties (MLATs)

a. Overview

Besides MOUs, two countries often enter into treaties regarding mutual legal assistance in criminal proceedings. Such an agreement is called an MLAT. Though this treaty applies only in criminal cases, the SEC can nonetheless use it to “obtain assistance in any investigation that relates to any securities violation that might be punishable by criminal sanctions.” Thus, an MLAT can be a powerful tool for securities authorities to conduct international enforcement. This is primarily because an MLAT contains its own binding power and allows various types of assistance. In the United States, this treaty is usually maintained by the DOJ. As of 2011, the DOJ maintains MLATs with a number of foreign countries, including Switzerland in 1973, Canada in 1985, the U.K. in

189. Ruiz, supra note 188, at 231.
190. Mills et al., supra note 132, at 499; see also Div. of Enforcement, SEC, supra note 27, § 3.3.6.3.
191. See Friedman et al., supra note 21, at 42.
192. See Paul Coggins & William A. Roberts, Extraterritorial Jurisdiction: An Untamed Adolescent, 17 Commw. L. Bull. 1391, 1402 (1991) (addressing the fact that MLATs legally oblige countries to provide assistance to each other); see also Div. of Enforcement, SEC, supra note 27, § 3.3.6.3 (“MLATs may be an effective mechanism to obtain assistance when an MOU with a particular country either does not exist or does not permit the type of information sought from a witness residing overseas.”).
194. Div. of Enforcement, SEC, supra note 27, § 3.3.6.3.
195. Id.; see, e.g., Treaties in Force, supra note 188, at 43, 55, 161, 265, 294.
1994, Hong Kong in 1997, and South Korea in 1993. Thus, in order to obtain assistance from these countries under their MLATs, the SEC must ask the DOJ to assume the requesting process on its behalf. This MLAT process proves useful in cases where MOUs are not available.

b. Making Requests

Most MLATs specify how to make a request for assistance. MLATs do not usually allow securities authorities to make a request directly to their counterparts. Instead, they require authorities to communicate with each other through an official channel for administrating MLAT procedures, namely, a “Central Authority.”

Given this requirement, all requests and responses to requests must be made through each country’s respective Central Authority on behalf of other regulatory authorities in the country.

Indeed, MLATs signed by the United States with Switzerland, Canada, the U.K., Hong Kong, and South Korea all have provisions to appoint Central Authorities for each party. Under these MLATs, in the United States, the Central Authority


197. See, e.g., U.S.-Switz. MLAT, supra note 27, ch. VII, art. 28; U.S.-Can. MLAT, supra note 27, arts. I, VI, para. 1; U.S.-U.K. MLAT, supra note 27, art. 2; U.S.-H.K. MLAT, supra note 27, art. 2; U.S.-S. Korea MLAT, supra note 27, art. 2.

198. DIV. OF ENFORCEMENT, SEC, supra note 27, § 3.3.6.3.

199. See U.S.-Switz. MLAT, supra note 27, ch. VII, art. 28; U.S.-Can. MLAT, supra note 27, art. VI; U.S.-U.K. MLAT, supra note 27, art. 2; U.S.-H.K. MLAT, supra note 27, art. 2; U.S.-S. Korea MLAT, supra note 27, art. 2.

200. Beard, supra note 129, at 274.

201. Harris, supra note 193, at 140; see also U.S.-Switz. MLAT, supra note 27, ch. VII, art. 28; U.S.-Can. MLAT, supra note 27, art. VI, para. 1; U.S.-U.K. MLAT, supra note 27, art. 2, paras. 3–4; U.S.-H.K. MLAT, supra note 27, art. 2, para. 3; U.S.-S. Korea MLAT, supra note 27, art. 2, paras. 1, 3.

202. Beard, supra note 129, at 274; see also U.S.-Switz. MLAT, supra note 27, ch. VII, art. 28, paras. 1–2; U.S.-Can. MLAT, supra note 27, art. VI, para. 1; U.S.-U.K. MLAT, supra note 27, art. 2, para. 3; U.S.-H.K. MLAT, supra note 27, art. 2, para. 3; U.S.-S. Korea MLAT, supra note 27, art. 2, para. 1.

is the Attorney General or his designee; in Switzerland, the Division of Police of the Federal Department of Justice and Police in Bern; in Canada, the Minister of Justice or his designee; in the U.K., the Secretary of State for the Home Department or his designee; in Hong Kong, the Attorney General of Hong Kong or his designee; and in Korea, the Minister of Justice or his designee.

c. The Demands of Dual Criminality

MLATs often require that a request demonstrate dual criminality. Under this requirement, a case specified in a request must constitute a crime in not only the requesting but also the requested jurisdiction. For example, the MLAT between the United States and Switzerland stipulates that each party can use its compulsory power for the purpose of assistance when “an offense . . . would be punishable under the law in the requested [s]tate if committed within its jurisdiction and [it] is listed in the [s]chedule [of the treaty].” The MLATs signed by the United States with Hong Kong and South Korea also require that the request show dual criminality. Under each of these three MLATs, however, dual criminality is not demanded

206. U.S.-Can. MLAT, supra note 27, art. I.
210. See U.S.-Switz. MLAT, supra note 27, ch. I, art. 4, para. 2; U.S.-H.K. MLAT, supra note 27, art. 3, para. 1(d); U.S.-S. Korea MLAT, supra note 27, art. 3, para. 1(d).
211. Harris, supra note 193, at 140.
212. U.S.-Switz. MLAT, supra note 27, ch. I, art. 4, para. 2. Under this MLAT, however, dual criminality is not demanded in cases where requests involve “offenses against the laws relating to bookmaking, lotteries and gambling when conducted as a business.” Id. app. at 49.
213. U.S.-H.K. MLAT, supra note 27, art. 3, para. 1(d); U.S.-S. Korea MLAT, supra note 27, art. 3, para. 1(d).
in cases where requests involve certain crimes listed in its Annex.214

Arguably, discarding the dual criminality requirement would, in fact, promote better cooperation.215 Because each country defines securities law violations in different ways, a requirement of this sort can actually impede international cooperation.216 Indeed, the MLATs signed by the United States with Canada and the U.K. have no provision of dual criminality.217 Thus, assistance is available under these MLATs as long as a requested case is criminally liable in a requesting country.218

III. REFORMING MEMORANDA OF UNDERSTANDING TOWARD GREATER ENFORCEMENT COOPERATION

A. Enhancing Mechanisms for Cooperation in Asset Freezing

1. Ineffectiveness of Current Methods

Assistance in freezing assets is indispensable to combating international securities fraud because if violators cannot enjoy the proceeds of the frauds, the deterrent function of securities laws will increase.219 Securities regulators, therefore, often seek to freeze assets abroad through cooperative mechanisms.220 Unfortunately, examining the methods that are available reveals that they are too lengthy and unstable for se-

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215. See Beard, supra note 129, at 274 (explaining the MLAT between the U.S. and Switzerland).
216. See id.; PICKHOLZ, supra note 137, §§ 4:42, 4:45.
220. See OFFICE OF INT’L AFFAIRS, supra note 23, at 5.
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Securities enforcement and thus are not as effective as they should be.²²¹

For example, MLATs can be used to freeze assets abroad if a treaty has been arranged beforehand.²²² This method, however, is not effective for securities enforcement because MLATs are designed for criminal prosecution and often require a request to demonstrate dual criminality.²²³ Furthermore, MLATs are generally administered by criminal authorities, such as the DOJ, and not by securities regulators.²²⁴ Indeed, most MLATs require that a request be processed through a Central Authority, which is designated in each MLAT.²²⁵ Generally, each country designates the Ministry of Justice or the Attorney General to carry out this position.²²⁶ For instance, in all MLATs to which the United States is a signatory, either the Attorney General, who serves as head of the DOJ,²²⁷ or his designee serves as the Central Authority;²²⁸ but using the Central Authority is not an effective process in international securities enforcement because securities regulators cannot directly make a request to foreign counterparts.²²⁹ Such bureaucracy in the requesting process can also delay the execution of assistance. Indeed, in order to use MLATs to obtain information from a foreign securities agency, the SEC must ask the DOJ to make a request so that the DOJ may then forward the request to the designated

²²¹. See IOSCO Annual Conference, supra note 219.
²²². OFFICE OF INT’L AFFAIRS, supra note 23, at 5; see also Mann et al., supra note 157, at 323–24.
²²³. See, e.g., U.S.-Switz. MLAT, supra note 27, ch. I, art. 4, para. 2; U.S.-H.K. MLAT, supra note 27, art. 3, para. 1(d); U.S.-S. Korea MLAT, supra note 27, art. 3, para. 1(d); see Beard, supra note 129, at 273–74. See Beard, supra note 129, at 273 & n.14, 274.
²²⁴. See, e.g., U.S.-Switz. MLAT, supra note 27; U.S.-Can. MLAT, supra note 27, arts. I, VI, para. 1; U.S.-U.K. MLAT, supra note 27, art. 2; U.S.-H.K. MLAT, supra note 27, art. 2; U.S.-S. Korea MLAT, supra note 27, art. 2.
²²⁵. Harris, supra note 193, at 140.
²²⁶. Harris, supra note 193, at 140.
²²⁹. Beard, supra note 129, at 274.
Central Authority of a foreign country rather than to the agency with the relevant expertise and knowledge. In recent years, as securities law enforcement has increasingly required prompt action, this process has become particularly problematic.

Securities regulators have another option besides using MLATs: namely, to bring a civil action in a foreign court and thereby seek to freeze illegal proceeds. This method suffers from its own difficulties. If the SEC opts to use this method, it may be exposed to risks of litigation, in addition to facing difficult situations wherein a foreign court may require the SEC to pay financial undertakings for the filing of injunctions. Indeed, in SEC v. Lydia Capital, the SEC was faced with legal challenges that compelled it to pay financial undertakings.

2. Need for the MOU Approach

To overcome the deficiencies in using the two methods mentioned above, securities regulators should enter into MOUs that require them to take all necessary steps to assist their foreign counterparts in obtaining asset freezes where the assets are located. If securities regulators use MOUs instead of MLATs or civil actions, enforcement cooperation can be more effective, because securities regulators can directly communicate with one another to freeze assets abroad. Indeed, when entering into these types of MOUs, authorities specializing in

230. See U.S.-Switz. MLAT, supra note 27, ch. VII, art. 28; U.S.-Can. MLAT, supra note 27, art. VI, para. 1; U.S.-U.K. MLAT, supra note 27, art. 2; U.S.-H.K. MLAT, supra note 27, art. 2; U.S.-S. Korea MLAT, supra note 27, art. 2.

231. See Friedman et al., supra note 21, at 48.

232. IOSCO Annual Conference, supra note 219.

233. Id.


235. SEC Obtains Asset Freeze in the United Kingdom Against Hedge Fund Principal, GIBSON DUNN (June 25, 2008), available at http://www.gibsondunn.com/publications/Pages/SECAAssetFreezeInUKAgainstHedgeFundPrincipal.aspx.

236. See Mann et al., supra note 157, at 326 (arguing that the MOU would be a useful tool for “enforcing provisional orders and final judgments”); see also Friedman et al., supra note 21, at 50 (calling for international assistance in freezing assets).

237. See IOSCO Annual Conference, supra note 219 (illustrating Canadian experience in cross-border asset-freezing assistance).
securities laws can directly negotiate and administer agreements so as to close the differences in securities enforcement regimes. In addition, by directly communicating under MOUs, securities regulators can more quickly help freeze assets than they can under MLATs, which require an indirect and bureaucratic process. Even so, MOUs signed by the United States with Canada, the U.K., and Hong Kong do not currently have explicit provisions to assist in freezing assets abroad. The IOSCO MMOU, likewise, does not require asset freezing assistance. Considering the benefits of direct cooperation, however, MOUs, including the IOSCO MMOU, should incorporate asset freezing assistance in some way.

3. Need for the Enhanced Domestic Authority of the U.S. SEC

The scope of “asset freezing assistance” can be broad, from non-substantive assistance—for example, merely explaining the asset-freezing process—to substantive assistance—such as obtaining asset freezes on behalf of a foreign authority. Complicating matters, many securities regulators cannot currently provide substantive assistance to their foreign counterparts. Indeed, most securities regulators may only be able to provide information about the domestic legal framework—as was the case when the U.K. Financial Services Authority (“U.K. FSA” or “FSA”) provided it to the SEC in *Lydia Capital*.

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238. See Mann et al., *supra* note 157, at 327.
239. See IOSCO Annual Conference, *supra* note 219 (addressing efficiency in asset-freezing assistance provided by Canadian regulators); see also Mann et al., *supra* note 157, at 326–27.
241. See generally IOSCO MMOU, *supra* note 156.
242. See Mann et al., *supra* note 157, at 327–28 (discussing that a possible MOU without asset-freezing assistance thwarts prosecution efforts to seize profits retained outside the United States, and describing how a potential MOU requiring asset-freezing assistance could operate).
243. See, *e.g.*, Gibson Dunn, *supra* note 235 (describing how the U.K.’s FSA assisted the SEC in freezing assets in *Lydia Capital*).
244. See, *e.g.*, IOSCO Annual Conference, *supra* note 219.
tal—or, at most, to provide information about other channels such as criminal authorities or private law firms. Thus, even if securities regulators change their MOUs to include asset freezing assistance, the difficulties in freezing assets abroad will not necessarily be eliminated. This is primarily because most securities regulators, including the SEC, “still lack sufficient powers to freeze ill-gotten assets on behalf of a foreign regulator.” Because of this, the foreign regulator must work through criminal channels or private law firms to accomplish any asset freezing in the United States; however, these channels are either ineffective or risky, as discussed above.

For this reason, the U.S. Congress should consider authorizing the SEC to go to court in the name of foreign authorities to obtain asset freezes. Along with this authority of representation, the SEC can provide substantive assistance under MOUs, enhancing international cooperation accordingly.

Indeed, securities regulators have recognized the importance of the authority to seek asset freezes on behalf of foreign regu-


247. See IOSCO PRESIDENTS COMM., supra note 245, at 1; see also IOSCO Annual Conference, supra note 219.

248. See IOSCO PRESIDENTS COMM., supra note 245, at 1; IOSCO Annual Conference, supra note 219.

249. See Beard, supra note 129, at 273–74 (discussing the ineffectiveness of MLATs); see also IOSCO Annual Conference, supra note 219 (discussing problems in filing civil proceedings in a foreign country). For the details of this discussion, see supra Part III.A.1.

250. See, e.g., Securities Act, R.S.O. 2011, c. S.5, § 126(1)(b) (Can.) (granting the Ontario Securities Commission the legal authority to temporarily freeze assets in Canada on behalf of foreign authorities).

251. See IOSCO Annual Conference, supra note 219 (calling for “increasing the abilities of securities regulators to freeze and repatriate assets on behalf of foreign counterparts”).
In 1992, Michael D. Mann, who was the Director of the SEC Office of International Affairs, argued in an article that cooperation in enforcing provisional orders would benefit from MOU approaches, and that “the foreign authority, pursuant to both the MOU and domestic law, would petition its courts or proper authorities for relief on behalf of the SEC.”

In 2003, Ethiopis Tafara, the current Director of the SEC Office of International Affairs, also contended that “the next bold step for securities regulators in their fight against cross-border financial crime . . . is increasing the ability of securities regulators to freeze and repatriate assets on behalf of foreign counterparts.”

As did the domestic regulators, IOSCO recognized in 2006 that substantive assistance in freezing assets was crucial for effective cooperation in securities enforcement, and reported that “many jurisdictions still lack sufficient powers to freeze ill-gotten assets on behalf of a foreign regulator.” IOSCO, therefore, encouraged “[a]ll member regulators . . . to examine the legal framework under which they operate and strive to develop, through law reform or otherwise, mechanisms by which they or another authority within their jurisdiction could, on behalf of foreign regulator, freeze assets derived from suspected and established cross-border securities and derivatives violations.”

Furthermore, in 2008 the SEC entered into an enhanced enforcement MOU with the Australian Securities and Investment Commission (“ASIC”), which addressed the matters of freezing assets abroad and restraining the distribution of illegal profits. Specifically, this MOU provided that “[e]ach

252. See generally Mann et al., supra note 157; IOSCO Annual Conference, supra note 219.
253. Mann et al., supra note 157, at 326.
254. Id. at 328.
255. IOSCO Annual Conference, supra note 219.
256. IOSCO Presidents Comm., supra note 245, at 1.
257. Id.
[a]lthough . . . [confirm] its commitment to seek the legal authority to assist the other [a]uthority in freezing assets in its jurisdiction that constitute proceeds of a possible violation of [l]aws and/or [r]egulations, and [to] facilitate restitution to investors.”

Christopher Cox, who was Chairman of the SEC at that time, explained that under this enhanced enforcement MOU “the SEC and ASIC are . . . committed to seeking asset freezes on each other’s behalf, and to assisting with the restitution of funds to injured investors.”

Despite a series of efforts, however, the SEC still lacks the legal authority to obtain asset freezes on behalf of foreign authorities. Indeed, the SEC cannot provide any substantive assistance in freezing assets even if MOUs are arranged. This is primarily because the Exchange Act has no explicit provision authorizing the SEC to seek asset freezes on behalf of foreign regulators. In the context of information sharing, the SEC has the firm legal authority to obtain information on behalf of foreign authorities, thus allowing it to substantively cooperate with its foreign counterparts under MOUs. Until 1988, however, the SEC had not been able to use its investigative power to assist foreign authorities because “§ 21(a) of the Exchange Act, in its original version, limited the SEC’s ability


261. Id.


264. See GAO REPORT, supra note 263, at 48; see also IOSCO Annual Conference, supra note 219.


266. Mann et al., supra note 157, at 318–19.
to investigate violations of ‘this Title.’” In order to solve this problem, Congress added Section 21(a)(2) to the Exchange Act, thereby authorizing the SEC to conduct investigations for the purpose of gathering evidence and information for foreign securities regulators. In the context of asset freezing assistance, however, the Exchange Act does not yet provide the SEC with explicit legal authority to act on behalf of foreign authorities. The ability to obtain a court order to freeze assets on behalf of foreign regulators will enable the SEC to provide substantive assistance in freezing assets, thereby enhancing international cooperation.

For example, the Ontario Securities Act of Canada grants the Ontario Securities Commission (“OSC”) the legal authority to temporarily freeze assets in Canada on behalf of foreign authorities. Foreign securities regulators can thus take advantage of this representing authority in Canada by requesting the OSC to exercise its power to freeze assets on a temporary basis. Therefore, cross-border securities enforcement will be far more effective if all other securities regulators also obtain the power to obtain asset freezes on behalf of their foreign counterparts.

The U.S. Congress, therefore, ought to consider passing legislation that gives the SEC power to seek asset freezes in a U.S. court in the name of foreign regulators. These regulators can then take advantage of this authority by requesting the SEC to exercise it. Furthermore, such legislation can encourage other countries to adopt similar provisions. If the SEC and foreign securities regulators have the legal authority to obtain as-

267. Id. at 319 n.68; see also Securities Exchange Act of 1934 § 21(a), 48 Stat. 899.
268. See 15 U.S.C. § 78u(a)(2) (2006); see also Friedman et al., supra note 21, at 40; Mann et al., supra note 157, at 319.
269. See GAO REPORT, supra note 263, at 48; see also IOSCO Annual Conference, supra note 219.
270. See IOSCO PRESIDENTS COMM., supra note 245, at 1; see also IOSCO Annual Conference, supra note 219.
271. Securities Act, R.S.O. 2011, c. S.5, § 126(1)(b) (Can.).
272. OFFICE OF INT’L AFFAIRS, supra note 23, at 5.
273. See IOSCO Annual Conference, supra note 219; see also IOSCO PRESIDENTS COMM., supra note 245, at 1.
274. See, e.g., Securities Act, R.S.O. 2011, c. S.5, § 126(1)(b) (Can.).
275. See OFFICE OF INT’L AFFAIRS, supra note 23, at 5.
276. Mann et al., supra note 157, at 329.
set freezes on each other’s behalf, they can then maximize the benefits of MOUs providing for asset freezing assistance.\textsuperscript{277} 

\textbf{B. Requiring Exchange of a Broader Range of Information} 

To ensure more effective cooperation, the IOSCO MMOU needs to explicitly require signatories to obtain telephone or Internet records necessary for foreign counterparts’ investigations.\textsuperscript{278} The ability to obtain such information is crucial in successfully combatting international insider trading, for telephone records and Internet service histories often provide authorities with crucial evidence of insider trading.\textsuperscript{279} Specifically, in \textit{United States v. Rajaratnam}, telephone conversations, instant messages, and emails exchanged between Raj Rajaratnam and other defendants showed that he obtained inside information from various sources, and either disclosed that information as a tip, or traded stock based on it.\textsuperscript{280} Thus, many authorities have recently sought a range of information broader than what the MMOU allows, particularly when these authorities are investigating insider trading.\textsuperscript{281} 

Despite the need for a broader range of information, there is no explicit provision of the MMOU that allows securities regulators to seek telephone and Internet records from foreign authorities.\textsuperscript{282} This limitation of the MMOU may impede effective enforcement cooperation among signatories, inasmuch as they would have to seek the same information through other mech-

\textsuperscript{277} See id. 
\textsuperscript{278} See CARVAJAL & ELLIOTT, supra note 142, at 16 (stating that telephone and Internet records can be crucial evidence in insider trading cases). 
\textsuperscript{279} Id. 
\textsuperscript{281} See CARVAJAL & ELLIOTT, supra note 142, at 17 (describing a case where telephone records served as an important source of evidence). See generally IOSCO MMOU, supra note 156, art. 7(b)(ii) (specifying the types of information that should be obtained under the IOSCO MMOU). 
\textsuperscript{282} See generally IOSCO MMOU, supra note 156, art. 7(b)(ii).
anisms. One such option for obtaining telephone and Internet records is to use a bilateral MOU that has been arranged between regulators. The bilateral MOUs, however, cannot cover a broad range of jurisdictions. A second path to acquiring telephone and Internet information might be to use MLAT procedures, though these are limited to criminal cases. The last option for obtaining that information involves using informal channels; however, with respect to these informal methods, reliability and cooperativeness are often uncertain, making it difficult to anticipate whether the information is obtainable. For this reason, the IOSCO MMOU should contain an explicit provision requiring signatories to obtain telephone or Internet records for assistance.

CONCLUSION

This article has discussed international cooperation in securities enforcement, with particular emphasis placed on detecting, investigating, and prosecuting hedge fund fraud and market manipulation. It has revealed several concerns about current international enforcement systems for cross-border hedge fund fraud. A major concern is that the current MOUs have not been effective in combatting multinational hedge fund fraud. Thus, this article calls for revisions of the MOUs. Specifically, bilateral MOUs and the IOSCO MMOU should explicitly pro-

283. Except for an MOU signed between the SEC and an Australian regulator, bilateral MOUs do not usually contain an explicit provision requiring exchange of telephone or Internet records. See U.S.-Austl. MOU, supra note 260, at 9; see also U.S.-U.K. MOU, supra note 140; U.S.-Can. MOU, supra note 139; U.S.-H.K. MOU, supra note 141; see also SEC International Enforcement Assistance, supra note 25.

284. The SEC entered into MOUs with only twenty different countries’ authorities before IOSCO created the MMOU. SEC International Enforcement Assistance, supra note 25. Indeed, the SEC has no bilateral MOU with any Korean securities regulator. See SEC, Cooperative Arrangements with Foreign Regulators, supra note 24. By contrast, the number of full signatories of the IOSCO MMOU currently stands at ninety-seven. Current Signatories, supra note 26.

285. See Friedman et al., supra note 21, at 42.

286. See Greene, supra note 131, at 640 (stating that MLATs can be employed only for criminal cases).

287. See Office of Int’l Affairs, supra note 23, at 4; see also SEC International Enforcement Assistance, supra note 25.

288. See supra Part III.
vide assistance in freezing assets. The IOSCO MMOU should also be reformed by requiring that telephone records and Internet service history be shared. These recommendations would provide guidance for international enforcement systems in order to promote a more cooperative environment.

289. See supra Part III.A.
290. See supra Part III.B.
All tradition, perhaps, is based upon respect for the dead.¹

Joseph Dean

If the dead are not to be censured, it is only pronouncing history a libel, and the annals of Britain should grow as civil things as the sermons at St James’s.²

Horace Walpole

INTRODUCTION

In 2001, two Chinese-English litigants battled against each other over posthumous reputation in China. The case involved a successful novel called “K: The Art of Love,” which was published in Taiwan, mainland China, and other countries in many languages. The book is a fictional portrayal of a love affair between the characters K and Bell in 1936 China.³ The two characters are based on Bloomsbury Poet Julian Bell, a nephew of Virginia Woolf, and the celebrated Chinese writer and painter Ling Shuhua.⁴ Chen Xiaoying, daughter of Ling, sued the author Hong Yi and her publishers for defamation of her dead

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3. The book was considered China’s Lady Chatterley’s Lover. See Kevin Toolis, China’s Lady Chatterley Stirs Passions over Censorship, GUARDIAN (June 17, 2002), http://www.guardian.co.uk/world/2002/jun/16/books.arts.

mother.\textsuperscript{5} For Chen, the highly erotic and offensive nature of the novel’s depiction of K’s relationship with Bell has “damaged the reputations of her mother and father and caused her mental anguish.”\textsuperscript{6}

The case was first rejected by the Beijing Haidian Basic People’s Court on the ground that the defendant and plaintiff are both British citizens, and later rejected by the Beijing Intermediate People’s Court for lack of jurisdiction.\textsuperscript{7} However, it was accepted by the Changchun Intermediate People’s Court in Jilin Province after Chen added the Changchun-based magazines, Chinese Writers and Sichuan Youth Daily, as codefendants who published parts of Hong’s book.\textsuperscript{8} The court ruled that the defendants defamed the dead, and ordered that Hong must stop calumny, and that the author should apologize openly and pay emotional damages.\textsuperscript{9} The court also granted an injunction to prevent the book from being further published, copied, or distributed in any form.\textsuperscript{10} After the defendant appealed to the High People’s Court of Jilin Province, the parties agreed to a pre-trial settlement under the guidance of the High Court that was comprised of lower damages, an apology from the author, and the possibility to publish the novel under other titles after revision.\textsuperscript{11}

The case attracted a lot of attention, not only from Chinese media, but also from the international community.\textsuperscript{12} Regarded as a landmark case, the decision has considerable impacts on the free speech rights of Chinese writers because it set up a

\textsuperscript{5} Chen Xiaoying Yu Chen Hongying Qinfan Mingyuquan An ([陈小滢与陈红英侵犯名誉权案] [Chen Xiaoying v. Chen Hongying] [Jilin High Ct. July 16, 2003] (China) [hereinafter Chen Xiaoying v. Chen Hongying]).


\textsuperscript{7} Id.

\textsuperscript{8} Id.

\textsuperscript{9} Id.

\textsuperscript{10} Id. See also Jacobson, supra note 4.

\textsuperscript{11} Libel Case Ends with Conciliation, CHINA DAILY (July 31, 2003), http://www.china.org.cn/english/culture/71233.htm.

\textsuperscript{12} The case was commented on by international journals and writers. See, e.g., Erotic Fiction? Pornographic Fact, Court Rules, THE AGE (Jan. 27, 2003), http://www.theage.com.au/articles/2003/01/26/1043533952898.html. See also Toolis, supra note 3; Jacobson, supra note 4.
benchmark for fictional novel writing, as well as other forms of writing regarding the dead in Chinese law. Furthermore, the judgment attracted criticisms from the international community in the context of ongoing suppression of free speech by the Chinese Party-state. For foreign critics, it is another example of the infamous censorship in China,\(^\text{13}\) despite the fact that this sort of censorship has more or less been justified under the protection of posthumous reputation.\(^\text{14}\)

This case showcases the certain overlap between defamation and privacy in China, in particular where graphic sexual depictions are under consideration. Sexuality was still taboo when this case went to court in the late 1990s and is part of the reason why the book attracted wide attention.\(^\text{15}\) Even in 2013, fabrication and publication of the dead’s past sexual adventures can still induce accusations of privacy invasion and defamation among most Chinese.\(^\text{16}\)

This case also highlights the strong protection of posthumous reputation in Chinese law, contrasted with the unlikelihood of similar claims being pursued in common law jurisdictions. As the plaintiff Chen declared openly, she filed the suit in China in particular because in that year the Chinese Supreme People’s Court (“Sup. People’s Ct.”) issued a legal interpretation supporting her claim.\(^\text{17}\) This interpretation concerning the liability for emotional distress affirms the legal protection of the dead’s close relatives who suffer from the violation of posthumous in-

\(^{13}\) Jacobson, \textit{supra} note 4.

\(^{14}\) \textit{Id.}

\(^{15}\) A telling example is a 1997 poll in Shanghai—one of the more progressive cities in China—indicating that “40% of the people had not hugged or kissed prior to marriage.” Michael Newton-McLaughlin, \textit{A Chinese Sexual Revolution: Is It In or Out?}, \textit{TAKING IT GLOBAL} (Feb. 29, 2004), http://www.tigweb.org/youth-media/panorama/article.html?ContentID=2920.


\(^{17}\) \textit{See} Zuigao Renmin Fayuan Guanyu Queding Minshi Qinquian Jingshen Peichang Zeren Ruogang Wenti De Jieshi (最高人民法院关于确定民事侵权精神损害赔偿责任若干问题的解释 [Interpretation of the Supreme People’s Court on Problems Regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts] (promulgated by the Sup. People’s Ct., Mar. 8, 2001, effective Mar. 1, 2001) (Lawinfochina) (China) [hereinafter Compensation Liability Interpretation].
terests, such as the deceased’s reputation, honor, privacy, name, likeness, and body.\textsuperscript{18}

The above case does not stand alone, and, on the whole, Chinese law is characterized by a strong protection of posthumous interests under the rubric of personality and dignity.\textsuperscript{19} The law, as will be explained in Part III below, is very plaintiff-friendly and protects a wide range of interests of the dead. As the 2001 Sup. People’s Ct. Interpretation dictates, these protections extend to the dead’s reputation, name, honor, privacy, publicity rights, remains and even their resting place.\textsuperscript{20} Though there is no statutory law governing these interests, strong protection has been established gradually through a series of cases in the past two decades and under the guidance of the Sup. People’s Ct.\textsuperscript{21}

The legal development is best understood as a dramatic social-political transition in China, in which people’s attitudes towards privacy and reputation—both of the living and the dead, and of the present and the past—have undergone significant changes. The ways these changes have affected Chinese society are best expressed in the following four points. The first is that in the past few decades, Chinese law has gained a secure position in society as an institution capable of resolving disputes of largely diversified social interests. Although constantly encountering political hindrance and harassment,\textsuperscript{22} law has be-

\textsuperscript{18} Id.

\textsuperscript{19} In China, personality right includes the rights to reputation and privacy, as well as other rights that are personal. The 2001 Supreme People’s Court Interpretation prescribes that the dead’s personality interests, including their reputation, privacy, honor, name, likeness, remains, etc., shall be protected. Id. See generally Hao Wang, Protecting Privacy in China: A Research on China’s Privacy Standards and the Possibility of Establishing the Right to Privacy and the Information Privacy Protection Legislation in Modern China 33–76 (2011); Liu Daoyun, Woguo Rengequan Baohu De Xiandu (我国人格权保护的限度), 3 Dong Fang Faxue (东方法学) (2011).

\textsuperscript{20} Compensation Liability Interpretation, supra note 17.

\textsuperscript{21} For the development of the law in the field, see discussion infra Part I.C.

\textsuperscript{22} A recent example is that new lawyers, and those renewing their licenses, are required by the Chinese Ministry of Justice to take an oath of loyalty to the Communist Party. Edward Wong, Chinese Lawyers Chafe at New Oath to Communist Party, N.Y. TIMES (Mar. 23, 2012), http://www.nytimes.com/2012/03/23/world/asia/chinese-lawyers-chafe-at-new-oath-to-communist-party.html.
come an important way for individuals to address their need for justice, rather than serving as a mere instrument of Party-state control. This is especially true in the context of posthumous reputation and posthumous privacy cases, which can reveal, from a unique angle, the ongoing social-legal changes and the law-state relationships.

Second, it is important to observe how Chinese law deals with the reputation of the deceased when politically-sensitive history is involved in defamation cases. In many cases, posthumous defamation can lead to potential challenges to official history in China. Since the communist party is still the dominant political force, and history an important source of its legitimacy, no serious challenges are allowed to certain parts of history.

A third point is that one can test the real boundaries of free speech rights in China by analyzing posthumous reputation and privacy cases. Though free speech is recognized as a fundamental right by the Chinese Constitution, there is still a big gap between reality and the constitutional promise under China's present legal-political regime. Posthumous reputation and privacy cases are certainly the minority of defamation cases and privacy invasion cases, but it is these marginal cases that present a clearer view of how the free speech of Chinese authors and publishers is under threat, especially when speech causes harm to the interests of the dead and their surviving families.

As a final point, an explanation of this body of law is also important for foreign lawyers who wish to protect the interests of dead westerners in China. Like what the plaintiff Chen has

23. See infra Part IV.
24. For example, no free discussion is allowed of China’s Cultural Revolution, the millions of starvation deaths that occurred during the 1959–1960 Great Leap Forward Movement, and the 1989 Student Movement. In He's words, the true history of events since the foundation of the Chinese Communist Party is still a closely guarded official secret. See He Qinglian, The Fog of Censorship: Media Control in China, xvii, 1, 28, 30, 196, 200 (2008) (discussing censorship and media control in China to highlight the abuse and misuse of history by the Chinese government).
26. In sharp contrast, reputation and privacy of the living, not to mention the dead, usually yield to free speech rights, which are regarded as fundamental in most Western democracies.
done in *Chen Xiaoying v. Chen Hongying*, there is a good chance for close family members of Western celebrities to protect the dead's interests in reputation and publicity in China. For example, when a Chinese company planned to produce and took pre-orders for an authorized replica of Apple founder Steve Jobs, Apple threatened the company with legal action on the ground that Jobs is protected under the California Celebrities Rights Act, which extends his publicity right to seventy years after his death. Instead of this legal threat, Apple’s lawyers could simply have initiated an action in China, where China’s strong protection of the dead’s interests would give them a strong chance of success.

The principal aims of this Article are to study the legal protection of posthumous privacy and reputation in Chinese law, and to analyze the political and social backgrounds behind such legal practices. This will be achieved through an analysis of thirty-seven cases, collected from 1989 to 2010, on posthumous reputation and posthumous privacy. These cases are found and selected from various sources, including the Gazettes of the Sup. People’s Ct., Chinese professional law websites, court verdicts, and media reports. The details of the most important cases from these thirty-seven examples will be discussed below.

Starting with a discussion of the above K case, this Article will first give a brief introduction to the concept of posthumous reputation and privacy, and the legal treatment of the two interests in other jurisdictions, for an overview of the issue. Next, it will discuss the Chinese legal framework governing defamation and privacy, so that readers may better understand how Chinese law has developed a unique path in protecting the two interests. It then goes on to analyze these cases from different perspectives: justifications and characteristics of the protection, plaintiffs and defamees, goals and aims of suits, defendants and defenses, as well as court approaches and verdicts. After this, the Article will turn to the cases that relate to China’s official history and analyze how the cases are handled by Chinese courts when politics are involved. This will be followed by a discussion of the possibility of censorship in history-relevant

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cases when protection of the dead’s interests becomes a possible justification of censorship. 

Note that it is possible to discuss posthumous defamation cases and posthumous privacy cases in China together in this article for two reasons. First, privacy has been mostly protected by Chinese law under the rubric of reputation, as it only became an independent civil right in 2010.28 Second, as further analysis will show, in most of the collected cases, invasion of the privacy of the dead has been treated by plaintiffs as the defamation of the dead.29


I. POSTHUMOUS REPUTATION AND PRIVACY IN GENERAL

Posthumous reputation is the continuity of one’s reputation after death. In other words, it is the evaluation of the past activities, behavior, and achievements of the deceased. What distinguishes ante-mortem reputation from post-mortem reputation is that after death, the dead can no longer defend their reputation any longer. Moreover, the events that make up a person’s life cease to accrue, such that no more of the source material that exists is added after death. In general, the lives of the dead are best assessed in a larger social context, and it is through this context that their reputation becomes increasingly objective post-mortem. This objectivity is justified by the various stakeholders in the dead’s reputation, and means that posthumous reputation is not an open target for criticism.

For instance, relatives of the dead will keep an eye on the reputation of their family members to ensure that the dead are not tarnished and humiliated. Posthumous defamation can cause mental distress, emotional and economic loss, and defamation of the surviving family of the dead. If a dead person is a public figure, his or her supporters and those who may have been involved in the same enterprises with the dead, may often fight defamation attempts based on the understanding that such remarks could sully their common enterprises. Finally, the reputations of many public figures are important components of collective memory and social identity. This is particularly true when parts of history related to a posthumous reputation are used for political ends, to justify political order, collective memory, or national identity. In most communities, posthumous reputation is protected by morality under the rubric of
human dignity and personality. However, if a community sees posthumous reputation as a collective issue with high social-political significance, it may protect posthumous reputation not only by morality, but also by law.

In comparison to reputation, posthumous privacy attracts less attention. Following De Baets’s approach, it is helpful to apply Prosser’s four privacy torts to the situation of the dead. This includes that the resting places of the dead shall not be violated; their names, portraits, and likeness shall not be illegally appropriated; their private facts shall not be disclosed after death when they are highly offensive or humiliating; and the personal details of the dead shall not be falsely publicized. In a way, the dead’s interests in privacy has a lot to do with the living: graveyards in many communities are sanctified and sacred places; disclosure of the dead’s private matters may offend a lot of people, and not just family members, such as publicizing the lives of the dead in a false light; and appropriation of the dead’s likeness and name is of direct concern to surviving families.

It is well known that common law countries do not recognize and protect the reputation and privacy of the dead based on the understanding that the dead cannot be harmed and thus


34. Besides China, a case from Taiwan indicates the collective nature of posthumous reputation. See YANG RENSHOU (杨仁寿), FAXUE FANGFA LUN (法学方法论) 1–8 (1st ed. 1999). Another telling example is the protection of Mustafa Kemal Atatürk under Turkish law. DE BAETS, supra note 32, at 77.

35. Prosser’s four torts of privacy are (1) intrusion upon an individual’s seclusion, solitude, or private affairs; (2) public disclosure of private facts; (3) publicity putting an individual in a false light; and (4) appropriation of an individual’s likeness. See generally William L. Prosser, Privacy, 48 CALIF. L. REV. 383 (1960).

36. Id.

37. While this is the general rule, Joel Feinberg has set off a long-standing philosophical debate as to whether the dead can be harmed, based on the argument that the dead can be defamed after death. See generally Joel Feinberg, The Rights of Animals and Future Generations, in PHILOSOPHY AND ENVIRONMENTAL CRISIS 140, 43–68 (William Blackstone ed., 1974); Joel Feinberg, Harm and Self-Interest, in LAW, MORALITY AND SOCIETY 285 (1977).
have no rights under law. In contrast, many continental law
countries protect reputation and privacy of the dead under
human dignity and personality provisions. For example, Ger-
man law emphasizes human dignity and protects the dead’s
reputation. In Italy, Princess Diana’s posthumous privacy has
been protected from the publicity of the photos taken at the
scene of her death by the Italian magazine *Chi*. A similar
example is the recognition of posthumous reputation by the
Israeli Supreme Court in the 1999 Szenes case. In a recent
Maltese case, a defendant was ordered by the court to pay civil
damages for posthumous defamation, although in Maltese law
Section 28 of the Press Act concerning civil actions does not al-
low relatives of a dead person to institute proceedings.


39. For the *Mephisto* case, judged in 1976, and other similar German cases, see Rösler, *supra* note 33.

40. The Italian court ordered that no further dissemination of such infor-

41. Hannah Szenes, the Jewish heroine who committed her life to save
other Jews under Nazi occupation, was captured by the Nazis, tortured, and
killed. She is regarded as a national symbol for courage and self-sacrifice, and
is considered part of the national identity in Israel where places and streets
are named in her remembrance. When her good name was questioned in col-
lective memory, the case went before the Supreme Court of Israel. The Court
rejected the claim, though recognized the importance of the interests of a good
name, both to the dead and the living. *See generally* HCJ 6126/94, 6143/94
Giora Szenes v. Broadcasting Authority, 53(3) PD 817 [1999] (Isr.), available
at http://www.concernedhistorians.org/content_files/file/le/131.pdf. For the

42. The case was rebutted by the European Court of Human Rights on the
ground of breaching Article 10 of the European Convention on Human Rights.
ever, Article 255 and Article 256 of the Criminal Code of Malta allow posthumous defamation complaints.\(^\text{43}\) As in Malta, many jurisdictions make defamation of the dead a criminal offense.\(^\text{44}\) For example, in Taiwan, a historian was punished as a criminal for defamation of a Chinese poet who died more than a thousand years ago.\(^\text{45}\) In India, Section 499 of the Penal Code recognizes defamation of the dead as a crime.\(^\text{46}\)

II. LEGAL FRAMEWORK

Like German law, Chinese law protects the dead’s reputation and privacy under personality and dignity provisions. Defamation of the dead is both a criminal and civil offense and the dead’s privacy has been protected under reputation in legal practice for certain reasons.\(^\text{47}\) There is no statutory law prescribing such protection directly. Since the 1989 Hehua Girl case (civil case) and the 1989 Tang Min case (criminal case), Chinese courts began to consider the protection of the dead’s reputation and privacy, and the interests of their close family members.\(^\text{48}\) This body of law has been developed gradually from China’s defamation law under the guidance of the Chinese Supreme People’s Court.\(^\text{49}\) The main characteristics of the gov-

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43. In particular, Article 255 prescribed that “where the party aggrieved dies before having made the complaint, or where the offence is committed against the memory of a deceased person, it shall be lawful for the husband or wife, the ascendants, descendants, brothers and sisters, and for the immediate heirs, to make the complaint.” Id. ¶ 17.


45. YANG RENSHOU (杨仁寿), supra note 34, at 1–8.


47. See infra Part II.B.

48. The first is well known in China as the Hehua Girl case. See Chen Xiuqin v. Wei Xilin, supra note 29; Tang Min’s Criminal Defamation Case, supra note 29.

49. Zhang Hong, Posthumous Personality Rights Protection in China: Cases and Judge Made Law, 138 FASHANG YANJIU (法商研究) 143 (2010). Unlike other jurisdictions, the Chinese Supreme People’s Court (“Sup. People’s Ct.”) usually issues general directions or interpretations regarding specific legal issues to lower courts for guidance in judicial decision making. It also sends the so-called communications to reply to lower courts’ inquiries concerning the implementation of law, which are regarded as formal legal interpretations. This legal practice has been criticized by many scholars as against judicial
erning law are to be discussed in the analysis of the collected cases in Part III. For background, Chinese defamation law and privacy law will first be briefly introduced.

A. Defamation Law

Defamation law in China has “certain Chinese characteristics” that make its application unique from other jurisdictions.50 Above all, Article 38 of the Chinese Constitution Law protects the reputation of the Chinese. It stipulates, “[T]he personal dignity of citizens of the People’s Republic of China is inviolable. Insult, libel, false charge or frame-up directed against citizens by any means is prohibited.”51 Defamation is a criminal offense in China and can be punished severely. Article 246 of Chinese Criminal Law prescribes that:

Whoever, by violence or other methods, publicly humiliates another person or invent stories to defame him, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights; The crime mentioned in the preceding paragraph shall be handled only upon complaint, except where serious harm is done to public order or to the interests of the State.52

Though the law does not explicitly mention protection of privacy in this text, it implies the ability to punish the invasion of privacy by criminal defamation law. This is because in many

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cases, disclosure of private facts and invention of stories also lead to defamation in the Chinese community. As Josephs pointed out earlier, “both criminal and civil liability may be imposed for defamation or invasion of privacy.”

In addition, Article 105(2) treats certain types of defamation as political offenses and allows the state to curb incitement to subversion under the rubric of defamation, stipulating that:

Whoever incites others by spreading rumors or slanders or any other means to subvert the state power or overthrow the socialist system shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention, public surveillance or deprivation of political rights; and the ringleaders and the others who commit major crimes shall be sentenced to fixed-term imprisonment of not less than five years.

Defamation is also a civil offense in China. Article 101 of the General Principles of the Civil Law of China stipulates that citizens and legal persons shall enjoy the right of reputation; the personality of citizens shall be protected by law; and the use of insults, libel, or other means to damage the reputation of citizens or legal persons shall be prohibited. Article 120 prescribes that if a citizen’s right of personal name, portrait, reputation, or honor is infringed upon, he shall have the right to demand that the infringement be stopped, his reputation rehabilitated, the ill effects eliminated, and an apology made; he may also demand compensation for incurred loss.

This protection has been further enhanced by two legal interpretations by the Sup. People’s Ct. The 1993 Judicial Interpretation provides three general circumstances to define defamation, instructs the choice of courts, and states the possi-

53. This can be clearly observed in the criminal defamation case concerning a deceased local leader. Tang Min’s Criminal Defamation Case, supra note 29.
55. Chinese Penal Code, supra note 52.
57. Id.
58. Id.
59. See Liebman, supra note 50, at 40–43.
ble legal remedies. The 1998 Judicial Interpretation resolved several specific legal problems brought up by lower courts, and includes: allowing plaintiffs to sue at their own domicile, if they are affected by such torts there, or at the place such tortious acts are committed; disallowing acceptance of allegations of defamation in confidential reports or other materials prepared for leadership departments; liability of source in defamation materials; no liability of news media for disclosing information from public official documents and functional acts of the state on the condition of objective and accurate reports; and liability for disclosure of information concerning certain diseases, such as AIDS, by employees of public health authorities acting on their own, etc.

In addition, defamation can incur lesser administrative punishment if it is not serious. Article 41 of the Public Security Administration Punishment Law allows police to detain and fine defamers. This happens in three circumstances: first, when insulting any other person openly or making up stories to defame any other person; second, when attempting to make any other person subject to criminal punishment or public security administration punishment by making up stories and bringing a false charge against any other person; and, third, when in-
苦害任何其他人的正常生活，反复发送任何淫秽、侮辱、威胁或其他信息。63

B. Privacy Law

Privacy is a new right in Chinese law and several meanings of the concept of privacy in Western law are foreign to Chinese society.64 Before the promulgation of the Chinese Tort Liability Law in 2009, Chinese law—including the Chinese Constitution Law and the General Principles of Civil Law—had not recognized privacy as an independent right.65 However, there are other laws protecting individual privacy and other privacy-related interests indirectly. For example, Articles 38, 39, and 40 of the Chinese Constitution Law protect the right of personal dignity, the right of residency, and the right of confidentiality in correspondence.66 Article 253 of the Chinese Criminal Code protects individual citizens from illegal disclosure of their private information by staffs working in governmental bureaus and certain enterprises concerning finance, hospitals, transportation, telecommunication, and education.67

Chinese Civil Procedural Law and Criminal Procedural Law protect privacy in legal procedures.68 Article 22 of the Police Law forbids police agents to illegally search and detain citizens.69 Article 39 of the Law of the People’s Republic of China

63. Id.

64. See China: The Long March to Privacy, ECONOMIST (Jan. 12, 2006), http://www.economist.com/node/5389362. See also HAO WANG, supra note 19, at v (“[T]he general population of China does not know what the concept of privacy is.”).

65. HAO WANG, supra note 19, at 137.


67. Chinese Penal Code, supra note 52.


69. Zhonghua Renmin Gongheguo Jingcha Fa (中华人民共和国人民警察法) [People’s Police Law of the People’s Republic of China] (promulgated by the
on the Protection of Minors (2006 Revision) in particular protects certain privacy interests of adolescents.\textsuperscript{70} Article 41 of the Public Security Administration Punishment Law forbids and punishes anyone who spies on, takes photos without permission, wiretaps, or spreads the private information of any other person.\textsuperscript{71}

Before 2009, privacy was only protected indirectly under the rubric of reputation. In the 1988 Sup. People’s Ct. interpretation, “Opinions on Several Issues Concerning the Implementation of the General Principles of the Civil Law,” Article 140, for the first time, established a legal basis to claim remedy for privacy invasion. In this interpretation, the Sup. People’s Ct. took an indirect approach to privacy protection, prescribing that “oral or written disclosures of other’s privacy with substantial effects can be determined as acts of defamation.”\textsuperscript{72} After this, privacy litigation could be filed as infringements of reputation.

In 1993, the Sup. People’s Ct. issued another judicial interpretation, “A Reply to Certain Issues Concerning Judging Defamation Cases,” confirming that without consent, any activities to disclose another’s private materials or reveal another’s privacy in oral or written forms, which causes damage to another’s reputation, shall be treated by law as defamation.\textsuperscript{73} Eight years later, the Sup. People’s Ct. reaffirmed the rule in a 2001 Judicial Interpretation. This judicial interpretation grants plaintiffs a right to claim emotional damages from invasions of

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\textsuperscript{71} See People’s Police Law, supra note 69.

\textsuperscript{72} Opinions of the Supreme People’s Court on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People’s Republic of China (For Trial Implementation) (promulgated by the Sup. People’s Ct., Jan. 26, 1988, effective Jan. 26, 1988) (Lawinfochina) (China). See also Jingchun, supra note 28, at 657; HAO WANG, supra note 19, at 152.

\textsuperscript{73} Reply Concerning Judging Defamation Cases, supra note 60.
privacy and other personality rights that are violated by activities against public interest and social morality.\textsuperscript{74}

Liebman’s study on defamation cases has shown that in legal practice, the remedy of privacy rights is one of the four main categories of defamation cases brought by ordinary persons.\textsuperscript{75} The strong tendency to subsume privacy under reputation rights in Chinese law can be understood in the context of China’s long tradition of maintaining an inclusive concept of reputation, in contrast to a narrow and weak concept of privacy.\textsuperscript{76} Chinese people view privacy from a much narrower perspective and with less importance than most Westerners do, which in turn determines the legal policies adopted by Chinese legislators and judges.\textsuperscript{77}

The interests protected under reputation and privacy are different, although they overlap with each other to a large extent.\textsuperscript{78} In China, reputation is an important issue representing an individual’s social standing, honor, dignity, credibility, and social networks, which are represented by the concept of “face” (“Mi-anzi”).\textsuperscript{79} Face is an important concern of ordinary Chinese and

\begin{itemize}
  \item \textsuperscript{74} Compensation Liability Interpretation, \textit{supra} note 17. Note also that the same judicial interpretation grants close relatives of the dead a right to claim emotional damages for defamation of the dead.
  \item \textsuperscript{75} See Liebman, \textit{supra} note 50, at 72–75.
  \item \textsuperscript{76} In the past, privacy has been traditionally viewed as being associated with shameful personal matters or secrets in China, but has been broadened in recent years by the introduction of Western law and ideas of privacy. For the Chinese approach to privacy in general, see generally Jingchun, \textit{supra} note 28; Guobin Zhu, \textit{The Right to Privacy: An Emerging Right in Chinese Law}, 18 \textit{STATUTE L. REV.} 208 (1997); Lü Yao-Huai, \textit{Privacy and Data Privacy Issues in Contemporary China}, 7 \textit{ETHICS & INFO. TECH.} 7 (2005).
  \item \textsuperscript{77} Privacy is also a relatively new right in common law countries, whose recognition is owed largely to Warren and Brandeis’ article. \textit{See generally} Samuel D. Warren & Louis D. Brandeis, \textit{The Right to Privacy}, 4 \textit{HARV. L. REV.} 193 (1890).
  \item \textsuperscript{79} \textit{See, e.g.}, Hsien Chin Hu, \textit{The Chinese Concept of Face}, 46 \textit{AM. ANTHROPOLOGY} 45 (1944); David Yau-fai Ho, \textit{On the Concept of Face}, 81 \textit{AM. J. SOC.} 867 (1976); Jingchun, \textit{supra} note 28. \textit{See} discussion \textit{infra} Part II.B.
\end{itemize}
can more or less be understood as meaning an individual’s social existence. But privacy in traditional Chinese society is conceived as related to issues improper for disclosure, issues that are secret, and issues that are shameful.\textsuperscript{80} Once such information is exposed, the person concerned is likely to be embarrassed and shamed by the public, causing him to be looked down upon and disrespected. A good example of this public shaming pertains to rape victims. Even now, in most areas of China, being a rape victim, and especially losing one’s virginity in this manner, is a devastating issue that brings shame and contempt to the victim and her family.\textsuperscript{81} As a secondary consequence, given the traditional male preference for virgin brides that persists today, rape victims usually have difficulties in finding future husbands, despite their innocence.\textsuperscript{82} The subordination of privacy to reputation in China will be further discussed in the collected posthumous cases.\textsuperscript{83}

The Chinese approach of protecting privacy via reputation has many drawbacks in practice. First, privacy invasion does not provide an independent cause of action, and thus cannot offer full protection.\textsuperscript{84} Second, as Yang pointed out, the two judicial interpretations of the Sup. People’s Ct. above do not offer a coherent definition of civil liability.\textsuperscript{85} For instance, it is not clear if

\textsuperscript{80} See Jingchun, supra note 28, at 646.


\textsuperscript{82} Even if rape victims can find husbands, the marriages may be brief in view of Chinese men's constant pursuit for their wives' virginity. Yang Wanli, Jiang Xueqing & He Na, Men in China Still Want Virgin Brides, ASIAONE (Mar. 8, 2012), http://www.asiaone.com/News/AsiaOne%2BNews/Asia/Story/A1Story20120308-332238.html.

\textsuperscript{83} It is notable that in common law countries, similar to China, the concept of privacy first stressed keeping secrets and guarding life's darkness, then recently switched to another concept focusing on free choice of individuals. LAWRENCE FRIEDMAN, GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY (1st ed. 2007).


\textsuperscript{85} Id.
damage to reputation is a necessary element of an actionable privacy invasion. This leaves Chinese judges with a large amount of discretion and leaves parties of privacy litigation with much uncertainty. In an authoritative article published by the Sup. People’s Ct. in 2008, the court clearly showed the problems inherent in the indirect approach to privacy protection. The article tried to interpret the 1993 Judicial Interpretation—"A Reply to Certain Issues Concerning Judging Defamation Cases"—so that it only regulates defamatory disclosure of privacy-related issues, without any intention to protect privacy as a sub-category right in the shadow of reputation.

The lack of an independent civil right of privacy changed in 2009 with the promulgation of the Chinese Tort Liability Law. Article 2 of this law recognizes privacy as an independent right and prescribes tort liability for privacy invasion. Article 15 stipulates possible liabilities and remedies for privacy invasion. Articles 20 and 22 grant monetary damages for property loss and compensation for mental distress. It is also noteworthy that Article 6 has shifted the burden of proof from plaintiffs to defendants, making it easier and less costly for plaintiffs to bring a privacy tort suit. However, the law does

86. Id. For other differences between the two torts under Chinese law, see, e.g., Zhu, supra note 76, at 212–13.
88. Id.
90. Tort Law of the People’s Republic of China, supra note 89, art. 2.
91. Id. art. 15.
92. Id. arts. 20, 22.
93. Id. art. 6.
not provide further details of the new right and its protection,\textsuperscript{94} and as such, courts can still interpret the rule in a way that reflects the strong influence of the old doctrine of protecting privacy under reputation.

\textit{C. Protections of Posthumous Reputation and Privacy by Tort}

The lack of statutory ground to protect posthumous reputation and privacy does not block Chinese courts from making their own decisions when the needs of the dead’s family have arisen. Since 1989, the Sup. People’s Ct. has issued seven judicial interpretations to resolve the legal problems brought up by lower courts.\textsuperscript{95} These judicial interpretations were made in the form of explanations, replies, opinions, and formal interpretations.\textsuperscript{96} The Sup. People’s Ct. also published three representative cases in its gazettes to set up authoritative references for lower courts.\textsuperscript{97} Following these guidelines, Chinese courts have gradually developed a judge-made law to protect the reputation and privacy of the dead. The following is an introduction to the legal interpretations and published cases that create the basic framework laws protecting posthumous reputation and privacy.

The case concerning the Hehua Girl in 1989 is a landmark case published by the Sup. People’s Ct.\textsuperscript{98} Hehua Girl is the stage name of Ji Wenzhen, a very famous artist in Tianjin who died in 1944 at age nineteen.\textsuperscript{99} A novel based on her life, which used the same stage name, was published as a series in a local newspaper.\textsuperscript{100} The novel contained many dubious depictions of her private life, and stated that she had been raped, that she died from a sexually transmitted disease, that she had three

\begin{itemize}
  \item \textsuperscript{94} See \textit{New Chinese Tort Liability Law Contains Provisions Affecting Personal Data}, \textsc{Hunton & Williams} (Jan. 2010), http://www.hunton.com/files/News/4bfa5361-4d8f-4c7e-af03-75055a82202c/Attachment/NewsAttachment/7d2612ba-40d6-4884-83de-c01965341d41/new_chinese_tort_liability_law.pdf.
  \item \textsuperscript{95} See Part II.C.
  \item \textsuperscript{96} See generally the discussion of the Court’s jurisdiction in \textsc{Liu, Opinions of the Supreme People’s Court}, supra note 49; \textsc{Randall Peerenboom, China’s Long March Toward Rule of Law} 304, 317, 326 (2002).
  \item \textsuperscript{97} See Part II.C.
  \item \textsuperscript{98} See \textit{Chen Xiuqin v. Wei Xilin}, supra note 29.
  \item \textsuperscript{99} Id.
  \item \textsuperscript{100} Id.
\end{itemize}
fiancées, and that she was once willing to be a mistress.\textsuperscript{101}
There were also defamatory graphic illustrations accompanying
the series.\textsuperscript{102} Chen Xiuqin, Ji Wenzhen’s mother, filed the case
in 1989 in the Tianjing Intermediate People’s Court, alleging
defamation and illegal appropriation of the likeness of her
daughter, as well as of invasion of her own reputation.\textsuperscript{103}

The trial court, after establishing relevant facts, referred the
case to the Tianjing High People’s Court for judicial guidance,
which in turn reported the case to the Sup. People’s Ct. for
further authoritative opinion; neither had been able to find law
to protect the reputation of the dead. In a reply to the Tianjin
High People’s Court in 1989, the Sup. People’s Ct. for the first
time openly recognized that “the posthumous reputation right”
of the Hehua Girl should be protected, that her mother had a
right to sue, and that there is civil liability involved to be further
decided.\textsuperscript{104} The defendants were ordered to make a public
apology and pay compensation for reputational loss, and the
publication of the book was banned in any form.\textsuperscript{105}

In 1990, the Sup. People’s Ct. re-affirmed this new protection
in a reply to the Sichuan High People’s Court regarding certain
procedural matters in a case of posthumous reputation.\textsuperscript{106} The
dead defamee was Hai Deng, a very famous Kung Fu master
from the Shaolin Temple. The Sup. People’s Ct. confirmed that
Hai Deng’s reputation should be protected, and Fan Yinglian,

\begin{footnotesize}
\begin{enumerate}
\item[101.]
\textit{Id.}
\item[102.]
\textit{Id.}
\item[103.]
\textit{Id.}
\item[104.]
\textit{Zuigao Renmin Fayuan Guanyu Siwang Ren De Mingyuquan Yingshou Baohu De Han (最高人民法院关于死亡人的名誉权应受法律保护的函) [Communication of the Sup. People’s Ct. Regarding the Protection of the Reputation of the Dead] (promulgated by the Sup. People’s Ct., Apr. 12, 1989, effective Apr. 1989) (China).}
\item[105.]
\textit{See \textit{Chen Xiuqin v. Wei Xilin, supra} note 29. This is the first time that a book was banned for non-political reasons and by means of law.}
\item[106.]
\end{enumerate}
\end{footnotesize}
the plaintiff and adopted son of Hai Deng, had a right to sue.\textsuperscript{107} Then in 1993, in another reply to the Sichuan High People’s Court regarding the same case, the Sup. People’s Ct. said that the defendant’s speeches and publications amounted not only to defamation of Hai Deng, but also defamed the plaintiff’s reputation to a lesser extent. At this time, the Sup. People’s Ct. used the term “reputation of the dead,” instead of “reputation right of the dead,” which had been used in the previous two legal interpretations, indicating that the Sup. People’s Ct. was aware of the unsuitability of the term “reputation rights of the dead.”\textsuperscript{108}

This semantic change remained throughout the rest of the legal interpretations of the Sup. People’s Ct. Paragraph 5 of the 1993 Sup. People’s Ct. Explanations of Several Issues in Judging Defamation Cases goes one step further and defines the scope of claims potential plaintiffs can bring for posthumous defamation litigation.\textsuperscript{109} The explanation employs the legal term “close relatives” as defined in the Chinese civil law, which includes spouses, parents, children, brothers and sisters, grandparents, and grandchildren of the dead.\textsuperscript{110} In addition, paragraph 9 in particular offers instructions on how to judge defamation cases involving literature.\textsuperscript{111} It creates liability for defamation and privacy invasion when works describe real people and their real life events, as well as works that target particular persons without using their exact names.\textsuperscript{112}

Then there came the Li Lin case in 1996.\textsuperscript{113} Li sued Xinshengjie Journal and an author called He Jianming for maligning her dead father Li Siguang, a leading geologist, by publication of a documentary novel (Jishi wenxue in Chinese)\textsuperscript{114} called

\begin{footnotes}
\textsuperscript{107} The Sup. People’s Ct. opined, “After the death of Hai Deng, his reputation right should be protected; as the adopted son of the dead, Fan Yinglian has a legal standing to sue.” \textit{Id.}
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} Reply Concerning Judging Defamation Cases, \textit{supra} note 60.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Li Lin Su Xinshengjie Zazishe he Hejianming (李林诉《新生界》杂志社 & Hejianming) [Li Lin v. Xinshengjie Journal & He Jianming], 1998 SUP. PEOPLE’S CT. GAZ. 1 (Beijing High People’s Ct. 1997) (China) [hereinafter \textit{Li Lin v. Xinshengjie Journal}.]
\textsuperscript{114} Documentary novels or docu-fictions in China are the type of literature in which authors will make up stories in historical contexts. While authors
Vanity Fair of a Scientist. The novel talked about Li’s political activities during China’s notorious Cultural Revolution and was seen as defamatory by the plaintiff. Upon appeal, the Beijing High People’s Court ruled that the dead should not be defamed and their close relatives had the right to sue. It declared that the novel had negative effects on people’s evaluation of Li Siguang and thus defamed him and caused mental distress to his daughter. The journal was held liable for defamation since it did not fulfill the duty to further check the controversial facts before publishing a work with respect to an important historical figure. Li Lin was awarded 10,000 RMB in compensation and 5,000 RMB in damages.

In 1998, the Sup. People's Ct. issued another legal interpretation regarding protection of the dead's interests in likeness. The decision was a reply to the Zhejiang High People’s Court concerning the appropriation of a dead person’s portrait and his likeness by a jewelry store. The court prescribed that a person’s interests in their name and likeness after death should be protected, and enabled close relatives of the dead to sue in the event of any tortious infringement of the dead’s likeness, or in the event that the likeness of the dead is used for profit. The claim they have full liberty to imagine and fabricate stories, the trouble with this category of literature is that readers cannot tell what aspects of the stories are true, and which are fictionalized. This type of literature is one of the major sources of defamation cases in China. For a discussion of the problem, see Josephs, supra note 28, at 207–09.

116. Id.
117. Id.
118. Id.
119. Id. The damages mentioned in this article are all in Chinese currency (RMB).
121. Id.
122. Id.
upper court also pointed out that the local court should accept the case and that mediation is preferred.\textsuperscript{123}

In 2001, the Sup. People’s Ct. issued a legal interpretation called Explanation of Several Issues Concerning Determination of Liability for Compensation of Emotional Damages in Civil Torts.\textsuperscript{124} Article 3 stipulates that Chinese courts should hear complaints brought by close relatives after a natural person’s death to claim mental damages consequent to any of the following tortious acts: (1) harm to the dead’s name, likeness, reputation, or honor by insulting, slandering, disparaging, vilifying, or other means of violating public interests, social morality, or otherwise; (2) illegally disclosing and appropriating the deceased’s privacy, or violating privacy by other means against public interests and public morality; and (3) illegally utilizing or damaging corpses and remains, or behaving in other ways against public interests and social morality.\textsuperscript{125} These articles thus grant the close relatives of the dead a right to sue when there is a violation of the dead’s privacy and reputation interests.\textsuperscript{126}

Shortly after this, there came the Peng Jiahui case.\textsuperscript{127} Ms. Peng accused Jingushi Journal for defamation of her brother, Peng Jiazhen, a hero of China’s Xinhai Revolution in 1912.\textsuperscript{128} Though her brother died in an assassination in 1912, the novel published by the Journal claimed that he escaped the killing, and then proceeded to denigrate the dead’s character with stories depicting him as a salacious devil, engaging in immoral relationships with various women.\textsuperscript{129} The trial court affirmed the defamation charge on behalf of the dead and his sister who was still alive, and awarded 50,000 RMB in mental damages.\textsuperscript{130} But while the appellate court awarded 50,000 RMB in damages (抚慰金, Fuweijin) to the plaintiff, it dismissed the accusation of the defamation of the plaintiff Ms. Peng herself.\textsuperscript{131} More im-

\begin{itemize}
\item[\textsuperscript{123}] Id.
\item[\textsuperscript{124}] Compensation Liability Interpretation, supra note 17.
\item[\textsuperscript{125}] Id.
\item[\textsuperscript{126}] Id.
\item[\textsuperscript{127}] Peng Jiahui v. China Story Journal, supra note 29.
\item[\textsuperscript{128}] Id.
\item[\textsuperscript{129}] Id.
\item[\textsuperscript{130}] Id.
\item[\textsuperscript{131}] Id.
\end{itemize}
importantly, when Peng died during the appeal, her children were allowed to continue the appeal and inherited the damages.\textsuperscript{132} This set a precedent for future cases where older plaintiffs died while awaiting judgment, yet heirs of the plaintiff were able to continue with litigation.

