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Just the Facts: Reimagining Wartime Investigations Concerning Attacks Against NGOs†

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Since October 2015, the United States has been in conflict with an NGO—Doctors Without Borders—over the bombing of the NGO's hospital in Kunduz, Afghanistan, early that month. Various fact-finding efforts by the US Central Command, the UN Mission in Afghanistan, NATO, and Doctors Without Borders focused on one question: whether the bombing conduct constituted a war crime. This focus on issues of law, guilt, and blame diverted attention from the more basic questions of what actually happened, why it happened, and what might be done to prevent similar incidents in the future. Moreover, the fact-finding efforts ended up exacerbating the controversy and exposing the inherent disbelief and mistrust between States, NGOs, and legal institutions. The attack on the Kunduz hospital and the controversy that followed exemplify a broader phenomenon. Legal fact-finding efforts aimed at resolving factual disputes often trigger more controversies, as the aforementioned entities are generally ill-equipped to gather sensitive military information and to facilitate cooperation among interested parties. This is particularly true when the controversy relates to attacks harming non-State actors, such as Doctors Without Borders. Fact-finding efforts surrounding such attacks generally suffer from structural, political, and legal weaknesses, particularly with regard to gathering sensitive military information.

By utilizing literature from three disciplines—international law, international relations, and organizational sociology—this Article offers an interdisciplinary framework to design fact-finding processes for conflicts between States and non-State actors. In particular, by exploring the complex social environment enabling wartime atrocities, this Article suggests moving away from criminalization, legal blame, and individualizing guilt in favor of an organizational "learning from failure" approach focused on future prevention, organizational change, and improving decision-making processes.

INTRODUCTION

Since October 2015, the United States has been in conflict with an NGO—Doctors Without Borders (*Médecins Sans Frontières*, or MSF)—over the bombing of the NGO's hospital in Kunduz, Afghanistan, early that month. The United States and Doctors Without Borders disagree over the facts of the case, as well as issues of accountability and prevention. But there are no disagreements concerning the severe results of the attack: forty-two people were killed, dozens were injured, and the main hospital building was acutely damaged and subsequently closed. Other issues however, have been gravely contested, such as the timeline of the attack, the concrete factors that enabled and escalated the attack, and the appropriate legal analysis and consequences. Various fact-finding efforts by the US Central Command, the UN Mission in Afghanistan, NATO and Doctors Without Borders exacerbated the controversies and exposed the inherent disbelief and mistrust between States, NGOs, and legal institutions.

This unique conflict raises several important questions. In what forum can States and NGOs settle disputes, given the inherent imbalance of power (political, financial, and other) as well as the confidentiality or unavailability of critical materials? What role, rights, and remedies do NGOs have in international and domestic accountability mechanisms during armed conflicts? How can the international legal order accommodate NGOs and their concerns in an asymmetrical and mostly nonbinding conflict resolution paradigm? Lastly, how can the international legal order improve the efficacy of its existing fact-finding mechanisms in a world where fake news and alternative facts frustrate almost any effort to disseminate credible information to conflicting parties and communities?

This Article focuses on factual controversies during armed conflicts, particularly when the controversy is between a State party to an armed conflict and non-State actors such as Doctors Without Borders. The Article examines methods of resolving factual disputes or at least enhancing existing mechanisms designed to "determine what happened." By utilizing literature from three disciplines—international law, international relations, and organizational sociology—this Article offers an interdisciplinary framework to design fact-finding processes for conflicts between States and non-State actors. It analyzes the failures of existing bodies to resolve basic controversies concerning the Kunduz hospital attack through political, organizational, diplomatic, ethical, and legal lenses to shed light on the questions highlighted above, and to explore new

avenues for conflict resolution tailored for such conflicts. In particular, by understanding the complex social environment enabling such wartime atrocities, this Article suggests moving away from criminalization, assigning legal blame, and individualizing guilt, and toward an organizational "learning from failure" approach that focuses on future prevention, organizational change, and improving decision-making processes.

The Article begins, in Section I, with an analysis of the legal status accorded to NGOs under international law, as well as the challenges stemming from the insufficient international legal regime. Section II then presents the facts concerning the US military's attack on Doctors Without Borders' hospital in Kunduz, Afghanistan on October 3, 2015. After describing the event, the Section surveys the various international and domestic interventions that followed the attack. Focusing on fact-finding practices concerning wartime attacks harming humanitarian-aid NGOs, Section III explores three main challenges to such fact-finding efforts: the contingency of legal facts; the detrimental impact of criminalization and legal blame on information gathering; and institutional design flaws, including goal ambiguity and mismatched goals, processes, and structures. Finally, Section IV applies an interdisciplinary framework to the Kunduz hospital bombing to suggest the adoption of an organizational, blame-free approach to wartime investigations.

I.
THE LEGAL STATUS AND LIMITS OF NGOS DURING ARMED CONFLICTS

NGOs have long been involved in armed conflicts in a variety of ways, including through active support for particular parties and efforts to provide humanitarian aid. Some NGOs have provided military or civil support to State parties to a conflict.[1] Some have maintained neutrality while advocating for the peaceful resolution of conflicts.[2] Others have contributed humanitarian aid or medical assistance.[3] This Article focuses on humanitarian-aid NGOs that operate in conflict zones as neutral third parties, such as Doctors Without Borders, the

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[1] *See generally* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES (Simon Chesterman & Chia Lehnardt eds., 2007)*;* CHRISTOPHER KINSEY, CORPORATE SOLDIERS AND INTERNATIONAL SECURITY: THE RISE OF PRIVATE MILITARY COMPANIES (2006); THOMAS R. MOCKAITIS, CIVIL-MILITARY COOPERATION IN PEACE OPERATIONS: THE CASE OF KOSOVO (2004); Doug Brooks, *Messiahs or Mercenaries? The Future of International Private Military Services*, 7 INT'L PEACEKEEPING 129 (2000); Oldrich Bures, *Private Military Companies: A Second Best Peacekeeping Option?*, 12 INT'L PEACEKEEPING 533 (2005).

[2] *See generally* MITIGATING CONFLICT: THE ROLE OF NGOS (Henry F. Carey & Oliver P. Richmond eds., 2004); David G. Chandler, *The Road to Military Humanitarianism: How the Human Rights NGOs Shaped a New Humanitarian Agenda*, 23 HUM. RTS. Q. 678 (2001).

[3] *See generally* Daniel Byman, *Uncertain Partners: NGOs and the Military*, 43 SURVIVAL 97 (2001); Nigel Hawkes, *Attacks on Doctors Rise as Rules of Conduct in Conflict Zones Are Abandoned*, 344 BRITISH MED. J. 6 (2012); Donna Winslow, *Strange Bedfellows: NGOs and the Military in Humanitarian Crises*, 7 INT'L J. PEACE STUD. 35 (2002);.

International Committee of the Red Cross (ICRC), and Amnesty International. These neutral organizations are not involved in the conflict or do not support one of the parties to the conflict.

Despite the recent growth in the number and diversity of humanitarian-aid NGOs involved in armed conflicts,[4] these organizations, in general, do not enjoy legal personality under international law (as opposed to most domestic legal systems, which attach legal status to various types of organizations).[5] While efforts to develop an international convention granting legal personality to international NGOs began as early as 1910, not much progress has been made more than a century later.[6] Mary Ellen O'Connell has argued that humanitarian-aid NGOs, such as Doctors Without Borders, enjoy an enhanced status under international law, as a variety of international treaties, including the Geneva Conventions, grant them certain rights.[7] However, these limited rights, which include access to and presence in war zones and occupied territories, do not alleviate several significant weaknesses of this legal regime, including the lack of legal standing in international institutions and tribunals.[8] The following paragraphs details five weaknesses of the legal regulation of humanitarian-aid NGOs operating in conflict zones.

First, due to their diminished capacity under international law, humanitarian-aid NGOs have very limited avenues for demanding and enforcing compensation for damages and injuries caused by war actions. Under international law, the injuring State must theoretically provide compensation for violations of international humanitarian law (IHL). Article 3 of Hague Convention IV clearly states that "a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation."[9] However, enforcement of this provision has been limited to rare and exceptional circumstances.[10] In the domestic context, the injuring State typically enjoys

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[4] *See generally* Andrew S. Natsios, *NGOs and the UN System in Complex Humanitarian Emergencies: Conflict or Cooperation?*, 16 THIRD WORLD Q. 405 (1995).

[5] Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348, 355 (2006); Kerstin Martens, *Examining the (Non-)Status of NGOs in International Law*, 10 IND. J. GLOBAL LEGAL STUD. 1, 2 (2003).

[6] Charnovitz, *supra* note 7, at 356. *See also* Janne E. Nijman, *Non-State Actors and the International Rule of Law: Revisiting the "Realist Theory" of International Legal Personality 1*, *in* NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW 91–124 (Math Noortmann & Cedric Ryngaert eds., 2016).

[7] Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror*, 43 COLUM. J. TRANSNAT'L L. 435, 440 (2004).

[8] *See id.*

[9] HAGUE CONVENTION (IV) RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND ART. 3, OCT. 18, 1907, 36 STAT. 2277, T.S. 539; HUGO GROTIUS, DE JURE BELLI AC PASIS LIBRI TRES [ON THE LAW OF WAR AND PEACE] 719 (Francis W. Kelsey trans., Oxford Univ. Press 1925) (1646).

[10] Gilat J. Bachar, *Collateral Damages: Domestic Monetary Compensation for Civilians in Asymmetric Conflict*, 19 CHI. J. INT'L L. 375, 387 (2019). *See also* Yael Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict*, 42 VAND. J. TRANSNAT'L L. 181 (2009).

sovereign immunity in other countries' domestic courts, and is not likely to grant war victims access to its own courts.[11] In the international context, compensation for war victims is quite rare, as international tribunals for individual claims are limited and the right to compensation under international law normally attaches to the targeted State rather than to injured individuals or other non-State actors such as humanitarian-aid NGOs.[12] While some NGOs may occasionally be awarded damages by the injuring State, such instances are typically treated as gestures of "good will" in response to standalone incidents, often immune to liability claims as acts of war.[13]

Second, humanitarian-aid NGOs are also limited in their capacity to affect immediate change on the ground and to protect teams in hostilities zones. The lack of clear legal obligations or transparent and consistent processes dictated by international law often leads to unsatisfactory outcomes, even in cases where NGOs do receive damages.[14] Compensation does not equal accountability, nor does it mandate organizational changes to prevent future harm. As repeat players in the battlefield, humanitarian-aid NGOs place particular importance on effective protection of their teams and facilities on the ground.[15] However, NGOs have a very limited ability to mitigate external threats. In contrast to State parties to a conflict, humanitarian-aid NGOs can neither implement a ceasefire nor tactically or strategically influence the intensity of the hostilities. As neutral third parties, humanitarian-aid NGOs may facilitate conflict-resolution processes, offer good offices, or serve as mediators or arbitrators.[16] However, ceasing fire, respecting temporary ceasefire agreements, or ending the hostilities remain in the hands of the State parties to the conflict.

Third, as third parties, humanitarian-aid NGOs do not enjoy *bargaining power based on reciprocity*. Reciprocity has become an important element in the functioning of international law; some scholars consider it a meta-rule of the system of international law.[17] International scholar Robert Keohane defined the concept of reciprocity as resting on two basic elements, both of which humanitarian-aid NGOs lack: the ability to return ill for ill and good for good, and

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[11] Ronen, *supra* note 12, at 217.

[12] *Id*. at 218-20; Bachar, *supra* note 132, at 387.

[13] Compensation to third parties under the US Foreign Claims Act (FCA) is one example. *See* Bachar, *supra* note 12, 403-06.

[14] *See id*. at 415.

[15] Indeed, three weeks after the attack on its hospital in Kunduz, Doctors Without Borders published a primer on the protection of medical services under international humanitarian law. *The Protection of Medical Services Under International Humanitarian Law: A Primer*, DOCTORS WITHOUT BORDERS (Oct. 21, 2015), https://www.doctorswithoutborders.org/what-we-do/news-stories/research/protection-medical-services-under-international-humanitarian-law.

[16] *See generally* HENRY F. CAREY & OLIVER P. RICHMOND, MITIGATING CONFLICT: THE ROLE OF NGOS (2004); Chandler, *supra* note 2.

[17] ELIZABETH ZOLLER, PEACETIME UNILATERAL REMEDIES 15 (1984); Francesco Paris & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L.J. 93, 94 (2003).

the prospect of equivalent exchange.[18] While in recent decades significant developments in the laws of war seemed to reject reciprocity as a core principle,[19] reciprocity has nonetheless remained an important consideration that affects State behavior.[20] Legal scholar Sean Watts has concluded that the law of war has long been conditioned on notions of reciprocal obligation and observation, which have persisted below the surface.[21]

Fourth, non-State actors generally cannot *refer their cases to international tribunals*, such as the International Court of Justice (ICJ) or the International Criminal Court (ICC). The ICC statute reinforces the traditional view that for a group's actions to be considered a war or armed conflict, there must be a connection to a State.[22] Furthermore, only States can become members of the ICC and grant the ICC jurisdiction over the case.[23] One of the most contentious international debates concerning the ICC relates to these provisions, and particularly to the definition of a "State" under the Rome Statute.[24]

Fifth, humanitarian-aid NGOs have *limited fact-finding capabilities* with regard to facts concerning military decision-making and processes. NGOs often engage in fact-finding as part of their monitoring activities[25] or as victims of military attacks.[26] They increasingly employ trained staff members to collect information on the ground, interview witnesses, review documents and recordings, and produce fact-finding reports.[27] Yet they lack the institutional mechanisms and political power required to access evidence related to military actions, and in particular, to the military decision-making processes that lead to indiscriminate attacks.[28] Without this critical information, NGOs' fact-finding

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[18] Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1, 5–6 (1986).

[19] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 498 (2005).

[20] As recently as 2002, the United States explicitly cited concerns of nonreciprocity in its decision to deny application of the law of war to Taliban fighters in Afghanistan. THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 18, 121 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

[21] Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L.J. 365, 368 (2009).

[22] O'Connell, *supra* note 9, at 444.

[23] Rome Statute of the International Criminal Court arts. 12–14, July 17, 1998, 2187 U.N.T.S. 90.

[24] *See, e.g.*, Daniel Benoliel & Ronen Perry, *Israel, Palestine, and the ICC*, 32 MICH. J. INT'L L. 73 (2010); Yaël Ronen, *Israel, Palestine and the ICC—Territory Uncharted but not Unknown*, 12 J. INT'L. CRIM. JUST. 7 (2014).

[25] Andrea Bartoli, *NGOs and Conflict Resolution*, *in* THE SAGE HANDBOOK OF CONFLICT RESOLUTION 392, 395 (Jacob Bercovitch, Victor Kremenyuk & I. William Zartman eds., 2009); Marie Törnquist-Chesnier, *NGOs and International Law*, 3 J. HUM. RTS. 253 (2004).

[26] *See, e.g.*, DOCTORS WITHOUT BORDERS, INITIAL MSF INTERNAL REVIEW: ATTACK ON KUNDUZ TRAUMA CENTRE, AFGHANISTAN (Nov. 4, 2015), http://www.msf.org/sites/msf.org/files/msf_kunduz_review_041115_for_public_release.pdf [hereinafter MSF REPORT].

[27] *See, e.g.*, Louise Mallinder, *Law, Politics and Fact-Finding: Assessing the Impact of Human Rights Reports* 1 J. HUM. RTS. PRAC. 166, 166 (2010).

[28] Christopher Stokes, *One Year After Kunduz: Battlefields Without Doctors, in Wars Without Limits,* DOCTORS WITHOUT BORDERS (Oct. 3, 2016), http://www.msf.org/en/article/one-year-after-kunduz-

efforts remain incomplete.[29] As a result, their fact-finding reports often prove ineffective at promoting accountability or mobilizing domestic condemnation and institutional changes.[30]

In sum, humanitarian-aid NGOs face various challenges when they become the victims of war acts: They have limited negotiating powers with regard to reparations or prosecutions; they are powerless to direct (or divert) the continuation of hostilities; they are unable to refer the case to international tribunals; and they only have access to partial and limited information. These problems, which stem from an inadequate international legal regime, intensify as the number and variety of humanitarian-aid NGOs rises and their participation in international processes becomes more impactful and nuanced.

How should humanitarian-aid NGOs respond to indiscriminate attacks harming their personnel and facilities? What methods are open for them to protect their teams and promote much-needed military reform? This Article focuses on one possible avenue for improving protection of humanitarian-aid NGOs operating in conflict zones: preventive fact-finding focused on organizational reform rather than on individual responsibility and blame. The subsequent Sections analyze the US military attack on Doctors Without Borders' hospital in Kunduz and the various interventions that followed to shed light on the challenges to wartime investigations in a conflict-resolution scheme between States and humanitarian-aid NGOs. After discussing the attack, various fact-finding efforts conducted to investigate the incident, and the outcomes of these interventions, the Article offers an interdisciplinary dispute system framework to design and evaluate investigations of wartime attacks against humanitarian-aid NGOs. This framework focuses on alternatives to legal blame and individual accountability as a means of promoting preventive measures and overcoming institutional failures. In particular, the Article suggests a "learning from failure" approach designed to facilitate organizational reform rather than individual accountability and punishment.

II.
THE US ATTACK ON DOCTORS WITHOUT BORDERS' HOSPITAL IN KUNDUZ

On October 3, 2015, at 2:08 a.m., a US Special Operations AC-130 gunship attacked a Doctors Without Borders hospital in Kunduz, Afghanistan with heavy

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battlefields-without-doctors-wars-without-limits.

[29] *See, e.g.*, Richard Goldstone, Opinion, *Reconsidering the Goldstone Report on Israel and war crimes*, WASH. POST, Apr. 11, 2011, https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html (clarifying that the Goldstone Report would have had different findings if he had access to the military information that was later included in the Israeli report about one of the investigated incidents). Krebs, Shiri, *Designing International Fact-Finding: Facts, Alternative Facts, and National Identities*, 41 FORDHAM INT'L L.J. 337, 378 (2017).

[30] Shiri Krebs, *The Legalization of Truth in International Fact-Finding*, 18 CHI. J. INT'L L. 83 (2017).

fire. Forty-two people were killed, mostly patients and hospital staff members. Dozens of others were injured. The main hospital building—the only free trauma care hospital in Northern Afghanistan—was severely damaged and subsequently closed.[31] In the aftermath of the attack on the hospital, many international organizations, including Doctors Without Borders and various bodies of the United Nations, called for an international fact-finding investigation to establish the truth and to bring those responsible to justice. UN Secretary-General Ban Ki Moon strongly condemned the airstrike and called for a "thorough and impartial investigation into the attack in order to ensure *accountability*."[32] The UN High Commissioner for Human Rights demanded an investigation and suggested that the attack might amount to a *war crime*.[33] Human Rights Watch called on the United States to establish "an independent panel outside the military chain of command with the aim of establishing the facts and assessing possible *culpability* for the strike."[34] Doctors Without Borders General Director Christopher Stokes stated that they operate "[u]nder the clear presumption that a *war crime* has been committed,"[35] and demanded that a full and transparent investigation into the event be conducted by an independent international body."[36] In a separate statement, Doctors Without Borders International President, Dr. Joanne Liu, urged that the investigation be conducted by the International Humanitarian Fact-Finding Commission (IHFFC), a "body set up specifically to *investigate violations of international humanitarian law*."[37]

These calls for action shared a clear focus: an impartial investigation concerning the possible commission of war crimes. Days after the attack, Dr. Joanne Liu, President of Doctors Without Borders International, described the

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[31] Matthew Rosenberg, *Pentagon Details Chain of Errors in Strike on Afghan Hospital*, N.Y. TIMES, April 29, 2016, https://www.nytimes.com/2016/04/30/world/asia/afghanistan-doctors-without-borders-hospital-strike.html.

[32] *Statement attributable to the Spokesman for the Secretary-General on attack in Kunduz*, UNITED NATIONS (Oct. 3, 2015), http://www.un.org/sg/statements/index.asp?nid=9095.

[33] *Kunduz Hospital Airstrikes "Inexcusable" – Zeid*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Oct. 3, 2015), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16564&LangID=E.

[34] *Afghanistan: US Inquiry Must Go Past Admitting Mistakes*, HUMAN RIGHTS WATCH (Oct. 6, 2015), https://www.hrw.org/news/2015/10/06/afghanistan-us-inquiry-must-go-past-admitting-mistakes.

[35] *Afghanistan: Kunduz Trauma Centre Bombing, statement from Christopher Stokes, MSF General Director*, DOCTORS WITHOUT BORDERS (October 4, 2015) https://www.doctorswithoutborders.org/what-we-do/news-stories/story/afghanistan-kunduz-trauma-center-bombing.

[36] *Id*; *see also* Alissa J. Rubin, *Doctors Without Borders Says It Is Leaving Kunduz After Strike on Hospital*, N.Y. TIMES (Oct. 4, 2015), http://www.nytimes.com/2015/10/05/world/asia/doctors-without-borders-says-it-is-leaving-kunduz-after-strike-on-hospital.html.

[37] *Afghanistan: Kunduz Trauma Centre Bombing, statement from* ***Dr. Joanne Liu, MSF International President***, DOCTORS WITHOUT BORDERS (October 7, 2015) https://www.doctorswithoutborders.org/what-we-do/news-stories/story/afghanistan-kunduz-trauma-center-bombing.

attack as not only a "war crime,"[38] but also "an attack on the Geneva Conventions."[39] Thereafter, academics,[40] non-governmental organizations,[41] activists,[42] and even poets[43] adopted both of these phrases in connection with the incident.

In the days and months following the attack, the US military, NATO, the UN Assistance Mission in Afghanistan (UNAMA), and Doctors Without Borders all carried out their own investigations.[44] But thirty months and four fact-finding reports later, uncertainty surrounded almost every aspect of the attack and its consequences. Even basic facts, such as the timeframe of the attack, remained contested.

About a month after the attack on its hospital, Doctors Without Borders released its initial fact-finding report concerning the attack.[45] The report described what happened before, during, and after the airstrikes, and included details concerning the magnitude of the damages, the functionality of the hospital, and Doctors Without Borders' failed attempts to halt the attack through various communications means.[46] This report concluded that the airstrike lasted about an hour, from about 2:00-2:08 a.m. until about 3:00-3:15 a.m.[47] Importantly, the report clarified that Doctors Without Borders' main concern was the future

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[38] Joanne Liu, *Médecins Sans Frontières (MSF) Denounces Blatant Breach of International Humanitarian Law*, DOCTORS WITHOUT BORDERS (Oct. 6, 2015), http://www.msf.org/en/article/m%C3%A9decins-sans-fronti%C3%A8res-msf-denounces-blatant-breach-international-humanitarian-law.

[39] Joanne Liu, *Afghanistan: Enough. Even War Has Rules*, DOCTORS WITHOUT BORDERS (Oct. 7, 2015), https://www.msf.org.za/stories-news/stories-and-news/msf-even-war-has-rules.

[40] *See*, *e.g.*, Phyllis Bennis, *The Pentagon Shouldn't Get to Absolve Itself for Bombing a Hospital*, FOREIGN POLICY IN FOCUS (May 3, 2016), http://fpif.org/pentagon-shouldnt-get-absolve-bombing-hospital.

[41] *See, e.g.*, Press Release, Statement from the START Network on the Kunduz Hospital Bombings, START NETWORK (Oct. 12, 2015), https://startnetwork.org/news-and-blogs/statement-start-network-kunduz-hospital-bombings.

[42] *See, e.g.*, *Kunduz Hospital Bombing = War Crime*, WAR RESISTERS LEAGUE, https://www.warresisters.org/kunduz-hospital-bombing-war-crime (last visited Nov. 11, 2019).

[43] *See, e.g.*, Kunduz Hospital Bombing Is a War Crime: Public Responses, POETRY AND CHOCOLATE (May 2, 2016), https://ancientruned.wordpress.com/tag/Kunduz.

[44] U.S. CENTRAL COMMAND, SUMMARY OF THE AIRSTRIKE ON THE MSF TRAUMA CENTER IN KUNDUZ, AFGHANISTAN ON OCTOBER 3, 2015: INVESTIGATION AND FOLLOW-ON ACTIONS (Apr. 2016) [hereinafter CENTCOM REPORT]; NATO, EXECUTIVE SUMMARY: COMBINED CIVILIAN CASUALTY ASSESSMENT OF AN AIRSTRIKE ON A MEDICAL FACILITY IN KUNDUZ CITY ON 03 OCTOBER 2015 (Nov. 2015), https://shape.nato.int/resources/3/images/2015/saceur/Exec_sum.pdf [hereinafter NATO REPORT]; U.N. MISSION IN AFGHANISTAN, HUMAN RIGHTS AND PROTECTION OF CIVILIANS IN ARMED CONFLICT: SPECIAL REPORT ON KUNDUZ PROVINCE (Dec. 2015), https://unama.unmissions.org/sites/default/files/special_report_on_kunduz_province_12_december_2015.pdf [hereinafter UNAMA REPORT]; MSF REPORT, *supra* note 28.

[45] MSF REPORT, *supra* note 28.

[46] *Id*.

[47] *Id*. at 7.

protection of hospitals, medical facilities, and personnel.[48] The report also demanded a commitment to the Geneva Conventions and an affirmation that the United States would adhere to the laws of war moving forward.

In December 2015, UNAMA published its *Special Report on Kunduz* (UNAMA Report).[49] The UNAMA Report was based on both independent interviews conducted by UNAMA's fact-finding team, and on statements and information provided by Doctors Without Borders.[50] UNAMA reached similar conclusions as Doctors Without Borders. UNAMA determined that the attack on the hospital lasted about an hour, from 2:07 a.m. until 3:00 or 3:15 a.m., and continued for at least forty minutes after hospital personnel first contacted US authorities in Afghanistan, at 2:19 a.m., to inform them that the hospital was under fire.[51] According to the UNAMA Report, the attack possibly amounted to a war crime.[52] However, UNAMA could not conclusively determine the status of the attack because the US military refused to cooperate with the mission and did not provide the information UNAMA needed to make firm determinations of responsibility.[53] Accordingly, the UNAMA Report concluded that the United States should initiate criminal investigations against—and potentially prosecute—those involved.[54]

The US Central Command investigation was concluded in November 2015, and General John F. Campbell, then Commander of US Forces in Afghanistan, announced the key findings at a press conference on November 25, 2015.[55] The written report—the Centcom Report—was released to the public in April 2016, after being reviewed and redacted by the military.[56] The Centcom Report described different facts and reached different conclusions than Doctors Without Borders and UNAMA. In particular, the Centcom Report found that the attack lasted only thirty minutes, from 2:08 a.m. until 2:38 a.m., and concluded that the "tragic errors" that lead to the attack on the hospital did not amount to a "war crime."[57] Moreover, the Centcom Report left many factual questions undecided. Centcom was unable to conclusively determine how many people were killed in the attack and emphasized its inability to verify the numbers provided by Doctors

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[48] *Id*. at 1.

[49] *See generally* UNAMA REPORT, *supra* note 46.

[50] *Id*. at 9.

[51] *Id*. at 7–8; MSF REPORT, *supra* note 28, at 7–8.

[52] UNAMA REPORT, *supra* note 46, at 10.

[53] *Id*.

[54] *See* UNAMA REPORT, *supra* note 46, at 11–12.

[55] Department of Defense Press Briefing by General Campbell via Teleconference from Afghanistan, U.S. DEPARTMENT OF DEFENSE (November 25, 2015). https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/631359/department-of-defense-press-briefing-by-general-campbell-via-teleconference-fro/.

[56] CENTCOM REPORT, *supra* note 46, at 1.

[57] *Id*. at 3.

Without Borders.[58] Nor did the Centcom Report explain what caused the series of errors that led to the hour-long attack on the trauma center, other than the general fog of war".[59] The Centcom Report thus embraced the uncertainty encountered during combat operations as the main factor contributing to the tragic course of events.[60] Moreover, in a single sentence, the Centcom Report dismissed calls to initiate criminal proceedings, concluding that "the label 'war crimes' is typically reserved for intentional acts," and that in this case, "the errors were unintentional."[61] Based on this version of the facts, the US military adopted administrative and disciplinary measures against the sixteen individuals who were identified as responsible for the errors.[62]

In conjunction with General Campbell's press conference, NATO concluded its internal investigation in November 2015 and released a short executive summary of its findings.[63] The NATO executive summary acknowledged the death and injury of civilians in the airstrike but found no evidence that the commander of the US forces or the aircrew knew that the targeted compound was a medical facility or that the hospital was deliberately targeted.[64] Additionally, the executive summary found no evidence that key commanders involved in the operation had access to a No Strike List identifying the location of the Doctors Without Borders medical facility, and found that the maps used by the United States Space Force (USSF) Commander did not label the Doctors Without Borders compound as a medical facility.[65] At the same time, NATO thought it was "unclear" whether the USSF Commander had the grid coordinates for the medical facility available to him at the time he authorized the airstrike.[66] Ultimately, the NATO executive summary concluded that the misidentification of and attack on the Doctors Without Borders compound resulted from "a series of human errors, compounded by failures of process and procedure, and [from] malfunctions of technical equipment which restricted the situational awareness of those Resolute Support forces supporting ASSF operations."[67] The language used by the NATO executive summary closely resembled the language used in the Centcom Report, which concluded that the attack resulted from a "combination of human errors, compounded by process and equipment failures."[68]

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[58] *Id*. at 2–3.

[59] *Id*.

[60] *Id*. at 2.

[61] *Id*. at 3–4.

[62] *Id*. at 4.

[63] *See* NATO REPORT, *supra* note 46, at 1.

[64] *Id*.

[65] *Id*.

[66] *Id*.

[67] *Id*.

[68] CENTCOM REPORT, *supra* note 46, at 1.

Both UNAMA and Doctors Without Borders expressed an inherent skepticism toward the Centcom and NATO investigations and the trustworthiness of their findings.[69] The UNAMA Report explicitly questioned the impartiality of both the Centcom and NATO investigations for their lack of independence and effectiveness.[70] As a result, Doctors Without Borders and UNAMA both continued their calls for an independent international investigation of the attack.[71] The factual controversies and uncertainties described above served as fertile ground for law professors and legal scholars and practitioners to highlight disagreements over the legal analysis of the applicable norms.[72]

Due to Doctors Without Borders' high profile, its international network, and the apparent unlawfulness of striking a functioning hospital, investigations of the attack on the hospital in Kunduz had the potential to produce transparent, consistent, and credible findings. Yet instead of settling the dispute over what happened, the four reports only exacerbated existing controversies and exposed the inherent mistrust between different organizations and communities. In the end, each side remained committed to its own version of the truth. To close this gap, both Doctors Without Borders and UNAMA reiterated their demand for the establishment of an independent international fact-finding mission authorized to collect the necessary evidence, investigate the incident, and produce authoritative legal findings.[73] A year after the attack on the hospital, Doctors Without Borders' General Director, Christopher Stokes, criticized the lack of an impartial investigation.[74] He further stated that the heavily redacted report published by the

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[69] *See* UNAMA REPORT, *supra* note 46, at 12; Press Release, Initial reaction to Public Release of U.S. Military Investigative Report on the Attack on MSF Trauma Hospital, DOCTORS WITHOUT BORDERS (Apr. 29, 2016), https://www.msf.org/kunduz-initial-reaction-public-release-us-military-investigative-report-attack-msf-trauma-hospital [hereinafter Press Release].

[70] *See* UNAMA REPORT, *supra* note 46, at 12.

[71] *See, e.g.*, Press Release, *supra* note 71.

[72] *See, e.g.*, Kevin Jon Heller, *Thoughts on Jens's Post About the Kunduz Attack,* OPINIO JURIS (May 3, 2016), http://opiniojuris.org/2016/05/03/thoughts-on-jens-post-about-the-kunduz-attack/; Jonathan Horowitz, *Why the US Should Cooperate With Investigations Into the Hospital Bombing,* JUST SECURITY (Dec. 23, 2016), https://www.justsecurity.org/28472/cooperate-investigations-hospital-bombing/; Peter Margulies, *Centcom Report on the Kunduz Hospital Attack: Accounting for a Tragedy of Errors*, LAWFARE (May 2, 2016), https://www.lawfareblog.com/centcom-report-kunduz-hospital-attack-accounting-tragedy-errors; Jens David Ohlin, *Was the Kunduz Hospital Attack a War Crime?*, OPINIO JURIS (May 1, 2016), http://opiniojuris.org/2016/05/01/was-the-kunduz-hospital-attack-a-war-crime/; Alex Whiting, *Recklessness, War Crimes, and the Kunduz Hospital Bombing*, JUST SECURITY (May 2, 2016), https://www.justsecurity.org/30871/recklessness-war-crimes-kunduz-hospital-bombing/.

[73] MSF specifically demanded an international investigation by the International Humanitarian Fact-Finding Commission (IHFFC). Press Release, *supra* note 71; *see also* Eve Bring, *The Kunduz Hospital Attack: The Existence of a Fact-Finding Commission*, EJIL TALK! (Oct. 15, 2015), http://www.ejiltalk.org/the-kunduz-hospital-attack-the-existence-of-a-fact-finding-commission (encouraging the international community to turn to the International Humanitarian fact-finding Commission to investigate this—and other—events). UNAMA required an independent, impartial, prompt, transparent, and effective investigation. *See* UNAMA Report, *supra* note 46, at 60.

[74] Stokes, *supra* note 30.

US military was both unsatisfactory and troubling, as it concealed important information and indicated that the United States failed to take necessary precautions to avoid harming civilians.[75] This kind of factual ambiguity, Stokes warned, leads to wars with no limits, which may then give rise to battlefields without doctors.[76]

III.
CHALLENGES TO LEGAL FACT-FINDING DURING ASYMMETRICAL CONFLICTS: FROM FARAH TO KUNDUZ

"History counts its skeletons in round numbers.
A thousand and one remain a thousand,
As though the one had never existed"
(Wislawa Szymborske, Hunger Camp at Jaslo)[77]

The contradictory reports concerning the attack on the hospital in Kunduz represent a broader phenomenon of factual uncertainty with regard to wartime events. In another striking example, numerous fact-finding efforts concerning a single incident from May 2009 in Farah Province, Afghanistan, announced strikingly different numbers of civilian casualties.

On the night of May 4, 2009, following a day of heavy fighting between Taliban, Afghan, and US Marines forces in the Bala Baluk District of Farah Province, four FA-18F fighter planes supporting the Marines were replaced with a B-1B bomber.[78] In three strikes, the B1-B fired five 500-pound and three 2,000-pound bombs on several buildings in the vicinity of Gerani village.[79] Controversies about the number of civilians killed in the bombings arose immediately, with estimates ranging from 26 to more than 140 casualties. An Afghan Government investigation determined that the US airstrike had killed one hundred and forty civilians, including ninety-three children;[80] an independent Afghan organization, Afghanistan Rights Monitor, announced that at least 117 civilians had been killed, including 26 women and 61 children;[81] an investigation

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[75] *Id*.

[76] *Id*.

[77] WISLAWA SZYMBORSKA, POEMS NEW AND COLLECTED, 1957-1997 (1998).

[78] U.S. CENTRAL COMMAND, U.S. CENTRAL COMMAND INVESTIGATIONS INTO CIVILIAN CASUALTIES IN THE FARAH PROVINCE, AFGHANISTAN, ON MAY 4, 2009 (2009) [hereinafter FARAH CENTCOM REPORT], at 7.

[79] *Id*. at 7–9.

[80] Hamid Shalizi & Peter Graff, *U.S. Strikes Killed 140 Villagers: Afghan Probe*, REUTERS (May 16, 2009), http://www.reuters.com/article/2009/05/16/us-afghanistan-civilians-idUSTRE54E22V20090516.

[81] Carlotta Gall and Taimoor Shah, *Afghan Villagers Describe Chaos of U.S. Strikes*, N.Y. TIMES

conducted by the Afghanistan Independent Human Rights Commission (AIHRC) concluded that 86 civilians were killed;[82] an ICRC investigation established that eighty-nine civilian were killed in the attack;[83] UNAMA established that 63 women and children were killed (excluding males of military age from the count, as it found it too difficult to determine whether they were combatants or non-combatants);[84] and the US Central Command investigation identified twenty-six civilian casualties.[85] The Centcom report acknowledged, however, that its findings in this regard might not be accurate, and that the number of civilian casualties could be much higher. The Centcom Report cited the Afghan Independent Human Rights Commission report as a 'balanced, thorough investigation into the incident.'[86]

The disparities between these many fact-finding efforts are puzzling: Did some fact-finders overlook one hundred and fourteen bodies, or did other fact-finders count non-existent bodies? There were witnesses to the attack, and there were bodies on the ground in the village of Gerani.[87] Joint fact-finding efforts could have settled these vast disparities, at least to some extent. Yet to this day, more than ten years after the attack, all we are left with is Centcom's pessimistic view that "no one will ever be able conclusively to determine the number of *civilian casualties* that occurred on May 4, 2009,"[88] a sentiment echoed in New York Times' report on the attack.[89] Grim as it is, this sentiment holds the key to understanding what seems to be a factual controversy: the legal definition of "civilian" and its application.

The focus of fact-finding efforts on civilian casualties is understandable. IHL permits the killing of civilians in only limited circumstances: when they directly participate in the hostilities, or when their death is evaluated to be proportionate with the anticipated military gain.[90] However, the legal definition of "civilian" is gravely contested, as is the extent of their protections under IHL.[91] Additional

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(May 14, 2009), https://www.nytimes.com/2009/05/15/world/asia/15farah.html.

[82] FARAH CENTCOM REPORT, *supra* note 80, at 11.

[83] ICRC Report On Farah Civcas Incident States 89 Civilians Were Killed, Ambassador Karl Eikenberry Cabl from Cabul, Afghanistan, on 2009 June 24.

[84] EurasiaNet, *Afghanistan: UN report documents steady increase in civilian deaths*, 4 August 2009, https://www.refworld.org/docid/4a8414f924.html (last visited Nov. 7, 2019)

[85] FARAH CENTCOM REPORT, *supra* note 80, at 11.

[86] *Id*. at 11.

[87] Elizabeth Bumiller and Carlotta Gall, *U.S. Admits Civilians Died in Afghan Raids*, N.Y. TIMES (May 7, 2009), https://www.nytimes.com/2009/05/08/world/asia/08afghan.html.

[88] FARAH CENTCOM REPORT, *supra* note 80, at 11.

[89] "The number of *civilians* killed by the American airstrikes in Farah Province last week may never be fully known." Gall and Shah, *supra* note 83.

[90] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 51(3), 51(5)(b), Jun.8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

[91] *See, e.g*., Michael N. Schmitt, *Deconstructing direct participation in hostilities: the constitutive elements*, 42 NYU J. INT'L. L. & POL. 697 (2009); Crawford, Emily, IDENTIFYING THE ENEMY:

controversy surrounds the methodology utilized to count civilian casualties of war.[92] It is not only that varying legal definitions and methodologies lead to different body-counts; they also overemphasize quantitative information about individuals at the expense of important qualitative factors: Who were the victims? How old were they? Did they have families and loved ones? What where they doing when were hit from the bomb that ended their lives? All this is lost in numerical debates about casualties. Analogizing from Szymborska's poem, legal fact-finding efforts count their skeletons in legal terms, stripping the victims of war from their individuality and humanity. Instead of being called by their names and recognized by their faces, they are collectively grouped into the deep bucket of collateral damage.

Similarly, the legal focus of the investigations into the attack on the Doctors Without Borders hospital in Kunduz and its aftermath did not provide an opportunity for investigators to sort out factual discrepancies. Therefore, Doctors Without Borders' continuous calls for an independent investigation of the attack by the International Humanitarian Fact-Finding Commission (IHFFC) seem redundant. An additional investigation by the IHFFC would likely only replicate the problem of focusing on legal questions at the expense of broader factual and organizational issues. Choosing the IHFFC means putting the law at the center of the investigation. Article 90 of Additional Protocol (I) to the Geneva Conventions established the IHFFC to investigate violations of IHL.[93] In other words, Doctors Without Borders' choice is consistent with a general move towards legal fact-finding and the preference of legal truth over other types of truth.[94]

Despite of this growing popularity of legal fact-finding as a mechanism to enhance accountability for wartime actions, empirical studies reveal some of their weaknesses. A series of comparative experiments this author conducted in the US and Israel has shown that legal fact-finding reports on war crimes committed by US Marines in Afghanistan and by Israeli Armed forces in Gaza, were ineffective at both (i) resolving controversies over contested events, and (ii) motivating domestic sanctioning of the perpetrators.[95] Doctors Without Borders, a third party

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CIVILIAN PARTICIPATION IN ARMED CONFLICT (2015). In another article I survey the main controversies around the definition of civilians and the extent of their protection under international humanitarian law. Shiri Krebs, *Rethinking Targeted Killing Policy: Reducing Uncertainty, Protecting Civilians from the Ravages of Both Terrorism and Counterterrorism*, 44 Fla. St. Univ. L. Rev. 943 (2017).

[92] Auchter, Jessica, *Paying attention to dead bodies: the future of security studies?* 1 J. Global Security Stud. 36 (2016); COUNTING CIVILIAN CASUALTIES: AN INTRODUCTION TO RECORDING AND ESTIMATING NONMILITARY DEATHS IN CONFLICT (Taylor B. Seybolt, Jay D. Aronson, and Baruch Fischhoff, eds., 2013).

[93] Protocol I, *supra* note 92.

[94] Between 2006 and 2015, the UN alone has dispatched thirty-eight fact-finding missions, each tasked with responsibility to establish legal facts by reporting on violations of human rights and international humanitarian law. Krebs, *supra* note 32, at 94-95; s*ee also* ROB GRACE & CLAUDE BRUDERLEIN, BUILDING EFFECTIVE MONITORING, REPORTING, AND FACT-FINDING MECHANISMS 3–9 (2012).

[95] Krebs, *supra* note 93, at 91; Shiri Krebs, *Law Wars: How Legal Labels Shape Beliefs About Wartime Controversies*, HARV. NAT'L SECURITY J. (forthcoming 2019).

not directly involved in the armed conflict and without clear legal status under international law, lacks effective means to pressure the United States into collaboration, information sharing, and institutional change. This deficiency will not be resolved by another legal investigation by the IHFFC: Like Doctors Without Borders, the IHFFC's jurisdiction depends upon the relevant State's consent, and it lacks authority or competence to ensure cooperation and access to evidence during its investigation, or acceptance and implementation of its recommendations after its conclusion.[96]

In addition to these structural weaknesses of legal fact-finding processes conducted by non-binding mechanisms, legal fact-finding efforts concerning wartime events are further limited in their ability to account for 'what happened,' in their capacity to disseminate their findings to different audiences, and in the long-term outcomes of their investigations. The following Subsections elaborate on these challenges to legal fact-finding. The first Subsection looks at factual contingencies of legal findings; the second Subsection focuses on the impact of legal blame and criminalization on information gathering, cooperation, and organizational change; and the third Subsection concerns dispute system design issues, including the mismatch between preventative goals and (some) legal processes. After discussing each of these challenges, this Article offers potential solutions and alternatives.

A. Factual Contingency

Truth is a fundamental objective of all adjudication.97 Two of the working assumptions of the practice of adjudication are that accuracy in fact-finding constitutes a precondition for just decisions98 and that fact-finding is a neutral practice,99 aimed at ascertaining an objective "truth."100 However, an

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[96] Protocol 1, *supra* note 92, at art. 90. It is therefore not surprising that to date, almost three decades after its establishment, the IHFFC has not formally been tasked with conducting any investigation. IHFFC , REPORT ON THE WORK OF THE IHFFC ON THE OCCASION OF ITS 25TH ANNIVERSARY 4 (2016), https://www.ihffc.org/Files/en/pdf/ihffc-presidential-report-2015-en.pdf

[97] Mirjan R. Damaska, *Truth in Adjudication*, 49 HASTINGS L.J. 289, 301 (1997); LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 1 (2006); *see also* FED. R. EVID. 102.

[98] Damaska, *supra* note 99, at 289, 292.

[99] Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y. L. SCH. L. REV. 123 (1992).

