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SYRACUSE UNIVERSITY COLLEGE OF LAW

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Massacre in the Media: Why Mexican Journalists Should Qualify for Asylum Protection Under the 'Particular Social Group' Prong Before It's Too Late

Briana T. Clayton*

ABSTRACT

Today, Mexican journalists continue to live in fear, and even face death, because of their critical role in disseminating information to their communities. These journalists have come under attack not only from corrupt public officials in law enforcement and the government but also from individuals running organized crime in Mexico. They have paid the ultimate cost because of the target on their back. In 2018, there were 544 attacks against journalists,[1] and as a result, journalists around Mexico have vehemently sought to obtain asylum at the border. In 2019, the estimated number of asylum-seekers doubled from 2018.[2] As of October 2019, the number of Mexican refugees also increased from 39,000 people in 2018 to over 60,000.[3] Yet despite increased refugee numbers that show an increased need to aid those fleeing persecution, the deadly dilemma Mexican journalists face seems to be met with indifference by the United States. This indifference is exemplified by the Trump administration's policies that disregard the dangerous conditions these individuals live with day in and day out. Against the backdrop of the asylum process, the policy reasons for granting asylum will reinforce why the United States

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* J.D. Candidate, 2021, Syracuse University College of Law. First, I would like to thank my family for their continuous love and support throughout my entire academic career, but especially during law school. You have supported and encouraged me in times I was full of doubt, and pushed me to challenge myself, especially during this writing process. Thank you for believing in me to the fullest. I would also like to express my sincerest appreciation to Professor Roy, who provided much support and guidance through this process, driving me to be greater with every draft I wrote. Lastly, thank you to my friends who have been and continue to be with me every step of the way, acting as my creative soundboard with each and every idea.

1. Civic Space, *Mexico: Report Shows Silencing of Journalists and Media Freedom*, ART. 19 (Apr. 17, 2019), *available at* https://www.article19.org/resources/mexico-report-shows-silencing-of-journalists-and-media-freedom/ (last visited Oct. 19, 2020).

2. Wendy Fry, *Asylum-seekers in Mexico Expected to Double by End of 2019 Amid Trump Administration Immigration Crackdown*, SAN DIEGO UNION-TRIB. (Oct. 21, 2019), *available at* https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-10-21/sd-me-tijuana-migration-meeting (last visited Oct. 19, 2020).

3. *Id.*

should honor their obligations under the 1951 Convention Relating to the Status of Refugees and accept these asylum-seekers with open arms.

I. INTRODUCTION

The press freedom organization, Article 19, stated, "Mexico is the most dangerous country in the world to practice journalism."[4] Article 19 made this statement after the newly elected Human Rights Commissioner, Rosario Piedra Ibarra, questioned the veracity of the number of Mexican journalists who have been killed for simply fulfilling the duties of their occupation and passion.[5] In 2019, according to the Committee to Protect Journalists, Mexico surpassed Syria and became the deadliest nation for journalists.[6] The Committee reported an average of 100 homicides a day in Mexico from January to June of that year.[7] Following the Commissioner's statement, a group of reporters filed a complaint against her. The reporter's complaint made note of how increasingly troubling the situation in their home country was becoming, and why they are desperately seeking aid after many were forced to flee their homes in the face of threat: "[t]he simple ignorance of 131 journalists killed in Mexico, coming from the 'ombudsman,' is, in itself, a violation of the human rights of those of us who have suffered violence for practicing journalism."[8]

Members of the press know the significance of their job to seek the truth and disseminate it to the public.[9] That responsibility has produced

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4. David Agren, *Mexico's Human Rights Chief Draws Fury for Asking if Journalists Have Been Killed*, GUARDIAN (Nov. 14, 2019), *available at* https://www.theguardian.com/world/2019/nov/14/mexico-rosario-piedra-ibarra-journalists-killed (last visited Oct. 19, 2020).

5. *Id.* After being elected, Commissioner Rosario Piedra Ibarra asked reporters: "They've killed journalists?" Ibarra tried to distance herself from the attacks, claiming they had taken place under past administrations despite a number of journalists being killed since President Andrés Manuel López took office in 2018. *Id.* Mexican journalists responded in outrage, especially since tensions between the President and the press corps worsened. *Id.*

6. Carrie Kahn, *12 Journalists Have Been Killed In Mexico This Year, The World's Highest Toll*, NPR (Sept. 12, 2019), *available at* https://www.npr.org/2019/09/12/759882660/12-journalists-have-been-killed-in-mexico-this-year-the-worlds-highest-toll (last visited Oct. 19, 2020).

7. *Id.*

8. Agren, *supra* note 4.

9. *See generally* Bill Kovach & Tom Rosenstiel, *The Elements of Journalism*, AM. PRESS INST. (Dec. 2020), *available at* https://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/elements-journalism/ (last updated Oct. 19, 2020) (discussing the necessity for journalists to show an ultimate allegiance to the citizens, striving to put the public interest and the truth above their own self-interests or assumptions).

fatal results, prompting members of the press to seek asylum at the border. The process of proving the requirements for asylum at the border, specifically under the *political opinion* or *particular social group* prongs under U.S. standards, has been almost impossible. This Note will examine the obstacles preventing these journalists from receiving refugee status, the treatment they face during the asylum process, and why the *political opinion* or *particular social group* prongs should be extended to journalists.

Section II of this Note conceptualizes the harsh realities that Mexican journalists face through the experiences of a few, and lays the Note's foundation by illustrating some of the persecution many are attempting to escape. Section III discusses, in-depth, the backdrop of Mexico and its stronghold on censoring members of the media. Section IV provides an overview of the relevant international law that explicitly supports refugees and asylum-seekers. This section also details the asylum process for those seeking asylum in the United States, and those who arrive at designated ports of entry at the U.S. border. The most favorable grounds for Mexican journalists to argue for asylum, of the five grounds for asylum under U.S. law, is membership of a *particular social group*.

Section V addresses the flawed application of the *particular social group* prong through case law and also considers reasons why, despite the cases cited, the particular requirements should be in favor of Mexican journalists. Section VI focuses on another ground for asylum, *political opinion*, a second ground that may apply to Mexican journalists in some cases. Finally, Section VII contemplates the core First Amendment values of freedom of speech and press, which may support the argument for a broader interpretation of asylum for Mexican journalists.

II. CATEGORICAL BARRIERS TO SEEKING ASYLUM AND ITS INCREASED IMPLICATIONS ON MEXICAN JOURNALISTS

The media's role in the world is essential: they are educators, providing the public with knowledge and giving them the tools to interact and develop their own opinions and conclusions on matters of public concern.[10] The media transmits reality and uncovers the underlying facts of

10. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (quoting Roth v. United States, 354 U.S. 476, 484 (1957));

events.[11] The world would not function as effectively if the media did not disseminate and reveal the truth on a host of subjects. Yet media members and journalists in Mexico are constantly living in fear for their lives simply for doing their jobs; at the same time, they face continuous hardships during the United States asylum-seeking process. The Mexican Constitution explicitly states that freedom of speech and press shall not be violated, but no true safeguards are in place for journalists seeking protection from the government or drug cartels who take serious offense to the information about which these journalists report and publish.[12] Journalists have no other option but to seek asylum in the United States. However, when exercising their right to seek asylum, found explicitly in the 1951 Refugee Convention, these individuals have failed to satisfy the U.S. government's standard for proving their fear of persecution under one of the five grounds for asylum: religion, race, nationality, *political opinion*, or membership in a *particular social group*.[13]

Journalists like Emilio Gutierrez Soto are brave enough to pen their experiences, obstacles, and frustrations while living in a dangerous

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Branzburg v. Hayes, 408 U.S. 665, 726-27 (1972) (Stewart, J., dissenting) ("Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society. Not only does the press enhance personal self-fulfillment by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government."); N.Y. Times Co. v. U.S., 403 U.S. 713, 717 (1971) (Black, J., concurring) ("The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. Paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people . . . ."); *Id.* at 728 (Stewart, J., concurring) ("In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people").

11. Marie Bray, *The Role of Media in Shaping Public Opinion*, THE QUAD (Mar. 5, 2018), *available at* https://wcuquad.com/6010053/op-ed/the-role-of-media-in-shaping-public-opinion/ (last visited Oct. 19, 2020).

12. Jon Allsop, *A Deadly Year for Mexico's Journalists*, COLUM. J. REV. (Aug. 27, 2019), *available at* https://www.cjr.org/the_media_today/mexico_journalist_murders.php (last visited Oct. 19, 2020) (the impunity rate for crimes against free expression is almost 100 percent, and a federal program offering protective measures to almost 1,000 reporters, including panic buttons and bodyguards, has not always worked).

13. U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention], as amended, U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol] [collectively hereinafter, the Convention], *available at* http://hrlibrary.umn.edu/instree/v1crs.htm (last visited Oct. 19, 2020).

climate where peril awaits them at every turn and they are eventually forced to seek safety at the border.[14] Soto has been a journalist in Mexico for twenty-five years and has covered a range of serious, high-stake news.[15] As a result, he was driven to flee his home and seek asylum in the United States in 2008.[16] Soto was one of the fortunate individuals not turned away at the border immediately; he was held instead in a detention center with his son.[17] Eventually, the two were allowed out of the detention center as they awaited a decision regarding whether they would be granted asylum.[18] In 2017, a judge denied Soto's asylum claim on the basis that Soto was unable to prove his life would be in danger if he returned to Mexico.[19] Many journalists who flee Mexico have heard these same words from American courts, sealing their fate the minute they decide evidence lacks credibility.

Lydia Cacho, another Mexican journalist, is all too familiar with the hurdles of being an investigative journalist in her home country. Cacho's career as an investigative journalist in Mexico spanned twenty years, but she was illegally arrested and tortured in 2005 after she released a book criticizing some of Mexico's political elites.[20] Cacho was detained by Mexican authorities for weeks, and harassed and tortured while in custody.[21] That harassment did not end when she was released from custody, however, as Cacho began receiving death threats shortly thereafter. Despite the continued harassment, Cacho continued to promote her story to the public.[22] Cacho persevered, and the opportunity arose to present a human rights case in front of Mexico's Supreme Court, effecting change in Mexican laws.[23]

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14. Emilio Soto, *I'm Safe, But Not Yet Free*, POLITICO (Jan. 20, 2019), *available at* https://www.politico.com/magazine/story/2019/01/20/mexico-asylum-immigrants-224028 (last visited Oct. 19, 2020).

15. *Id.*

16. *Id.*

17. *See id.*

18. *Id.*

19. Soto, *supra* note 14.

20. Nicole Krestos, *2010 Tully Award for Free Speech*, NEWHOUSE SYRACUSE UNIV. (2010), *available at* https://tully.syr.edu/award/lydia-cacho/ (last visited Oct. 19, 2020). *See also* Lydia Cacho, *Los Demonios Del Edén: El Poder Que Protégé a la Pornografia Infantil* (2005) (exposed a Mexican child pornography ring that was protected by Mexican politicians and businessmen).

21. *Id.*

22. *See id.*

23. *Id.* For example, defamation is now decriminalized, though it was once a criminal offense.

Méndez Pineda, a twenty-five-year-old reporter, fled to the border after receiving months of threats and harassment from corrupt officials in law enforcement stemming from the fallout of an article he published.[24] Pineda believed he could seek aid from the United States, given the increasing wave of terror and violence for journalists in particular.[25] A month after crossing the border, Pineda had his first credible-fear interview and passed in ninety minutes; however, he remained in Immigration and Customs Enforcement's (ICE) custody as he awaited to appear in court.[26] The same attorney who worked on Soto's case, Carlos Spector, also aided Pineda. However, under the Trump administration, release from ICE custody was more difficult to obtain than ever before.[27] After a sixty-eight page appeal, Pineda was denied bail from ICE custody a second time, and he eventually self-deported given the conditions of the facilities he was forced to live in.[28] However, journalists like Pineda who are denied asylum and must return to Mexico do not return to a life conducive to their well-being, as they remain in fear of persecution by those who drove them out of the country in the first place. Many journalists denied asylum live in Mexico under the radar, hiding just to be able to see the next day. Less than a day after Pineda's return, award-winning journalist Javier Valdez was gunned down in cold blood and broad daylight in Culiacan, Sinaloa.[29] Valdez reported on critical issues, particularly that of the drug war and the participation of one of the most powerful drug dealers, Joaquin "El Chapo" Guzman.[30] Young journalists like

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24. J. Weston Phippen, *Hold the Line*, MOTHER JONES (Oct. 2019), *available at* https://www.motherjones.com/politics/2019/09/carlos-spector-trump-asylum-mendez-pineda/ (last visited Oct. 19, 2020).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Nina Lakhani, *They Treat Everyone Like Criminals: US Asylum Fails Reporter Fleeing Mexico*, THE GUARDIAN (May 28, 2017), *available at* https://www.theguardian.com/world/2017/may/28/us-asylum-immigration-mexico-reporter-journalist-martin-mendez-pineda (last visited Oct. 19, 2020).

30. *Id.* Joaquín Guzmán, also known as "El Chapo," was born in a remote and impoverished area of Sinaloa state in northwestern Mexico, and became the leader of the Sinaloa cartel in the late 1980s; *see also* André Munro, *Joaquín Guzmán: Mexican Criminal*, BRITANNICA (Feb. 27, 2014), *available at* https://www.britannica.com/biography/Joaquin-Guzman-Loera (last visited Oct. 18, 2020). Under his leadership, the Sinaloa cartel developed creative smuggling techniques and strategies, including building air-conditioned tunnels under the Mexico-U.S. border, hiding drugs in chili pepper cans and fire extinguishers, and catapulting drugs over the border. *Id.* In the early 21st century, Guzmán was believed to be responsible for most of the marijuana and cocaine trafficked from Colombia and Mexico to the United States and the largest smuggler of methamphetamine in the Asia-Mexico-U.S.

Pineda are rightfully scared and seeking to get out of the country when some of their well-established, successful, respected colleagues are killed without regard. How can the significant value of media continue to remain intact and grow when reporters are being silenced or are choosing to self-censor to avoid the same outcome as their peers?

Journalists face severe uncertainty. Presently, 99% of murders and disappearances of fellow journalists in Mexico remain unsolved.[31] President Andrés Manuel López Obrador pledged to improve protections for journalists, but the administration has shown that it does not fully recognize the country's grave freedom of expression crisis and the seriousness of the issue which further increases the uncertainty of journalists' situations.[32] The government's proposed commitments have appeared to be insufficient to reduce the level of impunity, and it is unclear whether that is due to an intentional blind eye or underappreciation of the media's role in news gathering and distribution.[33]

The President's communication team claims that what is perceived as the stigmatization of journalists and media outlets is simply a matter of public debate.[34] Their cavalier attitude regarding the exigency of the press is contributing to the vulnerable, dangerous environment in which media members are left.[35] If the highest level of government does not share the same concern for this group of individuals, whose objective is to promote a truly open and free public discussion, the rise of violence against them will only continue.

III. MEXICO'S POLITICAL HISTORY AND RESULTING CENSORSHIP

The freedoms of speech and press are suffering in Mexico. Journalists are being silenced and murdered. Those in hiding receive the

triangle. *Id.* In 2004, the U.S. government announced a $5 million reward for information leading to his arrest on federal drug charges, but he continued to evade capture for quite some time. *Id.* Despite being apprehended in Matzalán, Mexico in 2014, Guzmán escaped custody, fleeing from the maximum-security Atiplano prison through a shaft beneath the shower in his cell to a tunnel, more than a mile long, that led to a house on a construction site. *Id.* He was captured once again in January of the following year. *Id.*

31. *Mexican Government Declines to Recognize Freedom of Expression Crisis*, RSF (Nov. 7, 2019), *available at* https://rsf.org/en/news/mexican-government-declines-recognize-freedom-expression-crisis (last visited Oct. 18, 2020).

32. *Id.*

33. *Id.*

34. *Institutional Revolution Party,* BRITANNICA (Sept. 20, 2018), *available at* https://www.britannica.com/topic/Institutional-Revolutionary-Party (last visited Mar. 11, 2020).

35. *Id.*

government's message loud and clear, to remain silent and out of sight–or else their life will be next. Drug cartels are effective at intimidating members of the media, and the Mexican government does seemingly little to aid or protect them. The quickest way for the media to face potentially fatal consequences as a result of their profession is to publish wrong or glaringly unfavored content of the Mexican government and drug cartels. This issue raises the question, *has Mexico always deprived the media of the freedom of speech and the press?* The Mexican Constitution currently provides Mexican citizens with the right to freedom of expression. Article 6 of the Mexican Constitution states: "[t]he expression of ideas shall not be subject to any judicial or administrative investigation, unless it offends good morals, infringes the rights of others, incites to crime, or disturbs the public order."[36] In addition, Article 7 of the Mexican Constitution states:

> Freedom of writing and publishing writings on any subject is inviolable. No law or authority may establish censorship, require bonds from authors or printers, or restrict the freedom of printing, which shall be limited only by the respect due to private life, morals, and public peace. Under no circumstances may a printing press be sequestrated as the instrument of the offense.
>
> The organic laws shall contain whatever provisions may be necessary to prevent the imprisonment of the vendors, newsboys, workmen, and other employees of the establishment publishing the work denounced, under pretext of a denunciation of offenses of the press, unless their guilt is previously established.[37]

Although these articles suggest the media is fully protected in Mexico, looking at the history of the country, it seems safe to say that Mexican media members have never been fully accorded nor recognized as having the same value as other members of the profession located elsewhere around the globe.

36. Constitución Política de los Estados Unidos Mexicanos, CP, art. 7, Diario Oficialde la Federación [DOF] 1968 (Mex.), *available at* https://web.oas.org/mla/en/Countries_Intro/en_mex-int-text-const.pdf (last visited Mar. 13, 2020).

37. *Id.* at 3.

A. Political Influence in Censorship of the Media

For over seventy years, Mexico was led by the Institutional Revolutionary Party (PRI), from 1929 until the end of the twentieth century.[38] The PRI was founded by Plutarco Elias Calles, alongside a group of local political leaders and military strongmen, as well as labor unions and regional political parties.[39] The PRI began as a means of organizing the political competition, but by 1934 Calles was singlehandedly in control of the Mexican government and politics, and his influence remained long after he left office.[40] Calles and Lazaro Cardènas, Mexico's sitting President from 1934-1940, engaged in a serious power struggle for political control of the country that resulted in Cardènas re-grouping the PRI. The PRI's members grew to some 4.3 million people within a year.[41] In the fifty years that followed, PRI's power only increased, and by the mid-1970s corruption had permeated the political organization, reaching unprecedented levels as more wealth flowed into the country.[42] At this point the media started to see the system and this dynamic, and called officials out for their actions.[43]

The PRI's presence was felt and supported by many, but the party was not afraid to employ repression and corruption to fulfill any objectives it saw as necessary and censor those who chose to speak out against the PRI's favor.[44] Media outlets have relied heavily on the government for their funding, which remains the case today, yet the PRI has had no sympathy for the profession. In the 1970s, PRI President Lopez Portillo stated, "I don't pay for them to beat me," and ceased government advertising in the only major independent media outlet at that time.[45] In turn, the government awarded certain media outlets government advertisements, tax breaks, and loans from the government.[46] However, no media

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38. *Id.*

39. *Institutional Revolution Party (PRI)*, U.S. LIBR. OF CONG. (2018), *available at* http://countrystudies.us/mexico/84.htm (last visited Mar. 11, 2020).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Constitution of Mexico, *supra* note 36.

45. Daniel Moreno et al., *Ad Politics: How Mexico's Government Controls Journalism*, ALJAZEERA (May 27, 2018), *available at* https://www.aljazeera.com/programmes/listening-post/2018/05/ad-politics-mexico-government-controls-journalism-180526094603031.html (last visited Sept. 5, 2020).

46. Lynn Romero, *Understanding Censorship of the Mexican Media Through an Analysis of Mexico's Political History*, *available at* https://repositories.lib.utexas.edu/bitstream/handle/2152/15562/Romero_FinalPoster.pdf?sequence=2 (last visited Jan. 18, 2020).

outlet was safe; if, after receiving a loan or tax break from the government, they chose to publish something the government believed was unfavorable to their interests, the PRI would demand immediate repayment.[47] Bribery was common, and some journalists were even added to the payroll of some officials to stay out of harm's way.[48] The PRI demanded its respect and was slow to let up on its control over the media.

Despite clear disapproval and lack of support from the government, the 1970s saw a rise in autonomous, independent, free journalism that challenged Mexico's regime publicly.[49] Many journalists believed Mexico's civil, social, and political realities needed to be brought to the forefront of public discourse, so they began highlighting alternative viewpoints.[50] The journalistic culture began to bubble with the emerging competition, and the readership base enhanced, in part, because of the press's credibility.[51] Individuals working in the media enjoyed the ability to communicate in a way that showcased the diversity and plurality of perspectives on significant issues which allowed other countries a view into their world. By the 1980s, the media was a force to be reckoned with – but not coincidentally, murders of journalists also began to rise in the '80s and this trend continued throughout the next two decades.[52]

B. Drug Cartels' Contributing to Silence the Media

In addition to potential harms that may be attributable to the government, Mexican cartels are responsible for the other increased risks to Mexican journalists. Currently, Mexico is "the largest foreign supplier of heroin, methamphetamine, and cocaine to the United States."[53] In 2019 alone, drug cartels were behind more than 17,000 homicides in Mexico between January and June. Drug trafficking organizations have splintered into smaller, competing factions of variable sizes, beginning in 2017, which has made it especially difficult to eradicate organized crime.[54]

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47. *Id.*

48. *Id.*

49. Felipe Carlos Betancourt Higareda, *The Development of the Media and the Public Sphere in Mexico*, 5 MEX. L. REV. 305, 319 (2013), *available at* https://www.sciencedirect.com/science/article/pii/S1870057816300270#fn0310 (last visited Oct. 17, 2020).

50. *Id.*

51. *Id.*

52. Romero, *supra* note 46.

53. Brianna Lee et al., *Mexico's Drug War*, CFR (Oct. 22, 2019), *available at* https://www.cfr.org/backgrounder/mexicos-drug-war (last visited Oct. 17, 2020).

54. *Id.*

Older organizations retained stronger familial ties, while their leaders were elusive kingpins who have been in such positions for quite some time.[55] Drug trafficking operated for over a century in Mexico, picking up momentum when the Columbian drug cartels came to their demise, using bribery and violence to discipline their workers, limit competitors, and coerce and corrupt government officials to prevent government action against them.[56] These efforts to re-establish impunity have seemingly succeeded, and only nine major drug trafficking organizations are in existence today.[57]

The war on drugs has increased the amount of violence in Mexico. However, the danger of corruption is also a persistent issue. Public officials have been able to get away with corruption in their roles and intimidating journalists.[58] Journalists, in particular, remain caught between two forces. They investigate and write pieces regarding significant events, but will be bribed to write the version a particular cartel wants, or be harassed, threatened, harmed, and possibly killed by cartels if their articles reveal too much information or cast them in an unfavorable light.[59] There have also been instances where journalists may be caught between two rival cartels that demand two conflicting versions of stories, and the journalist cannot avoid risk on either side.[60]

Despite little to no aid from the government, Mexican journalists have carried on their love for reporting and writing on real issues, refusing to give up what they love to do the most. Yet these risks remain, and it fuels the desire for these journalists to flee and seek asylum on the other side of the border. Organizations like the National Association of Hispanic Journalists are dedicated to supporting Hispanic journalists around the world.[61] One of their main goals is to promote accurate and fair treatment of Hispanics by the news media, as well as foster a greater understanding of the unique cultural identity, interests, and concerns of Hispanic journalists.[62] Reporters Without Borders (RSF), one of the world's largest nonprofit organizations, supports Mexican journalists in their

55. *Id.*

56. *Id.* at 9.

57. *Id.* at 14.

58. Phippen, *supra* note 24.

59. Don Winslow, *Mexican Journalists Risk Death to Tell the Truth*, TIME (June 28, 2017), *available at* https://time.com/4836655/mexican-cartels-free-press-don-winslow/ (last visited Oct. 12, 2020).

60. *Id.*

61. *NAHJ Mission*, NAHJ, *available at* https://nahj.org/about-overview/ (last visited Oct. 12, 2020).

62. *Id.*

mission to protect freedom of information.[63] Additionally, there are people on the ground who support Mexican journalists and try to provide resources where needed. Carlos Spector, an American attorney, specialized in arguing asylum cases for thirty years.[64] Spector, growing up between El Paso, Texas, and Guadalupe, Mexico, was familiar with the challenges of immigrants and it sparked his passion for immigration work, involving such cases as that of Méndez Pineda.[65]

IV. OVERVIEW OF ASYLUM AND THE RIGHT OF REFUGEES

The system of international protection has had a complicated history dating back to its origins. Article 14(1) of the Universal Declaration of Human Rights (UDHR), which was adopted in 1948, guarantees the right to seek and maintain asylum in other countries.[66] The Declaration has been said to have been created as a "set standard of rights for all people everywhere: whether male or female, black or white, communist or capitalist, victor or vanquished, rich or poor, for members of a majority or a minority in the community."[67] It was made for "recognition of the inherent dignity and . . . equal and inalienable rights of all members of the human family '. . . and through that recognition [to] provide the foundation of freedom, justice, and peace in the world.'"[68] The controlling international convention on refugee law is the 1951 Convention relating to the Status of Refugees (1951 Convention) and its 1967 Optional Protocol relating to the Status of Refugees (1967 Optional Protocol),[69] and the

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63. *Our Values*, REP. WITHOUT BORDERS, *available at* https://rsf.org/en/our-values (last visited Oct. 10, 2020). A central message of the RSF's value statement is that the freedom of information is unquestionably one of the freedoms that help to develop the capacities of individuals. *Id.* Freedom of information is essential to the growth in all the social, economic and political possibilities available to the individual. *Id.*

64. Phippen, *supra* note 24.

65. *Id.* RSF connected Pineda with Spector because of his well-known success with four other Mexican journalists, including Emilio Gutiérrez Soto. *Id.* In the years since Pineda self-deported in 2017, Spector has continued to fight for asylum-seekers, despite the Trump administration's treatment of asylum cases. *Id.*

66. G.A. Res. 217 (III), A Universal Declaration of Human Rights (Dec. 10, 1948).

67. Peter Bailey, *The Creation of the Universal Declaration of Human Rights*, UNIVERSAL RIGHTS NETWORK, *available at* https://www.universalrights.net/main/creation.htm#top (last visited Oct. 18, 2020).

68. *Id.*

69. U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention], as amended, United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

process is notably overseen by the United Nations High Commissioner for Refugees (UNHCR).[70] The UNHCR has existed for almost seventy years and has worked with over fifty million refugees to successfully get them to safety and freedom for a new life. During the aftermath of the Second World War, the UNHCR was created by the United Nations and from its inception, it has been a tremendous aid to millions of Europeans when they resettled.[71] The following year, the 1951 Refugee Convention was created and overseen by the UNHCR, which defined the term "refugee" and outlined refugee rights as well as the responsibilities of the 145 State signatories to protect them.[72] Nonrefoulement is one of the core principles of the Convention, and it stands for the proposition that refugees should not be returned to a country where serious threats to their life and freedom exist based on "race, religion, nationality, membership of a *particular social group*, or *political opinion*."[73] The 1967 Protocol recognized that refugee situations would continue to occur in the future, and broadened the Convention's applicability by removing its time and geographical limitations so that persons seeking refugee status no longer were confined to displacement following events in Europe before January

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70. *Asylum Law, Asylum Seekers and Refugees: A Primer*, TRAC IMMIGR. (Aug. 7, 2006), *available at* https://trac.syr.edu/immigration/reports/161/ (last visited Oct. 18, 2020). The primary responsibility of the UNHCR is to lead and coordinate international efforts to protect refugees as well as to solve global refugee issues. *Id.*

71. *History of UNHCR*, UNHCR, *available at* https://www.unhcr.org/pages/49c3646cbc.html (last visited Oct. 18, 2020). The UNHCR won its first Nobel Peace Prize in 1954 for its work in Europe. *Id.* The UNHCR won its second Nobel Peace Prize in 1981 for its worldwide refugee assistance during the 1960s and over the following two decades. *Id.*

72. *The 1951 Refugee Convention*, UNHCR, *available at* https://www.unhcr.org/en-us/1951-refugee-convention.html?query=1951%20convention%20of%20refugee (last visited Oct. 18, 2020). The 1951 Convention is the key legal text that has formed the basis for the UNHCR's work. *Id.* It was ratified by 145 State parties. *Id.* Other rights contained in the 1951 Convention include: "The right not to be expelled, except under certain, strictly defined conditions (Article 32); the right not to be punished for illegal entry into the territory of a contracting State (Article 31); the right to work (Articles 17 to 19); the right to housing (Article 21); the right to education (Article 22); the right to public relief and assistance (Article 23); the right to freedom of religion (Article 4); the right to access the courts (Article 16); the right to freedom of movement within the territory (Article 26); and the right to be issued identity and travel documents (Article 27 and 28)." *See also The 1951 Refugee Convention and Protocol*, FACING HIST. AND OURSELVES, *available at* https://www.facinghistory.org/standing-up-hatred-intolerance/1951-refugee-convention-and-protocol (last visited Oct. 18, 2020).

73. Sir Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Nonrefoulement: Opinion*, UNHCR (June 20, 2001), *available at* https://www.unhcr.org/enus/protection/globalconsult/3b33574d1/scope-content-principle-non-refoulement-opinion.html?query=nonrefoulement (last visited Dec. 5, 2020).

1, 1951.[74] The United States immediately ratified the 1967 Protocol in 1967, but in 1980, Congress passed the Refugee Act which followed the prior 1951 Convention.[75] The Refugee Act defined a refugee—aligned with the definitions of the 1951 Convention—as "an individual . . . outside their country of residence or nationality, or someone . . . without any nationality and is unable or unwilling to return to his or her homeland because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a *social group*, or *political opinion* . . . "[76] With this new legal foundation, the United States appeared to want to commit itself as a nation to opening its borders to those being persecuted and oppressed, providing a safe place for refuge for those who needed such shelter.[77]

U.S. immigration law also makes the distinction between refugees and asylum-seekers. A refugee is a person who claims to meet its definition from outside the United States,[78] and an asylum-seeker is a person who claims to meet the definition of "refugee" and is already located in the United States.[79] This definition is significant in determinations of both refugee resettlement and asylum status, but the process to obtain either is quite different.[80] The Immigration and Nationality Act (INA) explicitly gives the executive branch the power to determine how the refugee process operates each year.[81] The INA also describes the asylum process in section 208 (a)(1):

> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after

74. *The 1951 Convention and its 1967 Protocol*, UNHCR (2011), *available at* https://www.unhcr.org/en-us/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html (last visited Sept. 6, 2020).

75. Dan Moffett, *What is the United States Refugee Act of 1980?*, THOUGHTCO (Nov. 19, 2019), *available at* https://www.thoughtco.com/united-states-refugee-act-1980-1952018 (last visited Oct. 18, 2020).

76. *Id.*

77. *Id.*

78. Whitney Drake, *Disparate Treatment: A Comparison of United States Immigration Policies Toward Asylum-Seekers and Refugees from Colombia and Mexico*, 20 TEX. HISP. J.L. & POL'Y 121, 124 (2014); *see generally* Immigration and Nationality Act § 207(d)(1).

79. Drake, *supra* note 78; *see* Immigration and Nationality Act § 208(a)(1) (1980); *see also* 8 U.S.C. § 1158(a)(1) (1980).

80. Drake, *supra* note 78.

81. Drake, *supra* note 78; *see* Immigration and Nationality Act § 207(a) (1980); *see also* 8 U.S.C. § 1157(a) (1980).

having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum . . .[82]

A. The Asylum Process

It is well-settled that a person may request asylum for any country outside of their own; there is no requirement for one to claim asylum in the first country they reach.[83] An asylum-seeker is also entitled to remain in the country of asylum and have their claim heard, a key right provided under the 1951 Convention.[84] Applicants who demonstrate that they meet the definition of a refugee can seek asylum in two ways: either affirmatively, by applying, or defensively, by raising a claim resisting removal if they have been apprehended while living in the United States without legal status.[85] An affirmative asylum-seeker is physically present in the United States and must apply for asylum within one year of his or her arrival in the United States.[86] Affirmative asylum claims are reviewed by the U.S. Citizenship and Immigration Services through a non-adversarial interview with an asylum officer.[87] The asylum-seeker must complete an I-589 Application which provides personal information demonstrating the grounds for asylum.[88] Then, the asylum officer may grant the asylum status or refer the applicant for removal proceedings in an immigration court, where the applicant will have to pursue asylum in front of an immigration judge.[89]

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82. Drake, *supra* note 78; *see also* Immigration and Nationality Act § 208(a)(1) (1980).

83. NewsDeeply, *The Asylum Process*, THE NEW HUMANITARIAN, *available at* https://deeply.thenewhumanitarian.org/refugees/background/the-asylum-process (last visited Oct. 19, 2020). The "first country of asylum" principle refers to the expectation that countries should accept asylum-seekers fleeing their neighboring countries. *Id.* The host country has the primary responsibility to provide international protection, including recognizing and providing a safe haven to refugees and processing asylum cases in a fair and timely fashion. *Id.*

84. *Id.*

85. *See* 8 U.S.C. § 1158(a)(1) (2009); *see also* 8 C.F.R. § 208.2(a)(b) (2009).

86. *Immigration Law: The Rules and Procedure for Asylum Seekers*, LAWSHELF, *available at* https://lawshelf.com/shortvideoscontentview/immigration-law-the-rules-and-procedure-for-asylum-seekers (last visited Oct. 19, 2020). The asylum-seeker, at the time he or she is applying for asylum, may be undocumented, living in the United States without status, or may have entered the United States on a visa which will soon expire. *Id.*

87. *Id.*

88. *Id.* In the application, the asylum-seeker sets forth information such as whether he or she has ever experienced "harm, or mistreatment or threats," whether he or she "fears harm or mistreatment" if forced to return home, and whether he or she has been imprisoned or detained in countries outside of the United States. *Id.*

89. *Id.*

A defensive asylum-seeker is an individual who has been apprehended after entering the United States, who then applies for asylum while the threat of removal by the Department of Homeland Security hangs in the balance.[90] This asylum-seeker must complete the same application as an affirmative asylum-seeker, however, the application must be filed with the immigration court that has jurisdiction over the case.[91] Without the opportunity of a non-adversarial interview where they can openly provide any information pertinent to their situation, the applicant applying defensively must show that persecution is more probable than not if he or she is forced to return home.[92] Defensive asylum cases are heard in adversarial proceedings, and the immigration judge will decide whether the applicant is eligible for asylum.[93]

Although the United States agreed to protect refugees, American courts had issues applying the refugee definition to asylum-seekers. In 1992, the Supreme Court denied asylum to Elias Zacarias, a Guatemalan citizen who raised a claim of asylum based upon the *political opinion* claim for his refusal to join the guerrillas, a leftist military group who rebelled against the government in his home country.[94] The Court denied Zacarias's claim, reasoning that he could not show his persecutors threatened him specifically due to his political opinion, stating:

> The ordinary meaning of the phrase "persecution on account of . . . political opinion" in § 101(a)(42) is persecution on account of the *victim's* political opinion, not the persecutor's. If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion. Thus, the mere existence of a generalized "political" motive underlying the guerrillas' forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that Elias–Zacarias fears persecution *on account of* political opinion, as § 101(a)(42) requires.[95]

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90. *Id.*

91. *Immigration Law: The Rules and Procedure for Asylum Seekers*, *supra* note 86.

92. *See id.*

93. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERV. (Oct. 19, 2015), *available at* https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-united-states (last visited Oct. 15, 2020).

94. *See* INS v. Elias-Zacarias, 502 U.S. 478, 483-84 (1992) (holding that an organization's attempt to coerce the claimant did not amount to necessary persecution within the meaning of the law).

95. *Id.* at 482.

This decision undoubtedly changed the way asylum-seekers were able to effectively raise claims because the burden of proof required them to show not only that they faced a real, well-founded fear of persecution based upon one of the five statutory grounds, but also to provide evidence of their persecutor's motivation.[96] As it stands, this evidentiary burden of proof has become one of the most strenuous obstacles to obtaining asylum protection in the United States.[97]

It comes as no surprise that some Mexican journalists have had similar experiences as Zacarias; they have historically had trouble proving persecution based on one of the five grounds. Mexican asylum-seekers applying defensively have trouble because they are disproportionately affected due to the large number of Mexican individuals who, likewise, seek asylum in this way.[98] Mexican asylum-seekers applying defensively have trouble because they are disproportionately affected due to the large number of Mexican individuals who, likewise, seek asylum in this way.[99] Not only do defensive asylum proceedings take much longer than affirmative actions, but they are much more difficult for asylum-seekers who do not have counsel to aid them.[100] Individuals who apply affirmatively for asylum may also face a host of issues during the interview process, such as those who have faced trauma or violence and have difficulty communicating and remembering certain events, hindering their credibility.[101] Others may be illiterate or do not speak English; thus their rights are jeopardized because they do not necessarily understand the extent of the documents they may be told to sign or the magnitude of what is said by the officer.[102] Many are denied asylum in part because of these issues, and although the core principle of the Convention was to protect refugees and those seeking asylum, there appears to be an intrinsic lack of protection when their rights are being violated in this manner through America's asylum process.

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96. Katy Mann, *Reporters as Refugees: Applying United States Asylum Laws to Persecuted Journalists in Mexico*, 35 HASTINGS INT'L & COMP. L. REV. 149, 157 (2012).

97. *Id.*

98. J. Anna Cabot, *Problems Faced by Mexican Asylum Seekers in the United States*, 2 J. ON MIGRATION & HUM. SEC. 362, 365 (2018), *available at* https://journals.sagepub.com/doi/pdf/10.1177/233150241400200405 (last visited Oct. 15, 2020).

99. *Id.*

100. *Id.* at 365.

101. *Id.*

102. *Id.* at 366.

1. *Journalists as Members of a Particular Social Group*

As individuals who are valued and vital to the media community-at-large, one would think that Mexican journalists would more readily qualify under the membership of a *particular social group* as grounds for asylum. Yet it has not been so easy, especially because a workable definition of the term has remained largely undefined. Historically, the United States has accepted more refugees annually than any other country.[103] Under the Trump administration, however, there have been significant cuts in refugee admission.[104] Ever since 2017, the administration has vetted refugees more thoroughly, ultimately resulting in a reduction of the number of refugees the United States will accept.[105]

In 2019 the number of admissions was cut even further to 30,000, and the currently anticipated numbers do not appear to be any better.[106] Mexican journalists have attempted to acquire asylum by contending that they were persecuted for being members of a particular social group; analyzing the requirements of this specific ground for persecution, however, may lend some clarity as to why so many journalists have had little success.

2. *Immutability*

The first case that tackled the meaning of the grounds for "persecution on account of membership in a particular social group" was *Matter of Acosta*. In *Acosta*, the Board of Immigration Appeals (BIA) interpreted the phrase to mean "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic."[107] The BIA relied on the doctrine of *ejusdem generis*, meaning "of the same kind," [108] to construe the phrase's meaning; in light of this doctrine, it further explained:

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103. Brittany Blizzard & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POL'Y INST. (June 13, 2019), *available at* https://www.migrationpolicy.org/article/refugees-and-asylees-united-states (last visited Aug. 30, 2020).

104. *Id.*

105. *Id.*

106. *Fact Sheet: U.S. Refugee Resettlement*, NAT. IMMIGR. F. (Nov. 5, 2020), *available at* https://immigrationforum.org/article/fact-sheet-u-s-refugee-resettlement/ (last visited Sept. 11, 2020).

107. Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) [hereinafter *Acosta*].

108. *Id.* at 233.

> The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances, it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed.[109]

The respondent was an El Salvadoran taxi driver who fled his home country after being assaulted and receiving death threats in the form of anonymous notes.[110] His claims consisted of persecution from the government and the guerillas; particularly, he claimed that the persecution "at the hands of the guerillas [was] on account of his membership in a particular social group," because he was an employee of a specific taxi company as well as a person involved in the El Salvadoran transportation industry.[111] The court held that the characteristics defining this asserted group–being a taxi driver and refusing to participate in the guerilla-sponsored work stoppages–were not immutable, because the members of the group could avoid the guerillas' threats by simply changing employment or cooperating with the stoppages.[112] The court viewed their employment as something that was within their control, and although it was unfortunate, there was no guaranteed right for an individual to work in the job of his choice.[113] The *Acosta* immutability requirement would be difficult for Mexican journalists to assert because their livelihood is the reason that they face persecution from both the government and the cartels, and courts have not recognized areas of employment as sufficient to establish a particular social group.

The U.S. Court of Appeals for the Ninth Circuit also set forth a definition of the legal basis in the 1986 case *Sanchez-Trujillo v. INS*. In

109. *Id.* at 233-34.

110. *Id.* at 217.

111. *Id.* at 231-32.

112. Acosta, *supra* note 107, at 234.

113. *Id.*

reviewing the petitioners' claim of persecution based upon their membership within "a particular social group consisting of young, urban, working-class males of military age who had never served in the military or otherwise expressed support for the government of El Salvador,"[114] the court stated:

> The phrase "particular social group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.[115]

The court found that the class of "young, urban, working-class males of military age" did not exemplify the type of "social group" for which protection from persecution could be provided.[116] The class was over-broad and, as such, too many variables could be included in defining that class; it was not the type of voluntary and cohesive, homogeneous group for which the grounds of persecution intended to apply.[117] The court articulated that "to hold otherwise would be tantamount to extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home country."[118] The court cited *Hernandez-Ortiz* as an example of a *particular social group* within which persecution against a family unit was relevant because a family constituted a "small, readily identifiable group."[119] On the contrary, the court reasoned that a group of males taller than six feet would not constitute a *particular social group* because, similar to the case at hand, the group of individuals would be too broad, and the shared characteristics may not sufficiently relate to the grounds for persecution.[120]

Other circuit courts have come to their own conclusions about what this requirement means and how it should apply. The U.S. Court of Appeals for the Second Circuit elaborated on the *Sanchez-Trujillo* definition, stating that "a particular social group is comprised of individuals who

114. Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1573 (9th Cir. 1986).

115. *Id.* at 1576.

116. *Id.*

117. *Id.* at 1577.

118. *Id.*

119. *See* Sanchez-Trujillo, 801 F.2d at 1576; *see also* Hernandez-Ortiz v. I.N.S., 777 F.2d 509, 516 (9th Cir. 1985).

120. *See* Sanchez-Trujillo, 801 F.2d at 1577.

possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or the eyes of the outside world in general."[121] Such a characteristic claimed to be the basis of persecution—like persecution on account of race, religion, nationality, and political opinion—must be "recognizable and discrete."[122]

3. *Particularity and Social Visibility*

Despite its uneven application, *Acosta* laid a significant foundation for what defined a *particular social group*, and the First, Third, Sixth, and Seventh Circuits adopted its formulation.[123] In 2006, the BIA attempted to clarify the elusive definition by adding the requirements of particularity and social visibility. In *Matter of C-A*, the Board concluded that members of a *particular social group* must be socially visible: generally, easily recognizable, and understood by others to constitute a social group.[124] In 2007, the BIA held that "noncriminal government informants" could not constitute a *particular social group* because the very nature of the conduct at issue was kept out of the public view.[125] The BIA relied on the Second Circuit's determination that members of a social group must be "externally distinguishable."[126] The BIA also noted the UNHCR's *Guidelines on Membership of a Particular Social Group*, which confirmed that "visibility" is an important element in identifying the existence of a *particular social group* that affects the determination of refugee status.[127] Normally, informants against a drug cartel intend to remain unknown and undiscovered; the requisite visibility, however, is limited to those informants who are seemingly witnesses or have somehow come to cartel members' attention.[128] The BIA determined that

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121. Gomez v. I.N.S., 947 F.2d 664 (2d Cir. 1991).

122. *Id.*

123. *Matter of C-A*, 23 I. & N. Dec. 951, 955-56. *See* Castellano-Chacon v. INS, 341 F.3d 533 (6th Cir. 2003) (applying *Acosta* to find that "tattooed youth" were not a "particular social group"); *see also* Lwin v. INS, 144 F.3d 505 (7th Cir. 1998) (finding that parents of Burmese student dissidents shared a common, immutable characteristic sufficient to comprise a particular social group); Fatin v. INS, 12 F.3d 1233, 1239-41 (3d Cir. 1993) (holding that a subgroup of Iranian feminists who refuse to conform to the government's gender-specific laws and social norms may constitute a particular social group); Ananeh-Firempong v. INS, 766 F.3d 621, 626 (1st Cir. 1985) (applying *Acosta* in determining that family relations can be the basis of a particular social group).

124. *Matter of C-A*, 23 I. & N. Dec. 951, 959.

125. *Id.* at 957.

126. *Id.* at 956.

127. *Id.* at 960.

128. *Id.*

informants were not in a substantially different situation from anyone who has crossed the cartel or is otherwise perceived as a threat to their interests; as such, it was difficult to conclude that any group is much narrower than the general population.[129]

Shortly thereafter, the BIA analyzed *Matter of A-M-E & J-G-U* to determine whether a *particular social group* existed, focusing on "social visibility" and "particularity" requirements as applied to the proposed group of "affluent Guatemalans."[130] The Board determined that this group did not meet the particularity requirement, stating that "the characteristic of wealth or affluence is simply too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group."[131] Depending upon the narrowness or expansiveness of one's perspective, the terms "wealthy" and "affluent" assume different meanings; correspondingly, the proposed social group could range from as little as 1% to as much as 20% of the population.[132] Because of this, particularity could not be demonstrated.[133]

The proposed social group also failed as a collective group under the social visibility requirement. According to the BIA, social visibility must be considered in the context of the country of concern while the persecution must be feared.[134] Additionally, a social group must be "particular" or sufficient enough to "provide an adequate benchmark for determining group membership."[135] The proposed social group was subjected to threats of extortion. However, there was no evidence to show that wealthy Guatemalans would be recognized as a group that was at a greater risk of crime, particularly extortion.[136] These threats are legitimate because violence and crime in the country appear to be pervasive at all socio-economic levels.[137]

In 2008, the BIA imposed two new requirements of "social visibility" and "particularity" for a proposed social group in *Matter of S-E-G*.[138]

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129. *Id.* at 960-61.

130. *Matter of A-M-E*, 24 I. & N. Dec. 69 (B.I.A. 2007).

131. *Id.* at 76.

132. *Id.*

133. *Id.*

134. *Id.* at 74-75.

135. *Matter of A-M-E*, 24 I. & N. Dec. 76 (B.I.A. 2007).

136. *Id.* at 74.

137. *Id.*

138. *Matter of S-E-G*, 24 I. & N. Dec. 579 (B.I.A. 2008) (holding that "Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities" did not constitute a particular social group).

In considering whether the proposed social group met the particularity requirement, the Board stated:

> The essence of the "particularity" requirement, therefore, is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons. While the size of the proposed group may be an important factor in determining whether the group can be so recognized, the key question is whether the proposed description is sufficiently "particular," or is "too amorphous . . . to create a benchmark for determining group membership."[139]

The BIA defined social visibility as a requirement that "the shared characteristic of the group should generally be recognizable by others in the community."[140] Through this standard and additional tests, the BIA was able to provide necessary clarification to the perplexing definition in *Acosta*.[141] However, the UNHCR recently criticized the BIA in an amicus brief for adding the requirements, stating that the addition was inconsistent with the "purpose and intent of the 1951 Convention and the 1967 Protocol."[142] The UNHCR interpreted a proposed social group as:

> A group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience, or the exercise of one's human rights.[143]

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139. *Id.* at 584.

140. *Id.* at 586.

141. *Matter of M-E-V-G*, 26 I. & N. Dec. 227 (B.I.A. 2014) (stating: "The generality permitted by the Acosta standard provided flexibility in the adjudication of asylum claims. However, it also led to confusion and a lack of consistency as adjudicators struggled with various possible social groups, some of which appeared to be created exclusively for asylum purposes").

142. Rachel Gonzalez Settlage, *Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the Acosta Definition of "A Particular Social Particular Group"*, 30 GEO. IMMIGR. L.J. 287, 305-06 (2016).

143. *Id.* at 306; *see* Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, § II(B)(10), U.N. Doc. HCR/GIP/02/02 (May 7, 2002), *available at* https://www.unhcr.org/3d58de2da.pdf (last visited Sept. 6, 2020) [hereinafter Guidelines].

This definition more closely resembles that of *Acosta*,[144] and scholars have taken note of The Guidelines, stating "the social perception aspect may cover certain characteristics, such as occupation, that are neither immutable nor fundamental to one's human rights, but that the Refugee Convention is designed to protect."[145] The Guidelines state, "only if a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental should further analysis be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society."[146] Thus, the UNHCR Guidelines make it clear that the immutability factor is the primary focus, while social visibility or perception is secondary. In regard to "particularity" and "social visibility", the group need not be visible to the "naked eye in a literal sense of the term."[147] The UNHCR also made clear the size of a *particular social group* is not a "relevant criterion" for the determination of a *particular social group*.[148]

The BIA addressed some of the ambiguity of the requirements of a *particular social group* in two decisions: *Matter of M-E-V-G- and Matter of W-G-R-*. The BIA formulated a new test which required applicants for asylum, or the withholding of removal of those seeking relief, to establish that the group is: (1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question.[149] In *Matter of M-E-V-G-*, the BIA stated literal or "ocular" visibility is not, and never has been, a prerequisite for a viable *particular social group*.[150] Although *a particular social group* may be set apart from the rest of society because of visible characteristics, the "social visibility" requirement was never intended to be limited solely to these characteristics. The Board noted that such an interpretation would run afoul of the principles of refugee protection under the Act and Protocol.[151] In addressing particularity, the BIA held that "a particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group."[152] The group must also be "discrete and have definable boundaries–it must not be

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144. *Acosta*, 19 I. & N. Dec. 234 (B.I.A 1985).

145. Kathleen Kersh, *An Insurmountable Obstacle: Denying Deference to the BIA's Social Visibility Requirement*, 19 MICH. J. RACE & L. 153, 160 (2013).

146. Guidelines on International Protection No. 2, *supra* note 143.

147. *Id.*

148. *Id.*

149. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 237.

150. *Id.* at 238.

151. *Id.*

152. *Id.* at 239.

amorphous, overbroad, diffuse, or subjective."[153] The BIA also introduced the concept of social distinction:

> Social distinction refers to social recognition, taking as its basis the plain language of the Act—in this case, the word "social." To be socially distinct, a group need not be seen by society; rather it must be perceived as a group by society. Society can consider persons to comprise a group without being able to identify the group's members on sight.[154]

This case provided a clear rule as to what is required of applicants to meet the particularity requirement.

In the *Matter of W-G-R-*, the question addressed by the "particularity" analysis was one of delineation, or in other words, "the need to put 'outer limits' on the definition of a 'particular social group.'"[155] In assessing an applicant's claim, both the social and cultural context of the alien's country of citizenship or nationality must be taken into account.[156] In both decisions, the BIA recognized that the "social distinction" and "particularity" requirements emphasized a different aspect of a particular social group.[157] The two requirements overlap in the sense that both of these requirements consider societal factors in application of the fact-specific society an applicant's claim for relief.[158] Whether people of a given society perceive a social group as sufficiently separate or distinct is key to determining if a proposed social group satisfies the "particularity" test.[159]

V. FLAWED APPLICATION OF PARTICULAR SOCIAL GROUP

Under these judicial tests, journalists do not explicitly constitute a particular social group. From the perspective of the journalists, however, they are a part of a particular social group, announcing their membership

153. *Id.*
154. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 240.
155. *Matter of W-G-R-*, 26 I. & N. Dec. 208, 214 (B.I.A. 2014).
156. *Id.*
157. *Id.* at 241.
158. *Id.*
159. *Matter of W-G-R-*, 26 I. & N. Dec. at 241.

every time they place their name in print in the byline of a publication.[160] Omar Bah, a Gambian journalist, was fortunate to receive asylum because the public nature of his profession helped demonstrate his qualification on particular social group grounds.[161] Similarly, a Honduran journalist won his appeal of a denied asylum application as a member of a particular social group.[162] The BIA concluded:

> The respondent submitted evidence to demonstrate that journalists are a socially distinct group within Honduran society, and frequently targets for violence and murder . . . . As the respondent has demonstrated that he suffered persecution on account of his membership in a particular social group and that the Honduran government was unable or unwilling to protect him, the respondent has demonstrated he qualifies as a refugee as described under the Act . . . We conclude it is unreasonable to expect the respondent, whose family, social and economic ties are all within one region of the country, to relocate within Honduras . . . We conclude that the respondent established eligibility for asylum.[163]

However, many Mexican journalists have had difficulty reviewing what is required to win an asylum claim on the ground of being a member of a particular social group. At times, they succeed because the occupation was the exact reason for their persecution. The Sixth Circuit rejected the argument that a group of Ethiopian journalists constituted a particular social group in an unpublished decision.[164] Despite the uphill battle, Mexican journalists hold out hope that their arguments will not fall on deaf ears. The media's role worldwide, and the principles of freedom of the press and human rights as a whole, may serve as a significant motivation

160. Allison Griner, *Caught in the Middle: Journalists Seeking Asylum Often Stuck in Limbo*, COLUM. JOURNALISM REV. (Aug. 17, 2015), *available at* https://www.cjr.org/analysis/journalists_seeking_asylum.php (last visited Sept. 7, 2020).

161. *Id.*

162. Daniel M. Kowalski, *Unpub. BIA PSG (Pro Bono) Asylum Victory – Honduran Journalist*, LEXISNEXIS (Oct. 23, 2015), *available at* https://www.lexisnexis.com/legalnews-room/immigration/b/insidenews/posts/unpub-bia-psg-pro-bono-asylum-victory-honduran-journalist (last visited Sept. 7, 2020) (the article discusses an unpublished BIA opinion).

163. *Id.*

164. Dubal v. Mukasey, 257 F. App'x. 875, 878 (6th Cir. 2007) (holding that "Dubal's claims of a three-week detainment in 1993, a three-hour detention in 1998, and a two-day detainment and a week of harassing phone calls in 2003, accompanied by general claims of physical abuse that Dubal failed to document before the IJ or the BIA, do not compel a finding of actual persecution").

for these journalists and other human rights activists to see this fight through.

A. Immutability

Part of the issue with journalists claiming to be a member of a particular social group is their ability to satisfy the immutability requirement. It is hard to argue that, as a group, journalists have an immutable characteristic when looking at judicial interpretations. For example, the *Acosta* court illustrated that occupation could not be considered to have an immutable characteristic because taxi drivers could choose to change their jobs or simply agree to the demands placed upon them.[165] However, when it comes to this requirement, it should be applied on a case-by-case basis. Mexican journalists often do not have the ability nor the opportunity to change their professions, nor can they decide to cede to the pressure imposed upon them by corrupt government players or members of the drug cartels; oftentimes, it is too late.

Journalists, like Miroslava Breach, who investigate stories of authorities and criminals working together become aware of the dangers associated with their profession but do not have any protection at all in their communities in Mexico.[166] Breach seemingly crossed the line, and though she informed her family and authorities of the mounting threats against her, she was still gunned down while taking her teenage son to school one morning in March 2016.[167] Mexican journalists are often exposed to danger but unable to dodge their fate.

Even before they can even think of retracting or completely removing themselves from the profession, and thus play by the rules, journalists are still not safe from harm because of their past publications. Another journalist, Emilio Soto Gutierrez, realized there was nothing he could have done to make up for his fatal mistake of disseminating information to the public about corrupt police, corrupt military officials, and cartel leaders.[168] Despite curtailing reporting on certain issues in his community about those in power, he still received serious threats and lived in fear day in and day out.[169] His apologies for his provoking publications

165. Acosta, 19 I. & N. Dec. at 234.

166. Hugo Bachega, *Can Mexico Save its Journalists?*, BBC (July 4, 2017), *available at* https://www.bbc.com/news/world-latin-america-39436568 (last visited Sept. 7, 2020).

167. *Id.*

168. Charles Bowden, *We Bring Fear*, MOTHER JONES (July 2009), *available at* https://www.motherjones.com/politics/2009/07/we-bring-fear/ (last visited Sept. 7, 2020).

169. *Id.*

fell on deaf ears, and a black cloud lingered over his head until he chose to flee his country.[170]

Not all journalists have the option to make things better because of the work they do in their professional capacity. All of these journalists face persecution and there is no way out. If this requirement were to be considered on a case-by-case basis, there is sufficient support to determine that Mexican journalists could establish a social group "composed of members who share a common immutable characteristic", thereby meeting the *Matter of S-E-G* requirement. [171]

The possibility of making room for journalists under the immutability requirement may suggest there would be a better chance of considering more journalists if the BIA were to go back to adhering to the *Acosta* definition. As the BIA has described, it does not matter what the common characteristic is so long as it is one that "the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences."[172] This proposed social group has done nothing wrong; they are simply working in a profession that they are passionate about and attempting to exercise freedom of expression. The Mexican Constitution states that there shall be no law that establishes censorship.[173] The legal framework promotes freedom that has been reflected in various think pieces and hard news. A journalist's work is fundamental to their identity and conscience, especially because it is primarily how they are recognized and revered throughout their respective communities. Moreover, the importance of the press in this day and age around the world is increasing, and it is an imperative reason why Mexican journalists should be protected due to their profession. They have contributed significant value to the world of news in and outside of their country. Additionally, their identity as a journalist who goes against "playing by the rules" is stamped upon them and as such becomes an immutable characteristic as they navigate the dangers associated with it.

170. *Id.*

171. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 122.

172. *Acosta,* 19 I. & N. Dec. 234

173. Constitución Política de los Estados Unidos Mexicanos, CP, art. 7, Diario Oficialde la Federación [DOF] 1968 (Mex.), *available at* https://web.oas.org/mla/en/Countries_Intro /en_mex-int-text-const.pdf (last visited Mar. 13, 2020).

B. Particularity and Social Visibility

Further, journalists should be able to sufficiently satisfy the particularity prong. As previously noted, the *Matter of A-M-E* determined that "affluent Guatemalans" did not establish particularity because "the characteristic of wealth or affluence is simply too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group."[174]Moreover, the proposed group must be "discrete and have definable boundaries . . . ."[175]

When looking at these requirements objectively, journalists are a group of distinguishable and determinate individuals. It is clear in the community, not only by the public nature of their work but also through word of mouth, that journalists are who they are. There is nothing amorphous about this proposed social group since there is evidence that journalists face serious persecution from all sides in a way that other occupations in Mexico may not. Thus, a line may be drawn between journalists and the rest of society. Furthermore, these journalists are so distinguishable that it is easy for them to be marked and tracked for revenge; individuals in different occupations may have an easier time laying low and finding ways to readjust their lives if necessary because their names are not known throughout the grapevine of officials and cartel members. Journalists are also perceived as a distinct group by society when considering the concept of social distinction. Some journalists in particular may even be identifiable to members of the public upon sight. Taking both the social and cultural context of Mexico into consideration, journalists should be assessed on a case-by-case basis to demonstrate and establish particularity.

Likewise, journalists should be able to meet the social visibility requirement. Pursuant to the BIA's conclusion in *Matter of C-A*,[176] journalists are easily recognizable and understood by the people to constitute a social group because their profession easily sets them apart. There is evidence of this distinction in the way that they are targeted by corrupt officials and the cartels. The expression and ability to disseminate certain information to the public sets journalists apart from the rest of society. If journalists cannot meet the immutability requirement, the requirement of social visibility should work in their favor. In addition, even if journalists are not recognizable on sight, the court in *Benitez-Holder* clarified that a literal sense of the term "social visibility" is not required–only that

174. *Matter of A-M-E*, 24 I. & N. Dec. at 76.

175. Matter of M-E-V-G, *supra* note 141.

176. Matter of C-A, *supra* note 123, at 959.

society recognizes a group as having a common characteristic.[177] Thus, journalists, by virtue of the public nature of their profession, may fit this description, especially when they all seemingly share similar experiences publishing unfavorable work.

In sum, Mexican journalists may continue to have issues persuading the BIA or other immigration judges that they have a well-founded fear of persecution on the grounds of being a member of a particular social group. However, there are creative arguments to suggest journalists can and should be able to establish their membership under the three requirements because of the nature of their profession and the intense persecution that comes with it. Even more to their point, the threats are directly targeted at members of the press because of what they do and who they are in society, and evidence of such should be favorable to the journalists seeking asylum. There is a real threat, and it is not merely because of the desire to keep journalists quiet. Journalists quickly become the focus because powerful officials, as well as cartel leaders, specifically want journalists to work in their favor solely because of their status. When journalists refuse to cooperate with this desired arrangement, neither side is satisfied with simply silencing journalists; they want to send a message to the media that their days are numbered. For this reason, there is ample support to demonstrate that journalists should be considered as members of a particular social group for asylum purposes.

VI. JOURNALISTS AND POLITICAL OPINION

The grounds of *political opinion* within asylum law are what Mexican journalists have turned to in order to plead their cases of persecution and potential for loss of life upon return to their home country. Many Mexican journalists may not believe they are necessarily political actors, yet there is room to argue that they may fall under the umbrella of *political opinion.* For instance, the decision in *Hussain v. INS* may indicate that the same rationale should be applied to journalists fleeing from Mexico. Hussain was a Pakistani reporter that was attacked by a political group based upon the belief that he supported a rival political organization, and he was granted asylum by the Ninth Circuit.[178]

The Ninth Circuit held that whether or not Hussain actually held the political beliefs imputed to him by his persecutors, he was being attacked based on these beliefs and that his journalistic choices were motivated by

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177. Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009).

178. Hussain v. I.N.S., 246 F.3d 674 (9th Cir. 2000).

politics.[179] The court stated "Journalism is a work that overtly manifests a political opinion,"[180] thus persecution based upon an imputable political opinion, whether or not the seeker actually holds such opinion, is a valid basis for asylum.[181] In light of the court pointing out that journalism has political elements, this seems applicable to Mexican journalists who, despite viewing themselves as non-political, may be believed to be political by their persecutors. Thus, persecution would fall within statutory grounds for protection. The Ninth Circuit also decided in *Hasan v. Ashcroft* that journalists who attempted to expose corruption through their reporting were making statements that fall under political opinion:[182] "When a powerful political leader uses his political office as a means to siphon public money for personal use and uses political connections throughout a wide swath of government agencies, both to facilitate and to protect his illicit operations, exposure of his corruption is inherently political."[183] Hasan, a female Bangladeshi reporter, was persecuted for publishing an article regarding a prominent government official and his alleged participation in criminal activity. Because of the publication, she was attacked numerous times, even once at her home by associates of the official, and the group of men also attacked her parents and her husband.[184] The Ninth Circuit panel thus concluded that Hasan and her family experienced persecution on account of the political opinion she voiced in her article.[185] The Court wrote:

> The text of the article provided in the record reveals that, contrary to the IJ's characterization, Afroza did more than call the Chairman a "crook." She accused him of organizing a cadre of "terrorism, repression, and extortion," of "misappropriation of public money," of "collect[ing] tolls for his own while giving hookup connection[s] for water and gas lines," and of making his political office "an office of corruption." These are indisputably political issues.[186]

179. *Id.* at 2.

180. *Id.*

181. *Id.*

182. Hasan v. Ashcroft, 380 F.3d 1114 (9th Cir. 2004), *overruled by* Maldonado v. Lynch, 786 F.3d 1155 (9th Cir. 2015).

183. *Id.* at 1121.

184. *Id.* at 1117-18.

185. *Id.* at 1121.

186. Ashcroft, 380 F.3d at 1120.

VII. FIRST AMENDMENT IN SUPPORT OF MEXICAN JOURNALISTS SEEKING ASYLUM

The U.S. Constitution explicitly protects freedom of speech and freedom of the press, as these values are deeply rooted in American history. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[187] Scholars have largely cited the purposes underlying the First Amendment protections of the freedom of speech are: "(1) to assure individual self-fulfillment; (2) to help attain the truth; (3) to inform the electorate; and (4) to promote the arts."[188] It has also been argued that free speech is an essential means of promoting tolerance; checking governmental abuse, and protecting those holding dissenting views.[189] While free speech is one of the United States' most cherished liberties, that freedom is not without limits. The Supreme Court has held that free speech will not be protected if an individual is a "clear and present danger" to U.S. security.[190] The test, "whether the words used are used in such circumstances are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent,"[191] is, therefore, a question of proximity and degree. This test requires that the speech be viewed and analyzed in its context and, by its utterance, create a real danger before it can be censored.

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187. U.S. CONST. amend. I.

188. Alexander Lindvall, *Frankly, My Dear, I Don't Give a "Darn" – An Argument Against Censoring Broadcast Media*, 7 ARIZ. ST. SPORTS & ENT. L.J. 153, 157 (2017); *see, e.g.*, Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J., 877, 878-79 (1963) (arguing that four major principles underlie the freedom of speech: (1) individual self-fulfillment; (2) the attainment of truth; (3) furthering participation in governmental decision-making; and (4) creating a balance between stability and change).

189. David Han, *The Value of First Amendment Theory*, U. ILL. L. REV. Slip Opinions 87, 88 (2015), *available at* https://illinoislawreview.org/print/free-speech-constitutionalism/the-value-of-first-amendment-theory/ (last visited Oct. 17, 2020); *see also* LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986); *see, e.g.*, Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; *see, e.g.*, Emerson, *supra* note 189, at 885.

190. Schenck v. United States, 249 U.S. 47, 52 (1919) (Justice Holmes is famous for his opinion that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic").

191. *Id.*

Similarly, the Supreme Court has also placed value in freedom of the press, consistently stating that a free press is essential to the "heart of our democracy and its preservation is essential to the survival of liberty."[192] The press is protected because of its recognized "crucial contribution to democracy and democratic legitimacy."[193] An independent press ensures that citizens remain informed about the actions of their government, creating a free forum for debate and open exchange of ideas, while also acting as a watchdog for government accountability.[194] Fundamentally, we the people are able to say what we think and the press may perform its essential roles: to agitate, investigate and scrutinize the nation's leaders and institutions, which is a freedom that differentiates a democracy from a dictatorship.[195] In sum, "a free press is an essential element of human rights protection."[196]

In light of these values, there are weighty reasons for reevaluating and redeveloping public policy regarding asylum for Mexican journalists. Despite the President's "running war with the media,"[197] the press still has explicit safeguards for their significant roles. On the contrary, there is no protection for journalism in Mexico like the First Amendment. Mexican President Andrés Manuel López Obrador has had a tumultuous

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192. Andrea Butler, *Protecting the Democratic Role of the Press: A Legal Solution to Fake News*, 96 WASH. U. L. REV.; *see, e.g.*, *Craig v. Harney*, 331 U.S. 367, 383 (1947) (Murphy, J., concurring); *see, e.g.*, *Associated Press v. United States*, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring) ("A free press is indispensable to the workings of our democratic society."); *see also* Kovach & Rostenstiel, *supra* note 9.

193. C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317, 388 (1998) (because a free press was so pivotal in their efforts to overthrow British rule, the Founding Fathers decided to protect that right with the First Amendment, ratified in 1791); *see also* Patrick D'Arcy, *Why Freedom of the Press is More Important Now Than Ever*, TED (Aug. 11, 2017), *available at* https://ideas.ted.com/why-freedom-of-the-press-is-more-important-now-than-ever/ (last visited Oct 17, 2020).

194. D'Arcy, *supra* note 193.

195. *The Importance of a Free Press*, CHARLES KOCH INST., *available at* https://www.charleskochinstitute.org/issue-areas/free-speech-and-toleration/importance-of-a-free-press/ (last visited Oct. 17, 2020).

196. Mago Torres, *Journalists Under Fire: Freedom of the Press in Mexico with Mago Torres*, POZEN FAM. CTR. FOR HUM. RTS. (Feb. 6, 2019), *available at* https://humanrights.uchicago.edu/events/journalists-under-fire-freedom-of-the-press-in-mexico-with-mago-torres (last visited Oct. 17, 2020).

197. Sonja R. West, *Presidential Attacks on the Press*, 83 MO. L. REV. 915 (2018) (President Trump has targeted particular news organizations, individual reporters, and the profession as a whole, attempting to punish or silence those that displease him. *Id.* His actions have undermined the purpose of the First Amendment and are contradictory to the Supreme Court's rule that "debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

relationship with the press, making such statements to reporters as "[i]f you go too far, you know what will happen."[198] Such rhetoric increases risks for Mexican journalists and has resulted in relentless threats and harassment for members of the press. This is a serious issue because essentially "[e]very incident is part of a larger global attack on press freedom."[199] "The price is paid by all of us if freedom of expression is taken away from anyone."[200] Mexican journalists are unwavering in their commitment to their profession, even in the face of the accompanying serious risks and costs of the job.[201] They are not only contributing to their communities by keeping the public informed and empowered with investigative reporting, but they also contribute in a major way to global newsrooms that benefit from their published stories.

Despite the Mexican Constitution stating: "[n]o law or authority may establish censorship,"[202] Mexican journalists severely lack security and protection for their words and ideas, and as a result, truths are silenced and information stifled. They seek asylum based on real fears of persecution because of their profession, a profession the United States has held dear since the Founding Fathers drafted the First Amendment, knowing that "when the press examines the actions of the government, the nation benefits."[203] United Nations Secretary-General António Guterres shared in the urge to protect this group, stating "[w]hen journalists are targeted, societies as a whole pay a price. Without the ability to protect journalists, our ability to remain informed and contribute to decision making, is severely hampered."[204] Ultimately, it is up to the United States to remember why it became a party to the 1951 Convention in the first place: "to protect refugees and provide them aid, shelter, and access to

198. Jan-Albert Hootsen, *López Obrador's Anti-Press Rhetoric Leaves Mexico's Journalists Feeling Exposed*, COMM. TO PROTECT JOURNALISTS (May 6, 2019), *available at* https://cpj.org/blog/2019/05/mexico-president-lopez-obrador-press-rhetoric-threatened.php (last visited Oct. 18, 2020). The President has been known to attack critical journalists and commentators for being "conservative," "neo-liberal," and "fifi" – meaning elitist or out-of-touch, and even specifically singling out several journalists and news outlets. *Id.*

199. Zainab Salbi, *Mexico's Journalists: On the Front Lines of Press Freedom*, HUFFINGTON POST (Dec. 22, 2016), *available at* https://www.huffpost.com/entry/mexico-journalists-press-freedom_b_585be98fe4b0d9a59457467c (last visited Oct. 18, 2020).

200. *Id.*

201. *Id.*

202. Constitución Política de los Estados Unidos Mexicanos, CP, art. 7, Diario Oficialde la Federación [DOF] 1968 (Mex.), *available at* https://web.oas.org/mla/en/Countries_Intro/en_mex-int-text-const.pdf (last visited Mar. 13, 2020).

203. *The Importance of a Free Press*, *supra* note 195.

204. *"When Journalists are Targeted, Societies as a Whole Pay a Price": UN Chief*, UN NEWS (Nov. 1, 2019), *available at* https://news.un.org/en/story/2019/11/1050411 (last visited Oct. 18, 2020).

education and work."[205] Those people, like these Mexican journalists who are seeking asylum, deserve and require the protection that was promised to them and required by the 1951 Convention.

VIII. CONCLUSION

In conclusion, the fight for asylum-seekers is strenuous and burdensome. Mexican journalists gain notoriety because they investigate stories for their communities, but it comes with immense harassment and fatal risk, and there is no way for them to flee persecution. The complexities of pursuing the asylum process are undue, yet this right is a fundamental human right: a right to seek refuge, a right to escape persecution, and a right to be protected by the nations that so long ago signed and made it their obligation to provide safe havens.[206] Moreover, the value placed in the First Amendment on the free press creates a space for these values to have strong support for granting Mexican journalists asylum. In the spirit of nonrefoulement,[207] there should be a broader interpretation of the grounds for asylum so that Mexican journalists can not only save their commitment to truth-seeking but their lives as well, rather than living in fear and counting their days with inevitable harm hanging in the balance.

205. Natalie Muller, *Refugee Convention of 1951 Still Crucial Cornerstone of Human Rights*, DEUTSCHE WELLE (July 28, 2016), *available at* https://www.dw.com/en/refugee-convention-of-1951-still-crucial-cornerstone-of-human-rights/a-19429093 (last visited Oct. 18, 2020).

206. *See Human Lives, Human Rights*, U.N. HIGH COMM'R FOR REFUGEES [UNHCR], *available at* https://www.unhcr.org/en-au/human-lives-human-rights.html (last visited Oct. 18, 2020).

207. *History of UNHCR*, *supra* note 71.

Transitional Justice: Lessons from Northern Ireland and Their Application to Achieving Peace in the Middle East

Brenna Mason*

I. INTRODUCTION

Peace in the Middle East has long been sought but thus far remains unattainable. A recent effort to broker peace to end the Israel-Palestine conflict was laid out by the Trump administration, which released a peace proposal in January 2020.[1] This proposal envisioned a two-state solution for peace that would limit a future Palestinian state's right to self-determination by maintaining current Israeli security over Palestinian territories and declaring Israeli sovereignty over occupied areas of the West Bank.[2] The Trump administration believed this plan could lead to a peace agreement that ends the Israeli-Palestinian conflict, but Palestinians are outraged by the proposal, and analysts are skeptical.[3]

Tareq Baconi, an Israel-Palestine analyst for the International Crisis Group, criticized the proposal as a recycling of past failed peace efforts.[4] At its core, the deal is premised on the misguided belief that economic incentives could compel Palestinians to relinquish their political demands.[5] The Trump proposal offers nothing new to the Middle East's

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1. *See generally* WHITE HOUSE, PEACE TO PROSPERITY: A VISION TO IMPROVE THE LIVES OF THE PALESTINIAN AND ISRAELI PEOPLE (2020), *available at* https://www.whitehouse.gov/wp-content/uploads/2020/01/Peace-to-Prosperity-0120.pdf (last visited Mar. 21, 2020). Another development, The Abraham Accords, will be discussed later in the paper.

2. Merrit Kennedy, *Trump Says His Mideast Peace Plan Provides a 'Realistic Two-State Solution'*, NPR (Jan. 28, 2020), *available at* https://www.npr.org/2020/01/28/800296507/white-house-to-unveil-mideast-peace-plan-despite-palestinian-rejection (last visited Mar. 21, 2020).

3. *Id.*

4. *Id.*

5. Rami Ayyub, *As Trump Team Trepares Mideast Plan, Palestinians Face Financial Crisis*, REUTERS (May 1, 2019), *available at* https://www.reuters.com/article/us-palestinians-usa-money/as-trump-team-prepares-mideast-plan-palestinians-face-financial-crisis-idUSKCN1S73EG (last visited Mar. 22, 2020).

peace process; it is an extension of decades of preexisting Israeli policy.[6] Establishing enduring peace that ends the intractable Israel-Palestine conflict requires more than repackaging old, failed solutions.

The Israel-Palestine conflict is one of the world's most persistent, enduring conflicts.[7] In its most basic form, the conflict's violent, intractable history is centered around the story of two self-determination movements, wherein Jewish Zionists and Palestinian Nationalists compete for control over a shared land.[8] The structure of this conflict and its history closely mirrors the Troubles in Northern Ireland. Northern Ireland was torn apart by sectarian violence from 1968-1998.[9] On one side of the conflict were mostly Protestant unionists who sought to maintain colonial ties with Britain.[10] Their adversaries were mainly Catholic nationalists, often referred to as Republicans, who wanted a unified, independent Irish Republic.[11]

These conflicts are analogous; they originate from self-determination movements over contested land. Since 1998, however, Northern Ireland has emerged as a post-conflict society. Following a formal cease-fire lamented in the Good Friday Agreement, the peace process was decentralized and implemented locally within affected communities. Northern Ireland has not coped with the past by utilizing formal transitional justice initiatives like truth commissions or wartime tribunals. Instead, a network of non-traditional measures, implemented at the local level, are responsible for Northern Ireland's current state of peace.

To better understand the process of achieving peace in the Middle East, this Note will use Northern Ireland as a case study. It will begin by exploring the genealogy and meaning of transitional justice as a legal discipline. This Note will then move through a historical recount of the

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6. Yesuda Shaul, *Trump's Middle East Peace Plan Isn't New. It Plagiarized a 40-year-old Israeli Initiative*, FOREIGN POL'Y (Feb. 11, 2020), *available at* https://foreignpolicy.com /2020/02/11/trump-middle-east-peace-plan-isnt-new-israeli-palestinian-drobles/ (last visited Mar. 22, 2020).

7. Zack Beauchamp, *Everything You Need to Know About Israel-Palestine*, VOX (Nov. 20, 2018), *available at* https://www.vox.com/2018/11/20/18079996/israel-palestine-conflict-guide-explainer (last visited Mar. 22, 2020).

8. *Id.*

9. *See generally History of the Northern Ireland Conflict*, HISTORY.COM, *available at* https://www.history.co.uk/history-of-the-northern-ireland-conflict (last visited Mar. 22, 2020).

10. Alan Cowell, *50 Years Later: Troubles Still Cast 'Huge Shadow' Over Northern Ireland*, N.Y. TIMES (Oct. 4, 2018), *available at* https://www.nytimes.com/2018/10/04/world /europe/northern-ireland-troubles.html (last visited Mar. 22, 2020).

11. *Id.*

Israel-Palestine conflict and the Troubles in Northern Ireland. Following this historical recount, it will analyze the local transitional justice methods utilized by Northern Ireland and apply them to the Israel-Palestine conflict. This Note aims to explore the alternative transitional justice processes and instruments that can help establish peace in the Middle East. In conclusion, this Note will propose that imposed political structures that lament relationships of interdependence between former adversaries are needed to end intractable conflicts. Following the negotiation of a treaty that establishes this equitable relationship, local transitional justice initiatives will enable a shared identity to emerge that will maintain enduring regional peace.

II. TRANSITIONAL JUSTICE

Transitional justice is a term of recent origin.[12] The term was first popularized in 1995 by the publication of *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*.[13] The emerging field of study asks the most difficult questions in post-conflict societies about the intersection of law and politics.[14] Consensus surrounding what disciplines converge to form transitional justice varies.[15] However, it is generally accepted that, at its foundation, the field attempts to deal with the past violence faced by societies currently undergoing or attempting to undergo a political, social, and legal transition from mass atrocity.[16] The process incorporates several legal, political, and cultural tools.[17]

Transitional justice is a label used to describe justice initiatives taken during periods of political transition.[18] Initially, these initiatives focused on the international community and individual countries' legal responses to acts of wrongdoing that accompanied periods of political transition.[19] Such legal response is rooted, foremost, in accountability and redress for victims.[20] The goal of the institutions implemented during times of

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12. GERALD GAHIMA, TRANSITIONAL JUSTICE IN RWANDA: ACCOUNTABILITY FOR ATROCITY 1 (Routledge, 1st ed. 2013).

13. *Id.*

14. *What is Transitional Justice?*, ICTJ, *available at* https://www.ictj.org/about/transitional-justice (last visited Dec. 15, 2020) [hereinafter ICTJ].

15. Christine Bell, *Transitional Justice, Interdisciplinary and the State of the 'Field' or 'Non-Field'*, 3 INT'L J. TRANSITIONAL JUST. 5, 7 (2009).

16. *Id.*

17. ANJA MIHR, AN INTRODUCTION TO TRANSITIONAL JUSTICE (Olivera Simić ed., 2016).

18. *See* RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000).

19. Bell, *supra* note 15, at 8.

20. ICTJ, *supra* note 14.

transition is to place victims at the forefront of reconciliation efforts as societies work to overcome the challenges of healing after a mass atrocity as a collective society.[21] The field emerged from the outset to help countries address large-scale, systematic human rights violations as they left behind times of political conflict and oppression.[22] Human rights violations in post-conflict societies are typically too numerous and prolific for domestic judicial systems to respond adequately to individuals' needs.[23] At this stage, domestic judicial systems are also typically hindered by a lack of resources and weak government infrastructure.[24]

Four main legal fields converge to make accountability in post-conflict societies possible.[25] These legal fields are international humanitarian law, international human rights law, domestic criminal law, and international criminal law.[26] Each of these fields works together to impose legal liability on those who partook in acts of violence that are typically associated with conflict and human rights abuses.

Following periods of conflict, the transitional justice institutions that impose legal accountability, such as criminal tribunals, have become a mainstay of how countries and the international community respond to human rights violations and political instability.[27] However, the field has expanded to include reconciliation and truth-gathering measures focused on helping victims deal with the past by offering them closure around unanswered questions.[28] This modern approach further departs from traditional court-ordered justice by incorporating local methods of reconciliation.[29] Localized methods of reconciliation promote an interrelated process of social learning between individuals who were once opponents in a conflict; they are not methods premised on a larger display and discourse of turning to the past to move on and heal in the future.[30]

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21. *Id.*

22. ICTJ, *supra* note 14.

23. *Id.*

24. *Id.*

25. Bell, *supra* note 15, at 19.

26. *Id.*

27. Andrew G. Reiter, *The Development of Transitional Justice in* AN INTRODUCTION TO TRANSITIONAL JUSTICE 30, 41 (Olivera Simić eds., 2017); *see generally* Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003).

28. Agete Fijalkowski, *Truth and Reconciliation Commissions in* AN INTRODUCTION TO TRANSITIONAL JUSTICE 91, 94 (Olivera Simić eds., 2017).

29. Nevin T. Aiken, *Rethinking Reconciliation in Divided Societies: A Social Learning Theory of Transitional Justice in* TRANSITIONAL JUSTICE THEORIES 40, 41 (Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun & Friederike Mieth).

30. *Id.*

A. Historical Evolution of Transitional Justice

Society has existed contemporaneously with conflict. Even before the advent of modern transitional justice techniques, societies dealt with the process of transitioning away from conflict through various means. Some of the most notable methods utilized include immediate retribution through execution and exile, broad amnesty policies geared toward enabling societies to move on from violence, and the payment of war reparations.[31] The transitional justice discourse incorporates many of these notable remedial measures.[32] However, the focus of most efforts historically centered around crimes that were committed by countries and the processes implemented to hold individual nations accountable for their actions.[33] Following World War II (WWII), that focus shifted as modern transitional justice measures took form.

Modern transitional justice practices began to develop following the devastation and catastrophic loss of human life caused by WWII.[34] Transitional justice initiatives found a home situated within the context of a larger body of international justice.[35] The Nuremberg and Tokyo Trials were the first examples of collaborative international justice efforts, and they laid the foundation for the formation of international criminal law.[36] These trials were necessary to hold high-ranking Nazi German and Japanese military members punitively accountable for their egregious wrongdoings and crimes. One critique of these proceedings, however, was their politicization of the trial process[37] and the international community's failure to prosecute the victorious Allied powers for any war crimes that they may have committed.[38] Although a necessary act of accountability, the trials following WWII demonstrate

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31. Reiter, *supra* note 27, at 30.

32. *Id.*

33. *See id.* at 31.

34. *See id.*

35. JESSICA LINCOLN, TRANSITIONAL JUSTICE, PEACE, AND ACCOUNTABILITY: OUTREACH AND THE ROLE OF INTERNATIONAL COURTS AFTER CONFLICT 15 (Routledge, 1st ed. 2011).

36. *Id.*; *see also* Reiter, *supra* note 27, at 31.

37. Charles E. Wyzanski, *Nuremberg: A Fair Trial? A Dangerous Precedent*, ATLANTIC (Apr. 1946), *available at* https://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492/ (last visited Dec. 13, 2020). The indictments resting on principles of ex post facto law are an example of how these trials were politicized. However, the punitive measures taken against the individuals prosecuted for their heinous wrongdoing was a necessary act of accountability.

38. Reiter, *supra* note 27, at 32.

the extent to which punishment has dominated our understanding of transitional justice.[39]

The ad hoc criminal tribunals created for the former Yugoslavia and Rwanda in the 1990s memorialized punitive justice and criminal accountability as the standard practice of international justice's response to mass atrocity.[40] Legal pieces from the 1990s, written in response to the ongoing fight against impunity in Central and South America, first cataloged the need for post-conflict accountability.[41] As transitional justice continued to evolve as the chosen response to political and violent conflict, a link formed between those who prioritized retributivist justice to hold perpetrators accountable and those whose primary goal was the truth.[42] A new model of transitional justice developed as a result of this evolution–the restorative model, which focuses on the use of truth commissions to process the broader historical perspectives that underlie a specific conflict.[43]

South Africa used such truth commissions as a transitional justice tool to move on from the injustice of the apartheid regime.[44] This strategy stands in stark contrast to the criminal tribunals established in Yugoslavia and Rwanda. Rather than situating the process of reconciliation within the broader narrative of criminal justice, the truth commission in South Africa sought to formulate an impartial historical record of human rights abuses.[45] Transitional justice in this space took on a different face–it emphasized victims and their experience by seeking the truth behind that past's wrongs to heal in the present.[46] Documenting crimes and listening to victims' voices are examples of the efforts undertaken by truth commissions to acknowledge individual pain, memory, and right to truth.[47] Each of these measures plays a critical role in enabling and

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39. Teitel, *supra* note 18, at 27.

40. Lincoln, *supra* note 35, at 15.

41. Bell, *supra* note15, at 7.

42. Teitel, *supra* note 27, at 78.

43. *Id.*

44. *See generally* Reiter, *supra* note 27.

45. Fijalkowski, *supra* note 28, at 105 (further departing from traditional criminal justice by granting amnesty to perpetrators of mass human rights violations for the sake of moving on from the past).

46. COLLEEN MURPHY, THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE 113 (2017).

47. Int'l Ctr. for Transitional Justice, *2018-2022 Strategic Plan* (2017), *available at* https://www.ictj.org/sites/default/files/ICTJ_2018-2022StrategicPlan.pdf (last visited Mar. 22, 2020).

shaping peace negotiations as well as signaling to leaders the need for any additional transitional justice measures once a conflict has ended.[48]

Transitional justice's evolving interdisciplinary nature has broadened the field to include the academic disciplines of sociology, psychology, politics, and history.[49] Including these academic disciplines in transitional justice's discourse has created a system that provides greater accountability and redress for victims. When traditional legal methods to deal with the past are not politically palatable, the expansive techniques of transitional justice can fill the gaps.[50] Though legal accountability is still possible, the interdisciplinary approach of transitional justice's myriad of techniques offers those implementing these methods a greater degree of flexibility, which may lead to higher levels of reconciliation within communities.[51]

A hallmark of transitional justice is its attempt to simultaneously engage with victims while holding perpetrators accountable for their crimes. However, its application may vary based on the social environment of the affected community. Although the methodology may, and is often encouraged to, adjust to the needs of the community it aims to support,[52] transitional justice's main goals remain relatively unchanged. The discipline's primary objectives include recognizing individuals' dignity, seeking redress for victims, acknowledging the perpetrators' violations, restoring devastated communities, and implementing preventative measures to decrease the likelihood that a perpetrator would commit a similar crime in the future.[53] Community objectives that are focused on legal accountability may occur through criminal tribunals comparable to those established in Rwanda and the former Yugoslavia, while those focused on the process of restoration may turn to reparations, truth commissions, and societal reform as the mode of redress for victims.[54]

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48. *Id.*

49. *See id.*

50. Christine Bell, *Transitional Justice, Interdisciplinary and the State of the 'Field' or 'Non-Field'*, 24 INT'L J. TRANSITIONAL JUST. 1, 27 (2009).

51. Susanne Buckley-Zistel, *Narrative Truth: On the Construction of the Past in Truth Commissions*, *in* TRANSITIONAL JUSTICE THEORIES 66, 73 (Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun, & Friederike Mieth ed., 2014).

52. *See generally* U.N. Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (Mar. 2010) [hereinafter *Guidance Note*].

53. *See generally* ICTJ, *supra* note 14.

54. *See generally What is Transitional Justice Factsheet*, ICTJ (2009), *available at* https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf (last visited Dec. 15, 2020).

The United Nations' (U.N.) acceptance of transitional justice signaled the international community's recognition of the importance of the discipline to mending relations in divided societies. Structurally, within the U.N., the Office of the United Nations High Commissioner for Human Rights is the lead entity that determines how areas transitioning away from conflict should implement transitional justice measures.[55] The office continually assesses the impact of transitional justice measures by evaluating individual initiatives' strengths and shortcomings.[56]

U.N. Secretary-General Kofi Annan defined the practice as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, to ensure accountability, serve justice and achieve reconciliation."[57] Annan similarly reflected on the rule of law and transitional justice in conflict and post-conflict societies. A report issued by the U.N. Secretary-General recognized that there is no one-size-fits-all plan for reconciliation in post-conflict societies.[58] However, the measures specific societies adopt must keep in mind the need to advance justice, peace, and democracy as the three central aims of rehabilitation.[59]

U.N. reports that address the promotion of peace and rehabilitation in post-conflict societies focus on the importance of the rule of law. These reports speak generally about the principle of holding those who committed war crimes and other human rights violations accountable through the International Criminal Court or ad hoc hybrid tribunals.[60] They often fail to acknowledge that the accountability promoted by more traditional legal methods is most effective when supported by the modern interdisciplinary approach incorporated into the field's broader discourse.[61]

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55. *Transitional Justice and Economic, Social and Cultural Rights*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (2014), *available at* https://www.ohchr.org/Documents/Publications/HR-PUB-13-05.pdf (last visited Oct. 11, 2020) [hereinafter *Transitional Justice Report*].

56. *See generally id.* This report focused on how transitional justice deals with violations of economic, social, and cultural rights. It meticulously reviews how truth commissions, judicial and quasi-judicial proceedings, reparations, and institutional reform address these rights. The detail exhibited by the UN in the review of these processes is indicative of the value of transitional justice to international institutions.

57. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 8, U.N. Doc. S/2004/616 (Aug. 23, 2004).

58. *Guidance Note*, *supra* note 52, at 4.

59. *Id.*

60. *See* U.N. Secretary-General, *supra* note 57.

61. *See id.*

B. Non-Traditional Forms of Transitional Justice

Emergent post-conflict societies have also relied on less traditional transitional justice methods to bring divided communities together.[62] These soft, local, or non-traditional forms of transitional justice focus less on achieving reconciliation by imposing criminal liability or establishing a national truth commission; these methods emphasize developing relationships between former adversaries at the community level.[63] In certain spaces, criminal liability may be crucial for individuals and collective societies to heal, but it stresses a retributivist form of justice that leaves communities unsure of where to turn next.[64] After a public trial that holds the most culpable people accountable, where does the once war-torn society turn? What will help guide future interactions between the former adversaries of a once violent conflict?

Criminal tribunals, and truth commissions, are one facet of a more complicated system of reconciliation.[65] Human rights violations may be so grotesque that they require criminal tribunals to hold perpetrators accountable. However, peace and peacebuilding measures will be successful and enduring if they incorporate specialized, local methods tailored to the affected community's specific needs.[66] Beginning the reconciliation process at the local level enables dexterity in implementation and will lay the foundation for lasting peace.

Local methods, however, will be unsuccessful without a fairly negotiated peace deal that forces adversaries to lay down their arms and cooperate for a shared future.[67] Flexible, relationship-driven approaches to peace, implemented in communities before engaging in treaty negotiations, may facilitate the process of seeing an adversary as the "other" to deteriorate. However, they are insufficient tools to establish peace independently. These methods of pursuing justice and stability will not solve an intractable conflict, but they will help de-escalate it. Once tensions between former adversaries have de-escalated, a peace treaty may be within reach because relationships and a basic level of respect have formed. Following a peace treaty that is cognoscente to respect both

62. *See* Aiken, *supra* note 29. Traditional forms of transitional justice refer to the legal and restorative initiatives discussed in the previous section of this paper.

63. *See id.*

64. *See id.* for more information on retributive justice; *see generally* Michelle Maiese, *Retributive Justice*, BEYOND INTRACTABILITY (May 2004), *available at* https://www.beyondintractability.org/essay/retributive.justice (last visited Dec. 15, 2020).

65. *See id.*

66. *Id.*

67. *See* Aiken, *supra* note 29.

sides of a conflict's demands and lays out a broad framework for the division of any disputed lands, there is potential for localized forms of transitional justice to create a fragile condition for peace. This peace is less susceptible to reignited violence because it is premised on interconnectedness.

III. HISTORICAL CONTEXT OF THE ISREAL-PALESTINE CONFLICT

The Israel-Palestine conflict is an intractable conflict, with divisions so entrenched that peace seems illusory. Two of the conflict's focal points arise from tensions that surround land sharing and identity politics. From a reductive perspective, the central challenge to solving peace in the Middle East and reconciling the conflict's principal tensions is determining where and how to draw borders around the shared land.[68] A persistent feature of the conflict is the struggle to define Israeli society and the edges of a modern Jewish state.[69] Failure to determine the land that will form the present-day Jewish state has created an environment of conditional statehood for Palestine.[70] The deep entrenchment of disputed land and identity politics has led to a situation where Palestine's future is deeply intertwined with the prospect of drawing definitive borders around Israel.[71]

A misperception of the Israel-Palestine conflict is that it is rooted in hundreds of years of religious strife.[72] Instead, most historians date the conception of the conflict back to the late 1800s and the early 1900s, following the Ottoman Empire's dissolution and coinciding with the Zionist movement's rise.[73] At the heart of the conflict is the sentiment embodied in the slogan popularized by members of the Zionist movement, "[a] land without a people for a people without a land."[74] Members of the Zionist movement, during this time, believed that Judaism was a nationality that deserved an independent nation-state. The persecution faced by Jewish Europeans fueled much of this sentiment.[75]

68. MARTIN BUNTON, THE PALESTINIAN-ISRAELI CONFLICT: A VERY SHORT INTRODUCTION xii (Oxford Univ. Press 2013).

69. *Id.* at xv.

70. *See id.*

71. *See id.*

72. *See generally* BUNTON, *supra* note 68.

73. *See id.* at 1.

74. *Id.* at 2.

75. *Id.*

Following years of mistreatment and oppression in Europe, this group began to see an ancestral home in the Middle East as their only hope for security,[76] which led groups of Jewish Europeans to leave Europe and settle the land of their ancestors.[77]

The Ottoman Empire controlled the land they sought, however, and contrary to their popular message of settling an uninhabited land, Arabic peoples had lived there for centuries.[78] These groups of Arabic settlers were largely nomadic peoples.[79] Throughout the early 1900s, as European Jewish settlers moved into this area of Ottoman-controlled land, Arabic settlers began to identify as Palestinian,[80] differentiating them from the European Jewish settlers.

Before the end of World War I, the British government issued the Balfour Declaration, which promised Zionists a right to settle their ancestral home in the Middle East once the war ended.[81] The Ottoman Empire collapsed following the war, and the British and French empires took control of the Middle East.[82] The European colonial powers carved up their respective portions of the Ottoman Empire to govern over the territories.[83] Britain created mandates, at the center of which system was the British mandate for Palestine, referred to as "British Palestine" by the colonial power.[84]

Initially, Britain allowed Jewish immigration to British Palestine, which kept to the promises made under the Balfour Declaration.[85] As Jewish Europeans began to emigrate to the region, they settled in the areas with agriculturally fertile lands, which forced many Arabic people, already living here, from their land.[86] The settlements of Jewish

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76. *See* Zack Beauchamp, *What is Zionism?*, VOX (May 14, 2018), *available at* https://www.vox.com/2018/11/20/18080010/zionism-israel-palestine (last visited Oct. 5, 2020); *see also* Zack Beauchamp, *How Did Israel Become a Country in the First Place?*, VOX (May 14, 2018), *available at* https://www.vox.com/2018/11/20/18080016/israel-zionism-war-1948 (last visited Oct. 5, 2020) [hereinafter *Israel become a country*].

77. *Id.*

78. *See Palestine, Palestine's Early Roots*, HISTORY.COM (Oct. 21, 2019), *available at* https://www.history.com/topics/middle-east/palestine#section_2 (last visited Oct. 12, 2020).

79. *The Israel-Palestine Conflict: A Brief, Simple History*, VOX (Jan. 20, 2020), *available at* https://www.youtube.com/watch?v=iRYZjOuUnlU (last visited Oct. 12, 2020) [hereinafter *Israel-Palestine Conflict*].

80. *Id.*

81. BUNTON, *supra* note 68, at 19.

82. *See id.* at 11-14.

83. *Id.* at 15.

84. *Id* at 22-23.

85. Israel-Palestine Conflict, *supra* note 79.

86. *Id.*

Europeans generated tension that led to violence between the Jewish European immigrants and the Palestinian Arabs who already occupied the land.[87] Tensions continued to escalate until Britain began limiting Jewish immigration into British Palestine.[88] Limiting immigration violated British commitments under the Balfour Declaration and led to the formation of Jewish militias to fight the indigenous Arab opposition for control of the now contested lands.[89] These Jewish militias also fought British forces, attempting to provoke Britain to reinstate policies that would once again enable immigration.[90]

During WWII, the Holocaust led more Jewish Europeans to flee Europe for British Palestine; they increasingly saw the land as their best chance at safety and security.[91] The increased persecution of Jewish Europeans during WWII lead to greater European support for Jewish immigration to British Palestine.[92] By 1947, the sectarian conflict between indigenous Arabs and Jewish Europeans over claims to the same land brought the dispute before the international community.[93] The U.N. became increasingly involved as the conflict between these two groups escalated. To end sectarian violence, the U.N. divided British Palestine into two states: an Arab state and a Jewish state, and Jerusalem would become an internationalized territory.[94] Jewish leaders accepted the plan, but many Palestinian Arabs openly opposed it, arguing that they represented most of the population in certain regions and should be awarded more territory under the plan.[95] Refusal to address this concern led Arabs to begin forming volunteer armies throughout Palestine to defend their lands.[96]

In May 1948, less than a year after the U.N. Partition of Palestine, Britain withdrew from the Middle East, and Israel became an independent state.[97] Arab states in the region, which had also recently gained their independence, viewed the newly independent Israeli nation-state as an extension of Western colonialism.[98] This tension between the Arab states

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87. *Id.*
88. *Id.*
89. Israel-Palestine Conflict, *supra* note 79.
90. *Id.*
91. *See* BUNTON, *supra* note 66, at 44.
92. Israel-Palestine Conflict, *supra* note 79.
93. Beauchamp, *supra* note 76.
94. *Id.*
95. Palestine, *supra* note 78.
96. *Id.*
97. *Id.*
98. *Id.*

and Israel began the Arab-Israeli War. The Arab states–Jordan, Iraq, Syria, Egypt, and Lebanon–declared war on Israel in an attempt to establish a unified Arab Palestine where the British Palestine mandate had once been.[99] However, the new Israeli state won the war and pushed beyond the state borders the U.N. established in 1947.[100] By the end of the war, Israel controlled everything but the Gaza Strip and the West Bank, which were controlled by Egypt and Jordan, respectively.[101] Many Palestinians were displaced from their homes as a result of the Israeli expansion, creating a large refugee population that was forced to relocate their homes to many of the neighboring Arabic countries.[102]

The next significant standoff between Israel and the Arab states was the Six Days War in 1967.[103] During the Six Days War, Israel seized the Golan Heights from Syria, the West Bank from Jordan, the Sinai Peninsula and Gaza Strip from Egypt, and the city of Jerusalem.[104] Israel was now solely responsible for governing the Palestinians.[105] To lament peaceful relations after this conflict, Egypt and Israel signed the US-brokered Camp David Accords in 1978.[106]

Egypt was the only Arabic state that signed a formal peace treaty with Israel, but other Arab states in the region began to acquiesce to Israel's existence even though they did not sign any similar agreements.[107] After the Six Days War, Israel maintained its occupancy of Palestinian territory in the West Bank and Gaza Strip.[108] At this time, the conflict shifted from focusing on disputes between Israel and the Arabic states in the region to the tension between Israel and the Palestinian territories.[109]

In the 1960s, the Palestinian Liberation Organization (PLO) was formed to advocate for Palestinians.[110] The PLO claimed the right to the

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99. Israel-Palestine Conflict, *supra* note 79.

100. *Id.*

101. *Id.*

102. Bunton, *supra* note 68, at 68.

103. *Id.* at 70.

104. *Id.* This sudden conquest of territory rich in Biblical history would ignite a desire in Israeli expansionism to maintain possession of these holy sites. This desire would remain a contested, central point of the conflict from this point on, making resolution even harder to attain.

105. Bunton, *supra* note 68, at 73.

106. *Id.* at 75-76.

107. Israel-Palestine Conflict, *supra* note 79.

108. *Id.*

109. *Id.*

110. Zack Beauchamp, *What is the Palestinian Liberation Organization? How About Fatah and the Palestinian Authority?*, VOX (May 14, 2018), *available at* https:

land of the former British Palestine, and over time the organization turned to acts of violence to make its point against the Israeli government.[111] Despite opposition from the PLO, Israel continued to occupy Palestinian territory, and Israeli settlers moved into the West Bank and Gaza Strip.[112] The Israeli government claimed the settlement of people into the territories was for religious reasons, and they subsidized the housing to make it affordable to move.[113]

Occupation of the territories, which has been condemned by the international community, has become increasingly hostile for members of the Arabic community as more Israeli settlers move to settlements within the territories.[114] The Israeli occupation intensified divisions over the land and led to the rapid deterioration of the agricultural lands that once belonged to Palestinian Arabs.[115] Persistent occupation and division of territories have made it difficult for Palestine to form a fully realized state.[116] Additionally, thousands of Jewish settlers have emigrated to the Palestinian territories since Israel's occupation began, making the possibility of creating a Palestinian state even more difficult.[117]

The frustrations of Palestinian Arabs grew as Israel's settlements and occupation continued.[118] In 1987, this frustration mounted and culminated in the First Intifada.[119] The First Intifada began as protests but quickly escalated into violence when the Israeli military forces responded with heavy force.[120] Hundreds of Israelis and thousands of Palestinians lost their lives during the First Intifada.[121] The First Intifada also created a schism between Palestinian independence fighters, the PLO in the West Bank, and nationalist groups in the Gaza Strip.[122] Hamas

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//www.vox.com/2018/11/20/18080054/palestinian-liberation-organization-israel-conflict (last visited Oct. 11, 2020) [hereinafter *PLO*]. The PLO currently runs the Palestinian National Authority, which manages the Palestinian territories until a deal is reached with Israel to acknowledge the independence of the territories.

111. *See id.*

112. *See* Zack Beauchamp, *What Are the Settlements, and Why Are They Such a Big Deal?*, VOX (May 14, 2018), *available at* https://www.vox.com/2018/11/20/18080052/israel-settlements-west-bank (last visited Oct. 11, 2020) [hereinafter *Settlement*].

113. *Id.*

114. *Id.*

115. Israel-Palestine Conflict, *supra* note 79.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Settlement, *supra* note 112.

121. Israel-Palestine Conflict, *supra* note 79.

122. *Id.*

formed out of the nationalist groups in the Gaza Strip.[123] Throughout the history of the conflict, Hamas has seemed more willing to engage in acts of violence against its Israeli adversaries. [124]

In 1993, the next step towards peace was the Oslo Accords.[125] The Oslo Accords intended to serve as the first step toward Israel withdrawing from the Palestinian territories.[126] The Oslo Accords' goal was to establish a Palestinian authority that would secure Palestinians' right to govern themselves.[127] Israeli and Palestinian hardliners both opposed the Accords, seeing them as a concession to the other side, indicative of weakness, and an act of transgression.[128] Hamas responded to the Accords violently by sending suicide bombers into Israel in a failed attempt to kill the Israeli Prime Minister.[129] These bombings were unsuccessful, and the Prime Minister ultimately died at the hands of far-right Israeli hardliners who shot and killed him.[130] Extremists on both sides used violence to derail the peace process and keep the conflict deeply entrenched.[131] Hardliners for Israel and Palestine were on a path of mutual destruction and despised the idea of a negotiated peace that would undermine any of their demands.[132]

The Second Camp David Accords, in 2000, was another unsuccessful attempt at brokering peace.[133] Leaving another round of negotiations empty-handed, many Palestinians believed it was impossible to broker a peace deal between the two sides of the conflict that would eventually lead to their independence.[134] This frustration manifested in the Second Intifada, which was more violent than the first.[135] In the Second Intifada, approximately 1000 Israelis and 32,000 Palestinians

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123. *Id.*

124. *Id.*

125. *Id.*

126. Zack Beauchamp, *What is the Israeli-Palestinian Peace Process?*, VOX (May 14, 2018), *available at* https://www.vox.com/2018/11/20/18080090/israel-palestine-peace-process (last visited Oct. 11, 2020) [hereinafter *Peace Process*].

127. *Id.*

128. *Id.*

129. BUNTON, *supra* note 68, at 94.

130. *Id.*

131. Israel-Palestine Conflict, *supra* note 79.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

died;[136] the uprising lasted from 2000 to 2005, years longer than the First Intifada.[137]

The nature of the conflict changed after the Second Intifada.[138] The Israeli people also began to believe negotiated peace was unattainable. Previously failed peace negotiations and ensuing violence made Israelis believe the Palestinians would never be satisfied with what Israel was willing to offer.[139] Many Israelis also felt negotiation efforts forced them into giving up Israeli sovereignty to a group that saw violence as their only constructive recourse.[140] During this time of lost faith, Israel's solution was to build walls and establish checkpoints around the West Bank and Gaza Strip.[141] This choice indicated a willingness to manage the conflict rather than solve it through peace talks designed to settle the land disputes.[142] Palestinians felt as if both peaceful negotiations and violence left their demands unheard; none of the outlets they turned to were leading them toward the eventual recognition of a Palestinian state.[143] Eventually, Hamas took full control over the Gaza Strip and Israel implemented a military blockade in response, which had devastating impacts on the local community.[144] Following the Israeli blockade, unemployment in the Gaza Strip rose to 40%.[145]

Presently, conflict periodically breaks out between the Israeli forces and Arabic Palestinians in the West Bank and the Gaza Strip, and Israeli settlement efforts continue.[146] However, this violence is rarely felt within the Israeli state; as occupation continues, so does the distance between the conflict and the general political will of Israelis. As a result of this conflict's history, opposition to the other has become deeply intertwined with the individual identity of Israelis' and Palestinians'. Israeli and

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136. Israel-Palestine Conflict, *supra* note 79.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Israel-Palestine Conflict, *supra* note 79.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *See generally Israel and Palestine: Events of 2017*, HUM. RTS. WATCH (2018), *available at* https://www.hrw.org/world-report/2018/country-chapters/israel/palestine (last visited Dec. 15, 2020); *see also Israel and Palestine: Events of 2018*, HUM. RTS. WATCH (2019), *available at* https://www.hrw.org/world-report/2019/country-chapters/israel/palestine (last visited Dec. 15, 2020); *see also Israel and Palestine: Events of 2019*, HUM. RTS. WATCH (2020), *available at* https://www.hrw.org/world-report/2020/country-chapters/israel/palestine (last visited Dec. 15, 2020).

Palestinian identities have become negatively interdependent in a manner characterized by exclusivity and disdain for the other.[147] Emotion and its interconnectedness to identity have exacerbated tensions in this conflict to the point of intractability, where peace seems to be an improbable outcome.[148]

IV. NORTHERN IRELAND CASE STUDY

The conflict between Israel and Palestine, in many ways, is analogous to the Troubles in Northern Ireland. These conflicts center around two groups of people claiming one land for competing reasons.[149] Walls were erected in the City of Belfast by British soldiers to contain violence, just like the walls built by Israeli forces in the West Bank and Gaza Strip.[150] Graffiti on the peace walls in Belfast lend support to the cause of Arabic Palestinians fighting for the recognition of statehood.[151] Both conflicts grew out of competing senses of nationalism and adversarial claims to a shared land.[152] The most significant difference between the two regions is that Northern Ireland has emerged as a post-conflict society,[153] and Belfast is no longer a paramilitary war zone.[154] On the other hand, Israel and Palestine have not been able to negotiate a peace deal similar to the Good Friday Agreement that would allow both groups of people to share common land.[155] The peace process in Northern Ireland provides a framework to analyze the conflict between Israel and Palestine;[156] it offers clues that indicate what model might work best to achieve lasting peace.[157]

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147. Herbert Kelman, *The Interdependence of Israeli and Palestinian National Identities: The Role of the Other in Existential Conflicts*, 55 J. SOC. ISSUES 581, 588 (1999).

148. *See id.*

149. *See* Liel Maghen & Eran Tsidkyahu, *What Northern Ireland Can Teach Us About Israel-Palestine*, +972 MAG. (June 16, 2017), *available at* https://www.972mag.com/what-northern-ireland-can-teach-us-about-israel-palestine/ (last visited Oct. 9, 2020).

150. *See id.*

151. *See id.*

152. *See id.*

153. *See id.*

154. *See* Maghen & Tsidkyahu, *supra* note 149.

155. *See id.*

156. *See generally* IAN S. LUSTICK, UNSETTLED STATES, DISPUTED LANDS: BRITAIN AND IRELAND, FRANCE AND ALGERIA, ISRAEL AND THE WEST BANK-GAZA (1993).

157. *See generally id.*

A. Historical Context of the Conflict in Northern Ireland

In 1968, the Troubles broke out across Northern Ireland.[158] The Good Friday Agreement replaced years of persistent violence with a formal cease-fire, signaling an end to the Troubles.[159] The conflict arose out of a complex network of nationalist, ethnic, religious, and postcolonial tensions. Deep connections to history enabled each of these dimensions to intensify over time. The colonial history of Ireland and the island's eventual partition created a condition where nationalism could fester. Following the partition of Ireland, Ulster, the northernmost Province of Ireland, found itself at the center of a conflict where divergent national identities competed for a shared land.

Ireland was a part of the British Empire before the three southern Provinces of the island declared their freedom from the colonial power and formed the Republic of Ireland (the Republic).[160] Geographically, four Provinces make up the island in its entirety, but only three form the Republic.[161] Ulster, which is now Northern Ireland (the North) and not part of the Republic of Ireland, was the Province where British settlers established their plantations.[162] In the 1600s, people sympathetic to the British Crown moved to the Ulster plantations to farm the incredibly fertile soil.[163] Those that settled the plantations were predominately Protestant, which set them apart from the mostly Irish Catholic population that already inhabited the land.[164] While the Crown of England was establishing plantations in Ulster, Irish Republicans across the island pushed for their independence.[165] Unlike the wealthy plantation owners in Ulster, Irish Republicans were only loyal to the notion of an independent country, free from their colonial oppressor.[166] Those who referred to themselves as Republicans and pushed for an independent Ireland were mainly Catholic, yet another point of departure from their British counterparts.[167]

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158. MARC MULHOLLAND, THE LONGEST WAR: NORTHERN IRELAND'S TROUBLED HISTORY (2002) [hereinafter THE LONGEST WAR].

159. MARC MULHOLLAND, NORTHERN IRELAND: A VERY SHORT INTRODUCTION 141 (2002) [hereinafter NORTHERN IRELAND].

160. *Id.* at 22.

161. *Id.*

162. *Id.* at 2.

163. *Id.*

164. NORTHERN IRELAND, *supra* note 159.

165. *Id.* at 6.

166. *See id.*

167. NORTHERN IRELAND, *supra* note 159, at 3-5.

In 1916, the Easter Rising, which took place in Dublin, was the catalyst the Irish needed to gain their independence from the United Kingdom.[168] Removed from the nationalistic protests that engulfed the South of Ireland in 1916, Ulster Unionists in the North were unwilling to engage in any acts that disobeyed the wishes of the Crown.[169] In 1920, the Government of Ireland Act awarded the six counties of Ulster to a parliament that would sit in Belfast, formally recognizing the division between the North and South of Ireland.[170] This parliament operated under the United Kingdom's watchful eye separate from Dublin, the Republic of Ireland's capital.[171]

The partition of Ireland into the North and the South fueled sectarian tensions in Northern Ireland. This process created an environment where Catholic Nationalists in the North felt cut off from the Republic and resented Ulster Unionists for their role in preventing a unified Ireland from being realized.[172] Sectarian groups formed along nationalistic party lines dominated the discourse around the government's formation. Ulster Unionists began a process of consolidating their political power and became the majority government in the North.[173] Policies that discriminated against Irish Catholics made the consolidation of political power possible.[174] Examples of the discriminatory policies Ulster Unionists put into place were gerrymandering voting districts, implementing civil service exams for employment, underfunding Catholic schools, and denying the right to universal suffrage.[175] Northern Ireland's formation, following partition, was built upon these contentious civil rights issues.

In the North, one of the most discriminatory practices was policing. Northern Ireland's Parliament passed the Special Powers Act in 1922.[176] This act gave security forces the power to arrest and search homes without a warrant, detain prisoners without trial, and hang and whip offenders.[177] The Special Powers Act gave this power to the Royal Ulster Constabulary (RUC), a majority Protestant police force in Northern

168. NORTHERN IRELAND, *supra* note 159, at 22.
169. *Id.* at 23.
170. *Id.*
171. *Id.*
172. *Id.* at 25.
173. *See* NORTHERN IRELAND, *supra* note 159, at 33-35.
174. *See id.* at 37-48.
175. NORTHERN IRELAND, *supra* note 159, at 37-48.
176. *Id.* at 26.
177. *Id.*

Ireland, which used that power to disproportionately target Catholic minority populations.[178]

The RUC's unreasonable targeting, open practices of discrimination, and rescinding of Catholics' rights led to civil rights protests across the North in 1968.[179] Those who partook in the protests advocated for equality.[180] However, these protests ended violently when the RUC and B-specials, wholly Protestant police auxiliaries, stepped in to disrupt demonstrations.[181] Unionist government officials recognized the need to respond to these protests, so they enacted reforms in a half-hearted attempt to eliminate their discriminatory policies; the Catholic community deemed this response inadequate.[182] In response, radical Republicans began the Long March from Derry to Belfast on January 1, 1969, to make their voices heard.[183] When the marchers crossed through Protestant towns, fierce resistance, violence, and outrage echoed down the streets.[184] This violence began the North's rapid societal deterioration as sectarianism became divisive and led to the deep-seated conflict between the two communities. Paramilitary forces like the Provisional Irish Republican Army (IRA) and the Ulster Volunteer Force (UVF) formed to protect their respective communities from violence, wage a guerilla war against their counterpart, and fight for control over the fate of the contested land.[185]

Bloody Sunday, in 1972, ignited Northern Ireland's descent into violence. In Derry/London-Derry, thirteen unarmed civil rights protestors were shot and killed by the British Army.[186] The protesters were all Catholics who were marching in protest of the newly instated policy of British internment for any person suspected of being an Irish

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178. *Id.* at 56.

179. *Id.* at 50.

180. NORTHERN IRELAND, *supra* note 159, at 49.

181. *Id.* at 51.

182. *Id.* at 52.

183. *Id.* at 53.

184. *Id.*

185. *See generally* Jeff Wallenfeldt, *The Troubles: Northern Ireland History*, BRITANNICA (Aug. 21, 2020), *available at* https://www.britannica.com/event/The-Troubles-Northern-Ireland-history (last visited Dec. 14, 2020). The paramilitary forces emerged during the Troubles to defend their cause. The IRA defended the nationalist cause, reunification with the Republic, and the UVF and Ulster Defense Association combated this Republican sentiment.

186. *"Bloody Sunday" in Northern Ireland*, HISTORY.COM (Feb. 9, 2010), *available at* https://www.history.com/this-day-in-history/bloody-sunday-in-northern-ireland (last visited Dec. 15, 2020).

nationalist sympathetic to the IRA's cause.[187] An additional seventeen people were injured when the shots were fired.[188] In April 1972, the British Government exonerated the soldiers who shot the protestors, and tensions in Northern Ireland became insurmountable.[189] The event outraged citizens across Northern Ireland and the violent struggle that would not end until 1998 began.[190]

On April 10, 1998, the Good Friday Agreement was signed and ended nearly thirty years of conflict in the North.[191] Most significantly, the agreement created a devolved government in Belfast that was a power-sharing governance system between Northern Ireland and England.[192] The agreement also created integrated political institutions between Northern Ireland and the Republic and between the United Kingdom and the Republic.[193] The addition of these institutions to the agreement helped address the Republican demand that the agreement recognize the Irish cultural and nationalistic dimensions of the North.[194]

Areas of concern that emerged as a byproduct of the conflict were also tackled during the agreement's negotiation, and lamented as compromises in the agreement. The three areas addressed were the decommissioning of weapons, releasing paramilitary soldiers from prison, and restructuring policing practices.[195] Reaching the final terms of this agreement was difficult, but the institutions it created ushered Northern Ireland into a post-conflict world by offering those divided by war an opportunity to come together.[196]

While the Good Friday Agreement managed to address certain sensitive topics, many others were left unresolved by this agreement.[197] Two of the most notable missing pieces were the failure to address the peace walls erected by British forces in Belfast to contain violence and the failure to set out a process for how Northern Ireland should begin to

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. NORTHERN IRELAND, *supra* note 159, at 142.

192. The Northern Ireland Peace Agreement, Ir.-U.K., Apr. 10, 1998.

193. *See id.*

194. NORTHERN IRELAND, *supra* note 159, at 143.

195. *Id.* at 142.

196. The Good Friday Agreement's detailed negotiation process is beyond the scope of this paper. However, for more information, *see generally* GEORGE J. MITCHELL, MAKING PEACE (2000).

197. The Northern Ireland Peace Agreement, Ir.-U.K., Apr. 10, 1998.

heal as a post-conflict society.[198] The Troubles left Northern Ireland divided and unable to find a common identity.[199] Protestant Unionists wanted to remain connected to the United Kingdom, while Catholic Nationalists wanted Northern Ireland to rejoin the Irish Republic in the South.

B. Successful Transitional Justice Measures Utilized in Northern Ireland

Northern Ireland emerged from the Troubles as a divided society. Although the Good Friday Agreement formally ended the sectarian violence within the country, it was only the beginning of the peace process. Change in Northern Ireland since the Good Friday Agreement has been incremental.[200] In this context, transitional justice methods focus on a multi-layered legal and political system of change. The country did not undergo its transition to peace through a single act of transitional justice, such as a truth commission; instead, its peace process is the sum of many smaller actions.[201]

The Good Friday Agreement created a system of interdependence, wherein former adversaries had to set aside their profound mistrust.[202] The structural interconnectedness created by the agreement brought together the two sides of the ethno-nationalist conflict, forcing formerly oppositional political traditions to come together.[203] Within the new political landscape created by the Good Friday Agreement, the Troubles' former adversaries became mutually dependent; they had to rely on one another to pass legislation to govern the country.[204] The agreement also embodies the ability of two sovereign nations to cooperate in order to resolve a conflict, even if that meant sacrificing some of their power.[205] For example, the United Kingdom sacrificed some of its territorial integrity to allow a permeable border between the North and the

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198. Cathy Gormley-Heenan, Jonny Byrne & Gillian Robinson, *The Berlin Walls of Belfast*, 8 BRIT. POL. 357 (2013).

199. THE LONGEST WAR, *supra* note 158.

200. Colm Campbell & Fionnuala Aolain, *Local Meets Global: Transitional Justice in Northern Ireland*, 26 FORDHAM INT'L L.J. 871, 883 (2003).

201. *Id.*

202. *Id.* at 886; *see also* GEORGE J. MITCHELL & ALON SACHAR, A PATH TO PEACE: A BRIEF HISTORY OF ISRAELI-PALESTINIAN NEGOTIATIONS AND A WAY FORWARD IN THE MIDDLE EAST 365 (2016) [hereinafter A PATH TO PEACE].

203. Campbell & Aolain, *supra* note 200, at 886.

204. *Id.*

205. *Id.*

Republic, and the Republic placed any desires for Irish reunification behind it.[206]

Although the agreement allowed for structural reform that transformed Northern Ireland into a modern post-conflict society, it did not address the individual memories of victims. A loose framework for political cooperation was placed at the forefront of the Good Friday Agreement's negotiations so that measures of reconciliation could be added to Northern Ireland's peace process over time.[207] As a result, Northern Ireland has addressed the victims in its divided society through more localized initiatives. Civil society and international non-governmental organizations (NGOs) instituted several bottom-up truth recovery projects that adopted the discourse of global transitional justice.[208] NGOs also offered victims access to international legal mechanisms by seeking redress in the European Court of Human Rights Judgments.[209]

One example of a local initiative implemented following the Good Friday Agreement is the Suffolk Lenadoon Interface Group (SLIG). The cornerstone of SLIG's operation is regeneration and peacebuilding through community development.[210] This community development organization was based in Belfast and is the joint initiative of the Suffolk Community Forum and the Lenadoon Community Forum.[211] These two communities exist on either side of an interface, or peace wall, in Belfast, where violence was once a mainstay in both communities during the Troubles. Suffolk is a Protestant Unionist community and Lenadoon is a Catholic Republican community; before 1996, there was no contact between these communities for over twenty years.[212] Despite years of violence and mistrust, SLIG created a community space for the divided community to come together.[213] This effort has since led to the creation of joint soccer leagues between the communities and other integrated

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206. *Id.* at 886-87.

207. *See* Maghen & Tsidkyahu, *supra* note 149.

208. Patricia Lundy, *Paradoxes and Challenged of Transitional Justice at the 'Local' Level: Historical Inquiries in Northern Ireland*, 6 CONTEMP. SOC. SCI. 89, 94 (2011).

209. *Id.* at 95.

210. *Suffolk Lenadoon Interface Group*, BELFAST INTERFACE PROJECT (2013), *available at* https://www.belfastinterfaceproject.org/community-group/suffolk-lenadoon-interface-group (last visited Oct. 16, 2020) [hereinafter *Interface Project*].

211. *Suffolk Lenadoon Interface Group (SLIG)*, PEACE INSIGHT (Jan. 2013), *available at* https://www.peaceinsight.org/conflicts/northern-ireland/peacebuilding-organisations/slig/ (last visited Oct. 11, 2020) [hereinafter SLIG].

212. *Id.*

213. *Id.*

community programs.[214] SLIG is an example of a local effort that brought the community together in the effort to shape a shared identity without a formal wartime tribunal or truth commission.[215]

Historical Enquiry Teams (HETs) were also established by the police department in Northern Ireland. HETs were a bold and innovative way for Northern Ireland to begin healing from local divisions.[216] Unlike truth commissions, these teams offered an individualized approach that attempted to answer victims' unresolved questions on a personal level.[217] An imperative goal of the peace process and reconciliation in Northern Ireland was to ensure that the police force addressed their past discriminatory practices through these teams.[218]

During the Troubles, a focus of hostility was the unjust policing practices that disproportionately targeted the Catholic community.[219] The HETs were established in pursuit of the goal to rebuild trust in the police force.[220] The HETs, however, did not prosecute criminals in a traditional legal sense;[221] instead, their focus is on answering the questions of individual families.[222]

Engaging with the memory of trauma this way has enabled reconciliation by allowing members of local communities to acknowledge past traumatic experiences, uncover the details of previously unknown events, and discover answers to questions which, if left unanswered, may have further fostered continued feelings of hostility.[223] This type of local community engagement can only be achieved through decentralized, local methods of transitional justice. A truth commission or tribunal established by the state may not have had the same success. The HETs, however, were perfectly implemented, although Her Majesty's Inspectorate of Constabulary released a report criticizing the HETs' inconsistent approach to reviewing cases,

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214. *Id.*

215. Lundy, *supra* note 208, at 102.

216. *Id.*

217. *Id.*

218. *Id.* at 95.

219. *See* NORTHERN IRELAND, *supra* note 159, at 30.

220. Lundy, *supra* note 208, at 95; *see also* Deborah McAleese, *'Destruction' of Historical Enquiries Team Was Massive Mistake, Says Ex-Police Chief Order*, BELFAST TEL. (Jan. 22, 2016), *available at* https://www.belfasttelegraph.co.uk/news/northern-ireland/destruction-of-historical-enquiries-team-was-massive-mistake-says-ex-police-chief-orde-34386735.html (last visited Dec. 15, 2020). HETs were ultimately disbanded as a result of police service of Northern Ireland budget cuts.

221. *Id.* at 98.

222. *Id.* at 100.

223. *Id.* at 99.

misrepresentation of the law, and belief the system may have more success as an independent commission.[224]

Northern Ireland has only conducted one official inquiry into the events surrounding Bloody Sunday. Northern Ireland implemented only one such tribunal because of the economic hardship it imposed on local communities.[225] The British conducted the inquiry from 1998 to 2010, and it cost approximately £200 million.[226] Victims were able to come before the tribunal and the state released the official narratives of the events in their official findings.[227] In the end, the report concluded that the British Army fired the first shot on a group of protesters who posed no threat.[228]

The inquiry provided insight into a contentious event, but it did so at a high economic cost. This inquiry was similar to the truth commission implemented in South Africa, which sought to learn the objective facts surrounding a contentious issue. However, these commissions and inquiries should not be the first tool of reconciliation used by transitioning societies because of the economic burden imposed on local communities. Accessible, local methods should primarily be used to create a transcendent community identity, and more robust inquiries should support this initiative when necessary.

C. Weaknesses of the Transitional Justice Methods Utilized in Northern Ireland

Construction of the peace walls began in Belfast during the summer of 1969. Since their initial construction, the number of peace walls in Belfast has grown since the ceasefire, now consisting of nearly ninety walls spread across the city.[229] The British Army and the Northern

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224. *Historic Enquiries Team Criticised: Reaction to HMC Report*, BBC (July 3, 2013), *available at* https://www.bbc.com/news/uk-northern-ireland-23165015 (last visited Dec. 15, 2020); *see generally Inspection of the Police Service of Northern Ireland Historical Enquiries Team*, HMIC (July 3, 2020), *available at* https://www.justiceinspectorates.gov.uk/hmicfrs /media/inspection-of-the-police-service-of-northern-ireland-historical-enquiries-team-20130703.pdf (last visited Dec. 15, 2020).

225. Campbell, *supra* note 200, at 888.

226. *Bloody Sunday Inquiry: Saville Has 'No Regrets'*, BBC NEWS (Oct. 13, 2010), *available at* https://www.bbc.com/news/uk-northern-ireland-11536743 (last visited Oct. 10, 2020).

