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Robert Bejesky 273

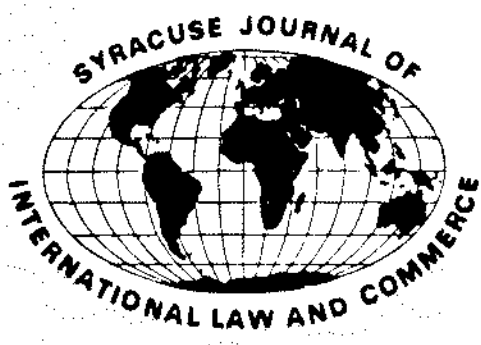
Host States' Due Diligence Obligations in International Investment Law
Dr. Eric De Brabandere 319

"Softness" in International Instruments: The Case of Transnational Corporations
Harri Kalimo & Tim Staal 363

NOTES

Road to Recovery: Pakistan's Human Rights Crises in the FATA
Naji'a Tameez 445

Data Protection Laws: Quilts Versus Blankets
Samantha Diorio 485



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CPA DICTATES ON IRAQ: NOT AN UPDATE TO THE CUSTOMARY INTERNATIONAL LAW OF OCCUPATION BUT THE NUCLEUS OF BLOWBACK WITH THE EMERGENCE OF ISIS

Robert Bejesky†

CONTENTS

INTRODUCTION 273
I.COMPETING PRINCIPLES OF OCCUPATION 278
II.IRAQI DEMOCRATIC CONTROL 289
A. Bush Administration Rhetoric 289
B. U.N. Authority for Occupation 294
C. CPA Dictates 297
i. Balancing Prerogative and Restrictions 297
ii. Constitutional Reforms 303
III.INTERPRETATIONS TO RECONCILE OCCUPATION LAW WITH CPA DIRECTIVES 308
A. Theoretical and Legal Interpretations 308
B. Interpreting the Terms of Resolution 1483 in Light of Contemporary Occupation Law 312
CONCLUSION 316

INTRODUCTION

The lack of legitimate populace-government relations in a state has become an imperative concern and a circumstance that can make the reasons for a war or intervention more compelling under international law and politics.[1] Foreign military support was provided to insurgents

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1. Jeff McMahan, *The Morality of Military Occupation,* 31 LOY. L.A. INT'L & COMP. L. REV. 7, 7 (2009) (noting that while there are a bountiful number of books written on just war, there are fewer works written on occupation even though the latter is a critical and related topic).

to foster violent uprisings in Libya and the U.S. military executed bombing operations that facilitated the overthrow of the 42-year dictator Muammar al-Gaddafi in 2011.[2] The uprising in Syria against President Bashar al-Assad, whose family has controlled the country since 1970,[3] continued for over two years and killed 160,000 through May 2014,[4] but there was no overt foreign intervention. Populist division remains in Ukraine among those who prefer closer relations with Western Europe and those who desire tighter relations with Russia, with foreign powers selecting sides to support their respective political alliance but without external powers officially announcing an intention to militarily intervene.[5] Overt occupation is found in the case of Israel occupying Palestinian territories, with relations periodically erupting into armed conflict.[6] U.S. troops exited Iraq in December 2011 after an eight-year occupation and after the Bush White House's Coalition Provisional Authority ("CPA") dictated legal reforms and new institutions of government,[7] ostensibly postulating that the institutions would furnish the infrastructure for peaceful relations, but instead Iraq is in danger of splintering.

These cases illustrate that the international community can be divided with varying levels of support for intervention on behalf of either a regime or opposing non-government actors. The depth of

2. Joshua Norman, *The World's Enduring Dictators: Muammar Qaddafi, Libya,* CBS NEWS (Aug. 21, 2011, 7:49 PM), *available at* http://www.cbsnews.com/news/the-worlds-enduring-dictators-muammar-qaddafi-libya/ (last visited Apr. 1, 2015).

3. *Profile: Syria's Ruling Baath Party,* BBC (July 9, 2012, 10:30 AM), *available at* http://www.bbc.com/news/world-middle-east-18582755 (last visited Apr. 1, 2015).

4. Faith Karimi & Salma Abdelaziz, *Syria Civil War Death Top 160,000, Opposition Group Says,* CNN (May 20, 2014, 6:19 AM), *available at* http://www.cnn.com/2014/05/19/world/meast/syria-civil-war/ (last visited Apr. 1, 2015).

5. *Landside Crimea Vote To Split From Ukraine,* SKY NEWS (Mar. 17, 2014, 9:11 AM), *available at* http://news.sky.com/story/1226921/landslide-crimea-vote-to-split-from-ukraine (last visited Apr. 1, 2015) (noting that Crimean people, who are 58% ethnic Russian, voted 97% in favor of becoming part of Russia in a referendum vote because of their displeasure with the government in Kiev). When Russia began to increase involvement in other parts of eastern Ukraine and supported Ukrainian rebels, the US voiced more objections and placed a series of sanctions on Russia.

6. Ashley Fantz, *Why are so Many Civilians Dying in Hamas-Israel War?,* CNN (Aug. 4, 2014, 9:16 AM), *available at* http://www.cnn.com/2014/08/04/world/meast/gaza-israel-why-civilian-deaths/ (last visited Apr. 1, 2015) (reporting that the most recent fighting began in July 2014 with the Israeli Defense force invading Gaza and that during the first month of fighting, 1,800 Palestinian were killed (including 300 children) and 10,000 wounded and 64 Israeli soldiers and three Israeli civilians were killed).

7. Mark Landler, *U.S. Troops to Leave Iraq by Year's End, Obama Says,* N.Y. TIMES (Oct. 21, 2011), *available at* http://www.nytimes.com/2011/10/22/world/middleeast/president-obama-announces-end-of-war-in-iraq.html?pagewanted=all (last visited Apr. 1, 2015).

international support may be amalgamated by factors such as the extent that curbing human rights violations is needed, whether the interest in humanitarian intervention sufficiently outweighs the cost of incursion on sovereignty, whether foreign intervention can actually effectively relieve the adverse conditions, and the stake in diplomatic relations with the regime in question. The outcome of the case of Iraq, due to the recent insurgency, updates the lessons for the manner in which an occupier should be permitted to impose institutional and legal reforms that endeavor to modify government-societal relations. The Bush White House's CPA unilaterally imposed dictates that were heavily criticized by Iraqis and the international community,[8] but fundamental to the lack of long-term success is an imperative distinction between reforms that were permissible and essential under occupation law and those modifications that may have set a foundation for blowback and abetted the recent crisis.

Iraqi Prime Minister Nouri al-Maliki was an Iraqi defector-exile for 23 years prior to the 2003 invasion[9] and has been prime minister for eight years which means that not long after he reentered Iraq, Maliki became prime minister and has held that position ever since. Maliki alienated Kurds and Sunnis,[10] was corrupt, deemed himself the "preeminent military leader," suppressed peaceful protests with his security services, called protesters terrorists, hired thugs to beat and kill dissenters, and arrested and tortured thousands of objectors until protests ended.[11] Remarking about Maliki's special forces, Zaid Al Ali

8. *See* Robert Bejesky, *The Enigmatic Origin of the CPA: An Attribute of the Unitary Executive*, 51 WILLAMETTE L. REV. (forthcoming Oct. 2015) (manuscript at 279-98) [hereinafter Bejesky, *The Enigmatic Origin*]; *see also infra* Part II (C)(i).

9. Jason Burke, *Iraq: How Much is the Divisive Approach of Maliki Responsible for the Turmoil?*, GUARDIAN (June 14, 2014, 1:30 AM), *available at* http://www.theguardian.com/commentisfree/2014/jun/15/nouri-al-maliki-is-he-the-man-to-blame-in-iraq (last visited Apr. 1, 2015).

10. *See* Jay Solomon & Matt Bradley, *Iraqi Parties Pressure Prime Minister Nouri al-Maliki to Step Down*, WALL ST. J. (June 23, 2014), *available at* http://online.wsj.com/articles/u-s-s-kerry-arrives-in-baghdad-for-meeting-with-prime-minister-maliki-1403508006 (last visited Apr. 1, 2015).

11. Zaid Al-Ali, *How Maliki Ruined Iraq*, FOREIGN POL'Y (June 19, 2014), *available at* http://www.foreignpolicy.com/articles/2014/06/19/how_maliki_ruined_iraq_armed_forces_isis (last visited Apr. 1, 2015); Sandy Berger, *U.S. Must Forge New Ties with Iraq to Tackle ISIS Threat*, TIME (Aug. 17, 2014), *available at* http://time.com/3130983/sandy-berger-iraq-isis-maliki/ (last visited Apr. 1, 2015) (national security advisor during the Clinton administration stating that "Maliki had governed in such an overtly anti-Sunni fashion that the Sunni tribes in the north had come to hate him more than they feared ISIS."); Lord Maginnis, *A Fictitious ISIL to Scare Us Away From the Truth in Iraq*, HUFFINGTON POST (Aug. 15, 2014), *available at* http://www.huffingtonpost.co.uk/lord-maginnis/iraq-isil_b_5494529.html (last visited Apr. 1, 2015) (U.K. House of Lords member stating that

writes: "Groups of young men were arrested in waves, often in the middle of the night, and would be wisked to secret jails, often never to be seen again."[12] A member of the U.K. House of Lords recently wrote that "Maliki has created a Mafia-like network of criminals and assassins to eliminate the voice of opposition at every level" and estimated that an average of a thousand Iraqis have been killed every month over the past decade by these assassins.[13] Political leaders called for the formation of a new and inclusive Iraqi government.[14]

Maliki reluctantly resigned after two months of urging,[15] but several days later was appointed to the position of vice president.[16] Meanwhile, the group that led the insurgency to end Maliki's rule has been labeled brutal zealots,[17] leaders of a larger movement of Sunni "revolutionaries,"[18] and a group that is seeking to regain oil production facilities, many of which are now operated by foreign multinationals.[19]

"Corruption in the [Iraqi] government and those affiliated to the government is almost unimaginable with billions of dollar embezzled and laundered, thus crippling the country's economy.").

12. Al-Ali, *supra* note 11.

13. Maginnis, *supra* note 11.

14. Jay Solomon & Carol E. Lee, *U.S. Signals Iraq's Maliki Should Go*, WALL ST. J. (June 19, 2014), *available at* http://online.wsj.com/articles/u-s-signals-1403137521 (last visited Apr. 1, 2015) ("The Obama administration is signaling that it wants a new government in Iraq without Prime Minister Nouri al-Maliki"); Mark Tran, *Iraqi Prime Minister Rejects Pleas for Government of 'National Salvation'*, GUARDIAN (June 25, 2014), *available at* http://www.theguardian.com/world/2014/jun/25/iraqi-prime-minister-rejects-calls-salvation-government (last visited Apr. 1, 2015) (German Chancellor Angela Merkel stating "We need a government in Iraq that embraces all parts of the population. For years this has not happened and because of this the pressure needs to be raised.").

15. *Iraq Crisis: Maliki Quits as PM to End Deadlock*, BBC (Aug. 15, 2014), *available at* http://www.bbc.com/news/world-middle-east-28798033 (last visited Apr. 1, 2015).

16. *See What Do Iraqi Leaders Hope to Hear From Obama's Strategy?*, PBS NEWSHOUR (Sept. 10, 2014), *available at* http://www.pbs.org/newshour/bb/iraqi-leaders-hope-hear-obamas-strategy/ (last visited Apr. 1, 2015).

17. Leon Watson, *Jihadi Terror Group PLC: ISIS Zealots Log Assassination, Suicide Missions and Bombings in Annual Report for Financial Backers*, DAILY MAIL (June 17, 2014), *available at* http://www.dailymail.co.uk/news/article-2661007/15-000-fighters-1-000-assassinations-4-000-IEDs-How-Isis-publishes-annual-report-detailing-reign-terror-Middle-East.html (last visited Apr. 1, 2015).

18. Scott Peterson, *Maliki or Isis? Neither Looks Good to Sunni Awakening Veterans*, CHRISTIAN SCI. MONITOR (June 18, 2014), *available at* http://www.csmonitor.com/World/Middle-East/2014/0618/Maliki-or-ISIS-Neither-looks-good-to-Sunni-Awakening-veterans (last visited Apr. 1, 2015) (reporting that "the stunning ISIS advance is riding what some top Sunni politicians—echoed by local players like Abu Omar—say is a much wider "revolution" against the unabashedly Shiite-first policies of Prime Minister Nouri al-Maliki.").

19. *Iraq Crisis: Baghdad Requests US Air Strikes Against Sunni Militants—Live*, GUARDIAN (June 18, 2014), *available at* http://www.theguardian.com/world/middle-east-live/2014/jun/18/iraq-crisis-maliki-sacks-officers-and-calls-for-national-unity-live-updates

Consequently, the eruption of violence in Iraq, just two years after the U.S. military departed, could also be perceived as an insurgency ignited by the existence of institutions that the Bush administration imposed and a continuation of rule under those institutions by an Iraqi exile who has evoked vehement opposition and has confronted insurmountable tribulation over his obligation to respect the human rights of citizens.

To assess the broad question of the balance between foreign powers respecting sovereignty and choosing to pressure or direct reforms on an occupied population, this article assesses how the Bush White House's CPA ordered many legitimate reforms but so expansively discerned its own authority that the recent backlash of violence jeopardized the efficacy of the permissible reforms. Hence, this recent precedent is evidence that an occupier should ensure that anything other than sanctioned reforms should be a byproduct of the sovereign choice of citizens in an occupied territory. Part II discusses competing principles of occupation law along an historical spectrum and rectifies how some departure in the strictness of occupation law is justified by new international law principles. Part III addresses how the Bush Administration's CPA presumed that dictated reforms were a product of Iraqi democratic control, which is inaccurate and inconsistent with the language of Security Council mandates. Part IV considers the opposing interpretations of the current state of occupation law and maintains that the precedent of Iraq affirms that the customary law of occupation should reside precisely where the Hague and Geneva Conventions placed it, except with the accommodation for institutionalizing human rights norms and principles of representative government. Part V concludes by emphasizing that excessive transgressions by a foreign power that deeply and callously transplant foreign institutions during an occupation can violate rules of occupation law, undermine the universal humanitarian interest at stake with a foreign intervention, and beget a backlash that nullifies the entire reason for the intervention.

(last visited Apr. 1, 2015); Nafeez Ahmed, *Iraq Blowback: Isis Rise Manufactured by Insatiable Oil Addition*, GUARDIAN (June 16, 2014), *available at* http://www.theguardian.com/environment/earth-insight/2014/jun/16/blowback-isis-iraq-manufactured-oil-addiction (last visited Apr. 1, 2015) ("The meteoric rise of Isis is a predictable consequence of a longstanding US-led geostrategy in the Middle East that has seen tyrants and terrorists as tools to expedite access to regional oil and gas resources").

I. COMPETING PRINCIPLES OF OCCUPATION

There are two polar conceptions of a belligerent military occupation authority—one that is archaic and another that is contemporary treaty law—and an apparent gray area that many commentators have contended exists following the occupation of Iraq.[20] This Part addresses distinctions between the extremes and punctuates that the obscure zone can be partially elucidated by recognizing the applicability of universal human rights standards and the preference for ensuring that there is a virtuous nexus between the governor and the governed.

The first conception is historical conquest, which presumed that military occupation imparted an authority to govern[21] and to impose rules on foreign lands, even if those institutions would be anathema to the local population.[22] Alexander the Great panegyrized the principle that conquerors dictated law on the defeated and assumed that subjugated people were mandated to obediently adhere to occupier imposed laws.[23] The British, French, Spanish, Portuguese, and other colonial powers, all imposed rules in foreign lands, including with the objective of retaining control over territorial possessions.[24] The international law norm that permitted the colonial power to subjugate and attain title to territory by conquest was the practice of rule by the mighty.[25]

The U.S. Supreme Court also generally followed this precedent in the case of the South's attempted succession during the Civil War, but the distinction was that a foreign sovereign was not imposing rule, but instead the national government was wielding sovereignty over a territory that was already locally prescribed. The Union's temporary subjugation sought to terminate rivalries and feuding with the mission

20. *See infra* Part III.

21. Coleman v. Tennessee, 97 U.S. 509, 517 (1878).

22. JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 195 (2006).

23. James Thuo Gathii, *Commerce, Conquest, and Wartime Confiscation*, 31 BROOK. J. INT'L L. 709, 730 (2006) (noting that the Roman Empire expanded pursuant to the principle that it was an "indubitable right of war, for the conqueror to impose whatever terms he pleased upon the conquered.").

24. *See* Rosa Ehrenreich Brooks, *Failed States, or the State as Failure?*, 72 U. CHI. L. REV. 1159, 1171-72 (2005) (stating that European powers "established nominally independent puppet-states" and used straight-forward colonial regimes in Africa, Asia, and South Asia).

25. Robert Bejesky, *Currency Cooperation and Sovereign Financial Obligations*, 24 FLA. J. INT'L L. 91, 143-44 (2012).

of preserving unification of the United States.[26] The Supreme Court held that Americans on opposing sides temporarily became enemies to each other[27] until relations could be permanently changed by government reform.[28] While reforms were being imposed, the occupying military possessed immunity from local civil and criminal laws,[29] which is similar to the terms of some contemporary Status of Force Agreements that allow one state's military to operate within another sovereign territory. The Supreme Court followed the then-dominant precedent under international law, which was that the military occupier bore the right to govern the occupied territory, enact laws, and even ensure that the relationship between the occupied population and the unlawfully acting Confederate government would be severed.[30]

Over the past century, international law has cashiered the historical practice of consecrating rule by the mighty belligerent and has rebuked the right of an occupier to impose institutional reform on a subjugated population. The universally accepted right of self-determination under international law[31] is the guiding norm that foremost undergirds the law of occupation.[32] Detailed rules of occupation law are found in the Hague Convention of 1907, the Geneva Convention of 1949, and customary international law,[33] and the rules automatically apply as soon as territory is placed under the authority of an invading hostile

26. Dow v. Johnson, 100 U.S. 158, 165 (1879) (explaining that the immunity for the occupier is due to the need to uphold the "efficacy of the army as a hostile force.").

27. *Id.* at 164 ("The people of the loyal States on the one hand, and the people of the Confederate States on the other, thus became enemies to each other . . . .").

28. Mrs. Alexander's Cotton, 69 U.S. 404, 406 (1864) ("[A]ll the people of each State or district in insurrection against the United States, must be regarded as enemies, until by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed.").

29. *Coleman*, 97 U.S. at 517 (noting that the residents of the occupied territory were subject to local laws); *Dow*, 100 U.S. at 165-66, 170 (immunity applied to the laws of an officially occupied country as they would to civil laws of any other country).

30. *Coleman*, 97 U.S. at 517-18; Ford v. Surget, 97 U.S. 594, 604-05 (1878) (noting that the Confederate government's actions were considered void and "simply the military representative of the insurrection against the authority of the United States").

31. Rep. of the Int'l L. Comm'n, 53rd Sess., Apr. 23-June 1, July 2-Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10, at 207-08 (2001); G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684, at 66 (1961); G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082, at 121 (1970).

32. Grant T. Harris, *The Era of Multilateral Occupation,* 24 BERKELEY J. INT'L L. 1, 17-18 (2006).

33. *See* Melissa Patterson, *Who's Got the Title? Or, The Remnants of Debellatio in Post-Invasion Iraq,* 47 HARV. INT'L L.J. 467, 469 (2006); David Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 843 (2003).

military.[34] Rules for belligerent occupation preclude an occupier from exercising sovereignty over the territory, adopting expansive legal change, abusing the population,[35] and contravening laws of occupation and inflicting damage on local inhabitants without providing recompense.[36]

Article 43 of the Hague Regulations imposes a trusteeship on the occupier[37] that requires "preserv[ing] the status quo" and forbids transforming the occupied territory,[38] but does permit the occupier to establish a "system of administration" to preserve the status quo[39] and to protect the local population.[40] Article 43 states that once the occupying

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34. Convention Respecting the Law and Customs of War on Land, art. 42 para. 1, Oct. 18, 1907, 36 Stat. 2277, 3306, 205 Consol. T.S. 277, 295 ("territory is considered occupied when it is. . .placed under the authority of the hostile army."); Macleod v. United States, 229 U.S. 416, 425 (1913) (stating that a military occupation occurs when there is an "invasion plus possession of the enemy's country for the purpose of holding it temporarily at least."); U.S. DEP'T ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 355 (July 18, 1956), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf (last visited Apr. 1, 2015) (defining an official occupation "as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority and . . . successfully substituted its own authority" over an area that it intends to hold).

35. Eric De Brabandere, *The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept*, 43 VAND. J. TRANSNAT'L L. 119, 129-30 (2010).

36. Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 36 Stat. 2277, 187 Consol. T.S. 227 [hereinafter Hague Convention] (providing that an occupying power that violates the Hague Regulations shall "be responsible for all acts committed by persons forming part of its armed forces."); *see also* Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 91, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I]("A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.").

37. Ralph Wilde, *From Trusteeship to Self-Determination and Back Again: The Role of the Hague Regulations in the Evolution of International Trusteeship, and the Framework of Rights and Duties of Occupying Powers*, 31 LOY. L.A. INT'L & COMP. L. REV. 85, 101-02 (2009) (expressing that the occupant administers a territory for the local people and in this status is a trustee).

38. *See generally* Scheffer, *supra* note 33, at 851; Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi "Freedom,"* 95 CALIF. L. REV. 2295, 2309-10 (2007); Bartram S. Brown, *Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 U.C. DAVIS J. INT'L L. & POL'Y 23, 27 (2004).

39. Breven C. Parsons, *Moving the Law of Occupation into the Twenty-First Century*, 57 NAVAL L. REV. 1, 9-10 (2009).

40. Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 24 (2004) (stating that pursuant to the 1907 Hague Regulations, the military is required to change from destroying as combatants to preserving as the occupant). The Geneva Protocol I of 1977, which was ratified by over

military obtains control and power over the territory, the occupier, "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while *respecting*, unless *absolutely prevented*, *the laws in force* in the country" existing at the time of the invasion.[41] The occupier's duties to preserve existing institutions and protect the civilian population are instrumental to facilitating self-determination because these conditions permit local people to exercise free choice.[42]

Despite provisions of the 1907 Hague Regulations and subsequent international law conventions, there has been some discrepant precedent of occupiers imposing reform on an occupied population during this century.[43] The U.S. Supreme Court upheld the U.S. military authority to construct government institutions in Puerto Rico in 1909 after the former government was displaced[44] and in the Philippines in 1913.[45] Occupier dictates were typical under the World War I colonial-power

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170 countries but not by the US or Iraq (until 2010), sought to add greater protections to civilians in occupied territories. *See International Humanitarian Law - Treaties & Documents*, INT'L COMM. RED CROSS, *available at* http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P (last visited Apr. 1, 2015) (highlighting a full list of signatories); Geneva Protocol I, *supra* note 36, art. 51 ("The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.").

41. Hague Convention, *supra* note 36, art. 43 (emphasis added); Wolff Heintschel von Heinegg, *The Rule of Law in Conflict and Post-Conflict Situations: Factors in War to Peace Transitions*, 27 HARV. J.L. & PUB. POL'Y 843, 862 (2004) ("[An occupier] is not entitled to enact comprehensive changes to the political, legislative, administrative, and social structures in the occupied territory.").

42. *See generally* EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 4-6 (2004) (noting that the Hague and Geneva Conventions restrict the occupying power and therein grants rights to the occupied population).

43. *See* Minxin Pei & Sara Kasper, *Lessons from the Past: The American Record on Nation Building*, CARNEGIE ENDOWMENT FOR INT'L PEACE POL'Y BRIEF 2 (2003), *available at* http://carnegieendowment.org/files/Policybrief24.pdf (last visited Apr. 1, 2015) (considering sixteen cases of US military "nation-building" over the past one hundred years and only two (Germany and Japan) were identified as clear successes); David Wippman, *Sharing Power in Iraq*, 39 NEW ENG. L. REV. 29, 30 (2004).

44. Santiago v. Nogueras, 214 U.S. 260, 265 (1909) ("By the ratifications of the treaty of peace [of 1898 with Spain], Porto Rico [sic] ceased to be subject to [that country] and became subject to the legislative power of Congress . . . . The authority to govern such ceded territory is found in the laws applicable to conquest and cession . . . . [U]nder the military control of the President as Commander in Chief.").

45. MacLeod v. United States, 229 U.S. 416, 425 (1913) ("The local government [of a conquered country] being destroyed, the conqueror may set up its own authority, and make rules and regulations for the conduct of temporary government, and to that end may collect taxes and duties to support the military authority and carry on operations incident to the occupation.").

controlled League of Nation mandates.[46] Likewise, following World War II and from 1943 to 1945, the Allied powers unilaterally established deep occupational control and introduced new government institutions on Germany[47] and engaged in fairly transformative occupations of Germany and Japan.[48]

The historical right to subjugate a population (due to the ability to subdue) following conquest is no longer valid and occupier dictates are not sanctioned, but exceptional and distant cases can be distinguished from institutional alterations implemented for the objective of actualizing standards encountered in human rights agreements.[49] Even if an occupier imposed reform in a contemporary occupation process that could be procedurally akin to the historical practice of unilateralism, the substantive result would presumably differ if the goal is to alter abusive institutions and legal structures and to preserve a civilized status quo. The target state is not entitled to retain oppressive institutions pursuant to universal human rights standards. However, in most cases, the substance of legal institutions may not be faulty, but instead structures are abusive on application for lack of government adherence or enforcement, which had been the case for eight years with

46. Brian Deiwert, *A New Trusteeship for World Peace and Security: Can an Old League of Nations Idea Be Applied to a Twenty-First Century Iraq?*, 14 IND. INT'L & COMP. L. REV. 771, 777-79, 782-84 (2004).

47. Dostal v. Haig, 652 F.2d 173, 176 (D.C. Cir. 1981) (discussing that the U.S. military possessed "supreme authority," controlled "local government institutions and courts," and holding that "[t]he U.S. military, entering Berlin as conquerors, were immune from jurisdiction of the courts of the conquered country, or would have been if any such courts had remained"); Madsen v. Kinsella, 343 U.S. 341, 361-62 (1952) (noting that the US did apply certain aspects of the German Criminal Code to non-Germans in the occupied territory).

48. JAMES GALLEN, *Jus Post Bellum: An Interpretive Framework*, *in* JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS 58, 62 (Carsten Stahn, Jennifer S. Easterday & Jens Iverson eds., 2014); *see generally* RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR (2002); CHARLES HARRIS, ALLIED MILITARY ADMINISTRATION OF ITALY, 1943-1945 (1957); WOLFGANG FRIEDMANN, THE ALLIED GOVERNMENT OF GERMANY (1947).

49. RICHARD N. HAASS, INTERVENTION: THE USE OF AMERICAN MILITARY FORCE IN THE POST-COLD WAR WORLD 13 (rev'd ed. 1999) ("when states violate minimum standards by committing, permitting, or threatening intolerable acts against their own people or other nations, then some of the privileges of sovereignty are forfeited."); Robert Bejesky, *Pruning Non-Derogative Human Rights Violations into an Ephemeral Shame Sanction*, 58 LOY. L. REV. 821, 829-31 (2012) (discussing that mandatory human rights standards are provided in a number of human rights agreements); Mark W. Janis, *Human Rights and Imposed Constitutions*, 37 CONN. L. REV. 955, 957 (2005) (stating that there was even a form of human rights transplant constitutionalism that was "prodded on" Eastern Europe after the demise of the Soviet Union).

Iraqi Prime Minister Maliki.[50]

In addition to ensuring that institutions meet global human rights standards so that self-determination can be soundly exercised by a free people,[51] self-determination can also be reasonably interpreted to require a political system that permits citizens to democratically choose their government[52] or at least to ensure that there is a widely-shared and legitimate connection between the populace and government.[53]

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50. Michael M. Farhang, *Reconstructing Justice: The Coalition Provisional Authority Took Giant Steps to Guarantee Iraq a Functioning Criminal Justice System*, 27 L.A. LAW. 44, 46 (2004) (noting that previous Iraqi criminal law institutions had flaws that should be supplemented). For example, pre-invasion Iraqi law prohibited torture and coercive confessions, but the former regime often ignored provisions. Law on Criminal Proceedings with Amendments, No. 23 of 1971, Decree No. 230, at para. 27 (Iraq), *available at* https://web.archive.org/web/20061208171014/http://www.law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf (last visited Apr. 1, 2015); *see supra* Introduction (noting Maliki's rule).

51. Failure to maintain human rights may undermine the states right to self-determination because of the adverse relation between the populace and government, while sustaining human rights can promote the theory of state sovereignty derived from a free people. *See e.g.* STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 4 (1999) (emphasizing that principles of sovereignty should not only include the traditional definition of Westphalian sovereignty with respect to foreign relations, but must also include "domestic sovereignty," which requires the government to also rule in the interests of the people); GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS 58 (1993) ("In a world of dual and conflicting loyalties, the state's demand for exclusive loyalty is rapidly losing its grip."); Nehal Bhuta, *New Modes and Orders: The Difficulties of a Jus Post Bellum of Constitutional Transformation*, 60 U. TORONTO L.J. 799, 807 (2010) (noting the theory of emphasizing the sovereignty in the people, which was inherent in the popular sovereign struggles between the Crown and Parliament in England during the seventeenth century and during the French Revolution of 1789).

52. Self-determination and sovereignty can be interpreted in different ways. Bhuta, *supra* note 51, at 810-11 (stating that the United Nations was formed not on representative governments within states, but on self-determination, rejection of foreign rule and domination, non-intervention, equality of states, and political legitimation). Self-determination permits a people with a common connection to a given territory to have the right to govern their own affairs, which was a critical principle during the era of decolonization. *See* G.A. Res. 2625 (XXV), *supra* note 31, para. 2. Self-determination could support a sub-national secession, based on popular will, if there is a licit justification. *See* In re Secession of Quebec, [1998] 2 S.C.R. 217, para. 134 (Can.) (holding that there is a right to secede when the people are disrespected or deprived of rights of the larger state); Michael P. Scharf, *Earned Sovereignty: Judicial Underpinnings*, 31 DENV. J. INT'L L. & POL'Y 373, 379 (2003); JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 134 (2d ed. 2006) (discussing Quebec's 49% vote to secede from Canada in 1995).

53. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 21 (1948) ("The will of the people shall be the basis of the authority of government."); *see also* International Covenant on Civil and Political Rights art. 25, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (stating that all citizens have the right to participate in public affairs, to be elected, to choose representatives, and to vote). Harvard Political Science Professor Arthur Isak Applbaum remarks of a generally agreed-upon definition of

Whether voting and democratic institutions are mandated to sanction the public choice accord between the government and populace have been controversial and may not be required by customary international law.[54] After all, the principle of sovereign rights grounds the U.N. system and affirms that "[e]ach state has the right to freely choose and develop its political, social, economic and cultural systems."[55] On the other hand, since the end of the Cold War, there has been a progressing acceptance of the assumption that a democratic government is more palatable than an undemocratic government[56] and this preference is accordant with the theoretical view of international law that presumes sovereignty resides with the people and not the government.[57] Moreover, the International Covenant on Civil and Political Rights ("ICCPR"), which entered into

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political legitimacy: "[T]he test of legitimate government is two-pronged. There needs to be an adequate connection between the governors and the governed, and there needs to be adequate protection of at least basic human rights." Arthur Isak Applbaum, *Forcing a People to be Free*, 35 PHIL. & PUB. AFF. 359, 288 (Fall 2007). Experts also maintain that legal institutions must be a representation of "widely shared societal commitment" and public will. *See* Daniel Bodansky, *Establishing the Rule of Law*, 33 GA. J. INT'L. & COMP. L. 119, 131 (2004); Kristen Boon, *Legislative Reform in Post-conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers*, 50 MCGILL L.J. 285, 323 (2005).

54. *See* Niels Petersen, *The Principle of Democratic Teleology in International Law*, 34 BROOK. J. INT'L L. 33, 56-59, 81 (2008) (stating that it does not appear that there is a customary international law *right* to democratic governance); Joseph S. Nye, *Public Diplomacy and Soft Power*, 616 ANNALS 94, 98 (2008) (noting that fewer than half of the countries in the world are democracies).

55. GA Res. 2625 (XXV), *supra* note 31.

56. *See* World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, para. 5, U.N. Doc. A/CONF.157/23 (July 12, 1993)("Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives"); U.N. Secretary-General, *An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping*, para. 82, U.N. Doc. A/47/277 (June 17, 1992) ("Democracy at all levels is essential to attain peace for a new era of prosperity and justice."); Harold Hongju Koh, *Preserving American Values: The Challenge at Home and Abroad*, *in* THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER 11, at 143, 143-47 (Strobe Talbott & Nayan Chanda eds., 2001); Petersen, *supra* note 54, at 57 n.132 (since 1988, the UN General Assembly has issued over a dozen resolutions on "Enhancing the Effectiveness" of elections without explicitly affirming a "right to democratic elections"); Ronald Rich, *Bringing Democracy into International Law*, 12 J. DEMOCRACY 20, 25 (2001); Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

57. *See* C. MICHAEL BARRY, THE AMERICAN REPUBLIC: THE FOURTH FORM OF GOVERNMENT 35 (2011) (noting that the U.S. Constitution's Framers viewed that "People are Sovereign," meaning that sovereignty resided in the people); BENVENISTI, *supra* note 42, at 94-96; W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 243 (Gregory H. Fox & Brad R. Roth eds., 2000).

force in 1976 and has been ratified by more than 160 countries, states in Article 1 that "[a]ll peoples have the right of self-determination," the right to "freely determine their political status and freely pursue their economic, social, and cultural development."[58] Article 25 of the ICCPR explicitly endows a right to electorally select a government.[59]

Beyond reaching human rights standards, one can contest whether given occupier-fiduciary reforms are valid as necessary to properly administrate and preserve the status quo of a citizenry's way of life[60] or whether newly imposed, modern legal norms should depose antiquated rules inconsistent with standards of civil society.[61] A convincing retort to a reformist position espousing a *carte blanche* is that there are no antiquated rules, other than those that fail to meet human rights standards or minister criterion of representative government, and an intervener that unilaterally issues fiats for reform is administrating immorally, improperly, and possibly illegally because every society has the self-determined prerogative to elect its own culturally-distinct institutions.[62]

A United Nations authorization could also constitute an institution to execute an occupier role or might leverage the actual or perceived

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58. ICCPR, *supra* note 53, art. 1.

59. *Id.* art. 25.

60. Patterson, *supra* note 33, at 473.

61. Michael J. Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 FLA. J. INT'L L. 1, 3 (2006) (Army JAG prosecutor expressing that "American advisors had to accomplish these and other tasks without offending the pride of the Iraqi lawyers and judges and without insulting their legal traditions, despite the fact that some of these traditions were barbaric and far outside the norm of modern jurisprudence."); Mirko Bagaric & John R. Morss, *Transforming Humanitarian Intervention from an Expedient Accident to a Categorical Imperative*, 30 BROOK. J. INT'L L. 421, 439-40 (2005) (stating that "whether other nations should forcibly defend only the basic right to life, or whether they should also be concerned with lesser rights, such as the right to own property" and other liberties are matters that should be contemplated).

62. STROMSETH, WIPPMAN & BROOKS, *supra* note 22, at 310 (emphasizing that simply imposing new legal rules without a focus on matching culture of the ordinary people is not likely to produce lasting reform); SAMUEL HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 243 (1981) (noting that a foremost reason to oppose interventionism is that "it is morally wrong for the United States to attempt to shape the institutions of other societies. Those institutions should reflect the values and behavior of the people in those societies. To intrude from outside is imperialism or colonialism, which also violates American values."); Madeleine K. Albright, *Speech: Remarks Based on New Book Memo to the President Elect: How We Can Restore America's Reputation and Leadership*, 20 FLA. J. INT'L L. 1, 4 (2008) ("You cannot impose democracy. Imposing democracy is an oxymoron."); Francis Fukuyama, *Nation-Building 101*, ATLANTIC (Jan. 1, 2004, 12:00 PM), *available at* http://www.theatlantic.com/magazine/archive/2004/01/nation-building-101/302862/ (last visited Apr. 1, 2015) (maintaining that "outsiders can never build nations.").

authority of the state-military occupier. The U.N. can exercise significant governance authority over a territory under U.N. Charter Article 81,[63] particularly to the extent that the governance would foster other core U.N. objectives, such as to facilitate self-rule and terminate colonialism.[64] In 1949, the U.N. General Assembly appointed a U.N. Commissioner for Libya, a former Italian colony;[65] a Trusteeship Council over Palestine;[66] and authorized Australia, New Zealand, and the U.K. to exercise full legislative, administrative and jurisdictional powers over the territory of Nauru[67] and required the occupation to compensate for occupier-associated wrongs.[68]

If a U.N. body does not administrate, one concern over the United Nations validation is whether the state-occupier's domain derives from the Security Council or the General Assembly. The Security Council should remain within its primary prerogative of addressing threats to international peace and security,[69] whereas the General Assembly has universal membership and possesses broader missions,[70] which not only imparts heightened accreditation with broad-based approval from across the world but also is more appropriate for authorizing civilian and inclusive government objectives during an occupation. Perhaps observing this logic of selecting the most appropriate UN institution, no Security Council resolutions or international agreements have ever sanctioned expansive occupations, which includes the operations that

63. U.N. Charter art. 81 (recognizing that the UN can be a potential Administering Authority over territories); *see generally* Ralph Wilde, *From Danzig to East Timor: The Role of International Territorial Administration*, 95 AM. J. INT'L L. 583 (2001).

64. U.N. Charter arts. 2(4), 73, 76 para. 1(b); ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 22 (2d ed. 2010) (stating that paramount UN goals included ending non-self-governing rule and assisting territories achieve self-government).

65. G.A. Res. 289 (IV)A, U.N. GAOR, 4th Sess., U.N. Doc. A/1089, at 10 (1949).

66. G.A. Res. 181(II), U.N. GAOR, 2nd Sess., U.N. Doc. A/516, at 132 (1947).

67. Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, 1992 I.C.J. 240, 240-70 (June 26).

68. *Id.* at 240; *see* Deiwert, *supra* note 46, at 795 (stating that Nauruans were entitled to AUS $107 million in compensation because Australia mined out one-third of the island while under Australian administration).

69. U.N. Charter art. 24(1). On the dangers of broadly-construed Security Council missions, see Susan Lamb, *Legal Limits to United Nations Security Council Powers, in* THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 361, 388 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999) (emphasizing that the Security Council's "open-textured and discretionary powers could be inherently subject to abuse, with profound consequences for the fundamental rights of States and individuals bearing the brunt of such measures").

70. U.N. Charter arts. 9-10 (noting universal membership and that the General Assembly can "discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter").

were authorized for Afghanistan, Bosnia, East Timor, Haiti, Herzegovina, and Kosovo; all of which only permitted temporary and specific military and civilian administration tasks.[71]

To summarize the trajectory of change, the following chart contextualizes these forms of occupation and includes their underlying justifications:

Full Prerogative				***Very Limited Prerogative***
Historical notions of colonialism	Post-World War II occupation	Temporary occupation with dictates following the US Civil War	United Nations authorizations and actions to uphold human rights	Hague and Geneva Conventions: No alteration under occupation except to preserve and protect
Justification: Rule of the mighty	*Justification:* Ending belligerency and quelling anger when cities and infrastructure were destroyed	*Justification:* Maintain peace inside an existing sovereign state	*Justification:* The UN possesses a peace and security mission and endeavors to uphold paramount principles of self-determination and human rights	*Justification:* Uphold self-determination and terminate remnants of colonialism

71. Scheffer, *supra* note 33, at 852-53; STROMSETH, WIPPMAN & BROOKS, *supra* note 22, at 6 (referencing similarities of post-conflict involvement in Kosovo, East Timor, Afghanistan, and Iraq); *see e.g.* S.C. Res. 1244, para. 10, U.N. Doc. S/RES/1244 (June 10, 1999) (stating the international civil presence in Kosovo is designed to "provide an interim administration for Kosovo under which the people can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions."); S.C. Res. 1244, Annex 2, U.N. Doc. S/RES/1244 (June 10, 1999) (approving the United Nations Interim Administration Mission in conflict-ridden Kosovo in June 1999); S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (creating the United Nations Transitional Authority in non-self-governing East Timor in October 1999).

To briefly prelude the next Part's discussion of the Bush White House's Coalition Provisional Authority by contextualizing this chart and its justifications, the occupier's colonial-like dictates have been universally rejected for most of the twentieth century and the justification for imposing reforms following World War II were conducted to address peace and security considerations of aggressors and the societal crisis of the Axis powers after defeat. Both Germany and Japan have been subjected to a seventy-plus year, and counting, occupation. By contrast, the Bush administration committed the aggression on Iraq without the assent of the Security Council[72] and the allegations of security threats from Iraq were patently false,[73] making similar justifications for the compelled reform encountered in the post-World War II cases inappropriate. Moreover, none of these reasons for war had anything to do with overthrowing a government and remaining in a near-nine year occupation,[74] but the decisive post-invasion development was that the Security Council adopted Resolution 1483 and specified terms for the occupation. The following part discusses the Bush Administration's pre-resolution rhetoric, the terms of Resolution 1483's sanction, and the fact that the CPA effectively ignored occupation law and liberally interpreted the terms of Resolution 1483 to

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72. *See generally* Robert Bejesky, *Weapon Inspections Lessons Learned: Evidentiary Presumptions and Burdens of Proof,* 38 SYRACUSE J. INT'L L. & COM. 295 (2011) [hereinafter Bejesky, *Weapon Inspections*]; Bodanky, *supra* note 53, at 132 (stating that a significant percentage of the global populace and Iraqis viewed the military invasion as illegitimate, making byproducts of that invasion potentially coercive).

73. Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards,* 44 CREIGHTON L. REV. 811, 875-82 (2011) [hereinafter "Bejesky, *Intelligence Information*"] (stating that intelligence assessments were specious and that the Bush administration pushed the allegations without reservation); *see* Charles Lewis & Mark Reading-Smith, *False Pretenses*, CTR. FOR PUB. INTEGRITY (Jan. 23, 2008), *available at* http://www.publicintegrity.org/2008/01/23/5641/false-pretenses (last visited Apr. 1, 2015) (aggregating a summary of 935 false statements).

74. Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 464 (2011) (emphasizing that Congress provided the Executive with a limited authorization to use force, conditioned on the existence of an actual imminent threat, which means that when the White House began offering additional rationalizations after the war, particularly of humanitarian intervention, "such talk was blatantly inconsistent with the plain language of the 2002 resolution."); Bejesky, *Weapon Inspections, supra* note 72, at 350-69. While overthrowing a government is not a direct legal justification for intervening, arguments have been made to support a connection between democracy (which might be the result of replacing an authoritarian regime) and peace with other states. *See* U.N. Doc. S/2001/1154 (Dec. 5, 2001) (former Secretary-General Boutros-Ghali stating that "democratic institutions and processes . . . minimize the risk that differences or disputes will erupt into armed conflict . . . In this way, a culture of democracy is fundamentally a culture of peace.").

do whatever it pleased.

II. IRAQI DEMOCRATIC CONTROL

A. Bush Administration Rhetoric

The Bush and Blair administrations often refrained from referring to the presence of the American and British militaries in Iraq as an "occupation,"[75] but frequently preferred to use the phrase "liberation" and assured that Iraqi citizens would quickly control their own government.[76] The importance of conveying a general message of liberation to the Iraqi people was deliberated three months prior to the invasion in a Pentagon operation called "Rapid Reaction Media Team," which arranged for disassembling the current Iraqi media network and

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75. BENVENISTI, *supra* note 42, at ix.

76. *President Rallies Troops at MacDill Air Force Base in Tampa*, WHITE HOUSE (Mar. 26, 2003), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030326-4.html (last visited Apr. 1, 2015) ("We will help the Iraqi people to find the benefits and assume the duties of self-government. The form of those institutions will arise from Iraq's own culture and its own choices."); *Interview on Doordarshan Television of India*, U.S. DEP'T ST. (Mar. 26, 2003), *available at* http://2001-2009.state.gov/secretary/former/powell/remarks/2003/19075.htm (last visited Apr. 1, 2015) (noting the aspiration of "put[ting] in place a new government that will reflect the will of all of the people"); *Deputy Secretary Wolfowitz Interview with 60 Minutes II*, U.S. DEP'T DEF. (Apr. 1, 2003), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2239 (last visited Jan. 25, 2015) (agreeing that it is critical to have "free institutions" that are a product of the culture and local people, stating that "we're going to try to be working with the Iraqis to help them build free institutions, and these are people who understand free institutions and, under Iraq, in a way that nobody who's not an Iraqi will ever understand," and noting that this free and functioning government will be developed "as rapidly as possible"); *Joint Conference with Serbian Prime Minister Zivkovic*, U.S. DEP'T ST. (Apr. 2, 2003), *available at* http://2001-2009.state.gov/secretary/former/powell/remarks/2003/19296.htm (last visited Apr. 1, 2015) (Powell stating: "I can assure you that we all want to end this as soon as possible so we can go on with the task of allowing the Iraqi people to form a new government—a government that is democratic, a government that will represent all the people of Iraq, a government that will cause Iraq to live in peace with its neighbors"); *Deputy Defense Wolfowitz, General Pace on NBC's Meet the Press*, U.S. DEP'T ST. (Apr. 6, 2003), *available at* http://iipdigital.usembassy.gov/st/english/texttrans/2003/04/20030406192943attocnich0.1897852.html#axzz3C03RtEwz (last visited Apr. 1, 2015) (Wolfowitz stating: "The goal is . . . to move as rapidly as possible after the regime is gone to a government that genuinely represents the Iraqi people"); *Prepared Statement for the Senate Armed Services Committee: The Future of NATO and Iraq by Paul Wolfowitz*, U.S. DEP'T DEF (Apr. 10, 2003), *available at* http://www.defense.gov/Speeches/Speech.aspx?SpeechID=365 (last visited Apr. 1, 2015) (Wolfowitz stating: "One of the greatest responsibilities of the coalition will be to help Iraqis create a new government, to paraphrase Abraham Lincoln, of the Iraqi people, by the Iraqi people and for the Iraqi people").

implanting the occupier's message for society.[77] Top Bush Administration officials also punctuated an unequivocal theme that promised the foreign military presence in Iraq would rapidly ordain self-government and ensure that Iraqi choices would design political institutions.

For example, on March 26, 2003, one week after the war began, President Bush affirmed: "We will help the Iraqi people to find the benefits and assume the duties of self-government. The form of those institutions will arise from Iraq's own culture and its own choices."[78] On April 2, Secretary of State Powell promised: "I can assure you that we all want to end this as soon as possible so we can go on with the task of allowing the Iraqi people to form a new government—a government that is democratic, a government that will represent all the people of Iraq."[79] On April 4, National Security Advisor Rice remarked: "We will leave Iraq completely in the hands of Iraqis as quickly as possible. As the President has said, the United States intends to stay in Iraq as long as needed, but not one day longer."[80] On April 6, Undersecretary of Defense Wolfowitz stated: "We come as an army of liberation, and we want to see the Iraqis running their own affairs as soon as they can."[81] On April 13, Secretary of Defense Rumsfeld emphasized: "And

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77. *White Paper: "Rapid Reaction Media Team" Concept*, U.S. DEP'T DEF. (Jan. 2003), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB219/iraq_media_01.pdf (last visited Apr. 1, 2015) (referencing that the plan called for implementing an Iraqi "Free Media" network by "informing the Iraqi public about USG/coalition intent and operation, to stabilize Iraq, . . .and to provide Iraqis hope for their future" and deploying "hand-picked" media experts from the US and UK to control the Iraqi media outlets). The program would control the media with messages of De-Bathification, war crimes of Saddam's regime, US-sponsored versions of "history telling," justice and the rule of law, and themes of Western entertainment (e.g. Hollywood and sports). *Id.* The latter element follows the approach used by the British and US media nearly a century ago, which employed distractions to create a compliant population. GARTH S. JOWETT & VICTORIA O'DONNELL, PROPAGANDA AND PERSUASION 100, 103, 162 (2006).

78. *In the President's Words: The Rights and Aspirations of the Iraqi People*, WHITE HOUSE (July 8, 2004), *available at* http://georgewbush-whitehouse.archives.gov/infocus/iraq/rightsandasp.html (last visited Apr. 1, 2015) (citing *President Bush's Remarks to Troops Macdill Air Force Base, Tampa, Florida*, Mar. 26, 2003); *see id.* (providing fifty statements from assorted speeches and contending that the Bush administration endeavored to provide liberty, freedom, and swift self-government to the Iraqi people).

79. *Joint Press Conference with Colin Powell, Zoran Zivkovic*, U.S. DEP'T ST. (Apr. 2, 2003), *available at* http://iipdigital.usembassy.gov/st/english/texttrans/2003/04/20030402205204rennefl0.1897852.html#axzz3C1W8b1Rz (last visited Apr. 1, 2015).

80. *Press Briefing by National Security Advisor Dr. Condoleezza Rice*, WHITE HOUSE (Apr. 4, 2003), *available at* http://iipdigital.usembassy.gov/st/english/texttrans/2003/04/20030404184631ennoccmk0.1897852.html#axzz3C1W8b1Rz (last visited Apr. 1, 2015).

81. *Deputy Defense Wolfowitz, General Pace on NBC's Meet the Press*, *supra* note 76;

the overall [governance] authority at the present time obviously is General Franks. And the task is to create an environment that is sufficiently permissive, that the Iraqi people can fashion a new government."[82] On April 24, General Jay Garner, the former director of the Pentagon's Office of Reconstruction and Humanitarian Assistance (forerunner to the CPA),[83] stated: "And nobody is going to run those ministries other than the Iraqis themselves. I think we need to be absolutely clear about that . . . . The new ruler of Iraq is going to be an Iraqi . . . I don't rule anything."[84] On April 28, Bush stated: "As freedom takes hold in Iraq, the Iraqi people will choose their own leaders and their own government. America has no intention of imposing our form of government or our culture. Yet, we will ensure that all Iraqis have a voice in the new government."[85]

The message relayed by the Bush Administration was one of liberation, expeditious self-government, and the conservation of Iraqi choices in constituting institutions and culture, which were themes of intention that would presumably be quite palatable to the international community. The Bush Administration also did not discuss unilaterally imposing legal reform (as distinguished from institutions of

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Deputy Secretary Wolfowitz Interview with 60 Minutes II, *supra* note 76 (Wolfowitz remarking that one of the most important goals was "an Iraq that stands on its own feet that governs itself in freedom. . .We'd like to get to that goal as quickly as possible."); *Prepared Statement for the Senate Armed Services Committee: The Future of NATO and Iraq by Paul Wolfowitz*, *supra* note 76 (providing the "goal to leave Iraq in the hands [of the Iraqi people] as soon as possible").

82. *Secretary Rumsfeld Interview with NBC Meet the Press*, U.S. DEP'T OF DEF. (Apr. 13, 2003), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2383 (last visited Apr. 1, 2015 (also noting that "over some period of months the Iraqis will have their government selected by Iraqi people."); *Transcript: Gen. Tommy Franks on Fox News Sunday*, FOX NEWS (Apr. 13, 2003), *available at* http://www.foxnews.com/story/2003/04/13/transcript-gen-tommy-franks-on-fox-news-sunday/ (last visited Apr. 1, 2015) (Franks remarking that Iraq would have a government that will provide the people with "freedom" and "liberty" and noting that "I think what we will see in the month and years ahead in Iraq will provide a bit of a model for how that can be done").

83. Garner and the ORHA were replaced by Paul Bremer and the CPA in mid-May 2003. While the reason for this replacement is not clear, perhaps the outcome supplanted the perception of a strictly US-creation that the Pentagon controlled—the ORHA—and an unavailing occupation, with a new entity that had an international label and appeared to be governed by civilians (rather than the military).

84. Kathleen T. Rhem, *Iraqis Need Work, Paychecks, U.S. Administrator Says*, AM. FORCES PRESS SERVICE (Apr. 24, 2003), *available at* http://www.defense.gov/news/newsarticle.aspx?id=29065 (last visited Apr. 1, 2015).

85. *President Discusses the Future of Iraq*, WHITE HOUSE (Apr. 28, 2003), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2003/04/20030428-3.html (last visited Apr. 1, 2015).

government) on the country. The correlative exigencies at the time these pledges were declared were that the former regime was displaced, infrastructure was destroyed by Pentagon bombing, societal affairs were halted, and humanitarian suffering was widespread, and the onset of these post-invasion reverberations led the U.N. Security Council to adopt Resolution 1472, one week after the invasion, to summon the international community to assist in resolving the humanitarian crisis.[86] In fact, President Bush anticipated that such adverse conditions would befall because he adopted National Security Presidential Directive 24 two months before the invasion in order to constitute an administrative unit called the Office of Reconstruction and Humanitarian Assistance ("ORHA")[87] in order to execute administrative obligations of an occupation, control funding for humanitarian operations and reconstruction, and collaborate with the U.S. Agency for International Development ("USAID") to implement the operations.[88] Despite the dearth of foreign support for the invasion and the fact that ORHA was

86. S.C. RES. 1472, Mar. 28, 2003, U.N. Doc. S/RES/1472 (2003); S.C. RES. 1483, para. 2, U.N. Doc. S/RES/1483 (May 22, 2003); Problems perdured. S.C. RES. 1511, para. 8, U.N. Doc. S/RES/1511 (Oct. 16, 2003); (stating that additional humanitarian relief, economic reconstruction, conditions for sustainable development, and restoration of government institutions were necessary). *Al Jazeera* and a dozen other channels "provided straight news that in many ways gave their viewers a more rounded picture—from the inside—than the Anglo-American networks did. While the Anglo-American networks tended to show Allied medics treating injured Iraqi civilians tenderly while their armed colleagues handed out drinking-water cans to thirsty Iraqi POWs, the Arab media, while airing the briefings and sound bites coming from London, Washington, and Doha . . . also showed the . . . charred Iraqi bodies, [corpses, blood-soaked pavements, blown-out brains, screaming infants and wailing women] . . . grievously wounded civilians, . . . [children wounded by US cluster bombs,] dead Allied troops and injured Iraqi soldiers, hospitals choked with wounded and burnt Iraqis. Away from the battle zone, the Arab networks showed Iraqi suffering, humiliation, and panic – distraught families held up at Anglo-American military checkpoints, hooded Iraqi POWs, thousands of fleeing the capital, and civilians, deprived of food and water, driven to begging or looting." DILIP HIRO, SECRETS AND LIES: OPERATION IRAQI FREEDOM AND AFTER 192-94 (2004).

87. Judith Miller, *White House Assembles Officials to Review Plan to Rebuild Iraq After War*, N.Y. TIMES (Feb. 23, 2003), *available at* http://www.nytimes.com/2003/02/23/world/threats-responses-looking-ahead-white-house-assembles-officials-review-plan.html (last visited Mar. 24, 2015) (noting that Directive 24 was adopted on January 20, 2003).

88. L. Elaine Halchin, *The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities*, CRS REPORT FOR CONGRESS 2 (June 6, 2005), *available at* http://www.au.af.mil/au/awc/awcgate/crs/rl32370.pdf (last visited Apr. 1, 2015); *see* Karen DeYoung & Dan Morgan, *U.S. Plan for Iraq's Future is Challenged; Pentagon Control, Secrecy Questioned*, WASH. POST, Apr. 6, 2003, at A21 (questioning the secrecy of the ORHA mission and intentions). ORHA would direct the post-invasion activities of "civilian aid, reconstruction, and civil administration or governance." Miller, *supra* note 87 ("The Bush administration's new office of postwar planning held a secret session this weekend to assess the government's plans for securing and rebuilding Iraq if Saddam Hussein is overthrown, senior administration officials said today.").

not internationally-authorized,[89] the Pentagon-run ORHA postulated that non-Coalition countries should deploy soldiers to stabilize Iraq[90] and that the U.N. should pay for the occupation.[91]

Jay Garner, a retired general, was the appointed head of the ORHA.[92] After irate Iraqis voiced widely-publicized complaints that nothing was getting accomplished, services were not being provided, and government officials had not been compensated for several weeks, Garner remarked that "[a]s soon as (the Iraqis) can identify those people to us, we'll start paying their salaries."[93] The problem is that *no one* could identify salary recipients because the invasion overthrew the previous government and eventually CPA Order Number 1, which was adopted before the Security Council Resolution 1483 authorized an occupation, legally stripped between fifteen and thirty thousand public-sector employees out of government due to association with the previous regime.[94] Perhaps the sensibility of such a request was more persuasive at the time because the international community was still under the impression that, due to six months of false statement by the Bush administration, it was necessary to search for the prohibited weapons that Iraq supposedly possessed, but those weapons ultimately did not exist.[95]

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89. The entity was created concomitant with UN inspections taking place, before Colin Powell addressed the Security Council, and before the UN Security Council had even begun the most intensive debates. Bejesky, *Weapon Inspections, supra* note 72, at 335-52.

90. Michael R. Gordon, *The Strategy to Secure Iraq Did Not Foresee a 2nd War*, N.Y. TIMES (Oct. 19, 2004), *available at* http://www.nytimes.com/2004/10/19/international/19war.html?pagewanted=1&_r=0 (last visited Apr. 1, 2015).

91. Simon Chesterman, *Bush, the United Nations and Nation-Building*, 46 SURVIVAL 101, 106 (2004).

92. Miller, *supra* note 87 (stating that the plan was announced nearly a month before the invasion). After the American media had entirely accepted the justifications for the invasion as proven for several months, it hosted former military commanders explaining potential invasion plans. Ideas of an anticipated invasion were being planted at the same time Bush administration officials explained that no such action was inevitable. Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 83-84 (2011) [hereinafter Bejesky, *Politico*].

93. Rhem, *supra* note 84.

94. *Purge of Saddam loyalists*, BBC (May 16, 2003, 11:55 AM), *available at* http://news.bbc.co.uk/2/hi/middle_east/3033919.stm (last visited Apr. 1, 2015); Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 614 (2006) (calling CPA Order No. 1 a much criticized order).

95. S.C. Res. 1483, at pmbl., U.N. Doc. S/RES/1483 (May 22, 2003); *see generally* Bejesky, *Weapon Inspections*, *supra* note 72; Bejesky, *Intelligence Information*, *supra* note 73, at 875-82; Lewis & Reading-Smith, *supra* note 73 (providing a chronological chart of false statements and noting that "President George W. Bush and seven of his administration's top officials, including Vice President Dick Cheney, National Security

B. U.N. Authority for Occupation

In furtherance of Resolution 1472 and to alleviate the continuing humanitarian crisis,[96] the Security Council passed Resolution 1483, which commissioned the occupying "Authority" to preserve public order, deliver humanitarian aid, search for weapons of mass destruction (the Bush administration's purported reason for invasion), administrate government functions, and assist Iraqi citizens in forming new institutions of government.[97] Other than searching for prohibited weapons, which did not exist,[98] the Resolution was constituted entirely to ameliorate injurious repercussions of an invasion and war that the United Nations had not authorized. Moreover, the pre-war diplomacy within the United Nations only involved questions of whether Iraq was violating a ban on enumerated prohibited weapons, but given that there were no proscribed weapons, even the underlying reason for invasion for which the Bush Administration was so insistent on convincing the Security Council and the international community—dire urgency from dreadful security peril[99]—made the invasion unnecessary and premised on "false pretences."[100] It also appears that the Bush and Blair

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Adviser Condoleezza Rice, and Defense Secretary Donald Rumsfeld, made at least 935 false statements in the two years following September 11, 2001, about the national security threat posed by Saddam Hussein's Iraq. . . . On at least 532 separate occasions (in speeches, briefings, interviews, testimony, and the like), Bush and these three key officials, along with Secretary of State Colin Powell, Deputy Defense Secretary Paul Wolfowitz, and White House press secretaries Ari Fleischer and Scott McClellan, stated unequivocally that Iraq had weapons of mass destruction (or was trying to produce or obtain them), links to Al Qaeda, or both.").

96. S.C. Res. 1472, U.N. Doc. S/RES/1472 (Mar. 28, 2003).

97. S.C. Res. 1483, at pmbl. paras. 1, 2, 4, 11, U.N. Doc. S/RES/1483 (May 22, 2003); Permanents Reps. of the U.K. & U.S. to the U.N., Letter dated May 8, 2003 from the Permanent Reps. of the United Kingdom and the United States to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/538 (May 8, 2003), *available at* http://www.globalpolicy.org/security/issues/iraq/document/2003/0608usukletter.htm (last visited Apr. 1, 2015) (recognizing that these itemizations were the goals). One cited example of significant concern was that "[m]ember States shall take appropriate steps to facilitate the safe return" of archeological items from the Iraq National Museum but the resolution does to mention that the Hague Regulations of 1907 (Arts. 43 and 56) can require the US to pay for items destroyed or missing is there was a failure to secure. S.C. Res. 1483, para. 7, U.N. Doc. S/RES/1483 (May 22, 2003); Hague Convention, *supra* note 36, arts. 43, 55, 56.

98. Bejesky, *Intelligence Information*, *supra* note 73, at 875-82.

99. Bejesky, *Weapon Inspections*, *supra* note 72, at 369-75.

100. Press Release, Senate Select Comm. on Intelligence, Senate Intelligence Committee Unveils Final Phase II Reports on Prewar Iraq Intelligence (June 5, 2008), *available at* http://intelligence.senate.gov/press/record.cfm?id=298775 (last visited Apr. 1, 2015) (stating that the Bush Administration led the nation to war under "false pretenses"); *see also* Ackerman & Hathaway, *supra* note 74, at 464.

administrations may have enthusiastically sponsored a Security Council resolution for occupation to introduce a perception of the Security Council implicitly authorizing the war *post facto,*[101] but this is not particularly convincing.

Resolution 1483 specified the mission and conditions for occupation, but it was the CPA's unsparingly-construed assumptions of prerogative to unilaterally restructure government and, more controversially, adopt new laws that remained in contention. Curiously, in a later released memo, dated March 26, 2003, which was before Resolution 1483 was adopted, British Attorney General Goldsmith affirmed that "a further Security Council resolution is needed to authorise imposing reform and restructuring of Iraq and its Government" because without "a further resolution, the U.K. (and the U.S.) would be bound by the provisions of international law governing belligerent occupation, notably the Fourth Geneva Convention and the 1907 Hague Regulations."[102] Both the U.S. and U.K. acknowledged that they were bound by the Geneva and Hague conventions when Resolution 1483 was adopted[103] and delivered letters to the United Nations that stated "[t]he States participating in the Coalition will strictly abide by their obligations under international law,"[104] and Resolution 1483 stated nothing about granting the occupation a prerogative to unilaterally impose reform. No unrestricted sanction was

101. *See* Achilles Skordas, *Hegemonic Intervention as Legitimate Use of Force*, 16 MINN. J. INT'L L. 407, 439 (2007) (contending that Resolution 1483 reflected "the UN's indirect, albeit unwilling, endorsement of the US intervention policies"); *see contra* Davis Brown, *Iraq and the 800-Pound Gorilla Revisited: Good and Bad Faith, and Humanitarian Intervention*, 28 HASTINGS INT'L & COMP. L. REV. 1, 22 (2004) ("Although the Security Council did not authorize the invasion, and several of its members opposed to it, the Council has nevertheless put its imprimatur of legitimacy on the presence of coalition forces in Iraq.").

102. Roberts, *supra* note 94, at 609 (referencing that Goldsmith further added that the "imposition of major structural economic reforms would not be authorized by international law").

103. Stefan Talmon, *A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq* (Univ. of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No. 25/2007, 2007), *available at* http://users.ox.ac.uk/~sann2029/SSRN-id1018172%5B1%5D.pdf (last visited Apr. 1, 2015) (citing 405. PARL. DEB. H.C. (6th ser.) (2003) 22 *available at* http://www.publications.parliament.uk/pa/cm200203/cmhansrd/vo030512/debtext/30512-05.htm#30512-05_spmin1) (British Foreign Secretary remarking to the House of Commons: "The United Kingdom and the United States fully accept our responsibilities under the fourth Geneva Convention and the Hague Regulations.").

104. Letter dated May 8, 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and and the United States of America to the President of the U.N. Security Council, S.C. Doc. S/2003/538 (May 8, 2003).

endowed; Resolution 1483 expressly affirmed that the Geneva Conventions and the Hague Regulations restrictions applied, which limited the occupation, and merely rearticulated mandatory customary international law norms[105] and overtly stated that Iraqis had the power to select their own institutions.[106] The sequence of events with the invasion and occupation is a prime example of being granted a U.N. authority based on public promises about intentions, and being afforded an inch by the terms of the sanction and then taking a mile.

Not only was the Security Council's institutional authority for this unprecedented circumstance placed into question by some Council members and the CPA's exercise of authority inconsistent with the authority that it was actually granted,[107] but several Council members objected to Resolution 1483 because Britain and the US were unwilling to expressly grant the U.N. a genuine role and because members were concerned that Iraqis would be situated in a rather uncompromising and

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105. *See Treaties and States Parties to Such Treaties*, ICRC *available at* https://www.icrc.org/IHL#view:_id1:_id2:_id250:repeat1:5:labelAnchor (last visited Jan. 25, 2015) (listing over 190 country-signatories to the Geneva Conventions); FRANÇOISE BOUCHET-SAULNIER, THE PRACTICAL GUIDE TO HUMANITARIAN LAW 115 (Laura Brav & Clémentine Olivier eds., 2d ed. 2007) (noting the customary international law status); *see also* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 161-168 (7th ed. 1997); LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 33-36 (2d ed. 2000); S.C. Res. 1483, at pmble. para. 5, U.N. Doc. S/RES/1483 (May 22, 2003) (citing the applicability of the Hague and Geneva Conventions); *see generally* Boon, *supra* note 53, at 285 (noting that the United Nations promotes the obligation of occupiers to adhere to the Hague rules of occupation).

