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Obama's First Trade War: The US-Mexico Cross-Border Trucking Dispute and the Implications of Strategic Cross-Sector Retaliation on U.S. Compliance Under NAFTA

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Bryan J. Soukup**

I. INTRODUCTION

In March 2009, President Barack Obama signed legislation suspending a pilot program that allowed a limited number of Mexican trucking firms to operate within designated areas on U.S. soil. President George W. Bush enacted the program during the last year of his presidency in preparation for a larger, more inclusive US-Mexican cross-border trucking program. With trucks carrying 90 percent of the goods traded between the United States and Mexico, the border-opening program was viewed by proponents of the North American Free Trade Agreement (NAFTA) as an important step in liberalizing trade and improving relations with Mexico. Opponents of NAFTA, however, have been critical of the program on the basis that Mexican trucks and their drivers endanger motorists, threaten national security, destroy the environment and contribute to the loss of thousands of American jobs.¹

Following the suspension of the pilot program, the Mexican government

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1. Associated Press, *Bush Plan to Allow Mexican Truckers Throughout U.S. Draws Criticism*, N.Y. TIMES, Feb. 24, 2007, available at <http://www.nytimes.com/2007/02/24/washington/24trucks.html>.

retaliated against the United States by imposing 90 tariffs ranging between 10 and 45 percent on U.S.-produced goods totaling \$2.4 billion.² Though trucking falls within the *services* sector, Mexico has targeted its tariff hikes on specific *goods* in key states where powerful politicians have been pressuring the Obama administration to impose tighter limits on Mexican truck traffic. This method of “cross-sector retaliation” is different from the usual approach in international trade disputes whereby the injured state retaliates in the same commercial sector in which the harm occurs, also known as “same-sector retaliation.” Cross-sector retaliation is permitted under international trade rules as an alternative remedy for smaller states who seek to improve compliance levels among larger states in asymmetric disputes.³

The purpose of this article is to examine Mexico’s approach to U.S. noncompliance with NAFTA trucking regulations and assess whether strategic cross-sector retaliation is an effective tool to compel the United States to comply with its NAFTA obligations. Part II will describe the background to NAFTA and the U.S.-Mexico cross-border trucking dispute. Part III will examine U.S. policy towards Mexican trucking since the creation of NAFTA and the implications of the 2001 NAFTA arbitration decision that paved the way for Mexican retaliation against the United States today. Part IV will discuss the specifics of the 2007 pilot program and the Obama administration’s reasons for suspending the program. Part V will analyze the concept of strategic cross-sector retaliation in international trade where smaller states have effectively utilized this remedy to compel larger states to comply with trade rules in asymmetric disputes. Finally, this article will discuss Mexico’s current program of strategic cross-sector retaliation against the United States, its political and economic ramifications, and the likelihood that Mexico’s retaliation will change U.S. policy.

II.

THE U.S.-MEXICO CROSS-BORDER TRUCKING DISPUTE AND NAFTA

A. *Origins of the Cross-Border Trucking Dispute*

The dispute between the United States and Mexico over cross-border trucking rights arose following the passage of the Bus Regulatory Reform Act (BRRRA) in 1982.⁴ Prior to the BRRRA, Mexican and Canadian trucks could

2. Mica Rosenberg, *Mexico Tariffs Hit a Diverse List of U.S. Goods*, REUTERS, Mar. 18, 2009, available at <http://www.reuters.com/article/idUSTRE52H1BQ20090318>.

3. Klint W. Alexander, *Rethinking Retaliation in the WTO Dispute Settlement System: Leveling the Playing Field for Developing Countries in Asymmetric Disputes*, in THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES 507 (Kern Alexander & Mads Andenas eds., 2008).

4. Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (codified as amended in scattered sections of 49 U.S.C.) (1982) [hereinafter BRRRA].

operate freely in the United States provided they complied with U.S. safety laws.⁵

In response to criticism from Canada, President Ronald Reagan lifted the restrictions on Canadian trucks entering the United States on the basis that Canada's truck safety standards were similar to those in the United States.⁶ President Reagan declared:

I regret that with respect to Mexico there has not yet been progress sufficient to justify a modification of the moratorium. A substantial disparity remains between the relatively open access afforded Mexican trucking services coming into the United States and the almost complete inability of United States trucking interests to provide service into Mexico.⁷

Under the BRRRA, Mexican trucks are permitted to operate within specified commercial zones in four U.S.-Mexico border states – Texas, California, New Mexico, and Arizona.⁸ These commercial zones generally extend from 3 to 20 miles from the border, reaching up to 75 miles in some locations.⁹ Upon reaching the edge of a commercial zone, a Mexican truck is required to transfer its cargo to a U.S. truck; the U.S. truck then completes the delivery to the product's final destination.¹⁰ Delays in delivery of goods and

5. U.S. Department of Transportation, Cross Border Truck Safety Inspection Program: Trucks Crossing the U.S.-Mexico Border, *available at* <http://www.dot.gov/affairs/cbtsip/factsheet.htm>. The BRRRA restricted foreign motor carriers from operating in the United States, though the President could modify these restrictions at any time. The BRRRA grandfathered in five Mexican carriers that were already operating without restriction within the United States, but instructed the Interstate Commerce Commission (ICC) to deny permits to all other Mexican carriers. *See In re Cross-Border Trucking Services (Mex. v. U.S.), USA-MEX-98-2008-01 at* ¶ 59 (NAFTA Arbitral Panel, Feb. 6, 2001), *available at* <http://www.worldtradelaw.net/nafta20/truckingservices.pdf> [hereinafter U.S.-Mexico Panel Decision]. The BRRRA introduced a two-year moratorium on U.S.-issued trucking permits from Canada and Mexico. BRRRA, *supra* note 4, at § 6(g)(1).

6. Memorandum from the President on the Bus Regulatory Reform Act of 1982, 18 WEEKLY COMP. PRES. DOC. 1180 (Sept. 20, 1982).

7. Determination Under the Bus Regulatory Reform Act of 1982: Memorandum of September 20, 1982, for the United States Trade Representative, 47 Fed. Reg. 41,721 (Sept. 22, 1982).

8. Mary E. Peters, Sec'y of Transp., & John H. Hill, Adm'r of the Fed. Motor Carrier Safety Admin., Statement before the Senate Appropriations Subcommittee for Transportation, Housing and Urban Development, and Related Agencies (Mar. 8, 2007) (transcript available at <http://www.fmcsa.dot.gov/documents/testimony/tst-030807.pdf>); *see also* 49 C.F.R. § 372.241 (2009).

9. *See* Peters & Hill, Statement before the Senate Appropriations Subcommittee for Transportation, Housing and Urban Development, and Related Agencies. Along the border from the Pacific Ocean to the Gulf of Mexico, commercial zones range from three-mile wide strips in some areas to as much as 75 mile-deep areas in others. The zones encompass nearly all urban areas in the border region and stretch as far north as the suburbs of Los Angeles in California.

10. The procedure going the other direction is similar. A U.S. trucker drives the freight or cargo to the Mexican border. At this time a "drayage" driver ferries the goods from the U.S. truck across the border to a warehouse. At the warehouse, Mexican truck drivers reload the cargo onto a Mexican truck and transport the goods deeper into Mexico to its final destination. Lowell Powell, *NAFTA Keep on Trucking: Paving the Way for Long-Haul Trucking Operations Between Mexico*

added costs associated with the transfer of goods are common.¹¹ These restrictions were later modified to include exceptions for direct Mexico-Canada transit and U.S.-owned Mexican trucks. While the changes did not grant Mexican truckers the same access that Canadian truckers enjoy, the United States showed that it was willing to open its border to Mexican trucks under certain conditions.

In 1995, Congress passed the Interstate Commerce Commission Termination Act (ICCTA).¹² The ICCTA authorized the President to lift the moratorium on Mexican carrier movements beyond the commercial zones if removal was deemed “consistent with the obligations of the United States under a trade agreement or with United States transportation policy.”¹³ The effect of the act was to give the President maximum flexibility to implement the trucking provisions under NAFTA, which entered into force on January 1, 1994.

B. NAFTA and Annex I

The North American Free Trade Agreement (NAFTA) is a trilateral agreement that addresses the trade in goods, services, and investment.¹⁴ The major goals of the agreement are to eliminate trade barriers, promote increased investment opportunities, and facilitate cross-border movements of goods and services between the parties.¹⁵ Among NAFTA’s 900 pages of rules and regulations are provisions calling for standardization of members’ truck length, weight, safety, and drivers’ licensing requirements. NAFTA Chapter 12 addresses trade in services, and Article 1202 (the National Treatment Clause) requires the members to treat foreign service providers no less favorably than domestic service providers.¹⁶ Trucking companies fall under Chapter 12 and

and the United States, 16 *TRANSNAT’L L.* 467, 473 (2008); *Mexico Tariffs Test Obama*, *LATIN BUS. CHRONICLE*, Mar. 17, 2009, available at <http://www.latinbusinesschronicle.com/app/article.aspx?id=3235>.

11. The Department of Transportation estimates that the requirement to off-load cargo within 25 miles of the border adds \$400 million in transportation and warehousing costs annually.

12. Interstate Commerce Commission Termination Act, Pub. L. No. 104-88, 109 Stat. 803 (codified as amended in scattered sections of 49 U.S.C.) (1995).

13. 49 U.S.C. § 13902(c)(3) (2006).

14. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 *I.L.M.* 289 (entered into force Jan. 1, 1994) [hereinafter *NAFTA*].

15. *Id.* art. 102(1) (describing the agreement’s objectives, including creating efficacious proceedings for implementing the Agreement).

16. *Id.* art. 1202. The National Treatment Clause provides:

1. Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers.

2. The treatment accorded by a Party under paragraph 1 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to service providers of the Party of which it forms a part.

are thus protected under the National Treatment Clause unless the company's activities violate local health and safety laws.¹⁷

Article 1203 – the Most-Favored-Nation Clause – requires the member states to treat foreign service providers from a fellow member state no less favorably than a service provider from another member state.¹⁸ Accordingly, the manner in which Congress modified the BRTA to permit Canadian trucks, but not Mexican trucks, to travel freely throughout the United States was in violation of this provision.

NAFTA Annex I set forth a two-step schedule for liberalizing cross-border trucking between the United States and Mexico.¹⁹ The first step required the United States to provide Mexican trucks with complete access to its roadways in the four border states – Texas, California, New Mexico, and Arizona – by December 18, 1995.²⁰ The second step called for Mexican trucks to be able to travel freely throughout the United States by January 1, 2000.²¹ At the time NAFTA was signed, the United States was committed to implementing both steps of the program on time. However, the Canadian plan was the only plan to progress on schedule. The Teamsters and other groups in the United States were opposed to the plan because of safety and other political concerns.²²

On December 15, 1995, President Clinton ordered that the U.S. border remain closed to Mexican carriers beyond the designated commercial zones.²³ According to one White House official, “[a]ll we need is one big environmental disaster, or one of these trucks plowing into a school bus, and all of a sudden NAFTA is going to look like a pretty disastrous idea.”²⁴ Teamsters president James P. Hoffa hailed the decision, exclaiming, “[n]o longer will companies be allowed to use NAFTA to take our jobs and endanger our health and security.”²⁵ Mexican officials denounced the decision and initiated a Chapter 20 arbitration

17. *Id.* art. 1201. Further, Article 904 permits a member state to impose legitimate safety requirements. *Id.* art. 904.

18. *Id.* art. 1203. The Most-Favored-Nation Clause provides that “[e]ach Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to service providers of any other Party or of a non-Party.”

19. *Id.* Annex I.

20. *Id.*

21. *Id.*

22. Dana T. Blackmore, *Continuing to Put the Brakes on Mexican Truckers: Will the U.S. Ever Implement NAFTA Annex I?*, 9 *LAW & BUS. REV. AM.* 699 (2003).

23. David E. Sanger, *U.S. and Mexico Postpone NAFTA on Truck Crossings*, *N.Y. TIMES*, Dec. 19, 1995, at B10, available at <http://www.nytimes.com/1995/12/19/us-and-mexico-postpone-nafta-on-truck-crossings.html?pagewanted=1>.

24. David E. Sanger, *Dilemma for Clinton on NAFTA Truck Rule*, *N.Y. TIMES*, Dec. 17, 1995, at 136 of NY Edition, available at <http://www.nytimes.com/1995/12/17/us/dilemma-for-clinton-on-nafta-truck-rule.html?pagewanted=1>.

25. Steven Greenhouse, *U.S. Delays Opening Border to Trucks from Mexico*, *N.Y. TIMES*, Jan. 8, 2000, at A10, available at <http://www.nytimes.com/2000/01/08/us/us-delays-opening-border-to-trucks-from-mexico.html?pagewanted=1>.

proceeding against the United States under NAFTA.²⁶ The Clinton administration asserted that when the problems associated with U.S. safety concerns were resolved, the NAFTA provisions could be implemented.²⁷

III.

THE 2001 NAFTA ARBITRATION DECISION AND ITS AFTERMATH

Between 1995 and 2001, Mexico enjoyed only limited access to the U.S. trucking market. In turn, Mexico closed its border to U.S. trucks pending the outcome of its arbitration proceeding against the United States.²⁸ In the proceeding, Mexico claimed that the United States had breached its obligations under NAFTA to phase out restrictions on cross-border trucking by the requisite deadlines as prescribed in Annex 1.²⁹ Specifically, Mexico alleged that the United States had violated Articles 1202 (the National Treatment Clause) and 1203 (the Most Favored Nation Clause) by preventing Mexican trucking firms from operating within the United States while giving Canadian trucking firms unfettered access to U.S. roadways.³⁰ According to the arbitration panel:

The objectives of this Agreement [NAFTA], as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; and (b) promote conditions of fair competition in the free trade area.³¹

U.S. restrictions on Mexican trucking allegedly violated these principles and rules.

The U.S. government claimed that its delayed compliance with Annex 1 was due to safety, homeland security, and economic concerns.³² The crux of its argument was that Mexican trucks and drivers could not comply with certain U.S. safety regulations governing hours-of-service limits, truck condition standards, and alcohol and drug testing requirements.³³ However, concern was pervasive in Washington that opening the border to Mexican trucking would

26. Mexico initially requested consultations with the United States as required under NAFTA Article 2006 at a meeting with the NAFTA Free Trade Commission pursuant to NAFTA Article 2007. After these consultations failed, Mexico requested an arbitration panel to hear the dispute.

27. Sanger, *supra* note 24.

28. U.S.-Mexico Panel Decision, *supra* note 5, ¶ 22.

29. *Id.* ¶ 2.

30. *Id.* ¶ 3.

31. *Id.* ¶ 217.

32. Paul Blustein, *U.S. Seeks Compromise on NAFTA Truck Rules; Mexican Border Travel Raises Safety Concerns*, WASH. POST, Dec. 18, 1995.

33. US-Mexico Panel Decision, *supra* note 5, ¶¶ 91, 95. Mexican trucks often fail to meet safety standards and their drivers often work more hours than those set for American drivers. Moreover, many trucks carry hazardous materials, including pesticides, corrosive chemicals, toxic waste, fuel and other flammable substances.

permit the transport of illegal or dangerous materials, including drugs and arms, into the United States, and result in lost jobs and depressed wages for U.S. workers.³⁴ Mexico claimed that United States' concern for Mexican safety regulations was a red herring, and the U.S. government was simply bowing to internal political pressure from labor unions.³⁵

In defense of its decision to allow Canadian trucking firms into the United States, the U.S. government claimed that Canadian safety standards were "equivalent" to that of the United States.³⁶ Moreover, the United States took the position that its policy in regard to Canada could not be in violation of NAFTA because Canada's regulatory system for trucks – as opposed to Mexico's – is "in like circumstances" with that of the United States, in compliance with NAFTA's National Treatment and Most-Favored-Nation clauses.³⁷

On February 6, 2001, the NAFTA arbitration panel ruled in favor of Mexico, stating that the failure of the United States to comply with Annex 1 violated NAFTA.³⁸ In its opinion, the panel concluded that the U.S. interpretation of the phrase "in like circumstances" under Articles 1202 and 1203 was too broad and thus frustrated NAFTA's objectives.³⁹ According to the panel, the United States was permitted to impose different regulatory requirements on Mexican truckers than Canadian truckers.⁴⁰ The United States needed to make that decision, however, "in good faith with respect to a legitimate safety concern" and implement it in a way that fully conforms with NAFTA.⁴¹ The panel recommended that the United States take all "appropriate steps" to bring its cross-border trucking practices into compliance with NAFTA.⁴² If it refused to do so, NAFTA Article 2019 permits Mexico to impose sanctions against the United States.⁴³

34. *Id.*

35. *Id.* ¶¶ 6, 149.

36. *Id.* ¶ 7.

37. *Id.* ¶ 242.

38. US-Mexico Panel Decision, *supra* note 5, ¶ 295.

39. *Id.* ¶ 259.

40. *Id.* ¶ 301.

41. *Id.*

42. *Id.* ¶ 299.

43. Article 2019 provides:

Such complaining party may suspend the application to the Party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution of the dispute...

2. In considering what benefits to suspend pursuant to paragraph 1:

(a) a complaining Party should first seek to suspend benefits in the same sector or sectors as that affected by the measure or other matter that the panel has found to be inconsistent with the obligations of this Agreement or to have caused nullification or impairment in the sense of Annex 2004; and

(b) a complaining Party that considers it is not practicable or effective to suspend

Though the panel decided in Mexico's favor, it also specified that the United States had the right to standardize safety regulations for those operating motor vehicles within its borders. According to the panel, "[i]t is not making a determination that the Parties to NAFTA may not set the level of protection that they consider appropriate in pursuit of legitimate regulatory objectives."⁴⁴ Thus, although the United States could not deny Mexican trucking companies the right to apply for cross-border trucking permits, it could regulate the safety standards imposed upon Mexican trucking firms pursuant to NAFTA Article 1210. Article 1210 provides that such measures (a) are based on objective and transparent criteria, (b) are not more burdensome than necessary to ensure the quality of a service, and (c) do not constitute a disguised restriction on the cross-border provision of a service.⁴⁵ The panel's decision was a major victory for NAFTA's weakest member, but it could not guarantee that the United States would comply with the ruling in an expeditious manner.

The Bush administration initially vowed to comply with the panel's ruling stating that "[W]e intend to live up to our NAFTA obligations to open the U.S.-Mexico border to trucking [and] [d]iscussions are under way on how to implement the recent NAFTA panel decision in a safe and orderly fashion."⁴⁶ Over the next several years, however, Congress pursued a policy of "constructive delay" with Mexico to avoid having to comply with its NAFTA Annex 1 obligations. In May 2001, Congress adopted more restrictive legislation requiring that each Mexican carrier seeking to operate within the commercial zones certify that its drivers have the requisite qualifications and insurance levels, and that they comply with U.S. hours-of-service limits, truck condition standards, and alcohol and drug testing requirements.⁴⁷ The law further mandated upgrades in emissions controls and called for a greater number of inspectors to monitor Mexican trucks at the border.⁴⁸ Mexican trucking firms that satisfied the tough new requirements would receive temporary permits

benefits in the same sector or sectors may suspend benefits in other sectors.

NAFTA, *supra* note 14, art. 2019; *see also* Blackmore, *supra* note 22, at 721.

44. U.S.-Mexico Panel Decision, *supra* note 5, ¶ 298.

45. NAFTA, *supra* note 14, art. 1210.

46. Remarks by Undersecretary Alan Larson Before the 54th Mexico-U.S. Business Community, Outlining the Potential for Expanded U.S.-Mexico Trade, Mar. 7, 2001, *available at* <http://statelists.state.gov/scripts/wa.exe?A2=ind0103a&L=dosssdo&P=833>.

47. Department of Transportation and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-87, 115 Stat. 833 (2001). The legislation requires Mexican drivers to have the equivalent of a U.S. commercial driver's license, and to prevent fatigue, they will be required to maintain hours-of-service logs showing that they are well-rested. *See* Hale Sheppard, *The NAFTA Trucking Dispute: Pretexts for Non-Compliance and Policy Justifications for U.S. facilitation of Cross-Border Services*, 11 MINN. J. GLOBAL TRADE 235, 241 (2002).

48. Under the legislation, the number of truck inspectors on the border was increased from 58 to 274. Steven Greenhouse, *Mexican Trucks Allowed to Haul All Over the U.S.*, N.Y. TIMES, Nov. 28, 2002, *available at* <http://www.nytimes.com/2002/11/28/us/mexican-trucks-allowed-to-haul-all-over-us.html?pagewanted=1>.

subject to reevaluation within eighteen months.⁴⁹ President Bush signed the legislation.

In 2002, some progress was made in U.S.-Mexico trucking relations when President Bush signed legislation easing the twenty-year moratorium on Mexican trucking activity beyond the designated commercial zones.⁵⁰ Under the new policy, Mexican truckers and buses hauling cargo and passengers, respectively, could drive throughout the United States after entering the country at one of twenty-seven possible check points along the border.⁵¹ The policy still required that Mexican trucks and drivers comply with U.S. safety standards and refused to allow Mexican trucks to provide service between points in the United States.⁵² Nevertheless, it prompted the review and approval of more than a hundred applications from Mexican trucking companies that were seeking to haul freight in the United States.⁵³

In response to the new legislation, a coalition of labor, consumer and environmental groups filed suit in the U.S. Court of Appeals for the Ninth Circuit seeking to enjoin the new policy on the basis that it violated the National Environmental Policy Act (NEPA) and the Clean Air Act.⁵⁴ The lawsuit claimed that the new rules failed to require an examination of the air quality and health effects of increased emissions and congestion from open-border trucking, and, therefore, were not in compliance with federal law.⁵⁵ The Ninth Circuit ordered the Bush administration to conduct a full environmental review before opening the border.⁵⁶ The Supreme Court, however, reversed the Ninth Circuit a year later, ruling that the Federal Motor Carrier Safety Administration (FMCSA) did not have to perform a detailed environmental impact study because the agency's issuance of regulations was not a legally relevant cause of the environmental effect.⁵⁷

The lawsuit and the 2004 presidential election campaign ultimately forced the Bush administration to rethink its position on expanding cross-border access to Mexican trucks. Hence, the administration and the Mexican government resumed negotiations to develop an acceptable, long-term framework for cross-border trucking.⁵⁸

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Pub. Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1009 (9th Cir. 2003).

55. *Id.* at 1024.

56. *See id.* at 1032; *Court Blocks Bush Implementation of NAFTA Truck Panel*, INSIDE U.S. TRADE, Jan. 24, 2003, <http://www.insidetrade.com/secure/display.asp?dn=INSIDETRADE-21-4-16&f=wto2001.ask>.

57. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004).

58. In 2005, the U.S. Department of Transportation issued a report stating that the FMCSA

IV.

THE 2007 CROSS-BORDER TRUCKING DEMONSTRATION (PILOT) PROGRAM

A. *The Push to Comply with NAFTA Annex 1*

In February 2007, the Bush administration inched closer to complying with NAFTA Annex 1 when it announced a Cross-Border Trucking Demonstration (Pilot) Program with Mexico.⁵⁹ The pilot program allowed 100 Mexican trucks to haul non-hazardous international cargo throughout the United States for one year as long as the truck drivers were properly licensed, insured and could speak and read English.⁶⁰ The purpose of the program was to demonstrate the effectiveness of the safety programs adopted by Mexico-domiciled motor carriers and the monitoring and enforcement systems developed by the U.S. Department of Transportation.⁶¹ In return for granting market access to a limited number of Mexican trucks, Mexico agreed to grant 100 U.S.-domiciled trucks access to its roadways for the same one-year period. “This program,” announced Transportation Secretary Mary E. Peters, “will make trade with Mexico easier and keep our roads safe at the same time.”⁶²

The FMCSA initiated the demonstration project on September 6, 2007 for one year, and later extended the project for two additional years on August 6, 2008.⁶³ The pilot program came under attack from organized labor, environmental groups and Democrats in Congress. The Teamsters, the Sierra Club, and other organizations criticized the Bush administration for opening the door to “serious safety, environmental, smuggling and security concerns.”⁶⁴

cannot “grant long-haul operating authority to any Mexican motor carrier” until an agreement “related to on-site safety reviews is reached with Mexico.” OFFICE OF INSPECTOR GEN, U.S. DEP’T OF TRANSP, OIG REP. NO. MH-2005-032, FOLLOW-UP AUDIT OF THE IMPLEMENTATION OF THE NORTH AMERICAN FREE TRADE AGREEMENT’S CROSS-BORDER TRUCKING PROVISIONS (2005). By 2007, the United States and Mexico were still negotiating over safety inspection procedures.

59. In response to the Bush Administration’s announcement, Congress passed the U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28, 121 Stat. 112 (2007) [hereinafter Pilot Program]. In that 2007 Act, Congress specifically addressed the limited circumstances under which FMCSA would be permitted to grant operating authority to Mexico-domiciled trucks to operate beyond the border zone. Most significantly, a grant of authority must be “first tested as part of a pilot program.” *Id.* §6901(a)(1).

60. Associated Press, *supra* note 1. Under the program, freight can move directly from origin to destination beyond the 20 mile commercial zones along the border. Inspectors are permitted to examine the condition of the trucks, interview drivers to ensure that they have a valid commercial license and can read and speak English, and verify that their employers are insured by companies licensed in the United States. *Id.*

61. Notice, 72 Fed. Reg. 46263, 46264 (Aug. 17, 2007).

62. Associated Press, *supra* note 1.

63. John Fritelli, *North America Free Trade Agreement (NAFTA) Implementation: The Future of Commercial Trucking Across the Mexican Border*, Congressional Research Service, Feb. 1, 2010, available at http://digitalcommons.ilr.cornell.edu/key_workplace/703.

64. Gretel C. Kovach, *For Mexican Trucks, a Road Into the U.S.*, N.Y. TIMES, Sept. 9, 2007,

Teamsters president James T. Hoffa said that the administration was “playing a game of Russian roulette on America’s highways.”⁶⁵

On Capitol Hill, the most vocal critic of the pilot program was Senator Byron L. Dorgan (D-North Dakota). In 2008, he led the charge to insert a provision into the fiscal year 2009 Omnibus Appropriations Bill to kill the pilot program.⁶⁶ Dorgan’s crusade against the program threatened to drive a wedge between the more moderate, pro-business wing of the Democratic party and organized labor during the waning days of the 2008 presidential election campaign. Foreshadowing what was ahead under a new Democratic administration, Dorgan argued that “[b]oth President-elect Obama and Vice-President-elect Biden voted to end the program in 2007, and it is expected that the new administration will uphold the intent of Congress and shut down the program in 2009.”⁶⁷

In February 2009, the FMCSA released a report evaluating the pilot program’s effectiveness.⁶⁸ In general, the report concluded that the FMCSA had taken the required steps to ensure the program’s safe implementation and its compliance with the new safety measures imposed by Congress.⁶⁹ The report also showed that Mexican carriers participating in the program had no reportable crashes and collectively had out-of-service rates lower than U.S. carriers.⁷⁰ Moreover, the report stated that the Mexican drivers participating in the program had safety performance scores comparable to or better than American drivers, partially undermining the argument set forth by organized labor that U.S.

available at <http://www.nytimes.com/2007/09/09/us/09truck.html>.

65. Associated Press, *supra* note 1. The Teamsters, in particular, have led the charge against the Pilot Program over the past two years. As discussed by one legal scholar, the focus of their attack is two-pronged: (1) safety and (2) national security. In regard to safety, the Teamsters allege that Mexican trucks seriously threaten America’s roadways and the U.S. citizens who drive on them. Mexican trucks, they contend, are old, unreliable and dangerous to those sharing the road. With respect to national security, they argue that the contents of Mexican trucks often contain illicit drugs as well as illegal and dangerous materials. Moreover, they contend that American economic security is at risk as Mexican truck drivers steal jobs and depress wages. See Erica Richman, Comment, *The NAFTA Trucking Provisions and the Teamsters: Why They Need Each Other*, 29 NW. J. INT’L LAW & BUS. 555, 557-58 (2009).

66. Despite Congressional efforts to cut funding for the pilot program, the Bush Administration was able to find funding for the program from other parts of the transportation budget. See Associated Press, *U.S. Moves Ahead with Mexican Truck Program*, MSNBC.COM, Jan. 4, 2008, <http://www.msnbc.msn.com/id/22507319>.

67. Ari Natter, *Senator Dorgan Sees End for Cross Border Program*, TRAFFIC WORLD ONLINE, Nov. 14, 2008, *available at* www.freerepublic.com/focus/f-news/2143264.

68. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF TRANSP., OIG REP. NO. MH-2009-034, STATUS REPORT ON NAFTA CROSS-BORDER TRUCKING DEMONSTRATION PROJECT (2009), *available at* http://www.oig.dot.gov/sites/dot/files/pdffiles/NAFTA_final_report_signed.pdf.

69. *Id.*

70. During the first year of the pilot program, Mexican carriers had a driver out-of-service rate of 0.46 percent and a vehicle out-of-service rate of 8.29 percent. In contrast, U.S. carriers had a driver out-of-service rate of 6.94 percent and a vehicle out-of-service rate of 21.72 percent. *Id.* at 4.

restrictions on Mexican trucking are based on legitimate safety concerns.⁷¹ This conclusion is tempered by the fact that that Mexican carrier participation during the first year of the pilot project was too low to make accurate statistical projections.⁷² As such, disagreement persists about whether there is a safety and performance differential between Mexican and U.S. truckers.

B. Obama's First Trade War

Strategic ambiguity is one way to describe the Obama administration's position on NAFTA and the cross-border trucking dispute.⁷³ Upon taking office in January 2009, President Obama softened his tough rhetoric on free trade, warning repeatedly against tit-for-tat protectionism in the midst of an economic crisis. However, in March 2009, he signed the FY 2009 Omnibus Spending Bill into law, which cut off funding for the pilot program that allows Mexican long-haul trucks to deliver goods into the United States.⁷⁴ According to the White House, President Obama wanted to create a new trucking project that would meet the "legitimate concerns" of Congress as well as U.S. commitments under NAFTA.⁷⁵ The Obama administration asked the U.S. Trade Representative's office to work with Congress, the Department of Transportation, and the State Department to accomplish this task.⁷⁶

In response to the suspension of the pilot program, Mexican officials pursued an aggressive strategy against the United States. The Mexican government, acting under NAFTA Article 2019, imposed \$2.4 billion in import duties ranging from 10 to 45 percent on 90 products from the United States.⁷⁷ According to Mexico's Economy Secretary Gerardo Ruiz Mateos, "the retaliatory measures are the cost the United States is going to have to pay for failing to fulfill its obligations under NAFTA."⁷⁸ More specifically, Mexico

71. See *id.* at 15-16.

72. The report concluded that project participation was too low to make statistical projections given the fact that other Mexican carriers are likely to seek long-haul authority in the future. *Id.* at 15.

73. See *Obama and Trade: Low Expectations Exceeded*, THE ECONOMIST, May 2, 2009, at 73.

74. *Id.*; see also Mark Stevenson, *Mexico Imposes Tariffs on U.S. Goods*, WASH. POST, Mar. 17, 2009, at D06, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/16/AR2009031602901.html>; Ioan Grillo, *Obama's Trade War: No Truck with Mexico*, TIME, Mar. 25, 2009, available at <http://www.time.com/time/world/article/0,8599,1887494,00.html>.

75. Associated Press, *Obama to Revisit Restrictions on Access of Mexican Trucks*, WASH. TIMES, Mar. 12, 2009, available at <http://www.washingtontimes.com/news/2009/mar/12/mexico-truck-ban-to-get-new-look/>.

76. *Id.*

77. Grillo, *supra* note 74.

78. Mark Stevenson, *Mexico Retaliates with Tariffs on 90 U.S. Products*, USA TODAY, Mar. 16, 2009, available at http://www.usatoday.com/news/world/latinamerica/2009-03-16-3456830028_x.htm.

opted to cross-retaliate against the United States pursuant to Article 2019(2) (b). Under this provision, Mexico has imposed rotating tariff hikes on a cross-section of goods in order to affect the greatest potential impact on U.S. trade and production. The typical sanctions approach under NAFTA is for the injured state to impose fixed countermeasures on a limited number of products or services in the same sector as that in which the harm has occurred. Here, the strategy is to apply pressure on industry groups, other than trucking services, in key states to mobilize political pressure on the Obama administration to alter its policy. This cross-sector approach is unprecedented under NAFTA.

The suspension of the pilot program also triggered a negative response from Mexico's private trucking industry. Mexico's National Cargo Transportation Association (CANACAR) – a private trade group representing 4500 trucking companies – filed a lawsuit under NAFTA seeking \$6 billion in compensation for losses they allegedly have suffered since the U.S. government first imposed restrictions on Mexican trucks.⁷⁹ According to CANACAR's attorney, Pedro Ojeda, the lawsuit's purpose was to “demand equal treatment and reciprocity because our industry is suffering.”⁸⁰ CANACAR's request for compensation is the largest made by a private actor against a state party in NAFTA's history.⁸¹

Mexico's actions fueled criticism of the White House among various industry and consumer groups, whose economic interests are threatened by the imposition of Mexican tariffs. Mexico is the third largest trading partner of the United States after Canada and China, and the new tariffs potentially jeopardize over 12,000 agricultural and 14,000 manufacturing jobs.⁸² In a joint letter to President Obama, General Electric, Wal-Mart, and 148 other businesses warned that “retaliation is already impacting the ability of a broad range of U.S. goods to compete in the Mexican market, from potatoes and sunscreen to paper and dishwashers.”⁸³ They called for the White House to take immediate action to resolve the trade dispute with Mexico.

79. See Associated Press, *Mexican Truckers Sue U.S. Government Over Ban*, ABC NEWS, June 1, 2009, <http://abcnews.go.com/International/wireStory?id=7740307>. See also Jose de Cordoba, *Mexican Truckers File \$6 Billion Claim Against U.S. in NAFTA Spat*, WALL ST. JOURNAL, June 2, 2009, at A4, available at <http://online.wsj.com/article/SB124390544386374905.html>.

80. Associated Press, *supra* note 79.

81. Cordoba, *supra* note 79.

82. See Doug Palmer, *LaHood Sends Obama Advice on Ending Trucking Dispute*, REUTERS, Apr. 14, 2009, <http://www.reuters.com/article/idUSTRE53C68F20090414>. In 2008, the United States and Mexico had \$368 billion in total trade. U.S. Census Bureau Foreign Trade Statistic: Top Trading Partners, <http://www.census.gov/foreign-trade/top/index.html#2009> (last visited March 19, 2010); see also *Obama Pressured to Let Mexican Truckers Through*, THE FARMER-STOCKMAN Apr. 8, 2009, available at <http://thefarmer-stockman.com/story.aspx/obama/pressured/to/let/mexican/truckers/through/8/22825>.

83. William Booth & Scott Wilson, *Obama Prepares for Mexico Talks on Drug Trade*, WASH. POST, Apr. 15, 2009, at A06, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/14/AR2009041403224.html>.

For the Obama administration, safety is a major concern in the trucking dispute.⁸⁴ Reports show that Mexican drivers drive old, unreliable trucks, work extremely long hours, and endure fatigue in order to keep their jobs.⁸⁵ This results in preventable highway deaths in border areas where underpaid, overworked drivers are concentrated. Mexico's ambassador to the United States, Arturo Sarukhan, contends that ending the program has nothing to do with safety, but is rather a protectionist move.⁸⁶ U.S. Transportation Secretary Ray LaHood has been working with members of Congress, industry officials and union representatives to craft a new program that would satisfy safety concerns and reopen U.S. roads to Mexican trucks.⁸⁷ The dispute has been dubbed "Obama's first trade war."

V.

THE RETALIATION REMEDY AS A TOOL TO AVOID TRADE WARS

A. Theory and Purpose of Retaliation

Since the end of World War II, the retaliation remedy has proved to be one of the more successful tools to promote state compliance with international trade rules. Retaliation involves the authorized suspension of concessions or other obligations by one party against another in a trade dispute; usually in the form of a complaining party imposing, or threatening to impose, higher tariff rates on a list of exports from the offending party to induce the latter to remove an illegal measure. The theory behind retaliation is rooted in the principle of reciprocity and self-interest, whereby an injured party is permitted to seize the offensive in a trade dispute by imposing countermeasures against the offending state.⁸⁸ The goal is to compel compliance with trade rules by imposing costs on export groups who can bring maximum pressure to bear upon political leaders to

84. Nicholas Johnston & Jens Erik Gould, *Obama Promises Solution to U.S. – Mexico Trucking Spat*, BLOOMBERG, Aug. 10, 2009, available at <http://www.bloomberg.com/apps/news?pid=20601070&sid=aiVLrrhUWbiU>.

85. Long-haul truck drivers who bring freight to the shipping terminals at the U.S. border describe their runs as "working on the blade of a knife" because of the dangers of Mexican highways. See Jesse Katz, *Working on the Blade of a Knife*, LA TIMES, Mar. 18, 1996, available at http://articles.latimes.com/1996-03-18/news/mn-48410_1_el-reverendo.

86. Dana Gabriel, *Ending NAFTA Inspired Trucking Program Could Spark Retaliation*, BORDERFIRE REPORT, Mar. 11, 2009, available at <http://www.borderfirereport.net/dana-gabriel/ending-nafta-inspired-trucking-program-could-spark-retaliation.php>.

87. Cordoba, *supra* note 79. See also Lois Romano, *Voices of Power: Interview of Ray LaHood, Secretary of Transportation*, WASH. POST, Apr. 24, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/24/AR2009042401623.html>.

88. See Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism*, 6 THEORETICAL INQUIRIES IN L. 215 (2005); Mark L. Movsesian, *Enforcement of WTO Rulings: An Interest Group Analysis*, 32 HOFSTRA L. REV. 1, 4 (2003).

remedy the violation. Faced with higher tariffs, exporters are forced to lobby their government for the removal of the offending measure that led to the retaliation in the first place.

The effectiveness of retaliation usually depends upon a variety of factors: the amount of harm caused by the offense; the discrepancy in strength between the injured and offending parties' economies; and the degree of influence injured import groups have with the complaining government and targeted export groups have with the offending government. In trade disputes between large countries, the threat of retaliation in the same sector usually creates sufficient anxiety among targeted export groups to trigger a lobbying effort to remove the illegal restriction. At the same time, the injured state runs the risk of igniting a trade war should countermeasures provoke a hostile reaction within the offending state. Through the lens of game theory analysis, political leaders on both sides of a dispute must weigh the costs and benefits of retaliation before going down this road.

To mitigate the possibility of a trade war, there are strict guidelines for retaliation contained within the rules and procedures governing the settlement of disputes before the World Trade Organization (WTO) and NAFTA.⁸⁹ For instance, under both WTO and NAFTA rules, only a complaining party who has been injured can retaliate against the offending party.⁹⁰ This rule excludes Canada from being able to impose countermeasures against the United States for violating NAFTA's trucking regulations in the U.S.-Mexico cross-border trucking dispute. Moreover, countermeasures, if authorized, must be "equivalent" to the injury caused by the illegal measure and "related to" the same economic sector as the illegal measure.⁹¹ For example, if State X violates a trade commitment to State Y by raising tariffs on \$20 million worth of widgets (goods) from State Y, State Y may seek a judgment and authorization from a dispute settlement panel to impose approximately \$20 million of retaliatory tariffs in the same sector (goods) against State X. This form of retaliation – same-sector retaliation – is the most frequently used remedy to resolve trade disputes.⁹²

The procedure for implementing a WTO or NAFTA panel ruling is fairly straight-forward. Once a dispute is decided, the offending party has three options. First, it can ignore the ruling. Second, it can remove the offending

89. See generally Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement, available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm [hereinafter DSU]. See also General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1126 [hereinafter GATT]; see also NAFTA, *supra* note 14, art. 2019.

90. GATT, *supra* note 89, art. 22; see also NAFTA, *supra* note 14, art. 2019.

91. GATT, *supra* note 89, art. 22; see also NAFTA, *supra* note 14, art. 2019.

92. R.V. Anuradha, *WTO Gamble on Market Rights*, *WSJ*, LIVEMINT.com, Feb. 12, 2008, available at <http://www.livemint.com/2008/02/12001523/WTO-gamble-on-market-rights.html>.

restriction. Third, it can continue the violation while compensating the complainant.⁹³ If the offending party chooses the first option, the injured party may request enforcement authority – i.e., countermeasures. Typically, once countermeasures have been authorized, the injured state announces a list of potential products to be targeted from the offending state. The goal of retaliation is not to make the injured party whole, but to induce the offending party to remove the offending measure.⁹⁴

During the past fifteen years, hundreds of trade disputes have been lodged with the WTO and NAFTA but only a few have reached the stage of authorized retaliation.⁹⁵ Generally, an offending party will withdraw, or modify, the restrictive measure before the dispute reaches this final stage. A major reason for the high level of compliance has been the heavy-handed nature of the retaliation remedy. The mere threat of retaliation by the injured state forces the offending government to consider the interests of those targeted by the retaliation and the political costs associated with both compliance and noncompliance. In most cases, the offending state will remove the restrictive measure aimed at protecting certain import groups if the cost of maintaining the measure will be felt by domestic export interests.

One of the most notable cases involving “same-sector” retaliation was the WTO dispute between the European Union (EU) and the United States over the U.S. imposition of steel tariffs in 2002. At the time, the U.S. steel industry had been lobbying the Bush administration for an increase in steel tariffs to protect it from foreign competition and provide it time to restructure its domestic operations. Hoping to shore up support in steel producing swing states such as Pennsylvania, Ohio, and West Virginia, the Bush administration announced tariffs up to 30 percent on imported steel for three years.⁹⁶ The EU, Japan, Korea, China, Switzerland, Norway, New Zealand, and Brazil filed actions with the WTO seeking the removal of the tariffs on various legal grounds, including violations of the Agreement on Safeguards and Article XIX:1 of GATT 1994.⁹⁷

93. NAFTA Chapter II deals with investment disputes between the members. Article 1110 provides compensation as a remedy to expropriation. NAFTA, *supra* note 14, art. 1110.

94. Alexander, *supra* note 3, at 487.

95. See generally Alexander, *supra* note 3.

96. The U.S. imposed 30% tariffs on most flat-rolled steel products and 15% tariffs on rebar and stainless steel. See Presidential Proclamation No. 7529, 67 Fed. Reg. 10,553 (Mar. 7, 2002); see also *Bush Slaps Tariffs on Steel*, THE VICTORIAN ADVOCATE, Mar. 6 2002, 16A. President Bush had followed the International Trade Commission's recommendation from 2001 to impose significant tariffs of between 20% and 40% on 17 steel products for three years in order to remedy the steel crisis in the U.S. M. Gyorffi, European Parliament: Common Policies, Steel Industry (Sept. 2006), available at http://www.europarl.europa.eu/parliament/expert/displayFtu.do?language=en&id=74&ftuId=FTU_4.8.2.html. Under WTO rules, countries can impose temporary increases in tariffs, known as safeguards, to give time for a domestic industry to restructure to improve competitiveness.

97. Summary of Dispute, *United States - Definitive Safeguard Measures on Imports of Certain Steel Products*, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds248_e.htm

On July 11, 2003, a WTO panel found that the U.S. safeguard measures at issue were inconsistent with WTO rules and requested the U.S. to bring its measures into conformity with its obligations under the agreement.⁹⁸ On appeal, the WTO Appellate Body upheld the panel's decision and the EU threatened to retaliate if the United States did not comply with its WTO obligations by December 5, 2003.⁹⁹ The EU had drawn up a list of U.S. products targeted with higher import duties and submitted that list to the White House.¹⁰⁰ The day before the deadline arrived, the United States withdrew the tariffs.¹⁰¹

The EU's carefully targeted sanctions approach was the main reason the Bush administration decided to withdraw the steel tariffs. Rather than hit a wide range of products, the EU had focused on a discrete set of industry groups from political swing states who could potentially mobilize quickly during an election year.¹⁰² For example, the EU list included 100% tariffs on fruit juices from Florida, t-shirts from South Carolina, and apples from Washington, all of which were critical swing states during the 2004 presidential election.¹⁰³ The EU's objective was to mobilize specific export groups to lobby the Bush administration for the removal of the steel tariffs.¹⁰⁴ The Bush administration capitulated because the political cost of losing support in these states one year before the presidential election was far greater than maintaining the restrictive measures on behalf of the steel industry. Though retaliation had never been authorized in this case, the EU's mere threat to seek that authorization and impose sanctions proved just as effective.

[hereinafter Steel Dispute Summary] (last updated Feb. 24, 2010).

98. Panel Report, *United States - Definitive Safeguard Measures on Imports of Certain Steel Products - Final Reports of the Panel*, WT/DS248/R (July 11, 2003).

99. Appellate Body Report, *United States - Definitive Safeguard Measures on Imports of Certain Steel Products - AB-203-3 - Report of the Appellate Body*, WT/DS248/AB/R (Nov. 10, 2003). The EU threatened to retaliate against \$2.2 billion worth of U.S. goods unless the U.S. withdrew the steel tariffs by 5 December 2003. See Joel Roberts, *Bush Drops Steel Tariffs: U.S. Steelmakers Denounce Move; EU Ends Threat of Sanctions*, CBSNEWS.COM, Dec. 4, 2003, available at <http://www.cbsnews.com/stories/2003/12/04/politics/main586980.shtml?tag=mncol;lst;4>.

100. As a response to the US tariffs, a Resolution of the ECSC Consultative Committee was adopted unanimously in April 2002. The Consultative Committee, whilst recognizing that the US steel industry is faced with economic, social and regional problems, firmly contested that these problems were caused by imports. Council Regulation (EC) No 1031/2002 established additional customs duties on imports of certain products originating in the U.S. Additional duties of 100% were imposed on certain products such as dried vegetables, fruits, juices and clothing. Gyorffi, *supra* note 96.

101. See Steel Dispute Summary, *supra* note 97.

102. See Council Regulation 1031/2002 of 13 June 2002 Establishing Additional Customs Duties on Imports of Certain Products Originating in the United States of America, 2002 O.J. (L 157) 8.

103. *Id.*

104. See Roberts, *supra* note 99.

The effectiveness of the retaliation remedy in the U.S.-EU steel dispute can be attributed to the role that domestic interest groups play in the political process. Business-conflict theorists argue that the most important domestic groups affecting government policy in the trade realm are multinational corporations who tend to be outward-looking/export-oriented in nature.¹⁰⁵ The goal of retaliation is for the injured state to inflict sufficient harm on the offending state's key export groups so that they, in turn, will pressure their government to remove the offending restriction supported by import-oriented groups. This is precisely what the EU did to compel U.S. compliance with WTO rules in the steel dispute. By strategically targeting products in politically sensitive states, the EU was able to create pressure on the Bush administration to change its policy. But what if the injured state is much weaker than the offending state, and, therefore, incapable of effectively imposing same-sector retaliatory tariffs to bring about a change in policy?

B. Cross-Sector Retaliation as an Alternative Remedy

A criticism of the current dispute settlement system under the WTO is that "same-sector retaliation" is less effective in resolving asymmetric disputes between unequal states – the classic case of David v. Goliath.¹⁰⁶ According to the argument, compliance is less likely to occur if an injured state cannot bring

105. For perspectives on business conflict or interest group models, see generally HELEN MILNER, RESISTING PROTECTIONISM: GLOBAL INDUSTRIES AND THE POLITICS OF INTERNATIONAL TRADE (1998); Jennifer Sterling-Folker, *Realist Environment, Liberal Process and Domestic-Level Variables*, 41 INT'L. STUD. Q. 1 (1997); ROBERT BALDWIN, THE POLITICAL ECONOMY OF U.S. IMPORT POLICY (1996); David Skidmore, *The Business of International Politics*, 39 MERSHO STUD. REV. 246 (1995).

106. Joseph Stiglitz and Andrew Charlton point out that developing countries are at a disadvantage in the WTO dispute settlement system because they cannot afford the cost of complex legal proceedings and are less likely to be able to impose 100 percent ad valorem tariffs, or other countermeasures, on products from from a large offending state. JOSEPH STIGLITZ & ANDREW CHARLTON, FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT 84 (2005); see also Peter M. Gerhart & Archana Seema Kella, *Power and Preferences: Developing Countries and the Role of the WTO Appellate Body*, 30 N.C. J. INT'L. L. & COM. REG. 515, 526-27 (2005); Douglas Ierley, *Defining the Factors That Influence Developing Country Compliance and Participation in the WTO Dispute Settlement System: Another Look at the Dispute Over Bananas*, 33 LAW & POL'Y INT'L. BUS. 615, 616-17 (2002); Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L. L. 792, 792, 832 (2001); Benjamin L. Brimeyer, *Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations*, 10 MINN. J. GLOBAL TRADE 133, 134 (2001); Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules - Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 338 (2000); Carolyn B. Gleason & Pamela D. Walther, *The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, 31 LAW & POL'Y INT'L. BUS. 709, 712-13, 729 (2000); Kim Van der Borgh, *The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate*, 14 AM. U. INT'L. L. REV. 1223, 1226 (1999); Kofi Oteng Kufuor, *From GATT to the WTO: The Developing Countries and the Reform Procedures for the Settlement of International Trade Disputes*, 31 J. WORLD TRADE 117, 132-40 (1997).

sufficient pressure to bear on key export groups in the same sector to effectuate a change in policy. Thus, to promote compliance, the injured state should be allowed to engage in cross-sector retaliation if particular export-oriented groups in another sector are better able to persuade their government to remove an offending restriction. Cross-sector retaliation helps to level the playing field between large and small states by giving small complainants the flexibility to apply pressure in areas that might inflict more harm on a large state, thus improving the chances of compliance.¹⁰⁷ Today, there is a growing list of cross-sector retaliation cases in international economic relations, the latest being Mexico's decision to employ this remedy against the United States in the cross-border trucking dispute.

1. *The Bananas Case (Ecuador v. EU)*

The EU Banana Import Regime was the first test case for cross-sector retaliation. The EU had been discriminating against banana imports from Central America while providing ex-colonies in Africa, the Caribbean and the Pacific with preferential access to EU markets for their banana exports.¹⁰⁸ In 1996, the United States, Ecuador, Honduras, Guatemala and Mexico filed a joint complaint in the WTO challenging the legality of the EU banana import policy.¹⁰⁹ A dispute settlement panel and the WTO Appellate Body ruled that the EU banana regime violated WTO rules and ordered the EU to modify the regime or face retaliation from the complainants.¹¹⁰ Following a stand-off between the parties, the WTO eventually authorized the United States and Ecuador to impose retaliatory tariffs against EU products in the amount of \$191.4 million and \$201.6 million per year, respectively.¹¹¹

Following the ruling, Ecuador requested authorization to suspend trade concessions in different sectors of the EU economy, including goods, services, and intellectual property.¹¹² This was the first time that a developing country had requested cross-sector retaliation as a remedy under the WTO dispute

107. Alexander, *supra* note 3, at 506-07.

108. The EU's tariff quota system granted selected import licenses to preferred former colonies in Africa, the Caribbean, and the Pacific ("ACP countries") and restricted imports of bananas from Central America. U.S. banana distributors, such as Chiquita Brands International, Inc., lobbied for the removal of the quota system following a loss of profits resulting from the exclusion of Central American bananas from the EU market.

109. Summary of Dispute, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm [hereinafter *Bananas Dispute*] (last updated Feb. 24, 2010).

110. *Id.*

111. *Id.*

112. In November of 1999, Ecuador requested authorization to retaliate against the EU in the amount of \$450 million per year. Frances Williams, *Ecuador seeks to retaliate in banana dispute*, *FIN. TIMES*, Nov. 20, 1999, at 7.

settlement system.¹¹³ As the world's largest producer of bananas, Ecuador was the injured party most affected by the EU's discriminatory import policy. The WTO agreed with Ecuador's position that the EU policy violated both the General Agreement on Tariffs and Trade (GATT) and the WTO Agreement on Import Licensing.¹¹⁴

In an unprecedented decision, the arbitrators granted Ecuador the right to cross-retaliate against \$201.6 million in EU goods, services, and intellectual property per year pursuant to the GATT, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).¹¹⁵ The decision acknowledged the fact that Ecuador was a small trading partner of the EU, and therefore would be limited in its capacity to obtain EU compliance through the imposition of tariffs in the goods sector alone. For the EU, countermeasures in the service sector, where seven out of ten Europeans are employed, were bound to stir up controversy. Thus, by the time Ecuador and the U.S. had prepared their sanctions list, the EU had agreed to reform its banana import regime.¹¹⁶

The outcome in the *Bananas* case is inconsistent with the conventional wisdom concerning the powerlessness of developing countries in asymmetric trade disputes. The EU, faced with authorized sanctions in more than one sector, agreed to reform its banana import policy rather than risk a backlash from affected service sector export interests back home. Until the *Bananas* case, weaker WTO members had been reluctant to request authorization to retaliate against a more powerful member. These weaker members were concerned that sanctions would have little impact or cause the stronger members to cut off aid or suspend certain preferential trading arrangements.¹¹⁷ By allowing Ecuador to retaliate against the EU under GATS and TRIPs, the WTO granted this weaker nation the means to effectively pressure the world's largest regional trade bloc to comply with its WTO obligations.

The United States also acted on its authority to retaliate against the EU in the *Bananas* case, imposing \$191.4 million worth of sanctions on a variety of EU products.¹¹⁸ U.S. import duties were strategically targeted toward key

113. *Id.*

114. For dispute settlement panel report, see Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Complaint by Ecuador*, WT/DS27/R/ECU (May 22, 1997). For Appellate Body Report, see Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997).

115. Frances Williams & Edward Alden, *Ecuador sanctions plea backed*, FIN. TIMES, Mar. 18, 2000, at 2.

116. See Movsesian, *supra* note 88, at 15; see also The EU Banana Regime, text from the UK Government Briefing (DEFRA) on Agriculture and Rural Development Committee, Nov. 30, 2001, available at http://www.erylmcnallymep.org.uk/eu_banana_regime.htm.

117. See Liz Harper, *Challenges for Poorer Nations at the WTO*, online newsletter, Sept. 2003, available at http://www.pbs.org/newshour/bb/international/wto/case_study.html.

118. *Id.*; see also Brimeyer, *supra* note 106, at 152-53.

export groups who could bring maximum pressure to bear on Brussels to modify the EU banana import regime. Under a newly enacted “carousel” provision, the U.S. government imposed tariffs on a rotating basis against a discrete set of EU industries every six months.¹¹⁹ One of these industries was the Scottish cashmere industry.¹²⁰ Another targeted group was the Italian handbag industry.¹²¹ Eventually, the EU agreed to bring its banana import regime into compliance with WTO rules.¹²² Thus, the *Bananas* case illustrates the effectiveness of the retaliation remedy and demonstrates how the strategic targeting of countermeasures by an injured party against a cross-section of interest groups can bring about compliance with the law.

2. *The Online Gambling Dispute (Antigua v. U.S.)*

Another example of cross-sector retaliation in an asymmetric dispute was the online gambling case between the United States and Antigua. In 2003, Antigua, with a population of 70,000 and a Gross Domestic Product (GDP) of under \$1 billion, filed a WTO complaint¹²³ against the United States over the U.S. prohibition of foreign-based online casinos.¹²⁴ Antigua alleged that the United States violated its obligations under GATS by allowing domestic companies to offer online gambling service to its own citizens while shutting its border to overseas Internet gambling services.¹²⁵ In particular, the provisions at issue were GATS Articles II, VI, VIII, XI, XVI, and XVII, as well as the U.S. Schedule of Specific Commitments annexed to the GATS.

119. The Trade and Development Act of 2000 (the “Carousel Legislation Act”) requires U.S. trade officials to revise the list of products subject to retaliation periodically. Congress enacted it in order to pressure foreign governments to remove offending trade measures and comply with WTO rules. 2000 § 407(2), 19 U.S.C. § 2416(b)(2)(B) (2000).

120. See Press Release 99-17, U.S. Trade Representative, United States Takes Customs Actions on European Imports (Mar. 3, 1999), available at www.ustr.gov/releases/1999/03/99-60.pdf.

121. See James Blitz & Frances Williams, *Italians urge EU to retreat in bananas dispute with the U.S.*, FIN. TIMES, Jan. 27, 1990, at 6; see also Nzilibe, *supra* note 88, at 226.

122. See *Bananas Dispute*, *supra* note 109.

123. Summary of Dispute, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (Jan. 21, 2009) [hereinafter *Online Gambling Dispute*]. The complaint was filed in the wake of the conviction of a U.S. citizen, Jay Cohen, who was convicted and sentenced to jail for operating an online gambling website based in Antigua. *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001).

124. Off-shore gaming enterprises claim that their industry creates jobs for residents of poor islands in the Caribbean, supposedly offsetting the negative effects of gambling addiction, tax evasion and money laundering associated with the economies of the Caribbean. See Gene Koprowski, *U.S. Misses Deadline in Online Gaming Dispute with Antigua*, CARIBBEAN NET NEWS, Apr. 20, 2006, available at <http://www.caribbeanetnews.com/cgi-script/csArticles/articles/000013/001317.htm>.

125. The United States allowed several domestic gambling companies to offer online gambling to Americans (otherwise known as legal gaming operations) such as Native American casinos and riverboat gambling. See Emily Flynn Vencat, *The Caribbean Hold'Em*, NEWSWEEK, Oct. 1, 2007, available at <http://www.newsweek.com/id/41719>.

The WTO found in favor of Antigua at both the panel and the appellate levels.¹²⁶ First, it was determined that U.S. federal laws prohibiting online gambling violated the “market access” rules in GATS Article XVI.¹²⁷ Second, the WTO found that the United States had not demonstrated that its laws were applied consistently with the *chapeau* of Article XIV, which requires that measures found necessary to protect public morals not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.”¹²⁸ The WTO ordered the United States to bring its laws into conformity with the GATS or face the prospect of retaliatory sanctions. The U.S. refused to do so mainly because Antigua did not possess the economic muscle to impose meaningful sanctions against it in the same sector – services.¹²⁹

The asymmetric nature of the U.S.-Antigua relationship prompted Antigua to pursue cross-retaliation as a remedy to compel U.S. compliance with its WTO obligations. On June 21, 2007, Antigua requested authorization from the WTO to cross-retaliate against the United States pursuant to Article 22.2 of the Dispute Settlement Understanding.¹³⁰ Specifically, Antigua sought to suspend its obligations under the WTO TRIPS Agreement on the basis that the United States is one of the leading producers of pharmaceuticals, movies, music and software technology. According to one Antiguan official, “selling legally pirated copies of Microsoft software and Disney movies — would get the attention of Hollywood and Silicon Valley.”¹³¹ The WTO agreed with Antigua that it had no effective remedy against the United States in the area of services, and therefore authorized Antigua to impose sanctions in the amount of \$21 million under the TRIPS Agreement.¹³² Antigua became known as the “Pirate of the Caribbean,” setting aside domestic rules aimed at protecting patented products and copyrights produced by corporate giants like Eli Lilly and the Motion Picture Association of America.¹³³ According to one of the lawyers

126. Online Gambling Dispute, *supra* note 123; see also Shamnad Basheer, *Turning TRIPS on Its Head: An “IP Cross Retaliation Model”* Express O (2009), available at http://works.bepress.com/shamnad_basheer/1/.

127. Online Gambling Dispute, *supra* note 123.

128. *Id.*

129. In 2007, U.S. total GDP was \$14.11 trillion and its per capita GDP was \$46,800 compared to Antigua’s total GDP of \$1.57 billion and per capita GDP of \$18,900, respectively. Central Intelligence Agency, *Antigua/Barbuda*, WORLD FACT BOOK (2009), available at <http://www.cia.gov/library/publications/the-world-factbook/geos/ac.html>.

130. Online Gambling Dispute, *supra* note 123.

131. Vencat, *supra* note 125.

132. James Kanter & Gary Rivlin, *In Trade Ruling, Antigua Wins a Right to Piracy*, N.Y. TIMES, Dec. 22, 2007, available at <http://www.nytimes.com/2007/12/22/business/worldbusiness/22gambling.html?pagewanted=print>.