227. Campbell, *supra* note 200, at 888.

228. Bloody Sunday Inquiry, *supra* note 226.

229. *New Research Pins Down Who Owns the 'Peace Walls'*, BELFAST TEL. (Jan. 26, 2012), *available at* https://www.belfasttelegraph.co.uk/news/northern-ireland/new-research-pins-down-who-owns-the-peace-walls-28707623.html (last visited Dec. 15, 2020).

Ireland Office constructed peace walls along interface areas as a policy response to the eruption of sectarian violence across the city.[230] The walls created physical lines of demarcation between communities, carving up the city of Belfast to counteract local sectarian violence.[231] Now, the structures that remain across the city are reminiscent of the feelings of hostility, fear, and violence so characteristic of the Troubles.[232]

Eventually, the government in Northern Ireland began to regard the growing number of peace walls as a political problem that could no longer go unaddressed.[233] Recognition that a narrative of segregation is perpetuated by the existence of these walls has caused policymakers to push for their removal from Belfast's urban framework.[234] This decision was also prompted by the increased international attention on the city of Belfast as Northern Ireland began to rise on the world stage as a peaceful country with the potential for economic prosperity in the future.[235] Although political integration has occurred as a result of the peace process, reconciliation and acceptance at local levels must branch out from growing acceptance for police practices. To reduce structural violence and put to rest the feelings of territoriality that helped perpetuate the conflict and remain reinforced by the physical presence of these barriers, local transitional justice efforts in Northern Ireland must address the physical separation within the city of Belfast.

Sectarian tension and segregation continue to shape the urban landscape of Belfast. When the Good Friday Agreement failed to address the political policy of building peace walls to diffuse violence, it perpetuated the continuation of segregation within society.[236] Physically, the walls separate communities all over the city, keeping Protestant and Catholic neighborhoods apart.[237] Presently, a lack of certainty stemming mostly from fear-driven emotions has increased among residents, which

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230. Cathy Gormley-Heenan, Jonny Byrne & Gillian Robinson, *The Problem with Northern Ireland's Peace Walls*, U. ULSTER (2012).

231. *See* Julia C. Obert, *'Shared Space': A Belfast Soundscape Study*, 18 NEW HIBERNIA REV. 13, 14 (2014).

232. Gormley-Heenan, *supra* note 230, at 4.

233. *See generally Reflected Lives: Intergenerational Oral Histories of Belfast's Peace Wall Communities*, BELFAST INTERFACE PROJ. (2013), *available at* https://www.belfastinterfaceproject.org/ (last visited Dec. 15, 2020).

234. *See* Gormley-Heenan, *supra* note 230, at 5.

235. *Id.* at 4.

236. *See* Steven Grattan, *Northern Ireland Still Divided by Peace Walls 20 Years After Conflict*, WORLD (Jan. 14, 2020), *available at* https://www.pri.org/stories/2020-01-14/northern-ireland-still-divided-peace-walls-20-years-after-conflict (last visited Dec. 15, 2020).

237. *See id.*

plagues attempts to remove the walls.[238] Many attitudinal surveys of Belfast residents suggest that although the walls might come down in the future, there are many security problems that need to be addressed before this point is reached.[239]

As a result, integration that transcends this physical barrier must be implemented at the local level to combat the segregation in Northern Ireland and further the peace process. Utilizing neutral spaces to accomplish this goal has been an initiative both promoted by the government and various NGOs.[240] Overcoming the division caused by the peace walls could benefit localized transitional justice initiatives.

Despite these walls, people in Belfast have managed to exist in a form of fragile coexistence.[241] This coexistence was made possible in part by the loose reconciliation process established by the Good Friday Agreement.[242] Peaceful proximity has created a city where each side of the sectarian conflict can live together in relative peace, without returning to the sectarian conflict that characterized the landscape of the city for thirty years.[243]

It is important to note that peace in Northern Ireland is not guaranteed to last for another thirty years. Brexit, the United Kingdom's exit from the European Union, created an environment in Northern Ireland that may make the country more susceptible to the return of sectarian tensions because of the possibility for a closed border between the North and South of Ireland. Although a return to paramilitary violence may not be the outlet to which those in Northern Ireland, Brexit may stoke the fires of a culture war that the peace process has yet to resolve completely.[244] Yet Brexit does not necessarily mean that Northern Ireland's peace will dissolve. The resurgence of the country's culture war to the forefront of Northern Irish politics, though, is a message that the process of peace and reconciliation in a post-conflict

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238. *Id.* at 18.

239. *See* Grattan, *supra* note 236; *see also* Patricia Mullan, *Peace Walls Attitudinal Survey Summary of Results*, INT'L FUND FOR IR. (2017).

240. *See generally* Mullan, *supra* note 239.

241. Maghen & Tsidkyahu, *supra* note 149.

242. *Id.*

243. *Id.*

244. Jonathan Gorvett, *Northern Ireland is in a Culture War. Brexit is Making it Worse*, FOREIGN POL'Y (Jan. 31, 2020), *available at* https://foreignpolicy.com/2020/01/31/northern-ireland-culture-war-brexit/ (last visited Oct. 11, 2020); *see also* James Angelos, *Will Brexit Bring the Trouble Back to Northern Ireland?*, N.Y. TIMES (Dec. 30, 2019), *available at* https://www.nytimes.com/2019/12/30/magazine/brexit-northern-ireland.html (last visited Dec. 15, 2020).

society is fragile. Peace can persist in a country for years following a conflict, and one cataclysmic event might end years of that peace and reconciliation. The lesson to learn from the precarious nature of transitional justice and its resulting peace is that it requires attention and adaptation to be sustainable.

V. PEACE FOR THE ISRAEL-PALESTINE CONFLICT

Northern Ireland offers one framework for how to approach the potential resolution of the Israel-Palestine conflict. However, the techniques of transitional justice used in Northern Ireland will not be a cookie-cutter fit for the process of ending conflict in the Middle East and transitioning it to a post-conflict region. Conflicts must be analyzed on a case-by-case basis, and lessons learned from analyzing the peace process of one conflict should be generalized and adapted to fit a conflict in another region of the world.[245] The Middle East is a more complicated environment to establish peace in than Northern Ireland in 1998.[246] In the Middle East, "[t]he conflict is more entrenched, the hostility is deeper, the mistrust greater, the destruction more widespread, the deaths more frequent."[247] If the two sides of the conflict in the Middle East want peace to work, however, a process similar to the one used in Northern Ireland may create the conditions for that peace to be lasting.[248]

A. Applying Northern Ireland's Peace Process to the Israel-Palestine Conflict

To formally end the Israel-Palestine conflict, Israeli and Palestinian political leaders should negotiate a peace treaty. Similar to the Good Friday Agreement between Northern Ireland, the United Kingdom, and the Irish Republic that ended the Troubles, all affected parties must be considered and have equal bargaining power. A treaty or proposal for peace, like the one currently offered by the Trump administration, will not achieve this goal because it fails to conceptualize the political aspirations of the Palestinian community.[249] A two-state solution must be sought for this contested land, but it must be a two-state solution that

245. *See generally* LOUIS KRIESBERG & BRUCE DAYTON, CONSTRUCTIVE CONFLICTS: FROM ESCALATION TO RESOLUTION 179-214 (5th ed. 2017).

246. A PATH TO PEACE, *supra* note 194, at 365.

247. *Id.*

248. *Id.*

249. Ayyub, *supra* note 5.

is willing to give both participants, Israel and Palestine, equal access to sovereignty and self-determination.

Palestinian and Israeli identities have become negatively intertwined.[250] Historically, the conflict has continued to negatively reinforce a narrative of "the other."[251] Former treaties have failed because they refuse to fully acknowledge the aspirations of both groups without being shaded by the history of a long, bitter conflict. Creating a transcendent identity must accompany a bilateral treaty that ends the conflict and creates a network of interconnectedness for future peace between former adversaries.[252] This transcendent identity should not threaten the particularistic nature of the identities of each side, but it should serve as the starting point to pursue a path toward commonality.[253] The interdependence of the adversarial identities should be reframed to be positively intertwined.[254] A treaty, like the Good Friday Agreement in Northern Ireland, may impose the initial structures that force adversaries to cooperate toward a common goal. This cooperation will begin to reframe the identity of the other in a positive light, which may create a space for the growth of stability in the region. However, "in the end the relationship between [the] Israelis and Palestinians will be determined by Israelis and Palestinians."[255]

Local transitional justice measures should form the foundation for reconciliation efforts following treaty negotiations. In time, international criminal law should address human rights abuses; the international community must not condone any grotesque violations of human rights by failure to prosecute them. Yet retribution should not be the singular focus of transitional justice following the Israel-Palestine conflict–focus on prosecuting adversarial criminals too early could cause the negative interdependence of the adversarial identities to re-emerge, which could reignite violence.[256]

Local measures should focus on historical inquiries for individual community members, like the HETs in Northern Ireland, and community integration programs similar to those implemented by SLIG. The historical inquiry committees should have no prosecutorial function, but should offer individuals answers to questions surrounding the deaths of

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250. Herbert C. Kelman, *The Interdependence of Israeli and Palestinian National Identities: The Role of the Other in Existential Conflicts*, 55 J. SOC. ISSUES 581, 583 (1999).

251. *See generally id.*

252. *Id.*

253. *Id.*

254. *Id.* at 598.

255. A PATH TO PEACE, *supra* note 194, at 366.

256. *See generally* Lundy, *supra* note 198.

loved ones. These localized inquiries will be vital in helping the healing of individuals who do not receive their day in court following the formation of criminal tribunals. Further, community integration should follow a model similar to the one implemented by SLIG in Northern Ireland, where former adversaries can come together and begin forming a shared identity.[257] Integrated programming for community members that increases contact with "the other" may lessen isolated feelings of hate and stigmatization. Increasing contact may increase the possibility of forming a common identity as an individual's thinking is continually reframed to reflect positive experiences.[258]

Importantly, none of these methods will provide immediate relief; they must have time to grow and cultivate community peace. As that occurs, and interconnectedness increases, there may be a space for a national transitional justice narrative such as an ad hoc tribunal or truth commission to establish a national record for the conflict and hold perpetrators accountable for their crimes.

VI. INEFFECTIVENESS OF RECENT DEVELOPMENTS

In September 2020, the Trump Administration brought Israel and the Arab nations, Bahrain and the United Arab Emirates, together to sign accords to normalize their relations.[259] The Abraham Accords and bilateral agreements between Israel and these Arab states are the first of any agreement between Israel and an Arab state since 1994.[260] President Trump marked the historic moment by stating, "[a]fter decades of division and conflict, we mark the dawn of a new Middle East."261 The Trump administration indicated that other Arab states, like Saudi Arabia, could take similar steps to normalize relations with Israel, though they

257. *See generally* SLIG, *supra* note 211.

258. *See generally* Oliver Christ & Mathias Kauff, *Intergroup Contact Theory in* SOCIAL PSYCHOLOGY IN ACTION 145 (Kai Sassenberg & Michael L.W. Vliek eds., 2019). This text supports the hypothesis of the social contract theory, that interconnectedness and contact between groups will reduce prejudices and assist in resolving conflict. It also acknowledges that increased contact alone is insufficient to lead to peace. The many factors associated with successful intergroup contact is beyond the scope of this paper, but contact should support an asymmetric balance of power.

259. Michael Crowley, *Israel, U.A.E. and Bahrain Sign Accords, With an Eager Trump Playing Host*, N.Y. TIMES (Sept. 15, 2020), *available at* https://www.nytimes.com/2020/09/15/us/politics/trump-israel-peace-emirates-bahrain.html (last visited Nov. 22, 2020).

260. *Id.* The last agreement that was signed between Israel and an Arab State was in 1994, when Israel and Jordan established diplomatic relations.

261. *Id.*

have yet to do so.[261] Israeli Prime Minister Benjamin Netanyahu echoed President Trump's sentiments about the Abraham Accords being a turning point for establishing peace in the Middle East, stating "[t]his peace will eventually expand to include other Arab states, and ultimately it can end the Arab-Israeli conflict . . . ."[262]

However, the Abraham Accords are missing the Palestinian voice and are, therefore, an incomplete attempt to achieving peace in the Middle East; all affected parties must have an equal opportunity to participate in diplomatic negotiations. Netanyahu's current approach to brokering peace in the Middle East sidesteps Palestinian self-determination and focuses on making peace with other Arab states.[263] For example, Netanyahu was able to fully normalize relations with the United Arab Emirates in return for suspending threats to annex portions of the West Bank,[264] where the international community continues to view Israel's occupation as illegal.[265] Palestine should be included in peace accords that involve their internationally recognized territories. The structure of the Abraham Accords places Arab states in the Middle East in a position to be power brokers for the future of Palestinian statehood, which ignores the aspirations of the Palestinian people.[266] For peace negotiations in the Middle East to represent a true movement toward regional stability, Palestinian aspirations must be adequately represented by their political leaders, not just the surrounding Arab world.

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261. *Id.*; *see also* Joseph Hincks, *Will Saudi Arabia Be Next to Normalize Relations with Israel? Don't Hold Your Breath Experts Say*, TIME (Sept. 18, 2020), *available at* https://time.com/5890151/saudi-arabia-israel-abraham-accords/ (last visited Nov. 21, 2020).

262. *Id.*

263. Bilal Y. Saab, *In Historic Deal With the UAE, Israel is the Biggest Winner*, FOREIGN POL'Y (Aug. 13, 2020), *available at* https://foreignpolicy.com/2020/08/13/in-historic-deal-with-the-uae-israel-is-the-biggest-winner/ (last visited Nov. 22, 2020).

264. *Id.*

265. *See* Isabel Kershner, *Are West Bank Settlements Illegal? Who Decides?*, N.Y. TIMES (Nov. 18, 2020), *available at* https://www.nytimes.com/2019/11/18/world/middleeast/israel-west-bank-settlements.html (last visited Nov. 22, 2020). Although the United States altered its foreign policy towards the settlements in the West Bank, claiming Israel had a right to maintain some of its settlements, the International Court of Justice, UN General Assembly, and UN Security Council all agree the settlements violate the Fourth Geneva Convention. Further, most of the world agrees that any annexation of territory in the West Bank would hinder future attempts at Israeli-Palestinian peace.

266. *See* Goldberg, *supra* note 264.

VII. CONCLUSION

Transitional justice has developed as a discourse to respond to the challenging questions posed by post-conflict societies. It began rooted in legal theory when the Nuremberg Trials were conducted after WWII. Since then, the discipline has evolved into an interdisciplinary field that puts victims first, as once war-torn societies start down a path of collective healing.

The Troubles in Northern Ireland and the Israel-Palestine conflict share many features. At their core, they are about oppositional self-determination movements claiming a contested, shared land. However, there is a major modern difference between these two conflicts–today, Northern Ireland is a post-conflict society while Israel and Palestine are still engaged in conflict. Northern Ireland departed from the typical transitional justice practice of establishing a criminal tribunal or truth commission to address the past. Instead, its peace process imposed political structures that cemented relationships of interdependence between former adversaries. Following the negotiation of a treaty that imposed this equitable relationship, local transitional justice initiatives were utilized to develop a shared identity that assisted in maintaining an enduring regional peace. As a result, Northern Ireland offers insight to how enduring, flexible peace can last in a society where peace was once thought to be unimaginable.

Trade Union Financing Law in the United States and in Brazil - An Ironic Convergence

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ABSTRACT

This study analyzes the compliance of Brazilian and United States trade union financing law with the international legal principle of freedom of association. In doing so, it notes an ironic convergence of both systems over the past three years. The entire public sector and much of the private sector are "right to work" in the United States, which resembles the recent universal "right to work" regime in Brazil. The Brazilian and American systems have coincided in this respect, despite continuing differences involving other aspects of labor relations and union structure. This article also briefly reviews how the labor movements of both countries are coping with the challenges of a right to work regime.

Keywords: Freedom of association; trade union contribution; Brazil; United States.

I. INTRODUCTION

Our objective is to analyze how well Brazilian and U.S. trade union financing law conform to the principle of freedom of association. The labor law regimes of both countries have been distinctly divergent for many years. The Brazilian regime has been associated with the ideal type

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of state corporatism, and the American system with liberal contractualism.[1]

Considering the vast differences between both labor law systems, it is reasonable to question the value of comparative analysis for the purpose of this article. For example, the Anglo-Saxon common law tradition continues to be a central influence on the American legal system, even in the area of administrative law.[2] In stark contrast, Brazil, with its Romano-Germanic civil law legacy, has a system of codification far more general and universal, which lacks the *stare decisis* limitations characteristic of the Anglo-American tradition. Another difference between both regimes is the role of the State in labor relations and in guaranteeing labor and trade union rights. In the United States, the State maintains a great distance, for the most part, from the collective bargaining process and the substantive results of collective agreements; this is in contrast to the Brazilian reality.[3]

In relative terms, there are fewer guarantees of substantive labor rights, benefits, and terms and conditions of employment in the American constitutional and infra-constitutional regime than in Brazil. It is also important to note that unlike the Brazilian labor courts, neither the American judiciary nor U.S. administrative agencies determine the substantive terms and results of collective bargaining agreements, provided that such substantive content is not in violation of the law.[4] For labor law and labor justice adjudication, there is a highly diverse and dispersed system in the United States that covers freedom of association, collective bargaining, minimum terms and conditions of employment, minimum wage, health and safety, employment discrimination, and many other subjects relating to the world of work. This system functions at both the federal and state levels and with different sets of labor relations legislation to cover private and public sector workers. Nevertheless, the National Labor Relations Act (NLRA) is the predominant legislation for labor relations in the private sector. The National Labor Relations Board (NLRB), a federal administrative agency, is responsible for the interpretation, application, and enforcement of the Act. The NLRB has both rule-making faculties and

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1. Stanley A. Gacek, *Revisiting the Corporatist and Contractualist Models of Labor Law Regimes: A Review of the Brazilian and American Systems*, 16 CARDOZO L. REV. 21, 26 (1994).

2. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 186-89 (Little, Brown and Co., 1976).

3. H.K. Porter Co., Inc. v. NLRB, 397 US 99, 102-09 (1970).

4. *Id.* The Supreme Court found that although the National Labor Relations Board (NLRB) has the power under the National Labor Relations Act (NLRA) to require employers and unions to negotiate in good faith, it does not have the power to compel either to agree to any substantive contractual provision of a collective bargaining agreement.

the power to produce case law based on the review of petitions and complaints. NLRB decisions have finality, but most of them are subject to further review by the federal judiciary. The Brazilian labor justice system, on the other hand, is highly centralized with a specialized system of labor courts at the local, regional, and national levels that have the power to adjudicate both individual and collective disputes concerning all of the labor and employment law subjects mentioned.

Notwithstanding the contrasts noted above, the current Brazilian labor law reality, and particularly the financial sustainability of the Brazilian union movement, should be of importance to American unionists, students of comparative labor law, and labor relations attorneys for the following reasons:

- Brazil's population is the fifth largest in the world, with over 211 million inhabitants and with a labor force of well over 100 million.[5] It is also still among the top ten economies in the world, notwithstanding the current economic downturn and unemployment exacerbated by the COVID-19 pandemic.[6]

- Although industrialized at different times, both Brazil and the United States share a common nineteenth and twentieth-century history of trade union struggle and militancy; draconian state and employer repression; and the eventual institutional recognition, legitimation, incorporation, and containment of the trade union movement during the same period—with the New Deal and Wagner Act of Franklin Delano Roosevelt and the *Estado Novo* and CLT (Consolidation of Labor Laws-Brazilian Labor Code) of Getúlio Vargas.[7]

- China replaced the United States as Brazil's number one trading partner over a decade ago; however, the United States continues

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5. *Population, Total - Brazil*, THE WORLD BANK (2019), *available at* https://data.worldbank.org/indicator/SP.POP.TOTL?locations=BR (last visited Nov. 8, 2020).

6. *World Economic Outlook Database*, INT'L MONETARY FUND (Oct. 2019), *available at* https://www.imf.org/en/Publications/WEO/Issues/2019/10/01/world-economic-outlook-october-2019 (last visited Nov. 8, 2020).

7. Franklin D. Roosevelt, *Remarks at a Banquet Given by President Getúlio Vargas of Brazil in Rio de Janeiro*, AM. PRESIDENCY PROJECT (Nov. 27, 1936), *available at* https:www.presidency.ucsb.edu/documents/remarks-banquet-given-president-getulio-vargas-brazil-rio-de-janeiro (last visited Nov. 8, 2020).

to lead in foreign direct investment (FDI),[8] and the Bolsonaro and Trump administrations discussed the possibility of a Brazil/United States free trade agreement (FTA).[9]

- Brazilian multinational companies have increased their investments and operations in North America to a remarkable degree in recent years. These companies include Gerdau Steel, Embraer Aircraft, construction conglomerates OAS and Odebrecht, Petrobrás for oil and gas exploration and refining, and banking giants Banco do Brasil, Itaú, and Bradesco, just to name a few. JBS has become the largest producer of animal protein in the world and is now the largest employer of packinghouse workers represented by the United Food and Commercial Workers (UFCW).

- There are hundreds of thousands of Brazilians living in the United States,[10] and many of them are working in both the formal and informal sectors of the economy.

- There was an official, formal recognition between the Brazilian and United States governments about the importance of interchange and cooperation in the labor field. In May of 2012, Brazilian Labor Minister Brizola Neto and U.S. Labor Secretary Hilda Solis signed the Memorandum of Understanding for Labor Cooperation, Brazil/United States, further making the area of social dialogue and collective bargaining a priority for a mutual discussion of best practices.[11]

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8. Abrão Neto & Roberta Braga, *U.S.-Brazil Trade and FDI: Enhancing the Bilateral Economic Relationship*, ATL. COUNCIL (Mar. 5, 2020), *available at* https://www.atlanticcouncil.org/in-depth-research-reports/us-brazil-trade-and-fdi-enhancing-the-bilateral-economic-relationship/ (last visited Nov. 8, 2020).

9. *Brazil-U.S. Joint Statement on Enhancement of Bilateral Economic and Trade Partnership*, DAILY COMP. PRES. DOC. (Apr. 7, 2020), *available at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/brazil-us-joint-statement-enhancement-bilateral-economic-and-trade-partnership (last visited Dec. 11, 2020).

10. Brittany Blizzard & Jeanne Batalova, *Brazilian Immigrants in the United States*, MIGRATION POL'Y INST., (Aug. 29, 2019), *available at* https://www.migrationpolicy.org/article/brazilian-immigrants-united-states-2017 (last visited Dec. 11, 2020).

11. *Memorandum of Understanding between the Department of Labor of the United States of America and the Ministry of Labor and Employment of Brazil Concerning Labor Cooperation*, U.S. DEP'T OF LABOR (May 17, 2012), *available at* https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/US%20Brazil%20MOU%20English.pdf (last visited Nov. 4, 2020).

This document was renewed following the official summit between U.S. President Barack Obama and Brazilian President Dilma Rousseff in Washington, D.C., at the end of June 2015. In addition, there was an agreement signed at the time of the summit concerning the portability and application of acquired social security benefits for U.S. nationals working in Brazil and for Brazilians working in the United States.[12]

An unprecedented convergence developed over the last three years between the Brazilian and American legal regimes concerning trade union financing. The compulsory *contribuição sindical*,[13] also known as the *imposto sindical* or trade union tax, helped sustain the Brazilian trade union structure for approximately seventy-five years, but it was effectively eliminated by the radically neo-liberal labor law reform, Lei 13.467, that was approved in the Brazilian Congress in July 2017 and implemented the following November. In 1998, almost twenty years earlier, the Tribunal Superior do Trabalho – Superior Labor Court (TST) declared the practice of collecting the *contribuição assistencial*—a trade union assistance contribution[14] from all of the workers of a given professional category in a geographical area not inferior to a municipality—invalid and only permitted the assessment to be exacted from the *associados*,[15] or voluntary union members. The combined effect of these

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12. SOCIAL SECURITY ADMINISTRATION, AGREEMENT ON SOCIAL SECURITY BETWEEN THE UNITED STATES OF AMERICA AND THE FEDERATIVE REPUBLIC OF BRAZIL (2015).

13. The compulsory trade union tax amounted to one day's pay per year and was collected from all workers covered by the monopoly union structure (governed by the principle of *unicidade*, or exclusive representation—only one union (*sindicato*) is allowed to represent the workers of a given professional category or economic activity (i.e., bank workers) and for a geographical area not inferior to a municipality, and regardless of whether or not the workers are voluntary members). The proceeds of the tax were destined for social welfare services on behalf of the union membership (such as medical and legal services). However, the Brazilian labor movement often used the proceeds for other trade union purposes during less repressive governments.

14. This contribution and its collection from all workers represented by the union had been similar to union security and agency fee practices in the United States. It has financed all types of trade union activity in Brazil.

15. Precedente Normativo do TST nº 119 (Normative Precedent 119 of the Superior Labor Court): "The Constitution of the Republic, in Articles 5, XX and 8, V, guarantees the right of freedom of association and free unionization. It is, therefore, offensive to this liberty if a clause established by an *acordo* (a collective agreement between the union of workers for a given professional category or economic activity and for a geographical area not inferior to a municipality and one or more individual employers of that same professional category or economic activity), by a *convenção coletiva* (a collective agreement between the union of workers of a given professional category or economic activity for a geographical area not inferior to a municipality with all of the employers of that professional category or economic activity represented by their own union, or *sindicato*), or by a normative sentence (issued by a labor court), providing for a confederative contribution (for the financing of a union confederation at the national level), or for any financing which assists, reinforces or strengthens

measures has invalidated approximately 90% of the financial base for the Brazilian labor movement.

In the United States, the NLRA permits clauses in collective agreements, providing for the obligatory payment of union dues, known as "union security" provisions, to be negotiated.[16] These clauses stipulate that, within thirty days, new employees are obligated to join the labor union as a condition of their employment.[17] In the event they exercise their right not to become full union members, they are required to pay a fee equivalent to union dues to help underwrite the costs of the collective representation and benefits they enjoy.[18]

However, the U.S. Supreme Court held in 1988 that when there is a union security clause in a collective agreement, a union can only collect from non-members those dues and fees absolutely necessary to perform its duties as a collective bargaining representative. The non-member has the right to demand a refund for any fees paid that had underwritten activities separate and apart from the strict bargaining representative function, including, for example, political action.[19] The remaining trade union financing obligation for the non-members became known as the *financial core* contribution.

Even with the union shop system having survived constitutional scrutiny in the United States, twenty-seven states outlaw union security clauses altogether, using so-called "right to work" legislation. Section 14(b) of the 1947 Taft-Hartley Act, which amended the original Wagner Act of 1935 and forms the current NLRA, enables states to pass these laws.[20] In "right to work" states[21], the union must engage in constant

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any union entity, and exacts payment from the non-members. Such a clause shall be considered null and void, with the proceeds irregularly collected to be returned." (The source was translated by the note's authors). It should be noted that the Brazilian labor relations system also has a counterpart and mirror image union structure for employers, consisting of local unions (or *sindicatos*), federations (generally at the state level), and confederations (at the national level). The employer *sindicatos* often function as the collective bargaining counterpart for the worker *sindicatos*.

16. The Railway Labor Act of the United States, 45 U.S.C. § 152 (2020).

17. National Labor Relations Act, 9 U.S.C. § 158(a)(3) (2020).

18. *See* NLRB v. Gen. Motors Corp., 373 U.S. 734, 743-44 (1963).

19. *See* Comm. Workers of Am. v. Beck, 487 U.S. 735, 752-53 (1988).

20. National Labor Relations Act, 29 U.S.C. § 164(b) (1947).

21. The term "right to work" is really a misnomer. The legislation has nothing to do with full employment nor the right of every American to a job. For a study of the true historical origins of the term; *see generally* Michael Pierce, *The Origins of Right to Work, Vance Muse, Anti-Semitism, and the Maintenance of Jim Crow Labor Relations*, LAWCHA (Jan. 12, 2017), *available at* http://www.lawcha.org/2017/01/12/origins-right-work-vance-muse-anti-semitism-maintenance-jim-crow-labor-relations (last visited Nov. 09, 2020).

organizing campaigns and attempt to convince new employees to become voluntary due-paying members. If the union fails to do so, it risks losing its majority authorization status as a collective bargaining representative, with the possibility of becoming decertified.

On June 27, 2018, the U.S. Supreme Court in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, held that the equivalent of union solidarity contributions for the public sector, known as agency fees or fair-share fees, were unconstitutional.[22] The decision overturned all of the legislation that permitted such trade union financing for the collective bargaining representation of public employees at the state, county, and municipal levels.[23]

In the United States, all of the public sector and most of the private sector are right to work, which corresponds to Brazil's nearly universal right to work regime. The two systems converge in this respect, despite continuing differences in trade union structure. We now turn to the question of how both trade union financing systems should be evaluated under international labor law.

II. WHAT DOES INTERNATIONAL LAW HAVE TO SAY ABOUT THE MATTER?

The international labor standards (ILS) of the International Labor Organization (ILO) include conventions, recommendations, protocols, declarations, and resolutions. ILO jurisprudence includes the observations of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), the conclusions and recommendations of the Committee on Freedom of Association (CFA), and the conclusions

22. Janus v. American Fed'n of State, Cnty. and Mun. Emp., Council 31, 585 U.S. 138, 244 (S. Ct. 2018).

23. Federal employee unions are prohibited from negotiating union security or agency fee provisions applying to all workers in the bargaining unit of the relevant federal agency. The law only permits the voluntary payment of dues by authorization of the individual. *See* Federal Service Labor-Management Relations Statute, 5 U.S.C § 7115(a) (2012) [hereinafter FSLMRS], *available at* https://www.flra.gov/resources-training/resources/statute-and-regulations/statute/statute-subchapter-ii-rights-and-4 (last visited Nov. 09, 2020). Moreover, the scope of collective bargaining is very limited for federal workers. It does not include salaries and benefits and is restricted to a limited class of terms and conditions affecting the employees—such as personnel policies. *See* FSLMRS, 5 U.S.C § 7103(a)(12-14) (2012), *available at* https://www.flra.gov/resources-training/resources/statute-and-regulations/statute/statute-subchapter-i-general-2 (last visited Nov. 09, 2020); *see also* Fort Stewart Schools v. FLRA, 495 U.S. 641, 649 (1990) (wages and fringe benefits excluded under the definition of "conditions of employment").

and recommendations of the Governing Body (GB). Such standards and jurisprudence constitute the primary foundation for all international labor law. Nearly every human rights system, multinational body, and trade agreement in the world today relies on the ILO as the primary authoritative reference.[24] ILO Convention 87 is the principal international instrument defining freedom of association and its guarantees.[25] It does not prescribe or presuppose an ideal system of trade union representation. Both trade union plurality (or pluralism) and trade union unity (or exclusive collective bargaining representation by one union) are compatible with the principle of freedom of association provided there is democratic worker authorization of the union that is free of governmental domination or employer interference enabled by the State.[26] According to the CFA, concerning the principle of freedom of association:

> It is derived from this principle that, although the Convention does not aim to make trade union pluralism compulsory, pluralism must be possible in every case, even if trade union unity was once adopted by the trade union movement. Systems of trade union unity or monopoly must not, therefore, be imposed directly by the law.[27]

Accordingly, the CFA has concluded: "[u]nity within the trade union movement should not be imposed by the State through legislation because this would be contrary to the principles of freedom of association."[28]

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24. "The vast majority of trade agreements that include labour provisions promote ILO instruments, such as the Declaration on Fundamental Principles and Rights at Work and its Follow-up [adopted by the ILC in 1998], the Decent Work Agenda, and the Declaration on Social Justice for a Fair Globalization [adopted by the ILC in 2008]." *See* ILO GOVERNING BODY, LABOUR-RELATED PROVISIONS IN TRADE AGREEMENTS: RECENT TRENDS AND RELEVANCE TO THE ILO (2016), *available at* https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_530526.pdf (last visited Dec. 20, 2020).

25. *See* International Labour Organization, *Freedom of Association and Protection of the Right to Organize Convention*, NORMLEX (July 9, 1948), *available at* https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232 (last visited Sept. 17, 2020).

26. ILO, *Compilation of Decisions of the Committee on Freedom of Association*, § 484 (2017), *available at* https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO:70002:P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3944476,2 (last visited Nov. 20, 2020).

27. JEAN CLAUDE JAVILLIER, INTERNATIONAL LABOUR STANDARDS: A GLOBAL APPROACH: 75TH ANNIVERSARY OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS 37 (Geneva: ILO, 2002).

28. COMM. ON FREEDOM OF ASS'N, INT'L LABOUR OFF., FREEDOM OF ASSOCIATION 90 (6th ed. 2018).

Moreover, Convention 87 does not presuppose any ideal regime of trade union funding. The ILO supervisory system on standards interprets and applies the Convention with an eye to the different cultures of union representation and, thereby, recognizes different modalities of financing. In systems that enable union pluralism for trade union representation, voluntary members of the trade union pay their contributions.[29] In regimes governed by trade union unity or exclusive bargaining representation, it is possible, according to Convention 87, to permit the collection of representation fees from all of the workers, including the non-members. Regarding this matter, the CFA has concluded:

> Problems related to union security clauses should be resolved at the national level, in conformity with the national practice and the industrial relations system in each country. In other words, both situations where union security clauses are authorized and those where they are prohibited can be considered to be in conformity with ILO principles and standards of freedom of association.[30]

Based on the findings of the CFA[31], the former *contribuição sindical* would have violated freedom of association because it was imposed on all workers by the State as a tax that was separate and apart from collective bargaining representation; mandatory dues collected from members and non-members were not a violation. According to the ILO, collective bargaining is a valued democratic practice.[32] Therefore, if the *contribuição sindical* was established through the collective bargaining

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29. Taking the example of Austria, Blaschke et al. explains: "the ÖGB's affiliates define the basis of calculating the membership dues." The affiliation is the linkage that constitutes the trade union representation that justifies the payment of the contribution. *See* Sabine Blaschke, Andrea Kirschner & Franz Traxler, *Austrian Trade Unions: Between Continuity and Modernization*, 92 J. OF LAB. RSCH. (2000).

30. *Id.* at 102.

31. ILO, *supra* note 26, at § 700 ("When legislation admits trade union security clauses, such as the withholding of trade union dues from the wages of non-members benefiting from the conclusion of a collective agreement, those clauses should only take effect through collective agreements").

32. According to the ILO, "[c]ollective bargaining is a way of attaining beneficial and productive solutions to potentially conflictual relations between workers and employers. It provides a means of building trust between the parties through negotiation and the articulation and satisfaction of the different interests of the negotiating partners. collective bargaining plays this role by promoting peaceful, inclusive and democratic participation of representative workers' and employers' organizations." *See Freedom of Association and the Effective Recognition of the Right to Collective Bargaining*, ILO (2008), *available at* https://www.ilo.org/declaration/principles/freedomofassociation/lang—en/index.htm (last visited Nov. 20, 2020).

process and approved in an assembly of the relevant workers then the collection from all workers, including non-members enjoying the benefits of the collective agreement, would have been compatible with freedom of association. The contribution would not have violated any dimension of freedom of association, including the negative—an issue to be addressed later in this essay.[33] As the CFA has made clear: "A distinction should be made between union security clauses allowed by law and those imposed by law, only the latter of which appear[s] to result in a trade union monopoly system contrary to the principles of freedom of association."[34]

Case No. 2739 (Brazil)[35] is one of the most recent and general observations of the ILO concerning the law of trade union financing. One should note that Brazil ratified Convention 98 in 1952, but has not yet ratified Convention 87.[36] The CFA, founded in 1951 by the ILO Governing Body (GB), has the authority to review and supervise the compliance of all ILO member states with the principles of freedom of association and collective bargaining guaranteed by Conventions 87 and 98, respectively. The Committee has this authority even in the cases of member states failing to ratify either convention because the principles of Conventions 87 and 98 are inherent to the ILO Constitution, making compliance with them a condition for ILO membership.[37] Accordingly, the United States is also subject to the CFA's jurisdiction, even though it has failed to ratify either convention.

In Case No. 2739, the Brazilian national trade union centrals, which bring together unions of various industries and sectors, alleged that the principles of Conventions 87 and 98 were violated by the decision of the Ministério Público do Trabalho (MPT – Public Ministry of Labor)[38] to prosecute the inclusion of *contribuições assistenciais* clauses in *acordos*

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33. *Id.*

34. *Id.*

35. COMM. ON FREEDOM OF ASS'N, INT'L LABOUR OFF., INTERIM REPORT - REPORT NO. 362 (2011).

36. *Information System on International Labour Standards, Ratifications for Brazil*, ILO (2017), *available at* https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102571 (last visited Sept. 20, 2020).

37. *See* Ana Virginia Moreira Gomes, *The Effect of the ILO's Declaration on Fundamental Principles and Rights at Work on the Evolution of Legal Policy in Brazil: An Analysis of Freedom of Association* (2009) (unpublished thesis on file with the University of Toronto Graduate Department of Law), *available at* https://tspace.library.utoronto.ca/bitstream/1807/18895/5/Gomes_Ana_VM_200911_LLM_thesis.pdf (last visited Sept. 20, 2020).

38. A branch of the Brazilian Government responsible for the prosecution of labor law violations in the country, and analogous to a Labor Attorney General's Office.

or *convenções coletivas*—obligatory for all workers covered by the union, including the non-members.[39] The CFA concluded the following:

> With regard to the question of salary deductions agreed to in a collective agreement that is applicable to non-unionized workers who benefit from a union's activities, the Committee recalls that it has stated in the past that, when legislation admits trade union security clauses, such as the withholding of trade union dues from the wages of non-members benefitting from the conclusion of a collective agreement, those clauses should only take effect through collective agreements.[40]

The implication of the CFA's final report is the following: *contribuições assistenciais*, approved in assemblies of the workers represented by the union and included in collective bargaining agreements, follow ILO norms concerning freedom of association. This is the case even if collected from both members and non-members, provided that national legislation permits such a practice and that process occurs exclusively through collective bargaining. In sum, Brazilian *contribuições assistenciais* and other collectively bargained contributions, as well as U.S. union security clauses, are permitted by ILO jurisprudence.

III. THE SIGNIFICANCE OF THE U.S. SUPREME COURT'S DECISION IN JANUS V. AM. FED'N OF STATE, CTY., & MUN. EMPLOYEES, COUNCIL 31

The *Janus* decision from June 27, 2018 leveled a major financial blow to unions representing public employees in the United States. The Court prohibited charging an agency fee to non-members for the union's cost of collective representation for everyone that is part of the bargaining unit.[41] This is a significant financial assault on the entire American labor movement since the critical mass of existing union coverage is from the

39. Committee on Freedom of Association Complaint against Brazil, Case No. 2739 Definitive Report, ILO (June 2012), *available at* https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3063459 (last visited Sept. 20, 2020).

40. *Id.*

41. Janus v. Am. Fed'n. of State, Cty., and Mun. Employees 31, 585 U.S. 138, 248-49 (S. Ct. 2018).

public, rather than the private, sector.[42] In 2020, the unionization rate for public sector workers was 34.8%, more than five times higher than the 6.3% rate for private sector workers. Aggregating both sectors, the unionization rate in 2020 was 10.8%, increasing 0.5% from 2019.[43]

The law requires labor unions in the U.S. private and public sectors to provide equal collective bargaining representation based on their exclusive bargaining status for members and non-members alike.[44] Even with this legally mandated duty of the unions on behalf of non-members, the five-to-four majority in *Janus* overturned an earlier Supreme Court decision, rendered in *Abood v. Detroit Board of Education*.[45] In *Abood*, the Court held that as long as an agency fee clause requires contributions from all workers in the bargaining unit, including non-members, and is strictly limited to the underwriting of collective bargaining representation costs, then it withstands First Amendment scrutiny.[46] However, agency fees used for political or ideological purposes that the employee did not agree to and which are not germane to the union's role as exclusive bargaining representative could infringe on First Amendment speech, expression, and association rights.[47]

By reversing *Abood*, the Court majority in *Janus* reversed over four decades of established doctrine governing trade union financing on behalf of public workers.[48] Public employee unions and the relevant public sector employers relied on *Abood*'s labor relations stability for the previous forty-one years. The *Janus* majority made an unusual, rare break from the bedrock principle of *stare decisis* in U.S. constitutional law.

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42. *See* Bureau of Labor Statistics, *U.S. Department of Labor News Release* (Jan. 22, 2021), *available at* https://www.bls.gov/news.release/union2.nr0.htm (last visited Sept. 21, 2020).

43. *Id.* The BLS explains the increase in the midst of the COVID-19 pandemic in its 2021 release: "The number of wage and salary workers belonging to unions, at 14.3 million in 2020, was down by 321,000, or 2.2 percent, from 2019. However, the decline in total wage and salary employment was 9.6 million (mostly coming from non-union workers), or 6.7 percent. The disproportionately large decline in total wage and salary employment compared with the decline in the number of union members led to an increase in the union membership rate."

44. *See* Steele v. Louisville and Nashville Railway Co., 323 U.S. 192 (1944); *see also* Vaca v. Sipes, 386 U.S. 171, 176-77 (1967); *see also* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 556 (1991).

45. Janus v. Am. Fed'n. of State, Cty., and Mun. Employees 585 U.S., 46-47 (2018)

46. Abood v. Detroit Board of Edu., 431 U.S. 209, 217-32 (1977), *overruled by* Janus v. Am. Fed'n. of State, Cty., and Mun. Employees, Council 31, 138 (2018).

47. *Id.* at 235-36.

48. Janus v. Am. Fed'n. of State, Cty., and Mun. Employees, Council 31, 585 U.S. 1 (2018), (Kagan, J., dissenting). The Kagan dissent provides the explicit reference to the four decades of established doctrine and stable labor relations in the public sector.

Justice Samuel Alito, writing for the majority in *Janus*, insisted *inter alia* that the prohibition on using the proceeds of agency fees for lobbying, political activity, and other ideological ends was not an adequate safeguard against compelled speech or speech subsidies in favor of third parties.[49] According to Justice Alito, union speech restricted to the collective bargaining process in public service necessarily involved political and ideological matters, such as budget crises, taxes, education, child welfare, and health care.[50] For Justice Alito, the firewall in *Janus* separating the subsidy of public sector collective bargaining from the subsidy for political speech could not adequately protect First Amendment rights.[51]

Justice Elena Kagan, writing for the dissenting minority, questioned the majority's radical break with *stare decisis* by noting that *Abood* had "struck a stable balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper."[52] In light of this stable balance, there could be a requirement for the public employees "to pay a fair share of the cost that a union incurs when negotiating on their behalf over terms of employment, but no part of that fair-share payment could go to any of the union's political or ideological activities."[53]

Justice Kagan found pre-empting free-ridership to be a legitimate policy that justified the agency fair-share payment requirement or fee.[54] She also found that there was no significant infringement on the First Amendment rights of the public employee that did not choose to be a union member. She understood that without fair-share requirements:

> [T]he class of union non-members spirals upward. Employees (including those who love the union) realize that they can get the same benefits even if they let their membership expire. And as more and more stop paying dues, those left must take up the financial slack (and, anyway, begin to feel like suckers)—so they too quit the union. *See* Ichniowski & Zax, Right-to-Work Laws, Free Riders, and Unionization in the Local Public Sector, 9 J. Labor Economics 255, 257 (1991). And when the vicious cycle finally ends, chances are that the union will lack the resources to effectively perform the

49. Janus v. Am. Fed'n. of State, Cty., and Mun. Employees, Council 31, 138 S. Ct. 2448, 2462-65 (2018).

50. *Id.* at 24-25.

51. *Id.* at 37-38.

52. *Id.*

53. *Id.* at 1.

54. *Id.* at 7-10.

> responsibilities of an exclusive representative—or, in the worst case, to perform them at all. The result is to frustrate the interests of every government entity that thinks a strong exclusive representation scheme will promote stable labor relations.[55]

Justice Kagan recognized and understood the principle of exclusive representation in the American labor relations system, including the public sector—namely, the legal imperative of only one union representing the bargaining unit for collective bargaining purposes, and with the union's concomitant legal obligation of representing the member and nonmember equally for such ends. Given such a legal and practical reality, the requirement of a fair-share fee without compelling union membership or infringing on speech, expression, and association rights of the individual public employee in any other way was an entirely reasonable and constitutionally defensible practice, according to Justice Kagan and the *Janus* minority. As noted in our prior discussion of ILO jurisprudence, it would be reasonable and defensible in terms of international labor standards.

IV. WHAT IS THE SIGNIFICANCE OF THE BRAZILIAN SUPREMO TRIBUNAL FEDERAL - SUPREME FEDERAL COURT (STF) DECISION IN ADI 5794: A NEW PROTAGONISM FOR NEGATIVE FREEDOM OF ASSOCIATION?

An important characteristic of the Brazilian corporatist system of labor relations was the *contribuição sindical*, or trade union tax, legally imposed and collected universally—from both union members and nonmembers. Among the four sources of union revenue,[56] only the *contribuição sindical* stipulated in Article 578 of the Consolidation of Labor Laws - Brazilian Labor Code (CLT) had been mandatory for both employers and workers in the relevant professional and economic categories.[57]

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55. *Id.* at 8-9.

56. The sources of union revenue according to the CLT include: Dues paid by individual workers who opt to join the union (Article 548(b)); *Contribuição negociada* or collectively bargained contribution (provided for in Article 513); *Contribuição da confederação* confederative contribution (Article 8, Section IV, of the Federal Constitution); and the contributions imposed by law and to be paid by all of the employees or employers of a given category, (in other words, the trade union tax imposed by law—Articles 578 to 610 of the CLT).

57. The Brazilian corporatist trade union system was based on *unicidade*, representation by category, and the *contribuição sindical*. On how these three elements interacted, *see* Ana

The *contribuição sindical* was an important source of funding, and for unions with a small number of members, it was often the only source. The 2017 CLT reform (Lei 13.467/2017) made the entire *contribuição* voluntary—in other words, there must be a formal and express agreement on the part of the individual worker for payment to be valid. This change led union budgets to abruptly contract. In 2018, the former Labor Ministry (now removed per order of President Bolsonaro) reported to the press that the income flow to unions fell 90%.[58]

Some observers argue abolishing the compulsory *contribuição sindical* is an effective means of making the Brazilian unions more responsive to their constituencies because they must now organize additional voluntary members to survive financially.[59] One of the union responses since implementing the 2017 CLT reform has been a greater reliance on the negotiation of *contribuição assistencial* clauses in collective agreements, as referenced in Article 513 of the CLT. The critical question is whether Brazil will uphold the constitutionality of *contribuição negociada* clauses considering the judicial decisions before and after the 2017 reform and in light of the STF's recent decision concerning the constitutionality of Lei n° 13.467's termination of the obligatory trade union tax.

Among the union prerogatives permitted by Article 513(b) of the CLT, unions may negotiate "*convenções de trabalho*"—collective labor conventions.[60] In Section (e) of the same article, the union has the faculty of "impos[ing] contribution requirements on all of those who participate in the economic or professional categories or in the liberal professions represented."[61] In other words, Brazilian labor law permits the practice of these obligatory representation fees through the process of collective bargaining. Although the 2017 reform ended the obligatory nature of the *contribuição sindical*—which had been imposed as a tax by law and not

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Virginia Gomes & Mariana Mota Prado, *Flawed Freedom of Association in Brazil: How Unions Can Become an Obstacle to Meaningful Reforms in the Labor Law System*, 32 COMPAR. LAB. L. & POL'Y J. 843 (2011).

58. Cleide Silva, *Sindicatos Perdem 90% da Contribuicao Sindical No 1° Ano da Reforma Trabalhista*, ESTADÃO (Mar. 2019), *available at* https://economia.estadao.com.br/noticias/geral,sindicatos-perdem-90-da-contribuicao-sindical-no-1-ano-da-reforma-trabalhista,70002743950 (last visited Nov. 13, 2020).

59. Ana Virginia Gomes & Mariana Mota Prado, *Flawed Freedom of Association in Brazil: How Unions Can Become an Obstacle to Meaningful Reforms in the Labor Law System*, Comp. Lab. L. & Pol'y J., 1, 6 (2010).

60. According to Article 513(b) of the CLT, "The prerogatives of the trade unions are: b) to negotiate collective labor contracts."

61. Consolidacao Das Leis Do Trabalho [C.L.T.] [Consolidation of Labor Laws], art. 513(b) (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm (last visited Nov. 13, 2020). (The source was translated by the note's authors).

by collective bargaining—it did not alter the text of Article 513. However, it added Article 611-B, Section XXVI, which states:

> [T]he suppression or the reduction of the following rights shall constitute an illicit object in the negotiation of a *convenção coletiva* or an *acordo coletivo*: union or professional freedom of association of the worker, including the right not to suffer, without express and prior approval, any union dues charge, or dues checkoff established in a *convenção coletiva* or *acordo coletivo*.[62]

Before the implementation of Lei 13.467 / 2017, the understanding of both the STF and TST in cases of the *contribuição confederativa* and the *assistencial* was that any required payment violated freedom of association, even if the assembly of workers represented by the union approved the contributions and the employer collectively negotiated those contributions.[63] The STF decided, in general terms, that the *contribuição assistencial* could not be exacted from a non-member.[64] In sum, these decisions considered the imposition of the *contribuição assistencial* on the non-members so they would violate Article 8, Section V of the Federal Constitution, which assures the right of freedom of association in its negative dimension: "no one shall be required to join a union or to

62. Consolidacao Das Leis Do Trabalho [C.L.T.] [Consolidation of Labor Laws] Article 611-B, Section XXVI (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm (last visited Nov. 13, 2020). (The source was translated by the note's authors).

63. Precedente Normativo, *supra* note 13; *see also* Orientação Jurisprudencial nº 17 [Jurisprudential Orientation no. 17] of the SDC (department of Dissidios Coletivos, LABOR COURT (2020), *available at* https://www.tst.jus.br (last visited Dec. 20, 2020). Decisions determining the final collective agreements in cases of impasse of the TST ("Collectively bargained clauses which establish a contribution on behalf of the trade union entity, at whatever level, and which are required of the non-members, are offensive to the right of freedom of association and unionization, a right constitutionally guaranteed, and, therefore, they are null and void, with the proceeds collected to be returned to the non-members"). (The source was translated by the note's authors). *See also* Súmula Vinculante, *[Binding Summary Doctrine] 40 of the STF* (2020), *available at* https://www.stf.jus.br (last visited Dec. 20, 2020). ("The confederative contribution, as referred to in Article 8, Section IV of the Federal Constitution, may be collected only from the members of the respective union"). (The source was translated by the note's authors).

64. S.T.F, ARE 1.018.459, Realtor: Min. Gilmar Mendes, 23.02.2017, Supremo Tribunal Federal [S.T.F.], 03.09.2017, 1 (Braz.) (2020), *available at* https://www.stf.jus.br (last visited Dec. 20, 2020). ("The institution of imposing the obligatory payment of the assistance contribution by means of a collective agreement, collective convention, or normative judicial sentence on those employees of the professional category who are not union members is unconstitutional"). (The source was translated by the note's authors).

maintain their union membership."[65] Even though Article 8, Section V does not expressly prohibit the *contribuição assistencial*, the conventional wisdom justifying its proscription predominated in the courts due to non-members already paying the obligatory *contribuição sindical* at the same time. Brazilian jurist Sergio Pinto Martins, in asserting the incompatibility of imposing *contribuições assistenciais* on non-members with the principle of negative freedom of association, said the following:

> [T]he argument that the workers are beneficiaries of the collective agreements for the category and, for that reason, must pay the *contribuições,* just does not hold. The workers already pay the *contribuição sindical*, which serves to underwrite the union's activities. Such a contribution is compulsory, according to the terms of Article 545 of the CLT. Therefore, there is no obligation to pay another contribution for those workers who are not union members.[66]

After the passage and implementation of Lei 13.467/17, direct petitions were submitted to the STF, asserting that the Brazilian Federal Constitution permitted the practice of obligatory *contribuições sindicais*. On June 29, 2018, exactly two days after the U.S. Supreme Court's decision in *Janus*, the STF ruled on one of the petitions (Ação Direta de Inconstitucionalidade nº 5794). The STF decided that revised Articles 545, 578, 579, 582, 583, 587, and 602 of the CLT, which extinguished the obligatory nature of the *contribuição sindical,* were constitutional. Joining with the majority, Justice Alexandre de Moraes remarked: "there is no union autonomy when the union system depends on the money from the State to survive."[67] Justice De Moraes' comment demonstrates just how much the obligatory trade union tax has dominated the Brazilian judicial discussion and rationale regarding trade union financing.

STF Justice Luiz Fux also joined the majority and pointed to the U.S. Supreme Court's decision in *Janus* as a justification for his vote.[68]

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65. Constituição Federal of 1988 [C.F.] [Constitution], art. 8, sec. 4 (Braz.), *available at* https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm (last visited Nov. 13, 2020). (The source was translated by the note's authors).

66. Sérgio Martins, *Exigência da Contribuição Assistencial de Não Associados,* REVISTA SÍNTESE TRABALHISTA E PREVIDENCIÁRIA 334, 413 (2017).

67. *Supremo Tribunal Federal, Case Abstract (ADI 5794), available at* http://www.stf.jus.br (last visited Nov. 13, 2020). *See also* Zuini, *É Obrigatório Recolher a Substituição Tributária do ICMS no Simples?*, EXAME (Jun. 29, 2018), *available at* https://exame.com/brasil/supremo-mantem-fim-de-imposto-sindical/obrigatorio (last visited Nov. 13, 2020).

68. *Id.*; *see also* Renata Queiroz Dutra & João Gabriel Lopes, *Os pesos da balança da justiça: custeio e liberdade sindical no STF,* JOTA (Oct. 19, 2020), *available at*

However, his reliance on *Janus* was totally inapposite. First, *Janus* applied exclusively to state, county, and municipal employees in the United States and did not invalidate the remaining legal union security regimes covering private-sector workers. Moreover, the agency fee clauses negotiated for public sector employees in the United States were totally unlike the trade union tax in Brazil, which had been separate and apart from collective bargaining and exclusively imposed by State fiat.

Brazilian judicial reflection following the passage and implementation of Lei 13.467/2017 and the STF's decision in ADI 5794 should focus seriously on whether something like the *contribuição assistencial* truly violates freedom of association in its negative dimension as defined by Article 8, Section V of the Federal Constitution. Moreover, should Section V be the chief protagonist in the interpretation and application of Brazilian trade union financing law, or should negative freedom of association dominate that interpretation and application? To answer this question, it is essential to understand what negative freedom of association is. Negative freedom of association is the individual's right of self-defense vis-à-vis his or her union through the prohibition of certain types of union security clauses as part of a defense mechanism.

The ILO Committee of Experts on Application of Conventions and Recommendations (CEACR) has observed that union security clauses found in collective agreements or arbitration decisions, which "make trade union membership or payment of union dues compulsory," could be subject to certain regulatory conditions and limitations.[69] The various types of union security systems include: a "closed shop"—the employer is only permitted to hire workers who are already union members and maintain union membership as a condition of employment;[70] a "union shop"—the employer may hire the workers of his or her choice, but they must become union members within a specific period;[71] and an "agency shop"—all of the workers, be they members of the union or not, must pay union dues and fees, but without the requirement of union membership as a condition of employment.[72]

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https://www.jota.info/opiniao-e-analise/artigos/os-pesos-da-balanca-da-justica-custeio-e-liberdade-sindical-no-stf-19102018 (last visited Nov. 13, 2020).

69. International Labour Organization, Convention on the Freedom of Association and Collective Bargaining, 81st Session, Geneva, 1994, Report III (Part 4B), *available at* https://www.ilo.org/public/libdoc/ilo/P/09661/09661(1994-81-4B).pdf (last visited Nov. 13, 2020).

70. *Id.*

71. *Id.*

72. *Id.*

Convention 87 does not expressly recognize or protect negative freedom of association. Article 2 of the Convention guarantees freedom of association for the individual, but only the right to join the organization of one's choice.[73] Uruguayan jurist Helios Sarthou commented on this express omission concerning the dubious doctrinal basis for the negative dimension: "if this modality of freedom of association has a philosophical foundation, it is, no doubt, and from a certain point of view, an individualistic and anti-union plan, which seeks to protect the individual from the so-called 'tyranny of the group' . . . ."[74]

Sarthou's observation has a special significance for Brazil, where negative freedom of association appears to be used as a defense against unions obtaining exclusive representation in an undemocratic manner. If that is the case, then the real violation of Article 8, Section V does not arise from *contribuições* paid by the non-members represented by the union. Rather, the real transgression stems from a system of exclusive representation created without democratic guarantees. For example, the *sindicato* representing the professional category in a geographical area not inferior to a municipality could obtain its monopoly status simply by being the first to register or a labor court could grant the monopoly based on the specific characteristics of the professional category, or on the efficiency of merging or dividing prior union jurisdictions. Such outcomes can occur because there is nothing within the CLT unconditionally requiring the establishment of exclusive representation status by means of majority authorization.[75] Article 8, Section V appears to guarantee negative freedom of association—like positive freedom of association, however, the right's negative dimension should not be interpreted or applied

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73. Pierce, *supra* note 21

74. Helios Sarthou, *Rasgos Ontológicos Generals de la Libertad Sindical, en: Instituciones de Derecho del Trabajo y de la Seguridad Social*, MEXICO: UNIVERSIDAD NACIONAL AUTÓNOMA DE MÉXICO 193 (1997); *see also* Paola Opertti & Andrés Marabotto, *Libertad Sindical Negativa en el Ordenamiento Jurídico Urguayo*, REVISTA DE DERECHO 40 (2008). ("Doctrine and jurisprudence are unanimous in their recognition of positive freedom of association. However, the same cannot be said for negative freedom of association, and that is due to several factors. In the first place, the lack of express recognition in Convention 87. Secondly, it runs counter to union security clauses which are very common in the Anglo-Saxon world. Finally, it is also resisted by the unions insofar as it is merely an individual right"). (The source was translated by the note's authors).

75. In the United States, the establishment of exclusive collective bargaining status is legally impossible without democratic and majority authorization (50% + 1) of the workers in the bargaining unit. Nevertheless, many unionists would argue that the American system is far from democratic, given the legally permitted employer interference in the process of organizing a union for collective bargaining purposes. *See, e.g.*, CHIRAG MEHTA & NIK THEODORE, UNDERMINING THE RIGHT TO ORGANIZE: EMPLOYER BEHAVIOR DURING UNION REPRESENTATION CAMPAIGNS (2005).

in a vacuum, nor should it stand as an absolute and unqualified axiom. All of the other facets of freedom of association derived from Article 8 form the context in which to read Section V; this context includes the positive individual and collective dimensions and the current reality of Brazil's union structure based on the exclusive representation of a professional category in a given geographical area. Accordingly, the CFA struck the balance between all of the dimensions of freedom of association in relation to trade union financing by relying on the institution of collective bargaining:

> In a case where the law authorized the trade union to set unilaterally and to receive from non-members the amount of the special contribution set for members, as a token of solidarity and in recognition of the benefits obtained from a collective agreement, the Committee concluded that to bring this in line with the principles of the freedom of association, the law should establish the possibility for both parties acting together—and not the trade union unilaterally—to agree in collective agreements to the possibility of collecting such a contribution from non-members for the benefits that they may enjoy.[76]

The CFA recognizes collective bargaining as the means to resolve the question. Such a solution is legitimate if the union representation is truly authentic and democratic in the first place.

One of the central questions following the recent CLT reform is how to conciliate two opposing and irreconcilable provisions from the same statute: Article 513(e) and Article 611-B, Section XXVI (added by Lei 13.467/2017). Article 513(e) authorizes a union to collect a *contribuição* from the entire professional category for a given geographical area and on the judicial basis for being a collectively negotiated assessment—*contribuição negociada*. Ideally, in conformity with the international principle of freedom of association, the contribution would be approved by a democratic, representative workers' assembly convened for the purpose of authorizing the amount of the payment.

In systems where the union must equally represent members and non-members, as in Brazil and the United States, it is sensible for sustainability purposes to collect *contribuições* from all of the workers represented. In the Brazilian case, a *contribuição* should be authorized by the workers through collective bargaining in a democratic assembly. The State, through its taxation power, imposed the prior *contribuição*

76. ILO, INT'L LABOUR OFFICE, FREEDOM OF ASSOCIATION: COMPILATION OF DECISION OF THE COMMITTEE ON FREEDOM OF ASSOCIATION 103 (6th ed. 2018).

sindical, which violated freedom of association because it was separate and apart from the institution of collective bargaining.

Article 611-B, Section XXVI of the CLT, established by Lei 13.467 / 2017, prohibits the establishment of obligatory *contribuições* through collective bargaining, in direct contradiction of ILO jurisprudence according to the CFA. This is regrettable and unfortunate for Brazilian workers because the "agency shop" model of union security guarantees the provision of collectively bargained gains and benefits for members and non-members by making the union financially sustainable.

ILO Convention 95 on the protection of wages, ratified by Brazil in 1957, recognizes the status of collective bargaining as a fundamental labor right and stipulates the following in Article 8: "deductions from wages shall be permitted only under conditions and to the extent prescribed by national laws or regulations *or fixed by collective agreement* or arbitration award."[77] Bargained contributions, collected through salary checkoffs that support a union's function as an exclusive bargaining representative are cognizable and permitted according to Article 8 of Convention 95. Under international law, Brazil's ratification of the convention makes the instrument legally binding.

Freedom of association does not expressly prohibit collectively bargained obligatory *contribuições*. In addition, Section II of Article 8 implicitly justified such contributions through the exclusive collective bargaining status of the *sindicato*.[78] Therefore, any provision of law, such as Article 611-B, Section XXVI of the CLT, which contradicts freedom of association and collective bargaining rights, as defined by the Brazilian Federal Constitution, and by ILO Conventions 87, 95, and 98—the latter two ratified by Brazil—should be invalidated by the Brazilian judiciary. Moreover, the Brazilian judiciary should reconsider its prior decisions proscribing collectively bargained contributions because they run afoul of the Brazilian Constitution and international labor law.

77. Protection of Wages Convention, art. VIII, July 1, 1949, ILO.

78. CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art.3, sec. 11, (Braz.) ("[T]he creation of more than one union organization is prohibited at whatever level, to represent the professional or economic category for a given geographical area, as defined by the interested workers or employers, provided that such a geographical area is not inferior to a municipality"). (The source was translated by the note's authors). This constitutional provision is also known as *unicidade*, referred to earlier in this essay.

V. HOW ARE BRAZILIAN AND AMERICAN UNIONS COPING WITH THE OVERWHELMING "RIGHT TO WORK" REALITY?

As mentioned, all public services in the United States are subject to the functional equivalent of the right to work, thanks to the *Janus* decision that invalidated agency shop for all state, county, and municipal employees. From the outset, union and agency shops were never permitted for federal employees. Right to work prevails for private sector workers covered by the NLRA in the vast majority of states. However, union security survives in California, New York, Washington, Pennsylvania, Illinois, and several other large states, which form the minority of the twenty-three states that have not implemented Section 14(b) of the Taft-Hartley Act.

Given this situation, which has the gravest effect on the U.S. labor movement since the Second World War, how are the unions coping? They are coping by constantly organizing, engaging with the new employees, and continuing communication with the already unionized workers to maintain membership, majority authorization status, and financial sustainability.

For example, the United Food and Commercial Workers International Union (UFCW), which represents over one million working women and men in the United States and Canada's retail, wholesale, service, food production, and food processing industries, succeeded in maintaining majority union status through its bargaining units and accompanying financial stability in U.S. right to work states for many years. UFCW did this by constantly reaching out to the new employees hired by unionized employers to convince them of the importance of becoming voluntary union members. The UFCW succeeded in incorporating clauses in its collective agreements with employers in right to work states, guaranteeing access to the stores and factories to orient the new employees on the importance of voluntary union membership.

In addition to informing new workers that union membership is critical for maintaining majority support and authorization status, allowing unions to avoid decertification, the UFCW offered special benefits to voluntary members. These benefits included special legal services for immigrant workers and financial assistance to workers and their families for continuing education—including university degrees. Although the union is legally obligated to represent members and non-members equally for collective bargaining and enforcement of the contract, it is entirely legal to offer members-only benefits *outside* the scope of the collective agreement.

Other American unions, including the Culinary Workers of Nevada, affiliated with UNITE-HERE (Hotel Employees and Restaurant Employees), have utilized similar methods to maintain successfully high levels of membership with financial sustainability. The Culinary Workers maintained a 90% unionization rate in Las Vegas before the COVID-19 pandemic, with many immigrant workers in their rank-and-file (including both documented and undocumented workers) despite being a right to work state.[79]

Notwithstanding the disastrous effects the *Janus* holding had on public sector workers in the United States, public employee unions are using the same strategies and methods previously cited for the private sector.[80] Unions are also pushing progressive state governments to pass legislation that would enable organizing more voluntary, due-paying members:

> In California, for example, unions now have the right, thanks to a new law, to meet with new public employees as soon as they start working. A second new law keeps private the phone numbers and email addresses of employees of public agencies, so that anti-union groups will have a harder time convincing them to drop out of unions.[81]

Moreover, with cuts to state government spending affecting public services across the country, many public employees have organized collectively and provoked strikes in protest. For example, in 2018, public school teachers walked out of classrooms in West Virginia, North Carolina, Colorado, Kentucky, Oklahoma, and Arizona in protest over their salaries and other terms and conditions of their employment. Most of these actions were spontaneous strikes; the teachers' unions saw the need to catch up with the rank-and-file militancy and organize accordingly. In West Virginia, for example, the American Federation of Teachers organized 1250 new voluntary members after the walkout.[82]

It is still too early to say exactly how the Brazilian unions will cope effectively with their new right to work reality. Many Brazilian unions

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79. Ruben J. Garcia, *Nevada's Unions Show How U.S. Labor Groups Can Adapt In a Right to Work Reality*, PAC. STANDARD (June 28, 2018), *available at* https://psmag.com/news/what-nevada-can-teach-fellow-unions (last visited Nov. 4, 2020).

80. *See* Alana Semuels, *Is This The End of Public Sector Unions in America?*, THE ATLANTIC (June 27, 2018), *available at* https://www.theatlantic.com/politics/archive/2018/06/janus-afscme-public-sector-unions/563879/ (last visited Nov. 2, 2020).

81. *Id.*

82. *Id.*

rely on regional labor prosecutors, labor courts, and willing employers who respect collectively bargained assistance contributions approved in worker assemblies, notwithstanding the contrary positions of the TST and the STF. Some are attempting to organize more aggressively to expand their voluntary membership, by offering social welfare, medical, and legal services traditionally provided by the *sindicatos*. However, these benefits were financed in the past by the trade union tax, which is now extinct.

Although the U.S. labor movement's coping strategies are not perfect or complete and are very much a work in progress, they may be of some instructive value to Brazilian unions. Nevertheless, the current COVID-19 crisis often precludes in-person recruitment of new members in Brazil and the United States, forcing the labor movements of both countries to employ virtual and remote organizing methods. Moreover, the public health crisis has caused economic devastation and massive unemployment in those sectors where American unions had made impressive organizing gains before the pandemic, including, for example, the hotel, hospitality, and gaming industries. At the same time, essential and front-line workers in health care, pharmacies, food retail, food production and delivery, public safety and transport, and other sectors, including the gig economy, are turning to the union movement to assure their physical and economic survival. Such an adverse environment is driving many workers in Brazil and the United States to understand the imperative of collective organization and defense as never before. Authentic solidarity and cooperation between the Brazilian and American labor movements have never been more important, especially given the ironic and dangerous convergence of trade union financing law in both countries.

Minding the Gap: Understanding Suwalki Vulnerabilities in the Post-INF Security Environment

Matthew Gregory

ABSTRACT

If Russia attempts to execute a daring land grab in the Baltic states of Estonia, Latvia, and Lithuania, it will likely seek to exploit the geographic and military advantages inherent to a strategic flashpoint along the Poland-Lithuania border known as the "Suwalki Gap." Situated between Kaliningrad and Moscow ally Belarus, this narrow stretch of land is particularly vulnerable to a dual-pronged assault that, if successful, could sever the Baltics from the main North Atlantic Treaty Organization (NATO) body and prevent the deployment of Allied reinforcements. Further exacerbating Russian threats to NATO's eastern flank is the Kremlin's introduction of emergent missile technology to the theater, namely a new ground-launched cruise missile (GLCM) designated the SSC-8. This weapons system, whose range extends beyond limitations previously imposed under the Intermediate-Range Nuclear Forces (INF) Treaty, allows Moscow to target cities and installations across the European continent. This article examines the impact of the SSC-8 and broader post-INF security environment upon the political and military dynamics surrounding the Suwalki Gap. It specifically finds that the SSC-8 will allow Russia to direct conventional attacks against European NATO assets in a manner that could severely impede Allied operations to reopen the Gap and recapture occupied Baltic territory.

I. INTRODUCTION

Should Russian President Vladimir V. Putin seek to execute a *fait accompli* by swiftly invading and occupying the Baltic republics of Estonia, Latvia, and Lithuania, he could likely do so with relative ease. Recent RAND Corporation war games predict that Russian forces could eliminate or bypass all resistance to reach Riga and Tallinn within thirty-six to sixty hours.[1] Putin himself has echoed this ominous forecast, claiming, "[i]f I wanted, in two days I could have Russian troops in Riga,

1. David A. Shlapak & Michael W. Johnson, *Reinforcing Deterrence on NATO's Eastern Flank*, RAND CORP. 4 (2016), *available at* http://www.rand.org/content/dam/rand/pubs/research_reports/RR1200/RR1253/RAND_RR1253.pdf (last visited Nov. 27, 2020) [hereinafter Shlapak & Johnson].

Vilnius, Tallinn, Warsaw, and Bucharest."[2] Notably, local geography does not favor the United States and its North Atlantic Treaty Organization (NATO) allies. Russian troops based in Kaliningrad Oblast and Belarus need only span the approximately forty-mile Poland-Lithuania border, known as the Suwalki Gap (the Gap), to sever the Baltic republics from the main NATO body.[3] Given the possibility of quantitatively superior Russian brigades sealing the Gap before Allied reinforcements arrive, Suwalki has become a flashpoint where "the many weaknesses in NATO's strategy and force posture converge."[4]

Further exacerbating threats along NATO's eastern flank is Moscow's introduction of novel missile technology to the European theater. In February 2017, the Kremlin deployed a new dual-capable[5] ground-launched cruise missile (GLCM), designated the SSC-8 or 9M729, with an estimated range of 2500 km.[6] In doing so, Moscow contravened its obligations under the Intermediate-Range Nuclear Forces Treaty (INF Treaty, or the Treaty),[7] prompting Washington to terminate the agreement.[8] This paper seeks to assess the impact of the SSC-8 and the broader post-INF Treaty security environment upon the military and strategic dynamics surrounding the Suwalki Gap. Most fundamentally, it finds that the SSC-8 provides Russia the newfound ability to direct conventional attacks against European NATO military assets in a manner that could impede Allied operations to recapture lost Baltic territory.

The paper will proceed in four parts. First, it will examine the Suwalki "doomsday" scenario, NATO vulnerabilities, and Russian motivations for aggression. Second, it will describe the origins and unique

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2. *Putin: Russian Troops Could be in Vilnius, Warsaw, and Bucharest in Two Days*, ATLANTIC COUNCIL (Sept. 18, 2014), *available at* https://www.atlanticcouncil.org/blogs/natosource/putin-russian-troops-could-be-in-vilnius-or-warsaw-in-two-days (last visited Nov. 27, 2020).

3. *See* Shalapak & Johnson, *supra* note 1. The "Suwalki Gap" is also commonly referred to as the "Suwalki Corridor" and "Kaliningrad Corridor," although this paper will use only "Suwalki Gap" for consistency.

4. Ben Hodges, Janusz Bugajski & Peter B. Doran, *Securing the Suwalki Corridor, Strategy, Statecraft, Deterrence, and Defense*, CTR. FOR EUR. POL'Y ANALYSIS 3 (2018), *available at* https://docs.wistatic.com/ugd/644196_ff84e43cc2504402bcf98e712e6a4c1f.pdf (last visited Nov. 27, 2020) [hereinafter Hodges, Bugajski & Doran].

5. Dual-capable refers to a weapon that may deliver a nuclear or conventional warhead.

6. *SSC-8 (9M729)*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 4, 2019), *available at* https://missilethreat.csis.org/missile/ssc-8-novator-9m729/ (last visited Nov. 27, 2020).

7. Intermediate-Range Nuclear Forces Treaty, Russ.-U.S., Dec. 8, 1987, 27 I.L.M. 84 (1988).

8. Michael P. Pompeo, *U.S. Withdrawal from the INF Treaty on August 2, 2019*, U.S. DEP'T OF ST. (Aug. 2, 2019), *available at* https://www.state.gov/u-s-withdrawal-from-the-inf-treaty-on-august-2-2019/ (last visited Nov. 27, 2020).

capabilities of the SSC-8. It will then discuss the advantages SSC-8 deployment may confer upon Moscow vis-à-vis Suwalki, including operational usage and political intimidation. Finally, it will prescribe four means via which Washington and its partners may mitigate this multidimensional threat: (1) enhancing forward-deployed forces in the Baltics; (2) augmenting investments in two developmental anti-cruise missile technologies; (3) placing ground-launched INF-range conventional missiles in Europe while engaging the Kremlin in negotiations to reinstate INF obligations; and (4) extending economic and political outreach to Belarus to induce reluctance to assist Russian operations across the Suwalki Gap.

II. THE SUWALKI THREAT

Following its successful campaigns in Georgia and Crimea,[9] a newly assertive Russia may next target the former Soviet republics of Estonia, Latvia, and Lithuania. The most troubling prospect is the potential materialization of what this paper terms the "Doomsday Scenario," a multipronged armored incursion from Kaliningrad and Belarus that severs the Suwalki artery and overwhelms the Baltic capitals before Allied reinforcements are able to arrive. The Gap presents particular vulnerabilities for NATO due to a combination of unfavorable geography and disadvantageous comparative force posture. Although this hypothetical bears a minimal likelihood of imminent fruition, a panoply of inducements could tempt Putin to attempt such a gamble.

A. The Doomsday Scenario

Recent Russian behavior offers some indication of the tactics it would employ in the course of a Baltic invasion. In 2013, Russian Armed Forces Chief of Staff Valery Vasilyevich Gerasimov published an article advocating the use of "nonmilitary means" such as information warfare, cyber operations, manipulation of "internal opposition," and special

9. Russia engaged in a brief armed conflict with Georgia in August 2008 over the status of self-proclaimed republics South Ossetia and Abkhazia. *See, e.g.*, Jim Nichol, *Russia-Georgia Conflict in August 2008: Context and Implications for U.S. Interests*, CONG. RES. SERV. (Mar. 3, 2009), *available at* https://fas.org/sgp/crs/row/RL34618.pdf (last visited Nov. 27, 2020). Moscow also annexed the former Ukrainian territory of Crimea in March 2014, and continues to engage in armed operations in the Donbas region. *See, e.g.*, Steven Pifer, *Crimea: Six Years After Illegal Annexation*, BROOKINGS INST. (Mar. 17, 2020), *available at* https://www.brookings.edu/blog/order-from-chaos/2020/03/17/crimea-six-years-after-illegal-annexation/ (last visited Nov. 27, 2020).

forces deployments to subvert the political authority of a target state.[10] As U.S. Lieutenant General Ben Hodges wrote in a seminal 2018 report, this so-called "Gerasimov Doctrine" leverages "all tools short of all-out war that may weaken and defeat an opponent."[11] Importantly, hard power underpins lower intensity actions.[12] Christopher Chivvis observes that behind Moscow's asymmetric tactics lie the "implicit threat of Russian conventional and, in the extreme, nuclear force."[13]

Past Russian military operations reflect the manifestation of the Gerasimov Doctrine's tenets in practice. In Georgia, the Kremlin coordinated cyber-warfare attacks, disinformation campaigns, and proxy raids in South Ossetia to establish a pretext for military intervention.[14] Similarly, propaganda aimed at inciting Crimea's local Russian-speaking population contributed to the efficacy of Moscow's annexation in 2014.[15] Hard power also played a role in these scenarios. Amidst the Crimea crisis, Russia transferred nuclear-capable Iskander missiles to Kaliningrad[16] and conducted a snap military exercise in the Western Military District (WMD) that included "150,000 troops, three armies, and hundreds of tanks and aircraft."[17] As Matthew Kroenig notes, "threats of

10. Mark Galeotti, *The 'Gerasimov Doctrine' and Russian Non-Linear War*, IN MOSCOW'S SHADOWS (Oct. 2015), *available at* https://inmoscowsshadows.wordpress.com/2014/07/06/the-gerasimov-doctrine-and-russian-non-linear-war/ (last visited Nov. 27, 2020). As Gerasimov writes, the use of nonmilitary means can create a "permanently operating front through the entire territory of the enemy state." Then, special forces, potentially "under the guise of peacekeeping and crisis regulation," may then appear in the contested territory to ensure "final success in the conflict." *Id.*

11. Hodges, Bugajski & Doran, *supra* note 4, at 25.

12. *See* Nicole Ng & Eugene Rumer, *The West Fears Russia's Hybrid Warfare. They're Missing the Bigger Picture.*, CARNEGIE ENDOWMENT FOR INT'L PEACE (July 3, 2019), *available at* https://carnegieendowment.org/2019/07/03/west-fears-russia-s-hybrid-warfare.-theyre-missing-bigger-picture-pub-79412 (last visited Nov. 27, 2020).

13. Christopher S. Chivvis, *Understanding Russian "Hybrid Warfare" and What Can Be Done About It*, RAND CORP. 4 (May 11, 2017), *available at* https://www.rand.org/content/dam/rand/pubs/testimonies/CT400/CT468/RAND_CT468.pdf (last visited Nov. 27, 2020).

14. *See* Eugene Rumer, *The Primakov (Not Gerasimov) Doctrine in Action*, CARNEGIE ENDOWMENT FOR INT'L PEACE (June 5, 2019), *available at* https://carnegieendowment.org/2019/06/05/primakov-not-gerasimov-doctrine-in-action-pub-79254 (last visited Nov. 27, 2020).

15. *Id.*

16. *See* Nicole Ng & Rumer, *supra* note 12.

17. Johan Norberg, *The Use of Russia's Military in the Crimean Crisis*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Mar. 13, 2014), *available at* https://carnegieendowment.org/2014/03/13/use-of-russia-s-military-in-crimean-crisis-pub-54949 (last visited Nov. 27, 2020).

deploying nuclear weapons formed part of the backdrop of the Ukraine invasion."[18]

In a Baltic scenario, the Gerasimov Doctrine stipulates that Moscow would first authorize "below the threshold" operations to establish a pretext for the incursion.[19] Possible examples include covert Spetsnaz insertions into Lithuania aimed at provoking a violent confrontation near the Kaliningrad border, fermentation of unrest amongst Russian speaking populations in former East Prussian lands, or deployment of an ostensibly nonviolent mission in response to a genuine or fabricated humanitarian crisis.[20]

To color its narrative, the Kremlin would likely employ bots and propaganda outlets, like *Russia Today* and *Sputnik News*, to "muddy the waters and cast doubt upon objective truths" within Baltic societies.[21] Moscow may also order cyber attacks against information systems and political processes to disrupt governmental responses to subsequent conventional assault and direct groups of domestic biker gangs and neo-Nazi sects to intimidate local populations or incite ethnic Russians into violence against their governments.[22] Last, Baltic security services may observe the appearance of "little green men," the Russian professional soldiers lacking uniforms or identifying insignia that played pivotal roles in establishing roadblocks and seizing strategic locations during the Crimea crisis.[23]

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18. Interview with Matthew Kroenig, Assoc. Professor, Georgetown Univ., in Washington, D.C. (Feb. 21, 2020) [hereinafter Kroenig interview].

19. *See* Chivvis, *supra* note 13, at 3.

20. Hodges, Bugajski & Doran, *supra* note 4, at 26-31. Other examples include a coup against Belarusian President Alyaksandr Lukashenko and counterterrorism operations against groups allegedly operating in the Baltic territory. *Id.*

21. *See* Chivvis, *supra* note 13, at 3.

22. *See* Agnia Grigas, *NATO's Vulnerable Link in Europe: Poland's Suwalki Gap*, ATLANTIC COUNCIL (Feb. 9, 2016), *available at* https://www.atlanticcouncil.org/blogs/natosource/nato-s-vulnerable-link-in-europe-poland-s-suwalki-gap/ (last visited Nov. 27, 2020); *see also* Michael Carpenter, *Russia Is Co-opting Angry Young Men*, THE ATLANTIC (Aug. 29, 2018), *available at* https://www.theatlantic.com/ideas/archive/2018/08/russia-is-co-opting-angry-young-men/568741 **Error! Hyperlink reference not valid.**(last visited Nov. 27, 2020).

23. *See* Steven Pifer, *Watch Out for Little Green Men*, BROOKINGS INST. (July 7, 2014), *available at* https://www.brookings.edu/opinions/watch-out-for-little-green-men/ **Error! Hyperlink reference not valid.**(last visited Nov. 27, 2020). This is far from the only plausible scenario of Russian aggression towards the Baltic states. As Hodges writes, in sparking a crisis "Russia's options are limited only by the creativity of its war planners." *See also* Hodges, Bugajski & Doran, *supra* note 4, at 26.

Figure 1: The Suwalki Gap[24]

After "little green men" and local militias commandeer government facilities or "invite" Russian intervention on their behalf, Moscow may proceed with a conventional military incursion aimed at rapidly overwhelming Baltic defenses. Hodges terms this strategy as "stab, grab and hold."[25] To exploit NATO inattentiveness, Russia could stage a snap

24. *See* Max Bearak, *This Tiny Stretch of Countryside is the Only Thing That Separates Baltic States from Russian Envelopment,* WASH. POST (June 20, 2016), *available at* https://www.washingtonpost.com/news/worldviews/wp/2016/06/20/this-tiny-stretch-of-countryside-is-all-that-separates-baltic-states-from-russian-envelopment/ (last visited Nov. 27, 2020).

25. Hodges, Bugajski & Doran, *supra* note 4, at 20. The Crimea annexation may offer some indication of a potential timeframe for Baltic aggression. Large-scale protests began in November 2013; by February 28, 2014, Russian "little green men" had seized Crimea's parliament building and two airports, after which a Ukrainian minister claimed that Russia had invaded the country. A "referendum" was held on March 16, and two days later, Crimean and Russian officials signed the Treaty of Accession of the Republic of Crimea to Russia. *See also* Gabriela Baczynska, Pavel Polityuk & Raissa Kasolowsky, *Timeline: Political Crisis in Ukraine and Russia's Occupation of Crimea,* REUTERS (Mar. 8, 2014), *available at* https://www.reuters.com/article/us-ukraine-crisis-timeline/timeline-political-crisis-in-ukraine-and-russias-occupation-of-crimea-idUSBREA270PO20140308 (last visited Nov. 27, 2020); *see also* Pifer, *supra* note 9.

exercise—in ZAPAD 2017, an estimated 60,000 to 70,000 troops simulated conflict with a NATO member—and promptly transition into actual combat.[26] The Kremlin employed this strategy to conceal preparations for operations against Georgia and Ukraine, and presently practices "surprise" maneuvers designed to, in the words of Defense Minister Sergei Shoigu, bring units to "the highest degree of combat readiness."[27] Moscow would then presumably deploy forces across the Gap in a pincer movement from Kaliningrad and Belarus while WMD-based troops surge into the northern Baltic territory.[28] Upon initiating hostilities, a combination of overwhelming force, superior firepower, and geographical advantages could enable Russia to prevail in as few as thirty hours.[29] Such an onslaught may present Baltic leaders with an unpalatable dilemma: resist and risk complete destruction, as occurred during the 2000 Russian siege of Grozny,[30] or surrender to the invading forces.[31] Given this choice, many may elect not "to turn their biggest cities into battlefields."[32]

Upon attaining control, Russia would likely seek swift annexation to attain some measure of political legitimacy for its conquest.[33] If NATO

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26. Dave Johnson, *ZAPAD 2017 and Euro-Atlantic Security*, NATO REV. (Dec. 14, 2017), *available at* https://www.nato.int/docu/review/articles/2017/12/14/zapad-2017-and-euro-atlantic-security/index.html (last visited Nov. 27, 2020). In 2014, for example, an estimated 155,000 Russian troops participated in the VOSTOK exercise. *See also* Dave Johnson, *VOSTOK 2018: Ten Years of Russian Strategic Exercises and Warfare Preparation*, NATO REV. (Dec. 20, 2018), *available at* https://www.nato.int/docu/review/articles/2018/12/20/vostok-2018-ten-years-of-russian-strategic-exercises-and-warfare-preparation/index.html (last visited Nov. 27, 2020).

27. Steve Gutterman, *Putin Puts Troops in Western Russia on Alert in Drill*, REUTERS (Feb. 26, 2014), *available at* https://www.reuters.com/article/us-ukraine-crisis-russia-military/putin-puts-troops-in-western-russia-on-alert-in-drill-idUSBREA1P0RW20140226 (last visited Nov. 27, 2020). *See also* Hodges, Bugajski & Doran, *supra* note 4, at 23.

28. Steven J. Flanagan, Jan Osburg, Anika Binnendijk, Marta Kepe & Andrew Radin, *Deterring Russian Aggression in the Baltic States Through Resilience and Resistance*, RAND CORP. 6 (Apr. 15, 2019), *available at* https://www.rand.org/content/dam/rand/pubs/research_reports/RR2700/RR2779/RAND_RR2779.pdf (last visited Nov. 27, 2020) [hereinafter Flanagan, Osburg, Binnendijk, Kepe & Radin].

29. *Id.* at 6.

30. During the Second Chechen War, Russian forces laid siege to the Chechen capital of Grozny between December 1999 and February 2000. As Daniel Williams wrote at the time, "[i]mages of Grozny broadcast on Russian television showed World War II-like destruction, as tanks and armored vehicles rolled down streets lined with blasted and burned-out buildings. Houses were battered into misshapen hulks and roads were deserted." *See* Daniel Williams, *Russians Capture Grozny*, WASH. POST (Feb. 7, 2000) at A01.

31. *See* Flanagan, Osburg, Binnendijk, Kepe & Radin, *supra* note 28, at 6.

32. *Id.*

33. *See* Shlapak & Johnson, *supra* note 1, at 7. Shlapak and Johnson envision operations designed to seize and occupy the entirety of Estonia, Latvia, and Lithuania. *Id.* Still, this scenario does not necessarily need to pertain to a full seizure of all three Baltic states; as

eschews the seemingly unthinkable route of accepting the Russian *fait accompli*, it would then face the daunting task of mobilizing a counter-offensive to recapture lost territory.[34] Michael O'Hanlon estimates the Alliance would require around 300,000 troops, the majority of whom it would need to draw from the U.S. military.[35] The process of deploying this multidivisional force, which would require a "fairly prolonged buildup," followed by loading equipment onto ships, transit across the Atlantic Ocean, and debarkation at European ports, would likely take two to three months.[36] Even this prediction, O'Hanlon notes, does not account for lack of U.S. readiness and inevitable Russian disruptions, such as operations against NATO electrical grids, satellites, and fiber optic cables.[37]

NATO forces in transit to the Baltics would also be particularly vulnerable to Russian attacks. The Kremlin could direct ballistic and cruise missile strikes against "discrete, localized targets on land and sea," such as airfields, ports, rail marshaling yards, and large truck depots.[38] Russian forces could also use missiles, aircraft-delivered precision-strike ordinances, and attack submarines to target NATO ships in the Atlantic Ocean or the North and Baltic Seas.[39] Given that the data from recent naval conflicts suggests that even warships "with their defenses alert and working" fail to intercept 10% to 30% of incoming advanced threats, Russian saturation attacks could sink or incapacitate several crucial NATO crafts, including the integral large medium-speed roll-on/roll-off transport vessels (LMSRs) and SL-7 Fast Sealift Ships.[40] Should this occur, the United States might lose "the majority of its top-line combat equipment in a single battle."[41]

Hodges writes, Russia's initial objective will be "the seizure of NATO territory in or around the Suwałki region," after which it may take further action contingent upon NATO's response. *See* Hodges, Bugajski & Doran, *supra* note 4, at 31.

34. MICHAEL E. O'HANLON, THE SENKAKU PARADOX: RISKING GREAT POWER WAR OVER SMALL STAKES 24 (2019) [hereinafter SENKAKU PARADOX].

35. *Id.* at 25-26.

36. *Id.* at 27. O'Hanlon bases this estimate on the two months necessary to deploy over 200,000 troops in Operation Desert Storm. *Id.*

37. *Id.* at 29.

38. *Id.* at 30.

39. SENKAKU PARADOX, *supra* note 34, at 31.

40. *Id.* at 31-32 (citing WAYNE P. HUGHES JR., FLEET TACTICS AND COASTAL COMBAT 275-76 (2d ed. 2000)). Russia could use, for example, torpedoes, anti-ship missiles and laser-guided bombs against NATO vessels. *Id.*

41. *Id.* at 33.

B. Suwalki Vulnerabilities

As currently situated, NATO forces are poorly positioned to defend the Gap against a Russian onslaught. First, regional geography exacerbates the challenges of defending Baltic territory. Hodges characterizes the Suwalki landscape as "relatively easy terrain for a Russian military incursion."[42] In particular, Lithuanian territory north of the Polish border, save a more densely wooded section adjacent to Belarus, is open and "amenable to maneuver mechanized forces."[43] Furthermore, Russian and Belarusian military training grounds, located near the Gap, provide locations from which massed forces disguised as exercise participants could strike.[44] Therefore, if Moscow seeks to "sever and hold territory," a campaign from Kaliningrad and Belarus's Hrodna *oblast* on the Lithuanian side of the Gap appears logical.[45]

Along the border, and to the south, the terrain is more easily defensible against armored assault, yet simultaneously more restrictive of NATO efforts to transport reinforcements northward. The heavily forested Polish side is hillier than Lithuania, and accordingly more "conducive to light infantry or operations by Special Forces" than to mass armored or mechanized movements.[46] Along the border, the terrain is a "nightmare for maneuver," with rolling fields "disrupted by chain lakes, rivers, streams, thick stands of forest, and muddy soil."[47] Gaładuś Lake, for example, spans approximately six kilometers of the border.[48] Moreover, only one railway and two narrow roads, Suwałki-Kaunas and Augustów-Alytus-Vilnius, lead northward from Poland across the Gap; Russia could sever this "tight and predictable funnel" with artillery or ground troops.[49] A gauge break at the Poland-Lithuania railhead could also

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42. Hodges, Bugajski & Doran, *supra* note 4, at 23.

43. *Id.* at 18. Finnish commentator Robin H. . .ggblom characterizes this land as "tank country." *See* Robin H. . .ggblom, *Kaliningrad and the Suwalki Gap – A Look From the Other Side*, CORPORAL FRISK (Aug. 11, 2016), *available at* https://corporalfrisk.com/2016/08/11/kaliningrad-and-the-suwalki-gap-a-look-from-the-other-side/ (last visited Nov. 27, 2020) [hereinafter H. . .ggblom].

44. *See* Hodges, Bugajski & Doran, *supra* note 4, at 23.

45. *See id.* at 18.

46. Hodges, Bugajski & Doran, *supra* note 4, at 18.

47. *Id.*

48. Location Information of Jezioro Galadus, GOOGLE MAPS (2020), *available at* http://maps.google.com (follow "Search Google Maps" hyperlink; then search destination field for "Jezioro Galadus") (last visited Nov. 27, 2020). As Finnish commentator Robin H. . .ggblom thus argues, a mechanized force attempting to bridge the Suwalki Gap "would be vulnerable to ambushes and being funneled into bottlenecks." H. . .ggblom, *supra* note 43.

49. *See* Hodges, Bugajski & Doran, *supra* note 4, at 16-18.

create a "severe bottleneck" that could delay tracked vehicles' transportation for days.[50]

Notably, the rail dynamic appears to be improving. In October 2016, the Baltic states and Poland agreed to implement Rail Baltica, a line extending from Poland northward to Tallinn via Riga and Kaunas.[51] As Olevs Nikers notes, this initiative, considered the "most important project for the Baltic States in the 21st century," would allow NATO to "move large volumes of military cargo from Germany and Poland to the Baltic States without interruption–saving time and limiting the numbers of personnel and transport equipment involved in the logistics."[52] The railway would thus offer NATO forces a more efficient form of military transportation than "any of the transit routes currently available by sea, air, or road."[53] However, budgetary disagreements between European Union (EU) leadership and the Baltic governments currently threaten the project's viability.[54]

Russian forces penetrating deeper into the Lithuanian heartland and northward into Latvia and Estonia would encounter "difficult" off-road mobility for wheeled vehicles, suggesting an advantage for light infantry.[55] Still, the Baltics contain a "fairly robust network of roads and highways" that attackers could utilize en route to Riga and Tallinn.[56] Additionally, if this aggression is successful, Hodges posits that the region's terrain is "conducive to holding and defense—rather than movement and counter-offensives," a product of the limited northbound roads and

50. *See* H. . .ggblom, *supra* note 43.

51. *See* Olevs Nikers, *New Railroad Agreement a National Security Milestone for Baltic Allies, Poland, EU, and NATO,* ATLANTIC COUNCIL (Oct. 24, 2016), *available at* https://www.atlanticcouncil.org/blogs/natosource/new-railroad-agreement-a-national-security-milestone-for-baltic-allies-poland-eu-and-nato/ (last visited Nov. 27, 2020) [hereinafter New Railroad Agreement]. In 2015, new construction extended standard-gauge track 123 km from the former break-of-gauge at Šeštokai to the city of Kaunas in central Lithuania. *See also* Keith Barrow, *Poland – Lithuania Standard-Gauge Link Opens,* INT'L RAILWAY J. (Oct. 16, 2015), *available at* https://www.railjournal.com/regions/europe/poland-lithuania-standard-gauge-link-inaugurated (last visited Nov. 27, 2020).

52. Olevs Nikers, *Baltics to Build Stronger Logistics Within the EU and NATO,* JAMESTOWN FOUND. (Oct. 19, 2016), *available at* https://jamestown.org/program/baltics-build-stronger-logistics-within-eu-nato/ (last visited Nov. 27, 2020). Rail Baltica is scheduled for completion in 2030 barring delays or budgetary complications. *Id.*

53. *Id.*

54. *See* Joshua Posaner, *Struggle Over Rail Baltica Spills Into Brussels Budget Fray,* POLITICO (Feb. 20, 2020), *available at* https://www.politico.eu/article/struggle-over-rail-baltica-spills-into-brussels-budget-fray/ (last visited Nov. 27, 2020).

55. *See* Shlapak & Johnson, *supra* note 1, at 4. *See also* H. . .ggblom, *supra* note 43.

56. *See* Shlapak & Johnson, *supra* note 1, at 4.

railways available to NATO.[57] Ultimately, even if Rail Baltica is completed, the Suwalki geographic layout appears to favor invading Russian armored forces over NATO defenders.

Beyond terrain, the NATO-Russia military balance also tilts toward Moscow. While NATO troop numbers outnumber Russian totals, the inverse is true in the Baltic region. As of 2018, Russia had an estimated 330,000 active duty troops in the WMD, including 14,611 in Kaliningrad.[58] Furthermore, as a 2018 RAND report finds, the WMD contains the "highest density of Russia's most-capable ground and air forces."[59] Belarus can also contribute 45,350 soldiers.[60] On the other hand, NATO maintains a force of around 35,000 active duty troops in the Baltics, although Poland adds another 105,000.[61]

Moscow could therefore deploy an estimated twenty-two WMD-based maneuver battalions, in contrast to the twelve NATO maintains in the region.[62] Moreover, David A. Shlapak and Michael Johnson characterize the Estonian and Latvian battalions—which comprise seven of NATO's twelve— as "extremely light, lack[ing] tactical mobility, and . . . poorly equipped for fighting against an armored opponent."[63] Russian armor will pose such a challenge. Moscow has 757 main battle tanks, 1276 infantry fighting vehicles, and 342 self-propelled howitzers in contrast to NATO's 129, 280, and 32, respectively.[64] And despite NATO's

57. *See* Hodges, Bugajski & Doran, *supra* note 4, at 52. Russia is also likely to hold a general advantage in defending seized territory against NATO forces seeking its recapture. *See id.* As O'Hanlon writes, Moscow may believe "that once it had succeeded in its aggression, NATO would find it difficult to dislodge Russian forces." *See also* SENKAKU PARADOX, *supra* note 34, at 23.

58. Hodges, Bugajski & Doran, *supra* note 4, at 4, 37. *See also* Robin Emmott, *Expect More Fake News From Russia, Top NATO General Says*, REUTERS (Feb. 18, 2017), *available at* https://www.reuters.com/article/us-germany-security-russia-nato/expect-more-fake-news-from-russia-top-nato-general-says-idUSKBN15X08V (last visited Nov. 27, 2020) (Russia has 330,000 troops amassed in its WMD).

59. Scott Boston, Michael Johnson, Nathan Beauchamp-Mustafaga & Yvonne K. Crane, *Assessing the Conventional Force Imbalance in Europe: Implications for Countering Russian Local Superiority*, RAND CORP. (2018), *available at* https://www.rand.org/content/dam/rand/pubs/research_reports/RR2400/RR2402/RAND_RR2402.pdf (last visited Nov. 27, 2020) [hereinafter Boston, Johnson, Beauchamp-Mustafaga & Crane].

60. *See* Hodges, Bugajski & Doran, *supra* note 4, at 43.

61. *Id.* at 50.

62. *See also* Michael E. O'Hanlon & Christopher Skaluba, *A Report From NATO's Front Lines*, BROOKINGS INST. (June 13, 2019), *available at* https://www.brookings.edu/blog/order-from-chaos/2019/06/13/a-report-from-natos-front-lines/ (last visited Nov. 27, 2020).

63. *Id.* at 50.

64. *See also* O'Hanlon & Skaluba, *supra* note 62.

considerable airpower advantage—5457 available fighters and bombers to Russia's 1251— it maintains a fleet of only 363 "fifth-generation" fighters capable of penetrating advanced Russian air defenses.[65] Moscow has deployed over twenty-four air defense battalions with a total of over 288 S-400 and S-300 batteries.[66] Taken together, these aircraft and air defenses will "greatly complicate efforts to focus NATO airpower on Russian maneuver forces in the initial phase of a conflict."[67] Moscow's armed presence in the WMD thus appears "more than adequate . . . to overwhelm whatever defense the Baltic armies might be able to present."[68]

C. Russian Motivations

To observe that Russia possesses the capability to overrun the Baltics is not to presuppose that Putin would actually pursue a course bearing such immense risk. As NATO members, Estonia, Latvia, and Lithuania are entitled to the protection of Article 5 of the North Atlantic Treaty (NAT), which provides that in the event of an "armed attack" against any member, each of the other members "will assist the Party or Parties so attacked by taking . . . such action as it deems necessary, including the use of armed force."[69] Despite ambiguity regarding the scope of state obligations[70] and the threshold for implication,[71] U.S. military leaders have consistently pledged to aid Allies in the event of Russian aggression, even if conducted via hybrid means.[72] As former Georgian President

65. *Id.*

66. *Id.* NATO also refers to these systems as the SA-20/21, SA-23, and SA-11/17.

67. *Id.* at 8.

68. Shlapak & Johnson, *supra* note 1, at 4. *See also* Hodges, Bugajski & Doran, *supra* note 4, at 43 (concluding that Russia "benefits from a numerical advantage over NATO forces opposite the Eastern Flank in terms of manpower and in every major category of combat weaponry").

69. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 [hereinafter NAT].

70. *See, e.g.*, Aurel Sari, *The Mutual Assistance Clauses of the North Atlantic and EU Treaties: The Challenge of Hybrid Threats*, 10 HARV. NAT'L SEC. J. 405, 426 (2019) (examining, in part, the scope of member state commitments required upon Article 5 invocation).

71. As O'Hanlon writes, if Russia "carried out the aggression in a way that maintained a semblance of deniability, with "little green men" instead of regular troops, few would really be fooled even for a short time. But some NATO countries looking to avoid confrontation might invoke Moscow's excuse as a reason to delay any military response and give diplomacy a chance to reverse the aggression." SENKAKU PARADOX, *supra* note 34, at 22-23.

72. *See, e.g.*, John Vandiver, *Breedlove: NATO Must Redefine Responses to unconventional Threats*, STARS & STRIPES (July 31, 2014), *available at* https://www.stripes.com/news/breedlove-nato-must-redefine-responses-to-unconventional-threats-1.296129 (last visited Nov. 23, 2020). *See also* Hodges, Bugajski & Doran, *supra*

Mikheil Saakashvili contends, the possibility of triggering Article 5 alone is presumably sufficient to deem the Baltics "safe" from Putin's reach.[73] NATO also has 3,128,520 total active troops to Russia's 831,000,[74] outspends Moscow on defense $900 billion to $66.3 billion,[75] and economically outproduces it eleven times over.[76] In the event of a Baltic incursion, Russia would therefore provoke consequent hostilities with an enemy by which it is militarily and financially outclassed.

Yet from Moscow's perspective, the potential benefits of successfully seizing Baltic territory could outweigh the costs of such a gamble. First, Putin may view Baltic territorial gains through an irredentist perspective of restoring past Soviet and imperial Russian glory.[77] Capturing a historically significant location like Narva, Estonia, for example, would offer Putin a symbolic victory reminiscent of Peter the Great's 1704 triumph.[78] As Kroenig notes, Moscow seeks "to re-establish a sphere of influence in Eastern Europe" and detests sharing borders with democratic NATO members.[79] To this end, Moscow has pursued a "compatriot

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note 4, at 10 (arguing that the United States should "immediately act to unilaterally defend an ally under Article 5," even before an Alliance-wide vote is held).

73. Mikheil Saakashvili, *Russia's Next Land Grab Won't Be in an Ex-Soviet State. It Will Be in Europe.*, FOREIGN POL'Y (Mar. 15, 2019), *available at* https://foreignpolicy.com/2019/03/15/russias-next-land-grab-wont-be-in-an-ex-soviet-state-it-will-be-in-europe-putin-saakashvili-sweden-finland-arctic-northern-sea-route-baltics-nato/ (last visited Nov. 23, 2020).

74. Hodges, Bugajski & Doran, *supra* note 4, at 36.

75. *See* Alasdair Sandford, *NATO Military Spending Continues to Dwarf That of Russia*, EURONEWS (Mar. 5, 2018), *available at* https://www.euronews.com/2018/05/02/nato-military-spending-continues-to-dwarf-that-of-russia (last visited Nov. 23, 2020).

76. NATO's combined GDP is approximately $18.35 trillion, whereas Russia's is $1.63 trillion. *See* Caleb Silver, *The Top 20 Economies in the World*, INVESTOPEDIA (Mar. 18, 2020), *available at* https://www.investopedia.com/insights/worlds-top-economies/ (last visited Nov. 23, 2020). *See also NATO countries: Statistical Profile*, NATIONMASTER (2020), *available at* https://www.nationmaster.com/country-info/groups/NATO-countries (last visited Nov. 23, 2020).

77. Robert Coalson, *Putin Pledges to Protect All Ethnic Russians Anywhere. So, Where Are They?*, RADIO FREE EUROPE/RADIO LIBERTY (Apr. 10, 2014), *available at* https://www.rferl.org/a/russia-ethnic-russification-baltics-kazakhstan-soviet/25328281.html (last visited Nov. 23, 2020). The Soviet Union attained control over the Baltic states in 1939 per the terms of the Molotov-Ribbentrop pact with Nazi Germany. Subsequently, Soviet leader Joseph Stalin instituted "Russification" policies that prompted the deportation of around 200,000 Estonians, Latvians, and Lithuanians. *Id.*

78. *See* Daniel Berman, *Will Narva Be Russia's Next Crimea?*, THE DIPLOMAT (Apr. 8, 2014), *available at* https://thediplomat.com/2014/04/will-narva-be-russias-next-crimea/ (last visited Nov. 23, 2020). Notably, more than 80% of Narva residents are of Russian descent, and 36% hold Russian passports. *Id.*

79. Kroenig interview, *supra* note 18. *See also* Emily Farris, *Probing the Baltic States: Why Russia's Ambitions Do Not Have a Security Dimension*, ROYAL U. SERV. INST. (Nov. 21,

policy", or *Russkiy Mir*, through which it claims "a legal right to protect Russian citizens wherever they reside."[80] An assertive *Russkiy Mir* may encourage Putin to seek the physical reintegration of relinquished former holdings, like Ukraine.[81] In the Baltics, where sizable ethnic Russian populations[82] are "at best unevenly integrated" into "post-independence political and social mainstreams," Shlapak and Johnson observe that this "storyline is disturbingly familiar."[83]

Acquiring Baltic territory could also advance Russian economic interests. Moscow would gain access to a series of warm-water ports, fulfilling a 300-year historical pursuit dating to the Great Northern War against Sweden.[84] Latvia's Ventspils Nafta, which served as the second-largest exporting terminal for Russian oil until 2001, is particularly valuable.[85] Furthermore, the Kremlin could enhance Kaliningrad's viability as an industrial port by establishing a physical connection to the mainland.[86] Estonia's shale reserves in Ida-Viru County, which provide 80% of the country's electricity, offer another incentive.[87] Closing the Gap would also create territorial contiguity between the Baltic and Black Seas, enabling Moscow to transport commercial goods and military equipment across the region.[88]

2018), *available at* https://rusi.org/commentary/probing-baltic-states-why-russia%E2%80%99s-ambitions-do-not-have-security-dimension (last visited Nov. 23, 2020).

80. Flanagan, Osburg, Binnendijk, Kepe & Radin, *supra* note 28, at 5. In 2014, Kremlin spokesman Dmitry Peskov described Putin as the "main guarantor of the safety" of the broader "Russian world." Coalson, *supra* note 77.

81. *See* Kristina Kallas, *Claiming the Diaspora: Russia's Compatriot Policy and its Reception by [the] Estonian-Russian Population*, ETH ZÜRICH CTR. FOR SECURITY STUD. (Nov. 30, 2016), *available at* https://css.ethz.ch/content/specialinterest/gess/cis/center-for-securities-studies/en/services/digital-library/articles/article.html/59907ae2-3fe4-4d7d-88c4-de2e3e3b907e (last visited Nov. 23, 2020). Certain ultranationalist Putin allies refer to Ukraine as "Novorossiya" and advocate its return to Russian control. *See also* Coalson, *supra* note 77.

82. *See generally* Kallas, *supra* note 81.

83. Shlapak & Johnson, *supra* note 1, at 3.

84. *See* A. Grace Buchholz, *Putin Is Thirsty – the Troubling Problem of Kaliningrad*, REALCLEAR DEF. (Aug. 7, 2017), *available at* https://www.realcleardefense.com/articles/2017/08/07/putin_is_thirsty___the_troubling_problem_of_kaliningrad_111983.html (last visited Nov. 23, 2020).

85. Agnia Grigas, *Russia's Motives in the Baltic States*, FOREIGN POL'Y RES. INST. (Dec. 7, 2015), *available at* https://www.fpri.org/article/2015/12/russias-motives-in-the-baltic-states/ (last visited Nov. 23, 2020).

86. *See* Buchholz, *supra* note 84.

87. Grigas, *supra* note 85.

88. Hodges, Bugajski & Doran, *supra* note 4, at 22. As Hodges notes, this would allow the Kremlin to more directly project force into the territorial integrity of Belarus and Poland. *Id.*

Last, Putin may perceive a successful Baltic campaign as a means to degrade and delegitimize NATO. Hodges perceives that Russia's foremost goal is to "disrupt, divide, make irrelevant, or eliminate NATO as a security organization and defense guarantor."[89] As O'Hanlon similarly reasons, a NATO failure to effectively respond to Russian aggression would expose the Alliance as a "paper tiger," plunging it into an "existential crisis" and providing Moscow with a "major strategic victory."[90] Aware of NATO's proclivity for indecisiveness, Russia aims to "leverage this bureaucratic sclerosis by expanding cleavages between allies to the point of fracture."[91]

By this logic, Putin may believe that, in the event of a Baltic *fait accompli*, he could conquer NATO territory while avoiding conflict. If Russia fortified and prepared to defend seized Baltic lands, the Alliance would face the daunting prospect of mounting a "potentially huge conventional military operation, and possibly risking nuclear war" to recapture a small, remote corner of the allied territory.[92] Given the ambiguities inherent to the Article 5 mutual defense guarantee, the prospect of acquiescing to a Russian conquest could present a "serious dilemma" for NATO members that prefer to remain uninvolved.[93] In particular, as

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89. Hodges, Bugajski & Doran, *supra* note 4, at 24.

90. SENKAKU PARADOX, *supra* note 34, at 23.

91. *See id.* North Atlantic Treaty (NAT) Article 4 reads, "The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened." NAT, *supra* note 69. A NATO member generally requests Article 4 consultations before demanding collective defense under Article 5; Hodges characterizes such situations as when a state "asks for urgent support." *See also* Hodges, Bugajski & Doran, *supra* note 4, at 31. A request for Article 4 consultations, however, does not necessarily entail the Alliance's eventual invocation of Article 5. When Turkey considered invoking Article 5 in 2016 following an escalation in hostilities along the Syrian-Turkish border, for example, NATO firmly rejected this possibility. *See also* Michael Moran, *Turkey's Article 5 Argument Finds No Takers*, CARNEGIE CORP. OF N.Y. (Feb. 24, 2016), *available at* https://www.carnegie.org/news/articles/turkeys-article-5-argument-finds-no-takers/. (last visited Nov. 23, 2020).

92. SENKAKU PARADOX, *supra* note 34, at 24.

93. *Id.* at 22; *see also* Hodges, Bugajski & Doran, *supra* note 4, at 31. Moreover, as Gen. Philip M. Breedlove (Ret.) and Amb. Alexander R. Vershbow (Ret.) write in an *Atlantic Council* report, "the often-cited nightmare scenario of a limited Russian land grab of territory in the Baltic States could take place well before US and allied reinforcements from Germany, Western Europe, or the continental United States could be brought to bear. Such a fait accompli could ultimately break the Alliance's will and determination to live up to its Article 5 commitments." *See also* Philip M. Breedlove & Alexander R. Vershbow, *Permanent Deterrence: Enhancements to the US Military Presence in North Central Europe*, ATLANTIC COUNCIL 31 (Feb. 7, 2019), *available at* https://www.atlanticcouncil.org/in-depth-research-reports/report/permanent-deterrence/ (last visited Nov. 23, 2020) [hereinafter Breedlove & Vershbow].

Shlapak and Johnson note, fears of nuclear escalation could induce NATO leaders to "concede, at least for the near to medium term, Russian control of the territory they had occupied."[94] Should the situation unfold in this manner, Moscow could accomplish the two-fold objective of shattering NATO's foundational collective security guarantee and emerging from its daring land grab unscathed.

Ultimately, the doomsday scenario is unlikely to materialize in the near future. Putin has accused NATO planners who warn of a Suwalki incursion of "scaremongering" and seeking to start a new Cold War.[95] Still, as O'Hanlon writes, while the odds of such a contingency seem "rather low," they are "significantly greater than zero" and could increase as Russia adopts a more "risk-tolerant strategic calculus."[96] For Hodges, the possibility of aggression turns on whether Moscow is "certain that it will succeed in its objectives," a function of its perceived operational superiority and belief in the ineffectiveness of any anticipated response.[97] The extent to which NATO signals readiness to defend Baltic territory, therefore, may directly influence the probability that Russia ever menaces in Suwalki in the first place.[98]

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94. Shlapak & Johnson, *supra* note 1, at 7.

95. Max Bearak, *This Tiny Stretch of Countryside is all that Separates Baltic States from Russian Envelopment*, WASH. POST (June 20, 2016), *available at* https://www.washingtonpost.com/news/worldviews/wp/2016/06/20/this-tiny-stretch-of-countryside-is-all-that-separates-baltic-states-from-russian-envelopment/ (last visited Nov. 23, 2020).

96. SENKAKU PARADOX, *supra* note 34, at 23-24. O'Hanlon also suggests that the emergence of a future Russian leader "with a more reckless and risk-prone temperament" could increase the likelihood of the doomsday scenario coming to fruition. *Id.* Ultimately, an in-depth analysis of Russian political trends is well beyond the scope of this paper. Still, as the 2017 U.S. National Security Strategy forecasts, Russia generally "seeks to restore its great power status and establish spheres of influence near its borders." *Nat'l Security Strategy of the U.S. of Am.*, THE WHITE HOUSE 25 (Dec. 2017), *available at* https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905-2.pdf. (last visited Nov. 23, 2020).

97. *See* Hodges, Bugajski & Doran, *supra* note 4, at 32.

98. *Id.* Some may wonder whether Suwalki presents a unique hazard to NATO interests if emphasizing this challenge represents another example of unsustainable, perpetual worldwide vigilance. One could liken this categorization to former Vice President Dick Cheney's supposition that "if there's just a 1 percent chance of the unimaginable coming due, act as if it is a certainty." *See* John Allen Paulos, *Who's Counting: Cheney's One Percent Doctrine*, ABC NEWS (May 3, 2007), *available at* https://abcnews.go.com/Technology/story?id=2120605&page=1 (last visited Nov. 23, 2020). As noted, however, not only do American and European military leaders consider Suwalki to pose an exceptional strategic danger, but Putin has threatened the Baltics and engaged in sufficient past aggression to suggest his warnings should not be ignored. *See, e.g.*, *Putin: Russian Troops Could be in Vilnius, Warsaw, and Bucharest in Two Days*, ATLANTIC COUNCIL (Sept. 18, 2014), *available at* https://www.atlanticcouncil.org/blogs/natosource/putin-russian-troops-could-be-in-vilnius-or-warsaw-in-two-days/ (last visited Nov. 23, 2020).

III. THE SSC-8 AND THE END OF THE INF TREATY REGIME

Moscow's deployment of the SSC-8 missile exacerbates an already volatile Baltic strategic environment. Evidence indicates that in designing, testing, and fielding this weapon, Moscow purposefully sought to circumvent INF range restrictions. Now, following the accord's termination, the Kremlin can likely strike almost all civilian and military assets in Europe with conventional or nuclear force in a manner undetectable by Allied defenses.

A. Background and Deployment

The origins of the modern SSC-8 may be traced back to the late 1970s when the Soviet Union introduced the SS-20 ground-launched ballistic missile (GLBM), a mobile, accurate system capable of striking Western Europe.[99] The SS-20 exposed a gap in NATO's deterrence posture, as the United States possessed strategic intercontinental ballistic missiles (ICBMs) and tactical battlefield ordinances but lacked "the ability to attack Soviet cities with nuclear weapons forward-deployed in Western Europe."[100] In response to the ensuing "Euromissile" crisis, the Carter administration implemented a "dual-track" approach; it installed 464 BGM-109G GLCMs and 108 Pershing II GLBMs in Western Europe while simultaneously engaging Moscow in negotiations to eliminate both sides' intermediate-range arsenals.[101] While European allies, in particular West Germany, urged Washington to proceed with BGM-109G and Pershing II deployments, anti-nuclear protests soon swept across much of Western Europe.[102] These demonstrations did not hamper operational readiness at the time,[103] although in countries like Belgium, where some

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99. Alexander Lanoszka, *The INF Treaty: Pulling Out in Time*, 13 STRATEGIC STUD. Q. 50. 46, 67 (2019) [hereinafter Lanoszka]. The SS-20 carried a range of 5,000 km, so it could strike targets in Western Europe but could not reach the U.S. heartland. *See* Missile Defense Project, *SS-20 "Saber" (RSD-10)*, CTR. FOR STRATEGIC & INT'L STUD. (June 15, 2018), *available at* https://missilethreat.csis.org/missile/ss-20-saber-rsd-10/. (last visited Nov. 23, 2020).

100. Lanoszka, *supra* note 99, at 50. *See also* Helmut Schmidt, *The 1977 Alastair Buchan Memorial Lecture*, 20 SURVIVAL 1 (1978).

101. Lanoszka, *supra* note 99, at 51. *See also Special Meeting of Foreign and Defense Ministers*, NATO OFFICIAL TEXTS (Dec. 12, 1979) (updated Nov. 9, 2010), *available at* https://www.nato.int/cps/en/natolive/official_texts_27040.htm (last visited Nov. 23, 2020).

102. *See* John T. Correll, *The Euromissile Showdown*, AIR FORCE MAG. (Feb. 1, 2020), *available at* https://www.airforcemag.com/article/the-euromissile-showdown/ (last visited Nov. 23, 2020).

103. *Id.*

of the largest rallies took place, their memory continues to inform modern views of nuclear deterrence perspectives.[104]

The United States and the Soviet Union signed the INF Treaty in 1987—a sweeping arms control triumph that vindicated the "dual-track" strategy.[105] The Treaty mandated the elimination of all nuclear and conventional GLBMs and GLCMs with ranges between 500 and 5500 kilometers, imposed obligations "not to possess, produce, or flight-test" any such system, and established a robust verification regime.[106] Following the dissolution of the Soviet Union, members of the Treaty expanded to include Belarus, Kazakhstan, and Ukraine.[107] In subsequent years, however, Russian perceptions of the Treaty's utility shifted. Soviet foreign policy under Premier Mikhail Gorbachev was characterized by openness to the West and a desire to recalibrate the USSR's previously confrontational approach to foreign policy, including in the area of arms control.[108] Yet by the mid-2000s, Russia's political climate had shifted considerably, as President Vladimir Putin began pursuing military modernization and augmenting existing missile capabilities.[109] In 2005, Russia inquired about terminating the agreement, asserting the illogicality of abiding by restrictions to which the rest of the world was not subjected.[110]

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104. *See* Manuel Lafont Rapnouil, Tara Varma & Nick Witney, *Eyes Tight Shut: European Attitudes Towards Nuclear Deterrence*, EUR. COUNCIL ON FOREIGN REL. (Dec. 2018), *available at* https://www.ecfr.eu/specials/scorecard/eyes_tight_shut_european_attitudes_towards_nuclear_deterrence (last visited Nov. 23, 2020) [hereinafter Rapnouil, Varma & Witney] ("During the Euromissile crisis, large demonstrations against the deployment of US nuclear weapons took place on Belgian soil. This led the government to postpone the installation of the weapons").

105. *See* John D. Maurer, *The Dual-Track Approach: A Long-Term Strategy for a Post-INF Treaty World*, WAR ON THE ROCKS (Apr. 10, 2019), *available at* https://warontherocks.com/2019/04/the-dual-track-approach-a-long-term-strategy-for-a-post-inf-treaty-world/ (last visited Nov. 23, 2020).

106. *See* Daryl Kimball & Kingston Reif, *The Intermediate-Range Nuclear Forces (INF) Treaty at a Glance*, ARMS CONTROL ASS'N (Aug. 2019), *available at* https://www.armscontrol.org/factsheets/INFtreaty (last visited Nov. 23, 2020) (Result of the Treaty requirements, the US and USSR eliminated 2692 short-, medium-, and intermediate-range missiles between 1988 and 1991).

107. *Id.*

108. *See* Lanoszka, *supra* note 99, at 51.

109. *See generally* Marcel de Haas, *Russia's Military Reforms: Victory after Twenty Years of Failure?*, NETHERLANDS INST. OF INT'L REL. (Nov. 2011), *available at* https://www.clingendael.org/sites/default/files/pdfs/20111129_clingendaelpaper_mdehaas.pdf (last visited Nov. 23, 2020).

110. *See* Steven Pifer, *The INF Treaty, Russian Compliance and the U.S. Policy Response*, BROOKINGS INST. (July 17, 2014), *available at* https://www.brookings.edu/testimonies/the-inf-treaty-russian-compliance-and-the-u-s-policy-response/ (last visited Nov. 23, 2020) [hereinafter Pifer, *Russian Compliance*]; Telephone Interview with Steven Pifer,

Alternatively, Russia proposed "multilateralizing" the accord to establish a "global ban" on missiles within this range.[111] When the Bush administration rejected both proposals, Putin decided, as Kroenig contends, "to go ahead and cheat."[112]

U.S. intelligence services estimate that Russia initiated the development of the SSC-8 in the mid-2000s,[113] began flight testing in 2008, and test-fired the missile in 2014.[114] During this period, Moscow attempted to preserve the appearance of INF compliance by first firing a warhead over 500 km from a fixed launcher, an action permissible under the Treaty if testing sea or air-launched missiles, and later mounting the SSC-8 on a mobile launcher to test it at under 500 km.[115] Combined, these tests demonstrate Russian capability to launch at INF-restricted ranges from a "ground-mobile platform," which is a Treaty violation.[116] The U.S. State Department declared Russia non-compliant in 2014 and reiterated this position until the Trump administration withdrew from the Treaty in August 2019.[117] Moscow denied Washington's accusations. Deputy Foreign Minister Sergei Ryabkov claimed in January 2019 that the White House was "not interested in giving us the opportunity to disprove their erroneous or fabricated information."[118] The Kremlin also retorted that the United States itself had violated INF restrictions by placing AEGIS-Ashore missile defense systems carrying SM-3 Block IIA and Block IIB interceptors in Poland and Romania.[119] These installations,

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Nonresident Senior Fellow, BROOKINGS INST. (Feb. 27, 2020) [hereinafter Pifer interview]. North Korea, South Korea, China, Pakistan, and India, among others, possessed missiles in this range at the time. *Id.*

111. Pifer, *Russian Compliance*, *supra* note 110.

112. Kroenig interview, *supra* note 18.

113. Daniel Coats, *Director of National Intelligence Daniel Coats on Russia's INF Treaty Violation*, OFF. OF THE DIR. OF NAT'L INTELLIGENCE (Nov. 30, 2018), *available at* https://www.dni.gov/index.php/newsroom/speeches-interviews/item/1923-director-of-national-intelligence-daniel-coats-on-russia-s-inf-treaty-violation (last visited Nov. 23, 2020).

114. Missile Defense Project, *SSC-8 (9M729)*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 4, 2019), *available at* https://missilethreat.csis.org/missile/ssc-8-novator-9m729/ (last visited Nov. 23, 2020).

115. *Id.*

116. *Id.*

117. Bureau of Arms Control, Verification, and Compliance, *The Intermediate-Range Nuclear Forces Treaty*, U.S. DEP'T OF STATE (2020), *available at* https://www.state.gov/inf (last visited Nov. 23, 2020).

118. Tom O'Connor, *Russia Gives First Look at Weapon That Is Causing U.S. to Leave Nuclear Missile Treaty*, NEWSWEEK (Oct. 5, 2020).

119. *See* Lanoszka, *supra* note 99, at 55.

Moscow alleged, could be repurposed for offensive uses at INF-prohibited ranges.[120]

Regardless of any potential validity to the Kremlin's claims regarding AEGIS-Ashore, Russia's development of the SSC-8 appears to constitute an intentional, strategic decision to prioritize operational advantages over any political benefits incurred by continued Treaty adherence. "Russia concluded that at the end of the day, it was prepared to lose the INF Treaty over the missile," Pifer asserts, "but there was likely a hope that they could disguise the missile and get away with it."[121] Evidence of this intent may be inferred from Russia's overt SSC-8 deployments even while the INF regime remained technically intact. As of February 2019, Russia had stationed at least one hundred operational missiles,[122] including spares, and sixteen launchers in four battalions located in the Western, Southern, Central, and Eastern military districts.[123] Moreover, a January 2020 article by Viktor Litovkin, head of the Kremlin-owned TASS military news office, claimed that Russia transferred the SSC-8 to "the European part of the country, namely in the Kaliningrad

120. *Id.* The question of whether the U.S. complied fully with INF treaty requirements is largely beyond the scope of this paper, but the State Department has refuted Russia's charges on this matter. *See, e.g.*, Bureau of Arms Control and Verification, *Refuting Russian Allegations of U.S. Noncompliance with the INF Treaty*, U.S. DEP'T OF STATE (Dec. 8, 2017), *available at* https://www.state.gov/refuting-russian-allegations-of-u-s-noncompliance-with-the-inf-treaty/ (last visited Nov. 23, 2020).

121. Pifer interview, *supra* note 110.

122. By comparison, Russia possesses around 820 sea-based non-strategic warheads mounted on the SS-N-30 Kalibr land-attack cruise missile (LACM), the older SS-N-21 Sampson LACM, and the SS-N-19 Shipwreck anti-ship cruise missile (ASCM). According to a report published by the Center for Strategic and Budgetary Assessments (CSBA), however, the breakdown amongst the various delivery systems is "unknown." *See* Jacob Cohn, Adam Lemon & Evan Braden Montgomery, *Assessing the Arsenals: Past, Present, and Future*, CTR. FOR STRATEGIC & BUDGETARY ASSESSMENTS 19 (2019), *available at* https://csbaonline.org/uploads/documents/Assessing_Web_FINAL.pdf (last visited Nov. 23, 2020).

123. The missiles are presently deployed to the following locations: Kapustin Yar, Kamyshlov, Mozdok, and Shuya. *See Report: Russia Has Deployed More Medium-Range Cruise Missiles Than Previously Thought*, RADIO FREE EUROPE/RADIO LIBERTY (Feb. 10, 2019), *available at* https://www.rferl.org/a/report-russia-has-deployed-more-medium-range-cruise-missiles-than-previously-thought/29761868.html (last visited Nov. 23, 2020). *See also* Hans M. Kristensen & Matt Korda, *Russian Nuclear Forces, 2019*, 75 BULL ATOMIC SCIENTISTS 73 (2019); *Russia Has Apparently Stationed Far More Missiles Than is Known*, DER SPIEGEL (Feb. 9, 2019), *available at* https://www.spiegel.de/politik/ausland/russland-hat-offenbar-mehr-umstrittene-raketen-stationiert-als-bekannt-a-1252500.html (last visited Nov. 23, 2020); Michael R. Gordon, *On Brink of Arms Treaty Exit, U.S. Finds More Offending Russian Missiles*, WALL ST. J. (Jan. 31, 2019), *available at* https://www.wsj.com/articles/on-brink-of-arms-treaty-exit-u-s-finds-more-offending-russian-missiles-11548980645 (last visited Nov. 23, 2020).

region;"[124] *Russia Today*, another Moscow propaganda arm,[125] also reported Kaliningrad deployments.[126] Even if these unsubstantiated claims represent mere Kremlin signaling intended to intimidate European capitals, they reflect at a minimum that Moscow has no qualms flaunting the newest addition to its arsenal.