[100] The International Criminal Tribunal for the former Yugoslavia (ICTY) prides itself on producing an undeniable truth, as well as "creating a historical record, combatting denial and preventing attempts at revisionism." *See, e.g.*, *Achievements*, ICTY, http://www.icty.org/en/about/tribunal/achievements (last visited May 19, 2019). Christof Heyns, the former UN Special Rapporteur on extrajudicial, summary, or arbitrary executions and a member of the UN Independent Investigation on Burundi, stated: "It is crucial to ascertain [the disputed facts] in an indisputable manner." Christof Heyns, *Oral Update*, U.N. Human Rights Council Enhanced Interactive Dialogue on Burundi (March 22, 2016), https://www.ohchr.org/EN/HRBodies/HRC/UNIIB/Pages/UNIIB.aspx

inescapable tension exists between accuracy in fact-finding and some of the legal rules governing legal fact-finding. Ultimately, legal fact-finding produces a contingent version of reality--one that adheres to legal rules and processes that frame the story, infuses that story with meaning, and dictates how the relevant facts are construed.

Ontologically, law provides norms and rules that construct reality in a specific manner, and this legal reality—or "legal truth"—may differ from non-legal constructions of reality.101 Terms such as "genocide," "civilian," "terrorist," "torture," and "responsibility" have unique meanings as legal terms, and these terms potentially have other meanings within political, ethical, or moral discourses. When we adopt legal discourse to interpret reality and determine the truth, our findings relate to a legal reality that may be very different from the moral, ethical, or political interpretation of reality.102 For example, a legal finding that a victim of a war act is not a protected "civilian" depends on the interpretation and scope of this legal category. Applying legal lenses, this category is perhaps more restricted than the colloquial use of the term in that it excludes those directly participating in the hostilities (a term than in itself allows for different meanings and interpretations, as detailed above). Additionally, legal reality is often binary, coercing complex identities into simplified categories such as "combatant" or "civilian" and thereby losing information that could have been meaningful if a spectrum approach, rather than binary categorization, were in force.103

Epistemologically, legal fact finders determine questions of fact based on legal conventions, procedures, and rules of evidence that guide them in their decisions regarding what is considered "true."104 These rules carve the boundaries of the story by limiting the universe of facts that are included in the legal account of "what happened."105 Only facts that are specifically relevant to answering the legal question, such as actions immediately preceding the event in question, causes of death, or intent of the perpetrator, are included.106 Other facts

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101 Michael S. Moore, *Legal Reality: A Naturalist Approach to Legal Ontology*, 21 L. AND PHIL. 619, 628 (2002) ("We thus can expect no precision in how to combine the very general moral, historical, scientific, and semantic facts that make a legal interpretation correct."); *see also* Jack M. Balkin, *The Proliferation of Legal Truth*, 26 HARV. J. L. AND PUB. POL'Y 5, 7 (2003) ("Law's truth is not the only truth, and law's vision of reality is not the only reality").

102 *Id*.

103 Sherwin has explored more generally the clash between law's demand for truth and justice and the modem mind's demand for closure and certainty, leading lawyers and processes of adjudication to simplify reality by leaving the "messy things" out. Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 40–41 (1994).

104 Damaška, Mirjan, *Epistemology and legal regulation of proof*, 2 LAW, PROBABILITY AND RISK 2.2 117 (2003); Laudan, Larry, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY (2006).

105 Scheppele, *supra* note 101 at 123. *See also*, Scheppele, Kim Lane, PRACTICES OF TRUTH-FINDING IN A COURT OF LAW: THE CASE OF REVISED STORIES (1994).

106 Burgess-Jackson, Keith, *An Epistemic Approach to Legal Relevance*, 18 ST. MARY'S L.J. 463

relating to the roots of the conflict, social processes of dehumanization, or acts committed outside the temporal or geographical jurisdiction of the legal institution conducting the fact-finding efforts are excluded.107

Legal epistemology further restructures the story by determining the weight, reliability, sufficiency, and admissibility of the relevant facts. Legal rules determine the value and strength of the information collected, elevating some facts over others. While many of these rules are designed to promote an accurate account of events, they nonetheless influence choices concerning how to construct reality.108 Moreover, some rules of evidence and legal procedure depart from the goal of ascertaining the truth and favor other purposes, such as protecting national security.109 This issue is particularly relevant in the context of wartime investigations, and predominantly affects non-State parties including NGOs, who lack access to sensitive information. Additionally, this sensitive information—typically intelligence assessments and evaluation—is collected and interpreted by security agencies that may be subject to groupthink and overconfident in their assessments.110 Among both NGOs and security agencies, legal fact-finding efforts may be further compromised by cognitive biases, including cognitive consistency, motivated reasoning, and denial.111

Another aspect of the epistemological contingency of legal facts in the context of wartime investigations stems from the centrality of predictions and

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(1986).

107 Mohamed, Saira, *Leadership Crimes*, 105 CALIF. L. REV. 777 (2017).

108 For example, common law jurisdictions place significant limitations on the admissibility of hearsay evidence that might be useful to establish disputed questions of fact. Richard D. Freidman, *Truth and its rivals in the law of hearsay and confrontation*, 49 HASTINGS L.J. 545 (1997).

109 For example, in stark contradiction to the general approach to hearsay, legal processes in domestic jurisdiction often relay upon confidential intelligence in the national security context. Richard Morgan, *Latif v. Obama: The Epistemology of Intelligence Information and Legal Evidence*, 22 S. CAL. INTERDISC. L.J. 303 (2012); Daphne Barak-Erez & Matthew C. Waxman, *Secret Evidence and the Due Process of Terrorist Detentions*, 48 COLUM. J. TRANSN'L L. 3, 5 (2009); Shiri Krebs, *Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court*, 45 VAND. J. TRANSNAT'L L. 639 (2012).

110 IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 9 (1982); Marleen O'Connor, *The Enron Board: The Perils of Groupthink*, 71 UNIV. OF CIN. L. REV. 1233, 1258 (2003); Robert Jervis, *War and Misperception*, 18 J. INTERDISC. HIST. 675, 688 (1988); Ephraim Kahana, *Analyzing Israel's Intelligence Failures*, 18 INT'L J. INTELLIGENCE AND COUNTERINTELLIGENCE 262, 274 (2005).

111 *See* Lee Ross & Andrew Ward, *Psychological Barriers to Dispute Resolution*, *in* 27 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 255, 263–64 (Mark P. Zanna ed., 1995). For literature concerning motivated cognition, see Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19 (2012). For literature concerning denial, see STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 6 (2013). Fact-finders may further be influenced by the false-positive-false-negative bias, meaning a mistake will only be discovered if a dangerous person is set free, but not if he or she is targeted or continues to be preventively detained. *See* Kitai-Sangero, Rinat, *The Limits of Preventive Detention*, 40 MCGEORGE L. REV. 903, 909 (2009); Gus Van Harten, *Weaknesses of Adjudication in the Face of Secret Evidence*, 13 INT'L J. EVID. AND PROOF 1, 1 (2009).

value judgments.112 In the context of ongoing hostilities, decision makers are tasked with predicting and calculating probabilities about the future rather than describing past occurrences. For example, assessing how many civilians will be harmed by an attack requires some learned guesswork concerning the presence of civilians at a specific place at a future time. Additionally, some facts seem easily severable from value judgments: for example, "Were there traces of Sarin gas in the blood of the victims?" However, in warfare it is often the case that crucial facts consist of complex social evaluations; for example, "How viable is the target?" or "How reliable is the intelligence?"113 Future predictions and value judgments are subjective and depend on institutional framing and processes. As a result, even when analyzing similar information, military and NGO factfinders may reach different conclusions.114 Thus, there is often a meaningful gap between findings produced by NGOs and third parties, and those produced by military and security organizations.115

The challenges described above highlight several characteristics of legal fact-finding that make it particularly prone to producing different—and sometimes contradictory—findings concerning wartime events during asymmetrical conflicts. The existence of contradictory reports concerning wartime events exacerbates belief polarization and strengthens the emergence of conflicting narratives, frustrating information dissemination and the emergence of a shared understanding regarding what really happened.116 A variety of sociopsychological dynamics further compromise public receptiveness to legal fact-finding, including cognitive consistency and biased assimilation of new

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112 For a more general discussion of these challenges, see Damaska, *supra* note 99 at 299-300.

113 *Id*. Faigman has argued that the principal reason for the US Supreme Court's inconsistent use of science is that it continues to approach factual questions as a matter of normative legal judgment rather than as a separate inquiry aimed at information gathering, claiming that "the Court 'interprets' facts, it does not 'find' them." David L. Faigman, *Normative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 544–45, 549 (1991).

114 Compare with Benvenisti's claim that security agents and human rights advocates often interpret the law of war differently, giving its concrete rules different schope and meanings. Benvenisti, Eyal. *The legal battle to define the law on transnational asymmetric warfare*, 20 DUKE J. COMP. & INT'L L. 339 (2009).

115 Consider the gap between the findings of the Israeli military and the Goldstone Mission with regard to the killing of twenty-four members of the Al-Samouni family in Gaza in 2009, and the following op-ed by Richard Goldstone explaining this gap. Shiri Krebs, *Designing International Fact-Finding: Facts, Alternative Facts, and National Identities*, 41 FORDHAM INT'L L.J. 337, 387–88 (2017). This gap is partly explained by the Israeli investigatory commission regarding the targeted killing operation of Salah Shehadeh, also in Gaza, which resulted in the death of thirteen civilians. Shiri Krebs, *Reducing Uncertainty in Targeted Killing Decision-Making: Protecting Civilians from Both Terrorism and Counterterrorism*, 44 FLA. ST. U. L. REV. 943, 983 (2017).

116 *See* Alan Jern, Kai-Min K. Chang & Charles Kemp, *Belief Polarization is Not Always Irrational*, 121 PSYCHOL. REV. 206, 218 (2014).

information,117 confirmation bias, 118 motivated cognition,119 and collective memories and beliefs,120 each of which may trigger distortion or rejection of threatening information.

B. Criminalization and Legal Blame

Legal discourse, especially in the context of criminal law and accountability, is focused on individualized blame.[121] While individualizing guilt serves several purposes, it has its own problems and dangers. As Professor Barbara Fried has pointed out, "we have gotten nothing from our 40-year blame fest except the guilty pleasure of reproaching others for acts that, but for the grace of God, or luck, or social or biological forces, we might well have committed ourselves."[122] Discussing the South African Truth and Reconciliation Commission, political scientist James Gibson argued that promoting an alternative of "shared blame" was the single most successful characteristic of that process.[123] As he explained: "Sharing responsibility, blame, and victimhood creates a common identity, which can provide a basis for dialogue. If people are no longer dogmatically attached to a 'good versus evil' view of the struggle, then perhaps a space for reconciliation

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[117] According to cognitive consistency theories, the mutual interaction among pieces of psychological knowledge substantially affects human cognition. Mounting evidence further demonstrates processes of biased assimilation of new information, meaning that people tend to interpret subsequent evidence so as to maintain their initial beliefs. *See generally* Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY AND SOC. PSYCHOL. 2098 (1979); Dan Simon, Chadwick J. Snow, & Stephen J. Read, *The Redux of Cognitive Consistency Theories: Evidence Judgments by Constraint Satisfaction*, 86 J. PERSONALITY AND SOC. PSYCHOL. 814 (2004).

[118] The term "confirmation bias" connotes the seeking or interpreting of evidence in ways that are "partial to existing beliefs, expectations, or a hypotheses in hand." Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. OF GEN. PSYCHOL. 175, 175 (1998).

[119] Ziva Kunda has explained that a motivation to arrive at particular conclusions "may affect reasoning through reliance on a biased set of cognitive processes—that is, strategies for accessing, constructing, and evaluating beliefs . . .that are considered most likely to yield the desired conclusion. There is considerable evidence that people are more likely to arrive at conclusions that they want to arrive at, but their ability to do so is constrained by their ability to construct seemingly reasonable justifications for these conclusions." Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 480 (1990).

[120] Societal beliefs and collective memories are cognitions that are shared by society members on topics and issues that are of special concern for the particular society and that contribute to the sense of uniqueness of the society's members. Daniel Bar-Tal, *Societal Beliefs in Times of Intractable Conflict: the Israeli Case*, 9 INT'L J. CONFLICT MGMT. 22, 25 (1998); Daniel Bar-Tal, *Collective Memory of Physical Violence: its Contribution to the Culture of Violence*, *in* THE ROLE OF MEMORY IN ETHNIC CONFLICT 85 (Ed Cairns & Mícheál D. Roe eds., 2003).

[121] *See generally* MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW (2010); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001).

[122] Barbara H. Fried, *Beyond Blame*, BOS. REV. (Jul./Aug. 2013).

[123] James L. Gibson, *The Contributions of Truth to Reconciliation: Lessons from South Africa*, 50 J. CONFLICT RESOL. 409, 417 (2006).

is opened."[124] Replacing the criminal legal discourse of individualized guilt with a social discourse of "shared blame" could potentially transform the binary legal discourse of guilt and innocence into a constructive social discourse supporting reconciliation.

Alternatively, scientific and medical literature has challenged the criminalization of human errors and the culture of blame altogether. Some scholars have argued that escalating punishments for errors results in suppressing, stonewalling, and covering up by clinicians and healthcare organizations.[125] Other scholars have emphasized that the culture of blame hinders investigations into why an error occurred and how to prevent future errors.[126] Exploring the social causes and psychological and organizational consequences of the criminalization of human error in aviation and healthcare, Sidney Dekker concluded that criminal prosecution may threaten safety, as it has a detrimental effect on willingness to report and disclose safety-related information.[127] Dekker demonstrated that the threat of judicial involvement can be enough to prevent people from coming forward with information about an incident that they were involved in.[128] Judicial involvement, he argued, can therefore engender a climate of fear and silence, in which it can be difficult, if not impossible, to access to information that may be critical to finding out what happened and preventing similar errors in the future.[129] Similarly, other scholars have maintained that cultures of blame—intensified by lawyers and the media—could lead individuals and organizations to blame others rather than take responsibility for their errors, thereby frustrating their ability to explore and create solutions to address the problem.[130] Medical scholars have further demonstrated that openly sharing experiences in a confidential setting helps defuse feelings of guilt and challenges the culture of shame and isolation that often surrounds medical errors.[131]

Official policy-making bodies and experts in medical and human error have called for a shift to a blame-free culture within healthcare systems, predicated on the notion that errors are largely attributable to systems rather than individuals.[132]

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[124] *Id*. at 414.

[125] Lucian L. Leape et al., *Promoting Patient Safety by Preventing Medical Error*, 280 JAMA 1444, 1447 (1998).

[126] Geoffrey Thomas, *A Crime Against Safety*, AIR TRANSPORT WORLD, Jan. 2007, at 57 (discussing the culture of blame in aviation).

[127] Sidney Dekker, *The Criminalization of Human Error in Aviation and Healthcare: A Review*, 49 SAFETY SCI. 121, 125 (2011).

[128] SIDNEY DEKKER, JUST CULTURE: BALANCING SAFETY AND ACCOUNTABILITY 103–05 (2012).

[129] *Id*. at 123–24.

[130] Jamie Dickey, Ralph J. Damiano & Ross Ungerleider, *Our Surgical Culture of Blame: A Time for Change*, 126 J. THORACIC AND CARDIOVASCULAR SURGERY 1259 (2003).

[131] *See generally* Richard T. Penson et al., *Medical Mistakes: A Workshop on Personal Perspectives*, 6 ONCOLOGIST 92 (2001).

[132] *See generally* Molly E. Collins et al., *On the Prospects for a Blame-Free Medical Culture*, 69 SOC. SCI. & MED. 1287 (2009).

One could argue that the root cause of healthcare and aviation catastrophes is human error rather than intentional action, which renders healthcare and aviation different from indiscriminate military attacks. However, human error, including errors in decision making, interpreting intelligence, identifying targets, and assessing risk, remains a key factor in many wartime controversies as well. Like many aviation and healthcare workers implicated in negligence cases, civilian casualties during armed conflicts often result from flawed systems and faulty organizational structures and processes, rather than from human pathology.[133] Preventing future harm requires identifying the military processes and institutional culture that enable—and sometimes even encourage—indiscriminate attacks, rather than pointing the finger at a few rotten apples.

Irrespective of blameworthiness and individuation, an important additional similarity between international law violations and human errors in medicine and aviation relates to the psychological processes leading individuals to share information about, take responsibility for, find solutions to, and prevent repetition of the same errors.[134] Naturally, when individuals do not fear retaliation or prosecution, and when the focus of investigation is not individualized blame but rather institutional reform, individuals are encouraged to share what they know. Indeed, this perspective guided the South African Truth and Reconciliation Commission, which offered immunity from criminal prosecution to those who came forward and were willing to truthfully share their stories and experiences.[135]

If criminalization and blame have a detrimental effect on willingness to report and disclose information, we should be motivated to explore blame-free alternatives to fact-finding, which could potentially motivate individuals to share information and experiences that would otherwise remain concealed. This is particularly important in the context of asymmetrical conflict, where limited access to information and the resulting emergence of contradictory narratives serve as constraints on both fact-finding and its consequences.

C. Truth, Accountability, and Prevention

"Ascertaining facts" is a core purpose of any fact-finding body.136 Nonetheless, ascertaining facts is not usually the singular, or even the primary, goal of international fact-finding. International organizations typically invest a great deal of resources into fact-finding efforts in order to use the ascertained facts

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[133] Rowe, Peter, *Military Misconduct during International Armed Operations:'Bad Apples' or Systemic Failure?* 13 J. CONFLICT & SECURITY L. 165 (2008); Bar, Neta, and Eyal Ben-Ari, *Israeli snipers in the Al-Aqsa intifada: killing, humanity and lived experience*, 26 THIRD WORLD QUARTERLY 133 (2005).

[134] For a brief typology of human errors and failures, see generally Amy C. Edmondson, *Strategies for Learning from Failure*, 89 HARV. BUS. REV. 48 (2011).

[135] Gibson, James L., *The contributions of truth to reconciliation: Lessons from South Africa*, 50 J. CONFLICT RESOL. 409 (2006).

[136] Théo Boutruche, *Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice*, 16 J. CONFLICT & SECURITY L. 105 (2011).

for a further purpose. International fact-finding missions, or commissions of inquiry, have been established to promote a variety of goals, including promoting accountability, preventing future atrocities, facilitating reconciliation, and advancing the peaceful resolution of international conflicts.137 These different purposes dictate a variety of fact-finding methods, processes, and tools, as well as diverse authorities, mandates, and jurisdictions.

In spite of this potential diversity of both goals and processes, the international community has increasingly used fact-finding within a narrow legalistic context. Over the past several decades, international fact-finding missions have become a dominant method of ensuring the implementation of, and promoting respect for, international law—particularly international human rights law (HRL) and IHL.138 Most of the relevant literature on international fact-finding missions has similarly focused on legal aspects of international fact-finding, including the standard of proof necessary to assign responsibility, the gravity threshold of violations to be considered by a fact-finding body, and the implementation, interpretation, and enforcement of IHL and HRL.139

The focus on legal fact-finding entails is problematic due to three reasons. First, it suggests that fact-finding is less important or even meaningless when facts are presented without a legal interpretation, and that some vague form of legal accountability is more important than a nuanced description of broader military processes and social dynamics. Second, it directs the fact-finding efforts to focus on future accountability processes, and to prefer individual accountability over promotion of other social goods, such as conflict resolution. Third, the ad hoc nature of legal fact-finding mechanisms prevents a thoughtful design process that would tailor processes to goals and consider broader implications of the fact-finding endeavor. I will now elaborate on each of these issues.

1. Immediate Goal: Finding the Truth

The most immediate, basic goal of any fact-finding mechanism is to ascertain facts. Nonetheless, the desire to find the truth necessitates making various choices and determinations, as the concept of truth has different meanings. The South African Truth and Reconciliation Commission, for example, developed four

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137 Erin Daly, *Truth Skepticism: An Inquiry Into the Value of Truth in Times of Transition*, 2 INT'L J. TRANSITIONAL JUST. 23, 23 (2008); Diane F. Orentlicher, *Bearing Witness: The Art and Science of Human Rights Fact-Finding*, 3 HARV. HUM. RTS. J. 83, 85 (1990); *see generally* Boutruche, *supra* note 138; Edwin Brown Firmage, *Fact-finding in the Resolution of International Disputes: From the Hague Peace Conference to the United Nations*, 1971 UTAH L. REV. 421 (1971).

138 *See generally* Boutruche, *supra* note 138; Orentlicher, *supra* note 139.

139 *See, e.g.*, Rob Grace & Claude Bruderlein, *Building Effective Monitoring, Reporting, and Fact-Finding Mechanisms* 3–9 (Program on Humanitarian Policy and Conflict Resolution, Harvard University Working Paper, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038854; *see generally* INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS: REVISED AND EDITED REPRINT (Bertrand G. Ramcharan ed., 2014); Boutruche, *supra* note 138; Orentlicher, *supra* note 139.

different aspects of truth: a forensic truth, focused on objective information; a narrative truth, focused on the personal stories and individual experiences of both victims and perpetrators as well as the creation of united, restored memories; a social truth, established through interaction, discussion, and debate; and a healing or restorative truth, enabled through public acknowledgment and common memories of the events.[140] Understanding, analyzing, and highlighting these various aspects of truth enabled the commission to reconcile its two principal goals of truth and reconciliation and to strive to achieve them both.

The adversarial legal truth—which leads to binary dichotomies like "guilty" or "not guilty"—could be replaced with forensic truth focused on the brute facts, or with narrative truth allowing for the coexistence of multiple narratives and perspectives. Such an approach may encourage public acknowledgment of the events as well as the creation and promotion of a shared narrative.[141] Additionally, rethinking the commitment to legal categories and interpretations may enable fact-finding bodies to access crucial information which persons involved might otherwise have concealed. Finally, basic, forensic, facts should not be disregarded, or overshadowed by their legal interpretation and evaluation. Legal interpretation is not necessary to infuse meaning into brute facts. As much as it is possible, there are benefits to letting the facts speak for themselves.

2. Long-Term Goals: Accountability Versus Prevention

While the immediate goal of the fact-finding process is discovering the truth, at times fact-finding is employed as a tool to achieve long-term goals such as creating a historical record, encouraging domestic accountability, fostering reconciliation, and preventing future atrocities.142 Doctors Without Borders' repeated calls for a new investigation by the IHFFC focus on three goals: establishing the facts, providing accountability, and assuring future protection of their facilities and teams.143 The problem is that tensions exist between these different goals, and the fulfilment of some of goals could impede the achievement of others.144 Another example of mismatched goals in fact-finding mandates is

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[140] Alex Boraine, *Truth and Reconciliation in South Africa, in* TRUTH V. JUSTICE: THE MORALITY OF THE TRUTH COMMISSIONS 151–53 (Robert I. Rotberg & Dennis Thompson eds., 2010).

[141] Alan W. Schefin, *Narrative Truth, Historical Truth, and Forensic Truth*, *in* THE MENTAL HEALTH PRACTITIONER AND THE LAW: A COMPREHENSIVE HANDBOOK (Lawrence E. Lifson & Robert I. Simon eds., 1998).

[142] *See, e.g.*, Cherif Bassiouni, *Appraising UN Justice-Related Fact-Finding Missions*, 5 WASH. UNIV. J. L. & POL'Y 35, 46 (2001); Boutruche, *supra* note 138, at 36.

[143] MSF launches petition drive for Afghanistan attack investigation, MSF Press Release, DOCTORS WITHOUT BORDERS (Oct. 15, 2015) https://www.msf.org/msf-launches-petition-drive-afghanistan-attack-investigation; Initial reaction to public release of U.S. military investigative report on the attack on MSF trauma hospital, MSF Press Release, DOCTORS WITHOUT BORDERS, (Apr. 29, 2016) https://www.msf.org/kunduz-initial-reaction-public-release-us-military-investigative-report-attack-msf-trauma-hospital

[144] For instance, a tension exists between the desire to promote accountability by conducting criminal trials, and the struggle for a peaceful change of regime, which sometimes can be achieved only by

the mandate of the UN Independent Investigation on Burundi (UNIIB). The mandate includes several goals, including "preventing further deterioration of the human rights situation"; making recommendations "on the improvement of the human rights situation"; assisting reconciliation efforts; ensuring "accountability for human rights violations and abuses, including by identifying alleged perpetrators"; adopting "appropriate transitional justice measures"; issuing a final report; and participating in an enhanced interactive dialogue on the human rights situation in Burundi.145 While all of these goals are valuable, it seems unlikely that a fact-finding body could accomplish all of them at the same time while relying on a single structure. A tension exists, for example, between the desire to promote accountability by identifying and prosecuting responsible individuals and the desire to prevent future abuses and to promote reconciliation, which can sometimes be achieved only by promising powerful leaders full or partial amnesty.146

Therefore, it is important to prioritize the goals of fact-finding bodies and to choose between certain long-term goals, such as accountability, and other objectives, such as preventing future atrocities.147 Keeping in mind the complexity of some conflicts, the goals of international fact-finding missions should not be limited to adjudication and accountability. While certain fact-finding mechanisms ought to support international criminal tribunals, not all international fact-finding mechanisms should be designed in their shadow.

3. Matching Goals with Processes in Asymmetrical Wartime Fact-Finding

As discussed above, an international fact-finding mechanism, like any other international institution, may be established to fulfil an array of goals and purposes. However, the structure and processes adopted by international fact-finding missions in recent years have been quite uniform, focusing on legal categories and legal violations frameworks to collect, interpret, and report

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promising powerful dictators full amnesty. *See* Andrea Kupfer Schneider, *The Intersection of Dispute Systems Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289, 292 (2009). Another tension exists between justice and truth, as the criminal legal process limits the permissible evidence. Moreover, the ICTY was criticized for fueling the Serb population's antagonism and for failing to create a common and accepted account of the war's history. *See* Patricia M. Wald, *ICTY Judicial Proceedings: An Appraisal From Within*, 2 J. INT'L CRIM. JUST. 466, 467 (2004).

145 Human Rights Council Res., U.N. Doc. A/HRC/RES/S-24/1 (Dec. 17, 2015), http://www.ohchr.org/EN/HRBodies/HRC/UNIIB/Pages/UNIIB.aspx [hereinafter Burundi Fact-Finding Resolution].

146 Schneider, *supra* note 146, at 291–92 (2009); *see also* JANE E. STROMSETH, DAVID WIPPMAN, & ROSA BROOKS, CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 253 (2006).

147 In fact, this issue becomes much more complex, since the question of "whether and how accountability proceedings can contribute to strengthening domestic justice systems" is "surprisingly underanalyzed." STROMSETH & WIPPMAN, *supra* note 148, at 253.

facts.148 A possible explanation for this uniformity is that the mandates of fact-finding mechanisms are often crafted hastily, without identifying and prioritizing concrete goals, while atrocities are ongoing.149 A lack of clarity concerning a mission's goals may motivate the adoption of existing or familiar processes and structures, without proper consideration of the appropriateness of these structures to achieve the desired goals, or of the existence of alternative structures.

Therefore, those designing fact-finding bodies investigating wartime attacks should first define, clarify, and prioritize the goals and purposes of the bodies' mission. Based on these goals and purposes, alternative processes and structures should be considered, matching goals to processes in order to maximize the efficacy of the fact-finding body. Instead of adopting a "one size fits all" approach, fact-finding efforts would benefit from careful consideration of alternative processes and structures, and from tailoring concrete processes and structures to specific goals. For example, if the main goal of a fact-finding exercise is legal accountability, a court-like structure, complete with enforcement powers, is advisable. If, however, the main goal is conflict resolution, then a narrative or restorative approach to truth would be preferable. Finally, if the main goal is to prevent future atrocities, a suitable fact-finding process should focus on systemic failures, flawed organizational processes, and faulty decision-making practices.

D. Returning to the Kunduz Hospital Bombing: Some Prospects for Effective Change

Applying the previous discussion to the case of the attack on the Doctors Without Borders hospital in Kunduz, the following Section proposes a shift away from legal blame and individual criminal responsibility and a renewed focus on necessary organizational reform.

1. Rethinking the Ontology and Epistemology of Asymmetrical Wartime Fact-Finding

Investigating the attack on the Kunduz hospital by the IHFFC, through its legal lens, dictates a focus on a set of legal questions that concern alleged violations of international law. By asking these questions alone, the investigation can only provide limited information about the legal issues at stake. Information concerning the intent of the perpetrators, or any other element of the relevant violations, will be collected, and the relevant law will be interpreted and applied. However, information concerning the broader institutional and social processes that enabled war crimes will be withheld. As a result, the organizational culture

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148 An analysis of the mandates of these sixty-six fact-finding missions established that an overwhelming majority of these missions—95 percent—were established to investigate alleged violations of international law. Krebs, *supra* note 32, at 96.

149 *See, e.g.*, *Burundi Fact-Finding Resolution*, *supra* note 147.

of the military, decision-making processes and dynamics, risk assessment strategies, and relevant precautionary methods and training will not be included in the fact-finding process. Questions about whether the soldiers violated international law or whether the attack constituted a war crime will probably be explored. Other questions, however, will likely remain unanswered, including questions pertaining to: how soldiers identified the target; what type of training and preparation soldiers had on dealing with mechanical failures and limited information during military operations; how information was transmitted between different units and divisions; how soldiers interpret and treat uncertainty during combat; and whether training programs existed to deal with battlefield stress and uncertainty.

The first set of (strictly legal) questions leads to binary outcomes: international law was violated or it was not; war crimes were committed or they were not. Answering these questions requires determining whether a crime as defined by the relevant law was committed, and whether a single individual (or a group of individuals) can be singled out as responsible for committing this crime. However, the second set of questions introduced above opens the stage for elaborate answers focused on organizational culture and processes within the military. These questions can point to institutional failures and identify problematic processes that increase the probability of misidentification and failed risk assessments.

Answering the legal questions, the US military investigation concluded that the attack on the Doctors Without Borders hospital did not amount to a war crime because it was not intentional.150 Instead, Centcom found that the attack resulted from a human error.151 However, instead of examining the decision-making processes in great detail, the report simply attributed the error to the "fog of war."152 Since the main question was whether a war crime was committed, Centcom did not need to explore the sources and causes of the error. Anything not related to the existence of a legal violation lost its significance.

Although today there is more public information about the events leading to the attack on the Doctors Without Borders hospital, it remains unclear what is needed to prevent such an error from happening again. It is time to reclaim fact-finding as a meaningful exercise in describing various aspects of wartime actions. Legal facts have their significance in defining and labelling wartime atrocities. Nonetheless, sheer facts, stripped of their potential legal meaning but interpreted within their social and organizational context, may be just as important in achieving military change and reform. This turn away from an exclusively legal focus resonates well within the context of asymmetrical conflicts in general, and resonates particularly well with regard to the conflict between the United States and Doctors Without Borders because this approach focuses on future prevention

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150 CENTCOM REPORT, *supra* note 46, at 2.

151 *Id*. at 1.

152 *Id*. at 2.

and reform rather than individual blame and the identification of a few "rotten apples."

2. From Legal Blame to "Learning from Failure"

If, indeed, the main goal of Doctors Without Borders is to prevent future breaches of the protections afforded to medical objects, the adoption of legal discourse may be counterproductive. A binary legal judgment that either incriminates or absolves specific individuals might stand in the way of information sharing and creating a detailed and accurate understanding of what happened. The adversarial process triggers defensive responses and denial. Such a focus on individual actors might mask broader systemic failures.

A prevention paradigm requires going beyond the legal questions. Doctors Without Borders' current commitment to criminalization and blame is likely to have detrimental effects on individuals' willingness to report and disclose sensitive information concerning erroneous risk assessments and organizational failures. Instead, Doctors Without Borders should consider forsaking this commitment in favor of an organizational discourse that promotes a "learning from failure" approach, offering collaborative, blameless, fact-finding structures to motivate information sharing, disclosure, and organizational reform.153 This approach would shift the organization's focus away from individual criminal responsibility and toward broader social processes that may better account for the failures that led to the attack on the Kunduz hospital, including the organizational culture, decision-making practices, and structural biases that contribute to erroneous risk assessments. The literature surveyed above testifies to the potential of such an alternative discourse in instigating better practices of information sharing and organizational change.

3. Dispute System Design: Restructuring Goals, Priorities, and Processes

What is more important: determining what happened, or determining who is responsible? Prosecuting individual persons involved, or implementing long-term institutional changes? Of course, it is possible to envisage a way to pursue a combination of these goals in a single case. However, clarifying and prioritizing these goals will help fact-finding bodies decide which structures and processes best fit the particular situation. In a statement made a year after the attack on the hospital in Kunduz, Doctors Without Borders' General Director, reiterated the organization's greatest hope and goal: to prevent incidents like the attack on its hospital in Kunduz from happening again.154 Based on this and other communications, it seems that the organization's main goal is not individualized prosecutions for the sake of criminal justice, but rather identifying the institutional processes and decision-making practices that lead to the misidentification of

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153 *See* Edmondson, *supra* note 136.

154 Stokes, *supra* note 30.

targets, intelligence failures, and erroneous attacks on humanitarian facilities and personnel.

Therefore, the real question in this case is what factors contributed to the US military's erroneous identification of the Kunduz hospital as a military target and its subsequent attack using heavy fire.155 This is a challenging question, because as Doctors Without Borders' General Director accurately observed, "there is zero political will among governments to have their military conduct examined from the outside."156 Nonetheless, there are ways to alleviate some of the resistance to external investigations and to encourage governments and military organizations to participate and cooperate in external fact-finding processes. For example, fact-finding bodies could relinquish their demand to hold individuals criminally accountable in return for a detailed account of the events, organizational processes, and the decision-making practices that were utilized.

CONCLUSION

As in Amichai's poem, the diameter of the 211 bombs fired at the Kunduz hospital encompasses the entire world, creating an endless circle of loss and grief. But the legal focus of the fact-finding efforts has made this enormous loss and human grief irrelevant. Focused solely on legal facts, the various investigations debated one question: whether US conduct constituted a war crime. Attempts to answer this question prompted discussions about the relevant laws and their proper interpretation, which in turn fueled disputes about specific facts relevant to those laws. Unfortunately, focusing on questions of law, guilt, and blame diverted attention from the more basic questions of what actually happened, why it happened, and most importantly, what might be done to prevent similar incidents in the future. Investigators' narrow legal focus may also have prevented deeper reflection and remorse, as the threat of legal proceedings tends to discourage those involved from taking responsibility out of fear of retribution.

The attack on the Kunduz hospital and the controversy that followed it exemplify a broader phenomenon. Legal fact-finding efforts aimed at resolving factual disputes often trigger further controversy, and are poorly equipped to gather sensitive information and facilitate cooperation. This is particularly true when the controversy relates to attacks harming non-State actors, such as Doctors Without Borders, which suffer from structural, political, and legal weaknesses in general and particularly when it comes to gathering evidence about wartime actions.

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155 *See, e.g.*, *Kunduz: Some of MSF's Questions in Response to the U.S. Military Investigation into Their Attack on the Hospital*, DOCTORS WITHOUT BORDERS (Apr. 29, 2016), http://www.msf.org/en/article/kunduz-some-msf%E2%80%99s-questions-response-us-military-investigation-their-attack-hospital.

156 Stokes, *supra* note 30.

Based on Doctors Without Borders' communications, the organization's main goal is not individualized prosecutions and adjudication, but rather protecting its people, medical facilities, and patients from future attacks. To achieve this goal, it would be wise to consider alternatives to legal fact-finding. Adversarial legal truth should not dominate wartime fact-finding efforts. Legal truth is not the only truth, and legal blame may be counterproductive when it comes to preventing future atrocities and mobilizing institutional change within inflexible military organizations. There are other types of knowledge that may be less threatening than legal truth and more sensitive to the nuances of complex wartime situations.

One such alternative approach would be to focus on systemic failures and processes rather than on individual blame. In investigations of medical and aviation catastrophes, a "learning from failure" approach can better prevent the recurrence of catastrophe by focusing on the organizational culture, decision-making processes, and structural biases that lead to erroneous risk assessments. This approach is better suited to motivate information sharing, disclosure, and organizational reform. Applying this approach to a wartime context would shift the focus of attention from issues relating to legal interpretation and individual criminal responsibility to broader structural biases and flawed decision-making practices, which may better account for the failures leading to the attack on the Kunduz hospital. By focusing less on issues of law, guilt, and blame, fact-finding bodies will be better able to disperse the "fog of war" and prevent future catastrophes.

Enforcing Freedom of Religion or Belief in Cases Involving Attacks Against Buildings Dedicated to Religion: The *Al Mahdi* Case at the International Criminal Court†*

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The international community has increasingly witnessed widespread and systematic attacks on buildings dedicated to religion in armed conflicts. Such violations of international law have deprived many individuals of places to express their beliefs within their communities. Although international law sources already protect these buildings, recent experience suggests that greater protections are required, particularly in times of armed conflict. This Article seeks to determine the extent to which the International Criminal Court (ICC) can operate to protect human rights, particularly the right to freedom of religion or belief, while dealing with intentional attacks against buildings dedicated to religion. The Al Mahdi case at the ICC provides the analytical foundation for this research. Al Mahdi was convicted in 2016 of the war crime of attacking buildings dedicated to religion. The attack, implemented by a militant group associated with al Qaeda, targeted ten religious buildings in Timbuktu, Mali, severely affecting the city's religious and cultural diversity. A critical analysis of the Al Mahdi case provides normative guidelines for legal issues arising from the protection of buildings dedicated to religion during armed conflicts. This Article argues that the ICC largely focused on violations of the collective right to cultural life at the expense of a proper consideration of serious breaches of freedom of religion or belief. We also discuss potential interactions between the ICC and international human rights law.

INTRODUCTION

Buildings dedicated to religion, such as holy places, temples, and burial sites, are legally protected during armed conflicts. This protection is based on international humanitarian law, international human rights law, and international criminal law. These legal disciplines are based on treaties, customs, and principles that offer different levels of protection for buildings dedicated to religion. For such protection to be maximized, international courts should consider these legal fields to be cumulative and mutually reinforcing. For example, the 1998 Rome Statute of the International Criminal Court defines intentional "attacks against buildings dedicated to religion" as a war crime.[1] Attacks on religious buildings violate the laws and customs applicable in armed conflicts,[2] and such attacks also violate international human rights law.[3] Consequently, the International Criminal Court (ICC) should apply the Rome Statute, general principles of international law, and its own jurisprudence while remaining "consistent with internationally recognised human rights."[4]

The first case decided by the ICC regarding attacks against buildings dedicated to religion is *Prosecutor v. Al Mahdi*.[5] In 2010, Al Mahdi and members of Ansar Dine—a movement associated with al Qaeda in the Islamic Maghreb (AQIM)—attacked ten religious buildings located in Timbuktu, Mali, severely diminishing the religious and cultural diversity of the community of Timbuktu.[6] Al Mahdi was arrested and later convicted of the war crime of attacking buildings dedicated to religion under Article 8(2)(iv) of the Rome Statute.[7] Consequently, an in-depth analysis of the *Al Mahdi* case provides specific normative guidelines for cases involving buildings dedicated to religion, as well as general standards of protection of human rights during armed conflicts.

The *Al Mahdi* case was highly anticipated, especially considering that the Court can hold individuals criminally accountable for their crimes and order

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[1] Rome Statute of the International Criminal Court, arts. 8(2)(b)(ix), 8(2)(e)(iv), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[2] *See, e.g.*, JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES 34 (2010).

[3] *See* U.N. Human Rights Comm., *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, UN Doc. CCPR/C/21/Rev.1/Add.4, ¶ 4 (July 30, 1993) [hereinafter UN Human Rights Committee General Comment 22].

[4] Rome Statute, *supra* note 1, art. 21(3).

[5] Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15-171, Judgment and Sentence (Sept. 27, 2016) [hereinafter *Al Mahdi* (Judgment and Sentence)].

[6] *Id.* ¶ 31.

[7] *Id.* ¶ 1, at 49.

reparations for the victims against the convicted person.[8] However, this Article argues that the case did not live up to expectations, with the Court largely focusing on collective cultural rights related to the destruction of protected monuments in Timbuktu at the expense of an in-depth consideration of serious breaches of other human rights. Therefore, after *Al Mahdi*, the central question addressed in this paper is whether and to what extent the ICC has protected freedom of religion or belief while dealing with intentional attacks against buildings dedicated to religion.

The novelty of and need for the present research arises from the fact that both the ICC and the subsequent legal literature on the *Al Mahdi* case have largely or exclusively focused on cultural dimensions, while neglecting relevant aspects related to freedom of religion or belief.[9] The present Article critically examines this elephant in the room once and for all.

This Article first explores the framework of protections for buildings dedicated to religion in international humanitarian law, international human rights law, and international criminal law (Section I.A). Second, it examines the ICC's human rights jurisprudence, with a focus on *Al Mahdi* (Section I.B). Third, it critically analyzes whether the ICC adequately accounted for freedom of religion or belief in *Al Mahdi* (Section II.A). Finally, it assesses the components of the reparations order of the Court in *Al Mahdi* (Section II.B). Considering all of these elements, this Article offers a systematic examination of the *Al Mahdi* case, in an attempt to provide (further) legal certainty in cases related to intentional attacks on buildings dedicated to religion in international law, particularly international criminal law. An underlying thread throughout this Article is whether and to what extent the ICC may contribute to the enforcement of human rights in mass atrocities, particularly with respect to freedom of religion or belief.

I.
PROTECTION OF BUILDINGS DEDICATED TO RELIGION AND HUMAN RIGHTS AT THE ICC

The universal protection of "buildings dedicated to religion" during armed conflict is a relatively recent legal innovation, coming into existence with the

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[8] *See*, *e.g.*, *ICC Appeals / Three appeals judgements in Bemba et al, Katanga and al-Mahdi cases*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT (Mar. 9, 2018), http://www.coalitionfortheicc.org/news/20180309/icc-appeals-three-appeals-judgments-bemba-et-al-katanga-and-almahdi-cases.

[9] *See, e.g.*, Paige Casaly, *Al Mahdi before the ICC Cultural Property and World Heritage in International Criminal Law*, 14 J. INT'L CRIM. JUSTICE 1199–1220 (2016); Sophie Starrenburg, *Who is the victim of cultural heritage destruction? The Reparations Order in the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi*, EJIL: TALK! (Aug. 25, 2017), https://www.ejiltalk.org/who-is-the-victim-of-cultural-heritage-destruction-the-reparations-order-in-the-case-of-the-prosecutor-v-ahmad-al-faqi-al-mahdi/; Serge Brammertz, et al., *Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY*, 14 J. INT'L CRIM. JUSTICE 1143–74 (2016).

adoption of the Rome Statute in 1998.[10] However, more limited international protections have existed for hundreds of years. This Section details the history of the evolution of protections for buildings dedicated to religion. A range of terms—varying in scope but often used interchangeably[11]—appear in other legal sources: "religious sites,"[12] "sacred places,"[13] "meeting places,"[14] "places of worship,"[15] and "holy sites"[16] are now used to describe religious buildings protected by international law. Although this Article uses the wording of the Rome Statute, the aforementioned terms are also employed where appropriate.

A. Protection of Buildings Dedicated to Religion in International Humanitarian Law, International Human Rights Law, and International Criminal Law

1. International Humanitarian Law

The protection of buildings dedicated to religion has continuously evolved throughout history. In times of war, it was common for one civilization to take over its enemies' religious sites and destroy or repurpose them.[17] Historical examples include the Christian destruction of pagan temples from the fourth century onward,[18] as well as the Muslim repurposing of holy places such as the Hagia Sophia in Istanbul and the Dome of the Rock in Jerusalem.[19] More recently, the destruction of the Babri Masjid mosque in 1992 presented a difficult case for Indian courts determining ownership of the site.[20] Religion has played a

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[10] Rome Statute, *supra* note 1, art. 8(b)(ix) (defining a war crime as "intentionally directing attacks against buildings dedicated to religion").

[11] HEINER BIELEFELDT, et al., FREEDOM OF RELIGION OR BELIEF: AN INTERNATIONAL LAW COMMENTARY 118–19 (2016).

[12] *See, e.g.*, G.A. Res. 55/254, Protection of Religious Sites (May 31, 2001).

[13] *See, e.g.*, SILVIO FERRARI & ANDREA BENZO, BETWEEN CULTURAL DIVERSITY AND COMMON HERITAGE: THE LEGAL PROTECTION OF THE SACRED PLACES OF THE MEDITERRANEAN 1–2 (2014).