133. Simon Lester, *WTO Gambling Dispute: Antigua Mulls Retaliation as the U.S. Negotiates Withdrawal of its GATS Commitments*, 12 ASIL INSIGHTS, Issue 5, Apr. 8, 2008, available at

representing Antigua, “[t]his is a landmark victory for Antigua as the first, and smallest, WTO member to defeat the United States, the largest member, in this well-respected international trade court.”¹³⁴ The United States responded to the decision by invoking GATS Article XXI to withdraw its commitments on gambling services within the WTO framework.¹³⁵ The withdrawal of commitments prompted protests and accusations of bad faith within the WTO.¹³⁶

Though the United States failed to relax its laws restricting overseas-based Internet gambling within its borders, the WTO decision was a significant victory for developing countries. It showed that a more flexible application of the retaliation remedy can give a smaller state power to strike back against a larger state in an asymmetric dispute. In the words of one former senior U.S. trade official, “[i]ntellectual property is the perfect sanction item because it gives small countries like Antigua absolute leverage.”¹³⁷ Since the decision, the Motion Picture Association of America has been pressuring the U.S. Trade Representative to negotiate with Antigua to prevent bootlegging.¹³⁸ Moreover, the United States has entered into settlement agreements with the EU, Australia, Japan, Canada, India, Costa Rica, and Macau over its discriminatory online gambling policy.¹³⁹ Thus, like the *Bananas* case, the WTO recognized the imbalance of economic strength between the parties in the online gambling case and allowed the injured party to cross-retaliate in an industry sector where the larger state would feel the punch.

VI.

THE CROSS-BORDER TRUCKING DISPUTE AND STRATEGIC CROSS-SECTOR RETALIATION UNDER NAFTA

The NAFTA provisions governing retaliation are similar to the WTO's

<http://www.asil.org/insights080408.cfm>; see generally, Henning Grosse Ruse-Khan, *A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations*, 11 J. INT'L ECON. L. 313 (2008).

134. *U.S. and Antigua Dispute WTO Ruling*, BBC NEWS Apr. 7, 2005, available at <http://news.bbc.co.uk/2/hi/business/4422457.stm>.

135. Under Article XXI, a Member may withdraw specific commitments, but must negotiate with “affected Members” over “compensation” for the withdrawn commitments. This procedure has only been invoked once before in a case involving EU GATS commitments in relation to EU enlargement. See Lester, *supra* note 133.

136. See *id.*

137. Vencat, *supra* note 125.

138. Bob Hartman, *Hollywood Urges US to Stop Internet Gambling Prohibition*, CASINO GAMBLING WEB, Sept. 16, 2007, available at http://www.casinogamblingweb.com/gambling-news/gambling-law/hollywood_urges_us_to_stop_internet_gambling_prohibition_46939.html; Vencat, *supra* note 125.

139. See Isaac Wohl, *The Antigua-United States Online Gambling Dispute*, JOURNAL OF INTERNATIONAL COMMERCE AND ECONOMICS, U.S. Trade Comm., July 2009, available at http://www.usitc.gov/publications/332/journals/online_gambling_dispute.pdf.

provisions. NAFTA Article 2019(1) provides that a party “may suspend benefits of equivalent effect until such time as [the parties] have reached agreement on a resolution of the dispute.”¹⁴⁰ In considering what benefits to suspend, an injured party should first “seek to suspend benefits in the same sector” as that affected by the restrictive measure.¹⁴¹ If it is not practicable or effective to suspend benefits in the same sector, the injured party “may suspend benefits in other sectors.”¹⁴² The agreement further states that

[o]n the written request of any disputing Party delivered to the other Parties and its Section of the Secretariat, the Commission shall establish a panel to determine whether the level of benefits suspended by a Party pursuant to paragraph 1 is manifestly excessive.¹⁴³

A. *Mexico’s Use of Strategic Cross-Sector Retaliation Against the United States*

Following the Obama administration’s decision to suspend the 2007 pilot program, Mexico announced that it planned to cross-retaliate against the United States in the goods-sector alone to the tune of \$2.4 billion.¹⁴⁴ Mexican officials claim that the tariffs are only imposed on products that have been shipped under the pilot program and hence fall within the same sector.¹⁴⁵ Some of the U.S. product groups facing import duties of 10-20 percent include Christmas trees, onions, pears, cherries potatoes, soy sauce, soup, mineral water, sunflower seeds, strawberries, wine, shampoo, toothpaste, deodorants, notebooks, coffee makers, sunglasses, almonds, beer, and batteries.¹⁴⁶ According to the U.S.

140. NAFTA, *supra* note 14, art. 2019(1).

141. *Id.* art. 2019(2)(a).

142. *Id.* art. 2019(2)(b).

143. *Id.* art. 2019(3).

144. Similar to the disparity in the size of the parties’ economies in the U.S.-Antigua Internet gambling dispute, the asymmetric nature of the U.S.-Mexico relationship has prompted Mexico to pursue cross-retaliation as a remedy to compel U.S. compliance with its NAFTA obligations. In 2007, Mexico’s total GDP was \$893 billion and its per capita GDP was \$12,400. Central Intelligence Agency, *The United States*, WORLD FACTBOOK (2009), available at <https://www.cia.gov/library/publications/the-worldfactbook/print/us.html>. *Obama Criticized for Mexico, Brazil Sanctions*, REUTERS, Mar. 9, 2010, <http://www.reuters.com/article/idUSTRE6283NR20100309>; Ken Ellingwood, *Mexico levies higher tariffs on U.S. imports*, LA TIMES, Mar. 19, 2009, available at <http://articles.latimes.com/2009/mar/19/world/fg-mexico-tariffs19>.

145. Fruits and vegetables are the most common items on the list of 90 products targeted with tariffs. Thomas Black and Grayton Harrison, *Mexico Puts Tariffs on U.S. Goods in Truck Dispute*, BLOOMBERG.COM, Mar. 18, 2010, <http://www.bloomberg.com/apps/news?pid=20601082&sid=aNMnPuyYFV5I&refer=canada>.

146. Christopher Conkey, Jose de Cordoba & Jim Carlton, *Mexico Issues Tariff List in U.S. Trucking Dispute*, WALL ST. J., Mar. 19, 2009, at A7, available at <http://online.wsj.com/article/SB123739445919172781.html>; see also United States Dept. of Commerce, Int’l Trade Admin., *Mexico Retaliation List* (Mar. 16, 2009), available at http://www.ita.doc.gov/td/industry/otea/301alert/mx_ret.html [hereinafter Mexico Retaliation List];

Department of Commerce, the retaliatory tariffs “represent the lost income roughly equal to the losses Mexican officials claim to have suffered with the end of the demonstration program.”¹⁴⁷ The Obama administration has repeatedly urged Mexico to hold off on the new tariffs, but to no avail.

The selection of a limited group of U.S. products reflects a calculated move by Mexican officials that this first round of retaliatory tariffs will spur U.S. business leaders to lobby Congress to restart the trucking program.¹⁴⁸ Moreover, officials claim to have targeted only specific exports from states whose political leaders have been opposed to the pilot program.¹⁴⁹ The selection of a limited group of U.S. products reflects a calculated move by the Mexican government to exert pressure on powerful Democratic lawmakers in key states who have influence with the White House.

In California, grape exporters have been hit under the Mexican Tariff List with a 45 percent tariff hike, by far the highest.¹⁵⁰ Currently, there are more than 550 grape producers based in California, and grape exports from this state have increased 36 percent in the last ten years.¹⁵¹ California is also home to Senator Diane Feinstein, Senator Barbara Boxer and Speaker of the U.S. House of Representatives Nancy Pelosi. These three lawmakers helped to push through the FY 2009 omnibus spending measure, which cut funding for the pilot program.¹⁵² Additionally, every California Democrat in the U.S. House and some House Republicans voted in favor of the omnibus spending bill. The Mexican tariffs are aimed at causing damage to California’s wine producers who are now at a competitive disadvantage to other foreign producers for Mexican market share. “If you are a California wine producer, and you’re competing against Chilean wine that’s coming in duty free, you’re screwed,” said University of Arizona professor James E. Rogers. “Clearly, this was designed to bring about some specific pain.”¹⁵³

Diario Oficial De La Federacion [D.O.], Tomo DCLXVI, No. 15, Mar. 18, 2009, p. 50-52 (in Spanish)[hereinafter DIARIO OFICIAL].

147. U.S. Chamber of Commerce, North American Free Trade Agreement: *Mexico Cross-Border Trucking Fact Sheet*, available at <http://www.uschamber.com/international/policy/nafta.htm>.

148. Mexico has indicated that it might increase the number of products it has “slapped tariffs” on if this first retaliatory round does not produce results. Conkey, *supra* note 146.

149. *Id.*

150. Mexico Retaliation List, *supra* note 146.

151. *Grapes from California*, California Table Grape Commission, 2008, available at <http://www.freshcaliforniagrapes.com/overview.php>; see also Fresh Plaza: Global Fresh Produce and Banana News, International Promotions Increase California Grape Sales (Mar. 27, 2009), available at http://www.freshplaza.com/news_detail.asp?id=40765.

152. Both Senators Feinstein and Boxer voted for the 2009 omnibus-spending bill, and Speaker Pelosi had calendar authority to bring the bill to the House floor for a vote. See *U.S. Senate Roll Call Votes 111th Congress - 1st Session*, United States Senate, Mar. 10, 2009, available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00096 [hereinafter Senate Roll Call Vote].

153. Brian J. Pedersen, *Mexican Tariffs Hit Southern Arizona Exporters*, ARIZ. DAILY STAR,

The state of Oregon, too, has been hit with Mexican import duties on a large scale. In 2008, Mexican consumers purchased approximately \$748 million worth of goods from Oregon.¹⁵⁴ Mexico has targeted Oregon Christmas trees, pears, frozen potatoes, and cherries with 20 percent tariff hikes. It has also imposed a 10 percent levy on onions from the state.¹⁵⁵ U.S. Senators Jeff Merkey (D-Oregon) and Ron Wyden (D-Oregon) voted for the 2009 omnibus spending measure.¹⁵⁶ Moreover, in the House, all four Democrats from Oregon voted in favor of the bill.¹⁵⁷ Congressman Peter DeFazio (D-Oregon), a leading opponent to the 2007 pilot program, remarked:

Virtually every member of Congress . . . , both Democrat and Republican, expressed serious concerns about this pilot program and the potential for compromised safety on our U.S. highways. I have always opposed NAFTA, and have long been alarmed at the prospect of Mexico-domiciled motor carriers operating beyond the current 20-mile commercial zone at our southern border. I am not confident that Mexican-owned trucking companies will meet U.S. safety and environmental standards.¹⁵⁸

In an open letter to President Obama, Congressman DeFazio described Mexico's policy of cross-sector retaliation as "illegal" and "nothing more than political gamesmanship."¹⁵⁹

Ohio is another strategically important state targeted by Mexican import duties. In 2006, 317,000 Ohio jobs were export-related, accounting for 6.7 percent of the state's private sector employment.¹⁶⁰ Some of the largest exports from the state are jellies and jams manufactured by Smucker's, Inc., and household products such as deodorants, shampoos, and other products manufactured by Proctor & Gamble Co.¹⁶¹ The Mexican government has

Mar. 19, 2009.

154. Robbie DeMesio, Mexico's new tariffs could cost Oregon millions, *THE OREGONIAN*, Mar. 18, 2009, available at http://www.oregonlive.com/business/index.ssf/2009/03/mexican_tariffs_will_cost_oreg.html.

155. *Id.*

156. Senate Roll Call Vote, *supra* note 152.

157. Office of the Clerk, Final Results for Roll Call 86, available at <http://clerk.house.gov/evs/2009/roll086.xml> (last visited Mar. 17, 2010); see also GovTrak, House Vote on Passage H.R. 1105 Omnibus Appropriations Act, 2009, <http://www.govtrack.us/congress/vote.xpd?vote=h2009-86> (last visited Mar. 17, 2010) [hereinafter Final Results for Roll Call 86].

158. *DeFazio Examines Cross-Border Trucking in Hearing Today*, Press Release, U.S. Representative Peter DeFazio, Mar. 13, 2007, available at <http://www.defazio.house.gov/index.php?option=content&task=view&id=274>.

159. Eric Adams & Wayne Havrely, *DeFazio Protests Mexican Tariffs on Oregon Products*, KGW.COM NEWSCHANNEL 8 PORTLAND, Aug. 15, 2009, available at <http://www.kgw.com/news/national/59491417.html>.

160. U.S. Dept. of Commerce, International Trade Administration: Industry Trade Data and Analysis, Employment Related to Manufactured Exports (2006), available at http://www.trade.gov/td/industry/otea/jobs/Reports/2006/jobs_by_state.html.

161. *Id.*

imposed a 20 percent tariff on preserved fruit, which is a key ingredient of Ohio-produced jellies and jams, and a 15 percent duty on household products.¹⁶² Exports of paper products, including self-copy paper, notebook paper, and bathroom tissue also have been targeted with a 10 percent tariff increase, affecting major producers such as Ohio-based Chillicothe Paper Products, which has annual sales of \$338 million.¹⁶³ Senator Sherrod Brown (D-Ohio), a longtime opponent of NAFTA, voted in favor of the 2009 omnibus spending measure.¹⁶⁴

To the surprise of many officials, products from North Dakota also were included on the Mexican Tariff List. North Dakota has very little trade with Mexico compared to other states, and its exports of sunflower seeds, oil, and soy products account for fewer jobs than other products targeted under the Mexican Tariff List. Nevertheless, Mexico has levied a 20 percent tariff on soy products and 15 percent duties on sunflower seeds and oilcake residue.¹⁶⁵ North Dakota was targeted because its entire Democratic delegation – Senator Kent Conrad, Senator Byron Dorgan, and Congressman Earl Pomeroy – voted for the 2009 omnibus spending measure.¹⁶⁶ As discussed above, Senator Dorgan has led the charge against the pilot program since its inception. Shortly after voting for the 2009 omnibus spending measure, he declared:

Tonight's vote is a victory for safety. It also represents a turning of the tide on the senseless, headlong rush this country has been engaged in for some time, to dismantle safety standards and a quality of life it took generations to achieve. It also rejects the Administration's action to push a program many of us believe would compromise the safety of American drivers. Tonight, commerce - for a change - did not trump safety. Because my amendment is identical to language already included in the House-passed version of this bill, I expect this provision will not be altered in the House-Senate conference committee and that we have, effectively, stopped this pilot program. I thank every Senator who voted tonight to stand up for the safety of American drivers on America's roadways.¹⁶⁷

The *Wall Street Journal* later questioned a Mexican official about Senator Dorgan's remarks after the release of the Mexican Tariff List, and that official explained "[t]here was no way for us to be tougher on his state without hurting Mexican consumers."¹⁶⁸

Other states with powerful Democratic lawmakers have been targeted as well. In Illinois, home to President Obama, shampoo and sunglasses have been

162. Mexico Retaliation List, *supra* note 146.

163. Jonathan Riskind, *Mexico vs. Brown?*, TRADE OBSERVATORY, Mar. 30, 2009, available at <http://www.tradeobservatory.org/headlines.cfm?RefID=105616>.

164. Senate Roll Call Vote, *supra* note 152.

165. Mexico Retaliation List, *supra* note 146.

166. Senate Roll Call Vote, *supra* note 152; Final Results for Roll Call 86, *supra* note 157.

167. Press Release, Byron Dorgan, Statement by U.S. Senator Byron Dorgan on Vote to Stop Mexican Truck Pilot Program (Sept. 11, 2007), available at <http://dorgan.senate.gov/newsroom/record.cfm?id=282361>.

168. Conkey, *supra* note 146.

hit with 15 percent duties.¹⁶⁹ Printed books from New York (home to Secretary of State Hillary Clinton) and bowling equipment from Nevada (home to Senate Majority Leader Harry Reid) have been targeted with tariff hikes.¹⁷⁰ In Connecticut, Duracell - one of America's premier battery companies - has been targeted with a 20 percent import duty on primary batteries, electric storage batteries, spent primary batteries, and spent electric storage batteries.¹⁷¹ Most of the Congressional delegation from Connecticut voted in favor of the 2009 omnibus spending measure, including Democratic Steering Committee Chairwoman Rosa DeLauro.¹⁷² These officials play an important role in shaping U.S. foreign policy towards Mexico. Ricardo Alday, spokesman for the Mexican Embassy in Washington, D.C., stated that pressuring key U.S. lawmakers "is one of the main considerations, but it is not the only one."¹⁷³

Mexican officials have been cautious not to allow the trucking dispute to exacerbate problems in areas affected by the global economic downturn. Specifically, Mexico left untouched the largest U.S. exports to Mexico, such as auto parts and appliances which could have caused further damage to troubled companies such as Ford and Whirlpool from Michigan. In addition, they have avoided placing duties on food products most vital to Mexican consumers such as chicken, pork, and beef.¹⁷⁴ Mexican officials would prefer that Congress restart the trucking program without a trade war that could prove costly to Mexico as well.¹⁷⁵ Jorge Montano, former Mexican ambassador to the United States, declared that "[g]oing to commercial war is a ridiculous thing which hurts both sides."¹⁷⁶

B. Strategic Cross-Sector Retaliation and U.S. Compliance with NAFTA

In the limited number of cases in which strategic cross-sector-retaliation has been applied by an injured party, the offending party has either withdrawn or modified the offending restriction rather than risk incurring the pain of targeted sanctions. The disputes over steel, bananas, and off-shore Internet gambling have shown that no matter how weak the injured party may be, a powerful player in the international system can be forced to alter its protectionist policies if economic sanctions are pinpointed to inflict maximum harm. Cross-sector

169. *Id.*

170. *Id.*

171. *Id.*

172. GovTrack, House Vote On Passage: H. Res. 184: Providing for consideration of the bill (H.R. 1105) making omnibus appropriations for the fiscal year ending September 30, 2009 and for other purposes (Feb. 25, 2009), available at <http://www.govtrack.us/congress/vote.xpd?vote=h2009-85>.

173. Conkey, *supra* note 146.

174. *Id.*

175. *Id.*

176. *Id.*

retaliation's record of success in the WTO is at the heart of Mexico's decision to utilize this remedy to pressure the United States to comply with its NAFTA obligations. Thus far, this approach has had some impact on the political climate in Washington, D.C., prompting calls from Republican members of Congress for an immediate solution to the problem.

There are signs that the Obama administration would prefer to reopen the border to Mexican trucking rather than risk incurring further sanctions from Mexico and alienating powerful lawmakers on Capitol Hill.¹⁷⁷ During a recent "Three Amigos" summit between the United States, Mexico and Canada in Guadalajara, President Obama told Mexico's president Felipe Calderon that he is committed to resolving the trucking dispute and would work "to try to move forward" with a new trucking program.¹⁷⁸ However, no specific plan or time frame was discussed. In addition, Transportation Secretary Ray LaHood has been meeting with members of Congress in an effort to craft legislation that would reopen the border to Mexican trucking.¹⁷⁹ The administration has urged Mexican officials to hold off on the new tariffs until this new legislation is put in place.

It has been a long and difficult road for the U.S.-Mexican relationship on the issue of cross-border trucking rights, but it appears that this road is coming to an end. Based on recent statements by President Obama and members of his Cabinet, it is only a matter of time until the United States brings its cross-border trucking policy in line with NAFTA. Eventually, both sides will claim victory once the dispute is resolved. But the reason for the change in U.S. policy should be attributed to the power of strategic cross-sector retaliation as a tool to promote compliance with international trade agreements.

177. See *Low Expectations Exceeded*, *supra* note 73.

178. CBS/AP, *Obama, Calderon Meet in Mexico*, CBSNEWS, Aug. 9, 2009, available at <http://www.cbsnews.com/stories/2009/08/09/world/main5228536.shtml>. See also Nicholas Johnston & Jens Erik Gould, *Obama Promises Solution to U.S.-Mexico Trucking Spat*, *supra* note 84. The summit was overshadowed by larger security issues, including mounting drug violence along the border, the outbreak of H1N1 influenza and the poor state of the U.S. and Mexican economies. Mexico is floundering in its attempt to deal with its violent drug war, which has claimed more than 6,000 lives. There have been numerous Congressional hearings in Washington, D.C. over how to prevent the spread of violence across the border into Texas, Arizona, California and New Mexico. Texas Governor Rick Perry has been urging President Obama to deploy U.S. troops to the border. See *Taking on the Narcos, and Their American Guns*, THE ECONOMIST, Apr. 4, 2009, at 42-43. Moreover, Obama, Calderon and Canadian Prime Minister Stephen Harper have pledged further cooperation to handle an expected new wave of swine flu cases this fall. See *Calderon's Hatful of Troubles*, THE ECONOMIST, July 11, 2009, 37-38, available at <http://www.highbeam.com/doc/1G1-203294142.html>; Steve Holland & Patricia Zengerle, "Three Amigos" Talk Trade, H1N1 and Drugs in Mexico, REUTERS, Aug. 10, 2009, available at <http://www.reuters.com/article/idUSN10470175>.

179. See *Obama Promises Solution to U.S.-Mexico Trucking Spat*, *supra* note 84.

VII.
CONCLUSION

Mexico's recent decision to employ strategic cross-sector retaliation against the United States in response to the U.S. suspension of the 2007 Cross-Border Trucking Development (Pilot) Program is a significant development in NAFTA relations. Never before has a NAFTA member imposed sanctions in this way to pressure a fellow member to comply with its NAFTA obligations. To date, this remedy has been utilized only in two WTO cases – the EU-Ecuador Bananas case and the U.S.-Antigua online gambling case - to promote compliance with international trade rules. In both of these asymmetric disputes, the larger state either withdrew the offending trade measure or modified its commitments to avoid the political fallout of targeted sanctions back home in unrelated industry sectors. The WTO's record of success at this final stage of dispute resolution underpins the Mexican government's decision to utilize this remedy under NAFTA. Mexico's hope is that targeted import duties on selected goods in key Democratic states will result in sufficient pressure on Congress and the White House to restart the trucking program without igniting a trade war. This is a risky move, but all signs indicate that the U.S. government is moving closer to bringing its cross-border trucking policy in line with NAFTA.

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Transnational Mass Claim Processes (TMCPs) in International Law and Practice

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I. INTRODUCTION

Mass claims processes implicating transnational issues have traditionally been inter-state. The modern era of international mass claim processes, or “IMCPs,” began with the Iran-US Claims Tribunal in 1981 and reached an institutional milestone when the United Nations Compensation Commission (“UNCC”) was set up in 1991.¹ With the exception of the Iran-US Claims Tribunal, IMCPs are usually created to redress losses suffered as a consequence of international or internationalized armed conflict and tend to focus primarily on compensation and restitution for property claims.² In parallel fashion,

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1. See John R. Crook, *Mass Claims Processes: Lessons Learned over Twenty-Five Years*, in REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES 41, 54-55 (Permanent Court of Arbitration ed., 2006) [hereinafter REDRESSING INJUSTICES]. By “mass claims processes” in this context, we mean simply “the resolution of an enormous volume of claims arising out of a similar event or circumstance....” Tjaco T. van den Hout, *Introduction*, in REDRESSING INJUSTICES, at xxix.

2. Inter-state mass claims procedures are not an invention of the 21st century. Early examples

several intra-state experiences involving mass claims type processes in the form of domestic reparations programs have taken place since the early 1980s. These programs have been directed at redressing gross violations of international human rights law involving thousands of victims of internal conflicts and/or political repression. The Argentine experience is one well-known example; South Africa's is another. Such programs can be viewed as mass claims procedures that take place in the human rights or transitional justice context, which we call transitional justice claims processes, or "TJCPs."³ Though co-existing, these two currents in the field of mass claim processing—IMCPs and TJCPs—have over the past quarter century evolved separately, in relative isolation from one another.

Only recently have the two currents begun to converge. On the one hand, IMCP experts have started to acknowledge the rise of domestic human rights related reparations programs as a practice connected to their field. An example is the book published by the Permanent Court of Arbitration ("PCA") entitled *Redressing Injustices Through Mass Claims Processes*.⁴ Although it focuses mainly on analyzing typical IMCPs, this publication somewhat disjointedly dedicates a final part to transitional justice issues. Entitled "Reparations: Recourse to Justice," this section contains chapters that examine the role of civil society actors in promoting domestic reparations legislation in Germany, Argentina and South Africa; the rights of victims of gross human rights and serious humanitarian law violations to reparations under international law; as well as the reparations provisions for victims pursuant to the Rome Statute of the International Criminal Court.⁵ The Introduction to *Redressing Injustices* nominally justifies including the unorthodox chapters on the grounds that the book covers "mass claims programs [...] created in the aftermath of war, revolution, terrorist attacks, and other atrocities," and that "reparations are often important components of settlement and emotional closure for victims."⁶

Yet TJCPs, as essentially intra-state experiences, do not sit easily alongside conventional mass claim processes in either theory or practice. The minimalist rationale given by the PCA editors of *Redressing Injustices* for including them

include the United States-Mexican Claims Commission in the late 19th century and the United States-German Mixed Claims Commission after World War I. For a short history of earlier mass claims processes, see Crook, *supra* note 1, at 41-43.

3. By intra-state transitional justice we mean "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoing of repressive predecessor regimes." Ruti Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003). The transitional justice context, therefore, is one of radical political transformation in which state institutions move away from autocratic and/or repressive practices and towards greater acceptance of liberal democratic principles and practices such as elections and the rule of law.

4. REDRESSING INJUSTICES, *supra* note 1.

5. *Id.* § III.

6. T. van den Hout, *supra* note 1, at xxxii (emphasis added). As will be discussed *infra*, an important distinction should be made between the traditional remedy of restitution in IMCPs and the notion of reparations in TJCPs.

seems strained and out-of-place in light of the traditional focus of most IMCP literature, which as a rule does not contain such references or comparisons.⁷ For instance, another leading treatise in the field published by the PCA, *International Mass Claims Processes: Legal and Practical Perspectives*, tellingly makes no reference to the well-known TJCPs in Argentina and South Africa, or to any other domestic reparation programs for victims of grave human rights abuses.⁸ More to the point, *Redressing Injustices*' editors and authors simply *assume* that IMCPs and TJCPs are substantially similar. In his chapter on past and current mass claim processes, for example, John Crook comments only that “[o]ther *comparable* claims processes have been established at the national level in many countries, aimed at identifying and compensating large numbers of individuals who suffered human rights deprivations or other types of injuries from past government actions.”⁹ But there is no reference anywhere in the book to the significant contextual, legal, political, philosophical, and economic *differences* between mass claims procedures occurring in the domestic human rights context and the international mass claims processes analyzed in the first two-thirds of the volume.¹⁰

The same phenomenon appears in the TJCP field, where important transitional justice studies hail the apparent synergies that exist with international mass claims processes, but fail to actually address, much less analyze, the precise nature of the presumed compatibility. An example is *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, a tome dedicated entirely to reparations issues and TJCPs.¹¹ The authors of the principal section in the book make a passing, but significant reference, to international arbitral tribunals and claims commissions. They succinctly observe that

the practice developed in this [traditional IMCP] context [...] is highly relevant for our purpose, to the extent it provides *principles and precedents* that may be applicable or useful in addressing similar issues in the context of human rights law.¹²

The accuracy of this statement notwithstanding, the point here is that despite

7. See, e.g., INSTITUTIONAL AND PROCEDURAL ASPECTS OF MASS CLAIMS SETTLEMENT SYSTEMS (International Bureau of the Permanent Court of Arbitration ed., 2000) [hereinafter INSTITUTIONAL AND PROCEDURAL ASPECTS].

8. INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES (Howard M. Holtzmann, Edda Kristjansdottir eds., 2007) [hereinafter HOLTZMANN & KRISTJANSDOTTIR].

9. Crook, *supra* note 1, at 55 (emphasis added). However, he does not mention any TJCP in particular, nor does he provide any explanation as to how or why these national claims processes are comparable.

10. See T. van den Hout, *supra* note 1, at xxxii-xxxiii.

11. OUT OF THE ASHES: REPARATIONS FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS (Koen de Feyte et al. eds., 2005) [hereinafter OUT OF THE ASHES].

12. Heidy Rombouts et al., *The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights*, in OUT OF THE ASHES, *supra* note 11, at 417-18 (emphasis added).

their cited significance, no effort is made to explain *which* principles and precedents those are, or just *how* they should be determined, analyzed, and applied to the formulation of reparations policies and programs in the transitional justice or human rights framework.¹³

The trend, in other words, is to assume the existence of significant parallels between IMCPs and TJCPs without examining them in any detail. Oxford University Press's landmark *Handbook of Reparations* focuses expressly on domestic reparations programs created by a country in response to human rights atrocities.¹⁴ But the book contains case studies of the September 11 Victims' Fund as well as the United Nations Claims Commission, despite the fact that admittedly neither is "a typical [domestic] reparations program."¹⁵ Tellingly, the *Handbook's* editor explains in the Introduction that the common denominator unifying the volume is a focus on compensation for victims, and "in particular on measures of material compensation."¹⁶ A number of additional similarities are assumed to exist between the IMCPs selected and TJCPs generally.¹⁷ And though the IMCPs studied in the *Handbook of Reparations* may indeed offer insights to domestic policymakers working in the transitional justice context, the methodological approach chosen in this respect seems to miss the forest for staring at the trees: important parallels between IMCPs and TJCPs are presumed to exist at a fundamental level while the myriad, substantive differences reigning between the two realms of mass claims experiences are minimized or ignored.

The literature analyzing IMCPs and TJCPs clearly reveals a growing convergence.¹⁸ The central question that remains unanswered—indeed,

13. A couple of points are leisurely flagged, such as observing that a "salient and unprecedented" feature of the Ethiopia-Eritrea Claims Commission is that it was charged with establishing liability and awarding compensation for violations of international humanitarian law. *Id.* at 418.

14. Pablo de Greiff, *Introduction – Repairing the Past: Compensation for Victims of Human Rights Violations*, in THE HANDBOOK OF REPARATIONS 1-3 (Pablo de Greiff ed., 2006) [hereinafter HANDBOOK OF REPARATIONS].

15. *Id.* at 4. De Greiff is referring specifically to the 9/11 Commission here, but the same is certainly true of the UNCC. At least one prominent commentator, Professor Dinah Shelton, considers the UNCC through the lens of redress for gross and systematic human rights violations. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 404-05 (2d ed. 2005). Most experts, however, view the UNCC as an inter-state mechanism designed to provide compensation for property "loss" and personal "injury" resulting from Iraqi aggression in Kuwait, without explicit reference to or grounding in international human rights law. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991); see also HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 56-60.

16. De Greiff, *supra* note 14, at 2.

17. *Id.* at 4-5 (pointing to the risks of individualizing procedures and assuming shared principles of reparations).

18. See, e.g., REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY (Carla Ferstman, Mariana Goetz and Alan Stephens eds., 2009) (combining parts on the "internationalized" context of mass claims and Holocaust claims resolution experiences with parts dedicated to 'national' domestic reparations programs) [hereinafter REPARATIONS FOR VICTIMS].

unaddressed—is to what extent are these two types of experiences truly comparable? A number of related inquiries arise as well. Which IMCP principles and precedents are most relevant to domestic reparations programs, how are they to be identified, and just how transferable are they? When comparing the two, to what extent are the seemingly shared elements in claims processing procedures, or other basic characteristics, such as monetary payments, functionally interchangeable? And is this a two-way street? Are there principles and precedents from the TJCP context that might nourish ongoing or future IMCP initiatives? When drawing such parallels, regardless of the direction in which they flow, what limitations or caveats exist? In other words, to what extent are IMCPs and TJCPs *different*? What is the nature of these differences, and what do they tell us about the underlying compatibility of the experiences and mechanisms contrasted? In our view, a new framework for thinking about mass claims processes is required to answer these threshold questions, one that can apply to situations arising in either the inter-state or transitional justice contexts.

The pressing need for a different approach to the comparative study of these experiences is underscored by the prescriptive nature of the above referenced publications and their normative agenda. In their writings many commentators assume a degree of kinship between international and transitional justice mass claims mechanisms that ostensibly gives rise to “common trends, best practices and lessons learned.”¹⁹ In addition, most observers have heretofore suggested or presumed that the potential “lessons” flow primarily from the realm of IMCP experience to that of TJCPs.²⁰ However, as noted already, none have engaged in a systematic study of the nature of this convergence, thus limiting the scope, depth and—as this Article will demonstrate—accuracy of their comparative suggestions. Underlying these well-intentioned initiatives is the desire to improve upon the design and implementation of new mass claims mechanisms in novel settings. Since such mechanisms are intended to benefit tens if not hundreds of thousands of victims

According to the editors, “[t]his book explores the practice of governments, national and international courts and commissions in applying, processing, implementing and enforcing a variety of reparations awards.” *Id.* at 7. This convergence is evidenced in earlier publications as well, such as Professor Shelton’s treatise on remedies in international human rights law. While neither a text on IMCPs or transitional justice *per se*, her book addresses both types of mass claims processes side-by-side in chapters dedicated to analyzing remedies for “Gross and Systematic Human Rights Violations” and “Reparations for Historical Injustices.” SHELTON, *supra* note 15, chs. 13, 14. Thus, in the former, Professor Shelton canvasses claims procedures focusing on compensation by starting with the war reparations paid by Germany after the Second World War before turning to a detailed overview of the UNCC. She then proceeds to conduct a survey of “National Compensation Schemes” such as those TJCPs in Argentina, Chile and Hungary.

19. Carla Ferstman et al., *Introduction*, in REPARATIONS FOR VICTIMS, *supra* note 18, at 7.

20. See, e.g., De Greiff, *supra* note 14, at 1-5 (recognizing expressly that a pathway of enlightenment flows in the direction of TJCPs), and T. van den Hout, *supra* note 1, at xxxix-xxxiii (implying a pathway of insight).

and their families who have suffered terrible abuses at the hands of state agents (and sometimes private actors), it is important that any comparative analyses offered as guidance be well-structured and constructive. In other words, the “best practices” and “lessons” implied or recommended by such studies must truly translate from one context to another, or their instructiveness as a practical matter will surely be minimal.

The Article’s objective is to generate constructive debate around the study of what we will call TMCPs or “transnational mass claims processes”—IMCPs, TJCPs, as well as other internationalized mass claims mechanisms—with a view to reorienting the normative discussion in a more productive direction. The TMCP rubric we employ is an analytical tool derived from our respective experience working on contemporary IMCPs and TJCPs.²¹ It is premised on a framework of core characteristics resulting from the systematic scrutiny of both international and national mass claims experiences. We have utilized this framework to isolate and evaluate several of the basic differences between IMCPs and TJCPs; this in turn has facilitated our ability to map more accurately the extent to which these two types of claims processes can be said to be comparable in practical terms. Without disregarding the issue of substantive redress, this Article favors a more innovative focus on exploring the *procedural* dimensions of reparations in the comparative study of mass claims processes. In so doing we seek to better bridge the IMCP and TJCP divide and enable more effective comparisons across differing contexts.

The TMCP methodology we propose can also be applied to dissecting other novel initiatives in mass claims processing. The International Criminal Court (ICC), whose ‘victim-focused’ approach to international justice is currently as undefined as it is unprecedented, presents one such challenge.²² Unlike any of its forerunners, the ICC is mandated to create a reparations regime for victims, “including restitution, compensation, and rehabilitation.”²³ To this end, the Rome Statute also establishes a special Trust Fund for victims.²⁴ Several of the international crimes that could be prosecuted, such as genocide or crimes against humanity, will typically create victims numbering in the thousands if not tens of thousands, thus requiring a mass claims process to provide redress. For these reasons, as the ICC proceeds to lay the groundwork for its as yet unrealized reparations program, it is widely “advised to closely examine the approaches and solutions developed by modern international and national mass claims

21. We are grateful to Professor Sean Murphy for his assistance in defining this new proposed category. For a detailed exploration of the concept of “transnational law,” see PHILLIP JESSUP, *TRANSNATIONAL LAW* (1956).

22. Elizabeth Odio-Benito, *Introduction*, in *REPARATIONS FOR VICTIMS*, *supra* note 18, at 2.

23. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 75 (July 17, 1998) [hereinafter Rome Statute].

24. *Id.* art. 79.

programs that have faced similar challenges.”²⁵ But just how should the ICC go about “examining” these programs, given their wide diversity? Which will be relevant and why? What “approaches and solutions” should it be looking to in light of its unique mandate?

To answer these queries as well as those posed regarding the compatibility of IMCPs and TJCPs, this Article offers a new perspective on the subject of mass claims processing that draws from both the traditional and human rights contexts. It proceeds as follows. Part II paints a spectrum of contemporary mass claims processes by examining seminal experiences in both the international and domestic arenas. Part III then engages in a systematic comparative analysis of these experiences to contrast key characteristics and identify areas common to mass claim type procedures. In Part IV we provide a working definition of TMCPs and, drawing from the prior discussion, outline an applied framework for the effective study of such procedures. We conclude that despite fundamental differences, there is a cache of experience on each side of the IMCP-TJCP equation that, when properly contextualized, can enrich the design and implementation of transnational mass claim processes in any setting. At the same time, we highlight new opportunities that exist to promote enlightened cross-fertilization between them.

II.

A SPECTRUM OF MASS CLAIMS EXPERIENCES

The first challenge in setting up a discussion of transitional mass claims processes, TMCPs, was to identify paradigmatic examples of IMCPs and TJCPs from which to create the respective baselines. While recognizing that no claims process in either field is exactly like any other, our experience suggested that a handful of examples could be selected from the international and transitional justice contexts that would lend themselves usefully to the type of comparative analysis we sought to carry out. Accordingly, this section contains six case studies, comprised of three influential international mass claims processes alongside three historic political transitions that produced domestic reparations programs. The former are the Iran-United States Claims Tribunal (1981-present), the United Nations Compensation Commission (1991-2005), and the Holocaust-era Claims Resolution Tribunals (CRT I and CRT II) (1999-2002, 2001-present); the latter are the reparations programs adopted in Argentina (1984-present), South Africa (1994-2004), and Hungary (1991-present). They are presented below in rough chronological order, to better illustrate the parallel development of experiences in both fields.²⁶ While the subsequent discussions

25. Marc Henzelin et al., *Reparations to Victims Before the International Criminal Court: Lessons from International Mass Claims Processes*, 17 *Crim. L.F.* 317 (2006); see also REPARATIONS FOR VICTIMS, *supra* note 18, at 7-15.

26. This approach may strike some readers as unusual or unorthodox. Our purpose in breaking

in Parts III and IV rely to a great extent on these case studies, we will draw from other significant mass claims processes in both areas as necessary to complement the analysis.²⁷

Before turning to the case studies, a word about the criteria employed to select them is in order. Each IMCP is widely considered to be a successful mass claim process that broke new ground.²⁸ Together they represent the quintessential mass claims processes through their use of arbitration principles to resolve a “large number of claims arising from common circumstances”²⁹ and to compensate victims for losses suffered.³⁰ These three case studies reflect a range of settings, goals, procedures, methods, and other characteristics typical of IMCPs, thus providing a spectrum of contemporary experience from which to draw useful lessons. Similarly, the TJCP examples were selected from a broader pool of domestic reparations programs because they offer a variety of widely

with tradition to present these case studies in sequential order rather than group them thematically was to integrate them temporally and highlight the overlap that in reality existed among them. This chronological integration, we think, de-emphasizes the domestic/international divide and allows the reader to better focus on the convergences and divergences between both types of claims processes.

27. Primary among these are the Ethiopia-Eritrea Claims Commission (EECC) (2000-present), the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) – Bosnia and Herzegovina (1996-2003), and the reparations program in Chile (1990-2003). Similarly, we will refer to ongoing TJCP experiences in Colombia and Peru. A related area that we do not draw upon is that of lump sum settlements under international law, under which countries resolve international claims of injured nationals by paying a fixed sum to the claimant state. Richard B. Lillich & Burns H. Weston, *Lump Sum Agreements: Their Continuing Contribution to the Law of International Claims*, 82 AM. J. INT’L L. 69, 69-70 (1988); see also BURNS H. WESTON, RICHARD B. LILLICH & DAVID J. BEDERMAN, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENT (1975-1995) 21 (1999) (providing that “Settlement Agreements expressly state that the distribution of the negotiated lump sum falls within the ‘exclusive’ or occasionally ‘sole’ jurisdiction of the claimant state”). These lump sum payments tend to be bilateral and unidirectional, as when a defeated country pays reparations to injured states. *Id.* at 65 (discussing payments by West Germany to countries such as The Netherlands, Greece, and Switzerland, as a result of claims arising from World War II and Nazi persecution). The main difference, of course, is that the recipient of such payments is the State, which has the discretion to make payment to its nationals, and not strictly speaking the individuals themselves. Jennifer Bodack, *International Law for the Masses*, 15 DUKE J. COMP. & INT’L L. 363, 367 (2005).

28. These enterprises figure prominently in the roster of 10 select IMCPs analyzed by Holtzmann, Kristjansdottir, and the PCA Steering Committee on Mass Claims Processes. See HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8. The others are Commission for Real Property Claims of Displaced persons and Refugees, Housing and Property Claims Commission, Holocaust Claims Processes administered by the International Organization of Migration (IOM), Eritrea-Ethiopia Claims Commission, and the International Commission on Holocaust Era Insurance.

29. Howard M. Holtzmann, *Mass Claims Settlement Systems: Potentials and Pitfalls*, in INSTITUTIONAL AND PROCEDURAL ASPECTS, *supra* note 7.

30. The three IMCPs discussed, the Iran-U.S. Claims Tribunal, the United Nations Compensation Commission, and the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT I), had a significant volume of claims, ranging from approximately 4,000 filed at the Iran-U.S. Claims Tribunal, to almost 10,000 claims at the CRT and over 2.6 million at the United Nations Compensation Commission. See Hans Das, *Innovations to Speed Mass Claims: New Standards of Proof*, in REDRESSING INJUSTICES, *supra* note 1, at 7; HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 25.

consulted perspectives on the question of how mass claims processes are created and carried out entirely within a state.³¹ The three case studies are from Latin America, Africa, and Eastern Europe, respectively, each illustrating to a certain extent the regional experience in transitional justice. A defining characteristic of each transitional justice case study is that large numbers of victims were actually awarded reparations, including compensation, a fact that limited the field of possibilities.³² In sum, while one may reasonably point to other IMCPs or TJCPs, omitted due to space limitations, as pertinent case studies, we are confident of the significance and utility of those selected given the goals of this Article.

A. Seminal Mass Claims Processes

1. Iran-United States Claims Tribunal

The Iran-United States Claims Tribunal was established as a result of the conflict between the Islamic Republic of Iran and the United States of America that began with the 1979 taking of the U.S. Embassy hostages. These two countries, with the assistance of the Government of Algeria, developed this dispute resolution mechanism to “promote the settlement of . . . claims.”³³ It was established in 1981 to decide contract and expropriation claims that United States citizens asserted against the Islamic Republic of Iran, as well as to resolve contract disputes between the two governments.

Even though the Iran-U.S. Claims Tribunal was the direct and intended result of the agreement negotiated between Iran and the United States, the Tribunal’s method of creation was unique. Unlike its predecessors,³⁴ the Iran-

31. Perhaps the most substantial reparation programs not included are those enacted by Germany after World War II to compensate Holocaust survivors as well as forced and slave laborers. See ARIEL COLONAMOS & ANDREA ARMSTRONG, *German Reparations to the Jews after World War II: A Turning Point in the History of Reparations* and J. Authers, *Making Good Again: German Compensation for Forced and Slave Laborers*, in HANDBOOK OF REPARATIONS, *supra* note 14, respectively. Other TJCPs of note include those in Brazil, Malawi, the United States (Japanese-American Internment), and Rwanda. Excluded from the definition of TJCPs (*infra* Part II) are internationalized reparations regimes like these created by the Rome Statute for the International Criminal Court, or by the Dayton Peace Accords with respect to the Human Rights Chamber for Bosnia-Herzegovina. See GILBERT BITTI & GABRIELA GONZÁLEZ, *The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court*, in REDRESSING INJUSTICES, *supra* note 1, at 299 and MANFRED NOWAK, *Reparation by the Human Rights Chamber for Bosnia and Herzegovina*, in OUT OF THE ASHES, *supra* note 11, at 245, respectively.

32. Transitional justice scenarios where reparations programs have not been created or substantially implemented include El Salvador, Guatemala, Haiti, East Timor, Sierra Leone, and Poland.

33. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, art. 1, Jan. 19, 1981 [hereinafter Claims Settlement Declaration].

34. See *supra* note 1 and accompanying text.

U.S. Claims Tribunal was not the result of direct bilateral negotiations between the Islamic Republic of Iran and the United States to foster and develop improved economic and diplomatic relations.³⁵ Rather, indirect negotiations through the Government of Algeria, complicated by an increasingly dramatic U.S. political stage³⁶ and an intense international standoff,³⁷ led to the Tribunal's birth. This conflux of domestic and international events required the negotiators to develop a distinctive protocol, which would allow the two Governments to successfully satisfy their varied constituencies at home.³⁸

The United States and the Government of Iran reached an agreement memorialized in two Declarations of the Government of the Democratic and Popular Republic of Algeria, known as the Algiers Accords, on January 18, 1981, after four months of intense and often frustrating negotiations.³⁹ The two Declarations—the General Declaration and the Claims Settlement Declaration—

35. The two principals involved in the negotiations – Iran and the United States – never signed an agreement or treaty between them. The Government of Algeria reported to the United States that Iran refused to sign any document that the United States signed. This recalcitrance on the part of Iran “led to the idea of separate, parallel, mutually reinforcing promises to the Algerians by both the United States and Iran.” Warren Christopher, *Introduction, in AMERICAN HOSTAGES IN IRAN – THE CONDUCT OF A CRISIS* 21 (Paul H. Kreisberg ed., 1985) [hereinafter *AMERICAN HOSTAGES IN IRAN*].

36. Public opinion regarding the Iranian hostages was so intense that *Time Magazine* posited that the handling of the hostage situation would be the dispositive factor in the 1980 Carter-Reagan election. George J. Church et al., *Battling Down the Stretch*, *TIME*, Nov. 3, 1980, available at <http://www.time.com/time/magazine/article/0,9171,924482,00.html>.

37. The United States, on November 29, 1979, filed a case before the International Court of Justice demanding that Iran release the U.S. hostages. U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 5 (May 24). Moving quickly, in early December of 1979, the ICJ ruled that Iran's seizure of the Embassy and taking of hostages was a clear violation of international law. *Id.* at 6. The United Nations also weighed in on Iran's illegal actions. On December 4, 1979, the Security Council unanimously joined in demanding that Iran immediately release the hostages. *see* Warren Christopher, *Introduction, in AMERICAN HOSTAGES IN IRAN, supra* note 35, at 9.

38. Two of the most important issues to be resolved during the negotiations between the two countries for the release of the U.S. hostages were how to deal with the Iranian assets that were frozen in the United States and how to address the many thousands of claims that U.S. citizens had against Iran in an appropriate forum. *See* R. Owens, *The Final Negotiation and Release in Algiers, in AMERICAN HOSTAGES IN IRAN, supra* note 35, at 301.

39. CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 141-52 (1998); GEORGE ALDRICH, *THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL: AN ANALYSIS OF THE DECISIONS OF THE TRIBUNAL* 5 (1996). Even though the two governments only “adhered to” the provisions of the Algiers Accords and neither the U.S. Senate nor the Iranian Majlis ratified the Accords, the document constitutes a “treaty” under international law. *See* U.S. v. Iran, Dec. 37-A17-FT (June 18, 1985), *reprinted in* 8 Iran-U.S. Cl. Trib. Rep. 206, 207 (1985) (noting that “[t]his Tribunal has frequently resorted to the [Vienna] Convention in interpreting the Algiers Accord and the State Parties have declared the Convention to provide the applicable law of interpretation.”); *see also* NASSER ESPHAHANIAN & BANK TEJARAT, AWD 31-157-2 (Mar. 29, 1983), *reprinted in* 2 Iran-U.S. Cl. Trib. Rep. 157, 160 (1983) (stating that “[s]ince the Claims Settlement Declaration and the General Declaration together constitute a Treaty under international law, we are guided in interpreting them by Articles 31 and 32 of the Vienna Convention”).

addressed the obligations of the two governments vis-à-vis one another.⁴⁰

The General Declaration provided that Iran would release the hostages and that the United States would perform a series of actions and financial transactions, including releasing and returning the assets frozen by President Carter⁴¹ and nullifying judicial attachments against Iran obtained by litigants in U.S. courts.⁴² The General Declaration also specified that U.S. branches of U.S. banks would transfer U.S. \$1 billion of Iranian assets to a Security Account to secure and pay the claims against Iran adjudicated at the Tribunal.⁴³ Paragraph 7 of the General Declaration specified that Iran would replenish the Security Account to a minimum balance of \$500 million, whenever it fell below this level, until all arbitral awards against it were paid.⁴⁴

The Claims Settlement Declaration provided for the creation of the Iran-U.S. Claims Tribunal.⁴⁵ This declaration provided that a Tribunal would be “established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States...[which arose] out of debts, contracts, ... expropriations or other measures affecting property rights ...”⁴⁶ It could also adjudicate “any counterclaim which [arose] out of the same contract, transaction or occurrence that constitute[d] the subject matter of that national’s claim ...”⁴⁷ Additionally, the Tribunal had jurisdiction over claims of the two governments against each other arising out of contractual arrangements between them for the purchase of goods and services, and over disputes as to the interpretation or performance of any provision of the Algiers Accords.⁴⁸ However, the Tribunal decided that it did not have jurisdiction over direct claims brought by one government against the nationals of the other

40. General Declaration of the Democratic and Popular Republic of Algeria (Jan. 19, 1981), available at <http://www.iusct.org/general-declaration.pdf>, reprinted in 1 Iran-U.S. Cl. Trib. Rep. 3 (1981) [hereinafter General Declaration]; Claims Settlement Declaration, *supra* note 33.

41. The sanctions were revoked by Executive Order issued contemporaneously with the Algiers Accords. See Exec. Order Nos. 12,276-12,285, 46 Fed. Reg. 7913-31 (1981); Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981).

42. General Declaration, *supra* note 40.

43. *Id.* pt. 2, ¶ 7.

44. *Id.* However, in November 1992, the Iranian Government balked on its commitment to shoulder the burden of maintaining the Security Account at the required minimum amount. Sean D. Murphy, *Obligation to Replenish Iran-U.S. Claims Tribunal Security Account*, 95 AM. J. INT’L L. 414, 415 n.3 (2001). In response, the United States Government filed a claim with the Tribunal demanding that Iran replenish the account pursuant to the Claims Settlement Agreement. U.S. v. Iran (Iran-U.S. Claims Tribunal), Case No. A/28 ¶¶ 1-2 (1993) (Statement of Claim). Nearly eight years after the infraction, the Tribunal ruled in favor of the United States and ordered Iran to replenish the Security Account. U.S. v. Iran (Iran-U.S. Claims Tribunal), Decision No. 130-A28-FT ¶ 95 (2000).

45. Claims Settlement Declaration, *supra* note 33, art. II, ¶ 1.

46. *Id.*

47. *Id.*

48. *Id.* ¶¶ 2-3.

government.⁴⁹ Similarly, claims by the hostages as a result of their illegal captivity were specifically excluded from the Claims Settlement Declaration.⁵⁰ This decision was subsequently ratified through Executive Order⁵¹ and has been upheld consistently by the judiciary, despite numerous cases filed by the former hostages.⁵²

The beginnings of the Tribunal were not without controversy in the United States. Upon the approval of the Algiers Accords, President Reagan suspended all lawsuits in United States courts against Iran that were within the Tribunal's jurisdiction.⁵³ When U.S. claimants decided to challenge the constitutionality of this Executive Order, the United States Supreme Court, in expedited proceedings, upheld the President's authority to suspend lawsuits in the U.S. in favor of the alternative forum of the Iran-U.S. Claims Tribunal.⁵⁴ After this ruling, U.S. citizens and corporations filed several thousand claims with the Tribunal.

In order to adjudicate the claims filed at the Tribunal, the Claims Settlement Declaration provided that the Tribunal have nine arbitrators, with the United States and Iran each appointing three.⁵⁵ The six party-appointed

49. Jurisdiction over Claims Filed by Iran Against U.S. Nationals (Iran-U.S. Claims Tribunal), Case No. A/2 (1982). As a result of this case brought by Iran and the decision by the Tribunal, Iran withdrew approximately 1,400 claims filed with the Tribunal. David P. Stewart and Laura B. Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, 24 VA. J. INT'L L. 1, 9 (1983).

50. Claims Settlement Declaration, *supra* note 33, art. II, ¶ 1; General Declaration, *supra* note 40, ¶ 11.

51. Prohibition Against Prosecution of Certain Claims, 31 C.F.R. § 535.216(a) (1976). The exclusion was necessary in order to successfully implement the Algiers Accords. Exec. Order No. 12,294, *supra* note 41. The focus of the Claims Settlement provisions were solely on property issues, specifically expropriation claims and contract losses. Claims Settlement Declaration, *supra* note 33, art. II, ¶ 1.

52. See, e.g., *Persinger v. Iran*, 729 F.2d 835, 843, (D.C. Cir. 1984); *Ledgerwood v. Iran*, 617 F. Supp. 311, 316 (D.D.C. 1985). The United States Government agreed to bar claims by the hostages because it concluded that, since the 1976 Foreign Sovereign Immunities Act would likely preclude United States courts from hearing claims of that nature, these claims would be valueless. *The Iran Agreements: Hearings Before the S. Comm. on Foreign Relations*, 97th Cong. 32 (1981). However, to ensure that the hostages were not left empty-handed, Congress passed two statutes – the 1980 Hostage Relief Act, 5 U.S.C. § 5561 (1998) and the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, § 803, 100 Stat. 853 (1986). The hostages, despite the commitment of the United States in the Accords and the explicit waiver by the United States of their lawsuits, have filed claims against Iran for monetary damages. To date, all of these lawsuits have been unsuccessful. Most recently, the plaintiffs sought compensatory and punitive damages in the amount of 33 billion dollars. *Roeder v. Iran*, 333 F.3d 228, 230 (D.C. Cir. 2003). However, the United States Court of Appeals for the District of Columbia held that, since Congress did not expressly indicate a clear intent to abrogate the Algiers Accords with amendments to the Foreign Sovereign Immunities Act, the court had to uphold the commitments that the United States made to the Islamic Republic of Iran in order to secure the freedom of the hostages in 1981. *Id.* at 237.

53. See Exec. Order No. 12,294, *supra* note 41, § 1.

54. *Dames & Moore v. Reagan*, 453 U.S. 654 (1981).

55. Claims Settlement Declaration, *supra* note 33, art. III, ¶ 1.

arbitrators selected the three remaining non-party arbitrators. The nine arbitrators were divided into three panels (chambers). Each chamber was comprised of one U.S. arbitrator, one Iranian arbitrator, and one non-party arbitrator, who was designated as the presiding arbitrator for that chamber.⁵⁶ All of the private claims were assigned to one of the three chambers. The Full Tribunal heard contract disputes between the two governments and disputes related to the interpretation and application of the Algiers Accords.⁵⁷

The Algiers Accords specified that the UNCITRAL Arbitration Rules would govern procedural matters.⁵⁸ In addition, the Algiers Accords provided that the UNCITRAL Rules could be modified by the Tribunal or the Parties.⁵⁹ Once appointed, the arbitrators undertook extensive deliberations to determine the necessary modifications, such as the publication of decisions.⁶⁰ The Tribunal accepted the modifications to the Rules by majority vote, after consultation with the Agent of the United States and the Agent of the Islamic Republic of Iran,⁶¹ and then issued its “Tribunal Rules,” which were modified as required by continuing circumstances.

The Claims Settlement Declaration determined how the Tribunal was to be funded. It required that the Governments of the United States and the Islamic Republic of Iran⁶² would bear the “expenses of the Tribunal . . . equally” unless the parties agreed otherwise.⁶³ The Tribunal set its own salaries, expenses, and other budgetary amounts, and the two governments had only an advisory role in the process.⁶⁴ Once the budget was set, requests were made to the two

56. *Id.*; see also Iran-U.S. Claims Procedure, Final Tribunal Rules of Procedure art. 7 (1983), reprinted in Annex I to INSTITUTIONAL AND PROCEDURAL ASPECTS, *supra* note 7, at 81-82 [hereinafter Procedural Rules].

57. Presidential Order Number One, ¶ 5 (Oct. 1, 1981) (reproduced in C. Pinto, *Institutional Aspects of the Tribunal*, in THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 117 (Caron & Crook eds., 2000) [hereinafter Caron & Crook]).

58. Claims Settlement Declaration, *supra* note 3, art. III, ¶ 1.

59. *Id.*

60. Procedural Rules, *supra* note 56, art. 32, ¶ 5. The UNCITRAL Rules do not contemplate the publication of decisions. The Tribunal modified this article to ensure that its decision would be available to the public.

61. H. Holtzmann, *Drafting the Tribunal Rules*, in Caron & Crook, *supra* note 57, at 76. “Each government shall designate an agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or to its nationals, agencies, instrumentalities, or entities in connection with proceedings before the Tribunal.” Claims Settlement Declaration, *supra* note 33, art. VI, ¶ 2. The U.S. Agent’s primary functions included presenting the U.S. government’s position to the Tribunal, consulting with claimants, reporting developments at the Tribunal to the Department of State, and conducting settlement negotiations. See A. Rovine, *The Role of the Agent*, in Caron & Crook, *supra* note 57, at 19.

62. Claims Settlement Declaration, *supra* note 33, art. VI, ¶ 3.

63. Procedural Rules, *supra* note 56, art. 41; Claims Settlement Declaration, *supra* note 33, art. III, ¶ 2.

64. Christopher Pinto, *Institutional Aspects of the Tribunal*, in Caron & Crook, *supra* note 57,

governments to deposit equal amounts as advances for costs on a quarterly basis, with both governments paying those costs simultaneously.⁶⁵

While the two governments established the Tribunal, claimants filed their own statements of claim, statements of defense, and rebuttals, setting forth legal arguments, witness statements, and documentary evidence, directly with the Tribunal.⁶⁶ The parties were then represented by their own attorneys at a hearing before a panel of three Tribunal arbitrators. Each side presented its legal arguments and produced witnesses and experts who testified on its behalf.⁶⁷ These witnesses were subject to cross-examination, not only from the opposing side, but also from the arbitrators.⁶⁸ After each side had presented its case-in-chief, the Tribunal allowed rebuttal arguments by each party.⁶⁹

Article 24 provided the applicable rule for the burden of proof for evidentiary submissions: "Each party shall have the burden of proving the facts relied onto support his claims or defence."⁷⁰ It further provided that the Tribunal "shall determine the admissibility, relevance, materiality and weight of the evidence offered."⁷¹ As is typical of arbitral proceedings, these rules gave the Tribunal broad discretion in evaluating the parties' evidentiary submissions and did not bind the Tribunal to any specific rules of evidence. The Tribunal's decisions, however, demonstrate that it preferred that the parties provide contemporaneous documentary evidence to support their claims.⁷²

The Claims Settlement Declaration also specified that "[a]ll decisions and awards of the Tribunal shall be final and binding"⁷³ and that "[a]ny award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws."⁷⁴ By design then, once the Tribunal issued an award, no appeal from that decision was possible. Payment of all awards issued against Iran was paid from the

at 107.

65. *Id.*

66. Procedural Rules, *supra* note 56, art. 15, ¶ 2.

67. *Id.*

68. *Id.*

69. *Id.* One category of claims did not follow this claims processing model. The United States filed approximately 2,300 claims of less than \$250,000 on behalf of U.S. citizens at the Tribunal. Rather than individualized dispute resolution of each of these claims, the claims were settled *en masse* by the two governments for U.S. \$105,000,000. Claims of Less than US \$250,000, 25 Iran-U.S. Cl. Trib. Rep. 327 (1990) (Case Nos. 86, B38, B76 and B77).

70. Procedural Rules, *supra* note 56, art. 24, ¶ 1.

71. *Id.* art. 25, ¶ 6.

72. *See, e.g., Avco Corp. v. Iran Aircraft Industries*, AWD 377-261-3 (July 18, 1988), reprinted in 19 Iran-U.S. Cl. Trib. Rep. 200, 209 (1998) (finding that the testimony of claimant's officers, supported by an audit of the evidence, but not by the documentary evidence itself, inadequate to prove unmitigated losses).

73. Claims Settlement Declaration, *supra* note 33, art. IV, ¶ 1.

74. *Id.* art. IV, ¶ 3.