B. Why is the SSC-8 Unique?

The SSC-8 offers Moscow several otherwise unavailable operational capacities. First, the GLCM's stealth capability and in-flight maneuverability allow for evasion of enemy detection and attempted interception. Although cruise missiles are markedly slower than ballistic variants,[127] a ballistic trajectory may carry a warhead approximately 2000 km into the atmosphere, whereas the SSC-8 can fly below the radar sightline at only 50 to 150 meters above the ground.[128] The missile also

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124. Viktor Litovkin, *NATO Secretary-General Announces Deployment of US Missiles in Europe*, INFOROS (Jan. 23, 2020), *available at* https://inforos.ru/en/?module=news&action=view&id=104013 (last visited Nov. 23, 2020). As Ukrainian defense commentator Semen Kabakaev notes, "if the Iskander system with 9M729 [SSC-8] missile was deployed in the Kaliningrad region, it could easily reach Germany and the UK." *See also* Semen Kabakaev, *Russia Deploys Banned Missile and Brags About It*, ATLANTIC COUNCIL (May 10, 2017), *available at* https://www.atlanticcouncil.org/blogs/ukrainealert/russia-deploys-banned-missile-and-brags-about-it/ (last visited Nov. 23, 2020).

125. *See, e.g.*, Jim Rutenberg, *RT, Sputnik and Russia's New Theory of War*, N.Y. TIMES (Sept. 13, 2017), *available at* https://www.nytimes.com/2017/09/13/magazine/rt-sputnik-and-russias-new-theory-of-war.html (last visited Nov. 23, 2020).

126. *Russia Offers NATO a Moratorium on Missile Deployment, but Won't Sacrifice its Own Security to Prove its Goodwill*, RUSS. TODAY (Sept. 26, 2019), *available at* https://www.rt.com/news/469701-putin-message-nato-missile-inf/ (last visited Nov. 23, 2020).

127. The SCC-8 has a likely maximum flight speed of around 240 m/s or 537 mph. *See 9M729 - SSC-8*, GLOBALSECURITY (2020), *available at* https://www.globalsecurity.org/wmd/world/russia/ssc-8.htm (last visited Oct. 5, 2020). A ballistic missile, conversely, may reach speeds of 7.9 km/s, or over 17,650 mph. *See, e.g.*, *The 10 Longest Range Intercontinental Ballistic Missiles (ICBMs)*, ARMY TECH. (Nov. 3, 2013), *available at* https://www.army-technology.com/features/feature-the-10-longest-range-intercontinental-ballistic-missiles-icbm/ (last visited Oct. 5, 2020).

128. *See SSC-8*, MILITARY-TODAY (2020), *available at* http://www.military-today.com/missiles/ssc_x_8.htm (last visited Oct. 5, 2020). The SSC-8 is equipped to carry either a low-yield nuclear warhead with a yield of around 10-50 kT, a conventional warhead with 500 kg of explosives, as well as "cluster, fuel-air explosive, and bunker-busting warheads." *Id.* The SS-N-30 Kalibr carries an estimated conventional explosive payload of 450 kg. *See 3M-14 Kalibr (SS-N-30A)*, MISSILE DEF. ADVOCACY ALLIANCE (2020), *available at* https://missiledefenseadvocacy.org/missile-threat-and-proliferation/missile-proliferation/russia/ss-n-30a-kalibr/ (last visited Oct. 5, 2020). By comparison, conventionally armed ballistic missiles may carry a much larger payload; modified U.S. Peacekeeper missiles, for

utilizes an advanced astro-inertial navigation system and receives Russian GLONASS satellite updates, allowing operators to adjust destination coordinates in-flight.[129] As the Department of Defense (DoD) 2019 Missile Defense Review warns, the difficulty of detecting and tracking an SSC-8 launch "presents a potentially major threat to U.S. regional military operations and deterrence goals."[130] The SSC-8 also boasts considerable accuracy, with a reported circular error probable (CEP), or the typical distance by which a missile may stray from its target, of five meters.[131] While this may appear substantial, as O'Hanlon notes, even a weapon with a CEP of 30 meters could inflict severe damage upon runways and ports "with salvos of no more than five to ten missiles."[132]

A third key characteristic is the SSC-8's range. Although commentators disagree on whether the missile can travel a maximum of 2500 km or 5500 km,[133] as seen in Figure 2, any distance beyond 2500 km allows Moscow to strike almost all of Europe without relying on ICBMs.[134] Whereas an INF-complaint Kaliningrad-based GLCM could cover the Gap and Baltic Sea but not strike targets west of Poland, the elimination of Treaty restrictions places all of Central and Western Europe, including key Atlantic ports, in Moscow's crosshairs.[135]

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example, could carry as much as 8,000 pounds. *See* Amy F. Woolf, *Conventional Warheads for Long-Range Ballistic Missiles: Background and Issues for Congress*, CONG. RES. SERV. (Jan. 26, 2009), *available at* https://fas.org/sgp/crs/nuke/RL33067.pdf (last visited Oct. 5, 2020).

129. *SSC-8*, *supra* note 128.

130. *See* Office of Sec'y Def., *Missile Def. Rev.*, DEP'T OF DEF. 18 (2019), *available at* https://media.defense.gov/2019/Jan/17/2002080666/-1/-1/1/2019-Missle-Defense-Review.Pdf (last visited Oct. 5, 2020) [hereinafter Missile Defense Review].

131. *See SSC-8*, *supra* note 128.

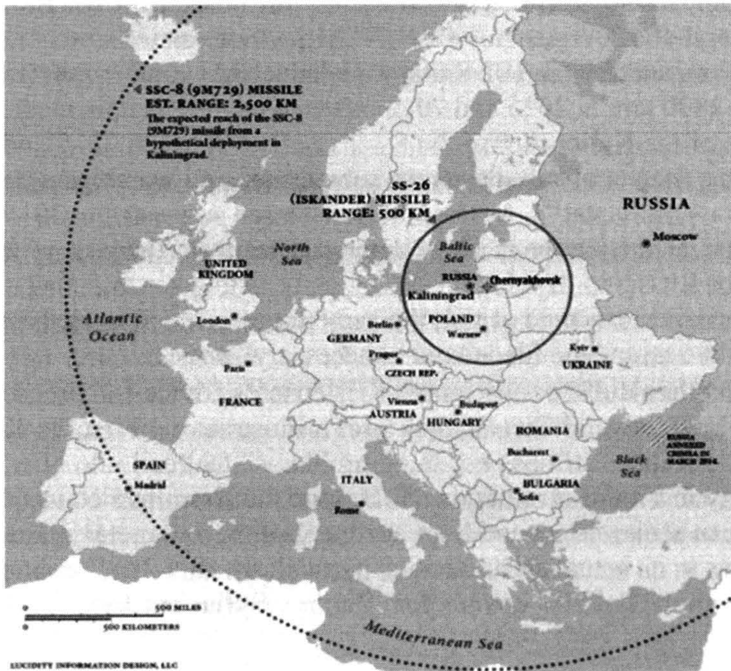
132. *See* SENKAKU PARADOX, *supra* note 34, at 31.

133. *See SSC-8 (9M729)*, *supra* note 115; *9M729 - SSC-8*, *supra* note 130 (this may depend, in part, upon the size of the payload).

134. *See* Jacek Durkalec, *European Security Without the INF Treaty*, NATO REV. (Sept. 30, 2019), *available at* https://www.nato.int/docu/review/articles/2019/09/30/european-security-without-the-inf-treaty/ (last visited Oct. 05, 2020).

135. If Moscow does not place SSC-8 batteries in Kaliningrad, the next closest deployment site to Europe is likely Kapustin Yar, a launch and development facility in Astrakhan Oblast around 500 km from the Ukrainian border. *See* Steven Pifer, *Multilateralize the INF problem*, BROOKINGS INST. (Mar. 21, 2017), *available at* https://www.brookings.edu/blog/order-from-chaos/2017/03/21/multilateralize-the-inf-problem/ (last visited Oct. 05, 2020) (from this location, the missile's range would not extend beyond Poland).

Figure 2: INF Prohibition and Minimum SSC-8 Range[136]



Last, the SSC-8 is a dual-capable weapon that may carry a low-yield nuclear or conventional warhead.[137] Questions remain about Moscow's preferred usage; Pifer claims the missile is "primarily intended for conventional purposes," while Kroenig suggests it could be used for several potential nuclear employments.[138] Regardless of principal intent, dual-capability offers Moscow considerable flexibility in deploying the SSC-8 and for what objective.[139]

136. *See* Rumer, *supra* note 14 (citing *SSC-8*, *supra* note 6, and Missile Defense Project, *SS-26 ISKANDER*, CTR. FOR STRATEGIC & INT'L STUDIES (Dec. 19, 2019), *available at* https://missilethreat.csis.org/missile/ss-26-2/ (last visited Oct. 5, 2020).

137. *See SSC-8*, MISSILE DEF. ADVOCACY ALLIANCE (2020), *available at* https://missiledefenseadvocacy.org/missile-threat-and-proliferation/missile-proliferation/russia/ssc-8/ (last visited Oct. 5, 2020).

138. Pifer interview, *supra* note 110; Kroenig interview, *supra* note 18 (noting that Russia could "go nuclear very early in a conflict to induce NATO into backing down altogether," by striking targets such as airbases in Poland or ships in the Baltic Sea).

139. Some commentators ask whether the benefits of a dual-use weapon may be overstated given the fact that NATO forces, upon observing an incoming Russian cruise missile, may not know how the type of warhead it carries. *See, e.g.*, *Conventional Prompt Global Strike and Long-Range Ballistic Missiles: Background and Issues*, CONG. RES. SERV. (Feb. 14, 2020), *available at* https://fas.org/sgp/crs/nuke/R41464.pdf (last visited Oct. 5, 2020) (noting that ground forces "might not know" whether an incoming missile "carried a nuclear

Russia also possesses sea- and air-launch systems that offer seemingly comparable advantages. The Kremlin introduced the SS-N-30A Kalibr land-attack cruise missile (LACM), which carries a range of 1500 to 2500 km, and the Kh-102 Raduga air-launched variant, with a range of 2500 to 2800 km, in 2015 and 2012, respectively.[140] Russia made extensive use of the Kalibr during the Syria conflict between 2015 and 2017, launching dozens of missiles from submarines and warships against Islamic State militants.[141] As Hans M. Kristensen suggested in 2015, Moscow's use of the Kalibr in Syria demonstrates that "there is no military need" for Russia to develop a GLCM, as "existing sea and air-launched cruise missiles can hold at risk the same targets."[142] Russia, he argues, should thus scrap "the illegal and unnecessary" project.[143]

Why then did Moscow ignore Kristensen's advice and proceed with the SSC-8? Several factors may prove illustrative. First, as Kroenig notes, the Kalibr "still has accuracy problems" that call into question its reliability in a conflict situation.[144] Despite the Kremlin's claims that the Kalibr can strike targets with an accuracy of "a few meters," questions remain as to its actual effectiveness, particularly after 2015 reports documented four Kalibrs bound for Raqqa, Syria crashing in Iran.[145]

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warhead or a conventional warhead"). Given the documented difficulties that current United States and NATO systems have experienced detecting and intercepting cruise missiles, however, it is likely that the enemy warhead would reach its target before planners would be faced with determining an appropriate retaliatory course. *See, e.g.*, Bradley Bowman & Andrew Gabel, *3 ways America can fix its vulnerability to cruise missiles*, DEF. NEWS (Oct. 29, 2019), *available at* https://www.defensenews.com/opinion/commentary/2019/10/29/3-ways-america-can-fix-its-vulnerability-to-cruise-missiles/ (last visited Oct. 5, 2020).

140. *See, e.g., Missile Defense Project, SS-N-30A (3M-14 Kalibr)*, CTR. FOR STRATEGIC & INT'L STUDIES (June 15, 2018), *available at* https://missilethreat.csis.org/missile/ss-n-30a/ (last visited Oct. 5, 2020); *Missile Defense Project, Kh-101 / Kh-102*, CTR. FOR STRATEGIC & INT'L STUDIES (June 15, 2018), *available at* https://missilethreat.csis.org/missile/kh-101-kh-102/ (last visited Oct. 5, 2020).

141. *See Russia Fires Cruise Missiles at IS Targets in Syria*, BBC NEWS (May 31, 2017), *available at* https://www.bbc.com/news/world-middle-east-40104728 (last visited Oct. 5, 2020).

142. Hans Kristensen, *Kalibr: Savior of INF Treaty?*, FED'N OF AM. SCIENTISTS (Dec. 14, 2015), *available at* https://fas.org/blogs/security/2015/12/kalibr/ (last visited Oct. 5, 2020).

143. *Id.*

144. Kroenig interview, *supra* note 18.

145. *See Russia Boasts of "High Efficiency" of Its Kalibr Missiles, As Fired At Raqqa*, RADIO FREE EUR. LIBERTY (Sept. 12, 2015), *available at* https://www.rferl.org/a/live-blog-syria-islamic-state-isis/27363628/lbl0lbi78155.html (last visited Oct. 5, 2020); Helene Cooper & Eric Schmitt, *Russia Denies U.S. Claim That Missiles Aimed at Syria Hit Iran*, N.Y. TIMES (Oct. 8, 2015), *available at*

Additionally, whereas air- and ship-based delivery systems may become "prohibitively" expensive for a large arsenal, "putting a missile on the ground or a truck is much cheaper."[146] As a February 2020 Congressional Budget Office (CBO) report claims, "[g]round-launched platforms are intrinsically cheaper than air or naval platforms."[147]

Last, ground-mobile systems are inherently less vulnerable to enemy attack than air- or sea-based missiles stored at bases or aboard naval vessels. As the CBO report asserts, truck-mounted mobile systems "are unlikely to remain in a location long enough for the United States to detect them, plan a strike mission, and execute that mission."[148] Furthermore, as noted in a report co-authored by Gen. Wesley Clark, it is "very hard to target and destroy [mobile launchers] without the presence of ground troops inside Russia's borders."[149] And as Pifer adds, there is "a huge expanse of Russian territory that they can hide in."[150] NATO forces, on the other hand, could detect and target air- and sea-launched capabilities with greater effectiveness. Ulrich Kühn suggests that Russian planners "do not trust [air and sea-based] delivery platforms in a second-strike scenario and believe that they would lose them early on in a war with NATO."[151] Russian military planners appear to share this mindset. In

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https://www.nytimes.com/2015/10/09/world/middleeast/syria-and-russia-continue-coordinated-assault-on-militants.html (last visited Oct. 5, 2020).

146. *Id.*

147. *Options for Fielding Ground-Launched Long-Range Missiles*, CONG. BUDGET OFF. 15 (Feb. 2020), *available at* https://www.cbo.gov/publication/56143 (last visited Nov. 22, 2020).

148. *Id.* at 21. (The report offers an example of these challenges by describing U.S. difficulties targeting Iraqi mobile Scud launchers during Operation Desert Storm. Despite the military sending "hundreds of aircraft over several weeks to locate and destroy a relatively small number of Iraqi Scud missile launchers in a barren desert environment"). *Id.* at 15 (after the conflict, "the United States could not confirm that it had destroyed any mobile Scud launchers"). *See also* Thomas Keaney & Eliot Cohen, GULF WAR AIR POWER SURVEY SUMMARY REPORT 89-90 (1993), *available at* https://apps.dtic.mil/dtic/tr/fulltext/u2/a273996.pdf (last viewed Nov. 22, 2020) ("Once again, there is no indisputable proof that Scud mobile launchers—as opposed to high-fidelity decoys, trucks, or other objects with Scud-like signatures—were destroyed by fixed-wing aircraft").

149. Wesley Clark, Jüri Luik, Egon Ramms & Richard Shirreff, *Closing NATO's Baltic Gap*, INT'L CTR. FOR DEF. & SEC. (May 2016), *available at* https://icds.ee/wp-content/uploads/2015/ICDS_Report-Closing_NATO_s_Baltic_Gap.pdf (last visited Nov. 22, 2020) [hereinafter Clark, Luik, Ramms & Shirreff] (referencing the S-300 and S-400 air defense units, but mobile launchers for those systems and the SSC-8 are of similar size and offer comparable mobility).

150. Pifer interview, *supra* note 110.

151. Ulrich Kühn, *Preventing Escalation in the Baltics: A NATO Playbook*, CARNEGIE ENDOWMENT FOR INT'L PEACE (2018), *available at*

January 2020, the Russian *Military-Industrial Courier*, the same newspaper in which General Gerasimov penned his seminal 2013 article, published a piece warning that Russian submarines at naval bases or on the open ocean are at risk of satellite detection and could be susceptible to preemptive enemy attack.[152] If the *Courier* piece accurately reflects the Russian military calculus, Moscow may have strong incentives to reduce reliance upon existing systems in favor of the SSC-8.

IV. POST-INF LANDSCAPE VULNERABILITIES

The SSC-8 elevates Russia's threat to Baltic sovereignty in two principal manners. First, following a Suwalki incursion, Moscow could employ the advanced missiles for de-escalation or warfighting purposes. Second, Russia could leverage the prospect of nuclear strikes to induce recalcitrance amongst NATO members to uphold mutual defense obligations.

A. Operational Impact

As a dual-capable weapon, the SSC-8 offers Moscow distinct advantages if it is armed with a nuclear or conventional warhead. The nuclear variant could enhance the Kremlin's ability to conduct de-escalatory detonations, though it already possesses a considerable sub-strategic arsenal. More concerning is the specter of conventional strikes against NATO military assets designed to impede the transportation of troops and equipment to reinforce the Baltic states.

1. Nuclear Capabilities

Moscow could acquire a potential operational advantage by integrating the SSC-8 into its nuclear planning. The famed doctrine of "escalate-to-deescalate" dictates that, should Russia face a "major non-nuclear assault that exceeded its capacity for conventional defense, it would 'de-escalate' the conflict by launching a limited—or tactical—nuclear strike"

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https://carnegieendowment.org/files/Kuhn_Baltics_INT_final_WEB.pdf (last visited Nov. 22, 2020) [hereinafter Kühn]. Moreover, as Pifer argues, Moscow developed the SSC-8 in part because it "did not believe, in a high-intensity conflict, that its navy would be around very long, and didn't fully trust its air-launched capabilities." Pifer interview, *supra* note 110.

152. *Media: Russian Submarines are 'Sitting Ducks,'* UAWIRE (Jan. 5, 2020), *available at* https://www.uawire.org/media-russian-submarines-are-sitting-ducks (last visited Nov. 22, 2020) (citing Косихин Евгений, *Is it Possible to Ensure Reliable Deployment of the Russian Submarine Fleet in the World Ocean*, MIL. INDUS. COURIER (Dec. 3, 2019), *available at* https://vpk-news.ru/articles/53969 (last visited Nov. 22, 2020)).

against enemy military assets.[153] Such an attack would likely take one of two forms: a *counterforce* strike targeting enemy troops, equipment, or infrastructure near the battlefield; or a *demonstration* strike designed to "intimidate NATO governments" while inflicting minimal casualties.[154] Although commentators often debate the validity of this concept in practice,[155] Russian cognizance of conventional inferiority vis-à-vis NATO, the size of its tactical arsenal,[156] and its past exercises simulating a "strike with a single nuclear weapon at the end of a conventional conflict" all point to the continuing relevance of de-escalatory strikes in its military strategy.[157] Indeed, nuclear threats may have loomed as 'part of the backdrop' of Russian aggression in Ukraine and Syria.[158]

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153. Joshua Ball, *Escalate To De-Escalate: Russia's Nuclear Deterrence Strategy*, GLOBAL SEC. REV. (June 10, 2019), *available at* https://globalsecurityreview.com/nuclear-de-escalation-russias-deterrence-strategy/ (last visited Oct. 3, 2020) ("Russian exercises do not preclude the possibility that Moscow plans for limited regional escalation using tactical nuclear weapons. Rather, the exercises suggest that Russia is also prepared to escalate in a limited fashion at the strategic level. Western analysts even assume that Russian escalation to the nuclear level, in general, could happen rather quickly in a conflict with NATO"); *see also* Frank Kirbyson, *Escalate to De-Escalate: Speculation on Russian Nuclear Strategy*, NAVAL POSTGRADUATE SCH. (Sept. 2019), *available at* https://calhoun.nps.edu/bitstream/handle/10945/63469/19Sep_Kirbyson_Frank.pdf?sequence=1&isAllowed=y (last visited Nov. 22, 2020).

154. *See* Barry Blechman, Alex Bollfrass & Laicie Heeley, *Reducing The Risk Of Nuclear War In The Nordic/Baltic Region*, STIMSON CTR. (Dec. 15, 2015), *available at* https://www.stimson.org/2015/reducing-risk-nuclear-war-nordicbaltic-region-0/ (last visited Nov. 22, 2020) (describing a scenario in which Russians launch two nuclear-armed missiles on NATO forces); Paul K. Davis et al., *Exploring the Role Nuclear Weapons Could Play in Deterring Russian Threats to the Baltic States*, RAND CORP. 28 (2019), *available at* https://www.rand.org/content/dam/rand/pubs/research_reports/RR2700/RR2781/RAND_RR2781.pdf (last visited Nov. 22, 2020) [hereinafter Paul K. Davis et al.] (suggesting Russia could consider a tactical strike on NATO conventional forces in the Baltic states).

155. *See, e.g.*, Jay Ross, *Time to Terminate Escalate-to-Deescalate – It's Escalation Control*, WAR ON THE ROCKS (Apr. 24, 2018), *available at* https://warontherocks.com/2018/04/time-to-terminate-escalate-to-de-escalateits-escalation-control/ (last visited Nov. 22, 2020) (arguing that the prospect of targeted tactical strikes is merely one facet of a broader strategy aimed at controlling escalation).

156. Russia is estimated to have over 2,000 tactical weapons, many of which are likely stored west of the Ural Mountains. *See* Kühn, *supra* note 150, at 18.

157. *See id.* at 19 (Kühn notes that there are two essential variants of escalate-to-deescalate: defensive, using a strike "to deter further aggression or terminate the conflict with an acceptable outcome"; and offensive, using it "to terminate such a conflict before Russia's opponent(s) could regain ground").

158. *See* Jacek Durkalec, *Nuclear Backed "Little Green Men:" Nuclear Messaging in the Ukraine Crisis*, POLISH INST. OF INT'L AFFAIRS (July 2015), *available at*

Russian planners could turn to the SSC-8 to execute an "escalate-to-deescalate" strike. If a NATO counter-offensive "went against its interests" to a sufficient extent,[159] Moscow could initiate counterforce strikes against NATO ships and other "isolated military targets" or demonstration strikes in the high atmosphere designed to create an electromagnetic pulse (EMP) effect.[160] In doing so, the Kremlin could choose from a plethora of low-yield options, including:

> [Five hundred] air-to-surface missiles and bombs assigned to tactical air forces; 810 warheads assigned to tactical naval forces for delivery via cruise missiles, anti-submarine weapons, anti-air missiles, torpedoes, and depth bombs; 380 warheads for air-, ballistic missile, and coastal defense forces; and 140 warheads assigned to ground-launched, short-range ballistic missiles.[161]

Yet despite this extensive arsenal, if the Kremlin selects a target within the 500-5000 km range—a NATO installation in Germany, for example—under INF restrictions, it could only employ air- or sea-based

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https://www.files.ethz.ch/isn/193514/Nuclear%20Backed%20%E2%80%9CLittle%20Green%20Men%E2%80%9D%20Nuclear%20Messaging%20in%20the%20Ukraine%20Crisis.pdf (last visited Nov. 22, 2020) [hereinafter Durkalec, *Nuclear Backed*] ("There is evidence that indicates that nuclear weapons have played an important role during the Ukraine crisis"); *see also* Kroenig interview, *supra* note 18.

159. SENKAKU PARADOX, *supra* note 34, at 34. Moreover, as Davis, Gilmore, Frelinger, Geist, Gilmore, Oberholtzer, & Tarraf write, "it would seem that Russian doctrine would notably apply to a scenario of Russian aggression, such as a Russian invasion of the Baltic states that quickly suffered conventional reverses or looked as though it might be followed by a major NATO military response that would bring to bear NATO's overall military and economic strength, perhaps over many months or a few years." Paul K. Davis et al., *supra* note 153, at 28.

160. SENKAKU PARADOX, *supra* note 34, at 34-35. Russia notably threatened to target Danish ships joining a March 2015 American-led missile defense effort with nuclear missiles. *See* Teis Jensen & Adrian Croft, *Russia Threatens to Aim Nuclear Missiles at Denmark Ships if it Joins NATO Shield*, REUTERS (Mar. 22, 2015), *available at* https://www.reuters.com/article/us-denmark-russia/russia-threatens-to-aim-nuclear-missiles-at-denmark-ships-if-it-joins-nato-shield-idUSKBN0MI0ML20150322 (last visited Nov. 22, 2020).

161. *Russia: Nuclear*, NUCLEAR THREAT INITIATIVE (Oct. 2018), *available at* https://www.nti.org/learn/countries/russia/nuclear/ (last visited Nov. 23, 2020). The United States maintains a tactical nuclear arsenal of around 500 air-dropped weapons, although it is also in the process of deploying a new submarine-launched sub-strategic nuclear missile. *See* Amy F. Wolf, *Nonstrategic Nuclear Weapons*, CONG. RES. SERV. (May 4, 2020), *available at* https://fas.org/sgp/crs/nuke/RL32572.pdf (last visited Nov. 22, 2020); William Arkin & Hans Kristensen, *US Deploys New Low-Yield Nuclear Submarine Warhead*, FED. OF AM. SCIENTISTS (Jan. 29, 2020), *available at* https://fas.org/blogs/security/2020/01/w76-2deployed/ (last visited Nov. 22, 2020).

capabilities for this mission.[162] Considering the risk of interception by fighters or air defenses,[163] as well as the aforementioned Kalibr downsides of questionable accuracy, vulnerability to enemy attack, and the cost of production and maintenance,[164] Kremlin planners may see the SSC-8 as a more reliable option for intermediate-range de-escalatory strikes.[165]

However, the most operational benefits that a nuclear-armed SSC-8 offers beyond existing aerial and naval capabilities may be offset by the Kremlin's unlikeliness to order a de-escalatory detonation at ranges beyond 500 km. If Moscow seeks a counterforce strike against a target in the Baltics or near the Gap, it could utilize the ground-launched SS-21 Scarab[166] and newer SS-26 Iskander-M,[167] which it has deployed to Kaliningrad.[168] During the 2012 KAZKAV exercise, the military conducted a live-fire Iskander-M test, which according to Roger McDermott "possibly suggests a rehearsal of a tactical nuclear use in a de-escalatory means."[169] Given that NATO forces and key military infrastructure, such

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162. As Figure 2 illustrates, all of German territory lies outside the range of a 500 km INF-compliant missile.

163. *Ballistic and Cruise Missile Threat*, FED. OF AM. SCIENTISTS (1998), *available at* https://fas.org/irp/threat/missile/naic/part02.htm (last visited Oct. 4, 2020). Missiles also require "fewer maintenance, training, and logistic requirements than manned aircraft").

164. Kroenig interview, *supra* note 18.

165. *Id.* ("Russia already had a number of nuclear and conventional options, but this does give them an additional one. If there is a fight, one possibility is they could use them for strategic strikes aimed at de-escalation").

166. Missile Def. Project, *SS-21 (OTR-21 Tochka)*, CTR. FOR STRATEGIC & INT'L STUD. (July 23, 2019), *available at* https://missilethreat.csis.org/missile/ss-21/ (last visited Nov. 23, 2020) (Russia refers to this missile, which has a 120 km range, as the OTR-21 Tochka).

167. *See* Olga Oliker, *Russia's Nuclear Doctrine: What We Know, What We Don't, and What That Means*, CTR. FOR STRATEGIC & INT'L STUD. (May 2016), *available at* https://www.csis.org/analysis/russia%E2%80%99s-nuclear-doctrine (last visited Oct. 4, 2020). Moscow refers to this missile as the 9M723 Iskander, which it employs exclusively for Russian military use; it also produces a variant called the Iskander-E (9M720) for export. The Iskander has a 500 km range. *See* Missile Def. Project, *SS-26 Iskander*, CTR. FOR STRATEGIC & INT'L STUD. (Dec. 19, 2019), *available at* https://missilethreat.csis.org/missile/ss-26-2/ (last visited Oct. 4, 2020).

168. *See* Jack Stubbs, *Russia Deploys Iskander Nuclear-Capable Missiles to Kaliningrad: RIA*, REUTERS (Feb. 5, 2018), *available at* https://www.reuters.com/article/us-russia-nato-missiles/russia-deploys-iskander-nuclear-capable-missiles-to-kaliningrad-ria-idUSKBN1FP21Y (last visited Nov. 16, 2020).

169. Roger McDermott, *Kavkaz 2012 Rehearses Defense of Southern Russia*, JAMESTOWN FOUND. (Sept. 25, 2012), *available at* https://jamestown.org/program/kavkaz-2012-rehearses-defense-of-southern-russia/ (last visited Nov. 16, 2020); *see also* Dave Johnson, *Russia's Conventional Precision Strike Capabilities, Regional Crises, and Nuclear Thresholds*, LAWRENCE LIVERMORE NAT'L LAB. CTR. FOR GLOBAL SEC. RES. (Feb. 2018), *available at* https://cgsr.llnl.gov/content/assets/docs/Precision-Strike-Capabilities-report-v3-7.pdf (last visited Nov. 16, 2020).

as the Poland-Lithuania border railyard, likely fall within Iskander range,[170] the SSC-8 would only augment Moscow's escalate-to-deescalate capabilities if it selects a more distant target, a prospect seemingly at odds with the counterforce rationale.[171] And if the Kremlin seeks a demonstration strike over the North Sea,[172] it could employ the Kalibr for a task where pinpoint accuracy is ancillary to the visual effect.[173] Therefore, as Kühn observes, although the SSC-8 may be "consistent with the doctrine of escalate-to-deescalate," its utility is "somewhat questionable."[174]

2. Conventional Capabilities

Beyond its possible nuclear role, the SSC-8, more importantly, offers Moscow the ability to conduct theater-range conventional strikes against NATO assets during an Allied effort to reinforce or recapture Baltic territory. Specifically, the SSC-8 augments and extends existing Russian area-denial/anti-access (A2/AD) capabilities: systems intended to "contribute to denying an adversary's forces access to a particular region or otherwise hinder freedom of maneuver."[175] As Gen. Philip Breedlove and Amb. Alexander Vershbow note, Russia has "steadily built up" its A2/AD capabilities in Kaliningrad, including "integrated air defenses, counter-maritime forces, ballistic and cruise missiles, and other precision-guided munitions to create a layered array of strategic surface-to-air

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170. SENKAKU PARADOX, *supra* note 34, at 30.

171. Paul K. Davis et al., *supra* note 153, at 28. As Justin Anderson and Amy Nelson argue, however, "should a future NATO-Russian conventional conflict begin to go badly for the Kremlin, the SSC-8 might be employed by Moscow to launch a theater nuclear strike to force a hard stop on NATO operations." Justin V. Anderson & Amy J. Nelson, *The INF Treaty: A Spectacular, Inflexible, Time-Bound Success*, 13 STRATEGIC STUD. Q. 107 (2019), *available at* https://www.airuniversity.af.edu/Portals/10/SSQ/documents/Volume-13_Issue-2/Anderson.pdf (last visited Nov. 16, 2020) [hereinafter Anderson & Nelson]. This paper does not discount this possibility but instead argues that an operational-level strike against NATO forces in the Baltic region is more likely.

172. *See* Kühn, *supra* note 150, at 46. As Kühn notes, Moscow may now "hold at risk additional European targets not already targeted by Russian tactical nuclear weapons." *Id.* at 20.

173. Paul K. Davis et al., *supra* note 153, at 32 (explaining purpose of a de-escalatory strike is to demonstrate "Russia's determination and readiness to bring hostilities to a halt" rather than necessarily "defeat the alliance's military or strategic forces outright").

174. Kühn, *supra* note 150, at 20.

175. Ian Williams, *The Russia – NATO A2AD Environment*, CTR. FOR STRATEGIC & INT'L STUDIES (Nov. 29, 2018), *available at* https://missilethreat.csis.org/russia-nato-a2ad-environment/ (last visited Nov. 16, 2020) [hereinafter Ian Williams].

missiles aimed at denying an enemy's ability to operate in the region."[176] Breedlove and Vershbow cite the Iskander-M and advanced S-400 "Triumf" anti-aircraft system as examples of emergent technologies that contribute to creating an A2/AD "bubble" in this area.[177]

Figure 3: Pre-SSC-8 Russian Ground-Launched A2/AD Capabilities[178]

As Figure 3 illustrates, Russia possesses several A2/AD "layers" that may restrict NATO's ability to operate in the Baltic region. The dotted red rings represent Kaliningrad's integrated air defenses. The innermost ring depicts the 150 km range of the S-300, and the two wider rings correspond to variants of the newer S-400.[179] The black circle represents the Bastion-P anti-ship coastal defense system with a 300 km range, and the solid red band connotes the aforementioned Iskander-M GLBM with

176. Breedlove & Vershbow, *supra* note 93, at 18.

177. *Id.* at 19.

178. Ian Williams, *supra* note 175. *See* Figure 1 for an illustration of the SSC-8's range in contrast to previous capabilities.

179. The S-400 supports the 40N6E-series missile, with a range of 400 km, and 48N6, with a range of 250 km. It also supports two other variants, the 9M96e2 (120 km) and the short-range 9m96e (40 km), which are not depicted on the map. *See* Stephen Bryen, *Why Russia's S-400 Anti-Air System Is Deadlier Than You Think*, NAT'L INTEREST (Nov. 9, 2019), *available at* https://nationalinterest.org/blog/buzz/why-russias-s-400-anti-air-system-deadlier-you-think-94541 (last visited Nov. 16, 2020).

a 500 km range.[180] Taken together, these capabilities, Breedlove and Vershbow write, "create a potential threat to [the United States] or NATO forces attempting to enter North Central Europe to defend or reinforce the region in a potential crisis."[181] As seen in Figure 3, however, Russian A2/AD capabilities under INF restrictions only extend 500 km beyond Kaliningrad, allowing Moscow to target forces in Poland and ships in the Baltic Sea, while Germany and Western Europe remain outside its reach. NATO forces en route to combat in the Baltics, therefore, would remain safe from Russian land-based attack until they approached the 500 km threshold of the first A2/AD layer.[182]

Integrating the SSC-8 into its post-INF arsenal allows Russia to expand the scope of its A2/AD network. At ranges under 500 km, the missile provides an additional option but offers no groundbreaking advances given the presence of the INF-compliant Iskander-M and Iskander-K.[183] Instead, the SSC-8 provides greater military utility as a "theater strike weapon": a missile category that can reach "far beyond operational ranges,"[184] but generally not past 3500 km.[185] As Michael Kofman notes, theater strike assets allow Russia to conduct "single or grouped strikes against critical objects" and larger campaigns aimed at "destroying critically important objects and affecting a disaggregating strike on the enemy's command and control."[186] In providing these capabilities, the SSC-8 adds another layer to existing A2/AD systems, extending the "bubble" beyond 2500 km to cover Scandinavia and Western Europe.[187]

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180. *Id.*

181. Breedlove & Vershbow, *supra* note 93, at 18.

182. SENKAKU PARADOX, *supra* note 34, at 30 ("Russia could easily range the rail and road lines with shorter-range conventionally armed missiles of the type still allowed it under the INF Treaty"). NATO forces would, however, remain vulnerable to sea- and air-based attacks.

183. *See* Kroenig interview, *supra* note 18 (noting that the SSC-8 offers Russia an "additional" nuclear and conventional option at operational levels); Durkalec, *supra* note 158 ("From a military perspective, these weapons became a valuable complement to other capabilities, increasing the number and the credibility of available strike options").

184. *See* Michael Kofman, *It's Time to Talk About A2/AD: Rethinking the Russian Military Challenge*, WAR ON THE ROCKS (Sept. 5, 2019), *available at* https://warontherocks.com/2019/09/its-time-to-talk-about-a2-ad-rethinking-the-russian-military-challenge/ (last visited Oct. 9, 2020).

185. John Pike, *Theater Ballistic Missiles*, FED'N OF AM. SCIENTISTS (Oct. 25, 1998), *available at* https://fas.org/nuke/intro/missile/tbm.htm (last visited Nov. 23, 2020).

186. Kofman, *supra* note 184.

187. *See* Figure 2 for a depiction of the SSC-8's estimated minimum range of 2,000 km.

In the event of a Russian Suwalki incursion and subsequent NATO counter-offensive, Moscow could employ the SSC-8 to "impede, delay or prohibit" the movement of reinforcements across the European continent toward the Gap.[188] The missile's minimum range of 2500 km allows strikes against not only European capitals but also "all the critical airports and seaports of embarkation for Allied reinforcement, as well as other critical infrastructure across NATO territory."[189] Pifer sees the ports of Rotterdam and Hamburg as potential targets.[190] If the United States were to deploy several hundred thousand troops with heavy equipment to Europe,[191] Moscow would likely direct conventional SSC-8 strikes "early in the conflict" against these assets before and during debarkation.[192] Given the SSC-8's accuracy and satellite-enabled in-flight adjustable navigation system, Moscow could target U.S. LMSRs and SL-7 vessels in the North Sea or the Atlantic as troops and equipment are being transported to Europe.[193] In light of well-documented difficulties in defending against cruise missile attacks, O'Hanlon suggests that NATO "could easily see an armada largely destroyed."[194] Kaliningrad-based missiles could also reach the Royal Air Force's six main operating bases in the United Kingdom.[195] Vice-Chairman of the Joint Chiefs of Staff Gen. Paul Selva expressed these sentiments before Congress in March 2017, testifying that the SSC-8 "presents a risk to most of our facilities in Europe."[196]

Yet considering the presence of air- and sea-launched cruise missiles in the Russian arsenal, are conventional SSC-8 capabilities merely redundant? Not necessarily. First, as noted above, mobile ground-based missiles offer advantages in the realms of in-flight accuracy, concealability

188. Durkalec, *supra* note 158.

189. *Id.*

190. Pifer interview, *supra* note 110. NATO would likely plan to use these ports "to receive American ships bringing across heavy equipment." *Id.*

191. *See* SENKAKU PARADOX, *supra* note 34, at 25.

192. *See* Kroenig interview, *supra* note 18; Ian Williams, *supra* note 175. As Ian Williams further notes, disabling "aerial and seaports of debarkation and embarkations," which are "essential to the rapid deployment of troops and equipment . . . would complicate NATO's ability to efficiently respond to crisis." *Id.*

193. *See* SENKAKU PARADOX, *supra* note 34, at 33.

194. *Id.* at 32.

195. *See* Carl Rehberg & Mark Gunzinger, *Air and Missile Defense at a Crossroads: New Concepts and Technologies to Defend America's Overseas Bases*, CSBA (Oct. 3, 2018), *available at* https://csbaonline.org/uloads/docments/CSBA_Crossroads_Base_Defense_Report_web.pdf (last visited Nov. 23, 2020) [hereinafter Rehberg & Gunzinger].

196. *Military Assessment of Nuclear Deterrence Requirements: Hearing on Armed Ser., Before the H. Comm. on Armed Services*, 115th Cong. 10 (2017) (statement of Gen. Paul Selva, Vice Chairman of the Joint Chiefs of Staff).

from enemy detection, and cost-effectiveness when compared to the Kalibr and Raduga.[197] More specifically, whereas escalate-to-deescalate generally dictates attacks against forces in the Baltic region, conventional precision strikes offer Moscow the greatest utility if directed against enemy military assets and infrastructure in Western Europe.[198] Unlike targets 500 km or closer, where Russia could alternatively employ the Iskander-M or other operational-range systems, Moscow maintains no other ground-launched conventional weapons capable of theater-level strikes.[199] Consequently, the SSC-8 offers the Russian military a theater-range strike capacity it previously lacked altogether.

Additionally, while the objective in an escalate-to-deescalate detonation is to generally demonstrate "Russia's determination and readiness to bring hostilities to a halt,"[200] conventional strikes aim to inflict tangible damage upon discrete military assets. Accuracy, therefore, is at a premium, particularly when targeting mobile objects like warships.[201] Given reports of Syria-bound Kalibrs landing in Iran and general concerns regarding the viability of its navy, the Kremlin is likely wary of relying upon sea-launched systems in a high-intensity conflict.[202]

Last, stealth is particularly important for strikes against fortified and well-defended vessels and bases. As Jacek Durkalec writes, because GLCMs are "more capable of avoiding launch detection and tracking during flight, thus striking their distant targets with little or no warning," if Russia sought a surprise attack, the SSC-8 "would be the best choice, especially compared to the more easily tracked air and sea platforms for land-attack cruise missiles."[203]

B. Strategic and Political Impact

Russia may also attempt to leverage SSC-8 threats to intimidate NATO members into re-assessing mutual defense obligations. During the Euromissile crisis, William Leonard writes, President Carter feared

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197. *See, e.g.*, Kroenig interview, *supra* note 18.

198. *See* Rehberg & Gunzinger, *supra* note 195, at 7.

199. *See* Pifer interview, *supra* note 110. Pifer notes, "previously, the Russians had no other choice besides nuclear weapons" to attack targets of this nature. *Id.*

200. Kühn, *supra* note 150, at 20, 32.

201. *See* SENKAKU PARADOX, *supra* note 34, at 31. *See generally* Pifer interview, *supra* note 110. As Pifer remarks, "I was hopeful a few years ago that the Russians would conclude that they didn't need this missile capacity, given the capabilities that they demonstrated in Syria." *Id.*

202. *See* Cooper & Schmitt, *supra* note 144; Pifer interview, *supra* note 110.

203. Durkalec, *supra* note 158.

the Soviet Union would "use threats of limited SS-20 strikes against Western Europe to intimidate and coerce political concessions from America's NATO allies."[204] As Zbigniew Brzezinski recalls, the Soviets "sought to win through intimidation and not warfighting."[205] Carter worried particularly about "Finlandization," or Soviet pressure compelling European allies into adopting "a more neutral foreign policy, as opposed to a foreign policy strictly aligned with the United States."[206] As Brzezinski and David Aaron came to believe, if NATO "failed to counter SS-20 deployments with its own missile deployments," Western Europe would be forced to accept a "non-aligned political orientation."[207]

Might deployment of the SSC-8 have a similar effect upon European decision-making regarding involvement in a Baltic conflict? Some commentators fear the SSC-8 could, like the SS-20, potentially induce recalcitrance among European capitals to take part in collective action against Russia. Kroenig believes that Moscow "does not want to use the SSC-8, but hopes this threat [will] lead Western European leaders to say that it is not worth war with Russia over Estonia."[208] Durkalec similarly notes that the SSC-8 offers Moscow the "option of nuclear intimidation without relying on strategic intercontinental capabilities,"[209] while Kuhn writes that it may "put pressure on NATO members to formulate a political and military response, thereby exposing alliance members' divergent views on nuclear weapons."[210]

Polling may support the possibility of a NATO fracture. Per 2015 data, majorities in key member states oppose military action to defend a NATO ally: 53% in France, 51% in Italy, and 58% in Germany say their state "should not" intervene.[211] The advent of anti-establishment populist

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204. William Leonard, *"Closing the Gap" The Euromissiles and President Carter's Nuclear Weapons Strategy for Western Europe (1977-1979)*, CSIS, *available at* https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/101221_Leonard_poni_essay.pdf (last visited Nov. 23, 2020) [hereinafter Leonard].

205. *Id.* at 12.

206. *Id.* at 4.

207. *Id.* at 13.

208. *See* Kroenig interview, *supra* note 18. As Kroenig argues, by deploying the SSC-8, Russia by deploying this capability, Russia can cast a "deterrent and coercive shadow over everything else it's doing in Europe." *Id.*

209. Durkalec, *supra* note 158.

210. Kühn, *supra* note 150, at 20.

211. *See* Katie Simmons et al., *NATO Publics Blame Russia for Ukrainian Crisis, but Reluctant to Provide Military Aid*, PEW RESEARCH CTR. (June 10, 2015), *available at* https://www.pewresearch.org/global/2015/06/10/nato-publics-blame-russia-for-ukrainian-crisis-but-reluctant-to-provide-military-aid/ (last visited Nov. 23, 2020); *see also* Judy Dempsey, *NATO's European Allies Won't Fight for Article 5*, CARNEGIE ENDOWMENT FOR INT'L

parties in Europe, such as Marie Le Pen's National Front, could also "apply political pressure to governing leaders to minimize national contributions to a NATO operation."[212] Therefore, as O'Hanlon suggests, fears of "further arousing the Russian bear" might induce certain NATO members to "opt-out of a military response and even disapprove of a formal NATO decision to use force."[213]

At the same time, several factors militate against a repeat of the Euromissile crisis. First, European attitudes toward the SSC-8 appear fundamentally different than the SS-20. As Justin Anderson and Amy Nelson note, whereas Europe greeted the arrival of the SS-20 with "alarm" and quickly pushed for the United States to deploy comparable missiles to quell doubts regarding its commitment to extended deterrence, the revelation of the SSC-8 did not "catalyze an alliance-wide assurance crisis."[214] Instead, when the U.S. State Department declared Russia INF non-compliant, European leaders initially "had little concern about that violation," and none raised the issue with Putin when they had an opportunity to do so.[215] While in the 1980s, allies "expressly lobbied for new U.S. delivery vehicles that could range the Soviet Union," the same partners strongly oppose similar deployments today.[216] These actions,

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PEACE (June 15, 2015), *available at* https://carnegieeurope.eu/strategiceurope/?fa=60389 (last visited Nov. 23, 2020). Kroenig considers this data "shocking," observing that "for a strong alliance, it's not the type of response you'd want to see." Kroenig interview, *supra* note 18.

212. Anika Binnendijk & Miranda Priebe, *An Attack Against Them All? Drivers of Decisions to Contribute to NATO Collective Defense*, RAND CORP. 12 (2019), *available at* https://www.rand.org/content/dam/rand/pubs/research_reports/RR2900/RR2964/RAND_RR2964.pdf (last visited Nov. 23, 2020).

213. SENKAKU PARADOX, *supra* note 34, at 22.

214. Anderson & Nelson, *supra* note 171, at 106.

215. *See* Steven Pifer, *RIP INF: The End of a Landmark Treaty*, STAN. CTR. FOR INT'L SEC. & COOP. (Oct. 31, 2018), *available at* https://cisac.fsi.stanford.edu/news/rip-inf-end-landmark-treaty (last visited Nov. 23, 2020). European NATO members did, however, charge Russia with violating INF obligations. A 2014 NATO communiqué called upon Russia "to preserve the viability of the INF Treaty through ensuring full and verifiable compliance," while a 2018 communiqué stated the following: Allies have identified a Russian missile system, the 9M729, which raises serious concerns. A pattern of behavior and information over many years has led to widespread doubts about Russian compliance. Allies believe that, in the absence of any credible answer from Russia on this new missile, the most plausible assessment would be that Russia is in violation of the treaty. NATO urges Russia to address these concerns in a substantial and transparent way, and actively engage in a technical dialogue with the United States. *Id.*

216. Anderson & Nelson, *supra* note 171, at 93. As German Foreign Minister Heiko Maas stated in December 2018, "Stationing of new medium-range missiles would be met with broad resistance in Germany." *See* Maria Sheahan, *Germany would oppose new nuclear missiles in Europe: Foreign Minister*, REUTERS (Dec. 27, 2018), *available at*

according to Pifer, send a message: "Europeans didn't worry much about the treaty violation or the [SSC-8]."[217]

More broadly, Europeans appear to have developed a general resignation towards the prospect of Russian nuclear threats. As Manuel Lafont Rapnouil, Tara Varma, and Nick Witney found in a 2018 survey, European governments chose "to react to the appearance of the SSC-8 by looking the other way" in part because they believe "that they can go on taking advantage of the comfort blanket of the post-cold war order" as well as for fear of opening a "Pandora's box of difficult questions and possible political opposition."[218] In Germany, for example, the short-lived debate over the merits of pursuing a national deterrent "concluded quickly by settling back into its more traditional stance."[219] Thus, while arguing that "no one seems to care much"[220] about the Russian nuclear menace is likely an overgeneralization, the proclivity of Europeans to "ignore nuclear issues almost entirely" suggests that SSC-8 deployments alone are insufficient to radically alter allied decision-making regarding commitments to collective defense.

Pifer also disagrees with Kroenig's doubts regarding European willingness to defend a besieged NATO member, responding that "most allied governments would recognize that failure to protect one ally would be the end of the alliance."[221] The SSC-8, therefore, "would not tip the balance to the point where key capitals would not engage in mutual defense" and cannot be seen as a strategic "game-changer."[222] Public opinion polling may also matter less in Germany, France, and Italy, where there is an "elite consensus" regarding foreign involvements that have the effect of "inoculating the leadership from electoral punishment" during

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https://www.reuters.com/article/us-usa-russia-treaty-germany/germany-would-oppose-new-nuclear-missiles-in-europe-foreign-minister-idUSKCN1OQ0BN (last visited Nov. 23, 2020).

217. *Id.* Germany lobbied the United States in late 2018 to allow additional time for diplomacy, thus delaying the U.S. announcement. *See* Anderson & Nelson, *supra* note 171, at 108.

218. Rapnouil, Varma & Witney, *supra* note 104.

219. *Id.*

220. Nick Witney, *Nothing to See Here: Europe and the INF Treaty*, EUR. COUNCIL ON FOREIGN REL. (Aug. 5, 2019), *available at* https://www.ecfr.eu/article/commentary_nothing_to_see_here_europe_and_the_inf_treaty (last visited Nov. 23, 2020). In justifying this assertion, Witney writes, "there have been no panicky appeals from European politicians for the US to match the Russian deployments, to maintain deterrence and transatlantic confidence." *Id.*

221. Pifer interview, *supra* note 110. "At that point," he says, "there would be no credibility." *Id.*

222. *Id.*

times of conflict.[223] Indeed, Rapnouil, Varma, and Witney note that while the German public "has long been overwhelmingly hostile to NATO's nuclear policy," German governments have supported it.[224]

Furthermore, despite Article 5's noncommittal wording[225] and some European sentiments suggestive of hesitancy to enforce collective security,[226] the prospect of SSC-8 strikes appears unlikely to dislodge the Alliance's foundational guarantee. Chancellor Angela Merkel has continuously reaffirmed Germany's adherence to Article 5 obligations,[227] while France's Armed Forces Minister, Florence Parly, stated in March 2019 that the Alliance should be "unconditional, otherwise it is not an alliance."[228] NATO Secretary-General Jens Stoltenberg also characterized

223. Sarah Kreps, *Elite Consensus as a Determinant of Alliance Cohesion: Why Public Opinion Hardly Matters for NATO-led Operations in Afghanistan*, 6 FOREIGN POL'Y ANALYSIS 192 (July 2010), *available at* https://academic.oup.com/fpa/article-abstract/6/3/191/1819987?redirectedFrom=fulltext (last visited Nov. 23, 2020).

224. Rapnouil, Varma & Witney, *supra* note 104.

225. Whereas a 1948 draft provision stated that in the event of an armed attack, the Parties "will assist" the aggrieved party "as may be necessary" to restore security, the final version required a member state to undertake only "such action as it deems necessary." *Report of the International Working Group to the Ambassadors' Committee*, U.S. DEP'T OF STATE (Dec. 24, 1948), *available at* https://history.state.gov/historicaldocuments/frus1948v03/d199 (last visited Oct. 5, 2020). As Broderick C. Grady notes, it was "clear that the United States would not accede to any agreement that forced it to automatically commit its forces." Broderick C. Grady, *Article 5 of the North Atlantic Treaty: Past, Present, and Uncertain Future*, 31 GA. J. INT'L & COMP. L. 167, 179 (2002).

226. French President Emmanuel Macron stated in a November 2019 interview that NATO is experiencing "brain death," and when asked about the future viability of the Article 5 guarantee, responded, "I don't know." *See* Michel Rose, *France's Macron Says NATO Suffering 'Brain Death', Questions U.S. Commitment*, REUTERS (Nov. 7, 2019), *available at* https://www.reuters.com/article/us-nato-france/frances-macron-says-nato-suffering-brain-death-questions-us-commitment-idUSKBN1XH1GG (last visited Nov. 18, 2020).

227. *See* Alexandra Hudson, *Merkel Pledges NATO will Defend Baltic Member States*, REUTERS (Aug. 18, 2014), *available at* https://www.reuters.com/article/us-ukraine-crisis-baltics-merkel/merkel-pledges-nato-will-defend-baltic-member-states-idUSKBN0GI1JI20140818 (last visited Nov. 18, 2020). Germany did, however, oppose both sending lethal weapons to Ukraine and permanently stationing NATO combat troops in the Baltic states, positions that suggested a more conciliatory approach to relations with Russia. *See* Eoin McNamara, *France and Germany Must Work With The US On Baltic Security*, FOREIGN POL'Y RES. INST. (Jan. 5, 2016), *available at* https://www.fpri.org/article/2016/01/france-and-germany-must-work-with-the-us-on-baltic-security/ (last visited Nov. 18, 2020).

228. Idrees Ali, *French Minister Expresses Concern About Long-Term U.S. Commitment to NATO*, REUTERS (Mar. 18, 2019), *available at* https://uk.reuters.com/article/uk-france-usa-nato/french-minister-expresses-concern-about-long-term-u-s-commitment-to-nato-idUKKCN1QZ29E (last visited Nov. 18, 2020). Like Germany, France has taken some actions viewed as representing a more pro-Russian stance. In 2009, it attempted to sell two Mistral assault vessels only months after the 2008 Georgia conflict. Moreover, in January

the Article 5 mandate as "ironclad,"[229] and numerous allied commanders have emphasized its fundamentality.[230] Moreover, whereas the presence of "little green men" or proxy forces could engender hesitation in immediately launching a military response,[231] it is impossible to dismiss the Article 5 implications of a conventional assault across the Gap.

Last, while the SS-20 carried three 150-kiloton nuclear warheads, the dual-capable SSC-8 is "seen as a largely conventional weapon."[232] As Anderson and Nelson claim, U.S. concerns with the SSC-8 pertain principally to its use in conjunction with "other Russian theater nuclear assets, conventional forces, and A2/AD capabilities" that threaten Washington's ability to deter Kremlin aggression.[233] Meanwhile, Europeans view "the Russian violation as an arms control compliance problem rather than a security threat."[234] Since the conventional SSC-8 is, therefore "not as intimidating as the SS-20 was in the late 1970s,"[235] Russian attempts to induce a modern "Finlandization" of NATO appear unlikely to succeed.[236]

2015, President François Hollande announced he would consider dropping EU economic sanctions against Russia and suggested this possibility again in November of that year. *See* McNamara, *supra* note 227.

229. Press Conference, By NATO Secretary-General Jens Stoltenberg following the meeting of the North Atlantic Council at the level of Heads of State and/or Government, NATO (Dec. 4, 2019), *available at* https://www.nato.int/cps/en/natohq/opinions_171554.htm (last visited Nov. 18, 2020).

230. *See* Vandiver, *supra* note 72 (quoting Breedlove on Article 5 obligations in a hybrid context); Hodges, Bugajski & Doran, *supra* note 4, at 10-11 (emphasizing the importance of signaling to Moscow that "the individual response of all allies to defend members of the Washington Treaty is an obligation, not an option"); Senate Committee On Armed Services, *Advance Policy Questions for General Tod D. Wolters, USAF Nominee for Appointment to the Position of Commander, United States European Command and Supreme Allied Commander, Europe*, U.S. SENATE COMMITTEE ON ARMED SERVICES (Oct. 3, 2019) (statement of General Tod Wolters) ("NATO is the 'gold standard' of alliances and Article 5 represents the enduring commitment that binds our nations together").

231. SENKAKU PARADOX, *supra* note 34, at 22.

232. Pifer interview, *supra* note 110.

233. Anderson & Nelson, *supra* note 171, at 106.

234. *Id.*

235. Pifer interview, *supra* note 110.

236. Another potential factor influencing the political dynamic between the United States, Europe, and Russia is President Donald Trump's criticism NATO, and demands for European members to increase defense expenditures. *See, e.g.*, Julie Hirschfeld Davis, *As Trump Criticizes NATO, E.U. Leader Warns: You 'Won't Have a Better Ally'*, N.Y. TIMES (July 10, 2018), *available at* https://www.nytimes.com/2018/07/10/world/europe/trump-donald-tusk-nato.html (last visited Nov. 18, 2020). The personal relationships between President Trump and European leaders, as well as the larger political implications of such dynamics, are largely beyond the scope of this paper. It should be noted, however, that the administration has made some efforts to reassure NATO allies of its commitment to upholding Article 5

V. HOW SHOULD THE UNITED STATES AND NATO RESPOND?

In light of Russia's emergent capacity to direct conventional theater-range SSC-8 strikes against NATO assets, the United States and its partners should pursue an integrated four-part strategy designed to augment defensive capabilities and, in doing so, establish a more effective deterrent posture. First, NATO should enhance the "tripwire" and "speed-bump" functions of Baltic forward deployments and enact logistical improvements to Suwalki infrastructure. Second, Congress should increase investments in two developmental cruise missile defense technologies, the Indirect Fire Protection Capability Increment 2-Intercept (IFPC Inc. 2) and the High Energy Laser-Indirect Fire Protection Capability (HEL-IFPC). Third, the United States should deploy ground-launched intermediate-range conventional missiles to Europe while concurrently engaging Moscow in negotiations designed to precipitate a bilateral reimposition of INF restrictions. Finally, Washington should expand economic assistance to and security cooperation with Belarus to induce Minsk to refrain from assisting Russian aggression.

A. Enhance Allied Forward Deployments

Initially, NATO should enact a series of improvements to forward deployments in the Suwalki region. The Alliance must first ensure that forces can effectively perform the "tripwire" function of acting as a "deployable guarantee of alliance solidarity" whose presence certifies that an attack against an individual member simultaneously implicates other major Allies.[237] NATO can enhance tripwire capabilities by first augmenting their mobility. As Hodges asserts, if Russia "knows the location of a tripwire, they might simply avoid it."[238] To ensure a rapid repositioning of units and equipment wherever a threat emerges, Hodges recommended deploying the Avenger Air Defense System, which is a Humvee-mounted short-range anti-aircraft unit equipped with Stinger missiles, to the Baltic

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obligations. *See, e.g., Opening Remarks by US Secretary of State Mike Pompeo and NATO Secretary-General Jens Stoltenberg at the Reception to Celebrate the 70th Anniversary of NATO*, NATO (Apr. 3, 2019), *available at* https://www.nato.int/cps/en/natohq/opinions_165208.htm (last visited Nov. 18, 2020).

237. Martin Zapfe, *NATO's "Spearhead Force"*, ETH ZÜRICH CTR. FOR SEC. STUDIES (May 2015), *available at* https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/CSSAnalyse174-EN.pdf (last visited Nov. 18, 2020).

238. Hodges, Bugajski & Doran, *supra* note 4, at 3, 13.

theater.[239] In December 2019, the Army followed Hodges' advice and redeployed seventy-two Avengers from the Letterkenny Army Depot in Pennsylvania to active service in Germany.[240] The Army should build upon this positive step by continuing Avenger deployments beyond Germany to Polish and Baltic territory.[241]

The U.S. military can further develop its mobile tripwire through greater utilization of Stryker Combat Vehicle brigades.[242] The Stryker, an eight-wheeled armored combat vehicle with a maximum speed of 62 mph and capable of firing TOW 2 and Javelin anti-tank missiles, is presently deployed to the Germany-based 2nd Cavalry Regiment.[243] Although Congress appropriated $300 million for Stryker improvements in 2015,[244] the Pentagon is delaying Javelin integration for three years due to interface problems with the weapons control system.[245] Moving forward, the Army must prioritize resolving these technical issues, as the Javelin could prove particularly effective against Russian armor.[246] The

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239. *See id.* at 5.

240. Dylan Malyasov, *U.S. Army Brings Back Avengers in the Face of Russian Aggression*, DEFENCE BLOG (Dec. 27, 2019), *available at* https://defence-blog.com/army/u-s-army-brings-back-avengers-in-the-face-of-russian-aggression.html (last visited Nov. 18, 2020).

241. Breedlove & Vershbow also advocate deploying "some of the short-range Avenger air-defense systems and multiple-launch rocket systems now slated for stationing in Germany (to be completed by 2020) to Poland, on a rotational basis." Breedlove & Vershbow, *supra* note 93, at 41.

242. *See M1126 Stryker Combat Vehicle*, MILITARY.COM (2020), *available at* https://www.military.com/equipment/m1126-stryker-combat-vehicle (last visited Nov. 18, 2020).

243. *See* David Axe, *Why the Army is Outgunned in Europe Compared to Russia*, TASK & PURPOSE (Feb. 8, 2019), *available at* https://taskandpurpose.com/analysis/army-outgunned-europe-russia-wargames (last visited Nov. 18, 2020). The 2nd Cavalry Regiment recently deployed a squadron-sized detachment of Strykers to Orzysz, Poland near the Suwalki Gap. *See* Maciej Szopa, *US Dragoons Getting Ready to Deploy to Orzysz*, DEFENSE24 (Jan. 10, 2020), *available at* https://www.defence24.com/us-dragoons-getting-ready-to-deploy-to-orzysz (last visited Nov. 18, 2020).

244. *See* Jen Judson, *Army to Outfit Double V-Hull Strykers with 30mm Firepower*, DEFENSENEWS (May 1, 2019), *available at* https://www.defensnews.com/land/2019/05/01/army-to-outfit-all-double-v-hull-strykers-with-30mm-firepower/ (last visited Nov. 18, 2020).

245. *See* Samuel Arlington Page, *This Army Unit Might Have Issues Fighting Russia in a War*, NAT'L INT. (Mar. 21, 2020), *available at* https://nationalinterest.org/blog/buzz/army-unit-might-have-issues-fighting-russia-war-135567 (last visited Nov. 18, 2020).

246. *See* Tyler Rogoway, *U.S. Army's "Upgunned" Stryker Armored Vehicles Will Soon Be On The Front Lines*, THE DRIVE (Aug. 18, 2017), *available at* https://www.thedrive.com/the-war-zone/13610/u-s-armys-upgunned-stryker-armored-vehicles-will-soon-be-on-the-front-lines (last visited Nov. 18, 2020); *see also* Sebastien Roblin, *Need to Stop a Tank? Meet America's Javelin Missile (Russia Fears Them)*, NAT'L INT.

2nd Cavalry Regiment should also expand Stryker deployments beyond Germany and Poland into the Baltic territory where, alongside Avengers, their presence would deliver needed firepower and mobility.[247]

NATO can also improve the deterrent function of Baltic tripwire forces by ensuring the continuity of American deployments. As Clark argues, the presence of U.S. troops "remains key" as it "strengthens the deterrent effect" of NATO battalions.[248] Because Russia, according to Kroenig, "really only respects U.S. military power," American forces are necessary to "create a more effective tripwire."[249] Breedlove and Vershbow agree, writing that U.S. deployments offer Allied forces "greater confidence, continuity, and much-needed visible deterrence."[250]

While largely concurring regarding the importance of a United States presence in the Baltics, military leaders disagree as to whether a permanent presence is necessary or if a rotational system will suffice. Hodges advocates a permanent presence, as do Breedlove and Gen. Curtis Scaparroti.[251] Clark contends, however, that the "debate about permanence should not be at the forefront if the continuous presence of combat-capable forces can be ensured through rotation."[252] One consideration is the 1997 NATO-Russia Founding Act (NRFA), an agreement whose terms likely bar "permanent stationing" of NATO forces in the countries of former Soviet members.[253] While NATO could breach the NFRA[254]

(Sept. 2, 2019), *available at* https://nationalinterest.org/blog/buzz/need-stop-tank-meet-americas-javelin-missile-russia-fears-them-77501 (last visited Nov. 18, 2020).

247. The 2nd Cavalry Regiment (2 CR) deployed its 3rd Squadron "Wolf Pack" to Estonia, Latvia, Lithuania, and Poland in January 2015 for a nine-month rotation as part of Operation Atlantic Resolve. *See, Operation Atlantic Resolve,* U.S. ARMY (Jan. 7, 2015), *available at* https://www.army.mil/standto/archive_2015-01-07/ (last visited Oct. 5, 2020).

248. Clark, Luik, Ramms & Shirreff, *supra* note 148, at 22.

249. Kroenig interview, *supra* note 18.

250. Breedlove & Vershbow, *supra* note 93, at 41.

251. *See* Hodges, Bugajski & Doran, *supra* note 4, at 5 (advocating for at least one Avenger battalion to be "always permanently forward-deployed in the Baltic States"); Breedlove & Vershbow, *supra* note 93, at 21.

252. Clark, Luik, Ramms & Shirreff, *supra* note 148, at 6.

253. The Act states in part: "NATO reiterates that in the current and foreseeable security environment, the Alliance will carry out its collective defense and other missions by ensuring the necessary interoperability, integration, and capability for reinforcement rather than by additional permanent stationing of substantial combat forces."

254. *See, e.g.*, Luke Coffey & Daniel Kochis, *The 1997 NATO–Russia Founding Act Does Not Prohibit Permanent NATO Bases in Eastern Europe*, HERITAGE FOUND. (Apr. 29, 2016) *available at* https://www.heritage.org/europe/report/the-1997-nato-russia-founding-act-does-not-prohibit-permanent-nato-bases-eastern (last visited Oct. 5, 2020). Clark argues that "despite the Alliance's current commitment to maintaining it, the NRFA is not sacrosanct and that the Alliance would be ready for a thorough review, or even abolition, of the

following Russia's own possible violations,[255] reneging could provide Moscow a propaganda victory and an impetus for further buildups in the WMD.

Rather than risk this scenario, NATO should seek a means of increasing the United States' Baltic presence without implicating questions of permanence. Breedlove and Vershbow suggest that American forces lead the Enhanced Forward Presence (eFP) Battle Group at Orzysz, Poland, near Suwalki, "for the indefinite future."[256] They also advocate deploying an additional brigade combat team to Germany "on a permanent or rotational basis," which would in-turn deploy one battalion to the Baltics "on a regular basis for training/exercises."[257] Along similar lines, Clark proposes increasing the size of U.S. units in each Baltic state "ideally to at least a battalion combined arms group."[258] Last, Hodges supports integrating U.S. Special Forces into existing Baltic units to plan for possible "insurgency operations against Russian occupation."[259] Taken together, these proposals strengthen deterrence while avoiding the pitfalls of permanent basing.

In addition to enhancing "tripwire" functionality, NATO should augment the ability of Baltic deployments to defend against an armored Russian incursion. Clark argues forward-based forces ought to serve a "speedbump" role in which they "prevent a fait accompli by Russia and, should an attack occur, delay the opposing forces for NATO to be able to deal with the A2/AD threat and deploy additional units and capabilities to the region."[260] In pursuit of this objective, NATO pledged in 2016 to deploy four multinational battalions to the Baltic states and Poland to demonstrate "to the potential aggressor the readiness to trigger the 40,000-strong rapid-reaction force and a full-scale NATO counter-assault."[261] In 2018, the Alliance adopted the "Four 30s" initiative, a

document, should it hinder NATO in ensuring the defense of each and every Ally." Clark, Luik, Ramms & Shirreff, *supra* note 148, at 19.

255. As Clark notes, the NRFA commits Russia to respect states' "inherent right to choose the means to ensure
their own security," a promise "it has broken." *Id.* at 8.

256. Breedlove & Vershbow, *supra* note 93, at 41.

257. *Id.*

258. Clark, Luik, Ramms & Shirreff, *supra* note 148, at 21-22.

259. Hodges, Bugajski & Doran, *supra* note 4, at 9.

260. As Clark argues, "NATO's conventional military posture in the Baltic states should be capable of convincing Russia that it is able to delay and bog down an invading force and inflict unacceptable damage on it." Clark, Luik, Ramms, & Shirreff, *supra* note 148, at 18.

261. Andis Kudors, *Regional Security of the Baltic States: Challenges and Solutions*, LATVIAN INST. OF INT'L AFFAIRS 18 (2018), *available at* http://appc.lv/eng/wp-content/uploads/sites/2/2018/10/A.Kudors_RegionalSecurity2018.pdf (last visited Oct. 5, 2020). *See*

commitment to mobilize thirty troop battalions, thirty squadrons of aircraft, and thirty warships within thirty days following a crisis.[262]

Yet, although the Four 30s is an encouraging step, more must be done to address a vulnerability Breedlove and Vershbow term the "time-distance gap."[263] Specifically, NATO is "seriously hampered in rapidly deploying additional units to the Baltics,"[264] a problem SSC-8 theater-range capabilities will only exacerbate. In the time the U.S. and Western-Europe-based forces take to arrive, even if only thirty days, Moscow may execute a *fait accompli* and cement its hold on seized Baltic lands, rendering any "largely reinforcement-based strategy" destined to fail.[265] Consequently, instead of the commonly cited "defense-in-depth" approach, [266] NATO must expand its forward deployments in the Baltic territory. As Shlapak and Johnson argue, a force of "about seven brigades, including three heavy armored brigades—adequately supported by air-power, land-based fires, and other enablers on the ground" could prevent "the rapid overrun of the Baltic states."[267]

Currently, NATO's eFP stations a battalion-size battle group in each Baltic state in addition to a larger U.S. brigade-sized unit in Poland.[268]

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also Warsaw Summit Key Decisions, NATO (Feb. 2017), *available at* https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2017_02/20170206_1702-factsheet-warsaw-summit-key-en.pdf (last visited Oct. 5, 2020).

262. *Press Conference by NATO Secretary-General Jens Stoltenberg Following the Meeting of the North Atlantic Council (NAC) in Defence Ministers' Session*, NATO (June 8, 2018), *available at* https://www.nato.int/cps/en/natohq/opinions_155264.htm (last visited Oct. 5, 2020).

263. Breedlove & Vershbow, *supra* note 93, at 31.

264. Clark, Luik, Ramms & Shirreff, *supra* note 148, at 21.

265. *Id.*; *see also* Breedlove & Vershbow, *supra* note 93, at 25.

266. As Hodges defines the concept, "NATO is willing to concede land to an attacker (e.g., at Suwałki) in exchange for the time needed to roll out reinforcements or mount a liberation campaign." Hodges, Bugajski & Doran, *supra* note 4, at 20. This approach, he warns, leaves Baltic territorial defense to "small national militaries, local citizen reserves, and paramilitary cadres, together with the limited combat power of allied tripwires." *Id.* at 3.

267. Shlapak & Johnson, *supra* note 1, at 2.

268. *See* Michael E. O'Hanlon & Christopher Skaluba, *A Report from NATO's Front Lines*, BROOKINGS INST. (June 13, 2019), *available at* https://www.brookings.edu/blog/order-from-chaos/2019/06/13/a-report-from-natos-front-lines/ (last visited Nov. 24, 2020). Currently, NATO's eFP consists of four battlegroups: the Estonia-based United Kingdom-led battlegroup contains one armored battalion, one armored infantry company, and 1073 total troops; the Latvia-based Canada-led battleground contains one mechanized infantry battalion, three mechanized infantry companies, and 1401 total troops; the Lithuania-based Germany-led battlegroup contains one armored infantry company, two mechanized infantry companies and, 1055 total troops; and the Poland-based United States-led battlegroup contains one armored cavalry squadron and 1218 total troops. *See* NATO's Enhanced Forward

Although this posture is an improvement over pre-2014 figures, it is far from what Shlapak and Johnson recommend.[269] To effectively deter Russian aggression, NATO must expand the size of these deployments with the ultimate objective of reaching the seven-brigade level.

Last, NATO should augment logistical capabilities and improve infrastructure to better facilitate the transportation of troops and equipment into the Baltics. As Hodges writes, supply networks through Germany, Poland, and the Baltics are critical for supporting "aviation, ground movement, logistics, and Command & Control (C2) sites."[270] On this front, the U.S. military can increase the size and capability of logistical units presently deployed to Marijampolė and Lielvārde Air Base.[271] Furthermore, Hodges suggests improvements to key "rail, bridge, and port facilities" that forces would need to traverse in a Baltic conflict.[272] Of particular importance is the construction of the Rail Baltica line connecting Tallinn to Poland through the Suwalki Gap.[273] Finalizing this project would confer two significant military advantages. First, troops and equipment could bypass the current "severe bottleneck" at the Poland-Lithuania railhead gauge break, eliminating the vulnerability of delayed forces to artillery and air assaults.[274] Second, it would reduce reliance upon the Baltic ports of Klaipeda, Ventspils, Liepaja, Riga, and Tallinn; these shipping routes would expose NATO vessels to the 300 km range of Moscow's Bastion-P coastal defense system.[275] Given the ability of an operational Rail Baltica to "dramatically improve this vulnerable transportation chain," NATO leaders must ensure budgetary concerns do not obscure the imperative strategic necessity of its completion.[276]

Presence, NATO (Mar. 2019), *available at* https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2019_04/20190402_1904-factsheet_efp_en.pdf (last visited Nov. 24, 2020).

269. Shlapak & Johnson, *supra* note 1, at 8.

270. Hodges, Bugajski & Doran, *supra* note 4, at 6.

271. *Id.*

272. *Id.* at 8.

273. *See* Nikers, *supra* note 52.

274. H. . .ggblom, *supra* note 43.

275. Missile Defense Project, *SS-N-26 "Strobile"*, CTR. FOR STRATEGIC & INT'L STUDIES (June 15, 2018), *available at* https://missilethreat.csis.org/missile/ss-n-26/ (last visited Nov. 24, 2020). *See also* Figure 3.

276. *See* Posaner, *supra* note 54.

B. Accelerate Development of Cruise Missile Defense Technology

Second, Washington should commit to advancing cruise missile defenses by continuing to fund the developmental IFPC Inc. 2 and HEL-IFPC systems. The 2019 Missile Defense Review recognizes a clear need to counter cruise missile threats, noting that active defenses could "play a crucial role in countering missile strikes that underpin potential adversaries' A2/AD operations."[277] Specifically, in light of the SSC-8, Pifer argues that NATO "needs to be more serious about defending key airfields, airports, and port facilities."[278] According to Kroenig, the primary contemporary challenge is "greater political demand than actual capability."[279] Current capacities include the aforementioned Avenger, equipped to fire Stinger missiles,[280] and ground-deployed naval Phalanx 20-millimeter guns.[281] Despite the presence of these older technologies, however, the FY 2019 National Defense Authorization Act (NDAA) Report characterized the Army's cruise missile defense of fixed stations as "nonexistent."[282]

In light of this evident vulnerability, the Pentagon should prioritize the development of IFPC Inc. 2, a truck-mounted multi-launch missile system specifically designed to counter the threat of advanced Russian and Chinese cruise missiles.[283] As Brig. Gen. Randall McIntire writes, IFPC Inc. 2 would replace the Stinger and Phalanx by offering "enhanced firepower protection to critical, more stationary fixed and semi-fixed assets."[284] This capability, a Center for Strategic and Budgetary Analysis

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277. Missile Defense Review, *supra* note 130.

278. Pifer interview, *supra* note 110.

279. Kroenig, *supra* note 18.

280. *See Avenger Low-Level Air Defence System, USA*, ARMY TECH. (2020), *available at* https://www.army-technology.com/projects/avenger/ (last visited Nov. 24, 2020).

281. *See* John Pike, *MK 15 Phalanx Close-In Weapons System (CIWS)*, FED. OF AM. SCIENTISTS (Jan. 9. 2003), *available at* https://fas.org/man/dod-101/sys/ship/weaps/mk-15.htm (last visited Nov. 24, 2020).

282. S. Rep. No. 115-262 at 73 (2018). *See also* Pifer interview, *supra* note 110. As Pifer notes, it is "a lot easier to defend a ship than an airport or port."

283. *See* Sydney J. Freedberg, *Army Reboots Cruise Missile Defense: IFPC & Iron Dome*, BREAKING DEF. (Mar. 11, 2019), *available at* https://breakingdefense.com/2019/03/army-reboots-cruise-missile-defense-ifpc-iron-dome/ (last visited Nov. 24, 2020).

284. Randall McIntire, *The Return of Army Short Range Air Defense in a Changing Environment*, FORT SILL FIRES BULL. (Dec. 2017), *available at* https://sill-www.army.mil/firesbulletin/archives/2017/nov-dec/articles/1_McIntire.pdf (last visited Nov. 24, 2020).

(CSBA) report notes, "should significantly improve the Army's ability to defeat cruise missiles and UAVs."[285]

Although NATO leaders have expressed a need to augment allied missile defenses,[286] funding and delays have produced doubts regarding IFPC Inc. 2's future viability. As the FY 2019 NDAA Report notes, the Army "continues to deprioritize IFPC."[287] CSBA found that DoD "allocated insufficient resources toward defending its bases against cruise missile salvos" while the IFPC program is now "delayed."[288] Moreover, despite the Army's plans to spend $517 million on IFPC through 2023,[289] the 2020 NDAA withheld half of the request "until the service produces a report on its plans to develop and field such a system."[290] Therefore, even though the 2019 NDAA mandates the military to "field at least two batteries of cruise missile defenses by 2020 and two additional batteries by September 2023,"[291] it is unclear whether necessary funds will be available to continue development at the desired pace.[292]

A second emergent capability is HEL-IFPC laser technology. Lasers can intercept cruise missiles by "rapidly heating their external casings, aerodynamic features, or susceptible seekers."[293] As the CSBA report observes, ground-based units "capable of generating 300 kW output power or greater" could be "postured around U.S. bases to defend against salvo threats."[294] Lasers can also protect "command posts, helicopter rearming points, supply dumps, and other support sites."[295] Still, distance restrictions and vulnerability to "atmospheric phenomena" dictate

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285. Rehberg & Gunzinger, *supra* note 195, at 12.

286. *Press Conference by NATO Secretary-General Jens Stoltenberg Following the Meetings of NATO Defence Ministers*, NATO (June 26, 2019), *available at* https://www.nato.int/cps/en/natohq/opinions_167072.htm (last visited Nov. 24, 2020).

287. S. Rep. No. 115-262 at 73 (2018).

288. Rehberg & Gunzinger, *supra* note 195, at 44.

289. *See* Freedberg, *supra* note 283.

290. *See* Jen Judson, *Congress to Withhold Funding for Army's Indirect Fire Protection System Until it Delivers Plan*, DEF. NEWS (Dec. 24, 2019), *available at* https://www.defensenews.com/land/2019/12/24/congress-to-withhold-funding-for-armys-indirect-fire-protection-system-until-it-delivers-plan/ (last visited Oct. 2, 2020).

291. Rehberg & Gunzinger, *supra* note 195, at 12. This request is subject to certification from the Secretary of Defense that "there is a need for the Army to deploy an interim missile defense capability." *Id.*

292. Kroenig interview, *supra* note 18.

293. *See* Rehberg & Gunzinger, *supra* note 195, at 19.

294. *Id.*

295. *See* Sydney J. Freedberg, *Army Boosts Investment In Lasers*, BREAKING DEF. (Oct. 16, 2018), *available at* https://breakingdefense.com/2018/10/army-boosts-investment-in-lasers/ (last visited Oct. 9, 2020).

optimal usage "over short-to-medium ranges."[296] Lasers under the 300 kW threshold may also lack military utility because "attack geometry requires a head-on shot," and lower intensity lasers cannot neutralize the missile in the requisite timeframe.[297]

HEL-IFPC is a prototype for a 250-300 kW-class laser that the Army plans to deliver to platoons by FY 2024.[298] Before attaining this capacity,however, the Army first aims to field 50 kW[299] and 100 kW[300] variants.[301] As with Inc. 2, budgetary questions persist as a limiting factor. For FY 2021, the Pentagon is asking Congress for $212.3 million to develop a Stryker-mounted 50-kW laser, an increase of 209% from FY 2020.[302] Notably, the request also describes securing funding for "a 300KW mobile, ground-based laser" integrated onto a medium tactical vehicle as an "essential" modernization task, but provides no specific timeframe for its deployment.[303]

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296. Rehberg & Gunzinger, *supra* note 195, at 19.

297. *See* Sydney J. Freedberg, *Army Boosting Laser Weapons Power Tenfold*, BREAKING DEF. (July 18, 2017), *available at* https://breakingdefense.com/2017/07/army-boosting-laser-weapons-power-tenfold/ (last visited Oct. 9, 2020). By some estimates, the range for successfully downing a cruise missile may extend from 300 to 600 kW. *Id.*

298. *See* Claire Heininger, *Army Awards Laser Weapon System Contract*, U.S. ARMY (Aug. 2, 2019), *available at* https://www.army.mil/article/225276/army_awards_laser_weapon_system_contract (last visited Oct. 9, 2020). In August 2019, the Army announced a $203 million contract with Kord Technologies, Northrop Grumman, Raytheon, and General Dynamics to develop the prototypes and integrate these systems into the Stryker armored vehicle. *Id.*

299. *See* Jen Judson, *Soon to Come to the Army: A High-Power Microwave to Take Out Drone Swarms*, DEF. NEWS (Aug. 7, 2019), *available at* https://www.defensenews.com/digital-show-dailies/smd/2019/08/07/the-armys-indirect-fires-protection-system-is-getting-a-high-power-microwave/ (last visited Oct. 9, 2020).

300. *See* Jen Judson, *Rolls-Royce Unveils Hybrid Power System for Laser Weapons*, DEF. NEWS (May 10, 2019), *available at* https://www.defensenews.com/industry/2019/05/10/rolls-royce-unveils-hybrid-power-system-for-laser-weapons/ (last visited Oct. 9, 2020).

301. In 2017, the Army reallocated over $1 billion in science and technology funding over FY 2019-2023 to address military modernization objectives. *See* Sydney J. Freedberg, *Army Accelerates Air & Missile Defense Five Years: MSHORAD, MML, Lasers*, BREAKING DEF. (Mar. 29, 2018), *available at* https://breakingdefense.com/2018/03/army-accelerates-air-missile-defense-five-years-mshorad-mml-lasers/ (last visited Oct. 9, 2020). As defense procurement commentator Sydney Freedberg notes, however, "actually producing and fielding new equipment is markedly more expensive than developing the technology." *Id.*

302. *See* Sydney J. Freedberg, *Army Ramps Up Funding For Laser Shield, Hypersonic Sword*, BREAKING DEF. (Feb. 28, 2020), *available at* https://breakingdefense.com/2020/02/army-ramps-up-funding-for-laser-shield-hypersonic-sword/ (last visited Oct. 9, 2020).

303. Office of the Undersecretary of Def. (Comptroller)/Chief Fin. Officer, *Defense Budget Overview: Irreversible Implementation of the National Defense Strategy*, U.S. DEP'T

Ultimately, neither the IFPC Inc. 2 nor the HEL-IFPC projects may prove viable means of countering Russia-based cruise missile threats. Taking this possibility into account, Congress hedged its bets by committing over $1 billion to purchase the Israeli Iron Dome as an interim measure until more advanced systems could be acquired.[304] Although Israel delivered two Iron Dome batteries, the Army eliminated plans to acquire two more by 2023, citing interoperability challenges and insufficient capabilities.[305] Given the inadequacy of this stopgap, the Pentagon should press onward with Inc. 2 and HEL, continuing to demand requisite funding to achieve the ambitious objective of deploying at least one system to Europe by FY 2024.

C. Pursue Conventional "Dual Track" Arms Control

Third, the United States should advance a two-pronged arms control initiative to induce Moscow into accepting a reimposition of INF restrictions.[306] In line with the "dual-track" approach that precipitated the Treaty's inception, this strategy would first entail the deployment of U.S. conventional intermediate-range missiles to the European theater.[307] Similar to Carter leveraging the presence of Pershing II and BGM-109 missiles "to give the United States bargaining leverage" in arms control talks,[308] U.S. negotiators should employ a comparable threat to persuade

OF DEF. (Feb. 10, 2020), *available at* https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2021/fy2021_Budget_Request_Overview_Book.pdf (last visited Oct. 9, 2020).

304. *See* Marcy Oster, *US Military Cancels Plans to Purchase Iron Dome Missile Defense Batteries*, JERUSALEM POST (Mar. 10, 2020), *available at* https://www.jpost.com/Israel-News/US-military-cancels-plans-to-purchase-Iron-Dome-missile-defense-batteries-620399 (last visited Oct. 9, 2020). As Congressman Doug Lamborn (R-CO) stated in a committee hearing, "I don't want to see the perfect be the enemy of the good . . . I don't want to see a perfect hoped for and expected capability deters us from using something that is available and usable right now and will save lives." *See also* Joseph Trevithick, *Lawmakers Grill Army Officer Over Lack Of Missile Defenses In Iraq After Fatal Rocket Attack*, THE DRIVE (Mar. 12, 2020), *available at* https://www.thedrive.com/the-war-zone/32562/lawmakers-grill-army-officer-over-lack-of-missile-defenses-in-iraq-after-fatal-rocket-attack (last visited Oct. 9, 2020).

305. *See* Charlie Gao, *The U.S. Army Just Dumped Israel's Iron Dome Rocket Defense System*, NAT'L INT. (Mar. 21, 2020), *available at* https://nationalinterest.org/blog/us-army-just-dumped-israels-iron-dome-rocket-defense-system-135727 (last visited Oct. 9, 2020).

306. *See* Maurer, *supra* note 105 (John D. Maurer makes a similar argument in favor of a new dual-track strategy, although he does not explicitly call for the U.S. deployment of conventional missiles to European territory).

307. *See generally* Lanoszka, *supra* note 99.

308. *See* Leonard, *supra* note 204, at 4.

the Kremlin to adopt a new accord that would mandate the elimination of the SSC-8.

The Pentagon has designed three systems that, according to Pifer, "almost certainly are being developed with European contingencies in mind."[309] Washington could install these missiles–a Tomahawk GLCM with a range of 1000 km, a GLBM with a 3000-4000 km range, and the 499 km-range Precision Strike Missile[310]–in locations within striking distance of Kaliningrad, Belarus, and the Russian heartland.[311] Indeed, Secretary of Defense Mark Esper expressed a desire in August 2019 to deploy new intermediate-range options "sooner rather than later."[312]

Although these weapons likely offer dual capability,[313] U.S. planners should not seek placement of nuclear missiles in Europe for fear of incurring a Euromissile-type backlash.[314] NATO leadership, for one, appears hostile to this prospect, with Stoltenberg declaring in February 2019, "[that] NATO doesn't have any intentions of deploying new

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309. Steven Pifer, *As US-Russian Arms Control Faces Expiration, Sides Face Tough Choices*, BROOKINGS INST. (Mar. 23, 2020), *available at* https://www.brookings.edu/blog/order-from-chaos/2020/03/23/as-us-russian-arms-control-faces-expiration-sides-face-tough-choices/ (last visited Oct. 9, 2020).

310. *See* Kingston Reif, *Trump Increases Budget for Banned Missiles*, ARMS CONTROL ASS'N (May 2019), *available at* https://www.armscontrol.org/act/2019-05/news/trump-increases-budget-banned-missiles (last visited Nov. 23, 2020).

311. In August 2019, the U.S. military tested the intermediate-range ground-launched cruise missile, which flew over 500 km in one test. *See* Missy Ryan, *U.S. Tests First Intermediate-Range Missile Since Withdrawing from Treaty with Russia,* WASH. POST (Aug. 19, 2019), *available at* https://www.washingtonpost.com/national-security/us-tests-first-intermediate-range-missile-since-withdrawing-from-treaty-with-russia/2019/08/19/d480c692-c2a8-11e9-b5e4-54aa56d5b7ce_story.html (last visited Nov. 23, 2020).

312. Mark T. Esper, *Secretary of Defense Esper Media Engagement En Route to Sydney, Australia*, DEP'T. OF DEF. (Aug. 2, 2019), *available at* https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1925072/secretary-of-defense-esper-media-engagement-en-route-to-sydney-australia/ (last visited Nov. 23, 2020).

313. *See* Sebastien Roblin, *U.S. Army is Bringing Back Land-Based Missiles With A Vengeance in a Post-INF World*, FORBES (Aug. 7, 2019), *available at* https://www.forbes.com/sites/sebastienroblin/2019/08/07/army-will-soon-begin-testing-precision-strike-missiles-for-a-post-inf-world/#80ddcff25e15 (last visited Nov. 23, 2020).

314. *See generally* Anderson & Nelson, *supra* note 171. *See also* Griff Witte, *At Germany's Last Nuclear Base, Fears of a New Arms Race as U.S.-Russia Treaty Collapses*, WASH. POST (Mar. 4, 2019), *available at* https://www.washingtonpost.com/world/europe/at-germanys-last-nuclear-base-fears-of-a-new-arms-race-as-us-russia-treaty-collapses/2019/03/03/90790ec4-391d-11e9-b10b-f05a22e75865_story.html (last visited Nov. 23, 2020) ("request from the United States to store and be ready to use new bombs and missiles would likely spark a furious backlash while exposing fractures in an alliance already strained by the mistrust between President Trump and his European counterparts."). *See* Maurer, *supra* note 105 ("conventionally armed missiles ought to provoke less opposition" than nuclear arms).

nuclear-capable ground-launched systems in Europe."[315] Germany has also expressed vehement opposition,[316] and as German commentator Otfried Nassauer suggests, only Poland and "maybe one or two others" might be willing to accept such deployments.[317] Conventional arms, on the other hand, would elicit less of a popular outcry. According to Kroenig, the Pershing II and BGM-109 elicited protests "because they were nuclear," whereas "deploying conventional weapons in INF ranges might be somewhat controversial, but much less than if we wanted nuclear missiles."[318]

Even conventional U.S. deployments are likely to provoke some backlash. Pifer argues that placing any intermediate-range systems in Europe would "further complicate the long-range precision-guide[d] conventional strike picture" and "impede [the] negotiation of a new agreement reducing and limiting nuclear weapons."[319] Moreover, as Owen LeGrone writes, ground-launched missiles offer minimal military utility given Washington's "unrivaled arsenal of the sea and air-launched weapons."[320] Yet as Pifer concedes, enticing Russia into a negotiation "will not be easy" if Moscow "looks at what the [United States] has on the table" and fails to see a "serious American countereffort."[321] It was the Kremlin's perception of the Pershing II and BGM-109 as "particularly dangerous U.S. capabilities that could potentially launch a sudden, devastating surprise attack on its command and control," Anderson and Nelson write, "that strengthened the bargaining position of American negotiators."[322] Therefore, if the U.S. military fails to introduce a novel threat to Russian interests, Moscow will lack an incentive to reduce or eliminate

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315. *Press Conference by NATO Secretary-General Jens Stoltenberg Following the Meetings of NATO Defence Ministers*, NATO (Feb. 13, 2019), *available at* https://www.nato.int/cps/en/natohq/opinions_163394.htm (last visited Nov. 23, 2020).

316. *See* Maria Sheahan, *Germany Would Oppose New Nuclear Missiles in Europe: Foreign Minister*, REUTERS (Dec. 27, 2018), *available at* https://www.reuters.com/article/us-usa-russia-treaty-germany/germany-would-oppose-new-nuclear-missiles-in-europe-foreign-minister-idUSKCN1OQ0BN (last visited Nov. 23, 2020).

317. Witte, *supra* note 314.

318. Kroenig interview, *supra* note 18 (conventional weapons also offer military utility with regard to the suppression of Russian A2/AD assets such as air defense units and surface-to-surface missile sites).

319. Pifer, *supra* note 301.

320. Owen LeGrone, *New U.S. Intermediate-Range Missiles Aren't Needed for Precision Strike in Europe*, ARMS CONTROL ASS'N (Aug. 27, 2019), *available at* https://www.armscontrol.org/blog/2019-08-27/new-us-intermediate-range-missiles-aren%E2%80%99t-needed-precision-strike-europe (last visited Nov. 23, 2020).

321. Pifer interview, *supra* note 110.

322. Anderson & Nelson, *supra* note 171, at 97.

its weapons. Additionally, even if submarine-launched capabilities could hypothetically provide comparable operational benefit,[323] only the presence of ground-launched systems could facilitate a straightforward proportionate drawdown under the parameters of the original agreement.

Commentators have proposed several other diplomatic approaches to alleviating the Russian missile threat. Pifer suggests that Washington could seek a "conventional only" agreement whereby Russia retains the SSC-8 but eliminates its nuclear payloads.[324] Yet as discussed above, the weapon's primary threat lies not in its capacity as a tool of nuclear intimidation, but rather as a conventional precision strike asset targeting NATO forces and infrastructure in Central and Western Europe.[325] For a negotiated accord to offer any strategic utility, it must therefore reinstate INF restrictions upon both nuclear and non-nuclear systems.

A second potential alternative is to simultaneously address the threat of China's burgeoning intermediate-range arsenal by including Beijing in trilateral arms control talks. As former U.S. Pacific Command Commander Admiral Harry Harris writes, China "controls the largest and most diverse missile force in the world, with an inventory of more than 2,000 ballistic and cruise missiles." Of which, 95% "would have been prohibited by the INF Treaty, had China been a signatory."[326] Moreover, the "vast majority" of these missiles are conventional.[327] Given the dangers that Beijing's considerable A2/AD capabilities could pose to freedom of navigation and the sovereignty of key allies like Taiwan, South Korea, and Japan,[328] Washington has a clear incentive to restrict China's development of missile technology. President Trump appears to support

323. In February 2020, for example, the U.S. Navy deployed the new W76-2 low-yield, submarine-launched ballistic missile warhead. *See* Idrees Ali, *U.S. Deploys 'More Survivable' Submarine-Launched Low-Yield Nuclear Weapon*, REUTERS (Feb. 4, 2020), *available at* https://www.reuters.com/article/us-usa-nuclear-pentagon/us-deploys-more-survivable-submarine-launched-low-yield-nuclear-weapon-idUSKBN1ZY2EQ (last visited Nov. 23, 2020). Additionally, as Kroenig notes, the cost of maintaining a sufficient arsenal of air and sea-launched missiles could easily become "cost-prohibitive." *See also* Kroenig interview, *supra* note 18.

324. *See* Pifer interview, *supra* note 110.

325. *See* Durkalec, *supra* note 158 (noting that the SSC-8 can "hit all the critical airports and seaports of embarkation for Allied reinforcement").

326. *See* Abraham Denmark, *U.S.-China Military Competition Intensifying Over INF Missiles*, WILSON CTR. (Nov. 13, 2019), *available at* https://www.wilsoncenter.org/blog-post/us-china-military-competition-intensifying-over-inf-missiles (last visited Nov. 23, 2020).

327. Pifer interview, *supra* note 110.

328. *See* Denmark, *supra* note 326.

this objective, suggesting the United States engage in arms control talks with China immediately following INF withdrawal.[329]

Beijing, however, appears disinclined to participate. "China will in no way agree to mak[e] the INF Treaty multilateral," Foreign Ministry Spokesperson Hua Chunying stated in July 2019.[330] Eric Edelman and Franklin C. Miller characterize prospects for trilateral arms control as "relatively slim," in part because China's "aversion to transparency" makes it "unlikely to accept intrusive verification inspection."[331] This is not to say that Washington should wholly forsake a China-oriented arms control strategy. Dave Deptula suggests a dual-track approach aimed at reducing China's "inventory of conventional missiles in exchange for halting any deployment of new U.S. conventional land-based missiles" in Asia.[332] Frank Rose similarly advocates for bringing China into "a future arms control and strategic stability framework."[333] Both concepts merit consideration. Yet if policymakers seek to explore their viability, they can do so outside the discrete context of the INF regime. If the SSC-8 presents a truly pressing threat, the United States cannot allow hopes for desirable yet unrealistic progress with Beijing to derail the possibility of a less ambitious arms control achievement that could tangibly mitigate this risk.

The third category of proposals attempts to link Russian and Chinese concessions with a U.S. commitment to extend the expiring New START agreement.[334] Kroenig suggests the Trump administration accept an

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329. *Compare INF nuclear treaty: Trump says new pact should include China*, BBC NEWS (Aug. 3, 2019), *available at* https://www.bbc.com/news/world-us-canada-49213892 (last visited Nov. 23, 2020) *with* Kroenig interview, *supra* note 18 (arguing that it "makes little sense to "negotiate with Russia without China being involved").

330. *China Reiterates Opposition to Multilateralization of INF Treaty*, XINHUA (July 30, 2019), *available at* http://www.xinhuanet.com/english/2019-07/30/c_138270534.html (last visited Nov. 23, 2020).

331. Eric Edelman & Franklin C. Miller, *Russia is Beefing Up its Nuclear Arsenal. Here's What the U.S. Needs to Do.*, POLITICO (Dec. 31, 2019), *available at* https://www.politico.com/news/magazine/2019/12/31/russia-nuclear-arsenal-new-start-091487 (last visited Nov. 22, 2020).

332. Dave Deptula, *Whether the U.S. Scraps the INF or Stays In, China Must Be Checked*, FORBES (Nov. 5, 2018), *available at* https://www.forbes.com/sites/davedeptula/2018/11/05/whether-inf-in-or-out-china-must-be-checked/#48a0ff06ce3c (last visited Nov. 22, 2020).

333. *Id.*

334. Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, art. XIV, 4, U.S.-Russ., Apr. 8, 2010, S. Treaty Doc. No. 111-5 (2010). (the agreement is slated to expire on February 5, 2021, unless the United States and Russia exercise an option to extend it by five years). *See* Matt Korda & Hans M. Kristensen, *Count-Down for No-Brainer: Extend*

extension "but reserve the right to pull out of New START if Russia cannot convince China to stay onboard for [a] new round of arms control negotiations that would include INF-type restrictions."[335] Similarly, Edelman and Robert Joseph argue that any future talks must address all Russian and Chinese nuclear weapons types, even if this mandate precludes the continuation of New START.[336] Last, Edelman and Miller advocate extending New START only if Moscow agrees to negotiate a subsequent accord addressing "all [United States] and Russian nuclear weapons regardless of range" and Washington may condition New START adherence upon negotiating progress.[337] Though an in-depth discussion of the merits and pitfalls of New START lies beyond the scope of this paper, the United States unquestionably derives tangible benefits from continued participation, including robust verification measures ensuring Russian adherence to strategic arsenal limitations.[338] It appears unwise to sacrifice the final standing United States-Russia arms control accord for the rather dubious prospect of attaining bilateral or even trilateral agreement on intermediate-range restrictions in the near future.

Admittedly, neither the diplomatic initiative this paper advocates nor any that commentators propose stands a realistic probability of immediate fruition. As Nikolai Sokov writes, the dual-track approach succeeded largely due to a "fundamental change in Soviet foreign policy" inspired by Premier Mikhail Gorbachev's pursuit of reform and rapprochement with the West.[339] Putin, conversely, will presumably follow the more confrontational "traditional Soviet pattern of response."[340] Moscow, too, continues to dispute U.S. claims regarding the SSC-8's range and demand removal of AEGIS-Ashore, presenting a series of

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New START Treaty, FED'N OF AM. SCIENTISTS (Feb. 5, 2020), *available at* https://fas.org/blogs/security/2020/02/count-down-begins-for-no-brainer-extend-new-start-treaty/ (last visited Nov. 22, 2020) (advancing six rationales for extending the accord).

335. Kroenig interview, *supra* note 18.

336. Robert Joseph & Eric Edelman, *New Directions in Arms Control*, NAT'L REV. (Apr. 29, 2019), *available at* https://www.nationalreview.com/2019/04/arms-control-treaties-russian-chinese-nuclear-forces/ (last visited Nov. 22, 2020).

337. *Id.* (The piece also suggests that "both the U.S. and Russia should seek China's inclusion in arms control talks at some point," including through a potential multilateral commitment by the United States, Russia, China, France, and the United Kingdom to declare their stockpile sizes and freeze their arsenals at such levels).

338. *See, e.g.*, Brian L. Sittlow, *New START: The Future of U.S.-Russia Nuclear Arms Control*, COUNCIL ON FOREIGN REL. (Jan. 28, 2020), *available at* https://www.cfr.org/in-brief/new-start-future-us-russia-nuclear-arms-control (last visited Nov. 22, 2020).

339. Robert Gallucci, Nikolai Sokov, James H. Lebovic & Alexandra Bell, *Correspondence*, 26 NONPROLIFERATION REV. 195, 198 (2019).

340. *Id.*

seemingly insurmountable roadblocks likely to forestall any attempts at negotiation.[341] These factors, Sokov concludes, suggest a "high probability of a lengthy deadlock and growing tension."[342] Ultimately, while the United States should pursue arms control, in part to demonstrate its good faith commitment to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) Article VI obligations,[343] it must strive toward this negotiated outcome without realistic expectations of rapid progress.

D. Deepen Engagement with Belarus

A final recommendation entails leveraging diplomatic inducements to urge Belarus toward denying Russia territorial access for a potential Suwalki assault. Hodges refers to Belarus as the "great unknown," as the former Soviet republic could submit to further integration into Russian strategic planning or, conversely, pursue rapprochement with the West.[344] In 1999, Belarus and Russia signed the Union State Treaty, pledging to establish "a joint regional military force" and "coordinate effectively" their foreign and economic policies.[345] This agreement has produced close bilateral security cooperation. Minsk is a member of the Collective Security Treaty Organization (CSTO), a Russia-dominated arrangement whose terms permit Moscow to "deploy its military on Belarusian territory in the event of war with a third party,"[346] and it currently houses at least twenty-four Russian Su-27M3 fighters at its Baranovichi airbase.[347] As Hodges asserts, Belarus "lacks operational decision-making powers over its armed forces" and has "in effect been incorporated" into Russia's Joint Operational Command.[348]

As of late, however, cracks have emerged in this previously robust strategic partnership. Despite the Union State Treaty promising economic "parity" through "equal oil and gas prices for business entities

341. *Id.* at 199.

342. *Id.*

343. Treaty on the Nonproliferation of Nuclear Weapons, art. VI, July 1, 1968, 21 U.S.T. 483 ("Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control").

344. Hodges, Bugajski & Doran, *supra* note 4, at 44.

345. *Russia and Union State*, Belarusian Diplomatic Serv. (2017), *available at* http://mfa.gov.by/en/courtiers/russia/ (last visited Nov. 22, 2020).

346. Hodges, Bugajski & Doran, *supra* note 4, at 44.

347. *Id.* at 45.

348. *Id.* at 43.

across all participating states,"[349] in the mid-2000s Moscow began to offer only "preferential" prices, placing Belarusian companies at a competitive disadvantage.[350] When Belarus demanded Russia halt subsidies to domestic oil refineries, Russia responded by requesting to "condition all its economic relations within Belarus on deeper integration within the Union State," raising questions regarding Belarusian sovereignty.[351] More recently, in February 2020, Lukashenko complained that Russia was supplying only 25% of promised oil.[352] In the security sphere, tensions arose after Minsk declined a 2015 Russian proposal to establish an airbase on Belarusian territory, creating, in the words of Russian Foreign Minister Sergei Lavrov, an "unpleasant episode."[353] Moscow, Hodges writes, has realized it cannot take for granted "the loyalty of all elements of the Belarusian army" or Lukashenko's automatic approval of an attack launched from Belarusian territory.[354]

This friction comes as prospects for expanded NATO-Belarusian coordination have begun to emerge. In February 2019, Assistant Minister of Defense Major General Oleg Voinov issued a statement calling for a "gradual improvement of relations with . . . NATO, the European Union, and other states that respect the sovereignty and territorial integrity of the Belarusian state."[355] The next day, Lukashenko declared Belarus "ready for a [constructive] dialogue with NATO on the principles of equality and transparency."[356] These statements, Arseny Sivitsky argues, "reflect a

349. Yauheni Preiherman, *Unsettled Union: The Future of the Belarus-Russia Relationship*, EUR. COUNCIL ON FOREIGN REL. (Jan. 21, 2020), *available at* https://www.ecfr.eu/article/commentary_unsettled_union_the_future_of_the_belarus_russia_relationship (last visited Oct. 9, 2020).

350. *Id.*

351. *Id.*

352. *See* Yarus Karmanua, *Belarus Leader Bemoans Russia's Halt on Oil Supplies*, ASSOC. PRESS (Feb. 6, 2020), *available at* https://anews.com/07ffc354f715a8f3a857bde6bf482622 (last visited Nov. 22, 2020).

353. *See* Tom Balmforth, *Russia Complains Over Belarus's Refusal to Host Air Base*, REUTERS (Sept. 26, 2019), *available at* https://www.reuters.com/article/us-russia-belarus-air-base/russia-complains-over-belaruss-refusal-to-host-air-base-idUSKBN1WB1NT (last visited Nov. 22, 2020); *see also* Hodges, Bugajski & Doran, *supra* note 4, at 43 (Hodges also notes that Russian and Belarusian forces also do not train in the same "integrated fashion" as NATO militaries).

354. Hodges, Bugajski & Doran, *supra* note 4, at 43.

355. *Briefing with Military Attachés*, MINISTRY OF DEF. OF THE REPUBLIC OF BELR. (Feb. 21, 2019), *available at* https://www.mil.by/ru/news/83438/ (last visited Nov. 17, 2020).

356. *Lukashenko: Belarus Ready for Dialogue with NATO Based on Equality, Transparency*, BELTA (Feb. 22, 2019), *available at* https://eng.belta.by/president/view/lukashenko-belarus-ready-for-dialogue-with-nato-based-on-equality-transparency-118940-2019/ (last visited Nov. 18, 2020).

clear intention to promote relations with NATO to a more advanced level."[357] Furthermore, in January 2020, Belarusian defense chief Oleg Belokonev stated that while "Russia is our strategic ally," Belarus is "ready for joint exercises with NATO."[358] Minsk also held joint military drills with British Marines in March 2020, a practice it has conducted for the past two years.[359]

In light of these developments, the United States may attempt to offer inducements in exchange for Belarus refraining from abetting Russian aggression. Currently, Belarus receives the "lowest amount of the financial aid in the region," due to U.S. concerns regarding human rights and democracy.[360] Washington could increase aid to at least the level provided to other former Soviet republics,[361] and diversify distribution beyond the Obama administration's focus on atomic energy security.[362] It could also facilitate a loan from the International Monetary Fund (IMF), which suspended talks with Belarus in 2018 after Lukashenko refused to accept the requested reforms.[363] Another possibility is Secretary of State Mike Pompeo's offer to "deliver 100% of the oil you need at competitive

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357. Arseny Sivitsky, *Not an Enemy: Belarus Seeks Warmer Relations With NATO*, JAMESTOWN FOUND. (Mar. 21, 2019), *available at* https://jamestown.org/program/not-an-enemy-belarus-seeks-warmer-relations-with-nato/ (last visited Nov. 18, 2020).

358. *See* John Vandiver, *Russia's Close Ally Belarus Explores Working Closer with NATO*, STARS & STRIPES (Jan. 3, 2020), *available at* https://www.stripes.com/news/europe/russia-s-close-ally-belarus-explores-working-closer-with-nato-1.613379 (last visited Oct. 9, 2020).

359. *See* Andrei Makhovsky, *With Russia Ties Under Strain, Belarus Holds Drills with British Marines*, REUTERS (Mar. 3, 2020), *available at* https://www.reuters.com/article/us-belarus-defence/with-russia-ties-under-strain-belarus-holds-drills-with-british-marines-idUSKBN20Q29K (last visited Oct. 9, 2020) (statement of Alexander Klaskovsky) ("The Belarusian leadership knows how Moscow reacts painfully to such things . . . Lukashenko is simply showing Moscow once again that there are plenty more fish in the sea and that he has alternatives").

360. *See U.S. Aid to Belarus*, BELR. INST. OF AM. (2018), *available at* http://belarusianinstitute.org/research/u-s-aid-to-belarus/ (last visited Nov. 18, 2020).

361. *See U.S. Foreign Aid by Country*, U.S. AGENCY FOR INT'L DEV., *available at* https://explorer.usaid.gov/cd/ALB?fiscal_year=2018&measure=Obligations (last visited Nov. 18, 2020) (Washington provided $10,186,538 in foreign aid to Belarus in Fiscal Year 2018, in contrast to, for example, $17,750,285 for Romania, $45,804,458 for Lithuania, $20,225,308 for Albania, $30,231,632 for Kazakhstan and $142,202,517 for Georgia).

362. *See* U.S. Aid to Belarus, *supra* note 360.

363. *See* Michal Romanowski, *Belarus' Strategic Solitude*, REALCLEAR WORLD (Feb. 28, 2019), *available at* https://www.realclearworld.com/articles/2019/02/28/belarus_strategic_solitude_112977.html (last visited Nov. 18, 2020).

prices" to "help Belarus build its own sovereign country."[364] Still, as Pifer notes, Russian financial incentives are "going to be much larger than anything the United States can offer,"[365] suggesting economics alone cannot sway Minsk from Moscow's orbit.

Washington could also attempt to leverage security-related carrots and sticks to influence Minsk's behavior. NATO could consider inviting Belarusian troops to participate in joint exercises, although, as Hodges warns, "such an effort should only be pursued once Belarus demonstrates its clear and unswerving intention not to threaten NATO."[366] On the other hand, the U.S. Treasury Department's Office of Foreign Assets Control could threaten to revoke a general license extending sanctions relief to certain Belarusian entities.[367] More drastically, in the event of an impending Suwalki crisis, Washington can communicate that if Minsk acquiesces to, facilitates, or participates in an invasion, it should anticipate a significant NATO counter-strike.[368] Whereas, as Pifer suggests, U.S. planners will be "careful about the targets we hit in Russia" due to fears of inadvertent escalation through incidental damage to air defense or command and control systems, they will "not be so careful" in Belarus.[369] The U.S. military can accordingly convey a credible threat: stay out of the fight or "bear the full brunt" of the Allied response.[370]

Engagement with Belarus could, of course, backfire. Hodges cites alleged NATO attempts to "tear" Belarus from Russia as a development that could precipitate a Russia-backed coup to remove President Lukashenko and create a "vassal state."[371] As Kroenig asserts, Belarus

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364. Matthew Lee, *Pompeo Says the U.S. Can Supply Belarus with 100% of Oil, Gas*, ASSOC. PRESS (Feb. 1, 2020), *available at* https://apnews.com/863371d1353f29fb38b27fe0e5027b8e (last visited Nov. 18, 2020).

365. Pifer interview, *supra* note 110.

366. Hodges, Bugajski & Doran, *supra* note 4, at 44.

367. *See* Evan Abrams, *OFAC Renews Belarus Sanctions Relief*, STEPTOE INT'L COMPLIANCE BLOG (May 2, 2018), *available at* https://www.steptoeinternationalcomplianceblog.com/2018/05/ofac-renews-belarus-sanctions-relief/ (last visited Nov. 18, 2020).

368. *See* Hodges, Bugajski & Doran, *supra* note 4, at 44.

369. Pifer interview, *supra* note 110. Pifer by no means suggests indiscriminate attacks that could violate the law of armed conflict. On the contrary, he argues that NATO operations against Russia would be carefully calibrated to avoid escalation to the point of Russian tactical or even strategic-level nuclear deployments. Given that Belarus does not possess equivalent nuclear or conventional capabilities, NATO planners would not need to exercise the same restraint before authorizing strikes against military objectives. *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(4)(b), June 8, 1997, 16 I.L.M. 1391.

370. *Id.*

371. Hodges, Bugajski & Doran, *supra* note 4, at 29 (this scenario could unfold with or without active U.S. efforts to actively court Minsk, as Moscow could employ disinformation

has "so little freedom of maneuver" that unless NATO were to offer membership, "there is not much it can do so long as Russia maintains military forces there."[372] Given the inevitability of considerable Russian hostility to such a proposition, particularly in light of past opposition to NATO enlargement into former Soviet territory,[373] the United States should proceed cautiously in any engagement in Belarus, neither expecting nor necessarily desiring an immediate return.

VI. CONCLUSION

At first glance, linkages between Russia's deployment of the SSC-8 and the Gap appear attenuated at best. Upon closer analysis, however, the missile's unique capabilities—range, mobility, accuracy, and stealth—permit the Kremlin to conduct precisely the manner of conventional strike necessary to prevent NATO reinforcements from reopening the Gap and recapturing lost Baltic territory. While the overt assault that the doomsday scenario portends is unlikely to materialize in the immediate future, the threats that the SSC-8 poses to NATO forces and infrastructure are already here. The Alliance must therefore undertake a critical evaluation of and formulate innovative solutions to the latent vulnerabilities that have consequently emerged. The prescriptions that this paper outlines are by no means guaranteed to avert these challenges, even if pursued vigorously and with a presently wanting spirit of multilateral unity. Still, even the act of exploring options in these realms will serve the crucial deterrent purposes of conveying the gravity with which NATO views the Russian peril and signaling the credibility of its commitment to resist and reverse any potential aggression.

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to craft a narrative blaming NATO for ensuing disorder and providing cover for a "military Anschluss").

372. Kroenig interview, *supra* note 18.

373. *See, e.g.*, Janusz Bugajski, *Why Moscow Fears NATO*, CTR. FOR EUR. POL'Y ANALYSIS (Feb. 7, 2018), *available at* https://www.cepa.org/why-moscow-fears-nato (last visited Nov. 19, 2020).

The Practices of Private Global Norm Production and Intellectual Property Epistemic Communities

P. Sean Morris*

ABSTRACT

This article considers the formation of private global norm production through technical standardization and e-commerce. The article frames these norm-generation developments through the lens of epistemic communities and the influence they have as private actors over their economic self-interests in the global legal system. The epistemic generation of norms are acute in many areas and sub-areas of the law; hence the discussion in this article focuses on technical standardization, e-commerce, and to some extent, online dispute resolution. The discussion also, implicitly and explicitly, relates to their relationship to intellectual property rights. These discussions can offer insight into how certain international legal norms emerge relating to internet governance. Thus, the article considers arguments from an international law perspective and then frames the discussion around the notion of epistemic communities. This article's assertions partially represent the different epistemes in technical standardization and e-commerce and, therefore, makes two main arguments. The first argument is that technical standardization, as a result of private norms, represents how epistemic communities engage in the production of private global norms. The second argument is that the practices of certain epistemic communities in e-commerce, where intellectual property rights are relevant, further add to the legal construction of global private norms. The observations in this article are only meant to show the power of epistemes that are or have been active in internet governance, e-commerce, and frame their role in a contextual analysis based on international law or the evolution towards the privatization of international law that has been evolving. In that regard, the discussions are beneficial to the normative aspects of global norm production, especially when the legal effect of norms and rules developed through practice is relevant to how we understand some of the developments in the international legal order.

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I. INTRODUCTION

This article deals with the global nature of norm production by developing a narrow understanding of two sets of private actors from the perspective of epistemic communities.[1] Focusing on those involved in technical standardization and matters relating to e-commerce, from a dispute resolution and legal point of view, demonstrates the importance of these epistemes for internet governance. The discussion, however, is not about setting out at length the legal nuances of either group as epistemic communities.[2] Rather, I briefly frame the discussion against the backdrop of international law, then introduce epistemic communities as a legal concept. Therefore, at times, the discussion relates to the epistemic communities in global intellectual property norm-generation, which affect contemporary internet governance and the core issues of technical standardization and e-commerce. These discussions are only snippets of a broader framework of private actors as epistemic communities and the creation of private norm production within the international legal system. The epistemic communities this article discusses give us a unique understanding of how the norms that shape global rules for particular areas in internet governance, and the spillover these norms have on intellectual property rights for questions relating to settling online disputes for intellectual property infringement. This exploration is especially important for understanding how, in other sectors, epistemic communities shape the globalization of law, thereby

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1. Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992) (defining epistemic communities as: "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area.") With this starting point, I also seek to extend the conception of the term in this article to cover related areas or use the term interchangeably. Hence, the reader may sometimes encounter "non-state actors"; "private actors"; and pointedly, "technical standard setters" for the internet, or other professional networks in relation to e-commerce. All these describe the same set of professional networks and private actors or *epistemes* for purposes of discussion in this article.

2. *See, e.g.*, JEAN D'ASPREMONT, INTERNATIONAL LAW AS A BELIEF SYSTEM (2017); S.I. Strong, *Clash of Cultures: Epistemic Communities, Negotiation Theory, and International Lawmaking*, 50 AKRON L. REV. 495 (2017); Stéphane Enguéléguélé, *Penal Epistemic Communities and the Making of Criminal Law Norms*, 40 DROIT ET SOCIÉTÉ 563 (1998); Lisa Toohey, *Accession as Dialogue: Epistemic Communities and the World Trade Organization*, 27 LEIDEN J. INT'L L. 397 (2014); Timothy L. Meyer, *Epistemic Institutions and Epistemic Cooperation in International Environmental Governance*, 2 TRANSNAT'L ENV. L. (2013); Charlotte Ku, *The ASIL as an Epistemic Community*, 90 AM. SOC'Y INT'L L. PROC. 584 (1996); Jan Klabbers, *On Epistemic Universalism and the Melancholy of International Law*, 29 EUR. J. INT'L L. 1057 (2018).

influencing how states eventually sign treaties in the international economic system.[3] In this regard, epistemic communities validate the functions and rules of public international law—not the interests of the state, per se. I posit that this occurs in the interest of the private governance mechanisms that drive globalization and thereby privatize public international law through the process of global norm production.[4]

In such light, epistemic communities should be partly seen as private governance mechanisms, similar to what Gunther Teubner describes as an explosion "of *lex mercatoria* and other practices of 'private' global norm production."[5] This article investigates how the production of global norms emerge in certain sectors using private governance mechanisms as the context. Thus, this article partly considers the technical standardization process used by the various coalitions of epistemic communities, and the new *corpus of economic merchants* and their legal interest organizations within global (online) commerce and governance.[6]

The adoption of certain treaties by states, where epistemic communities have been heavily involved, such as the Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application

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3. *See, e.g.*, TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE GLOBAL ECONOMY (2011); DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY (2018).

4. *See* P. Sean Morris, *From Territorial to Universal-The Extraterritoriality of Trademark Law and the Privatizing of International Law*, 37 CARDOZO ARTS & ENT. L.J. 33 (2019) (although at the time of this article, I am still pursuing aspects of this argument in a more elaborate form, I've earlier discussed parts of the privatization paradigm using intellectual property rights). *See, e.g.*, A. CLAIRE CUTLER, PRIVATE POWER, AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY (2003); POWER IN GLOBAL GOVERNANCE (Michael Barnett & Raymond Duvall eds., 2004); MARIE-LAURE DJELIC & SIGRID QUAK, TRANSNATIONAL COMMUNITIES: SHAPING GLOBAL ECONOMIC GOVERNANCE (2012); TRANSNATIONAL GOVERNANCE: INSTITUTIONAL DYNAMICS OF REGULATION (Marie-Laure Djelic & Kerstin Shalin-Andersson eds., 2006); Miles Kahler & David A. Lake, *Governance in a Global Economy: Political Authority in Transition*, 37 PS: POL. SCI. & POL. 409 (July 2004); THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002) (relating to private governance and globalization).

5. GLOBAL LAW WITHOUT A STATE XIV (Gunther Teubner ed., 1997) (the book in general looks at legal pluralism in the context of globalization and in particular the phenomenon of "*lex mercatoria*, the transnational law of economic transactions" as "the most successful example of global law without a state"). *Id.* at 3.

6. *See, e.g.*, MILTON L. MUELLER, NETWORKS AND STATES: THE GLOBAL POLITICS OF INTERNET GOVERNANCE (2010); Neha Mishra, *Building Bridges: International Trade Law, Internet Governance, and the Regulation of Data Flows*, 52 VAND. J. TRANSNAT'L L. 463 (2018); Shamel Azmeh et al., *The International Trade Regime and the Quest for Free Digital Trade*, 22 INT'L STUD. REV. 671 (2020).

of Sanitary and Phytosanitary Measures (SPS),[7] suggests the endorsement of the lawmaking activities that epistemic communities are engaged in. The SPS and TBT Agreements in the World Trade Organization (WTO), for example, are based on certain technical standards and represent and promote the private economic interests of non-state actors.[8] Arguably in that regard, states are effectively promoters of the private rules of economic merchants in public international law; it thereby shifts the center of gravity of international rule-making away from states.[9] Epistemic communities are specialists' global networks that, to quote Teubner, form "the new living law of the world" and as such are "global networks of an economic, cultural, academic or technological nature."[10] I interpret Teubner's formulation of *living law* to partially include the role of epistemic communities in global lawmaking. That role includes the generation of international norms, private production of global treaty norms in technical standardization, and allied rules on intellectual property relating to e-commerce.[11] These

7. *See, e.g.*, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement]; Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement]; Agreement on Technical Barriers to Trade, June 1, 1995, WTO Agreement, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

8. Appellate Body Report, *Eur. Cmtys. – Measures Prohibiting the Imp. and Mktg. of Seal Prods.*, ¶ 5.1.3., WTO Doc. WT/DS400/AB/R (adopted May 22, 2014) [hereinafter EC–Seals] (discussing the framing of technical standards under the TBT Agreement). *See also* Steven Bernstein & Erin Hannah, *Non-State Global Standard-Setting and the WTO: Legitimacy and the Need for Regulatory Space*, 11 J. INT'L ECON. L. 575 (July 2008); Eva van der Zee, *Disciplining Private Standards Under the SPS and TBT Agreement: A Plea for Market-State Procedural Guidelines*, 52 J. WORLD TRADE 393 (2018); Michael M. Du, *The Regulation of Private Standards in the World Trade Organization*, 73 FOOD & DRUG L.J. 432 (2018) (all discussing the relation to the private standards under the TBT and SPS Agreements).

9. *See also* Buthe & Mattli, *supra* note 3; *see generally* Kevin Davis et al., *Indicators as a Technology of Global Governance*, 46 L. & SOC'Y REV. 71, 83 (2012) (discussing standard-setting in general).

10. Teubner, *supra* note 5, at 7. (Teubner himself never used the phrase epistemic communities, but there is no doubt that his formulations of global networks are not far from this term. In any event, one of the phenomena that Teubner identified as having epistemic communities' characteristics is "the boundaries of global law" by "invisible colleges," "invisible markets and branches," "invisible professional communities," "invisible social networks" that transcend territorial boundaries). *Id.* at 7-8. *See also* Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. (1992). (This latter formulation of epistemic communities by Haas is widely discussed in the social sciences literature and is the basis for the conception of epistemic communities discussed in this article).

11. Data and privacy protection are sample allied areas that interact with intellectual property rights from an online perspective, for general discussions; *see* SERGE GUTWIRTH,

developments are often due to the role of private economic merchants who often formulate and direct the agenda of global rulemaking.[12] Historically, the role of private economic merchants in the intellectual property sphere may be traced to the 1870s and 1880s, especially in the emergence of the Berne and Paris Conventions.[13]

Generally, one appeal of intellectual property rules to the system of public international law is that intellectual property law, as part of the broader corpus of private law, are *refined rules* of legality and as such are useful to interpret the ambiguities in international law that pertain to global economic transactions.[14] What is clearly observable from an *inter-systemic* dance of intellectual property rules and their public international law character is that international law's narrative has created a new language that is accented by the *fineness* of private law and the *elegance* of economic merchants' norms.[15] Therefore, if private law rules are present in public international law's construction of intellectual property then there are grounds to demonstrate how, within certain areas, the finesse of such private law rules is a result of epistemic communities incorporating private law norms into the international legal system.[16]

RONALD LEENES, AND PAUL DE HERT, DATA PROTECTION ON THE MOVE: CURRENT DEVELOPMENTS IN ICT AND PRIVACY/DATA PROTECTION (2016); Daniel Gervais, *Exploring the Interfaces Between Big Data and Intellectual Property Law*, 10 J. INTELL. PROP. INFO. TECH & ELEC. COM. L. 3 (2019).

12. *See* Buthe & Mattli, *supra* note 3.

13. For an overview of arguments discussing the strong developments of intellectual property protection in recent years. *See, e.g.*, Julien Chaisse & Xinjie Luan, *Revisiting the Intellectual Property Dilemma: How Did We Get a Strong WTO IPR Regime?*, 34 SANTA CLARA HIGH TECH. L.J. 153 (2018); Andreas Wechsler, *WIPO and the Public-Private Web of Global Intellectual Property Governance*, 4 EUR. Y.B. INT'L ECON. L. 413 (2013); Paris Convention for the Protection of Industrial Property, 20 March 1883, 828 U.N.T.S. 305 [hereinafter Paris Convention]; Berne Convention for the Protection of Literary and Artistic Works, 24 July 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention].

14. Discussing private law in an international law context is, of course, a delicate matter, but for the gist of what I am getting at with my link of private law and international law as refined rules, *see, e.g.*, Richard Epstein, *The Natural Law Bridge Between Private Law and Public International Law*, 13 CHI. J. INT'L L. 47 (2013). For a more extreme argument, where the assertion is that many public international lawyers hide their rhetoric in private law rules, *see* Ralf Michaels, *Private Lawyer in Disguise: On the Absence of Private Law and Private International Law in Martti Koskenniemi's Work*, 27 TEMP. INT'L & COMP. L.J. 499 (2013).

15. *See also* Benedetta Ubertazzi, *Intellectual Property Rights and Exclusive Jurisdiction (by Reason of Matter): Between Private International Law and Public International Law*, 10 ANNUARIO ESPANOL DER. INT'L PRIV. 183 (2010); Sung Pil Park, *The Coordinating Role of Public International Law: Observations in the Field of Intellectual Property*, 9 J.E. ASIA & INT'L L. 321 (2016).

16. *But see* Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (1927); Valentina Vadi, *Through the Looking-Glass: International Investment Law Through the Lens of a Property Theory*, 8

But perhaps the most important observation is that international legal literature has not explored the inter-systemic relationship between intellectual property rules and public international law through a theory that recognizes the *global norm production* of economic merchants and epistemic communities in intellectual property.[17] States alone are no longer the supreme actors and initiators of international law. Epistemic communities have been active participants in international law-making, to the point where they design and control all the formalities of modern international law.[18]

MANCHESTER J. INT'L L. 22 (2011); Christopher May, *Cosmopolitan Legalism Meets Thin Community: Problems in the Global Governance of Intellectual Property*, 39 GOV'T & OPPOSITION 393 (2004). *See also*, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 ICJ, p. 178 (Apr. 11) (confirming the role of non-state actors in international law).