[14] EUR. PARL. ASS., Tackling intolerance and discrimination in Europe with a special focus on Christians, 2015—First part-session, Doc. No. 13660, ¶ 6.8 (Jan. 29, 2015), http://semantic-pace.net/default.aspx?search=Y2F0ZWdvcnlfc3RyX2VuOiJBZG9wdGVkIHRleHQi (enter search terms "tackling intolerance and discrimination" and select the document dated Jan. 29, 2015).

[15] *See, e.g.*, Prof. W. Cole Durham Jr., *Places of Worship: Enhancing Implementation of a Core Human Right*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (July 13, 2009), https://www.osce.org/odihr/38068?download=true.

[16] *See, e.g.*, Search for Common Ground, et al., *Universal Code of Conduct on Holy Sites* (Jan. 2011), https://www.codeonholysites.org/translations-of-the-code.

[17] Kevin Chamberlain, WAR AND CULTURAL HERITAGE: AN ANALYSIS OF THE 1954 CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS TWO PROTOCOLS 7 (Institute of Art and Law, 2nd ed. 2013).

[18] *See* CATHERINE NIXEY, THE DARKENING AGE: THE CHRISTIAN DESTRUCTION OF THE CLASSICAL WORLD 83–88, 91–100 (2017).

[19] DIARMAID MACCULLOCH, A HISTORY OF CHRISTIANITY: THE FIRST THREE THOUSAND YEARS 260 (2010).

[20] *See, e.g.*, M. Siddiq (D) Thr. Lrs. v. Mahant Suresh Das, (2019) 4 SCC 641 (India).

significant role in these conflicts, as religion both requires the protection of holy places and may be used to justify attacks on other religious sites.[21]

Unsurprisingly, religion also played a major role in the formation of international law, even though the relationship is more nuanced than one might assume. Marti Koskenniemi has explained that "'religion' and 'international law' relate to each other, sometimes supporting, sometimes colliding against each other."[22] For example, religious groups used "just war" theories as a framework to either restrain the use of force against enemies or legitimize persecution of dissenters and other religious groups.[23] The Peace of Westphalia (1648) also provides a classic example of the centrality of religion in the early evolution of international law. This treaty provided for the indirect and highly selective protection of buildings dedicated to religion, as it granted members of major Christian groups the right to worship in private and public churches at "appointed Hours."[24] The development of the protection of buildings dedicated to religion remained selective for centuries, with protections limited to members of certain religious groups or circumscribed to specific States.[25]

Protection of buildings dedicated to religion began to expand during the second half of the nineteenth century as international declarations started to emphasize the notion that religious buildings deserved protection regardless of their affiliation. The Brussels Declaration (1874) established that seizure, destruction, or willful damage to "institutions dedicated to religion" (*établissements consacrés aux cultes*) "should be made the subject of legal proceedings by the competent authorities."[26] Although it provided an exception for times of urgent military necessity, the Oxford Manual (1880) included a similar provision.[27] The Oxford Manual expanded protections for religious

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[21] See additional examples of destruction and appropriation of sacred places by other religious groups in Patrick J. Boylan, REVIEW OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: (THE HAGUE CONVENTION OF 1954) ¶¶ 2.4–2.5 (1993).

[22] MARTTI KOSKENNIEMI, et al., INTERNATIONAL LAW AND RELIGION: HISTORICAL AND CONTEMPORARY PERSPECTIVES 18 (2017).

[23] *See* MALCOLM D EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 22–41 (1997); Mark W. Janis, *Religion and Literature of International Law: Some Standard Texts*, *in* RELIGION AND INTERNATIONAL LAW 121–40 (Mark W. Janis & Carolyn Evans eds., 2004).

[24] Treaty of Peace Between France and the Empire, art. XXVIII, Oct. 24, 1648, 1 C.T.S. 271 [hereinafter Treaty of Westphalia]; *see also* Knox Thames, *Old is New: Europe and Freedom of Religion or Belief*, *in* THE CHANGING NATURE OF RELIGIOUS RIGHTS UNDER INTERNATIONAL LAW 150 (Malcolm D. Evans, et al. eds., 2015).

[25] *See, e.g.*, Francis Lieber, Instructions for the Government of Armies of the United States in the Field, art. 34, General Orders No. 100 (Apr. 24, 1863) [hereinafter Lieber Code], https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=A25AA5871A04919BC12563CD002D65C5.

[26] *See, e.g.*, Project of an International Declaration concerning the Laws and Customs of War, art. 8, Aug. 27, 1874, 1 A.J.I.L. (Supp.) 96, 65 B.F.S.P. 1005, *reprinted in* THE LAWS OF ARMED CONFLICTS 27 (Dietrich Schindler & Jiří Toman eds., 3rd rev. ed. 1988) [hereinafter 1874 Brussels Declaration]; *see also* ROGER O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 22 (2006).

[27] The Laws of War on Land, art. 53, Sept. 9, 1880, adopted by the Institute of International Law

buildings by declaring that "[i]n case of bombardment all necessary steps must be taken to spare, if it can be done, buildings dedicated to religion (*les édifices consacrés aux cultes*)."[28] Additionally, the Oxford Manual emphasized that religious conviction and practices should be respected during wars.[29] Nevertheless, a treaty-based protection of buildings dedicated to religion was not formulated until the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex, which is largely based on its predecessors.[30] The 1907 Hague Convention (IV) has been in force since January 26, 1910; however, it has only been ratified by thirty-eight States and is therefore far from being universally accepted.[31]

After 1910, there was a notable lack of development in the protection of buildings dedicated to religion, which might seem counterintuitive. While one might expect subsequent treaties to provide more robust protection for such buildings in international humanitarian law, especially after major conflicts, the opposite occurred. For example, the Roerich Pact (1935), which was drafted to protect artistic and scientific institutions and historic monuments, made no reference to buildings dedicated to religion.[32] After the Second World War, the United Nations Educational, Scientific and Cultural Organization (UNESCO) assisted States in drafting the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention).[33] The 1954 Hague Convention only mentioned religious property once, and included this category under a strict definition of cultural property: "For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether *religious* or *secular*."[34]

Therefore, the only buildings dedicated to religion that the 1954 Hague Convention covered were those of great importance to the cultural heritage of

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[hereinafter Oxford Manual].

[28] *Id*. at art. 34.

[29] *Id*. at art. 49.

[30] *Cf*. The Hague Convention (IV) respecting the Laws and Customs of War on Land annex: Regulations Respecting the Laws and Customs of War on Land, arts. 27 & 56, Oct. 18, 1907, 36 Stat. 2277, T.S. 539 [hereinafter The 1907 Hague Convention (IV)], *with* Oxford Manual, *supra* note 27, arts. 34 & 53.

[31] *Treaties, State Parties, and Commentaries to The Hague Convention IV*, ICRC, (last visited Sept. 24, 2019) https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=195.

[32] Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 167 L.N.T.S. 289 [hereinafter Roerich Pact].

[33] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, S. Treaty Doc. 106-1, 249 U.N.T.S. 216 [hereinafter 1954 Hague Convention].

[34] *Id*. art. 1(a) (emphasis added).

every people.[35] This protection is substantially narrower than the protection provided by the 1907 Hague Convention (IV),[36] as the vast majority of religious buildings fall outside the scope of the 1954 definition. In 1999, UNESCO strengthened the protection of cultural property in its Second Protocol to the Hague Convention for the Protection of Cultural Property (1999 Second Protocol),[37] providing stronger protection for buildings considered as having cultural heritage status and adding some elements contained in the Rome Statute.[38] Nonetheless, the 1999 Second Protocol did not promote more robust protection for buildings that are dedicated to religion but are not considered as cultural heritage.[39] In practice, UNESCO has registered 1,121 properties in the World Heritage List (as of 2019),[40] yet only about 20 percent of these properties "have some sort of religious or spiritual connection."[41] Consequently, despite the importance of these buildings, UNESCO treaties afford minimal protections to buildings dedicated to religion.

Likewise, the Geneva Conventions mention only the protection of "places of worship which constitute the cultural or spiritual heritage of peoples" in the Protocols, which were adopted in 1977, twenty-eight years after the original Conventions.[42] This provision generated much controversy when it was being drafted,[43] yet it is clear from the official records that protection was not intended to extend to all places of worship, but only those "which constitute the cultural or spiritual heritage of peoples."[44] Once again, the extent to which these international

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[35] *Id*.

[36] The 1907 Hague Convention (IV), *supra* note 30, arts. 27, 56.

[37] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 172, 38 I.L.M. 769 [hereinafter 1999 Second Protocol].

[38] DIETRICH SCHINDLER & JIŘÍ TOMAN, THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 1037 (Martinus Nijhoff 4th rev. and completed ed., 2004).

[39] *See* 1999 Second Protocol, *supra* note 37, art. 10.

[40] *World Heritage List*, UNESCO, https://whc.unesco.org/en/list/https://whc.unesco.org/en/list/ (last visited Sept. 24, 2019).

[41] *Heritage of Religious Interest*, UNESCO https://whc.unesco.org/en/religious-sacred-heritage/https://whc.unesco.org/en/religious-sacred-heritage/ (last visited Sept. 24, 2019).

[42] Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 53, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Conventions Protocol I]; Protocol Additional to the Geneva Conventions Aug. 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, art. 16, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Conventions Protocol II].

[43] CLAUDE PILLOUD, ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUG. 1949, ¶ 4828 (Yves Sandoz, et al., eds., 1987).

[44] *Id*. ¶ 4839. *But see* Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, ¶ 62, ICRC Doc. CDDH/236/Rev.1 (June 11, 1976) (noting disagreement in the working group over whether any place of worship constitutes the cultural heritage of peoples, or only places that were particularly formative of that cultural heritage).

treaties have refrained from mentioning religious buildings in their terminology is puzzling. Recent International Committee of the Red Cross (ICRC) materials provide further evidence of a discomfort with religious terms. The Third Additional Protocol to the Geneva Conventions (Protocol III), for example, emphasized that the ICRC's two iconic emblems—the Red Cross and the Red Crescent—are not intended to have any religious significance and added a third, arguably neutral, Red Crystal emblem.[45]

The ICRC has, however, recently identified some essential rules of customary international humanitarian law related to the protection of all buildings dedicated to religion during armed conflict. It recognized such rules only after the advent of the Rome Statute, suggesting that this protection has only recently become part of customary law.[46] Rule 9 provides that "[c]ivilian objects are all objects that are not military objectives," and includes places of worship in the description.[47] Rule 10 emphasizes that "[c]ivilian objects are protected against attack," thus relating this rule to the protection that the Rome Statute provides in Articles 8(2)(b)(ix) and 8(2)(e)(iv), which will be further examined below.[48] Rules 38 and 40 specify the protection of cultural property and define buildings dedicated to religion as a subdivision of this category.[49] Rule 104 provides that "[t]he convictions and religious practices of civilians and persons *hors de combat* must be respected."[50] This rule emphasizes that freedom of religion or belief must be respected even in times of armed conflict, and its interpretation is based on international human rights law.[51] Finally, Rule 147 prohibits reprisals against protected objects, including buildings dedicated to religion, while Rule 156 describes the destruction of such buildings as a war crime.[52]

By overlooking the essence of buildings dedicated to religion, international humanitarian law has overlooked fundamental human rights related to these buildings. Indeed, as Gerd Oberleitner has argued, certain human rights, such as freedom of religion or belief, are often "side-lined as less important in armed

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[45] *See* Protocol additional to the Geneva Conventions Aug. 12, 1949, and relating to the adoption of an additional distinctive emblem (Protocol III), Preamble ¶ 5, Dec. 8, 2005, 45 I.L.M. 558 [hereinafter Geneva Conventions Protocol III].

[46] We suggest that the text of the Rome Statute, *supra* note 1, arts. 8(2)(b)(ix) and 8(2)(e)(iv), expanded the protection to all buildings dedicated to religion instead of restricting it only to those of defined as cultural heritage. This point is further highlighted *infra* Section I.A.iii. *See* Manlio Frigo, *Cultural property v. cultural heritage: A "battle of concepts" in international law?*, 86 INT'L REV. RED CROSS 367, 377 (2004). *But see* Michael Bothe, *War Crimes*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 379, 410 (Antonio Cassese, et al. eds., 2002); and Micaela Frulli, *The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, 22 EUR. J. INT'L L. 203, 210–12 (2011).

[47] HENCKAERTS & DOSWALD-BECK, *supra* note 2, at 34.

[48] *Id*. at 34–35 n. 69.

[49] *Id*. at 127 and 132.

[50] *Id*. at 375.

[51] *Id*. at 377–78.

[52] *Id*. at 523–26 and 596–97.

conflicts."[53] Thus, a human rights-based approach must be taken when analyzing cases related to the protection of buildings dedicated to religion during armed conflicts.

2. International Human Rights Law

The protection of buildings dedicated to religion in international human rights law has developed slowly and has been largely connected to the protection of freedom of religion or belief. At the global level, the obligation to protect freedom of religion or belief in international human rights law largely stems from Article 18 of the Universal Declaration of Human Rights,[54] and Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR), which states that:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.[55]

The ICCPR does not explicitly provide for the protection of religious or cultural buildings, as the 1954 Hague Convention does.[56] The ICCPR provides for the protection of the individual right to freedom of religion or belief, a right which includes the freedom to worship in community with others. Since people often gather together to worship in buildings dedicated to religion, these buildings are essential for the realization of the right to freedom of religion or belief.[57] This protection applies even in times of public emergency, as the ICCPR does not permit any derogation of the right to freedom of religion or belief.[58] Other human rights are also related to the protection of buildings dedicated to religion, as the existence of these buildings may promote freedom of expression, freedom of assembly, the rights of members of minority groups to practice their own religion, as well as the right of everyone to take part in cultural life.[59]

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[53] GERD OBERLEITNER, HUMAN RIGHTS IN ARMED CONFLICT: LAW, PRACTICE, POLICY 113 (2015).

[54] G.A. Res. 217 A (III), Universal Declaration of Human Rights, art. 18 (Dec. 10, 1948) [hereinafter U.D.H.R.].

[55] International Covenant on Civil and Political Rights, art. 18(1), Dec. 16, 1966, 999 U.N.T.S. 171, 178 [hereinafter ICCPR].

[56] *Compare id. with* 1954 Hague Convention, *supra* note 33, art. 1.

[57] *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 9, Nov. 4, 1950, E.T.S. 5 [hereinafter E.C.H.R.]; American Convention on Human Rights, art. 12, Nov. 22, 1969, O.A.S. T.S. 36 [hereinafter A.C.H.R.]; African Charter on Human and Peoples' Rights, art. 8, June 27, 1981, (1982) 21 I.L.M. 58 [hereinafter Banjul Charter].

[58] ICCPR, *supra* note 55, art. 4(2).

[59] *Id.* arts. 18, 19, 21, 27; International Covenant on Economic, Social and Cultural Rights, art. 15(a),

Nonetheless, most human rights claims about the protection of buildings dedicated to religion are related to the right to freedom of religion or belief, which according to Heiner Bielefeldt, Nazila Ghanea, and Michael Wiener, "necessarily includes provisions concerning places of worship, i.e. their construction, renovation, ownership, availability, and accessibility."[60] This interpretation is largely based on how soft law documents have developed in this area at the United Nations (UN). The UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Arcot Krishnaswami, wrote a study in 1959 that contained several passages explaining the need to protect places of worship as an integral part of the right to freedom of religion or belief, as well as some "Basic Rules" to assist States in protecting this right.[61] This extensive study was later shortened, and references to places of pilgrimage and burial sites were removed from subsequent documents,[62] such as the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.[63] In 1993, the Human Rights Committee, in General Comment No. 22, reiterated that freedom to manifest religion or belief in worship encompasses, inter alia, "ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship."[64]

This issue received much more attention at the UN in the 2000s, when terrorist groups started targeting religious sites. The destruction of the Buddhas of Bamiyan by the Taliban in March 2001 generated a swift response from the General Assembly. The resulting Resolution 55/254 aimed to reinforce the protection of religious sites by calling on "all States to exert their utmost efforts to ensure that religious sites are fully respected and protected in conformity with international standards and in accordance with their national legislation and to adopt adequate measures aimed at preventing such acts or threats of violence."[65]

Another significant document in this area was UN Human Rights Council Resolution 6/37, which highlighted the need for complementarity in protecting buildings dedicated to religion and acknowledged the importance of the work of the Special Rapporteur in this area.[66] Resolution 6/37 urged States

> [t]o exert the utmost efforts, in accordance with their national legislation and in conformity with international human rights and humanitarian law, to ensure that

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opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

[60] BIELEFELDT, et al., *supra* note 11, at 118.

[61] Arcot Krishnaswami (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of Discrimination in the Matter of Religious Rights and Practices*, UN Doc. E/CN.4/Sub.2/200/Rev.1 (1960).

[62] BIELEFELDT, et al., *supra* note 11, at 120.

[63] G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, art. 6(a) (Nov. 25, 1981).

[64] UN Human Rights Committee General Comment 22, *supra* note 3, ¶ 4.

[65] G.A. Res. 55/254, *supra* note 12, ¶ 2.

[66] Human Rights Council Res. 6/37, UN Doc. A/HRC/RES/6/37, ¶¶ 16–20 (Dec. 14, 2007).

> religious places, sites, shrines and symbols are fully respected and protected and to take additional measures in cases where they are vulnerable to desecration or destruction.[67]

Even though this resolution amplified the content of human rights treaties in this area, its adoption was not unanimous.[68] It was adopted by twenty-nine votes with eighteen abstentions, which makes it difficult to qualify the resolution as consensual or consider it as giving hard content to treaties.[69] Nevertheless, it is noteworthy that the General Assembly has, in some instances, considered the impacts of the destruction of buildings dedicated to religion on the enjoyment of the right to freedom of religion or belief.[70]

Notably, UN Special Rapporteurs on Freedom of Religion or Belief have repeatedly reported on issues related to the protection of buildings dedicated to religion and provided clear normative guidelines in this area. These reports range from carefully worded descriptions of human rights violations in connection to places of worship to naming and shaming States that do not protect religious sites.[71] The late Special Rapporteur Asma Jahangir emphasized that "places of worship, religious sites and cemeteries have more than a material significance for the religious community attached to them," thus suggesting that "the concept of collective heritage of humankind could be used more prominently with regard to the preservation and protection of religious sites."[72] This approach aligns with that of the 1954 Hague Convention,[73] despite its limitations (as explained above). In a later report, Jahangir flagged two important interrelated issues regarding the protection of places of worship: "the deliberate destruction of and attacks on places [of] worship and other religious sites of a specific community by non-State actors,"[74] as well as discrimination and violence on the basis of religion or belief as demonstrated in "frequent attacks on places of worship and the desecration of cemeteries."[75] Concerning the situation in Mali specifically, Special Rapporteur Heiner Bielefeldt noted the destruction of religious sites in Timbuktu,[76] and the

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[67] *Id*. ¶ 9 (e).

[68] ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 218 (2017).

[69] *Id*. at 226.

[70] *See, e.g.*, G.A. Res. 72/177, Freedom of religion or belief, ¶ 13 (d) (Jan. 29, 2018); G.A. Res. 73/176, Freedom of religion or belief, ¶ 13 (d) (Jan. 14, 2019).

[71] Abdelfattah Amor (Special Rapporteur of the Commission on Human Rights on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief), *Interim Report*, ¶ 27, UN Doc. A/56/253 (July 31, 2001).

[72] Asma Jahangir (Special Rapporteur on Freedom of Religion or Belief), *Annual Report*, ¶ 53, UN Doc. A/HRC/10/8 (Jan. 6, 2009).

[73] 1954 Hague Convention, *supra* note 33, art. 1.

[74] Asma Jahangir (Special Rapporteur on Freedom of Religion or Belief), *Annual Report*, ¶ 27, UN Doc. A/HRC/13/40 (Dec. 21, 2009).

[75] *Id*. ¶ 35.

[76] Heiner Bielefeldt (Special Rapporteur on Freedom of Religion or Belief), *Report on Freedom of religion or belief of Persons Belonging to Religious Minorities*, ¶ 48 n. 29, UN Doc. A/HRC/22/51

UN also created another special procedure to explicitly address issues related to the ongoing armed conflict in the country: the Independent Expert on the situation of human rights in Mali.[77]

Initially, the Independent Expert acknowledged the destruction of religious buildings in Mali only as a cultural issue.[78] The ideas posited by the Independent Expert were in line with Security Council Resolution 2100 (2013) on establishment of the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), which virtually ignored the religious nature of some cultural buildings.[79] Only after the ICC convicted Al Mahdi did the Independent Expert fully acknowledge the religious dimension of the sites destroyed by the Ansar Dine/AQIM in Mali, even though he—like the ICC—made no reference to violations of freedom of religion or belief in Timbuktu.[80]

Furthermore, in 2011 the UN Special Rapporteur in the Field of Cultural Rights (originally entitled the Independent Expert in the Field of Cultural Rights), Farida Shaheed, provided a framework for the protection of religious sites that is more in line with the protection of human rights, placing more significance on the religious aspects of these sites.[81] Resolutions adopted by the UN Human Rights Council to provide assistance to Mali also spoke of the importance of religious buildings.[82] In other reports, the UN Special Rapporteur in the Field of Cultural Rights, Karima Bennoune, further connected the protection of cultural property to public international law,[83] quoting the 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage,[84] Security Council Resolution

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(Dec. 24, 2012).

[77] Human Rights Council Res. 22/18, Assistance to the Republic of Mali in the field of human rights, UN Doc. A/HRC/RES/22/18, ¶ 9 (Apr. 10, 2013) [hereinafter Human Rights Council Res. 22/18].

[78] Suliman Baldo (Independent Expert on the Situation of Human Rights in Mali), *Report on the Visit to Mali*, ¶¶ 88–89, UN Doc. A/HRC/25/72 (Jan. 10, 2014).

[79] *See* S.C. Res. 2100, ¶¶ 16 (f), 32 (Apr. 25, 2013). The Security Council acknowledged the religious nature of some religious buildings, although without reference to human rights, after the *Al Mahdi* case was decided by the ICC, in S.C. Res. 2347 (Mar. 24, 2017) [(on destruction and trafficking of cultural heritage by terrorist groups and in situations of armed conflict].).

[80] Suliman Baldo (Independent Expert on the Situation of Human Rights in Mali), *Rep. on the Visit to Mali*, ¶ 36, UN Doc. A/HRC/31/76 (Jan. 21, 2016); Suliman Baldo (Independent Expert on the Situation of Human Rights in Mali), *Rep. on the Visit to Mali*, ¶ 37, UN Doc. A/HRC/34/72 (Feb. 10, 2017); *see also* Suliman Baldo (Independent Expert on the Situation of Human Rights in Mali), *Rep. on the Visit to Mali*, ¶ 22, UN Doc. A/HRC/37/78 (Feb. 2, 2018).

[81] Farida Shaheed (Independent Expert in the Field of Cultural Rights), *Annual Rep.*, ¶ 48, UN Doc. A/HRC/17/38 (Mar. 21, 2011).

[82] Human Rights Council Res. 22/18, *supra* note 77, ¶ 1; Human Rights Council Res. 25/36, Assistance to the Republic of Mali in the field of human rights, UN Doc A/HRC/RES/25/36, ¶ 2 (Apr. 15, 2014).

[83] *See* Karima Bennoune (Special Rapporteur in the Field of Cultural Rights), *Rep. on Mapping of Cultural Right and Preliminary Views on Destruction of Cultural Heritage as a Violation of Human Rights*, UN Doc. A/HRC/31/59 (Feb. 3, 2016); Karima Bennoune (Special Rapporteur in the Field of Cultural Rights), *Rep. on Intentional Destruction of Cultural Heritage*, UN Doc. A/71/317 (Aug. 9, 2016).

[84] UNESCO, Declaration Concerning the Intentional Destruction of Cultural Heritage (Oct. 17, 2003), http://portal.unesco.org/en/ev.php-

2199 (2015),[85] the UN Plan of Action to Prevent Violent Extremism,[86] and Judge Cançado Trindade's opinion related to the interpretation of the International Court of Justice's ruling in the case of the Temple of Preah Vihear.[87]

There are, however, two problems with approaching this topic purely from a cultural rights perspective. Firstly, while most of these documents refer to the protection of religious and cultural sites, UNESCO documents often ignore a religious perspective altogether,[88] even when explicitly quoting the pertinent international instruments related to such protection.[89] Secondly, although an expanded view of the protection of cultural rights might be helpful for collective rights in this context, as Special Rapporteur in the Field of Cultural Rights Karima Bennoune suggested in her submission to the Al Mahdi case,[90] this approach could prevent individuals from bringing claims based on freedom of religion or belief. We argue that these two problems might have contributed to the ICC's focus on collective cultural rights at the expense of individual rights such as freedom of religion or belief. This could be easily avoided, as the Vienna Declaration and Programme of Action explains that "[a]ll human rights are universal, indivisible and interdependent and interrelated."[91] Therefore, all pertinent human rights should be taken into account in situations involving attacks against buildings dedicated to religion.

Another essential feature of human rights law for the advancement of the protection of buildings dedicated to religion is the fact that human rights courts and treaty-based monitoring bodies have already dealt with similar issues. Therefore, such jurisprudence could certainly inform similar cases in situations of armed conflict. The Inter-American Court of Human Rights, for instance, found a violation of the right to freedom of religion or belief in relation to the destruction of sacred sites that compromised the ability of members of an indigenous community to celebrate burial rites.[92] In addition, both the African Commission

URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html [hereinafter UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage].

[85] S.C. Res. 2199, ¶ 15 (Feb. 12, 2015).

[86] UN Secretary-General, *Rep. of the Secretary-General, Plan of Action to Prevent Violent Extremism*, ¶ 49 (f), UN Doc. A/70/674 (July 18, 2011).

[87] Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Separate Opinion of Judge Cançado Trindade Reports 2013, 606, Order of July 18, 2011 (ICJ).

[88] This is not uncommon for the UNESCO, as described in Alberto Melloni, *Naming the sacred: A Chronology of UNESCO Dispute on Jerusalem and its Holy Places* (forthcoming 2019).

[89] UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, *supra* note 84, at preambular paragraph.

[90] Prosecutor v. Al Mahdi, ICC-01/12-01/15-214-AnxI-Red3, Brief by Ms. Karima Bennoune, UN Special Rapporteur in the Field of Cultural Rights, at 8–18 (Apr. 27, 2017) [hereinafter Al Mahdi (UN Special Rapporteur on Cultural Rights Brief)].

[91] World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 5, UN Doc. A/CONF.157/23 (June 25, 1993) [hereinafter *Vienna Declaration and Programme of Action*].

[92] Río Negro Massacres v. Guatemala, Preliminary Objection, Merits, Reparations and Costs, Inter-

on Human and Peoples' Rights and the African Court on Human and Peoples' Rights have found that, in cases concerning indigenous peoples, restricting access to sites where the practice of religion takes place is a violation of the right to freedom of conscience and religion.[93] The European Court of Human Rights also found that Turkey violated the right to freedom of religion or belief of Greek Cypriots living in Northern Cyprus by restricting their access to places of worship in an area that had experienced armed conflict.[94] In contrast, the UN Human Rights Committee preferred a collective rights approach, finding only violations of the right of members of minority groups to enjoy their culture, instead of the right to freedom of religion.[95] Therefore, despite not having been directly referenced in human rights treaties, the destruction of religious sites has been condemned time and time again in international human rights fora.[96]

Moreover, soft law documents in this area provide an extensive rationale for the protection of buildings dedicated to religion,[97] as well as normative guidelines that could benefit the ICC when deciding related cases.[98] Theodor Meron has argued that "[b]y raising human rights issues before national courts, human rights lawyers can contribute to the acquisition of additional expertise in human rights law by judges, lawyers, and by the public at large, and to the expansion of the role of international human rights in the protection of the individual."[99] The same applies to international courts, which could use a "complementary and mutually

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Am. Ct. H.R., (ser. C) No. 250, ¶¶ 151–65 (4 Sept. 2012) [hereinafter Río Negro Massacres]. *See also* Plan de Sánchez Massacre v. Guatemala, Merits, Separate Opinion of Judge Cançado Trindade, Inter-Am. Ct. H.R. (ser. C) No. 105, ¶ 47 (Apr. 29, 2004) [hereinafter Plan de Sánchez Massacre (Merits)]; Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 217–20 (June 27, 2012) [hereinafter Kichwa Indigenous People of Sarayaku].

[93] Centre for Minority Rights Development and Minority Rights Group on behalf of Endorois Welfare Council v. Kenya, Communication 276/03, Decision, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 163–73 (Nov. 25, 2009) [hereinafter Endorois Welfare Council]; African Commission on Human and People's Rights v. Kenya, Communication 006/2012, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 162–69 (May 26, 2017) [hereinafter Afr. Comm'n H.P.R. v. Kenya].

[94] *See, e.g.*, Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 1, ¶¶ 241–46 [hereinafter Cyprus v. Turkey (Merits)].

[95] *See, e.g.*, Lubicon Lake Band v. Canada, CCPR/C/38/D/167/1984 (UN Human Rights Committee Mar. 26, 1990) [hereinafter Lubicon Lake Band]; and Äärelä & Näkkäläjärvi v. Finland, CCPR/C/73/D/779/1997 (UN Human Rights Committee Oct. 24, 2001) [hereinafter Äärelä & Näkkäläjärvi].

[96] *See* BIELEFELDT, et al., *supra* note 11, at 120.

[97] *See* Peter Petkoff, *Finding a Grammar of Consent for "Soft Law" Guidelines on Sacred Places: the Legal Protection of Sacred Places within the Existing Public International Law Instruments and Grass-root Approaches*, *in* BETWEEN CULTURAL DIVERSITY AND COMMON HERITAGE, 70–71 (Silvio Ferrari & Andrea Benzo eds., 2014).

[98] *See, e.g.*, UN Alliance of Civilizations, *The United Nations Plan of Action to Safeguard Religious Sites: In Unity and Solidarity for Safe and Peaceful Worship* (Sept. 12, 2019), https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/12-09-2019-UNAOC-PoA-Religious-Sites.pdf.

[99] THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 134–35 (1989).

reinforcing" approach between international humanitarian law and international human rights law to provide greater protection for buildings dedicated to religion.[100]

3. International Criminal Law

International criminal law complements human rights and humanitarian approaches by providing its own protections to buildings dedicated to religion. Article 3(d) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) states that the "seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science" constitutes a violation of the laws and customs of war.[101] The ICTY has affirmed this specifically for buildings dedicated to religion in a variety of cases, including *Karadžić & Mladić*,[102] *Blaškić*,[103] *Naletilić & Martinović*,[104] *Brđanin*,[105] and *Župljanin*.[106] Moreover, the ICTY has considered the destruction of religious sites such as mosques or Catholic churches as evidence of intent to destroy a religious group (genocide)[107] and persecution on religious grounds (a crime against humanity).[108] Similarly, in *Case 002/01*, the Extraordinary Chambers in the Courts of Cambodia noted that victims who were forcefully transferred lost contact with their places of worship and thus "experienced a diminished sense of 'physical and spiritual security.'"[109]

The Rome Statute defines intentional attacks against buildings dedicated to religion as a war crime both in international and non-international armed conflicts.[110] The wording of the Rome Statute is unambiguous: "[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or

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[100] *See* Office of the UN High Commissioner for Human Rights, International Legal Protection of Human Rights in Armed Conflict, 1, UN Doc. HR/PUB/11/01 (Nov. 2011).

[101] Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002) May 25, 1993, 32 I.L.M. 1159 [hereinafter Int'l Crim. Trib. for the Former Yugoslavia Statute].

[102] Prosecutor v. Karadžić & Mladić, IT-95-5-R61, Review of the Indictment, ¶¶ 6, 15, 16 (Int'l Crim. Trib. for the Former Yugoslavia July 11, 1996).

[103] Prosecutor v. Blaškić, IT-95-14, Judgment, ¶ 185 (Trial Chamber, Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

[104] Prosecutor v. Naletilić & Martinović, IT-98-34, Judgment, ¶¶ 604–05 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003).

[105] Prosecutor v. Brđanin, IT-99-36, Judgment, ¶¶ 596–599, 678 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

[106] Prosecutor v. Župljanin, IT-99-36-1, Second Amended Indictment, ¶¶ 44–45 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 6, 2004).

[107] *See* Gregory M. Mose, *The Destruction of Churches and Mosques in Bosnia-Herzegovina: Seeking a Rights-Based Approach to the Protection of Religious Cultural Property*, 3 BUFFALO J. INT'L L. 180, 191–99 (1996).

[108] *See, e.g.*, Karadžić & Mladić (Review of the Indictment), *supra* note 102, ¶ 94.

[109] Case 002/01, Judgment, ¶ 523 (Trial Chamber, Extraordinary Chambers in the Courts of Cambodia Aug. 7, 2014) [hereinafter Case 002/01].

[110] Rome Statute, *supra* note 1, arts. 8(2)(b)(ix), 8(2)(e)(iv).

charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives" is a war crime.[111] This comprehensive definition represented a substantial improvement over the 1954 Hague Convention and the Geneva Conventions' approach to the topic.[112] The choice to extend the protection to all buildings dedicated to religion was not accidental. The *travaux préparatoires* of the Rome Statute indicate that the drafters, when deciding on the war crime of intentionally attacking buildings dedicated to religion,[113] were divided between the broad definition in the 1907 Hague Convention (IV) and the narrow one found in the Geneva Conventions Protocol I.[114] The final text reveals that they chose the former: the protection was intended to extend to all buildings dedicated to religion, and not only to those regarded as cultural heritage sites.

In addition to expanding protection to all buildings dedicated to religion, the Rome Statute enhanced the protection for such buildings in two significant ways. First, the Rome Statute defines as a war crime "intentionally directing attacks against buildings dedicated to religion,"[115] and therefore the war crime does not depend on the result of the attack; in short, the actual destruction of religious buildings is not necessary for criminal prosecution.[116] Second, the Rome Statute does not qualify buildings dedicated to religion as a subset of cultural property. Rather, buildings dedicated to religion have a stand on their own, alongside buildings dedicated to education, art, science, and health, as well as historic monuments.[117] While some buildings may fall under multiple categories, it is essential—at least from a human rights perspective—to acknowledge the importance of each item separately.

The Rome Statute also has its limitations, however. Indeed, it appears to protect only "buildings dedicated to religion," and not necessarily all sacred sites. Although some religious groups might define a mountain as a sacred place,[118] and

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[111] *Id*.

[112] *See* discussion *supra* § A (i).

[113] Preparatory Committee on the Establishment of an International Criminal Court, *Decisions Taken by the Preparatory Committee at Its Session Held from 11 to 21 Feb. 1997*, § B(2)(d), UN Doc. A/AC.249/1997/L.5.

[114] *Compare* The 1907 Hague Convention (IV), *supra* note 30, art. 27, *with* Geneva Conventions Protocol I, *supra* note 33, art. 85(4)(d).

[115] Rome Statute, *supra* note 1, arts. 8(2)(b)(ix), 8(2)(e)(iv). *See also* Commission of Responsibilities, Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 14 AM. J. INT'L L. 95, 115 (1920); Int'l Crim. Trib. for the Former Yugoslavia Statute, *supra* note 101, art. 3(d).

[116] *See, e.g.*, WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 268 (Oxford Univ. Press 2nd ed. 2016); *see also* CHRISTINE BYRON, WAR CRIMES AND CRIMES AGAINST HUMANITY IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 111 (2009).

[117] *Compare* Rome Statute, *supra* note 1, arts. 8(2)(b)(ix), 8(2)(e)(iv), *with* 1954 Hague Convention, *supra* note 33, art. 1(a).

[118] *See* UNESCO, *Report of the World Heritage Committee, Twelfth Session*, ¶ XIV/II A, UN Doc.

indigenous peoples might claim an area of land as a place of worship,[119] the text of Rome Statute alone does not seem to envision the protection of these sacred sites. Nevertheless, if the ICC reads this provision in line with "internationally recognized human rights,"[120] a broader interpretation of buildings dedicated to religion could incorporate sacred sites.[121]

All of the characteristics discussed above provide greater protections for buildings dedicated to religion during armed conflicts. Although it might be easier to recognize some places of worship as merely cultural sites, in the eyes of the believer such buildings will have a much more profound meaning. Thus, if victims claim that their religious buildings were attacked during armed conflicts, the ICC should address these buildings as religious, not only as a cultural.[122] Additionally, small buildings dedicated to religion, such as worship places for gatherings of minority religious groups, might not be considered as having any cultural appeal,[123] but should still be considered buildings dedicated to religion under the Rome Statute.[124]

In summary, the Rome Statute substantially expanded the protections afforded to buildings dedicated to religion when it was adopted in 1998. It also helped the ICRC define the protection of all buildings dedicated to religion as a rule of international customary law.[125] Still, this expansion is meaningless if the ICC does not apply the broadened concept to its cases. Thus, this Article will now turn to an analysis of the role of international human rights law in *Al Mahdi*, and then focus on the specific question regarding freedom of religion or belief in the present case.

B. Human Rights in Al Mahdi

1. Applicable Law

Article 21 of the Rome Statute lists the legal sources applicable at the ICC in a hierarchical manner. Under Article 21(1)(a), the ICC shall apply the Rome Statute, the Elements of Crimes, and the Rules of Procedure and Evidence,[126]

SC-88/CONF.001/13 (Dec. 23, 1988).

[119] Lubicon Lake Band, *supra* note 95, ¶ 16.4.

[120] Rome Statute, *supra* note 1, art. 21(3).

[121] *See, e.g.*, the Decisions of the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights, *supra* notes 92, 93.

[122] *See, e.g.*, Al Mahdi (Judgment and Sentence), *supra* note 5.

[123] Emerson Giumbelli, *When Religion is Culture: Observations about State Policies Aimed at Afro-Brazilian Religions and Other Afro-Heritage*, 8 REVISTA SOCIOLOGIA & ANTROPOLOGIA 401, 404–07 (2018).

[124] Rome Statute, *supra* note 1, arts. 8(2)(b)(ix), 8(2)(e)(iv).

[125] HENCKAERTS & DOSWALD-BECK, *supra* note 2, at 127–28.

[126] Rules of Procedure and Evidence, Sept. 9, 2002, ICC-ASP/1/3 [hereinafter ICC Rules of Procedure

which constitute the ICC's "internal" applicable law. This internal law contains human rights clauses. For example, there are normative provisions on the rights of defendants and victims.[127] Moreover, the crime against humanity of persecution for internationally impermissible grounds such as religion falls under the jurisdiction of the ICC.[128] Additionally, Article 21 hierarchically lists two "external" tiers of applicable law at the ICC. As Article 21(1)(b) lays down, the first tier consists of "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict."[129] In turn, the second tier consists of "general principles of law derived by the Court from national laws of legal systems of the world."[130] In order to apply external subsidiary law, the ICC in its case law has determined that two conditions must be met: there must (i) be a gap in the "internal" applicable law, i.e., the ICC legal instruments detailed in Article 21(1)(a), that the rules of treaty interpretation under the Vienna Convention of the Law of the Treaties cannot fill; and (ii) such application needs to be consistent with "internationally recognized human rights" as Article 21(3) of the Rome Statute requires.[131] Under Article 21(2), "[t]he Court may apply principles and rules of law as interpreted in its previous decisions."[132] However, external international human rights law and international humanitarian law jurisprudence are not mentioned. Although the ICC has relied on such case law, this jurisprudence is not per se binding on the Court.[133]

Unlike in other cases, the ICC did not explicitly invoke Article 21 in its *Al Mahdi* judgment and sentence[134] and reparations order.[135] Nevertheless, Trial Chamber VIII did refer to international humanitarian law instruments previously examined, including the 1907 Hague Convention (IV),[136] Additional Protocols I and II to the Geneva Conventions,[137] and the 1999 Second Hague Protocol.[138] This corresponds to the context of armed conflict in which the events at issue in *Al Mahdi* took place. As for reparations, Trial Chamber VIII followed previous ICC

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and Evidence].

[127] Rome Statute, *supra* note 1, arts. 55, 67, 68, 75, 82(4), 75, 85.

[128] *Id*. art. 7(1)(h).

[129] *Id*. art. 21(1)(b).

[130] *Id*. art. 21(1)(c).

[131] Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 126 (Mar. 4, 2009).

[132] Rome Statute, *supra* note 1, art. 21(2).

[133] Prosecutor v. Bemba, Case No. ICC-01/05-01/08-3343, Judgment Pursuant to Article 74 of the Statute, ¶ 72 (Mar. 21, 2016).

[134] *See* Al Mahdi (Judgment and Sentence), *supra* note 5.

[135] *See* Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15-236, Reparations Order (Aug. 17, 2017). [hereinafter Al Mahdi (Reparations Order)].

[136] The 1907 Hague Convention (IV), *supra* note 30.

[137] 1954 Hague Convention, *supra* note 33; 1999 Second Protocol, *supra* note 37.

[138] 1999 Second Protocol, *supra* note 37.

jurisprudence,[139] invoking the UN General Assembly Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Victim Declaration)[140] and, especially, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Reparations Principles).[141]

Nonetheless, the Chamber did not call on major international or regional human rights instruments. International humanitarian law is *lex specialis* in nature because it consists of norms which are specially tailored to regulate armed conflicts.[142] Nevertheless, international practice[143] and scholars[144] accept that, subject to certain exceptions, international human rights law obligations are not derogated during armed conflicts; in principle at least, international humanitarian law and international human rights law norms apply concurrently. Although Trial Chamber VIII did not refer to international human rights law treaties, the Chamber invoked a human right to cultural life and its physical embodiments under the aforementioned international humanitarian law instruments and the World Heritage Convention.[145] Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Human Rights and Article 17(2) of the African Charter on Human and Peoples' Rights also recognize this right. However, these instruments were generally ignored in *Al Mahdi*. Due to their (potential) relevance, Trial Chamber VIII should, at minimum, have explicitly acknowledged why it considered other human rights treaties, but not these particular treaties, in order to justify the judicial selection of the invoked legal sources.

More problematically, Trial Chamber VII focused too much on the cultural dimensions of the Timbuktu monuments and on only one human right: the right

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[139] *See* Al Mahdi (Reparations Order), *supra* note 135, ¶¶ 24–25.

[140] G.A. Res. 40/34 Annex, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985) [hereinafter UN Victim Declaration].

[141] G.A. Res. 60/147 Annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Mar. 21, 2006) [hereinafter UN Reparations Principles].

[142] *See* Marco Sassòli & Laura Olson, *The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts*, 90 INT'L REV. RED CROSS 599, 603–05 (2008); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep 226, July 8, 1996, ¶ 25 [hereinafter Nuclear Weapons (Advisory Opinion)].

[143] Nuclear Weapons (Advisory Opinion) *supra* note 142;142; *see also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep 136, ¶ 106 (July 9, 2004); UN Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, ¶ 11 (May 26, 2004).

[144] Jean-Marie Henckaerts, *Study on customary international humanitarian law*, 87 INT'L REV. RED CROSS 175, 195–96 (2005); Andrew Clapham, *The Complex Relationship Between the Geneva Conventions and International Human Rights Law*, *in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY, 734 (Andrew Clapham, et al. eds., 2015); Sassòli & Olson, *supra* note 142, at 603.

[145] Al Mahdi (Reparations Order), *supra* note 135, ¶ 20.

to cultural life. This determination was made at the expense of further considerations of the serious breaches of the victims' right to freedom of religion or belief, given the religious nature of the buildings attacked in Timbuktu. Subsequent submissions filed by parties and participants in *Al Mahdi* largely followed this trend.[146] As Article 18 of the ICCPR and articles of regional human rights treaties, such as Article 8 of the African Charter on Human and Peoples' Rights, recognize freedom of religion or belief, the absence of references to these treaties and relevant human rights jurisprudence in the *Al Mahdi* decisions constitutes an important deficit. Despite the lack of explicit reference to these authorities, however, Trial Chamber VIII extensively relied on previous reparation case law of the ICC, which has used (as adapted) international human rights law and international humanitarian law sources, to decide on victim participation and, especially, reparations in *Al Mahdi*.[147] Thus, Trial Chamber VIII "indirectly" relied on international human rights law sources incorporating freedom of religion or belief. Nonetheless, the aforementioned excessive judicial focus on cultural aspects in *Al Mahdi* caused some negative side effects. For example, Trial Chamber VIII invoked the case law of the Inter-American Court of Human Rights on disruption of culture,[148] but it neglected international human rights law and international humanitarian law jurisprudence on freedom of religion or belief, especially case law related to sacred sites or places of worship.[149]

2. Consistency with Human Rights

Under Article 21(3) of the Rome Statute, "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction," including on grounds of "religion or belief."[150] Under its jurisprudence, the ICC must interpret and apply "the law applicable under the Statute . . . in accordance with internationally recognized human rights."[151] Human rights underpin the Rome Statute,[152] the ICC

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[146] *See, e.g.*, Prosecutor v. Al Mahdi, ICC-01/12-01/15-194, UNESCO Amicus Curiae Observations (Dec. 2, 2016)) [hereinafter Al Mahdi (UNESCO Amicus Curiae)].