Security Account created pursuant to the Algiers Accords.⁷⁵ Upon rendering an award the Tribunal notified the Escrow Agent (Banque Centrale d'Algerie), which then instructed the N.V. Settlement Bank to make the payment to the intended recipient.⁷⁶

As of April 2009, 3,936 claims were finalized by award, decision, or order, including the lump sum settlement of 2,388 claims for less than \$250,000, as well as 92 government-to-government claims.⁷⁷ The Tribunal has awarded more than \$2.5 billion to the United States and U.S. nationals and more than \$900 million to Iran and Iranian nationals.⁷⁸ The decisions on these claims have been reported in the Iran-U.S. Claim Tribunal reporter and most are available on the Tribunal's official website.⁷⁹ Over the years, the Tribunal's published awards and decisions resolving these disputes have contributed significantly to the expansion of international law in this field.⁸⁰ The Tribunal decided that making its decisions public was essential to ensure uniformity for the parties and to guarantee that the jurisprudence would be accessible for its precedential value in developing principles of international law.⁸¹

75. *Id.* art. II, ¶ 7.

76. Technical Agreement with the N.V. Settlement Bank of The Netherlands, para. 3(e)(1) (Aug. 17, 1981), reprinted in BROWER & BRUESCHKE, *supra* note 39, at 708, 710.

77. Communiqué from the Office of the Secretary-General, No. 09/2 (Apr. 22, 2009) [hereinafter Communiqué of Apr. 22, 2009].

78. Yulia Andreeva et al., *International Legal Developments in Review: 2007 Disputes - International Courts Committee*, 42 INT'L LAW. 345, 358 (2008). According to the Communiqué issued by the Secretary-General of the Tribunal, the "total amount awarded to United States Parties and notified to the Escrow Agent to date: US\$2,166,998,515.43 and the US equivalent of £303,196.00, DM297,051.00 and Rls.97,132,598 (excluding any interest to be calculated by the Escrow Agent)." Communiqué of Apr. 22, 2009, *supra* note 77. Additionally, "a total amount (excluding any interest to be calculated) of US\$1,013,716,179.13 and the U.S. Dollar equivalent of Rls. 7,977,343 was awarded or ordered to be paid to Iran and Iranian parties . . ." *Id.*

79. Iran-United States Claims Tribunal, <http://www.iusct.org>.

80. Judge George Aldrich, a long-standing arbitrator of the Iran-U.S. Claims Tribunal, stated that he "never doubted that the hundreds of awards and decisions made by the Tribunal would be recognized for their lasting value as legal precedents in international law and perhaps in a nascent *lex mercatoria*." George Aldrich, *Book Review*, 102 AM. J. INT'L L. 213, 214 (2008) (reviewing THE IRAN-U.S. CLAIMS TRIBUNAL AT 25: THE CASES EVERYONE NEEDS TO KNOW FOR INVESTOR-STATE & INTERNATIONAL ARBITRATION (Christopher R. Drahozal & Christopher S. Gibson eds., 2007)).

81. As explained by one of the Agents of the United States, Lucy Reed, the transparency of publication assisted "literally hundreds of US claimants and their counsel" in that "the availability of procedural precedents allowed parties to write better memorials and conduct better hearings." Lucy Reed, *The Iran-United States Claims Tribunal*, in THE PERMANENT COURT OF ARBITRATION/PEACE PALACE PAPERS: INSTITUTIONAL AND PROCEDURAL ASPECTS OF MASS CLAIMS SETTLEMENT SYSTEMS 9, 13 (Kluwer Law Int'l ed., 2000). The decisions to these claims are reported in the Iran-U.S. Claim Tribunal reporter and are available on the Tribunal's official website at www.iusct.org. The decisions focused on a variety of international and commercial law issues. These issues included, inter alia, interpretation and application of the Vienna Convention and other principles of treaty law, the application of the International Monetary Fund, expropriation, breaches of contract, interest on awards, rights of dual nationals, and force majeure. Warren Christopher & Richard M. Mosk, *The Iranian Hostage Crisis and the Iran-U.S. Claims Tribunal: Implications for International*

2. Argentina

Argentina's transition to democracy is most often recalled for the work of its groundbreaking truth commission and the trials of high-level officers responsible for the "dirty war" (*guerra sucia*) that took place between 1976 and 1983 under a succession of military juntas. During that period of severe repression, state security forces forcibly disappeared at least twelve thousand persons.⁸² State forces also created many more thousands of victims through systematic killings, torture, and arbitrary detention.⁸³ Once democracy was restored, the country and its civilian leadership began to grapple with this devastating legacy of atrocities. Economic reparations for victims were among the measures pursued. The administrations of presidents Raúl Alfonsín (1983-89), Carlos Menem (1989-99), and Néstor Kirchner (2003-2007) each enacted laws to provide redress to victims of the dictatorship.

Although we refer to this patchwork of legislation compensating victims as Argentina's reparations program, it more closely resembles a cumulative series of domestic policies that evolved over two decades. The different stages of this development are summarized below. But a denominator common to nearly all the policies enacted is that they were (1) legally anchored by legislation and (2) implemented administratively by a specialized executive agency of the Argentine Ministry of the Interior.⁸⁴ Though hampered by economic hardship, among other obstacles, the resulting program continues to represent one of the most comprehensive and generous reparatory efforts in the transitional justice context.⁸⁵

Dispute Resolution and Diplomacy, 7 PEPP. DISP. RESOL. L.J. 165, 173 (2007).

82. Carlos H. Acuña, *Transitional Justice in Argentina and Chile: A Never-Ending Story*, in RETRIBUTION AND REPARATION IN THE TRANSITION TO DEMOCRACY 206, 208-09 (Jon Elster ed., 2006). In 1984, the Committee on Disappeared Persons (CONADEP) documented the disappearance of 8,963 persons and estimated that the number of forced disappearances exceeded 9,000 cases. From 1984-1999, the Under-Secretariat of Human Rights in the Ministry of the Interior confirmed an additional 3,000 cases.

83. See generally *id.*

84. Exec. Decree No. 3090, Sept. 20, 1984; see also María José Guembe, *Economic Reparations for Grave Human Rights Violations: The Argentine Experience*, in HANDBOOK OF REPARATIONS, *supra* note 14, at 21, 23, 44. Initially, this was the *Subsecretaría de Derechos Humanos y Sociales* [Under-Secretariat for Human and Social Rights]. When the structure of the Ministry of the Interior changed, the Under-Secretariat was renamed *Dirección Nacional de Derechos Humanos* [National Directorate for Human Rights] in 1991 before eventually returning to its original name in 1996. In 1999, the Under-Secretariat was transferred to the Ministry of Justice and Human Rights by Executive Decree No. 20, Dec. 13, 1999. Finally, in 2002 it became the *Secretaría de Derechos Humanos y Sociales* [Secretariat of Human and Social Rights], its current name.

85. See De Greiff, *supra* note 14, at 13. Argentina's reparations program was especially munificent in the sense that its individual awards were, relatively speaking, very substantial. But the Argentine transition has been rightfully criticized on other grounds, particularly its early penchant for impunity. See, e.g., *Instrucciones a los fiscales militares* [Instructions to Military Prosecutors] (1986) (requiring Military Prosecutors to exempt from liability those human rights violators who

The foundation for reparations was set almost immediately once President Alfonsín took office in December 1983. The first set of remedial measures adopted in 1984 and 1985 resulted in the reinstatement of public servants who had been dismissed from their posts during the dictatorship for political or arbitrary motives. Among those who benefited were public employees of state owned banks and companies, Foreign Service officers, and teachers.⁸⁶ At the same time, the Commission on the Disappearance of Persons or “CONADEP,” established by presidential decree only days after Alfonsín’s inauguration, was charged with investigating the practice of forced disappearances.⁸⁷ It recommended in 1984 that “economic assistance” be provided to the next of kin of persons disappeared, including “scholarships, social assistance and job positions.”⁸⁸

In 1986, the Alfonsín government passed a law granting pensions to the spouses and children of persons who had been disappeared.⁸⁹ To establish a claim, beneficiaries had to point to a judicial or administrative “accusation” or complaint made in response to the forced disappearance of their loved one, which included those collected from victims by CONADEP.⁹⁰ Under Argentine law, where documentary or other evidence was lacking, the sworn testimony of two or more persons would be sufficient to establish the claim.⁹¹ Once the claim was established, beneficiaries of the pension regime received payments

could demonstrate that they were acting according to orders); *Ley de Punto Final* [Full Stop Law], Law No. 23492, Dec. 29, 1986, B.O. (implementing a 60-day period after which no additional accused human rights violators could be indicted); *Ley de Obediencia Debida* [Law of Due Obedience], Law No. 23521, June 9, 1987, B.O. (granting impunity to all officers and subordinates who committed crimes during the dictatorship if they were obeying orders from their superiors). Although impunity measures strongly influenced the reparations calculus described in this case study, those issues are beyond the scope of this paper. For a detailed analysis, see Acuña, *supra* note 82, at 209-15.

86. See Guembe, *supra* note 84, at 23-24 (citing Law 23505, Feb. 22, 1984 (reincorporating into the Foreign Service those diplomats who were dismissed during the dictatorship); Law 23117, Sept. 30, 1984 (reincorporating into State-controlled entities those employees who were dismissed because of their political views or affiliation with trade unions); Law 23238, Sept. 10, 1985 (reincorporating teachers who were dismissed during the dictatorship because of their political views or affiliation with trade unions); Law 23523, June 24, 1988 (reincorporating bank workers who were dismissed for political motives); Law 23278, Sept. 28, 1985 (aimed at individuals who were dismissed or forced to quit their public or private positions because of their political views or affiliation with trade unions)). In some cases, they received back pay and benefits.

87. Exec. Decree No. 157, Dec. 15, 1983, reprinted in MARCELO A. SANCINETTI, *DERECHOS HUMANOS EN LA ARGENTINA POSTDICTATORIAL* 177-79 (1988); see also PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* 174 (2001).

88. COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS (CONADEP), *Recommendations*, in NUNCA MÁS: INFORME DE LA COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS, 5TH ED., pt. VI (1999).

89. Law 23466, Oct. 30, 1986. Under certain circumstances such as disability or unemployment, parents and siblings could be eligible as well.

90. Guembe, *supra* note 84, at 26.

91. *Id.*

equivalent to the “minimum ordinary amount received by a retired public servant.”⁹² They also received state sponsored health care benefits.⁹³

The reparations regime in Argentina entered its most active phase from 1989 through 1999 during President Carlos Menem’s back-to-back administrations. As a former political prisoner, Menem was sympathetic to the cause of other victims, especially those who had been detained and/or disappeared. His interest in redressing victims directly flowed also from a desire to counter-balance the intensely controversial measures he and Alfonsín, his predecessor, championed *vis-à-vis* the perpetrators.⁹⁴ While Alfonsín sponsored legislation that ensured immunity from prosecution for most members of the armed forces, Menem pardoned the convicted *junta* members and other high-ranking military officers still on trial.⁹⁵ In 1992, the Inter-American Commission on Human Rights found these measures to be incompatible with the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.⁹⁶ The Commission urged Argentina to devise a reparations program for the victims of state terrorism, as well as to prosecute the perpetrators.⁹⁷ As a result, the Menem government tried to “reduc[e] political costs by moving forward in a series of human rights aspects . . . namely, reparation for the victims and the search for kidnapped children.”⁹⁸

Additionally, largely in response to the cases brought before the IACHR, Menem issued a presidential decree in 1991, granting economic reparations for persons detained during the dictatorship, where they or their next of kin had filed a lawsuit for damages before December 10, 1985.⁹⁹ Many applicants had received either a non-appealable judgment on the grounds that the two-year statute of limitations had expired on their claim or had claims that were still pending when the decree was issued.¹⁰⁰ The latter could relinquish their judicial

92. *Id.*

93. *Id.*

94. *See id.* at 46-47.

95. *Id.* at 27; Acuña, *supra* note 82, at 209, 214-15.

96. *See* Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Inter-Am. C.H.R., Report No. 28/92 (1992), available at <http://www.cidh.org/annualrep/92eng/Argentina10.147.htm>; *see also* Guembe, *supra* note 84, at 28.

97. Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Inter-Am. C.H.R., Report No. 28/92 (1992), available at <http://www.cidh.org/annualrep/92eng/Argentina10.147.htm>.

98. Acuña, *supra* note 82, at 215.

99. Exec. Decree No. 70/91, Jan. 10, 1991. This date represents the cut-off date based on a two-year statute of limitations, which started to run on the date the dictatorship was deemed to have ended. Menem issued this executive decree when a draft law on the subject presented to Congress became bogged down.

100. Former political prisoners and their relatives had filed numerous suits starting in 1983. Some courts had allowed them; others dismissed them on statute of limitations grounds. This inconsistent treatment generated pressure for an equitable resolution to the issue. *See* Guembe, *supra* note 84, at 24, 28.

claims and accept the benefit or continue to litigate.¹⁰¹ Under this decree, compensation was calibrated according to the amount earned on a daily basis by the highest category of national civil servants; this amount was then paid for each day the claimant spent in detention.¹⁰² In addition, the equivalent of five years in detention was paid in cases of death; where severe injuries occurred the victim was entitled to 70% of this amount.¹⁰³ These benefits were payable in cash within 60 days of approval by the Ministry of the Interior.¹⁰⁴ Argentine authorities calculate that 227 persons benefited from this decree, a small percentage of the estimated 10,000 detained during the state of emergency by the security forces.¹⁰⁵

Shortly thereafter, the Argentine Congress passed a law extending economic reparations to *all* victims who (i) were detained by military tribunals or as a result of executive authority pursuant to the state of siege before December 10, 1983, and (ii) had not already received compensation for the same violations by a judicial ruling.¹⁰⁶ Even though implementation began in 1992, the first payments did not issue until 1994.¹⁰⁷ The economic reparations were paid out in the form of government bonds, though there are no statistics on the actual amounts disbursed under this program.¹⁰⁸ The period for filing claims ended in September 1998, during which time about 13,600 individuals claimed the benefit. In the end, some 7,800 former detainees received compensation.¹⁰⁹ Under this law, as under the Presidential Decree, the Ministry of the Interior

101. Guembe, *supra* note 84, at 30. These litigants could still apply for administrative reparations if they lost their cases. Exec. Decree No. 70/91, art. 11, Jan. 10, 1991. However, acceptance of reparations under the decree was contingent upon the renouncement of additional rights to indemnification. *Id.*

102. Guembe, *supra* note 84, at 30-31. Individuals received \$27 Argentine pesos for each day they spent in detention.

103. *Id.* at 31. Individuals who died in detention were entitled to \$49,275 Argentine pesos plus \$27 per day spent in detention. Individuals who suffered severe injuries under the meaning of Article 91 of the Penal Code (those causing a “physical or mental illness, certainly or probably incurable, permanent work disabilities, the loss of one sense, an organ, a member, the use of an organ or a member, loss of speech, or the capacity to beget or conceive”) were entitled to \$34,492 Argentine pesos plus \$27 per day spent in detention.

104. *Id.* Claimants had to file applications for benefits with the Ministry of the Interior, which in turn had to verify the duration of detentions and the corresponding payment. Claimants had a right of appeal to the courts if rejected. Further, if payments were not made in the time allotted, beneficiaries could claim the payments through the normal judicial process for executing sentences.

105. *Id.* at 28, 31. No information is available on the actual amounts paid out, though the decree itself did charge the expense to the State directly. Exec. Decree No. 70/91, art. 12, Jan. 10, 1991.

106. HAYNER, *supra* note 87, at 175.

107. Guembe, *supra* note 84, at 34.

108. *Id.* at 33. The bonds had nominal values, paid interest, and could be exchanged at any time for their market value, or exchanged for their total value at the date of their expiration, in this case in 2010, 16 years after they were issued.

109. *Id.* at 33.

processed applications.¹¹⁰ The law eventually came to augment the decree since it authorized substantially higher payments.¹¹¹ As with the decree, the amounts under the new law were calibrated according to the projected daily income of persons in the highest category of national civil servants, but the daily rate came out to be nearly three times higher due to delays in the law's implementation.¹¹² Further, in cases of death while in detention, as under the decree, the law paid the equivalent of five years in detention, and where severe injuries occurred, paid the victim 70% of this amount.¹¹³

When filing a claim, claimants had to declare under oath "that they had been detained under the conditions established by the law between November 6, 1974 and December 10, 1983."¹¹⁴ As to evidence required to substantiate claims, "the guidelines [established by the law and its implementing decrees] were broad and took into account the conditions in which detention occurred and the difficulties in proving them."¹¹⁵ Accordingly, judicial, administrative, and other official records like those compiled by CONADEP could be complemented by press accounts or documentation compiled by international human rights bodies such as the Inter-American Commission.¹¹⁶ Claims of serious injury in relation to detention were verified by the reviewing agency in the Ministry of the Interior based on court-validated medical records from the detention facility, a victim's medical history, or, if necessary, the evaluation from a medical meeting at a hospital conducted for this purpose.¹¹⁷ Under both the reparations law and the presidential decree it expanded, unsuccessful claimants could appeal to a court of law.¹¹⁸

The most controversial component of Argentina's reparations program was the enactment of a group of laws, beginning in 1994, aimed at repairing victims of forced disappearances and state-sponsored assassinations (extrajudicial executions).¹¹⁹ The first law, enacted in part to respond to inconsistent judicial

110. *See id.* at 30-31.

111. *Id.* at 33.

112. *Id.* at 32. The rate was \$74 per day, as the pertinent salary scale, set in 1994 after some controversy, had risen substantially since the payments under the decree were issued. In 1994, Argentina offered bonds in the national currency (pesos) or in U.S. dollars. In 2002, all of the bonds that were issued in U.S. dollars were converted to pesos, and the foreign currency option no longer exists for those who have not yet received benefits. *Id.* at 40-41.

113. *Id.* at 32-33.

114. *Id.* at 32; Exec. Decree No. 1023/92, June 24, 1992.

115. Guembe, *supra* note 84, at 32.

116. *Id.*

117. *Id.*

118. *Id.*

119. Law No. 24411, Dec. 7, 1994 (granting economic reparations for victims of forced disappearance and the successors of victims of extrajudicial execution); *Ley Parche* [Mending Patch Law], Law No. 24823, May 7, 1997 (added to Law No. 24411, establishing the order in which benefits should be paid out to successors (i.e. to descendants, spouse, ancestors, and relatives to the fourth degree) and applying the law to common law marriages, among other things); *Ley de*

decisions awarding relatives of victims amounts ranging from \$250,000 to \$3,000,000 Argentine pesos, required a judicial finding or presumption of death for successors to qualify for benefits.¹²⁰ Eventually, however, additional norms had to be promulgated to create a new legal status for victims of forced disappearance under Argentine law, and to allow the next of kin to claim redress on their behalf without first presuming the victim's death, which many were loathe to do.¹²¹ Under the modified regime, a close relative would first bring a claim in court to have a judge declare the victim "absent by forced disappearance."¹²² Upon receiving an application for the corresponding benefits, the Ministry of the Interior validated the claim before making payment to the victim's "assignees."¹²³

Under the series of laws enacted starting in 1994, the assignees of the nearly 9,000 victims of forced disappearance whose cases were documented by the CONADEP were automatically entitled to the compensation.¹²⁴ In other cases, judges could employ a broad evidentiary perspective like the one the reparations regime for arbitrary detention adopted. "This is of particular importance because repression in Argentina took place under clandestine conditions and no exhaustive investigation had been carried out, which made many of these cases quite difficult to prove."¹²⁵ Thus, cases reported after CONADEP could be corroborated "either through a mention in the press or a report to a national or international human rights body at the time, or evidence

Ausencia por Deaparición Forzada [Law of Absence by Forced Disappearance], Law No. 24321, May 11, 1994 (forcing the State to recognize victims who were illegally kidnapped by agents of the State never to be seen again, dead or alive); Guembe, *supra* note 84, at 34-37. These laws were controversial: victims and their successors viewed the reparations as blood money received in exchange for their silence and the impunity for those responsible. Further, the successors of victims of forced disappearance demanded that the disappeared be recognized as such rather than declared deceased. *Id.* at 35.

120. HAYNER, *supra* note 87, 176, n.14 (citing various articles in *Clarín* (local newspaper)).

121. Law No. 24823, May 7, 1997; Guembe, *supra* note 84, at 35-37.

122. Guembe, *supra* note 84, at 36. The judge could verify the accusations by requesting and examining the original accusation of disappearance from the CONADEP or claims filed with the Secretariat of Human and Social Rights of the Ministry of the Interior. After reviewing the reports, the judge had to order the publication of edicts for three consecutive days and then allow 60 days to pass before declaring the individual absent by forced disappearance. *Id.* at 40.

123. *Id.* In doing so, the Ministry, for example, had to request police records in the victim's name, dated after the date of alleged disappearance, as a precaution against fraud in the application for benefits. A police report subsequent to the alleged disappearance would indicate that the person was ultimately released from detention rather than forcibly disappeared. *Id.* at 36-37. The Mending Patch Law also established that an individual who had been judicially declared a victim of forced disappearance would receive economic reparations through his or her *causahabientes*, or assignees. The distinction between heirs and assignees was significant for the same reasons it was important to distinguish between death and forced disappearance. *See supra* note 119.

124. HAYNER, *supra* note 87, at 175. Their cases were considered proven. Guembe, *supra* note 84, at 40.

125. Guembe, *supra* note 84, at 39.

that a habeas corpus petition had been submitted to the courts”¹²⁶ Significantly, the new law shifted the burden of proof from the claimants to the state, which had the effect of greatly expanding eligibility criteria.¹²⁷

The benefit awarded for extrajudicial execution and forced disappearance was the same: \$244,000 Argentine pesos payable in government bonds.¹²⁸ In addition, the children of victims of forced disappearance were exempted from military service,¹²⁹ received housing credits, and were entitled to a monthly pension of \$140 per month until they reached age 21.¹³⁰ By 2004, the Ministry of the Interior’s specialized agency had received 8,200 claims for economic reparations for cases of forced disappearance and assassination, 8,000 of which were approved.¹³¹ It is estimated that the Government of Argentina paid \$1,912,960,000 to beneficiaries of this reparations regime. When added to the \$1,117,000,000 paid out under the rubric established for victims of arbitrary detention, the total for just these two initiatives came to \$3,082,960,000.¹³²

The Argentine government has initiated two much smaller programs since 2004. The first program resulted when then-President Néstor Kirchner and the Argentinean Congress passed a law extending substantial economic benefits to minors who were victims of state terrorism. These victims included children born to mothers the military detained as political prisoners, minors who remained imprisoned due to the detention or disappearance of their parents for political reasons, and victims of identity substitution.¹³³

126. *Id.* at 23, 39. The CONADEP had a limited mandate and was dissolved after publishing *Nunca Más* in 1984 and replaced with an Executive Agency. Executions could be validated with a judicial ruling, a petition received by the CONADEP, or administrative documents indicating that security forces or their paramilitary allies were responsible. *Id.* at 40.

127. Andrea Armstrong, *The Role of Civil Society Actors in Reparations Legislation*, in REDRESSING INJUSTICES, *supra* note 1, at 254.

128. Guembe, *supra* note 84, at 40. Payable in U.S. dollars or Argentine pesos, *see supra* note 112. Using government bonds as a method of payment was also controversial, especially in light of Argentina’s precarious economic situation. *See* Christina Marie Wilson, *Argentina’s Reparations Bonds: An Analysis of Continuing Obligations*, 28 FORDHAM INT’L L.J. 786 (2005); Guembe, *supra* note 84, at 41. Given the magnitude of the atrocities addressed, the economic reparations represented a significant financial burden on the state. Bondholders could sell the bonds at market price to obtain approximately 75% of face value or wait until maturity, about sixteen years after issuance. During the first six years, the State did not have to pay financial services or amortization for the bonds, an obligation that began in 2001 and was set to run through the date of maturity in 2011. In the wake of the economic crisis, the State declared the cessation of all public debt titles in December 2001. However, in May 2002, the State exempted from the cessation of payments all bonds that were issued under the laws redressing forced disappearances that were in the possession of their original holders. It also converted all bonds issued in U.S. dollars to Argentine pesos and denied others the option to request foreign currency bonds.

129. At the time, military service was mandatory. HAYNER, *supra* note 87, at 330-31.

130. Law No. 23466, Oct. 30, 1986.

131. Guembe, *supra* note 84, at 41.

132. *Id.* All amounts are in Argentine pesos pegged to the U.S. dollar.

133. *Id.* at 42. \$244,000 Argentine pesos, the same amount paid under Law No. 24411 for forced disappearance or extrajudicial execution, but after the devaluation of the peso.

The second program was directed at covering persons forced into exile during the dictatorship.¹³⁴ In October 2004, the Argentine Supreme Court held that the situation of a person persecuted by the dictatorship and forced into exile was analogous to that of a victim of arbitrary detention, and thus should be repaired accordingly under the existing reparations laws.¹³⁵ In 2005 a bill providing compensation for those persons forced into exile was introduced and passed in the Senate; the Commission of Human Rights in the Chamber of Deputies approved it later that same year.¹³⁶ However, three additional legislative commissions must still approve the legislation.¹³⁷

3. *United Nations Compensation Commission*

The United Nations Compensation Commission (UNCC) was established in 1991 to resolve claims against Iraq as a result of its invasion and occupation of Kuwait, after a determination of Iraq's liability under international law by the United Nations Security Council.¹³⁸ Over the course of its lifetime, the UNCC processed over 2.6 million claims from 96 different countries.¹³⁹ In order to review such an extraordinary number of claims, the UNCC developed novel methods for processing mass claims, such as statistical sampling, that greatly contributed to the techniques available in the field.¹⁴⁰ While these methodologies were unprecedented in international practice, the UNCC's

134. HAYNER, *supra* note 87, at 176.

135. See Hugo Alconada Mon, *Ordenan indemnizar a exiliados por la dictadura*, LA NACIÓN, Oct. 15, 2004; Guembe, *supra* note 84, at 43-44.

136. Guembe, *supra* note 84, at 43-44; Laura Serra, *Avanza el plan para compensar a exiliados*, LA NACIÓN, Apr. 8, 2005.

137. Serra, *supra* note 136. While the members of the Comisión de Ex Exiliados Políticos de la República Argentina (COEPRRA) favor the legislation, some former exiles are opposed to the idea of economic reparations on the moral ground that exile does not compare to torture and disappearance suffered by other victims of the military regime. *General polémica el proyecto oficial para indemnizar exiliados*, LA NACIÓN, Mar. 28, 2005.

138. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991).

139. Norbert Wühler, *Institutional and Procedural Aspects of Mass Claims Settlement Systems: The United Nations Compensation Commission*, in THE PERMANENT COURT OF ARBITRATION'S PEACE PALACE PAPERS 18 (2000).

140. Due to the enormous number of Category C claims submitted, the UNCC developed a mass processing methodology containing criteria for evaluating, verifying and compensating each loss element in the Category "C" claim. The computer software was coded so that answers to questions would result in the claim being grouped or sub-grouped, as appropriate. Using this methodology, "the Panel found that an 'aggregate picture' of the claims – presented often through a review of many sample claims and the respective claimed losses, statistical analyses of claimed amounts and evidentiary patterns, and common socio-economic characteristics of claimants – provided it with a level of comfort concerning its general criteria and conclusions, and allowed certain general presumptions to be made, that would not have been possible in the context of resolving claims on an individual basis." *Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Individual Claims for Damages Up To US\$100,000 (Category "C" Claims)*, S/AC.26.1994/3 (Dec. 21, 1994).

application of legal principles were still firmly rooted in the international tribunals that preceded it; most notably, the Iran-U.S. Claims Tribunal.¹⁴¹ However, the UNCC was not an arbitral body or an international court. Rather, as the former chief of the Legal Services Branch of the UNCC noted, it was “an administrative body which perform[ed] an essentially fact-finding function of examining claims, verifying their validity, evaluating losses and making payments of compensation.”¹⁴²

The UNCC was established as a subsidiary organ of the UN Security Council as a result of Iraq’s invasion of Kuwait.¹⁴³ The United Nations adopted Resolution 687 on April 3, 1991, five weeks after the suspension of the military operations against Iraq. Specifically, the resolution stated that Iraq was “liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals, and corporations, as a result of its unlawful invasion and occupation of Kuwait.”¹⁴⁴ Three days after the Security Council adopted Resolution 687, Iraq accepted its terms. In doing so, Iraq accepted liability for all losses incurred as a result of its invasion and occupation of Kuwait.¹⁴⁵

Not only did Resolution 687 codify Iraq’s liability for the losses suffered due to its unlawful actions, but it also established the mechanism for redressing those losses. The Security Council created an entity that would process claims and pay compensation for losses resulting from Iraq’s invasion and occupation of Kuwait.¹⁴⁶ Specifically, Paragraph 19 directed the Secretary-General to

develop and present to the Security Council for decision, no later than 30 days following the adoption of the present resolution, recommendations for the fund to meet the requirement for the payment of claims established in accordance with paragraph 18. . . and for a programme to implement the decisions in paragraph 16, 17, and 18¹⁴⁷

In May of 1991, as required by Resolution 687, the Secretary-General

141. In deciding claims, the UNCC relied on traditional theories of international law, including precedents established by the Iran-U.S. Claims Tribunal in the areas of expropriation, property loss, and contract dispute.

142. Wühler, *supra* note 139, at 17.

143. Iraq’s justification for invading Kuwait arose out of territorial and economic claims. John Quigley, *The United Nations Action Against Iraq: A Precedent for Israel’s Arab Territories?*, 2 DUKE J. COMP. & INT’L L. 195, 198 (1992). Based on these claims, Iraq escalated hostilities against Kuwait from February through July of 1990, culminating in its invasion of Kuwait on August 2, 1990. UNITED NATIONS, THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT, 1990-1996 14 (1996).

144. S.C. Res. 687, *supra* note 138, ¶ 16.

145. UNITED NATIONS, *supra* note 143, at 35.

146. The Secretary-General, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and the United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, U.N. Doc. S/22559 (May 2, 1991), reprinted in UNITED NATIONS, *supra* note 143, at 240-45.

147. S.C. Res. 687, *supra* note 138, ¶ 19.

presented the report to the Security Council.¹⁴⁸ In the report, the Secretary-General recommended that the proposed Compensation Commission would resolve claims filed by countries on behalf of their citizens for losses suffered as a result of Iraq's invasion of Kuwait.¹⁴⁹ On May 20, 1991, the Security Council adopted Resolution 692, which established the UNCC and located the Commission at the UN office in Geneva.¹⁵⁰

The UNCC consisted of three parts: 1) the Governing Council, 2) the Secretariat, and 3) the panels of commissioners.¹⁵¹ The Governing Council was comprised of the same countries that made up the Security Council.¹⁵² The Governing Council was responsible for promulgating the UNCC Rules of Procedure, establishing the criteria for claims and deadlines for claims, creating the sequence of priority for deciding claims and distributing payment of awards, considering reports on various aspects of the Commission's work, and approving the recommendations made by the panels of Commissioners, who acted as the primary decision makers on individual claims.¹⁵³

The Secretariat was headed by the Executive Secretary, who was appointed by the UN Secretary-General after consultation with the Governing Council.¹⁵⁴ The Secretariat was responsible for the technical, legal, and administrative support of the UNCC.¹⁵⁵ Among those working for the UNCC Secretariat were lawyers who reviewed the claims and worked with the Commissioners in drafting the reports and recommendations to the Governing Council, accountants and loss adjusters who assisted in verifying and valuing the claims, and information technology specialists who developed programs that allowed for the mass processing of millions of property loss claims.¹⁵⁶

The Commissioners were individuals the Executive Secretariat recommended and the Secretary-General approved.¹⁵⁷ The function of the commissioners was to verify and evaluate claims, and, in so doing, to determine

148. U.N. Doc. S/22559, *supra* note 146, ¶ 1.

149. The Secretary-General reiterated Iraqi culpability for "any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait." *Id.*

150. S.C. Res. 692, U.N. Doc. S/RES/692 (May 20, 1991).

151. The Secretary-General made his recommendations in U.N. Doc. S/22559, *supra* note 146. The Security Council adopted those regulations in S.C. Res. 692, *supra* note 150.

152. U.N. Doc. S/22559, *supra* note 146, ¶ 5. As the membership of the Security Council has changed, so did the membership of the Governing Council.

153. To date, all decisions of the Governing Council have been made by unanimous consent. Jessica Bodack, *International Law for the Masses*, 15 DUKE J. COMP. & INT'L L. 363, 378 (2005).

154. *Id.*

155. U.N. Doc. S/22559, *supra* note 146.

156. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 302.

157. *Id.* at 183-84. During the life of the UNCC, 59 Commissioners were appointed to Panels to resolve claims. The United Nations Compensation Commission, The Commissioners, <http://www.uncc.ch/commiss.htm> (last visited Feb. 11, 2009).

whether they were directly related to Iraq's invasion and occupation of Kuwait.¹⁵⁸ In nominating individuals as commissioners, the UNCC Provisional Rules for Claims Processing required the Secretary-General to take into account the need for geographical representation, experience, and integrity.¹⁵⁹ Additionally, the commissioners were required to be experts in "fields such as finance, law, accounting, insurance, environmental damage assessment, oil, trade, and engineering."¹⁶⁰

Governments filed claims on behalf of their citizens for compensation as a result of death, injury, loss of or damage to property, commercial losses, and environmental damages that occurred due to Iraq's invasion of Kuwait.¹⁶¹ Claimants who were eligible to have their governments file claims for them included citizens of Kuwait, citizens of foreign countries, corporations, the governments themselves and international organizations.¹⁶² Iraqi citizens were specifically prohibited from filing claims, unless they were also nationals of another country.¹⁶³

The Governing Council identified six categories of claims (categories "A" through "F").¹⁶⁴ Four of the categories were created for claims for individuals (Categories "A" through "D"),¹⁶⁵ one was created for corporations (Category "E"),¹⁶⁶ and one was created for governments and international organizations (Category "F").¹⁶⁷ Category "A" claims were those submitted by individuals who were forced to depart from Iraq or Kuwait during the period of August 2, 1990 to March 1991.¹⁶⁸ The Governing Council established fixed sums of US \$ 2,500 for individual claimants and US \$ 5,000 for families. However, if claimants only filed a category "A" claim, the fixed sum was increased to US \$ 4,000 for individuals and US \$ 8,000 for families.¹⁶⁹ Approximately US \$ 3.2

158. The United Nations Compensation Commission, *supra* note 157.

159. Provisional Rules for Claims Procedure, U.N. Doc. S/AC.26/1992/10, art. 19, para. 1 (June 26, 1992) [hereinafter UNCC Provisional Rules].

160. *Id.* art. 19, ¶ 2.

161. S.C. Res. 687, *supra* note 138. Individuals and corporations who suffered losses could not file claims on their own behalf before the UNCC. Rather, claims had to be filed by the country of their nationality or citizenship. UNCC Provisional Rules, *supra* note 159, art. 5.

162. UNCC Provisional Rules, *supra* note 159, art. 5.

163. Criteria for Expedited Processing of Urgent Claims, U.N. Doc. S/AC.26/1991/1, ¶ 17 (Aug. 2, 1991).

164. The United States Compensation Commission, Claims, <http://www.uncc.ch/theclaims.htm> (last visited June 22, 2009).

165. U.N. Doc. S/AC.26/1991/1, *supra* note 163, ¶¶ 10-14.

166. *Id.* ¶ 16.

167. *Id.* ¶ 30.

168. *Id.* ¶ 10.

169. The United States Compensation Commission, Category "A" Claims, http://www.uncc.ch/claims/a_claims.htm (last visited June 22, 2009).

billion was approved for category “A” claims.¹⁷⁰

Category “B” claims were submitted by individuals who suffered “serious personal injury” or “whose spouse, child, or parent died.”¹⁷¹ The Governing Council established fixed sums of US \$2,500 for individuals and up to US \$10,000 for families.¹⁷² Approximately US \$13.5 million was approved for category “B” claims.¹⁷³ Category “C” and “D” claims were submitted by individuals for 21 different types of losses, including losses of income, support, housing, personal property, medical expenses or costs of departure.¹⁷⁴ Category “C” claims were capped at \$100,000.¹⁷⁵ Approximately 1,800,000 Category “C” claims were filed and around US \$5.2 billion was approved in payment for those claims.¹⁷⁶ Category “D” claims were for claims above \$ 100,000.¹⁷⁷ Approximately 14,000 Category “D” claims were filed and around US \$3.4 billion was approved in payment for those claims.¹⁷⁸ Category “E” claims were claims filed by corporations, private legal entities, and public sector enterprises.¹⁷⁹ Approximately 6,500 category “E” claims were filed seeking approximately US \$79 billion in compensation.¹⁸⁰ Finally, approximately 300 category “F” claims were claims filed by governments and organizations seeking US \$236 billion in compensation.¹⁸¹

The UNCC required claimants to file a claim through their government, each of which had its own internal processes for collecting and reviewing claims.¹⁸² However, the UNCC did mandate some uniformity in the

170. *Id.*

171. U.N. Doc. S/AC.26/1991/1, *supra* note 163, ¶ 10.

172. The United States Compensation Commission, Category “B” Claims, http://www.uncc.ch/claims/b_claims.htm (last visited June 22, 2009).

173. *Id.*

174. U.N. Doc. S/AC.26/1991/1, *supra* note 163, ¶ 14; The United States Compensation Commission, Category “C” Claims, http://www.uncc.ch/claims/c_claims.htm (last visited June 22, 2009).

175. U.N. Doc. S/AC.26/1991/1, *supra* note 163, ¶ 14.

176. *See* The United States Compensation Commission, UNCC Status, <http://www.uncc.ch.status.htm> (last visited June 22, 2009).

177. The United States Compensation Commission, Category “D” Claims, http://www.uncc.ch/claims/d_claims.htm (last visited June 22, 2009).

178. *Id.*

179. United Nations Compensation Commission Governing Council, *Criteria for Additional Categories of Claims*, U.N. Doc. S/AC.26/1991/7/Rev. 1, ¶ 16 (Mar. 16, 1992); *see also* The United Nations Compensation Commission, Category E Claims, http://www.uncc.ch/claims/e_claims.htm (last visited June 22, 2009).

180. *See* The United Nations Compensation Commission, UNCC Status, <http://www.uncc.ch.status.htm> (last visited June 22, 2009).

181. U.N. Doc. S/AC.26/1991/7/Rev. 1, *supra* note 179, ¶ 30; *see also* The United Nations Compensation Commission, Category F Claims, http://www.uncc.ch/claims/f_claims.htm (last visited June 22, 2009).

182. For instance, the Office of the Legal Adviser, Office of International Claims and Investment Disputes, provided the claim forms to potential claimants, received the completed claim

procedures. For instance, the UNCC mandated that claimants submit their claims on the official claim form that the UNCC provided.¹⁸³ Claim forms were accepted in any of the official languages of the U.N. However, as English was the working language of the claims procedure and computerized database, if claims were not submitted in English, the Rules of Procedure required an English translation.¹⁸⁴ Claim forms and documents in Categories B through F had to be submitted in paper, with the option of a duplicate computerized submission, while Category A claims had to be submitted in the computerized format required by the UNCC Secretariat.¹⁸⁵

In order to process claims, the UNCC Provisional Rules established a minimal evidentiary threshold. For the expedited Category A, B, and C claims, the claimant only had to show “appropriate evidence of the circumstances and amount of the loss” and the evidence had to be the “reasonable minimum.”¹⁸⁶ For instance, in claims for departure from Iraq or Kuwait (Category A claims), simple documentation that demonstrated the departure, such as a plane ticket or passport stamp, would suffice.¹⁸⁷ For the Category D, E, and F claims, a stricter standard was applied: claimants had to provide “documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the loss.”¹⁸⁸ This standard was subject to interpretation by the panels reviewing the claims and varied depending upon the type of claim presented.¹⁸⁹

forms, reviewed them for compliance with the UNCC filing rules, and transmitted the claims to the UNCC registry. See U.S. Dep’t of State – Iraq Claims, <http://www.state.gov/s/l/3200.htm> (last visited Mar. 16, 2009). The United States submitted approximately 3100 individual claims, 144 corporate claims, and five government claims. See R. Bettauer, *Current Developments*, 89 AM. J. INT’L L. 416, 417 n.4 (1995).

183. UNCC Provisional Rules, *supra* note 159, art. 6.

184. *Id.*

185. *Id.* art. 7.

186. *Id.* art. 35(2)(c). The appropriate evidence of the circumstance included the difficult conditions claimants faced in making quick departures from Kuwait and Iraq, which resulted often in loss of their personal property, passports, and other documents. Wühler, *supra* note 139, at 20.

187. M. Kazazi, *An Overview of Evidence before the United Nations Compensation Commission*, 1 INT’L L.F. 219, 221 (1999).

188. UNCC Provisional Rules, *supra* note 159, art. 35(3). Further, Decision 15 required that the claim contain “detailed factual descriptions of the circumstances of the claimed loss, damage or injury.” *Compensation for Business Losses Resulting from Iraq’s Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures Were also a Cause*, U.N. Doc. S/AC.26/1992/15, ¶ 5 (Jan. 4, 1993).

189. Kazazi, *supra* note 187, at 222. For instance, one Category D Panel interpreted the standard to require that “the level of proof the Panel . . . considered appropriate [was] close to what has been called the ‘balance of probability’ as distinguished from the concept of ‘beyond reasonable doubt’” *Report and Recommendations Made By the Panel of Commissioners Concerning Part One of the First Instalment of Individual Claims for Damages Above US\$100,000 (Category “D” Claims)*, U.N. Doc. S/AC.26/1998/1, ¶ 72 (Feb. 3, 1998). This panel also gave significant weight to and reliance upon a clear explanatory statement in support of the losses claimed in the claim form. *Id.* ¶ 74. “An explanatory statement “must clearly state the nature and extent of the loss . . . make clear that the loss was a direct result of the Iraqi invasion and occupation, and . . . clearly explain the

The Security Council mandated that the Secretary-General create a method for funding the operation and paying the claims. The Secretary-General recommended that the compensation to be paid by Iraq should not exceed 30% of the value of its oil exports.¹⁹⁰ On August 15, 1991, the Security Council adopted Resolution 705, which formally accepted the Secretary-General's recommendation.¹⁹¹ Under Resolution 706, adopted in conjunction with Resolution 705, funding for the UNCC and compensation to pay claims was to be derived from oil exported from Iraq. In 1995, funding to pay UNCC awards was achieved through the sale of Iraqi oil under the Oil-for-Food Program.¹⁹² Resolution 986 authorized this sale of oil and permitted the United Nations to take 30% of the revenue generated from oil exported from Iraq to pay UNCC awards.¹⁹³ In return, the United Nations provided humanitarian relief to Iraqi citizens.¹⁹⁴ Although Resolution 986 allowed the UN to take 30% of Iraqi oil proceeds, the resolution also required regular reviews of the Oil-for-Food Program.¹⁹⁵ The 30% originally agreed upon was subsequently lowered to 25% in 2000¹⁹⁶ and then to 5% in 2003.¹⁹⁷

Approved category "A", "B", and "C" claims were given priority in receiving compensation.¹⁹⁸ The Governing Council ordered "successful claims in categories 'A', 'B' and 'C' [to] receive all funds available in the Compensation Fund for paying claims, until each has received payment of the initial amount [of US \$ 2,500]."¹⁹⁹ Governments, corporations, and international organizations were the last groups to receive compensation.²⁰⁰ Because claims were filed by countries on behalf of their citizens, payments for successful claims were distributed *en masse* to the filing countries and international organizations and those entities were then directed to distribute the funds to individuals.²⁰¹ Governments and international organizations were

reasons, regarded as credible and sufficient by the Panel, for the absence of any additional documentary evidence. . . ." *Id.* ¶ 75.

190. The Secretary-General, *Report of the Secretary-General recommending procedures for the sale of Iraqi oil and transmitting estimates of humanitarian requirements in Iraq*, para. 57(d), U.N. Doc. S/23006 (Sept. 4, 1991), reprinted in UNITED NATIONS, *supra* note 143, at 300.

191. S.C. Res. 705, U.N. Doc. S/RES/705 (Aug. 15, 1991).

192. S.C. Res. 986, U.N. Doc. S/RES/986 (Apr. 14, 1995).

193. *Id.* ¶ 8(c).

194. *Id.* ¶ 8(a).

195. *Id.* ¶ 4.

196. S.C. Res. 1330, U.N. Doc. S/RES/1330 (Dec. 5, 2000).

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

198. *Priority of Payment and Payment Mechanism*, ¶ 5, U.N. Doc. S/AC.26/1991/Dec. 17 (Mar. 24, 1994).

199. *Id.* After the initial US\$2,500 was paid to each claimant within categories "A," "B," and "C", the balance was then paid to the remaining successful claimants in the other categories.

200. *Id.*

201. *Distribution of Payments and Transparency*, U.N. Doc S/AC.26/Dec. 18 (Mar. 24, 1994).

required to distribute the funds to successful claimants within six months of receiving payment and to report on the payments made to claimants within three months.²⁰² Any Government that received payments on behalf of claimants was required to submit reports to the Governing Council describing the mechanisms employed to pay the claimants and detailing the amount and date of each payment.²⁰³ After distributing all payments received from the Compensation Commission, each Government was to produce a final summary of payments made, including who was paid, the exact amount received by each claimant, and the date of each payment, as well as a report on amounts not distributed.²⁰⁴

In June 2005, the Governing Council approved the Commissioners' last report and recommendation, marking the end of the Commissioners' work.²⁰⁵ Throughout its 12 years of operation, the Commissioners approved U.S. \$52 billion in claims for approximately 1.5 of the 2.6 million claims filed.²⁰⁶ Of that \$52 billion in claims, approximately \$27.6 billion has been made available to claimants.²⁰⁷ While the UNCC Commissioners' legal work is complete, the UNCC itself is still in operation to correct duplicate awards and to make additional payments.²⁰⁸

4. Hungary

The reparations process in Hungary differs in many respects from that experienced by other countries with histories of mass human rights violations. The Soviet occupation of Hungary for over four decades complicated attempts

202. *Id.*

203. U.N. Compensation Commission, *Decision Concerning the Return of Undistributed Funds Taken by the Governing Council of the United Nations Compensation Commission at its 75th meeting, held on 2 February 1998 at Geneva*, U.N. Doc. S/AC.26/Dec. 48 (Feb. 3, 1998). Money that is not distributed within twelve months (for example when a Government cannot locate a claimant within twelve months of the receipt of award funds) must be returned to the Commission. *Id.* The UNCC was authorized to suspend payments to Governments and international organizations when those entities failed to report on distribution of funds or failed to return undistributed funds on time. U.N. Doc. S/AC.26/Dec. 18, *supra* note 201. When funds were returned to the UNCC, it held the returned amounts until the claimant was located, at which time the Government could request that the money be returned for distribution to the claimant. U.N. Doc. S/AC.26/Dec. 48.

204. U.N. Doc S/AC.26/Dec. 18, *supra* note 201.

205. See Press Release, United Nations Compensation Commission, Governing Council of United Nations Compensation Commissions Has Concluded Its Fifty-Sixth Session, U.N. Doc. PR/2005/8 (June 30, 2005), available at http://www.uncc.ch/pressrel/pr_56c.pdf.

206. *Id.*

207. See Press Release, United Nations Compensation Commission, United Nations Compensation Commission Pays Out US\$430 Million, U.N. Doc. PR/2009/4 (July 29, 2009), available at <http://www.uncc.ch/pressrel/Press%20release%20-%2029%20July%202009.pdf>.

208. *Id.* After awards have been approved by the Governing Council, the Provisional Rules require the Executive Secretary to inform the Governing Council of any computational, clerical, typographical, or other errors made in the awards. UNCC Provisional Rules, *supra* note 159, art. 41, ¶ 1. The Governing Council must then direct the Secretary General as to how the error shall be corrected, if it decides to correct it. *Id.* art. 41, ¶ 2.

to address the unlawful state takings of property, the deprivation of life and liberty, and the other state sponsored abuses that affected millions of citizens. Starting in 1989-90 the new Hungarian authorities struggled to find a balance between promoting justice and maintaining the rule of law in the fledgling democracy. Ultimately, Hungary's Constitutional Court upheld laws adopted by Parliament to hold human rights perpetrators responsible for committing violations of international norms, to partially compensate individuals whose property was unlawfully seized by the state, and to indemnify individuals who were deprived of life or liberty.²⁰⁹ The effects of this process were far-reaching: “[b]y mid-1992, nearly one million people – some 10% of the population – had [already] applied for compensation” for communist-era abuses.²¹⁰

A focal point of reparations for victims of gross human rights abuses in Hungary arose as a result of the widespread killings committed during the October 31, 1956 popular revolution against the dictatorship. Abetted by the Communist Hungarian Socialist Worker's Party's leaders, the Soviet Army carried out mass shootings of unarmed demonstrators throughout the country, leaving thousands dead.²¹¹ Almost four decades later, after the Soviet Union's collapse, the Hungarian Parliament sought to hold the individuals who participated in quelling the 1956 uprising responsible.²¹² Many were arrested and charged with treason for their collaboration with the Soviets during the occupation.²¹³ In 1991, the Hungarian Parliament enacted legislation that revived related offenses for which the statute of limitations had already passed, permitting the prosecution of crimes state agents and their collaborators committed during the 1956 uprising.²¹⁴ But in 1992, the Hungarian Constitutional Court held that this legislation with its retroactive effects was an unconstitutional *ex post facto* law.²¹⁵ The Hungarian Parliament subsequently

209. The respective laws are these: Act on Procedures concerning Certain Crimes Committed during the 1956 Revolution (1993) (Hung.) [hereinafter Prosecution Law]; Act XXV of 1991, On Partial Compensation for Damages Unlawfully Caused by the State to Properties Owned by Citizens in the Interest of Settling Ownership Relations (1991) (Hung.) [hereinafter Act XXV]; Act XXXII of 1992, On Compensation to Persons Unlawfully Deprived of their Lives or Liberty for Political Reasons (1992) (Hung.) [hereinafter Act XXXII]. See generally 2 TRANSITIONAL JUSTICE 645, 645-92 (Neil Kritz ed., 1995) [hereinafter Kritz II]. The Compensation Laws are translated and compiled in 3 TRANSITIONAL JUSTICE 751, 751-68 (Neil Kritz ed., 1995).

210. Kritz II, *supra* note 209, at 646.

211. RUTI G. TEITEL, TRANSITIONAL JUSTICE 95 (2000).

212. Jane Perlez, *Hungarian Arrests Set Off Debate: Should '56 Oppressors Be Punished?*, N.Y. TIMES, Apr. 3, 1994, available at <http://www.nytimes.com/1994/04/03/world/hungarian-arrests-set-off-debate-should-56-oppressors-be-punished.html>.

213. TEITEL, *supra* note 211, at 38.

214. Zetenyi-Takacs Act, Law Concerning the Prosecutability of Officers between December 21, 1944 and May 2, 1990 (1991) (Hung.), translated in 1 J. OF CONST. L. IN E. & CENT. EUR. 131 (1994).

215. Alkotmánybíróság [Constitutional Court], *Judgment of Mar. 5, 1992*, Magyar Közlöny [Hungarian Gazette] No. 23/1992 (1992) (Hung.), translated in 1 J. OF CONST. L. IN E. & CENT. EUR. 136 (1994). “From the principle of predictability and foreseeability, the criminal law's

enacted a new statute that authorized the prosecutions but limited it to prosecutions for war crimes and crimes against humanity committed in contravention of Hungary's international obligations, which are imprescriptible.²¹⁶ Although Hungary's Constitution is silent on the precedence of international law over domestic law, the Constitutional Court upheld the latter statute, declaring in relation to the statute of limitations issue, that "Hungary [would] respect the universally accepted rules of international law, and . . . ensure . . . the accord between [its international] obligations . . . and domestic law."²¹⁷

During this time the Hungarian Parliament also promulgated two laws that indemnified victims for certain abuses of the previous regime. The first provided compensation for property that the state had unlawfully seized; the second granted compensation to individuals who were deprived of their rights to life and liberty for political reasons.²¹⁸ With the transition to democracy following the Soviet collapse, the Hungarian Government recognized the importance of protecting private property, and its responsibility to indemnify individuals whose property was wrongfully seized.²¹⁹ The purpose of the Act on Partial Compensation for Damages Unlawfully Caused by the State to Properties Owned by Citizens in the Interest of Settling Ownership Relations (the "Property Act") was to settle ownership relations and to provide incentives for investment.²²⁰ To qualify for compensation, beneficiaries were required to submit a claim within ninety days of the enactment of the Property Act.²²¹ Originally, only individuals whose property was forcibly nationalized after 1949 were eligible for reparations under the Property Act.²²² But for reasons of equality, the Hungarian Constitutional Court extended the scope of the law back to 1939 to ensure that victims of Nazi-era takings were also indemnified.²²³ Compensation was based on the value of the seized property.²²⁴ Farmland was

prohibition of the use of retroactive legislation, especially *ex post facto* . . . directly follows Only by following the formalized legal procedure can there be valid law."

216. Prosecution Law, *supra* note 209; *see also* Kritz II, *supra* note 209, at 646.

217. Alkotmánybíróság [Constitutional Court], *Resolution of the Hungarian Constitutional Court of Oct. 12, 1993 on the Justice Law*, Magyar Közlöny [Hungarian Gazette] No. 53/1993 (1993) (Hung.), *quoted in* Krisztina Morvai, *Retroactive Justice based on International Law: A Recent Decision by the Hungarian Constitutional Court*, 2 E. EUR. CONST. REV. 32, 34 (Fall 1993/Winter 1994).

218. Act XXV, Act XXXII, *supra* note 209. It should be noted that in 1992 the Parliament further adopted legislation voiding the convictions of persons jailed for crimes committed against the state and political order. *See* Kritz II, *supra* note 209, at 691.

219. TEITEL, *supra* note 211, at 130.

220. SHELTON, *supra* note 15, at 413-414.

221. *Id.* at 414.

222. TEITEL, *supra* note 211, at 136.

223. *Id.* (citing Alkotmánybíróság [Constitutional Court], *Land Reform Decision* (1991) (Hung.)).

224. SHELTON, *supra* note 15, at 414.

valued based on special gold crown value.²²⁵ If beneficiaries were unable to produce a deed to establish the value of the expropriated land, the land was valued using average gold crown data of the village where it was located.²²⁶

Once the value of the land was established, property owners were compensated in interest-bearing coupons. Individuals who owned property valued at 200,000 Hungarian forints or less (approximately US\$2,000) were entitled to the entire amount in compensation.²²⁷ But as the value of the expropriated property increased, the percentage of compensation the property-holder was entitled to decreased.²²⁸ The total amount of compensation was capped at HF 5,000,000 (approximately US \$50,000) per property owned per former owner.²²⁹ The interest-bearing coupons could be used in three principal ways: to purchase property sold during the privatization of state property, to buy farmland, or to receive a life annuity in the social security system.²³⁰ In 1993, Hungarian nationals challenged the Property Act and its voucher system, asserting that it violated Article 26 of the International Covenant on Civil and Political Rights because it did not distinguish “between such cases where the expropriation was the consequence of breaches of the Covenant [as in the case of the petitioners] and the majority of cases where the expropriation had been the result of the nationalization of private property.”²³¹ The United Nations Human Rights Committee found, however, that the Property Act did not violate the claimants’ right to equal protection under the law.²³²

In addition to the Property Act, Hungary promulgated the Act on Compensation to Persons Unlawfully Deprived of their Lives or Liberty for Political Reasons (“Human Rights Violations Act”).²³³ The Human Rights Violations Act provided redress to individuals who were unlawfully deprived of their life or liberty between March 11, 1939 and October 23, 1989.²³⁴ Potential beneficiaries initially had four months to file claims under the Human Rights Violations Act, although the deadline was subsequently extended through 2006.²³⁵ Individuals were considered to be deprived of liberty under the

225. *Id.* One gold crown equals 1,000 Hungarian forints.

226. *Id.*

227. *Id.*

228. *Id.* For losses over HF200,000, individuals were entitled to HF200,000 plus fifty percent of the excess up to HF300,000; for losses over HF300,000, individuals were entitled to HF250,000 plus thirty percent of the amount in excess of HF300,000; for losses over HF500,000, individuals were entitled to HF310,000 plus ten percent of the amount in excess of HF500,000.

229. SHELTON, *supra* note 15, at 414.

230. *Id.*

231. *Somers v. Hungary*, Comm’n No. 566/1993, § 3.1, U.N. Doc. CCPR/C/53/D/566/1993 (1996). Petitioners demanded full restitution of their property and home on this basis.

232. *Id.* § 10.

233. Act XXXII, *supra* note 209.

234. *Id.* This covered the period from the beginning of World War II until the Soviet collapse.

235. SHELTON, *supra* note 15, at 415. See Separate Compensation and Documentation

meaning of the Human Rights Violations Act if they were the subjected to political condemnations, preventive detention, forced medical treatment, internment in camps, forced labor, forced resettlement, and deportation.²³⁶ Individuals who suffered serious restrictions on personal liberty of longer than thirty days were eligible for an indemnification that increased depending upon the length of their detention. Significantly, the law specified that an individual identified as a human rights perpetrator would be ineligible for compensation, “unless it can be proved that he has suffered serious prejudice in consequence of criminal procedure due to his activity displayed in the interest of democracy after the violation of basic rights.”²³⁷

Once beneficiaries or their heirs had established that they were subjected to qualifying human rights abuses, they were compensated depending upon the nature of the violations that they suffered and the identities of their successors.²³⁸ The successors of individuals who were killed for political reasons were originally entitled to lump sum payments of HF1,000,000,²³⁹ though this sum was substantially reduced in later years due to budgetary restraints.²⁴⁰ Individuals who were deprived of their personal liberty for more than thirty days but less than six months received a lump sum, payable in two installments.²⁴¹ Beneficiaries received the baseline amount of HF11,000 for each two months of detention, up to a total of six months.²⁴² Victims detained for longer than six months received an annuity that was calculated by dividing the duration of the detention by an official life expectancy schedule and multiplying by the baseline amount.²⁴³

According to the department within the Hungarian Central Office of Justice charged with implementing the Human Rights Violations Act and other relevant norms, it received a total of 97,600 claims by the extended cut-off date of

Department, Hungarian Central Office of Justice, Information about the progress rate of the claims submitted pursuant to Act XLII on reopening the deadlines stipulated in Act XXXII of 1992 on compensation due to persons unlawfully deprived of life and liberty, *available at* http://www.kih.gov.hu/english_pages/Compensation/Information/information_090810.html (last visited Aug. 13, 2009) [hereinafter Compensation Information].

236. SHELTON, *supra* note 15, at 415.

237. *Id.*

238. SHELTON, *supra* note 15, at 414-15. All reparations were tax-exempt.

239. *Id.* at 414. This comes to about US\$10,000. The amount was divided equally among the victim's living spouse, parents, and children. Or, if none of these were present, siblings could claim half the prescribed sum, or HF500,000, to be divided among them.

240. *See* Lajos Szabo, Republic of Hungary Central Compensation Office Director-General, Letter to Claimants, May 5, 2005, *available at* http://www.kih.gov.hu/english_pages/Compensation/customer_information.html (last visited Aug. 13, 2009).

241. SHELTON, *supra* note 15, at 415.

242. *Id.*

243. *Id.*

December 31, 2006.²⁴⁴ As of July 31 2009, the 41 agency “decision-makers” had adopted a total of 57,438 final resolutions and orders. The total compensation the Hungarian government paid by mid-2009 was HF 2,109,174,689 (about US \$9,153,450.00); a monthly life annuity had been awarded in 190 cases, with additional compensation paid for claims arising from unlawful deprivations of liberty reaching HF 18,117,000 (approximately US \$78,625.00).²⁴⁵ Difficulties slowing the process include the high number of claims, the advanced age of most claimants, and the fact that many are “aliens” residing outside of Hungary.²⁴⁶ Moreover, despite flexible and straightforward evidentiary standards, petitioners apparently have experienced difficulty in properly documenting their claims.²⁴⁷ The goal of the Hungarian Office of Justice is to resolve all outstanding compensation claims by the middle of 2011.²⁴⁸

5. South Africa

Although unique in many respects, prior transitional experiences, most notably those in Argentina and Chile, shaped the creation of the South African Truth and Reconciliation Commission (“TRC”).²⁴⁹ It is perhaps best known for offering individual perpetrators amnesty conditioned upon full disclosure of their politically motivated abuses during the apartheid regime. Indeed, a pervasive criticism of the TRC process is that perpetrators received amnesty relatively quickly, while monetary payments promised to their victims were repeatedly delayed.²⁵⁰ While many viewed the payment of reparations as a counterweight to amnesty, the clear emphasis of the TRC was on truth telling

244. Compensation Information, *supra* note 235.

245. *Id.* The US figures are calculated based on the exchange rate in 2009.