17. The international political economy literature on intellectual property has, to some extent, covered this relationship, but not necessarily from a legal point of view, or, at least invoke rational-legal arguments that justify the evolution of international intellectual property law. For some of the discussions in the international political economy literature, *see, e.g.*, CLAIRE CUTLER, VIRGINIA HAUFLER & TONY PORTER, PRIVATE AUTHORITY IN INTERNATIONAL AFFAIRS (1999); Claire Cutler, PRIVATE POWER, AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY (2003); SUSAL SELL, PRIVATE POWER PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (2003). Some of the early general literature offering a critical analysis of intellectual property in the global economic system include, GAIL EVENS, LAWMAKING UNDER THE TRADE CONSTITUTION: A STUDY IN LEGISLATING BY THE WORLD TRADE ORGANIZATION (2000); KEITH MASKUS, PRIVATE RIGHTS AND PUBLIC PROBLEMS: THE GLOBAL ECONOMICS OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY (2012); DUNCAN MATTHEWS, GLOBALISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT (2002); CHRISTOPHER MAY, A GLOBAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS: THE NEW ENCLOSURES? (2005); PETER DRAHOS & RUTH MAYNE, GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT (2002); DONALD RICHARDS, INTELLECTUAL PROPERTY RIGHTS, AND GLOBAL CAPITALISM: THE POLITICAL ECONOMY OF THE TRIPS AGREEMENT (2003); PETER YU, INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE (2007). More recent works include, THOMAS DIETZ, GLOBAL ORDER BEYOND LAW: HOW INFORMATION AND COMMUNICATIONS TECHNOLOGIES FACILITATE RELATIONAL CONTRACTING IN INTERNATIONAL TRADE (2014); MONICA HORTEN, THE CLOSING OF THE NET (2016); NATASHA TUSIKOV, CHOKEPOINTS: PRIVATE REGULATION ON THE INTERNET (2017); HANNS ULLRICH, PETER DRAHOS & GUSTAVO GHIDINI, KRITIKA: ESSAYS ON INTELLECTUAL PROPERTY (2018); ROCHELLE DREYFUSS AND ELIZABETH SIEW-KUAN NG, FRAMING INTELLECTUAL PROPERTY IN THE 21ST CENTURY: INTEGRATING INCENTIVES, TRADE, DEVELOPMENT, CULTURE AND HUMAN RIGHTS (2018); ROCHELLE DREYFUSS & JUSTINE PILA, THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW (2018).

18. *See* Buthe and Mattli, *supra* note 3, at 5. The TRIPS Agreement on Trade-Related Aspects of Intellectual Property Rights (Apr. 15, 1994); Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1869 UNTS 299, is often said to be largely due to how epistemic communities such as the Intellectual Property Committee (IPC) a loose gathering of business titans and corporations that was formed to influence the negotiation of the TRIPS Agreement influenced its outcome; *see also* SUSAN

By all accounts, as the Preamble of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement)[19] acknowledges that intellectual property rights are private rights (of economic merchants) that require public international law to play a role as it recognizes "that intellectual property rights are private rights."[20] The successful implementation of the TRIPS Agreement is one example of where epistemic communities influenced the international lawmaking process by *coercing* states to privatize public international law.[21] In other words, the protection of private intellectual property rights, under public international law, facilitates the formation of global rules, thereby increasingly shifting the focus of public international law to matters of private law (commercial). I have discussed elsewhere some of the arguments that relate to the privatization of international law from an intellectual property perspective.[22]

SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (2003); Duncan Matthews, *The Role of International NGOs in the Intellectual Property Policy-Making and Norm-Setting Activities of Multilateral Institutions*, 82 CHI.-KENT L. REV. 1369 (2007); Baogang He & Hannah Murphy, *Global Social Justice at the WTO? The Role of NGOs in Constructing Global Social Contracts*, 83 INT'L AFF. 707 (2007); Erin Hannah, *NGOs and the European Union: Examining the Power of Epistemes in the EC's TRIPS and Access to Medicines Negotiations*, 7 J. CIV. SOC. 179 (2011); CAROLYN DEERE, THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES (2009); Steve Charnovitz, *Opening the WTO to Non-Governmental Interests*, 18 FORDHAM INT'L L.J. 173 (2000); JAYA WATAL & ANTHONY TAUBMAN, THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS (2015).

19. Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1869 UNTS 299.

20. Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1869 UNTS 299. Preamble (4th recital) ("intellectual property rights are private rights"). *See* China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (WT/DS362/R), 26 January 2009, para. 7.247 (where the panel confirmed that provisions of the TRIPS Agreement reflects private rights: "This is consistent with the nature of intellectual property rights as private rights, as recognized in the fourth recital of the preamble of the TRIPS Agreement").

21. *See generally*, Deere, *supra* note 18 (discussing how developing countries were essentially coerced to implement the TRIPS Agreement); Christopher May, *Learning to Love Patents: Capacity Building, Intellectual Property and the (Re)production of Governance Norms in the 'Developing World' in* REGULATING DEVELOPMENT: EVIDENCE FROM AFRICA AND LATIN AMERICA (Edmund Amann ed. 2006) 65-98.

22. *See also*, Morris, *supra* note 4; P. Sean Morris, *To What Extent Do Intellectual Property Rights Drive the Nature of Private International Law in the Era of Globalism?*, 28 IOWA TRANSNAT'L L. & CONTEMP. PROBS. 421 (2019); P. Sean Morris, *Private Intellectual Property Regulation in Public International Law*, 26 U.C. DAVIS J. INT'L L. & POL. 147; Annabelle Bennett & Sam Granata, *When Private International Law Meets Intellectual Property Law – A Guide for Judges in* THE HAGUE: HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW; GENEVA: WORLD INTELLECTUAL PROPERTY ORGANIZATION (2019)

This process of globalization, driven by private economic power, affects *how* laws and treaties are created in the global economy.[23] One reason for the importance and influence of these private economic actors, seen through the lens of epistemic communities, is their influence beyond the formal control of the nation-state. My focus is to demonstrate how the law and legal certainty account for the emergence of technical standards and intellectual property concerns in e-commerce and to give some insights into the legal effect[24] of "privatized norm-making."[25]

II. INTERNATIONAL LAW: A RATIONAL COORDINATION

The use of international law in private law matters is undoubtedly a complex issue. However, international law is required to evaluate and solve complex questions that relate to jurisdiction and private law norms that are presented in international disputes.[26] The precise rules and treaties in international law may vary depending on the complexity of the

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(these works sets out different paradigms of the privatization phenomenon of international law from intellectual property perspectives).

23. There is a growing body of work that examines the process of economic globalization from constitutionalization methodological perspectives. What separates my work from theirs is my focus on the *process* and *design* of the international rules that relate to private rights in the intellectual property field, and the subsequent *coercion by epistemic communities* of states to sign international treaties and lawmaking procedures. *See generally* Kennedy, *supra* note 3; EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE (2014); BRYAN MERCURIO & KUEI-JUNG JI, SCIENCE, AND TECHNOLOGY IN INTERNATIONAL ECONOMIC LAW: BALANCING COMPETING INTERESTS (2013); JONATHAN NITZAN & SHIMSHON BICHLER, CAPITAL AS POWER: A STUDY OF ORDER AND CREORDER (2009); DANIEL WOODLEY, GLOBALIZATION AND CAPITALIST GEOPOLITICS: SOVEREIGNTY AND STATE POWER IN A MULTIPOLAR WORLD (2015). For a discussion on the constitutionalization debate *see, e.g.*, JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009); GAVIN ANDERSON, CONSTITUTIONAL RIGHTS AFTER GLOBALIZATION (2005); DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE (2008); LINDA YUEH, THE LAW, AND ECONOMICS OF GLOBALIZATION: NEW CHALLENGES FOR A WORLD IN FLUX (2009); MARCELLO VARAELLA, INTERNATIONALIZATION OF LAW: GLOBALIZATION, INTERNATIONAL LAW AND COMPLEXITY (2014); JEAN-BERNARD AUBY, GLOBALIZATION, LAW AND THE STATE (2017); WILLIAM COLEMAN, PROPERTY, TERRITORY, GLOBALIZATION: STRUGGLES OVER AUTONOMY (2011).

24. *See, e.g.*, CHRISTOPHER MAY, THE RULE OF LAW: THE COMMON SENSE OF GLOBAL POLITICS (2014); *see also* STEPHEN GILL & CLAIRE CUTLER, NEW CONSTITUTIONALISM AND WORLD ORDER (2014).

25. On this terminology *see* Saskia Sassen, *The State and Economic Globalization: Any Implications for International Law*?, 1 CHI. J. INT'L L. 109, 115 (2000).

26. *See, e.g.*, Barcelona Traction, Light & Power Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 3 (Feb. 5); Barcelona Traction, Light & Power Ltd. (Belg. v. Spain), Judgment, 1964 I.C.J. 6 (July 24).

case, the territory of concern, the private law matter—such as an intellectual property issue—and the role of the internet.[27] Not all rules of international law may apply to a particular case, but international law is often a significant factor that contributes to the outcome of complex cases relating to private law.[28] Apparent *conflicts* in the law demonstrate how domestic private law norms have been transposed onto international law and lend credence to the argument that private law norms are an important aspect of modern international law.[29] International law is even more significant to laws that relate to economic transactions over the internet and how private norms end up in international treaties.[30]

International law's contemporary thinkers often embrace *old approaches* to the legal field, such as legal realism,[31] and in doing so keep

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27. From the perspective of this article, the latter example of the internet, is how some intellectual property-related treaties are handled in different cases where the internet infringement of property rights are the core concerns, which oftentimes raises questions about territoriality and jurisdiction, *see, e.g.*, Google Inc. v. Equustek Solutions Inc. (2017) 1 S.C.R. 824 (Canada). For general discussions *see also*, Morris, *supra* note 22; Elisabeth Fiordalisi, *The Tangled Web: Cross-Border Conflicts of Copyright Law in the Age of Internet Sharing*, 12 LOY. U. CHI. INT'L L. REV. 197 (2015).

28. *See, e.g.*, Barcelona Traction, *supra* note 26. Internet jurisdiction cases that involve intellectual property rights, in the long run, will be a concern for privacy international law, not necessarily international law. This idea is further complicated where the TRIPs Agreement referenced the domestic privacy laws of states to enforce intellectual property rules; this means states must also consider the "differences in national legal systems."

29. *See, e.g.*, Annelise Riles, *The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State*, 56 AM. J. COMP. L. 605, 618 (2008) (arguing that the global private law regime is "persuasive among those who critique the delegation of state power to global private authorities"). *See also* VALENTINA VADI, ANALOGIES IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 3 (2015) (highlighting the need to use "public international law sources" over "private law sources" for investment arbitration).

30. For example, a request for consultation by Qatar to the WTO where intellectual property rights, e-commerce, and blocking website forms general claims is only a view into the complex arena of international law and e-commerce, or in contemporary language, "digital trade." *See* United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, Request for Consultations by Qatar, WT/DS526/11, 04 Aug. 2017. *But see* Google Inc. v. Equustek Solutions Inc. (2017) 1 S.C.R. 824 (Canada); *see also* Mishra, *supra* note 6; Milton Mueller, John Mathiason, & Hans Klein, *The Internet and Global Governance: Principles and Norms for a New Regime*, 13 GLOBAL GOVERNANCE 237 (2007); Yves Schemeil, *Global Governance: Evolution and Innovation in International Relations in* GOVERNANCE, REGULATION, AND POWERS ON THE INTERNET (Eric Brousseau, Meryem Marzouki, & Cecile Meadel eds., 2012); Susan A. Aaronson and Patrick Leblond, *Another Digital Divide: The Rise of Data Realms and its Implications for the WTO*, 2 INT'L ECON. L. 1 (2018).

31. *See, e.g.*, BENJAMIN COATES, LEGALIST EMPIRE: INTERNATIONAL LAW AND AMERICAN FOREIGN RELATIONS IN THE EARLY TWENTIETH CENTURY (2016); *see also* Brian Leiter, *Legal Realism, Old and New*, 47 VAL. L. REV. 949 (2013); Harry Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799 (1961).

the boat steady. However, often there are new approaches to international law that not only rock the boat but also drive the currents further onto the high seas of world politics.[32] Scholars, trained both in international and private law, may find solace in discourses on international law that speak of "law and economics,"[33] "private law analogies in international law,"[34] "global administrative law,"[35] or "transnational law".[36] Yet, these divergent approaches to the discourse of international law indicate that there is a missing link that could hold together the fragmented doctrinal discourses of international law in a rational and coordinated fashion.[37]

I am merely giving an account of the justifications of private law practices and private norms in public international law from the epistemic communities' perspective, not advocating for a new approach to international law. This is, in part, the privatization paradigm.[38] Thus, it is useful to examine briefly the role of rationalism[39] in international legal order to help better explain the *dialectical necessity* of private law and norms in public international law. In short, my argument is that the privatization of international law is a special case and international legal

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32. *See, e.g.*, Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81 (1991); B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES (2d ed. 2017).

33. For works that generally speak of law and economics as such, *see* John R. Commons, *Law and Economics*, 34 YALE L.J. 371 (1924); Richard H. Coase, *Law and Economics at Chicago*, 36 J.L. & ECON. 239 (1993). Recent works addressing a law and economics approach in the context of international law include: Ronald A. Cass, *Economics and International Law*, 29 N.Y.U. J. INT'L L. & POL. 473 (1996); Joel P. Trachtman, *The Methodology of Law and Economics in International Law*, 6 INT'L L.F. 47 (2004); Anne van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT'L L.J. 421 (2014).

34. *See* Lautherpacht, *supra* note 16.

35. *See* Benedict Kingsbury, *The Concept of Law in Global Administrative Law*, 20 EUR. J. INT'L L. 23 (2009).

36. *See generally* Harold H. Koh, *Why Transnational Law Matters*, 24 PENN ST. INT'L L. REV. 745 (2006); Roger Cotterrell, *What is Transnational Law*, 37 L. & SOC. INQUIRY 500 (2012).

37. The rational choice theory is possibly an indication of how to gauge the behavior of states or complex systems. *See also* Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. R. 641; John Ferejohn & Debra Satz, *Unification, Universalism, and Rational Choice Theory*, 9 CRITICAL REV. 71 (1995); Alexander Thompson, *Applying Rational Choice Theory to International Law: The Promises and Pitfalls*, 31 J. LEG. STUD. 285 (2002). For some provocative discussions on the state-centric nature of international law that does not focus on international economic law, *see* IAN HURD, HOW TO DO THINGS WITH INTERNATIONAL LAW (2017).

38. *See also* Morris, *supra* note 11.

39. ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2008); Eric Posner & Jack Goldsmith, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective in* JOHN OLIN WORKING PAPER SERIES 108 (2000).

scholars must rationally apply the private law norms and principles that offer a rational solution to legal questions and can keep international law intact.[40]

One scholar has developed an innovative and appealing structure of rationality, which among other things, creates a *justification nexus* for actions, beliefs, and desires based on a philosophical construction of a "coherence theory."[41] The coherence theory applies to developments in international law as one way of justifying new developments or to explain the rationality of new arguments.[42] Hence, the interaction of private law norms in public international law can be partially justified through the coherence theory as it relates to how epistemic communities, as a belief system, exist in international law.[43] Robert Audi's work[44] is a reflection of the different approaches to international law: practical applications and theoretical propositions. However, it appears that the theoretical propositions in international law outweigh any of its practical applications and beg the question of whether international law is even law at all or useful as a matter of fact.[45]

In recent times, influential works that divide international law into theoretical testing grounds, such as *International Law as Belief System*[46]

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40. *See also* Thompson, *supra* note 32; Vadi, *supra* note 28; Kerry A. Chase, *Economic Interests and Regional Trading Agreements, The Case of NAFTA*, 57 INT'L ORG. 137; Lauge Poulsen and Emma Aisbett, *When the Claims Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65 WORLD POL. 273 (2013); *but see* Benedict Kingsbury, *The Concept of Law in Global Administrative Law*, 20 EUR. J. INT'L L. 23 (2009).

41. ROBERT AUDI, THE ARCHITECTURE OF REASON: THE STRUCTURE AND SUBSTANCE OF RATIONALITY 24, 46-48 (2001). Audi, for instance, explains that "coherence" relates in part to "the acquisition of concepts and their operation." *Id.* at 28. Audi notes: "Certain kinds of coherence among beliefs maybe even more than an often reliable sign of justification...coherence *is* in a way basic for justification..." *Id.* at 47.

42. *But see* Avery Katz, *Taking Private Ordering Seriously*, 144 U. OF PA. L. REV. 1745 (1996); Christoph Engel and Michael Kurschilgen, *The Coevolution of Behaviour and Normative Expectations: An Experiment*, 15 AM. L. ECON. R. 578 (2013); NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW (Rainer Hoffman ed., 1999).

43. *See also* JEAN D'ASPREMONT, INTERNATIONAL LAW AS A BELIEF SYSTEM (2017); HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933); Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. INT'L L. & POL. 1 (2007).

44. Audi, *supra* note 41.

45. For some critical discussions, *see* Anthea Roberts, Paul Stephan, Pierre-Hugues Verdier & Mila Versteeg, *Comparative International Law: Framing the Field*, 109 AM. J. INT'L L. 467 (2015).

46. *See generally* JEAN D'ASPREMONT, INTERNATIONAL LAW AS A BELIEF SYSTEM (2017).

and the classic *From Apology to Utopia*,[47] have maintained or gained ground as the default mode for cataloging the relevance of international law.[48] The theoretical propositions these works contain are hardly applicable or useful for the practical day-to-day application of international law that occurs through treaty interpretation, adjudications in international tribunals, and the more complex forums where private law collides with public international law. Yet the tragic irony is that the writings of professors of international law, esteemed legal commentators, or what the International Court of Justice (ICJ) Statute describes as "the teachings of the most highly qualified publicists" are a source of international law.[49] Therefore, from my perspective, this creates what I might call a *reverse syndrome*: on the one hand, publicists set the tone of international law; on the other hand, they practice international law through their participation in international adjudication.[50]

Perhaps Jean d'Aspremont is right to argue that international law is a belief system. In all likelihood, international law may be a belief system because beliefs are based on what we experience. Preeminent international legal scholars often experience international law through their gilded ivory towers; this may practically occur through the practices of Western-based tribunals and academic institutions. As a result, these international legal scholars have little contact with the realities of how international law is applied from a rational perspective—that is, how international law affects the underlying politics of a country that may, say, cause civil wars. Naturally, for an international legal scholar based in a location where a civil war is taking place, they may view the rational coordination of international law as a utopian engagement. The critic in me however cannot pursue these arguments here; suffice to say that, in the context of this article, international legal scholars are often engaged with the efforts of private actors to frame norms for the global legal system.[51] There are also good reasons to despise the applicability of

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47. *See generally* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2006).

48. *See generally* Akbar Rasulov, *From Apology to Utopia and the Inner Life of International Law*, 29 LEIDEN J. INT'L L. 641 (2016); Tarik Kochi, *Dreams and Nightmares of Liberal International Law: Capitalist Accumulation, Natural Rights and State Hegemony*, 28 L. & CRITIQUE 23 (2017); ANDREA BIANCHI, INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING (2016).

49. STAT. OF I.C.J. art. 38 ¶ 1(d) (2013).

50. *See also* Gillian Triggs, *The Public International Lawyer and the Practice of International Law*, 24 AUSTL. Y. INT'L L. 201 (2005).

51. Academic international lawyers often act as advisers to NGOs or in the creation of new procedures for international organizations. However, in most cases, the academic international lawyer generally approaches their role in a top-down fashion; that is, they are

international law when multinational corporations can hide behind the veil of international law to deny alleged expropriation of their patented drugs to treat HIV patients in developing countries.[52] In this example, it is a rational choice for the patent holder to reject the expropriation of his patents because he will end up without economic compensation. Under international law, the patent holder's decision to reject appropriation of their patent is justifiable because international law reflects the current state of play in the world legal order. In this scenario, the patent holder is protected by the WTO's TRIPS Agreement and other applicable instruments under international law.[53]

There needs to be a compromise to achieve a desirable outcome for private patent holders in state systems that desperately seek many patented medications at lower prices to assist those who have contracted illnesses like HIV.[54] Compromises can be achieved when a coordinated outcome, desirable to private rightsholders of the patent and the state, is reached, or by *amending international law* to better suit the state, including benefits for those suffering from communicable diseases. Such developments would give rise to a "practice-dependent" formula where rational coordination between the law and politics of private law rights in public international law can be established through "laws and policies whose authority is underwritten by some kind of reasoned argument."[55]

The benefit of the *reasoned argument* perspective to approach critical situations in international law, where the private law rights of economic entities are at risk, is that it can help create a *principle of reasonableness*. I posit that it would be dependent on the holder of the economic rights to allow compulsory licensing of his patented drug.

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primarily connected to the major global organizations, tribunals, and Western academic institutions, where they are able to exert their influence; *see also* Sondre Helmersen, *Finding 'the Most Highly Qualified Publicists': Lessons from the International Court of Justice*, 30 EJIL 509 (2011).

52. For a general discussion on the relationship between AIDS and compulsory licensing of patents as a result of the AIDS crisis in South Africa, *see* Florence Shu-Acquaye, *The Legal Implications of Living with HIV/AIDS in a Developing Country: The African Story*, 32 SYRACUSE J. INT'L L. & COM. 51 (2004).

53. *See* Trade-Related Aspects of International Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 319.

54. *See generally* Solomon F. Sacco, *A Comparative Study of the Implementation in Zimbabwe and South Africa of the International Law Rules that Allow Compulsory Licensing and Parallel Importation for HIV/AIDS Drugs*, 5 AFR. HUM. RTS. L.J. 105 (2005) (governments of Zimbabwe and South Africa should utilize the TRIPS agreements to further citizenry access to cheap anti-retroviral drugs).

55. *See* Peter Steinberger, *Rationalism in Politics*, 109 AM. POL. SCI. REV. 750, 758 (2015).

Under this approach, the *evil rigidity* of international law that helps protect a patented drug would be diluted. The second benefit of the reasoned argument approach is that it helps develop a dialectical necessity narrative that justifies the structure of private law rights in public international law. In both cases international law as a belief system and from a rational coordination perspective ends up being the winner, given that both approaches allow for the different parameters of international law to remain intact without shifting theoretical boundaries.

This perplexing situation, nevertheless, is "Audian,"[56] as it reflects structural rationality to justify the existence of private law rights in international law.[57] Furthermore, the situation allows international law to be applied as an instrument to protect the private rights of economic entities faced with situations that expropriate their investments and property. It is quite logical, after all, that international instruments dealing with the protection of intellectual property can be perplexing at times, and that the legal adjustments that states initiate from their rational perspectives to respond to potential global health crises can end up "undermining . . . interpretation as a rule-governed activity."[58]

For some notable scholars like Jan Klabbers,[59] it is evident that in international law there is a certain amount of *political obviousness*.[60] In that regard, it is difficult to mask whether any approach such as *old* legal realism; law and economics, rationalism, critical legal studies, etc., can bring about any practical changes. However, some victory can be claimed from using a long lens to examine the rationality of international law; if treaties, the core structure of contemporary international law, are interpreted in a rule-governed fashion, then this approach will mostly benefit private law rights that have permeated the treaty structure of public international law.[61]

The structure of contemporary global economic legal relations is highly dependent on treaties, as these contemporary treaties are often related to economic matters. As a result, most treaties contain provisions that have some function in how private law rights are interpreted, or how

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56. *See* AUDI, *supra* note 36.

57. *See id.* at 204-05 (discussing "global rationality," which implies separating truths and beliefs).

58. Jan Klabbers, *On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization*, 74 NORDIC J. INT'L LAW 405, 418 (2005) (discussing how international law is nothing more than political tools for states to deploy).

59. *Id.*

60. In general, I am thinking of the "Helsinki School"; *see, e.g.*, Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4 (1990).

61. *See, e.g.*, TRIPS Agreement, *supra* note 20, at 4th recital.

tribunals tend to acknowledge the existence of such private law rights.[62] Thus, rather than resorting to political rhetoric to justify international economic treaties, it is important for the practice of international law, with the support of tribunals, to explore creative and innovative ways to rationally interpret treaties. Moreover, the interpretation, function, and structure of the international legal system are generally framed in novel and innovative ways. This helps when searching for a legal solution. One could therefore argue that global economic legal relations are often accelerated because of the intersection of private law rights for economic entities in public international law. In this respect, private law norms in the international rules-based system of economic governance have given credence to Martti Koskenniemi's concept of culture of formalism, which I have rechristened as *the culture of privatization*.[63] For my purposes, one particular group of actors—epistemic communities—are crucial in this emerging culture of privatization.

III. FRAMING THE EMERGENCE OF EPISTEMIC COMMUNITIES: A PRIMER

Throughout the history of international law, specialized networks that are responsible for the economic interests of their merchant clients have helped shape how states participate in the field's development.[64] The theoretical development and doctrinal structure of epistemic communities should be understood as what Peter Haas describes as "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant

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62. *See* DANIEL PEAT, COMPARATIVE REASONING IN INTERNATIONAL COURTS AND TRIBUNALS (2019).

63. MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 503 (Cambridge Univ. Press, 2001) (discussing the culture of formalism).

64. For instance, the then-powerful East India Company has had its hands in many of the treaties the British signed during the height of colonialism. The East India Company, with the blessings of the British, would become a party to international treaties like the Treaty of Commerce between the East India Company and the Government of Nepal, E. India Co.-Nepal, Mar. 1, 1792. *See also*, Michael Mulligan, *The East India Company: Non-State Actor as Treaty-Maker in* NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT 39, 39-59 (2018). In the formation of recent treaties modern networks, such as various environmental activism professionals, have been influential participants during the development of certain international environmental treaties such as the, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243.

knowledge within that domain or issue area."[65] The networks that the Haasian version of epistemic communities relate to—taking into account, what Teubner describes as "global norm production"[66]—suggest that epistemic communities engage in the international coordination and development of international rules beyond the paradigms of the typical state. This occurs because international law is a broad construct with various sub-fields that represent different interests within the global community. Moreover, various hierarchies in the international lawmaking system can exert greater influence than others. Although Haas' all-encompassing description of epistemic communities covers various global level fields, for this article the description is adopted solely for developments in the world of e-commerce, online dispute resolution, and internet governance. Yet, it is still fitting to frame epistemic communities in the context of the process of international law development and as a theoretical construct to appreciate its full functional value.

From the late 19th century to the present, when economic matters became a focus of international law various non-state actors have been responsible for generating and designing the norms and subsequent treaties that states have signed, and have been responsible for creating other international rules, especially in intellectual property.[67] These non-

65. *See, generally,* Haas, *supra* note 4, at 74. Beyond Haas, the theory and definition of epistemic communities have caught the imagination of the academic community in various disciplines. Sometimes, the narratives on epistemic communities are framed under different linguistic guises such as transnational regulatory networks or private power authority, amongst many others. Some of the literature that address different policy or regulatory focus from a Haasian version of epistemic community include: MARGARET KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1st ed. 1998); DAVID HORNSBY, RISK REGULATION, SCIENCE, AND INTERESTS IN TRANSATLANTIC TRADE CONFLICTS (2013); PAUILIUS JURCYS, POUL KJAER, & REN YATSUNAMI, REGULATORY HYBRIDIZATION IN THE TRANSNATIONAL SPHERE (2013); SARA KUTHCHESFAHNI, POLITICS AND THE BOMB: THE ROLE OF EXPERTS IN THE CREATION OF COOPERATIVE NUCLEAR NON PROLIFERATION AGREEMENTS (2014); ARMIN VON BOGANDY & INGO VENZKE, IN WHOSE NAME? A PUBLIC LAW THEORY ON INTERNATIONAL ADJUDICATION (2014); YVES DEZALAY & BRYANT GARTH, LAWYERS AND THE CONSTRUCTION OF TRANSNATIONAL JUSTICE (2012); ELIES SLIEDREGT & SERGEY VASILIEV, PLURALISM IN INTERNATIONAL CRIMINAL LAW (2014); KATHERINE LYNCH, THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION 77-124 (2003); Michael Wailbel, *Interpretive Communities in International Law in* INTERPRETATION IN INTERNATIONAL LAW (2015).

66. *See* Teubner, *supra* note 5.

67. Most of the non-state actors that later contributed to the process of international rule-making began their efforts at a number of world fairs and international exhibitions held in places like Paris in the nineteenth century. An example was the Paris International Exposition of 1867 or 1899. A concern for many innovators and inventors at these exhibitions was how

state actors, I posit, fall into three categories that similarly make up the networks previously described by Haas.

The first category is the *invisible* college of international law.[68] This group is primarily composed of international legal academics that fall under certain umbrella groupings such as the *defunct* Russian Society of International Law,[69] and the International Law Institute (*Institute de Droit International*) that began in 1873 and is still functioning today.[70] Additionally, societies such as the American Society of International Law (founded in 1906)[71] and the Commission of Jurists that considered the laws of war set up in the wake of the 1897–1907 Hague Conventions are important[72] because they have contributed to international lawmaking as epistemic communities.

The second category of early epistemic communities are semi-private international networks. These networks are the non-governmental organizations (NGOs) of international legal relations; an example of an NGO is the *defunct* International Tin Council (ITC) (1956) that championed the International Tin Agreement of 1954.[73] This

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to guard their patents and copyrights displayed in the exhibits. During the ensuing years, various inventors pushed for international treaties that resulted in the Paris and Berne Conventions of 1883 and 1886 respectively as an example. For discussions on the exhibitions *see, e.g.*, Susanne Berthier-Foglar, *The 1889 World Exhibition in Paris: The French, the Age of Machines, and the Wild West*, 31 NINETEENTH-CENTURY CONTEXTS 129, 129-42 (2009); PAUL GREENHALGH, FAIR WORLD: A HISTORY OF WORLD'S FAIRS AND EXPOSITIONS FROM LONDON TO SHANGHAI 1851–2010 (2011); PAUL GREENHALGH, EPHEMERAL VISTAS: THE EXPOSITIONS UNIVERSELLES, GREAT EXHIBITIONS AND WORLD'S FAIRS: 1851–1939 (1988). During the latter years of the nineteenth century, two influential intellectual property non-state actors, AIPPI and Association Litteraire et Artistique Internationale (ALAI) emerged as guardians of the Paris and Bern Conventions.

68. The most resounding observation is that of Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217, 217-26 (1997).

69. *See* W.E. Butler & V.S. Ivanenko, *On the Russian Society of International Law (1880)*, 2 JUS GENTIUM US: J. INT'L HIST. 189, 189-99 (2017). The Russian Society of International Law founded in 1880 has no relations with the modern Russian Association of International Law.

70. *See* Thomas Barclay, *Institute of International Law*, 10 L. Q. REV. 348 (1894); James Brown-Scott, *The Institute of International Law*, 21 AJIL 716 (1927); Peter Macalister-Smith, *Institut de Droit International*, MAX PLANK ENCYCLOPAEDIA OF INT'L L. (2011).

71. Frederic Kirgis, *The Formative Years of the American Society of International Law*, 90 AJIL 559, 589 (1996).

72. *See, e.g.*, *Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, General Report*, 32 AJIL 1 (1938).

73. *See also* Sandhya Chandrasekhar, *Cartel in a Can: The Financial Collapse of the International Tin Council*, 10 NW. J. INT'L L. & BUS. 309 (1989); Roman Sadurska & Christine Chinkin, *The Collapse of the International Tin Council: A Case of State Responsibility*, 30 VA. J. INT'L L. 845 (1990).

example shows how epistemic community engagement in the international rulemaking system results in the development of an international treaty. This result also shows the significance of realizing that international coordination is sometimes a matter of public-private coordination, because private activities for the state's interests can be promoted by non-state actors.[74] What is interesting about these types of non-state actors, however, is how they derive authority and how that authority fits within the international instruments of policymaking.[75]

The third cohort of epistemic communities are those that represent the private economic activities of merchants in the modern global world. These are the various networks and international non-governmental organizations that are used for international policy coordination and participate in the informal process of rulemaking on the international plane. This type of epistemic community has been prominent in areas like intellectual property rulemaking. Historically, various non-state actors have been active in different interactions with the state and how private interests have driven states' obligations in the legal order.[76] The situation was no different with international intellectual property laws, shaping how they evolved from the mid-19th century to the present day.[77] Beginning with various expos, private networks, such as industrial property forerunners to the ALAI, would gather at 19th century world fairs like the Paris expositions, which lead up to the formation of the Paris and Berne Conventions.[78] In this regard, the most prominent examples of epistemic communities are those that influenced the formation of international intellectual property laws and other forms of "industrial property".[79] These epistemic communities are now recognized as the International Association for the Protection of Intellectual Property (AIPPI),[80] the *Association Litteraire et Artistique Internationale* (International Literary and Artistic Association, or ALAI), and more recently the Intellectual Property Committee (IPC) that championed the

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74. *See also* FE Koch, *Cartels as Instruments of International Economic Organization: Public and Private Legal Aspects of International Cartels*, 8 MOD. L. REV. 130 (1945).

75. *See also* NILS JANSEN, THE MAKING OF LEGAL AUTHORITY: NON-LEGISLATIVE CODIFICATION IN HISTORICAL CONTEXTS AND COMPARATIVE PERSPECTIVE (2010).

76. *See, e.g., supra* note 64.

77. *See also* Susan Sell & Christopher May, *Moments in Law: Contestation and Settlement in the History of Intellectual Property*, 6 REV. INT'L POL. ECON. 467, 484 (2001).

78. *See* Berne Convention for the Protection of Literary and Artistic Works (July 24, 1971), 828 U.N.T.S. 221; Paris Convention for the Protection of Industrial Property (Mar. 20, 1883), 828 U.N.T.S. 305.

79. Sell & May, *supra* note 77, at 484 (discussing industrial property).

80. *See also* H.A. GILL, *Objects of the AIPPI and its Influence on the Drafting and Amendment of the International Convention*, 44 TRADEMARK REP. 244 (1954).

TRIPs Agreement. These epistemic communities were integral to and are flexible for private property rightsholders, making them effective for legislative developments in international intellectual property law.

As knowledge elites, epistemic communities have managed to make international law accessible and dynamic by removing it from the static clutches of the state.[81] For the state, international law is only a policy initiative that can aid in (a) concluding treaties with other states, or (b) serving as a tool that offers concise diplomatic language during state inter-relations such as negotiations or crisis conferences. Beyond these paradigms, international law is not useful for the everyday operation of state functions because states will choose to resort to their *sovereign* domestic laws to solve conflicts.

In this regard, however, epistemic communities translate international law's language into the vocabulary of the state's main governing organs, such as the foreign or educational ministries that exist under the auspices of the state. Most importantly, epistemic communities also break the language of international law down into adverse components that threaten their survival, and as such may often face backlash due to their power and influence on the global stage. However, that is not the argument that I am pursuing in this article; rather, my argument is about the role epistemic communities play in the broader legal context and how they shape legal content and processes of global norm production.

Nevertheless, because the vocabulary of international law is highly specialized, it can be detrimental to epistemic communities whose interests may not necessarily align with those of the state. In this regard, the design, conclusion, and execution of a treaty by a state may be beneficial for the state–but at the other end, the industries and other private economic interests that an epistemic community represents may suffer adverse economic effects of such treaty outcomes.

Initiating an engagement that uses the vocabulary of international law's epistemic communities, such as an industry association or the national society of international law, may *decompartmentalize* any adverse components of international law to create mutually beneficial outcomes. The net contribution of these epistemic communities to international legal relations is that they help bring legislative developments to international law. Furthermore, they also provide powerful and innovative channels for normative mechanisms that support a specific economic ideology of the contemporary global state.

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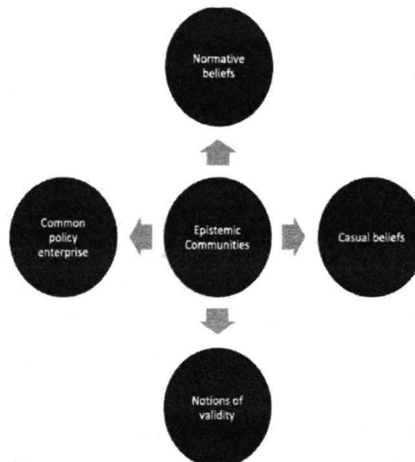
81. *See generally* INFORMAL INTERNATIONAL LAW-MAKING (Joost Pauwelyn, Ramses Wessel & Jan Wouters eds., 2012).

However, perhaps the main role of epistemic communities is that they challenge the state's hold on international law, and by challenging the state they develop their own power structure as the guardians of *their* realm in international law. This is only possible when epistemic communities can exploit their positions as powerful non-state actors in international legal relations, or when they command a specific role in international rulemaking and governance and they are able to initiate and design the content and structure of international legal instruments.

The power epistemic communities can build up and deploy in international legal relations is derived primarily from a set of characteristics[82] that allows them to coordinate international legal policy with successful outcomes. Considering such characteristics, epistemic communities can be selected by states[83] for the negotiation process of an international treaty (or, at least, drive the negotiation process using state representatives) that corresponds to their *shared normative and principled beliefs*.

Figure 1 illustrating the characteristics of an epistemic community per Haas



The Haasian characteristics of epistemic communities presuppose that the communities will engage in international policy coordination to

82. Haas, *supra* note 1, at 3 (identifying four characteristics: (1) shared normative and principled beliefs; (2) shared casual beliefs; (3) shared notions of validity; and (4) a common policy enterprise).

83. On similar arguments, *see generally* MATHIAS KEONING-ARCHIBUGI & MICHAEL ZURN, NEW MODES OF GOVERNANCE IN THE GLOBAL SYSTEM: EXPLORING PUBLICNESS, DELEGATION, AND INCLUSIVENESS (PALGRAVE, 2005).

exert their influence over state policies.[84] However, these characteristics exclude the relevance of other axiological traits that are ever-changing due to the shifting priorities of global governance. They also exclude possible negative economic factors that shape how much and to what extent states are willing to cede international policy coordination to epistemic communities.

Nevertheless, as Haas rightly argues, "members of transnational epistemic communities can influence state interests either by directly identifying them for decision-makers or by illuminating the salient dimensions of an issue from which the decision-makers may then deduce their interests."[85] Generally, most epistemic communities seek to influence state interests. Thus, the level of access they acquire to directly or indirectly convince states to back their common policy enterprise is crucial.

Although Haas's depiction of epistemic communities is still reverberating in academic literature, there are significant ways to depart from Haas's rationale for the existence of epistemic communities. For instance, Haas identifies the complexity test as one of the reasons for the state's increasing reliance on epistemic communities: "decision-makers have turned to specialists to ameliorate the uncertainties and help them understand the current issues and anticipate future trends."[86] Hence, the complex nature of issues, as per Haas, opens up various prospects for uncertainty and as such leads to the breakdown of operating procedures or a power vacuum.[87] Faced with these prospects, Haas argues that decision-makers turn to epistemic communities to (1) "provide advice about the likely results of various courses of action;" (2) "shed light on the nature of the complex interlinkages;" (3) "define the self-interests of a state;" and (4) "formulate policies."[88]

While acknowledging that Haas made some valid points, I contend that there is an alternative way to look at epistemic communities, especially from the perspective of public international law. My alternate argument is that epistemic communities privatized international law—that is, removed the state from the design and structure of international legal negotiations. In this light, such privatization is based on shared

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84. *Id.* at 3 (Haas discusses three dynamics of epistemic communities as a basis for their "casual logic": (1) uncertainty, (2) interpretation, and (3) institutionalization").

85. Haas, *supra* note 4, at 4.

86. *Id.* at 13.

87. *Id.* at 14. For example, Haas made the following observation regarding the power vacuum: "In the face of uncertainty...many of the conditions facilitating a focus on power are absent."

88. *Id.* at 15.

beliefs over or principled stances on an issue.[89] In this regard the state only functions as an agent of the epistemic communities, rather than as the views expressed by Haas.

IV. BETWEEN AUTHORITY AND LAWMAKING: AN EPISTEMIC COMMUNITY INTELLECTUAL PROPERTY ANALYSIS OF INTERNATIONAL LAW

Let me briefly set out an analysis of intellectual property under international law from the perspective of epistemic communities. I will use the term epistemic communities to broadly refer to a large coalition of non-state actors, such as a network of experts in academia or those who work through specialized organizations at the behest of private intellectual property rightsholders.

One advantage for private rightsholders who take part in the international intellectual property system is that they are able to gain an advantage over the international legislative process; this advantage includes when they participate as amicus curiae in international adjudications, or as protagonists or antagonists in investment claims involving intellectual property.[90] But any advantage gained by epistemic communities in either international rulemaking or international adjudication also creates divisions where ideological rifts are laid bare.

Although states may benefit from the input of epistemic communities during the international rulemaking process, states may also be at a disadvantage if different epistemic communities do not cooperate and find common ground on issues that are relevant to the international legal standing of the state. Nevertheless, if the legal consensus is that states use international law as political tools to further their own goals, then epistemic communities engage in the international process as channels for their economic self-interest. This is a win-win situation for both states and epistemic communities.

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89. *See, e.g.*, Peter Drahos, *Expanding Intellectual Property's Empire: The Role of the FTAs*, GRAIN (2003), *available at* https://www.grain.org/article/entries/3614-expanding-intellectual-property-s-empire-the-role-of-ftas (last visited Dec. 20, 2020) ((discussing the Advisory Committee on Trade Negotiations (ACTN) as a node in interlinked networks. The ACTN itself was a quasi-government body created by the United States Congress in 1974, however, the ACTN would later create the Intellectual Property Committee (IPC) in 1986 where its members were only private institutions (the major US corporations) that would, in turn, sit in the driver's seat during the Uruguay Round of the TRIPs negotiations)).

90. *See* Eli Lilly & Company v. The Government of Canada, ICSID Case No. UNCT/14/2, Final Award (16 March 2017) (where a number of intellectual property scholars were involved).

For the international intellectual property legal system, epistemic community approaches reflect their status as knowledge elites–they are innovative and sometimes bold meaning they can breakdown complex legal structures often misinterpreted by critics of the international intellectual property system. For example, while not all critics may understand the relevance of the utility doctrine and its application in international patent law, a non-state actor providing impartial expertise may dissect utility application as a function common to all domestic legal systems that have patent laws.[91] Although it is not uncommon to formally use the term "epistemic communities" as a broad description of non-state actors in the international legal system, at least one use of the term in this article relates to the formulation by Haas as a model of "network" with "authoritative claim"[92] to international norm production. Taking into account the Haasian version of epistemic communities, as briefly mentioned earlier and recapped here, it is important to further delineate these types of epistemic communities.

For purposes of the discussions here, there are three types of epistemic communities to consider. The first is specialized international non-governmental organizations (INGOs) that advocate policy issues for intellectual property rightsholders. The second type are those with a global reach, which are set up specifically to respond to and act as a check and balance system to international intellectual property treaties such as the Paris and Berne Conventions. For example, the AIPPI and its role as private gatekeeper of the Paris Convention, and conversely, the ALAI in a similar role for the Berne Convention demonstrate this point. Finally, the third type are academic experts who use their position to take part in various aspects of intellectual property rulemaking, adjudication, and advocacy in both domestic and international settings.[93] The common theme found among all three types of epistemic communities here is that they are influenced by the existence of intellectual property law and rights and, as such, create a set of relations interlinked with private rightsholders and the state.

One particular distinction that must be made between the epistemic communities I set out here and their interlinkage with the state is that the state has no obligation toward them, as they are not state-sponsored

91. In some jurisdictions, the patent utility doctrine only stipulates that a patent must be useful. *See* AstraZeneca Canada Inc. v. Apotex, [2017] S.C.R. 943 (Can.); *see generally* Jay Erstling, Amay Salmela & Justin Woo, *Usefulness Varies by Country: The Utility Requirement of Patent Law in the United States, Europe, and Canada*, 3 CYBARIS (2012) (giving a comparative discussion of the utility doctrine).

92. Haas, *supra* note 4.

93. This was most visible in the Eli Lilly Arbitration.

institutions. Nevertheless, they do form a particular bond with the state. This is particularly true for the second type of epistemic community described above—those with a global reach, such as the AIPPI and the ALAI, whose task is to monitor specialized international intellectual property instruments. The second type of epistemic community has the power to reach into the realm of the state because it can organize diplomatic conferences to revise existing international intellectual property treaties that will ultimately be adopted by the state.[94]

The World Intellectual Property Organization Treaties of 1996 – in which a significant number of type one epistemic communities, specialized INGOs, participated – were able to influence and encourage downstream epistemic communities. This downstream relationship created information spillover, that is, the extent and reach of other epistemic communities that operate at a national level about the extent and reach of their power in global lawmaking.[95] This information spillover created relations not only with new epistemic communities but also signaled to private rightsholders that it is in their best interest to expand the family of epistemic communities they support. At the broader end of the spectrum, the knowledge and expertise created by epistemic communities in the international legal process form a system of knowledge, which reinforces the idea that knowledge is a belief, and in turn helps to shape the "belief system" of international law.[96]

The implications for the practice of international law when the theory of epistemic communities and their presence are included is that they generate a rich source of output conditionalities that intrigue academic scholars. These output conditionalities may range from inclusivity in international legal relations to legitimizing the process and outcome of international legislation. Seen from this perspective, epistemic communities are also state-like, due to the power and influence they wield in international legal relations (especially relations regarding intellectual property rights). Moreover, given that epistemic communities can organize diplomatic conferences to revise international

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94. *See generally* Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, 2-20 December 1996, WIPO: Geneva. At the end of the Diplomatic Conference on 20 December 1996, the WIPO adopted two treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

95. *Id.*; *see also* Graeme Dinwoodie, *The Copyright Treaty: A Transition to the Future of International Copyright Lawmaking?*, 57 CASE W. RES. L. REV. 751, 753 (2007) ((noting how the 1996 Diplomatic Conference "was populated by a wide range of non-governmental organizations (NGOs) in numbers never before seen at international copyright events")).

96. *See* D'Aspremont, *supra* note 2.

treaties,[97] they effectively engage in a form of public power solely for the needs of private rightsholders.

The actions of epistemic communities in the international legal system are, to a certain extent, akin to corporations. However, are they both subjects of international law? In general, epistemic communities enjoy a certain amount of participation in the international legal process and have been involved in informal and formal lawmaking as a result. The latter is especially relevant in relation to epistemic communities convening diplomatic conferences for treaty revision. In that regard, they do enjoy the status of a state-like power in the contemporary global economy.[98] Therefore, the argument can be made that they are similar to corporations.

Perhaps the most chilling effect that intellectual property epistemic communities (types one, two, and three, above) have on the international legal system is their ability to help tribunals reach decisions that effectively draw up new rules for international intellectual property by participating in litigation efforts and their accompanying decisions. For instance, in the Eli Lilly[99] patent dispute, the tribunal dismissed patent obligation claims against Canada with the help of an expert amicus curiae who fell under the equivalence of the intellectual property epistemic community.[100] This particular submission drew on the comparative function method of utility application in patent law and argued that it precluded Canada from recognizing any international obligations. The significant point here is that when intellectual property epistemic communities participate in intellectual property litigation that occurs in different tribunals at the international level, they can systematically shape the jurisprudence of private law rights at the expense of public international law. This process not only favors epistemic communities and the private rightsholders they represent, but also creates the space for the privatization paradigm.

97. *See, e.g.*, Diplomatic Conference, *supra* note 94.

98. *See* Jose Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L.J. 1 (2011) (giving a general critique of multinational corporations in the international legal system).

99. Eli Lilly & Company v. Government of Canada, ICSID Case No. UNCT/14/2, Final Award (Mar. 16, 2017).

100. Eli Lilly, para. 442 (dismissing the claims).

A. "The New Living Law of the World": Epistemic Communities in Global Economic Lawmaking

In this section of the article, I explore developing epistemic communities as instruments of global lawmaking through the notion of "the new living law of the world." I develop my arguments through a normative account by using selected epistemic communities as examples in relation to internet governance. I intend to demonstrate that "the new living law of the world" is a contemporary natural phenomenon because it is evidence of various international legal developments in online commerce and intellectual property.[101] These regimes, amongst others, shape modern international economic laws and governance structures, and are initially actions resulting from private economic interests that do not have the formal capacity for lawmaking at the international level. In this regard, these regimes represent the new living law of the world as they directly affect the global population, through both the markets and the ability of less developed states to fully comprehend and comply with international legal instruments that were formed as a result of private economic interests.[102]

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101. *See* Laurence R. Helfer, *Nesting in the International Intellectual Property Regime, available at* https://www3.nd.edu/~ggoertz/rei/reidevon.dtBase2/Files.noindex/pdf/4/Helfer%20memo.pdf (last visited Nov. 16, 2020) ("intellectual property is now nested within many distinct international regimes, which together form a multi-modal, multi-venue "conglomerate regime" or a "regime complex", made up of multilateral, regional, and bilateral treaties, soft law resolutions and declarations, and competing networks of state and non-state actors"). *See also* Laurence Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L.J. 1 (2004); *see also* Laurence Helfer, *Regime Shifting in the International Intellectual Property System* 7, 39 (2009), *available at* https://core.ac.uk/download/pdf/20631531 1.pdf (last visited Nov. 16, 2020).

102. A recent work paints the picture of how international law-making in the global economic system is nothing but a source of immiseration and discontent for the world's non-developed states and their inhabitants. *See* JOHN LINARELLI ET AL., THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY (2018) (arguing that the unhindered flow of foreign investments that are protected by international law is a major source of injustice). There is no doubt that the current global economic system that is driven by international law has been a failure. It is a failure, in part, because it does not properly integrate the pluralistic nature of the world or bring equal benefits to countries from the South. There are various works from different fields that offer criticisms of the current system. Criticism has been offered from historical, political, economic, developmental studies, international relations, and legal approaches. In the latter field, most of the criticisms of international law are often ideological or reinforce a particular hegemonic approach to international discourse. *See, e.g.*, Kennedy, *supra* note 3.

I embrace this new living law of the world to offer some innovative views on the arguments raised by previous parts of this article and the spillover repercussions for epistemic communities, which are the power behind the throne of global economic governance. My reliance on Teubner's concept of "the new living law of the world" can help illustrate the power and influence epistemic communities have in shaping the international law of global economic governance, and reinforces the Haasian conception of epistemic communities where law and regulation are constructed to match their interests and visions of that governance.

This approach is important because it reflects the extent to which epistemic communities are integral to global economic governance and is, arguably, what some scholars refer to as the constitutionalizing of international law.[103] The latter is the actual result of the global economic order that helps shape our legal understanding of global economic governance. As Michael Zurn suggests, global governance contains many normative principles and actors, and the only requirement is to take into consideration any principles that reinforce their egoism.[104]

Taking Zurn's construction into account, the wide degree of global governance allows several different epistemes to flourish. Those that survive are those which get to wield influence over international economic governance. For the purposes of discussion here, two such areas are important: technical standardization and e-commerce. This is because, as Zurn argues in his work, global governance systems consist of paradigms of authority, power, and legitimacy, and the epistemes of technical standardization and e-commerce exhibit some of these characteristics.[105]

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103. *See, e.g.*, Klabbers et al., *supra* note 23.

104. MICHAEL ZURN, A THEORY OF GLOBAL GOVERNANCE: AUTHORITY, LEGITIMACY, AND CONTESTATION 25 (2018).

105. The discussions on power, authority, and legitimacy in international law, are to some extent, an import from the international relations literature, or at least, the international law narrative relies on narrative international relations literature for descriptive purposes. It is not the intention of this article to revisit the international relations literature; however, the recent work of Zurn captures the theoretical developments in that area well. *Id.*; *see* MICHAEL ZUM, GLOBALIZING INTERESTS: PRESSURE GROUPS AND DENATIONALIZATION (Gregor Walter ed. 2005); Harry Eckstein, *Authority Patterns: A Structural Basis for Political Inquiry*, 67, AM. POL. SCI. REV. 1142 (1973); Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379 (1999); David A. Lake, *Rightful Rules: Authority, Order, and the Foundations of Global Governance*, 54 INT'L STUD. Q. 587 (2010); Emanuel Adler & Steven Bernstein, *Knowledge in Power: The Epistemic Construction of Global Governance in* MICHAEL BARNETT & RAYMOND DUVALL, POWER IN GLOBAL GOVERNANCE, 294–318 (2004); OLE JACOB SENDING, THE POLITICS OF EXPERTISE: COMPETING FOR AUTHORITY IN GLOBAL GOVERNANCE (2015); Thomas G. Weiss & Rorden Wilkinson, *Rethinking Global Governance? Complexity, Authority, Power, Change*, 58 INT'L STUD. Q. 207 (2014). Equally,

My focus here, however, will be on authority and legitimacy, in order to unravel some of their legal contents, match them to how international law operates, and determine their relevance in international economic governance, especially for the world of online commerce. Although the argument on power is helpful, it is not explored as such, for the purposes of the framing or the understanding of epistemic communities developed in this article.[106] Epistemic communities require an authoritative basis to delegate their power which then legitimizes their newfound influence in international economic governance.

As part of the informal law process in the global economic system, epistemic communities are integral to the process of how standards and rules evolve. Their importance can be compared with other participants in the system, such as states—where the right to regulate is equally inherent. Take the internet corporation for assigned names and numbers (ICANN) as an example, and more specifically how it administered the domain name system between 1999–2012.[107] During this period, ICANN's right to regulate was virtually unchallenged and state-sanctioned. But ICANN was not a sovereign state and did not represent one—rather, it acted in the private economic interest of trademark owners and internet service providers—the importance being that, with authority and power, an epistemic community such as ICANN legitimized its right to rule. An implication of this right to rule scenario is that an argument can be made that ICANN has contributed to the legalization of intellectual property norms and internet governance at the international

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the legal literature has its own version on the notion of authority in international law. *See, e.g.*, Samantha Besson, *The Authority of International Law: Lifting the State Veil*, 31 SYDNEY L. REV. 343, (2020); Ingo Venzke, *Between Power and Persuasion: On International Institutions' Authority in Making Law*, 4 TRANSNAT'L LEGAL THEORY 354, (2015); Nicole Roughan, *Mind the Gaps: Authority and Legality in International Law*, 27 EUR. J. INT'L LAW 329 (2016); Horatia Muir Watt, *Private International Law's Shadow Contribution to the Question of Informal Transnational Authority*, 25 IND. J. GLOBAL LEGAL STUD. 37 (2018); BASAK CALI, THE AUTHORITY OF INTERNATIONAL LAW: OBEDIENCE, RESPECT, AND REBUTTAL (2015).

106. For a wider discussion on power in international law, *see* Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64 (2006).

107. ICANN began *democrating* its system of assigning top-level domains in the fall of 2013, and hundreds of new top-level domains were added, displacing the *old dot com* era prior to 2012 with generic top-level domains (gTLDs) which comprised of 22. During the *ICANN reformation of 2012,* where organizations were asked to submit applications, to operate new gTLDs (a number of trademarks owners jumped at the initiatives), to turn their trademarks into gTLDs, example, Google, along with geographic terms such as London, and non-Latin scripts, often referred to as internationalized domain names (IDNs) were some of the new formations. For more discussions on the post-2012 reforms in the ICANN, *see, e.g.*, Daniela Michele Spencer, *Much Ado About Nothing: ICANN's New GTLDs,* 29 ANN. REV. L. & TECH. (2014).

level. We have seen similar manifestations in how some of the modern Free Trade Agreements (FTA) contain significant intellectual property provisions as a result of private actors advocating for their interests and for the right to recourse in investor-state dispute settlement (ISDS) mechanisms.[108]

B. The Authority of Private Economic Interests in the International Legal Order

In a symposium issue of the Indiana Journal of Global Studies,[109] the contributors concerned themselves with questions relating to the public-private divide, the role of law, and the status of authority in the globalizing economy. One of the themes that resonated in most papers was how private power, in the transnational sense, has become the living law of the world and that "the expressions of private authority in the global arena continue to take place outside formal legal discourse."[110] This is a powerful observation that links the relationship between private law and private economic interests, thereby making a connection to the notion of authority in the international legal system. This helps frame or align the notion of authority from the perspective of public international law or international relations with private legal relations.

The treatment of authority in public international law has many methodological elements, but the two most common methods are to treat authority in a philosophical context,[111] and using a narrative or descriptive approach (that often purports to be sociologically based).[112] These methodological approaches each have their main selling points, depending on the target audience, but what they seem to agree on is that

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108. *See, e.g.*, United States–Colombia Trade Promotion Agreement Implementation Act, Colom.-U.S., Oct. 21, 2011, 125 STAT. 462; The United States–Chile Free Trade Agreement Implementation Act, Chile-U.S., June 6, 2003, 42 I.L.M. 1026; *see generally* Elisa Walker Echenique, *Implementing the IP Chapter of the FTA Between Chile and the USA: Criticisms and Realities from a Developing Country Perspective*, 9 SCRIPTED 233 (2012).

109. 25 IND. J. GLOBAL STUD. (2018).

110. Watt, *supra* note 105, at 43.

111. Roughan, *supra* note 105; JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979).

112. Here, I am thinking in Weberian derivatives, as applied to law, that is, works that are based on the original conception and sociological approach developed in Weber's monograph. *See* MAX WEBER, ECONOMY AND SOCIETY (1978). For recent discussions in a more useful context, *see, e.g.*, RICHARD NEW LEBOW, MAX WEBER AND INTERNATIONAL RELATIONS (2017).

"authority is both the central power that law and its institutions claim to wield and is seemingly central to the very idea of legality."[113]

Here we can deduce that authority concerns law, power, institutions, epistemic communities, legalization, and legitimacy,[114] but there is a problematic take on this conception of authority in international law. Can it be reasonably assumed that all international lawyers, or those working with authority in the international field, can actually conclude that authority conveniently encompasses all attempts at legality? I would argue that for the concept of authority to be safely situated within the legality of international relations, different actors with authoritative influence are crucial to inform how we situate and discuss authority in international law. This is where private economic interest groups and their ability to influence lawmaking, especially at the global level, fit into the discussion. For the purposes of this section, however, the relevant questions concern the extent to which private economic interest groupings can be deemed authoritative, and how they fit the notion of authority that Nicole Roughan describes.[115]

The criteria of power and legality, as discussed by Roughan, in view is appealing to how epistemic communities in internet governance and e-commerce engage in rulemaking. Hence, the examples of technical standardization and e-commerce contain examples of how to ascertain or set out some of the parameters that relate to legality and power.[116] I chose technical standardization in internet matters as a case study because in some respects one could argue that the provision of standards is a public good, even if they are being supplied to satisfy private economic interests.[117] An additional reason for the e-commerce case study is the complex legal paradigms that are often evident in copyrights and trademarks and the problem jurisdiction poses as a result of e-commerce being conducted entirely over the internet.

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113. Roughan, *supra* note 105, at 329.

114. For some concerns on the latter, *see* Nicolas Suzor, *Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms*, 4 SOC. MEDIA & SOC'Y 1 (2018).

115. Roughan, *supra* note 113.

116. *See also* Mark Lemley, *Standardizing Government Standard-Setting Policy for Electronic Commerce*, 14 BERKELEY TECH. L.J. 745 (1999).

117. The public good argument is not new per se as it permeates most disciplinary fields. *See, e.g.*, Jennifer Gerbasi & Mildred Warner, *Privatization, Public Goods and the Ironic Challenge of Free Trade Agreements*, 39 ADMIN. & SOC. 127 (2007); Ellen Dannin, *Red Tape or Accountability: Privatization, Publicization, and Public Values*, 15 CORNELL J.L. & PUB. POL'Y 111 (2005).

The development of private regulation for standardization and e-commerce has been a prominent activity for some time. The link of standardization and e-commerce to both intellectual property and international law is evident: standardization is the effort to standardize patented technology and innovation;[118] e-commerce contains elements of patented technology, copyrights, and trademarks.[119] These different aspects of intellectual property pose jurisdictional problems in international law, and are problematic because some of these technological developments represent how the internet is operated or what operates over the internet. Thus, it is clear that intellectual property and jurisdiction are concerns for public international law.[120] Therefore,

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118. A proper definition of standardization includes "movements towards uniformity" or an "approach aiming to create a uniform process (standard) that can be applied across various premises" including common principles and procedures. *See*, Anne Marie Tasse, *A Legal Perspective on Harmonization, Standardization and Unification*, 7 STUD. ETHICS L. & TECH. 8 (2013). *See also*, Mark Patterson, *Inventions, Industry Standards, and Intellectual Property*, 17 BERKELEY TECH. L.J. 1043 (2002); Mark Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889 (2002); Henry Smith, *Intellectual Property, and the New Private Law*, 30 HARV. J.L. & TECH. 1, 3-4 (2017) ("standard-setting involves private parties generating an agreement or set of agreements that often look like . . . enforceable contracts"); Janet Freilich & Jay Kesan, *Towards Patent Standardization*, 30 HARV. J.L. TECH. 233, 234 (2017) ("standardization does not need to be mandated by formal rules, rather, it can arise through voluntary informal mechanism, which provides an easier goal than statutory or regulatory interventions do"). *See* Joseph Farrell and Garth Saloner, *Standardization, Compatibility, and Innovation*, 16 RAND J. ECON. 70 (1985); Naomi Roht-Arriaza, *Private Voluntary Standard-Setting, The International Organization for Standardization, and International Environmental Lawmaking*, 6 Y.B. INT'L ENV. L. 107 (1996).

119. It should be pointed out that intellectual property is at the heart of the internet, and e-commerce for that matter because it is intellectual property rights that "protect the computer code that forms the architecture of cyberspace, the text, images, and sound that comprise the bulk of online content and the symbols that guide consumers through the maze of e-businesses." *See* Laurence Helfer & Graeme Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141, 149-50 (2001). *See also* Herbert Hammond & Justin Cohen, *Intellectual Property Issues in E-commerce*, 18 TEX. WESLEYAN U. L. REV. 743 (2012); Corey Field, *Copyright Co-Ownership in Cyberspace: The Digital Merger of Content and Technology in Digital Rights Management and E-Commerce*, 19 ENT. & SPORTS L. REV. 3 (2001); Adrienne Garber, *E-Commerce: A Catalyst for Change in Intellectual Property Law*, 6 DUQ. BUS. L.J. 157 (2004).

120. *See, e.g.*, Keith Akoi, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293 (1996); Daniel Benoliel, *Cyberspace Technological Standardization: An Institutional Theory Retrospective*, 18 BERKELEY TECH. L.J. 1259 (2003); Graeme Dinwoodie, *Trademarks and Territoriality: Detaching Trademark Law from the Nation-State*, 41 HOUS. L. REV. 886 (2004); Thomas Schultz, *Carving Up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface*, 19 EUR. J. INT'L L. 799 (2008); Sung Park, *The Coordinating Role of Public International Law: Observations in the Field of Intellectual Property*, 9 J. EAST

the argument in this section of the article is not about the extent to which intellectual property intersects with public international law; rather, the argument demonstrates how power and legality, when pursued or used by private economic interests in the global legal order, are the twin elements of authority that contribute to the private production of global norms.

C. Authority as "Power" and Standardization

The standardization of technology and how it intersects with intellectual property has long been a focus of academic curiosity from an international legal standpoint.[121] This is because: (a) there is a complex relationship between intellectual property and standards; and (b) the standard setters for technology are, significantly, specialized knowledge elites in the global community. This is especially the situation with those organized under the auspice of the International Organization for Standardization (ISO).[122] Specialized knowledge elites have been successful in having their standards adopted in international legal instruments such as the TBT Agreement in the WTO[123] or the International Telecommunications Regulations (ITRs).[124] These results suggest that standard-setting entities operating at the global level exert a certain amount of power that enhances their capacity as private standardization entities to shape international legal policy. One advantage is that private standard-setting entities "can be much faster and more flexible than government standardization"[125] and thereby affect the speed and development of standardization internationally.

ASIA & INT'L L. 321 (2016); BENEDETTA UBERTAZZI, EXCLUSIVE JURISDICTION IN INTELLECTUAL PROPERTY (2012).

121. *See, e.g.*, KAI JAKOBS, INFORMATION TECHNOLOGY STANDARDS AND STANDARDIZATION: A GLOBAL PERSPECTIVE (1999); Christopher Gibson, *Globalization and the Technology Standards Game: Balancing Concerns of Protectionism and Intellectual Property in International Standards*, 22 BERKELEY TECH. L.J. 1403 (2007); TIMOTHY SCHOECHLET, STANDARDIZATION AND DIGITAL ENCLOSURE: THE PRIVATIZATION OF STANDARDS, KNOWLEDGE, AND POLICY IN THE AGE OF GLOBAL INFORMATION TECHNOLOGY (2009); Janelle Diller, *Private Standardization in Public International Lawmaking*, 33 MICH. J. INT'L L. 481 (2012).

122. *See, e.g.*, David Wirth, *The International Organization for Standardization: Private Voluntary Standards as Swords and Shields*, 36 B.C. ENV. AFF. L. REV. 79 (2009).

123. ANDREA VILLAREAL, INTERNATIONAL STANDARDIZATION AND THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE (2018).

124. *See* RICHARD HILL, THE NEW INTERNATIONAL TELECOMMUNICATION REGULATIONS AND THE INTERNET (2014).

125. Marcus Maher, *An Analysis of Internet Standardization*, 3 VA. J.L. TECH. 1, 8 (1998). *See also*, Stavros Gadinis, *Three Pathways to Global Standards: Private, Regulator, and Ministry Networks*, 109 AM. J. INT'L L. 1 (2015).

Another advantage that private standard organizations possess over government-backed standardization is that "standards organizations may be able to combine the expertise of many people to help overcome information problems."[126] This latter position reinforces how epistemic communities are singularly in charge of standards and norms that eventually mature into global rules. This is where the issue of private standard-setting organizations and authority, as Roughan describes, gets interesting. Private standard-setting organizations enjoy power as authoritative institutional experts. Part of that power lies in the realization of profits, economic benefits, or guarding technological progress such as standards-essential patents (SEPs).[127] Another part of the argument is that power must be viewed in the context of institutional governance structures that are driven by global pluralism, where conflicting and opposing standards are perpetuated by private economic interests. The former point about economic benefits is more aligned with the domestic nature of standards and domestic legal order, even though these standards are global.[128] However, it is the latter point that is relevant to the international legal context that I advance in this article. Pluralism, as such, can contribute to how we view standardization. This is because, whilst competing with other states for regulatory standards, some states are forced to incorporate and support the dominant standard setter.

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126. Maher, *supra* note 79.

127. *See, e.g.*, Apple, Inc v. Motorola Mobility, Inc., 2012 U.S. Dist., LEXIS 181854, (W.D. Wis. Nov. 2, 2012); Microsoft Corp. v Motorola, Inc., 795 F.3d 1024 (9th Cir. 2015). Another point worth mentioning regarding SEPs is that they can be construed as part of the process of *private ordering*, where intellectual property law in general, the domestic legal order, and other community norms drive how epistemic communities are also motivated by financial concerns. *But see,* Katherine Strandburg, *Evolving Innovation Paradigms and the Global Intellectual Property Regime*, 41 CONN. L. REV. 861, 885, 901–05 (2009); Richard Stern, *Who Should Own the Benefits of Standardization and the Value it Creates*, 18 MINN. J.L. SCI. & TECH. 107 (2018). There is another argument about standardization which is equally disheartening: that once a standard has been adopted, it then excludes other standards that are competitive alternatives, therefore, requiring the involvement of antitrust authorities. But that argument requires its own article, and it is excluded from the power dynamics I am attempting to establish in this section. *See* Björn Lundqvist, *Standardization for the Digital Economy: The Issue of Interoperability and Access Under Competition Law*, 62 ANTITRUST BULL. 710 (2017); Roger Brooks, *SSO Rules, Standardization, and SEP Licensing: Economic Questions from the Trenches*, 9 J. COMPETITION L. & ECON. 859 (2013); JORGE L. CONTRERAS, THE CAMBRIDGE HANDBOOK OF TECHNICAL STANDARDIZATION LAW: COMPETITION, ANTITRUST, AND PATENTS (2018).

128. For other cases where SEPs were at issue, *see, e.g.*, Fujitsu v. Tellabs, (N.D. Ill. 2012) concerning ITU G.692 and LSI v. Realtek, (N.D. Cal. 2014) concerning IEEE 802.11.

Because standards are ingrained in the structure of certain epistemes ((e.g., the standards association of the Institute of Electrical and Electronic Engineers (IEEE 802), for wireless and remote media access control;[129] the International Swaps and Derivatives Association (ISDA), for derivatives[130])) there are rivalries and social structures that hold those epistemes together. Hence, one could make the argument that pluralism, in the broadest sense, endorses various communities and diversity broadly. From an intellectual property law perspective, technology standards perform certain roles that organically build power through institutional governance, thereby giving rise to authority and legality.

The authority by standard setters and their capacity to generate legal norms encourages the state to support initiatives for global standardization and/or regulatory recommendations for legal instruments and treaties.[131]

This is important if we look at these types of developments from a position of justice, as it reveals that nation-states are obviously favoring one episteme over the other by allocating power to certain epistemes that are capable of driving industry standards necessary for economic advancement. In this context, standards could be seen as a form of property that is tied to the state and can be unevenly distributed. But there is also a need to make standardization more pluralistic as part of how global norms evolve and the situation of power and its relation to influencing regulatory developments. This is so given that technological standardization and intellectual property are a complex maze full of privileges, authorities, legalities, rights, and powers, wherein the realm of international law has made some attempts to recognize these dimensions.[132]

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129. *See also*, Christopher Gibson, *Globalization and the Technology Standard Game: Balancing Concerns of Protectionism and Intellectual Property in International Standards*, 22 BERKELEY TECH. L.J, 32 (2007).

130. *See, e.g.*, Maciej Borowicz, *Private Power, and International Law: The International Swaps and Derivatives Association*, 8 EURO. J.L. STUD. 46 (2015).

131. In formulating this argument, I am reminded of Hohfeld's jural relations relating to property rights. *See* Leslie Newcomb Hohfeld, *Fundamental Legal Conceptions of as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917). *But see* Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 FLA. L. REV. 136 (2004); Nestor Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1598 (2008); Henry Smith, *Property as Platform: Coordinating Standards for Technological Innovation*, 9 J. COMPETITION L. & ECON. 1057 (2013); Mark Perry, GLOBAL GOVERNANCE OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY: REFLECTING POLICY THROUGH CHANGE (2016).

132. Some of the literature that discusses standardization in an international legal context include, Diller, *supra* note 117; Pablo Marquez, *Standardization and Capture: The Rise of Standardization in International Industrial Regulation and Global Administrative*

Although there is a burgeoning body of literature that discusses other forms of standardization and their nexus in international law—for example, environmental standards or private certification systems[133]—they are, for the most part, not a concern here. Rather, the concern is the role of technological standards, intellectual property, and private actors in the global economic system.[134] However, it must be said that the traditional institutional standardization of other technological issues, via organizations such as the ISO, eco-labeling, and international financial reporting standards (IFRS) by the International Accounting Standards Board (IASB),[135] help to make the argument on technical standardization in relation to certain internet activities. In the same vein, they also helped to create a linkage factor in international law and the technological standardization paradigm of intellectual property where private norms are concerned in an international legal setting.[136] There is evidence in the academic debate that supports the argument that the private economic entities with the power to standardize technology form part of the social[137] fabric of epistemic communities. As such, the lure of standardizing and norm creation through international law is attractive for various private epistemes to develop rules that ultimately have a public function.

For epistemic communities, not only is international law attractive as a means for turning private norms into public rules – competing visions of an international legal order based on private norms are also standardized as a result of their inherent powers for developing public

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Law, 7 GLOB. JURIST 1 (2007); Janewa Oseitutu, *Value Divergence in Global Intellectual Property Law*, 87 IND. L.J. 1639 (2012); Katharina Pistor, *Standardization of Law and its Effect on Developing Countries*, 50 AM. J. COMP. L. 97 (2002); Yannick Radi, *Standardization: A Dynamic and Procedural Conceptualization of International Lawmaking*, 25 LEIDEN J. INT'L L. 283 (2012).

133. *See, e.g.*, Jason Morrison, *Private and Quasi-Private Standard-Setting in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Daniel Bodansky, Jutta Brunee, and Ellen Hey eds., 2008).

134. *See, e.g.*, Gibson, *supra* note 125. *But see*, Andrew Power & Oisin Tobin, *Soft Law for the Internet, Lessons from International Law*, 8 SCRIPTED 31 (2011).

135. *See* KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE NEW LEX MERCATORIA 41 (2d ed. 2010); Keith Bader, *The International Accounting Debate: Options in Standardization*, 8 J. INT'L BUS. & L. 99 (2009).

136. On other private norm matters *see, e.g.*, Carola Glinski, *Private Norms as International Standards? – Regime Collisions in Tuna-Dolphin II*, 3 EUR. J. RISK REG. 545 (2012); Naomi Roht-Arriaza, *The International Organization for Standardization and the Drafting of Private Environmental Standards*, 90 ASIL PROC. OF THE 90TH ANN. MEETING 178 (1996).

137. DAVID SINGH GREWAL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION (Yale University, 2008).

and private norms. Grewal argues that the powers wielded by epistemic communities should not be underestimated, as they "are the conduits through which common nodes of perception and reaction are channeled in the effort to resolve transnational problems."[138] This argument resonates with the epistemic networks responsible for technological standardization advanced in this section.

Not only are the epistemic networks for standardization attempting to resolve problems in areas where they feel that there is little or sub-standard government intervention, but they are also harnessing their powers to influence how the law reacts to their common nodes of perception at the global level. For example, Grewal illustrates how the open-source movement has been instrumental in setting technical standards and practices. But what Grewal found disheartening about the open-source movement was the tendency to use power in an undemocratic fashion, noting that "how best to counter the power that private actors have over technical standards remains the subject of a debate that reveals the technological utopianism of the open-source movement."[139] Although Grewal's arguments are a worthy critique to be acknowledged, some of his criticisms, like most of the critics of technology and intellectual property at the global level,[140] are often in opposition to my views. Instead of critiquing how dangerous or powerful private actors and their institutional sponsors are, we should attempt to understand how they come about in the first place, and what role international law – and increasingly, transnational law – plays in their ability to accumulate power.

Furthermore, a legitimate concern is whether the services and norm production by private actors at the international level is a form of public service to which international law must respond. The power standardization dynamics reflect these concerns primarily because private economic entities have consistently had their services and technological standardization validated at the international level through markets, norms, treaties, and good practices.

The arguments raised in this section that integrate power, in the Roughan sense, of authority,[141] and my attempts to link it to technological

138. *Id.* at 284.

139. *Id.* at 215.

140. The discussions can be wide-ranging and not only legal but interdisciplinary. *See, e.g.*, Greg Distelhort, Richard Locke, Timea Pal, & Hiram Samel, *Production Goes Global, Compliance Stays Local: Private Regulation in the Global Electronics Industry*, 9 REG. & GOV. 224 (2015); *Compliance Stays Local: Private Regulation in the Global Electronics Industry*, 9 REG. & GOV. 224 (2015).

141. Zum, *supra* note 105.

standardization, especially technological developments with an intellectual property implication and the private economic interests behind them, has a major implication for international law. That implication is that these epistemic communities open up a new language route to interpret and engage in the dialogue of international law through the lens of private power and norm production.

Given that private actors, when engaged in the standardization of technical internet activities, are participants in the international legal system, they help shape the international legal outcome of treaties, norms, and other legalization processes that are relevant to their community.[142] However, their participation also confirms that their engagement in international lawmaking is an exercise of the concept of traditional power that has always been inherent to international law. In other words, the central element of international law has always been about power—no matter how that power was or is conceptualized or interpreted. It is in this context that I now turn to the element of authority articulated by Roughan: legality.[143] To situate it within the realm of intellectual property and international law, I will use a different case study—e-commerce, as a form of "practice,"[144] where problems of copyrights and trademarks create linkages to international law.[145]

Authority as "Legality" in E-Commerce and Online Dispute Resolution

The second element of authority that needs further discussion is legality—the power to use the law to control or settle disputes. For our purposes, the case study is e-commerce and the wild world of the internet, wherein trademark and copyright infringements are some of the more problematic areas for international law. The discussion, however, focuses on trademarks in the context of e-commerce, legality, and international law from private norm perspectives.

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142. *See also* Peter Gerhart, *Introduction: The Triangulation of International Intellectual Property Law: Cooperation, Power, and Normative Welfare*, 36 CASE W. RES. J. INT'L L. 1, (2004); *see also* Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT'L L. REV. 465, 466 (2005).

143. Nicole Roughan, *Mind the Gaps: Authority and Legality in International Law*, 27 EUR. J. INT'L LAW 329, 337 (2016). "The idea that law claims authority is an abstract idea, but it is made concrete by the practices in which official agents of the law, both individual and institutional, purport to bind subjects."

144. *Id.*

145. *See also* Thomas Schultz, *Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface*, 19 EUR. J. INT'L LAW 799, 836 (2008) (discussing emerging practices such as eBay in relation to jurisdictional practices and the relationship to international law).

One particular argument will focus on online dispute resolution (ODR), as this is a fascinating private system for settling inter-state online disputes. My discussion of legality—as a part of the authority paradigm set out earlier—is in the context of how intellectual property law functions within e-commerce, and how it shifts the internal dynamics of international law to those in favor of private enforcement of rules. Thus, if international law covers various regimes and rules, then intellectual property law covers different regimes, rules, and choices of law; e-commerce is a symptom of the intersection of international law and intellectual property law.[146] The internet is largely about e-commerce. The factors that drive the internet are a network of market-based institutions performing various trade functions that serve a variety of customers. A good example is Amazon.com, which was initially known for selling books and other items and has since grown into an institution with a variety of technical and cloud hosting services, arguably making it the backbone of the modern internet. In this web of services, several small and large vendors depend on Amazon services. The same is true for other major internet suppliers, ranging from Google.com to Yandex.ru and Yahoo.com. But there is a common node about e-commerce on the internet—online dispute resolution[147] mechanisms for intellectual

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146. Because of the challenge of jurisdiction pose by the internet due to the domestic nature of contracts, or enforcement of applicable law, e-commerce, intellectual property, and international law often leads to regulatory competition among, state, international, and non-state actors, and therefore opens up fertile ground for academic exploration and legal questions. Not all issues can be answered in this discussion but for a sampling of the literature *see, e.g.*, Louis del Duca, Colin Rule, & Zbynek Loebl, *Facilitating Expansion of Cross-Border E-Commerce: Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems – Work of the United Nations Commission on International Trade Law)*, 1 PENN. ST. J.L. & INT'L AFF. 59 (2012); Marshall Leaffer, *The New World of International Trademark Law*, 2 MARQ. INTELL. PROP. L. REV. 1, (1998); Wade Estey, *The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality*, 21 HASTINGS INT'L & COMP. L. REV. 177 (1997); Stephan Wilske & Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?*, 50 FED. COMM. L.J. 117 (1997); Tapio Puurunen, *The Legislative Jurisdiction of States over Transactions in International Electronic Commerce*, 18 J. MARSHALL J. COMP. & INFO. L. 689 (2000); Robert Wai, *Transnational Lift-off and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COL. J. TRANS. L. 209 (2002); Mohamed Wahab, *Globalization and ODR: Dynamics of Change in E-Commerce Dispute Settlement*, 12 COL. J. TRANS. L. 123, (2004); Gralf-Peter Calliess, *Online Dispute Resolution: Consumer Redress in a Global Market Place*, 7 GERMAN L.J. 647 (2006); Riika Koulu, *Disintegration of the State Monopoly on Dispute Resolution: How Should We Perceive State Sovereignty in the ODR Era?*, 1 INT'L J. ONLINE DISP. RESOL. 125 (2014).

147. The notion of online dispute resolution in this article refers to the various alternative dispute resolution methods available such as mediation, arbitration, negotiations, and whatever combinations that the use of internet technology may facilitate. For our

property infringement are purely non-state actor initiatives that impact the state, and thereby impact international law.[148] At the heart of this common node is the question of legality, or what the legal rules for intellectual property infringement are in e-commerce, and how those rules relate to domestic and international law.

To illustrate what I am focusing on in this section, consider the following diagram:

Figure 2

In Figure 2, there are three sets of normative relationships with regard to e-commerce and online dispute resolution. The industry's normative relationships developed by private economic interests as part of their self-regulation; the normative relationship developed at the governmental level that often makes agencies responsible for the enforcement of these relationships; and the implication of these

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purposes, one of the most visible has been the ICANN dispute resolution process for top-level domains in the *top-level dot com* era (pre-2012) for trademarks and still applies today as the Uniform Domain-Name Dispute Resolution Policy (UDRP). For early assessment of ICANN's UDRP, *see* Jeffrey Samuels & Linda Samuels, *Internet Domain Names: The Uniform Dispute Resolution Policy*, 40 AM. BUS. L.J. 885 (2003); Laurence Helfer, *International Dispute Settlement at the Trademark-Domain Name Interface*, 29 PEPP. L. REV. 87 (2001); Lisa Sharrok, *The Future of Domain Dispute Resolution: Crafting Practical International Legal Solutions form within the UDRP Framework*, 51 DUKE L.J. 817 (2002); Robert Badgley, *Internet Domain Names and ICANN Arbitration: The Emerging "Law" of Domain Name Custody Disputes*, 5 TEX. REV. L. & POL. 343 (2001); DAVID LINDSAY, INTERNATIONAL DOMAIN NAME LAW, ICANN AND THE UDRP (2009).

148. One of the concerns in the ICANN dispute resolution process has been the notion of *bad faith*, that is, when legitimate trademarks or domain names are hijacked or cybersquatted by entities or individuals seeking a financial windfall. *See, e.g.*, Peter Gey, *Bad Faith Under ICANN's Uniform Domain Name Dispute Resolution Policy*, 23 EUR. INTELL. PROP. REV. 507 (2001); *see also* Frederick Mostert & Gloria Wu, *The Importance of the Element of Bad Faith in International Trademark Law and its Relevance Under the New Chinese Trademark Law Provisions*, 12 J. INTELL. PROP. L. & PRAC. 650 (2017). Of course, the bad faith notion runs contrary to the principle of good faith in international law. *See generally* ANDREW MITCHELL, M. SORNARAJAH & TANIA VOON, GOOD FAITH AND INTERNATIONAL ECONOMIC LAW (2015) (provides a comprehensive analysis of good faith and its parameters).

normative relationships at the international level when questions of jurisdiction, state intervention, and international private law arise.

There are a few things I want to consider before getting into the full discussion on how e-commerce and legality interact within intellectual property in international law. The issue of online dispute settlement is paramount to the discussions and hence requires a broader explanation to support the skeletal references made earlier. The subject of online dispute settlement is broad and can affect anything from securities and tax to employment.[149] Although it is somewhat agreeable that e-commerce entails all forms of commercial transactions that take place over the internet,[150] its total composition may be elusive. One must accept, however, that given the involvement of the internet, e-commerce is a question of domestic and international law, as it traverses borders and touches upon issues of sovereignty.[151]

The OECD, for example, has given some guidance on how to define e-commerce, and notes:

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149. The literature is voluminous but some works include: JULIA HÖRNLE, CROSS-BORDER INTERNET DISPUTE RESOLUTION (2009); FAYE FANGFEI WANG, LAW OF ELECTRONIC COMMERCIAL TRANSACTIONS: CONTEMPORARY ISSUES IN THE EU, US, AND CHINA (2d ed. 2014); KATHERINE LYNCH, THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION (2003); Tapio Puurunen, *International Online Dispute Resolution – Caveats to Privatizing Justice*, 14 FINNISH Y.B. INT'L L. 233 (2003); Veijo Heiskanen, *Dispute Resolution in International Electronic Commerce*, 16 J. INT'L ARB. 29 (1999); Jagruti Chauhan, *Online Dispute Resolution Systems: Exploring E-Commerce and E-Securities*, 15 WINDSOR REV. LEGAL & SOC. ISSUES 99 (2003); COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, E-COMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS (2002); Rifat Azam, *The Political Feasibility of a Global E-Commerce Tax*, 43 U. MIAMI L. REV. 711 (2013); JOHN A. ROTHSCHILD, RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW (2016). A more recent work that also contextualizes some of the issues and presents a decent narrative is: RIIKKA KOULU, LAW, TECHNOLOGY AND DISPUTE RESOLUTION: THE PRIVATISATION OF COERCION (2018).

150. *See* Directive 2000/31, of the European Parliament and of the Council of 8 June 2000 on the certain legal aspects of information society services, in particular electronic commerce in the Internal Market (Directive on electronic commerce), 2000 O.J. (L 178) 1, 3.

151. *See also*, Koulu, *supra* note 146; Ethan Katsch, *Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace*, 21 INT'L REV. L. COMPUTERS & TECH. 97 (2007); Mary Martin, *Keep it Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce*, 20 B.U. INT'L L.J. 125 (2002); Brian Bieron & Usman Ahmed, *Regulating E-Commerce through International Policy: Understanding the International Trade Law Issues of E-Commerce*, 46 J.W.T. 545 (2012); Gavin Clarkson, Katherine Spilde, & Carma Claw, *Online Sovereignty: The Law and Economics of Tribal Electronic Commerce*, 19 VAND. J. ENT. & TECH. L. 1 (2016).

> Electronic commerce refers to generally all forms of transactions relating to commercial activities, involving both organizations and individuals that are based upon the processing and transmission of digitized data, including text, sound, and visual images. It also refers to the effects that the electronic exchange of commercial information may have on the institutions and processes that support and govern commercial activities.[152]

This soft definition of e-commerce from the OECD is widely endorsed, but it has not been given the force of law through either legislation or judicial holdings.

Moreover, because commercial activities over the internet cover such a wide field, the actual definition of e-commerce in most internet commercial transactions is set out in the contractual terms governing those specific commercial activities. Under this scenario, a few issues are likely to occur: the first is that e-commerce is a matter of domestic law; the second, that some contracts may contain provisions that change the applicable law from domestic law to the law of other jurisdictions. These conditions often lead to the organization of groups, private economic interests in different commercial areas, and networks of intellectual property rightsholders to combine their efforts for adjudicating online dispute resolution among other activities. Most major internet e-commerce sites operate online dispute resolution mechanisms privately,[153] which are generally self-contained and full service:

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152. OECD, *Electronic Commerce: Opportunities and Challenges for Government*, OECD DIGITAL ECONOMIC PAPERS, No. 29 (June 12, 1997) ("Sacher Report"), *available at* https://www.oecdilibrary.org/docserver/237058611046.pdf?expires=1601055780&id=id&accname=guest&checksum=C78B9CC73305138B9F4804D4FE2A4C5C (last visited Sept. 25, 2020).

153. *About Online Dispute Resolution Platform (ODR Platform)*, AMAZON (2020), *available at* https://www.amazon.co.uk/gp/help/customer/display.html?nodeId=G9NMDH46UFNMFNKN (last visited Dec. 18, 2020); Amazon operations in Europe adheres to the ODR platform set up by the European Commission, and although, major internet e-commerce sites prefer to have consumers contact them prior to the Commission's platform, this may not be the case all the time. Amazon UK Operations ODR; *see also Online Dispute Resolution*, EUR. COMM'N (2020), *available at* https://ec.europa.eu/consumers/odr/main/?event=main.home2.show (last visited Dec. 18, 2020). *See generally*, Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes, EUR-LEX (2013), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0524 (last visited Dec. 18, 2020).

> A self-contained ODR platform is designed to resolve disputes within a community, such as in an online marketplace like eBay, Amazon, or Etsy. Members of that community agree to be governed by the terms of service and associated agreements that regulate the community and dictate how and when that ODR platform is used.[154]

Through these terms and conditions and other contractual arrangements, set out in an e-commerce provider's terms of service, a dispute resolution mechanism will be automatically triggered for online infringement of intellectual property rights. To put it differently, one must ask themselves, under what conditions would an online e-commerce provider such as eBay be liable for trademark infringement?

In L'Oréal v. eBay, the Court of Justice of the European Union (CJEU) held that eBay was not liable for trademark infringements committed by third parties' users on its e-commerce platform.[155] Before the L'Oréal v. eBay decision in Europe many similar cases were litigated in other jurisdictions – most notably in the United States,[156] where online trademark infringement occurred at a more rapid rate than the law and its courts could keep up with. The challenge for trademark owners was how to balance their rights alongside how third-party users on the internet fairly use those trademarks. Trademark owners recognized these issues earlier as the internet took hold and attempts were made to counter cybersquatting and other bad faith uses of trademarks on the internet. For the established community of experts – epistemic communities, which

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154. Suzanne Van Arsdale, *User Protections in Online Dispute Resolution*, 21 HARV. NEGOT. L. REV. 107, 120 (2015). *See also* Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 CARDOZO J. CONFLICT RESOL. 717, 722 (2017) ("When not based on normative standards, dispute resolution is just another form of bureaucratic processing, the resolution of disagreements according to a set of tacit, often biased, intra-organizational, administrative norm (e.g., seller is always correct), that are defined by repeat players who "capture" the system and use it for their private ends").

155. The opinion by the Advocate General in Europe first warned that eBay was not liable for online trademark infringement by users on its platform prior to the actual ruling by the CJEU. *See* Case C-324/09, L'Oréal SA Lancôme parfums et beaute & Cie, Laboratoire Garnier & Cie, L'Oréal (UK) Ltd. v. eBay Int'l AG, eBay Europe SARL, eBay (UK) Ltd., 2011 E.C.R. I-6011. The dispute has had multiple rounds over various aspects with different rulings and has been one of the most visible cases regarding the liability for trademark infringement on e-commerce platforms. For a commentary *see generally*, CHRISTINE RIEFA, CONSUMER PROTECTION, AND ONLINE AUCTION PLATFORMS: TOWARDS A SAFER LEGAL FRAMEWORK (2016).

156. *See, e.g.*, Tiffany (NJ) Inc. v. eBay, Inc., 576 F. Supp. 2d 463 (S.D.N.Y. 2008); 1-800 Contacts, Inc. v. WhenU.com, Inc., 414 F.3d 400 (2d Cir. 2005); Rescuecom Corp. v. Google, Inc., 456 F. Supp. 2d 393 (N.D.N.Y. 2006); FragranceNet.com, Inc. v. FragranceX.com, Inc., 493 F. Supp. 2d 545 (E.D.N.Y. 2007).

guard and advance the private interests of their stakeholder's trademarks – their role in the e-commerce revolution and online trademark infringement remains crucial to how court decisions are handed down.

Some of the active epistemic communities in the global governance of intellectual property, specifically for trademarks, are the International Trademark Association (INTA);[157] the European Communities Trade Mark Association (ECTA); the Association of European Trade Mark Owners (MARQUES); the less notable Scotch Whisky Association;[158] and the more notable ones for marks, geographical indications (GIs),[159] such as the French Comite Interprofessionnel du Vin de Champagne.[160]

As an epistemic community INTA, for example, has been warning members about the collision of trademarks and international law because of the lack of questions relating to the jurisdiction of international law since the 1990s.[161] INTA rejected "a comprehensive domain name dispute policy" in favor of a "sui generis approach which would permit a workable procedural, rather than substantive, system for domain name

157. *The Intersection of Trademarks and Domain Names: INTA "White Paper"*, 87 TRADEMARK REP. 668 (1997).

158. Tracing its origins to 1912, which among other things, "safeguard the Scotch Whisky category." On many occasions, the Scotch Whisky Association attempted to prevent other parties from using terms that suggest Scotland as the origin of certain whiskeys. *See* Case C-44/17, Scotch Whisky Association v. Klotz 2018 E.C.R. (where the SWA claimed that Gaelic term "glen" used by a German whisky producer infringed the GI "Scotch Whisky").

159. Article 22(1) of the TRIPs Agreement defines geographical indications as "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origins." For a discussion *see* Jose Cortez Martin, *TRIPS Agreement: Towards A Better Protection for Geographical Indications*?, 30 BROOK. J. INT'L L. 117 (2004); *see generally* DEV GANGJEE, RELOCATING THE LAW OF GEOGRAPHICAL INDICATIONS (2012).

160. The Champagne Committee, founded in 1941 operates under the mantra that "Champagne only comes from Champagne, France", and has been successful in a number of cases asserting these claims, such as the *Spanish Champagne Case, 1960* in London; the 1987 case against *Perrier Mineral* water in Germany; and in 2002 against Arla, which manufactured a yogurt that purportedly tasted like champagne. For this latter case, *see* Institut National des Appellations d'Origine v. Arla Foods AB (2002) re yogurt "Yoggi Original Champnesmak." The link of Geographical Indications to e-commerce, in short, emanates from the closeness or overlap of geographical indications to trademarks, and therefore when using online on e-commerce platforms, not only do infringements arise but the likelihood of confusion to consumers that requires hard legal questions to be addressed. *See generally*, Burkhart Goebel & Manuela Groeschl, *The Long Road to Resolving Conflicts Between Trademarks and Geographical Indications*, 104 TRADEMARK REP. 924 (2014); Deborah Kemp & Lynn Forsythe, *Trademarks and Geographical Indications: A Case of California Champagne*, 10 CHAP. L. REV. 257 (2007).

161. International Trademark Association, *supra* note 157, at 690.

registration and dispute."[162] INTA has traditionally favored trademark disputes being settled in courts or other tribunals, and since 1916 has been acting as a "friend of the court" (amicus curiae) through expert briefs and affidavits for litigations taking place all over the world. In Rosetta Stone v. Google,[163] which concerned online trademark infringements when using AdWords (advertising program online), INTA noted in an amicus curia that previous decisions in the case were legal errors.[164] Clearly, this is only an example of how different questions of legality arise when viewed from the perspective of epistemic communities and how they act in the international system, whether in adjudication or lawmaking for interests that represent their private needs rather than those of the state.

The above example of legality and others discussed earlier, such as norm production or lawmaking, relate to e-commerce and trademarks from the perspectives of online trademark infringements; most importantly, however, the role of epistemic communities and their authority is to set out the legal criteria or defend those criteria that are beneficial to their commercial clients. Their involvement in the litigation and advocacy systems made available by the global governance systems of e-commerce and internet commercial transactions helps to establish questions of hard legality. The legality of Google's AdWords program in the Rosetta Stone litigations reflects the extent to which hard legal questions drive trademark representations at both the domestic and global levels, and how those hard-legal questions are addressed by both domestic and international law.

From that perspective, epistemic communities are integral in shaping legal arguments because of their ability to offer concrete legal analysis by submitting amicus briefs during litigation. Other trademark epistemic communities, such as MARQUES and ECTA, have also been active in filing briefs on behalf of their commercial stakeholders, and in this regard have added to the debate on the intersection of trademarks and international law.[165] However, it is the epistemic community of French Champagne producers representing holders of GIs that have exposed some of the fault lines of e-commerce disputes concerning international law. What sparks the legality test in both international law and e-commerce is the designation of the word "Champagne". The French want this term to only refer to champagnes that are produced in the Champagne

162. *Id.* at 700.

163. Rosetta Stone Ltd. v. Google, Inc., 676 F.3d 144 (4th Cir. 2012).

164. Brief of International Trademark Association as Amicus Curiae, Rosetta Stone Ltd. v. Google, Inc., No. 10-2007 (4th Cir. 2012).

165. *See* Kemp & Lynn Forsythe, *supra* note 160.

region of France. Of course, the challenge posed by this champagne debacle is that Californian wine producers, for example, may not find this easy to digest because of their commercial interests.[166]

Thus, the degrees to which private economic actors and/or states support the legalization of names for variations of trademarks and geographical indications is, to some extent, also a reflection of how the law treats any similar infringement that may occur on the internet. Some epistemic communities (as used in the context of this section to refer to the private economic interests representing the holders of intellectual property rights) have taken steps to create a truce between e-commerce platforms and members that use geographical indications online.[167] This has occurred with the Italian Association of GI Consortia (AICIG) and eBay, where a memorandum of understanding between the two seeks to alleviate the illegality of the use of geographical indications on the eBay platform.[168] But perhaps it is the use of the term "Bavaria" in e-commerce that captures from all three dimensions the arguments on legality that this section of the article seeks to develop – that is, this issue of legality from the perspectives of epistemic communities and domestic and international legal institutions, as also depicted in Figure 2, above. In Bavaria v. Bayerischer, the concern was over the GI "Bayerishces Bier" (Bavarian Beer).[169] However, the infusion of Italian and German domestic laws, transnational European law, and international law via a 1963 Agreement captures how geographical indications stand at the

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166. *But see*, Kemp & Forsythe, *supra* note 160; Tim Jay & Madeline Taylor, *A Case of Champagne: A Study of Geographical Indications*, 29 CORP. GOVERNANCE J 1 (2013); Demetra Makris, *Geographical Indicators: A Rising International Trade Dispute Between Europe's Finest and Corporate America*, 34 ARIZ. J. INT'L & COMP. L. 160, 179-181 (discussing American ambivalence towards GI of Champagne).

167. My discussion of geographical indications in this section is not meant to be exhaustive but rather to introduce a particular point in relation to how e-commerce and the question of *legality* are intertwined and the link to international law. For a general reading on the geographical indication's literature *see, e.g.*, DEV GANGJEE, RELOCATING THE LAW OF GEOGRAPHICAL INDICATIONS (2012); Kal Raustiala & Stephen Munzer, *The Global Struggle over Geographic Indications*, 18 EJIL 337 (2007); Michelle Agdomar, *Removing the Greek from Feta and Adding Korbel to Champagne: The Paradox of Geographical Indications in International Law*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 550 (2008); IRENE CALBOLI & NG-LOY WEE LOON, GEOGRAPHICAL INDICATIONS AT THE CROSSROADS OF TRADE, DEVELOPMENT AND CULTURE: FOCUS ON ASIA-PACIFIC (2017).

168. *See E-Commerce: The Protection of GIs on the Web* (Nov. 28, 2014), *available at* https://www.origin-gi.com/activities/policy-and-advocacy/248-regulatory-issues/8940-28-11-2014-e-commerce-the-protection-of-gis-on-the-web.html (last visited Nov. 15, 2020) (discussing the verified rights owner's program). *See generally*, German-Italian Agreement on the Protection of Indications of Provenance, Designations of Origin and other Geographical Indications of 23 July 1963 (Ger.-It., 1963) (BGBI 1965 II S. 157).

169. Case C-343/07, Bavaria NV v. Bayerischer Brauerbund eV, 2009 E.C.R. I-05491.

intersection of legality and the process of privatizing international law. This echos similar developments in the Havana Club rum dispute,[170] which concerned the source origin of rum production.

The two main international organizations that are responsible for intellectual property disputes within the confines of international law, the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO), approach dispute settlements in different ways. For the WTO, intellectual property disputes are adjudicated via the Dispute Settlement Body (DSB), the decisions of which are binding. The advantage of the WTO's DSB in intellectual property disputes is that the general characteristics of international law are applicable. This is not the case with the WIPO.

The WIPO's dispute settlement mechanism is mediation or arbitration, and while submission to WIPO's arbitration mechanism is binding, the outcome is not. WIPO's Mediation and Arbitration Center (Center) "offers . . . alternative dispute resolution (ADR) options . . . to enable private parties to settle their domestic or cross-border commercial disputes."[171] The operative phrases here are "private parties" and "commercial disputes," as these phrases indicate that state parties are excluded. Moreover, the resolution of domain name disputes and bad faith registration is no longer the primary function of the WIPO Center, although, since its founding in the late 1990s, the Center has administered over 41,000 cases relating to domain name disputes. In this regard, the WIPO Mediation and Arbitration Center is part of the broader rule of international law, wherein the market and commercial activities are provided with the legal certainty necessary to enable the underlying economic function of international law.

It is the existence of legal certainty that provides the operating space for epistemic communities to thrive and exercise authority over the development of international law, which has increasingly relied on private norms to respond to the different challenges that e-commerce and intellectual property pose to the global economy. Moreover, the network of private economic interests generally advances various procedures to

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170. Havana Club Holding, S.A. v. Galleon S.A., 203 F.3d 116 (2d Cir. 2000) (discussing whether rum produced in a foreign county could be labeled Havana club); *see also* Appellate Body Report, *United States-Section 211 Omnibus Appropriations Act of 1998*, WTO Doc. WT/DS176/AB/R (adopted Jan. 2, 2002).

171. *Alternative Dispute Resolution*, WIPO (2018), *available at* https://www.wipo.int/amc/en/ (last visited Nov. 16, 2020); *see also* Joyce A. Tan, *WIPO Guide on Alt. Disp. Resol. (ADR) Options for Intell. Prop. Offs. and Cts.*, WIPO (2018), *available at* https://www.wipo.int/edocs/pubdocs/ en/wipo_pub_guide_adr.pdf (last visited Nov. 16, 2020).

resolve online disputes for intellectual property in e-commerce. At the same time, the very process establishes a normative system of private justice and, parallel to the same sequence, private economic interests advocate that they are providing a form of public service.[172]

There is no doubt that, given the challenges of intellectual property in e-commerce, those private economic interests have moved beyond the domain of national legal standards and rules. The domain of contemporary e-commerce and legality is to fully embrace international legal techniques, procedures, and other methods for online dispute resolution in intellectual property. Even with this development, e-commerce enjoys hybrid normativity, at the same time relying on the legal certainty that both emerging national rules and traditional international rules provide. Thus, while national laws continue to ascend from the domestic paradigm of the state to that of the global paradigm, during that ascension a new normative framework on the globalization of national laws emerges. This includes private global norms and legal regulations, largely abetted by private economic interests, for a global system of law that is beyond hybridization,[173] and one of private authority where, within the global system, legal certainty is paramount to the effective function of modern international law.

V. FROM PRIVATE ORDERING TO COMMUNITY NORMS: TOWARDS THE FIRST ACT OF A CONCLUSION

Scholars have pointed out that, among other things, the participation of non-state actors in the global regulatory system forms part of a governance triangle, due in part to their agenda-setting activities.[174] This argument is appealing, and also has some resonance with my own approach and some of the arguments developed in this article. Thus, I will rely on the agenda-setting aspect of the governance triangle argument by Abbott and Snidal to frame my concluding argument. According to Abbott and Snidal, "agenda-setting"[175] is part and parcel of how non-state

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172. *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); *see also* J.R. Hildenbrand, *A Normative Critique of Private Domain Name Dispute Resolution*, 22 J. MARSHALL J. COMPUTER & INFO. L. 625 (2004).

173. *See* REG. HYBRIDIZATION IN THE TRANSNAT'L SPHERE (Paulius Jurčys, Poul F. Kjaer, & Ren Yatsunami, eds., 2013) 71-98.

174. Kenneth Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State* in THE POL. OF GLOBAL REG. 64 (Walter Mattli & Ngaire Woods, eds.) (2009).

175. *Id.* "Agenda-setting requires an ability to capture attention, frame issues in politically powerful ways, gather and disseminate information, and formulate appropriate

actors advance policies and make regulatory changes at the international level. For purposes of my own analysis, I will discuss this task, re-christening it as "private-ordering". I am using the term private-ordering to refer to situations where epistemic communities are the actual agenda-setters in the law and governance of the internet. As a corollary to the task of agenda-setting, subsequent developments on the relationship with intellectual property rules at the international level are equally important to how private ordering is understood. In other words, private ordering is the genesis of a process that epistemic communities undertake to shape the emergence of rules to regulate internet activities as they relate to e-commerce, online dispute resolution, the role of intellectual property rights, and their broader implications for the global economic system.

The formal relationship the term private-ordering has with, for example, how private law incorporates issues of private ordering,[176] especially in relation to intellectual property,[177] suggests that any form of regulatory authority transcends both the state and private actors. My definition of private ordering should partially shield me from what private ordering actually means when discussed in different strands of legal literature.[178]

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ways to proceed . . . Agenda-setters must also have legitimacy; this will stem from perceptions of normative commitment, expertise, and independence from the targets of regulations."

176. *See, e.g.*, Steven Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319, 319 (2002) "The sharing of regulatory authority with private actors (i.e., private ordering) can occur in many ways." *See also*, Matthew Jennejohn, *The Private Order of Innovation Networks*, 68 STAN. L. REV. 281(2016); Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L.J. 471 (2005).

177. *See, e.g.*, Reto Hilty, *Intellectual Property and Private Ordering in* ROCHELLE DREYFUSS & JUSTINE PILA (EDS) THE OXFORD HANDBOOK OF INTELL. PROP. L. (2018); Severine Dusollier, *Sharing Access to Intellectual Property through Private Ordering*, 82 CHI.-KENT L. REV. 1391 (2007); Yafit Lev-Aretz, *Copyright Lawmaking, and Public Choice: From Legislative Battles to Private Ordering*, 27 HARV. J.L. & TECH. 203, 210 (2013) (noting that: "Private ordering in copyright has manifested itself in three classes of interplays: (1) the user-industry relationship (e.g., digital locks on software and end-user license agreements), (2) the inter-industry relationship (e.g., collective rights management organizations and other joint ventures), and (3) the cross-industry relationship (e.g., business partnerships between rightsholders and broadband providers). While the deference to private ordering in user-industry and inter-industry settings has been widely tackled in legal commentary, private ordering in the cross-industry context has yet to be studied in detail").

178. Yafit Lev-Aretz, *Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering*, 27 HARV. J.L. & TECH. 203, 248 (2013) (highlighting the schisms in the academic literature on the scope of private ordering but has defined private ordering as "norms formulated by private parties using decentralized processes.") *See also*, Tehila Sagy, *What's So Private About Private Ordering?*, 45 L. & SOC'Y REV. 923 (2011) (discussing two bodies of literature the privatization-of-law model and the multiculturalist theory).

Thus, the central premise of my development of private ordering is that private ordering is the first step towards the actual realization of regulatory rules for internet governance and the role of intellectual property in the global system. In that regard, private ordering is a form of "informal norms"[179] with the capacity to influence and "provide an efficient effective mechanism to govern conduct."[180] Hence, it is anticipated that private ordering as a framework of informal rules will later generate and influence the other regulatory needs leading to formal international law rules for intellectual property rights.

In this context, the relevance of private ordering that I developed is that it forms the grundnorm of an epistemic community's belief about how the legal and regulatory landscape in e-commerce, internet governance, and intellectual property governance should develop. Furthermore, private ordering reflects how intellectual property rules should respond to the different private systems of rules and communities in global economic governance.[181] As shown in this article, those communities include the private actors in e-commerce where technical standardization is paramount. Moreover, other actors, including those relating to the evolution of norms for online dispute resolution, form part of this community. This does not mean that the community is limited to these examples, rather that these examples track with the discussions in this article.

The ability to frame private ordering through private community norms reflects the fact that the drivers of private ordering, epistemic communities, have sufficient power to conduct the other regulatory tasks attendant to international rules. Such regulatory tasks can be conducted in a manner that only engages the state or group of states as the formal lawmaking authority; on other occasions, the state lawmaking authority can be challenged by non-state actors.[182]

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179. Curtis Milhaupt & Mark West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41, 43 (2000).

180. *Id.*

181. *See also*, Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1745 (1996).

182. On this latter claim, I am thinking of how a number of intellectual property owners and content producers were able to mount an opposition to the SOPA/PIPA copyright bills. *See* Stop Online Piracy Act (SOPA), H.R. 3261, 26 October 2011, bill introduced in the US House of Representatives, and Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PIPA), S.968, US Senate 12 May 2011. For a discussion *see*, Mike Belleville, *IP Wars: SOPA, PIPA, and the Fight Over Online Piracy*, 26 TEMPLE INT'L & COMP. L.J. 303; Michael Carrier, *SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements*, 11 NW. J. TECH. & IP L. (2013); Sandra Schmitz, *The US SOPA, and PIPA – A European Perspective*, 27 INT'L REV. L.,

Because intellectual property epistemic communities can operate in a decentralized process, they can "privatize the rule-making process"[183] that is essential to the content and form of the international rules in intellectual property that relate specifically to their beliefs and interests. The emergence of the Marrakesh Treaty in the WIPO[184] is an example of how an epistemic community can tailor international rules to its needs through my conception of private ordering.[185] Hence, taking another example of an intellectual property epistemic community such as the ICANN, that organization has been able to exert its powers and develop norms for the internet that in a way, as James Boyle argues, "exercise[s] regulatory power over the internet."[186]

What the genesis of private ordering demonstrates is that as epistemic communities enjoy success, two fundamental questions are often resolved at this initial stage: what should permissible rules consist of, and how can those rules contribute to the ideals of the community, especially through governance and enforcement? Because intellectual property rights are an area that comprises different private actors and consists of interactions at the global and national levels, the informal normative rules developed by epistemic communities contribute to the formalization of international rules. Therefore, the ability of private actors to develop private community norms and to reorient policy agendas that are geared towards the emergence of international rules are shaped largely based on the requirements of the actors and producers of intellectual property rights. The result is an increase in global

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COMPUTERS & TECH. 213 (2013); Annemarie Bridy, *Copyright Policymaking as Procedural Democratic Process: A Discourse-Theoretic Perspective on ACTA, SOPA, and PIPA*, 30 CARDOZO ARTS & ENT. L.J. 153 (2012); Melis Atalay, *Regulating the Unregulable: Finding the Proper Scope for Legislation to Combat Copyright Infringement on the Internet*, 36 HASTINGS COMM. & ENT. J. 167 (2014); Yafit Lev-Aretz, *Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering*, 27 HARV. J.L. & TECH. 203 (2013).

183. *See* Freeman, *supra* note 173, at 248.

184. Marrakesh Treaty to Facilitate Access to Published Works for Persons who Are Blind, Visually Impaired, or Otherwise Print Disabled (opened for signature 27 June 2013); *see also*, Freeman *supra* note 173, at 249 (arguing that agreements governing open-source software licenses are examples of private ordering as a result of efforts by the CCO).

185. *See* LAURENCE HELFER, MOLLY LAND. RUTH OKEDIJI & JEROME REICHMAN, THE WORLD BLIND UNION GUIDE TO THE MARRAKESH TREATY: FACILITATING ACCESS TO BOOKS FOR PRINT-DISABLED INDIVIDUALS (2017).

186. James Boyle, *A Nondelegation Doctrine for the Digital Age?*, 50 DUKE L.J. 1, 7 (2000) (explaining that "ICANN is a classic example of a private entity creating new rules in . . . law").

authoritative law that "tends to reflect economic power and private interests" based largely on "community values."[187]

Therefore, private ordering helps to determine how the rules that are adopted by states for global intellectual property governance are nurtured in the incubators of epistemic communities which will then initiate different processes for the production of informal rules and the rules that will eventually form international intellectual property law. Private ordering reflects the authority to create, frame, and nurture what constitutes the groundwork of mandatory action for other actors, such as states, to negotiate treaties for the development of international rules for intellectual property rights.

From a formal point of view, the necessity of private ordering for the needs of the international community allows for epistemic communities and states to familiarize themselves with the causes of action to adopt international regulatory instruments. Hence, the private ordering of community norms and standards not only helps generate international intellectual property rules but also functions as a "fall-back" barrier to prevent uncertainty, and allows solutions to problems that can arise at other stages in the adoption of international intellectual property rules.[188]

In the same way that private ordering helps to promote the protection of intellectual property rights[189] and helps determine how rules addressing copyright or other forms of intellectual property apply, then my conception of private ordering, as I demonstrated, as a genesis process (or agenda-setting in the Abbott and Snidal context) is significant for the emergence of international intellectual property rules. Private ordering not only opens the gates of authority to international rulemaking for epistemic communities, but it also legitimizes the role epistemic communities play in shaping the discourse and rulemaking content of international legal instruments.

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187. Oscar Schachter, *The Decline of the Nation-State and Its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 12 (1998) (stating that under private market conditions, the state gives way for the development of "non-state mechanisms" where "private rather than public international law rules prevail").

188. For constructive arguments in relation to the idea of "fall-back" within international law, *see* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 201-03 (2003) (developing a criterion of fall-back as interpretation of treaty norms and application of the context of other norms of international law). My usage of the term fall-back, in some ways, relates to "other norms" within the international law production context.

189. *See, e.g.*, Hilty, *supra* note 177; Freeman, *supra* note 178.

VI. CONCLUSION

This article demonstrated that the character of epistemic communities in the international legal order can be seen as part of the new living law of the world, wherein epistemic communities are effective participants in global norm production. Specifically, the article engaged in a normative discussion on how technical standardization and e-commerce norms and practices contribute to the internationalization of private activities in the legal sphere. It then demonstrated how epistemic communities are involved in the power and legality of intellectual property rules in different circumstances concerning e-commerce and online dispute resolution. Thus, through a systematic and analytical discussion, I argued that the character of epistemic communities in the international legal order can be seen as part of how authority leads to legalization and globalizes the production norms and normative rules. Given that various epistemic communities are disguised in the normative frame of their economic interests and practices, it is essential to see their activities as part of the paradigm of how new rules and laws in the global economic system emerge in relation to internet governance. Since intellectual property rules are crucial to this change, one can hardly deny that the private rights of intellectual property are changing the normative landscape of the global legal arena. One of the critical issues to note is that the changes are becoming more robust and noticeable due to intellectual property arbitration in tribunals within which international laws are used to settle disputes; and private intellectual property arbitration concerning trademarks, the plain packaging of cigarettes,[190] and patent utility doctrines.[191]

190. *See, e.g.*, Philip Morris Asia Ltd. v. Commonwealth of Australia, Case No. 20212-12, PCA Case Repository (2015).

191. Eli Lilly & Company v. Government of Canada, (2017), ICSID Case No. UNCT/14/2, Final Award.

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Unfinished Business:
Why Multilateral Development Banks Need to Carry Out Post-Project Environmental Assessments

Audrey Bimbi*

ABSTRACT

Multilateral development banks assist their member states by financially supporting project developments that members facing budget constraints are unable to achieve alone. However, because of the environmental concerns plaguing the developing world, banks are now considering environmental protection in their initial assessments of projects. By requiring states to submit environmental and social management plans, multilateral development banks ensure that they can assist states in their fight to enhance environmental standards and revive their economies.

This Note focuses explicitly on two multilateral development banks: the World Bank and the African Development Bank (AfDB). Projects begin with environmental protection assessments. Using Zimbabwe's water sanitation projects carried out by both banks as an example, their reports show that those assessments were only carried out in the initial portion of those projects. However, when reading through the final project reports, there is no mention of a post-project environmental assessment to determine whether those involved carried out the project in an environmentally conscious manner. This lack of a post-project assessment raises the question of whether those in charge of executing these projects did so in a manner consistent with the requirements articulated in the pre-funding stage. This is especially concerning when one considers that corrupt governments and other political issues affect the appropriate use of money allocated to projects.

The first part of this Note will introduce the environmental assessment procedures of two multilateral development banks, the World Bank and the AfDB, including the current implementation of those assessments. The second part will focus on Zimbabwe as the case study of this discussion, where there is a water shortage crisis. This crisis led the World Bank, AfDB, and the United Nations to implement water sanitation projects in different regions of the country. This Note's

* I would like to thank Professor David Driesen for his assistance, advice, and mentorship throughout the entire Note-writing process. I would also like to thank my mother and friends for the empowering support they gave and showed me during this process.

discussion will only focus on the projects implemented by the two multilateral development banks. The third part will discuss the progression of projects based on the implemented environmental assessments. The fourth and final part will introduce the legal basis for the argument that current environmental and social management plans are not complete without a post-project evaluation conducted in the project's final stages.

I. INTRODUCTION

Nothing puts a damper on one's morning routine more than a croaking tap. Imagine turning on your faucet, ready to wash up for the day, only to hear a dragged-out croaking sound with no water coming out. You soon find out that the problem is not just with that tap; there is a problem with every single tap in your household and those throughout the entire neighborhood. Whatever the issue is, you may think the solution will be available in minutes—hours at most. However, as the news spreads around your city—yes, the problem affects your entire city—you realize that it might be days before you get a drop of water flowing through the pipes to your household again. To make matters worse, you hear your city officials calling this problem *Day Zero*, and you are confused because you were never aware of a countdown to anything.[1]

This is not the synopsis of an apocalyptic movie's poorly written plot, but a real-life situation currently affecting many people in developing and developed countries. So far, the countries that have or nearly experienced this phenomenon are South Africa,[2] Zimbabwe,[3] Brazil,[4] and Australia.[5] The encroaching reality of climate change fuels

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1. Day Zero is a day when water is shut off for an entire population (might be for a city or country as a whole), such that people have to go to a communal place to get water for their most basic needs.

2. Aryn Baker, *What It's Like To Live Through Cape Town's Massive Water Crisis*, TIME (n.d.), *available at* https://time.com/cape-town-south-africa-water-crisis/ (last visited Apr. 30, 2021).

3. Patrick Kingsley & Jeffrey Moyo, *In Zimbabwe, the Water Taps Run Dry and Worsen 'a Nightmare'*, N.Y. TIMES (July 31, 2019), *available at* https://www.nytimes.com/2019/07/31/world/africa/zimbabwe-water-crisis.html (last visited Apr. 30, 2021).

4. *20 Lessons From São Paulo's Day Zero*, 50 LITERS (Nov. 10, 2019), *available at* http://50liters.com/sao-paulo-day-zero-lessons/ (last visited Apr. 30, 2021).

5. Nicole Trian, *Australia Prepares for 'Day Zero' – The Day the Water Runs Out*, FR. 24 (Sept. 9, 2019), *available at* https://www.france24.com/en/20190919-australia-day-zero-

the fear of a global *Day Zero* as water reservoirs dry up and rainy seasons become dryer. The most significant division created by climate change is how different countries handle the stress that accompanies this crisis. Developed countries have better access to resources, while developing countries suffer because of the lack of infrastructure to keep clean, safe drinking water running. The lack of funding and absence of the resources necessary to fix the problem only further exacerbate the issue.

States turn to multilateral development banks, from which they can borrow funds, to address the issues surrounding this lack of finance and resources. Multilateral development banks are responsible for providing monetary assistance to promote economic and social development in developing countries.[6] The funding for these banks comes from member states' contributions and is used to fund their needs. However, this funding model affects the types of projects the banks focus on and how they carry them out. For example, the United States is a contributing member of the World Bank and five other multilateral development banks.[7] As the World Bank's largest shareholder, the United States is one of the most influential members whose role affects the Bank's priorities and practices. Therefore, whenever the World Bank's practices seem to favor one group of member states over another, the disadvantaged group is more likely to alter those practices if it builds a coalition with the United States.[8] This, however, is not an easy task. As a result, when major shareholders and contributors like the United States do not support a project, the World Bank is less likely to fund that project or change its practices to accommodate that project's demands. Of particular interest to this discussion is how multilateral development banks have incorporated an environmental focus in their pre-funding evaluation process.

The first part of this Note will introduce the environmental assessment procedures used by two multilateral development banks, the World Bank and the African Development Bank (AfDB), including what drove the change and the current implementation of those assessments.

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drought-water-climate-change-greta-thunberg-paris-accord-extinction-rebe (last visited Apr. 30, 2021).

6. Rebecca M. Nelson, *Multilateral Development Banks: Overview and Issues for Congress*, CONG. RSCH. SERV. (Feb. 11, 2020), *available at* https://fas.org/sgp/crs/row/R41170.pdf (last visited Apr. 30, 2021).

7. Rebecca M. Nelson, *Multilateral Development Banks: U.S. Contributions FY 2000-2020*, CONG. RSCH. SERV. (Jan. 23, 2020), *available at* https://fas.org/sgp/crs/misc/RS20792.pdf (last visited Apr. 30, 2021).

8. Daniel L. Nielson & Michael J. Tierney, *Delegation to International Organizations: Agency Theory and World Bank Environmental Reform*, 57 INT'L ORG. 241, 254-56 (2003).

The second part will focus on Zimbabwe as a case study. Currently, Zimbabwe is facing a water shortage crisis. This crisis led the World Bank, AfDB, and the United Nations (U.N.) to implement water sanitation projects in different regions of the country. This discussion will only focus on the projects implemented by World Bank and AfDB. The third part of this Note will discuss the projects' progression based on the environmental assessments carried out. The fourth and final part will introduce the legal basis for the argument that the current environmental and social management plans are incomplete without a post-project evaluation conducted during the projects' final stages.

II. ENVIRONMENTAL ASSESSMENTS

A. The World Bank's Environmental Impact Assessment

Like all other multilateral development banks, the World Bank receives funding from its member states. Historically, the World Bank has funneled these funds into economic and development projects, with little to no concern for their environmental impacts.[9] Environmental assessments of proposed projects were not a state practice until 1969, when the United States became the first country, and World Bank member state, to require environmental assessments in the National Environmental Policy Act (NEPA).[10] However, as other member states grew concerned about the environmental disasters affecting Third World countries, intense financial pressure led the World Bank to change its financial programs assessments by adopting environmental safeguards.[11] These safeguards are collectively known as the Environmental Impact Assessment (EIA).

The main objective of EIAs is to assess the foreseeable environmental impacts of a proposed project for which a state is requesting World Bank funds.[12] When a member state makes a project proposal, regardless of the project's field, the Bank requires the proposal to show that the process will environmentally be sound and sustainable.[13]

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9. Jose O. Castaneda, *The World Bank Adopts Environmental Impact Assessments*, 4 PACE INT'L L. REV. 241, 261; *see also id.* at 241.

10. Nicholas A. Robinson, *International Trends in Environmental Assessment*, 19 B.C. ENVTL. AFF. L. REV 591, 593 (1992).

11. Castaneda, *supra* note 9, at 241.

12. *Id.*

13. THE WORLD BANK OPERATIONAL MANUAL: OPERATIONAL POLICY 57 (1999), *available at* https://www.env.go.jp/earth/coop/coop/materials/10-eiae/10-eiae-7.pdf (last visited Apr. 30, 2021).

This, in turn, helps the Bank improve its decision-making process and fulfill the overall objective of evaluating a proposed project's environmental risks and impacts. The assessment also includes examining the project in light of its alternatives, which may help identify ways to improve its design, siting, and implementation.[14] Any alternative improvements must prevent, mitigate, or compensate for adverse environmental impacts and enhance positive impacts.[15] When feasible, the World Bank will opt for preventative measures, as opposed to those that simply mitigate or compensate for an environmental impact.[16] All of these factors—prevention, mitigation, and compensation—are considered at different stages of the EIA.

The EIA itself has four main stages. In the first stage, the Bank screens the project to evaluate the EIA's detail level and determine its applicability. In the second stage, the focus is on scoping. At this stage, the Bank assesses whether the proposal considered the most pressing issues and completed the terms of reference for the EIA. Following this, the environmental assessment report is prepared and completed—including identified impacts, evaluated alternatives, and designated mitigation measures. The final stage, which involves preparing an environmental management plan, can be part of the environmental assessment report or brought up as its own separate report.[17]

B. African Development Bank's Integrated Safeguards

The AfDB is a regional developmental bank comprised of fifty-four African or regional member states and twenty-seven non-regional member states. Some of the non-regional member states are the United States, United Kingdom, France, and China.[18] The African Development Fund finances the AfDB, which has thirty-two contributing or donor countries.[19]

Like the World Bank, the AfDB requires regional member countries to show they will implement their projects in an environmentally sound

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14. *Id.*

15. *Id.*

16. *Id.*

17. Robinson, *supra* note 10, at 593.

18. *Member Countries*, AFR. DEV. BANK (2021), *available at* https://www.afdb.org/en/about-us/corporate-information/members (last visited Apr. 30, 2021).

19. *About the ADF*, AFR. DEV. BANK (2021), *available at* https://www.afdb.org/en/about-us/corporate-information/african-development-fund-adf/about-the-adf (last visited Apr. 30, 2021).

manner, aligned with the Integrated Environmental and Social Impact Assessment (IESIA).[20] Specifically, the IESIA provides the regional member countries guidance on carrying out pre-funding environmental impact assessments.[21] The Bank's staff members, who are in charge of reviewing and clearing the proposals, also use these guidance materials for the review-and-approval process and project supervision stages.[22] The guidance materials are also subject to review and regular updates, requiring the Bank and the regional member countries to evaluate what they have implemented thus far and agree on any necessary adjustments.[23]

All subsequent stages of the project apply the environmental and social assessment procedures. These phases are country programming, and project identification, preparation, appraisal, and implementation.[24] The main difference between the AfDB's IESIA and the World Bank's EIA is that the AfDB's guidelines specifically require member states to ensure that the environmental impact requirements from the pre-funding stage are adequately met.[25] To meet these standards, the Bank requires that environmental and social experts be available throughout the various stages of the project cycle—especially in Category 1 and Category 4 projects.[26] Category 1 projects require a full IESIA and Environmental and Social Management Plan (ESMP) because they are more likely to cause irreversible, adverse environmental and social harm. The displacement of more than 200 people is just one example of a Category

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20. *Bank Group's New Guidance on Environmental and Social Impact Assessment to Boost Sustainable Development in RMCs*, AFR. DEV. BANK (2015), *available at* https://www.afdb.org/en/news-and-events/bank-groups-new-guidance-on-environmental-and-social-impact-assessment-to-boost-sustainable-development-in-rmcs-15256 (last visited Apr. 30, 2021) [hereinafter *Bank Group's New Guidance*].

21. *Id.*

22. *Id.*

23. *Id.* The IESIA guidelines have been in place since 2001 and were last reviewed in 2015. One of the main changes to the guidelines includes guidance on providing specific support where critical environmental and social risks are concerned when carrying out projects in several priority sectors.

24. *AfDB Launches Revised Version of its Environmental and Social Assessment Procedures for 2015*, AFR. DEV. BANK (2015), *available at* https://www.afdb.org/en/news-and-events/afdb-launches-revised-version-of-its-environmental-and-social-assessment-procedures-for-2015-15013 (last visited Apr. 30, 2021).

25. *Id.*

26. *Id.*; *see also* AFR. DEV. BANK, ENVIRONMENTAL & SOCIAL ASSESSMENT PROCEDURES BASICS FOR PUBLIC SECTOR OPERATIONS 6 (AfDB, 2011), *available at* https://www.afdb.org/sites/default/files/documents/environmental-and-social-assessments/esap_basics_guide_en.pdf (last visited Apr. 30, 2021).