106. S.C. Res. 1483, at pmbl. paras. 1, 4, 5, 7, 8(c)(i), 9, U.N. Doc. S/RES/1483 (May 22, 2003) (Provisions of the Hague and Geneva Conventions affirm that foreign assistance is permitted to the extent that the occupied population is allowed to choose its own institutions and preserve its own culture and Resolution 1483 precisely affirmed this structure.); *see e.g.* S.C. Res. 1483, at pmbl. para. 4, U.N. Doc. S/RES/1483 (May 22, 2003) (requiring the US and UK to "promote the welfare of the Iraqi people through effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future").

107. U.N. Charter art. 2(1)(7) (affirming the sovereign equality of members and states and that the UN shall not "intervene in matters which are essentially within the domestic jurisdiction of any state"); S.C. RES. 1483, at preamble, U.N. Doc. S/RES/1483 (May 22, 2003) (affirming the "sovereignty and territorial integrity of Iraq"; Mahmoud Hmoud, *The Use of Force Against Iraq: Occupation and Security Council Resolution 1483*, 36 CORNELL INT'L L.J. 435, 438, 443, 445 (2004) (stating that "the legality of the Coalition's occupation of Iraq was, at best, questionable . . . [T]he occupation of Iraq was an illegal act that should be recognized by the international community"); Felicity Barringer, *U.N. Reaction to Resolution Seems Positive but Reserved*, N.Y. TIMES, (May 10, 2003), *available at* http://www.nytimes.com/2003/05/10/world/aftereffects-diplomacy-un-reaction-to-resolution-seems-positive-but-reserved.html?pagewanted=print (last visited Apr. 1, 2015) (stating that the degree of authorization under 1483 was criticized by some Security Council members as exceeding any authority that the Security Council can even grant).

overly-dependent situation as oil revenues would be controlled and distributed by the U.S. and Britain.[108] Given the humanitarian crisis, dissenting Security Council members voiced that they had no other viable option, but to approve Resolution 1483.[109] Despite objections from Security Council members, Resolution 1483 was passed pursuant to the assumption that the U.N. would provide a significant advisory role and that political authority would be transferred to an Iraqi government as quickly as possible,[110] but after the Resolution went into effect, the Bush Administration ensured that the U.N. played almost no role[111] and the CPA did whatever it desired while appointing loyalists to the occupation, calling the assemblies of chosen individuals local representative bodies, ignoring the terms of Resolution 1483, and dictating new laws and reforms without regard to the Iraqi people.

C. CPA Dictates

i. Balancing Prerogative and Restrictions

Even if an occupation is perceived as lawful, the self-determination of the local population can be violated by the manner of occupation.[112] An occupying foreign military cannot alter the structure of government

108. Gary Younge & Ian Black, *Blueprint Gives Coalition Control of Oil*, GUARDIAN (May 10, 2003), *available at* http://www.theguardian.com/world/2003/may/10/iraq.oil (last visited Apr. 1, 2015); Hmoud, *supra* note 107, at 451 (reporting that several Security Council members wanted the United Nations to administer the country); Scheffer, *supra* note 33, at 850 (stating that the White House rejected a significant UN role); Paul Blustein, *G-7 Agrees that Iraq Needs Help with Debt: Important Roles seen for IMF, World Bank*, WASH. POST (Apr. 13, 2003) (stating that the Bush administration was "balking at mandates that would give the United Nations as big a part in running postwar Iraq as many European nations want").

109. U.N. SCOR, 58th Sess., 4671st mtg., at 11, U.N. Doc. S/PV.4761 (May 21, 2003), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.4761 (last visited Apr. 1, 2015) (referencing a statement made by the Pakistani representative to the Security Council prior to the adoption of Resolution 1483 that captures the surrounding circumstance: "Pakistan, like several other members of the Security Council, has agreed, due to the exigencies of the circumstances, to the delegation of certain powers by the Security Council to the occupying Powers, as represented by the Authority."). Out of expediency and the dire humanitarian need, the Security Council should be perceived as a credibility surrogate in this case.

110. *See* Thomas D. Grant, *The Security Council and Iraq: An Incremental Practice*, 97 AM. J. INT'L L. 823, 825 (2003).

111. *See* BOB WOODWARD, PLAN OF ATTACK 357-63 (2004); Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUR. J. INT'L L. 721, 736-37 (2005); Grant, *supra* note 110, at 853.

112. Yael Rouen, *Illegal Occupation and Its Consequences*, 41 ISR. L. REV. 201, 218 (2008).

or institutions in the occupied country[113] and must ensure that the pre-occupation law remains in force,[114] which means that dictated frameworks, exceeding an occupier's authority, can be viewed as null and void.[115] Instead of heeding the lawful parameters of occupation Law, the CPA failed to conform to licit administrative responsibilities as an "occupier,"[116] freehandedly imposed controversial reforms from its inception,[117] and adopted at least thirty new laws relating to the economy over its fourteen month existence,[118] which were blatant transgressions that tore society apart.[119] Immediately prior to its disbandment, the CPA locked in the reforms for the future[120] under Order 100 as Transitional Administrative Law, which could only be modified with a supra-majority vote of a future legislature and with the consent of the cabinet.[121] The CPA also replaced "the name of new

113. *See* YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 124 (2009); *see also* Christopher C. Joyner, *"The Responsibility to Protect": Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VA. J. INT'L L. 693, 713-14 (2007) (stating that in prosecuting a lawfully conceived humanitarian intervention, "the authority structure of the offending state should not be overthrown, nor should the domestic political process of that state be permanently altered."); Bhuta, *supra* note 51, at 824 (noting that an occupier "cannot legislate to 'implement' the population's right to self-determination through the creation of a new order.").

114. *See* Boon, *supra* note 53, at 322 (further stating that the occupational authorities freely accepted the conditions of the international law of occupation).

115. *See* Scheffer, *supra* note 33, at 842; *see also* Peter Galbraith, *Iraq: The Bungled Transition*, 51 N.Y. REV. BOOKS 70 (Sept. 23, 2004) (book review).

116. *See* Zahawi, *supra* note 38, at 2297; *see also* Roberts, *supra* note 94, at 614; Boon, *supra* note 53, at 324-25.

117. *See* J. Stephen Shi, *The Legal Status of Foreign Military and Civilian Personnel Following the Transfer of Power to the Iraqi Interim Government*, 33 GA. J. INT'L & COMP. L. 245, 246 (2004).

118. *See* Kristen E. Boon, *"Open for Business": International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law*, 39 N.Y.U. J. INT'L L. & POL. 513, 544 (2007).

119. *See* Zahawi, *supra* note 38, at 2301 (expressing that "blatant transgressions outside the laws of occupation exacerbated the post-war tensions, jeopardizing the security, economy, and administration of the state and safety of the people.").

120. *Id.* at 2332.

121. *See* Antonia Juhasz, *Bush's Economic Invasion of Iraq*, L.A. TIMES (Aug. 14, 2005), *available at* http://articles.latimes.com/2005/aug/14/opinion/oe-juhasz14 (last visited Apr. 1, 2015) ("Laws governing banking, investment, patents, copyrights, business ownership, taxes, the media and trade have all been changed according to U.S. goals, with little real participation from the Iraqi people. (The TAL can be changed, but only with a two-thirds majority vote in the National Assembly, and with the approval of the prime minister, the president and both vice presidents.) The constitutional drafting committee has, in turn, left each of these laws in place"). Yet, at the time that the TAL proposals were launched, it was only intended to remain operative until nation-wide elections scheduled for January 31, 2005. *See also* Law of Administration for the State of Iraq for the Transitional Period (Mar. 8, 2004), *available at* http://www.iraqcoalition.org/government/TAL.html (last

Iraqi institutions and officials for those of the CPA" in order to "protect the [CPA] reforms into the future."[122]

At the same time the CPA unilaterally dictated reforms and operated above the law,[123] President Bush was publicly representing that the institutional metamorphoses were a byproduct of Iraqi free will and self-governance, which was the same theme that top Bush Administration officials repeatedly represented as their intention for occupation starting shortly after the invasion and prior to the adoption of Resolution 1483.[124] The text of Resolution 1483 did bestow an occupational authority, which was akin to the Bush Administration's pre-Resolution 1483 public promises and to the restrictive approach to occupation enumerated in the Hague and Geneva Conventions,[125] but the occupation repeatedly contravened occupation law.[126] Moreover, during the occupation, the Bush Administration relayed that there was no substantial plan for post-war operations,[127] but one year after the invasion, declassified documents divulged that the White House's

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visited Apr. 1, 2015). Then, in the same law, it states that the laws would "remain in force until rescinded or amended by legislation duly enacted and having the force of law." *See id.* art. 26(C). Theories that have permitted overruling foreign occupation dictates in the past have included asserting that the laws were not consistent with international law (i.e. the doctrine of postliminy) or the occupier exceeded its authority. *See* ERNEST H. FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATIONS 145-50 (1942); ROLAND ROBERTS FOULKE, 2 A TREATISE ON INTERNATIONAL LAW 289-90 (1920).

122. Zahawi, *supra* note 38, at 2332.

123. *See* Ryan J. Liebl, *Rule of Law in Postwar Iraq: From Saddam Hussein to the American Soldiers Involved in the Abu Ghraib Prison Scandal, What Law Governs Whose Actions?*, 28 HAMLINE L. REV. 91, 131 (2005) ("Under the legal system established by the CPA in Iraq, the CPA was above the law").

124. President Bush Addresses the United Nations General Assembly (Sept. 23, 2003) (emphasizing that "[t]he primary goal of our coalition in Iraq is self-government for people of Iraq, reached by orderly democratic process."); *see supra* Part II (A): Bush Administration Rhetoric.

125. S.C. Res. 1483, at pmbl. paras. 1, 4, 5, 7, 8(c)(i), 9, U.N. Doc. S/RES/1483 (May 22, 2003).

126. Kristen E. Boon, *Obligations of the New Occupier: The Contours of a Jus Post Bellum*, 31 LOY. L.A. INT'L & COMP. L. REV. 57, 61 (2009) (noting that the core concept of conservationism in protecting existing institutions during occupation was compromised); Patterson, *supra* note 33, at 472 (emphasizing that inherent in the title "Operation Iraqi Freedom" is the implicit assumption that the Bush administration was "not planning to respect the laws of *any* regime that had ever existed in Iraq.").

127. THOMAS E. RICKS, FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ 109 (2006) (quoting Lieutenant General Joseph Kellogg, who was involved in the invasion planning, stating that "[t]here was no real plan" for postwar operations); T. CHRISTIAN MILLER, BLOOD MONEY: WASTED BILLIONS, LOST LIVES, AND CORPORATE GREED IN IRAQ (2006) (noting that occupation planning was amiss); *see also* Monroe E. Price, *Symposium: Foreward: Iraq and the Making of State Media Policy*, 25 CARDOZO ARTS & ENT. L.J. 5, 8-9 (2007).

Future of Iraq Project, constituted in early-2002 and over a year before the invasion, selected White House, State Department, CIA, and Pentagon employees, and two hundred Iraqi exiles, and adopted thirteen volumes comprising 2,000 pages of plans for government restructuring and economic reform.[128] Not only did the CPA ostensibly follow this blueprint and appoint similarly-situated defectors who were involved in the *Future of Iraq Project,* but the early and detailed planning suggests that the Bush White House never had any intention of respecting occupation law.

One of the most significant complications with the CPA's unilateralism is that hostilities across the population can be expected to erupt if new institutions shift resources and alter political, social, and economic power.[129] Reform, particularly capitalist and privatization frameworks, can generate winners, but also antagonistic losers because a democratically-elected government or even representative locals did

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128. Farrah Hassan, *New State Department Releases on the 'Future of Iraq' Project*, NAT'L SEC. ARCHIVE (Sept. 1, 2006), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB198/index.htm (last visited Apr. 1, 2015); Eric Schmitt & Joel Brinkley, *State Dept. Foresaw Trouble Now Plaguing Iraq*, N.Y. TIMES (Oct. 19, 2003), *available at* http://www.nytimes.com/2003/10/19/world/struggle-for-iraq-planning-state-dept-study-foresaw-trouble-now-plaguing-iraq.html (last visited Apr. 1, 2015) (stating that the 13 volumes and over 2,000 pages of the Future of Iraq Project was not released until "several House and Senate committees" had requested them); US DEP'T ST., THE FUTURE OF IRAQ PROJECT: OIL AND ENERGY WORKING GROUP 2 (Apr. 30, 2003) (declassified in part on June 22, 2005), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB198/FOI%20Oil.pdf (last visited Apr. 1, 2015) (espousing "decentralization" which literally means reducing central government control, but is apt to also result in privatization or at least significant advocacy for private sector participation). This fetish for privatization is particularly controversial when exploiting the natural resources of a territory is expressly prohibited under occupation law. Patterson, *supra* note 33, at 478; Antonio Perez, *Symposium: Markets in Transitions: Reconstruction and Development: Part One – Reconstruction: Prescriptions for Iraq, Predictions for Russia and Performance for China: Legal Frameworks for Economic Transition in Iraq – Occupation Under the Law of War vs. Global Governance Under the Law of Peace*, 18 TRANSNAT'L L. 53, 55, 63 (2004).

129. *See* Judith Kullberg and William Zimmerman, *Liberal Elites, Socialist Masses, and Problems of Russian Democracy*, 51 WORLD POL. 323, 324 (1999) (writing of polls several years into the Russian reforms and noting that elites like the system because "[s]upport for liberalism is causally related to the ability of individuals to participate in the new economic order: those who are 'locked out' of the new economy and are constrained by circumstances and context from improving their conditions will be more likely to express antiliberal values and attitudes," but only a small segment of the Russian population dramatically benefited with the fall of the socialist economy, but a majority of the Russian population has been harmed); Duncan Kennedy, *Shock and Awe Meets Market Shock*, BOSTON REV. (Oct. 1, 2003), *available at* http://www.bostonreview.net/world/duncan-kennedy-shock-and-awe-meets-market-shock (last visited Apr. 1, 2015) (listing the capitalist reforms applied to Iraq and noting that "[e]conomic development is a dynamic process in which small initial disadvantages often translate into massive permanent inequalities").

not enact the laws. Reactions may arouse immediate violence or beget delayed hostilities because of the belief that the occupation coerced unfair conditions and subsequently enforced those ultimatums with a police power. In fact, the existence of this police power to protect economic reforms into the future is found in both the secret agreement on the continuing occupation consummated by the Bush and Maliki governments in 2007 and the withdrawal agreement adopted in 2008.[130]

Having addressed how CPA dictates were inconsistent with occupation law and the mandate contained in Resolution 1483, the CPA was entirely reasonable to presume that it possessed significant latitude to ensure that Iraqi law comported with customary international law or *jus cogen* doctrines in the case of universal human rights standards, such as principles contained in the International Covenant on Civil and Political Rights and Universal Declaration of Human Rights,[131] which was an implication drawn in the typology depicted in Part II. Although, it is difficult to reconcile the occupation's right to impose compliance with human rights standards in the cases of the Pentagon's high-profile mass incarcerations and interrogation abuses at Abu Ghraib prison[132]

130. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, art. 27, Nov. 17, 2008, *available at* http://www.state.gov/documents/organization/122074.pdf (last visited Apr. 1, 2015) (stating that the U.S. military would agree to protect Iraq's constitutional order in the future); White House, Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America, Nov. 26, 2007, *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071126-11.html (last visited Apr. 1, 2015) (stating that the U.S. would further support Iraq's financial and economic system and "facilitate[] and encourage[] the flow of foreign investments into Iraq").

131. Brett H. McGurk, *Revisiting the Law of Nation-Building: Iraq in Transition*, 45 VA. J. INT'L L. 451, 463 (2005-06). These alterations would include having an effective judiciary, having institutions that would prohibit any future Iraqi government from having the prerogative or means of perpetrating torture and discrimination, and promoting due process standards in criminal law, which were actions that the CPA did take. Coalition Provisional Authority, Order No. 7, Penal Code, §§ 3(2), 4, CPA/ORD/9 June 2003/07 (June 9, 2003), *available at* http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf (last visited Apr. 1, 2015) (banning torture and prohibiting law enforcement officers and legal system personnel from discriminating); Coalition Provisional Authority, Order 13, The Central Criminal Court of Iraq, § 6, CPA/ORD/X 2004/13 (July 11, 2003), *available at* http://www.iraqcoalition.org/regulations/20040422_CPAORD_13_Revised_Amended.pdf (last visited Apr. 1, 2015) (establishing the court system and specifying that judges must be independent); Coalition Provisional Authority, Order 15, Establishment of the Judicial Review Committee, CPA/ORD/-- June 2003, June 23, 2003, *available at* http://www.iraqcoalition.org/regulations/20030623_CPAORD_15_Establishment_of_the_Judicial_Reveiw_Committee.pdf (last visited Apr. 1, 2015).

132. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment

and with the brutality and human rights abuses of Prime Minister Maliki,[133] the long-term prime minister that the Bush administration effectively installed.

The design of democratic institutions was also a legitimate CPA reform that was very acceptable across Iraqi society[134] and engendered widespread support from the international community, but the manner in which reforms were executed and the institutional preferences that were codified proved controversial.[135] There is complexity for any transitional political system due to discord over what "democracy" means because of the many different models across the world,[136] but

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or Punishment art. 14(1), *opened for signature* Dec. 10. 1984, 108 Stat. 382, 1465 U.N.T.S. 85 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible."); Frank, *supra* note 61, at 3 n.5 (mentioning the torture scandal and noting that it arose prior to the "liberation of Iraq."). The abuses at Abu Ghraib and the interrogations ordered by the Bush administration were not consistent with norms of modern humanitarian jurisprudence. *See generally* Robert Bejesky, *The Abu Ghraib Convictions: A Miscarriage of Justice*, 32 BUFF. PUB. INT. L.J. 103 (2013).

133. *See* Dirk Adriaensens, *Iraq: Unspoken Crimes Against Humanity Committed Against the People of Iraq*, CENTRE FOR RES. ON GLOBALIZATION (Jan. 28, 2012), *available at* http://www.globalresearch.ca/iraq-unspoken-crimes-against-humanity-committed-against-the-people-of-iraq/29162 (last visited Apr. 1, 2015) (itemizing warnings about Maliki's abuses); *Letter to President Obama Regarding the Visit of Iraqi Prime Minister Nuri al-Maliki*, HUM. RTS. WATCH (Oct. 13, 2013), *available at* http://www.hrw.org/news/2013/10/29/letter-president-obama-regarding-visit-iraqi-prime-minister-nuri-al-maliki (last visited Apr. 1, 2015) (noting 5,740 deaths in areas such as Basra, Thi Qar and Baghdad, and within Diyala and Ninewa and that perpetrators are not being held accountable, and stating that this impunity has infuriated Sunnis who "see the government's failure to hold Shia-dominated security forces accountable as confirmation that policies remain rooted in sectarianism"); Maginnis, *supra* note 11 (member of the UK House of Lords writing that "Maliki has created a Mafia-like network of criminals and assassins to eliminate the voice of opposition at every level" and estimated that a thousand Sunnis have been killed every month for the past decade by these assassins); *supra* Introduction.

134. Public International Law & Policy Group and the Century Foundation, *Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations*, 39 NEW ENG. L. REV. 53, 56 (2004); Roberts, *supra* note 94, at 621 (stating that "of all the parts of a transformative project, the ones likely to have the strongest appeal include the introduction of an honest electoral system as part of a multiparty democracy . . . reflecting as it does the sense that democracy and self-determination . . . constitute not only an important part of a human rights package, but also an acceptable means of hastening the end of an occupation.").

135. Note, *Democracy in Iraq: Representation Through Ratification*, 199 HARV. L. REV. 1201, 1201 (2006) [hereinafter Note]; Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97 (2002) (noting the assumption that Iraq fell into the category of a country that suffered from a democratic deficit).

136. G.A. Res. 55/96, U.N. Doc. A/RES/55/96 (Dec. 4, 2000) (articulating the very basic institutional structures that can be agreed upon); JAN TEORELL, DETERMINANTS OF

perhaps the most precarious variable regarding democratization protrudes from the fact that even the American public overwhelmingly believes that American democracy has been subject to "corporate capture"[137] and that the CPA was intent on subordinating public functions as part of the democratic process, which may disempower citizens.

ii. Constitutional Reforms

An indication of the agitation over the broadness of reforms, how occupational dictates can bind society without commensurate local democratic will, and the dominance of U.S. influence on the Iraqi political system, is encountered in the Iraqi constitutional ratification process. In any country, a constitutional drafting process can be essential for establishing robust and abiding societal norms because the constitution endows and structures government powers,[138] imposes constraints on government,[139] formulates enduring rules, and requires all legislation and administrative regulations to comport with constitutional principles. Countries, such as the U.S., have traversed prolonged periods of "constitutional construction" in which constitutional ratification is followed the interpretation of abstract principles, vague clauses, and interacting precedent to set a trajectory of expectations

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DEMOCRATIZATION: EXPLAINING REGIME CHANGE IN THE WORLD, 1972-2006, at 30 (2010) (noting that beyond the "basic criteria" of having effective elections and political rights, "there is profound disagreement over the meaning of democracy"); CHARLES TILLY, DEMOCRACY 2-3 (2007) (listing a series of indicators for democracy, as derived from a Freedom House checklist); Donald L. Horowitz, *Constitutional Design: An Oxymoron?*, *in* DESIGNING DEMOCRATIC INSTITUTIONS 253, 253-54 (Ian Shapiro & Stephen Macedo eds., 2000) ("there is no agreement on the political and constitutional arrangements most likely to be conducive to peace and accommodation in a democratic context"); Nick Robinson, *Citizens Not Subjects: U.S. Foreign Relations Law and the Decentralization of Foreign Policy*, 40 AKRON L. REV. 647, 676-77 (2007) (stating that notions of suitability of democracy have evolved since Plato and Aristotle theorized about democracy over two thousand years ago and assumed that it was only suitable for city-states and an ideal electorate size of 5,040).

137. *Survey: January 18-27, 2008*, WORLDPUBLICOPINION.ORG (Jan. 18-27, 2008), *available at* http://www.worldpublicopinion.org/pipa/pdf/mar08/USGov_Mar08_quaire.pdf (last visited Apr. 1, 2015) (finding that 94% of Americans believe that "leaders should pay attention to the views of the people as they make decisions" and that 80% of Americans believed that the US was "run by a few big interests" with only 19% believing that US government is "run for the benefit of the people").

138. David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. INT'L L. & FOREIGN AFF. 75, 142 (2007).

139. Reid v. Covert, 354 U.S. 1, 5-6 (1957) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution").

through rules and practices.[140] Whether there are stable and effective societal norms depends on whether there is a commitment to and acceptance of the values incorporated into constitutional provisions, institutions, and codes.[141]

In the case of Iraq's constitutional drafting procedures, the process was conducted rapidly, under the shadow of a gun,[142] in secrecy, with a small committee of CPA and CPA-appointed Iraqi Governing Council ("IGC") members,[143] and without Iraqi citizens discerning the bearing of provisions[144] or possessing an effective avenue for challenging the drafting process or the IGC.[145] Feldman and Martinez opined that the Iraqi public's rejection of the IGC and its lack of perceived democratic qualities significantly delayed the constitutional drafting process.[146]

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140. Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1812 (2010).

141. STROMSETH, WIPPMAN & BROOKS, *supra* note 22, at 78 (stating that today's globalized world "requires modern and effective legal institutions and codes, and it also requires a widely shared cultural and political commitment to the values underlying these institutions and codes").

142. Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 858 (2005) (advisor to the CPA acknowledging about the occupations of Iraq and Afghanistan that "constitutions *are* being drafted and adopted in the shadow of the gun").

143. *See Conference: From Autocracy to Democracy: The Effort to Establish Market Democracy in Iraq and Afghanistan: Panel 2: Building the Institutions of the Nation*, 33 GA. J. INT'L & COMP. L. 171, 175 (2004) (describing general approach as "elite pact-making"); Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695, 707-08 (2004); Randall T. Coyne, *Reply to Noah Feldman: Escaping Victor's Justice by the Use of Truth and Reconciliation Commissions*, 58 OKLA. L. REV. 11, 11 (2005); Vicki C. Jackson, *What's in a Name? Reflections on Timing, Naming and Constitution-Making*, 49 WM AND MARY L. REV. 1249, 1272-74 (2008).

144. Ashley S. Deeks & Matthew D. Burton, *Iraq's Constitution: A Drafting History*, 40 CORNELL INT'L L.J. 1, 5 (2007) (American legal advisers in Iraq remarking: "There has been considerable speculation by the press, by non-governmental organizations, and by Iraqi citizens themselves about why various provisions of the new Iraqi constitution look the way they do and about what they mean."); Bodansky, *supra* note 53, at 132; Daniel H. Cole, *From Renaissance Poland to Poland's Renaissance*, 97 MICH. L. REV. 2062, 2093 (1999) (stating that many years are required for a constitutional drafting process).

145. Article 38, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005 (only permitting freedom of expression, peaceful demonstration, the press, and association if they do not infringe "public order and morality"). Another restriction on the right of free speech existed due to criminalizing criticisms to the new government. Paul von Zielbauer, *Iraqi Journalists Add Laws to List of Dangers*, N.Y. TIMES (Sept. 29, 2006), *available at* http://www.nytimes.com/2006/09/29/world/middleeast/29media.html?pagewanted=print&_r=0 (last visited Apr. 1, 2015) (This was ostensibly a draconian restriction and the Executive reasonably enforced the terms perhaps was a rule that could remove Iraq from the category of "democracy," unless a judiciary reasonably interpreted the terms).

146. Noah Feldman & Roman Martinez, *The International Migration of Constitutional*

Deeks and Burton, Legal Adviser and Deputy Legal Adviser at the US Embassy in Baghdad during the Iraqi constitution drafting process, detailed their advisory role during the drafting procedures, which included US officials writing formulations of constitutional text, submitting those drafts to CPA-appointed Iraqi leaders, and voicing concerns on behalf of the "U.S. Government" over the substance of the provisions.[147]

Critiques of the constitutional drafting process should actually be construed as a product of anteceding initiatives. Constitutionalism had already effectively been imposed by the CPA's adoption of TAL provisions.[148] The process that traversed from the CPA's ultimatums to the constitutional drafting procedures can be interpreted as a semblance of "precommitment," which means "becoming committed, bound or obligated to some course of action or inaction or to some constraint on future action . . . to influence someone else's choices."[149] Pre-commitments open the prospect of path dependent behavior, which is a term in political science employed to describe how planting precursors to future action makes a desired outcome highly probable.[150] The CPA enacted TAL, which defined "precommitments" for the draft Constitution and the Constitution set a "precommitment" for future Iraqi governments even before an elected government took office. Indeed, the proposals for the Constitution were predominantly consistent with the CPA's TAL mandates.[151] Deeks and Burton emphasize that

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Norms in the New World Order: Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy, 75 FORDHAM L. REV. 883, 892-94 (2006); Stilt, *supra* note 143, at 697.

147. Deeks & Burton, *supra* note 144, at 2, 8, 31; Feldman & Martinez, *supra* note 146, at 919 (stating that the US role was "facilitating, not imposing, constitutional compromises"); Ashley S. Deeks, *Iraq's Constitution and the Rule of Law*, 28 WHITTIER L. REV. 837, 838 (2007).

148. Feldman & Martinez, *supra* note 146, at 895.

149. THOMAS C. SCHELLING, STRATEGIES OF COMMITMENT AND OTHER ESSAYS 1 (2006).

150. Path dependence and critical junctures refer to decisive choices and events that prompt future trajectories, which are difficult to reverse because the progression of the political or institutional consequence involves entrenched behavior, anteceding determinations, and an elevated cost of altering course. RUTH BERINS COLLIER & DAVID COLLIER, SHAPING THE POLITICAL ARENA: CRITICAL JUNCTURES, THE LABOR MOVEMENT, AND REGIME DYNAMICS IN LATIN AMERICA 27-29 (2002); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 251-53 (2000).

151. Deeks & Burton, *supra* note 144, at 7 (frequently referencing back to the TAL when describing the drafting and legislative history). A word search of the article retrieves 98 instances of "TAL" and 40 instances of "CPA," often relating to Orders and Regulations, seemingly suggestive of the critical influence of the CPA on the constitutional drafting process. *Id.* A word search of another document written by constitutional advisors retrieves

constitutional language often "tracks precisely a phrase . . . of the TAL."[152] In fact, the TAL had been regarded as the "supreme law of Iraq"[153] and the interim constitution.[154]

Consequently, constitutional drafting procedures consisted of Iraqi factions principally lining up in opposition to or in support of the CPA's TAL provisions, but because TAL provisions were often the same as the final constitutional text, compromises among Iraqi groups were apparently not considered.[155] Even with the populace's ambiguous understanding of the Constitution, 79% voted in support of the proposed constitution in the October 2005 national referendum vote.[156] However, the ratification vote may have been an expedient reception facilitated by a desire to shed the occupation more precipitously than a testament to a rational analysis of the content of the Constitution.[157] Iraq's Constitution was not an autonomous product of the self-determination of the Iraqi people, but instead was a foreign transplant framework that remained alien to the society and befuddled Iraqis for years after the ratification.[158]

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110 uses of "TAL." Feldman & Martinez, *supra* note 146, at 883.

152. Deeks & Burton, *supra* note 144, at 43, 54, 60-61, 75 (citing examples).

153. Feisal Amin al-Istrabadi, *International and Comparative Perspectives on Defamation, Free Speech, and Privacy: Also Inside: Reviving Constitutionalism in Iraq: Key Provisions of the Transitional Administrative Law*, 50 N.Y.L. SCH. L. REV. 269, 274 (2005-06) (stating that "Article 3(C) makes the TAL the supreme law of Iraq.").

154. Feisal Amin al-Istrabadi, Iraqi Ambassador to the UN, remarked before the Constitution was adopted: "No Iraqi wanted the American Civil Administrator to sign a document called an Iraqi constitution. Thus rather the [TAL]. . .in fact is Iraq's interim constitution." al-Istrabadi, *supra* note 153, at 270; Jackson, *supra* note 143, at 1273.

155. Andrew Arato, *Post-Sovereign Constitution-Making and Its Pathology in Iraq*, 51 N.Y.L. SCH. L. REV. 534, 546 (2006/07) ("the TAL, in spite of repeated violations, and in a very crude way regulated the subsequent process of transitional government formation and constitution-making").

156. Note, *supra* note 135, at 1205.

157. Arato, *supra* note 155, at 551; Zachary Elkins, Tom Ginsburg & James Melton, *Constitution Drafting in Post-Conflict States Symposium: Baghdad, Tokyo, Kabul ...: Constitution Making in Occupied States*, 49 WM. & MARY L. REV. 1139, 1139 (2008) ("new constitutional structure has not been able to ameliorate, and may even have exacerbated, a problem of instability and political disintegration."); Bejesky, *Politico*, *supra* note 92, at 105 (Iraqis favored a withdrawal of the occupation) (citing to a list of polls that affirmed that approximately 80 percent of Iraqis were opposed to the continuing occupation). Program on Int'l Policy Attitudes, *What the Iraqi Public Wants: A Worldopinion.org Poll*, WORLD PUBLIC OPINION 4 (Jan. 31, 2006), *available at* http://www.worldpublicopinion.org/pipa/pdf/jan06/Iraq_Jan06_rpt.pdf (last visited Apr. 1, 2015) (In January 2006, 87% of Iraqis wanted a timeline for withdrawal, with 64% of Kurds, 90% Shia, and 94% Sunnis supporting withdrawal...Overall, 47% of Iraqis supported attacks on U.S. troops, with 16% of Kurds, 41% of Shia, and 88% Sunnis supporting attacks on U.S. troops).

158. Intisar A. Rabb, *"We the Jurists": Islamic Constitutionalism in Iraq*, 10 U. PA. J.

Despite the pitfalls inherent in not ensuring that there was widespread domestic sentiment of ownership over the process, many constitutional provisions were soundly designed, such as those articles that promoted pluralism, federalism, and equality.[159] Pluralism and equality are consistent with democratization and institutions designed to bolster human rights. Federalism can respect geographical distinctions across a population that coincide with religious, linguistic, and ethnic differences; accommodate local diversity in law and policy; check the central level; and boost participation in democratic processes.[160] Adopting federal institutions is a prudent choice for a country with sharp divisions across geographically concentrated population with approximately 15-20% Sunnis, 15-20% Kurds, and 60-65% Shi'ites[161] and the CPA imposed a federal structure in Article 4 of the TAL twenty months prior to constitutional reform.[162] However, trade-offs in decentralizing Iraq into a duel-sovereignty system might have reduced the prospect of more exceptional nationality unity[163] and protracted discord on formidable choices, including on reconciling the sharing of geographically concentrated oil reserves and on determinations over

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CONST. L. 527, 528 (2008) ("More than two years after this ratification, there has been little to no headway toward detailing the mechanisms to be employed for fleshing out Iraq's constitutional skeleton."); Charles H. Norchi, *The Legal Architecture of Nation-Building: An Introduction*, 60 ME. L. REV. 281, 289 (2008) (stating that there can be disconcertment in a population if nation-building constitutionalism is imposed and informal practice is inconsistent with new institutions).

159. IRAQI CONST. at pmbl. arts. 1, 14.

160. Robinson, *supra* note 136, at 679 (noting that Federalism can check concentrated government power.) Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

161. *Iraq Poll: Note on Methodology*, ABC NEWS (Mar. 17, 2008), *available at* http://abcnews.go.com/PollingUnit/story?id=4443992 (last visited Apr. 1, 2015); Joseph R. Biden, Jr. & Leslie H. Gelb, Op-Ed., *Federalism, Not Partition*, WASH. POST (OCT. 3, 2007), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/10/02/AR2007100201824.html (last visited Apr. 1, 2015) (explaining that external advocates favored a decentralized system of power sharing in Iraq that would elevate sub-national power); Peter W. Gailbraith, Op-Ed, *Make Walls, Not War*, N.Y. TIMES (Oct. 23, 2007), *available at* http://www.nytimes.com/2007/10/23/opinion/23galbraith.html (last visited Apr. 1, 2015) (favoring partition).

162. Law of Administration for the State of Iraq for the Transitional Period, *supra* note 121, art. 4.

163. *See* Feldman & Martinez, *supra* note 146, at 898, 914; Note, *supra* note 135, at 1203; Scott Malcomson & Michael Zumot, *Iraq's Kurds: Toward an Historic Compromise?*, INT'L CRISIS GROUP (Apr. 8, 2004), *available at* http://www.crisisgroup.org/en/publication-type/media-releases/2004/mena/iraqs-kurds-toward-an-historic-compromise.aspx (last visited Apr. 1, 2015).

whether oil production decisions should be governed at the federal or local level.[164] With the insurgency led by ISIS, which reportedly has claimed its own Caliphate where Sunnis reside in western Iraq, and Kurdish demands for more regional autonomy in northern Iraq, there is an intensified struggle for those who seek to keep Iraq unified.[165]

III. INTERPRETATIONS TO RECONCILE OCCUPATION LAW WITH CPA DIRECTIVES

A. Theoretical and Legal Interpretations

The restrictive view of occupation law, which is the near-universally-accepted treaty framework that has been applicable for most of this century, does not accord an occupying military with a prerogative to transmute law and state institutions, but instead requires preserving existing institutions.[166] Moreover, the modern international law on occupation, which includes the Hague and Geneva Conventions,[167] does not depend upon whether there is a belligerent or non-belligerent occupation or how the occupier classifies itself,[168] but

164. Vanessa J. Jimenez, *Iraq's Constitutional Process: Challenges and the Road Ahead*, 13 HUM. RTS. BR. 21, 23 (2005) (noting that Federalism could lead to more subnational control over property rights and natural resources, and that the success of federal structure is particularly dependent on the resource allocations); Christopher Helman, *How Iraq's Kurds May be the Unlikely Losers in the ISIS Chaos*, FORBES (June 12, 2014), *available at* http://www.forbes.com/sites/christopherhelman/2014/06/12/how-iraqs-kurds-may-be-the-unlikely-losers-in-the-isis-chaos/ (last visited Apr. 1, 2015) (reporting that even Kurds have had lasting disputes over the central level's monopolization of the licensing system).

165. *Two Arab Countries Fall Apart*, ECONOMIST (June 14, 2014), *available at* http://www.economist.com/news/middle-east-and-africa/21604230-extreme-islamist-group-seeks-create-caliphate-and-spread-jihad-across (last visited Apr. 1, 2015) (noting that the most contentious and extreme position of the occupation was partition into three separate countries, which was proposed to quell violence); Andrew George, *We Had to Destroy the Country to Save It: On the Use of Partition To Restore Public Order During Occupation*, 48 VA. J. INT'L L. 187, 187 (2007).

166. Scheffer, *supra* note 33, at 859 (stating that principles of self-determination and autonomy were the "crucial parts of the very phenomenon of democratic constitutionalism itself.").

167. Youngjin Jung, *In Pursuit of Reconstructing Iraq: Does Self-Determination Matter?*, 33 DENV. J. INT'L L. & POL'Y 391, 394 (2005).

168. JEFFREY DUNOFF, INTERNATIONAL LAW 590 (2d ed. 2006) (noting that the occupier may be reluctant to accept the restrictions and duties that occupation law imposes); Gregory Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 231 (2005) (stating that many occupying powers during the twentieth century refused to admit that they were "occupiers" and instead stated that they lacked "requisite control over the occupied territory.").

instead the Conventions apply to *any* partial or full foreign military occupation of another country,[169] which means that the restrictions on the military occupation of Iraq governed as soon as the U.S. and U.K. invaded Iraq and controlled territory.[170]

The Security Council provided language in Resolution 1483 that approximated a contextually-specific interpretation of the restrictive view of occupation law, an explication of the "Authority's" obligation to preserve and protect,[171] and affirmed that it was imperative to address the humanitarian crisis, which unfolded due to the invasion itself. Hence, with clear international law provisions governing occupation, but with the CPA occupation disregarding rules of occupation law and assuming excessive liberty with interpreting the language of Security Council Resolution 1483, and without the Security Council or any other actor preventing or halting the CPA's initiatives or imposing liability, scholars offered many provocative explanations to reconcile how to classify the CPA's precedent[172] and the possible impact on the customary international law of occupation.

At one end of the spectrum, historical doctrines accentuate a victorious military's unconditional prerogative during occupation.[173] The ancient doctrine of *debellatio* represents that a conqueror takes title to the subjugated adversary's territory,[174] establishes "fundamental

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169. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 973 [hereinafter Convention (IV)] ("The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of a territory . . . even if the said occupation meets with no armed resistance.").

170. Scheffer, *supra* note 33, at 842.

171. *See infra* Part III (B).

172. Naomi Burke, *A Change in Perspective: Looking at Occupation Through the Lens of the Law of Treaties*, 41 N.Y.U. J. INT'L L. & POL. 103, 114 (2008); Jean L. Cohen, *The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for "Interim Occupations"*, 51 N.Y.L. SCH. L. REV. 496, 500 (2006-07).

173. Rep. of the Int'l Law Comm'n, 59th Sess., May 7-June 5, July 9-Aug. 10 2007, U.N. Doc. A/62/10 at para. 324(b)(ii) (discussing occupation following armed conflict); PAUL K. MACDONALD, THE SOCIAL FOUNDATION OF PERIPHERAL CONQUEST IN INTERNATIONAL POLITICS 185-86 (2014) (discussing Iraq as a case of peripheral conquest, but was not similar to Britain's quest to acquire a global empire).

174. Patterson, *supra* note 33, at 467; GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY 7 (1957)(discussing historical rule); Perez, *supra* note 128, at 60. The historic claim to property with *debellatio* meant that there was full "extermination in war of one belligerent by another through annexation of the former's territory after conquest, the enemy forces having been annihilated." 2 LASSA OPPENHEIM, INTERNATIONAL LAW: DISPUTE § 264, at 470-71 (Hersch Lauterpacht ed., 5th ed., 1963)(1905).

institutional changes to the government of an enemy nation," takes actions to alleviate the potential continuing threat posed by that country, and provides for the population.[175] The CPA assuredly did not seize title to conquered land,[176] which eliminates a key prerogative characteristic of *debellatio*, but the incidence of other factors makes the CPA's unilateral dictates approximate circumstances surrounding the period that immediately followed the downfall of colonial empires. During the early-twentieth century and pursuant to the League of Nation's territorial trusteeship system,[177] the military occupier possessed a "sacred trust" justification for temporary governance over a foreign population in order to assist the foreign population with self-governance.[178]

The CPA's actions were comparable to the "territorial trusteeship" system, but some distinctions are that the occupation of Iraq followed after a one-sided war and not colonial rule, there has been a conclusive renunciation of the appalling self-righteousness that pervaded colonialism,[179] a dictated occupation may not be accordant with a trusteeship,[180] and the Mandate and Trusteeship systems were racist concepts that classified certain people as "uncivilized" and unworthy of possessing "sovereignty."[181] Decolonization thoroughly repudiated this discriminatory distinction between sophisticated and simpleton

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175. John Yoo, *Iraqi Reconstruction and the Law of Occupation*, 11 U.C. DAVIS J. INT'L L. & POL'Y 7, 8 (2004).

176. *See* U.N. Charter art. 2, para. 4 (affirming self-determination).

177. Deiwert, *supra* note 46, at 772-73.

178. League of Nations Covenant art. 22, para. 1 ("To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.").

179. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 17, U.N. Doc. A/5217 (1970); TATAH MENTAN, THE STATE IN AFRICA 157 (2010) (stating that "[t]here is a general *consensus* among Africanist historians that colonialism is morally wrong."); *see generally* ANTHONY ARNOVE, IRAQ: THE LOGIC OF WITHDRAWAL 31, 34 (2006); CHALMERS JOHNSON, THE SORROWS OF EMPIRE 29 (2004); THE UNITED NATIONS AT THE MILLENNIUM: THE PRINCIPAL ORGANS 142 (Paul Graham Taylor & A.J.R. Groom eds., 2000); UDAY SIGH MEHTA, LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT (1999); Eyal Benvenisti, *The US and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies*, 15 EUR. J. INT'L L. 677 (2004); Thomas M. Franck, *When, if Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J. L. & POL'Y 51 (2001).

180. Wilde, *supra* note 37, at 109.

181. *Id.* at 94.

populations on which the trusteeship system depended,[182] making the conception decidedly anachronistic in the twenty-first century.

Perhaps the most compelling interpretation that justifies significant leeway in instituting reform is one that affirms the restrictions of the Hague and Geneva Conventions, but incorporates universal human rights prescriptions as a fundamental goal of an occupation. In this sense, the history of occupation law is not as salient as reconciling the development of international convention rules governing *jus post bellum* in conjunction with the chronological introduction of modern human rights values, which is a diagnostic synthesis of codified law and subsequent custom that may still ultimately result in a transformative or "nation-building" occupation.[183]

Professor Feldman, who was a constitutional advisor to the Iraqi Governing Council, believed that a minimalist intrusion in domestic affairs should be followed during an occupation, but emphasized that a "government may permissibly set its goals on the basis of its own citizens' interests *whenever those goals do not fundamentally conflict with the interests of people whom the government does not represent.*"[184] Offering an interpretation for applicability to the occupation, Professor Purdy notes that this philosophy is a spin on the application of the John Stuart Mill "harm principle" to international affairs, in which "one may act freely so long as one's actions do not harm another," but Purdy also accentuates the deficits in this interpretation, including that one "cannot have perfect knowledge" of others' "interests" or appreciate which interests should be most authoritative.[185] Moreover, commentators might also disagree over whether there should be a presumed intention that the occupier aspires to fulfill a philanthropic mission or whether the international community should acquiesce to the foreign military's disposition that occupation law restrictions would only unduly hamper the fuzzy and

182. WILLIAM BAIN, BETWEEN ANARCHY AND SOCIETY: TRUSTEESHIP AND THE OBLIGATIONS OF POWER 135-36 (2003).

183. DANIEL LEVY & NATAN SZNAIDER, HUMAN RIGHTS AND MEMORY 25-26 (2010) (emphasizing that there is a dearth of theorizing on human rights in the context of nation-building, but that "human rights are about the breakdown of boundaries"); *see also* Boon, *supra* note 126, at 57 (noting that while interventions in Iraq and Afghanistan resulted in transformative occupations, there is "no uniform legal framework regulating transitions from conflict to peace," but that rules of *jus post bellum* fill the void); Norchi, *supra* note 158, at 281.

184. NOAH FELDMAN, WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING 24 (2004).

185. Jedediah Purdy, *Review Essay: The Ethics of Empire, Again*, 93 CALIF. L. REV. 1773, 1779 (2005).

warmly regarded goodwill mission.[186] Fact-specific exigencies may not be the most favorable circumstances for establishing new customary international law norms, but this position has been raised by commentators with reference to the occupation of Iraq.[187]

B. Interpreting the Terms of Resolution 1483 in Light of Contemporary Occupation Law

Theorization and contentions that practice may have updated custom should also include the language of Resolution 1483, which defined the occupation's authority, and appraise how scrupulously the

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186. McGurk, *supra* note 131, at 452 (working lawyer for the CPA remarking that "we often encountered hard ceilings on the limits of our authority under international law" but that his experience "revealed an inexcusable gulf between what international law clearly permits and what any successful state-building operation requires."). The connotation that there is a fuzzy and warmly regarded do-gooder presence that should remain beyond reproach is a theoretical conception; MACDONALD, *supra* note 173, at 186 (noting that "states' intentions [such as if they are assumed to be noble] are largely irrelevant when assessing whether a particular act qualifies as an act of conquest"); Roberts, *supra* note 94, at 601 (remarking of the depiction of the occupant as a bastion of progress can beget a "dangerous mix of crusading, self-righteousness, and self-delusion"). Others have raised questions over what is "lawful" under international law and what is "legitimate," including by maintaining that occupation rules are outmoded because these particular actions in Iraq involved "nation-building." Harris, *supra* note 32, at 3; Cohen, *supra* note 172, at 496, 500. Others have suggested that sovereignty can fracture because it was never really *absolute*. Jenik Radon, *Sovereignty: A Political Emotion, Not a Concept*, 40 STAN. J. INT'L L. 195, 196 (2004).

187. BENVENISTI, *supra* note 42, at xi (contending that even though CPA actions in Iraq were not consistent with occupation law, the precedent may update occupation law). A "transformative occupation" may represent an evolution in occupation law since the era in which international agreements were consummated. Roberts, *supra* note 94, at 580; Nehal Bhuta, *The Antimonies of Transformative Occupation*, 16 EUR. J. INT'L L. 721, 740 (2005). Army JAG attorney Major Nicholas F. Lancaster also suggests that principles of customary international occupation law and the Hague Regulations and the Geneva Convention may have been replaced by new customary standards as a result of a "Coalition occupation and administration of Iraq." Major Nicholas F. Lancaster, *Occupation Law, Sovereignty, and Political Transformation: Should the Hague Regulations and the Fourth Geneva Conventions Still be Considered Customary International Law?*, 189 ARMY L. REV. 51, 51 (2006). Other commentators have maintained that there are other recent examples of practice modifying custom. Jeanne M. Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 A.F. L. REV. 143, 144 (2001) (contending that even though Article 52(2) of the Geneva Convention strictly limits attacks to military targets and objectives, because these rules have not always been followed, violations are not indicative of a breach of international law but instead that the treaty rule "may not necessarily reflect customary international law or state practice."). A possible limitation in this contention is that breach examples, which contradict customary practice (World War I and World War II), precede the 1949 treaty provision. *Id.* at 153-62 (providing examples). However, Human rights Watch and Amnesty International have criticized bombing tactics in the former Yugoslavia during the late-1990s. *Id.* at 165-66, 176-77.

CPA adhered to the Resolution. Depending on the level of compliance, perhaps questions should not fixate on what occupation law is or how occupation law has evolved, but on why Bush administration rhetoric prior to the adoption of Resolution 1483 maintained one representation, why Bush's CPA departed from those representations,[188] and how the parameters of Resolution 1483 were averted without consequence. These reflections do not venture to imply that the U.N. could not permit the Security Council to impose a deep occupation authority on an unwilling target state,[189] but queries whether that authorization was in fact located in the text of Resolution 1483.

Resolution 1483 specifically called the U.K. and the U.S. "the Authority" and "occupying powers," referenced the applicability of the Geneva and Hague Conventions, and specified that the Authority was obliged to "recognize the specific authorities, responsibilities, and obligations under applicable international law . . . as *occupying powers*."[190] Not one word in Resolution 1483 refers to "the Authority" or any faction of the occupation to embark on any form of "legislating."[191] In the six times that the Resolution refers to "institutions" and the equivalent of law-making initiatives, the language is surrounded by affirmations that it is the Iraqi people who will determine their "own political future" and that all U.N. members, U.N. organs, and "the Authority" were required to *assist* Iraqis in establishing their own institutions.[192] Thus, aside from the occupying authority's right to make rule modifications or adopt certain laws as necessary to ensure public order and safety during the occupation,[193] uphold human rights, and assist the fruition of a representative Iraqi government that

188. *See infra* Parts II (A)(C).

189. The legitimacy of such a delegation could be more robust to the extent that the Security Council's specific mission endeavors to maintain peace and security and also weighs the respective infringement on internal governance.

190. S.C. Res. 1483, pmbl. para. 13, U.N. Doc. S/RES/1483 (May 22, 2003) (emphasis added); *see* Boon, *supra* note 118, at 535-36.

191. S.C. RES. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

192. *Id.* at pmbl. paras. 1, 7, 8(c), 8(e) 15; Harris, *supra* note 32, at 1 (stating that the Security Council, without reservation, affirmed that the Iraqi people were to possess sovereign control of their own choices).

193. Convention (IV), *supra* note 169, art. 64 (permitting the occupying power to "subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain an orderly government of the territory, and to ensure the security of the Occupying Power."); Hague Convention, *supra* note 36, art. 43 (providing that the occupier must ensure that there is "public order and safety" and must respect the laws of the country unless absolutely prevented from doing so); Boon, *supra* note 53, at 324 (remarking that the occupier has some authority to legislate).

would make its own legal choices, there was no unilateral prerogative in Resolution 1483 that permitted the "Authority" to reform Iraq's legal system.[194] Resolution 1483 required the U.S. and U.K. to "promote the welfare of the Iraqi people through effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future."[195] It is the political future that selects the legal future. That is how democracy works.

Despite the language, some commentators have maintained that Resolution 1483 did sanction widespread reforms. For example, Bart Fisher, an attorney who founded the U.S.-Iraq Business Council in April 2002, explains that he specializes in assisting American businesspersons who want to invest in Iraq and believed that Iraq should have taken full advantage of the benefits of foreign investment and privatization, and remarked:

> As far as privatizing Iraq, a regime has been established. As the occupying power, we have great discretion under the CPA. U.N. Resolution 1483 actually provides the authority to promote economic reconstruction and we have operated under this resolution. If fact, operating under the Resolution is a matter of international law. Occupying powers have broad discretion to change the laws of the country to ensure that it functions. The first pillar is to establish an investment law.[196]

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194. U.S. DEP'T ARMY, *supra* note 34, at preface, para. 2, 4 ("the occupant. . .continue[s] [to administer and enforce] the ordinary civil and penal laws of the occupied territories except to the extent [that] it may be authorized by Article 64 [of the Geneva Convention]. . .and Article 43 [of the Hague Regulations] to alter, suspect or repeal such laws."); Scheffer, *supra* note 33, at 845-49 (stating that Resolution 1483 did fall within occupation law and occupation law "was never designed for such transforming exercises.").

195. S.C. RES. 1483, preamble para 4, U.N. Doc. S/RES/1483 (May 22, 2003).

196. Bart S. Fisher, *Symposium: Markets in Transition: Reconstruction and Development: Part One – Reconstruction: Prescriptions for Iraq, Predictions for Russia and Performance for China: Investing in Iraq: Legal and Political Aspects*, 18 TRANSNAT'L LAW 71, 73 (2004). (Fisher is correct in that this was the CPA's actions, but where that authority came from is a mystery. Similarly, if one reads half of Article 47, one can say that the "occupying power may introduce changes, 'as the result of the occupation of a territory, into the institutions or government of the said territory.'" However, a complete quote of Art. 47 actually states that "protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power." Regulations Respecting the Law and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631. Reading the entire provision denotes that an occupation must meet a very high threshold before it can introduce changes to the institutions of the occupied territory because any modification is almost guaranteed to disadvantage at least one protected person. In terms of human rights protections or democratization, one can make a legitimate argument that equally respected and protected citizens are not politically disadvantaged, but to maintain that an occupation's

Fisher represented what the CPA did. Likewise, Feisal Amin al-Istrabadi, Iraqi Ambassador to the U.N., admitted that Bremer and the CPA exercised all lawmaking authority and states: "Resolution 1483 derogated this principle [that an occupier cannot change the occupied country's legal system] by giving sweeping powers to the Civil Administrator."[197] Resolution does affirm that the occupation was authorized to administrate the government's affairs[198] and to assist Iraqis in developing their own representative government institutions,[199] which was reasonably interpreted as an implied right to initiate the democratic reform process.[200] Administrate does not mean legislate. Having read Resolution 1483 several times in an attempt to specifically locate broader discretion, this author remains perplexed and continues to believe that the CPA was never given *any* special authority in Resolution 1483 to unilaterally legislate.

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economic changes will not disadvantage certain segments of the population is not compelling).

197. al-Istrabadi, *supra* note 153, at 270; Yoo, *supra* note 175, at 12-13, 16 (referencing the fact that the Geneva and Hague Conventions are binding and that Resolution 1483 is binding on the occupation and citing provisions of those conventions relating to administering and "providing public services and maintaining security").

198. Hmoud, *supra* note 107, at 449-50 (stating that, specifically, the CPA assumed responsibility over the Oil-for-Food program from the United Nations and established the Development Fund for Iraq which permitted using the funds to administrate and for reconstruction).

199. Parsons, *supra* note 39, at 32 (noting that "U.N. Security Council Resolution 1483, recognizing the state of occupation after the fact, stated that the law of occupation applied to the U.S. and Great Britain in Iraq, while at the same time allowing the transformation of Iraq into a democratic nation."); Yoo, *supra* note 175, at 7 (referencing "the authority of the United States, under domestic and international law, to make fundamental changes to the constitutional law and government institutions of Iraq.").

200. Jose E. Alvarez, *Contemporary International Law: An 'Empire of Law' or the 'Law of Empire'?*, 24 AM. U. INT'L L. REV. 811, 820, 820 n.40 (2009) ("At least during the period prior to installation of an Iraqi government, the Security Council also gave the United States and the United Kingdom, as occupying powers, implicit permission to reform Iraqi institutions to the extent necessary to bring about democratic institutions" and pointing to the preamble and paragraphs 4 and 8 of Resolution 1483); Scheffer, *supra* note 33, at 845-46 (the resolutions "invited the Authority to act beyond some of the barriers that occupation law otherwise would impose on occupying powers."); Cohen, *supra* note 172, at 500, 511 (stating that the language of Resolution 1483 seems ambiguous under occupation law as it requires promoting "economic reconstruction and the conditions for sustainable development" and for "the protection of human rights," which suggests legislating could be necessary and/or implied). This point does reference the most interpretable language of the seven-page resolution, but it refers to a UN Special Representative for Iraq" who should work with "the Authority" to "*assist* the people of Iraq" in promoting these missions, but it does not state that the "Authority" should take any initiative on its own or make choices for the Iraqi people or appointed puppets. S.C. Res. 1483, at 8(e) (emphasis added).

CONCLUSION

If one maintains that there are *carte blanche* occupation prerogatives and that there is an evolution of the customary international law by occupation as a result of the occupation of Iraq, perhaps the consequence of the CPA's reforms should be considered. Violence was a hallmark of the occupation, the overwhelming majority of Iraqis opposed the occupation, Iraqis were infuriated by the CPA reforms,[201] and now, in mid-2014, Iraq faces another critical turning point. Divisions have intensified with Sunni insurgencies and Kurds expressing acerbity with Prime Minister Maliki, the long-term Iraqi exile and eight-year prime minister, who has presided as a brutal dictator[202] pursuant to the institutions initially installed by the CPA. This practical result further evinces that the most favorable interpretation of occupier powers is to adhere to the restrictions of occupation law and to not assume that there is legitimate precedent that has altered the customary international law of occupation. The people should commonly recognize that *they* formulated the trajectory for their political and legal future because that is self-determination.

While the governing treaties only permit an occupier to discharge functions necessary to administer the country and nothing more,[203] persuasive arguments can be made that the international law of occupation does now permit an occupier to impose institutional reform that will allow the local population to enjoy cogent human rights and representative government,[204] particularly when these are optimal

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201. *See* Bejesky, *The Enigmatic Origin*, *supra* note 8 (manuscript at 279-98); *see generally* Robert Bejesky, *A Ripe Foundation for the Formation of ISIS: Tit-for-Tat Hostilities and Contingently Contained Violence* (Working Paper June 2015).

202. *See supra* Introduction.

203. GALLEN, *supra* note 48, at 62 (noting that the intention behind occupier administrative duties in the law of occupation was to only permit "[t]he occupier . . . to administer territory in a conservative fashion, only enforcing legal changes where necessary to maintain peace and security" and to "promote local capacity for autonomous self-government"); *see also* VON GLAHN, *supra* note 174, at 139-41; HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 254 (Dieter Fleck ed., 1995). Moreover, the invasion of Iraq was not approved by the Security Council and was called a violation of international law. Robert Bejesky, *A Theorization on Equity: Tracing Causal Responsibility for Missing Iraqi Antiquities and Piercing Official Immunity*, 27 PACE INT'L L. REV. (forthcoming 2015) (manuscript at 39-41). There was a progressively deepening intention for occupation involving a unilaterally conceived British and American mission, designed for disarmament of prohibited weapons. However, this then expanded into removing Saddam Hussein and his top officials from power, and then into removing tens of thousands of identifiable Baathe officials from government. *See* Clair Dyer, *Occupation of Iraq Illegal, Blair Told*, GUARDIAN (May 22, 2003, 7:18 AM), *available at* http://www.theguardian.com/politics/2003/may/22/uk.iraq2 (last visited Apr. 1, 2015).

204. *See supra* Introduction.

conditions to ensure the populace is able to freely choose its own laws. It is much more controversial to assume that an occupier can impose a large-scale economic and social restructuring to implant a capitalist free-for-all that upsets an existing socioeconomic order. One can raise a variety of novel and extemporaneous claims of vague quasi-*de jure* authority[205] that existed beyond the very limited prerogative in Resolution 1483 because the Hague rules do permit an occupier to act in concert with temporary governing authorities. The problem is that occupiers absolutely do not possess the sovereign authority of the regime that was ousted,[206] cannot obtain any authority above a temporary *de facto* administrative authority,[207] and cannot exercise rights of sovereignty,[208] and all of the temporary governance bodies were appointed by and beholden to the CPA.[209]

Circumstances have evolved since The Hague and Geneva Conventions were adopted, but if anything, it would appear that the era of decolonization furthered a population's right of self-determination to pursue its own interests without being paternalistically coddled by a

205. S.C. Res. 1511, para. 4, U.N. Doc. S/RES/1511 (Oct. 16, 2003) ("The Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period until an internationally recognized, representative government is established and assumes the responsibilities of the Authority."). By the terms of this resolution, the appointed Governing Council was not *de jure,* but the resolution offers lip service to *de facto* authority. However, the Governing Council was not exercising *de facto* authority because the CPA was the entity with sovereign control and the Governing Council had no independent existence apart from the CPA. The Governing Council's existence was probably more similar to the functioning of presidential appointments in the US. The CPA's own mission statement identified itself as the temporary, "lawful government of Iraq." Michael A. Newton, *The Iraqi High Criminal Court: controversy and contributions,* 88 INT'L REV. RED CROSS 399, 417 (June 2006). Pursuant to Order No. 1, The CPA "vested [itself] with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war." Coalition Provision Authority, Reg. No. 1, sec. 1(2), CPA/REG/16 May 2003/01, *available at* http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority.pdf (last visited Apr. 1, 2015). The *ruling* organizational chart depicted the Pentagon and the CPA, and the CPA directing various US and British generals and diplomats for their respective responsibilities, and the IGC was subordinate to all relevant actors. NOAM CHOMSKY, IMPERIAL AMBITIONS 46 (2005); *see contra* al-Istrabadi, *supra* note 153, at 270, 274 (Iraqi UN representative suggesting that the CPA had some amorphous *de jure* authority but then alternatively described that "Iraq's sovereignty was dormant for a time").

206. OPPENHEIM'S INTERNATIONAL LAW 437 (H. Lauterpacht, ed. 1952).

207. *See* Davis P. Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573, 1581 (1985); Boon, *supra* note 53, at 296.

208. Burke, *supra* note 172, at 109-111.

209. Bejesky, *The Enigmatic Origin*, *supra* note 8 (manuscript at 279-98).

foreign intervention or by subjecting a population to a system similar to a League of Nations' mandate. It is offensive to assume that a population does not really "understand" its own real interests and requires assistance to learn how to be "civilized," as this postulate is akin to the same strain of loathsome intermeddling that sustained colonialism, but has since been universally repudiated. As for imposing laws because Iraqis do not comprehend legitimate legal structure, an Iraqi judge opined:

> We don't need you to come here and tell us about what law is. We invented law. . . . We are the people who figured law out, thousands of years ago. But now your soldiers are coming in and telling us what to do, and you're not respecting our legal traditions or legal process. The first thing the Americans did after the war was to announce that they were immune from Iraqi legal process. So, if an American commits a crime, they're completely immune, there's nothing that we can do about it. The Americans are unaccountable. How can this be the rule of law?[210]

210. Bodansky, *supra* note 53, at 130.

HOST STATES' DUE DILIGENCE OBLIGATIONS IN INTERNATIONAL INVESTMENT LAW

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CONTENTS

ABSTRACT 320
INTRODUCTION 320
I. DUE DILIGENCE AND STATE RESPONSIBILITY 322
II. DUE DILIGENCE AND THE PROTECTION OF ALIENS 324
III. DUE DILIGENCE IN CONTEMPORARY INTERNATIONAL INVESTMENT LAW 328
A. Due Diligence and the International Minimum Standard .. 330
B. Due Diligence and Full Protection and Security 332
1. The State's Duty to Abstain 333
2. The State's Duty to Protect Foreign Investments from Acts of Third Parties 337
i. States' Obligation to Act with Due Diligence to Prevent Acts of Third Parties 338
ii. States' Obligation to Act with Due Diligence to Apprehend and Punish those Responsible for the Acts 340
iii. States' Obligation to Possess and Make Available to Foreign Investors a Judicial and Administrative System Capable of Preventing Acts, and of Punishing and Apprehending Those Responsible for the Act 341
3. FPS and Legal Protection and Security 345
C. Due Diligence and Fair and Equitable Treatment 346
IV. THE CONTENTS OF THE DUE DILIGENCE STANDARD ... 350
V. THE OBJECTIVITY OR SUBJECTIVITY OF THE STANDARD 353
VI. COMPENSATION FOR BREACHES OF THE DUE

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DILIGENCE STANDARD 358
CONCLUSION 360

ABSTRACT[1]

Due diligence is present in a variety of aspects of the protection of foreign investors in international investment law and plays an important role in several aspects of the protection of foreign investors. In particular, certain standards of investment protection, notably "full protection and security" ("FPS") include an obligation for the State to act with due diligence.

This articles seeks to establish an explanatory framework for past and future decisions of arbitral tribunals which have applied or will be confronted to applications of the due diligence standard in international investment law, by providing a typology of the different possible applications of the standard in relation to the obligations of the host State. It addresses the role of due diligence in the law governing State responsibility, and the application of due diligence in the customary norms relating to the protection of aliens. Based on these two sections, it next discusses the principle in contemporary investment law, focusing on the application of due diligence in the FPS, the international minimum standard ("IMS") and the fair and equitable treatment ("FET") standards of treatment. It then addresses the question of whether applying due diligence allows for the possibility of taking into account the relative capacities of host States, and the consequences the application of the due diligence standard has on the compensation for damages.

INTRODUCTION

Due diligence is present in a variety of aspects of the protection of foreign investors in international investment law and plays an important role in several aspects of the protection of foreign investors. In particular, certain standards of investment protection, notably "full protection and security" ("FPS") include an obligation for the State to act with due diligence.

Due diligence has been considered to be a general principle of

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[1] Keywords: Investment law, due diligence, protection and security, fair and equitable treatment, minimum standard, state responsibility, protection of aliens

law.[2] Its role in international law however is limited and concise, in that due diligence applies in certain specific situations only. In contemporary international law, due diligence requires States to exercise due diligence only in relation to certain specific conduct that is required from States under a set rule of international law. If a State is found in breach of its obligation to exercise due diligence, State responsibility may then ensue if the act in question is attributable to the State. For several reasons, the current regime governing international State responsibility indeed has departed from generalizing the application of the due diligence standard as a secondary norm for establishing State responsibility, but due diligence has taken a prominent place in certain specific areas of international law, as part of primary norms, notably in international environmental law,[3] the law relating to diplomatic and consular relations,[4] and international investment law. The due diligence standard has essentially been considered in relation to FPS, the international minimum standard ("IMS"), and fair and equitable treatment ("FET").