246. *Id.*

247. *Id.* As for evidentiary standards, requisite criteria such as the loss of life or liberty, or family relationship to the victim, could be established through a fairly flexible range of official documentation or its functional equivalent. For instance, to prove loss of life an official death certificate or its equivalent (e.g. from the Hungarian Red Cross) would suffice. Where such documents were not available, the loss of life might be established by notarized testimony to the same effect provided “it is based on direct knowledge.” Likewise, a family relationship to the victim could be established through a range of official documents like birth or marriage certificates or, in their absence, “contemporary” sources attesting to it, such as school records. See Central Office of Justice, Frequently Asked Questions, available at http://www.kih.gov.hu/english_pages/Compensation/FAQ (last visited Aug. 13, 2009).

248. See Compensation Information, *supra* note 235.

249. Alex Boraine, *Truth and Reconciliation Commission in South Africa Amnesty: The Price of Peace*, in RETRIBUTION AND REPARATION IN THE TRANSITION TO DEMOCRACY 299, 301 (Jon Elster ed., 2006).

250. Wendy Orr, *Reparation Delayed is Healing Retarded*, in LOOKING BACK REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 239, 242-43 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000).

“in the search for reconciliation and unity.”²⁵¹ By some accounts the TRC succeeded in revealing the truth, but was less effective in promoting reconciliation.²⁵²

The TRC was established to facilitate a peaceful transition from apartheid to a new democratic system.²⁵³ Secret negotiations between the ruling National Party (“NP”) and the outlawed African National Congress (“ANC”) culminated in the 1990 dismantling of the apartheid regime under President de Klerk.²⁵⁴ During subsequent talks between the legalized ANC and the NP government, the ANC proposed the creation of a truth commission along with other transitional measures aimed at promoting accountability for past abuses.²⁵⁵ Ultimately, both sides reached a compromise reflected in the Interim Constitution and Postamble, which called for the creation of mechanisms that would promote reconciliation primarily by “offering the opportunity for storytelling by victims and truth telling by perpetrators.”²⁵⁶ Amnesties figured prominently in the transitional formula prescribed by the Interim Constitution. Reparations, on the other hand, scarcely received a mention.²⁵⁷

The issue of reparations fared only slightly better in the debates on the Promotion of National Unity and Reconciliation Act (“Act” or “TRC Act,” since its principal function was to create the Truth and Reconciliation Commission) preceding the law’s enactment by newly elected President Nelson Mandela in 1995.²⁵⁸ Despite the highly participatory nature of the drafting process, which included public hearings and extensive consultations with NGOs on the proposed Act, the specific question of how to design a reparations program as part of the ongoing transitional process was never fully discussed.²⁵⁹ One reason cited for this is the fact that the subject of reparations generally, and compensation in particular, had become controversial within the victim community active in the process.²⁶⁰ Another is that, in practice, reparations

251. Christopher J. Colvin, *Overview of the Reparations Program in South Africa*, in HANDBOOK OF REPARATIONS, *supra* note 14, at 193.

252. See Ronald W. Walters, THE PRICE OF RACIAL RECONCILIATION 60 (2008). “[A] common criticism [at the time was] that the Commission had been strong on truth and had little or no contribution to reconciliation.” *But see* Boraine, *supra* note 249, at 315-16.

253. Boraine, *supra* note 249, at 302.

254. Colvin, *supra* note 251, at 177.

255. Boraine, *supra* note 249, at 301.

256. Colvin, *supra* note 251, at 178. “The decision to opt for a Truth and Reconciliation Commission was an important compromise . . . [because otherwise], a bloody revolution sooner rather than later would have been inevitable. The Truth and Reconciliation Commission is therefore a bridge from the old to the new.” Boraine, *supra* note 249, at 302 (quoting Judge Richard Goldstone).

257. Colvin, *supra* note 251, at 178-79. In fact, reference to reparations was left out of the final Constitution of the Republic of South Africa entirely.

258. *Id.* at 179-80.

259. *Id.* at 180.

260. Graeme Simpson & Paul van Zyl, *South Africa’s Truth and Reconciliation Commission*,

continued to be overshadowed by other priorities defined by the parties to the political negotiation. Thus the first two TRC priorities as defined in the final Act were the need (1) to establish an historical account of apartheid, including the first-hand perspectives of the actors involved; and (2) to promote truth telling by perpetrators through the exchange of amnesties for confessions. The third goal was to

promote national unity and reconciliation [by] making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them.²⁶¹

In this regard it is important to note that the Act defined reparations as “include[ing] any form of compensation, *ex gratia* payment, restitution, rehabilitation or recognition.”²⁶² However, in contrast to the authority it had to directly realize the first two objectives, with respect to the third, the TRC was authorized only to

make recommendations to the President with regard to (i) the policy which should be followed or measures which should be taken with regard to the granting of reparations to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims; (ii) measures which should be taken to grant urgent interim reparation to victims[.]²⁶³

The TRC Act defined victims as persons who “suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights (i) as a result of a gross violation of human rights; or (ii) as a result of an act associated with a political objective for which amnesty has been granted.”²⁶⁴ Close relatives or dependents of such persons, as determined by South African law, were also recognized as victims.²⁶⁵ Under the Act, the definition of “gross violation of human rights” was drawn narrowly. It was defined as

(a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit

585 TEMPS MODERNE 394 (1996), available at <http://www.csvr.org.za/wits/papers/papgpsv.htm>. “The whole area of compensation/reparation in relation to the Truth Commission has become fairly controversial. This is because the compensation that will be offered to victims by the government will be considerably less than if they brought a civil action against the responsible perpetrator. Certain activists who were assassinated may well have filled top-level government positions if they were alive today. In such cases, their wives/husbands and their dependants would be entitled to civil claims of hundreds of thousands, if not millions, of rands. Once amnesty is granted to a perpetrator then these claims are extinguished – and there is simply no way that a new government will be able to offer a comparable compensation package to such victims.”

261. Promotion of National Unity and Reconciliation Act 34 of 1995 ch. 2, ¶ 3(1)(c) (1995) (S. Afr.) [hereinafter TRC Act] (emphasis added).

262. *Id.* ch. 1.

263. *Id.* ch. 2, ¶ 4(f)(i).

264. *Id.* ch. 1.

265. *Id.*

an act referred to in paragraph (a), which emanated from conflicts of the past and which was committed during the period 1 March 1960 to the cut-off date within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive.²⁶⁶

The TRC Act came into effect once the members of the TRC were appointed.²⁶⁷ Though the Act empowered President Mandela to appoint the commissioners directly, he declined to do so. Instead, he created a committee comprised of representatives from major political parties and civil society to review nearly 300 nominations.²⁶⁸ It conducted public hearings, eventually narrowing the list of nominees to twenty-five names.²⁶⁹ In December 1995, President Mandela chose fifteen of the appointment committee's twenty-five nominees; he named Archbishop Desmond Tutu as the Commission's Chairperson and Alex Boraine as its Deputy Chairperson.²⁷⁰ The resulting TRC was racially representative of the South African population; it included seven women, ten men, seven Africans, two bi-racial individuals, two Indians, and six whites.²⁷¹ The TRC was given two years to fulfill its mandate as stipulated in the Act.²⁷²

To implement its mandate, the TRC relied on three committees defined in the Act: the Committee on Human Rights Violations Committee ("CHRV"), the Amnesty Committee ("AC"), and the Committee on Reparations and Rehabilitation Committee ("CRR").²⁷³ The CRR, comprised of a chairperson, a

266. *Id.*

267. Alex Boraine, A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION 71 (2000) [hereinafter Boraine II].

268. *Id.* at 71-72.

269. *Id.* at 73. See University of the Witwatersrand, Traces of Truth: Documents relating to the South African Truth and Reconciliation Commission, available at http://truth.wvl.wits.ac.za/cat_desc.php?cat=1. The short-list submitted to President Mandela included academics, religious leaders, former politicians, and individuals drawn from the NGO, legal, and medical fields.

270. Boraine II, *supra* note 267, at 73.

271. *Id.* at 75.

272. TRC Act, *supra* note 261, ch. 2, ¶ 3(1). The objectives of the TRC were to "promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past" by investigating the causes and extent of the gross violations of human rights that were committed, granting amnesty to human rights perpetrators in exchange for full disclosure of their actions, establishing the fate and whereabouts of victims, giving victims an opportunity to tell their story, devising a plan to make reparations to the victims, and compiling a comprehensive report on its activities and findings. Boraine, *supra* note 249, at 304. An additional three months was added in order to complete the Final Report.

273. Promotion of National Unity and Reconciliation Act 34 of 1995 chs. 3, 4, 5 (1995) (S. Afr.). For detailed descriptions of the HRVC and the AC, see LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA [hereinafter LOOKING BACK, REACHING FORWARD] (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000). These committees investigated and, in a sense, "adjudicated" cases of gross human rights violations by establishing the responsibility of perpetrators for historical and amnesty purposes, respectively. In this regard, they employed standards and techniques similar to those used

vice chairperson, and five other members selected by the Commission at large, was charged with implementing the TRC Act's directives regarding reparations as described above; it was also tasked with recommending urgent interim measures.²⁷⁴ In addition to setting forth the CRR's powers and duties, the Act provided a general framework for processing applications for reparations.²⁷⁵ It further outlined the political procedure whereby the CRR's recommendations would be submitted to the President for subsequent consideration and approval by Parliament.²⁷⁶ The Act also provided for the creation of a President's Fund, to consist of all funds appropriated by Parliament or contributed from other sources for the payment of reparations.²⁷⁷

In discharging its functions, the CRR first had to determine who qualified as a victim. According to the Act, "[a]ny person who [was] of the opinion that he or she [had] suffered harm as a result of a gross violations of human rights [could] apply for reparation."²⁷⁸ Because presenting the Government with an open-ended list of victims was impractical, the CRR limited the possible reparation recipients to those individuals who had made victim statements before the CHR V prior to December 15, 1997, when the process ended.²⁷⁹ The final list of victim applicants the CRR compiled for the TRC numbered 22,000.²⁸⁰ Of these, over 14,000 received cash payments ranging from US\$250 to US\$750 as beneficiaries of the Urgent Interim Reparations ("UIR") Program which began in July 1998.²⁸¹ In a departure from the terms of the TRC Act, the CRR was authorized to distribute the compensation directly to those claimants it

by some IMCPs charged with arbitrating claims, like the Iran-U.S. Claims Tribunal. But the key distinction is that the decision regarding who is a victim and therefore a claimant was not tied to the determination of perpetrator responsibility *per se*, but rather decided in a separate, less formal process by the CRR. See Orr, *supra* note 250, at 243.

274. Promotion of National Unity and Reconciliation Act 34 of 1995 s.25(1)(a) (S. Afr.).

275. *Id.* at s.25, 26. The rules stipulated by the TRC Act in respect of the CRR were few and fairly broad, especially when compared to the extensive and detailed procedures explicitly dictated to govern the Amnesty Committee's more politically charged work.

276. *Id.* at s.27. Under the Act, the President was responsible for issuing the regulations to implement Parliament's resolution on reparations. See Colvin, *supra* note 251, at 183.

277. Promotion of National Unity and Reconciliation Act 34 of 1995 s.42 (S. Afr.).

278. *Id.* ch. 5, ¶ 26.

279. Orr, *supra* note 250, at 243. Dumisa Ntsebeza, *The Struggle for Human Rights: From the UN Declaration of Human Rights to the Present*, in LOOKING BACK, REACHING FORWARD, *supra* note 273, at 2, 6-8. The CHR V determined whether individuals were victims of gross human rights violations under the meaning of the TRC Act by an elaborate statement-taking process generally followed by fact-finding by the Investigative Unit. All of the CHR V's findings had to be based on verified or corroborated evidence and were required to meet the standard of proof employed by the TRC – proof on a balance of probabilities.

280. Colvin, *supra* note 251, at 192.

281. *Id.* at 188-89. See also Oupa Makhalemele, *Still not Talking: The South African Government's Exclusive Reparations Policy and the Impact of the R30,000 Financial Reparations on Survivors*, in REPARATIONS FOR VICTIMS, *supra* note 18, 547 (noting that "[b]y the end of 1999, the President's Fund had paid out R16,754,921 in urgent interim reparations to 15,078 survivors.").

determined had “urgent medical, emotional, educational, material and/or symbolic needs.”²⁸² For example, beneficiaries included individuals who were not expected to outlive the TRC and claimants who had no fixed home or shelter.²⁸³ The UIR process was complete by 2001, with payments totaling US\$5.5 million.²⁸⁴

To design a general reparations policy to recommend to the government, the CRR relied heavily on nationwide consultations with victims, though it looked to international sources and experiences as well.²⁸⁵ Most victims surveyed requested monetary or other forms of compensation; second on their list of desired reparations were official investigations into the violations suffered.²⁸⁶ A lawsuit filed soon after the creation of the TRC challenged its legality on the grounds that the amnesty provisions contravened the new Constitution by foreclosing criminal and civil remedies, including compensation, for victims of persons the TRC granted amnesty.²⁸⁷ The Constitutional Court, however, disagreed. It found that the amnesty provisions were a necessary means for securing greater truth telling, which was essential to advancing the constitutional goals of reconstruction and reconciliation.²⁸⁸ In other words, because Parliament was authorized to balance competing goals in the national interest, “the abrogation of victims’ rights to civil and criminal redress was . . . constitutionally certified.”²⁸⁹

Several other issues arose during the CRR process. One was a conflict in the perceptions of pecuniary versus non-pecuniary or symbolic measures, reflecting the tension between individual and collective reparations.²⁹⁰ A related concern was whether compensation should consist of monetary payments to victims, or whether a package of social services represented a better approach.²⁹¹ In the end, after consulting with an economist, the CRR decided to recommend the payment of “individual reparations grants” over a six-year

282. Measures to Provide Urgent Interim Reparation to Victims, GN R545 of 3 April 1998, in GOVERNMENT GAZETTE 18822; 5 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, ch. 5, ¶ 56 (Oct. 29, 1998) [hereinafter TRC REPORT]; see also Colvin, *supra* note 251, at 187-89. Direct compensation was permitted because of the delays experienced in responding to victims with urgent needs, and the desire to avoid further obstacles to the implementation of the UIR.

283. Colvin, *supra* note 251, at 188.

284. *Id.* at 189.

285. Orr, *supra* note 250, at 242.

286. *Id.*

287. Colvin, *supra* note 251, at 185.

288. *Azanian People's Organization (AZAPO) v. President of the Rep. of South Africa* 1996 (4) SA 672 (CC), ¶¶ 17-21 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/1996/16.html>.

289. Colvin, *supra* note 251, at 185.

290. Brandon Hamber, *Repairing the Irreparable: Dealing with the Double-Binds of Making Reparations for Crimes of the Past*, 5 ETHNICITY & HEALTH 221 (2000).

291. Orr, *supra* note 250, at 244-45.

period to victims on the final list compiled with input from the CHR.V.²⁹² The suggested amount was based on the median annual household income for a family of five in South Africa in 1997, with the amount increased for beneficiaries in rural areas to facilitate access to services.²⁹³

The CRR's recommendations on reparations were published in October 1998 as part of the TRC's "Interim" Report.²⁹⁴ In addition to the individual grants, the TRC's recommended reparations policy included symbolic measures to be adopted at the individual (e.g. issuing death certificates), community (e.g. erecting memorials), and national levels (e.g. establishing a day of remembrance).²⁹⁵ It recommended community rehabilitation (e.g. resettlement of displaced persons) and institutional reform aimed at preventing the recurrence of human rights violations in the future.²⁹⁶ The TRC also advocated for the establishment of an elaborate governmental entity under the President's direction to implement the program.²⁹⁷ The TRC Report affirms that reparations play an important role in the process because they concretize the state's recognition of its responsibility for past abuses, help to restore the dignity of victims, and raise public awareness of the need to reconcile past wrongs to ensure future reconciliation as a nation.²⁹⁸

After years of foot-dragging in the face of intense pressure from victims' organizations, the South African government under President Thabo Mbeki finally decided in April 2003 to announce its final reparations program.²⁹⁹ Rejecting the TRC's recommendation of a grant program, it instead to provide a one-time payment of R 30,000, or roughly US \$4000, to each of the 18,000 survivors named by the TRC.³⁰⁰ The government similarly agreed to provide

292. Colvin, *supra* note 251, at 194; *see also* Ntsebeza, *supra* note 279. *See supra* note 31 for a brief description of the process employed by the CHR.V.

293. TRC REPORT, *supra* note 282, vol. 5, ch. 5, ¶¶ 69-70; Colvin, *supra* note 251, at 194. The CRR's final recommendation called for yearly individual reparations grants ranging from R17,029 (US\$2,129) to R23,023 (US\$2,878) to be paid out in six-month installments over a six year period.

294. Brandon Hamber, *Reparations as Symbol: Narratives of Resistance, Reticence and Possibility in South Africa*, in REPARATIONS: INTERDISCIPLINARY INQUIRIES 252, 254 (Jon Miller & Rahul Kumar eds., 2007) [hereinafter Hamber II]; Colvin, *supra* note 251, at 193. The Final Report was submitted in 2003 after the work of the Amnesty Committee was complete.

295. Colvin, *supra* note 251, at 195.

296. *Id.* at 195-96.

297. *Id.* at 196-97.

298. TRC REPORT, *supra* note 282, vol. 5, ch. 8.

299. Hamber II, *supra* note 294, at 256-57. *See* TRC Act: Regulations Regarding Reparation to Victims, REGULATION GAZETTE 7821 of 12 November 2003, 461 GOVERNMENT GAZETTE 25695, available at http://us-cdn.creamermedia.co.za/assets/articles/attachments/00932_regulation1660.pdf. The regulations granted reparations to those victims and beneficiaries of victims who were identified as eligible by the CRR based on the CHR.V's statement-taking process. The reparations were paid out of the President's Fund, which was administered by an appointed accounting officer. The final reparations were available to the identified victims or their beneficiaries by request only.

300. Makhalemele, *supra* note 281, at 542. It is important to note that in 2003, President Mbeki charged the South African Department of Justice and Constitutional Development with

“community reparations and assistance through opportunities and services,” and to advance with measures to establish national holidays and memorials in remembrance of this legacy.³⁰¹ The President’s Fund established for this purpose began making the promised cash payments in November 2003; within a year it had distributed most of them, totaling approximately US \$80 million, or one-fifth of the reparations amount originally recommended by the TRC.³⁰² As noted at the outset, the South African reparations process has been criticized as “too little, too late” in regard to both the urgent interim reparations and the final reparations programs.³⁰³ It is evident that the government’s emphasis on truth telling, amnesty and reconciliation in the TRC process dampened the impact of the reparations component to a significant degree.³⁰⁴

6. *Swiss Banks Dormant Accounts (CRT-I, CRT-II)*

While the Claims Resolution Tribunal for Dormant Account in Switzerland (CRT- I) and the Claims Resolution Tribunal (CRT-II) provide classic examples of mass claims processing to provide restitution for property losses, i.e. Swiss bank accounts that have been dormant since the end of World War II, their creation is overlaid with a modern day human rights goal of correcting an historical wrong perpetrated by Nazi Germany.³⁰⁵ Prior to and during World War II, many subsequent victims of the Nazi regime sought to move their assets to safety in neutral or allied countries.³⁰⁶ Due to Switzerland’s geographic proximity to Axis and Axis-occupied countries and its bank secrecy laws, many victims opened accounts with the Swiss National Bank and various other Swiss

implementing these and other TRC recommendations. In 2005, a specialized unit, the TRC Unit, was created within this Department to complete the work. *Id.* at 544.

301. Colvin, *supra* note 251, at 209.

302. Hamber II, *supra* note 294, at 257. The TRC’s projected budget for its proposed reparations program was US\$460 million. The Accounting Office of the President’s Fund reported that by March 2007, nearly 16,000 applicants for reparations approved by the TRC had received the one-off payment. *See* Makhalemele, *supra* note 281, at 544, 558.

303. Makhalemele, *supra* note 281, at 541-42, 565-56; *see also* Orr, *supra* note 250, at 294; Colvin, *supra* note 251, at 177, 189, 200-03.

304. *See generally* Orr, *supra* note 250; Colvin, *supra* note 251. “Economic justice and the restoration of the moral order should be seen as two sides of a single coin. Whereas the focus of the Commission was on truth seeking in the search for reconciliation and unity, serious delays in delivering social services could bring into disrepute any talk of reconciliation.” Boraine, *supra* note 249, at 300.

305. *See* Alfonse D’Amato, *Justice, Dignity and Restitution of Holocaust Victims’ Asset*, 20 CARDOZO L. REV. 427, 431 (1988). Senator D’Amato explained that in meeting with Edgar Bronfman, who was negotiating with the Swiss banks regarding the dormant accounts, Bronfman told D’Amato that it was not a question of settling for a specified amount of money. Rather, it was “a question of getting an accounting and getting justice.” *Id.*

306. REPORT OF THE INDEPENDENT COMMITTEE OF EMINENT PERSONS REPORT ON DORMANT ACCOUNTS OF VICTIMS OF NAZI PERSECUTION IN SWISS BANKS, ¶ 8 [hereinafter VOLCKER REPORT], available at http://www.crt-ii.org/ICEP/ICEP_Report_english.pdf.

commercial banks.³⁰⁷ However, as many account holders perished in the Holocaust and their heirs were unable to prove ownership of the accounts, the assets in the banks remained unclaimed.³⁰⁸

The effort to resolve assets held in Swiss banks resulted in two distinct processes to adjudicate claims for dormant Swiss bank accounts. In July 1997, due to pressure on the Swiss Bankers Association (SBA) and the Swiss Federal Banking Committee (SFBC), the SBA published the names of account holders whose accounts were opened prior to World War II and had been dormant since the end of that war.³⁰⁹ In October 1997, the SBA published additional names in a second list.³¹⁰ From 1997 until 2001, CRT-I resolved claims to these accounts. Beginning in 2001, CRT-II was established under a new set of procedures and utilizing new rules to resolve claims to an additional 21,000 accounts.³¹¹ These CRT-II accounts were published in 2001, after an independent audit of the Swiss Banks that the Independent Committee of Eminent Persons (“ICEP”) initiated in November 1996,³¹² which concluded that these accounts possibly or probably belonged to victims of Nazi persecution.³¹³

The CRT-I was created as a result of negotiations between Jewish groups and the major Swiss banks to rectify the denials by those banks of access to the accounts held by victims of the Nazi government who died during the Holocaust.³¹⁴ In May 1996, the Swiss Bankers Association entered into a Memorandum of Understanding (MOU)³¹⁵ with the World Jewish Restitution Organization (WJRO) to establish an independent investigation of the bank accounts that had been dormant since the end of World War II and their rightful ownership by victims of Nazi persecution.³¹⁶ To conduct this investigation, the

307. *Id.*; Rolf Weber, *Holocaust-Related Claims and Liability of Swiss Banks – Political and Legal Implications*, 36 INT’L LAW. 1213, 1215 (Winter 2002).

308. For a discussion of the history of Swiss Holocaust bank accounts, see Roger Alford, *The Claims Resolution Tribunal and Holocaust Claims Against Swiss Banks*, 20 BERKELEY J. INT’L L. 250, 252-59 (2002) [hereinafter *Holocaust Claims Against Swiss Banks*].

309. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 25.

310. *Id.*

311. *Id.* at 260.

312. Sylvain Beauchamp, *The New Claims Resolution Tribunal for Dormant Accounts in Switzerland – Distribution Organ, Mass Claims Adjudicative Body or Sui Generis Entity?*, 3 J. OF WORLD INVESTMENT 999 (2002). Paul Volcker, former Chairman of the Board of Governors of the United States Federal Reserve System, was the chair of ICEP, and as a result, ICEP was also referred to as the “Volcker Committee.” HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 24. The report issued by the Volcker Committee at the end of the four-year audit is referred to as the “Volcker Report.” *See supra* note 306.

313. Beauchamp, *supra* note 312, at 1011.

314. J. Crook, REDRESSING INJUSTICES, *supra* note 1, at 49.

315. *See Memorandum of Understanding, Appendix A to VOLCKER REPORT, supra* note 306, available at http://www.crt-ii.org/ICEP/ICEP_Report_Appendices_A-W.pdf.

316. Thomas Buergenthal, *Arbitrating Entitlement to Dormant Bank Accounts*, in LIBER AMICORUM IBRAHIM F.I. SHIHATA 79 (Sabine Schlemmer-Schulte & Ko-Yung Tung eds., 2001).

Memorandum of Understanding established ICEP,³¹⁷ which was tasked to conduct an investigative audit to determine the existence of dormant accounts, financial instruments, and other assets of the victims of Nazi persecution that were deposited in Swiss Banks before and during the Second World War.³¹⁸ After conducting audits of the dormant Swiss banks and building databases of the names of victims of Nazi persecution, ICEP and the Swiss Federal Banking Commission (SFBC) jointly organized a foundation, the “Independent Claims Resolution Foundation”, to monitor a Claims Resolution Tribunal (CRT-I).³¹⁹

Like the Iran-U.S. Claims Tribunal, the CRT-I operated as an international arbitral tribunal. As Lucy Reed, one of the principal architects of CRT-I, aptly stated “the basic principles of international commercial arbitration provided certain foundation stones of this unique multiple claims resolution process.”³²⁰ The CRT-I was comprised of seventeen arbitrators, which included a Chairman and Vice-Chairman.³²¹ Article 30 of the Rules of Procedure established a secretariat,³²² which a Swiss law firm staffed and then supplemented with additional foreign lawyers, paralegals and secretaries.³²³ Sole Arbitrators or Claims Panels, comprised of three arbitrators, issued the CRT-I decisions.³²⁴ If a Claims Panel decided the claim, the panel consisted of one Swiss and two non-Swiss arbitrators.

The CRT-I’s mandate was to adjudicate all claims pertinent to the dormant accounts.³²⁵ In July and October 1997, the Swiss Bankers Association published in the world press and on the Internet the names and last known domiciles of account holders that held accounts prior to the end of the Second World War and that have been dormant since that time.³²⁶ The two lists included approximately 5,570 bank accounts.³²⁷ Approximately 9,900 claims related to these account were received for adjudication.³²⁸

317. *Id.* at 80.

318. VOLCKER REPORT, *supra* note 306, ¶¶ 13-17.

319. Buergenthal, *supra* note 316, at 80.

320. Lucy Reed, *Arbitration Principles in Resolving Holocaust Bank Claims*, in INSTITUTIONAL AND PROCEDURAL ASPECTS, *supra* note 7, at 61.

321. See Shai Wade, *Mass Claims Arbitration: The Experience of The Claims Resolution Tribunal for Dormant Accounts in Switzerland*, 14 MEALEY’S INT’L ARB. REP. 1, Annex 1, for a list of the arbitrators and their brief biographies.

322. Rules of Procedure for the Claims Resolution Process, art. 30 (1997), available at http://www.crt-ii.org/_crt-i/frame.html [hereinafter CRT-I Rules of Procedure].

323. Hans Van Houtte et al., *Winning the Parties’ Hearts and Minds*, POST-WAR RESTORATION OF PROPERTY RIGHTS UNDER INTERNATIONAL LAW, VOLUME 1: INSTITUTIONAL FEATURES AND SUBSTANTIVE LAW 73, n.89 (2008) [hereinafter Hans van Houtte et al.].

324. CRT-I Rules of Procedure, *supra* note 322, arts. 3-5.

325. *Id.*

326. Volcker Report, *supra* note 306, ¶12; Wade, *supra* note 321, at 1, n.7 (1999).

327. Volcker Report, *supra* note 306, ¶12.

328. Buergenthal, *supra* note 316, at 81.

Once a claimant submitted a claim, it was forwarded to the bank holding the account. Due to Swiss bank secrecy laws, the bank's name and the amount in the account were not disclosed to the public.³²⁹ The bank would then review the claim, decide whether it wanted its name and the amount in the account disclosed to the claimant and have the claimant sign a Claims Resolution Agreement, or it would deny the claim.³³⁰ In either case, the claim was transmitted to CRT-I, either to proceed in arbitration if the bank had disclosed its name and the amount in the account to the claimant, or for an initial screening by the CRT-I if the bank had denied disclosure of the information.³³¹

The Initial Screening process was "an admissibility proceeding with a very low threshold."³³² Its purpose was to screen out claims that had no merit in order to simplify and quicken the claims process. The Sole Arbitrator, after reviewing the claim, would order that the name of the bank and the amount in the account be disclosed to the claimant, unless it was determined that "(i) the claimant has not submitted any information on his or her entitlement to the dormant account, or (ii) if it appears that the claimant is not entitled to the dormant account."³³³ A written Initial Screening decision was mailed to the claimant and if the claimant disagreed with the decision of the Sole Arbitrator, the claimant could, within 30 days, re-submit the claim for an additional Initial Screening by a Claims Panel of three arbitrators, which would consider the claim *de novo*.³³⁴

Once the bank or the Tribunal determined that the claimant should receive the pertinent bank information, the claim proceeded in arbitration—either as a "fast track"³³⁵ or "ordinary" procedure.³³⁶ The "fast track" procedure was used when a bank believed the claimant was entitled to the assets in the account and the bank was willing to pay the amount pursuant to an award or via a settlement agreement between the bank and the claimant or claimants.³³⁷ In addition to claims that were subject to "fast track" procedures by the bank, another expedited procedure was developed by the CRT-I and SBA to deal with small amount claims on accounts that had a balance of less than 100 Swiss Francs, and where the bank was willing to pay ten times the reported amount in full and final

329. Hans Van Houtte et al., *supra* note 323, at 73.

330. Wade, *supra* note 321 at 3; see also R. Alford, *Federal Courts, International Tribunals, and The Continuum of Deference*, 43 VA. J. INT'L L. 675, 713-14 (2003) (noting that one of the fundamental tenets of arbitration is that the parties submit to the jurisdiction of the arbitral panel).

331. CRT-I Rules of Procedure, *supra* note 322, art. 10.

332. Buergethal, *supra* note 316, at 83.

333. CRT-I Rules of Procedure, *supra* note 322, art. 10(3).

334. *Id.*

335. *Id.* Arts. 11-12.

336. *Id.* Arts. 14-15.

337. Wade, *supra* note 321, at 12; Hans Van Houtte et al., *supra* note 323, at 74; *Holocaust Claims Against Swiss Banks*, *supra* note 308, at 261.

settlement of the claims.³³⁸

All claims that were not resolved in either Initial Screening or “Fast Track” proceedings were resolved in Ordinary Procedure.³³⁹ This procedure required “a full review of the claim and all available evidence in an expedited procedure.”³⁴⁰ It was used when multiple unrelated claimants filed claims to the same account or when the claims to the account presented difficult inheritance or conflict of laws questions.³⁴¹ The procedure itself was governed by Article 17 which provided that the Claims Panel “conduct the proceedings in an informal manner and under relaxed procedural rules that are convenient for the claimants and take into account their age, language and residence.”³⁴² Most important, the rules gave the arbitrators full discretion in conducting the proceedings to ensure “an expeditious and equitable determination of all claims to dormant accounts.”³⁴³ The CRT-I proceedings as a result were mostly document only proceedings, with the arbitrators basing their decisions on law and equity.

In reviewing the claim, entitlement was to be established in accordance with the relaxed standards of proof provided in Article 22.³⁴⁴ Article 22 of the Rules of Procedure provided that “[t]he claimant must show that it is *plausible* in light of all of the circumstances that he or she is entitled, in whole or in part, to the dormant account.”³⁴⁵ This plausibility standard was balanced against the circumstances that faced the claimants at the time as reflected by the fact that CRT-I decision makers were instructed to “bear in mind the difficulties of proving a claim after the destruction of the Second World War and the Holocaust and the long time that has elapsed since the opening of these dormant accounts.”³⁴⁶ Even with this low standard of proof, claims were difficult to prove as heirs often had little or no evidence to establish familial connections to the account holder and the banks, for the most part, had very little biographical information about the account holder.³⁴⁷ The relaxed standard of proof as applied by CRT-I meant that information known to the claimant is often used as a substitute for documentary evidence of a familial relationship.³⁴⁸ Specifically, if a claimant provided biographical information about his or her relative that matched unpublished information about the account holder, such as date of

338. Hans Van Houtte et al., *supra* note 323, at 74-75.

339. CRT-I Rules of Procedure, *supra* note 322, art. 14.

340. *Id.*

341. Buergenthal, *supra* note 316, at 90.

342. CRT-I Rules of Procedure, *supra* note 322, art. 17.

343. *Id.* art. 15.

344. *Id.* art. 15.

345. *Id.* art. 22 (emphasis added).

346. *Id.*

347. Buergenthal, *supra* note 316, at 94.

348. Wade, *supra* note 321, at 20.

birth, occupation, or address, this information likely was sufficient to establish entitlement to the account.³⁴⁹

If the CRT-I determined that the claimant was entitled to the account, it would render a Partial Award that directed the bank to distribute the assets to the claimant.³⁵⁰ Once the Independent Claims Resolution Foundation issued the Rules on Interest, Charges and Fees,³⁵¹ the CRT-I determined whether the claimant was entitled to an upward adjustment of its award to reflect unpaid simple interest on the account since 1945 and to compensate for bank fees deducted from the account for the same period.³⁵² The claimant would receive the adjustment in a Final Award if the account holder was determined to be a victim or target of Nazi persecution.³⁵³

Through its process of initial screening and fast track and ordinary procedure, CRT-I reviewed over 9,900 claims.³⁵⁴ Upon finishing this review in September 2001, the CRT-I had awarded 49 million Swiss Francs (approximately US \$30 million) to claimants who claimed “non-Victim” accounts and 16 million Swiss Francs (approximately US \$10 million) to claimants who were awarded accounts owned by victims of Nazi persecution.³⁵⁵

CRT-II, as a successor entity to CRT-I, continued to adjudicate claims to dormant bank accounts on a case-by-case basis to determine if the claimant was plausibly entitled to the claimed account. CRT-II was tasked with resolving claims to dormant Swiss accounts as part of the implementation of a Settlement Agreement reached in a consolidated class action lawsuit brought in the United States District Court for the Eastern District of New York against major Swiss banks.³⁵⁶ The lawsuits were settled in 1999, with the banks agreeing to fund a \$1.25 billion settlement.³⁵⁷ The court then appointed a special master to determine the appropriate allocation of the settlement fund among the different

349. *Id.*; Buergenthal, *supra* note 316, at 94.

350. CRT-I Rules of Procedure, *supra* note 322, arts. 31-33.

351. See www.crt-ii.org/_crt-i/rules_interest.html for the complete text of the Rules on Interest, Charges and Fees for Arbitral Decision of the Claims Resolution Tribunal [hereinafter Rules on Interest].

352. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 284. See also *Holocaust Claims Against Swiss Banks*, *supra* note 308, at 263 for a fuller discussion of the four-step process for calculating the interest and fees.

353. Rules on Interest, *supra* note 351, art. 4B. A victim of Nazi persecution was defined in the Rules on Interest as “[a]ny individual, corporation, partnership, sole proprietorship, unincorporated association, community, congregation, group, organization, or other entity persecuted or targeted for persecution by the Nazi Regime because they were or were believed to be Jewish, Romani, Jehovah’s Witness, homosexual, or physically or mentally disabled or handicapped.” *Id.* art. 2I.

354. Hans Van Houtte et al., *supra* note 323, at 75.

355. See CRT-I Progress Report/Statistics, http://www.crt-ii.org/_crt-i/frame.html.

356. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 25.

357. Settlement Agreement, *In re Holocaust Victim Assets Litig., CV-96-4849* (E.D.N.Y. 2000), available at www.swissbankclaims.com/PDFs_Eng/exhibit1toPlanofAllocation.pdf.

classes that composed the class action.³⁵⁸ Once drafted and approved by the court, the Plan of Allocation and Distribution³⁵⁹ constituted the CRT-II as the entity to “decide claims to assets deposited with Swiss banks by victims or targets of Nazi persecution in accounts that were open or opened during the period 1933 to 1945.”³⁶⁰

While CRT-I was designed as an international arbitration process and functioned as such, the CRT-II was “a court-sponsored alternative dispute resolution process.”³⁶¹ It was not an arbitral tribunal as the banks no longer had an interest in the proceedings. All payments to successful claimants from dormant accounts of victims of Nazi persecution, whether already paid or pending payment, were credited against the allocated \$800 million in the Settlement Fund.³⁶² Thus, while retaining the nature of an international tribunal, CRT-II’s function was to act as a class action settlement distribution body.³⁶³ The CRT-II was not instructed to adjudicate claims between the bank and claimants; rather, it applied a series of presumptions contained in the CRT-II Rules of Procedure to determine whether the claimant was entitled to the dormant account.³⁶⁴

The CRT-II’s Rules of Procedure, instead of implementing the Initial Screening process of CRT-I, provided for standards of admissibility based on whether the claimant presented any information that provided a reasoned and satisfactory basis for further examination of the claim.³⁶⁵ In order for a claim to be admissible, Article 18 of the Rules Governing the Claims Resolution Process (the “Rules”) required that the claim be sufficiently detailed about the account holder to provide enough information to determine eligibility for entitlement.³⁶⁶ Additionally, claims were inadmissible if a victim or target of Nazi persecution did not hold the account.³⁶⁷

358. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 26.

359. Special Master’s Proposed Plan of Allocation and Distribution of Settlement Proceeds, www.swissbankclaims.com/DistributionPlan.htm [hereinafter Plan of Allocation and Distribution]. The Plan of Allocation and Distribution was approved by the U.S. district court on November 20, 2000. In re Holocaust Victim Assets Litig., 2000 WL 33241660 (E.D.N.Y. 2000), *aff’d*, 413 F.3d 183 (2d Cir. 2005). Out of the \$1.25 billion, \$800 million dollars was allocated for distribution to claimants who filed claims for dormant accounts held by Swiss banks.

360. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 26.

361. *Holocaust Claims Against Swiss Banks*, *supra* note 308, at 265.

362. T. Buergethal, *supra* note 316, at 101.

363. For a discussion of the legal nature of the CRT-II, see Beauchamp, *supra* note 312, at 1026-34.

364. CRT-II Rules Governing the Claims Resolution Process, art. 28, *available at* http://www.crt-ii.org/_pdf/governing_rules_en.pdf [hereinafter CRT-II Rules of Procedure].

365. *Id.* art. 18.

366. *Id.*

367. *Id.* art. 14 (providing “[t]he CRT shall have jurisdiction to resolve claims to Accounts of Victims open or opened in Swiss banks during the Relevant Period and to certify to the Court for payment of the value of Accounts.”); art. 46(4) (stating that the Tribunal does not have jurisdiction

If the claimant successfully passed this admissibility requirement, eligibility for an award of the claimed account was now determined by computerized matching of account holders to claimants.³⁶⁸ This step, referred to as “matching” in Article 19 of the CRT-II Rules, occurred when one or more accounts in the computerized Account History Database was the same or similar to the name of the relative of the claimant asserting the claim.³⁶⁹ In the case of a successful match, the CRT-II then made a determination under Article 22 using a relaxed standard of proof³⁷⁰ that the claimed owner and the actual owner of the account were the same individual.³⁷¹ Article 28 of the CRT-II Rules provided a number of presumptions that the Tribunal was to apply to the claim explaining why the account holder did not receive the proceeds of the account that would justify an award of the account, absent plausible evidence to the contrary.³⁷²

Once a determination was made that the Account Holder never received the proceeds of the account, the CRT-II determined distribution. CRT-I, in making this determination, relied upon the inheritance laws applicable between the account holder and the individuals claiming the account.³⁷³ Under the CRT-II Rules, Article 23 provided rules of distribution for the amounts awarded, in the absence of a will or other inheritance documents.³⁷⁴

Since 2001, when CRT-II began, it has received over 33,000 claims for accounts held in Swiss banks since the Second World War. As of March 2010, the CRT-II had awarded 2,902 claims for a total of approximately US \$472 million.³⁷⁵

III.

COMPARATIVE ANALYSIS OF SELECTED IMCPs AND TJCPs

We now turn to a comparative analysis of the two types of claims procedures illustrated in the previous section. Contrary to the approach of most

to resolve claims submitted for an account whose holder was not a victim of Nazi persecution).

368. *Id.* arts. 19-21.

369. *Id.*

370. *Id.* art. 17. CRT-II adopted the same relaxed standard as CRT-I. Article 17 provides that “[e]ach Claimant shall demonstrate that it is plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the claimed Account.” *Id.*

371. *Id.* art. 22.

372. *Id.* art. 28.

373. CRT-I Rules of Procedure, *supra* note 322, art. 16.

374. CRT-II Rules of Procedure, *supra* note 364, art. 23.

375. See www.crt-ii.org/_awards/index.phtm. Despite the fact that it has placed a premium on speed and efficiency due to an elderly Holocaust survivor claimant community, the CRT-II has been in operation for over nine years and is still processing claims today. *Id.*; *Holocaust Claims Against Swiss Banks*, *supra* note 308, at 277.

commentators,³⁷⁶ we start by looking at the differences between the two types of claims procedures, before addressing the parallels.³⁷⁷ The most obvious difference, of course, is the context in which each takes place: most IMCPs play largely on the field of international law and international relations, while TJCPs are shaped primarily by powerful social-political forces in the domestic realm.³⁷⁸ Not surprisingly, from the dissimilar political contexts involved, a number of other significant divergences between the two types of claims procedures are derived. Foremost among these is the distinct nature of the constituting legal norms underpinning each set of procedures. IMCPs are generally framed by international agreements by, between, or among states, or by agreements to arbitrate internationalized issues between parties;³⁷⁹ TJCPs, on the other hand, are exclusively a product of domestic executive and legislative legal processes.³⁸⁰ Since the settings and foundations of these two types of claims procedures are so different, it is not surprising that the divergences outnumber the convergences.

For these reasons, we start by examining a number of basic differences between the two types of mass claims processes, beginning with the distinct goals and values promoted by each. Other differences involve key issues like determinations of liability; the nature of the parties and the claims processes; the types of decision makers employed; the remedies offered; and the mechanisms established for the payment and enforcement of awards. It is also instructive to contrast the degree to which the lessons learned from a given mass claims process can benefit subsequent efforts; such “transferability” varies greatly between the institutionalized “recycling” of IMCP experiences and the inherent

376. See *supra* Introduction.

377. A necessary caveat to this approach is to recognize that the IMCP and TJCP categories are neither homogenous nor static. On the one hand, there are significant variations between and among types of IMCPs as well as TJCP experiences as we have defined them. Each claims process, regardless of context, is a dynamic response to the particular circumstances within which it arises. Moreover, the two fields are in flux, so there are few absolutes in either direction. That said, it is equally clear that the categories as defined either mirror accepted terminology or reflect widely shared understandings in the international mass claims and transitional justice fields, respectively. In addition, the methodical analysis of paradigmatic TJCPs and IMCPs in Part II further substantiates our reliance upon a broad set of widely accepted definitional parameters for each category, which are based on past and current practice. Our intention is not to circumscribe these processes to artificial boundaries or ignore the significant variations that may exist between them. Rather, we seek to capture the essence of each process’ evolution to enable constructive comparative analyses in the future.

378. Domestic actors or forces within state parties may influence the development of IMCPs, and TJCPs may be susceptible to international law’s influence on internal processes. See *supra* Part II. However, the essential nature of each is undisputedly anchored in the distinct arenas described, despite some overlap.

379. See *infra* Part III.A.3; HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 17.

380. See *infra* Part III.A.3; see also Richard Falk, *Reparations, International Law, and Global Justice: A New Frontier*, in HANDBOOK OF REPARATIONS, *supra* note 14, at 498; SHELTON, *supra* note 15, at 400.

uniqueness of every TJCP. The objective of this sub-section, then, is to bring to the fore several of the key contextual, conceptual, structural and practical differences that distinguish traditional IMCPs from their home-grown cousins, the TJCPs.

After exploring these dissimilarities, we will engage in a more informed study of apparent and actual parallels between the two mechanisms viewed in light of the preceding analysis. Any contemplation of similarities between IMCPs and TJCPs is substantively affected when conducted *after* careful study of the myriad differences that separate them. By applying this methodology, we are inevitably drawn to a number of operational aspects of these claims processes that, upon closer examination, share a functional equivalency in either context. The best examples are provided by those operational principles and procedures inherent in any mass claims process, regardless of context, such as establishing credibility or identifying and screening claimants. On the other hand, some frequently cited characteristics that appear to be shared, and thus, comparable, including those relating to the remedial nature of both IMCPs and TJCPs, turn out upon closer examination not to be as substantially equivalent as generally presumed. But, this conclusion can only be fully appreciated after a thorough examination of the differences that reign between the two.

A. *IMCPs and TJCPs: How Are They Different?*

1. *Divergent Goals and Values Promoted*

IMCPs and TJCPs exist on different planes and arise within different normative frameworks.³⁸¹ What is perhaps less obvious is that, because the institutional goals pursued by each are shaped by the distinct contexts involved, these goals and the underlying values they promote can be substantively different. By contrasting the prevailing definitions for each type of claims process, one can begin to look past nominal similarities to discern just how dissimilar the two can be in function as well as purpose.

As a rule, IMCPs are established as an alternative to judicial and other dispute resolution mechanisms,³⁸² often in the interest of promoting international peace and stability.³⁸³ It is no coincidence that modern day IMCPs grew out of the evolution of international arbitration procedures and corresponding institutions such as the Permanent Court of Arbitration.³⁸⁴ Indeed, in several notable instances, such processes have been charged with

381. See *infra* Part III.A.3. See also Falk, *supra* note 380, at 498; SHELTON, *supra* note 15, at 400.

382. Crook, *supra* note 1, at 55; see also Das, *supra* note 30, at 5; HOLTZMANN & KRISTJANSÐOTTIR, *supra* note 8, at 1, 6; see also *infra* note 420 *et seq.* and accompanying text.

383. See Holtzmann, *Forward*, in REDRESSING INJUSTICES, *supra* note 1, at v.

384. *Id.*

adjudicating the liability of a state or other party before establishing the arbitral award or granting compensation.³⁸⁵ This variation notwithstanding, the overarching goal of any IMCP is to provide “effective remedies for numerous individuals who suffered losses, damage or injuries as a result of an armed conflict or a similar event causing widespread damage.”³⁸⁶ These remedies, as Howard Holtzmann points out, are generally limited in practice to monetary compensation or restitution because they are most often directed at redressing property claims.³⁸⁷ With few exceptions, the compensation of personal injuries has traditionally taken a back seat to property losses in the international context.³⁸⁸ On the other hand, IMCPs are generally successful at achieving elevated degrees of “completeness,” understood as the “ability of a program to cover [the] universe of potential beneficiaries.”³⁸⁹

Another defining characteristic of IMCPs is the creation of an adjudicatory and/or administrative organ, called “a tribunal, a commission, or other dispute resolution body,”³⁹⁰ which is charged with implementing the specific mandate defined by the parties to the underlying agreement.³⁹¹ In this key respect, “[IMCPs] are usually self-contained *ad hoc* regimes . . . driven by the administrator rather than the parties.”³⁹² The primary challenge faced by these claims processing bodies is resolving

the tension between individualized justice, on the one hand, and efficiency and speed, on the other . . . [In other words, a] balance must be struck between the traditional requirements of fairness [in individual cases] and the imperative to provide justice quickly to all claimants.³⁹³

The emphasis, however, is clearly on efficiency: IMCPs are usually judged on their ability to advance procedural goals such as “speed of process, cost-effectiveness, and consistency in the handling of claims and decision making.”³⁹⁴ Hans Das, quoting from a study of the UNCC, summarizes: “The guiding principle . . . is one of ‘practical justice: that is, a justice that would be

385. See *infra* Part III.A.2.

386. Das, *supra* note 30, at 5.

387. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 72-73. See *infra* Parts III.A.3, III.A.5.

388. All eleven of the international mass claims processes analyzed in HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, deal with property or contractual claims, among others; only two – UNCC and EECC – contemplate compensation for personal injuries resulting from violations of international law. See *infra* Part III.A.3.

389. De Greiff, *supra* note 14, at 6. The taxonomy of terms used to describe the effectiveness of reparations programs from which this concept is drawn is discussed in greater detail, *infra*. A good example of the comprehensiveness achieved by IMCPs on the whole is the UNCC, which processed US\$ 2.6 million claims. See Das, *supra* note 30, at 7.

390. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 6.

391. *Id.* at 17-19, 37-38.

392. Das, *supra* note 30, at 10. A notable exception to this general rule is the Iran-U.S. Claims Tribunal. See *supra* note 376 and accompanying text.

393. *Id.*

394. T. van den Hout, *supra* note 1, at xxx.

swift and efficient, yet not rough.”³⁹⁵

Now, contrast international mass claims processes with those taking place in the transitional justice context. TJCPs, as previously noted, are best defined as domestic programs enacted by government authorities through legislation and other legal means to provide reparations to citizens or residents who were victims of gross and often systematic human rights abuses that occurred in the country.³⁹⁶ As we have seen, these programs are generally comprised of legislatively driven administrative regimes that can overlap with existing procedures under domestic law for providing state granted benefits or redressing related types of harm.³⁹⁷ Or, they may require the creation of specialized mechanisms to fulfill their mandate,³⁹⁸ or both.³⁹⁹ Regardless of the actual configuration, state practice over the past several decades confirms the existence of what Ruti Teitel calls “a paradigm of transitional reparatory justice associated with transitional times”⁴⁰⁰ involving radical political change:

[This paradigm] is a complex conception, as it does work advancing multiple purposes mediating and constructing the transition. Transitional reparations publicly recognize and instantiate individual rights that are, in a sense,

395. Das, *supra* note 30, at 10, quoting David D. Caron and Brian Morris, *The United Nations Compensation Commission: Practical Justice, Not Retribution*, 13(1) EUR. J. INT’L L. 188 (2002).

396. See Argentina, South Africa and Hungary case studies *supra* Part II. See also SHELTON, *supra* note 15, at 400; Pablo de Greiff, *Justice and Reparations*, in HANDBOOK OF REPARATIONS, *supra* note 14, at 453 [hereinafter De Greiff II]. These abuses are usually attributable to the state directly, but may sometimes include abuses committed by non-state actors such as paramilitary groups acting in concert with state agents (Colombia) or armed opposition groups (Peru). For general background on the Colombian conflict and recent reparations processes, see Julian Guerrero Orozco and Mariana Goetz, *Reparations for Victims in Colombia: Colombia’s Law on Justice and Peace*, in REPARATIONS FOR VICTIMS, *supra* note 18, at 435-58. For an overview of the Peruvian experience, see JULIE GUILLEROT & LISA MAGARRELL, MEMORIAS DE UN PROCESO INACABADO: REPARACIONES EN LA TRANSICIÓN PERUANA (ICTJ/OXFAM/APRODEH 2006).

397. See, e.g., Argentina case study, *supra* Part II (illustrating the use of administrative law and procedure to disburse pensions, compensation and other benefits. This was likewise the model employed in Chile, where social benefits were administered through pre-existing government ministries or agencies). Elizabeth Lira, *The Reparations Policy for Human Rights Violations in Chile*, in HANDBOOK OF REPARATIONS, *supra* note 14, at 59 (pensions), 68-69 (health benefits). Similarly, in Hungary, the Executive’s justice office has been charged with implementing the administrative schemes created by the post-transition compensation. See *supra* notes 217-47 and accompanying text.

398. See South Africa case study, *supra* Part II (discussing mandate of the Truth and Reconciliation Commission in relation to reparations); see also Lira, *supra* note 397, at 60 (describing the National Corporation for Reparations and Reconciliation created to implement the recommendations of the Chilean Truth and reconciliation Commission). A good example of recent reparatory initiatives that required the creation of new institutions is from Colombia, where the National Reparations and Reconciliation Commission was created as part of the so called “Justice and Peace” process with demobilized paramilitary groups. See Arturo Carrillo, *Truth, Justice, and Reparations in Colombia: The Path to Peace and Reconciliation?* in COLOMBIA: BUILDING PEACE IN A TIME OF WAR 133, 145 (USIP Press 2009).

399. See Argentina and South Africa case studies *supra* Part II; see also Lira, *supra* note 397, 55-71 (describing different components of Chile’s reparations program).

400. TEITEL, *supra* note 211, at 146.

predominantly symbolic. Often they are not truly compensatory, bearing little or no relation to the material loss, exemplified in the Latin American “moral reparations” or the post-communist rehabilitations. Transitional reparations may take many forms: They can be in kind, as in property restitutions, monetary payments, or nonconventional redress, such as education vouchers or other collective public benefits, such as memorials, legislative rehabilitations, and apologies.⁴⁰¹

Even so, redressing the harm suffered by victims of human rights abuses is not the only goal of such reparatory policies nor, some would argue, the most important one. In the transitional justice context, reparations programs are one of several initiatives linked to a broader political strategy aimed at promoting national reconciliation and consolidating democratic institutions.⁴⁰² Such programs are part and parcel of the transformative policies adopted by transitional governments. At the same time, however, they are subject—and sometimes subordinated—to other priorities. South Africa provides a stark example where an emphasis on truth telling facilitated by amnesties eclipsed the government’s minimal efforts to adequately compensate or otherwise redress victims.⁴⁰³ In part, this tension is due to competing political demands on limited resources in hard times; it is one of the threshold challenges facing domestic decision makers. But, it also reflects the fact that “[t]he reparatory projects of societies in the extraordinary context of political flux [must] advance purposes related to radical political change other than those conventionally considered remedial, such as societal reconciliation and economic transformation.”⁴⁰⁴

Policymakers in countries undergoing such transformations therefore must grapple with the conundrum of providing a viable degree of “justice” for multitudes of individual human rights victims while ensuring the overarching social, political, and economic objectives of the transition.⁴⁰⁵ In addition, as numerous commentators have observed, honoring the concept of “justice” in the strictly reparatory sense is itself fraught with difficulties.⁴⁰⁶ In countries transitioning from repressive authoritarian regimes to liberal democratic ones,

401. *Id.*

402. *See generally id.; see also* De Greiff, *supra* note 14, at 11 (recognizing that reparations programs should be “designed in such a way as to bear a close relationship with other transitional mechanisms, i.e. minimally, with criminal justice [prosecutions], truth telling, and institutional reform”); SHELTON, *supra* note 15, at 390-91.

403. *See* South Africa case study, *supra* Part II.

404. TEITEL, *supra* note 211, at 132; Shelton explains further how remedies in the transitional justice context “have to be adjusted to achieve other goals, including cessation of conflict, prevention of future conflict, deterrence of individual wrongdoing, rehabilitation of society and victims, and reconciliation of individuals and groups.” *See supra* note 15, at 390.

405. De Greiff II, *supra* note 396, at 451-72; *see also* Rama Mani, *Reparation as a Component of Transitional Justice: Pursuing ‘Reparative Justice’ in the Aftermath of Violent Conflict*, in *OUT OF THE ASHES*, *supra* note 11, at 55.

406. *See, e.g.,* De Greiff II, *supra* note 396, at 467-71; Arturo Carillo, *Justice in Context: The Relevance of Inter-American Human Rights Law and Practice in Repairing the Past*, in *HANDBOOK OF REPARATIONS*, *supra* note 14, at 505-09, 527-30.

like Eastern European nations formerly under communist rule or like South Africa under Apartheid, the challenge is determining *who* should be redressed if, in effect, “*everyone* suffered.”⁴⁰⁷ Even where state-sponsored atrocity has produced distinct classes of victims, as is typical in Latin America, it is not always clear where to best draw the line; domestic decision makers must make hard choices about which types of victims (and violations) will be covered by their reparatory measures and which ones will be excluded.⁴⁰⁸

Finally, policymakers must strive to determine what constitutes “justice” for the victims selected, as well as how to achieve it. In other words, “what should victims in fairness receive?”⁴⁰⁹ This question alone has generated endless debate in the literature.⁴¹⁰ It suffices for our purposes to emphasize that, regardless of the actual policy adopted, decision makers in transitional regimes generally have a range of possible reparatory strategies available to them,⁴¹¹ as well as an extensive array of remedial measures—pecuniary and non-pecuniary, or symbolic—all of which can be combined and calibrated to achieve the objectives selected to varying degrees.⁴¹² One of the issues and challenges inherent in this exercise is to reconcile the conflict that can arise between reparations for individual victims and the goal of promoting collective redress for groups or communities of victims.⁴¹³ Given the zero-sum nature of financial and, often, political capital, to what extent does an emphasis on the former (reparations for individual victims) come at the expense of achieving the latter (collective or communal redress), thereby undercutting the overarching goal of reconciliation?

407. TEITEL, *supra* note 211, at 132 (emphasis added) (quoting V. Havel).

408. See De Greiff, *supra* note 14, at 9 (describing how different reparations programs at different times have excluded certain classes of victims due to political or other factors). The classic example is Chile, which omitted political prisoners and victims of torture from the original purview of its compensation policies. See Lira, *supra* note 397, at 77.

409. De Greiff II, *supra* note 396, at 455.

410. See generally OUT OF THE ASHES, *supra* note 11; HANDBOOK OF REPARATIONS, *supra* note 14.

411. See *supra* note 399 and accompanying text.

412. See De Greiff II, *supra* note 396, at 467-71 (outlining the range of possible pecuniary and non-pecuniary reparations measures). See also *infra* Part III.A.5.

413. This paradigmatic debate tends to pit the focus on monetary compensation for individuals against the goal of “collective and symbolic reparation” for groups or communities of victims more broadly. Colvin, *supra* note 251, at 191. South Africa provides an enduring example of this dilemma operating at different levels, that is, not only within the design of a reparations program, but also in terms of transitional justice policy more generally. See *id.* at 184-86 (describing lawsuit brought by individual victims challenging the amnesty provisions of the TRC Act as unconstitutional because it foreclosed their rights to pursue judicial remedies). A recent example of this contraposition is Peru, where legislators removed the figure of individual compensation from the reparations proposal submitted by the TRC, opting instead to focus exclusively on collective reparations in the form of social benefits and development aid to communities. See Decreto Supremo No. 015-2006-JUS, Reglamento de la Ley No. 28592, Ley que crea el Plan Integral de Reparaciones, July 6, 2006 [initial regulations to Reparations Law defining modalities of reparations], available at <http://www.registrodevictimtas.gob.pe/normas.html> (last visited Aug. 14, 2009).

2. *Issues of Liability*

How IMCPs and TJCPs respectively approach the issue of liability is further illustrative of the dynamic of difference between the two. By liability we refer to the process of determining whether a legal duty to compensate or otherwise redress the claimant exists through arbitration or some other dispute resolution mechanism that takes place as an integral part of the mass claims process. Deciding questions of liability is a pre-condition to the awarding of benefits in a regime that adopts this approach. As it happens, IMCPs can address liability issues; TJCPs do not.

IMCPs can be erected as the arbiters of legal responsibility with respect to state parties to the constituting agreements, or the nationals of state parties, as well as provide the mechanisms to ensure that successful claims are compensated.⁴¹⁴ The first IMCP of modern times, the US-Iran Claims Tribunal, is a perfect example. It was charged with deciding contractual and property related claims by nationals of the United States or Iran brought against the other state, as well as adjudicating disputes between the two states themselves.⁴¹⁵ Another recent experience is the Ethiopia Eritrea Claims Commission, which adjudicated *inter alia* the responsibility of each state party for the harm unlawfully inflicted on the nationals of the opposing state and their property during the course of the war between them.⁴¹⁶ An arbitral approach to claims between private parties as opposed to states can be seen in the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT-1), which had “arbitrators acting pursuant to arbitration law, with the power to issue final and binding [judgments and] awards.”⁴¹⁷ And, even where an IMCP is engaged in a systematic sampling of claims for the purpose of extrapolating to the general claimant population, examining the merits of the sampled claims implicate decision making of an administrative and quasi-judicial nature.⁴¹⁸

414. See Norbert Wühler, *The Different Contexts in which International Arbitration is Being Used: International Claims Tribunals and Commissions*, 4 J. OF WORLD INVESTMENT 379, 379-97 (June 2003) (noting the rise of claims tribunals and arbitration commissions in a variety of settings and examining their similarities and differences); see also HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 97-98.

415. See Iran-U.S. Claims Tribunal case study *supra* Part II.

416. Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Dec.12, 2000, available at http://www.pca-cpa.org/showpage.asp?pag_id=1151 [hereinafter Ethiopia-Eritrea Agreement].

417. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 99-100. Even though the arbitration was between private parties, the participation of the Swiss and United States governments was critical to the establishment of the Claims Resolution Tribunal. See CRT case study, *supra* Part II.