1 project's adverse social impact.[27] Category 4 projects, on the other hand, are those "that involve subprojects which may result in adverse environmental and/or social impacts and for which the AfDB's investments are handled by a financial intermediary."[28]

C. Summary of the Two Banks' Environmental Assessments

Although both banks require EIAs in the pre-funding stages, they do not consider the assessments in post-project evaluations or reports. The case study in Part III of this Note will show how, in funding a project in Zimbabwe, each bank implemented its own environmental assessments.

III. CASE STUDY: ZIMBABWE'S WATER SHORTAGE CRICIS

Zimbabwe is a landlocked developing country in Southern Africa. Like other landlocked countries, Zimbabwe faces social and economic difficulties because it lacks access to seaports and the world trade market.[29] To engage in importing and exporting, Zimbabwe relies on neighboring countries for transit routes, making trade expensive.[30]

The country also underwent political reform following the overthrow of the late Robert G. Mugabe, whose administration is blamed for many of Zimbabwe's political issues.[31] Some Zimbabweans also

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27. AFR. DEV. BANK, *supra* note 26, at 6.

28. *Id.*

29. *See* Kacana Sipangule, *Trade Needs Ports*, DEV. & COOPERATION (Mar. 28, 2017), *available at* https://www.dandc.eu/en/article/landlocked-developing-countries-struggle-high-trade-costs-and-depend-transit-countries (last visited Apr. 30, 2021) ("Landlocked developing countries thus pay a high price for not having a sea-port of their own. Their trade depends on the ports of other countries. The worse transport links are, the higher the transaction costs rise. Moreover, many transit countries impose fees and road tolls that raise costs even further[.]").

30. *See* Michael L. Faye et al., *The Challenges Facing Landlocked Developing Countries*, 5 J. HUM. DEV. 31, 32 (2004) ("Landlocked countries not only face the challenge of distance, but also the challenges that result from dependence on passage through a sovereign transit country, one through which trade from a landlocked country must pass to access international shipping markets. While rivers were a more common form of trade transit . . . the principle of dependence on neighbors applies equally to the more modern transport modes of roads and railways. Such dependence can take several forms, many of which are less deliberate than . . . power politics.").

31. *See* Mwita Chacha & Jonathan Powell, *It's Been One Year Since Zimbabwe Toppled Mugabe. Why Isn't it a Democracy Yet?*, WASH. POST (Nov. 17, 2018), *available at*

blame President Mugabe's administration for the decline in the country's economic growth.[32] The political unrest and economic failure of President Mugabe's administration largely contributed to the mismanagement of the infrastructure needed to supply clean water.[33] As a result, local municipalities and governments resorted to rationing the water supply to ensure that people had enough clean drinking water without draining the reservoirs.[34]

Rationing the water supply only temporarily fixed the issue of the drying reservoirs. Climate change also led to drier rainy seasons, leaving the reservoirs to dry up without replenishment. Reservoir depletion led to the closure of treatment plants used to purify drinking water. Closing these facilities meant there was no remaining infrastructure to purify water, which led to other problems. Water pollution levels rose as a

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https://www.washingtonpost.com/news/monkey-cage/wp/2018/11/17/its-been-one-year-since-zimbabwe-toppled-mugabe-why-isnt-it-a-democracy-yet/ (last visited Apr. 30, 2021) ("Certainly, the 2018 elections were better than previous Zimbabwean elections, at least in the high voter turnout and calmly observed on election day. But it does not appear to have been a turning point toward democracy. Throughout the electioneering period, the ZANU-PF showed that it would still go to great lengths to ensure that it retained power, much like Mugabe and other dictators who manipulate elections.").

32. *See* Kingsley & Moyo, *supra* note 3 ("But the water crisis is only a microcosm of Zimbabwe's malaise. Years of mismanagement under Robert Mugabe, who governed Zimbabwe for 37 years until he was finally ousted in 2017, have left the economy in tatters.").

33. *See Urgent Water Supply and Sanitation Rehabilitation Project Phase 2*, AFR. DEV. BANK (2013), *available at* https://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Zimbabwe_-_Urgent_Water_Supply_and_Sanitation_Rehabilitation_Project_-_Phase_2_-_Appraisal_Report.pdf (last visited Mar. 13, 2021) ("In the late 1990s, Zimbabwe was among the top-ranking countries in the provision of basic water supply and sanitation services in sub-Saharan Africa. In the following decade, due to the declining economy and political crisis, the country's infrastructure collapsed with severe socioeconomic impacts reaching the worst level in 2008/9 resulting in the devastating cholera epidemic which took the lives of more than 4300 people.").

34. *See Urgent Water Supply and Sanitation Rehabilitation Project*, AFR. DEV. BANK (Oct. 2010), *available at* https://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_390 (last visited Mar. 13, 2021) ("The country has approximately 2200 dams, of which 213 are classified as large dams under the International Commissions for Large Dams (ICOLD) definition. Like the rest of the infrastructure, some of the dams are at risk due to the prolonged period without adequate maintenance.").

ramification of open defecation[35] and chemical dumping that affected the potability of groundwater.[36]

The first, most dangerous consequence of the pollution was its devastating health effects. In 2008 and 2009, the country experienced one of the worst cholera epidemics in Africa, it claimed over 4000 lives and affected more than 98,000 people.[37] To address the problem, private individuals, local governments, and donors drilled boreholes, yet they faced two main issues with this solution. First, some of the boreholes required electricity to pump water. This was problematic because Zimbabwe relies primarily on hydroelectricity, which climate change has affected by depleting water levels in the reservoirs that serve as hydroelectricity sources.[38] As a result there were, and still are, many power cuts—when the local government cuts off electricity for a uncertain time—making it difficult to operate the boreholes.[39] The pipes also became rusty, making the water unclean and unsafe to drink,[40] but people resorted to drinking that water anyway because there were few better alternatives. As a result, in 2018, Zimbabwe experienced another cholera outbreak that claimed at least fifty victims and affected the health

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35. *See Zimbabwe: Water and Sanitation Crisis - Government Mismanagement, Corruption Risks Lives of Millions*, HUM. RTS. WATCH (Nov. 19, 2013), *available at* https://www.hrw.org/news/2013/11/19/zimbabwe-water-and-sanitation-crisis (last visited Apr. 30, 2021) ("Harare's water and sanitation system is broken. The government isn't fixing it . . . In many communities, there is no water for drinking or bathing, there is sewage in the streets, there is diarrhea and typhoid, and the threat of another cholera epidemic. The water shortage and the lack of functioning indoor toilets or community latrines sometimes gave them no choice but to defecate outdoors.").

36. *See* Jane Cohen, *Troubled Water – Burst Pipes, Contaminated Wells, and Open Defecation in Zimbabwe's Capital*, HUM. RTS. WATCH (Nov. 2013), *available at* https://www.hrw.org/report/2013/11/19/troubled-water/burst-pipes-contaminated-wells-and-open-defecation-zimbabwes (last visited Apr. 30, 2021) ("Despite government statistics pointing to a low rate of open defecation in urban areas, people we interviewed said they often resorted to open defecation because they were unable to flush their toilets as a result of lack of water, or their toilets were clogged and overflowing, rending the toilets unusable.").

37. Jeremy Youde, *Don't Drink the Water: Politics and Cholera in Zimbabwe*, 65 INT'L J. 687, 690-91 (2010).

38. Problem Masau, *Zimbabweans Work at Night to Beat Hydropower Shortage as Drought Bites*, CLIMATE CHANGE NEWS (July 2019), *available at* https://www.climatechangenews.com/2019/07/24/zimbabweans-work-night-beat-hydropower-shortage-drought-bites/ (last visited Mar. 13, 2021).

39. Zimbabwe Peace Project, *The Water Crisis Fact Sheet No. 2, 2019*, RELIEF WEB (2019), *available at* https://reliefweb.int/report/zimbabwe/water-crisis-fact-sheet-no-2-2019 (last visited Mar. 13, 2021).

40. *Id.*; *see also* Liliosa Pahwaringira et al., *The Impacts of Water Shortages on Women's Time-Space Activities in the High-Density Suburb of Mabvuku in Harare*, 4 J. GENDER & WATER 65, 66 (2017).

of more than 8000 people.[41] Safe drinking water remains a concern as more water purification plants shut down.

The water pollution crisis also caused a second problem: waiting hours in queues to use the boreholes threatens the safety of women and children.[42] When it gets dark, women and children must choose between staying line and waiting their turn, or returning the next day. This predicament is not an easy choice since returning home without water means another day without drinking water and food. On the other hand, staying in the queues late at night exposes individuals to the potential to be attacked on the walk home, as the boreholes are often neither conveniently nor located within a short distance of local homes.[43]

The water pollution crisis also affects education. When there is no water, children miss school because they do not have food to eat, clean uniforms, or enough drops of water to clean themselves. As a result, they must choose between waiting in queues to get water, thereby missing school, and attending school where they risk being turned away or isolated because of poor hygiene.

A. Responsibility and Resources

In addressing these problems, one needs to understand both who has either claimed or actually has responsibility for solving these problems, and the means by and extent to which those parties have solved it thus far.

i. State Level

Section 77 of the Zimbabwean Constitution stipulates that "[e]very person has the right to safe, clean and potable water . . . and the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right."[44] Although the Constitution recognized the right to clean water, two issues hindered the government's ability to address the problem. The first issue is that there too many institutions were involved in the water

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41. *Cholera-Zimbabwe*, WORLD HEALTH ORG. (Oct. 5, 2018), *available at* https://www.who.int/csr/don/05-october-2018-cholera-zimbabwe/en/ (last visited Mar. 13, 2020).

42. Zimbabwe Peace Project, *supra* note 39.

43. People taking over public boreholes and selling water to others is also a concern.

44. Constitution of Zimbabwe Amendment (No.20) Jan. 31, 2013, ch. 4, art. 77 (Zim.).

and sanitation sector, making it quite difficult for the government to determine who was accountable.

The government assigned the Ministry of Water Resources Development and Management with overall responsibility for the water and sanitation sector. However, the involvement of other government ministries made it difficult to reach a consensus when implementing policies. For example, the Zimbabwe National Water Authority (ZINWA), Ministry of Local Government, Urban and Rural Development—which, as the name suggests, is also responsible for water supply in urban areas—and the Department of Environmental Health, housed under the Ministry of Health and Child Welfare, share responsibility for water supply to rural areas.

The second problem is with the phrase "within the limits of the resources available to it." As of 2019, the World Bank reported that Zimbabwe was experiencing extreme poverty due to an El Niño-induced drought and a recent cyclone, nicknamed *Idai*, that worsened the drought when it devastated the provinces that account for 30% of the country's agricultural output.[45] Because of its current debt to the World Bank, Zimbabwe's lending program is inactive, leaving the country to rely on financial aid from other governments and intergovernmental organizations (IGOs) to fund projects geared toward fixing the infrastructure.[46]

ii. International Level

The U.N. expressed its commitment to water sanitation when the United Nations General Assembly (GAOR) declared "safe and clean drinking water and sanitation a human right essential to the full enjoyment of life and all other human rights."[47] This resolution further called for states and international organizations to work together by "provid[ing] financial resources, capacity-building and technology transfer[s] . . . to developing countries, to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all."[48] In terms of accessibility, the World Health Organization (WHO) requires that the clean water source be "within 1000 meters [about two-thirds of a mile] of the home and collection time should not exceed [thirty] minutes."

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45. *The World Bank in Zimbabwe*, THE WORLD BANK (Aug. 2020), *available at* https://www.worldbank.org/en/country/zimbabwe/overview (last visited Mar. 13, 2021).

46. *Id.*

47. G.A. Res. 64/292, at 2 (July 28, 2010).

48. *Id.*

This means that even if the boreholes drilled in the Zimbabwean communities met the sanitation levels, the current situation level in Zimbabwe would still fail to meet the "physical accessibility" criteria of the right to water and sanitation.

One of the ways the U.N. has collaborated with states to work towards realizing this right is by setting sustainable development goals (SDGs). Of specific relevance to this Note is SDG 6, which aims at "[e]nsur[ing] the availability and sustainable management of water and sanitation for all."[49] SDG 6's goals include achieving universal and equitable access to safe and affordable drinking water for all by 2030. Target indicator 6.3 of SDG 6 stipulates that the U.N. plans to "improve water quality by reducing pollution, eliminating dumping and minimizing [the] release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally."[50]

Zimbabwe has carried out infrastructure-renewal projects to ensure that currently available water sources are treated to provide people with greater access to safe drinking water, even though reservoirs are drying up. One such project is the Urgent Water Supply and Sanitation Rehabilitation Project (UWSSRP). The next two parts of this Note will explore the project's background, current performance, and the results this project has purportedly achieved. The bulk of the discussion will focus on accountability, transparency, and compliance with the project's budget and terms as stipulated by the funding organizations.

IV. THE BANKS' PROJECTS

A. AfDB: UWSSRP

i. Background

The UWSSRP began in 2013 due to the work and support of the Zimbabwe Multi-Donor Trust Fund (Zim-Fund), a group of donors who came together in 2010 to support the Government of Zimbabwe's management of activities geared toward recovery and development.[51]

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49. *Ensure Availability and Sustainable Management of Water and Sanitation for All*, DEP'T U.N. ECON. & SOC. AFF. (2020), *available at* https://sustainabledevelopment.un.org/sdg6 (last visited May 2, 2021).

50. *Id.*

51. Catherine Benson Wahlen, *ZimFund Project to Improve Water Supply and Sanitation in Six Zimbabwean Municipalities*, SDG KNOWLEDGE HUB (Apr. 23, 2013),

Zim-Fund launched the project, and the AfDB managed it with a focus on increasing the "availability, quality and reliability of water, restor[ing] wastewater treatment capacity and reduc[ing] water-borne related diseases."[52] Zim-Fund implemented the project in six major Zimbabwean urban areas: Chitungwiza (Harare), Chegutu, Kwekwe, Masvingo, and Mutare. By restoring the treatment capacity of the water sources in these urban areas, the project also aimed to "reduce pollution to the raw potable water sources and hence reduce [the] cost of the water treatment chemicals used."[53] At the conclusion of this project, these urban areas should have received refurbished pumping equipment and treatment plants. This would increase the facilities' usage by 4% and improve the quality of the water supply and sanitation sector services.[54]

ii. Rehabilitation of Water Supply and Sewerage Infrastructure

The rehabilitation part of the project was concerned with the restoration, replacement, and/or refurbishment of existing water facilities and infrastructure. This included the "rehabilitation of the main outfall and trunk sewers, booster pump stations, treatment plants to achieve at least preliminary treatment, sludge digestion and disposal and repair of sewers blockages."[55] To ensure that the solutions were long-term, the project's rehabilitation phase required water supply and sanitation departments of urban municipalities to be equipped with the treatment plants, equipment, and transportation necessary to improve the quality of

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available at http://sdg.iisd.org/news/zimfund-project-to-improve-water-supply-and-sanitation-in-six-zimbabwean-municipalities/ (last visited May 2, 2021).

52. *Urgent Water Supply and Sanitation Rehabilitation Project Appraisal Report*, AFR. DEV. BANK (Oct. 2010), *available at* https://docplayer.net/amp/3580405-Urgent-water-supply-and-sanitation-rehabilitation-project-country-zimbabwe-project-appraisal-report-october-2010.html (last visited May 2, 2021) ("The Program Oversight Committee (POC), comprising of contributing donors and representative of the GOZ, is to oversee the implementation of the Zim-Fund, ensure alignment and coherence of the activities with the Government's recovery program and development programmes, endorse project briefs and proposals and recommend to the Bank the allocation of funding to the approved projects. The Operations Manual will guide the processing and implementation of the project financed by the Zim-Fund developed for the Fund. In line with the procedures, the proposed project's brief was approved by the Zim-Fund Policy Oversight Committee (POC) on 25 October 2010, which led to the preparation and appraisal of the project in detail.").

53. *Id.*

54. *Id.*

55. *Id.*

operation, maintenance, service, and delivery.[56] While carrying out these tasks the AfDB was aware of the environmental impact, as evinced by discussions about taking measures to replace destroyed vegetation and protect surrounding areas when disposing of discarded equipment and materials.[57]

iii. Promotion of Improved Sanitation and Hygiene Education

The sanitation and hygiene component focuses on teaching community residents about ways to improve hygiene levels to reduce the chance of contracting water-borne diseases, improving the overall health of the environment. Additionally, there would also be a focus on educating the community on common ownership of the infrastructure and power supply equipment to reduce the number of incidents connected to vandalism and theft. Educating the community with this information would mitigate environmental degradation.

iv. Institutional Support

The project also aimed to ensure that water supply and sanitation sector staff improved their knowledge of how to operate equipment and maintain facilities. Proposed training modules focused on educating the staff on how to reduce non-revenue water, introduce efficient operation and maintenance techniques, and "recommend the most suitable financial and billing programs together with the necessary hardware for running the [water supply and sanitation] services."[58]

v. Project Management and Engineering Services

Project management and engineering focused on compliance and accountability issues by ensuring that a Project Implementation Entity (PIE) was responsible for assessing the different stages of the project. This component included assessments and supervision of the

56. *Id.*

57. *Urgent Water Supply and Sanitation Rehabilitation Project*, *supra* note 34, at 13 ("The environment and social management plan will entail how the upgrade should be undertaken such that the sludge is not disposed of in a manner that will contaminate the soil and groundwater resources. Included in the mitigation measures would be the prevention of nuisance in terms of dust, noise, vermin, and odor."); *see also Urgent Water Supply and Sanitation Rehabilitation Project Appraisal Report*, *supra* note 52.

58. *Id.* at 10.

specifications, drawings, rehabilitation works, and design. There was also an annual audit of the project, carried out by an independent audit firm.[59]

Per these four points of focus, as provided by the AfDB, Zim-Fund implemented the UWSSRP in two phases.[60] Phase I ran from December 2011 and focused on rehabilitating water supply and sewer infrastructure and facilities, as stipulated under the first component. Phase II focused on ensuring the long-term survival of the effects of Phase I, i.e. emphasizing community education and the institutional support of the staff in the water sanitation and supply sector.

vi. Integrated Environmental and Social Impact Assessment

Zimbabwean environmental legislation does not require project management to conduct EIAs when implementing rehabilitation programs to existing water sources and wastewater facilities.[61] However, per the Bank's protocol, the AfDB carried out an EIA because the UWSSRP was a Category 2 project—that is, likely to have a detrimental social and environmental impact on the construction site.[62] It might appear useless to carry out an EIA for a project to correct activities that have resulted in environmental pollution and other kinds of damage.[63] However, the Bank found the assessment necessary because of the potential environmental harm that could occur without proper management.[64]

In carrying out the ESMP, the Bank had several objectives. The first was to ensure that there would be continuous improvement of social and

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59. *Id.* at 10.

60. *Portfolio of Projects Financed Under the ZimFund*, AFR. DEV. BANK (Nov. 2015), *available at* https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/zimbabwe-multi-donor-trust-fund/portfolio-of-projects (last visited May 2, 2021).

61. *Environmental and Social Management Plan*, AFR. DEV. BANK (Oct. 2012), *available at* https://www.afdb.org/fileadmin/uploads/afdb/Documents/Environmental-and-Social-Assessments/Zimbabwe%20-%20Urgent%20Water%20Supply%20and%20Sanitation%20Rehabilitation%20-%20ESMP%20Summary.pdf (last visited May 2, 2021).

62. *Id.* at 2. *See also* AFR. DEV. BANK, *supra* note 6 (stating that Category 2 projects are those that are "likely to induce detrimental, site-specific environmental and social impacts that can be minimized by including mitigation measures in an ESMP and an Abbreviated Resettlement Action Plan (ARAP), when applicable.").

63. *Id.* ("It is worth noting that the project mainly involves correcting activities that harm the environment, such as discharging untreated wastewater into the natural environment; pollution through sewage leaks; drinking water leakages, etc.").

64. *Id.*

environmental performance throughout the project's implementation. This objective focused on reducing negative impacts and enhancing positive effects during the facilities' rehabilitation process. Fulfilling this objective would also help meet the second objective, which focused on ensuring that the project does not cause any immitigable social and environmental problems. The third objective was to outline mitigation measures that could increase the management of social and environmental impacts associated with the project. The fourth objective focused on ensuring that the rehabilitation or upgrades of the water and wastewater infrastructure would be conducted according to the Bank's guidelines throughout the project. The fifth objective was to comply with national and local legislatures. Lastly, the Bank aimed to identify the roles, responsibilities, and management costs of social and environmental protection.[65]

Although temporary and localized, some of the project's negative impacts involved environmental concerns about soil and groundwater contamination if wastewater treatment was inadequate.[66] Additionally, because the rehabilitation process and wastewater treatment required de-sludging, environmental pollution was still likely to occur.[67] To mitigate the occurrences of these issues, the AfDB proposed measures like "local chlorination . . . to address potential recontamination and ensure delivery of safe water, develop appropriate sludge management measures including increased re-use of the sludge and [use of] vacuum trucks to remove impounding sewage and other contaminants spillages."[68] To ensure that the project implemented these measures, the Bank relied on the local agencies to closely monitor the execution of these tasks.[69]

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65. *Id.*

66. *Environmental and Social Management Plan*, *supra* note 61, at 4 ("Expected negative environmental and social impacts . . . Soil and groundwater contamination from the storage of fuel and chemicals and wastewater flows or leaks during the rehabilitation of pumping and treatment facilities and replacement of pipes.").

67. *Id.*

68. *Id.* at 5.

69. *See Urgent Water Supply and Sanitation Rehabilitation Project Appraisal Report*, *supra* note 52; *see also Urgent Water Supply and Sanitation Rehabilitation Project*, *supra* note 34 (it is not exactly clear which "agency" was in charge of implementing this. The appraisal report simply mentioned that a Project Implementing Entity (PIE) and Procurement Agency (PA) would oversee the implementation of the project on behalf of the Government of Zimbabwe [pg. viii]).

B. The World Bank: The Zimbabwe National Water Project

i. Background

The World Bank founded the Zimbabwe National Water Project (National Water Project) to "improve access and efficiency in water services in selected growth centers and to strengthen planning and regulation capacity for the water and sanitation sector."[70] The Zimbabwe National Water Authority (ZINWA) implemented the project, which was financed by the Zimbabwe Reconstruction Fund, a multi-donor trust fund established by the World Bank's Board of Executive Directors.[71] In implementing the project, ZINWA focused on the watersheds, also known as drainage basins—Madziwa, Nembudziya, Zimunya, Mataga, Lupane, Guruve, and Gutu—located near the seven major rivers in the country.[72] A watershed, or drainage basin, is a land area that moves rainfall or water from melted snow to a river, lake, or other larger body of water.[73]

The main reason for the program's implementation was the Zimbabwean government's belief that the country's growth centers were missing water supply and sanitation support.[74] Zim-Fund, the financing agency through AfDB, provided water supply and sanitation support to large towns via the UWSRRP discussed above; the U.N. International Children's Education Fund (UNICEF) funded projects for rural areas through its Water, Sanitation, and Hygiene (WASH) program.[75] Like the

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70. *Zimbabwe National Water Project: Resettlement Policy Framework*, THE WORLD BANK (Feb. 2018), *available at* http://documents.worldbank.org/curated/en/804611521551293477/pdf/RPF-Zimbabwe-National-Water-Project-P154861-World-Bank-DISCLOSED.pdf (last visited May 2, 2021) [hereinafter *Resettlement Policy Framework*].

71. *Zimbabwe Reconstruction Fund (ZIMREF)*, THE WORLD BANK (Feb. 2018), *available at* https://www.worldbank.org/en/programs/221imbabwe-reconstruction-fund (last visited May 2, 2021).

72. *Resettlement Policy Framework*, *supra* note 70, at 7.

73. Howard Perlman, *Watersheds and Drainage Basins*, U.S. GEOLOGICAL SURVEY (2003), *available at* https://www.usgs.gov/special-topic/water-science-school/science/watersheds-and-drainage-basins?qt-science_center_objects=0#qt-science_center_objects (last visited May 2, 2021).

74. THE WORLD BANK, INTERNATIONAL DEVELOPMENT ASSOCIATION PROJECT APPRAISAL 3 (2016), *available at* http://documents.worldbank.org/curated/en/247961467989558934/pdf/PAD1569-PAD-P154861-Box396267B-PUBLIC-National-Water-Development-Project-PAD.pdf (last visited May 2, 2021) [hereinafter PROJECT APPRAISAL].

75. *See id.*

UWSRRP, the National Water Project was divided into different components: Growth Center Water and Sanitation Improvement; Technical Assistance; and Project Management.[76]

ii. Growth Center Water and Sanitation Improvements

With $14.04 million USD allocated to this component, the aim was to finance investments in UWSSRP for the seven watersheds.[77] This amount was based on the short-, medium-, and long-term investment needs of these areas following the evaluation of their designs and preliminary environmental impact assessments.[78]

iii. Technical Assistance

To assist various institutions associated with this project, $5.11 million USD was allocated "to ensure the sustainability of investments and improve the overall planning, regulation, and reform of the sector in line with the National Water Policy."[79] The $5.11 million USD was allocated to five subcomponents: (A) National Water Resources Master Plan ($3 million USD); (B) Technical Assistance for a Water Services Regulator ($0.25 million USD); (C) Technical Assistance to Local Authorities ($0.4 million USD); (D) Institutional Strengthening of ZINWA ($1.25 million USD); and (E) Training ($0.21 million USD).[80] Subcomponents (A) and (B) were set up in response to the Zimbabwean government's request.[81] Subcomponent (C) was set up to finance three key activities proposed by two ministry departments.[82] Subcomponent (D) financed a "skills audit and strategic gap analysis," which ZINWA

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76. *Id.* at 6.

77. *Id.*

78. *Id.* ("Investments will include expanding and rehabilitating water treatment works, boreholes, transmission mains, storage and service reservoirs, distribution systems, connections, and meter installation and replacement.").

79. PROJECT APPRAISAL, *supra* note 74, at 7 (noting that the covered institutions are both national, such as ZINWA, and local institutions that cover the municipalities in the seven catchment areas).

80. *Id.* at 7-8.

81. *Id.* at 7.

82. *Id.* ("Three key areas were identified as priorities: (a) separating ZINWA's utility and water resources functions, (b) improving commercial orientation, and (c) improving customer focus and poor stakeholder management. This subcomponent will also help ZINWA to carry out sanitation needs assessment for growth centers, including developing options for sanitation in these areas.").

requested to help identify the areas that would strengthen the department.[83] Subcomponent (E), the Training plan, was necessary because it assisted ZINWA, the Ministry of Environment, Climate, and Water, and other associated ministry departments to ensure the sustainability of the project.[84]

iv. Project Management

As the implementing agency, ZINWA was in charge of setting up a Project Implementation Unit to be the secretariat of the different ministers under Subcomponents (A)-(C) of the Technical Assistance Component, and to manage the Growth Center WSS improvements under Component 1.[85]

v. Environmental Impact Assessment

Like the UWSRRP, the National Water Project had negative environmental impacts that were temporary and site-specific, making it a Category B project under the World Bank's Environmental and Social Management Plan (ESMP).[86] One of the major negative environmental impacts of the project was the effect on aquatic life because some of the water supply would be from bodies of water with fish and other river species.[87] Another concerning negative environmental effect, although limited in scale, was soil erosion and water pollution.[88] A significant difference between the World Bank's ESMP and the AfDB discussed earlier is that the ESMP has a specific agency that can be held accountable for implementing the project consistent with the mitigation requirements. ZINWA took responsibility for ensuring compliance with the ESMP

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83. *Id.*

84. PROJECT APPRAISAL, *supra* note 74, at 7. The other ministry departments are the Ministry of Rural Development and Preservation of Cultural Heritage (MRDPCH); the Ministry of Local Government, Public Works and National Housing (MLGPWNH), and the Ministry of Agriculture, Mechanization, and Irrigation Development. Local authorities would also be covered in this training.

85. *Id.* at 8.

86. *Id.* at 23; *see also Environmental and Social Management Plan (ESMP): Weather Surveillance Radar*, THE WORLD BANK (2017), *available at* http://documents1.worldbank.org/curated/en/801501521170801261/pdf/Environmental-and-social-management-plan-for-weather-surveillance-Radar-in-Punjab-Lahore.pdf (last visited May 2, 2021) ("'Category B' as per the World Bank OP 4.01, [are] the activities under the project [that] would involve small scale constructions with temporary and reversible environmental and social impacts.").

87. *Id.*

88. PROJECT APPRAISAL, *supra* note 74, at 24.

guidelines, during both the project's internal implementation phases and the contractors' winning bid to carry out other parts of the project.[89]

C. Summary of the Two Projects and Introduction to International Environmental Law

The pre-funding evaluations and appraisal reports of each project show that both banks followed the guidelines set within their ESMPs. Such transparency and attention to detail help shield multilateral-development banks from criticisms that they are still funding "dirty" deals masquerading as environmentally sound projects.[90] However, the post-project evaluations do not discuss whether the environmental impact assessments conducted before funding and implementation were in fact carried out, or whether the allocated funds were adequate to complete the ESMP requirements.

V. INTERNATIONAL ENVIRONMENTAL RULE OF LAW AND ITS APPLICATION TO THE ENVIORNMENTAL IMPACT ASSESSMENTS

A. Introduction to the International Environmental Rule of Law

The U.N. defined the international environmental rule of law as having three related components: "[l]aw should be consistent with fundamental rights; law should be inclusively developed and fairly effectuated; and law should bring forth accountability not just on paper, but in practice—such that the law becomes operative through observance of, or compliance with, the law."[91] These three components are interdependent, and the environmental rule of law requires their implementation.[92] The same weakness affects whether the parties contributing the most to environmental harm will consider changing their business conduct or investment ideals.[93] Due this weakness, the U.N.

89. *Id.*

90. *See* Nielson & Tierney, *supra* note 8, at 260 ("After the 1987 reforms, the Bank increased the number of environmental loans. But many NGOs questioned whether these new loans were in fact 'environmental,' rather than traditional sector loans with new labels.").

91. BRUCH ET AL., ENVIRONMENTAL RULE OF LAW: FIRST GLOBAL REPORT 8 (2019).

92. *Id.* at 8.

93. *See id.* ("Often environmental ministries are among the weakest ministries, with comparatively fewer staff and less political clout; yet the political economy often drives

found it particularly important to pay close attention to the environmental rule of law and its enforcement.

There are two main reasons why enforcement of the environmental rule of law is paramount. First, even though many countries have voluntarily implemented environmental protections laws and regulations, such voluntary measures are insufficient to address the range of environmental issues faced throughout the globe.[94] Additionally, voluntary measures are inadequate because countries choose different caps for the scope of their regulations or differ on the amount they are willing to sacrifice to ensure environmental protection for the global community. The second reason for enforcing the environmental rule of law is that legal goals and their objectives are easier to satisfy if there is an established, broadly recognized rule of law.[95]

B. Application to the Environmental Impact Assessments of Multilateral Development Banks

In cases of projects in developing countries where the U.N. and the international community invest to ensure achieving Sustainable Development Goals (SDGs), environmental rule of law is the key part of their realization. Considering Zimbabwe, for example, projects such as UWSRRP, National Water Project, and WASH are geared towards ensuring that the population has access to clean drinking water, thereby satisfying the goals of SDG 6: Clean Water and Sanitation.[96] To achieve this globally, the U.N. argues that "[m]ore efficient use and management of water are critical."[97] When policy, regulation, or law fulfills the three interdependent components of the environmental rule of law, efficient use and management are more likely.

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environmental violations. Why should companies invest in pollution control technologies if there is little likelihood of enforcement, the penalties are too low and can be incorporated as a cost of doing business, and there is widespread non-compliance?").

94. *Id.* at 9.

95. *Id.* at 10.

96. *Sustainable Development Goal 6*, U.N. (2019), *available at* https://sustainabledevelopment.un.org/sdg6 (last visited May 2, 2021).

97. *Progress of Goal 6 in 2019*, U.N. (2019), *available at* https://sustainabledevelopment.un.org/sdg6 (last visited Mar. 13, 2021).

C. Analysis of the Multilateral Development Banks' Environmental Impact Assessments Through the Lens of the Environmental Rule of Law

The following analysis evaluates whether the EIAs of multilateral development banks, such as the World Bank and the AfDB, fulfill the interdependent components of environmental rule of law. Paying particular attention to SDG 6, the analysis below will determine whether the current application of these assessments is in line with the U.N.'s contention that environmental rule of law is the key to achieving SDGs. It is also important to note that this analysis focuses on elements that are interdependent components, all of which must be satisfied for the MDBs' assessments to be consistent with the environmental rule of law.

i. Consistency with a Fundamental Human Right

The employment of EIAs is consistent with fundamental human rights. The Universal Declaration of Human Rights (UDHR) articulates and enumerates the rights and freedoms to which every human being is "equally and inalienably entitled."[98]

Article 3 of the UDHR states that everyone has, among other things, the right to life.[99] While this right does not specifically indicate a right to or in the environment, the U.N. proclaimed in the Declaration of the United Nations Conference on the Human Environment that "[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights [and] the right to life itself."[100] The fact that the international community has promulgated laws and enforced international agreements that address the connection between human rights abuses and the deterioration of the environment further supports this declaration.[101]

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98. *See Universal Declaration of Human Rights*, U.N. (2015), *available at* https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (last visited May 2, 2021) ("The extraordinary vision and resolve of the drafters produced a document that, for the first time, articulated the rights and freedoms to which every human being is equally and inalienably entitled.") [hereinafter UDHR].

99. *Id.* at art. 3.

100. U.N. Conference on Environment & Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev. 1 (1973) [hereinafter U.N. Conference on Environment & Development].

101. *See Right to Environment of Human Right*, LAWTEACHER (Dec. 2020), *available at* https://www.lawteacher.net/free-law-essays/human-rights/right-to-environment-of-human-right.php?vref=1 (last visited May 2, 2021) ("Of late, the worldwide society has

In the case of multilateral development banks, the pressure from member states for policies addressing the environmental impacts of projects help recognize this right. As mentioned earlier, the United States was the first country to make EIAs a part of its project-review process in 1969. By 1992, the U.N., in the Rio Declaration on Environment and Development, embraced the environmental impact assessment as a requirement for states to use when implementing projects that posed a threat to the environment.[102] Since states began requiring assessments for projects funded by their governments, it seemed logical to require multilateral development banks to do the same, especially since some of the states contribute significantly to the banks' funds.

Therefore, because states recognized the right to enjoy the environment as a fundamental human right, requiring multilateral development banks to carry out EIAs is also consistent with fundamental human rights.

ii. Inclusive Development and Fair Effectuation

As with any international agreement or law, the participation of the entire international community is necessary, especially by those state and non-state entities that will be most affected or bear the most burden. Due to the conception that SDGs are generated with the developing world in mind, it is important that the U.N. includes the leaders and representatives of those states in the development of the environmental rule of law. An example of this inclusivity was at the first Africa Colloquium on Environmental Rule of Law in Nairobi, Kenya, during which judges and other prominent law enforcement figures and the legal field agreed on the enforcement and implementation of the environmental rule of law.[103] Of significant importance to this discussion is that the agreement developed a roadmap by which the African countries present at the Colloquium

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amplified its alertness on the relationship between environmental dilapidation and human rights abuses.").

102. U.N. Conference on Environment & Development, *supra* note 100, at Principle 17 ("Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.").

103. Green Economy, *Environmental Rule of Law Critical to Achieving Inclusive, Sustainable Development in Africa, Concludes Regional Colloquium*, U.N. ENV'T (Oct. 16, 2015), *available at* https://www.unenvironment.org/news-and-stories/story/environmental-rule-law-critical-achieving-inclusive-sustainable-development (last visited May 2, 2021).

would implement Principle 10 of the Rio Declaration on Environment and Development.[104]

Like the second component of the environmental rule of law, Principle 10 of the Declaration calls for active participation and inclusivity from the international community when dealing with environmental issues.[105] Effectuating the rule of law fairly comes from successful, inclusive development of the law, where the people affected by the enforcement of that law have the means to seek redress for grievances and remedy for violations.[106]

Here, the multilateral development banks' pre-funding and proposal assessments concerning environmental impact show inclusivity in development. For example, the AfDB, in agreement with its regional member states, implemented the IESIA out of concern for the burden they bear as a result of the effects of climate change. In its implementation of the IESIA, the Bank's guidelines provided a process to periodically review the assessment plan to address any inconsistencies and implement improvements. This kind of review satisfies the inclusive development prong because as the bank figures out what works in practice, states implementing the plan in their proposals will be a part of its expansion. Concerning fair effectuation, multilateral development banks ensure that the states have access to information concerning implementing these assessments by publishing the guidelines so that all the member states are aware of the procedure when requesting funds.

iii. Accountability in Practice

Accountability ensures that liability is imposed when there is a violation of law, and the affected individuals seek redress or remedy. This is accountability—on paper, in practice, and as an interdependent component of the environmental rule of law. It would be futile to develop and implement this rule, or any other, if the rights and responsibilities associated with it cannot be enforced by the judiciary or are

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104. *Id.*

105. U.N. Conference on Environment and Development, *supra* note 100, at Principle 10 ("Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.").

106. *See id.* ("States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.").

unaccountable to the legislature.[107] Additionally, because lax compliance is one of the major criticisms of international law, it is paramount to the environmental rule of law's enforcement that accountability is given as much weight, if not more. This is especially true when considering the adequacy of any law or policy implemented adhering to its standards. However, one of the major hindrances to accountability in practice is the lack of reliable data on policy and compliance.[108]

The multilateral development banks' current implementation of EIAs fails to satisfy the standards of accountability in practice, in part because there is no clarity about the consequences an implementing agency will face if the assessment's requirements are not met. As seen in the example of the UWSSRP, the AfDB's assessment of the project's negative environmental impacts simply alluded to the fact that an agency would be in charge of ensuring mitigation. While it is understandable that, in funding the projects, the MDBs do not interfere with the governments' sovereignty to oversee the implementing agencies, international accountability guidelines are necessary for three reasons.

First, the banks fund these projects using contributions from other member states, some of which are non-regional members that contribute to funding more than one multilateral development bank. Since those contributions come from the state's taxpayers, it is necessary to enact regulations that ensure accountability if the funds allocated to the project are inappropriately used.

Secondly and closely tied to the use of allocated money is the concern that, while some degree of corruption exists in every government, it is more crippling in some than others. During the time the AfDB was funding the UWSSRP in 2013, for example, Zimbabwe was ranked the thirteenth most corrupt country in the world.[109] This was a huge concern for donors, since corruption could affect the effectiveness of financial donations narrowly intended to improve water sanitation and availability. This ranking is also concerning when one considers that the

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107. Alexandra Dapolito Dunn & Sarah Stillman, *Advancing the Environmental Rule of Law: A Call for Measurement*, 21 SW. J. INT'L L. 283, 291 (2015).

108. *See id.* ("Policymakers and practitioners struggle to demonstrate the effectiveness of efforts aimed at strengthening the rule of law partly because there is a lack of empirical data on policy and compliance effectiveness.").

109. *See* Jane Cohen, *Troubled Water*, HUM. RTS. WATCH (Nov. 2013), *available at* https://www.hrw.org/report/2013/11/19/troubled-water/burst-pipes-contaminated-wells-and-open-defecation-zimbabwes#page (last visited May 4, 2021) ("Officials from donor agencies and international organizations in meetings and discussions with Human Rights Watch have repeatedly cited endemic corruption as key to the inability of donor interventions to improve the availability of water and sanitation services.").

UWSSRP began in 2011 and Phase I was purportedly completed; in 2019, however, approximately two million Zimbabweans in the capital still struggled to access clean water.[110]

The third reason why the current implementation fails to satisfy the accountability requirement is that there is no transparency in post-project environmental impact assessments. Neither the World Bank nor the AfDB provided access to post-project evaluations that show whether the mitigation requirements suggested during the pre-funding/proposal phase were implemented. This was also the case with projects in other member states that addressed issues beyond water sanitation. As mentioned earlier, the lack of reliable data is one reason why accountability is a major concern in the enforcement of the rule of law. In the case of Zimbabwe, such a lack of post-project data will perpetuate the same issues that caused the initial water sanitation crisis. In such cases accountability is important to stop corruption in the allocation of funding, and the sustainability of the project's results.[111] Without post-project environmental impact assessments, there is no guarantee that issues designated as temporary and other local negative impacts will not become long-term issues. For example, if groundwater contamination is a perceived environmental impact of the project but limited to the site of the implementation of the project, a post-project assessment would help show whether the implementing agency followed the instructions in monitoring the use of chemicals at the site to avoid or reduce contamination.

VI. CONCLUSION

In conclusion, multilateral development banks' current implementation of the EIAs is inadequate to meet the goal of the international environmental rule of law concerning the achievement of SDGs. Although the implementation satisfies the first two components, it fails miserably at accountability in practice. Because accountability is closely tied to the sustainability of projects in developing countries, multilateral development banks need to strengthen their current project

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110. *See* Kingsley & Moyo, *supra* note 3 ("More than half of the 4.5 million residents of Harare's greater metropolitan area now have running water only once a week, according to the city's mayor, forcing them to wait in lines at communal wells, streams, and boreholes.").

111. *See* Cohen, *supra* note 109 ("For example, many residents informed Human Rights Watch that donor agencies had drilled boreholes to help relieve water scarcity during the 2008/2009 cholera epidemic and that these boreholes provided communities with an important source of water. According to residents, many boreholes were not maintained, and now a significant number of them are either broken or contaminated.").

evaluation policies. It is not clear whether they already practice post-project assessments and fail to publish them, or simply do not conduct them. If the former, then transparency is needed to show the contributing countries that their funds were used based on the budget allocations shown in the proposal documents. If the latter, then the current implementation is incomplete and illusory, showing that multilateral development banks, especially the World Bank, have not changed their business conduct away from the days when accusations of funding "dirty" projects that negatively impact the environment were more common.

Not only will this help the banks ensure that the funds they allocate are used for its intended or stated purposes, but it will also help them appear more accountable to their member states. This is especially important when reporting the progress that the banks have made to help the international community achieve SDGs to contributing and other member states. It will also help the international community acquire more reliable data on how to improve development and SDG projects in a manner that does not worsen environmental issues in the developing countries. This will mean more than just relying on reports from the benefiting countries because these countries could simply take pictures of an isolated "success" and a few testimonials to pass them on as completed projects. Unless multilateral development banks follow through with post-project assessments, the application of the international environmental rule of law is incomplete and insufficient to fulfill the objective of achieving the Sustainable Development Goals.

Tampa Bay Rays of Montréal: Home Field Advantage in Two Countries

Conor M. Bowers*

ABSTRACT

In the United States, professional sports are a large part of our social culture. As fans, we develop attachments to our teams, and sometimes our passion borders on obsession. Part of the sporting life that fans regularly live with is the effect of players changing teams from year to year—an entire team moving to a new city, however, is much rarer. When a team does move, it has the potential to break the hearts of all the fans who support it, yet very rarely do we consider the effect moving teams has on the individual players themselves. Their lives and families are grounded in a specific city for a large portion of the year; when the team moves, they have to uproot all of that. In this Note, I will analyze a Major League Baseball team's unprecedented proposal, the effects this decision would have on the team as a business, and the possible repercussions for its players.

I. INTRODUCTION

Over the last few years, the Tampa Bay Rays have proposed several plans for a new or renovated stadium in Saint Petersburg, Florida. They proposed renovations to their current stadium, Tropicana Field, and asked the city of Tampa about building a new stadium downtown that would be more accessible to fans than their current stadium in Saint Petersburg. Unfortunately, after several proposals and tireless negotiations between the city of Saint Petersburg and the Rays organization, the organization grew tired of waiting for the city to make a decision that would benefit both parties.

To counter the strategic inaction used by Saint Petersburg to keep the Rays playing in their home stadium, the team began exploring the possibility of splitting their season between two locations. Under this plan, the Rays would spend the spring in Tampa Bay and relocate to the city of Montréal, Québec, Canada, for the summer months. A partial

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relocation has never occurred before in the League and is further complicated by the two locations being in separate countries. No North American professional sports team has ever had two home stadiums in separate countries; the move would be an unchartered first. Major League Baseball (MLB) has given the team permission to begin exploring a partial relocation to Montréal. Although the team paused the plan to focus on the upcoming season, the front office left open the possibility that the team will explore a partial relocation of the franchise.

Montréal was formerly the home of the Montréal Expos, from 1969 until 2004.[1] While in Montréal, however, the Expos were never a great success. Their on-field product failed to make it deep into the postseason, and their business leadership eventually doomed the team. In 2005, the MLB became the team's owner, relocated them to Washington, D.C., and renamed them the Washington Nationals.[2]

Recently, however, there has been a strong call amongst fans in the Montréal area and across Canada for a Major League team to return to Montréal. As the second most populated city in Canada, and given its history with the MLB, it is both feasible and understandable that Montréal would be the first option for an expansion. Yet the question here is not about Montréal's suitability as a baseball town, but rather the idea behind and potential consequences of splitting a team between two cities in two different countries.

A partial relocation for the Rays is a relatively new idea. The Rays' management proposed it in late June 2019 to get the team a more supportive fan base. Although they have been a playoff contender, the Rays have a tremendously low attendance number, and attendance is a significant revenue driver for any MLB team. Inability to attract a home crowd has made it hard for the organization's business side to continue to put a winning team on the field.

The purpose of this Note is to legally assess the feasibility of the Rays' proposed business operation. I will explore how the Rays could move their team for half of a season and how this would affect their business. I will then look at how this would change the business's expenses, how it would affect the players and business from a tax perspective, and finally, the legal path to navigating operations in two countries. There has never been a team in the MLB that has split time between two "permanent" homes. Further complicating this matter, the

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1. *Montreal Expos Team History*, SPORTS TEAM HIST. (n.d.), *available at* https://sportsteamhistory.com/montreal-expos (last visited Apr. 1, 2021) [hereinafter *Montreal Expos*].

2. *Id.*

locations are in two different countries. In this Note, I will also examine how strategy affects the players, how international law affects the organization as a whole, and the role it plays in this transition. All mentions to currency throughout this Note will be in U.S. dollars. I believe significant legal and business issues fundamental to the plan will doom the team from executing this ambitious move, which will prohibit the Rays from successfully carrying out the proposed transition.

II. THE TAMPA BAY RAYS

The Tampa Bay Rays' first year in operation was the 1998 MLB season, and since this time, they have been based in Saint Petersburg, Florida.[3] Saint Petersburg is a city of 265,000 people and is located about thirty minutes away from Tampa.[4] In 1995, the MLB owners voted to expand the League to thirty teams by adding the Tampa Bay Devil Rays and the Arizona Diamondbacks as expansion teams; with this decision, the team was formed.[5] Players drafted from other teams in the League during an expansion draft constitute an expansion team.[6] During an expansion draft, other teams can keep additional players with each passing round.[7] Because of this protection, current MLB teams do not lose their best players, instead often losing players they did not plan on keeping long-term.[8]

Expansion teams do not typically perform well because a group of unwanted players from the first few seasons fill their rosters, but as time passes the teams adjust and create their own identities. Despite this adjustment period, however, the Arizona Diamondbacks won the World Series four years after its creation in 2001,[9] and the Rays were the 2008 runners-up.[10] The Rays also competed in the postseason several times,

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3. *Franchise Timeline*, MLB (n.d.), *available at* https://www.mlb.com/rays/history/timeline (last visited Apr. 2, 2021) [hereinafter MLB].

4. *St. Petersburg, Florida Population 2020*, WORLD POPULATION REV. (n.d.), *available at* http://worldpopulationreview.com/us-cities/st-petersburg-population/ (last visited Apr. 2, 2021).

5. MLB, *supra* note 3.

6. *Expansion Draft Rules*, NOWHITTING (n.d.), *available at* https://www.nowhitting.com/index.php?option=com_content&view=article&id=530&catid=28&Itemid=40 (last visited Apr. 2, 2021).

7. *Id.*

8. *Id.*

9. Adam Augustyn, *Arizona Diamondbacks*, BRITANNICA (Oct. 3, 2018), *available at* https://www.britannica.com/topic/Arizona-Diamondbacks (last visited Apr. 2, 2021).

10. MLB, *supra* note 3.

won their division twice, and in 1994 had the best record in the American League.[11]

The team has played all of its home games at Tropicana Field, the only domed stadium in the MLB, since the team's inception.[12] The original funding for the stadium came from public financing; the public added 79% of all funding for subsequent renovations and the Rays financed the remaining 21% themselves.[13] The stadium opened in 1990 at a total cost of $138 million, with the goal of attracting an MLB team.[14] In 1996, the field received an $85 million facelift in order to look more like a traditional ballpark.[15] The $85 million investment "included wider concourses, installation of Astroturf, clubhouses, dugouts," escalators, and offices for front-office personnel.[16] The team itself has also invested around $37 million in capital improvements to the stadium.[17]

Despite these investments, the Rays' stadium is amongst the worst in the MLB for various reasons, including the playing surface and the dome itself, which lacks amenities for fans.[18] After the 2018 season, *Forbes* magazine valued the stadium at $114 million, which is well beneath the total amount invested to date.[19] *Forbes* also ranked the Rays as the twenty-ninth highest-valued franchise in the MLB.[20] Compared to the rest of their division, the American League East (AL East), this valuation makes them the lowest revenue team.

A significant portion of the team's revenue is from attendance, with some estimates as high as 70%.[21] During the 2019 season, the Rays

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11. *Id.*

12. *Tropicana Field*, BALLPARKS OF BASEBALL (n.d.), *available at* https://www.ballparksofbaseball.com/ballparks/tropicana-field/ (last visited Apr. 2, 2021) [hereinafter *Tropicana Field*].

13. *Id.*

14. *Tropicana Field History*, MLB (n.d.), *available at* https://www.mlb.com/rays/ballpark/information/tropicana-field-history (last visited Apr. 2, 2021).

15. *Id.*

16. *Tropicana Field*, *supra* note 12.

17. *Id.*

18. Maury Brown, *Ranking All 30 of MLB's Ballparks: Best to Worst*, FORBES (Mar. 19, 2018), *available at* https://www.forbes.com/sites/maurybrown/2018/03/19/ranking-all-30-of-mlbs-ballparks-first-to-worst/#60a4a5f76be4 (last visited Apr. 2, 2021).

19. *Tampa Bay Rays*, FORBES (Apr. 2020), *available at* https://www.forbes.com/teams/tampa-bay-rays/#44fb9835d12b (last visited Apr. 2, 2021).

20. *Id.*

21. John Romano, *If We're Going to Complain About Rays Attendance, at Least Get the Story Right*, TAMPA BAY TIMES (May 3, 2019), *available at* https://www.tampabay.com/sports/rays/2019/05/03/if-were-going-to-complain-about-rays-attendance-at-least-get-the-story-right/ (last visited Apr. 2, 2021).

averaged 14,552 fans per game;[22] this was second-to-last in the League.[23] On the contrary, the Yankees averaged attendance of 40,795, which was third in the MLB, and the Red Sox averaged 36,107 fans per game, which was seventh.[24] The disparity in home attendance creates revenue differences that hurt the team when it comes to having a higher payroll for players, whether that is done by extending offers to organizationally-grown players (players drafted or signed internationally) or acquiring high-priced free agents. Such disparate home attendance makes it extremely difficult for the Rays to generate the revenue that would allow them to better compete with the AL East's established powers.

As a team, the Rays are a consistent contender within the AL East. Even in this traditionally difficult division, they reached the playoffs in 2008, 2010, 2011, 2013, and 2019.[25] In the 2010 season, the team had the best record in the American League.[26] In the AL East, they compete against the New York Yankees and the Boston Red Sox, two large-market teams that can outspend the Rays annually, in part due to attendance, the size of the fanbase, and branding.[27] In 2019, the Tampa Bay Rays spent $53.5 million on player salaries.[28] This salary size ranked thirtieth out of thirty teams in the MLB.[29] By comparison, the Yankees spent $205.4 million on player salaries, making them the second-highest spending team in the League; the Red Sox, having spent $204.3 million, were fourth.[30] In a league where payroll often determines a team's success, it was a testament to the Rays' front-office philosophy that, in a division where they were both intra-division rivals outspent them by nearly $150 million, they made the playoffs as a wild-card team.

These figures tell us that it is hard for the Rays to create the same on-field product as teams like the Yankees or Red Sox. They have less money on hand to bring in high-priced free agents that put good teams "over the hump," which transforms them into World Series contenders.

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22. *2019 MLB Attendance and Team Age*, BASEBALL REFERENCE (n.d.), *available at* https://www.baseball-reference.com/leagues/MLB/2019-misc.shtml (last visited Apr. 2, 2021).

23. *Id.*

24. *Id.*

25. *Tampa Bay Rays Season Results*, ESPN (n.d.), *available at* http://www.espn.com/mlb/history/teams/_/team/TB (last visited Apr. 2, 2020).

26. *Id.*

27. *Top Team Payrolls*, USA TODAY (2019), *available at* https://www.usatoday.com/sports/mlb/salaries/2019/team/all/ (last visited Apr. 2, 2021).

28. *Id.*

29. *Id.*

30. *Id.*

Instead, the Rays must rely on picking well in the MLB draft, signing lesser-known international prospects, and redoubling focus on player development, simply to have a shot at competing. These financial realities are important support for the argument against moving the Rays to Montréal. Although they already struggle to earn and spend money on players, a move to Montréal would increase the team's overall tax burden, steepening their uphill battle to land better players with even less money.

With the large differences in average attendance and payroll, the Rays are at a tremendous competitive disadvantage against two of the teams they compete against around twenty times per year. Being unable to bring in the same caliber players, they must instead rely on situational baseball and analytics to create an on-field product sufficient to reach the postseason. While the Rays have been "ahead of the curve" in using data to determine the best way to piece a game and a team together, the traditionally best teams are now seeing the light and understand that baseball, like society in general, is moving towards twenty-first-century technology. Since the Rays cannot raise the money that other teams in their division can, staying ahead in analytics is all the more crucial.

Tropicana Field and the Rays' local and international fan base are significant factors working against generating higher revenue. The Rays recently proposed moving the team to Ybor City, a trendy area within Tampa.[31] The move would have given the team a new stadium that would have attracted fans and rivaled the more modern stadiums in the MLB.[32] However, not long after the proposal to move to Ybor City was first made, the team announced that the idea was dead.[33] Using a fifty-fifty split of public and private funds to finance building the estimated $900 million facility was too high for the MLB to agree to the project's feasibility.[34] The split season in Montréal is the Rays newest proposal to even the playing field with the larger market teams in their division.

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31. Dayn Perry, *Rays to Reportedly Announce Where They Want to Build a New Ballpark in Tampa*, CBS (Feb. 8, 2018), *available at* https://www.cbssports.com/mlb/news/rays-to-reportedly-announce-where-they-want-to-build-a-new-ballpark-in-tampa/ (last visited Apr. 2, 2021).

32. *New Stadium, New City: Rays Unveil Ybor City Ballpark Plan*, FOX TAMPA BAY (July 10, 2018), *available at* https://www.fox13news.com/news/new-stadium-new-city-rays-unveil-ybor-city-ballpark-plan (last visited Apr. 2, 2021).

33. Mike Axisa, *Rays Announce Stadium Project in Ybor City is Dead*, CBS (Dec. 11, 2018), *available at* https://www.cbssports.com/mlb/news/rays-announce-stadium-project-in-ybor-city-is-dead-likely-locking-the-team-into-tropicana-field-through-2027/ (last visited Apr. 2, 2021).

34. *Id.*

III. MONTRÉAL AS A BASEBALL TOWN

Montréal was home to the Expos from 1969 until 2004.[35] Before the 2005 season, the team was sold and relocated to Washington, D.C., where they rebranded as the Washington Nationals.[36] The Expos were the first MLB franchise located outside of the United States—the Toronto Blue Jays followed their founding in 1977.[37] The team itself was never particularly successful on the field, and their business management was even less successful. They made the playoffs once, in 1981, and they had the best record in the National League East in 1994, but the MLB season that year was cut short due to a players' strike.[38] In terms of attendance, they were slightly under the National League average each year.[39] During their best years, 1979 through 1983, they averaged between 26,000 and 28,700 fans per game.[40]

In 1999, Jeffrey Loria purchased a minority interest in the team for $50 million and became the team's managing general partner.[41] Eventually, he became a large majority owner of the team, with 92% of the team under his control.[42] As the owner, his main objective was to get the team a new stadium, even though the city and team still had a large outstanding debt on the Olympic Stadium, where the Expos played.[43] Loria went on an off-season spending mission in 2000 to acquire new high-profile players to create more buzz around the team;[44] instead, the team fell to fourth place in the division.[45] He also raised the cost of

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35. *Montreal Expos*, *supra* note 1.

36. *Id.*

37. William Humber, *Toronto Blue Jays*, CANADIAN ENCYC. (Feb. 7, 2006), *available at* https://www.thecanadianencyclopedia.ca/en/article/toronto-blue-jays (last visited Apr. 2, 2021).

38. *Washington Nationals Team History*, BASEBALL REFERENCE (n.d.), *available at* https://www.baseball-reference.com/teams/WSN/index.shtml (last visited Apr. 2, 2021).

39. *Washington Nationals Attendance Data*, BASEBALL ALMANAC (n.d.), *available at* https://www.baseball-almanac.com/teams/montattn.shtml (last visited Apr. 2, 2021) [hereinafter *Washington Nationals*].

40. *Id.*

41. Farid Rushdi, *How Jeffrey Loria Destroyed the Montreal Expos/Washington Nationals*, BLEACHER REP. (Feb. 2, 2009), *available at* https://bleacherreport.com/articles/118868-how-jeffrey-loria-destroyed-the-montreal-exposnationals (last visited Apr. 2, 2021).

42. *Id.*

43. *Id.*

44. Ian Wenik, *The Fraud of Jeffrey Loria: How One Man Ruined Two Franchises*, DANIEL LEWIS SPORTS (Nov. 22, 2012), *available at* http://www.daniellewissports.com/the-fraud-of-jeffrey-loria-how-one-man-ruined-two-franchises.html (last visited Apr. 22, 2021).

45. *Id.*

broadcasting rights, but the increase was so steep that no English-speaking channel would carry the team's games.[46] This is significant because the sport has many fans in English-speaking market, and only broadcasting in French deterred those fans from watching the games. Loria then purchased the Florida Marlins in 2002, using the $120 million that the League paid for the Expos and $30 million from an interest-free loan provided by the League, and moved everything he could—from computers to personnel—to Florida from Montréal.[47] He sold the Expos to the MLB, knowing that the League wanted to move the team, and headed down to Florida where he would go on to mismanage another team.[48] Soon thereafter, the MLB and Loria solidified the deal, and the Montréal Expos relocated to Washington, D.C., where they were rebranded as the Washington Nationals for the 2005 season.[49]

Recently, the city of Montréal has been trying to bring a Major League team back. The MLB began playing exhibition games in Montréal, and attendance has been tremendous.[50] In 2014 and 2015, the Blue Jays took on the New York Mets and the Cincinnati Reds, respectively, in Montréal.[51] Attendance at these two game sets combined exceeded 96,000 fans.[52] While these matchups were special, and the attendance certainly saw a spike with the increased fanfare, it was also an indication that MLB games in Montréal were ready to succeed.

The Montréal metro area is one of two metro areas in the United States and Canada that has more than 4,000,000 residents but does not have an MLB franchise.[53] The main criticism of a baseball team returning to Montréal is the belief that the Olympic Stadium is no longer adequate

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46. Rushdi, *supra* note 41.

47. Ian Wenik, *What Does Jeffrey Loria Get for Mishandling Marlins*, ESPN (Aug. 11, 2017), *available at* https://www.espn.com/mlb/story/_/id/18658184/what-does-jeffrey-loria-get-mishandling-miami-marlins-pure-profit (last visited Apr. 2, 2021); *see also* Rushdi, *supra* note 41.

48. *Id.*

49. Tyler Kepner, *The Luckless Expos Gave Birth to the Nationals and a Lot More*, N.Y. TIMES (Oct. 18, 2019), *available at* https://www.nytimes.com/2019/10/18/sports/baseball/nationals-montreal-expos.html (last visited Apr. 2, 2021).

50. Jonah Keri, *More Than Just Momentum for MLB Return to Montreal*, CBS (Apr. 5, 2016), *available at* https://www.cbssports.com/mlb/news/more-than-just-momentum-for-mlb-return-to-montreal/ (last visited Apr. 2, 2021).

51. *Id.*

52. *Id.*

53. Neil deMause, *MLB Expansion is Probably Inevitable, but Where and When?*, DEADSPIN (June 11, 2018), *available at* https://deadspin.com/mlb-expansion-is-probably-inevitable-but-where-and-whe-1830100867 (last visited Apr. 2, 2021) (the other metro area is Inland Empire, California, which counts as part of the Greater Los Angeles area).

for MLB games.[54] However, the city has the support of many former fans and players, such as Warren Cromartie, who has touted Montréal as a "baseball town."[55]

Today, in order for the MLB to operate in Canada and the United States, it first has to meet some regulations set out by federal law. Like large businesses throughout the United States, the MLB must respect federal antitrust laws.[56] Teams must comply with the Sherman Act, as amended under the Reagan Administration, to address foreign antitrust issues.[57] When a team exists outside of the United States but the parent organization operates in the United States, and "single entity ownership" election is adopted, then they are subject to the Sherman Act.[58] The United States prevents sports leagues from merging with similar leagues in other countries by prohibiting the acquisition of stock or assets where the goal is to create a monopoly.[59] In compliance with these laws, the MLB expanded into Canada, and the teams playing therein must also comply with Canadian antitrust law.[60]

The death of the Expos is ultimately attributable to poor management and ownership, including the owner's failure to put in the necessary capital and work. However, the Expos did prove that when the team was competitive, even in an outdated stadium, its fanbase showed up and supported them. The exhibition series at the Olympic Stadium, featuring the Toronto Blue Jays, also showed that Montréal's fans will come out for good baseball.

The Rays had a playoff team in the 2019 season, after consistently competing for a playoff spot since 2008. With such a large population and the public outcry for a team, it is clear that Montréal could sufficiently support an MLB team. However, Montréal (or Canada itself) is not the problem, as we have seen the Toronto Blue Jays successfully operate a full-time MLB team in Canada. By splitting the season between Tampa and Montréal there are no incentives for the team or its players,

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54. *Id.*

55. John Greenwood, *Can One Man's Dream to Bring Major League Baseball Back to Montreal Come True?*, FIN. POST (Aug. 8, 2014), *available at* https://business.financialpost.com/news/can-one-mans-dream-to-bring-major-league-baseball-back-to-montreal-come-true (last visited Apr. 2, 2021).

56. 1 AARON N. WISE & BRUCE S. MEYER, INTERNATIONAL SPORTS LAW & BUSINESS 453 (Kluwer Law Int'l, 1997).

57. *Id.*

58. *Id.*

59. *Id.*

60. Competition Act, R.S.C. 1985, C-34 (Can.).

as the money necessary to leave Tampa Bay will exceed the gain accrued from expanding into the new market.

IV. THE CITIES COME TOGETHER

Both Tampa and Montréal are large cities with metropolitan areas able to support successful professional sports teams. As for a potential expansion, both cities have operated MLB teams long enough to qualify as sustainable host cities for MLB teams. When the Expos produced a decent on-field product—one that contended for a playoff spot—the city rallied behind them, as evidenced by above-average attendance.[61] The Rays are currently a playoff contender in the American League, having gone to the postseason last year, and they are searching for the support they need to compete with the New York Yankees and Boston Red Sox in their division. However, their goal is to achieve something that has never happened in either Tampa or Montréal: a World Series win. With a low budget, the team has thus far relied on analytical baseball to compete.

The Rays believe that the city of Saint Petersburg's governance has neglected them and been a hindrance to building a ballpark in Tampa that resembles more modern MLB stadiums. The Rays have offered a few different proposals to the city, including a new stadium in Ybor City, Tampa; renovations to the current Tropicana Field; and lastly, the partial relocation to Montréal. In order to combat attendance issues at their current stadium, they believe a split season in Montréal would be helpful, although the now-departed Expos themselves were hindered by their own stadium conditions in Montréal. The Rays' inquiry and proposal will certainly have to address both stadiums and how the city of Montréal would fund a new and/or improved ballpark. Replacing one low-quality, attendance-deterring stadium with two below-average stadiums that also hinder attendance is clearly not a business plan the Rays should adopt. The Rays believe that this partial move will make them the home team in two markets, subsequently expanding their large market international fanbase and raising their bottom-of-the-league average per-game attendance.

Many believe this partial relocation is being proposed merely to generate fear amongst Saint Petersburg's local politicians, and in so doing push them toward raising money for an adequate stadium. The Rays assured the League that they believe the move to Montréal is a possibility

61. *Washington Nationals*, *supra* note 39.

for them and that a partial relocation would be good for their business.[62] The Rays are an innovative team on the field, utilizing different shifts defensively based on hitter matchups and having separate lineups for righty and lefty pitchers. Teams use this strategy to develop lineups that have more right-handed hitters when facing lefty pitchers and vice versa. This strategy got the team to the American League Divisional Series against the Houston Astros in 2019. The Rays pioneered strategic development and the use of performance-enhancing analytics. They now seek to implement a business model that is just as innovative, to remain perennial contenders in the AL East against the high-payroll Yankees and Red Sox.

V. U.S.-CANADA TREATY

If the Rays split their season between Canada and the United States, they will become an international company. The MLB itself is currently an international company because the Blue Jays' home base is Toronto. The U.S.-Canada Treaty was signed on September 26, 1980 and entered into force on August 16, 1984.[63] The Rays playing in Canada will create a U.S.-based organization that does business in Canada, thus subjecting it to the terms of the Treaty.[64]

The first action a business must undertake is determining whether it is a resident of Canada for tax purposes.[65] A foreign company that has central management and control in Canada is considered a Canadian resident, subjecting its worldwide income to Canadian income tax.[66] This is where the U.S.-Canada Treaty is the most relevant because a business can glean the benefits of the treaty if it can show that it is a resident of

62. James Wagner, *Rays to Explore Making Montreal a Part-Time Home*, N.Y. TIMES (June 20, 2019), *available at* https://www.nytimes.com/2019/06/20/sports/tampa-bay-rays-montreal.html (last visited Apr. 2, 2021).

63. Canada-United States Convention with Respect to Taxes on Income and on Capital and Subsequent Protocols, U.S.-Can., Sept. 26, 1980, T.I.A.S. No. 11,087, 28 A.L.R. Fed.3d [hereinafter U.S.-Can. Treaty].

64. Stuart Lyons, *Cross-Border Costs: If You're Considering Doing Business in Canada, Pay Attention to Taxes*, BAKER NEWMAN NOYES (Dec. 1, 2016), *available at* https://www.bnncpa.com/resources/cross-border-costs-if-youre-considering-doing-business-in-canada-pay-attention-to-taxes/ (last visited Apr. 2, 2021).

65. Todd Trowbridge, *The Taxation of U.S. Corporations in Canada and the Impact of the Canada-U.S. Tax Treaty on Corporate Residency Status*, GREATER IRVINE CHAMBER (Dec. 18, 2018), *available at* https://www.greaterirvinechamber.com/news/latest-news/p/item/8649/the-taxation-of-us-corporations-in-canada-and-the-impact-of-the-canadaus-tax-treaty-on-corporate-residency-status (last visited Apr. 2, 2021).

66. *Id.*

the United States for tax liability purposes.[67] Specifically, a business needs to avoid establishing a "permanent establishment" as defined within the treaty to not be taxed on any Canadian business profits.[68] A company that has revenue produced through a permanent establishment will be subject to a tax on that revenue.[69] The U.S.-Canada Treaty defines how revenue earned by an international entity is taxed in the specific country, but revenue taxed in another country with a higher tax rate will not result in net profitability. In Florida, the Rays are subject to a lower tax rate than they would be in Canada. Thus, the Rays will have to make a financial decision to determine whether the money generated from having a second home base will exceed the tax liability loss as owed to the Canadian government.

VI. HOW LIVING IN TWO COUNTRIES AFFECTS PLAYERS

A. Visas

At the beginning of the MLB season, the League issues permits to any foreign national that comes to North America to play for any of its franchises.[70] Typically, foreign-born players enter the United States by being issued a P-1A visa, which is approved by the U.S. State Department in conjunction with the consulate of the player's home country.[71]

Those who are temporarily coming to the United States to perform a "specific athletic competition" at an "internationally recognized level of performance," or an athlete who is "part of a team or franchise that is located in the United States" but is a member of a foreign league, are eligible for a P-1A visa.[72] Since 2006, any player who comes to the United States at the minor league level also qualifies for a P-1A visa.[73]

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67. *Id.*

68. Lyons, *supra* note 64.

69. MINDY HERZFELD & RICHARD L. DOERNBERG, INTERNATIONAL TAXATION IN A NUTSHELL 129 (West Acad., 12th ed. 2017).

70. Barry M. Bloom, *MLB Players Aided Through Visa Process but Families Face Roadblocks*, GLOBAL SPORT MATTERS (May 10, 2018), *available at* https://globalsportmatters.com/business/2018/05/10/mlb-visa-process-families-face-roadblocks/ (last visited Apr. 2, 2021).

71. *Id.*

72. *P-1A Athlete*, U.S. CITIZENSHIP & IMMIGR. SERVS. (n.d.), *available at* https://www.uscis.gov/working-united-states/temporary-workers/p-1a-athlete (last visited Apr. 2, 2021) [hereinafter U.C.I.S.].

73. Bloom, *supra* note 70.

Players are required to apply for these visas individually and are also required to submit an I-129 form.[74]

This form comes from either their team, the MLB, or an agent who describes the type of work to be done in the United States, provides a copy of the contract to the team, and outlines the nature of events that will take place. For any player who make more than $10 million in a season, this also includes tax documents or audited financial documents for the visa.[75] If a foreign player is only on a minor league team for one year, he must show that the team is part of a specific league and that he has a contract with the team.[76] To be eligible for the P-1A visa, a player must show that he is coming to a team that is part of an organization with six or more teams with a combined revenue of more than $10 million, or to a team that is part of the League's minor league affiliates.[77] International players must have this visa to stay in the United States to play during a season.

Athletes may also apply for B-2 visas, which are meant for tourism and may be used by sports amateurs; B-1 visas, meant for business deals such as negotiating a contract or consulting with a business associate; or O-1 visas, which are meant for persons with demonstrated extraordinary abilities as met by acclaim in one's field of expertise.[78] These visas are designed for visitors and are required for individuals aged fourteen to seventy-nine years old.[79] Under a B-1 visa, a foreign-born player may come back to the United States to consult with business associates, attend conferences, settle an estate, or negotiate his contract.[80] A B-2 visa is for tourist activities like vacationing, visiting relatives, receiving medical treatment, or enrolling in a short educational study program.[81] Playing games is not permitted under a B-2 visa, because it is considered employment, which is not allowed.[82] While these visas are not intended for foreign-born players to compete in games during the season, they do give them the opportunity to attend to business and other personal matters

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74. *Id.*

75. U.C.I.S., *supra* note 72.

76. *Id.*

77. *Id.*

78. *Visas for Athletes*, LEIBL & KIRKWOOD PC (n.d.), *available at* https://usimmigrationlaw.net/athletes-2/ (last visited Apr. 2, 2021).

79. *Visitor Visa*, U.S. DEP'T OF ST. (n.d.), *available at* https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visitor.html (last visited Apr. 2, 2021).

80. *Id.*

81. *Id.*

82. *Id.*

in the United States. All MLB players are required to have authorization to play in the United States—this includes Toronto Blue Jays players. As such, players competing in Canada would not need to consider additional authorization measures because they are already permitted to play in the United States.

During the 2018 MLB season, 27% of MLB rosters were comprised of foreign-born players.[83] Many of these players have families, but because athletes' wives and children are not eligible for P-1A visas, they must apply for P-4 visas.[84] P-4 visas are obtained by a P-1, P-2, or P-3 visa holder's spouse or child.[85] The P-4 visa holder may remain in the United States as long as the P-1, P-2, or P-3 holder maintains their legal status.[86] The visa applies to the spouse of the P-1 holder, and to any unmarried minor children.[87] During the length of their stay, they may not accept employment, but they may engage in full- or part-time study.[88] As discussed prior, there would be no added immigration complexities for players if the Rays split time between Tampa Bay and Montréal, because the families of foreign national players are already required to apply for a visa to be in the United States during the season.

All MLB teams have the opportunity to play in Canada during the season. Each American League team travels outside of the country throughout the year, and some National League teams travel to Canada for interleague play and/or the World Series. Canada allows players who make a living through sports to enter Canada with teams from foreign countries to compete; even though they are traditionally classed as foreign workers, the country adds no visa restrictions or penalties for them to enter.[89] The Canadian government believes that subjecting athletes to visa requirements for only a few games would be overly burdensome, and work visas for the athletes or the team's essential personnel are generally not required.[90]

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83. Stuart Anderson, *27% of Major League Baseball Players are Foreign-Born*, FORBES (Apr. 27, 2018), *available at* https://www.forbes.com/sites/stuartanderson/2018/04/27/27-of-major-league-baseball-players-are-foreign-born/#e5dc6da77120 (last visited Apr. 2, 2021).

84. Bloom, *supra* note 70.

85. *P4 VISA – P1 Dependent Visa*, MESSER SMITH L. (n.d.), *available at* https://messersmithlaw.com/p4-visa/ (last visited Apr. 2, 2021).

86. *Id.*

87. *See id.*

88. *Id.*

89. *See Working in Canada as an Athlete*, CANADAVISA (Sept. 2020), *available at* https://www.canadavisa.com/working-in-canada-athlete.html#gs.sxf4ve (last visited Apr. 2, 2021) [hereinafter CANADAVISA].

90. *Id.*

Despite this, moving the Rays to Canada for a portion of the year would create immigration headaches for both foreign and American players. A player signed with the Toronto Blue Jays, or the potential Montréal/Tampa Bay Rays, may have to demonstrate that he is needed as a foreign worker, in addition to showing that no Canadian worker is available for or has the expertise to do the job.[91] This requirement is a Canadian regulation under the Labour Market Impact Assessment.[92] The Rays differ from the Blue Jays because foreign players will need visas in both countries. Canada does not have a specific visa for athletes—only a uniform worker visa for foreigners.[93] The Canadian government would require an athlete or a coach hired by a Canadian employer to have a work visa.[94]

Acquiring a work visa first requires submitting a Labour Market Impact Assessment that demonstrates a labor shortage, as a result of which the employer was unable to find a Canadian citizen to fill the role.[95] Once the employer receives the Labour Market Impact Assessment confirmation that a foreign worker is permitted to fill a job, they may apply for a work permit.[96] Canada does not always require professional sports teams to fill out a Labour Market Impact Assessment because the athletes tend to be extremely gifted, and it is readily apparent that the country does not have players with a similar skill set.[97]

Rays players without dual citizenship in Canada and America would need to obtain one of the aforementioned visas in one or both countries. For players who are foreign nationals in both Canada and the United States, the visa process would be twice as long if they signed with a dual country team, such as the proposed Rays. The process of obtaining the visa, while not necessarily difficult, is an initial hoop that players coming to a new team would have to jump through in order to be eligible to play in home games. Players and coaches who play for professional teams in Canada or who represent Canada are required to obtain these visas.[98] Although the visa process in Canada is not as tedious as that of the United

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91. *See What is a Labour Market Impact Assessment?*, GOV'T OF CAN. (Jan. 2020), *available at* http://www.cic.gc.ca/english/helpcentre/answer.asp?qnum=163&top=17 (last visited Apr. 2, 2021) [hereinafter *Impact Assessment*].

92. *Id.*

93. *See* Alex Brosh, *Canadian Visa for Athletes*, COHEN, DECKER, PEX & BROSH (n.d.), *available at* https://lawoffice.org.il/en/canadian-visa-for-athletes/ (last visited Apr. 2, 2021).

94. *Id.*

95. CANADAVISA, *supra* note 89.

96. *Impact Assessment*, *supra* note 91.

97. CANADAVISA, *supra* note 89.

98. *Id.*

States, it does create an extra step that foreign professional players would need to comply with in order to play for the team in Montréal.

B. Housing and Residency

Rays players would also need to acquire housing where they play a majority of their home games. Partially relocating the team across two countries will require players to navigate the challenges of finding housing twice. Playing half the season in Tampa will necessitate that the players find a home or apartment for themselves and/or their families in Florida, and another home for the other forty or forty-one games played in Montréal. This poses a threat to the Rays' organizational strategy, which utilizes a model that relies on lower-cost players who will now need to purchase or rent two living spaces throughout the season. Only thirteen players on the Rays forty-man roster made more than $1 million in 2019, and of those only two made over $10 million.[99] For a free agent player, who could pick any team to play on, the added housing and moving costs during the year will make playing for the Rays less appealing.

C. Non-Resident Speculation Tax

In Canada, there are laws that affect non-residents' ability to own and rent real estate. The first law that non-residents should be aware of is the Non-Resident Speculation Tax (NRST).[100] This tax subjects non-permanent residents to a 15% added tax on the value of property in the Greater Golden Horseshoe region, which extends up to Guelph.[101] This property tax is an example of a provincial tax that players who buy homes would pay for the portion of the season they play in Canada. Foreigners with homes they rent out are subject to a 25% withholding tax on rental income.[102] Non-residents are also required to secure a mortgage from a Canadian bank, where a 35% tax is not uncommon for non-residents.[103]

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99. *Tampa Bay Rays Contracts*, SPOTRAC (2020), *available at* https://www.spotrac.com/mlb/tampa-bay-rays/contracts/ (last visited Apr. 2, 2021).

100. *Non-Resident Speculation Tax*, ONT. MINISTRY FIN. (Jan. 2021), *available at* https://www.fin.gov.on.ca/en/bulletins/nrst/ (last visited Apr. 2, 2021).

101. *Id.*

102. Kazi Stastna, *Real-Estate Rules Don't Discriminate Against Foreigners*, CBC (Mar. 19, 2012), *available at* https://www.cbc.ca/news/canada/real-estate-rules-don-t-discriminate-against-foreigners-1.1216517 (last visited Apr. 2, 2021).

103. *Id.*

These additional considerations make housing more complicated and expensive for MLB players without Canadian citizenship. The six-month temporary residency that players would have in Canada will allow them to rent or buy without additional paperwork or filing for permanent residency, but higher down payments and funding for mortgages would be an obstacle for seasonal baseball players. This obstacle exists because Canada usually grants a temporary resident visa for no more than six months.[104]

D. Residency

A positive for players is that Canada does not subject foreign nationals to many regulations regarding buying or renting property.[105] Canada allows foreigners who spend less than six months per year in the country to keep a home without needing to apply for residency—this is particularly important for players who typically spend time in winter homes after the season.[106] This six-month temporary housing limit allows foreigners to either rent or buy property in Canada during this time.[107] However, if a foreign player spends more than six months in Canada, he would need to apply for permanent residency.[108]

The MLB season can last as long as April 1 to November 1.[109] In this seven-month-long season scenario, only half of the games would be played in Montréal, allowing players to fit comfortably within the six-month temporary residence window. These added restrictions deter foreigners from buying or renting property in Canada because the laws are restrictive and penalize Americans or other foreign-born players by imposing higher fees. Since players would only have to live in Canada during the season, they would need to pay that extra cost. While this is not a specific penalty for players, it is an added issue that the Rays will need to consider and address.

Throughout the MLB season, many players are called up to join the big leagues club. Although a roster is made up of twenty-five players, in

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104. *Canadian Temporary Resident Visa (TRV)*, VISAGUIDE (2020), *available at* https://visaguide.world/canada-visa/temporary/temporary-resident/ (last visited Apr. 2, 2021).

105. Stastna, *supra* note 102.

106. *Id.*

107. *Id.*

108. *Id.*

109. *MLB Announces 2019 Regular Season Schedule*, MLB (Aug. 22, 2018), *available at* https://www.mlb.com/press-release/mlb-announces-2019-regular-season-schedule-291431268 (last visited Apr. 2, 2021).

2019 the Rays had twenty-nine players get an at-bat, while thirty-three players registered an appearance on the mound.[110] Players who spend most of the year in the minor leagues, but play in the MLB for at least one game, receive a pro-rated amount of the MLB's minimum salary, which was $555,000 for the 2019 season.[111] Minor league players make far less: the average salary in 2018 for players in Single-A was $6000; $9350 in Double-A; and $15,000 in Triple-A.[112] This means that players who get called up often do not have the money to purchase housing, and are forced to sleep on the couches of veteran players.

Securing housing in two places over the course of the year will be even harder for players because they now have two possible living locations, conceivably further limiting temporary options. A partial move to Montréal would certainly impose a larger financial burden and stress on Rays players—particularly the vast majority of their approximately sixty lower-paid players— because splitting time would further complicate their personal finances through increased costs of living.

Americans and foreign players who enter Canada expecting to find housing are forced to go through the Labour Market Impact Assessment.[113] As such, players looking for housing will have larger down payments under Canadian law in an effort to guarantee that Canadian banks will not face loan foreclosures.[114] With Canadian laws and regulations, finding housing could be trickier than simply walking into a real estate agency, finding a home suitable to a player's needs, and purchasing it.

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110. *Rays Statistics*, MLB (2020), *available at* http://mlb.mlb.com/stats/sortable.jsp?c_id=tb#elem=%5Bobject+Object%5D&tab_level=child&click_text=Sortable+Player+pitching&game_type='R'&season=2019&season_type=ANY&league_code='MLB'§ionType=sp&statType=pitching&page=1&ts=1573522434782 (last visited Apr. 2, 2021).

111. *The Business of MiLB*, MiLB (2020), *available at* https://www.milb.com/about/faqs-business#11 (last visited Mar. 17, 2021); *Minimum Player Salary in Major League Baseball from 2003 to 2020*, STATISTA (n.d.), *available at* https://www.statista.com/statistics (last visited Apr. 2, 2021).

112. Daniel Gallen, *Minor League Baseball Salaries Hover at Poverty Level While Major League Teams Earn Big Profits*, PENN LIVE (July 8, 2019), *available at* https://www.pennlive.com/sports/2019/07/minor-league-baseball-salaries-hover-around-poverty-line-some-are-pushing-for-change.html (last visited Apr. 2, 2021).

113. Wayne Carl, *3 Reasons Americans Can't Just Move to Canada and Buy Up Our Homes*, HUFFINGTON POST (Jan. 25, 2017), *available at* https://www.huffingtonpost.ca/ypnexthome/americans-moving-to-canada_b_14338892.html (last visited Apr. 2, 2021).

114. *Id.*

E. Taxes for Individuals

Income tax is a tax placed on revenue earned by individuals and businesses over a period of time. The Canada-United States Convention with Respect to Taxes on Income and on Capital and Subsequent Protocols (the U.S.-Canada Treaty, or Treaty) entered into effect in 1980.[115] The Treaty applies to Americans who are subject to Canadian taxes and to Canadians subject to U.S. taxes.[116] Under the Treaty, individual taxpayers are often able to pay fewer taxes to their non-resident country than they otherwise would.[117] This facilitates the Treaty's goal of providing relief from double taxation to citizens of either country.[118] Instead of paying a double tax, both countries' citizens report their foreign income and pay taxes on the income made in each respective country.[119]

Under Article XV of the Treaty, the first $10,000 earned in Canada is exempt from gross income tax; any amount exceeding $10,000 is only exempt if the taxpayer is present in Canada for less than 183 days within a twelve-month period, and if the employer is not a Canadian resident or a permanent establishment in Canada.[120] If a taxpayer is earning an international income over "$200,000 at the end of the year or $300,000 at any time during the year," then the taxpayer must file a Foreign Account Tax Compliance Act Form 8938.[121]

Under the United States' Foreign Earned Income Exclusion, "one could exclude the first $100,000 from U.S. income tax by" showing they reside in Canada for more than 330 days per year.[122] If married or filing jointly, one could deduct twice that amount, claiming a $200,000

115. U.S.-Can. Treaty, *supra* note 63.

116. Department of the Treasury, *Information on the United States-Canada Income Tax Treaty*, IRS (Oct. 2015), *available at* https://www.irs.gov/pub/irs-pdf/p597.pdf (last visited Apr. 2, 2021).

117. *Id.*

118. *Using the United States-Canada Income Tax Treaty to Reduce Double Taxation*, TURBOTAX CAN. (Nov. 7, 2019), *available at* https://turbotax.intuit.ca/tips/using-the-united-states-canada-income-tax-treaty-to-reduce-double-taxation-6229 (last visited Apr. 2, 2021).

119. *Id.*

120. Department of the Treasury, *supra* note 116.

121. *U.S. Canada Tax Treaty – What Expats Living in Canada Need to Know*, EXPAT TAX CPAS (n.d.), *available at* https://www.expattaxcpas.com/canada/u-s-canada-tax-treaty-expats-living-canada-need-know/ (last visited Mar. 24, 2021).

122. *Id.*

deduction.[123] In 2019 the federal tax rate in Canada on income exceeding $210,371 was 33%—but this is only part of the story since Canada also has provincial tax rates, which are analogous to states taxes in the United States.[124] In Québec, the province wherein Montréal is situated, the provincial tax rate was 25.75% on taxable income over $108,390 in 2020.[125] These rates are much higher than both the 37% tax on income over $518,401 in the United States and the 0% income tax rate imposed in the state of Florida.[126]

The money that the players earn while in Canada would be subject to Canadian taxes.[127] These taxes would only apply to the income earned from the forty games the team plays in Montréal. Their tax rate in Canada would be 58.75%; Florida's rate would be 37%. The Treaty allows the first $100,000, or $200,000 if the player is married, to be exempt from tax. The Treaty's implications allow Canada, a less friendly tax country, to be less punitive to Americans—a positive if the players have no choice. But when players can pick their team, that 58.75% tax rate would be the highest imposed on any MLB team, which would discourage prospective players from signing with the Rays. Allowing the players to only pay a portion of their salary at the Canadian-Québec rate would soften the players' tax implications. From a Rays' player perspective, the Treaty's softening of Canadian tax impositions would still not be as attractive an option as only playing their home games in Florida.

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123. *Foreign Earned Income Exclusion*, TAXES FOR EXPATS (n.d.), *available at* https://www.taxesforexpats.com/expat-tax-advice/foreign-income-exclusion.html (last visited Apr. 2, 2021).

124. *Canadian Income Tax Rates for Individuals*, GOV'T CAN. (n.d.), *available at* https://www.canada.ca/en/revenue-agency/services/tax/individuals/frequently-asked-questions-individuals/canadian-income-tax-rates-individuals-current-previous-years.html#federal (last visited Apr. 2, 2021).

125. *Id.*

126. *Tax Brackets*, DEBT.ORG (2020), *available at* https://www.debt.org/tax/brackets/ (last visited Apr. 2, 2021).

127. Jeffrey Steinberg & Adam Scherer, *Tax Lesson During the Blue Jays' Off-Season*, ADVISOR (Dec. 11, 2015), *available at* https://www.advisor.ca/tax/tax-news/tax-lessons-during-the-blue-jays-off-season/ (last visited Apr. 2, 2021).

VII. BUSINESS OPERATIONS

A. Income Tax Treaties

The purpose of an income tax treaty is to lower tax barriers and incentivize international trade.[128] When a tax treaty is in effect between the United States and another country, it lowers the other country's tax jurisdiction and, in effect, provides a lower U.S. tax burden.[129] In the United States, when there is a conflict between the Internal Revenue Code and an international treaty, the later-in-time rule applies.[130] The later-in-time rule allows whichever provision has been more recently promulgated to apply to the individual or entity paying income tax within the United States.[131] Under an income tax treaty, the individual or business will not usually be subject to tax on the business income earned in the contracting state unless there is a permanent establishment.[132] What constitutes a permanent establishment is covered below. If there is no permanent establishment, then the income that would otherwise be taxable in the contracting state without a treaty will not be taxable.[133]

Tax treaties with the United States are typically initiated to eliminate the international double tax.[134] Instead, individuals and businesses that would be subject to paying in both countries have the ability to only pay tax where their money is earned. An agreement will typically contain provisions requiring a treaty partner to provide information to the other treaty partner as a means of keeping enforcement fair.[135] These exchanges will usually include names and dividends, royalties or interest accumulated, and other simultaneous examinations of taxpayers.[136] In this case, the specific treaty in place is the U.S.-Canada Treaty. The two countries honor this agreement and businesses and individuals earning income in both countries, or citizens of one country earning income in the other, are subject to its terms. With this international tax treaty background, we must now turn to the specific agreement to determine how it will affect the Rays.

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128. HERZFELD & DOERNBERG, *supra* note 69.
129. *Id.* at 130.
130. *Id.*
131. *Id.*
132. *Id.* at 144.
133. HERZFELD & DOERNBERG, *supra* note 69.
134. *Id.* at 161.
135. *Id.* at 172.
136. *Id.*

B. Creating an Entity

The Rays operate as a corporation in the United States, under the name Tampa Bay Rays, Ltd.[137] A general corporation has shareholders and directors and can go by various indicators, including "Co.," "Corp.," and "Ltd."[138] Once the Rays start playing in Montréal, they would need to establish a business within the province wherein they plan to operate; Québec is the applicable province here. The first step to establish a business in Canada is to meet the residency requirement by providing a Canadian address.[139]

Since the Rays are a corporation operating as a limited company, it may be subject to various Canadian laws about incorporating a business within Canada.[140] Most businesses operating in Canada choose to use a corporation setup rather than a branch, which requires a permanent establishment to determine tax liability.[141] However, if a corporation exists in another country, the business can apply for incorporation as a subsidiary of the parent organization within Canada.[142] Under Canadian federal law, 25% of the business's directors must be Canadian residents, and if a company has fewer than four directors, at least one director must be Canadian.[143] The province that a corporation operates in may also have residency requirements, although some do not.[144]

If the Rays used a branch instead of a foreign corporation subsidiary, then they would have to meet the requirements for a permanent establishment, as outlined in the U.S.-Canada Treaty.[145] Further, they would need to form a Canadian place of business for corporate records and would be subject to a 25% branch tax levied on Canadian after-tax

137. *Tampa Bay Rays Baseball Ltd.*, BLOOMBERG (n.d.), *available at* https://www.bloomberg.com/profile/company/7351090Z:US (last visited Apr. 2, 2021).

138. *What Does LLC, Inc., Co., Corp., and Ltd. Mean?*, INCNOW (Oct. 23, 2020), *available at* https://www.incnow.com/blog/2019/03/29/inc-llc-lp-sifting-through-the-abbreviations-and-choosing-the-right-entity/ (last visited Apr. 2, 2021).

139. Susan Ward, *How to Start a Non-Resident Business in Canada*, SMALL BUS. (Nov. 17, 2019), *available at* https://www.thebalancesmb.com/nonresident-business-in-canada-2948595 (last visited Apr. 2, 2021).

140. *Entity Set Up*, DLA PIPER (May 27, 2020), *available at* https://www.dlapiperintelligence.com/goingglobal/corporate/index.html?t=02-entity-setup&c=CA (last visited Mar. 18, 2021).

141. *Id.*

142. Ward, *supra* note 139.

143. DLA PIPER, *supra* note 140.

144. *Id.*

145. *Id.*

earnings, minus the amount reinvested in Canadian businesses.[146] Businesses operating in Canada through representative branches are automatically treated as branch entities subject to the same guidelines outlined above.[147] The information included only applies if the business continues as a non-resident; the applicable regulations would differ if the Rays were headquartered in Canada, like the Blue Jays.[148]

C. Permanent Establishment

A permanent establishment for businesses is well-defined within Article V of the Treaty.[149] Under Article V, a permanent establishment is "a fixed place of business through which the business of a resident of one of the two countries is wholly or partly carried out in, and can include a place of management or a workshop."[150] A building for these purposes constitutes a permanent establishment if it exists for twelve months in either one of the specified countries.[151] For a business with a permanent establishment in a country it is not principally from, the applicable profits acquired through that establishment are subject to the corporate tax rate and the allowable deductions of the country where it has its principal place of business.[152]

In the United States, the current corporate tax rate is 21%; in Montréal, the corporate tax rate for a non-Canadian controlled private corporation (non-CCPC) is 11.6%, which is then added to the 15% federal rate, to a total 26.6% corporate tax.[153] Corporations that are not residents of Canada and/or non-CCPCs will be taxed on profits earned while operating within the country per the Treaty.[154]

The U.S.-Canada Treaty is a helpful regulation enacted for companies conducting business in both countries because it allows them to keep their business profits taxable within their own country, and only subjects them to taxes on the profits generated while operating within the

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146. *Id.*

147. Petar Chakarov, *Business Entities in Canada*, HEALY CONSULTANTS GRP. PLC (n.d.), *available at* https://www.healyconsultants.com/canada-company-registration/setup-llc/ (last visited Apr. 2, 2021).

148. Ward, *supra* note 139.

149. Department of the Treasury, *supra* note 116.

150. *Id.*

151. *Id.*

152. *Id.*

153. 26 U.S.C. § 11 (2019).

154. Trowbridge, *supra* note 65.

other country.[155] In the Rays' case, the first issue is whether they would be considered a resident of Canada. In order to be considered a resident of Canada, the organization must have a "permanent establishment" located within Canada, which must exist for more than twelve months. The listed buildings within the Treaty do not specifically include "baseball stadiums," but "business centers" are considered permanent establishments if they have existed for longer than twelve months. Next, while the business of baseball is not specifically noted in the Treaty, we see that when a permanent establishment exists, as it would here, the business (team) will earn their profits in one of the countries taxed as though they are a resident.

The implication for the Rays organization is that it will be subjected to higher corporate tax on profits in Québec than it would be by staying in Florida. The rate is 26.6% when located specifically in the Québec province; it is 21% within the United States. In 2018, the Tampa Bay Rays had a $27 million income.[156] Dividing that number by two, to $13.5 million, reflects the Rays' earning half of all profits in the United States and the other half in Canada. Each half taxed per each country's respective rates would result in the Rays owing $2.835 million in taxes in the United States and $3.591 million in taxes in Canada before any deductions.

VIII. CONCLUSION

Even with a tax-friendly treaty between the two nations, a move does not seem to make the most financial sense for the team. The Rays would have to decide that the tax liability imposed on them would be offset by the increased profits they would be able to generate while operating in Montréal for half of the year. Thus, the move does not appear to be in the Tampa Bay Rays' best economic interests.

155. *Id.*

156. Christina Gough, *Operating Income of the Tampa Bay Rays from 2002 to 2018*, STATISTA (May 6, 2020), *available at* https://www.statista.com/statistics/829626/tampa-bay-rays-operating-income/ (last visited Apr. 2, 2021).

The Right to Remain Anonymous: How the GDPR Should Look to India and China to Fix the Incomplete Concept of Data Anonymization

By Moneeka Brar*

I. INTRODUCTION

The rise of the technology industry caused many countries to enact legislation focused on protecting individual citizens' privacy. Data anonymization, a protection layer, is one of the most significant safeguards implemented to protect individuals, but it is relatively unsuccessful in its current form. Two of the most significant problems with data anonymization are that anonymized data can still be easily retraced via reidentification science, and the fact that such retracing misinforms the way individuals think about data anonymization in their daily lives. This public perception should shift to acknowledge that data anonymization is a layer of protection, rather than total protection. By looking at how other countries approach the concept of privacy and exploring how they structure their data protection and privacy laws, a more globally unified system is possible. This uniform global system can emerge once privacy is acknowledged as a fundamental global right, thus fostering shared values around the world, wherein data anonymization is acknowledged and accepted not as total protection, but as a protective layer.

Which information will be privatized and which information needs to remain public are extremely debated topics in data protection and privacy law. There have been various approaches to solving this problem, with the European Union's General Data Protection Regulation (GDPR) at the forefront. Since its implementation, other countries have followed the standards set by the GDPR. This Note will focus on attempts to apply data anonymization to domestic privacy law in the European Union (EU), India, and China. Specifically, this Note analyzes the standard set by the GDPR—even though data anonymization remains unsuccessful in its present form within this framework—and considers

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how other countries have tackled the issue of keeping individuals' information private. India and China were chosen as case studies because of their differing governments.

The first section of this Note will discuss the history and importance of data protection laws, explaining data anonymization itself. Within that context, the Note will then discuss the current shortcomings of data anonymization, and introduce the idea of reidentification. The second section of the Note will focus on analyzing anonymization. It will look at the GDPR's version of anonymization, and its failure from the outset as predestined by its focus on how anonymization was supposed to work based on its original context. It will then turn to India to analyze its attempt to replicate the GDPR in its domestic laws. Discussion of how India passed and enforces data protection laws will focus on India's switch to the Indian Aadhaar biometric database, and create a version of data protection and privacy laws in 2019.

It will then examine China's approach to implementing data protection and privacy laws from the perspective of a different government. After considering these countries' different approaches there will be discussion of how to fix their attendant problems, first by changing people's mindsets towards anonymization and its use, then by uniquely combining the various forms of safeguards from these different areas. Using these three countries, this Note will discuss and compare the different forms of safeguarding individual's private information to determine whether it is possible to make this specific safeguard more successful. This Note will conclude that, rather than specifically focusing on fixing anonymization in every area, countries should acknowledge that anonymization is unsuccessful in its current form, and encourage governments to be transparent and accountable for individuals' privacy interests.

II. HISTORY OF DATA PROTECTION AND PRIVACY LAWS AND ANONYMIZATION DEFINED

The United States conducted its most recent census in 2020.[1] During this year, every household in the country had to fill out and submit a form

1. *What is the 2020 Census?*, U.S. CENSUS (2020), *available at* https://2020census.gov/en/what-is-2020-census.html?cid=20402:%2Bwhat%20%2Bis%20%2Ba%20%2Bcensus:sem.b:p:dm:en:&utm_source=sem.b&utm_medium=p&utm_campaign=dm:en&utm_content=20402&utm_term=%2Bwhat%20%2Bis%20%2Ba%20%2Bcensus&msclkid=87a5911d1a2217b91b1ecf6868257653 (last visited Apr. 20, 2021).

to the federal government.[2] The form included identifiable questions about individuals' names, sex, race, age, telephone number, and a household's residence type.[3] These are identifiable questions because their answers make it possible to trace the form back to a specific person. While it is normal in the United States to fill out this questionnaire every ten years, the census raises the question of who exactly this form is being sent to and, more importantly, what is that recipient going to do with this data? These questions only give rise to more questions about individual privacy and whether keeping identifiable information private is a fundamental right.

However, to grasp modern-day data protection and privacy arguments, privacy's basic history must be understood. The right to privacy dates back to the late 1800s when Samuel D. Warren and Louis Brandeis wrote *The Right to Privacy*,[4] arguing that the first definition of privacy is the *right to be left alone*.[5] Since its publication, the importance of data protection and individual privacy has grown exponentially alongside the rise of technology.[6] Technological innovation is happening all around the world, with the EU front and center.[7] Data protection and privacy laws prohibit the disclosure or misuse of information about individuals; in recent years, the privacy of that information has emerged as a central issue.[8] Technology plays a prominent role in the emergence of data protection and privacy laws, with countries passing new laws to keep up with technological innovations.[9]

A country has data protection laws if any of its national laws provide a set of basic data privacy principles, and those principles are accompanied by officially-backed methods of enforcement.[10] In 1973,

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2. *Id.*

3. *Questions Asked on the Form*, U.S. CENSUS (2020), *available at* https://2020census.gov/en/about-questions.html (last visited Apr. 20, 2021).

4. *A Brief History of Data Protection: How Did it All Start?*, EUROCLOUD (Jan. 6, 2018), *available at* https://cloudprivacycheck.eu/latest-news/article/a-brief-history-of-data-protection-how-did-it-all-start/ (last visited Apr. 20, 2021).

5. *Id.*

6. *Id.*

7. Emily Stewart, *Why You're Getting So Many Emails About Privacy Policies*, VOX (May 29, 2018), *available at* https://www.vox.com/policy-and-politics/2018/4/5/17199754/what-is-gdpr-europe-data-privacy-facebook (last visited Apr. 20, 2021).

8. Daniel J. Solove, *A Brief History of Information Privacy Law*, GEO. WASH. L. FAC. PUBL'N & OTHER WORKS 1, 3 (2006).

9. *Id.*

10. Stewart, *supra* note 8.

Sweden became the first country to pass a national data protection law.[11] It was a simple law that only covered personal data processing in traditional, computerized registers, and did not contain any material provisions about when and how the data was processed or any other general data protection principles.[12]

A. Data Anonymization Generally

To anonymize is "to remove identifying information from [something, such as computer data] so that the source cannot be" easily discovered.[13] Anonymization also removes any information that would associate specific data with a particular individual.[14] An extensive amount of data can be anonymized, but anonymized data is simply data that would no longer be immediately attributable to an individual.

Anonymization was partially popularized by social science's attempts to learn about society and the people therein by studying individuals' patterns of behavior.[15] Direct identifiers, such as names, addresses, and telephone numbers, are easily traced to specific individuals.[16] There are also indirect identifiers that, when put together, could reveal the identity of a particular individual.[17] This process occurs by cross-referencing someone's job or social media presence with their surrounding area, thereby identifying an individual using that specific information.[18] This is only one example of how an individual can become traceable again. Anonymization in its proper form would not allow for the reidentification of individuals through indirect identifiers.

The public once believed that anonymizing data sets removed any risks to an individual's privacy and safeguarded the individual's

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11. Graham Greenleaf, *Global Data Privacy Laws: 89 Countries, and Accelerating*, 115 PRIV. L. & BUS. INT'L REP. (2012).

12. Sören Öman, *Implementing Data Protection in Law*, STOCKHOLM INST. SCANDINAVIAN L. 390, 391 (2010).

13. *Anonymize*, MERRIAM-WEBSTER (n.d.), *available at* https://www.merriam-webster.com/dictionary/anonymize (last visited Apr. 21, 2021).

14. *Anonymize*, CAMBRIDGE DICTIONARY (n.d.), *available at* https://dictionary.cambridge.org/us/dictionary/english/anonymize (last visited Apr. 21, 2021).

15. Kristel Toom & Pamela F. Miller, *Ethics and Integrity*, SCIENCEDIRECT (2018), *available at* https://www.sciencedirect.com/topics/biochemistry-genetics-and-molecular-biology/anonymization (last visited Apr. 21, 2021).

16. *Id.*

17. *Id.*

18. *Id.*

identity.[19] Yet critics question its credibility, and many wonder if there is even a purpose to data anonymization.[20] Some critics argue that complete anonymization is impossible because other data sets will undoubtedly be released, leading to eventual identification.[21] On the other hand, anonymization defenders believe that the likelihood of reidentification is still relatively low, and that most data sets will remain anonymized using appropriate techniques.[22]

There are multiple techniques to anonymize data,[23] including: data masking; pseudonymization; generalization; data swapping; data perturbation; and synthetic data.[24] Data masking occurs when data is hidden with altered values. Pseudonymization replaces private identifiers with fake identifiers. Generalization deliberately removes data to make it less distinguishable. Data swapping rearranges the dataset values so that they do not correspond with the original data. Data perturbation modifies the original data set by applying techniques that round numbers and add random noise. Synthetic data is manufactured information that has no connection to real events.[25] Each of these techniques offers a different way to anonymize data, yet attackers can still retrace data sets back to the individual.[26] To combat this, conceptualizing anonymization should shift away from individuals putting their entire faith in data anonymization systems and towards the belief that data anonymization is only one layer to maintaining privacy.

A major reason to anonymize data is to protect individuals' privacy when storing or disclosing data.[27] Many industries utilize the process to protect someone's interests and provide anonymity when supplying data, as in healthcare or internet advertising.[28] Many defend the privacy-protecting power of anonymization and believe it is important and successful, despite evidence that indicates otherwise.[29] Data

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19. Ira S. Rubinstein & Woodrow Hartzog, *Anonymization and Risk*, 91 WASH. L. REV. 703, 704 (2016) (describing the risk to an individual's privacy).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Anonymization*, IMPERVA (n.d.), *available at* https://www.imperva.com/learn/data-security/anonymization/ (last visited Apr. 20, 2021).

24. *Id.*

25. *Id.*

26. *Id.*

27. Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1708 (2010).

28. *Id.*

29. Elizabeth A. Brasher, *Addressing the Failure of Anonymization: Guidance from the European Union's General Data Protection Regulation*, 18 COLUM. BUS. L. REV. 209 (2018).

anonymization is perceived as essential, but criticism has proved that it alone is insufficient to protect privacy.[30] The process is appealing to the public because it balances the free flow of information with the risks of privacy harms and releases. The main concern with anonymization is that it removes the possibility of retracing information to the original data supplier. While Recital 26 of the GDPR[31] gives a circular definition of data anonymization as "data rendered anonymous in such a way that the data subject is not or no longer identifiable," it emphasized that anonymized data must be stripped of any sort of identifiable information so that a particular individual cannot be reidentified.[32] Compared to pseudonymization—which processes personal data so that it is no longer attributable to a specific data subject without additional information—anonymization completely anonymizes an individual's identity, taking this strategy a step further.[33]

Researchers found that using data while preserving an individual's privacy requires more than simply adding noise, sampling datasets, and other reidentification techniques.[34] A study conducted by communication researchers helped the public understand that retracing data is likely, even if individuals are assured that the dataset they are participating in is anonymized and a limited amount is shared with the general public.[35] This research shows that "once bought, the data can often be reverse-engineered using machine learning to reidentify individuals, despite the anonymization techniques."[36] Reverse engineered data exposes sensitive information about those personally identified, showing how easy it is to pinpoint individuals in practice.[37]

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30. Ohm, *supra* note 28.

31. *General Data Protection Regulation, Recital 26 Not Applicable to Anonymous Data*, INTERSOFT CONSULTING (2018), *available at* https://gdpr-info.eu/recitals/no-26/ (last visited Apr. 20, 2021) [hereinafter INTERSOFT] ("Data rendered 'anonymous' in such a way that the data subject is not or no longer identifiable.").

32. Matt Wes, *Looking to Comply with GDPR? Here's a Primer on Anonymization and Pseudonymization*, IAPP (Apr. 25, 2017), *available at* https://iapp.org/news/a/looking-to-comply-with-gdpr-heres-a-primer-on-anonymization-and-pseudonymization/ (last visited Apr. 20, 2021).

33. *Id.*

34. *Anonymizing Personal Data 'Not Enough to Protect Privacy,' Shows New Study*, SCI. DAILY (July 23, 2019), *available at* https://www.sciencedaily.com/releases/2019/07/190723110523.html (last visited Apr. 20, 2021).

35. *Id.*

36. *Id.*

37. *Id.*

A common misconception about anonymization is that all data sets are untraceable once completed.[38] Critics of anonymization argue that completely detaching an individual's identity from a data set is impossible because other data sets will make it possible to identify that individual.[39] Another criticism of anonymization is that it does not work the way it was intended because of its simplicity. Publications from communications researchers claim the ability to correctly reidentify 99.98% of individuals in anonymized data sets using only fifteen demographic attributes.[40] Researchers also created a statistical model that estimates how easy it would be to identify any individual from a supposedly anonymized data set.[41]

Generally, data anonymization is regarded as a failure, but sustained public belief in this failure results from the current consensus that data anonymization is the only form of data protection. To combat this, data anonymization should instead be considered as one layer of a multi-layer protection initiative. Technological advancements make it difficult to keep data private, but data privacy is not impossible. In light of consumers' growing reliance on technology, information that is online and in datasets is more susceptible to tracking.[42] Reliance on technology is also problematic because it enables large amounts of data collection.[43] While internet sites often give individuals a choice of whether to share their data while using the site, that information may still be tracked another way.[44] Europe's current data protection framework allows for the use and sharing of anonymous data that is truly free; therefore, European nations are careful to recognize reidentification risk, and their laws use the term "pseudonymization" rather than "anonymization."[45] Critics have pointed out that it is a mistake to rely too much on these assessments.[46]

The most prevalent way to track data is through reidentification science. Reidentification science, also known as deanonymization, is a

38. Rubinstein, *supra* note 20, at 704.

39. *Id.* at 705.

40. Natasha Lomas, *Researchers Spotlight the Lie of "Anonymous" Data*, TECHCRUNCH (July 24, 2019), *available at* https://techcrunch.com/2019/07/24/researchers-spotlight-the-lie-of-anonymous-data/ (last visited Apr. 21, 2021).

41. *Id.*

42. Brasher, *supra* note 30, at 236.

43. *Id.*

44. *Id.*

45. Lomas, *supra* note 41.

46. Rubinstein, *supra* note 20.

technique that reidentifies encrypted or generalized information.[47] This practice leads to two important conclusions: that the power of reidentification will create and amplify privacy harms, and that regulators will protect privacy in the face of easy reidentification at a high cost.[48] Utility and data privacy are connected, so no regulation can increase data privacy without decreasing data utility; thus, no useful database will ever be entirely anonymous.[49] Reidentification science compares anonymized information with other available data to identify a person, group, or transaction. Reidentification can create and amplify privacy harms.[50] It "combines data sets that were meant to be kept apart, and in doing so, gains power through accretion," which facilitates future reidentification.[51]

Data anonymization masks an individual's personally identifiable information (PII), which is available from different fields, such as health services, social media platforms, and e-commerce trades.[52] PII includes information like "date of birth, Social Security Number, zip code, and IP address;"[53] however, "reidentification reserves the process of anonymization by matching shared by limited data sets with data sets that are easily accessible online."[54] Reidentification is simpler to accomplish if the anonymization process is incorrect.[55] Easier reidentification foretells of increasing inability to guarantee anonymity, but with continued technological advances in anonymization reidentification should be harder to achieve, insofar as it outpaces dueling reidentification technology advances.[56]

Opinions differ on whether or not anonymization and reidentification are possible.[57] Critics of anonymization argue for reduced reidentification-based approaches, while those that support reidentification argue that it is an unavoidable means necessary for identity protection.[58] Because reidentification is unavoidable, data

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47. Jake Frankenfield, *De-Anonymization*, INVESTOPEDIA (2018), *available at* https://www.investopedia.com/terms/d/deanonymization.asp (last visited Apr. 20, 2021).

48. Ohm, *supra* note 28, at 1705.

49. *Id.* at 1705-06.

50. *Id.* at 1705.

51. *Id.*

52. Frankenfield, *supra* note 48.

53. *Id.*

54. *Id.*

55. *See id.*

56. *Id.*

57. *See* Rubinstein, *supra* note 20.

58. *See id.*

anonymization is an inherent failure which processes cannot be successfully implemented on the scale that data protection and privacy laws require.[59] Replacing names and values with random numbers or pseudonyms often passes as anonymized data, but actually increases the risk of reidentification instead.[60]

B. History of Data Protection in Europe and the GDPR

In Europe, the adoption of data protection and privacy laws eventually led to the implementation of the GDPR in May 2018. This law replaced the EU's Data Protection Directive 95/46/ec as the primary law regulating how companies protect EU citizens' personal data.[61] The goal of the more expansive GDPR was to evolve data and privacy protections alongside current technology. Because of the strict rules of the GDPR, companies had to comply with the new regulations before it became effective on May 25, 2018.[62] The law's reach extends beyond the EU to other countries, forcing non-member states to comply with these regulations in order to continue doing business within EU borders.[63]

One basic GDPR principle is that compliance with the law need be widespread, spanning the entire world.[64] Any company that does business in the EU will be subject to GDPR standards.[65] This includes businesses located within EU borders and individual employees working in EU member states or selling products and other goods to EU citizens. Businesses must get explicit consent from individuals regarding the processing of their data.[66] A pop-up window typically requests consent when an individual visits the company's website; these pop-ups inform the user that the website will track and collect their data as they navigate through the site.

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59. *Id.*

60. *Id.*

61. Juliana De Groot, *What is the General Data Protection Regulation? Understanding & Complying with GDPR Requirements in 2019*, DATAINSIDER (Dec. 2, 2019), *available at* https://digitalguardian.com/blog/what-gdpr-general-data-protection-regulation-understanding-and-complying-gdpr-data-protection (last visited Apr. 20, 2021).

62. *See id.*

63. *Id.*

64. Jessica Barker, *What Does GDPR Mean for You?*, DATAINSIDER (July 11, 2018), *available at* https://digitalguardian.com/blog/what-does-gdpr-mean-for-you (last visited Apr. 21, 2021).

65. *Id.*

66. *Id.*

The purpose of the GDPR is to create a set of standards for companies that handle EU citizens' data in order to better safeguard its processing and movement.[67] This measure prevents member states from writing their own data protection laws, thereby ensuring that these laws are consistent throughout the EU.[68] The GDPR helps promote uniformity, allowing for clearer interpretation of data regulations. Another issue the GDPR seeks to remedy is the effect of privacy laws as impediments to the free flow of information, which travel is instrumental to certain political and economic functions.[69] Part of the growth of data protection and privacy laws is attributable to the Internet's growth and the increasing normalcy of performing tasks online.[70] Consumers leave a digital trail of activity—from e-mail and social media communications to search engine queries and payment transactions—with private companies that have an interest in collecting, storing, and selling that data. Data anonymization is appealing because it lowers the risk of harm and enables the release of valuable, sensitive information while reducing that data's linkability to its owner.[71] As people put more information on the globally accessible internet, individuals continue to seek ways to keep themselves off of search engines and maintain their privacy; many do not want any possibility of being traced.

Compliance with the GDPR is a very serious matter. Companies that fail to follow the new GDPR rules face severe fines, potentially up to 20 million EUR or 4% of annual global revenue.[72] These fines depend on the severity of the violation and its surrounding circumstances.[73] The EU declared that GDPR compliance is not optional, and strictly enforces its rules in order to maintain compliance.[74]

The GDPR has an expansive view about what constitutes personal identification information, and companies have to find ways to safeguard smaller forms of identification, such as IP addresses and cookie data, the same way they protect larger ones, like names, addresses, and

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67. De Groot, *supra* note 62.

68. *Id.*

69. Sophie Stalla-Bourdillon & Alison Knight, *Anonymous Data v. Personal Data – A False Debate: An E.U. Perspective on Anonymization, Pseudonymization and Personal Data*, 34 WIS. INT'L L.J. 284 (2016).

70. *Id.*

71. *Id.*

72. Richie Koch, *Everything You Need to Know About GDPR Compliance*, GDPR.EU (2020), *available at* https://gdpr.eu/compliance/ (last visited Apr. 19, 2021).

73. *Id.*

74. *Id.*

identification numbers.[75] It says that companies must provide a "reasonable" level of protection for personal data, but does not define what constitutes "reasonable."[76] This lack of direction regarding the requirements of these strict rules and regulations could make uniform compliance difficult to maintain.[77] Recital 26 of the GDPR says the following about data anonymization:

> The principles of data protection should apply to any information concerning an identified or identifiable natural person. Personal data which have undergone pseudonymization, which could be attributed to a natural person by the use of additional information should be considered to be information on an identifiable natural person. To determine whether a natural person is identifiable, an account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments. The principles of data protection should therefore not apply to anonymous information, name information that does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable. This Regulation does not, therefore, concern the processing of such anonymous information, including for statistical or research purposes.[78]

The EU is generally stricter with its privacy regulations than the United States.[79] They enforce a comprehensive data privacy regulation upon all member states, with the GDPR imposing heightened privacy protections, including anonymization.[80] The GDPR defines an individual as an identifiable person if they can "be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic,

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75. Michael Nadeau, *General Data Protection Regulation (GDPR): What You Need to Know to Stay Compliant*, CSO (June 12, 2020), *available at* https://www.csoonline.com/article/3202771/general-data-protection-regulation-gdpr-requirements-deadlines-and-facts.html (last visited Apr. 20, 2021).

76. *Id.*

77. *Id.*

78. *See* INTERSOFT, *supra* note 32.

79. *See* Brasher, *supra* note 30, at 244.

80. *Id.*

cultural or social identity of that natural person."[81] This definition heightens the threshold for determining whether a natural person is "identifiable" by saying that an "account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly."[82] Through this, the regulation indicates that forms of reidentification need to be acknowledged and that those attempting to regulate data privacy should be aware of potential attempts to take data.

While the idea behind GDPR – having a uniform system across multiple countries – sounds good in theory, certain aspects of this regulation have not worked quite to plan in practice. In particular, data anonymization has not worked because the process of deleting an individual's traceable facts is still unsuccessful. The GDPR brings data anonymization to the center of the discussion on data protection and privacy laws because many of its rules and regulations focus on how data collected by companies and individuals should not have any individual identifying information. In doing so, it emphasizes the importance of allowing people to maintain their anonymity when browsing the Internet or conducting business.[83] Although this approach is lacking, looking at other countries to learn from their anonymization attempts could improve the process.[84] India and China are two such countries that have developed anonymization regulations and continue to implement them through their respective data protection and privacy laws.[85]

C. Data Protection and Privacy in India

India is a federal democratic republic with a parliamentary system of government.[86] India has a modern parliamentary institution that originated with the British colonial administration and developed organically over time due to struggles for better representation in the government.[87] After India won its independence from the British, the

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81. *Id.*

82. *Id.* at 245.

83. *Id.*

84. *Id.*

85. *See* Brasher, *supra* note 30.

86. *India Government Type*, INDEX MUNDI (2019), *available at* https://www.indexmundi.com/india/government_type.html (last visited Apr. 20, 2021).

87. *National Parliaments: India*, LIBR. OF CONG. (2014), *available at* https://www.loc.gov/law/help/national-parliaments/india.php (last visited Apr. 20, 2021) ("Colonization of India by the British helped developed the basis of a functioning government in India.").

Constituent Assembly[88] convened to draft the Constitution of India. In this Constitution, the Assembly stipulated the need for a "Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of State and the House of the People."[89] Under this system of governance, the process of a bill becoming a law in India is as follows:

The *first stage* consists of the introduction of the Bill which is done on a motion moved by either a Minister or a Member. During the *second stage*, any of the following motions can be moved: that the Bill be taken into consideration; that it be referred to a Select Committee of the House; that it be referred to a Joint Committee of the two Houses; or that it be circulated for the purpose of eliciting opinion thereon. Thereafter, the Bill is taken up for clause-by-clause consideration as introduced or as reported by the Select/Joint Committee. The *third stage* is confined to the discussion on the motion that the Bill be passed and the Bill is passed/rejected either by voting or voice vote (or returned to the Lok Sabha by the Rajya Sabha in the case of a Money Bill).[90]

This system allows politicians to voice differing opinions, and safeguards bills as they go through the many legislative stages before becoming law. This is India's approach to maintaining the democratic system and allowing elected government officials to scrutinize each bill before it is passed.

In 2017, the Indian Supreme Court ruled that the Indian Constitution guarantees a fundamental right to privacy, but at that time, India had neither a data protection act nor a data protection agency.[91] However, the country later created a large biometric database called Aadhaar,[92] which is now the largest in the world.[93] An Aadhaar number is a twelve-digit number issued by the Unique Identification Authority of India (UIDAI) to residents of India who complete a specific verification process.[94] It is

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88. *First Day in the Constituent Assembly*, LOK SABHA (n.d.), *available at* http://164.100.47.194/loksabha/constituent/facts.html (last visited Mar. 22, 2021) ("The Constituent Assembly took three years to draft the Constitution for an Independent India.").

89. Brasher, *supra* note 30.

90. *Id.*

91. *State of Privacy India*, PRIV. INT'L (Jan. 26, 2019), *available at* https://privacyinternational.org/state-privacy/1002/state-privacy-india (last visited Apr. 21, 2021).

92. *Welcome to AADHAAR*, AADHAAR (2020), *available at* http://www.aadhaar.nl (last visited Apr. 21, 2021) ("foundation" in Hindi).

93. Brasher, *supra* note 30.

94. *What is Aadhaar*, UNIQUE IDENTIFICATION AUTH. INDIA (2019), *available at* https://uidai.gov.in/my-aadhaar/about-your-aadhaar.html (last visited Apr. 21, 2021).

a non-commercial and non-governmental organization that began development in 1997 to support grassroots-level development in India.[95] Its purpose is to bridge the gap between classes of people, improve the standard of living, and lead people out of poverty.[96] Citizens may voluntarily enroll with UIDAI to obtain an Aadhaar number; during enrollment they must provide minimal demographic and biometric information, which is free.[97] The official purpose of Aadhaar is as follows:

> Aadhaar is a strategic policy tool for social and financial inclusion, public sector delivery reforms, managing fiscal budgets, increas[ing] convenience and promot[ing] hassle-free people-centric governance ... [it]facilitates financial inclusion of the underprivileged and weaker sections of the society and is, therefore, a tool of distributive justice and equality. The Aadhaar identity platform is one of the key pillars of the "Digital India," wherein every resident of the country is provided with a unique identity. The Aadhaar programme has already achieved several milestones and is by far the largest biometrics-based identification system in the world.[98]

Since the creation of Aadhaar, Indian's legislative body worked on passing an all-encompassing data protection and privacy law based on the GDPR.[99] The law included individual rights protections, heightened consent requirements, and stiff penalties for non-compliance.[100] It also created barriers, making it more difficult to transfer personal data out of India. Further, the committee defined personal data slightly differently than the GDPR,[101] as "data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic ... of the identity of such person."[102] However, there is nothing in the law about data anonymization regarding collected data because the draft bill argues that anonymization must be "irrevocable," despite the fact that irrevocability is most likely impossible under current standards.[103]

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95. AADHAAR, *supra* note 93.

96. *Id.*

97. *Id.*

98. *India's Aadhaar System*, DFT EMPOWER (2017), *available at* http://www.dftempower.com/index.php/aadhaar (last visited Apr. 19, 2021).

99. *Key Provisions in India's Draft Personal Data Bill*, INSIDE PRIV. (Sept. 12, 2018), *available at* https://www.insideprivacy.com/international/key-provisions-in-indias-draft-personal-data-bill/ (last visited Apr. 20, 2021).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

While the goal of Aadhaar was to make the lives of Indian citizens more equal and protect their privacy, the legislature is still working through inconsistencies and bumps in the law to make the it successful.[104] Problems include issues with accessing Aadhaar numbers, particularly as experienced by citizens who are sick, immobile, or bedridden;[105] generally lacking awareness of Aadhaar's individual benefits; and the denial of replacements to persons who lost their Aadhaar cards, which led to fake Aadhaar numbers.[106] The Supreme Court of India also ruled that illegal immigrants will not get an Aadhaar number.[107] With the biometric system in place and the fact that the country is still working on passing an all-encompassing law, India has leeway when incorporating data anonymization into its domestic regulations. Since Aadhaar already exists, individuals should be able to elect to keep their information private if the data is used for any purpose.

D. Data Protection and Privacy in China

China's government consists of four different divisions—the legislative, executive, judiciary, and military—which comprise the Communist Government of the People's Republic of China.[108] China's legislation is often passed in very vague terms because legislators want to see the effect of a law before adding clarifying details.[109] China has a National People's Congress (NPC), which is the highest ranking body[110] and largest in their government.[111] Its 3000 members rarely meet, requiring the NPC to rely on its committees to conduct the central government's regular business of drafting legislation.[112] For national

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104. Reetika Khera, *Aadhaar Failures: A Tragedy of Errors*, ECON. & POL. WKLY. (Apr. 6, 2019), *available at* https://www.epw.in/engage/article/aadhaar-failures-food-services-welfare (last visited Apr. 20, 2021).

105. *Id.*

106. *Id.*

107. *Cabinet Gives Go-Ahead to Aadhaar Bill*, ECON. TIMES (Oct. 9, 2013), *available at* https://economictimes.indiatimes.com/news/economy/policy/Cabinet-gives-go-ahead-to-Aadhaar-Bill/articleshow/23762608.cms (last visited Apr. 21, 2021).

108. Amber Pariona, *What Type of Government Does China Have*, WORLDATLAS (Apr. 25, 2017), *available at* https://www.worldatlas.com/articles/what-type-of-government-does-china-have.html (last visited Apr. 21, 2021).

109. *Id.*

110. *Id.*

111. *Id.*

112. *The PRC Legislative Process: Rule Making in China*, US-CHINA BUS. COUNCIL (2009), *available at* https://www.uschina.org/sites/default/files/prc_legislative_process.pdf (last visited Apr. 20, 2021).

laws, the NPC's Law Committee reviews the drafted laws and other legislative items, then writes a report to the NPC Standing Committee Council of Chairs.[113] They intently read this report three times before passing it, at which point it is published in the NPC gazette.[114] Under the Chinese Constitution, the Communist party has complete political authority and governs according to democratic centralism.[115] This system of governance allows open discussion and policy decisions, but all the members must uphold a collective decision.[116]

China's legislature tends to pass deliberately incomplete legislation at promulgation because it gives lawmakers more flexibility to adapt laws after their effects become apparent.[117] In other words, they wait to see how the laws and regulations play out before they decide how to enforce and interpret them. An issue often mentioned is that there are inconsistencies between the national laws and their local implementation guidelines because of the vagueness of their legislation.[118] This is because local guidelines are published months or years after creation.[119] China is often considered a surveillance state—a government that uses facial recognition and big data to control and monitor its citizens.[120] These practices coincide with their growing need for privacy protections, and the country is working faster to achieve these protections.[121]

Citizens of China often view privacy differently because they have a distinctive understanding of its principles and how it works. Currently, there is no data anonymization in China because data is collected from citizens whenever necessary, especially via facial recognition. When the Chinese government drafted its data protection and privacy laws, it looked to the GDPR as a model, particularly when it came to

113. *Id.* at 3.

114. *Id.*

115. *See id.*

116. *See id.*

117. Daniel Rechtschaffen, *Why China's Data Regulations Are a Compliance Nightmare for Companies*, THE DIPLOMAT (June 27, 2019), *available at* https://thediplomat.com/2019/06/why-chinas-data-regulations-are-a-compliance-nightmare-for-companies/ (last visited Apr. 20, 2021).

118. *Id.*

119. *Id.*

120. Samm Sacks & Lorand Laskai, *China's Privacy Conundrum*, SLATE (Feb. 7, 2019), *available at* https://slate.com/technology/2019/02/china-consumer-data-protection-privacy-surveillance.html (last visited Apr. 20, 2021).