[147] *See, e.g.*, Prosecutor v. Lubanga, ICC-01/04-01/06-3129-AnxA, Order for reparations, ¶¶ 13–19, 23–28 (Mar. 3, 2015)) [hereinafter Lubanga (Order for Reparations)].

[148] Al Mahdi (Reparations Order), *supra* note 135, ¶ 85 n. 134.

[149] *E.g.*, Rio Negro Massacres, *supra* note 92, ¶¶ 151–65; Kichwa Indigenous People of Sarayaku, *supra* note 92, ¶¶ 217–20; Endorois Welfare Council, *supra* note 93, ¶¶ 163–73; Afr. Comm'n H.P.R. v. Kenya, *supra* note 93, ¶¶ 162–69; Cyprus v. Turkey (Merits), *supra* note 94, ¶¶ 241–47.

[150] Rome Statute, *supra* note 1, art. 21(3).

[151] Lubanga (Order for Reparations), *supra* note 147, ¶ 37

[152] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 Oct. 2006, ¶ 37 (Dec. 13, 2006)) [hereinafter Lubanga (Jurisdiction of the Court)].

must exercise its jurisdiction in accordance with these rights,[153] and Article 21(3) underlies the whole Rome Statute regardless of *lex specialis* provisions.[154] Thus, the decisions of the ICC must be consistent with international human rights law. Article 21(3) arguably has a "supra-legal" or "constitutional" character.[155] Nevertheless, the ICC has appropriately pointed out that it is not a human rights court.[156] By definition, the ICC is an international criminal tribunal with a mandate to determine individual criminal liability rather than State responsibility. Indeed, Article 21(3) does not advocate that the ICC should adjudicate human rights. However, when the ICC exercises its mandate, it should consider all relevant international human rights. As discussed in the previous Section, the applicable law at the ICC includes human rights clauses such as provisions on the rights of the victims (internal applicable law) and, where necessary, international human rights law sources such as the law and practice of regional human rights courts (external applicable law). Moreover, human rights laws constitute a practical standard to assess the legitimacy, legality, and effectiveness of international courts, including the ICC.[157] Furthermore, the adapted or prudent use of international human rights law sources, particularly international human rights law jurisprudence,[158] by international criminal tribunals helps to address issues of fragmentation in international law.[159]

Unlike other cases at the ICC, the judicial decisions in *Al Mahdi* lack explicit references to Article 21(3) of the Rome Statute, introducing methodological inconsistencies in the ICC's practice. A closer analysis of the *Al Mahdi* decisions, however, reveals that the court used international human rights law and international humanitarian law sources, mainly for interpretation and application

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[153] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, ¶ 602 (Mar. 14, 2012).

[154] Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11-565, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 Oct. 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi," ¶ 229 (July 24, 2014) [hereinafter Gaddafi (Judgment on the Appeal on the admissibility of Al-Senussi)].

[155] SCHABAS, *supra* note 116; Alain Pellet, *Applicable Law*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 1051, 1080–81 (Antonio Cassese, et al. eds., 2002).

[156] Gaddafi (Judgment on the Appeal on the admissibility of Al-Senussi), *supra* note 154, ¶ 219.

[157] Nienke Grossman, *The Normative Legitimacy of International of International Courts*, 86 TEMPLE L. REV. 61, 96–102 (2013); Göran Sluiter, et al., *Introduction*, *in* INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES, 1, 27 (Göran Sluiter, et al. eds., 2013); Sigall Horovitz, et al., *The International Criminal Court*, *in* ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS, 232–51 (Yuval Shany ed., 2014).

[158] ASBJØRN EIDE & MORTEN BERGSMO, HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN: ESSAYS IN HONOUR OF ASBJØRN EIDE 20–21 (2003).

[159] Sergey Vasiliev, *International Criminal Tribunals in the Shadow of Strasbourg and Politics of Cross-fertilisation*, 84 NORDIC J. INT'L L. 371, 388–91 (2015); Paolo Lobba & Triestino Mariniello, *The Grammar of the Judicial Dialogue between International Criminal Tribunals and the European Court*, *in* JUDICIAL DIALOGUE ON HUMAN RIGHTS THE PRACTICE OF INTERNATIONAL CRIMINAL TRIBUNALS, 1, 1–4 (Paolo Lobba & Triestino Mariniello eds., 2017).

purposes. This is consistent with the jurisprudence of the ICC.[160] In certain situations in *Al Mahdi*, international human rights law and international humanitarian law were judicially used to verify, further back up, and contextualize certain interpretations or outcomes already obtained via direct interpretation or application of the ICC legal instruments. For instance, there are references to international humanitarian law instruments in the interpretation and application of the provisions of the Rome Statute and the Elements of Crimes that concern the legal elements of the war crime of intentional attack against protected objects.[161] The fact that Trial Chamber VIII consulted international law sources fulfilled to a substantial extent, albeit not totally, the requirement of interpretative and applicative consistency with internationally recognized human rights laid down in Article 21(3) of the Rome Statute.

International human rights law played a more crucial role with regard to victim participation and reparations in *Al Mahdi*. Aside from general references to the UN Victim Declaration and the UN Reparations Principles, the court relied on the ICC's prior jurisprudence on victim participation and reparations.[162] This case law uses international human rights law sources, notably the aforementioned instruments and regional human rights case law, for clarifying or defining functions.[163] This corresponds to legal notions or categories merely mentioned in ICC legal instruments, such as definitions of elements and subcategories of victims, kinds of inflicted harm, reparations principles, reparations modalities (compensation, rehabilitation, symbolic measures, etc.), reparations types (individual and collective awards), and others. To identify reparations principles applicable in *Al Mahdi*, Trial Chamber VIII largely used international human rights law sources as interpreted and applied in the ICC's previous jurisprudence. Trial Chamber VIII invoked a number of principles, including: fair, equal, human, and dignified treatment of victims; the granting of reparations without adverse discrimination unless prioritization of those most harmed is needed; the right of victims to appropriate, adequate, and prompt reparations; the reflection of local cultural and customary practices on reparations unless these practices are discriminatory and exclusionary; the adoption of gender-sensitive approaches, considering gender-specific risks, challenges, and discrimination in gaining

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[160] *See, e.g.*, Prosecutor v. Lubanga, ICC-01/04-01/06-2904, Decision establishing the principles and procedures to be applied to reparations, ¶¶ 182–255 (Aug. 7, 2012); *see also* Stephen Bailey, *Article 21(3) of the Rome Statute: A Plea for Clarity*, 14 INT'L CRIM. L. REV. 513, 513 (2014); Margaret McAuliffe deGuzman, *Article 21 Applicable law in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 932, 947–48 (Kai Ambos & Otto Triffterer eds., Nomos 3rd ed. 2016); SCHABAS, *supra* note 116, at 530–34.

[161] Al Mahdi (Judgment and Sentence), *supra* note 5, ¶¶ 14–15.

[162] Al Mahdi (Reparations Order), *supra* note 135, ¶¶ 24–26.

[163] Annika Jones, *Insights Into an Emerging Relationship-Use of Human Rights Jurisprudence at the International Criminal Court*, 16(4) HUM. RTS. L. REV. 701, 719–22 (2016).

access to and defending cultural heritage; and consistency with the rights of the convicted person.[164]

3. Human Rights as an Additional Legal Source

As legal scholars have noted, the ICC has to a certain extent relied on Article 21(3) of the Rome Statute for "generative" and "gap-filling" functions, which suggests that internationally recognized human rights not included in the ICC's internal law are applicable and therefore become an additional legal source.[165] For instance, the ICC, based on international human rights law, has stayed proceedings when breaches of abuses of process make a fair trial impossible, though the ICC's legal instruments do not include this remedy.[166] The ICC has also invoked substantive rights, such as the right to privacy and family life;[167] the right to liberty;[168] and the rights to education and health.[169] Such reliance on these substantive rights is consistent with: i) the inclusion of international human rights law as part of subsidiary external sources applicable at the ICC; and ii) the existence of generative effects, which mean the ICC's application of certain human rights or remedies is not explicitly included in the Rome Statute.[170]

Trial Chamber VIII did not invoke Article 21(3) of the Rome Statute in *Al Mahdi*. Nonetheless, based on international humanitarian law instruments and the World Heritage Convention, the Chamber invoked the "human right to cultural life and its physical embodiments."[171] By referring to UNESCO and expert submissions in *Al Mahdi*, the Chamber drew two main conclusions. First, cultural heritage involves cultural identification and development processes of individuals and groups that wish to transmit this heritage to future generations, including tangible heritage (sites, structures, and remains of historical, religious, and

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[164] Al Mahdi (Reparations Order), *supra* note 135, ¶¶ 29, 31–34, 37, 105, 146, 148.

[165] Jones, *supra* note 163, at 720–22; Bailey, *supra* note 160, at 535–36, 549; Gilbert Bitti, *Article 21 and the Hierarchy of Sources of Law before the ICC*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT, 437–38 (Carsten Stahn ed., Oxford Univ. Press 2015).

[166] Lubanga (Jurisdiction of the Court), *supra* note 152, ¶¶ 37–39; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1486, Appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008," ¶ 77 (Oct. 21, 2008).

[167] Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06-785-Red, Public redacted version of Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts, ¶ 33 (Aug. 18, 2015).

[168] Prosecutor v. Katanga, Case No. ICC-01/04-01/07-3405-Anx, Decision on the application for the interim release of detained Witnesses DRCD02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, Dissenting opinion of Judge Christine Van den Wyngaert, ¶¶ 12–15 (Oct. 1, 2013).

[169] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, Dissenting Opinion of Judge Elizabeth Odio Benito, ¶ 21 (July 13, 2012).

[170] *See, e.g.*, Bailey, *supra* note 160, at 535–36, 549; Bitti, *supra* note 165, at 437–38.

[171] Al Mahdi (Reparations Order), *supra* note 135, ¶ 14.

cultural value) and intangible heritage (traditions, customs, practices, etc.).[172] Second, the loss of heritage during armed conflicts deprives a community of its identity, its memory, and physical testimony of its past.[173]

Several elements of cultural heritage considered by Trial Chamber VIII in *Al Mahdi* have religious aspects. As the Chamber additionally remarked, the World Heritage List included Timbuktu mosques and holy places because they played an essential role in the spread of Islam and are of continuing historical and spiritual importance.[174] Yet the Chamber fell short of referring to freedom of religion or belief. This deficit is striking because the Chamber pointed out that cultural heritage is important not only in itself but also in connection with its human dimension, in that most cultural property and heritage is of sentimental value.[175]

Trial Chamber VIII correctly pointed out the narrow scope of the charge in *Al Mahdi* compared to the wider range of alleged human rights violations in Timbuktu.[176] Nevertheless, the Chamber should have highlighted the gross violations of other human rights such as freedom of assembly and, in particular, freedom of religion or belief. Regional human rights bodies in cases concerning religious sites have generally found State's responsible for violations of both cultural rights and freedom of religion or belief.[177] Under Article 18 of the ICCPR and various regional instruments, freedom of religion or belief encompasses both private and public dimensions.[178] These public dimensions comprise active manifestations such as worship, access to places of worship, observance, practice, and teaching.[179]

Therefore, the obliteration of the Timbuktu religious sites constituted a serious violation of victims' freedom of religion or belief. The attacks were part of the religious measures and edicts that Ansar Dine/AQIM imposed in occupied Timbuktu to eliminate any visible vice, as determined and implemented by Al Mahdi, who headed the Hesbah (morality brigade).[180] References to violations of freedom of religion or belief would have partially compensated for the lack of charges on crimes against humanity for religious persecution. Furthermore, an

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[172] *Id*. ¶ 15.

[173] *Id*. ¶ 14.

[174] *Id*. ¶ 21.

[175] *Id*. ¶¶ 16, 22.

[176] *Id*. ¶ 108.

[177] E.g., Rio Negro Massacre, *supra* note 92, ¶¶ 151–65; Kichwa Indigenous People of Sarayaku, *supra* note 92, ¶¶ 217–20; Endorois Welfare Council, *supra* note 93, ¶¶ 163–73; Afr. Comm'n H.P.R. v. Kenya, *supra* note 93, ¶¶ 162–69.

[178] UN Human Rights Committee General Comment 22, *supra* note 3, ¶ 4; MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 410–25 (N P Engel 2nd rev. ed. 2005).

[179] UN Human Rights Committee General Comment 22, *supra* note 3, ¶ 4; Cyprus v. Turkey (Merits), *supra* note 94, ¶¶ 245–46; *see also* NOWAK, *supra* note 178, at 419–21.

[180] Al Mahdi (Judgment and Sentence), *supra* note 5, ¶ 81.

explicit analysis of freedom of religion or belief as applied to international crimes involving religious elements in *Al Mahdi* would have been relevant for future cases at the ICC, including the second case related to Timbuktu, *Prosecutor v. Al Hassan*. The following Section discusses aspects related to freedom of religion or belief in *Al Mahdi*.

II.
FREEDOM OF RELIGION OR BELIEF IN *AL MAHDI*

A. Accountability and Sentencing

1. Intentional Attacks Against Buildings Dedicated to Religion

The war crime of intentionally directing attacks against protected buildings requires an association with an armed conflict.[181] From the factual background and analysis conducted by Trial Chamber VIII in the judgment and sentence in *Al Mahdi*, the armed conflict in Mali had religious elements.[182] Ansar Dine/AQIM's occupation of Timbuktu from April 2012 to January 2013 was an episode of internal armed conflict between these groups and the government of Mali. The destruction of the protected sites in Timbuktu was part of the religious and political edicts that Ansar Dine/AQIM imposed during the occupation. These measures were implemented through the establishment of a functioning local government, which in turn created institutions such as an Islamic police force, an Islamic tribunal, and the Hesbah. These religious aspects are also present in the case against Al Hassan. Al Hassan was the de facto chief of the Islamic police and was suspected both of crimes against humanity based on the religious persecution of Timbuktu's inhabitants and the war crime of intentionally attacking historic monuments and buildings dedicated to religion.[183]

As Daragh Murray explains, "the law of armed conflict and international human rights law require the Occupying Power to respect religious freedom [and] [i]nternational human rights law provides further specificity in relation to the content of this obligation."[184] This obligation encompasses the protection of buildings dedicated to religion.[185] The international community originally thought that this obligation applied to the occupying State during international armed conflicts, but legal scholars have suggested that non-State actors who exercise

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[181] *Id.* ¶ 18.

[182] *See id.* ¶ 31. *See also* Juan-Pablo Perez-Leon-Acevedo, *International Criminal Justice Rendered Concerning the Attack Against Timbuktu Mausoleums and Mosque: Focus on Religion-Related Considerations*, 6 OXFORD J. L. & RELIGION 180 (2017).

[183] Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18-2, Mandat d'arrêt à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Mar. 17, 2018) ¶¶ 1, 14.

[184] DARAGH MURRAY, PRACTITIONERS' GUIDE TO HUMAN RIGHTS LAW IN ARMED CONFLICT ¶ 10.44 (2016).

[185] *See* UN Human Rights Committee General Comment 22, *supra* note 3, ¶ 4.

control over a territory and a population are plausibly and mutatis mutandis bound by certain international human rights law principles, standards, and obligations.[186] Some international practice also supports this trend.[187] In any event, a case-by-case analysis must be applied.[188] The status of Al Mahdi and other Ansar Dine/AQIM members as non-State actors does not mean that they cannot violate international human rights law. Under the doctrine of "horizontal effects," certain rights and freedoms "require extensive protective measures by the State to prevent violations by private persons."[189] In light of this doctrine, Article 18(1) and 18(2) of the ICCPR can arguably be interpreted in a manner that requires States to prevent private coercion of individuals to have or follow certain religious beliefs.[190] Mali was unable to protect Timbuktians from the serious breaches of their freedom of religion or belief committed by Ansar Dine/AQIM during the occupation of Timbuktu. These abuses largely exceeded permissible limitations on freedom of religion or belief during public emergencies, such as armed conflicts, and stood in clear violation of Articles 4(2) and 18(3) of the ICCPR.[191]

As noted above, the Rome Statute substantially expanded the protection of buildings dedicated to religion during international and internal armed conflicts.[192] However, other international instruments, especially UNESCO-related ones, have disregarded some human rights elements in favor of others. Roger O'Keefe correctly affirmed that with the 1999 Second Hague Protocol and the Rome Statute, "the international law on the protection of cultural property in armed conflict has assumed a shape that will probably remain unchanged for quite some time."[193] Nevertheless, scholars and international courts have said very little about the connection between the protection of buildings dedicated to religion and civil and political rights such as freedom of religion or belief. Unfortunately, the ICC did not shed light on this in *Al Mahdi* either.

Trial Chamber VIII understood in *Al Mahdi* that the criminal "conduct" was "the attack on cultural objects."[194] This corresponds to the judicial focus on cultural aspects in *Al Mahdi*. Nevertheless, Article 8(2)(e)(iv) of the Rome Statute

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[186] *See* Oberleitner, *supra* note 53, at 211–19; Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations* 88 INT'L RED CROSS 491, 495–508 (2006).

[187] *See, e.g.*, Philip Alston (Special Rapporteur on extrajudicial summary or arbitrary executions), *Annual Report*, ¶ 76, UN Doc. E/CN.4/2005/7 (Dec. 22, 2004); S.C. Res. 1564, Preamble (Sept. 18, 2004).

[188] *See* Sandesh Sivakumaran, *Re-envisaging the International Law of Armed Conflict*, 22 EUR. J. INT'L L. 219, 255–56 (2001).

[189] NOWAK, *supra* note 178, at xxi. *See also* ANJA SEIBERT-FOHR, PROSECUTING SERIOUS HUMAN RIGHTS VIOLATIONS 31–32 (Oxford Univ. Press 2009).

[190] SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 569 (Oxford Univ. Press 3rd ed. 2013); NOWAK, *supra* note 178, at xxi, 412–13.

[191] See ICCPR, *supra* note 55, arts. 4(2), 18(3)

[192] Rome Statute, *supra* note 1, arts. 8(2)(b)(ix),) and 8(2)(e)(iv).

[193] O'KEEFE, *supra* note 26, at 360.

[194] Al Mahdi (Judgment and Sentence), *supra* note 5, ¶ 18.

does not explicitly include "cultural objects;" instead, this normative provision mentions attacks against "buildings dedicated to religion [and] historic monuments . . . provided that they are not military objectives." Article 8(2)(e)(iv)(2) of the Elements of Crimes uses the same language.[195]

Compared to the reparations award in *Al Mahdi* (examined later), it should be noted that Trial Chamber VIII carefully considered the religious nature of the protected sites attacked in Timbuktu in its judgment and sentence. Trial Chamber VIII stated the following points.[196] First, the Timbuktu mausoleums of saints and mosques constitute an integral part of the religious life of Timbuktu, serving as prayer places for residents and pilgrimage sites for external visitors.[197] Second, Al Mahdi monitored the religious practices of Timbuktians concerning mausoleums to raise awareness about so-called inconsistent religious Muslim practices and to stop or prohibit them.[198] Third, the destruction of the protected sites corresponded to an alleged Islamic ban on any construction over a tomb.[199] Fourth, Al Mahdi wrote a sermon dedicated to the destruction of the mausoleums and read a prayer at the launch of the attack.[200] Fifth, the nine mausoleums and the destroyed mosque had clearly served vital religious functions, especially for local Muslims.[201] Apart from one mausoleum, all of the attacked sites were religious and historic monuments that had the status of protected UNESCO World Heritage sites.[202]

The Chamber concluded that religion motivated Al Mahdi's attacks.[203] First, Al Mahdi referred to the attack against Timbuktu sites as a way of "eradicating superstition, heresy . . . or subterfuge which can lead to idolatry," and the attackers feared that "these myths will invade the beliefs of people and the ignorant who, because of their ignorance and their distance from religion, will think that this is the truth."[204] Second, Al Mahdi added that he did not "know the truth about those saints . . . [but] fools . . . come and take sand from those places to get blessed."[205] Third, he claimed to execute the attack "in collaboration with the imams . . . We only paid attention to the buildings constructed above the graves in the cemetery, and the tombs that are annexed to the mosques from the

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[195] *See also* Roberta Arnold & Stefan Wehrenberg, *Article 8(2)(b)(ix)*, *in* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 416–21 (Otto Triffterer & Kai Ambos eds., C.H. Beck 3rd ed. 2016).

[196] Al Mahdi (Judgment and Sentence), *supra* note 5, ¶¶ 28, 34–39.

[197] *Id.* ¶ 34.

[198] *Id.* ¶ 35.

[199] *Id.* ¶ 36.

[200] *Id.* ¶ 37.

[201] *Id.* ¶ 38.

[202] *Id.* ¶ 39.

[203] *Id.* ¶ 48.

[204] *Id.* ¶ 38(viii).

[205] *Id.* ¶ 41.

outside."[206] Fourth, Al Mahdi stressed that Ansar Dine/AQIM spent time "explaining to the people what's right and what's wrong, and now's the time for implementation,"[207] namely, the attack. Fifth, Al Mahdi stated that "[t]hose UNESCO jackasses think that this is heritage. Does 'heritage' include worshipping cows and trees?"[208] Thus, in addition to the circumstances of the attack, Trial Chamber VIII examined Al Mahdi's statements to conclude that the offenders intended to attack and destroy religious buildings.[209]

2. Sentencing

Article 78 of the Rome Statute and Rule 145 provide sentencing guidelines.[210] Under the three main categories of sentencing factors considered in *Al Mahdi*, several religion-related elements can be identified.[211]

With respect to the assessment of the gravity of the crimes committed, Trial Chamber VIII considered "in particular, the extent of damage caused, the nature of the unlawful behaviour and, to a certain extent, the circumstances of the time, place and manner."[212] As the Chamber pointed out, Al Mahdi, unlike other defendants at the ICC, was not charged with a crime against persons but with the less grave crime against property.[213] Nevertheless, the Chamber concluded that this was a crime "of significant gravity."[214]

Among the sentencing factors related to the assessment of gravity of the crimes committed, particularly "extent of the damage caused" and "the nature of the unlawful behaviour,"[215] the Chamber identified the following religion-related elements in its judgment and sentence. First, Timbuktu is an emblematic city with a mythical dimension that played a crucial role in the regional expansion of Islam, and is at the heart of Malian cultural heritage due mainly to manuscripts and mausoleums of saints that are located there.[216] Second, the Timbuktu mausoleums were of great importance to the locals, who admired the sites and were attached to them.[217] These mausoleums reflected a commitment to Islam and were psychologically important because they were perceived as protecting locals.[218] The mausoleums were among the most cherished Timbuktu buildings, and were

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206 *Id.*

207 *Id.*

208 *Id.* ¶ 46.

209 *Id.* ¶ 48.

210 *See generally* SCHABAS, *supra* note 116, at 1163–81.

211 *See also* Perez-Leon-Acevedo, *supra* note 182, at 183–86.

212 Al Mahdi (Judgment and Sentence), *supra* note 5, ¶ 76.

213 *Id.* ¶ 77.

214 *Id.* ¶ 82.

215 *Id.* ¶ 76.

216 *Id.* ¶ 78.

217 *Id.*

218 *Id.*

looked after by the entire community, visited by Timbuktians, and used as prayer places and pilgrimage locations.[219] Third, the crime was perpetrated for religious motives, as part of measures adopted by Ansar Dine/AQIM to impose their religious edicts on the population of Timbuktu during the occupation of the city, and it affected multiple victims.[220] The attack was part of the Hesbah's campaign, led by Al Mahdi, to eradicate any "visible vice"—namely, destroying buildings dedicated to religion in order to stop religious practices that Ansar Dine/AQIM regarded as prohibited.[221] Thus, Trial Chamber VIII appropriately concluded that the "discriminatory religious motive invoked for the destruction of the sites is undoubtedly relevant to [an] assessment of the gravity of the crime."[222]

In addressing Al Mahdi's culpability, Trial Chamber VIII assessed his degree of participation, intent, and means of executing the crime.[223] The Chamber concluded that Al Mahdi's actions were religiously motivated, finding that he played an essential role in the execution of the attack, including through organization, supervision, and personal participation in the destruction of protected sites.[224] Al Mahdi justified the need for the attack by writing a sermon, which was read prior to the attack, and by delivering public speeches as the destruction occurred.[225] Although Al Mahdi indicated that Timbuktian practices were prohibited by the Islamic legal community, he had previously been reluctant to attack the sites out of a desire to maintain a good relationship with the locals.[226] Other than the attack against the Sidi Yahia mosque, he advised against using bulldozers so as not to damage graves next to the mausoleums, and ensured that the attackers respected structures next to the mausoleums.[227] The Chamber found these to be mitigating circumstances.[228] In any event, Al Mahdi's official capacity as the head of the Hesbah was not aggravating because he did not abuse his position: "the mere fact that Mr Al Mahdi committed the crime in this position does not as such constitute an aggravating circumstance."[229] However, this conclusion is questionable in the light of the facts.

With regard to the personal circumstances of Al Mahdi, the present Article identifies the following elements in the judgment and sentence. First, Trial Chamber VIII expressly did not consider age or economic background to be

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[219] *Id.*

[220] *Id.* ¶¶ 81, 87.

[221] *Id.* ¶ 81.

[222] *Id.*

[223] *Id.* ¶ 83.

[224] *Id.* ¶¶ 84, 90.

[225] *Id.* ¶ 85.

[226] *Id.* ¶ 89.

[227] *Id.* ¶ 91.

[228] *Id.* ¶ 93.

[229] *Id.* ¶ 86.

relevant.[230] However, the Chamber did consider how well-behaved Al Mahdi was in detention.[231] Second, although the Chamber noted statements concerning Al Mahdi's education or knowledge,[232] it provided no aggravating or mitigating weight to Al Mahdi's status as a scholar and an expert on religious matters.[233] Certainly, the Chamber could have found this status aggravating: Al Mahdi belonged to a family recognized in his community for possessing a particularly deep knowledge of Islam, received a Koranic education from childhood, had a thorough knowledge of the Koran, and had lectured as an expert on religious matters.[234] Ansar Dine/AQIM leaders and the Islamic tribunal viewed and consulted him as an expert on religion.[235] Because of his religious knowledge, Al Mahdi was appointed to lead the Hesbah to regulate the "morality" of the Timbuktian inhabitants, and to prevent, suppress, and repress anything considered a vice.[236] Nevertheless, since the Chamber disregarded Al Mahdi's positive role in his community before the takeover of Timbuktu as a mitigating circumstance, the lack of judicial consideration of Al Mahdi's knowledge of religion as an aggravating circumstance was arguably "compensated" for. Third, the Chamber considered Al Mahdi's remorse and empathy towards the victims, including his offer to reimburse the cost of the destroyed door of the Sidi Yahia mosque, as a mitigating circumstance.[237]

B. Reparations

1. Reparations, Claimants, and Beneficiaries

In *Al Mahdi*, Trial Chamber VIII presented some flaws in the identification and categorization of victims. In abstracto, the Chamber correctly determined that "reparations may be granted to legal entities that are direct victims of the crime committed."[238] However, the Chamber *ratio decidendi* stated that the destruction of the protected buildings affected "not only the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community," and quoted UNESCO's assessment of local communities as "the principal victims."[239]

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[230] *Id.* ¶ 96.

[231] *Id.* ¶ 97.

[232] *Id.* ¶¶ 95–97.

[233] *Id.* ¶ 96.

[234] *Id.* ¶ 9.

[235] *Id.* ¶ 32.

[236] *Id.* ¶ 33.

[237] *Id.* ¶ 104–05.

[238] Al Mahdi (Reparations Order), *supra* note 135, ¶ 41.

[239] Al Mahdi (Judgment and Sentence), *supra* note 5, ¶ 80; Al Mahdi (Reparations Order), *supra* note 135, ¶¶ 51–52.

These findings are not entirely consistent with the law and jurisprudence of the ICC. As described above, the targets of the attacks were by definition protected objects rather than individuals. Certain war crimes specifically consist of attacks against protected or civilian objects rather than civilians.[240] Intentional direct attacks against buildings dedicated to religion (Article 8(2)(e)(iv)), for which Al Mahdi was tried and convicted, clearly fall in this category. This is also reflected in the scope of victimhood for victim participation and reparations at the ICC. Under Rule 85(a) of the ICC Rules of Procedure and Evidence, victims are "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."[241] In turn, Rule 85(b) states that victims "may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion . . . and to their historic monuments."[242] By relying on international human rights law sources, particularly the UN Reparations Principles (Principle 8), and regional human rights jurisprudence, the ICC in its jurisprudence on victim participation and reparations has identified direct and indirect victims.[243] Direct victims are those originally targeted.[244] Besides the relatives of direct victims, indirect victims include those who attempted to prevent crimes; suffered harm when helping or intervening on behalf of direct victims; or suffered personal harm as a result of these offences.[245]

In *Al Mahdi*, organizations and institutions directly related to the Timbuktu monuments and duly represented would, therefore, be considered direct victims. The inhabitants of Timbuktu would be indirect victims. In its victim participation decision in *Al Mahdi*, Trial Chamber VIII followed the requirements for participation of individual victims as established in previous ICC case law: personal identification; personal harm; and causal—but not direct—link between the harm and the crime.[246] The Chamber also determined criteria applicable to organizations and institutions: the quality of organization or institution must be established; the individual acting on behalf of the organization or institution must demonstrate his or her capacity to represent it; this individual must establish his or her identity; and the organization must have suffered direct harm resulting from

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[240] *See, e.g.*, Knut Dormann, *War Crimes under the Rome Statute of the International Criminal Court*, *in* 7 MAX PLANK YEARBOOK OF UNITED NATIONS LAW 341, 363–65 (2003).

[241] ICC Rules of Procedure and Evidence, *supra* note 126, at Rule 85(a).

[242] *Id.* at Rule 85(b).

[243] Lubanga (Order for Reparations), *supra* note 147, ¶ 6.

[244] On direct and indirect victims, see Cherif Bassiouni, International Recognition of Victims' Rights, 6 HUM. RTS. L. REV., 243, 256–57 (2006).

[245] Lubanga (Order for Reparations), *supra* note 147, ¶ 6b.

[246] Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15-97-Red, Decision on Victim Participation at Trial and on Common Legal Representation of Victims, ¶¶ 17–22 (June 8, 2016)). [hereinafter Al Mahdi (Victim Participation Decision)].

an incident within confirmed charges,[247] or charges confirmed by the Pre-Trial Chamber and which constituted the subject-matter of the trial.[248]

However, the Chamber found that the three individuals who applied on behalf of organizations dedicated to religion and their historic monuments were actually victims who had suffered personal and moral harm as a result of the crime perpetrated.[249] Indeed, all victim participants and reparations claimants in *Al Mahdi* were determined to be Rule 85(a) victims (natural persons).[250] Thus, no Rule 85(b) victim (organization or institution) participated or claimed reparations prior to the reparations order.

Despite acknowledging the suffering endured by Malians and the international community, Trial Chamber VIII appropriately focused its harm assessment on the community of Timbuktu in order to maximize the reparation effects. Through these specific reparations for Timbuktians, the Trial Chamber sought to address broader harms to the national and international community.[251] Consequently, no victim applied for reparations only on behalf of national or international community interests.[252] Trial Chamber VIII claimed to consider its assessment only as for harm suffered by or within the community of Timbuktu: "organizations or persons ordinarily residing in Timbuktu at the time of the commission of the crimes or otherwise so closely related to the city that they can be considered to be part of this community at the time of the attack."[253] Nevertheless, there is no accurate identification or delimitation of the categories of direct and indirect victims. Moreover, the harm suffered by Timbuktian organizations and institutions was not properly analyzed.

Trial Chamber VIII largely focused on natural persons for victim participation and reparations. This brought about the legal flaws discussed above. Nevertheless, such an approach may have been justified by teleological considerations. Justice for victims understood to be natural persons is an important goal of international criminal justice[254] and is embedded in the preamble of the Rome Statute.[255] Such implicit consideration of natural persons, rather than Timbuktu-related organizations, as the main or only direct victims merits further consideration of all relevant rights seriously breached by the crime committed. Yet again, the Chamber excessively focused on cultural aspects at the expense of

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[247] *Id*. ¶¶ 23–26.

[248] *See* Rome Statute, *supra* note 1, art. 61.

[249] Al Mahdi (Victim Participation Decision), *supra* note 246, ¶ 28.

[250] *Id*. ¶¶ 28, 34.

[251] Al Mahdi (Reparations Order), *supra* note 135, ¶¶ 52–55.

[252] *Id*. ¶ 52.

[253] *Id*. ¶ 56.

[254] Anne-Marie De-Brouwer & Mikaela Heikkilä, *Victim Issues*, *in* INTERNATIONAL CRIMINAL PROCEDURECRIMINALPROCEDURE: PRINCIPLES AND RULES, 1298, 1344–46, 1368–70 (Göran Sluiter, et al. eds., Oxford Univ. Press 2013); Horovitz, et al., *supra* note 157, at 232–33.

[255] *See* Rome Statute, *supra* note 1, ¶ 2 ("Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity").

any explicit analysis of freedom of religion or belief or other human rights such as freedom of assembly.[256] This arguably undermined the teleological approach. Freedom of religion or belief should have been considered on its own merits and under the principle of interdependence and indivisibility of human rights.[257]

Unlike other ancient monuments that lack or have lost religious significance, the Timbuktu monuments hold special religious importance as places of worship for Timbuktians and pilgrims today. Moreover, the attack was aimed at impeding certain forms of worship. Trial Chamber VIII indeed referred to "the faithful and inhabitants of Timbuktu" as direct victims.[258] Nevertheless, the Chamber fell short of invoking freedom of religion or belief as a powerful ground to justify its judicial categorization and assessment of victimhood. As examined later, this gap was partially filled when the Chamber examined moral harm. However, the Chamber mainly focused on the cultural rather than religious dimensions of the victims' statements. While UNESCO and experts provided evidence on cultural heritage,[259] no expert witnesses on freedom of religion or belief were present.

139 victims—137 individuals and two organizations—filed individual reparations claims.[260] The eligibility of these and other reparation claimants for individual awards will be determined during the screening process that the Trust Fund for Victims will conduct. This Trust Fund, based on Article 79 of the Rome Statute, is the designated body that implements the ICC's reparations awards under the judicial supervision of Trial Chambers.[261] As determined by Trial Chamber VIII and confirmed by the Appeals Chamber, victims who are eligible for individual awards are: "(i) those whose livelihoods exclusively depended upon the Protected Buildings and (ii) those whose ancestors' burial sites were damaged in the attack."[262] This second group corresponds to "the descendants of the saints."[263] Due to their guarding and maintaining the protected buildings, those in the second category are likely the same individuals as those in the first.[264] Trial Chamber VIII considered that these individuals have a different kind of emotional connection to the destroyed sites than the rest of Timbuktians.[265] Had the Chamber

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[256] *See, e.g.*, Al Mahdi (Reparations Order), *supra* note 135, ¶¶ 26, 34, 53.

[257] *Vienna Declaration and Programme of Action*, *supra* note 91, ¶ 5.

[258] Al Mahdi (Reparations Order), *supra* note 135, ¶ 51.

[259] *See, e.g.*, Al Mahdi (UNESCO Amicus Curiae), *supra* note 146; Al Mahdi (UN Special Rapporteur on Cultural Rights Brief), *supra* note 90.

[260] Al Mahdi (Reparations Order), *supra* note 135, ¶ 5.

[261] *See* Assembly of States Parties, Regulations of the Trust Fund for Victims, Res. ICC-ASP/4/Res.3, Regulations 54–58 (Dec. 3, 2005) [hereinafter Trust Fund for Victims].

[262] Al Mahdi (Reparations Order), *supra* note 135, ¶ 145. See also Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15-259-Red2, Judgment on the appeal of the victims against the "Reparations Order," ¶¶ 33–43 (Appeals Court, ICC Mar. 8, 2018) [hereinafter Al Mahdi (Judgment on Appeal Reparations)].

[263] Al Mahdi (Reparations Order), *supra* note 135, ¶ 89.

[264] *Id.* ¶ 145.

[265] *Id.*Al Mahdi (Reparations Order), *supra* note 135, ¶ 89.

further examined serious breaches of freedom of religion or belief, more victims might have been eligible for individual awards. Under regional human rights jurisprudence on reparations concerning violations of freedom of religion or belief that involved places of worship or sacred sites, victims have also benefited from individual awards despite judicial consideration of their communities as collective beneficiaries of reparations.[266]

Nevertheless, an exponential increase in individual reparations beneficiaries must be avoided at the ICC because available resources for reparations are scarce as a result of the indigence of the convicted and reliance on State donations. Balanced approaches should be adopted. For example, faithful Timbuktians, even those not descended from saints, suffered emotional distress as a direct result of the destruction of buildings dedicated to their religion, and should be compensated for the violation of their freedom of religion. Their eligibility, however, must be subject to a high threshold of emotional distress, as properly proven via medical and psychological tests and other methods. During the screening of individual reparations applications, the Trust Fund for Victims and Trial Chamber VIII should also take into account serious violations of freedom of religion or belief when examining the mental pain and anguish of victims whose ancestors' burial sites were damaged.

Importantly, Trial Chamber VIII has also ordered collective and symbolic reparations for the community of Timbuktu "for the mental pain/anguish and disruption of culture of the Timbuktu community as a whole."[267] Implementation of this award should also regard the serious violations of freedom of religion or belief that the Timbuktu community endured. As the Legal Representative of Victims claimed, the 139 reparation claimants are only a portion of those who suffered collective harm across Timbuktu, which had around 70,000 inhabitants at the time of the attack.[268]

2. Reparable Harm

Trial Chamber VIII mostly relied on previous ICC jurisprudence, which is partly based on international human rights law sources,[269] to identify the following principles of reparable harm. First, victims must have suffered harm as a result of the crime committed in order to receive reparations.[270] Second, harm is injury or damage that does not need to be direct, but must be personal to the victim.[271] Third,

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[266] Plan de Sánchez Massacre v. Guatemala, Reparations, Inter-Am. Ct. H.R., (ser.Series C) No. 116, ¶¶ 75–76 (Nov. 19, 2004) [hereinafter Plan de Sánchez Massacre (Reparations)]; Cyprus v. Turkey, 2014-II Eur. Ct. H.R. 1, operative ¶¶ 4–5 [hereinafter Cyprus v. Turkey (Just Satisfaction)].

[267] Al Mahdi (Reparations Order), *supra* note 135, ¶ 90.

[268] *See id.* ¶ 141.

[269] *See, e.g.*, UN Reparations Principles, *supra* note 141, at principles 15–23.

[270] Al Mahdi (Reparations Order), *supra* note 135, ¶ 42.

[271] *Id.* ¶ 43.

"harm may be material, physical or psychological."[272] Fourth, organizations must demonstrate "direct harm to their properties."[273] Fifth, the crime committed is the actual ("but/for") and "proximate" cause of reparable harm.[274] "Proximate cause" is sufficient to result in liability, and exists where it was reasonably foresee that the commission of crimes would "cause the resulting harm."[275] Sixth, "balance of probabilities" is the evidentiary standard.[276] Seventh, the liability of the convicted person "must be proportionate to the harm inflicted," their criminal participation, and specific circumstances.[277]

In *Al Mahdi*, the harm that directly resulted from breaches of freedom of religion or belief was reasonably foreseeable, reinforcing the need for consideration of such violations. Among the types of reparable harm, Trial Chamber VIII properly found moral and material or economic harm, but not bodily harm. Crimes were committed against protected buildings; there were neither crimes against persons nor factual findings with respect to crimes against persons, and bodily harm was not sufficiently foreseeable.[278] However, the Chamber did not explicitly consider serious violations of freedom of religion or belief.

While Trial Chamber VIII focused on the cultural dimension of the Timbuktu monuments to assess moral harm, it did not further examine the religious dimension of the Timbuktu monuments. Such a narrow approach is present across the Chamber's assessment of moral harm. For instance, the Chamber invoked the case law of the Inter-American Court of Human Rights to establish that international human rights law recognizes a relationship between forms of moral harm and disruption of culture.[279] Nevertheless, there is no reference to international human rights law or the relationship between moral harm and serious violations of freedom of religion or belief. Another example is the finding of emotional distress resulting from the attack on "cultural property which is integral to the community of Timbuktu."[280] Again, there was no explicit reference to the underlying breaches of freedom of religion or belief that inflicted moral or emotional distress onto victims.

International human rights law sources have considered and identified the existence of moral, psychological, or emotional harm in cases involving serious violations of freedom of religion or belief.[281] Particularly, regional human rights

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[272] *Id*.

[273] *Id*.

[274] *Id*. ¶ 44.

[275] *Id*.

[276] *Id*.

[277] *Id*. ¶ 50.

[278] *Id*. ¶¶ 93, 98–99.

[279] *Id*. ¶ 85 n. 134.

[280] *Id*. ¶ 87.

[281] *E.g*., Rio Negro Massacres, *supra* note 92, ¶¶ 151–65; Kichwa Indigenous People of Sarayaku,

jurisprudence on reparations—in cases concerning attacks against communities and their places of worship or sacred sites—has considered moral harm and other damages for violations of both cultural rights and freedom of religion or belief.[282] This jurisprudence should have been considered by Trial Chamber VIII when judicially assessing moral harm. Victim statements, some of which the Chamber quoted, clearly established the need for an assessment of moral harm comprising not only culture-related but also religion-related considerations. For example, victims claimed: "I was completely emotionally devastated by the destruction of the mausoleums"; "[M]y faith [was] shattered and my belief unsettled"; "I lost everything and all my faith"; "[T]he whole city suffered on the day the mausoleums were destroyed . . . [W]e were in great pain . . . The saints are all important to us . . . We used to seek blessings from them and make offerings to them at every milestone in our lives"; "My family, my friends, and all people of Timbuktu suffered . . . The Saints of Timbuktu are the descendants of Allah. When we used to ask for their blessings, they would be given . . . [E]ven if the saints protect us still, it's not the same as before"; and "[T]he destruction of the sacred shrines of my ancestors caused me suffering . . . [I]t was the only place in which we gathered and prayed for protection."[283]

In terms of moral harm, Trial Chamber VIII only ordered individual reparations for victims whose ancestors' burial sites were damaged in the attack, given that these people were regarded as "descendants of the saints" who "ha[d] a different kind of emotional connection to the destroyed sites than the rest of the Timbuktu population."[284] Although this is appropriate, it could have been better grounded. The Chamber should have explicitly considered serious breaches of these victims' freedom of religion or belief, as well as serious violations of their right to private life. As previously noted, consideration of freedom of religion or belief might also better guide the Chamber to identify other subcategories of victims, but with due safeguards to prevent an excessive increase in the number of reparations beneficiaries.

Nevertheless, individual reparations for moral harm do not necessarily have to come in the form of compensation. If there are insufficient resources, reparations may instead come in the form of rehabilitative and symbolic measures. In any case, Trial Chamber VIII ordered collective reparations through rehabilitation for the mental pain and anguish in favor of the Timbuktu community as a whole.[285] However, Trial Chamber VIII only invoked "disruption

supra note 92, ¶¶ 217–20; Endorois Welfare Council, *supra* note 93, ¶¶ 163–73; Afr. Comm'n H.P.R. v. Kenya, *supra* note 93, ¶¶ 162–69.

[282] Plan de Sánchez Massacre (Reparations), *supra* note 266, ¶¶ 80–89; Río Negro Massacres, *supra* note 92, ¶ 324; Cyprus v. Turkey (Just Satisfaction), *supra* note 266, operative ¶¶ 4–5; Endorois Welfare Council, *supra* note 93, ¶¶ 144–73, 239–51, and operative ¶ 1.