\textbf{D. Protection by Criminal Law}

As discussed above, defamation can be punished by criminal law as incitement by slander (Article 105), or as criminal defamation (Article 246).\textsuperscript{133} Like Chinese civil law, there is no particular statute with regard to defamation of the dead. In legal practice, there are only two cases reported under each category.\textsuperscript{134} They were both decided in 1989, and since then no such case has been published or reported.\textsuperscript{135} So on the whole, criminal defamation of the dead can be regarded as a law that exists largely on paper.

Tang Min was the first Chinese writer imprisoned for defamation since the legal reform.\textsuperscript{136} She was accused of libeling three private plaintiffs and their dead relatives by putting malicious fabrications and rumors in her documentary novel.\textsuperscript{137} She not only used the real names of the dead, but disclosed the dead’s relationships to the three plaintiffs, so that the latter were easily identified by people familiar with the local community.\textsuperscript{138} The plaintiffs requested that Tang be held liable for criminal defamation and claimed compensation for economic loss.\textsuperscript{139} The court found that the controversial texts had had great influences upon the plaintiffs’ lives and caused economic loss due to the litigation.\textsuperscript{140} Refusing to confess her crime in the court-directed pre-trial settlement, Tang was sentenced to one year’s jail and ordered to pay compensation.\textsuperscript{141}

\begin{thebibliography}{99}
\bibitem{132} Id.
\bibitem{133} Chinese Penal Code, \textit{supra} note 52.
\bibitem{134} Id.
\bibitem{135} At least to the author’s knowledge, with available literature and cases at hand.
\bibitem{136} \textit{See Tang Min’s Criminal Defamation Case, supra} note 29.
\bibitem{137} Id.
\bibitem{138} Id.
\bibitem{139} Id.
\bibitem{140} Id.
\bibitem{141} Id.
\end{thebibliography}
The other case was politically charged. It was adjudicated two months after the crackdown of the 1989 Student Protest at Tiananmen Square.\textsuperscript{142} Three young people threw eggs filled with ink at the great Mao's portrait at Tiananmen Gate in order to challenge the autocratic state.\textsuperscript{143} Mao's portrait was and still is a significant political symbol of the communist state, and thus was inviolable to most Chinese at the time of the incident.\textsuperscript{144} Accused of counter-revolutionary sabotage and incitement, the three were sentenced to life imprisonment, imprisonment for twenty years, and imprisonment for sixteen years, respectively.\textsuperscript{145} In China, defamation is not limited to libeling and slandering with words, but can also be done by defacing the likeness of others and humiliating their bodies, so that the dead are exposed to contempt and ridicule.\textsuperscript{146}

The fact that these are the only two posthumous criminal defamation cases from 1989 until the present indicates that criminal charges of defamation of the dead are very rare in China. The law is of more symbolic significance, as witnessed in the recent story of Mao Yushi, a micro-economist, who was confronted by unsuccessful accusations of criminal defamation


\textsuperscript{143} See generally DENISE CHONG, EGG ON MAO: THE STORY OF AN ORDINARY MAN WHO DEFACED AN ICON AND UNMASKED A DICTATORSHIP (2009).

\textsuperscript{144} Id.

\textsuperscript{145} Id.

of Mao Zedong by many of Mao’s supporters. 147 In general, protection of posthumous reputation through criminal law is not a significant threat to Chinese authors, although defamation of the living can be severely punished. 148

E. Other Protections

Reputation of the living is protected under the rights to personality and dignity in China. 149 The reputation of the dead is also protected by their interests in personality and dignity. 150 However, there are other categories of posthumous interests that are important to the dead’s personality and dignity, and their violation can lead to defamation charges in China.

The first category is copyrights. For many artists, as Madoff expressed, their creations and works are part of their identity and there are reputational interests in their creations. 151 In countries such as Japan, Mexico, Canada, Nigeria, and France, their laws recognize not only copyright, but also special moral rights of authors, including the right of paternity, and the right of integrity of artistic works. 152 Chinese law takes a similar approach and includes the moral rights in copyright protection. Article 10 of the Chinese Copyrights Law grants an author the rights to publication, authorship, revision, integrity, reproduction, alternation, distribution, lease, exhibition, and projection,


148. If defamation is serious, according to Article 246 of the Chinese Penal Code, violators can be “sentenced to three years or fewer in prison, put under criminal detention or surveillance, or deprived of their political rights.” Chinese Penal Code, supra note 52.

149. Compensation Liability Interpretation, supra note 17, art. 1. For a discussion of the issue, see Liu Daoyun, supra note 19.


151. See MADOFF, supra note 40, at 148.

152. Id. at 149–50.
amongst others. Article 20 prescribes that the protection term of the rights of authorship, alternation, and integrity of an author shall be unlimited. Article 21 provides protection of publication rights for an author for his whole life, plus fifty years after death.

The second type of interest important to person’s personality and dignity is the publicity interest that originates from privacy and protects the economic interest in an individual’s name and likeness. This category of posthumous interest is well protected by the present Chinese law. Clauses 1 and 2 of Article 3 of the Sup. People’s Ct. Explanation of Several Issues Concerning Determination of Tort Liability of Mental Damages (2001) grant close relatives of the dead the right to seek remedy (1) for mental distress resulting from harm to the dead’s names, likeness, honor, and reputation; and (2) for illegal disclosure and use of privacy of the dead, and other forms of invasion of privacy that are against public interests and social morality. In another Sup. People’s Ct. interpretation regarding the use of the deceased’s likeness for commercial purposes, the Sup. People’s Ct. asked the adjudicating courts to take a lawsuit filed on the ground of unauthorized use of a dead writer’s likeness for commercial purposes. The Sup. People’s Ct. dictated that likeness of the dead should be protected, and that close relatives of the dead have a right to sue the tortfeasor for appropriation of the dead’s likeness for commercial purpose, defacement, and smear. There are also cases regarding the un-consented commercial use of the dead’s name, which is also taken by many plaintiffs as an offense of posthumous reputation. For example, the son of Lu Xun, China’s most famous classic writer, lodged a case against the unauthorized use of his father’s name. In

154. Id. (emphasis added).
155. Id.
156. Compensation Liability Interpretation, supra note 17.
157. Reply Concerning Jurisdiction, supra note 120.
158. Id.
159. Zhou Haiying Yu Luxun Waiyu Xuexiao Qinhmingquan An (周海婴与鲁迅外国语学校侵害鲁迅姓名权一案) [Zhou Haiying v. Luxun Foreign
another case, the plaintiff accused the defendant author of defamation and insult for improper use of his dead father’s name.\textsuperscript{160}

In China’s social-cultural context, many posthumous interests are seen as relevant to the dead’s reputation and, by extension, relevant to the reputation of their surviving family and close relatives. As observed in practice, the indecent treatment of dead bodies, the dead’s personal clothes, coffins, and graveyards is deemed to be relevant to a person’s posthumous reputation.\textsuperscript{161} Chinese will treat violations of such “posthumous belongings” as a violation of the dead’s dignity and personality. For instance, the abovementioned 2001 Sup. People’s Ct. Interpretation allows close relatives of the dead to sue for emotional damages when anyone illegally makes use of or ruins the dead’s remains or bones, or does such things in forms that are against public interest and social morality.\textsuperscript{162}

In 1993, at a Chinese family funeral and farewell ceremony, which was attended by hundreds of family members, relatives, friends, colleagues, and acquaintances of the family, the mourning daughter suddenly found that the person lying in the coffin was not her dead father, but someone else.\textsuperscript{163} Her father’s body had been mistakenly cremated many days earlier and the Funeral Home tried to hide the mistake by putting another corpse in the coffin.\textsuperscript{164} Feeling deeply humiliated by the mistreatment in front of so many people, the daughter went to court seeking damages and an apology.\textsuperscript{165}


\textsuperscript{161} Please see discussion in the following two cases, as well as the findings of Xiao Zesheng (肖泽晟), Mudi Shang De Xianfa Quanli (墓地上的宪法权利), \textit{FAXUE} (法学) 70 (2011).

\textsuperscript{162} Compensation Liability Interpretation, supra note 17.

\textsuperscript{163} \textit{Li Zhaoping v. Anyang Funeral Home, supra} note 146.

\textsuperscript{164} \textit{Id.}

\textsuperscript{165} \textit{Id.}
A 2008 case involved the destruction of the tombstone and graveyard of a plaintiff’s mother. 166 In most rural Chinese communities, the integrity of graveyards and tombstones is important to the dignity of the dead, and the defendants’ activities are seen as causing deep humiliation—and therefore defamation—to the dead and her family. If the family was not afforded a proper defense, the family would be looked down upon and degraded in social standing in the small community. The plaintiffs were awarded an apology and damages for economic loss that resulted from the defamation, although the claim for emotional damages was denied. 167

These are not defamation cases strictly speaking from the Western point of view. But in the Chinese community, damages to the dead’s remains, belongings, and other intangible properties have been deemed a form of defamation not only of the dead, but also of their family. 168 In reality, the living family’s passive response to this sort of defamation may further lead to degradation of their social standing and subject the whole family to ridicule and contempt, such that failing to take action against such defamation may be more harmful than the defamation itself.

II. AN ANALYSIS OF THE SELECTED CASES

Thirty-seven cases have been collected for analysis below. They are the most representative cases of posthumous defamation and privacy law, and have attracted much attention from Chinese media and lawyers. Posthumous defamation and privacy invasion cases are only a small part of all defamation cases

166. *Xiao Xinan v. Yan Yuewen*, supra note 146.

167. For a better illustration of reactions towards destruction of tombstones, see how the Chinese local government in Henan province has provoked anger and wrath among rural residents when the tombs of their dead family members were forced to be razed to the ground. Adam Minter, *Hungry China Turns to Grave Robbery*, BLOOMBERG (Nov. 28, 2012), http://www.bloomberg.com/news/2012-11-28/hungry-china-turns-to-grave-robbery.html.

168. Article 65 of the Law of the People’s Republic of China on Public Security Administration Punishments prescribes that anyone intentionally destroying or damaging the grave of another person, or damaging or discarding the remains or ashes of another person, shall be fined or detained according to the seriousness of the damages. Public Security Administration Punishments Law, supra note 62.
and privacy cases of the past two decades, as can be observed in past studies. In the 223 defamation cases collected by Liebman from 1995 to 2004, there are only nine cases concerning posthumous defamation. In a separate study, Chen and Ang have collected about 145 defamation cases from the court dockets in Chengdu City from 1987 to 2005, and there are only six cases relevant to defamation of the dead.

Most of the collected cases clutter together in peaks. The first such group is between 1999 and 2002, with three, three, four, and five cases in each year, respectively. The other peak is between 2007 and 2010, with two, three, two, and two cases, respectively. Outside of these groupings, 1989 had four cases, and 1997 had five cases. There was only one case reported in years 1993, 2003, 2004, and 2006. As mentioned above, there are only two posthumous criminal defamation cases reported in the past two decades.

Among the collected cases, seventeen are from Beijing and five from Zhejiang Province. The rest are from eleven different provinces, in which Sichuan, Hubei, Hunan, and Jilin each have two cases. Beijing has high frequencies of cases at least because it is the residence of many big publishers and close family members of dead celebrities.

In the following sections, this Article will first discuss the uneasiness of Chinese law in establishing the protection of posthumous reputation and privacy, evidenced by the law’s constant back-and-forth swaying among three different approaches. Next, it will explain why posthumous privacy is protected under the rubric of posthumous reputation. Third, the Article will present the collected cases from the perspectives of defamees and plaintiffs, plaintiff’s motivations and goals in litigation, defendants and their defenses, and court approaches and verdicts. After this, it will analyze the social-political backgrounds against which all of these cases arise, which is characterized by a considerable social transition. Last, it will test if there is censorship of history involved in many history-related cases before some brief concluding remarks.

169. See Liebman, supra note 50, at 79.
170. See Chen & Ang, supra note 50.
171. This figure was determined by considering cases in first-instance only, and not those on appeal.
172. See infra Part II.D.
A. Whose Protection?

While trying to protect the dead’s reputation, Chinese law has been zigzagging over three different approaches; namely, (1) direct protection of the dead, (2) protection of the interests of the living, and (3) a combination of the two. We can observe this from the Sup. People’s Ct.’s interpretations and its three published cases, as well as other posthumous defamation cases.

The first two legal interpretations of the Sup. People’s Ct., from 1989 and 1990, each took a direct approach, granting legal protection of the dead’s “rights to reputation.” But the appellate court of the 1989 Hehua Girl case did not follow the guidance strictly. The court opined in mediation that defamation of the dead could do harm to the living family relatives and that the author violated the reputation rights both of the dead and the living, thus actually taking the third approach. Then in the 1993 Sup. People’s Ct. Interpretation with regard to the Fan Yinglian case, the Sup. People’s Ct. did not use the term “the dead’s right to reputation,” but instead mentioned the “reputation of the dead.” In doing so, it recognized that posthumous defamation was protection afforded not only to the dead, but also to the adopted son. As such, the court took this third approach in holding the author liable for defamation in relation to the adopted son.

173. From the report of Tianjing High People’s Court, sent to the Sup. People’s Ct. on this case, we can infer how such protection was justified at that moment by legal analogy. First, the court reasoned that the dead only lose their civil capacity, and that the rights (interests) they acquired before death should be protected. The court argued that for those wronged and killed in past political events, the official restitution and vindication of their reputation was a form of protection of their reputation. The court argued that another similar situation was that criminals sentenced to the death penalty could be deprived of political rights after death by criminal law. Last, the court said that this situation was very similar to the authorship right that is inviolable and inheritable in Chinese law. See Communication of the Sup. People’s Ct. Regarding the Protection of the Reputation of the Dead, supra note 104.

This approach was not followed in a case published by the Sup. People’s Ct.’s Gazette regarding a defamation of the dead claim involving the leading archaeologist, Li Siguang. In this case, both the trial court and the appellate court affirmed the defamatory liability of the defendant, but did not mention defamation of the living daughter. Instead, they grounded her remedy on the fact that the plaintiff suffered mental distress from defamation of her dead father, reflecting the court’s decision to implement the second approach. After this case, other Chinese courts all followed a similar approach, granting damages based on emotional distress to plaintiffs, while avoiding mentioning the cognate defamation of the living. In the 2001 Sup. People’s Ct. Interpretation regarding remedy for mental distress in torts, Article 3 directly awards the dead’s surviving close relatives a right to seek remedy for emotional damages, thus affirming the favorability of the second approach.

The court partially deviated from this doctrine in the 2002 Peng Jiahui case, published by the Sup. People’s Ct. The appellate court ruled that the plaintiff’s suit protected the dead’s reputation, but not the reputation of the plaintiff, which, to the court, had not been under threat. In doing so, the court overruled the judgment of the trial court, which found that defamation of the dead constitutes tortious infringement to the surviving close relatives. While it is not clear what the court meant by “tortious infringement of the close relatives,” the appellate court still affirmed the emotional damages granted to the dead plaintiff by the trial court; although it denied the accompanying result of the defamation of the living close relatives. Given this uncertainty, the appellate court has created a rather dubious decision that may reflect the court’s uneasiness in taking sides. However, if we take into account the award of the emotional damages, it is still fair to say that the court took the third approach to protect the interests of both the dead and the living.

Later, in 2008, the Sup. People’s Ct. expressed its strong willingness to adopt the second approach of providing protection.

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176. *Id.*
178. *Id.*
179. *Id.*
to the interests of the family in an important, authoritative article published by a judge from the Sup. People’s Ct. The article explained the legal policies in judging defamation cases. The article summarized the past legal practices in reputation protection since the 1993 Sup. People’s Ct. Interpretation, and provided guidance for further application of defamation law. First, the reputation of the dead is well recognized in Chinese society, protected by Chinese law, and such protection of reputation persists for a certain period of time after death. Second, the purpose of the legal protection is in essence to protect the interests of the close living relatives of the dead, acknowledging the fact that defamation of the dead can have significant effects on the reputation and interests of those still living. Finally, because the close relatives of the dead have the legal standing to sue, the protection of posthumous reputation has a determined term. This Article has thus laid out the favorability of the second approach to the Sup. People’s Ct.

B. Big Reputation and Small Privacy

A prominent characteristic of the collected posthumous cases is the close affiliation of privacy to reputation, as already observed in the previous discussion. Historically, privacy has been protected under the umbrella of reputation rights in Chinese law. However, it was not until 2009 that privacy became an independent right protected by Chinese law. Despite the fact that privacy is now an independent right, it is the reality in China that reputation is an important concept that is pervasive in Chinese culture, while privacy, as it is conceived of in the West, is relatively new.

180. Interpretation of Sup. People’s Ct.’s Reply, supra note 87.
181. Id.
182. Id.
183. Id.
184. See supra Part II.B.
185. The situation has been changed by the promulgation of the new Chinese Tort liability law, as discussed in Part II.B. Tort Law of the People’s Republic of China, supra note 89. Before 2009, many Chinese scholars argued for privacy to be an independent right for better protection. See HAO WANG, supra note 19, at 145–64.
The social significance of reputation in China is tied to the concept of “face” (Mingyu or Mianzi). While there is no exact corresponding term in English, it is similar in meaning to dignity, self-esteem, prestige, fame, and honor. This concept of “face” plays out in Chinese society as the importance placed on the goal of social advancement and prosperity in social networks. If we adopt the terminology used by Robert Post, reputation is understood as honor, perceived through the lens of social standing, as well as the respect commanded in a hierarchical society. As indicated by Ho, one can lose or gain face as a result of the behavior of someone else, and this logic applies equally to both the living and the dead. Any activities that may degrade the dead can be seen by society as direct or indirect defamation in a broad sense, and as has been repeatedly established, defamation does not only affect individuals, but the collective to which the defamed is affiliated. In China, an individual’s face and the reputation of his family are inextricably linked. This explains why in many cases humiliation, insult and degradation of the dead result directly in defamation of the surviving family. In the collected cases, acts that bring about

186. For a detailed discussion of the Chinese concept of face, see Hu, supra note 79, at 45–64. Regarding the two aspects of the Chinese concept of face, the author thinks that Lien is a more personal trait resembling dignity and self-esteem, while Mianzi is more related to one’s social evaluation and interaction with others and thus much closer to the concept of reputation in Western law. See also Ho’s article proposing another account of “face” and relevant critics of Hu’s distinction. Ho, supra note 79, at 867–68.
190. See Ho, supra note 79, at 880.
191. As illustrated above, defamation of the dead, destruction of the dead’s graves, and abuse of the dead’s likeness all lead to defamation and disrespect to the dead and their family in China. See infra Part II.B.
192. Ho, supra note 79, at 880.
this shame in the living include the destruction of a grave, improper treatment of dead bodies, abuse and illegal appropriation of likeness, etc., in addition to ordinary libel and slander.

While privacy is an important part of reputation in China, the concept of privacy, as perceived by the West—namely the right to be let alone, freedom from government intervention, personal information control, intimacy, personhood, autonomy, etc.—are new to the Chinese. For Chinese people, privacy denotes mostly secret, negative, and embarrassing information that creates a social imperative in an individual to hide, lest shame be brought upon the individual. Disclosure of an individual’s personal secrets is seen as weakening one’s public image and reputation. Of the four concepts of privacy defined by Prosser, only disclosure of private affairs is familiar in China, while the

194. Xiao Xinan v. Yan Yuewen, supra note 146.
195. Li Zhaoping v. Anyang Funeral Home, supra note 146.
197. See Zhu, supra note 76, at 208; HAO WANG, supra note 19, at v.
198. This is reflected in Posner’s approach to take privacy as personal secrecy that is hidden from others for personal good. Richard A. Posner, The Right of Privacy, 12 GA. L. REV. 393 (1977); Posner, supra note 78.
other three, let alone the concept of constitutional privacy, are completely foreign concepts.

In this regard, sexuality-related issues are always the central concern of the Chinese. Even speaking about sex in public is a shameful thing in Chinese culture. While the situation is changing in recent years, sexuality is still taboo, and activities like extra-marital sex, homosexual orientation, sodomy, and prostitution are all behaviors that go against prevailing public morals and therefore bring about shame and bad reputation. Given this sensitivity to sexuality, an effective way to disparage individuals in China is to expose their sex-related secrets. In fifteen of the collected cases, plaintiffs claimed that the defamation of their dead relatives through publication of their private sexual affairs was not true. When sexually graphic depictions are involved, such publications become all the more humiliating and insulting to the dead and their surviving family.

To summarize, the indifference of the Chinese towards the modern legal concept of privacy, together with the overarching concept of reputation, can account for China’s weak privacy law practice in the past decades. When privacy is deemed a reputation-related issue, and when there is no compelling demand to

199. In China, sex and related issues are not public subjects and are considered a shameful thing for most Chinese according to tradition. One aspect of privacy is the “shameful secret,” defined as a hidden bad thing, usually relating to “sexual affairs.” Zhu, supra note 76, at 208–09.

200. Id.

protect privacy interests other than secrecy, the Chinese law stays silent on the issue.

Furthermore, as explained above, an individual’s reputation is not limited to his or her own self. Just as the reputation of an individual’s family reflects on them, so too do their actions reflect on their family. As such Chinese reputation is more affiliated with the collective: family, affiliated institutions and associations, and communities which once belonged to the dead. As the Sup. People’s Ct. put it, “Under China’s present social circumstances, an individual’s family backgrounds, social origins and social relations have certain effects on one’s work, personal life and social life; Defamation of the dead always directly influences the reputation of close relatives and their other interests.”202 For instance, in a case involving the defamation of military hero, Dong Cunrui, who died in China’s Civil War in 1949,203 Dong’s former comrades in arms and a representative from the military force in which he served, joined the plaintiff as third parties because they had substantive interests in the trial.204 Because of Dong’s fame, defamation aimed at him undoubtedly harmed those parties and institutions most closely associated with him. In a sense, their honor and privilege in the community tracks the honor and privilege accorded to Dong, and as such they are given a right to protect their interest in him.

Because of Chinese society’s hierarchical nature, reputation as honor, which works as a proxy for social status, is still central to Chinese society.205 This is because individuals receive substan-
tive economic interests and other social benefits through collective institutions, on the condition that they become a part of the “systems or institutions” (体制 Tizhi) that pervade all aspects of Chinese culture, and include families, government bureaus, companies, or the like.206 Because a person’s place in Chinese society is based on their interaction with collective groups, and interaction with these collective groups is based on reputation, individuals must be able to defend their reputations. This is in contrast to western societies, especially American society, where individualism is prized and one is less likely to inherit their reputation from the dead.207

C. Defamees and Plaintiffs

In the collected defamation cases, which are representative of wider trends in Chinese defamation law, most defamees are dead public figures and celebrities. Such celebrities include a scientist,208 a professor,209 military heroes or martyrs,210 mili-

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206. An important instantiation of such institutions is the highly criticized “Hukou” institution, which divides the rural and urban residents into two social groups, providing them with very different social welfare, as well as legal and political status. See generally Kam Wing Chan & Will Buckingham, Is China Abolishing the Hukou System?, 195 CHINA Q. 82 (2008); Tiejun Cheng & Mark Selden, The Origins and Social Consequences of China’s Hukou System, 139 CHINA Q. 644 (1994).

207. See Post, supra note 190, at 736.


tary generals, leading musicians and artists, political leaders, Kung Fu Masters, famous writers, film directors, etc., who died between the 1920s and 2009. The most famous politician of the dead defamees is the former Chinese Vice Prime Minister Chen Yonggui, who entered the Chinese political stage during the Cultural Revolution with support from Mao. In a recent biography by Wu Si, a famous historian,
Chen was depicted as “a good peasant of Mao.”218 The author disclosed many unknown stories of Chen from the Sino-Japanese War and Cultural Revolution that consequently had a negative impact on his national reputation.219 The book was serialized in the famous Beijing Youth Newspaper, which commands a large audience in the country. The author was accused of defamation by Chen’s son and wife in Beijing, and the appellate court ordered 20,000 RMBs in damages and a public apology.220

Like Chen’s case, an interesting category of defamee is the dead public figure that is closely affiliated to official Chinese history.221 In such a context, stories that effect personal reputation will be treated as defamatory if they put forward a challenge to the related official history.222 Usually, Chinese courts will refer to official history in a posthumous defamation case and adopt decisions accordingly.223 However, Chinese courts are more relaxed when cases are not politically-charged and therefore will have less impact on sensitive history.224 For example, in contrast to cases that might affect the official version of history, in the above-mentioned Hehua Girl case, the adjudicating Court was rather neutral and delivered very persuasive argumentation to justify the protection of posthumous reputation.225

In the collected cases, following Chinese law, plaintiffs are all close family members of the dead that decide to stand up to the defamation of their beloved and attempt to defend the honor of their family. However, sometimes a plaintiff’s relationship to the dead is called into question by the defendants, and not all plaintiffs are recognized by court as qualified to sue. As such, plaintiffs have to provide solid evidence to prove that they are qualified litigants. For example, Huo Zhizeng’s litigation right was questioned by the ten defendants—including the international film star Jet Li and Jet Li’s film director, film producer, distributer, etc.—when he went to court to defend the posthu-

218. Id.
219. Id.
220. Id.
221. See infra Part IV.
222. Id.
223. Id.
224. Id.
225. See Chen Xiuqin v. Wei Xilin, supra note 29.
mous reputation of his grandfather, Huo Yuanjia, one of China’s most famous Kung Fu masters.226 The trial court in Beijing accepted this case and made it clear that, (a) when a household registration record (Hukou Dengji in Chinese) is not available, a family genealogy book is valid proof, since any change must be approved by the whole family; (b) the plaintiff’s reservation in the family graveyard can be considered a valid evidence of kinship; and (c) the testimony of witnesses from the hometown of the dead Kung Fu master are acceptable to the court.227 In so ruling, the court recognized the validity of Chinese conventions and customs on the matter of kinship relation.

However, despite this ruling, family genealogy is not always accepted by Chinese courts. In another case, Yang Kewu protested against the distorted image in a TV drama series of his adoptive father, Yang Zirong, a dead military hero and martyr.228 Both the trial court and the appellate court rejected his litigation right on the ground that the law does not recognize him as the dead’s adopted son, given that the hero died before the plaintiff’s birth and had not expressed the intention for his adoption. Though the dead’s wife may have done so, there was never an agreement on the issue between the couple. In so ruling, the court even ignored a suspicious change in the genealogy book provided by the plaintiff.229

Among other things, the economic and physical conditions of plaintiffs are significant matters to be considered. Usually, when potential plaintiffs are poor, they will not opt for legal action and thus no case will be reported. A good example is what happened to Sun Guoxuan, an elderly man whose legal battle was only possible when local lawyers offered him free legal ser-

226. Huo Shoujin v. China Film Group, supra note 201.
227. Id.
228. Yang Kewu v. Center Theater, supra note 29.
229. Though there was no consensus between Yang and his wife on the adoption issue, and no expression of intention by the hero himself, the adoption should have been accepted had the courts taken the Chinese tradition into consideration. In China, the worst situation for a family is to have no male descendant. This can be made up for by adoption of children of the same surname from close family members. Though Yang’s wife had never seen Yang after his departure, she was his official wife and should have the right to make the adoption. This is a well-recognized practice, even nowadays in most Chinese rural areas. Id.
vice.\textsuperscript{230} His original claim was struck down by the court of first instance, although he eventually was vindicated on some of his claims after appeal.\textsuperscript{231} Like Sun, many plaintiffs are very old—especially when they are the brothers or sisters of the deceased.

In the cases where a plaintiff dies during a trial, however, the case may still continue on the condition that his or her heir(s) will not waive the right of litigation.\textsuperscript{232} Such was the case when Peng Jiahui died during her appeal regarding the defamation of her dead brother, and the case was reopened after her five children agreed to step in, ultimately winning and inheriting the damages awarded to their dead mother.\textsuperscript{233}

A final observation worth noting is that Chinese law allows third parties to join the plaintiffs, on the condition that they have substantial interests involved, or the outcome may have significant influences on their interests.\textsuperscript{234} As mentioned above, in the case regarding the defamation of a Chinese military hero and martyr that died in the Chinese Domestic War in 1949, two third parties, namely the dead’s previous comrades in arms and the military force which they once served, joined the plaintiff to defend the dead’s reputation.\textsuperscript{235}

\section*{D. Motivations and Goals}

Defamation of the dead and invasion of their privacy in the collected cases has brought close family members together before courts to defend their interests and rights in general. Yet, a more detailed discussion of the motivations and goals behind

\begin{itemize}
\item \textsuperscript{231} \textit{Id.}
\item \textsuperscript{232} Chinese law allows the continuation of the legal proceedings in which the plaintiff died and his lawful heirs explicitly want to continue the case.
\item \textsuperscript{233} \textit{Peng Jiahui v. China Story Journal, supra} note 29. One may doubt the verdict because if the dead mother can suffer mental distress from defamation of her brother and be awarded damages, it is not clear how her children can suffer. Because Ms. Peng died during appeal, her children should not have been awarded damages.
\item \textsuperscript{234} \textit{See} Civil Procedure Law of the People’s Republic of China (2007 Amendment), \textit{supra} note 68, art. 56.
\item \textsuperscript{235} \textit{Dong Cunmei v. Guo Wei, supra} note 203.
\end{itemize}
these lawsuits is needed to enhance our understanding of the general situation in China, as well as what sorts of particular issues present the greatest threat to the surviving families.

The primary offense that agitated many plaintiffs was the fabrication and publication of the dead’s private life, in particular sensational matters related to sexuality or extra-marital affairs. For most family members and children in China, publicity of sexual activity and sensational private matters are embarrassing and libelous per se, harming not only the deceased’s reputation, but also their family’s honor. The chief culprits include novelists, autobiography writers, or film directors who sought to attract larger audiences by intentionally adding fictional, romantic stories and sensational sexual episodes to satiate the public’s curiosity and taste. This kind of fabrication is directly defamatory to surviving family members. Of the thirty-seven collected cases, fifteen were brought to court for this particular reason.

A telling example is the detailed description, in a book, of a national heroine’s physical conditions—in particular her wounded sexual organs—after brutal electrical torture by the Japanese special forces during the Sino-Japanese War. The author said that his intention was to demonstrate her bravery, sacrifice, and determination not to betray others while facing the severest torture, but the plaintiff argued that the graphic nature of the description was not necessary for the story. Instead, the details were offensive and insulting, and violated the dignity of the dead. Moreover, the plaintiff’s consultation with many experts found no evidence to suggest that the author’s claims for the depictions were factually supported.

A second significant category of posthumous defamation pertains to the dead’s official reputation ante-mortem, such as in cases where the dead is part of official history, as discussed

236. See supra Part II.B, ¶ 4.
237. See cases cited supra note 201.
238. Chen Hong v. Shi Gengli, supra note 29.
239. Id.
240. Id.
above in the case concerning China’s previous Vice Premier Minister Cheng Yonggui. The publication of false facts, or facts harmful to the dead’s official good reputation, will injure the dead’s family and warrant litigation. In a sense, protection of the dead’s reputation is equal to the protection of the official history. This will be discussed at greater length in the following section.

There are two forms of defamation in this category. First, in some cases, new narratives can be completely contrary to the official reputation or identity, and, therefore, the involved families have a very strong claim. For example, there is a case concerning the famous Shaolin Temple Kung Fu master Hai Deng, who had acquired a high political status and was praised by the state authority upon his death. In the case, an author published several articles in different magazines claiming that the dead’s special Kung Fu techniques were a form of cheating. Given that Hai Deng’s reputation is founded on his skill at Kung Fu, this was a devastating attack on the dead. Such claims were unacceptable to the plaintiff, the adopted son of the dead, who as a Kung Fu master himself, stood to lose much in the way of reputational capital. The appellate court’s opinion was vague on whether or not the Kung Fu Master’s martial skill was real or not, but instead grounded the judgment of alleged issues on official documents and the dead’s personal achievements to rebut the author’s publication.

Another example of this first form is the defamation case regarding Peng Jiazheng. Peng’s real name and historical background was used in a novel, but was attached to a totally fictional, defamatory narrative. Peng was viewed by the state authority as a hero who dedicated his life to the Xinhai Revolution, and a positive influence. The novel failed to reflect this in any sense, and instead violated the dead’s personality and dignity according to both the trial and appellate courts.

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244. Id.
245. Id.
246. Id.
248. Id.
249. Id.
The second form of defamation of political or quasi-political figures is when defamation concerns trivial issues of the dead, and will not change the dead’s good reputation on the whole. Still, even trivial issues can humiliate or insult the surviving family. For instance, when a film told the story of a dead military hero with his real name, he was portrayed as an orphan without a sister and brother, and was labeled with the wrong birthplace. This agitated the local community where the hero was born and grew up, whose residents were proud of the dead and enjoyed the benefits of his fame. For this reason, the dead’s brother and sister sued for defamation of the dead and claimed damages for mental distress.

In cases like the above, even if the involved family is not motivated to bring a case, the local community or other institutions may encourage or push the family to sue, highlighting the collective nature of reputation in China. This puts families in the awkward position of bringing a claim they do not wish to bring, or cannot afford to bring, in order to maintain their status in the community. To defend the reputation of the dead, and thus the reputation of the family, is a strong motivating factor behind much posthumous defamation litigation.

A third category of defamation of the dead claims is comprised of cases of illegal appropriation of the dead’s likeness for advertisement or other similar purposes, which are seen as disrespectful to the dead and their family. As an example, a dead father’s body was accidentally cremated and his casket was filled with someone else’s body at the family’s funeral. This was seen as a serious humiliation (and thus defamation) of both the dead and his family, causing them to lose face before funeral attendants.

In another case where a dead mother’s portraits were put on tombstones for commercial advertisements, the plaintiffs sued the advertiser for appropriation of the dead’s likeness and

251. Id.
252. The two plaintiffs eventually withdrew the case for various reasons. Id.
253. Hu wrote in 1944 that “[p]ublic disgrace or ridicule of a serious nature is bound to have an effect on the reputation of the family.” However, the situation largely remains the same, even today. Hu, supra note 79, at 50.
254. Li Zhaoping v. Anyang Funeral Home, supra note 146.
255. Id.
sought emotional damages.\textsuperscript{256} According to the plaintiffs, their father died from insult and anger as a result of seeing the advertisements and hearing rumors circulating in the local community.\textsuperscript{257} Placing his wife’s portraits on the tombstone advertisement was seriously offensive to the family, and made the family the laughingstock of the local community.\textsuperscript{258} While the act was offensive, taking legal action was necessary to avoid the risk of being perceived as cowardly had the family not sought reparations, a risk that is especially real in rural areas.

A fourth category is comprised of the significant humiliation of the dead and their family caused by the destruction of the tombs and graves of the dead. This kind of offense is also taken especially seriously in rural areas, due to the sanctity of such places under Chinese tradition.\textsuperscript{259} It is offensive not only as an analog to the intrusion of the homes of the living, but also as an insult to the dead’s family, who are perceived as unable to protect the resting place of their kin.\textsuperscript{260}

Fifth, we have to pay attention to the economic interests involved in posthumous defamation and privacy torts. In addition to appropriation of the dead’s likeness and names, protection of the copyrights of the dead in books and artistic works is an important cause of action in defamation-related cases in China. For instance, beginning in the late 1990s Zhou Haiying—son of Luxun, who was defined by the state authority as the leading writer of China’s New Culture Movement—initiated a series of cases to protect his father’s publicity rights and copyrights.\textsuperscript{261}

As the above cases indicate, the principal goal of plaintiffs is to protect the reputation of the dead and the family’s reputational interests (social standing and status, face, or other economic interest). Many of the dead defamees are public figures with

\textsuperscript{256} Chen Mou v. Wangmou, supra note 146. In another similar case, the portrait of the plaintiff's mother appeared on a hospital advertisement advertised on shuttles on Beijing streets. Wang Xiuzhen v. Beijing Songtang Hospital, supra note 196.
\textsuperscript{257} Id.
\textsuperscript{258} Id.
\textsuperscript{259} Xiao Xinan v. Yan Yuewen, supra note 146.
\textsuperscript{260} See Xiao Zesheng, supra note 161.
local or national reputations that bring honor and prestige to their families. Plaintiffs believe it is wrong for defendants to profit through defaming the dead, and accordingly seek justice from the law. Because of how Chinese react to these breaches of their honor, nearly all seek an apology from defendants—public or private, court-approved or not—and restoration of posthumous reputation. Their claims also typically include cessation of tortious activities, such as further publication and dissemination, and further newspaper coverage.\footnote{262}

Furthermore, most plaintiffs seek money damages, either for mental distress or substantive damages incurred. Under different circumstances, the claims range from a low of about 400 RMB (about 60 USD) in 1989,\footnote{263} to a high of 1,000,000 RMB (about 154,000 USD) in 1997 and 1999.\footnote{264} As the income of Chinese people has largely increased in the past two decades, so too has the amount of damages for defamation and privacy invasion claims. In a sense, people have become more aware of the economic value of reputation and their emotional damages than they have been previously.\footnote{265} However, not all plaintiffs seek monetary damages. In these cases, plaintiffs openly declared that they only sought to defend the reputation of the dead and their family honor, and as such only needed an apology.\footnote{266}

Besides these private goals, a plaintiff in a 2010 case even proclaimed their motivation was to protect the dignity and identity of the Chinese nation and people via law.\footnote{267} This makes sense in the context of the dead, who as national heroes or

\footnote{262. These are observed in most of the collected posthumous reputation and privacy cases, which echoes Liebman’s findings. Liebman, \textit{supra} note 50, at 83–93.}
\footnote{263. \textit{See Chen Xiuqin v. Wei Xilin}, \textit{supra} note 29.}
\footnote{264. \textit{Li Lin v. Xinshengjie Journal}, \textit{supra} note 113; \textit{Du Hui v. Jinlin Daily News}, \textit{supra} note 196.}
\footnote{265. For example, ordinary plaintiffs in Chinese defamation cases, although they do not receive large awards, still bring cases just for being famous. Businesses also bring cases to enlarge their commercial reputation by media coverage and free advertising. \textit{See, e.g.}, Liebman, \textit{supra} note 50, at 87.}
\footnote{266. \textit{Chen Hong v. Shi Gengli}, \textit{supra} note 29; \textit{Feng Jining v. Xi’an Film Enterprise}, \textit{supra} note 211.}
\footnote{267. The plaintiff’s goals of the lawsuit were “to protect his grandma’s rights, and more than that, to defend the national image and dignity.” \textit{Chen Hong v. Beijing Film}, \textit{supra} note 29. For the story, see \textit{GUANJIE (关捷)}, Zhaoyiman Sunnu: Wo Hanwei De Shi Guojia Xingxiang (赵一曼孙女：我捍卫的是国家形象), HUANQIU SHIYE (环球视野) (Apr. 24, 2010).}
martyrs are recognized as an indispensable part of national identity. Defamation of the dead at its most extreme can therefore lead to the destruction of the national identity. For instance, when Dong Cunmei and others sued for defamation of the dead military hero Dong Cunrui, what they had in mind was not only to protect the dead’s reputation, but also to defend his identity and character, which was put down in school textbooks and widely learned by students as part of national character. With such motivations, Chinese courts cannot ignore such compelling calls.

E. Defendants

In the collected thirty-seven cases, most defendants are authors of biographies, documentary literature, novels, and journal or newspaper articles, or are TV or film directors, producers, or actors. Many of them bear national or international reputations. For example, Hong Ying, who was accused in the K Case, is an internationally-known author, Wu Si is a famous liberal historian, and Li Lianjie is the international film star Jet Li. Given their fame, their defamation cases always attract more attention than others. There are also official educational institutions and companies involved in publicity cases that made use of the dead’s names, images, or likeness without the consent of the dead’s family. For example, one commercial company in Beijing and another foreign language school in Zhejiang were accused of illegal use of the dead writer Lu Xun’s name and likeness.

In recent years, internet commentators and bloggers are also listed as defendants in relation to their online speech. In a

269. Huo Shoujin v. China Film Group, supra note 201.
271. Chen Lin v. Wu Dongfeng, supra note 211; Shi Yi v. Wu Dongfeng, supra note 211; Widow of Xie Jin v. Song Zude, supra note 16.
2009 case, two popular online commentators, Song Zude and Liu Xinda, were accused of defamation by the wife of the most famous Chinese film director, Xie Jin, for publishing stories that Xie died from overindulging in sex with young prostitutes at a hotel, and that he had an extra-marital son with a famous actress living abroad.  

Individual defendants are joined by the mass media: book publishers, newspapers, journals, film companies, tabloids, magazines, and sometimes even distributors are also listed as defendants. Many of them are state-owned enterprises at different administrative levels. However, since commercial reform started in the early 1990s, they have become more critical and aggressive to compete for audience and profits. The price of such competition is an increase in defamation accusations. This is especially true as people become more aware of their rights consequent to China’s deepening legal reforms.

Most of the media and publishing companies involved in the collected cases are from the provincial level, but there are also some national companies involved, such as Zhuojia Magazine, Renmin Publishing House, and Zhuojia Publishers. Moreover, two famous film companies—China Film Group Cooperation and Beijing Film—and even the state-owned propaganda en-

272. Widow of Xie Jin v. Song Zude, supra note 16.
273. See the following cases in which state-owned media were involved: Chen Xiaoying v. Chen Hongying, supra note 5; Chen Mingliang v. Wu Shi, supra note 213; Sun Guoxuan v. Hou Hongxu, supra note 230; Long Yunsha v. Lu Jiandong, supra note 209; Lu Shan v. Zhang Zhenglong, supra note 213; Li Moumou v. Kong Jingde, supra note 29; Ling Li v. Cao Jisan, supra note 29; Du Hui v. Jilin Daily News, supra note 196.
terprise China Central Television ("CCTV") have been sued for defamation of the dead.\textsuperscript{276}

Given their previous affiliations with the state authorities, these plaintiffs could be treated very differently by Chinese courts. It is notable that when defendants have a close connection with a state authority, their cases are likely to be judged in their favor.\textsuperscript{277} This is because in China, when law is dependent on politics, Chinese judges are working under political power that controls their career and life. If a case involves someone who has a close connection to state power, there is no such thing as independent judgment and a neutral verdict.\textsuperscript{278} An extreme case involves a defendant with a military background. When three plaintiffs accused General Kong Qingde and People’s Liberation Army Publishing House of defamation of their dead father, Li Yingxi, they encountered enormous difficulties.\textsuperscript{279} The two generals involved in the defamation case worked together during China’s Cultural Revolution, but General Kong’s recent autobiography depicted his old colleague as a bad figure, which angered his three children.\textsuperscript{280} The trial court first refused to accept the case, and sent it to the Intermediate People’s Court of Wuhan, which after an unsuccessful mediation filed a report to the People’s High Court of Hubei for further guidance.\textsuperscript{281} Finally, the case was directed back to the trial court, and in a secret trial, the court rejected the plaintiffs’ claim after another unsuccessful mediation effort.\textsuperscript{282}

Obviously, the military background of the defendant, to which local politicians have to yield, put the trial court in a difficult situation with no alternative. In two similar cases, defendants with strong military backgrounds also demonstrated no fear of

\textsuperscript{276} Huo Shoujin v. China Film Group, supra note 201; Chen Xiaoying v. Chen Hongying, supra note 5; Lu Shan v. Zhang Zhenglong, supra note 213; Dong Cunmei v. Guo Wei, supra note 203; Ling Li v. Cao Jisan, supra note 29.
\textsuperscript{277} See Liebman, supra note 50, at 51–54.
\textsuperscript{278} For a brief discussion of the dependence of Chinese courts on political power, see RONALD C. BROWN, UNDERSTANDING CHINESE COURTS AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS 127–30 (1997).
\textsuperscript{279} Li Mourou v. Kong Qingde, supra note 29.
\textsuperscript{280} Id.
\textsuperscript{281} Id.
\textsuperscript{282} Id.
defamation accusations while confronting ordinary plaintiffs.\textsuperscript{283} The accusation of the adopted son against the defamer was dismissed on the ground that he had no right to sue, despite being contrary to Chinese tradition and in contrast to another case previously judged in Shichuan.\textsuperscript{284}

Likewise, when national media are parties to a claim, they usually have more connections with the central government and various political-social networks to influence the court's decision-making process both at the central and local level. In view of the dependence of Chinese courts on politics and the magic power of social networks, when media are involved as defendants, they are in an advantageous position. Especially when they are sued in Beijing by ordinary people who lack such social capital, defendants with media background rarely lose.\textsuperscript{285} Even if plaintiffs managed to win, damages granted could be reduced due to strong local protectionism in Chinese law.\textsuperscript{286} Given this reality, the dead's family is unlikely to sue national media companies, as they know there is very little chance for them to win. As an illustration of this, in the collected cases, the People's Publishing House, which is one of the most powerful and influential publishers in China, was sued twice. In the first case it won, and in the second case it lost, but with the emotional damages reduced from 160,000 RMB to 30,000 RMB (about 5,000 USD).\textsuperscript{287}

\textbf{F. Defenses}

Chinese defamation law lacks any legal doctrines regarding defense at the national level.\textsuperscript{288} While defendants may use

\textsuperscript{283} Yang Kewu v. Center Theater, supra note 29.

\textsuperscript{284} Id. Compare this case with a similar case in which the Kung Fu Master's "adopted" son won. Huo Shoujin v. China Film Group, supra note 201.

\textsuperscript{285} See, e.g., Huo Shoujin v. China Film Group, supra note 201; Chen Hong v. Beijing Film, supra note 29; Ling Li v. Cao Jisan, supra note 29.

\textsuperscript{286} Local protectionism has been a big obstacle to legal justice in China. See Peerboom, supra note 96, at 311–12.

\textsuperscript{287} Ling Li v. Cao Jisan, supra note 29; Lu Shan v. Zhang Zhenglou, supra note 213.

\textsuperscript{288} In defamation cases, Western law generally allows the defenses of truth, privilege, opinion, public interest, innocent dissemination, consent, lack of actual injury, and the public figure doctrine. See Wei Yongzheng (魏永征), Zhuguo Dalu Xinwen Qinquanfa De Fazhan Jiuyu Taihang Feibangfa Zhi Bi jiao (祖国大陆新闻侵权法的发展及与台港诽谤法之比较), Zhongguo Jiancha
Western defenses, their arguments are not often accepted by Chinese courts. The major issue is that Chinese law has not firmly and clearly established any systematic defenses in favor of free speech. Nevertheless, many of these Western-style defenses were used in the selected cases. Most author defendants commonly claimed that what they wrote is true and based on solid sources, that there is no degradation of the dead’s reputation, that there is no bad intention, and that their works are fictions that allow considerable freedom of creation and imagination. Meanwhile, media defendants argued that they had fulfilled the duty to check statements and sources properly, and that upon notification of the dead’s family, suitable steps had been taken to vindicate the dead’s reputation, in addition to the publication of apologies. The defenses the accused may have chosen in practice depends on the nature of their alleged activities, and the particular contexts in which the defamation accusations arose.

For historians, biographers, and documentary writers, truth is the strongest defense. Unfortunately, in Chinese law, truth is not an absolute defense. As mentioned above, the 1993 Sup. People’s Ct. Interpretation has made it clear that defamation can be the result of true but insulting comments, or of the sole revelation of private details. Article 8 of the 1993 Interpretation stipulates that authors of commentary and opinion articles are liable if the majority of contents of an article are untrue and the subject’s reputation is harmed, or the majority of the contents of an article are true, but it also contains humiliating content. This opinion has been reaffirmed by the authoritative article of the Sup. People’s Ct. in 2008, and makes two


289. See generally Liebman, supra note 50, at 40–43.
292. Reply Concerning Judging Defamation Cases, supra note 60.
293. Id.
points clear. First, disclosure of private facts, though true, can still distort and lower an individual’s social standing. The justification of the policy is that people’s evaluation of a person shall change over time according to continuous changes in personal behavior; such that, to only evaluate a person’s present reputation by his past deeds is unfair. Second, it confirms that in looking at alleged defamation, courts will consider whether the description singles out a particular person in real life; whether there are humiliating or privacy disclosing elements; and whether there are negative reputational consequences to the subject. These facts are considered in relation to posthumous defamation cases.

To establish truth, in general authors must provide solid evidence before the court to show that their writings are true. However, one important problem before Chinese courts when dealing with writings regarding the dead is which references and historical materials are authoritative, and which are not. Historian Wu Si lost his case as he was accused of defamation of the dead Vice Premier Minister Chen Yonggui. Both the court of first instance and the appellate courts held that the memoirs on which he based his controversial statements were not authoritative sources, although the archives he cited were accepted as such. The appellate court ruled that when citing memoirs, the author should further check and verify the recalled facts that may not be true, and as Wu failed to fulfill this duty, he lost the case. Under such circumstances, to succeed with truth as a defense is very difficult, if not impossible. With regards to memoirs as a primary source, Beijing’s courts stood in stark contrast to a Jiangshu local court. The latter court recently ruled that a published memoir is an authoritative primary source, with which both plaintiffs and defendant agreed.

294. Interpretation of Sup. People’s Ct.’s Reply, supra note 87.
295. The publication of private facts is protected under reputation. It seems that the court has recognized the importance of giving a person a second chance in life, which is similar to the American approach to privacy. See Melvin v. Reid, 112 Cal. App. 285, 291–92 (1931).
296. See Interpretation of Sup. People’s Ct.’s Reply, supra note 87.
298. Id.
299. Id.
300. Shi Yi v. Wu Dongfeng, supra note 211.
Another closely related issue is the validity of interviews in history articles. At least in one case, the court doubted the validity of such personal interviews conducted by a historian, and even ruled that the author has a duty to further verify the details with the dead’s family.301 In this regard, one may doubt whether Chinese courts have asked too much from historians, given that memoirs and interviews as primary sources may now in effect be censored by surviving family members at will. Many historians protested against the Beijing court’s approach, complaining that they could not write about the dead and related history if they were threatened by defamation accusations.302

In view of the situation, the truth defense turns on the ability to tell whether or not sources are, or are not, authoritative. In this sense, Chinese courts step into a field for which they lack sufficient knowledge and expertise. The collected cases contain no examples of historians summoned to testify about the authority of the cited sources or the working attitudes of defendants. Instead, Chinese courts decide the issue themselves, in contrast to Western courts. 303 This situation, however, is changing gradually, as evidenced by a 2006 case that held the court’s role was not to establish “historical truth” via law.304 This, the court said, is the work of historians and regardless of whether the defamatory statements are good artistic works or not, the determination of whether writing is historical truth shall be left to open discussion.305

In the collected cases, the use of archives is also a source of controversy. Though Chinese courts normally accepted archives as a valid, authoritative source for writing about the dead, not

301. For a case regarding the use of an interview as a primary source, see Chen Hong v. Shi Gengli, supra note 29.
303. Antoon De Baets pointed out that European courts, in cases regarding posthumous defamation, generally avoid seeking the truth of the controversial facts and instead consider whether the accused historians have fulfilled their duties to act in good faith, take reasonable care, display intellectual honesty, and apply their professional methods carefully and objectively. Antoon De Baets, Defamation Cases Against Historians, 41 HIST. THEORY 346, 356 (2002).
304. Huo Shoujin v. China Film Group, supra note 201.
305. Id.
every single use of the archives was permitted by Chinese courts. Chinese courts emphasized that the authors must follow related laws and state (or party) policies for using archives. For example, in a defamation case involving a university president in South China, the president of the collegial panel later said in an interview that the author’s quotations of university archives concerning the defamee’s conduct during China’s Anti-rightist Movement was inappropriate and forbidden by the related Chinese archive law and applicable party policy.

For historical authors and their publishers, a plausible defense is to claim they acted with due care and checked all available sources, such that there was no negligence or malice involved. Another defense is to argue that on the whole, there was no evidence that the dead’s reputation was degraded or downplayed as a result of their work. One defendant even argued that the dead had in fact acquired a better reputation by means of his work, despite some minor issues.

For authors of fiction and novels, and directors and producers in the film and television industry, a popular defense is to argue that they write or broadcast fictional, not historical or documentary works that should be in accordance with facts. Given the nature of such works, defendants are free to base fiction on true historical contexts. However, this defense may not always help defendants to escape liability, as the 1993 Sup. People’s Ct. Interpretation has a particular article governing this issue. Article 9 points to literature in particular, prescribing that if a literary work does not refer to a specific living person, but only bears similarities with real life, it should not be regarded as defamatory; but, if a literary work depicts real life and persons, and humiliates, slanders, or reveals private issues.

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308. Long Yunsha v. Lu Jiandong, supra note 209.
309. See, e.g., Chen Xiaoying v. Chen Hongying, supra note 5. See also Hong Ying Fating Zi Bian Ci (虹影法庭自辩词) [Hong Ying’s Self Defense], http://www.xys.org/xys/ebooks/literature/essays/k.txt (last visited May 21, 2013); Tao Yuyun v. Ouyang Youhui, supra note 29; Chen Lin v. Wu Dongfeng, supra note 211.
310. See Chen Xiuqin v. Wei Xilin, supra note 29.
311. Id.
312. Reply Concerning Judging Defamation Cases, supra note 60.
of a specific person, the author should be held liable.\textsuperscript{313} Additionally, if there is no real name or address mentioned in a literary work, but it refers to a particular person or his or her acts with humiliating, defamatory, and privacy-disclosing remarks that harm the subject’s reputation, the author should be held liable.\textsuperscript{314} Ultimately it does not matter which form the product of an author’s, director’s, or producer’s work takes, as the law is strict in defending the dead’s reputation and privacy if the contested contents can be used to identify the dead.

Though the language of the law is clear, in practice Chinese courts are given a lot of discretion, as there is no coherent criterion to gauge what are, or are not, defamatory remarks. As such, Chinese courts may make divergent decisions on very similar issues.\textsuperscript{315} A telling example is the sharp contrast between court decisions on film and TV series, and those of novels and fictions.

The film depiction of famous Kung Fu master Huo Yuanjia, as a former gangster with no descendants (because his family was killed by his rival), was held by the court in Beijing as non-defamatory.\textsuperscript{316} Despite this ruling, the court acknowledged the film resulted in the heavy mental distress of the dead’s descendants and described such a storyline as “improper.”\textsuperscript{317} It is worth noting that under Chinese tradition, to say that someone has no offspring is one of the most humiliating curses.\textsuperscript{318} It is notable that in the selected cases, defendants sued for defamation in the film and TV industry have a better chance of winning, or at least to escape large damages with court supported pre-trial mediations.\textsuperscript{319}

\textsuperscript{313} Id.
\textsuperscript{314} Id.
\textsuperscript{315} See generally Margaret Y.K. Woo, Law and Discretion in the Contemporary Chinese Courts, 8 Pac. Rim L. & Pol'y J. 581 (1999).
\textsuperscript{316} Huo Shoujin v. China Film Group, supra note 201.
\textsuperscript{317} Id.
\textsuperscript{318} The first instance court’s decision that there is no defamatory, humiliating content in the film is not persuasive if one considers the above social convention. The appellate court cleverly avoided making its own judgment on the content by referring to the administrative advice given by competent state authorities, claiming that after their professional advice was followed, the film had excluded defamatory elements. Id.
\textsuperscript{319} In the seven collected cases concerning films and TV programs, defendants won three cases, lost two, had one case end in pre-trial mediation,
This is in contrast to cases where writers and publishers are defendants. Consider once again the above mentioned 2002 K case. Here, the fictional depiction of the private life and love affairs of the dead, based on a real life story, are no worse than the allegations in the film cases from the viewpoint of distortion and ridicule. By their very nature, novel and fiction writings allow authors to use imagination and invention, which is not different from films and TV dramas, and should at least be treated in similar ways.320 Unfortunately, for whatever reason, courts look at print media defendants less favorably than their film and television counterparts.

Some general defenses are suitable for all defendants. One such defense is to argue that publication or publicity caused no defamatory consequences. Some defendants have even argued that after the publication of the accused works, the dead’s reputation suffered no harm in third party’s eyes, which is more objective and different from the sensitive perspectives of the dead’s relatives.321 Others even argue that due to the dissemination of their works, defamees gained a better reputation than before.322 A similar argument would be that though the alleged contents are somehow defamatory to the plaintiffs, the accused authors in general promoted the dead’s reputation.323 In addi-
tion, many of them would argue that there is no ill intention to
defame the dead in their writings.324

The last category of cases concerns whether the dead’s like-

ness shall be protected when they are public figures before

death.325 In these cases, defendants claimed that because the
defamees were public figures before death, the protection of
their reputation should be restricted to a certain extent.326 As

such, they argue that surviving family members should need to
display a certain degree of tolerance. In two related cases,
Chinese courts have had a different reaction to such an argu-
ment. In the first case, both the lower and appeals courts rec-
ognized the validity of the argument, saying that the dead’s
family should not be so sensitive to a film character that is part

of an artistic work, that similar artistic works bring the dead’s
family more fame, and therefore the family should have some
tolerance and respect for artists, allowing them some space.327

However, in the second case, this argument was rejected on the

ground that the alleged issue was not an urgent matter for the

public to know, such that the defamed was not considered a

present public figure.328

Before 1993, mass and print media in China could be held li-
able for defamation on the ground that they published defama-
tory works.329 Even when plaintiffs did not accuse publishers,
Chinese courts could still list them as co-defendants.330 The

324. Chen Xiaoying v. Chen Hongying, supra note 5; Long Yunsha v. Lu

Jiandong, supra note 209. See also Hong Ying Fating Zibian Ci, supra note

309; Shi Yi v. Wu Dongfeng, supra note 211; Ling Li v. Cao Jisan, supra note

29. 325. Zhou Haiying v. Shaoxing Yuewang Jewerly, supra note 196; Zhou

Haiying v. Luxun Foreign Language School, supra note 158; Zhou Haiying v.

Zhejiang Stamp Bureau, supra note 196; Zhou Haiying v. Beijing Quansheng

Ltd., supra note 196.

326. Huo Shoujin v. China Film Group, supra note 201.

327. Id.

328. Chen Lin v. Wu Dongfeng, supra note 211.

329. 1988 Zuigao Renmin Fayuan Guanyu Qinhai Mingyuquan Anjian

Youquan Baokan Yingfou Liewei Beigao He Ruhe Shiyong Guanxia Wenti De

Pifu (1988 最高人民法院关于侵害名誉权案件有关报刊社应否列为被告和如何适用

管辖问题的批复) [1988 Sup. People’s Ct.’s Reply Regarding Whether Journals

and Magazines Should Be Listed as Plaintiffs and the Issue of Jurisdiction]

(promulgated by the Sup. People’s Ct., Jan. 15, 1988, invalidated Jan. 28,

1997) (China).

330. See Chen Xiuping v. Wei Xilin, supra note 29.
1993 Sup. People’s Ct. Interpretation, however, indicated that plaintiffs decide whom to sue and courts have no active role in the decision. Article 9 prescribes that publishers, upon acknowledging defamation, should take reasonable measures such as publishing apologies to dissipate negative influences and the like; if they are unwilling to do so, and continue to publish defamatory works, publishers should be held liable. Under this rule, publishers and editorial boards should not be liable if they take positive measures upon notice by the dead’s family. However, in many of the collected cases, publishers were still held liable even if they had taken the prescribed steps to remedy the situation and restore the dead’s reputation.

The central issue is to what extent such legal duties can be fulfilled so that publishers can avoid liability. In practice, many journals and magazines were held liable because they did not fulfill the obligation to verify the controversial facts that they published. Some publishers were even liable for printing defamatory statements that were found defamatory later, or for reprinting defamatory statements made by others. One popular defense used by publishers is that the accused articles were literary works and that there was no need for further verification on the publisher’s side. But, as seen above, this argument did not hold much sway with courts, who may still demand the verification and checking duty to be fulfilled by publishers before publication.

331. Reply Concerning Judging Defamation Cases, supra note 60.
332. Id.
335. See, e.g., Peng Jiahui v. China Story Journal, supra note 29; Chen Xiuqin v. Wei Xilin, supra note 29; Ling Li v. Cao Jisan, supra note 29.
336. In one case, the appellate court ruled that the alleged fiction was based on real history and people, which is different from fictional novels, so that the journal had a duty to verify the veracity of the description, and the duty to check that there was no offense to the dead’s reputation. Peng Jiahui v. China Story Journal, supra note 29.
lation, publishers have to make such verification and checks even if they reprint articles.338

A rather creative defense proposed by a newspaper defendant was that the dead died long before the promulgation of the present law, and therefore was not protected, since the present law cannot be applied retroactively.339 This would be a strong argument if the law only took posthumous interests into consideration. However, as Chinese courts stress the interests of the living, this defense fails.

G. Internet and Posthumous Defamation

With China entering the digital era, the Internet has become a public sphere where people read news and articles, entertain themselves, and quickly spread rumors and gossip. In recent years, many authors and celebrities started to publish articles, comments, and opinions on the Internet. Through the Internet, publication becomes easier than ever before, and this opens a new set of issues that traditional defamation did not need to confront. First, it is very hard to control untrue information once uploaded online because of the characteristics of the Internet.340 Once in cyberspace, publicized information can stay there forever, or be archived by someone unknown for future reappearance when needed.341 Given this, rumors and gossip spread at an unthinkable speed and can reach anywhere in the world instantaneously. Thus, online defamation has the potential to be very harmful in view of the size of the impact it can have in relation to traditional defamation.

This tendency is reflected in the four online posthumous defamation cases collected. All four defendants are well-known online commentators or bloggers with certain social influences. The first defendant, Wu Dongfeng, is a well-known military

339. See Chen Xiuqin v. Wei Xilin, supra note 29.
340. For personal data persistence and its influence on individual life, as well as solutions, see generally VIKTOR MAYER-SCHÖNBERGER, DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE (2009).
341. Therefore, the European initiative to a right to be forgotten. Jeffrey Rosen, The Right to Be Forgotten, 64 STAN. L. REV. ONLINE 88, 88 (2012).
history writer, famous for his biographies about reputable generals.342 He put two revised articles from his past publications on his blog describing two dead generals and was accused of defamation.343 The second commentator uploaded a controversial article on his blog regarding a national heroine that died at Japanese hands, which was widely disseminated by China’s most influential websites.344 The remaining two bloggers held liable for defamation are very famous online entertainment commentators with a national readership and a reputation for circulating gossip and rumors of celebrities.345

There are a number of issues worthy of our attention in the court verdicts of the four cases. First, in the case that involved the two bloggers, no internet company providing portal services was sued and held liable.346 Secondly, the nature of blogs has been defined by the court as the sphere for publishing information and social communication.347 Also, in creating the definition, it distinguished between private and public blogs.348 A private blog is akin to a private diary for putting down one’s emotions and self-reflections, and is unlikely to have an influence on other people.349 However, public blogs are those open and accessible to strangers, and bloggers use them for publication of personal opinions.350 Public blogs are akin to publishing articles in the traditional way, and thus can be used as propaganda.351 The court thus demanded that a public blogger has the legal obligation to check the contents in one’s blog(s) and verify their truthfulness so that no one will be harmed; this mandate applies even if the content was originally published by others.352 Third, if defendants are held liable for defamation, they will be asked to delete defamatory content and publish an

342. See Xu Lina (许黎娜), supra note 302.
343. Chen Lin v. Wu Dongfeng, supra note 211; Shi Yi v. Wu Dongfeng, supra note 211.
344. Chen Hong v. Shi Gengli, supra note 29.
345. Widow of Xie Jin v. Song Zude, supra note 16.
346. Id.
347. Id.
348. Id.
349. Id.
350. Id.
351. Id.
352. Id.
apology on their blog, and sometimes even in traditional medi-
as.\footnote{353}

The above four cases also show the importance of the Internet, which is regarded as an important medium for public apologies and as having significant influence upon public opinion. In three internet-related cases, authors and publishers were asked in particular to publicize their apologies on the Internet.\footnote{354} Even traditional publisher defendants may be asked by plaintiffs to publish apologies and corrections online to vindicate the dead’s reputation and reach a larger audience.\footnote{355} In some circumstances, parties made live reports of their cases following up each step of their legal procedure.\footnote{356} For instance, a plaintiff that sued to vindicate his grandfather’s reputation published every detail of his lawsuit online, including his petition and court verdict, which gained national attention.\footnote{357} Likewise, an author defendant said explicitly that he won his lawsuit because of the help of the Internet in motivating more people to display concern about a given issue and pressure the court to act according to law and not bend to political pressure.\footnote{358}

\textbf{H. Courts and Verdicts}

China is a continental law country, meaning that Chinese courts must follow statutory law.\footnote{359} But since the first post-

\begin{footnotes}
\footnote{353. Shi Yi \textit{v.} Wu Dongfeng, supra note 211.}
\footnote{355. See, e.g., Lu Shan \textit{v.} Zhang Zhenglong, supra note 213.}
\footnote{356. Shi Yi \textit{v.} Wu Dongfeng, supra note 211; Feng Jining \textit{v.} Xi’an Film Enterprise, supra note 211.}
\footnote{357. “Xian Shibian” Dianshiju Qinhai Fengqinzai Mingyuquan An Kaiting (“西安事变”电剧侵害冯钦哉名誉权案开庭) [Defamation Case Regarding Fengqinzai], BOLIAN SHE (博联社), http://fengjining.blshe.com/post/4177/220899 (last visited Sept. 8, 2013).}
\footnote{359. See J. CHEN, \textit{CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE, AND DEVELOPMENTS} 31–55 (1999).}
\end{footnotes}
humorous defamation case in 1989, Chinese courts encountered cases to which no governing law would apply. As such, they had to decide on various issues without guidance: whether the law should protect the dead’s reputation and privacy; if so, what were the justifications behind the protection; what were legally-recognized defenses and liabilities; and how to define and evaluate damages. In handling these legal issues, Chinese courts demonstrated certain creativity and flexibility under the guidance of the Sup. People’s Ct. to meet the social needs of society. Step by step, they found their own way to protect posthumous interests, and to adapt the protections to social reality. In creating this course, several observations can be made from the selected cases.