121. *Id.*

strengthening individuals' control over their personal information.[122] The Republic of China is known for its notoriously strict internet laws, which censor the Internet platforms citizens can access within its borders.[123] Because of this, they minimized individuals' privacy rights when it comes to using the Internet.[124] This minimization included setting up a specific regulatory system to monitor social media sites, like Facebook.[125]

China does not have a single comprehensive data protection law.[126] China's cybersecurity law, the Cyber Security Law, came into effect on June 1, 2017, and was its first national law addressing cybersecurity and data privacy protection.[127] The Cyber Security Law introduced a framework for comprehensive regulation for the privacy of electronically stored data.[128] This law has only further complicated the system by creating a multi-layered pyramid that implements regulations and measures, guidance notices, and national and technical standards, which narrows into highly granular rules at the top.[129]

As with many Chinese laws, the application of the Cyber Security Law and the steps needed to ensure uniform compliance are uncertain.[130] Some of the biggest concerns is protecting online information security; safeguarding the lawful rights and interests of citizens, legal entities, and other organizations; and ensuring national security and public interests.[131] The law requires consent to collect personal information and grants the government power to demand that companies turn over more information on users through random inspections of internet service providers,

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122. Samm Sacks, *China's Emerging Data Privacy System and GDPR*, CSIS (Mar. 9, 2018), *available at* https://www.csis.org/analysis/chinas-emerging-data-privacy-system-and-gdpr (last visited Apr. 20, 2021).

123. Cheang Ming & Saheli Roy Choudhury, *China Has Launched Another Crackdown on the Internet - but it's Different This Time*, CNBC (Oct. 26, 2017), *available at* https://www.cnbc.com/2017/10/26/china-internet-censorship-new-crackdowns-and-rules-are-here-to-stay.html (last visited Apr. 21, 2021).

124. *Id.*

125. Rechtschaffen, *supra* note 118.

126. DLA Piper, *China: Law*, DATA PROT. L. OF THE WORLD (2020), *available at* https://www.dlapiperdataprotection.com/index.html?t=law&c=CN (last visited Apr. 20, 2021).

127. *Id.*

128. Richard Bird & Pern Yi Quah, *Where Are We Now With Data Protection Law in China?*, LEXOLOGY (Sept. 10, 2019), *available at* https://www.lexology.com/library/detail.aspx?g=6f52a281-b5b7-4f9f-940d-1951a905c4e1 (last visited Apr. 21, 2021).

129. *Id.*

130. Ming & Choudhury, *supra* note 124.

131. DLA Piper, *supra* note 127.

making it increasingly difficult for users to be anonymous online.[132] Government action has shown this difficulty. In recent years China has cracked down on its internet platforms, including social media, for content violations.

Most importantly, from this case study, Chinese citizens' mindset towards collecting data can be useful for the Western world, particularly as reflected in how they do not depend on one system to completely privatize their information. Their thinking is more relaxed because their information is protected, so they do not worry about tracing their data and information. With this idea spreading to the west, the mindset regarding data anonymization will lead to an evolution of more realistic data protection techniques.

China defines personal data as all kinds of information recorded by electronic means, or otherwise, that can be used to independently identify or be combined with other information to identify a natural person's information.[133] Sensitive personal data is personal information that, if disclosed or abused, will adversely affect the data subject.[134] Some examples include a personal identification number, correspondence records and contents, property information, credit information, location tracking, lodging information, health, physiological information, and transaction information.[135]

The enforcement of the Cyber Security Law depends on specific data protection laws and regulations.[136] Because of this, there is no bright-line punishment for violators. Affected individuals may claim indemnification under Chinese Tort Liability Law,[137] and in severe cases breaches may lead to higher fines or license revocation.[138] China is looking to find the balance that allows the construction of a data protection regime which is both uniquely suited to China's needs and does not undermine the government's ability to maintain control.[139] Their mindset towards what should be private and how it should stay private would help advance data anonymization in other nations as well, insofar as anonymization is therein regarded as one piece of a layered approach to privatizing information rather than the entire solution.

132. Rechtschaffen, *supra* note 118.

133. DLA Piper, *supra* note 127.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. DLA Piper, *supra* note 127.

139. Rechtschaffen, *supra* note 118.

III. FINDING A SOLUTION TO THE DATA ANONYMIZATION PROBLEM

To be successful, the international structure around data anonymization must change to reflect individual countries' needs. The EU, India, and China all provide an interesting look at how different governments handle this issue, and how that allows them to introduce their data protection and privacy regulations. Independently, each effort is not a total success; there are problems within each that require individualized solutions. However, if portions of the three strategies were taken together, then small provisions like data anonymization would become stronger. Broadly, this is achieved by acknowledging that privacy is a fundamental international right, which would create a common, shared value throughout the entire world. The international community should also accept that data anonymization is a protective layer, not full protection.

A. Mindset on Privacy

First, the international community needs to acknowledge privacy as a fundamental right. The EU set forth this right in the Charter of Fundamental Rights of the European Union (Charter) shortly after its establishment.[140] Chapter II of this Charter lists many freedoms,[141] including the right to private life.[142] The Charter also includes the right to privacy and the right to data protection, which form the foundation of the Charter.[143] When collecting data, the data subject must know why the data is being collected and what purpose the data collection serves.[144] It "must be collected for specified, explicit, and legitimate purposes and not further processed in a way incompatible with those purposes."[145] The data should also be adequate, relevant, and not exceed its purpose.[146]

140. *Charter of Fundamental Rights*, EUR. DATA PROT. SUPERVISOR (2009), *available at* https://edps.europa.eu/data-protection/our-work/subjects/charter-fundamental-rights_en (last visited Apr. 21, 2021).

141. Charter of Fundamental Rights of the European Union ch. 2, Dec. 7, 2000, 2000 O.J. (C 364/01).

142. *Id.* at art. 7.

143. *See Charter of Fundamental Rights*, *supra* note 143.

144. Robert Jan Uhl, *Data Protection*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS. (Aug. 2012), *available at* https://fra.europa.eu/en/data-protection (last visited Apr. 21, 2021).

145. *Id.*

146. *Id.*

The general public only has access to information related to "public interest," otherwise, the access is limited to the European Agency's staff.[147] With the focus on maintaining this information's privacy, the EU can collect personal data to perform tasks conducted in the public interest, or to exercise the official authority vested in the EU and a particular institution. This applies to compliance with legal obligations to which the Agency is subjected, and processing is based on individual consent.[148]

Other countries have also begun to take action. In India, its nine-person Supreme Court bench held in a 2017 landmark decision that the "right to privacy" was a fundamental right.[149] The three focal points of this bill are: (1) the growth of the digital economy expanded the use of data as a critical means of communication between people, so it is necessary to create a collective system that fosters a free and fair digital economy; (2) respecting the informational privacy of the individuals, ensuring empowerment and progress; and (3) innovation through digital governance and inclusion.[150] The bill, similar to the GDPR, looks to "personal data" as information that will be obtained via consent from entities that classify as data fiduciaries.[151] The proposed bill suggests that some form of data anonymization will occur, but does not specifically mention anything except the government's ability to direct data collectors to hand over anonymized personal information or other "non-personal data" for "evidence-based policy-making."[152] This bill is intentionally vague, and it is not readily clear what the above might entail.[153]

The bill's intentional vagueness leaves open endless possibilities for what can be done with the data. The bill may include a discussion or reference to the fact that individuals have a right to privacy, and therefore mandate taking specific precautions. India could look to the GDPR's definition of data anonymization to clarify that this is only a step towards complete anonymization. It is important to again emphasize the layering effect, within which data anonymization would be only one part.

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147. *Id.*

148. *Id.*

149. K.S. Puttaswamy v. Union of India, (2012) 1 S.C.C. 809, Judgement No. 494 (India).

150. Arindrajit Basu & Justin Sherman, *Key Global Takeaways From India's Revised Personal Data Protection Bill*, LAWFARE (Jan. 23, 2020), *available at* https://www.lawfareblog.com/key-global-takeaways-indias-revised-personal-data-protection-bill (last visited Apr. 20, 2021).

151. *Id.*

152. *Id.*

153. *Id.*

China defines personal data as all kinds of information recorded by electronic means or which can otherwise be used to identify a natural person's information either independently or in combination with other information.[154] The translation of "privacy" in Chinese is "yinsi," which means "shameful secret."[155] It is an "instrumental good" rather than an intrinsic good.[156] China's approach to privacy differs; its government favors technologies like facial recognition, which are generally frowned upon by Western countries.[157]

The different types of accepted regulations create problems when deciding the purpose of anonymization rules. As facial recognition gains traction in China, leading the Chinese government to keep tabs on their citizens, the same type of software is swiftly denounced in the EU and other Western countries.[158] The EU and India have democracies as their main national government, while China has a more centralized government. The difference in structure and values explains the difficulty of creating a uniform system of laws. The EU and India focus on the betterment of their institutions, where each individual is a small, important piece that fits into the puzzle. However, China's difference lies in the fact that the government represents the group, and although they do not legally own the labor force, the central planners direct where citizens should work.[159] The cultural belief in China is that its citizenry should all happily contribute to a commonly shared skill, eventually resulting in their economy surpassing capitalism.[160] This belief stands in stark contrast to the Western concept of individualism, heavily contributing to different law enforcement systems in each of these countries.

To make effective changes, individuals' conceptualization of anonymization must shift. Right now, people believe that the anonymization of private information should be secure and unidentifiable. However, suppose those people were to accept that pure

154. Ming & Choudhury, *supra* note 124.

155. Tiffany Li, *China's Influence on Digital Privacy Could Be Global*, WASH. POST (Aug. 7, 2018), *available at* https://www.washingtonpost.com/news/theworldpost/wp/2018/08/07/china-privacy/ (last visited Apr. 21, 2021).

156. *See id.*

157. *Id.*

158. *Id.*

159. Kimberly Amadeo, *Communism, Its Characteristics, Pros, Cons, and Examples*, THE BALANCE (Oct. 30, 2019), *available at* https://www.thebalance.com/communism-characteristics-pros-cons-examples-3305589 (last visited Apr. 20, 2021).

160. *Id.*

anonymization is not feasible; in that case, they could look for other ways to maintain anonymity, even if not at the level that they expected. This change in process would not come easily, but with modern cyber surveillance it would be simpler to implement safeguards moving forward instead of focusing on the fact that the information is not actually private. The development of global privacy norms will strengthen if the international community is willing to work together and include different government types.[161]

For anonymization to be successful, a few things must initially be accepted. First, that privacy is a basic human right that needs to be protected by national governments.[162] Acceptance of this principle motivates taking steps towards protecting an individual's identity and keeping their information private. If privacy is viewed as a societal value by individuals, it opens to an economic investigation that is important for developing societies, which will ultimately lead to a sociological investigation of the concept.[163] Many privacy-specific goals focus on confidentiality and un-linkability, hoping that researchers, and those collecting data, will be able to strip away any identifiable information without taking away the purpose of collecting that data in the first place.[164]

B. Promoting Compliance

Another reason that anonymization has become an issue is that definitions of "personal data" vary. The GDPR defines "personal data" as:

> [A]ny information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.[165]

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161. *See* Basu & Sherman, *supra* note 151.

162. *See* Jan Zibuschka et al., *Anonymization is Dead – Long Live Privacy*, OPEN IDENTITY SUMMIT (2019), *available at* https://dl.gi.de/bitstream/handle/20.500.12116/20995/proceedings-06.pdf?sequence=1&isAllowed=y (last visited Apr. 20, 2021).

163. *Id.*

164. *Id.*

165. General Data Protection Regulation, art. 4, 2016 O.J. (L 119) 33.

Compliance is made difficult through these varying differentiations across countries, making uniformity difficult to maintain. In China, through the elimination of the free market, the government can set prices for the rest of the economy.[166] China also enacted regulations that align with the GDPR.[167] These regulations were promulgated to ensure that Chinese companies and corporations would not get fined while conducting business in the EU.[168]

Privacy compliance has become a basic component of privacy law because without it nobody would be liable for failing to adhere to the laws. Since the passage of the GDPR, countries have been working on passing laws and creating a framework that delivers a quick, cost-efficient solution.[169] These countries must understand the GDPR's compliance risks, so they should create programs that are easily maintained and work on training employees to keep the programs running as to avoid any issues.[170]

The initial cost of compliance is high, but will eventually even out over time.[171] These compliance systems will support and uphold democratic values and respect basic human rights.[172] Informing individuals that network operators are not gathering irrelevant information through their use of services, and assuring those individuals that their personal information will not be shared without their consent, supports basic human rights through privacy laws in the long run.[173] The GDPR recommends that the information collected "be stored in GDPR-compliant locations," no matter where those may be.[174] When working to comply with the GDPR, the Chinese Cyber Security Law took the

166. Nicolas Sartor, *9 Data Anonymization Use Cases You Need To Know Of*, AIRCLOAK (July 29, 2019), *available at* https://aircloak.com/data-anonymization-use-cases/ (last visited Apr. 21, 2021).

167. Wei Sheng, *One Year After GDPR, China Strengthens Personal Data Regulations, Welcoming Dedicated Law*, TECHNODE (June 19, 2019), *available at* https://technode.com/2019/06/19/china-data-protections-law/ (last visited Apr. 21, 2021).

168. *Id.*

169. Andrew Henderson, *The 10 Steps to Achieving a Data Privacy Compliance Framework*, LEXOLOGY (Apr. 23, 2018), *available at* https://www.lexology.com/library/detail.aspx?g=4ff0c436-2438-4b0d-b6f2-f617665049e8 (last visited Apr. 20, 2021).

170. *Id.*

171. Sartor, *supra* note 167.

172. *Id.*

173. *Id.*

174. Focal Point Insights, *Beyond the GDPR: A Look at China's National Data Protection Standard*, FOCAL POINT (June 13, 2019), *available at* https://blog.focal-point.com/beyond-the-gdpr-a-look-at-chinas-national-data-protection-standard (last visited Apr. 21, 2021).

opposite approach and stated that "personal information or important data collected in China must be stored solely in China."[175]

As mentioned above, similarly defining terms would narrow the varying privacy laws and disallow the current, existing variations. The numerous definitions of what comprises "privacy" create confusion in and between different world regions. Providing definitions using basic words like "privacy" allows for more coherent laws to be easily applied. Privacy should encompass an individual's basic information, such as name, address, and telephone number. It should also include identification numbers, which vary in usage from country to country.

Looking to data anonymization, its wide-ranging acceptance would succeed if it also acknowledged that stripping away a person's entire identity is not possible. Data anonymization should protect an individual's identity, not erase it. Current laws attempt to remove any personal information that could trace a person's identity back to them. However, because this strategy fails, it gives the entire concept of anonymization in data protection and privacy laws a bad name. Data anonymization turns "sensitive data into usable data sets by stripping identifiable information and making it anonymous."[176] These data sets are important, but are often compromised through reidentification science.

Critics argue that data anonymization is "dead" and that its current failures have had an irreversible, worldwide effect.[177] It is argued that the quality of anonymized data is lost once the identifiable information is taken away.[178] This is the opposite of pseudonymized data, where the link to the identifier is still present, and identifiable processes could be enabled at any time.[179] If the information no longer has this link, then the original data set is also impossible to identify, making the data hard to place into a specific context.[180] The biggest concern is that the data already collected is not anonymized and, therefore, will have consequences for privacy engineering.[181]

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175. *Id.*

176. *8 Fundamental Data Anonymization Mistakes That Could Put Your Business at Risk*, CLOVERDX (Nov. 27, 2019), *available at* https://www.cloverdx.com/blog/data-anonymization-mistakes (last visited Mar. 22, 2021).

177. Zibuschka et al., *supra* note 163.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

The focus should move away from attempting to erase an individual's identity and towards transparency and accountability.[182] In the EU, India, and China, withholding information is not possible because each country, in its own way, maintains that privacy is a fundamental right; therefore, each citizen has the right to assert its protections. Accountability would make adherence to compliance and uniform laws more possible because each country would be responsible for its own system.[183] This will be important, especially when companies and corporations conduct business internationally. Accountability will also decrease the belief that anonymization is a failure because it will not focus on the fact that people's information is not private; rather, on how those collecting the information are working to safeguard it.

IV. CONCLUSION

Data protection and privacy laws still have a long way to go before they even approach finalization and perfection. With technology continually changing, the laws that protect privacy must evolve in conjunction with these advancements. This task is accompanied by the challenges with varying governmental systems in different countries and the pace at which laws are passed.

The rise of the technology industry created a new set of problems for protecting individuals' privacy. As discussed, countries are doing their best to develop data protection and privacy laws which allow their citizens to live public lives on the Internet while maintaining a level of anonymity. These laws are extremely debated and anonymization is one of the issues at the forefront. The EU's GDPR is the leading standard in this field. If a country wants to work within EU borders, it must comply with the GDPR's baseline of rules or risk fines for non-compliance. This has become cost-heavy for businesses and foreign countries, but it is strictly enforced.

The GDPR is considered the gold standard of privacy laws. Compliance is not optional, and rules must be enforced to protect citizens' identities. The GDPR uses anonymization to protect individuals' identities by attempting to strip away their names, addresses, and identification numbers. Companies must safeguard an individual's data by "reasonable" levels, but "reasonable" is not defined, which leaves a large gray area open for interpretation. The concept of anonymization

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182. Amadeo, *supra* note 160.
183. *Id.*

is appealing to the general public because it makes individuals feel as though they have power over what kind of personal information they can give; this is a false pretense, however, that leaves the public feeling as if the government is tricking them.

A country has data protection laws if their domestic laws provide a set of basic data privacy principles and a method of enforcement. Finding a uniform system across the countries is not impossible but could be difficult to manage. With India's biggest focus being on the biometric system Aadhaar, it has tried to pay attention to all citizens of India, especially those living in poverty. The intention behind its creation was to treat people equally, yet the program is plagued with implementation issues. On the anonymization front, the Aadhaar numbers are easily identifiable and not as anonymous as initially thought. India's non-commercial and non-governmental organization was about twenty years in the making, and remains a strategic policy tool for social and financial inclusion by issuing every single person with a unique identity. With the stress of being the most extensive biometrics-based identification system in the world, there are still small issues that have to be worked out before the system can be deemed a success.

China differs from the EU and India in that its communist government tends to pass vague laws that appear to be enacted without thought toward possible interpretations or long-term outcomes, thus creating potential for messes when it comes to implementation and enforcement. These messes seem to be left unaddressed until the Chinese government passes new laws to fix the old ones. China defines personal data as all kinds of information recorded by electronic means or otherwise that can be used to independently identify or be combined with other information to identify a natural person's information. China is an interesting state when it comes to privacy because it already imposes strict internet laws on their citizens. China is also a surveillance state, which means it gathers more public information than countries that are not surveillance states. A popular feature of its government is the use of facial recognition and big data to control and monitor citizens. When China drafted its data protection and privacy laws, it looked to the GDPR as a model, but ensuring anonymization was not as highly prioritized.

Finally, the international community wrongfully conceptualizes anonymization. The focus on anonymization should no longer be on anonymization through stripping away identifying information; it should instead position accountability as the primary focus. With accountability, there will be more opportunity to control which information data sets use. This will be beneficial because then the data sets can be linked to their origins. With this new branding of anonymization, identifiable

information will still be gathered, but instead of being stripped away, it will remain present yet unavailable to the public. This will help hold companies, corporations, and governments accountable for the type of information they collect, while allowing citizens to maintain a level of individual privacy.

The Contractual and Transnational Nature of Sovereign Donor-Trustee International Aid Contributions

Ilias Bantekas*

ABSTRACT

Donor pledges and commitments at international conferences are typically channeled through inter-governmental funds. Given that the pledging conference itself does not enjoy international personality, the donors must contract with the trustee so the latter can receive, hold, invest, and reimburse the funds to their intended beneficiaries. Although inter-governmental organizations, such as the World Bank, make the vast majority of contributions to states and trustees, treaties do not convey the pertinent transactions. Rather, the two parties tend to situate their contractual relationship within the broader realm of transnational law. As a result, they have shown a preference for flexible instruments such as memoranda of understanding, ad hoc contracts (such as instruments of commitment), simple unilateral acts, and others. Relevant instruments, while facilitating the transformation of a promise/pledge into an asset-based contribution, at the same time relinquish both the donor and trustee from all possible liability.

I. INTRODUCTION

The time of States providing international aid directly to other target States by simply depositing money into a sovereign account are long gone. This practice was discredited because it lacks transparency, fails to account for the use of the assets by the recipient government, and is generally ineffective. Sadly, corruption and intermediary fees constitute a significant dimension of aid programs, and local governments are generally incapable of mobilizing domestic resources to enhance local ownership over the process. This is all the more so given two significant developments in the field of international development finance. The first development is concerned with aid, which is a broader concept than simply providing money. Aid includes debt relief, either as a stand-alone

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action or as part of a poverty reduction strategy for subsequent lending;[1] political and financial guarantees[2] in order to attract low-interest loans;[3] non-World Bank debt relief from the so-called "Paris Club;"[4] debt-for-equity swaps;[5] overseas development assistance, whether unilateral or multilateral;[6] and capacity building.[7]

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1. *See* M.S. ELLIS, THE WORLD BANK; FIGHTING POVERTY – IDEOLOGY VERSUS ACCOUNTABILITY (Krista Nadakavukaren Schefer ed., 2011); *see* Nadakavukaren Schefer, *Poverty & International Economic Law: Duties to the Poor*, EUR. J. INT'L L. (2013).

2. A typical example is the World Bank's Policy-Based Guarantee (PBG), which is applied to facilitate distressed sovereign borrowing in support of structural and social policy reforms. The PBG effectively covers or guarantees part of a debt's servicing, allowing a private financier to lend money to a sovereign that would otherwise be ineligible. The structural conditionalities imposed on the borrowing state, usually draconian, leave little doubt that the Bank will come out victoriously. *See Guarantees Program*, THE WORLD BANK (Feb. 4, 2021), *available at* http://www.worldbank.org/en/programs/guarantees-program (last visited Apr. 2, 2021).

3. *See* AGASHA MUGASHA, THE LAW OF MULTI-BANK FINANCING (Oxford Univ. Press 2007).

4. Although the Paris Club is formally distinct from the IMF, Paris Club members own the bulk of the special drawing rights in the IMF and control this IFI. In practice, no debt relief is possible before the Paris Club if the applicant has not agreed with the IMF. As a result, the requirements of the IMF and the latter's seal of approval are necessary. *See* Mauro Megliani, *Paris Club*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2015).

5. A debt-for-equity swap allows an indebted state to exchange/swap part of its debt for stocks in local state enterprises. *See* RALPH REISNER ET AL., LATIN AMERICAN DEBT MANAGEMENT, INTER-AM. DEV. BANK 111 (1990).

6. Since the launch of the MDGs, the question of aid effectiveness has become critical for donor states. As a result, in 2005, the Paris Declaration on Aid Effectiveness was adopted to disburse and manage ODA more effectively. The Declaration is not binding and established a bilateral partnerships framework between donors and creditors and individual aid-recipient countries. Aid effectiveness is linked to five mutually reinforcing principles: (1) recipient countries exercise efficient ownership over their development strategies; (2) support is based on recipient countries' strategies and institutions (alignment); (3) harmonization and transparency of donors' actions; (4) improvement in decision-making and management; (5) mutual accountability of donors and recipients. The Paris Declaration was rigidly technocratic and only incidentally concerned with development outcomes. Hence, it avoids references to human rights, unlike its follow-up instrument, the 2008 Accra Agenda for Action. Moreover, the OECD DAC published its *Action-Oriented Policy Paper on Human Rights & Development* in 2007. It identified ten principles whereby human rights play an inextricable part in donor effectiveness and harmonization. However, in *Evaluating Development Cooperation: Summary of Key Norms & Standards*, the DAC explains its five principles for evaluating development assistance (i.e., relevance, effectiveness, efficiency, impact sustainability) without any reference to human rights indicators. *See Evaluating Development Cooperation: Summary of Key Norms & Standards, OECD* (n.d.), *available at* https://www.oecd.org/development/evaluation/dcdndep/41612905.pdf (last visited Apr. 2, 2020).

7. The Busan Partnership Agreement (BPA) was adopted at the Fourth High Level Forum on Aid Effectiveness, with support from over 160 states and civil society. The BPA builds on the Paris Declaration and the Accra Agenda for Action with a view to more efficient

The second development, which directly relates to this article, concerns the clear legal nature of unilateral aid as a non-enforceable promise. One particular aspect of this development is the proliferation of trust funds to channel and manage promised aid through and—in many cases—disburse the aid to intended beneficiaries. A tripartite relationship between one or more donors, trustees, and future beneficiaries forms these trust funds. These trusts differ from typical domestic notions of a trust[8] and the Islamic *awqaf* tradition[9] because the relationship between the donor and trustee is contractual, and the beneficiaries have no right of action against the donor or the trustee. The trustee is typically an inter-governmental organization, such as the World Bank[10] or the United Nations (U.N.), which manages the assets provided by the donors and disburses those assets,[11] as agreed to by the donors, to a class of named beneficiaries.[12] Depending on the affluence of its assets, which regular donor conferences may regularly replenish, the trust fund might require a more elaborate corporate governance mechanism; several trusts have moved away from serving as mere bank accounts of the trustee to full-blown inter-governmental organizations.[13]

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institutional arrangements based on successful policies and actions. *See Busan Partnership for Effective Development Co-Operation*, BUSAN HLF4 (Dec. 1, 2011), *available at* https://www.oecd.org/dac/effectiveness/49650173.pdf (last visited Apr. 2, 2021).

8. Clearly, inter-governmental trusts have been modeled on their domestic counterparts and are effectively creatures of comparative law as applied to their inter-state context. *See, e.g.*, MAURIZO LUPOI, TRUSTS: A COMPARATIVE STUDY (Cambridge Univ. Press 2000); Adeline Chong, *The Common Law Choice of Law Rules for Resulting & Constructive Trusts*, 54 INT'L COMP. L.Q. 855 (2005); Adair Dyer, *International Recognition & Adaptation of Trusts: The Influence of the Hague Convention*, 32 VAND. J. TRANSNAT'L L. 989 (1999).

9. *See* Haitam Suleiman, *The Islamic Trust Waqf: A Stagnant or Reviving Legal Institution?*, 4 ELEC. J. ISLAMIC & MIDDLE EASTERN L. 27 (2016).

10. *See 2017 Trust Funds Annual Report*, THE WORLD BANK (2017), *available at* http://documents.worldbank.org/curated/en/428511521809720471/pdf/124547-REVISED-PUBLIC-17045-TF-Annual-Report-web-Apr17.pdf (last visited Apr. 2, 2021) (the Bank's key instrument for managing trusts is its IBRD Operational Policy (OP) 14, 40 (Jan. 1997, as revised in 2013 on Trust Funds)).

11. *See U.S. $14 Billion to Step Up the Fight Against the Epidemics*, GLOB. FUND (Oct. 10, 2019), *available at* https://www.theglobalfund.org/en/specials/2019-10-09-global-fund-sixth-replenishment-conference/ (last visited Mar. 29, 2021) (noting that by late 2019, the total amount of funds committed by donors to the Global Fund for AIDS, TB & Malaria were $14 billion USD).

12. *See* Nele Matz, *Environmental Financing: Function & Coherence of Financial Mechanisms in International Environmental Agreements*, *in* 6 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 473 (2002).

13. Ilias Bantekas, *The Legal Personality of World Bank Funds Under International Law*, 56 TULSA L. REV. 209 (2021).

An agreement establishes the donor-trustee relationship, but this paper will demonstrate this is a *sui generis* agreement that excludes, for example, the elements of bargaining or consideration where the trustee typically endeavors to assume as few obligations as possible.[14] Given that most donors are States and typically inter-governmental organizations are trustees, one would expect that a treaty would record the agreement setting out this relationship, but this practice is quite rare. It is not uncommon for the trust agreement to be a memorandum of understanding (MoU)[15] or other agreement, which often lacks the binding nature of a contract. Apart from the initial act of appointing a trustee, a future donor may wish to participate in the trust arrangement as follows: by simply depositing money in the trust account; concluding a bilateral agreement with the trustee for the same purpose; or acceding to the original trust agreement. In all of these cases, there is a convergence of consent between the donor and trustee because the trustee must approve the deposit of funds into an account, demonstrated by the maintenance of the funds in the trust account or their subsequent withdrawal for disbursement purposes.[16]

The trust agreement between the appointee (or donor) and the trustee may, but does not necessarily, establish the trust fund entity. It acts as an appointment instrument, followed by a trustee's future obligation to set up the trust fund, which is usually done by opening a bank account, and thereafter arranging the modalities for deposits, financial maintenance, and disbursement. This is the standard practice of the World Bank Group, the leading trustee of humanitarian projects financed by States.[17] There may be numerous donors to a particular inter-governmental trust, but they do not all have the same international legal personality; therefore, involving inter-governmental organizations, physical persons,

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14. This is, of course, not surprising for the World Bank. *See* Tor Krever, *The Legal Turn in Later Development Theory: The Rule of Law & the World Bank's Development Model*, 52 HARV. INT'L L.J. 288 (2011) (tracing the rule of law discourse in the Bank to show its narrow understanding of the rule of law and distancing from concrete human rights obligations).

15. MEMORANDUM OF UNDERSTANDING, SWEDEN MINISTRY OF SUSTAINABLE DEV. & U.N. ENVIRONMENT PROGRAMME (Feb. 2005); *see also* MEMORANDUM OF UNDERSTANDING ON CONTRIBUTING TO THE WATER & SANITATION TRUST FUND, CANADA & U.N. HUMAN SETTLEMENT PROGRAMME (Feb. 2005).

16. *See id.* at Section 2.1.

17. The World Bank practically sets up a trust fund not only by opening a bank account but also by adopting an executive resolution that has the effect of bringing the fledgling fund within its institutional remit, both for internal Bank purposes and vis-à-vis third parties. This was the case, for example, with the establishment of the GEF fund. *See* Int'l Bank Reconstruction & Dev. Res. 91-5 (Mar. 14, 1991).

multinational corporations, and legal persons with limited international legal personality in addition to States is critical. A treaty would be the appropriate arrangement for these actors, necessitating a series of distinct legal transactions by the trustee with each entity. In such cases, some contractual arrangements will possess a private law character, but that character does not detract from the trust's international legal nature. Moreover, the trust agreement is hierarchically superior, at least in the U.N. system, to the financial rules and regulations of the U.N.'s specialized agencies. As a result, it may convey authority to the trustee—when the trustee is not the U.N. or a subdivision thereof—to audit the financial management of a specialized agency when acting as an implementing or other entity.[18]

In the following subsections, we shall examine the contractual relationship of the two most important entities associated with a trust fund: its donors and trustees. This involves a legal analysis of deposits—a transfer of assets by a state entity to the trustee or the private bank where the account holds the trust fund.[19] This is significant because some trust funds simply require the donor to deposit or transfer their contribution to a private bank account without a written agreement. Whether this amounts to a unilateral act is debatable; if it does, so too is whether such an act produces a legal obligation on the part of the depositor. We will also look at a donor agreement when the donor is a State or inter-governmental organization to assess whether a treaty or a non-binding instrument, such as an MoU, achieves the goal of the donor when the parties' intention is not to be bound to the terms of the agreement.[20] A donor agreement with private parties presents fewer

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18. *Selected Legal Opinions of the Secretariats of the United Nations & Related Intergovernmental Organizations*, U.N. JURID. Y.B. 399, 414-15 (1995), *available at* https://legal.un.org/unjuridicalyearbook/volumes/1995/ (last visited Apr. 2, 2021).

19. This is an issue that generally pertains to domestic banking laws, such as the U.S. Electronic Funds Transfer Act, 15 U.S.C. 1693. There is no standard practice when it comes to monetary deposits by sovereigns. UNCITRAL has attempted to standardize electronic transfers irrespective of the depositor through its 1994 Model Law on International Credit Transfers. MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS, U.N. COMM. ON INT'L TRADE L. (Proposed Official Draft 1992).

20. This is not always the case, however. In Case C-258/14, the Court of Justice of the European Union (CJEU) came to the conclusion that MoU concluded under EU financial assistance mechanisms and balance-of-payment processes qualified as EU acts under art 267(1)(b) TFEU, and hence susceptible to interpretation by the Court. *See* Case C-258/14, Eugenia Florescu & Others v. Casa Județeană de Pensii Sibiu & Others, CJEU Judgment (Grand Chamber) of 13 June 2017, ¶ 36, EU:C:2017:448. In Joined Cases C-8-10/15P, where the CJEU held that where the EC Commission is involved in the signing of MoU within the framework of the European Stability Mechanism, it is acting within the sphere of EU law. *See* Joined Cases C-8-10/15P, Ledra Advertising Ltd. & Others v. European Commission &

difficulties and is predominantly governed by domestic law.[21] Finally, we delve into the legal nature of the agreement between the donor and the trustee, which provides the latter with the authority to act in such capacity.

II. PLEDGES, COMMITMENTS, AND REPLENISHMENTS

The following sections examine the legal nature and practical effects of the various mechanisms by which donors agree to transfer financial assets to a fledgling trust fund or replenish the fund's resources through a new funding cycle. In exploring how States finance conferences, an attempt is made to apply the general rule to inter-governmental trust funds, which are an extension of the financing conferences in many cases. As a result, we differentiate between the following international law concepts—promises, pledges, and commitments. There is, of course, an institutional instrument within the U.N. that is dedicated to trust fund pledges, the Secretary-General's Bulletin on "Establishment and Management of Trust Funds,"[22] but this does not, at first view, help clarify the distinction between a pledge and a commitment. The importance of the various ways to finance trust funds should not be underestimated; it also should not be assumed that prospective state donors are eager to finance development efforts or that they generally honor their pledging commitments.

A. The Legal Nature of Donors' Pledges

An inter-governmental trust fund principally consists of assets transferred by one or multiple donors to the trustee's account.[23] By

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European Central Bank, EU:C:2016:701. Therefore, it is bound to refrain from MoU that are inconsistent with EU law, including the EU Charter of Fundamental Rights.

21. Agreements between States and private entities are excluded by both the Vienna Convention on the Law of Treaties as well as by customary law from the ambit of treaties. *See* Anglo-Iranian Oil Company Case (U.K. v. Iran), Judgment, 1952 I.C.J. Rep. 93, ¶ 112 (July 22). With few exceptions, the practice of private entities transacting with States and international organizations is to adopting choice of law clauses based on private law.

22. U.N. Secretary-General, *Establishment & Management of Trust Funds*, U.N. Doc. ST/SGB/188 (Mar. 1, 1982).

23. The capital transferred to trust funds by donors does not consist of cash transfers alone. It may well involve grants, loans, a combination of both, and the parties may agree to payment in tranches, a one-off, front-end loaded payment or others. *See* Benjamin Graham, *Trust Funds in the Pacific*, ASIAN DEV. BANK 9, 58 (2005).

transferring assets to the trustee's account the donors—whether they are states, inter-governmental organizations, or individuals[24]—are undertaking a purely voluntary act, which may involve a variety of stages before the pledge of donation or the donation itself binds the donor. This section seeks to identify the point at which the pledge becomes a binding promise under international law and the degree to which the concept of a promise in international law differs from that of a pledge within a multilateral donor conference. As will become obvious, given the absence of legal commitment in State pledges related to Sustainable Development Goals (SDG), the assets/donation placed in a trust fund are an excellent way to diffuse any legal obligations and thus live up to one's political commitments. This vagueness is difficult to achieve through formal agreements, and as the following sections demonstrate, it is precisely why most donor-trustee agreements either have an ambiguous legal nature or otherwise attempt to maintain informality.[25]

It is common practice for contemporary peace treaties to call on the treaty's sponsors or other potential donors to contribute financial assets towards the realization of post-conflict agendas regarding governance, constitution building, health, infrastructure, and others.[26] Such calls are even more vociferous if the potential donors partook in the peace efforts,

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24. The UNDP's traditional legal basis for accepting donations from private parties can be traced back to the practice of its predecessor, the Special Fund, which was itself authorized to accept private contributions on the basis of the General Assembly mandate that created it. *See Legal Framework for the UNDP's Use of Donations from Non-Governmental Sources*, U.N. JURID. Y.B. 463, 463-64 (1996). *See also The Use of the United Nations Name & Emblem*, U.N. JURID. Y.B. 461, 426-27 (1997) (wherein the opinion highlighted the creation of purposely established foundations under U.S. law in order to channel tax-deductible private contributions to the UN50 Trust Fund).

25. *See generally* JOOST PAUWELYN, RAMSES WESSEL & JAN WOUTERS, INFORMAL INTERNATIONAL LAW MAKING (Oxford Univ. Press 2012). That international transactions are gradually moving towards informality, particularly through the process of transnational law is slowly emerging in the legal literature. *See, e.g.*, Ilias Bantekas, *The Rise of International Commercial Courts: The Astana International Financial Centre Court*, 33 PACE INT'L L. REV. 1, 41 (2020); Ilias Bantekas, *The Contractualization of Public International Law & Its Impact on the Rule of Law*, 21 INT'L J.L. CONTEXT 1-8 (2021).

26. *See* Arusha Peace and Reconciliation Agreement for Burundi, protocol IV, ch. III, art. 17(1), Aug. 28, 2000, (called for the establishment of an Inter-Ministerial Reconstruction & Development Unit (the Development Unit)) [hereinafter Burundi Agreement]. The Development Unit was charged with drafting a detailed reconstruction plan, in cooperation with the World Bank, the United Nations Development Programme & other multilateral entities; *see also* Agreement on the Basis for the Legal Integration of the Unidad Revolucionaria Nacional Guatamalteca, ¶ 5-55, Dec. 12, 1996 [hereinafter Guatemala Agreement]; Interim Agreement for Peace & Self-Government in Kosovo, ch. 4, ¶ 3, Feb. 23, 1999 [hereinafter Kosovo Agreement]; Peace Agreement Between the Government of Sierra Leone & the Revolutionary United Front of Sierra Leone, art. XXVII(1), July 7, 1999.

assisting in a country's national reconstruction plan.[27] When donor states are involved in reconstruction efforts, the negotiators and parties to a conflict examine the possible avenues for peace that would allow armed groups to put down their weapons and assist in finding them meaningful employment. Negotiating peace inevitably requires drafting a national reconstruction plan that addresses both finance and infrastructure. Obviously, these peace treaties are not binding on potential donor States. They solely serve as guarantors (and not as parties); moreover, the wording of these peace treaties clearly suggests that parties should seek donations from the international community. Even so, at the political level, the guarantors will be expected to make some financial contributions and try to solicit other funding. Thus, the donation clauses in post-conflict peace treaties do not give rise to a binding promise as a matter of practice or of law.

Let us now examine the nature of pledges in the context of multilateral donor conferences. The U.N.'s voluntary donor conferences passed through three stages of evolution. Until 1977 the organization hosted individual donor events for each one of its programs, but following a restructuring the U.N. began organizing a massive single donor conference once a year based on the belief that this would prevent donor fatigue and rejuvenate State interest.[28] This strategy probably worked well for a while, but in the early 2000s the practice and donor habits of the most influential States changed. Developed countries were no longer inclined to pour money into a development program or a developing State without a results-based mechanism or significant recipient accountability. They also wanted local ownership over the projects to increase and governmental intrusion to decrease, which leads to corruption and embezzlement.[29]

This has led the U.N. to host distinct donor conferences, particularly when setting up inter-governmental trust funds to administer collected assets, or in instances when immediate action is requested by the donor community. Two examples of donor conferences are the 2003 Madrid Conference on Reconstruction in Iraq and the 2006 London Conference on Afghanistan.[30] Despite some coherency regarding the pledging

27. *See* Christine Bell, *Peace Agreements: Their Nature & Legal Status*, 100 AM. J. INT'L L. 373, 380-82 (2006).

28. G.A. Res. 32/197, ¶ 31 (Feb. 23, 1999).

29. U.N. Secretary-General, *Pledging Mechanisms to Fund Operational Activities for Development of the United Nations System*, pp. 4-5, U.N. Doc. A/57332 (Aug. 21, 2002) [hereinafter U.N. Doc. A/57332].

30. The explosion of acute and large-scale humanitarian crises across the globe has necessitated co-ordination, which is now offered by the UN Office for Humanitarian Affairs.

process and procedure at the U.N.'s donor conferences,[31] States' customary practice generally suggests the existence of a rule whereby conferences possess an independent right to adopt their own rules of procedure. This idea is pertinent to our discussion because it helps determine the binding nature of pledges given at specific conferences. If, for example, the organizers of a conference insist that every pledge be entered into a multilateral treaty that must subsequently be ratified by national parliaments, this is very different from a conference that only requires oral expressions of pledges.

State practices at international donor conferences demonstrate that a pledge should not be viewed as possessing the same legal effect as a promise (in the form of a unilateral act) that would otherwise constitute a binding expression of will by the promising State.[32] Rather, the legal nature of a pledge is anything but a binding promise![33] The only binding act on the potential donor is the act of contribution itself, which materializes when the actual payment or the transfer of funds or goods to the recipient collecting entity occurs. Only at the moment of receipt or deposit is the donor bound to honor the transaction. On the other hand, a pledge is merely an expression of intent to provide a voluntary contribution.[34] Therefore, a pledge is a non-binding announcement of an

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This now holds direct pledging conferences, as was the case with Yemen in 2019. *Yemen: Donors Pledge U.S. $26.2 Billion to Support a Massive Humanitarian Operation*, U.N. OFF. COORDINATION HUMANITARIAN AFF. (Feb. 26, 2019), *available at* https://www.unocha.org/story/yemen-donors-pledge-us26-billion-support-massive-humanitarian-operation (last visited Apr. 2, 2021).

31. U.N. Doc. A/57332, *supra* note 29, at 3-4.

32. This distinction is not made by ILC Rapporteur Victor Rodriguez Cedeño in his Report on Unilateral Acts of States. Victor Rodriguez Cedeño (Special Rapporteur on Unilateral Acts of States), *First Rep. on Unilateral Acts of States*, U.N. Doc. A/CN.4/486 (Mar. 5, 1998).

33. This is not very different from the treatment of promises in domestic contract law. Generally, a binding offer is distinguished from a mere invitation to treat (which does not amount to a binding offer). Advertising-related cases, which involve an alleged unilateral act (by the seller), provide significant evidence to this effect. *See* the English leading case of *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 QB 256 (Eng.); *see also Fisher v. Bell* [1961] 1 QB 394 (Eng.). The position in the U.S. is similar. *See* Lefkowitz v. Great Minn. Surplus Store, Inc., 86 N.W.2d 689 (Minn. 1957). Equally in the civil law tradition, albeit more cautious. *See* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 145 (Ger.) (indicating that the display of goods in a window is not an offer, but merely an invitation to make an offer).

34. The matter is not beyond contention in domestic law. In the U.S., for example, there is sharp disagreement between two distinct camps. The first asserts that pledges made to charitable organizations should not be treated any different to ordinary principles of contract formation, arguing that unless agreed otherwise, such pledges are invitations to treat or unenforceable promises. *See* Md. Nat'l Bank v. United Jewish Appeal Fed'n of Greater Wash., Inc., 407 A.2d 1130, 1136 (Md. 1979). The other camp argues that such pledges

intended contribution under international law,[35] unless that pledge adopts the form and content of a binding agreement.[36] An intermediate category between pledging and contribution does not exist. In fact, a pledge's binding character is derived from its assimilation to an offer under a country's domestic contract laws, by which the donor specifies the committed amount and which amount is subsequently accepted by the trustee.

It is, therefore, possible for a pledging conference to accumulate numerous pledges[37] that do not translate into concrete commitments. This situation can only be remedied by implementing appropriate conference mechanisms that leave little room for pledges and that create instruments binding potential donors.[38] Thus, the only option to implement a binding commitment is to conclude a multilateral treaty (or another binding undertaking) between the donors at the conference, or to

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should be enforced on public policy grounds and the philanthropic purposes underlying charities. *See* Jewish Fed'n of Cent. N.J. v. Barondess, 560 A.2d 1353, 1354 (N.J. Super. Ct. L. Div. 1989); *see also* Salsbury v. Nw. Bell Tel. Co., 221 N.W.2d 609, 613 (Iowa 1974).

35. *See* J. E. Archibald, *Pledges of Voluntary Contributions to the United Nations by Member States: Establishing & Enforcing Legal Obligations*, 36 GEO. WASH. INT'L L.R. 317, 317-29 (2004). Archibald rightly comments that, with regard to unpaid voluntary contributions, the U.N. does not invoke Art. 19 of the U.N. Charter, at 325-26.

36. *See also* RUTSEL SILVESTRE J. MARTHA, THE FINANCIAL OBLIGATION IN INTERNATIONAL LAW 263 (Oxford Univ. Press 2014). The issue has not received any particular treatment in general international law, nor in the expert work on unilateral acts of the U.N. International Law Commission (ILC). *See* C. ECKART, PROMISES OF STATES IN INTERNATIONAL LAW (2012).

37. This is in fact the case with SDG-related financing. Modern cooperation on development was effectively established at the first International Conference on Financing for Development that took place in Monterrey in 2002. The principles of a holistic and integrated approach to the multifaceted challenges of development were expressed in the 'Monterrey Consensus,' which gave birth to a series of Financing for Development follow-up meetings. *See* U.N. Int'l Conference on Financing for Development, U.N. Doc. A/CONF.198/11 (Mar. 22, 2002); *see also* A. Caliari, *Guest Editorial: The Monterrey Consensus, 14 Years Later*, 59 DEV. 5 (2016). The financing of development strategies and programs was, however, streamlined and fully developed in the Addis Ababa Action Agenda (AAAA). G.A. Res. 69/313, Addis Ababa Action Agenda of the Third Int'l Conference on Financing for Development (AAAA) (July 27, 2015). The AAAA aligns all financial flows and policies with economic, social, and environmental priorities, ensuring in the process the sustainable nature of all financing and actions. There is nothing, however, in the pledges made that suggests that they are anything more than political commitments.

38. This is achieved in respect of trust mechanisms that employ contractual terms with their donors, as is the case with the GEF's instrument of commitment, whereby donors "formalize their promise to contribute" to the trustee. Where the promise requires subsequent parliamentary approval, the promise is conditional. *See* RUTSEL SILVESTRE J. MARTHA, THE FINANCIAL OBLIGATION IN INTERNATIONAL LAW 264 (2015); *see also* G. DROESSE, FUNDS FOR MULTILATERAL DEVELOPMENT: MULTILATERAL CHANNELS FOR CONCESSIONAL FUNDING 281-83 (2011).

form bilateral agreements between the trustee and each individual donor. In either case, because the negotiated agreement is a treaty, the constitutional authorities in the signing State will need to ratify it, and it is possible, although unlikely in practice, for said authorities to refuse ratification for a variety of reasons.[39]

In this eventuality, no binding obligation for that State would arise. This means it would possess the same legal qualities as the pledge until the donor agreement is ratified. The U.N. Secretary-General's bulletin on establishing trust funds aptly recognized this reality and stated that a pledge is:

[A] written commitment by a prospective donor to make a contribution to a trust fund. (A written commitment which is subject to the need to secure an appropriation or other national legislative approval is considered a pledge.) A pledge can be accepted only after the trust fund has been formally established.[40]

The making of a pledge and its acceptance is recorded in an exchange of letters or, if deemed appropriate, a more formal agreement.[41]

This definition is somewhat problematic because it seems to equate an otherwise "committed" contribution, presumably subject to the international law of promise, to a contribution that may be rejected by the national legislature. A coherent interpretation of this provision must be as follows: 1) the terms "pledge" and "commitment" have the same meaning in the Secretary-General's Bulletin; 2) only written pledges are considered binding; 3) pledges, not otherwise qualified, are binding either upon exchange of letters, another agreement, or when received in writing by the administrator of the trust fund; and 4) qualified pledges become binding only when the qualification is lifted, otherwise they produce no legal effect for the pledging State.

In order to avoid hosting donor conferences where the outcome is merely making pledges that do not translate into concrete cash, it became evident that conferences must end in binding commitments. Above, paragraph 29 of the Secretary-General's Bulletin aims to remedy this lacuna by requiring a degree of formality in the pledge. At this stage, it is also worth noting that only a portion of the money committed and

39. The Instrument for the Revitalised Global Environmental Facility (GEF) of Mar. 2008, Annex C, 2(b), states that in cases of qualified instruments of commitment, the donor state "undertakes to exercise its best efforts to obtain legislative approval for the full amount of its contribution by the [agreed] payments date."

40. U.N. Secretariat, Letter dated Mar. 1, 1982 from the Secretary-General addressed to all heads of offices and departments and all executive and administrative officers, U.N. Doc. ST/SGB/188 ¶ 26 (Mar. 1, 1982).

41 *Id.* at ¶ 29.

collected as a result of donor conferences is earmarked for trust funds. The trustee may attempt to set up a particular legal mechanism to turn pledges into concrete commitments depending on the trustee's experience in the administration of trust funds, his influence, and based on the mandate established by the creators of the trust fund. Largely, the World Bank has managed to standardize and streamline this process, but only with respect to particular trust funds.

A typical example is the Global Environmental Fund (GEF), whereby donors must sign an Instrument of Commitment, which constitutes a binding agreement subject to ratification by national parliaments. The same type of binding commitment is established by the trustee regarding the various replenishments required to keep the GEF alive.[42] These Instruments of Commitment are a useful mechanism for replacing pledges without inferring that outdated pledges serve no useful purpose, as in some situations particular donors will feel disinclined to be cornered.

A multilateral treaty, or a legal instrument of the same effect, is another mechanism. In each case, the intention of the parties to commit themselves requires verification. The Foundation Remembrance, Responsibility and Future, founded to compensate the Jewish victims of Nazi Germany, was set up by a Joint Statement between the governments of various States, and the German government promised to pay specified dollar amounts to the trust fund. This Joint Statement is not a pledge because of its otherwise binding language, and its implementation was given effect the same day, as a result of a clause in the Joint Statement to that effect.[43] The Joint Statement embodies an Executive Agreement adopted between Germany and the United States.[44]

The U.N. Legal Counsel highlighted some tax-related problems regarding the tax-deductible nature of contributions made to the U.N. and its agencies.[45] Under U.S. law, for example, only charitable institutions

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42. *Instrument for the Establishment of the Restructured Global Environment Facility*, GEF (Sept. 2019), *available at* https://www.thegef.org/sites/default/files/publications/gef_instrument_establishment_restructured_2019.pdf (last visited Feb. 6, 2021).

43. Similarly, Art. 2 of the 2001 Washington Agreement between the United States and France Concerning Payment for Certain Losses Suffered during World War II (including Annexes), *available at* http://www.civs.gouv.fr/download/uk/washington.pdf. (last visited Apr. 2, 2021)

44. Agreement Concerning the Foundation "Remembrance, Responsibility & the Future," Ger.-U.S., July 17, 2000, U.S.T. 13104.

45. Legal Framework for the United Nations Development Programme's Use of Donations from Non-Governmental Sources UNDP Financial Regulations & Rules, 1996 U.N. JURID. Y.B. 463, U.N. Doc. ST/LEG/SER.C/34.

founded in that country are eligible to receive tax-deductible contributions; inter-governmental organizations are not. Tax-deductible donations to U.N. agencies are possible if they are channeled through a properly established foundation under U.N. law which is thereafter authorized to transfer the contributions to the desired agency.[46] Hence, the U.N. Association of the United States and the U.N. Association of the U.S. Committee for United Nations International Children's Emergency Fund serve this purpose. Foundations serve as vehicles to channel funds while performing their typical functions.[47] This brief case study illustrates the problems faced by trust funds, whether in the U.N. system or elsewhere, in receiving private contributions. In each case, the political prowess of the major donor States to an inter-governmental trust fund and the trustee's influence can determine, to a large degree, the methods of soliciting and payment by other donors.

B. The Practice and Politics of Earmarking

Earmarking involves proactively determining a donation's terms of condition, which means the donation will only be used for the particular purpose associated with the trust fund.[48] Where a multilateral funding treaty stipulates that donor members are obligated to provide funding without specifying where to use the funding, the risk that donors will reserve how funds are to be used remains. The submission of a unilateral declaration that a particular donor's contribution is earmarked for a specified purpose would amount to an interpretative declaration, and would depend on the relevant circumstances to ascertain whether this designation is tantamount to a reservation.[49] In any event, reservations and interpretative declarations are permissible as long as they are compatible with the object and purpose of the treaty;[50] thus, where both

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46. *Id.* at 465.

47. *Id.*

48. *See* EDWARD ELGAR, RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS 124 (J. Klabbers et al. eds., 2011); Piera Tortora and Suzanna Steensen, *Making Earmarked Funding More Effective: Current Practices and a Way Forward*, OECD (2014), *available at* https://www.oecd.org/dac/aid-architecture/Multilateral%20Report%20N%201_2014.pdf (last visited Feb. 6, 2021).

49. The term "reservation" means "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

50. Reservations to Convention on Prevention & Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15 (May 28).

the instrument of commitment and the fund's constitutive agreement (even if not a treaty) are silent on the matter of earmarking, its permissibility is strongly presumed.[51]

Some inter-governmental trust funds are, by their very nature, subject to earmarking, especially in the case of single donor funds created by a State to finance a particular contingency in a developing country. In such situations, the trustee cannot divert the purpose of the fund, nor can donor States prohibit the trustee from earmarking its contribution, as that would defeat its very purpose. In practice, given that in the vast majority of cases the trust constitutive instrument will stipulate whether earmarking is permissible, however, only in exceptional circumstances will the trustee have permission to authorize a request to earmark the instrument of commitment with a donor. An exception of this nature would undoubtedly involve an extraordinarily large contribution whereby the donor will explicitly demand how and where the funds are used. Because such requests violate the trust fund's constitution, the trustee would need approval from the fund's executive board in order to satisfy the prospective donor's demands; otherwise, he would be acting *ultra vires*. If the trustee receives the money without any formal objection to the condition attached by the donor, it must be presumed the trustee acquiesced to the earmarked funds' stated condition.

Three types of earmarking identified in the process of this study are permissible, qualified, and prohibited earmarking. We have already discussed permissible earmarking—trust funds that permit donors to earmark their contributions. As far as this author is aware, although very little, if any, information is publicly available, trustees and donor conferences are generally averse to discriminatory earmarking requests, which favor the donor's interests. Between the two extremes, there is an intermediate category wherein the trust's constitution or terms of reference permit earmarking to the extent that such requests can be accommodated. Article 5 of the Terms and Conditions of the World Bank's International Reconstruction Fund Facility for Iraq (IRFFI) states:

A donor may state a preference that its contribution be used to support one or more of the fourteen sectors and cross-cutting themes defined under needs assessment with the exception of mine action from which no funds from the World Bank Iraq Trust Fund may be allocated. In the event that a donor's preference cannot be accommodated, the Bank

51. Where neither the constitutional text of the trust fund nor the instrument of commitment contains a provision on earmarking, an earmarking provision appended to the instrument of commitment is a true interpretative declaration and is wholly permissible, unless the preparatory works of the trust fund clearly and overwhelmingly demonstrate otherwise.

may allocate the contribution to other sectors with the agreement of the donor.[52]

The institutional law of earmarking is different from but not wholly unrelated to the practice of conditional contributions. A donor may agree with the trustee that he is willing to make a substantial contribution as long as a particular policy of the trust fund is altered or, if the specific allocation is not possible, that other projects satisfying the policy considerations of the donor receive the earmarked money. The U.S. government, for example, established the President's Emergency Plan for AIDS Relief (PEPFAR),[53] under which the Global Fund for AIDS, Malaria, and Tuberculosis receives a significant amount of its funding.[54] In its Guidance No. 1, PEPFAR proclaimed that only projects premised on the triptych of "abstinence, be[ing] faithful and consistent condom use" (ABC) would receive funding.[55] Consistent with its policy

52. IRFFI Terms of Reference (Dec. 11, 2003).

53. United States Leadership Against HIV/AIDS, Tuberculosis, & Malaria Act of 2003, Pub. L. No. 108-25, 117 Stat. 711 (2003).

54. The Global Fund for AIDS, TB, and Malaria was constituted in 2002 as a foundation (non-profit) under articles 80ff of the Swiss Civil Code, after which it began to enjoy legal personality under Swiss private law until the subsequent conferral to the Global Fund of a limited degree of international legal personality through its Headquarters Agreement with the Swiss Federal Government. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] Dec. 10, 1907, SR 210, RS 210, arts. 80ff (Switz.). In order to retain the Global Fund on Swiss soil, the federal government of that country launched a well-organised bid, which encompassed, on the one hand, the signing of an Administrative Services Agreement (ASA) with the World Health Organisation (WHO), under which the Fund's Secretariat would be subsumed within the WHO's international legal personality, while remaining independent for the purposes of its own functions. Subsequently, the Fund entered into an ASA with the WHO on May 24, 2002, which, although it served to confer international law rights and privileges to the Global Fund and its personnel, was itself subject to Swiss law and therefore did not constitute a treaty. *See* Global Fund, *Report on Legal Status Options for the Global Fund*, GF Doc. GF/B4/12 (Jan. 29, 2003). The nature of the HQ Agreement only confers IO-like status to said entity in the country where this is granted. Switzerland has a strong tradition of conferring such status to particular NGOs operating therein on the basis of its Federal Decree of September 30, 1955 'On the Conclusion and Modification of Agreements with International Organizations in View of Determining their Legal Status in Switzerland.' Similar agreements have been concluded with the International Olympic Committee (IOC), the International Air Transport Association (IATA) and others. *See* M-C Krafft, *Legal Opinion on the Modifications Which Should be Made to the Legal Status of the Global Fund in View of the Transformation of the Fund into an Intergovernmental Organisation*, GLOBAL FUND (Apr. 2003), *available at* https://www.theglobalfund.org/media/2928/bm05_07gpcreportannex6_annex_en.pdf (last visited Mar. 22, 2021).

55. PEPFAR Guidance No. 1, Abstinence, Be Faithful and Consistent Condom Use (2003). For a critical analysis, *see* Kent Buse et al., *A Farewell to Abstinence & Fidelity?*, 4 LANCET 600 (2016).

objectives, PEPFAR notified the Global Fund that it would only contribute to the programs of countries that incorporated its ABC requirement. This stipulation rendered the requirement attached to the United States contribution a hybrid between earmarking and conditional funding. It is obvious that only sufficiently powerful trust funds can deny conditional funding and exceptional earmarking (or simply earmarking). The stronger a trust fund is, both politically and financially, the greater the likelihood that its potential contributors will respect its earmarking prohibition. As a result, the trust fund will have greater political enforcement power. Therefore, the practice of political bargaining is commonplace, given that the only chance of trust funds' survival is through the contributions of member States. It is no accident that there is relative flexibility with respect to accommodating some or all of prospective donors' wishes. This author is not advocating that this kind of practice leads, or tends to lead, to poor results or that it stifles the work of trust funds.

III. THE DEPOSIT OF THE DONATION IS NOT A UNILATERAL ACT DEVOID OF OBLIGATION

In previous sections, this article explains that funding pledges are not generally binding on pledging States; signing an instrument of commitment, however, has the exact opposite effect.[56] This section will assess the legal nature of depositing or transferring assets to the trust fund. In this connection, the principal legal question is whether transferring funds to the trust fund's name by a contributing State is a unilateral act. Some unilateral acts may give rise to an international legal obligation,[57] whereas others may not. A unilateral act, devoid of legal significance, involves the actions of a single State[58] and, by its very nature, does not create any rights or obligations for other States or inter-governmental organizations.[59] *Prima facie*, it would seem that the

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56. *See id.* at § 2.1.

57. This is clear in the jurisprudence of the ICJ, particularly in Nuclear Tests (Aus. V. Fr.), Judgment, 1974 I.C.J. Rep 253, at 267-68 (Dec. 20). *See also* A.P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1 (1977).

58. Unilateral acts may be individual or collective, particularly where they are undertaken through a joint multilateral declaration. *See* Víctor Rodríguez Cedeño (Special Rapporteur on the Unilateral Acts of States), *First Rep. on the Unilateral Acts of States*, 79 INT'L L. COMM'N 139, U.N. Doc. A/CN.4/486 (Mar. 5, 1998).

59. The ILC plenary was eager to emphasize that "the criterion for unilateral acts should be the concept of an international legal obligation and not that of their legal effects, which was a broader and vaguer concept applying to all unilateral acts of States." *Rep. on the Work*

deposit or transfer of a donation/contribution into a bank account is a unilateral act. Moreover, such a transfer does not establish any further legal obligations or corresponding rights for the trust fund or the trustee, particularly if the contractual agreement is clear about what the State is bound to contribute. This assumption is untrue for several reasons.

First, as previously noted, in the majority of cases pledging money is a binding promise to act in a particular manner.[60] Even so, in the specific practice of multilateral donor conferences, merely making a pledge does not generally give rise to a legal obligation absent an express intention to that effect. However, when a donor who makes an oral pledge unilaterally deposits the money, this act represents the implementation of the promise by the contributor, and at that time, the deposit coincides for all legal purposes with the pledge. In any event, by its own operation, the deposit creates legitimate expectations for the depositing State.[61] This no doubt gives rise to conduct-based estoppel.[62] Courts across the world differ on this point. The courts of Hong Kong confirmed conduct-based estoppel,[63] whereas their Canadian counterparts rejected it on the basis that tacit assent cannot be arbitrarily presumed without proof of positive action.[64]

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of Its Fifty-Sixth Session, INT'L L. COMM'N ¶ 224, U.N. Doc. A/59/10, (July 5, 2004-Aug. 6, 2004).

60. *See id.* at ¶ 195. Moreover, the ICJ held in *Nicaragua v USA* (*Military and Paramilitary Activities in and against Nicaragua*) that the unilateral declarations adopted by states under Article 36(2) of the ICJ's Statute, by which they accept the Court's compulsory jurisdiction, constitute "a series of bilateral engagements." Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. Rep. 392, ¶ 60 (Nov. 26). Judge Jennings was only prepared to accept, however, that they could be regarded as *sui generis* treaties. Nicar. v. U.S., 1984 I.C.J. at 415, ¶ 53.

61. Although criticized for his emphasis on this point, the ILC Special Rapporteur on Unilateral Acts has successfully claimed that most of such acts are premised on a pre-existing treaty obligation. In such cases, this is, in fact, the source of the binding nature of unilateral acts. *See* Int'l L. Comm'n, Rep. on the Work of Its Fifty-Sixth Session, ¶¶ 91, 97-99 U.N. Doc. A/59/10, (July 5, 2004-Aug. 6, 2004).

62. *See* Andrew Robertson, *Reasonable Reliance in Estoppel by Conduct*, 23 U. NEW S. WALES L. REV. 87 (2000).

63. *See* Hissan Trading Co. v. Orkin Shipping Corp., [1992] 43 H.K.C. 286, 286 (C.F.I.) (presenting the issue of a cargo claim where there existed an agreement between the parties that any disputes would be referred to arbitration, and that the arbitration should be conducted in Japan).

64. *See* Achilles (USA) v. Plastics Dura Plastics (1977) Ltd., [2006] C.A. 1523 (Can.) (seized of a motion seeking to refer to arbitration an action relating to an international commercial dispute). *But see* Ferguson Bros. of St. Thomas v. Manyan Inc., [1999] 98 O.T.C. 265 (Can.) (where it was held that a cheque referring to an invoice amounted to a record of

Secondly, from the very fact that the trustee does not engage in retail banking, it is implicit that two separate transactions are borne following, or at the time of, the transfer of money by the contributing State. The first transaction consists of transferring or depositing money to the private bank that handles the accounts of the trustee. This action is subject to domestic law, and confers an obligation on the bank to hold and handle the money and provide access to the trustee and the trust fund. Thereafter, the private bank must act as an agent of the trustee (under the terms of their respective contract), as the transfer imposes a legal obligation. This agency relationship, too, is subject to domestic law and private agreements rather than treaties.[65] In this web of transactions, the contributor's intent is to provide money to a corresponding entity endowed with an international legal personality. The transfer of money to an independent legal entity, even when not accompanied by a written agreement or non-binding memorandum of understanding, produces legal consequences for both the trustee and the trust fund.[66] Regarding the trust fund itself, all monies deposited are thereafter part of its budget. The trustee, if it is the World Bank, for example, is obligated under its terms of agreement with the trust fund to handle, invest, and disburse money deposited in its account.[67] If the transfer, therefore, was a unilateral act devoid of any legal effect, the contributing State could claim the reimbursement of the money contributed at any time on the basis that,

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the issuer's consent to an arbitration clause inserted in a contractual offer to which the issuer had heretofore not replied in writing).

65. Agency principles are common to the majority of nations. For an excellent account of uniformity, *see UNIDROIT Principles of International Commercial Contracts, Arts 2.2.1.*, UNIDROIT (2010), *available at* https://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf (last visited Apr. 6, 2021).

66. It is common practice for public international financial institutions, such as the World Bank, to require state donors, based on of their respective treaty, to send a copy of their deposit instruction to their Accounting Trust Funds department, as well as instruct the private bank where the donation has been deposited to notify the Bank. *See Administration Agreement between the Government of the United Kingdom of Great Britain & Northern Ireland through DEFRA, IBRD, IDA & IFC for Contribution to TF073003*, THE WORLD BANK (Apr. 6, 2018), *available at* http://documents1.worldbank.org/curated/en/425341523648989641/pdf/Official-Documents-Administration-Agreement-between-the-Government-of-the-United-Kingdom-of-Great-Britain-and-Northern-Ireland-through-DEFRA-IBRD-IDA-and-IFC-for-Contribution-to-TF073003.pdf (last visited Apr. 6, 2021); *see also Extractive Industries Transparency Initiative (EITI) Multi-Donor Trust Fund (MDTF)*, THE WORLD BANK (Dec. 2015), *available at* https://www.worldbank.org/en/programs/eitimdtf (last visited Apr. 5, 2021).

67. *See* Ilias Bantekas, *Effective Management of International Aid Through Inter-governmental Trust Funds*, 17 LOY. U. CHI. INT'L L. REV. 1 (2021).

by its action, it did not create any legitimate expectations vis-à-vis the trust fund or the trustee.

Thirdly, the private bank and trustee must meet the contributing State's contribution with a corresponding acceptance. In some cases, this acceptance may be tacit but, even so, the private bank's records of deposit or the trustee's official audits will no doubt record it. Normally, as is consistent with audit practices, internal rules and regulations require the trustee to approve the contribution and make a clear record of it.[68] The trustee's possible refusal to accept an earmarked contribution by the donor to the dissatisfaction of the trustee[69]—or where it is deemed inconsistent with the terms of the fund—confirms that this is a clear correspondence of the will of the respective parties.

However, only the arousal of legitimate obligations through a transfer/deposit between the contributing State and the trust fund or trustee is subject to international law; the transaction between the contributor and the private bank is not. Whether the said transfer of money by the contributor to the trust fund and the trustee—whence the latter enjoys sufficient international legal personality—is also governed by treaty law is an altogether different matter. The crucial issue is whether the transfer amounts to an autonomous written agreement or, alternatively, if it is based on another treaty. In his dissenting opinion to the South-West Africa case, Judge Fitzmaurice noted: "Unilateral engagements may have a quasi-treaty character when they interlock with one another or interlock with provisions of an existing treaty. Otherwise, they lack the elements of a treaty altogether."[70]

In the vast majority of cases, such transfers are not predicated on autonomous written agreements; cost and time would render this practice ineffective. One way of treating them, as explained above, is as unilateral acts that entail the assumption of obligations. Equally, although this may constitute a somewhat radical theorization, oral agreements may assimilate such money transfers to the informality associated with

68. Rule 103.5 of the U.N.'s Financial Regulations & Rules requires the approval of the Organization. Equally, under Regulation 3.12, money accepted for purposes specified by the donor shall be treated as trust funds. *See* U.N. Secretary-General, *Financial Regulations & Rules of the United Nations*, §§ 103.5, 3.12, U.N. Doc. ST/SGB/2013/4 (July 1, 2013).

69. *See, e.g.*, Regulations of the Trust Fund for Victims, ICC-ASP/4/Res. 3 (Dec. 3, 2005). Regulation 27 states that voluntary contributions from states shall not be earmarked. Interestingly, Regulation 26 stipulates that the Board shall establish mechanisms for the verification of the sources of funds received by the Trust Fund. This is further evidence of the binding character of the deposit of funds, even though *prima facie* a deposit resembles a unilateral transaction that does not produce legal effects.

70. South-West Africa (Eth. v. S. Afr.), Judgment, 1961 I.C.J. Rep. 465 (May 20).

agreements to arbitrate, which equally may be predicated on oral agreements. In recent years, the traditional requirement that an agreement to arbitrate be in writing has been deemed satisfied by any means of telecommunication that provides a record of the agreement, including a telegram, fax, and email.[71] Moreover, several domestic arbitration laws accept oral agreements,[72] and the doctrine of incorporation by reference allows a term not expressly included in the original agreement to be considered as part of it, as long as it is referred to in the said agreement.[73] Oral agreements and terms incorporated by reference or conduct share many of the characteristics of deposits/transfers. Some of those shared characteristics are: 1) concluding a written agreement to implement an otherwise non-binding pledge is impracticable or cost-prohibitive; 2) the interlocutor (i.e. trustee/bank) may react positively or negatively to the transfer in the same manner as its counterpart; 3) both acts are subject to an underlying corpus of law or industry-standard contractual terms; and 4) it may be argued that only private businesses law has employed this paradigm, which cannot now be arbitrarily transplanted to regulate legal relationships between states—particularly in a field generally governed by the law of treaties. However, when the state donor is contributing to a private bank account, that donor is subject to a significant amount of private law, not treaty law. The emerging customary international law of trust funds that we have alluded to in this paper does not encompass the range of transactions that are subject to private domestic law.

It should be emphasized that only specific obligations arise as a result of the transfer of money, particularly when the parties have no other agreement. Certainly, a single donation does not involve a perpetual

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71. UNCITRAL Model Law on International Commercial Arbitration art. 7(2), U.N. Doc. A/40/17, Annex I (June 21, 1985). This is considered as being consistent with the fundamental principle of equal treatment. *See* Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration*, 69 INT'L & COMP. L.Q. 991, 998 (2020).

72. *See* ILIAS BANTEKAS ET AL., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY 129-31 (Cambridge Univ. Press 2020). *See also Rock Advertising Ltd. v. MWB Business Exchange Centres Ltd. [2018] UKSC 24 (UK)* (where the U.K. Supreme Court implicitly confirmed the binding nature of oral agreements, by arguing that 'No Oral Modification Clauses' in contracts were valid and enforceable).

73. *See* Sphere Drake Ins. PLC v. Marine Towing Inc., 16 F.3d 666 (5th Cir. 1994) (which considered a similar, although not identical situation, involving an arbitration clause in a larger contract not signed by the contesting party). As this was not a stand-alone arbitration agreement (which would have required mutual recording of consent) the contesting party's signature was not required. Conversely, *see* Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd., 186 F.3d 210 (2d Cir. 1999) (holding that the parties were required to append signatures to the arbitration clause itself as opposed to just the compromise).

obligation to contribute funds, and all liabilities and legal effects concern only particular donations.

IV. THE DONOR AGREEMENT

The intended trustee of a donor agreement is a complicated matter. As the following sections demonstrate, the parties have used a variety of mechanisms to express their consent, many of which find little support in the Vienna Convention on the Law of Treaties or even in contract law. However, they demonstrate the complexity of this relationship and, to a large degree, exhibit some of the forward-thinking tendencies and flexibility of transnational law.

A. Donor Agreements in the Form of Treaties

A typical example of an inter-governmental trust fund, whose relationship with its donors is contractual in nature and encompasses the virtues of treaty law, is the Instrument for the Establishment of the Restructured Global Environmental Facility (GEF).[74] Unlike its predecessor, the Restructured GEF Instrument was adopted in 1994 by a number of States and U.N. specialized entities acting in a contractual capacity with the aim of setting up a trust fund. It was not the aim of state parties to the Restructured GEF Instrument to delegate this function *in toto* to a trustee without producing any legal effects for themselves—apart from their donation pledges. Nonetheless, without further investigation, the GEF Instrument's status as a treaty under the 1969 Vienna Convention on the Law of Treaties should not be taken for granted.[75] This is particularly true since the entity it envisaged creating was meant to receive the assets of its predecessor, the Global Environmental Trust Fund (GET), and carry on its obligations and functions. The GET itself was created on the basis of a resolution adopted by the International Bank for Reconstruction and Development (World

74. The Restructured GEF Instrument is reproduced in (1994) 33 I.L.M. 1273, as subsequently amended in March 2008. *See* Peter Sands, *Trusts for the Earth: New International Financial Mechanisms for Sustainable Development*, *in Sustainable Development & International Law* (Springer 1995); *see also* WINFRIED LANG, SUSTAINABLE DEVELOPMENT & INTERNATIONAL LAW 167 (Springer 1995).

75. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

Bank),[76] whereby an independent legal personality was not conferred to the GET.[77]

Two significant matters arise in order to subject the GEF Instrument to the law of treaties: 1) whether a contractual regime may validly subject assets, duties, and liabilities of an entity that does not enjoy international legal personality; and 2) whether participating states to the GEF Instrument expressed their unequivocal consent to be legally bound by this instrument's terms.[78]

The first query is essentially practical by nature. It concerns the ownership of the trust fund's assets and the legal implications of transferring rights and duties from an inter-governmental organization's account, as was the GET, to a group of states organized around a treaty-based mechanism that claims to be an independent legal entity. Under the customary law of trust funds, the assets attached to them are in the trust ownership of their trustee for the duration of the trust relationship.[79] Let us assume that the donors are opposed to transferring the trust fund's assets to a multilateral entity. If such transfer were in the best interests of the trust fund's objectives and purposes as set out in the initial trust agreement, then such a transfer would be wholly within the trustee's prerogatives. An exception would arise where the trustee was precluded from exercising such discretion from the terms of the trust agreement. In the present case, the GET was predicated on an agreement between donors, which confirms its legal nature as a contract, and the donors are in the vast majority States establishing the GEF Instrument. Equally, the contractual relationship with donor States and the implicit nature of the tasks expected from its capacity as trustee grounded the assumption of rights and duties by the World Bank. It is not theoretically possible to distinguish any rights or duties that the trustee is prohibited from

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76. The GET was established by IBRD Exec. Directors' Res. 91-5 (Mar. 14, 1991). Following the agreement to restructure the GET into the GEF, the IBRD formally executed this transformation through IBRD Decision 94-2 (May 24, 1994).

77. *See U.N. Legal Counsel Opinion of 4 Nov. 1993*, U.N. JURID. Y.B. 427, 429-30 (1993) (where it was clearly stated that the GET was expressly established in such a way as to lack an independent personality and all of its operations were to be subsumed under the international legal personality of its trustee).

78. *See generally The World Bank Group's Partnership With the Global Environment Facility*, THE WORLD BANK (2015), *available at* https://ieg.worldbankgroup.org/evaluations/gef (last visited Apr. 6, 2021).

79. *See GEF Instrument*, Annex B, Role & Fiduciary Responsibilities of the Trustee of the GEF Trust Fund, ¶ 1; *2002 Agreement between IBRD & the Global Fund to Fight AIDS, TB & Malaria on Establishing a Trust Fund*, Art. 4; J. Gold, *Trust Funds in International Law: The Contribution of the International Monetary Fund to a Code of Principles*, 72 AM. J. INT'L L. 856, 863 (1978).

performing from the assets of the trust fund. A probable exception is certain consultancy-related mandates that are not tied to the assets that any agency other than the World Bank could perform. Therefore, it is evident that no legal obstacle exists that prohibits the trustee—unless explicitly mentioned in the trust agreement—from transferring the fund's assets and corresponding rights and duties to a distinct multilateral or other entity.

The second matter raises a query as to whether the GEF Instrument is a legally binding treaty. The GEF Instrument establishes three different and distinct relationships: 1) membership to the GEF, open to state entities and U.N. specialized agencies under different terms of reference; 2) conferral of implementing agency status to the World Bank, the United Nations Development Program (UNDP), and the United Nations Environmental Program (UNEP);[80] and 3) appointment of the World Bank as trustee.[81] Paragraph 7 of the GEF Instrument stipulates that "participants" are member States and U.N. specialized agencies.[82] However, these two categories of actors do not enjoy equal rights because, in accordance with paragraph 16, the GEF Council, the Fund's most senior decision-making body, is only composed of State entities from a particular geographical area.[83] Equally, from the wording of paragraph 7 of the GEF Instrument, unlike the case with participating States, participating inter-governmental organizations are not required to contribute to the assets of the Fund.[84] Thus, inter-governmental organizations may validly partake in the workings of the GEF as non-paying participants. This conclusion is deduced from the fact that paragraph 7 requires both States and inter-governmental organizations to confirm their participation by lodging a so-called instrument of participation; except in the case of States, the GEF Instrument renders participation implicit if a State already lodged an instrument of commitment.[85] This instrument of commitment is tantamount to a binding pledge to make a financial contribution to the Fund.[86]

The GEF establishes two distinct legal relationships for participating States and inter-governmental organizations. The first concerns the status of their participation. Much like other treaties, the GEF Instrument

80. Sands, *supra* note 74, at ¶ 22.
81. *Id.* at ¶ 8.
82. *Id.* at ¶ 16.
83. *Id.* at ¶ 7.
84. *Id.*
85. *GEF Instrument*, *supra* note 79, at ¶ 7.
86. On the legal nature of trust pledges generally, *see infra* § 2.1.

requires participating entities to submit an instrument of participation to the GEF Secretariat.[87] For State parties, this is equivalent to an instrument of ratification because it requires the instrument "be signed on behalf of the Government by a duly authorized representative thereof."[88] It is assumed that the submission of this instrument is required only once since the GEF Instrument is silent on this point. The second contractual relationship is premised on the instrument of commitment,[89] through which participating entities make their pledges to the Fund.[90]

It is also important to assess whether the instruments of participation and commitment require parliamentary assent,[91] in generally the same way as treaties. This is a question of constitutional law that touches on the two forms of integrating international law domestically: monism and dualism. In a number of countries, it is the constitutional prerogative of domestic government departments to enter contractual agreements with inter-governmental organizations and other States, particularly with respect to loans, fiscal and similar issues without parliamentary assent, and subsequent publication in the Official Gazette.[92] Even where formal ratification is, in fact, required by pertinent constitutional principles, the dispatch of the ratification instrument may precede the adoption of implementing legislation.[93] Therefore, the fact that the instrument of commitment, in particular, has not undergone the legal transition into the domestic legal order of the State at issue is not a serious indication

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87. *GEF Instrument*, *supra* note 79.

88. Sands, *supra* note 74.

89. *Id.* at Annex C2.

90. A new "Instrument of Commitment" needs to be deposited every time parties pledge money, or where they are requested to replenish the Fund. *See IBRD Executive Directors' Res. 98-2* (July 14, 1998), *available at* http://documents1.worldbank.org/curated/en/462171468137103226/pdf/656650WP0GEF0I00Box365714B00PUBLIC0.pdf (on the Second Replenishment of GEF Resources) (last visited Apr. 3, 2021).

91. This, of course, depends on the characterization of the instrument of commitment under a particular constitution. Certain treaties of an executive or financial character may not require full parliamentary approval but simply assent by the pertinent minister. *See* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 144-46 (C.A. Bradley ed., 2019).

92. *See* Uzbek International Agreements Law, Art 14(5) (1995); *see also* ANTHONY AUST, MODERN TREATY LAW & PRACTICE 80-85 (3rd ed., 2000). *See also* Ilias Bantekas, *Natural Resource Revenue Sharing Schemes (Trust Funds) in International Law*, 52 NETH. INT'L L. REV. 31, 40-50 (2005); Ilias Bantekas & R. Vivien, *The Odiousness of Greek Debt in Light of the Findings of the Greek Debt Truth Committee*, 22 EUR. L.J. 539, 542-46 (2016).

93. *See also* U.N. Secretary-General, *Establishment & Management of Trust Funds*, ¶26, U.N. Doc. ST/SGB/188 (Mar. 1, 1982) (renders a pledge subject to ratification by parliament tantamount to a qualified agreement).

weighing against its contractual nature. Given that inter-governmental organizations also deposit the relevant instruments, the ensuing contractual relationships are not subjected merely to the law of treaties between states but also to the regime of treaties between states and inter-governmental organizations.

Following the deposit of the aforementioned contracts, the GEF Instrument and the individual instruments of commitment become the governing instruments. Finally, decisions adopted by the executive boards of the representative agencies may result in the assumption of duties by the trustee and other implementing agencies.[94] These decisions only generate an intra-institutional effect, but they are premised on the contractual undertaking of the trustee and the agents arising from the GEF instrument. The trustee is bound as a party to the GEF Instrument vis-à-vis all other "participant" parties. The GEF itself is further tied, although not necessarily in the strict contractual sense, to legal relationships with other governing bodies of particular environmental treaties, such as the 1992 Convention on Biological Diversity[95] and the 1992 Framework Convention on Climate Change.[96]

The GEF Instrument establishes the premise of the GEF Trust Fund and possesses the attributes of a treaty constituted by both States and inter-governmental organizations. Ratification of the GEF Instrument is legally distinct from the contractual undertaking to donate money to the Fund. The undertaking to donate is therefore equally subjected to international law and, more particularly, to the regime of the law of treaties. Although under the GEF Instrument the World Bank, as trustee, is bound to perform its duties under its Articles of Agreement and by-laws,[97] the nature of such duties is necessarily affected by the treaty nature of the GEF Instrument. The consequence that accrues from the GEF Instrument's nature as a treaty—as well as the instrument of commitment—is that even if the Fund was registered as a legal person under the laws of a particular jurisdiction, international law would still govern the rights and liabilities of participants.[98]

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94. *See, e.g.*, U.N. Developmental Programme Decision DP/1994/9 (May 13, 1994); U.N. Environmental Programme Decision SS.IV.1 (June 18, 1994); International Bank for Reconstruction & Development Decision 94-2 (May 24, 1994).

95. Convention on Biological Diversity, June 4, 1992, 1760 U.N.T.S 79.

96. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

97. Global Environment Fund, Annex B, ¶ 3 (1992).

98. Some authors are of the view that the GEF does not possess international legal personality. *See* RUDIGER WOLFRUM & VOLKER ROEBEN, DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 445 (2005).

What is unclear is whether the GEF Instrument supersedes the institutional law of the trustee and implementing agencies, which all possess inter-governmental organization status. This issue arose in 1995 when the U.N. Legal Counsel advised on the normative hierarchy between the UNDP Financial Regulations and Rules, the UNDP/World Bank Agreement on April 24, 1991, GEF, and paragraph 20(j) of the GEF Instrument, which provides that the GEF Council shall arrange periodic financial and performance audits of the UNDP Secretariat and implementing agencies regarding activities undertaken in respect of the GEF. If the GEF Instrument's relevant provision took precedence over the UNDP's Financial Regulations, the UNDP would have conferred audit rights to an entity outside the UNDP.[99] The U.N. Counsel first noted that the UNDP/World Bank Agreement is a pilot program that, upon the termination of its predecessor, the GET, ceased to have any legal effects on the parties.[100]

The UN Legal Counsel did not, however, exclude the possibility that an international agreement such as the GEF Instrument may impose an external audit on a UN specialized agency in respect of its asset management. Such an eventuality may happen only when the specialized agency in question expressly and clearly agrees to be bound—thus excluding the possibility of implicit undertakings. This is because of the long-standing U.N. practice whereby each agency applies its own rules for the financial management of assets placed under its custody.[101]

In this case, the U.N. Counsel pointed out that the "shall arrange" phraseology in paragraph 20(j) does not impose a strict obligation on the UNDP, and it was assumed that the GEF Council would authorize the World Bank to conclude specific audit agreements with the GEF's implementing agencies.[102] Equally, and under the same legal rationale, the UNDP was held incapable of engaging in lending-type activities stipulated in paragraph 9(c) of the GEF Instrument because such activities are not expressly authorized by its own Financial Regulations.[103]

The GEF Instrument is a complicated example of a treaty that sets up a trust fund; others are more straightforward. A multilateral treaty between four nations created the Tuvalu Trust Fund.[104] The Global Crop

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99. U.N. JURID. Y.B. 413 (Feb. 14, 1995).

100. *Id.* at 414.

101. *Id.* at 415.

102. *Id.*

103. *Id.* at 416.

104. Agreement Concerning an International Trust Fund for Tuvalu, June 16, 1987, 1536 U.N.T.S. 48. It was founded in 1987, almost a decade following the tiny island's independence, based on a multilateral treaty between Tuvalu, New Zealand, Australia, and

Diversity Trust was also based on a multilateral agreement, the sole purpose of which was to set up the trust and endow it with the status of international organization.[105] Multilateral treaties are not ideal instruments for setting up trust funds in situations that require an urgent international response, particularly those involving natural catastrophes and humanitarian aid. The Palau Compact of Free Association (COFA) Trust Fund between the United States and Palau is an example of a bilateral treaty.[106] The unattractiveness of treaties is even more poignant because a trust fund seeks the engagement of non-State stakeholders, like private foundations and affected communities, while a treaty might exclude them or sustain a discriminatory two-tier membership. Moreover, treaties require lengthy negotiations and may take a significant amount of time to conclude, leaving beneficiaries who are the intended recipients of the treaty's provisions in a precarious state. The best model under these circumstances is a type of trust fund set up by a resolution of an international organization, such as the U.N. or the World Bank. This model may later emerge as a concrete legal entity through a series of bilateral agreements with the trustee serving in its capacity as such. In respect to long-standing revolving trust funds set up to address serious fiscal imbalances, such as the Tuvalu and the Palau trust funds, bilateralism and multilateralism are preferred in practice and generally do not pose problems for the parties.

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the U.K. It is expressly given the status of an international organization and is administered by a Board of Directors composed of representatives from the four contracting states in an equal capacity. The Board, not surprisingly, acts as the Fund's trustee and is assisted by an Advisory Committee whose function is to advise the government of Tuvalu as to the progress of its economy, as well as on the social and economic effects of the Fund on the island. *See* BENJAMIN GRAHAM, TRUST FUNDS IN THE PACIFIC: THEIR ROLE & FUTURE (Asian Dev. Bank, 2005).

105. The Global Crop Diversity Trust, which unlike the Global Fund for AIDS, was founded based on a treaty between states—and the participation of other inter-governmental organizations—the Agreement for the Establishment of the Global Crop Diversity Trust. The Trust's objective is to ensure the long-term conservation and availability of plant genetic resources for food and agriculture to achieve global food security and sustainable agriculture. To accomplish this objective, significant resources are required. Thus, the Trust established an endowment fund for this purpose through which it solicits contributions from member states and organizations, and private entities voluntarily. *See* Constitution of the Global Crop Diversity Trust, art. II.

106. The Palau Compact of Free Association (COFA) Trust Fund was established pursuant to § 211(f) of the 1995 Compact of Free Association Agreement between the U.S. & Palau, 48 U.S.C. § 1931. Much like the Tuvalu trust fund, its Palau counterpart was premised on an international agreement, albeit a bilateral one. Decision-making does not rest solely with the government of Palau, save for appropriations into the budget. The U.S. maintains a right, in consultation with Palau, to decide on investment options.

B. Informal and Other Agreements

In previous sections, we established that States might contribute to a trust fund by way of a unilateral act, although, in this case, the act would be purely unilateral, entailing the assumption of an obligation or a bilateral agreement because it includes an offer, acceptance, and an intention to be bound. The starting point in this discussion must examine the entity the State donor will ultimately agree with, particularly the legal relationship regarding the content and the deposit of the pledged contribution. In the vast majority of cases, this role is entrusted to the trustee under the terms of the instrument that establishes this trust relationship. The alternative is an agreement between all of the donors wherein the protagonists act under the guise of a joint entity, but this option has two significant limitations: 1) it involves a self-contract leading to a substantial conflict of interest; and 2) given that only a few trust funds are organized as entities enjoying a sufficient degree of international legal personality, their agreements with state donors would be problematic and potentially subjected to the law of the State wherein the trust funds are organized. Thus, the trustee, especially the World Bank, is not only able to negotiate and conclude donor agreements uniformly but is also best suited to receive, handle, and invest donations. The trustee can also provide donors with accurate financial statements as part of the agreement or the Bank's operational policies.[107] The same is obviously true regarding the range of trust projects undertaken by the United Nations.

Having established the two contracting entities, let us now consider the nature of the agreement itself. In accordance with its operational policies, the World Bank, when acting as a trustee, enters into framework agreements with the donors.[108] Under these policies, donors are required to enter into an additional Trust Fund Administration Agreement, on the basis of which the Bank recovers its costs to manage and administer the trust fund.[109] The elaborate mechanism by which the above agreements are drafted, signed, and implemented, as well as the absence of lighter, non-binding alternatives, suggests that the World Bank intends to conclude binding treaties with contributing States, rather than contracts

107. THE WORLD BANK, OPERATIONAL POLICY (OP) 14.40 'ON TRUST FUNDS,' n.11 (1997) (amended 2013) (exceptionally, a grant agreement acceptable to the Bank may be made directly between the donor and the recipient country). This has been implemented in the case of the Special Program of Assistance in Africa. *See* THE WORLD BANK, OPERATIONAL MANUAL: BANK PROCEDURES BP 14.40 (July 1, 2008).

108. Global Environment Fund, *supra* note 97, at art. 1.

109. *Id.* at art. 7-8.

subject to private law. In fact, the Bank, where possible, enters into standard binding agreements with all donors to a particular trust fund in order to harmonize results and reduce cost.[110]

Each Letter of Agreement expressly states the Bank's applicable Standard Provisions.[111] For example, in the Agreement between the European Communities (EC) Commission and the World Bank for the Asia-Europe Meeting (ASEM) Trust Fund of December 23, 1998, it was stated in relevant part: "[w]e are pleased to confirm the intention of the Commission to make available to the World Bank the sum of [. . .]" Equally, "the contribution shall be used for the purposes [earmarked and agreed to]," and "the Commission shall deposit," but "the Bank shall make available to the competent bodies of the EC, upon request, all relevant information . . . "[112]

In cases where the U.N. Secretariat acts as a trustee, although not always consistently, donors may be requested to engage in a binding agreement with the United Nations. Article 6 of the U.N. Special Missions Trust Fund[113] requires that "[t]he making of a pledge and its acceptance are to be recorded in an exchange of letters . . . or if deemed appropriate, in a formal agreement."[114] This provision, which is a verbatim reflection of the relevant paragraph in the U.N. Secretary-General's Bulletin on the Establishment and Management of Trust Funds,[115] refers to the form of the pledge only, and not to the contractual modality for the participation of the donor in the trust fund. The Bulletin distinguishes the latter relationship. A general trust fund does not require a written agreement. Such an agreement is required only when it "is deemed necessary,"[116] albeit no further guidance exists to elaborate on

110. ASEM-EU Asian Financial Crisis Response Fund, U.K, June 29, 1998, TF 020147; ASEM-EU Asian Financial Crisis Response Fund, Den.-I.B.R.D., Nov. 10, 1998.

111. *Id.*

112. TF 020147, Project No. ALA/ASI/98/0419, preamble.

113. The Secretary-General's authority to establish such a trust fund stems from Article 97 of the UN Charter related to the Secretary-General's capacity as the UN's chief administrative officer. Equally, it is also derived explicitly from Regulation 4.13 & Rule 104.3 of the UN's Financial Regulations and Rules and the Secretary-General's Bulletin on the Establishment and Management of Trust Funds. The Special Missions Trust Fund stipulates that "the making of a pledge and its acceptance are to be recorded in an exchange of letters, or if deemed appropriate, in a formal agreement." Special Missions Trust Fund, Terms of Reference, § 6. This is no doubt a verbatim reflection of the Secretary-General's Bulletin on the Establishment & Management of Trust Funds, U.N. Doc. ST/SGB/188 (Mar. 1, 1982), ¶ 29.

114 The same is not, however, stipulated in the Trust Fund for Preventive Action (TFPA).

115. ST/SGB/188, *supra* note 114, at ¶ 29.

116. *Id.* at ¶ 31.

this requirement. Conversely, technical cooperation trust funds always require a written agreement.[117] It is clear, therefore, that general trust funds set up by the Secretariat and the General Assembly do not require a formal arrangement between the donors and the U.N., let alone a treaty.

Consequently, it is evident that the adoption of treaties between the trustee and State/inter-governmental organization donors is not a general requirement of the international law of trusts, although it is good practice when the trustee is able to enforce them. Where the trustee is a U.N. specialized agency, such as the UNEP—which alone manages a sizeable amount of international trust funds—none of the surveyed Terms of Reference require the UNEP to conclude donations in the form of treaties.[118] As a result, the UNEP's agreements with donors can take many legal forms, including treaties with MoU,[119] even where donations are reflective of similar projects and sums.[120]

The same is true regarding donor agreements that the UNDP accepts. The UNDP's Financial Regulations and Rules require the conclusion of an agreement but fail to specify its legal nature;[121] it is thus possible for donor agreements consummated with the UNDP to possess non-binding characteristics under the U.N. rationale analyzed above. In practice, however, the UNDP has set up a model trust administration agreement which it now uses in all of its relationships with donors. The adoption of a MoU instead of a treaty is not always more beneficial to the contributing State.[122] On the contrary, it would seem that a binding treaty

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117. *Id.* at ¶ 32. In fact, in respect of technical cooperation trust funds there exists a model agreement as set out in the Secretary-General's Administrative Instruction for Technical Cooperation Trust Funds, U.N. Doc. ST/AI/285.

118. Vienna Convention on the Protection of the Ozone Layer, COP Decision VCI/9 (Apr. 28, 1989), *available at* http://ozone.unep.org/Publications/VC_Handbook/Section_2_Decisions/Article_6/Decs-financial_matters/Decision_VCI-9.shtml#Annex%20III (last visited Apr. 6, 2021).

119. Even though the parties' general intention in concluding a MoU is the avoidance of entering into a binding instrument, we agree with the position that the normative character of a MoU is judged both by its content and the intention of the parties. The two may sometimes be conflicting, but certainly, one should not disregard the wish of the parties not to be bound by the terms of an agreement. *Supra* note 82, at 26-34.

120. MoU between Swedish Ministry of Sustainable Development & UNEP (Feb. 2005); *see also* UN-HABITAT MoU with Canada for Contributing to the Water & Sanitation Trust Fund. Other countries such as Norway preferred instead the conclusion of agreements.

121. UNDP Financial Regulations and Rules, Reg. 5.07(a) (Apr. 2000). Rule 108.1 states that trust funds shall be established either on the basis of a written agreement, or by the issuance of its terms of reference, in anticipation of receipt of contributions by prospective contributors.

122. MoU are common in sovereign finance, especially following the post-2008 financial crisis, chiefly as a means of avoiding obligations, whether parliamentary scrutiny, or the

is a secure basis for confirming the rights and duties of the parties, given that it is in the interests of the trustee and the trust fund itself to bind the contributors to their pledge amount. The likely benefits of an MoU are perhaps its speedy conclusion and adoption—particularly where the donation is below a particular threshold—its confidentiality, and avoiding a perpetual obligation.[123]

It is also common practice for donors to conclude an MoU with the potential trustee and recipient States. The purpose of these instruments is not to set up the trust fund or agree to the terms of the donation, but rather to record the intention of the parties to enter into appropriate agreements in due course. This was expressly mentioned in the various identical MoU between the Netherlands, on the one hand, and Indonesia and the World Bank, on the other, addressing the establishment of a multi-donor trust fund following the catastrophic effects of the 2004 earthquake and tsunami.[124] Eventually, given that the World Bank was appointed trustee to the Multi Donor Fund (MDF) for Indonesia, contribution agreements were entered with each State donor in the form of treaties. The Bank's policy is to treat all donors equally, in a manner whereby the agreements must be "substantially the same." Disagreement arose between the various departments in the Bank as to whether "substantially the same" means word-for-word identical, or if a request by a donor State that did not alter the obligations of the agreement could,

application of human rights or other rules. *See* Menelaos Markakis & Paul Dermine, *Bailouts, The Legal Status of Memoranda of Understanding, & the Scope of Application of the EU Charter: Florescu*, 55 COMMON MKT. L. REV. 643 (2018). In fact, the use of informal agreements in a manner that violates human rights is at the heart of the business and human rights debate. *See* Ilias Bantekas, *The Linkages Between Business & Human Rights & Their Underlying Causes*, 43 HUM. RTS. Q. 118 (2021); Ilias Bantekas, *The Emerging UN Business and Human Rights Treaty & its Codification of International Norms*, 12 GEO. MASON INT'L L.J. 1 (2021).

123. *See* Anthony Aust, *The Theory & Practice of Informal International Instruments*, 35 INT'L COMP. L.Q. 787 (1986). Lipson has added to this list the desire to prevent formal and visible pledges, the desire to avoid ratification, the ability to renegotiate or modify as circumstances change, as well as the need to reach agreements quickly. Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495, 500 (1991). Moreover, Bilder has argued that states may choose the option of non-binding accords out of a desire to manage more efficiently the risks of international agreement. Richard B. Bilder, *Managing the Risks of International Agreement*, U. WIS. L. STUDIES RES. PAPER NO. 1327, 24 (1981).

124. The Multi-Donor Trust Fund was adopted on Apr. 25, 2005. *See Indonesia: MoU on the Establishment of the Multi-Donor Trust Fund to Support Aceh & North Sumatra Rehabilitation & Reconstruction ADB's Contribution*, ADB (May 10, 2005), *available at* https://reliefweb.int/report/indonesia/indonesia-mou-establishment-multi-donor-trust-fund-support-aceh-and-north-sumatra (last visited Apr. 6, 2021).

in fact, be accommodated.[125] A formal cap on administrative costs, the designation of terrorism therein, and the conclusion of an expiration date for the agreement also provoked disagreement. In connection with the terrorism language, for example, one donor was content with the definition, but because it imposed a condition on the assets, the MDF was forced to amend its Standard Provisions. This, however, meant that the donors reached a subsequent agreement on this issue.[126]

Finally, accession to donor agreements is possible through an appropriate provision in the general agreement, where applicable, or in each individual agreement. Article 3 of the Donor Agreement for the establishment of an Anti-Corruption Activities Fund between Norway and the Inter-American Development Bank (IDB) states that the Fund shall accept contributions from any donor through the subscription of a Letter of Adherence to the Donor Agreement.[127] Arrangements may become complicated if new contributors besides States, international organizations, and private entities were included.

In this case, since the Donor Agreement is a treaty, it is not possible for the private entity to accede to it. Therefore, it must be assumed that the trustee will enter into a new agreement with the private donor under the terms of the treaty, as long as the terms of the treaty apply to private entities and are subject to applicable private law. Alternatively, the same result will be presumed—albeit State parties will take it for granted that the Agreement has a dual status—depending on whether the entity under consideration is a State or private party.

V. DONOR AGREEMENTS WITH PRIVATE ENTITIES

Private parties, like states, must contract with the trustee rather than the trust fund regarding any transactions with the trust fund. Similarly, an agreement must be entered into, even though this agreement will be a contract governed by the law chosen by the parties rather than a treaty.[128]

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125. The World Bank, *Review of Post-Crisis Multi-Donor Trust Funds: Final Report*, NORAD (Feb. 2007), *available* at https://www.norad.no/globalassets/import-2162015-80434-am/www.norad.no-ny/filarkiv/vedlegg-til-publikasjoner/reviewofpostcrisismultidonortrustfunds_finalreport.pdf (last visited Mar. 29, 2021).

126. *Id.*

127. The Agreement is attached to IDB Doc. CC-6146 (Feb. 26, 2007).

128. *See* F.A. Mann, *The Proper Law of Contracts Concluded by International Persons*, 35 BRIT. Y.B. INT'L L. 34 (1959); ELISABETTA MORLINO, PROCUREMENT BY INTERNATIONAL

Given that contracts must be "substantially the same" so as to ensure equal treatment of the contracting entities, the governing law will be different in the trustee's agreements with the private donors. This will likely be the law of the seat (or country of incorporation) of the trustee,[129] but when a contract is performed in a third territory, the applicable law may be the law of that country.[130] This is certainly a choice between the parties and subject to the principle of party autonomy. Generally, although State donors will face administrative costs to set up the trust fund, this is not the case with private parties. Indeed, the contractual terms for the latter are far simpler because the constitutional formalities relating to treaty-making are inapplicable. Nonetheless, any liability that may accrue from such a relationship will burden the private entity on account of its lack of privileges;[131] this stands in stark contrast to burdens accrued by the World Bank or the U.N., which enjoy significant privileges. Obviously, in its mutual relationship with the private party, the trustee will be an equal contractual partner. Private entities may, where applicable, be entitled to simply transfer or deposit money in a trust fund without requiring a written agreement. They simply need to notify the trustee in writing that they have deposited the money. In this case, since the private entity is not a state, its actions cannot be assimilated to a unilateral act—with or without legal obligation. The applicable banking and contract law governing a particular transaction will determine the legal nature of these acts.[132] In any event, they entail privity of contract and should be viewed as such by all interested actors.

ORGANIZATIONS: A GLOBAL ADMINISTRATIVE LAW APPROACH 261 (Cambridge Univ. Press 2019).

129. The law of the seat is fundamental to the interpretation of arbitration clauses in contracts. Arbitration clauses are procedural in nature and hence if they are subject to the law of the seat, such law is the seat's civil procedure law. *See* Ilias Bantekas, *The Proper Law of the Arbitration Clause: A Challenge to the Prevailing Orthodoxy*, 27 J. INT'L ARB. 1, 2-4 (2010).

130. *See* P. SANDS ET AL., BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 462 (Sweet & Maxwell, 2001).

131. It is usual for trustees to be mandated by the donors to enter into arrangements with the private entity in order to provide it with tax deductibility allowances in respect of its donation. *See infra* note 150 at art. 27(a)(i)(2). Otherwise, the relevant financial or operational regulations clearly stipulate that no special advantages or benefits should accrue to private donors, such as Article 6 of the World Bank's OP 14.40. Equally, when acting as trustee, the Bank should avoid providing any benefits to private investors that would give rise to a conflict of interest or a distortion of its procurement rules 2.13 *et seq.* of the World Bank Trust Fund Hand-Book, IBRD Doc. 17304 (Apr. 1997).

132. This is a complex issue that is not susceptible to generalizations. The Court of First Instance (CFI) of the EU has long confirmed that the law of EU member states is not applicable to public contracts granted by entities set up by the EU Council of the EU. *See*

The U.N. Legal Counsel has made it clear that the Organization can incur private liabilities, particularly when such liabilities arise from contracts, purchase orders, leases, and other agreements.[133] Equally, therefore, the choice of forum and *lex arbitri* is a matter settled by agreement between the parties. The governing law of private contracts entered by international organizations and private entities is usually designated by reference to the law of the seat of the international organization, particularly when the private party's operations lie therein.[134] Conversely, where the performance under the contract will occur in a territory other than the seat of the organization, especially in the event of small scale contracts that do not involve significant resources, the national law of the country where performance will occur is deemed to constitute the governing law. Loan agreements with private entities entered by the IBRD and the International Monetary Fund (IMF) are governed either by the law on whose territory the private contracting banks are incorporated, the law of the State of New York,[135] or a neutral law that is typically liberal and commerce-friendly, such as the laws of England.[136] One should exercise caution when ascribing the characterization of a contract to a particular transaction, in the sense that an agreement encompasses both consideration and acceptance. Agreements at the international level between a variety of actors are more complex than contracts under domestic law, as is the case with the IMF's

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Case T-411/06, *Sogelma - Societá generale lavori manutenzioni appalti Srl v European Agency for Reconstruction (AER)*, ECLI:EU:T:2008:419, ¶ 115 (the CFI argued that such a principle was applicable, unless otherwise provided, to any international organization in the EU).

133. Legal Opinion of 23 Feb. 2001, (2001) U.N. Jurid. Y.B. 381, 384-85.

134. W. JENKS, THE PROPER LAW OF INTERNATIONAL ORGANIZATIONS 171 (Stevens & Sons, 1962).

135. Art. 11(a), IMF-Monetary Agency of Saudi Arabia Loan Agreement, IMF Decision 6843 (81/75), 6 May 1981, *cited in* P. SANDS, P. KLEIN & D. W. BOWETT, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 462 (Sweet & Maxwell, 2001). In such cases the World Bank Group may well trigger its privilege of immunity from suit by invoking it before the court. However, great reluctance is applied in invoking immunity. By way of example, an action against the IMF for failure to pay the amount due under any note or coupon may be brought before the federal courts of New York, England, or Geneva. The IMF agreed in that case to waive its immunity from suit and execution. *See* J. GOLD, INTERPRETATION: THE IMF & INTERNATIONAL LAW 69 (Springer, 1996).

136. *See* Ilias Bantekas, *A Human Rights-Based Arbitral Tribunal for Sovereign Debt*, 29 AM. REV. INT'L ARB. 52 (2018); Ilias Bantekas, *The Contractualisation of Fiscal and Parliamentary Sovereignty: Towards a Private International Finance Architecture?*, G. CONSTITUTIONALISM (2021) (forthcoming). For good or bad, English contract law has become indispensable in the majority of transnational transactions. *See* Ilias Bantekas, *The Globalization of English Contract Law: Three Salient Illustrations*, 137 L.Q. REV. 130, 131-40 (2021).

stand-by-arrangements, which are not considered to entail a contractual relationship in any way.[137]

Amerasinghe is of the view that agreements between international financial institutions, such as the International Bank for Reconstruction and Development (IBRD), the European Bank for Reconstruction and Development (EBRD), the Asian Development Bank (ADB), and others, with private parties that are predicated on another loan or guarantee agreement with the private parties' respective States, should be governed by international law.[138] He rests his hypothesis on the international law provisions in the loan agreements "or by implication resulting from association."[139] The World Bank's policies generally exclude the possibility of such agreements,[140] whereas the U.N.'s specialized agencies that administer trust funds have taken a varied approach to the legal modalities of private contributions.[141] The legal nature of the

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137. Under Article XXX(b) of the IMF Articles of Agreement, a stand-by-arrangement is defined as "a decision of the Fund by which a member is assured that it will be able to make purchases from the General Resources Account in accordance with the terms of the decision during a specified period and up to a specified amount." It is clear that Article XXX(b) only refers to the Fund's decision and not the letter of intent that is required of the petitioning state, which sets forth the objectives and policies that will make up the financial program for which assistance is sought. In order to clarify that stand-by-agreements are not in fact contracts, the IMF adopted two distinct decisions, *see* Decision No. 2603-(68/132) Sept. 20, 1968; Decision No. 6056-(79/38) Mar. 2, 1979. In particular, ¶ 7 of the 1968 Decision stated that "in view of the character of stand-by-arrangements, language having a contractual flavour will be avoided in stand-by-documents." *See generally* J. GOLD, THE LEGAL CHARACTER OF THE FUND'S STAND-BY-ARRANGEMENTS AND WHY IT MATTERS (IMF Pamphlet Series No. 35, 1980). *See also* Ilias Bantekas, *Exceptional Recognition of Governments & Political Parties in Respect of Sovereign Loans: The Greek Case*, 82 NORDIC J. INT'L L. 317, 320-21 (2013).

138. The EBRD does not distinguish between states and non-state entities in its contractual arrangements with borrowers and as a result has no hesitation to institute a uniform and consistent application of public international law as the governing law of its contracts with all borrowers. *See* J.W. Head, *Evolution of the Governing Law for Loan Agreements of the World Bank & other Multilateral Development Banks*, 90 AM. J. INT'L L. 214, 230 (1996).

139. *See* C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 388-89 (Cambridge Univ. Press 2005).

140. In 2016 an updated standardized Administration Agreement template with sixteen of the World Bank's largest donors who provide 90% of IBRD/IDA trust fund resources was adopted, including standard provisions on disclosure of information and communication on fiduciary issues. This was supplemented with a series of notes on governance arrangements in trust funds, preferencing arrangements, donor reporting, managing trust funds for results, and indicative budgets. *2017 Trust Fund Annual Report*, WORLD BANK (2017), *available at* http://documents1.worldbank.org/curated/en/428511521809720471/683696272_201803110 085340/additional/124547-REVISED-PUBLIC-17045-TF-Annual-Report-web-Apr17.pdf (last visited Apr. 6, 2021).

141. Article 17 of the U.N. Secretary-General's Guidelines on Cooperation between the U.N. and the Business Community envisages four types of partnership arrangements. Of

agreement also depends on the type of contribution made. It is common for private contributors, particularly those in a specific industry, to donate in-kind rather than in cash. In 2003, the pharmaceutical corporation Novartis agreed to provide tuberculosis medicine to treat 500,000 patients over a five-year period. This undertaking was consummated through an MoU, not a binding contract. The medicines were delivered to the Global Drug Facility (GDF) of the Stop TB Partnership for use by programs supported by the Global Fund against AIDS, Tuberculosis, and Malaria.[142] There is no mention in U.N. Financial Regulations 4.13 and 4.14 about the legal format of agreements with donors, thus the U.N.'s principal organs and its specialized agencies are free to agree the legal terms of their agreements with private entities. In Section VII of this paper, the reader will come to appreciate the possibility of setting up a trust fund solely based on private contracts in order to accommodate private and public entities speedily and with greater efficiency in a single instrument.

VI. THE TRUSTEE (ADMINISTRATION) AGREEMENT AND THE AGREEMENT BY WHICH A TRUST FUND ASSUMES THE ROLE OF FINANCING MECHANISM

One would think the agreement that appoints an entity as a trustee of monies and other assets contributed by States would by necessity assume only a single legal form, i.e. a treaty. However, this has not occurred, and the appointment of trustees has been achieved through varied legal formulas, as demonstrated by this paper. Treaties remain the standard agreement form, whereby the institutional rules of the trustee, as in the case of the World Bank, require adopting a binding agreement with the donor,[143] or whereby the use of model administration agreements with prospective donors has been institutionalized, as in the case of the

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interest in this connection is paragraph (a) dealing with direct contributions, whereby it is advised that this be accommodated through a trust fund or special account agreement with the partner subject to the applicable U.N. Rules and Regulations. *See Guidelines on Cooperation between the United Nations and the Business Sector*, U.N. (Nov. 20, 2009), *available at* https://www.un.org/en/ethics/assets/pdfs/Guidelines-on-Cooperation-with-the-Business-Sector.pdf (last visited Mar. 23, 2021).

142. *Partnerships to Build Healthier Societies in the Developing World*, IFPMA (Sept. 2006), *available at* https://issuu.com/ipha/docs/ifpma_building_healthier_eng_2007 (last visited Mar. 23, 2021).

143. *See* OP 14.40, Art. 1. The authority of the IDB to set up and receive donations for trust funds through the conclusion of treaties is prescribed in Res. DE-51/91 (Mar. 20, 1991); IBD Doc. GN-1808 (Feb. 5, 1991).

UNDP. Treaties like this between a State and a public international financial institution, or a U.N. specialized agency, will either expressly designate the latter as the trustee,[144] or this type of appointment may be inferred from the range of powers and responsibilities entrusted to the particular entity.[145]

In the latter case, parties will take for granted the inter-governmental financial institution as the designated trustee from the outset, even if this is not explicit in the administration agreement, as such an occurrence is rather rare. Where the World Bank has already set up a trust fund, or an agency/organ of the U.N., and where States have entrusted these entities with the role of trustee through existing instruments, subsequent agreements will either: 1) tacitly recognize the assumption of the trustee role by the Bank/U.N.; 2) make no reference to the trustee, but implicitly recognize it on account of the fact that the Fund's Instrument, Terms of Reference, etc. is attached as an integral annex to the Agreement;[146] and 3) expressly recognize its contracting partner as the trustee.[147] Where donors finance a trust fund through such subsequent donor agreements, they cannot unilaterally alter or amend any of the provisions of the trust fund's Instrument or Standard Provisions without the prior consent of the trustee and the other parties to the trust fund, although they can amend provisions with the consent of the trustee. Thus, the underlying agreement—whether called a Fund Instrument, Attached Standard Terms, or by another name—is treated the same as a multilateral treaty under Articles 40-41 of the 1969 Vienna Convention on the Law of Treaties, because the parties have agreed that said instruments govern their legally binding relationships. While such an underlying instrument may not be legally binding on its own accord, it becomes binding through its incorporation in the treaty between the trustee and the donor or, alternatively, because the administration agreement renders it binding upon the parties.

Given that both the U.N. and its specialized agencies do not require a treaty format for concluding trustee administration agreements or donor

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144. *See* Administration Agreement between the U.K. & IBRD/IDA Concerning the Multi-Donor Trust Fund for the Extractive Industries Transparency Initiative (TF 053509) (Aug. 19, 2004), Preamble.

145. *See* IDB-Norway Donor Agreement for the Establishment of the Anti-Corruption Activities Fund (Mar. 2007). A Draft of the Agreement is contained in IDB Doc. CC-6146 (Feb. 26, 2007).

146. *See* Agreement between the U.K. & IBRD/IDA for the ASEM-EU Asian Financial Crisis Response Fund (TF 020147) (June 29, 1998), Annex I.

147. *See* Italy-UNDP Trust Fund Agreement for Anti-Poverty Partnership Initiatives (June 27, 2000).

agreements—in fact, the relevant Financial Regulations do not stipulate the two as separate contracts—it is not surprising that several MoU have appeared to conclude these agreements. Typical trust agreement examples are: the MoU between the conference of parties (COP) of the Convention to Combat Desertification; the International Fund for Agricultural Development (IFAD)[148] regarding the Modalities and Administrative Operations between the Global Fund;[149] and the MoU between the COP to the Biological Diversity Convention and the GEF regarding the Institutional Structure Operating the Financial Mechanism of the Convention.[150]

The GEF and IFAD are financing mechanisms for these conventions, not trustees. Their role is to finance the projects, in full or in part, decided by the COP to these conventions, as long as these decisions are consistent with the respective constitutional instruments of IFAD[151] and the GEF.[152] In the case of the COP-GEF MoU, one may

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148. The practice of most COP confirms that, because they must interact with other actors, they must be assumed to possess some, at least, legal personality. COP to environmental treaties regularly, for example, adopt decisions by which they appoint a third entity as a trustee to a financing mechanism stipulated under their founding treaty followed thereafter by the conclusion of an MoU with the designated trustee. *See* U.N. Doc. UNEP/CBD/COP/1, Decision I/2, ¶ 2; U.N. Doc. UNEP/CBD/COP/2/19, Decision II/6, ¶ 1. MoU between the COP to the Convention on Biological Diversity (CBD) & the Council of the Global Environmental Fund (GEF), U.N. Doc. UNEP/CBD/COP/3/38, Decision III/8; *see also* the MoU between COP to the Convention to Combat Desertification (CCD); The International Fund for Agricultural Development (IFAD) regarding the Modalities and Administrative Operations of the Global Mechanism, U.N. Doc. ICCD/COP(3)/10 (Aug. 30, 1999), Annex I.

149. The MoU is attached as Annex I in Doc. UNEP/CBD/COP/3/10 (Oct. 11, 1996).

150. Art II(C). The Draft MoU is attached as Annex I to Doc. ICCD/COP (3)/10 (Aug. 30, 1999).

151. According to Art. 2 of the 1976 Agreement Establishing the IFAD, the objective of the Fund shall be to mobilize additional resources under concessional terms for agricultural development in developing member states. This involves projects designed to introduce, expand or improve food production systems and to strengthen related policies, taking into consideration the need to increase food production in the poorest food-deficit countries, the need to increase food production in other developing countries and the importance of improving the nutritional level of the poorest populations. IFAD has entered into an agreement with the UN under Art. 57 of the UN Charter and is a specialized agency thereof. *See* IFAD Lending Policies and Criteria, Res. 83/XVII, U.N. IFAD 2nd Sess., (Dec. 14, 1978) adopted by IFAD Governing Council on 14 Dec 1978 (as recently amended by Res 106/XXI (12 Feb 1998)).

152. The Restructured GEF Instrument is reproduced in Nicholas Van Praag, *The Global Environment Facility*, 33 INT'L LEGAL MATERIALS 1273-308 (1994) (subsequently amended in Mar. 2008, ¶¶ 2 3 stipulate also "that the agreed incremental costs of other relevant activities under Agenda 21 that may be agreed by the Council shall also be eligible for funding insofar

obviously argue that the choice of this instrument is necessarily dictated by the fact that neither of the two entities possess sufficient legal personality to enable them to negotiate a treaty or other binding agreement.[153] In any event, while the parties to such an MoU are generally presumed to intend to desist from assuming any binding obligations, the non-binding character of these instruments may, nonetheless, be questioned on several grounds.

First, regarding trust agreements established by an MoU, the trustee is appointed as the account holder, when applicable, and administrator of the trust fund and its assets. This in itself entails a reciprocal obligation whereby the trustee owes particular duties to the donors, which can hardly be assumed on a non-binding basis. As most of these duties stem from widespread practice in the field of the international law of trust funds, it is not out of the question to posit that they have become part of customary international law between States and trustees; as such they are not merely voluntary, but binding. Moreover, the trustee owes some fiduciary duties to the beneficiaries once these have been designated.[154] It would thus be absurd for the trustee and the donors to appoint the trustee without either of these entities owing any obligations to the beneficiaries at any stage of the trust process.

Equally, despite the lack of inter-governmental character regarding environmental financing to treaty-bodies by the GEF, some obligation must arise for the trustee under relevant cooperation agreements. While this may not necessarily involve strict adherence to the policy decisions of the respective COP, it may include an obligation to, for example, prepare and submit annual financial reports.[155] Some environmental treaties fully finance their own projects and do not engage the GEF or IFAD as their financial mechanisms. In these cases, the decisions issued by the respective COPs are binding on the GEF when releasing funds (owned by the COP) for particular projects, despite the non-contractual character of their agreement.[156] The U.N. Legal Counsel has made it clear that COP operating under universal treaties possess the legal capacity,

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as they achieve global environmental benefits by protecting the global environment in the focal areas").

153. Nele Matz, *Financial Institutions Between Effectiveness & Legitimacy: A Legal Analysis of the World Bank, Global Environmental Facility & Prototype Carbon Fund*, 5 INT'L ENVTL. AGREEMENTS POL. L. & ECON. 265, 285 (2005).

154. *See* Ilias Bantekas, *The Emergence of the Intergovernmental Trust in International Law*, 81 BRIT. Y.B. INT'L L. 224, 231 (2011).

155. Biological Diversity Convention COP-GEF MoU, (n.137), Arts 3.1 & 4.

156. *See also* Doc. FCCC/CP/2001/13/Add.1 (Jan. 21, 2002), pp 40ff.

within the limits of their mandate, to enter into agreements and other arrangements with state and non-state entities.[157]

In practice, the majority of commentators argue that, despite the relevant MoU, the GEF is not legally bound by decisions of the COPs.[158] Although the intention of the parties entering into such an MoU should be respected, the content of such instruments entails a plethora of binding obligations, as either a result of customary international law or implicitly by the very function of the trustee's role. Perhaps, therefore, the best way of approaching the normative character of such agreements is article by article. Alternatively, it may be argued that the parties to an MoU establishing a trust relationship are aware of and accept the binding duties arising from such a relationship, and thus the role of the MoU is to emphasize the non-binding character of the other aspects of the relationship. It should be noted, of course, that the parties to the aforementioned MoU are not States, but largely inter-governmental organizations.

Moreover, there may be doubt about the inter-governmental status of others, such as the GEF. Nonetheless, it is undeniable that they enjoy at least some international legal personality, and even if they are unable to enter into treaties as quasi-inter-governmental organizations, they are competent to conclude contracts under domestic law. The MoU route, therefore, is not the only option. Overall, the problematic nature of MoU serving as administration agreements is limited to a small number of cases that do not generally involve State entities.

A. Jurisdiction in Respect of Disputes Arising from Administration Agreements

A brief assessment of the appropriate jurisdiction for disputes arising out of the interpretation and implementation of administration agreements is warranted. One cannot rely on the general principles underlying the international law of trust funds because the relevant practice is inconsistent. Some agreements provide for arbitral proceedings, while others do not. Even so, where arbitration is incorporated in the body of an agreement, the parties generally fail to elaborate on its modalities. In the absence of an arbitration clause, it is wholly unreasonable to conclude that the World Bank's General

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157. Legal Opinion of Nov. 4, 1993, U.N. JURID. Y.B. (1993) 427, 429.

158. In fact, the COP to the CBD, in its first review of GEF effectiveness as the CBD's financial mechanism expressed discontent with the GEF's level of compliance. *See* Matz, *supra* note 141, at 285-86.

Conditions Applicable to Loan and Guarantee Agreements are applicable, assuming the World Bank is a trustee in that case.[159] The IBRD and IDA submit their own loan and credit arrangements with State entities[160] to public international law,[161] subject to very minor and specific exceptions in respect of necessarily local matters such as the creation of sureties. Equally, the relevant arbitration provision in the Bank's Articles of Agreement cannot resolve trust fund disputes with a donor State that is not a party to the Articles of Agreement. This result differs if the donor is a party thereof.

One way of resolving this legal vacuum is by subjecting the dispute to the appropriate jurisdiction of domestic courts, particularly the seat of the World Bank, which corresponds to its standard practice respecting the introduction of choice of forum clauses in international credit contracts.[162] This is indeed the most appropriate solution. The State can neither invoke the procedural defense of State immunity, nor raise issue with the fact that the agreement in question was a treaty rather than a private contract in order to avoid the civil jurisdiction of the courts of the

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159. Incorporation by reference would be inapplicable in this case, unless an instrument containing an arbitration clause was expressly mentioned in a first agreement. It is generally accepted that the instrument incorporated by reference need not be an agreement previously concluded by the parties. It may just as well be one of the parties' standard terms or an instrument to which none of the parties has any other relationship. *See* Thyssen Can. Ltd. V. Mariana, [2000] 3 F.C. 398 (judgment from Canadian Court of Appeal) (Can.); Fai Tak Engineering Co. v. Sui Chong Construction & Engineering Co., [2009] H.K.D.C. 141 (judgment from Hong Kong District Court) (H.K.).

160. The IBRD typically enters into a loan and guarantees agreements with borrowing states. These states assume full responsibility for carrying out the project in respect of which the funds were borrowed. The direct borrower is a private entity, the Bank will enter into a Guarantee Agreement with the government of the relevant member state.

161. Int'l Bank for Reconstruction and Dev. [IBRD], *General Conditions Applicable to Loan and Guarantee Agreements* § 10.01, IBRD Doc. 75043 (Mar. 15, 1974) (in accordance with which the Agreement expressly prevails over any domestic law to the contrary); IBRD, *General Conditions for Loans* § 8.01 (Oct. 16, 2006); *see also* IBRD, *General Conditions Applicable to Development Credit Arrangements* § 10.01 (Dec. 2, 1997). These General Conditions, much like those of the UN, constitute integral components of subsequent agreements with recipient states and are implicitly binding on the parties. *See* The World Bank Grp. [WBG], *IDA-Chad Development Credit Agreement (Management of the Petroleum Economy Project)*, Credit No. 3316 CD (Mar. 20, 2000). The same is true of § 7.01 of the IBRD's Loan Regulations (1956), which expressly exclude the application of all or any municipal law in contracts between the Bank and a borrower.

162. *See* Norbert Horn, '*Non-Judicial Dispute Settlement in International Financial Transactions*', *in* NON-JUDICIAL DISPUTE SETTLEMENT IN INTERNATIONAL FINANCIAL TRANSACTIONS 9 (Norbert Horn & Joseph J. Norton eds., 2000) (Horn, however, notes that the incorporation of such clauses has declined almost to extinction in favor of arbitration and many states, particularly Latin American, have enacted constitutional amendments that preclude the state from being sued before the civil courts of any other state).

forum, unless it is shown that its contribution to the trust fund was made in a *jure imperii* capacity, rather than as *jus gestionis*. In every case, the object and purpose of the relevant transaction and the nature of the trust fund will inform such determinations, as this is set out in its founding instrument or through later institutional actions.[163] The existence of sovereign immunity, if persistent, would constitute a procedural bar to the jurisdiction of local courts, yet it is unlikely that a trustee with some degree of international legal personality would decide to settle its disputes with a contributing State before domestic courts. This route is only appropriate with respect to disputes that arise with private contracting entities.

VII. CAN AN INTERNATIONAL TRUST BE SET UP BY MEANS OF A PRIVATE CONTRACT?

The likelihood that an international trust fund between States and international organizations can be set up by a contract, rather than a treaty, exists neither in the world of fiction nor in the realm of legal impermissibility. We have already examined several trust instruments, the participants in which, whether as equal parties or otherwise, included both States and private actors. The latter's legal relationships with States and international organizations are not susceptible to regulation by means of treaties,[164] but are nonetheless amenable to an MoU and private contracts. These instruments retain their particular character even where their governing law is principally predicated on public international law.

163. Again, this is a complex issue that cannot be exhausted in the limited confines of this article. The general rule arising from the *Tin Council* cases is that member states to an international organization do not incur liability from conduct attributed to the organization. *See, e.g.*, J.H. Rayner (Mincing Lane) Ltd. v. Dep't of Trade & Indus. & Others and related appeals [1990] 2 AC (HL) 418; MacLaine Watson & Co. v. Dep't of Trade & Indus. [1988] 3 All ER 257 (Eng.); Maclaine Watson & Co. v. Int'l Tin Council, Judgement, 81 I.L.R. 670, 678 (Oct. 26, 1989). The privileges and immunities of a quasi-international entity, besides general international law, may be circumscribed by its HQ agreement with the host state. Although the Swiss government conferred international legal personality to the Global Fund through their respective HQ Agreement, Article 5 of said Agreement exempted from immunity of legal process, among other things, "counterclaims directly related to principal proceedings initiated by the Fund," arbitration awards between itself and Switzerland, as well as "[d]isputes arising out of contracts and disputes of a private law character to which the Global Fund is a party." Agreement between the Swiss Fed. Council & the Glob. Fund to Fight AIDS, Tuberculosis & Malaria, art. 5, GF/B7/7 (Dec. 13, 2004); *Id.* at art. 25(1).