This article seeks to establish an explanatory framework for the application of the due diligence standard to host State's obligations in international investment law, by providing a typology of the different possible applications of the standard in that respect. In doing so, this article will draw on the historical origins of the standard to understand the present relevance of due diligence and to map the contemporary use of due diligence in international investment law. This article will translate the historical uses of due diligence into modern investment treaty standards, notably the FPS and FET standards. This article does not, therefore, aim at providing a general account of or categorizing all references to due diligence in awards of arbitral tribunals. This article focuses on the obligations of States to act in due diligence, and does not address foreign investors' due diligence obligations.[5]

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2. Timo Koivurova, *Due Diligence*, *in* 11 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW para. 2 (Rüdiger Wolfrüm ed., Oxford U. Press, 2012), *available at* http://www.arcticcentre.org/loader.aspx?id=78182718-d0c9-4833-97b3-b69299e2f127 (last visited Mar. 30, 2015).

3. *Id.* para. 3.

4. *See* Vienna Convention on Diplomatic Relations art. 22(2), Apr. 18, 1961, 23 U.S.T. 3237, 500 U.N.T.S. 95.

5. *See* Peter Muchlinski, *'Caveat Investor'? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard*, 55 INT'L & COMP. L. Q. 527 (2006); IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 216 (Oxford U. Press, 2008); MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT 256 (Oxford U. Press, 2013); Parkerings-Compagniet AS v. Republic of

I will first address the role of due diligence in the law governing State responsibility, before addressing the application of due diligence in the customary norms relating to the protection of aliens. Based on these two sections, I will discuss the principle in contemporary investment law, focusing on the application of due diligence in the IMS, the FPS and FET standards of treatment. I will then address the contents of the standard, and the question of whether applying due diligence allows for the possibility of taking into account the relative capacities of host States, and the consequences the application of the due diligence standard has on the compensation for damages.

I. DUE DILIGENCE AND STATE RESPONSIBILITY

The work of the International Law Commission ("ILC") on the topic of State responsibility originally focused on the responsibility of States for injuries caused to aliens,[6] despite the more general mandate given to the ILC by the United Nations General Assembly.[7] Much attention in the first years of the work of the ILC was thus devoted to classifying the various categories of injury caused to aliens, and the ensuing obligation to provide reparation. In doing so, the ILC at that time had included in certain of its draft articles substantive rules in relation to the treatment of aliens, such as the "duty of protection" of States and rules relating to expropriation and nationalization.[8] In view of the double focus on the responsibility of States for injuries caused to

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Lithuania, ICSID Case No. ARB/05/8, Award, para. 333 (Sept. 11, 2007); Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, para. 602 (Jul. 24, 2008); Eudoro Armando Olguín v. Republic of Paraguay, ICSID Case No. ARB/98/5, Award, para. 75 (Jul. 26 2001); Iurii Bogdanov, Agurdino-Invest Ltd. & Agurdino-Chimia JSC v. Republic of Moldova, Arbitral Award, 19 (Sept. 22, 2005); Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award, para. 58 (May 19 2010).

6. *See* Special Rapporteur on State Responsibility, *Second Rep. on the Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens. Part I: Acts and Omission*, Int'l Law Comm'n, U.N. Doc. A/CN.4/106 (Feb. 15, 1957) (by F. V. Garcia Amador) [hereinafter *Second Report*]; *State Responsibility*, INT'L LAW COMM'N, *available at* http://legal.un.org/ilc/guide/9_6.htm (last visited Apr. 1, 2015) (all documents relating to the work of the ILC on the topic State responsibility is located here unless mentioned otherwise).

7. *See* G.A. Res. 799 (VIII), U.N. GAOR, 4th Sess., Supp. No. 10, U.N. Doc. A/2589, at 52 (Dec. 7, 1953).

8. *See* Special Rapporteur on State Responsibility, *Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens – Reparation of the Injury*, arts. 7 & 9, Int'l Law Comm'n, U.N. Doc. A/CN.4/134 (Jan. 26, 1961) (by F. V. Garcia Amador).

aliens and on the primary norms in this respect, it is not surprising that one finds numerous references to the obligations for States to exercise due diligence in the protection of aliens for acts of third parties in the early work of the ILC on this topic.[9]

The 2001 Articles on State Responsibility on the contrary focus on the secondary norms governing State responsibility and do not seek to define the contents of the primary obligations of States.[10] As a consequence, whether or not the conduct of the State involves "some degree of fault, culpability, negligence or want of due diligence . . . vary from one context to the another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation."[11] The possible failure to exercise due diligence is not constitutive of State responsibility, *unless* the primary obligation contains such an obligation. Then, the failure to act in due diligence or not will determine whether or not there is a breach of the primary obligation. This in essence is the consequence of the ILC abandoning attempts to codify and progressively developing the primary obligations of States in relation to injuries caused to aliens following the designation of Roberto Ago as Special Rapporteur on the topic.[12] However, under Ago, much attention still was given to the classification of different forms of responsibility, in terms of whether the obligation at stake required for the State to adopt a specific course of conduct, or required the State to achieve a particular result.[13] This distinction was finally abandoned by James Crawford in the 2001 final version of the Articles, essentially because the ILC considered that the distinction "does not seem to bear specific or direct consequences."[14]

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9. *See Second Report*, *supra* note 6, at 122-23; Special Rapporteur on State Responsibility, *Fourth Rep. on The Internationally Wrongful Act of the State, Source of International Responsibility (continued)*, Int'l Law Comm'n, U.N. Doc. A/CN.4/264 (Jun. 30, 1972) (by Roberto Ago) [hereinafter *Fourth Report*].

10. Rep. of the Int'l Law Comm'n, 53d Sess., April 23-June 1, July 2-August 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001) [hereinafter ILC Articles on State Responsibility].

11. *Id.* art. 2 (commentary, para. 3).

12. *Fourth Report*, *supra* note 9, at 99-100; *see also* Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 EUR. J. INT'L L. 371 (1999); Pierre-Marie Dupuy, *Dionisio Anzilotti and the Law of International Responsibility of States*, 3 EUR. J. INT'L L. 139 (1992); Koivurova, *supra* note 2; Robert P. Barnidge, *The Due Diligence Principle under International Law*, 8 INT'L COMMUNITY L. REV. 81 (2006).

13. *See* Special Rapporteur, *Sixth Rep. on the Internationally Wrongful Act of the State, Source of International Responsibility (continued)*, U.N. Doc. A/CN.4/302 and Add. 1, 2 & 3 (1977) (by Robert Ago) [hereinafter *Sixth Report*]; *see also* Dupuy, *supra* note 12.

14. ILC Articles on State Responsibility, *supra* note 10, art. 12 (commentary).

As a consequence, whether or not the obligation of a State is one to obtain a certain result or an obligation of conduct, such as an obligation to exercise due diligence, is a matter to be determined by the primary norm only, and the distinction has little or no consequence for the rules on State responsibility. I say "little" because there are some implications in respect of the obligation of reparation ensuing from responsibility, in function of whether the obligation is one to exercise due diligence or any other obligation of result, but this is again a consequence of the type of obligation breached, and does not derive from any specific secondary norm on state responsibility to this effect. I will turn back to this at a later stage. That being said, the use of the principle of due diligence as part of a primary norm, does bear some resemblance with subjective responsibility, which tends to be applicable in cases where States fail to act or in cases of omissions.[15] The current approach to State responsibility however, is to view the subjective aspect of responsibility as part of the primary norm rather than the secondary norms governing State responsibility.

II. DUE DILIGENCE AND THE PROTECTION OF ALIENS

Many cases dated from the late 19th Century and early 20th Century have applied the customary norms relating to the duty of States and State organs not only to abstain themselves from taking measures that would infringe on the security of aliens and their property, but also the duty of States to protect the security of aliens and their property from acts of third parties in their territory. While the first obligation – the duty for States and State organs to abstain themselves- was not assessed through the due diligence standard, the second obligation – the duty to protect against acts of individuals – has been tested through that standard.[16] I will therefore focus here essentially on the latter obligation, although I will refer to the former in order to make clear the distinction between both.

The duty to protect the security of aliens and their property from acts of third parties in their territory has been accepted since long in international law. This obligation can be decomposed into three sub-

15 James Crawford & Simon Olleson, *The Nature and Forms of International Responsibility*, *in* MALCOLM D. EVANS, INTERNATIONAL LAW 441, 454-58 (Oxford U. Press, 2010).

16. *See* Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GER. Y.B. INT'L L. 9 (1992).

components[17]:

1) the obligation of States to prevent acts of individuals that may harm the security of aliens and their property, by making use of their administrative and judicial apparatus to that effect;
2) the obligation of States to apprehend and bring to justice those responsible for injuries caused to aliens by making use of their administrative and judicial apparatus to that effect, and
3) the obligation for States to possess and make available to aliens a judicial and administrative system capable of preventing18 acts, and of punishing and apprehending those responsible for the acts.

This distinction between these three obligations is important, since practice shows that the third obligation – States' obligation *to possess and make available a judicial and administrative system* – is tested not by reference to the due diligence standard,[19] while States' other obligations have been assessed by reference to the due diligence standard.[20]

These principles have been confirmed in many cases, notably in the decisions of several Claims Commissions established in the late 19th Century and early 20th Century. These obligations have been found to be applicable in cases of occasional acts of third parties, in situations of public disorder, revolts and violence, and in case of civil war or international armed conflict.[21]

In relation to *isolated acts of individuals*, in *Venable v. Mexico*,[22] the Commissioner considered that the acts complained of (essentially allowing theft of parts of locomotives that had been seized –the obligation for States to prevent- and not prosecuting those responsible

17. *Id.* at 25.

18. The obligation too possess a judicial and administrative system capable of *preventing* acts however is very close to the obligation of States to act with due diligence to prevent acts of individuals. The difference however lies, not only in that due diligence applies to the latter only, but in that the first covers States' obligations in a specific situation, while the second concerns States' general obligations to maintain public order and prevent crimes. *See* Pisillo-Mazzeschi, *supra* note 16, at 26-29; Noyes (U.S. v. Panama), 6 R.I.A.A, 308, 311 (U.S.-Panama Gen. Cl. Comm'n 1933).

19. *See Second Report, supra* note 6, at 110-11.

20. *See id.* at 120; Pisillo-Mazzeschi, *supra* note 16, at 26-29.

21. *See* Pisillo-Mazzeschi, *supra* note 16, at 27-29 (discussing the general overview of the various case-law to this effect).

22. *See* H. G. Venable (U.S v. Mexico), 4 R.I.A.A. 219-261 (Mex.-U.S. Gen. Cl. Comm'n 1927).

for the crime –the obligation for States to apprehend and punish-) amounted to "an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[23] In several other cases, the specific obligation to apprehend or punish those responsible for the acts was also confirmed. In *Janes v. Mexico*[24] for instance, the Commissioner decided, that "there was clearly such a failure on the part of the Mexican authorities to take prompt and efficient action to apprehend the slayer," and therefore the Mexican authorities were held responsible for not having taken "proper steps to apprehend and punish the slayer of Janes."[25] In *Kennedy v. Mexico*,[26] in which the person responsible for the injuries caused had been convicted to a sentence disproportionate to the crime committed and the injuries inflicted, the Commission decided that "it seems that there was negligence in a serious degree, and that such negligence constitutes a denial of justice."[27] Since this obligation related to the obligation for States to possess and make available to aliens a judicial system capable of punishing those responsible for the acts, the Commission made no reference to the due diligence standard.[28]

In respect of *mob violence, riots or civil unrest*, several decisions applied the same principles. Arbitrator Max Huber in the *British Property in Spanish Morocco* case[29] confirmed the principle that in the events of riots ("banditry, which results in a state of general insecurity, but without the situation amounting, strictly speaking, to a state of rebellion")[30] States have a duty of vigilance towards aliens. In *Youmans v. Mexico*, the Commissioner also held that in case of "mob violence", States incur responsibility if "a lack of diligence in the punishment of the persons implicated in the crime" is shown.[31]

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23. *Id.* para. 23.

24. Laura M. B. Janes et al. (U.S. v. Mexico), 4 R.I.A.A. 82-98 (Mex.-U.S. Gen. Cl. Comm'n 1925).

25. *Id.* at 85-86, paras. 10, 17.

26. Kennedy (U.S. v. Mexico), 4 R.I.A.A.194-203 (Mex.-U.S. Gen. Cl. Comm'n 1927) (concurring opinion by American Commissioner).

27. *Id.* para. 5.

28. *See* Pisillo-Mazzeschi, *supra* note 16, at 30.

29. British Claims in the Spanish Zone of Morocco, 2 R.I.A.A. 615, 642, 645 (U.K.-Spain 1925); *see also* Great-Britain United States Mixed Commission, 9 R.I.A.A. 144 (1920).

30. Original in French ('actes de brigandage, dont résulte un état d'insécurité générale, sans toutefois qu'il y'ait, à proprement parler un état de rébellion' - translation by the author). British Claims in the Spanish Zone of Morocco, 2 R.I.A.A. 644 (U.K.-Spain 1925).

31. Youmans (U.S. v. Mexico), Gen. Claims Comm'n, 110-17 (1926).

Finally, in relation to *insurrectional movements*, one can refer to the *Sambiaggio* case, decided in the context of the Italy-Venezuela Mixed Claims Commission, in which the Commission held that Venezuela would be responsible for acts occurred during the revolution, if "Venezuelan authorities failed to exercise due diligence to prevent damages from being inflicted by revolutionists."[32]

Despite the occasional use of terms such as "indirect responsibility"[33] in early cases, which was in essence the consequence of the ambiguity that existed at that time on the question of whether the State was responsible for the injury caused to the alien, or rather was responsible only for the failure to exercise due diligence in preventing the injury or apprehending and punishing the responsible individuals,[34] which of course had important consequences in respect of the compensation awarded, the responsibility of States for breaching their obligations in relation to the protection of aliens is not an "indirect responsibility" of the State for the act committed; the act which has caused harm in itself cannot be attributed to the State.[35] This does not imply, however, that the reparation awarded may not take account of the damages caused by the act, but this will depend on the circumstances of each case. Indeed, in principle, the reparation should first of all remedy the obligation breached, which is not the act of the individual, but the obligation of the State to act in due diligence to prevent an injury caused to an alien or the failure to exercise due diligence in apprehending and punishing the individual responsible for that injury. This was famously posited by Max Huber in the mentioned *British Property in Morocco* case, which not only confirmed the application of the due diligence standards, but also confirmed the absence of any direct responsibility of the State for the commission of the act itself[36]:

> It seems indisputable that the State is not responsible for a riot, rebellion, civil war or international war nor for the fact that these events cause damage on its territory.
>
> . . . .
>
> This principle of absence of responsibility does not exclude the duty to

32. Sambiaggio (Italy v. Venezuela), 10 R.I.A.A. 499, 524 (Mixed Claims Commission 1903).

33. *See* H. G. Venable (U.S v. Mexico), 4 R.I.A.A. 229, para. 23. (Mex.-U.S. Gen. Cl. Comm'n 1927).

34. *Second Report, supra* note 6, at 34; *Sixth Report, supra,* note 13, at 99.

35. *Sixth Report, supra* note 13, at 100.

36. British Claims in the Spanish Zone of Morocco, 2 R.I.A.A. 709-10 (U.K.-Spain 1925).

> exercise certain vigilance. While the State is not responsible for the revolutionary events themselves, it may nevertheless be responsible for what the authorities are doing or not doing to avert, to the extent possible, the consequences. Responsibility for the action or inaction of public power is completely different from responsibility for acts attributable to individuals who are beyond the influence of the authorities or who are openly hostile to the authorities.[37]

In *Janes*, the Commissioner also pointed out that "in cases of improper governmental action of this type [denial of justice], a nation is never held to be liable for anything else than the damage caused by what the executive or the legislative committed or omitted itself."[38] As a consequence, "the measure of damages for which the Government should be liable can not be computed by merely stating the damages caused by the private delinquency of Carbajal."[39] These principles still stand today.[40]

This early practice has been particularly relevant for the recent application of due diligence in the context of international investment law. Considering that the current investment regime is partly rooted in the general customary norms governing the treatment of aliens in international law, this is not surprising. Indeed, full protection and security ("FPS"), the international minimum standard ("IMS"), and fair and equitable treatment ("FET") share many features with that customary norm.

III. DUE DILIGENCE IN CONTEMPORARY INTERNATIONAL INVESTMENT LAW

Although it is not the purpose here to engage in an all-inclusive discussion of the exact contents of these standards of treatment, it is

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37. Original in French ('Il paraît incontestable que l'État n'est pas responsable pour le fait d'une émeute, révolte, guerre civile ou guerre internationale, ni pour le fait que ces événements provoquent des dommages sur son territoire. [. . .] Le principe de la non-responsabilité n'exclut point le devoir d'exercer une certaine vigilance. Si l'État n'est pas responsable des événements révolutionnaires eux-mêmes, il peut être néanmoins responsable de ce que les autorités font ou ne font pas, pour parer, dans la mesure possible, aux suites. La responsabilité pour l'action ou l'inaction de la puissance publique est tout autre chose que la responsabilité pour des actes imputables à des personnes échappant à l'influence des autorités ou leur étant ouvertement hostiles.' - translation by the author). *Id.* at 642.

38. Laura M. B. Janes et al. (U.S. v. Mexico), 4 R.I.A.A. 88, para 22. (Mex.-U.S. Gen. Cl. Comm'n 1925).

39. *Id.* at 89, para 25.

40. *See* Crawford & Olleson, *supra* note 15, at 454-55.

necessary to briefly sketch their main characteristics and their interconnectedness in order to better grasp the role of due diligence in assessing breaches of these standards.

FPS, IMS, and FET are generally referred to as non-contingent, absolute or objective standards of treatment as opposed to contingent, relative or subjective standards, such as national treatment ("NT") or the most favored nation treatment ("MFN").[41] The latter category of standards of treatment impose on the host State the obligation to act in a certain way by reference to how *other* investors or investments are treated, e.g. national investors or investments in case of NT, or investors or investments from third States in case of MFN treatment. The objective of such standards is that States may not discriminate between investors and investments; whether or not the State has exercised due diligence in this respect is irrelevant. Objective standards, on the other hand, require from the State to act in a certain "objective" way, as required under international law (either custom or treaty law) irrespective of how other investors or investments are treated. There is, in other words, no comparison with the treatment of other investors or investments.

This categorization partially explains the presence of due diligence in those standards of treatment. Indeed, when the acts of States are tested against how other investors or investments are treated, there is neither room nor need to apply a due diligence standard. The standard to be applied when dealing with relative standards is a comparative standard: how *other* investors or investments have been treated. Whether the State was diligent or not is irrelevant. Conversely, when the acts of States are tested against absolute standards under FPS, IMS and FET, how other investors or investments are treated is irrelevant; the conduct and acts of States are tested against requirements for such conduct or acts under international law. The assessment standard of a breach of the latter category of standards then requires a comparison with an objective assessment standard: how investors and investments should be treated under international law. This comparator/objective assessment in certain interpretations of FPS, and partly also in the IMS and FET as will be explained, is the due diligence standard – the conduct of a diligent State.

However, the "objectivity" of the absolute treatment standards will

41. *See* CAMPBELL MCLACHLAN QC, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 207, para 7.19 (Oxford U. Press, 2008); Nicolas Angelet, *Fair and Equitable Treatment*, *in* 3 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1094 (Rüdiger Wolfrum ed., 2012).

vary by operation of the due diligence standard if one considers that the circumstances and resources of the host State should be taken into account when applying the due diligence requirement, which I will discuss below. In that sense even absolute standards of treatment carry a subjective element, although the latter should not be understood as implying a comparison with how other investors or investments are or have been treated.

A. Due Diligence and the International Minimum Standard

The exact relation between FPS, the IMS and FET is still subject to much debate. It has been contented that FPS forms part of the IMS,[42] or that FET and FPS are included in the IMS.[43] Others have contended to the contrary that all three standards or treatment are independent treaty standards.[44] Despite these controversies, which I do not intend to settle here, it is beyond doubt that all three-treatment standards have certain commonalities, and thus overlap in certain aspects.[45] The overlap is particularly noticeable in context of the State's duty to protect foreign investors and investments from acts of third parties, and thus, as will be shown in the application of the due diligence standard to such obligation. The overlap, in essence, is a consequence of the fact that these standards, whether one views them as autonomous standards or not, are rooted in the general rule relating to States' obligations in respect of the protection of aliens discussed above. The obligations to which the due diligence standard applies, and thus those that I will consider here, are part of the FPS or FET, and whether one views these standards as embodied in the IMS is irrelevant for our purposes.

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42. *See* Christoph Schreuer, *Full Protection and Security*, 1 J. INT'L DISPUTE SETTLEMENT 353, 354 (2010). The decision of the Tribunal in *Noble Ventures* argued that "[w]ith regard to the Claimant's argument that the Respondent breached Art. II (2)(a) of the BIT which stipulates that the '*Investment shall . . . enjoy full protection and security*', the Tribunal notes: that it seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens." Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, para. 164 (Oct 12, 2005).

43. *See Notes of Interpretation of Certain Chapter 11 Provisions*, NAFTA FREE TRADE COMM'N (July 31, 2001), *available at* http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (last visited Apr. 7, 2015).

44. Schreuer, *supra* note 42, at 362.

45. Jan de Nul N.V. & Dredging Int'l N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, para. 269 (Nov. 6, 2008) (stating that "[t]he notion of continuous protection and security is to be distinguished here from the fair and equitable standard since they are placed in two different provisions of the BIT, even if the two guarantees can overlap"); *see also* PSEG Global Inc. & Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, para. 258 (Jan. 19, 2007).

Situations covered by the FPS indeed will require conduct in accordance to the IMS.

To give one example, in the *Neer* case, often quoted as representing the IMS, although not without controversy in respect of the application of that decision to modern investment law,[46] the US/Mexico General Claims Commission described the IMS as follows:

> [T]he propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.[47]

This statement in actual fact related to a situation typically covered by a contemporary FPS provision, as understood in physical protection from acts of third parties, as it related to the obligation of Mexico to apprehend and punish those responsible for the acts.[48] The scenario of that case, although seen as defining the IMS, is applicable to FPS as well. To that extent, it is beyond doubt that the IMS can be seen as embodied in contemporary treaty obligations relating to the obligation to provide (full) protection and security.[49] FPS, understood as providing an obligation for the State to protect against physical violence, is indeed analogous to the IMS standard represented in the classical theory on the protection of aliens discussed above,[50] and it is consequently unnecessary to distinguish both standards in respect of physical protection from acts of third parties. It is moreover unnecessary since contemporary investment treaties generally do not refer to the minimum standard at all, or in isolation of other treaty standards namely without linking FPS and FET to the IMS.

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46. *See* ROLAND KLÄGER, 'FAIR AND EQUITABLE TREATEMENT' IN INTERNATIONAL INVESTMENT LAW 51-55 (James Crawford SC FBA & John S. Bell FBA, 2013).

47. L. F. H. Neer & Paulene Neer (U.S. v. Mexico), 4 R.I.A.A. 60, 61-62 (Gen. Claims Comm'n 1926).

48. *Id.* at 62.

49. *See* Elettronica Sicula SpA (U.S. v. Italy), 1989 I.C.J. 15, para. 111 (July 20) ("The primary standard laid down by Article V is 'the full protection and security required by international law', in short the 'protection and security' must conform to the minimum international standard.") [hereinafter ELSI].

50. El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Award, para. 522 (Oct. 31, 2011); *see* KLÄGER, *supra* note 46, at 292.

Whether or not FPS entails more than the IMS is a question I will not settle here, although specific consideration will be given to broader interpretations of FPS, without taking any position on the correctness of such a view, in order to verify the possible application in such context of the due diligence standard. As a consequence, the discussion below on FPS, understood as the duty to protect foreign investors and investments from physical violence by third parties, is *mutatis mutandis* applicable to the IMS.

B. Due Diligence and Full Protection and Security

Provisions granting protection and security to investments and investors vary in nature. Some treaties refer to "full protection and security," while others provide for "protection and security" or "constant protection and security."[51] It is not the purpose here to engage in a discussion of these variances, and the standard will be referred to here as FPS despite the existing differences in wording. Indeed, the current conception of the FPS standard of treatment – however phrased – comprises the obligation for States to provide physical or police protection to foreign investments/investors from harm caused by the State itself or by third parties, which includes the obligations to prevent, to punish and apprehend, and possess and make available a functioning administrative and legal system to that effect.[52] Some tribunals moreover have argued that the difference in wording do "not make a significant difference."[53] Therefore, the addition of terms such as "constant" or "full" do not change the application of the due diligence standard rather than a strict liability standard for assessing breaches of that provision[54] nor does the use of "protection" rather than "protection and security" change the level of police protection a host State is required to provide.[55]

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51. *See* Schreuer, *supra* note 42, at 353-69.

52. *See* U.N. Conf. on Trade & Dev., *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, U.N. Doc. UNCTAD/ITE/IIT/2006/5, 132 (2007), *available at* http://unctad.org/en/Docs/iteiia20065_en.pdf (last visited Apr. 1, 2015); *see also* JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 132, 209-10 (2010); George K. Foster, *Recovering "Protection and Security": The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, 45 VAND. J. TRANSNAT'L L. 1095, 1095-156 (2012).

53. Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, para. 354 (Sept. 11, 2007).

54. Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, para. 50 (June 27, 1990).

55. Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, para. 354 (Sept. 11, 2007).

As said earlier in relation to the customary norm on the protection of aliens, the obligation to provide FPS applies to acts both of the State and of third parties under its jurisdiction.[56] Although I will essentially focus on the latter type of obligation, since I argue that the standard of due diligence applies primarily to those type of cases, it is nevertheless necessary to briefly discuss whether or not the due diligence standard plays a role when the acts of the State itself, or when any of its organs or other entities the acts of which are attributable to the State, have physically impaired the investor or investment, are involved. This is important also to explain investment law cases which have discussed the due diligence standard in that context.

1. The State's Duty to Abstain

Traditionally, as was explained above, the State's duty to abstain from infringing the *physical* protection and security of aliens, which applies to all State organs and entities the acts of which are attributable to the State, is not tested by reference to the due diligence standard.[57] This is supported by several cases, such as the *Sambiaggio* case mentioned above, in which Umpire Ralston distinguished between the acts of the State and the acts of revolutionaries, and applied to the former acts the principle that a State is responsible for the acts of its organs, while in the latter case, responsibility only was considered possible in the event of a lack of due diligence.[58] It has also been confirmed in many other cases, which related to the unlawful killing of individuals by police officers or the military.[59] The act itself – the unlawful killing – was considered a breach of an international obligation of the State, which was attributable to the latter because of the involvement of State organs. No reference then was made to the principle of due diligence – the State basically is responsible for the acts of its organs. If, for example, police officers or the military have caused harm to a foreigner, whether or not the State has acted with due diligence to prevent the act is unconnected. The act itself is attributable to the State. This of course presupposes that the act in question, which

56. *See* Schreuer, *supra* note 42, at 355-62; *see also* Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, para. 730 (Jul. 24, 2008).

57. Pisillo-Mazzeschi, *supra* note 16, at 23.

58. *See* Sambiaggio (Italy v. Venezuela), 10 R.I.A.A. 499, 520-24 (Mixed Claims Commission 1903).

59. *See* J. W. & N. L. Swinney (U.S. v. Mexico), 4 R.I.A.A. 98-101 (Mex-U.S. Gen. Cl. Comm'n Nov. 16, 1926); D. Guerrero vda. De Falcón (Mexico v. U.S.), 4 R.I.A.A. 104-106 (Gen. Cl. Comm'n Mex-U.S. Nov. 16, 1926).

has caused harm, is in itself wrongful. It is interesting to note in this respect that certain tribunals, such as the Tribunal in *El Paso*, have implied that in case of acts of the State or State organs, the FPS standard does not apply, being limited to acts of third parties only.[60] Other tribunals have however, correctly, posited that the FPS standard applies both to State and third party acts.[61]

In this case, contrary to the responsibility of States for acts of third parties other than State organs, the wrongful act is *the act that has caused harm*. In case of acts of third parties other than State organs, the internationally wrongful act is *the failure to prevent* the occurrence of the act or the failure to apprehend or punish those responsible for the act, assessed through the due diligence standard. This explains why due diligence is of no relevance in the first case, but is in the latter.

There is some case law from investment tribunals, which discusses this distinction. In line with the early case law mentioned above, it is correct to state that the acts of State organs which result in an impairment of the protection and security to be guaranteed to aliens generally, and thus foreign investors and their investments, are wrongful as such, without the need to enquire whether the State organ in question was diligent or not. Tribunals have refrained from applying the due diligence standard to the conduct of States and State organs, although they have on several occasions explicitly referred to the due diligence standard in general terms when discussing the contents of the FPS standard. This may cause certain confusion as to the relevance of due diligence when the duty of the State to abstain is concerned, but the principle remains that due diligence is irrelevant in relation to the duty of the State to abstain.

AAPL v. Sri Lanka and *AMT v. Zaire* are sometimes invoked in the

60. El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Award, para. 524 (Oct. 31, 2011). "El Paso did not specify or determine the duty to act against a third party that has allegedly been breached by Argentina under the BIT: all the impugned acts that allegedly violate the FPS standard are directly attributable to the GOA and not to any third party. In the present case, none of the measures challenged by El Paso were taken by a third party; they all emanated from the State itself. Consequently, these measures should only be assessed in the light of the other BIT standards and cannot be examined from the angle of full protection and security." *Id.*

61. *See* Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, para. 355 (Sept. 11, 2007). "A violation of the standard of full protection and security could arise in case of failure of the State to prevent the damage, to restore the previous situation or to punish the author of the injury. The injury could be committed either by the host State, or by its agencies or by an individual." *Id.* (internal footnotes omitted).

context of violence caused by State organs,[62] but as I will point out, both cases did not relate to such acts. In *AAPL v. Sri Lanka*,[63] the Tribunal indeed did not apply the due diligence standard to the acts of State organs which had caused harm.[64] In that case, which concerned the destruction of a shrimp farm and the killing of several staff members of that farm during a military operation between the Sri Lankan Security Forces and Tamil rebels, the Tribunal considered that Sri Lanka, by failing to take precautionary measures to remove suspected staff members from the farm through peaceful means before launching the attack, "violated its due diligence obligation which requires undertaking all possible measures that could be reasonably expected to prevent the eventual occurrence of killings and property destruction."[65] This finding was not applied to the acts of the State organ which had caused the killings and destruction of property, since the Tribunal had found that there was no conclusive evidence that the Sri Lankan security forces had in fact killed the staff members and destroyed the farm, nor that the acts had been caused by rebels.[66] Faced with the impossibility of establishing who was directly responsible for the acts, the Tribunal thus engaged in an analysis of whether the governmental forces were capable of providing protection to prevent the destruction of the farm, which indeed was assessed through application of the due diligence standard. This assessment thus was alien to the application of the due diligence standard to the acts of the destruction of the property itself by the Government forces.

In *AMT v. Zaire*,[67] the claimant had sought compensation for the destruction of property of one of its subsidiaries, and the looting in 1991 by certain member of the Zairian forces, which had resulted in the destruction, damage and loss of finished goods and raw materials. The Tribunal considered the host State in breach of its obligations to provide FPS to AMT by having failed to take any measure whatsoever, but here again, the Tribunal did not consider the acts in question to be those of a

62. *See* Gleider I. Hernandez, *The Interaction Between Investment Law and the Law of Armed Conflict in the Interpretation of Full Protection and Security Clauses, in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES 21, 35-38 (Freya Baetens ed., 2013).

63. *See generally* Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (June 27, 1990).

64. *But see* Schreuer, *supra* note 42, at 5.

65. Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, 562. (June 27, 1990).

66. *Id.* at 563.

67. Am. Mfg. & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997).

State organ, since they were perpetrated by "separate individuals and not the [Zairian] forces."[68]

In more recent cases, Tribunals have explicitly referred to the due diligence standard in general terms, but have refrained from applying that standard to alleged acts of States, which had caused damage. In *Saluka* v. *Czech Republic*, the acts in question were acts of the State organs. The acts complained of consisted of the suspension of trading of shares Saluka held in IPB, the prohibition of transfers of Saluka's IPB shares, and police searches and seizure of documents.[69] After setting out the contents of the FPS standard, which includes a brief mention of due diligence, and limiting FPS to physical protection only, the Tribunal rejected all claims in this respect, by arguing, without taking the position that all acts complained of fell within the ambit of the FPS clause, that the measures taken were not "totally unreasonable and unjustifiable."[70] The Tribunal refrained from applying the due diligence standard to those acts, which moreover did not involve the use of force, and in essence boiled down to claims of denials of justice and lack of due process.[71] In that respect, I will refer back to this case at a later stage.

In *Biwater Gauff v. Tanzania*, the Tribunal considered that the removal of the management from the offices or the seizure of the City Water's premises, "even if no force was used [were] unnecessary and abusive and amount[ed] to a violation by the Republic of its obligation to ensure full protection and security."[72] Rightly, no reference was made to the "due diligence" standard in applying the law to the facts of the case since the complaints related to the acts of Tanzania itself, although ample reference was made to the standard in the preceding paragraphs.[73]

Another case at point is *Tecmed v. Mexico*, in which the Tribunal briefly touched upon the issue.[74] In that case, the Claimant had alleged that Mexican authorities had not only encouraged protests against the landfill it sought to operate through its subsidiary Cytrar, but also that

68. *Id.*

69. Saluka Invs. B.V. v. Czech Republic, UNCITRAL, Partial Award, para. 485 (Perm. Ct. Arb. 2006).

70. *Id.*

71. *Id.* para. 486.

72. Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, para. 731 (Jul. 24, 2008).

73. *Id.*

74. Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003).

police and judicial authorities

> did not act as quickly, efficiently and thoroughly as they should have to avoid, prevent or put an end to the adverse social demonstrations expressed through disturbances in the operation of the Landfill or access thereto, or the personal security or freedom to move about of the members of Cytrar's staff related to the Landfill.[75]

The Tribunal in *Tecmed* differentiated the rules applicable to acts of the State or State organs, or other acts which are otherwise attributable to the State, but concluded that no evidence was furnished to prove, first, the involvement of the authorities in the demonstrations, and, secondly, in relation to acts of third parties, that Mexican authorities "have not reacted reasonably, in accordance with the parameters inherent in a democratic state, to the direct action movements conducted by those who were against the Landfill," the latter criterion being an application of the due diligence standard.[76]

More recently in *Tulip v. Turkey,* the Tribunal mentioned the distinction explicitly in an *obiter dictum*, and applied due diligence only the conduct of State organs in relation to acts of third parties:

> There is, therefore, no basis to conclude, that the State (assuming, *arguendo*, that Emlak were an emanation of the State) planned to engage in an unlawful seizure of land belonging to a foreign investor or, alternatively, that State organs failed to exercise due diligence and to prevent planned unlawful action by a private party.[77]

Recent practice of investment tribunals thus shows that the principles established by early case-law, namely that when the State's acts impair the physical protection and security of foreigner investors and investments, the due diligence standard should not apply, applies equally in investment law. Based on the discussed cases, and since the FPS standard without doubt is similar to or emerges from the IMS, at least when understood as requiring physical protection and security, there is no reason to depart from the principles applied in the past.

2. *The State's Duty to Protect Foreign Investments from Acts of Third Parties*

In line with the distinction made above, States' obligations in respect of acts of third parties under the FPS standard of treatment

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75. *Id.* para. 175.

76. *Id.* at para. 177.

77. Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Award, para. 433 (Mar. 10, 2014) (an application for annulment of the tribunal's award was filed in July 2014).

comprise several distinct obligations: first, the obligation to act with due diligence to prevent such acts, secondly, the obligation for States to act with due diligence to apprehend and punish those responsible for the act, and thirdly, the obligation to possess and make available to foreign investors a judicial and administrative system capable of preventing acts, and of punishing and apprehending those responsible for the act.

i. States' Obligation to Act with Due Diligence to Prevent Acts of Third Parties

Although FPS is often not further defined in investment treaties, it is the general understanding of the contents of the standard that it requires the State to exercise due diligence in providing physical protection and security to foreign investments and/or investors to prevent acts of individuals that would cause damage. To that extent it represents the classical understanding of the customary norm relating to the protection of aliens described above, and represented in cases such as *Venable v. Mexico*. This is the most common use that is made of the provision in contemporary investment law and arbitration.

Such obligation does not entail any form of strict liability for the host State. In *Lauder v. Czech Republic*, the Tribunal noted in respect of an FPS provision:

> The Arbitral Tribunal is of the opinion that the Treaty obliges the Parties to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances. However, the Treaty does not oblige the Parties to protect foreign investment against any possible loss of value caused by persons whose acts could not be attributed to the State. Such protection would indeed amount to strict liability, which cannot be imposed to a State absent any specific provision in the Treaty.[78]

This understanding of the FPS standard of treatment is shared by many tribunals.[79] Investment law cases over the past decade confirm not only the existence of the due diligence standard to test State's

78. Lauder v. Czech Republic, UNCITRAL Arb., Final Award, para. 310 (Sept. 3, 2001).

79. *See* Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, para. 164 (Oct. 12, 2005); Saluka Invs. B.V. v. Czech Republic, UNCITRAL Arb., Partial Award, para. 483 (Mar. 17, 2006); Biwater Gauff, Ltd. v. Republic of Tanzania, ICSID Case No. ARB/05/22, Award, para. 725 (July 24, 2008); Rumeli Telekom A.S v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, para. 668 (July 29, 2008); Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Award, para. 229 (June 7, 2012); Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, para. 161 (July 30, 2010).

behavior, but also the principle mentioned above, that the State is not responsible for the acts of individuals as such, but only for having failed to exercise due diligence in preventing harm caused by the act in question. Such obligations also apply, and perhaps primarily, in cases of armed conflict, civil strife or revolution,[80] in line with early case law mentioned above which has applied this principles as part of customary law. In the event of an armed conflict, a State indeed should use "the police and military forces to protect the interests of the alien to the extent feasible and practicable under the circumstances, both before the event and while it unfolds."[81] Certain tribunals have used tests similar to "due diligence," without however referring explicitly to a duty of "due diligence." They have rather referred to a duty of "vigilance."[82] In practice, the applied standard essentially is the same.

It is clear from arbitral practice that the State holds no strict liability for harm caused by third parties.[83] Although not explicitly referring to "due diligence," the International Court of Justice ("ICJ") in the *ELSI* case followed the same approach.[84] The ICJ in *ELSI* posited that "the reference in Article V to the provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed."[85] Considering the very close relation between FPS and the customary rules governing the protection of aliens, this rule is not surprising, and indeed conforms to the main principles mentioned above. An FPS treaty provision understood as requiring the State to exercise due diligence to prevent acts of third parties that would cause harm to

80. ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 315 (2009).

81. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 166 (2008).

82. See, for instance, the statement by the Tribunal in Am. Mfg. & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award, para. 6.05 (Feb. 21, 1997) ("The obligation incumbent on Zaire is an obligation of vigilance, in the sense that Zaire as the receiving State of investments made by AMT, an American Company, shall take all measures necessary to ensure the full enjoyment of protection and security of its investment and should not be permitted to invoke its own legislation to detract from any such obligation."); *see also* Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award, para. 84 (Dec. 8, 2000) (citing and endorsing this statement).

83. *See* SALACUSE, *supra* note 52, at 132, 209-10; Asian Agric. Prods. Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, para. 77 (June 27, 1990); Técnicas Medioambientales Tecmeda S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, para. 177 (May 29, 2003).

84. Elettronica Sicula S.P.A, Judgement (U.S. v. Italy), 1989 I.C.J. 15, para. 108. (July 20).

85. *Id.*

foreign investments and/or investors essentially is the same requirement as the customary standard mentioned above. The same is true in respect of the obligation for States in apprehending and punishing those responsible for the harm.

ii. States' Obligation to Act with Due Diligence to Apprehend and Punish those Responsible for the Acts

The principle that a State is under an obligation, in case of harm caused by acts of third parties to apprehend and punish those responsible for the acts also is part of the FPS standard.[86] Besides the preventive obligation mentioned in the previous section, States thus have also a remedial obligation,[87] or in the words of the Tribunal in *El Paso v. Argentina*, "a duty of prevention and a duty of repression."[88] This "existence of a duty of repression" again is very much in line with the obligations under customary international law described above,[89] in particular in relation to the conduct of investigations into the events that have caused damage. Again, the principle of due diligence applies: States should take all reasonable measures a diligent State would take to apprehend and punish those responsible. As the Claims Commission in *Janes* explained "[t]he culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender."[90] At the outset I should note that this obligation does not comprise the obligation for the State to act in due diligence in respect of the conduct of a potential trial or the access given to foreign investors to their judicial system. Such obligations are covered in States' general obligation to possess and make available to foreign investors a judicial and administrative system capable of preventing acts, and of punishing and apprehending those responsible for the act.

Some investment tribunals have dealt with this question, and in doing so have confirmed these main principles. One of the few examples is *Wena Hotels v. Egypt*, in which the Tribunal explicitly

86. McLachlan QC, Shore & Weiniger, *supra* note 41, at 262, para. 7.190; Newcombe & Paradell, *supra* note 80, at 246, para 6.8.

87. *See, e.g.*, Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Award, para. 229 (June 7, 2012).

88. El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Award, para. 523 (Oct. 31, 2011).

89. *See* U.N. General Claims Comm'n, Reports of Arbitral, *Lina Balderas de Diaz (United Mexican States) v. United States of America,* Decision, 106-108 (Nov. 16, 1926).

90. Laura M. B. Janes et al. (U.S. v. Mexico), 4 R.I.A.A. 87 (Mex.-U.S. Gen. Cl. Comm'n 1925).

argued that the failure by the State to take action against those responsible for the forceful seizure of Wena's property constituted a breach of FPS.[91] No specific mention was made of due diligence however, but this is understandable considering the complete absence of any action taken by the host State. Another example is *Parkerings v. Lithuania* in which the claimant had alleged the police did not find the authors responsible for damages to its materials.[92] The Tribunal however considered that there had been an investigation and that there was no evidence that the process of investigation was in breach of the applicable BIT. In *Frontier v. Czech Republic*, the claimant *inter alia* alleged that Czech officials charged with investigating the criminal complaints, which had been lodged against certain individuals, "were negligent and did not proceed in an even-handed manner."[93] The Tribunal, after confirming the application of due diligence to such claims, dismissed the claim having concluded that there was no evidence that the police authorities had been negligent or acted in bad faith.[94]

This State obligation of course is closely related to the general obligation of States to possess a judicial and administrative system capable of preventing acts, and of apprehending and punishing those responsible for the acts. Indeed, the obligation to apprehend and punish those responsible for the acts will in the majority of the cases rest upon an assessment whether the foreign investors had adequate access to the legal system to seek redress for the acts, which have caused harm. Several cases, such as *Parkerings* or *Frontier*, have thus applied both obligations.

iii. States' Obligation to Possess and Make Available to Foreign Investors a Judicial and Administrative System Capable of Preventing Acts, and of Punishing and Apprehending Those Responsible for the Act

It is accepted that, under customary international law, States have an obligation of due diligence in the administration of justice, very often

91. Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award, paras. 82, 84, 94 (Dec. 8, 2000).

92. Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, para. 326 (Sept. 11, 2007).

93. Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award, para. 423 (Perm. Ct. Arb. Nov. 12, 2010), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0342.pdf (last visited Apr. 1, 2015).

94. *Id.* paras. 261, 436.

also in relation to criminal acts towards the foreign investor.[95] This is embodied in the FPS obligation to act with due diligence in apprehending and punishing those responsible for the harm, but States' obligations in this respect go beyond such understanding FPS standard. States indeed more broadly have an obligation to *possess*, and *make available to foreign investors* an adequate administrative and judicial system capable of preventing acts, and of apprehending and punishing those responsible for the acts.[96] I will focus here on the obligation to possess, and make available to foreign investors an adequate administrative and judicial system capable of apprehending and punishing those responsible for the acts, and not on the obligation in relation to the prevention of acts. The latter obligation, although nothing would hinder its application in contemporary investment law being part of customary law, has not been addressed by investment tribunals.

This obligation has also been considered as part of the FPS standard,[97] especially when it relates to acts of third parties that impair the protection and security of foreign investors. As noted by the Tribunal in *Frontier*: "In this Tribunal's view, where the acts of the host state's judiciary are at stake, 'full protection and security' means that the state is under an obligation to make a functioning system of courts and legal remedies available to the investor."[98] The obligation however has also been considered more broadly to form part of the IMS or the FET standard, especially when seen in relation to the obligations relating to due process and the prohibition of a denial of justice, which have been considered part of customary law.[99]

This obligation, which indeed is close to the prohibition of denial of justice, does not entail any due diligence obligation. The "due diligence" standard here is inapplicable, and thus, one should not generalize the application of the standard to the obligation to possess and make available a judicial and administrative system capable of

95. NEWCOMBE & PARADELL, *supra* note 80, at 246.

96. *See generally* JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 57 (Cambridge University Press 2005).

97. *See* Giuditta Cordero Moss, *Full Protection and Security*, *in* STANDARDS OF INVESTMENT PROTECTION 131, 144 (August Reinisch ed., 2008).

98. Frontier Petroleum Services LTD. v. Czech Republic, UNCITRAL, Final Award, para. 273 (Nov. 12, 2010).

99. Katia Yannaca Small, *Fair and Equitable Treatment Standard: Recent Developments*, *in* STANDARDS OF INVESTMENT PROTECTION 111, 144 (August Reinisch ed., 2008); see also Lœwen Grp., Inc. v. United States, ICSID Case No. ARB (AF)/98/3, Award, para. 129 (June 26, 2003).

preventing acts and punish and apprehend those responsible for the injuries caused.[100] The obligation *to possess and make available a functioning administrative and legal system* is not tested against the due diligence standard; due diligence applies only to the *use* by the State of that system, not to the *existence and availability* of the system to a foreign investor.

This is confirmed by several decisions of investment tribunals, but these cases, although applying these principles, did not concern acts of third parties which had caused physical damage to the investor/investment. Rather, these cases concern the need for host States to make available to foreign investors a functioning judicial system for disputes with third parties more generally. While this may seem surprising, it may at the same time simply be the application of the customary principles to modern investment relations, where the State's obligation to provide FPS not only covers protection from physical harm, but also other types of harm caused by third parties. Whether this is correct or not, will not be discussed here, and in any event, the same principles apply, namely that due diligence is of no relevance to test that State's obligation.

For instance, the Tribunal in *Lauder* considered in relation to the FPS standard that,

> The investment treaty created no duty of due diligence on the part of the Czech Republic to intervene in the *dispute between the two companies over the nature of their legal relationships*. The Respondent's only duty under the Treaty was to keep its judicial system available for the Claimant and any entities he controls to bring their claims, and for such claims to be properly examined and decided in accordance with domestic and international law.[101]

Because the Czech Republic had made a functioning system of courts and legal remedies available to the claimant, who in fact had made use of these possibilities, the Tribunal considered that there was no breach of the FPS standard.[102]

In *Saluka*, the Tribunal also considered that Saluka had been given adequate access to justice to appeal certain decisions of Czech Republic and that "nothing therefore emerges from the facts before the Tribunal that would amount to a manifest lack of due process leading to a breach of international justice and to a failure of the Czech Republic to provide

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100. *See* discussion *supra* Section II.

101. Lauder v. Czech Republic, UNCITRAL, Final Award, para. 314 (Sept. 3, 2001) (emphasis added).

102. *Id.*

'full protection and security' to Saluka's investment."[103] Again, the due diligence standard was not mentioned.

In similar wording as the Tribunal in *Lauder*, the Tribunal in *Parkerings* considered that,

> The Claimant also criticized the Respondent for its passivity when the City of Vilnius breached the Agreement. However, the Arbitral Tribunal considers that the investment Treaty created no duty of due diligence on the part of the Respondent to intervene in the dispute between the Claimant and the City of Vilnius over the nature of their legal relationships.
>
> The Respondent's duty under the Treaty was, first, to keep its judicial system available for the Claimant to bring its contractual claims and, second, that the claims would be properly examined in accordance with domestic and international law by an impartial and fair court.[104]

In *Frontier,* also mentioned above in relation to the obligation to apprehend and punish, the claimant had alleged breaches of an FPS clause because of the failure for certain state agencies "to 'exert pressure' on the bankruptcy trustees to properly protect the interests of Claimant," and the refusal by Czech courts to recognize and enforce an arbitral award related to the bankruptcy of two companies in which the claimant had invested.[105] The Tribunal, after citing *Parkerings*, considered that the obligation to make a functioning system of courts and legal remedies available to the investor implies that the Tribunal may verify whether "the courts have acted in good faith and have reached decisions that are reasonably tenable,"[106] which is reminiscent of the due diligence standard, but it is not clear where the Tribunal derived this from. The Tribunal finally found that a judicial system was available to the claimant, and that although Claimant had availed itself of that system only with limited success, there was no breach of the principle of full protection and security.[107] No mention was made of due diligence, despite extensive references to the principle in the Tribunals general comment on the standard,[108] and similar wording. It

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103. Saluka Investments B.V. v. Czech Republic, UNCITRAL, Partial Award, para. 485 (Perm. Ct. Arb. 2006).

104. Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, para. 333 (Sept. 11, 2007).

105. Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award, para. 454 (Perm. Ct. Arb. Nov. 12, 2010), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0342.pdf (last visited Apr. 1, 2015).

106. *Id.* para. 273.

107. *Id.* para. 467.

108. *Id.* para. 270.

is, however, unclear whether the Tribunal intended to convey the idea that due diligence applies in this context as well. In relation to the recognition of the arbitral awards, the Tribunal engaged in a rather extensive review of the decision of Czech courts, but found that there was no evidence that the court had "acted arbitrarily, discriminatorily, or in bad faith."[109]

3. FPS and Legal Protection and Security

Besides the requirement of providing physical protection and security, certain tribunals have, in particular when the word "full" precedes "protection and security," also extended the application of the standard to "*legal* protection and security," making this understanding of the standard in fact relatively similar to the FET protection standard.[110] This understanding of the standard is different from the idea that States should prevent acts of third parties and apprehend and punish those responsible for harm caused to foreign investors, and the obligation of States to possess and make available a functioning judicial and administrative system, which are derived from the classic customary norms on the protection of aliens.

Legal protection and security, in certain interpretations, in essence would require *States* to refrain from taking legal or governmental acts or measures that would hinder the proper functioning of the investment or would contravene investor's rights.[111] It is thus an interpretation of the standard that targets acts of the State itself, not of third parties. Certain case law suggests that FPS requires host States to provide to foreign investors a legal framework that guarantees legal protection to investors.[112] As explained by the Tribunal in *CME* for example:

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109. *Id.* para. 529.

110. CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Partial Award, para. 613 (Sept. 13, 2001); Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic, ICSID Case No. ARB/97/4, Award, para. 170 (Dec. 29, 2004); Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, para. 408 (July 14, 2006); PSEG Global, Inc., North Am. Coal Corp., & Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, para. 258 (Jan. 19, 2007); Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, para. 323 (May 22, 2007); Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, para. 7.4.15 (Aug. 20, 2007); Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, para. 729 (Jul. 24, 2008); National Grid v. Argentine Republic, UNCITRAL, Award, para. 189 (Nov. 3, 2008).

111. *See* Schreuer, *supra* note 42, at 6-8; *see also* NEWCOMBE & PARADELL, *supra* note 80, at 311.

112. Schreuer, *supra* note 42, at 10.

> The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued.[113]

This goes further than the obligations explained above, but seems to add little to the protection offered by FET. Moreover, tribunals are not clear on the precise scope of such protection because these issues often are discussed in conjunction with FET.[114] Although it has been suggested that this in fact had already been accepted, although not explicitly, by the ICJ in the *ELSI* case,[115] such reference only is partially correct. The question in the *ELSI* case in that respect revolved around the question of the length of judicial proceedings in relation to the administrative requisition of the ELSI plant, a situation covered by the obligation of States to possess and make available a functioning judicial and administrative system. It did not concern the "amendment of laws," to use the *CME* terminology. Therefore, the question discussed by *ELSI* related to the more customary norms relating to the obligation for States to make available a functioning judicial system than to an FPS clause, which would include a stable legal framework as part of *legal* protection and security.

In any event, when deciding claims in relation to failures to provide legal protection and security, arbitral awards contain little references to due diligence.[116] This is understandable and logical, since the obligation is one that relates to the acts of the State itself or a State organ which would breach the FPS standard, not the responsibility of the State to act in relation to acts of third parties which have caused harm to the investor or investment. Such obligation, in terms of the standard applied, thus is similar to the obligation to make available a functioning court system, which is not tested against to the due diligence standard. This is also why due diligence in relation to FET, to which the notion of *legal* protection and security bears much resemblance is limitedly applicable.

C. Due Diligence and Fair and Equitable Treatment

Due diligence is also occasionally referred to when assessing alleged breaches of the fair and equitable treatment standard ("FET").

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113. CME Czech Republic B.V, UNCITRAL, Partial Award, at para 613.

114. *See* NEWCOMBE & PARADELL, *supra* note 80, at 312.

115. Elettronica Sicula S.P.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, para. 109 (July 20).

116. *See generally* Pisillo-Mazzeschi, *supra* note 16.

The fair and equitable treatment standard is a flexible and rather vague concept. However, it is generally accepted that the legitimate expectations of the foreign investor forms a key element of fair and equitable treatment,[117] as are obligations of due process, transparency, freedom from coercion and harassment, stability, predictability and a general duty of due diligence.[118] Fair and equitable treatment also includes the prohibition against denial of justice.[119]

Because FET requires at least treatment in accordance with the IMS as understood in general international law,[120] there is here again a certain overlap between the two standards, notably in relation to the due diligence obligations of States in relation to FPS. As the Tribunal in *Lauder* explained: "fair and equitable treatment is related to the traditional standard of due diligence."[121] Also, there is a certain overlap between FET and *legal* protection and security.[122] This explains why in several cases, Tribunals have held that if a State breaches the fair and equitable treatment standard, this automatically entails a breach of FPS, when the latter is interpreted as *legal* protection and security,[123] or have dealt with both standards at the same time.[124] In such cases, Tribunals

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117. NEWCOMBE & PARADELL, *supra* note 80, at 279.

118. *Id.* at 277; *see* TUDOR, *supra* note 5, at 157, 186; *see also* Katia Yannaca Small, *Fair and Equitable Treatment Standard: Recent Development*, *in* STANDARDS OF INVESTMENT PROTECTION 111, 118 (August Reinisch ed., 2008).

119. *See* Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/16, para. 262 (July 6, 2012); *see also* DOLZER & SCHREUER, *supra* note 81, at 163.

120. NEWCOMBE & PARADELL, *supra* note 80, at 277.

121. Lauder v. Czech Republic, UNCITRAL Arb., Final Award, para. 292 (Sept. 3, 2001).

122. TUDOR, *supra* note 5, at 157.

123. Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, para. 408 (July 14, 2006). Note that Argentina filed a claim in annulment of the award, including on the equation made by the tribunal between the two standards, and the lack of reasoning in support of this. This was rejected by the Ad Hoc Committee on the ground that, even though this finding may constitute an error in law, annulment of an award is not possible on such a ground only. Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, paras. 183-84 (Sept. 1, 2009). *See also* Occidental Exploration and Prod. Co. v. Republic of Ecuador, UNCITRAL Arb., LCIA Case No. UN3467, Final Award, para. 187 (July 1, 2004) ("The Tribunal accordingly holds that the Respondent has breached its obligations to accord fair and equitable treatment under Article II (3) (a) of the Treaty. In the context of this finding the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment").

124. *See* Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, paras. 303-403 (Jan. 17, 2007) (stating that the Tribunal deals with both standards of treatment jointly, without distinguishing or identifying a specific standard necessary to

have not identified a specific standard necessary to violate the FPS standard of treatment, which may be explained by the fact that if the tribunal has already found a breach of the FET standard, a finding that the State has also breached it obligation to provide the investor or the investment with *legal* protection and security is unlikely to affect the outcome of the decision.[125]

More generally, references to due diligence in Tribunal's discussion of the FET standard are rather sparse, such references being only made when the FET standard is jointly discussed with the FPS standard. Indeed, Tribunals refer most often to the "legitimate expectation" part of the FET standard, rather than due diligence. It is therefore difficult to understand how the general duty of due diligence would operate under FET, besides situations which are also covered by the FPS standard of treatment. There is however one case in which this was discussed. In *Suez*, the Tribunal defended relying on the concept of "legitimate expectations" rather than "due diligence" in applying the FET standard, but did not rule out that "due diligence" forms part of FET as well, as had been argued by Arbitrator Pedro Nikken in a separate opinion:

> A State may violate an investment treaty's fair and equitable treatment standard in many ways and with many differing consequences. The majority's finding in the present cases that Argentina's various actions violated the fair and equitable treatment standard by frustrating the Claimants' legitimate and reasonable expectations is by no means a rejection of the conclusions of our esteemed colleague Professor Nikken in his separate opinion to the effect that Argentina failed to exercise due diligence in certain elements of its treatment of the Claimants' investments. The majority agrees that Argentina failed to exercise due diligence, as that concept is generally understood, and that such failure resulted in a violation of the treaties' fair and equitable treatment standard. As discussed earlier in this Decision, the majority of the Tribunal finds that Argentina's actions also frustrated the Claimants' legitimate expectations and it has concluded that it is more appropriate to base its decision on that rationale.[126]

In a separate opinion, Arbitrator Pedro Nikken, criticizing the use

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violate that the FPS standard of treatment); Compañiá de Aguas del Aconquija S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, paras. 7.4.15-17, 11.1 (Aug. 20, 2007). For a discussion, see OECD, Fair and Equitable Treatment Standard in International Investment Law 24 (OECD Working Papers on Int'l Inv., 2004/03), *available at* http://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf (last visited Apr. 1, 2015).

125. NEWCOMBE & PARADELL, *supra* note 80, at 277.

126. Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, para. 248 (July 30, 2010).

of the "legitimate expectations" of foreign investors as a standard in relation to FET, argued that generally, FET represents a standard of conduct for States, which should be tested against a due diligence standard:

> However, even as a current minimum standard, and even within the concept that has prevailed in recent doctrine and in decided cases in the sense that fair and equitable treatment is different from and independent of the customary minimum standard, it could never lose its essence as a standard of conduct or conduct of the State with respect to foreign investments, which should not automatically translate into a source of subjective rights for investors. The BITs contain a list of the States' obligations regarding their respective investments, not a declaration of rights for investors. Regardless of what is considered the autonomy of fair and equitable treatment with respect to the minimum standard, *fair and equitable treatment represents the degree of due diligence that the States Parties to the BIT mutually pledged to observe with respect to the investments from nationals of both States.* The language used in the French Treaty reinforces this interpretation, since the reference to the principles of international law can only be understood, at least, by prescribing an obligation of due diligence.[127]

Nikken argued further that the due diligence standard should be assessed by reference to "the canons of good governance" and "the propriety of the government '*of a reasonably well-organized modern State*.'"[128]

The idea developed by Nikken essentially is to return to the customary norms on the treatment of aliens, which I have discussed above, in order to define the content of FET. In doing so, Nikken extracts the application of the due diligence standard in customary norms, and transposes its application more generally to FET, which he considers to be a norm, which applies only to the conduct of States, and could not attract any obligation of result. If one considers FET to have its roots in the customary norms relating to the treatment of aliens and the IMS, the due diligence standard indeed would be applicable, at least in certain situations, which are similar to those discussed in relation to FPS. The problem however is that several tribunals, including the Tribunal in *Suez*, – rightly or wrongly – have interpreted FET as going beyond the IMS, in which case the due diligence becomes of little or

127. Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Separate Opinion of Arbitrator Pedro Nikken, para. 19 (July 30, 2010).

128. *Id.* para. 20 (internal footnotes omitted).

subsidiary relevance, as is implicit in the reasoning of the *Suez* Tribunal cited above. That is why there is little explicit reference to the standard of due diligence in this context in arbitral decisions. Despite the occasional references to due diligence standard in relation to FET in the arguments raised by the parties,[129] discussions of the link between FET and due diligence are uncommon in arbitral awards, which tend to limit the use of the due diligence standard in relation to FET only to those situations where there is an obvious overlap with FPS.

IV. THE CONTENTS OF THE DUE DILIGENCE STANDARD

How the due diligence standard is applied is still subject to much debate and tribunals are often sparse in giving explanations in this respect. In general, one could describe it as an obligation for the State to take all measures it could reasonably be expected to take in order to prevent the occurrence of damages to the foreign investor and its investment.[130] In case law, what would be required from a 'diligent' State is not explained in detail and sometimes even absent.[131] This is not surprising since it is difficult to define the standard in abstract terms, as was moreover acknowledged by the Seabed Disputes Chamber in its Advisory Opinion on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*:

> The content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. It may change over time . . . .[132]

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129. See for example the statement by the Claimant, that [the FET] standard requires the government to exercise "vigilance and use due diligence within its political and legal system to protect investments." Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, para. 404 (July 14, 2006). Also, the argument raised by the Claimant in *Biwater Gauff* that "[t]his series of public statements, according to BGT, was designed to destroy, rather than maintain, confidence in City Water and inevitably undermined the investment. This failure to manage the public expectations, and the actions taken to undermine the public's confidence in City Water, together constitute a breach of the fair and equitable treatment standard, in as much as they represent a failure to use due diligence in the protection of BGT's investment, and the departure from BGT's legitimate expectation that the government would at the very least maintain a neutral position and not tarnish City Water's image in the eyes of the public." Biwater Gauff_(Tanzania) Ltd., v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, para. 552 (Jul. 24, 2008).

130. SALACUSE, *supra* note 52, at 217.

131. National Grid v. Argentine Republic, UNCITRAL Arb., Award, para. 189 (Nov. 3, 2008).

132. Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, ITLOS

When the due diligence standard is applied by investment tribunals, references are made to whether the State has "reacted reasonably, in accordance with the parameters inherent in a democratic state,"[133] whether the State had "adopt[ed] all reasonable measures to protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners,"[134] the obligation for the State to "take all measures necessary to ensure the full enjoyment of protection and security of its investments,"[135] whether acts lead to a "manifest lack of due process leading to a breach of international justice,"[136] the requirement for the State to "undertak[e] all possible measures that could be reasonably expected to prevent the eventual occurrence of killings and property destructions,"[137] whether certain conduct "fell well below the standard of protection that the Claimants could reasonably have expected,"[138] the requirement for a State to "take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury,"[139] or the rather circularly formulated need for States "to act to prevent actions by third parties that it is required to prevent."[140]

Although difficult to define in abstract terms, a couple of elements can be derived from the mentioned case law, in order to provide contents to the notion of due diligence. First, reasonableness is a common thread in determining which measures States should take.[141] The term however is, as is the due diligence standard itself, difficult to

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Rep. 2011, para. 117.

133. Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, para. 177 (May 29, 2003).

134. Saluka Invs. B.V. v. Czech Republic, UNCITRAL, Partial Award, para. 484 (Perm. Ct. Arb. 2006).

135. Am. Mfg. & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, para. 6.08 (1997).

136. Saluka Invs. B.V. v. Czech Republic, UNCITRAL, Partial Award, para. 493 (Perm. Ct. Arb. 2006).

137. Asian Agricultural Products Ltd. v. Republic of Sri Lanka, Final Award, ICSID Case No. ARB/87/3, para. 85 (1990).

138. Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, para. 448 (June 1, 2009).

139. El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Award, para. 523 (Oct. 31, 2011).

140. E. Sugar B.V. (Neth.) v. Czech, SCC Case No. 088/2004, Partial Award, para. 203 (Mar. 27, 2007).

141. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 526 (7th ed. 2008); *see generally* Helge E. Zeitler, *The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors*, 3 STOCKHOLM INT'L ARB. REV. 1 (2005).

determine *in abstracto*. Reasonableness indeed implies an evaluation of the measure taken by reference to what could be *expected* from a State. And this precisely is problematic to define, since what could be *expected* from a State cannot be described in general terms, and depends more on the question of whether this can be objectively defined (cf. Section 5). This is why the application of the standard requires a case-by-case analysis. In this respect some indication of the contents of "reasonableness" may be found in the national treatment standard, in the sense that treatment may be considered unreasonable if it is less than is normally provided to nationals.[142] Some tribunals have also posited the need for States to acts "in accordance with the parameters inherent in a *democratic* state,"[143] in order to further delimit what could reasonably be expected from a State.

Secondly, such an obligation only applies when the State has knowledge of the situation, or should be aware of the risk of injury. A certain conduct of a State can, quite logically, only be expected if the State has knowledge of the situation, and the burden of proof in this respect lies with the claimant.[144] A specific request for protection therefore is not necessary, but it will of course not only establish proof of the knowledge, but it will also more easily serve as proof of the bad faith conduct of the State in the absence of any measure taken by the State. This was the case, for example, in *Wena* discussed above. This idea moreover is very much in line with due diligence as understood in international environmental law, to the extent that a State has to act diligently in the event of foreseeable harm.[145]

Thirdly, a State cannot be considered to have acted diligently when the State has acted in bad faith or has knowingly refused to take any measures whatsoever. In that case, indeed, a State will not be able to claim that, being aware of the situation, it has taken reasonable measures to prevent the act or apprehend and punish those responsible for the acts.

142. Zeitler, *supra* note 141, at 16.

143. Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, para. 177 (May 29, 2003).

144. Zeitler, *supra* note 141, at 14.

145. *See* Duncan French & Tim Stephens, *ILA Study Group on Due Diligence in International Law, First Report,* INT'L L. ASSOC. (Mar. 7, 2014), *available at* http://www.ila-hq.org/en/study-groups/index.cfm/cid/1045 (last visited Mar. 30, 2015).