First and foremost, there are still no well-established coherent standards or legal doctrines in this body of law regarding important issues, such as what is defamatory content and what is not. On this issue, the legal interpretations of the Sup. People’s Ct. are generally vague. Moreover, there are no refined rules or doctrines defining public figure, absolute or qualified privilege, fair comment on public interest, innocent dissemination, and opinion, etc., that have been well recognized in most Western jurisdictions. Many defendants, however, have proposed such defenses before courts that should be systematically considered. However, taking into account the size and variety of the Chinese judicial system and complexity of social life in China, it is difficult for the Sup. People’s Ct. to unify such standards at the national level. As Wilhelm pointed out, in Chinese defamation law, there is lack of detailed, coherent guidance and a clear foundation.

Given the lack of a working standard in these defamation cases, some minor issues have been taken as seriously defamatory, and, vice versa, more serious issues are not recognized by

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360. Many in the media argue that such “existing legal standards are excessively vague.” Liebman, supra note 50, at 42.
361. Wei Yongzheng (魏永征), supra note 288.
362. For instance, the public figure doctrine has been raised as a defense by defendants in two of the collected cases. See Huo Shoujin v. China Film Group, supra note 201; Chen Lin v. Wu Dongfeng, supra note 211.
courts as defamatory in other cases. In the previous discussion, it has been established that film and TV producers, directors, and distributors enjoyed wider margins of success in posthumous defamation cases than authors of literature and their publishers. In addition, defendants involved with print media could be held liable for defamation, even if what they said was true.364 A relevant point is that there is no clear standard as to what extent redress or remedy made by publishers is sufficient upon notice of defamation by the dead’s family, to prevent defamatory liability.365

A second characteristic of these selected cases is that Chinese courts usually judged in favor of plaintiffs, though this tendency is beginning to change in recent years.366 In the collected cases, plaintiffs won twenty cases, two cases ended in withdrawals, four ended with mediations in their favor, and for three cases the results were unknown.367 The plaintiffs only lost seven cases.368 From 1989 to 1999, plaintiffs won nine of twelve cases.369 From 2000 to 2002, plaintiffs only won five cases out of twelve,370 lost three,371 had three end in mediation,372 and one

364. E.g., Chen Mingliang v. Wu Shi, supra note 213; Long Yunsha v. Lu Jiandong, supra note 209.
366. See Liebman, supra note 50, § II(C).
367. Except Xiao Xinan v. Yan Yuewen, which is special with multiple results and thus excluded. Xiao Xinan v. Yan Yuewen, supra note 146.
368. Huo Shoujin v. China Film Group, supra note 201; Tao Yuyun v. Ouyang Youhui, supra note 29; Shi Yi v. Wu Dongfeng, supra note 211; Chen Hong v. Beijing Film, supra note 29; Li Moumou v. Kong Qingde, supra note 29; Yang Kewu v. Center Theater, supra note 29; Ling Li v. Cao Jisan, supra note 29.
result unknown.\textsuperscript{373} From 2003 to 2010, plaintiffs won six cases out of thirteen,\textsuperscript{374} lost four,\textsuperscript{375} had one case end in withdrawal,\textsuperscript{376} one in mediation,\textsuperscript{377} and one result unknown.\textsuperscript{378} Though the collected cases are a small sample, they suggest that in recent years, a plaintiff’s chance of winning is still strong, but weakening.

A third trait that can be gleaned from these cases is that Chinese courts have a strong tendency to mediate before formal trial, and even before appeal.\textsuperscript{379} Only when court-supported pre-trial mediations or settlements are not successful, will the judge hear a case.\textsuperscript{380} This echoes the strong mediation tradition in Chinese law that began in the Maoist period, as well as the traditional Confucian ideology of achieving social harmony.\textsuperscript{381} In the collected cases, however, only six cases out of thirty-six ended in mediation. This is unsurprising given that plaintiffs

\begin{itemize}
\item\textsuperscript{371} Tao Yuyun v. Ouyang Youhui, supra note 29; Li Moumou v. Kong Qingde, supra note 29; Ling Li v. Cao Jisan, supra note 29.
\item\textsuperscript{372} Zhou Haiying v. Luxun Foreign Language School, supra note 159; Chen Xiaoqiang v. Chen Hongying, supra note 5; Zhou Haiying v. Luxun Art School, supra note 215.
\item\textsuperscript{373} Fan Zhiyi v. Liu Deyi, supra note 201.
\item\textsuperscript{374} Chen Ling v. Wu Dongfeng, supra note 211; Lu Shan v. Zhang Zhenglong, supra note 212; Xu Dawen v. Song Zude, supra note 354; Xiao Xinan v. Yan Yuewen, supra note 146; Feng Jining v. Xi’an Film Enterprise, supra note 211; Chen Qiejia v. Chen Liming, supra note 160.
\item\textsuperscript{375} Huo Shoujin v. China Film Group, supra note 201; Shi Yi v. Wu Dongfeng, supra note 211; Chen Hong v. Beijing Film, supra note 29; Yang Kewu v. Center Theater, supra note 29.
\item\textsuperscript{376} Gao Quanting v. Central Theater, supra note 210.
\item\textsuperscript{377} Dong Cunmei v. Guo Wei, supra note 203.
\item\textsuperscript{378} Chen Hong v. Shi Gengli, supra note 29.
\item\textsuperscript{379} This kind of formal mediation led by Chinese courts has the binding force of court verdicts. For a discussion of Chinese mediation, see STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 40–70, 216–49 (1999). For critics of the mediation practice in China, see PEERENBOOM, supra note 96, at 163.
\item\textsuperscript{380} Preference for mediation has a strong tradition after 1949. See Fu Hualing & Richard Cullen, From Mediator to Adjudicatory Justice: The Limits of Civil Justice Reform in China, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 25, 28, 33 (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011).
\item\textsuperscript{381} For the mediation tradition in China, see Philip C.C. Huang, Court Mediation in China, Past and Present, 32 MOD. CHINA 275, 277, 286, 303 (2006).
\end{itemize}
have a strong will to fight to the end for justice and restitution of the dead’s dignity. 382 This determination of the plaintiffs is in and of itself additional proof of the strong value placed on reputation in China.

Fourth, we have to note the large improvements of Chinese courts in delivering reasonable legal reasoning and good arguments. In a 2000 case, the appellate court briefly mentioned that its role was not to find the truth of the disputed facts and that it would not make a comment on that.383 But in the 2006 case concerning the Kung Fu Master Huo Yuanjia, the appellate court made a clear, detailed analysis of the interests and concepts involved in the case.384 First, the court distinguished different categories of films and judged that the film at stake was a drama-action, characterized by fiction and performance.385 Second, it found there were only a few historical records of the Kung Fu master in existence, which left enough room for artistic creation.386 Though it ruled in favor of the defendants, the court did not forget to pinpoint that the dead’s dignity in reputation and respect, as well as the surviving family’s interests, should be considered by the film’s producers and directors.387 Third, it explicitly expressed that in this case, it was not suitable for the court to make the decision of what was true history, or what was the right description of the dead, and said that such a determination should be in the hands of historians.388 Fourth, it distinguished between the perspective of the dead’s family from that of ordinary, reasonable third persons whose opinion should be the standard to evaluate the disputed material.389

382. In total, five of the plaintiffs who were dismissed appealed. Huo Shoujin v. China Film Group, supra note 201; Tao Yuyun v. Ouyang Youhui, supra note 29; Shi Yi v. Wu Dongfeng, supra note 211; Sun Guoxuan v. Hou Hongxu, supra note 230; Long Yunsha v. Lu Jianzong, supra note 209. One plaintiff also appealed for dissatisfaction with the verdict. Peng Jiahui v. China Story Journal, supra note 29.
384. Huo Shoujin v. China Film Group, supra note 201.
385. Id.
386. Id.
387. Id.
388. Id.
389. Id.
In a 2008 case, a Xi'an local court made very specific distinctions between different types of alleged defamatory facts. It determined that a bribery charge against a dead general by a TV drama was defamatory because it degraded the dead’s personality. However, as to other allegations, depicting the general as killing a military official, destroying mines, and mismanaging troops, the court ruled that they had nothing to do with the dead’s personality and morality, and should be left to historians for discussion.

The fifth feature is that, on the face of it, the free speech rights of the authors and media are apparently not a big concern for Chinese courts. It is to be lamented that in the collected cases, none of the adjudicating courts has spoken of a strong concern for the free speech rights of the defendants when these rights conflicted with the interests of the dead and their surviving family. In Western democracies, free speech rights generally restrict the protection of reputation and privacy, because of its importance in itself, and to democracy. Focusing on how to balance the two categories of rights, Western laws have established rules and doctrines to secure both rights. In contrast, protection of free speech rights has not been a principal goal of Chinese courts in their decision making process for many reasons. Free speech is weakly protected in China due to China’s strong communist propaganda and political censorship, which is

390. Feng Jining v. Xi’an Film Enterprise, supra note 211.
391. Id.
392. Id.
critical for the Communist Party to remain in power.\footnote{Consider the American Government's report on media censorship in China. Isabella Bennett, Media Censorship in China, COUNCIL ON FOREIGN RELATIONS (Jan. 24, 2013), http://www.cfr.org/china/media-censorship-china/p11515.} Though the Chinese Constitution lists free speech as a fundamental right of the Chinese people, the Chinese Constitution cannot be directly applied in Chinese law.\footnote{See Guobin Zhu, Constitutional Review in China: An Unaccomplished Project or a Mirage?, 43 SUFFOLK U.L. REV. 625, 625–26 (2010).} The only verdict in the collected cases that mentioned free speech rights, however, merely stressed the negative consequences of the improper exercise of the right.\footnote{Huo Shoujin v. China Film Group, supra note 201.} Ultimately, there has not been a real balancing of free speech rights with other rights observed in the selected cases.

Finally, when posthumous defamation cases involved public figures, Chinese courts would defer to their official history, or official remarks made by the state or the Communist party. When important public figures die in China, especially those who once made big contributions to Chinese government and the Communist Party, they are awarded official obituaries for final appraisals that are formally published by official media, such as the People’s Daily or local daily newspapers.\footnote{See, e.g., Jason Dean, Chinese Eulogy Bares Party Intrigue, WALL ST. J. (Apr. 15, 2010), http://online.wsj.com/article/SB10001424052702304628704575185861979803430.html (noting where the status of a political figure is honored in Chinese official history).} Additionally, their past activities or achievements could be later inserted in official or quasi-official histories or school textbooks.\footnote{For instance, the dead hero Dong Cunrui and heroine Zhao Yiman were all mentioned in China’s past history textbooks and regarded as important figures in Chinese history.} It is usually the case that Chinese courts judge in favor of plaintiffs when depiction of the dead’s past activities or characteristics is negative and against the relevant official version. Even if Chinese courts do not directly defer to the official version of history or to official remarks of the defamees, they still cannot escape these versions as they are accepted by society as the only “right” and acceptable version.\footnote{Judges may face critics, if judging in favor of the defendants, not from the government, but from the public who admire the heroes or heroines and do}
claimed: “how can a hero we have read and learned about for half a century, now turn out to be a person like this?” The judges seem to follow a similar reasoning before delivering their decisions.

Chinese courts can find such official history and official remarks in many sources. One is the memorial speeches or eulogies by the Communist Party published in the People’s Daily. This is the most authoritative official remark on the dead’s past. Another form is the rehabilitation and redress made by the Party to individuals who were wronged during the Anti-rightist Movement, the Cultural Revolution, or other political moments. Other sources include texts extracted and selected from official or quasi-official history books published by state-owned authoritative publishers, such as official military histories or official party histories, or local chronicles edited by local governments. These official remarks and comments have been used as authoritative standards to judge disputed contents.

not bear alternative stories in this regard. This is also observed in the motivations of some plaintiffs who are encouraged by the local residents to defend the honor of their hometown. See Dong Cunmei v. Guo Wei, supra note 203.

401. Yang Kewu v. Center Theater, supra note 29.


403. This is known as Pingfang (平反, rehabilitation), a moral ground that Chinese judges use to justify their protection of the dead’s reputation. See Chen Xiuqin v. Wei Xilin, supra note 29.

404. Peng Jiahui v. China Story Journal, supra note 29; Shi Yi v. Wu Dongfeng, supra note 211; Chen Mingliang v. Wu Shi, supra note 213; Chen Hong v. Shi Gengli, supra note 29; Feng Jining v. Xi'an Film Enterprise, supra note 211; Yang Kewu v. Center Theater, supra note 29; Chen Qiejia v. Chen
III. POLITICS, HISTORY, AND SOCIAL TRANSITION

A striking characteristic of many defamation cases is that they are history-related. Talking about the dead and their past deeds necessarily involves talking about the social-political settings prevalent in the time period in which the dead once lived. The importance of these details takes on even greater significance when the subjects are important historical figures. The controversies over posthumous reputation can, on many occasions, draw the public’s attention to a particular period of history, and the disclosed “new stories” of historical figures will invite people to rethink the history associated with them. This can, in many occasions, result in challenges to the official history and is therefore against the interest of the ruling Chinese Communist Party.

The most controversial period of China’s modern history after 1949 is the Cultural Revolution, and it is still a politically sensitive time period in China today. Thus, in cases from this time period, plaintiffs won all cases on different grounds—with the exception of a living general accused of defaming his past colleague—and four of them are politically relevant. The two most representative cases concerned China’s former Vice Premier Chen Yonggui, and a former party secretary of a famous university in South China. In these two cases, the adjudicating courts set high standards for both autobiographers to meet in defense. In fact, the standard was set so high that university archives recording the defamee’s radical conduct during China’s Anti-rightist Movement were rejected as a legally-accepted primary source in biography writing. In the case

Liming, supra note 160; Wang Xiuzhen v. Beijing Songtang Hospital, supra note 196.

405. In the collected cases, five cases involved disclosure of past activities of the dead during the Cultural Revolution and one case concerned the notorious Anti-rightist Movement (1957–1958). Li Lin v. Xinshengjie Journal, supra note 113; Long Yunsha v. Lu Jianzong, supra note 209; Chen Mingliang v. Wu Shi, supra note 213; Tang Min’s Criminal Defamation Case, supra note 29; Li Moumou v. Kong Qingde, supra note 29; Chen Mingliang v. Wu Shi, supra note 213.

406. By politically relevant I mean they involved important political figures.


408. Long Yunsha v. Lu Jianzong, supra note 209.
concerning Chen Yonggui, oral history and published individual memoirs were rejected as valid sources, and the historian was further required to verify them. In contrast, the collected cases relevant to China’s Civil War from 1945–1949 are much less politically-charged, and the adjudicating courts could sit in a rather comfortable position. In the related six cases, plaintiffs only won two; one was withdrawn, one ended in mediation, and two cases were won by the defendants.

Though not all courts in the six cases set up high standards, it is notable that Chinese courts were cautious in handling cases regarding politically-charged history. As the president of a collegial panel said, “to make use of the documents and materials of that period (the Anti-rightist Movement) is improper nowadays.” He also said that the court could not open the door for such materials—such as memos containing severe mutual criticisms—to be used in historical writings. It was also said that if the author had not put the dead’s name in the book, there would be no problem for him. However, when someone is readily identifiable, Chinese courts have a strong tendency to defer to official remarks on the dead to decide if the allegedly defamatory statements are really defamatory.

Presently, history is still an important justification for China’s Party-state. However, this function of history has weakened, largely in the past decades, by China’s increasing focus on economic development. The Party-state has quickly rebuilt its legitimacy on fast economic growth and social development. This may signal the gradual decline of the importance placed on

410. See Yang Kewu v. Center Theater, supra note 29; Gao Quanting v. Central Theater, supra note 210; Shi Yi v. Wu Dongfeng, supra note 211; Dong Cunmei v. Guo Wei, supra note 203; Feng Jining v. Xi’an Film Enterprise, supra note 211; Chen Lin v. Wu Dongfeng, supra note 211.
411. The interview with Judge Shao Mingyan, see Feng Boqun (冯伯群), supra note 307.
412. Id.
413. Id.
414. See supra Part II.H.
416. As well as an attempt in borrowing the concept of “the rule of law.” See PEERENBOOM, supra note 96, at 169–74.
the official version of history, such that certain deviations might be tolerable, especially when non-political figures are at concern. We can observe this in what happened to some national heroes and military martyrs, who are not as well-protected by Chinese courts as the military generals with high political status. 417

Since the 1980s’ Reform and Open Policy, Chinese society has undergone an enormous transition from communism to capitalism and a market-based economy. Decades later, Chinese people have become more individualistic, practical, and concerned with their own economic interests. In this context, the economic aspects of reputation and privacy of both the living and the dead have come into full sight. While defending the dead for justice and family dignity, surviving family members also increasingly seek mental and monetary damages consequent to posthumous defamation, as well as posthumous privacy invasion. This trend can be seen in the increasing claims in substantive damages in the collected cases. 418

As a consequence of China’s economic development, Chinese people have grown richer and have encountered an increasingly diverse society. 419 This has led to, among other things, people’s increasing demands for knowledge of Chinese history, social science, and literature, and for more entertainment after decades of suppression and censorship. There is also a particularly strong drive to know more about China’s dark past, as people want to know what happened to their fathers, grandfathers, and

417. Chen Hong v. Shi Gengli, supra note 29; Chen Hong v. Beijing Film, supra note 29; Dong Cunmei v. Guo Wei, supra note 203; Gao Quanting v. Central Theater, supra note 210.

418. See discussion regarding monetary remedies supra Part II.D.

419. China is in the process of a major transition, which was triggered first by economic reform and then quickly spread into cultural and social spheres. The diversification of economic forms lead to the diversification of individual interests and group interests. The Opening Up policy and the wide-spread use of the Internet bring to China more tolerance to and the greater acceptance of Western ideas. Another tendency is the increasing localism in China’s booming economy and eroding politics. See, e.g., Barry Naughton, The Chinese Economy: Fifty Years into the Transformation, in CHINA BRIEFING 2000: THE CONTINUING TRANSFORMATION 49 (Tyrene White ed., 2000); BARRY J. NAUGHTON & DALI L. YANG, HOLDING CHINA TOGETHER: DIVERSITY AND NATIONAL INTEGRATION IN THE POST-DENG ERA (2004); CHINESE SOCIETY—CHANGE AND TRANSFORMATION (Li Peilin ed., 2012).
their dead family members who were the victims of China’s successive political waves and military conflicts in the past decades.420

Given these circumstances, there is a great desire for historical works, biographies, novels, fictions, and documentaries, as well as films and TV products, and the market has responded to meet the diversified needs and wants of Chinese society. In order to gain a share in a highly competitive market, writers and producers have offered diversified content to attract more consumers. Especially in recent years, film and TV producers are likely to dramatize history or play with history when they have not been allowed to “talk about” the present.421 Some entertain with distant history as a safe way to avoid litigation. But when others try to “interpret” more recent history, and speak of the not-far-away dead who have surviving families, they risk repercussions.

Another situation that leads to defamation suits concerns what in China are called “the red classics”; a term that is used to describe TV programs or films re-telling military legends and spy stories of the Chinese Communist Party before 1949.422 This category of movies and TV series, as well as Maoist revolutionary culture in general, is very popular among Chinese today, easily passes state censorship, and is even encouraged by Chinese authorities.423 Unlike former propaganda movies and TV programs, directors or producers try to humanize and embellish their products by fabricating love stories and other de-

420. This is a reaction against the official tautology of history education for the purposes of communist propaganda. There is increasing readership of history books and biographies narrating the mysterious Chinese history after 1949. For instance, in a 2006 official ban of eight books, five of the books tell the story of the dark side of the Chinese Communist Party rule after seeking power. See Joel Martinsen, History Books Get the Axe; Another Zhang Yihe Title Falls, DANWEI (Jan. 19, 2007), http://www.danwei.org/media_regulation/banned_books_zhang_yihe.php.

421. There is a particularly strong tradition in China to criticize the present through historical metaphors, the so-called Jiegu Fengjin (借古讽今).


tails of the characters. These new stories, whether true or false, can lead to defamation litigation if the added stories might damage the dead’s shining reputation.

Currently, the most important social transition in China is its entrance into the digital era. This ushers China into a new stage, allowing more liberal access to and free dissemination of information. This change has been reflected in some of the collected cases in which the dead’s families reacted strongly against online libel, worrying about the possibility of permanent online defamation.

Last, but most important, Chinese law itself is undergoing a big transition. Since the commencement of the legal reforms in the early 1980s, law has become an important social force with an increasing power in Chinese society, and the legal profession is continuously growing—a development that the Party-state cannot ignore. Law is increasingly regarded by the public as an important means to address injustice, instead of merely as a tool for the leaders of the Party-state. Though the recent Chinese law reform is characterized by a process of importing Western rule-of-law ideals and legal techniques, Chinese judges and lawyers have also tried to adapt the imported Western law to China’s social reality. The development of the body of law for

424. For instance, this is observed in the cases of Chen Hong v. Beijing Film, supra note 29, Dong Cunmei v. Guo Wei, supra note 203; Gao Quanting v. Central Theater, supra note 210; Yang Kewu v. Center Theater, supra note 29.

425. Chen Hong v. Shi Gengli, supra note 29; Chen Hong v. Beijing Film, supra note 29; Gao Quanting v. Central Theater, supra note 210; Yang Kewu v. Center Theater, supra note 29.

426. See supra Part II.G.

427. A more recent example is the Li Zhuang Case. The former Governor of Chongqing had to yield to law eventually before the increasing pressure and criticisms from lawyers, judges, and legal scholars all through the country. See Ian Johnson, Trial in China Tests Limits of Legal System Reform, N.Y. TIMES (Apr. 19, 2011), http://www.nytimes.com/2011/04/20/world/asia/20china.html. See also PEERENBOOM, supra note 96, at 398–99.

the protection of the reputation of the dead and the interests of
the living close family members is such an example.

Of course, there have been numerous occasions for those in
political power to use law to achieve political ends in the pro-
cess. For instance, say that there is at least some level of cen-
sorship in the court judgments of the collected cases, since free
speech is never a major concern of Chinese courts. However, to
be fair, these judgments are based on justified reasons, and at
least some of the recent verdicts reflect a shift away from old
practice.429 First, law is used less and less as a brutal tool for
political interference. This is already a big step when compared
to the situation decades ago. Second, if censorship has to be
executed by means of law, law becomes a platform and stage to
present argumentation from both parties. In this context, the
rising importance of legitimate rule of law—when censorship
becomes “dominantly pejorative”430—can rein in the political
impulse to censor information and soften the state’s capabilities
to do so.

IV. HISTORY, CENSORSHIP, AND THE LAW

The formation of Chinese law governing posthumous reputa-
tion and privacy bespeaks the development of Chinese law. The
legal protection is justified in law first by protection of the dig-
nity of the dead, which is the product of a deeply embedded
Chinese tradition to respect the dead,431 and to hide sins of or-
acles, relatives, and sages (为尊者讳, 为亲者讳, 为贤者讳)—a
Confucian doctrine that is still popularly accepted by the pub-
lic.432 Second, it is justified by the interests of the close family
members whose lives can be affected by the dead’s reputation.433
But the strong protection of posthumous reputation in China, in
contrast to Western jurisdictions, means that there is only weak
protection of free speech.434

429. See supra Part II.H.
430. Please see Schauer’s analysis of the concept of censorship. Frederick
Schauer, The Ontology of Censorship, in CENSORSHIP AND SILENCING:
431. Xiao Zesheng, supra note 161.
432. This includes not speaking ill of the dead and their past sins. Confucius,
Mingong Yuanian (闵公元年), CHUNQIU GONGYANG ZHUAN (公羊传).
433. See supra Part II.A.
434. See Liebman, supra note 50, at 100.
In most of the collected cases, judges did not show a strong will to protect the free speech of defendants. They are more likely to look at whether the interests of the dead and their living family are well taken care of, rather than to assure defendant’s free speech rights. Most courts in the collected cases, including the appellate courts, involved such as the intermediate people’s courts at the municipal level and the high courts at provincial level, only look at the specific legal issues involved, and do not inspect the free speech and liberty rights of the defendants in a more abstract, categorical way.

Given this lack of protection for free speech, one may ask: when many cases are history-related and Chinese law lacks solid legal protection of free speech, is there systematic censorship of history by Chinese courts? The answer is both yes and no, if taking the approach that censorship is “the policy of restricting the public expression of ideas, opinions, conceptions and impulses which have or are believed to have the capacity to undermine the governing authority, or the social and moral order which that authority considers itself bound to protect.”

Those who say there is no systematic censorship of history will point out that, as mentioned above, most Chinese courts do not look too much into abstract legal issues. They only try to decide if plaintiffs’ claims are justified by law. Even the Sup. People’s Ct. interpretations mainly deal with concrete legal matters consulted by lower courts, and never refer to any fundamental principles of Chinese law. The above discussion has revealed that legal protection of posthumous reputation and privacy has been developed on a case-by-case basis, and on the whole, the justifications that Chinese judges delivered in court verdicts are acceptable in general and in accordance with the governing laws and public morality.

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435. Only in one case did the appellate court rule that the descendants should be more tolerant and allow artists more freedom in artistic creation and activities. The court also pointed out that the law has to balance the liberty of artists and the legal interests of descendants of the historical figures. *Huo Showjin v. China Film Group*, *supra* note 201.


437. See discussion *supra* Part II.C.
A persistent tradition to respect the dead, paired with a weak awareness of free speech among the Chinese people, leaves no real challenge to court decisions strongly protecting posthumous reputation and privacy at the expense of the free speech of the defendants. In most cases, judges are not obviously performing the role of censors on purpose. In a few recent cases, Chinese courts even explicitly expressed ideas similar to Western courts; that to verify what really happened in the past is not the court’s task and should be left to historians and critics.\textsuperscript{438} At the very least, there is no statute or case law that prescribes any form of censorship of history.

However, there are many things that could be interpreted to reflect that, yes, there is systematic censorship of history in China. If judges try to censor certain periods of history, they will not do it bluntly, but with certain justifiable legal grounds.\textsuperscript{439} When some arguments in court verdicts seem apparently unreasonable, or at odds with professional standards, the question arises as to whether there is the possibility of censorship under the guise of law. In the collected cases that involve the dead’s conduct during the Cultural Revolution and the Anti-rightist Movement, or cases regarding important political and military figures, judges act with great caution and sensitivity. They are likely to set higher standards for the authors who use truth and due care as defenses. This sort of behavior was showcased in the collected cases.

For instance, sensitive interviews and memoirs were denied as solid sources in biography writing.\textsuperscript{440} Second, a historian could be required to verify the controversial article with the dead’s relatives before publication.\textsuperscript{441} Third, certain sensitive archives of politically-sensitive periods were considered improper for autobiographical writing.\textsuperscript{442} Fourth, novel and fiction authors were asked not to use defamatory comments, which because China lacks a coherent standard, gives a huge amount

\textsuperscript{438} Huo Shoujin v. China Film Group, supra note 201.

\textsuperscript{439} For example, by questioning the validity of the resources used by historians (or authors) for their research. See Chen Lin v. Wu Dongfeng, supra note 211; Chen Mingliang v. Wu Shi, supra note 213; Long Yunsha v. Lu Jiandong, supra note 209.

\textsuperscript{440} For a more detailed discussion, see supra Part II.F.

\textsuperscript{441} Id.

\textsuperscript{442} Id.
of discretion to courts.\textsuperscript{443} Fifth, Chinese courts, upon judging defamation of political figures, are likely to defer to official history or official remarks.\textsuperscript{444} Last, in some cases, authors are required to verify their quotations from other authors.\textsuperscript{445} Though these practical measures can be justified by the purpose to protect the dead’s dignity and personality, as well as the living family’s interests, they nevertheless amount to strong restrictions on the free speech rights of historians and other authors, leading to a form of indirect censorship. It would seem that if authors are required to meet higher standards by law than the popularly-accepted professional standards in writing, there is possible censorship involved, albeit justified by law.

Notably, this kind of indirect censorship is still restricted by the formality of law, as a determination of defamation needs to be supported by solid evidence to demonstrate that the contested publications are really defamatory in accordance with law. When there is no governing statutory law, case law, especially Sup. People’s Ct. interpretations, must be followed. When there is no case law to be followed due to complicated circumstances, courts must deliver strong arguments to justify decisions. When decisions lack statutory authority and precedent in case law, such arguments will be under forthcoming scrutiny from the public, from historians, and from lawyers. As these detractors may argue, case law has made it such that Chinese courts can still invalidate evidence or use other legal tricks to achieve desired goals of censorship.\textsuperscript{446} But this kind of “censorship via law,” is traceable in court verdicts and transparent to the public, and it is these formalistic requirements of the rule of law that create a minimum level of accountability.\textsuperscript{447}

In sharp contrast, another indirect but more efficient form of censorship deserves our full attention. Though no explicit censorship exists in Chinese law, it can still provide a strong support for censorship in different ways. This type of censorship can

\textsuperscript{443} \textit{Id.}
\textsuperscript{444} \textit{See supra} Part IV.
\textsuperscript{445} \textit{See supra} Part II.G.
\textsuperscript{446} For instance, the courts can deny the sources used by historians or authors that would be accepted in other jurisdictions, such as archives and previous publications. \textit{See Chen Mingliang v. Wu Shi, supra} note 213; \textit{Long Yunsha v. Lu Jiandong, supra} note 209.
be conducted via government or party policies that are only
circulated among high-profile officials and party members. Or-
dinary Chinese have no access to these policies, and they can
be classified as state secrets that are protected by criminal
law. A telling example is what happened to the Chinese po-
litical dissident and prisoner Shi Tao. In 2004 he emailed an
internal “official note” via his personal Yahoo mailbox to an
overseas Chinese website. The document, a warning not to re-
port anything about a protest event, was issued by the Chinese
governing agency and was only supposed to be circulated among
high-level journalists and editors. After Shi Tao sent the of-
ficial note overseas, “a notice concerning the work for main-
taining stability” was published by an American pro-democracy
website, and Shi Tao was prosecuted for disclosure of state se-
crets and sentenced to imprisonment of ten years.

Furthermore, there are more direct party policies and gov-
ernment regulations issued by the Ministry of Propaganda and
State Administration of Radio, Film and Television (“SARFT”)
to censor sensitive topics that are not allowed to be discussed.
Such policies and regulations are indeed better implemented
and more effective than formal Chinese laws, and therefore
have a chilling effect on free speech. For example, in January
2007 the Central Propaganda Department of the Chinese
Communist Party issued new pre-censorship rules requiring the
media to have permission to cover significant historical events
or sensitive anniversaries involving figures regarded as politi-

448. See Jamie P. Horsley, China Adopts First Nationwide Open Government
Information Regulations, FREEDOMINFO (May 9, 2007)
http://www.freedominfo.org/2007/05/china-adopts-first-nationwide-open-gover-
nment-information-regulations/.

449. See State Secrets: China’s Legal Labyrinth, HUMAN RIGHTS IN CHINA,

450. For the Chinese and English versions of the verdict, see Shi Tao Wei
Jingwai Feifa Tigong Guojia Jimi An (师涛为境外非法提供国家机密案) [Shi Tao
Illegal Disclosure of State Secret to Foreign Institutes Case] (Changha Internm.
f.

451. NETWORK OF CONCERNED HISTORIANS, 2005 ANNUAL REPORT 11–12,
available at http://www.concernedhistorians.org/content_files/file/ar/05.pdf.
cally sensitive or controversial. This was closely followed by SARFT’s order banning reports on twenty issues, including judicial corruption and rights protection campaigns.452

Yet another recent way to achieve censorship by the state authority is to threaten publishers not to publish any works by authors on government black lists, and to punish publishers who defy these instructions from above for reasons other than censorship.453 Recently, the deputy director of China’s General Administration of Press and Publication reprimanded a publisher at a meeting, menacing openly: “How dare you publish a book by this author?” and “Do you know this is what we called banning authors, not books?”, although the official later denied such speech.454 Indeed, many publishers or newspapers that overstep or ignore government guidelines will encounter financial penalties and personnel reshuffle.455 Such forms of censorship are not traceable, because speeches at meetings and private telephone calls leave no tangible evidence. This is probably one of the reasons that we have not seen many defamation cases regarding biographical writings and historical books in recent years.

All in all, the rise of law in China is a development which may help curtail censorship. As indicated above, the formality of law,


453. It is a common practice for the Chinese authority to issue harsh laws tightly constraining individuals and companies, so that they have to act illegally to gain interests and benefits that are legal in other countries. The authority thus can implement law selectively against certain targets to achieve other purposes. For example, while most Chinese companies evade the heavy tax in one way or another, the central or local authority may pick up those who are deemed troublesome and prickly. This was seen when the famous Chinese artist Ai Weiwei was accused of tax evasion after he challenged the state authority in various ways. See China Says Artist Ai WeiWei Can Challenge $2.4m Tax Bill, BBC (May 8, 2012), http://www.bbc.co.uk/news/world-asia-17992674.

454. Ms. Zhang’s two books, which tell the story of China’s Anti-rightist Movement, are both banned in different ways.Martinsen, supra note 420.

455. A telling example is the recent reshuffle at the top of Nanfang Daily Group, China’s most outspoken media group. See David Bandurski, China’s Boldest Media: Losing the Battle?, CHINA MEDIA PROJECT (May 14, 2012), http://cmp.hku.hk/2012/08/14/25926.
including the formal procedural requirements and legal argumentation from all parties, presupposes a strong demand to justify any limitations on the free speech of authors and artists by means of the law.\textsuperscript{456} And those justifications will be, once put down on paper, checked and challenged constantly. For example, the high standards set up by Chinese courts for biographers using primary sources can be criticized and scrutinized by defendants, lawyers, history scholars, and the public. If Chinese courts give in and lower the standards, it will be a big step in cutting back censorship and protecting free speech.

\textbf{CONCLUSION}

On the whole, Chinese law offers protection of posthumous reputation and posthumous privacy. With no statutory law applicable in 1989, this body of law has been developed gradually by Chinese courts under the supervision of the Sup. People’s Ct. in various forms of legal interpretations. A striking feature of this body of law is that posthumous privacy is actually protected under the name of posthumous reputation. This can be attributed to the fact that as a Western-oriented legal concept, privacy is rather new to Chinese society and thus had been weakly protected under the rubric of defamation law for a long time before gaining independence in Chinese law in 2010.

The legal protection is rather strong for four reasons. First, the Chinese custom to respect the dead still remains a rather strong factor for judges to consider in adjudication, although it has gradually lessened in past decades. Second, under many circumstances, surviving family members have substantial interests in the reputation and privacy of the dead, due to shared social status and China’s hierarchical social structure. Third, the reputation of many dead political figures still plays an important role in China’s official history that justifies the legitimacy of the ruling regime. For this reason, the reputations of political figures have been closely monitored by the state authority. Finally, a fundamental reason for the strength of China’s defamation protection is China’s notoriously weak protection of a free speech right, despite it being recognized in the Chinese constitution. In most Western democracies, protection

\textsuperscript{456} For a discussion of the minimum requirement of legal morality of law as a formality requirement, see FULLER, supra note 447.
of free speech sets a strong limitation on protection of reputation and privacy of the living, not to mention those of the dead. Common law countries do not offer protection of reputation and privacy of the dead, and even in most continental countries, free speech is an important value to be weighed in conflicts that deal with reputation or privacy. In China, the strong protection of the dead’s reputation and privacy is practically possible with a very weak free speech right. This is most readily observed in politically-charged cases where posthumous reputation is regarded as an element of the official government history that justifies the ruling of the party state.

In contrast to this are some positive developments in relation to cases that lack famous individuals or a highly charged political issue. In these cases, as discussed above, Chinese judges, similar to their Western colleagues, have delivered solid arguments to support free speech rights of authors and film directors, and restrict the strong protection of posthumous reputation. However, in general, the strong protection remains a dominating feature of Chinese law, and the status quo will not be changed until the point of a fundamental political change to democracy.
OUT OF AFRICA: TOWARD REGIONAL SOLUTIONS FOR INTERNAL DISPLACEMENT

INTRODUCTION

A startling 830,000 people were internally displaced in 2011 as a consequence of the Arab Spring uprisings that transformed the political landscape of the Arab region. That number represents a six-fold increase in displacement from the previous year. The displaced population rose even more

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1. This Note adopts the definition of internally displaced persons (“IDPs”) used by both the United Nations (“U.N.”) and the African Union (“AU”). According to that definition, IDPs are “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.” UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT ¶ 2 (2d ed. 2004) [hereinafter GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT], available at https://docs.unocha.org/sites/dms/Documents/GuidingPrinciplesDispl.pdf. While it is not binding law, this instrument is recognized to “reflect and [be] consistent with international human rights law and international humanitarian law.” Id. ¶ 3.

2. The term “Arab Spring” is widely used to refer to the popular uprisings that spread through the Middle East and North Africa beginning in February 2011 with the revolution in Tunisia. See Adrien K. Wing, The “Arab Fall”: The Future of Women’s Rights, 18 U.C. DAVIS J. INT’L L. & POL’Y 445 (2012). The uprisings have been described as “regional grassroots movements seeking democracy and greater respect for human rights.” Id. at 446; see also Fouad Ajami, The Arab Spring at One: A Year of Living Dangerously, 91 FOREIGN AFF. 56, 56 (2012) (discussing the Arab Spring more generally).


4. This Note uses the definition of displacement generally utilized in related literature, which defines one who is “displaced” as one who has been involuntarily or forcibly moved from one’s area of habitual residence. See, e.g., Maria Stavropoulou, The Right Not to Be Displaced, 9 AM. U.J. INT’L L. & POL’Y 689, 690 (1993–94).

sharply amid ongoing regional conflict during 2012, with 2.5 million people newly displaced throughout the Middle East and North Africa. By early 2013, the International Rescue Committee reported that the situation in the Middle East had become “a human displacement tragedy,” with the Syrian Arab Republic (“Syria”) experiencing the most extreme and ongoing displacement crisis.

Indeed, the number of internally displaced persons (“IDPs”) within Syria has grown dramatically since March 2011, when civil unrest in the country began. During the course of 2012, as the conflict escalated into a recognized civil war, displacement in Syria rose over twelve times—from an estimated 200,000 displaced at the beginning of the year to a reported 2.5 million displaced by the year’s end. By July 2013, more than 4.25

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million Syrians, or roughly 20% of the population, were displaced within the country. Multiple United Nations agencies were then reporting on the urgent humanitarian needs of Syria’s IDPs, and the crisis was dubbed the world’s worst humanitarian emergency.

Toward the end of 2013, the Internal Displacement Monitoring Centre was reporting an internal displacement figure upwards of 6 million Syrians, a staggering figure amounting to more than a quarter of the Syrian population. With no apparent end to the conflict in sight at the time of writing, displacement was expected to continue to increase and the situation for those already displaced was expected to worsen.

12. The reported population of Syria was 21.9 million at the time of writing. Internally Displaced Persons in Syria, supra note 6.
13. 2013 UNHCR Country Operations Profile—Syrian Arab Republic, UNHCR, http://www.unhcr.org/pages/49e486a76.html (last visited Nov. 13, 2013) [hereinafter UNHCR Country Operations Profile—Syria]; see also Mark Tran, Millions of Syrians in Need of Food as War Devastates Food Production, Guardian (July 5, 2013), http://www.guardian.co.uk/world/2013/jul/05/syrian-food-aid-war. Although this was the latest estimate at the time of writing, it is acknowledged that “accurate figures on internal displacement are increasingly difficult to ascertain due to government imposed restrictions preventing international agencies from reaching displaced populations” in Syria. Internally Displaced Persons in Syria, supra note 6.
14. In addition to the World Food Programme (“WFP”) and Food and Agriculture Organization of the U.N. (“FAO”) (discussed infra note 16), the World Health Organization reported that Syrian authorities had “increasingly blocked delivery of medicine and medical supplies around the country . . . even as health needs [were] escalating for people trapped in two years of conflict.” Hania Mourtada & Nick Cumming-Bruce, State of Siege in Syrian City Is Blocking Humanitarian Aid, Health Officials Say, New York Times (July 5, 2013), http://www.nytimes.com/2013/07/06/world/middleeast/syria.html.
15. Tran, supra note 13.
19. Erin Banco, U.N. Reports Increased Number of Displaced People, N.Y. Times (June 18, 2013), http://www.nytimes.com/2013/06/19/world/middleeast/un-reports-increased-
The Syrian authorities’ response to the displacement crisis within the country’s borders has been wholly inadequate throughout the two and a half years of conflict. Despite ongoing international recognition of the severity of the displacement crisis, for the first year of the conflict the Syrian government “refused to acknowledge that the country faced a humanitarian

number-of-displaced-people.html. See also Conflicts Worldwide Uproot Millions, supra note 3.

20. In June 2013, U.N. FAO/WFP reported that “if the present conflict continues the food security prospects for 2014 could be worse than they are now.” FAO/WFP Crop and Food Security Assessment Mission to the Syrian Arab Republic, FOOD & AGRIC. ORG./WORLD FOOD PROGRAMME 8 (July 5, 2013), available at http://reliefweb.int/report/syrian-arab-republic/faowfp-crop-and-food-security-assessment-mission-syrian-arab-republic. It was also reported that by the end of 2013, the disaster could likely leave half the country’s population in need of urgent aid. Tran, supra note 13.


Throughout the unrest, the Syrian government has consistently failed to fully cooperate with aid-giving organizations and other international actors, stymying these organizations’ efforts to provide relief to Syria’s IDPs. In the absence of a U.N. Security Council (“Security Council”) decision to intervene, the international community’s ability to...
help displaced Syrians has been limited to humanitarian assistance.\textsuperscript{26} Indeed, attempts by international organizations and U.N. agencies to render humanitarian assistance adequate to meet the needs of displaced populations have continued to hinge crucially on the cooperation of Syrian authorities.\textsuperscript{27} The Office of the U.N. High Commissioner for Refugees ("UNHCR"), for instance, was able to provide only limited assistance to IDPs in Syria during 2012 and 2013, with access to crucial areas of the country restricted by the Syrian government.\textsuperscript{28} Outside states have also been reluctant to intervene.\textsuperscript{29} Due to all of

\textsuperscript{26} Pursuant to the U.N. Charter ("Charter"), only the Security Council is authorized to use force or seek political solutions. Article 42 of the Charter authorizes the Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." U.N. Charter art. 42. As of early November 2013, the Security Council had not voted to make such an intervention.


\textsuperscript{28} UNHCR Country Operations Profile—Syria, supra note 13. This aid is provided "within the framework of the UN Syria Humanitarian Response Plan and in collaboration with the Syrian Arab Red Crescent." Id. In April 2013, UNHCR reported having reached a "breaking point" due to lack of funds to provide assistance to the millions fleeing their homes in Syria. Syrian Refugee Crisis Worsens with Aid Efforts Grossly Underfunded, UN Warns, UN News Ctr. (Apr. 9, 2013), http://www.un.org/apps/news/story.asp?NewsID=44602&Cr=syria&Crl.

\textsuperscript{29} "The growing influence of radical Islamist fighters and divisions among rebel forces have made Western powers reluctant to intervene directly in a conflict that has killed more than 100,000 people and driven millions from
these complexities, the protection and assistance needs of Syrian IDPs have remained unmet.30

The state’s inability or unwillingness to protect its displaced, and the inability or unwillingness of the international community to sufficiently assist,31 is not unique to Syria among instances of armed conflict.32 The dire displacement situation in Syria therefore presents an opportunity to consider the development of international legal protections that could more effectively assist those displaced due to internal armed conflict. Recent activity of the African Union ("AU"), the leading regional organization on the African continent, offers an innovative example of one such solution: framing the protection of and assistance to IDPs as a regional responsibility.

On December 6, 2012, the African Union Convention for the Protection and Assistance of Internally Displaced Persons (the "Kampala Convention" or the "Convention") 33 entered into force.34 Upon ratification, the Kampala Convention became the
world’s first legally-binding instrument\(^{35}\) to define the responsibilities of states toward IDPs.\(^{36}\) The Convention establishes active involvement on the part of the AU and reflects a general conception of internal displacement as a regional problem requiring the cooperation of myriad regional actors. The Convention in this way envisions a solution to the common situation of a state’s inability or unwillingness to independently meet the needs of its IDPs that calls on the involvement of neighboring states parties, local civil society organizations, and the AU itself.\(^{37}\) The AU has been widely hailed for this development.\(^{38}\)

This Note argues that the Kampala Convention could serve as a template for the League of Arab States (the “Arab League” or the “League”)\(^{39}\) to adopt a regional solution to internal dis-

\(^{35}\) In 2008, the General Assembly of the Organization of American States passed a resolution encouraging states to enhance protection efforts for IDPs. While this is a development deserving of accolades, it is important to note in this context that the language of the resolution is normative. The Assembly “urged member states to consider using the Guiding Principles on Internal Displacement, prepared by the Special Representative of the United Nations Secretary-General on Internally Displaced Persons, as a basis for their plans, policies, and programs in support of such persons.” Organization of American States [OAS], G.A. Res. 2417, OAS Doc. AG/RES. 2417 (XXXVIII-O/08) (June 3, 2008). 

\(^{36}\) *Africa Takes the Lead*, supra note 34.

\(^{37}\) Kampala Convention, supra note 33, art. 8.


\(^{39}\) The Arab League has been chosen for this example as it is considered the most prominent regional organization in the Arab region. See Marco Pinfari, *Nothing but Failure?: The Arab League and the Gulf Cooperation Council as Mediators in Middle Eastern Conflicts*, (Crisis States Research Ctr.,
placement for instances in which reliance on national resources or international intervention leaves IDPs insufficiently protected or provided for, as is currently the situation in Syria.\textsuperscript{40} It is argued that the Arab League should employ a similar approach to that taken by the AU and create a convention that frames internal displacement as a regional problem with a regional solution. Such an approach may prevent future large-scale displacement crises and, absent prevention, better protect and assist those who do become displaced.

Part I of this Note provides background on the current legal framework applicable to IDPs and examines the implications of a regional solution to the problem of internal displacement. Part II explores the regional conditions, provisions, and limitations of the Kampala Convention. Part III considers transferring the AU’s approach to the Arab region through implement-

\textsuperscript{40} Syria is one of twenty-two Arab League member states and has since November 2011 been temporarily suspended from the League:

Syria has been suspended from the Arab League over its failure to end the bloodshed caused by brutal government crackdowns on pro-democracy protests in a move that will increase the international pressure on President Bashar al-Assad. At an emergency session of its 22 member states in Cairo to discuss the crisis, the league decided to exclude Syria until it implements the terms of an earlier agreed peace deal to stop the violence. The league also agreed to impose economic and political sanctions on Syria over its failure to stop the violence.

The decision was made with the support of eighteen of the twenty-one other Arab League member states. David Batty & Jack Shenker, \textit{Syria Suspended from Arab League}, \textsc{Guardian} (Nov. 12, 2011), http://www.theguardian.com/world/2011/nov/12/syria-suspended-arab-league. However, it is understood that the action taken against Syria “does not amount to a full suspension of membership from the regional body.” \textit{Arab League Decides to Suspend Syria}, \textsc{Al Jazeera} (Nov. 13, 2011), http://www.aljazeera.com/news/middleeast/2011/11/201111121342948333.html. Indeed, the Arab League has continued to take an active role in trying to negotiate an end to the conflict. “Arab League foreign ministers gathered in Cairo on Sunday to push the Syrian opposition to attend the proposed Geneva II peace conference.” \textit{Report: Arab League to Press Syria Opposition Over Peace Talks}, \textsc{ReliefWeb} (Nov. 3, 2013), http://reliefweb.int/report/syrian-arab-republic/arab-league-press-syria-opposition-over-peace-talks; \textit{see, e.g.,} Bayoumy, \textit{supra} note 29.
tation of a similar convention by the Arab League. The Note concludes with the suggestion that a convention that addresses internal displacement in the Arab region by framing it as a regional issue, deserving of a regional solution, would well serve the Arab League as a viable alternative to the current options for providing protection and assistance to the region’s IDPs.

I. BACKGROUND

A. The Legal Framework for Protection of IDPs

The absence of an international legal framework applicable to IDPs reveals the unique and relatively invisible position in which internally displaced persons exist. Although IDPs and refugees often face similar factual conditions and require similar kinds of assistance, the two groups are classified separately under international law, legally distinct by virtue of their differing relationships with their states of nationality or habitual residence.41

The transboundary nature of the situation of refugees imposes a responsibility on the international community to meet refugees’ needs.42 A refugee is a person who is, inter alia, displaced “outside the country of his nationality.”43 The act of crossing the border takes that person out of the sovereignty of his home state and implicates international law.44 In contrast, IDPs are, by definition, displaced within the borders of their home state.45 As such, under traditional notions of sovereignty,

43. The U.N. defines a refugee as:

any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

44. See generally Barbour & Gorlick, supra note 42.
45. See GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT, supra note 1.
the home state retains primary responsibility for IDPs needs. Very often, however, conditions within the home state have caused the displacement, so the home state is unable or unwilling to meet those needs. Nonetheless, because IDPs remain within their state, they do not become the concern of international law as do refugees.

While this legal difference does not prohibit international humanitarian organizations from assisting IDPs, it does limit the extent to which these organizations can help. The dearth of protection afforded IDPs led former U.N. Secretary-General Kofi Annan to call internal displacement “the great tragedy of our times,” and IDPs “among the most vulnerable of the human family.”

In the early 1990s, as internal displacement became more widespread, the U.N. authorized the U.N. Special Representative of the Secretary-General on IDPs to establish an “appropriate normative framework” that would state the current norms and rights of IDPs and obligations of states toward them. This framework became the Guiding Principles on Internal Displacement (“Guiding Principles”) and articulated for

47. Kidane, supra note 41, at 45.
49. For example, UNHCR was mandated by the U.N. General Assembly in 1950 to provide protection and assistance to refugees when host governments cannot sufficiently do so. Internally displaced persons were not included in the mandate. Refugee Convention, supra note 43. Since 1972, UNHCR has been extended authority by the General Assembly to assist IDPs on an ad hoc basis when the country requires assistance. Roberta Cohen, Humanitarian Imperatives Are Transforming Sovereignty, 16 ILSA Q. 14, 15 (2008) [hereinafter Cohen, Humanitarian Imperatives]. This practical implication of the distinct legal status for IDPs is rooted in “deference to traditional notions of sovereignty.” Id.
50. Jan Egeland, foreword to GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT, supra note 1.
the first time rights of states toward IDPs. The Guiding Principles are recognized as a significant step in the evolution of a doctrine of international protection for IDPs and they remain the most important articulation of this protection on an international scale. In 2005, the U.N. World Summit Outcome document endorsed the Guiding Principles and expressed “resolve to take effective measures to increase the protection of internally displaced persons.” However, neither the World Summit Outcome document nor the Guiding Principles are binding on member states.

As such, while refugees have been accorded international protection for over sixty years, IDPs continue to occupy a lacuna of legal protection. No similar binding international framework articulating standards for the protection and assistance of IDPs yet exists despite the increased visibility of the plight of IDPs during the past decade. Indeed, amid this ongoing chasm of legal protection, the last decade has seen more people displaced than ever before. The world now has almost twice as many IDPs as refugees. For example, by summer 2013, the number of displaced persons within Syria was rough-

52. Id.
53. Id.
55. 2005 World Summit Outcome, supra note 54, ¶ 132. This wording was confirmed in a General Assembly resolution. G.A. Res. 60/1, ¶ 8, U.N. Doc. A/RES/60/168 (Mar. 7, 2006). See also Cohen, Humanitarian Imperatives, supra note 49, at 18 (referring to the World Summit Outcome, supra note 54).
56. Like all U.N. General Assembly resolutions, the World Summit Outcome is not a legally binding document, but “is more appropriately considered a political commitment.” Saira Mohamed, Taking Stock of the Responsibility to Protect, 48 STAN. J. INT’L L. 319, 328–29 & n.57 (2012); Giustiniani, supra note 46, at 349.
57. Since 1951, the U.N. has recognized refugees as a special legal category possessing certain rights and owed certain obligations by the international community. Refugee Convention, supra note 43.
58. Barbour & Gorlick, supra note 42, at 555.
60. Schmidt, supra note 27, at 485.
ly four times the number of Syrians who fled the country as refugees. The growth in the number of IDPs emphasizes that the consideration of where the legal responsibility for this population falls requires serious attention and should be prioritized.

B. The Role of Regional Organizations

One forum suited to address legal responsibility for IDPs is regional organizations. Regional organizations have long served an important role in the international community. The U.N. Charter (the “Charter”) encourages an active role for regional organizations, contemplating a relationship of support and coexistence between regional organizations and the international U.N. system. The Charter does not define regional organizations, but the term as used is generally interpreted broadly to “focus appropriately on function rather than form.” One scholar has made this term more tangible, offering an interpretation of the regional arrangements contemplated by the Charter as “less-than-global, state-based entities or associations that need not be treaty-based and that may include geographically, politically, or economically oriented organizations.”

61. While at least two million Syrians were estimated to be internally displaced by January 2013, 600,000 Syrians had fled Syria into neighboring countries by the same date. Anne Barnard, Dozens of Civilians Are Said to Be Killed by Syrian Airstrikes, N.Y. TIMES (Jan. 14, 2013), http://www.nytimes.com/2013/01/15/world/middleeast/syria-launches-deadly-airstrikes-in-damascus-suburbs.html.


63. Article 52 of the U.N. Charter encourages “the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.” U.N. Charter art. 52.


65. Id.
tions accorded a prominent place to regional arrangements in their vision of the new world body. He emphasized that this original conception of regional organizations envisioned in the Charter has been realized, with these organizations playing an increasingly significant role in the world order.

In addition to highlighting the importance of regional organizations generally, in recent years the U.N. has specifically recognized regional organizations as well-positioned to provide an alternative to action by the Security Council or U.N. General Assembly. The Secretary-General also emphasized specifically that the Charter “underline[s] the value of ongoing working relationships among global, regional and sub-regional organizations for prevention and protection purposes.” Indeed, in the early twenty-first century, the U.N. has explicitly noted the crucial role regional organizations play in the maintenance of international peace and security. With numerous controversial examples of instances in which the Security Council did or did not resolve to intervene “in time” to adequately protect a population, an approach that would not require the same political and diplomatic considerations as those faced by the Security Council is attractive. A regional approach could thus

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67. Id. ¶ 2.
68. Id. ¶ 2.
69. Id. ¶ 5.
70. As one example, member states at the 2005 World Outcome Summit “[r]ecogniz[ed] the important contribution to peace and security by regional organizations.” 2005 World Summit Outcome, supra note 54, ¶ 93. The Secretary-General has since emphasized this recognition given in the World Summit Outcome. Secretary-General’s Report on R2P, supra note 62, ¶ 3.
72. This aligns with the statement of member states in the 2005 World Summit Outcome document:

The international community, through the United Nations, also has the responsibility to... help protect populations from genocide, war
serve as an alternative to reliance on the Security Council to act to maintain or restore international peace and security. The high-level recognition of this both suggests and contributes to the increasingly visible, active position that regional organizations are seen to play in preventing conflict and protecting populations in the contemporary world.73

This is in line with a regionalist approach. Scholars advocating for regionalism, who take the view that regions are “significant in their own right, and not merely derivative of state power or global processes,”74 have presented and defended the position that regional institutions are singularly positioned to bring about certain change that no other institution or actor could.75 These scholars suggest that regional institutions can be important and powerful forces for social and political change due to the unique character of regions as both local and international.76

An illustrative example of regional organizations’ capacity to spearhead solutions to contemporary problems is provided by the leadership role that regional organizations are taking in creating disaster response policy and addressing issues arising from crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

2005 World Summit Outcome, supra note 54, ¶139.

73. Cilja Harders & Matteo Legrenzi, Introduction to Beyond Regionalism: Regional Cooperation, Regionalism and Regionalization in the Middle East 1 (Cilja Harders & Matteo Legrenzi eds., 2008).
74. Id.
75. Id.
76. Id.
from migration due to climate change. Natural disasters and climate change are two conspicuous examples that highlight the fact that states in a particular region are often faced concurrently with “similar environmental phenomena and hazards.” Regional organizations therefore may be best positioned to lead discussions on appropriate, vernacular solutions tailored to these vernacular problems, which will best serve the region, its states, and its populations. For the same reasons, a regional organization would be well situated to address internal displacement, whether due to change in the political or natural climate. As is poignantly demonstrated by the widespread displacement caused by conflict arising out of the Arab Spring uprisings, the same factors may be the force for change in many states throughout a region, making a regional organi-

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One particular area where regional organizations seem to be playing a leading role is in the relationship between migration and climate change. Regional processes to deal with labor migration have been increasing in importance over the past decade or so . . . [Likewise, w]ith growing recognition of the potential effects of climate change, regional organizations are becoming aware that they have particular roles to play in policy discussions. Regions are more likely to face similar environmental phenomena and hazards and if (or when) people are forced to leave their countries because of the effects of climate change, they are likely to turn first to nearby countries.

Elizabeth Ferris & Daniel Petz, In the Neighborhood: The Growing Role of Regional Organizations in Disaster Risk Management, BROOKINGS INST. (Feb. 2013), http://www.brookings.edu/research/reports/2013/02/regional-organizations-disaster-risk-ferris, at 3. Authors Ferris and Petz conclude their study by arguing that their research has shown that in almost all regions of the world, regional organizations are playing increasingly active roles in disaster risk management. While each region has unique characteristics that shape the nature and activities of its regional bodies, it seems as if they all (or almost all) see value in working together to prevent disasters and to a lesser extent to respond to disasters occurring in the region.

Id. at 25.

78. Id. at 3.

zation a fitting venue for crafting well-tailored solutions. While these conflicts may be contained within a state, they affect the region as a whole.80

Regional approaches to regional phenomena also bring important indirect benefits. One theory holds that “functional regional cooperation on specific issues can contribute to peace and security, . . . [as] cooperation between countries on specific practical issues can lead to cooperation on broader issues, leading to decreasing likelihood of conflict between the countries and eventually to the development of regional identities.”81 This would seem an especially valuable consequence for regional organizations plagued by disharmony.82 Harnessing such cooperation will be of increasing import in the contemporary era in which the value of regional institutions is garnering much attention.83

It may be possible to counter the advocacy of a regional approach to internal displacement with the Responsibility to Protect or “R2P” doctrine.84 While there was much discussion in the early twenty-first century of an emerging customary norm recognizing the international community’s “responsibility to protect” the citizens of a state when the state has failed to do so, the doctrine has not been utilized consistently or successfully.85 It remains an issue of debate whether an international responsibility to step in would be beneficial to the international community,86 but it is clear that a reliable R2P framework has

80. In early October, the Security Council “voiced ‘deep concern’ at the consequences of the refugee crisis caused by the conflict, ‘which has a destabilizing impact on the entire region.’” U.N. Security Council Urges All Sides, supra note 22.

81. This is called a functionalist approach. See, e.g., Ferris & Petz, supra note 77, at 2; see also Louise Fawcett, Exploring Regional Domains: A Comparative History of Regionalism, 80 INT’L AFF. 429, 431 (2004).

82. See infra Parts III.A and III.B.2 for more on the Arab League’s reputation for weak leadership amid intra-regional noncooperation.


84. For background on R2P, see generally, Barbour & Gorlick, supra note 42.


86. Scholars have argued that “a well-defined, coordinated response where states and the international community of actors including the U.N., regional and sub-regional actors and civil society take responsibility according to an
yet to crystallize. The applicability of the doctrine to situations of internal displacement also remains unclear. The R2P doctrine thus requires further elucidation and clarification of existing misconceptions about its use before it is considered as a viable option to assist IDPs.

With no indication that the R2P doctrine will solidify in the near future, an additional benefit of a regional approach to IDP protection may be to punt the thorny question of whether and to what degree a responsibility on the part of the international community as a whole to care for a sovereign state’s nationals exists. A regional response provides an alternative; with responsibility for IDPs rendered an intraregional duty, the controversial and nebulous R2P issue may be sidestepped altogether.

II. THE AU’S APPROACH TO INTERNAL DISPLACEMENT: AN EMPHASIS ON REGIONAL COOPERATION

A. The Kampala Convention: Context, Characterizing Conditions, and Limitations

An examination of the background, objectives, and key provisions of the Convention sheds light on the conditions that gave rise to an atmosphere ripe for its creation and illustrates what aspects of this approach could be utilized for successful transfer beyond the AU.

1. The Context: Africa and the African Union

As the Kampala Convention necessarily reflects values of the AU, exploring the context of the AU’s history and character is

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89. Barbour & Gorlick, supra note 42, at 555.
90. See Nanda, supra note 71. The effectiveness of an R2P framework is also hindered by logistics, with no “international enforcement machinery” in place to offer protection or assistance to IDPs. Cohen, *International Response*, supra note 31, at 8.
91. Barbour & Gorlick, supra note 42.
an essential starting place to further an understanding of the foundations for this instrument. The AU was established in 2001 as the successor to the Organization of African Unity (“OAU”), amid recognition by OAU member states of a need for a regional organization better suited to serve the goals of a developing, post-colonial continent. With the signing of the Constitutive Act, the AU became Africa’s premier intergovernmental organization, with fifty-four state parties as of November 2013.

The moment in which the AU was established shaped its objectives as reflected in the structure and substance of the Constitutive Act, which in turn informed the Kampala Convention. The AU was conceived of in the immediate post-Cold War years, during which time regional organizations shifted with the changing global order in the aftermath of several significant regional crises.

Regional organizations formed during the Cold War were predominantly established to protect the member states from “external threats,” with the principal of sovereignty reigning supreme. Regional organizations established during the mid- and late-twentieth century accordingly prioritized “collective defense” over all other considerations. After the Cold War, however, this focus changed dramatically amid new recognition of intraregional threats and a related emphasis on the re-


94. Morocco is the only African nation that is not an active member of the AU. *AU in a Nutshell*, AFR. UNION, http://www.au.int/en/about/nutshell (last visited Nov. 14, 2013).


97. *Id. at 241–42.*

98. *Id. at 250.*
sponsibility of sovereign states toward each other. While the principle of nonintervention by a member state in the internal affairs of another had been a central tenet on which regional organizations had formerly been based, following the Cold War “regional and global security perspectives” radically shifted toward a focus on preserving and fostering the relationships between the states in a region.

The AU was created during this shift, and the Constitutive Act indeed reflects an emphasis on strengthening intraregional responsibility. Whereas the OAU was primarily concerned with securing independent identities for the former colonies, the Constitutive Act evidences an attempt on the part of the AU to limit sovereignty “by defining sovereignty in terms of a state’s willingness and capacity to provide protection to its nationals.” Reconceptualizing the role of the regional organization in this way allowed the AU to address and seek to “improve the normative framework for protecting and assisting displaced persons . . . [and] strengthen [the] institutions involved.”