418. The UNCC Panel of Commissioners decided the claims and issued reports that recommended payments to compensate for losses suffered. The Commissioners would review the factual details of the claims and apply the appropriate international legal principles to resolve the disputes. The UNCC Commissioner was vested with full discretion in reviewing the facts and applying the appropriate law. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 183. In this regard, the role of the UNCC Commissioner in issuing its decision was closer to what an administrative law

In contrast, transitional justice reparations programs in have been characterized primarily by domestic administrative procedures for the disbursal of reparations to persons who qualify as victims. Liability for the underlying violations is not at issue in these claims processes; it is generally pre-established or presumed.⁴¹⁹ The primary questions are whether a given individual qualifies as a victim and whether he or she can establish a recognized claim to the benefits offered. In most cases, state responsibility for the harms redressed is established beforehand, often by a government-sponsored truth commission,⁴²⁰ or acknowledged by the successor regime implementing the reparations program. The newly democratic government in Hungary, where no truth commission operated, exemplifies the latter process in that it recognized expressly that it had a legal obligation to redress the abuses committed by the predecessor communist regime.⁴²¹ Regardless of the approach, in the transitional justice context, it is the reparations program's place among various other interlocking government policies, including those that address the issue of liability separately that explains this division of labor.⁴²²

3. *Nature of Parties and Claims Process*

Additional differences between the two processes can be discerned by looking to the nature of the parties involved and the claims processes they create. In this section, we examine the instrumentalities that establish a claims process and the role its creators play in the development thereof. As we have seen, government actors tend to create IMCPs through the negotiation and execution of international instruments. The principal effort emanates from the executive who implements international agreements through his or her role as head of state. In contrast, TJCPs rely almost exclusively on individual political actors operating in the domestic arena. National legislatures develop statutory schemes that explicitly detail the workings of the reparatory programs. These legislative efforts tend to be sponsored, supported, and implemented by the executive acting in a role very different from the one he or she plays when negotiating, establishing and supporting an IMCP.

judge does than the decision-making role of officials in the Argentine or Chilean ministries, who were merely charged with distributing benefits pursuant to a fixed statutory scheme to persons who managed to prove the violation and their relation to the victim. See United Nations Compensation Commission and Argentina case studies *supra* Part II.

419. Of course, this can happen with IMCPs as well. See SHELTON, *supra* note 15, at 405 ("The decision of the Security Council to establish the UNCC has been analogized to 'what is tantamount to a summary judgment holding Iraq responsible for a whole series of breaches of international law.'") (quoting Stanley J. Glod, *International Claims Arising from Iraq's Invasion of Kuwait*, 25 INT'L LAW. 713, 715 (1991)). Even so, this approach did not completely remove liability issues from the Commissioners' purview. See *supra* note 415 and accompanying text.

420. See, e.g., Argentina and South Africa case studies, *supra* Part II.

421. TEITEL, *supra* note 211, at 15-17.

422. See *supra* notes 401-04 and accompanying text.

In IMCPs, the state *qua* state is the engine behind the process, whether acting individually or collectively. The instrumentalities that are developed to resolve disputed claims result from state acquiescence to the principles of international law, specifically the concept of state responsibility.⁴²³ Treaties, international agreements, or United Nations actions are frequently the conduits through which states enforce a party's responsibility for its wrongdoing. Third party mediation between Iran and the United States created the Iran-U.S. Claims Tribunal which adjudicated claims of expropriation and breach of contract resulting from Iran's wrongful seizure of the U.S. Embassy. Negotiated peace agreements to adjudicate claims of property losses that were the result of hostilities between the parties resulted in the Commission for Real Property Claims of Displaced Persons (CRPC) in Bosnia and Herzegovina and the Eritrea-Ethiopia Claims Commission.⁴²⁴ State responsibility was also clearly implicated when the United Nations Security Council unanimously adopted Resolution 687 imposing a duty on Iraq to provide reparations for the losses suffered as a result of its invasion and occupation of Kuwait.⁴²⁵ Thus, the willingness of states to submit to international agreements or instrumentalities in resolving the disputes between them is the *sine qua non* for the existence of most IMCPs.

Unlike the establishment of an international mass claims process, where the state must act *vis-à-vis* another state or states pursuant to international law to resolve disputes between them. In a TJCP, domestic authorities within a state (e.g., the legislature, executive, and judiciary) act *vis-à-vis* each other in more starkly political terms to provide remedies to a sector of the domestic population harmed by prior governments. In South Africa and especially Argentina, the crucial role played by the newly elected presidents and their governments in promoting reparations as part of their transitional policies cannot be overstated.⁴²⁶ Similarly, the Hungarian Parliament, like the Argentine Congress, was the legislative motor behind the compensation schemes enacted during the democratic transition period. The judiciary in South Africa and

423. See generally International Law Commission, Draft Articles on the Responsibilities of States for Internationally Wrongful Acts, U.N. Doc A/CN.4/L.602/Rev.1 (July 2001). States recognize that "[e]very internationally wrongful act of a State entails the international responsibility of that State." *Id.* art. 1. The corresponding precept is that a party injured due to an internationally wrongful act must be repaired. See *Factory at Chorzow (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 27, 28 (Sept. 13, 1928). In order to make these reparations, dispute resolution mechanisms are usually (although not exclusively) established by multilateral or bilateral government-to-government negotiations. See, e.g., *supra* notes 39-48 and 143-150 and accompanying text.

424. See HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 23, 33 for fuller discussion of the constituting method of these two institutions. Note that even though the CRPC was ultimately a domestically oriented procedure like those typical of TJCPs, e.g. Hungary, it was conceived and constructed as an IMCP, hence its inclusion as a case study in the Holtzmann & Kristjansdottir treatise on international mass claims processes.

425. S.C. Res. 687, *supra* note 138; see also SHELTON, *supra* note 15, at 405.

426. The same can be said of Chile. See Lira, *supra* note 397, *passim*.

Hungary also played a central part in ensuring the viability of the respective governments' reparations plan.⁴²⁷ And, one cannot forget that domestic non-state actors, including other parties to internal conflict or regime change, can also be critical to the development of TJCPs. South Africa presents just such a case in that negotiations between the African National Congress (ANC) and the National Party (NP) government resulted in the dismantling of the apartheid regime and the proposal of reparations for the wrongs committed.⁴²⁸ In almost all cases, however, TJCPs are designed, adopted, and implemented by government and state officials on behalf of the domestic victims of massive or widespread abuses committed by their predecessors.⁴²⁹

The difference in the nature of the two types of claims processes is perhaps best reflected in the role played by international law in advancing the respective objectives of each.⁴³⁰ With respect to IMCPs, as noted, international law is the normative bedrock upon which such processes are erected; it generally provides not only jurisdiction as a function of state responsibility, but also governs the instrumentalities (treaties, agreements, and UN resolutions) that create them. The IMCPs' rules of procedure emanate from established international norms and practices and, in some instances, their decisions possess legal authority beyond the confines of the claims process itself, forming an integral part of the corpus of international law.⁴³¹ Conversely, domestic law entirely governs TJCPs, even where reference to the state's international obligations is present.⁴³² Procedurally, they are as much creatures of national legislatures as

427. See South Africa and Hungary case studies, *supra* Part II.

428. See South Africa and Argentina case studies, *supra* Part II. Victims groups and their NGO allies have also influenced the design and implementation of reparations programs, most notably in Argentina and Chile. See case studies *supra* Part II. Certainly non-state actors can also be important to IMCPs, as was the case with the CRT-I proceedings, but in the main such actors play a lesser role in the IMCP context than that of TJCPs.

429. Important recent exceptions include the Justice and Peace process in Colombia which provides for reparations to victims of the demobilized paramilitary groups. See Carrillo, *supra* note 398, at 143-48. In Peru, reparations programs benefit victims of the Shining Path guerrillas as well as state agents. In Peru, the definition of "victim" in the law creating the Reparations Plan refers to all persons who during the 20-year reference period suffered any of a series of listed abuses in the course of the internal armed conflict, regardless of whether the perpetrator was a state or private actor. Ley No. 28592, 20 July 2005, Congreso de la Republica, Ley que crea el Plan Integral de Reparaciones – PIR, available at <http://www.registrodevictimtas.gob.pe/normas.html> (last visited Aug. 14, 2009).

430. Richard Falk distinguishes three scenarios involving reparations under international law: "disputes between states, and increasingly other actors," "war/peace settings in which the victorious side imposes obligations on the losing side," and "transitions to democracy setting in which the prior governing authority is held accountable for alleged wrongs." See Falk, *supra* note 380, at 480.

431. Examples include the awards made by the Iran-U.S. Claims Tribunal and the judgments handed down by the EICC.

432. It is widely accepted that states have an obligation under international law to provide remedies and reparations to victims of gross and systematic violations of human rights and serious violations of humanitarian law. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious

IMCPs are of international law and relations. Thus, in the TJCP context, to the extent that international law is relevant at all, it is to provide *legal* arguments or *jurisprudential* background useful for representatives and advocates of victims' rights in *domestic* political arenas to the effect that victims are legally entitled to reparations, and that the domestic system is obliged to make this right tangible by providing meaningful procedures.⁴³³

4. Decision Makers

Issues related to the “macro” decisions about whether and how to create a mass claim process, as well as to the role of the parties that shape them, were addressed in prior sections.⁴³⁴ Here we focus exclusively on the “micro” component of decision making in the process of resolving individual claims once a mass claim procedure has been established. By “decision makers” we refer to those officials *within* a mass claims regime authorized to hear and/or resolve the legal issues leading to the decision to recognize a particular claim and award the corresponding benefits.⁴³⁵ What interests us here, however, is not so much *what* is decided as *who* decides it and how. Again, major differences are apparent.

All IMCPs require “a body that considers the merits of the claims.”⁴³⁶ As a rule IMCPs are divided into two kinds: those in which the body charged with examining claims—called a tribunal or commission—makes the final decision on the merits, and those in which the body “makes recommendations or rulings that subject to approval by a supervisory organ.”⁴³⁷ Examples of the former include the Iran-US Claims Tribunal, and the EECC, while the UNCC is a perfect illustration of the latter approach. Moreover, as noted, IMCPs often grapple with questions of liability, which can be central to the kind of decision maker selected.⁴³⁸ Thus, regardless of the type of IMCP chosen, the individuals selected to make final determinations tend to be persons of various nationalities with extensive prior experience in the field of international arbitration and/or

Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) [hereinafter Basic Principles and Guidelines].

433. Falk, *supra* note 380, at 481 (emphasis in the original). Ruti Teitel agrees, viewing international law as a “mediating concept” that transcends domestic law and politics, thereby providing constructive and constitutive elements to the political debates that shape domestic transitional justice policies. *Supra* note 211, at 20; *see also id.* at 213-25 (describing a theory of transitional justice and the “transformative” role of law.).

434. *See supra* Parts III.A.1 and III.A.3.

435. *See supra* Parts III.A.1 and III.A.3.

436. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8 at 179.

437. *Id.*

438. *See supra* Part III.A.2. In some cases, policy making, executive and administrative function, such as setting the IMCP's budget fall on the main decision makers as well. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 299 *et seq.*; *see, e.g.*, Iran-U.S. Claims Tribunal; *see also* EECC.

mass claim processing.⁴³⁹ Such experts, whether they are called “Judge” or “Commissioner” or any other of the terms applied to IMCP decision makers, are always appointed through a carefully balanced selection process that, while allowing for each party’s input, emphasizes impartiality and expertise.⁴⁴⁰

In stark contrast to the experience expected of IMCP decision makers, TJCP decision makers are not required to have experience in transitional justice to carry out the compensation or other redress provided to domestic victims of human rights abuses. The “decision makers” in the transitional justice context are generally charged with determining the *eligibility* of individual claimants within a pre-established procedure. They tend to be government officials operating in an administrative capacity to implement a legislatively supported reparations scheme or program.⁴⁴¹ As noted already, specialized institutions or procedures are sometimes created within the executive branch to implement such programs; other times, existing state or government agencies are called upon to execute the new regime (or parts of it), just as they would any other legislative or executive act.⁴⁴² The question of implementation is separate, of course, from the issue of defining reparations policy, which may involve the participation of civil society and international experts on the subject, as in South Africa during the TRC experience, or in Argentina through victims’ organizations.

On a related note, it is telling that a defining characteristic of the IMCP field is the extensive “recycling,” in the constructive sense, of experienced international arbitrators and experts in mass claims commissions from one IMCP to another.⁴⁴³ The list of dignitaries who have comprised the PCA’s Steering Committee on Mass Claims Processes illustrates this fact: several members have served on two or more IMCPs, and some on three or more.⁴⁴⁴ This profile is intentional; the idea is that institutional knowledge has been and should be passed from IMCP to IMCP, not least through those individuals who are primary actors or decision makers.⁴⁴⁵ In other words, international mass claims processing is a field dominated, in the positive sense, by a reduced number of eminent persons, and by institutions like the Permanent Court of Arbitration with which they are affiliated.⁴⁴⁶ Obviously, no such dynamic exists

439. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 5, 7, 375 (indicating the multiple IMCP experiences of the PCA Steering Committee on Mass Claims Processes members).

440. *See id.* at 180.

441. *See, e.g.*, case studies *supra* Part II; *see also* De Greiff, *supra* note 14, at 17 n.22.

442. *See supra* note 392 and accompanying text.

443. *See* HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 5, 7, Annex A (indicating multiple IMCP experience of the PCA Steering Committee on Mass Claims Processes members).

444. *Id.* at Annex A.

445. *Id.* at 7.

446. For example, Lucy Reed was the Agent at the U.S-Iran Claims Tribunal, an arbitrator on the EECC panel, and one of the co-directors of the CRT-I. Howard Holtzmann was a judge for the Iran-U.S. Claims Tribunal, the CRT-I and the CRT-II. Hans van Houtte was a judge for the CRT-I

in the TJCP context; nor could it. Such an approach would be wholly out of place in the respective domestic arenas in which local elected officials debate, design, adopt and implement domestic policies on reparations through administrative and other legal channels.⁴⁴⁷

5. Remedies

Perhaps no other issue is as critical to the analysis underway than that of the remedies awarded by the two types of claims processes. Indeed, the prevailing wisdom depicted in the introduction holds that these restitutionary processes are “comparable” precisely because they appear to do similar things, i.e. provide relief to persons who have suffered some sort of harm.⁴⁴⁸ Nonetheless, as we have seen, there is a great deal more to contrast in these claims processes than meets the eye. Unsurprisingly, the significant variations that exist in the form, focus and purpose of the remedies provided within their respective contexts mirror the substantial divergences between IMCPs and TJCPs already described in terms of goals, function, and composition.

It is helpful to recall the nature of the claims processes analyzed to highlight once more that IMCPs often serve an arbitral function entailing the adjudication of claims to establish liability for losses suffered at the hands of a specific party.⁴⁴⁹ These claims processes provide declaratory relief to the parties before them as well as remedies.⁴⁵⁰ Moreover, they often offer the added benefit of influencing subsequent decisions in similar cases where decisions are made public.⁴⁵¹ Because transparency is generally considered a virtue,⁴⁵² arbitral awards and other IMCP decisions are regularly published. The Iran-US Claims Tribunal Rules require all awards and decisions to be made public.⁴⁵³ Those of the Ethiopia Eritrea Claims Commission are available on its website.⁴⁵⁴ The publication of such findings within a given international claims

and an arbitrator on the EECC panel.

447. This is not to say that there is no expertise accumulated or shared in the transitional justice area among domestic actors and international experts. It exists, but on a different order of magnitude. For a detailed discussion of the differences involved, see *infra* Part III.A.8 (discussing the transferability of experiences).

448. Crook, *supra* note 1, at 55; see also *OUT OF THE ASHES*, *supra* note 11, at 417-18.

449. See *supra* notes 411-15 and accompanying text.

450. See SHELTON, *supra* note 15, at 34 (stating “[c]ourts [and tribunals] have the power to declare rights, status and other legal relations whether or not further relief is or could be claimed. A declaratory judgment is the least coercive form of remedy and is often used for resolving uncertainty in legal relations.”).

451. See HOLTZMANN & KRISTJANSDDOTTIR, *supra* note 8, at 116-117, 122-23 (describing the practice of *de facto* precedent by the Iran-U.S. Claims Tribunal and the EECC).

452. See *id.* at 369.

453. Iran-U.S. Claims Tribunal Rules, *supra* note 56, art. 32, ¶ 5; see also *supra* note 81.

454. See Permanent Court of Arbitration – Eritrea-Ethiopia Claims Commission, available at http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited Apr. 29, 2009).

process is important because it allows decision makers to “refer to past cases in the interest of fostering uniformity, and [at the same time,] submissions by parties and awards [will] typically include references to earlier decisions which, while not binding, are often influential.”⁴⁵⁵ In addition to promoting internal consistency, the publication of arbitral decisions and awards can also contribute to the development of international law more broadly.⁴⁵⁶ This contribution has certainly been seen with the Iran-US Claims Tribunal’s jurisprudence⁴⁵⁷ and that of the Ethiopia-Eritrea Claims Commission.⁴⁵⁸

Regardless of whether an IMCP is constituted as an arbitral tribunal or an administrative proceeding, the primary remedy awarded to successful claimants is limited to either monetary compensation or restitution of property or assets. Of the ten international mass claims processes examined by Howard Holtzmann and Edda Kristjansdottir in their landmark comparative analysis for the Permanent Court of Arbitration, every one provided predominantly, if not exclusively, for compensation or restitution as a remedy for property loss. In the few instances where personal injuries were also addressed (e.g., UNCC), monetary compensation was the sole remedy.⁴⁵⁹ Notably, the EECC, while emphasizing monetary compensation as the “appropriate” remedy for successful claims, left the door open to “other types of remedies in appropriate cases,” though it did not specify what those remedies might be or under what circumstances they would be available.⁴⁶⁰ Nonetheless, it is plain that the IMCP framework, premised as it is on state responsibility principles under international law,⁴⁶¹ is characterized by a marked remedial focus on monetary compensation: “Of the various forms of reparations, compensation is perhaps

455. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 118. The same influence can be true of quasi-administrative bodies such as the UNCC, which published all of its decisions online as well. See United Nations Claims Commission Website, available at <http://www.uncc.ch> (last visited Apr. 29, 2009).

456. The arbitral decisions are frequently cited in international law and have made notable contributions to its development. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 19-20 (5th ed. 1998).

457. See *supra* note 80 and accompanying text.

458. See Won Kidane, *Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Eritrea-Ethiopia Claims Commission in the Hague*, 25 *WIS. INT’L. L. J.* 21, 23 (2007).

459. See HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 72-82. This general practice is, of course, reflected in the IMCP case studies in Part II. Other remedial measures contemplated in rare instances are injunctions and specific performance, as ordered by the Iran-US CT. See *id.* at 74.

460. EECC Decision No. 3: Remedies (July 24, 2001) available at <http://www.pca-cpa.org> (last visited Apr. 29, 2009). Apparently there was concern on the part of the Tribunal that other types of remedies might be necessary to redress aspects of the social and economic chaos caused by the brutal armed conflict between Ethiopia and Eritrea. See HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 81.

461. See *supra* Part III.A.3; see also Draft Articles on Responsibilities of States for Internationally Wrongful Acts, *supra* note 423, arts. 31, 34-36.

the most commonly sought in international practice.”⁴⁶² This is especially true where restitution of property or assets is not available,⁴⁶³ or where personal injury is the harm redressed.⁴⁶⁴ In short, keeping in mind their potential arbitral function, IMCPs are created through the operation of international law primarily to *compensate* successful claimants for losses or harms incurred.⁴⁶⁵

Countries form TJCPs in order to provide *reparations*, which can include compensation, to eligible victims for past human rights violations. Three fundamental principles underlie the differences in practice between IMCPs and TJCPs. First, TJCPs, as a rule, do not engage with issues of liability and thus afford no declaratory relief to individual claimants.⁴⁶⁶ Unlike IMCPs, TJCPs are never adversarial in nature.⁴⁶⁷ The exclusive purpose of domestic reparations programs is to resolve the claims of qualified victims of selected human rights abuses for whom certain entitlements have been recognized. Such was the case in each of the three TJCP case studies summarized in Part II, and this continues to be the common practice.⁴⁶⁸ There are no decisions or awards in the adjudicatory sense, since the only “decision” to be made is an administrative determination as to which applicants claiming reparatory benefits are eligible according to pre-determined criteria.

Second, TJCPs can do much more than just provide monetary compensation to victims. As we have seen, “[t]ransitional reparations may take many forms: They can be in kind, as in property restitutions, monetary payments, or nonconventional redress, such as education vouchers or other collective public benefits, such as memorials, legislative rehabilitations, and apologies.”⁴⁶⁹ The transitional governments in South Africa, Argentina and Chile sought to combine compensation with other types of redress including enhanced social benefits and state efforts aimed at victim dignification.⁴⁷⁰ This multifaceted approach to construing remedies for victims of mass political

462. JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES* 218 (2002).

463. *Id.* at 218-19.

464. See SHELTON, *supra* note 15, at 103 (noting “[i]t appears from the law of state responsibility for injury to aliens that restitution is often impossible due to the nature of the injury and that compensation for material and moral harm therefore constitutes the general form of reparation.”).

465. See *supra* note 378 and accompanying text.

466. See *supra* note 419 and accompanying text. The Colombian Justice and Peace Process is arguably a notable deviation from this otherwise uniform practice, despite the fact that it represents a *sui generis* approach to a unique and complex situation. See Carrillo, *supra* note 398, at 133-51.

467. See *supra* note 420 and accompanying text.

468. A current example is provided by the Peruvian reparations process. See *supra* note 396-97 and accompanying text.

469. TEITEL, *supra* note 211, at 146.

470. See Argentina and South Africa case studies *supra* Part II; Lira, *supra* note 397, at 55-101 (discussing Chile’s various programs providing pensions, military service exceptions, as well as health and educational benefits to surviving victims of the political repression).

violence is the prevalent one today.⁴⁷¹ International human rights law recognizes a diverse array of reparatory measures available to those designing domestic reparations programs,⁴⁷² each configured to address a different dimension of the profound personal harm inflicted by serious human rights violations.⁴⁷³ Monetary compensation is but one such measure, and increasingly not the preferred one in the transitional justice context.⁴⁷⁴ The ongoing reparations programs in Peru, for instance, omit individual payments altogether, and focus instead on providing health and educational benefits to the Andean communities most affected by the brutal conflict with *Sendero Luminoso*.⁴⁷⁵

Third, even where compensation is central to a domestic reparations program, it is but one of various means adopted to reach a variety of transitional justice ends. In addition to the role that indemnification can play *within* the broader reparatory calculus, when combined with other remedial measures to maximize effective redress to individual victims, it must also complement national reconciliation policies that preoccupy transitional governments.⁴⁷⁶ In other words, just as compensation is inherently part of a larger reparations

471. When the government in Colombia attempted to implement transitional justice type legislation that did not fully recognize the rights of victims to reparations, among others, international and domestic pressure obliged law-makers to reform the law to ensure that the reparations regime comported with Inter-American and other legal standards to which Colombia had adhered. See Carrillo, *supra* note 398, at 133-58.

472. See G.A. Res. 60/147, *supra* note 432. See also Velasquez-Rodriguez, Inter-Am. Ct. H.R., (Ser. C) No. 4 (1988); TEITEL, *supra* note 211, at 124-29 (describing the influence of the Velasquez-Rodriguez Judgment and subsequent Court practice on development of reparations policy and practice in Latin America). For a recent analysis of the influence of the Court on the development of reparations under international human rights law, see Thomas Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008).

473. See Martien Schotsmans, *Victims' Expectations, Needs and Perspectives after Gross and Systematic Human Rights Violations*, in OUT OF THE ASHES, *supra* note 11; see also Brandon Hamber, *The Dilemmas of Reparations: In Search of a Process-Driven Approach*, in OUT OF THE ASHES, *supra* note 11.

474. In domestic reparations practice, as opposed to that derived from the adjudication of individual cases under international human rights law, reparatory measures can be generally organized as follows: (1) symbolic measures, both individual and collective in nature; (2) service or benefits packages, including medical, educational and housing assistance; and (3) individual grants or monetary compensation. See De Greiff II, *supra* note 396, at 467-71. In South Africa, a form of symbolic compensation was made only after intense national and international pressure was brought to bear on the ANC government. See Colvin, *supra* note 251, at 200-2009 (describing the 'fight for reparations' after the TRC's recommendations were published).

475. See *supra* note 413 and accompanying text. Concerns about the strain that "full" compensation can place on the state's resources has led numerous commentators to disfavor anything more than mere symbolic compensation in the context of mass reparations programs. See, e.g., Falk, *supra* note 380, at 492.

476. See *supra* note 399 and accompanying text. One perceived conflict is that which arises when emphasis is placed on individual grants at the expense of collective reparations promoting reconciliation. See, e.g., De Greiff II, *supra* note 396, at 467.

program, these programs are themselves inextricably linked to other transitional policies writ large.⁴⁷⁷ In South Africa, victims challenged the Truth and Reconciliation Commission's authority to expend amnesties through its truth-telling process on the ground that the Commission unconstitutionally curtailed the victims' right to pursue not only criminal justice vis-à-vis perpetrators, but also civil remedies (damages).⁴⁷⁸ The judgment upholding the South African Parliament's prerogative to subordinate individual victims' rights in this respect to the overarching constitutional aims of reconstruction and reconciliation had important implications for the underlying issue of reparations. Advocates read the judgment as confirming the legal basis for a substantial reparations program because "by immunizing itself and those individuals responsible for human rights violations, the State... assumed the burden of responsibility to compensate those victims whose right to criminal and civil redress was denied."⁴⁷⁹ Although the formal trade-off envisioned by this interpretation was neither explicitly recognized in the judgment nor borne out by subsequent events, the intense polemic it generated illustrates the interrelated nature and inherent tensions between parallel transitional policies regarding truth, justice and reparations.⁴⁸⁰

6. Claimant Participation

Significant differences also exist between IMCPs and TJCPs with respect to the roles that the communities of persons affected by the claims processes play. One could expect that potential claimants should have an influence on the formation, development, and implementation of those processes. As it happens, such claimant participation is virtually unheard of in the IMCP context, but significant with respect to most TJCPs. Given the predominantly interstate nature of IMCP formation, parties behind such an initiative tend to act on behalf of claimant communities that have little or no impact on the negotiations or implementation of the claims mechanism.⁴⁸¹ In comparison, the victim

477. For a discussion of the overlapping and at times competing goals of reparatory and transitional justice, see *supra* Parts III.A.1 and III.A.3.

478. Constitutional Court of South Africa, *Judgment in Case CCT 17/96*, at ¶ 8.

479. Colvin, *supra* note 251, at 186, citing Mpho Leseka, *The TRC's Recommendations on Rehabilitation and Reparation*, in *FROM RHETORIC TO RESPONSIBILITY: MAKING REPARATIONS TO THE SURVIVORS OF PAST POLITICAL VIOLENCE IN SOUTH AFRICA 2* (B. Hamber and T. Mofoken eds., 2000).

480. In relevant part, the prevailing interpretation of the judgment seems to be that "a reparations program could take any number of forms and need not necessarily be tied down to the specific question of the loss of rights of redress of particular individuals." Colvin, *supra* note 251, at 187.

481. Notable exceptions to this general practice are the CRT processes, as well as other Holocaust-related claims processes, which due to their unique nature benefitted from the influence of well-organized and politically powerful Jewish claimant communities. See HOLTZMANN & KRISTJANSDDOTTIR, *supra* note 8, at 91.

communities who ultimately benefit from TJCPs are often actively involved in the discussions that drive government actions to create and guide such processes.

Due to the exclusive role of the executive branch in negotiating the instrumentalities governing IMCPs,⁴⁸² individuals in claimant groups have little or no input into the development of these entities. IMCPs exist because governments make binding international obligations that create them. In so doing, the executive exercises the sovereign right to negotiate treaties under international law,⁴⁸³ thereby eliminating the citizens' ability to provide meaningful input into the formation of the dispute resolution mechanism. When the Iran-US Claims Tribunal was created, tens of thousands of U.S. citizens who had claims against Iran were impacted by the United States' exercise of its sovereign authority. Yet there was no claimant participation in the negotiation of the Algiers Accords.⁴⁸⁴ In the negotiation, the U.S. agreed to nullify the opportunity for U.S. citizens to litigate such claims in U.S. courts; instead the aggrieved parties were required to bring their claims exclusively to the Iran-U.S. Claims Tribunal.⁴⁸⁵ Indeed, since states are the constituting parties behind most IMCPs, they often play the role of formal claimant on behalf of their citizens who have suffered losses or injuries. At the UNCC, for instance, eligible governments filing claims on behalf of their citizens had to distribute the awards received to the individual beneficiaries.⁴⁸⁶

Unlike IMCPs, TJCPs like those in Argentina and South Africa and elsewhere, saw victims and civil society organizations play instrumental roles in the development of the reparations programs eventually adopted.⁴⁸⁷ "The most general aim of a program of reparations is to do justice to the victims."⁴⁸⁸ Thus, within the newly democratic institutions characteristic of most transitional societies, victim communities and local civil society organizations tend to play active roles in the debates that lead to the creation of TJCPs.⁴⁸⁹ For instance, in

482. See *supra* Part III.A.3.

483. For instance, only officials of the United States and Iran, through Algerian government officials, negotiated the Algiers Accords, with no expectation of a role for individual claimants in either the formation of the Tribunal's policy or procedure. See Owens, *supra* note 38, at 297-324.

484. *Id.*; see also HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 19-21.

485. See *supra* Iran-U.S. Claims Tribunal case study, Part II.

486. See *supra* notes 198-202 and accompanying text.

487. Andrea Armstrong defines these local organizations as "civil society groups." Broadly speaking, these groups include informal traditional associations, voluntary religious, ethnic, and professional entities, and formal non-governmental organizations. Armstrong, *supra* note 127, at 245. For a historical perspective on the role of civil society actors in the first successful individual reparations program, see *id.* at 247-51 (discussing the role of Jewish advocacy organizations, including the Conference on Jewish Material Claims Against Germany, in negotiating Germany's reparations laws implemented to compensate victims of the Nazi government).

488. De Greiff II, *supra* note 396, at 455.

489. Local organizations often play an important role in the "origin, design, and implementation of reparation legislation within the context of transitional justice." Armstrong, *supra* note 127, at

Argentina, thanks to the judicial cases brought by or on behalf of the persons detained during the dictatorship, the Argentinean government decided to grant economic reparations to *all* persons detained during the dictatorship.⁴⁹⁰ Further, due to the adamant advocacy of relatives of persons who were “disappeared”,⁴⁹¹ Argentina enacted a series of laws in which the assignees of the nearly 9,000 victims of forced disappearance automatically had a right to compensation without having to first declare their loved ones dead, as under the previous rules.⁴⁹² Similarly, in South Africa, the disenfranchised and victimized communities of the apartheid regime provided the impetus for the notion that any reparations program must include a compensatory component. In designing a general reparations policy to recommend to the government, the Committee on Reparations and Rehabilitation, appointed by the Truth and Reconciliation Commission, relied heavily on its nationwide consultations with these victims, incorporating their preference for monetary compensation in the broader reparations strategy it recommended.⁴⁹³

7. *Payment and Enforcement of Decisions*

One of the more notable differences that exist between IMCPs and TJCPs is the role of funding for the claims process. This issue, both in terms of operational funding, as well as that available for compensation, is a function of the political strength of the constituting entity or entities. It is also a function of their capacity to obtain and implement monies to finance the process. With regard to IMCPs, compensation for claimants’ property losses or personal harm suffered is the *raison d’être* for the establishment of the claims process under international law. Accordingly, either the governments that have created the IMCP or independent sources that have a vested interest in insuring the IMCP’s

245.

490. See *supra* notes 99-116 and accompanying text.

491. See Guembe, *supra* note 84, at 38. However, victims’ groups were not uniform in their support of reparations for “forced disappearances”. Mothers of Plaza de Mayo Association believed that accepting economic reparations was akin to prostituting themselves, while Mothers of Plaza de Mayo – Founding Group asserted that the decision to accept or reject reparations was a choice that had to be made by the affected individual. See *also id.*

492. See Argentina case study, *supra* Part II. Prior to this, the Ecumenical Movement for Human Rights lobbied for the creation of the legal status of “disappeared” that did not presume death and drafted the first version of Law 24,321, which was adopted in May 1994. See Armstrong, *supra* note 127, at 253 (citing Guembe, *supra* note 84).

493. In order to develop a final reparations policy, the Commission on Reparations and Rehabilitation (CRR) consulted with individual victims and victim advocacy groups. Orr, *supra* note 250, at 242; see also Colvin, *supra* note 251, at 191 (discussing that most victims when asked in private by the CRR about their needs listed money or compensation as their first priority). In 1997 and 1998, the CRR also held a series of public meeting throughout the country seeking input from victims, NGOs, community-based organizations, and churches. *Id.* Due to the active role played by the TRC and CRR, local organizations found it difficult to exist independently and were more reactive than proactive, unlike the civil organizations in Argentina. See Armstrong, *supra* note 127, at 259, 262.

success usually guarantee the availability of funds for both the operation of the institution as well as payment of its awards.⁴⁹⁴ In contrast, funding for TJCPs tends to be more difficult as resources are often scarce in the developing countries that tend to undergo radical transitions. At the same time, there are always competing social-political interests that vie for the limited resources available to compensate the massive human rights violations at issue. For all of these reasons, among others, many transitional countries with legacies of human rights abuses forego pursuing reparations programs.⁴⁹⁵

Sources for funding an IMCP are often quite divergent and depend upon the type of mechanism that the constituting instruments have created. "Each arrangement is largely the result of political circumstances, as well as the relative financial abilities and bargaining strengths of the parties funding the particular [p]rocess."⁴⁹⁶ In the IMCP context, governments, as sovereign actors, are usually creating institutions to resolve property disputes between them. As a result, they tend to possess the political will and financial wherewithal to achieve the successful funding. In addition, IMCPs are often structured such that the party-governments fund the operating expenses of the institution. For example, the Algiers Accords explicitly set forth the funding for the Iran-U.S. Claims Tribunal, providing that each government would pay one-half of the expenses of the Tribunal.⁴⁹⁷ Likewise, the Eritrea-Ethiopia Agreement provided that the two governments were to fund the EECC Claims Process.⁴⁹⁸

Other IMCPs have had their expenses paid from a settlement funded by one party whose obligations for funding the IMCP were explicitly delineated or imposed by the party-governments establishing the mechanism. At the UNCC, pursuant to UN Security Council Resolution 687, Iraq had to pay all expenses for the operating costs of the UNCC.⁴⁹⁹ Similarly, the Swiss banks (with the tacit approval of the Swiss government) paid all expenses for the Claims Resolution Tribunal.⁵⁰⁰ In the latter two circumstances, the party that had to pay the operating expenses had the economic capacity to comply with this obligation. As a rule, however, the lack of funding will not usually affect the day-to-day operations of an IMCP. Regardless of the method by which the IMCP was constituted, state parties recognize their international legal

494. This observation is not suggesting that the financing of IMCPs is necessarily straightforward or non-contentious. States and other administering bodies involved in such initiatives can struggle to ensure availability of sufficient resources, as has been the case with the Iran-U.S. Claims Tribunal. See C. Pinto, *supra* note 64, at 108. But the difference is nonetheless palpable *vis-a-vis* national governments seeking to implement a domestic reparations policy, especially one that includes compensation.

495. See *supra* note 32 and accompanying text.

496. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 357.

497. See *supra* notes 62-64 and accompanying text.

498. Ethiopia-Eritrea Agreement, *supra* note 416, art. 5, ¶15.

499. See *supra* notes 188-95 and accompanying text.

500. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 360.

obligations and tend to ensure suitable funding exists for the payment of awards.⁵⁰¹

In contrast, funding for TJCPs is often elusive since *domestic* social and political realities create impediments to effective funding of both operations and remedial measures. Two models exist for funding reparation programs: national and international resources financing the creation of special funds, and direct financing of the reparations program using funds from the public budget.⁵⁰² Experience shows that governments that support the direct financing of reparations programs through the public budget, such as those in Chile, Argentina, and Brazil, are likely to enjoy more stable and adequate financing of their reparations programs.⁵⁰³ However, governments internally are not subject to the types of pressures that states face internationally, making it more difficult to guarantee funding adequate to effectuate the recommendations made by truth commissions or otherwise established in relation to reparations.⁵⁰⁴ Transitional governments with scant financial resources in particular have often to choose between funding programs for reparations or other important social programs.

In the transitional justice context, financing is “fundamentally a political process that requires considerable mobilization of public financial resources, achieved by either a reorientation of existing resources and/or obtaining additional resources.”⁵⁰⁵ The challenges in both respects are substantial. Not surprisingly, some transitional governments prefer to fund social programs that appear to address structural problems, such as poverty, inequality, and exclusion, over reparations programs that directly compensate victims and their families for human right abuses.⁵⁰⁶ Ultimately, the decision to fund such programs depends on the existence of adequate political will or the ability of proponents to forge that will in the branches of the transitional government. Guatemala is a clear example of inadequate political will. Despite the recommendations in the Peace Agreements to compensate victims, in practice,

501. State responsibility principles, especially the duty incumbent upon states to repair the harm caused by their wrongful acts, which often consists of compensation, likely play an important role in ensuring that many IMCPs receive funding. See *supra* note 423 and accompanying text. In other words, states are most likely to produce funds, voluntarily or involuntarily, when they have engaged in serious violations of international legal obligations held *vis a vis* other states. These principles will at the same time tend to reinforce the diplomatic efforts directed at ensuring the success of a given IMCP, as was evident, for example, in the creation of the UNCC. See *supra* note 425 and accompanying text.

502. Alex Segovia, *The Reparations Proposals of the Truth Commissions in El Salvador and Haiti: A History of Non-Compliance*, in HANDBOOK OF REPARATIONS, *supra* note 14, at 660.

503. *Id.*

504. *Id.* at 651. Segovia posits that governments in this situation are not willing “to risk their political capital for seeking a mobilization of those resources.” *Id.* See also *supra* notes 433, 500-02 and accompanying text, to the effect that international law plays more of an indirect role in guiding domestic political debates and decisions than it does internationally between states.

505. Segovia, *supra* note 502, at 655.

506. *Id.* at 654, 673 n.13.

the state has advanced very few reparation measures; a circumstance that the government attributes to a lack of financial resources to fund such a process.⁵⁰⁷ Sometimes even political will is not enough; though Argentina was largely successful in implementing a series of compensation schemes,⁵⁰⁸ payment was still halted during Argentina's financial crisis.⁵⁰⁹

Generally speaking, reparations programs that include compensation for victims have been feasible only when the political parties or coalitions in power are committed to adopting the necessary measures and making the promised payments.⁵¹⁰ States that have looked to the international community for support have often disappointed in the response.⁵¹¹ Ultimately, a strong political incentive in favor of such efforts accompanied by support from the executive, legislative, and judicial branches of government must exist to mobilize the fiscal resources necessary for a functional TJCP.

8. *Transferability of Experiences*

As noted earlier, IMCPs tend to share institutional and personnel resources in ways that facilitate the accumulation of expertise over time.⁵¹² The identification of a handful of international experts who sit on multiple IMCPs is clear evidence of this dynamic, one that ensures the beneficial and desirable outcome of maintaining continuity of experience in the field.⁵¹³ It was no coincidence that when the parties were choosing their candidates for the EECC, persons with prior experience in the Iran-US Claims Tribunal, the UNCC and CRT I were at the top of the list. Institutions like the Permanent Court of Arbitration have become repositories for this specialized knowledge and have strived to capitalize on it through successful efforts at systematization and comparative analysis.⁵¹⁴ The model rules of procedure that the PCA crafted, for

507. Segovia, *supra* note 502, at 662. Until recently a similar situation existed in El Salvador. *Id.*

508. Guembe, *supra* note 84, at 45. "The Argentinean experience stands out among these transitions for its efforts regarding truth telling, prosecution of the military juntas and economic reparations for victims." *Id.*

509. Crook, *supra* note 1, at 57 (citing Larry Rohter, *In Argentina, A New Injustice*, INT'L HERALD TRIB., Mar. 14, 2002, at 2).

510. Segovia, *supra* note 502, at 666. For instance, Chile's reparation program was directly financed from the public budget without any major opposition since the political parties that came to power post-Pinochet supported reparations. *Id.*

511. *Id.* at 659.

512. See *supra* notes 443-46 and accompanying text.

513. *Id.*

514. The PCA in particular created the Steering Committee on Mass Claims Procedures for this purpose, building on a prior body of work to publish new and more comprehensive studies of the field, most notably *International Mass Claims Process*. See the PCA's website for more information on its leading role in the mass claims processes area, available at http://www.pca-cpa.org/showpage.asp?pag_id=1059.

instance, are often the first stop for decision makers developing a new IMCP.⁵¹⁵ In light of these practices, it is easy to see why the assumption that the PCA and others have actively promoted that many of the lessons that a given IMCP taught will be relevant, if not directly transferable, to subsequent mass claims processes of a similar nature.⁵¹⁶ Almost by definition, IMCPs today are to be built upon the foundation provided by the structural, procedural, and substantive legacies of their predecessors.

Despite similar efforts to systematize the TJCP experience,⁵¹⁷ nothing approaching the high degree of “transferability” which characterizes the IMCP practice exists with respect to the development of domestic reparations programs. Any country undergoing a radical political transformation will have to obey primarily domestic forces, even while recognizing the relevance of other TJCPs that have gone before. In South Africa, where input from Argentina and Chile was key to informing the process, the government arrived at a different blend of truth, justice and reparations than these predecessors.⁵¹⁸ Similarly, in Colombia, state, government and civil society actors have exhaustively studied the transitional justice experiences in those and other countries such as Northern Ireland and Sierra Leone, but have innovated an entirely new approach tailored to the particulars of its transitional process.⁵¹⁹ This is not to say that expertise is not accumulated or shared in the transitional justice field. Organizations like the International Center for Transitional Justice (ICTJ), along with experts from other countries that have undergone such transformations, are actively involved in advising policy-makers and other key actors, including civil society, in places where such processes are underway.⁵²⁰ But the transference *and* implementation of “lessons learned” between domestic actors in the TCJP context do not and arguably cannot occur to nearly the same degree as in the IMCP setting.⁵²¹

B. IMCPs and TJCPs: How are they comparable?

The Article now turns to a review of actual and apparent similarities identified in light of the preceding analysis. To facilitate the discussion, this section is organized into two sub-sections, the first addressing “true” parallels,

515. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 205.

516. *See, e.g.*, Holtzmann, *supra* note 383, at vi.

517. *See, e.g.*, HANDBOOK OF REPARATIONS, *supra* note 14; OUT OF THE ASHES, *supra* note 11.

518. *See* South Africa case study, *supra* Part II.

519. *See* Carrillo, *supra* note 398, at 133-58.

520. The ICTJ website provides a good account of its advisory function and other activities throughout the world. International Center for Transitional Justice, <http://www.ictj.org> (last visited Mar. 29, 2010). In Colombia, the ICTJ has an office in Bogota headed by the former executive secretary of the Peruvian Truth and Reconciliation Commission.

521. *See infra* Part III.C.

521. *See infra* Part III.C.

the second dedicated to exploring a number of “partial” parallels suggested by our exploration of the divergences above. The former looks at traits or mechanisms shared by IMCPs and TJCPs possessing functional equivalencies. The partial parallels consist of characteristics that are ostensibly shared by the two, but that, when viewed in close context, are not as operationally compatible or interchangeable as they may first appear. By distinguishing between true and partial parallels, we hope to set the stage for a better method of evaluating and applying the lessons learned from transnational mass claim processes: the subject of Part IV.

1. True Parallels

The true parallels between IMCPs and TJCPs are best viewed as procedural mechanisms and techniques that share a high degree of operational interchangeability. We define true parallels for purposes of our analysis as functionally comparable principles and procedures inherent in any mass claims process, regardless of context. One such principle is that of credibility: all mass claims processes struggle in similar ways to establish their legitimacy in the eyes of beneficiaries, as well as those of the parties and societies responsible for their creation. The best examples of functionally comparable procedures are those that define the process of mass claims processing: outreach; identifying and screening claimants; collecting and evaluating evidence; as well as, more recently, techniques for handling large numbers of mass claims. These principles and procedures provide a better basis for comparative analysis of mass claims type processes than other aspects because: 1) they are largely impervious to the social, legal and political context within which they operate; and 2) their basic content, form and function will not vary substantially from context to context.

One of the hallmarks of any successful claims process is credibility. A claim process, whether IMCP or TJCP, must not only be legitimate and fair, but also perceived as such to establish credibility.⁵²² Legitimacy in either context is established by the exercise of recognized authority through established legal procedures, as when TJCPs are created and operated through coordinated executive, legislative and judicial action,⁵²³ or when state parties reach agreements under international law defining the IMCP.⁵²⁴ But such origins are themselves insufficient to definitely establish the credibility of an IMCP or TJCP; *any* claims process must also ensure that legitimate outcomes are achieved in a manner that is fair and is perceived as such. Generally speaking, a number of basic elements go into making a claims process fair; these include the

522. See, e.g., Van Houtte et al., *supra* note 323, at 107; De Greiff II, *supra* note 396, at 471.

523. See Argentina, South Africa and Hungary case studies, Part II *supra*.

524. Van Houtte et al., *supra* note 323, at 107; see also *supra* Nature of Parties and Claims Processes, Part III.A.3.

trustworthiness of the implementing institution or mechanism, decision-maker neutrality, the opportunity for claimants to be actively involved in the procedure, and, of course, the treatment of claimants with dignity and respect.⁵²⁵ Also essential to fairness is the principle of non-discrimination – in other words, that similar cases be treated in a similar manner.⁵²⁶ These factors are critical to establishing credibility, itself a prerequisite to ensuring the successful implementation of any mass claims process. Because of their ability to guarantee the presence of several, if not all, of these factors, all of the IMCPs and most of the TJCPs described in Part II have enjoyed high degrees of credibility.⁵²⁷

But perhaps the strongest parallels exist at the level of the functionally comparable procedures that make up the *mechanics* of mass claims processing. These are like the basic parts of a car—fan belts, spark plugs, tires, etc.—that tend to be interchangeable between similar makes and models of automobile, year after year. Such basic mass claim component “parts” include procedures for determining claimant eligibility, carrying out outreach to claimant communities, conducting initial screening of potential claimants, as well as collecting, processing and evaluating evidence in thousands of cases, and sometimes more. Regardless of the constituting method employed or context at issue, each of these elements embodies a fundamental dynamic of mass claim processing that, at some level, must be present. The functional interchangeability and similarity in form of these basic components guarantee not just the relevance, but the utility as well of the parallels they represent to the comparative analysis of IMCPs and TJCPs.

What follows is a brief introduction to these process-based parallels, focusing on those that we believe offer the best opportunities for productive cross-referencing between mass claim types. This survey is by no means exhaustive, nor is it intended to provide a definitive statement of each component. Rather, our goal is to shift the focus of debate in this area to those elements of mass claims processes that best lend themselves to fruitful comparative analysis.

a. Claimant Eligibility and Outreach

Any mass claim process must determine who will be an eligible claimant and inform him or her of its existence through some form of outreach.⁵²⁸

525. Van Houtte et al., *supra* note 323, at 111-12.

526. See Rombouts et al., *supra* note 12, at 459.

527. The exception on the TJCP side appears to be the South African reparations program. The government's reticence to compensate in accordance with the TRC recommendations, among other shortcomings, has been widely criticized for not responding to the needs of the victim community. See *supra* notes 303-304 and accompanying text.

528. Van Houtte et al., *supra* note 323, at 139.

Usually the eligibility standards for IMCPs are explicitly defined in the constituting instruments for the claims process or the procedural rules. Likewise, statutory provisions or executive decrees provide the criteria for eligibility in TJCPs. These sources tend to establish access by demarcating the types of claims that can be made as well as identifying who can make them. Interesting parallels will arise in situations where a shared substantive focus exists between mass claims processes, e.g., where the type of harm addressed stems primarily from human rights-type violations. This occurs when eligibility in the IMCP context, like with all TJCPs, turns on who is defined as a “victim” of state abuse.⁵²⁹ These types of parallels, like several of those to follow, will become increasingly important as new IMCPs are set up to provide compensation and other redress to victims of international crimes.⁵³⁰

Once the claimant categories are identified, an outreach strategy must be implemented to inform potential beneficiaries of the remedies available. “A Mass Claims Process has little practical value unless the potential claimants are aware of the opportunity to make claims and are given information on how to do so.”⁵³¹ To the extent that an IMCP focuses on claims arising within a country or defined geographic region, the strategies it employs will correlate well with those available to TJCPs undertaking the same task. Typically, in both contexts, the strategies involved will draw upon all types of media to implement an informational campaign targeting the communities of potential claimants, as well as the public at large.

b. Initial Screening Procedures

Regardless of the type of mass claims mechanism or context involved, once the claims start arriving they must be screened, sorted, and processed. The objective of these efforts will generally be the same across the board: “to weed out claims that fall outside the scope of the . . . programme or that are incomplete.”⁵³² Over time, IMCPs in particular have developed and honed a range of effective procedures for this function. For instance, initial screenings for procedural requirements, like timeliness and sufficiency of the filing, are often performed by a registrar or secretariat, as occurs at the Iran-U.S. Claims

529. For instance, the CRT-II Governing Rules established claimant eligibility by defining victims entitled to file a claim as “any person or entity persecuted or target for persecution by the Nazi regime because they were or were believed to be Jewish, Romani, Jehovah’s Witness, homosexual, or physically or mentally disabled or handicapped.” CRT-II Rules, *supra* note 364, art. 46, ¶ 26.

530. See Pablo de Greiff & Marieke Wierda, *The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints*, in *OUT OF THE ASHES*, *supra* note 11, at 235 (discussing how the “experiences of societies in transition may be instructive” in setting up and operating the Victims Trust Fund of the International Criminal Court). See *infra* Part IV.D.

531. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 141.

532. Van Houtte et al., *supra* note 323, at 151.

Tribunal and the UNCC.⁵³³ The CRT-I provided for an arbitrator to make an initial determination as to the viability of the claim on the merits, though at a “very low threshold”.⁵³⁴ Of course, the TJCPs studied in Part II all had to implement similar administrative procedures to ensure the accurate sorting of victims’ claims. In Argentina, for example, a government ministry was charged with fulfilling the role of secretariat in this respect, and in South Africa, a committee of the Truth and Reconciliation Commission performed these functions.⁵³⁵ The point of this parallel is merely to highlight the overlap in approaches, and to suggest that some cross-referencing may be possible. TJCPs can reasonably look to the initial screening procedures replicated over time by IMCPs that have dealt with tens of thousands, even millions, of claimants; IMCPs that share a similar substantive focus to TJCPs, dealing with claims arising from human rights violations, could benefit from the administrative procedures employed by the TJCPs in screening those types of claims.

c. Collection and Evaluation of Evidence

The violent circumstances that drive governments to create either IMCPs or TJCPs are themselves often responsible for producing a lack of evidence to buttress claims. From an evidentiary perspective, the challenges faced in these situations can be very similar, even identical. Thus, experiences in the collection and assessment of evidence can provide ample opportunity for constructive exchange between the two types of processes. One innovative technique employed by IMCPs and TJCPs alike is to provide for a “relaxed” standard of proof with regard to evidentiary submissions.⁵³⁶ In this respect, the UNCC was a pioneer among IMCPs, requiring claims to provide only “appropriate evidence of the circumstances and amount of the loss,” at a “reasonable minimum.”⁵³⁷ Subsequently, the CRT-I took the notion of a relaxed standard of proof even further by introducing the evidentiary test of mere “plausibility”.⁵³⁸ In South Africa, evidence gathering among victim

533. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 164. The Registrar’s decisions were subject to review by the Tribunal if the claimant filed a timely objection. Procedural Rules, *supra* note 56, art. 2, ¶ 5. The UNCC Secretariat would send a notification of deficiency and allow the party sixty days to remedy the defect. UNCC Provisional Rules, *supra* note 159, art. 15.

534. Buergenthal, *supra* note 316, at 83. *See also* CRT-I Rules of Procedure, *supra* note 322, art. 10.

535. *See supra* notes 82-137 and accompanying text (Argentina); *supra* notes 249-304 and accompanying text (South Africa).

536. Buergenthal, *supra* note 316, at 83; *see also* Argentina case study, *supra* notes 82-137 and accompanying text.

537. UNCC Provisional Rules, *supra* note 159, art. 35(2)(c). The appropriate evidence of the circumstance included the difficult conditions claimants faced in making quick departures from Kuwait and Iraq, which often resulted in loss of their personal property, passports, and other documents. Wühler, *supra* note 139, at 20.

538. CRT-I Rules of Procedure, *supra* note 322, art. 22. “The claimant must show that it is

communities was often conducted through informal means. Moreover, IMCPs themselves will sometimes collect evidence for purposes of efficiency in verification, basing decision making at least in part upon an institution's internal databases.⁵³⁹ These institutions have been particularly good at developing uniform methods for the assessment and evaluation of evidence where overwhelming number of claims are filed requiring resolution in a timely and fair manner, especially where claimants face difficulties in producing documentary evidence.⁵⁴⁰ At the domestic level, the specialized administrative bodies in both Argentina and South Africa charged with studying the merits of victims' claims also adopted flexible standards in the face of challenging circumstances for the evaluation of available evidence.⁵⁴¹

d. Techniques for Processing Mass Claims

Information technology provides various means to enhance the effectiveness of claims procedures when faced with an overwhelming number of potential beneficiaries, often tens of thousands or more.⁵⁴² IMCPs in particular have been making productive use of information technology. In this context, information technology serves three key functions: 1) it facilitates the planning and management of the process; 2) it permits computerized decision making and use of mass claims processing techniques such as statistical sampling and "matching;" and 3) it allows for decisions based on grouping as opposed to individual case-by-case determinations.⁵⁴³ By building on prior experiences, especially that of the UNCC, international mass claims processes have increasingly applied a series of techniques for evaluating very large numbers of claims that would undoubtedly be of great utility to TJCPs as well.⁵⁴⁴ The most promising of these techniques are these:

- **Statistical sampling and modeling.** This technique was pioneered by

plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the dormant account." *Id.*

539. See Van Houtte et al., *supra* note 323, at 156 (discussing the collection efforts of the UNCC Secretariat in gathering evidence from governments and international organizations for its computerized verification database for Category "A" and "B" claims).

540. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 211.

541. See *supra* Parts II.A.2, 5.

542. See Veijo Heiskanen, *Virtue Out of Necessity: International Mass Claims and the New Uses of Information Technology*, in REDRESSING INJUSTICES, *supra* note 1, at 27. For instance, the UNCC, using information technology that allowed for computerized matching and statistical sampling, reviewed 2.6 million claims in under ten years, as compared to the United States-German Mixed Claims Commission that spent seventeen years resolving approximately 20,000 claims. *Id.* TJCPs will naturally benefit from technology as well for many of the same reasons.

543. *Id.* at 29.

544. Most of these techniques did not actually originate with international arbitral or mass claims institutions, but rather are derived from the statistical and computer-processing techniques developed by mass tort class action litigation and large insurance cases in the United States. See HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 244.

the UNCC, which faced millions of claims that had to be resolved within a limited period of time. Statistical sampling, for instance, permitted the UNCC to formulate evidentiary presumptions on the basis of decisions taken with respect to random but representative samples drawn from a predefined population of claimants sharing similar legal and factual issues.⁵⁴⁵ It then applied the presumptions to the other similarly situated claimants from the target population.⁵⁴⁶

- **Computerized Matching.** Matching is computerized decision making on “large numbers of individual claims that can be resolved by determining relatively limited specific facts.”⁵⁴⁷ It is made possible by entering basic claim information into one database which is then compared against a second “verification database” containing evidentiary data “collected from sources such as banks, historical archives or property registers.”⁵⁴⁸ For example, the CRT-II employed this useful methodology, contrasting claims information in one database with another containing bank account records. When the computer program generated a “match,” this result either provided sufficient grounds for an award of compensation or provided a basis for additional research to confirm the match.⁵⁴⁹
- **Grouping and precedent setting.** Claims that are too complex or large to be susceptible to matching may be managed through a decision making process that involves individual categorization of claims based on the similarity of their legal and factual issues. Claims are “grouped” according to key characteristics entered into a database, allowing decision makers “to focus on resolving the principal legal and factual issues [shared] by a large number of claims, without having to consider each of them separately.”⁵⁵⁰ Some IMCPs take grouping a step further by allowing initial decisions taken with respect to certain claims presenting common issues to act as “precedent” in resolving “all subsequent similar cases.”⁵⁵¹
- **Standardized verification and valuation.** Specialized techniques have been developed by technical experts in other fields that allow for the

545. *Id.* at 244-45, 248-49.

546. “The basic method of statistical sampling and modeling is, first, to design a sample that is representative of the entire population constituting a similarly situated group of claimants; secondly, to analyze the claims of that sample groups to answer the factual and legal questions that determine its eligibility for compensation; and, finally, to extrapolate or apply the results of the analysis of the sample to all other similarly situated claims.” *Id.* at 245.

547. *Id.* at 245.

548. *Id.*

549. *Id.* at 250-51.

550. *Id.* at 256.

551. *Id.* at 246. *See also supra* note 80 and accompanying text (Iran-U.S. Claims Tribunal).

standardized verification of claims “using certain evidentiary presumptions justified by knowledge obtained from historical research or fact-finding about the event in question to fill in gaps in individual records.”⁵⁵² These are methods are employed by IMCPs to address the dearth of reliable evidence characterizing post-conflict scenarios as well as to avoid the great expense in time and resources associated with the verification of individual claims.⁵⁵³

In light of the foregoing, it is fair to say that information technology “has become the enabling factor of modern mass claims processing in cases where most, if not all, of the claims arose during the same time period and involved many of the same legal and factual issues.”⁵⁵⁴ This is as true for TJCPs as it has been for IMCPs. It would seem, therefore, that the marvelous advances in IT methodologies promoted by IMCPs, such as statistical sampling, matching, grouping, and standardized verification, represent an important but underexploited source of expertise for those working on large-scale reparations programs in the transitional justice context.

2. *Partial Parallels*

We have provocatively dubbed “partial” parallels as those traits sharing a surface similarity that upon closer examination turn out not to be as equivalent in substance as generally presumed. Partial parallels tend to flow from key concepts common to claims processing generally that are assumed to be comparable or interchangeable. In practice, however, these concepts can be understood and implemented in substantially different ways depending on the context. Basic notions of “fairness,” “remedies,” and even “compensation,” which can seem standard in an IMCP setting, may in fact fulfill a substantially different role when operating within a transitional justice framework. In other words, their meaning may vary according to the function assigned to them by the respective IMCPs or TJCP. They are a kind of “conceptual homonym,” commonly used terms for basic concepts that may nonetheless take on varying connotations depending on the type of mass claims process at issue.

The concept of basic fairness is a good example. While IMCPs and TJCPs both strive to be fair, the differences between the two described in prior sections ensure that this term will not necessarily mean the same thing in both contexts. Where IMCPs are configured as arbitral tribunals or commissions charged with establishing liability prior to making awards, the proceedings are adversarial in nature. In this environment, fairness means due process. It requires an opportunity for parties to present evidence in support of their claim, to be heard, and to challenge opposing evidence, all before a competent and impartial

552. *Id.* at 246.

553. Heiskanen, *supra* note 542, at 34.

554. HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 244.

adjudicator.⁵⁵⁵ Where proceedings are essentially administrative, as is the case with most TJCPs (and some IMCPs), fairness more accurately represents efficiency, particularly in avoiding undue delays, and consistency in decision making.⁵⁵⁶ This means, among other things, treating similarly situated claims substantively in the same manner: “At an individual level, *fair* reparation requires that the distribution of reparation is done in a fair manner, [which] means without discrimination among groups or categories of beneficiaries (i.e. victims).”⁵⁵⁷

Perhaps the most misleading of the partial parallels are those relating to the core function of remedies, especially compensation. To illustrate why this is so, we should recall the examples from the Introduction where commentators writing on IMCPs and TJCPs drew such comparisons. On the one hand, the reference by an IMCP expert to “*reparations* [as] important components of settlement” for victims of human rights abuses, in a publication dedicated primarily to the study of IMCPs, is intended to suggest a parallel to the function of *remedies* in international mass claims processing.⁵⁵⁸ The fact that access to remedies, sometimes referred to as procedural reparations, is central to the redress for victims as required by international human rights law, surely contributes to the impression that the two concepts are functionally interchangeable or naturally comparable.⁵⁵⁹ But, as we saw in the preceding sections, the profound differences that distinguish the two fields have a direct effect on the nature and function of the redress implemented by TJCPs. When the aforementioned differences in the transitional justice context are taken together with the diversity of reparatory measures available to domestic policymakers, they tend to render comparisons with IMCP remedies—themselves essentially limited to monetary compensation or asset restitution—virtually meaningless. Thus, suggesting or assuming such parallels, without a concomitant effort to engage with the universe of differences that reigns between TJCPs and IMCPs, is at best an incomplete exercise.