164. Anglo-Iranian Oil Co. Case (U.K. v. Iran), Judgement, 1952 I.C.J. Rep. 93, 112 (July 22).

With respect to trust funds encompassing private parties, reference to an instrument other than a treaty is the only viable way to aptly regulate the legal relations of asymmetrical actors. For this reason, the Instrument of the Prototype Carbon Fund (PCF) cannot be considered a treaty between private and public actors, further necessitating the conclusion of bilateral agreements between the trustee and individual participants.[165] We have pointed to the theoretical possibility that the PCF Instrument could incorporate public and private relationships in a single document.[166] Throughout this paper there are numerous examples of trust funds encompassing a variety of actors in different legal capacities, all of which regulate a myriad of contractual relationships. None of these trust funds, however, are predicated on a private contract.

The emerging international law of trust funds places no requirement on the legal nature of the instrument setting up the trust fund. Generally, however, a treaty would organize those funds set up between States and/or between States and international organizations. States and international organizations are not precluded from entering into private agreements among themselves where they determine to regulate their relationships only on the basis of private law. States typically prefer the treaty option because it deprives the courts of other nations from examining their affairs and, in many cases, private law is not capable of regulating matters of sovereignty, such as maritime delimitation, cession of territory, self-determination, space exploration, and others.[167]

As a result, donors that prefer the contractual option do not need to be concerned with being sued in a national court because any suits will be directed against the trustee or the person of the trust fund itself.[168]

165. The PCF Instrument gives rise to a membership based on legal equality that comprises both states and private corporations. These membership types are reflected in the instruments of participation, which, however, are different in legal nature depending on whether the entity in question is a state or a non-state actor. Whereas in the former case, the agreement is a treaty, it is a contract of a private nature. This suggests that the PCF Instrument cannot constitute a treaty for some participants while representing a private agreement in respect of other participants. The Instrument Establishing the Prototype Carbon Fund was amended by IBRD Res 2000-1 (15 May 2000), on "Changing the Terms of a Second Closing and on Certain Other Amendments to the Instrument Establishing the PCF," and subsequently by IBRD Res 2001-3 (Mar. 22, 2001) on "Changing the Composition of the Participants' Committee and on Certain Other Amendments to the Instrument Establishing the PCF," and finally by IBRD Res 2005-5 and PCF Participants Meeting Resolution adopted on 10 Nov. 2005, as subsequently adopted by the IBRD Board of Executive Directors on 22 Dec. 2005.

166. *Id.*

167. With the advent of transnational law, which does not exclude state capitalism, states are increasingly turning to private contracts under governing laws of convenience. *See* Bantekas, *supra* note 25.

168. Bantekas, *supra* note 142, at 271.

Apart from trusts adopted to deal with the fiscal stabilization of small island states, where the employment of treaties provides a degree of security between the parties, trusts set up to address all other matters do not need require the conclusion of a treaty. The State parties to a private agreement of this nature would only be liable to the trustee as far as the delivery of their contribution is concerned, and in respect of their decision-making authority, if any, in the context of the trust fund's organs.

Given the private nature of the contract, the parties may have subjected the functioning of these internal operations to the corporate governance or private foundation laws (referring to governance) of a particular country. This option is not generally advisable, given its potential for extensive intra-party litigation and the possibility of third parties trying to intervene on the basis of domestic law, particularly because all such matters could far more easily be subjected to the trustee's internal procedures. Overall, concluding a contract would be simpler because it would require only ministerial consent, not parliamentary approval.

The parties may adopt international law as the governing law of the contract and exclude local courts during the settlement of any ensuing dispute in favor of arbitral resolution. This would, in effect, be a mixed[169] agreement, whereby the arbitrator may apply the law of the country of signature or that of the seat.[170] The tribunal may also designate another law, when the relevant rules of international law are deemed insufficient to provide a concrete solution. Certainly, the arbitrator will make use of the *lex arbitri* to regulate the conduct of proceedings and to seek injunctions and other measures from authorities.

Following this discussion, we have only determined the parties' intra-relationships in the eventuality of forming a contract. We have not fully considered the implications regarding the trust fund's recognition as

169. An example of a mixed agreement that turned sour concerned the choice of law in the Libyan oil concessions to western oil companies. This was to be governed and interpreted in accordance with "the principles of law of Libya common to the principles of international law..." Texaco Overseas Petroleum Co. v. Libya, I.L.R. 389 (1979). *See* Christopher Greenwood, *State Contracts in International Law: The Libyan Oil Arbitrations*, 53 BRIT. Y.B. INT'L L. 27 (1983).

170. The parties may wish to delocalize the arbitration altogether by avoiding its subjection to any state's law. In this sense, the *lex arbitri* would have a minimal role. It would be unwise for the parties to believe that the international law of trust funds (which may be assimilated to a *lex mercatoria*) can supply the tribunal with the appropriate *lex arbitri*. *See* GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 36-37 (Oxford Univ. Press 2004). Delocalization is best explained by reference to contract theory. *Id.* at 39ff.

an entity subject to the international law of trust funds. It seems logical to assume that the legal nature of the agreement plays no role in the recognition of the trust under international law so long as the parties, at least one of which is a State and the trustee endowed with international legal personality, agree that international law governs the trust. In this case, the trust is detached and independent from the parties' other private law relationships until the conclusion of the contract.

This result is further fortified by the clause in the contract providing for a trustee such as the World Bank, or another international financial institution or international organization, such as the United Nations. From the moment of conclusion, the trust's governing law, in respect of both its internal and international processes, is subsequently supplemented by the trustee's institutional rules, which itself is subject to international law by virtue of the trustee's founding treaty or implied powers. The trust entity is not wholly independent from the trustee, except for the trustee's limitation of liability as usually enshrined in the trust's instrument, because an institutional act of the trustee practically triggers its birth (e.g. an IBRD Executive Board resolution). As a result, the trust entity is, for all legal purposes, subsumed within the international legal framework of the trustee unless the agreement between the parties' states otherwise.

VIII. CONCLUSION

The vast labyrinth of agreements utilized by donors and trustees is evidence that existing domestic and international treaty and contractual legal regimes are inadequate for the relevant actors. It would be fair to say that these contractual relations have migrated into the flexible sphere of transnational law.[171] There, we find a fusion of both domestic and international law, adaptable to the commercial needs of the parties. Intergovernmental funds are no longer agents of states, but entities that pursue various purposes, both public and private, and whose managerial and other roles make them financially accountable to their direct stakeholders.[172] Moreover, it is generally agreed that investment or aid should lead to development, and not solely to prosperous investors or

171. *See* T.C. HALLIDAY & G. SHAFFER, TRANSNATIONAL LEGAL ORDERS (Cambridge Univ. Press 2015); A.C. Cutler, *The Judicialization of Private Transnational Power & Authority*, 25 IND. J. GLOBAL LEGAL STUD. 61 (2018).

172. *See* Ilias Bantekas, *Effective Management of International Aid Through Intergovernmental Trust Funds*, 18 LOY. CHI. INT'L L. REV. (2021).

financial institutions.[173] In fact, trusts must invest their assets as a means of replenishing them, but the literature is silent on the rights and obligations of trust funds as investors.[174]

This article has made a first attempt to describe how inter-governmental trusts transact with their direct stakeholders. As transnational actors, trustees and contributors have exhibited a tendency to seek contractual forms that are flexible, liability-averse, extra-constitutional, and outside the narrow confines of international or domestic laws.[175] The starting point for such a tendency is the legal nature of donor pledges, which are perceived as non-binding unless donors expressly consent for such pledge to take the form of a validly made offer, acceptance, or the equivalent of deed-based promise. In such a context, the function and aims of trusts would be in peril because pledges would not translate into assets fulfilling the aims agreed with the trustee. Hence, the use of soft law instruments and pledge diplomacy ensures that donors feel that no liability can arise from their pledge, and that what they agree to contribute is, in fact, consistent with what they can afford. This pledge diplomacy and the non-binding instruments employed in the process have helped achieve this outcome. Until the early 2000s, donor States often defaulted on their pledges. Current practice suggests that States are cautious with the amounts pledged, and as a result donor conferences are usually unable to meet their targets.[176] Although there is no empirical evidence, this author strongly believes that trust pledging diplomacy has enhanced the SDGs' finance side of things.

This paper has shown that there are many ways to attract assets and disburse them other than traditional inter-state agreements. Moreover, it is evident that transnational actors unshackled from the constraints of

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173. Ilias Bantekas, *The Human Rights & Development Dimension of Foreign Investment Laws: From Investment Laws with Human Rights to Development-Oriented Investment Laws*, 31 FLA. J. INT'L L. 339 (2020).

174. At best, this process is referred to as state capitalism, but without the level of investment law analysis as that offered for private investors. *See* J. KURLANTZIK, STATE CAPITALISM: HOW THE RETURN OF STATISM IS TRANSFORMING THE WORLD (Oxford Univ. Press 2016); A. Cuervo-Cazurra et al., *Governments as Owners: State Owned Multinational Companies*, 45 J. INT'L BUS. STUD. 919 (2014).

175. *See* R. GOODE ET AL., TRANSNATIONAL COMMERCIAL LAW 1.04 (Oxford Univ. Press 2d ed. 2015). There is an abundance of soft and hard law rules that facilitate this process, including the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, and the Hague Principles on Choice of Law in International Commercial Contracts.

176. *Donor Pledges Fall Short of Target at Brussel's II Syria Conference*, EUR. COUNCIL ON REFUGEES & EXILES (Apr. 27, 2018), *available at* https://ecre.org/donor-pledges-fall-short-of-target-at-brussels-ii-syria-conference/ (last visited Apr. 6, 2021).

their usual governing laws—i.e., constitutions, international law etc.—are entrepreneurial and can shape complex relationships through relatively simple agreements. However, it is important that both donors and trustees are accountable to the nominal owners, namely the citizens of member States. Many trustees have shown a sharp antipathy to human rights despite being funded by taxpayers' money expressly in order to alleviate global poverty, such as the World Bank and the IMF.[177] Therefore, it is crucial that human rights-based processes ground all relevant transactions, be culturally sensitive,[178] and that actions are not undertaken in a vacuum devoid of them.[179]

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177. *See* G. SARFATY, VALUES IN TRANSLATION: HUMAN RIGHTS & THE CULTURE OF THE WORLD BANK (Stanford Univ. Press, 2012).

178. *See* Eleni Polymenopoulou, *Localizing Intellectual Property & UNESCO Claims*, 6 CANADIAN J. HUM. RTS. 87 (2017); Eleni Polymenopoulou, *Cultural Rights in the Case Law of the International Court of Justice*, 27 LEIDEN J. INT'L L. 447 (2014).

179. The human rights considerations should permeate development finance programs was raised by the OHCHR during the third international conference on financing for development and the negotiations of the Addis Ababa Action Agenda (AAAA), its outcome document. It was emphasized that the objective of financing development should be the equitable distribution of resources so that all persons have their most basic needs met and human rights are made a reality for all. *See* OHCHR, *Key Messages on Financing for Development and Human Rights*, U.N. HUM. RTS. (n.d.), *available at* https://www.ohchr.org/Documents/Issues/Development/KeyMessageHRFinancingDevelopment.pdf (last visited Apr. 6, 2021).

Choice of Forum in Passenger Claims Under the Montreal Convention 1999: A Two-Dimensional Solution to a Three-Dimensional Problem

David Cluxton*

I. INTRODUCTION

In the wake of an aviation accident—although rarely the immediate concern of the representatives of the victims—the issue of compensation will inevitably arise at an early stage. Law firms specializing in aviation litigation are quick to respond, some sending agents (referred to as "runners") to offer their services to victims and their families. Similarly, law firms representing potential defendants dispatch their own runners to settle potential claims. In speaking to lawyers from both the plaintiff and defense sides, one hears shocking anecdotes with accusations, made by both sides against one another, of all forms of skullduggery and unethical behavior in this post-accident free-for-all. Evidently, there is little love lost between them. The question of the extent to which these anecdotes have been exaggerated is not a question that this Article seeks to address, but it does demonstrate the emotive and morally charged backdrop against which the matter of aviation litigation unfolds.

It is always important to remember that these cases involve terrible events where lives have been lost in violent and often terrifying circumstances. There is loss and suffering on all sides, not only for the families and friends of those injured or killed, but also for the carrier involved, for which the accident will likely be the worst moment in its history, and in which it too has suffered tragic human losses. Conscious and respectful of this, the goal of this Article is to explore a particular aspect of the legal regime through which those suffering damages arising from passenger death or injury during international carriage by air seek compensation. That particular aspect is choice of forum. My interest in the issue of choice of forum in the litigation of international aviation passenger claims arose from a narrower research interest in the question

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of the availability of the doctrine of *forum non conveniens* (FNC) within the Warsaw Convention System (WCS)[1] and the Montreal Convention 1999 (MC99).[2] Both are international treaties aimed at governing the liability of the carrier for international carriage by air. WCS originated with the Warsaw Convention of 1929 and consists of various amending protocols, supplementary conventions, and agreements. MC99 is a modernization and consolidation of WCS, but it is a new convention that is neither supplemental to nor an amendment of WCS.[3]

However, there is a great deal of commonality between the two regimes. Many of MC99's provisions were taken, with little or no alteration, from WCS. Presently, there are 137 Contracting States to MC99, including the majority of States that are big-time players in the

1. The term Warsaw Convention System (WCS) refers to the general body of instruments built around the Warsaw Convention. The term refers to the following: Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter Warsaw Convention]; Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 Oct. 1929, Sept. 28, 1955, 478 U.N.T.S. 373 [hereinafter Hague Protocol]; Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, Sept. 18, 1961, 500 U.N.T.S. 31 [hereinafter Guadalajara Convention]; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 Oct. 1929, as Amended by the Protocol done at The Hague on 28 Sept. 1955, Mar. 8, 1971, 10 I.L.M. 613, ICAO Doc. 8932 [hereinafter Guatemala City Protocol or GCP]; Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 Oct. 1929, as Amended by the Protocol done at The Hague on 28 Sept. 1955, Sept. 25, 1975, 2097 U.N.T.S. 23 [hereinafter MAP1]; Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on Oct. 12, 1929, as Amended by the Protocol done at The Hague on 28 Sept. 1955, Sept. 25, 1975, 2097 U.N.T.S. 63 [hereinafter MAP2]; Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 Oct. 1929, as Amended by the Protocol done at The Hague on 28 Sept. 1955 and at Guatemala City on 8 Mar. 1971, Sept. 25, 1975, ICAO Doc. 9147 [hereinafter MAP3]; Additional Protocol No. 4 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 Oct. 1929 as amended by the Protocol done at The Hague on 28 Sept. 1955, Sept. 25, 1975, 2145 U.N.T.S. 31 [hereinafter MAP4]. WCS also includes several inter-carrier agreements, including the Montreal Agreement 1966 and the IATA inter-carrier agreements of 1992-1995. For the text of these and others, *see* INT'L AIR TRANSP. ASS'N, ESSENTIAL DOCUMENTS ON INTERNATIONAL AIR CARRIER LIABILITY (3d ed. 2012).

2. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, T.I.A.S. 13038, 2242 U.N.T.S. 309 [hereinafter MC99].

3. As recognized by the U.S. courts. *See* Schopenhauer v. Compagnie Nationale Air Fr., 255 F. Supp. 2d 81, 87 (E.D.N.Y. 2003).

carriage by air industry.[4] Thus, it is fair to say that MC99 currently governs most international carriage by air, but it must be remembered that WCS continues to apply in an ever-decreasing number of cases.[5]

Where applicable, WCS and MC99 lay down the conditions upon which the carrier is liable for damages arising from certain events during international carriage by air. These "conditions" cover matters such as monetary limitations of liability, available defenses, limitation periods for bringing a claim, and so on. Both WCS and MC99 also have jurisdictional regimes that specify the places to whose courts a claim for damages can be brought. Under WCS, there are four specified jurisdictions;[6] MC99 added a fifth.[7] Although it is possible that a plaintiff may have a choice of four or five forums, in most cases there are overlaps that will mean a plaintiff will only have a choice between two or three forums, and sometimes only one.[8] In addition, under both jurisdictional

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4. Having entered into force on November 4, 2003, MC99 currently has 137 Contracting Parties. *List of Parties*, INT'L CIV. AVIATION ORG. (n.d.), *available at* https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf (last visited Sept. 15, 2021).

5. *See, e.g.*, Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., Mar. 4, 2015, Bull. Civ. I, No. 48 (Fr.) (*also published as* Cass Civ (1ère) Arrêt n 327 du 4 mars 2015, Airbus c. Armavia, n. 13-17392, [2015] R.F.D.A.S. 92) (Fr.). This case involved the crash of an aircraft on a flight from Yerevan, Armenia, to Sochi, Russia. Although the crash occurred in 2006, the resulting litigation was not governed by MC99. This was because Armenia was not then party to MC99, but it was to the Warsaw Convention, so it was the latter that governed. Armenia has since ratified MC99, it came into effect for Armenia on June 15, 2010.

6. Warsaw Convention, *supra* note 1, at art. 28(1) ("An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination."). These four jurisdictions are repeated in MC99. *See* MC99, *supra* note 2, at art. 33(1) ("An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.").

7. MC99, *supra* note 2, at art. 33(2) ("In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.").

8. *See, e.g.*, Roberts v. Guyana Airways Corp., [1998] 77 O.T.C. 266 (Can. Ont. S.C.) (Guyana was the jurisdiction under all four bases).

regimes, there is a provision to the effect that the rules of procedure shall be governed by the law of the court seized on the case.[9]

Although this Article identifies the need to reform MC99's jurisdictional regime, the need identified is actually quite precise and limited. For the most part, the jurisdictional regime of MC99 functions extremely well. Certainly, some minor alterations might be made to bring greater clarity and certainty to the requirements necessary to invoke the third jurisdiction (i.e., jurisdiction at the place where the carrier has a place of business through which the contract has been made), specifically clarity as to what does and does not constitute a place of business. Likewise, the rather convoluted definition of the fifth jurisdiction is a target of complaint by some lawyers who regard it as inviting unnecessary litigation. Some might argue there is a question of whether the identification of a particular venue within a Contracting State under MC99's jurisdiction is affected by the Convention. These are, in my mind, minor issues (or, in some cases, non-issues). It is important to state that this Article is generally very supportive of MC99's jurisdictional regime. However, this Article believes a major issue with the jurisdictional regime of MC99 is the availability of FNC within that regime and what that means for choice of forum.

It is fair to say that there have been two major controversies regarding the jurisdictional regime of WCS and MC99. First was the criticism leveled at WCS—predominantly by the United States—that it did not guarantee the plaintiff a forum in their home state; the United States had fought for the inclusion of such a jurisdiction since at least 1970.[10] Eventually, with MC99, the so-called fifth jurisdiction found its place within the regime, putting that controversy to bed.

The other major controversy arose with respect to FNC. The question was whether FNC was applicable in WCS or MC99 cases. Could the plaintiff's choice of forum, from those available under the relevant instrument, be upset by a procedural rule, such as FNC, or was the plaintiff's choice to be regarded as inviolable? To put it another way, was the application of FNC consistent with the plaintiff's right—as granted under the Convention—to choose their forum?

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9. *See* Warsaw Convention, *supra* note 1, at art. 28(2); MC99, *supra* note 2, at art. 33(4). Article 28(2) provides (as does Article 33(4) of MC99), that: "Questions of procedure shall be governed by the law of the Court seized of the case."

10. *See* Gerald F. Fitzgerald, *The Revision of the Warsaw Convention* (1970), 27 CAN. Y.B. INT'L L. 284, 302 (2016). The possible amendment of the Warsaw Convention to make provision—in response to U.S. insistence—for a fifth jurisdiction was raised at the 17th Session of the ICAO Legal Committee in 1970, and a draft proposal agreed which was considered at the Diplomatic Conference held in Guatemala City in 1971.

Resolving the conundrum regarding the place of FNC within WCS and MC99 was the catalyst for my initial research into choice of forum. After all, FNC is ultimately a procedural device for resolving a conflict between the parties over the chosen forum where concurrent jurisdiction exists. In a previous article,[11] I presented the findings from my research, concluding that whilst FNC *is not available* under WCS, *it is available* under MC99. However, what had become clear early on was that the conundrum surrounding FNC was only a symptom of a larger problem centered around choice of forum. Taking FNC as a prism through which to examine choice of forum granted insight into the interests driving the plaintiff's initial choice, as well as those manifested in the defendant's opposition thereto. It was at the level of these interests' analysis that a bigger picture was revealed, one that takes us beyond WCS and MC99; finding an answer to the question of the availability of FNC did not solve the bigger problem. In a narrow sense, even though FNC is available, we were still left asking whether it *should* be. In a broader sense, once we perceive the bigger picture, we realize that any solution focused on MC99 is doomed to fail because, when it comes to choice of forum, MC99 is not a hermetically sealed system insulated and protected from outside influence—it is just one part of a larger aviation accident passenger compensation system. The discontent felt with respect to choice of the forum requires engaging with the bigger picture to find a solution.

This bigger picture consists of two interrelated aspects. The first concerns the availability of alternative remedies for passenger claims; that is, alternatives to a claim against the carrier. The second considers the influence of other stakeholders, specifically third parties to the passenger-carrier relationship. Let us examine each aspect a little more closely.

The typical plaintiff in an aviation accident is not limited to solely pursuing the carrier through MC99 or WCS; this is, in fact, just one option amongst many. Due to the nature of aviation accidents—which typically involve a multitude of contributing factors—the aviation plaintiff usually has several options from which to choose. Often there is a possibility of bringing a claim against several alternative defendants, typically aircraft or component manufacturers, or—as has become fashionable of late—an aircraft lessor. These actions are not based on a cause of action governed by MC99/WCS; they arise independently,

11. David Cluxton, *The West Caribbean Conundrum: The USA Versus France on the Availability of FNC Under MC99*, 85 J. AIR L. & COM. 3 (2020). In many respects, this present article is a continuation of my earlier article, so readers are encouraged to read this earlier article first.

usually under national tort law.[12] Whilst an MC99 action is a highly attractive option to a plaintiff (something American lawyers colloquially refer to as a "slam-dunk"), the reality is that there has been a proliferation in aviation litigation outside MC99. Why? The answer comes down to choice of forum.

The plaintiff's choice of the defendant is frequently driven by their choice of forum in which to litigate. This is because the forums available to a plaintiff depend on, and often differ between, each of the various potential defendants. For example, the plaintiff might only have the option of suing the carrier under MC99 in either Cyprus or Greece, whereas if the plaintiff decides to sue the manufacturer, the action could be taken to the United States.[13] Interests of forum selection often drive the decision of which defendant to sue. In simple terms, an action against the carrier under MC99 may not provide as advantageous a forum for the plaintiff as an action against the manufacturer or some other defendant.

It almost goes without saying that the United States is the forum of choice for litigating passenger claims. Many factors make trials in the United States desirable. The availability of contingency fees is a major advantage, without which the possibility of suing a rich corporate defendant would be beyond the means of many plaintiffs. Likewise, the absence of the loser pays principle, when it comes to legal costs, makes litigation in the United States less risky for the plaintiff. The broad

12. In the United States, it is common in aviation litigation to find claims brought against several defendants under a variety of theories of liability. Most commonly, liability is based on some theory of negligence, strict products liability, and/or negligent entrustment. *See In re* Air Crash Disaster over Makassar Strait, Sulawesi, No. 09-CV-3805, 2011 U.S. Dist. LEXIS 2647 (N.D. Ill. Jan. 11, 2011). Plaintiffs brought their actions in the United States on these three theories against the manufacturer of the aircraft (Boeing), the aircraft maintenance provider (World Star Aviation), the alleged lessors (Triton Aviation and Wells Fargo Bank) as well as the manufacturer of an avionics system (Honeywell International). The case was dismissed on the grounds of FNC in favor of the courts of Indonesia where the accident occurred. *See also* Fatkhiboyanovich v. Honeywell Int'l, Inc., No. 04-CV-4333, 2005 U.S. Dist. LEXIS 23414 (D.N.J. Oct. 5, 2005). There, the litigation arose from the mid-air collision of the aircraft of Bashkirian Airlines and DHL over Überlingen, Germany. Claims were brought in negligence and strict products liability against several defendants, including the manufacturers of the Traffic Collision Avoidance System (TCAS), Honeywell International, Thales Avionics, and L-3 Communications. Again, the complaint was dismissed on the grounds of FNC.

13. *See* Clerides v. Boeing Co., 534 F.3d 623 (7th Cir. 2008). The plaintiff sued the U.S. manufacturer of the aircraft in Illinois in relation to the death of a passenger in an air crash. The flight in question was operated by the Cypriot airline Helios Airways between Larnaca, Cyprus and Athens, Greece. As such, the likely forums available under MC99 against the carrier were either Cyprus or Greece, but not the United States. However, the manufacturer could be sued in the United States. A similar scenario would likely have been at issue under WCS in *Ahmed v. Boeing Co.*, 720 F.2d 224 (1st Cir. 1983).

general jurisdiction of U.S. courts is also attractive to plaintiffs' lawyers because it permits unified litigation against multiple defendants in a single forum. The robustness of the U.S. judicial process, with its liberal and far-reaching pre-trial discovery rules, is the envy of many foreign litigators and augments the United States' appeal as a forum. Additionally, a potential plaintiff can rely on the existence of (and competition between) highly qualified law firms with a wealth of experience in aviation litigation. These are among the most compelling factors that make passenger aviation accident litigation trials in the United States desirable, but at the crux of the matter, the decisive factor behind the choice of a U.S. forum is the quantum of damages.

The potential recovery in a U.S. forum is likely to be far greater than in the plaintiff's home forum because of the right to trial by jury and the broad heads of damages available.[14] Even when courts are likely to engage with choice of law rules that will lead to applying foreign law to determine damages, a jury award in the United States will nearly always be higher than if the foreign court were to make the determination. Provided a jury determines damages of a general nature, then there is a good likelihood that a jury will award an amount far in excess of the sum that a judge would have granted in the plaintiff's home forum.[15] For these reasons, the United States is spoken of as the El Dorado for injured plaintiffs,[16] that "promised land" where they can expect an award akin in value to winning their national lottery.[17]

The fact that a plaintiff will elect to forego a tailor-made remedy against a carrier under MC99 in favor of an alternative general remedy provokes searching questions about the efficacy of MC99 as a system for

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14. *See* WARREN FREEDMAN, PRODUCT LIABILITY ACTIONS BY FOREIGN PLAINTIFFS IN THE UNITED STATES 13 (1988) ("The amount of potential recovery in a US court is a special factor favoring the choice of US forums; the jury system and the recognition of numerous elements of damages produce awards for personal injury or death which are much higher than in any other national jurisdiction.").

15. *Id.* at 13 (Freedman noting, "[s]urvival and wrongful death statutes in virtually all [s]tates recognize elements of damages far beyond those recognized in many foreign jurisdictions; these elements include loss of future earnings, loss of society, loss of parental guidance, pain and suffering, and ever fear of impending death"). Some of these elements of damages are particularly prone to large awards by juries precisely because they are not readily quantifiable in objective terms.

16. *Id.* at 1 ("[t]he United States is indeed the mecca or El Dorado for injured plaintiffs because the American tort system is geared to full recognition of the rights of consumers.").

17. Michael W. Gordon, *Forum Non Conveniens Misconstrued: A Response to Henry Saint Dahl*, 38 U. MIAMI INTER-AM. L. REV. 141, 145 (2006) ("[I]t shouldn't be a mystery why foreign plaintiffs choose the United States as a forum; it is a combination of court systems in which their own nationals have reason not to have confidence combined with the perceived riches of a U.S. judgment akin in magnitude to their own national lotteries.").

compensating passengers. As will be shown, this reflects the very different legal landscape MC99 exists within, compared to what existed at the time of the Warsaw Convention's drafting. One has to ask if MC99, as successor to WCS, has failed to appreciate its place in the bigger picture of modern international aviation litigation. It is worth repeating that plaintiffs are opting for alternative remedies rather than pursuing the bespoke "slam-dunk" regime provided under MC99, and we should also remember that the reason they do so is choice of forum.

The existence of alternative remedies has also played a part in the emergence of the second aspect of the bigger picture: the involvement of third parties. The natural tendency is to look upon MC99 litigation as being only two-party in form, i.e., as plaintiff passenger versus defendant carrier. However, an analysis of the interests actually involved brings to light a complex web of devices by which third parties can affect the litigation. The truth is that disputes between the nominal parties to MC99 litigation are only the tip of the iceberg. Beneath the surface is the behemoth of third-party influence, linked to the carrier (qua nominal defendant) by numerous devices for risk allocation and loss spreading.

These devices for risk allocation take many forms, either arising by force of law or by contractual agreement. Whatever the source, through these devices third parties gain considerable interest in and over the litigation. The most direct manifestation of this is something so patently obvious that it is staggering that it is so infrequently commented upon: that is, the fact that in the majority of cases, the substantive and operative interests are those of the carrier's insurer. The truth is that it is not the defendant carrier who calls the shots, but its insurer. Through subrogation or contractual assignment, the insurer holds claims control in the vast majority of cases wherein carriers are being sued for passenger liability.

Furthermore, linked to the defendant carrier are various third-party defendants with whom the carrier may bear concurrent liability, and against whom the carrier's insurer has a subrogated claim to contribution or indemnity. The true picture is that the plaintiff is not simply faced with litigating against the carrier—a formidable foe in its own right—but they must also contend with other parties often possessing extraordinary resources and influence. The ugly truth is that the insurer, acting in the carrier's name, often cooperates with potential third-party defendants and/or their insurers (not infrequently the same insurer as the carrier) to secure a jurisdictional advantage that will translate to lesser net liability. The cheaper the award against the carrier, the cheaper the third-party's contribution or indemnity payment. In many cases, and well in advance of any litigation, the potential defendants will have already reached a

sharing agreement with respect to liability for a given accident, and will coordinate their efforts to secure the outcome that best serves their common interest.

This bigger picture reveals the fallacy of the two-party paradigm upon which MC99 (as successor to WCS) is established. Although the court docket presents a simple picture, the reality is that on account of these risk allocation and loss spreading devices the true litigation relationship does not conform to this two-party paradigm. While the courts are constrained to dealing with the parties appearing before them, the same constraint does not limit policymakers; and yet, these third-party interests have not been given the consideration they demand in the context of MC99. The result has been the myopic exclusion of vital factors that contribute to making up the bigger picture, of which MC99 comprises only one part. Consequently, MC99 is premised on a skewed appreciation of the interests actually involved, and has not kept pace with developments in aviation litigation.

This Article argues that MC99, as the successor to WCS, is predicated on an anachronistic understanding of itself as a discrete system grounded on the two-party paradigm of plaintiff passenger versus defendant carrier. It also argues that this does not correspond to the reality in which MC99 is merely a component of a bigger, interdependent aviation accident passenger compensation system. The interdependency between MC99 and this bigger system means that evaluating the fairness and efficacy of choice of forum under MC99 requires us to understand how this system is organized and how it operates. This evaluation is achieved by identifying the third-party stakeholders and by elucidating the nature of their relationships and interests. In so doing, a fuller appreciation of the wider issues can be achieved.

To outline this Article, Part II fundamentally provides background and context. However, it also seeks to establish a fundamental thesis, i.e., that the Warsaw Convention System is built upon the foundation of a two-party understanding of the legal relations it sought to regulate. It begins by looking at Europe's legal landscape in the 1920s and accounts for why this gave rise to the need for an international treaty to regulate the liability of the carrier for international carriage by air. It will identify the mischief that the Warsaw Convention sought to address and in so doing describe the basic features and define the purpose of the liability regime. The focus will then shift to demonstrating that the drafters of the Warsaw Convention were, at least in 1929, justified in adhering to a two-party paradigm as the basis for their regime. We will then jump forward ninety years and consider the Montreal Convention 1999, demonstrating how, as the successor to WCS, it remains tethered to the two-party paradigm;

at the same time, the key changes to the liability regime and their general purpose are noted.

Part III will reveal the bigger picture of international aviation litigation by illuminating the complex interplay of liability relations between plaintiff passengers, defendant carriers, and third parties. After providing some background and illustration, this section will describe the emergence of alternative litigation options for plaintiffs seeking compensation for passenger death or injury. It will then build upon this analysis by looking at the multi-party nature of aviation litigation and the impact of third-party (non-contractual) actions for contribution or indemnification. Finally, attention will shift to risk management devices and how they provide another avenue for third-party influence. This analysis will be done by first examining the contractual indemnities agreed between commercial stakeholders to international air transport, whereby they allocate risk amongst themselves; and second, by revealing the reality of aviation insurance, that allows for the spreading of risk, and on account of which the insurer assumes the controlling interest in aviation litigation on the defense side.

The fourth and final section of this Article applies the lessons learned, and conclusions reached, in the preceding parts. It will conclude that the regulation of choice of forum under MC99 is fundamentally unfair to the plaintiff passenger and that it frustrates the policy objectives of MC99. A reform proposal shall be put forward that will: (1) take account of the existence of alternative remedies and the influence of third parties; (2) change how choice of forum operates so that it is fair to all parties; and (3) promote the policy objectives of MC99 and the industry generally.

A quick note about scope is necessary. This Article concentrates on choice of forum within litigation about passenger liability. It is concerned only with the liability for damage arising from passenger death or injury; liability for damage concerning passenger baggage and delay is not herein considered, neither is liability for cargo. Furthermore, on a point of terminology, reference to the two-party paradigm of plaintiff passenger versus defendant carrier is a term of convenience. It simplifies what is in reality a more complex issue. The quintessential passenger aviation litigation action is not taken by a passenger at all, but by a relative of theirs, e.g., a spouse. In other words, the passenger death case is the archetypal case. Strictly speaking, these plaintiffs are third parties to the contract of carriage. Furthermore, in some death cases, e.g., wrongful death, the plaintiff is exercising a cause of action distinct from that of decedent passenger's contractual cause of action. Yet, this does not alter the fact that the litigation in question is essentially two-party in nature,

insofar as liability is premised on a single core legal relationship between the carrier and passenger. This Article is interested in revealing the consequences of third parties entering on the defense side into the core legal relationship upon which the principal litigation is grounded.

II. WCS, MC99, AND THE TWO-PARTY PARADIGM

It is axiomatic that international air transport, by its nature, exposes carriers and their customers (be they passengers or shippers) to the diversity of laws across multiple jurisdictions. Within each jurisdiction the law may differ, to a greater or lesser extent, not only from the national law of the passenger, shipper, or carrier, but from each of the individual States otherwise connected to the flight in question. As an international industry, commercial air transport is thus in a position to be hindered by potential exposure to a multitude of divergent legal regimes. Indeed, the fundamental question of the existence of an enforceable contract of carriage might be resolved very differently in the forum State than the State of the carrier or passenger. Likewise, the enforceability of contractual clauses exempting or limiting the carrier's liability might be tolerated in the carrier's State, but fall afoul of public policy considerations in the forum where the case is heard. Some systems may perceive the passenger's claim as delictual rather than contractual, bringing with it a whole host of new problems and considerations that the parties most likely would not have countenanced when forming the contract of carriage. Add to the mix issues of jurisdiction, choice of law, statutes of limitation, and so on, and one can see the potential for the conflict and confusion of laws.

From early on, aviation was awake to the issues of non-uniformity in regulation. In 1910[18] and again in 1919,[19] the international community convened in Paris to agree to uniform principles and rules for the regulation of international civil aviation. However, these initiatives only sought to address issues of public air law. Between 1922 and 1924, at least three international organizations passed resolutions calling for the

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18. The 1910 International Conference on Aerial Navigation did not result in a signed treaty, but the draft produced was instrumental in the 1919 Conference. For a record of the Conference, *see* CONFÉRENCE INTERNATIONALE DE NAVIGATION AÉRIENNE; PARIS (18 MAI - 29 JUIN, 1910): PROCÈS-VERBAUX DES SÉANCES ET ANNEXES [INTERNATIONAL CONFERENCE ON AERIAL NAVIGATION; PARIS (MAY 19 - JUNE 29, 1910): MINUTES OF MEETINGS & ANNEXES] (1910).

19. Convention relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173.

formulation of a uniform code for regulating private air law.[20] The consensus was clear: uniformity of certain rules relating to international carriage by air, specifically those governing the legal relationship between carrier and shipper/passenger, were a necessity. The Warsaw Convention of 1929 was the solution adopted by the international community.[21]

A. Background

The Warsaw Convention emerged from a background consisting of national law efforts to regulate the liability of the air carrier. As a new form of carriage, there were considerable doubts in many jurisdictions about how, or even if, carriage by air fit into the existing codes or legal regimes governing carriage under *le droit commun*. Critically, the extent to which national regimes could restrict air carriers employing exemption clauses was particularly troublesome. For example, French civil law generally permitted exemption clauses in contractual liability, but not to the extent of exempting *dol* or *faute lourde* (i.e., willful misconduct or gross negligence).[22] Article 103 (now Article L 133-1) of the French Commercial Code (as amended by the so-called *Loi Rabier* of 1905) prohibited a carrier from excluding itself entirely from liability, but allowed reasonable limitation of liability.[23] However, the *Loi Rabier* only applied to goods; thus, nothing prevented the carrier from using exemption clauses to evade any liability short of *dol* or *faute lourde* in the carriage of passengers. Indeed, prior to the Warsaw Convention coming into force, the standard conditions of carriage used by the

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20. Stephen Latchford, *The Growth of Private International Air Law*, 13 GEO. WASH. L. REV. 276, 276 (1944). *See also* John J. Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. AIR L. 27, 27 (1932); Alexander N. Sack, *Unification of Private Law Rules on Air Transportation and the Warsaw Convention*, 4 AIR L. REV. 345, 346 (1933).

21. *See* Robert P. Boyle, *The Warsaw Convention—Past, Present, and Future*, *in* ESSAYS IN AIR LAW 1, 2 (Arnold Kean ed., 1982) (("The answer provided by Warsaw was to establish an integrated system of international air law to assure that the same law would be applied no matter where the liability arose, and no matter where action to assert a claim might be brought (always assuming, of course, that by its terms the Warsaw Convention applied to the transportation.")).

22. French courts are hostile to enforcing exemption clauses, especially where they attempt to exempt the party from delictual liability based on fault and will almost certainly not enforce exemptions for *dol* or *faute lourde*. *See* Simon Whittaker, *The Law of Obligations*, *in* PRINCIPLES OF FRENCH LAW 333, 356 (John Bell et al. eds., 2008).

23. DANIEL GOEDHUIS, NATIONAL AIR LEGISLATIONS AND THE WARSAW CONVENTION 53 (1937).

International Air Traffic Association[24] sought to exclude the carrier from all liability in the carriage of goods and passengers.[25]

Against this backdrop of uncertainty, the French legislature introduced the Air Navigation Law of 1924.[26] The Act confirmed the contractual basis for air carrier's liability and recognized, while at the same time limiting, the use of exemption clauses.[27] A limitation of liability was imposed on goods, but liability for passenger death or injury was unlimited.

The French Air Navigation Law of 1924 is of great relevance given the temporal coincidence with the initiation by the French government of the process that would ultimately lead to the conclusion of the Warsaw Convention in 1929. Although fundamentally based on a regime of strict liability, by authorizing the use of exemption clauses and only limiting their use to cases of the personal fault of the carrier, the French national regime was in effect more closely aligned to a fault-based model of liability. According to contemporary commentators, similar laws to the French Act were introduced in Chile (1925), and Yugoslavia (1928),[28] while the regime in Italy (1923) was described by one commentator as being practically the same.[29] Other civilian legal systems did not follow

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24. To be distinguished from the post-World War II I.A.T.A., i.e., the International Air *Transport* Association. INT'L AIR TRANSPORT ASS'N (n.d.), *available at* http://www.iata.org (last visited Apr. 5, 2021).

25. *See* GOEDHUIS, *supra* note 23, at 85.

26. *Loi du 31 Mai 1924 Relative à la Navigation Aérienne* [Law of May 31, 1924, Relating to Aerial Navigation], J. OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 2, 1923, p. 1 (Fr.). An English translation of the relevant articles (i.e., arts. 41, 42, 43, and 48) can be found in GOEDHUIS, *supra* note 23, at 52. For some background to the Act, *see* Georges Ripert, *Responsabilité du Transporteur Aérien*, 7 REVUE JURIDIQUE INTERNATIONALE DE LA LOCOMOTION AÉRIENNE [R.J.I.L.A.] 353 (1923); Louis Josserand, *La Loi du 31 Mai 1924 Relative a la Navigation Aérienne et le Droit Commun de la Responsabilité*, 10 REVUE JURIDIQUE INTERNATIONALE DE LA LOCOMOTION AÉRIENNE [R.J.I.L.A.] 137 (1926). *See also* Lincoln H. Cha, *The Air Carrier's Liability to Passengers in International Law*, 7 AIR L. REV. 25, 201-06 (1936).

27. For goods, Article 41 of the Act affirmed the applicability of the *Loi Rabier* defense of inherent vice and provided a limitation of liability in the absence of a declaration of value. Under Article 42 (for goods) and Article 48 (for passengers), exemption clauses were explicitly permitted against risks of the air or for piloting errors, both of which applied on the conditional basis that the aircraft was airworthy and the crew licensed on departure. Article 43 provided that exemption clauses were prohibited in two cases. First, any clause by which the carrier sought to exempt itself from liability for its own act or that of its employees in the commercial handling of goods. Second, any clause that sought to exempt the carrier from liability for its own personal faults.

28. Sack, *supra* note 20, at 360 n.65.

29. GOEDHUIS, *supra* note 23, at 78.

the fault-based model but adhered to a risk-based model, e.g., Germany (1922)[30] and Switzerland (1920).[31]

On the international plane, there were only a small number of international legal regimes governing carriage, e.g., the Hague Rules 1924 governing carriage of goods by sea,[32] and the CIM 1924 and the CIV 1924 for the carriage of goods and passengers by rail,[33] but these clearly did not include carriage by air.

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30. The text of the German law of 1922 is reproduced (in French) in *Loi Réglant la Navigation Aérienne*, 7 REVUE JURIDIQUE INTERNATIONALE DE LA LOCOMOTION AÉRIENNE [R.J.I.L.A.] 59 (1923) (Fr.). The only defense expressly provided in the Act was for the fault of the victim (art. 20). Article 23 of the German law provided monetary limitations on liability for individual death or personal injury (1 million marks or an annual annuity of 50,000 marks) for multiple death or injury in the same accident (2.5 million marks or an annual annuity of 250,000 marks) and for loss or damage to goods (250,000 marks). The use of exemption clauses was not prohibited by the Act and remained governed by general principles of German law that permits such clauses provided they are not *contra bonos mores* or seek to exempt liability for willful misconduct. For greater detail on the German law, *see id.* at 65-73.

31. Arrêté du Conseil Fédéral Concernant la Réglementation de la Circulation Aérienne en Suisse du 27 Janvier 1920, 6 REVUE JURIDIQUE INTERNATIONALE DE LA LOCOMOTION AÉRIENNE [R.J.I.L.A.] 141 (1922) (Fr.). The Swiss law of 1920 provided for strict liability with the only possible exoneration provided by the fault of the victim. No monetary limitation of liability was provided under the law. No express prohibition was imposed on exemption clauses; thus, general principles of Swiss law presumably applied. Goedhuis opined that exemption clauses were probably not valid in Switzerland at the time. GOEDHUIS, *supra* note 23, at 95-96.

32. International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 155 [hereinafter Hague Rules 1924]. The Hague Rules 1924 had arisen from the excessive use of exemption clauses by the ship-owning sector of the maritime industry to exclude or limit itself from liability, even in cases of negligence. Various States had attempted to unilaterally address this abuse by ship-owners of their dominant position in the industry through specific statutes, perhaps most famously the Harter Act of 1893 in the United States. The resulting patchwork of statutes produced an intolerable degree of uncertainty for the industry. *See* A.N. Yiannopolous, *Unification of Private Maritime Law by International Conventions*, 30 L. & CONTEMP. PROBS. 370, 386 (1965). For a history of the Hague Rules, *see generally* H.M. Cleminson, *International Unification of Maritime Law*, 23 J. COMP. LEGIS. & INT'L L. 163 (1941); Jose Angelo Estrella Faria, *Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules*, 44 TEX. INT'L L.J. 277 (2009). The liability regime established by the Hague Rules is based on fault liability with the burden of proof resting on the carrier to demonstrate the absence of fault (art. IV(1)) and with a limitation of liability of a maximum of £100 per package or unit unless a special declaration as to value has been agreed (art. IV(5)). The carrier was prohibited from employing exemption clauses inconsistent with its obligations under the Hague Rules; such clauses would be null and void (art. III(8)). For commentary, *see* FRANCESCO BERLINGIERI, 1 INTERNATIONAL MARITIME CONVENTIONS ch. 4.4 (2014).

33. As early as 1874, international conferences were convened by the Swiss government in an attempt to unify the law with respect to the commercial transport of goods by rail in Europe. *See* A.C. Schröder, *The Berne Railway Transport Convention 1890*, 22 INT'L L. ASS'N REP. CONF. 220, 220 (1905). These efforts ultimately resulted in the Berne Convention

This background to the Warsaw Convention tells us that there was substantial uncertainty about the place of carriage by air within the existing legal orders governing carriage. At the same time, the industry demonstrated its intention to employ exemption clauses to the fullest extent possible while States were eager to avoid the kinds of abuses that had emerged in the cases of maritime and railway carriage. However, individual State action of introducing specific national statutory regimes fostered non-uniformity that fell heavily on the international air carrier industry at a time when it was seeking to establish itself.

The purpose of the Warsaw Convention was to establish a uniform legal regime consisting of certain rules relating to travel documentation and the liability of the air carrier sufficiently certain and predictable to both assure passengers/consignors of their rights, and to empower the carrier to protect itself through the foreknowledge of the extent of its liability.[34] The regime ultimately established sought to achieve this principle objective whilst pursuing a complementary goal of promoting public interest in the development of international air transport while striking an equitable balance between various interests. The purpose of the Warsaw Convention was twofold, consisting of a cardinal purpose and a supplementary purpose:

Avoidance of conflict of laws through unification of certain rules relating to carriage documentation and air carrier liability.

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of 1890, i.e., Convention Internationale Concernant le Transport des Marchandises par Chemins de Fer, [International Convention concerning the carriage of goods by railway] Oct. 14, 1890 [hereinafter Berne Convention 1890]. The Berne Convention 1890 was subject to a number of revisions, the first substantial revision being made in 1924, i.e., Convention Concernant le Transport des Marchandises par Chemins de fer [Convention Concerning the Carriage of Goods by Rail], Oct. 12, 1924, 77 L.N.T.S. 367 [hereinafter CIM 1924]. The general principle was that the railway was presumptively liable for loss or damage to goods arising during international carriage by rail unless it could exonerate itself under one of the defenses provided. It was thus a regime of strict liability with limited exceptions (arts. 27-28). A limitation of liability applied under the CIM 1924, the railway's liability for loss or damage to goods was to be limited to a maximum of fifty francs per kilogram of gross weight (art. 29). The carrier was prohibited from exempting itself from liability arising from its willful misconduct or recklessness (art. 36). However, it was possible for a railway to offer to the public a special tariff whereby an alternative limitation of liability could be offered in exchange for a lower price for carriage (art. 34). Whilst the CIV 1924, i.e., Convention Concernant le Transport des Voyageurs et des Bagages par Chemins de fer [Convention Concerning the Carriage of Passengers and Baggage by Rail], Oct. 23, 1924, 78 L.N.T.S. 17 [hereinafter CIV 1924], sought to extend the CIM 1924 regime to the carriage of passengers and baggage by rail, it left the determination of liability for passenger death or injury to le droit commun, providing only a choice of law rule. *See id.* at art. 28(1).

34. For a fuller account of the purpose of the Warsaw Convention, *see* Cluxton, *supra* note 11, at Part II.A.

Furtherance of the public interest in the development of air transport whilst striking an equitable balance of interests between carriers, users, and plaintiffs.

B. The Warsaw Regime

Although it concluded in 1929, the history of the Warsaw Convention began in 1923 when France issued a diplomatic letter expressing its wish to convene an international conference on the liability of the air carrier.[35] Originally intended to take place in 1923, it was not until October of 1925 that the first International Conference on Private Aeronautical Law actually took place. At this conference, a French draft (*Avant Projet*) was considered; this draft was largely based on France's Air Law Navigation Law of 1924. The conference produced a revised draft, and it would be the job of the newly established *Comité International Technique d'Experts Juridiques Aériens* (C.I.T.E.J.A) to study the draft and the general question of the liability of the carrier. This was the task of the Second Commission of C.I.T.E.J.A.

The Second Commission was composed of delegates from several States, nearly all hailing from civil law systems, but one member of the Commission was from the United Kingdom, i.e., a with a common law system.[36] Over the following years, it conducted its work and submitted a revised draft (C.I.T.E.J.A. Final Draft) to the Second International Conference on Private Aeronautical Law, held in Warsaw in 1929, from which the Warsaw Convention resulted. As shall prove significant later in this Article, it must now be noted that the United States was not a member of C.I.T.E.J.A. until 1932,[37] and it did not officially participate in the First or Second Conference on Private Aeronautical Law; it only sent observers.[38]

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35. *See* GOEDHUIS, *supra* note 23, at 4; *see also* Ide, *supra* note 20, at 27-28.

36. Cha, *supra* note 26, at 32. Cha lists the membership of the Second Commission as follows: Richter (Germany); de Vos (Belg.); Sir Alfred Dennis (U.K.); Morales (Dom. Rep.); de las Penas (Spain); Ripert (Fr.); Figeroa (Guat.); Cogliolo (It.); Gorski (Pol.); Ibarra (Uru.); Akamine (Japan, although Cha lists his position as "reserved").

37. It would not be until 1932 that the United States would become a member of C.I.T.E.J.A. Even then, the participation of its nominated experts was limited to written correspondence due to the absence of adequate funding. It was only in 1935 that the funding was finally in place to permit active participation by U.S. experts in the work of C.I.T.E.J.A. A history of the United States' involvement in C.I.T.E.J.A. may be found in Ide, *supra* note 20, at 40-44.

38. Stephen Latchford, *The Warsaw Convention and the CITEJA*, 6 J. AIR L. 79, 87 (1935). Latchford argued that the decision of the United States not to actively participate was because there was not yet any federal legislation in the field of regulation of air navigation

Our concern is not with the substantive provisions of the Warsaw Convention, as accounts of those can be found elsewhere.[39] Nevertheless, a short summary of the Warsaw Convention's liability regime may prove useful and is provided below. Our concern is with the more general issue of how choice of forum operates in the litigation of international aviation passenger claims. However, it is critical to say a word about the general scope of the Convention because it is the first evidence that the drafters of the Warsaw Convention adopted a two-party conception for their regime, and it provides some explanation as to why this was the case.

Article 1(1) lays down the general scope of the Warsaw Convention, which remains fundamentally the same for MC99. It provides that the application of the Convention is conditional upon the carriage in question being an international carriage of persons, baggage, or goods, and it must be performed by aircraft for hire (or gratuitously by an air transport undertaking).[40] Article 1(2) provides a definition of *international carriage* that makes the contract of carriage its cornerstone.[41] Even the most superficial reading of the Warsaw Convention will impress upon the reader the centrality of the contract of carriage.[42] The text and drafting

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and that no executive body had been given authority to deal with the area. It seemed, therefore, that the United States did not think it worthwhile because it could not contribute much in the way of experience. *See* Latchford, *supra* note 20, at 282.

39. For a relatively recent study of the Warsaw Convention, *see* LAWRENCE B. GOLDHIRSCH, THE WARSAW CONVENTION ANNOTATED - A LEGAL HANDBOOK (2d ed. 2000). For some older studies, *see* GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT (1st ed. 1977); RENÉ H. MANKIEWICZ, THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER (1st ed. 1981).

40. Warsaw Convention, *supra* note 1, at art. 1(1) ("This Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.").

41. *Id.* at art. 1(2) ("For the purposes of this Convention, the expression 'international carriage' means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of this Convention.").

42. It is explicitly mentioned on multiple occasions and plays a critical function in various provisions. The contract of carriage is referred to in Articles 1(2), 1(1), 3(2), 4(4), 5(2), 11(1), 12(1), 13(3), 14, 18(3), 23, 28(1), 30(1), 32, and 33. This centrality was described by the Fifth Circuit in *Block v. Compagnie Nationale Air Fr.*, 386 F.2d 323, 333-34 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968) ("The contract plays a role fundamental to the objectives of the Warsaw Conference. The obligations arising from the contract between the

history of the Warsaw Convention make it difficult to arrive at any conclusion other than that the drafters had a contractual understanding of the regime they created. This was made abundantly clear in the report on the C.I.T.E.J.A. Final Draft, which formed the basis for consideration at Warsaw, wherein Rapporteur de Vos stated:

[T]he text applies single-mindedly to the contract of carriage - first in its outward manifestations of form and then in the legal ties which are established between the carrier and the persons carried or who ship. It does not regulate any other question which might be raised by engaging in the carriage.[43]

The legal relationship upon which the Convention is predicated, i.e., its *vinculum juris*, arises from carriage being performed pursuant to an agreement between the parties, i.e., the parties to the contract of carriage.[44] The foundation of the Convention's applicability is thus quite simply defined: there must be carriage performed pursuant to a commercial undertaking whereby the carrier commits to provide international carriage by air to the passenger or shipper. This was expressed very clearly by the U.S. Court of Appeals for the Fifth Circuit in *Block v. Compagnie Nationale Air France*, which opinion stated that "[t]he Warsaw Convention, governs the relations between the party who assumes the liability for the transportation [(the carrier)] and the one who is transported [(the passenger)] or has something transported [(the shipper)]."[45] This is the core legal relationship upon which the Convention is built and without which the Convention does not apply. The drafters understood this relationship as fundamentally contractual. Indeed, for many of them, it was entirely consistent with the contractual principles of their domestic legal systems. However, it is vital to note that the Convention's conception of the contract of carriage is not

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carrier and the passenger carry out the Conference goal that the rules of limited liability be known to both parties.").

43. G. Nathan Calkins Jr., *The Cause of Action under the Warsaw Convention (Part One)*, 26 J. AIR L. & COM. 217, 219 (1959). The original French can be located in DEUXIÈME CONFÉRENCE INTERNATIONALE DE DROIT PRIVÉ AÉRIEN [SECOND INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW] 160 (1930).

44. *See* Warsaw Convention, *supra* note 1, at arts. 1(1), 1(2), 31(2), and 32. The Warsaw Convention makes reference to *the parties*, on a number of occasions, always as referring to the parties to the agreement pursuant to which international carriage is performed.

45. *Block*, 386 F.2d at 343. The court also stated: "The applicability of the Convention undeniably is premised upon a contract but on a contract of a particular kind. It is based on a contract of carriage that arises from the relationship between a 'carrier' and the passengers. This contractual relationship requires only that the carrier consent to undertake the international transportation of the passenger from one designated spot to another, and that the passenger in turn consent to the undertaking." *Id.* at 330-31.

dependent upon concepts of national contract law; instead, it must be regarded as an autonomous concept, albeit one very closely aligned to the essence of contractual obligations under *le droit commun*. Although the topic of a future publication, it would be remiss not to point out that non-contractual liability of the carrier for passenger-related damages in a Convention case is possible, e.g., wrongful death, and is contemplated by Article 24 of the Warsaw Convention (Article 29 MC99).

Article 1 laid down the general scope of the Warsaw Convention, thereby defining the core conditions of its applicability. Once the Convention is applicable, various rights and duties arise, including those pertaining to jurisdiction and to the question of liability. The Warsaw Convention's liability regime was established on the basis of fault with monetary limits on the liability of the carrier. Its starting point is the presumption of the carrier's fault for damage arising under the circumstances covered by the Convention,[46] and in such cases the carrier is liable. However, the carrier may exonerate itself from liability by proving that it and its agents took all necessary measures to avoid the damage,[47] or that the damage was caused or contributed to by the negligence of the injured party.[48] Where the carrier cannot overcome the burden of proof, then it is liable, but the Convention sets monetary limits on that liability.[49] The carrier is prohibited from excluding or limiting its liability below the limits set by the Convention;[50] while the carrier loses its freedom of contract in this sense, it may agree to a higher limit by special agreement with the passenger/shipper.[51] The carrier is thus doubly insulated. First, it is only liable where it cannot prove the absence of fault; second, if liable, its liability is capped at a low level. There are two occasions in which the carrier may face unlimited liability: the first, where it fails to fulfil the mandatory documentary requirements of the

46. *See* Warsaw Convention, *supra* note 1, at arts. 17-19.

47. *See id.* at art. 20(1). In the case of goods and luggage, the Warsaw Convention (art. 21(2)) provided another avenue for exoneration where the carrier can prove the damage was the result of negligent pilotage or negligence in the handling of the aircraft. This controversial basis for exoneration was removed by the Hague Protocol in 1955.

48. *See id.* at art. 21.

49. The limit differs depending on the nature of the damage: for damage arising from the death or injury of passengers, the limit is 125,000 gold francs; for luggage and goods, 250 francs per kilogram; and for items for which the carrier takes charge himself, e.g., carry-on baggage, a limit of 5000 francs applies. *Id.* at art. 22.

50. *See id.* at art. 23.

51. *See id.* at art. 22.

Convention;[52] the second, when the damage is caused by the willful misconduct of the carrier or its agents.[53]

Very briefly,[54] Article 28 lays out the jurisdictional scheme of the Warsaw Convention. Article 28(1) provides four bases for identifying the places before whose courts an action for damages under the Convention may be brought. These are: (1) the place where the carrier is ordinarily a resident; (2) the carrier's principal place of business; (3) the place where the carrier has a place of business through which the contract has been made; and (4) the place of destination.[55]

The essential purpose of the jurisdictional scheme is the same as the Convention's cardinal purpose, i.e., to avoid conflict of laws through unification of certain rules. The drafters chose to establish harmonized rules of jurisdiction. The scheme's key features are: (1) a limited number of potential forums; (2) the guarantee of a forum in a Contracting State; (3) the centrality of the contract of carriage; and (4) that the forum has a substantial business connection to the carrier. These key features reflect two core policies – first, the need to ensure legal certainty and predictability, and second, the desire to balance the parties' interests. Primacy was given to legal certainty and predictability, balanced against the secondary concern for the interests of the parties.

C. Vindication of the Two-Party Paradigm

With the benefit of hindsight, it may seem a gross oversight by the drafters of the Warsaw Convention to focus their regime on the "contractual" relationship between the carrier and the passenger/shipper. In so doing, they apparently left the potential liability of third parties and how this might interfere with their regime out of consideration; however, this would be an unfair accusation. As Part III of this Article will show in detail, although the drafters' focus on a two-party paradigm would prove problematic, considering the law as it stood at that time, we realize the drafters of the Warsaw Convention were vindicated in establishing their regime on that basis.

52. *See id.* at arts. 4(4) and 9.

53. *See id.* at art. 25.

54. A fuller account is provided in Cluxton, *supra* note 11, at 22-28.

55. Warsaw Convention, *supra* note 1, at art. 28(1).

i. Historical Inadequacy of the Common Law

Under the common law circa 1929, a plaintiff had extremely limited options for commencing proceedings for damages suffered in an aviation accident. The practice of carriers at the time was to exempt themselves from liability under the contract of carriage with the passenger. With no remedy against the carrier, the injured passenger also found themselves unable to succeed in tort liability against a manufacturer or other third party. This was as a consequence of the rule articulated in the 1842 case *Winterbottom v. Wright*[56] that stood for the proposition that no cause of action, whether in contract or tort, lay against a manufacturer in the absence of privity of contract.[57]

The rule from *Winterbottom* represented, in the absence of privity, a de facto immunity for manufacturers from claims of liability for damages caused by their defective products.[58] The rule was subject to a small number of exceptions,[59] wherein the courts recognized that a manufacturer had undertaken a duty to the public at large, e.g., in the case of inherently dangerous articles.[60] In these limited cases, the existence of a specific legal duty owed by the manufacturer in tort law remedied the

56. Winterbottom v. Wright (1842) 152 Eng. Rep. 402; 10 M. & W. 109 (Eng.).

57. Cornelius W. Gillam, *Products Liability in a Nutshell*, 37 OR. L. REV. 119, 133 (1957).

58. *See* Francis H. Bohlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees*, 45 L.Q.R. 343, 343 (1929) (Bohlen explaining: "Prior to 1926 the so-called doctrine of *Winterbottom v. Wright*, in so far as it was applied to determine the liability of a manufacturer, seems to have crystallized in England into a fairly definite shape. A manufacturer who put upon the market an article dangerous for the use for which it was sold, was normally not liable to anyone other than his immediate vendee for injuries sustained while using the article.").

59. *See* J.J. Adams, *Note: Liability of Supplier of Chattels to Third Persons*, 38 MICH. L. REV. 116, 117 (1939) (Adams listing these four exceptions: "For almost a hundred years courts have said that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the article he handles, though four well-established exceptions have been engrafted on this general rule. Where the article (1) is inherently dangerous, (2) contains a concealed defect known to the supplier but not to the user, (3) will be dangerous if negligently made, or (4) has been supplied by an invitor for use on his premises, the supplier is held liable to third persons for negligence in the construction, manufacture, or sale of the article he handles.").

60. The distinction between ordinary articles and inherently dangerous articles was accepted by the court in *Longmeid v. Holliday* (1851) 155 Eng. Rep. 752; 6 Exch. 761 (Eng.). *See* Bohlen, *supra* note 58, at 344 (Bohlen providing a definition: "If an article is of a class which is generally regarded as dangerous for certain uses, although safe for others, the maker is liable if he mislabels it or otherwise misrepresents its true character.").

absence of privity of contract.[61] Recognition of a cause of action in tort law without privity helped ameliorate the harshness of the rule in *Winterbottom*, but these exceptions were so limited that they offered little help in the vast majority of cases.

For a plaintiff to succeed against a manufacturer, they either had to be a party to the contract or bring themselves within the set of narrow exceptions whereby the court would recognize that the manufacturer owed a duty to the public, the breach of which would give rise to an actionable instance of negligence. As it stood at that time, there was no accepted general principle of tortious liability for negligence. In *Heaven v. Pender*,[62] Lord Justice Brett M.R. (later Lord Esher) attempted to articulate such a principle from the accepted instances in which a manufacturer or supplier of goods could be held liable without privity of contract. He stated:

The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.[63]

Even though the majority decided the case on narrower grounds,[64] Lord Justice Brett's principle was a precise and potent articulation of what would become in 1932—with some adjustment—the accepted principle for the duty of care in *Donoghue v. Stevenson*.[65] Prior to this seminal case, however, Lord Justice Brett's principle found favor in the United States, where it was referred to in 1916's *MacPherson v. Buick Motor Co.*, the case that lay the foundations for products liability.[66]

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61. It was stated in *Thomas*: "The liability of the dealer in such case arises, not out of any contract or direct privity between him and the person injured, but out of the duty which the law imposes upon him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with such label may have passed through many intermediate sales before it reaches the hands of the person injured." Thomas v. Winchester, 6 N.Y. 397, 405 (1852). *See also* Norton v. Sewall, 106 Mass. 143 (1870).

62. Heaven v. Pender [1883] 11 QBD 503 (Eng. C.A.).

63. *Id.* at 509.

64. *See* Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 512 (1948) ("[T]he majority of the judges decided the case on the rather narrow point that the necessary workmen were in effect invited by the dock owner to use the dock and appliances.").

65. Donoghue v. Stevenson [1932] AC 562, 580 (HL) (appeal taken from Scot.) (Scot.).

66. MacPherson v. Buick Motor Co., 217 N.Y. 382 (1916).

In *MacPherson*, Judge Cardozo of the New York Court of Appeals stated, "[i]f the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger."[67] In finding for the plaintiff, the court concluded that where there is an element of danger and knowledge that the thing will be used by third parties, then "irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."[68] Judge Cardozo thus laid down a general rule of manufacturers' liability for negligence based on a duty to take reasonable care to avoid causing reasonably foreseeable injury.[69]

This was the state of play under the common law in England and the United States during the time of the Warsaw Convention's gestation. We shall shortly draw some conclusions from this brief history, but not before first reviewing the situation in the civilian legal systems and perusing the Convention's *travaux préparatoires*.

ii. The Situation under Civilian Law

The adequacy of private law to provide remedies against third parties for those injured in aviation accidents was not much better under French civil law at the time of the Warsaw Convention's drafting. The place to begin this analysis is with Articles 1382 and 1383 of the Civil Code (now, since 2016, Articles 1240 and 1241 respectively). These are grounded in the concept of *faute délictuelle*, under which a plaintiff has to prove harm (*dommage*)[70] causally linked (*lien de causalité*)[71] to the fault (*faute*)[72] of the defendant. On the face of it, delictual liability under Articles 1382 and 1383 seems extremely broad, and we might thus expect that it would have provided a good source of redress against a manufacturer and other third parties; however, this was not the case. First, proving fault was very difficult, especially in defective product cases. Second, at the time of the Warsaw Convention's drafting, it was

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67. *Id.* at 389.

68. *Id.*

69. For a list of authorities by which the courts of other states adopted Judge Cardozo's rule, and for its subsequent development, *see* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100-02 (1960). Prosser stated that the rule "has become, in short, a general rule imposing negligence liability upon any supplier, for remuneration, of any chattel." *Id.* at 1102.

70. KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 657 (Tony Weir trans., 2d ed. 1987).

71. *Id.* at 659.

72. *Id.* at 661.

not generally accepted that placing a defective product into the market was an example of *faute délictuelle* upon which an action could succeed under Articles 1382 and 1383; indeed, this was not recognized as *faute délictuelle* until the 1970s.[73] For these reasons, actions based on contract or on the strict liability provision of Article 1384 were preferred.

The problem of privity was also at issue for an aviation plaintiff seeking a remedy in contract under French civil law. However, the French civil law was less constrained by privity than the common law.[74] For example—and of particular relevance to the field of defective products—is the concept of the *action directe en garantie*.[75] This permits a buyer to pursue sellers further up the chain of commerce. Thus, where the plaintiff sub-buyer has a contract of sale with his immediate seller but not with the manufacturer, he is permitted to reach back through the chain of contracts to sue the manufacturer directly for latent defects. In effect, the sub-buyer becomes the successor in interest to the original buyer's rights against the manufacturer. The *action directe en garantie*, which is contractual, was introduced precisely because the sub-buyer did not have a cause of action in contract or delict against the manufacturer.[76] This form of recourse was available at the time of the Warsaw Convention's drafting; in fact, it was available well prior.[77] However, this remedy was

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73. SIMON WHITTAKER, LIABILITY FOR PRODUCTS: ENGLISH LAW, FRENCH LAW AND EUROPEAN HARMONIZATION 51 (2005).

74. Simon Whittaker, *Privity of Contract and the Law of Tort: The French Experience*, 15 OXFORD J. LEGAL STUD. 327, 367 (1995) (Whittaker stating that, "French law has certainly been much more willing to allow a contract to escape the bounds of privity than English law"). Whittaker gives, amongst others, the examples of the recognition of contractual benefits for third parties (*stipulation pour autrui*) and of the right of action against sellers further up the chain of commerce (*actions directes en garantie*). *Id.* at 367-68.

75. Whittaker describes this concept as follows: "In the context of sale, the courts have long accepted the idea that the various rights of the 'initial' buyer in a chain of distribution against his own seller (typically, the manufacturer) in respect of its latent defects attach to the property as its 'accessory,' with the result that any buyer in the chain may sue *any* seller further up the chain by way of a 'direct action' (*action directe en garantie*): there is no restriction that the buyer must be a consumer nor that the seller must be *professionel*." WHITTAKER, *supra* note 73, at 96.

76. Whittaker notes that "[i]t is clear that the original purpose of the recognition of these *actions directes en garantie* was to create a direct contractual claim for a sub-buyer against the original seller (often the manufacturer of goods or the builder of premises) at a time before any claim in delict has been established ... Such a direct action avoided the circuity of action of suit up the chain of contracts and had the advantage for claimants of side-stepping the insolvency of any intervening member of the chain." *Id.* at 97.

77. *See id.* at 96 n.344 (citing authorities from 1884, 1885, and 1886).

limited to sub-buyers of goods and thus would not have availed the aviation passenger plaintiff who purchased services, not goods.[78]

The final option available to the plaintiff was Article 1384(1) of the French Civil Code (now, since 2016, Article 1242). Similar to the common law doctrine of res ipsa loquitur,[79] Article 1384(1) provides for strict liability of the *gardien*[80] of a thing that causes damage.[81] Initially it only countenanced responsibility for damages caused by animals or buildings, but was subsequently interpreted as providing a much broader principle of liability on the *gardien* for anything that causes damage.[82] Since 1930, Article 1384(1) of the Civil Code established a presumption of strict liability for damage caused by things (*le fait d'une chose*).[83] This presumption arises regardless of whether the thing is defective or dangerous, and is not based upon any notion of fault of the *gardien*. The only defenses available are contributory negligence and *force majeure* (albeit with French law having a simpler definition, which entails unforeseeable and unpreventable harm).[84]

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78. *See id.* at 139 ("In the case of public transport ((in the sense of transport available to the public generally)), the provider of the service does not supply any product to any member of the public but does use products in the provision of the service, notably, the vehicle of transport itself.").

79. *See infra* Part III.A.

80. The meaning of this legal term is difficult to translate into English, but the terms *keeper* or *custodian* come close to conveying the gist. *See* ZWEIGERT & KÖTZ, *supra* note 70, at 703 ("A further requirement for liability under art. 1384 para. 1 is that the person being sued for damages be the custodian ['*gardien*'] of the thing which caused the harm.").

81. Article 1384.1 of the Code civil provides: "*On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde.*" CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1384.1 (Fr.). ["We are responsible not only for the damage caused by our own act, but also for that which is caused by the acts of persons for whom we are responsible, or by things that are in our custody."], English translation by French Civil Code, LEGIFANCE.GOUV.FR (n.d.), *available at* www.legifrance.gouv.fr/content/download/7754/105592/version/4/file/Code_civil_20130701_EN.pdf (last visited Feb. 15, 2021). Whittaker provides an alternative translation: "One is liable not only for the harm which one causes by one's own deed, but also for that which is caused by the deed of persons for whom one is responsible, or of things which one has in one's keeping." WHITTAKER, *supra* note 73, at 24.

82. WHITTAKER, *supra* note 73, at 52.

83. *Id.* at 7-8.

84. WHITTAKER, *supra* note 73, at 52. The courts sought to avoid a situation where an unforeseeable and unpreventable defect in a thing could be grounds for a defense of force majeure. This was achieved by specifying that force majeure must be external to the thing. The result of which was that a defect in the thing was included within the risks for which the *gardien* assumes liability toward third parties. *See id.* at 58. *See also* ZWEIGERT & KÖTZ, *supra* note 70, at 704 (noting, "[o]ne important effect of the rule that the cause must be 'external' or 'outside' the thing which does the harm is that a latent defect in the thing, such

This might seem like an ideal theory under which to pursue a manufacturer, but it is entirely dependent on the definition of *gardien*, and that definition generally did not apply to manufacturers. The definition attributed to *la garde* centers on the possession, use, direction, and control of the thing.[85] For instance, the legal owner of a car is presumed to be its *gardien*, but may rebut this presumption by showing that control (i.e., *la garde)* has been transferred to another party. In the context of an aircraft, such control at the operative moment when harm is caused to the passenger is not vested in the manufacturer; rather, it is most likely vested in the operator (or potentially the legal owner).[86] Thus, Article 1384(1)—useful though it might be against the carrier—would not have aided the aviation plaintiff against third parties circa 1929.

iii. The Warsaw Travaux Préparatoires

Given that the Warsaw Convention concerns the liability of the *carrier* for international carriage by air, it should not come as much of a surprise that the liability of third parties is seldom mentioned in its *travaux préparatoires*. However, a small amount of attention was given to the manufacturer in respect to the carrier's liability for inherent defects in the aircraft.[87] At the second session of the Warsaw Conference, Rapporteur De Vos provided a commentary on the substantive provisions of the Final C.I.T.E.J.A. Draft.[88] Moving from article to article, De Vos outlined the reasoning and objectives behind the adoption of specific principles and explained the various alterations made to the text since the Conference of 1925. In treating the topic of the possible exoneration of

as a defect in the way it is made or the material it is made of, does not release the defendant even if it was quite impossible for him to discover and remove the defect.").

85. WHITTAKER, *supra* note 73, at 53.

86. It has since become accepted that there can be two *gardiens* at the same time, one in respect of its behavior (*gardien du comportement*), the other in respect of its structure (*gardien de la structure*). *See* ZWEIGERT & KÖTZ, *supra* note 70, at 717; WHITTAKER, *supra* note 73, at 341 ("[I]n the context of liability for a defective product, the manufacturer can be said to be *gardien* of its structure, while either the supplier or the victim himself may be the *gardien* of its behaviour."). In the context of an aircraft, the carrier would be the *gardien* of its behavior, while the manufacturer could be regarded as the *gardien* of the thing's construction and thus potentially liable under Article 1384(1). However, this does not appear to have been the law at the time of the Warsaw Convention's drafting. Whittaker cites cases dating from 1956 and 1960 for this theory. *Id.* at 341 n.121.

87. SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, OCTOBER 4-12, 1929 WARSAW: MINUTES 21, 36, 43-54 (Robert C. Horner & Didier Legrez trans., 1975) [hereinafter WARSAW MINUTES].

88. *Id.* at 18-23.

the carrier on proof that the carrier had taken all reasonable measures, it was noted that the draft no longer permitted such exoneration in the case of the aircraft's inherent defect; rather, the carrier would be held strictly liable.[89]

Paragraph 1 of Article 22 of the draft provided: "The carrier shall not be liable if he proves that he and his servants have taken the reasonable measures to avoid the damage or that it was impossible for them to take them, unless the damages [arise] out of an inherent defect in the aircraft."[90] This solution had been adopted for the benefit of passengers who, it was stated, could not "turn against the manufacturer."[91] Instead the carrier would bear the burden of liability, with any unfairness mitigated by the fact that the carrier, unlike the passenger, would have "recourse against the manufacturer."[92] As explained by Pittard (the Swiss Delegate and Rapporteur of the 1925 Conference), excluding exoneration of the carrier in the case of inherent defect ensured that the victim would have access to a remedy against someone (i.e., the carrier) rather than no one.[93]

The written submissions made by the United Kingdom,[94] France,[95] and Sweden[96] on the Final C.I.T.E.J.A. Draft expressed misgivings about the inherent defect provision. During the Conference itself, there were proposals for its removal.[97] Although the delegates were sympathetic to the humanitarian interests involved,[98] it was nevertheless regarded as inequitable to impose liability on the carrier in the absence of its fault and in circumstances where the defect could not reasonably be detected by the carrier exercising due diligence.[99] The then-unperfected state of aeronautical science was also highlighted as another reason not to adopt this instance of strict liability.[100] Manufacturing defects were regarded as unavoidable, even where the greatest care and expertise were employed. Therefore, even assuming recourse was available, one could not rely on the carrier recovering against the manufacturer. Indeed, the

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89. *Id.* at 21.
90. *Id.* at 265.
91. *Id.* at 21.
92. WARSAW MINUTES, *supra* note 87, at 21.
93. *Id.* at 45.
94. *Id.* at 296-97.
95. *Id.* at 286.
96. *Id.* at 316.
97. *See, e.g.*, *id.* at 36, 52-53.
98. *See id.* at 44-45 (in particular, the views expressed by the Swiss Delegate).
99. *See, e.g.*, *id.* at 39, 43.
100. *See, e.g.*, *id.* at 50, 53.

delegates acknowledged that manufacturers were generally not disposed to offer carriers warranties.[101] Therefore, in practice, the carrier would often have no right of recourse against the manufacturer.[102] In the end, the drafters elected to remove the inherent defect proviso of Article 22 altogether,[103] granting the carrier the possibility of exoneration in all cases where it could prove that it and its servants had taken all necessary measures to avoid the damage, or that those measures were impossible to undertake.[104]

There is a twofold significance in this dalliance with the prospect of holding the carrier liable, in the absence of fault, for damage caused by the manufacture's presumptively wrongful conduct. First, it demonstrates that the delegates did not understand the passenger as generally having a cause of action against the manufacturer under then-existing national law. Secondly, the delegates contemplated, and even endorsed, the existence of recourse actions by carriers against manufacturers, albeit subject to limitations in practice.

iv. Concluding Remarks

What this legal history shows, is that during the period of the Warsaw Convention's gestation and its 1929 adoption, a third party to the passenger-carrier relationship (the aircraft manufacturer providing the quintessential example) was practically immune from direct liability against an injured passenger under the common law. Privity of contract was the greatest stumbling block for a plaintiff seeking to sue the manufacturer or another third party for damage negligently caused. Such liability could only be established in very limited circumstances. There was not yet the general principle of negligence, such as that established in England under *Donoghue v. Stevenson* in 1932. It is true that a New York court enunciated a principle of general products liability in 1916, and that this decision, i.e., *MacPherson*,[105] "found immediate acceptance."[106] However, this acceptance was limited to U.S.

101. *Id.* at 48, 296.

102. *Id.* at 296. This point was reinforced by the French Delegate who had noted that the short lifetime attached to such warranties really meant that unless the accident occurred shortly after delivery of the aircraft the carrier would be strictly liable without being able seek recourse from the manufacturer. *Id.* at 48.

103. *Id.* at 54.

104. *See* Warsaw Convention, *supra* note 1, at art. 20(1).

105. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

106. WILLIAM L. PROSSER, LAW OF TORTS 643 (3d ed. 1964). *See also* Gillam, *supra* note 57, at 143.

jurisdictions pre-Warsaw. As noted earlier, the United States did not actively participate in drafting the Warsaw Convention, and the record does not indicate that the actual drafters were aware of emerging products liability in the United States.

The French civil law was also beneficial to the manufacturer and other third parties, although not so much so as the common law. Aside from the difficulty of establishing fault, delictual liability was not recognized against manufacturers under Articles 1382 and 1383 of the Civil Code. The strict liability of Article 1384(1) did not avail the aviation plaintiff against a third party because he was not regarded as the *gardien* of the thing. Likewise, contractual remedies were of no avail to the aviation plaintiff due to the French law's version of privity.

The manufacturer and other third parties were largely insulated from passenger claims on account of the lack of privity of contract and the absence of the modern doctrines of negligence and strict products liability. The drafters of the Warsaw Convention would not have needed to take into consideration the potential impact of the existence of alternative remedies against third parties. It was reasonable, at that time, to rely on the liability relationship involved in the international carriage of passengers by air as being two-party in nature. Since the passenger could not sue a manufacturer, there was no risk of that manufacturer seeking recourse against the carrier; that aspect of recourse did not arise.

On the other hand, the manufacturer had little to fear from the carrier in terms of recourse. The Convention's Minutes show that the delegates were aware of the possibility of recourse actions by carriers against third parties—they even endorsed them—but they acknowledged that they were unlikely to arise in practice.[107] They were right. The aircraft purchase agreements between manufacturers and carriers invariably contained express warranties against defects in material and workmanship, a remedy limitation section in the event of defect, and various liability disclaimers.[108] In addition, recourse actions taken against manufacturers resulting from the carrier's liability to the passenger under the Convention were generally blocked (at least in common law jurisdictions) by the rule against contribution amongst tortfeasors. Therefore, the other aspect of recourse actions, i.e., the

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107. WARSAW MINUTES, *supra* note 87, at 21.

108. As one legal counsel for a manufacturer later put it: "Any manufacturer having reasonably competent legal counsel can exempt itself from virtually all liability from manufacturer caused damages to aircraft that the manufacturer has sold to the air carrier." Hunter Hughes, *Aircraft Manufacturer Warranties—Protection for the Manufacturer or the Purchaser?*, 2 AIR & SPACE L. 71, 71 (1977).

carrier seeking recourse against third parties for its liability to the passenger, did not concern the delegates and further reinforced their two-party understanding of their aviation liability system.

The drafters were quite content to leave the manufacturer and other third parties out of the system. They had no desire to protect them as they were already amply protected by their own business practices and the law. The drafters did not foresee that the law would evolve to provide the plaintiff with a choice of defendants and a selection of remedies through which the scope for the involvement and influence of third parties in the carrier-passenger relationship would greatly expand. However, this is precisely what happened with the development of the general doctrine of negligence, strict products liability, and other new remedies.

D. The Montreal Convention 1999

Even from its early days, the Warsaw Convention was often the subject of much criticism. Its limits of liability were attacked as being low, and the maturation of the air transport industry undermined the original policy justifications for its perceived pro-carrier slant. This discontent only increased over time. The various efforts to amend and supplement the Warsaw Convention transformed it into WCS. However, the patchy ratification of these instruments resulted in a fragmented, dis-unified system that was the subject of conflicting jurisprudence. By the end of the twentieth century, the disunification reached a breaking point and the time for action came, resulting in MC99.

MC99 is a consolidation and modernization of WCS. This requires our appreciation of two key factors: (1) the continuing relevance of the Warsaw Convention and WCS; and (2) the contrasting purpose of MC99 to that of WCS. It is not within the scope of this Article to perform a thorough analysis of MC99's purpose,[109] yet some points are of particular relevance to the matter at hand and require attention here.

Firstly, the preamble to MC99 recognizes the need to *modernize* and *consolidate* the Warsaw Convention; this is the first clear indication of one of MC99's purposes.[110] Indeed, the courts have generally found a

109. *See* Cluxton, *supra* note 11, at 54 (discussing MC99's purpose).

110. For example, the Second Circuit described MC99 as having been passed to "'harmonize the hodgepodge of supplementary amendments and intercarrier agreements' of which the Warsaw Convention system consists." Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 401 (2d Cir. 2004) (*quoting* Carl E. Fumarola, *Stratospheric Recovery: Recent and Forthcoming Changes in International Air Disaster Law and its Effect on Air Terrorism Recovery*, 36 SUFFOLK U. L. REV. 821, 835 (2003)).

great commonality of purpose between the Warsaw Convention and MC99.[111] However, we ought not to directly equate the purpose of MC99 with that of the Warsaw Convention; instead, we must accommodate the effects and changes of the process of modernization and consolidation. The mere act of modernizing and consolidating WCS is itself a powerful reaffirmation by MC99's drafters of WCS' cardinal purpose as the unification of certain rules of private air law. This cardinal purpose remains the same with MC99 and is broadly acknowledged by the courts.[112]

As noted earlier, the Warsaw Convention's supplementary objective was to further the public interest in the development of air transport whilst achieving an equitable balance of interests. Under MC99, the development of air transport remains a fundamental objective, but the perspective regarding the balance of interests has substantially changed. In MC99, the notable change was the weight given to protecting the interests of consumers;[113] thus, its preamble specifically recognizes the

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111. The Supreme Court of the United Kingdom noted in *Stott*: "One of the original purposes of the Warsaw Convention was to bring some order to a fragmented international aviation system by partial harmonization of the applicable law and to provide benefit to both prospective passengers and to the airlines in reaching an equitable balance of interests; the same purpose applies to the Montreal Convention." Stott v. Thomas Cook Tour Operators [2014] AC 1347, 1359 (SC) (on appeal from Eng.) (Eng.). *See also* Matz v. Nw. Airlines, No. 07-CV-13447, 2008 U.S. Dist. LEXIS 38614, at *1 (E.D. Mich. May 13, 2008).

112. The Supreme Court of Canada observed that the "two of the main purposes of the *Warsaw Convention*, and hence of the *Montreal Convention*, are to achieve a uniform set of rules governing damages liability of international air carriers and to provide limitation of carrier liability." Thibodeau v. Air Can., [2014] S.C.R. 67, ¶ 47 (Can.). *See also* Allianz Glob. Corp. & Specialty v. EMO Trans. Cal., Inc., No. 09-CV-4893, 2010 U.S. Dist. LEXIS 62425, at *11 (N.D. Cal. June 21, 2010) ("The goal of the Montreal Convention was to create an international unified system of rules and procedures to alleviate the uncertainty of operating under a diverse set of legal systems.").

113. This was clearly evidenced in the President Clinton's letter of transmittal to Congress. The President described MC99 as "a vast improvement over the liability regime established under the Warsaw Convention and its related instruments, relative to passenger rights in the event of an accident." Message from the President of the United States transmitting the Convention for the Unification of Certain Rules for International Carriage by Air, Done at Montreal, May 28, 1999, *in* S. TREATY DOC. NO. 106-45, at iii, iii (2000). In the Department of State letter of submittal, Strobe Talbott endorsed MC99 as "the culmination of a four decades-long effort by the United States and other countries to persuade the international aviation community to provide increased economic protection for the international air traveler and shipper with a regime of liability and modernized procedures that match the developments in today's aviation industry." Letter of Submittal from Strobe Talbott, Deputy Sec. of State (June 23, 2000), *in* S. TREATY DOC. NO. 106-45, at v, v (2000). *See also* Bin Cheng, *The 1999 Montreal Convention on International Carriage by Air Concluded on the Seventieth Anniversary of the 1929 Warsaw Convention (Part II)*, 49 ZEITSCHRIFT FÜR LUFT- UND WELTRAUMRECHT 484, 497 (2000) ("In drawing up the new

importance of ensuring protection for consumers (something echoed by both courts[114] and commentators).[115] This is not to say that the interests of carriers and the general public were disregarded.[116] Instead, just as with the Warsaw Convention, it was a question of achieving an equitable balance between the interests of all parties. Without a doubt, there was a shift in that balance between Warsaw and MC99. The Warsaw Convention favored the interests of the air transport industry (comprising both the carrier and the traveling public) over those of the plaintiff passenger. A new deal was promised with MC99—it would better protect the interests of consumers and ensure equitable compensation for victims and their families.[117]

Convention [MC99], it was constantly being emphasized that the interests of the consumer are paramount.").

114. *See* Ehrlich, 360 F.3d at 371 n.4 ("The new treaty 'unifies and replaces the system of liability that derives from the Warsaw Convention,' ... explicitly recognizing 'the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution.' ... This Convention seems to have reversed one of the premises of the original Warsaw Convention, which favored the airlines at the expense of consumers."). Nevertheless, the Montreal Convention did not alter the original Warsaw Convention goal of maintaining limited and predictable damage amounts for airlines. *See* Sompo Japan Ins., Inc. v. Nippon Cargo Airlines Co., 522 F.3d 776, 780-81 (7th Cir. 2008); Weiss v. El Al Isr. Airlines Ltd., 433 F. Supp. 2d 361, 365 (S.D.N.Y. 2006); Bassam v. Am. Airlines, Inc., 287 F. App'x 309, 312 (5th Cir. 2008).

115. *See* Thomas J. Whalen, *The New Warsaw Convention: The Montreal Convention*, 25 AIR & SPACE L. 12, 14 (2000) (noting the shift in policy, away from the interests of the carriers to those of the consumer/passenger). *See also* GEORGE N. TOMPKINS JR., LIABILITY RULES APPLICABLE TO INTERNATIONAL AIR TRANSPORTATION AS DEVELOPED BY THE COURTS IN THE UNITED STATES: FROM WARSAW 1929 TO MONTREAL 1999 33-34 (2010); Bin Cheng, *A New Era in the Law of International Carriage by Air—From Warsaw (1929) to Montreal (1999)*, 53 INT'L & COMP. L.Q. 833, 844-45 (2004).

116. The interests of the carrier, in particular those of the small to medium airlines (especially from developing nations), were strongly advocated for at the Conference, with several States raising concerns about the negative impact of being too pro-consumer. For the comments made by the following States in the general observations on the draft Convention, *see* Minutes of 1 INTERNATIONAL CONFERENCE ON AIR LAW (CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR) MONTREAL, 10-28 MAY 1999: MINUTES), 45-6 (Alg.); 47 (India, Can.); 48 (China, Madag.); 49 (Indon.); 50 (Mex.); 51 (Egypt), ICAO Doc. 9775-DC/2 (1999) [hereinafter MC99 MINUTES].

117. This is evidenced by two of the clauses to MC99's preamble: (1) "RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution," and (2) "CONVINCED that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests." MC99, *supra* note 2, at preamble.

MC99 retains the two-fold purpose of its predecessor, consisting of a cardinal purpose and a supplementary purpose. The former remains unchanged, whereas the latter has undergone significant recalibration in light of the industry's changing circumstances and socioeconomic conditions. This is underlined by the forceful declarations made by the Contracting Parties in the preamble, and reflected in the substance of the provisions contained within the Convention itself. Thus, the object and purpose of MC99 can be defined as follows:

Avoidance of conflict of laws through unification of certain rules relating to travel documentation and air carrier liability.

Assurance of an equitable balance between the interests of consumers in international carriage by air, the need for equitable compensation based on the principle of restitution, and the orderly development of international air transport.

Regarding the liability regime for passenger death and bodily injury, MC99 consists of a two-tier system: strict liability of the carrier up to SDR 128,821,[118] and presumed fault liability for claims exceeding that amount. In respect to both tiers, the carrier can invoke contributory negligence as a defense.[119] For second tier liability, the carrier can exonerate itself by proving the absence of fault, rather than the previous *all necessary measures* defense.[120] An additional ground for exoneration was introduced that releases the carrier from liability under the second tier if it can prove the damage was solely due to the negligence, or a wrongful act or omission of a third party.[121]

The new regime is very beneficial for the plaintiff because unlimited recovery is available without a prima facie obligation to prove the fault of the carrier. Indeed, once a plaintiff has proved recoverable damages in excess of the first-tier limit, this limit will only come into play where the carrier elects to and successfully raises one of the available defenses. Given that most aviation disasters involve an element of carrier negligence, the likelihood of the carrier deciding to raise a defense, let alone prove it, is rare. As a result, liability is seldom litigated. Indeed, a chief complaint made by lawyers about MC99 is the loss of work it has

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118. The limit was originally 100,000 Special Drawing Rights (SDR), but this figure was raised in 2009 to SDR 113,000 and then again in 2019 to SDR 128,821, pursuant to Article 24 of MC99. MC99, *supra* note 2, at art. 24; *2019 Revised Limits of Liability Under the Montreal Convention of 1999*, INT'L CIV. AVIATION ORG. (n.d.), *available at* https://www.icao.int/secretariat/legal/Pages/2019_Revised_Limits_of_Liability_Under_the_Montreal_Convention_1999.aspx (last visited Apr. 4, 2021).

119. MC99, *supra* note 2, at art. 20.

120. *Id.*

121. *Id.* at art. 21(2)(b).

meant for them, as compared to WCS. It has certainly reduced the volume of litigation and sped up the resolution of claims. Nevertheless, its success is conditional on offering the plaintiff their desired choice of forum, and rather than liability, the matter of jurisdiction has become the primary battlefield for litigation.

As described in Part I above, MC99's jurisdictional regime essentially amounts to that of the Warsaw Convention with the addition of the long-sought fifth jurisdiction.[122] The inclusion of the fifth jurisdiction demonstrates a shift in the balance of interests—it is largely viewed as pro-consumer and contrary to the interests of carriers. Other than this shift, the purpose of MC99's jurisdictional regime remains the same as that of the Warsaw Convention.[123]

III. THE BIGGER PICTURE

We began in this Article by looking at the question of choice of forum within the context of WCS, to which MC99 is the successor. We have seen that this system is predicated on the paradigm of the two-party liability relationship between carrier and passenger. It appears to be a simple and discrete system within which the passenger-carrier relationship is insulated from third-party interests and influences. We have seen that the drafters of the Warsaw Convention were vindicated in establishing their regime on the basis of this two-party paradigm given the then-current state of play under *le droit commun*. Since then, however, a number of substantial developments now render that two-party paradigm an anachronism. The thesis of this Article is that a bigger picture now exists, within which WCS and MC99 are merely parts. The modern reality is one in which the passenger-carrier relationship is very exposed to third-party interest and influence. The goal of Part III of this Article is to demonstrate the existence of this bigger picture and to elaborate upon its nature and dynamics—but first, an illustrative case.

A. An Illustrative Case

The Kegworth air disaster was the crash of British Midland Flight 92 on January 8, 1989, near East Midlands Airport in the United Kingdom. The accident took the lives of forty-seven people and seriously

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122. For an account of how the fifth jurisdiction finally came to be accepted, *see* Cluxton, *supra* note 11, at Part III.B.

123. *See supra* Part II.B.

injured many of the seventy-nine survivors.[124] The aircraft (a Boeing 737-400) was climbing to cruising altitude when a fan blade detached from its left (number 1) engine (a CFM56 manufactured and sold by CFM International). The detached blade caused secondary damage to the engine and, as a result, the airframe began to vibrate severely. At the same time, fumes and smoke were ingested into the cabin of the aircraft through the air conditioning system. Believing—erroneously, as it would turn out—that the air conditioning system was fed from the right (number 2) engine, the crew identified it as defective and throttled it back and shut it down. In response, the shuddering lessened, and the smoke and fumes reduced. This induced the crew to believe that the problem was mitigated and the crew decided to divert to East Midlands Airport. On approach, thrust to the damaged left engine increased, which caused it to fail and catch fire. There was a resulting abrupt loss of power. Without sufficient time to restart the other engine, the aircraft crashed short of the runway, colliding with the embankment of the M1 motorway.

The United Kingdom's Air Accident Investigation Branch (A.A.I.B.) would ultimately identify the cause of the accident as the flight crew shutting down the wrong engine.[125] Whilst this was the theory from early on, it was challenged by some, including plaintiffs, who argued that the true cause was the cross-wiring of an engine warning system by the manufacturer.[126] The A.A.I.B. was not yet published when the *Nolan v. Boeing Co.* litigation began.[127] The plaintiffs in *Nolan* were the forty-five surviving relatives of the passengers killed in the disaster, seventy-six survivors, two bystanders, and various others claiming loss of consortium from injuries to survivors.[128] Since this crash occurred in the United Kingdom during a domestic flight between London and Belfast, operated by a British carrier, one might have expected that any resulting litigation would have taken place in the United Kingdom. Instead, the claims were brought before the U.S. courts. The defendants were Boeing Co., CFM International and General Electric Co. (G.E.). The engines were marketed by CFM, a joint enterprise created by G.E., and a French

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124. The brief summary of the key facts provided above is taken from the Air Accidents Investigation Branch (A.A.I.B.) report. For a full account of the accident, the reader is directed to AIR ACCIDENTS INVESTIGATION BRANCH [AAIB], REPORT ON THE ACCIDENT TO BOEING 737, 400 G-OBME NEAR KEGWORTH, LEICESTERSHIRE ON 8 JANUARY 1989 3-7 (1990).

125. *Id.* at 2.

126. The A.A.I.B. report found no evidence to support this theory. *Id.* at 145.

127. Nolan v. Boeing Co., 762 F. Supp. 680, 681 (E.D. La. 1989), *aff'd*, 919 F.2d 1058 (5th Cir. 1990).

128. *Id.*

company, S.N.E.C.M.A.,[129] each of which designed and manufactured components of the engines.

Another likely reason the case was brought in the United States was to avoid the limitation of liability imposed by the application of WCS to any claim brought against the carrier.[130] Given the strong connections to the United Kingdom, keeping the litigation in the United States would require overcoming some serious obstacles, foremost amongst which was the prospect of FNC dismissal. The U.S. law firm's strategy was to avoid federal court by suing in Louisiana State Court, which, at that point in time, did not recognize the doctrine of FNC.

The next hurdle to vault was the issue of diversity jurisdiction.[131] For the purposes of diversity jurisdiction, a corporation is considered a citizen of both its state of incorporation and its principal place of business.[132] In *Nolan*, none of the victims were U.S. citizens, but the defendants were U.S. corporations.[133] It thus appeared that diversity jurisdiction existed, and the defendants would have been entitled to have the case removed to federal court. The plaintiffs knew that once in federal court FNC dismissal would be almost certain, so they attempted to

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129. S.N.E.C.M.A. (*Société Nationale d'Etudes et de Construction de Moteurs d'Aviation*) was a corporation organized under French law which, in 2004, merged with Sagem to form S.A.F.R.A.N. In 2016, S.N.E.C.M.A. was renamed Safran Aircraft Engines.

130. Although the flight in question was a domestic flight and therefore not directly subject to the Warsaw Convention, the Convention would have applied by virtue of an Order made pursuant to § 10(1) of the Carriage by Air Act 1961, 9 & 10 Eliz. 2 c. 27, § 10(1) (U.K.). Under § 4 of the earlier Carriage by Air Act 1932, 22 & 23 Geo. 5 c. 36, § 4 (U.K.), the Warsaw Convention was made applicable to non-international carriage by the Carriage by Air (Non-International Carriage) (U.K.) Order 1952 (S.I. 1952, No. 158).

131. Under the U.S. Constitution (U.S. Const. art. III, § 2, cl. 1) and as modified by the general diversity statute (codified under 28 U.S.C. § 1332), federal courts are granted subject matter jurisdiction in civil cases involving diversity of citizenship where the matter in controversy exceeds a certain amount (currently $75,000). Diversity of citizenship arises where the litigants are citizens of different states (*e.g.*, a Florida plaintiff suing a Colorado defendant) or where one is a citizen of a state, and the other is a citizen of a foreign State (*e.g.*, a Florida plaintiff suing a French defendant, or vice versa). The generally accepted explanation for why the First Congress chose to bestow such jurisdiction on the federal courts is that they wished to avoid the possibility of prejudice by state courts against out-of-state parties by ensuring a neutral forum. *See* CHARLES ALAN WRIGHT ET AL., 13 FEDERAL PRACTICE AND PROCEDURE § 3601 (3d ed. 2008).

132. 28 U.S.C. § 1332(c)(1).

133. In the case of Boeing, its place of incorporation was Delaware, and its principal place of business Washington. G.E. was incorporated and had its principal place of business in New York. CFM International was a Delaware corporation with its principal place of business in Ohio.

employ an untested theory to resist removal: narrowing in on the requirement that diversity of citizenship must be complete.[134]

Instead of filing actions under the names of the real plaintiffs in interest, the plaintiffs' lawyers filed actions under the names of the appointed legal representatives who shared national citizenship with the defendants.[135] The case was initially removed to federal court whereupon the plaintiffs sought remand. Although the defendants sought to impugn the strategy as fraudulent, the district court had no choice but to accept the citizenship of the appointed representatives and remand the case back to state court because of then-existing law.[136]

With removal successfully resisted, the case appeared to be stuck in state court. At that time, the court did not have the doctrine of FNC, so the plaintiff lawyers thought they were home free. Unbeknownst to them, Boeing and G.E. had an ace up their sleeve: joining S.N.E.C.M.A. as a third-party defendant. Although it was not alleged that S.N.E.C.M.A. owed any liability to the plaintiffs, it was under a contractual obligation to G.E. as part of their joint venture in CFM International, under which they shared profits and liabilities. This allowed G.E. to file cross claims for indemnification and contribution against S.N.E.C.M.A., thereby joining the company to the litigation. At that time, S.N.E.C.M.A. was owned by the French State, and was thus entitled to have the case removed to federal court under the Foreign Sovereign Immunities Act.[137]

Once back in federal court, Boeing (with the support of the other defendants) moved for FNC dismissal, arguing that England was an adequate alternative forum to resolve the dispute.[138] Plaintiffs challenged

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134. The requirement of complete diversity is defined by Black's Law Dictionary in the following terms: "In a multiparty case, diversity between both sides to the lawsuit so that all plaintiffs have different citizenship from all defendants." *Complete Diversity*, BLACK'S LAW DICTIONARY (9th ed. 2009). The rule of complete diversity was first laid down by Chief Justice Marshall in Strawbridge v. Curtiss, 7 U.S. 267 (1806) (the theory being that in such cases, there is no risk of prejudice where citizens of the same state are represented on both sides of the dispute).

135. The nominal plaintiffs were Kenneth P. Nolan and Vernon T. Judkins, both of whom were attorneys hired by administrators, curators, and/or tutors of the 225 persons (or family members of the persons) injured or killed in the accident. Nolan v. Boeing Co., 919 F.2d 1058, 1060 (5th Cir. 1990). Nolan was a New York citizen; Judkins, a Washington citizen. Far from being a mere coincidence, the plaintiff lawyers admitted "their sole reason for appointing domiciliaries of those states to act as administrators was to avoid diversity of citizenship and prevent the removal of their actions to federal court." *Id.* at 1061.

136. It should be noted that this strategy was subsequently closed off by statutory action that specifies that the domicile of the true party in interest should be used for diversity purposes. *See* 28 U.S.C. § 1332.

137. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1441(d).

138. *Nolan*, 919 F.2d at 681

dismissal on the grounds that the change in law would be so detrimental to their interests that it rendered England an inadequate forum.[139] The court noted that the likely damages awarded in England would be much lower because punitive damages would not be available, and it averred to the possible unavailability of strict products liability in that jurisdiction.[140] Nevertheless, the court concluded that "the plaintiffs' remedy in the United Kingdom is not so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law ought not to be given substantial weight."[141] The court also stressed the absence of any connection to the local forum, in contrast to the overwhelming links to the United Kingdom.[142] The private and public interest factors all pointed toward dismissal and, indeed, the district court granted a conditional dismissal subsequently affirmed by the Fifth Circuit. The ultimate fate of the plaintiffs' claims is not publicly known. It is likely that they settled for sums substantially lower than what they would have been awarded had the litigation continued to a successful pro-plaintiff conclusion in the United States.

Aside from demonstrating the lengths to which plaintiff and defendant lawyers will go in order to secure a jurisdictional advantage, *Nolan* also illustrates a number of salient points of immediate relevance to this Article.

First, it is a prime example of a group of plaintiffs electing to forego a WCS claim in a local forum in preference for an alternative remedy in a foreign forum. Whilst *Nolan* was litigated within the context of WCS, a system with obvious drawbacks (e.g., the low limit of liability), we continue to see the same practice of foregoing a remedy under MC99, a purportedly superior system to WCS. Why is that? The simple answer is choice of forum. The attractiveness of MC99 is ultimately conditional upon its jurisdictional scheme providing the particular plaintiff with a choice of their desired forum.

Second, *Nolan* exemplifies the reality that, because most aviation accidents can be attributed to several possible causes, a range of potential

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139. *Id.* at 682.

140. *Id.*

141. *Id.* (*citing* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 265 (1947); Ahmed v. Boeing Co., 720 F.2d 224, 226 (5th Cir. 1983).

142. *Nolan*, 919 F.2d at 683 ("Even if plaintiffs intend to base their case on the negligence of defendants in the planning, design, manufacture, assembly, testing, service and inspection of the aircraft and its engines, the evidence regarding the crash itself and the actions of BMA are central to the tragedy . . . Here, one finds even less of a connection to this forum since none of the airplane's components were designed or manufactured in Louisiana . . . In addition to evidence about the crash, substantially the evidence of the damage is also in the United Kingdom. Trial in the U.K. would greatly facilitate access to this evidence.").

defendants can be implicated. In other words, aviation litigation is usually multi-party in nature. This is more so at the preliminary stage when jurisdiction is being litigated, precisely because the pool of potential defendants will be larger because there have not yet been any findings on the substance of the various claims.

Third, the existence of multiple defendants (whether as co-defendants or third-party defendants) raises additional issues that influence choice of forum. Choice of forum considerations may influence the plaintiff's choice of defendant. In addition, the subsequent actions taken by the defendant(s) can be motivated by their own interests regarding choice of forum. Although British Midland was the prime suspect from the outset and thus the *proper* defendant for the plaintiffs' actions, the availability of U.S. defendants, combined with the plaintiffs' desire to secure a U.S. forum, resulted in the selection of Louisiana as the litigation forum, even though British Midland was not susceptible to the jurisdiction of that state's courts. From the perspective of a defendant, *Nolan* illustrates how they too will exploit the multi-party nature of aviation accident litigation to secure a jurisdictional advantage by excluding, impleading, or joining other parties.

The common denominator of these three points is choice of forum. Plaintiff lawyers will go to great lengths to secure the most advantageous forum, while defense lawyers will bend over backward to frustrate their securing that goal. At the top of the list of desirable forums is the United States. A good plaintiff lawyer will look at their jurisdictional options under MC99, if one of those is the United States, and FNC dismissal is avoidable, then they are home free and can expect the airline—in reality its insurer—to settle posthaste. Where MC99 does not offer a U.S. forum, then plaintiff lawyers will turn their attention to other potential defendants and theories of liability—anything that will get their foot in the door of a U.S. courtroom.[143]

B. Alternative Remedies

As *Nolan* amply illustrates, a highly eligible alternative defendant in aviation litigation is the manufacturer, especially since an enormous share of the airframe and aircraft component market is owned by U.S.

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143. As one U.S. lawyer stated: "[I]f any part of the epicenter of the dispute touches the United States, the legal representatives would be negligent not to explore the possibility of action there." Alan Reed, *To Be or Not To Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT'L COMP. L. 31, 31 (2000).

corporations. The manufacturer is even more attractive as a defendant where an action is based on strict products liability. This all begs a rather obvious question: if the aviation manufacturer is such a clear and attractive target for passenger claims, then why did the drafters of the Warsaw Convention not address it? Why did the drafters instead focus exclusively on the two-party relationship of the carrier-passenger rather than considering the reality of alternative remedies against third parties?

As shown above in Part II(C), at the time of the Warsaw Convention's drafting alternative remedies for passengers against third parties, e.g., a manufacturer, were few and far between. The drafters were justified at that time in adhering to the two-party paradigm as the basis for their system. What they could not appreciate at that time was that the subsequent emergence of alternative remedies would render that system anachronistic. The modern plaintiff has choices when it comes to which defendant to sue and what remedy to pursue. It is the core argument of this Article that MC99, as successor to WCS, is predicated on this anachronistic understanding, the repercussions of which undermine the effectiveness and fairness of MC99 as an aviation accident passenger compensation system.

This section explores the existence of alternative remedies. Mercifully, it can be a relatively short section as our interest is in establishing the factual existence of alternative remedies within the bigger picture of international aviation litigation, rather than analyzing their substantive content or assessing their overall efficacy. Furthermore, the greatest relevance of alternative remedies is the fact that they provide the source for third-party actions for contribution or indemnification, as will be further discussed in the next section.

The development of the common law to provide a general principle of liability for negligence opened an avenue for recovery in tort law for injured parties against parties with whom there was no privity of contract. Under these, it became possible for a plaintiff to bring a direct claim against a third party, such as a manufacturer, service provider (e.g., an airport), or even against a state's aviation authorities (provided sovereign immunity was not a barrier). Privity of contract no longer constrained the plaintiff to sue only the carrier with whom the contract of carriage had been formed. Now, the plaintiff had the possibility of an alternative tort-based remedy in negligence against third parties to the contract of carriage.

However, the alternative remedy provided under the general principle of negligence would not prove particularly useful to the plaintiff in the context of an aviation accident claim. Then, as now, a claim on the general theory of negligence was not usually an attractive option to a

plaintiff because of the need to prove fault. This is an especially onerous burden to overcome in the field of aviation, given the technical sophistication of the industry[144] and the likelihood that evidence has been destroyed and/or witnesses killed.[145] Even where it is possible to establish proof of negligence, the actual cost of doing so in an aviation accident may be prohibitively expensive. Where applicable,[146] the doctrine of res ipsa loquitur has provided some amelioration, yet the doctrine is of almost no value to a claim brought against a manufacturer or other third party because it requires that the defendant be in exclusive control of the instrument. In the case of an aircraft, it is the carrier who is generally in exclusive control, so—in the vast majority of aviation cases—the manufacturer or another third party will not be within the grasp of res ipsa loquitur, and the difficulties of proving negligence will remain.[147]

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144. As stated in *Shawcross & Beaumont*: "To succeed in a products liability case based on liability in negligence, a plaintiff must establish that the defendant was at fault in being negligent in respect of the design or manufacture of the product. In an aviation context, given the technical sophistication of the industry, this may be a difficult task." 4 SHAWCROSS & BEAUMONT: AIR LAW ¶ 406 (David McClean et al. eds., 169th ed. 2020).

145. *See, e.g.*, Cox v. Nw. Airlines, Inc., 379 F.2d 893 (7th Cir. 1967), wherein the plaintiff's husband had been a passenger of a flight operated by the defendant that had disappeared over the Pacific Ocean. Some wreckage was subsequently located, but the bodies of the passengers and crew were never found, nor was any evidence as to the cause of the accident. *Id.*

146. While seemingly custom-made for aviation accident cases, it was initially argued that the doctrine was inapplicable to aviation due to the inherent perils of the air, which meant that the defendant was never truly in exclusive control of the circumstances. This was addressed in *Fosbroke-Hobbes v. Airwork* [1937] 1 All ER 108 (KB) (Eng.), and in *Boulineaux v. Knoxville*, 99 S.W.2d 849 (Ark. 1935). Goedhuis wrote, circa 1937, "[t]he question whether or not the doctrine of *res ipsa loquitor* ought to be applied to air accidents has in the last years been much debated, especially in the United States." GOEDHUIS, *supra* note 23, at 34. Some support for not applying the doctrine was found in the early days of aviation. For example, in *Morrison v. Le Tourneau Co.*, 138 F.2d 339, 341 (5th Cir. 1943), the Fifth Circuit declared that "[t]he doctrine of *res ipsa loquitor* cannot apply in cases of this sort, because there is no showing that accidents of this very nature cannot happen to the most skillful [sic] pilots in planes of the finest type and condition." However, the technological advances and resulting improvements in safety and performance have eroded this basis for resisting the application of the doctrine. In 1977, the Fifth Circuit reconsidered its position. Higginbotham v. Mobil Oil Corp., 545 F.2d 422, 429-30 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618 (1978). *Higginbotham* was cited approvingly by the Privy Council in *George v. Eagle Air Services Ltd.* [2009] 1 WLR 2133 (PC) (appeal taken from St. Lucia) (Eng.). By 1965, Prosser's *Law of Torts* stated that "all the later cases now agree that the safety record justifies the application of *res ipsa loquitor* to [an unexpected airplane] crash, or even to the complete disappearance of a plane." PROSSER, *supra* note 106, at 220-21.

147. For more on *res ipsa loquitor* in an aviation context, *see* ANDREAS F. LOWENFLED, AVIATION LAW: CASES AND MATERIALS 7, 106-10 (2d ed. 1981); Howard Osterhout, *The*

In the 1960s, a distinct body of law emerged in the United States known as strict products liability, built upon aspects of tort and contract law—specifically, the elements of negligence and warranty.[148] This body of law produced a distinct cause of action that has proven especially valuable in the case of aviation litigation, i.e., strict products liability in tort.[149] This new cause of action relieved the plaintiff of the heavy burden of proving fault while also providing a general basis upon which to establish the liability of third parties for their products. In 1965, the American Law Institute codified it as a rule in its Restatement (Second) of Torts,[150] which has been adopted (with some alteration) by the majority of U.S. states.[151]

Inspired by the U.S. experience, the European Union established a strict liability regime for damage caused by defective products in the 1980s.[152] As a form of strict liability, the plaintiff is not required to prove fault or negligence on the part of the producer, instead, they must prove the damage, defect, and causation.[153] The European experience is noted

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Doctrine of Res Ipsa Loquitor as Applied to Aviation, 2 AIR L. REV. 9 (1931); E.A. Harriman, *Carriage of Passengers by Air*, 1 J. AIR L. 33, 39-40 (1930).

148. LAURENCE E. GESELL, AVIATION AND THE LAW 650-51 (1998); *see also* James D. Ghiardi, *Products Liability—Where is the Borderline Now?*, 13 THE FORUM 206, 206-07 (1977); Richard A. Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C. L. REV 643, 643 (1978). A good summary of the history of products liability law in the United States is to be found in Rebecca Tustin Rutherford, *Changers in the Landscape of Products Liability Law: An Analysis of the Restatement (Third) of Torts*, 63 J. AIR. L. & COM. 209, 212-18 (1997).

149. *See* William L. Prosser, *Products Liability in Perspective*, 5 GONZ. L. REV. 157, 162 (1970); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 804 (1966).

150. RESTATEMENT (THIRD) OF TORTS § 402A (AM. LAW INST. 1965).

151. It must be noted that the application of § 402A has been "anything but uniform." Rutherford, *supra* note 148, at 229. In 1997, the American Law Institute approved RESTATEMENT (THIRD) OF THE LAW OF TORTS: PRODUCTS LIABILITY, which seeks to supersede § 402A of the Second Restatement. However, the vast majority of states still adhere to the Second Restatement. The Restatement is extremely influential and has been adopted by many states as an authoritative statement of strict liability for products in tort. Rutherford, *supra* note 148, at 222.

152. The European Commission began to study strict liability for products in the 1970s and produced a draft Directive in 1976. In 1985, Council Directive 85/374 was adopted, i.e., Council Directive 85/374, 1985 O.J. (L 210/29) (EC) [hereinafter Directive 85/374], on the approximation of the laws, regulations, and administrative provision of the Member States concerning liability for defective products. This Directive was to be transposed by the E.U. Member States into national law by 1988. *Id.* For some history and discussion of the Directive, *see generally* Peter Shears, *The EU Product Liability Directive—Twenty Years On*, J. BUS. L. 884 (2007).

153. *See* Directive 85/374, *supra* note 152, at art. 4 ("The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage.").

simply to demonstrate that the emergence of a new remedy, i.e., strict products liability, is not unique to the United States. Instead, it is safe to say that the expansion of remedies beyond those available in 1929 has taken place worldwide. From the plaintiff's point of view, WCS and MC99 are no longer the only shows in town.

The emergence of alternative remedies and defendants has meant that third parties (i.e., third parties to the contract of carriage) are now directly or indirectly implicated in the litigation of passenger claims. Whereas at the time of the Warsaw Convention, the drafters could rely on the law insulating third parties from passenger claims, the development of alternative remedies has expanded the plaintiff's options. The current reality is that MC99 is just one of several potential remedies available. Not only does this raise questions about its efficacy, but it also impacts the issue of choice of forum. The attractiveness of MC99 is ultimately conditional upon its jurisdictional scheme granting the plaintiff a choice of the most desirable forum. Where an alternative remedy exists that offers a preferable forum, then plaintiffs will forego an MC99 action, even if that alternative remedy is otherwise a less attractive option. Foregoing a convention remedy was not contemplated by the drafters of the Warsaw Convention, but it must now be taken into account when evaluating choice of forum under MC99.

C. Third-Party Actions

The emergence of alternative remedies led to another development that also contributes significantly to the bigger picture. This is the reality of third-party actions for contribution or indemnification, the impact of which is threefold. First, they provide the link by which alternative remedies become directly implicated in the carrier-passenger liability relationship. Second, they can undermine the goals and objectives of WCS and MC99 by circumventing some of the provisions of those regimes. Third, third-party actions can also have a direct bearing on choice of forum. Whether the defendant to the main action is the carrier (or some other party), the existence, or even just the prospect, of the defendant bringing a third-party action against another party alters the jurisdictional power play. As shown by the *Nolan* case, third-party actions are a strategic tool used by defendants in aviation litigation to win a jurisdictional advantage over the plaintiff. This raises new questions: Is this fair to the plaintiff? Is it consistent with the goals of MC99?

What is a third-party action? A third-party action is distinct from, but conditional upon, the main action between a plaintiff and a defendant.

A defendant may bring a third-party action to the main action against a third party who it alleges is liable to the defendant, either in part or in full, for its liability to the plaintiff in the main action. In practical terms, when a plaintiff brings an action for damages against a carrier, that carrier may allege that another party (e.g., the manufacturer of the aircraft) is also to blame, and this other party should reimburse the carrier for some (or all) of the damages that the carrier ends up owing to the plaintiff. Various other configurations can arise – instead of the carrier, the plaintiff might sue an agent of the carrier (e.g., in negligence) or a component manufacturer (e.g., in products liability), and that defendant may seek recourse against the carrier for some share (if not all) of the liability. The parties to the third-party action are called the third-party plaintiff and the third-party defendant.

The most common examples of a third-party action are claims for indemnification or contribution. In simple terms, the difference between indemnity and contribution is that in the former, the entirety of the liability is transferred from one party to the other; in the latter, liability is effectively shared between the tortfeasors according to the doctrine of apportionment.[154]

While indemnity might arise by way of contract and/or by operation of law, the right to contribution arises only by operation of law.[155] However, a distinction must be made between a third-party action for indemnification arising as a matter of law and one arising as a matter of contract. A right to indemnification arising under contract will be treated in the next section, which focuses on the influence of third parties via contractual indemnities and contracts of insurance. In this section, we are concerned with the influence exerted by third parties via their right to contribution or indemnification as it arises by operation of law. This

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154. One commentator described it thus: "'Contribution' indicates that the liability for loss occasioned by a tort is shared by those responsible for it. 'Indemnity' indicates that the entire liability for loss is shifted from one person held legally responsible to another person. One who receives contribution is nevertheless out of pocket the amount of the judgment for which he does not receive contribution. One who is awarded indemnity is not out of pocket all because his indemnitor has to pay the entire judgment." E. Eugene Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, 517 (1952). *See also* Gus M. Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEX. L. REV. 150, 150-51 (1947) ("'Contribution' is used to mean the payment by each tortfeasor of his proportionate share of the plaintiff's damages to any other tortfeasor who has paid more than his proportionate part ... 'Indemnity' is used to mean the payment of all of plaintiff's damage by one tortfeasor to another tortfeasor who had paid it to the plaintiff.").

155. Francis J. Gorman, *Indemnity and Contribution Under Maritime Law*, 55 TUL. L. REV. 1165, 1167 (1981).

occurs in the case of joint or concurrent tortfeasors, which is common in aviation litigation.

Where a third-party plaintiff seeks contribution/indemnification against a third-party defendant based on common tort liability (as distinct from a contractual basis), then a condition of recovery is that both parties (to the third-party action) bear common liability to the plaintiff in the main action. If the plaintiff could not sue the manufacturer, the defendant carrier cannot seek contribution from the manufacturer. In the aviation example above, unless the manufacturer (i.e., the third-party defendant) would be liable to the plaintiff in a direct action, then the manufacturer cannot be liable to the carrier (*qua* third-party plaintiff) for contribution.

This commonality, upon which contribution/indemnification is founded, may be expressed either in the tortious act (and consequently in the damage) or solely in the damage. Where the commonality is in the tortious act *and* the damage, then the parties are defined as joint tortfeasors.[156] Where the commonality is *only* in the damage, then they are defined as concurrent tortfeasors.[157] What both species of tortfeasors

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156. Joint tortfeasors combine to commit a single tortious act that necessarily causes the same damage. *See* W.T.S. STALLYBRASS, SALMOND'S LAW OF TORTS 74 (10th ed. 1945) ("In order to be joint tortfeasors they must, in fact, or in law, have committed the same wrongful act."). In the case of a joint tortfeasor, there is a single tort for which multiple parties bear shared responsibility. Joint tortfeasors thus share a mental concurrence in the commission of the wrongful act; that is, they act in concert or with a joint purpose. There are various doctrines for determining the existence of this mental concurrence, and these differ between jurisdictions. For instance, in English law, the concept of common design is employed by the courts. *See, e.g.*, Unilever Plc. v. Gillette (U.K.) Ltd. [1989] RPC 583, 609 (CA) (Eng.) (Mustill L.J. defining the test for liability as a joint tortfeasor as whether, "(a) there was a common design between [the parties] to do acts which ... amounted to infringements, and (b) [the party] has acted in furtherance of that design."). This area of law was addressed in 2015 by the Supreme Court of the United Kingdom, in *Fish & Fish Ltd. v. Sea Shepherd* [2015] 2 WLR 694 (SC on appeal from Eng.) (UK).

157. Whilst liability as joint tortfeasors arises where the parties combine to commit a single tort; there are situations in which two parties commit *separate* torts that combine to cause damage to the same injured party. This is frequently the case in aviation accidents since the torts, e.g., the independent negligent act of the carrier combined with a manufacturer's design defect, combine contemporaneously to cause personal injury or death. In this case, the tortfeasors do not act jointly, but their acts do run together to cause damage. Where their acts substantially and contemporaneously result in damage that is indivisible, then these several (i.e., not joint) tortfeasors may be regarded as *concurrent tortfeasors*. For example, in *Walton v. Avco Corp.*, 610 A.2d 454, 460, 530 Pa. 568, 580 (1992), an aviation product liability case involving concurrent tortfeasors' failure to warn, the court refused a claim for indemnification because each party's liability was independent from the other. ("The relationship of the parties in this case, however, establishes concurrent primary liabilities and therefore precludes any right to indemnification. Neither defendant's liability was dependent upon, or a precursor to, the other's. The jury found them both liable for their own acts, independent of one another.").

(generally referred to as solidary tortfeasors in the civilian law tradition)[158] share is that their torts must, as Glanville Williams put it, "run together" to produce the same damage.[159]

i. Contribution

Contribution allows one tortfeasor, who paid more than their share of the liability to the plaintiff, to seek a portion of that liability from another non-paying tortfeasor (or tortfeasors, if there is more than one). It is essentially a concession to fairness[160] and rests upon the recognition of the need for equity between those with a common obligation.[161] Each legal system has its own doctrine of contribution, or indeed may have a rule against it. However, the right of contribution at common law is generally denied an intentional tortfeasor; a similar exclusion applies in civil law.[1621]

Although contribution between tortfeasors is now commonplace, it was not always so. Under the rule in *Merryweather v. Nixan* (1799),[163] there was no contribution between joint tortfeasors at common law.[164] Therefore, where the plaintiff elected to recover solely from tortfeasor A, then tortfeasor B effectively got a free pass because A had no right of indemnity/contribution against B. The policy justification for this rule (as well as for the contributory fault exclusionary rule) was expressed in the legal maxims *in pari delicto* (*potior est conditio defendantis*) and *ex*

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158. This is, of course, a generalization regarding civilian law systems. In fact, the various civilian systems do differ in how they define solidary tortfeasors, not all of which would identify concurrent tortfeasors as being *solidary*, although they would hold them liable *in solidum* for the damages. The difference emerges in the division of liability. In the case of joint tortfeasors, liability is distributed on a percentage basis corresponding to relative fault. For concurrent tortfeasors, the division tends to be on percentage causation. But there is also a tendency in some systems to see the liability of concurrent tortfeasors as a case of indivisibility, which has technical rules different from solidarity.

159. GLANVILLE L. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 1 (1951).

160. *See* Robert A. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 134 (1932).

161. *Id.* at 137.

162. HUIBERT DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 103-04 (1954).

163. Merryweather v. Nixan (1799) Eng. Rep. 186; 101 ER 1337 (Eng.).

164. For discussion of this case, *see generally* Theodore W. Reath, *Contribution Between Persons Jointly Charged with Negligence - Merryweather v. Nixan*, 12 HARV. L. REV. 176 (1898); Hodges, *supra* note 154; Ellis Berger, *Contribution Between Tortfeasors*, 9 IND. L.J. 229 (1934).

turpi causa non oritur actio.[165] In simple terms, the courts would not come to the aid of a wrongdoer.

This could be a harsh rule that imposed an injustice on parties who bore only a small proportion of the fault. In addition, it undermined the deterrent effect of tort liability. Nevertheless, the common law did not—and, strictly speaking, still does not—permit a right to contribution; however, an exception did arise in admiralty.[166] However, since then, English law,[167] various U.S. state laws,[168] and various other jurisdictions have enacted statutory schemes that provide a right to contribution.

When it comes to the civil law tradition, Szalma states that whilst Roman law recognized delictual, solidary obligations, permitting the injured party to recover all losses from one of several tortfeasors, the law did not permit contribution claims between tortfeasors.[169] Although Szalma claims that the majority of European civil law systems followed the Roman law, he describes provisions under Austrian, German, Swiss, and French Codes that allowed contribution between solidary tortfeasors.[170] Indeed, this appears to be the current general position of the European civilian law tradition.[171]

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165. *See* Leflar, *supra* note 160, at 130.

166. An exception did arise, but only in admiralty in England and the United States. A court of admiralty could order that the loss be divided equally between the parties, known as the rule of moiety (also referred to as the divided damages rule). The rule was first laid down in 1815 by Lord Stowell in *The Woodrop-Sims* (1815) 165 Eng. Rep. 1422, 1423 (UK). The U.S. Supreme Court adopted the rule in 1854 in *The Schooner Catharine v. Dickinson*, 58 U.S. 170 (1854).

167. Under English law, a statutory right was provided by the Law Reform (Married Women and Tortfeasors) Act 1935, 25 & 26 Geo. 5 c. 30, § 6 (UK). This Act was subsequently repealed and replaced by the Civil Liability (Contribution) Act 1978, c. 47 (UK), under which any party liable for damage suffered by another person may recover contribution from any other person liable for the same damage (whether jointly or otherwise). *Id.* at § 1.

168. Many states have adopted legislation based on the Uniform Law Commission's model legislation, the 1977 Uniform Comparative Fault Act. *See* UNIFORM APPORTIONMENT OF TORT RESPONSIBILITY ACT 4 (UNIF. LAW COMM'N 2003). The State of Idaho, for example, provides comparative negligence as the basis for apportionment. *See* Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976).

169. Jozef Szalma, *Solidary and Divided Liability of Joint Tortfeasors—with Special Regards to the Provisions of the New Hungarian Civil Code*, 8 J. EURO. HIST. L. 66, 66-67 (2017).

170. *Id.* at 69.

171. The Principles of European Tort Law (PETL), published by the European Group on Tort Law (EGTL), provide some evidence of this. Although the PETL are not legally binding, they do intend to provide a harmonized codification of the law in Europe (including common-law States) in a similar vein to the American Law Association's Restatements. Under Article 9(102)(1) of the PETL: "A person subject to solidary liability may recover a contribution from any other person liable to the victim in respect of the same damage. This right is without

Therefore, unlike the common law, the civil law tradition has long provided for contribution between solidary tortfeasors. However, as demonstrated above in Part II(C)(ii), this was still problematic because it required establishing the liability of the parties in the first instance; this was very hard to do against third parties to the contract of carriage, so the availability of contribution was more theoretical than practicable. In other words, the need for contribution seldom arose in the context of carriage because the underlying requirement for liability of a third party to the plaintiff was extremely rare.

ii. Indemnification

In essence, indemnity means the duty to make good the liability incurred by another.[172] As noted above, the right of indemnity can arise either by contract or by operation of law. It is with the latter that we are currently concerned; the former is addressed in the next section. The origin of the non-contractual right to indemnity is found in equity, where it was founded upon the doctrines of restitution and unjust enrichment.[173] Simply put, indemnity results in the "shifting of the entire loss from one tortfeasor to another."[174]

The rule against contribution/indemnification could be harsh on a joint/concurrent tortfeasor, especially when the paying tortfeasor was morally faultless or where his or her share of the fault was minimal, e.g., when the paying tortfeasor's liability was based on strict liability or was vicarious.[175] In these cases, common law courts recognized an equitable right for a tortfeasor to recoup his or her loss from the other tortfeasor who was truly at fault.[176] As one commentator described it, "[i]ndemnity

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prejudice to any contract between them determining the allocation of the loss or to any statutory provision or to any right to recover by reason of subrogation [*cessio legis*] or on the basis of unjust enrichment." *See Principles of European Tort Law*, EUR. GROUP ON TORT L. (May 2005), *available at* http://www.egtl.org/docs/PETL.pdf (last visited Apr. 9, 2021).