Indeed, particular provisions of the Constitutive Act reveal the notion that regional solutions to internal problems were deemed well within the AU’s scope of concern. Most significantly, Article 4(h) codifies “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.” Questions surround the scope and definition of this intervention power, as neither the Constitu-

100. Brown, *supra* note 95, at 237.
101. Id. at 251.
102. “Regional organizations now no longer needed for collective defense have begun to assert a new role in collective security by stopping civil wars and helping (or making) combatants achieve peace,” thus “the role of regional organizations in preventing or stopping internal conflicts has expanded.” Id. at 236–37.
106. Some scholars have argued that the AU’s “right” of intervention is more properly interpreted to be a duty:
tive Act nor subsequent treaties or documents define the substance of the right or the procedure to follow when invoking it. \textsuperscript{107} Further, there has not yet been an occasion for the judicial organ of the AU to interpret the scope of the intervention power. \textsuperscript{108}

At the time of writing, the AU had not exercised its Article 4(h) power to intervene in a member state without that state’s

[A] “right” implies that the AU does not have to intervene when circumstances that pertain to crimes against humanity, war crimes, and genocide occur. A legal duty, on the other hand, may create legal consequences for the AU if it fails to execute its obligation to intervene as compared to a discretionary “right to intervene.”

Ntombizozuko, supra note 103, at 12–13 (citing Nsongurua Udombana, \textit{When Neutrality Is a Sin: The Darfur Crisis and the Crisis of a Humanitarian Intervention in Sudan}, 27 \textit{Hum. RTS. Q.} 1149, 1157 n.42 (2005)).

\textsuperscript{107} Ntombizozuko provided an overview of the issues related to interpreting the intervention power:

It is unclear whether the AU Assembly may first conduct an investigation before determining if an intervention is necessary, or whether it needs to first decide to intervene before finding out if indeed international crimes were committed in a member state. Article 4(h) requires that there must be a commission of an international crime to necessitate an intervention . . . There is no institution operational yet to interpret Article 4(h) of the Constitutive Act or the AU Assembly’s decision to intervene or not to intervene. The African Court of Justice [the AU institution with subject matter jurisdiction over the interpretation and application of the Constitutive Act; any question of international law; all acts, decisions, regulations, and directives of AU organs; and circumstances that would constitute a breach of an obligation owed to a state party or the AU] is not yet operational . . . [but] will be helpful in interpreting Article 4(h) to ascertain the meaning of intervention . . . The Constitutive Act provides that if the organ responsible for its interpretation is not operational, the AU Assembly can assume such function as long as the decision reaches a two-thirds majority. This may be problematic, especially when it comes to deciding on the meaning of the right to intervene, as the AU Assembly may be embroiled in disagreements . . . There has not been an instance where the meaning of the AU’s right to intervention has been questioned in practical terms. One hopes that when that time comes the African Court of Justice will be fully operational.

Ntombizozuko, \textit{supra} note 103, at 14–17.

\textsuperscript{108} The African Court of Justice would have jurisdiction over this question of jurisdiction, but is not yet fully operational. \textit{See id.} at 15–17.
consent. Scholars posit that this is due to logistical and ideological hindrances; logistical, as the AU Assembly normally meets only twice a year and assembly decisions require at least a two-thirds majority vote of all members, and ideological, “given the continent’s traditional reluctance to endorse interventionism.” As such, the use of the Article 4(h) authority would be both “time-consuming and fraught with political obstacles.” By this understanding, intervention pursuant to Article 4(h) “may not happen at all or may happen too late.”

Other scholars have suggested that the provision’s lack of use indicates that the AU remains uncomfortable with circumventing state sovereignty, and that it remains unclear whether the “AU Assembly has, in fact, changed its stance of non-intervention in internal armed conflicts.” However, the existence of this provision suggests that the drafters at least desired intraregional responsibility to coexist with sovereignty, to allow for the possibility of intervention when deemed necessary.

2. Key Provisions of the Kampala Convention

From early in the organization’s existence, there was commitment on the part of the AU to work to relieve the situation of Africa’s displaced. The Kampala Convention accordingly reflects the AU’s foundational principles. The Convention fundamentally “reaffirm[s] the principle of the respect for sovereignty.”

109. Id. at 43–44. However the AU has exercised its right to intervene through the consent of the member state involved (pursuant to Article 4(j)) on at least three occasions: “in Burundi to build peace, intervened in Darfur to enable the establishment of a more robust U.N. peace operation and to monitor the humanitarian crisis effectively, and intervened in Somalia to coordinate efforts to advance the cause of peace.” Id. at 33.

110. Constitutive Act, supra note 105, art. 7(1).

111. Bellamy, supra note 54, at 78–79, quoted in Ntombizozuko, supra note 103, at 44.

112. Bellamy, supra note 54, at 78–79, quoted in Ntombizozuko, supra note 103, at 44.

113. Ntombizozuko, supra note 103, at 44.

114. Id.

115. For more on the discussion of whether the authority to intervene is more properly considered a right or a duty, see supra note 106.

116. Solomon, supra note 38.

eign equality” among member states, and makes clear that nothing within it is intended to supersede the notion that states retain primary responsibility for the persons within their borders. However, the Convention’s substance and structure also suggest that the AU recognized the benefits for regional accountability that exists prominently alongside this emphasis on sovereign equality. As indicated by the first objective “to promote and strengthen regional and national measures” for preventing displacement and assisting and protecting IDPs, the AU sought to introduce this notion on regional cooperation as a buttress to national action.

The Convention strikes this balance by framing states parties’ substantive obligations not as individual duties the state owes only to its IDPs, but as responsibilities that states owe as part of a network of regional actors. For instance, states parties are obligated to extend adequate humanitarian assistance where appropriate to communities in need, and when unable to provide sufficient support to their own IDPs, states parties are obligated to request assistance from relevant regional actors. They are required to cooperate with those actors who subsequently render assistance. In this they must “allow rapid and unimpeded passage of all relief consignments, equipment and personnel” to the internally displaced; sovereignty is given no place in that arrangement. States parties are further required to provide resources to assist and protect other states’ IDPs when assistance is requested by that other state or by the Conference of States Parties, as well as to protect IDPs regardless of the cause of displacement. Upon ratifica-

118. Kampala Convention, supra note 33, pmbl.
119. Id. art. 5(1), (12), art. 7(2).
120. Id. art. 2(a).
121. See Giustiniani, supra note 46.
122. For instance, states parties must “ensure assistance to internally displaced persons by meeting their basic needs as well as allowing and facilitating rapid and unimpeded access by humanitarian organizers and personnel.” Kampala Convention, supra note 33, art. 3(1)(j).
123. Id. art. 9(2)(b).
124. Id. art. 5(6).
125. Id. art. 5(6).
126. Id. art. 5(7).
127. Id. arts. 6(1), (2).
128. Kampala Convention, supra note 33, art. 9(1)(a). One can imagine a regional twist to this obligation; for instance, it would require a state to ren-
tion, states parties are required to implement the obligations into domestic laws and policies, including incorporating the Convention’s substantive obligations into relevant legislation as well as creating “an authority or body” that will be “responsible for . . . cooperating with relevant international organizations or agencies, and civil society organizations, where no such authority or body exists.”

The Convention also codifies the obligations of a wide range of other regional actors. One objective of the Convention is to “provide for the respective obligations, responsibilities, and roles of armed groups, non-state actors and other relevant actors, including civil society organizations, with respect to the prevention of internal displacement and the protection of, and assistance to, internally displaced persons.”

Additionally, the Kampala Convention specifically articulates the role and obligations of the AU vis-à-vis internal displacement in Africa. First, the Convention incorporates the Constitutive Act’s intervention power, and gives the AU a right to intervene either upon request of two-thirds of the AU Assembly in situations deemed “grave circumstances,” or upon unilateral request by a state party “to restore peace and security.” The AU is also obligated to provide necessary support to states parties in the prevention of displacement and in the protection of IDPs in the form of coordinating the mobilization of resources and collaborating with international organizations, states parties, civil society organizations (“CSOs”), and humanitarian organizations.

[der protection to IDPs uprooted in its territory due to conflict in a neighboring state.]

129. Id. art. 3(2).
130. Id. art. 3(2)(a).
131. Id. art. 3(2)(b).
132. Id. art. 2(1)(e). For instance, Article 6 establishes the obligations of international organizations and humanitarian agencies are established; Article 7 addresses members of armed groups (who “shall be held criminally responsible for their acts which violate the rights of IDPs under international law and national law”); Article 10 addresses the duties of private stakeholders causing displacement through development projects. See id. arts. 6, 7, 10.
133. Id. art. 8.
134. Id. art. 8(1). Grave circumstances are therein defined as war crimes, genocide, and crimes against humanity. Id.
135. Id. art. 8(2).
136. Kampala Convention, supra note 33, art. 8(3).
Through all of these provisions, the Convention communicates the AU’s position that meeting the needs of IDPs involves a web of cooperating regional actors. The Convention articulates duties that recognize a multi-layered support system of states, non-state actors, and the AU by which this understanding is made manifest. In light of the increased reliance on and noted benefits of regional organizations, the AU has taken a logical and forward-looking approach to a problem that remained unsolvable when traditionally considered to be a purely national responsibility.

3. Limitations of the Convention

However groundbreaking the Convention may be, the inevitable limitations of the Convention illustrate the downsides of a regionally cooperative approach to the protection and assistance of IDPs. Noteworthy potential limitations are the hesitancy of states to ratify, the questionable strength of the Convention’s enforcement mechanism, and the effectiveness of the AU’s intervention power.

The majority of signatories to the Convention had yet to ratify the document at the time of publication, and over two-thirds of AU member states had neither signed nor ratified. Political unpopularity at the state level and the large financial commitments that accompany ratification are understood to be primary reasons for states’ reluctance to sign or ratify the Convention. The political climate in many states is such that displacement is not prioritized on the national agenda. In other cases, the Convention has been seen as politically unpopular due to the positive obligations it places upon ratifying states. Specifically, the obligation to bring national laws into compliance (which could be expensive or represent a major

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137. For more on the drafting process of the Kampala Convention, see Giustiniani, supra note 46.
138. Ferris & Petz, supra note 77.
139. Twenty of the thirty-five AU member states that had signed the Convention had not ratified it as of January 2013. Kampala Convention, IDMC, supra note 34.
140. See Giustiniani, supra note 46.
141. Taylor, Lopas & Soloman, supra note 38, at 48.
142. Id.
change in policy),\textsuperscript{143} the obligation to prevent displacement from private development projects,\textsuperscript{144} and the obligation to provide reparations upon displacement\textsuperscript{145} all serve as obstacles to ratification.

A second limitation is the concern that the Convention does not have the strong enforcement mechanisms necessary to ensure compliance with its guidelines.\textsuperscript{146} Scholars have commented that the Convention will hinge on compliance at the national level as well as on effective oversight by the AU.\textsuperscript{147} Yet, it has been argued that the Convention’s oversight system is weak, and that the AU will not be able to compel compliance.\textsuperscript{148} Indeed, while the Convention has certain oversight functions in place, it is not clear what power the AU has to compel compliance.

For instance, the Convention obligates states parties to implement measures at the national level “for monitoring and evaluating the effectiveness and impact of the humanitarian assistance delivered to IDPs,”\textsuperscript{149} and for the establishment of “a Conference of States Parties . . . to monitor and review the im-

\begin{itemize}
\item \textsuperscript{143} Many states parties of the Convention simply do not have the financial assets that ratification would require to bring national laws into compliance with the Convention’s obligations. \textit{Id.}
\item \textsuperscript{144} Kampala Convention, \textit{supra} note 33, art. 10.
\item \textsuperscript{145} \textit{Id.} art. 12.
\item \textsuperscript{146} Lauren Groth, \textit{Engendering Protection: An Analysis of the 2009 Kampala Convention and Its Provisions for Internally Displaced Women}, 23 INT’L J. REFUGEE L. 221, 251 (2011); Giustiniani, \textit{supra} note 46, at 370. A similar weakness in the Constitutive Act has also been highlighted; scholars have suggested that “the Constitutive Act should be revised to more effectively ensure state compliance” with its principles and the principles of the AU Charter. Elvy, \textit{supra} note 92, at 88.
\item \textsuperscript{147} Abebe, \textit{supra} note 38, at 52; Giustiniani, \textit{supra} note 46, at 370; Ferris & Petz, \textit{supra} note 77.
\item \textsuperscript{148} Giustiniani, \textit{supra} note 46, at 370. It has also been noted that it may not be possible to force compliance by non-state actors who are not parties to the Convention but who are nonetheless the subject of obligations within it. These include international organizations and humanitarian agencies who are the subjects of Article 6, and members of armed groups who are the subjects of Article 7. \textit{Analysis: African IDP Convention Fills a Void in Humanitarian Law}, IRIN (Oct. 27, 2009), http://www.irinnews.org/report/86762/analysis-african-idp-convention-fills-a-void-in-humanitarian-law.
\item \textsuperscript{149} Kampala Convention, \textit{supra} note 33, art. 9(2)(m). This may be done pursuant to assistance by international organizations, humanitarian agencies, CSOs, and other regional actors. \textit{Id.} art. 9(3). 
\end{itemize}
plementation of the objectives of the Convention," which would meet regularly pursuant to AU facilitation. This provision further obligates states to “enhance their capacity for cooperation and mutual support under the auspices of the Conference of the States Parties.” This system is of obvious practical import; with no oversight function, states that ratify the Convention have no incentive to take the challenging and costly steps to implement the provisions into national laws. An oversight function ensures that there are repercussions for states that do not comply. Such provisions accordingly help to facilitate the Convention and to provide necessary support to encourage its implementation. It remains to be seen whether states will comply with their obligations post-ratification and, if not, whether the oversight system in place will effectively compel compliance. If these concerns are realized, the ability of the Convention to accomplish its goals would be jeopardized.

Finally, the effect of the AU’s intervention power pursuant to Article 4(h) of the Constitutive Act and incorporated into Article 8 of the Kampala Convention has been questioned. What is clear is that there are specific limits to the intervention power: it may only be exercised in cases of crimes against humanity, war crimes, and genocide, and any intervention would first depend on the AU being willing and able to facilitate the intervention. As noted above, the intervention power has yet...
to be exercised,\textsuperscript{158} and the right of intervention has not been defined in either the Constitutive Act or the Kampala Convention.\textsuperscript{159} Critics argue that the intervention authority has been left too vague, and will require clarification before it can be put to effective use.\textsuperscript{160} If this is so, it could hinder the effective functioning of one of the most innovative provisions of the Convention.

\textbf{B. The Prevalence of Internal Displacement and Regional Cooperation}

Several influential conditions present in Africa while the Kampala Convention was under consideration can be viewed as significant to the instrument’s creation and eventual ratification. Specifically, the prevalence of internal displacement in Africa and the cooperation between member states, the U.N., and other regional actors were determinative of the Convention’s viability.\textsuperscript{161}

1. The Prevalence of Internal Displacement Across Africa

The drafters have indicated that the Convention was formed amidst recognition of the need to address the disproportionate number of IDPs in Africa, in light of the gap in protection due

\textsuperscript{158} “The AU has not yet exercised its right to intervene as envisaged in Article 4(h) of the Constitutive Act, which does not require the consent of member states,” though the AU has exercised interventions with the state’s consent. \textit{Id.} at 43–44. For more on this generally, see \textit{id.}

\textsuperscript{159} See \textit{infra} Part II.A.1. Thus far, the “assumption has been that the AU’s right to intervene can be equated to the use of force. This assumption is based on the fact that, in order to exercise this right, the AU has made provisions for the establishment of an armed force whose responsibility includes intervention as contemplated in the Constitutive Act. Less intrusive means of intervention are listed outside this right.” Ntombizozuko, \textit{supra} note 103, at 17.

\textsuperscript{160} “Further, the AU may be barred from exercising this right as it appears that the principles of sovereignty, non-interference, and territorial integrity of the AU member states are interpreted restrictively. The AU must deal with these issues before an attempt to exercise the right to intervene is made.” \textit{Id.} at 1.

\textsuperscript{161} This list is not meant to be exhaustive. There are many other factors that contributed to the AU’s ability to create the Convention in 2009 and to its ratification in late 2012, but these stand out to the author as noteworthy and, at least, a starting point.
to the absence of a binding international legal regime.\textsuperscript{162} While displacement exists in every region of the globe,\textsuperscript{163} the problem is more widespread in Africa than on any other continent.\textsuperscript{164} As a continent, Africa had the highest number of internally displaced persons in the years leading up to the AU Executive Council order to draft the Convention.\textsuperscript{165} IDPs also vastly outnumber refugees in Africa.\textsuperscript{166} Displacement thus permeates life on the continent in a way that it does not in other areas where the issue is not as prevalent, and the issue was familiar and tangible to heads of state and the drafters in a way that it may not have been in a region not experiencing the phenomenon on such a large scale.\textsuperscript{167}

Recognition of the severity of internal displacement on the continent was accordingly a major impetus behind the Convention.\textsuperscript{168} Indeed, as expressed in the Explanatory Note to the Convention, states parties created the document “conscious of the fact that the African continent has the largest number of refugees, internally displaced persons, and returnees.”\textsuperscript{169} A perception of the commonality of internal displacement in Africa appears to have fostered the framing of internal displace-
ment as a distinctly African problem, which likely facilitated the cooperation necessary to bring the Convention into being. It is difficult to say whether the Convention would have garnered the same political support without such widespread awareness resulting from its omnipresence.

2. Cooperation Between African States, the U.N., and Other Regional Actors

Cooperation between African States and outside actors was also influential in the creation of the Convention. Although initiated by the AU Executive Council and coordinated by the AU Secretariat, the Kampala Convention was created during a five-year process involving a comprehensive team of AU member states, U.N. representatives, legal experts, and a variety of civil society and regional organizations. The AU ensured that the project had the support, participation, and commentary of a wide range of regional actors. Indeed, the drafting and negotiation of the terms of the Convention were inclusive and cooperative processes, characterized by the involvement and input of partner organizations and experts. UNHCR was involved and provided support throughout the process. CSOs were included in the negotiations, offering comments on issues felt to be inadequately addressed in initial drafts. NGOs had (limited) involvement as well.

170. See id.
171. Solomon, supra note 38, at 85 n.2. The African Union Executive Council created the team in response to a decision in 2004 for the AU Commission to collaborate with relevant cooperating partners to ensure that IDPs would be provided with appropriate legal protection. Abebe, supra note 38, at 32.
172. Abebe, supra note 38, at 33 (the author comments that involving outside actors in this process was “notable”).
173. Id. at 31–41.
176. On the role of NGOs, one scholar comments, “NGOs participated in the drafting process both within the framework of the Consultative Group and also by providing a written submission. It should, however, be stated that the role of NGOs was considerably limited,” as “very few African NGOs . . . have
NGOs and CSOs both play a vital role in assisting and protecting IDPs in the field in Africa and are thus well situated to comment on the problem. Indeed, these organizations may be in a position to best represent the needs of IDPs and to make sure the IDPs’ position is heard. The inclusion of these groups demonstrates the AU’s pragmatic approach to the creation of a Convention well suited to address the realities of displacement on the continent.

The AU also invited legal experts, acting in an independent capacity, to comment on the initial draft of the Convention. Later drafts drew heavily upon their suggestions for structure and content. The input of these experts included robust debate on the balance between the notions of state sovereignty, regional responsibility, and intervention. The contributions of these experts were significant; their suggestions directly resulted in broadening the AU’s oversight role to allow for intervention during “grave circumstances” causing displacement. The inclusion of this provision highlights the value of a collaborative drafting process that draws on the input of a variety of experts and represents various perspectives.

Additionally, the U.N. proffered much support of the AU’s development and leadership in Africa, which was significant to the formation of the collaborative climate in which the Convention was created. Even prior to the drafting process, the U.N. had encouraged the AU to craft regional solutions to displace-

sufficient expertise in humanitarian and forced displacement areas.” Abebe, supra note 38, at 36.


178. “In some countries ... [CSOs] play very important roles in monitoring IDP situations and often serve as fora for IDPs to make their voices heard. In some cases, [CSOs] are given formal roles in supporting solutions for IDPs.” Id.

179. Abebe, supra note 38, at 36.

180. Id.

181. Id. at 35.

182. Kampala Convention, supra note 33, art. 8.

183. See Giustiniani, supra note 46.

184. In 2005, for instance, the U.N. committed to partnering with the AU to bring positive developments to the continent. World Summit Outcome, supra note 54.
And in 2006, the U.N. and the AU entered into a partnership to promote the AU; the U.N. Secretary-General and the AU Commission Chairperson signed a declaration, the main objective of which was “to enhance the capacity of the AU Commission and African sub-regional organizations to act as effective U.N. partners in addressing the challenges to human security in Africa.” The AU took the official position in these discussions that the U.N. system as a whole would benefit from the AU taking primary responsibility for “certain tasks on the African continent.” The agreement reveals a perceived “common commitment” to assist in “advancing Africa’s development and regional integration.” This support of the U.N. provided legitimacy to the AU as it grew into its role as a regional organization.

The Kampala Convention shows that the AU addressed the continent’s displacement issues with a regional approach, imposing duties on states parties to seek the assistance of other states and regional actors when independently unable to meet the needs of the displaced, as well as duties on myriad non-state actors. In addition, the AU was granted authority to intervene in grave circumstances affecting the security of IDPs.

While this cooperative approach has limitations, the interconnected web of accountability which it weaves for regional actors makes it possible that future crises will be prevented and that the protection and assistance needs of those already

187. Enhancing UN-AU Cooperation, supra note 186.
188. Id.
189. As discussed above, this is pursuant to certain procedures; intervention is by either the Assembly’s decision or by request of a state party for assistance. See Kampala Convention, supra note 33, art. 8(1), (2).
displaced will be better met. It remains to be seen whether this approach will provide an effective alternative to traditional methods of protection. In the meantime, its very existence is beneficial to the building of intraregional cooperation, accountability, and self-sufficiency in Africa.

III. OUT OF AFRICA: TRANSFERRING THE REGIONAL APPROACH TO THE LEAGUE OF ARAB STATES

This approach to internal displacement, still nascent in Africa, has yet to be utilized by other regional organizations.190 This section will apply the factors identified above to the current internal displacement crisis in Syria. It will argue that despite differences in the regions and the regional organizations involved, a cooperative approach would be viable for the Arab League as well, and, if adopted, could provide relief for contemporary displacement crises such as the one currently ongoing in Syria.

A. The Arab League’s Characterizing Principles and Objectives

It was argued above that the foundational principles and characteristics of the AU were influential in the creation of the Kampala Convention and are reflected in its substantive provisions.191 The principles and nature of the Arab League would likewise influence the character of an IDP convention and are thus relevant to the present inquiry.

The Arab League was founded in 1945192 and is the world’s oldest existing regional organization.193 Comprised of twenty-two member states,194 it is the Arab region’s most prominent

190. As noted, the Assembly of the Organization of American States passed a non-binding resolution encouraging member states to consider adjusting national laws to better protect and assist IDPs. See supra note 35.
191. See supra Part II.A.
193. Pinfari, supra note 39.
194. As discussed supra note 40, Syria has been suspended since late 2011, following an Arab League resolution to suspend the country if the government failed to cease violent activity against civilians. See Batty & Shenker, supra note 40; MacFarquhar, Arab League Votes to Suspend Syria over Crackdown, supra note 25. The Arab League has nonetheless maintained involvement with seeking a solution to the Syrian conflict. See Bayoumy, supra note 29.
and significant regional organization. 195 The League was founded following the Second World War, as states of the region struggled to emerge from the hegemony of colonizing European powers.196 It was created as “part of a broad and ambitious political project,” in a moment in which some involved envisioned “the creation of a single Arab state.”197 The organization grew out of a time in which the region was seeking to redefine itself, and in that sought both “unity and independence.”198 Indeed, the foundational document, the Pact of the League of Arab States (the “Pact”), states that the organization was established to “draw closer the relations between member states.”199 Going forward, League members were “to consider in a general way the affairs and interests of the Arab countries.”200

Contrasting with this quest for unity is the Pact’s more prominent emphasis on the principle of sovereignty.201 The preamble reveals this dichotomy between cooperation and independence. While states were to “direct their efforts toward the goal of the welfare of all the Arab States, their common weal,” that endeavor was to be undertaken only upon a “basis of respect for the independence and sovereignty” of member states.202 And while the Pact provides for a Council with some oversight function to give binding judgments on disputes between two states, those decisions only bind the states that accept them.203 This is one indication that the states parties sought to retain independent authority at the expense of regional coexistence,204 a characterizing focus on sovereignty that has remained in the intervening decades.205

197. Pinfari, supra note 39, at 1.
198. Pogany, supra note 196.
199. Arab League Pact, supra note 192, art. 2.
200. Id.
201. As reflected in several articles of the Pact. See, e.g., id. arts. 18, 20; see also Romano & Brown, supra note 195, at 157.
202. Arab League Pact, supra note 192, pmbl.
203. Romano & Brown, supra note 195.
204. Pogany, supra note 196.
205. Romano & Brown, supra note 195.
It has been argued that one explanation for the continued, near-constant conflict in the Arab region may be this presence of both sovereignty and pan-Arabism\textsuperscript{206} in the agenda of the Arab League.\textsuperscript{207} This dichotomy may cause “role conflict,” stymying the development of a regional identity and thereby contributing to regional conflict.\textsuperscript{208} Regardless of the merits of that position, this dual agenda should not be deemed fatal to the creation of a regional framework to address regional problems such as internal displacement.

As explored above, the AU has sought to emphasize cooperation without sacrificing respect for sovereignty,\textsuperscript{209} demonstrating that advancing a regional approach to internal displacement need not come at the expense of relinquishing an emphasis on independence. It follows that while the Arab League has historically and contemporarily emphasized the sovereignty of its member states, such a stance would not necessarily be dispositive of a viable regional framework to address issues facing the region. The League could thus incorporate a focus on cooperation without losing its emphasis on sovereignty and independence. This approach may appeal simultaneously to the strong sense of sovereign equality and to pan-Arabism.\textsuperscript{210}

\textsuperscript{206} The term “pan-Arabism” is used generally to refer to “a social and political movement that supported the unification of the Arab world,” which emerged around the turn of the twentieth century and was tied to the quest for independence from colonizing powers. For background on pan-Arabism and its influence on geopolitical concerns since the mid-twentieth century, see Bassam Tibi, The Fundamentalist Challenge to the Secular Order in the Middle East, 23 FLETCHER F. WORLD AFF. 191 (1999). The author notes that “[o]n a regional level, the Arab states as outlined in the Arab League’s charter have sought to achieve the political goal of pan-Arabism: the pursuit of Arab unity.” Id. at 191.

\textsuperscript{207} Michael Barnett, Institutions, Roles, and Disorder: The Case of the Arab States System, 37 INT’L STUDIES Q. 271, 282–84 (1993).

\textsuperscript{208} Id.

\textsuperscript{209} See supra Part II.A.

\textsuperscript{210} It is recalled that the AU drafters have been clear that the Convention is not intended to undermine the notion that states retain primary responsibility for their nationals; it is also recalled that the Article 8 intervention power may only be triggered upon consent of the state at issue or by two-thirds of the Assembly members. Further, as discussed below, there is some indication that the recent Arab Spring uprisings have occasioned change to the role the Arab League seeks to play in the region. See infra Part III.C.
B. Key Principles and Limitations of an Arab League Convention on Internal Displacement

1. Provisions of a Regional Approach to Protecting and Assisting IDPs in the Arab Region and Application to the Current Situation in Syria

For an effective convention to address the problem of internal displacement in the Arab region, the Arab League should replicate the provisions that have been essential to the regional approach of the Kampala Convention. Specifically, the League should build into the document provisions emphasizing cooperation between and among state parties and other regional actors, and establish a right of intervention for the AU in cases of genocide, war crimes, and crimes against humanity, similar to those provisions within the Kampala Convention.

If Syria was a party to a similar Arab League convention for the protection and assistance of IDPs, it would be obligated to bring its national laws into compliance with the convention and to fulfill those obligations in the case of displacement. For instance, Syria would have a duty to fully cooperate with aid-giving organizations. Neighboring states parties would be obligated to assist if requested by Syria to help meet the needs of IDPs. In the event that the Syrian government proved unable to provide sufficient protection and assistance, the Arab League would have the authority to facilitate assistance and support from non-state actors, and to intervene on behalf of the displaced if the situation was deemed, by the other member states or by an established council, to be of such grave circumstance to warrant intervention.

211. The emphasis on regional cooperation is manifested in the Kampala Convention in such substantive provisions as the obligations upon the states parties to, inter alia, seek assistance of other states and humanitarian agencies when unable to provide adequately for their own IDPs (art. 5(6)); to provide that assistance when requested (art. 6(1), (2)); and to participate in the Conference of the States Parties oversight mechanism (art. 14). As noted above, the Convention emphasized that these provisions were not intended to detract from the territorial integrity and primary responsibility of states for their own populations (see arts. 5(1), 5(12), 7(2)). Kampala Convention, supra note 33.

212. Kampala Convention, supra note 33, art. 8(1).

213. Kampala Convention, supra note 33, arts. 1–9.
In the current situation, Syria would likely be found in violation of its substantive obligations to assist and protect its IDPs. Both sides of the conflict would be in violation of Article 7, which prohibits members of armed groups during armed conflict from, inter alia, “hampering the provision of protection and assistance to internally displaced persons under any circumstances,” “impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons,” and “attacking or otherwise harming humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons.” It is unclear whether either the Syrian government’s reaction or that of opposition forces would differ if the country were under a legal obligation to cooperate with humanitarian actors seeking to render assistance. Further, the confirmed use of chemical weapons in Syria would meet the threshold for a  

214. Syria’s continuing non-cooperation with humanitarian agencies would be a direct violation of Article 5(6) and Article 7 of the Kampala Convention. See supra note 24 (regarding the non-cooperation on the part of Syrian authorities to aid-giving organizations); Kampala Convention, supra note 33, art. 7(6)(b), (g), (h).  

215. In August 2013, U.N. Secretary-General Ban Ki-moon commissioned a team of inspectors to determine whether evidence corroborated reports that chemical weapons had been used during the conflict in Syria. Following the team’s investigations, a U.N. Report was issued which “confirmed that a deadly chemical arms attack caused a mass killing in Syria [in August] and for the first time provided extensive forensic details of the weapons used, which strongly implicated the Syrian government.” Rick Gladstone & C.J. Chivers, Forensic Details in U.N. Report Point to Assad’s Use of Gas, N.Y. TIMES (Sept. 16, 2013), http://www.nytimes.com/2013/09/17/world/europe/syria-united-nations.html. In remarks to the press following his Security Council briefing on the Report, the Secretary-General stated, “The findings are beyond doubt and beyond the pale. This is a war crime.” Id. In a note accompanying the published Report, the Secretary-General conveys profound shock and regret at the conclusion that chemical weapons were used on a relatively large scale, resulting in numerous casualties, particularly among civilians and including many children. The Secretary-General condemns in the strongest possible terms the use of chemical weapons and believes that this act is a war crime and grave violation of the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare and other relevant rules of customary international law . . . The Secretary-General reiterates that any use of
finding of grave circumstances warranting intervention by the Arab League. Whether actual or effective intervention followed would hinge on decisive and cooperative action by the Arab League delegates as well as on the existence of sufficient resources and will on the part of the Arab League to use force for this purpose.

Such a convention would add a critical alternative to the current inadequate options for the displaced in Syria. It would obligate Syria, its fellow Arab states, and the Arab League to adequately provide for the IDPs whose needs currently are severely unaddressed. As there have been documented violations of international criminal law, the League could exercise a right of intervention (if codified) and use force to intervene to chemical weapons by anyone under any circumstances is a grave violation of international law.


216. See, e.g., Neil MacFarquhar, Commissioner Urges Action on Syria, N.Y. TIMES (Jan. 18, 2013), http://www.nytimes.com/2013/01/19/world/middleeast/united-nations-commissioner-urges-action-on-syria.html. (This conclusion is made assuming that an identical right of intervention to that in the Kampala Convention was codified by the Arab League, which would—as discussed—authorize the organization to intervene in instances of war crimes, genocide, and crimes against humanity. Kampala Convention, supra note 33, art. 8(1)).

217. The Arab League’s Pact requires at least majority vote. Arab League Pact, supra note 192, art. 7(1). The AU Constitutive Act establishes a two-thirds majority of voting members to agree to a decision, supra note 105, art. 7(1).

218. As is the case with the AU’s intervention power. See Ntombizozuko, supra note 103, at 43–48.


220. See Gladstone & Chivers, Forensic Details in U.N. Report Point to Assad’s Use of Gas, supra note 215.
protect IDPs suffering from these violations. While it is impossible to know if any substantive protections afforded by such a convention would be effective if applied to the current situation in Syria, it would at least provide an alternative to the bleak options that now exist.

2. Learning from the Kampala Convention’s Limitations

The first limitation of the Kampala Convention discussed above was states’ reluctance to ratify. Unpacking the likely reasons behind that reluctance promotes an understanding of the ways a regional approach could be improved upon when transferred beyond the AU. The hesitation among AU member states to ratify the Convention has been attributed to political hesitations with regard to certain obligations that would result, such as compensating the displaced and the obligation to bring national guidelines into compliance, which may be costly and unpopular domestically. Concern over the requisite financial resources and weak political will necessary to bring domestic laws into compliance with a convention’s guidelines could be expected to hinder ratification; few Arab states currently have domestic provisions to protect the displaced. The Arab League would therefore likely face hesitations due to economic hindrances and political hesitations related to requiring these domestic changes, which would hold up the ratification process. To counter that, the League could encourage states to replicate steps taken during the AU’s ratification process, intended to induce ratification without sacrificing substance. For instance, ratification in the Gambia was subsequent to an initiative to inform national assembly members about the substance and expected benefits of the Convention. In the face of certain hesitations, the Arab League would better ensure ratification by maintaining involvement and support in this way in all steps of the process.

221. Kampala Convention, supra note 33, art. 12 (compliance); id. art. 3(2) (defining the obligation to bring national policies and laws into alignment with the obligations under the Convention).
222. Taylor, Lopas & Solomon, supra note 38, at 48; see also supra Part II.A.3.
224. See, e.g., Taylor, Lopas & Solomon, supra note 38.
225. Id. at 48.
The impact of the convention would hinge on states parties’ compliance, and in the face of a state party’s noncompliance, on the Arab League’s ability to compel compliance via an oversight function. The Arab League should therefore incorporate a strong oversight function to avoid possible limits on its ability to ensure compliance with an IDP convention. Critics have voiced concern that the oversight function of the Kampala Convention may be weak. While the Arab League’s Council does have monitoring functions and can issue binding judgments, those decisions only bind the states that accept them. A provision that requires ratifying states to consent to being bound by an oversight body might render this a non-issue. It is noteworthy that the oversight mechanism in the Kampala Convention does not appear in previous African conventions; the provision was negotiated for the first time at the AU summit at which the Convention was adopted. This suggests that the Arab League could incorporate a more strict oversight mechanism than that articulated in previous League documents and in the Pact.

Finally, a right of intervention similar to that codified in the Kampala Convention would likely be problematic for the Arab League, steeped as the organization is in an emphasis on state sovereignty. To cure the issue of vagueness, for which the AU’s intervention power has been criticized, it would be beneficial for the League to define the intervention right and to detail the scope, procedures, and substance of that right. It also bears keeping in mind that, while the intervention provision of the Kampala Convention is based in the intervention right codified in the AU’s Constitutive Act, the provision in the Convention is seen to be an expansion of the authority as it appears in the Constitutive Act. A similarly activist approach could be employed by the drafters of an Arab League IDP convention to create an effective right of intervention on the part of the League that has no precedent in prior League documents.

In light of these potential obstacles, the Arab League should proactively seek to incorporate measures to strengthen the pos-

226. See, e.g., Giustiniani, supra note 46, at 370.
227. Romano & Brown, supra note 195.
228. Kampala Convention, supra note 33, art. 14.
229. Abebe, supra note 38, at 52.
230. See Constitutive Act, supra note 105, art. 4(h); see also supra Part II.B.1–2.
sibility that such a convention would be drafted, widely supported, and subsequently abided. Following the lead of the AU provides a solid starting point for such an approach.

C. The Prevalence of Internal Displacement and Regional Cooperation

Despite real ideological and practical hurdles that the Arab League would face in the crafting of an instrument to address internal displacement with a regional framework, the prevalence of internal displacement in the Arab League and the cooperation between member states, the U.N., and other regional actors would work in the League’s favor and could bolster the possibility of successfully developing such a document.

1. The Prevalence of Internal Displacement in the Arab Region

The degree to which internal displacement exists in Africa was shown to have been of major importance to the AU’s ability to create and encourage ratification of the Kampala Convention.231 This prevalence allowed the AU to couch the discussion of displacement in terms of the phenomenon as an “African problem” and the Convention as an African solution. However, it is worth noting that the Convention was crafted amid a downward trend in African displacement.232 While Africa continues to have the highest number of displaced persons, the continent has seen the number of displaced drop since 2004.233 So while displacement has to a large degree been characterized as an “African problem,” that characterization does not need to become an excuse for this issue to not be taken up by other regions’ organizations.

Indeed, the Arab League could at this point adopt the issue of internal displacement as an Arab regional problem. Throughout much of the twentieth century, many states in the region experienced displacement due to ongoing wars and unrest.234 Indeed, most of the states in the League experienced phenome-

231. See supra Part II.C.
233. Id.
na of displacement at some point toward the end of the twentieth century.\textsuperscript{235}

And, unfortunately, the case could be made that internal displacement is becoming a twenty-first century “Arab region problem.” In the first decade of the twenty-first century, the number of IDPs tripled in the region due to multiple armed conflicts.\textsuperscript{236} The Middle East and North Africa experienced the highest percentage of increase in internal displacement of any region in 2012, with the number rising more than 40\% that year and continuing to rise drastically throughout 2013.\textsuperscript{237} Indeed, the situation of internal displacement is more prevalent now in the states of the Arab League than perhaps ever before.

As the historic visibility of displacement in Africa allowed the AU to prioritize seeking a solution to the displacement problem, the Arab League should re-conceptualize the current displacement crisis as an Arab problem, requiring cooperative, inclusive regional prioritization. Most states in the Arab region have experienced displacement relatively recently, with the last few years seeing an increase in displacement affecting the entire region. The Arab region is therefore situated to use this bleak situation as an opportunity to productively bind together to find a common solution to this now-common problem.

2. Cooperation Between Arab States, the U.N., and Other Regional Actors

Cooperation between member states and with international organizations and non-state actors was central to the approach taken by the AU to successfully draft the Kampala Convention and bring it into force.\textsuperscript{238} Unfortunately, the Arab League has not benefited from a positive reputation for cooperation.\textsuperscript{239} The

\begin{itemize}
  \item \textsuperscript{235} Id. at 463–46 (highlighting the displacement experienced in Egypt, Tunisia, Libya, Sudan, Ethiopia, Somalia, Iraq, Kuwait, Saudi Arabia, Jordan, Lebanon, and Syria in the last decades of the twentieth century, making the point that displacement has been a reality for many in the region).
  \item \textsuperscript{236} Global Overview, supra note 59, at 72.
  \item \textsuperscript{237} Internally Displaced Figures, UNHCR, supra note 7.
  \item \textsuperscript{238} See supra Part II.B.2.
  \item \textsuperscript{239} Indeed, the Arab League is widely considered to be riddled with shortcomings that severely inhibit proper functioning. Some even consider the League an outright “failure.” See, e.g., Michael Barnett & Etel Solingen, Designed to Fail or Failure to Design? The Origins and Legacy of the Arab League, in CRAFTING COOPERATION, supra note 83, at 180, 180–220.
\end{itemize}
League is considered problematic and unique, elements that may be characteristic of a region shaped by instability and a lack of cohesion; the states that comprise the organization are seen to have “deep-rooted ideological” differences. In contrast to newer regional organizations, the League has been characterized as incapable or at least unwilling to work as a force for change and cooperation in the region. It has been argued that this is due in part to the League’s founding “principle of membership deriv[ing] from an ethnic nationalist identity—being Arab—rather than civic or geographic inclusion within a region,” which has effectively prevented the League from being a progressive, unifying influence.

The Arab League’s reputation for a lack of cohesion among members evokes concern that the League would be unable or unwilling to serve as a driving force to lead and guide the drafting process, as the AU did in bringing the Kampala Convention to fruition, and to subsequently ensure its effectiveness. Indeed, during its seventy-year existence, the Arab League has proved consistently weak in steering the Arab region in any particular collective direction. Most relevantly, certain examples tend to indicate the League’s ineffective efforts to halt

240. See, e.g., Barnett, supra note 207.
241. Id.
242. See Pinfaridi, supra note 39.
243. See Romano & Brown, supra note 195.
244. In this regard, the leadership of the League has been criticized in the past for failing to take an active role in solving crises affecting the region. This criticism was vividly portrayed in an article in the Lebanon Daily Star in 2005, condemning the repeated inaction of the Arab League leaders, thus “allowing crisis after crisis in the Arab world to go completely unaddressed . . . Time after time, LAS has been guilty of extreme negligence and irresponsibility. Such inaction defies the notion of Arab cooperation, the ideal upon which the Arab League was created.” Id. at 161.
245. As one scholar has noted, “The Arab League has mainly been a political bloc, albeit ineffective in presenting or generating a unified, integrated Arab front.” Michael Fakhri, Images of the Arab World and Middle East: Debate about Development and Regional Integration, 28 Wis. Int’l L.J. 391, 399–400 (2010).
246. Brown, supra note 95, at 241–42. Brown provides one illustrative example: when Member State Iraq violated Pact provisions by invading fellow Member State Kuwait, “[l]eague action was limited to condemning Iraqi aggression, demanding withdrawal, and reaffirming Kuwait’s sovereignty.” Id. at 241.
the Syrian uprising. In November 2011, for instance, the League drafted a peace plan requiring the Syrian government to cease hostilities. Syrian authorities accepted the plan, but recommenced hostilities again the next day. In response, the League “deployed observers . . . but their mission came to an abrupt end when a month later the Gulf countries pulled their members out,” citing the mission’s inability to bring “the perpetrators to account.” The League’s response to this breach may raise concerns about the League’s ability to effectively lead the region toward signature and ratification of such an instrument and to subsequently compel compliance.

However, pertinent recent examples also demonstrate active League involvement in seeking a solution to the Syrian conflict, which suggests that the League may be growing into a new role in the region. For example, the Arab League members have voted to suspend Syria’s membership in the League for the state’s violence toward civilians. The suspension allegedly resulted from delegates, “alarmed by the region-spanning upheaval of the Arab Spring demonstrations,” who sought “to head off another factional war like Libya’s, in which the group took the unprecedented step of approving international intervention.” The League was commended for the decision, with the action hailed as signaling a shift within the League:

In acting against Syria, a core member of the Arab League, the group took [a] bold step beyond what had been a long tradition of avoiding controversy . . . Previously, when the Arab League was more of a dictators’ club, cautious members . . .

247. See Syria: A Full-Scale Crisis, supra note 10, at 11.
248. Id.
249. Id.
250. “In acting against Syria, a core member of the Arab League, the group took [a] bold step beyond what had been a long tradition of avoiding controversy.” MacFarquhar, Arab League Votes to Suspend Syria over Crackdown, supra note 25.
251. Id.
252. Id.
253. President Obama issued a statement commending the League for the decision to suspend: “After the Assad regime flagrantly failed to keep its commitments, the Arab League has demonstrated leadership in its effort to end the crisis and hold the Syrian government accountable.” Id.
put the brakes on any activism. But the uprisings appear to be rewriting that formula.\textsuperscript{254}

Following the decision to suspend Syria, the Arab League Chairman stated that the League’s goal was “to find a solution to the problem within an Arab framework;” the suspension was reportedly an attempt by the League “to walk a tightrope between bringing pressure to bear without bringing foreign military intervention.”\textsuperscript{255} With such intent, the League reveals a determination to act effectively as a cooperative body for the good of the region, without relying on outside actors. Another Arab League diplomat involved in the decision told the press that the League did not want “some sort of a blank check that is given to the Security Council to try to take this issue in hand . . . [Rather, there is the belief that] if the regime comes under intense pressure from the Arab side, then [the regime] will make some changes.”\textsuperscript{256} Accordingly, the decision by League member states to suspend Syria showcases a more activist organization than it has traditionally proven to be.

Further, and most significantly here, the League couched the decision to suspend as a regional response intended to bring about a regional solution to halt a perceived regional harm. This mirrors the approach taken by the AU in creating a convention to address displacement in Africa. Finally, the League has demonstrated its ability for sustained engagement in bringing about a solution to this regional harm. Indeed, the League has been actively engaged in negotiating a political end to the Syrian conflict and has been committed throughout to ensuring that both sides of the conflict participate in the Geneva II peace talks.\textsuperscript{257}

\textsuperscript{254} Id.
\textsuperscript{255} Id.
\textsuperscript{256} Id.
\textsuperscript{257} Arab states formally endorsed proposed peace talks to end the Syrian civil war that have been delayed by disputes between world powers and divisions among the opposition. A final communiqué after an emergency meeting of Arab League foreign ministers on Sunday called on the opposition swiftly to form a delegation under the leadership of the mainstream Syrian National Coalition, to attend the Geneva 2 talks. The Arab League’s position indicated Gulf rivals Qatar and Saudi Arabia—who have backed different rebel groups
These examples showcase willingness on the part of Arab League member states to hold their regional neighbors accountable and to distance member states not acting in accordance with their norms. This is also an example of the regional organization deciding to take action instead of waiting on international support. It has been suggested that this represents a new stage in the League’s role in the region. That remains to be seen. But, while it is still far from certain whether it would be possible to create a regional convention to prevent internal displacement and to protect and assist IDPs in the Arab region, these recent developments in the Arab League provide at least some suggestion that the atmosphere within the League may be well suited to consider the drafting of such a regional framework with an inclusive and cooperative approach. Such a convention would go a long way toward reinforcing the emergence of a new Arab regional approach in which member states view each other as cooperative partners sharing similar experiences.

If the AU’s experience with the Kampala Convention is any indication, the inclusion of legal experts and regional CSOs in all stages of the process would prove critical to the Arab League’s successful creation of a pragmatic IDP convention well tailored to the region’s displacement concerns. The participation of independent legal experts would provide alternate perspectives that may prove beneficial to the League in seeking to overcome any obstacles that may be experienced due to the

fighting President Bashar Al Assad—had put their differences aside to urge opposition chief Ahmad Jarba to head to Geneva. The Geneva talks are meant to bring Syria’s warring sides to the negotiating table. Syria’s Foreign Ministry reiterated on Sunday that it must be up to Syrians alone “to choose their leadership and political future without political interference.”

The Arab League, however, said only pressure from major powers could ensure a successful outcome in Geneva. In its communique it “reaffirmed the Arab position that demands the necessity of the required international guarantees to supervise and ensure the success of a peaceful solution at the Geneva 2 conference.” Arab League Backs Geneva 2 Peace Talks, NATIONAL (Nov. 4, 2013), http://www.thenational.ae/world/middle-east/arab-league-backs-geneva-2-peace-talks#ixzz2keDeSSrB; see also Arab League to Press Syria Opposition over Peace Talks, supra note 40.

258. MacFarquhar, Arab League Votes to Suspend Syria over Crackdown, supra note 25.
259. See supra Part II.B.2.
League’s traditional emphasis on sovereignty; these experts would be useful in the negotiation of substantive provisions, such as whether the convention should incorporate a right of League intervention, and if so, in what situations.\textsuperscript{260} The inclusion of CSOs and NGOs could ensure that the provisions respond to the needs of the region’s IDPs.\textsuperscript{261} Incorporating and giving a voice to these non-state actors would also importantly reveal that the League was taking a truly cooperative regional approach to the issue of displacement.

The U.N.’s support of the Arab League in this endeavor would also be highly beneficial. As demonstrated, the AU received significant support from the U.N. throughout the evolution of the Kampala Convention; that support has been noted as crucial to achieving the end result.\textsuperscript{262} There is no indication that the U.N. would not likewise support the Arab League in undertaking a similar drafting and negotiation process. Indeed, throughout the Syrian conflict, the U.N. has called attention to the plight of Syrian IDPs and appealed to the relevant parties to provide protection and assistance.\textsuperscript{263} The U.N. has also officially endorsed the Arab League’s efforts to cease conflict in

\begin{footnotesize}
\begin{enumerate}
\item As discussed \textit{supra} in Part II.B.3, the legal experts utilized by the AU had a large influence on the substantive provisions and encouraged the incorporation of a right of AU intervention in grave circumstances; this provision clearly implicates territorial integrity and state sovereignty. The legal experts that participated in the drafting of the Kampala Convention debated this issue robustly. \textit{Id.}
\item For instance, the on-the-ground nature of CSOs render these organizations well suited and well equipped to
\begin{itemize}
\item monitor conditions of return, local integration or resettlement to another part of the country for IDPs; conduct inquiries into reports of violations of IDPs’ human rights; investigate complaints particularly regarding compensation or restitution for property, and discrimination against returnees; monitor and report on the implementation of peace agreements with particular regard to their provisions for durable solutions; and advise the government on the rights of IDPs.
\end{itemize}
\item In a prominent example, the U.N. Special Rapporteur on the Human Rights of IDPs in August 2012 “called upon all Syrian authorities and parties to the conflict” to protect and assist IDPs, specifically urging the parties to pay due “attention to the Guiding Principles on Internal Displacement,” and “remind[ing] parties to the conflict that IDPs are entitled to the rights and freedoms afforded to them under international law irrespective of their legal status.” \textit{Syria: Severe Internal Displacement Crisis, supra} note 22.
\end{enumerate}
\end{footnotesize}
Syria and to provide assistance to the country’s civilians. Additionally, the U.N. has been instrumental in serving as a forum for the negotiation of a political solution to the conflict; in September 2013, the Security Council unanimously called for the Geneva II peace talks and various U.N. entities have subsequently supported the work of relevant actors, including the Arab League, in orchestrating that conference. This U.N. involvement suggests that the Arab League would be able to rely on this critical pillar of support as it pursued the creation of a convention to address internal displacement in the Arab region.

The above analysis suggests that, despite the Arab League’s fundamental emphasis on sovereignty and a traditional lack of intraregional cooperation, significant factors such as the current prevalence of displacement throughout the region and the recent action taken by the Arab League indicate that it would be possible at this time for the Arab League to draft an inclusive convention addressing the concerns of a variety of regional actors and reflecting a shift toward regional cooperation and accountability.

CONCLUSION

This Note has examined factors present during the formation of the Kampala Convention and applied them to the context of the Arab League to consider whether transferring a regional approach beyond Africa could be a viable solution to internal displacement crises in the Arab region. Some aspects of the Arab League make the creation and ratification of such a convention unlikely, such as the emphasis on sovereignty over regional unity and the characteristic disharmony between member states. However, it was argued that the current prevalence of the issue of displacement, the apparent cooperation of international institutions, and recent indications that the Arab League may be taking a new, more robust leadership role in the region


265. For information on this process, see supra note 25.
counteract these factors. Therefore, the time is ripe for the development of such a convention.

To increase the chance of success (in the form of cooperation during drafting, speedy and widespread ratification, and ultimate compliance with the provisions of such a convention), drafters should include a provision that would create a regional web of accountability between states, non-state actors, and the Arab League itself, as appeared in the Kampala Convention. The League should also replicate the AU’s inclusive negotiation and drafting process, to encourage the input of the regional actors most in touch with the needs of IDPs. This inclusion would also be good regional policy and may bolster the chance of compliance with the convention once implemented.

The perception that the Kampala Convention was a solution to a uniquely African problem has been a powerful concept, which carried weight with international organizations, non-state actors, and member states alike. Accordingly, the actors involved focused on the particular characteristics, trends, and causes of displacement in Africa to arrive at a document tailored to the regional conditions of the phenomenon. Creating a similar convention, the Arab League could seek to reconfigure the issue of displacement as one that is also a problem experienced uniquely in the Arab region. Thus framed, intraregional support for such a legal regime may be garnered and a convention that responds to the vernacular particularities of Arab internal displacement may develop.

The most likely obstacle to the creation of such a convention by the Arab League may be the organization’s traditional focus on sovereignty at the expense of intraregional cooperation. However, recent activity of the League suggests that member states are starting to hold each other accountable to regional action and norms. In such a climate, delegates may well be willing to consider a cooperative approach to displacement that emphasizes regional accountability rather than individual state sovereignty.

The AU has demonstrated that a regional approach to the problem of internal displacement is possible. While it remains to be seen how effective the Kampala Convention will be, the Convention serves as a model for other regional organizations to take the regional approach out of Africa and adapt it to fit the vernacular conditions of displacement in other regions.
Most immediately, the Arab League would do well to heed the AU’s example.

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THE UNSPECIFIED SPECIFICITY OF SPORT: A PROPOSED SOLUTION TO THE EUROPEAN COURT OF JUSTICE’S TREATMENT OF THE SPECIFICITY OF SPORT

European football is among the world leaders in revenue generation. Despite this perceived success, due to a combination of inflated wages, large cash transfer fees, and pressure from supporters to compete and succeed at the highest levels, football clubs often spend far more than the revenue they bring in. In response to the financial frailty among football clubs across Europe, the Union des Associations Européennes de Football ("UEFA") promulgated a set of rules called the UEFA Club Licensing and Financial Fair Play Regulations ("Financial Fair Play" or "FFP").

The purpose of these regulations is to, inter alia, “improve the economic and financial capability of the clubs” and to “introduce more discipline and rationality in club football finances.”

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2. See, e.g., Premier League Clubs Boast £3.1 Billion in Debt, GUARDIAN (June 2, 2009), http://www.guardian.co.uk/football/2009/jun/03/english-premier-league-debt.

3. Unlike most sports organizations in the United States, the Union des Associations Européennes de Football is not commonly referred to as “the UEFA,” but rather called “UEFA.” See, e.g., About UEFA—Overview, UEFA, http://www.uefa.com/uefa/aboutuefa/organisation/history/index.html (last updated May 25, 2013) [hereinafter About UEFA—Overview].


5. Id. art. 2(2)(a).

6. Id. art. 2(2)(c).
However, since UEFA approved the Financial Fair Play regulations in 2010, there has been vast speculation as to their compatibility with European Union law, including the right to free movement and competition law. This speculation stems from uncertainty about the amount of power conferred upon the European Court of Justice (“ECJ” or the “Court”) to evaluate sporting claims, and the Court’s consistent findings that sporting rules or regulations are incompatible with EU law.

EU law is based on various treaties developed over the course of sixty years. The applicable treaty today is the Treaty on the Functioning of the European Union (“Treaty” or “TFEU”). While many provisions of the treaties have changed over the EU’s long history, the provisions relating to sports governance have remained substantively the same, with the exception of their numbering.

In the ECJ’s first ruling on sports governance, Walrave v. Association Union Internationale, the Court declared that the “practice of sport is subject to [EU] law only in so far as it constitutes an economic activity within the meaning of . . . the Treaty.” Since the decision, while European courts have...
acknowledged the potential of a “‘sporting exception’ in which rules of purely sporting interest were removed from the scope of the Treaty,” they have struggled to separate pure sporting rules from non-exempt areas of law such as competition, free movement of workers, and other treaty provisions. As a result of this struggle, the ECJ has often found that sporting rules are incompatible with the Treaty based on the principle of proportionality, which “requires that action undertaken must be proportionate to its objectives,” even though it found that the objectives of the regulations were legitimate based on social or public interests.

Using a challenge to the Financial Fair Play regulations as a paradigm of how the Court would analyze a challenge to sports regulation, this Note argues that the ECJ’s strict use of the principle of proportionality does not take into account the specificity of sport that the ECJ itself established, resulting in overregulation. Therefore, in order to account for the unique nature of sports regulation, such as the preservation of equal competition and interdependence among competitors, the ECJ should first determine whether the regulations in question af-

18. See Case C-325/08, Olympique Lyonnais SASP v. Bernard, 2010 ECJ EUR-Lex LEXIS 113 (Mar. 16, 2010) (encouragement, recruitment, and training of young players can justify a restriction); Case C-415/93, Union Royal Belge de Societes de Football Association ASBL v. Bosman (Bosman), 1995 E.C.R. I-4921 (maintaining a competitive balance and encouraging recruitment and training of young players can justify a restriction).
19. “For several years now, both politicians and legal scholars have discussed the much vexed question of the so-called ‘sporting exception’ to European Union law, sometimes referred to as the ‘specificity of sport.’” Gianni Infantino, Mecha-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport, UEFA (Feb. 10, 2006), http://www.uefa.org/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf.
20. While throughout the sporting cases presented to the ECJ, the Court consistently found that the goals of the rules in question were legitimate, the principle of proportionality left the Court with little choice but to find the rules incompatible with the Treaty. See, e.g., Bosman, 1995 E.C.R. I-4921. But see Case C-519/04, Mecha-Medina v. Comm’n, 2006 E.C.R. I-6991.
flect a fundamental right or a non-fundamental right. Because fundamental rights warrant the use of strict proportionality, the ECJ’s analysis of these challenges should remain the same. However, when non-fundamental rights are involved, the Court should apply a less exacting, or “non-fundamental” proportionality test, which would lead to a finding that certain practices comply with the Treaty even though those practices would not meet the standard of proportionality currently applied by the ECJ.

Part I will discuss the basic structure of UEFA, the Financial Fair Play regulations, and the development of EU sports law. Part II will apply current EU sports law to Financial Fair Play and show that a strict application of the principle of proportionality would lead to a finding that the regulations are incompatible with the Treaty. Part III will propose a new approach where the ECJ would first distinguish between fundamental and non-fundamental EU rights, and then apply a lower proportionality standard to non-fundamental rights in order to grant sporting organizations the deference required for efficient internal regulation.

I. UEFA, Financial Fair Play, and the Development of European Union Sports Law

UEFA is “one of six continental confederations of world football’s governing body, [Fédération Internationale de Football Association (“FIFA”)].” As the continental confederation for Europe, UEFA grants licenses to national football associations and clubs and is currently comprised of fifty-three European members. In addition to “fostering and develop[ing] unity and
solidarity among the European football community.” 26 UEFA hosts the most prestigious and lucrative club tournaments in world football. 27 Only licensed clubs from member associations can participate in these tournaments, and because compliance with UEFA regulations is required to obtain a license, the financial incentive to comply is too high for most clubs to risk non-compliance. 28

UEFA enacted its Financial Fair Play regulations in response to “repeated, and worsening, financial loses” among football clubs. 29 The federation’s fears were not unfounded; between the approval of FFP in 2010 and its implementation in 2012, 30 as many as ten clubs declared bankruptcy due to overspending. 31 One example is the Scottish club Glasgow Rangers, 32 who were

27. In European football, the terms tournament, league, and cup are often used interchangeably. These tournaments include the Champions League, Europa League, and Super Cup. The most lucrative of the tournaments is the Champions League, which distributed €904.6 to clubs that competed in the 2012–2013 tournament. Management Clubs Benefit from Champions League Revenue, UEFA CHAMPIONS LEAGUE (July 23, 2013), http://www.uefa.org/management/finance/news/newsid=1975196.html [hereinafter Champions League Revenue].
29. Financial Fair Play, supra note 7.
31. Such overspending is the result of large transfer fees, which are lump sum payments to other clubs to acquire a player and very high salaries of players and managers. The Football Debt League—Top 10 Most Indebted Clubs, SOCCERLENS.COM, http://soccerlens.com/the-football-debt-league-top-10-most-indebted-clubs/50035/ (last visited May 20, 2013).
32. Unlike American sports, football clubs are often referred to by city and team name without the article “the.” For example, the American baseball team is called “the Texas Rangers” or “the Rangers,” whereas the Scottish football club is just called “Glasgow Rangers” or “Rangers.” See, e.g., Rangers Dropped to Lowest League in Scotland, USA TODAY (July 14, 2012, 12:03 AM), http://www.usatoday.com/sports/soccer/story/2012-07-13/
frequent champions of Scottish football. The club, founded in 1873, recently declared bankruptcy; and after a vote among other teams in the Scottish Premier League, the club was forced to begin the 2012–2013 season in the lowest competitive tier of professional football in Scotland. Although an extreme example of a club’s financial collapse, Glasgow Rangers’ bankruptcy demonstrates that even the world’s most popular clubs are not immune to the perils of overspending.

A. Financial Fair Play Regulations

Seeking to prevent further instances of insolvency, UEFA’s Financial Fair Play regulations require that clubs “live within their means’ or break even based on football-related income at least matching their football-related expenditure[s].” Additionally, there are several non-financial requirements listed in the FFP Regulations. For example, a club must show that it has “a youth development program, player registration, training facilities, a general manager, a financial officer, a media
If a club does not comply with the FFP regulations, UEFA or the club’s national association can revoke, or refuse to renew, the club’s license. For most of the larger, more established clubs, compliance with the non-financial regulations requires very little change to club policies, as it is likely that most of these processes and positions are already in place, or would require only minor adjustments. Therefore, “[t]he [real] challenge for the clubs is to fulfill the break-even requirement,” even though the regulations account for deviations in clubs’ profits and expenses, allowing up to €5 million in losses each year. Additionally, the regulations allow for excess losses up to €45 million for the 2013 and 2014 seasons, €30 million for the 2015 through 2018 seasons, and “a lower amount as decided by . . . the UEFA Executive Committee” in the subsequent years, so long as “the excess [losses are] entirely covered from equity participants and/or related parties.” This allows clubs with wealthy investors to continue to compete in UEFA competitions notwithstanding large losses until 2018, as long as the investors are willing to contribute equity to cover any excess losses beyond the permissible deviation of €5 million. However, if a club does not have the assistance of a wealthy benefactor, or other means of quickly generating income, the maximum allowable football loss without suspension of the club’s UEFA license is €5 million. With such staggering sums of money involved, the owners, or even players, of a club whose license is revoked are likely to challenge the FFP regulations’ compatibility with EU free movement or competition law. Regardless of the compelling reasons for Financial Fair Play’s implementation, the ECJ

40. UEFA Club Licensing Regulations, supra note 4, art. 14.
41. Murphy, supra note 39, at 414.
42. Id.
43. UEFA Club Licensing Regulations, supra note 4, art. 61.
44. Id.
45. Id.
46. After 2018, the maximum deviation allowed will be decided by the UEFA Executive Committee. Id.
47. Id.
48. Id.
would likely find that the regulations are incompatible with the Treaty because the FFP regulations do not meet the strict standards of the proportionality test developed in EU case law.

B. The Development of EU Sports Law: From an Exception to a Justification

Over the course of nearly thirty years, the ECJ has recognized that sports are of a unique nature and therefore may warrant different treatment than other areas of the law. At first, the ECJ considered rules of a purely sporting interest to be outside the scope of the treaty, or an exception to the rules.49 However, as more cases arose, this exception turned into a justification for restrictions on competition or the free movement of workers, subject to the principle of proportionality.50 This section will introduce the relevant Treaty provisions and the principle of proportionality, outline the development of sports law and its application through a discussion of the landmark case law, then conclude with recent developments in the EU legislature’s specific mention of sport.

1. The Relevant Treaty Provisions and the Principle of Proportionality

In order to better understand the development of EU sporting case law, a brief introduction of the relevant Treaty provisions is warranted.51 Challenges to sports regulations have generally been brought under three Treaty provisions. First, many early challengers invoked Article 12, which prohibits “any discrimination on grounds of nationality.”52 However, recently this type of challenge has given way to free movement challenges under Article 45, which dictates “that free movement for workers

51. See discussion infra Part II.A.
shall be secured within the Union." Finally, these challenges are often paired with Article 101 challenges, which prohibit “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States.”

To analyze these claims, the ECJ applies the principle of proportionality, a general principle of EU law that “requires that action undertaken must be proportionate to its objectives.” The principle stems from the legal systems of various member states and “[i]ts development as a ground for review can be seen as the judiciary’s response to the growth of administrative powers and the augmentation of administrative discretion.”

The test for proportionality can be broken down into two requirements. The first is whether the measure aims to achieve a legitimate objective. There are many types of legitimate objectives, but these vary from case to case and often involve matters of public interest or public safety. The second requirement is whether the measure is necessary and not overly restrictive. To determine necessity, the ECJ often asks “whether there are other less restrictive means of producing the same result.” This second requirement, often called the least restrictive means test, is what frequently leads to a finding that a regulation is incompatible with the Treaty.