V. THE OBJECTIVITY OR SUBJECTIVITY OF THE STANDARD

A debate exists as to the assessment of due diligence in this context, namely whether it should be subjectively or objectively assessed. Is "all necessary means" objectively definable or should the specific situation of the state be taken into consideration? This discussion exceeds the application of the due diligence standard,[146] but I will focus here only on the assessment criteria of the due diligence standard. Max Huber, in the *British Property in Spanish Morocco* case mentioned before,[147] explained in detail the due diligence standard to be applied, advocating the use of a standard which takes account of the circumstances of the situation and the means available to the State. This statement is worth reproducing *in extenso*:

> Is the territorial State exempt from responsibility if it did what we may reasonably request from it, taking into account the actual situation? Or is the State required to guarantee some degree of security, being responsible for any failure to provide it?
>
> . . . .
>
> To require such means to correspond to the circumstances would impose on the State a burden which it will often not be able to bear. Also, the argument that the vigilance to be exercised must match the importance of the interests at stake has not been accepted. Vigilance, which from the point of view of international law the state is required to guarantee, can be characterized by applying by analogy the Roman law term of *diligentia quam in suis*. This rule, consistent with the overriding principle of the independence of States in their internal affairs, in fact offers States, for their nationals, the degree of security which they can reasonably expect. As long as the vigilance exercised clearly falls below this level compared to nationals of a foreign State, the latter is entitled to consider this to be an injury its interests which should enjoy the protection of international law.
>
> What has been said about the due diligence with respect to general insecurity arising from the banditry, applies a fortiori to the other two situations envisaged above, namely common crimes and rebellion. In the first case, to require a vigilance beyond the *diligentia quam in suis* would require the State to provide special security services to

146. *See* Nick Gallus, *The "Fair and Equitable Treatment" Standard and the Circumstances of the Host State*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION, 223 (Cambridge University Press, 2011); *see also* Nick Gallus, *The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection*, 5 TRANSNATIONAL DISPUTE MANAGEMENT (2006).

147. *See also* Home Frontier & Foreign Missionary Soc'y of the United Brethren in Christ (U.S. v. U.K.), 9 R.I.A.A. 44 (1920).

> foreigners, which certainly would go beyond the scope of accepted international obligations (with the exception of persons having a right to special protection).
>
> In the other case, that of the rebellion, etc., responsibility is limited because the public authority is faced with an exceptional opposition.[148]

Huber distinguished between the due diligence obligations of States in relation to acts committed by individuals against *other States*, which indeed requires States to exercise a specific degree of vigilance which may exceed the means available to the State,[149] and the due diligence obligation of States towards aliens. Huber supported the use of the *diligentia quam in suis* standard, which in essence requires States to act respecting the same standard as they ordinarily observe in relation to their own affairs.[150] This boils down to a *culpa in concreto*.[151] This standard may be contrasted to the standard of a *diligens paterfamilias*,

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148. Original in French ('L'État territorial est-il exonéré, s'il a fait ce qu'on peut raisonnablement lui demander, en tenant compte de sa situation effective? Ou est-il tenu de garantir un certain degré de sécurité, étant responsable de l'incapacité éventuelle de l'assurer? [. . .] Exiger que ces moyens soient à la hauteur des circonstances, serait imposer à l'État des charges auxquelles il ne pourrait souvent pas faire face. Aussi, la thèse que la vigilance à exercer doit correspondre à l'importance des intérêts enjeu, n'a-t-elle pu s'imposer. La vigilance qu'au point de vue du droit international l'État est tenu de garantir, peut être caractérisée, en appliquant par analogie un terme du droit romain, comme une diligentia quam in suis. Cette règle, conforme au principe primordial de l'indépendance des États dans leurs affaires intérieures, offre en fait aux États, pour leurs ressortissants, le degré de sécurité auquel ils peuvent raisonnablement s'attendre. Du moment que la vigilance exercée tombe manifestement au-dessous de ce niveau par rapport aux ressortissants d'un État étranger déterminé, ce dernier est en droit de se considérer comme lésé dans des intérêts qui doivent jouir de la protection du droit international. Ce qui vient d'être dit au sujet de la vigilance due par rapport à l'insécurité générale résultant de l'activité des brigands, s'applique à plus forte raison aux deux autres situations envisagées ci-dessus, savoir: la criminalité de droit commun et la rébellion. Dans le premier de ces cas, une vigilance poussée plus loin que la diligentia quam in suis imposerait à l'État l'obligation d'organiser un service de sûreté spécial pour les étrangers, ce qui dépasserait certainement le cadre des obligations internationales reconnues (en dehors des cas où il s'agit de personnes jouissant en droit d'une protection spéciale). Dans l'autre hypothèse, celle de la rébellion, etc., la responsabilité est limitée parce que la puissance publique se trouve en présence d'une résistance exceptionnelle.' - translation by the author). *See* British Claims in the Spanish Zone of Morocco, 2 R.I.A.A. 644 (U.K.-Spain 1925).

149. *See* Pisillo-Mazzeschi, *supra* note 16, at 31.

150. AARON X. FELLMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW (2011), *available at* http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380 (last visited Mar. 30, 2015); Herbert Hausmaninger, *Diligentia Quam In Suis: A Standard of Contractual Liability from Ancient Roman to Modern Soviet Law*, 18 CORNELL INT'L L.J. 179, 180 (1985).

151. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 210 (1996).

or *culpa in abstracto*,[152] which requires States to act under a certain objective standard, namely that of a *pater familias*. *Diligens paterfamilias* leaves no room for taking the specific means of the State into consideration, since it requires States to act as a reasonable State only, the State equivalent of the *bonus pater familias*.[153]

Certain authors have argued that international law adheres, generally, to the *diligens paterfamilias* standard,[154] which is also supported by certain old cases.[155] In his 1955 Hague Academy Lecture, Freeman noted that the standard of due diligence requires "nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances."[156] This is an "objective" assessment criterion.

The objective standard has however been rejected by several scholars, and arbitrators, which have instead relied on the "subjective due diligence standard," taking into consideration the means at the disposal of the state, and the specific circumstances present in the state.[157] Brownlie for instance, following Max Huber, supported the application of the *diligentia quam in suis* standard. Brownlie considered that, while no all-encompassing definition of due diligence exists, the applicable standard is the standard ordinarily observed by the particular state in its own affairs, which means that variations in the wealth between States can be taken into account.[158] This is in line with the application of the principle other fields of international law, such as international environmental law. The ILC, in its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, for instance considers that the "economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence," in relation to States obligation of prevention, noting at the same time that "a State's economic level cannot be used to dispense the State from its obligation."[159]

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152. *Id.*

153. *Cf.* Hausmaninger, *supra* note 150, at 180.

154. Pisillo-Mazzeschi, *supra* note 16, at 41.

155. *See, e.g.*, H. G. Venable (U.S v. Mexico), 4 R.I.A.A. 229 (Mex.-U.S. Gen. Cl. Comm'n 1927) (referring to governmental action "so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency").

156. Alwyn V. Freeman, *Responsibility of States for Unlawful Acts of Their Armed Force*, 88 RCADI 1955-II, 267, 277-78 (Leiden, Sijthoff, 1956).

157. For an overview, see NEWCOMBE & PARADELL, *supra* note 80, at 310, para. 6.44.

158. BROWNLIE, *supra* note 141, para. 77.

159. U.N. GAOR, 56th Sess., U.N. Doc. A/56/10 (2001) *Draft Articles on Prevention*

Investment tribunals have only very sparsely addressed the question, and only in relation to the application of due diligence under the FPS standard of treatment. Case law thus is very limited on this specific question, which is also the consequence of the little information Tribunals usually give in relation to what the due diligence standard specifically entails. *AAPL v. Sri Lanka* is an exception, in that the Tribunal spent much time on elaborating its understanding of the standard. The Tribunal noted

> A number of other contemporary international law authorities noticed the "sliding scale", from the old "subjective" criteria that takes into consideration the relatively limited existing possibilities of local authorities in a given context, towards an "objective" standard of vigilance in assessing the required degree of protection and security with regard to what should be legitimately expected to be secured for foreign investors by a reasonably well organized modern State.
>
> As expressed by Professor FREEMAN, in his 1957 Lectures at the Hague Academy of International Law:
>
> The "due diligence" is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances.
>
> According to modem doctrine, the violation of international law entailing the State's responsibility has to be considered constituted by "the mere lack or want of diligence", without any need to establish malice or negligence.[160]

Despite references to the "old 'subjective' criteria" of due diligence in that case, more recent cases suggest that the applicable standard is a subjective due diligence standard. In *Lauder*, the Tribunal considered that the FPS obligation "obliges the Parties to exercise such due diligence in the protection of foreign investment *as reasonable under the circumstance*."[161] In *CME*, the Tribunal also explained "a government is only obliged to provide protection which is *reasonable in the circumstances*."[162] The sole arbitrator, Jan Paulsson, in *Pantechniki v. Albania* also unambiguously adopted the subjective assessment method, distinguishing "physical protection and security" from "denial

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of Transboundary Harm from Hazardous Activities, *noted in* commentary to Article 3, para. 13.

160. Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, para. 77 (June 27, 1990) (internal references omitted).

161. Lauder v. Czech Republic, UNCITRAL Arb., Final Award, para. 310 (Sept. 3, 2001).

162. CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Partial Award, para. 353 (Sept. 13, 2001).

of justice," the latter not requiring to take into account the resources of the State, but the former allowing to take account of the resources of the State:

> A failure of protection and security is to the contrary likely to arise in an unpredictable instance of civic disorder which could have been readily controlled by a powerful state but which overwhelms the limited capacities of one which is poor and fragile. There is no issue of incentives or disincentives with regard to unforeseen breakdowns of public order; it seems difficult to maintain that a government incurs international responsibility for failure to plan for unprecedented trouble of unprecedented magnitude in unprecedented places. The case for an element of proportionality in applying the international standard is stronger than with respect to claims of denial of justice.[163]

In *Frontier* however, the Tribunal questioned in an *obiter dictum* whether the principle posited by the Tribunal in *Pantechniki* is applicable in situations not involving violence, without firmly establishing that an objective standard applies.[164]

Despite these ambiguities, the preferable standard is without doubt *diligentia quam in suis*, when one deals with due diligence in relation to physical protection and security. As noted earlier, the application of due diligence in other fields of international law, notably environmental law, allows taking into account the economic and other capabilities of a State. This moreover conforms to the relevance of investor conduct when making the investment, and the expectations of investors. As noted by the Tribunal in *Parkerings* for instance:

> The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment.[165]

Which measures a State ought to have taken, as explained in Section 4, indeed has to be determined by reference to what can be expected from a State, and it would be difficult to accept that a State should provide protection and security to investors beyond the capacity

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163. Pantechniki S.A. Contractors & Engineers v. Republic of Albania, ICSID Case No. ARB/07/21, Award, para. 77 (July 30, 2009).

164. Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award, para. 271 (Perm. Ct. Arb. Nov. 12, 2010), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0342.pdf (last visited Apr. 1, 2015).

165. Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, para 333. (Sept. 11, 2007).

of the State to do so. As noted by Huber, admitting the contrary would require States to organize a special security service for foreign investors,[166] which to date is only accepted in relation to certain specific categories of protection individuals in international law, such as foreign officials.

VI. COMPENSATION FOR BREACHES OF THE DUE DILIGENCE STANDARD

As noted in relation to the customary rules, the responsibility of States for breaching their obligations to exercise due diligence in preventing an injury caused to a foreign investor or investment, or for failing to exercise due diligence in apprehending and punishing the third party responsible for that injury, is not an "indirect responsibility" of the State for the act committed. The act attributable to the State is not the act that has caused harm, but rather the failure to exercise due diligence.

As a consequence, in principle, the compensation awarded to a foreign investor should be to provide reparation for the damage caused by the failure of the State to exercise due diligence, not to provide reparation for the damage cause by the act of the third party, as argued by Max Huber in the *British Property in Morocco* case[167] and the Commissioner in *Janes*.[168] As a consequence, "the measure of damages for which the Government should be liable can not be computed by merely stating the damages caused by the private delinquency of Carbajal."[169] These principles still stand today.[170] This does not imply that the compensation awarded may not take account of the damages caused by the act, but this will depend on the circumstances of each case. Indeed, in principle, the reparation should first of all remedy the obligation breached, which is not the act of the individual, but the obligation of the State to prevent an injury caused to an alien or apprehend and punish the individual responsible for that injury.

The practice of arbitral tribunals does not reveal much in this respect. First, findings of violations of the failure of a State only to exercise due diligence in relation to FPS, IMS or even FET are almost

166. British Claims in the Spanish Zone of Morocco, 2 R.I.A.A. 644 (U.K.-Spain 1925).

167. *Id.* at 709-10.

168. Laura M. B. Janes et al. (U.S. v. Mexico), 4 R.I.A.A. 88 (Mex.-U.S. Gen. Cl. Comm'n 1925).

169. *Id.* at 89.

170. *See* Crawford & Olleson, *supra* note 15, at 454-55.

completely absent. In the majority of the cases, such findings are accompanied by findings of violations of other treaty provisions as well, such as those relating to the prohibition of unlawful expropriations, or other aspects of the FET standard. Then, a finding of a violation of the due diligence obligations of States does not influence the outcome of the decision, nor the calculation of compensation.[171] Secondly, findings of violations of FPS alone are relatively scarce, at least when compared to findings of violations of other treaty standards.[172]

In *AAPL* however, the Tribunal found that the State had failed to exercise due diligence in launching an armed attack causing the destruction of the farm owed by Claimant, and decided to calculate the compensation based on the loss suffered by the Claimant by the destruction of the property, although the Tribunal had not found that the armed forces of the host State were directly responsible for the destruction of the farm.[173] This may seem surprising. However, since the legal basis for equating the compensation to the effective losses suffered from the act itself, and not from the failure to exercise due diligence is not explicitly mentioned, this decision may be read as confirming the principle that the compensation awarded *may* be equivalent to the damage caused by the act, but that this is not automatically the case. In fact, when the failure to exercise due diligence is applied to a failure to prevent the occurrence of harm, such decision is perfectly arguable. However, when the failure to exercise due diligence relates to apprehending or punishing the individual responsible for the act that has caused damage, it seems more appropriate to calculate the compensation differently from the damage caused by the act itself, in line with the principles explained above.

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171. *See* Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, para 731 (Jul. 24, 2008) (where the Tribunal found violation of legal FPS, but acts in question were not considered to have 'caused any quantifiable financial or commercial loss'); *see also* Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, paras. 448, 450 (June 1, 2009) (the Tribunal found violation of FPS standard and due diligence obligation of State, but since it also found the State had made an unlawful expropriation, breached FET standard and subjected the investment to unreasonable measures, there was no influence on compensation). Further, the Tribunals found that a violation of FET entailed a violation of FPS, and again, there was no influence on the calculation of compensation. *See* Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, paras 408-09 (July 14, 2006); *see also* Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, paras 178-80 (July 30, 2010).

172. For instance, in *Lauder*, *Saluka*, or *Rumeli Telekom*, no violation of the due diligence obligations of the State in relation to FPS was found.

173. L. F. H. Neer & Paulene Neer (U.S. v. Mexico), 4 R.I.A.A. 62 (Gen. Claims Comm'n 1926).

CONCLUSION

This article has discussed the role due diligence plays in contemporary international investment law; based not only on recent practice in this respect, but also on the historical roots of the current protection standards in international investment law. Such historical overview indeed has been useful to describe the contours of the application of due diligence in several standards of treatment, such as FPS, the IMS and FET.

The article has demonstrated that especially in relation to FPS, due diligence performs an important function. This function can be traced back to the historical interpretations of the obligations of States in respect to the treatment of aliens more generally. In particular, while case law suggests that the *acts of State organs*, which result in a deprivation of the protection and security to be guaranteed to aliens, and thus foreign investors and their investments, are wrongful as such without the need to enquire whether the State organ in question was diligent or not, the principle of due diligence applies fully to the state's duty to protect foreign investments from acts of third parties. Indeed, FPS requires the State to exercise due diligence in providing physical protection and security to foreign investments and investors from acts of third parties, which does not entail any form of strict liability for the host State. Such obligation also applies to the host State generally, including in cases of armed conflict, civil strife, revolution or natural disasters. The principle that a State is also under an obligation, in case of harm caused by acts of third parties to apprehend and punish those responsible for the acts, is considered part of the FPS standard, which implies that States should take all reasonable measures a diligent State would take, to apprehend and punish those responsible.

Whether viewed as part of the FPS or the IMS, it is clear that States have an obligation of due diligence in the administration of justice, also very often in relation to criminal acts towards the foreign investor. This principle is similar to the obligation of due diligence as understood in FPS, particularly in relation to the State's obligation to act with due diligence in apprehending and punishing those responsible for the harm. However, it applies more generally to making a functioning judicial system available to foreign investors. The obligation in making available an adequate judicial system is however not assessed by applying the due diligence standard.

In relation to the FET, this article has argued that because the FET requires at least treatment in accordance with the minimum standard of treatment as understood in general international law, there is a certain

overlap between the two standards, notably in relation to due diligence. References to due diligence in Tribunal's discussion of the FET standard are rather sparse, such references being made only when the FET standard is jointly discussed with the FPS standard.

As noted in relation to the customary rules, the responsibility of States for breaching their obligations to exercise due diligence in preventing an injury caused to a foreign investor or investment, or for failing to exercise due diligence in apprehending and punishing the third party responsible for that injury, is not an "indirect responsibility" of the State for the act committed. The act attributable to the State is not the act that has caused harm, but rather the failure to exercise due diligence.

In respect to the question of how the due diligence standard is applied, although it is not only impossible to define the standard in abstract terms, Tribunals require States to have knowledge of the situation and to react to that situation by taking reasonable measures. What could be *expected* from a State also cannot be described in general terms, and depends on the question whether this can be objectively defined. In that respect, I have argued that the preferable standard is without doubt *diligentia quam in suis*, which allows the taking into consideration of the specific circumstances of the cases and the means available to the State.

As far as compensation is concerned, this article has explained that compensation awarded to a foreign investor should be to provide reparation *for the damage caused by the failure of the State to exercise due diligence*, not to provide reparation for the damage cause by the act of the third party. The practice of arbitral tribunals however does not address this question in detail, notably because findings of violations of the failure of a State to exercise due diligence in relation to FPS, IMS, or even FET only are almost completely absent. There is however no reason to depart from this principle, established since long in customary law, and in line with the wrongful act in question, which is not the act that has caused harm, but rather the failure to provide protection and security.

"SOFTNESS" IN INTERNATIONAL INSTRUMENTS: THE CASE OF TRANSNATIONAL CORPORATIONS

Harri Kalimo & Tim Staal[†]

CONTENTS

INTRODUCTION 365

A. Prelude—Chevron Case and the Challenge of Governing Transnational Corporations Through "Soft Law" 365

B. The Thesis and the Objectives 367

I. THE CHALLENGE OF GOVERNING TRANSNATIONAL CORPORATIONS ("TNCS") 368

A. Business Across the Borders 368

B. The Sanctuary of Multiple Jurisdictions 368

C. Resistance Towards the Implementation and Reform of Domestic Law and International Law 370

D. Domestic Law and the Legal Void in Regulating TNCs – Host State and Home State Dimensions 371

E. International Law and the Legal Void in Regulating TNCs 372

1. Lack of International Law (almost) Directly and Specifically Applicable to TNCs 372

2. Poor Domestic Implementation and Enforcement of International Law – Back to Square One? 374

3. Nigerian Farmers v. Shell – The Absence of International Law in "Home State" Cases 376

F. "Hard Law" as an Insufficient Means to Address TNCs 377

II. FILLING WITH "SOFT LAW" THE VOID LEFT BY "HARD LAW"? 379

A. Turning a Political Necessity into a Virtue – "Soft Law" as an Alternative or Precursor to "Hard Law" 380

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B. Unique Qualities of "Soft Law" – A Complement to "Hard Law" 381

C. Counter-productive Uses of Soft Law – The Antagonist Approach 383

D. Interactions Between "Soft Law" and "Hard Law" 384

III. FROM THE DEFICIENT NOTION OF "SOFT LAW" TOWARDS AN ACCURATE CONCEPTUALIZATION OF SOFTNESS 384

A. Definitional Deficiencies of "Soft Law" 384

1. An Incorrect Concept 384

2. Too Generic a Concept 386

B. The Lay of the Land in the Theory of "Soft Law" 387

1. The Three Dimensions of Softness 387

2. Softness v. Effectiveness 389

3. Instrumentum and Negotium 390

C. Making Use of the "Soft Law Theories" 391

D. Towards a More Accurate Conceptualization of Softness in Instruments 393

E. Applying the Tool to Public Legal Instruments, Public Non-Legal Instruments and Private Instruments 398

IV. APPLYING THE CONCEPTUAL TOOL ON SOFTNESS TO PRACTICAL CASES 402

A. Public Legal Instruments 403

1. General Observations 403

2. The Human Rights Covenants 405

3. Environmental Agreements 408

4. Concluding Perspectives on Public Legal Instruments 410

B. Public Non-Legal Instruments 411

1. General Observations 411

2. The OECD Guidelines and National Contact Points 412

3. The United Nations Guiding Principles on Business and Human Rights ("U.N. Guiding Principles" or "Principles") 416
4. Concluding Perspectives on Public Non-Legal Instruments 421
C. Private Instruments 422
1. General Observations 422
2. The United Nations Global Compact ("U.N. Global Compact" or "Global Compact") 424
3. The Forest Principles of the Forest Stewardship Council 427
4. Concluding Perspectives on Private Instruments 432
V. CONCLUSIONS—THE MYRIAD EFFECTS OF SOFTNESS 432
A. Effective Softness? 433
B. Effective Hardness? 435
1. Over-reaching 435
2. Under-reaching 436
C. Softness – A Combination of Multiple Dimensions 438
D. Systemic Coherence 440
E. Prospects of Governing TNCs with "Soft Law" 440
1. "Soft law" as a Misnomer – But Softness as an Asset 440
2. Soft Instruments as Complements and Alternatives to "Hard Law" 441
EPILOGUE – REVISITING THE *CHEVRON* CASE 443

INTRODUCTION

A. Prelude—Chevron Case and the Challenge of Governing Transnational Corporations Through "Soft Law"

After eighteen years of litigation, on February 14, 2011 an Ecuadorian judge ordered the oil conglomerate Chevron to pay eighteen

billion dollars in damages, "the largest judgment ever awarded in an environmental lawsuit,"[1] in the oil contamination case *Afectados* ("the Affected") *v. Chevron.*[2] The judgment was affirmed on appeal a year later,[3] yet the case is far from over. The liable parties remain to be called to account and the environmental damage is still to be remedied. Chevron no longer has considerable assets in Ecuador;[4] it has lodged an appeal with the Ecuadorian Supreme Court, and a United Nations Commission on International Trade ("UNCITRAL") arbitration before the Permanent Court of Arbitration ("PCA") in The Hague has witnessed a number of interim awards in favor of Chevron.[5] In the media, the case has been described as a local plaintiffs' apparently fruitless legal struggle in a society with a corrupt judiciary and political and economic dependence on foreign oil companies.[6]

The *Chevron* case evidences the difficulties in properly governing transnational corporations ("TNCs"), sometimes even to prevent the most egregious of abuses. Multiple international and domestic laws may be applicable, but that often seems detrimental rather than helpful. Weaknesses in the content, implementation and enforcement of laws may allow the politically and economically powerful parties to dominate the situation. Thus, in cases such as *Chevron,* alternative means of governance are desperately needed to address the failures of

1. *See* Patrick Radden Keefe, *Reversal of Fortune,* NEW YORKER (Jan. 9, 2012), *available at* http://feeds.newyorker.com/magazine/2012/01/09/reversal-of-fortune-patrick-radden-keefe (last visited Apr. 1, 2015) [hereinafter *Reversal of Fortune*].

2. *See generally* Aguinda y Otros v. Chevron Corp., (2011) Trial No. 2003-0002, Provincial Court of Justice of Sucumbios (Ecuador), *available at* http://chevrontoxico.com/assets/docs/2011-02-14-Aguinda-v-ChevronTexaco-judgement-English.pdf (last visited Apr. 1, 2015).

3. *See generally* Aguinda y Otros v. Chevron Corp., (2012) Case No. 2011-0106, Provincial Court of Justice of Sucumbios (Ecuador), *available at* http://chevrontoxico.com/assets/docs/2012-01-03-appeal-decision-english.pdf (last visited Apr. 1, 2015).

4. *See* Patrick Radden Keefe, *Why Chevron Will Settle in Ecuador*, NEW YORKER (Jan. 4, 2012), *available at* http://www.newyorker.com/online/blogs/newsdesk/2012/01 /why-chevron-will-settle-in-ecuador.html (last visited Apr. 1, 2015).

5. *See generally* Chevron Corp. & Texaco Petroleum Corp. v. Republic of Ecuador (U.S. v. Ecuador), Case No. 2009-23 (Perm. Ct. Arb. 2013) ("Fourth Interim Award on Interim Measures"); Chevron Corp. & Texaco Petroleum Corp. v. Republic of Ecuador (U.S. v. Ecuador), Case No. 2009-23 (Perm. Ct. Arb. 2012) ("Third Interim Award on Jurisdiction and Admissibility"). The case is still pending at the moment of publication. Chevron's main argument is that its due process rights were denied before the Ecuadorian courts because of undue influence on the judiciary by the Ecuadorian government. The arbitral tribunal still has to decide on the merits whether the issuing of the Ecuadorian judgment was in violation of the investment agreement.

6. *See Reversal of Fortune*, *supra* note 1.

classic international and domestic laws in protecting the environment and human rights. "Soft law" is then often hailed as the remedy. Chevron, for example, is indeed an active participant in several voluntary initiatives and schemes, such as the Social Responsibility Group of the International Petroleum Industry Environmental Conservation Association ("IPIECA").[7] Chevron was also one of the companies consulted during the drafting of UN Special Representative John Ruggie's UN Guiding Principles on Business and Human Rights.[8]

Proposing "soft law" as the solution in more effectively governing transnational giants such as Chevron leads, however, to a fundamental conundrum: it remains quite unclear what the notion of "soft law" entails, and why and how it could be able to provide an adequate policy response. The objective of this paper therefore is to clarify the discussion through a detailed theoretical analysis of "soft law," and to test the findings in the practically pivotal area of the environmental and human rights conduct of TNCs.

B. The Thesis and the Objectives

This paper claims, using the fields of environmental protection and human rights as examples, that *"soft law" is conceptually and substantively inadequate and misleading in filling the voids left by classic "hard law" in governing TNCs. A reconceptualization of, and a more systematic approach to, soft instruments is required if they are to play a constructive part in filling the void.*

The paper proceeds in five steps to prove its thesis and to propose remedies to the identified shortcomings. The first objective is to show that what has been called classic "hard law" – state laws and the formal sources of international law – seems to fail in adequately governing TNCs. Second, the paper explains why other, "soft law" instruments are believed to address the void, but reveals as the third step that the current way of understanding such other, "soft law" instruments is inadequate and too general for assessing the successes or failures of such a very diverse group of instruments. The paper therefore seeks as its fourth objective to create and assess better methods for approaching the void, and proposes to that account a tool that re-conceptualizes and systemizes the soft law discourse. Fifth, preliminary tests of such a new

7. *See* INT'L PETROLEUM INDUS. ENVTL. CONSERVATION ASS'N (IPIECA), *available at* http://www.ipieca.org/ (last visited Apr. 1, 2015).

8. Obviously, the "soft law" instruments cited here date from after the relevant facts of the *Chevron* case.

tool are conducted by applying it to practical case studies of TNC behavior in the fields of environmental and human rights protection. The paper concludes by showing how the notion of "soft law" is not only obscure and inadequate, as has been previously contended by other scholars, but that it also is conceptually deceptive in ways that risk leading towards ineffective policy instruments. "Softness" on the other hand does seem instructive for better understanding and reacting to the challenges of managing transnational corporations.

I. THE CHALLENGE OF GOVERNING TRANSNATIONAL CORPORATIONS ("TNCS")

A. Business Across the Borders

The first objective of this paper is to show how classic "hard law" seems to fail in adequately governing transnational corporations (TNCs). The U.N.'s Special Representative on business and human rights has stated that TNCs come in many varieties on a scale from little to almost complete reliance on transnational activities.[9] The qualification of a company as a TNC is thus not based on its legal personality; corporations of various legal forms can be included in the category of TNCs. More important than an undisputable definition of a TNC is, however, that there are important factual and regulatory problems that arise as a consequence of corporations pursuing activities in multiple jurisdictions. Globalization of the marketplace has driven companies to operate across borders. Many companies have become TNCs, and many TNCs have become global actors. This is no longer limited to developed country based businesses; numerous TNCs are Asian or South American companies. With the emergence of multiple trade areas (such as the Association of Southeast Asian Nations ("ASEAN") or the Andean Community in Latin-America) the TNC has truly "gone global."

B. The Sanctuary of Multiple Jurisdictions

The activities of TNCs are spread among the territories of many so-called *host* states. In the majority of cases, and often due to

9. *See* Rep. of the Special Representative of the Secretary General of the U.N. Human Rights Council, 8th Sess., *Protect, Respect and Remedy: A Framework for Business and Human Rights*, para. 6-7, 15, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John G. Ruggie) [hereinafter Ruggie].

requirements in domestic laws, they are nonetheless *based* in a single *home* state. In contrast to domestically operating businesses, however, they do not fall under the complete control of a single jurisdiction, not even that of their home state. They are partially subject to the *domestic* legal systems of their home state and of all the host states in which parts of their fragmented, networked activities take place or have effects.

Domestic laws are to an increasing extent harmonized by international law, such as customary law and conventions. On many issues, however, domestic legal systems still vary considerably, in particular in the implementation and enforcement of law. This variance may create a void: activities in a particular jurisdiction risk escaping the (legal) consequences that would and should have followed. A hazardous part of waste treatment activities may be located in a country where such activities are not subject to (stringent) standards, for example, or labor-intensive work in the textile sector is set up in a country where labor laws permit longer working hours, or the part of operations that is subject to high taxes in the company's *de facto* home state is formally relocated to a tax haven.

Innovative judges may find ways around the issue of multiple jurisdictions with different substantive standards. In some of the recent judgments from the lower court and the court of appeals in the *Chevron* case, for example, the judges were not held back by the fact that neither environmental standards nor legal protection of the areas belonging to indigenous people existed in Ecuador at the time of the tort. Yet the judges reasoned that it was enough that "the existence of damages has been verified," combined with "the right to obtain compensation for damages suffered in its various forms, which was recognized by the Civil Code well before the start of Texpet [Texaco, predecessor of Chevron] activities in the Amazon."[10] Thus, a specific prohibition of an environmental harm was not deemed necessary to establish a tort. In various Western jurisdictions, arguments are being forwarded that the home state standards should apply to "their" TNCs' activities in the host states as well.[11]

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10. *Aguinda*, Case No. 2011-0106, para. 9 (further arguing by the Appeals Court found "the fact that there is no express mention of environmental damages in references to contingent damages in the Civil Code does not mean that environmental damages cannot be contingent damages, nor does it mean that the legislature wished to exclude the possibility that environmental damages could be considered to be contingent damages.").

11. *See generally* Jonathan Verschuuren, *Overcoming the Limitations of Environmental Law in a Globalised World*, *in* A HANDBOOK OF GLOBALISATION AND ENVIRONMENTAL POLICY, SECOND EDITION: NATIONAL GOVERNMENT INTERVENTIONS IN A GLOBAL ARENA 616 (Frank Wijen et al. eds., 2012).

C. Resistance Towards the Implementation and Reform of Domestic Law and International Law

The opportunities of globalization have made many transnationally operating companies extremely wealthy, superseding in economic terms many nation states. The largest TNCs have become especially influential economic and political players, both in the various domestic jurisdictions where they operate, as well as on the global level. For example, many developing countries rely on TNCs to use their resources. The TNCs may thereby have a clear advantage over local actors in influencing the creation or implementation of law by domestic authorities, although this will vary case by case. Unlike local companies, TNCs can often rather easily shift their activities from one country to another, should a local government advocate for instance to more stringently enforce costly environmental standards. TNCs are also often backed by Bilateral Investment Treaties ("BITs"), concluded between their home state and their host state. The BITs may allow the TNCs to threaten to sue the host state for expropriation, should the enforcement of laws risk harming the company economically. Such a BIT is also the basis for Chevron's claim before the PCA in the *Chevron* case.[12]

TNCs—especially when acting together through sectorial global business associations or high-profile events such as the World Economic Forum in Davos[13] — are also a powerful force influencing the decisions made in international organizations and diplomatic negotiations. The scope of the TNCs' organizations gives them a global overview and a strategic grip of the policy discourse that particularly the developing states may struggle to match. This power may allow the TNCs to create or sustain a void on the global level, which moves or keeps parts of the corporations' operations beyond the reach of the domestic and international legal orders.

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12. *See generally* Ecuador Bilateral Investment Treaty, U.S.-Ecuador, Aug. 27, 1993, S. TREATY DOC. NO. 103-15 (1997).

13. The publicly visible tip of the proverbial iceberg of this political influence occurred at the yearly World Economic Forum in Davos, Switzerland. *See* Ellen Paine, *The Road to the Global Compact: Corporate Power and the Battle Over Global Public Policy at the United Nations*, GLOBAL POL'Y FORUM (Oct. 2000), *available at* http://www.globalpolicy.org/images/pdfs/GPF_The_road_to_the_global_compact_October_2000.pdf (last visited Apr. 1, 2015). Incidentally, the 1999 Forum was also one of the earliest occasions where the UN Global Compact was formally and informally discussed. *See id.*

D. Domestic Law and the Legal Void in Regulating TNCs – Host State and Home State Dimensions

The ability of the TNCs to escape full regulatory control and to exert political pressure on decision makers clearly creates the risk of a legal void.[14] This paper defines a legal void as *a regulatory situation in which a TNC behavior, permitted in a host state, would have been in violation of the laws of the TNC home state or of international law.* The legal void may be viewed as part of a (wider) policy void, whereby the public policy objective on the particular question is not reached.

The legal void reveals itself in a slightly different fashion in the home states (where the company is incorporated) than in the host states (where the TNCs operate). As De Feyter submits, "developing and transition countries [i.e. often the '*host states*'] compete to attract foreign investment and technology to exploit natural resources, and are often reluctant to impose human rights and other conditions on foreign companies."[15] In the case of developing country host states, there thus may be a system of laws that is applicable—the problem is that it either sets very low standards (in which case the legal void is qualitative) or it does not properly apply the higher standards (in which case the legal void is one of enforcement).

On the other hand, De Feyter continues, "[t]he *home state* is faced with the difficulty that, in principle, the reach of domestic law is limited to its own territory."[16] To overcome the limits of home country jurisdiction, some states exceptionally recognize universal or extra-territorial civil jurisdiction over torts outside their territory.[17] However, the potential of such extra-territorial jurisdiction is for various reasons quite limited.[18] Suffice it to say here that international law allows extra-territorial (or universal) jurisdiction only for a few crimes under international customary law. These offenses may be enforced by any state(s) regardless of their ties with the offense.[19]

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14. The UN Guiding Principles on Business and Human Rights speak of "governance gaps created by globalization." *See* Ruggie, *supra* note 9, at 3.

15. Koen De Feyter, *Globalisation and Human Rights*, *in* INTERNATIONAL HUMAN RIGHTS IN A GLOBAL CONTEXT 51, 81-82 (Felipe Gómez Isa & Koen De Feyter eds., 2009).

16. *Id.* at 82 (emphasis added).

17. *See generally* Alien Tort Statute, 28 U.S.C. § 1350 (2011).

18. *See generally* Donald F. Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 142-63 (2006).

19. Universal civil jurisdiction of U.S. courts remains nonetheless a tool of at least some usefulness for the most gruesome abuses that remain unprosecuted in the states where they occur.

Another possibility to overcome the home state problem is the active nationality principle, which allows a state to exercise prescriptive and adjudicative jurisdiction over its nationals for offenses they commit abroad. In practice, however, states are not likely to use this option more than sparsely, and have done so in the past only for a limited number of crimes. An important reason for this is that it conflicts with competing jurisdictional claims of other states, primarily the territoriality principle. Another reason is that international law does not allow states to enforce such jurisdiction abroad, for example to collect evidence or to make arrests.

E. International Law and the Legal Void in Regulating TNCs

If there is a void in domestic law regulating TNC activities, one might assume that *international* law could better succeed in addressing this distinct group of actors. Surely international law, which can potentially contain universal or near-universal rules,[20] could help in filling the void left by domestic law. In addition, it could be argued that the international legal order is positioned 'close' to the transnational sphere, where TNCs themselves operate.

There are four ways in which international *human rights* law may apply or be applied to TNCs[21]: (1) it can be applied directly, (2) almost directly, (3) transposed into national law or (4) applied indirectly. In international *environmental* law, the picture is somewhat different, because directly and almost directly applicable international law is practically non-existent. The application of most international law to individuals depends on transposition or indirect application. Particularly those two means of application do not overcome a number of obstacles to effectively regulating TNCs through international law. As noted earlier, the matter is elaborated here through the examples of international environmental and human rights law.

1. Lack of International Law (almost) Directly and Specifically Applicable to TNCs

In contrast to states and intergovernmental organizations, TNCs are generally not considered subjects of international law, and are as such

20. *See generally* Jonathan Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993).

21. This section uses the taxonomy suggested by John H. Knox. *See generally* John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1 (2008).

not directly bound by most of it.[22] TNCs entertain only certain rights and have a limited set of obligations[23] on the basis on international law directly. These rights and obligations are similar to those directly applicable to all private actors.[24] Direct applicability of international law entails that both national judicial organs of home, host and potentially other states, as well as international tribunals, enforce the international law obligations directly, even without such provisions being transposed into national law.[25] The direct applicability of international law to the conduct[26] of TNCs as private actors is limited to a few international human rights related crimes, such as genocide and crimes against humanity, based on customary international law.[27] As mentioned above, universal jurisdiction to enforce such obligations is the least controversial.

There is another set of obligations that, in Knox's terminology, is applied "almost directly" to private actors. These obligations are not directly applicable, but they specifically instruct states—including dualist states—how to place requirements on private actors and how to enforce them through domestic laws. The transposition of such provisions is thus strictly predetermined.[28] The Convention Against Torture[29] and the Convention on Child Labor[30] contain examples of

22. P.A. NOLLKAEMPER, KERN VAN HET INTERNATIONAAL PUBLIEKRECHT 58-59 (5th ed. 2011). For human rights specifically see, e.g., Robert McCorquodale, *Corporate Social Responsibility and International Human Rights Law*, 87 J. BUS. ETHICS 385 (2009).

23. If a legal provision requires an action or inaction from an actor, it is a legal obligation.

24. *See* Knox, *supra* note 21, at 2 (speaking generally of *private duties*).

25. However, the question of extraterritoriality arises in the context of applying it in home states, however, *see infra* Section I (E)(2).

26. The present paper does not focus on the *rights* of TNCs.

27. In the words of the human rights scholar John Knox, "[v]irtually all of these duties are found in international criminal law. The paradigmatic example is the Genocide Convention, which states that 'genocide . . . is a crime under international law' that the parties 'undertake to prevent and to punish,' through both domestic tribunals and 'such international penal tribunal as may have jurisdiction.'" Knox, *supra* note 21, at 28. These provisions are not only directly targeted at, but also internationally enforced upon individual parties, including TNCs. *See id.* Direct applicability to companies is sometimes seen to be contrary to the basic *consensual* premise of international law. *See id.* How can TNCs have obligations on the basis of international law to which they have not consented?

28. *Id.* at 28-29. The obligations concern duties, such as the prohibitions on slavery (Supplementary Convention on the Abolition of Slavery the Slave Trade, and Institutions and Practices Similar to Slavery, April 30, 1956) and torture (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984). The parties to these conventions are states that are obliged to make slavery and torture criminal offences under their domestic laws and to enforce them upon private parties. *Id.*

29. *See* Knox, *supra* note 21, at 28-29.

such "almost directly applicable international law." However, the limited number of these kinds of provisions leaves many parts of the legal void uncovered. Another reason for the void is that the provisions do not tend to address the behavior of TNCs specifically.[31]

As far as the international obligations that are placed "almost directly" upon the individuals are specific, they *de facto* create quasi-universal domestic criminal law. In other words, the global application is decentralized, so that the direct applicability, and almost direct applicability, approaches can make good use of domestic courts' enforcement capacities, which are far superior to those of international judicial institutions. Political will permitting, this seems the most promising international law track to pursue in governing TNCs. It could in theory combine a universal and precise prescription of obligations specifically for transnational commercial activities with the high enforcement capacities of domestic authorities. A contracting state would not fulfill its own international obligations, should it not enforce the provisions against TNCs under its jurisdiction.

2. Poor Domestic Implementation and Enforcement of International Law – Back to Square One?

The third and fourth types of international law that deal with the internal policies of developed western states, including international human rights law and international environmental law, are not directly applicable to TNCs.[32] International treaty provisions need to be properly transposed into the domestic legal system in order to create the intended legal effect on the TNCs. The states often retain a large measure of freedom in this respect. For example, many environmental treaty provisions, such as the provisions in the Montreal Protocol on the downscaling of the production of ozone depleting substances, must be first transposed into domestic law and then properly implemented if a state is to meet its obligations under the treaty. The treaty will in this way become binding, not only on the state in question, but also in the form of national law on those operating a production facility of ozone

30. Worst Forms of Child Labour Convention, June 17, 1999, 87 ILO 182.

31. *See* INT'L CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE, 1992, *reprinted in* INT'L OIL COMPENSATION FUNDS, LIABILITY AND COMPENSATION FOR OIL POLLUTION DAMAGE: TEXTS OF THE 1992 CONVENTION, THE 1992 FUND CONVENTION AND THE SUPPLEMENTARY FUND PROTOCOL (2011), *available at* http://www.iopcfunds.org/uploads/tx_iopcpublications/Text_of_Conventions_e.pdf (last visited Apr. 1, 2015) [hereinafter CLC] (for an example of the latter)

32. On indirect applicability, see *infra* note 33.

depleting substances within the jurisdictions.

The obligation to incorporate and enforce the international norm rests on the states and it is left to the state in question to decide exactly how it will incorporate and enforce the international law provisions. This is problematic if the content of the international norm is too vague to establish clearly whether a state has failed to discharge its duties or not. This is often the case in international human rights law and international environmental law.

Finally, international law may also be indirectly applicable on TNCs. Indirect applicability means that the (existing) laws of the domestic legal system are construed, i.e. interpreted in a manner that is as much in conformity with international law as possible.[33] Most of the international human rights law and international environmental law can be considered indirectly applicable.[34]

For example, state parties must take the above noted provisions of the Montreal Protocol on the downscaling of the production of ozone depleting substances duly into consideration in interpreting their relevant domestic norms, to be consistent with their obligations under the treaty. The interpretation will also affect the TNCs operating within the jurisdiction.

There is certain hierarchy in the way that domestic courts rely on direct and indirect applicability of international law. In striving to achieve conformity with the international norm, the courts give priority to consistent interpretation, i.e. indirect applicability. Only if the domestic law is so inconsistent with international law that it is not reconcilable by favorably interpreting domestic law, will the courts rely on international law directly.[35] Indirect applicability of international law is thus the primary means of trying to fill in the gaps of domestic law on TNCs.

However, the value added of all the not-directly-applicable

33. *See* André Nollkaemper & Gerrit Betlem, *Giving Effect to Public International Law and European Community Law Before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation*, 14 EUR. J. INT'L L. 569, 582 (2003).

34. The two general international human rights conventions—the International Covenant on Civil and Political Rights, December 16, 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, December 16, 1966 (ICESCR)—are prominent examples of international law obligations that apply indirectly to TNCs. The same goes for international obligations on states in the realm of environmental protection: they ultimately have some impact upon the legality of natural and legal persons' behavior. This is true for both monist and dualist states.

35. R.H. LAUWAARS & C.W.A. TIMMERMANS, EUROPEES GEMEENSCHAPSRECHT IN KORT BESTEK 100 (4th ed. 1997); *see* Nollkaemper & Betlem, *supra* note 33, at 569.

provisions of international law in diminishing the void left by domestic law is often quite limited. The very same "host state problem" that was explained for law of purely domestic origin resurfaces, unsurprisingly, in the transposition, implementation, and interpretation of international obligations in domestic law.[36] The broad and generic language of international agreements often leaves states ample room for discretion in incorporating international law into domestic legislation, and even more in enforcing it. The TNCs are able to exert their clout as with any other domestic law. The *in*direct application of interpreting international law by courts would be in a better position, should the courts be more resilient to (external political) pressure than the legislature. This is not necessarily the case in practice, however. Yet even where free from external pressures, the fragmented, transboundary nature of TNC activities may in the end preclude any nation state—or multiple states—from effectively enforcing an international obligation.[37]

The international law obligations are thus rarely globally *directly* and specifically *applicable* to TNCs. The policy void of TNCs cannot be fully and effectively addressed through present international law.

3. Nigerian Farmers v. Shell – The Absence of International Law in "Home State" Cases

The *Nigerian Farmers v. Shell* case is a good example of how international law is still absent in "home state" court cases that involve "home state" TNCs. In that case, four inhabitants of Oruma (Nigeria) sued Shell and its subsidiary companies before a civil court in the Netherlands, *i.e.* the "home state" of Shell.[38] The case concerned an oil leakage from a Shell pipeline that had, according to the plaintiffs, caused damage to the local environment and to the incomes of fishermen and farmers. The domestic court in The Hague[39] decided that according to the Dutch conflict of laws rules on tort cases, it had to apply Nigerian law in this dispute. Indeed, the case is a classic attestation of the home state problem, where only the below-par developing country standards are applied to TNCs.

Having decided that Nigerian law was applicable, the Dutch court

36. Questions relating to the monistic versus dualistic systems in transposing international law are left aside here.

37. De Feyter, *supra* note 15, at 81-82.

38. Milieudefensie v. Royal Dutch Shell PLC & Shell Petroleum Development Company, Merits Decision of 30 January 2013 (LJN: BU3535) [Language: Dutch].

39. To be clear, this is not one of the Hague international courts and tribunals.

made another important procedural decision: it denied the plaintiffs access to documents solely in possession of Shell *cum suis,* even though the documents could have given further insight into the causes and consequences of the oil leakage. The court concluded that Shell and its Nigerian daughter company had, on the face of the evidence already available to the court, not acted in violation of any obligations under Nigerian law.

In making its decision, the court did not check whether Nigerian law was in accordance with international environmental, human rights, or labor law. For example, the court concluded that under Nigerian law, an oil company does not seem to be under an obligation to replace deteriorated pipelines. Yet, the court did not examine whether there were international rules that would have forced Nigeria to enact such an obligation, or that would have mandated it to interpret Nigerian law in accordance with international law. The obligation would have existed in the legal system of The Netherlands and other developed countries. The court also disregarded all potential violations of international law in concluding that under Nigerian law, only the owner of a polluted fishing pond or property was able to claim losses, and that future losses could not be claimed.

The stance taken by the Dutch court seems understandable from the viewpoint of sovereignty. It would be quite far-reaching if a court were to rule on the compatibility of another country's law with international standards. It is also doubtful whether any international standards were sufficiently precise so as to enable a meaningful conformity check. Still, it seems somewhat illogical that as soon as a foreign law becomes applicable, international law will no longer be of relevance. And what would be the difference between applying foreign law and applying international norms to which the foreign state has consented? Whatever the merits of the above considerations, it seems unlikely both in practice and in legal theory that international law will fill the legal void in cases like this.

F. "Hard Law" as an Insufficient Means to Address TNCs

To summarize, the current framework of domestic law and international law appears incapable of fully managing the effects of globalization, in particular the global nature of commercial activities. The variation in domestic laws, together with the TNCs' economic and political power and ability to partially avoid falling under the laws of a specific state, allows the corporations to operate to some degree in a legal void. As defined above, a legal void is a regulatory situation in

which a TNC behavior in a host state would have been in violation of the laws of the TNC home state or of international law. There is very limited, directly applicable international law, and the transposition, implementation, and enforcement of international law usually leave the several state institutions/branches with (considerable) room for maneuver. International law is therefore unable to improve the situation.

As a result of the problems that both national and international law have in controlling TNCs, there is room for misconduct. In the words of the U.N. Special Representative:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization—between the scope and impact of economic forces, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.[40]

The *Chevron* case, introduced at the outset of this paper, is a case in point on these challenges. The Ecuadorian government had been in a joint venture with the oil company at the time of the pollution. It thus appears to have been at least silently complicit in the abuses. The whole of the Ecuadorian economy had been dependent on the exploitation of oil resources, so there was a counter-incentive to faithfully implement national legislation or international rules. The Ecuadorian judicial system offered no remedy, either, as it proved to be extremely weak and corrupt. Several judges had to step down during the long process amidst accusations of corruption, while others were seen to have a clear allegiance with either side of the conflict.[41]

In terms of environmental law, Chevron did acknowledge the environmental pollution to some degree, but argued that its predecessor Texaco had acted "completely in line with the standards of the day" and that "[the] practices did not directly violate Ecuadoran law; in fact, the country had no meaningful environmental regulations at the time."[42] In other words, behavior that presumably would have been illegal in the United States at the time[43] was in all earnestness claimed to be perfectly legitimate in Ecuador. However, the courts in the United States, where

40. Ruggie, *supra* note 9, para. 6-7.

41. *Reversal of Fortune*, *supra* note 1.

42. *Id.*

43. "In the United States, it is standard practice, once the oil has been isolated from this mixture, to 'reinject' the produced water, pumping it deep underground into dedicated wells, in order to prevent damage to the local habitat." *Id.*

the case had originally been brought in 1993, found in 2001 that the case had "everything to do with Ecuador and very little to do with the United States."[44] It thereby refused an extra-territorial application of U.S. law, affirming that a U.S. company did not have to live up to U.S. standards as long as it acted abroad and the judicial system there did not take issue with the activities.

It is telling that probably the clearest invocation of international law in the *Chevron* case was on the part of the TNC-defendant Chevron. The legal representatives of the company moved the forum to the Permanent Court of Arbitration on the basis of the Bilateral Investment Treaty between the U.S. and Ecuador. All in all, the *Chevron* case is a tangible illustration of the failures of domestic, extraterritorial and international law in governing TNCs in a global environment.

It has so far proven impossible to come to a formal international agreement, or a treaty specifically addressing TNCs or transnational commercial activities to alleviate the void. Perhaps such a treaty even could not alleviate the matter, as it too may be bound to suffer from many of the structural problems previously explained. It appears very unlikely that the causes behind the void will disappear any time soon. The governance of TNCs (or transnational commercial activities more generally) clearly appears to require responses beyond classic "hard law."

II. FILLING WITH "SOFT LAW" THE VOID LEFT BY "HARD LAW"?

The last two decades have witnessed a continuous proliferation of instruments—public, private and any combination thereof—that specifically address TNCs, but seem to do so by expanding beyond the notion of classic "hard law." Strictly speaking, instruments that fall outside the category of "law" cannot perhaps alleviate a *legal* void. But they may, in more general terms, address the practical problem at stake, which is abusive company behavior. Instruments other than legal ones can, in other words, alleviate the *policy* void in question.

The term "soft law" has often been used to denote these types of instruments. The multiplicity, volume and variance of such soft instruments, as well as their coexistence with the "hard law" framework has created a regulatory situation that is much more difficult to

44. *Id.*

understand than the 'straight-forward' formal agreements.[45] Scholarly and practical attention seems necessary to better understand the possibilities and shortcomings of using "soft law" instruments in filling the void left by "hard law".

The reasons that are often presented for using "soft law"[46] may be divided into three generic groups.

Necessity—there exists only limited binding and effective hard legal instruments now and in the foreseeable future;

Uniqueness—the coverage of "soft law" instruments is extensive, and may influence TNCs in ways that "hard law" does not. They can be much more specific to TNC behavior, and their adoption and adaptation may be more flexible and quicker; and

Inevitability—the emerging transnational space renders it inevitable that a separate transnational normative order emerges as well. It inevitably consists of other types of instruments, as the non-state actors who operate in this space cannot make "hard law."

A more careful look into these three, partly overlapping groups appears instructive for properly understanding the reasons that have been proposed to explain the emergence "soft law" (Sections II (A) and II (B)). It is important to shortly describe also the views of those more pessimistic about the use of "soft law" as an alternative or a complement to classic "hard law". Some authors see "soft law" rather as working antagonistically against "hard law" (see Section II (C)).

A. Turning a Political Necessity into a Virtue – "Soft Law" as an Alternative or Precursor to "Hard Law"

First of all, non-binding instruments appear to be in many cases a sheer necessity. As long as no directly applicable, legally binding instruments specifically aimed at the behavior or TNCs will be adopted by states, nor existing international and national laws reformed to this effect, the rationalist perspective is to see "soft law" as the alternative.[47] The large and diverse array of non-legal instruments may simply be the best attainable means to govern TNCs. A binding international

45. The normativity of "hard law" also remains to a large extent a mystery. *See generally* Martti Koskenniemi, *The Mystery of Legal Obligation*, 3 INT'L THEORY 319 (2011).

46. *See generally* Jean d'Aspremont, *The Politics of Deformalization in International Law*, 3 GOETTINGEN J. INT'L L. 503 (2011).

47. *See* Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 722 (2010).

agreement to govern TNCs directly is indeed unlikely in the foreseeable future,[48] as many states and much of the private sector continue to resist the idea for the reasons and with the means explained below. At the same time, however, a certain willingness to adopt instruments of a voluntary character can be observed.

A related point is to see soft instruments as precursors to formal agreements. In a situation where an outright formal agreement is politically unattainable, other types of instruments can be used as intermediate steps towards it. These alternative instruments may be used to, for example, experiment with a new rule or to innovatively encourage changes in the behavior of relevant actors. Exposure to the new ideas will, the theory assumes, prepare the regulators and regulatees up to a point where they are ready to take the ultimate step towards "hard law."[49] This is relatively common in areas with considerable (scientific) uncertainty regarding the optimal contents and effects of the policies in tackling a particular problem.[50] However, this type of precursory role for soft instruments is relatively weak in areas where the obstacles to "hard law" are political, rather than relate to uncertainty.

Finally, soft law instruments may be seen as a necessity also from the perspective of non-state actors, in case they themselves act as regulators: these parties obviously do not even have the direct means to develop classic "hard law."

B. Unique Qualities of "Soft Law" – A Complement to "Hard Law"

Soft law instruments often are unique in terms of their versatility, scope and/or "depth." The large number of different kinds of soft instruments means that they are many times aimed much more

48. The last attempt, the 'Norms on Responsibility' did not make it above the level of a sub-commission of the Human Rights Council. *See, e.g.*, De Feyter, *supra* note 15, at 81-82. And the more recent UN Guiding Principles make explicit that they are not intended as the precursor to a binding international agreement. *See* Rep. of the Special Representative of the Secretary General of the U.N. Human Rights Council, 17th Sess., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (John Ruggie), *available at* http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf [hereinafter *Guiding Principles*].

49. HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE 28 (John J. Kirton & Michael J. Trebilcock eds., 2004).

50. *See, e.g.*, Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 271 (2008).

specifically at the problems caused by the activities of TNCs than are formally binding instruments. They may be used to address TNC behavior in more elaborate detail than, for instance, international human rights conventions, which have an evident legacy as acts aimed primarily at *state* behavior and rarely are very specific as to what amounts to proper or improper behavior. It seems important also for these reasons to gauge whether and how this large body of instruments may actually alleviate the policy void on TNCs.

Another, interlinked argument is that soft instruments possess *different qualities* than formal international law. Many policy tools work in ways that are not dependent upon the core characteristic of "hard law," which is to create legally binding rights and obligations on parties. Constructivists, in particular, argue that soft law can promote discursive, experimentalist processes that can transform the way norms are perceived and created.[51] Such means may even be preferable from the perspective of responsive governance.[52] In comparison with rules that need to go through the entire legislative or treaty-making process, they may also be much faster to set up and to flexibly change afterwards. But whether and how exactly such "soft law" could complement "hard law" is precisely the question that deserves further clarification. This is all the more so, considering that soft instruments may even be *inevitable* or *inherent* in the phenomenon of globalization. According to Nijman and Nollkaemper, "[o]ne of the challenges that globalization poses to legal theory is precisely the emergence of 'non-State' legal orders, and the resulting need for a conceptual framework which enables our discipline to accommodate different legal cultures."[53] In other words, these instruments may correctly reflect the fact that the activities of TNCs are of such a special kind that they warrant a unique approach. As noted, if TNCs, non-governmental organization ("NGOs"), and other non-state parties act themselves as rule makers in

51. Shaffer & Pollack, *supra* note 47, at 722.

52. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1019-20 (2004).

53. *Beyond the Divide*, *in* NEW PERSPECTIVES ON THE DIVIDE BETWEEN INTERNATIONAL AND NATIONAL LAW 341, 349 (James Nijman & Andre Nollkaemper eds., 2007) (paraphrasing WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY 51 (Butterworths 2000)) ("Today, a picture of law in the world must deal with a much more complex picture involving established, resurgent, developing, nascent and potential forms of legal ordering." *Id.* Twining furthermore asks: "[c]an public international law, as traditionally conceived, cope adequately with such problems as environment, international crime, and basic human needs or rights at the global level?"); *see also* Peer Zumbansen, *Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power*, L. & CONTEMP. PROBS. 117 (2013).

these transnational normative orders, then there may not even be any other choice but to resort to soft instruments. TNCs and NGOs simply do not have the capacity under international law to make legal instruments, nor are they directly subjects of international law.

C. Counter-productive Uses of Soft Law – The Antagonist Approach

Shaffer and Pollack claim that all three principle schools of thought that address the strengths and weaknesses of soft law and "hard law"—positivists,[54] rationalists,[55] and constructivists[56]—tend to see them as alternatives or mutually supporting complements.[57] These authors raise doubts about the proposition that new soft instruments are always adopted with a view to decreasing the policy void. More attention should be paid to "soft law" as an *antagonist* to "hard law,"[58] because it frequently leads to inconsistencies and conflicts among norms. Or worse, this may have been the aim from the outset. The antagonistic behavior has specific implications in a fragmented legal system, resulting in a strategic hardening of "soft law" regimes and softening of hard-law regimes, or in a pre-emption of "hard law" through "soft law." These kinds of situations arise under conditions of distributive conflicts between states and in regime complexes, in particular.[59] They also fit well the notion of legal pluralism, where numerous heterogeneous legal orders coexist, interact and compete without clear hierarchies.[60] "Soft law" in this sense is inevitably a part

54. *See, e.g.*, Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC J. INT'L. 381 (1998); Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413 (1983).

55. *See, e.g.*, Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORGS. 495 (1991); Andrew Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579 (2005); ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONALIST CHOICE THEORY (2010); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005).

56. *See, e.g.*, David Trubek, Patrick Cottrell & Mark Nance, *"Soft Law," "Hard Law," and European Integration: Toward a Theory of Hybridity*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 65 (Gráinne de Búrca & Joanne Scott eds., 2006).

57. Shaffer & Pollack, *supra* note 47, at 707-08.

58. This argument has been made by others before, albeit in a less comprehensive way. For example, NGOs, who have long held this position, oppose voluntary instruments in part because they tend to bring hard law" negotiations to a standstill.

59. Shaffer & Pollack, *supra* note 47, at 709, 728.

60. *See, e.g.*, Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT. L. 553 (2002); Roderick A. MacDonald, *Metaphors of Multiplicity: Civil Society, Regimes, and Legal Pluralism*, 69 ARIZ. J. INT. & COMP. L. 75 (1998).

of globalization.

D. Interactions Between "Soft Law" and "Hard Law"

The last-mentioned, antagonistic perspectives on "soft law" are not at the core of this paper, which focuses on the ability of "soft law" to fill the void left by "hard law." It is nevertheless important to realize, following Shaffer and Pollack that "hard law" and soft law are not in a binary either/or relationship. Rather, their interaction is one where specific conditions are conducive to making the actors employ them as alternatives, complements, or antagonists.[61] This paper strives to contribute to the discourse by exploring the notion of softness and how that characteristic may reflect in the choice of the instrument in each individual case. The analysis leads to observations about how on occasion, *neither a* hard *nor* soft type of an instrument is able to fill a policy void, and that a focus on "soft law" may in fact only be leading the attempts astray.

III. FROM THE DEFICIENT NOTION OF "SOFT LAW" TOWARDS AN ACCURATE CONCEPTUALIZATION OF SOFTNESS

In order to understand whether "soft law" instruments may succeed in alleviating the *policy* void in governing TNCs, and if so, how, it is next pertinent to define in more detail what "soft law" actually means. As the analysis below will reveal, the term "soft law" is rather problematic: there seem to be more suitable terms than "soft law" to describe instruments that are not part of "hard law" in the classic sense of the term. The terminological analysis will lead to a conceptualization of instruments, which is believed to be more instructive for understanding their key characteristics in terms of "softness." With the tool, the suitability of a number of leading human rights and environmental instruments that govern TNCs may then be analyzed in the ensuing Section IV.

A. Definitional Deficiencies of "Soft Law"

1. An Incorrect Concept

The instruments looked at in this paper have often been grouped together under a single concept: "soft law." "Soft law" is widely used

61. Shaffer & Pollack, *supra* note 47, at 709.

as a concept to denote all normative instruments that do not amount to classic "hard law." As Jan Klabbers, a staunch critic of the concept, has submitted

> [w]e tend to use the term soft law in order to describe things which are difficult to describe as hard law. Thus, guidelines, codes of conduct, resolutions, recommendations and action programs, indeterminate provisions of treaties, unratified conventions, perhaps even the opinions of advocates general or dissenting opinions of individual judges of the ICJ or the various human rights courts, they may all perhaps be qualified as 'soft law.' Clearly they are not hard law; clearly they are not totally irrelevant either, so *voilà*: soft law it must be.[62]

Klabbers and some other international legal scholars denounce the idea that law can be "soft." "As soon as soft law is to be applied to any specific set of circumstances, it collapses into either 'hard law,' or no law at all."[63] In a binary world of law and non-law, soft law as an in-between is incorrect: there either are or are not normative obligations that are created when the law is applied *ex post*. The "soft" part of the concept creates confusion from another perspective. It glosses over the fact that many "soft instruments" have direct effects on the behavior of states, TNCs, and other actors, and they have indirect legal effects by transforming subsequently into formal international law. Mechanisms often employed by "soft law," such as economic incentives and reputational costs, can be much more compulsory than the term soft would indicate. They may be more effective than "hard law" itself, as some of the authors noted in Section II have suggested.

As for the 'law' part of the concept, it seems rather odd to use it where states or international organizations have usually quite purposefully chosen "an instrument that lies *outside* the realm of law," and have thus indicated their specific intention "not to legally commit themselves."[64] Using the term "law" for something that is adopted explicitly as something other than law threatens to blur the "normativity threshold." This is so in particular if and when there is a point of transition between law and non-law, between what does and does not constitute a legal norm.[65]

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62. Klabbers, *supra* note 54, at 385.

63. *Id.* at 382.

64. Jean d'Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 19 EUR. J. INT. L. 1075, 1081-82 (2008) (emphasis added).

65. BLACK'S LAW DICTIONARY (7th ed. 2000); Weil, *supra* note 54, at 415.

2. Too Generic a Concept

While soft law may be inaccurate as a concept, it also seems much too generic to properly guide our understanding regarding the very different nature, properties, and normativity of the various instruments relating to TNCs and their behavior. As long as there are soft and hard ends to the spectrum of instruments, it seems inevitable that there are also shades of softness and hardness in between. At the very least, there must be such spectrums from softer to harder within the two binary categories of law and other instruments. A sharp binary categorization seems unlikely to be helpful in explaining all the legal as well as non-legal instruments, each with their different characteristics. This is so especially for legal instruments with soft dimensions and for non-legal instruments with hard dimensions. There is no denying the growing disaggregation of power into myriad spheres of authority, which may not (fully) be public authorities and that deliver formal and informal rules and norms of various kinds.[66] There is considerable variance, whichever way one may wish to create categories.[67] This is certainly so with respect to instruments addressing the behavior of TNCs.

Although it is thus not possible to describe all such variance with a single term "soft law," it would seem equally unadvisable to limit the use of the term to only a clear but narrow sub-group among the variance. In this latter case, there is likely to exist a more accurate descriptive term than "soft law" to explain the instruments in question.

Therefore, a simple dichotomy between "hard law" and "soft law" (and also between law and "non-law") *alone* seems too stiff and inaccurate to be useful for fully understanding the instruments, which the terms intend to cover.[68] It remains important to maintain that binary distinction, because in some contexts—such as domestic or international adjudication—the legal status of an instrument continues to be relevant

66. Martti Koskenniemi, *The Fate of Public International Law: Between Techniques and Politics*, 70 MOD. L. REV. 1 (2007); James Rosenau, *Governing the Ungovernable: The Challenge of Global Disaggregation of Authority*, 1 REG. & GOVERNANCE 88, 88 (2007).

67. Sylvia Karlsson-Vinkhuyzen & Antto Vihma, *Comparing the Legitimacy and Effectiveness of Global Hard and Soft Power: An Analytical Framework*, 3 REG. & GOVERNANCE 400, 401 (2009).