172. The etymology of the word "indemnity" has been traced to the conjunction of the Latin words *in* (not), *damn* (loss), and *ficere* (to make), i.e., to not make loss. Gorman, *supra* note 155, at 1166 n.4.

173. Marie R. Yeates et al., *Contribution and Indemnity in Maritime Litigation*, 30 S. TEX. L. REV. 215, 223 (1990).

174. Ingham v. E. Air Lines Inc., 373 F.2d 227, 241 (2d Cir. 1967).

175. For example, a right of indemnity may arise in the case where liability arises vicariously based on a special relationship, e.g., *respondeat superior*. *See* Gorman, *supra* note 155, at 1172 ("[A] master, who is held vicariously liable under *respondeat superior* for the negligent acts of his servant, would be entitled to indemnity from the servant.").

176. For example, indemnity between tortfeasors was allowed by the Iowa Supreme Court in *Rozmajzl v. Northland Greyhound Lines*, 242 Iowa 1135, 49 N.W.2d 501 (1951)

is given to the person morally innocent but legally liable, as against the actual wrongdoer whose misconduct has brought the liability upon him."[177] There are, of course, various doctrines. Generally speaking, the right to equitable indemnification is usually only available in those circumstances where the paying tortfeasor is de jure liable but de facto "fault-less."[178] Where the paying tortfeasor bears more than a de minimis level of fault, then the right of indemnification is not available, and they must rely instead on the availability of a right to contribution.

The need to rely on equitable indemnification has been substantially reduced by the introduction of statutory regimes for contribution that generally permit contribution on a proportional basis all the way up to, and including, full indemnification.[179] In the context of aviation accident litigation, indemnification is much more likely to arise through an insurance agreement or contractual indemnities, to which we shall shortly turn.

iii. Relevance to Aviation Litigation

The availability of a right to non-contractual contribution or indemnification was not a feature of the common law at the time of the Warsaw Convention, and its availability within the civilian legal system was largely theoretical. On the international law plane, there was some precedent for recourse. The Collision Convention of 1910 provided for the apportionment of liability between joint tortfeasors according to their relative degree of fault.[180] The international regime governing the carriage of goods by railway contained provisions on recourse since the Berne Convention in 1890,[181] and continued to do so with both the CIM

(original common carrier was found liable); for some commentary on this case, *see* Davis, *supra* note 154, at 520.

177. Francis H. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 243 (1908).

178. It is not possible to discern a precise common doctrinal basis to the various doctrines. *See Ingham*, 373 F.2d at 240; Davis, *supra* note 154, at 536; Hodges, *supra* note 154, at 153-57. At most, it could be said, as Judge Learned Hand stated in *Slattery v. Marra Bros., Inc.*, 186 F.2d 134 (2d Cir. 1951), that indemnity ought to arise where "faults differ greatly in gravity."

179. *See, e.g.*, Civil Liability (Contribution) Act 1978, c. 47, § 2(2) (Eng.).

180. *See* International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, art. 4, Sept. 23, 1910, TD/B/C.4/296 [hereinafter Collision Convention].

181. *See* Berne Convention 1890, *supra* note 33, at art. 48.

1924[182] and the CIV 1924.[183] However, the recourse provisions in the railway conventions dealt only with recourse between carriers who were party to the contract of carriage, i.e., successive carriage. Neither the CIM 1924 nor the CIV 1924 made any provision in relation to recourse actions by, or against, third parties.

All of this suggests that recourse actions were not a common feature of the legal landscape at the time the Warsaw Convention was drafted, which is further reflected in the fact that the Convention does not address them. This is in stark contrast to the state of affairs that presently exists where third-party actions are a regular feature of civil litigation. This fact alone has fundamentally changed the legal landscape of international aviation litigation, exploding the myth of the two-party paradigm upon which WCS (and thus MC99) was established.

The development of doctrines of indemnification and contribution drove the expansion of procedural rules of joinder. Traditionally, the ability to join a defendant to proceedings was limited to cases of joint tortfeasors, so that when a plaintiff wished to recover against concurrent tortfeasors he or she was forced to pursue each in a separate action. Once contribution and indemnification became available, it made more sense to provide for separate proceedings to be joined together. This certainly countered many of the traditional regime's inequities and led to a greater incidence of multi-party litigation. This has, it is submitted, generated new inequities for the plaintiff because it empowers defendants to employ various strategies to challenge the jurisdictional choice of the plaintiff, which is precisely what occurred in *Nolan*.[184]

In *Nolan*, a factor militating in favor of FNC dismissal was the defendants' inability to join the carrier (British Midland) as a third-party defendant to the U.S. proceedings. It was argued that unfortunate consequences would arise if the FNC dismissal was not granted because the defendants, if found liable, would be forced to seek indemnification or contribution from British Midland through a separate action in England. Ironically, the defendants in *Nolan* had complained of their inability to join British Midland as a third-party defendant due to the court's lack of jurisdiction over the carrier. However, it is highly unlikely that Boeing did not have contractual indemnity in place with British Midland upon which it could have found jurisdiction. Indeed, jurisdiction over S.N.E.C.M.A. was established on a similar basis. To the cynical

182. *See* CIM 1924, *supra* note 33, at art. 27. Chapter III of the CIM 1924 contained a number of provisions relating to recourse actions between carriers, including jurisdiction.

183. *See* CIV 1924, *supra* note 33, at arts. 48-49.

184. *See supra* Part III.A.

observer, it might seem that the defendants (including potential third-party defendants) were coordinating their efforts to ensure a jurisdictional advantage that served their common interest. Strategically, it made sense for the defendants to keep British Midland out of the litigation altogether. This is what they had initially done with S.N.E.C.M.A., only bringing them into the litigation as a last resort to secure removal to federal court.

Cases such as *Nolan* bring to light the impact that third-party actions can have on the litigation of international aviation accident cases, particularly the issue of choice of forum. Through a third-party action, a defendant can bring about the joinder of another party to the litigation between it and the plaintiff to the main action. This invariably alters the dynamics and is frequently exploited by the defense to secure a jurisdictional advantage, most often by manufacturing an FNC dismissal.

Another consequence for aviation litigation of third-party actions for non-contractual contribution/indemnification is the risk they pose to circumventing the provisions and purpose of WCS and MC99. This is an area of intense debate, and for reasons of space cannot be explored here in the detail required.[185] Nevertheless, it is necessary to flag this issue and provide a very concise description.

If a plaintiff elects to forego a remedy against the carrier under WCS or MC99 and chooses instead to pursue a third party (e.g., an airframe manufacturer), the possibility can emerge that if that third party takes a third-party action against the carrier, that carrier would not be able to rely on the provisions of WCS or MC99 in that third-party action—although it could have, if the plaintiff had sued the carrier directly.

For example, in *In re Air Crash Over the Mid-Atlantic on June 1, 2009*,[186] most plaintiffs were non-U.S. domiciliaries for whom there was no U.S. jurisdiction over the carrier (Air France) under MC99. Instead, plaintiffs brought several tort actions against a number of U.S. component manufacturers in U.S. courts. These actions were consolidated before the District Court for the Central District of California. At this point, the defendant manufacturers brought third-party actions against Air France for indemnification or contribution. Air France argued that MC99 should apply to the third-party action and that the court should recognize that it did not have jurisdiction; to do otherwise, Air France argued, would circumvent and thereby undermine MC99 jurisdictional provisions.[187]

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185. For a short summary of the issue, the reader is directed to 7 SHAWCROSS & BEAUMONT: AIR LAW ¶ 446 (David McClean et al. eds., 169th ed. 2020).

186. *See In re* Air Crash Over the Mid-Atlantic on June 1, 2009, 760 F. Supp. 2d 832 (N.D. Cal. 2010).

187. *See id.* at 846-47.

Although the court acknowledged the existence of a "potential tension," it avoided the issue by granting an FNC dismissal.[188] Indeed, it is likely that the manufacturer defendants brought the third-party actions to engineer an FNC dismissal, as it was in their collective interests to resolve the dispute in France rather than the United States.

Although still the subject of debate, the balance of opinion has come down on the side of holding that third-party actions are not governed by WCS or MC99; it is submitted that this is the correct view.[189] Unfortunately, this state of play could consequently open the possibility of WCS or MC99 being subject to circumvention, yet we must be careful when employing the term "circumvention" itself. Although it is often used in a pejorative sense, the circumvention involved here is not illegal or dishonest. The plaintiff is entitled to pursue a third party under an alternative cause of action rather than pursue the carrier via WCS or MC99. However, where that third party then brings a third-party action against the carrier, the result can be that the carrier indirectly answers a passenger claim in a forum that it would not have been subject to in an action brought by the passenger directly. This is inconsistent with the purpose of those conventions insofar as it generates legal uncertainty and undermines uniformity. Is it fair to a carrier that a plaintiff should be able to circumvent the jurisdictional (and perhaps other provisions of the conventions) by means of an alternative remedy, taken in the knowledge that the carrier will be added to the litigation via a third-party action? This is the reality of international aviation litigation, and policymakers and legislators are entitled—if not obligated—to take this into account when assessing the efficacy of MC99 within the bigger picture that this Article describes.

The two key takeaways from this section are that third-party actions provide an additional avenue for third-party influence in international aviation litigation (including WCS and MC99), and that third-party actions give rise to the risk of circumvention of WCS and MC99. These are two critical components of the bigger picture.

D. Risk Management Devices

Given its history, the extent of the potential liability involved, and the sophistication of parties, it should come as no surprise that a complex network of arrangements exists within the aviation industry for

188. *See id.* at 846.

189. *See* SHAWCROSS & BEAUMONT, *supra* note 185, ¶ 446.

channeling and allocating the risks associated with carriage by air. These can be broadly split into two groups: (1) contractual indemnities; and (2) insurance.

Why should this Article take an interest in contractual indemnities and insurance? There are at least two reasons. First, and most obviously, they are part of the bigger picture, each playing a critical role as devices for the management of aviation risk. At least to the extent that both seek to control and allocate the risks related to liability for damages suffered by passengers and shippers during international carriage by air, they occupy the same space as MC99 and thus may promote or frustrate its objectives. More specifically, both mechanisms provide another avenue through which third parties exert influence over choice of forum. Collectively, this matrix of contractual indemnities and insurance agreements bind parties together in opposition to the interests of the plaintiff.

Secondly, insurance for passenger liability in international carriage by air is so ubiquitous nowadays as to be almost universal.[190] Whilst

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190. Pursuant to Article 50 MC99, the European Union introduced Regulation 785/2004 that requires certain carriers operating within the European Union to have minimum levels of insurance in respect of their liability under MC99 for passengers, baggage, and cargo. *See* Regulation (EC) No. 785/2004 of the European Parliament and of the Council of Apr. 21, 2004, on insurance requirements for air carriers and aircraft operators [2004] O.J. (L 138/1) [hereinafter Regulation 785/2004]. The minimum level of insurance required by the Regulation in respect of liability for passengers is SDR 250,000 per passenger. *Id.* at art. 6(1). Regulation 785/2004 was subsequently amended in 2010 by Commission Regulation (EU) No. 285/2010 Apr. 6, 2010, amending Regulation (EC) No. 785/2004 of the European Parliament and of the Council on insurance requirements for air carriers and aircraft operators [2010] O.J. (L 87/19) [hereinafter Regulation 285/2010]. The amendment was necessary to make provision for the revision of the monetary limits of liability under MC99 that had been adjusted to account for inflation. However, since the level set for passenger liability in Regulation 785/2004 was in excess of that required by the Convention, the limit in respect of passenger liability was not adjusted in 2010. The Regulation applies to all air carriers "flying within, into, out of, or over the territory of a Member State to which the Treaty applies." Regulation 785/2004, *supra* note 184, at art. 2(1). Thus, insurance is mandatory for all carriers operating within the European Union regardless of whether they are Community air carriers or not. However, the minimum levels of insurance in respect of liability for passengers (as well as baggage and cargo) do not apply to flights of non-Community air carriers that merely overfly the territories of E.U. Member States. *See id.* at art. 7(4). It should be noted that prior to Regulation 785/2004, insurance was already mandated for Community air carriers pursuant to the licensing requirements of Council Regulation (EEC) No. 2407/92 of July 23, 1992, on licensing on air carriers (1992) O.J. (L 240/1) art. 7, now replaced by Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of Sept. 24, 2008 on common rules for the operation of air services in the Community (recast) (2008) 293 O.J. (L 3) art. 11. Beyond the European Union, compulsory insurance for air carriers has been a feature of national licensing regimes of commercial air carriers for many years. For details in respect of some national law regimes, *see* ROD D. MARGO, MARGO ON AVIATION INSURANCE ¶ 3.19

neither WCS nor MC99 make it compulsory for carriers to insure themselves, Article 50 of MC99 does provide that the Contracting States shall require their carriers to maintain "adequate" insurance covering their liability under the Convention.[191] The quasi-universality of insurance coverage is not limited to air carriers; all commercial aviation entities, whether by law or mere prudence, insure themselves against risk. This means that, in aviation litigation, it is the insurer, rather than the liable party, who is settling the bill with the victim of an accident. This fact invariably influences the litigation of claims.

The concluding part of this Article will require some evaluation of MC99 as a system of compensation, and this can only be done where the actual exposure of the carrier is known and, even more importantly, the full extent of the insurer's role is brought to light. The aviation insurer is not some benign presence whose only role is to sign the checks for its insured. Instead, it occupies—through subrogation—a staggeringly important place in the process of defending and settling claims. Yet, the insurer's role is seldom noted and even less often analyzed.

i. Contractual Indemnities

The labyrinthine complexity of contractual indemnities within the aviation industry is well illustrated by the facts of *In re Air Crash near Peggy's Cove, Nova Scotia on September 2, 1998*.[192] A Swissair-operated McDonnell Douglas MD-11 crashed into the Atlantic Ocean during a flight from New York to Geneva, resulting in the deaths of all 215 passengers on board. The crash resulted from an in-flight fire that started due to faulty wiring in the in-flight entertainment system, which ignited flammable insulating blankets. The plaintiffs sued not only

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et seq. (Katherine B. Posner et al. eds., 4th ed. 2014). In the United States, federal regulations require U.S. and foreign direct air carriers to maintain minimum levels of coverage, including $300,000 per passenger and $20 million per aircraft per occurrence. *See* 14 C.F.R. § 205.5. Thus, the vast majority of carriers are legally obligated to maintain insurance if they wish to operate within the European Union or the United States. Similar regulations are applied throughout the world. For instance, under US federal law, aircraft accident liability insurance is compulsory for U.S. direct air carriers and for foreign direct air carriers operating under the permission or authority of the Department of Transportation, whether it be domestic or international operations. *See* 14 C.F.R. § 205(3)(a) (providing: "A U.S. or foreign direct air carrier shall not engage in air unless it has in effect aircraft accident liability insurance coverage that meets the requirements of this part for its air carrier or foreign air carrier operations.").

191. MC99, *supra* note 2, at art. 50.

192. *In re* Air Crash Disaster Near Peggy's Cove, 210 F. Supp. 2d 570 (E.D. Pa. 2004).

Swissair, Boeing,[193] and Interactive Flight Technologies (the designers of the in-flight entertainment system), but also the manufacturers of the thermal blankets, the sub-contractor who installed the system, and two other sub-contractors who provided certification of the installation. The spaghetti-like crisscrossing of third-party actions between these seven defendants was mitigated by Swissair and Boeing settling with the plaintiffs and reaching recourse agreements with all but one of the other defendants. However, even still, Interactive Flight Technologies' refusal to settle with Boeing and Swissair led it to seek contractual indemnification from four of the six other defendants, including Swissair. Multi-party litigation such as this is common in the field of aviation litigation. Even if only one defendant appears on the docket, the truth is that the contractual indemnities between the various parties feed into the nexus and demand that we expand our attention beyond the illusory paradigm of a simple two-party dispute.

Contractual indemnities refer to indemnities arising from contract, as opposed to those which arise by law or equity[194] or in the case of insurance.[195] In the simplest of terms, we are concerned here with a particular type of clause frequently included in contracts between commercial aviation entities by which one party promises to indemnify the other.[196] For example, an aircraft lease or purchase agreement will nearly always contain a clause by which the aircraft operator agrees to indemnify the lessor or manufacturer against any losses arising from the operator's use of the aircraft. Therefore, if the manufacturer is sued by a passenger who is injured during carriage by air, the manufacturer will

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193. Boeing Co. was a successor in interest, having acquired McDonnell Douglas.

194. Indemnification need not be contractual. As dealt with earlier, a right to indemnification can arise as a matter of law. This was recognized by the Privy Council in *E. Shipping Co. v. Quah Beng Kee* [1924] AC 177, 182-83 (PC) (appeal taken from Straits Settlements) (Eng.) (stating that "[a] right to indemnification generally arises from contract express or implied, but is not confined to cases of contract. A right to indemnification exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other . . . The right to indemnification need not arise by contract.").

195. Whilst a non-life insurance contract is a contract of indemnity, it is distinguishable from a non-insurance contract of indemnity. For instance, indemnities in insurance contracts are subject to legal doctrines that are not applicable in a non-insurance context, such as the duty of utmost good faith and the principle of fortuity. For some of the differences between insurance and non-insurance indemnities, *see* WAYNE COURTNEY, CONTRACTUAL INDEMNITIES 9 (2015).

196. In the context of contractual indemnities, Courtney defines a promise of indemnification as "a promise of exact protection against loss." *Id.* at 6.

turn to the operator in the expectation that it will hold the manufacturer harmless against such liability.[197]

Once a loss is within the scope of the indemnity, the indemnified is entitled to full indemnification; there is no rule providing for apportionment of liability between the indemnifier and indemnified based on any notion of comparative fault.[198] Subject to limitations imposed by statute or public policy, a party may undertake to indemnify another party against any conceivable loss. Of relevance to this work is indemnification relating to liability to passengers for personal injury or death sustained during international carriage by air. As has been noted on several occasions, the plaintiff has a range of possible defendants to sue in the event of an accident. Therefore, to the extent that these possible defendants have pre-existing contractual relations, they have an interest in securing contractual indemnities from each other. Of course, the buck has to stop with at least one of them, and the question of who shall carry the risk is generally a matter for commercial negotiation.

Contractual indemnity clauses in non-insurance agreements can vary significantly from one agreement to the next, but some common features are easily discerned. The following is an example of part of general indemnity clause taken from a lease agreement[199] between a leasing subsidiary of a major aircraft manufacturer and an international air carrier:

The [lessee] agrees to indemnify and hold harmless the [Indemnitee] against any and all Losses which the Indemnitee may at any time suffer or incur, whether directly or indirectly as a result of (i) ownership,

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197. The desired effect of an indemnity is to protect a party (the indemnified) from loss. The party undertaking to protect the indemnified is obliged to either prevent such loss arising in the first place or to compensate for loss already incurred. For this reason, the effect of contractual indemnities is described as being either "preventative" or "compensatory." *Id.* at 17-18. Courtney distinguishes the two in the following manner: "For [indemnities of prevention], the indemnifier is expected to act before the indemnified party suffers a loss. In contrast, it is implicit in the notion of compensation that the indemnifier is to perform after the indemnified party has already sustained loss." *Id.* at 18.

198. *See id.* at 80-81. Courtney quotes Chief Justice Stephen in *Osborne v. Eales* [No. 2], stating "it seems to be impossible to hold that a man indemnifies another against a loss by merely paying a portion of it. If the latter shares the loss, he is to that extent clearly not indemnified." Osborne v. Eales [No. 2] (1862) 15 Eng. Rep. 849, 137-38 (PC) (appeal taken from Austl.) (UK).

199. This operating sublease agreement between sublessor Airbus Leasing II, Inc. and sublessee Siberia Airlines was filed as part of the documents associated with the case of *Esheva v. Siberian Airlines*. Operating Sublease Agreement (Doc. 128-7), Esheva v. Siberian Airlines, 499 F. Supp. 2d 493 (S.D.N.Y. 2007) (No. 06-CV-11347). The author accessed the document through Public Access to Court Electronic Records (PACER), a service maintained by the Administrative Office of the U.S. Courts.

registration, import, export, storage, modification, leasing, . . . use, operation whether in the air or on the ground, delivery or re-delivery of the Aircraft or any part thereof, and which relate to the Aircraft, during the lease period, and (ii) any act or omission which invalidates or which renders voidable any of the Insurances.[200]

What is immediately notable is that the scope of the general indemnity is incredibly broad, covering every conceivable act involving the aircraft resulting in any and all loss to the indemnified. It applies whether the loss is direct or indirect, the latter covering claims by third parties (such as passengers). There is no requirement of fault on the part of the lessor; it is expected to assume the obligation to indemnify the lessee for any and all risks. Indeed, the next sub-clause specifies that the indemnities apply even where the loss is attributable to an act or omission of the lessor, or to a defect in the aircraft, or to strict liability.[201] Subsequent sub-clauses of the lease agreement do provide exceptions which do not require the lessee to indemnify the lessor, e.g., where the indemnified party's fraud, willful misconduct, or gross negligence, caused the loss.[202]

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200. *Id.* at 21. A general indemnity provision is also found in the agreement between lessor and carrier quoted by the English High Court in *Pindell Ltd. v. AirAsia Bhd.* [2012] 2 CLC 1, 35-36 (Com Ct) (Eng.) ("Lessee hereby agrees at all times to indemnify, protect, defend and hold harmless each Indemnitee from and against all and any liabilities, losses, claims, proceedings, damages, penalties, fines, fees, costs and expenses whatsoever (any of the foregoing being referred to as a 'Claim') that any of them at any time suffers or incurs . . ."). In another case, a helicopter lease agreement included the following indemnification clause: "Lessee hereby assumes liability for, and shall defend, indemnify and hold harmless the Lessor and each of its agents, servants and assigns from and against any and all costs, losses, liabilities, obligations, expenses, claims, damages, penalties, actions, suits, expenses and disbursements of any nature whatsoever, including legal expenses, imposed on, incurred by or asserted against Lessor in any way relating to or arising out of the manufacture, purchase, acceptance or rejection, ownership, delivery, lease, possession, use, condition, sale, return or other disposition hereunder of the Helicopter (including, without limitation, latent and other defects, whether or not discoverable by Lessee, any claim in tort for strict liability, and any claim for patent, trademark or copyright infringement." Helicopter Lease Agreement (Doc. 128-7) 1, 8, Escobar v. European Aeronautic Def. & Space Co., No. 13-CV-598 (D. Hawaii filed June 11, 2016). The author accessed the document through Public Access to Court Electronic Records (PACER), a service maintained by the Administrative Office of the U.S. Courts.

201. The clause (numbered 14.2) provides: "Except to the extent Clause 14.3 applies, the Sublessee will be liable in respect of its indemnities in paragraph 14.1 [i.e., the general indemnity clause] even though the Loss is suffered or incurred after the Expiry Date or is attributable to an act or omission of an Indemnitee, to some defect in the Aircraft or strict liability (provided it relates to an event or circumstance occurring during the Sublease Period)." Operating Sublease Agreement, *supra* note 198, at 21.

202. *See id.* at 22.

Generally speaking, aircraft manufacturers tend to have far-reaching indemnity clauses in their aircraft sales agreements that allocate the risk of liability to the carrier.[203] The scope of these indemnities can be surprisingly broad. This is well illustrated by the case *Pakistan International Airlines v. Boeing Co.*[204]

Although the facts of the case involved first-party damage to the carrier's aircraft, the indemnity clause at issue here extended to include third-party liability for injury to, or death of, any person(s). The carrier's aircraft was damaged in a hard landing at Ankara, Turkey. Boeing sent a survey team to inspect the damage and submitted a repair proposal to Pakistan International Airlines (PIA). After completing the repairs, Boeing agents were towing the aircraft when a component of the main landing gear broke, resulting in US$500,000 in damage to the aircraft. Naturally, PIA sought compensation from Boeing, arguing that the damage resulted from its own negligence in failing to detect the problem.[205] Unfortunately for PIA, its claim for compensation was frustrated by an indemnity clause in the aircraft sales agreement, which provided:

Buyer will indemnify and hold harmless Boeing and each employee of Boeing assigned pursuant to paragraphs (a), (d) and (e) above from and against all liabilities, costs and expenses incident thereto, which may be suffered by, accrue against, be charged to or recoverable from Boeing or any such employee, or both, by reason of injury to or death of any person or persons . . . or by reason of loss of or damage to property, including the Aircraft, arising out of or in any way connected with the performance by said employee of services in connection with any of the aircraft after delivery thereof to Buyer.[206]

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203. The lessor's indemnification is reinforced by a disclaimer and waiver clause in the agreement whereby, except as otherwise agreed, the lessor waives, releases, and renounces all claims against the lessee, however and whenever arising, and the lessor disclaims any obligation or liability toward the lessee or any other person. The agreement's disclaimer states: "None of the indemnitees will have any obligation or liability whatsoever to the [lessee] or any other person (whether arising in contract or in tort, and whether arising by reference to negligence or strict liability of the sublessor or otherwise) . . . " *Id.* at 38-39. The waiver clause doubles down on the disclaimer by stating: "The [lessee] hereby waives releases and renounces, as between itself and each indemnitee to the extent permitted by applicable law ... all claims against such indemnitee, however, and whenever arising . . . " *Id.* at 39. The waiver and exclusion apply in respect of, *inter alia*: "any liability, loss or damage caused or alleged to be caused directly or indirectly by the aircraft or by any inadequacy thereof or deficiency or defect therein or by any other circumstance in connection therewith; ... The use, operation or performance of the aircraft or any risks relating thereto." *Id.* at 39.

204. Pakistan Int'l Airlines Corp. v. Boeing Co., 575 F.2d 1268 (9th Cir. 1978).

205. *Id.* at 1270.

206. *Id.* at 1269.

This clause effectively immunized Boeing against any conceivable liability, not only arising from PIA's operation of the aircraft, but also arising in any way connected to the aircraft. Such indemnities are commonplace in aircraft purchase agreements with aircraft manufacturers.

An easily accessible example of a contractual indemnity that is almost universally employed by air carriers engaged in international carriage by air is found in the Standard Ground Handling Agreement (SGHA) of the International Air Transport Association (IATA). This SGHA is a model agreement of standard clauses that carriers (members and non-members of IATA alike) use as the basis for the contracts with ground handling agents. Ground handling agents provide the vast majority of ground operations for carriers at their outstations, e.g., baggage and cargo handling/loading, de-icing, aircraft marshaling, load control, fueling, surface transport, and so on. Article 8 of the 2018 edition of the IATA SGHA includes several clauses about liability and indemnity. Article 8(1) provides, inter alia, that the carrier indemnifies the ground handling agents against liability for claims for liability for passenger death or personal injury arising from the act or omission (including negligence) insofar as it falls short of willful misconduct.[207]

The contractual indemnities agreed to by carriers with third parties (e.g., manufacturers) allocate the risk of liability towards passengers—and much more besides—to the carrier. The carrier becomes the repository for the risk of third parties' liability to passengers. Where a passenger claim arises against an aircraft or component manufacturer, or whichever other aviation business entity one cares to mention, the reality is, with few exceptions, that the complex web of contractual indemnities

207. *Standard Ground Handling Agreement*, SWISSPORT (2018), *available at* https://www.swissport.com/fileadmin/downloads/publications/190327_SP-18-C2177_GH_Agreement_Gesamt-PDF_sse_RZ.pdf (last visited Apr. 5, 2021) ("Except as stated in Sub-Articles 8.5 and 8.6, the Carrier shall not make any claim against the Handling Company and shall indemnify it (subject as hereinafter provided) against any legal liability for claims or suits, including costs and expenses incidental thereto, in respect of: (a) delay, injury or death of persons carried or to be carried by the Carrier; (b) injury or death of any employee of the Carrier; (c) damage to or delay or loss of baggage, cargo or mail carried or to be carried by the Carrier, and (d) damage to or loss of property owned or operated by, or on behalf of, the Carrier and any consequential loss or damage; arising from an act or omission of the Handling Company in the performance of this Agreement unless done with intent to cause damage, death, delay, injury or loss or recklessly and with the knowledge that damage, death, delay, injury or loss would probably result . . ."), ("The exceptions referred to in Article 8(1) pertain to damage to the carrier's aircraft (i.e., art. 8(4)) and for direct loss or damage to cargo (i.e., art. 8(5)). For these, the handling company accepts limited liability. A similar indemnity is provided by Article 8(2), which includes death or personal injury to third parties, i.e., non-passengers.").

will lead back to the carrier. The carrier will have little option but to fulfill its assumed contractual duties to indemnify other parties and pick up the bill.

Why do carriers assume this burden? It is certainly not for charitable or ethical motives; instead, the reasoning is commercially driven and predicated on the fact of insurance. The carrier prefers to accept the allocation of risk because it knows it will transfer that risk to the insurance market, and because it believes that the ultimate cost of doing so will be cheaper when it sources the insurance coverage itself. Were the carrier to refuse to accept the allocation of risk, then the third party would be required to purchase the extra coverage necessary, the cost of which would be factored into the price paid by the carrier. Take the example of an airframe manufacturer: the additional cost to the manufacturer of insurance, resulting from the absence of an indemnity from the carrier, would be added to the aircraft's purchase price. Put simply, carriers prefer to buy cheaper aircraft even though they must assume the risk and cost of insuring against liability as a quid pro quo.

Through contractual indemnities and similar risk allocation devices, the parties agree between themselves who will carry the risk of liability. It should interest us greatly that it is the carrier who voluntarily accepts this role as the repository of risk but, more realistically, it is a matter of deciding who will assume the primary obligation to insure against that risk. The carrier knows full well that it will shift that risk to the aviation insurance market. This brings us nicely to the topic of insurance.

ii. Insurance

This sub-section begins by providing some background on aviation insurance agreements, but the substantial part of it focuses on the doctrine of subrogation, the device by which the insurer can assume claims control and acquires the right to bring third-party actions. This is presented from an English law perspective, as justified by the size, importance, and influence of the United Kingdom aviation insurance market globally.[208]

Aviation insurance comprises policies issued to aircraft operators (e.g., airlines), aircraft manufacturers, component manufacturers, airports, aviation maintenance and repair providers, aviation service

208. As one commentator on aviation insurance notes, "[w]ith the London market being recognized as the international centre for aviation insurance . . . common law principles have a strong influence in the formulation and interpretation of aviation insurance policies." Wolf Müller-Rostin, *Insurance*, *in* COLOGNE COMPENDIUM ON AIR LAW IN EUROPE 1095 (Stephan Hobe et al. eds., 2013).

providers, and so on.[209] As is to be expected, there are substantial differences amongst aviation insurance policies. This is partly due to the numerous variables at play, from the individual insured's particular needs and the peculiarities of their operations, to the specific regulatory background and idiosyncrasies of the different insurance markets. Nevertheless, there is also a great deal of standardization to be found in the documentation employed by the aviation insurance market. This has, in large part, been thanks to the efforts of various groups within the market that have produced voluminous libraries of standard clauses, which are then combined and utilized by the market to tailor individual policies to specific requirements.[210]

Within the field of commercial aviation insurance,[211] coverage for several categories of risk is available for purchase. The insurance policy document will often contain a schedule of insurance consisting of separate sections; each addressed to a particular risk, such as loss or damage to the aircraft (i.e., hull insurance), liability to passengers, liability to third parties,[212] and war and allied perils.[213] In some respects,

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209. MARGO, *supra* note 190, ¶ 2.04 ("[B]roadly speaking, aviation insurance embraces the insurance of risks associated with (a) manufacture, ownership, operation and maintenance of aircraft, and (b) the operation of aviation facilities on the surface.").

210. *See id.* ¶ 10.03. In 1949, the Lloyd's Aviation Underwriting Association drafted a standard aircraft policy referred to as AVN 1. This standard has been amended over the years, most recently by the Aviation Insurance Clauses Group (AICG), which produced AVN 1D in 2014. Its predecessor (AVN 1C) is still commonly used regardless of where the risk is situated. *Id.* ¶ 10.03 n.3. However, for U.S.-based business, AVN 16 is employed for aircraft hull policies and AVN 20 for aircraft liability policies. *Id.* ¶ 10.03. According to MARGO, standard policies are common to the general aviation business but are not generally used in connection with the insurance of commercial airlines. *Id.* For commercial airlines, it is more common for the broker to prepare a policy specific to the airline but generally utilizing various standard clauses from AVN 1C and augmenting it with others produced by the AICG and other groups. Many of these standard clauses can be accessed at Aviation Insurance Clauses Group, AICG (Aug. 3, 2020), *available at* https://www.aicg.co.uk/AICG_Web/Product/AICG_Web/AICG_clauses.aspx (last visited Apr. 5, 2021).

211. The field of aviation insurance is divided between commercial aviation and general aviation. We are concerned with the former, which involves, "very large risks with high-limit first-party policies covering hull losses (for example, large aircraft or property damage) or high-stakes third-party liability coverages." Katherine Posner, *The Unique Role of Aviation Insurance Coverage Counsel*, *in* NEGOTIATING INSURANCE POLICY DISPUTES: LEADING LAWYERS ON INTERPRETING INSURANCE CONTRACTS, OBTAINING KEY DOCUMENTS, AND RESOLVING COVERAGE DISPUTES (INSIDE THE MINDS) 17 (2011).

212. Here, the term *third party* is used to refer to non-passengers, i.e., third parties to the contract of carriage, rather than third parties to the contract of insurance.

213. Other insurance agreements include aviation products liability (*see* AVN 66), loss or damage to aircrew baggage and personal effects (*see* AVN 75), and liability to/of pilots/crew (*see* AVN 73).

an aviation insurance policy is a collection of separate policies covering different risks amalgamated within a single document. Each of these sections will usually provide specifics as to coverage, exclusions, conditions, and (possibly) extensions of cover.[214] The precise limits, deductibles, and premiums are generally itemized for each type of insurance provided under the policy.[215]

We are concerned with the category of risk referred to as aviation legal liability. This is a type of "liability insurance" defined as covering "the monetary impact of legal claims against policyholders and, crucially, sometimes the cost of defending claims."[216] The aviation insurance market further sub-categorizes aviation legal liability,[217] and a fundamental distinction applies between liability to passengers and liability to third parties. From the carrier perspective, our attention is on passenger liability insurance, as this is the category into which WCS and MC99 claims fall. Third-party liability insurance policies for other commercial entities in the aviation industry are concluded on much the same terms, and thus the exposition provided herein will also serve for a broader perspective on aviation insurance generally.

Subject to applicable limitations and deductibles, aviation legal liability insurance for passengers grants the insured airline indemnity from the insurer against all sums that the insured shall become legally liable to pay as damages for any bodily injury to passengers, or for

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214. AVN 1C and AVN 1D do not include extensions of cover in the sections of the schedule of insurance. Brokers may elect to add clauses to the section wording within the policy itself or will attach the same as endorsements. Extensions of cover are treated below in the sub-section on endorsements.

215. For instance, for hull cover, the policy schedule may specify maximum agreed values for the aircraft types as well as a deductible for each (usually applied on a per claim basis). Depending on the policy, the deductible may not apply in the case of a total loss, a constructive total loss, or an arranged total loss. The level of deductible is usually specified by broad categories, such as narrow-bodied jets (including Airbus A320 and Boeing 737 variants) with a possible deductible of US$750,000 or wide-bodied jets (including Airbus A330 and Boeing 777) with a possible deductible of US$1,000,000. Deductibles can be reduced, and the insured may elect to take out deductible insurance.

216. Malcolm A. Clarke, *Insurance*, *in* ENGLISH PRIVATE LAW 785 (Andrew Burrows ed., 2013). It is to be distinguished from first-party liability insurance, whereby the insured insures their own life or property. In an aviation insurance context, an example of first-party liability insurance would be hull insurance, which forms part of the category known as *aircraft insurance* (as distinct from *liability insurance*).

217. In addition to passenger and third-party liability, aviation legal liability includes cargo liability, product liability, and premises liability. The latter two are usually taken out separately by an airline. For example, aviation products liability insurance can be taken out separately under the AVN 66 policy wording. In some cases, a policy may, in addition to passenger, third-party, and cargo liability, also provide cover under the same clause for some product and premises liability.

property damage to baggage or personal articles caused by an occurrence arising out of or in connection with the insured's operation of an aircraft.[218] This cover includes liability of the airline for losses caused by the negligence of its employees.[219] It will also usually cover the insured carrier's defense costs.[220] When it comes to liability for death or injury to passengers and third parties, aviation policies do not usually have deductibles, but an overall limitation is generally specified between US$1.5 and US$2 billion per occurrence.[221]

It goes without saying that insurance coverage is not absolute. In addition to monetary limitations, there are also coverage limitations. The description of cover contained in the schedule of insurance in a policy provides, in and of itself, a form of exclusion insofar as it defines the circumstances in which the duty to indemnify will arise.[222] Prima facie, if the loss suffered does not fall within the description of cover, then the insurer is not at risk, and no duty to indemnify arises.

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218. The coverage provided by an aviation insurance policy for legal liability to passengers is entirely dependent on the wording of the policy in question. The wording provided above is thus not intended as a universal definition of such coverage but rather as a description of the general features of such coverage. Other descriptions include: "Passenger liability insurance protects an aircraft operator against its legal liability to passengers. In the case of airlines, the insurers undertake to pay on behalf of the insured airline all sums which the insured shall become legally liable to pay as damages arising from bodily injury or property damage caused by an occurrence and arising out of or in connection with the insured's operations." MARGO, *supra* note 190, ¶ 12.01. *See also* 9 SHAWCROSS & BEAUMONT: AIR LAW ¶ 38 (David McClean et al. eds., 169th ed. 2020) (1997) ("The purpose of this cover is to indemnify the insured for all sums which he shall become legally liable to pay as damages or compensation for accidental bodily injury (fatal or otherwise) to passengers who are carried by the insured under a contract of carriage by air.").

219. However, cover does not include the personal liability of the employee to the injured party unless an extension for such cover is purchased.

220. In respect of the insured carrier's defense costs: firstly, as shall be discussed below, it is the insurer who controls the conduct of the proceedings, and it is, therefore, the party incurring the costs on the insured's behalf. It is thus only fair that the defense costs should be covered by the insurance policy, and this is indeed usually the case. *See* AVN 1C (July 26, 2016) Final, at § II(3); AICG, *supra* note 209. *See also* MARGO, *supra* note 190, ¶ 23.39.

221. MARGO, *supra* note 190, ¶ 12.05 n.1; P.J.C. VICCARS, AVIATION INSURANCE: A PLANEMAN'S GUIDE 20 (2d ed. 2012).

222. The coverage for legal liability to passengers as laid out in Section III(1) of AVN 1C provides: "The Insurers will indemnify the Insured in respect of all sums which the Insured shall become legally liable to pay, and shall pay, as compensatory damages (including costs awarded against the Insured) in respect of: (a) accidental bodily injury (fatal or otherwise) to passengers whilst entering, onboard, or alighting from the Aircraft; and (b) loss of or damage to baggage and personal articles of passengers arising out of an Accident to the Aircraft." AVN 1C (July 26, 2016) Final, at § III(1); AICG, *supra* note 209.

Supplemental to the basic coverage are exclusions, usually laid down in an exclusions section.[223] Whether general or specific, the significance of an exclusion is that, where the loss suffered by the insured comes within the scope of the exclusion, the insurer is entitled to refuse to indemnify the insured against the loss.[224] An example of an exclusion clause is one to the effect that the policy will not apply where the aircraft is operated outside the geographical limits specified in the policy schedule.[225]

The general exclusions portion of the policy will usually include detailed exclusions attached from standard clauses produced by the aviation insurance market. The most relevant attached exclusion clause is the "War, Hi-Jacking and Other Perils Exclusion Clause" (AVN 48B).[226] This particular exclusion clause excludes claims arising from a range of perils. Aside from the obvious cases of war and hijacking, AVN 48B excludes claims arising from, inter alia, "strikes, riots, civil commotions or labour disturbances," and "[a]ny malicious act or act of sabotage."[227]

It is very common for these general exclusions to be written back into the policy through an *endorsement*. Broadly speaking, an

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223. Section III of AVN 1C provides specific exclusions to legal liability to passengers. For example, exclusions pertaining to documentary requirements and also excluding the insurer from liability for injury or loss suffered by employees or operational crew. In terms of general exclusions, these are specified in Section IV of AVN 1C and apply to all the attached insurance policies, e.g., hull, passenger, and third party. One general exclusion provides that the policy does not apply, "[w]hilst the total number of passengers being carried in the Aircraft exceeds the declared maximum number of passengers stated in Part 2(4) of the Schedule." *Id.* at § IV(A)(7).

224. *See* MARGO, *supra* note 190, ¶ 10.49 ("An exclusion, sometimes also called an exception, is a clause in a policy which limits the risks by excluding or excepting the insurers from liability for certain types of claims or for claims arising from certain types of risk that would otherwise fall within the basic coverage provisions of the policy.").

225. For some case law on this issue, *see* Vargas v. Ins. Co. of N. Am., 651 F.2d 838 (2d Cir. 1981); Monarch Ins. Co. v. Castellano, 176 Ill. App. 3d 849, 531 N.E.2d 908 (1988).

226. Other frequently attached exclusion clauses are: Nuclear Risks Exclusion Clause (AVN 38B); Noise and Pollution and Other Perils Exclusion Clause (AVN 46B); Asbestos Exclusion Clause (AVN 96); Contracts (Rights of Third Parties) Act 1999 Exclusion Clause (AVN 72); Crew Exclusion Clause (AVN 68). *See* AICG, *supra* note 209. For example, paragraph 1 of AVN 46B provides: "This Policy does not cover claims directly or indirectly occasioned by, happening through or in consequence of: (a) noise (whether audible to the human ear or not), vibration, sonic boom and any phenomena associated therewith; (b) pollution and contamination of any kind whatsoever; (c) electrical and electromagnetic interference; (d) interference with the use of property . . . " AVN 46B (July 26, 2016) Final, § III(1); AICG, *supra* note 209.

227. *See* War, Hi-Jacking & Other Perils Exclusion Clause (Aviation) (AVN 48B) (Jan. 10, 1996), *reprinted in* MARGO, *supra* note 190, at app. A43.

endorsement is a document attached to an insurance policy that modifies the policy in some way.[228] An endorsement may provide additional coverage to the basic policy, such as increasing the limits of liability or extending coverage to a type of risk not covered by the basic policy. In simple terms, endorsements are add-ons to the basic policy that allow the parties to customize the coverage.[229]

Another common usage for an endorsement is "writing back" something excluded in the basic policy. Since war and related perils are always excluded by the policy, coverage for this can be reinstated via an endorsement. AVN 52E is the standard clause currently used for this purpose. To illustrate this, let us take the tragic case of the Germanwings Flight 9525. Here, in an apparent act of suicide, the co-pilot crashed the aircraft into the French Alps, killing himself and all others on board. Such an event counts as a malicious act that an aviation insurer excludes under AVN 48B.[230] Therefore, but for that clause, the insurer would be liable to indemnify the insured.

However, in all likelihood, an insurer would be liable to indemnify a carrier in such circumstances but only because coverage for war risks (including malicious acts) would have been written-back into the policy by way of an endorsement, albeit under differing terms.[231] A standard endorsement exists within the aviation insurance market for this very purpose, i.e., AVN 52E. Alternatively, the carrier may separately arrange cover from a specialized war risks insurer. In either case, the norm is that carriers are amply covered.

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228. Endorsements may be standard or non-standard. The aviation insurance market makes widespread use of standard clauses in endorsements. Attached to the basic policy will be several documents that are generally identified as numbered endorsements, where utilizing a standard clause then a code will usually be inserted at the foot of the document including a reference to the publication date of the standard clause (*e.g.*, AVN 106 22.01.09). If the standard clause has been amended by the parties, and thus differs from the standard, then word *amended* may be included in parentheses beside the code. An example of a standard endorsement is AVN 62. This provides indemnification for reasonable expenses incurred for the purpose of search and rescue operations.

229. For example, where the airline operates leased aircraft (whether under a finance or operating lease), then a number of standard clause endorsements exist that the lessor or financier will insist of being included in any contract of insurance. *See, e.g.*, AVN 67B adds the lessor/financier as an additional insured to the policy.

230. The AICG produced two new versions of this clause in 2006, AVN48C and AVN48D. There is only a slight difference in wording between the two versions. The aviation insurance market has continued to use AVN48B in the case of passenger liability.

231. *See* VICCARS, *supra* note 220, at 59-62. Whilst the AVN 52E will provide a different limit of liability (*e.g.*, $150 million) to that provided under the main policy (a limit of $1.5 billion), the sub-limit would usually not be applied to the insured's liability for passengers.

This brief overview of aviation insurance contracts intends only to demonstrate the fact of aviation insurance, specifically of carriers, and the nature and extent of the coverage provided. As explained in the introduction to this Article, insurance coverage for carrier liability to passengers is mandated by law, so much so that it is all but universal. The sophisticated contracts of insurance used within the aviation industry provide the insureds with very comprehensive protection against loss, damage, or liability arising from accidents. Not only can the insured shift the risk of liability to the insurer under these policies, but it can also immunize itself against its own legal costs (and those awarded to the plaintiff) incurred in the process of defending claims brought against it. Naturally, to enjoy these benefits, the carrier must pay a premium, but the cost of these premiums is negligible in comparison to the potentially financially ruinous consequences of a major disaster. Indeed, one distinguished commentator has stated that "[w]hilst insurance is an indispensable prerequisite for an air carrier's operation, its actual cost is relatively small, usually averaging less than two percent of the total operating cost of the flight."[232]

The facts are that the carrier (as well as other commercial aviation parties) is comprehensively insured against passenger liability, in most cases not having to pay a cent itself to the victim of an aviation accident in compensation or as costs. Deductibles are not generally a feature of aviation insurance agreements for passenger liability, and the overall limits provided under policies are massive (ranging from US$1.5 to US$2 billion per occurrence).[233] The near-universal existence of such insurance almost guarantees that in the event of an aviation catastrophe, the resources are in place to provide the victims and their families with the compensation to which they are entitled under the terms of the applicable conventions, even where the carrier has long since been wound-up or become insolvent.

iii. Subrogation

Under the common law, a contract of indemnification might permit an insured party to recover more than his actual loss. This is because the insured's right to indemnification from the insurer is not affected by his having a right of action against a third party for the same loss.[234] In other

232. Müller-Rostin, *supra* note 207, at 1094.

233. MARGO, *supra* note 190, ¶ 12.05 n.1.

234. JONATHAN GILMAN ET AL., ARNOULD'S LAW OF MARINE INSURANCE AND AVERAGE 1485 (17th ed. 2008) [hereinafter GILMAN ET AL.] ("[A]n assured's right to claim against a

words, it is no defense to the insurer to argue that the insured has a claim against the wrongdoer. Likewise, where the insured sues the wrongdoing third party for the loss, the fact that he has insurance does not affect his claim against the third party.[235] Therefore, the injured party could theoretically recover twice for his loss, once by way of a claim against the wrongdoer and another by way of indemnification of his insurer. However, as stated in *Arnould's Law of Marine Insurance and Average*, "it is entirely foreign to the spirit of contracts of indemnity that a person damnified should recover his loss more than once."[236] For this reason, the common law recognizes that the indemnifying party has rights against the indemnified that are collectively referred to under the doctrine of subrogation.

Subrogation gives rise to two entitlements. First, the right of the insurer to step into the insured's shoes and exercise any causes of action vested in the insured against third parties.[237] Second, the right of the insurer to recover from the insured any sums received from third parties in respect of the insured loss.[238]

In its first aspect, the doctrine of subrogation grants the insurer the right to the benefits of any rights or remedies of the insured against third parties that may relieve or lessen the loss for which indemnification has been provided.[239] This aspect of subrogation was alluded to by Lord

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third party liable for the assured loss (or contractually liable to indemnify him against the same) does not affect his right to claim the same from his insurer."); JOHN BIRDS ET AL., MACGILLIVRAY ON INSURANCE LAW ¶ 24-002 (John Birds et al. eds., 13th ed. 2015) [hereinafter BIRDS ET AL.] ("If a person suffers a loss for which he can recover against a third party, and is also insured against such loss, his insurer cannot avoid liability on the ground that the insured has the right to claim against the third party.").

235. GILMAN ET AL., *supra* note 233, at 1485 ("[T]he assured's right to recover his loss from a third party liable for the same [or contractually liable to indemnify him against the same] is not affected by any recovery he may make [or be entitled to make] under a contract of insurance which covers him for the same loss"); BIRDS ET AL., *supra* note 233, ¶ 24-002 ("[T]he third party if sued by the insured, cannot avoid liability on the ground that the insured has been or will be fully indemnified for his loss.").

236. GILMAN ET AL., *supra* note 233, at 1487.

237. *See* BIRDS ET AL., *supra* note 233, ¶ 24.001 ("In insurance law 'subrogation' is the name given to the right of the insurer who has paid a loss to be put in the place of the insured so that he can take advantage of any means available to the insured to extinguish or diminish the loss for which the insurer has indemnified the insured.").

238. S.R. DERHAM, SUBROGATION IN INSURANCE LAW 1 (1985). *See also* BIRDS ET AL., *supra* note 233, ¶ 24.002; J. BIRDS, BIRDS' MODERN INSURANCE LAW 331 (10th ed. 2016).

239. In *Castellain v. Preston*, Lord Justice Brett summed up this first aspect of subrogation, referring to it as the fundamental rule of insurance: "[A]s between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of

Mansfield in *Mason v. Sainsbury*: "[e]very day the insurer is put in the place of the insured . . . . The insurer uses the name of the insured."[240] In practical terms, the insurer's right of subrogation gives it the right to control proceedings against third parties in the name of the insured. It is important to note that subrogation does not operate to vest the insured's cause of action in the insurer. The insurer, as subrogee, does not gain a personal cause of action against the third party; it is reliant on the insured's cause of action.[241] For this reason, the insurer cannot—except in some limited jurisdictions—take the subrogated action in his own name, but only in that of the subrogor insured. Therefore, the insurer may only exercise by subrogation the rights that the insured could themselves have exercised against the third party.[242] The insured must have a cause of action against the third party before the insurer can exercise its right of subrogation. Likewise, if the insured's right of action is somehow limited or extinguished, the insurer cannot be in any better position when making a subrogated claim.

The second aspect to which the term subrogation is applied typically entitles the insurer to receive from the insured any money received in damages from third-parties liable for the indemnified loss.[243]

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condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished." Castellain v. Preston [1883] 11 QBD 380, 388 (CA) (Eng.). Lord Cairns nicely summarized the rule in *Simpson v. Thomson*: "I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss." Simpson & Co. v. Thomson [1877] 3 App. Cas. 279, 284 (HL) (on appeal from Scot.) (UK).

240. Mason v. Sainsbury [1782] 3 Douglas 61, 99 Eng. Rep. 538, 64 (1782) (KB) (Eng.).

241. *See* DERHAM, *supra* note 237, at 69 ("The doctrine of subrogation does not confer a new and independent right of action on the insurer, but merely gives it the benefit of any personal right that the insured himself has against the third party.").

242. *See* GILMAN ET AL., *supra* note 233, at 1494 ("Self-evidently, the insurer can only be subrogated to rights currently vested in the assured, and can acquire by subrogation no better right than the assured possesses.").

243. In *Burnand v. Rodoconachi Sons & Co.*, Lord Blackburn described this aspect of subrogation: "The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back." Burnand v. Rodocanachi Sons & Co. [1882] 7 App. Cas. 333, 339 (HL) (on appeal from Eng.) (Eng.).

Colinvaux's Law of Insurance argues that the first is the only true instance of subrogation.[244] It is submitted that this view is to be preferred. While the term subrogation is used to refer to the second case, it is does not strictly amount to subrogation since it involves the exercise of a personal right of the insurer against the insured and not the subrogated exercise of the insured's cause of action against a third party.

It is the first aspect of subrogation that we are primarily concerned with because it gives the insurer the power of claims control. Although subrogation may arise by force of law, insurers will usually include a contractual clause to this effect in the policy, rather than rely on common law subrogation (also referred to as equitable subrogation).[245] The major consequence is that it is the insurer, not the insured, who is really calling all the shots in proceedings brought against the insured; the insurer is *dominus litis*. As Lord Justice Brett put it in *Wilson v. Rafflalovich*:

> The underwriters are, in the sense in which the phrase is always used, the real plaintiffs, that is, they are the persons instructing the solicitors, the persons paying for the action, the persons to benefit by the action, and the persons to lose by the action if it is lost; but in point of law they are not the plaintiffs, the plaintiffs on the record being the only persons who can be recognized as plaintiffs.[246]

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244. *See* ROB MERKIN, COLINVAUX'S LAW OF INSURANCE 622 (10th ed. 2014).

245. This is done, in part, because there are limitations to subrogation at common law. For example, whilst the right of subrogation arises upon conclusion of the contract of insurance, it is only exercisable once the insured has been fully indemnified. *See* MARGO, *supra* note 190, ¶ 23.63 ("The right of subrogation arises *ipso facto* upon the conclusion of the contract of insurance, although its exercise is postponed until the indemnification of the insured by the insurers."). *See also* Page v. Scottish Ins. Corp. [1929] 33 Lloyd's List LR 134, 137 (CA) (Eng.) (the court stating: "the underwriter had no right to subrogation until he had fully indemnified the assured under the policy"). In another case before the Court of Appeal, the judgment noted: "You only have a right to subrogation in a case like this when you have indemnified the assured." Scottish Union & National Ins. Co. v. Davis [1970] 1 Lloyd's Rep. 1, 5 (CA) (Eng.). Providing for a contractual right of subrogation also has the advantage of permitting the parties to alter the rules normally applicable to subrogation. DERHAM, *supra* note 237, at 144. Derham also cites the decision of Judge North in *Arthur Barnett Ltd. v. Nat'l Ins. Co. of N.Z.* [1965] NZLR 874 (CA) (N.Z.), as holding that an express provision in the policy at issue, "would entitle the insurer to be *dominus litis* of the action and to control proceedings even before the insured had received a full indemnity, and indeed that it may enable the insurer to exercise a right of subrogation before it has made payment under the policy." DERHAM, *supra* note 237, at 146. *See also* Morris v. Ford Motor Co. [1973] QB 792, 812 (CA) (Eng.) (Lord Justice James stating: "It is open to the parties to a contract of indemnity to contract on the terms of their choice, and by the terms, they choose they can exclude rights which would otherwise attach to the contract.").

246. Wilson v. Raffalovich [1881] 7 QBD 553, 558 (CA) (Eng.).

iv. Subrogation in Aviation Litigation

In conversation with aviation litigators, it becomes abundantly clear that it is the insurer who is, so to speak, "calling all the shots." This is a state of affairs that plaintiff lawyers enthusiastically point out; on the defense side, lawyers are eager to downplay the insurer's role, as they know not to bite the hand that feeds them. Depending on the parties involved, the air carrier may have some influence over how litigation is pursued, not by matter of law or contract but by blunt commercial clout. A large airline is a valuable customer to an aviation insurer, and the market is highly competitive, so the desire to keep the insured happy will influence the power dynamic. The insurer will generally stress this aspect of the arrangement and emphasize the importance of satisfying the insured and protecting its interests.

Clearly, each situation is unique, and the relative bargaining strength of the parties will influence the de facto control of proceedings. One such situation was described to me by a defense lawyer. A very large international air carrier was opposed to the course of action pursued by its insurer, which was to concede liability concerning a high-profile aviation disaster. The insurer's interest was in minimizing its exposure and settling with the manufacturer (a major airframe manufacturer), whereas the airline was primarily concerned with the negative impact that conceding liability would have for its business. In this case, the carrier was in a position to be able to exert sufficient influence over its insurer to alter the course of litigation; thus, one must be cautious before relying upon generalizations. One thing is clear, however: it is the insurer who controls the purse strings, and it is also the insurer who is in the driver's seat when it comes to making the final decision.[247]

AVN 1C contains a claims control clause that provides: "[t]he Insurers shall be entitled (if they so elect) at any time and for so long as they desire to take absolute control of all negotiations and proceedings and in the name of the Insured to settle, defend or pursue any claim."[248] AVN 1D contains provisions to a similar effect.[249] Even in a case where

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247. *See* Tom Baker, *Insurance in Sociolegal Research*, 6 ANN. REV. L. & SOC. SCI. 433, 436 (2010) ("Whether a lawsuit involves securities fraud, medical malpractice, an auto accident, or a president accused on sexual harassment, a liability insurer most likely will be paying the defense lawyer and deciding whether to go to trial or settle the case. If there is a settlement or a trial verdict, it will be the insurance company, not the defendant, that pays. It is no exaggeration to say that liability insurers are the bankers for the tort system.").

248. *See* AVN 1C, *supra* note 209.

249. *See* AVN 1D, *supra* note 209, at 9.

the insured retains the right of claims control—a rarity in aviation insurance—the insured nonetheless owes a duty of good faith to the insurer with respect to claims against third parties; in most cases, this is codified as a contractual obligation within the policy.[250] As a result, even if the insurer cannot directly control the proceedings, its potential to seek damages against the insured for any prejudice caused by the insured's own handling of the claim against the third party gives the insurer indirect control.

There are two aspects to claims control. First, it grants the insurer control of proceedings brought against the insured, and second, it also gives the insurer the power to bring third-party actions in the name of the insured. However, a word of caution must be voiced here with respect to joint insurance in light of a majority decision of the Supreme Court of the United Kingdom in *Gard Marine & Energy Ltd. v. China National Chartering Company Ltd. (The Ocean Victory)*.[251] The majority determined that subrogation will not operate for the insurer in an action between the co-insureds. As joint insurance is not commonplace in the aviation insurance market, this is unlikely to prove problematic, and insurers can be expected to act to counter it.

In most jurisdictions, although the insurer is *dominus litis*, the litigation in question will proceed under the name of the insured, e.g., the carrier. The insurer's name will not appear anywhere on the court docket. Therefore, in the case of a claim by a passenger against a carrier, although the insurer may not be the de jure liable party, it is the real defendant in interest because the litigation is being primarily conducted in accordance with its instructions and in pursuance of its benefit. The reality is that a passenger bringing an action against a carrier under WCS or MC99 is not taking on the party with whom it concluded the contract of carriage, or the carrier who actually performed the flight in question. Instead, they are facing off against a party with whom they have neither contracted nor one that was ever within their contemplation. In some jurisdictions (e.g., New York), a direct action against an insurer is possible, and an insurer

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250. For example, in AVN 1C, Section IV(3)(B)(d) provides that the insured shall "not act in any way to the detriment or prejudice of the interest of the Insurers." AVN 1C, *supra* note 203; *see generally* BIRDS ET AL., *supra* note 233, ¶ 24.049 ("Insurance policies frequently contain a clause expressly requiring the insured to take all necessary steps to protect the insurer's rights. If an insured under such a policy allowed a time-bar to elapse, thereby precluding the insurer from enjoying the exercise of remedies against a third party, the insurers could, it is submitted, recover damages for the breach of that stipulation in the amount which would have been recoverable from the third party.").

251. Gard Marine & Energy Ltd. v. China Nat'l Chartering Co. [2017] UKSC 35 (appeal taken from Eng.) (Eng.).

may be obligated to take any subrogated actions in its own name.[252] However, this is exceptional. In the vast majority of jurisdictions worldwide, the insurer can pull the strings from behind the curtain without fear of revealing itself; this is especially beneficial when a jury is involved.

Claims control by the insurer fundamentally alters the dynamics of aviation litigation. Not only is the imbalance in power between the plaintiff and defendant shifted even further in favor of the latter, but the insurer's interests may also differ significantly from those of the carrier. Whilst a carrier may be eager to settle, the insurer may wish to challenge the quantum to be paid out in damages. Claims control—indeed subrogation itself—undermines the theory of corrective justice. For many plaintiffs, especially in cases involving the death of passengers, a primary objective for litigation is the vindication of the rights of decedent passengers against the party actually responsible for their deaths. This is best served by ensuring that it is the carrier who must assume the duty of answering for their wrongdoing and compensate the passenger out of their own pocket. Claims control by the insurer removes the carrier one step further from the litigation, and defeats the element of corrective justice embodied by the carrier itself compensating the victim. Clearly, MC99 contemplated insurance and was not intended to embody principles of corrective justice solely. Still, the adequacy with which it has considered the role actually played by the insurer in the litigation of claims taken under it, and the extent to which the interests of the insurer drive the efficacy of MC99 as a compensatory system, is a question to which the concluding part of this Article shall attend.

The insurer's right to step into the shoes of its insured and take advantage of rights and benefits accruing to the insured in respect of the loss for which the insurer has indemnified it provides extraordinary potential for loss shifting. This aspect of subrogation is often put front-of-stage by supporters of the doctrine, who argue that it ensures that the cost of compensating the victim is ultimately borne by the responsible

252. Whilst insurance in the United States is primarily a matter for individual state law; many state jurisdictions have a similar rule, New York being a prime example. Thus, where goods shipped by IBM had been lost by the defendant carrier, proceedings were brought before the district court in New York in the name of the insurer and not IBM, who had already been indemnified. *See* Royal Ins. v. Amerford Air Cargo, 654 F. Supp. 679 (S.D.N.Y. 1987); *see also* B.R.I. Coverage Corp. v. Air Can., 725 F. Supp. 133 (E.D.N.Y. 1989). Insurers have not acquiesced to this kind of development. To avoid having to reveal itself as the true party in interest, they have employed a number of tricks, e.g., the loan receipt. *See generally* J. Thomas Ray, Jr., *The Loan Receipt and Insurers' Subrogation—How to Become the Real Party in Interest Without Really Lying*, 50 TUL. L. REV. 115 (1975).

party.[253] In this sense, it can promote corrective justice. In a similar vein, it is argued that subrogation lowers the costs of premiums since it reduces the final sum paid by the insurer as indemnification. However, some courts have expressed skepticism as to whether the insurer actually includes subrogation recoveries into the calculation of premiums, or instead treats them as a windfall.[254] In any case these arguments are, on other grounds, less persuasive in the context of the aviation insurance market for reasons detailed below.

Subrogation cuts both ways in aviation litigation. Where the carrier is sued by the passenger, the carrier's insurer is entitled to take subrogated third-party actions against other liable parties, such as the aircraft manufacturer. Likewise, where the manufacturer is held liable in a product liability action taken by the passenger against it, subrogated actions by the manufacturer's insurer against the carrier or other parties are a distinct possibility.

The value of a subrogated claim against a third party will depend on a number of factors. First, in many cases, the same insurer will be involved on both sides, serving as the insurance carrier of both the carrier and the manufacturer for at least part of the risk. Second, there will more than likely be a preexisting contractual relationship between the insured and the third party, so any contractual provisions that affect the insured's right of action against the third party will be binding on the insurer. For instance, if the insured carrier has given the third-party manufacturer contractual indemnities of the type discussed above, the right of subrogation will most likely be worthless. In addition, the parties may have agreed to a waiver of the subrogation clause, which the insured will be obliged to make provision for in its insurance policy.[255] In the case of leasing agreements, the lessor always requires that the lessee carrier take out and maintain insurance, and that the lessor shall be named as an

253. PETER CANE, ATIYAH'S ACCIDENTS, COMPENSATION AND THE LAW 377 (8th ed. 2013) ("The main argument in favor of subrogation rights is to ensure that the cost of compensation ultimately rests on the party legally responsible for the harm the compensation redresses.").

254. In her work on subrogation, Derham quotes the following dictum from a U.S. case. DERHAM, *supra* note 237, at 153; De Cespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224, 227-28 (Fla. Dist. Ct. App. 1966) ("[Subrogation] has frequently become a source of windfall to insurers in that the anticipated recoveries under subrogation rights are generally not reflected in the computation of premium rates.").

255. MARGO, *supra* note 190, ¶ 23.71 ("The right of subrogation may be expressly waived under the policy, and may also be impliedly limited by the policy wording. The right of subrogation is frequently waived under airline policies where third parties such as suppliers or financiers require it."). Endorsements have been produced for the purpose of providing a waiver of subrogation for named parties, AVN 102, in the case of loss or damage to aircraft.

additional insured.[256] This prevents the carrier's insurer from bringing a subrogated claim against the lessor. As the grantor of contractual indemnities, waivers, etc., the carrier is thus placed in the position of having the risk contractually allocated to it – a risk it then shifts to the insurer, who will be unable to rely on subrogation to shift it elsewhere.

However, the insurer of the recipient of these contractual indemnities (and related mechanisms) will have the option of utilizing subrogation to shift the loss off of its shoulders and onto those of the carrier. But since the carrier is itself insured, the reality of subrogation in an aviation market where insurance is so ubiquitous is that the loss is merely shifted from one insurer to another, the net impact of which is not only that it necessitates the duplication of insurance, but also results in immense cost. Subrogation is a wasteful and extremely costly process that only adds to the overall cost of litigation.[257] In turn, this results in higher insurance premiums that are ultimately paid for by the consumer for international carriage by air. In this scenario, the justifications of subrogation (i.e., promoting corrective justice and keeping costs down) are of doubtful value because it is the insurer of the responsible party who pays, and they will figure the cost into the future premiums charged.

The fact that the insurer can do all this in the insured's name is of enormous value to an insurer who is desperate to keep its name out of the litigation. Its anonymity is chiefly motivated by the fear that "the knowledge of the existence of liability insurance is likely to affect the jury both in the allocation of responsibility and in the assessment of damages."[258] Naturally, where the dispute is to be decided by a judge, this motivation is less pressing as the judge will be well aware of who is who. As Sir Richard Aikens (Lord Justice of Appeal) noted in the foreword to Merkin and Steele's *Insurance and the Law of Obligations*, "[t]he fact that the claimant was actually a subrogated insurer and the defence was being maintained by the defendant's liability insurer have traditionally been treated as the unacknowledged elephants in the court room."[259] Even still, the insurer is keen to maintain a low profile, and

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256. *See* AVN 67 Airline Finance/Lease Contract Endorsement (Dec. 10, 1990), *reprinted in* MARGO, *supra* note 190, at app. A82 (reproduction of AVN 67 Airline Finance/Lease Contract Endorsement (Dec. 10, 1990)).

257. *See* CANE, *supra* note 252, at 378 ("Another objection to subrogation is that shifting losses around is costly. The initial allocation of liability is expensive and subrogation adds further to the cost by shifting it against.").

258. WOLFGANG FRIEDMANN, LAW IN A CHANGING SOCIETY 120 (abr. ed. 1964). *See also* Ray, *supra* note 252, at 119-20.

259. Richard Aikens, *Foreword* to ROB MERKIN & JENNY STEELE, INSURANCE AND THE LAW OF OBLIGATIONS (2013).

subrogation facilitates this by obfuscating its presence as the true party in interest. The reality is that the nominal plaintiff or defendant has long since been indemnified by its insurer and plays only a supporting role (if any) in the proceedings.

The prevalence of insurance coverage for international carriage of passengers by air is undoubtedly a great boon for the traveling public. It all but ensures that the resources necessary to satisfy claims will be available in the event of an accident. In addition, insurance also means that in most cases, the passenger's right to compensation will not be defeated by the dire financial straits of fly-by-night operators. However, there is a hidden cost to insurance for the plaintiff: by way of subrogation—regardless of what the docket says—it is the insurer who calls the shots in the vast majority of aviation litigation of passenger claims.

By holding claims control, the insurer's interest in choice of forum becomes paramount, which undoubtedly changes the dynamics involved. The question of the liability of the carrier is seldom of concern. Instead, the litigation is perpetuated by the matter of the quantum of damages that will have to be paid in settlement of the claim. Whether it settles a claim in the United States, or almost anywhere else, is the key factor driving the insurer to challenge the plaintiff's choice of forum. "Anywhere but here" is the mantra of the aviation insurer when it comes to being sued in a U.S. court. FNC is thus a godsend for the insurer that is zealously employed – not as a device for ensuring fairness and convenience in the selection of the forum for the resolution of a dispute, but as a means of mitigating the cost of the insurer's duty to indemnify the insured.

Subrogation further empowers the insurer in this battle over forum because the insurer exploits it to bring third-party actions to secure a jurisdictional advantage, as we saw with the *Nolan* case. Whilst plaintiffs can add alternative defendants to proceedings to do likewise, they are not, unlike the defendants, able to count on the cooperation of those parties. In some cases, the plaintiff might be able to play the defendants against each other, but in most cases it will be the defendants teaming up against the plaintiff.

There are, of course, cases where subrogation is employed toward a genuine goal of shifting the loss from the insurer (who has indemnified its insured) to the party at fault. This is especially important in the case of a regime such as MC99 that provides for no-fault liability of the carrier. Where this strategy succeeds, then it is arguable that it keeps the costs of premiums down and, by extension, the passenger pays a lower fare. But there remains a social cost, in that it makes the plaintiff's road to receiving compensation so much longer and more arduous. In addition,

the reality of aviation litigation is that the loss is not shifted to the party at fault, but to its insurer. Thus, instead of reducing the overall loss to be spread across the market, the loss is just shifted—at great expense—from one loss-spreading insurer to another, with the cost of doing so added on top. Who ultimately pays for this? The traveling public! Is it all worth it?

IV. THE WAY FORWARD IS BACK

Starting with the narrow issue of the availability of FNC within WCS and MC99 regimes, the analysis of the parties' conflicting interests over where to litigate revealed a bigger picture, within which those regimes for passenger compensation were shown to be just one part of a larger aviation accident passenger compensation system. The stakeholders to this multi-party system were identified and its organization and means of operation revealed. This permitted us to reach the vital conclusion that MC99 (as successor to WCS) is based on an anachronistic understanding of international aviation litigation as two-party in nature. Such an understanding was justifiable in 1929, but not in 1999, and even less so in 2021. With the emergence of alternative remedies, the realization of rights to contribution and indemnification, and the ubiquity of insurance and other risk management devices, the reality is that modern aviation litigation of passenger claims is predicated on a multi-party system of liability relations. The two-party paradigm of the plaintiff passenger versus defendant carrier has been demolished. In its place stands a far more complex multi-party system in which third-party interests play a dominant role.

The jurisdictional regime established by MC99 has not adapted to this bigger picture, and the inclusion of FNC therein means that the manner in which it regulates choice of forum is inadequate, inequitable, and outdated. It is fundamentally unfair to the plaintiff, and it frustrates rather than furthers the policy objectives of MC99. It goes without saying that the application of FNC prejudices the plaintiff. In light of the bigger picture, the idea that this prejudice was somehow balanced against defendant carriers' interests evaporated. This reveals that the interests on the defendant carrier's side receive generous and powerful support from its insurer and third-party defendants, who are more than willing to cooperate in securing a common jurisdictional advantage resulting in lower net liability.

When it comes to choice of forum, the balance of interests is tipped firmly against the plaintiff, which has prejudicial consequences for the extent and level of compensation they can hope to receive. Yet, is it not a stated goal of MC99 to provide a new deal that assures plaintiffs of

swifter and more equitable compensation in the event of an accident? In so doing, it professes to readdress the balance of interests and make concessions to the plaintiff WCS had hitherto underserved. However, by failing to appreciate the bigger picture, the balance of interests upon which MC99's jurisdictional regime is established is fundamentally incomplete. In consequence, this skews results derived therefrom. Furthermore, by leaving the plaintiff's choice of forum open to challenge, MC99 incentivizes and generates unnecessary litigation over jurisdiction that not only lengthens the process of securing compensation, but also adds to its cost – a cost then borne by the industry and, ultimately, the fare-paying public.

There is an important counterargument in support of FNC within MC99's jurisdictional regime that this Article must address. With the United States as the current center for international aviation litigation, FNC serves an important function in controlling forum shopping and keeping the cost of settlements and damages awards down. Indeed, this is arguably the strongest argument in favor of FNC. However, this argument rests on the supposition that there is a need to control forum shopping, specifically in the context of MC99; this supposition must be challenged. FNC makes sense within a common law system where the jurisdiction of courts is extremely broad. Civil law systems manage without an equivalent to FNC precisely because the jurisdiction of their courts is more constrained and narrowly prescribed.

The jurisdictional regime of MC99—based as it is on the Warsaw Convention—has a civilian sensibility. It provides a limited number of pre-determined forums in which a plaintiff can sue. These are forums that have been selected because the drafters deemed them prima facie appropriate. In the vast majority of cases, the reality is that an MC99 plaintiff will most likely only have a choice between two or three forums in which to pursue an action for damages against a carrier. It is wholly inappropriate and downright disingenuous to accuse a plaintiff of forum shopping when they have selected a forum from a very limited and specially selected range of options.

In light of all these considerations, FNC has no place within the jurisdictional regime of MC99. The plaintiff's choice of forum under MC99 should be absolute and inviolable. However, merely excluding FNC from MC99 will not be sufficient on its own.

The legal landscape in 1929 meant the Warsaw Convention ring-fenced passenger claims falling within its scope, and it could operate as a discrete passenger compensation system largely insulated from third-party influence. This is no longer true. Due to the evolution of the legal landscape since the Warsaw Convention's drafting, the plaintiff now has

several litigation options. The existence of alternative remedies, the reality of third-party actions, and contractual indemnities means that the exposure of the carrier, and the industry in general, to liability for passenger claims arising from international carriage by air is not kept contained within MC99. This undermines MC99 in a number of ways.

First, it generates litigation outside MC99, the knock-on effect of which is that, instead of providing the fast and equitable compensation envisaged, passenger claims arising from accidents are submitted to non-uniform, general regimes of liability under which the resulting costs will usually be far in excess of what would have been awarded under MC99's bespoke regime. In addition, the liability imposed on the third party will often be shifted to the carrier by way of third-party actions and/or contractual indemnities. Where this loss-shifting is contested by the carrier—in truth, its insurer—the resulting litigation is incredibly expensive. Although this will not trouble the plaintiff to the main action, it should concern the industry and the fare-paying public who ultimately pick up the cost.

Second is the risk of circumvention. Where MC99 does not offer the plaintiff their desired choice of forum, they will forego MC99 and pursue an alternative remedy that does offer them access to that forum. Albeit indirectly, the carrier is thereby exposed via a third-party action taken by this alternative defendant to litigation of the plaintiff's action in a forum not specified by MC99. In addition, there is still a risk that the theory and extent of liability that the carrier will ultimately face may be inconsistent with that envisaged by MC99.

Merely removing the possibility of FNC from MC99 litigation will not resolve these issues. The optimal solution is to amend MC99, not only to exclude the application of FNC, but also to explicitly state that it provides the exclusive remedy for passenger claims falling within its substantive scope—not just against the carrier, but against a list of specified third parties (e.g., the airframe manufacturer, component manufacturer, aircraft lessor, and airport authority). The plaintiff's MC99 action against the carrier would preempt claims against these specified third parties. In effect, all passenger claims should be channeled through MC99 and alternative remedies proscribed. A savings clause should be provided to ensure that the carrier's right of recourse against third parties is not prejudiced. The sharing or shifting of liability between the carrier and the specified third parties should be left—as it is at present—to the contractual mechanisms agreed inter se.

This proposed amendment to the regime would resolve the immediate problem of the availability of FNC, greatly reduce the volume of litigation of passenger claims, and assure plaintiffs of faster and more

equitable compensation in the event of an accident. The non-availability of alternative remedies would effectively eliminate the risk of circumvention. In addition to providing greater certainty and predictability to all stakeholders, these immediate consequences would reduce the cost of aviation litigation to the industry.

Several secondary benefits will flow from this proposal. One such benefit would be the avoidance of duplication of aviation insurance. At present, whilst the carrier is under the all-but-universal legal obligation to insure against passenger liability, the reality is that manufacturers and other parties involved in international air transport also insure themselves against potential liability to passengers. This duplication of insurance is a consequence of the different bases for liability that exist (MC99, products liability, negligence, etc.). Under the proposed regime of exclusive carrier liability, the carrier would be the single repository of specified risks and thus the party responsible for insuring against them. Indeed, such a scheme would merely replicate what these parties already establish between themselves through contractual indemnification. As other stakeholders would no longer require insurance coverage for the same risks, this would reduce the cost of insurance to the aviation market and ought to translate into lower fares.

Such a proposal is not new to international law. A similar proposal was put forward by Cheng[260] and considered by the International Law Association (ILA) at its Conference in 1980.[261] This led to a draft convention that was then debated at the 1982 ILA Conference but never came to fruition.[262] This proposal was for an integrated system of aviation liability under which liability for personal injury or death was based on the principle of absolute, unlimited, and secured liability.[263] Crucially, liability was channeled through the carrier. However, as noted by the authors of *Shawcross & Beaumont*, the "weakest link" in the argument was that it proposed to include liability for damage to third parties on the surface.[264] An additional weakness of the regime was that the proposed channeling was de facto rather than de jure.[265] It did not propose to legally exclude alternative remedies against third parties, but expected that assured and unlimited recovery against a carrier would be

260. *See* Bin Cheng, *Fifty Years of the Warsaw Convention: Where Do We Go from Here?*, 28 ZEITSCHRIFT FÜR LUFT- UND WELTRAUMRECHT 373, 379-80 (1979).

261. *Air Law*, 59 INT'L L. ASS'N REP. CONF. 471, 479-82 (1980).

262. *Id.* at 553-93.

263. *Id.* at 583.

264. SHAWCROSS & BEAUMONT, *supra* note 185, ¶ 184.

265. *See Air Law*, *supra* note 260, at 583. An alternative draft had been proposed by Mankiewicz that would have made channeling obligatory, but it was not preferred. *Id.* at 583.

a sufficient incentive to achieve that in effect, if not in law. As observed in this Article, the availability of an alternative remedy, even where seemingly less attractive, will be exploited by plaintiffs where it offers the preferred choice of forum. The advantage of the channeling proposal made in this Article is that it does not extend to liability to third parties,[266] and it does provide for de jure exclusivity of the liability of the carrier.

Similar proposals were successfully implemented in international law. Indeed, Cheng's proposal was inspired by conventions on civil liability for nuclear damage agreed through the International Atomic Energy Agency.[267] In addition, the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC 1969)[268] makes the ship-owner strictly liable for oil pollution damage. As amended by the 1992 Protocol,[269] it defines a range of persons against whom no remedy, either under the Convention or otherwise, can be sought. In addition to servants or agents of the ship-owner, the pilot, charterer, operator, any person taking preventative measures, etc., are now insulated from liability.[270] Thus, CLC 1992 provides a quasi-exclusive remedy against the ship-owner. In other words, it channels liability through the ship-owner. At present, 138 States have ratified CLC 1992 (accounting for 97.75% of world tonnage). It thus represents a compelling analogy that could be applied *mutatis mutandis* to international carriage by air.

Channeling claims through the carrier also makes sense in the context of the near-universal requirement for carrier insurance that now exists—insurance that is relatively inexpensive, offers very wide coverage, and has capacity well in excess of that required to satisfy claims in the vast majority of aviation accidents. The carrier's own financial capacity to meet the cost of settlement will not be at issue. Limiting plaintiffs to an MC99 action against the carrier (i.e., excluding alternative remedies) will not deprive them of their right to full damages since

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266. It is appropriate to exclude liability to third parties on the ground as this is the subject to a new regime consisting of two conventions agreed through ICAO in 2009: Convention on Compensation for Damage Caused by Aircraft to Third Parties May 2, 2009, DCCD Doc. No 42 (General Risks Convention); Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft May 2, 2009, ICAO Doc. 9920 (Unlawful Interference Convention).

267. *See* Cheng, *supra* note 259, at 379.

268. International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1966, 973 U.N.T.S. 3 [hereinafter CLC 1969].

269. Protocol to Amend the Convention on Civil Liability for Oil Pollution Damage, Nov. 27, 1992, 1956 U.N.T.S. 255 [hereinafter CLC Protocol 1992].

270. International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1966, 973 U.N.T.S. 3, *as amended by* Protocol to Amend the Convention on Civil Liability for Oil Pollution Damage, Nov. 27, 1992, 1956 U.N.T.S. 255 [hereinafter CLC 1992].

recovery is guaranteed by insurance. There would be no need to pursue alternative remedies where the MC99 remedy is capable of satisfying claims in full. There are, of course, exclusions and limits to insurance coverage; therefore, cases in which the carrier will bear the financial burden of meeting claims without the aid of insurance will remain. In such cases, the plaintiff's remedy is dependent on the solvency of the carrier. Where a carrier proves incapable of satisfying the full cost of compensating the plaintiff, then the absence of an alternative remedy would be prejudicial. This is an issue that would benefit from future research, the conclusions from which may require adjustments to the proposals put forward here.

A related issue would pertain to the existing grounds on which the carrier can be exonerated from tier-two (i.e., unlimited) liability under MC99. As it stands, the carrier is not liable when it can prove: "(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party."[271] It is submitted that such grounds for exoneration should be removed. In their place, however, the carrier should be entitled to exonerate itself from tier-two unlimited liability where it can prove the damage arose solely due to the negligence or other wrongful act or omission of a third party other than the specified third parties.

A further issue for future examination is how this proposal would interact with the controversial matter of the exclusivity of MC99. In this context, the exclusivity in question pertains to the scope of MC99 and of the available remedies found therein. As decided by the Supreme Court of the United Kingdom (then the House of Lords) in *Sidhu v. British Airways Plc.*[272] and the U.S. Supreme Court in *Tseng v. El Al Israel Airlines Ltd.*,[273] where a plaintiff's action against the carrier falls within the substantive scope of the Warsaw Convention (or MC99)[274] but no liability is provided for under the provisions of the relevant convention, then no action lies against the carrier (either under the conventions or *le droit commun*). For example, a passenger injury that occurs during qualifying international carriage by air but is not the result of an "accident" and/or is not "bodily injury" would not be recoverable. This

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271. MC99, *supra* note 2, at art. 22(2).

272. Sidhu v. British Airways Plc. [1997] AC 430 (HL) (joined cases on appeal from Eng. & Scot.) (UK).

273. El Al Isr. Airlines v. Tsui Yuan Tseng, 525 U.S. 155 (1999).

274. *Sidhu* and *Tseng* were decided in relation to the Warsaw Convention. However, they have been followed in MC99 cases. *See, e.g.*, Stott v. Thomas Cook Tour Operators Ltd. [2014] UKSC 15 (SC) (Eng.); Doe v. Etihad Airways P.J.S.C., 870 F.3d 406 (6th Cir. 2017).

proposition is largely accepted but is not without challenge.[275] As it stands, the consensus of jurisprudence would deny the plaintiff a remedy against the carrier, but they would be entitled to pursue a third party (e.g., a manufacturer) under *le droit commun.*

The question to be asked in the context of this research is whether the immunity granted to third parties by channeling claims through the carrier should be maintained in the case where there is no liability of the carrier. In other words: should the exclusivity enjoyed by carriers under the conventions be extended to the nominated third parties? Resolution of this issue depends on the solution to the exclusivity question, which is still contested. If the current consensus prevails, then the issue of third parties would arise, and a policy would need to be adopted with respect to third parties. However, if non-exclusivity were to win out, then the issue would not arise since both carriers and third parties could be sued under *le droit commun.* In either event, the proposal made in this Article would be applicable; the only distinguishing issue would the extent of its application. Establishing a policy to address this would be a valuable area for future research.

An advantage of the proposal put forward in this Article is that it would replicate the arrangements already established by the industry itself. Through contractual indemnities, the principal stakeholders to international carriage by air allocate risk to the carrier, which in turn shifts that risk onto the aviation insurance market. The cost to the insurer in assuming that risk is then spread across that market through the payment of premiums by carriers. This is the most efficient and appropriate mechanism, as it focuses the cost on the party best placed to spread it across the widest possible consumer base for international carriage by air, i.e., the passengers. This results in a regime where it is the two contracting parties to international carriage by air who are prima facie bearing the costs of a risk that has been rationally and responsibly insured against.

The way forward is back. Back to a regime where the plaintiff's choice of forum was absolute and inviolable. Back to the two-party

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275. Several jurisdictions have followed the *Sidhu/Tseng* position on exclusivity, *see, e.g.*, Thibodeau v. Air Can., [2014] S.C.R. 67 (Can.); Hennessy v. Aer Lingus [2012] IEHC 124 (Ir.); Potgieter v. British Airways [2005] (3) SA 133 (C) (S. Afr.). Commentators are supportive of exclusivity. *See, e.g.*, SHAWCROSS & BEAUMONT, *supra* note 185, ¶ 406; TOMPKINS, *supra* note 115, at 99-100. For non-exclusivity, the authors of *Shawcross & Beaumont* cite a French decision (i.e., Duffy v. Brit. Air (Le Havre, June 12, 1986), (1987) 40 R.F.D.A. 446, *aff'd*, Rouen CA (Apr. 26, 1988) (Fr.)) and a German decision (i.e., Oberlandesgericht Frankfurt (1 U 34/88) (Apr. 20, 1989), (1989) 38 ZEITSCHRIFT FÜR LUFT-UND WELTRAUMRECHT 381). SHAWCROSS & BEAUMONT, *supra* note 185, ¶ 411.

paradigm upon which the Warsaw Convention was established and under which the plaintiff was effectively limited to a remedy against the carrier. If this is done, then choice of forum will be regulated in a manner that takes account of the bigger picture, that is fair to all parties, and that also promotes the policy objectives of MC99 and those of the industry generally.

Human Rights Due Diligence: Why It Matters and Why It's Not Enough Without Access to Remedies for Human Rights Violations

E. Barrett Ristroph*

ABSTRACT

Transnational corporations (TNCs) operate through subsidiaries and supply chains that may be involved in human rights and environmental abuses in multiple countries, with little recourse for those harmed. There is a need for national legislation and international treaties that require human rights due diligence (HRDD) reporting to uncover and prevent potential abuses. This alone, however, is not enough to prevent abuses and provide for remedies. There is also a need for a "standard of care" for human rights obligations that are binding on TNCs (HRDD+). These rights must come with the ability of those harmed to pursue justice in the court of their choice, with access to information needed to prove their cases. This article outlines the inadequacy of legal systems in the European Union (EU) and beyond to remedy potential abuses, and suggests elements that could be included in an EU law that provides for due diligence and an accompanying standard of care. The law would establish an express parent company duty of care over foreign subsidiaries; provide for a rebuttable presumption of parent company liability for harm caused by subsidiaries; apply the law of the country where the case is tried if the host country provides an ineffective remedy; and facilitate discovery by shifting evidentiary burdens.

I. INTRODUCTION

Do governments have a responsibility to make sure that corporations are not peddling "blood diamonds," benefitting from child labor, or leaving behind a trail of environmental destruction in a foreign country? Should corporations be obligated to monitor their supply chain for potential human rights and environmental abuses, and can they be held liable if they do not have a contract with the entity carrying out these abuses? These issues have come to the forefront in recent years, not just

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among those who drink fair trade coffee, but also in international regulatory circles.

Human rights due diligence (HRDD) is one of the core elements of the United Nations Guiding Principles on Business and Human Rights (UNGPs), whereby corporations must protect human rights and states must enforce such protections.[1] HRDD is an ongoing risk management process through which a company identifies, prevents, mitigates, and accounts for how it addresses its adverse human rights impacts (including environmental impacts) throughout its supply chain (from production to final sale).[2] As this article will discuss, some European nations have already adopted legislation requiring companies domiciled within their borders to carry out HRDD.[3]

In April 2020, European Justice Commissioner Didier Reynders announced that the European Commission would develop HRDD legislation that would bind European Union (EU) companies.[4] Internationally, the United Nations Human Rights Commission has been leading negotiations since 2014 to develop a treaty governing the activities of transnational corporations (TNCs) and other business enterprises regarding human rights.[5] This article first considers the justification for legislation requiring TNCs to protect human rights. It then considers why a due diligence law without an enforceable standard of care would not adequately protect human rights. Finally, it offers recommendations to the EU and other countries on how to provide effective HRDD and what an enforceable standard of care would include.

1. U.N. Office of the High Comm'r for Human Rights, Guiding Principles on Business & Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. HR/PUB/11/04 (2011), at Articles 3 and 17 [hereinafter UNGPs].

2. Filip Gregor et al., *The EU Competence and Duty to Regulate Corporate Responsibility to Respect Human Rights Through Mandatory Human Rights Due Diligence*, EUROPEAN COAL. CORP. JUSTICE (ECCJ) (Nov. 2017), *available at* https://media.business-humanrights.org/media/documents/files/documents/Brief_The_EU_competence_and_duty_to_legislate_BLayout.pdf (last visited Feb. 23, 2021).

3. *See* Section III, *infra*.

4. Responsible Bus. Conduct Working Grp., *Presentation and Discussion with Commissioner for Justice Didier Reynders on Due Diligence Study*, VIMEO (Apr. 29, 2020), *available at* https://vimeo.com/413525229 (last visited Apr. 11, 2021).

5. *Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. HUM. RTS. COUNCIL (n.d.), *available at* https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx (last visited Apr. 11, 2021).

II. INADEQUACY OF LEGAL SYSTEMS

Victims and survivors of human rights abuses caused by TNCs face daunting—sometimes insurmountable—obstacles when seeking judicial relief. As discussed in this section, many countries, including "developed" countries, like the United States and the Netherlands, do not offer adequate remedies to litigants seeking damages for human rights abuses.

A. Denial of Jurisdiction

First, a court may avoid considering the merits of the case by asserting that it lacks jurisdiction over a TNC defendant that is not domiciled within the court's country. The court may either be unwilling to hold a domestically incorporated parent corporation liable for the wrongful acts of the corporation's foreign subsidiary ("piercing the veil"),[6] or the court may not consider the jurisdiction it presides over to be a convenient or practical place for the litigation to occur ("forum non conveniens").[7] Even if a defendant is clearly domiciled in the court's country, the court may decline jurisdiction over "extraterritorial" acts committed in another country.[8]

In the United States, the ability to pursue relief under the Alien Torts Claims Act for abuses committed abroad has become increasingly limited.[9] EU laws provide access for litigating violations committed outside of the EU in the member state where the defendant is domiciled,[10]

6. *See, e.g.*, Barcelona Traction, Light & Power Co. (Belg. v. Spain), Judgment, 1970 I.C.J. 3 (Feb. 5); *see also* Choc v. Hudbay Minerals, Inc. (2013), 116 O.R. 3d 674 (Can. Ont. Super. Ct. J.), ¶¶ 4-6.

7. *See* Uniform Law Conference of Canada, Court Jurisdiction and Proceedings Transfer Act, S.B.C., c 28 (1994) (Can.) [hereinafter CJPTA], *available at* https://www.ulcc.ca/en/home-en-gb-1/183-josetta-1-en-gb/uniform-actsa/court-jurisdiction-and-proceedings-transfer-act/1092-court-jurisdiction-proceedings-transfer-act?showall=1&limitstart= (last visited Apr. 11, 2021).

8. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (presumption against the extraterritorial application of U.S. law, including the Alien Torts Statute (28 U.S.C. § 1350)).

9. In 2013, the United States Supreme Court decided that the Alien Tort Claims Act presumptively does not apply extraterritorially. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013). In 2018, the Court decided that foreign domiciled corporations could not be sued under the Act. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

10. *See, e.g.*, Akpan v. Royal Dutch Shell & Shell Petroleum Dev. Comp. of Nigeria, Ltd., (2013) LJN BY9854 (Neth.). The Brussels I Regulation mandated that the national courts of the EU Member States accept jurisdiction in civil liability cases filed against

since EU courts recognize extraterritorial jurisdiction.[11] But *Akpan v. Shell*,[12] litigated in the Netherlands against Shell and its Nigerian subsidiary for damages caused by the subsidiary, demonstrates the challenge of piercing the veil. In *Akpan*, the court held the Nigerian subsidiary liable, but not the parent company. As this case demonstrates, it is difficult for litigants to prove that parent companies are sufficiently related to their subsidiaries as to be held liable for the actions of subsidiaries. Parent company responsibility is important because subsidiaries may be under-funded, leaving them unable to provide adequate compensation.

In the United States, Australia, and Canada, courts use the doctrine of forum non conveniens to dismiss cases when they find that litigation would be more practical elsewhere,[13] even though those cases may never be refiled in the "more practical" country.[14] The Uniform Court Jurisdiction and Proceedings Transfer Act in Canada contains common rules for forum non conveniens.[15] In the EU, *Owusu v. Jackson* expressly barred the doctrine of forum non conveniens.[16]

B. Question of Which Country's Law to Apply

Courts must determine which country's laws to apply when human rights abuses occur abroad. EU courts generally apply the civil compensation law of the state where the damage took place,[17] although

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defendants domiciled in the forum State. (Article 2 (1) of Regulation (EU) No 44/2001). Regulation (EU) No. 1215/2012 [hereinafter Brussels II Regulation] was adopted on December 12, 2012, to replace Brussels I effective to legal proceedings instituted (and to judgments rendered) on or after January 10, 2015. Article 4(1) of the Brussels II Regulation provides similar jurisdiction to that of the original Brussels I.

11. *See* Brussels II Regulation, *supra* note 10, Art. 4(1) and Art. 63 (providing that a company can be domiciled in up to three EU states at the same time or have domiciles both within the EU and outside of it).

12. *See* Akpan, (2013) LJN BY9854 (Neth.), *supra* note 10.

13. *See, e.g.*, the U.S. cases Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002); Bhopal v. Union Carbide Corp., 809 F.2d 195 (2d Cir. 1987).

14. In a case filed in the U.S. state of Delaware, by Argentine citizens alleging exposure to pesticides used on Argentine tobacco farms, the Delaware Supreme Court held that defendants have demonstrated that litigating in Delaware would result in an overwhelming hardship to defendants; the case could be dismissed under the doctrine of forum non conveniens even if no alternative forum is available. *See* Aranda v. Philip Morris USA, Inc., 183 A.3d 1245 (2018).

15 *See* CJPTA, *supra* note 7.

16. Andrew Owusu v. N.B. Jackson [2002] EWCA (Civ) 877, [2003] PIQR 186 (Eng.).

17. Council Regulation 864/2007, art. 4, 2007 O.J. (L 199) 40 [hereinafter Rome II] (on the law applicable to non-contractual obligations).

there are some exceptions, including cases that involve environmental damage.[18] This application can be problematic if the law of that country allows a certain level of damage[19] or does not provide adequate compensation. For example, a country's criminal laws may exclude remedies for victims and survivors, while civil laws may only compensate for physical damage—not economic loss or moral damage.[20]

C. Difficulty of Obtaining Evidence and Rules Related to Business/Confidentiality

Survivors of human rights abuses may have no information about the corporations and actions that contributed to the harm. Injured parties may be unable to obtain the evidence needed to file a lawsuit due to lack of finances and capacity. While courts in many developed countries have "discovery rules" that require litigants to provide information upon request,[21] a defendant may flout these requirements by flooding the plaintiff with too much information that disguises or obfuscates the human rights issues relevant to understanding the potential human rights impacts. Further, exceptions to the discovery rules allow companies to keep "trade secrets and other information confidential."[22] Information from previous cases may be impossible for a litigant to obtain if the corporation settled the dispute through a confidential settlement.[23]

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18. *Id.* at art. 7 (In claims for "environmental damage," the claimant may elect to have the claim governed by the country's law where the 'event giving rise to the damage' occurred.).

19. This bar was raised in Lubbe v. Cape Plc [2000] UKHL 41, [2000] 1 WLR 1545 (appeal taken from Eng.) (7500 South African asbestos miners suing in the U.K.); Connelly v. RTZ Corp. Plc [1997] UKHL 30, [1998] AC 854 (appeal taken from Eng.) (Namibian uranium miners with throat cancer suing in the U.K.).

20. For example, the United States Department of Justice Human Rights and Special Prosecutions section may prosecute human rights-related crimes committed internationally, but does not provide relief to victims. *See Human Rights and Special Prosecutions Section*, U.S. DEP'T JUST. (n.d.), *available at* https://www.justice.gov/criminal-hrsp (last visited Apr. 12, 2021).

21. *See, e.g.*, Fed. R. Civ. P. Title V ("Disclosures & Discovery").

22. *Id.* at r. 26(b)(5).

23. For example, a case against Monterrico Metals by Peruvian farmers, scheduled for a ten-week trial in the English High Court in October 2011, was also settled without admission of liability in a confidential settlement. *See generally* Dan Collyns, *UK Firm Agrees to Pay Compensation to Peruvian Farmers*, BBC NEWS (July 20, 2011), *available at* https://www.bbc.com/news/world-latin-america-14227670 (last visited Apr. 12, 2021). *See also* Jad Mouawad, *Shell to Pay $15.5 Million to Settle Nigerian Case*, N.Y. TIMES (June 8, 2009), *available at*

Finally, the burden of proof in litigation may require so much evidence as to be nearly insurmountable for a plaintiff.[24]

D. Other Inadequacies of Host Country Courts

The following are additional reasons why litigants may not obtain relief from a "host country" (where the damage occurred):

- Human rights laws included in national constitutions may not be justiciable,[25] and there may be significant gaps in civil rights and environmental laws.
- The law of the host country may bar a claim under workmen's compensation laws that prohibit claims against an employer.[26]
- There is a lack of affordable legal assistance (lawyers unwilling to operate on a contingency fee or *pro bono*).
- There may be legal restrictions on non-government organizations (NGOs) that could support litigation[27] or judicial rules limiting their ability to litigate.[28]

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https://www.nytimes.com/2009/06/09/business/global/09shell.html?ref=global (last visited Apr. 12, 2021) (settlement just before trial involving Shell).

24. *See, e.g.*, Gomez v. Dole Food Co. (Cal. Ct. App. Oct. 27, 2011) (Dismissal of case against Dole where court found that Dole sustained its evidentiary burden of showing a reasonable probability that it would prevail at trial by presenting "competent evidence that overwhelmingly refutes plaintiffs' primary claim, i.e., that Dole and its Col[o]mbian subsidiary, Tecbaco, conspired with, and made payments to, the AUC in exchange for violent security services.").

25. In the United States, for example, Executive Order 13175 ("Consultation and Coordination With Indian Tribal Governments") requires agencies to consult with indigenous communities if a proposed project may impact these communities. But Section 10 of the Order says, "this order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person." *See* Exec. Order No. 13175, 65 Fed. Reg. 67249 (2000).

26. *See supra* note 19.

27. Federal'nyi Zakon RF ot 20 Iiulia 2012 Goda N 121-FZ "O Vnesenii Izmenenii v Otdel'nye Zakonodatel'nye Akty Rossiiskoi Federatsii v Chasti Regulirovaniia Deiatel'nosti Nekommercheskikh Organizatsii, Vipolniaiushchikh Funktsii Inostrannogo Agenta" [Federal Law RF of July 20, 2012, N 121-FZ "On Amendments to Legislative Acts of the Russian Federation Regarding the Regulation of the Activities of Non-profit Organizations Performing the Functions of a Foreign Agent"], Ros. Gaz., July 23, 2012 (Russ.) (a Russian law requiring non-profit organizations that receive foreign donations and engage in "political activity" to register and declare themselves as foreign agents).

28. Consider the U.S. doctrine that an NGO must have "standing" (a distinct injury and connection to the injury) to bring a case regarding that injury. *See* Powers v. Ohio, 499 U.S. 400, 410 (1991).

- Local courts may not have the capacity to handle complex litigation,[29] and cases may take decades to resolve.[30]
- There may be blurred lines or even collusion between national governments and corporations,[31] which may contribute to corruption[32] or allow for sovereign immunity.[33]
- Courts may be subject to political interference.[34]

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29. *See The Rule of Law in the Kyrgyz Republic*, IDLO (July 23, 2019), *available* at https://www.idlo.int/fr/what-we-do/initiatives/rule-law-kyrgyz-republic (last visited Apr. 12, 2021) (Until recently, court processes in the Kyrgyz Republic have not been automated; manual or paper systems are still required and the norm.).

30. Paul Cartsen, *UPDATE 1-UK Supreme Court Hears Nigerian Communities' Case Against Shell*, REUTERS (June 23, 2020), *available at* https://https://www.reuters.com/article/nigeria-oil-idUSL8N2E04YR (last visited Apr. 12, 2021).

31. Examples include state-owned petroleum entities in joint ventures with TNCs, as is the case with Shell's subsidiary in Nigeria, and the appointment of a lobbyist for coal producer Murray Energy (Andrew Wheeler) as the head of the United States Environmental Protection Agency in 2018. *See* Lisa Lambert, *Trump Nominates Acting EPA Head, an Ex-Coal Lobbyist, to Run Agency*, REUTERS (Jan. 9, 2019), *available at* https://www.reuters.com/article/us-usa-trump-epa/trump-nominates-acting-epa-head-an-ex-coal-lobbyist-to-run-agency-idUSKCN1P324H (last visited Apr. 8, 2021).

32. *See Transparency Afghanistan*, TRANSPARENCY INT'L (n.d.), *available at* https://www.transparency.org/en/countries/afghanistan?redirected=1 (last visited Feb. 25, 2021) (country data includes corruption perception ranking); *see also* Ximena Barria, *Odebrecht Case: Deficiencies in the Rule of Law in Latin America*, U. DE NAVARRA (Feb. 6, 2018), *available at* https://www.unav.edu/web/global-affairs/detalle/-/blogs/the-odebrecht-case-deficiencies-in-the-rule-of-law-in-latin-america (last visited Feb. 18, 2021) (Brazilian firm confessed to offering numerous bribes to political leaders). *See also* Jill Ambrose, *Prosecutors Seek Jail Terms Over Shell and Eni Oil Deal in Nigeria*, THE GUARDIAN (July 22, 2020), *available at* https://www.theguardian.com/business/2020/jul/22/prosecutors-seek-jail-terms-shell-eni-executives-nigeria-oil-deal (last visited Feb. 18, 2021) (Italian prosecutors seeking corruption charges against Shell and Eni officials involved in Nigerian oil deals).

33. In the U.S. case *Saleh v. Titan Corp.*, involving a contractor's actions at Abu Ghraib prison in Iraq, the D.C. Court of Appeals found that, among other things, because the defendants had contracted with the United States for their work in Iraq, the plaintiff's claims were pre-empted by the Federal Tort Claims Act combat exception related to sovereign immunity, even though the contractors were private entities. *See* Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2009). In the EU, at least for the countries that have signed the Basel Convention, sovereign immunity is more limited. *See* European Convention on State Immunity art. 6, May 16, 1972, 1495 U.N.T.S. 181, 184. According to Article 6, such immunity cannot be claimed if the State "participates with one or more private persons in a company, association or other legal entity having its seat, registered office, or principal place of business in the territory of the State of the forum, and the proceedings concern the relationship, in matters arising out of that participation, between the State on the one hand and the entity or any other participant on the other hand."

34. *See* José Luis Castro-Montero & Gijs van Dijck, *Judicial Politics in Unconsolidated Democracies: An Empirical Analysis of the Ecuadorian Constitutional Court (2008–2016)*,

- Plaintiffs, witnesses, and/or activists may be persecuted by the host country's government.[35]
- Plaintiffs may face retaliation in the form of Strategic Lawsuits Against Public Participation (SLAPP) suits.[36]

It may be difficult to execute a judgment in a host country if all of the assets are in the country of the parent company.

III. LIMITATION ON DUE DILIGENCE GUIDANCE AND REQUIREMENTS

Globally, there is already abundant voluntary guidance regarding due diligence,[37] including the UNGPs[38] and some TNCs that are developing policies to address potential abuses in their supply chains ahead of any legal mandate to do so. But these voluntary policies may be insufficient. An example of a voluntary policy is Shell's corporate social responsibility policy, which guides operations in Nigeria through its subsidiary Shell Petroleum Development Company of Nigeria Limited. Researchers have argued that this policy has done little to improve the social and environmental standards in local communities,[39]

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38 JUST. SYS. J. 380, 380-98 (2017) (discussing lack of judicial autonomy in Ecuadorian constitutional court). Another example is the State of Louisiana in the United States, where judges are elected and depend on campaign contributions. *See* Caitlin Morgenstern, *Ethical Guidelines for Judicial Campaigning*, LA. SUP. CT. JUD. CAMPAIGN OVERSIGHT COMM. (n.d.), *available at* https://www.lasc.org/judicial_campaign_oversight/Ethical_Guidelines_For_Judicial_Campaigning.pdf (last visited Feb. 18, 2021).

35. *See* Alexandra Krylenkova, *Crimean Tatars Face Unfounded Terrorism Charges*, HUM. RTS. WATCH (July 12, 2019), *available at* https://www.hrw.org/news/2019/07/12/crimean-tatars-face-unfounded-terrorism-charges# (last visited Feb. 18, 2021); *see also* Green Scenery, *Jailed for Resisting Big Palm Oil: Release the MALOA Six!*, RAINFOREST RESCUE (June 2016), *available at* https://www.rainforest-rescue.org/petitions/1046/jailed-for-resisting-big-palm-oil-release-the-maloa-six (last visited Feb. 18, 2021).

36. For example, in a case involving Texaco's extraction efforts in Ecuador, defendant Chevron sued plaintiffs and the lawyer for fraud under the Racketeer Influenced Corrupt Organization (RICO) Act for conspiracy. *See* Chevron v. Donziger, 990 F.3d 191 (2021).

37 Lise Smit et al., *Study on Due Diligence Requirements Through the Supply Chain*, EUR. COMM'N (Jan. 2020), *available at* https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en (last visited Apr. 14, 2021).

38. UNGPs, *supra* note 1.

39. SHELDON LEADER ET AL., CORPORATE LIABILITY IN A NEW SETTING: SHELL AND THE CHANGING LEGAL LANDSCAPE FOR THE MULTINATIONAL OIL INDUSTRY IN THE NIGER DELTA, ESSEX, AND HUMAN RIGHTS PROJECT 19-28 (2011); *see also* TARA VAN HO, DUE DILIGENCE IN TRANSITIONAL JUSTICE STATES: AN OBLIGATION FOR GREATER TRANSPARENCY? (Jernej L.

despite the assertion that the subsidiary carried out business activities "efficiently, profitably, and to high standards."[40] Rather, local residents have been affected by oil spills,[41] pollution,[42] gas flaring,[43] and related practices on the part of the subsidiary, similar companies, and the Nigerian government.

Even mandatory due diligence requirements are insufficient to protect human rights if they simply require TNCs to report potential abuses in their supply chains without any enforcement regarding the accuracy of the report. Information contained in a due diligence report could be irrelevant, selective, or insufficient to prove a case against the corporation. Companies may fail to meet the reporting requirement with little to no consequence. An example of an existing reporting requirement is the United Kingdom's Modern Slavery Act. The Act requires entities to prepare an annual slavery and human trafficking statement that enumerates the steps taken by companies "to ensure that slavery and human trafficking [are] not taking place—(i) in any of its supply chains, and (ii) in any part of its own business" or states that "the organization has taken no such steps."[44] However, the content of these reports may be vague, and there are no clear sanctions for failing to report or for misleading reports. The U.K. government estimates that 40% of the companies required to file a report under the legislation have failed to

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Cernic & Tara Van Ho eds., 2015); Hakeem O. Yusuf & Kamil Omoteso, *Combating Environmental Irresponsibility of Transnational Corporations in Africa: An Empirical Analysis*, 21 LOC. ENV'T INT'L J. JUS. & SUSTAINABILITY 1372, 1372-86 (2016).

40. Uwem E. Ite, *Changing Times and Strategies: Shell's Contribution to Sustainable Community Development in the Niger Delta, Nigeria*, WILEY (Aug. 5, 2006), *available at* https://onlinelibrary.wiley.com/doi/10.1002/sd.294 (last visited Apr. 7, 2021).

41. *Shell's Nigerian Subsidiary Agrees £55 Million Settlement with the Bodo Community*, SHELL (Jan. 7, 2015), *available at* https://www.shell.com/media/news-and-media-releases/2015/shells-nigerian-subsidiary-settlement-with-bodo-community.html (last visited Apr. 7, 2021).

42. Sarah Kent, *Pollution Worsens Around Shell Oil Spills in Nigeria*, WALL ST. J. (May 25, 2018), *available at* https://www.wsj.com/articles/pollution-worsens-around-shell-oil-spills-in-nigeria-1527246084 (last visited Apr. 7, 2021). A 2011 UNEP report estimated that the clean-up of Ogoniland, United Nations Environment Programme, Nigeria could take thirty years. U.N. Envtl. Programme, *Rep. on the Environmental Assessment of Ogoniland*, UNEP (2011), *available at* https://www.unenvironment.org/explore-topics/disasters-conflicts/where-we-work/nigeria/environmental-assessment-ogoniland-report (last visited Apr. 14, 2021).

43. Leonore Schick et al., *Gas Flaring Continues Scorching Niger Delta*, DW (Nov. 14, 2018), *available at* https://www.dw.com/en/gas-flaring-continues-scorching-niger-delta/a-46088235 (last visited Apr. 7, 2021).

44. Modern Slavery Act 2015, c. 30, 6 § 54 (UK), *available at* https://www.legislation.gov.uk/ukpga/2015/30/section/54/enacted (last visited Apr. 12, 2021).

do so.[45] As with the voluntary guidelines, reporting requirements do not clearly provide compensation for those harmed by due diligence failures.[46]

Another example of a reporting requirement is the EU law requiring certain companies ("public interest entities" with over 500 employees) to disclose their social and environmental responsibility policies and non-financial information about the outcomes of these policies.[47] But there is no obligation to report on "significant incidents," and member states can permit companies to withhold information associated with ongoing developments or negotiations. Other EU laws require due diligence, which includes requirements for companies that deal in certain raw minerals, metals,[48] and forest products.[49] But these EU laws have no enforcement mechanisms, leaving enforcement to member states.

Finally, even with robust reporting requirements that have penalties for non-compliance, human rights abuses will continue if there is no legal mandate to remedy and prevent the abuses uncovered by the reporting process. The reporting requirements could become a procedural "checkbox" that a TNC must satisfy before carrying out business as usual.

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45. *Home Office Tells Business: Open Up On Modern Slavery or Face Further Action*, GOV.UK (Oct. 18, 2018), *available at* https://www.gov.uk/government/news/home-office-tells-business-open-up-on-modern-slavery-or-face-further-action (last visited Apr. 12, 2021). At the time of this 2018 assessment, only 60% of industries required to file reports under the 2015 Modern Slavery Act had done so. *Id.*

46. The EU Council recognized this limitation in the UNGPs in its document revisiting the UNGPs five years after their creation. Council Conclusions on Business and Human Rights 10254/16 of June 20, 2016, Annex, 2016 O.J. 12.

47. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L330/1), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095 (last visited Apr. 14, 2021). *See also The Non-Binding Commission Guidelines on Non-Financial Reporting*, EUR. COMM'N (June 26, 2017), *available at* https://ec.europa.eu/info/publications/non-financial-reporting-guidelines_en (last visited Apr. 12, 2021); *see also Commission Guidelines on Reporting Climate-Related Information*, EUR. COMM'N (June 20, 2019), *available at* https://ec.europa.eu/info/publications/non-financial-reporting-guidelines_en#climate (last visited Apr. 12, 2021).

48. *See* Council Regulation 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas, 2017 O.J. (L 130) 1, 5, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R0821 (last visited Apr. 14, 2021).

49. Commission Regulation 995/2010 of the European Parliament and of the Council of 20 October 2010 Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market, 2010 O.J. (L 295) 23, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010R0995 (last visited Apr. 14, 2021) (referring to but not clearly designating "competent authorities" to monitor operators for compliance).

Countries need a "standard of care" in their HRDD legislation akin to the standards found in the international human rights instruments onto which those countries have signed. This standard would illustrate the scope of abuses (i.e., child labor) that a TNC domiciled in that country must avoid perpetuating through its subsidiaries and/or supply chains.[50] Along with the standard, there must be a right to a remedy[51] and access to justice[52] for those harmed by the TNC's abuses.

To that end, criminal law, although important for other reasons, does not compensate victims. While there are model principles of EU tort law that suggest a route for compensation, there is no uniform body of law or a statutory obligation to adhere to these principles.[53] Individual EU member states' tort laws are also insufficient to protect against ongoing human rights violations in supply chains because tort liability depends on clear evidence of a defendant proximately causing past harms. Tort law is not designed to address human rights violations, such as child labor and lack of free, prior, and informed consent.

IV. RECOMMENDATIONS FOR HHRD+ LAW

This section considers the elements HRDD legislation should include to address HRDD, as well as a standard of care and access to justice (referred to collectively as HRDD+). It specifically considers a potential EU law, given the possibility of its implementation in the near future.[54]

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50. *See Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, HUM. RTS. COUNS. (June 8, 2020), *available at* https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf (last visited Apr. 14, 2021) (referencing a second revised draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises).

51. *Id.* at art. 4 ("Rights of Victims").

52. *Id.* at art. 7 ("Access to Remedy").

54. The European Commission has committed to enacting EU-wide human rights due diligence law by June 2021. *See* Mayer Brown, *The EU's Proposed Mandatory Human Rights Due Diligence Law - What You Need to Know*, LEXOLOGY (Feb. 10, 2021), *available at* https://www.lexology.com/library/detail.aspx?g=0171490e-fcc5-4a33-ad62-b60105ec206c (last visited Apr. 12, 2021). *See also* Consolidated Version of the Treaty on the Functioning of the European Union art. 50(2)(g), May 9, 2008, 2008 O.J. (C340), which authorizes the EU to harmonize national company laws to attain freedom of establishment companies. Article 114 also allows the EU to approximate legislation to ensure the establishment and proper functioning of the internal market.

A. Applicability and Scope

An EU HRDD+ law should at least apply to all companies domiciled in EU member states, operating in certain sectors (i.e., extractive industries), and of a certain size if operating in other sectors (i.e., 500 or more employees). Arguably, the law could apply even more broadly since the UN Guiding Principles "apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership, and structure."[55]

The law should mandate minimum reporting requirements, such as what risks and impacts a company must report and their methodology for assessing those risks and impacts. Each company should specify all of its subsidiaries and the relationships between the parent and its subsidiaries in terms of percentages owned. Board directors for each company should also be listed, and this information should be easily accessible so the public can understand the relationship between each entity (i.e., whether the directors are nearly the same for the subsidiary and parent such that the two are highly intertwined). The public should have the chance to offer input on due diligence reports similar to the process in the United States for environmental impact statements.[56]

In addition to due diligence requirements, the law should have codified standards of care, establishing norms of conduct and providing remedies for those harmed by companies that are domiciled in the EU or offer products or services in the EU market. Namely, such companies should (1) follow the same human rights and environmental standards the EU adheres to;[57] (2) ensure that these standards are respected by the companies under their control; and (3) take appropriate measures so that subsidiaries and suppliers throughout the supply chain respect these standards. EU law should also have penalties for non-compliance and an opportunity to litigate damages in a competent court within the EU.

B. Violations

If due diligence requirements are unilateral proclamations by a company without standards of care (which I do not recommend), then rules on unfair competition and consumer protection should at least hold companies accountable for misleading statements that unfairly gain

55. UNGPs, *supra* note 1, at General Principles.

56. National Environmental Policy Act, 42 U.S.C. § 4321 et seq. (1970).

57. These standards could be akin to those in the UNGPs (i.e., limited to child labor and discrimination and harassment).

consumer goodwill. Inaccurate or incomplete reporting should have consequences including sanctions, withdrawing licenses or government support, appointing monitors, and allowing interested parties to legally seek the necessary amendments.

Particularly if the EU adopts a HRDD+ law, the EU and individual member states can create oversight and enforcement bodies within existing institutional structures such as domestic state departments, which may already oversee traditional corporate law requirements.[58] Violations and reporting failures could result in the penalties described above, as well as the company's dissolution and/or subjugation to civil suit by injured parties, government entities, and non-government public interest groups.[59]

A due diligence statement should not absolve a company from liability for its conduct.[60] Liability could be based on the severity or significance of the company's impact, size, sector (this may not be relevant if the applicability of the law is already limited to a certain size and sector), ownership, structure, resources, industry practices, amount of leverage they hold, if the leverage was exercised, and what they knew or should have known.[61]

C. Jurisdiction and Legal Access

The EU should modernize its laws and court rules to account for the global nature of TNCs and the way business takes place in the modern Internet era. EU law should clarify that the extraterritorial actions of companies domiciled in EU member states can be subject to the EU's jurisdiction when those actions violate the laws of the host country in which they occur—even if the host countries have no due diligence requirements.[62]

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58. Smit et al., *supra* note 37, at 258.

59. *Id.*

60. *Id.* at 107, 250; *see also* UNGPs, *supra* note 1, at 19 ("business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses"); Human Rights Council Rep., U.N. Doc. A/HRC/38/20, at ¶12 (June 1, 2018).

61. Smit et al., *supra* note 37, at 250-51.

62. Council of Europe (CM), Recommendation to Member States on Human Rights and Business, CM/Rec(2016)3, ¶ 35 (Mar. 2, 2016) (The Council of Europe has called for "domestic courts to exercise jurisdiction over civil claims concerning business-related human rights abuses against subsidiaries, wherever they are based, of business enterprises domiciled within their jurisdiction if such claims are closely connected with civil claims against the latter Enterprises."). *See* The OHCR Accountability and Remedy Project's *Illustrative Examples for Guidance to Improve Corporate Accountability and Access to Judicial Remedy for*

To address the challenge of regulating subsidiary companies that are not domiciled within the EU, legislation could establish an express duty of care for the parent company. A model is the French law that imposes a "duty of vigilance" on certain large French companies to prevent environmental and human rights harms caused by their subsidiaries and other business relationships.[63] Parent companies must design, implement, and account for the measures put in place to identify, prevent, and address the human rights risks and impacts of their global operations. Those harmed by an alleged lack of vigilance may sue the parent company in a French court of law.[64]

EU law already defines a parent company.[65] For any company that meets this definition, there should be a rebuttable presumption of parent company liability for harm caused by subsidiaries. The parent company could rebut the presumption by showing that it took every reasonable step to avoid the harm caused by the subsidiary. Even if the presumption is adequately rebutted, liability should still be imposed on the parent company if the subsidiary no longer exists, was underfunded to avoid liability, or if there is no adequate avenue to pursue a remedy in the host country.

The European Commission should reintroduce its proposal (which it considered making as part of the 2011 recast of Brussels I Regulation) to add a "forum necessitates" provision to the Brussels I Regulation, requiring European courts to exercise jurisdiction if no other forum

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Business-Related Human Rights Abuse, Companion Document to A/HRC/32/19 and A/HRC/32/19/Add.1, at Policy Objectives 12-13 (July 5, 2016) (UN guidance calls for a legal regime "sufficiently robust to ensure that there is both effective deterrence from and remedy in the event of corporate contributions to business-related human rights abuses perpetrated by third parties.").

63. *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, FRENCH REPUBLIC (Mar. 27, 2017), *available at* https://www.legifrance.gouv.fr/loda/id/JORFTEXT000034290626/ (last visited Apr. 8, 2021). This applies to companies domiciled in French with at least 5000 employees in the parent and subsidiary companies or domiciled elsewhere with at least 10,000 employees in the parent and subsidiary company.

64. Another model is the holding adopted in the U.K. case *Chandler v. Cape Plc* [2010] EWCA (Civ) 525 (Eng.) (holding that a parent company may owe a direct duty of care to its subsidiary's employees where (1) the business of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or out to have, superior knowledge on some relevant aspects of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent know, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection).

65. Council Directive 2013/14/EU, art. 22(1), 2013 O.J. (L 182/19) (defines "parent undertaking").

guaranteeing the right to a fair trial is available and the dispute has a sufficient connection with the member state concerned (i.e., by virtue of a parent company to the defendant being domiciled in the member state).[66]

The law of the state where the case is tried should apply when the law of the host state does not provide an effective remedy. This may already be the state of the law under the EU regulation regarding the conflict of laws on the law applicable to non-contractual obligations, known as the Rome II Regulation.[67] Rome II Article 16 provides that "[n]othing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation."[68] But it is not clear what "mandatory" means, and interpretations may vary per court. Another possible way to apply the law of the state in which the case is heard is Article 26 "[t]he application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum."[69] The EU should clarify the extent to which the exceptions incorporated into the Rome II Regulation may be used to address these problems, including in Articles 16, 26, and 17 (which address application of domestic rules of safety and conduct). Article 7 (which recognizes the right of victims of environmental damage to elect whether the court will apply the law of the State in which the harm occurred or the law of the state in which the event that gave rise to the harm took place) could be expanded to cover human rights violations.[70]

D. Discovery of Evidence

EU law should address the challenges of obtaining evidence in litigation against TNCs and the lack of laws facilitating discovery. If plaintiffs present reasonably available evidence to support a cause of action and indicate that further evidence is controlled by the defendants,

66. *See* GWYNNE L. SKINNER, TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS: OVERCOMING BARRIERS TO JUDICIAL REMEDY (2020).

67. Rome II, *supra* note 17, at art. 16.

68. *Id.*

69. *Id.* at art. 26.

70. *Id.* at art. 7.

then the courts should order defendants to timely provide information regarding company actions.[71]

The law should specify minimum requirements for what must be disclosed and the format for disclosure to ensure it is both complete (avoiding glaring omissions) and concise (avoiding obfuscating and superfluous information). The law should also specify what information (e.g., background technical data or assessments) companies must maintain and disclose upon request.

Finally, to avoid situations where evidence regarding past corporate violations is confidential due to non-disclosure provisions in settlements, the law should generally prohibit settlements from being confidential. There could be some exceptions for legitimate trade secrets.

E. Financial Considerations

Funding cases will always be a challenge. The United States' and Australian models of using class actions,[72] in which the plaintiff's lawyer takes a contingency fee,[73] are one way to reduce this financial barrier.[74] A class action resolves key legal issues through a single suit involving a large number of individual claimants, thereby reducing the level of legal resources required and any financial disincentive for claimants' lawyers. Potential plaintiffs may opt out of the class to avoid being bound by the outcome of the action.

EU law should provide for some form of collective redress, whether modeled after United States and Australian class actions or another format. Legal standing should include representative action by public interest NGOs, whose statutory objectives are to protect and assist those harmed by business-related human rights abuses. The EU should allow class actions even if claimants live outside of the EU, and when non-EU

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71. This would be consistent with the 2016 Council of Europe Recommendations, *supra* note 62, calling for revisions of "civil procedures where the applicable rules impede access to information in possession of the defendant or a third party if such information is relevant to substantiating victims' claims of business-related human rights abuses, with due regard for confidentiality considerations."

72. *See* Fed. R. Civ. P. 23; *Supreme Court Act 1986* (Vic) pt. 4A (Austl.).

73. Through a contingency fee, a lawyer takes a significant portion of any compensation paid, or else nothing at all. *See* MODEL RULES OF PROF'L CONDUCT r. 1.5(a) (AM. BAR ASS'N 1983); *Legal Profession Act 2004* (Vic) ss 3.4.27-3.4.28 (Austl.).

74. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011). The U.S. Supreme Court decision imposed a higher requirement for certifying a class action, impeding the ability of injured parties to bring a class action. The EU should not adopt such a high bar.

law will apply to their claim (following the rules of the Rome II Regulation).

In the United States and other jurisdictions, SLAPPs aim to shut down critical speech and lawsuits by intimidating critics and draining their resources. While Australia, Canada, and some states in the United States have "anti-SLAPP" statutes in place,[75] the EU has none. The EU should adopt an anti-SLAPP law that would give investigative journalists and human rights advocates the power to request the rapid dismissal of "vexatious lawsuits."[76]

Finally, the EU could consider establishing a fund to support litigation on behalf of those whose human rights have been violated. This fund would be consistent with Article 47 of the EU Charter of Fundamental Rights, which stipulates that "[l]egal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."[77] There is no limitation on residence or citizenship in this provision.

V. CONCLUSION

The call for HRDD comes at a time when the world is more connected and interdependent than ever before because of international trade and the instant exchange of information on the Internet. At the same time, it is a world where the annual revenues of many TNCs exceed that of many countries.[78] There are positive trends in the sphere of voluntary corporate social environmental efforts, just as there are advancements in European national legislation to promote HRDD. Yet, with all of these advancements, there remain significant abuses in TNC supply chains, leaving those who are harmed without a remedy.[79]

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75. *See, e.g.*, COLO. REV. STAT. §13-20-11 (2019).

76. *See* Stephanie Kirchgaessner, *MEPs Call for Power to Tackle 'Vexatious Lawsuits' Targeting Journalists*, THE GUARDIAN (Feb. 22, 2018), *available at* https://www.theguardian.com/world/2018/feb/22/meps-call-for-power-to-tackle-vexatious-lawsuits-targeting-journalists (last visited Apr. 16, 2021).

77. Charter of Fundamental Rights of the European Union 364/01, art. 47, 2000 O.J. (C 326) 395, 405 (EU).

78. *See* Fernando Belinchón & Qayyah Moynihan, *25 Giant Companies That Are Bigger Than Entire Countries*, BUS. INSIDER (July 25, 2018), *available at* https://www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7 (last visited Apr. 16, 2021).

79. *See, e.g.*, Patricia Jolly, *Cambodian Farmers Accusing Bolloré of Spoliation Are Asked To Show Proof*, LE MONDE (Nov. 11, 2019), *available at* https://www.farmlandgrab.org/post/view/29298-cambodian-farmers-accusing-bollore-of-spoliation-are-asked-to-show-proof (last visited Apr. 16, 2021) (outlining the difficulties of

There is a need for national legislation and international treaties that not only provide for mandatory due diligence but also set forth a standard of care for human rights obligations that are binding on TNCs. These rights must come with the ability for those harmed to pursue justice in the court of their choice, with adequate access to the information needed to prove their cases.

Cambodian farmers seeking a remedy for damages caused by a subsidiary of the European company Bolloré).