[283] Al Mahdi (Reparations Order), *supra* note 135, ¶ 85.

[284] *Id*. ¶ 89.

[285] *Id*. ¶¶ 90, 104.

of culture."[286] The Chamber did not mention collective violations of freedom of religion or belief of the Timbuktu community. Interestingly enough, the Chamber referred to "information describing the emotional distress and harm suffered across the Timbuktu community," and stated that the attack "not only destroyed cherished monuments but also shattered the community's collective faith that they were protected."[287] These elements point to serious underlying violations of freedom of religion or belief. The destruction of religious buildings in Timbuktu directly and negatively impacted the exercise of freedom of religion and belief of Timbuktians, who were deprived of their public places of worship. Unfortunately, the Chamber did not flesh out these elements to assess moral harm and related individual and collective reparations.

The culture-centered approach that the Trial Chamber VIII adopted (which was not developed further by the Appeals Chamber) is also problematic in its quantification of moral harm. The Chamber adopted the criteria established by an expert, based on the criteria developed in an award decision by the Eritrea-Ethiopia Claims Commission related to the damaged Stela of Matara.[288] However, this comparison is partially unsuitable. Unlike the Stela of Matara, the Timbuktu monuments are not only historical and cultural monuments, but are also prominent buildings dedicated to religion. Among Timbuktians, the religious dimensions of the protected sites are arguably at least as important as the cultural dimensions. Nevertheless, the Chamber, in its quantification of moral assessment, explicitly considered only the cultural status of the Timbuktu protected sites as World Heritage sites, adopting the notion of "disruption of culture suffered," just as the Eritrea-Ethiopia Claims Commission and the Inter-American Court of Human Rights had.[289] In the end, the Chamber set Al Mahdi's liability for moral harm at €483,000.[290] Had the Chamber considered serious violations of the victims' freedom of religion or belief, that amount would likely be significantly larger.

With regard to material harm, Trial Chamber VIII (subsequently confirmed by the Appeals Chamber) determined that individual reparations for economic loss would be given only to victims "whose livelihoods exclusively depended upon the Protected Buildings," including persons who maintained and protected the buildings and owners of businesses exclusively focused on selling "holy" sand from the protected sites.[291] These findings again imply religious dimensions. The Chamber should have established the relationship between freedom of religion or belief and resulting economic or material losses. For instance, when assessing consequential economic harm, the Chamber quoted victims who claimed to rely

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[286] *Id.* ¶ 90.

[287] *Id.* ¶ 86.

[288] *Id.* ¶ 131.

[289] *Id.* ¶¶ 131–32.

[290] *Id.* ¶ 133.

[291] *Id.* ¶¶ 81–83, 104(ii), 145; Al Mahdi (Judgment on Appeal Reparations), *supra* note 262, ¶¶ 33–43.

exclusively on pilgrims' donations and gifts for their economic wellbeing.[292] Regarding damage to buildings, the Chamber noted that UNESCO spent over €2.53 million to rebuild and rehabilitate mausoleums, mosques, and libraries in Timbuktu.[293] The Chamber then focused on Al Mahdi's specific liability for this harm, which it quantified at €97,000 based on expert reports.[294] The Chamber in its judgment and reparations order found that the destroyed buildings were among the most cherished and were perceived as providing protection to Timbuktians.[295] But in fact, the Chamber had quoted the victims' requests for restoration of these sites due to their consideration as holy places and the need for re-establishment of strong "emotional and spiritual ties."[296] Once again, there was no explicit judicial consideration of the restoration and conservation of these holy sites in order to affirm the victims' freedom of religion or belief.

3. Reparations Outcomes

Under Rules 97 and 98, the ICC may order individual or collective awards against the convicted.[297] Under Article 75 of the Rome Statute, reparation modalities include compensation, restitution and rehabilitation.[298] In defining these categories, Trial Chamber VIII relied on previous ICC jurisprudence that invoked international human rights law sources, particularly the UN Reparations Principles and jurisprudence of the Inter-American Court of Human Rights. Thus, the Chamber ordered individual compensation for victims whose livelihoods depended exclusively upon the protected buildings and for victims whose ancestors' burial sites were damaged in the attack.[299] Additionally, the Chamber recognized and ordered collective reparations in favor of the Timbuktu community as a whole, via rehabilitative and symbolic modalities. The rehabilitation of the protected buildings and the establishment of an "aid/counselling programme tailored to the needs of Timbuktians to address emotional distress suffered [were] ordered."[300] In addition to Al Mahdi's apologies,[301] the Chamber ordered effective measures to guarantee nonrepetition of the attacks against protected buildings,[302] as well as memorials,

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[292] Al Mahdi (Reparations Order), *supra* note 135, ¶ 73.

[293] *Id.* ¶ 116.

[294] *Id.* ¶¶ 116–18.

[295] Al Mahdi (Judgment and Sentence), *supra* note 5, ¶ 78; Al Mahdi (Reparations Order), *supra* note 135, ¶ 60.

[296] Al Mahdi (Reparations Order), *supra* note 135, ¶ 61.

[297] Rome Statute, *supra* note 1, art. 75.

[298] *Id.*

[299] Al Mahdi (Reparations Order), *supra* note 135 ¶¶ 104, 145.

[300] *Id.* ¶¶ 67, 90, 92, 104.

[301] *Id.* ¶¶ 69–71.

[302] *Id.* ¶ 67.

commemorations, or forgiveness ceremonies designed to "give public recognition of the moral harm suffered by the Timbuktu community and those within it."[303]

Since judicial considerations of serious breaches of freedom of religion or belief are missing, these reparations outcomes may be criticized. First, individual compensations could also have been ordered for Timbuktians who could prove the existence of considerable emotional distress as a result of serious breaches of their freedom of religion or belief in the form of the destruction of their places of worship. In turn, compensatory figures could have increased if serious breaches of freedom of religion or belief were also taken into account. Nevertheless, these proposals may not be feasible due to the reparations system of the ICC: reparations at the ICC are rendered against convicted persons rather than responsible States. Most convicted individuals, including Al Mahdi, are indigent, so State donations are required to fund reparations. By paying attention to international human rights law sources, the ICC has determined that it cannot order an increase in compensation without greater funding.[304] Nonetheless, an increase in compensation for victims of serious breaches of freedom of religion or belief is exactly what is needed. Indeed, the ICC already examines reparations criteria such as the feasibility of economic quantification of the harm, the gravity of the crime, and the specific circumstances of each case. Compensation must include all forms of damage, loss, and injury.[305] Furthermore, there is significant overlap between persons whose ancestors' burial sites were damaged in the attack and persons whose livelihoods depended exclusively on the protected buildings.[306] This leaves room to compensate additional victims. Compensation via individual and collective awards has always been granted in regional human rights jurisprudence concerning reparations for violations of freedom of religion or belief and involving places of worship or sacred sites.[307]

Second, Trial Chamber VIII found Al Mahdi's apologies to the Timbuktu community, Mali, and the international community as a whole to be genuine, categorical, and empathetic.[308] Nevertheless, the Chamber considered that in any judicial case, some victims will always be unsatisfied with the apology given.[309] In his apologies, Al Mahdi invoked Islamic principles of forgiveness and referred to Timbuktu's heritage.[310] He did not, however, explicitly address the terrible

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[303] *Id*. ¶ 90.

[304] Lubanga (Order for Reparations), *supra* note 147, ¶ 37; UN Reparations Principles, *supra* note 141, at Principles 16, 20.

[305] Lubanga (Order for Reparations), *supra* note 147, ¶¶ 20, 37, 39.

[306] Al Mahdi (Reparations Order), *supra* note 135, ¶ 145.

[307] *E.g*., Plan de Sánchez Massacre (Reparations), *supra* note 266, ¶ 125; Río Negro Massacres, *supra* note 92, ¶ 324; Cyprus v. Turkey (Just Satisfaction), *supra* note 266, at operative ¶¶ 4–5; Endorois Welfare Council, *supra* note 93, operative ¶ 1.

[308] Al Mahdi (Reparations Order), *supra* note 135, ¶ 70.

[309] *Id*. ¶ 69.

[310] Prosecutor v. Al Mahdi, ICC-01/12-01/15-T-4-Red-ENG, Trial Hearing, 8–9 (Aug. 22, 2016) https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/15-T-4-Red-ENG.

impact of his crime on victims' freedom of religion or belief. Public apologies should include acknowledgement of the facts and acceptance of responsibility.[311]

The collective symbolic measures in the reparations order in *Al Mahdi* do not explicitly invoke freedom of religion or belief. Symbolic measures, such as promises not to commit the same crimes or forgiveness ceremonies, should be ordered in a manner that includes an explicit recognition of the serious breaches of freedom of religion or belief. This would help to further satisfy victims. Additional symbolic reparation modalities not mentioned by the Trial Chamber should also be considered. Under Principles 22(h) and 23(e) of the UN Reparations Principles, relevant regional human rights jurisprudence,[312] and the practice of the Extraordinary Chambers in the Courts of Cambodia,[313] these modalities could include: unrestricted access to religious and cultural sites by community members; incorporation of an accurate account of the violations that occurred in international human rights law and international humanitarian law in educational materials; resources to promote collective memory; continued provision of human rights and international humanitarian law education to all sectors of the society; permanent and mobile exhibitions to inform current and future generations of the atrocities committed; and the construction of a peace learning center. Indeed, the Trust Fund for Victims has proposed the performance of sanctification ceremonies for the mausoleums in order to restore their previous sacredness.[314]

Finally, additional rehabilitative measures could be implemented to properly address the harm resulting from serious breaches of freedom of religion or belief. As established in ICC jurisprudence, based on Principle 21 of the UN Reparations Principles, the provision of medical services, healthcare, psychological, psychiatric, or social assistance, and legal and social services constitutes rehabilitation.[315] Regional human rights jurisprudence dealing with violations of freedom of religion or belief that involved sacred sites has also identified similar categories.[316] Rehabilitative measures ordered by the Extraordinary Chambers in the Courts of Cambodia, such as testimonial therapy and self-help group therapy, could also be explored.[317]

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[311] UN Reparations Principles, *supra* note 141, at Principle 22(e).

[312] *See, e.g.*, Endorois Welfare Council, *supra* note 93, operative ¶ 1; Plan de Sánchez Massacre (Reparations), *supra* note 266, ¶ 104.

[313] Case 002/01, *supra* note 109, ¶¶ 1134–35, 1137.

[314] Prosecutor v. Al Mahdi, ICC-01/12-01/15-265-Corr-Red, Draft Implementation Plan for Reparations, ¶¶ 266–67 (ICC Trust Fund for Victims May 18, 2018).

[315] Lubanga (Order for Reparations), *supra* note 147, ¶ 42.

[316] *See, e.g.*, Río Negro Massacres, *supra* note 92, ¶ 289; Plan de Sánchez Massacre (Reparations), *supra* note 266, ¶¶ 106–08.

[317] Case 002/01, *supra* note 109, ¶¶ 1132–33.

CONCLUSION

The central question posed by this Article is whether and to what extent the ICC has protected human rights while dealing with intentional attacks against buildings dedicated to religion. As explained throughout the Sections of this article, Trial Chamber VIII only addressed the collective right to cultural life, while virtually ignoring other human rights at stake—most evidently freedom of religion or belief.

This preference for a cultural rights approach is rooted in the development of international law, which has historically disregarded universal protections for buildings dedicated to religion. International humanitarian law tried to solve this issue by fleshing out what the protection of such buildings meant for the full realization of human rights. It also recognized the need for complementarity between international humanitarian law and international human rights law in order to effectively protect buildings dedicated to religion during armed conflicts. The Rome Statute provides such protection, and for this reason, the first case decided by the ICC in relation to attacks on buildings dedicated to religion merits extensive analysis.

Al Mahdi had the potential to—and to a certain extent did—develop this area further,. Overall, Trial Chamber VIII's approaches are laudable. However, the *Al Mahdi* decisions present critical deficits, such as the lack of consideration for gross violations of freedom of religion or belief. Such shortcomings could be rectified through the implementation of the reparations ordered in *Al Mahdi*.

The violations of freedom of religion or belief, in this case, are twofold. First, the attack and destruction of the Timbuktu mausoleums and mosque unduly limited the right of many persons to worship with others in their community. Second, the attacks emotionally affected believers in Timbuktu and beyond. The fact that Trial Chamber VIII took into consideration several religious elements present in the case makes its resounding silence regarding freedom of religion or belief even more astounding. These shortcomings could be remedied by developing a rationale that more clearly connected the events in Timbuktu to human rights doctrine.

This conclusion does not ignore the fact that the ICC is primarily a criminal court. It only suggests that the Court could adequately enforce human rights within the constraints of its mandate. In its essence, the Court seems to have missed an excellent opportunity to contribute to the enforcement of freedom of religion or belief. Such a contribution would certainly be useful in future cases, given that systematic and widespread attacks on buildings dedicated to religion continue to take place. Unfortunately, Iraq, Syria, Myanmar, and Yemen are prime examples of States devastated by armed conflicts in which persons have been deprived of many human rights, including the freedom to manifest their beliefs "in community with others."[318]

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[318] ICCPR, *supra* note 55, art. 18(1).

The ICC had the opportunity to address a significant gap in human rights protection and enforcement at a critical moment. Moving forward, the Court should not exclusively on one right when the circumstances of a case beg for the consideration of others. In the future, the Court can address this issue by taking a more holistic and systemic approach, one that is based on the consideration of human rights as "universal, indivisible[,] interdependent, and interrelated."[319]

[319] *Vienna Declaration and Programme of Action*, *supra* note 91, ¶ 5.

India's Personal Data Protection Act, 2018: Comparison with the General Data Protection Regulation and the California Consumer Privacy Act of 2018†

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2018 was a big year for data privacy and data processing regulation. On July 27, 2018, India published a draft bill for a new, comprehensive data protection law to be called the Personal Data Protection Act, 2018—only a few weeks after the European Union General Data Protection Regulation (GDPR) took effect and California enacted the California Consumer Privacy Act of 2018 (CCPA). Brazil followed with a new general data protection law (Lei Geral de Proteção de Dados Pessoais, Law No. 13,709/2018) only a few weeks later. In this Article, we review the history and political context of the Indian Personal Data Protection Act, summarize its key provisions, and compare the Act to the GDPR and the CCPA.

With the new law, the Indian government was responding to a mandate from the Indian Supreme Court, which directed the government of India to enact comprehensive data protection legislation in August 2017. India does not currently have an omnibus data protection regulation scheme like Europe or detailed sectoral privacy laws like the United States. Once enacted, the Personal Data Protection Act will therefore represent a monumental shift.

The Personal Data Protection Act adopts and further develops many existing principles of European Union data processing regulation and some aspects of US data privacy laws. In the interest of efficiency, global companies can and should try to address the requirements of the new Indian Data Protection Law, the GDPR, the California Consumer Privacy Act, and other privacy regimes simultaneously and holistically. But it is also clear that companies cannot just expand the coverage of their GDPR-focused compliance measures to India without addressing the nuances of the new Indian Personal Data Protection Act and the many differences between that Act and other jurisdictions' data processing regulations and data privacy laws.

It is noteworthy that India is not maintaining its status quo, pursuing lighter regulation, or following the US approach of sectoral, harm-specific protections for individual privacy. Instead, India is leaning heavily toward the European model of restrictive data processing regulation. This shift could well affect India's globally leading information technology sector.

INTRODUCTION

2018 was a big year for regulation around data privacy and data processing. On July 27, 2018, India published a draft bill for a new, comprehensive data protection law to be called the Personal Data Protection Act, 2018 [1]—only a few weeks after the European Union General Data Protection Regulation (GDPR)[2] took effect[3] and California enacted the California Consumer Privacy Act of 2018 (CCPA), which goes into effect on January 1, 2020.[4] Brazil followed with a new general data protection law only a few weeks later.[5]

According to Chapter 1, Section 1 of India's Personal Data Protection Act, the Act "extends to the whole of India."[6] In fact, the Act extends much further. It also applies worldwide to companies outside of India.[7] It includes many of the requirements contained in the GDPR and the CCPA, and it also introduces a broad data residency requirement[8] (i.e., a requirement that a copy of data processed subject to the law be stored in India) similar to the requirement that Russia enacted in 2015.[9]

With this new law, the Indian government responded to a mandate from the Indian Supreme Court, which directed the government of India to enact comprehensive data protection legislation in August 2017. In this Article, we review the history and political context of the Personal Data Protection Act,

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[1] Personal Data Protection Act § 1(1) (2018), http://meity.gov.in/writereaddata/files/Personal_Data_Protection_Bill%2C2018_0.pdf (last visited Nov. 2, 2019). This is the title of the new law, which is currently a "bill" until it is signed into law, at which point it will become an "act." As the bill is still in draft form, it may change prior to becoming law.

[2] Commission Regulation 2016/679, On the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 2016 O.J. (L 119) 1 [hereinafter GDPR].

[3] CAL. CIV. CODE § 1798.105. *See generally* DETERMANN'S FIELD GUIDE TO PRIVACY LAW, *supra* note *, at ch. 5.04 *et seq*.

[4] *See generally* Lothar Determann, *Analysis: The California Consumer Privacy Act of 2018*, IAPP ADVISOR (Jul. 2, 2018), https://iapp.org/news/a/analysis-the-california-consumer-privacy-act-of-2018/.

[5] Lei Geral de Proteção de Dados Pessoais, Law No. 13,709/2018. *See 10 Things You Need to Know About Brazilian General Data Protection Law*, BAKER MCKENZIE (Dec. 11, 2018), https://www.bakermckenzie.com/en/insight/publications/2018/12/brazilian-general-data-protection-law.

[6] Personal Data Protection Act § 1(2).

[7] *Id*. § 2(2).

[8] *Id*. § 41.

[9] *See* Lothar Determann, Edward Bekeschenko & Vadim Perevalov, *Residency Requirements for Data in Clouds—What Now?*, PRIVACY & SECURITY LAW REPORT (BNA) (Feb. 16, 2015), https://www.bakermckenzie.com/~/media/Files/BDSUploads/Documents/equity%20equation/residency%20requirements%20for%20data%20in%20clouds%20%20what%20now.pdf.

summarize key rules, and suggest action items that businesses should consider if they have any nexus to India, such as customers, suppliers, employees, data centers, a subsidiary, or any other presence in India.

I. PRIVACY AND ARTICLE 21 OF THE INDIAN CONSTITUTION

On August 24, 2017, a nine-judge bench[10] of the Indian Supreme Court directed the government of India to enact a robust and comprehensive data privacy law.[11] In *Justice K. S. Puttaswamy (Retd.) v. Union of India and Others*, the Court held that the Indian Constitution treats the right to privacy as a fundamental right.[12] Although the Constitution does not expressly mention the right to privacy, the Supreme Court ruled that privacy is enshrined in Article 21, which grants the right to "life and personal liberty."[13] The Court opined that privacy permits an individual to lead a life of dignity, without which the right to life and personal liberty would be meaningless.[14]

A. International Precedent: Census Act Decision by the German Constitutional Court

With its interpretative approach in *Justice K.S. Puttaswamy*, the Indian Supreme Court followed a 1983 decision by the German Constitutional Court, which identified a fundamental right to self-determination with respect to personal information and privacy in Articles 1 and 2 of the German Constitution.[15] Like the constitutions of India and the United States, the German Constitution references dignity in its catalogue of civil rights, but does not expressly grant a

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[10] It is rare for the Indian Supreme Court to form a nine-judge bench, and such benches are only formed to decide particularly important questions of law where there is a conflict between smaller benches of the Supreme Court. Under the Indian Constitution, a minimum of five judges must decide "substantial questions of law" relating to the interpretation of the Constitution. INDIA CONST. (1950) art. 145(3). In this case, the nine-judge bench was formed to decide whether the right to privacy is a fundamental right under the Constitution. The government argued that previous five-judge benches of the Supreme Court had issued conflicting precedents as to whether privacy is a fundamental right under the Constitution, which can only be interfered with on specified grounds, or whether it is a (relatively weaker) legal right.

[11] Justice K.S. Puttaswamy (Retd.) v. Union Of India And Others, (2017) 10 SCC 1, Part T(H) (India) https://indiankanoon.org/doc/91938676/ (last visited Oct. 7, 2019).

[12] *Id*. at Part T(C).

[13] *Id*.; *see also* INDIA CONST. (1950) art. 21.

[14] *Id*. at Part T(F).The Indian Supreme Court also maintained that the right to privacy was inherent to the meaningful enjoyment of aspects of some other rights under the Indian Constitution, such as the right to freedom under Article 19, the right to equality under Article 14, and the right to freedom of religion under Article 25. For example, the Court stated that the right to freedom of religion includes the privacy-dependent right to decide whether to share one's religious identity and beliefs with others.

[15] *See* Bundesverfassungsgericht [BVerfGE] (Federal Constitutional Court], 1 BvR 209/83, Dec. 15, 1983, https://www.bundesverfassungsgericht.de/e/rs19831215_1bvr020983.html, *translation at* https://freiheitsfoo.de/census-act/.

right to privacy.[16] This is unlike, for example, the California Constitution, since Californians added an express right to privacy to their State Constitution in 1972 by way of a ballot initiative.[17]

When the German government sought to significantly expand the reach of personal data collection in connection with a nationwide census, the German Constitutional Court stepped in to protect individual privacy with a newly developed constitutional right to information self-determination. This decision was rendered a few days before the beginning of 1984, the year for which George Orwell had predicted a totalitarian surveillance state in his novel *1984*—a prediction that Germans took particularly seriously, given their own horrible experiences with totalitarian regimes.[18]

Although the Indian and German courts reached similar conclusions, their approaches retain significant differences. Unlike the Indian Supreme Court, the German Constitutional Court did not have to direct the German legislature to enact privacy laws.[19] In 1983, when the German Constitutional Court affirmed a constitutional right to privacy, the German Legislature had already passed robust data protection laws at both the state and federal levels.[20] The German Constitutional Court had to decide on the validity of a statute, the German Census Act of 1983.[21] By comparison, India had enacted relatively few data privacy laws before 2018.[22] Moreover, unlike the German Constitutional Court, the Indian Supreme Court was not dealing with a nationwide census, but with a further-reaching data processing program: Aadhaar. The Aadhaar program, which was the subject matter of the Supreme Court's decision, is significant owing to its proposed scope and impact on the daily lives of Indian citizens.

B. Aadhaar Program in India

With the Aadhaar program, the government of India is building a nationwide database with biometric information. Citizens must have an Aadhaar ID card to

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[16] *See* GRUNDGESETZ [GG] [Basic Law] art. 1, 2, *translation* at http://www.gesetze-im-internet.de/englisch_gg/index.html.
[17] *See* J. Clark Kelso, *California's Constitutional Right to Privacy*, 19 PEPP. L. REV. 328 (1992).
[18] When the German State of Hessen enacted the world's first data protection law in 1970, Governor Albert Osswald declared that its purpose was to prevent the Orwellian vision of a totalitarian surveillance state. *See EDV im Odenwald*, DER SPIEGEL, Oct. 5, 1971, at 88, http://www.spiegel.de/spiegel/print/d-43176393.html.
[19] *See Justice K.S. Puttaswamy*, 10 SCC at Part T(H).
[20] Hessen enacted the first data protection law in 1970. Other states followed. In 1978, the federal parliament enacted the first Federal Data Protection Act (BDSG). [Act to Adapt Data Protection Law to Regulation (EU) 2016/679 and to Implement Directive (EU) 2016/680], Jun. 30, 2017 (Ger.), https://iapp.org/resources/article/the-german-act-to-adapt-data-protection-law-to-regulation-eu-2016679-and-to-implement-directive-eu-2016680-english/.
[21] *See* BVerfGE, 1 BvR 209/83, Headnote 4, *translation at* https://freiheitsfoo.de/census-act/.
[22] *See infra* Part II.

access to various public and private services, including driver's licenses, bank accounts, and phone connections.[23]

The Indian government views Aadhaar as a tool to broaden social and financial inclusion, ensuring that subsidies and services reach their intended recipients while eliminating corruption-linked leakages worth about $10 billion.[24] India's Minister of Law, Justice, Electronics and Information Technology, Ravi Shankar Prasad, promoted both the Aadhaar program and India's new Personal Data Protection Act at a town hall and panel discussion in Palo Alto, California in August 2018, which was hosted by the US-India Business Council and the Hewlett Foundation. Minister Prasad presented alongside Justice Cuéllar of the California Supreme Court; Raj Sabhlok, President of Zoho Corporation; and Lothar Determann, one of the authors of this Article.[25] Minister Prasad emphasized that the Aadhaar program enables female empowerment and corrects social imbalances by delivering services and resources to traditionally marginalized sectors of society.[26] He held up an Aadhaar ID card as he vouched for data security and emphasized the importance of the program for welfare, innovation, justice, and the economy in India.[27] Minister Prasad noted that privacy and innovation have to be balanced and listed five principles as key governmental

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[23] *See* Preeti Motiani, *Four Aadhaar linking deadlines you should not miss*, ECONOMIC TIMES (Dec. 2, 2017, 5:11 PM), https://economictimes.indiatimes.com/wealth/personal-finance-news/four-aadhaar-linking-deadlines-you-should-not-miss/articleshow/60478187.cms; *see also* Press Trust of India, *Aadhaar-driving licence linking to be mandatory soon: Ravi Shankar Prasad* INDIA TODAY (Jan. 6, 2019), https://www.indiatoday.in/india/story/govt-to-make-aadhaar-driving-licence-linking-mandatory-ravi-shankar-prasad-1424739-2019-01-06.

[24] *See JAM trinity helped government save $10 billion leak: Modi*, GULF NEWS (Nov. 23, 2017, 2:43 PM), https://gulfnews.com/business/economy/jam-trinity-helped-government-save-10-billion-leak-modi-1.2129377; *see also* Ravi Shankar Prasad, *Core Biometrics Under Aadhaar Safe, Savings of Rs 90,000*, HINDUSTAN TIMES (Aug. 3, 2018); *see also* Press Trust of India, *Jan Dhan, Aadhaar, mobile ushered in a social revolution: Jaitley*, HINDUSTAN TIMES (Aug. 27, 2017, 1:55 PM), https://www.hindustantimes.com/business-news/jan-dhan-aadhaar-mobile-ushered-in-a-social-revolution-jaitley/story-5itVdxDEuDMtdnc42YClpO.html; Ajay Bhushan Pandey, *Criticism without Aadhaar:*
The unique identification number empowers the people, not the state, INDIAN EXPRESS (May 13, 2017, 1:42 AM), https://indianexpress.com/article/opinion/columns/criticism-without-aadhaar-4653369/.

[25] *See* Ritu Jha, *India's digital data debated at town hall*, INDICA NEWS (Aug. 29, 2018), https://indicanews.com/2018/08/29/indias-digital-data-debated-at-town-hall/. Minister Prasad was in California to meet with tech leaders and discuss data privacy and security issues. *See also* PTI, *Need to work together to better manage challenges like data privacy security issues*, ECONOMIC TIMES (Aug. 28, 2018, 9:37 PM), https://economictimes.indiatimes.com/news/economy/policy/need-to-work-together-to-better-manage-challenges-like-data-privacy-security-issues-ravi-shankar-prasad/articleshow/65583364.cms.

[26] Ravi Shankar Prasad, Minister, Law, Justice, Electronics and Information Technology, Promoting Digital India and Economic Growth, Address at USIBC and William and Flora Hewlett Foundation Town Hall Discussion (August 27, 2018).

[27] *Id*.

policy objectives regarding personal data: availability, innovation, usability, anonymity, and privacy.[28]

Critics of the Aadhaar program view the program as a tool for large-scale State surveillance and complain about inadequate privacy protections.[29] While India already has various identity cards and numbers—including tax identification numbers, driver licenses, and identity cards for voting in elections—citizens have not historically needed to provide this identification to receive services, nor have these databases been interlinked with other systems as the government proposes to do with Aadhaar.[30]

The Aadhaar program was initially implemented through an executive order establishing the Unique Identification Authority of India, which had the responsibility of setting up the Aadhaar program.[31] Retired Justice K.S. Puttaswamy and thirty additional petitioners—including prominent Indian activists, such as Aruna Roy, civil rights organizations, such as the Centre for Civil Society, and sitting members of the Indian Parliament[32]—filed constitutional challenges in the Indian Supreme Court, complaining that Aadhaar was being implemented through executive action without a fundamental debate about privacy implications in the Indian Parliament, even though the program could have a significant impact on the privacy of Indian citizens.[33] These petitions were ultimately combined into a single case: *Justice K. S. Puttaswamy (Retd.) v. Union of India and Others*.

While *Justice K.S. Puttaswamy* was pending, the Indian government enacted a law regulating the Aadhar program, the Aadhaar (Targeted Delivery of Financial

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[28] *See Fine balance must for data availability, innovation and privacy: IT Minister Ravi Shankar Prasad*, ECONOMIC TIMES TELECOM (Apr. 19, 2018, 2:49 AM), https://telecom.economictimes.indiatimes.com/news/infrastructure/telecom-equipment/fine-balance-must-for-data-availability-innovation-and-privacy-it-minister-ravi-shankar-prasad/63829583.

[29] *See* Jean Dreze, *Dissent and Aadhaar*, INDIAN EXPRESS (May 8, 2017, 10:37 AM), https://indianexpress.com/article/opinion/columns/dissent-and-aadhaar-4645231/; *see also* Rahul Bhatia, *Critics of Aadhaar Project Say They Have Been Harassed, Put Under Surveillance*, REUTERS INDIA (Feb. 12, 2018, 9:41 PM), https://in.reuters.com/article/india-aadhaar-breach/critics-of-aadhaar-project-say-they-have-been-harassed-put-under-surveillance-idINKBN1FX0FU; Reetika Khera, *Why'India's Big Fix is a Big Flub*, N.Y. TIMES (Jan. 21, 2018), https://www.nytimes.com/2018/01/21/opinion/india-aadhaar-biometric-id.html.

[30] *See* Asheeta Regidi, *Aadhaar Hearing: Petitioners Argue For A Voluntary ID Card System That Does Not Collect User Data,* TECH2 (May 11, 2018, 10:39 AM), https://www.firstpost.com/tech/news-analysis/aadhaar-hearing-petitioners-argue-for-a-voluntary-id-card-system-that-does-not-collect-user-data-4343721.html.

[31] *See Journey of Aadhaar*, Software Freedom Law Center (May 21, 2016, 1:22 PM), https://sflc.in/journey-aadhaar.

[32] *See* Anoo Bhuyan, Aadhaar Isn't Just About Privacy. There Are 30 Challenges the Govt Is Facing in Supreme Court, THE WIRE (Jan. 18, 2018), https://thewire.in/government/aadhaar-privacy-government-supreme-court.

[33] *See* T. A. Johnson, *Right to Privacy: 91-year-old Retd Justice KS Puttaswamy Is the Face Behind Legal History*, INDIAN EXPRESS (Aug. 25, 2017, 12:18 PM), https://indianexpress.com/article/india/right-to-privacy-justice-k-s-puttaswamy-retd-vs-union-of-india-91-year-old-judge-is-the-face-behind-legal-history-4812440/.

and Other Subsidies, Benefits and Services) Act, 2016, which contained provisions relating to the security and privacy of identity information collected for Aadhaar.[34] But the 2016 law did not sway the Supreme Court. The Court found a fundamental right to privacy in the Constitution and directed the government of India to enact comprehensive data privacy legislation.[35]

C. Identifying a Fundamental Right to Privacy Under Article 21 of the Indian Constitution

In *Justice K. S. Puttaswamy*, which was heard by a nine-judge bench, the government asserted that privacy was not a fundamental right, citing precedent from smaller benches of the Indian Supreme Court.[36] The Supreme Court overruled conflicting precedent and decided against the government, unanimously holding that privacy is a fundamental right under the Indian Constitution.[37]

The fact that the Indian Supreme Court anchored the right to privacy in Article 21 of the Constitution is significant because Article 21 deals with the fundamental right to life and personal liberty, and this right enjoys heightened protection under the Indian constitutional scheme.[38] The right to life and personal liberty must not be interfered with, except in accordance with a law that meets the constitutional test of reasonableness and satisfies three requirements: (1) the intrusion must be sanctioned by a statute or other formal law that was enacted in accordance with all formal requirements of the Indian Constitution,[39] (2) the intrusion must be necessary for legitimate government purposes, and (3) the intrusion must be proportionate, based on a balancing of the objects of the law and the means adopted to achieve them.[40]

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[34] *See* Aadhaar (Targeted Delivery of Financial & Other Subsidies, Benefits & Services) Act, No. 19, Acts of Parliament, §§ 28, 29, 33, 2016. https://uidai.gov.in/images/the_aadhaar_act_2016.pdf.

[35] *See* Justice K. S. Puttaswamy (Retd.) v. Union of India and Others, (2017) 10 SCC 1, Part T(H) (India).

[36] *See* M P Sharma v. Satish Chandra, 1954 AIR 300 (Del.); Kharak Singh v. State of Uttar Pradesh, 1963 AIR 1295 (U.P.). These cases were decided by benches of eight and six judges respectively. Both judgments contained observations that the right to privacy was not a fundamental right under the Constitution.

[37] *See Aadhaar update: Supreme Court declines Centre's offer to file panel's report on data protection*, FINANCIAL EXPRESS (Jul. 30, 2018, 6:48 PM), https://www.financialexpress.com/aadhaar-card/aadhaar-update-supreme-court-declines-centres-offer-to-file-panels-report-on-data-protection/1263318/. Interestingly, the Indian Supreme Court declined to take the new Personal Data Protection Act on record when considering the constitutionality of Aadhaar. However, when the Court ultimately ruled on the validity of the Aadhaar program, it cited to and relied on the Personal Data Protection Act to uphold the Aadhaar Act, on the basis that a robust data protection regime would help mitigate any data privacy concerns that may arise under Aadhaar.

[38] *See* INDIA CONST. (1950) art. 21. "Law" is not restricted to Acts of Parliament. INDIA CONST. (1950) art. 13(3) (defining "law" as including "any Ordinance, [executive] order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law").

[40] *See Justice K. S. Puttaswamy* (nine judge bench addressing the fundamental right to privacy).

The Supreme Court applied these tests in a September 2018 ruling on the constitutional validity of the Aadhaar program. In a 1,400-page judgment, a bench of five judges upheld the constitutionality of the Aadhaar program in a four-to-one split.[41] The majority held that the Aadhaar program was constitutionally valid, necessary for the delivery of government services, and proportionate for achieving the government's aims.[42] However, the majority limited the purposes for which Aadhaar data can be used and struck down Section 57 of the Aadhaar Act, which allowed private companies to use Aadhaar data for authentication purposes.[43] Citing German and other European definitions of proportionality, the Court found that Section 57 was not a proportional means of achieving the aim of authenticating identity, and thus represented an unjustified intrusion on the right to privacy.[44]

The dissenting judge, Justice Chandrachud, found the entire Aadhaar Act unconstitutional and disproportionate, holding that the government's stated aim of delivering public services could be achieved by less intrusive means and without building a large-scale biometric database.[45] The contours of the constitutional right to privacy will continue to be defined in subsequent cases.[46]

D. Constitutional Right to Privacy Against Companies

In addition to finding that privacy was a constitutional right, five out of nine judges in *Justice K. S. Puttaswamy* held that the right to privacy applies not only to government action but also to private sector action.[47] Fundamental rights under the Indian Constitution are normally enforceable only against the government, *i.e.*, against State actors.[48] But with *Justice K.S. Puttaswamy*, the Indian Supreme

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[41] *See* Justice K S Puttaswamy (Retd.) v. Union of India and Others, (2018) 9 SCJ 224 (India) [hereinafter *Aadhar Judgment*] (five judge bench addressing the validity of the Aadhaar program), https://indiankanoon.org/doc/127517806/.

[42] *Id.* ¶ 447(2).

[43] The decision makes Aadhaar mandatory for those filing Income Tax Returns (ITR) and requires the tax filing Permanent Account Number (PAN) to be linked with Aadhaar numbers. It also makes Aadhaar mandatory for those availing facilities of welfare schemes and government subsidies. However, Aadhaar numbers are no longer required to open a bank account, get phone connections, or be admitted to school.

[44] *Aadhar Judgment*, *supra* note 41, at ¶ 447(4)(h).

[45] *See Aadhar Judgment*, *supra* note 41, separate opinion of Justice Chandrachud ¶ 339.

[46] The Supreme Court has already relied on the newly declared right to "read down" an Indian legal provision criminalizing sexual acts "against the order of nature," holding that the provision would not apply to persons engaging in homosexual relations. A bench of five judges unanimously held that criminalizing homosexual conduct violated the right to privacy and the related rights of self-determination and personal autonomy. Navtej Singh Johar v. Union of India, (2018) 10 SCC 791 (India), https://indiankanoon.org/doc/168671544/.

[47] *See Justice K. S. Puttaswamy*, at Part T(H).

[48] *See* INDIA CONST. (1950) part III, art. 12. Only some rights, such as the right to access public restaurants, shops and hotels on a non-discriminatory basis, can be applied "horizontally" to non-State actors. *See, e.g.*, INDIA CONST. (1950) art. 15(2) (barring discrimination with respect to accessing certain public places).

Court signaled that companies can also be challenged for violations of the constitutional fundamental right to privacy.[49] Major international social networks have already been sued in India under this principle.[50]

By applying constitutional principles to relations and disputes between non-State actors, the Indian Supreme Court increased legal uncertainties for companies, given the relative vagueness of constitutional principles compared to typically more detailed statutes.[51] At the same time, the Court conferred significant powers on the judiciary to create new privacy laws.[52] Perhaps the Court intended such powers only as a temporary measure, given its simultaneous direction to enact privacy legislation.[53] But even after privacy legislation is enacted, Indian courts will retain the power to overrule or reinterpret statutory provisions based on constitutional principles, which could permanently affect the balance of power between the judiciary and legislative branches of the government.[54]

By way of international comparison, the German Constitutional Court has also assumed greater control, for itself and for lower courts, over rights and disputes between non-State actors. The German Constitutional Court has emphasized that courts, as State actors, are bound by constitutional provisions regarding civil rights when deciding disputes between non-State actors ("third party effects doctrine").[55] As a result, the German Constitutional Court can overrule interpretations of the German Civil Code and other statutes by other

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[49] *See Justice K. S. Puttaswamy*, at Part T(H). This would allow persons aggrieved by the data privacy practices of private companies to directly approach the State High Courts under Article 226 of the Indian Constitution and seek injunctive relief or declarations of illegality with respect to the data practices of private companies. The High Courts have sweeping powers to issue directions under Article 226 and could ask companies to modify their data practices or alter their privacy policies, for example. This holding will also make it easier to directly approach the Indian Supreme Court under Article 32 of the Constitution in the form of a "Public Interest Litigation" seeking relief against both State and non-State actors. The Supreme Court has similarly broad powers to grant relief under Article 32. This is likely to lead to an uptick in privacy-related litigation against private companies, since petitioners will find it easier to overcome the burden of proving that they have standing and can easily assert that a private company has violated their fundamental right to privacy. A common approach to filing such cases is to implead both the central government (or one of its agencies, such as the IT Ministry or the Telecom Regulatory Authority) and the private companies in question.

[50] *See, e.g.*, Amit Anand Choudhary, *Supreme Court asks WhatsApp, Facebook to undertake not to share consumer data with third party*, TIMES OF INDIA (Sept. 6, 2017, 9:10 AM), http://timesofindia.indiatimes.com/articleshow/60396539.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst. These lawsuits are ongoing and may be amended to rely on the Act if it becomes a law while they are pending.

[51] *See e.g.*, Information Technology Act, No. 21 of 2000, INDIA CODE (2005) (consisting of 94 detailed sections, while Article 21 merely expresses a general principle).

[52] *See Justice K. S. Puttaswamy*, at Part T(G), (H).

[53] *Id.*

[54] *Id.*

[55] *See* Lothar Determann, *Kommunikationsfreiheit im Internet: Freiheitsrechte und gesetzliche Beschränkungen* [Freedom of Communications on the Internet: Civil Rights and Statutory Limitations] (1999).

appeals courts of last instance, even though these courts have the same level of judicial authority under the German Constitution.[56] Furthermore, the German Constitutional Court requires lower courts to apply constitutional civil rights guarantees when applying any statute (*i.e.*, constitutional rights always apply when lower courts are interpreting statutes), which arguably results in a shift of power from the legislative branch to the judiciary.[57] Because constitutional rights are based on the courts' interpretation, this effectively gives courts more power to decide what the law means, even in the face of potentially contrary intent by the legislature.

The US Supreme Court, on the other hand, has remained dedicated to the principle that civil rights under the US Constitution can only be enforced against State actors.[58] Therefore, US courts do not apply privacy protections arising under the Fourth, Fifth, or Fourteenth Amendments to disputes between companies and individuals.[59] When US courts apply privacy statutes, they defer to Congress and do not typically consider constitutional privacy principles in the context of interpreting privacy statutes.[60]

California takes a different approach to the constitutional right to privacy, and interprets the right more broadly.[61] In 1994, the California Supreme Court held that the right to privacy in Article 1, Section 1 of the California Constitution applies to private companies, even though other civil rights afforded by the California Constitution generally apply only vis-à-vis state actors.[62] The California Supreme Court made this exception with respect to the State's right to privacy in recognition of a 1972 ballot initiative through which the people of California added a right to privacy to the California Constitution.[63] In practice, the State's constitutional right to privacy did not add any substantive rules or prohibitions to the already robust and detailed body of California privacy law.[64] However, the California Supreme Court's recognition that the State's constitutional right to privacy is applicable between private persons and entities has allowed plaintiffs to add vague claims based on the broad right to privacy

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[56] *See* Lothar Determann and Markus Heintzen, *Constitutional Review of Statutes in Germany and the United States Compared* 2 (U.C. Hastings Research Paper No. 299, 2018).
[57] *See id*.
[58] *See, e.g.*, DeShaney v. Winnebago County, 489 U.S. 189 (1989) (holding that a state government agency's failure to prevent child abuse by a custodial parent does not violate the'child's right to liberty for the purposes of the Fourteenth Amendment to the U.S. Constitution, as the abuse was committed by the'child's parent, who was "ot a "State" actor).
[59] *See* Hill v. Nat'l Collegiate Athletic Assn., 865 P.2d 633, 641–44 (1994).
[60] *See* Orin S. Kerr, *The Effects of Legislation on Fourth Amendment Protection*, 115 Mich. L. Rev. 1117, 1125-1127 (2017).
[61] *See Hill v. Nat'l Collegiate Athletic Assn.*, 865 P.2d at 642–44.
[62] *See id*. Californian voters added an express right to privacy to the California Constitution in 1972 by way of a ballot initiative. *See generally* Determann, CALIFORNIA PRIVACY LAW: PRACTICAL GUIDE AND COMMENTARY, U.S. FEDERAL AND STATE LAW, *supra* note *.
[63] *See* Kelso, *supra* note 17, at 328.
[64] Determann, CALIFORNIA PRIVACY LAW: PRACTICAL GUIDE AND COMMENTARY, U.S. FEDERAL AND STATE LAW, *supra* note *, at Ch. 2–2:3.

under the California Constitution, which lacks substantive rules pertaining to privacy. Defendants struggle to get these claims dismissed during the early stages of litigation, thereby strengthening class action plaintiffs and imposing greater settlement costs on businesses.[65] Because the Indian Supreme Court adopted a similarly broad definition of privacy, similar results can be expected for Indian litigation based on *Justice K. S. Puttaswamy*.[66]

E. Judicial Directive to the Indian Legislature to Enact Data Privacy Law

In *Justice K.S. Puttaswamy*, the Supreme Court of India directed[67] the central government to propose a comprehensive data protection law in order to create a legislative framework protecting the constitutional right to privacy from interference.[68] In response, the government set up the Srikrishna Committee, which was headed by retired Indian Supreme Court Justice Srikrishna and consisted of six government members and three industry representatives.[69] The Srikrishna Committee prepared the draft bill for the 24,000-word Personal Data Protection Act; the word count fell between the operative segment of the GDPR (about 30,000 words) and the California Consumer Privacy Act (about 10,000 words). The Srikrishna Committee also produced a 213-page explanatory report

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[65] *See* Helen Trac, *Six Modern Technology Cases Involving the California Constitutional Right to Privacy*, PRIVACY & DATA SECURITY LAW REPORT (BNA) (Nov. 7, 2016) (discussing *In re Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125 (3d Cir. 2015); *In re Yahoo Mail Litig.*, No. 5:13-cv-04980-LHK, 2016 WL 4474612 (N.D. Cal. Mar. 15, 2016) (order granting motion for final approval of class action settlement); *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010 (N.D. Cal. 2012); *Goodman v. HTC Am., Inc.*, No. C11-179MJP, 2012 WL 2412070 (W.D. Wash. June 26, 2012); *Cahen v. Toyota Motor Corp.*, 147 F. Supp. 3d 955 (N.D. Cal. 2015); *In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051 (N.D. Cal. 2015)).