55. TRIDIMAS, supra note 17, at 6.
56. Id. at 136.
57. Id.
58. Tridimas describes it as a three-part test, but states that “in practice, the [ECJ] does not distinguish in its analysis between the second and third test.” Id. at 139.
60. TRIDIMAS, supra note 17, at 136.
61. Id. at 139.
62. Id.
2. The Development of EU Sporting Case Law

In the 1974 case, *Walrave v. Association Union Cycliste Internationale*, the Court ruled on a sport governance matter that paved the way for the confusion still present in EU sports law today.63 In the case, two cyclists challenged a rule promulgated by the Association Union Cycliste Internationale ("UCI" or "Cyclist Union") that required the pacemaker to be of the same nationality as the cyclist.64 The cyclists argued that this practice constituted discrimination on grounds of nationality under Article 12 of the Treaty and a restriction of free movement under Article 45.65 The Court first stated that "the practice of sport is subject to [European] Community law in so far as it constitutes an economic activity,"66 then concluded that the "composition of . . . national teams . . . has nothing to do with economic activity."67 Therefore, the Court found the rules in question did not fall within the scope of the discrimination and free movement provisions of the Treaty.68 The Court’s interpretation in *Walrave* created the idea that “pure sporting rules” were removed from the scope of the Treaty, providing sporting organizations with a potential defense to challenges under EU law and laying the framework for much of the following thirty-five years of EU sporting case law.

Two years later, in *Dona v. Mantero*,69 the Italian Football Federation ("IFF") attempted to use this exception to validate a set of rules that indirectly70 resulted in only Italian footballers being able to participate in professional or non-professional

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64. *Walrave*, 1974 E.C.R. 1405, para. 2. The rule in question stated in French "l'entraîneur doit être de la nationalité du coureur," which translates literally to “the coach must be of the nationality of rider.” *Id.* The ECJ clarifies the phrase idiomatically finding in English it means “[t]he pacemaker must be of the same nationality as the stayer.” *Id.*
65. The applicant also included a free movement of services claim, but the ECJ analyzed both claims together. *Id.*
66. *Id.* para. 4.
67. *Id.* para. 8.
68. *Id.* para. 13.
70. The rule said that only players who were affiliated with the Italian Football Federation could take part in matches, but affiliation to the federation was only available to Italian nationals. Therefore, only Italian nationals could take part in matches. *Dona*, 1976 E.C.R. 1333, para. 5.
matches. The Court again spoke of “the possibility that certain specific rules could constitute ‘purely sporting’ rules that were not contrary to the Treaty freedoms and their requirement of non-discrimination,” but without much explanation, found that the IFF’s rules were incompatible with the Treaty. Because the Court failed to elaborate on what type of rules could constitute purely sporting rules other than the national team selection rules in Walrave, sporting organizations were left with little guidance on how to regulate.

Nearly thirty years after Walrave, in Union Royal Belge de Societes de Football Association ASBL v. Bosman, the Court drastically narrowed the “pure sporting rules” exception, but opened the door to another possible defense for sporting organizations. Jean-Marc Bosman was a Belgian football player whose contract had expired with RFC Liege, a football club in Belgium’s highest division. Several other clubs were interested in signing Bosman, but transfer negotiations between RFC Liege and the interested clubs were unsuccessful because RFC Liege demanded too high of a price. Subsequently, RFC Liege refused to let Bosman leave the club and reduced his wages, prompting Bosman to challenge RFC Liege’s transfer practices,

71. Id.
72. PARRISH & MIETTINEN, supra note 15, at 84.
76. PARRISH & MIETTINEN, supra note 15, at 84.
77. Bosman, 1995 E.C.R. I-4921, para. 28. European football leagues are set up in different divisions, or tiers, with a promotion and relegation system whereby at the end of the season, the clubs that finish in the worst ranking of one division are “relegated” to the division immediately below. See discussion infra Part II.B.
79. Id. para. 29.
as well as “the so called 3+2 rule,”80 which limited the number of foreign players that each club could have on its roster.81

Bosman challenged the rules as being incompatible with Article 12, prohibiting discrimination based on nationality; Article 45, prohibiting restrictions on the free movement of workers; and Article 101, prohibiting competition distortion. The Court did not address Bosman’s challenges under Article 101, “perhaps recognizing the difficulties involved with the application of competition law to sporting competitions.”82 However, the Court did address the challenge under Article 45,83 which “entail[s] the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.”84

The Court again turned to the language of Walrave and Dona limiting the scope of the TFEU to sporting regulations that constitute economic activities, as defined in the Treaty.85 More significantly, the Court added to the rule, stating that “within the context of economic sporting activity, [it] recognized a category of rules or practices ‘justified on non-economic grounds related to the particular nature and context of certain matches’ and limited to their proper objectives.”86 This language represented the Court’s recognition that its definition of pure sporting rules, as formulated in Walrave and Dona, was too narrow due to the complex relationship between sport and its economic aspects.87

Turning to the merits of Bosman’s challenge, the Court ruled that RFC Liege’s transfer policy was incompatible with Article 45 as it was “likely to restrict the freedom of movement of players who wish to pursue their activity in another member

80. Parrish & Miettinen, supra note 15, at 86. “Under the 3+2 rule, teams could only have a maximum of three foreign players in a team plus a maximum of two foreign players who were classified as assimilated players in that they had been registered in the relevant national association for at least five years.” Gardiner & Welch, supra note 50, at 829 n.3.
81. Gardiner & Welch, supra note 50, at 829 n.3.
82. Parrish & Miettinen, supra note 15, at 86.
84. Id.
85. Parrish & Miettinen, supra note 15, at 86.
86. Id.
87. Id. at 87.
However, such restrictions may still be justified under the principle of proportionality, and therefore compatible with the Treaty, if the “rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest.” Applying this standard, the Court found that “the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate,” meeting the first prong of the proportionality test. Next, however, the Court found that while the transfer rules in question have such an effect, the “same aims [could] be achieved at least as efficiently by other means.” Thus, by not meeting the least restrictive means test, the rules did not satisfy the second prong of the proportionality test and were therefore incompatible with the Treaty.

Similarly, the Court found that the 3+2 rule also placed an impermissible restriction on the free movement of workers. The Court first distinguished the rule from the “purely sporting” national team rules in Walrave and Dona and found that the rule “has the effect of reducing the workers’ chances of finding employment.” As a justification for the rule, the national associations argued, inter alia, that the rules “help[ed] to maintain a competitive balance between clubs by preventing the richest clubs from appropriating the services of the best players.” The Court conceded that maintaining a competitive balance could be a legitimate justification, but found that the 3+2 rule was “not sufficient to achieve [that] aim” because a single club could still acquire the best domestic players and

89. Id. para. 104.
90. Id. para. 106.
91. Id. para. 108.
92. Id. para. 110.
93. Id. para. 114.
94. Id. para. 121.
95. Id. para. 124.
96. The Belgian National Football Association, UEFA, and German, French, and Italian governments argued in favor of the rules. Id. para. 122.
97. They also argued that the rule “serve[d] to maintain the traditional link between each club and its country” and that it was “necessary to create a sufficient pool of national players to provide the national teams with top players to field in all team positions.” Id. paras. 123–24.
98. Id. para. 125.
thus undermine the competitive balance. Therefore, the rule was not proportional to its objectives.\textsuperscript{99}

The \textit{Bosman} ruling had a significant impact on the internal structure of sports organizations\textsuperscript{100} and sparked concerns that the Court was interfering with “a whole raft of sectors never intended to be subject to supranational governance.”\textsuperscript{101} Further, the analysis showed that sporting interests, such as maintaining a competitive balance and recruiting and training youth players, could justify a restriction for the purposes of proportionality.\textsuperscript{102} However, by finding that these measures did not meet the least restrictive means test without further explanation, the Court again left sports regulators with very little guidance as to how they should regulate to achieve their goals.

Five years after \textit{Bosman}, in 2000, the ECJ made two rulings within two days of each other that had a significant impact on EU sports law.\textsuperscript{103} In the first case, \textit{Deliege v. Ligue de Judo},\textsuperscript{104} the Court broadened its reach into sports governance and further narrowed the \textit{Walrave} exception by “offer[ing] an expansive interpretation of ‘economic activity.’”\textsuperscript{105} \textit{Deliege} involved an amateur Judo\textsuperscript{106} athlete who claimed that a set of European Judo Union rules, which restricted the number of participants in Judo tournaments on the basis of nationality, were incompatible with EU law.\textsuperscript{107} In finding amateur sport “constitutes an economic activity within the meaning of . . . the [Treaty],”\textsuperscript{108} the Court offered a broad and complicated interpretation of amateurism and its connection with economic activity within EU law.\textsuperscript{109} It essentially said that there are means outside of remuneration that bring amateur athletics within the scope of economic activity, such as sponsorships, celebrity status, and

\textsuperscript{99.} \textit{Id.} para. 135.
\textsuperscript{100.} Parrish, \textit{Reconciling Conflicting Approaches, supra} note 9, at 29.
\textsuperscript{101.} \textit{Id.}
\textsuperscript{102.} \textit{Bosman}, 1995 \textit{E.C.R.} I-4921, para. 106.
\textsuperscript{103.} Parrish \& Miettinen, \textit{supra} note 15, at 89.
\textsuperscript{104.} \textit{Joined Cases C-51/96 \& C-191/97, Deliege v. Ligue de Judo (Deliege), 2000 \textit{E.C.R.} I-2549, para. 10.}
\textsuperscript{105.} Parrish \& Miettinen, \textit{supra} note 15, at 89.
\textsuperscript{106.} Judo is a “sport developed from jujitsu [that] emphasizes the use of quick movement and leverage to throw an opponent.” \textit{Merriam-Webster's Collegiate Dictionary} 677 (11th ed. 2003).
\textsuperscript{107.} \textit{Deliege}, 2000 \textit{E.C.R.} I-2549, para. 10.
\textsuperscript{108.} \textit{Id.} para. 13.
\textsuperscript{109.} \textit{Id.}. 


other grants or aid.\textsuperscript{110} However, without providing further explanation, “the Court left rather unclear how directly connected the economic activity must be for the sporting rule to be capable of constituting a restriction on the freedom to provide services.”\textsuperscript{111} On the other hand, the Court did make clear “that the decisions of national amateur associations could be subject to [EU] law even where the sport itself had no direct economic dimension and the rule in question was non-discriminatory.”\textsuperscript{112}

The second case, \textit{Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball (Belgian Royal Federation of Basketball Clubs - FRBSB)},\textsuperscript{113} involved the player transfer policies of the International Basketball Federation (“FIBA”).\textsuperscript{114} Although the transfer rules applied uniformly to all member federations, the Court still found “[t]he existence of an obstacle to freedom of movement.”\textsuperscript{115} Therefore, it had to determine whether “the need to prevent distortion of sporting competitions was capable of justifying those rules.”\textsuperscript{116} Though the Court found that the measures met the first prong of the proportionality test because the rules of “setting . . . deadlines for the transfers of players may meet the objective of ensuring the regularity of sporting competitions,”\textsuperscript{117} it concluded that the rules went “beyond what [was] necessary for achieving the aim pursued.”\textsuperscript{118} Therefore, the second prong of the proportionality test was not met.\textsuperscript{119} Again, the Court failed to elaborate on what would be a proportional rule, offering no guidance to sporting organizations as to what would constitute a rule that is proportional to its objectives.\textsuperscript{120}

\begin{itemize}
\item\textsuperscript{110} \textit{Id.}
\item\textsuperscript{111} \textit{Parrish & Miettinen, supra} note 15, at 91.
\item\textsuperscript{112} \textit{Id.}
\item\textsuperscript{113} \textit{Case C-176/96, Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball [Belgian Royal Federation of Basketball Clubs—FRBSB] (Lehtonen)}, 2000 E.C.R. I-2681.
\item\textsuperscript{114} “Basketball is organized at world level by the [International Basketball Federation (FIBA)].” \textit{Id.} para. 3. Like the structure of UEFA, FIBA is comprised of individual national federations. For example, \textit{Lehtonen} involved the FRBSB, the Royal Belgian Basketball Federation. \textit{Id.}
\item\textsuperscript{115} \textit{Id.} para. 51.
\item\textsuperscript{116} \textit{Parrish & Miettinen, supra} note 15, at 92.
\item\textsuperscript{117} \textit{Lehtonen,} 2000 E.C.R. I-2681, para. 53.
\item\textsuperscript{118} \textit{Id.} para. 58.
\item\textsuperscript{119} \textit{Id.}
\item\textsuperscript{120} \textit{Parrish & Miettinen, supra} note 15, at 93.
\end{itemize}
By the time the Court reached its decision in *Meca-Medina v. Commission*¹²¹ in 2006, EU sports law, while still imperfect and disconnected, was “underpinned by identifiable themes which define[d] the permitted scope of sports governance.”¹²² One of these themes, the “purely sporting” exception from the scope of the Treaty declared in *Walrave*, was essentially struck down by the Court’s decision in *Meca-Medina*.¹²³ *Meca-Medina* involved a challenge under Articles 45 and 101 by two professional swimmers who were banned from competition for two years after failing a drug test administered by Federation Internationale de Natation (“FINA”),¹²⁴ the international governing body of professional swimming.¹²⁵ The Court of First Instance¹²⁶ interpreted “th[e] anti-doping rules [as] concern[ing] exclusively non-economic aspects of sport, designed to preserve ‘noble competition.’”¹²⁷ The ECJ rejected this notion and interpreted precedent on rules of pure sporting interests very narrowly.¹²⁸ The Court held that if an activity falls under a provision of the Treaty, “that activity must satisfy the requirements of those provisions,”¹²⁹ thereby rejecting “the notion that a ‘purely sporting’ rule is of itself apt to escape the scope of application of the Treaty.”¹³⁰

Turning to the merits of the case, the Court found that “safeguard[ing] equal chances for athletes [to compete on level terms, without performance enhancing drugs], athletes’ health, the integrity and objectivity of competitive sport and ethical values in sport” were sufficient justifications to meet the first

¹²³ PARRISH & MIETTINEN, supra note 15, at 96.
¹²⁶ The Court of First Instance was created in 1989 to alleviate the increasing caseload of the European Court of Justice. EU Factsheets: Court of Justice of the European Union, CIVITAS, http://www.civitas.org.uk/eufacts/FSINST/IN5.php (last visited Sept. 30, 2013).
¹²⁹ Id. para. 28.
¹³⁰ Weatherill, *The Influence of EU Law*, supra note 122, at 83.
prong of proportionality. Next, the Court gave deference to FINA’s thresholds for punishment, and in a rare decision, found that the rules were not excessive or disproportional. However, it is worth noting that the Court did not apply the stringent, least restrictive means test used in prior decisions. It is also important to note that this relaxed standard may indicate that when a case involves something that the Court does not approve of, such as using performance-enhancing drugs, it is less willing to offer the same fundamental protection. Further, Meca-Medina marked the end of the existence of a pure sporting exception, leaving only a sporting justification for the purposes of the proportionality test.

This approach was confirmed in Olympique Lyonnaise SASP v. Bernard, where the purely sporting exception was not even argued. Bernard involved another Article 45 challenge to a transfer rule, which Olympique Lyonnaise (‘Lyon’), a French football club, claimed resulted in a restriction on the free movement of workers. Bernard, a player whose trainee contract with Lyon had expired, refused to sign a new contract with the club. Instead, he signed a professional contract with Newcastle United FC, an English club. Lyon then sought compensation based on a French rule that said if a professional club trained a player between the ages of sixteen and twenty-two under a fixed term contract, that player must sign a professional contract with that club upon the expiration of the trainee contract or the club is entitled to damages. The ECJ found that such rules “are likely to discourage [a] player from

132. See id. para. 54.
133. The Court stated that since the “appellants [did] not specify at what level the thresholds should have been set[,] . . . it does not appear that the restrictions go beyond what is necessary.” Id. para. 53.
134. PARRISH & MIETTINEN, supra note 15, at 87.
136. Id.
137. Id. para. 17.
138. Players between the ages of sixteen and twenty-two are considered trainees and sign professional contracts once their trainee contracts expire. Id. para. 3.
139. Id. paras. 7–10.
140. Id. para. 47.
exercising his right of free movement”\textsuperscript{141} and therefore constituted a restriction incompatible with the Treaty.\textsuperscript{142}

The Court then applied the proportionality test. The Court reiterated that the special nature of sport gives rise to justifiable reasons of public interest,\textsuperscript{143} but found that the rules did not meet the second prong of the proportionality test.\textsuperscript{144} The Court reasoned that because the rules were based on damages, rather than actual compensation for training, they were “not necessary to ensure the attainment of [the] objective” of promoting the recruitment and training of young players, again showing the difficulties of meeting the second prong of the Court’s strict proportionality standard.\textsuperscript{145}

Thus, having affirmed the elimination of a pure sporting exception from \textit{Meca-Medina}, the \textit{Bernard} Court left only a sporting justification for sporting rules that may implicate a provision of the Treaty.\textsuperscript{146} Further, this standard applies to governance of both professional and amateur sports, due to the various ways in which both fall within the Treaty’s definition of economic activity.\textsuperscript{147} Finally, for such a rule or regulation to be justifiable, it must meet the strict proportionality standards set forth in both \textit{Bosman} and \textit{Lehtonen}.\textsuperscript{148}

\textbf{C. The White Paper on Sport and the Treaty of Lisbon}

In 2007, the Commission of the European Communities (“Commission”) released the \textit{White Paper on Sport}\textsuperscript{149} (“White Paper”) in order “to give strategic orientation on the role of sport in Europe, to encourage debate on specific problems, to enhance the visibility of sport in EU policy-making, and to raise public awareness of the needs and specificities of the sec-

\begin{itemize}
\item \textsuperscript{141} \textit{Id.} para. 35.
\item \textsuperscript{142} \textit{Id.} para. 37.
\item \textsuperscript{143} \textit{Id.} para. 39.
\item \textsuperscript{144} \textit{Id.} para. 48.
\item \textsuperscript{145} \textit{Id.} para. 50.
\item \textsuperscript{147} See Joined Cases C-51/96 & C-191/97, \textit{Deliege}, 2000 E.C.R. I-2549, para. 57.
\item \textsuperscript{148} Case C-415/93, \textit{Bosman}, 1995 E.C.R. I-4921.
\end{itemize}
After highlighting several reasons why sport plays such an important role in society, the White Paper discussed “the specificity of sport,” emphasizing that the unique characteristics of sport make it subject to certain exemptions, such as organizational rules establishing separate competitions for men and women. Then, using similar language to the Court’s prior decisions regarding sport, the White Paper affirmed Mecca-Medina’s rejection of pure sporting rules and said that “the assessment of whether a certain sporting rule is compatible with EU competition law can only be made on a case-by-case basis.”

This declaration by the Commission not only affirmed the end of the pure sporting exception but also reflected the legislature’s support for the use of sporting objectives as potential justifications for Treaty violations.

Next, the Treaty of Lisbon’s entry into force in 2009 marked “the first time that sport [was] subject to explicit reference within the treaties establishing and governing the European Union.” However, the “content of the new provisions [were] drawn with conspicuous caution,” making their “influence on sport in Europe both profound and trivial.” Article 165(1) of the Treaty of Lisbon states that “[t]he Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.”

The treaty’s cautious phrasing has two implications. The first implication involves a limited grant of power to govern in the field of sports law. The Treaty of Lisbon grants the EU three

150. Id. at 2.
151. Such reasons included “enhancing public health,” id. at 3, “education and training,” id. at 5, “promoting volunteering and active citizenship,” id. at 6, “social inclusion, integration, and equal opportunities,” id. at 7, and “prevention of and fight against racism,” id. at 8.
152. Id. at 13.
153. Id. at 14.
155. Id.
156. Id.
157. Id.
158. TFEU, supra note 83, art. 165. See also Weatherill, The Effect of the Lisbon Treaty, supra note 154, at 416.
levels of governing power to various fields of law, called competences.\textsuperscript{160} The strongest level is “exclusive competence,” which gives the EU sole power to “legislate and adopt binding acts in [a field].”\textsuperscript{161} The second, “shared competence,” allows both member states and the EU to legislate.\textsuperscript{162} The third, “support competence,” only gives the EU the power “to support, coordinate or compliment the action of the Member States” and does not grant any legislative power.\textsuperscript{163} Of these three competences, Article 165 grants “only a supporting competence for the EU, the weakest type of the three.”\textsuperscript{164} This shows the EU’s hesitancy to get too deeply involved with sport governance.

Next, and perhaps more importantly in relation to sports law, the Treaty’s explicit reference to sport validated the idea that the goals of sporting organizations are capable of justifying a restriction on competition or of free movement under certain circumstances. It also further confirmed the special nature of sport, the Commission’s statements from the White Paper, and the Court’s general approach to sporting cases.\textsuperscript{165}

II. A CHALLENGE TO FINANCIAL FAIR PLAY UNDER THE CURRENT STANDARD

UEFA began implementing the Financial Fair Play regulations at the beginning of the 2012–2013 season and has already withheld prize money from twenty-three clubs as sanctions for noncompliance with the regulations.\textsuperscript{166} As more clubs feel the repercussions of such sanctions, the likelihood of a challenge under EU law increases. The most likely challenges to FFP would be either under Article 45, as a restriction on the free movement of workers, or under Article 101, involving agreements that affect trade. Under the current standard, analysis of a challenge is a four-step process. First, the Court must de-


\textsuperscript{161} Id.

\textsuperscript{162} Id.

\textsuperscript{163} Id.

\textsuperscript{164} Weatherill, The Effect of the Lisbon Treaty, supra note 154, at 414.

\textsuperscript{165} Weatherill, The Effect of the Lisbon Treaty, supra note 154, at 416.

\textsuperscript{166} UEFA Hands Out First Financial Fair Play Penalties, BBC SPORT (Sept. 11, 2012), http://www.bbc.co.uk/sport/0/football/19557934.
termine whether the regulations are an economic activity within the meaning of the Treaty. Next, the Court determines whether the regulations constitute a restriction according to each provision in question. Third, the Court looks to the regulation’s aims and determines whether the aims are capable of justifying the restriction. Finally, the Court asks whether the regulations are sufficient to achieve those aims without going beyond what is necessary to do so.

A. Financial Fair Play as a Restriction on Free Movement and Competition

Applying the current standard of proportionality to FFP, “the practice of sport is subject to [EU] law only insofar as it constitutes an economic activity within the meaning . . . [of the] Treaty.” It is clear from case law that “this applies to the activities of professional and semi-professional football players, which are in the nature of gainful employment or remunerated service.” Additionally, although UEFA is based in Switzerland, a non-member state, and is governed by Swiss Law, the ECJ’s ruling in Bosman shows that “an entity whose practi[c]es [infringe] on competition or free movement in the EU comes under its jurisdiction and EU law is applicable.”

Next, the free movement claim and the competition claim must be considered separately to determine whether the practices in question are compatible with the Treaty. Article 45(1) states that “[f]reedom of movement for workers shall be secured within the Union.” In the context of sport, challengers have invoked two distinct sections of Article 45, Sections 2 and 3(b). Section 2 prohibits restrictions on the freedom of

168. Id. para. 33.
169. Id. para. 21.
170. Id.
171. Id. para. 27.
174. TFEU, supra note 83, art. 45(1).
175. Id. art. 45(2), (3)(b).
movement due to discrimination based on nationality and Section 3(b) prohibits general restrictions on the right to move freely within the territory of member states. The former type of restriction can be dismissed outright because the Financial Fair Play regulations apply equally to all clubs, and therefore do not discriminate on the basis of nationality, either directly or indirectly. However, the latter restriction requires deeper analysis.

The Bosman Court stated that all “provisions which preclude or deter a national . . . from leaving his country . . . in order to exercise his right to freedom of movement . . . constitute an obstacle to [the freedom of movement] . . . even if they apply without regard to the nationality.” The next question then becomes whether the Financial Fair Play regulations preclude or deter players from moving freely throughout the Union. Parrish and Miettinen refer to the minimum threshold for deterrence as a “substantial hindrance.” Referring to the ECJ decision of Volker Graf v. Filzmoser Maschinenbau GmbH, they state that regulations that present “too uncertain and indirect a possibility . . . of hinder[ing] free movement . . . [do] not constitute a restriction.”

The effects of Financial Fair Play on players’ ability to move freely within the EU exemplify this type of tenuous causal relationship. Actual or threatened UEFA sanctions on a club for noncompliance have multiple consequences. First, the club will be less inclined to over-spend, resulting in lower transfer fees and lower potential salaries for players. While this may decrease the number of clubs willing to spend large sums of money on a player, the player will still have several club options, including the opportunity to play in another country. Next, if a club’s UEFA license is revoked, this will make the club less at-

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176. Id. art. 45(2); see, e.g., Dona, 1976 E.C.R. 1333; Case 36/74, Walrave v. Ass’n Union Cycliste Internationale, 1974 E.C.R. 1405.
177. Id. art. 45(3)(b); see, e.g., Case C-325/08, Olympique Lyonnais SASP v. Bernard, 2010 ECJ EUR-Lex LEXIS 113 (Mar. 16, 2010).
178. Lindholm, supra note 8, at 202.
tractive to players who want to compete in UEFA competitions. However, because of the structure of UEFA competitions, if one club is not permitted to participate, another club will take its place, maintaining the amount of clubs participating in the competitions. Thus, since the FFP regulations would not affect a player’s ability to join a club and participate in those competitions, it is unlikely that the ECJ would find that Financial Fair Play substantially hinders a player’s right to free movement under Article 45 of the Treaty.

The next step is to determine whether Financial Fair Play constitutes a restriction of competition under Article 101, which states that “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market [are] incompatible with the internal market.” Therefore, in order to fall within the scope of Article 101, UEFA must either be an “undertaking” or an “association of undertakings.” Though not defined in the Treaty, the ECJ provided a sweeping definition of the term in Höfner v. Macroton GmbH, where it ruled that “every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed” constitutes an undertaking. Thus, “an organization carrying out regulatory functions and economic functions will be subject to competition law in so far as its economic functions are concerned.”

Based on this broad definition, and the Commission’s White Paper, the Court would find that the UEFA’s FFP regulations constitute an agreement between undertakings or among an association of undertakings. The White Paper “acknowledge[d] the usefulness of . . . licensing systems for professional clubs,” but expressly stated that “[s]uch systems must be compatible with competition . . . provisions.” Further, the “White Paper listed as undertakings individual athletes performing services.

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182. TFEU, supra note 83, art. 101.
186. Parrish & Miettinen, supra note 15, at 111.
sports clubs carrying out economic activities such as selling tickets, broadcasting or advertising rights, and national and international sports associations that commercially exploit a sports event as capable of constituting undertakings.” 188 UEFA and its FFP regulations meet both these standards. First, UEFA’s FFP regulations fall squarely into this category of licensing systems to which the White Paper refers. 189 Second, UEFA also commercially exploits football by coordinating ticket sales, selling advertising, and distributing media rights. 190

Additionally, case law shows that UEFA’s FFP regulations constitute an agreement between undertakings or among an association of undertakings. In Piau v. Commission, 191 the ECJ ruled on a challenge to FIFA’s rules governing players’ agents. 192 To rule on the matter, the Court first had to determine whether FIFA and its regulations fell within the scope of the Treaty. 193 The ECJ stated that FIFA was made up of national associations, and because those associations constitute “associations of undertakings ... by virtue of the economic activities that they pursue,” FIFA also “constitutes an association of undertakings within the meaning of [the Treaty].” 194 Because UEFA is made up of the same national associations that the Court found determinative in Piau, UEFA is also an undertaking or association of undertakings within EU Law. 195

The next step in analyzing an Article 101 challenge is to determine whether the Financial Fair Play regulations “have an effect on trade between Member States.” 196 Again, the ECJ

188. PARRISH & MIETTINEN, supra note 15, at 111.
189. See UEFA CLUB LICENSING REGULATIONS, supra note 4, art. 1.
190. UEFA CLUB LICENSING REGULATIONS, supra note 4, art. 1.
192. Id. paras. 3–8. Upon Piau’s request, the Commission initiated a procedure to investigate FIFA’s rules. Id. para. 10. Subsequently, FIFA amended several of the rules and the Commission discontinued its investigation, saying that the amendments eliminated the “main restrictive elements of the ... [r]egulations and that there was no longer any Community interest in continuing with the procedure.” Id. para. 19. Piau then brought an action to annul the Commission’s decision. Id. para. 29.
193. Id. paras. 3–8.
194. Id. para. 72.
195. About UEFA—Overview, supra note 3.
196. See PARRISH & MIETTINEN, supra note 15, at 113.
provided a broad definition of what constitutes an effect on trade for this purpose, requiring “only probable foresight of influence, direct or indirect, actual or potential, on the pattern of trade between Member States which can be either detrimental or beneficial.”197 Though this also brings agreements that facilitate competition within the article’s scope, the “effect[] . . . must be ‘appreciable’ to fall within [EU]” law.198 The Commission provided guidance as to what is appreciable in its notice entitled Guidelines on the Effect of Trade Concept Contained in Arts. 81 and 82 of the Treaty199 and stated that “where the parties to an agreement . . . control less than 5% of the relevant market and the turnover of the products in question is less than €40 million[,] an agreement fails the appreciability test . . . .”200
ECJ case law also dictates that the Court would find that FFP regulations have an appreciable effect on trade. In Piau, the ECJ looked to the agency fee regulations in question and, citing phrases such as “for a fee” and “transfer contract,” concluded that the regulations constituted an economic activity and therefore had an effect on trade.201 Similarly, UEFA’s FFP regulations contain inherently economic language and their effects are far more pervasive than the rules in Piau. For example, a club that qualified to participate in the “group stage”202 of UEFA’s 2012–2013 Champion’s League received “a minimum €8.6 million” in profit,203 while the winner of the

199. At the time of the notice, competition law was governed by Articles 81 and 82 of the Treaty. Commission Notice—Guidelines on the Effect of Trade Concept Contained in Articles 81 and 82 of the Treaty, para. 52, 2004 O.J. (C 101) 7.
200. PARRISH & MIETTINEN, supra note 15, at 114.
202. The group stage consists of thirty-two clubs. Those clubs are divided into groups of four based on a seeding system. Each club then plays every club in its group twice, once at home and once away, and is awarded three points per win and one point per draw. The top two clubs from each group advance into a knockout round. Competition Format, UEFA CHAMPIONS LEAGUE, http://www.uefa.com/uefachampionsleague/season=2013/competitionformat/index.html (last visited May 20, 2013).
203. Champions League Revenue, supra note 27.
tourneyment, FC Bayern Munich, earned over €55 million in prize money.\textsuperscript{204} Also included in the FFP’s compensation scheme are performance-based bonuses,\textsuperscript{205} and a market pool share that is split amongst the competing clubs.\textsuperscript{206} With such large figures involved, a club that routinely competes in the Champions League would suffer immense economic losses if its license were revoked for non-compliance. It follows that if the ECJ found that the \textit{Piau} regulations of agency fees constituted an effect on trade, it would make a similar finding in regards to the compensation scheme of the FFP regulations.

With respect to the appreciability test, the Commission’s guidance on trade effects suggests that UEFA and its FFP regulations would meet both the 5% relevant market threshold and the minimum turnover requirement of €40 million. “Market definition is particularly important in the context of \textit{[EU competition law]},”\textsuperscript{207} and the Court can approach the problem in various ways.\textsuperscript{208} The \textit{Piau} case offers guidance as to how the Court would define UEFA’s market, but ultimately this determination is made at the Court’s discretion.\textsuperscript{209} Although deciding the case on other grounds, the \textit{Piau} Court stated that “the market affected by the [player agency] rules in question is a market for the provision of services where the buyers are players and clubs[,] and the sellers are the agents.”\textsuperscript{210} This notion suggests a willingness to “entertain notions of FIFA’s activities in the ‘football market,’”\textsuperscript{211} which would be analogous to the market affected by Financial Fair Play. Whether the Court intended to mean the world or the European football market is immaterial because, in either case, UEFA’s market share would surpass the 5% appreciability threshold.\textsuperscript{212} Further, with UEFA’s top tournament boasting a €904.6 million prize pool, the €40 million in turnover requirement is also met.

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\textsuperscript{204.} \textit{Id.}
\textsuperscript{205.} The bonuses consist of €1 million for a win and €500 thousand for a draw in the group stage, increasing as the tournament progresses. \textit{Id.}
\textsuperscript{206.} \textit{Id.}
\textsuperscript{207.} \textit{PARRISH & MIETTINEN, supra} note 15, at 114.
\textsuperscript{208.} \textit{Id.}
\textsuperscript{209.} \textit{Id.}
\textsuperscript{211.} \textit{PARRISH & MIETTINEN, supra} note 15, at 114.
\textsuperscript{212.} \textit{Champions League Revenue, supra} note 27.
Finally, after meeting the two threshold requirements, in order to apply Article 101’s analytical framework, the FFP regulations must restrict competition in some way. The EU has recognized two types of restrictions on competition: those that have an object of negatively restricting competition, and those that have the effect of negatively restricting competition. However, incidental restriction from an agreement with a legitimate objective might not constitute a restriction of competition if that restriction is unavoidable.

Financial Fair Play is anomalous in this regard. While the regulation’s goal is “to protect the long-term viability and sustainability of European club football,” thereby preserving competition conditions, the sanctions for non-compliance provided by the regulations constitute a restriction on the clubs’ ability to participate in the European market for club football. The restrictive monetary or licensing sanctions are avoidable in that there are alternative means available to achieve the preservation of competition. Thus, if the monetary or licensing sanctions are avoidable, the restrictions on competition caused by them are also avoidable, bringing the Financial Fair Play regulations within the scope of Article 101, subject to the principle of proportionality.

B. Proportionality

The principle of proportionality is recognized as a general principle of EU law and is applied across almost all aspects of EU governance. To be proportional, Financial Fair Play must meet two requirements: (1) the regulations must have legitimate goals that are capable of justifying a restriction, and (2)
the regulation’s means of achieving those goals must be necessary and not overly burdensome.219

1. A Test of Legitimacy

Even when an agreement falls within the scope of Article 101, it may nonetheless be exempt from the Article if it “contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.”220 This is the case when the “measure [is] appropriate and necessary to achieve its objectives,” or proportional to the agreement’s legitimate goals.221 Within the context of competition, this framework uses the term “inherency” rather than the “justification” terminology applied in the context of free movement challenges.222 This is because rules that contain inherent restrictions are not actually considered restrictions under Article 101, “whereas . . . justified rules under free movement are within the meaning of ‘restriction’” and are considered excused by the ECJ due to their legitimate goals.223 However, for the purposes of analysis, “[t]he practical differences are limited, since the analytical criteria applied to both are similar.”224 Further, although the language of Article 101 refers to goods, the ECJ has interpreted it to include distribution of services.225 Therefore, the next step in analyzing a challenge to Financial Fair Play is to determine whether the regulations’ aims justify the restriction.

Although the ECJ often found sporting regulations incompatible with the Treaty, it typically found that the regulation’s various goals had the potential to justify the restriction. First, in Bosman, the Court found that “the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results” was a legitimate goal that

219. TRIDIMAS, supra note 17, at 139.
220. TFEU, supra note 83, art. 101(3).
221. TRIDIMAS, supra note 17, at 139.
222. PARRISH & MIETTINEN, supra note 15, at 122.
223. Id. at 122–23.
224. Id. at 123.
could justify a restriction. This is also one of the main objectives of the Financial Fair Play regulations. By limiting the amount of acceptable losses each year, the regulations aim to level the playing field between the clubs that have investors with seemingly endless amounts of capital and the clubs that do not.

Additionally, in both Bosman and Bernard, the ECJ found that “encouraging the recruitment and training of young players” was also a legitimate goal. Financial Fair Play encourages such development. Because the costs associated with bringing young players through the club’s internal system are significantly lower than bringing established players in through transfers, a club struggling to meet Financial Fair Play’s break-even requirement would likely invest more in recruitment. Further, developing youth players can generate more football-related income because as those players develop, they can be sold to other clubs, which would raise money for bringing new players or improvements to the club.

Another justification, which has not been tested before the ECJ, stems from the unique nature and structure of European football. European football associations operate on a promotion and relegation system, meaning that a club’s position in the standings at the end of each season determines the level that the club will play at in the next season. For example, in Eng-

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230. A. Nock, Promotion and Relegation Systems of Europe, FOOTBALLSPEAK.COM (Jul. 9, 2012),
land’s Premier League (“PL”), the clubs who finish in the bottom three positions are relegated to the Championship, the second tier league.\footnote{231} Meanwhile, the top two clubs of the Championship are automatically promoted to the PL, while the third through sixth place clubs compete in a playoff to win the third promotion spot.\footnote{232} To maintain such a system, a consensual interdependence must exist.\footnote{233} Further, any disturbance to this interdependence, like a club’s bankruptcy, will have effects that ripple throughout each level of the sport. If a club that was about to be relegated collapsed financially, either a club that would otherwise not have been relegated would be, or a club that would otherwise have been promoted would not be. In either case, that club would suffer financial hardship from either the loss of income from going down to a lower league, or the loss of income that it would have expected from moving up to a higher one. By requiring clubs to maintain fiscal responsibility, Financial Fair Play seeks to achieve stability and avoid such disturbances in football’s internal market. With such justifications, the ECJ would likely find that Financial Fair Play’s effects on competition could be justified if proportional to these legitimate goals.

2. A Test of Necessity

Having met the first burden of proportionality, a legitimate objective, the next step in the analysis is to determine whether the Financial Fair Play regulations are necessary to achieve that goal and not overly burdensome. It is at this stage of the analysis that the ECJ has often found that a rule or regulation is incompatible with the Treaty. The most notable example of this is in \textit{Bosman}, where the ECJ found that because the objectives of maintaining a competitive balance among the clubs and encouraging youth development could “be achieved at least as efficiently by other means,” the rules in question were not proportional.\footnote{234} Similarly, it is likely that the ECJ would find Financial Fair Play regulations would not meet this test due to

\footnotesize{http://footballspeak.com/post/2012/07/09/Promotion-and-Relegation-Systems.aspx.}
\footnotesize{231. \textit{Id.}}
\footnotesize{232. \textit{Id.}}
\footnotesize{233. PARRISH & MIETTINEN, supra note 15, at 2.}
\footnotesize{234. Case C-415/93, \textit{Bosman}, 1995 E.C.R. I-4921, para. 110.}
the alternative means available for FFP to accomplish its fiscal responsibility goals. One example of an alternative means for FFP to achieve its goals is to incentivize fiscally responsible club management, rather than punish irresponsibility. In such a scheme, a reward could be given to those clubs that achieve an adequate financial balance, rather than sanctions for those that do not. This scheme could also help clubs that are struggling competitively because a team that has a good financial balance would likely spend the reward by purchasing players from other clubs, thus putting more “responsible” money into the football market. Another alternative could involve UEFA representatives acting as advisors to clubs that wish to comply. Instead of attempting to break even on its own, a club could assent to having a UEFA financial advisor on staff that would approve or deny decisions of the club based on its budget. By making participation voluntary, such a system would be less restrictive and would likely achieve the regulation’s aims just as effectively. Because a variety of less restrictive means are readily conceivable, Financial Fair Play would likely fail the test of necessity.

The Court in Bosman invalidated the second set of rules in question because they were “not sufficient to achieve [the] aim” of maintaining a competitive balance. The Financial Fair Play regulations are unlikely to meet this high standard. While the regulations will encourage many clubs to spend wisely, their reach is limited. First, the majority of clubs are unlikely to participate in UEFA cups due to the tournaments’ elite nature. For example, for an English club to participate in either the Europa League or the Champions League, it must either win one of England’s domestic tournaments, or finish in one of the top five or six positions in the Premier League, depending on a variety of factors. Although it is not impossible for a lower division club to win one of these tournaments, it is ra-

236. When a club has qualified for the Champions League, the most prestigious of the UEFA tournaments, it cannot also qualify for the Europa League. Therefore, the range of Europa League qualification can range from fifth place to seventh place, but three English clubs will qualify. Frequently Asked Questions, BARCLAYS PREMIER LEAGUE, http://www.premierleague.com/eng-b/fans/faqs/who-qualifies-to-play-in-europe/ (last visited May 20, 2013).
Therefore, most of the clubs in the third or fourth tiers of English football would not suffer from having their licenses revoked by UEFA, unless the English Football Association enforces the revocation too. Because lower division clubs face the same problems of overspending, and are less likely to have a wealthy investor, the Court would likely find that FFP is not sufficient to achieve its goals.

Another decision where the ECJ invalidated a regulation on proportionality grounds was *Lehtonen*, where it found that the rules “went beyond what [was] necessary to achieve the aim pursued.” Although a similar reason to that in *Bosman*, this language suggests that the means used could pass the Court’s test if appropriately scaled back. Applied to Financial Fair Play, the ECJ would likely find that the extensive penalties for non-compliance go beyond what is necessary to achieve UEFA’s goals. For example, the regulations could achieve these means without revocation of a club’s license and keep the incentives for compliance by merely withholding a portion of a club’s prize money.

Therefore, although UEFA’s goals of ensuring stability of the sport, promoting fair competition, and promoting youth development through Financial Fair Play are legitimate, the aforementioned factors, combined with the ECJ’s history of finding sporting rules incompatible with the Treaty, make it highly unlikely that FFP would pass the test of proportionality.

III. A PROPOSAL FOR A NEW APPROACH TO SPORTS-RELATED PROPORTIONALITY

If the Court were to apply a less exacting standard of proportionality in certain areas of law that do not require such strong protection, it would allow for the Financial Regulations to stand without diluting its doctrinal protection of more fundamental rights. Both the ECJ and the European Commission have suggested that sports organizations should be granted “conditional autonomy” due to sport’s unique needs and struc-

237. In the past thirty years, only one winner has been from a league other than the Premier League. *FA Cup Information*, FA-CARLING.COM, http://www.fa-carling.com/fa-cup/information/ (last visited Sept. 18, 2013); see also *Cup Final Statistics*, THEFA.COM, http://www.thefa.com/Competitions/FACompetitions/TheFACup/History/cupfinalresults (last visited May 20, 2013).

Such autonomy should be conditioned upon “respect for the core norms of the Treaty,” such as fundamental human rights and a free market. While there is no doubt that sporting rules and regulations should not restrict an individual’s right to free movement and other fundamental rights, there is a strong argument “that the paradigm of open and unrestrained competition simply does not apply to competitive sport, because of the interdependence of sporting clubs and the pronounced detrimental effects of market exit.” Therefore, with regard to sport governance, the ECJ should distinguish between restrictions that violate fundamental or core human rights and restrictions that violate EU competition law based on market efficiency. Once distinguished, the Court should continue to apply its exacting standard of proportionality to any regulation or rule that restricts fundamental rights, but should apply a lower standard to those that do not. This approach will serve to give deference to the organizations that are most familiar with the unique nature of sport.

A. Determining What Type of Right Is Involved

Determining whether a right is fundamental is not always simple and should be evaluated on a case-by-case basis. Additionally, challenges to sporting rules often come under multiple articles of the Treaty, so the Court must evaluate each claim individually to determine what rights are involved. However, because the ECJ’s normal practice is to evaluate each article claim individually in order to determine whether the rule falls within the scope of Treaty, isolating the individual rights does not impose an excessive burden on the Court.

The development of what constitutes a fundamental right stems largely from ECJ case law. The seminal case in this development was Internationale Handelsgesellschaft v. Einfuhr-

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239. "The story of the manner in which first the Court and more recently the Commission developed the law in its application to sport is a complex though intriguing one. It reflects the need to allow a conditional autonomy to sporting practices." Weatherill, The Effect of the Lisbon Treaty, supra note 154, at 405.
240. Id.
In Handelsgesellschaft, German citizens contended that EU regulations were incompatible with certain fundamental rights embodied in the German Constitution. The ECJ found that although its actions need not conform to the German Constitution, “respect for fundamental rights forms an integral part of the general principles of law protected by the Court.” Since this decision, the ECJ has recognized a wide variety of fundamental rights through case law. Further, “there are now express references to their protection in the [Treaty] and the [EU] has acquired its own catalogue of fundamental rights in the form of the Charter [of Fundamental Rights of the European Union].” While not an exhaustive list, the Charter of Fundamental Rights of the European Union ("Charter") is divided into six sections: dignity, freedoms, equality, solidarity, citizens’ rights, and justice. The enumerated rights range from the right to marry to the right of collective bargaining, and the rights to free movement of persons and services are highlighted in the preamble. Ultimately, however, when a right is not expressly mentioned in the Charter, it is in the Court’s discretion whether to treat it as a fundamental right.

Under the proposed system, after a determination that a right is fundamental, the ECJ’s proportionality analysis would remain the same. For example, if the Court determined that a regulation created a restriction on an individual’s right to marry, it would first look to the aims of the rule to see if the restriction could be justified. Then, the Court would test the regulation’s necessity by asking whether there is a less restrictive, alternative means to achieving those aims; whether the regulations are sufficient to achieve those aims; and whether the reg-

245. Id. para. 4.
246. Tridimas, supra note 17, at 298.
248. Id.
249. Id.
250. Id. art. 28.
251. Id. pmbl.
ulations go beyond what is necessary to achieve them. By continuing to apply this “fundamental proportionality” standard, the ECJ would be able to preserve the respect for fundamental rights that it advocated in *Handelsgeellschaft*.

1. Non-fundamental Rights

The ECJ has not found that every right presented in a challenge under EU law deserves the same amount of protection. For example, in *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*,\(^\text{252}\) the Court distinguished the right of a wholesaler to conduct its business from the right to make a profit and said that the guarantees afforded to fundamental rights “can in no respect be extended to protect mere commercial interests or opportunities.”\(^\text{253}\) In a similar case, *Liselotte Hauer v. Land Rheinland-Pfalz*,\(^\text{254}\) the applicant argued that regulations allowing the German government to deny her a vineyard permit\(^\text{255}\) infringed on her fundamental rights to property\(^\text{256}\) and freedom to pursue trade.\(^\text{257}\) The Court rejected the applicant’s argument and declined to extend fundamental protection to a type of restriction that is commonly “known and accepted as lawful . . . in [the] constitutional structure of all the Member States.”\(^\text{258}\)

Under the proposed system, if the Court finds that a regulation infringes on a non-fundamental right or rule, instead of using the standard applied to fundamental rights, it would apply a “non-fundamental proportionality” standard that gives greater deference to the regulating organization. Using the *Hauer* case as an example, the Court would first ask whether the regulations in question are aimed at a legitimate goal. In regulating the vineyards in Germany, the government could have the goals of soil preservation, protecting public health by limiting wine consumption, or stabilizing the wine market, all of which would likely be legitimate. The next step would be the


\(^{253}\) *Id.* para. 14.


\(^{255}\) *Id.* para. 2.

\(^{256}\) *Id.* para. 4.

\(^{257}\) *Id.* para. 31.

\(^{258}\) *Id.* para. 22.
same test of necessity, but instead of the least restrictive means, sufficiency, and beyond necessity tests, the Court would simply ask whether the means chosen could be rationally expected to advance the intended goals. The Court would likely find that the Hauer permit system for vineyards would meet this standard and would therefore uphold the regulation. This system would give the ECJ the option to defer to regulating bodies that may have more adequate knowledge and insight into the best means of achieving a goal. It would also alleviate the problem of the ECJ having to consider every potential less restrictive means, whether realistic or not, to determine whether a rule is proportional. Finally, it would allow the ECJ to avoid diluting the fundamental rights doctrine when it does not consider that the rights involved warrant strict protection.

B. Financial Fair Play and the New Standard

Analysis of Financial Fair Play under the new standard would likely achieve a different result than under the Court’s current standard. The first step, determining whether a restriction or violation of the Treaty exists, would remain the same. The next step in the new system would be to determine what right or rule is being violated. Then, the Court would determine whether each right or rule involved is either a fundamental or non-fundamental right. Finally, the Court would apply the corresponding standard of proportionality to determine whether the rule is compatible with EU law. Because of Financial Fair Play’s legitimate goals and reasonable means of advancing them, the Court would likely find the regulations acceptable.

As discussed above, a claim against Financial Fair Play would likely come under Articles 45 and 101. However, because of the tenuous causal relationship between Financial Fair Play and a football player’s ability to move from country to country freely, the Court would likely not go any further in its analysis of the Article 45 claim of discrimination based on nationality. That leaves only the Article 101 claim and the determination of whether the right to free competition would be considered a fundamental or non-fundamental right.

259. See discussion supra Part II.A.
260. See discussion supra Part II.A.
The likely starting point of the Court’s analysis would be Article 16 of the Charter, which touches on the right to conduct a business. However, the article merely states that “[t]he freedom to conduct a business in accordance with Community law and national laws and practices is recognised.” Although Article 16 involves the freedom to conduct a business, it does not address any aspect of competition. Additionally, the Court would likely find that the phrase “in accordance with Community law and national laws” does not necessitate conducting a business with fiscal responsibility as required by FFP.

Unlikely to find the Charter determinative, the Court would then look to case law as an indicator of whether unrestrained competition is fundamental. Here, the Nold case is particularly telling. The applicant in Nold, a wholesaler in the coal and construction materials industries, challenged a regulation that set the minimum amount of coal a purchaser must buy per year to remain a wholesaler. The applicant contended that by setting the minimum at a “quantity which greatly exceed[ed] [the business’s] annual sales in [the] sector,” the regulation deprived the applicant of its “right [to] freely . . . choose and practice [its] trade or profession.” The Court rejected this argument, finding that such regulations “must be viewed in the light of [their] social function.” The Court went on to say that the applicant’s inability to compete in the market due to the regulations represented a “mere commercial interest” that does not warrant fundamental protection.

The effects of the regulations in Nold are similar to the effects of Financial Fair Play. First, the regulation is industry specific and affects undertakings differently depending on their size and profitability. Those affected in Nold were smaller organizations, which were unable to generate enough sales to match the minimum purchase quota. The Financial Fair

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261. See EU Charter of Fundamental Rights, supra note 247.
262. Id. art. 16
263. Id.
265. Id.
266. Id. para. 14.
267. Id.
268. Id.
269. See id. para. 1.
Play Regulations are likely to affect clubs that are less popular and less able to generate football-related income, whether it is through merchandise sales, television rights, or player sales. Second, the effect of the regulation for the Nold applicant was a total ban on the undertaking’s access to the wholesale coal market. The effect of the FFP regulations on a non-complying club is less excessive because it would not ban all access to the football market. Instead the sanction would merely ban access into the UEFA sanctioned competitions, or European football market, allowing the club to continue to participate in competitions domestically. Therefore, the restraint on the free market from FFP regulations would be less pronounced than those in Nold. Third, viewed in light of their social function, as instructed by the Nold Court, the FFP regulations serve multiple purposes such as maintaining a competitive balance, encouraging youth development, and promoting market stabilization. Finally, because a club can still compete in other competitions to generate ticket revenue, develop and sell players to make a profit, and sell merchandise and media rights, the benefits of competing in the UEFA competitions represent no more than “a mere commercial interest”—similar to the interest seen in Nold. Therefore, taking the totality of these factors and the similarity of the effects to Nold, it is unlikely that the ECJ would find that the Financial Fair Play regulations restrict any fundamental rights that warrant such stringent protection.

The final step in the analysis is to determine whether the Financial Fair Play regulations can rationally be expected to advance the goals of maintaining a competitive balance, encourage youth development, and promote market stabilization. The Court would likely find that the regulation’s sanctions could rationally advance each of these goals. Because Financial Fair Play would limit clubs from spending from their owners’ personal finances, the regulations would advance the goal of narrowing the gap between clubs with wealthy benefactors and those operating on a modest budget. Next, the regulations will cause clubs to seek alternative means of finding players and sources of football-related income. Because bringing a player through a club’s youth system is a means of achieving both of these objectives, it is reasonable to find that Financial Fair

270. Id.
Play would advance this goal. Finally, a market exit by a bankrupt or financially unstable club would cause a severe disturbance to the football market. By encouraging fiscal awareness and responsibility, the regulations would likely lead to fewer bankruptcies and therefore promote stability.

CONCLUSION

The ECJ’s hesitation to grant sporting organizations extensive powers of self-governance is well founded due to the potential of abuse that comes with such autonomy. However, because of its distinct characteristics, the sports market does not appropriately fit within the EU’s current legal framework. While sports governance will never fit perfectly into the framework of EU law, the proposed “non-fundamental proportionality” standard would allow the Court to defer to organizations’ inside knowledge of the sports market. It would do so by granting the associations the necessary, but conditional, autonomy that they need to efficiently regulate, without diluting principles developed to preserve the respect for fundamental rights in the EU.

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USING THE JULIAN ASSANGE DISPUTE TO ADDRESS INTERNATIONAL LAW'S FAILURE TO ADDRESS THE RIGHT OF DIPLOMATIC ASYLUM

INTRODUCTION

On November 20, 2010, an international arrest warrant was issued for WikiLeaks founder Julian Assange, who was wanted in Sweden for questioning on the charges of rape, sexual molestation, and unlawful coercion. Less than three weeks later, on December 8, 2010, Assange turned himself into the London, United Kingdom police, triggering a lengthy legal battle that played out in the English courts over the next eighteen months. The case seemingly drew to a conclusion in May 2012, when the U.K. Supreme Court determined that Sweden’s “extradition request had been ‘lawfully made’.” After a final bid to reopen his appeal was dismissed, U.K. officials were given ten days to remove Assange to Sweden.

Rather than exhaust his legal alternatives by pursuing an appeal with the European Court of Human Rights (“ECHR”),

2. After Assange was granted bail in December 2010, both the Magistrates’ Court and the U.K. High Court ruled against him prior to the U.K. Supreme Court agreeing to review the case. Id.
3. Julian Assange Loses Extradition Appeal at Supreme Court, BBC NEWS (May 30, 2012), http://www.bbc.co.uk/news/uk-18260914. Although Assange was not permitted to appeal directly to the U.K. Supreme Court, he won the right to petition directly to the court after judges ruled that “the case raised a question of general public importance.” Julian Assange Wins Right to Pursue Extradition Fight, BBC NEWS (Dec. 5, 2011), http://www.bbc.co.uk/news/uk-16027942. The U.K. Supreme Court determined that the Swedish prosecutor who issued the European Arrest Warrant (“EAW”) was a “judicial authority” within the broad meaning provided in the statutory language. Assange v. Swedish Prosecution Authority, [2012] UKSC 22 (appeal taken from Eng.).
5. Id. The European Court of Human Rights (“ECHR”) is an international court established by the European Convention on Human Rights that rules on alleged “violations of the civil and political rights set out in the European
Assange sought refuge at the Ecuadorian Embassy in London in June 2012.6 Citing his well-founded fears of political persecution and the possibility of the death penalty were he sent to the United States,7 Ecuador formally granted asylum to Assange on August 16, 2012.8 Sweden and the U.K. criticized Ecuador’s controversial decision and vowed to prevent Assange from receiving safe passage out of the country.9

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Because Assange took refuge in Ecuador’s diplomatic mission and not within its formal territory, he was the recipient of the right of “diplomatic asylum.”\textsuperscript{10} This distinction is notable not only because Assange’s freedom of movement is limited, but also because political asylum and diplomatic asylum draw their support from different international treaties. In support of its position, Ecuador primarily relied on two treaties—the 1948 Universal Declaration of Human Rights (“UDHR”) and the Organization of American States (“OAS”) Declaration of the Rights and Duties of Man—as illustrative of basic human rights to which every individual is entitled.\textsuperscript{11} In addition, Ecuador relied on the OAS Convention on Diplomatic Asylum, which established the principle of diplomatic asylum in Latin America for instances when these fundamental human rights were threatened.\textsuperscript{12} Finally, when the U.K. allegedly threatened

\begin{footnotesize}
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\item The U.N. broadly defined this term in 1975 as “asylum granted by a State outside its territory, particularly in its diplomatic missions . . . in its consulates, on board its ships in the territorial waters of another State . . . and also on board its aircraft and of its military or para-military installations in foreign territory.” U.N. Secretary-General, Question of Diplomatic Asylum, ¶ 1, U.N. Doc. A/10139 (Part II) (Sept. 22, 1975) [hereinafter Question of Diplomatic Asylum]. This form is notably different than “territorial asylum” in that asylum is granted by a nation outside its borders. Id.
\item Article 14(1) of the Universal Declaration of Human Rights provides that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.” Universal Declaration of Human Rights [UDHR], G.A. Res. 217 (III) A, ¶ 14(1), U.N. Doc. A/RES/217(III) (Dec. 10, 1948). Conversely, Article XXVII of the OAS Declaration of the Rights and Duties of Man states that “[e]very person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.” OAS, American Declaration of the Rights and Duties of Man, art. 27, OEA/Ser.L/V.II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/11.82, doc. 6, rev. 1 at 17.
\item The Convention on Diplomatic Asylum is a multilateral treaty ratified in 1955 that bound many Latin American nations to the rules and regulations surrounding the practice of diplomatic asylum. This convention notably recognizes “[a]sylum granted in legations to persons being sought for political reasons or for political offenses,” and defines legations as “any seat of a regular diplomatic mission . . . .” Convention on Diplomatic Asylum, art. 1, Mar. 28, 1954, O.A.S.T.S. No. 18, 500 U.N.T.S. 95. Although each American nation is a formal member of the OAS via ratification of the OAS Charter, signatories to the Convention on Diplomatic Asylum are limited to Latin American
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to enter the Ecuadorian embassy and arrest Assange, Ecuador forbade entry by citing to another international treaty—The Vienna Convention on Diplomatic Relations.\(^\text{13}\)

The U.K. remains steadfast in its desire to extradite Assange and provided two arguments in stating its opposition to Ecuador’s involvement.\(^\text{14}\) First, the U.K. asserted that Ecuador is under a legal obligation to remove Assange to Sweden after the U.K. Supreme Court ruled that the European Arrest Warrant (“EAW”) against him, requiring his arrest and transfer to Sweden for prosecution,\(^\text{15}\) was enforceable.\(^\text{16}\) Second, the U.K. refused to recognize “the principle of diplomatic asylum.”\(^\text{17}\)


15. The EAW, adopted in 2002, “is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal persecution or executing a custodial sentence or detention order.” Council Framework Decision of 13 June 2002, art. 1(1), 2002 O.J. (L 190) 1 (EU) [hereinafter Council Framework Decision]. Once Sweden (the issuing authority) issued an international arrest warrant for Assange, the system triggered the U.K.’s obligation (as the executing judicial authority) to remove Assange to Sweden, since both nations are members of the EU. Countries, EUROPA, http://europa.eu/about-eu/countries/member-countries/index_en.htm (last visited Jan. 18, 2013). The EAW has no binding effect on Ecuador, since it is not a member of the EU.


17. U.K. Foreign Secretary William Hague added that diplomatic asylum “is far from a universally accepted concept: the United Kingdom is not a party to any legal instruments which require us to recognise the grant of diplo-
U.K. asserted that even for countries that do accept diplomatic asylum, it should not be granted “for the purposes of escaping the regular processes of the courts.” The U.K. claimed that Assange’s legal options had been exhausted by virtue of the fact that three separate courts in the U.K. ruled that the EAW was valid. Thus began a lengthy standoff, pitting Ecuador and the small number of countries that recognize diplomatic asylum against the U.K. Both sides maintain that international law supports their respective positions.

When the right of political asylum was definitively recognized in 1948, most nations interpreted the right to cover instances of asylum granted to an individual by a nation within its borders, or “territorial asylum.” However, the lack of clarity of the scope of territorial asylum has led to significant uncertainty about whether the right extends to individuals seeking asylee status from a diplomatic mission. In 1950, the International Court of Justice (“ICJ” or “Court”), in Asylum Case, indicated that diplomatic asylum was not protected by internation-
al law; however, it also intimated that diplomatic asylum may exist on an international scale as customary law if accepted by all parties. While the use of diplomatic asylum is concededly prevalent in nations that have explicitly recognized the principle, it is the noteworthy instances where diplomatic asylum has been granted by nations that purportedly do not recognize the concept that demonstrate its largely undefined role within customary international law. As it currently stands, nations such as Ecuador work within the margins of international law, quoting various multilateral treaties that allegedly support their position at the particular moment when diplomatic asylum is granted.

This Note argues that the ICJ's intervention is necessary to redefine the right of diplomatic asylum and to clarify the protection it is owed under international law. In its current form, the vague principle of diplomatic asylum is not protected by international law and should thus be redefined to address

25. See generally Asylum (Colom./Peru), 1950 I.C.J. 266 (Nov. 20) (stating that diplomatic asylum was not protected by international law, but it may exist as customary law if accepted by all involved parties).

26. Id. at 277–78.

27. See Question of Diplomatic Asylum, supra note 10, ¶¶ 11–12, 155 (“[T]he practice, especially prevalent in Latin American countries, of granting asylum in legations or embassies . . . had not been accepted by the majority of European States, and by the United Kingdom Government in particular.”).


29. In its official statement granting Assange diplomatic asylum, Ecuador cited sixteen legal instruments that provided the authority to grant Assange asylum. See Declaración del Gobierno de la República del Ecuador sobre la solicitud de asilo de Julian Assange [Declaration of the Government of the Republic of Ecuador on the Asylum Application of Julian Assange], MINISTERIO DE RELACIONES EXTERIORES Y MOVILIDAD HUMANA [MINISTRY OF FOREIGN AFFAIRS AND HUMAN MOBILITY: ECUADOR] (Aug. 18, 2012), http://cancilleria.gob.ec/declaracion-del-gobierno-de-la-republica-del-ecuador-sobre-la-solicitud-de-asilo-de-julian-assange/ [hereinafter Declaración del Gobierno], Amongst them were the Charter of the United Nations, the Universal Declaration of Human Rights of 1948, the Declaration of the Rights and Duties of Man, the Geneva Convention of 1949, the Convention on Diplomatic Asylum, and the Vienna Convention on the Law of Treaties. Id.
modern concerns. An important part of this transformation is establishing specific guidelines as to how the right of diplomatic asylum will be administered—specifically with regards to its scope within international law, the requisite conditions for when it may be granted, and its provisional nature. Such a resolution must also seek to address how the protection of regional interests is to be reconciled with the promotion of global cooperation.

Part I of this Note provides background information on how the debate surrounding diplomatic asylum is framed within instruments of international law. Part II shows how geopolitical differences on whether the right to diplomatic asylum exists makes resolution of the Assange dispute under the current standard unlikely, and illustrates why enforcement of diplomatic asylum has been nearly impossible to administer internationally. Part III proposes three solutions—establishing the scope of diplomatic asylum, outlining specific conditions that are applied to all individuals requesting diplomatic asylum, and determining how it would be terminated if no resolution is reached after a period of time—and discusses how they should be achieved, consequently defining diplomatic asylum’s role within international law.

I. BACKGROUND

At its most fundamental level, the Assange case illustrates the conflicting viewpoints regarding the right of diplomatic asylum and its basis in international law. However, the dispute

30. Asylum Case is the lone ruling by the International Court of Justice (“ICJ” or “Court”) on the legitimacy of diplomatic asylum, and although the Court refused to recognize diplomatic asylum as a universal legal concept, the ruling permitted nations to regulate diplomatic asylum on a case-by-case basis. See Asylum, 1950 I.C.J. at 266. The ICJ advised the parties to resolve their dispute through negotiation, a resolution that is utilized to this day. Jovan Kurbalija, The Assange Asylum Case: Possible Solutions and Probable Consequences, DIPLOFoundation (Aug. 16, 2012), http://www.diplomacy.edu/blog/assange-asylum-case-possible-solutions-and-probable-consequences.

31. These conflicting viewpoints are encapsulated in statements made by Ecuador and the U.K. in the weeks following Assange being granted diplomatic asylum. Ecuador defended its decision to grant diplomatic asylum by first discussing the potential dangers of extradition and then appealing for
also demonstrates that the debate surrounding diplomatic asylum often involves case-specific legal issues not directly related to the right of asylum. While the contentious issue of diplomatic asylum in the Assange dispute has received the most international attention, there are too many elements of this particular case for it to be cast only as a “diplomatic asylum” case. The complexity of the diplomatic asylum issue is often clouded by tensions between regional interests and global commitments, as is the case when it is allowed to flourish regionally in the name of international human rights. While these incongruous responsibilities are often limited to a national scale, questions about the legitimacy of diplomatic asylum by presenting various international agreements in support of its position. Id. The U.K.’s response made it clear that it finds itself under no legal obligation to recognize diplomatic asylum by any foreign embassy. Foreign Secretary Statement, supra note 17. To the contrary, the U.K.’s desire to extradite Assange results from a binding legal obligation that arises from its responsibilities to EU member states under the EAW system. See Foreign Secretary Statement, supra note 17; Council Framework Decision, supra note 15, art. 31(1) (indicating that the EAW “replace[s] the corresponding provisions of the . . . conventions applicable in the field of extradition in relations between the Member States”).

32. Factors to consider in the context of a diplomatic asylum case may include, but are not limited to: the relationship between the interested nations, the crime for which the individual is sought, and the length of time for which the individual has been pursued.