68. László Blutman, *In the Trap of a Legal Metaphor: International Soft Law*, 59 INT'L & COMP. L. Q. 605, 611 (2010); Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 GERMAN L.J. 1865, 1869 (2008) (Goldmann remarked that the term "soft law" is not much more than a slightly more elegant way of saying "underconceptualized law." Accordingly, he continues, we should use formal criteria to divide it into subspecies, each with its own characteristics).

for its softness or hardness. Yet it *also* seems vital to understand norms to be on a continuum with a lot of diversity along numerous other variables.[69]

One may thus agree with d'Aspremont that a binary approach to law is not in conflict with the growing complexity of regulatory tools in contemporary international relations.[70] A binary division may be maintained, but while distinguishing *e.g.* the different regulatory choices and the gradations of normativity in the language that are available for *both* legal and non-legal norms. The nuance and the binary approach are not mutually exclusive.[71]

B. The Lay of the Land in the Theory of "Soft Law"

Numerous attempts have been made to make sense of "soft law." Problematic in these approaches has been the disregard for the idea of maintaining the binary distinction in parallel with the more fluid characterizations. The empirical basis of the attempts has also often been wanting.[72] This Section highlights the views of authors that appear the most insightful, and which therefore have served as the basis in this paper for developing the methodology for assessing "soft law."

1. The Three Dimensions of Softness

Amongst the most quoted authors in describing "soft law" are Abbott et al., who have proposed a continuum of legalization,[73] where the softness or hardness of legalization may be measured in terms of the "*obligation*, *precision* and *delegation*" of the measure.[74] Obligation means the (legally or otherwise) binding nature of the rule; precision reflects the ability of the rule to unambiguously define conduct; and delegation refers to the extent to which an implementing and

69. Karlsson-Vinkhuyzen & Vihma, *supra* note 67, at 402; *see also* DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 100-01, 106-07 (2010) (emphasizing the importance of both legal status, as well as various other characteristics).

70. d'Aspremont, *supra* note 64, at 1075.

71. *Cf.* Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT'L L. 167, 180 (1996) ("law itself, for all its binariness, is capable of reflecting a whole spectre of subtleties and nuances; . . . law itself can accommodate various shades of grey without losing its binary character").

72. Karlsson-Vinkhuyzen & Vihma, *supra* note 67, at 401.

73. These authors define legalization as "global regulation through diverse types of norms." Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401 (2000).

74. *Id.*

interpretive authority has been defined.[75] Taking these three dimensions seriously, *most* international instruments, including those on the 'law' side of the binary distinction, seem soft in many respects.[76] This is certainly true of global environmental and human rights treaties with their many indeterminate provisions and limited delegation to third parties.

To be more specific, the dimension of "*obligation*" is dependent on the mandatory, normative—Abbott et al. use "binding"—nature of the rule. Obligation seems to be a concept with multiple meanings. It may indicate especially the mandatory quality of the language of the instrument. The authority of the actors that adopted the instrument, or a more general sentiment of obligation caused by the legitimacy of the instrument is also central. Obligation thus can be linked to the concept *author*, which Neil Komesar finds important from an institutional perspective.[77] As he has suggests, the implications of a policy may differ greatly according to the author.

"*Precision*," the second dimension proposed by Abbott et al., measures the extent that "that rules unambiguously define *the conduct* they require, authorize, or proscribe."[78] The third dimension, "*delegation*," reminds us that not only the authority of the *adopting* entities matters. The instrument's *implementation*, *enforcement*, and *interpretation* are quite relevant.[79] It needs to be determined who, if anyone, is in charge, and how much authority is being delegated.

The approach of Abbott and Snidal to instrument choice, which builds on these three dimensions of legalization, emphasizes the role of different types of legalization in the instrumentalist hands of powerful states.[80] For example, Chinkin's categories of "soft law" reflect these three dimensions.[81] Weakening one or more of the dimensions turns

75. *Id.*

76. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 422 (2000).

77. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY 4-5 (Univ. of Chi. Press 1994).

78. Abbott et al., *supra* note 73, at 402.

79. The relevance of delegation to the normativity of international norms was already stressed in Lauterpacht's critical analysis of the auto-interpretive character of international law, or what he called "self-judging obligations." *See* HERSCH LAUTERPACHT, THE FUNCTION OF INTERNATIONAL LAW IN THE INTERNATIONAL COMMUNITY (Oxford Univ. Press 1933).

80. Abbott & Snidal, *supra* note 76, at 421.

81. Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L. Q. 850 (1989). The degree of legalization (as defined by Abbot et al.'s obligation, precision and delegation) is the independent variable,

legal arrangements conveniently into "soft law" or vice versa. This is essential from the perspective of governance, because TNCs may be able to exert pressure towards the governing authorities on the types of instruments that will be created.

2. Softness v. Effectiveness

It may be noted that Abbott et al. deliberately avoid assessing the instruments' effects, as that would conflate delegation with effective action.[82] Also in the analysis of this paper, effectiveness is understood as conceptually distinct from softness; the two must be evaluated separately. While softness refers to low levels of obligation, precision, and delegation seems to correlate negatively with effectiveness, the interrelationship between the two appears rather complex and case-specific.[83] There are many intervening external factors, such as the degree of stakeholder agreement on the issue, reputational risks, and potential fringe benefits of compliance. Softness is not a *conditio sine qua non* of ineffectiveness, nor is hardness a prerequisite of effectiveness, even if the former usually increases the latter.[84] Indeed, soft measures can be effective, otherwise the prospect of them acting as alternatives to "hard law" would not materialize. Similarly, there would be no need to complement or replace "hard law" if it could not be ineffective. Thus, by *not* conflating softness and effectiveness, the analysis of the instruments of governance remains more detailed and transparent on the surface. The focus of this paper is precisely on this softness aspect.

Karlsson-Vinkhyuzen and Vihma take a similar view in their comparison of international norms: softness is the independent variable, while *effectiveness*, together with *legitimacy*, emerge as the central, overarching dependent variables.[85]

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effectiveness and legitimacy the dependent variables in determining softness. *See* Abbott et al., *supra* note 73.

82. Abbott et al., *supra* note 73, at 402.

83. *See, e.g.*, Karlsson-Vinkhuyzen & Vihma, *supra* note 67, at 414; Jean-Marie Kamatali, *The New Guiding Principles on Business and Human Rights' Contribution in Ending the Divisive Debate over Human Rights Responsibilities of Companies: Is it Time for an ICJ Advisory Opinion?*, 20 CARDOZO J. INT'L & COMP. L. 437, 449-50 (2012); Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1, 43-45 (2012); Deborah E. Rupp & Cynthia A. Williams, *The Efficacy of Regulation as a Function of Psychological Fit: Reexamining the Hard Law/Soft Law Continuum*, 12 THEO. INQ. L. 581, 594-95 (2011).

84. *See* Karlsson-Vinkhuyzen & Vihma, *supra* note 67, at 414.

85. *Id.* at 401-03. Their approach thus is wide as it relies on both rationalist and constructivist theories to cover, respectively, the utilitarian political economy aspects and

3. Instrumentum and Negotium

d'Aspremont proposes on the basis of the *theory of legal acts* that in contemporary international law, it is either the *instrumentum* (the "container") or the *negotium* (the "content") that can be softened.[86] The softness of the *instrumentum* thus pertains to the choice of an instrument outside the realm of law, defined as formal treaties or binding unilateral declarations.[87] A soft *instrumentum* can also produce legal effects, such as interpretative guidelines of other legal acts, or even customary law in the long run. However, being such *legal fact*, capable of creating *legal effects*, is according to d'Aspremont not sufficient to qualify it as a *legal act*. The latter creates effects only at the explicit will of its authors, hence the distinction to "hard law."[88]

As for the *negotium* (the content) of a legal act, it can also be softer or harder. Soft, non-normative content does not produce rules that would commit the subjects. The *negotium* of a *legal act* can be softened without invalidating it or transforming it to a *legal fact*.[89] The softness of the *negotium* will not affect the status of the instrument as law. It will, however, reduce law's ability to oblige the parties, reflecting on the obligation and precision dimensions of Abbot et al.

Blutman takes a similar approach using the notions of legal (formal) source and the substance of the norm.[90] He further notes that current studies group "soft law" into three categories: (1) *non-binding* decisions of *international organisations*, (2) *non-obligatory* agreements of *states*, and (3) recommendations of *non-state parties* (NGOs).[91] In the first two groups, the softness emanates from what d'Aspremont called the *negotium* – the lack of *obligation* of the non-binding content

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the culturo-anthropological aspects of the issue. *See id.* at 401-03. Effectiveness is for these authors interdependent with legitimacy, and they both consist of numerous components. *See id.* at 403-04. Effectiveness can be understood as the degree to which the set policy objective is achieved as a consequence of the measure. *See id.* at 405. Note the difference between effectiveness and compliance. *See* Kal Raustiala & David G. Victor, *Conclusions*, *in* THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE 659-708 (Kal Raustiala, David G. Victor & Eugene Skolnikoff eds., 1998). Also note the difference between behavioral effectiveness and problem-solving effectiveness. *See* Arild Underdal, *One Question, Two Answers, in* ENVIRONMENTAL REGIME EFFECTIVENESS: CONFRONTING THEORY WITH EVIDENCE 3 (Miles Edward et. al eds., 2002).

86. d'Aspremont, *supra* note 64, at 1084.
87. *Id.* at 1084-85.
88. *Id.* at 1084-87.
89. *Id.* at 1084.
90. Blutman, *supra* note 68, at 606.
91. *Id.* at 607-08.

of the norm. In the third group, softness is caused by the *instrumentum* and the legislating *party*. Blutman does not consider the authority of the author, and indeed probably not the *delegation* or the *instrumentum* either. Moreover, neither precision, effectiveness, nor legitimacy are directly relevant in this type of categorization. The strength of categorizations such as Blutman's, lies in their simplicity and ease of application, as well as the direct link to existing types of instruments.

C. Making Use of the "Soft Law Theories"

It would seem that the above selection of approaches to "soft law" have varying degrees of explanatory power. Many of them consist of dimensions that from the perspective of softness constitute continuums rather than either/or type binary choices. A careful combination of the dimensions, whether continuums or not, appears to be a useful way to better conceptualize "soft law" and to understand specific cases of instruments' softness in international governance.

It seems possible to combine the assessments of softness along many such dimensions onto a single, summarizing scale. A summary value of softness may be useful in providing an overview of the characteristics of the instrument that one is dealing with. It might even be possible to define a point, a dividing line between soft and hard, similar to that which we recognize between law and "non-law." One may wonder, however, to what extent such a point is actually relevant. First of all, all instruments, be they soft or hard in the end, are in any event analyzed along the same dimensions of softness, just as water may be measured for its coldness/hotness. But like water, is there a metaphysical "melting point" where the definition of an instrument changes from hard to soft in a way that would represent a drastic change in its qualities, like (solid, hard) ice changes into (liquid, soft) water? Most of the instruments are likely to have some degree of softness/hardness anyway; only at the extremes are instruments entirely hard or soft.

Second, it seems important to perceive that any such dichotomy between soft and hard is indeed only a summary of many aspects. It appears more relevant to understand what the constitutive dimensions of each summary value of softness in a particular case may be, in particular on those dimensions that are close to the extreme ends of the scales. This is so especially as regards the "*instrumentum*." On the one hand, there are legal instruments, which in the context of international governance consist of the formal sources of international law: conventions, customary law and binding decisions of international

organizations. On the other hand, there are non-legal instruments, which are all the other international or transnational public or private instruments that are not formal sources of international law.[92] A hard *instrumentum* thus refers to formal "law," while a soft *instrumentum* means that one is not dealing with law. This in turn implies that to qualify as soft an instrument that in terms of its *instrumentum* dimension is "hard (law)", it would need to rank quite low (soft) on many if not all other dimensions. Conversely, to consider a non-legal (and thus prima facie soft) instrument as hard,[93] it would need to rank high across many, if not all, dimensions beyond the *instrumentum*. A precise obligation by an authoritative NGO with strong oversight on the implementation could perhaps achieve such hardness in a soft *instrumentum*.

Third, an understanding of softness as relative and measured against the same criteria for all kinds of instruments, whether formal law or something else, is important. As could be seen in the discussion in Section II on the voids left by (international) "hard law" in governing TNCs, various types of instruments may have important roles to play. Perhaps an instrument is not just a second best solution in a particular case — or for particular ends within that case — but indeed the best, or even the only means of achieving a policy outcome?[94] The situation for which the instrument is intended needs to be analyzed along the same dimensions to know what type of an instrument is required.

Finally, there is still an important aspect from the viewpoint of the instruments' functioning that could be called *systemic coherence*. It relates closely to the above points noted by Shaffer and Pollack: all legal and non-legal instruments, whether hard or soft, also affect one another. Indeed, as was described above, soft instruments are often seen as an alternative or complement to international "hard law." Treaties can generate secondary (delegated) rules that may be non-legal. Treaties can harden existing non-legal instruments, and non-legal instruments may not only be an alternative or complement to legal instruments, but also soften them. Non-legal instruments may even become antagonists that work directly against treaties, as Shaffer and Pollack have pointed out.[95]

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92. Guzman, *supra* note 55, at 580 (noting that a categorical difference between harder and softer types of governance is created here).

93. Blutman, *supra* note 68, at 612 (noting that it is a common misconception that non-binding "soft law" would influence less the actions of a state than a binding norm).

94. *See id.* at section 3.

95. Shaffer & Pollack, *supra* note 47, at 788-96. This would seem to imply that the

The types of conceptualizations portrayed in this Section can be useful when the hardness/softness of multiple instruments, both legal and non-legal, is assessed comparatively against one another. As Karlsson-Vinkhuyzen and Vihma point out, the development of a legal or non-legal instrument, and subsequently its qualities as a "harder" or "softer" instrument in global governance, is only one variable in the evolution that determines the long-term policy outcome.[96] Moreover, the choice as often explained involves a highly complex set of interrelated, time- and place-specific variables and impacts. This touches the very core of modern politics that struggles to address the dynamics of globalism.

D. Towards a More Accurate Conceptualization of Softness in Instruments

Linguistic conventions such as "soft law" are difficult to fight against.[97] Political scientists make the observation that "[a] few international institutions and issue-areas approach the theoretical ideal of hard legalization, but most international law is soft in distinct ways."[98] The proposal here is to take the above-noted dimensions of softness, fine-tune them, and use them to describe the instruments more accurately. The assumption is that such a systemization/categorization may be helpful to the understanding of policy instruments, distinguishing, for example, between their softness and effectiveness.[99]

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effectiveness of an instrument could even be negative from the perspective of the policy objective: it decreases rather than increases the ability to reach the set policy goal. This is an important aspect explaining the reasons behind the existence of a legal void in TNC governance. As was explained earlier, the void on TNCs is in part created by their ability to influence law making at various levels of governance. An important way to do so is to swap from the role of a subject of international norms to that of an author of international (private) norms by creating alternative (non-legal) norms that are *antagonistic* to the objectives of prevailing legal instruments, or to other public instruments such as decisions of international organizations or joint declarations of states. In other words, if we were to measure the effectiveness of antagonistic instruments, a scale would need to continue from "weekly positive" and "none" onto a "negative," when the point of reference are the prevailing policy objectives rather than the alternative or direct objective of the law or other instrument in question. Because this paper focuses on ways to fill in the voids left by "hard law", the antagonistic aspects of non-legal instruments are however, not discussed further. *Id.*

96. *See* Karlsson-Vinkhuyzen & Vihma, *supra* note 67, at 400, 401.

97. Blutman, *supra* note 68, at 605.

98. Abbott & Snidal, *supra* note 76, at 421.

99. Obviously, there is likely to be overlap between the dimensions. A similar pragmatic approach is taken by Shaffer and Pollack. *See* Shaffer & Pollack, *supra* note 47, at 714.

It is further proposed here that each of these dimensions of softness of Abbott et al. (obligation, precision, and delegation) be specified a step further into a few more accurate, particularly significant sub-dimensions. The proposed sub-dimensions improve the tool, because their values seem especially instructive for the processes being studied in this paper: the behavior of TNCs.[100]

The "obligation" dimension is perhaps the most ambiguous. As indicated above, it seems that Abbott et al.[101] equates "obligation" with "legal obligation." Such a definition of obligation would, however, not clearly distinguish the dimension from (*i.e.* would limit it to) the concept of *instrumentum*. The hard v. soft *instrumentum* distinction in this paper makes a difference between two types of public instruments: those that are and those that are not (formal) law. Only formal sources of law oblige in the hardest sense of *legally binding* the parties and being capable of *enforcement through judicial* means. These qualities could be qualified as sub-dimensions of obligation. However, because of the importance of the either/or type *binary* distinction between what is or is not a legally binding formal source of law, it seems appropriate to turn them into a dimension of their own. *Instrumentum* must therefore be lifted out of the obligation dimension.

The obligatory nature of the instrument, however, also appears to depend on the authority of the "author" of the instrument and on its mandatory quality. These should be the focus of the obligation dimension. First, the authority sub-dimension of obligation reflects the authority of the author over the addressees of the instrument. Some institutions that adopt instruments on TNC behavior have more authority over TNC behavior than others. There are various factors on which such authority may be based. Authority will depend upon whether there has been some grant of authority from the addressees of the instrument to the author. It also turns on the involvement of experts during the drafting, the perceived quality of the instrument, and whether the process leading to the text has allowed for consultations with the addressees. In other words, the relationship between the authors and the constituency of the instrument matters. This also explains why a single institution ("author") may have authority in one specific case, but less so in another. A higher level of authority will make the instrument more obliging, and hence harder, regardless of its public or private character.

100. *See* Abbott et al., *supra* note 73, at 403.

101. *Id.* at 401.

Instruments created by the addressees themselves are usually referred to as self-regulation, distinguishing them from other private rulemaking by third parties. It is difficult to generalize whether a rule to which specific private parties (such as TNCs) have committed themselves is more obligatory or less obligatory than that created by some other private parties without the involvement and/or assent of the former (i.e. TNCs). Some NGOs are more highly regarded by TNCs than others in terms of their expertise or trustworthiness, whereas others may be more feared because of their effective publicity campaigns. All such factors influence whether TNCs regard instruments to be authoritative. It would also seem important to extend the obligation dimension to the *negotium*, the contents of the instrument. A legal *instrumentum* can contain a *negotium* devoid of any obligatory language, such as "shall." At the same time, a non-legal *instrumentum* can contain a *negotium* that is worded in unmistakably mandatory terms.[102] The provisions of both legal and non-legal instruments can attempt to guide the behavior of their addressees "in a stronger or weaker fashion."[103] The obligation dimension hence would seem to consist of two sub-dimensions: *authority* and the *mandatory nature* of the instrument.

Also, the precision dimension would, at least with regard to the particular subject matter of TNCs, seem to be improved if divided into two sub-dimensions. Abbott et al.'s concept of precision related to the object of the rule *ratione materiae*: "that rules unambiguously define *the conduct* they require, authorize, or proscribe."[104] This is the *accuracy* of the instrument. But precision would also seem to include the *specificity* of an instrument towards certain actors or issues. Softness or hardness of an instrument in terms of a certain group of actors such as TNCs, also depends on whether the rules specifically address *that group*. The softness, in other words, is influenced also by the scope of the instrument *ratione personae*. A narrow, specific scope increases hardness especially in the international context, where the absence of an institutional framework moves the *ex post* interpretation and application of general rules to the hands of the actors to be governed—the TNCs, in this case, and also states within whose jurisdiction the TNCs act.[105] The precision dimension therefore is

102. *See generally* Anthony Aust, *Alternatives to Treaty-Making: MOUs as Political Commitments*, *in* THE OXFORD GUIDE TO TREATIES 46, 46-72 (Duncan. B. Hollis ed., 2012).

103. BODANSKY, *supra* note 69, at 103.

104. Abbott et al., *supra* note 73, at 401 (emphasis added).

105. *Id.* at 414.

enhanced by including the sub-dimension of "specificity" in addition to what could be redefined as its "accuracy."

Finally, delegation[106] concerns primarily the question of how much of the authority to implement and enforce the instrument is delegated to others, how much is retained by the author of the instrument, and how much simply remains undetermined. Delegation to third parties increases hardness, and is vital where precision in terms of specificity is low.[107] Delegation of interpretive authority is a variety of delegation that links back directly to accuracy, i.e. precision *ratione materiae*.

Furthermore, the softness of the delegation also appears to depend on to whom exactly the authority is delegated, *i.e.* the authorship of the delegated acts. Close ties, even a shared identity amongst those authorized to implement the instrument and those addressed by it soften the delegation dimension. Delegation is harder when an auditor or NGOs enforce the instrument, than where the TNCs, as the subjects of the instrument, enforce their own rules. It is also important to distinguish between delegation in rule-making and dispute settlement (*i.e.* judicial) functions.[108]

To sum up, the tool proposed here incorporates the following dimensions of softness:

> the *instrumentum* (formal source of law v. other instruments)
> obligation (authority and mandatory nature of the language)
> precision (accuracy and specificity), and
> delegation (extent and authority of delegation).

These softness-related dimensions measure only specific qualities of the instrument. They may be combined and may interact with numerous other qualities of the instruments, such as how quickly they can be enacted, how representative they are, etc. A discussion on the qualities of the instrument itself also easily merges into a discussion on the impacts that the instruments have. International lawyers and legal scholars often concentrate on compliance, while political scientists assess, for example, the effectiveness, dynamic and static efficiency, legitimacy and administrative burden of the instrument, with a clear

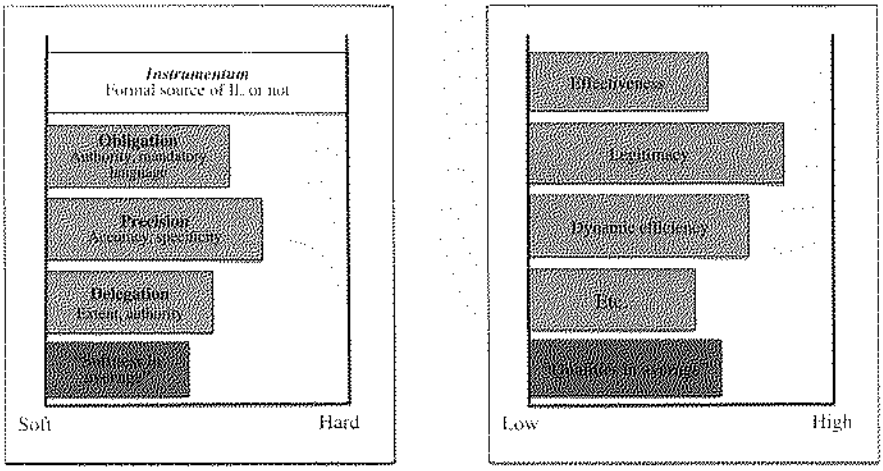
106. "*Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules." *Id.* at 401.

107. *See id.* at 415-18

108. *See id.* at 408-10.

emphasis on effectiveness.[109] Mitchell convincingly argues that compliance is only a subset of effectiveness, and indeed from the perspective of this paper it is the final policy outcome—a change in the environmental and human rights behavior of TNCs—that is relevant.[110] As this paper specifically addresses the question of the aptness of "soft law" instruments to govern TNCs, the effectiveness of instruments thus is a relevant, yet limited part of the analysis. It is worth repeating that softness and effectiveness are separate but interrelated issues, and that only softness-related qualities are analyzed in this article; the other qualities of the instruments are not assessed.[111]

The following tool emerges:



Dimensions of "softness" Other qualities of instruments

Figure 1: Assessing "Softness" and Other Characteristics of Instruments

The aspect of systemic coherence—the complementing, replacing, precursory or antagonistic impacts that the instruments have against each—seems worth bringing forth in some examples in view of the earlier discussion. The coherence may be depicted as follows:

109. *See generally* RONALD B. MITCHELL, INTERNATIONAL POLITICS AND THE ENVIRONMENT 146-80 (Sage 2010).

110. *See id.*; *see generally* Karlsson-Vinkhuyzen & Vihma, *supra* note 67.

111. Qualities such as static and dynamic efficiency, and administrative burden, are typically assessed.

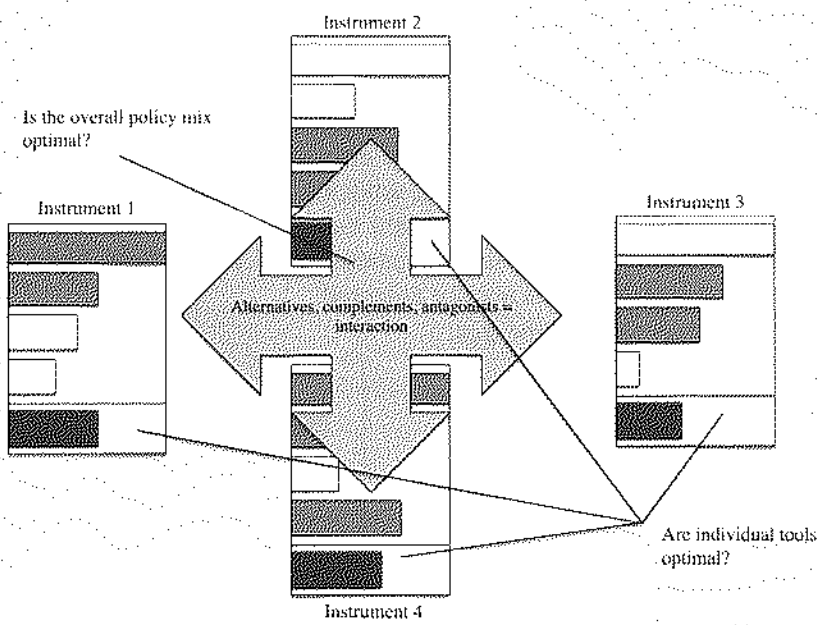


Figure 2: Systemic Coherence of Soft Instruments

E. Applying the Tool to Public Legal Instruments, Public Non-Legal Instruments and Private Instruments

In order to structure the application of the tool to particular environmental and human rights instruments in Section IV, it is useful to categorize the instruments in a preliminary fashion. First, as was indicated in Section III (C), it is possible to distinguish between the formal sources of international law (legal *instrumentum*) and the non-legal or "soft" *instrumentum*. It is not implied that non-legal instruments cannot bind actors politically, nor that they cannot be successful in addressing a policy problem. The distinction simply reflects that such instruments cannot *legally* bind states and in most cases cannot be enforced through *judicial* means. Therefore, there are some good reasons why non-legal instruments cannot operate in the *same* way as legal instruments.

Second, the broad non-legal category can be further sharpened[112] by separating *public* instruments from *private* instruments.[113] Three broad categories of instruments can be identified[114]:

- *Public Legal Instruments* are the formal sources of *international* law – *i.e.* the legal *instrumentum* within the context of the international legal order – consist primarily of conventions, customary law and binding decisions of international organizations. These instruments are in the left column of Table 1, while non-legal instruments form the right column.

- *Public Non-Legal Instruments* include the output of international organizations, two or more states collectively, or even more loose gatherings of public officials (such as collaborative networks), that are however not laid down as formal international law.[115] "Public" thus denotes the centrality of public actors: state representatives, intergovernmental organizations, other public officials.

- *Private Instruments*[116] in contrast include the output of private or primarily private transnational initiatives, such as guidelines or standards. A few instruments, such as the UN Global Compact and other public-private partnerships, partly fit under either category, public or private. The distinction public/private may be particularly relevant in the area of TNCs, where the private authorship of an instrument usually points to the involvement of either the regulated TNCs themselves or their staunchest critics, NGOs. The difference between the Public Non-Legal and Private (Non-Legal) Instruments (as well as the

112. *See* Blutman, *supra* note 68, at 607-08.

113. Compare the IN-LAW project, which leaves private formal instruments outside of its ambit. *See generally* INFORMAL INTERNATIONAL LAWMAKING (Joost Pauwelyn, Ramses Wessel & Jan Wouters eds., Oxford U. Press 2012).

114. These three groups are different from those distinguished by Blutman: the output of international organizations; non-binding output of states directly other than what is part of the formal sources of international law; and the output of civil society which is per definition non-binding. Blutman, *supra* note 68, at 607-08.

115. Blutman distinguishes more categorically between state instruments and instruments adopted by international organizations. However, because the adoption of instruments within international organizations is heavily influenced by states a further distinction would not seem useful or justifiable.

116. The type of private instruments that this article analyses are never legal instruments, so that the addition 'non-legal' is superfluous. Private actors are of course perfectly capable of adopting legal instruments in the form of private law contracts, but those are outside the scope of this research.

overlap between them) is highlighted with background shadings in the right-hand column of Table 1 below.

The most noteworthy environmental and human rights instruments can be grouped into these three categories of Public Legal Instruments, Public Non-Legal Instruments and Private Instruments as shown in Table 1 below:

	Legal *instrumentum* (Formal Sources of International Law)	**Non-legal *instrumentum*** (Other than Formal Sources of International Law)
PUBLIC (States and IOs)	**IV.A. Public Legal Instruments** - ICCPR, ICESCR, other human rights treaties; -Multilateral Environmental Agreements - Security Council Decisions	**IV.B. Public Non-Legal Instruments** -UN Guiding Principles on Business and Human Rights -OECD Principles on Multinational Enterprises -UNEP Guidelines[117]
PUBLIC-PRIVATE (Mix of States/ IOs and TNCs/ NGOs)	—	-UN Global Compact -UN Business Partnerships -Equator Principles -Voluntary Principles on Security and Human Rights

117. *E.g.*, Charles Thomas, Tessa Tennant & Jon Rolls, *The GHG Indicator: UNEP Guidelines for Calculating Greenhouse Gas Emissions for Businesses and Non Commercial Organizations* (2000), *available at* http://www.unepfi.org/fileadmin/documents/ghg_indicator_2000.pdf (last visited Apr. 1, 2015).

PRIVATE (TNCs)	—	**IV.C. Private Instruments** -Corporate Codes of Conduct -Extractive Industries Transparency Initiative
PRIVATE (NGOs)	—	-Forest Stewardship Council's Forest Principles -ISEAL Alliance-labels -Social Accountability International Standards

Table 1. Categories of Environmental and Human Rights Instruments.

It seems that instruments belonging to different categories are likely to denote certain recurring combinations of dimensions of softness. These soft dimensions are marked in white in Figure 3 below,[118] although there may also of course be other soft characteristics, as the analysis further below will clearly show.

118. The values of the other characteristics in the Figure are default values marked only for the purposes of illustration.

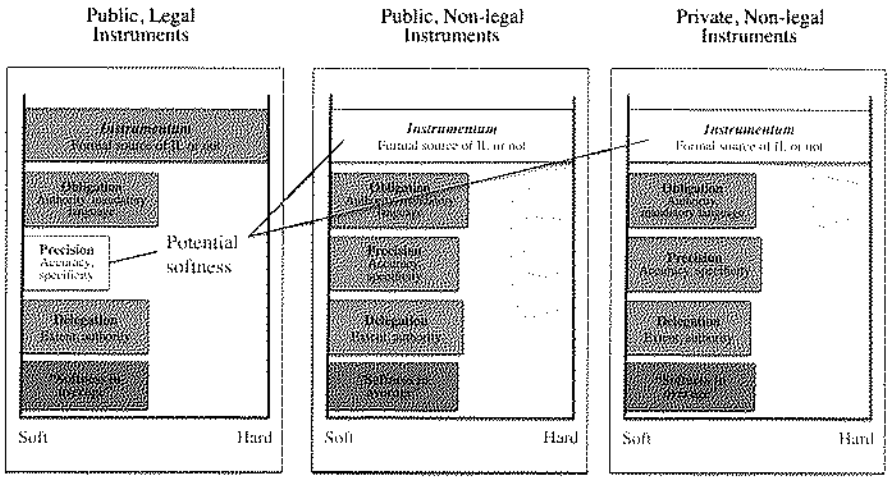


Figure 3: Hypothetical Illustration of the "Softness" of Instruments (white color indicates the sources of softness)

The possibility of such different dynamics of softness, as well as different underlying explanations, justifies a separate analysis of instruments from each of the three categories. The categories of Public Legal Instruments, Public Non-Legal Instruments and Private Instruments thus constitute Sections IV (A) through (C) in the discussion that follows below.

IV. APPLYING THE CONCEPTUAL TOOL ON SOFTNESS TO PRACTICAL CASES

In this Section, the conceptual tool created in the preceding Section is applied to practical case examples on human rights and environmental instruments that deal with TNCs. The approach has two objectives. First, the tool's scores along the dimensions of softness enable a sharper *differentiation* of the numerous instruments that apply to TNCs. Second, the application of the tool will allow for observations of potential connections between the instrument's softness (both along individual dimensions and overall) and how it operates. Ultimately, this enables preliminary reflections on the relationship between (categories of) instruments' softness and their effectiveness. It might even enable the grouping of measures into some type of *sub-categories* on the basis of their softness, as measured along the dimensions.

The instruments that are to be analyzed have been selected for their central place in the legal system for this area (Human Rights Covenants), for their high profile (U.N. Guiding Principles, OECD Guidelines) or their visibility towards the public (U.N. Global Compact, Forest Stewardship Council). In the TNC context, instruments often combine human rights with environmental protection.

As may be recalled from the previous Section, the preliminary application of the tool grouped instruments into three general categories, that are each discussed in the Sections that follow: *Public Legal Instruments* (IV (A)), *Public Non-Legal Instruments* (IV (B)), and *Private Instruments* (IV (C)).[119] The instruments have been chosen so as to provide case examples that are representative of each of those categories.[120] The selected instruments for each category will be scrutinized along the (sub)dimensions of softness of the conceptual tool—obligation (authority and mandatory nature of the language); precision (accuracy and specificity); and delegation (extent and authority of delegation)—to add further nuance to the analysis.

A. Public Legal Instruments

1. General Observations

Instruments that are formal sources of international law—treaties and binding decisions of international organizations—possess a legal *instrumentum*, and have thereby specific characteristics compared to non-legal instruments: only formal sources of law are capable of creating obligations that are hard in the sense of being legally binding and capable of enforcement through judicial means.

Most international law, aside from a few obligations under customary law, is nonetheless not applicable to TNCs directly[121] as was explained in Section I. Treaties and binding decisions of international organizations also usually do not specifically address TNC behavior. The hardness of the *instrumentum* of Public Legal Instruments is therefore in the particular context of international governance not

119. A few of the examples amount to such an important participation of both private and public actors that they may also be considered to constitute a separate public-private category.

120. The first group, Public Legal Instruments, was already discussed in Section I to establish the existence of a legal void. The observations in the following section on them will therefore build upon the previous analysis in Section I.

121. NOLLKAEMPER, *supra* note 22, at 58-59.

equaled in the *negotium* part when measured along the dimensions of creating *obligations* on TNCs and being *specific* in doing so.

Authority as a sub-dimension of "obligation" emanates in this category of instruments from public authors, states and, to a much lesser extent, international organizations. However, a state as a public authority is not always authoritative as a rule maker, when it adopts instruments to address its own behavior, the obliging authority of the instrument is at the state's own discretion, and thus lower than when it is set by a binding Security Council Chapter VII resolution. States also do not have much authority over activities that take place outside their jurisdictions, which is very relevant in the context of TNCs. This type of exception therefore limits public authorities' power in terms of the obligatory nature of the enacted instrument.

On the other (sub)dimensions in the tool, the softness of Public Legal Instruments may in principle vary like it varies in all other types of instruments. In the absence of direct obligations and likely poor specificity, the tool places special emphasis on *the delegation dimension* of international public law instruments. Are the implementing tasks comprehensively delegated, and do the *delegatee* bodies possess the necessary authority to oversee the process? It should be kept in mind that because the states in any event need to act in-between the international requirements and TNCs, there already are two steps in applying international public law instruments. The delegation dimension of the tool shows how there is one further step to be taken into account.

The state's implementing authority and responsibility to apply the international provisions is often delegated to a public body such as a ministry or agency. Although an actor other than the TNCs themselves, the authority of the delegation is limited by the fact that it was these very states that adopted the instruments in question, and they are addressed to these very same states. The implementing and interpretive authorities are in this sense not delegated to a truly independent actor. The state's independent authority in the delegation will depend on many factors, but there is often little in the instruments to guarantee it, and much to restrain it. For example, the interests of the state may be too close to that of the TNCs for it to exercise "independent" delegated authority over the corporations. This holds true for host states, as the *Chevron* case vividly illustrated, but also for home states, which may be unwilling to constrain the operations of 'their" corporations abroad.

Another problem is that international jurisdictional laws limit the authority that is legally delegated to the home state. Home state organs enforcing or adjudicating on 'their' corporations may rightly fear that such extensive exercises of jurisdiction are for the most part prohibited by international law. The *Shell Nigeria* case showed that even where a home state judge declares itself competent, it may only be able to apply the law of the host state, which in that case was far below the standards prescribed by the home state.[122] Third, a state may be unlikely to proactively enforce the rules, and will often only intervene if the victims or their representatives bring a case against the state authorities. Local inhabitants or vigilant NGOs may be required to force the state to assume its role as the delegatee. An example is again the *Chevron* case, where only a decades-long effort by interest groups was able to move the case forward.

Truly relevant delegation would mean third party oversight over the states' performance of their delegated tasks with regard to TNCs. The following sections will show that such oversight is nevertheless often deficient on all levels: national, regional as well as international. In conclusion, the delegation sub-dimension is rather soft for many Public Legal Instruments on TNCs.

A tentative picture can thus already be envisaged before applying the tool to provisions of particular Public Legal Instruments in areas of human rights covenants and multilateral environmental agreements. Public Legal Instruments are formally binding upon states that are parties to them, but not upon TNCs nor do they generally contain mandatory and precise requirements specifically about their behavior, or delegation of oversight regarding state actions vis-à-vis TNCs. Public Legal Instruments thus appear soft along all dimensions in their application to TNCs. The conclusion seems almost counter-intuitive. 'Hard law' could leave a void in terms of TNCs because it is in fact not hard at all.

2. The Human Rights Covenants

The human rights covenants, the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), illustrate the softness that may plague Public Legal Instruments in the field of human rights. The Covenants amount only to what Knox calls a due diligence

122. *See supra* Section I (E)(3); Milieudefensie v. Dutch Royal Shell, Judgment (LJN: BU3535) (2013).

obligation, "an obligation of conduct and effort, not of result,"[123] regarding human rights violations between private actors such as TNCs and individual citizens. It is sufficient for the state governments to satisfy their obligations to just take "reasonable steps" in trying to prevent violations. Individual states and national legal orders retain rather large discretion to determine appropriate measures.

Admittedly, the Human Rights Committee has commented that states must protect individuals "also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private parties or entities."[124] But *how exactly* the rights apply to private actors, and *which actions* are required of states in particular situations is left to the states themselves to determine. Moreover, the General Comments of the Covenant's bodies are not legally binding. Research conducted under the UN Special Representative for business and human rights' mandate shows that in practice, very few states actually have "special policies, programs, or tools designed specifically to deal with corporate human rights challenges."[125] The conclusion is that the "due diligence" standard leads to a low level of obligation, and that the lack of accurate guidance on which actions are a part of that due diligence standard amounts to a low level of precision, both in terms of accuracy and specificity.

As for the duties of home states to oversee that corporations based within their jurisdiction respect human rights extra-territorially, the Covenants are even more ambiguous: "The committees have not expressly interpreted the treaties as requiring states to exercise extraterritorial jurisdiction over abuses committed abroad by corporations domiciled in their territory. Nor however, do they seem to regard the treaties as prohibiting such action, and in some situations they have encouraged it." For example, the Committee on Economic, Social and Cultural Rights has suggested that state parties take steps to "prevent their own citizens and companies" from violating rights in other countries.[126] Thus, the dimensions of obligation and precision appear to be for home states even softer than for host states.

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123. Knox, *supra* note 21, at 22.

124. Human Rights Comm., General Comment No. 31, para. 8, U.N. Doc. CCPR/21/Rev.1/Add.13 (May 26, 2004).

125. *See* Human Rights Council, Human Rights Policies and Management Practices: Results from Questionnaire Surveys of Governments and the Fortune Global 500 Firms, U.N. Doc. A/HRC/4/35/Add. 3 (Feb. 28, 2007).

126. Committee on Economic, Social and Cultural Rights, 46th Sess. May 2-May 20,

Is the softness of such low levels of obligation and precision mitigated through oversight by third parties, delegation? The Human Rights Committee ("HRC") and the Committee on Economic, Social and Cultural Rights (the "Human Rights Bodies") may be considered as a kind of "secondary" *delegatee*: they monitor whether the states complete their delegated task of providing horizontal protection. Such interventions by the Human Rights Bodies will not be able to strengthen the delegation much in practice, however, as it is widely acknowledged that these U.N. bodies have only very limited powers. The so-called 'views' the HRC adopt in specific cases are non-binding as are the General Comments of both committees.

Regional courts, such as the European Court of Human Rights, have declared themselves incompetent to assert jurisdiction outside the territory of the member states of the European Convention on Human Rights, except where a member state exercises effective control, but this is only possible in cases of either full occupation[127] or military action on the ground.[128] In the developing regions, where the consequences of the void are felt most, oversight mechanisms are much weaker. They are practically absent in Asia,[129] while the African Court of Human and Peoples' Rights is slowly starting to make use of its competences.[130] The Inter-American Court of Human Rights seems in this respect most promising in the short term. However, the primary focus of all these courts often is, or at least should be, in scrutinizing government's own inappropriate conduct. Scrutiny of governmental oversight of corporate conduct would seem a second-tier priority.

The *Shell-Nigeria* case implies that home state courts will at most oversee that the state applies to national corporations the domestic law of the host state, but not that it applies the ECHR or the ICCPR. The

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2011, U.N. Doc. E/C.12/2011/1 para. 5.

127. *See* Cyprus v. Turkey, App. No. 25781/94, 35 Eur. Ct. H.R. 731, para. 76 (2001); *see* Loizidou v. Turkey, App. No. 15318/89, 20 Eur. H.R. Rep. 99, para. 62 (1995).

128. *See* Al-Skeini v. United Kingdom, App. No. 55721/07, 53 Eur. H.R. Rep. 18, para. 110 (2011).

129. The ASEAN Intergovernmental Commission on Human Rights (AICHR) has as of yet no real judicial powers. *See* James Munro, *The Relationship Between the Origins and Regime Design of the ASEAN Intergovernmental Commission on Human Rights (AICHR)*, 15 INT'L J. HUM. RTS. 1185, 1185 (2011).

130. A first decision was issued on 15 December 2009, in the matter of Michelot Yogogombaye v. The Republic of Senegal, 001/2008, AFR. CT. H.R. *See* Chacha Bhoke Murungu, *Judgment in the First Case Before the African Court of Human and Peoples' Rights: A Missed Opportunity or a Mockery of International Law in Africa?*, 3 J. AFR. & INT'L L. 187 (2010).

OECD National Contact Points are a very modest attempt to oversee human rights violations outside ECHR territory. The Contact Points fall in this paper under the next category of Public Non-Legal Instruments.

These examples are well aligned with the conclusions of the U.N. Special Rapporteur. States seem to escape effective oversight by other delegated bodies, irrespective of the level of governance.

3. Environmental Agreements

The previous discussion on Public Legal Instruments in the field of human rights indicated that these tools often lack in terms of their obligation, precision and delegation. International environmental agreements may however be used to illustrate that such deficiencies are not an unavoidable characteristic of Public Legal Instruments, but rather a consequence of more or less deliberate choices in constructing the instruments. In other words, hardness is also possible to achieve in international law. The International Convention on Civil Liability for Oil Pollution Damage (the "CLC Convention") 1992[131] provides an instructive example. The CLC Convention is an international maritime treaty that was adopted to ensure that adequate compensation is available for oil pollution damage caused by accidents of oil tankers.[132] Article IX of the Convention states that "[e]ach Contracting State shall ensure that its Courts possess the necessary jurisdiction to entertain such actions for compensation."

The convention is extremely precise and framed in mandatory terms. It reads almost like an insurance contract.[133] Paradoxically, as

131. *International Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention, (CLC))*, INT'L MARITIME ORG. (Nov. 29, 1969), *available at* http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx (last visited Apr. 1, 2015).

132. *Id.*

133. For example, paragraphs 1-3 of Article V state:

> The owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an aggregate amount calculated as follows:
>
> (a)4,510,000 units of account for a ship not exceeding 5,000 units of tonnage;
>
> (b)for a ship with a tonnage in excess there of, for each additional unit of tonnage, 631 units of account in addition to the amount mentioned in sub-paragraph (a);
>
> provided, however, that this aggregate amount shall not in any event exceed 89,770,000 units of account.
>
> The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

the text of for example the Preamble and Articles III and V of the Convention show a central aim of the Convention is in fact to *limit* the liability of the ship owners. A number of scholars indeed criticize the way in which a regime, which was meant to establish a balance between the needs of the victims of oil spills (compensation for the harm) and the needs of the economic actors (continuation of activities), favors the latter.[134] The victims of a recent oil spill, caused by the tanker Erika, have for that reason sought to escape the limitations of the international civil liability regime. They try to rely on the more protective provisions of national criminal law or EU waste legislation,[135] instead.[136] All other public law instruments, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms ("HR Convention"), also seem incapable of alleviating the victims' concerns.

> For the purpose of availing himself of the benefit of limitation provided for in paragraph 1 of this Article the owner shall constitute a fund for the total sum representing the limit of his liability with the Court or other competent authority of any one of the Contracting States in which action is brought under Article IX or, if no action is brought, with any Court or other competent authority in any one of the Contracting States in which an action can be brought under Article IX. The fund can be constituted either by depositing the sum or by producing a bank guarantee or other guarantee, acceptable under the legislation of the Contracting State where the fund is constituted, and considered to be adequate by the Court or other competent authority.

Id. art. V.

134. *Cf.* A.E. Boyle, *Globalising Environmental Liability: The Interplay of National and International Law*, 17 OXFORD J. ENVTL. L. 3 (2005); *see* EDWARD H. P. BRANS, LIABILITY FOR DAMAGE TO PUBLIC NATURAL RESOURCES: STANDING, DAMAGE, AND DAMAGE ASSESSMENT (1st ed. 2001); LIABILITY FOR DAMAGE TO THE MARINE ENVIRONMENT (Colin M. De la Rue ed., 1993); Gotthard M. Gauci, *Protection of the Marine Environment Through the International Ship-Source Oil Pollution Compensation Regimes*, 8 REV. EUR. COMP. & INT'L ENVTL. L. 29 (1999); Magnus Göransson, *Liability for Damage to the Marine Environment*, *in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 345 (Alan Boyle & David Freestone eds., 1999); David Wilkinson, *Moving the Boundaries of Compensable Environmental Damage Caused by Marine Oil Spills: The Effect of two New International Protocols*, 5 OXFORD J. ENVTL. L. 71 (1993). For more critical approaches, see Anne Daniel, *Civil Liability Regimes as a Complement to Multilateral Environmental Agreements: Sound International Policy or False Comfort?*, 12 REV. EUR. COMP. & INT'L ENVTL. L. 225 (2003); Michael Faure & Wang Hui, *The International Regimes for the Compensation of Oil-Pollution Damage: Are they Effective?*, 12 REV. EUR. COMP. & INT'L ENVTL. L. 242 (2003); Armelle Gouritin, *The International Regime for the Compensation of Oil-Pollution Damage. A Good Candidate to Have a Human Rights Approach?*, 20 REV. EUR. COMP. & INT'L ENVTL. L.194 (2011); Dramé Ibrahima, *Recovering Damage to the Environment per se Following an Oil Spill: The Shadows and Lights of the Civil Liability and Fund Conventions of 1992*, 14 REV. EUR. COMP. & INT'L ENVTL. L. 63 (2005).

135. *See* Case C-188/07, Commune de Mesquer v. Total Fr. SA, 2008 E.C.R. I-4501, paras. 24-27, 66.

136. *See* Gouritin, *supra* note 134.

The precision and delegation of the HR Convention is low and much inferior to that of the CLC Convention.

The example demonstrates how a Public Legal Instrument *can* be very hard in terms of its obligations, precision and delegation, and that it may then tend to be working to shield rather than to govern the specific powerful group of TNCs, in the quoted example the shipping companies.

4. Concluding Perspectives on Public Legal Instruments

The application of the softness tool on Public Legal Instruments reveals that they tend to score low on the mandatory language, precision and specificity in terms of managing TNCs and other private actors. The level of obligation for states in fulfilling their tasks as *delegatees* also remains ambiguous. Especially the extra-territorial enforcement of home state laws against national corporations is rare. In many respects, the "hard law" turns out not to be hard at all, even if there clearly is potential for it be so.

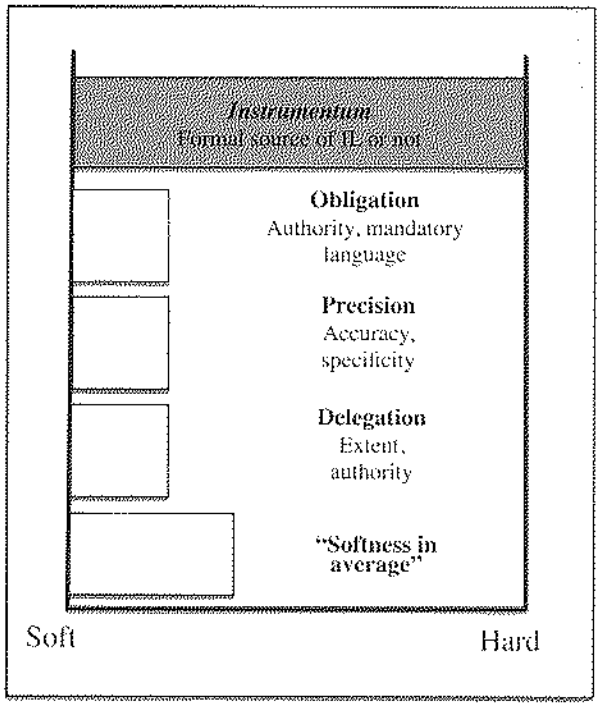

Figure 4: "Softness" of TNC Related Public Legal Instruments in Human Rights and Environmental Protection.

B. Public Non-Legal Instruments

1. General Observations

The second group, Public Non-Legal Instruments contains agreements between state parties, state-centric institutions or even looser gatherings of public officials. The proliferation of international organizations has increased the importance of public yet non-legal instruments,[137] and this is also true for the governance of TNCs. Such instruments are therefore not a new phenomenon in international governance, and their longstanding role has been described by scholars, such as Schachter, Lipson, and Aust.[138]

The obvious observation on the softness of the entire category of Public Non-Legal Instruments is what distinguishes them from formal law: that governments and international organizations ("IOs") have opted for a *non*-legal *instrumentum*, that is not formal law. The non-legal nature of the *instrumentum* is often reflected in the denominations of the instruments, such as "recommendations" or "guidelines." Sometimes a closer analysis of the IO's constitutive instrument, or of the content of the agreement, is necessary to establish that one is indeed dealing with a non-legal *instrumentum*.

Many Public Non-Legal Instruments that relate to TNC behaviour are adopted through, or by, IOs such as the Organization for Economic Cooperation in Europe ("OECD"), the United Nations ("U.N.") and the United Nations Environment Programme ("UNEP"). Their *authority* tends to vary on a case-by-case basis: the U.N. as an eminent organization can assert great moral authority on state and TNC activities, while the OECD is regarded highly by TNCs for its competence and expertise on economic issues. The obligations created by the authority of other IOs, for instance UNEP, towards TNCs are in

137. *See generally* JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005); *see, e.g.*, Christian Brutsch & Dirk Lehmkuhl, *Complex Legalization and the Many Moves to Law*, *in* LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS 9, 9-27 (Christian Brutsch & Dirk Lehmkuhl eds., 2007) (discussing the increase in international law making and legalization of transnational relations); Kal Raustiala, *Institutional Proliferation and the International Legal Order*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 293 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012) (referring to institutional proliferation and the rise of institutional density).

138. *See* Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT'L & COMP. L.Q. 787 (1986); Charles Lipson, *Why are Some International Agreements Informal?*, 45 INT'L ORG. 495 (1991); Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296 (1977).

many cases softer. What is relatively new in Public Non-Legal Instruments is that increasingly they contain a mixture of provisions that are intended to directly cover the behavior of non-state actors, even though the non-state actors have no official part in the adoption of such instruments. This increases the obligatory nature of the instruments towards TNCs. On the other hand, the member states of international organizations voting in favor of such instruments tend to equate them with political agreements. The language of the instruments is not mandatory, and hence does not create obligations: not on the TNCs, the states, nor on the IOs adopting them. The member states tend to share the idea that the TNCs' behavior needs to change in certain ways, and wish to point each other's actions into that direction. The instruments that are directly addressed to TNCs only encourage them to act in a certain way.

The sub-dimensions of precision—the accuracy and specificity of the instruments — appear to vary widely in Public Non-Legal Instruments. Specificity perhaps tends to be the 'harder' sub-dimension of the two, as the instruments occasionally address specific kinds of businesses and specific types of TNC behavior, but are less often very accurate about what exactly the states and TNCs are in practice expected to do.

Finally, the *delegation* dimension tends to be low across Public Non-Legal Instruments, as the implementation and interpretation of the instruments is mostly left to the enacting states and IOs themselves.

2. The OECD Guidelines and National Contact Points

The Organization for Economic Cooperation and Development ("OECD") adopted the OECD Guidelines for Multinational Enterprises ("OECD Guidelines" or "Guidelines") in 1976, and revised them in 2000 and 2011. The OECD Guidelines are "recommendations addressed by governments to multinational enterprises operating in *or from*" OECD Member States adhering to the Guidelines.[139] They "provide non-binding principles and standards for responsible business conduct in a global context,"[140] thus apparently aiming to fill the void left by the Human Rights Covenants with their unclear stance on extra-territoriality. The Guidelines encourage companies to "[r]espect the

139. *OECD Guidelines on Multinational Enterprises*, ORG. FOR ECON. CO-OPERATION AND DEV. 3 (2011), *available at* http://www.oecd.org/corporate/mne/48004323.pdf (last visited Mar. 16, 2015) [hereinafter *OECD Guidelines*].

140. *Id.*

internationally recognised human rights of those affected by their activities,"[141] "wherever they operate."[142]

In terms of precision, the OECD Guidelines are thus *specifically* addressed at multinational enterprises and are quite accurate as to what is expected from them. For example, the Guidelines state that

> [a] State's failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights.[143]

However, much of the language is not phrased as obligations. In most provisions, "should," "seek ways to," or "does not diminish the expectation" in the provisions just quoted above prevail over "shall."[144] It remains unclear where in the Guidelines an obligation for the TNCs[145] to actually act in accordance with them is really created. Perhaps it flows from the "procedural" obligations that are phrased in more mandatory terms.[146] For instance, TNCs—if acting in accordance with the Guidelines—must have an internal policy on human rights, carry out human rights due diligence and "provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts."[147] Yet the Guidelines do not mention any sanctions on transnational corporations that do not carry out such tasks. It should be recalled that for the TNCs, the Guidelines indeed only establish non-binding principles. The ability of the procedural provisions of the Guidelines to set obligations that amount to a high level of hardness in the sense of the tool will hence depend on the authority of the instrument, and the OECD more generally. As was noted above, the corporate community would seem to regard the organization rather highly.[148]

A further dimension along which to measure the hardness of the Guidelines is the delegation of their implementation and enforcement.

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141. *Id.* at 19, art. II.A.2.

142. *Id.* at 17, art. 1.3.

143. *Id.* at 32, art. IV.38.

144. *See e.g.*, *OECD Guidelines supra* note 139, art. IV.1-IV.3.

145. *Id.* at 21, para. 3 (The OECD Guidelines uses the terminology "MNEs.").

146. *Id.* at 31, art. IV.4-IV.6.

147. *Id.* at 31, art. IV.6.

148. For an example of a critical approach to the OECD Guidelines, see Joris Oldenziel & Joseph Wilde-Ramsing, *OECD Guidelines Lack Teeth, Influence*, OECD WATCH (Sept. 25, 2009), *available at* http://oecdwatch.org/news-en/oecd-guidelines-lack-teeth-influence (last visited Apr. 1, 2015).

The Guidelines do set legally binding obligations on the OECD member states in this respect. The states must, amongst other things, establish "National Contact Points" ("NCPs") to assist companies and their stakeholders in complying with the Guidelines.[149] This obligation finds a legal backrest in Article 5(a) of the OECD Convention, which specifically mandates state parties to follow the OECD Guidelines' procedural and institutional rules regarding the setting up of NCPs and the proceedings that they are to follow.[150] However, it is doubtful whether the NCPs may be considered independent from the executive branch of the states that establish them. As noted, this triggers problems on the role of the state as a *delegatee*.[151] This problem is slightly less serious in OECD Guidelines than in many Public Legal Instruments because the state is implementing standards that apply directly to the TNCs instead of relying on their indirect application through the duty to protect. It has been argued that the NGOs also play the role of a *delegatee*, next to the NCPs themselves, because the procedure allows NGOs to bring cases to the attention of the NCPs.[152] In practice, this is the way in which a case usually reaches an NCP.

A more serious problem is the limited extent of delegation. The ultimate power of the NCPs resides in their ability to make public statements. While the power of negative publicity in inducing changes in TNC behavior (or at least in the image it wishes to promote) should not be underestimated, it usually still falls short of the obligatory force of, for instance, monetary fines or the judicial prosecution of individuals. There are good reasons to doubt the extent to which the NCPs are, or can be expected to be, performing their tasks as effective

149. *OECD Guidelines*, *supra* note 139, at 68.

150. *Convention on the Organisation for Economic Co-operation and Development*, art. 5(a), OECD, Dec. 14, 1960, *available at* http://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm (last visited Apr. 1, 2015) [hereinafter *OECD*].

151. The Netherlands tried to mitigate this problem by making its NCP a more independent body, but the OECD Guidelines require at least some measure of government involvement, so that independence could only partially be achieved. For instance, the Minister of Foreign Affairs can still make a statement before a report is made public. *See Dutch National Contact Point: Aspirations and Expectations Met? Report of the NCP Peer Review Team* (2010), *available at* http://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Verwaltungsrecht/de_Wet/27_Dutch_NCP.Peer_Review.pdf (last visited Apr. 1, 2015).

152. *OECD*, *supra* note 150, at 1774. According to Schuler, another possible role of delegatee is reserved for the OECD Investment Committee, but its role is limited to posting clarifications of a general nature and it cannot overrule statements by NCPs in specific cases.

implementers and interpreters of the Guidelines. In fact, there is no sign that TNCs *actually* have been publically reproached in more cases than the odd one out. For example, in the eleven cases over a period of *ten years*—a low figure in itself—on which the NCP of the Netherlands so far has reached a Final Report, *not once* did it find a reason to publicize the violations of substantive rights.[153] In but a few cases did it find that transparency, communication and other such more secondary issues were below the OECD standard.[154] It urged the companies in question to improve those particular points, or only congratulated them for having already done so. In the remainder of the cases, the NCP concluded that no 'investment context' or 'nexus' existed, so that the situation fell outside the scope of the OECD Guidelines,[155] or that bilateral talks between the NGO complainant and the company had already brought the issue to a close.[156] The figures on the Dutch NCP reflect those on other OECD member states.[157]

153. *Closed Procedures*, MINISTRY FOREIGN AFF., *available at* http://www.oecdguidelines.nl/notifications/contents/overview-notifications/closed-procedures (last visited Apr. 1, 2015).

154. *See e.g.*, Neth. Nat'l Contact Point, *Final Statement of the Dutch NCP on the "Complaint (dated May 15, 2006) on the Violations of Pilipinas Shell Petroleum Corporation (PSPC), Pursuant to the OECD Guidelines for Multinational Enterprises"*, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 14 (July 14, 2009), *available at* http://www.oecd.org/corporate/mne/43663730.pdf (last visited Apr. 1, 2015).

155. *See* Neth. Nat'l Contact Point, *Final Statement of the Dutch NCP on the Specific Instance Raised by Shehri-CBE Concerning Makro-Habib Pakistan Limited, Raised on 9 October 2008*, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (Feb. 2010), *available at* http://www.oecd.org/daf/inv/mne/46085466.pdf (last visited Apr. 1, 2015).

156. *See* Neth. Nat'l Contact Point, *Final Report of the National Contact Point for the OECD Guidelines in the Netherlands on the Specific Instance Notified by CEDHA, INCASUR Foundation, SOMO and Oxfam Novib Concerning Nidera Holding B.V.*, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (Feb. 3, 2012), *available at* http://www.oecd.org/daf/inv/mne/Netherlands_final_statement_nidera_03-02-2012.pdf (last visited Apr. 1, 2015).

157. *See* JORIS OLDENZIEL, JOSEPH WILDE-RAMSING & PATRICIA FEENEY, OECD WATCH 10 YEARS ON: ASSESSING THE CONTRIBUTION OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES TO RESPONSIBLE BUSINESS CONDUCT 10-11 (2010).

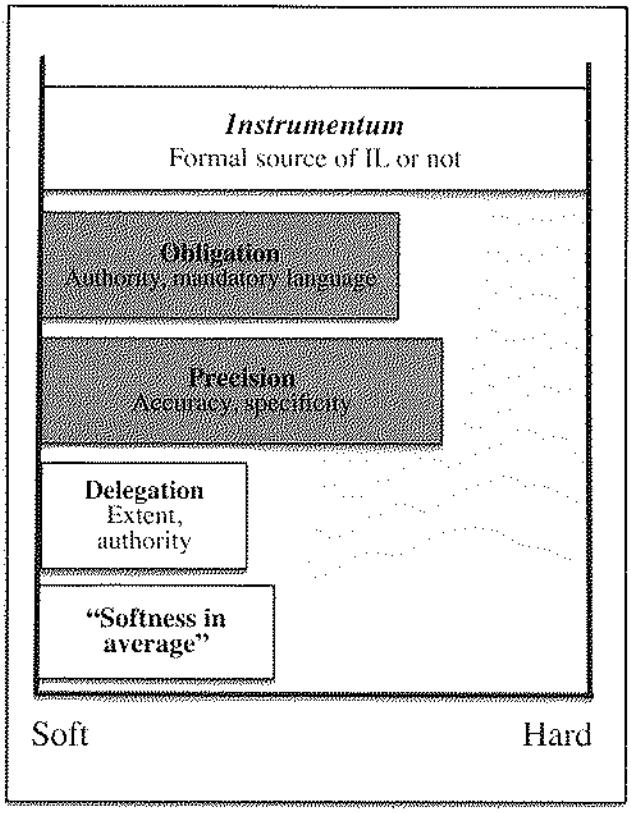

Figure 5: "Softness" of OECD Guidelines

3. The United Nations Guiding Principles on Business and Human Rights ("U.N. Guiding Principles" or "Principles")

The U.N. Guiding Principles are the result of a U.N. Human Rights Council mandate to the Special Representative of the U.N. Secretary-General, John Ruggie. On the basis of the mandate, Ruggie was to develop such principles within the framework proposed in his Report to "Protect, Respect and Remedy."[158] The Principles rest accordingly on the Report's three pillars of protection, respect and remedy:

> The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate

158. Ruggie, *supra* note 9, para. 9.

> responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial.[159]

The text of the U.N. Guiding Principles was consulted extensively with a wide variety of relevant actors ranging from governments to businesses and NGOs.[160] The substantive principles of the U.N. Guiding Principles are quite similar to the OECD Guidelines, which in their 2011 version were aligned with the former.[161] Yet, the U.N. Guiding Principles have a broader scope *ratione personae*, because they include TNCs from all U.N. member states, rather than from the industrialized OECD countries only. *Ratione materiae*, the U.N. Guiding Principles are not limited to investment settings, unlike the OECD Guidelines. In other words, the U.N. Principles apply to a larger number of states and TNCs, and to a wider array of situations.

The U.N. Guiding Principles were adopted by the geographically representative U.N. Human Rights Council. The Principles' hardness along the obligation dimension of the tool is likely to benefit from the rather strong systemic coherence with the human rights Covenants. As explained previously, systemic coherence denotes the influence that one instrument may have on the performance of another along the dimensions of the tool. The interaction between a similarly aligned Public Legal Instrument, such as a human rights Covenant, and a Public Non-Legal Instrument, such as the U.N. Guiding Principles, could mutually increase the hardness of both instruments. In this case both instruments are even a part of the U.N. human rights system. The Principles could lead judiciaries to interpret more specifically the obligations of states as delegatees vis-à-vis TNC conduct under the Covenants.[162] Since all parties to the human rights Covenants are also parties to the U.N., the U.N. Guiding Principles could be argued to constitute a subsequent agreement or practice that contributes to the

159. *Guiding Principles*, *supra* note 48, para. 6.

160. *Id.* para. 12.

161. This is understandable since the most recent version of the OECD Guidelines (2011) explicitly states that they are in line with the UN Guiding Principles. *OECD Guidelines*, *supra* note 139, at 3.

162. Arguably, there is no reason why this would not be true as well to some extent for the OECD Guidelines, just as for all other Public Non-Legal Instruments, which may influence the development of the law through interpretation or the development of customary international law.

interpretation of the pre-existing international human rights obligations of states.[163] Alternatively, the U.N. Guiding Principles could be considered a part of the *opinio juris* in the formation of new customary rules.[164] Most relevant in this respect is that Part I of the UN Guiding Principles deals with what the state "duty to protect" amounts to for companies.[165] The notion of systemic coherence thus provides insights in how one instrument may have a high level of obligation but lack in precision, while for another one the situation is the other way around. Taken together, the instruments may alleviate each other's softness.

The obligations created by the U.N. Guiding Principles could therefore be harder than the principled, non-legal nature of their form would lead to assume, if they are "hardened" by their close links to existing "hard law" instruments. Conversely, the U.N. Guiding Principles could oblige states, and consequently TNCs, by further "hardening" the obligations that the states have earlier agreed to as delegatees under human rights Covenants.