[66] *See Justice K. S. Puttaswam*y.

[67] This is an interesting feature of the modern Indian political system and its separation of powers. Since the 1970s, the Indian Supreme Court has been increasingly active in passing far-ranging directions to the legislature or executive and "finding" or incorporating new rights into existing rights under the Indian Constitution. Sometimes the Court passes these directions on the basis of letters written to the it. *See, e.g.*, People's Union for Democratic Rights and Others v. Union of India and Others, (1982) 3 SCC 235 (India), where on the basis of a letter, the Supreme Court construed the violation of labor laws as a violation of fundamental rights and directed the executive to remedy them. Similarly, for more than two decades, the Supreme Court has heard petitions relating to deforestation in various parts of India on a weekly basis and directed the government to remedy violations. *See* P.K. Manohar and Praveen Bhargav, *The architect of an omnibus forest-protection case*, THE HINDU (Jul. 5, 2016, 12:25 AM), https://www.thehindu.com/opinion/open-page/The-architect-of-an-omnibus-forest-protection-case/article14470903.ece. While alien to the US legal system, other jurisdictions such as South Africa have also seen their constitutional courts play a more active policy role. In *Minister of Health & Others v. Treatment Action Campaign & Others* (No. 2) (2002) 5 SA 721 (S. Afr.), the South African Constitutional Court directed the South African government to provide access to a particular antiretroviral drug to prevent the transmission of HIV from mothers to children.

[68] *See Justice K. S. Puttaswamy*, at Part T(H).

[69] *See* Surabhi Agarwal, *Justice BN Srikrishna to head Committee for data protection framework*, ECONOMIC TIMES (Aug. 1, 2017, 7:32 PM), https://economictimes.indiatimes.com/news/politics-and-nation/justice-bn-srikrishna-to-head-committee-for-data-protection-framework/articleshow/59866006.cms.

titled *A Free and Fair Digital Economy, Protecting Privacy, Empowering Indians* (the "Srikrishna Report").[70]

The draft Personal Data Protection Act currently awaits approval by the Ministry of Electronics and Information Technology, under the leadership of Minster Ravi Shankar Prasad, and by the Union Cabinet, as well as subsequent debate and approval by the legislature. At the panel discussion in Palo Alto (*see supra*, Section I, Part 3), Minister Prasad emphasized that the Personal Data Protection Act is still in draft form and could see changes before it is enacted.[71] Minister Prasad also encouraged all stakeholders to share their views on the draft Personal Data Protection Act.[72]

II. CURRENT STATE OF INDIAN DATA PRIVACY LAW

India has never had omnibus data protection regulations like Europe or detailed sectoral privacy laws like the United States.[73] This state of affairs will continue until the Personal Data Protection Act becomes effective. Currently, Indian privacy law consists of the following elements:

A. Constitutional and Common Law Protections

According to *Justice K.S. Puttaswamy*,[74] Indians enjoy a fundamental right to privacy under Article 21 of the Constitution against both State and non-State actors.[75] However, courts have not yet developed the exact contours of this recently enumerated right.[76] Privacy protections under tort laws are more established,[77] including protections that follow from English common law regarding nuisance, trespass, harassment, defamation, malicious falsehood, and

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[70] COMMITTEE OF EXPERTS UNDER THE CHAIRMANSHIP OF JUSTICE B.N. SRIKRISHNA, A FREE AND FAIR DIGITAL ECONOMY: PROTECTING PRIVACY, EMPOWERING INDIANS (2018) [hereinafter Srikrishna Report], *available* at https://meity.gov.in/writereaddata/files/Data_Protection_Committee_Report-comp.pdf.

[71] *See* Jha, *supra* note 25; *see also* PTI, *supra* note 25.

[72] *See* PTI, *supra* note 25.

[73] For an overview of US privacy laws, see Determann, CALIFORNIA PRIVACY LAW: PRACTICAL GUIDE AND COMMENTARY, U.S. FEDERAL AND STATE LAW, *supra* note 1 at ch. 1.

[74] *Justice K. S. Puttaswamy*, at Part T.

[75] *Id*. at Part T(C), T(H).

[76] *See, e.g.*, *id*. at Part T, Conclusion G, stating that "This Court has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy. The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the rule of law. The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features…"

[77] *See, e.g.*, PEN. CODE §§ 268, 441, https://indiacode.nic.in/handle/123456789/2263?locale=en, (codifying nuisance and trespass, respectively).

breach of confidence.[78] Additionally, certain communications between spouses and with attorneys are privileged and subject to protections against disclosure.[79]

B. Existing Statutes

In addition to unwritten protections, several key pieces of legislation protect specified privacy rights. The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 require companies to meet certain criteria when collecting "sensitive" personal data.[80] Companies must appoint a grievance officer and provide a privacy policy, among other requirements.[81] Credit bureaus have to adopt specified "privacy principles" under Section 20 of the Credit Information Companies (Regulation) Act, 2005, including rules relating to the purpose for which credit information may be used and disclosed, as well as rules relating to data protection.[82] The use of information collected for the Aadhaar program is regulated under the Aadhaar Act, which forbids the sharing of biometric information and requires other identity information to be shared and used only for specified purposes.[83]

C. Draft Bills

In addition to the Personal Data Protection Act, India is currently considering several bills that implicate privacy rights. For example, in March 2018, the Indian Health Ministry proposed a new law, the Digital Information Security in Healthcare Act, which would give data subjects "ownership" of their digital health data.[84] In July 2018, the telecom regulator issued recommendations on privacy,

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[78] However, individuals rarely use these actions owing to long delays in the civil litigation process. For defamation, which is also a criminal offence under PEN. CODE § 499, individuals often choose to initiate criminal proceedings as a pressure tactic instead. *See* Chinmayi Arun, *A Question of Power*, INDIAN EXPRESS (May 25, 2016, 12:01 AM), https://indianexpress.com/article/opinion/columns/criminal-defamation-law-supreme-court-2817406/.

[79] Indian Evidence Act, No. 1 of 1872, INDIA CODE (1993) §§ 122, 126, https://indiacode.nic.in/handle/123456789/2188?view_type=browse&sam_handle=123456789/1362 (marital communications and attorney-client privilege, respectively)

[80] *See* Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, Gazette of India, pt. III sec. 4 (Apr. 11, 2011), Rule 4 (privacy policy requirement), Rule 5(1) (requirement to obtain consent before collection of sensitive personal information), and Rule 5(9) (appointment of a grievance officer).

[81] *Id.*

[82] *See* Credit Information Companies (Regulation) Act, No. 30 of 2005, INDIA CODE (1993) § 20.

[83] *See* Aadhaar (Targeted Delivery of Financial & Other Subsidies, Benefits & Services) Act, No. 18 of 2016, INDIA CODE (1993) § 29.

[84] *See* Digital Information Security in Healthcare Act §§ 2(j), 31 (2018), https://mohfw.gov.in/newshighlights/comments-draft-digital-information-security-health-care-actdisha. Under this proposed law, "owners," similar to data subjects under the GDPR, are granted a number of rights with respect to their digital health data, including the right to privacy, confidentiality, and security, and the right to refuse or withdraw consent with respect to the storage and transmission of their health data (§ 20). Entities which have custody of health data are required

security and ownership of data in the telecom sector, which seek to impose consumer data protection requirements on "entities in the digital ecosystem" through telecom rules or licensing conditions.[85]

D. Data Residency Requirements

In April 2018, the Reserve Bank of India issued a notification requiring all payment system operators to store data locally in India.[86] This effectively serves as a precursor to the data residency requirement in the new Personal Data Protection Act by requiring payment related data to be resident in India.[87] However, it does not seem intended or suited to protect individual privacy; rather, it serves to secure access to data for the Indian government.[88]

E. Preemptive Effect of Personal Data Protection Act

Section 110 of the Personal Data Protection Act gives the Act overriding effect to the extent it is inconsistent with existing law.[89] The Personal Data Protection Act states that it will override the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 but does not enumerate any other existing laws that it supersedes or replaces.[90] The Srikrishna Report accompanying the Personal Data Protection Act lists fifty different laws, including the Aadhaar Act, that may be impacted by the Personal Data Protection Act and recommends that the respective ministries

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to inform owners of data breaches and can be penalized for those breaches (§§ 35(5), 37-39). The concept of ownership of data may, however, be a misnomer. Some data protection authorities in the EU, as well as legal commentators, like to encourage the idea that natural persons "own" personal data relating to them, with the exception of exclusion rights. However, data protection and privacy laws diverge from property laws. Unlike property laws, privacy laws do not incentivize or reward creation or investment, do not regulate the acquisition or transfer of ownership rights to others, and do not apply against everyone. *See generally* Lothar Determann, *No One Owns Data* (UC Hastings, Working Paper No. 265, 2018), https://ssrn.com/abstract=3123957 (discussing why claims of ownership are inappropriate in the context of data, and how the US and European legal systems typically address rights with respect to data).

[85] *See* Press Release, Telecom Regulatory Authority of India, Recommendations on Privacy, Security and Ownership of Data in the Telecom Sector (Jul. 16, 2018), https://www.trai.gov.in/sites/default/files/PRNo7816072018.pdf.

[86] *See* RESERVE BANK OF INDIA NOTIFICATION, STORAGE OF PAYMENT SYSTEM DATA (2018), https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11244&Mode=0.

[87] *Id*.

[88] *Id*. The Reserve Bank of India explains the rationale of the notice as follows: "In order to ensure better monitoring, it is important to have unfettered supervisory access to data stored with these system providers as also with their service providers/intermediaries/third party vendors and other entities in the payment ecosystem." See Lothar Determann, *Data Residency Rules Cutting Into Clouds: Impact and Options for Global Businesses and IT Architectures*, BLOOMBERG BNA PRIVACY & SECURITY LAW REPORT (Apr. 3, 2017), for an analysis of the impact of recent data residency laws in other jurisdictions such as Russia, Germany, Indonesia and China.

[89] Personal Data Protection Act § 110.

[90] Personal Data Protection Act § 111, First Schedule.

amend these laws as necessary.[91] Amending all of the laws identified in the Srikrishna Report is a tall order and will likely spawn litigation over whether existing legislation is inconsistent with the Personal Data Protection Act, the extent of any inconsistencies, and whether the Personal Data Protection Act completely supersedes the existing legislation. For example, if businesses comply with the data residency requirements of the Personal Data Protection Act by storing a copy of personal data in India, are they still required to comply with the Reserve Bank of India's data residency requirements by storing personal data related to payment processing *only* in India (and nowhere else)?

III. TERMINOLOGY OF THE PERSONAL DATA PROTECTION ACT

Like the GDPR, the Personal Data Protection Act uses the term "data processors" to refer to entities that process data on the instructions of a data controller and do not independently determine the means and purposes of data processing. However, where the GDPR refers to data "controllers," the Act refers to "data fiduciaries," and where the GDPR refers to "data subjects," the Act refers to "data principals."[92] Like data controllers under the GDPR, data fiduciaries are responsible for their own data processing activities, as well as the activities of data processors.[93] The drafters of the new Indian law chose this modified terminology to emphasize that the individual data subjects entrust their data to companies and other controllers, which therefore have a fiduciary duty of care towards those subjects.[94] In the remainder of this Article, we use the more commonly used terms "data controller" and "data subject" in place of "data fiduciary" and "data principal."

"Personal data" is defined as broadly under the Personal Data Protection Act as under the GDPR. Personal data means any data about or relating to a natural person who is directly or indirectly identifiable.[95] "Sensitive personal data"[96] receives heightened protections and "irreversibly" anonymized[97] data is excluded from protection.

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[91] *See* Srikrishna Report, *supra* note 70, at Annexure C.
[92] *See* Personal Data Protection Act § 3; GDPR, *supra* note 3, art. 4.
[93] Personal Data Protection Act § 11.
[94] *See* Srikrishna Report, *supra* note 70, at 7–10.
[95] Personal Data Protection Act § 3(29).
[96] *See id*. § 3(35) ("'Sensitive Personal Data' means personal data revealing, related to, or constituting, as may be applicable: (i) passwords; (ii) financial data; (iii) health data; (iv) official identifier; (v) sex life; (vi) sexual orientation; (vii) biometric data; (viii) genetic data; (ix) transgender status; (x) intersex status; (xi) caste or tribe; (xii) religious or political belief or affiliation; or (xiii) any other category of data specified by the Data Protection Authority under the Act.").
[97] *See id*. § 3(3) ("'Anonymisation' in relation to personal data means the irreversible process of transforming or converting personal data to a form in which a data subject cannot be identified, meeting the standards specified by the [Data Protection] Authority [to be established under the Act by the Indian Government].").

IV. ENTITIES AND DATA PROTECTED UNDER THE PERSONAL DATA PROTECTION ACT

The Personal Data Protection Act protects all individual persons worldwide if and to the extent that their personal data is processed on Indian territory.[98] Indian residents are also protected when their personal data is processed outside India if processing occurs (i) in connection with business carried out in India, (ii) systematic offering of goods or services to data subjects in India, or (iii) activity which involves profiling of Indian data subjects (e.g., building a data profile of Indian data subjects based on their browsing activity).[99]

V. ENTITIES AFFECTED BY THE PERSONAL DATA PROTECTION ACT

Any company anywhere in the world must comply with the Personal Data Protection Act to the extent that the company in question processes personal data on Indian territory, including with the help of a data processor in India, offers goods or services to data subjects in India, or profiles Indian residents remotely.[100]

Any Indian company that processes personal data belonging to an Indian or a foreign data subject must likewise comply.[101] The Personal Data Protection Act applies to the processing of all personal data collected, disclosed, shared, or otherwise processed within India.[102] Since the definition of "processing" includes mere storage, the Personal Data Protection Act's requirements apply to the personal data of any foreign data subjects if that data was stored or otherwise processed in India.[103] Therefore, any outsourcing operation that transfers foreign personal data to India will be covered by the Personal Data Protection Act and will have to comply with the Act's requirements.[104] The Indian government has the discretion to exempt data processing related to foreign data subjects in an outsourcing context from obligations under the Personal Data Protection Act, but it remains to be seen whether the government will actually exempt such data processing from substantive compliance obligations.[105]

Any foreign data controller or data processor outside India will have to comply with the Personal Data Protection Act if that company processes personal data in connection with business carried out in India, a systematic offering of

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[98] *See id*. § 2(1).
[99] *See id*. § 2(2).
[100] *See id*. §§ 2(1)-(2).
[101] *See id*. § 2(1).
[102] *See id*.
[103] *See id*. § 3(32) ("'Processing' in relation to personal data, means an operation or set of operations performed on personal data, and may include operations such as collection, recording, organisation, structuring, storage, adaption, alteration, retrieval, use, alignment or combination, indexing, disclosure by transmission, dissemination or otherwise making available, restricting, erasure or destruction.").
[104] *See id*. §§ 2(1), 3(2).
[105] *See id*. § 104.

goods or services to Indian residents, or activity involving the profiling of Indian residents.[106] This sweeps in almost any foreign company with an Indian connection, such as a company that offers goods or services to Indian residents online. Providers of global apps will also be covered, since they profile persons in India.[107] However, a foreign company that only processes the personal data of foreign data subjects collected abroad, without any other nexus or connection to India, will not have to comply with the Personal Data Protection Act.

VII. COMPLYING WITH THE PERSONAL DATA PROTECTION ACT

Under the Personal Data Protection Act, companies have to address a series of requirements similar to those established by the GDPR, which include the following:

A. Identifying a Basis for Processing Data

Data controllers must provide a lawful processing basis for both personal and sensitive personal data.[108] For each category of data, the Personal Data Protection Act specifies permissible bases for data processing (i.e., what the law considers a lawful basis for processing that category of data).[109] Consent is a lawful basis for processing both personal and sensitive personal data (i.e., if someone consents, it is legal to process their data), but heightened information requirements apply for sensitive personal data.[110] In addition, the data subject can withdraw consent,[111] which makes consent an unreliable basis for processing data.

The Personal Data Protection Act also allows companies to process personal data for a purpose "reasonably incidental" to the purpose for which the data was collected.[112] For example, if personal data is collected in connection with a candidate's employment application, it may also be permissible to process the same data to provide employment-related benefits to the subsequently employed candidate. The law also permits processing of personal data for "a reasonable purpose."[113] Some non-exhaustive examples of "reasonable purposes" are data processing for a mergers and acquisitions transaction, for network security

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[106] *See id*. § 2(2).
[107] *See id*. § 3(33) ("'Profiling' means any form of processing of personal data that analyses or predicts aspects concerning the behavior, attributes or interest of a data principal."). For example, this would include a food delivery app that uses user data to make restaurant suggestions.
[108] *See id*. § 5.
[109] *See id*. §§ 12–17 for personal data, §§ 18–22 for sensitive personal data. The bases for both categories of data also include processing for functions of the State (which would cover Aadhaar), for compliance with law, and to address an emergency situation.
[110] *See id*. §§ 12, 18. Consent has to be free, informed, specific, clear and capable of being withdrawn.
[111] *Id*. § 12(2)(e).
[112] *See id*. § 5(2).
[113] *See id*. § 17.

purposes, or for credit scoring.[114] The Personal Data Protection Act also establishes the Data Protection Authority, which is expected to clarify what these terms mean and what processing they permit.[115]

B. Data Subject Notice Requirements

Data controllers must notify data subjects about the collection and use of personal data.[116] Irrespective of whether data is being collected directly from the data subject, data controllers must provide the subject with information regarding the processing purposes; categories of data collected; the subject's rights, including the right to withdraw consent for processing; the source of the personal data if not collected from the data subject; other data controllers or data processors with whom personal data may be shared; any cross-border data transfers; and the retention period for such personal data.

Most businesses will communicate the required information in the form of a privacy policy, statement, or notice.[117] Businesses are required to make this information clear, comprehensible, and available in multiple languages "where necessary and practicable."[118] For example, if a US company transferred Japanese customer data to a data processor in India for processing, the Personal Data Protection Act would require the US company, as the data controller, to comply with notice requirements with respect to the Japanese customers.[119] According to the Personal Data Protection Act, the US company may even be required to deliver the notice in Japanese "if necessary and practicable."[120]

C. Develop Processes to Grant Data Subject Rights

Data subjects receive GDPR-style rights under the Personal Data Protection Act, including the right to confirmation of and access to data,[121] the right to data portability,[122] the right to be forgotten,[123] and the right to correction of data.[124] However, these rights are not identical in scope to the corresponding rights under the GDPR. For example, under the Personal Data Protection Act, the "right to be forgotten" requires a data subject to submit a request to an adjudicating authority. This authority weighs the request against various other factors, such as the

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[114] *See id*.
[115] *See id*. § 49.
[116] *Id*. § 8.
[117] *See* DETERMANN'S FIELD GUIDE TO PRIVACY LAW, *supra* note *, at chs. 3.10 *et seq*.
[118] Personal Data Protection Act § 8(2).
[119] *See id*. §§ 2(1), 3(2), 8.
[120] *Id*. § 8(2).
[121] *Id*. § 24.
[122] *Id*. § 26.
[123] *Id*. § 27. The "right to be forgotten" generally allows data subjects to have personal data (such as text or video) about themselves deleted from records.
[124] *Id*. § 25. When data is corrected, the data controller also has an obligation to notify other entities or individuals to whom personal data was disclosed about the correction as per § 25(4).

sensitivity of the personal data and the relevance of the personal data to the public at large, before deciding whether to grant it.[125] Under the Personal Data Protection Act, data controllers are less likely to receive such requests to be forgotten as compared to the corresponding right under the GDPR[126] or under the new California Consumer Privacy Act.[127] Unlike the Personal Data Protection Act, the GDPR and the CCPA do not have the hurdle of an adjudication process. Businesses that act as data controllers must inform data subjects of these rights and develop mechanisms to address rights requests from data subjects. There is a penalty of approximately $80 a day for failing to comply with requests from data subjects.[128]

D. Legitimizing Cross-Border Data Transfers

Cross-border transfers, which are essential to most outsourcing data processing operations, remain an open issue under the Act. To conduct a cross-border data transfer under the Personal Data Privacy Protection Act, businesses must either enter into standard contractual clauses approved by the Data Protection Authority or transfer data pursuant to a EU-style adequacy decision from the Indian government.[129] Additional consent of the data subject may be required, though it is unclear from the Personal Data Protection Act whether this is still needed if using standard contractual clauses or relying on an adequacy decision.[130] The Indian government has not made any adequacy decisions to date, and the Data Protection Authority can only provide standard contractual clauses once the Personal Data Protection Act becomes law.

E. Developing a Data Breach Notification Plan

Further guidance is also expected to be provided in the future with respect to data breaches, and the situations in which notifications will be required. The Personal Data Protection Act requires all data controllers to notify the Data Protection Authority of any breach if the "breach is likely to cause harm to any data subject."[131] The Act requires businesses to develop assessment models to decide and document the likelihood of harm such as identity theft .[132] This is similar to the assessment carried out under the GDPR by data controllers deciding whether to notify a European Data Protection Authority about a data breach.[133]

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[125] *Id*. §§ 27(2), 27(3).
[126] *See* GDPR, *supra* note 2.
[127] *See* CAL. CIV. CODE § 1798.105.
[128] Personal Data Protection Act § 70.
[129] *Id*. § 41.
[130] *Id*. §§ 41(1)(d)-(e).
[131] *Id*. § 32.
[132] *See id*. §§ 32(1)-(2).
[133] GDPR, *supra* note 2, at art. 33. The GDPR requires notification by the data controller "unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons."

Under the Personal Data Protection Act, the data controller must notify the Indian Data Protection Authority of the data breach "as soon as possible."[134] Once established, the Indian Data Protection Authority may specify more concrete deadlines. Upon notification, the Data Protection Authority will determine if the data controller must also notify data subjects.[135] The Data Protection Authority can also order remedial actions and post details of breach on its website.[136]

F. Assessing Whether Heightened Obligations for High-Risk Data Controllers Apply

Additional obligations may also apply depending on whether a company is treated as high risk. The Indian Data Protection Authority may classify individual companies or categories of companies as "significant," i.e., high-risk with respect to data privacy if they process large volumes of personal data, process sensitive personal data, and—depending on turnover—create risk of harm to data subjects, among a number of other factors.[137] Heightened requirements apply to such "significant" data controllers; they have to conduct data protection impact assessments,[138] comply with record keeping requirements,[139] conduct data audits,[140] and appoint a data protection officer.[141] It remains to be seen whether the Data Protection Authority will designate individual entities as high-risk data controllers or instead publish a list of categories of high-risk data controllers.

G. Protecting Children's Data

Data controllers are required to create mechanisms for age verification and parental consent to process the personal data of children, defined as persons under the age of eighteen.[142] The Personal Data Protection Act is not prescriptive with these mechanisms, giving data controllers some leeway in designing the mechanisms. "Guardian" data controllers, who operate commercial websites or online services directed at children or who process large volumes of children's personal data, are barred from profiling, tracking, monitoring behavior, directing targeted advertising, and other processing activities that can cause "significant harm" to children.[143]

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[134] Personal Data Protection Act § 32(3).
[135] *Id*. § 32(5).
[136] *Id*. §§ 32(6)-(7).
[137] *Id*. § 38. The other factors are the turnover of the data controller and the use of new technologies.
[138] *Id*. § 33.
[139] *Id*. § 34.
[140] *Id*. § 35.
[141] *Id*. § 36.
[142] *Id*. §§ 23, 3(9).
[143] *Id*. § 23(5).

H. Addressing Data Residency Requirements

The Personal Data Protection Act creates stringent data residency requirements[144] that have already been the subject of criticism.[145] Data fiduciaries must store a copy of all personal data to which the law applies in India; additional copies can be stored outside India.[146] The government can also specify categories of data that must be stored only in India.[147] This would effectively compel the creation of Indian data centers for many businesses. The government can exempt some categories of personal data (except sensitive personal data) from this residency requirement.[148]

VII. SANCTIONS AND REMEDIES

Under the Indian Personal Data Protection Act, companies face GDPR-style penalties. Data controllers can be fined approximately $730,000 or two percent of global turnover[149] for, among other items: failing to notify data breaches to the Data Protection Authority to be established under the Act, or failing to meet obligations as a significant data controller. Similarly, data controllers are subject to a fine of approximately $2.7 million or four percent of global turnover[150] for: failing to provide notices to data subjects explaining the existence of a legitimate basis for processing; conducting unlawful cross-border data transfers; or processing children's data in contravention of the relevant sections of the Personal Data Protection Act.[151]

The Indian government can also impose criminal penalties for the sale of personal data in contravention of the law that results in significant harm to the data subject, and for reidentification of anonymized data.[152] Data subjects can also apply for compensation for violations of their rights by making a complaint to an adjudicating officer under the Personal Data Protection Act.[153]

However, data controllers cannot be sued in civil court by data subjects under any separate private right of action, as is common in the United States.[154] This is because the Personal Data Protection Act expressly bars civil courts from

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[144] *Id*. § 40.
[145] *See, e.g*., Naomi Shiffman and Jochai Ben-Avie, *Data localization: bad for users, business, and security*, OPEN POLICY AND ADVOCACY (Jun. 22, 2018), https://blog.mozilla.org/netpolicy/2018/06/22/data-localization-india/.
[146] Personal Data Protection Act § 40(1).
[147] *Id*. § 40(2).
[148] *Id*. § 40.
[149] *Id*. § 69(1).
[150] *Id*. § 69(2).
[151] *Id*.§ 23.
[152] *Id*. § 90.
[153] *Id*. § 75.
[154] *See, e.g*., CAL. CIV. CODE § 1798.150(a)(1) (creating a private right of action with respect to data breaches).

exercising jurisdiction over matters covered by the Act, instead granting exclusive jurisdiction to authorities established under the Act.[155]

VIII. LEGISLATIVE TIMELINE

The Personal Data Protection Act must still be reviewed and approved by the Ministry of Electronics and Information Technology, then placed before the Union Council of Ministers; once approved there, the Act must then be placed before Parliament.[156] According to some reports, the Personal Data Protection Act will be placed before Parliament once the Ministry of Electronics and Information Technology completes additional consultations with stakeholders.[157] Both houses of Parliament must debate and pass the Personal Data Protection Act before the President signs it into law. All of this should take at least a few months. Changes to the draft Personal Data Protection Act could take place during any of these steps.

However, the Act is unlikely to stall over a long period of time. As already noted, in August 2017, the Indian Supreme Court ordered the government to enact a comprehensive data protection law. If the government unduly delays enacting this law, it could potentially be in contempt of court.[158]

The substantive compliance provisions of the Personal Data Protection Act will go into effect eighteen months after its enactment.[159] This provides lead time during which the Data Protection Authority can be established to provide guidelines with respect to compliance with and enforcement of the Act.

IX. COMPARING THE PERSONAL DATA PROTECTION ACT WITH THE GDPR AND CCPA

The Indian Personal Data Protection Act joins a growing body of national data protection legislation that impacts businesses around the globe. The GDPR went into effect on May 25, 2018 and created compliance requirements for all entities processing the data of EU citizens or processing personal data in the EU.[160]

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[155] Personal Data Protection Act § 91.

[156] *See* PARLIAMENT OF INDIA LOK SABHA [House of the People], Abstract of Parliamentary Process, http://loksabhaph.nic.in/writereaddata/Abstract/legislative_process.pdf.

[157] *See* ET Bureau, *MeitY seeks feedback on data bill from select few*, ECONOMIC TIMES (Aug. 21, 2019, 8:46 AM), https://economictimes.indiatimes.com/tech/internet/meity-seeks-feedback-on-data-bill-from-select-few/articleshow/70763907.cms.

[158] *See* INDIA CONST. (1950), art. 129.

[159] Personal Data Protection Act § 97.

[160] *See* Lothar Determann, *GDPR Ante Portas: Compliance Priorities for the Impending EU Data Protection Regulation*, 2 PLI CURRENT: THE JOURNAL OF PLI PRESS (2018); *see also*, *Less Than 20 Weeks to the European Union GDPR—What to Do Now?* PRIVACY & SECURITY LAW REPORT (BNA) (Jan. 10, 2018), https://www.bloomberglaw.com/document/X7GK454O000000?bc=W1siQ2l0YXRpb24gUmVzdW

As of January 1, 2020, with the passage of the CCPA, companies around the world will have to comply with additional regulations related to the processing of personal data of California residents. Pursuant to the CCPA, covered companies must observe restrictions on data monetization business models; accommodate rights to access, delete, and port personal data; and issue or update privacy notices to provide detailed disclosures about data handling practices.[161]

At the panel discussion in Palo Alto with Minister Prasad (*see supra*, Section 1, Part 2), the panel discussed competing approaches to data regulation. Minister Prasad contrasted the European approach of regulating data processing through a default prohibition on processing of personal data with the US approach of sectoral, harm-specific protections for individual privacy, in which the information technology sector has flourished.[162] Lothar Determann questioned why India seems to be leaning heavily towards the European approach, as opposed to the US approach, given that India is also nourishing a globally leading information technology sector.[163] In response, Minister Prasad noted that all societies have to develop their own conceptions of privacy based their unique culture and history; he further explained that the Personal Data Protection Act is still in draft form, and that the Indian government must find a balance between fostering innovation and safeguarding privacy.[164]

With this need for balance in mind, this Article will review key similarities and differences between the draft Personal Data Protection Act, the GDPR, and the CCPA.

A. Extent of Privacy Protections

The Personal Data Protection Act, like the GDPR, broadly regulates all processing of personal data with the prohibitive character of an omnibus data protection law. The Indian law will establish a Data Protection Authority and will subject companies to numerous administrative duties, including the appointment of data protection officers, local representatives (for foreign companies), data protection impact assessments, record keeping, privacy by design (i.e., the conscious consideration of privacy as a desirable feature at all stages of the design and conception of a product or service), and audits.[165]

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[161] *See generally* Determann, *supra* note 4 (analysis of CCPA and its history).

[162] For a description of the panel discussion held at the Hewlett Foundation in Palo Alto, see Jha, *supra* note 25. The Minister was in California to meet with tech leaders and discuss data privacy and security issues. *See also* PTI, *supra* note 25.

[163] *Id*.

[164] *Id*.

[165] Personal Data Protection Act §§ 29, 34-36.

The CCPA also applies broadly but does not create any such administrative obligations. The CCPA addresses the specific risks for individual privacy created by data trading[166] (the buying and selling of personal data by businesses), and was created to supplement—not replace—hundreds of existing data privacy laws at the federal and state level.[167] Neither California nor the United States have established data protection authorities.[168]

B. Scope of the Definition of Personal Data

The Personal Data Protection Act, the GDPR, and the CCPA all regulate any information that relates to an identifiable individual.[169] The CCPA additionally regulates information relating to households.[170]

C. Protected Persons

The Personal Data Protection Act, the GDPR, and the CCPA protect individuals only, and do not protect legal entities.[171] The CCPA protects only California residents.[172]

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[166] *See* A.B. 375, 2017-18 Reg. Sess., § 2(c)–(f) (Cal. 2018) ("The Legislature finds and declares that: …(c) At the same time, California is one of the world's leaders in the development of new technologies and related industries. Yet the proliferation of personal information has limited Californians' ability to properly protect and safeguard their privacy. It is almost impossible to apply for a job, raise a child, drive a car, or make an appointment without sharing personal information. (d) As the role of technology and data in the everyday lives of consumers increases, there is an increase in the amount of personal information shared by consumers with businesses. California law has not kept pace with these developments and the personal privacy implications surrounding the collection, use, and protection of personal information. (e) Many businesses collect personal information from California consumers. They may know where a consumer lives and how many children a consumer has, how fast a consumer drives, a consumer's personality, sleep habits, biometric and health information, financial information, precise geolocation information, and social networks, to name a few categories. (f) The unauthorized disclosure of personal information and the loss of privacy can have devastating effects for individuals, ranging from financial fraud, identity theft, and unnecessary costs to personal time and finances, to destruction of property, harassment, reputational damage, emotional stress, and even potential physical harm…").

[167] *See* Determann, CALIFORNIA PRIVACY LAW: PRACTICAL GUIDE AND COMMENTARY, U.S. FEDERAL AND STATE LAW, *supra* note 1.

[168] *See* Lothar Determann, *Adequacy of data protection in the USA: myths and facts*, 6 INTERNATIONAL DATA PRIVACY LAW 244 (2016).

[169] *See* CAL. CIV. CODE § 1798.140(o)(1); GDPR, *supra* note 3, art. 4(1); Personal Data Protection Act §3(29).

[170] CAL. CIV. CODE § 1798.140(o)(1).

[171] CAL. CIV. CODE § 1798.140(o)(1); GDPR, *supra* note 3, art. 4(1); Personal Data Protection Act §3(29).

[172] Reference the definition of "consumer" in CAL. CIV. CODE §1798.140(g).

D. Applicability to the State

Unlike the GDPR and the CCPA, the Indian Personal Data Protection Act also applies to the State.[173] In Europe, the GDPR does not apply to data processing by the member states, which is separately regulated in national legislation.[174] Similarly, the United States and California have enacted separate public sector privacy laws, with relatively robust protections against government access to personal data, including the new California Electronic Communications Privacy Act.[175]

The Indian Personal Data Protection Act broadly authorizes public sector data processing in Section 13, which provides:

> (1) Personal data may be processed if such processing is necessary for any function of Parliament or any State Legislature (2) Personal data may be processed if such processing is necessary for the exercise of any function of the State authorized by law for: (a) the provision of any service or benefit to the data principal from the State; or (b) the issuance of any certification, license or permit for any action or activity of the data principal by the State.[176]

Thus, data processing by the State is subject to the same law as data processing by private entities, but the State has broader permission to engage in data processing.[177]

E. Prohibition and Minimization of Data Processing

The GDPR and the Indian Personal Data Protection Act prohibit companies from processing personal data unless they can claim an exception or defense, and even then, companies are required to minimize the processing of personal data.[178] Companies in Europe have been subject to such restrictions since the early 1970s.[179] Indian companies in the information technology sector have so far flourished in the current, largely unregulated legal environment. It remains to be seen how they will fare under the newer, heavily regulated regime.

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[173] Personal Data Protection Act §2(1)(b).
[174] *See* GDPR, *supra* note 2, at art. 2(2).
[175] California Electronic Communications Privacy Act (CalECPA), S.B. 178, *available at* https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201520160SB178. Under the California Electronic Communications Privacy Act, for example, no California government entity can search phones, and no police officer can search online accounts, without going to a judge, getting consent, or showing it is an emergency.
[176] Personal Data Protection Act § 13.
[177] *See id*. §12 (restrictions on private entities).
[178] GDPR, *supra* note 2, at arts. 5(1)(c) and 6(1); Personal Data Protection Act §§ 6, 7.
[179] This may partially explain why European companies are relatively less prominent in the information technology sector compared to their US counterparts. *See* Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639 (2014).

In the United States, Congress deliberately decided against enacting data regulation in the 1970s in order to preserve and protect innovation and economic freedoms.[180] Under most US data privacy laws, companies are not prohibited from processing personal data or required to minimize data processing, but are merely required to observe narrowly tailored restrictions deemed necessary to protect individual privacy.[181] Even under the extensive CCPA, companies only have to seek prior opt-in consent from minors or their parents before selling personal information pertaining to children under sixteen years of age.[182] Otherwise, selling or processing personal data is not prohibited or limited, unless or until a data subject exercises their right under the CCPA to limit processing of individual information.[183]

F. Global Scope of Applicability

Companies around the world can be subject to the Personal Data Protection Act, the GDPR, and the CCPA (and to most other privacy laws around the world) if they collect or process personal data from or in the territories governed by the respective laws. To avoid becoming subject to these laws, companies would have to stop doing business in regulated jurisdictions. After the GDPR took effect in May 2018, some US newspapers started blocking online access by E.U. residents,[184,] and in Europe, various bloggers, nonprofit organizations and smaller businesses went offline because they felt unable to comply with the new requirements.[185] Most multinational companies, however, are unlikely to consider this a viable option given the size of the European and Indian economies and business opportunities.[186]

A key difference between the three laws is that most US privacy laws, including the CCPA, only protect the privacy of residents, whereas the GDPR and the Personal Data Protection Act regulate any processing of personal data on local territories, including personal data pertaining to persons residing in other

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[180] *See* Paul Schwartz, *Preemption and Privacy*, 118 YALE L.J. 902 (2009).
[181] *See Determann, supra* note 168.
[182] CAL. CIV. CODE §1798.120(c).
[183] *Id.*
[184] Adam Saratiano, *U.S. News Outlets Block European Readers Over New Privacy Rules*, N.Y. TIMES (May 25, 2018), www.nytimes.com/2018/05/25/business/media/europe-privacy-gdpr-us.html.
[185] Patrick Bernau, Was der neue Datenschutz angerichtet hat, FRANKFURTER ALLGEMEINE ZEITUNG (May 28, 2018, 3:19 PM), www.faz.net/aktuell/wirtschaft/diginomics/skurrile-folgen-der-dsgvo-15609815.html#void.
[186] The United States (#1), Germany (#4) and India (#7) are in the top 7 of economies by gross domestic product, and the E.U. and California would come in as #2 and #5 respectively if they were nations. See *World Bank GDP Data,* https://data.worldbank.org/indicator/ny.gdp.mktp.cd?most_recent_value_desc=true; *California is now the world's fifth-largest economy, surpassing United Kingdom*, LOS ANGELES TIMES (May 4, 2018, 1:50 PM), www.latimes.com/business/la-fi-california-economy-gdp-20180504-story.html.

countries.[187] As a result, foreign companies subject themselves to compliance obligations under the GDPR and the Personal Data Protection Act not only if they collect information about Indian or European residents, but also if they process foreign personal data in European or Indian territory. This could noticeably impair India's attractiveness as a destination for offshoring of business process outsourcing, call centers, and data processing services more generally. Foreign companies will generally not want to subject themselves to Indian privacy law applicable to data controllers on the basis that they engage a data processor, call center operator, or other service provider on Indian territory.[188]

For example, hypothetically, if a bank in Brazil were to consider engaging a cloud service provider in Europe, India, or the United States to process the data of Brazilian bank customers, the bank would need to comply with requirements on data controllers under the GDPR and Personal Data Protection Act if it selects a data processing location in Europe or India.[189] By contrast, the Brazilian bank would not have to comply with the CCPA if it engaged a cloud provider in California because the California law applies only to the personal data of California residents, not of Brazilian bank customers.[190] Neither the bank nor its Brazilian customers would likely perceive the applicability of E.U. or Indian data protection laws as an advantage. Both parties may be concerned about data access by foreign governments against which neither the GDPR nor the Indian Personal Data Protection Act provide meaningful protections.[191] More significantly, the Brazilians might be concerned about data access by the Brazilian government, which local data processing service providers in Brazil would be more exposed to than any foreign service provider. Absent any special favorable treatment under foreign data protection laws, the Brazilian bank and its customers would have rely on Brazilian law and contractual protections for data security, which applies regardless of which jurisdiction a cloud or other service provider is based in. Consequently, Indian service providers may become a less attractive option internationally if engaging those providers triggers additional substantive compliance obligations on foreign customers under the Personal Data Protection Act.

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[187] *See* CAL. CIV. CODE §1798.140(g); GDPR, *supra* note 3, at arts. 2, 3; Personal Data Protection Act § 2.

[188] *See, e.g.*, IANS, *An Indian lobby with the likes of Facebook, Flipkart, and Microsoft as members is still arguing against storing data in India*, BUSINESS INSIDER (Oct. 7, 2019, 8:50 PM), https://www.businessinsider.in/policy/news/an-indian-lobby-with-the-likes-of-facebook-flipkart-and-microsoft-as-members-is-still-arguing-against-storing-data-in-india/articleshow/71472585.cms.

[189] *See* GDPR, *supra* note 3, at arts. 2, 3; Personal Data Protection Act § 2.

[190] *See* CAL. CIV. CODE § 1798.140(g).

[191] *See* Lothar Determann, *Data Residency Rules Cutting Into Clouds: Impact and Options for Global Businesses and IT Architectures*, BLOOMBERG BNA PRIVACY & SECURITY LAW REPORT (Apr. 3, 2017) (analysing the impact of recent data residency laws in other jurisdictions such as Russia, Germany, Indonesia and China).

G. Rights of Data Subjects

Under all three laws, individuals have the rights to access (i.e., to know what data is held about them), portability (i.e., to have data transferred to another entity that provides similar services), and to be forgotten (i.e., to have information held about them deleted or restricted), subject to different nuances and exceptions.[192] Under the Personal Data Protection Act, individuals enjoy only a limited right to be forgotten with respect to further disclosure, but not a right to absolute deletion.[193] To obtain absolute deletion, individuals need to seek a decision weighing data privacy and information freedom interests from an adjudicating officer at the Data Protection Authority. Requesting individuals may have to pay a fee to compensate the data controller for the costs of handling such requests.[194]

H. Selling of Personal Data

The GDPR does not regulate selling of data specifically or even reference "selling" or "sale" in its text. Companies are generally prohibited from processing personal data, and the definition of processing broadly encompasses any disclosure of relevant data.[195] Thus, under the GDPR, selling data is subject to the general broad prohibitions and exceptions.[196]

By contrast, the CCPA is very focused and prescriptive regarding "selling of information," as a reaction to the data processing activities of Cambridge Analytica, a U.K. company that focused on influencing of national elections.[197] The Cambridge Analytica scandal was specifically mentioned in the recitals to the California law and similarly provoked outrage in India.[198]

Under the Personal Data Protection Act, as under the GDPR, companies must comply with general restrictions on data processing whenever they sell data. Additionally, companies face criminal penalties if they sell personal data in violation of the Personal Data Protection Act and thereby cause significant harm to data subjects.[199]

I. Data Security and Breach Notifications

Like the GDPR, the Personal Data Protection Act obligates companies to keep data secure and to notify data protection authorities and individuals of

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[192] CAL. CIV. CODE §§1798.100 *et seq*.; GDPR, *supra* note 2, at arts. 12–23; Personal Data Protection Act §§ 24–28.
[193] Personal Data Protection Act § 27.
[194] Personal Data Protection Act §§ 27-28.
[195] *See* GDPR, *supra* note 2, at art. 6.
[196] *Id*.
[197] *See* A.B. 375, 2017–18 Reg. Sess., § 2 (Cal. 2018).
[198] Vindu Goel, *India Pushes Back Against Tech 'Colonization' by Internet Giants*, N.Y. TIMES (Aug. 31, 2018), www.nytimes.com/2018/08/31/technology/india-technology-american-giants.html.
[199] Personal Data Protection Act § 90(d). If sensitive personal data is sold, then only "harm" rather than "significant harm" to the data subject is required for criminal penalties to apply. *Id*. § 91(d).

breaches under certain circumstances, such as if the "breach is likely to cause harm to any data subject."[200] California enacted data security requirements and data breach notification obligations in 2002, and supplemented these existing laws with new statutory damages provisions in the CCPA.[201]

J. International Transfer Restrictions

Like the GDPR, the Personal Data Protection Act restricts international transfers of personal data.[202] California and US laws do not impose any restrictions on international data transfers.