33. The Assange case specifically brings into question the applicability of diplomatic asylum in cases where an individual faces impending political persecution and the death penalty, as Ecuador alleges Assange would face if surrendered to Swedish authorities. Neuman & Ayala, supra note 8. The EAW system raises separate questions about whether extradition to another member country is appropriate if the allegations made by the issuing country do not constitute a crime in the executing country. Although English courts twice rejected Assange’s specific contention that the allegations would not have constituted rape in the U.K., the issue remains largely unresolved. David Allen Green, Legal Myths about the Assange Extradition, NEWSTATESMAN BLOG (Aug. 20, 2012), http://www.newstatesman.com/blogs/david-allen-green/2012/08/legal-myths-about-assange-extradition.

34. These obligations may be legal or nonlegal. Legal obligations between nations, such as extradition, are often dictated by treaties and typically have a limited scope. Nonlegal obligations, such as foreign relations, exist on a larger scale and often have an indeterminate scope.
lum result in a difficult analysis when issues of preexisting commitments between countries arise.35

A. Extradition and the European Arrest Warrant

In a typical diplomatic asylum case, the individual seeking asylee status often stands accused of crimes perpetrated in the nation seeking the individual’s apprehension. It stands to reason that the nation seeking apprehension would request cooperation from other nations to assist in the individual’s capture. In this manner, one legal issue that is not specific to the Assange dispute is the widely recognized international obligation known as the extradition process.36 The practice of extradition originated in early civilizations, but has seen its scope expand as “[g]lobalization has brought about increased mobility for persons across national borders, greater opportunities for transnational crimes, and significantly more knowledge about international crimes.”37 Despite its increased acceptance, it is commonly understood that there is no general obligation for a state to extradite an individual to a foreign government.38

As a result, extradition finds its legal basis almost exclusively in a vast number of bilateral and multilateral treaties. Most common law countries require formal treaties with respect to extradition, including the United States and the U.K.39 As of October 2011, the United States was a party to 114 bilateral

35. These international obligations may be outlined in near-universally recognized pieces of international law, such as documents adopted by the U.N. or multilateral treaties between nations.

36. Extradition is defined as “[t]he official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged.” BLACK’S LAW DICTIONARY, supra note 8, at 665.


38. An increasing number of states may now be engaged in extradition due to their perceived “need for increased international cooperation” as a result of recent international developments such as globalization and terrorism. Id. at xi–xii. Although one line of thinking holds that an affirmative legal duty does have a basis in international law, this view is adopted only “with respect to international crimes.” Id.

39. Id. at 36. Contrary to common law countries, civil law countries typically do not observe formal obligations and instead grant extradition “on the basis of reciprocity or comity.” Id.
extradition treaties as well as the Multilateral Convention on Extradition.40 Though beneficial to a certain extent, the lack of international uniformity regarding the rules of extradition can pose significant problems with respect to enforcement and compliance.41 In addition, a consequence of exclusive reliance on bilateral extradition treaties is that it necessitates “a burdensome practice of treaty-making.”42 The result of this continuously evolving system of regulation is that the extradition process is more efficient between “states which have closer political relations and similar legal systems.”43

While some nations have expressed a reluctance to engage in extradition, based in part on national sovereignty concerns, the process is generally recognized as necessary to facilitate the prosecution of both domestic and international crimes.44 Due to its importance, adherence to the treaties that make up extradition law is the primary means by which nations can enhance international cooperation.45 The international community supplements this piecemeal approach by imposing an affirmative

40. See 1 WILLIAM S. HEIN & CO., EXTRADITION LAWS AND TREATIES, UNITED STATES v–ix (2011). The United States is also a party to a number of multilateral treaties relating to extradition, namely aviation, genocide, narcotic drugs, terrorism, and torture. See 2 WILLIAM S. HEIN & CO., EXTRADITION LAWS AND TREATIES, UNITED STATES 1150.1–1150.36 (2011).

41. One benefit to such a structure is “more detailed laws and more effective administration and judicial procedures,” which often result in “a tendency to facilitate extradition.” BASSIOUNI, supra note 37, at xii. The process also allows nations to condition their compliance on certain issues, such as the possibility of certain forms of punishment, the political nature of the alleged crime, and jurisdiction. In this manner, national legislation and specifically-tailored extradition treaties provide a legitimate and effective means by which nations can protect their sovereignty or any other values they believe are worth protecting within the context of international law.

42. Id. at 86. The lack of uniformity may also mean newcomers to the process are “less forthcoming as well as less effective in their extradition practices,” as well as more reluctant to turn their back on national sovereignty. Id. at xii.

43. Id. at xii.

44. Bassiouni describes many developing countries as having “a residue of sensitivity with respect to their national sovereignty,” although he notes that such concerns are slowly disintegrating. Id. He also notes that the development of the bilateral system was based partly on the preference of developing nations to emphasize their sovereignty. Id. at 46.

45. Id. at xii.
legal obligation to extradite individuals alleged to have participated in certain international crimes.\textsuperscript{46} However, in an effort to create a more effective and transparent system on a smaller scale, some regions have undertaken to improve the extradition process by effectively replacing the treaty-based system with a system based on more explicit legal obligations.\textsuperscript{47}

A notable instance of a region that has made extraordinary efforts to supplement bilateral treaties on extradition and improve coordination between member states is the European Union.\textsuperscript{48} Prior to 2001, the EU had a treaty on extradition in place that exceeded what was required of it under international law.\textsuperscript{49} Despite this, the EU felt increasing pressure to improve cooperation between member states following the terrorist attacks that took place in the United States on September 11, 2001.\textsuperscript{50} The primary result of the EU’s renewed interest was the adoption of the EAW in 2002, which replaced the extradition system in place at the time.\textsuperscript{51} The principle of “mutual recognition,” which allows for the harmonization between the

\begin{itemize}
\item \textsuperscript{46} Bassiouni lists twenty types of multilateral conventions that establish the duty to extradite, including, but not limited to war, apartheid, torture, slavery, and genocide. \textit{Id.} at 913–24.
\item \textsuperscript{47} Multilateral Regional Arrangements are often the by-products of such efforts and serve as “a mechanism to harmonize legal systems, if not unify them with respect to the practice.” \textit{Id.} at 42.
\item \textsuperscript{48} These efforts are possibly the result of the EU’s desire “to harmonize policies among its members in the area of ‘justice and home affairs.’” \textsc{Kristin Archick}, \textsc{Cong. Research Serv.}, Order Code RS22030, \textsc{U.S.-EU Cooperation Against Terrorism} 1 (Apr. 22, 2013).
\item \textsuperscript{49} The European Convention on Extradition was a multilateral treaty instituted in 1960 between member states that intended to regulate extradition by creating affirmative legal obligations between nations for certain crimes. \textit{Council of Europe, European Convention on Extradition, opened for signature Dec. 13, 1957, E.T.S. No. 24}.
\item \textsuperscript{50} This concern was based partly on the fact that “at the time of the 2001 attacks, most EU member states lacked anti-terrorist legislation, or even a legal definition of terrorism.” \textsc{Archick, supra} note 48. The situation was aggravated by the fact that the EU had “largely open borders and . . . different legal systems [which] enabled some terrorists and other criminals to move around easily and evade arrest and prosecution.” \textit{Id.}
\item \textsuperscript{51} Article 31(1) provides that “this Framework Decision shall . . . replace the corresponding provisions of the . . . conventions applicable in the field of extradition in relations between the Member States.” \textit{Council Framework Decision, supra} note 15, art. 31(1).
\end{itemize}
member states in the absence of national legislation, was also introduced to the new legislation. Expansion of this widely observed economic principle into transnational criminal law, along with the undeniable purpose of the decision to both harmonize and expand extradition obligations through the EAW, demonstrates that national sovereignty has taken a back seat to "police and judicial cooperation" between member states.

B. Instruments of International Law

While the EAW provides useful guidelines on extradition for EU member states, its scope is limited by international law. The EU has authority over its member states, but each member state also has responsibilities as a result of their membership in the U.N. For the instances in which conflicting obligations exist, the U.N. Charter states that responsibilities to the U.N. shall take precedence over "any other international obligations."  


53. “Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of the framework decision.” Council Framework Decision, supra note 15, art. 1(2) (emphasis added). The EU described the new system as "the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the cornerstone of judicial cooperation.” Id. ¶ 6.

54. Although the EU describes itself as “a unique economic and political partnership . . .”, Basic Information on the European Union, Europa, http://europa.eu/about-eu/basic-information/index_en.htm (last visited Jan. 18, 2013), this cooperation in the legal arena falls under the broad “justice and home affairs” umbrella, which encompasses various policies that are neither political nor economic. ARCHICK, supra note 48.

55. Article 21 is specifically entitled “Competing international obligations,” and outlines the responsibilities of nations in various circumstances where this issue may arise. Id. art. 21.

56. The Treaty on European Union, also known as the Maastricht Treaty, was signed by the members of the former European Community and formally created the EU. Treaty on European Union (Maastricht Treaty), Feb. 7, 1992, 1992 O.J. (C 191) 1. This treaty has since been amended to reflect both the increased role of the EU and its new membership. Treaty of Maastricht on European Union, Europa: Summaries of Legislation (Oct. 15, 2010), http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_maastricht_en.htm.
agreement.” The U.N. lays out clearly defined consequences for violating this supremacy, emphasizing the importance of its involvement in resolving diplomatic asylum disputes. However, issues of supremacy arise in instances where multilateral agreements that potentially conflict with other international treaties cause nations to disagree about the extent of their responsibilities under international law. With regard to the U.N. specifically, various international agreements continue to have a noteworthy impact on the treatment of refugees and asylees, especially those residing in diplomatic premises.

Assange’s indefinite stay in the Ecuadorian diplomatic premises creates a significant hurdle for any party attempting to capture him against his will. The Vienna Convention on Diplomatic Relations places significant limitations on the ability of the U.K. to honor the EAW issued by Sweden. It is a fundamental premise of diplomatic law that “[t]he premises of the mission shall be inviolable] [and that] [t]he agents of the receiving State may not enter them, except with the consent of the head of the mission.” Although Assange has taken refuge inside a place that is physically accessible to the relevant authorities, the U.K. is left with no means of apprehending Assange until he leaves the embassy. Failure to observe this clearly-defined limitation would have a drastic effect on the relationship between the U.K. and Ecuador and on diplomatic relations around the world. Therefore, international law of-

57. See U.N. Charter art. 103 (obligations under the U.N. Charter prevail over “obligations under any other international agreement”); Council Framework Decision, supra note 15, art. 21.
58. See U.N. Charter art. 6 (“A member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.”).
59. Vienna Convention on Diplomatic Relations, supra note 13, art. 22.
60. The U.K. has gone so far as to allegedly bring into question the inviolability of the Ecuadorian embassy in London, but eventually retreated from this position. Pearse, supra note 13.
61. Although the relationship between Ecuador and the U.K. may be irretrievably broken based on the threats exchanged between the countries, Ecuador is currently the sole recipient of the lucrative Andean Trade Preferences from the United States, which provide preferential tariff treatment for certain products. Nicholas Kozloff, Ecuador Comes Out Winner as UK Overreaches with Assange Threats on Likely Behalf of US, BUZZFLASH (Aug. 19,
fers near limitless protection to Assange as long as he stays within Ecuador’s embassy.\(^6^2\)

Ecuador’s status as a member of the OAS poses another problem for the U.K., one that was first recognized by the U.N. in 1975.\(^6^3\) The root of diplomatic asylum is traced back to Europe in the sixteenth and seventeenth centuries, when ambassadors in newly-designated permanent missions were provided with inviolability of their dwellings to supplement “the personal inviolability that he had traditionally enjoyed in order to remove him from the influence of the receiving State.”\(^6^4\) However, by the time the principle had all but disappeared in nineteenth century Europe, it had been earnestly adopted and frequently utilized in Latin American countries.\(^6^5\) Following the ratification of the OAS Convention on Diplomatic Asylum by Latin American countries in 1954, some scholars even went so far as to argue that the UDHR provided that diplomatic asylum is a human right.\(^6^6\) Although the U.N. report on the *Question of Diplomatic Asylum* was published more than forty years ago,
the reality that diplomatic asylum is viewed differently in Latin America than it is internationally has not changed.67

International law stands at the heart of these dissonant views on diplomatic asylum. The supremacy of the U.N. as an organization, the scope and binding nature of its various agreements, and its vast membership make the U.N. the only international body that can decisively determine whether the granting of diplomatic asylum was appropriate in the case of Julian Assange.68 While there are ultimately a number of different manners by which the U.N. could address the issue, the ICJ, as the “principal judicial organ of the United Nations,” 69 is the most appropriate body to resolve such a dispute.

C. The Influence of the International Court of Justice

The importance of the ICJ’s role in resolving diplomatic asylum disputes is based on two important factors. First, the Court’s self-defined role is specifically tailored to hear the dispute between Ecuador and the U.K. 70 Individuals are not permitted to appear in front of the Court as “[o]nly States may be


68. Of the sixteen legal instruments Ecuador provided as the basis for granting Assange asylum, five of them were either U.N. documents or required U.N. enforcement. Declaración del Gobierno, supra note 29. These are the U.N. Charter, UDHR, Geneva Convention, CRSR, and Vienna Convention on the Law of Treaties. Id.

69. U.N. Charter art. 92.

70. The Court has broad jurisdiction over “all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; the existence of any fact which . . . would constitute a breach of an international obligation; d. the . . . reparation to be made for the breach of an international obligation.” Statute of the International Court of Justice art. 36(2), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 [hereinafter ICJ Statute]. The Court is also able to “give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.” Id. art. 65(1).
parties in cases before the Court.” Further, these states must be a party to the Statute of the International Court of Justice. Most importantly, the judgments of the Court are binding on all concerned parties, final, and non-appealable. The strict guidelines of the ICJ provide the ideal forum to not only resolve the Assange dispute, but to also examine the validity of diplomatic asylum in general. The four other principle organs are ill-equipped to resolve disputes on international law because such disputes fall outside their intended responsibilities and are thus not intended to resolve conflicts of this magnitude.

71. Id. art. 34(1). This procedural exclusivity ensures that the Court hears only those cases deemed sufficiently important for sovereign governments to pursue, and not those pertaining to private parties. In this respect, the ICJ is unique from each of the other three international courts (European Court of Justice, ECHR, and Inter-American Court of Human Rights), which are able to consider claims brought by individuals. Frequently Asked Questions, INT’L COURT OF JUSTICE (ICJ), http://www.icj-cij.org/information/index.php?p1=7&p2=2 (last visited Jan. 19, 2013). Further, the Court is not permitted to “deal with a dispute of its motion” and “can only hear a dispute when requested to do so by one or more States.” Id.

72. See U.N. Charter art. 93 (indicating that “[a]ll members of the United Nations are ipso facto parties to the Statute of the International Court of Justice,” but also providing non-U.N. members with a means by which they can become a party to the ICJ Statute).

73. “The judgment is final and without appeal.” ICJ Statute, supra note 70, art. 60. “Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.” U.N. Charter art. 94, para. 1. Failure to conform to the obligations required by an ICJ judgment may result in further measures taken by the U.N. Security Council against the offending country to the extent necessary to effectuate the judgment. U.N. Charter art. 94, para. 2.


Further, the ICJ is the only body that is capable of rectifying the uncertainty following its ruling in Asylum Case, the last instance in which it heard a case regarding diplomatic asylum. Asylum Case, the first ruling on the Haya de la Torre dispute, involved a Peruvian national who was granted diplomatic asylum in the Colombian embassy in Lima, Peru, after a warrant was issued for his arrest by the Peruvian government. When Peru refused Colombia’s request to allow Haya de la Torre safe passage into Colombia, Colombia brought suit against Peru in the ICJ. Colombia invoked “American international law in general” and “regional or local custom peculiar to Latin-American States” to argue that Haya de la Torre was a proper recipient of diplomatic asylum. In response, Peru argued that Colombia’s decision to grant asylum was in violation of multiple articles of the Havana Convention on Asylum, and

The secretariat is primarily responsible for carrying out the daily tasks of the U.N. and servicing the other principal organs. It is not designed to effectuate a resolution based on analysis of international law. See U.N. Charter arts. 97–101. The Economic and Social Council is responsible for “international economic, social, cultural, educational, health and related matters,” and is ill equipped to resolve a dispute with significant political ramifications. Id. art. 62, para. 1. The Security Council is conferred the “primary responsibility for the maintenance of international peace and security,” id. art. 24, para. 1, but the standoff between the parties appears to be limited to political posturing and threats. The General Assembly (“G.A.”) has broad discretion to consider “any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter.” Id. art. 10.

76. The only sources that have addressed (or notably failed to address) the concept of diplomatic asylum have been the Vienna Convention on Diplomatic Relations (where it was not included despite efforts by Latin American countries), Asylum Case, and the OAS Convention on Diplomatic Asylum. Kurkalija, supra note 67.

77. See Asylum (Colom./Peru), 1950 I.C.J. 266 (Nov. 20).

78. Haya de la Torre was a controversial figure throughout Latin America based on his political involvement fighting for democracy and labor rights. Victor Raúl Haya de la Torre, U.N. High Comm’r for Refugees (“UNHCR”), http://www.unhcr.org/3b72551038.html (last visited Jan. 18, 2013).


80. Id. at 270, 276. Colombia argued that as a result of this customary law, Peru was bound “to give ‘the guarantees necessary for the departure of the refugee, with due regard to the inviolability of his person, from the country.’” Id. at 268.
that Colombia had no right to grant asylum to Haya de la Torre as a means of avoiding Peru’s laws.\textsuperscript{81} To resolve the dispute, the Court had to determine whether Colombia was “competent to qualify the nature of the offence by a unilateral and definitive decision binding on Peru.”\textsuperscript{82}

To determine the binding nature of Colombia’s decision to grant Haya de la Torre diplomatic asylum, the Court applied the rule that conduct that has been established as custom in a country is considered binding law in that country.\textsuperscript{83} The Court first determined that Colombia had not proven that the rule of diplomatic asylum had a binding effect on Peru.\textsuperscript{84} The Court considered “a large number of particular cases in which diplomatic asylum was in fact granted and respected,”\textsuperscript{85} but held such evidence did not conclusively demonstrate that the custom existed in Latin America.\textsuperscript{86} It found that even if custom were proven in Colombia, it would also have to exist in Peru to have a binding effect on both parties, and this was not the case.\textsuperscript{87}

The Court next posited that, although “asylum may be granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible sections of the population,” this issue was not in dispute.
between the parties. The ICJ then considered the confining language of the Havana Convention to hold that “asylum cannot be opposed to the operation of justice.” The Court elaborated by stating “the safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals.” In adding that such vast protection “would . . . become the equivalent of an immunity,” the Court’s final disposition gives a clear indication that diplomatic asylum is not recognized by international law. However, the ICJ also recognized that diplomatic asylum in Latin America was “an institution which . . . owes its development to extra-legal factors” and could continue to exist in customary international law via “agreements between interested governments inspired by mutual feelings of toleration and goodwill.”

The impact of the ICJ’s open invitation to engage in diplomatic asylum within the context of customary law was felt immediately. On June 13, 1951, the ICJ made a second ruling on the Haya de la Torre matter, the *Haya de la Torre Case*. The Court ruled that, although the asylum granted to Haya de la Torre should have been terminated, “Colombia [was] under no obligation to surrender Victor Ratil Haya de la Torre to the Pe-

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88. *Id.* at 282–83. The Court later discounted the possibility that the term “urgent cases” was intended to encompass “the danger of regular prosecution to which the citizens of any country lay themselves open by attacking the institutions of that country.” *Id.* at 284.
89. *Id.* at 284. The Court specifically cited Article 2, paragraph 2 of the Havana Convention, which provided that “[a]sylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure some way his safety.” *Id.* at 282. This was taken in conjunction with Article I, paragraph 1, which provided that states could not grant asylum “to persons accused or condemned for common crimes . . .” *Id.* at 281.
90. *Id.*
91. *Id.*
92. *See id.* at 286. The ICJ specifically struggled to find where diplomatic asylum found its legal basis, as “considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation.” *Id.*
93. *Id.*
94. *Haya de la Torre Case (Colom./Peru), 1951 I.C.J. 71, 71 (June 13).*
ruvian authorities."95 Less than three years after this ruling, in 1954, several American countries adopted the OAS Convention on Diplomatic Asylum—fourteen countries would eventually ratify the agreement.96 In 1961, many Latin American nations made a strong push for the Vienna Convention on Diplomatic Relations to recognize diplomatic asylum, but were forced to settle for limited recognition under Article 41(3).97 The general recognition of diplomatic asylum remains unique to Latin America.98 Likely as a result of Ecuador’s membership amongst this small group of signatories to the OAS Convention on Diplomatic Asylum, The Union of South American Nations has pledged its support for Ecuador’s decision to grant asylum to Assange.99

D. The United States: Paying Attention, but from a Distance

The United States has publicly voiced support for the U.K., asserting that it “does not recognize the concept of diplomatic asylum as a matter of international law.”100 The United States'
role in the process is notable, as both its longstanding interest in Assange and its use of the death penalty for espionage are well known.\footnote{The U.S. Justice Department has launched a criminal investigation into Assange and Wikileaks regarding the release of classified information Wikileaks allegedly received from American soldier Bradley Manning. Details of the investigation were requested by Assange’s attorneys to determine the nature of the allegations. Kevin Gosztola, \textit{Lawyers for Julian Assange & WikiLeaks Seek Details on Justice Department’s Criminal Investigation}, FIREDOGLAKE (Oct. 11, 2012), http://dissenter.firedoglake.com/2012/10/11/lawyers-for-julian-assange-wikileaks-seek-details-on-justice-departments-criminal-investigation/. For its part, Sweden has stated that Assange will not be extradited if he were to face the death penalty in the United States. Adam Taylor, \textit{Sweden Says It Will Not Extradite Assange to US If He Faces Death Penalty}, BUS. INSIDER (Aug. 21, 2012), http://www.businessinsider.com/sweden-says-it-will-not-extradite-assange-to-us-if-he-faces-death-penalty-2012-8.}

II. THE INTERNATIONAL SIGNIFICANCE OF THE ASSANGE DISPUTE

There are countless features of the Assange case that have lent themselves to scrutiny by the international community. One of the primary reasons for this scrutiny is that Julian

\begin{itemize}
\item[\footnote{See, e.g., Greene, \textit{supra} note 28 (listing key international precedents for diplomatic asylum).}]
\end{itemize}
Assange is a well-respected journalist. In his position as the
editor-in-chief of WikiLeaks, Assange has achieved notable in-
ternational recognition for his role in disseminating infor-
mation not otherwise available to the public. As a result of
his efforts to create greater transparency in the media and ex-
pose numerous human rights transgressions, he has become
something of an international celebrity, albeit under unusual
circumstances.

103. Amongst the awards Assange has received in recent years are: the
2009 Amnesty International UK Media Award (New Media), Amnesty Inter-
national Media Awards 2009: Full List of Winners, GUARDIAN (June 3, 2009),
http://www.guardian.co.uk/media/2009/jun/03/amnesty-international-media-
awards; the 2011 Sydney Peace Foundation's gold medal for his “exceptional
courage in pursuit of human rights,” Julian Assange Awarded Australian
Peace Prize, GUARDIAN (May 11, 2011), http://www.guardian.co.uk/world/2011/may/11/julian-assange-australian-
peace-prize-wikileaks; the 2011 Martha Gellhorn Prize for Journalism for his
work that “penetrated the established version of events and . . . expose[d] estab-
lished propaganda,” Julian Assange Wins Martha Gellhorn Journalism
Prize, GUARDIAN (June 2, 2011), http://www.guardian.co.uk/media/2011/jun/02/julian-assange-martha-
gellhorn-prize; and the 2011 Walkley Award for Most Outstanding Contri-
butation to Journalism for taking “a brave, determined and independent stand for
freedom of speech and transparency that has empowered people all over the
journalism (last visited Jan. 18, 2013).

104. Wikileaks achieves its goal of “bring[ing] important news and infor-
mation to the public” by “provid[ing] an innovative, secure and anonymous
way for sources to leak information to our journalists.” About: What Is Wik-
ileaks, WIKILEAKS, http://wikileaks.org/About.html (last visited Jan. 18,
2013). Amongst the stories the website has broken about the United States
are classified U.S. reports on the war in Iraq and Guantanamo Bay's main
operations manuals. Id.

105. A number of high-profile supporters of Assange have forfeited
£300,000, which was offered as sureties and securities after Assange skipped
bail. Celebrity Backers Are £300,000 Down But Still Supporting Assange De-
spite His Decision to Skip Bail, DAILY MAIL ONLINE (Oct. 9, 2012),
http://www.dailymail.co.uk/news/article-2215373/Celebrity-backers-300-000-
supporting-Assange-despite-decision-skip-bail.html. Michael Moore, Oliver
Stone, and Noam Chomsky are three of the many "celebrities" who signed a
letter to President Correa on June 25, 2012, urging him to grant asylum to
Assange. Moore, Glover, Stone, Maher, Greenwald, Wolf, Ellsberg Urge Cor-
rea to Grant Asylum to Assange, JUSTFOREIGNPOLICY.ORG (June 22, 2012),
From a legal perspective, however, the convergence of interests in the Assange dispute is perhaps the most alluring. At the heart of the conflict is Ecuador, a country that has chosen to protect Assange’s “human rights” while its president, Rafael Correa, continues to suppress freedom of speech and press within Ecuador.106 The Ecuadorian government’s seemingly contradictory positions have led some to question whether Ecuador’s instrumental role in the process is the result of its legitimate human rights concerns, or President Correa making a calculated political gamble.107 On the other side of the dispute is the U.K., which is now faced with the daunting task of monitoring Assange’s every move in the Ecuadorian embassy in order to uphold its duty to execute the EAW.108

Three other parties have a vested interest in the case for distinctly different reasons: Sweden, the United States, and Australia. The root of the conflict is Assange’s alleged misconduct in Sweden, which finds itself at the center of controversy as to whether they have their own ulterior motives for Assange de-

106. “Research by numerous international human rights defenders . . . has concluded that the Correa administration does not brook dissent and is engaged in a campaign to silence its critics in the media.” Carlos Lauría, As It Backs Assange, Ecuador Stifles Expression at Home, COMM. TO PROTECT JOURNALISTS (Aug. 16, 2012), http://cpj.org/blog/2012/08/as-it-backs-assange-ecuador-represses-free-express.php. In his defense, President Correa has stated that his approach “was necessary to rein in private [media] who had enjoyed too much power for too long.” Jonathan Watts, Rafael Correa Hits Back over Ecuador’s Press Freedom and Charge of Hypocrisy, GUARDIAN (Aug. 24, 2012), http://www.guardian.co.uk/world/2012/aug/24/rafael-correa-assange-ecuador-press.


108. “Scotland Yard confirmed it costs £11,000 day to ensure the Australian does not flee . . . the Ecuadorian Embassy.” Chris Greenwood, Police Stake-out Bill for Assange Tops £11,000 a DAY to Ensure He Doesn’t Flee Ecuadorian Embassy, DAILY MAIL (Oct. 1, 2012), http://www.dailymail.co.uk/news/article-2211530/Police-stakeout-Assange-tops-1m-costs-11-000-DAY-ensure-doesnt-flee-Ecuadorian-Embassy.html.
spite their guarantees to the contrary.\textsuperscript{109} Next, despite the United States’ compelling interest in how the Assange case is handled, the country appears content to leave “Assange’s immediate fate . . . in the hands of Britain, Sweden, and Ecuador.”\textsuperscript{110} Finally, despite Australia’s status as Assange’s birthplace, it has conspicuously distanced itself from the Assange controversy, prompting some citizens and politicians to wonder why Ecuador was willing to protect Assange when his own government was not.\textsuperscript{111}

The international attention given to the Assange standoff has served to force Ecuador’s hand.\textsuperscript{112} The scrutiny has compelled Ecuador to defend its position vociferously on an international stage, an undoubtedly different strategy than that which is typically utilized when diplomatic asylum is granted amongst Latin American nations. For example, the case would likely receive little attention if Assange sought refuge at an Ecuadorean embassy located in a nation that had ratified the OAS Conven-

\begin{footnotesize}
\begin{enumerate}
\item[109.] See Taylor, supra note 101. Deputy Director of the Service for Criminal Cases and International Cooperation of Sweden’s Justice Ministry, Cecelia Riddselius, stated that Sweden “will never surrender a person to the death penalty.” \textit{Id.}
\item[110.] Mark Hosenball, \textit{Julian Assange, Wikileaks Founder, Faces No Criminal Charges in U.S., Sources Say}, HUFFINGTON POST (Aug. 22, 2012), http://www.huffingtonpost.com/2012/08/22/julian-assange-wikileaks-no-criminal-charges-in-us_n_1823159.html (“Sources say the United States has issued no criminal charges against [Assange] and has launched no attempt to extradite him [to the United States].”); Philip Dorling, \textit{US Calls Assange ‘Enemy of State’}, SYDNEY MORNING HERALD (Sept. 27, 2012), http://www.smh.com.au/opinion/political-news/us-calls-assange-enemy-of-state-20120927-26m7s.html. It was reported on September 27, 2012, that Assange and Wikileaks were “designated as enemies of the United States,” a designation which “has serious implications for [Assange] if he were to be extradited to the U.S.” \textit{Id.}
\item[112.] Ecuador insinuated that the attention being given to Assange is not only the result of “persecution in different countries [as a result of exposing] corruption and severe human rights abuses of citizens around the world,” but also the desire of various nations to cater to the desires of the United States. \textit{Declaración del Gobierno, supra note 29.}
\end{enumerate}
\end{footnotesize}
tion on Diplomatic Asylum.113 However, the U.K. is not a party to that convention and it does not otherwise recognize the concept of diplomatic asylum.114 Therefore, the protection available to Ecuador if asylum were granted in another Latin American country does not apply.115

Ecuador, aware of its dilemma, looked for guidance from an international organization in which membership is nearly universal: the U.N.116 Since diplomatic asylum was not formally recognized at the 1961 Vienna Convention,117 Ecuador supported its position by demonstrating that political asylum was a universally recognized principle118 and by citing to the inviolability of the diplomatic mission.119 In demonstrating universal recognition of two separate concepts that, taken together, offer some support for diplomatic asylum, Ecuador established that Assange is safe from extradition while he remains in its em-

113. See Convention on Diplomatic Asylum: General Information, supra note 12 (indicating that membership consists exclusively of Latin American nations).
114. Foreign Secretary Statement, supra note 17. See also Question of Diplomatic Asylum, supra note 10, ¶¶ 155–56 (proposing to the Internal Law Commission “that the words ‘in its territory’ should be added after the word ‘asylum’” because “that practice had not been accepted by the majority of European States, and by the United Kingdom Government in particular”).
115. Id. Of the legal documents that Ecuador cites as support for its position, some are binding on the U.K. and some are not. See Declaración del Gobierno, supra note 29.
117. The Vienna Convention on Diplomatic Relations is the treaty that regulates diplomatic relations between countries; it notably excludes any language that would have recognized the concept of diplomatic asylum. See Vienna Convention on Diplomatic Relations, supra note 13, art. 41(3).
118. Article 14(1) of the Universal Declaration of Human Rights, Article 27 of the Declaration of the Rights and Duties of Man, and the Geneva Convention provide the most relevant support on this issue. See sources cited supra note 11; see generally Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (although this document does not explicitly reference the right of asylum, the articles discuss at length the rights of parties taken as prisoners during international conflicts, whose status may eventually become that of an asylee).
bassy. In addition, Ecuador has put the onus on Sweden to guarantee that Assange will not face subsequent extraditions to a “third country . . . that would put at risk Mr. Assange’s life and freedom.” However, up to this point, all appearances are that Ecuador has found Sweden’s response unsatisfactory in that it has not been able to guarantee Assange will not face extradition to a third country.

The problems demonstrated by the Assange case are illustrative of the lack of regulation surrounding diplomatic asylum that has existed on an international scale for more than a century. On one hand, widespread recognition of diplomatic asylum has been limited to Latin America since the nineteenth century. In theory, Latin American nations are able to grant diplomatic asylum freely amongst other parties to the OAS

120. See Ecuador President Correa Wants ‘Guarantee’ Over Assange, BBC NEWS (Aug. 18, 2012), http://www.bbc.co.uk/news/uk-19309183. Given the fact that Assange’s stay has extended to seven months, with no sign of an impending resolution, the U.K. appears resigned to the protection afforded to Assange within the embassy. Meanwhile, Assange has also realized his unique status and continues to make “public appearances” from the embassy. See Alexander Rankine, Oxford Students to Protest at Assange ‘Visit,’ GUARDIAN (Jan. 10, 2013), http://www.guardian.co.uk/education/2013/jan/10/oxford-students-to-protest-at-assange-talk.

121. Ecuador President Correa Wants ‘Guarantee’ over Assange, supra note 120.

122. Although Deputy Director of the Service for Criminal Cases and International Cooperation of Sweden’s Justice Ministry, Cecelia Riddselius, has stated “that they would demand strict assurances from the US that ‘the prisoner will not be executed in any case,’” she admitted that it was impossible to guarantee whether Assange would be extradited without a formal extradition request. Taylor, supra note 101.

123. This lack of regulation is likely the result of an international community that has failed to recognize the problems that accompany widespread use. Despite the issues discussed in detail in the U.N. Secretary-General report, no significant steps were taken by the U.N. to clarify the right of asylum established in numerous agreements. See supra note 63. A 1967 protocol made small changes to diplomatic asylum, specifically with regards to temporal and geographic limitations, but it did not take the opportunity to redefine the right of asylum generally. See Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 606 U.N.T.S. 267.

124. See supra note 65.
Convention on Diplomatic Asylum. On the other hand, because diplomatic asylum draws numerous fundamental similarities to political asylum, countries such as Ecuador are able to support their arguments on an international scale with numerous universally recognized documents that non-OAS parties are unable or unwilling to challenge. It is not in the best interests of the U.K. and the United States, long-standing and integral members of the U.N., to challenge treaties that have been in force for decades and are of fundamental importance to the development of human rights.

Foreign-relations law introduces another complication in addressing diplomatic asylum. Each party involved in the Assange case occupies a unique role within the controversy. Ecuador’s position on asylum has been widely criticized, but regional support appears to have strengthened the country’s resolve. Ecuador now appears fully prepared to let the

125. Although exact figures are unavailable, there is evidence that Latin American nations have granted diplomatic asylum on a frequent basis since it became prevalent in the nineteenth century. The U.N. report lists seven instances over a period of forty-one years when diplomatic asylum was granted, and acknowledges that the “list is purely illustrative” of “[m]any other examples . . . mentioned in the records in the asylum case and in various publications.” Question of Diplomatic Asylum, supra note 10, ¶ 12. The ICJ acknowledged that the “Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected.” Asylum (Colom./Peru), 1950 I.C.J. 266, 277 (Nov. 20).

126. See, e.g., supra note 29.

127. Not only were the U.K. and the United States members of the U.N. when the Charter was ratified in 1945, but both nations have maintained permanent membership status on the U.N. Security Council since that time. U.N. Charter art. 110; U.N. Charter art. 23.

128. The term “foreign-relations law” has come to encompass the modern definition of “international law,” BLACK’S LAW DICTIONARY, supra note 8, at 720, which is defined as “the law of international relations, embracing not only nations but also such participants as international organizations and individuals (such as those who invoke their human rights or commit war crimes).” Id. at 892.

129. Although the ministers pledged their general support for Ecuador, they have also taken a diplomatic stance on the dispute, urging that both parties “continue the dialogue and negotiation to find a mutually acceptable solution.” Julian Assange Row: Ecuador Backed by South America, supra note 20; see discussion supra Part II.
Assange situation run its course.\textsuperscript{130} Although Sweden’s interest in questioning a man who allegedly committed crimes of a sexual nature has not been challenged, speculation is rampant as to whether Sweden is a conduit for the United States to gain possession of Assange to try him in the U.S. legal system.\textsuperscript{131} Even if a party were to disregard the potential risks that accompany drastic measures against Ecuador, each nation must also consider the risks of going against the Latin American nations that have pledged their support for Ecuador.\textsuperscript{132}

Smaller regional international organizations, such as the OAS, further strain the balance between the protection of regional interests and the promotion of global cooperation.\textsuperscript{133} Up to this point, Ecuador’s membership in the OAS has caused manifest problems because of the tacit support Ecuador has received from other OAS members as well as the legal basis the


\textsuperscript{131} Some believe Sweden’s continued role has been dictated by the fact that it is easier for the United States to extradite Assange from Sweden than it would be from the U.K., although in reality this may be more difficult. Green, \textit{supra} note 33. The United States and Sweden have enjoyed a strong relationship over the years, as evidenced by their military cooperation during the Cold War. Peter Vinthagen Simpson, \textit{Research Reveals Depth of Sweden-US Cold War Relations}, \textsc{Local} (Mar. 17, 2009), http://www.thelocal.se/18262/20090317/#.UPLzW6HjlH8.

\textsuperscript{132} The U.K. has sought to improve its trade relations with Latin America in recent years, an effort that may be severely hampered as a result of its declining reputation in the region. \textit{Julian Assange Row: Ecuador Backed by South America}, supra note 20.

\textsuperscript{133} The OAS is the “world’s oldest regional organization,” which dates back to the First International Conference of American States in 1890. The First International Conference of American States also established “the inter-American system, the oldest international institutional system.” \textit{Who We Are}, OAS, http://www.oas.org/en/about/who_we_are.asp (last visited Jan. 19, 2013). It was created “to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence.” Charter of the Organization of American States art. 1, para. 1, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.
binding regional treaties under the OAS provide. However, membership to the OAS should not affect Ecuador’s responsibilities to the U.N. The OAS exists as a regional agency within the U.N. and provides that one of the principal responsibilities of the OAS General Assembly is “[t]o strengthen and coordinate cooperation with the United Nations and its specialized agencies.” Although the OAS predates the U.N., its charter recognizes the authority of the U.N. and relies upon the recognition and protection provided by the U.N.

A party’s membership to the U.N. is conditioned upon its acceptance and execution of the various binding U.N. agreements. However, there are significant obstacles to enforcing a commitment of such large proportions. For one, smaller organizations, such as the OAS, are typically more effective in addressing the needs of their constituent member nations.


135. See Charter of the Organization of American States, supra note 133, art. 1 (“Within the United Nations, the Organization of American States is a regional agency.”); id. art. 140 (“None of the provisions of this Charter shall be construed as impairing the rights and obligations of the Member States under the Charter of the United Nations.”).

136. Id. art. 54(c).

137. Although the origins of the OAS may date back to 1889, the U.N. Charter was signed three years before the OAS signed their charter. Who We Are, supra note 133; U.N. Charter, opened for signature June 26, 1945; Charter of the Organization of American States, supra note 133 (signed in Bogotá, Colombia in 1948).

138. See Charter of the Organization of American States, supra note 133, art. 1 (“The Organization of American States has no powers other than those expressly conferred upon it by this Charter . . . .”); id. art. 131.

139. See U.N. Charter art. 2 (discussing the obligations of members to “act in accordance with the following Principles”); id. arts. 5–6 (detailing the penalties for member states that do not comply with the principles outlined in Article 2).

140. Regional organizations are better equipped to address the concerns of their member states. The effectiveness of such organizations is contingent upon smaller membership, specifically tailored purposes, and a larger voice for each of its members. See Johannes F. Linn & Oksana Pidufala, The Experience with Regional Economic Cooperation Organizations: Lessons for Central Asia 6 (Wolfensohn Ctr. for Dev. at Brookings, Working Paper No. 4, 2000), available at
For this reason, the U.N. may find that adherence to the principles espoused by various U.N. instruments is lacking on issues where a regional organization provides exceptional support.  

Although the U.N. encourages such regional agreements, a hierarchy amongst the numerous U.N. treaties naturally emerges in relation to these regional agreements depending on various factors, including the stability of the government, the system of government in place, and the level of discretion allowed for interpretation of the U.N. treaties.

Ecuador has attempted to manipulate its dual membership in the OAS and the U.N. by arguing that diplomatic asylum is supported by an OAS regional treaty, as well as by U.N. treaties that have protected human rights for many years. Although the validity of diplomatic asylum is reasonably questioned, the U.N. treaties Ecuador references in the dispute are not easily dismissed. Assange presents an ideal opportunity

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http://www.brookings.edu/~/media/research/files/papers/2008/10/carec%20integration%20linn/10_carec_integration_linn.pdf. Implicit amongst these regional organizations is a willingness to address issues that would otherwise not be addressed by larger international organizations. Id. at 4.

141. Ecuador’s relationship with the OAS and other Latin American nations, as demonstrated by its ratification of the Convention on Diplomatic Asylum, is emblematic of this concern.

142. See U.N. Charter art. 52, para. 1 (“Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.”).


144. Although Ecuador cites various pieces of international law, the primary basis for its hardline stance is the existence of diplomatic asylum as customary law in Latin America, as established by the Convention on Diplomatic Asylum and the *Haya de la Torre* decision. See supra note 12 and text accompanying note 93.

145. Given the lack of precedent of taking over “the sovereign territory of another country,” the U.K.’s threat to invade the Ecuadorian embassy and thus violate the Vienna Convention on Diplomatic Relations was seen by many as a “huge mistake.” “UK Made a Huge Mistake Threatening Ecuador”—Analyst, RT (Aug. 17, 2012), http://rt.com/news/uk-ecuador-threat-mistake-
for the U.N. to resolve the ambiguities surrounding diplomatic asylum that should have been addressed many years ago.\textsuperscript{146} The popularity of Julian Assange, the foreign-relations implications of the issue, and the unlikelyhood of an amicable resolution to the conflict demonstrate the need for a recognized international body to take a leadership role to develop a uniform international standard for diplomatic asylum.

III. WHY ASSANGE PRESENTS AN AMPLE OPPORTUNITY TO END THE UNCERTAINTY SURROUNDING DIPLOMATIC ASYLUM

A. The International Court of Justice is Best Qualified to Hear the Dispute

In order to maintain their preeminence, it is important for the ICJ to demonstrate that it is in control and continues to act in the best interests of the international community.\textsuperscript{147} The ICJ is empowered by judicial authority that extends beyond that of any other international court.\textsuperscript{148} Since membership to the ICJ

\textsuperscript{146} Several notable steps could have been taken before the U.N. Secretary-General report that could have curbed the use of diplomatic asylum in such a manner that future conflict would have been avoided. One example of such a step is placing certain limits on U.N. membership. \textit{See, e.g., supra note 125} (discussing the development of diplomatic asylum in Latin America in the years leading up to the U.N. Report on Diplomatic Asylum).

\textsuperscript{147} Along with its indisputable international nexus, the Assange dispute is also unique in that it implicates each of the purposes stated for the U.N.'s existence. \textit{See U.N. Charter art. 1} (establishing the four broad purposes of the U.N.: maintaining peace and international security; developing friendly relations; achieving international cooperation; and harmonizing of actions, all of which are implicated by the Assange dispute).

\textsuperscript{148} This can be implied from the fact that “[a]ll members of the United Nations are ipso facto parties to the Statute of the International Court of Justice,” as well as from the broad discretion the ICJ is permitted to exercise as part of its role. \textit{U.N. Charter art. 93, para. 1; ICJ Statute, supra note 70, art. 36(2)} (the Court has authority to rule on “all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which . . . would constitute a breach of an international obligation; [and] d. the . . . reparation to be made for the breach of an international obligation”).
is exclusive, and both Ecuador and the U.K. are ipso facto parties to the Statute of the International Court of Justice by virtue of their membership in the U.N., the Court should take advantage of an opportunity to resolve a dispute between two parties that are bound to its rulings.

An essential aspect of the ICJ’s involvement in the Assange dispute is whether either Ecuador or the U.K., each of which stands to lose a great deal if they do not prevail, is willing to allow the ICJ to intervene. Although Ecuador’s controversial position has already placed its international reputation at risk—at least amongst Sweden, the U.K., and the United States—an adverse ruling by the ICJ would seemingly bring an end to a situation that Ecuador is content to allow resolve itself. However, the leverage that the U.K. has in the negotiations as a result of their geographical and geopolitical advantages over Ecuador would be at risk if the ICJ were to make an adverse determination.

Although the outcome will primarily impact Assange’s future, the ramifications of the case also extend to the various pieces of international law that will be affected by a definitive ruling on diplomatic asylum. The ICJ’s role as the U.N.’s judicial organ illustrates that this authority must be exercised in the context of the entire U.N. organization. The fact that the ICJ was established by the U.N. Charter and owes its existence to the very document it has been entrusted to protect demonstrates that an ICJ determination should seek to reach a fair determination, while still promoting the stated purposes of the U.N.

149. See U.N. Charter art. 93.
150. Prevailing thoughts on diplomatic asylum support the belief that Ecuador would be the underdog in a formal legal proceeding. See Julian Ku, Ecuador Has Got to Be Bluffing About Its ICJ Case for Assange, OPINIO JURIS (Aug. 24, 2012), http://opiniojuris.org/2012/08/24/ecuador-has-got-to-be-bluffing-about-its-icj-case-for-assange/ (stating that Ecuador’s potential claim to the ICJ is so preposterous as to “be blown out of the water by the ICJ”).
151. See Harding, supra note 130.
152. See generally supra note 29 (five of the sixteen legal instruments cited by Ecuador as supporting their position were either U.N. documents or were instruments that required U.N. enforcement).
153. See supra note 69 and accompanying text.
154. Even though the statute does not specifically provide that the ICJ should consider principles espoused by the U.N., the structure and compe-
If the ICJ is requested to hear\textsuperscript{155} the Assange case, the proceeding will provide an opportunity for the ICJ to revisit its inconclusive ruling in \textit{Haya de la Torre} and establish definitive guidelines as to the availability of diplomatic asylum within customary international law.\textsuperscript{156} Since the enactment of the OAS Treaty on Diplomatic Asylum, there has not been a definitive ruling by a recognized international body on the availability of diplomatic asylum.\textsuperscript{157} As a result, an inevitable conflict has developed over the last fifty years, where the practice of diplomatic asylum has been allowed to flourish in certain areas, and thus become regional custom, while it has fallen into disuse in other regions.\textsuperscript{158} As the result of numerous high-profile disputes that highlight the inconsistent law in this field, the ICJ’s failure to institute a universal standard for diplomacy of the Court make it difficult to imagine a case in which the Court is not at least encouraged to take into account such concerns. See generally ICJ Statute, \textit{supra} note 70 (setting forth the Court’s organization, competence, procedure, advisory opinions, and amendments).

155. The ICJ cannot hear a dispute “of its own motion” and can only review a case when a nation requests them to do so. See \textit{Frequently Asked Questions}, \textit{Int’l Court of Justice} (ICJ), http://www.icj-cij.org/information/index.php?p1=7&p2=2 (last visited Jan. 19, 2013). While Ecuador has threatened to pursue such an appeal, there is no evidence that either party has requested that the ICJ resolve the dispute. \textit{Ecuador May File Appeal to ICJ If UK Refuses Assange Safe Passage}, \textit{supra} note 74. Although it is possible that the Court would be asked to give an advisory opinion under Article 65, the Assange dispute is more aptly described as a legal dispute between Ecuador and the U.K. than a legal question to be determined without the two parties’ involvement. ICJ Statute, \textit{supra} note 70, art. 65.

156. See generally Asylum (Colom./Peru), 1950 I.C.J. 266, 266–89 (Nov. 20) (stating that diplomatic asylum was not protected by international law, but it may exist as customary law if accepted by all parties involved); \textit{Haya de la Torre Case} (Colom./Peru), 1951 I.C.J. 71, 82 (June 13) (where the Court acknowledged that even though “asylum must cease . . . the Government of Colombia [was] under no obligation to bring this about by surrendering the refugee to the Peruvian authorities”).

157. See Kurbalija, \textit{supra} note 67 (indicating that the issue of diplomatic asylum has not been addressed since the \textit{Haya de la Torre} decision).

158. See \textit{Question of Diplomatic Asylum, supra} note 10, ¶ 12 (the seven instances over a period of forty-one years when diplomatic asylum was granted were “purely illustrative” of the “[m]any other examples . . . mentioned in the records in the asylum case and in various publications.”); \textit{Asylum}, 1950 I.C.J. at 277 (the “Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected”).
ic asylum in the *Haya de la Torre* decision can no longer be ignored.\textsuperscript{159}

The urgent nature of the Assange dispute lends itself to review by the ICJ, which should have the opportunity to review both parties’ arguments before the situation becomes untenable, which may come either as the result of Assange’s declining health or from the mounting adverse implications for foreign relations.\textsuperscript{160} The numerous diplomatic missions in foreign countries are undoubtedly affected by the legitimacy of the action taken by Ecuador. In particular, these diplomatic missions have a compelling interest in a definitive ruling on whether diplomatic asylum occupies a role within customary international law.\textsuperscript{161} The ICJ’s inconclusive resolution to *Haya de la Torre* decision was binding only on Colombia and Peru, the ICJ should have been aware that its decision would extend beyond the immediate parties. See ICJ Statute, *supra* note 70, art. 59 (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”); *id.* art. 36(2) (establishing the jurisdiction of the Court in most international matters); *id.* art. 38(1) (listing factors that should be considered by the ICJ when making their determination, which include international custom and “the general principles of law recognized by civilized nations”).

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\textsuperscript{160} Ecuador has had some concerns about Assange’s health, and the U.K. has vowed not to prevent Assange from receiving medical care if it becomes necessary. *Julian Assange ‘Has Lung Infection,’* BBC News (Nov. 29, 2012), http://www.bbc.co.uk/news/uk-20537157. Furthermore, it is difficult to imagine a scenario in which the U.N. will continue to allow Assange to make public attacks on the United States—as he has done via satellite to the U.N.—without some type of intervention, especially after a U.N. report in March 2012 indicated that Wikileaks ally Bradley Manning “may have been treated inhumanely.” See Ashley Fantz, *Assange Speaks via Satellite from London, Calls for End to ‘Persecution’,* CNN (Sept. 27, 2012), http://edition.cnn.com/2012/09/26/world/assange-un-address/index.html.

\textsuperscript{161} Resolution of this case would have a significant impact on international relations. On one hand, nations will likely have some guidance as to whether diplomatic asylum is a recognized extension of political asylum within international law. On the other hand, “[m]ost countries are fiercely protective of their embassies” and have a vested interest in the level of protection extended to their embassies under the right of diplomatic asylum. Timothy McDonald, *Assange Case Could Have Wider Impact on Diplomacy,* ABC (Aug. 16, 2012), http://www.abc.net.au/worldtoday/content/2012/83569084.htm. At the very least, most observers agree that the bar to revoking such diplomatic immunity is extremely high, considering both the context and the legislation in place. *Id.*
Torre can no longer be seen as a viable option since neither party in the present dispute has shown signs of conceding.162 The ICJ should take responsibility for mitigating an international crisis of indeterminate proportions by redefining customary international law to address diplomatic asylum, while also addressing the conflicting pieces of international law that have formed the basis for the arguments on both sides of the dispute.163

B. A New Standard Must Provide Clear Guidelines in Order to Ensure Cooperation and Prevent Confusion

1. Ambiguous Language Has Doomed Application of Diplomatic Asylum on an International Scale

In order to ensure the attention to detail that creating a definitive standard requires, the ICJ must undertake a multi-step process in presenting a solution to the question of diplomatic asylum. The Court must first develop a new standard for diplomatic asylum that incorporates precise language as to how diplomatic asylum will be analyzed in the context of customary international law. A broad rule addressing international human rights, such as the one established by the ICJ in the Asylum Case164, is inappropriate in that it exhibits significant deference to principles of sovereignty.165 Further, such sovereign principles are likely to be closely aligned to regional beliefs.166

162. Fittingly, South American ministers encouraged the parties to continue the negotiation process despite voicing public support for Ecuador. See supra note 129.
163. See generally supra note 29 (listing the numerous legal instruments cited by Ecuador in support of its decision to grant Assange diplomatic asylum); note 31 (illustrating the “conflicting viewpoints” between Ecuador and the U.K. regarding the countries’ international obligations).
164. The consequence of a deferential resolution may be perceived as the Court’s acquiescence to subsequent events in the regions that are affected, such as the events that transpired after the Haya de la Torre cases. See generally Question of Diplomatic Asylum, supra note 10 (discussing the history and growth of diplomatic asylum, most notably in Latin America).
165. See supra note 139 (stating that regional organizations are specifically designed to address issues that would otherwise go unresolved in the larger international community).
While regional customs and sovereign principles are important in determining the context in which a dispute arises, the function of an international dispute resolution body is to provide a solution “in accordance with international law.” 166 Thus, even when a regional dispute such as *Haya de la Torre* comes before the ICJ, the ICJ has broad discretion to determine what canons of international law apply. 167 Since the U.N. Charter and international treaties merely provide guidelines for member states, and not a binding body of law, the ICJ is entrusted to interpret ambiguous international standards for disputes that often result from a basic lack of conformity amongst different legal systems. 168

The ICJ’s ruling in *Asylum Case* was notably lacking in its effort to define absolute terms that would bind the parties to customary international law. The Court’s broad statement that “asylum cannot be opposed to the operation of justice” 169 provided an opportunity for nations to adopt their own interpretations on when this would be implicated. 170 The custom that resulted from the OAS Convention on Diplomatic Asylum ap-

166. ICJ Statute, *supra* note 70, art. 38(1).
167. Within its broad responsibility “to decide in accordance with international law,” the ICJ is to apply,

a. international conventions . . . establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; [and] d. . . . judicial decisions and the teachings . . . of the various nations, as subsidiary means for the determination of rules of law.

Id.

168. The International Criminal Court is a reflection of an attempt to codify certain aspects of criminal law in international law, although the court’s efforts up to this point have concentrated on crimes committed on a large scale. For instance, it has attempted to “reach[] a consensus on definitions of genocide, crimes against humanity and war crimes.” *About the Court, Int’l Crim. Ct.*, http://www2.icc-cpi.int/Menus/ICC/About+the+Court/ (last visited Jan. 19, 2013).

169. Asylum (Colom./Peru), 1950 I.C.J. 266, 284 (Nov. 20).
170. The Court’s attempt to qualify this term, by stating that “[t]he safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals[,]” *id.*, missed the mark by failing to limit the subjectivity of the term “justice.”
pears to comport with the ICJ’s general advice to observe customary law and undertake good faith efforts to come to a negotiated settlement.171 Although the Haya de la Torre model has survived for more than fifty years, it is apparent that a new standard must emerge that better takes into account globalization and the importance of uniformity regarding fundamental human rights.

The Asylum Case standard initially failed in its effort to specify whether different standards would apply to political asylum and diplomatic asylum.172 Specific conditions relating to the “urgency” and duration of diplomatic asylum must not only define asylum in general terms, but also address whether political asylum and diplomatic asylum will be treated differently in the future.173 The urgency of a case is dependent on numerous factors and thus almost entirely reliant on a subjective determination by the nation granting asylum.174 A modern determination should therefore seek to establish an objective standard that is not subject to the fanciful interpretations that accompany illusive terms such as “reasonable fear of political persecution.”

2. A Clearly Defined Role for Diplomatic Asylum

In defining the standard for diplomatic asylum, the ICJ should proceed with various goals in mind. First, the Court

171. See Convention on Diplomatic Asylum, supra note 12, art. 9 (“[t]he official furnishing asylum shall take into account the information furnished to him by the territorial government in forming his judgment as to the nature of the offense or the existence of related common crimes”). Although the precise usage patterns amongst OAS members remain unknown, the absence of any recent dispute that has garnered international attention appears to indicate that the concept is widely accepted and rarely challenged, or at least resolved amicably between the interested nations.

172. The Court itself acknowledged that the two parties’ arguments “reveal[ed] a confusion between territorial asylum (extradition), on the one hand, and diplomatic asylum, on the other.” Asylum, 1950 I.C.J. at 274.

173. From the Havana Convention, the ICJ held that diplomatic asylum “can be granted only to political offenders who are not accused or condemned for common crimes and only in urgent cases and for the time strictly indispensable for the safety of the refugee.” Id. at 278.

174. In determining that Haya de la Torre’s case was not of an “urgent character,” the Court did not establish a helpful standard for future use, but implied that the determination was almost entirely contextual. Id. at 283–87.
should firmly establish the scope of diplomatic asylum within international human rights law. In an effort to monitor its use, the ICJ should recognize diplomatic asylum as a subset of political asylum within customary international law. A significant reason behind the international failure to regulate diplomatic asylum is the divergent paths that were taken after Asylum Case. By broadening the applicability of diplomatic asylum law, the ICJ would thereby eliminate disputes about what constitutes "international custom," defined by the Court "as evidence of a general practice accepted as law." This would preclude the Court from engaging in fact-intensive investigations of past use, such as whether diplomatic asylum is a part of U.S. custom as a result of its sporadic but infamous use of the right over the past century. The expanded scope of

175. Within pieces of recognized international law, the formal international stance on the incident is that diplomatic asylum is not officially recognized by most countries. See Question of Diplomatic Asylum, supra note 10, ¶ 155 (arguing that diplomatic asylum "had not been accepted by the majority of European States, and by the United Kingdom Government in particular"). However this dispute, along with the prevalence of diplomatic asylum in Latin America, and notable instances of use by the United States over the past fifty years, has certainly raised questions as to how nations view diplomatic asylum unofficially. See, e.g., Greene, supra note 28 (listing three cases where the United States granted asylum to those who sought refuge in its diplomatic missions).

176. In retaining the right to differentiate between political and diplomatic asylum, the ICJ should determine that the broad protection offered by Article 14 of the UDHR only applies in cases of political asylum, so as to not restrict human rights any more than necessary. Article 14(1) of the Universal Declaration of Human Rights provides that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." See UDHR, supra note 11.

177. See generally Question of Diplomatic Asylum, supra note 10 (discussing how a system had developed amongst Latin American countries whereby ad hoc administration of diplomatic asylum had become sufficiently prominent so as to become an important part of regional human rights law, while the right had all but ceased to be granted in all other parts of the world).

178. ICJ Statute, supra note 70, art. 38(1)(b). The Haya de la Torre case demonstrates that even evidence of past practice does not necessarily signify the existence of custom in a specific country. See Asylum (Colom./Peru), 1950 I.C.J. 266, 277 (Nov. 20) (holding that the evidence failed to demonstrate that the right of diplomatic asylum existed as custom in Colombia).

179. See Austermuhle, supra note 100 (recalling the infamous U.S. diplomatic asylum case involving József Mindszenty); Greene, supra note 28 (citing to an article discussing key international precedents involving diplomatic
diplomatic asylum would also result in each U.N. member being bound by the same terms, so as to enable each nation to tailor its other international responsibilities around a uniform principle of diplomatic asylum.

Having addressed to whom diplomatic asylum will apply, the Court should then move on to its most important role: establishing the requisite conditions for when diplomatic asylum may be granted. As it currently stands, the OAS Convention on Diplomatic Asylum provides that nations have wide discretion in situations where diplomatic asylum is available.\textsuperscript{180} The only qualification to this unfettered discretion appears to be that there must be a good faith effort by a nation to “take into account the information furnished to [it] by the territorial government in forming [its] judgment as to the nature of the offence or the existence of related common crimes.”\textsuperscript{181} The expansive language of the UDHR provides no further instruction as to \textit{when} asylum should be granted.\textsuperscript{182} The absence of a tem-

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\textsuperscript{180} Article IV of the OAS Convention on Diplomatic Asylum provides that “[i]t shall rest with the State granting asylum to determine the nature of the offense or the motives for the persecution.” Convention on Diplomatic Asylum, \textit{supra} note 12, art. 4.

\textsuperscript{181} \textit{Id.} art. 9. In this regard, however, the Dominican Republic did make a reservation to the applicability of diplomatic asylum in certain situations, specifically “to any controversies that may arise between the territorial State and the State granting asylum, that refer specifically to the absence of a serious situation or the non-existence of a true act of persecution against the asylee by the local authorities.” Convention on Diplomatic Asylum: General Information, \textit{supra} note 12.

\textsuperscript{182} Article 14 provides only that “everyone has the right to seek and to enjoy in other countries asylum from persecution.” Universal Declaration of Human Rights, \textit{supra} note 11. Article II of the OAS Convention on Diplomatic Asylum additionally provides that “[e]very State has the right to grant asylum; but it is not obligated to do so or to state its reasons for refusing it.” Convention on Diplomatic Asylum, \textit{supra} note 12, art. 2. However, Guatemala and Uruguay both made reservations to this provision, arguing that states
poral element may have symbolized an effort to allow countries to make subjective determinations in constantly evolving political times.183

A specific standard for when diplomatic asylum applies should first seek to place a time limit on the duration of a grant of diplomatic asylum. The lack of a fixed duration has proven problematic for both OAS nations and the United States.184 Although the United States does not depart from its stated policy against diplomatic asylum, the instances in which the United States has granted diplomatic asylum have signaled its willingness to allow asylees to remain in U.S. missions for long periods of time.185 While cooperation amongst OAS nations has generally facilitated this process, Latin America has encountered difficulties with regard to extended grants of diplomatic asylum.186

An established duration would reflect a compromise between the complete elimination of diplomatic asylum and the OAS'...
standard “for the time strictly indispensable for the safety of the refugee.” Such broad language places exclusive reliance on a negotiated solution, since it is difficult to imagine a scenario in which the “safety of a refugee” is ensured without an amicable resolution between parties. Thus, a short duration permits both parties sufficient time to engage in good faith efforts to reach a negotiated solution before the parties become subject to consequences that accompany a failure to reach a mutually agreed upon resolution.

Conflicts without an established date for resolution also raise the important question of how diplomatic asylum should be terminated if no amicable resolution is reached between the parties. This is the precise issue that the ICJ considered in its Haya de la Torre judgment when the ICJ refused to compel Haya de la Torre’s surrender to Peru because such an action would reward Peru with custody of Haya de la Torre. The consequences of failing to come to an agreement prior to the expiration of the six-month duration of asylum that should be implemented in all future cases of diplomatic asylum should have repercussions that both parties will acknowledge as legitimate, but only to the extent that it encourages good faith negotiation.

187. Asylum (Colom./Peru), 1950 I.C.J. 266, 278 (Nov. 20). This language was later changed to “the period of time strictly necessary for the asylee to depart from the country with the guarantees granted by the Government of the territorial state . . . .” Convention on Diplomatic Asylum, supra note 12, art. 5.

188. Such reliance lends credence to Ecuador’s refusal to budge on its stance, as the de facto position permits them to keep Assange indefinitely. See supra note 130 (stating Ecuador’s willingness to allow Assange to remain in its embassy for “two centuries” if necessary).

189. While a fixed duration would not necessarily encourage an expeditious result, it would give both parties ample opportunity to explore various avenues for a settlement. It also shows that diplomatic asylum cases are often illustrative of larger political differences that take time to resolve.

190. Haya de la Torre Case (Colom./Peru), 1951 I.C.J. 71, 81–82 (June 13). The court inexplicably provided no further guidance as to how Haya de la Torre’s asylum should be terminated, alleging that such advice would require the Court to “depart from its judicial function.” Id. at 83.

191. As it currently stands, whether a party is willing to make a good faith effort in negotiation is affected by the strength of its bargaining position. See supra note 185 (arguing that Ecuador has the superior bargaining position at
The ICJ should thus mandate that all unresolved disputes be referred to an independent international body that would definitively rule on the validity of a diplomatic asylum case. Since the primary purpose of such an international body would be to encourage a negotiated resolution and discourage the pursuit of independent judicial review, this review body would ideally be the creation of an organization that deals with human rights cases, such as the United Nations High Commissioner for Refugees (“UNHCR”). For parties that do not want to face the uncertainty that accompanies a judicial proceeding, a negotiated settlement within the fixed time period provides the only alternative.

When the independent tribunal is called upon to resolve a diplomatic asylum dispute, it is important that a specific legal standard is applied to the individuals that have been granted asylum. First, the tribunal should defer to the penal system in the nation bringing the charges in determining whether the asylee is sought for a “common crime.” The tribunal’s interpretation of this term provides a safeguard to ensure that poor foreign relations between nations will not impact whether specific misconduct is classified as a “common crime.” Next, the tribunal should make the conclusive determination whether the asylee faces a “reasonable fear of political persecution.” It is only at this point that the tribunal will determine which of two courses of action is appropriate: surrender the party to the nation seeking prosecution, or recognize the party’s permanent political asylee status and allow for safe passage into the nation that has granted diplomatic asylum.

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192. Judicial review led by the UNHCR would be ideal, not only for UNHCR’s history of dealing with asylum and refugees, but also because its authority is granted by the U.N. About Us, supra note 180.
193. See Asylum (Colom./Peru), 1950 I.C.J. 266, 278 (Nov. 20) (holding that, under the Havana Convention, diplomatic asylum “can be granted only to political offenders who are not accused or condemned for common crimes . . .”).
194. The importance of the only two potential outcomes is that both outcomes present a natural conclusion to the temporary status of diplomatic asylum, which should be the primary goal.
While this proposed proceeding is assuredly a fact-intensive determination that rests upon the subjective determination of a third party, it only comes at the end of a process that has presented numerous opportunities for both sides to resolve the dispute amicably without judicial interference. Further, the subjective determination is entrusted to a judicial body intrinsically qualified to make determinations on sensitive human rights matters in an efficient manner that reflects the magnitude of the proceedings. A judicial body that has adhered to the process outlined above will offer substantial clarity to a system that has led some to question whether diplomatic asylum is recognized by international law.