This line of reasoning nevertheless holds in practice only where the Public Non-Legal Instrument in question is actually hard comprehensively, *i.e.* is also precise and uses mandatory language. It is questionable whether this is the case for the U.N. Guiding Principles. First, the duties of states in the Principles are not phrased in a mandatory or particularly accurate fashion. The duty of the states towards "abuses by private actors" is in the Principles defined by using wordings such as "appropriate steps," "discretion," and "*should* consider."[166] Compared with how state duties have developed in the jurisprudence of the international human rights bodies, the U.N. Guiding Principles may therefore be a step backwards in terms of accuracy. The vagueness about what the duty to protect amounts to leaves the states a *wider* margin of discretion on what is acceptable TNC behavior.[167] A closer analysis of the Principles thus reveals evidence of systemic *in*coherence, or antagonism, in contrast to what initially seemed like a case of coherence.

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163. *Guiding Principles*, *supra* note 48, para. 14; *see also* Vienna Convention on the Law of Treaties art. 31(2)(b), May 23, 1969, 1155 U.N.T.S. 331.

164. This is what happened to some of the principles established in the famous Rio Declaration on Environment and Development (1992).

165. *Guiding Principles*, *supra* note 48, at 3.

166. *Id.* at 3-4.

167. Nicola Jägers, *UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Accountability?*, 29 NETH. Q. HUM. RTS. 159, 161 (2011).

Moreover, the express emphasis in the Principles that no international *obligations* are set on the corporations directly, only on the states, obviously dilutes the obligatory character of the Principles on TNCs. In the period before the drafting of the Principles, the idea of setting legal obligations for companies was still taken seriously.[168] The "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights"[169] were however dismissed, after which the appointment of the Special Representative followed. The part that directly applies to companies speaks only of *responsibilities to respect*, but not of obligations in the same more explicit sense as the *duties* laid on states. The concept of "responsibility" is not defined any further than that a certain standard of conduct is "expected" of the businesses.[170] Moreover, the U.N. Guiding Principles do not state on what basis this responsibility arises. Clearly, it is not on the basis of a legal *instrumentum*. Since TNCs are not legally bound by the Principles, the Principles represent to the TNCs, a mere reiteration of pre-existing legal obligations, and a consensually agreed moral obligation to reach beyond such legal obligations. The hardness of such a moral obligation would depend on the authority of the instrument.[171]

In terms of precision, the U.N. Guiding Principles represent the high end in this paper's examples of instruments. They are slightly less specific than the OECD Guidelines, because the drafters broadened their scope of application to all businesses rather than to TNCs alone. Also accuracy is reasonably high, with elaborate commentaries to each of the "Operational Principles." The part that sets out the desired scope and content of the companies' human rights due diligence processes seems to some extent comparable to an environmental impact

168. *Id.* at 160 ("From the very beginning professor Ruggie has steered determinedly away from the concept of human rights obligations for corporations and instead placed exclusive emphasis on the State as the sole duty-bearer."). *See also* De Feyter *supra* note 15, at 78.

169. Sub-Comm'n on Promotion and Prot. Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corps. and Other Bus. Enter. with Regard to Human Rights*, Rep. on its 55th Sess., Aug. 26, 2003, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

170. *Guiding Principles*, *supra* note 48, at 13.

171. Special Representative Ruggie notes quite positively the numerous consultations he had with companies in establishing the Principles. *See* Ruggie, *supra* note 9, Introduction, ¶ 7, ¶12. It is difficult to assess whether the consultations have truly supported the authority of the Principles, or were merely something that TNCs participated in to maintain a constructive image and to influence any obligations they could be subjected to.

assessment.[172] The focus of the Principles is on prevention, which the TNCs have direct influence on, and which is often more effective than remediation.

However, although precise, much is laid out in descriptive and explanatory concepts that do not amount to new mandatory requirements from the perspective of the dimension of obligation. So while accurate, the Principles and their Commentaries at most reiterate existing legal requirements. They, for example, note that in many jurisdictions, complicity in committing a crime can lead to criminal liability, even on TNCs, but they do not in any way expand the scope of such liability.[173]

Even precise obligations on companies need to be interpreted when they are implemented into practice. The implementation is optimally delegated to separate authorities. Yet on delegation, the U.N. Guiding Principles are considerably softer than, for example, the OECD Guidelines. An earlier version of the Principles envisaged an Ombudsperson,[174] but this role was apparently removed. The Principles in the part on the state Duty to Protect probably confused rather than clarified the role of states as *delegatees* in the implementation and enforcement of international human rights law on TNCs.[175] The part on Access to Remedy calls for various kinds of national and company-based *non*-judicial grievance mechanisms to complement the state-based judiciaries. In other words, the Principles neither strengthen the role of home states nor do they create a centralized authority to coordinate the implementation. They only advocate a very soft form of delegation that excludes the power to take decisions. Moreover, such mechanisms are only encouraged, rather than made mandatory. The contrast to the National Contact Points ("NCPs"), mandated by the OECD Guidelines, is clear.

172. *Guiding Principles*, *supra* note 48, at 17-23.
173. *Id.* at 18.
174. Ruggie, *supra* note 9, para. 103.
175. Jägers, *supra* note 167.

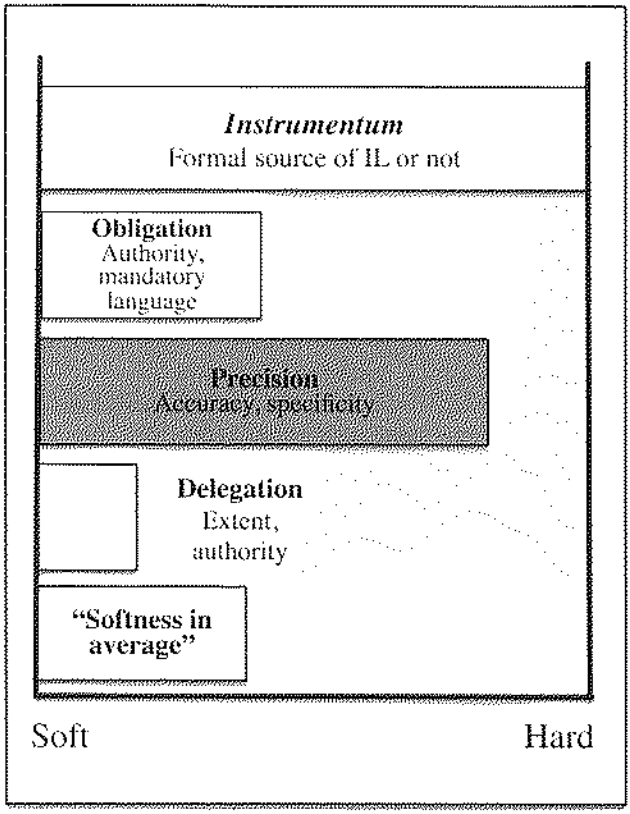

Figure 6: "Softness" of UN Guiding Principles

4. Concluding Perspectives on Public Non-Legal Instruments

Public Non-Legal Instruments score around the average on several dimensions of softness in the tool. While scoring rather high on the dimension of precision, the Public Non-Legal Instruments in this paper score low on the scale of delegation. They are low on the scale of obligation as well, because the two sub-dimensions of obligation—authority and the mandatory nature of the language—give contradictory results. The language used is often overtly non-mandatory, and this fact cannot be fully compensated by the respectability of the IOs involved, which is likely to reinforce the authority of the instruments. Public Non-Legal Instruments, such as the OECD Guidelines and the UN Guiding Principles, by definition lack the legally binding character of their counterparts in formal treaties. Unless they are considered interpretive agreements, they cannot be invoked before a judge as

directly applicable to a dispute. Systemic coherence, therefore, could influence the softness or hardness of a non-legal instrument. However, unless that dynamic clearly increases the level of obligation and delegation, the softness along these two dimensions only appears to permit average levels of hardness in this category of instruments.

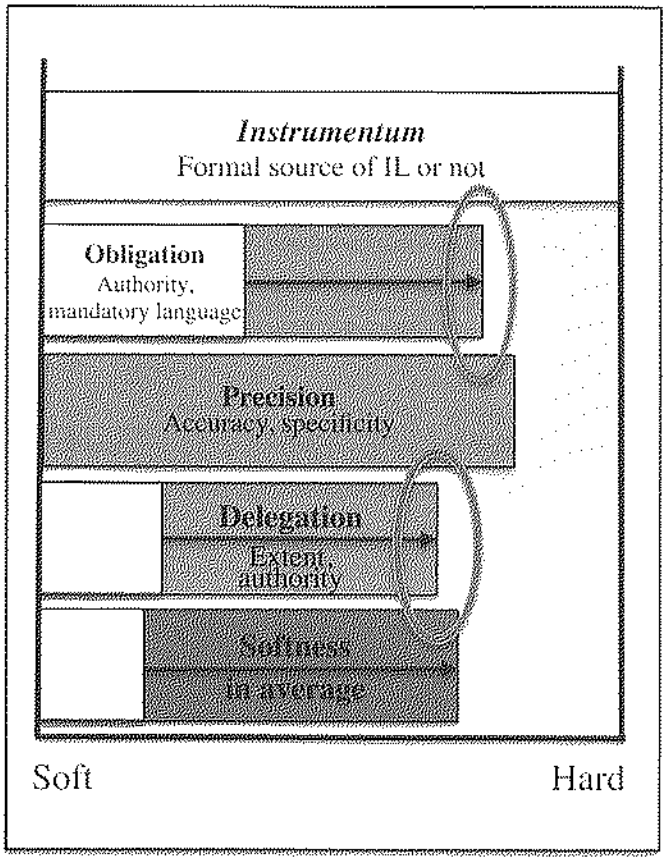

Figure 7: Effects of Systemic Coherence – Hardening Public Non-Legal Instruments Through Hard Law

C. Private Instruments

1. General Observations

There are a great number of instruments that belong to the third group: private instruments with direct relevance to TNC behavior.

Despite the variance among the instruments in this category, it is possible to make some general assumptions on how they score on the dimensions of the tool.

Private instruments, as explained above in Section III, derive their denomination from the fact that their dominant authors are neither states nor state-centric international organizations. These types of organizations do not have the capacity to adopt instruments that qualify as formal sources of international law, i.e. as Public Legal Instruments. None of these instruments in other words has a legal *instrumentum*. At the same time, however, such authors do have the capacity to agree among themselves on instruments that are of private kind.

Private instruments vary significantly by the combinations of authors adopting them. These authors are principally businesses or their associations, as well as national and international NGOs. In many fields, TNCs and NGOs have even entered into a veritable contest to set the applicable standards. Sometimes a single instrument is ultimately agreed upon by TNCs and NGOs together, such as the much discussed Forest Stewardship Principles and Criteria. Some private instruments are adopted together with or without the support of states or international organizations that result in some cases in so-called public-private partnerships ("PPPs").[176] It is for that reason not always easy to distinguish between private and public instruments, although in most cases either the public or the private actors will be in a dominant role. The Voluntary Principles on Security and Human Rights ("VPSHR") and the Extractive Industries Transparency Initiative ("EITI") are, respectively, examples of a venture purely among TNCs and a venture between TNCs and a few states. In some cases, such as the UN Global Compact, NGOs have heavily criticized PPPs for being dominated from the outset by business interests under the umbrella of what was formally a state or IO initiative.[177]

It is difficult to make generalizations along the tool's dimension of authority with so many different author-addressee combinations. Public authors are generally, but not always, more authoritative than private parties, and the views on the authority of self-regulation vary greatly. Low authority indicates low obligation, and hence softness. Mandatory

176. Peter Utting & Ann Zammitt, *United Nations-Business Partnerships: Good Intentions and Contradictory Agendas*, 90 J. BUS. ETHICS 39 (2009).

177. Paine, *supra* note 13, at 13-14. *See also* J. Martens, *Precarious Partnerships: Six Problems of the Global Compact Between Business and the UN*, GLOBAL POL'Y FORUM, *available at* http://www.globalpolicy.org/component/content/article/225/32252.html (last visited Mar. 20, 2014).

nature of the language differs widely as well: the Forest Stewardship Council confronts a TNC with mandatory language, while the U.N. Global Compact does not. It is voluntary to sign up for either instrument.

Generally, the dimension of delegation is very soft across the board, in particular where private instruments are a form of self-regulation. The role of the state as *delegatee* is absent in the context of private instruments. In the NGO-led schemes, there may be some delegation to the NGOs, and the TNC schemes sometimes rely on external firms that perform corporate social accountability audits. Yet neither of them wields the investigative and prosecutorial powers of the state.

Specificity is often high, not only *ratione personae*, but also *ratione materiae*, as companies are the only addressees. The language used may range from the very accurate and mandatory expressions of technical standards to the very open and loosely formulated texts that are predominant in the human rights and environmental context, such as the Corporate Social Responsibility declarations of TNCs. Finally, on precision there is again much variance. The NGO principles usually score higher on this dimension than their TNC counterparts.

2. The United Nations Global Compact ("U.N. Global Compact" or "Global Compact")[178]

The United Nations Global Compact is a cooperative initiative of the U.N. and businesses, based on the multi-stakeholder ideology of U.N.-Business Partnerships that became prevalent in the U.N. in the 1990's.[179] The Global Compact is based on the voluntary incorporation by TNCs of a set of ten principles on human and labor rights, environmental rights, and the fight against corruption into all their activities. The companies also undertake to actively defend these values within their "sphere of influence."[180] The Global Compact is completely voluntary, both in regards to the initial registration as well as the subsequent adherence to the rules. In earlier versions, the principles were quite vague, but recently they refer to the U.N. Guiding Principles' chapter on the responsibilities of businesses. The link

178. The content of this section is derived partly from Tim Staal, *The Roles of Hard Law and Soft Law in the Regulation of Global Business Conduct* (2010) (unpublished Master's Thesis, Vrije Universiteit Brussels) (on file with authors).

179. Utting & Zammitt, *supra* note 176, at 39-40.

180. See *Overview of the UN Global Compact*, U.N. GLOBAL COMPACT, *available at* http://www.unglobalcompact.org/AboutTheGC/index.html (last visited Apr. 1, 2015).

subjects companies to the more elaborate set of principles. They give more accurate, yet clearly non-mandatory guidance about the steps that TNCs can take not to violate existing legal rules. One may clearly notice the effects of positive systemic coherence between the Global Compact and the Principles. For example:

> Principle 2: "Businesses should make sure they are not complicit in human rights abuses;"[181]
>
> Principle 9: "Businesses should encourage the development and diffusion of environmentally friendly technologies."[182]

The Global Compact awards companies who report their efforts on a regular basis the right to sport the Global Compact Logo. A sanction exists in the form of "de-listing" a company that does not report on its efforts over three consecutive one-year periods.[183] But in order to remain listed, a company need not do anything substantive. This TNC-favorable overall set-up attests to the private sector dominance in the Global Compact, and speaks for analyzing this public-private arrangement under the category of Private Instruments.

The Global Compact is based on the idea of forming a "community among the participants in which each individual actor strives to appear as appropriate in relation to other members of the network and to their stakeholders at large, a stance that should drive them to act according to the articulated principles."[184] Thus, the success of the Global Compact seems to depend on the plausibility of this relation between (superficial) peer accountability, the attractiveness of the Logo, and a TNC improved human rights and environmental record. This outcome seems quite case specific: what may create a hard instrument for a diligent TNC with high brand recognition and many aggressive competitors, may appear completely soft for a low profile free rider. The difficulty in even measuring such attributes against the tool illustrates well in fact the uncertainties and vagueness inherent in this type of an instrument.

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181. The *Ten Principles*, U.N. GLOBAL COMPACT, *available at* https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited Apr. 1, 2015).

182. *Id.*

183. *Integrity Measures*, U.N. GLOBAL COMPACT, *available at* http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html (last visited Apr. 1, 2015).

184. *See* Kerstin Sahlin-Andersson, *Emergent Cross-Sectional Soft Regulations: Dynamics at Play in the Global Compact Initiative*, *in* SOFT LAW IN GOVERNANCE AND REGULATION: AN INTERDISCIPLINARY ANALYSIS 129, 138-40 (Ulrika Mörth ed., 2004).

In terms of softness, the drafters of the Global Compact seem to expect that the lack of mandatory and precise wording, as well as the emphasis on the Global Compact's voluntary nature, are compensated through the hardness of other dimensions. The primary means here is the delegation of the supervision over self-implementation to "other members of the network and to their stakeholders at large."[185] These groups include other TNCs and NGOs. This has, however, arguably remained an empty promise. First of all, a single group of actors, the TNCs themselves, "appear[s] as rule setters, rule enforcers, rule followers and rule monitors."[186] This is at odds with the very idea of delegation. Second, the delegation of authority to "stakeholders at large" points to two groups of actors: the general public and NGOs. The former may be expected to react at press stories about serious violations, but will not actively compare company behavior to the Principles. So in that sense the general public has a limited, if any task at all, in the governance of the Global Compact. The most visible part of the public, NGOs, have from the beginning played an ambivalent role in the Global Compact. NGOs can be members, just like TNCs, and can therefore present a matter of alleged "egregious abuse" to the Global Compact Board. However, the ultimate sanction is the "de-listing" of the TNC. Such an outcome seems superficial at best, and thus makes for a very unsatisfactory route for NGOs. Compared to the OECD Guidelines' National Contact Points or to the human rights treaty bodies, one may conclude that barely any delegation of authority takes place under the Global Compact.

185. *Id.* at 140.
186. *Id.*

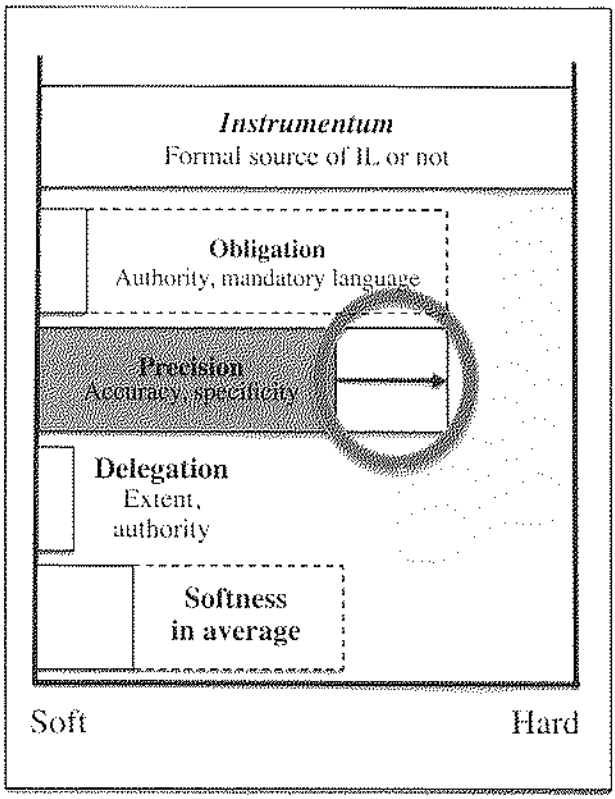

Figure 8: "Softness" of the UN Global Compact, with the Impact of Systemic Coherence Highlighted

3. The Forest Principles of the Forest Stewardship Council

Forestry is an area where nation states have consistently failed to reach a global legally binding agreement. Negotiations on a global forest convention were called off already at the Rio Earth Summit of 1992.[187] The International Tropical Timber Agreement ("ITTA") is

187. Benjamin Cashore et al., *Can Non-state Governance 'Ratchet Up' Global Environmental Standards? Lessons from the Forest Sector*, 16 RECIEL 158, 158 (2007). All substantive provisions of the ITTA 2006, which entered into force 7 December 2011, are indeed formulated as 'objectives' (Article 1), that are to be implemented through "policy work and project[s]" (Article 24) and funding (Article 21) and the conduct of studies (Article 27). United Nations Conference on Trade and Development: Negotiation of a Successor Agreement to the International Tropical Timber Agreement, Jan. 16-27, 2006, International Tropical Timber Agreement, Jan. 27, 2006, U.N. Doc. TD/TIMBER.3.12 (Feb. 1, 2006).

criticized for focusing on trade issues and leaving environmental protection practically entirely at domestic discretion. What is left are a number of initiatives that in the course of the 1990's resulted in non-binding instruments with weak substance.[188] Possibly for these very reasons, forestry was one of the first fields where a new form of private transnational regulation appeared: the NGO-based certification scheme of the Forest Stewardship Council ("FSC") aims directly at changing the behavior of large forestry companies,[189] often TNCs.

The FSC stands both for a governance scheme, the Forest Stewardship Council, and for a set of principles on forestry.[190] These "Forest Principles and Criteria" are further "elaborated through more specific global standards, which are adapted to local conditions by national or regional chapters."[191] FSC-certified forests must have a continuously updated management plan, the implementation of which is to be monitored and periodically verified by an accredited third-party auditor.[192] Participating companies may actually be obliged to change their policies, even in ways that are not necessarily cost-effective.[193] The Forest Principles are specific in that they refer to one particular sector with its own demands, and they are also quite accurate. There are detailed provisions on tenure and use rights (Principle 2), indigenous

188. Intergovernmental Panel on Forests; Intergovernmental Forum on Forests; United Nations Forum on Forests, which produced the "Plan of Action" and the "Programme of Work," contained in E/CN.18/2001/3/Rev.1, which Dimitrov describes as "masterpieces of Machiavellian diplomacy." Radoslav S. Dimitrov, *Hostage to Norms: States, Institutions and Global Forest Politics*, 5 GLOBAL ENVTL. POL. 1, 11 (Nov. 2005).

189. The high intensity of research on the FSC shows that if any private regulatory instrument is taken seriously and seen as a forerunner, it is the FSC. Interestingly, this literature has also ventured into the complement-substitute-or-antagonist debate referred to above. *See generally* Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: the Case of Forestry*, 17 EUR. J. INT'L L. 47, 75-76 (2006); Cashore et al., *supra* note 187, at 160; Jonathan Zeitlin, *Pragmatic Transnationalism: Governance Across Borders in the Global Economy*, 9 SOCIO-ECON. REV. 187, 196-97 (2011); Tim Bartley, *Transnational Private Regulation in Practice: The Limits of Forest and Labor Standards Certification in Indonesia*, 12 BUS. & POL. 1, 7-8 (2010); Tim Bartley, *Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards*, 12 THEORETICAL INQUIRIES L. 517, 517 (2011) [hereinafter *Transnational Governance*].

190. *FSC Principles and Criteria for Forest Stewardship FSC-STD-01-001 (version 4-0)*, FOREST STEWARDSHIP COUNCIL, *available at* http://ic.fsc.org/principles-and-criteria.34.htm (follow "FSC-STD-01-001" hyperlink) (last visited Apr. 1, 2015).

191. Christine Overdevest & Jonathan Zeitlin, *Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector Revisited*, *in* LEVELING THE PLAYING FIELD: TRANSNATIONAL REGULATORY INTEGRATION AND DEVELOPMENT 235, 247 (Laszlo Bruszt & Gerald A. McDermott eds., 2014).

192. *Id.*

193. Cashore et al., *supra* note 187, at 161.

peoples' rights (Principle 3), community relations (Principles 4) and environmental impacts (Principle 6).[194] Moreover, all the mentioned principles are phrased in clearly mandatory terms with every provision using the verb "shall."

On the macro level, the hardness of the obligation will depend on how many producers have been willing to join the scheme. Participation is in principle voluntary, but the pressure to join is nowadays rather high due to the strong developed country industry buy-in and increasing consumer awareness. By the end of 2012, it was estimated that 169.324 million hectares,[195] compared to over 4 billion hectares in total forest coverage,[196] were FSC-certified. Overall, the high degree of authority of the scheme and its mandatory language render the scheme quite hard in terms of the created obligation.

Delegation seems at first sight to be quite far reaching as well, although ultimately it is the softest link in the FSC. The governance of the FSC is in the hands of the tripartite Board of Directors, with members representing Environmental, Social and Economic (i.e. business) constituencies, and an equal participation from the global North and South.[197] This multi-stakeholder set-up has arguably boosted the authority of implementing the FSC. The interpretation of the Forest Principles, discussed above, is in the hands of the FSC's organs, not in that of the timber-producing participants. The Board of Directors has indeed from time-to-time issued interpretive decisions on TNC activities.[198] Moreover, fulfillment by a timber producer of the FSC Principles is validated by independent certification bodies, which have in turn been accredited by the FSC.[199]

However, there are at least two reasons why the FSC and the certification bodies as *delegatees* do not reach a high level of delegation. First, it is quite impossible for the certification bodies to regularly check the companies' adherence with the principles. Its

194. *Id.*

195. *Facts & Figures*, FSC INTERNATIONAL (2014), *available at* https://ic.fsc.org/facts-figures-2012.509.htm (last visited Apr.1, 2015).

196. *State of the World's Forests 2012*, FOOD & AGRIC. ORG. U.N 15, FAO (2012), *available at* http://www.fao.org/docrep/016/i3010e/i3010e.pdf (last visited Apr. 1, 2015). In other words, about 4.2 % of total global forest coverage is certified by FSC.

197. *Governance*, FSC INTERNATIONAL (2014), *available at* http://ic.fsc.org/governance.14.htm (last visited Apr. 1, 2015).

198. *See id.*

199. *Accreditation*, FSC INTERNATIONAL (2014), *available at* http://ic.fsc.org/accreditation.28.htm (last visited Apr. 1, 2015).

executive capacities fall far short of those of public authorities, even in developing countries. Its knowledge of "local dynamics" is often inadequate to really assess compliance with the FSC Principles' criteria.[200] Second, and also connected to the lack of government resources and the authority involved, the only sanction available is the suspension of a forest's certification. As in most timber exporting developing states, FSC certified forests still amount to only a fraction of total production; this can hardly be called an effective sanction. To summarize, a private, non-local authority without effective means of enforcement makes for a "softer" *delegatee* than a public, local authority.

The weaknesses in delegation are further aggravated by the FSC's lack of legal *instrumentum*. FSC is a telling example of how the softness of the dimensions of precision and obligation is quite limited, yet the scheme still will have to yield in case of conflict with other, formal rules such as domestic laws on forestry. As Bartley has insightfully hypothesized and empirically researched with Indonesia as case study, the design of private instruments such as the FSC and its criteria disregard the domestic regulatory setting in which the rules are expected to operate. For example, FSC Principle 2 requires that the exploitation of certified local forests respects "the tenure and use rights to the land and forest resources", and that such rights may only be given up through the "free and informed consent" of the involved communities.[201] However, in the large forestry industry country Indonesia, the FSC requirements conflict with the domestic Forestry Act. The Act has "affirmed state control over forest land", and although the Forestry Act does protect local rights, "roughly ninety percent of the twelve million hectares of state forest land in Indonesia has not been properly defined."[202] The FSC certifications have added another layer of rules, with requirements that are in part contradictory to domestic laws. Yet in case of conflict, the local formal law obviously prevails, as is even explicitly stated in FSC Principle 1.1.[203] This problem may lead

200. *Transnational Governance*, *supra* note 189, at 533 (in the context of the community land use rights demanded by Principle 2.2) ("One former auditor suggested that assessment teams generally do not spend enough time on the ground to understand community dynamics, explaining that you are 'lucky if there's an NGO there,' or it can be difficult to learn the real situation.").

201. *The 10 Principles*, FOREST STEWARDSHIP COUNCIL, *available at* https://ic.fsc.org/the-10-principles.103.htm (last visited Apr. 1, 2015).

202. *Transnational Governance*, *supra* note 189, at 531-32.

203. *Revised FSC Principles and Criteria for Forest Stewardship FSC-STD-01-001 (V5-0)*, FSC INTERNATIONAL 12 (Rev. 2012), *available at* https://ic.fsc.org/principles-and-

the FSC to "crumble under its own contradictions": a company must, to be in conformity with the Forest Principles, both act in *accordance* with local law, as well as in *contravention* of it.[204] Had the FSC's Principles been laid down by states in a formal source of international law, it would have been much less clear that domestic forestry law would have prevailed in case of a conflict. The example shows well how the *instrumentum* dimension is fundamentally important.

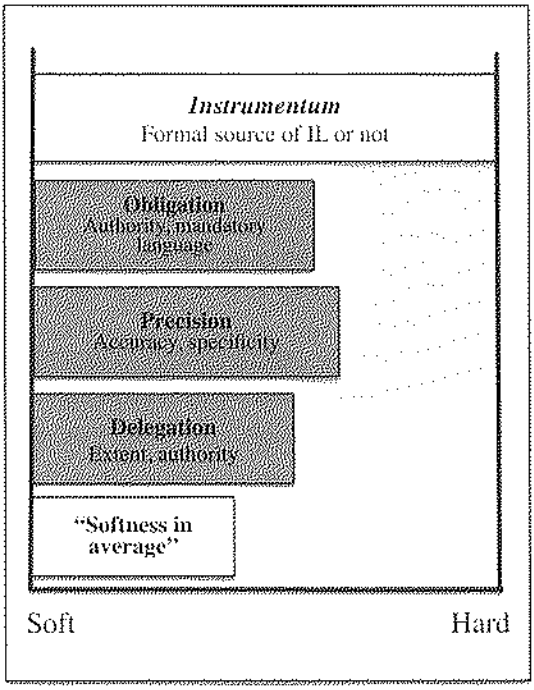

Figure 9: "Softness" of FSC

criteria.34.htm [hereinafter *Revised FSC Principles and Criteria*] (last visited Apr. 1, 2015) ("Principle 1: Compliance with Laws: The Organization shall comply with all applicable laws, regulations and nationally-ratified international treaties, conventions and agreements.").

204. *Transnational Governance*, *supra* note 189, at 534. Compare the above stated umbrella to Principle 1 with Principle 1.8: "The Organization shall demonstrate a long-term commitment to adhere to the FSC Principles and Criteria in the Management Unit, and to related FSC Policies and Standards. A statement of this commitment shall be contained in a publicly available document made freely available." *Revised FSC Principles and Criteria*, *supra* note 203, at 10.

4. Concluding Perspectives on Private Instruments

There are many labeling initiatives, such as the FSC,[205] and many voluntary standards with an approach similar to the U.N. Global Compact. Some of them are even aimed at more specific sectors, problems or groups of TNCs, such as the Voluntary Principles on Security and Human Rights ("VPSHR") and the Extractive Industries Transparency Initiative ("EITI").

Two main problems became apparent from the analysis of these much-discussed private instruments. First, the great weakness in terms of delegation is, in the words of Sahlin-Andersson, that "it is not so clear who is governing whom."[206] Are NGOs governing TNCs? Or are TNCs governing themselves—or even each other? What role remains for governments? Second, it is unclear where obligation in these instruments really comes from. They often refer to "international human rights standards," and stress that lower local standards, local government abuses, or lack of government enforcement do not impede what companies "should" do. Yet it is not clear what exactly leads to raise the requirements above the level of a mere moral obligation, beyond a bare exclusion from a voluntary scheme. Is the marketplace already sophisticated enough to create such an impact?

It was apparent that even an instrument that on the surface seems to have a relatively high level of delegation, the FSC, in practice has rather limited implementation resources. It moreover has to recede where it conflicts with formal legal instruments that often maintain lower environmental or human rights standard. Although the implementing authority is clearly delegated, its reach remains limited.

V. CONCLUSIONS—THE MYRIAD EFFECTS OF SOFTNESS

The tool developed in this paper has two aims. First, it aims to contribute to the "soft law discourse" by promoting a move beyond the inaccurate and overly generic term "soft law."[207] This term appears problematic in the global governance of TNCs. It is proposed here, on

205. Many of these are assembled under the ISEAL Alliance. *See generally About Us*, ISEAL ALLIANCE, *available at* http://www.isealalliance.org/about-us (last visited Feb. 7, 2015).

206. Sahlin-Andersson, *supra* note 184, at 130.

207. *See generally* Abbott et al., *supra* note 73. With international law, they mean to include explicitly formal sources of international law such as conventions/treaties. *Id.* at 402.

the one hand, because it is more accurate and useful in the legal and political discourse to describe instruments on the basis of the three general categories introduced in the previous Section: *Public Legal Instruments, Public Non-Legal Instruments*, and *Private Instruments*.[208] The categories build on the work of scholars such as d'Aspremont[209] and Blutman.[210] The basic distinction lies in the dimension of *instrumentum*, the "container" of the instrument, as opposed to its *negotium*, the "contents."

On the other hand, it would add further, important nuance to the understanding of the instruments to perceive them along four dimensions of softness: the softness of the *instrumentum*, and of three aspects of the *negotium*, namely obligation (authority and the mandatory nature of the language); precision (accuracy and specificity); and delegation (extent and authority of delegation). These dimensions of softness, proposed originally by Abbott et al.[211] and developed further here, fine-tune the analysis by bringing forth key characteristics of the instruments.

Second, through the tool the paper explores how such re-systemization of instruments functions in the specific framework of the TNCs, taking into account the challenge of finding solutions to the void in their governance. The paper focuses in particular on how softness as a characteristic manifests itself in different types of TNC related instruments, and how this may link to the perceived void, and further to the instruments' effectiveness. It may even be possible to contemplate certain dimensions of softness, and combinations of thereof that are necessary in reaching effectiveness in different circumstances. Finally, the utility and potential weaknesses of the conceptual tool itself may be elaborated upon during its application to practical case examples on the global governance of TNCs.

A. Effective Softness?

The application of the tool to various TNC related instruments, including legal public instruments, illustrate well how an analysis of softness is by no means limited to what is incorrectly called "soft law"

208. Compare these three groups with those distinguished by Blutman, who noted output of international organizations; non-binding output of states directly other than what is part of the formal sources of international law; and the output of civil society, which is per definition non-binding. Blutman, *supra* note 68, at 607-08.

209. *See* d'Aspremont, *supra* note 64, at 1082-87.

210. Blutman, *supra* note 68, at 607-08.

211. Abbott et al., *supra* note 73, at 401.

instruments. All kinds of hard and soft instruments can, and indeed should, be scrutinized for their softness.

From the practical perspective of applying the instruments, the essential question is whether, and to what extent, the observed softness of an instrument correlates with its effectiveness. While the research in this paper is not geared to answer this question with any definitiveness, it is designed to prop exploratory insights onto what such a relationships might be. The first observation along this trajectory is the usual claim that "soft law" might be able to act as a supplement or a complement, or even an alternative, to "hard law."[212] The claim assumes that somehow an instrument that is soft along one or more of the depicted dimensions can be effective in reaching a policy outcome. It can even potentially be more effective in doing so than a "hard law" instrument would be.

The effectiveness in other words may link to softness—but how exactly? At least two options appear to arise. In the first option, the softness of one (or more) dimension(s) directly contributes to the fact that the policy outcome is reached. This would reflect the scenario of "soft law" acting as an alternative to "hard law": it is because of its hardness along all the dimensions that a "hard law" instrument would *not* able to reach the desired outcome. Softness would under this assumption correlate positively with effectiveness.

The second option is that softness along one (or more) of the dimension(s) is unavoidable for an instrument to be legally, politically, technically, and/or in some other manner possible. Softness is the critical prerequisite for a policy instrument to be created, yet it is the other, hard dimension(s) of the instrument that in fact directly determines the instrument's effectiveness. Soft instruments are in this scenario a complement to "hard law." Softness as a characteristic only has an indirect role. Without the subtlety the instrument would not exist, and hence its qualities could not have an impact. The unique quality of "soft" instruments as complements is their achievability.[213] They are, as explained in Section II, a *necessity* if "hard law" options are not at all, or not initially, available. But softness in itself will rather work against, than for, the effectiveness of the instrument. Softness is in these instruments just limited enough not to impede reaching the policy objective in a sufficient manner. The perceptions on what is considered sufficient may be quite subjective and, as the examples of

212. "Soft law" may also be seen in some cases as an antagonist to "hard law," but these questions are beyond the focus of this piece.

213. *See* Abbott et al., *supra* note 73, at 401-03.

using soft instruments to govern TNCs implied, not always representative of the reality.

The first option, i.e. the *direct* role and relevance of softness in an instrument's performance, can be tested through a number of propositions. The most different case approach would lead one to ask whether there are instruments that are soft on *all* the dimensions, yet still perform effectively. A positive answer would point towards effective instruments that are already quite removed from classic command-and-control law. Although the limited scope of the research does not exclude the possibility, the TNC case studies conducted in this paper did not offer support for this hypothesis. Rather, the observations on the case studies seemed to point to the opposite direction: when defined along the dimensions used in this paper, there seems to be a negative correlation between softness and effectiveness. A negative correlation would hence perceive soft instruments in a paradoxical way: one should seek for the vital aspects of *hardness* in defining effective *soft* instruments. If the hypothesis on a positive correlation held, the ensuing question would then be whether an instrument's effectiveness could be associated with a particular aspect of softness.

B. Effective Hardness?

Indeed, looking back at the three categories of instruments and the empirical examples within them, the observations would appear to point into the opposite direction: some measure of hardness may be required on at least one, if not most, of the dimensions also for instruments to be effective. Turning this around, even the absence of hardness on one or two dimensions beyond the *instrumentum*—for instance lack of precision and specificity in the human rights treaties, or the incomplete delegation in the case of the FSC—may be fatal for its effectiveness. The conclusion of the case studies was that *none* of the instruments in any of the categories of *Public Legal Instruments*, *Public Non-Legal Instruments*, and *Private Instruments* seemed to satisfactorily achieve the set human rights and environmental governance objectives regarding TNCs. The disappointing observation could hence have an explanation: each one of the TNC related instruments—even the "hard law" instruments—lacked one or more crucial *hard* dimensions that would have allowed them to be effective in that particular instance.

1. Over-reaching

One may wonder, however, if the need to consider hard dimensions in soft instruments is already a sign of "over-reaching":

have the soft instruments been set to achieve objectives that only instruments that are hard on *all* dimensions can achieve? Are they surpassing the limits of what soft instruments in directly filling a policy void can reach, even theoretically? In cases of over-reaching, soft instruments cannot act as complements nor as alternatives to "hard law"—except perhaps in some narrow respects.

As may be remembered from the development of the tool, the *instrumentum* is a core dimension of classic "hard law" instruments. Soft instruments lack this key characteristic; only in the first group, which consists of the *formal sources of international law*, are the instruments formally speaking law. *Private instruments* as defined in this paper are adopted by private actors, either amongst themselves or in collaboration with public authorities. Because private actors completely lack the capacity to legislate, they cannot create formal instruments of international law. The *instrumentum* is not legal. A logical reaction would be to seek to increase hardness on the other dimensions of obligation, precision and delegation—potentially even all of them. The OECD Guidelines from the group of Public Non-Legal Instruments and Forest Stewardship Council from the group of Private Instruments served as examples. As noted above, while perhaps practically possible, such across-the-board hardness would mean that the instrument measures hard in average, so much so as start to conceptually changing its nature from soft to hard, and even from non-law to law, if hardened along the *instrumentum* to a legislative act. In other words, the soft instrument has been "over-reaching," if the aim had been in policy objectives that can in fact only be reached with formal legal instruments that are hard on all accounts. It does not seem justified, or even possible, to contemplate Public Non-Legal Instruments or Private Instruments as effective alternatives or complements to "hard law" in these types of situations. Their role would remain partial, at best.

2. Under-reaching

The fact that an instrument's effectiveness is tied to more hardness on a particular dimension does not have to imply that all effective instruments be considered "hard law." In practice, the relevance of such labels of hardness or softness is linked to the ability of the tool to help in creating the impetus to amend (i.e. to harden) an existing instrument *in a tailored and adequate manner* so as to reach the set objective. The situation may be different to the above examples of over-reaching. In cases of "*under*-reaching," the soft instrument is not fulfilling its complete promise, which would still be within the boundaries of what

under the three categories and the four dimensions still constitute soft instruments. Hardening a particular aspect of an under-reaching instrument not would not always require pushing it beyond the boundaries of what conceptually are soft instruments. Understanding that the level of obligation and precision in the OECD Guidelines is sufficient, but that it is mainly the delegation aspect of the instrument that is lacking, could lead to amend the instrument in the correct fashion. This would point towards amending the practice of NCPs to become considerably more aggressive in publically reproaching the companies for their violations of human rights law.

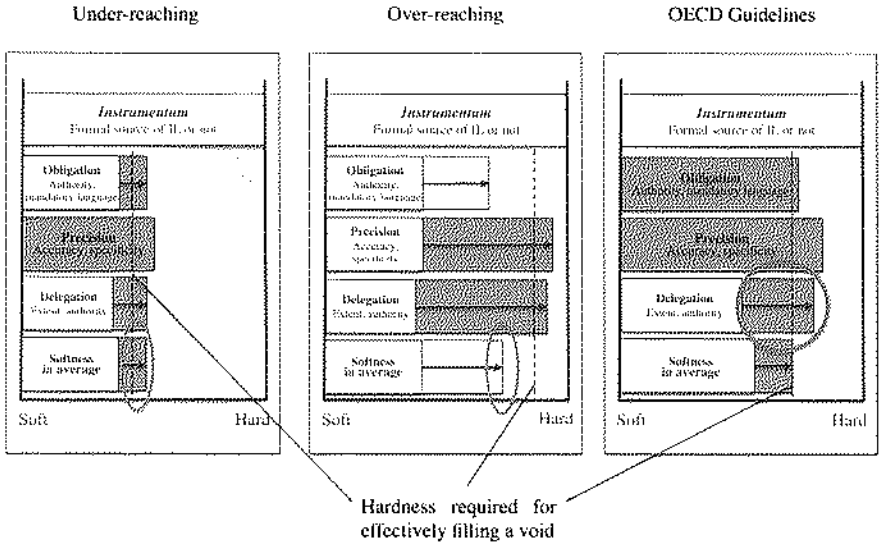

Figure 10: Instrument's Achieved v. Potential Hardness in Cases of Under-Reaching and Over-Reaching Instruments

Indeed, delegation appears to be a dimension on which practically all of the TNC-instruments that were used as case examples measured on the soft end of the scale. This implies an almost structural deficiency in delegating the implementation of the instruments. The observation finds clear parallels in the discourse on the deficiencies of "hard law": poor implementation and enforcement is also often cited as the weak point of hard international environmental and human rights law. In this important respect "soft law" therefore appears to offer very limited remedies. To state this differently: non-legal instruments could most fundamentally remedy the deficiencies of "hard law" if their unique

characteristics could innovatively improve enforcement. To reiterate the above example: the impact of negative media coverage on TNCs image can be drastic, and hence prompt sweeping changes in company behavior. For example, heavy media attention led the company Chiquita (formerly United Fruit) to completely overhaul in the early 1990s its dreadful corporate social responsibility policies on exotic fruit business. Chiquita outsourced the corporate environmental and social audits to an external NGO, the Rainforest Alliance.[214] Yet, to actually create such an impact, the application of this instrument needs to be delegated to a party that is prepared and equipped to publicize it without hesitation and delay —not just in theory, but in practice. This is a far cry from the current state of affairs, should the application of the media provisions of the OECD Guidelines offer a representative example in this respect.

It appears possible to give examples of under-reaching "soft law" also in terms of all other dimensions of softness. The U.N. Guiding Principles were an example of an instrument where the wording on what is really expected is both ambiguous and drafted in non-mandatory terms. More precise use of words that are clearly obligating would harden this instrument in a way that would appear to be vital for increasing its effectiveness in filling the policy void. Precision is a dimension on which the non-legal instruments may score quite well, because the tools can contain quite accurate provisions specifically targeted at TNCs. It is in fact the legal instruments that may be under-reaching on this aspect. The systemic coherence between soft and hard instruments could in a useful way combine the precision of the soft instruments with e.g. the hard *instrumentum* of for instance the Human Rights treaties.

C. Softness – A Combination of Multiple Dimensions

Still, it is possible with the help of the developed conceptual tool to synthesize the findings regarding the over-reaching and under-reaching soft instruments a few steps further. The values of all the dimensions of an instrument may be combined into a single value of "average softness," as was explained in Section III (D) above. The softness/hardness of an instrument is only a single variable amongst many other time- and space-specific, inter-related variables that affect

214. DANIEL C. ESTY & ANDREW S. WINSTON, FROM GREEN TO GOLD. HOW SMART COMPANIES USE ENVIRONMENTAL STRATEGY TO INNOVATE, CREATE VALUE AND BUILD COMPETITIVE ADVANTAGE 88, 183-84 (2006).

the overall policy outcomes in a globalized environment.[215] Yet a summary value may be useful in having an overview on the characteristics of the instrument that one is dealing with, even if the line between soft and hard is a subjective continuum, not a "metaphysical border" where the overall characteristics of an instrument would suddenly drastically change like the qualities of water change in the melting and boiling points. This may be exactly the point of using the model proposed here: the fact that any instrument consists of four dimensions with their "sub-dimensions" should quickly lead to a realization that the denomination of an instrument as "hard law" or "soft law" actually reveals very little of its characteristics. It is the constitutive dimensions of the instrument that matter. *Instrumentum* is central, and admittedly the distinction of the formal sources of international law implies a binary dimension.

But, its binary nature and importance are tempered by the other, continuum-type dimensions. They too can be crucial, depending on such factors as the instrument's objectives and addressees. The case studies on Public Legal Instruments showed how "hard law" may be quite soft. Case studies across the groups of instruments seemed to suggest that weak delegation of implementing tasks in some cases "softens" the instrument more than a low measure of precision or obligation. The continuums are therefore useful; they make an analysis of the instruments more flexible and accurate, and facilitate detailed comparisons between them. As Abbot et al. noted[216] while developing these three dimensions, they can also serve to trace an instrument's evolution over time. The dimensions were used here as a means to understand, explain, and propose nuanced improvements to various kinds of TNC related instruments.

One might also speculate whether there are specific combinations of these dimensions of softness that are particularly well or poorly adapted for certain kinds of policy objectives and/or circumstances. Such "pairing" could support the policy making process. The case studies gave anecdotal evidence of such interconnections. For example, in the case of FSC, the hardness of the instrument along the dimensions of precision and delegation considerably alleviated the need to have fully hard obligations. Market pressures on TNCs also contributed to a lesser emphasis on delegation in this particular example.

215. *See generally* Karlsson-Vinkhuyzen & Vihma, *supra* note 67.

216. Abbott et al., *supra* note 73, at 405.

States and IOs often seem to enforce international law upon TNCs in a rather lenient fashion: the delegation dimension was soft on virtually all the analysed instruments. Only very limited delegation to more independent, international bodies seems likely in the near future as well. Hardness along the other dimensions may alleviate that shortcoming only in some cases, such as the example of FSCs above. More precise and specific provisions will make it harder for states to argue that they are not under an obligation to act in a given situation.

D. Systemic Coherence

Many authors have highlighted the importance of the systemic coherence between different instruments. Soft instruments may, according to these views, act either as complements, alternatives or antagonists to "hard law." This paper does not have as its objective to delve into the systemic coherence of instruments. It does shed some light on some of the interrelationships that were noticeable between the U.N. Global Compact, U.N. Guiding Principles, the OECD Guidelines, the Forest Stewardship Council, the human rights Covenants and domestic law. In particular, the systemic inconsistencies and antagonistic relations deserve further research particularly in order to better understand the prospects of governing TNCs. The discussion merges here with themes such as the fragmentation and integration of international law[217] and the management of institutional complexity in global governance.[218]

E. Prospects of Governing TNCs with "Soft Law"

1. "Soft law" as a Misnomer – But "Softness" as an Asset

The analysis above has elaborated on whether "soft law" may help in filling the policy void left by "hard law" in governing transnational corporations in the areas of environmental protection and human rights. Softness may indeed be a quality that explains the characteristics of policy instruments in a manner that is useful. However, this benefit has often gone undetected or has been overshadowed by

217. *See* Koskenniemi & Leino, *supra* note 60, at 553; *see also* Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

218. For institutional interaction, see generally Thomas Gehring & Sebastian Oberthür, *The Causal Mechanisms of Interaction between International Institutions*, 15 EUR. J. INT'L REL. 125 (2009).

misunderstandings.[219] The softness of an instrument tends to correlate *negatively* with its effectiveness—if any straightforward relationship between the two is even verifiable. Softness as an overarching conceptual construct might end up not only correlating with ineffectiveness, but being defined by it. The notion of soft instruments, let alone "soft law," as an optimal gap filler for legal voids appears in this sense fundamentally flawed. Soft instruments may remedy policy problems, but in most cases exactly *despite* of their softness.

Gearing the policy strategy towards "soft law" without properly defining it could essentially threaten to misguide the entire effort. Perhaps the clearest example is the U.N. Global Compact, which relies on softness quite explicitly.[220] "Soft law" is therefore not only a vague and overly generic concept—it may be a precarious misnomer. The case studies on the governance of TNCs gave insights into how "soft law" approaches may create false assumptions, and might lead to skewed policy pathways and meager outcomes.[221] The conceptualization of the instruments and of the issue at stake, as well as the definition of the desired policy objectives, need to take place in much more accurate and authentic terms.

2. Soft Instruments as Complements and Alternatives to "Hard Law"

While "soft law" may be a misnomer, softness as a characteristic that is first properly defined may prove to be quite useful. It helps in explaining the characteristics of individual instruments. The notion of softness may also be useful in more correctly understanding the general characteristics that are commonly associated with soft instruments as we noted them in Section II: their necessity, uniqueness and unavoidability;[222] and their role as complements or alternatives[223] to

219. *See* d'Aspremont, *supra* note 64, at 1083. Note d'Aspremont's recent introduction in the Leiden Journal of International Law where he apologizes for devoting a whole issue of the journal to such an oft-debated theme. *See* Jean d'Aspremont & Tanja Aalberts, *Which Future for the Scholarly Concept of Soft International Law? Editors' Introductory Remarks*, 25 LEIDEN J. INT'L L. 309, 309 (2012).

220. *Overview of the UN Global Compact*, U.N. GLOBAL COMPACT (Apr. 22, 2013), *available at* http://www.unglobalcompact.org/AboutTheGC/index.html (last visited Apr. 1, 2015) ("The initiative seeks to combine the best properties of the UN, such as moral authority and convening power, with the private sector's solution-finding strengths and the expertise and capacities of a range of key stakeholders. The Global Compact is global and local; private and public; voluntary yet accountable.").

221. *See* Utting & Zammitt, *supra* note 176, at 44, 47 (showing the wide belief within the UN in the late 1990's that soft approaches are preferable, because of lack of UN implementation powers).

222. *See supra* Section II.

"hard law." The *uniqueness* of soft instruments can mean a number of things. It can refer either to the instrument as a whole or to some of its particular characteristics. This observation prompts us to rethink the categories of Shaffer and Pollack, soft instruments as *complements* or *alternatives* to "hard law." A unique instrument would seem to mean that it combines softness and hardness in a different way along the dimensions of obligation, precision and delegation. *Unique* soft instruments are soft enough to be achievable—unlike a fully hard and legal instrument—yet hard enough to be effective. Thus, they are able to *complement* "hard law" in the narrow sense of addressing policy questions that "hard law" simply could not address at this moment. This is different from the occasional misconception that soft instruments are unique and effective *for* their softness only. The notion of a soft instrument constituting in these cases an "alternative"[224] also seems misleading: it hints at the existence of a choice—yet if the soft instrument is unique in this narrow sense, there is none.

If the uniqueness of the entire instrument refers to its distinctiveness from a "hard law" instrument, yet does not entail the filling of policy gaps beyond what "hard law" can do, it seems to offer an *alternative* to reaching a policy objective. Because certain softness on some dimensions is "permissible" in terms of reaching adequate effectiveness, a soft instrument can be the preferred alternative for other reasons, such as for being less costly to negotiate, lighter to administer or quicker to adapt to the evolving circumstances.

The uniqueness of certain (combinations of) *characteristics*, instead of the entire soft instrument, leads to a different kind of complementarity—the type Shaffer and Pollack described.[225] The differences in the softness of a soft and a hard instrument lead them to interact in a way that, together, creates a complementary result. The *complementary characteristics* may make up for certain soft dimensions in legal instruments—on which the complementing instrument is in fact harder—and result in even harder combinations. Some non-legal instrument may in this way prove harder on important dimensions than many existing legal instruments, particularly on precision, even though they are soft on others.

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223. The role of soft instruments as antagonists to hard law were excluded from the scope of this paper.

224. Shaffer & Pollack, *supra* note 47, at 717-21.

225. *Id.* at 721-22.

As for the *unavoidability* of soft instruments as a consequence of globalization, the nuance that can be identified in the softness of instruments calls for a similarly delicate attention in managing such instruments. To the extent that globalization implies the predominance of instruments without a hard *instrumentum*, it may imply doubtful effectiveness. Yet, this is not at all self-evident, and can only be determined on a context-specific instrument-by-instrument analysis. The complication would offer one explanation to why it is so difficult to create clear-cut theories and approaches about the global governance of TNCs, or governance through regime complexes more generally speaking.

EPILOGUE – REVISITING THE *CHEVRON* CASE

While the *Chevron* case dragged on in the Ecuadorian judiciary and now continues in the arbitration bodies, Chevron has aligned itself with the Voluntary Principles on Security and Human Rights ("VPSHR") and the Extractive Industries Transparency Initiative ("EITI"). Will these soft instruments offer a remedy to address the considerable environmental degradation? Could they prevent similar cases from taking place in the future? The EITI aims at transparent financial flows between the extractive industry and their host governments. VPSHR aims to prevent human rights abuses that would be a consequence of companies' private security operations. Already in terms of the subject matter, these instruments do not present comprehensive solutions to address issues of environmental protection or human rights protection. Regrettably, when assessed through the tool developed in this paper, they appear moreover to be of the softest type. Both are predominantly private, non-legal instruments, with some involvement of governments in the VPSHR. The rather vague and non-mandatory principles are quite soft in terms of precision and obligation, and auditing as the only measure of delegation leaves this dimension soft as well. In fact, the principal aim of both instruments may rather be to shield companies from further liability rather than addressing fundamental aspects of human rights or environmental protection related conduct. In other words, a closer analysis of softness reveals there to be little hope for these particular soft instruments preventing, let alone remedying, the situation in cases such as *Chevron*.

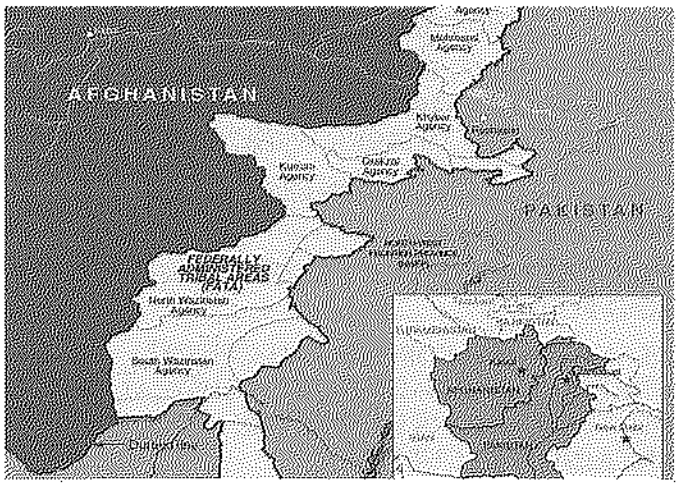
More promising, at least for future cases, could be the National Contact Points under the revised 2000 OECD Guidelines for Multinational Enterprises. Especially insofar as the damage can be

qualified as (environmental) human rights or labor rights violations, a "specific procedure" can be commenced before the United States NCP.[226] As was discussed above in Section IV (C), such procedures may lead to public statements by the NCP, or to a settlement of the dispute between the parties. However, due to the very limited delegation dimension, an NCP cannot order damages; it can primarily be useful in ceasing the TNC conduct.

226. *See U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises*, U.S. DEP'T ST., *available at* http://www.state.gov/e/eb/oecd/usncp/index.htm (last visited Apr. 1, 2015).

ROAD TO RECOVERY: PAKISTAN'S HUMAN RIGHTS CRISES IN THE FATA

Naji'a Tameez†



"For the first five days they beat us constantly with leather belts across the top and bottom of our backs throughout the day, up to an hour at a time. The pain was too much to describe. There were always five soldiers at every interrogation session; all in army uniform but usually only one of them did the talking. He would threaten to kill me if I didn't confess to being part of the Taliban. I kept telling him that neither I, nor my Ayub, ever belonged to the Taliban, we are just farmers. On hearing this [he] would scream '[y]our brother is going to die tonight! If you don't want to see him for the last time speak the truth!'"[1]

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† Naji'a Tameez is a May 2015 graduate of the Syracuse University College of Law. She would like to thank her family and close friends for always providing the open discussion of this deeply personal topic, which pushed her to conduct her own research into the human rights crises in Pakistan's tribal lands.

1. AMNESTY INT'L, 'THE HANDS OF CRUELTY' ABUSES BY ARMED FORCES AND TALIBAN IN PAKISTAN'S TRIBAL AREAS 20 (2012), *available at* http://www.amnesty.nl/sites/default/files/public/p4026_end_impunity_in_tribal_areas.pdf (last visited May 10, 2015) [hereinafter *Hands of Cruelty*].

CONTENTS

INTRODUCTION 447

I. THE HUMAN RIGHTS ABUSES STEM FROM POOR GOVERNING STRUCTURE AND PAKISTAN'S INABILITY TO BALANCE FOREIGN AND DOMESTIC INTEREST. 448

II. UNDERSTANDING HOW THE HISTORY OF THE FATA INFLUENCED THE CURRENT STATE OF AFFAIRS 452

III. GOVERNING THE FATA: CONTRADICTING THE CONSTITUTION 457

IV. CONFLICT BETWEEN THE TALIBAN AND PAKISTANI ARMED FORCES 459

V. PAKISTANI ARMED FORCES AND CENTRAL GOVERNMENT COMMIT INTERNATIONAL HUMAN RIGHTS VIOLATIONS UNDER THE GUISE OF MAINTAINING SECURITY 466

VI. PAKISTAN IS OBLIGATED TO ACT IN COMPLIANCE WITH THE INTERNATIONAL HUMAN RIGHTS OBLIGATIONS IT IS A PARTY TO. 470

A. *International Obligation to Children* 471

B. *International Obligation for the Equal Treatment of Women* 472

C. *International Obligation to Provide Humane Living Conditions* 473

VII. PAKISTAN CAN REMEDY HUMAN RIGHTS ABUSES BY GOVERNING THE FATA IN ACCORDANCE WITH ITS INTERNATIONAL HUMAN RIGHTS OBLIGATIONS 476

A. *Previous Attempts at Reforming FATA Governing Mechanisms* 478

B. *The FATA Must be Integrated into the Central Government* 478

C. *Women Must be Treated Equally with Men Before the Law* 481

D. *Perpetrators of Human Rights Violations Must be Held Accountable* 481

CONCLUSION 483

INTRODUCTION

Niaz, a 39-year-old farmer from Swat, and his younger brother Ayub are among the thousands of men and boys swept up in security operations by Pakistan's armed forces in areas formerly controlled by the Taliban. Niaz was released ten days after his arrest, on that same day he was confronted with Ayub's dead body, the hospital claiming he had died of "heart stroke" in army custody. This is just one of the thousands of instances of uninvestigated enforced disappearance, torture and death inflicted upon the tribal lands of Pakistan.

The tribal lands have been entrenched in a human rights crisis for decades, but since 2004 conditions in the region have taken a considerable nosedive. Due to the U.S. led efforts in Afghanistan and the Taliban[2] insurgency in Pakistan's tribal lands, thousands of people in the tribal lands have been subject to unjust and inhumane treatment,[3] tens of thousands of people have died and millions of people have been displaced. The Pakistani government has not only made minimal effort to remedy this crisis and help its citizens, but has also exacerbated the poor conditions in the tribal lands.

This paper begins by reviewing the structure of government in the tribal lands and how said structure puts Pakistan in violation of international human rights law,[4] international humanitarian law[5] and

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2. The Taliban presence in Pakistan is a combination of Taliban and al-Qaeda militants who fled Afghanistan and slipped through Pakistan's borders in 2001 and 2002. They formed a new insurgency and drew together Pakistani veterans of the Taliban movement and recruited new members who agreed with their platform against U.S. military operations in Afghanistan and Iraq. *Id.* at 29-30. All references to the Taliban in this note are references to the Pakistani Taliban movement, specifically the TTP.

3. In *Prosecutor v. Furundzija* the International Criminal Tribunal for the former Yugoslavia emphasized that humane treatment revolved around "the general principle of respect for human dignity[, which] forms the common foundation of both international human rights law and international humanitarian law."

> "The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. . . . This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well-being of a person."

Daniel Thürer, *Dunant's Pyramid: Thoughts on the "Humanitarian Space"*, 89 INT'L REV. RED CROSS 47, 57 (Mar. 2007).

4. International human rights law is comprised of international human rights treaties, which governments "undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties." INT'L HUM. RTS. L., *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx (last visited May 10, 2015).

5. International humanitarian law (IHL) is comprised of principles and rules governing

customary international law.[6] This paper then argues that Pakistan must remedy these grave circumstances in order to meet its international legal obligations and abide by its own constitution as it applies to the rest of the country.

Pakistan must ensure that all of its citizenry, of which the people of the tribal lands are a part, is treated equally, humanely and in accordance with international law and custom. This paper then concludes by offering some of the more important reforms Pakistan must make to begin complying with international obligations. These include, but are not limited to, fully incorporating the tribal lands into the central government, setting up proper mechanisms for representation, providing adequate education and healthcare, as well as equal treatment of women.

I. THE HUMAN RIGHTS ABUSES STEM FROM POOR GOVERNING STRUCTURE AND PAKISTAN'S INABILITY TO BALANCE FOREIGN AND DOMESTIC INTEREST

Pakistan is made up of five administrative provinces,[7] one of which is in the northwest part of the country, known as the Federally Administered Tribal Area ("FATA"). The FATA is further divided into several tribal agencies, from north to south: Bajaur, Mohmand, Khyber, Orakzai, Kurram, North Waziristan and South Waziristan.[8] Most of

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the conduct of all parties to international and non-international armed conflicts. Key provisions of IHL include the four Geneva Conventions of 1949 (which Pakistan signed in 1951) and customary international humanitarian law applicable to non-international armed conflict. *What is International Humanitarian Law?*, INT'L COMMITTEE RED CROSS (July 2004), *available at* https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf (last visited May 10, 2015).

6. "Customary international law refers to international obligations arising from established state practice, as opposed to obligations arising from formal written international treaties." *Customary International Law*, LEGAL INFO. INST., *available at* http://www.law.cornell.edu/wex/customary_international_law (last visited May 10, 2015).

7. The four remaining provinces are known as Sindh, Punjab, Balochistan and Kyber Pakhtunkhwa. Before the renaming of this province in 2010, Kyber Pakhtunkhwa was known as the North West Frontier Province (NWFP). The former NWFP is also a tribal area but it is not the subject of this note. Though there is some spill over from the conflict in the FATA into Kyber Pakhtunkhwa, Kyber Pakhtunkhwa participates in the central government and has not been as gravely affected by the US' war in Afghanistan, the Taliban insurgency or by Pakistan's neglect. *Provinces and Administrative Units of Pakistan*, GOVT. PAKISTAN, MINISTRY INFO., BROADCASTING, & NAT'L HERITAGE (2012-13), *available at* http://nationalheritage.gov.pk/provinces.html (last visited May 10, 2015).

8. The FATA is further divided into several tribal agencies, from north to south: Bajaur, Mohmand, Khyber, Orakzai, Kurram, North Waziristan and South Waziristan. North and South Waziristan are especially troubled within the FATA because they are

these agencies are astride the Durand Line, the disputed international border between Pakistan and Afghanistan.[9]

The FATA is a partially autonomous region because, under Pakistan's constitution, it is governed primarily through tribal leadership but ultimately supervised directly by the executive branch of Pakistan's central government. This executive mechanism of governing the FATA[10] leaves the people living there completely unprotected. There is a total absence of law in the region since neither legislative nor judicial control officially extends there. The FATA is Pakistan's least integrated and least developed province.[11] The Pakistani state has failed to invest in either the human development of this area or in the physical infrastructure that would connect the FATA to the rest of Pakistan. On top of that, Pakistanis living in the FATA have no redress for the gross human rights violations that are committed at the hands of tribal heads, the Taliban, the Pakistani military, and the United States through drone strikes, because there are extensive limitations on the ability of the central government to act as a check. As a result, most FATA residents have little sense of patriotism or even responsibility towards the Pakistani state.[12]

The influx of Arab *Mujahideen* in the 1980s and of the Taliban and al-Qaeda fighters since 2001 brought "political Islam, money and illicit economic activity" to the region and "buttressed emergent Islamist leadership."[13] The region has also undergone changes in the demographic strength of certain tribes; this, in conjunction with the infusion of new resources and militant influence, has caused discord in the traditional tribal hierarchy.[14]

This has allowed new charismatic, religious leaders to emerge as

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Taliban strongholds, which have led them to become a heavy target of Pakistan's military campaign and the primary site of continued drone attacks from the United States. *Federally Administered Tribal Areas*, KHYBER PAKTUNKHWA FEDERALLY ADMINISTERED TRIBAL AREAS & BALOCHISTAN MULTI-DONOR TRUST FUND, *available at* http://www.pakistan mdtf.org/fata.html (last visited May 10, 2015).

9. C. Christine Fair, Nicholas Howenstein, and J. Alexander Their, *Troubles on the Pakistan-Afghanistan Border*, U.S. INST. OF PEACE (Dec. 1, 2006), *available at* http://www.usip.org/publications/troubles-the-pakistan-afghanistan-border (last visited May 10, 2015) [hereinafter Fair].

10. *See infra* Part IV.