K. Data Residency Requirements

Section 41 of the Personal Data Protection Act requires that companies store on Indian territory all personal data subject to the Act, or, at a minimum, a copy of such personal data. Russia, Kazakhstan, and Indonesia have also enacted data residency laws in the past; China has included data residency requirements in draft cybersecurity laws.[203]

Neither the GDPR nor US federal or California privacy laws contain data residency requirements. Germany enacted fairly limited national laws requiring storage of Internet metadata on German territory in 2016, but these seem to be conflicting with E.U. law and have to date not been enforced.[204] If the E.U. or the United States retaliate with broad data residency requirements of their own, this could have a significant adverse impact on India's information technology and outsourcing sector.[205]

L. Data Processing Contracts

Under Article 28 of the GDPR, companies must sign written contracts with processors and "stipulate" particular clauses prescribed in detail.[206] Section 37 of the Personal Data Protection Act also requires a contract, but it is less prescriptive as to its content.[207] Companies that meet the requirements of Article 28 of the GDPR with existing data processing agreements should also meet the new

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[200] GDPR, *supra* note 2, at arts. 24, 32–34; Personal Data Protection Act §§ 31, 32.
[201] CAL. CIV. CODE §1798.150; *see* Lothar Determann, *Be Wary of Liability for Statutory Damages under California Consumer Privacy Act*, PRIVACY & SECURITY LAW REPORT (BNA) (Jul. 9, 2018), https://www.bloomberglaw.com/document/X6TG8870000000?bna_news_filter=privacy-and-data-security&jcsearch=BNA%2520000001646a6fd844a3f76e7f95030002#jcite.
[202] GDPR, *supra* note 2, at arts. 44 *et seq*.; Personal Data Protection Act §§ 41–42.
[203] Determann, *supra* note 71.
[204] Lothar Determann & Michaela Weigl, *Data Residency Requirements Creeping into German Law*, PRIVACY & SECURITY LAW REPORT (BNA) (Apr. 11, 2016), https://www.bloomberglaw.com/product/blaw/document/X1KCCTDG000000.
[205] Goel, *supra* note 198.
[206] *See* GDPR, *supra* note 2, at art. 28.
[207] Personal Data Protection Act § 37.

requirements under the Personal Data Protection Act.[208] Under the CCPA, companies do not face any new contracting obligations, but many companies may nevertheless consider updating their vendor contracts to expressly prohibit "selling" of personal information to avoid triggering disclosure obligations under the new California law.[209]

M. Age of Children and Consent Issues

The Personal Data Protection Act requires companies to obtain parental consent from parents or guardians of persons under the age of eighteen.[210] According to Article 8(1) of the GDPR, the age threshold for parental consent is sixteen years.[211] According to the CCPA, companies must obtain prior consent to sell data from minors between thirteen and sixteen years old, and must obtain consent from guardians or parents of children under thirteen years old.[212]

In 1998, the US Congress enacted the Children's Online Privacy Protection Act (COPPA), under which companies must obtain parental consent with respect to children under thirteen years old.[213] The US Federal Trade Commission started enforcing COPPA, and most companies in the United States and elsewhere started to prohibit children under the age of thirteen from accessing their websites and online services.[214]

Parents around the world may have observed this development with mixed feelings, based on a desire to teach their children to use online services responsibly.[215] Many parents allowed their children to lie about their age online.[216] Companies and parents in India and Europe alike will face more difficult decisions and enforcement challenges in light of the higher age threshold: eighteen in India, as compared to thirteen in the United States and sixteen in Europe.[217]

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[208] See Personal Data Protection Act § 37; GDPR, *supra* note 3, at art. 28.
[209] Amy de La Lama & Brian Hengesbaugh, Navigating disclosures and sales of personal information under the CCPA (The Privacy Advisor, IAPP, Aug. 28, 2019), https://iapp.org/news/a/navigating-disclosures-and-sales-of-personal-information-under-the-ccpa/.
[210] Personal Data Protection Act §§ 3(9), 23(2)e.
[211] *See* GDPR, *supra* note 2, at art. 8(1).
[212] CAL. CIVIL CODE § 1798.120 (d).
[213] Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506.
[214] *See* FEDERAL TRADE COMMISSION, PROTECTING CHILDREN'S PRIVACY UNDER COPPA: A SURVEY ON COMPLIANCE (April 2002), www.ftc.gov/sites/default/files/documents/reports/protecting-childrens-privacy-under-coppa-survey-compliance/coppasurvey.pdf.
[215] Danah Boyd, *Why Parents Help Tweens Violate Facebook's 13+ Rule*, HUFFINGTON POST (Dec. 6, 2017, 1:38 AM), www.huffingtonpost.com/danah-boyd/tweens-on-facebook_b_1068793.html.
[216] *Id*.
[217] *See* 15 U.S.C. § 6501(1); GDPR, *supra* note 3, at art. 8(1); Personal Data Protection Act § 3(9).

N. Penalties and Enforcement

Under the Personal Data Protection Act, much like the GDPR, companies face tiered penalties of up to $2.7 million or four percent of global turnover.[218] The Indian Data Protection Authority shall set up special funds for its operative costs, supported by fees and charges, and for privacy awareness, supported by penalty funds.[219]

The GDPR also provides for fines up to four percent of global turnover, but leaves the details of applying and allocating the revenue from penalties to the member states of the European Economic Area (which includes the E,U. States plus Iceland, Norway and Liechtenstein).[220] Some member states, including Spain, allow their data protection authorities to use enforcement revenue to fund their operations, which has resulted in disproportionate enforcement activities compared to the general EEA standards.[221] The CCPA also establishes a Consumer Privacy Fund, which is funded by penalties and is designed to induce and support additional enforcement activities.[222]

Under the Personal Data Protection Act, data subjects can also be awarded individual compensation after an adjudication process if their rights are violated.[223]

X. OUTLOOK AND ACTION ITEMS

As our comparison in Section IX of this Article indicates, the new Indian Personal Data Protection Act adopts and further develops many existing principles of EU-style data processing regulation and some aspects of US-style data privacy laws. Global companies can, and should, try to address the requirements of the new Personal Data Protection Law, the GDPR, the California Consumer Privacy Act, and other privacy regimes simultaneously and holistically, in the interest of efficiency.[224] However, it is also clear that companies cannot just expand the coverage of their GDPR-focused compliance measures to India without addressing the nuances of the Personal Data Protection Act and its many differences from other jurisdictions' data processing regulations and data privacy laws.

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[218] Personal Data Protection Act §§ 69–74.
[219] *Id*. at § 77.
[220] GDPR, *supra* note 2, at arts. 77 *et seq*.
[221] *See Data Protection Enforcement in Spain*, GLOBAL COMPLIANCE NEWS (2006), https://globalcompliancenews.com/data-privacy/data-protection-enforcement-in-spain/.
[222] CAL. CIV. CODE § 1798.155 contemplates 20 percent of penalties to be allocated to the Consumer Privacy Fund; new legislation contemplates increasing this amount to 100 percent.
[223] Personal Data Protection Act § 75.
[224] *See* Daniel J. Solove, *The Challenge of Global Privacy Compliance: An Interview with Lothar Determann*, TECHNOLOGY ACADEMICS POLICY (Nov. 15, 2017), www.techpolicy.com/Solove_BeyondGDPR-Challenge-GlobalPrivacyCompliance-InterviewWithLotharDetermann.aspx.

Any company that has already undertaken GDPR compliance measures and created a comprehensive data inventory, carried out a data processing assessment, put in place procedures to address data breaches, and considered when it can use anonymized or pseudonymized aggregated data will be better positioned to comply with the new Indian law and any future legislation that may be modelled on it as these action items and considerations are shared by both the GDPR and the new Indian law.[225] Companies that have not yet tackled GDPR compliance need to prepare for significant projects and should consider simultaneously addressing GDPR and Personal Data Protection Act compliance.[226]

All companies that may be subject to the new Indian Personal Data Protection Act should prepare a task list and start with a few initial action items:

> **Review data sharing and processing practices** and prepare a roadmap for compliance and implementation. As anyone who has worked on the GDPR knows,[227] eighteen months is not a large amount of time to prepare for compliance with an entirely new regulatory regime.
> **Integrate compliance measures and task lists with existing efforts** to address requirements of the E.U. GDPR, the California Consumer Privacy Act of 2018, and other global data protection, privacy, and security laws holistically.
> **Prepare data maps, inventories, or other records** of all personal data covered by the Personal Data Protection Act to assess what personal data in the company's control is covered, add newly required information to privacy policies, and prepare for data access, correction, and portability requests.
> **Consider data minimization and retention duties and identify legal bases for processing of personal data** under the Personal Data Protection Act.
> **Consider how to comply** with some of the Personal Data Protection Act's substantive requirements, such as those relating to data subject rights, data residency, and mechanisms for cross-border data transfers.
> **Evaluate agreements with data processors** to see if they meet the accountability requirements for data controllers under the Indian Personal Data Protection Act

Companies outside of India will additionally have to consider whether they are comfortable subjecting themselves to the new compliance requirements with respect to personal data pertaining to data subjects outside India, which will only become subject to Indian data protection law if it is stored or processed by an affiliated or unaffiliated data processor in India. Where this is undesirable, multinationals should consider removing personal data from Indian territory.

Finally, companies should closely monitor modifications to the draft Indian Personal Data Protection Act as it moves through the legislative process and

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[225] *See e.g.*, GDPR, *supra* note 3, at art. 28; Personal Data Protection Act § 37.
[226] *See generally* Determann, *Less Than 20 Weeks to the European Union GDPR—What to Do Now?*, *supra* note 160; DETERMANN'S FIELD GUIDE TO PRIVACY LAW, *supra* note 1.
[227] *See generally* Determann, *Less Than 20 Weeks to the European Union GDPR—What to Do Now?*, *supra* note 160.

watch out for implementation guidance to be provided by the Data Protection Authority under the Personal Data Protection Act.

Don't Cry for Me Argentina: The Aftermath of *Republic of Argentina v. NML Capital* and the Uncertain Limits of Post-Judgment Attachment Discovery Against Foreign Sovereigns†

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Post-judgment discovery allows successful plaintiffs to locate the assets of a defendant who is otherwise unwilling to pay and attach those assets to satisfy a judgment. When the defendant is a foreign sovereign, the Foreign Sovereign Immunity Act immunizes most assets from attachment. However, a successful plaintiff cannot know which assets are immune from attachment without first knowing what those assets are. After the Supreme Court's ruling in Republic of Argentina v. NML Capital, *district courts have discretion to determine whether a plaintiff can order discovery over potentially immune sovereign assets. This uncertainty creates numerous risks, since different courts use entirely different considerations when deciding whether to grant discovery of sensitive sovereign assets including State secrets, diplomatic property, or even military property.*

This Note provides the first account of how district courts have evaluated post-judgment attachment discovery requests against foreign sovereigns after NML Capital. *It reveals that district courts have used a variety of methods, from approaches allowing for attachment discovery of any sovereign asset worldwide to restrictive approaches that frustrate successful plaintiffs from collecting their judgments. These extremes show the need for uniformity within the federal system, and a proportionality approach taken by the District of DC provides the best method going forward.*

INTRODUCTION

Let us start with a truism: when a court renders a judgment in favor of a plaintiff, the plaintiff is entitled to payment from the defendant. But what happens if the defendant simply refuses to pay? Ordinarily, the court could seize property owned by the defendant through attachment and auction it off to satisfy the judgment.[1] However, when that defendant is a foreign sovereign, the plaintiff's means of recourse are limited.[2] The Foreign Sovereign Immunities Act (FSIA) provides immunity from attachment for most property, with a few narrow exceptions.[3] Plaintiffs must therefore use discovery to locate the few sovereign assets that are not shielded by immunity and which the court can seize through attachment and execution.[4]

Until 2014, it was not clear whether the FSIA provided any protection against discovery of sovereign assets that might be immune from attachment.[5] The Supreme Court addressed this issue in *Republic of Argentina v NML Capital*, holding that the FSIA did not protect against attachment discovery.[6] The Court stated that "other sources of law," such as doctrines of privilege and district courts' discretionary determinations of necessity and comity, control such discovery requests.[7] Although the Court referred to traditional tools that lower courts could use to limit discovery requests, it did not establish any concrete standards.[8]

The broad discretion that *NML Capital* conferred upon district courts creates serious risks. American discovery is far more extensive and burdensome than

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[1] *See* Transcript of Oral Argument at 5, 9–10, Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134 (2014) (No. 12-842).
[2] Claims against foreign sovereigns can arise in several contexts, such as unpaid debt, breach of contract, or tort claims. *See*, *e.g.*, Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134 (2014) (concerning unpaid sovereign debt); Rubin v. Islamic Republic of Iran, 637 F.3d 783 (7th Cir. 2011) (concerning Iran's role in sponsoring a terrorist attack in Israel); Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria, 308 F.R.D. 27 (D.D.C. 2015) (concerning breach of contract by a foreign government).
[3] *See* Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 (1976).
[4] FED. R. CIV. P. 69(a) governs this process of attachment,
[5] *NML Capital*, 573 U.S. at 136.
[6] *Id*. at 146.
[7] *Id*. at 146 n.6.
[8] *See id*. at 139.

discovery in other countries.[9] When US courts issue discovery orders for assets located in foreign countries, those orders are generally met with resistance. Indeed, the reporter's notes in the Restatement (Third) of Foreign Relations Law state that "[n]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States."[10] To combat this, foreign nations can and have adopted laws imposing sanctions on parties for complying with US discovery orders.[11]

This foreign relations challenge presents particularly significant concerns when plaintiffs seek discovery from a foreign sovereign defendant, as the targeted assets may intrude upon sovereign interests such as State secrets or diplomatic or military property.[12] From a diplomatic perspective, allowing discovery of such sensitive assets may be disastrous for American foreign policy and increases the likelihood of adverse treatment of the US government in foreign courts.[13] Given these concerns, how have district courts analyzed attachment discovery requests against foreign sovereigns post-*NML Capital*?

Part I of this Note briefly discusses the history of sovereign immunity in American jurisprudence and the introduction of the FSIA. Part II provides background on the Second and Seventh Circuits' differing approaches to post-judgment attachment discovery prior to *NML Capital*, which created a circuit split. Part II also examines *NML Capital*'s holding, which provided minimal guidance as to how district courts should approach post-judgment attachment discovery requests. Part III tracks the various approaches district courts have taken in the wake of *NML Capital* and identifies three general approaches: limiting discovery through comity considerations; using relevance as a limiting principle; and allowing broad general asset discovery with minimal interference. Part IV highlights a superior approach, adopted by the District of DC after the 2015 amendments to the Federal Rules of Civil Procedure, which utilizes the proportionality analysis in Rule 26(b)(1).

Most importantly, this Note provides the first account of how district courts have evaluated post-judgment attachment discovery requests against foreign sovereigns after *NML Capital*. It reveals that district courts have interpreted the Supreme Court's directive to allow for a great variety of approaches, from

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[9] Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. S.D. Iowa, 482 U.S. 522, 542 (1987); Keith Y. Cohan, Note, *The Need for a Refined Balancing Approach When American Discovery Orders Demand the Violation of Foreign Law*, 87 TEX. L. REV. 1009, 1010 (2009).

[10] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 442 Reporters' Note 1 (AM LAW. INST. 1987).

[11] Diego Zambrano, *A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery*, 34 BERKELEY J. INT'L L. 157, 167–71 (2016) (identifying blocking statutes in countries such as France, Japan, Switzerland, and Brazil).

[12] *See* Mallory Barr, *The Litigation Tango of La Casa Rosada and the Vultures: The Political Realities of Sovereign Debt, Vulture Funds, and the Foreign Sovereign Immunities Act*, 14 SANTA CLARA. J. INT'L L. 567, 584–86 (2016).

[13] *See* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 15 (1987)

attachment discovery of any sovereign asset worldwide[14] to workarounds designed to achieve the restrictive approach that the Court rejected in *NML Capital*.[15] These extremes show the need for uniformity within the federal system, and the District of DC's proportionality approach may prove the best method going forward.

I. SOVEREIGN IMMUNITY

A. History

Foreign sovereign immunity in US jurisprudence has its roots in *Schooner Exchange v. McFaddon*, which the Supreme Court decided in 1812.[16] In that case, the Court declined to exercise jurisdiction over French ships, even though the ships were docked in Philadelphia, based on "a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."[17] Despite the fact that the jurisdiction of a nation within its own territory "is susceptible of no limitation not imposed by itself," the United States implicitly waived jurisdiction over foreign sovereigns in some circumstances.[18] While the Court limited its opinion to jurisdiction over foreign warships, later decisions extended the immunity doctrine to include a broad concept of absolute immunity for foreign sovereigns and their instrumentalities.[19] Critically, in *Schooner Exchange*, the executive branch attempted to persuade the Court to grant sovereign immunity, to the point that the Court felt obligated to disclose this attempt in its opinion.[20] Such executive influence is not inappropriate: because sovereign immunity is "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution," the Constitution leaves courts free to defer to recommendations made by the politically elected branches of government.[21]

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[14] *See infra* Section III.C.
[15] *See infra* Section III.A.
[16] 11 U.S. 116.
[17] *Id.* at 145–46; Republic of Austria v. Altmann, 541 U.S. 677, 688 (2004) ("Chief Justice Marshall's opinion in Schooner Exchange . . . is generally viewed as the source of our foreign sovereign immunity jurisprudence.").
[18] *Schooner Exchange*, 11 U.S. at 136–38; Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).
[19] *See Verlinden*, 461 U.S. at 486 ("Although the narrow holding of The Schooner Exchange was only that the courts of the United States lack jurisdiction over an armed ship of a foreign state found in our port, that opinion came to be regarded as extending virtually absolute immunity to foreign sovereigns.").
[20] *Schooner Exchange*, 11 U.S. at 147 ("[T]here seems to be a necessity for admitting that the fact might be disclosed to the Court by the suggestion of the Attorney for the United States."); Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 217 (2010).
[21] *Verlinden*, 461 U.S. at 486 ("[T]his Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.").

In the 1930s, the Court began giving substantial deference to the State Department's recommendations as to whether sovereign immunity was warranted in particular cases,[22] eventually concluding that it was bound by the State Department's recommendations.[23] This led to a two-step process governing requests for sovereign immunity. First, a foreign diplomat would request a "suggestion of immunity" from the State Department.[24] If the request was granted, the courts would forgo jurisdiction.[25] If the request was denied, courts would nonetheless analyze whether the grounds for immunity were similar to cases typically granted by the State Department.[26] Consequently, the results often came out the same way, regardless of whether or not the State Department provided a favorable recommendation.[27]

In 1952, the State Department abandoned its policy of granting nearly all immunity requests, instead adopting a restrictive theory of sovereign immunity.[28] The State Department's Legal Adviser issued what would become known as the "Tate Letter," which stated that immunity would henceforth be limited to foreign sovereigns' acts, with an exception for purely commercial acts.[29] As this was merely a department policy rather than an enacted law, however, it led to complications because the executive department functionally remained the primary authority for immunity determinations.[30] This meant that the executive often requested immunity when the restrictive theory would not have typically allowed it, based on political pressure or other considerations.[31] Unsurprisingly, these contrasting immunity standards resulted in a muddled doctrine. The lack of clear standards forced judges to rely upon vague factors, such as "diplomatic considerations."[32]

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[22] Adam S. Chilton & Christopher A. Whytock, *Foreign Sovereign Immunity and Comparative Institutional Competence*, 163 U. PA. L. REV. 411, 424 (2015).
[23] Ex parte Republic of Peru, 318 U.S. 578, 588 (1943).
[24] Samantar v. Yousuf, 560 U.S. 305, 311–12 (2010).
[25] *Id*. at 311.
[26] *Id*. at 311–12; Republic of Mex. v. Hoffman, 324 U.S. 30, 36 (1945).
[27] *See id*. at 312 (inquiring "whether the ground of immunity is one which it is the established policy of the [State Department] to recognize").
[28] Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen., U.S. Dep't of Just. (May 19, 1952), 26 DEP'T ST. BULL. 984, 984 (1952) ("According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).").
[29] Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983)
[30] *See id*. at 488.
[31] *See* Republic of Austria v. Altmann, 541 U.S. 677, 690 (2004); *see also* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2139 (2015) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 436 (1964) ("Often the State Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically.")
[32] *Verlinden*, 461 U.S. at 488.

B. The Foreign Sovereign Immunities Act

To remedy uncertainty in the immunity doctrine, Congress enacted the FSIA in 1976, codifying the State Department's restrictive theory of sovereign immunity.[33] This alleviated the political pressures the State Department faced by transferring the responsibility for immunity determinations from the executive branch to the judiciary.[34] Congress intended for the bill to provide a comprehensive set of legal standards governing sovereign immunity.[35]

The act provided two types of immunity: jurisdictional immunity[36] and execution immunity.[37] Jurisdictional immunity precludes foreign sovereign liability in US courts except in instances such as waiver, actions arising out of a commercial activity within the United States, or injuries caused by terrorism.[38] Execution immunity, by contrast, prevents courts from attaching and executing property within the United States in order to enforce a judgment unless the property was used for a commercial activity within the United States and meets one of the specific exceptions in Section 1610,[39] or the property meets one of the exceptions in Section 1611, such as military property.[40] Despite these immunities, the FSIA allows private parties greater access to the courts in suits against foreign sovereigns through its codified exceptions, and ensures that the grounds for denying judgment are legal rather than political.[41] Its passage was both an attempt to depoliticize immunity decisions and a judgment that courts possessed greater institutional competence to make these determinations than the State Department.[42]

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[33] 28 U.S.C. § 1330, 1602

[34] *See* 28 U.S.C. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States."); H.R. REP. NO. 94-1487, at 7 (1976).

[35] *See Altmann*, 541 U.S. at 691 (quoting *Verlinden*, 461 U.S. at 488) ("[B]y enacting the FSIA, a comprehensive statute containing a 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.'"); H.R. REP. NO. 94-1487, at 12–13 ("Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states.").

[36] 28 U.S.C. § 1604 ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.").

[37] 28 U.S.C. § 1609 ("[T]he property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter."); *see also* 28 U.S.C. §1610 (listing exceptions to attachment immunity including waiver or property used for commercial activities).

[38] 28 U.S.C. §§ 1605, 1605A.

[39] 28 U.S.C. § 1610(a)(1)–(7) (examples of exceptions include waiver or violations of international law).

[40] 28 U.S.C. § 1611. However, note that the Terrorism Risk Insurance Act overrides Section 1611's immunities in cases involving terrorism. *See* Weininger v. Castro, 462 F. Supp. 2d 457, 498–99 (S.D.N.Y. 2006).

[41] H.R. REP. NO. 94-1487, at 45 (communication from the State Department to the House); *see also* Chilton & Whytock, *supra* note 22, at 430.

[42] *See* Chilton & Whytock, *supra* note 22, at 430.

II. DISCOVERY AND THE FOREIGN SOVEREIGN IMMUNITIES ACT

It is unclear whether the FSIA provides protections against discovery. While the FSIA establishes protections for attachment and execution, it does not deal with questions of discovery at all; in fact, discovery is mentioned only once.[43] This Part will discuss how the resulting open-endedness culminated in the Supreme Court's decision in *NML Capital*. Section A will explain how attachment discovery against foreign sovereigns differs from jurisdictional discovery. Section B will discuss the circuit split that arose out of the Second and Seventh Circuits' differing interpretations of how the FSIA governs discovery. Section C will then discuss how the Supreme Court came to adopt the Second Circuit's view that the FSIA itself provides no protection against discovery.

A. Distinguishing Attachment Discovery

Courts generally agree that a foreign sovereign's jurisdictional immunity limits a party from seeking discovery to determine whether a court can properly exercise jurisdiction over a sovereign.[44] While courts use various approaches to make determinations regarding jurisdictional discovery, they usually require some sort of heightened pleading standard.[45] The most commonly cited standard, which originated in the Fifth Circuit, provides that "discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination."[46] The Second Circuit interpreted this test as requiring a balancing of expectations, taking into account the FSIA's statutory exceptions and the sovereign's claims of immunity.[47] This balancing, in turn, requires the party seeking discovery to show a "reasonable basis" for assuming jurisdiction before any discovery, other than the bare minimum that is necessary to make an initial jurisdictional determination, can be granted.[48] Most courts follow some variant of the Fifth Circuit's approach.[49]

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[43] *See* 28 U.S.C. § 1605(g). The House Report even explicitly highlighted the fact that the FSIA "does not attempt to deal with questions of discovery." H.R. REP. NO. 94-1487, at 23. The House Report also clarified that other areas of law provided sufficient protection against inappropriate discovery requests, such as various types of privilege and immunity. *Id*.

[44] *See* Steven R. Swanson, *Jurisdictional Discovery under the Foreign Sovereign Relations Act*, 13 EMORY INT'L L. REV. 445 (1999) (providing case-by-case analysis of courts' approaches to jurisdictional discovery); Joseph M. Terry, Comment, *Jurisdictional Discovery Under the Foreign Sovereign Relations Act*, 66 U. CHI. L. REV. 1029 (1999) (tracking the Second, Fifth, and DC Circuits' approaches to jurisdictional discovery).

[45] Terry, *supra* note 44, at 1047.

[46] Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528, 534 (5th Cir. 1992).

[47] *See* First City, N.A. v. Rafidain Bank, 150 F.3d 172, 176 (2d Cir. 1998).

[48] *Id*.

[49] *See* Gabay v. Mostazafan Foundation of Iran, 151 F.R.D. 250, 256–57 (S.D.N.Y. 1993); *Terry*, *supra* note 44, at 1047–48. For a more complex standard, see Millicom Int'l Cellular v. Costa Rica, No. Civ.A.96-315(RMU), 1997 WL 527340 at *1 (D.D.C. Aug. 18, 1997) ("If plaintiffs set forth non-conclusory allegations that, if supplemented with additional evidence, would materially affect the court's analysis vis-a-vis the FSIA, then the court should permit limited discovery.").

Despite this relatively consistent approach to pretrial discovery, courts did not approach post-judgment attachment discovery under the FSIA in a similarly unified manner prior to *NML Capital*. Attachment discovery takes place in post-judgment proceedings in an attempt to locate resources from a losing defendant who refuses to pay. Attachment discovery is governed by Rule 69 of the Federal Rules of Civil Procedure, which states that a judgment creditor may obtain discovery "as provided in these rules or by the procedure of the state where the court is located."[50] If the plaintiff successfully locates assets, the court can issue a writ of execution against those assets if the court has jurisdiction over the assets and they are not barred by statute or immunity.[51]

The goals of jurisdictional discovery (or pretrial discovery in general) and post-judgment discovery are quite different.[52] Pretrial discovery serves to narrow possible issues at trial or during settlement negotiations.[53] To curb potential abuse, the Supreme Court raised pleading standards at this stage to protect defendants from being pressured into early settlements by the cost of discovery.[54] Attachment discovery, however, exists to protect the successful litigant from an evasive debtor who simply refuses to pay.[55]

The FSIA provides significant immunity protections against attachment and execution, with minimal exceptions, but it does not mention attachment discovery.[56] Since the FSIA does not elaborate on any potential discovery limitations, it is unclear what limitations exist when a successful plaintiff seeks post-judgment discovery of a foreign sovereign's assets. Moreover, it is unclear whether the analysis changes if all, some, or any of the assets sought are immune from execution.

B. Restrictive vs. Expansive Attachment Discovery: A Circuit Split

1. The Seventh Circuit's Restrictive Approach

The Seventh Circuit interpreted the FSIA as providing significant protection against discovery requests. In 2011, the Seventh Circuit prohibited general post-

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[50] FED. R. CIV. P. 69(a)(2).
[51] FED. R. CIV. P. 69(a)(1); Robert K. Kry, *Asset Discovery Against Foreign Sovereigns After NML*, 86 N.Y. ST. B. A. J. 40, 40–41 (2014).
[52] Professor Aaron Simowitz articulated the difference between jurisdictional discovery and post-judgment discovery, arguing that they are fundamentally different and thus require different standards of analysis, especially in the transnational context. *See* Aaron D. Simowitz, *Transnational Enforcement Discovery*, 83 FORDHAM L. REV. 3293, 3320–24 (2015).
[53] *Id*. at 3304–05.
[54] *See* Jonah B. Gelbach, *Material Facts in the Debate over Twombly and Iqbal*, 68 STAN. L. REV. 369, 379 (2016) ("The Court's opinions in the two cases themselves [Twombly and Iqbal] raise policy concerns related to the discovery burdens that defendants face.").
[55] *See* Simowitz, *supra* note 52, at 3304. *See generally* Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601 (1968) (exploring the recognition of foreign judgments).
[56] *See supra* notes 36–40 and accompanying text.

judgment attachment discovery against foreign sovereigns in *Rubin v. Islamic Republic of Iran*, holding that the FSIA requires a judgment creditor to show that the assets sought are actually attachable under an exception to the FSIA's general execution immunity.[57] The *Rubin* plaintiffs sought a general-asset discovery order for any Iranian assets located within the United States, regardless of whether or not those assets could be attached.[58] The court cited jurisdictional discovery precedent in its opinion, reasoning that the two types of discovery were similar enough that the rationales for only ordering jurisdictional discovery "circumspectly" applied to post-judgment discovery as well.[59] In doing so, the court noted that one of the primary purposes of sovereign immunity is to protect foreign sovereigns from the burdens of litigation, particularly burdens associated with costly and intrusive American discovery.[60] The Seventh Circuit also interpreted the FSIA as incorporating the common law presumption against attachment and execution of a foreign sovereign's property.[61] This put the burden on the plaintiff judgment creditor to show that property sought in discovery met a statutory exception to immunity, rather than requiring the foreign sovereign to make a showing of immunity.[62] The Seventh Circuit's rule effectively meant that judgment creditors bore the cost of being unable to collect on their judgments against sovereigns.

2. The Second Circuit's Expansive Approach

A year after the Seventh Circuit's decision in *Rubin*, the Second Circuit rejected the Seventh Circuit's restrictive approach, holding in *EM Ltd. v. Republic of Argentina* that immunity from attachment did not per se prohibit discovery of any particular asset.[63] *EM Ltd.* arose out of Argentina's failure to pay its creditors

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[57] *See* Rubin v. Islamic Republic of Iran, 637 F.3d 783, 799 (7th Cir. 2011) ("[U]nder the FSIA a plaintiff seeking to attach the property of a foreign state in the United States must identify the specific property that is subject to attachment and plausibly allege that an exception to § 1609 attachment immunity applies."). These exceptions include commercial property used within the United States and any property of a sovereign that aided in a terrorist attack. *See* 28 U.S.C. §§ 1610, 1611 (2012).

[58] *See Rubin*, 637 F.3d at 785.

[59] *See id.* at 796–97 (citing the Fifth Circuit's language from *Arriba*, 962 F.2d at 534, a jurisdictional discovery case). The court found that the same tension existed in balancing a plaintiff's need for discovery to prove that they could meet one of the FSIA's exceptions and the sovereign's claim of immunity in any discovery case, regardless of when discovery occurred in the proceeding. The Seventh Circuit reasoned that exceptions to attachment discovery in Section 1609 are narrower than the jurisdictional discovery exceptions in Section 1604. The court also cited the Second Circuit's "circumspectly" language from *EM Ltd. v Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007), an attachment case, but one where the judgment creditor had not shown a reasonable basis for assuming jurisdiction over the third-party bank from whom discovery was sought. *See Rubin*, 637 F.3d at 796.

[60] *Id.* at 795.

[61] *Id.* at 796.

[62] *Id.*

[63] EM Ltd. v. Republic of Arg., 695 F.3d 201, 208–09 (2d. Cir. 2012); LG&E Energy Corp. v. Arg. Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 54 (Oct. 3, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf.

back for bonds it had previously sold.[64] Because Argentina had waived jurisdictional immunity as a condition of sale, the only source of protection from discovery that Argentina could seek was through execution immunity, which the Seventh Circuit had read into Section 1609 of the FSIA. The Second Circuit found that the Seventh Circuit's approach had no textual basis in the FSIA.[65] Moreover, the Second Circuit concluded that reading in a protection would force the district court to serve as a "clearinghouse for information," evaluating foreign sovereigns' assets and making individual determinations as to which assets were immune from execution under FSIA.[66]

In *EM Ltd*., NML Capital and EM Ltd., vulture funds and owners of Argentine bonds, sued Argentina in the Southern District of New York to collect on their debt once Argentina defaulted on its $100 billion debt.[67] The funds prevailed on all of their claims, but were unable to collect damages because Argentina refused to pay.[68] The Southern District of New York, later affirmed by the Second Circuit, issued an injunction preventing Argentina from making any further payments to bondholders who had agreed to discounted payments until it paid plaintiffs their holdout debt of $1.33 billion.[69] To avoid payment and maintain its leverage over bondholders, Argentina subsequently transferred assets outside the United States to avoid attachment, since US courts generally lack the authority to attach assets outside the country.[70] In response, the vulture funds attempted to locate Argentine assets worldwide, eventually serving subpoenas on Argentina's investment assets and even traditional sovereign assets such as war ships and planes.[71]

Upholding NML Capital's discovery request, the Second Circuit first noted that post-judgment attachment discovery was typically broad under both Rule 69 of the Federal Rules of Civil Procedure and New York law.[72] The Southern District of New York had limited the subpoenas and removed any assets within Argentina, since no Argentine court would allow attachment.[73] However, the

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[64] *EM Ltd*., 695 F.3d at 209.
[65] *Id*.
[66] *Id*. at 204.
[67] John Muse-Fisher, *Starving the Vultures: NML Capital v. Republic of Argentina and Solutions to the Problem of Distressed-Debt Funds*, 102 CALIF. L. REV. 1671, 1688 (2014).
[68] *EM Ltd*., 695 F.3d at 203.
[69] NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 265 (2d Cir. 2012) (affirming Judge Gresia's injunctions because of the pari passu clause in the vulture funds' bonds preventing them from being subordinated in repayment).
[70] *Foreign Sovereign Immunities Act of 1976 – Postjudgment Discovery – Republic of Argentina v. NML Capital Ltd*., 128 HARV. L. REV. 381, 381 (2014); *see also* 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3013, p. 156 (2d ed. 1997) ("a writ of execution . . . can be served anywhere within the state in which the district court is held").
[71] *See* Barr, *supra* note 12, at 585–86.
[72] *EM Ltd*., 695 F.3d at 207 (citing DAVID D. SIEGEL, NEW YORK PRACTICE § 509 (5th ed. 2011) ("[T]he 'judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment.'").
[73] *Id*. at 204–05.

district court refused to provide the same protection against discovery that the Seventh Circuit had provided, noting that just because an asset is immune from execution does not mean it is immune from discovery in aid of execution.[74] The Second Circuit acknowledged that it would not be able to execute on nonimmune assets abroad since the laws of the countries where the property was located typically governed, but found this inapplicable to the discovery inquiry.[75] Importantly, the Second Circuit found that the rationale of sovereign immunity—to protect sovereigns from the expense and intrusiveness of litigation and discovery—did not apply when it was clear that the court already had jurisdiction over the sovereign.[76] In this case, Argentina had waived jurisdictional immunity in its bond agreements.[77]

C. From the Second Circuit to the Supreme Court: Expansive Attachment Discovery Prevails in NML Capital

The Supreme Court granted certiorari in *NML Capital* to determine whether the FSIA provided any protection against attachment discovery.[78] The Court emphasized that the FSIA provided comprehensive standards for resolving sovereign immunity issues, meaning that any protection must come from the FSIA itself, rather than the former, disjointed common law scheme.[79] Consequently, the Court held that because the FSIA contained no textual protections mentioning discovery, there were no restrictions on discovery of a sovereign's assets, even assets that were immune from execution.[80] Writing for the majority, Justice Scalia emphasized that a prevailing party attempting to enforce a judgment could not

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[74] *Id*. at 209. The court clarified that the Seventh Circuit was mistaken in relying on the Second Circuit's prior opinion in *EM Ltd*., 473 F.3d at 486, which applied the "circumspectly" standard, since jurisdiction had not yet been established in that case and the rationales for using a pre-judgment discovery standard were thus warranted. See *id*.; *see also* Thai Lao Lignite Co., Ltd. v. Government of Lao People's Democratic Republic, 924 F. Supp. 2d 508, 522 (S.D.N.Y. 2013) (allowing discovery, but clarifying that discovery must be circumspect because the court had not yet established jurisdiction over the party).

[75] *EM Ltd*., 695 F.3d at 208.

[76] *See id*. at 210.

[77] *Id*. at 209. Additionally, while US pre-judgment discovery is exceptional in its breadth, the United States is not alone in allowing for broader post-judgment discovery. Many other countries impose more robust enforcement duties upon debtors than they do for traditional merits or jurisdictional discovery, often with harsher penalties for failure to comply. *See* Simowitz, supra note 52, at 3322–23 (illustrating the enforcement approaches of the United Kingdom, Switzerland, Germany, and Portugal).

[78] 573 U.S. 134.

[79] *Id*. at 2255–56 ("[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand or fall on the Act's text."). This contradicted the Seventh Circuit's claim in *Rubin*, which held that the FSIA incorporated former common law protections with it, including that foreign sovereign property was presumptively immune from attachment, and therefore discovery. 637 F.3d at 798–99.

[80] Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134, 143 (2014) ("[T]he Act says not a word on the subject [discovery].").

know what assets were executable without first knowing what assets existed.[81] The Court found that potential burdens to sovereigns or invasions of their privacy were irrelevant, but noted that despite the FSIA's lack of protections, other safeguards remained effective:

> "[O]ther sources of law" ordinarily will bear on the propriety of discovery requests of this nature and scope, such as "settled doctrines of privilege and the discretionary determination by the district court whether the discovery is warranted, which may appropriately consider comity interests and the burden that the discovery might cause to the foreign state."[82]

These "other sources of law," particularly judicial discretion, strongly empower district courts to shape the scope of discovery.

Dissenting, Justice Ginsburg declined to follow the Seventh Circuit's assessment that the FSIA includes common law presumptions of immunity.[83] Rather, she argued that a judgment creditor had to show the relevance of any discovery request to enforce a judgment.[84] Therefore, assets immune from execution could not be discovered because they would not be relevant to the enforcement of the judgment.[85] This would be more complicated when dealing with extraterritorial assets, since the laws of the country or countries where the assets were located would presumably govern attachment and might require a district judge to evaluate several sources of law to determine the relevance of a debtor's various assets.[86] Justice Ginsburg would have resolved the issue by limiting discovery to the commercial activities exception in Section 1610 of the FSIA.[87] Thus, Justice Ginsburg's test would have allowed for extraterritorial discovery of assets relating to commercial activity within the United States, and immunized other assets from discovery because they would be presumptively immune from attachment.

The majority in *NML Capital* did not delineate the precise scope of Rule 69 of the Federal Rules of Civil Procedure, opting only to decide whether discovery

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[81] *Id*. at 144. During oral argument, Justice Scalia analogized the process of discovery and attachment of extraterritorial assets to intrastate attachment. A New York court's writ of execution does not run to Florida, but the court can still order discovery of a "deadbeat defendant's" assets in Florida. Once those assets were located, the plaintiff would have to take the New York judgment to a Florida court and bring another cause of action in Florida to enforce that judgment. Similarly, a successful plaintiff could take their New York judgment to another country such as France and see if French courts would enforce that judgment under French law. Transcript of Oral Argument at 5, 9–10, *NML Capital*, 573 U.S. 134.

[82] *NML Capital*, 573 U.S. at 146 n.6.

[83] *Id*. at 147 (Ginsburg, J., dissenting).

[84] *Id*.

[85] *Id*.

[86] *See* Transcript of Oral Argument at 12–13, *NML Capital*, 573 U.S. 134 (Justice Alito's questions regarding a district court's approach).

[87] *See NML Capital*, 573 U.S. at 147 (Ginsburg, J., dissenting) ("A court . . . has no warrant to indulge the assumption that, outside our country, the sky may be the limit for attaching a foreign sovereign's property in order to execute a U.S. judgment against the foreign sovereign.").

violated the FSIA.[88] However, given the textualist nature of the majority's approach in *NML Capital*, the most logical interpretation of Rule 69 would be to establish whether Rule 26, the rule that governs the scope of discovery generally, or the state law of the proceeding allowed such discovery. Other potential approaches include: (1) Justice Ginsburg's idea of extending domestic exemptions abroad, requiring a plaintiff to show that an asset may be executed upon before allowing discovery of that asset; (2) placing the burden on the debtor to show that foreign exemptions would bar execution; or (3) returning to a system that defers to the executive branch, either by deferring to the State Department's recommendations or by actively seeking those recommendations.[89] Regardless, *NML Capital* established that the FSIA provides no protection against discovery in aid of execution against a foreign sovereign's property, that any protection must come from other sources of law, and that district courts possess significant discretion when determining the scope of post-judgment discovery.

III. THE FALLOUT FROM NML CAPITAL AND LOWER COURTS' CURRENT APPROACHES

Potentially unchecked asset discovery against a foreign sovereign raises significant problems and could severely threaten State secrets. Left unchecked, court-ordered discovery against foreign sovereigns could put an enormous strain on the diplomatic relations between the United States and those sovereigns. For example, during oral argument in *NML Capital*, the Justices expressed concerns regarding the discovery of potential military assets such as fighter jets.[90] Justice Breyer assumed as a baseline that discovery of military assets was off the table, even though the FSIA itself does not bar it.[91] The majority's opinion also acknowledged these problems, and suggested that litigants take the issues up with Congress.[92]

As a result of these sovereignty concerns, reactions to the *NML Capital* decision have been mixed. Positive responses have noted that the Court correctly applied statutory interpretation just as it would for domestic law matters, a trend that is becoming more common in foreign relations law.[93] Moreover, allowing

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[88] *Id*. at 140.

[89] Transcript of Oral Argument at 7, *NML Capital*, 573 U.S. at 134. Justice Breyer posited the possible approaches to post-judgment discovery in general as to either (1) allow it; (2) prohibit it; (3) ask the State Department to make sure it would not offend foreign policy concerns; or (4) have the State Department come in when the discovery *would* affect foreign policy concerns.

[90] *Id*. at 35. Of course, this worry was especially acute because NML attempted to seize an Argentine warship and the Argentine presidential airplane. Barr, *supra* note 12, at 586.

[91] *See id*.

[92] *NML Capital*, 573 U.S. at 146 (stating that Argentina should take its objections to "that branch of government with authority to amend the Act.").

[93] *See* Ellen Ginsberg Simon & Q. Monty Crawford, *The Impact of* Republic of Argentina v. NML Capital, LTD.*: Why the Supreme Court's Ruling Against Argentina Avoided a Host of Unintended, Negative Consequences*, 30 MD. J. INT'L L. 55, 58–59 (2015). *See generally* Ganesh Sitaraman &

discovery gives injured Americans the ability to discover executable assets against a State that sponsors international terrorism, which is one of the purposes that the FSIA was specifically designed to provide a cause of action for.[94] Victims are ill-suited to bear the cost of identifying attachable sovereign assets without discovery. The decision also arguably encourages trade in the New York markets, since it provides investors with confidence that the bonds they purchase from foreign sovereigns will be enforceable.[95]

Criticism of the decision has centered on the foreign policy difficulties involved in discovery. To start, critics have argued that the Court's formalistic textualism ignored real-world policy concerns about the extraterritorial applications of US law.[96] Another significant concern with all matters regarding international comity is that expansive burdens from litigation in US courts could lead to reciprocal treatment abroad.[97] Further, the Court's opinion raised as many questions as it answered. First, questions of relevance went largely unanswered; Justice Scalia alluded to the fact that Rule 26 of the Federal Rules of Civil Procedure and state rules might provide a relevance limiting principle in attachment discovery, but then endorsed general worldwide asset discovery even though such discovery would turn up those same nonattachable, and therefore irrelevant, assets.[98] Other countries have already objected to discovery of this breadth, which many see as American judicial imperialism.[99] Additionally, the "other sources of law" that provide protection against intrusive discovery requests

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Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015) (describing the trend of treating foreign relations law like domestic law).

[94] *See* 28 U.S.C. §§ 1605A, 1610 (providing a terrorism exception to jurisdictional immunity, but noting that President may waive attachment); Simon & Crawford, *supra* note 93, at 63–64 (providing examples of "international bad actors" that would be able to escape judgment if protected from discovery, such as Sudan for its role in funding al Qaeda in the 9/11 attack and Sudan and Iran for aiding the 1998 US embassy attacks in Kenya and Tanzania). Indeed, the Seventh Circuit's opinion in *Rubin v. Islamic Republic of Iran*, which led to the circuit split, involved attempting to enforce a judgment against Iran for its role in a Hamas suicide bombing in Jerusalem that injured eight American citizens. 830 F.3d 470, 473 (7th Cir. 2016).