CONCLUSION

Julian Assange’s stay in the Ecuadorean embassy has provided the international community an opportunity to address an area of law that has needed clarification since it was first recognized more than sixty years ago. As the role of asylum law has changed in conjunction with increased international interest in human rights, the uncertainty surrounding the right of diplomatic asylum has been largely disregarded in favor of guaranteeing widespread protection from persecution. The result has been nearly unfettered limits to a principle that has grown within the right of political asylum, providing pro-

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195. The ability to make such determinations in a competent manner is perhaps the most important role of this independent tribunal, since such expertise has a significant impact on the parties’ willingness to resolve their dispute in front of this judicial body.

196. Although the right of asylum draws aspects from various pieces of law, the Asylum Case and Haya de la Torre decisions and the OAS Convention on Diplomatic Asylum provide the necessary foundation for diplomatic asylum law. See supra notes 12 (stating that the OAS Convention on Diplomatic Asylum provides the framework for how diplomatic asylum will be administered amongst parties to the treaty), 69 (Asylum Case addressed whether diplomatic asylum was recognized by international law, while the Haya de la Torre case centered upon whether Colombia was compelled to surrender Haya de la Torre to the Peruvian government).

197. This increased interest in human rights is perhaps best illustrated by the history of the UNHCR. This organization has grown from thirty-four staff members in 1954, to more than 7,000 members in 2012, and has been awarded two Nobel Peace Prizes, most recently in 1981 for “worldwide assistance [of] refugees.” About Us, supra note 180.
tection within diplomatic premises to individuals fleeing persecution by sovereign nations.

While the availability of political asylum is an important tool in the protection of human rights on a global scale, definitive limits must be placed on a tool with such expansive reach. Geopolitical differences have allowed definitions of asylum to diverge, resulting in the growth of diplomatic asylum in Latin America.\footnote{See Question of Diplomatic Asylum, supra note 10, ¶ 12 (noting famous instances where diplomatic asylum had been granted in Latin America from 1850 to 1891).} Notably, this unprecedented growth has seemingly coincided with an increased lack of acceptance of diplomatic asylum amongst most other countries. The Assange dispute has demonstrated that separate treatment for political refugees based on their geographic location can result in contentious disputes that extend beyond the question of human rights. As the supreme international organization, the U.N. should not allow the Assange dispute to dissipate before definitively providing a binding international standard on the permissibility of the concept of diplomatic asylum. Failure to take such decisive action may have drastic consequences for the future, when additional disputes over the right of diplomatic asylum under an imprecise standard could have a disastrous effect on foreign relations.

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NARROWING THE RIGHT TO BE FORGOTTEN: WHY THE EUROPEAN UNION NEEDS TO AMEND THE PROPOSED DATA PROTECTION REGULATION

By the time a current thirteen-year-old is applying for college, or starting her professional career, she will have a social media history of her entire adolescence. However, due to a proposed regulation, citizens of the European Union may soon be able to contact a website and effectively demand the permanent removal of any and all unwanted content from the website’s server.1 This is part of the European Commission’s January 2012 proposal to overhaul the EU’s personal data privacy laws.2 If the European Parliament and European Council approve the proposed General Data Protection Regulation (“Regulation”), citizens of the EU will gain a new right called the “Right to be Forgotten.”3

The proposed Right to Be Forgotten empowers individuals to assert greater control over their reputations and identities on the Internet, but further analysis reveals glaring issues with its effect on freedom of expression and notions of privacy.4 This controversial right would grant individual citizens the ability to demand the permanent removal of personal content from the Internet. This could be content posted either by themselves or by third parties.5 While the Regulation provides exceptions for

5. Commission Proposal, supra note 2, art. 17.
content deemed artistic, journalistic, or literary, it leaves the
determination of what constitutes an exception to the entity in
charge of its removal (i.e. Google or Facebook). Furthermore, it
penalizes companies for noncompliance. This has the potential
to forcefully transform the role of these Internet companies
from hosts to censors.6

Courts around the world are beginning to tackle the issue of
who controls personal content once it is posted to the Internet
and the degree to which individuals can control their online
reputations.7 For example, two women in Argentina recently
won lawsuits both claiming the Right to be Forgotten.8 Virginia
Da Cunha, an Argentinian pop star, sued Google and Yahoo! to
take down explicit photographs posted to the Internet.9 These
were photographs that she consented to but did not wish to be
widely published on the Internet.10 After Da Cunha won on ap-
peal, the content was removed from the Internet; a query on
Yahoo!’s search engine in Argentina for the material will pro-
duce no search results.11 Similarly, an Argentinian model for
Sports Illustrated, Yesica Toscanini, demanded Yahoo! take
down photographs of her drinking at a party that had been
posted to the Internet.12 The court “ordered Yahoo! to block
‘Yesica’ searches while the two sides appeal[ed].”13 Through the
deletion of their presence on the Internet, these two cases ex-

6. Id. arts. 17(3)(a), 80.
7. There have been at least 130 similar cases since 2006 for issues related
to individual’s requesting the removal of personal content from the Internet.
Vinod Sreeharsha, Google and Yahoo Win Appeal in Argentine Case, N.Y.
8. Jeffrey Rosen, The Right to Be Forgotten, ATLANTIC (June 19, 2012,
2:23 PM), http://www.theatlantic.com/magazine/archive/2012/07/the-right-to-be-forgotten/309044; Robert Krulwich, Is the ‘Right to Be Forgotten’ the ‘Big-
gest Threat to Free Speech on the Internet’?, NPR (Feb. 24, 2012, 9:06 AM),
http://www.npr.org/blogs/krulwich/2012/02/23/147289169/is-the-right-to-be-
forgotten-the-biggest-threat-to-free-speech-on-the-internet.
9. Id.
10. Id.
13. Id.
emplify the potential chilling effect the Right to Be Forgotten may have on individuals around the world.\textsuperscript{14}

This Note will argue that the ambiguity in implementation and enforcement of the Right to Be Forgotten will have a chilling effect on freedom of expression that outweighs its personal privacy benefits. It will then propose several solutions to reduce this chilling effect, while maintaining the Regulation’s goals of granting individual’s control over their online reputations. While the policy and goal behind the EU’s proposed “Right to Be Forgotten” empowers individuals to take control of their reputation and privacy, it is problematic for multiple reasons. For example, the penalty for noncompliance creates a disincentive for companies to genuinely evaluate Internet content to determine whether it falls within an exception named within the Regulation. Part I introduces Article 17, the Right to Be Forgotten, provides an overview of the Right to be Forgotten’s basis in EU privacy rights, and compares the right to U.S. privacy law. Part II analyzes the positive and negative aspects of the Right to Be Forgotten and suggests changes to make compliance more effective. Part III analogizes the Right to Be Forgotten to a theory of copyright law showing that the current draft of the Regulation will result in regulatory overreach. Finally, Part IV examines nonlegislative solutions to data privacy, finding that the Right to Be Forgotten is the best method to provide personal data privacy protection.

I. BACKGROUND AND PRIVACY OVERVIEW

In a speech at the January 2012 Innovation Conference Digital, Life, Design in Munich, Vivian Redding, Vice President of the European Commission, outlined the Commission’s proposal to overhaul the 1995 Directive on European Union Data Protection.\textsuperscript{15} By implementing a new regulation in place of the ex-

\textsuperscript{14} Incidentally, one can still conduct an Internet search on both Yahoo! and Google in the United States and obtain a large amount of content on both women. A search for “Yesica Toscanini” and “Virginia Da Cunha” in Google’s search engine produces hundreds of thousands of articles and photos on the women.

existing directive, the EU seeks to harmonize the laws on data protection among its twenty-seven member states and provide legal certainty to all European citizens. Under EU law, a directive is legislation that serves as a guideline for member states and requires each member state to transpose the directive into its own national legislation within a specified period of time. Alternatively, a regulation does not require transposition but instead immediately becomes law within each member state upon adoption. Therefore, by proposing a regulation rather than a directive, the Commission seeks to create a unified and universal right immediately upon the enactment of the proposal.

The new regulation serves two purposes: to encourage business that promotes the protection of personal data and to provide transparency and control to individuals. Viewing personal data as Internet currency, the Commission attempts to establish stability and trust in this currency through the proposed Regulation. In line with these goals, the purpose of the Right to Be Forgotten is to “give individuals better control of their own data.” This stems from concern for an individual’s interest in controlling personal information that is available on the Internet. In acknowledging the “almost unlimited search and memory capacity” of the Internet, the Right to Be Forgotten recognizes that “it is the individual who should be in the best position to protect the privacy of their data by choosing whether or not to provide it.” However, this new right is not

16. Id.
18. Bender, supra note 17.
21. Id. at 15.
22. Id. at 2.
23. Id.
24. Vice President Redding goes on to explain that the proposed right is intended to protect teenagers from poor judgment and youthful indiscretion. By giving people the ability to take down content that they post as teenagers,
A. The Right to Be Forgotten

Article 17, the “Right to be forgotten and to erasure” contains three important sections. First, Section 1 explicitly provides that individuals “have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data, especially in relation to personal data which are made available by the data subject while he or she was a child . . .” Section 1 is in line with the Regulation’s emphasis on protecting children and young adults from reputational harm caused by the existence of old, undesirable content posted to the Internet. Second, Section 2 then charges the “controller” of the data to inform third-party entities that are processing the data of the subject’s request for erasure. The controller is also responsible for the takedown. Section 3 states that “the controller shall carry out the erasure without delay, except to the extent that the retention of the personal data is necessary.” Third, Section 3 carves out several exceptions where retention of personal data in light of a takedown request is considered necessary. The exceptions are (a) for exercising freedom of expression, including works designated as artistic, literary, or journalistic; (b) public interest regarding public health; (c) historical, statistical, and scientific research purposes; and (d) for retention of personal data by the EU or member state under state law. Complications arise under the current draft of the Regulation because the penalty for
noncompliance could cost controllers up to 1% of its global earnings.32

Although the Right to be Forgotten is a new concept in relation to the Internet, it is derived from existing notions of privacy. European countries have strong traditions of protecting individual privacy and limiting personal content published in public forums.33 The origin of this notion is derived from the French concept *le Doit à l’Oubli*, which loosely translates to “the right to oblivion.”34 If enacted, Article 17 of the Regulation would codify a modern version of this concept into EU law.35 The French notion of privacy allows people to escape their past and control what is said about them.36 Similar notions of privacy can be found in other countries across Europe.37 The approach to privacy by these European countries, particularly France and Germany, is “diametrically opposed” to the United


33. A famous example of this concept of privacy from the late nineteenth century is the publication of a scandalous photograph of an aging Alexander Dumas and Adah Isaacs Menken. The aging author and young American actress’s love affair was published and publicized by a paparazzo. Dumas and Menken sued. The court held that “posing for the photographs did not mean Dumas and Menken had surrendered their rights to privacy and dignity, even if they consented to just that during a heady romantic moment.” Bob Sullivan, *‘La Difference’ is stark in EU, US privacy laws,* NBC NEWS (Oct. 19, 2006), http://www.nbcnews.com/id/15221111/ns/technology_and_science-privacy_lost/t/la-difference-stark-eu-us-privacy-laws.


35. See Fleischer, *supra* note 34.


States’ approach. Where the United States values the First Amendment protections of freedom of expression far more than individual privacy, European countries place a greater premium on individual privacy.

For example, two men convicted of murder in Germany sued Wikimedia, Wikipedia’s parent company, to remove their names from the English language Wikipedia page of their German victim. The German editors of Wikipedia removed the convicts’ names from the German language site upon request, but the two men wanted their names removed from the site internationally as well. Claims of this nature would fail in the United States on First Amendment grounds, but the German editors of Wikipedia removed the content avoiding a lengthy lawsuit. In the United States, the First Amendment protects the publication and dissemination of factual content; whereas in Germany, laws prioritize the protection of individual privacy over freedom of expression, even over the disclosure of factually accurate information.

The history of French and German privacy law informs the EU perspective of privacy and shows how the Right to Be Forgotten is compatible with the European privacy framework. Throughout its evolution, the EU looked to member state laws and constitutions to establish community law. Initially, the EU had no codified catalogue of fundamental human rights, but instead derived fundamental human rights from member state constitutions. Eventually, fundamental human rights were recognized by the EU through the European Convention for the Protection of Human Rights (“Convention”). The Convention established privacy and freedom of expression as fun-

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38. Rosen, supra note 4.
39. See Hauch, supra note 36 (citing Dorsey D. Ellis, Jr., Damages and the Privacy Tort: Sketching a Legal Profile, 64 Iowa L. Rev. 1111, 1133 (1979)). See also Werro, supra note 37, at 289.
41. Schwartz, supra note 40.
42. Id.
43. See id.
44. BERMANN ET AL., supra note 19, at 230.
45. Id.
damental rights under a unified standard applicable to all member states.\(^46\) In order to understand the evolution of privacy law that the Right to Be Forgotten stems from, it is necessary to look at specific member state privacy laws. Specifically, French and German law highlight the extent of privacy rights, and exemplify how the Right to Be Forgotten is an adoption of historical protections in a modern context.

B. Analysis of French and German Notions of Privacy

The French legal system has long respected “personality rights,” which include the “right to control the use of one’s image, and the right to protect one’s honor and reputation.”\(^47\) Codified in the French Civil Code, Article 1382 states that “[a]ny human act whatsoever which causes damage to another, obligates him by whose fault the act occurs to repair the damage.”\(^48\) Furthermore, French Civil Code Article 1383 states that “[e]ach individual is responsible for the damage he causes not only by his acts, but also by his negligence or imprudence.”\(^49\) Application of these articles resulted in the establishment of strict liability in French tort law. Thus, if someone published imagery without the subject’s consent, the publisher’s “mental state is irrelevant” in determining liability.\(^50\) The focus of the law is instead on the subjective emotional suffering of the individual in instances where the individual’s privacy was violated.\(^51\) Furthermore, the French idea that “personality rights are inherently inalienable, has led the French courts to find liability even for republication of private facts that have been previ-

\(^{46}\) Id. at 215.
\(^{47}\) Hauch, supra note 36, at 1228.
\(^{48}\) Hauch, supra note 36, at 1232 (citing CODE CIVIL [C. CIV.] art. 1382 (Fr.)).
\(^{49}\) Hauch, supra note 36, at 1232 (citing C. CIV. art. 1383 (Fr.)).
\(^{50}\) Hauch, supra note 36, at 1234.
\(^{51}\) The first application of these principles occurred in 1858 in a case referred to as the “Rachel affair.” Photographs of a famous French actress on her deathbed were commissioned by her family and subsequently exposed publicly, causing emotional harm to the surviving family. The published images could only have been created by a person present at the scene or with access to the private photographs. The court famously held that reproductions of private photographs without the consent of the person captured in the photograph are a violation of the individuals’ privacy. Hauch, supra note 36, at 1233–34.
ously revealed to the public with the plaintiff’s knowledge or consent.” This approach reflects the French view of privacy as a moral right. Granting permission for use of certain personal private facts or photographs in one context does not necessarily grant a blanket authorization for use in other forums. For example, in a modern context, granting a website permission to use a photograph may not be a blanket license for other websites to republish the photograph without permission. The Right to be Forgotten is an extension of the French concept of privacy by granting individuals’ more autonomy over their personal or private content on the Internet.

Building on the protections in Articles 1382 and 1383, France enacted civil and criminal protections of privacy under Article 9 and Article 22 to define the breadth of privacy rights. The scope of these rights is quite expansive, including “family [and romantic] life, sexual activity and orientation, illness and death . . . private repose and leisure . . . the human body . . . and certain aspects of social life and lifestyle . . . [including] familial relations and procreative activities . . .” The breadth of these

52. Id. at 1234.
53. Id.
54. An example of a case where the court found the republication of private information to violate an individual’s privacy is “The Chaplin Affair.” In the 1960s, Charlie Chaplin collaborated on an autobiography with a journalist and later granted the same journalist an exclusive interview. Content from this interview was used for an article published in France and Germany. Lui magazine later restructured the content of the previously published articles; resulting in the appearance that Chaplin granted Lui an exclusive interview. Chaplin sued Lui magazine asserting violation of Article 1382 for recharacterization of the article and violation of his right to privacy under Article 9 for republishing the private facts. Lui appealed the case all the way to the Cour de cassation, where the court held that the republication of private content violated Chaplin’s right to privacy. The court recognized that the “right to oppose republication” is not an absolute right, citing potential exceptions for the fair use of facts with historical value. Id. at 1266–69.
55. Id. at 1242.
56. Information on maternity, labor, or even the name of the mother of an illegitimate child is protected from unwanted disclosure. Similarly, plans for divorce, and even a secret second marriage, are protected. Id. at 1247.
57. Even when previously revealed, social and lifestyle choices can be protected under French Privacy laws. For example, a person participating in a Gay Rights demonstration has the right to keep his participation private from his family or professional colleagues. Id. at 1247–48.
privacy protections shows how “personality rights” are closely related to the Right to Be Forgotten. In a country that places a high premium on the privacy of its citizens and their ability to control their reputation, acknowledging how evolving technologies and the Internet impact privacy necessitates new protections like the Right to Be Forgotten.

Another European country with a strong tradition of protecting privacy rights is Germany. Germany began protecting the “right to one’s image” in 1907 through legislative means by enacting the Act on Copyright in Works of Visual Arts (Kunstüberrechtsgesetz) (“KUG”), and later established the “general personality right” in 1954.58 In the aftermath of the Nazi occupation of Germany, the country was motivated to protect human dignity and did so by including a provision in the German Constitution of 1949 recognizing that “everyone has the right to the free development of his personality.”59 Generally, the personality right explains that “everyone has the right to the free development of his personality, in so far as he does not violate the rights of others or offend against the constitutional order or the moral code.”60

By 1954, the general right to personality was recognized by private law.61 A famous case called Herrenreiter, known as the gentleman rider case, is an example of German law protecting one’s right to personality.62 In Herrenreiter, a man was photographed in a horse riding competition; his photograph was subsequently used in an advertisement for a sexual stimulant without his consent.63 While the man did not suffer material damage, the German Supreme Court granted him “damages for pain and suffering.”64 The court justified the award of damages holding “that a serious injury to personality interests was analogous to a violation of a freedom.”65

59. Id.
60. Id. at 100.
61. See id. at 101.
62. See id.
63. See id.
64. Id.
65. Id.
While some personality rights are specifically codified in Article 12 of the German Civil Code, Burgerliches Gesetzbuch and in Articles 22 and 23 of the KUG, the more general personality right is quite broad. This breadth allows for flexibility in application of the right, giving courts the freedom to hold a defendant in violation of the right in the absence of specific legislative action. While this flexibility in application may be beneficial for courts to find new violations of the right, there also

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66. Id. at 113. Article 12 protects the right to one’s name: “Whenever the right to the use of a name is disputed by another person or whenever the legitimate user’s interest is violated by another person using the same name, the legitimate user can demand the cessation of the interference. If any further interference is to be expected, he may also apply for injunctive relief.” Id. Article 22 of the Act on Copyright in Works of Visual Arts (Kunsturheberrechtsgesetz, or KUG) protects the right to one’s image:

Portraits may only be disseminated or exhibited with the consent of the person portrayed. Consent is deemed to have been given if the person portrayed has received a remuneration for having the portrait taken. For ten years after the death of the person portrayed, consent given by the relatives of that person must be obtained. Relatives within the meaning of this section are the surviving spouse and the portrayed person’s children and, if neither a spouse nor children exist, the portrayed person’s parents.

Article 23 provides exceptions to Article 22:

1. Without the consent required by §22 the following may be disseminated and exhibited:
   1. Pictures from the sphere of contemporary history;
   2. Pictures on which persons are only portrayed accidentally as parts of a landscape or any other location;
   3. Pictures of gatherings, processions or similar activities in which the persons portrayed participated;
   4. Pictures not having been made to order, if the dissemination or exhibition serves a higher interest of art.

2. This authorization does not justify any dissemination or exhibition by which a justified interest of the person portrayed or, if the person is deceased, of his relatives is violated.

Id. at 99, 105 (citing Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie [KUG] [Act on Copyright in Works of Visual Arts], Jan. 9, 1907, arts. 22–23 (Gr.).

67. See id. at 113.
exists a lack of legal certainty that potentially inhibits people's ability to rely on the right.\textsuperscript{68} Despite the nebulous character of the general personality right, German's view the right as indispensable.\textsuperscript{69} In light of this broad perception of the personality right, the Right to Be Forgotten can be viewed as a modern application of this principle.

\textbf{C. Analysis of United States Notions of Privacy}

In contrast to the French and German traditions of protecting the individual's right to privacy, the United States takes a very different approach. Where countries in Europe protect privacy as a fundamental right, the United States protects freedom of expression over privacy.\textsuperscript{70} For example, in the Bill of Rights, the First Amendment explicitly protects the freedom of expression; however no explicit protection exists for privacy.\textsuperscript{71} In addition, the United States “fiercely” defends the right to free press, but grants no specific right to privacy.\textsuperscript{72}

Discussion of U.S. privacy law can be traced back to the seminal article written by Warren and Brandeis, published in the Harvard Law Review in 1890.\textsuperscript{73} Warren and Brandeis argue that the right to privacy, derived from common law, exists as a “right to be let alone.”\textsuperscript{74} They address the need for privacy protection from unwanted press or from public dissemination of private information created by new inventions and wider publication of newspapers.\textsuperscript{75} Eighty years later, William Prosser published an article outlining four distinct privacy rights that were later incorporated into the Restatement of Torts.\textsuperscript{76} These four privacy rights include “(1) Intrusion upon a person’s seclu-

\begin{flushleft}
\textsuperscript{68} See id.
\textsuperscript{69} See id.
\textsuperscript{71} See Werro, supra note 37, at 291.
\textsuperscript{72} Id.
\textsuperscript{74} Samuel D. Warren & Louis D. Brandeis, \textit{The Right to Privacy}, 4 HARV. L. REV. 193, 193 (1890).
\textsuperscript{75} DeCew, supra note 73, at § 1.1.
\textsuperscript{76} William Prosser, \textit{Privacy}, 48 CAL. L. REV. 383, 389 (1960); Werro, supra note 37, at 292.
\end{flushleft}
sion or solitude, or into his private affairs; (2) Public disclosure of embarrassing private facts about an individual; (3) Publicity placing one in a false light in the public eye; [and] (4) Appropriation of one's likeness for the advantage of another.”

However, in application these concepts fail to provide broad privacy protection due to expanding protections of the First Amendment freedom of the press.

The First Amendment in the Bill of Rights expressly protects freedom of speech whereas the U.S. Constitution is mostly silent with respect to privacy protections for its citizens. In contrast to the previous example of Wikipedia removing the German convicts’ names from its website, under U.S. jurisprudence, court records are matters of public record and available for the press to publish. For example, in *Cox Broadcasting Corp. v. Cohn* the Court held that no privacy interest was violated because information disclosed by the broadcasting company “was taken from publicly available court documents.” Additionally, the Court held in *Smith v. Daily Mail Publishing Co.* that so long as information is lawfully acquired and of public interest it is publishable. These decisions show the import

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77. Prosser, supra note 76, at 389.
78. Werro, supra note 37, at 292.
80. In *Cox Broadcasting Corp. v. Cohn*, the father of a deceased rape victim sued a newspaper for violation of his right to privacy after publicly broadcasting the name of the victim. The Court held that a court cannot impose sanctions for the accurate disclosure of a rape victim’s identity where the information was obtained through public court documents. The Court went on to state that privacy interests fade when the relevant information is publicly accessible. *Id.*
81. In *Smith v. Daily Mail Publishing*, two newspapers published articles containing the name of a juvenile offender arrested after a shooting at a middle school. The newspaper acquired the name of the offender by asking witnesses and police at the crime scene for the name of the young man arrested for the shooting. Contrary to state law, the newspaper made the editorial decision to publish the name of the offender. Once published, the name was then broadcast over the radio and re-published in other newspapers. The West Virginia statute in question required newspapers to obtain a court order prior to publishing the name of any child in connection with a criminal proceeding. The Court held that the state statute violated the First and Fourteenth Amendments. The need to obtain a court order prior to publication constituted a prior restraint, and the newspaper could not be punished for
of the First Amendment in relation to personal privacy in the United States.\textsuperscript{82}

The differences in the approaches to privacy and freedom of speech between the United States and European countries, such as France and Germany, are significant. One way to look at the differences is to highlight the degree of protection given to freedom of the press and expression under the First Amendment, as compared to the European inclusion of the right to personality in both national and EU law.\textsuperscript{83} The differences can also be explained by looking to socio-political differences between Europe and the United States; U.S. law developed critical of centralized power, while European law originates from social traditions of aristocracy, honor, and autonomy.\textsuperscript{84} The difference in valuing privacy over freedom of expres-

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\textsuperscript{82} For a more modern reflection of a U.S. court's application of privacy law in the context of social media, see \textit{Snyder v. Millersville University}. In \textit{Snyder}, a student at a public university was studying education with plans to become a teacher upon graduation. However, the university denied her a degree in education, granting her a bachelor of arts in English instead. The reason for denying plaintiff's degree in education was primarily due to photographs the plaintiff posted to her Myspace profile. In response, the plaintiff filed suit against the university for violation of her First Amendment right to freedom of speech. The court held that due to her position as a student teacher, her speech was not a matter of public concern, and therefore did not warrant First Amendment protection. This case shows where U.S. constitutional law and privacy law intersect. Here, Snyder was unable to pursue a career or obtain a degree, despite fulfilling all academic requirements, due to her profile on a social media website. Snyder v. Millersville University, No. 07-1660, 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008).

\textsuperscript{83} See Werro, supra note 37, at 298. In addition to the national laws addressed in Part LA of this Note, the European Convention on Human Rights recognizes a right to private personal life stating, "[e]veryone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests in national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

\textsuperscript{84} See Werro, supra note 37, at 298.
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sion is why the Right to Be Forgotten fits within the framework of the EU, but conflicts with the values underlying U.S. law. These policy implications inform the analysis of the Regulation, and show where the Regulation is unclear and needs to be modified before it becomes effective.

II. STATUTORY INTERPRETATION AND PROPOSED CHANGES

Article 17, the “Right to Be Forgotten and to Erasure,” builds on Article 12(b) of the 1995 Directive and is one of the most controversial additions to privacy law in the EU.85 The crux of the Right to Be Forgotten is to give an individual more control over her personal data and content, especially when the data is no longer necessary for the purpose it was initially used for.86

In order to interpret the Right to Be Forgotten, the scope of the Regulation must be defined. Article 4 provides definitions for certain terms applicable to the Right to Be Forgotten such as data subject and personal data:

(1) ‘data subject’ means an identified natural person or a natural person who can be identified, directly or indirectly, by means reasonably likely to be used by the controller or by any other natural or legal person, in particular by reference to an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, gen- netic, mental, economic, cultural or social identity of that person; (2) ‘personal data’ means any information relating to a data subject.87

These definitions are quite broad, making the level of certainty required to identify the data subject unclear.88 Furthermore, they fail to address how to treat a data subject who is part of a group of data subjects, like a photograph of a school class or a family.89 For example, if two people are the ‘data subjects’ of one photograph and only one of them issues a takedown re-

85. Bender, supra note 17.
86. Bender, supra note 17.
87. Commission Proposal, supra note 2, art. 4(1), (2).
89. Id. at 7.
request, the Regulation is unclear as to whose rights must be honored. As the European Network and Information Security Information Agency ("ENISA") recommends, the Commission needs to clarify its definition of who has the right to issue takedown requests, and what content qualifies as the data subjects’ personal data, warranting removal.

Following a takedown request, Article 17 holds the controller responsible for taking reasonable steps to erase the content at issue. Where information is public, the controller must also inform third party processors of the subject’s takedown request, which includes links to or copies of the data or content. The Regulation requires erasure “without delay,” unless the content falls within an exception. However, what remains unclear is who determines whether content satisfies a noted exception. Controversy lies in this lack of clarity over analyzing content to determine whether it falls within the proscribed exceptions. A recently published report by ENISA shares the same concern stating that “implementing acts are still needed to clarify how this important right will be implemented.”

Additionally, the requirement that controllers notify third parties that a data subject issued a takedown request may propose an impossible task. Both the Center for Democracy & Technology ("CDT") and ENISA argue that tracing personal data to its data subject and removing it wherever it exists on

90. Id.
91. Id. at 14. The Center for Democracy & Technology also recommends clarifying these definitions in their report issued in response to the proposed regulation. CDT Analysis of the Proposed Data Protection Regulation, supra note 17, at 2.
92. “Controller” is defined in the Regulation under Article 4(5) as “the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purpose, conditions and means of the processing of personal data; where the purposes, conditions and means of processing are determined by Union law or Member State law, the controller or the specific criteria for his nomination may be designated by Union law or by Member State law.” Commission Proposal, supra note 2, art. 4(5). “Processor” is defined under Article 4(6) as “a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller” Id. art. 4(6).
93. Bender supra note 17; Commission Proposal, supra note 2, art. 17(2).
94. Commission Proposal, supra note 2, art. 17(2).
95. Backes, Druschel & Tirtea, supra note 88, at 3.
the Internet are technologically impossible tasks.96 Given the open-system nature of an expansive portion of the World Wide Web, data can be stored and copied from almost any location.97 The Regulation requires controllers to notify third parties, but there is no current technology to trace the source of content hosted by third parties. ENISA argues that in “an open system it is not generally possible for a person to locate all personal data items . . . stored about them[,]”98 and the only technologically feasible means enforcing the Right to Be Forgotten is in a “closed” system.99 In theory, the closed system model could be implemented in public networks existing solely within the jurisdiction of EU member states with users and providers “strongly authenticated using a form of electronic identity that can be linked to natural persons.”100 To address these obstacles, as an alternative to the broad Right to Be Forgotten, the CDT proposes the “Right to Erase.”101 The Right to Erase grants similar protections as the Regulation, but limits the request for removal of data to a “particular service provider.”102 This iteration of the right would not hold the controller responsible for resolving any privacy violations; instead it would force an individual with a privacy concern to address the matter directly with the entity responsible for the posted material.103 Furthermore, burdening controllers with weighing one subject’s “privacy rights over another’s free expression rights” is too high a burden for controllers to bear.104

96. Id. at 8; CDT Analysis of the Proposed Data Protection Regulation, supra note 17.
97. Backes, Druschel & Tirtea, supra note 88, at 8.
98. Id.
99. ENISA defines a closed system as “one in which all components that process, transmit or store personal information, as well as all users and operators with access to personal information can be trusted or held accountable for respecting applicable laws and regulations concerning the use of the private information.” Id.
100. Id.
102. Id.
103. Id.
104. Id.
The burden on controllers is exacerbated by the exceptions contained in Article 17. The first exception under Article 17(3)(a) provides for the exercise of “the right of freedom of expression in accordance with Article 80.” \(^{105}\) Article 80 requires exceptions for data “carried out solely for journalistic purposes, or the purpose of artistic or literary expression.” \(^{106}\) This exception is included to reconcile the dichotomy between protecting personal data and freedom of expression. \(^{107}\) Under Article 80(2), each member state is required to notify the Commission of their national provisions for freedom of expression within two years from the date the Regulation takes effect. \(^{108}\) This notification requirement will help facilitate compliance with the various provisions for freedom of expression throughout Europe by implementing the Regulation in compliance with member state law. However, this idea also seems to go against the general goal of harmonization because it requires the recognition of individual member states’ provisions, which could have slight differences. \(^{109}\) The Regulation requires compliance with member states’ provisions on freedom of expression, and if member states have different provisions regarding freedom of expression, complying with and honoring them could become extremely complicated. \(^{110}\) In addition to guidelines, the Commission could create a review board to step in and provide advice to controllers in determining whether content falls within an exception.

The second exception is for “reasons of public interest in the area of public health in accordance with Article 81.” \(^{111}\) Article 81 addresses the need to retain information for the purposes of medical treatment, diagnosis, public interest in the area of public health, and historical statistical data used for research purposes. \(^{112}\) Similar to the public health exception, Article 81 contains the third exception for historical, statistical, and sci-

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106. *Id.* art. 80(1).
107. *Id.*
108. *Id.* arts. 80(2), 91(2).
110. This stems from the purpose of the Regulation to harmonize laws on personal privacy protection. Bender, *supra* note 17.
111. *Commission Proposal, supra* note 2, art. 17(3)(b).
112. *Id.* art. 81.
Factual data and data of historical importance are necessary to retain because of the important social value of the information. The fourth exception is for "compliance with a legal obligation to retain the personal data by Union or Member State law to which the controller is subject . . ."114 The final exception is for instances where the controller does not need to erase the data, but must restrict processing.115 This occurs when the data subject contests its accuracy and the controller needs time to verify the claim, because the controller must retain the data for purposes of proof, because “the processing is unlawful and the data subject opposes their erasure and requests the restriction of their use instead,” or because the data subject requests personal data be transmitted to another system.116

The Commission retains the right to establish criteria for implementing Article 17, which is an important element of the Regulation.117 Criteria for implementation of the Regulation are necessary, but need to be established before, or in conjunction with, enactment of the Regulation because without further specification or implementation measures, freedom of expression in the EU is threatened.118 The Regulation leaves vast amounts of power in the hands of the controller and it is this power that leaves freedom of expression at risk. Controllers charged with responding to takedown requests need authoritative guidelines to ensure adequate execution of the Regulation.

Implementation of the Right to Be Forgotten will require controllers to establish ways to respond to each takedown request within a timely manner.119 Not only will this process take time, it will require hiring new employees and addressing new issues. Due to the nature of the penalties at stake for failure to comply with the Regulation, controllers will be incentivized to take content down even when it may in fact be permissible. This is because controllers will not want to spend the time, effort, and resources to analyze each request to determine

113. Id. art. 83.
114. Id. art. 17(3)(d).
115. Id. art. 17(4).
116. Id.
117. Id. art. 17(9).
118. Backes, Druschel & Tirtea, supra note 88, at 7.
119. Commission Proposal, supra note 2, art. 17.
whether the content holds literary, artistic, or journalistic value if the penalty for a wrong decision, or not addressing the request, could result in a US$379 million fine.\footnote{120} Furthermore, an additional complication presents itself as controllers are forced to define the scope of the exceptions. For example, the determination of what constitutes journalistic content. While an article posted by a reputable news source is obviously journalistic, citizen journalists reporting and blogging on sites like Tumblr and Wordpress represent more nuanced forms of journalism.\footnote{121} More definitive definitions of the exceptions are necessary to clarify the inevitable confusion involved with analyzing a data subject’s request for removal.

Resolution of the aforementioned issues with the Regulation is especially important because one likely result of the implementation of the Regulation will be vast numbers of privacy lawsuits. After the Regulation is enacted, individuals will be able to sue companies under EU law in national courts. When national courts in member states need clarity of EU law, they issue a preliminary reference to the European Court of Justice to provide its interpretation of the Regulation.\footnote{122} Waiting for a preliminary reference is an inefficient means of obtaining clarification because lawsuits take time, and while the cases are pending, there will be uncertainty as to how controllers must treat controversial content.


\footnote{121} Matt Warman, EU Fights ‘Fierce Lobbying’ to Devise Data Privacy Law, TELEGRAPH UK (Feb. 9, 2012), http://www.telegraph.co.uk/technology/internet/9069933/EU-fights-fierce-lobbying-to-devise-data-privacy-law.html. A citizen journalist is a person without professional journalism training who writes in a public forum on a blog or website. Citizen journalists use the Internet, social media, and other tools of modern technology to research and write stories, fact check authentic journalism, and write social commentary or editorial perspectives on society. While citizen journalism is becoming more popular, it is controversial among professional journalists who feel citizen journalists do not have the proper ethical or professional training to produce content that may be widely consumed. Mark Glaser, Your Guide to Citizen Journalism, PBS (Sept. 27, 2006). http://www.pbs.org/mediashift/2006/09/your-guide-to-citizen-journalism270/.

\footnote{122} BERMANN ET AL., supra note 19, at 321.
A solution to the threatening overreach is to reduce the penalty for noncompliance. A lower punishment would incentivize controllers to analyze takedown requests more thoroughly and reduce the threat to freedom of expression. Furthermore, the Commission will need to issue guidelines for controllers. A company facing the daunting task of determining what content necessitates compliance with a takedown request needs instruction and guidelines from the EU itself.123

The Right to Be Forgotten fits within the framework of European privacy laws and grants important rights to individual citizens of the EU. However, before it is enacted, certain amendments must be made. First, the Commission must clarify the implementation measures and further define what data can be requested for removal and who may make such a request. Second, the scope of the Regulation should be reduced to make the Right to Be Forgotten technologically feasible.124 Lastly, the penalty for violations must be reduced so that it does not lead to an overreach, resulting in a dramatic reduction in free expression on the Internet.

The penalties imposed for violating the Right to Be Forgotten are too high and constitute an overreach that will result in a chilling effect on freedom of expression. If controllers comply with takedown requests without true and intensive analysis as to whether an exception applies, the resulting effect will be the unnecessary removal of permissible material. Article 79 of the Regulation imposes administrative sanctions for negligent, intentional, and unintentional noncompliance with the articles of the Regulation.125 Article 79(5)(c) states,

The supervisory authority shall impose a fine up to 500 000 EUR, or in case of an enterprise up to 1% of its annual worldwide turnover, to anyone who, intentionally or negligently: . . .

(c) does not comply with the right to be forgotten or to erase, or fails to put mechanisms in place to ensure that the time limits are observed or does not take all necessary steps to inform third parties that a data subjects requests to erase

123. Backes, Druschel & Tirtea, supra note 88, at 7.
124. CDT Analysis of the Proposed Data Protection Regulation, supra note 17.
125. Commission Proposal, supra note 2, art. 79.
any links to, or copy or replication of the personal data pursuant Article 17.\(^\text{126}\)

With potential penalties of up to 1\% of a company’s global annual revenue, “enterprises” such as Google will be incentivized to comply with all takedown requests in fear of the supervisory authority issuing crippling penalties.\(^\text{127}\) The Regulation requires these companies to determine what content falls within the exceptions for “literary, artistic or journalistic” content, forcing these enterprises into the role of global censors.\(^\text{128}\) This new requirement puts enterprises in a new role not previously required of them and tasks them with the substantial obligation of analyzing personal content.

III. ANALOGY TO COPYRIGHT LAW

A helpful analogy to inform the argument that the Regulation will result in an overreach can be found in copyright law. The United States Constitution grants the Federal Govern-

\(^{126}\) Id.

\(^{127}\) 2012 Financial Table, supra note 120. The term “enterprise” is defined under Article 4 as “any entity engaged in an economic activity, irrespective of its legal form, thus including, in particular, natural and legal persons, partnerships or associations regularly engaged in an economic activity.” Commission Proposal, supra note 2, art. 4. The term “Supervisory Authority” is defined under Article 46 as one or more public authorities appointed by each member state to monitor the implementation and application of the Regulation, in addition to protecting fundamental rights and freedoms and “facilitating the free flow of personal data throughout the Union.” Id. at art. 46.

\(^{128}\) In 2010, Google began releasing a bi-annual Transparency Report indicating what countries and “officials have asked Google to delete content and why.” In 2011, Google reported that it complied with 65\% of court orders and 47\% of informal requests to delete content it hosts. Google analysts have stated they are alarmed by the number of requests they receive, and that the company expects requests to increase. In some situations, Google does not comply, asserting “they cannot lawfully remove any content for which they are merely the house and not the producer.” Google: Government Requests to Censor Content “Alarming,” Reuters (June 18, 2012), http://www.reuters.com/article/2012/06/18/us-google-censorship-idUSBRE85H0S220120618. The Center for Democracy & Technology issued a report making recommendations regarding the proposed Regulation and also argues that controllers are not in the position to face the burdensome task of weighing the “conflicting privacy and free expression interests of the data subject.” CDT Analysis of the Proposed Data Protection Regulation, supra note 17, at 5.
ment the ability to enact copyright laws “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” 129 Article 1, Section 8 of the United States Constitution, along with the Copyright Act, grants copyright owners exclusive rights over their creative works. 130 However, this exclusive right is limited. 131 The purpose of granting these exclusive rights is to motivate creativity and encourage artists and writers to continue in their pursuit of the arts. 132 Furthermore, the limitation on the exclusivity of the rights to a pre-determined number of years allows future artists and writers to use older works for their own creative projects once the older content enters the public domain.

However, according to Jason Mazzone, people take advantage of copyright laws by asserting exclusive rights over material that has already entered the public domain, thereby limiting access to the public domain. 133 Mazzone uses the term copyfraud “to refer to the act of falsely claiming a copyright in a public domain work.” 134 Instances of copyfraud run rampant. 135 People claim copyright over material that no longer has a basis for a copyright’s exclusivity, which, according to Mazzone, “stifles creativity and imposes financial costs on consumers.” 136

Other factors that contribute to the overreaching of copyright laws include the ineffective enforcement mechanisms for claiming false copyright rights. 137 There are vast economic incentives for museums, institutions, publishers, and filmmakers to assert

131. Id.
132. Id. at 436 (citing Twentieth Century Music Corp v. Aiken, 422 U.S. 151, 156 (1975)).
133. JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW 2–4 (2011).
134. Id. at 3.
135. Id. at 9. Even though copyrights are only granted for discrete duration and limited by original authorship, “modern publishers routinely affix copyright notices to reprints of historical works in which copyright has expired.” For example, reprints of Shakespeare plays publish copyright notices despite the fact that Shakespeare plays are well within the public domain. Id.
136. Id. at 18.
137. Id.
false copyright on material. 138 This is because people rarely challenge copyrighted material, and sanctions are rarely imposed against false copyright assertions. 139 Under the Copyright Act, there are no civil remedies against improper assertions of copyright. 140 However, two provisions criminalize false assertions: Section 506(c) for fraudulent copyright notices and Section 506(e) for false representation. 141 Mazzone notes that despite the criminal provisions within the Copyright Act, there are very few prosecutions for false assertions, creating a minimal threat to those who falsely claim copyright to work in the public domain. 142 Without the deterrent of criminal prosecution, there is no threat to the expanding use of copyfraud. As Mazzone states, “[t]he point of copyright is to promote creativity,” however the imbalanced statutory protections granted to copyright owners’ exclusive rights are far stronger than the little protection for works that exist in the public domain. 143

Because of copyfraud, expression and artistic creation are being squelched. 144 According to Mazzone, claims of “fair use” are diminishing because the doctrine is applied in inconsistent ways, leading to uncertainty amongst artists about what works

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138. Securing the rights for artwork to be included in a book can cost upwards of US$30,000, resulting in these books not getting published. Id. at 22.
139. Id. at 18.
141. Copyright Act § 506(c) states, “[a]ny person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distribute or imports for public distribution any article bearing such notice or words that such a person knows to be false, shall be fined not more than $2,500.” Section 506(e) defines “false representation” as “[a]ny person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than $2,500.” Id.
142. There were no prosecutions for false assertions of copyright in 2008. Between 1994 and 2008, only eight prosecutions were filed under § 506(e) and only four prosecutions under § 506(c). Mazzone, supra note 133, at 8 (citing Universal Studios Stumbles on Internet Archive’s Public Domain Films, CHILLING EFFECTS (Feb. 27, 2003), http://www.chillingeffects.org/notice.NoticeID=595).
143. Id. at 6.
144. Id. at 3.
require permission for use.\textsuperscript{145} This uncertainty leads to an overreach of copyright laws.

Mazzone’s theory of the overreach that results from \textit{copyfraud} can be analogized to the Right to Be Forgotten. The current draft of the proposed Regulation will result in an overreach; specifically, it will lead to a substantial amount of content being removed due to the failure of controllers to apply the exceptions provided. Like Mazzone’s \textit{copyfraud} argument, ineffective enforcement allows owners of expired copyrights to prevent use of work that should be part of the public domain, thereby restricting the cultural commons. Here, the ineffective enforcement is the penalty for noncompliance. If controllers fear the government imposing a US$3.7 billion fine for not complying with Article 17, there is no incentive for them to legitimately analyze each takedown request to determine whether it falls within an exception.\textsuperscript{146} This will result in a chilling effect on free speech and free expression, and reduce the marketplace of ideas.\textsuperscript{147}

In order to respond to takedown requests, companies will need to set up processes and procedures for evaluating these requests. Currently, companies that host content do not make decisions about the value of the content.\textsuperscript{148} If the Regulation is enacted, these companies will become censors of the Internet as they are forced to comply with the Regulation. Additionally, the enactment of the Regulation will presumably result in a lot of litigation.\textsuperscript{149} The necessity and value of these exceptions to protect valuable freedom of expression is evident, however, the risk of suppressing expression is high when people can demand content re-posted by a third party be permanently removed.

\begin{thebibliography}{99}
\bibitem{145} The Fair Use Doctrine does not require permission from the copyright owner for use, so long as the use falls within the ambit of the doctrine. \textsc{Lemley, Merges & Menell, supra} note 130, at 610.
\bibitem{146} \textit{2012 Financial Table}, \textit{supra} note 120.
\bibitem{147} The marketplace of ideas is a theory used in discussing freedom of expression. The concept is an analogy to the free market and argues that the more ideas that exist in the “marketplace” the more likely people are to come to the truth. Justice Holmes first used the phrase in his dissent in \textit{Abrams v. United States} in 1919. Stanley Ingber, \textit{The Marketplace of Ideas: A Legitimizing Myth}, 1984 \textit{Duke L.J.}, 1, 3 (1984).
\bibitem{148} Reuters, \textit{supra} note 128.
\bibitem{149} See discussion \textit{supra} Part II.
\end{thebibliography}
from the Internet. One can easily imagine a data subject issuing a takedown request for content with substantial journalistic value, where a decision to honor or deny a takedown request may hinge on whether or not the company is threatened by the penalty. Similar to Mazzone’s assertion that Internet service providers blindly take down content when confronted with accusations of infringing content on their websites, the Regulation will result in blind takedowns by controllers who will not risk the crippling fines for violating the Right to Be Forgotten.

Blind takedowns are just one example of how copyfraud and The Right to Be Forgotten have the potentially similar effect of diminishing expression. The suppression of expression under copyfraud is caused by an overreach by owners of expired copyrights, whereas the suppression of expression caused by the Right to Be Forgotten is created by the controllers’ overreach through lack of proper evaluation.

IV. ALTERNATIVE SOLUTIONS TO ADOPTING THE “RIGHT TO BE FORGOTTEN”

While opposition to the EU’s overhaul of its data privacy laws is great, many still recognize that the changing world of the Internet and social media necessitate greater protection and control for people and their data. Opposition to the proposed Regulation comes from resistance to the use of legislation as a means to provide the protections contained in the Right to Be Forgotten. Professor Jeffrey Rosen, who opposes the proposed Right to Be Forgotten, acknowledges that people are “experiencing the difficulty of living in a world where the Web never forgets, where every blog and tweet and Facebook update and MySpace picture about us is recorded forever in the digital cloud.” However, Rosen theorizes that laws are not the solu-

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150. Backes, Druschel & Tirtea, supra note 88.
151. MAZZONE, supra note 133, at 72.
152. Id. at 2–4.
tion. Instead, technology, evolving Internet norms, and insurance schemes are seen as potential alternatives to legislative means. While each of these three solutions proposes interesting alternatives, they do not provide the same comprehensive protection or grant individuals the same level of control and autonomy over their presence on the Internet as the Right to be Forgotten.

Instead of allowing individuals to demand content or data be taken down from the Internet, one alternative is to give data an expiration date. Viktor Mayer-Schonberger, in his book *Delete*, says that giving data an expiration date would allow users to determine the length of time they want something to remain on the Internet. Rosen supports this idea, and even notes that similar services already exist. TigerText is an example of a service that provides expiration dates for data. TigerText is a cross-platform application that sends encrypted text messages that have a limited lifespan and will be permanently deleted once the message is no longer needed by the user.

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155. Id. at 353.
158. Google currently has an app called Mail Goggles that adds an additional step to sending emails late at night. If a user sends an email late on a Saturday night, the app will promptly ask the user “are you sure you really want to do this?” This feature also may ask the user to solve math problems before sending an email. The app adds an additional layer of protection, forcing people to think again before sending emails they could potentially regret. Rosen, *Information Privacy: Free Speech, Privacy, and the Web That Never Forgets*, supra note 152, at 353 (citing Jon Perlow, *New in Labs: Stop Sending Mail You Later Regret*, OFFICIAL GMAIL BLOG (Oct. 6, 2008, 6:25PM), http://gmailblog.blogspot.com/2008/10/new-in-labs-stop-sending-mail-you-later.html).
160. In Germany, the Joint Commission on Accreditation of Healthcare Organizations banned the use of text messaging by hospital personnel. Tiger
use of expiration dates for data became widespread, it may be a successful alternative to the proposed Right to Be Forgotten. The benefits are similar in terms of giving users more control over content they post to the Internet, however, because the user would determine the expiration date, this solution fails to provide a remedy for content posted by third parties.

In addition to incentivizing technological alternatives, Rosen proposes “norms-based solutions” to the Right to Be Forgotten. According to Rosen, creating new norms may be the most practical solution to “digital forgetting.” Journalists and media outlets should exercise judgment when gathering material from nonpublic social networking sites and society may need to grow more attune to forgiveness and atonement. Consistent respect from journalists and individuals could help “construct zones of privacy.” Furthermore, social norms of usage among users that embody this respect could help strengthen users’ privacy. For example, an overwhelming number of people in Japan use pseudonyms on social networking sites. A survey conducted in Japan noted that 89% of users of social media were reluctant to use their real name publicly on the Internet. Facebook even encountered slow growth in Japan because of Japanese preference of anonymity, as well as the prevalence of Japan’s own social networking sites. While Facebook states that its purpose is to promote “real-life

Text advertises its app to be used by medical professionals as an alternative to text messages and emails. German app developers have also created a plug-in for Internet browsers that would make images uploaded to the Internet only available for a certain amount of time. The service is subscription based. TIGERTEXT, http://www.tigertext.com/benefits (last visited Nov. 8, 2012). However, one problem is that the service does not prevent the images from being downloaded and reposted elsewhere; leaving the image permanently posted even after the data expires. Savov, supra note 159.

162. Id. at 355.
163. Id. at 354.
164. Id.
166. Id.
167. Id.
social relationships online, many Japanese use Web anonymity to express themselves, free from the pressures to fit into a conformist workplace.\textsuperscript{168} Despite the existing norms in Japan, Facebook has been insistent that new users in Japan “adhere to its real-name policy.”\textsuperscript{169} Because norms of social media usage are so deeply entrenched, and because Facebook continues to modify its privacy policies in favor of more public disclosure, protecting privacy through changing norms would be an uphill battle.

Finally, a third alternative is a scheme for online reputation insurance. Evgeny Morozov suggests that instituting a mandatory reputation insurance scheme, administered by the government, is an alternative solution to protecting one’s data and reputation on the Internet.\textsuperscript{170} Morozov postulates that the Right to Be Forgotten “is too restrictive and unrealistic,”\textsuperscript{171} and instead suggests insurance would protect people from what he calls an “online disaster—a ferocious man-made information tsunami that can destroy one’s reputation the way a real tsunami can destroy one’s home.”\textsuperscript{172} There are several advantages to this solution. First, insurance does not alter how the Internet functions.\textsuperscript{173} Second, victims of reputational harm would be provided with compensation.\textsuperscript{174} And third, mandatory insurance would level the playing field by providing everyone with protection, instead of simply protecting individuals and corporations willing to pay large premiums.\textsuperscript{175} Furthermore, Moro-

\begin{thebibliography}{9}
\bibitem{168} Id.
\bibitem{169} Id.
\bibitem{170} Morozov, supra note 156.
\bibitem{171} Id.
\bibitem{172} Id.
\bibitem{173} Id.
\bibitem{174} Id.
\bibitem{175} Id. Reputation.com provides four services—myprivacy, myreputation, reputationdefender, and myreputation discovery edition—for individuals and corporations to monitor and improve search results. The company uses proprietary technology to improve a company or individual’s online presence and reputation. The services include monitoring of search results, requesting removal of personal information, creation of new profiles to improve search results, and blocking false, misleading, or irrelevant content. Additionally, they also employ reputation advisors to help people further control and develop their online identity. REPUTATION.COM, http://www.reputation.com/company (last visited Jan. 20, 2013).
\end{thebibliography}
zov argues that the insurance needs to be mandatory because one does not need to be an active user of social media, or even use the Internet, to suffer harm. Unfortunately, a mandatory insurance scheme seems like an unlikely solution. It would only provide compensation for those who suffer large-scale reputational harm, and provides no solution for those individuals who simply regret posting a picture on social media, such as to their Facebook profile. One benefit of the Right to Be Forgotten is the control it gives individuals over their identity on the Internet. An insurance scheme would only compensate people after the harm, but not provide the permanent results.

Of the three alternatives, none provide as comprehensive protection as the Right to Be Forgotten. Establishing expiration dates on content is a creative idea to consider moving forward, but it does not solve the issue of deleting older content. Furthermore, this solution would only be sufficient if all service providers and social media platforms instituted similar technologies. The Right to Be Forgotten is more comprehensive in that it applies to all controllers and does not rely on each service provider installing an individual program. Next, the creation of new norms takes time. For example, Facebook began as a social networking page in 2004, and Google began as a search engine in 1998; people using these platforms have such deeply entrenched norms that it would take years to modify. Not only are people inundated with various forms of social media, people also use the Internet to “troll” and cause destruction to people’s reputations and lives. Trolling and cyber-bullying are major issues and unfortunate trends that are increasing in

176. Morozov, supra note 156.
177. Redding, supra note 15.
frequency. In an ideal world, notions of forgiveness and atonement would be honored and respected. People would be forgiven for youthful indiscretion or exercising poor judgment with regards to their social media presence. Unfortunately we do not live in that world. While certain cultures and religions promote the values of forgiveness and atonement for sins, society cannot be expected to forgive and forget when the Internet keeps eternal records. As evidenced by the proposal for the Regulation, it appears that the EU wants protection for its citizens now. Finally, reputation insurance would not solve the problems the Right to Be Forgotten attempt to solve. The Right to Be Forgotten is intended to grant control of one’s personal data back to the individual. While it is important for people to monitor their online presence, services like Reputation.com, which help users monitor and control their online presence, do not give people the complete protection that the Right to Be Forgotten provides. Protection against reputational harm is important for job hunting, but another benefit of the proposed Regulation is one’s ability to take down content that is not only

180. Id. Recently, a Canadian teenager named Amanda Todd committed suicide after suffering years of bullying both in school and on the Internet. When she was in seventh grade, she and her friends would use the Internet to meet people. On one occasion she flashed a man, who one year later contacted her through Facebook and threatened to expose the picture—which he eventually did. Todd moved towns and schools, but the man continued to bully her by posting pictures. Then, peers at school bullied her; her story even followed her to her new school and town. This bullying resulted in depression, anxiety, cutting, and eventually suicide. Todd could not escape a photo taken as a screenshot during a webcast that she could not control. While cyber bullying is a major issue that must be dealt with on its own, the Right to Be Forgotten would allow victims of Internet trolls and cyber-bullying to have content taken down, allowing them to escape their bullies, which is very a significant benefit because the Internet does not exist in a specific geographic location. Once a personal attack is posted on a public website, it exists for anyone to see, and moving schools or even towns is an insufficient solution for escaping targeted bullying. Ryan Grenoble, Amanda Todd: Bullied Canadian Teen Commits Suicide after Prolonged Battle Online and in School, HUFFINGTON POST (last updated Oct. 12, 2012, 12:17 PM), http://www.huffingtonpost.com/2012/10/11/amanda-todd-suicide-bullying_n_1959909.html.


harmful, but simply undesirable. The Right to Be Forgotten would allow people to delete content they regret posting, not just content causing them harm. When weighing freedom of expression against privacy rights, the idea that the Regulation allows people to issue takedown requests for just about anything, on a whim, combined with the likelihood that service providers will just give in to requests to avoid penalties, shows how drastic the impact of the Regulation could be.

CONCLUSION

The Right to Be Forgotten establishes a universal right of privacy for all citizens of the EU, and provides a significant amount of autonomy over one’s online identity and reputation. While this concept receives a significant amount of backlash, the Right to Be Forgotten is derived from existing European privacy laws. Privacy is a fundamental right granted under the European Convention for Human Rights and has long been honored by various European countries. However, freedom of expression is also a fundamental right and the Right to Be Forgotten, as currently written, leaves freedom of expression at risk.

Before the European Council and Parliament can enact the new Regulation, certain changes must be made. Specifically, the Commission must definitively define the scope of the Right to Be Forgotten through more specific definitions of ‘data subject’, ‘personal data’, and elaborate on the implementation criterion. Additionally, in light of the technological barriers to the Right to Be Forgotten, the Commission should consider the CDT’s recommendation to restrict the right to the Right of Erasure. Furthermore, the penalty for noncompliance must be reduced to prevent overreach. Controllers need an incentive to legitimately evaluate claims under the Right to Be Forgotten, and imposing a 1% penalty will result in blind compliance and a chilling effect on speech. Despite the need for these

183. See supra Part I.
184. See id.
185. See id.
186. See id.
187. See supra Part II.
188. See id.
189. See id.
changes, the mere introduction of the Right to Be Forgotten shows that the EU is taking huge steps to put control of the Internet into the hands of individuals. The Right to Be Forgotten allows people to live life without their past interfering with their future.

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INTRODUCTION

The International Criminal Court has never been more important than it is today; especially considering the upcoming trial of President Kenyatta of Kenya, charges against individuals who worked with Muammar Gaddafi, and a warrant of arrest for Joseph Kony of the Lords Resistance Army. Governed by the Rome Statute, the International Criminal Court (“ICC” or “Court”) has become a true judicial force in the world and “is the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community.” Established in 2002, the Court did not hear its first case until 2008 in the trial of Thomas Lubanga Dyilo (“Lubanga”), a Congolese warlord accused of the war crimes of conscripting and enlisting children under the age of fifteen and using them to actively participate in hostilities. On March 14, 2012, a guilty verdict was returned for Lubanga and consequently, on July 10, 2012, Lubanga was the first person ever sentenced by the ICC. The Lubanga trial granted the ICC the chance to set a strong precedent in its sentencing jurisprudence. However, instead of sending a clear message to other

3. Id.
5. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Hearing, at 12.
grave offenders, the ICC sentenced Lubanga to only the minimum required by statute.\textsuperscript{6}

International criminal tribunals have often been plagued by inconsistency and leniency in sentencing.\textsuperscript{7} With the ICC’s first case and sentencing, a true legal lens has been provided to evaluate similar shortcomings of the Court’s statutory sentencing guidelines. This Note explores the ICC’s statutory sentencing guidelines in the wake of the \textit{Lubanga} trial and argues that in its attempt to build from the tribulations of prior international tribunals, the ICC has unfortunately failed to consider penal theories and to set forth the appropriate penalty framework for those convicted of the most serious international crimes. Specifically, when mitigating factors that decrease the sentence require less proof than aggravating factors\textsuperscript{8}, the resulting sentence is increasingly lenient, especially because there are no mandatory minimums to counteract this effect. Hence, the ICC is wrongly governed by a thirty-year maximum sentence as opposed to mandatory minimum sentences, as it inadequately balances mitigating and aggravating factors, and ignores guidance from the complementary laws of the nations involved.

Part I provides background pertaining to the Rome Statute, the jurisdiction of the ICC, and the crimes committed by Lubanga. Part II provides a comparative overview of other international tribunals, the United States Federal Sentencing Guidelines, and the theories of punishment as applied in sev-

\textsuperscript{6} See Rome Statute of the International Criminal Court, \textit{opened for signature} July 17, 1998, 2187 U.N.T.S 90 [hereinafter Rome Statute]. Article 78(3) states that the imprisonment sentence “shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment.” \textit{Id.} art. 78(3).


\textsuperscript{8} See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, 4 (July 10, 2012), \url{http://www.icc-cpi.int/iccdocs/doc/doc1440143.pdf}. As explored later in Part II, mitigating factors must be proved by a balancing of the probabilities, whereas aggravating factors must be proved beyond a reasonable doubt. \textit{Id.}
eral domestic sentencing regimes. Part III applies the punishment theories to the ICC to analyze how the thirty-year maximum sentence, joint sentence limitations, and inadequate balance of mitigating and aggravating factors ultimately frustrate any potential penal justifications for the ICC’s sentencing practices. Part IV considers the failure of the Rome Statute to include deference to domestic laws as an additional guiding mechanism. Finally, Part V recommends that the thirty-year maximum sentence should be abolished, mitigating and aggravating factors should require the same standard of proof, and deference should be given to the laws of the nation that was harmed by the crime.

I. BACKGROUND

A. Establishment and Purpose of the International Criminal Court

The ICC is seen as “the culmination of international efforts to replace impunity with accountability.” The establishment of an international criminal court had periodically been considered since the 1948 General Assembly meeting of the United Nations. Following World War II, the world witnessed the Nuremberg trials, the first attempt at international prosecution and criminal accountability for the crimes of the Holocaust. However, it was not until the early 1990s that the International Criminal Tribunal for Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) were


10. Establishment of an International Criminal Court, U.N. TREATY COLLECTION, http://legal.un.org/icc/general/overview.htm (last visited Oct. 29, 2013). Following the Holocaust, genocide was a dominant international concern. Id. This concern led many states to adopt the Convention on the Prevention and Punishment on the Crime of Genocide. Id. Additionally, the General Assembly issued a resolution stating that “[r]ecognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required.” Id.

created to deal with the mass genocides of these respective regions. The international attention that was rendered by these tribunals, and the realization that mass atrocities continued throughout the world, finally fueled the creation of the ICC.

In 1998, the General Assembly convened in Rome, Italy for over a month “to finalize and adopt a convention on the establishment of” the ICC. The statute establishing and governing the ICC, entitled the Rome Statute, went into effect on July 1, 2002 after ratification by the necessary sixty states. The ICC was seen as the “missing link in the international legal system.” Unlike the International Court of Justice at The Hague, which handles civil cases between states, the ICC would deal with individual criminal liability as an “enforcement mechanism” against human rights violations that often go unpunished.

B. Bringing Perpetrators of International Crimes before the ICC: The Rome Statute, Jurisdiction, and Sentencing Guidelines

The Rome Statute is divided into thirteen parts ranging from the establishment of the Court and its jurisdiction, to the investigation, trial, penalties, appeals, and enforcement of the Court. The thirteen parts, in total, contain the 128 articles

12. Id. at 610–13.
14. Id.
17. Id. Another key difference between the International Court of Justice (“ICJ”) and the International Criminal Court (“ICC” or “Court”) is the compulsory nature of the courts. See M. Cherif Bassiouni, The Time Has Come for an International Criminal Court, 1 IND. INT'L & COMP. L. REV. 1, 14 (1991). Since the ICJ only hears civil disputes between states, and never between individuals of different states, there are unique political sensitivities that arise. Id. This is why the ICJ provides member states “the choice of compulsory or voluntary submission to jurisdiction.” Id. However, since the ICC has jurisdiction over individuals, political sensitivities are of a “much lesser nature.” Id.
18. Rome Statute, supra note 6. The statute is specifically divided as follows: Establishment of the Court; Jurisdiction, Admissibility and Applicable Law; General Principles of Criminal Law; Composition and Administration of the Court; Investigation and Prosecution; The Trial; Penalties; Appeal and
that govern the ICC. 19 Article 3 establishes the seat of the Court at The Hague in the Netherlands, and later Article 62 sets forth the seat of the Court as the place of trial, unless otherwise decided. 20

The Rome Statute establishes the structure of the ICC through the judicial divisions, the Presidency, the Office of the Prosecutor, and the Registry.  21 There are currently eighteen judges who are divided amongst the three judicial divisions of Pre-trial, Trial, and Appeals. 22 Three judges are elected to make up the presidency and are responsible for the proper administration of the Court. 23 The Office of the Prosecutor acts as an independent and separate organ of the Court and is “responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.” 24 Finally, the Registry handles administrative and “non-judicial aspects” of the ICC. 25 Other “semi-autonomous offices . . . fall under the Registry for administrative purposes,” including the Office of Public Counsel for Victims, and the Office of Public Counsel for Defense.  26

1. Jurisdiction

The Rome Statute sets forth crimes within the jurisdiction of the Court, as well as how individual criminal acts may fall within the jurisdiction of the Court. 27 The most serious crimes of concern to the international community are defined in Arti-

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20. Id. art. 3, 62.
21. Id. art. 34.
22. Id. art. 39; Structure of the Court, INT’L CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx (last visited Dec. 18, 2012).
23. Rome Statute, supra note 6, art. 38; Structure of the Court, supra note 22.
24. Rome Statute, supra note 6, art. 15; Structure of the Court, supra note 22.
25. Rome Statute, supra note 6, art. 43; Structure of the Court, supra note 22.
26. Structure of the Court, supra note 22.
Article 5, which grants the Court jurisdiction over international disputes, including crimes of genocide, crimes against humanity, war crimes, and the crime of aggression. However, even for individuals who committed these crimes, there are still several preconditions that must be satisfied before the ICC has jurisdiction over a case.