The same is largely true of the potential parallels presumed by TJCPs experts with respect to the utility of constructing a comparative approach with IMCPs around “measures of material compensation,” the one remedial strategy adopted by all the paradigmatic claims processes studied in Part II. It is true that, on the surface, the similarities appear obvious: beneficiaries of either IMCPs or TJCPs who meet certain pre-established criteria for harm and eligibility will receive economic redress via the operation of a legally constituted procedure. However, as we have seen, these shared characteristics are insufficient by themselves to enable a meaningful comparative analysis of the role of

555. *Id.* at 263.

556. *See* Das, *supra* note 30, at 9-10.

557. Rombouts et al., *supra* note 12, at 459.

558. *See supra* note 6 and accompanying text.

559. *See* Basic Principles and Guidelines, *supra* note 432.

compensation within, between and among particular mass claim processes. Compliance with state responsibility principles makes “compensation” distributed by IMCPs for property loss or personal injury functionally a more limited concept than that which characterizes the indemnifications or “grants” paid by governments to victims of serious human rights abuses and their families in the domestic context. Among other defining distinctions, one typically carries out the latter to advance both a reparatory strategy as well as an overarching transitional justice policy.⁵⁶⁰ Simply put, TJCP compensation is best viewed as one of several interlocking means to a set of overarching ends; IMCP compensation, on the other hand, is more accurately viewed as an end in itself.

C. Concluding Observations

The previous sections have exposed a substantial number of inherent limitations to the comparison of IMCPs and TJCPs; they have also delineated more clearly a narrow but promising path of intriguing synergies. It should now be apparent that the ground considered common to the two types of claims processes is neither as broad nor as even as commonly assumed. Regarding the purported relevance of IMCP experience to emerging TJCPs, the primary axis of comparison in the literature, we have shown that a number of basic IMCP characteristics and components apparently shared with TJCPs in fact provide a doubtful foundation for a constructive comparison. Sweeping or implied presumptions of compatibility in this respect, then, tend to be imprecise and potentially misleading. At the same time, it is evident from the previous section not only that a set of “true parallels” *do* exist as between IMCPs and TJCPs, but also that these parallels represent avenues for cross-fertilization *in both directions*. It is, in other words, a two-way street, even if the traffic to date has predominantly flowed only in one direction. That under certain circumstances the TJCP experience may be a productive source of inspiration and input to IMCP experts devising or implementing new procedures is itself a paradigm-shifting conclusion. In any event, the foregoing are all significant findings running counter to prevailing wisdom that could, in our view, contribute to reorienting in more fruitful directions the scope of future studies contrasting different types of mass claims processes.

Ultimately, this rethinking of transnational mass claims processes is meant to contribute to improving the personal experience of the countless numbers of victims of mass atrocity who are their beneficiaries. How this goal can be realized in practice is the subject of the next Part. A final question to address

560. TJCPs capture this distinction in the notion of symbolic compensation, as in South Africa, where cash payments expressly were intended to convey recognition of victims and their claims, but not formal redress of the harms at issue, in substantial part due to resource and political limitations. No IMCP has ever claimed its payments to be purely symbolic.

here, albeit briefly, is this: *why* are IMCPs and TJCPs not as comparable as has been generally assumed? It is one thing to demonstrate that they are not; it is quite another to explain why such a difference in perception persists.

Without purporting to provide a definitive response to this query, we offer a preliminary reflection. It seems to us that the element of “transferability” provides a particularly illustrative lens. We noted above that while IMCP experiences tend to translate well into lessons learned for their successors, one rarely reproduces such a dynamic within the transitional justice arena. Indeed, when one considers that TJCP experiences are barely “transferable” between and among themselves, it becomes instantly evident why they are not more functionally comparable even to similar IMCPs.⁵⁶¹ As it turns out, the reasons for the former premise hold largely true for the latter one as well.

Almost by definition, TJCPs experiences are non-cumulative, context-specific, and resistant to precedent. Unlike IMCPs, international law or practice influences but does not govern TJCPs. Efforts to systematize the study of TJCPs highlight their uniqueness, which flows from several defining traits of any domestic reparations program. One is the intensely indigenous nature of radical political transition. Another is the predominance of national actors as the primary decision makers who work predominantly within a domestic political context. A third is the nationalistic resistance to copying outside experiences that characterizes many native decision makers, often coupled with the need to tailor reparations to compelling domestic circumstances. And then there is the inherent non-transferability of domestic legislation and other normative decisions shaping country specific TJCPs, which will add layers of resistance to efforts to import concrete approaches adopted by other countries and cultures. Together these and related factors typical of the transitional justice context impede attempts to draw (much less assume the existence of) straightforward parallels between not just TJCPs, but also between these claims processes and their international counterparts.

IV.

THE TMCP FRAMEWORK

A. Rationale

The preceding Part provided a more comprehensive response than previously existed to the interrogatories posed in the Introduction regarding the extent to which IMCPs and TJCPs are truly comparable. On the one hand, it confirms the instinct of most observers that there are common denominators

561. Note also what could be considered properly contextualized comparisons, such as restitution and compensation mechanisms in Eastern Europe with similar property centered IMCPs such as the BHZG Restitution Commission. See TEITEL, *supra* note 211, at 129-31.

between the claims processing experiences in both realms, limited as they might be. On the other, the analysis in Part III challenges several assumptions underlying the conventional wisdom about *which* “principles and precedents” are most pertinent to the comparative exercise, as well as how to view them. Contrary to prevailing perspectives, it establishes that the starting point for any analysis of parallels should be an express recognition of the deep divergences that separate international and domestic claims processes. These in turn not only dictate what aspects of a given mass claims process lend themselves to a meaningful comparative analysis, but also inform the extent to which useful lessons, procedures or practices in one context are functionally transferable to another. It is this dynamic that we seek to capture with the *transnational mass claim process* or TMCP framework.

A threshold issue worth attending to before outlining our framework concerns why commentators in both fields have tended to assume or suggest untenable degrees of IMCP and TJCP comparability. There are several likely reasons that can be deduced from the analyses of the preceding Part; we highlight but a few of them here. The first is undoubtedly the increasing trend towards an overlapping of subject matter involving human rights abuses between international and transitional justice mass claims processes.⁵⁶² The UNCC provides an early example. Because it is one of the few IMCP experiences to compensate personal injury, including harm that in a domestic context would clearly constitute human rights violations, commentators have readily considered it alongside the more traditional TJCP experiences.⁵⁶³ Likewise, the CRT can be recognized as straddling the divide between traditional IMCPs and domestic TJCPs as the institution achieved “reparations and the moral accounting . . . through Holocaust restitution and reparations claims.”⁵⁶⁴ Such a statement recognizes the value of “moral compensation” which provides restitution for a property loss, bank accounts, but also recognizes the reparation aspect of the payment for the human rights atrocity that was the Holocaust.

The notion of “conceptual homonyms” discussed in the preceding part explains a second contributing factor. The overlap of nominally identical terminology (such as “compensation”) can suggest a stronger interchangeability of key principles and procedures than is borne out in practice. A third consideration is the relative autonomy with which the two camps have developed until recently, which has led practitioners without detailed knowledge of the companion field to accept such apparent overlap at face value. Lastly, as noted, there are indeed significant parallels that lend themselves to productive analysis, some of which require careful contextualization, others less so. The challenge now is to move beyond mere comparison and towards a more

562. See *supra* note 18 and accompanying text.

563. See, e.g., SHELTON, *supra* note 15, at 404.

564. *Holocaust Claims Against Swiss Banks*, *supra* note 308, at 251.

purposeful, comprehensive and nuanced examination of the ways IMCPs and TJCPs interrelate.

In other words, to paraphrase an old adage, you cannot assume to compare apples and oranges, unless, of course, you are talking about fruit. As the adage suggests, it is a matter of proper perspective. The TMCP framework introduced in the following section is intended as a corrective lens. It can guide analysts in breaking down the constituent parts of any mass claim procedure regardless of context to better understand the extent to which its key components will relate or “translate” when contrasted with those of another process. By stepping back and viewing mass claim processes at a slightly higher level of generality than heretofore employed, commentators using the TMCP framework can identify those considerations, conditions and qualifiers needed to most appropriately frame a comparative analysis of parallels, principles and precedents. We expect this new approach to move the discussion of IMCPs and TJCPs away from mere pronouncements or suggestions of mutual relevance, and towards a plane of deeper integration through the strategic exploitation of true parallels.

B. A Framework for the Study of Transnational Mass Claims Processes (“TMCPs”)

Transnational mass claim processes are those that take place in the international or domestic context to resolve claims by persons acting individually or collectively, usually against a state, where such claims are brought for serious personal harm or property loss resulting from armed conflict, political repression and/or social upheaval. Depending on the type of procedure involved, the affected persons can bring such claims either directly or through their respective governments.

To facilitate the analysis of TMCPs, we have developed a “checklist” built around basic elements shared by all such mechanisms, regardless of context.⁵⁶⁵ It can be utilized to establish the TMCP “profile” of a given claims process, which in turn provides a more comprehensive reference for productive comparison with other processes similarly profiled. Among other things, the TMCP checklist outlined below is designed to make explicit the consideration of key issues relating to the context and manner in which TMCPs are created; the purpose and nature of the mechanism(s) established; the nature and function of the procedures employed; the remedies prescribed and their disbursement; their overall funding; and their transparency. The comparative analysis of TMCP “profiles,” as opposed to the decontextualized consideration of certain components thereof, should provide designers of mass claims processes in any

565. The TMCP Checklist presented draws extensively from that compiled by Howard Holtzmann and Edda Kristjánsdóttir in their study of IMCPs. See Annex E to HOLTZMANN & KRISTJANSDOTTIR, *supra* note 8, at 419. No similar checklist exists on in the transitional justice field, though important efforts to systematize the rubric of reparations have been undertaken. See, e.g., De Greiff, *supra* note 14; OUT OF THE ASHES, *supra* note 11.

context with a heightened capacity to identify and integrate functionally compatible elements of other experiences in a manner that better advances their own particular objectives.

C. The TMCP Checklist

1. Constituting Method and Instrument(s): Refers to the process and to the constituent instrument(s) by which a TMCP is created. Includes reference to political context and related formative events.

1.1 Who are the parties creating the TMCP? E.g., states, IGOs, domestic authorities (executive, legislative, judicial), etc.

1.2 What are the relevant political circumstances, domestic and/or international?

1.3 What are the enabling normative sources or instruments? E.g., treaties, agreements, judicial decisions, legislation, executive decrees, etc.

1.4 What are the stated goals of the TMCP?

1.5 To what extent do the constituting instruments detail the norms, rules and procedures to be applied by the TMCP?

1.6 What is the role in the constituting process of the international community?

1.7 What is the role of the potential beneficiaries/claimants in the constituting process??

2. Legal and Procedural Norms I: Refers to jurisdiction as well as legal nature of proceedings and decisions.

2.1 What is the nature of the claims process created? E.g., arbitration, administrative proceedings, etc.

2.2 What is the range of claims covered by the TMCP?

2.3 Who is entitled to remedies pursuant to these claims?

2.4 Who is entitled to bring a claim?

2.5 What substantive law applies, if any?

2.6 How are the procedural rules defined and administered?

2.7 How is fairness guaranteed?

2.8 Are decisions final and binding? What is their legal authority?

2.9 Can decisions be enforced?

2.10 What is the effect on claimants' legal rights to recourse in other jurisdictions, domestic or international?

3. Legal and Procedural Norms II: Refers to the claims process, including the participants and procedures involved.

3.1 How are potential claimants identified and informed of the process?

3.2 What is the process for screening claims to ensure only those meeting prima facie criteria are processed?

3.3 Is there a timetable for implementing the TMCP's mandate, including deadlines and a wind-up date?

3.4 Who makes decisions on claims?

3.5 How were these decision makers selected?

3.6 What rules apply to the submission of evidence by claimants?

3.7 What rules apply to burdens and standards of proof?

3.8 Are provisions made for oral hearings?

3.9 What mass claim techniques, if any, are employed?

3.10 What provisions exist to support claimants who may not have the

resources to access the TMCP?

4. Remedies and Reparations:

4.1 What types of loss or harm can be addressed?

4.2 What types of individual remedies or reparations are offered to claimants?

4.2.1 Restitution?

4.2.2 Compensation?

4.2.3 Non-monetary benefits or services?

4.3 What types of collective remedies or reparations are offered to claimants?

4.4 How are the rules governing compensation defined?

4.5 How are the amounts of individual compensation fixed?

4.6 How is compensation distributed?

4.7 Is compensation subject to a maximum aggregate amount or other limitations?

4.8 What non-pecuniary remedies or reparations (NPRs) are available?

4.9 How are NPRs realized or distributed?

5. Operational Funding

5.1 What types of expenses are required to set up and operate the TMCP? E.g., staff salaries, other official fees and expenses, infrastructure costs, IT, etc.

5.2 How are these operational costs funded?

5.3 How are the available remedies and reparations, especially compensation, funded?

5.4 Is the TMCP sustainable, that is, secured enough in terms of resources to carry out its mandate in substantial part?

6. Transparency and Accountability

6.1 Does the TMCP have a communications strategy? If so, who is responsible for it?

6.2 What type of outreach, if any, does the TMCP engage in? E.g., to potential claimants, government institutions and authorities, the general public.

6.3 What mechanisms exist to provide information to the public on the TMCP's activities? E.g., webpage, mass media announcements, etc.

6.4 Does the TMCP engage in regular or periodic reporting on its activities? If so, what form does it take?

6.5 What types of information are made available to the public? E.g., information on legal norms and procedures, rules, decisions and awards, number of claims, etc.

D. Application of TMCP Framework

The need for a more methodical approach to the study of transnational mass claims processes is more evident than ever. The area of international law dedicated to international tribunals and commissions has expanded enormously since the establishment of the Iran-US Claims Tribunal in 1981. The field of transitional justice, which did not exist two decades ago, is now an established and active area of academic as well as institutional pursuit. Mass claims experiences in both contexts are increasingly viewed in light of each other, due to a deepening convergence, first in practice, and now theory. The TMCP

framework outlined in the preceding sections represents a conscious step in this direction. It provides the analytical tools that were missing from prior studies to promote a more functional systematization of experiences in mass claims processing. As such, it enables practitioners and policymakers to engage in comparative analyses that are better informed, appropriately focused and, ultimately, more fruitful. International claims processes such as the Ethiopia-Eritrea Claims Commission, or domestic reparations programs such as those active in Peru and Colombia, are examples of ongoing TMCPs that could benefit from the application of the framework outlined above, as well as the underlying analyses in Part III. And, of course, there are those mass claims experiences still to come. The framework could prove instructive for instituting a procedure and resolving property claims arising from present conflicts, like that between the Palestinians and Israelis.

At the outset we suggested that the TMCP framework could assist in the design of novel compensation or reparations scenarios, like the one that the International Criminal Court is developing. We noted that the context and large number of victims typical of several types of international crimes, for example genocide and crimes against humanity, point to the need for traditional mass claims processing techniques. Yet these crimes by their very definition arise from the widespread and systematic human rights abuses characteristic of transitional justice scenarios. The issue is whether the ICC would be best served by following IMCP approaches in designing its reparations procedures or whether it should also look to national programs despite their limiting specificity. Much has been written on the subject already. Some commentators rely primarily on conventional international mass claims experiences to draw lessons for the Court, making little reference to domestic practice.⁵⁶⁶ Other experts, however, observe that “[t]he experiences of societies in transition may be instructive,” especially as concerns the goals and remedial modalities of an ICC-administered reparations program.⁵⁶⁷ How, then, should the ICC proceed in evaluating its options?

Even the cursory application of the TMCP framework to the challenge that the ICC poses illuminates a methodological pathway to resolving this question. It is evident, for example, that the ICC’s reparations structure will more closely resemble traditional IMCPs in terms of the Court’s constituting method and instruments, its decision makers, and the mass nature of most of the claims procedures to be adopted. Therefore, many of the lessons, mechanisms and techniques of mass claims processes like the UNCC will likely be directly relevant to the development of ICC reparations procedures.⁵⁶⁸ But a similar

566. See, e.g., Marc Henzelin et al., *Reparations to Victims Before the International Criminal Court: Lessons from International Mass Claims Processes*, 17 CRIM. L. F. 317 (2006).

567. De Greiff & Wierda, *supra* note 530, at 235.

568. See Edda Kristjánsdóttir, *International Mass Claims Processes and the ICC Trust Fund for Victims*, in REPARATIONS FOR VICTIMS, *supra* note 18, at 167-95.

analysis of the other ICC features, such as the Rome Statute Art. 75's stated goal to provide "reparations" to victims, suggests that it should in other respects act more in line with the experience of TJCPs insofar as *substantive* measures of redress are concerned. It is undoubtedly for this reason that Art. 75 also speaks of the "rehabilitation" of victims while leaving the door open to other reparations derived from international human rights law. Another feature closer to the TJCP experience than that of IMCPs revolves around claimant participation given the standing that victims will have to participate in ICC reparatory proceedings.⁵⁶⁹ The monetary compensation and restitution measures typical of IMCPs and the expeditious "justice" they provide to a mass of largely disenfranchised claimants may therefore be insufficient in the ICC context. Rather, a hybrid system that draws *appropriately* from both the TMCP and TJCP contexts, as oriented by the TMCP framework, will be most likely to produce an effective ICC reparations program in any particular case.

569. See Rome Statute, *supra* note 23, art. 75(3); Rules of Procedure and Evidence, R. 89-97, U.N. Doc. ICC-ASP/1/3 (Sept. 2002) (outlining procedures for victim participation).

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The Joint Law Venture: A Pilot Study

Jayanth K. Krishnan*

I.

INTRODUCTION

The current economic downturn has forced large law firms in the United States to scale back their hiring practices, lay off employees, and reconsider their overall business structure.¹ One prominent scholar has argued “that the bubble has permanently burst on the traditional BigLaw [or big law firm] model.”² As such, the ramification of the economic crisis is that regional and local law firms will play a more prominent role in the delivery of legal services.³ The idea is that because they incur lower costs (in terms of salaries and fees) and are generally more attentive to client needs, these smaller firms are likely to receive greater amounts of work that otherwise would have been given to the elite law firms.⁴

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1. For a detailed listing of firms that have been suffering under the present economic crisis, see David Lat’s blog, *Above the Law*, <http://abovethelaw.com/2009/06/13/> (last visited Mar. 6, 2010), and the *Layoff Tracker* on legal professions blog *Law Shucks*, <http://lawshucks.com/layoff-tracker/> (last visited Mar. 6, 2010). Both blogs have been maintaining copious data on the number of layoffs occurring at law firms in Britain and the United States.

2. See posting of Professor William Henderson to *Brian Leiter Law Reports*, <http://leiterlawschool.typepad.com/leiter/2009/04/the-upheaval-in-the-market-for-new-lawYERS-at-the-big-law-firms-temporary-or-permanent.html> (Apr. 30, 2009). See also John P. Heinz, *When Law Firms Fail*, 43 SUFFOLK U. L. REV. 67 (2009); Larry E. Ribstein, *The Death of Big Law* (University of Illinois Law & Economics Research Paper LE 09-025, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1467730.

3. See Henderson, *supra* note 2.

4. *Id.*

This pilot study will seek to add a more international dimension to the analysis. As big law firms in the United States have struggled, so too have their counterparts in Britain. The result is that many large law firms in both countries are focusing on markets that until now have remained untapped. For example, in October 2008, mega-firm DLA Piper opened an office in Kuwait, noting that the country's strong economic presence within the Gulf Cooperation Council served as the impetus for this move.⁵ Similarly, a partner from a high-powered British firm recently commented that places like "Jakarta and Vietnam are the hot markets now where [Western] lawyers can mint money."⁶ And a report by the Bloomberg news group notes that the slumping global economy "has encouraged . . . firms led by Cleary Gottlieb; Skadden, Arps, Slate, Meagher & Flom, and Dewey & LeBoeuf to accelerate foreign expansion programs . . ."⁷

That American and British law firms are "going international" is not a new development.⁸ However, because these law firms have not experienced such hard-hitting economic conditions in more than a generation, the manner in which they are looking to create business in other countries merits scholarly attention. One method law firms are using to enter newer markets is the establishment of what is called the joint law venture, or JLV. The structure of this entity is straightforward. An American firm, for instance, decides it wants to expand into country X. While X allows foreign lawyers to conduct international transactions within its borders, it has stringent licensing requirements that effectively bar American (and all other foreign) lawyers from practicing X's domestic laws. Yet the American firm has been eyeing country X precisely because it sees potential for earning a great amount of money from the local business sector. As a result, the American firm contacts, develops a relationship with, and eventually enters into a joint law venture with a local firm in X. The JLV is a legally distinct body that now has the ability to practice the laws of country X through its locally licensed lawyers.⁹

5. See Press Release, DLA Piper, Joint Venture Agreement Announced between Leading Kuwaiti Law Firm and DLA Piper (Oct. 8, 2008), available at <http://www.dlapiper.com/global/media/detail.aspx?news=2821>.

6. Interview with anonymous partner of an elite law firm (June 9, 2009).

7. See Lindsay Fortado, *Law Firms Find Work Abroad as U.S. Mergers Hit a Low*, BLOOMBERG, Apr. 10, 2008, <http://www.bloomberg.com/apps/news?pid=20601109&sid=aAwMFWmJgaM&refer=home>. A November 2008 article affirmed this position during a time when the U.S. economy was arguably at one of its lowest points. See John Bringardner, *U.S. Law Firms Expanding Abroad*, N.Y. TIMES, Nov. 23, 2008, <http://www.nytimes.com/2008/11/23/world/americas/23iht-lawyers.1.18063294.html>.

8. See Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 GEO. J. LEGAL ETHICS (forthcoming 2010).

9. For enlightening work on the subject of joint law ventures in Japan, see Bruce E. Aronson, *The Brave New World of Lawyers in Japan*, 21 COLUM. J. ASIAN L. 45 (2007); Bruce E. Aronson, *Elite Law Firm Mergers and Reputational Competition: Is Bigger Really Better? An International Comparison*, 40 VAND. J. TRANSNAT'L L. 763 (2007). David Wilkins, who is cited extensively later in this study (see *infra* notes 25 and 31), has also discussed joint ventures, but in a different vein (noting the emerging relationships between lawyers and their clients). See, e.g., David B. Wilkins,

In theory, then, the JLV appears an optimal route for the American law firm to pursue. Theoretically, the local firm in country X also benefits. It has an opportunity to gain international contacts, learn skills and “best practices” from the American counterparts, and link itself to a highly prestigious U.S. firm. Therefore, it seems as though the JLV is a win-win strategy for both sides.

But is it really? Below, I preliminarily test this theory by considering a country that has been a major hub for JLVs over the past decade. The wealthy Asian country of Singapore, with a population of 4.8 million, is a significant financial center, where business elites from states like Japan, China, Indonesia, and Malaysia interact with one another as well as with economic players from India, the Middle East, Europe, and North America. Since becoming fully independent in 1965, Singapore has made economic development a primary goal, achieving gross domestic product and per capita income numbers that are among the highest in the world.¹⁰ As part of its development plan, Singapore has aggressively liberalized its economy, including its legal services sector. For decades, Singapore has granted foreign law firms admission into the country but prohibited them from practicing Singaporean law.¹¹ Then, about ten years ago, the government sought to expand the scope under which foreign law firms could work. Upon consultation with lawyers from the United States and Britain, as

Team of Rivals? Toward a New Model of the Corporate Attorney/Client Relationship, in 62 CURRENT LEGAL PROBLEMS 478 (Colm O’Cinneide ed., 2009); David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers?*, 11 GEO. J. LEGAL ETHICS 855 (1998). For other studies of relevance, see David A. Gantz, *Doi Moi, the VBTA, and WTO Accession, The Role of Lawyers in Vietnam’s No Longer Cautious Embrace of Globalization*, 41 INT’L LAW. 873 (2007); Jeff Coburn, *All for One: Strategic Alliances Are Good for Business, Clients*, 17 (5) LEGAL MGMT. 46 (1998); Jonathan Barsade, *The Effect of EC Regulations Upon the Ability of U.S. Lawyers to Establish a Pan-European Practice*, 28 INT’L LAW. 313 (1994); Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Gap*, 63 TUL. L. REV. 443 (1989). While she does not focus on the subject of joint law ventures (notwithstanding a mention in n. 30), Carole Silver, in a 2007 study, discusses how globalization has led American law firms to emphasize the importance of recognizing what she terms “[t]he rise of local players.” See Carole Silver, *Local Matters: Internationalizing Strategies for U.S. Law Firms*, 14 IND. J. GLOBAL LEGAL STUD. 67, 77-89 (2007). For a discussion on joint relationships in terms of law firms and legal outsourcing companies, see Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189 (2007); Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEO. J. INT’L L. 401 (2007); Mimi Samuel & Laura Currie Oates, *From Oppression to Outsourcing: New Opportunities for Uganda’s Growing Number of Attorneys in Today’s Flattening World*, 4 SEATTLE J. FOR SOC. JUST. 835 (2006). For work on joint ventures between law firms and non-legal entities, see John S. Dzienkowski & Robert J. Peroni, *Multi-Disciplinary Practice and the American Legal Profession: A Market Approach to the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83 (2000); Gregory Steven Swan, *The Political Economy of Interprofessional Imperialism: The Bar and Multidisciplinary Practice, 1999-2001*, 21 J. LEGAL PROF. 151 (2000).

10. For data that bears this point out, see World Economic Outlook Database, Apr. 2009, International Monetary Fund, <http://www.imf.org/external/pubs/ft/weo/2009/01/weodata/index.aspx>.

11. Interview with anonymous lawyer from a well-known Singaporean firm (June 9, 2009). For brief background on this point, see Warren B. Chik, *Brief Notes: Recent International Developments in Singapore*, 7 SINGAPORE J. INT’L & COMP. LAW 267 (2003).

well as its own domestic bar, the Singaporean government began allowing for the establishment of the JLV in the late 1990s, believing it would positively serve all parties involved. And indeed, between 2000 and 2009, eleven JLVs were created between elite foreign law firms and local Singaporean firms.

Yet to date, no sustained work has evaluated how effective these JLVs have functioned in Singapore. Therefore, during part of the summer of 2009, I spent time in the country conducting fieldwork on this subject. As I quickly learned upon my arrival, more than half of these eleven JLVs have since disbanded. I also learned that in 2007, the government formally adopted a new set of procedures (that came into force in early 2009) intended to facilitate the liberalization of the legal services sector.¹² With these facts as my starting points, I set out to understand why many of the JLVs had not lived up to their theoretical accolades – and how those that remain standing have managed to do so. Employing the well-accepted empirical method of semi-structured interviews,¹³ I met with nine high-ranking lawyers representing six of the eleven JLVs. Subsequently, upon my return to the United States, I conducted phone interviews with three other lawyers respectively representing three additional, separate JLVs. I also engaged in follow-up email exchanges with several of these respondents and conducted interviews with lawyers in Singaporean, U.S., and U.K. firms that have affirmatively decided not to opt for the joint entity.¹⁴ The data gathered reveal a telling account, detailed below, illustrating some pluses – but also many pitfalls – that have accompanied the JLV. It is for these reasons that I will argue that American and British law firms should think seriously before pursuing the JLV route in the future – not just in Singapore, but even perhaps more broadly in other markets where they are already present or are contemplating entering.

This project proceeds in the following manner. Part Two reviews those studies that have discussed the structure of law firms over the years. In addition, I draw on works by business and economics scholars who have explored international joint ventures and explain how their studies can apply to my research and help fill an important gap in the legal professions' scholarship.

12. For background on what occurred, see Singaporean Government Ministry of Law website, http://notesapp.internet.gov.sg/_48256DF20015A167.nsf/LookupContentDocsByKey/GOVI-79LDRE?OpenDocument.

13. Robert Dingwall, *Accounts, Interviews and Observation*, in *CONTEXT AND METHOD IN QUALITATIVE RESEARCH* 51-64 (Gale Miller & Robert Dingwall eds., 1997); Herbert M. Kritzer, *Stories from the Field: Collecting Data Outside Over There*, in *PRACTICING ETHNOGRAPHY IN LAW: NEW DIALOGUES, ENDURING METHODS* 143-59 (June Starr & Mark Goodale eds., 2002); Shirley Harkness & Carol A.B. Warren, *The Social Relations of Intensive Interviewing: Constellations of Strangeness and Science*, in *21 SOCIOLOGICAL METHODS & RESEARCH* 317-39 (Feb. 1993).

14. At times, the nature of my interviews with these individuals touched upon professionally delicate matters. Based on my consultation with my university's human subjects institutional review board, which granted me full approval to conduct my research, I promised all of my respondents that their identities would be kept confidential. For that reason, throughout the course of this study, I withhold the names of my interviewees and the firms for which they work in my citations.

Part Three briefly covers Singapore's meteoric economic rise and the political environment in which this growth has occurred. From there, I describe the nature of the Singaporean legal profession and how the American and British presence and the JLV fit within this landscape. Part Four then presents the findings of my fieldwork and interviews, which cast doubt on the theory that JLVs are necessarily an ideal vehicle for Western law firms to expand into newer markets. Finally, Part Five assesses where to go from here by offering the beginnings of alternative models that suggest how law firms may globalize in the future, given the challenges presented by the joint law venture.

II.

SURVEYING THE LITERATURE AND IDENTIFYING THE GAPS

Notwithstanding Erwin Smigel's work from nearly forty years ago or Paul Hoffmann's 1973 work, *Lions in the Street*, little was written about the structure and business model of American law firms until after 1979.¹⁵ It was then that Steven Brill launched *The American Lawyer*, a monthly magazine that has developed into a leading publication that tracks various aspects of the legal profession, including how law firms function.¹⁶ Within its "Firms" section, the magazine discusses current work, management issues, employment, and the overall legal environment in which lawyers are operating.¹⁷ One of its most well known features is its ranking of the top law firms in the United States on the basis of gross profits, profitability per partner, and salaries of full-time and summer associates.¹⁸

The American Lawyer has spawned other similar types of publications. The American Bar Association, for instance, has a weekly e-mailing that, among other items, contains data, news, and human interest stories on what is happening in the law firm world.¹⁹ And numerous blogs cover this sector of the legal profession with great interest.²⁰

With more information available on law firm practices, academic studies

15. See ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATIONAL MAN?* (1964); PAUL HOFFMANN, *LIONS IN THE STREET: THE INSIDE STORY OF THE GREAT WALL STREET LAWYERS* (1973). For a discussion of this point, and an ensuing account of the development of the scholarly literature, see Eli Wald, *The Other Legal Profession and the Orthodox View of the Bar: The Rise of Colorado's Elite Law Firms*, 80 U. COLO. L. REV. 605 (2009).

16. For background and content of this magazine, see AMERICAN LAWYER.COM, <http://www.law.com/jsp/tal/index.jsp>. See also Wald, *supra* note 15, at n.419.

17. See AMERICAN LAWYER.COM, <http://amlawdaily.typepad.com/amlawdaily/work/index.html>.

18. *Id.*

19. See, e.g., ABA JOURNAL WEEKLY NEWSLETTER, <http://abajournal.com/weekly/>.

20. See, e.g., Above the Law, <http://www.abovethelaw.com/>; Law Shucks, <http://lawshucks.com/layoff-tracker/>; The Legal Profession Blog, http://lawprofessors.typepad.com/legal_profession/; Empirical Legal Studies Blog, <http://www.elsblog.org>.

soon emerged as well. For example, in 1988, Robert Nelson published *Partners with Power*, which revealed a transition by corporate law firms towards more specialized, non-litigation oriented practices.²¹ A few years later, Marc Galanter and Thomas Palay wrote *Tournament of Lawyers*, arguing that the structure of large law firms could be explained by the race to partnership, which led to a need to hire more associates and would ultimately lead to even larger firms.²² In 2008, Galanter, this time together with William Henderson, followed up on that study by noting that although the race-to-the-partnership thesis was still both relevant and applicable, this tournament had consequences that the original model had not initially foreseen.²³ Namely, the obsession with growth and economic profitability led firms to shun other worthwhile causes, such as the need for racial and gender diversity, *pro bono* cases, and mentoring younger lawyers.²⁴ According to Galanter and Henderson, the existing structure of big law firms effectively only allowed for a culture that valued “the bottom dollar” – and little else.

In between *Tournament of Lawyers* and that 2008 article, other studies examined this point and, more broadly, the subject of how firm structure and culture intersected.²⁵ For example, a number of authors found that gender equity, in terms of salaries or promoting women to partners, was simply not part of law firm culture.²⁶ Other work cited arcane cultural norms, along with

21. See Robert L. Nelson, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* (1988). For a concise summary of the works that came out post-1980, see JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 12-13* (2005); Wald, *supra* note 15, at 612-20.

22. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRMS* (1991). Note that HEINZ ET AL. also discuss this work and that there were challenges to the Galanter-Palay thesis, see *supra* note 21, at 12 (citing Robert L. Nelson, *Of Tournaments and Transformations: Explaining the Growth of Large Law Firms*, WIS. L. REV. 733 (1992)); Kevin A. Kordana, *Law Firms and Associate Careers: Tournament Theory Versus Production-Imperative Model*, 104 YALE L.J. 1907 (1995)). See also Wald, *supra* note 15, at 612-20.

23. See Marc Galanter & William D. Henderson, *The Elastic Tournament: The Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867 (2008).

24. *Id.* For another study that has examined the issue of how law firm practice setting and structure affects similar types of issues, see Stuart Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5 INT'L. J. LEGAL PROF. 209 (1998).

25. Again, for a detailed account of this development, see Wald, *supra* note 15, at 612-20. For a study of norms, culture, and partnerships, see EMMANUEL LAZEGA, *THE COLLEGIAL PHENOMENON: THE SOCIAL MECHANISMS OF COOPERATION IN A CORPORATE LAW PARTNERSHIP* (2001) (also discussed in HEINZ ET AL., *supra* note 21, at 13). See also Marc Galanter & Simon Roberts, *From Kinship to Magic Circle: The London Commercial Law Firm in the Twentieth Century*, 15 INT'L J. LEGAL PROF. 143 (2008).

26. See, e.g., Timothy O'Brien, *Why Do So Few Women Reach the Top of Big Law Firms*, N.Y. TIMES, Mar. 16, 2006, <http://www.nytimes.com/2006/03/19/business/yourmoney/19law.html>; Fiona M. Kay & John Hagan, *Raising the Bar: The Gender Stratification of Law Firm Capital*, 63 AM. SOCIOLOGICAL REV. 728 (1998) (discussing how such barriers exist beyond U.S. firms and in Canadian firms, too); Fiona M. Kay, *Flight From Law: A Competing Risks Model of Departures*

hidden and overt biases, as barriers deterring lawyers of color from rising to the upper echelons within big law firms.²⁷

There has been less comparative work, but certain structural observations are still worth mentioning. John Flood, for example, is at the forefront of documenting how the increase in international business transactions has affected the organizational structure of law firm practice in Britain and beyond.²⁸ On China, research explores how Western law firms have been entering the Chinese market, learning from local counsel, and providing best-practices skills to their domestic counterparts – all as a process of the “boundary blurring”²⁹ of legal services. In India, previous work has shown that the present fight over whether foreign lawyers should be permitted access to the domestic market has resulted in both Western and Indian firms restructuring how they operate in order to meet

from *Law Firms*, 31 LAW & SOC’Y REV. 301 (1997); Jo Dixon & Carol Seron, *Stratification in the Legal Profession: Sex, Sector, and Salary*, 29 LAW & SOC’Y REV. 381 (1995); Elizabeth Chambliss, *Organizational Determinant of Law Firm Integration*, 46 AM. U. L. REV. 669 (1997). For important earlier studies, see also John Hagan, *The Gender Stratification of Income Inequality Among Lawyers*, 68 SOCIAL FORCES 835 (1989); Carrie Menkel-Meadow, *The Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers*, in LAWYERS IN SOCIETY: VOL. 3 COMPARATIVE THEORIES (Richard Abel and Philip Lewis eds., 1989); CYNTHIA FUCHS EPSTEIN, ACCESS TO POWER – CROSS NATIONAL STUDIES OF WOMEN AND ELITES (1981). Note most of these pieces are also discussed in HEINZ ET AL., *supra* note 21, at 12-13. See also Wald, *supra* note 15, at 611-616. In addition, in 2006 (later updated in 2008), Keith Buckley, Associate Librarian and Lecturer in Law at Indiana University, compiled a “Bibliography on Law Firms and Gender.” For a wealth of informational readings, see <http://firms.law.indiana.edu/research/Gender.pdf>.

27. David Wilkins’ work is perhaps the most prominent scholarship in this area. For a sample of his writings on this topic, see David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981 (1993); David B. Wilkins, *Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1 (1998); David B. Wilkins and G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the International Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1582 (1998) (also discussed in HEINZ ET AL., *supra* note 21, at 14; Marc Galanter and Thomas M. Palay responded to this piece in *A Little Jousting about the Big Law Firm Tournament*, 84 VA. L. REV. 1683 (1998)); David B. Wilkins and G. Mitu Gulati, *Why Are So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996). Keith Buckley has also compiled a detailed “Bibliography on Race and the Legal Profession.” For another set of valuable readings, see <http://firms.law.indiana.edu/research/Race.pdf>.

28. See, e.g., John Flood, *Globalization and Large Law Firms*, in THE NEW OXFORD COMPANION TO LAW (Peter Cane & Joanne Conaghan eds., forthcoming); John Flood, *Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions*, 10 INDIANA J. GLOBAL LEGAL STUDIES 35 (2007); John Flood, *Resurgent Professionalism? Partnership and Professionalism in Global Law Firms*, in REDIRECTIONS IN THE STUDY OF EXPERT LABOUR (Daniel Muzio, Stephen Ackroyd, & Jean-Francois Chanlat eds., 2007); John Flood & Fabian P. Sosa, *Lawyers, Law Firms, and the Stabilization of Transnational Business*, 28 N.W. J. INT’L. L. & BUS. 489 (2008). For work that has discussed the more general role of lawyers in society and the legal profession in other parts of Europe and in Japan, see also HERBERT JACOB, HERBERT M. KRITZER, DORIS MARIE PROVINE & JOSEPH SANDERS, COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE (1996).

29. See Sida Liu, *Globalization as Boundary-Blurring: International and Local Law Firms in China*, 42 LAW & SOC’Y REV. 778 (2008).

the demands of globalization.³⁰ And some scholars have joined together to discuss various aspects of legal culture and globalization in Latin America and “Latin Europe,” with bits and pieces relating to the legal profession and the types of work influential lawyers are doing in these regions.³¹

All of this literature clearly has enhanced the understanding of the institutional and cultural structures of law practice. But it is by no means without gaps. As Eli Wald has argued, even with the diverse array of studies that exist, in some sense a “standard story”³² has emerged regarding the structure and growth of law firms, which has narrowed the discourse. Yet in turn, it also provides a nice opportunity to consider this subject from a different perspective. To that end, a survey of the relevant legal professions’ scholarship reveals that, notwithstanding a few studies,³³ there has been little critical academic examination to date of the extent to which law firms are engaging in the specific practice of forming international joint law ventures.

This lack of literature is somewhat conspicuous, given the reports (cited in the Introduction) that law firms from the West are entering into these relationships and that academics from other disciplines have looked at the joint venture model in other business contexts for some years. In 2009, Sameer Vaidya published an article reviewing the scholarship on joint ventures.³⁴ Working from the definition of joint ventures by Oded Shenkar and Yoram Zeira,³⁵ Vaidya notes that the research has been divided into several discrete

30. See Krishnan, *supra* note 8.

31. See LAWRENCE M. FRIEDMAN & ROGELIO PEREZ-PERDOMO, *LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE* (2003). By “Latin Europe,” the authors mean Italy and Spain.

32. See Wald, *supra* note 15, at 612-20 (analyzing how this standard story does not explain the set of firms in Colorado that he studied, which has achieved great profitability and elite status through the practice of nepotism).

33. See, e.g., Krishnan, *supra* note 8. Also, as stated, *supra* note 9, David Wilkins has discussed law firm joint ventures in his work but from a different perspective. See, e.g., David B. Wilkins, “If You Can’t Join ‘Em, Beat ‘Em!” *The Rise of the Black Corporate Law Firm*, 60 *STAN. L. REV.* 1733, 1764 (2008) (tracing how, in certain situations, majority white firms in the United States, at the behest of minority politicians, made “it clear that the only way the firm would be able to win city business was to find a suitable minority joint venture partner . . . that would be cut in on some of this work”). See also Wilkins, *Team of Rivals?*, *supra* note 9. For a discussion of joint ventures between law schools and law firms, see Chad P. Brown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 *J. INT’L ECON. L.* 861, 879 n.31 (2005).

34. Sameer Vaidya, *International Joint Ventures: An Integrated Framework*, 19 *INT’L. BUS. J.* 8 (2009).

35. Namely, that it is a “separate legal organizational entity representing the partial holdings of two or more parent firms in which the headquarters of at least one is located outside the country of operation of the joint venture. This entity is subject to the joint control of its parent firms each of which is economically and legally independent of the other.” Oded Shenkar & Yoram Zeira, *Human Resources Management in International Joint Ventures: Directions for Research*, 12 *ACAD. MGMT. REV.* 546 (1987).

areas.³⁶ Some studies have looked at the motivations behind the formation of joint ventures.³⁷ Others have focused on the structure of management, such as how leaders are selected and who wields control.³⁸ Still others have concentrated on issues of trust between those involved in the joint venture.³⁹ Finally, there has been scholarship on who holds better bargaining strength, access to resources, and best practice procedures in joint venture dealings.⁴⁰

According to Vaidya, with joint venture collaborators often having different motives for entering into the relationship – along with frequently non-integrated management structures, stark salary differentials, lack of trust, and disparate levels of power between the foreign and domestic partners – it is unsurprising that the literature shows that such entities “have had a high rate of failure, [with] . . . many of them break[ing] up.”⁴¹ At the same time, however, even in this current economic climate, Vaidya and others hasten to state that there is little doubt that the vehicle of joint ventures is here to stay.⁴² The question is whether *international JLVs* – about which there is a lack of any sustained data – suffer from infirmities similar to those found with other joint ventures. This article addresses that inquiry below, but first it examines an environment in which several JLVs have taken place – Singapore.

36. See Vaidya, *supra* note 34, at 9.

37. See *id.* at 9-10 (citing KATHRYN HARRIGAN, STRATEGIES FOR JOINT VENTURES (1985); Bruce Kogut, *Joint Ventures: Theoretical and Empirical Perspectives*, 9 STRATEGIC MGMT. J. 319 (1988)).

38. See Vaidya, *supra* note 34, at 9-14 (citing John B. Cullen et al., *Japanese and Local Partner Commitment to IJV's: Psychological Consequences of Outcome and Investment in IJV Relationship*, 26 J. INT'L BUS. STUD. 91 (1995); Paul W. Beamish, *Joint Ventures in LDCs: Partner Selection and Performance*, 2 MGMT. INT'L REV. 60 (1994); Shenkar & Zeira, *supra* note 35; Benjamin Gomes-Casseres, *Joint Ventures in the Face of Global Competition*, SLOAN MGMT. REV. 17 (Spring 1989); Benjamin Gomes-Casseres, *Joint Ventures in the Face of Global Competition*, 22 J. INT'L BUS. STUD. 41 (1991)).

39. See Vaidya, *supra* note 34, at 11-12 (citing Robert M. Morgan & Shelby D. Hunt, *The Commitment-Trust Theory of Relationship Marketing*, 58 J. MARKETING 20 (1994); Anoop Madhok, *Revisiting Multinational Firms' Tolerance for Joint Ventures: A Trust-Based Approach*, 26 J. INT'L BUS. STUD. 117 (1995); Cullen et al., *supra* note 38; Ann V. Llana & Esteban Garcia-Canal, *Distinctive Features of Domestic and International Joint Ventures*, 38 MGMT. INT'L REV. 49 (1998)).

40. See Vaidya, *supra* note 34, at 11-12 (citing Andrew C. Inkpen & Paul W. Beamish, *Knowledge, Bargaining Power, and the Instability of International Joint Ventures*, 22 ACAD. MGMT. REV. 117 (1997); A. Yan & B. Gray, *Bargaining Power, Management Control, and Performance in the United States-China Joint Ventures: A Comparative Case Study*, 37 ACAD. MGMT. J. 1478 (1994); Wesley M. Cohen & Daniel A. Levinthal, *Fortune Favors the Prepared Firm*, 40 MGMT. SCI. 227 (1994)).

41. Vaidya, *supra* note 34, at 10. See also Suet-Fern Lee & Mark Tan, *Joint Ventures in China – Lessons to be Learned from Danone Versus Wahaha*, 30 COMP. L. Y.B. INT'L BUS. (2008) (discussing a French company and a Chinese company that engaged in a food joint venture).

42. See Vaidya, *supra* note 34, at 14. See also AIMIN YAN & YADONG LUO, INTERNATIONAL JOINT VENTURES: THEORY AND PRACTICE 247-48 (2001) (looking specifically at joint venture structures, the authors “argue that an understanding of the key driving and restraining forces for [why there is] joint venture restructuring is pivotal”).

III.

BACKGROUND ON THE SINGAPOREAN CONTEXT

A. *Political Stability and Economic Success*

Singapore enjoys one of the highest standards of living in the world.⁴³ Its arrival at such an economic pinnacle is beyond the scope of this study, but Singapore's achievements have been discussed at length elsewhere.⁴⁴ Certain basic points are worth noting, however, before proceeding to an examination of the country's legal profession and a discussion of joint ventures. For example, Singapore has long had a strong English-language influence, stemming mainly from the fact that as early as 1819 it was settled by the British East India Company, then led by Sir Thomas Stamford Raffles.⁴⁵ In 1867, Singapore formally became a British colony, and notwithstanding a four-year period of Japanese control during World War II, British rule lasted until the 1950s.⁴⁶ For a brief time thereafter, beginning in 1963, Singapore merged with Malaysia, but in 1965 it withdrew and became an independent state with Lee Kuan Yew presiding as prime minister.⁴⁷

There has been no more pivotal political figure in Singapore post-1965 than Lee Kuan Yew. His People's Action Party (PAP) has held overwhelming majorities in every session of Parliament, and it prevailed once again in the most recent election in 2006.⁴⁸ As Lee himself has written, the PAP's key platform has been to provide Singaporeans with security *and* economic prosperity – the latter accomplished by making the country's infrastructure among the best in the world, creating value-added goods for export, and opening its borders to foreign investment.⁴⁹ And although there have been various financial hurdles along the

43. See World Economic Outlook Database, *supra* note 10.

44. See, e.g., HENRI GHESQUIERE, SINGAPORE'S SUCCESS: ENGINEERING ECONOMIC GROWTH (2007); TILAK ABEYSINGHE & KEEN MENG CHOY, THE SINGAPORE ECONOMY: AN ECONOMETRIC PERSPECTIVE (2007); HAFIZ MIZRA, MULTINATIONALS AND THE GROWTH OF THE SINGAPORE ECONOMY (1986); R.P. LEBLAC, SINGAPORE: THE SOCIO-ECONOMIC DEVELOPMENT OF A CITY STATE: 1960-1980 (2008); SUDHA V. MENON, SINGAPORE ECONOMY: AN OVERVIEW (2008).

45. See MAURICE COLLINS, RAFFLES: THE DEFINITIVE BIOGRAPHY (1966).

46. See C.D. COWAN, NINETEENTH-CENTURY MALAYA: THE ORIGINS OF BRITISH POLITICAL CONTROL (1961). See also HIROSHI SHIMIZU & HITOSHI HIRAKAWA, JAPAN AND SINGAPORE IN THE WORLD ECONOMY: 1870-1965 (1999).

47. Initially, the British allowed limited self-rule in the early 1950s. But in 1959, Singapore achieved full self-rule that saw the People's Action Party (PAP) emerge victorious in elections for the national legislative assembly. Note that in that 1959 election, Lee Kuan Yew was elected prime minister as well. Political scientist Diane Mauzy has written extensively on Singapore, the PAP, and Lee Kuan Yew. See Diane Mauzy, *Electoral Innovation and One Party Dominance in Singapore*, in HOW ASIA VOTES (John Hsieh & David Newman eds., 2001); DIANE MAUZY & ROBERT MILNE, SINGAPORE POLITICS UNDER THE PEOPLE'S ACTION PARTY (2002).

48. See Mauzy, *supra* note 47; MAUZY & MILNE, *supra* note 47, at 38-50. For a more recent account of the PAP's dominance, see LEBLAC, *supra* note 44; MENON, *supra* note 44.

49. See LEE KUAN YEW, FROM THIRD WORLD TO FIRST: THE SINGAPORE STORY 1965-2000

way – the 1997 Asian financial crisis, the 2002-2003 outbreak of the SARS disease, and the current worldwide credit crunch and economic downturn – Singapore has remained better off, economically, than most other countries around the world.⁵⁰

Lee Kuan Yew's tenure as prime minister ended with his retirement in 1990. But he remains active in government, even continuing to hold a senior ministerial position as his son, Lee Hsien Loong, serves as Singapore's present prime minister.⁵¹ Politically, various observers have debated the type of system Singapore has had for decades.⁵² Human rights groups, academics, and political commentators, for example, routinely castigate the government for its historically strict regulations of free speech and political opposition and for its harsh criminal statutes and treatment of criminal defendants.⁵³ The state and its backers bristle at such criticism. They note that the country has regular parliamentary elections and strong public and electoral support for the PAP; moreover, given the almost unrivaled standard of living for those who live within its borders, they scoff at those who seek to critique the "Singaporean" way of governance.⁵⁴

(2000). In addition, Singapore played a critical role in promoting regional prosperity, development, and security. For example, in 1967, Lee led the efforts to form the Association of Southeast Asian States (ASEAN), which had (and continues to have) as its main focus economic, political, and military security within the region. See MAUZY & MILNE, *supra* note 47, at 176-83; see generally ROBERT S. MILNE & DIANE MAUZY, SINGAPORE: THE LEGACY OF LEE KUAN YEW (1990); Hong Lysa, *The Lee Kuan Yew Story as Singapore's History*, 33 J. SE. ASIAN STUD. 545 (2002).

50. For data on Singapore's economic and financial health, see World Economic Outlook Database, *supra* note 10. See also SINGAPORE IN THE NEW MILLENNIUM: CHALLENGES FACING THE CITY-STATE (Derek da Cunha ed., 2002); THE ECONOMIST, COUNTRY BRIEFINGS: SINGAPORE – ECONOMIC DATA, <http://www.economist.com/countries/Singapore/profile.cfm?folder=Profile%2DEconomic%20Data> (last visited Mar. 7, 2010); THE HERITAGE FOUNDATION AND WALL STREET JOURNAL, SINGAPORE INFORMATION ON ECONOMIC FREEDOM, <http://www.heritage.org/index/country/Singapore> (last visited Mar. 7, 2010).

51. For a detailed biography of Lee Hsien Loong, see The Cabinet – Mr. Lee Hsien Loong, <http://www.cabinet.gov.sg/CabinetAppointments/Mr+Lee+Hsien+Loong.htm> (last visited Mar. 7, 2010). See also YEW, *supra* note 49; MAUZY & MILNE, *supra* note 47, at xii, 117.

52. For an overview of this debate, see Garry Rodan, *Singapore Exceptionalism? Authoritarian Rule and State Transformation*, in POLITICAL TRANSITIONS IN DOMINANT PARTY SYSTEMS: LEARNING TO LOSE 231-51 (Edward Friedman & Joseph Wong eds., 2008).

53. See Singapore – Amnesty International, <http://www.amnesty.org/en/region/singapore> (last visited Mar. 7, 2010) (critical evaluation of the human rights situation in Singapore). See also Singapore – Human Rights Watch, <http://www.hrw.org/asia/singapore> (last visited Mar. 7, 2010); 2008 Human Rights Report: Singapore, <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119056.htm> (last visited Mar. 7, 2010); Freedom House's Evaluation of Singapore, <http://www.freedomhouse.org/template.cfm?page=363&year=2005&country=6829> (last visited Mar. 7, 2010).

54. See Singapore Government, <http://www.gov.sg> (last visited Mar. 7, 2010) (addressing these points in detail). See also Bryan Caplan, *Democracy in Singapore: How is One-Party Rule Possible?*, LIBRARY OF ECONOMICS AND LIBERTY, Nov. 28, 2008, http://econlog.econlib.org/archives/2008/11/democracy_in_si.html#; YEW, *supra* note 49; Gordon Silverstein, *Singapore: The Exception that Proves Rules Matter*, in RULE BY LAW: THE POLITICS OF

Despite the different positions of those who debate this issue, one point around which consensus appears is that Singapore has been the model for how to attract foreign investment. One reason cited for overseas businesses finding the country so amenable is that “the legal system [for financial entrepreneurs] is efficient and highly protective of private property.”⁵⁵ The following section examines the context under which law and lawyers operate within this system.

B. The Singaporean Legal Profession and the Inviting Environment for Joint Law Ventures

According to 2009 data from the Law Society of Singapore, the country’s statutorily established body in charge of representing the interests of lawyers, there are approximately 3,700 licensed practitioners in the country.⁵⁶ The same data reports 781 registered law firms in Singapore, 685 of which are small practices that have “1 to 5 lawyers.”⁵⁷ Throughout the course of my interviews with both Singaporean and foreign lawyers involved in joint ventures, I repeatedly was told that the conventional wisdom is that over half of these lawyers practice mainly transactional law.

Given the heavy influence of British colonial rule, the Singaporean legal profession continues to retain the nomenclature of “solicitor” and courtroom “advocate” (with the term “barrister” sometimes interchangeably used for the latter). Yet it is important to note that the Singaporean bar is unified, whereby one who is granted a license to practice within the country may do so in court or in transactional settings.⁵⁸ In order to become a practicing lawyer, one typically graduates with an undergraduate degree in law from the National University of Singapore, the main legal educational institution in the country.⁵⁹ Thereafter, the law degree holder will engage in a period known as a “pupillage,” where she will spend six months working under an experienced private or public sector practitioner.⁶⁰ Because the Singaporean bar recognizes law degrees granted from several British, Australian, New Zealand, and Malaysian law schools, these particular law degree holders, depending upon the circumstances, may be

COURTS IN AUTHORITATIVE REGIMES 74 (Tom Ginsburg & Tamir Moustafa eds., 2008) (summarizing the pro-Lee Kuan Yew perspective).

55. THE HERITAGE FOUNDATION AND WALL STREET JOURNAL, SINGAPORE INFORMATION ON ECONOMIC FREEDOM, <http://www.heritage.org/index/country/Singapore> (last visited Mar. 7, 2010).

56. See The Law Society of Singapore, Annual Report 2009, http://www.lawsociety.org.sg/about/annual_report/2009/src/Lawsoc_Annual_Report_2009.pdf (last visited Mar. 7, 2010).

57. *Id.* at 36. See also Tzi Yong Sam Sim, *A Guide to the Singapore Legal System and Legal Research*, GlobaLex, Feb. 2007, available at <http://www.nyulawglobal.org/globalex/Singapore.htm>.

58. The Law Society of Singapore, *supra* note 56; Tzi Young Sam Sim, *supra* note 57.

59. *Id.* See Tzi Yong Sam Sim, *supra* note 57 (noting the recent arrival of Singapore Management University (in 2007), which “offer[s] a 4 year law or 5 year joint-degree courses”).

60. Singapore Board of Legal Education: Outline, http://www.lawsociety.org.sg/LSS_TEST/ble/c2_pupillage.htm (last visited Mar. 7, 2010).

exempt from undertaking a pupillage.⁶¹

The vast majority of private lawyers in Singapore are in small law practices, and most of these practices have emerged in the post-1965 independence era. Others, however, have longer histories – and a handful of firms are larger, more prestigious and profitable, and have experimented with the JLV model. Upon my request, the Attorney General of Singapore had his staff provide me with the complete history and list of JLVs in the country. Table 1 (*see next page*) highlights this information.

Of the Singaporean firms in Table 1 that have participated in JLVs, four – Drew & Napier, Rodyk & Davidson, Shook Lin & Bok, and Allen & Gledhill – trace their roots back nearly a century or more.⁶² Lee & Lee has existed since 1955, as has another firm not listed in Table 1, Rajah & Tann, which had a more informal alliance, rather than an official joint venture, with the Wall Street firm Weil, Gotshal & Manges.⁶³ And another, Colin Ng, is now over two decades old.⁶⁴ (The other Singaporean firms in Table 1 have emerged within the past fifteen years.⁶⁵) One additional point to remember is that while the first JLVs were established in 2000, foreign firms were present within the country for years before – although their practices were limited to non-Singaporean law.⁶⁶

61. *Id.* at provision no. 5. See also The Law Society of Singapore, Section F http://www.lawsociety.org.sg/ble/f_aas15.htm (last visited Mar. 7, 2010); Alexander F.H. Loke, *The Past, Present and Future of Legal Education in Singapore*, in *THE SINGAPORE LEGAL SYSTEM* 325 (Kevin Y.L. Tan ed., 1999).

62. For a history of each of these firms, see, e.g., Drew & Napier, Our History, <http://www.drewnapier.com/history-body.htm> (last visited Mar. 7, 2010); Rodyk & Davidson, History, <http://www.rodyk.com/page/About/1> (last visited Mar. 7, 2010); Shook Lin & Bok, The Firm, <http://www.shooklin.com/firm.htm> (last visited Mar. 7, 2010); Allen and Gledhill, About Us, <http://www.allenandgledhill.com/aboutus.html> (last visited Mar. 7, 2010).

63. See Lee & Lee, Brief History, <http://www.leenlee.com.sg/en/about-us/brief-history.html> (last visited Mar. 7, 2010). For information on Rajah & Tann's alliance with Weil, Gotshal & Manges, see Rajah & Tann, History, <http://www.rajahtann.com/RajahTannCMS/misc.aspx?mid=1&aid=5> (last visited, Mar. 07, 2010); *Weil Gotshal Ramps Up Modest Asia Strategy*, ALB LEGAL NEWS, July 22, 2004, <http://asia.legalbusinessonline.com/law-firms/weil-gotshal-ramps-up-modest-asia-strategy/1188/21021>.

64. Colin Ng, Our History, <http://www.cnplaw.com/en/index.asp> (last visited Mar. 7, 2010).

65. We will be discussing Wong & Leow, TSMP, and Central Chambers below, shortly.

66. There is some dispute as to exactly when foreign firms first came into Singapore. One report states that this occurred in 1992. Conrad Raj, *Colin Ng's Pact with White & Case Likely to Break-Up*, SINGAPORE PRESS HOLDINGS, 2002, <http://www.lawonline.com.sg/News/Law%20JV.htm>. But the foreign firms themselves dispute this date. For example, Baker & McKenzie, on its site, says that it has operated in Singapore for “nearly 30 years.” Singapore – Locations – Baker & McKenzie, <http://www.bakermckenzie.com/Singapore/> (last visited Mar. 7, 2010). Linklaters notes that it has been in Singapore for two decades. Linklaters in Singapore, <http://www.linklaters.com/Locations/Pages/Singapore.aspx> (last visited Mar. 7, 2010).