[95] Simon & Crawford, *supra* note 93, at 65.

[96] Karen Halverson Cross, *The Extraterritorial Reach of Sovereign Debt Enforcement*, 12 BERKELEY BUS. L.J. 111, 142–43 (2015) (arguing that enforcing discovery orders raises the same foreign policy concerns that the Supreme Court was worried about in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), when it decided to reject applying the Alien Tort Statute extraterritorially, and that applying the FSIA mechanically ignored those larger foreign policy concerns).

[97] Adriana T. Ingenito & Christina G. Hioureas, *Carving Out New Exceptions to Sovereign Immunity: Why the NML Capital Cases May Harm U.S. Interests Abroad*, MD. J. INT'L L. 118, 130–31 (2015).

[98] Justice Scalia hinted at this relevance limitation mentioned by Justice Ginsburg's dissent briefly, but disagreed that a judgment creditor would have to prove that any assets sought were attachable up front. This leaves open the question of how such a relevance challenge would be brought. Presumably, the burden would be on the sovereign to make a showing to the district court regarding which of their assets were not executable. This still does not fully mitigate the foreign policy concerns of broad discovery, since it would force the sovereign to disclose highly secret assets to a U.S. district court judge. *NML Capital*, 573 U.S. at 144–45.

[99] Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism,"* 73 WASH. & LEE L. REV. 653, 700–01 (2016).

are murky. For example, district courts "may appropriately consider" the scope of discovery, taking into account international comity and the burden to the foreign State.[100]

This vague directive leaves district courts with broad discretion to dictate post-litigation attachment discovery, as evidenced by the numerous approaches courts have taken after *NML Capital*.[101] Some have used concerns of international comity or relevance to limit discovery, while others have seized upon the opportunity to serve as clearinghouses of information and place minimal restrictions on discovery requests. This Section considers these varying approaches in more detail. Part A tracks courts that have used an international comity analysis. Part B looks at courts that have used relevance as a limiting factor, and Part C evaluates courts that place little or no restrictions on discovery requests.

A. Discovery Limitations Through Considerations of International Comity

As Justice Scalia suggested, courts can and often do take international comity concerns into account when making discretionary determinations on discovery questions against a foreign sovereign's assets. However, due to the breadth of judicial discretion in comity determinations, the amount of protection afforded varies.

1. Background on Comity

US courts use international comity to demonstrate respect for foreign laws and judgments.[102] Comity is often interpreted as the judiciary's means of conducting diplomacy.[103] There are mutual conveniences for countries that agree to enforce the judgments of each other's courts.[104] These conveniences include avoiding double liability in multiple countries, promoting international commerce, avoiding the burdens of litigating in the United States for foreign

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[100] Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134, 146 n.6 (2014).

[101] *See*, *e.g.*, In re Ohntrup, 628 Fed. Appx. 809, 810–11 (3d Cir. 2015); Leibovitch v. Islamic Republic of Iran, 188 F. Supp. 3d 734, 759 (N.D. Ill. 2016); Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria, 308 F.R.D. 27 (D.D.C. 2015).

[102] American endorsement of international comity can be traced back throughout the writings of American jurisprudence, including in Justice Gray's opinion in *Hilton v. Guyot*: "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." 159 U.S. 113, 163–64 (1985).

[103] Zambrano, *supra* note 11 at 162.

[104] Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS § 30 (1834).

parties, and considerations of reciprocity in having US judgments recognized abroad.[105]

American discovery poses comity concerns, since foreign laws usually have much greater restrictions on the scope of discovery.[106] Many countries abhor the liberal discovery afforded by US courts, and some have enacted laws known as "blocking statutes" that prohibit the disclosure of certain property.[107] In 1968, to remedy these conflicts, the Hague Convention established the Letters of Request system as a means of obtaining information from foreign jurisdictions.[108] However, it was unclear whether this system superseded the US Federal Rules of Civil Procedure in suits against foreign parties, or whether it simply provided an alternative process.[109]

The Hague Convention's Letters of Request system was short-lived in US courts. Soon after its development, the Supreme Court announced the modern method for addressing issues of comity in conflict of laws cases in *Société Nationale Industrielle Aéropostiale v. U.S. Dist. Ct. for the Southern Dist. of Iowa*.[110] In *Aéropostiale*, the Court adopted the Restatement of Foreign Relation Law's multifactor balancing test for discovery requests, requiring courts to consider: (1) the importance of the documents to the litigation; (2) the specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of obtaining the information; and (5) the interests of the United States and the country where the information at issue is located.[111] The *Aéropostiale* balancing test remains the tool US district courts use to evaluate concerns of international comity, rendering the Hague Convention's Letters of Request system a relatively unused alternative.[112]

2. International Comity as Applied to Post-Judgment Discovery Requests Against Foreign Sovereigns

So far, the Northern District of Illinois is the only court to fully embrace the use of international comity to severely restrict post-judgment discovery against foreign sovereigns.[113] This is unsurprising, as the Seventh Circuit prohibited post-judgment attachment discovery by reading protections into the FSIA prior to the

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[105] Zambrano, *supra* note 11, at 162.
[106] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 Reporters' Note 1 (AM. LAW INST. 1987) (noting that "[n]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.").
[107] *See* Zambrano, *supra* note 11, at 167–71 (highlighting blocking statutes in France, Japan, Switzerland, Brazil, and other countries).
[108] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *adopted* Mar. 18, 1970, 23 U.S.T. 2555.
[109] *Société Nationale Industrielle Aéropostiale*, 482 U.S. at 533.
[110] *Id*. at 522.
[111] *Id*. at 544 n.28.
[112] Zambrano, *supra* note 11, at 176.
[113] *See* Leibovitch v. Islamic Republic of Iran, 188 F. Supp. 3d 734, 759 (N.D. Ill. 2016).

NML Capital decision.[114] Instead, the Northern District of Illinois chose a route that left it significant discretion: *Aéropostiale*'s multi-factor balancing test.[115]

In *Leibovitch v. Islamic Republic of Iran*, the Northern District of Illinois declined to grant post-judgment asset discovery from nonparty banks (Bank of Tokyo and BNP Paribas) that had branches in Chicago to locate Iran's assets.[116] Like *Rubin v. Islamic Republic of Iran*, the Seventh Circuit's pre-*NML Capital* decision, *Leibovitch* involved victims seeking recompense from Iran for its support of terrorist attacks in Israel.[117] The Northern District of Illinois found that it did not have personal jurisdiction over the third-party banks due to modern restrictions on general jurisdiction that the Supreme Court established in *Daimler AG v. Bauman*.[118] Nevertheless, the court clarified that even if it had personal jurisdiction, it would not grant discovery due to international comity concerns.[119] Applying the *Aéropostiale* factors, the court found that the civil liabilities that the banks would face in Japan by disclosing Iran's assets and the availability of alternative means of obtaining discovery (e.g., Letters of Request through the Hague Convention) outweighed the victims' interest in obtaining discovery to enforce their judgment.[120] The court followed Justice Ginsburg's *NML Capital* dissent in its analysis, refusing to serve as a "clearinghouse for information" on Iran's property to determine which assets would be immune from execution under the FSIA.[121] The court also refused to allow for jurisdictional discovery regarding the banks, effectively ending any chance for the plaintiffs to discover Iran's assets.[122]

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[114] *See* Rubin v. Islamic Republic of Iran, 637 F.3d, 783, 800–01 (7th Cir. 2011).

[115] *See* Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat., 902 F.2d 1275, 1283–84 (7th Cir. 1990) (Easterbrook, J., concurring) (criticizing the Third Restatement's balancing test, which the Court adopted in *Aéropostiale*).

[116] *Leibovitch*, 188 F. Supp. 3d at 740–41.

[117] *Leibovitch*, 188 F. Supp. 3d at 740–41.

[118] *See id*. at 750; *see also* Daimler AG v. Bauman, 571 U.S. 117, 127 (2014) (restricting general jurisdiction over corporations to only instances where the corporation's "affiliations with the state are so continuous and systematic as to render it essentially at home in the forum State" (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011))). This was a rather harsh ruling considering that the litigation had been ongoing for years and *Daimler* was only decided during proceedings. Gwynne L. Skinner, *Expanding General Personal Jurisdiction over Transnational Corporations for Federal Causes of Action*, 121 PENN ST. L. REV. 617, 655 n.215 (2017).

[119] *Leibovitch*, 188 F. Supp. 3d at 759.

[120] The court also cited prior Seventh Circuit precedent suggesting that a party seeking discovery has less of an interest in discovery when the matter is post-judgment rather than toward the merits of the case. *See* Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat., 902 F.2d 1275, 1280 (7th Cir. 1990).

[121] *See Leibovitch*, 188 F. Supp. 3d at 758 ("As Justice Ginsburg has noted, there is little legal basis for a court in the United States to 'become a clearinghouse for information about any and all property held by [a foreign state] abroad.'" (quoting *NML Capital*, 573 U.S. at 147 (Ginsburg, J., dissenting))). The court's conclusion that there is "little legal basis" for serving as a clearinghouse seems a bit conclusory, particularly since the majority opinion in *NML Capital* effectively endorsed such an approach by a 7-1 vote.

[122] *Id*. at 760 n.18.

However, the Northern District of Illinois has not used comity to prevent all discovery requests against the property of foreign sovereigns. Two years after denying the plaintiffs' discovery request in *Leibovitch*, the court granted a narrowed discovery request that sought information from the Boeing Company regarding a contract they had with Iran to provide eighty commercial planes.[123] The court granted this request because unlike the banks in *Leibovitch*, Boeing was an American corporation and the property was in the United States, which meant that Boeing would not face civil liability elsewhere.[124] This decision indicates that the Northern District of Illinois is at least willing to entertain discovery requests served on American companies for property located within the United States that would not trigger civil liability in another country.

Other courts mentioned international comity in throwaway comments, raised comity as a tacked on justification for overly broad discovery requests, or used comity to limit the most intrusive forms of discovery, such as discovery against military and diplomatic property.[125] However, none were nearly as restrictive as the Seventh Circuit, which, in accordance with its practice prior to *NML Capital*, used comity and other means to avoid conducting general asset discovery, at least when targeted at foreign corporations.[126] Using comity to prevent the burdens of general asset discovery on foreign sovereigns follows a trend of decisions attempting to restrain US courts from imposing on foreign parties more generally.[127] Restrictions include areas like personal jurisdiction[128] and the extraterritoriality of US laws.[129]

Professor Diego Zambrano has distilled many of the justifications for limiting the reach of US jurisdiction—and by extension the burdens of

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[123] Leibovitch v. Islamic Republic of Iran, 297 F. Supp. 3d 816, 822–23 (N.D. Ill. 2018).
[124] *Id*. at 829–30.
[125] *See* Aurelius Capital Master, Ltd. v. Republic of Arg., 589 Fed. App'x. 16, 18 (2d Cir. 2014) (urging the district court to consider a foreign sovereign's interest when targeting diplomatic and military assets because sovereigns are "entitled to a degree of grace and comity"); Ladjevardian v. Republic of Arg., 06-cv-3276 (TPG), 2016 WL 3039189, at *5 (S.D.N.Y. May 26, 2016) ("If plaintiffs truly wish to seek discovery and a restraining order, they should do so through the proper procedures rather than in such a throwaway fashion . . . it seems unlikely that such speculative discovery requests would be 'reasonably related to the discovery of attachable assets.'"); *see also* Amduso v. Republic of Sudan 288 F. Supp. 3d 90, 98 (D.D.C. 2017) (treating comity as only one factor among many when considering post-judgment discovery requests against a foreign sovereign).
[126] *See* Rubin v. Islamic Republic of Iran, No. 03 C 9370, 2016 WL 3940034, at *4 (N.D. Ill. July 21, 2016) (finding discovery appropriate after a case was closed but denied for improper service); *see also* Pine Top Receivables of Ill., LLC v. Banco de Seguros del Estado, 771 F.3d 980, 986 (7th Cir. 2014) (finding a pre-judgment security under Illinois law to be an attachment under the FSIA and therefore prohibited).
[127] *See* Zambrano, *supra* note 11, at 180–94 (Section III. The Return of International Comity: *Daimler*, *Gucci*, and *Motorola* Establish a New Paradigm).
[128] Daimler AG v. Bauman, 571 U.S. 117, 141 (2014) (limiting the scope of general jurisdiction and chiding the Ninth Circuit for giving "little heed to the risks to international comity its expansive view of general jurisdiction posed.").
[129] *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115–16 (2013), (holding that the Alien Tort Statute does not apply extraterritorially); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 269 (2010) (holding that the Securities Exchange Act does not apply extraterritorially).

discovery—to two central themes: avoiding reciprocal treatment abroad and protecting the international economy.[130] For instance, European countries enacted retaliatory laws in response to intrusive US discovery, such as blocking statutes, which subject defendants to double liability for complying with discovery orders.[131] Litigation even caused enough foreign relations embarrassment to prompt the State Department to write amicus briefs on behalf of foreign parties.[132] Comity also promotes the international economy by ensuring less redundancy between international legal systems and encouraging foreign parties (and sovereigns) to invest in US markets.[133] Importantly, US discovery is by far the most problematic aspect of the American justice system with respect to its foreign policy implications and is a feature often derided as American "judicial imperialism."[134]

However, the Northern District of Illinois' approach is not without problems. The *Aéropostiale* test can be difficult to evaluate without a predetermined desired outcome, as it involves weighing exceptionally difficult questions of foreign policy and balancing different sovereigns' interests.[135] Judge Easterbrook of the Seventh Circuit has criticized the test for requiring judges to balance "incommensurables," as judges are not in the best position to evaluate policy determinations such as whether one sovereign has a greater interest in a discovery dispute than another.[136] Denying discovery in aid of execution under the guise of comity also discourages investors from purchasing sovereign bonds, as in Argentina's case, or forces them to discount the value for the risk that the sovereign refuses to pay.[137]

Furthermore, it is unclear what deference should be given to either the State Department or foreign governments when they submit amicus briefs stating the importance of sovereign or foreign policy interests. Clearly, courts are not meant to defer to the executive branch as they did in the pre-FSIA landscape,[138] but it would be irresponsible to entirely disregard the State Department's positions. Likewise, it may be difficult for courts to determine whether sovereigns are articulating their interests in resisting asset discovery in good faith. Because of

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[130] Zambrano, *supra* note 11, at 194.
[131] *Id*. at 169–71.
[132] *Id*.
[133] *Id*. at 197.
[134] Buxbaum, *supra* note 99, at 700–01.
[135] *See* Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat., 902 F.2d 1275, 1283–84 (7th Cir. 1990) (Easterbrook, J., concurring)
[136] *Id*. at 1284.
[137] Simon & Crawford, *supra* note 93, at 66.
[138] *See* Republic of Austria v. Altmann, 541 U.S. 677, 701–02 (2004); Transcript of Oral Argument at 17, Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134 (2014) (No. 12-842) ("I thought that the whole purpose of the Foreign Sovereign Immunities Act was to protect us from you, from the State Department and the government coming in and saying, Oh, you know, in this case, grant this one, deny that one. I thought the whole purpose of the FSIA was to enable us to look at the case and decide it on the basis of the statute.").

the significant discretion the *Aéropostiale* test gives judges, there is less predictability and uniformity within the federal system.

B. Relevance as a Limiting Principle

Some courts, led by the Third Circuit, have used relevance as a means of limiting asset discovery against foreign sovereigns.[139] Both the *NML Capital* majority and Justice Ginsburg's dissent mentioned this approach, but in differing forms.[140] The majority acknowledged that a discovery request only for property immune from execution would fail the relevance requirement of Rule 26 of the Federal Rules of Civil Procedure, but that general asset discovery that included assets that were immune from execution would be allowable.[141] Justice Ginsburg would have required the judgment creditor to show up front that the assets they sought were attachable, thus proving their relevance.[142] Neither approach, however, addressed whether assets that are immune from execution are also immune from discovery.[143] Arguably, immunity should be found in both cases because assets immune from execution are not relevant to discovery in aid of execution, since they cannot be attached.[144] The approach courts use in applying a relevancy limitation can vary. For example, a court could put the burden on the plaintiff to make an initial showing that some portion of the discovery sought could be attachable. Or a court could require the defendant to demonstrate that the specific assets sought by a general discovery order were immune from execution and therefore irrelevant.[145]

The Third Circuit took a middle ground between Justice Scalia's seemingly narrow relevance limitation—where general asset discovery is appropriate as long as it is not targeted solely at assets immune from execution—and Justice Ginsburg's limitation, which would restrict discovery to commercial property.[146] The Third Circuit's approach allows a party resisting discovery to show the district court that property sought by the judgment creditor is not attachable, but requires the resisting party to bear the burden of persuasion.[147] This requires showing specific assets that would be immune from attachment, as the possibility

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[139] Federal Rule 26 defines one of the limitations of discovery as "relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1).
[140] Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134, 144–45 (2014)
[141] *Id*.
[142] *Id*. at 147 (Ginsburg, J., dissenting).
[143] *NML Capital*, 573 U.S. at 139–40, 140 n.2 ("[T]his is not a case about the breadth of Rule 69(a)(2)."). The District of D.C. interpreted this as signaling that the Supreme Court cast doubt on the idea that Rule 69 prohibits discovery of assets that are immune from discovery. Amduso v. Republic of Sudan, 288 F. Supp. 3d 90, 97 n.5 (D.D.C., 2017).
[144] *NML Capital*, 573 U.S. at 147 (Ginsburg, J., dissenting).
[145] *See supra* note 98 and accompanying text.
[146] *See* In re Ohntrup, 628 Fed. Appx. 809, 810–11 (3d Cir. 2015).
[147] Ohntrup v. Makina ve Kimya Endustrisi Kurumu, 760 F.3d 290, 297 n.6 (3d Cir. 2014) ("As the party objecting to the discovery, Alliant would bear the burden of persuasion on the FSIA issue.").

of an inability to discover attachable assets does not itself make the request improper.[148]

Using relevance as a limiting principle is an attractive option, but it does not solve all the problems it attempts to mitigate. Putting the burden on the judgment debtor to show that assets sought are immune from execution provides more protection for sovereigns than allowing the district court to serve as a clearinghouse for information would provide.[149] The distinction is whether the evaluation of execution immunity under the FSIA is done before discovery or during execution. A court using a relevance limitation could simply prevent discovery against categories of assets shown by a sovereign to be immune from attachment, while a court serving as a "clearinghouse" would have more discretion to allow discovery of potentially sensitive sovereign assets and limit attachment during the execution proceedings.[150] This approach still burdens the sovereign by requiring it to make an affirmative showing that certain types of assets the plaintiff seeks are immune from attachment.[151] However, it protects against the much more intrusive method of requiring a judge to evaluate sensitive State secrets and giving the plaintiff access to that property, since the sovereign must only show that the requested information is immune from attachment.[152]

Alternatively, courts could require plaintiffs to make a threshold showing of relevance by illustrating which exception to the FSIA's execution immunity the requested property fits into. Prior to *NML Capital*, requiring such a showing was fairly common.[153] Today, some district courts continue to use versions of this approach, although they generally exhibit some confusion as to what standard to use.[154] The Eastern District of California, for example, follows Justice Ginsburg's approach and limits discoverable assets only to commercial property within the United States.[155] In *Lasheen v. Loomis Company*, the Eastern District of California required the plaintiff to show which enumerated exception under Section 1610 of

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[148] *See id*. at 296 ("[P]otential inability to show that the subject property is not immune from attachment is immaterial to the question of unreasonable burden.").
[149] *See infra* Section III.C.
[150] *See infra* Section III.C.
[151] *See Ohntrup*, 760 F.3d at 297 n.6.
[152] *Id*.
[153] *See* Simowitz, *supra* note 52, at 3312–13 (providing examples of such an approach in federal and state courts) (citing Blaw Knox Corp. v. AMR Indus., Inc., 130 F.R.D. 400, 403 (E.D. Wis. 1990) *and* Ayyash v. Koleilat, 957 N.Y.S.2d 574, 576 (Sup. Ct. 2012)).
[154] Lasheen v. Loomis Co., No. 2:01–cv–0227–KJM–EFB, 2017 WL 4410167, at *3 (E.D. Cal. Oct. 4, 2017) (finding that parties seeking discovery were only entitled to information that is likely to lead to the discovery of executable assets under Rule 26(b)(1)). Oddly, the court stated that plaintiffs are limited to Rule 26 for discovery in aid of execution, when Rule 69 provides that "procedure of the state where the court is located" may be used as well. FED. R. CIV. P. 69(a)(2). While this may have been irrelevant for the case at issue, many states allow for broader discovery than the Federal Rules, which can create different outcomes even within the same circuit. *See infra* notes 184–185 and accompanying text. Other courts still cite the "circumspectly" standard provided for jurisdictional discovery despite the modern separation of the two doctrines. *See* HWB Victoria Strategies Portfolio v. Republic of Arg., No. 17-1085-JTM, 2017 WL 1738065 at *3 (D. Kan. May 4, 2017) (citing both the circumspectly standard and the Third Circuit's opinion in *Ohntrup*).
[155] *Lasheen*, 2017 WL 4410167, at *3.

the FSIA is applicable.[156] In contrast, the District of Kansas requires a more general "initial showing that an FSIA exception to foreign immunity applies."[157] The District of Kansas approach prohibits the generic asset discovery that the *NML Capital* majority suggested is appropriate.[158]

Requiring plaintiffs to make an initial showing can be difficult, particularly if they are forced to choose which enumerated exception applies without knowing what assets the debtor even possesses.[159] Moreover, the scope of Federal Rule of Civil Procedure 69, especially in 69(a)(2) discovery, is necessarily broad, because it was created to give judgments legitimacy through enforcement.[160] Both state and federal courts have historically permitted broad discovery in aid of execution for that reason, even going so far as to permit "fishing expeditions."[161] While requiring a threshold showing is within the district court's discretion to prevent discovery from unnecessarily burdening judgment creditors, the Scalia majority in *NML Capital* explicitly rejected requiring such an approach since the text of the FSIA does not mandate it.[162] The Southern District of New York and the District of DC have taken Justice Scalia's approach even further and explicitly rejected a relevance limitation.[163] Furthermore, providing such a high level of protection raises the post-judgment asset discovery close to the jurisdictional discovery standard, obscuring the distinction between the two. The District of Kansas serves as a perfect example of a court confusing the two standards: when requiring a threshold showing, the court mistakenly cited the jurisdictional standard as its authority.[164] Requiring the plaintiff to make a threshold showing of

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[156] *Lasheen*, 2017 WL 4410167, at *2; 28 U.S.C. § 1610(a)(1)–(7).
[157] *HWB Victoria Strategies*, 2017 WL 1738065, at *3.
[158] *See id*. (denying further discovery for failing to articulate "any reasonable basis" that further discovery would rebut pre-existing evidence of probable immunity).
[159] Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134, 144 (2014)
[160] *See* Nat'l Serv. Indus. v. Vafla Corp., 694 F.2d 246, 250 (11th Cir. 1982) ("A judgment creditor is entitled to discover the identity and location of any of the judgment debtor's assets, wherever located."); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE§ 3014 (2d ed. 2012) (broad post-judgment asset discovery is permissible as long as the purpose is not to harass).
[161] *See* Caisson Corp. v. Cnty. W. Bldg. Corp., 62 F.R.D. 331, 335 (E.D. Pa. 1974) ("[I]n an attempt to discover assets by which to satisfy its judgment, plaintiff is entitled to a very thorough examination of the judgment debtor."); *see also* Capital Co. v. Fox, 15 F. Supp. 677, 678 (S.D.N.Y. 1936) ("To be sure, the subpoenas are a fishing excursion, but a judgment creditor is entitled to fish for assets of the judgment debtor. Otherwise he will rarely obtain satisfaction of his judgment from a reluctant judgment debtor.") (internal citations omitted).
[162] *See NML Capital*, 573 U.S. at 145 n.4.
[163] *See* Amduso v. Republic of Sudan, 288 F. Supp. 3d 90, 97 (D.D.C. 2017) ("If Sudan ultimately believes some of the discovered assets are immune from attachment, it will have the opportunity to make that argument at the execution stage."); Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria, 308 F.R.D. 27, 35 (D.D.C. 2015) (stating that requiring a plaintiff to make a threshold showing that assets sought were not immune from execution "fundamentally unfair" and " perhaps impossible.").
[164] HWB Victoria Strategies Portfolio v. Republic of Arg., No. 17-1085-JTM, 2017 WL 1738065 at *3 (D. Kan. May 4, 2017)

relevance is nearly impossible for plaintiffs to manage, and it creates confusion as to what the appropriate standard for such a showing should be.[165]

After deciding which party bears the burden, the more difficult question becomes how a court should evaluate whether an asset, particularly an asset located abroad, is immune from execution and therefore irrelevant to discovery. In *NML Capital*, Justice Ginsburg suggested limiting extraterritorial property to commercial use to mirror the FSIA's limitations, but the majority disagreed.[166] Authority to execute upon property generally comes from the laws of the country in which the property is located.[167] However, the *NML Capital* majority also realized the difficulty of making a district judge evaluate numerous countries' laws just to determine whether every potential discoverable asset, unknown at the time, could be attached.[168] Additionally, if a country had fewer execution limitations on property than the United States, presumably more could be discovered about assets abroad than in the United States. Foreign nations, already displeased with American discovery, would certainly find providing less discovery abroad than within US jurisdiction to be emblematic of so-called American judicial imperialism.[169] Moreover, the limits of such an approach do not appear to exist. As Justice Kagan hypothesized in the *NML Capital* oral argument, if a country allowed execution upon military or diplomatic assets, discovery could even extend to those assets.[170] Using relevance as a means of limiting discovery is an effective approach when placing the burden on the sovereign resisting discovery, but it leads to complex choice of law questions the Supreme Court has not yet answered.

C. Courts as "Clearinghouses of Information"

While some courts created barriers through comity or via the imposition of a relevance limitation to protect against general asset discovery, others read *NML Capital* to suggest that since the FSIA does not provide any limitations on discovery, a sovereign's only recourse is to raise immunity defenses during execution.[171] These courts also typically constrain relevance limitations within Rule 69, since FSIA immunity determinations are more easily and accurately made during execution than before discovery, when the assets sought are not yet known.[172]

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[165] *See NML Capital*, 573 U.S. at 144; *HWB Victoria Strategies*, 2017 WL 1738065, at *3.
[166] *NML Capital*, 573 U.S. at 147 (Ginsburg, J., dissenting).
[167] *Id*. at 144.
[168] Transcript of Oral Argument at 12–13, Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134 (2014) (No. 12-842) (Justice Alito questioning if a district court could be forced to evaluate as many as forty sources of law for asset discovery).
[169] Buxbaum, *supra* note 99, at 700–01.
[170] *See* Transcript of Oral Argument at 37–38, *NML Capital*, 573 U.S. 134 (No. 12-842).
[171] *See*, *e.g*., Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria, 308 F.R.D. 27, 35 (D.D.C. 2015).
[172] *Thai Lao Lignite Co., Ltd. v. Government of Lao People's Democratic Republic*, 924 F. Supp. 2d 519 (S.D.N.Y. 2013) ("Forcing Petitioners to show that property is attachable before permitting

The Second Circuit and the District of DC were among the first to adopt this approach, and other courts across the country followed.[173] The Second Circuit maintains its approach from *EM Ltd*., which specifically distinguished asset discovery from jurisdictional discovery, and thus offered no protections for sovereigns under the FSIA.[174] Indeed, the Second Circuit found that neither military nor diplomatic property are necessarily immune from discovery.[175] The Second Circuit did at least note that military and diplomatic documents may be protected by privilege or inviolability under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.[176] Typical in camera review of military and diplomatic documents, or serving as a clearinghouse for information, may be undesirable from a foreign policy perspective.[177] However, the Second Circuit's approach is that "broad post-judgment discovery in aid of execution is the norm in federal law and New York state courts."[178] Even during attachment, the Southern District of New York has interpreted the commercial use requirement broadly, which is reflective of the Second Circuit's general approach to post-judgment enforcement.[179]

The problems with allowing discovery against military and diplomatic property are readily apparent. Military and diplomatic property represents the core of State secrets and allowing discovery in this sphere would be a severe intrusion into State sovereignty. At oral argument in *NML Capital*, the Justices were especially concerned with military and diplomatic property.[180] This concern stemmed from the real-world foreign policy interests surrounding that property, including: diplomatic issues between the United States and other sovereign nations; retaliatory statutes imposed by those nations to deter parties from

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them to gain any information about Respondent's assets would present an insurmountable Catch–22 for judgment creditors seeking to enforce a valid judgment.").

[173] *See Comm'ns Imp. Exp. S.A. v. Republic of Congo*, No. 2:16-CV-00404-BSJ, 2016 WL 3951080. at *4 (D. Utah Mar. 16, 2015) (granting a motion to compel requiring the Bank of Utah to disclose its information regarding a Boeing 787-8 airplane that the successful plaintiffs suspected was owned by the Republic of Congo); Motion to Compel Compliance with Subpoena Duces Tecum for Commissions Import Export S.A. at 2, No. 2:16-MC-00404, *Comm'ns Imp. Exp. S.A. v. Republic of Congo* (D. Utah June 8, 2016), ECF No. 8.

[174] EM Ltd. v. Republic of Arg., 695 F.3d 201, 209–10 (2d. Cir. 2012); *see supra* Section II.B.

[175] *See* Aurelius Capital Master, Ltd. v. Republic of Arg., 589 Fed. App'x. 16, 18 (2d Cir. 2014) ("Again, the potential immunity of property [military property] from attachment does not preclude discovery of that property; indeed, discovery may be necessary for the parties to properly litigate the existence of immunity.").

[176] *Id*. at 17.

[177] *Id*. at 17–18; *see also* Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 546–48 (2d Cir. 1991) ("In camera review is a method by which a court can confidentially review the evidence for which a privilege is claimed and determine the propriety of the assertion of the privilege.").

[178] *EM Ltd*., 695 F.3d at 207.

[179] *Thai Lao Lignite Co., v. Gov't of Lao People's Democratic Republic* (S.D.N.Y. Sept. 13, 2011) (No. 10 Civ. 5256 (KMW)(DCF)), 2011 WL 4111504, at *3–4 (finding that a sovereign's diplomatic accounts could still be subject to attachment if they were primarily used for commercial uses).

[180] *See* Transcript of Oral Argument at 38–40, Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134 (2014) (No. 12-842)

complying with American courts' discovery orders; or reciprocal treatment in foreign courts.[181]

D. Rule 26 and the 2015 Amendments: A Limiting Principle?

Rule 69 states that courts may obtain post-judgment attachment discovery as provided by the Federal Rules, which means that attachment discovery can be subject to traditional Rule 26 protections.[182] The Third Circuit's relevance limitation is one example of a court using those protections, but relevance is not the only protection Rule 26 provides. The District of DC, which uses the Second Circuit's expansive "clearinghouse" approach, has suggested that general asset discovery might be allowed as long as the order does not "ask *solely* for information about a set of assets that the FSIA and international law render immune from attachment."[183] The District of DC has also found that immunity objections should be made during execution rather than during asset discovery, even for assets sought worldwide.[184] However, it has used the traditional Rule 26(b) scope limitations (privilege, relevance, and—after 2015—proportionality)[185] to analyze post-judgment discovery requests. These limitations provide more protections, particularly in the proportionality analysis that the 2015 amendments to the Federal Rules re-emphasized.[186]

The 2015 amendments to Rule 26 re-emphasized the principle of proportionality in discovery requests by adding the term "proportionality" back into the forefront in subsection (b)(1).[187] This amendment attempted to curb discovery abuses by only allowing discovery proportional to the needs of the case.[188] Rule 26(b)(1) measures proportionality through: (1) the importance of the issues at stake; (2) the amount in controversy; (3) the parties' relative access to the information; (4) the importance of discovery to resolving the issues; and (5) whether the burden of discovery outweighs its likely benefit.[189] Factors (1) through (4) do not provide much protection for foreign sovereigns, since the amount in question against a sovereign will nearly always be high, the sovereign will have a significant advantage of access, and the importance will be critical

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[181] *See supra* discussion following Part III.
[182] FED. R. CIV. P. 69(a)(2).
[183] Amduso v. Republic of Sudan, 288 F. Supp. 3d 90, 97 (D.D.C. 2017) (emphasis added).
[184] *Id*.
[185] FED. R. CIV. P. 26(b)(1).
[186] *See* FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment; Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria, 308 F.R.D. 27, 36 (D.D.C. 2015) (evaluating whether discovery was overly broad, burdensome or too costly to the sovereign).
[187] *See* 2015 Year-End Report on the Federal Judiciary, https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf (Commenting on the 2015 discovery restrictions, Justice Roberts stated that "I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests or evading legitimate requests through dilatory tactics.").
[188] FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment.
[189] FED. R. CIV. P. 26(b)(1).

since the only issue will be execution.[190] Conversely, factor (5) could provide protection significant for a sovereign, principally for protecting State secrets. The burden a sovereign would face by being forced to disclose the amount and location of its military assets—a clear invasion of State secrecy and sovereignty—would nearly always outweigh a judgment creditor's interest in discovering those assets, since the assets would be immune from execution anyway.[191]

The modern version of Rule 26 offers an appropriate balance of competing interests, but it is fundamentally flawed because a creditor can bypass it by using state court procedures instead. Rule 69 provides that a judgment creditor may obtain discovery under the Federal Rules, or "by the procedure of the state where the court is located."[192] In states with more expansive discovery and attachment laws than the Federal Rules, plaintiffs can effectively circumvent the Rules' limitations by using those state procedures.[193]

For example, in the aftermath of *NML Capital*, NML Ltd. searched worldwide to find property owned by Argentina, and found potentially attachable assets located in Nevada.[194] The relevant Nevada Rule allowed for discovery "regarding any matter" that is "relevant to the subject matter involved in the pending action."[195] The Nevada Supreme Court noted that the Nevada Rule was broader than the Federal Rule and found that while a request of "all records related to the judgment debtors" would be unduly burdensome under the Federal Rules, it was proper under the Nevada Rule.[196] Thus, in any state that has more expansive post-judgment discovery than the federal system, the Rule 26, protections are rendered meaningless, as plaintiffs could simply utilize the more expansive rule. This is particularly troublesome in the New York districts because New York law allows for discovery far beyond the Federal Rules, and a disproportionately high amount of litigation against foreign sovereigns takes place there.[197] New York allows discovery for "all matter[s] relevant to the satisfaction of the judgment,"

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[190] *See*, *e.g.*, Amduso v. Republic of Sudan, 288 F. Supp. 3d 90, 98 (D.D.C. 2017).

[191] For an example of a district court using 26(b)(1)'s proportionality analysis, see *Amduso*, 288 F. Supp. 3d at 90.

[192] FED. R. CIV. P. 69(a)(2).

[193] *See* Simowitz, *supra* note 52, at 3305, 3307–08 (finding that federal courts using state execution and post-judgment discovery rules typically apply them broadly). Another problem is that, due to the recency of the amendments, not at all federal courts even use the proportionality analysis. *See*, *e.g.*, Textron Fin. Corp. v. Gallegos, No.: 15CV1678-LAB (DHB), 2016 WL 4077505 at *3 (S.D. Cal. Aug 1, 2016). Additionally, this creates variability between states, even within the same circuit. *Compare* Lasheen v. Loomis Co., No. 2:01-cv-0227-KJM-EFB, 2017 WL 4410167 at *3 (E.D. Cal. Oct. 4, 2017) (using a relevance limitation to deny discovery), *with* NML Capital, Ltd. v. Republic of Arg., Nos. 2:14–cv–492–RFB–VCF, 2:14–cv–1573–RFB–VCF., 2015 WL 1186548 at *15 (D. Nev. Mar. 16, 2015) (using state discovery law which, unlike federal discovery, permits discovery for "all records related to judgment debtors").

[194] NML Capital, Ltd. v. Republic of Arg., Nos. 2:14–cv–492–RFB–VCF, 2:14–cv–1573–RFB–VCF., 2015 WL 1186548 at *1 (D. Nev. Mar. 16, 2015).

[195] *Id*. at *15.

[196] *Id*.

[197] N.Y. C.P.L.R. 5223 cmt. 5223:2 (McKinney 2014) (author Richard C. Reilly, recompiling David D. Siegel's commentary).

an exceptionally broad standard even noted by the Supreme Court in *NML Capital*.[198]

IV. PROPORTIONAL DISCOVERY AND SOLVING THE STATE LAW LOOPHOLE

This Note argues that the District of DC's approach, which uses proportionality as a limiting principle, provides the fairest method for evaluating attachment discovery against foreign sovereigns. The Northern District of Illinois appears to be using comity as a means of continuing the Seventh Circuit's pre-*NML Capital* practice of preventing most discovery, which ignores successful plaintiffs' interests in collecting their judgments.[199] The *Aéropostiale* test for international comity has also been the subject of heavy criticism due to its unworkability.[200] The Third Circuit's relevance limitation is more balanced, at least when placing the burden on the foreign sovereign challenging discovery to disprove relevance, but it raises complicated choice of law questions that may be too burdensome for district courts to efficiently manage.[201] Allowing general asset discovery worldwide, as the Second Circuit permits, does not give proper weight to American foreign policy concerns or the intrusiveness of American discovery.[202]

The District of DC's proportionality approach protects foreign sovereigns from the type of discovery that is the most harmful to their sovereignty — such as the discovery of diplomatic or military property — since sensitive property of that nature will rarely be proportional to the needs of a case. Additionally, this approach follows the modern trend of discovery more generally, whereby federal courts have acknowledged that unchecked discovery presents too high a burden even in the domestic context.[203] However, the District of DC's proportionality approach cannot be undertaken nationwide, as Rule 69(a)(1) states that for enforcement, courts must use the "procedure of the state where the court is located, but a federal statute governs to the extent it applies."[204] Because of this rule, courts in states with rules that allow for broad discovery, such as the Southern

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[198] *Id*. ("This is a generous standard and permits the creditor a broad range of inquiry through either the judgment debtor or any third person with light to shed on the debtor's property, present or potential.").
[199] *See Leibovitch*, 188 F. Supp. 3d at 740–41.
[200] *See* Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat., 902 F.2d 1275, 1283–84 (7th Cir. 1990) (Easterbrook, J., concurring)
[201] *See* Transcript of Oral Argument at 12–13, Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134 (2014) (No. 12-842) (Justice Alito questioning a district court's approach).
[202] *See*, *e.g*., Aurelius Capital Master, Ltd. v. Republic of Arg., 589 Fed. App'x. 16, 18 (2d Cir. 2014) (failing to prevent discovery of military property that would have been immune from execution).
[203] Michael Thomas Murphy, *Occam's Phaser: Making Proportional Discovery (Finally) Work in Litigation by Requiring Phased Discovery*, 4 STAN. J. COMPLEX LITIG. 89, 106 (2016).
[204] FED. R. CIV. P. 69(a)(1).

District of New York, cannot use the Federal Rules' proportionality limitations at all.[205]

Therefore, Congress should amend the FSIA to require courts to use the Federal Rules for discovery requests in cases against foreign nations. This would provide a baseline proportionality protection against unnecessary post-judgment attachment discovery for sovereigns while still allowing for judicial discretion. Amending the FSIA in this context would also present an opportunity to preempt another looming issue: extraterritorial attachment.[206] While judges in some cases, particularly in the Second Circuit, have offered seemingly minimal protection to foreign sovereigns, most of these instances occurred before the 2015 amendments to the Federal Rules of Civil Procedure, which went into effect eighteen months after *NML Capital*.[207] The District of DC began using the proportionality analysis after the amendments, as it had no alternative state procedures that plaintiffs could utilize instead.[208]

Setting a proportionality standard for post-judgment discovery in suits against foreign sovereigns is important because discovery is the feature of the American legal system that foreign parties, including sovereigns, find most intrusive.[209] Justice Scalia was quite aware of the concerns regarding overly intrusive discovery and signaled to the parties that their complaints would be appropriately targeted to Congress to amend the FSIA.[210] President Obama also stressed that wide-ranging discovery was a significant reason for vetoing a bill that would have expanded jurisdiction within the FSIA, since it would make cooperation with other sovereigns on national security issues difficult.[211]

Sovereigns litigating in the United States find little comfort in the FSIA's execution immunity, since the sovereign could still be forced to disclose the locations of its sensitive assets, despite litigating in federal court, simply because

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[205] See *supra* Section III.D for a discussion of this limitation. For an example of how Rule 69 lets parties circumvent Rule 26's proportionality analysis, see, e.g., NML Capital, Ltd. v. Republic of Arg., Nos. 2:14–cv–492–RFB–VCF, 2:14–cv–1573–RFB–VCF., 2015 WL 1186548 at *1 (D. Nev. Mar. 16, 2015).

[206] The Seventh and Second Circuits have split again regarding the issue of whether they can attach assets located abroad. *Compare* Peterson v. Islamic Republic of Iran, 876 F.3d 63, 89 (2d Cir. 2017) (allowing a court to recall a sovereign's extraterritorial assets held by a third party for execution evaluation under Section 1610 since the court had jurisdiction over the third party), *with* Rubin v. Islamic Republic of Iran, 830 F.3d 470, 475 (7th Cir. 2016) (requiring that assets must be "within the territorial jurisdiction of the district court" to be subject to execution).

[207] *See, e.g.*, *Aurelius Capital Master*, 589 Fed. Appx. 16.

[208] *Compare* Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria, 308 F.R.D. 27, 35 (D.D.C. 2015) (analyzing a post-judgment discovery request prior to the 2015 amendments), *with* Amduso v. Republic of Sudan, 288 F. Supp. 3d 90, 98 (D.D.C. 2017) (using the proportionality analysis).

[209] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 Reporters' Note 1 (AM. LAW INST. 1987).

[210] Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134, 146 (2014).

[211] 162 Cong. Rec. H6024 (daily ed. Sept. 28, 2016) (veto message of President Obama regarding the Justice Against Sponsors of Terrorism Act).

the state where the court is located allows for broad attachment proceedings.[212] While individual states have an interest in utilizing their methods of judicial enforcement, that interest should not prevail over the United States' foreign policy interest in ensuring that parochial enforcement proceedings do not infringe upon potential allies' sovereign interests, particularly in a federal course of action. Moreover, adding discovery to the FSIA would be consistent with the FSIA's existing approach in other procedural contexts, including venue,[213] jurisdiction,[214] service of process,[215] counterclaims,[216] and attachment.[217] Additionally, unlike with many other statutes, Congress has proven willing to amend the FSIA, and did so twice in 2016: once to allow for tort suits against sovereigns, and once to prevent attachment of pieces of art on display in the United States in temporary exhibits.[218] Amending the FSIA to add discovery that mirrors the Federal Rules would set an appropriate baseline that sovereigns could rely upon when facing discovery in US courts.

CONCLUSION

NML Capital's holding provided a vague directive that gave district courts great discretion as to which standards to apply for attachment discovery requests against foreign sovereigns. This Note has provided the first account of the different approaches lower courts use when considering such discovery requests. After the 2015 amendments to the Federal Rules of Civil Procedure, the District of DC began using proportionality as a potentially new standard. This approach gives appropriate weight to plaintiffs' interests in collecting their judgments and sovereigns' interests in preventing intrusive American discovery, and it follows the modern trend of reining in discovery to protect against complete general asset discovery.

Amending the Rule 69 attachment to require execution to be governed by the Federal Rules closes the choice of law loophole that plaintiffs could otherwise use to avoid such limitations. Proportionality better accounts for plaintiff's interests than the Seventh Circuit's comity test but provides more protections against abusive discovery requests than the Second Circuit's expansive approach. Although proportionality still leaves discretion to the district judge, the proportionality standards can be borrowed from other civil contexts as well, creating a greater body of precedent to work from than the pure comity analysis.

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[212] *See*, *e.g.*, *NML Capital, Ltd. v. Republic of Arg.*, Nos. 2:14–cv–492–RFB–VCF, 2:14–cv–1573–RFB–VCF., 2015 WL 1186548 at *1 (D. Nev. Mar. 16, 2015).
[213] 28 U.S.C. § 1391(f) (2016).
[214] *Id.* § 1604.
[215] *Id.* § 1608.
[216] *Id.* § 1607.
[217] *Id.* § 1609.
[218] *See* 28 U.S.C. § 1605 (2016); 28 U.S.C. §1605B (2016).