The first hurdle that must be overcome for jurisdiction is ratification of the Rome Statute. Once a state ratifies the Rome Statute, it grants the ICC jurisdiction over two types of individuals: first, citizens of that state, and second, any noncitizen who commits an Article 5 crime within that state. In effect, the ICC may have jurisdiction over citizens of nonmember states and this remains a controversial issue. One such controversy includes the United States, which has not ratified the Rome Statute, but has enacted legislation in an attempt to avoid jurisdiction of the ICC over its citizens who commit Article 5 crimes in other states.

The second hurdle that must be overcome for the ICC to exercise jurisdiction is the precondition of “complementarity.” The principle of “complementarity” requires that states “utilize the Court only as a last resort, after first attempting to litigate ICC

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28. Rome Statute, supra note 6, art. 5. The specific crime that Thomas Lubanga Dyilo is charged with is found in Article 8 where war crimes are defined. As defined in Article 8(2)(b)(xxvi), “war crimes” means “[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: . . . [c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.” Id. art. 8(2)(b)(xxvi).

29. Rome Statute, supra note 6, art. 12.


31. See CARTER & WEINER, supra note 30, at 1145–47.

32. Id. at 1142–45. In 2002, the U.S. Congress passed the American Service-Members’ Protection Act, “which barred the United States from cooperating with the ICC.” Id. at 1142. “The law also . . . authorized the President to use ‘all means necessary and appropriate to bring about the release’ of Americans held by or for the ICC.” Id. Other states have taken issue with these objections, finding them misconstrued and unnecessary because other procedural safeguards, such as the prerequisites to jurisdiction, remain in place. Id. at 1143.

33. Rome Statute, supra note 6, pmbl. The preamble states, “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” Id.
crimes domestically in their local courts.”

It is only after the state is “unwilling or unable” to charge the individuals who violated Article 5 in their own domestic courts that the ICC may exercise jurisdiction over the case.

After the state is “unwilling or unable,” there are several ways that the ICC Prosecutor may become aware of and investigate a claim. First, a state party may refer a situation to the ICC Prosecutor. Second, the Security Council of the United Nations may also choose to refer a situation to the ICC Prosecutor. And third, the ICC Prosecutor may investigate on its own initiative based on any other information it has received.

Regardless of the means used to initiate an investigation, so long as the matter involves a potential defendant who is either a citizen of a state party, or committed the Article 5 crime in the territory of a state party, the ICC may accept the case. Hence, with 122 state parties to the ICC, a necessary system has been established for referring situations to the ICC Prose-

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34. Triponel & Pearson, supra note 9, at 67.
35. Id. A sham trial conducted by a state would not satisfy this requirement, and the state would be deemed unwilling or unable to prosecute the case. Carter & Weiner, supra note 30, at 1143.
36. Rome Statute, supra note 6, art. 14. Also note that “situation” is the general terminology used for any matter that may result in a potential case. See Press Release, Office of the Prosecutor, Int’l Criminal Court, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (Apr. 19, 2004), available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/press%20releases/Pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20Democratic%20Republic%20of%20the%20Congo.aspx. For example, in Lubanga’s case, the President of the DRC initially sent a letter to the Prosecutor of the ICC “referring to him the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute.” Id. Hence, this falls within a state party referring the “situation” to the Prosecutor to further investigate and determine if one or more persons should be charged with such crimes. Id. In comparison, for the more recent “situation” involving the Republic of Kenya, the Prosecutor submitted a request to Kenya to begin an investigation on its own initiative. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 4 (Mar. 31, 2010), http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf.
37. Rome Statute, supra note 6, art. 13.
38. Id. art. 15.
39. Id. art. 13–15.
ctor where the state was “unable or unwilling” to investigate.40

2. Sentencing Guidelines

Sentencing guidelines are contained in Part 7 of the Rome Statute, with applicable penalties and the determination of sentences addressed in Articles 77 and 78, respectively.41 According to Article 77, a person convicted of an Article 5 crime may face “[i]mprisonment for a specified number of years which may not exceed a maximum of 30 years” or “[a] term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances . . . .”42 This is not “an elaborate or specific set of sentencing guidelines [but] rather . . . a vague general description of potential punishments.”43

Article 78 continues with guidelines for determining the sentence, such as in the sentencing of a person convicted of more than one crime. As specified in Article 78(3),

40. Triponel & Pearson, supra note 7, at 67–72; see also About the Court, supra note 2.
41. Id. art. 77–78. This Note will not explore the penalty provisions of the Rome Statute that refer to fines and forfeiture in Article 77(2)(a), and the establishment of a trust fund by Article 79. Id. arts. 77, 79. For additional information on these provisions and the Victim’s Trust Fund, see Linda M. Keller, Seeking Justice at the International Criminal Court: Victims’ Reparations, 29 T. JEFFERSON L. REV. 189 (2007); see also Peter G. Fischer, The Victims’ Trust Fund of the International Criminal Court—Formation of a Functional Reparations Scheme, 17 EMORY INT’L L. REV. 187 (2003), for an analysis of the history of victim’s rights and policy considerations for the ICC Victims’ Trust Fund.
42. Rome Statute, supra note 6, art. 77. Additionally, this sentencing guideline is somewhat reiterated in Article 78(1), stating, “[i]n determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.” Id. art. 78(1). In the ICC Rules of Procedure and Evidence, Rule 145(3) additionally states that “life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances.” Int’l Criminal Court, Rules of Procedure and Evidence, at 55, Official Records No. ICC-ASP/1/3 (2002), available at http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf [hereinafter Rules of Procedure and Evidence].
43. Dubinsky, supra note 11, at 617.
[T]he Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77 . . . .44

Under Article 78(2), the Court must deduct from the sentence any previous time spent in detention in accordance with an order of the Court, and may also deduct any time spent in detention in connection with the crime.45

Article 78(1) requires that in its sentencing procedures, the ICC refer to the ICC Rules of Procedure and Evidence, which set forth a wide-range of circumstances that the Court must also consider.46 First, Article 78(1) requires that the “gravity of the crime and individual circumstances of the convicted person” be weighed into the sentencing decision.47 Additionally, Rule 145 proscribes a non-exhaustive list of mitigating and aggravating circumstances that must be balanced.48 Mitigating circumstances include, but are not limited to, “diminished mental capacity,” duress, or the “person’s conduct after the act.”49 Alternatively, aggravating circumstances may include, but are not limited to, prior criminal convictions, abuse of power, particularly defenseless victims, “particular cruelty,” and “any motive involving discrimination.”50 The standard of proof for such circumstances is not established in the Rome Statute or the

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44. Rome Statute, supra note 6, art. 78(3).
45. Id. art. 78(2).
46. Id. art. 78(1).
47. Rules of Procedure and Evidence, supra note 42. The Rules of Procedure and Evidence provide additional considerations beyond the Rome Statute. For example, according to Rule 145(1)(c),

In addition to the factors mentioned in article 78, paragraph 1, give consideration, inter alia, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

Id.
48. Id.
49. Id.
50. Id.
Rules of Procedure and Evidence, leaving such discretion to the ICC.\textsuperscript{51} The ICC has currently set the standard of proof for aggravating circumstances as proof beyond a reasonable doubt, whereas mitigating circumstances are determined by the balancing of probabilities,\textsuperscript{52} also known as preponderance of the evidence.\textsuperscript{53} Overall, the Rome Statute provides the foundation for the ICC and helps states understand what types of conflicts


\textsuperscript{52} It is crucially important to understand the difference in the standards of proof that the ICC has instituted for aggravating and mitigating factors. \textit{Id.} First, proof beyond a reasonable doubt is the highest standard of proof, and has been viewed by the U.S. Supreme Court as “designed to exclude as nearly as possible the likelihood of an erroneous judgment.” Etan Mark & Monica F. Rossbach, \textit{Que Rico? Discarding the Fallacy That Florida Rico and Federal Rico Are Identical}, 86 FLA. B.J. 10, 12 (Jan. 2012) (citing Santosky \textit{v. Kramer}, 455 U.S. 745, 755 (1982)). In contrast, balancing of the probabilities, also known as the preponderance of the evidence, has been recognized as indicating “society’s ‘minimal concern with the outcome.’” \textit{Id.} In other words, whereas proof beyond a reasonable doubt entails overwhelming evidence, balancing of the probabilities only requires “51%” likelihood, or that “more evidence supports the finding than contradicts it.” Stephen Wilkinson, \textit{Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions}, GENEVA ACAD., available at http://www.geneva-academy.ch/docs/Standards%20of%20proof%20report.pdf.

If the ICC wanted to avoid requiring too much proof for aggravating factors, they could have elected for a middle standard of proof such as “clear and convincing evidence.” \textit{Id.} The burden for clear and convincing evidence requires “very solid support,” which is around a “60%” likelihood that the evidence “supports the finding.” \textit{Id.} In choosing the standard of proof beyond a reasonable doubt for aggravating circumstances, and balancing of the probabilities for mitigating circumstances, the ICC chose standards of proof that were as far apart on the spectrum as possible. \textit{Prosecutor v. Lubanga}, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 4. Hence, the ICC made it very easy for mitigating circumstances to lessen a sentence, and very difficult for aggravating circumstances to increase the sentence. \textit{Id.}

\textsuperscript{53} \textit{Prosecutor v. Lubanga}, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 4. Based on the Rome Statute, the only way a sentence would go beyond thirty years is if there were aggravating circumstances. \textit{See Rome Statute, supra} note 6, art. 77. However, aggravating circumstances cannot be factors already considered in the crime itself that must also be proved beyond a reasonable doubt. \textit{Prosecutor v. Lubanga}, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 4. It is difficult to hypothesize where an “aggravating factor” would be proved beyond a reasonable doubt and not be charged as a crime itself. This is further analyzed in Part III of this Note.
may fall within the ICC’s jurisdiction, as well as the factors that are relevant to its sentencing decisions.

C. The First Sentencing: The Prosecutor v. Thomas Lubanga Dyilo

1. Background on Thomas “Lubanga” Dyilo

The first ever trial and sentence by the ICC was related to Lubanga’s leadership role in the Forces Patriotiques pour la Liberation du Congo (“FPLC”), a military wing of the Union of Congolese Patriots (also known as Union des Patriotes Congolais, or “UPC”) in the Democratic Republic of the Congo (“DRC”). Lubanga’s abuse of his UPC leadership role would ultimately lead him to face charges and a conviction for the criminal acts he committed in the DRC.

The DRC, formerly known as Zaire, is a country known for its rich mineral wealth. The natural resources of the DRC, and the wars in neighboring Rwanda and Uganda, have often caused the DRC to be plagued by conflict. Specifically in 1996, and again in 1998, the DRC was invaded by neighboring Rwanda and Uganda; these nations claimed to be fighting against their own rebels who had taken refuge in the DRC. The conflict intensified in 2000 when local interethnic conflicts began to brew within the wider context of the DRC war. Interethnic conflicts increased between the Hema and Lendu...

57. Id. at 540–41.
58. Timothy B. Reid, Killing Them Softly: Has Foreign Aid to Rwanda and Uganda Contributed to the Humanitarian Tragedy in the DRC?, 1 AFR. POL’Y J. 74, 74–75 (2006). From the time of that first invasion and until 2004, fighting continued between the DRC and Rwanda, leaving an estimated 3.8 million people dead. Id. at 77.
peoples over natural resources, land use, and arms smuggling within the Ituri region of the DRC.60

The UPC was created on September 15, 2000 for the purpose of establishing and maintaining political and military control over Ituri.61 The UPC quickly became an ethnic Hema militia and Lubanga took a primary role in the “common plan to build [a Hema] army.”62 Throughout the Ituri conflict, armed groups, including Lubanga’s, often targeted civilians and participated in “widespread killings, torture, and rape.”63 “Thousands of children, some as young as seven were recruited by all sides and used as fighters.”64 As leader of the UPC, Lubanga recruited child soldiers and would go to people’s homes “ask[ing] for cash, a cow, or for a child to fight for his rebel army.”65 “In 2003, at the height of the DRC armed conflict as many as ‘30,000 boys and girls’ were conscripted into service.”66 Overall, an estimated 60,000 people were killed in the Ituri conflict, many of whom were child soldiers.67

On April 11, 2002, the DRC became a state party to the ICC, and therefore subject to its jurisdiction.68 In March 2004, Joseph Kabila, president of the DRC, referred the situation in Ituri to the ICC Prosecutor, asking him to further investigate the conflict.69 The ICC Prosecutor’s investigation led to the

62. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 5.
64. Id.
65. DR Congo Warlord Thomas Lubanga Sentenced to 14 Years, BBC NEWS (July 12, 2010), www.bbc.co.uk/news/world-africa-18779726.
67. Id.; DR Congo: Q&A on the First Verdict at the International Criminal Court, supra note 63.
68. About the Court, supra note 2.
March 2006 arrest of Lubanga. 70 Lubanga remained imprisoned from the time of his initial arrest through the duration of his trial. 71 Pretrial hearings began soon after his arrest, and on January 29, 2007, the judges confirmed the charges against Lubanga. 72 Lubanga was charged as the co-perpetrator of the Ituri conflict for “enlisting and conscripting children under the age of fifteen years ... and using [the children] to [actively participate] in hostilities.” 73

Lubanga’s trial took place over the course of several years, with opening statements given on January 26, 2009 and closing statements given on August 25–26, 2011. 74 There were several delays prior to and during the trial, including those caused by two stay of proceedings orders, as well as an adjournment for an interlocutory appeal. 75 Finally on March 14, 2012, Lubanga was found guilty of “the war crimes of enlisting and conscripting children under the age of fifteen years and using them to participate actively in hostilities in the DRC between September 2002 and August 2003.” 76 On July 10, 2012 the ICC held its first sentencing hearing, and Lubanga was sentenced to fourteen years imprisonment. 77

2. The Sentencing of Lubanga

The ICC was founded on the premise that “[t]he most serious crimes of concern to the international community as a whole

70. Lubanga Case, COALITION FOR THE INT’L CRIMINAL COURT, http://www.iccnow.org/?mod=drctimeline&lubanga (last visited Aug. 22, 2013). The DRC’s ratification of the Rome Statute and its inability to prosecute Lubanga as shown by its referral to the ICC Prosecutor were the necessary preconditions to grant the ICC jurisdiction.
71. Id.
73. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Hearing, at 1.
74. Id. at 3.
75. Id. at 2–3.
76. Id. at 12.
must not go unpunished.” The Court cited to this at Lubanga’s sentencing, and attempted to make clear that it was taking this important background principle into account. In arriving at its sentence for Lubanga, the Court specifically considered the provisions of Articles 77 and 78 of the Rome Statute, as well as Rule 145 of the Rules of Procedure and Evidence.

The Court applied and balanced the factors from Article 78 and Rule 145, which together mention the “gravity of the crime and the individual circumstances,” as well as “mitigating and aggravating circumstances.” First, the Court considered the gravity of Lubanga’s crime, finding it to be “very serious” and “affect[ing] the community as whole.” This was exacerbated by the element of “compulsion” in the crime of conscripting. For example, the physical well-being of children was placed at risk of fatal and nonfatal injuries from the violence, and the children may continue to suffer serious trauma to their psychological well-being. Although the exact number of children involved in the conflict could not be identified, the Court determined that the use of children was “widespread.”

78. Id. (quoting Rome Statute, supra note 6, pmbl.).
79. See id. at 1.
80. Id. at 4–8.
81. Id. at 2; Rome Statute, supra note 6, art. 78.
82. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 4; Rome Statute, supra note 6, art. 78.
83. Based on the long-accepted doctrine of international human rights law, it is not necessary to show the element of compulsion in proving the crime of conscription. Christie Nicoson, Lisa Dailey & Rachel Hall, The International Criminal Court, WORLD WITHOUT GENOCIDE, worldwithoutgenocide.org/genocides-and-conflicts/icc (last visited Oct. 22, 2012). Therefore, showing this element only worsens or further contributes to the findings against the defendant.
84. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 4.
85. Id.
86. Id. at 5.
87. Id. It is also important to note that in the circumstances of this case, the Court states the following should be considered as part of the gravity of the crime:

[The extent of the damage caused, and in particular the harm caused to the victims and their families, the nature of the unlawful
Court also recognized that Lubanga is “an intelligent and well-educated individual, who would have understood the seriousness of the crimes of which he has been found guilty.” 88 Although a relevant factor, this was not considered an “aggravating” circumstance because factors considered within the gravity of the crime cannot be counted twice or additionally considered to be an aggravating circumstance. 89

In Lubanga’s case, several possible aggravating circumstances were considered, including the punishment inflicted among child soldiers and instances of sexual violence. 90 Although Lubanga was not specifically charged with these crimes, the ICC Prosecutor was still able to put them forth as aggravating circumstances. 91 However, the Court was unable to take such circumstances into account because the ICC Prosecutor could not prove them beyond a reasonable doubt—the Court-established standard of proof for aggravating circumstances. 92 There were, however, mitigating factors that the ICC found to be adequate under the Court-established standard of proof of balancing the probabilities. 93 Mitigating factors included Lubanga’s “respectful and co-operative [nature] throughout the proceedings,” even when placed “under considerable unwarranted pressure by the conduct of the prosecution.” 94

behavior and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner; time and location; and the age, education, social and economic condition of the convicted person.

Id. Specifically, in the case of Lubanga, the Court later notes that it has “borne in mind the widespread recruitment and the significant use of child soldiers during the time-frame of the charges; the position of authority held by Mr. Lubanga within the UPC/FPLC and his essential contribution to the common plan that resulted, in the ordinary course of events . . . .” Id. at 10.

88. Id. at 6.
89. Id. at 8. As an additional example, the Court mentions that age is already considered in evaluating both the gravity of the crime and the individual and cannot be considered additionally as an aggravating factor. Id.
90. Id. at 7.
91. Id. at 4.
92. Id.
93. Id.
94. Id. at 9. The Court lists all of the “particularly onerous circumstances,” that Lubanga faced during his trial proceedings. Id. It is unclear if the Court viewed this as one mitigating factor or several mitigating factors. Id.
In accordance with Article 78(3), the Court announced a sentence for each crime Lubanga was found guilty of and a “joint sentence specifying the total period of imprisonment.” Lubanga was sentenced to thirteen years’ imprisonment for conscripting children under the age of fifteen to join the UPC, twelve years imprisonment for enlisting children under the age of fifteen to join the UPC, and fourteen years’ imprisonment for using children under the age of fifteen to participate actively in hostilities. However, despite the twelve- to fourteen-year sentences accompanying each crime, the majority of the Court sentenced Lubanga to a total period of fourteen years imprisonment. Additionally, pursuant to Article 78(2), the Court deducted the six years Lubanga spent in custody since 2006, finding that only eight years would remain on his sentence.

II. COMPARATIVE SENTENCING REGIMES AND PENAL THEORIES THAT MAY PROVIDE JUSTIFICATIONS IN INTERNATIONAL SENTENCING

A. Overview of Sentencing in the International Criminal Tribunals for Yugoslavia and Rwanda

The ICTY and ICTR, two of the most prominent international tribunals to precede the ICC, were established to “prosecute persons responsible for serious violations of international humanitarian law.” The ICTY addresses widespread human
rights abuses in the former Yugoslavia since 1991, including violations of the 1949 Geneva Conventions, and violations of the laws or customs of war, genocide, and crimes against humanity. The ICTR assumes jurisdiction over criminal matters, specifically genocide and violations of international humanitarian law that occurred in Rwanda and neighboring states in 1994.

The two tribunals are structured similarly to one another; they often issue a joint or global sentence when there are multiple convictions, or they issue separate sentences that are served concurrently. The “gravity of the offence,” the individual's circumstances, and aggravating and mitigating factors are all considered in sentencing. The ICTY and ICTR also provide for recourse to the general sentencing practices of the “former Yugoslavia, and Rwanda, respectively.” In reaching a “suitable” sentence, the ICTY and ICTR judges are given what others have labeled as “remarkably wide” or “unfettered discretion to evaluate the facts and attendant circumstances.” However, such unfettered discretion and the resulting sentences are not without criticism.

Both the ICTY and ICTR have been criticized for several reasons, reasons which often play a role in the resulting nonuniform sentences for similar offenders. One criticism is the lack of explanation for the prescribed term of years, resulting in sentences that lose effectiveness and legitimacy. A widely cited example in the ICTY includes the convictions of Generals

102. Id.
103. Clark, supra note 7, at 1688.
104. Id. at 1689.
105. Id.; see infra text accompanying note 199.
106. Clark, supra note 7, at 1689; Drumbl, supra note 7, at 553. “The ‘unfettered discretion’ to sentence delegated to international judges inexorably leads to a broad range of actual sentences.” Id. at 558.
107. See supra text accompanying note 7.
108. Clark, supra note 7, at 1689–94. Legitimacy largely depended on consistency in punishment, because consistency in exchange reflects the “notion of equal justice.” Id. at 1689. Global sentences may contribute to a lack of legitimacy because “[t]he practice of issuing a single, global sentence for multiple crimes makes it difficult to demonstrate with precision the extent to which similar defendants receive different penalties for similar crimes.” Id. at 1692.
Tihomir Blaskic and Dario Kordic.\footnote{See id. at 1692.} Although both convictions were very similar in nature and included the “crimes against humanity of persecution, murder, and inhumane acts,” Blaskic was sentenced to forty-five years, and “Kordic to only twenty-five years.”\footnote{Id.} Additionally, despite the gravity of the crimes in the former Yugoslavia, only one of the ICTY’s sixty-two convictions has resulted in a life sentence.\footnote{Id.} The ICTY and ICTR have also been criticized as giving insufficient weight to mitigating and aggravating factors, and sentences in both tribunals have been revised for this reason.\footnote{See id. at 1693–94.} Andrew N. Keller, author of \textit{Punishment for Violations of International Criminal Law: An Analysis Of Sentencing at the ICTY and ICTR}, critiques that “the Trial Chambers [have] full discretion to consider any other aggravating and mitigating circumstance, and to give ‘due weight’ to those factors in the determination of an appropriate punishment . . . perhaps [the discretion is] too broad and should be limited by general sentencing guidelines.”\footnote{Keller, supra note 7, at 57.}

Finally, although the reasons for the establishment of these tribunals are clear, the tribunals’ justifications for punishment are not. In the case of the ICTY, “[t]he Security Council argued in a resolution establishing the tribunal that its purpose would be to bring to justice persons who are responsible for the crimes as well as to deter and to contribute to the restoration and maintenance of peace.”\footnote{Christoph J.M. Safferling, \textit{The Justification of Punishment in International Criminal Law}, 4 Austrian Rev. Int’l & Eur. L. 126, 146 (1999).} However, not only is the statutory language silent as to the penal theories, but the judicial decisions are also inconsistent. An analysis of ICTY judgments from the years 2000 to 2005 reveals that there are “judgments that cite retribution as the ‘primary objective’ and deterrence as a ‘further hope,’ warning deterrence ‘should not be given undue prominence,’ and judgments that flatly state ‘deterrence
probably is the most important factor in the assessment of appropriate sentences.”

Although the ICTY and ICTR clearly highlight some of the criticisms the ICC may face, in order to find a sentencing rationale in the international context, it may be best to look at attempts to justify domestic punishment.

B. The United States Federal Sentencing Guidelines as a Roadmap for Sentencing

Sentencing regimes pose a challenge for most nations, and it is not surprising that the ICC may struggle in its early years to reach a proper balance, even with the precedent and criticisms of the ICTY and ICTR as guidance. The United States Federal Sentencing Guidelines also serve as an example of how difficult it may be to limit judicial discretion in sentencing. However, a U.S. federal statute, 18 U.S.C. §3553(a), provides a helpful reference. Specifically, 18 U.S.C. §3553(a) lists several factors a court should use to determine a “reasonable” sentence. These factors, in turn, provide a roadmap for rectifying the shortcomings of the ICC.


For almost a century, until the federal sentencing guidelines went into effect in 1986, federal judges wielded broad discretion under an

115. Drumbl, supra note 7, at 561. As discussed throughout this Note, the issue is not that the ICC, like the ICTY and ICTR, does not speak clearly to one theory of punishment. The issue is, however, when statutory guidelines of the ICC do not satisfy or serve any justification of punishment.

116. See Safferling, supra note 114, at 128 (discussing domestic theories of punishment and stating, “before we try to find a rationale for sentencing in international criminal law, we want to look at attempts to justify domestic punishment”).


Guidelines were enacted in 1987 as a means to eliminate disparate criminal sentences.\textsuperscript{120} Although the mandatory guidelines reduced disparity, they did not always provide for a “fitting” punishment,\textsuperscript{121} and in 2005 the role of the guidelines sharply changed. In \textit{United States v. Booker}, the sentencing guidelines were rendered advisory in nature, leaving sentencing to the district courts’ discretion and largely guided by the factors contained within 18 U.S.C. §3553(a).\textsuperscript{122}

Pursuant to 18 U.S.C. §3553(a)(1), the “nature and circumstances of the offense and the history and characteristics of the defendant” must be considered.\textsuperscript{123} Additionally, 18 U.S.C. §3553(a)(2) is especially significant as it shows the importance placed on several penal theories by the United States in federal sentences. The section provides reference to the theories of retribution, deterrence, and rehabilitation.\textsuperscript{124} Both 18 U.S.C.\textsuperscript{125}
§3553(3) and (4) refer to the kind of sentences available, and the associated sentencing ranges. Lastly, 18 U.S.C. §3553(6) refers to “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” However, the ICC has only one determinate guideline: that the sentence does not exceed thirty years unless justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

C. Theories of Punishment in Domestic Criminal Justice Systems

There are several theories of punishment that are incorporated into sentencing guidelines in states throughout the world, including, but not limited to, the United States, Singapore, Hong Kong, New Zealand, Finland, Sweden, and Germany. As referenced in 18 U.S.C. §3553(a), the most prominent theories include retribution, deterrence, and rehabilitation.
Another theory often considered in the international context is restorative justice.\textsuperscript{130} The ICC, however, refuses to refer to any punishment theories in its decisions and sentencing guidelines.\textsuperscript{131} Additionally, the ICC and the Rome Statute have never purported to ascribe to any of these theories specifically.\textsuperscript{132} Rather, the ICC merely looks at the gravity of the crime and the individual circumstances.\textsuperscript{133} Notwithstanding, punishment theories, as seen through the example of several states, provide important considerations in sentencing and should serve as underlying justifications for imposing individual criminal liability on an international scale.\textsuperscript{134} Furthermore, they highlight the shortcomings of the Rome Statute as demonstrated by the Lubanga trial.

Similar to the United States, criminal statutes in Singapore, Hong Kong, and New Zealand recognize the several theories of punishment to include retribution, deterrence, and rehabilitation.\textsuperscript{135} The theory of retribution specifically focuses on the in-

\begin{itemize}
\item \textsuperscript{131} See generally Drumbl, supra note 7, at 558 (stating that “international criminal tribunals . . . are silent as to the penological purpose of the sentences imposed”). See also David Bosco, The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal?, 19 Mich. St. J. Int’l L. 163, 194 (2011).
\item The guidelines for sentencing at the ICC are elaborated in the Rule of Procedure and Evidence, but they do not include any reference to the deterrence function or indeed to any of the traditional purposes of punishment . . . a number of aggravating and mitigating conditions are also listed, but none of them relate specifically to prevention or deterrence.
\item \textsuperscript{132} See supra text accompanying note 131.
\item \textsuperscript{133} Rome Statute, supra note 6, art. 78(1).
\item \textsuperscript{134} See sources cited supra note 128.
\item \textsuperscript{135} See Lin, supra note 128, at 26 (discussing the Singapore case, R. v. Sargeant, and stating “there are four (classical) sentencing goals or aims: retribution, deterrence, prevention and rehabilitation”); Busche & Walls, supra note 128, at 180 (discussing the balancing of different penal theories and stating that “[l]egal scholars suggest that the criminal justice system has several aims: retribution, reformation, incapacitation, individual deterrence, and general deterrence. These aims can be thought of as combining considerations of justice relating to past actions and considerations of deterrence of
dividual offender, and the punishment is set forth simply as commensurate with what the criminal deserves. 136 As expressed by the courts in New Zealand, “the judicial obligation is to ensure that the punishment [the courts] impose in the name of the community is itself a civilized reaction, determined not on impulse or emotion but in terms of justice and deliberations.” 137 Retribution is also considered to be “proportional justice,” where the punishment increases directly with the seriousness of the crime. 138 In Finland, for example, the penal code states, “punishment shall be measured so that it is in just proportion to the damage and the danger caused by the offence and to the guilt of the offender manifested in the offence.” 139 The 1989 Swedish Criminal Code has a similar statement, where the key factors considered for punishment include “the harm, offence or risk which the conduct involved, what the accused realized or should have realized about it, and the intention and motives of the accused.” 140 Ultimately, the moral culpability of the offender places the duty to punish on society. 141 The punishment should fit the crime, and the sentence should be comparable to the crime. 142 Therefore, retributive rationales are backward-looking and result in a moral balance being rectified. 143

The theories of deterrence and rehabilitation both fall within the wider category of utilitarian punishment theories. 144 Utilitarianism, as compared to retribution, focuses on the ultimate betterment of society, and in the case of general deterrence, the crime by control of future criminal behavior”) (internal citations omitted); see generally New Zealand Sentencing Paper, supra note 128.

136. JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 38–46 (5th ed. 2007).
137. New Zealand Sentencing Paper, supra note 128.
139. New Zealand Sentencing Paper, supra note 128.
140. Id. (quoting A. ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 83 (1st ed. 1992)).
141. DRESSLER, supra note 136, at 38–46.
142. Id.; Leinwand, supra note 130, at 804.
143. See Dubinsky, supra note 11, at 618.
144. DRESSLER, supra note 136, at 33–38. Prevention is often considered with deterrence and rehabilitation under utilitarianism. Id.
offender becomes part of the means to reach a “greater social good.” The purpose of general deterrence is to dissuade others from such acts in the future. The New Zealand courts have also recognized the use of imprisonment as a general deterrent, stating that “there can be no time when it is more necessary for the court to use their sentencing powers firmly in the hope of deterrence than at the early stage of the growth of a new social evil.” It is important to note, however, that the effectiveness of deterrence often depends on a potential offender’s knowledge as to the likelihood of being caught and convicted, and on the likely penalty.

Rehabilitation may also be considered, in the hopes of helping and reforming those who have committed crimes. In many European countries, for example, the focus is on rehabilitation so that convicted criminals can reenter society and resume a normal life. For this reason, life imprisonment is rarely imposed and the death penalty is not an option. The importance of re-socialization is seen in a famous German Constitutional Court case, often referred to as “Lebach.” In that case, the court granted an injunction so that a documentary on a convicted criminal could not be released after the offender had

146. Deterrence is usually divided into general and individual deterrence. Id. “If individual deterrence is the goal, then penalties are escalated once a person starts reoffending. The sentencing judge could, for example, choose to make an example of a persistent burglar by imprisoning him or her for the maximum term, even if the current offense is relatively minor.” Id. This can also be analogized to the United States three-strikes policy. See Taifa, supra note 121. However, in the international context this will likely be less relevant as the ICC should not be dealing with repeat offenders for crime of the most serious concern to the international community.
147. New Zealand Sentencing Paper, supra note 128.
148. Id. It is important to note that although retribution and utilitarian theories of punishment have very different means of reaching a just punishment, this does not necessarily mean they will result in different ends. Hypothetically, a sentence of forty years for murder may be considered proportional to the crime and it may also be sufficient to deter others from committing a similar crime.
149. DRESSLER, supra note 136, at 33–45.
150. Eberle, supra note 128, at 484–85.
151. Id.
152. Id. at 485. Eberle, the author, also explains this case as an example of a situation where the felon’s healthy re-entry into society was more important than an accurate depiction of his role in a notorious crime. Id.
served his prison sentence.\textsuperscript{153} In the judgment, the court gave priority to protection of personality over freedom of expression or information, and found the right to re-socialization to be an integral part of the offender’s constitutionally guaranteed rights.\textsuperscript{154} Ultimately, utilitarian rationales are forward-looking, hoping to both deter and rehabilitate the offender, while generally deterring society as a whole.

Finally, restorative justice is often considered on an international scale in order to encourage peace building for the nation.\textsuperscript{155} One definition of restorative justice is the “bringing together [of] individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime.”\textsuperscript{156} The hope is that restorative justice will result in a restoration that both benefits and is agreed upon by the victims, the offenders, and the affected communities.\textsuperscript{157} Although a newer penal theory with less practical examples, many scholars consider restorative justice an important consideration for international courts.\textsuperscript{158}

Overall, the ICC’s main goal is to end impunity, or exemption, from punishment. Despite the Rome Statute’s clear statement of this goal, the statute fails to provide any penal theory, or combination of theories, to justify such punishment. It remains unclear if sentences should be driven by a backward- or forward-looking approach, and whether the needs of victims, the needs of society as a whole, or the rehabilitation of victims should be given primary, if any, importance. The ICTY, ICTR, and the U.S. federal sentencing regime provide a comparative tool that can be used to show where the ICC has fallen short in its sentencing guidelines, and in the sentencing of

\textsuperscript{153} Christine Morgenstern, Judicial Rehabilitation in Germany—The Use of Criminal Records and the Removal of Recorded Convictions, 3 EUR. J. PROBATION 20, 22 (2011).

\textsuperscript{154} Id.

\textsuperscript{155} Leinwand, supra note 130, at 809–10.


\textsuperscript{157} Id. The article provides some examples of restorative justice, such as “family group conferencing in Australia and New Zealand, community reparative boards in Vermont, circle sentencing in Canada, and victim-offender mediation throughout North America and Europe—all aimed at bringing stakeholders together to fashion appropriate resolutions to crime, typically through mediated dialogue.” Id. at 229.

\textsuperscript{158} See generally Leinwand, supra note 130; Luna, supra note 156.
Lubanga. Furthermore, they highlight how the ICC has failed to account for the theories of punishment, which provide important justifications that could help the ICC to reach its goals.

III. MITIGATING AND AGGRAVATING CIRCUMSTANCES, MAXIMUM SENTENCES, AND GLOBAL SENTENCES ONLY FRUSTRATE THE THEORIES OF PUNISHMENT THAT THE ICC MAY CONSIDER

In an attempt to solve the problems and inconsistencies that plagued the ICTY and ICTR, the Rome Statute and the ICC have made it increasingly difficult to consider any of the penal theories. One major concern that was prevalent in both the ICTY and ICTR was the unequal weight given to mitigating and aggravating circumstances. As a consequence, the ICTY and ICTR were often criticized as having discretion that was too broad, resulting in sentences that lacked uniformity and were too far removed from the theories of punishment.

With the intention to resolve this problem, or at least to allow for more consistent sentences, the Rome Statute set forth the thirty-year maximum imprisonment sentence, with a life sentence available only in extreme circumstances. However, the

159. See sources cited supra note 7.
160. See Keller, supra note 7, at 57–74 (discussing that in the use of aggravating and mitigating circumstances “discretion is perhaps too broad,” and “[t]he ICTY and ICTR should reassess certain aspects of their sentencing practice with regard to the use of aggravating and mitigating circumstances, the Trial Chambers must refrain from deviating substantially from the principles of deterrence and retribution merely because of the existence of mitigating factors”); see generally Clark, supra note 7, at 1707–08 (discussing the lack of uniformity in Ad Hoc Tribunal’s sentencing, where many times on appeal, the Appeals Chamber had to increase or decrease a sentence due to the weight that the Trial Chamber had given to both mitigating and aggravating factors. In the ICTY, a two-and-a-half-year sentence was found to be “manifestly inadequate,” and in the ICTR, cases on appeal included purported mitigating factors of relative insignificance).
provisions of the Rome Statute have not resolved these problems, but actually created more of them. First, the inconsistencies created by mitigating and aggravating circumstances remains and can be seen by their unequal application in Lubanga’s sentence. Second, the thirty-year maximum provision, together with the use of joint and concurrent sentences, will likely lead to more lenient sentences.

A. The Problems That Remain from the ICTY and ICTR: Unequal Balance of Mitigating and Aggravating Circumstances in the ICC

The unequal balancing of mitigating and aggravating circumstances that often caused lenient and inconsistent sentencing in the ICTY and ICTR are likely to have the same result in the ICC as seen through the example of the Lubanga trial.162 As discussed in Collective Violence and Individual Punishment: The Criminality of Mass Atrocity, Professor Mark Drumbl163 states:

No ordering principle is provided as to the relative weight to attribute to any of these [aggravating and mitigating] factors. Nor is there any explicit guidance as to the weight to accord to a factor in sentencing when that same factor already may have been considered in establishing the mental element of the substantive offense. Consequently, the quantification of sentence in individual cases still is effectively left to the exercise of judicial discretion in a manner similar to the ICTY and ICTR. Nor does the ICC’s . . . law provide any significant guidance regarding the purposes of sentencing.164

Despite the intent of the drafters of the Rome Statute to adopt what they “considered the best rulings and practices of earlier courts,” Lubanga’s case demonstrates that Drumbl’s

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162. See generally sources cited supra note 7.
163. Professor Mark Drumbl has researched, published, and given numerous lectures in the area of international criminal law, especially relating to child soldiers. For more information, see Mark A. Drumbl, WASH. & LEE UNIV. SCH. OF LAW, law.wlu.edu/faculty/profiledetail.asp?id=11 (last visited Jan. 12, 2013).
164. Drumbl, supra note 7, at 554 (internal citations omitted).
statement is correct and the ICC has fallen victim to the same criticism as the ICTY and ICTR.165

First, the Lubanga Court’s decision to adopt unequal standards of proof for aggravating and mitigating circumstances demonstrates that the Court’s discretion is too broad. At the sentencing hearing, the Court stated that “[i]t is for the Chamber to establish the standard of proof for the purposes of sentencing, given the Statute and the Rules do not provide any guidance.”166 The Court continues to explain that because the aggravating factors established “may have a significant effect on the overall length of the sentence []Lubanga will serve, it is necessary that they are established to the criminal standard of proof, namely ‘beyond a reasonable doubt.’”167 Mitigating circumstances, however, were granted the much lower evidentiary standard of being established by a balancing of the probabilities.168

Not only are these standards now evaluated on far from equal footing, but a circular problem is created as aggravating circumstances cannot be factors considered within the gravity of the crime, and they must be proved beyond a reasonable doubt.169 However, if a crime or charge could be proved beyond a reasonable doubt, then the ICC Prosecutor would have likely charged the defendant with that crime.170 For example, the ICC Prosecutor did not charge Lubanga with rape and other forms of sexual violence as separate or additional crimes.171 The

166. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 4.
167. Id.
168. Id.
169. Id. at 8.
170. Although, in the July 10 Hearing to Deliver the Decision, the Court seems to be of the view that the ICC Prosecutor “failed” to charge Lubanga with sexual crimes, this still does not alter the problem that arises when aggravating circumstances must be proved beyond a reasonable doubt. Id. at 7.
171. Id. at 6–7. There are issues that arise with this, as the Court seems to blame the ICC Prosecutor for failing to include this as a charged offense and then for referring to it throughout trial. Id. However, knowing this was an important factor, especially to victims, makes it increasingly unfair that the Court did not allow its inclusion and shows that the Court’s discretion was too broad. Id. The Court knew this was a factor that was going to be considered in sentencing, and using “the balancing of probabilities” would have
Court was unable to conclude that “sexual violence against the children who were recruited was sufficiently widespread to mean that it could be characterized as occurring in the ordinary course of the implementation of the common plan for which [Lubanga is responsible],” and hence, Lubanga’s role could not be proved beyond a reasonable doubt. These factors, however, still should have been given some consideration in sentencing, especially since the purpose of aggravating circumstances is to give weight to additional negative factors affecting the defendant’s role or crime. The Court has ultimately set a standard of proof that will almost always fail to consider aggravating circumstances. In contrast, if the much lower standard of proof that applies to mitigating circumstances, balancing of the probabilities, applied equally to aggravating circumstances, then Lubanga’s role in sexual crimes would have likely qualified as an aggravating circumstance.

Rather than learning from the inconsistent sentencing that plagued the ICTY and ICTR, the ICC’s broad discretion will likely lead it down an analogous, nonuniform path where similar crimes result in a wide range of sentences. Furthermore, the Court’s broad discretion has resulted in a lenient sentence that does not seem to serve the theories of punishment. Lubanga was found guilty of conscripting, enlisting, and having children participate actively in hostilities. However, his sentence seems to go against both retributive and utilitarian theories, as a high bar has been placed that denies

made it very likely that this could be considered in Lubanga’s sentencing as compared to the standard of proof that was set forth for aggravating circumstances.

172. Id. at 7.
173. Id. at 4. It is also important to note that aggravating, mitigating, and individual circumstances, as well as the gravity of the crime, are all factored into the sentencing equation. Id. Why the court chose to acknowledge that aggravating circumstances have a significant impact on sentencing, but did not say mitigating circumstances have an impact, only adds to the confusion set forth by the ICC in its first sentencing. See id. As the Court mentions, there is nothing in the rules that provides guidance on the standard of proof. Id. However, that being said, there is also nothing that gives the Court reason to set different and unequal standards.
174. See generally id. at 4.
175. See generally Clark, supra note 7, at 1707. This statement follows the assumption that the ICC will continue to follow a similar path to that of the ICTY and ICTR.
consideration of the possible sexual crimes and punishments the defendant committed, but allows leniency for the defendant’s respect and cooperation during proceedings. First, under the retributive theory, Lubanga’s true moral culpability is not considered because aggravating circumstances, such as sexual crimes, cannot be factored into sentencing, but mitigating circumstances can and ultimately allow for leniency. Additionally, deterrence is not adequately considered, as Lubanga would have no reason to be deterred from participating or taking a less substantial role in other crimes, so long as they could not be proved beyond a reasonable doubt.

B. The ICC’s Problematic Provisions of Concurrent Sentences and the Thirty-Year Limit

Additional problems arise as the penalties section of the Rome Statute, specifically Article 77, seems unable to serve the purposes of most, if not all, theories of punishment. This inadequacy can be seen first in the thirty-year maximum sentence that the statute implements for almost all penalties. Such a strict limitation cannot be found in the statutes governing other international tribunals, such as those of Rwanda or Yugoslavia.

The ICC Prosecutor will almost always be unable to request a sentence greater than thirty years. This limitation further frustrates having punishments that are proportional to the offense. It has ultimately been predetermined that no crime

176. Dressler, supra note 136, at 38–46. As discussed in Part II.A, “true moral culpability” speaks to the heart of the theory of retribution. See id. For a sentence to reflect the offender’s true moral culpability, it should be proportional. See id. Here, by allowing positive or mitigating factors to decrease the sentence but not allowing “negative” or aggravating factors to increase it, the resulting sentence is not proportional to the offender’s actions and therefore does not reflect the offender’s “true moral culpability.”

177. Rome Statute, supra note 6, art. 77. Part III.A explains why the life imprisonment sentence is extremely unlikely because of the additional limiting circumstances that are placed on it by the standards governing aggravating circumstances.


179. Rome Statute, supra note 6, art. 81(2)(a). Despite the several contradictions to this goal, including the thirty-year limitation set forth by the Rome Statute, the Court states, “pursuant to Article 81(2)(a) of the Statute, the Chamber must ensure that the sentence is in proportion to the crime.”
will be proportional to a sentence that is greater than thirty years but not deserving of life imprisonment. Additionally, even a thirty-year sentence will be a high bar to overcome, since thirty years is the maximum sentence for almost all cases.

The problem worsens when the individual and joint sentence provisions are considered. As seen in Lubanga’s case, he received three sentences of twelve, thirteen, and fourteen years, but a joint sentence of only fourteen years for all three crimes he was convicted of. First, Lubanga could not be sentenced to serve these terms consecutively because thirty-nine years is not an available sentencing option. Second, as stated in Article 77, the Court was only required to sentence Lubanga to the highest of his individual sentences. Hence, the Court sen-


180. According to the Rome Statute, there can be no sentence that is greater than thirty years, except in extreme situations where a life sentence may be imposed. Rome Statute, supra note 6, art. 78(3).

181. If the Court is already afraid to set a high sentence in its first case, and thirty years will almost always be the maximum sentence, the Court may be reserving this for the criminals it sees as the worst offenders. However, it is unclear who the Court will determine this to be or when this may happen. See Kate Kovarovic, Pleading for Justice: The Availability of Plea Bargaining as a Method of Alternative Dispute Resolution at the International Criminal Court, 2011 J. DISP. RESOL. 283, 299–300 (2011). In Kovarovic’s article, this proposition is additionally supported through the discussion of plea bargains.

Critics also discount the fact that prosecutors must work within the sentencing confines established by the Tribunal. The sentencing range of the ICC is “already perceived by some as too low,” as the Rome Statute does not provide for the death penalty and only allows life imprisonment to be assigned in exceptional circumstances . . . The appeal for most defendants in seeking a plea bargain is the hope of securing a more lenient sentence. When the sentencing maximum is fairly minimal, prosecutors are thus forced to reduce a defendant’s sentence even further . . . the problem of leniency stems from the Rome Statute itself.

Id.

182. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 11.

183. Rome Statute, supra note 6, art. 77(1)(a). Thirty-nine years exceeds the thirty-year limitation. Id.

184. Rome Statute, supra note 6, art. 78(3).
tenced Lubanga to the minimum required by the statute, resulting in his fourteen-year sentence. Further, without any type of minimum sentence requirement, the ICC could theoretically choose between zero and thirty years. By providing a minimal explanation to Lubanga’s fourteen-year sentence, it appears as though the ICC simply chose an arbitrary number that was in the middle of the available range, influenced only by a thirty-year limitation, with no mandatory minimum weighing in.

Setting such a low bar for its first sentence is not unique for an international court. The ICTY in Prosecutor v. Erdemovic, one of the first cases ever before the ICTY, experienced a similar problem. The ICTY sentenced Erdemovic to only a five-year sentence after he pled guilty to killing between ten and

185. Id.
186. See Rome Statute, supra note 6, art. 78(3). As discussed above, although extreme situations may warrant a life sentence, in all other cases there can be no sentence that is greater than thirty years. Id. Hence, the upper-limit of a sentence will almost always be thirty years. Id. With no minimum sentence provided for in the Rome Statute, the lowest sentence available is theoretically zero years.
187. At the sentencing, the Court addressed all the relevant provisions of the Rome Statute, as also discussed throughout this Note. See generally Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision. For example, the Court explained that there were no aggravating circumstances as they could not be proved beyond a reasonable doubt, and hence, there were no extreme circumstances warranting a life sentence. Id. at 10. The Court also reviewed the mitigating circumstances it would take into account. Id. at 9. However, other than “taking into account all the factors ... discussed,” an explanation as to why the term of years was fourteen, as opposed to any other available sentence, is not provided in the sentencing transcript. Id. at 11.
188. Marisa Bassett, Defending International Sentencing: Past Criticism to the Promises of the ICC, HUM. RTS. BRIEF, Winter 2009, at 22, 23. See also Dubinsky, supra note 11, at 636, where Dubinsky discusses that the ICC must learn from Erdemovic’s trial.

The purpose of an international court is not to punish crimes such as petty theft or common law torts. Instead, cases before such a court will involve serious crimes inflicted on populations of people, such as crimes against humanity and war crimes. Crimes in front of the ICC will involve the systemic rape, torture, and murder of many people. Therefore, the ICC will only try the world’s most heinous criminals. Because of this, it is unacceptable for people like . . . Drazen Erdemovic to walk out of a jailhouse alive.

Id.
100 civilian Muslim men. The ICTY received major criticism for imposing such a low first sentence. However, in the ICTY’s sixty-two convictions, it has ultimately imposed much higher sentences on many other offenders and has been able to overcome the low bar it initially set. Unfortunately, due to the joint sentence and thirty-year limitations, it will be very difficult for the ICC to overcome what many have criticized as a very low sentence for its first case.

Finally, the provisions of Article 77 fail to satisfy the theories of punishment for several reasons. First, based on the theory of retribution, the punishment should fit and be comparable to the crime. However, based on the Lubanga sentencing, it appears that whether Lubanga committed only the crime deserving of the fourteen-year sentence, or all three crimes, he only deserved a fourteen-year sentence. This punishment seems to fit only one of the crimes, rather than all three of them as it should. Second, it is possible that an offender would be deterred from committing a crime based on his or her knowledge of the ICC and the fact that he or she may face imprisonment. However, once he or she chooses to commit one crime, there

189. Dubinsky, supra note 11, at 622–25.
190. Bassett, supra note 188, at 23.
191. See generally Weinberg de Roca & Rassi, supra note 161.
192. See DR Congo Warlord Thomas Lubanga Sentenced to 14 Years, supra note 65.
193. Dressler, supra note 136, at 38–46; Leinwand, supra note 130, at 804.
194. The Court rejected the Prosecutor’s argument that there should be a consistent baseline of 80% of the statutory maximum for sentencing, which would then take into account aggravating or mitigating circumstances. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, 11 (July 10, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1440143.pdf. Here, this would be twenty-four years, based on the thirty-year statutory guideline, and then properly balanced for other circumstances. See id. The Court rejected the Prosecutor’s proposal and stated that one reason the sentence passed was that the sentence “should always be proportionate to the crime” and “an automatic starting point—as proposed by the former Prosecutor—that is the same for all offences would tend to undermine that fundamental principle.” Id. at 10. However, this argument can be seen as ironic considering the joint sentence of fourteen years in the case of Lubanga. Id. at 4. He was individually sentenced to twelve to fourteen years for each of his three crimes but his joint sentence is only fourteen years. Id. By this standard, it appears that whether one or three crimes was committed, almost the same sentence would be given. One may argue that this decision of the Court is contrary to the Article 81(2)(a) requirement that sentences should be proportionate to the crime. Rome Statute, supra note 6, art. 81(2)(a).
would be little to deter an offender from committing multiple crimes when the resulting sentence remains the same. Finally, with Lubanga returning to the DRC in eight years or less, it seems unlikely to satisfy the restorative justice theory because the affected individuals have lost the opportunity to weigh in on the sentence and have had little time to rebuild peace in the nation.

IV. A CHANGE FROM OTHER INTERNATIONAL COURTS: WHY THE NATIONAL DEFERENCE PROVISION SHOULD NOT HAVE BEEN REMOVED

In order to better serve the theories of punishment, and provide additional means of guidance in sentencing, the Rome Statute should be amended to provide deference to the laws of the nation involved. For example, international criminal justice was sought for the crimes committed by Charles Taylor in Sierra Leone.195 Taylor was found guilty by the Special Court for Sierra Leone ("SCSL") for "crimes against humanity and war crimes," including murder, rape, mutilation of civilians, and the use of child soldiers.196 However, in Taylor's case, the prosecutors requested that he receive eighty years imprisonment, and the judge ultimately sentenced the 64-year-old Taylor to fifty years.197 With a fifty-year sentence, Taylor will likely spend the rest of his life in prison, whereas Lubanga may return to the DRC in less than eight years.198 There is one factor that may help to explain this discrepancy. Special international courts or tribunals like that of the SCSL, and similar to the ICTY and ICTR, give deference to laws of the nation involved,

198. Simons & Goodman, supra note 196.
especially when considering “penalties” or sentencing.¹⁹⁹ The Rome Statute, however, contains no such provision.²⁰⁰

Unlike the SCSL that sentenced Taylor, which is special to Sierra Leone, or the ICTY and ICTR, which are special to Yugoslavia and Rwanda respectively, the ICC could potentially take on cases from 122 different nations.²⁰¹ Initially, considering the increasing commitment required to give deference to a different nation every time one of its individuals is brought to the ICC, it makes sense that the ICC removed such a provision from the Rome Statute. When the principles of “complementarity” and “implementation” are considered, however, the justifications for not giving deference seem to lose support.

First, the principle of complementarity is unique to the ICC, as it allows the ICC to complement the justice system of the

¹⁹⁹. The ICTY, ICTR, and the Special Court for Sierra Leone, respectively, gave deference to the national sentencing guidelines as follows: “The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.” Statute of the International Tribunal for the Prosecution of Persons Responsible for Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 art. 24(1), U.N. Doc. S/RES/827 (1993); “The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the trial chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.” S.C. Res. 955, Annex art. 23(1), U.N. Doc. S/RES/955 (Nov. 8, 1994). “The Trial Chamber shall impose upon a convicted person other than a juvenile offender imprisonment for a specified number of years. In determining the terms of imprisonment the trial chambers shall have recourse to the practice regarding prison sentences in the International Tribunal for Rwanda and the national courts of Sierra Leone.” Agreement for and Statute of the Special Court for Sierra Leone, U.N.-Sierra Leone, art. 19, Jan. 16, 2002, THE SPECIAL COURT OF SIERRA LEONE, http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx (last visited Aug. 6, 2013).

²⁰⁰. See Weinberg de Roca & Rassi, supra note 161, at 9. The article states that “the ICC Statute does not expressly permit recourse to the sentencing practice of the territory where the crimes were committed; rather, Article 76(1) allows the Chambers to consider such practices if they are relevant to an ‘appropriate’ sentence.” Id. (quoting Rome Statute, supra note 6, art. 76(1)). The article further states, “it is the general view that the overriding sentence obligation must be to ‘individualize a penalty to fit the individual circumstances of the accused and the gravity of the crime.’” Id. (quoting Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, 717 (Feb. 20, 2001); Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, 511 (Mar. 15, 2002)).

²⁰¹. About the Court, supra note 2.
nation involved.202 As discussed in Part I,203 the ICC is a court of last resort and the nation must be unable or unwilling to handle the case before the ICC can gain jurisdiction.204 It is only after the failure of the nation to prosecute its own criminals, and after acquiring proper jurisdiction, that the ICC will step in to investigate and prosecute individuals suspected of major criminal wrongdoing.205 Second, it is in response to the complementarity principle that “implementation” of the provisions of the Rome Statute becomes important.206 In order for a state to maintain its sovereignty, and have the ability to prosecute its own criminals for international crimes, it must first have legislation that provides it with jurisdiction over such crimes.207 For example, if a state has signed the Rome Statute but does not include “war crimes” in its own penal code or legislation, then the only way war crimes could be prosecuted is by the ICC. Therefore, the principle of complementarity is not in force, as the ICC would be the only way to prosecute such crimes, rather than acting as the court of last resort.208

For this reason, nations adopting the Rome Statute will at least set forth draft legislation providing penalties in their domestic systems for the same crimes which the ICC may prosecute.209 This often includes the crimes of genocide, crimes against humanity, and war crimes, which are offenses prohib-

202. Rome Statute, supra note 6, pmbl. The preamble states that the “International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” Id.
203. Discussion of jurisdiction can be found in Part I.B.1 of this Note.
204. See Triponel & Pearson, supra note 9, at 67.
205. See id.; see also Carter & Weiner, supra note 30, at 1143.
206. Triponel & Pearson, supra note 9, at 68. Triponel and Pearson assert that “this principle [of complementarity] also requires that State Parties take an active role to implement the Rome Statute into their domestic legislation.” Id.
208. See id.
ized by the Rome Statute. In addition, implementing legislation sets forth sentencing guidelines for how that nation would punish international crimes. For example, Senegal is one nation that has ratified the Rome Statute and put implementing legislation in force. Several other nations, including the DRC, have at least drafted implementing legislation.

In drafting implementing legislation, most countries have adopted stronger penalties than those in the Rome Statute, and few African countries have adopted the specific wording of Article 77, or the thirty-year maximum penalty. The DRC is one example of a nation with draft legislation that sets forth sentencing guidelines very different from Article 77 and its thirty-year imprisonment provision. For example, Article 25 of the DRC draft legislation states, “whosoever kills a person protected by international humanitarian law during armed international or non-international conflict, is sentenced to life imprisonment,” and Article 26(1) states, “[p]unishable by a criminal sentence of five to twenty years is whosoever takes hostage a person protected by international humanitarian law.”

Throughout the DRC draft legislation, this format is followed, and varying degrees of crimes are assigned different sentences. Additionally, unlike the Rome Statute, many crimes are assigned a range, including a minimum sentence.

Importantly, and relevant to Lubanga’s sentencing, is that the “DRC’s draft legislation has adopted the [Rome] Statute’s definition of war crimes and has included the recruitment of children under the age of eighteen years as a punishable offense.” This is broader than the Rome Statute, where the age for penalized enlistment is children under the age of fifteen.

211. Id.; Yang, supra note 207.
212. Stone & Plessis, supra note 209.
213. Id.
214. Triponel & Pearson, supra note 9, at 95–96.
216. Id.
217. See id.
218. See id.
219. Triponel & Pearson, supra note 9, at 85.
220. Id.
Since Lubanga’s case provides only an estimate for the thousands of soldiers used, it is unclear if this could have impacted the ICC’s sentencing.\textsuperscript{221} Regardless, the DRC’s definition seems to reflect a desire for broader, harsher enforcement, and this could have been an influential factor in sentencing.\textsuperscript{222}

If a nation has at least drafted implementing legislation, the ICC could then easily give deference to how the nation itself would have prosecuted the crime.\textsuperscript{223} Although deference to national legislation may not favor uniformity across all states, it would instead allow for sentences that better reflect the different theories of punishment and are more likely to be respected as fair and legitimate by each state.\textsuperscript{224} First, a minimum sentence increases the effectiveness of deterrence, as potential offenders will more likely be aware of the consequences.\textsuperscript{225} Second, as part of the theory of retribution, the punishment should fit the crime and provide a moral balance.\textsuperscript{226} National legislation may provide for sentencing ranges, which include minimums and maximums, resulting in proportional punishments that better fit the crime.\textsuperscript{227} Additionally, if a sentence reflects the legislation that has been recorded by the state, then the desires of the victims and the community are more likely to be heard, and the theory of restorative justice is more likely to be satisfied.\textsuperscript{228}

Although it seems that many African nations have adopted broader interpretations or recommended higher sentences than the Rome Statute, this may not always be the case.\textsuperscript{229} For ex-

\begin{itemize}
  \item \textsuperscript{221} Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, 5 (July 10, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1440143.pdf.
  \item \textsuperscript{222} See Triponel & Pearson, supra note 9, at 85. The DRC’s desire can be assumed by its clear change in guidelines in draft legislation.
  \item \textsuperscript{223} See generally id. at 84–85.
  \item \textsuperscript{224} This specifically speaks to the theories of retribution and restorative justice. Additionally, increased awareness of the sentence one may face could also serve as a better deterrent.
  \item \textsuperscript{225} See generally New Zealand Sentencing Paper, supra note 128.
  \item \textsuperscript{226} See Dubinsky, supra note 11, at 618.
  \item \textsuperscript{227} See Draft Legislation—Implementation of the Rome Statute, supra note 216; see generally Stone & du Plessis, supra note 209.
  \item \textsuperscript{228} See Leinwand, supra note 130, at 809.
\end{itemize}
ample, there may be state parties that adopt draft legislation that actually lends support to or even lowers the maximum penalties below the thirty years provided by the Rome Statute.230 Regardless, the theories of punishment, especially restorative justice to the victims and the community, would be best satisfied by giving deference to a nation’s draft implementing legislation.231 Therefore, “complementarity,” “implementation,” draft legislation, and the different theories of punishment all lend support to giving deference to how a nation would sentence an individual who has committed an international crime in its territory.

V. FINAL RECOMMENDATIONS

As discussed, the criticisms of the ICTY and ICTR left the drafters of the Rome Statute in pursuit of sentencing provisions that would result in greater consistency in sentencing.232 The drafters of the Rome Statute chose to continue the balancing of mitigating, aggravating, and individual circumstances with the gravity of the crime.233 However, the Rome Statute included the additional use of a thirty-year imprisonment limitation that would be applicable in almost all cases.234 Finally, the Rome Statute differed from the guidelines governing the ICTY, ICTR, and SCSL when it did not include the provision requiring deference to national law.235

Unfortunately, in a possible attempt to reach more consistent results, the drafters of the Rome Statute granted the ICC judges too much discretion and failed to account for the theories of punishment. Lubanga’s case demonstrates that the problems that existed in the ICTY and ICTR have carried over to the ICC and will likely result in further inconsistencies in the future. However, rather than focus solely on “consistency,” the drafters of the Rome Statute should have given more consideration to the discretion granted to judges, the theories of punishment, and the purposes that the punishment of international criminals should serve.

230. Id.
231. See infra text accompanying note 238.
232. See supra text accompanying note 161.
233. Rome Statute, supra note 6, arts. 77–78.
234. Id. art. 77.
235. See sources cited supra note 199.
First, the thirty-year imprisonment provision should be removed. Even if the thirty-year limitation leads to greater consistency in sentencing, it will do little to deter criminals by imposing sentences that are too lenient, thereby failing the theories of punishment and resulting in minimal justice for victims.236 Hence, by focusing only on consistency, the ICC is failing to recognize its most important purpose, to punish “the perpetrators of the most serious crimes of concern to the international community.”237 However, by deferring to national legislation, any state party concerns regarding the removal of the thirty-year imprisonment provision may be counterbalanced.238 Additionally, deferring to national legislation will often provide a sentencing range, including a minimum, 239 making it more difficult for the ICC to arbitrarily sentence perpetrators.

Second, finding a solution for the balance of mitigating and aggravating circumstances is a more challenging endeavor. However, allowing the ICC broad discretion to choose the standards of proof used to evaluate these circumstances does not aid the situation. Alternatively, the same standard of proof should be used for both mitigating and aggravating circumstances, whether that standard is balancing of the probabilities, proof beyond a reasonable doubt, or an intermediate standard of proof such as clear and convincing evidence.240 This will serve to remove some judicial discretion and lead to sen-

236. If all proposed recommendations were adopted, however, and a state implementing legislation involved the use of thirty-year maximum imprisonment sentences, then that would be acceptable. This is because the ICC would be giving deference to the nations and restoring justice in a way that the victims and society approves of.

237. See About the Court, supra note 2 (emphasis added).

238. Assuming that both this recommendation and the later recommendation for deference to national implementation legislation were adopted, a procedural safeguard would be provided for any states that disagree with the removal of the thirty-year limitation. For example, a state could reinstate the thirty-year limitation, or any limitation for that matter, in their implementing legislation, and that would be given deference. Therefore, any concerns regarding the removal of the thirty-year limitation would be counterbalanced by deference to national legislation.

239. See Stone & Plessis, supra note 209. This is based on the earlier explanation that the ICC arbitrarily chose a sentence between zero and thirty years. See supra text accompanying note 186. Having some type of minimum guideline would prevent the ICC from sentencing below a certain threshold.

240. See supra text accompanying note 52.
tences that fairly and equitably balance both positive and negative considerations relating to the defendant.

Finally, the ICC should reinstate the provision of the ICTY, ICTR, and SCSL that allow for deference to the law of the nation, and specifically allow for at least some deference to drafts of implementing legislation. Although this may not result in consistency on the international level, it would result in consistency on the national level by taking away some of the broad discretion granted to the ICC; and most importantly, it would cater to the theories of punishment. First, it connects the “departure from international sentencing guidelines to a State’s domestic law” or implementation law. This in turn “both justifies its reasoning to the international community, and assures the domestic constituency that local values will be considered and protected.” Second, it forces the court to “express its reasoning, avoiding reliance on discretion alone.” This would, in effect, limit the ICC’s broad discretion and force it to better serve the injured nation.

By implementing all of these changes, the ICC would ultimately use the relevant nation’s draft legislation as a guideline for the sentence, mitigating and aggravating circumstances would be equally weighed into the sentencing equation, and the thirty-year provision would no longer apply. These changes would better serve all of the theories of punishment. First, with national legislation providing a different sentence range based on the offense, and the removal of the thirty-year limitation, the sentences would be “proportional” to the offence committed.

241. Leinwand, supra note 130, at 850.
242. Id.
243. Id.
244. See Keller, supra note 7, at 57. In the section entitled “The Use of Aggravating and Mitigating Circumstances,” Keller discussed that “the [ICTY and ICTR] Trial Chambers’ discretion is perhaps too broad and should be limited by general sentencing guidelines.” Id.

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and better satisfy the theory of retribution. Second, the removal of the thirty-year limitation and the equal weighing of mitigating and aggravating circumstances would provide for harsher sentences, strengthening the general deterrent effect. Finally, by deferring to draft legislation, the nation itself will weigh in on the sentence, helping to restore justice to that nation.

In the end, Lubanga is the first and only case the ICC has considered. With proper changes to its sentencing guidelines, the ICC can be a strong enforcer of international criminal law that deters future offenders, punishes perpetrators based on their true moral culpability, and brings restorative justice to the nations involved.

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