11. *Pakistan's Lawless, Impoverished Northwest,* ASIA SENTINEL (Aug. 2013), *available at* http://www.asiasentinel.com/society/pakistans-lawless-impoverished-northwest/ (last visited May 10, 2015) [hereinafter *Impoverished Northwest*].

12. Fair, *supra* note 9.

13. *Id.*

14. *Id.*

> political entrepreneurs using political Islam as their instrument of mobilization. These Islamist leaders also gained considerable credibility and resources with the influx of foreign fighters from the Soviet-jihad period and the persistent flow of financial and Islamist resources during the period of Taliban consolidation in Afghanistan. Critically, these new Islamist and militant leaders have robust ties with Pakistan's chief Islamist parties (such as the Jamiat-e Ulame- Islam and the Jamaat Islami), with the Taliban and its allied militants, as well as with al Qaeda.[15]

In addition to these new influences, other factors that contribute to the FATA's instability are the migration of FATA residents out of the FATA and into the more settled areas of Pakistan or abroad.[16] People who leave generally come from "lower tribal lineages with relatively low social and tribal prestige" and use the opportunity away from the FATA to financially provide for their families.[17] Leaving the FATA also allows them to understand the inequality in the tribal lands and bring this awareness back to those who still live there.[18] In addition, the new influx of money allows the families to seek power and influence in correspondence with their new wealth, which then begets changes and conflict in the tribal structure.[19]

The FATA gained particular significance because of its location along the Afghan border, which resulted in remnants of al-Qaeda and Taliban militants seeking refuge in the FATA's remote villages and difficult terrain.[20] Militants then used these remote locations to launch attacks against international forces in Afghanistan and then also allied themselves with local insurgents, based primarily in the Waziristan agencies, which then led to concerns regarding Pakistan's internal security. Its location makes the FATA key to policing the Afghan-Pakistan border and also the primary site of U.S. drone attacks.[21] The opposition from the FATA tribes and their alliances with each other and

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15. *Id.*
16. *Id.*
17. Fair, *supra* note 9.
18. *Id.*
19. *Id.*
20. *Id.*
21. In 2012, the U.S. carried out about 48 serial drone strikes on suspected al-Qaeda and Taliban members. These strikes resulted in large numbers of civilian casualties; lack of access to these tribal areas has prevented independent verification of statistics. The U.S. drone strikes cause much controversy, outrage and civilian casualties in Pakistan. *See Pakistan: Abuses, Impunity Erode Rights*, HUM. RTS. WATCH (Feb. 1 2013), *available at* http://www.hrw.org/news/2013/02/01/pakistan-abuses-impunity-erode-rights (last visited May 10, 2015).

with militant groups across Pakistan has made the situation especially volatile in the last decade, both for Pakistan's domestic security and the war in Afghanistan.[22] The continued drone attacks have also further soured the relationship between the FATA and Pakistan's central government, as there is now a feeling of betrayal and abandonment where the people of the tribal lands feel their government has allowed a foreign power to wreak complete havoc and destruction upon them.[23] While these factors all contribute to the derogation of the area and to the rise of militant violence, the lack of societal development as a result of Pakistan's longtime neglect is also a significant factor that must be taken into account.[24]

The combination of having to balance domestic interests and the interests of foreign powers makes the situation more complicated for Pakistan and limits its military options. As a result, many of the actions Pakistan has taken in its counter-insurgency effort have been questionable. Accusations of arbitrary detentions, torture, enforced disappearances and collective punishment have steadily increased over the last few years as Pakistan has regained territory from the Taliban and shifted its focus to smaller clashes with militant groups. This is especially problematic from a legal standpoint because from 2008 to 2010 Pakistan ratified multiple human rights treaties, including the International Covenant on Civil and Political Rights ("ICCPR"), the UN Convention Against Torture ("UNCAT") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[25]

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22. SYED FAROOQ HASNAT, GLOBAL SECURITY WATCH – PAKISTAN 144 (2011). Though the War in Afghanistan has wound down considerably there are still American troops in Afghanistan, training Afghan security forces, aiding in the reconstruction process and continuing to manage the presence of the Taliban and al-Qaeda. These foreign troops are directly affected by Pakistan's ability to manage the FATA and Waziristan especially, a fact Pakistan has to take into account when they take action in the region. *Id.*

23. Umar Farooq, *Civilians Bear Brunt of Pakistan's War in the Northwest*, FOREIGN POL'Y (Feb. 11, 2013), *available at* http://southasia.foreignpolicy.com/posts/2013/02/11/civilians_bear_brunt_of_pakistans_war_in_the_northwest (last visited May 10, 2015).

24. *Impoverished Northwest*, *supra* note 11.

25. Arshad Mahmood, *ICCPR Ratified*, DAWN (Aug. 2, 2010, 12:00 AM), *available at* http://www.dawn.com/news/875750/iccpr-ratified (last visited May 10, 2015); *Chapter IV Human Rights*, UNITED NATIONS TREATY COLLECTION, *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited Mar. 31, 2015); *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUM. RTS, *available at* http://indicators.ohchr.org/ (last visited May 10, 2015) (Pakistan ratified CEDAW in 1996, the ICESCR in 2008, and the ICCPR and UNCAT in 2010).

Though compliance with these agreements is difficult to enforce on an international level, ratification creates a duty on Pakistan's part to fulfill the terms of the treaties.[26] With ratification Pakistan acknowledged that there exists a universal standard for the treatment and governing of people and that Pakistan has a responsibility to provide its citizens with that standard of living. Yet Pakistan has not fulfilled its duty of incorporating these universal standards into its governmental structure when it comes to the FATA.

Despite this, there are ways that Pakistan can begin to repair the damage that has been done in the tribal lands and act in accordance with its own constitution as well as international law. Pakistan can create a fair and more representative system of governing the region by integrating the FATA into the federal union, of which the other provinces are already a part. Pakistan can invest in the area's infrastructure, education, healthcare system (what little exists), and security and hold those who have committed human rights abuses accountable.

II. UNDERSTANDING HOW THE HISTORY OF THE FATA INFLUENCED THE CURRENT STATE OF AFFAIRS

The history and makeup[27] of the FATA explains the logic behind Pakistan's handling of the region, because the fact that the FATA borders Afghanistan makes it a very central and strategic location[28] from which to carry out militant operations. This, in combination with the rough and varied terrain, makes the FATA treacherous for those unfamiliar with the terrain to infiltrate. The people of the FATA, who number close to 3.9 million by recent estimates, also make effective

26. Enforcement of international agreements is difficult because all nations are sovereign and there is no overarching legal body that can force states to comply. Often economic sanctions or military force are threatened or used to create compliance but such actions are dependent upon what stake enforcing states have in another state's compliance. Julian Ouellet, *Enforcement Mechanisms*, BEYOND INTRACTABILITY (Sept. 2004), *available at* http://www.beyondintractability.org/essay/enforcement-mechanisms (last visited May 10, 2015).

27. The terrain of the tribal lands makes the region a difficult one to tame. It is a mountainous region but is also made up of forests and deserts. Its extreme winters and summers make it difficult for armed forces to carry out effective operations. Akbar Ahmed & Harrison Akins, *Waziristan: 'The Most Dangerous Place in the World,'* AL JAZEERA (Apr. 12, 2013, 9:37 PM), *available at* http://www.aljazeera.com/indepth/opinion/2013/04/20134983149771365.html (last visited May 10, 2015); HASNAT, *supra* note 22, at 145.

28. HASNAT, *supra* note 22.

military operations difficult.[29] The FATA operates under a tribal system of government where clans are defined by common ancestry; most FATA residents are *Pashtuns*.[30] Because most tribes straddle the Durand Line, cross border movement is "substantial and difficult to control."[31]

Prior to the Taliban insurgency the tribes dealt with issues of crime, administration and politics through their own traditions, an arrangement that was accepted by the British when they were in power and later by Pakistan's government as well.[32] The *Jirgas* were by no means perfect, but they emphasized mediation rather than violence as a method of conflict resolution. Safdar Dawar, a journalist from North Waziristan and head of the Tribal Union of Journalists, reminisces that "the elders and the people recall the situation before 2001, [when] they had their own culture, unity, lashkars [militias], and peace committees," he explains, that the people of the FATA know that they were more effective than any tools from "these stakeholders in the Great Game."[33] They kept relative peace among the tribal people they served.[34] But in recent years, the Taliban gained control and severed the structure of

29. AMNESTY INT'L, AS IF HELL FELL ON ME: THE HUMAN RIGHTS CRISES IN NORTHWEST PAKISTAN 20 (June 2010), *available at* http://www.protectingeducation.org/sites/default/files/documents/amnesty_as_if_hell_fell_on_me.pdf (last visited May 10, 2015) [hereinafter AMNESTY INT'L]. The tribes of the FATA have a history of resistance, most notably with Soviet occupation forces in 1979 but also much earlier when the British were colonizing the Indian sub content. The British tried to establish some sort of central rule in Waziristan by sending governors into the region. These governors acted more like ambassadors; they had very limited jurisdiction and were barely effective in keeping order in the region. Ahmed & Akins, *supra* note 27. Tribes like the Mehsuds and Wazirs from North and South Waziristan regularly repelled the British when the British encroached on their territory, they would leave the British forces in shambles and refused to make concessions until the colonial troops had no choice but to retreat. David Ignatius, *Waziristan and the British Experience*, WASH. POST (Oct. 25, 2009), *available at* http://articles.washingtonpost.com/2009-10-25/opinions/36856216 1south-waziristan-tribal-areas-tribal-leaders (last visited May 10, 2015).

30. With a population of at least 50 million, the Pashtun people are Afghanistan's largest ethnic group, and are also the second-largest ethnicity in *Pakistan*. Pashtuns are united by the Pashto language, which is a member of the Indo-Iranian language family, although many also speak Dari (Persian) or Urdu. Kallie Szczepanski, *Who are the Pashtun*, ABOUT EDUC. (2014), *available at* asianhistory.about.com/od/gloassaryps/g/Who-Are-The-Pashtun.htm (last visited May 10, 2015).

31. Fair, *supra* note 9.

32. HASNAT, *supra* note 22, at 149.

33. "Stakeholders in the Great Game" is a reference to the key players in the FATA conflict, the U.S., the Taliban and Pakistan's military forces. Farooq, *supra* note 23.

34. Ahmed & Akins, *supra* note 27.

Jirgas, giving way instead to militant religious leaders, who govern on the basis of stringent religious doctrine.[35]

The Taliban's method of tribal governing is not well taken by the people of the FATA. The people of the FATA have traditionally abided by an honor code called *Pashtunwali* that predates Islam.[36] This ethical code, in combination with tradition and religion is what the region's culture is comprised of; however, the religious extremism that contributed to the region's instability can largely be attributed to the relatively recent alterations to the region's power structures.[37]

When Pakistan gained independence from India in 1947, Pakistan's founder, Mohammed Ali Jinnah "maintained the British civil structure of the tribal agency and the role of the political agent[38] in administering the Tribal Areas."[39] Jinnah continued to operate the tribal lands in much the same way as the British had. However, his leadership differed markedly in policy when, in April 1948, Jinnah made the unprecedented move of withdrawing military forces from the province of Waziristan upon meeting with a *grand Jirga* of FATA tribesman.[40] He said,

> Keeping in view your loyalty, help, assurances and declarations we ordered, as you know, the withdrawal of troops from Waziristan as a concrete and definite gesture on our part. . .Pakistan has no desire to unduly interfere with your internal freedom. On the contrary; Pakistan wants to help you and make you, as far as it lies in our power, self-reliant and self-sufficient and help in your educational, social and economic uplift. . . We want to put you on your legs as self-respecting citizens who have the opportunities of fully developing and producing what is best in you and your land.[41]

As Jinnah is widely considered a brilliant political mind, his speech to the grand *Jirga* can be interpreted as strategic political rhetoric meant to placate the tribes. However, it was also a practical assessment of the situation and the needs of the region. Jinnah knew that the northwest frontier of the newly created Pakistan would be difficult to incorporate; its people had a long history of tribal leadership that would not be easy

35. HASNAT, *supra* 22, at 149.
36. *Id.*
37. Fair, *supra* note 9.
38. *See infra* Part IV.
39. Ahmed & Akins, *supra* note 27.
40. *Id.*
41. HASNAT, *supra* note 22, at 148.

to transition into the central government.[42] It is obvious from Jinnah's speech that while Pakistan was willing to aid the FATA it never intended to fully integrate the FATA, which is what created the rift that exists today.

Instead of fighting them into submission with resources and time the new government did not have, Jinnah made sure they were aware of their internal autonomy, while still being subject to the central government. Though keeping the tribal lands autonomous was a practical necessity at the time it was ultimately detrimental. Because despite their autonomy, the tribal lands are subject to Pakistan's central government, yet are inadequately represented in the central government. Jinnah had promised the tribesmen economic and social aid to lift their society,

> Pakistan will not hesitate to go out of its way to give every possible help– financial and otherwise–to build up the economic and social life of our tribal brethren across the border. . . It will certainly be my constant solicitude and indeed that of my Government to try to help you to educate your children and with your co-operation and help we may very soon succeed in making a great progress in this direction.[43]

For the next fifty years or so Pakistan struck a balance between the tribal structure in the FATA and Pakistan's central government with mechanisms in place to ensure law and order.[44] This balance, which was just non-interference from the central government, did little to actually lift Waziristan or any of the FATA out of its impoverished conditions, in fact the non-interference, and therefore isolation, only pushed the FATA further into the Taliban's hands.[45]

For example, in 1996, the government extended voting rights for adults to the FATA.[46] But, "mainstream parties were not allowed to mobilize in FATA as the elections were supposedly held on a non-party basis."[47] The problem though is that Islamist parties held great influence over mosques and schools, and therefore their candidates

42. Pakistan had just seceded from India and creating a new country was challenging enough without taking on the arduous task of integrating an autonomous tribal region that was used to battling those who attempted to conquer it.

43. HASNAT, *supra* note 22, at 148.

44. Ahmed & Akins, *supra* note 27.

45. "According to a WHO report, nearly 50 percent of tribesmen live in abject poverty, 75 percent have no access to clean drinking water. Annual population growth rate is almost 4 percent as compared to nationally cited figures of 2 percent." *Impoverished Northwest*, *supra* note 11.

46. Fair, *supra* note 9.

47. *Id.*

could effectively lobby for votes.[48] As a result, the tribal lands elected *mullahs* to represent them in the National Assembly in 1997 and again in 2002.[49] This is a major departure from tradition. Previously, *maliks* chose their tribal representatives to Parliament on a "secular and tribal basis."[50] The collapse of the *maliki* system because of Pakistan's neglect and the Taliban's influence, is significant to the FATA because it created a power vacuum that *mullahs* and Islamic militants then eagerly filled.

Pakistan continued to treat the tribal lands as separate and apart but never gave them true autonomy as far as governing. Jinnah's political promises remained just that; the central government continued to neglect the people of the FATA.[51] The people of the tribal lands have always lived in destitute conditions. For shelter, most people live in pueblo-like constructions,[52] usually with no electricity. The area remains impoverished, with extremely low rates of literacy and little to no healthcare services. Much of the FATA is completely inaccessible because of the lack of infrastructure, including lack of roads and railways.[53] This lack of attention to a major segment of its population is a large part of Pakistan's problem in the FATA.

While the central government has neglected to govern the area and has floundered to regain control in the last decade, the Taliban "seem to operate with a clear chain of command and high level of discipline, and ha[ve] demonstrated strong–and growing–operational and strategic cohesion."[54] Residents of the FATA who joined the Taliban have done so for a host of reasons, most of which are ultimately traceable to unemployment and poverty.[55] Further proving that the rise of Taliban influence and religious extremism in the FATA is directly traceable to the lack of social development and infrastructure, a responsibility the

48. *Id.*

49. *Id.*

50. *Id.*

51. Fair, *supra* note 9.

52. Pueblos were housing constructions built from stone, mud and other local material that were built by Native Americans in the Southwestern United States.

53. HASNAT, *supra* note 22, at 147.

54. AMNESTY INT'L, *supra* note 29, at 30.

55. Naveed Ahmad Shinwari, *Understanding FATA: 2011 Attitudes Towards Governance, Religion & Society in Pakistan's Federally Administered Tribal Areas (Vol. V 2012)*, COMM. APPRAISAL & MOTIVATION PROG., *available at* http://www.understandingfata.org/uf-volume-v/Understanding_FATA_Vol-V-11.pdf (last visited May 10, 2015).

central government should be handling.[56] In fact, while more that 30% of the FATA characterizes the Taliban as "terrorists," almost 23% recognize them to also be uneducated youth.[57] The lack of literacy and jobs make supporting the Taliban fruitful for those who join their ranks and those who do not join are too intimidated to resist in any meaningful way.[58]

III. GOVERNING THE FATA: CONTRADICTING THE CONSTITUTION

The Pakistani Constitution of 1973 ("the Constitution") gives special status to the tribal areas and directs that neither the power of Parliament nor of the power of the judicial system shall extend to the tribal areas without the President's assent.[59] While the rest of Pakistan functions as a parliamentary democratic republic, the FATA does not. Under Article 51 of the Constitution, the FATA is included among the territories of Pakistan.[60] The FATA functions as a combination of exclusive executive authority and tribal tradition.[61] The extent of the FATA's involvement in the central government is that FATA representatives can be elected on a non-party basis to the National Assembly and the Senate, but it still remains under the direct executive control of the President.[62] Despite election to the National Assembly and Senate, representatives cannot exercise any legislative powers with regard to the FATA, meaning that any laws passed by the National Assembly do not apply to the FATA unless ordered by the President.[63]

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56. *Id.*

57. *Id.* at 95.

58. HASNAT, *supra* note 22, at 147.

59. *History of FATA*, FEDERALLY ADMINISTERED TRIBAL AREAS, *available at* http://fata.gov.pk/Global.php?iId=28&fid=2&pId=23&mId=13 (last visited May 10, 2015) ("Soon after [Pakistan's] Independence [from India], the various tribes in the region entered into an agreement with the Government of Pakistan, pledging allegiance to the newly created state. The agreement . . . did not include political autonomy of the tribes. The instruments of agreement, signed in 1948, granted the tribal areas a special administrative status. Except where strategic considerations dictated, the tribal areas were allowed to retain their semi-autonomous status, exercising administrative authority based on tribal codes and traditional institutions. This unique system was crystallized in Pakistan's Constitution of 1973.").

60. PAKISTAN CONST. art. 51; *see also Administrative System*, FEDERALLY ADMINISTERED TRIBAL AREAS, *available at* http://fata.gov.pk/Global.php?iId=29&fid=2&pId=23&mId=13 (last visited May 10, 2015).

61. HASNAT, *supra* note 22, at 149; PAKISTAN CONST. arts. 51, 59, 246-47.

62. *Administrative System, supra* note 60; PAKISTAN CONST. arts. 51, 59, 246-47

63. AMNESTY INT'L, *supra* note 29, at 27; *Administrative System*, *supra* note 60.

The special mechanism for governing this region falls under a body of law called the Frontier Crime Regulations ("FCR").[64] The FCR dates back to the 1870s when Pakistan was still part of India and the whole subcontinent was under British rule.[65] Despite India's independence from Britain, then Pakistan's secession from India, and multiple revised constitutions, the FCR has been retained.[66] Through reliance on the concept of Collective Punishment, the FCR codifies the government's ability to commit human rights violations and fails to recognize "the rule of law, due process, political representation or democratic institutions."[67] Under the FCR, "the government may hold an entire tribe or subgroup accountable for the actions of alleged wrongdoers."[68] This kind of legal framework and the associated mechanisms for law enforcement are specific to the FATA. Segments of FATA tribes, Pakistani human rights organizations and even Pakistan's Supreme Court have decried the FCR; the court going so far as to deem the FCR unconstitutional.[69]

Though Pakistan's central government has often promised to reform the FCR and improve the status of those living in the tribal lands, it has not made any substantial changes to the FCR in 113 years.[70] The millions who live in the FATA still have "second-class legal status."[71] Pakistan's constitution lays out a list of guaranteed fundamental rights for all citizens, but it then excludes the FATA from benefiting from said rights and excludes the majority of judicial, legal and parliamentary control from reaching there.[72]

Since the control of parliament and the judiciary do not extend to the FATA, it is essentially under direct executive control. The President

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64. It is worth noting that under art. 247(6) of the 1973 constitution, the president of Pakistan has the constitutional authority to end the applicability of the FCR to any agency after consulting with a tribal Jirga. AMNESTY INT'L, *supra* note 29, at 26-27; PAKISTAN CONST. art. 247, § 6.

65. *History of FATA*, *supra* note 59.

66. PAKISTAN CONST. art. 247.

67. AMNESTY INT'L, *supra* note 29, at 26; Umar Farooq, *Pakistan's FATA: Lawless no more?*, ALJAZEERA (Mar. 22, 2014, 12:10 AM), *available at* http://www.aljazeera.com/indepth/features/2014/03/pakistan-fata-lawless-no-more-20143211115508289 97.html (last visited May 10, 2015).

68. Fair, *supra* note 9.

69. *Id.*

70. *Id.*; Umar Farooq, *Pakistan's FATA: Lawless no more?* ALJAZEERA (Mar. 22, 2014, 12:10 PM), *available at* http://www.aljazeera.com/indepth/features/2014/03/pakistan-fata-lawless-no-more-20143211115508289 97.html (last visited May 10, 2015).

71. Fair, *supra* note 9; Farooq, *supra* note 70.

72. PAKISTAN CONST. art. 8(3).

appoints a Political Agent[73] ("PA") for each agency within the FATA who exercises a broad range of administrative, executive and judicial powers.[74] The PA wields so much power that he can "order whole villages to be burnt down and tribes to be blockaded or sent into exile."[75] The only check on the PA is that he may consult with the *Jirgas*[76] when resolving disputes.[77] However this is a discretionary option left up to the PA.[78] Currently, the FATA is administered by the Governor of the Khyber Pakhtunkhwa ("KP") "in his capacity as an agent to the President of Pakistan, under the overall supervision of the Ministry of States and Frontier Regions in Islamabad."[79]

IV. CONFLICT BETWEEN THE TALIBAN AND PAKISTANI ARMED FORCES

The current conflict between Pakistan's armed forces and the insurgents in the FATA is widely considered Pakistan's largest security threat. Though the social tensions that underlie this conflict are hardly new, the war itself began after the U.S. and its coalition invaded Afghanistan in 2001.[80] The fall of Afghanistan's Taliban regime caused many Taliban officers and leaders to cross the border into the FATA.[81] As a strategic safe haven, Waziristan was ideal for escaped Taliban

73. The Political Agent position was created by the British around 1901. "Each agency was administered by a Political Agent who was vested with wide powers and provided funds to secure the loyalties of influential elements in the area." *History of FATA*, *supra* note 59.

74. AMNESTY INT'L, *supra* note 29, at 26.

75. Farooq, *supra* note 70; *see* Fair, *supra* note 9 ("The role of the Political Agency has continued to erode both due to the diminished quality and rank of the civil servants assigned to the position and due to the ever-expanding corruption within the agency since 1947. In recent years, the army has further supplanted the PA's authority in key agencies such as North and South Waziristan.").

76. *Jirgas* are traditionally made up of 3 elder tribesmen, known as *Maliks*, who are appointed and dismissed at the whim of the PA. Though they are meant to function as a check on the Political Agent's extensive authority, practically speaking, they serve at the pleasure of the executive appointed PA. Around the same tie as when the role of the Political Agent was carved out, the Maliki system was developed as well. The Maliki system allowed the "colonial administration to exercise control over the tribes. Under this system, local chiefs (Maliks) were designated as intermediaries between the members of individual tribes and the colonial authorities, and also assisted in the implementation of government policies." *History of FATA*, *supra* note 59.

77. Farooq, *supra* note 70.

78. HASNAT, *supra* note 22, at 149.

79. *Administrative System*, *supra* note 60.

80. HASNAT, *supra* note 22, at 143.

81. AMNESTY INT'L, *supra* note 29, at 20.

members to carry out attacks on the U.S-led coalition.[82] From there, they could assist whatever remained of al-Qaeda and the Taliban in Afghanistan, who had by then escaped into the villages and mountains to avoid further attack.[83] The northern agencies in the FATA began noticing a significant increase in Taliban presence in 2006. By 2009 a substantial portion of the Federally Administered Tribal Area was under Taliban control.[84]

Due to this increase in Taliban presence the U.S. government put pressure on Pakistan, particularly on then-president General Pervez Musharraf, to contain the militant forces that had escaped into the FATA's mountain terrain and then into the rest of the FATA.[85] Musharraf was pressured into launching his own military operation to assist the U.S. and its allies. This was a difficult decision for Pakistan because its military had developed a close working relationship with the tribesmen since 1979.[86] Launching a military operation, at the insistence of the U.S., against those same tribes was not an easy proposition for Pakistan's military to carry out. The fact that the FATA tribesmen, especially those already sympathetic to the Taliban, considered the struggle between the U.S and the Taliban as a justified "war of liberation" from the U.S.' "War on Islam" made Pakistan's decision even more difficult.[87]

Musharraf succumbed to U.S. pressure and beginning in 2002 Pakistan carried out unenthusiastic military operations, relying on para-military forces. In 2008 and 2009 Taliban forces blocked supply routes through the Khyber agency, which the U.S. and NATO forces used, and proceeded to seize, loot and burn several hundred supply trucks. Due to U.S. pressure, Pakistan "conducted fierce battles to maintain this supply line" in June 2008, January 2009 and March 2010.[88] Operations like these were often botched and then followed with urgent peace

82. HASNAT, *supra* note 22, at 143.

83. *Id.*

84. AMNESTY INT'L, *supra* note 29, at 20.

85. HASNAT, *supra* note 22, at 143.

86. Waziristan has been kept mostly autonomous because of their tradition of militaristic service and support in the defense of Pakistan. Since 1979, Pakistan's military established a close relationship with the tribesmen of the FATA to encourage them to help the Afghans in their struggle against Soviet occupation. Waziristan was central to the support of the Mujahideen forces attempting to repel the Soviets. HASNAT, *supra* note 22, at 143, 145, 147.

87. *Id.* at 143.

88. AMNESTY INT'L, *supra* note 29, at 20.

agreements with the tribes that later fell apart.[89] It was obvious from Pakistan's halfhearted efforts that they had no desire to establish state rule in the FATA by inserting the central government into the largely autonomous region, at least not through military means.

The drawback to this lack luster effort was that it gave legitimacy to the Taliban in the FATA, allowing them to eventually establish their own party, the *Tehrik-i-Taliban Pakistan* (The Pakistani Taliban Movement, also referred to as the "TTP"). Through Pakistan's every botched military operation and failed peace agreement, the TTP was able to gain sympathy and support from the tribesmen, which led to new resources and recruits, eventually creating a serious obstacle for the military.[90] The Taliban was no longer just a formidable militant force but now also an emboldened and legitimized political influence.

Through a series of peace agreements, Pakistan released Prisoners of War, weapons and territory back to TTP militants, actions that both the TTP and the tribes in the FATA saw as a weakness.[91] Encouraged by this display of vulnerability the TTP took steps to challenge state rule throughout the FATA by carrying out terrorist activity across the country against law enforcement, military facilities and civilian targets[92] and by appointing their own members to positions of political influence.

This is where the decline of the *maliki* system is especially problematic. The decline of the tribal governing structure impaired the authenticity and legitimacy of the *maliks'* leadership.[93] Political Agents favored *maliks* whose cooperation they could bribe, creating an environment of corruption and mistrust. As a result, the tribes no longer recognize or trust *maliks* as their legitimate representation.[94] They instead turned to other political forces, more specifically the "charismatic, religious and militant" alternatives offered by the Taliban.[95] "These new leaders have effectively captured the various forms of simmering discontent within the tribes and have emerged as more legitimate defenders of tribal interests. Thus, the mullahs have now become respected representatives of the tribes, as have key Islamist militants in FATA."[96]

89. HASNAT, *supra* note 22, at 144.
90. *Id.*
91. *Id.*
92. *Id.*
93. Fair, *supra* note 9.
94. *Id.*
95. *Id.*
96. *Id.*

The increased influence of the TTP had widespread ramifications across Pakistan. Constantly on the defensive in order to preserve the interests of the U.S. rather than the interests of Pakistani citizens, Pakistan ended up prolonging the conflict. Its indecisive military strategy damaged the military's prestige, caused much human casualty, property damage and displaced thousands of people, all while causing massive strain on Pakistan's economy.[97] Residents of the FATA were affected much worse, dying by hundreds due to random and violent terrorist attacks, U.S. drone strikes and indiscriminate action by Pakistan's military.[98]

The U.S. drone attacks and the subsequent bombings by Pakistani warplanes further soured the FATA's relationship and opinion of the central government, causing them to seek refuge in the only viable opposition, the TTP.[99] Anti-U.S. sentiment is still strong in the FATA, with 79.3% of tribal people opposing American military presence in the area, a number heavily influenced by the continuing drone strikes.[100] There is also bitterness towards the Taliban for having destroyed the peace of the region and bringing upon the FATA the chaos caused by continued drone strikes and Pakistan's military.[101]

Nearly 70% of the FATA opposes the presence of Pakistani Taliban fighters[102] because in addition to suicide bombings across Pakistan, the TTP has also become an oppressive presence in the FATA by constantly eliminating its opponents, fighting the Pakistani state and its security forces, and carrying out beheadings and kidnapping people for ransom. By 2009, the TTP had carried out so many violent and disruptive operations, both outside and within the FATA, especially against military sites that it forced the military's hand to end the conflict

97. HASNAT, *supra* note 22, at 144.

98. *Id.*

99. *See* Rahimullah Yusufzai, *Waziristan – the Mother of all Battles*, NEWS (Oct. 20, 2009), *available at* http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=204037&Cat=9&dt=9/2/2009 (last visited May 10, 2015).

100. Shinwari, *supra* note 55, at 87.

101. Tribesmen have often banded together to expel al-Qaeda, the Taliban, or other extremist groups from their land. But they have also consistently claimed that the source of their current problems lies in Afghanistan and the U.S. invasion of 2001. "If you are asking about Americans," Dawar says, "100% [of the people] here are hating Americans. They are thinking that this whole drama is from the side of America, because they came to Afghanistan. That is why they are demanding America leave Afghanistan." Farooq, *supra* note 23.

102. Shinwari, *supra* note 55, at 87.

as swiftly as possible, leading to more violence and death in the FATA.[103]

In 2009, Pakistan renewed air and ground offensives against the TTP in the FATA. These attacks were intended to target militant strongholds but were often inaccurate since Pakistan was working with very limited and often unreliable intelligence, a result of having little to no public support or assets in the area.[104] From the beginning of the war in Afghanistan, public opinion in the FATA favored the Taliban and their efforts to rid the region of the infiltration of a foreign power. However, the TTP's violent and destructive tactics have caused them to lose much of the public sympathy they gained when Pakistan first began military operations.

This does not imply that public opinion has shifted in Pakistan's favor. Pakistan's most recent military campaign in the FATA, Operation Zarb-e-Azb, an air and ground offensive launched on June 15, 2014 in North Waziristan, has caused mass civilian casualty and is yet another source of major human rights violations exacted by Pakistan against FATA residents.[105] Zarb-e-Azb was launched after government peace talks with Taliban leaders once again fell through, and though the military had been planning the offensive well before, the Operation was pursued ultimately because of the major Taliban attack on Pakistan's largest airport on June 9, 2014.[106]

Zarb-e-Azb was aimed to be a "comprehensive operation against foreign and local terrorists who are hiding in sanctuaries in North Waziristan" but practically resulted in the displacement of 500,000 of

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103. *See* Yusufzai, *supra* note 99.

104. *See id.*

105. Rebecca Santana & Asif Shahzad, *Pakistan Launches Offensive Against Military Near Afghan Border*, HUFFINGTON POST (June 15, 2014, 10:23 AM), *available at* http://www.huffingtonpost.com/2014/06/15/pakistan-army-says-launch_n_5496487.html (last visited May 10, 2015).

106. On June 9, 2014, the TTP claimed responsibility for an attack on Pakistan's Jinnah International Airport, located in Karachi. The nearly 12-hour siege left 28 dead, including 10 TTP attackers. The TTP released a statement following the attack stating, "the biggest reason for attacking Karachi airport is because it serves as the biggest air logistics center supplying goods for the Crusaders' war in Afghanistan and Pakistan." This statement referred to the Afghanistan-bound U.S.-NATO cargo, which comes in through Karachi. The siege has also been attributed as the TTP's revenge for the death of Hakimullah Mehsud, a prominent Taliban leader who was killed by U.S. drone strike in November 2013. Declan Walsh, *Pakistani Forces Begin Assault on Militant Strongholds*, N.Y. TIMES (Jun. 30, 2014) *available at* http://www.nytimes.com/2014/07/01/world/asia/pakistan-army-begins-ground-assault-on-militants.html?_r=2 (last visited May 10, 2015); *TTP claims attack on Karachi airport*, DAWN (Jun. 9, 2014) *available at* http://www.dawn.com/news/1111397/ttp-claims-attack-on-karachi-airport (last visited May 10, 2015).

people and hundreds of casualties.[107] Zarb-e-Azb has caused Pakistan's "biggest conflict-driven humanitarian crises since 2009."[108] The Pakistani military has claimed that no civilian casualties resulted from Zarb-e-Azb, this claim is unrealistic on its face and has been disproven through by refugees from the area who have given accounts of the military's indiscriminate attacks which have resulted in mass civilian death and grave injuries.[109] While Pakistan may claim that Operation Zarb-e-Azb has been successful in ridding the area of militants and dismantling the TTP's power in the FATA, especially in North Waziristan, the TTP has made it clear that these claims are inaccurate.

On December 16, 2014, in what can only be described as retaliation for Zarb-e-Azb, seven TTP militants laid siege on a school in Peshawar for hours ("Peshawar Attaack").[110] The school, Army Public School and Degree College, is primarily for the children of active military members.[111] By the time the siege ended later that day, there were at least 100 injuries and 152 casualties; 132 children, 10 school staff members, three soldiers and the seven militants.[112] The attack is considered the deadliest attack in Pakistan since October 2007.[113]

Pakistan, in a very opportunistic fashion, has used the Peshawar Attack to institute fast track avenues around the criminal justice system. On December 17, 2014, the day after the Peshawar Attack, the Prime Minister, Nawaz Sharif, lifted a moratorium on the death penalty, which has been in place since 2008, and promised that death warrants would follow in the coming days.[114] Given that the rise of Taliban control in the FATA and the main source of criticism against the Pakistani government in the FATA is based on the lack of fair governing – the renewal of the death penalty is particularly problematic.

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107. Syed Azeem & Noaman G. Ali, *Zarb-e-Azb and the Left: On Imperialism's Materiality*, TANQEED (Aug. 2014) *available at* http://www.tanqeed.org/2014/08/zarb-e-azb-and-the-left-on-imperialisms-materiality/ (last visited May 10, 2015); Santana & Shahzad, *supra* note 105.

108. Walsh, *supra* note 106.

109. *Id.*; Santana & Shahzad, *supra* note 105.

110. Sophia Saifi & Greg Botelho, *In Pakistan School Attack, Taliban Terrorists Kill 145, Mostly Children*, CNN (Dec. 17, 2014), *available at* http://www.cnn.com/2014/12/16/world/asia/pakistan-peshawar-school-attack/ (last visited May 10, 2015).

111. *Id.*

112. *Id.*

113. *Id.*

114. Sheree Sardar & Katharine Houreld, *Pakistan PM Lifts Moratorium on Death Penalty After School Attack*, REUTERS (Dec. 17, 2014), *available at* http://in.reuters.com/article/2014/12/17/pakistan-school-deathpenaltyidINKBN0JV0LJ20141217 (last visited May 10, 2015).

Currently, more than 8,000 prisoners sit on Pakistan's death row, and about 10% of them are convicted of "terrorism" related offenses.[115] Pakistan's definition of terrorism is very broad, to the point where almost any crime can fall under the category of "terrorism," as a result more that 17,000 cases of terrorism are pending in special courts.[116] Those convicted of terrorism are often denied their basic rights; they are tortured into confessions, denied lawyers, and denied adequate living conditions.[117] Many defendants who have been convicted of terrorism were charged on the basis of crimes that bore no relation to terrorism in the first place; they were sentenced to death despite incredibly unfair trials.[118]

What makes this situation even worse, especially for those in the FATA who suffer most from these government injustices, is that this heavy crackdown on "terrorism" has not stopped militant attacks.[119] These crackdowns, which essentially pervert the criminal justice system, have done nothing to alleviate the actual problem of Taliban militancy. Instead, they are just another way in which Pakistan's central government commits human rights violation through the justification of maintaining security in the FATA and in Pakistan as a whole.

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115. *Id.*

116. *Id.* Under Section 6 of the 1997 Anti-Terrorism Act (ATA), "Terrorism" is defined as "the use or threat of action" where among other things, "the use or threat is designed to coerce and intimidate or overawe the government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society; or the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause." *The Anti-Terrorism Act (ATA), 1997*, FED. INVESTIGATION AGENCY, GOVT. OF PAKISTAN, *available at* http://www.fia.gov.pk/ata.htm (last visited May 10, 2015). In 2013, the ATA was amended so as to expand Section 6 - adding in that "intimidating and terrorizing the public, social sectors, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies" would also be considered "terrorism." Amendment of Section 6, Act XXVII of 1997, GAZETTE OF PAKISTAN EXTRAORDINARY, Mar. 26, 2013, at 2, *available at* http://www.na.gov.pk/uploads/documents/1365050846_309.pdf (last visited May 10, 2015). This means that almost any criminal action can be categorized as terrorism. Such language lends itself to abuse, hence the large amount of terrorism related cases pending in Pakistani courts and the hundreds of people sitting on death row.

117. Sardar & Houreld, *supra* note 114.

118. *Id.*

119. *Id.*

V. PAKISTANI ARMED FORCES AND CENTRAL GOVERNMENT COMMIT INTERNATIONAL HUMAN RIGHTS VIOLATIONS UNDER THE GUISE OF MAINTAINING SECURITY

The human rights crisis in the FATA can be attributed to three main sources, the neglect and mistreatment from the Pakistani government and military, Taliban militancy and influence and the U.S.' drone attacks. Actors are largely able to continue committing human rights violations because the very setup of the FATA leaves the area susceptible to corruption and abuse. Although the FATA accounts for 7% of the national population, it receives a mere 1% of the national budget.[120] The estimated unemployment rate reliably rests somewhere between 60% and 80% but it often reaches higher numbers depending on patterns of migrant labor.[121] In regards to healthcare, the ratio of doctors to people in the FATA is about 1 to 7670, whereas the national average is about 1 to 1226.[122] There is about one hospital for every fifty square kilometers, which serve large populations, sometimes extending to those living Afghanistan's side of the border.[123] The FCR is responsible for this neglect because the various branches of government are barely accountable to the FATA.

Relying on the FCR to govern the FATA violates Pakistan's human rights obligations under the international human rights conventions.[124] The extension of the FCR's power is in direct conflict with the Constitution and the rights it guarantees to the rest of Pakistan's provinces. The FCR denies FATA's residents equal protection under the law, as well as voting rights.[125] Pakistan's central government and military forces often exploit the FCR to justify human rights violations, such as collective punishment and unwarranted detention of tribal leaders' relatives, in an effort to pressure those leaders for State purposes.

Since the jurisdiction of Pakistan's judiciary does not extend to the FATA, the FCR has its own judicial mechanism, which consequently has negative human rights implications. Under the FCR, a *Jirga*

120. *See Impoverished Northwest*, *supra* note 11.

121. *See id.*

122. *See id.*

123. *See id.*

124. *See infra* discussion Section VI, Pakistan is Obligated to Act in Compliance with the International Human Rights Obligations it is a Party to.

125. *See* PAKISTAN CONST., arts. 8-28.

decides all civil and criminal matters arising in the FATA.[126] Should a FATA resident wish to appeal a *Jirga's* decision they may do so to the Supreme Court of Pakistan (Pakistan's highest court) or to the Peshawar High Court through a constitutional writ challenging the decision.[127] The FATA is divided into two administrative categories, protected areas, which are under the direct control of the government and non-protected areas, which are administered (indirectly) through local tribes.[128]

> In protected areas, criminal and civil cases are decided by political officers vested with judicial powers. After completing the necessary inquiries and investigations, a *Jirga* is constituted with the consent of the disputing parties. The case is then referred to the Jirga who issues a verdict, which is examined by the Political Agent. This decision can be appealed against to the High Court and Supreme Court. Once appeals are exhausted, execution of the verdict is the responsibility of the political administration. In non-protected areas, cases are resolved through a local *Jirga* at the agency level. Local mediators first intervene to achieve a truce (*tiga*) between parties in a criminal case, or to obtain security (*muchalga*) in cash or kind for civil disputes. Thereafter, parties must arrive at a consensus concerning the mode of settlement (arbitration), *riwaj* (customary law) or *Shariah* (Islamic law). Once the mode of settlement is agreed upon, mediators arrange for the selection of a *Jirga*, with the consent of the parties to the case.[129]

Under customary international human rights law, international humanitarian law and Pakistan's own Constitution, the right to a fair trial and an impartial court is necessary, but Pakistan has not extended that principle to the FATA.[130] As it stands, the PA, or a *Jirga* appointed by the PA, carries out judicial functions. However, neither can be considered impartial judicial bodies, and under the FCR their decisions may not always be appealable to Pakistan's higher courts.

This has always been problematic but is more so now because under the FCR the power of the PA is so extensive that on "vaguely defined grounds he can order that individuals or entire communities be detained without trial for years at a time seize their property and impose fines, all without any requirement of ordinary criminal trial."[131] This

126. *Administrative System*, *supra* note 60.
127. *Id.*
128. *Id.*
129. *Id.*
130. AMNESTY INT'L, *supra* note 29, at 27; PAKISTAN CONST. art. 10.
131. AMNESTY INT'L, *supra* note 29, at 27.

provision has often been used to justify collective punishment during recent military operations in the FATA. One of the more notable instances was during the large-scale military operations in Waziristan in October 2009. The military blocked tribal access to necessary humanitarian aid when they suspected members of the Mehsud tribe to be involved in Taliban activities, punishing an entire population of people for the suspected actions of a few.

In recent years, with the increased presence of the Taliban, Pakistan's military operations in the region, and the U.S. drone attacks, the tribal mechanism of policing and redress fell subject to the Taliban. The Taliban openly killed *Maliks* and entire *Jirgas* for their alleged cooperation with Pakistan's central government and military. They then replaced this already corrupt system with insurgents or *Mullahs* who are more sympathetic to the Taliban.[132]

Before the Taliban insurgency, tribes in the FATA had largely policed themselves through their own traditions, mainly the *Jirgas*. This method of enforcement was unfair to begin with because the *Jirgas* and *Maliks* were appointed on the basis of how useful they could be to the PA.[133] As structured under the FCR, the *Jirgas* also discriminated against women by denying women access to tribal councils, even when many of the decisions directly impacted them. This is just another way the FCR contradicts the broader constitution, which guarantees, "all citizens are equal before law and are entitled to equal protection of law" and that "there shall be no discrimination on the basis of sex alone."[134]

In the last few years, Pakistan has managed to regain control over most of the FATA from the Taliban. But in order to accomplish this goal the military has detained thousands of suspected Taliban supporters without giving any cause for such action.[135] In an effort to combat Taliban insurgents Pakistan passed legislation to give the military a wider breadth of discretion. The Actions in Aid of Civil Power Regulations (AACPR) was passed in 2011.[136] While the FCR allows expansion of executive power into the FATA and limits the reach of parliament and the judiciary, the purpose of the AACPR is to enable the military to operate against the Taliban and other "armed groups" in the

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132. *Id.* at 28-29.

133. *Id.* at 28.

134. PAKISTAN CONST. art. 25, §§ 1, 2.

135. *Hands of Cruelty*, *supra* note 1, at 12.

136. *Report Exposes 'the Hands of Cruelty' in Pakistan's Tribal Areas*, AMNESTY INT'L (Dec. 12, 2012), *available at* http://www.amnesty.org/en/news/report-exposes-hands-cruelty-pakistan-s-tribal-areas-2012-12-12 (last visited May 10, 2015).

Tribal areas "in accordance with the law."[137] The AACPR also gives the armed forces the flexibility to take on "law and order duties" and "law enforcement operations."[138]

In combination with the FCR, the AACPR gives the military enough legal coverage to arrest and detain suspects without justification. What is more troubling is that the military's arrest and detention practices go way beyond the enhanced powers granted to them under the AACPR, human rights violations committed by the military extend as far as enforced disappearances, torture and other ill treatment of prisoners, which sometimes lead to death.[139] Amnesty International reports that on a weekly basis "[m]en and boys allegedly arrested and detained by the Armed Forces are being returned dead to their families or reportedly found dumped across the Tribal Areas."[140]

Though the families of the detained and the dead often seek redress, they are given no explanations for why their loved ones were taken or what happened to them in the months and years they were gone. The military conducts no investigations into why the detainees were arrested in the first place, what happened to them while they were in prison or what led to their deaths.[141] Regional high courts have called for local authorities to look into the dumped bodies and a host of other illegal activities, but investigations are rarely carried out and the military has not been called upon to give any sort of accounting.[142] This type of treatment and lack of accountability further degrades the image and reputation of the government and the military in the eyes of those living in the FATA. The only way for Pakistan to rectify these extensive human rights violations and its reputation is to make significant policy reforms and effective mechanisms of redress.

One would think that the government and military are not held accountable because their violations are hard to prove or because records do not exist. However, there are reports that document the military's activities regarding forced detention, disappearances and torture as a method of combating the Taliban in the FATA. The military has admitted to some of these reports, acknowledging the detention of some 700 militants held without charges or possibility of

137. *Hands of Cruelty*, *supra* note 1, at 8-9.
138. *Id.*
139. *Id.* at 13.
140. *Id.*
141. *Id.* at 17
142. *Hands of Cruelty*, *supra* note 1, at 17.

trial.[143] Upon inquiry, Pakistan's Attorney General, Irfan Qadir, told the Supreme Court, "There is a military operation in Waziristan. Under the law we cannot try these 700 people, nor can we release them, unless the operation is over."[144]

A case that has become famous throughout Pakistan is the case of the Adiala 11. Eleven prisoners were arrested from different places because they were believed to be connected to terrorist activity,[145] but in April 2010, they were all acquitted of the charges by an anti-terrorism court.[146] Despite their acquittal the eleven prisoners remained in a detention facility for about a month. Finally, in May 2010, a regional high court called for the release of the prisoners, declaring their detention illegal, but shortly after that the eleven had disappeared from the prison.[147] Pakistan's intelligence agencies continued to give contradictory statements for sometime before finally admitting to having them in custody, by which time four had died.[148]

VI. PAKISTAN IS OBLIGATED TO ACT IN COMPLIANCE WITH THE INTERNATIONAL HUMAN RIGHTS OBLIGATIONS IT IS A PARTY TO

Obligations to citizens within a country's borders do not arise from just domestic legislation. Countries are bound by an international legal system as well. International human rights law, international humanitarian law and customary international law all play a role in making sure that all people are given equal opportunities and are treated

143. *Pakistan Admits to Holding 700 Militants Without Charge*, REUTERS (Jan. 24, 2013, 7:02 AM), *available at* http://www.reuters.com/article/2013/01/24/us-pakistan-detainees-idUSBRE90N0HD20130124 (last visited May 10, 2015).

144. *Id.*

145. Waseem Ahmad Shah, *Case of 'Missing' Adiala Prisoners Far From Over*, DAWN (Aug. 13, 1012, 2:45 AM), *available at* http://dawn.com/news/741861/case-of-missing-adiala-prisoners-far-from-over (last visited May 10, 2015). "The prisoners are wanted by intelligence agencies in connection with different acts of terrorism, including an attack on the GHQ, a rocket attack on the Pakistan Aeronautical Complex Kamra, bomb blasts at the Rawalpindi Parade Lane mosque, shots fired from anti-aircraft guns on a plane carrying former President Pervez Musharraf, suicide attacks on a bus of an intelligence agency in Rawalpindi and other attacks on different military installations and killing of a number of senior army personnel." *Bring 'Missing' Detainees to Court, Agencies Ordered*, DAWN (Feb. 11, 2012, 5:35 AM), *available at* http://dawn.com/news/694709/bring-missing-detainees-to-court-agencies-ordered (last visited May 10, 2015).

146. Shah, *supra* note 145.

147. *Id.*

148. *Id.*

humanely. The human rights obligations most relevant to the conflict in the FATA (which are covered by an array of international laws) are the rights to life, fair trial, water, food, housing, education and the highest attainable standards of healthcare. There are also significant prohibitions on torture, arbitrary detention, enforced disappearance and discrimination against women. Pakistan is a party to many international agreements that cover this broad range of human rights issues and ratifying[149] or acceding[150] these agreements were notable steps towards human rights and an acknowledgment of responsibility towards its citizenry of a certain standard of living and treatment. Though, it is certainly not enough unless Pakistan takes serious steps towards compliance with these agreements through governmental reform.

The International Court of Justice ("ICJ") and the UN Human Rights Committee have confirmed that international human rights law applies both in peacetime and during times of armed conflict.[151] While some of these rights can be modified or limited during times of armed conflict, this can only be done as absolutely necessary depending upon the circumstances of the situation.[152] Therefore the current conflict in the FATA does not give the Pakistani government or military legal justification under international law for the abuses it carries out.

A. International Obligation to Children

In 1990 Pakistan ratified the Convention on the Rights of the Child ("CRC").[153] The CRC requires that states make every available effort to ensure children have access to the highest attainable standards of healthcare, compulsory primary education with an effort to develop adequate general and vocational secondary education and access to adequate food, water and housing.[154] The CRC also prohibits torture,

149. Ratification is the act where a state indicates its consent to be bound to a treaty. *Glossary of Terms Relating to Treaty Actions*, UNITED NATIONS TREATY COLLECTION, *available at* https://treaties.un.org/pages/Overview.aspx?path=overview/glossary/page1_en.xml#ratification (last visited May 10, 2015).

150. "Accession" is the act where a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. *Glossary*, UNITED NATIONS TREATY COLLECTION, *available at* https://treaties.un.org/pages/Overview.aspx?path=overview/glossary/page1_en.xml#accession (last visited May 10, 2015).

151. AMNESTY INT'L, *supra* note 29, at 93.

152. *Id.*

153. *See* Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/Res/44/25 (Sept. 2, 1990).

154. *Id.* arts. 3, 24, 27, & 28.

cruelty, lengthy imprisonment and capital punishment against children and seeks to ensure that no child is deprived of life or liberty "unlawfully or arbitrarily."[155] Further specifying that all "arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."[156]

B. International Obligation for the Equal Treatment of Women

In March 1996, Pakistan acceded to the International Convention on the Elimination of all forms of Discrimination Against Women ("CEDAW"), a major treaty advocating the equal treatment of women.[157] In addition to contradicting the constitution, the FCR's treatment of women also violates the CEDAW, which requires Pakistan "accord to women equality with men before the law."[158] CEDAW goes so far as to require states parties take the appropriate measures

> [T]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[159]

Under CEDAW Pakistan is obligated to rectify the unequal treatment women in the tribal areas face as a result of tribal culture, the *Jirgas* and the Taliban.

For women in general, CEDAW requires state parties to give women, in equality with men, the right to vote and to be elected in all publicly elected bodies and also to participate in the formulation of government.[160] CEDAW also has specific provisions when dealing with the plight of rural women that can be applied to the FATA.[161] It requires states parties to take all appropriate measures to ensure rural women the right to participate in development planning, to have access to healthcare (including family planning), to be able to attain formal and

155. *Id.* art. 37, para. b.

156. *Id.*

157. Convention on the Elimination of all forms of Discrimination Against Women, 1249 U.N.T.S. 13, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979) [hereinafter CEDAW].

158. *Id.* art. 15(1).

159. *Id.* art. 5(a).

160. *Id.* art. 7.

161. *Id.* art. 14.

informal education, to participate in their communities and to have adequate housing, electricity, water and transportation.[162]

C. *International Obligation to Provide Humane Living Conditions*

On April 17, 2008 Pakistan ratified the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[163] The ICESCR requires state parties to recognize the right of everyone to an adequate standard of living, which includes adequate food, clothing and housing, and to the continuous improvement of living conditions.[164] The ICESCR also requires that the "development of a system of schools at all levels shall be actively pursued" and that all people have access to the highest attainable standards of physical and mental health.[165] The ICESCR also deals with the equal treatment of all individuals regardless of race, color, sex or other affiliation and with labor rights.[166]

On June 23, 2010 Pakistan ratified the International Covenant on Civil and Political Rights ("ICCPR") and the UN Convention against Torture ("UNCAT"), two of the most notable international agreements dealing with equality and human rights.[167] Many of the rights and prohibitions expressed in these two treaties are also represented in the ICESCR, CEDAW and the CRC, as well as a host of other international agreements and customary international law. The ICCPR and UNCAT, as two of the more influential human rights agreements, further reinforce Pakistan's awareness of the standards it should be applying to *all* of its citizenry. They also further cement Pakistan's international legal obligation to abide by human rights guidelines and reform the structure of the FATA to meet them.

The ICCPR deals with individuals' civil and political rights, addressing the issues of freedom of speech, religion, assembly, voting rights and due process concerns.[168] Specifically the ICCPR provides for those whose rights have been violated to be able to seek effective remedy and that those who claim such remedy "have [their] right[s] thereto determined by competent judicial, administrative or legislative

162. CEDAW, *supra* note 141, art. 14.

163. International Covenant on Economic, Social and Cultural Rights, Apr. 17, 2008, 993 U.N.T.S. 3 [hereinafter ICESCR].

164. *Id.* art. 11.

165. *Id.* arts. 12-13.

166. *Id.* arts. 2, 8.

167. International Covenant on Civil and Political Rights, June 23, 2010, 999 U.N.T.S. 171 [hereinafter ICCPR].

168. *See id.*

authorities . . . and to develop the possibilities of judicial remedy" where they do not already exist.[169] The UNCAT seeks to prevent the state use of torture and cruel and inhuman treatment and punishment. The UNCAT defines torture as

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[170]

By June 2011, Pakistan had withdrawn most of its reservations to the ICCPR and the UNCAT.[171]

In the last few years, since Pakistan has shifted its focus from large-scale military operations to search and intelligence gathering initiatives, the military has arrested and detained thousands of people. Human rights groups have expressed concern over the treatment of these detainees since reports of mistreatment and torture have come to light.[172] Torture and cruel and inhumane treatment are prohibited by multiple international agreements, including the ICCPR, the Geneva Conventions, customary international law, and the UNCAT.[173]

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169. *Id.* art. 2.

170. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishent, G.A. Res. 39/46, art. 1., U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

171. *Pakistan Decides to Withdraw Most of Reservations on ICCPR, UNCAT,* NATION (June 23, 2011), *available at* http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/national/23-Jun-2011/Pakistan-decides-to-withdraw-most-of-reservations-on-ICCPR-UNCAT (last visited May 10, 2015). With respect to the ICCPR, Pakistan still has reservations regarding Article 3 and Article 25, which deal with gender equality and voting rights respectively, making these articles subject to the provisions in Pakistan's constitution. ICCPR, *supra* note 167 (Pakistan should withdraw its remaining reservations so that the ICCPR and UNCAT are more effective).

172. Amnesty International has documented the situation of detainees who are kept malnourished and received daily beatings, causing them to suffer major bodily injury and disfigurement. The military has also been accused of resorting to torture in the detention facilities as a method of interrogation. *Hands of Cruelty, supra* note 1, at 19.

173. Torture is a crime under international law and information obtained through torture or inhumane treatment should not be admitted as evidence in judicial proceedings. *Id.* at 21; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 1: RULES (Cambridge University Press, 2009), *available at* http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf (last visited May 10, 2015).

For example, article 6 of the ICCPR provides that "[e]very human being has the inherent right to life. This right shall be protected by law and no one shall be arbitrarily deprived of his life," yet Pakistan continues to detain individuals without cause, detention that often eventually leads to their uninvestigated deaths.[174] Article 7 of the ICCPR provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment," a general assertion that is supported more extensively by the UNCAT.[175] Pakistan has agreed to these provisions and almost all others in these treaties yet continues to allow its military to exact cruel treatment justified through its own laws, such as the AACPR.

In part, these human rights violations continue because there is neither any real consequence levied against the state nor any opportunity for FATA residents to seek redress. Pakistan's constitution explicitly excludes the tribal lands from judicial jurisdiction, leaving no way for the courts to rule on issues of fundamental rights and impunity within the FATA. Legislation like the AACPR makes redress for human rights violations especially difficult because it leaves much military action discretionary and therefore above reproach.[176] This sets up a series of legal and practical barriers that prevent the people of the tribal lands from bringing suit against the military in Pakistan's courts. Despite these obstacles, some cases had made it through, and the military has even conceded to unlawful action.[177]

While these concessions are an important step in developing a judicial mechanism of redress, they have not translated into justice for the victims, consequences for the perpetrators or legislative reform.[178] Failing to take steps toward reform or at least investigating these occurrences of human rights violations puts Pakistan in violation of its international human rights agreements and its international legal obligations. Specifically Article 2 Section 3 of the ICCPR each state that is a party to the agreement has the responsibility to ensure effective remedies for those whose rights and freedoms are considered violates.[179] The violation of rights and the determination of remedy is to be made

174. ICCPR, *supra* note 167, art. 6 § 1.

175. *Id.* art. 7.

176. *Hands of Cruelty*, *supra* note 1, at 9.

177. Cyril Almeida, *The Adiala 11*, DAWN (Feb. 19, 2012), *available at* http://dawn.com/news/696615/ (last visited May 10, 2015).

178. *Hands of Cruelty*, *supra* note 1, at 9.

179. ICCPR, *supra* note 167, art. 2 § 3.

by "competent judicial, administrative or legislative authorities" which "shall enforce such remedies when granted."[180]

In addition to violations of international human rights law, Pakistan is also in violation of international humanitarian law. Pakistan's conflict in the FATA is a non-international armed conflict, and as such, Pakistan is obligated to at least abide by Article 3 of the 1949 Geneva Conventions.[181] Article 3 provides that prohibited conduct applies to any person not actively involved in hostilities for any reason.[182] On November 11, 2009, UN Security Council Resolution 1894 dealt with the protection of civilians in armed conflict and it emphasized that "states bear the primary responsibility to respect and ensure the human rights of their citizens, as well as all individuals within their territory as provided for by relevant international law."[183] Therefore, it is important to note that while Taliban insurgents are not adhering to the rules of international law, that does not give Pakistan valid reason to also violate international law nor does it deprive in any way the civilian population from the protections of international law to which they are entitled to from their government and the international legal framework.[184]

VII. PAKISTAN CAN REMEDY HUMAN RIGHTS ABUSES BY GOVERNING THE FATA IN ACCORDANCE WITH ITS INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Human rights organizations like Amnesty International have been calling on Pakistan to reform or repeal the FCR for years and this is certainly important. However, another important step towards reform is earning the people's trust, establishing a consistent message and following through on it. So far the only thing Pakistan has been consistent about in the FATA is its neglect of it. When Pakistan has peace talks with the Taliban,[185] begins reconstruction efforts or

180. *Id.*

181. AMNESTY INT'L, *supra* note 29, at 101.

182. *Id.*

183. S.C. Res. 1894, U.N. Doc S/RES/1894 (Nov. 11, 2009).

184. AMNESTY INT'L, *supra* note 29, at 101.

185. The Pakistani Taliban leadership has demonstrated its ability to negotiate, conclude, and implement agreements. The decisions of the Pakistani Taliban leadership, for example when declaring ceasefires, are implemented and enforced by local fighters. A central hierarchy seems to command and control the escalation and the de-escalation of military tactics, including serious violations of IHL, such as the use of suicide bombings to target civilians, attacks on local tribal leaders, and restrictions on the operation of

implements new government initiatives it needs to make its commitments clear, it must lay out effective and specific plans with realistic targets that alleviate the human rights abuses and move the population forward. This means Pakistan needs a clear strategy for integrating the FATA and for the creation of necessary infrastructure like roads, an education system and adequate health care. Pakistan should incorporate civilian needs into its military strategy by offering access and protection to civilian necessities like health care and education, especially the education of women and girls, which the Taliban severely limited.

Pakistan must also take care of its weighty Taliban problem. This is obviously a difficult feat because after decades of insurgency, the Taliban have proved to be a challenging and well-structured enemy. The Taliban have been reduced in numbers, and while they are certainly still an active threat, they are no longer as large a presence in terms of militant force. Because the Taliban still have an influential presence in the FATA through maintenance of control of the local governments, the people of the region, even when they disagree, cannot voice their dissent for fear of lethal retribution.[186]

In order to remedy the egregious human rights situation Pakistan and the Taliban have created in the FATA Pakistan must first, enact legislative reform by integrating the FATA into the parliamentary system and extending to the FATA the same rights and amenities afforded to the rest of the country. Second, Pakistan must implement these reforms by creating mechanisms for adequate representation, healthcare, education and equal rights for women. It is important for Pakistan to realize that any remedy in the region cannot be achieved through a completely top-down approach. The central government cannot simply mandate or legislate its way to reform. In a region very much used to a high level of independence, grass roots initiatives and local involvement are not just a good idea, but they are absolutely necessary. Incorporating the tribes and tribal elders into the process will ensure a much smoother transition. Each area of the FATA is different, with different needs and traditions. Success is dependent upon these needs being met and these traditions being accounted for. Another necessary method of local involvement is incorporating women into these reforms.

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humanitarian aid workers. In short, the Taliban leadership clearly has the ability to respect IHL and should be held to account for a failure to do so. *Id.* at 30.

186. *Id.* at 39.

A. Previous Attempts at Reforming FATA Governing Mechanisms

While Pakistan's executive leadership has made some halfhearted attempts over the last two decades to remedy the extreme inequality the FCR legalizes, these minimal steps have been fruitless because they have lacked the requisite legislative support. In 1996, Pakistan finally extended voting rights to adults in the FATA and also proposed several reforms to the FCR but they never got very far. Then in 2005, Musharraf acknowledged the need for reforms and the NWFP (as Kyber Pakhtunkhwa was then called) governor created the FCR Reform Committee, but the committee did not accomplish much at all.[187] In 2008, the Pakistani Peoples Party (PPP) promised to repeal the FCR and incorporate the FATA into Pakistan's constitutional framework. Also in 2008, Prime Minister Gilani announced the FCR had been revoked, but there has been no legislation or judicial ruling to substantiate that claim or to put it into practical effect.

In August 2009, former President Asif Ali Zardari announced a reform package for the FATA, which included placing limitations on the powers of the PA, right to bail for detainees, protection for women and children from the collective responsibility provisions, access for political parties and the setting up of an appeals process. While these reforms would have limited some of the scope of the FCR, the FCR is still in place. In 2010, Zardari again promised to reform the FCR but there has been little movement to actually do so.[188]

B. The FATA Must be Integrated into the Central Government

Though Pakistan has made some attempts to reform the way it governs the FATA it needs to take a more radical step and totally repeal the AACPR and the FCR in order to manage the FATA in accordance with international human rights standards. The FATA must be brought under constitutional protection so that the people living within it have their fundamental rights enforced just like the rest of Pakistan's citizenry. Under the ICCPR every citizen is supposed to have the right and opportunity to take part in public affairs directly or through chosen

187. *Govt Failed to Implement Recent Reforms in FATA, Amendments in FCR After Passage of Six Months*, ONE PAKISTAN, *available at* http://pakistan.onepakistan.com.pk/news/city/islamabad/68847-govt-failed-to-implement-recent-reforms-in-fata-amendments-in-fcr-after-passage-of-six-months.html (last visited May 10, 2015).

188. Raja Asghar, *Zardari Eyeing History, Wants Bill Passed Soon*, DAWN (Apr. 6, 2010), *available at* http://www.dawn.com/news/529098/zardari-eyeing-history-wants-bill-passed-soon (last visited May 10, 2015).

representatives.[189] Citizens should also be able to vote in periodic elections through equal suffrage in a way guarantees "the free expression of the will of the electors."[190] For the most part, Pakistan abides by these internationally accepted rights, except for when dealing with the FATA. Except for the FATA, all the other provinces in Pakistan are represented through elected legislators in the bicameral parliament[191] and the Prime Minister appoints a Chief Minister, as his representative, to oversee the provincial governments. Though the FATA elects representatives to Parliament, no act of Parliament applies unless the President so directs.[192] As a result, the Political Agent, an executive that answers only to the President, is the only true official governing the FATA.

The FATA must be integrated into the central government as much as any other province of Pakistan. This means treating it in equality with other provinces, providing it with representation in Parliament and with a Chief Minister. It means establishing free and fair elections and enfranchising the entire adult population of the FATA. The role of the PA should be abolished and the constitution should be amended through removal of Article 247 so that jurisdiction and control of the judicial system and parliament extend there. Doing so will make the central government and the entire electorate accountable for the issues in the region.

Until the Political Parties Act of 2002[193] was extended in 2011, political parties were banned in the FATA. Lack of political parties made it difficult to have participatory political culture because without the financial backing of such organizations people could not afford to contest and win elections.[194] And even if they managed to win an election without the backing of a political party, that elected individual would remain insignificant in the parliamentary politics in Islamabad without the backing of any particular faction and because acts of parliament have no effect in the FATA.[195] This is not an effective way

189. ICCPR, *supra* note 167, art. 25(a).

190. *Id.* art. 25(b).

191. Pakistan's Parliament is made up of the lower house, known as the National Assembly, and the upper house, known as the Senate. The National Assembly is comprised of directly elected representatives from the four provinces. The Senate is comprised of indirectly elected representatives.