Table 1⁶⁷

Foreign Law Firm	Singapore Law Firm	JLV Status
Freshfields (U.K.)	Drew & Napier	2000-2007 (Disbanded)
Clifford Chance (U.K.)	Wong Partnership	2003-2009 (Disbanded)
Orrick (U.S.)	Helen Yeo/Rodyk & Davidson	2000-2003 (Disbanded) ⁶⁸
Allen & Overy (U.K.)	Shook Lin & Bok	2000-2009 (Disbanded)
Shearman & Sterling (U.S.)	Stamford Partnership	2001-2002 (Disbanded)
White & Case (U.S.)	Colin Ng & Partners	2001-2002 (Disbanded)
Linklaters (U.K.)	Allen & Gledhill	2001-Present
Lovells (U.K.)	Lee and Lee	2001-Present
Baker & McKenzie (U.S.)	Wong & Leow Partnership	2001-Present
Allens Arthur Robinson (Australia)	TSMP Law Corporation	2007-Present
Dacheng (China)	Central Chambers	2009-Present

In terms of the working relationships within the JLVs, as one foreign lawyer told me, “the big elephant in the room is how lawyers, who are trained in the [Western] rule-of-law tradition, function in this environment.”⁶⁹ On the one hand, according to this individual and several others with whom I met, given Singapore’s long-standing commitment to open markets, foreign capital, and multinational investment, lawyers working in these areas have been allowed to go about their business with little interference from the government.⁷⁰ The establishment of the JLV was in part an attempt by the government to promote greater international legal transactions, whereby lucrative international clients would view Singapore as the hub where such legal work could be done.

On the other hand, as Gordon Silverstein has suggested, while there may be

67. Information provided to the author by the Singapore Office of the Attorney General, June 22, 2009. Note that the dates in Table 1 were also compiled from different sources, including lawyers in the respective firms. Also, certain foreign law firm names were shortened in order to fit inside the above table. These include Freshfields Bruckhaus Deringer and Orrick, Herrington & Sutcliffe.

68. Note that Orrick originally entered into a joint venture with the Singaporean firm Helen Yeo, but Helen Yeo merged with the Singaporean firm Rodyk & Davidson.

69. Anonymous interview (June 10, 2009).

70. *Id.* Interviews with lawyers (June 9, 2009; June 11, 2009).

continued “international investor confidence”⁷¹ and one may argue that Singapore has a “judicial system that is efficient, effective, consistent, and reliable,”⁷² the state imposes pervasive constraints that are simply irreconcilable with how many Westerners view freedom and democracy.⁷³ Silverstein discusses how the state has restricted judicial review and used the courts to clamp down on political opposition and criticism of public policy decisions.⁷⁴ But, he explains, by justifying these actions as necessary for keeping international capital flowing into the country and preserving order and prosperity for Singaporean citizens, the state is generally able to retain its control over, and acceptance by, local and foreign players.⁷⁵

This last point is especially worth noting. Lawyers engaged in sophisticated transactions and relationships, like JLVs, are among those that acquiesce to the Singaporean system – staying fully aware of what is tolerated and what is not. For them, so long as foreign investment remains privileged and they are able to continue benefitting financially, their “confidence,” to use Silverstein’s word, will stay high. As one foreign lawyer commented, “we know there are definite restrictions here – this isn’t the U.K. or the U.S. But we find ways to work around them in order to keep making . . . [the money] we’re making.”⁷⁶

The next section looks more closely at the financial and business interactions between foreign and local Singaporean lawyers. It evaluates how the JLV model has fared over the past decade and concludes that the hopes for it that were present in 2000 have simply not come to fruition.

IV.

AN EMPIRICAL ANALYSIS OF THE JOINT LEGAL VENTURE

A. Background

As Table 1 highlights, five pairs of JLVs exist in Singapore today: Linklaters (U.K) and Allen & Gledhill, Lovells (U.K.) and Lee and Lee, Baker & McKenzie (U.S.) and Wong & Leow, Allens Arthur Robinson (Australia) and TSMP Law Corporation, and Dacheng (China) and Central Chambers. Before the advent of the JLV, while foreign firms could be in Singapore and perform legal services for clients on an international level, they were barred from providing advice or services to clients on local Singaporean matters. To a certain extent, this preclusion was understandable; after all, the Singaporean bar,

71. See Silverstein, *supra* note 54, at 74-75.

72. *Id.* at 75.

73. *Id.* at 74.

74. *Id.* at 74-75; 86-92.

75. *Id.* at 86-101.

76. Anonymous interview (June 11, 2009).

government, and Law Society had an interest in ensuring that only those with accredited legal credentials were able to practice Singaporean law.⁷⁷ But this justification was undermined by the curious extension of this prohibition to properly-licensed Singaporean lawyers who were employed by foreign firms.⁷⁸

Therefore, as a means of trying to gain more complete access to the wealthy Singaporean market, foreign lawyers began talks with the government, the Law Society, and various Singaporean law firms during the late 1990s.⁷⁹ Eventually the different sides arrived at an agreement that in theory would continue to promote the government's goal of remaining open to foreign investment, protect the interests of Singaporean law firms, and allow foreign law firms a greater possibility of developing domestic client relationships.⁸⁰ What emerged was the JLV model, which created a new separate legal entity comprised of lawyers and staff from a foreign law firm working in conjunction with lawyers and staff from a domestic law firm.⁸¹

On paper, the benefits for the foreign law firm that participated in the JLV were quite significant. For example, while the ratio of foreign and Singaporean partners in the JLV had to be comparable,⁸² the foreign firm was under no obligation to bring onto its payroll any of the Singaporean JLV lawyers.⁸³ In fact, to a certain extent, the JLV simply served as an umbrella under which the foreign and domestic firms worked. Each kept its own "books," including payroll. But as explored in detail below, this lack of full integration led to many Singaporean JLV lawyers feeling like second-class citizens, resentful that the pay they received – albeit determined by their own firm's compensation system – was much less than their foreign counterparts'. In addition, by being part of

77. Singaporeans explained this point to me during interviews conducted on June 9, 2009 (anonymity requested.)

78. Lawyers mentioned this complaint during interviews on June 9, 2009, June 11, 2009, and July 12, 2009 (anonymity requested.)

79. For background information, see Report of the Committee to Develop the Singapore Legal Sector, September 2007, 1-2, [http://notesapp.internet.gov.sg/_48256DF200173A1F.nsf/LookupMediaByKey/GOVI-79LDSM/\\$file/Justice%20V%20K%20Rajah%20report.pdf](http://notesapp.internet.gov.sg/_48256DF200173A1F.nsf/LookupMediaByKey/GOVI-79LDSM/$file/Justice%20V%20K%20Rajah%20report.pdf) (last visited Mar. 7, 2010). See also Government Accepts Key Recommendations of Justice V.K. Rajah's Committee on the Comprehensive Review of the Legal Services Sector, December 7, 2007, http://notesapp.internet.gov.sg/_48256DF20015A167.nsf/LookupContentDocsByKey/GOVI-79LDRE?OpenDocument [hereinafter Reports].

80. Report of the Committee to Develop the Singapore Legal Sector, *supra* note 79; Reports, *supra* note 79.

81. Reports, *supra* note 79.

82. See Report of the Committee, Enclosure 2, *supra* note 79, at 108 (noting that "if JLV is constituted as a partnership, the number of equity partners in the [foreign law firm] and resident in Singapore shall not at any time be greater than the number of equity partners in the Singapore law firm"). It is important to keep in mind that there was no ratio requirement in terms of the number of lawyers (associates) who were part of the JLV.

83. *Id.* at 111 (noting explicitly that "[a Singapore law firm] lawyer in the JLV may not become an equity or profit sharing partner in the foreign law firm. If he does so, he will be regarded as a [foreign law firm] lawyer in the JLV.").

the JLV, the foreign firm now could practice “banking law, finance law, corporate law, and any other area of legal or regional work as may be approved by the Attorney General.”⁸⁴ And perhaps most importantly, the JLV effectively gave the foreign firm access to the domestic market, since now the foreign firm would have a partnership with a licensed Singaporean firm that could solicit and offer services to those highly sought-after Singaporean clients.⁸⁵

Still, the interests of the Singaporean firms were accounted for as well. First, once a foreign firm entered into a JLV, it was barred from operating a separate “foreign firm-only” practice within the country.⁸⁶ The converse was not true; the Singaporean firm was allowed to maintain a separate practice of its own. Second and related, written into the government’s plan was a stipulation that the foreign law firm in a JLV was not allowed “to share in the profits of the constituent [i.e. partnering] [Singapore law firm] . . . [and that] the foreign law firm’s share of the JLV’s profits”⁸⁷ was restricted to money that came from “those areas of legal practice permitted to the JLV.”⁸⁸ Third, litigating in court and practicing real estate law – two profitable and respected sectors of the Singaporean legal profession – were specifically kept within the exclusive domain of locally-licensed counsel,⁸⁹ thereby increasing these lawyers’ importance within the JLV.

Fourth, Singaporean lawyers told me that another incentive to joining a JLV was the opportunity to gain exposure to the “best practices” of elite international law firm lawyers, many of whom had been trained at the top schools and came from legal hubs like London, New York, and Washington, D.C.⁹⁰ Fifth, although they were barred from being a part of the foreign firm’s equity partnership structure, the Singaporean lawyers in a JLV were allowed to play an integral role “in the [foreign law firm’s] regional management team.”⁹¹ This option provided Singaporean lawyers with the ability to make contacts and develop relationships with international clients who otherwise may have been out of reach. Finally, there was a belief that entering into a JLV with a

84. *Id.* at 107.

85. *Id.* at 110 (noting that the “JLV may practise in areas of legal practice mutually agreed between the constituent [Singapore law firm] and the [foreign law firm], who may also agree among themselves on the parameters of the practice areas; and JLV shall not practise Singapore law except through a Singapore lawyer who has in force a practising certificate and is practising in the constituent [Singapore law firm] of the JLV, or a foreign lawyer registered to practise Singapore law in the JLV under section 130I of the Legal Profession Act or in the constituent [Singapore law firm] of the JLV under section 130J of the same Act”).

86. *Id.*

87. *Id.* at 107.

88. *Id.* So, in other words, if the JLV made money from other sources, in which the foreign law firm could not be involved, the foreign law firm could not claim access to that money.

89. *Id.*

90. This statement was made during interviews with such lawyers on June 9, 2009 (two separate telephone interviews); June 15, 2009; and July 5, 2009 (anonymity requested).

91. See Report of the Committee, Annex C, *supra* note 79, at 111.

prestigious foreign firm would only enhance the reputation of the Singaporean firm, which concomitantly with the above points would lead to greater profit margins for the latter as well.⁹²

Therefore, there has been a list of benefits for parties to the JLV. Did the hopes pan out as expected? For some, yes; for others, no. The next section examines the positive results.

B. *The Upside – And Why Relationships Matter*

Most joint ventures that exist today formed in a similar manner. Typically, a foreign firm arrives or already has a presence in Singapore and then creates a JLV with a well-established, well-reputed local firm. So, for instance, Linklaters, the elite magic circle London-based firm, which had been in Singapore for nearly twenty years, entered into a JLV in 2001 with the highly regarded, century-old Singaporean firm Allen & Gledhill.⁹³ That same year, Lovells, another prestigious U.K. firm, formed a JLV with Lee & Lee, a full-service Singaporean firm that was started in 1955 by three local lawyers, one of them the former prime minister, Lee Kuan Yew.⁹⁴

Two other existing JLVs that were created more recently have had like characteristics. In 2007, Australian legal powerhouse Allens Arthur Robinson joined forces with the “boutique corporate and commercial”⁹⁵ Singaporean firm, TSMP. While TSMP itself only emerged in 1998, it was founded by a former partner at the elite Singaporean firm of Drew & Napier and who was also once the Dean of the Law Faculty at the National University of Singapore.⁹⁶ And in 2009, the large Chinese law firm Dacheng established a JLV with Central Chambers,⁹⁷ a Singaporean outfit that, while only seven years old, consists of highly experienced lawyers, some of whom have been in practice for nearly three decades.⁹⁸

The only present-day JLV that stands apart, in terms of how it was created,

92. See interviews, *supra* note 90.

93. The Linklaters website discusses this relationship. See Linklaters in Singapore, <http://www.linklaters.com/Locations/Pages/Singapore.aspx> (last visited Mar. 6, 2010).

94. For a brief history of Lee & Lee, see Brief History, <http://www.leenlee.com.sg/en/about-us/brief-history.html> (last visited Mar. 6, 2010). For a discussion of Lovells' partnership with Lee & Lee, see Lovells Worldwide/Singapore, <http://www.lovells.com/Lovells/Worldwide/Singapore/Singapore.htm> (last visited Mar. 6, 2010).

95. See TSMP's website at http://www.tsmplaw.com/index.php?option=com_content&view=article&id=50&Itemid=57 (last visited Feb. 27, 2010).

96. *Id.*

97. See Rashida Yosufazi, *Firms Form First China-Singapore JV to Target India*, ALB LEGAL NEWS, July 24, 2009, <http://asia.legalbusinessonline.com/news/breaking-news/firms-form-first-china-singapore-jv-to-target-india/36103>.

98. See Central Chambers Law Corporation Website, About Our People, <http://www.centralchambers.com.sg/CentralChambers400/Page/9882/OURLAWYERS.aspx> (last visited Feb. 27, 2010).

is the one started by Baker & McKenzie. About a decade ago, Jon Bauman published a history of this global American mega-law firm.⁹⁹ And other reports have documented the growth of this mammoth enterprise.¹⁰⁰ Relevant to this study, though, is that Baker's JLV in Singapore was not a combination of it and an already existing local firm. Operating under the *Swiss Verein* model, whereby its offices around the world comprise a confederation of sorts that function in an independent manner and in accordance with the laws of the jurisdiction under which each respective branch resides,¹⁰¹ Baker launched the domestic Singaporean firm of Wong and Leow in 1996.¹⁰² Wong and Leow today has some 80 lawyers and is a separate legal entity with its own clients, profits, management structure, and partnership track for associates.¹⁰³ It has, however, worked closely with Baker in a joint venture since 2001, and this relationship – highlighted in legal periodicals, news reports, and in conversations with various lawyers in the country – seems ultimately to define who Wong and Leow is.¹⁰⁴

In spite of the distinct way in which the Baker-Wong JLV emerged, it and the other above-mentioned JLVs remain standing. But why and how? Perhaps most obviously, they have done so because they are profitable. As one lawyer mentioned, “we’re making money – plain and simple. But *why* we’re making money, that’s what interesting.”¹⁰⁵ As this individual and the data gathered from the empirical interviews suggest, several common contributing factors are in play here. A key reason relates to the strong relationships and significant professional trust that exist between the foreign and domestic players

99. See JON BAUMAN, PIONEERING A GLOBAL VISION: THE STORY OF BAKER & MCKENZIE (1999).

100. See, e.g., *Baker & McKenzie Lures 7 Energy Lawyers from T & K*, LAW 360, June 12, 2009, http://www.law360.com/registrations/user_registration?article_id=105765 (registration required); *Law Firms: Legal Advice*, THE ECONOMIST, Aug. 23 2008 at 81. For a host of articles on the Baker business model, see the SAN FRANCISCO BUSINESS TIMES, which has tracked these pieces over the course of the last several years, <http://www.bizjournals.com/sanfrancisco/> (search “Baker & McKenzie”).

101. See BAUMANN, *supra* note 99; Legal 500.com, What the Firm Says, <http://www.legal500.com/firms/50079-baker-mckenzie/offices/10313-zurich/profile> (last visited Mar. 6, 2010).

102. For information on this set-up, see Baker’s website, <http://www.bakermckenzie.com/Singapore/> (last visited Mar. 6, 2010).

103. For background on Wong & Leow and its operations, see <http://www.legal500.com/firms/33424-wong-leow-llc/offices/31590-singapore> (last visited Mar. 6, 2010).

104. Beyond hearing this during my various interviews with Singaporean and foreign lawyers, the close interaction between Baker and Wong & Leow was discussed during my various interviews with Singaporean and foreign lawyers and at *id.*; Baker’s website, *supra* note 102; Legal 500’s website, <http://www.legal500.com/firms/50079-baker-mckenzie/offices/30159-singapore> (last visited Mar. 6, 2010).

105. Telephone interview with lawyer (June 30, 2009) (anonymity requested).

involved.¹⁰⁶ As another Singaporean lawyer stated, “remember, it’s *always* about relationships. We succeed because we can work with them and vice versa.”¹⁰⁷

Not surprisingly, these ties have developed and are nurtured in different ways, depending on the JLV. For some, the relationships began with the local firm’s Singaporean lawyers already having friends within the foreign firm well before entering into the joint venture. In other instances, lawyers in the Singaporean firm worked in the partnering foreign firm at some earlier point and became familiar with the latter’s culture, norms, and ways of doing business. In these cases, the foreign firm’s lawyers naturally came to learn of these Singaporeans – “as professionals and as people”¹⁰⁸ – before deciding whether to pursue the JLV route with the local firm. And of course, that “personalities have simply meshed”¹⁰⁹ following the creation of the joint venture has helped preserve the cohesiveness of these alliances, too.

In addition to working well with, respecting, and liking one another, the foreign and local lawyers of these JLVs also noted that their relationships are strong because each side has realistic expectations. Consider for a moment two separate but related issues. First, in terms of leadership and management, every lawyer in these partnerships with whom I spoke emphasized that their respective joint operation continues because of a lack of, as one respondent remarked, a “colonialist mindset”¹¹⁰ in how the JLV is run. In other words, there is a mutual understanding that while the foreign lawyers have important skills to convey, they also have as much to learn from the Singaporeans. There is a real sense among the Western and domestic lawyers that, given the history of British imperialism in the region, together with the strong values placed on Singaporean culture, identity, and independence, cooperation is necessary in order to administer a successful joint venture of this type. As such, decisions on matters ranging from hiring to promotion to marketing to soliciting client business tend to be made jointly between the foreign and Singaporean leaders of the JLV.¹¹¹

Second, and particularly relating to this last point involving client contacts, the JLVs’ foreign and domestic lawyers appear to have a solid understanding as to how business will be apportioned and files allocated between them, although once again there is variation as to how this takes place.¹¹² For some, where a local client is satisfied with the existing relationship she has with her

106. Telephone interviews with lawyers (June 15, 2009; June 30, 2009; July 12, 2009) (anonymity requested).

107. Telephone interview with lawyer (June 15, 2009) (anonymity requested).

108. *Id.*

109. Telephone interview with lawyer (July 12, 2009) (anonymity requested).

110. Telephone interview with lawyer (June 30, 2009) (anonymity requested).

111. Information gathered during telephone interviews (June 15, 2009; June 30, 2009; July 12, 2009) (anonymity requested).

112. *Id.*

Singaporean firm – a firm that also happens to be in a JLV – these partnering foreign firms’ lawyers told me that they would be unwilling to attempt to rope this business into the joint venture.¹¹³ “The client would have to pay more and may not even need us; and we’ll end-up pissing off [our Singaporean JLV partner],” one foreign lawyer said.¹¹⁴ Now, this same lawyer did say that in situations where the JLV brought value-added services to such a client, like helping on an international deal with which the Singaporean firm had little experience, he then “certainly will make a play – after all that’s the whole purpose of the JLV.”¹¹⁵ But such outreach is accepted and well-understood under these circumstances, this lawyer remarked.

A different type of client-contact understanding exists where there is an implicit acknowledgment that the JLV serves as a base for the foreign law firm to expand its business more regionally, while the Singaporean JLV lawyers serve as the point-persons for work within the country.¹¹⁶ Where each side needs the assistance of the other, then the two will certainly come together; but otherwise, the expectation is that each side has its respective jurisdictional terrain.¹¹⁷ Another successful arrangement can occur when the foreign and domestic lawyers view the JLV, rather than their own respective practices, as the primary setting where client demands are met.¹¹⁸ In this situation, the everyday operations of the joint venture are seamless. And the interactions between the foreign and domestic lawyers are cooperative because both sides understand that the JLV is the main face representing who they are within the country.¹¹⁹

It is important to note that even with these understanding and trusting relationships, issues of conflict still arise within the JLVs. Pay differentials between the foreign and domestic JLV lawyers, inadvertent (and sometimes purposeful) slights, frustrations over practice procedures, and the everyday pressures of staying financially strong are just some of the tensions that can exist. One participant even compared the JLV model to a stressful marriage – noting that, yes, there are good times, but there are also times when one or the other side simply feels like walking away.¹²⁰ However, this person noted that when routine “couple’s counseling”¹²¹ occurs – mainly in the form of evaluating the positive financial returns accompanying the alliance – the decision to remain

113. Information gathered during telephone interviews (June 15, 2009; July 12, 2009) (anonymity requested).

114. Telephone interview with lawyer (July 12, 2009) (anonymity requested).

115. *Id.*

116. Telephone interview with lawyer (June 15, 2009) (anonymity requested).

117. *Id.* This relationship describes one of the observed JLVs.

118. Telephone interview with lawyer (June 30, 2009) (anonymity requested).

119. *Id.*

120. Interview with lawyer (July 12, 2009) (anonymity requested).

121. This was the term that I used during my interview with the lawyer, *id.*, but the lawyer eagerly embraced this phrase, saying it captured the exact sentiment he was trying to convey.

together rather than divorcing carries the day.

But as Table 1 illustrates, a majority of JLVs in Singapore have reached the opposite conclusion. Why? Once again, relationships are the key, but the dissolution of these marriages is the result of a lack of relationships.

C. The Downside – And Why Relationships Matter

Of the six JLVs disbanded since 2000, the three that lasted the shortest periods of time were with American firms, White & Case with Colin Ng, Shearman & Sterling with Samford Partnership (each from 2001-2002), and Orrick with Helen Yeo (that was then absorbed into the Singaporean firm of Rodyk & Davidson) from 2000-2003. The other three involved British firms – Freshfields, Clifford Chance, and Allen & Overy – that had joined, respectively, with the Singaporean firms of Drew & Napier, Wong Partnership, and Shook Lin & Bok. Like those JLVs that continue to exist today, these six that dissolved each started with the primary hope of reaping increased profit margins and expanding client bases.¹²² Yet the troubles that ensued placed too great a burden on these alliances, with the result that each ultimately disbanded.

As the interview data reveal, the main issue dividing these two groups of lawyers was that neither side had the same set of expectations regarding the JLV. And each side felt as though it was being taken advantage of – leading to a situation where there was simply too little trust for these relationships to have any long-term sustainability. First, take the sentiments of and complaints from the foreign lawyers with whom I spoke. One frequent refrain was that the Singaporean firms conveniently forgot how fortunate they were to be linked to a prestigious Western law firm.¹²³ Two foreign lawyers from two different firms used the exact same language in noting the significance of the “branding benefits”¹²⁴ to the Singaporeans participating in the JLV. Each described how, in a society where prestige is of the highest import, the ability to affiliate with the most well-reputed of Western firms brought enormous international status to these Singaporean lawyers, the likes of which they had never seen before.¹²⁵ And with this new reputational position, the Singaporean firms gained access to client networks around the globe, as well as the opportunity to work with some of the most talented and experienced transactional lawyers anywhere.¹²⁶ But these foreign lawyers rarely felt any sense of gratitude or recognition from their domestic affiliates for what they were receiving.¹²⁷

122. Interviews with two separate Singaporean lawyers (June 9, 2009) (anonymity requested); interviews with foreign lawyers (June 9, 2009; June 10, 2009).

123. Interviews with lawyers (June 9, 2009; June 10, 2009) (anonymity requested).

124. Interviews with lawyers (June 9, 2009; June 10, 2009) (anonymity requested).

125. *Id.*

126. *Id.*

127. *Id.*

Moreover, from the foreign lawyers' vantage point, the return on their investment in the JLV was relatively small. For one thing, the goal of making serious inroads into the local market via their Singaporean partners never materialized to the extent that they had hoped.¹²⁸ Sure, in some cases it made little sense to enlist into the JLV clients who were represented by the Singaporean firm, especially if the expertise of the foreign firm was not needed. The foreign lawyers accepted and understood this reality.¹²⁹ But in other cases, particularly with yet-unsigned clients, the foreign lawyers believed that their respective Singaporean JLV partners would at times undermine the joint relationship by seeking to divert potential business into their separate local firms.¹³⁰ (Recall that under the JLV rules, while foreign law firms that entered into these alliances had to give up their separate practices, the Singaporean firms did not.)

Then, on those deals where clients did require the Singaporean and foreign lawyers to work together, the latter told me that the work performed by the domestic counterparts was frequently "sub-par."¹³¹ One such foreign lawyer relayed how he sometimes felt like he was educating two clients – the paying one and his Singaporean JLV colleagues who were scrambling to stay on top of the deal.¹³² Another foreign lawyer stated that from a client services point of view, he often became upset when his international clients who needed domestic work done by the Singaporean lawyers complained of local counsel being unresponsive or unprepared to provide the necessary information.¹³³ Partly for these reasons, certain foreign lawyers even remarked that the Singaporean lawyers, who were being paid less than their foreign colleagues but in accordance with their own Singaporean firm's salary structure, simply did not deserve to be compensated at any higher a rate.¹³⁴

To say that the Singaporean lawyers held a different perspective on why their JLV arrangements failed would be an understatement. Although some variation existed in the responses from this group, a set of common themes

128. *Id.*; see also interview with another pertinent foreign lawyer (June 11, 2009) (anonymity requested).

129. *Id.*

130. *Id.*

131. This was the word used by lawyer interviewed on June 9, 2009 (anonymity requested), but this sentiment was expressed during the other interviews conducted. See *id.*

132. Interview with lawyer (June 11, 2009) (anonymity requested).

133. Interview with lawyer (June 9, 2009) (anonymity requested).

134. Interviews with lawyers (June 9, 2009; June 10, 2009; June 11, 2009) (anonymity requested). The foreign law firms in Singapore generally use the standard "lockstep formula" in allocating salaries. Law firms following a lockstep method compensate their employees on the basis of years of service, so in theory a third-year associate in the London home office would earn the same as a third-year associate in a New York satellite branch. For a discussion of this point, see James D. Cotterman, *Lockstep Compensation: Does it Still Merit Consideration?* LAW PRACTICE TODAY, Aug. 2007, <http://www.abanet.org/lpm/lpt/articles/fin08071.shtml>.

emerged, highlighting the hurt and resentful feelings of not being appreciated in a number of ways. For example, more than one Singaporean lawyer told me that it was only because of the JLV arrangement that some of the foreign firms were able to receive prime office space in the heart of the city at such an affordable rate.¹³⁵ This situation occurred because many of the Singaporean firms had resided in these locations well before 2000 and either had extra room to house their foreign colleagues or negotiated favorable rental agreements for additional space in these office towers on the foreign firms' behalf.¹³⁶

Furthermore, as even some foreign lawyers conceded – and as the Singaporeans vociferously emphasized – had it not been for the domestic JLV lawyers, the firms from abroad could never have started their regional private investment funds practices, which proved extremely rewarding during their time in the alliance. There were other issues as well. Perhaps most significantly, the Singaporeans I interviewed uniformly noted that the lack of economic integration,¹³⁷ particularly JLV compensation, served as a point of contention that simply could not be overcome.¹³⁸ While understanding that the respective firms determined salaries within the JLV (i.e. the foreign firm paid its own lawyers, while the domestic firm did the same), the Singaporeans nevertheless expressed frustration that no agreement was ever reached equalizing the pay-scale. As one Singaporean lawyer commented, “We were working the same horrible hours, on the same tedious projects, and making so much less!”¹³⁹

Many of the Singaporeans also disputed the claim that the foreign side willingly mentored and transmitted best practice techniques to them. It was quite the opposite, according to the domestic lawyers, especially when it came to sharing standard form documents, or “precedent” materials, as they referred to them.¹⁴⁰ The Singaporeans told me, and the foreign counterparts later confirmed, that the latter would zealously guard these papers, perplexing and infuriating the former.¹⁴¹ From the foreign lawyers' viewpoint, these were extremely sensitive work-products, and given that the Singaporeans had their own separate firms and separate clients, it would be irresponsible not to monitor these files closely.¹⁴² For the local lawyers that rationale was mind-boggling. As one Singaporean exclaimed, “We were supposed to be partners! It's true, I

135. Interviews with three separate Singaporean lawyers (June 9, 2009) (anonymity requested).

136. *Id.*

137. Interview with foreign lawyer (June 9, 2009) (anonymity requested); interviews with three separate Singaporean lawyers (June 9, 2009) (anonymity requested).

138. *Id.*

139. Interview with Singaporean lawyer (June 9, 2009) (anonymity requested). This particular lawyer stated that Singaporean salaries were often one-third less than foreign salaries.

140. Interviews with three separate Singaporean lawyers (June 9, 2009) (anonymity requested).

141. Interviews with three separate Singaporean lawyers (June 9, 2009) (anonymity requested); interviews with foreign lawyers (June 9, 2009; June 10, 2009) (anonymity requested).

142. Interviews with foreign lawyers (June 9, 2009; June 10, 2009) (anonymity requested).

needed to learn a lot, and I wanted to. But instead, we kept having to reinvent the wheel!"¹⁴³ This person went on to note that the lack of cooperation by the foreign firm cost valuable time, but as importantly, it contributed to a shattering of trust that severely undermined the joint relationship almost from the start.¹⁴⁴

This absence of trust had domino-like implications. For example, the Singaporean side in several of these JLVs admitted to retaining tight control over previously acquired local clients within their own individual firms, refusing even to explore the possibility of involving the JLV. The Singaporeans emphatically justified their actions on the grounds that client preferences for such sole representation always governed, that the JLV rates for these particular clients were too costly and unnecessary, and that, yes, if the foreign firms could "turf-guard," then so could the Singaporeans.¹⁴⁵

With unhappiness at a peak between these different JLV partners, several of the foreign firms began looking outside of their unstable arrangements to other local Singaporean lawyers with whom they could engage.¹⁴⁶ (But they did maintain their formal JLV ties with their original, respective Singaporean partners and continued to work with them as needed.) In addition, as the tensions mounted, a provocative refrain gained momentum among the agitated Singaporeans – namely, that the foreign lawyers were acting like the colonial rulers of years past. Charges that the foreign firms were exploiting the inexpensive Singaporean legal labor market for self-serving purposes ran rampant among the disaffected. These sentiments were compounded by the Westerners' shoddy and condescending treatment of the domestic practitioners.¹⁴⁷ While the foreign lawyers dismissed these accusations as baseless and a convenient excuse for the Singaporeans' own failure to keep pace with the complex needs of internationally sophisticated clients, the colonialist label had traction and (together with the other above-mentioned events) prompted interested observers to start seriously reevaluating this entire business model.

Witnessing this discontent and feeling pressure from both the foreign and domestic law firms, in August 2006, the government decided that something needed to be done. It called on the eminent lawyer and a sitting justice of the Singaporean Court of Appeal, V.K. Rajah, to conduct a thorough assessment of

143. Interview with Singaporean lawyer (June 9, 2009) (anonymity requested).

144. *Id.*

145. Stoking the ire of the foreign side further was that their Singaporean partners in some instances had clients in other parts of Asia, but because there was no JLV-relationship in these settings, the Singaporeans were even more protective of their client relationships. Interviews with three separate Singaporean lawyers (June 9, 2009) (anonymity requested).

146. Different foreign lawyers engaged in this practice told me this during interviews conducted on June 9, 2009, and June 10, 2009 (anonymity requested).

147. For example, one Singaporean lawyer, during an interview on June 9, 2009, referred to the foreign law firm lawyers as "colonial bastards." Another, that same day, discussed how culturally insensitive foreign lawyers were.

the JLV situation.¹⁴⁸ The justice brought together an array of interested parties in what came to be called the “Rajah Committee” to study the history, pluses, and shortcomings that had accompanied this law firm merger experiment.¹⁴⁹ In December 2007, after surveying the diversity of opinions, the Committee issued its final report on the JLV, which ultimately caused an important policy shift on the part of the government. The next section examines these findings.

V.

THE RAJAH COMMITTEE REPORT – AND WHERE TO GO FROM HERE

A. *Enhancing the JLV*

It is important to keep in mind that while the Rajah Committee reevaluated the functioning of the JLV, neither it nor the Singaporean government ever sought to scale back the country’s general policy of intense economic liberalization in the legal services sector.¹⁵⁰ Perhaps for that reason, the JLV model, which in principle continued to resonate among various government leaders, remained one to which both the Committee and the state stayed wedded. Thus, those who hoped that Justice Rajah’s reforms would serve as a formal rebuke of the JLV structure were disappointed.

To start, the Committee did not even move away from the language of the “joint law venture” in its reforms when it issued a statement saying that while the original JLV program had experienced difficulties, a new, better, “enhanced JLV” would ameliorate many of the problems that beset the initial model.¹⁵¹ One improvement would be allowing foreign law firms within a JLV directly “to

148. For background on the government’s decision to call on Justice Rajah to conduct a formal inquiry of the JLV situation, see the Singapore Ministry of Law Website, *Government Accepts Key Recommendations of Justice V.K. Rajah’s Committee on the Comprehensive Review of the Legal Services Sector*, <http://app2.mlaw.gov.sg/News/tabid/204/currentpage/8/Default.aspx?ItemId=95>.

149. *Id.*

150. In fact, the Ministry of Law’s discussion of the Rajah Committee report on its website cites the document itself, noting: “The most significant set of proposals made by the Committee concerns the liberalisation of the legal services sector. The Government agrees with the Committee that the legal services sector is a key pillar of the economy. Liberalising the sector will support Singapore’s aim to be a vibrant global city and an attractive venue for talent. Liberalising the legal market will result in three key benefits. First, it will bolster the growth of our banking, financial and other key economic sectors through a full range of competitive cutting edge legal services. Secondly, the legal sector, itself an important component of our economy, will grow and Singapore will establish itself as a premier regional legal centre. Thirdly, we will attract and retain high quality international and local legal talent, which is critical to sustain the legal sector and economy in the long term.” See <http://app2.mlaw.gov.sg/News/tabid/204/currentpage/8/Default.aspx?ItemId=95>.

151. See Ministry of Law Website, *Government Accepts Key Recommendations*, *supra* note 148, Enhanced Joint Law Venture Scheme, <http://app2.mlaw.gov.sg/News/tabid/204/currentpage/8/Default.aspx?ItemId=95>. <http://app2.mlaw.gov.sg/News/tabid/204/currentpage/8/Default.aspx?ItemId=95>.

hire Singapore-qualified lawyers to advise on Singapore law.”¹⁵² This was important because before this change, if a Singaporean-licensed lawyer joined a foreign law firm, regardless of whether that firm was part of a JLV, the lawyer lost her privilege to practice Singaporean law. Now, however, such revocation would not occur if the foreign firm was part of an enhanced JLV, and in making this amendment, the Committee hoped that more organic, enjoyable, and productive relationships might develop among the different lawyers within the venture.¹⁵³

The Committee also recommended expanding the JLV’s jurisdiction in one important lucrative area – international commercial arbitration. Prior to 2007, foreign law lawyers were restricted in what they could do arbitration-wise. However, the Committee argued for enhancing the role of foreign lawyers within the JLV by allowing them to

participate wherever arbitration is contemplated: [namely] in the vetting and drafting of Singapore law agreements incorporating arbitration clauses, and [by] advising parties on their legal rights and liabilities in such agreements both before and after the dispute is referred to arbitration.¹⁵⁴

The Committee felt that equalizing what foreign and domestic lawyers could do in arbitration would eliminate the privileged position that the latter had been able to hold within the JLV. The hope again was that with greater seamlessness would come stronger bonds of trust that would help the JLV run in a more cohesive manner.

To punctuate these points further, the Committee concluded by suggesting that not only should the two sets of lawyers share JLV profits more generously,¹⁵⁵ but there should be increased integration in the management and administration of the joint venture.¹⁵⁶ Thus, the recommendations of the Rajah Committee for addressing the problems accompanying the original JLV model centered around promoting greater – not lesser – access to the Singaporean market by foreign law firms. The next section describes how the Committee went one step further in its stated goal of liberalizing the legal services sector by recommending an entirely separate program in which foreign law firms could participate.

152. *Id.*

153. *Id.* (“FLFs [foreign law firms] may hire up to one Singapore lawyer for every foreign lawyer, and the Singapore lawyers should have more than three years’ experience.”).

154. *Id.*

155. *Id.* (“The foreign law firm will be allowed to share up to 49% of the profits of the constituent Singapore law firm in the permitted areas. Apart from this, the EJLV constituents will be allowed to decide whether, and to what extent, to share profits.”).

156. *Id.* (“The partners from the Singapore law firms will be allowed to concurrently hold partnership and administrative positions in the foreign law firms In addition, parties which are interested in a joint venture or which are currently in a joint venture agreement, may suggest any other arrangement beneficial to their particular circumstances. The Minister for Law and the Attorney-General will have the discretion to approve joint venture structures that go beyond the proposed conditions set out above.”).

B. *The QFLF*

Along with suggesting ways to enhance the JLV, the Rajah Committee introduced the Qualified Foreign Law Firm (QFLF) license in its report as well. This QFLF program gave foreign law firms the option of foregoing entrance into a JLV and instead provided them with an opportunity to “practi[c]e Singapore law in commercial areas through [the direct hiring of] Singapore-qualified lawyers.”¹⁵⁷ While remaining firmly committed to the notion that this “new [initiative] would add greater diversity, competitiveness, and vibrancy to the legal market,”¹⁵⁸ the government did continue to prohibit foreign firms from engaging in “criminal law, retail conveyancing, family law, administrative law and all aspects of . . . litigation.”¹⁵⁹ It also restricted the number of foreign law firms that would be able to receive the QFLF license. (The original number was set at five,¹⁶⁰ but it later was expanded to six.¹⁶¹)

In order to win one of these licenses, the foreign firms had to compete with one another.¹⁶² Importantly, as part of the process, they also were required to provide “revenue projections.”¹⁶³ This meant they had to forecast – and agree – that if designated as a QFLF, 50% of their revenue would come from outside of the Singapore market after two years, and 80% would be from “offshore” sources after five years – else their license was subject to revocation by the government.¹⁶⁴

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* (noting in section (i) that “[u]p to five FLFs will be given a QFLF license to practise Singapore law through Singapore-qualified lawyers employed by the firm”).

161. See Ministry of Law website, *Award of Qualifying Foreign Law Practice (QFLP) Licenses*, Dec. 5, 2008, http://www.news.gov.sg/public/sGPC/en/media_releases/agencies/minlaw/press_release/P-20081205-1.

162. See *id.*; see also Ministry of Law Website, *Government Accepts Key Recommendations*, *supra* note 148, Enhanced Joint Law Venture Scheme, <http://app2.mlaw.gov.sg/News/tabid/204/currentpage/8/Default.aspx?ItemId=95> (noting at section (ii) that “FLFs will have to compete for the licences by demonstrating a commitment to Singapore. They would be asked for proposals regarding the size and constituency of their local office, the areas of work in which they will engage, and the countries which they will service from Singapore.”).

163. I heard this point from a lawyer on June 10, 2009, as well as from a lawyer (whose firm did not receive a QFLF-license) on June 11, 2009 (anonymity for both requested).

164. According to observers, the idea behind this move was simple: it was a way of pacifying the domestic bar that worried that the QFLF-license would enable the foreign law firms to overtake completely the local market. And the way it would be done, according to those concerned, is as follows: The foreign firms, with all of their resources would come in and cut rates for Singaporean clients to the point where domestic firms simply could not compete. Even though the foreign firms would absorb some initial loss, because of their strength, size, and resources, they could withstand this pressure – at least until the domestic firms folded. At that point, the argument goes, the foreign firms would then jack up their rates, essentially creating a monopoly on such legal services within the country. This “percentage/off-shore QFLF provision” thus served as a check on having such an outcome.

In early 2009, the government named four British firms – Norton Rose, Clifford Chance, Allen & Overy, and Herbert Simon – and two American firms – Latham & Watkins and White & Case – as recipients of five-year QFLF licenses. Lawyers from the firms that failed in their bids reacted with both anger and disappointment.¹⁶⁵ This group conveyed two consistent sentiments. First, government assurances that they could reapply within twelve to eighteen months offered little comfort, given the fact that, as one lawyer stated, “a lot of financial damage will have already been done to us [by those with QFLF privileges] in this time.”¹⁶⁶ Second, the firms expressed frustration that they received no detailed, individualized explanations as to why they lost out. This same lawyer intimated that he thought it was because his firm did not inflate its revenue projections as much as he believed the others who were awarded the licenses had done.¹⁶⁷

Ultimately, because of its recent implementation, it is difficult to know at this point the effects that the QFLF program will have on the Singaporean legal labor market. On the one hand, the fact that foreign law firms can now compete on their own against their domestic counterparts does signal the government’s continued desire to make Singapore an inviting place for international investors. On the other hand, the government’s attention to the demands of its domestic constituency also sends a cue to the foreign firms that the QFLF license has limitations. A foreign lawyer who is currently involved in one of the few ongoing JLVs told me that he saw no real benefit for his firm if it became a QFLF.¹⁶⁸ Especially with the new enhanced JLV in place, he found no reason to “mess with something that is working just fine for us.”¹⁶⁹

VI. CONCLUSION

Positive sentiments towards JLVs (enhanced or otherwise), like those felt by the lawyer quoted above, are clearly not the norm, and whether the enhanced JLV or QFLF license will serve as a better model than the original JLV remains to be seen. Placed in a larger context, the findings of this pilot study offer a starting point for further research on two fronts: 1) the efforts of other governments that are seeking to attract international law firms; and 2) the entrepreneurial initiatives that international law firms are undertaking to enter emerging, thriving, but still for foreign lawyers, restrictive countries. Simply

165. See Ministry of Law website, *Award of Qualifying Foreign Law Practice (QFLP) Licenses*, Dec. 5, 2008, http://www.news.gov.sg/public/sgpc/en/media_releases/agencies/minlaw/press_release/P-20081205-1.

166. Interview with lawyer (June 11, 2009) (anonymity requested).

167. *Id.*

168. Telephone interview with lawyer (July 12, 2009) (anonymity requested).

169. *Id.*

put, so much is unknown, which for the curious scholar serves as ripe terrain for future study. For example, while reports, like those cited in the Introduction, document the presence of JLVs in places like the Middle East and Japan, to what extent empirically is this model regularly used by foreign law firms as a means of gaining access to other potentially profitable, untapped domestic markets? In these other settings, what types of foreign firms use JLVs – traditional, big, elite firms, midsize ones, and/or smaller practices? Once created, how successful have these JLVs been in these other places? Have there been tensions, economic or cultural, like seen in Singapore, within these other JLVs? How, if at all, have JLVs complemented, competed with, or fared against other existing foreign/domestic law firm relationships, such as “best friend” alliances, international referral networks, and the like? All of these questions arise out of this pilot project, and the preliminary findings regarding Singapore hopefully provide a beginning point to which subsequent scholars can refer.

Interestingly, two countries that I am in the process of examining and that are presently using variations of law firm joint ventures are Indonesia and Vietnam.¹⁷⁰ Both have long looked to Singapore for guidance on increasing foreign investment and expanding growth in their respective economies. One foreign lawyer working in Singapore said that he and his firm have been eyeing the Indonesian and Vietnamese markets for some time.¹⁷¹ According to this attorney, leaders in both these countries are convinced that greater foreign investment – including greater investment from foreign law firms – will significantly improve the standards of living in their societies.¹⁷² Working with government policymakers in Jakarta and Ho Chi Minh City, this lawyer further noted that if the two countries continue liberalizing their economic policies accordingly, as he expects, international law firms will have an opportunity to prosper immensely in these places as well.¹⁷³

Another country where the findings of this pilot study will be important is India. Elsewhere, detailed work has demonstrated the present existence of a fierce debate over whether and to what extent foreign law firms should be allowed admission into that country.¹⁷⁴ Today, foreign law firms are barred from entry into India, although their presence is felt in a number of different ways.¹⁷⁵ The evidence adduced from that India project also suggests varied and nuanced positions on the part of multiple constituencies, including international

170. See Directorate General of Tax, Special Regional Office Jakarta, Information for Foreign Investment in Indonesia, <http://www.kanwilpajakhusus.depkeu.go.id/infoInvestment.asp>. For information on Vietnam, see GLOBAL INVESTMENT & BUSINESS CENTER, VIETNAM: BUSINESS LAW HANDBOOK 126-27 (2007).

171. Interview with lawyer (June 9, 2009) (anonymity requested).

172. *Id.*

173. *Id.*

174. Krishnan, *supra* note 8.

175. *Id.*

and domestic law firm lawyers, solo practitioners working in the local Indian courts, government officials, judges, and grassroots activists.¹⁷⁶ There is a sense from those who support liberalizing the legal services sector – and even from some opponents – that if the Indian market eventually opens formally to foreign law firms, the process will have to be gradual, with the joint-venture framework pointed to as a model possibly worth adopting.¹⁷⁷ Given the difficulties encountered in neighboring Singapore, where the domestic opposition has been nowhere near as strong as in India, the findings here should be of interest (and possibly even concern) for those who believe that the joint venture might be the appropriate vehicle for settling the legal services conflict within that country.

Finally, returning to the discussion that began this study, those American and British law firms looking to enter as-yet untapped foreign markets as a means of offsetting the downturn in business in their own home economies may glean useful lessons from the Singapore case. Since certain JLVs have indeed functioned adequately in Singapore, it is not impossible that future ones may do so there as well. The key determinants of their success are whether the arrangement is economically well-integrated, whether there is sufficient cultural sensitivity, and whether both sides are willing to work in good faith with one another while maintaining realistic business expectations. Where these variables are absent or lacking in salience, the evidence above suggests that, more often than not, JLVs will face daunting challenges. In sum, positive, nurturing relationships need the opportunity to develop and thrive because the bottom line is that the success or failure of these law firm joint ventures is ultimately and directly related to how much trust exists among the different working parties.

176. *Id.*

177. *Id.*

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Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations

Megan J. Ballard*

SUMMARY

The international community has recently hailed the restoration of property rights for people uprooted by armed conflict as a means of remedying forced displacement. Proponents of property restitution assert that this remedy can enhance the rule of law in a post-conflict society by promoting reconciliation and bolstering economic and social stability. A United Nations (U.N.) sub-commission has endorsed a set of legal and technical guidelines for constructing a property restitution scheme. While other authors have written in support of this plan and a general right to property restitution, this Article represents a critical analysis of the remedy, pointing to weaknesses in its legal and theoretical foundations.

The current emphasis on property restitution is similar to past efforts of the United States and other Western nations to promote the rule of law and economic development through exporting an instrumentalist model of law. Just as these well-intentioned “law and development” efforts were plagued by unforeseen, deleterious consequences, so too might the export of property restitution laws and processes suffer from ill side effects. This Article identifies some of the possible unintentional outcomes of property restitution, including, ironically, that the U.N.’s property restitution scheme may ultimately undermine development of the rule of law. The Article seeks to spur further debate on the merits of property restitution so that unintended consequences might be avoided and the remedies to forced displacement can be strengthened to meet the needs of refugees and internally displaced people.

* Associate Professor, Gonzaga University School of Law. I am grateful to the colleagues and students who encouraged and assisted my drafting of this Article, specifically Professors Mary Pat Treuthart and Linda Rusch and research assistants Dena Burke and Darryl Coleman. Many thanks also to Ben Muse, 2009-10 Editor-in-Chief of the *Gonzaga Law Review*, for his outstanding editorial assistance.

I.
INTRODUCTION

The judge was summoned to a small village outside of Prey Veng, Cambodia in August 1995.¹ Pol Pot's survivors had returned to the village after the fall of the Khmer Rouge and as years had passed since the families had been in the village, many no longer recalled property boundary locations. Two families unable to settle their differences sought a judicial determination as to where the boundary lay. The judge, however, had no formal legal training, and no property documents existed to help her resolve the dispute.² After listening to representatives from the two families, the judge called for a village elder and interviewed him as to his recollection of the disputed boundary. She wrote down his version on a clean sheet of paper. The judge then painted the parties' thumbs with her lipstick and they affixed red thumbprints to the paper. The boundary was settled.

This dispute is a minor example of the plethora of property problems that can arise in the aftermath of armed conflict.³ As has occurred in Cambodia, the former Yugoslavia,⁴ Somalia,⁵ Iraq,⁶ and elsewhere around the world, violence

1. The author worked at the Prey Veng courthouse as a pro bono lawyer for the International Human Rights Law Group, Cambodian Court Training Project, during the summer of 1995.

2. Most of the nation's judges and lawyers either fled the country or died under the Pol Pot regime and the country had no law school from 1975 until 1992. Dolores A. Donovan, *Cambodia: Building a Legal System from Scratch*, 27 INT'L LAW. 445 (1993); see also The World Bank, *Project Information Document: Cambodia – Legal and Judicial Reform Project*, Feb. 2, 2001, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2001/03/26/000094946_01032309511010/Rendered/INDEX/multi0page.txt.

3. The Cambodian peace agreement established the right for Cambodian refugees to return to Cambodia. Final Act of the Paris Conference on Cambodia, Oct. 23, 1991, art. 20.1, pt. V, U.N. Doc. A/46/608 (1991). Nonetheless, continued unrest and a 1992 property law that prohibited the state from recognizing pre-1979 property rights prompted hundreds of thousands of Cambodians to be displaced from their homes after the Paris Peace Accords were signed. Shaun Williams, *Internally Displaced Persons and Property Rights in Cambodia*, 19 REFUGEE SURV. Q. 194, 195 (2000).

4. Over half of the entire population of Bosnia and Herzegovina was forced to leave their homes between 1992 and 1995. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Promotion & Prot. of Human Rights, *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons – Preliminary Report of the Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/2003/11 (June 16, 2003) (prepared by Paulo Sérgio Pinheiro) [hereinafter *Preliminary Report*]; see also Charles Philpott, *Though The Dog is Dead, The Pig Must Be Killed: Finishing with Property Restitution to Bosnia-Herzegovina's IDPs and Refugees*, 18 J. REFUGEE STUD. 1 (2005) [hereinafter *Dog is Dead*] (reporting that approximately 2,632,928 people had been displaced).

5. More than half of the Somali population was displaced following the 1991 overthrow of the Siad Barre regime. U.N. HIGH COMM'R FOR REFUGEES [UNHCR], THE STATE OF THE WORLD'S REFUGEES 2006: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM 129 (2006), available at <http://www.unhcr.org/4a4dc1a89.html> [hereinafter STATE OF THE WORLD].

6. The United Nations High Commissioner for Refugees reports that, by the end of 2008, 1.9 million Iraqis left the country as refugees and another 2.6 million remained as internally displaced persons. U.N. HIGH COMM'R FOR REFUGEES [UNHCR], 2008 GLOBAL TRENDS: REFUGEES,

forces hundreds of thousands of people to leave their homes every year.⁷ When the conflict subsides, refugees and internally displaced persons (IDPs) face immense barriers to returning home.⁸ Among these are: proving a right to occupancy in light of the destruction or nonexistence of property records; confronting the intentional or collateral devastation of structures; overcoming abandonment laws that purport to deprive those who have fled their homes of their property rights;⁹ and confronting the possibility that others may have occupied homes during the interim without consent (secondary occupation).¹⁰

The worldwide problem of displacement is enormous. At the end of 2008, the Office of the United Nations High Commissioner for Refugees (UNHCR)

ASYLUM-SEEKERS, RETURNEES, INTERNALLY DISPLACED AND STATELESS PERSONS 2, 19 (2009), available at <http://www.unhcr.org/4a375c426.html> [hereinafter GLOBAL TRENDS].

7. The UNHCR reported that there were approximately 42 million forcibly displaced people worldwide at the end of 2008. *Id.* Some of the displaced flee without being able to make arrangements for their property; others sell property under duress prior to fleeing.

8. "Refugees" are people who flee across a national border. "Internally displaced persons," on the other hand, leave their homes but remain within the country.

9. Michael Kagan, *Restitution as a Remedy for Refugee Property Claims in the Israeli-Palestinian Conflict*, 19 FLA. J. INT'L L. 421, 433-435 (2007) (discussing Israeli abandoned property laws). Wartime laws in Bosnia, for example, declared that housing vacated by fleeing occupants was "abandoned" and allowed municipal authorities to reallocate these homes. Hans Das, *Restoring Property Rights in the Aftermath of War*, 53 INT'L & COMP. L.Q. 429, 431 (2004).

10. Another layer of complexity arises if the original occupant has died and a person purporting to be an heir asserts a claim. In Bosnia, for example, there was a relatively short period of time between the beginning of the war in 1992 and the time that property claimants began to file claims for restitution, four years later. *See, e.g.*, Rhodri C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice*, 37 N.Y.U. J. INT'L L. & POL. 441, 489 (2005) [hereinafter *Post-Conflict Property Restitution*] (discussing property repossession claims filed with domestic courts in 1997). Accordingly, most applicants were the original property owners. If the owner had died, heirs could file claims using the same procedure available for the original owners, with the added requirement that heirs had to prove inheritance rights under the national law of succession or produce a valid will. INT'L ORG. FOR MIGRATION, PROPERTY RESTITUTION AND COMPENSATION: PRACTICES AND EXPERIENCES OF CLAIMS PROGRAMMES 103-04 (2008). A more complex situation faced the Claims Resolution Tribunal for Dormant Accounts in Switzerland ("CRT"), established in 1997 to determine the rights to assets deposited in Swiss bank accounts prior to or during World War II and dormant since 1945. *Id.* at 34. Because over 50 years passed between the initial point of dormancy and the beginning of the claims process, most claims were filed by heirs and legatees of the original victims. *Id.* at 103. Where an account holder's will was not available, the CRT process required that a claimant prove heirship under applicable national law, or the law with the closest connection to the dispute. *Id.* at 114. Identifying which national law to use was, in itself, a challenge. Depending on the circumstances, this could have been the last domicile of the account holder, the country where the account holder had citizenship, or the country to which the account holder had emigrated. *Id.* at 113, 273 n. 211. The process also allowed claims to be resolved according to Talmudic law at the request of all parties involved. *Id.* at 272 n. 210. Moreover, a single bank account commonly had claimants from different branches of the original owner's family, representing different generations and residing in different countries. *Id.* at 114. Once the tribunal identified the applicable national law, it had to apply the laws of various jurisdictions to settle each claim. For example, *see id.* at 103-113, for a discussion of the ways some restitution processes managed the claims of heirs.

estimated a global population of 16 million refugees and 26 million IDPs.¹¹ The UNHCR reports that 604,000 refugees returned to their countries of origin, and 1.3 million IDPs returned home in 2008, representing only a fraction of those previously displaced.¹²

The United Nations (U.N.) has long worked to protect people forced from their homes.¹³ It has emphasized voluntary repatriation for refugees since 1950,¹⁴ and made various pronouncements declaring that refugees have a right to return home.¹⁵

Governments, as well as refugee and migration policymakers, have increasingly focused attention on this right to return. Ensuring conditions for refugee return following the cessation of an armed conflict has become associated not just with protecting the human rights of refugees, but also with solidifying peace agreements and building economic development.¹⁶

11. UNHCR, GLOBAL TRENDS, *supra* note 6, at 2, 29. Afghanistan contributed the highest number of refugees fleeing its borders, 2.8 million. *Id.* at 9. Colombia tops the list for the highest number of IDPs, estimated to be close to 3 million. *Id.* at 19.

12. *Id.* at 7. The degree to which those returning did so “voluntarily” is contested. Some returnees may have failed in attempts to gain asylum elsewhere; others may not have been forcibly removed from host countries but are given no option to stay legally. Richard Black & Saskia Gent, *Sustainable Return in Post-Conflict Contexts*, 44 INT’L MIGRATION 15, 19 (2006).

13. “[I]nnumerable United Nations Security Council and General Assembly resolutions, adopted over the past 60 years explicitly address housing and property restitution rights.” Scott Leckie, *Introduction to CENTRE ON HOUSING RIGHTS AND EVICTIONS, THE PINHEIRO PRINCIPLES: UNITED NATIONS PRINCIPLES ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS* 4 (2005), available at <http://www.cohre.org/store/attachments/Pinheiro%20Principles.pdf> [hereinafter *Introduction*].

14. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Promotion & Prot. of Human Rights, *The Return of Refugees’ or Displaced Persons’ Property: Working Paper Submitted by Mr. Paulo Sérgio Pinheiro*, ¶ 17, U.N. Doc. E/CN.4/Sub.2/2002/17 (June 12, 2002) (prepared by Paulo Sérgio Pinheiro) [hereinafter *Working Paper*] (discussing a “General Assembly resolution of 14 December 1950, in which the Assembly adopted the UNHCR Statute,” likely referring to G.A. Res. 428 (V), ¶ 2, U.N. Doc. A/1775 (Dec. 14, 1950)).

15. G.A. Res. 35/124, at 93, U.N. Doc. A/RES/35/124 (Dec. 11, 1980) (affirming “the right of refugees to return to their homes in their homelands”). Other General Assembly resolutions concerning specific conflicts also restate this right. *Working Paper, supra* note 14, ¶ 25 (citing G.A. Res. 1672 (XVI), at 28, U.N. Doc. A/5100 (Dec. 18, 1961) (Algeria); G.A. Res. 3212 (XXIX), at 3, U.N. Doc. A/9361 (Nov. 1, 1974) (Cyprus); G.A. Res. 51/126, at 120, U.N. Doc. A/RES/51/126 (Dec. 13, 1996) (Palestine/Israel); G.A. Res. 194 (III), at 21, U.N. Doc. A/194 (Dec. 12, 1948) (Palestine/Israel); and G.A. Res. 51/114, at 263, U.N. Doc. A/RES/51/114 (July 3, 1997) (Rwanda)). Similarly, the U.N. Security Council has reaffirmed a right to return to one’s home within the context of conflicts in Bosnia and Herzegovina, Abkhazia and the Republic of Georgia, Azerbaijan, Cambodia, Croatia, Cyprus, Kosovo, Kuwait, Namibia and Tajikistan. *Working Paper, supra* note 14, ¶¶ 23-24 (citing to Security Council resolutions for each conflict). See also Rhodri C. Williams, *The Significance of Property Restitution to Sustainable Return in Bosnia and Herzegovina*, 44 INT’L MIGRATION 39, 51 (2006) [hereinafter *Significance of Property Restitution*]; Guilia Paglione, *Individual Property Restitution: from Deng to Pinheiro - and the Challenges Ahead*, 20 INT’L J. OF REFUGEE L. 1, 2 (2008).

16. Black & Gent, *supra* note 12, at 24; Anders H. Stefansson, *Homes in the Making: Property Restitution, Refugee Return, and Senses of Belonging in a Post-War Bosnian Town*, 44

U.N. officials and other policymakers have more recently interpreted the right to return as giving rise to a right to property restitution.¹⁷ In August 2005, a sub-commission of the U.N. Commission on Human Rights formally endorsed guidelines addressing legal and technical issues related to property restitution for persons arbitrarily or unlawfully displaced from their property.¹⁸ These guidelines are commonly referred to as the “Pinheiro Principles” (or the Principles), after the U.N. Special Rapporteur on Housing and Property Restitution for Refugees and Internally Displaced Persons, Paulo Sérgio Pinheiro.¹⁹

The Pinheiro Principles propose legal, administrative and enforcement guidelines for the construction and implementation of property restitution processes.²⁰ More specifically, they suggest elements of a legal framework within which a process of restitution might occur, as well as possibilities for administering that process and options for enforcing restitution orders.

Scholars and human rights workers have hailed the recent focus on property restitution as a means of depoliticizing the right of voluntary return.²¹

INT’L MIGRATION 115, 116-17 (2006) (noting that return and property restitution are regarded as essential to peace processes).

17. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Promotion & Prot. of Human Rights, *Housing and property restitution in the context of the return of refugees and internally displaced persons: Preliminary report of the Special Rapporteur*, at 9, U.N. Doc. E/CN.4/Sub.2/2003/11 (June 16, 2003) (prepared by Paulo Sérgio Pinheiro)[hereinafter *Progress Report*]; see, e.g., S.C. Res. 820, U.N. Doc. S/RES/820 (April 17, 1993); U.N. Econ. & Soc. Council [ECOSOC], U.N. Comm’n on Human Rights, *Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) (prepared by Francis M. Deng) [hereinafter *Guiding Principles*]. According to international law, restitution is a remedy encompassed under reparations. Pablo De Greiff, *Justice and Reparations*, in THE HANDBOOK OF REPARATIONS 451, 452 (Pablo De Greiff ed., 2006) (stating that reparations includes restitution, compensation, rehabilitation and satisfaction and guarantees of nonrecurrence). The term “reparations” generally refers to “measures that may be employed to redress the various types of harms that victims may have suffered as a consequence of certain crimes.” *Id.*; see Richard Falk, *Reparations, International Law, and Global Justice*, in THE HANDBOOK OF REPARATIONS 478, 481-82 (Pablo De Greiff ed., 2006) (discussing the customary law genesis of reparations and its authoritative restatement in *The Case Concerning the Factory at Chorzow (Ger. v. Pol.)*, 1927 P.C.I.J. (Ser. A) No. 12 (Nov. 21)); see also ILARIA BOTTIGLIERO, REDRESS FOR VICTIMS OF CRIMES UNDER INTERNATIONAL LAW 13-24 (2004) (discussing the historical origins of the right to redress).