192. PAKISTAN CONST. arts. 54, 59, 247(3).

193. Pakistan Chief Exec. Order 18 (2002), *available at* http://www.refworld.org/pdfid/47567a432.pdf (last visited May 10, 2015).

194. *Impoverished Northwest*, *supra* note 11.

195. *Id.*

to build up the region. Regardless of whom they elect, even if they have a free and fair choice in the matter, that representative will be further proof of the incompetency of the federal government's reach. What would be the point of investing in an election when you know your vote is meaningless.

Though the Political Parties Act has limited the PA's authority to some extent, until 2011 the PA enjoyed absolute control over matters of law and administration. The people of the FATA had no say in local or national decision making because the PA was not, and still is not, under any obligation to take them into account. So although the FATA can technically elect representatives to the National Assembly, voter turnout in the FATA is low. This is likely because despite the extension of the Political Parties Act and the limitation of the PA's power, people know the elections lack any real legitimacy and that there is no effective representation at the national level. The FCR's allocation of power to the Political Agent leaves the political power of the FATA electorate negligible at best. And since the FCR doesn't allow judicial decisions or parliamentary legislation to extend to the FATA, these governmental bodies can go on just ignoring the crises that exists there.

Fully integrating the FATA means not only repealing counterproductive legislation like the FCR and AACPR, but also creating better mechanisms of governing. Knowing that voter turnout is low because voting has very little tangible effect in the FATA means Pakistan needs to get rid of those apparatuses that prevent the FATA from moving forward. That means establishing a new system of governing.

The PA continues to be a repressive force, unaccountable to anyone but the President. Replacing the PA with a Chief Minister, an appointee of an elected representative with far more limited power, would foster better results. Every province in Pakistan has a provincial assembly, analogous to state legislatures in the U.S., which deals with provincial matters.[196] Every province except the FATA. The Taliban corrupted the FATA's Jirga system, but it was hardly a fair system of governing to begin with. Instead of allowing the tribal lands to continue with the *Jirgas*, the government should establish a provincial assembly in the FATA as well. A more direct line of governing is likely to build faith among the tribal lands because they are more likely to see the results that they need, rather than waiting for the federal government to step in as they have been.

196. PAKISTAN CONST. art. 106.

C. Women Must be Treated Equally with Men Before the Law

Another change that should be made in FATA governing is better treatment of women. While the rest of the constitution enfranchises women by mandating seats for them in Parliament, it conspicuously fails to do so for women in the FATA by not allocating seats for them.[197] Women in the FATA also do not have the right to vote. This right should be extended in the FATA since it already exists throughout the other provinces. The ICCPR talks about universal suffrage[198] and CEDAW specifies that women should be afforded equality with men before the law.[199]

Another way to better the situation of women in the FATA would be to involve them in all reconstruction efforts going forth. It is imperative that a more inclusive public sphere be created for women. That means women must be guaranteed fair and equal voting rights as well as the ability to participate in conflict resolution and reconstruction. Pakistan must find a way to enfranchise women in a way that does not force them to break with their tribal traditions. They will have a voice in the reconstruction of their communities without being forced to value their traditions against a new governmental order. The current state of women in the FATA violates the terms of the ICCPR and CEDAW and is also contradictory to the majority of the constitution. Pakistan must remedy this in order to comply with its international obligations and also to maintain consistency in governing.

D. Perpetrators of Human Rights Violations Must be Held Accountable

Pakistan needs to send a clear message that the violence and inhumane treatment the FATA has dealt with is completely unacceptable. It needs to earn the confidence of the tribal people and eventually their support. That means not only extending rights and protections to the tribal lands but also holding both state and non-state actors accountable for their human rights transgressions. So far Pakistan has failed in its responsibility to protect the people of the FATA from Taliban insurgents, as well as misconduct by the armed forces.

At the hands of the Taliban the FATA has been riddled with unlawful killing, unlawful detention, torture, ill treatment, deprivation of equality, inadequate healthcare, no freedom of association, no

197. *Id.* arts. 54, 59.
198. ICCPR, *supra* note 167, art. 25(b).
199. CEDAW, *supra* note 157, art. 15.

freedom of movement and dwindling education for girls and women.[200] They have suffered the destruction of civilian residences, farms and businesses.[201] All of these serious human rights violations are already considered criminal offenses under Pakistan's law, but such law has never been enforced due to neglect and the cover given to the central government under the FCR.

While the central government and even the military are not completely responsible[202] for the actions of the Taliban, they are responsible for failing to exact adequate measures to stop these abuses from happening once they are aware. This can only be done through the extension of judicial jurisdiction. Since the Pakistan's courts have no reach in the FATA, any allegations of mistreatment cannot be brought before an impartial body and therefore injured parties have no form of redress and perpetrators are not held accountable. The FATA does have its own court system, but the *Jirgas* or the will of the Political Agent often circumvents those courts' decisions. To reform this, the FATA courts should be brought under the national judicial system just as the other provincial courts are, with their apex being the Supreme Court of Pakistan.

When Pakistan eventually deals with the Taliban, as it will inevitably have to do, it must refrain from giving clemency to those who are unequivocally implicated in those serious abuses of human rights and breaches of law. According to customary international humanitarian law, military commanders and civilian leaders can be held accountable for the actions of their subordinates, when and if their subordinates commit war crimes, or if they knew their subordinates were committing such actions, and they took no necessary measures to prevent such actions.[203] Taliban leaders can be held accountable for the abuses they perpetrate and, under this same provision, so can armed forces personnel.

Remedying the Taliban's transgressions will be only one part of Pakistan's efforts towards solving the human rights crisis in the FATA. Pakistan must also hold its own military and political leaders

200. AMNESTY INT'L, *supra* note 29, at 100.

201. *Id.*

202. There are peace talks with the Taliban where the military or state agencies have condoned, allowed, or supported some of the Taliban's actions against FATA residents. In those instances, Pakistan is certainly more responsible, and should eventually be held accountable through investigation and judicial action. Strategic considerations should not be available as an excuse for neglecting the population or for knowingly allowing insurgents to commit human rights transgressions.

203. HENCKAERTS & DOSWALD-BECK, *supra* note 173, at Rule 152.

accountable. First, Pakistan must make sure that all military forces are aware of the correct standard of conduct that is expected of them under international law and under the hopefully reformed method of governing the FATA. They must then be required to comply with those obligations and it must be made clear that failure to do so will have appropriate consequences. Human rights transgressions that have already been made should be properly and impartially investigated according to international standards so that those who have committed illegal actions are brought to justice. The military should be required to incorporate precautionary measures for civilians in their strategy, and they should absolutely be prohibited from any sort of collective punishment, the sort that is allowed under the current FCR.

Some of Pakistan's most egregious human rights violations revolve around arbitrary detentions and enforced disappearances.[204] Not only is this a human rights violation, but it also creates a climate of fear in the FATA that is counterproductive to any reconstructive efforts. Pakistan should investigate and reveal any information it has about the fate and location of those who have been subjected to enforced disappearances. Pakistan should also sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearance ("CED"). Ratification of CED would signal that Pakistan is committed to ending this practice, which is a grave violation of human rights.

Those criminal and insurgent suspects who can be transferred out of military custody and into civilian detention centers should be transferred and then should be provided with all the safeguards available to them under the constitution,[205] domestic and international law. Those detainees should then be afforded fair trials in front of competent and impartial courts. Pakistan may have an easier time of all this if it builds up the law enforcement mechanism of the tribal areas. Rather than having a constant military presence, a trained law enforcement agency would be able to alleviate the military presence in the region while still being a safeguard against insurgents and protecting civilians.

CONCLUSION

The problems Pakistan faces are certainly not simple ones. Any remedy that Pakistan implements, and there are many that it must, will

204. AMNESTY INT'L, *supra* note 29, at 49.
205. PAKISTAN CONST. art. 10.

take years to show practical improvement. But the longer Pakistan waits, the worse the situation in the FATA gets. More people will lose their lives, their homes and their livelihoods. Pakistan can start by taking legislative measures to equalize the FATA and its residents with the rest of the country. Pakistan must then begin holding those who have committed human rights abuses accountable for their actions and showing the FATA residents that they are not in fact second-class citizens. Pakistan must then begin to rebuild the FATA through greater infrastructure; better education, especially for women and girls; access to health care and training for law enforcement to maintain security. Pakistan has to create incentives for the FATA to support it because as of right now they risk losing their lives by expressing dissent from the Taliban and any sort of government effort towards redress does not outweigh this risk.

Pakistan has made many mistakes in dealing with the FATA. Between decades of neglect for the tribal lands and the military's gutting of the region for "national security" purposes, the inadequate judicial systems, the weak government structure and the total lack of development, the situation has only worsened. These issues have to be remedied not only because they are major transgressions against human rights, but also because they exacerbate a problem that poses a substantial threat to Pakistan's national security and internal stability. It is time for Pakistan to meet its human rights responsibilities to its people, both for morality and for practical necessity.

DATA PROTECTION LAWS: QUILTS VERSUS BLANKETS

Samantha Diorio†

CONTENTS

INTRODUCTION 486
I. THE CONCEPT OF PRIVACY IN GENERAL & INTERNET COMPLICATIONS 489
II. BACKGROUND OF U.S. LAW 491
A. Patchwork System of Laws 491
1. Historical Background in American Law 491
2. FTC Regulation of Online Privacy 493
3. Sporadic State Regulation 495
III. DIVERGENT NOTIONS OF PRIVACY 497
A. Europeans and Personal Dignity 498
B. Americans and Liberty 499
C. Liberty and Dignity Diverge 500
IV. PRIVACY LAW'S EVOLUTION IN THE E.U. 501
A. Basic Principles of the E.U. Data-Protection Regime 501
B. Germany: The E.U.'s Strictest Data Collection Laws 502
C. United Kingdom: Least Stringent Data Collection Laws in the E.U. 503
V. COMPARING DATA COLLECTION PRIVACY LAWS IN THE UNITED STATES AND EUROPEAN UNION 504
A. Princess Caroline of Monaco 505
B. Sipple v. San Francisco Chronicle, Inc. 507
VI. WHETHER OR NOT THE E.U. SYSTEM WOULD WORK IN THE U.S. 508
A. Where Should the Law Go in the Future? 508
B. South Africa Implementing European-like Laws 509
CONCLUSION 511

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INTRODUCTION

Send a card, some flowers and be prepared to pay your respects; the age of privacy is dead. At least this is how Facebook founder Mark Zuckerberg sees it. According to the chief executive of the world's most popular social networking site, Facebook, "[p]eople have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people. That social norm is just something that has evolved over time."[1] To Zuckerberg, and an increasing number of others, the rise of social networking online means that people "no longer have an expectation of privacy" when they choose to utilize social media.[2] Zuckerberg's comments underscore not only the pervasiveness of social media and online technology, but also its implications on an individual's privacy in today's technological age. And it would seem that his observations are not without merit. With over one billion people using Facebook, it seems as though more and more people are using electronic media to post, upload, or share their most personal and private details, arguments, and disputes.[3] For many, yesterday's journal entry is today's Facebook post or Twitter tweet.

This was the exact mentality of 24-year-old law student Max Schrems from Salzburg, Austria.[4] With all the personal information that he knew he shared online, he decided that he wanted to know exactly what Facebook knew about him.[5] So he requested his own Facebook file.[6] What he received from Facebook both frightened and fascinated him; a virtual autobiography at 1,222 pages long.[7] The file had wall posts that had been deleted, old messages to friends that discussed a friend's difficult past, even information about his precise locations that

1. Bobbie Johnson, *Privacy No Longer a Social Norm, Says Facebook Founder*, GUARDIAN (Jan. 10, 2010, 8:58 PM), *available at* http://www.theguardian.com/technology/2010/jan/11/facebook-privacy (last visited Apr. 22, 2015).

2. *Id.*

3. Cooper Smith, *7 Statistics About Facebook Users That Reveal Why It's Such A Powerful Marketing Platform*, BUS. INSIDER (Nov. 16, 2013, 8:00 AM), *available at* http://www.businessinsider.com/a-primer-on-facebook-demographics-2013-10 (last visited Apr. 22, 2015).

4. Somini Sengupta, *Should Personal Data Be Personal?*, N.Y. TIMES (Feb. 4, 2012), *available at* http://www.nytimes.com/2012/02/05/sunday-review/europe-moves-to-protect-online-privacy.html?pagewanted=all (last visited Apr. 22, 2015).

5. *Id.*

6. *Id.*

7. *Id.*

he did not enter himself.[8] When asked how he felt about such personal information being collected by Facebook, Schrems responded that he was mostly concerned about what Facebook could do to him in the future with all that information.[9] He wondered why all that information was kept when he clearly deleted it from his profile. "'It's like a camera hanging over your bed while you're having sex. It just doesn't feel good,' is how [Schrems] finally put it."[10] Mr. Schrems's reaction is illustrative of the distress sweeping across the globe about the ways in which Internet companies are treating and storing personal information.[11] It is this ever-present existence of technology that has Europeans and Americans alike confronting head-on the issue of how privacy law can function in an age of constant data collection.[12] It has become clear that with new technologies appearing quicker and quicker, privacy laws have become more difficult to keep up and craft to ensure adequacy.[13]

This note will explore whether the European Union's privacy laws could serve as a model for the United States. Currently, the United States' data protection laws can be seen as a patchwork system of laws coming from the state and federal levels, in addition to regulations imposed by various agencies.[14] In contrast, the European Union's 1995 Directive on Data Protection mandates that every member of the E.U. pass laws on the national level that will protect their citizens' privacy.[15] While the E.U. Model is vast and widespread, it also allows for some variation by permitting member states to craft their own laws.[16] This note will investigate how the United States should take a more comprehensive approach in regulating online privacy law and protecting its citizen's legal rights to protect their personal data.

The United States should implement baseline privacy protections that seek to cover a broad array of personal data, ensuring coverage of information that is not currently covered by fragmented privacy laws. In contrast to the U.S., the European Union has a far-reaching set of

8. *Id.*
9. Sengupta, *supra* note 4.
10. *Id.*
11. *Id.*
12. *See id.*
13. *See id.*
14. *See, e.g.*, The Online Privacy Protection Act (OPPA) of 2003, CAL. BUS. & PROF. CODE § 22575-22579 (Deering 2004); The Health Insurance Portability and Accountability Act of 1996 (HIPAA), 110 Stat. 1936 (1996).
15. Council Directive 95/46, art. 189b, 1995 O.J. (L 281) 31 (EC).
16. *Id.* para. 9.

legal rights that serve to protect personal data online. Every country in the E.U. has a statute that establishes proper practices in collection, storage, use, and disclosure of personal information. However, "[t]he E.U. model also allows for variation" in how a particular member state collects data, "by allowing its member countries to determine their own laws."[17] This slight flexibility may serve as an important guide to better regulation in the United States' federal patchwork system. The United States should seek to adopt some of the key portions of the European model instead of continuing to add to the disjointed and fragmented set of laws currently being used. The patchwork quilt of privacy laws that separately limit the use of Americans' information online should give way to a more European-like model of a blanket regulatory system.

Part I of this note examines the background and history of privacy law in the United States. It explores what factors led the U.S. to its current patchwork-system of privacy legislation and what might be preventing the United States from moving towards a more European-model. Part II discusses the underlying attitudes about privacy in the United States versus Europe. This section explains how certain protections and freedoms that citizens from different states value may very well translate into what they choose to protect and what they allow to remain untouched by the state. Part III traces European Union data collection privacy laws and the divergent standards that have materialized in Germany and the United Kingdom. Part IV provides a comparative analysis of the data protection and privacy laws in the European Union and the United States. This section seeks to examine the strengths, weaknesses, and sources of regulation. In addition, this section explores how certain features of the European law can better serve the American people as powerful legal weapons to assert control over their own digital lives. Finally, Part V concludes that implementation of key European laws is possible outside of the European Union. South Africa currently serves as a real-life export of such regulations. This global push towards stricter regulation may help to pressure the United States towards implementing more European regulations.

17. Laura Ybarra, *The E.U. Model as an Adoptable Approach for U.S. Privacy Laws: A Comparative Analysis of Data Collection Laws in the United Kingdom, Germany, and the United States*, 34 LOY. L.A. INT'L & COMP. L. REV. 267, 271 (2011).

I. THE CONCEPT OF PRIVACY IN GENERAL & INTERNET COMPLICATIONS

All across the Western world, the notion of privacy is seen as an essential element of our humanity, and as such has been described as a value that cuts to our core and somehow "makes life worth living."[18] At the same time, such a fundamental component of our very personhood proves difficult to define. In fact, the United States Courts and Congress have largely avoided defining exactly what the meaning of "privacy" is by adopting a flexible approach to privacy protections that uses voluntary codes of conduct enforced by the Federal Trade Commission mixed with privacy laws that cover certain categories such as health, finance, or education. *Griswold v. Connecticut*, one of the most influential American cases debating the existence of a "right to privacy," did not establish a set body of rights, but rather saw privacy to exist only in the "penumbras" and "emanations" of other Constitutional protections.[19]

This issue has been further complicated with the age of technology and the creation of the Internet. Protecting one's privacy in the "Internet Age" has proven to be immensely difficult, with some believing that with the dawn of social networking, comes the demise of privacy as a "social norm."[20] Others refuse to believe that simply because they utilize the Internet, social media, and email, it somehow bars them from asserting privacy rights.[21]

Privacy law has the elusive task of determining if, and under what conditions, personal information may be discoverable by others. Essentially, privacy law serves as the gatekeeper between the right to be left alone and the right to know. Contemporary technology has made this legal sector far more complicated and has created divisions largely along societal and cultural lines.[22]

The concept of privacy being "all or nothing" is not a notion that may co-exist with the Internet.[23] Internet users, particularly Americans,

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18. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L. J. 1151, 1153 (2004).

19. Griswold v. Connecticut, 381 U.S. 479, 483-84 (1965).

20. *See* Johnson, *supra* note 1 (discussing how Facebook creator Mark Zuckerberg suggests changing social norms of privacy with creation of social media).

21. *See* Anne Flaherty, *Study Finds Online Privacy Concerns on the Rise*, YAHOO! News (Sept. 5, 2013, 1:42 AM), *available at* http://news.yahoo.com/study-finds-online-privacy-concerns-rise-040211677.html (last visited Apr. 22, 2015) (discussing how Americans are more concerned today about their privacy rights online).

22. *See generally* Whitman, *supra* note 18.

23. Flaherty, *supra* note 21.

are sharing more personal information than ever before.[24] However, they want the power to control what is released and who has access to that information.[25] The Internet remains largely unregulated because of its status as a global enterprise. To further complicate the matter, comfort levels towards releasing personal information online vary greatly. These comfort levels reflect unmistakable differences amongst societies over what ought to be kept "private."[26]

A key illustration of the conflicting notions towards what is to be kept "private" arose in a 2008 case. Millions of Internet users were able to get a glimpse into the private and disreputable sex life of Max Mosley, the then head of Formula One racing, when a British tabloid released the secretly captured videos of Mosley engaging in various sexual escapades with several prostitutes.[27] Mosley successfully sued the British tabloid for the "breach of his privacy" but in today's digital age, removing the tapes from the Internet completely proved more difficult than winning the suit. Luckily for Mosley, European privacy laws place a high value on individual's dignity. This value is seen to be so important that European states provide powerful legal tools to the individual that afford him or her the necessary grounds to sue Internet companies, like Google. The laws in Europe could even compel Google to filter out the videos from Internet searches.[28] This is all because the current E.U. Data Protection Directive affords Europeans the right to "object to the processing of any data relating to himself."[29] In fact, a German court has ordered Google to block all search results in Germany that provide links to Mosley's photos.[30] Mosley's case stands to be further strengthened by a privacy law currently under review by the European Commission that affords citizens the "right to be forgotten,"[31]

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24. *Id.*

25. *Id.*

26. *See* Bryce Clayton Newell, *Rethinking Reasonable Expectations of Privacy in Online Social Networks*, 17 RICH. J. L. & TECH. 12, 4 (2011).

27. Eugene K. Chow, *Learning From Europe's 'Right to Be Forgotten'*, HUFFINGTON POST (Sept. 9, 2013), *available at* http://www.huffingtonpost.com/eugene-k-chow/learning-from-europes-rigb3891308.html (last visited Apr. 22, 2015).

28. See Mosley v. News Group Newspapers Ltd., [2008] EWHC 1777 (Q.B.).

29. Council Directive 95/46/EC, *supra* note 15.

30. Harro ten Wolde & Nikola Rotscheroth, *German Court Orders Google to Block Max Mosley Sex Pictures*, RUETERS (Jan. 24, 2014, 8:22 AM), *available at* http://www.reuters.com/article/2014/01/24/us-google-germany-court-idUSBREA0N0Y420140124 (last visited Apr. 22, 2015).

31. Note from the Presidency to the Council on the 'Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), 10227/13 (May 31, 2013), *available at*

which would "allow individuals to force tech companies to delete all the data it has on them." [32]

So why does Mosley have legal recourse in Europe and not in the United States? Why is there such a transatlantic privacy clash? To answer these questions, we look to the basic intuitions that are "shaped by the prevailing legal and social values of the societies in which we live."[33] We must recognize that European and American sensibilities about privacy have grown from a much larger legal and political tradition. It is the contrast between "privacy as an aspect of dignity and privacy as an aspect of liberty."[34]

II. BACKGROUND OF U.S. LAW

A. Patchwork System of Laws

1. Historical Background in American Law

The American system of privacy law "involves a patchwork of federal and state privacy laws that separately govern the use of personal details in spheres like patient billing, motor vehicle records, education and video rental records."[35] Existing federal laws govern the management of personal information online by regulating specific types of entities and specific types of information. For instance, federal law is in charge of regulating the collection, storage, and distribution of data by "consumer reporting agencies,"[36] regulates how federal governmental agencies collect and handle personal data,[37] and requires financial services corporations to implement measures that ensure the security and confidentiality of their customers' personal data.[38] In addition, the federal government has enacted legislation that oversees the protection, use, and handling of personal data that includes individually identifiable health information,[39] education records,[40] and

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http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010227%202013%20INIT (last visited Apr. 22, 2015).

32. Chow, *supra* note 27.

33. Whitman, *supra* note 18, at 1160.

34. *Id.* at 1161.

35. Natasha Singer, *An American Quilt of Privacy Laws, Incomplete*, N.Y. TIMES, (Mar. 30, 2013), *available at* http://www.nytimes.com/2013/03/31/technology/in-privacy-laws-an-incomplete-american-quilt.html (last visited Apr. 22, 2015).

36. Fair Credit Reporting Act, 15 U.S.C.A. § 1681 (West 2014).

37. Privacy Act of 1974, 5 U.S.C.A. § 552a (West 2014).

38. Gramm-Leach-Bliley Act, 15 U.S.C.A. §§ 6801-6809 (West 2011).

39. 42 U.S.C.A. § 1320d-2 (West 2010).

consumer reports.[41]

The United States has separate laws that protect the specific content of the information, but there is no law that spells out explicitly how to control or use online data.[42] This method of dealing with privacy concerns is a result of American history and culture. Suspicion of state power and control has always stood at the core of American privacy law policy, and court doctrine continues to see the state as the prime enemy of a citizen's privacy.[43] For American jurisprudence, the starting point to understanding the origins of the right to privacy begins in the late eighteenth century, most notably in the Bill of Rights, with its forceful constraints on state power.[44] More specifically, the concept of "privacy" starts with the Fourth Amendment and the idea of privacy as being protected from unlawful searches and seizures.[45] Therefore, the right to privacy is a right that "inheres in us as free and sovereign political actors, masters in our own houses, which the state is ordinarily forbidden to invade."[46] Over time American judges and legal scholars have connected this protection of physical spaces and bodies from arbitrary government intrusion, to include a much broader sense of deference for safety and dignity that are necessary to ensure the well-being of our democratic society.[47]

The classic statement of this American ideal came in 1886, in the case of *Boyd v. United States*.[48] The Supreme Court decided to forbid the government from seizing the documents of a merchant in a customs case, after issuing a lengthy opinion discussing the "sanctity" of an American home.[49] The Court reasoned, "[i]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of

40. Family Education Rights and Privacy Act, 20 U.S.C.A § 1232g (West 2013).

41. Fair Credit Reporting Act, 15 U.S.C.A § 1681-1681x (West 2014).

42. Sengupta, *supra* note 4.

43. Whitman, *supra* note 18, at 1211.

44. *Id.* at 1211-12.

45. *Id.*

46. *Id.*

47. *See* City of Ontario v. Quon, 560 U.S. 746, 755-56 (2010) ("The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government."); Kyllo v. United States, 533 U.S. 27, 31 ("At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("They [the Framers] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be left alone—the most comprehensive of rights, and the right most valued by civilized men.").

48. Boyd v. United States, 116 U.S. 616 (1886).

49. *Id.* at 625-26.

the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offence."[50] *Boyd*'s fundamental understanding of privacy rights as protecting the "sanctity of the home" have survived generations and continues to be relevant today.[51]

One of the more influential and widely cited articles on the issue of privacy is Samuel Warren and Louis Brandeis' *The Right to Privacy*, published in 1890.[52] The arrival of photography as commonplace in American culture prompted Warren and Brandeis to write the piece, to "warn of the dangers of displaying private family wedding pictures in the pages of every newspaper."[53] Warren and Brandeis specifically emphasized the right to keep personal information outside of the public domain.[54] Although written over 123 years ago, this article still serves as an important dimension to the discussion as it was written in response to the author's own changing technology. Warren and Brandeis' work laid the foundation for the common law development of privacy during most of the twentieth century, and gave rise to the four primary tort causes of action that seek to limit the individual's invasion of privacy as a "right to be left alone."[55] These common law tort actions may be brought by placing someone in a false light, public disclosure of private facts, the intrusion upon a person's seclusion, or the appropriation of a person's name or likeness.[56]

2. FTC Regulation of Online Privacy

Today, the Federal Trade Commission ("FTC") is the leading regulatory agency controlling issues of online privacy.[57] Congress

50. *Id.* at 630.

51. Whitman, *supra* note 18, at 1213.

52. *See* Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

53. Sengupta, *supra* note, at 4; Warren & Brandeis, *supra* note 52.

54. *E.g.*, Warren & Brandeis, *supra* note 52, at 198 ("The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.").

55. Whitman, *supra* note 18, at 1208; *Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework* (2010), U.S. DEP'T COM., NAT'L TELECOMM. & INFO. ADMIN. 10, *available at* http://www.ntia.doc.gov/report/2010/commercial-data-privacy-and-innovation-internet-economy-dynamic-policy-framework (last visited Apr. 22, 2015) [hereinafter U.S. DEP'T COM. INTERNET POLICY TASK FORCE].

56. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

57. Michael D. Scott, *The FTC, The Unfairness Doctrine, and Data Security Breach Litigation: Has the Commission Gone Too Far?*, 60 ADMIN L. REV. 127, 128 (2008).

created the FTC in 1914 in an effort to halt unfair methods of competition arising in the commercial sector.[58] Upon its creation, Congress granted the FTC a tremendous amount of power.[59] Beginning in 1938, the FTC has been the agency charged with preventing corporations from using "unfair or deceptive acts or practices in or affecting commerce" spelled out in Section 45 of the Federal Trade Commission Act.[60] Courts have treated the FTC's decisions with a considerable amount of deference, thereby allowing the FTC to hold a quasi-legislative power to enact its own regulations.[61] However, the FTC has placed limitations on its own regulatory power.[62] Specifically with online privacy concerns, the FTC admits that it "lacks the authority to require firms to adopt information practice policies or abide by the fair information practice principles on their websites, or portions of their websites, not directed at children."[63] The main source of concern stems from the fact that the FTC appears to be limited to enforcing whatever a particular company promises, and most companies are under no legal obligation to make any promises regarding how they collect or use personal data online.[64] In its 2012 report on how to better protect consumer privacy, the FTC suggested that more regulation of online privacy is needed and it is up to Congress to provide such regulation.[65]

Despite its own concern for lack of power, the FTC does in fact bring complaints against companies that violate their established and published privacy policies.[66] In 2010, the FTC filed its first security case against a social networking site.[67] The FTC alleged that social media giant Twitter failed "to provide reasonable and appropriate security to: prevent unauthorized access to nonpublic user information

58. *About the Federal Trade Commission*, FED. TRADE COMM'N, *available at* http://www.ftc.gov/ftc/about.shtm (last visited Apr. 22, 2015).

59. *See id.*

60. *See* Fed. Trade Comm'n Act, 15 U.S.C. §§ 41-58 (2000).

61. *See* Jeff Sovern, *Protecting Privacy with Deceptive Trade Practices Legislation*, 69 FORDHAM L. REV. 1305, 1321 (2001).

62. *See* Ybarra, *supra* note 17, at 272.

63. Sovern, *supra* note 61, at 1324.

64. *See generally A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FED. TRADE COMM'N (July 2008), *available at* http://www.ftc.gov/ogc/brfovrvw.shtm (last visited Apr. 22, 2015).

65. *See Protecting Consumer Privacy in an Era of Rapid Change, Recommendations for Businesses and Policymakers*, FED. TRADE COMM'N (Mar. 2012), *available at* http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf (last visited Apr. 22, 2015).

66. *See* Scott, *supra* note 57, at 129.

67. *See* In the Matter of Twitter, Inc., 151 F.T.C. 162 (2011).

and honor the privacy choices exercised by its users in designating certain tweets as nonpublic."[68] The security breach by Twitter resulted in two incidents where impostors were able to reset account passwords and access private account information.[69] In one of these instances, the unauthorized user was able to gain access to then-presidential candidate Barack Obama's account and tweet to his over 150,000 followers about a chance to win $500 worth of gasoline.[70] The complaint resulted in an agreement by Twitter to "strengthen its non-public user information and further agreed to [undergo] third-party assessments of its privacy procedures."[71] This case is only one of a limited number of FTC cases brought against social media sites, and serves to underscore the fact that the FTC is hesitant to provide stronger regulation of online privacy through bringing forth more litigation.[72]

Director of the FTC's Bureau of Consumer Protection, David Vladeck, made a statement in 2010 affirming the agency's commitment to protecting consumers through bringing litigation to those companies that may threaten to undermine their personal data.[73] Vladeck stated,

"When a company promises consumers that their personal information is secure, it must live up to that promise. . . . [A] company that allows consumers to designate their information as private must use reasonable security to uphold such designations. Consumers who use social networking sites may choose to share some information with others, but they still have a right to expect that their personal information will be kept private and secure."[74]

3. Sporadic State Regulation

Individual states have provided constitutional privacy rights, however these rights have not been focused on protecting informational privacy.[75] The sporadic nature of regulation, both on the state and federal levels, results in the recognition of only the most serious attacks against privacy interests. Informational privacy issues are regularly

68. *Id.* at 166.
69. *Id.* at 167-68.
70. *Id.* at 168.
71. Ybarra, *supra* note 17, at 273.
72. Sovern, *supra* note 61, at 1321.
73. Press Release, Fed. Trade Comm'n, Twitter Settles Charges That it Failed to Protect Consumers' Personal Information: Company Will Establish Independently Audited Information Security Program, (June 24, 2010), *available at* http://www.ftc.gov/opa/2010/06/twitter.shtm (last visited Apr. 22, 2015).
74. *Id.*
75. Prosser, *supra* note 56.

reviewed under common law privacy torts.[76] Under common law doctrine, a cause of action may be brought by: (a) the placement of someone in a false light, (b) the public disclosure of private information, (c) the interference upon a person's seclusion, or the (d) misappropriation of a person's name or likeliness.[77] There has been a division between state courts about whether informational privacy should extend so far as to comfortably fit within one of these causes of action.[78]

The case law within the United States tends to suggest that courts are hesitant to extend informational privacy protection to fit within one of these four categories.[79] The State of New Jersey, for example, in *State v. Reid*, recognized an individual's reasonable expectation of privacy in the possible disclosure of Internet Service Provider (ISP) records.[80] However, the court stressed the importance in the case that the government was the primary actor in the privacy intrusion.[81] It is very possible that the outcome might have been different if this was not the case. It is likely that state action proved to be an important point in the case holding because of the historical distrust in the United States of possible government intrusion into the lives of its citizens.

In fact, a Pennsylvania court reached an entirely different decision where the primary "offender" was a private actor. In *Boring v. Google, Inc.*, the court found that the images taken of the plaintiff's home from Google Street View did not rise to the level a privacy invasion or an intrusion upon an individual's right to seclusion.[82] The court reasoned that the photos taken by Google were less intrusive than a person knocking on the front door; therefore, the plaintiffs did not suffer any significant injury.[83] What is interesting to note is the fact that Google paid the plaintiffs one dollar in nominal damages when the company entered a consent judgment for trespassing.[84] This judgment stopped higher courts from further investigating the issue of privacy.

These differing outcomes serve as examples of the widespread

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76. *Id.*
77. *Id.* at 389.
78. Sovern, *supra* note 61, at 1317.
79. *See* Boring v. Google Inc., 362 F. App'x 273, 278-79 (3d. Cir. 2010).
80. State v. Reid, 194 N.J. 386, 388 (2008).
81. *See id.*
82. *Boring*, 362 F. App'x 273 at 278-79.
83. *Id.*
84. Defendant Google Inc.'s Response to Plaintiff's Motion to Stay Pending Petition for Writ of Certiorari from the United States Supreme Court, Boring v Google Inc., No. 08-cv-694 (ARH) (W.D.Pa. 2009), 2010 WL 3445457.

incoherence of decisions dealing with informational privacy cases. It is clear that the courts are focusing very narrowly upon particular issues within the cases, rather than seeking to provide any cohesiveness to establish a set of uniform privacy laws in the United States. The current method taken by courts to examine possible privacy breaches on a case-by-case basis is not ideal for online privacy control. Citizens across the United States have attempted to bring cases before the court in an effort to push for more regulation of the treatment of personal information. However, the existing self-regulating model, claimed by the FTC to be the "least intrusive and most efficient means to ensure fair information practices online, given the rapidly evolving nature of the Internet and computer technology" continues to be the most common practice used at the federal and state levels.[85] Therefore, instead of providing citizens with blanket legislation that can provide greater protection of data collection practices, the states and federal governments have been focused on singular practices and sporadic regulation.

III. DIVERGENT NOTIONS OF PRIVACY

Although in many ways the United States and Western European countries are culturally similar, these states are showing very different attitudes towards data protection and privacy online. Every country in the European Union has a privacy law, while the United States remains a firm holdout.[86] In the U.S., we have laws that protect data covering everything from our health and financial records, to the movies we buy online. However, there is no single law that addresses exactly who controls and uses personal data online.[87] The American system may be seen more as a "patchwork of federal and state privacy laws" that govern separate spheres, while the European system has "one blanket data protection directive" that lays out the rules, no matter what the particular sector.[88] For now, European laws and U.S. laws are operating on very different speeds. However, with globalization and the ease of

85. Allyson W. Haynes, *Online Privacy Policies: Contracting Away Control Over Personal Information?*, 111 PENN ST L. REV. 587, 600 (2007).

86. Press Release, Eur. Comm'n, Commission proposes a comprehensive reform of data protection rules to increase users' control of their data and to cut costs for businesses (Jan. 25, 2012), *available at* http://europa.eu/rapid/press-release_IP-12-46_en.htm?locale=en (last visited Apr. 22, 2015).

87. *See* Sengupta, *supra* note 4 (discussing how Europeans feel about the American perspective on online privacy and the concern over American companies and their control over our digital lives).

88. Singer, *supra* note 35.

worldwide trade and travel, if "the United States wants to foster trust in American companies operating abroad it has to figure out how to explain its privacy laws on a global stage."[89] As of now, this patchwork of American privacy law is "more of a macramé arrangement—with serious gaps in consumer protection, particularly when it comes to data protection online."[90]

In addition to the speed of legislation, it is important to recognize the speed of innovation. The swiftness of progression with regards to the Internet and technology adds to the difficulty of regulating online privacy. While the law has traditionally lagged behind technology, favoring stability and certainty, this comes at a price when technology is evolving so rapidly there is no law to regulate it. This is another area that Europe seems to have recognized as "Europe has forged ahead with its project to modernize data protection."[91] This difference in action can largely be attributed to the difference in thinking about the principle of privacy more generally.[92]

A. Europeans and Personal Dignity

To Europeans, privacy protections fundamentally serve to protect the right to "respect and personal dignity."[93] The core value of European privacy protection seeks to safeguard the "right to one's image, name, and reputation."[94] For Europeans, "dignity, honor, and the right to private life" are among the most important fundamental rights of a human being, and are not to be infringed upon.[95] Europe's legal system sees privacy, regardless of its context, as a core democratic value that must be vehemently protected and not left to market forces to control.[96] Europeans seek to foster the right to guarantee that a person's image to the rest of society is how they wish to be seen. Privacy in Europe is the right to "be shielded against unwanted public exposure—to be spared embarrassment or humiliation."[97] The primary enemy to

89. *Id.*
90. *Id.*
91. *Id.*
92. *See* Chow, *supra* note 27; Newell, *supra* note 26, at 3; Whitman, *supra* note 18, at 1155.
93. Whitman, *supra* note 18, at 1161.
94. *Id.*
95. Chow, *supra* note 27; *see* Whitman, *supra* note 18, at 1155.
96. Joel R. Reidenberg, *Should the U.S. Adopt European-Style Data-Privacy Protections?*, WALL ST. J. (Mar. 8, 2013), *available at* http://online.wsj.com/news/articles/SB10001424127887324338604578328393797127094 (last visited Apr. 22, 2015).
97. Whitman, *supra* note 18, at 1161.

this right is the media, which is constantly threatening to broadcast distasteful information about people in ways that may severely undermine a person's public dignity.[98]

B. Americans and Liberty

American privacy law, on the other hand, is based primarily on the "political value of liberty from government intrusion and sovereignty within the home, rather than public image or social dignity."[99] At its core, the American right to privacy is very much the same as it was at the founding of the nation, "the right to be free from state intrusions, especially in one's own home."[100] American law also values the right to control access to and the distribution of personal information.[101] The prime danger to Americans is that the "sanctity of [our] home[s]", using the language of a leading nineteenth-century Supreme Court ruling on privacy law, will be breached by governmental actors.[102] There is very little concern towards the media's potential to infringe on a person's privacy, but rather the worry focuses on maintaining private autonomy within our own homes.[103] This value is often at odds between the right of free speech and individual rights. The American law focus on individual liberty to control personal information seeks to "allow the individual to determine which information to keep private and which information to release into the public domain."[104] However, American laws frequently prioritize free speech at the expense of individual rights. Mug shots are a prime example, as they are considered public information. This gives rise to numerous websites solely dedicated to publishing mug shots, which publicly shame those shown, regardless of their guilt or innocence, and the First Amendment protects such publication.[105] In contrast, in the United Kingdom, the High Court has ruled that the police must destroy mugshots taken of innocent people.[106] The High Court held that retaining photographs of suspects who were

98. *Id.*

99. Newell *supra* note 26, at 10.

100. Whitman *supra* note 18, at 1161.

101. Newell *supra* note 26, at 10.

102. Boyd v. United States, 116 U.S. 616, 630 (1886); *see also* Whitman, *supra* note 18, at 1162.

103. Whitman, *supra* note 18, at 1162.

104. Newell, *supra* note 26, at 10.

105. Chow, *supra* note 27.

106. Rebecca Camber, *Police Forced to Destroy All Mugshots of Innocents: Schoolboy's Landmark Legal Victory*, UK DAILY MAIL (June 22, 2012, 22:42 GMT), *available at* http://www.dailymail.co.uk/news/article-2163219/Police-forced-destroy-mugshots-innocents-Schoolboys-landmark-legal-victory.html (last visited Apr. 22, 2015).

never charged was a breach of their human rights.[107]

C. Liberty and Dignity Diverge

It is important to note that the distinction between liberty and dignity is not black and white. But this lack of a solid separation can be helpful in creating a more ideal contemporary notion of what is reasonable to protect online. Privacy online should have a healthy respect for control and liberty, while also balancing an essential recognition of the benefits of protecting human dignity.[108] Therefore, American law could greatly benefit from the underlying principle of the "right to be forgotten" dignity from European thinking.[109] When considering the implementation of the "right to be forgotten" in America, the question should not be whether individuals like Max Mosley should be afforded the capability to compel search engines to filter out undesirable content, but rather why it takes a high-profile lawsuit before individuals are given a voice and control over the status of their online selves.[110] When issues of online reputation arise, the burden of proof is placed on the individual, who is already lacks the ability to say how their personal information is distributed and to whom.[111] High-powered tech companies and governmental agencies constantly parse through mounds of online personal data that reveal information from online shopping habits, location data, to even the very content of our emails.[112] Individuals are left with very little control or recourse of their personal data once they click "I agree," so it comes as no surprise that privacy rights online are continually violated.[113] By beginning to implement more of the European notion of privacy online, Americans could have a powerful legal tool to better control their digital lives.[114]

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107. *Id.*
108. Newell, *supra* note 26, at 4.
109. Chow, *supra* note 27.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. Chow, *supra* note 27.

IV. PRIVACY LAW'S EVOLUTION IN THE E.U.

A. Basic Principles of the E.U. Data-Protection Regime

The current E.U. data-protection regime is set within a large body of legislation that was adopted by its Council of Ministers on October 24, 1995, entitled "European Union Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data" ("E.U. Directive").[115] The E.U. Directive requires its member-states to adopt individual national legislation based on the provisions set within and may be characterized as the product of "over fifty years of Europe's devotion to recognizing, maintaining, restoring, and ensuring personal privacy."[116]

The E.U. Directive sets forth eight principles that oversee the gathering and usage of personal information: purpose limitation, data quality, data security, sensitive data protection, transparency, data transfer, independent oversight, and individual redress.[117] The primary purpose of the directive is to "protect the fundamental rights and freedoms of natural persons and in particular their right to privacy with respect to the processing of personal data."[118] Essentially, the E.U. Directive seeks to ensure that personal data within the European Union cannot be handled without the individual's permission, unless the processing of such information is either necessary to perform a contract between the entities, or falls within a set exception.[119]

The European Data Protection Supervisor ("EDPS") monitors the handling of personal data within the European Union.[120] The EDPS also serves as an advisor on policies and pieces of legislation that affect privacy in the European Union, as well as works in cooperation with other data-protection authorities to promote consistency in data protection throughout the entire European Union.[121] This agency is an independent entity that was created by the European Parliament and Commission and has broad authority regarding data collection, and

115. Council Directive 95/46/EC, *supra* note 15.

116. JON MILLS, PRIVACY: THE LOST RIGHT 82 (2008).

117. *Id.* at 83.

118. *Id.*

119. *Id.*

120. *See generally* EUR. DATA PROTECTION SUPERVISOR, *available at* https://secure.edps.europa.eu/EDPSWEB/edps/lang/en/EDPS (last visited Apr. 22, 2015).

121. *See Information Brochures 2009*, EUR. DATA PROTECTION SUPERVISOR 5, *available at*, https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Brochures/Brochure_2009_EN.pdf (last visited Apr. 22, 2015).

therefore has helped to make it an effective enforcement organization.[122]

However, each E.U. member-state has its own data-protection authority, given the powers to recommend, counsel, study, and impose punishments for violations of their data-protection laws.[123] This allowance of member-state independence has resulted in natural differences in policy and enforcement. As long as the E.U. member-state maintains the baseline laws and policies of the E.U. Directive, they are free to choose to adopt additional laws and oversight. Looking to both Germany and the United Kingdom helps to provide an example of the different approaches member-states take in data protection. This difference should be seen as not a weak spot in promoting uniformity, but rather as a way for other entities, like the United States to more successfully adopt such a comprehensive system. For instance, if applied to the United States' federalist system, a slight independence among levels would allow for baseline federal uniformity, while also allowing for more "wiggle room" amongst the states.

B. Germany: The E.U.'s Strictest Data Collection Laws

In both 2009 and 2010, the German government passed a number of amendments to the nation's Federal Data Protection Act.[124] These amendments covered a vast array of data collection issues, from tightening the consent requirements of online users, to limiting the transmission of data to commercial agencies.[125] The amendments also increased fines for any violations of the set law and extended the powers of the supervisory authority.[126]

This tightening of online data security has not been exclusively for German-based entities. Germany has kept a close eye on American technology companies.[127] Specifically, German officials have begun investigations of Google, Facebook, and Apple in how they collect and disperse data.[128] "Facebook is being investigated for collecting data on

122. *Id.* at 4.

123. *Id.* at 6.

124. *See* Bundesdatenschutzgesetz [BDSG] [Federal Data Protection Act], Jan. 14, 2003, BGBL. I at 2814, *available at* http://www.gesetze-im-internet.de/englischbdsg/ (last visited Apr. 22, 2015).

125. *See generally id.*

126. *Id.*

127. Kevin J. O'Brien, *Despite Privacy Inquiries, Germans Flock to Google, Facebook and Apple*, N.Y. Times (July 11, 2010), *available at* http://www.nytimes.com/2010/ 07/12/technology/12disconnect.html (last visited Apr. 22, 2015).

128. *Id.*

non-Facebook users," whose information was pulled from the mailing lists of active users.[129] Google is under watch for having "errantly collected personal Internet information" during the research phase of its Street View mapping service.[130] And Apple is expected to explain exactly what kind of information it stores about its users and for how long a period of time.[131] It is clear that Germany favors a stricter punitive system, which serves to set out clear guidelines to ensure that those who may violate the law are aware of the consequences.[132]

C. United Kingdom: Least Stringent Data Collection Laws in the E.U.

Alternatively, the United Kingdom has taken a more relaxed approach to privacy protections compared to the German system. In fact, there has been concern among the European Union that the United Kingdom's approach may, at times, not be compliant with E.U. Directives. A 2009 European Commission Union ("E.C.") report maintained it position that the United Kingdom is "failing to comply with EU rules protecting the confidentiality of electronic communications."[133] Citing a lack of an independent and central national authority to oversee the possible interception of communications, the report urged U.K. authorities to change their national laws to ensure complete compliance with the safeguards set out in E.U. law, concerning the right of all E.U. member state citizens to confidentiality of electronic communications.[134] Most recently in September 2013, the United Kingdom has been accused of trying to "impede data protection reforms that would make it more difficult for spy agencies to get hold of material online."[135] Broadly speaking, the apprehension in the United Kingdom is the transfer of more power from Westminster to Brussels.[136] More precisely, the U.K. government is concerned over enforcement.[137] British officials are worried that by have a zero-tolerance policy with privacy intrusions and not leaving

129. *Id.*

130. *Id.*

131. *Id.*

132. Philip Oltermann, *Britain Accused of Trying to Impede EU Data Protection Law*, GUARDIAN, (Sept. 27, 2013), *available at* http://www.theguardian.com/technology/2013/sep/27/britain-eu-data-protection-law (last visited Apr. 22, 2015).

133. *Telecoms: Commission Steps Up UK Legal Action Over Privacy and Data Protection*, EUROPEAN COMM'N (Oct. 29, 2009), *available at* http://europa.eu/rapid/press-release_IP-09-1626_en.htm?locale=en (last visited Apr. 22, 2015).

134. *Id.*

135. Oltermann, *supra* note 132.

136. *Id.*

137. *Id.*

room for possible mistakes, enforcers of the law will be forced to punish even the smallest of offenses, perhaps mistakenly made.[138] This concern has been articulated by a U.K. information commissioner: "If you have inflexible regulation, you overclaim and lose authority. Less is more."[139]

Despite the difference in approaches to regulating privacy between the United Kingdom and Germany, an ever-growing number of their citizens are using a litany of social media sites and online resources.[140] These differences highlight a split that many European nations are experiencing with how to properly draft legislation that adequately reconciles the competing interests of data protection laws, technology companies' push to enter the European market, and consumer attitudes towards privacy in a culture where social media reigns supreme.[141]

V. COMPARING DATA COLLECTION PRIVACY LAWS IN THE UNITED STATES AND EUROPEAN UNION

The United States government is also struggling to come to an agreement on whether to adopt stricter data protection laws. In February 2012, the Obama Administration proposed a "Consumer Privacy Bill of Rights,"[142] but there has been little traction in Congress.[143] Those who continue to "favor industry self-regulation and agreements between Internet companies and their users" are often led by advertising lobbyists and consumer advocates alike.[144] Although, there are others that believe that the U.S. government's entrustment of the Internet industry to police itself has actually created a situation where consumers are left with little control over their own personal data or recourse in the event of a privacy invasion.[145] And this camp is gaining traction. More and more Americans see their representatives are more

138. *Id.*

139. *Id.*

140. O'Brien, *supra* note 127.

141. Ybarra, *supra* note 18, at 267-71.

142. Press Release, Office of the Press Sec'y, Fact Sheet: Plan to Protect Privacy in the Internet Age by Adopting a Consumer Privacy Bill of Rights (Feb. 23, 2012) (on file with author).

143. Alex Byers, *White House Pursues Online Privacy Bill Amid NSA Efforts*, POLITICO (Oct. 7, 2013, 5:03 AM), *available at* http://www.politico.com/story/2013/10/white-house-online-privacy-bill-nsa-efforts-97897.html (last visited Apr. 22, 2015).

144. *Id.*

145. Reidenberg, *supra* note 96.

interested in protecting commerce than the consumer. This commercial interest is often cloaked in the stance that strict regulation of information among citizens will inevitably lead to the situation that Chinese citizens face, with barriers to Internet-access called the "Great Firewall."[146] This fear has been described as the belief that such rigorous standards and disclosure in Internet policy-making would create countries that could best be seen as "series of walled gardens with governments holding the keys to locked gates."[147] Often U.S. lawmakers cite the importance of free speech and individual autonomy in keeping with the status quo of Internet self-regulation.

Freedom of expression is an extremely valuable and important right to protect because it works to ensure a stable democratic society. At the same time, privacy is also valuable and vital protection, because it works to ensure personal health and flourishing. Therefore, the two million dollar questions are, at what point does speech and free expression violate informational privacy, and what personal information is essential to ensure democratic stability?[148] While American history has long publicized the individual as the pillar of society, it is European law that has a much clearer respect for the individual, at least in terms of privacy protection.[149] This is evidenced by a long history in Europe of prioritizing people over photographers, newspapers, and technology companies.[150] So why do such similar cultures and sets of values seem to stray from one another in the realm of online privacy? To best understand the difference in mentality and priority between the United States and Europe is to take two instances of similar circumstances and compare.

A. Princess Caroline of Monaco

Princess Caroline of Monaco battled a long fight in multiple European courts in seeking to protect her right to prevent the publication of various unauthorized photographs.[151] The photos

146. Danny Hakim, *Europe Aims to Regulate the Cloud*, N.Y. TIMES (Oct. 6, 2013), *available at* http://www.nytimes.com/2013/10/07/business/international/europe-aims-to-regulate-the-cloud.html?pagewanted=all (last visited Apr. 22, 2015).

147. *Id.*

148. ADAM MOORE, PRIVACY RIGHTS: MORAL AND LEGAL FOUNDATIONS, 144-45 (2006).

149. Chow, *supra* note 27.

150. *Id.*

151. Von Hannover v. Germany, 294 Eur. Ct. H.R. at 25 (2004) (Section 25 of the European Court of Human Rights opinion is a reproduction of the relevant portions of the decision by the German Federal Constitutional Court).

included images of her and her children engaging in various private activities. With the photos of her children, the German Federal Constitutional Court (Bundesverfassungsgericht) found that a parent's relationship with their children warranted more privacy protection.[152] However, the images of just Princess Caroline shopping and sunbathing were found not to necessitate further protection because Princess Caroline is a public figure,[153] and the photographs showed her in public places.[154]

She appealed to the European Court of Human Rights, which found that the German court's decision violated her right to privacy under the European Convention on Human Rights.[155] The court balanced Princess Caroline's Article 8 "right to respect her private life" against the Article 10 "right of freedom of expression."[156] What ultimately tipped the scales in favor of Princess Caroline and her right to privacy was the substance of the photographs. The court categorized the pictures as portraying Caroline in "activities of purely private nature such as engaging in sport, out walking, leaving a restaurant or on holiday."[157] Because these photos did not "contribute to a debate of general public interest" and Princess Caroline performed no official function, these images were only related to her private life and fell within the bounds of protection.[158] The court argued, "photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution."[159]

It is important to note that the photographs in this case would almost certainly have fallen under the protection of the First Amendment if this case were heard in the United States. What is interesting here is the European court's inclination to differentiate between the types of subject matter and content that could be seen to fall under public interest and what does not. It is clear that American courts prefer to permit speech and err on the side of "newsworthiness" when faced with a First Amendment case, which often results in the loss

152. *Id.*

153. German case law refers to a "figure of contemporary society '*par excellence*.'" *Id.* para. 18.

154. *Id.* para. 25.

155. MILLS, *supra* note 116, at 100.

156. *Id.*

157. Von Hannover v. Germany, 294 Eur. Ct. H.R. para. 25 (2004).

158. *Id.* at 65; *see also* MILLS, *supra* note 116, at 100.

159. Von Hannover v. Germany, 294 Eur. Ct. H.R. at 59 (2004).

of privacy rights.[160]

B. Sipple v. San Francisco Chronicle, Inc.

In contrast, in 1975, the California Supreme Court upheld the right of journalists to publicly out Oliver Sipple as a gay man after he stopped an assassination attempt on President Gerald Ford. While most of the media outlets celebrated Sipple as a hero in protecting President Ford, a reporter discovered Sipple was a homosexual, a fact that his family was not aware of.[161] Despite Sipple's repeated requests to the media to keep his sexual orientation private, the court reasoned that Sipple was a public figure, thereby surrendering many of his privacy protections.[162] The court subsequently denied his motion to suppress and a hero's sexuality quickly became part of the news headlines.[163]

The information in this case can be split into two categories. The first deals with the facts like the assassination attempt, Sipple's duties as a secret service agent, and his actions in removing the President from a dangerous situation as appropriate to publish and circulate.[164] The second category deals with the sensitive information about the citizen-hero, like his sexuality, home address, medical history, or favorite hangout spot.[165] These pieces of information are entirely "personal" and are by no means relevant in helping to maintain a stable democratic institution or more open society. Sipple's outing quickly led to his parent's discovery that he was gay, which ultimately led to ostracization from his family, depression, and a battle with alcoholism.[166] In Sipple's case, by upholding such a rigid protection in favor of the freedom of expression, Sipple was neither afforded the American "right to be left alone" nor the European right to "dignity, honor, and the right to private life."[167]

It has become clear that in matters concerning one's reputation online or in the media, the burden of proof is placed firmly on the individual. This can prove to be extremely difficult as the individual is already at a disadvantage compared to the tech giants and media moguls. Individuals have little to say about how their personal

160. MILLS, *supra* note 116, at 100.
161. MOORE, *supra* note 137 at 147.
162. Chow, *supra* note 27.
163. Sipple v. Chronicle Publ'g Co., 154 Cal. App. 3d 1040, 1044-45 (Ct. App. 1984).
164. MOORE, *supra* note 148, at 148.
165. *Id.*
166. Chow, *supra* note 27.
167. *Id.*

information is collected or distributed to the rest of the world. However, if more courts begin to follow the pattern of analysis from Princess Caroline's case, the individual will be able to assert more control over personal data and information, giving Americans and Europeans alike a powerful legal weapon to better assert control over our own digital identities.

VI. WHETHER OR NOT THE E.U. SYSTEM WOULD WORK IN THE U.S.

A. Where Should the Law Go in the Future?

Companies are watching us. They want to know what sites we visit on the Internet, what we choose to buy, and as much personal information as they can gather about us. This is all in the hopes of targeting their own marketing campaigns and sending online users specific offers based on our online personas. So if companies are watching us, who's watching over them? Who is making sure they don't misuse personal data or break promises they make to consumers about handling their private information? In the United States, the answer is largely no one. Self-regulation seems to be the name of the game. But this entrustment to the industry to regulate itself has created a state where the ordinary individual has little control over their own online information and even less control over remedies they may exercise when their privacy has been raided. However, as we have seen in Europe, there are strict regulations about what companies can and cannot do in terms of data collection, and governments are pushing to make these already rigorous rules even more rigorous. The United States should look to this European model in helping to expand our limited legal rights seeking to protect us against online tracking and profiling. There are a number of qualities that the European system possesses that the American model can greatly benefit from imitating.

First and foremost, the European system recognizes privacy, regardless of the subject matter, as a core democratic value that must be vehemently protected. It must not be left to market-forces to protect; the State must step up to the plate to protect the individual against the industry. Second, information today has immense value so it only makes sense that good business practice includes knowing what information a company holds, how they store it, and making sure its used properly. Strict and far-reaching privacy standards seen in the European Union serve to encourage companies to adopt practices that respect the power of information and ensure they adopt practices that

Syracuse Journal of International Law and Commerce, Vol. 42, No. 2 [2015], Art. 1

protect the collection and storage of information, or risk the punishment for misconduct. Third is the fact that in Europe, individuals have legal recourse and action to take when their privacy rights have been violated. In the U.S., remedies only exist in small sectors of privacy rights. For instance, if a doctor reveals a patient's medical condition, the patient would be permitted to sue under the health-information privacy law, but if a website was to disclose the very same information, the website user would have no claim.[168] This lack of consistency leaves major gaps in privacy protection and greatly undermines public trust in the protection of their online activity. Fourth, it is very important to have oversight in the enforcement of privacy rules. The independent nature of the oversight board helps to ensure privacy compliance in a constantly changing and complex online world. This independent board exists in the European Union, yet remains without a counterpart here in the United States.

Some critics assert that legislators and officials in Washington cannot be trusted with developing complex privacy law and it should be left to market-forces to correct the intrinsic flaws in the current system.[169] While this may have been true in the past, privacy has and continues to garner bipartisan support. Particularly in light of recent online privacy scandals, like Edward Snowden's National Security Agency leaks about the existence of American spies or the Target Company's credit card information breach, more and more Americans are seeking more legal protections online.[170] Our current system of self-regulation is not the only viable option for the United States. It is possible for the U.S. to adopt important practices currently being done in Europe. In fact, lawmakers in South Africa are doing just that.

B. South Africa Implementing European-like Laws

For those who assert that comprehensive laws on privacy protection can only be successful in Europe, South Africa serves as an interesting counter example. The effort in Europe to adopt the world's strongest data protection laws has drawn international attention. Often new regulation proposals are motivated by the desire to rein in the unregulated data collection of powerful social media companies like Google, Facebook, and Twitter. Companies in the United States, like

168. Reidenberg & Davenport, *supra* note 96.

169. *Id.*

170. Adam Blenford & Christine Jeavans, *After Snowden: How Vulnerable is the Internet?* BBC NEWS (Jan. 27, 2014), *available at* http://www.bbc.co.uk/news/technology-25832341 (last visited Jan. 30, 2015).

Exxon Mobil, Amway, Aon, and Procter & Gamble, remain interested in the discussions going on in Europe about stronger and stronger rights for consumers.[171] Often they send representatives to conferences and governmental body meetings where regulations are debated on. But these multinational companies are not the only ones watching what is happening in Europe, other countries are watching as well. In fact, lawmakers in South Africa have been so interested in the European regulations that they have decided to replicate it.

The South African Parliament passed the "Protection of Personal Information Act" on August 22, 2013 and it officially became law on November 26, 2013.[172] This Act essentially regulates how anyone who processes and is exposed to personal information must handle that information, and ensure that that information is kept safe and secure.[173] The Protection of Personal Information Act has taken over eight years to complete, but the final result has been largely seen as a solid piece of legislation.[174] This act represents the country's first comprehensive data protection laws, which are greatly crafted from the E.U.'s rules.[175] Lawmakers hope that this new act will help South Africa become internationally recognized as a nation with impressive data protection standards, thereby attracting businesses to the country.[176]

Although the legislation allows a one-year compliance window, it is already quite clear that this law means business. The rules are strict and deviation means substantial penalties. A party that does not comply with the Act's provisions faces possible prison time and fines up to 10 million Rand.[177] For instance, Zurich Insurance lost an unencrypted back-up disk in South Africa and the mistake cost the company £2.3 million.[178] In addition, the legislation permits individuals to file

171. Kevin J. O'Brien, *Firms Brace for New European Data Privacy Law*, N.Y. TIMES (May 13, 2013), *available at* http://www.nytimes.com/2013/05/14/technology/firms-brace-for-new-european-data-privacy-law.html (last visited Apr. 22, 2015) (Aon is headquartered in London, United Kingdom) [hereinafter *Firms Brace for New European Data Privacy Law*].

172. Hunton & Williams, LLP, *South Africa Passes Comprehensive Personal Data Protection Legislation*, PRIVACY & INFO. SECURITY L. BLOG (Aug. 30, 2013), *available at* https://www.huntonprivacyblog.com/2013/08/articles/south-africa-passes-comprehensive-personal-data-protection-legislation/ (last visited Apr. 22, 2015).

173. Lucien Pierce, *Protection of Personal Information Act: Are You Compliant?*, MAIL & GUARDIAN (Dec. 2, 2013, 1:15 PM), *available at* http://mg.co.za/article/2013-12-02-protection-of-personal-information-act-are-you-compliant/ (last visited Apr. 22, 2015).

174. *Id.*

175. *Firms Brace for New European Data Privacy Law*, *supra* note 171.

176. *Id.*

177. Pierce, *supra* note 173.

178. *Id.*

separate civil complaints, so offenders face additional financial losses on top of whatever fines are imposed. It is clear that there is a global "expectation that data protection laws around the world are going to become more stringent, and Europe is leading the way."[179]

This piece of legislation serves as an important example of the viability, success, and influence that the European model of data protection has on an international scale. Stringent data protection is not just something that is important to Europeans, it is important on a global scale. There is no doubt that the world will be watching South Africa and monitoring the success of this new Act. Its success may serve as an important model of the viability of the European perspective outside of the region. In addition, the success may add further pressure to the United States and its lawmakers for similar changes. If it is one thing that the United States hates, it is the feeling of being behind the rest. If the South African government can show this law to be successful, American lawmakers will certainly feel the pressure to join the club.

CONCLUSION

"Personal data is the oil that greases the Internet"[180] and each one of us sits on a vast reserve of this oil. It's the data that we share each and every day, the names, addresses, pictures, and even our exact locations, with our GPS and Internet equipped smartphones.[181] This information helps multi-million dollar companies target their advertising and discern our personal opinions and desires based on what we choose to post online.[182] This information translates into millions of dollars for companies. But there is a price for us, the consumer. The data that we post about our lives and desires are collected, dissected, and preserved, often for a very long time, by numerous companies.

Personal data is extremely valuable. It is because of its immense value to a great deal of companies that we will no doubt see resistance from the business sector if and when any new data collection laws are proposed here in the United States. In fact, we are already seeing companies prepare themselves for such an occurrence. In January 2011, it was reported that Facebook beefed up its Washington presence as the Federal Trade Commission and Department of Commerce began to consider additional and clearer safeguards that Internet companies must

179. *Firms Brace for New European Data Privacy Law, supra* note 171
180. Sengupta, *supra* note 4.
181. *Id.*
182. *Id.*

begin to use when collecting user data.[183] Current laws allow companies to be vague about their privacy policies and data collection, and many do not wish to change such policies. Lawmakers have allowed this to happen because the business sector is given immense latitude because the government does not wish to stifle innovation.[184] But this resistance should not stop us, and in fact it is not.

According to a survey conducted in July 2013 by the Pew Internet Center, most Americans said that they believed current laws on online privacy protections were inadequate.[185] Many of those surveyed said they did what they could to protect themselves, namely clearing browsing histories, deleting social media posts, or utilizing encryption tools.[186] And while Congress has largely stalled in its efforts to protect the public, State lawmakers are responding to the concerns of their constituents. For instance, over the last couple of years, ten states have passed laws restricting employers from requiring access to their employees' social media accounts.[187] It is clear that State legislatures across the United States are facing growing worries about the collection and use of personal data, and many have swiftly proposed a series of privacy laws from requiring police to obtain warrants to track cellphone locations to how schools can collect student data from their online usage.[188] "Congress is obviously not interested in updating those things or protecting privacy," said Jonathan Strickland, a Republican state representative in Texas.[189] "If they're not going to do it, states have to do it."[190] And with the recent reports on eavesdropping by the federal government, the issue of digital privacy is becoming more and more pressing for many citizens. With these concerns becoming increasingly widespread amongst the states, it is only a matter of time before the federal government has no choice but to take notice.

As the United States adopts new data protection law, it may look to the European Union as an adoptable model. U.S. citizens are "becoming

183. Jon Swartz, *Facebook Changes Its Lobbying Status in Washington*, USA TODAY (Jan. 13, 2011, 10:51 AM), *available at* http://www.usatoday.com/money/industries/technology/2011-01-13-facebook13_CV_N.htm (last visited Apr. 22, 2015).

184. *See* U.S. DEP'T COM. INTERNET POLICY TASK FORCE, *supra* note 55.

185. Somini Sengupta, *No U.S. Action, So States Move on Privacy Law*, N. Y. TIMES (Oct. 30, 2013), *available at* http://www.nytimes.com/2013/10/31/technology/no-us-action-so-states-move-on-privacy-law.html (last visited Apr. 22, 2015) [hereinafter Sengupta, *No U.S. Action*].

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. Sengupta, *No U.S. Action*, *supra* note 185.

increasingly wary that their lives are going to be no longer their own," said Georgia state representative John Pezold, "and we have got to protect that."[191] There is no doubt that there are a number of competing factors, such as consumer mindsets and commercial sector interests, that complicate the implementation of new and stronger privacy laws in the United States. However, data collection laws can and must be implemented to provide Americans with broader protections in today's modern digital age.

191. *Id.*