18. *Housing and Property Restitution for Refugees and Displaced Persons*, U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Promotion & Prot. of Human Rights, Res. 2005/21, U.N. Doc. E/CN.4/Sub.2/RES/2005/21 (Aug. 11, 2005) [hereinafter *Pinheiro Principles*].

19. CENTRE ON HOUSING RIGHTS AND EVICTIONS, *supra* note 13, at 4. The Sub-Commission on the Promotion and Protection of Human Rights appointed Pinheiro as Special Rapporteur in 2002.

20. See *infra* notes 81-94 and accompanying text (discussing the Pinheiro Principles).

21. Williams, *Post-Conflict Property Restitution*, *supra* note 10, at 450; Williams, *Significance of Property Restitution*, *supra* note 15, at 39; Philpott, *Dog is Dead*, *supra* note 4, at 10 (noting that amending the law in Bosnia, so that restitution could be awarded even if the rights holder did not plan to return, refocused the restitution program from a political one to a rights-based one). One author suggests that viewing housing recovery after natural disasters as a right rather than charity similarly shifts the debate in a productive manner. Charles W. Gould, *The Right to Housing*

For example, one observer suggests that the value of property restitution is that it “shift[s] the focus from the highly politicized concept of return to a more impartial ‘rule of law’ approach, connoting an emphasis on individuals’ rights to their former homes.”²² While a systematic approach to property restitution as suggested by the Pinheiro Principles does emphasize technical matters of process over political considerations related to the conflict, the merits of this approach are debatable.

Property restitution has intuitive appeal, from both property rights and human rights perspectives. This Article maintains, however, that the legal bases and theoretical claims for the Pinheiro Principles’ approach to restitution are weak. Failure to recognize these weaknesses can ultimately undermine the sustainability of return and repatriation.²³

Scholars, human rights advocates, and practitioners have written about the value of property restitution and specific restitution programs, including the degree to which programs adhere to the Pinheiro Principles.²⁴ The literature, however, is less replete with extensive critiques of property restitution.²⁵ This Article attempts to fill this gap by identifying and analyzing limitations of the Pinheiro approach to property restitution.

Part II addresses different phases of law and development movements in order to establish a framework for critically evaluating post-conflict property

Recovery After Natural Disasters, 22 HARV. H. RTS. J. 169, 173 (2009).

22. Williams, *Significance of Property Restitution*, *supra* note 15, at 39.

23. “Repatriation” refers to the process of returning from the perspective of international refugee law. International human rights law refers generally to a right to “return.” Eric Rosand, *The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?* 19 MICH. J. INT’L L. 1091, 1096, n.17 (1998).

24. See, e.g., Scott Leckie, *New Directions in Housing and Property Restitution*, in RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS, 3-4 (Scott Leckie ed., 2003); Dan E. Stigall, *Refugees and Legal Reform in Iraq: The Iraqi Civil Code, International Standards for the Treatment of Displaced Persons, and the Art of Attainable Solutions*, 34 RUTGERS L. REC. 1 (2009); Williams, *Significance of Property Restitution*, *supra* note 15, at 40; Williams, *Post-Conflict Property Restitution*, *supra* note 10, at 442-47; Philpott, *Dog is Dead*, *supra* note 4 at 1-2; Gould, *supra* note 21, at 173.

25. This is true at least with regard to English-language publications. For critiques of the focus on individual property restitution, to the exclusion of alternative remedies, see Paglione, *supra* note 15, and Jose-Maria Arraiza & Massimo Moratti, *Getting the Property Question Right: Legal Policy Dilemmas in Post-Conflict Property Restitution in Kosovo (1999-2009)*, 21 INT’L J. OF REFUGEE STUDIES 421, 426 (2009) (arguing that compensation may have been the preferred remedy for the majority of those displaced during conflict in Kosovo); see also Anneke Rachel Smit, *Housing and Property Restitution and IDP Return in Kosovo*, 44 INT’L MIGRATION 63 (2006) (questioning the value of restitution schemes that ignore other aspects of the right to return); Stefansson, *supra* note 16, at 116, 125, 132 (claiming that the international community’s focus on property restitution in Bosnia came at the expense of constructing political and socio-economic structures necessary for sustainable return); MARIA KETT & MIRANDA DALRYMPLE, THE CONTINUING “PLIGHT” OF DISPLACED PEOPLE IN BOSNIA-HERZEGOVINA 7 (2004), available at <http://www.responseinternational.org.uk/downloads/archives/BiHLCCEditedReportAug04.pdf> (criticizing the focus on property laws in Bosnia as minimizing the attention paid to the welfare of the IDP population).

restitution. Large-scale restitution processes, similar to the legal reform instigated under the auspices of the law and development efforts, depend heavily on Western nations imposing or influencing law in other countries. Both law and development movements have resulted in unintended, harmful consequences.²⁶ Revisiting these law and development experiences may prevent a similar legacy from attaching to restitution efforts.

Part III provides background information useful for understanding this Article's critiques of property restitution. It describes salient features of the Principles and briefly explains the property restitution process following the war in the Federation of Bosnia-Herzegovina (Bosnia). The Bosnian experience is important not only because it provides an example of a property restitution scheme, but also because the Bosnian restitution experience significantly influenced the drafting of the Pinheiro Principles.²⁷

Part IV analyzes the legal underpinnings and non-legal theoretical claims of restitution. This Part considers evidence from Bosnia and other sources to reveal limitations of the legal and theoretical support for post-conflict property restitution as a remedy to mass displacement. It also discusses difficulties related to international involvement in restitution processes.

The scope of this Article is limited to the application of the Pinheiro Principles in the context of significant population displacement caused by armed conflict.²⁸ However, it is important to note that the Pinheiro Principles themselves are not so limited. They broadly prescribe elements of a property

26. See *infra* Part II.

27. Pinheiro was appointed as U.N. Special Rapporteur in 2002; he submitted his Working Paper on the principles that same year. *Working Paper*, *supra* note 14. He drafted a Preliminary Report in 2003. *Preliminary Report*, *supra* note 4. The property restitution process in Bosnia underwent significant transition and growth during those two years. See, e.g., Philpott, *Dog is Dead*, *supra* note 4 (discussing the restitution process following the December 2001 amendments to the property laws and the end of 2003, when the bulk of claims processing was to be completed). Moreover, both the Working Paper and the Preliminary Report reflect the influence that the Bosnia experience had on crafting the Pinheiro Principles. The 2002 Working Paper, for example, includes a section on "Issues Requiring Further Study" expressly referencing problems encountered in Bosnia, such as: the lack of independent local judicial systems, *Working Paper*, *supra* note 14, ¶ 44; secondary occupation of abandoned housing, *id.* ¶ 46; and abandonment laws implemented during the conflict that purported to terminate the property rights of persons who vacated their housing, *id.* ¶ 49. The 2003 Preliminary Report includes a section reviewing property restitution in Bosnia to identify "best practices" and "common obstacles" in property restitution programs. *Preliminary Report*, *supra* note 4, ¶ 21-29. Notably, this review states that the Peace Accords ending the conflict in Bosnia "established principles which are of fundamental importance to this discussion . . ." *Id.* ¶ 25.

28. While this Article addresses "post-conflict" situations, there likely is no exact moment when a society in conflict transitions to a post-conflict society. Even after warring factions officially cease armed activity, violence and displacement can still be part of the political and social landscape. B.S. Chimni, *Refugees and Post-Conflict Reconstruction: A Critical Perspective*, 9 INT'L PEACEKEEPING 163, 165 (2002) (quoting a World Bank report as acknowledging that "drawing a line between 'conflict' and 'post-conflict' is difficult.") (citing WORLD BANK, POST-CONFLICT FUND: GUIDELINES AND PROCEDURE (1999)).

restitution system for people “arbitrarily or unlawfully deprived of their former homes . . . regardless of the nature or circumstances by which displacement originally occurred.”²⁹ This language conceivably could include displacement caused by natural disasters, armed conflict, peaceful regime change, or large-scale development projects.³⁰ Similarly, the Principles can be applied to isolated instances of forced displacement, rather than mass population displacement, which is the focus of this Article.³¹

II.

THEORETICAL FRAMEWORK

A systematic property restitution process in the aftermath of violent conflict involves actors in the international community external to the actual conflict. International actors may play a role in implementing a negotiated peace agreement, which itself might include a right to property restitution.³² Indeed, the Pinheiro Principles advise that peace agreements should include restitution procedures, institutions and mechanisms.³³ Moreover, because the return of refugees and IDPs, as well as the establishment and implementation of a process to restore property rights depend on international financial, technical, and

29. *Pinheiro Principles*, *supra* note 18, ¶ 1.2.

30. A U.N. precursor to the Pinheiro Principles addressed the rights of IDPs and declared those rights to be the same whether displaced persons were forced to leave homes or places of habitual residence because of “natural or human-made disasters.” *Guiding Principles*, *supra* note 17, Annex ¶ 2. Human-made disasters include large-scale development projects not justified by compelling and overriding public interests. *Id.* principle 6, 2.c. For a discussion of the Pinheiro Principles in the context of natural disasters, see Gould, *supra* note 21, at 194-198.

31. The scope of this Article is also general, inasmuch as the critiques of restitution it presents are not tailored to apply to any particular aspect of a variety of possible post-conflict situations. It does not address details of specific conflicts that would have import in designing a restitution procedure. For example, the Article does not distinguish between types of property (agricultural or urban, for example); legal interests in property (leasehold, fee, or communal interests, for example); or various origins of conflicts (ethnic, religious, or other class struggle). A restitution process for urban residential property may look different from one where the displaced were primarily from rural areas. Likewise, the process of restitution may be constructed differently depending on whether it aims to restore mostly property rights to tenants, those who hold property communally, or fee holders. Finally, restitution following conflict caused primarily by ethnic or religious divisions may be constructed differently than a restitution process following some other manifestation of political struggle. Nonetheless, the Pinheiro Principles themselves are general about the types of property and conflicts to which the restitution guidelines apply. *See infra* notes 81-95 and accompanying text discussing the Principles in more detail. This Article addresses post-conflict property restitution on a more abstract level to highlight the overarching limitations and inconsistencies that seem inherent to application of the remedy to instances of mass displacement caused by armed conflict.

32. The United States, for example, was instrumental in brokering the agreement ending the war in Bosnia. *See infra* note 69. This agreement included a right to property restitution. *See infra* note 70.

33. *Pinheiro Principles*, *supra* note 18, ¶ 12.5.

personnel resources,³⁴ the Pinheiro Principles call on the international community to “work with national Governments and share expertise on the development of national housing, land and property restitution policies and programs”³⁵

While international support for post-conflict restitution seems benign, if not laudable, it can lead to significant international influence over domestic legal affairs. Bosnia’s experience in creating and implementing its property restitution scheme illustrates that international actors can be involved in drafting, adjudicating, and enforcing local property laws.³⁶ In this manner, property restitution to remedy mass forced displacement gives rise to potential law exportation. There is, however, very little consensus on the merits of importing or exporting law or legal processes across borders.

The history of law is marked by substantial borrowing or transplanting of substantive elements and processes from other legal systems.³⁷ Some scholars have posited that one of the objectives of the evolution of law should be to produce unified legal theories to elevate law across different systems.³⁸ Others criticize the value of legal transplants claiming that law is so embedded in its social setting that imports and exports of foreign legal principles are misguided or futile.³⁹ Indeed there is a significant history of transplanted law and

34. See *infra* notes 71-74, 181-82 and accompanying text (describing the international resources required to create, execute, and enforce Bosnia’s restitution process); see also INT’L ORG. FOR MIGRATION, *supra* note 10, at 87-94 (discussing international support for restitution in Bosnia, Kosovo and South Africa).

35. *Pinheiro Principles*, *supra* note 18, ¶ 22.3.

36. See, e.g., *infra* notes 71-74 and accompanying text.

37. For example, Roman law spread throughout Western Europe in varying degrees in the 12th and 13th centuries. JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 9-10 (2007). German legal thought took over from 1850 to 1900, followed by the predominance of French legal thought, both influencing the development of legal systems beyond their borders. Duncan Kennedy, *Three Globalizations of Law and Legal Thought*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 23 (David M. Trubek & Alvaro Santos eds., 2006); see also ALAN WATSON, *COMPARATIVE LAW: LAW, REALITY AND SOCIETY* 5, 22 (2008) (declaring that “Borrowing is the name of the game and is the most prominent means of legal change” and that the majority of the private law found in most of the legal systems of the West derives from Roman civil law or English common law).

38. See, e.g., KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 24-25 (3d ed. 1998) (discussing the advantages of unified law and asserting that comparative law plays a significant role in this regard); PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 506 (3d ed. 2007); P.G. Monateri, *The Weak Law: Contaminations and Legal Cultures*, 13 *TRANSNAT’L L. & CONTEMP. PROBS.*, 575, 579 (2003).

39. See, e.g., Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 *IND. J. GLOBAL LEGAL STUD.* 383 (2003); Pierre Legrand, *European Legal Systems are Not Converging*, 45 *INT’L & COMP. L.Q.* 52, 56-60 (1996); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L. J.* 814 (1987). But see Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 *U. PA. L. REV.* 1121, 1125 (1983) (stating that “a great deal, if not most, of law operates in a territory for which it was not originally designed, or in a society which is radically different from that which created the law”).

institutions resulting in harmful, unintended consequences.⁴⁰

“Law and development” efforts over the last fifty years provide recent examples of the unintended consequences of legal transplants. The initial law and development movement in the 1960s and 1970s sought to promote economic development primarily in Africa and Latin America by exporting a model of Western law that upheld “law as an instrument through which state actors could shape the economy.”⁴¹ Law and development programs attempted to transform legal education and institutions, in part, through transplanting legal institutions from the United States and Europe.⁴² No such transformation occurred. The initial law and development export of Western models of law largely failed.⁴³ In some cases, local political actors co-opted transplanted legal norms and used them to consolidate their own power.⁴⁴

A second wave of interest in law and development emerged in the 1980s in the context of increased international trade, global economic integration, and a

40. David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1080-1085 (1974); Thomas Carothers, *The Rule-of-Law Revival*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 3, 9-11 (Thomas Carothers ed., 2006) [hereinafter *Rule-of-Law Revival*] (commenting on the general failure of law reform in post-Soviet states; noting extensive Western assistance for law reform in those states; and suggesting that many Western advisors involved in such assistance “have not learned that aid must support domestically rooted processes of change, not attempt to artificially reproduce preselected results”); Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD 31, 60-61 (Thomas Carothers ed., 2006) (suggesting that Western-backed law reform may create “worse, less liberal outcomes”); Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75, 77 (2008) (noting that law reformer’s rhetoric of failed law in Latin America serves to undermine imported models of law and legal institutions); Monateri, *supra* note 38; Thomas A. Kelley, *Exporting Western Law to the Developing World: The Troubling Case of Niger*, 39 Geo. Wash. Int’l L. Rev. 321, 364 (2007) (predicting that the result of Western-based law reform in Niger will create social unrest because it embodies a perspective of law and justice distasteful to most of the population in Niger). Criticism of transplanted law and institutions is not intended to suggest an isolationist approach to the resolution of humanitarian crises caused by international or civil armed conflict. This criticism, however, informs a cautious evaluation of any standardized legal approach to common problems experienced worldwide, including the restitution approach prescribed by the Pinheiro Principles.

41. David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 74, 75 (David M. Trubek & Alvaro Santos eds., 2006) [hereinafter *Rule of Law*].

42. *Id.* at 77.

43. Trubek & Galanter, *supra* note 40, at 1080-1085; JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 8-10 (1980) (concluding that “American legal assistance was inept, culturally unaware, and sociologically uninformed. It was also ethnocentric, perceiving and assisting the Third World in its own self-image.”); see also Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41 (2003).

44. GARDNER, *supra* note 43, at 11 (asserting that lawyers trained to be the “legal engineers” of development” all too often used the transplanted legal instrumentalism as technicians or apologists for authoritarian regimes). Trubek & Galanter, *supra* note 40, at 1083 (concluding that the initial law and development movement illustrated that “law may be used to justify and legitimate arbitrary actions by government rather than to curb such excesses.”).

spate of democratization worldwide.⁴⁵ In this context, governments aspired, in part, because of pressure by international development agencies, to adopt legal reform to facilitate and strengthen the growth of market institutions. International development agencies, in particular the World Bank, peddled a “one-size fits all” model of legal reform that emphasized the administration of justice.⁴⁶ This institutional focus on courts and judiciaries, however, may have missed the essence of the rule of law inasmuch as it did little or nothing to alter the perceived fairness and legitimacy of law.⁴⁷ Moreover, “transplanted laws, thought to reflect best practices, often did not take hold, or produced results diametrically opposite from what was intended.”⁴⁸ Even the World Bank has recognized the limitations of this approach:

[M]any of the assumptions underlying law and justice reform efforts have not been subject to rigorous questioning, theorizing, or testing. The lack of well-developed conceptual and empirical underpinnings is a serious concern, especially in light of past efforts to reform legal institutions—most notably the Law and Development Movement of the 1960s—that are widely believed to have failed due to flawed or insufficient theoretical foundations.⁴⁹

A third wave of interest in law and development is now emerging primarily from critiques of the first two law and development efforts.⁵⁰ One of the features of this third rendition is the view that development encompasses more than economic growth; it includes the recognition and protection of human freedom.⁵¹ A second hallmark of this revised vision of law and development is a “simultaneous presence of critique.”⁵² The purpose of simultaneous critique is to be more intentional about identifying potential deleterious consequences of

45. Some scholars refer to this second wave as the “Law and the Neoliberal Market” movement, others the “rule-of-law aid movement.” David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 5* (David M. Trubek & Alvaro Santos eds., 2006) (identifying the free market focus of this “second moment” of law and development); Thomas Carothers, *The Problem of Knowledge, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 15-16* (Thomas Carothers ed., 2006) [hereinafter *Problem of Knowledge*] and Carothers, *Rule-of-Law Revival, supra* note 40, at 5-6 (suggesting that this wave, which began in the early 1980s as dozens of countries experienced political democratization, had broad appeal as a means of shoring up democracy and market-oriented economic reform).

46. Trubek, *Rule of Law, supra* note 41, at 86; Megan J. Ballard, *The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil*, 17 BERKELEY J. INT’L L. 230, 233 (1999); Carothers, *Problem of Knowledge, supra* note 45, at 20 (noting that the rule-of-law assistance focus on judiciaries was so ubiquitous that “the terms *judicial reform* and *rule-of-law reform* often [are] used interchangeably”).

47. Carothers, *Problem of Knowledge, supra* note 45, at 20-21.

48. Trubek & Santos, *supra* note 45, at 6.

49. The World Bank, *Rule of Law and Development, available at* <http://web.worldbank.org/> (search for “Rule of Law and Development” and follow the first link to “Law & Justice Institutions: Rule of Law and Development”) (last visited Apr. 15, 2010).

50. Trubek & Santos, *supra* note 45, at 7.

51. *Id.* at 8.

52. *Id.*

exporting Western models of law to further economic development and strengthen the rule of law. Another element of this third conceptualization of law and development is the recognition that no single vision of law reform will promote development.⁵³

The current emphasis on post-conflict property restitution shares with the first law and development movement an optimistic faith in law as a tool to foster economic and social development. Post-conflict property restitution also has much in common with the second law and development movement heralded by international development agencies as democratization spread in the 1980s. In the rush to avoid anarchy and poverty in newly democratized states, national and international actors from the West instituted rule-of-law programs globally without deep analysis of the ambiguous or conflicting goals of these programs.⁵⁴ Critics, and eventually rule-of-law practitioners, questioned the efficacy and propriety of attempting to promote the rule of law and economic development through a narrow focus on institutions.⁵⁵ In light of such concern, development agencies have refocused their assistance to incorporate social objectives into development policy, ushering in the third law and development movement.⁵⁶ Similarly, in an attempt to repatriate refugee populations in a manner that comports with international human rights norms, national and international actors from the West are backing property restitution as the solution to a number of different problems without sufficient analysis of the goals or limitations of restitution.

While the enthusiasm for post-conflict property restitution parallels the second law and development movement, this Article's critical analysis of restitution is consistent with the emerging "third moment" in law and development theory.⁵⁷ As international actors continue to emphasize property restitution to bolster the rule of law in, and legitimacy of, post-conflict societies, there needs to be a simultaneous critique to avoid the unintended consequences of earlier Western efforts to export law and legal processes as solutions to the various ills plaguing developing nations. The present critique indicates that post-conflict property restitution schemes could benefit from considering the third law and development movement's emphasis on broader human development and reconsideration of a one-size-fits-all model of law reform.

53. *Id.* at 9, 17.

54. Kleinfeld, *supra* note 40, at 64.

55. *Id.*; Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 206 (David M. Trubek & Alvaro Santos eds., 2006).

56. Trubek, *Rule of Law*, *supra* note 41, at 91 (quoting a World Bank critique of its earlier attempts to transplant a formalist vision of the rule of law to developing or democratizing countries) (citing World Bank, *Legal Institutions of a Global Economy* Homepage, <http://www1.worldbank.org/publicsector/legal/index.htm>); Rittich, *supra* note 55, at 203-04.

57. Trubek & Santos, *supra* note 45, at 7-8.

III.

PROPERTY RESTITUTION BACKGROUND: BOSNIA AND THE PINHEIRO PRINCIPLES

The property restitution process in Bosnia is important to an analysis of post-conflict property restitution for a variety of reasons. First, experts in the field have hailed the Bosnian program for the resolution of post-conflict property disputes as a model worldwide.⁵⁸ In addition, the institutions and procedures established to enforce restitution rights in Bosnia represented the most comprehensive and systematized post-conflict restitution effort ever implemented.⁵⁹ The most important reason to understand the context and implementation of restitution in Bosnia, however, is that the Pinheiro Principles borrowed significantly from Bosnia's experience.⁶⁰

A. *Bosnia's Restitution Experience*

The 1992-1995 conflict in Bosnia took place against the larger backdrop of the breakup of the Socialist Federal Republic of Yugoslavia involving several nationalist and ethnic offensives.⁶¹ Attempting to reconcile this fractionalization, the 1995 peace agreement ending the war created the new state of Bosnia and Herzegovina, comprised of two separate entities: the Federation of Bosnia and Herzegovina and the Republika Srpska.⁶² By the end of the war, the conflict had displaced over two and a half million people in the area covered by this new state.⁶³ Ninety percent of the Serbs from the Federation of Bosnia and Herzegovina and 95 percent of the Bosniaks (Muslims) and Croats from the

58. Charles B. Philpott, *From the Right to Return to the Return of Rights: Completing Post-War Property Restitution in Bosnia Herzegovina*, 18 INT'L J. REFUGEE L. 30, 30 (2006) (noting that Bosnia serves as an example in both positive and negative aspects); Williams, *Significance of Property Restitution*, *supra* note 15, at 39 (declaring property restitution "highly successful" and suggesting it as a model for other post-conflict situations, but cautioning that its success rested on favorable domestic and international contexts unlikely to be replicated elsewhere); Das, *supra* note 9, at 430 (suggesting that the practice of the Bosnian and Kosovo property claims commissions can provide valuable lessons for the mechanics of property restitution schemes elsewhere).

59. Paglione, *supra* note 15, at 2 (asserting that the Dayton Peace Agreement, ending the hostilities in Bosnia, represented "the international community's first comprehensive attempt to enforce individual property restitution rights through the setting up of formal institutions and claims procedures."). While other states have established mechanisms for the return of property as part of negotiated peace agreements, no effort has been as far reaching and systematized as that in Bosnia and Herzegovina. Williams, *Post-Conflict Property Restitution*, *supra* note 10, at 443.

60. See *supra* note 27 for a discussion referencing Bosnia in the Working Paper and Preliminary Report.

61. Williams, *Significance of Property Restitution*, *supra* note 15, at 41 (noting that Croatia, bordering Bosnia and Herzegovina, seceded from Yugoslavia in 1991 and neighboring Serbia used force in both Croatia and Bosnia to try to prevent Yugoslavia's disintegration, to protect Serb minorities, and perhaps also to create a greater Serbia).

62. *Id.* at 42.

63. Philpott, *Dog is Dead*, *supra* note 4, at 1.

Republika Srpska had been displaced.⁶⁴ At the time of the peace accords, only 42 percent of the population remained in their pre-war residences.⁶⁵ More than half of the housing stock in Bosnia and Herzegovina was abandoned by forcible eviction.⁶⁶ Of the homes not destroyed in the conflict, many that remained habitable were occupied by non-owners, typically by those connected to the faction responsible for the expulsions.⁶⁷

The December 1995 Dayton Accords ending hostilities established the right of return for all refugees and displaced persons.⁶⁸ This peace agreement itself was the product of international influence.⁶⁹ The agreement set forth “the right to have restored to [refugees and IDPs] property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.”⁷⁰ To implement this mandate, the agreement established a quasi-international commission to “receive and decide any claims for real property in Bosnia and Herzegovina.”⁷¹

The restitution process in Bosnia—not only initially, but also ultimately—depended on international political control and financial as well as human resources. Directly after the signing of the Dayton Accords, local court officials and administrative authorities stalled and manipulated the restitution process for two years, resettling primarily majority populations to consolidate ethnic separation.⁷² The Office of the High Representative (OHR), an international

64. Rosand, *supra* note 23, at 1100 (citing the INT’L CENTRE FOR MIGRATION POLICY DEV., FRAMEWORK REPORT TO FACILITATE THE LAUNCHING OF THE COMMISSION STIPULATED IN ANNEX SEVEN CHAPTER TWO OF THE DAYTON AGREEMENTS ¶ 81 (1996)) (noting that an estimated thirty-nine percent of all Bosnian Serbs, sixty-seven percent of Bosnian Croats, and sixty-three percent of Bosniaks were dislocated because of the war).

65. Williams, *Post-Conflict Property Restitution*, *supra* note 10, at 478.

66. Williams, *Significance of Property Restitution*, *supra* note 15, at 43.

67. Williams, *Post-Conflict Property Restitution*, *supra* note 10, at 478; Philpott, *Dog Is Dead*, *supra* note 4, at 2; Williams, *Significance of Property Restitution*, *supra* note 15, at 44.

68. The General Framework Agreement for Peace in Bosnia-Herzegovina, Bosn.-Herz., annex 7, art. 1, ¶ 1, Dec. 14, 1995, 35 I.L.M. 75 [hereinafter Dayton Accords], *reprinted in* HOUSING, LAND, AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS: LAWS, CASES, AND MATERIALS 31 (Scott Leckie ed., 2007) [hereinafter HOUSING, LAND, AND PROPERTY] (stating in art. 1, ¶ 1, that “[a]ll refugees and displaced persons have the right freely to return to their homes of origin.”).

69. It took place in Ohio and was a product of negotiations sponsored by the United States and a number of mostly European states. Paul C. Szasz, *The Dayton Accord: The Balkan Peace Agreement*, 30 CORNELL INT’L L.J. 759, 760 (1997); *see infra* Part IV.E. for a discussion of the problems posed by international involvement in post-conflict property restitution programs.

70. Dayton Accords, *supra* note 68, annex 7, art. 1, ¶ 1, *reprinted in* HOUSING, LAND, AND PROPERTY, *supra* note 68, at 31. The entire text of the Dayton Accords is reproduced on the United States Department of State web site and available at <http://www.state.gov/www/regions/eur/bosnia/bosagree.html>.

71. *Id.* art XI.

72. Philpott, *Dog Is Dead*, *supra* note 4, at 3; Williams, *Significance of Property Restitution*, *supra* note 15, at 43.

body entrusted with legislative authority, later imposed new restitution legislation and amendments to existing property laws.⁷³ Various international agencies interpreted the legislation, imposed amendments, and oversaw implementation at the local level, which included canton and municipal officials in one part of the country and branch offices of the Ministry for Refugees and Displaced Persons in the other.⁷⁴ Ten years after Dayton, the real property of over 216,000 claimants had been returned to pre-war residents.⁷⁵

While property restitution did facilitate the return of some refugees and IDPs, it did not result in widespread return of people to areas where they represented a minority. In other words, restitution did not reverse ethnic cleansing.⁷⁶ Many who succeeded in reclaiming their property chose to sell or exchange it to facilitate relocation elsewhere.⁷⁷ In those situations where an individual did return to a sector in which they represented a minority, it was typically in isolated rural areas.⁷⁸ Of these minority returnees, many were elderly, retired people with an emotional connection to their land.⁷⁹ Younger

73. Williams, *Post Conflict Property Restitution*, *supra* note 10, at 497-98 (describing the “quasi-legislative” powers of the Office of the High Representative and noting twenty-eight OHR decisions in 1999 imposing “new legal instruments and amendments to existing legislation”). The Dayton Accords facilitated the creation of the OHR in 1995, a body representing the countries involved in the Dayton Accords. See also KETT & DALRYMPLE, *supra* note 25, at 7 (describing the OHR as “internationally appointed”); Philpott, *Dog is Dead*, *supra* note 4, at 7. While the OHR had no legislative power at the time of its creation in 1995, the internationally-comprised Peace Implementation Council granted significant authority to it by 1998. Gerald Knaus & Felix Martin, *Travails of the European Raj*, 14 J. DEMOCRACY 60, 63-64 (2003).

74. Dayton divided the country between two entities, the Federation of Bosnia and Herzegovina and the Republika Srpska. See *supra* note 62 and accompanying text. The Federation contained ten “Cantons,” a territorial division that allowed Bosniaks and Croats to each remain in charge of areas they controlled. Williams, *Significance of Property Restitution*, *supra* note 15, at 42.

75. Philpott, *Dog is Dead*, *supra* note 4, at 1; Williams, *Significance of Property Restitution*, *supra* note 15, at 39. But see Black & Gent, *supra* note 12 (citing a UNHCR web page indicating that the total number of returnees is over one million); Daniela Heimerl, *The Return of Refugees and Internally Displaced Persons: From Coercion to Sustainability?* 12 INT’L PEACEKEEPING 377, 383 n. 22 (2005) (citing a 2004 UNHCR report announcing that over one million people had returned to their pre-war properties, but also noting that the exact number of returnees is difficult to calculate). See also KETT & DALRYMPLE, *supra* note 25, at 10 (reporting that about 1 million people were still living “in camps, collective centres and private accommodation outside their home communities,” presumably at the time their report was updated in August 2004).

76. Stefansson, *supra* note 16, at 131 (claiming that “property restitution in itself did not generally provide the basis for sustainable mass return of ethnic minorities” according to his study of the post-war city of Banja Luka). Philpott, *Dog Is Dead*, *supra* note 4, at 1, 18 (noting that restitution resulted in “lower” returns but asserting that the return that occurred in Bosnia would not have been possible but for property restitution) (citing a UNHCR report indicating that less than half of the Bosnian returnees were ‘minority’ returnees).

77. Marita Eastmond, *Transnational Returns and Reconstruction in Post-War Bosnia and Herzegovina*, 44 INT’L MIGRATION 141, 143 (2006); Williams, *Post-Conflict Property Restitution*, *supra* note 10, at 445 (commenting that “the return of property to people has not always resulted in the return of people to property” because many people opted to sell or rent returned properties).

78. Heimerl, *supra* note 75, at 385.

79. *Id.*

people opted not to return for the most part, due to security concerns and the dearth of economic and educational opportunities.⁸⁰

B. *The Pinheiro Principles*

While drawing from a number of sources, the Pinheiro Principles reflect many of the initial experiences of restitution in Bosnia.⁸¹ The Principles, which create guidelines addressing the legal and technical issues surrounding property restitution, are set forth in a preamble and seven sections.⁸² Sections II through IV establish the rights on which the Principles are based. These include, for example, a specific right to housing and property restitution,⁸³ as well as more general rights to be protected from displacement,⁸⁴ to adequate housing,⁸⁵ and to voluntary return in safety and dignity.⁸⁶

Section V of the Principles contains the core of the legal and technical guidelines for establishing a property restitution system and comprises nearly half of all of the suggested principles. The eleven principles in Section V recommend, for example, that states “establish and support equitable, timely, independent, transparent and non-discriminatory procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims.”⁸⁷ Recognizing the difficulty of this task in the aftermath of war, the Principles advise that states should include property restitution procedures in peace agreements, following the restitution approach in Bosnia.⁸⁸ The Principles also suggest—again, tracking the experience in Bosnia—that:

[w]here there has been a general breakdown in the rule of law or where States are unable to implement the procedures, institutions and mechanisms necessary to

80. *Id.*

81. The Pinheiro Principles also borrow from the restitution experience in Kosovo, general precepts of international human rights and humanitarian law, and economic development theory. See, e.g., Smit, *supra* note 25, at 65 (stating that the restitution mechanisms adopted following the war in Kosovo “undoubtedly influenced” the Pinheiro Principles).

82. There are 23 principles divided among these seven sections. The section titles reflect the content of the principles: 1) Scope and Application, 2) The Right to Housing and Property Restitution, 3) Overarching Principles, 4) The Right to Voluntary Return in Safety and Dignity, 5) Legal, Policy, Procedural, and Institutional Implementation Mechanisms, 6) The Role of the International Community, Including International Organizations, and 7) Interpretation. *Pinheiro Principles*, *supra* note 18. The Principles speak broadly and consistently in terms of providing restitution for “housing, land and property.” The Principles themselves do not include definitions. The background documents supporting the Principles, however, incorporate the phrase “housing and property” and define it to mean housing, real property and land. *Working Paper*, *supra* note 14, ¶ 9; *Preliminary Report*, *supra* note 4, ¶ 4.

83. *Pinheiro Principles*, *supra* note 18, § II (referencing Principle 2).

84. *Id.* § III (referencing Principle 5).

85. *Id.* § III (referencing Principle 8).

86. *Id.* § IV (referencing Principle 10).

87. *Id.* ¶ 12.1.

88. *Id.* ¶ 12.6.

facilitate the housing, land and property restitution process in a just and timely manner, States should request the technical assistance and cooperation of relevant international agencies.⁸⁹

Other guidelines in this section advise independent and impartial decision making bodies,⁹⁰ protections for secondary occupiers,⁹¹ and caution in allowing the remedy of compensation to be used in lieu of restitution.⁹² The experience of Bosnia's restitution program likely influenced the inclusion of these guidelines as well. Pinheiro's Working Paper and Preliminary Report preceding his final Principles highlighted Bosnia's lack of independent local judicial systems and the problem of widespread secondary occupation.⁹³ The Working Paper also addresses potential problems where compensation is substituted for restitution because of a lack of legal or political will.⁹⁴ While the Dayton Accords stipulated that claimants could choose between restitution or compensation, a compensation fund was never established in Bosnia, in part, out of concern that doing so would minimize the will of refugees and IDPs to return home and thus undermine the goal of reversing ethnic cleansing.⁹⁵

While the heart of the Pinheiro Principles' legal and technical guidelines are traceable to the struggles of Bosnia's property restitution scheme, there are a number of flaws in the legal and theoretical bases underlying restitution as a remedy for mass forced displacement.

89. *Id.* ¶ 12.5.

90. *Id.* ¶ 13.1 (stating that those displaced from their property "should be able to submit a claim for restitution and/or compensation to an independent and impartial body, to have a determination made on their claim . . .").

91. *Id.* ¶ 17.1 (suggesting that "States should ensure that secondary occupants are protected against arbitrary or unlawful forced eviction").

92. *Id.* ¶ 21.1 ("States shall, in order to comply with the principle of restorative justice, ensure that the remedy of compensation is only used when the remedy of restitution is not factually possible, or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution . . ."). The Pinheiro Principles also include additional guidelines. *See, e.g., id.* ¶ 15.1 (advising that "States should establish or reestablish . . . appropriate systems for the registration of housing, land and property rights . . ."); *id.* ¶ 16.1 (States should ensure that restitution programs recognize the rights of tenants and other legitimate occupants); *id.* ¶ 18.1 ("States should develop a legal framework for protecting the right to housing, land and property restitution which is clear, consistent and, where necessary, consolidated in a single law").

93. *See supra* note 27 (discussing *Working Paper, supra* note 14, ¶¶ 44-46); *see also Preliminary Report, supra* note 4, ¶ 28 (discussing the difficulty of evicting secondary occupiers in Bosnia); *id.* ¶ 27 (noting that a separate commission was established to process claims); *id.* ¶ 54 (stating that property commissions could help address the problem of a lack of an effective judiciary, which is especially prevalent in post-conflict societies).

94. *Working Paper, supra* note 14, ¶¶ 57-59.

95. INT'L ORG. FOR MIGRATION, *supra* note 10, at 89-90.

IV.

WEAKNESSES OF RESTITUTION AS A REMEDY FOR MASS FORCED DISPLACEMENT

To analyze the limitations of restitution, the discussion in this Part is divided into five subparts. Subpart A presents the legal foundations said to give rise to a right to restitution as a remedy for mass forced displacement. Subpart B discusses the weaknesses in these foundations. Subpart C identifies the non-legal, theoretical claims supporting restitution, which relate generally to the way in which restitution is said to promote the rule of law. Subpart D discusses the limitations of these theoretical claims. Subpart E analyzes problems related to the necessary internationalization of a post-conflict restitution process.

A. Legal Bases for Restitution

The Pinheiro Principles' enunciation of a right to property restitution is premised on rights established by international law.⁹⁶ Arguably, the most significant preexisting right supporting restitution is the right of those who leave their country to return to it, initially articulated by the non-binding Universal Declaration of Human Rights.⁹⁷ Subsequent U.N. resolutions reaffirm this right to return.⁹⁸ This well-established right, however, does not necessarily lead to a

96. *Preliminary Report*, *supra* note 4, ¶ 79 (listing six "specific international human rights norms and standards underlying the right to housing and property restitution for refugees and other displaced persons"). In addition to being premised on a right to return, restitution is also based on international legal protections for housing rights. *See infra* note 121 and accompanying text discussing these protections. The Principles are also based on the right not to be forcibly evicted. A U.N. Commission on Human Rights resolution declares "forced eviction constitutes a gross violation of human rights, in particular the right to adequate housing." *Preliminary Report*, *supra* note 4, ¶ 6 (citing U.N. Comm'n on Human Rights Res. 1993/77, U.N. Doc. E/CN.4/RES/1993/77 (Mar. 10, 1993)). Moreover, victims of human rights violations have a right to a remedy. *Id.* ¶ 7. Two additional rights underlie restitution, but these relate more to the manner in which the Pinheiro Principles recommend that a property restitution scheme be carried out, rather than the legal justifications for imposing restitution. These additional rights are the right to non-discrimination and the right to equality. The Pinheiro Principles prescribe, for example, that "restitution procedures, institutions and mechanisms are age and gender sensitive, and recognize the equal rights of men and women . . ." and that a restitution claims process be age and gender sensitive. *Pinheiro Principles*, *supra* note 18, ¶¶ 12.2, 13.2.

97. *Progress Report*, *supra* note 17, ¶¶ 26-27. The right to return is asserted in the Universal Declaration of Human Rights ("Everyone has the right to leave any country, including his own, and to return to his country."). Universal Declaration of Human Rights, G.A. Res. 217A, art. 13, § 2, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). Closely related, the Working Paper highlights the identification by the UNHCR of "voluntary repatriation" as one of the three "key durable solutions" to the problems faced by refugees. *Working Paper*, *supra* note 14, ¶ 16 (citing U.N. High Comm'r for Refugees [UNHCR], Exec. Comm., *Conclusions Adopted by the Executive Committee: Durable Solutions and Refugee Protection*, No. 56 (XL) (Oct. 13, 1989)).

98. *See, e.g.*, G.A. Res. 51/126, U.N. Doc. A/RES/51/126 (Dec. 13, 1996); G.A. Res. 35/124, U.N. Doc. A/RES/35/124 (Dec. 11, 1980); S.C. Res. 1287, U.N. Doc. S/RES/1287 (Jan. 31, 2000); S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999); S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998); S.C. Res. 1036, U.N. Doc. S/RES/1036 (Jan. 12, 1996); S.C. Res. 971, U.N. Doc. S/RES/971 (Jan. 12, 1995); S.C. Res. 876, U.N. Doc. S/RES/876 (Oct. 19, 1993); S.C. Res. 820,

right to restitution.

Because the legal justification for property restitution rests so heavily on the right to return, as do specific criticisms of restitution, an exploration into the history and parameters of this right is useful. The right to return is fraught with political considerations. The 1948 Universal Declaration of Human Rights stated that “Everyone has the right to leave any country, including his own, and to return to his country.”⁹⁹ Prior to this assertion, the general consensus of the international community allowed for significant population transfers as a means of solving ethnic tensions, and those forced to move had no right to return to their homes.¹⁰⁰

Between the end of World War II and the conclusion of the Cold War in the late 1980s, Western governments that supported the United Nations emphasized the right to leave much more than the right to return.¹⁰¹ These nations assumed that return was not an option for refugees fleeing communist regimes.¹⁰² The UNHCR assisted Soviet bloc refugees to resettle in the European and North American countries providing asylum.¹⁰³

The end of the Cold War brought a shift in strategy for dealing with refugee populations. U.N. agencies began to maintain that returning refugees to their countries of origin was necessary to promote post-conflict peace and development.¹⁰⁴ Beginning in the 1980s, the emphasis on repatriation was given further momentum by the increase of migration from poor to rich countries and the reluctance of wealthy nations to offer resettlement.¹⁰⁵ In 1989, the UNHCR identified voluntary repatriation as one of its three “key durable solutions” to the problems faced by refugees.¹⁰⁶

U.N. Doc. S/RES/820 (Apr. 17, 1993).

99. Universal Declaration of Human Rights, *supra* note 97, art. 13, § 2.

100. Rosand, *supra* note 23, at 1115-16 (reviewing the 1923 Treaty of Lausanne, involving the compulsory exchange of Greek Muslims to Turkey and Greek populations living in Turkey back to Greece, and the 1945 Potsdam Declaration, requiring the transfer of 15 million Germans living in other parts of Europe back to Germany).

101. *Id.* at 1119.

102. UNHCR, STATE OF THE WORLD, *supra* note 5, at 129; Patricia Weiss Fagen, *UNHCR and Repatriation*, in *PALESTINIAN REFUGEE REPATRIATION: GLOBAL PERSPECTIVES* 41, 43 (Michael Dumper ed., 2006) (concluding that Western governments found repatriation of refugees from communist countries “unthinkable”); Black & Gent, *supra* note 12, at 16 (stating that “the ideological interests of the West meant that local integration in host countries in Europe, or resettlement to North America, were generally more attractive options” for refugees fleeing communist countries).

103. Fagen, *supra* note 102, at 43 (commenting, however, on UNHCR efforts during the Cold War to organize large African repatriations of refugees who had fled in light of pro-independence struggles in African countries); Black & Gent, *supra* note 12, at 16 (noting that labor shortages also paved the way for resettlement by shaping public policy to focus on resettlement and integration rather than encouraging return).

104. Fagen, *supra* note 102, at 46.

105. UNHCR, STATE OF THE WORLD, *supra* note 5, at 130.

106. See *Working Paper*, *supra* note 14, ¶ 16; U.N. High Comm’r for Refugees [UNHCR],

B. Critique of Legal Bases

Despite the creation of a right to return under international law, the degree to which this right supports a right to property restitution following mass displacement remains questionable.¹⁰⁷ A number of scholars interpret the international human rights conventions articulating a right to return—those on which the Pinheiro Principles are based¹⁰⁸—as guaranteeing the right for individuals asserting an individual right. Traditionally, the right to return did not apply to the claims of large numbers of people displaced *en masse*.¹⁰⁹ Instead, scholars assert that the return of masses of dislocated people is a problem in need of a political solution rather than a rights-based solution.¹¹⁰

In addition, the right to return has long been interpreted to mean the right to return to one's country of origin, not necessarily to a particular home.¹¹¹ The 1995 Dayton Accords ending hostilities in Bosnia was the first time the right to return was specifically established as a right to return to one's home of origin.¹¹² A progress report leading up to the Pinheiro Principles recognizes this shift away from the traditional understanding by acknowledging that "the right to return is increasingly seen as encompassing not merely returning to one's country, but to one's home as well."¹¹³ Since resolution of the conflicts in the former Yugoslavia, however, various international human rights bodies have

Exec. Comm. of the Programme of the UNHCR, *Addendum to the Report of the United Nations High Commissioner for Refugees: Report of the Executive Committee of the Programme of the UNHCR on the work of its fortieth session, 1989*, U.N. Doc. A/44/12/Add.1 (Oct. 30, 1989), available at <http://www.unhcr.org/3ae68c358.html>.

107. Not all scholars accept that international law provides for a right to property restitution. Pablo de Greiff, *Repairing the Past: Compensation for Victims of Human Rights Violations*, in THE HANDBOOK OF REPARATIONS 1, 7 (Pablo de Greiff ed., 2006).

108. See *infra* Part IV.A.

109. Rosand, *supra* note 23, at 1128 (quoting one author as stating that the International Covenant on Civil and Political Rights (ICCPR) section confirming the right to leave and to return "is intended to apply to individuals asserting an individual right. There was no intention here to address the claims of masses of people who have been displaced as a byproduct of war or by political transfers of territory or population The [ICCPR] does not deal with those issues and cannot be invoked to support a right to "return." These claims will require international political solutions on a large scale.") (citing Stig Jagerskiold, *The Freedom of Movement*, in THE INTERNATIONAL BILL OF RIGHTS 166, 180 (Louis Henkin ed., 1981)).

110. Rosand, *supra* note 23, at 1128-29 (quoting Stig Jagerskiold, *The Freedom of Movement*, in THE INTERNATIONAL BILL OF RIGHTS 166, 180 (Louis Henkin ed., 1981) and citing other authors). Interestingly, the restitution program in Bosnia initially failed because it was too politicized. The process became more productive when international involvement turned the focus to a "rule of law" or rights-based approach and away from a political approach. See sources cited *supra* notes 21-22.

111. Fagen, *supra* note 102, at 46.

112. Heimerl, *supra* note 75, at 378 (stating that Annex 7 of the Dayton Accords "provided a right to return unique in international law" inasmuch as it established a right to return to a displaced person's home of origin, not just country of origin) (citing Dayton Accords, *supra* note 68, annex 7, art. 1, ¶ 1, reprinted in HOUSING, LAND, AND PROPERTY, *supra* note 68, at 31).

113. *Progress Report*, *supra* note 17, ¶ 29.

viewed the right to return to include a right to have housing and property restored.¹¹⁴

Moreover, justifying a right to property restitution by reference to the right of return overshadows alternative remedies that victims of forced displacement might prefer. Not all refugees or displaced persons wish to return to a “home” altered by war; some may prefer other forms of reparations such as compensation.¹¹⁵ The Pinheiro Principles do authorize compensation when restitution “is not factually possible, or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution.”¹¹⁶ Yet the Principles also instruct that “states shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice.”¹¹⁷ Indeed, restitution is the only form of reparations through which return can be immediately advanced.

While grounding a right to restitution in the right to return gives rise to the most significant potential legal deficiencies, there remains a question about the degree to which international law protects a general right to property ownership.¹¹⁸ A provision in the non-binding Universal Declaration of Human Rights states, “Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.”¹¹⁹ Yet international human rights law provides no solid interpretation of the substance of this right.¹²⁰ Human rights principles do protect housing; however, this right to housing is not expressly related to ownership interests in any particular housing.¹²¹ Both the Working Paper and Preliminary Report

114. See, e.g., S.C. Res. 820, *supra* note 98; *Guiding Principles*, *supra* note 17.

115. Paglione, *supra* note 15, at 7-8; see also Arraiza & Moratti, *supra* note 25, at 450.

116. *Pinheiro Principles*, *supra* note 18, ¶ 21.1.

117. *Id.* ¶ 2.2.

118. The regulations annexed to the Hague Convention protect public and private property during *international* armed conflict, but not during civil armed conflict. See Kagan, *supra* note 9, at 445-46 (addressing the status of the Hague Regulations as “binding customary norms” and their application to Israeli seizure of Palestinian property).

119. Universal Declaration of Human Rights, *supra* note 97, at 71.

120. Paglione, *supra* note 15, at 2-3 (pointing out the lack of clarity surrounding the extent to which international human rights law protects private property and highlighting that the two universal human rights conventions adopted by the U.N. in 1966 failed to include a right to private property in part because of ideological conflicts during the Cold War period). See International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, S. Exec. Doc. D, 95-2 (1978), 993 U.N.T.S. 3 [hereinafter ICESCR].

121. See, e.g., the ICCPR, *supra* note 120, art. 17, which protects homes: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence”; and the ICESCR, *supra* note 120, art. 11, which protects the right to adequate housing: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” In 1991, a U.N. Committee interpreted article 11 of the ICESCR to include a right to legal security of tenure. U.N. Comm. on Econ., Soc. & Cultural Rights

preceding the Pinheiro Principles acknowledge that international law protects housing rights, more so than private property rights generally.¹²² Presumably, unlawful interference with a right to housing could be remedied by ensuring access to equivalent housing rather than providing restitution for “housing, land and property,” as advocated by the Pinheiro Principles.¹²³

This is not to suggest that the Pinheiro Principles represent a violation of international norms. However, the right to property restitution following displacement caused by armed conflict should be viewed as a new right based on the evolution of international law, rather than one firmly grounded in international law.¹²⁴ Indeed, after the U.N. Sub-commission endorsed the Pinheiro Principles, the U.N. General Assembly adopted guidelines on reparations for victims of violations of international human rights law.¹²⁵ These guidelines suggest very generally that such victims be allowed restitution, “includ[ing], as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”¹²⁶

C. Theoretical Justifications for Restitution

Proponents of the Pinheiro Principles highlight a number of interrelated, theoretical bases supporting a right to property restitution. These claims generally pertain to the notion that a property restitution process can enhance the rule of law in a post-conflict society. In this way, proponents of property restitution link the remedy with promoting post-war peace and reconciliation

[CESCR], *Gen. Cmt. 4: The Right to Adequate Housing* (Art. 11 (1) of the Covenant), at 8, U.N. Doc. E/1992/23 (Dec. 13, 1991). Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination prohibits racial discrimination “in the enjoyment of . . . the right to housing.” International Convention on the Elimination of All Forms of Racial Discrimination [CERD], Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195.

122. *Working Paper*, *supra* note 14, ¶ 10; *Preliminary Report*, *supra* note 4, ¶ 5.

123. *Pinheiro Principles*, *supra* note 18, ¶ 1.1 (“The Principles on housing and property restitution for refugees and displaced persons articulated herein are designed to assist all relevant actors, national and international, in addressing the legal and technical issues surrounding housing, land and property restitution in situations where displacement has led to persons being arbitrarily or unlawfully deprived of their former homes, lands, properties or places of habitual residence.”).

124. *See also* Paglione, *supra* note 15, at 3 (maintaining that property restitution to remedy forced displacement is an “evolving area of law” but that there is ample jurisprudence on the right to restitution to remedy forced evictions). *But see* Gould, *supra* note 21, at 195-97 (suggesting that the right to restitution is firmly established as a remedy for gross violations of international human rights and under the principle of unjust enrichment).

125. 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, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter *Right to a Remedy*].

126. *Id.* ¶ 19.

and bolstering economic and social stability.¹²⁷

At first glance, these bases do support property restitution. Deeper analysis, however, suggests the limitations of these claims.

The Working Paper on which the Pinheiro Principles are based states that the restoration of property rights is a “prominent component” of efforts to restore the rule of law in post-conflict societies.¹²⁸ Similarly, international actors increasingly view return and accompanying restitution programs as a means of validating post-conflict regimes.¹²⁹ In Bosnia, for example, property restitution was the lynchpin to re-mixing ethnicities separated by violence.¹³⁰ Restoring property rights through an established “legal” process was a way of diffusing the highly politicized concept of return and ethnic reintegration.¹³¹ The emphasis on a systematic process was equated with elevating the rule of law over local political tensions. To the extent that the new state could undo the effects of ethnic cleansing, it gained political legitimacy. In other words, the claim is that depoliticizing return through rights-based, rule of law rhetoric and processes lends political legitimacy to a new post-conflict government.

Closely related to the idea that a restitution process can promote the rule of law, reintegration of refugees into their homes is considered an integral part of the national reconstruction process.¹³² To gain this reconstitutive effect, the return and reintegration of refugees must be “sustainable.”¹³³ The sustainability of return rests in part on the resolution of property and housing rights.¹³⁴

Overlapping with the rule of law vision of restitution is the theory that restoring property rights to those displaced by armed conflict can build peace and deter retribution. The Pinheiro Principles state that establishing a property

127. See, e.g., Leckie, *Introduction*, *supra* note 13, at 4 (stating that the international community recognizes “the direct links between housing, land and property restitution and peace, stability, reconciliation and economic development” and that this recognition “bolstered support for the human rights remedies offered to the displaced by restitution rights.”).

128. *Working Paper*, *supra* note 14, ¶ 14.

129. Black & Gent, *supra* note 12, at 17.

130. Rosand, *supra* note 23, at 1110 (discussing U.N. Security Council resolutions tying the return of Bosnians to their homes with the reversal of ethnic cleansing).

131. See *supra* notes 21, 22 and accompanying text for a discussion of observers who hailed Bosnia’s de-politicization of return and reintegration by focusing on the procedural aspects of property restitution.

132. Black & Gent, *supra* note 12, at 24.

133. *Id.* at 25 (noting, however, that the “sustainability” of return is a “slippery” concept) (quoting R. B. GIBSON, SUSTAINABILITY ASSESSMENT: CRITERIA AND PROCESS 39 (2005)). The UNHCR has described sustainability to involve “a situation where—ideally—returnees’ physical and material security are assured, and when a constructive relationship between returnees, civil society and the state is consolidated.” Chimni, *supra* note 28, at 167-68 (quoting U.N. High Comm’r for Refugees [UNHCR], *Oversight Issues: Reintegration*, U.N. Doc. EC/48/SC/CRP.15 (1998)).

134. Chimni, *supra* note 28, at 168.

restitution plan “is essential to the resolution of conflict.”¹³⁵ Like the legal foundations for restitution, this reconciliation claim is grounded in the right of return. Beginning at the end of the 1980s, coinciding with the end of the Cold War and an emphasis on return, rather than integration into host countries, returning refugees to their countries of origin was viewed as key to post-conflict peace processes.¹³⁶ The UNHCR has posited that, “unless uprooted populations can go back to their homes and enjoy a reasonable degree of security in their own community, the transition from war to peace may be . . . delayed or even reversed.”¹³⁷

The Bosnia experience underscores the premise that a return of property rights is essential for lasting peace. A number of U.N. Security Council resolutions claimed that returning refugees and IDPs to their pre-war homes was an essential part of a lasting solution to that conflict.¹³⁸

Finally, and also closely related to the rule of law impact of restitution, is the idea that restitution establishes conditions for economic and social stability. Clear and undisputed property rights are correlated with economic recovery and growth, as well as social stability.¹³⁹ In some conflict situations, forced displacement from rural areas has resulted in unproductive agricultural property, further impairing a conflict-ridden economy.¹⁴⁰ Restoring rights to agricultural property can restore productivity. Moreover, facilitating the return of refugees and IDPs is premised on the notion that displaced populations will be better off when they can reintegrate themselves back into their societies generally, and to their homes, specifically.¹⁴¹ Thus, restitution implicitly assumes that

135. *Pinheiro Principles*, *supra* note 18, pmbl.

136. Black & Gent, *supra* note 12, at 17.

137. Richard Black, *Conceptions of ‘Home’ and the Political Geography of Refugee Repatriation: Between Assumption and Contested Reality in Bosnia-Herzegovina*, 22 APPLIED GEOGRAPHY 123, 127 (2002) [hereinafter *Home*] (quoting U.N. High Comm’r for Refugees [UNHCR], THE STATE OF THE WORLD’S REFUGEES: A HUMANITARIAN AGENDA 143 (1998)).

138. Rosand, *supra* note 23, at 1106 (citing five U.N. Security Council Resolutions from 1992 to 1996).

139. HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 5-7 (2000) (pointing out that a lack of security of ownership rights prevents people in many parts of the world from turning assets into capital). Das, *supra* note 9, at 429; *see also* Carothers, *Rule-of-Law Revival*, *supra* note 40, at 5 (noting that property rights comprise an element of a modern market economy).

140. World Bank, Rural Development Unit, Latin America Region, COLOMBIA LAND POLICY IN TRANSITION, Report No. 27942-CO (Jan. 29, 2004) (concluding that displacement has contributed to a “significant and unproductive concentration of land in some areas” and that such unequal land distribution results in “foregone growth potential in rural areas, lack of sustainable management of natural resources, and failure to diversify”). *Id.* at 3, 16.

141. Black & Gent, *supra* note 12, at 20 (quoting a World Bank discussion paper that asserts “there can be no hope of normalcy until the majority of those displaced are able to reintegrate themselves into their societies”) (citing U.N. High Comm’r for Refugees [UNHCR], THE STATE OF THE WORLD’S REFUGEES 162 (1997)).

reintegration into a former community means attaining order and stability.¹⁴²

D. *Limitations of Theoretical Claims*

While these rule of law and related claims bolstering a right to post-conflict property restitution carry logical appeal, closer analysis indicates their flaws.¹⁴³

Scrutiny is merited given that reliance on a restitution process to help promote the rule of law represents an instrumentalist view of law promoted by Western legal actors, similar to the one that backfired in the first law and development movement. Likewise, suggesting that there is a universal approach to property restitution that can, in turn, enhance the rule of law in post-conflict societies, mirrors one of the failures of the second law and development movement: promoting a standardized rule of law formula.¹⁴⁴

142. *Id.* (citing Daniel Warner, *Voluntary Repatriation and the Meaning of Return to Home: A Critique of Liberal Mathematics*, 7 J. REFUGEE STUD. 160 (1994)).

143. While the focus of these critiques is on restitution—a specific method of reparations—it is worthwhile to mention that even the broad remedy of reparations has its detractors. Some observers have criticized a fixation on reparations as deterring the formulation of forward-looking policies. JOHN TORPEY, *MAKING WHOLE WHAT HAS BEEN SMASHED: ON REPARATIONS POLITICS* 5 (2006) (asserting that “The global spread of reparations demands and the preoccupation with the past to which it bears witness reflect an unmistakable decline of a more explicitly future-oriented politics”). Torpey defines reparations as “compensation, usually of a material kind and often specifically monetary, for some past wrong.” *Id.* at 42. His focus, and perhaps then, conclusion of the remedy as being backward looking, seems to be on reparations for distant past wrongs—historical injustices committed as early as the colonial period or during World War II—rather than very recent wrongs. Despite criticism of the approach, international law endorses reparations to remedy violations of international human rights and humanitarian law. *See, e.g., Right to a Remedy, supra* note 125. Reparations are said to forestall future wrongdoing and to mend past wrongs.

There is, however, an element of hypocrisy when Western governments craft a recipe for reparations for other states to follow. For example, some observers claim that the United States’ reparations efforts for wrongs committed against indigenous tribes were inadequate. *See, e.g.,* Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 476–77 (1994). Critics may also point to attempts by the United States to remedy the internment of nearly 120,000 Japanese Americans during WWII. Many would posit that an apology and a \$20,000 payment 46 years later to surviving internees did not adequately redress the wrongs committed pursuant to President Roosevelt’s Executive Order 9066. John Torpey & Rosa Sevy, *Commemoration, Redress, and Reconciliation: The Cases of Japanese-Americans and Japanese-Canadians*, in *MAKING WHOLE WHAT HAS BEEN SMASHED: ON REPARATIONS POLITICS* 80–81 (2006). Other attempts at reparations subject to critique include the September 11th Victim Compensation Fund and the government’s response to the displacement caused by hurricane Katrina. From this perspective, prescriptions for reparations posited by Western states seem somewhat lacking in legitimacy.

144. One of the proponents of the Pinheiro Principles, who also served as a consultant to Pinheiro, characterizes the Principles as providing “a consolidated and universal approach” to restitution. Leckie, *Introduction, supra* note 13; *see also* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Promotion & Prot. of Human Rights, *Housing and property restitution in the context of the return of refugees and internally displaced persons*, n. 1, U.N. Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005) (*prepared by* Paulo Sérgio Pinheiro) (listing Scott Leckie as one of the participants in the “Expert Consultation” group).

1. *Restitution Meets the Needs of Western Asylum States*

One of the flaws underlying all of the theoretical claims regarding the value of restitution is the possibility that restitution schemes are geared to address the concerns of Western states and as such, may render return not entirely voluntary. Just as the return of refugees to their countries of origin became a priority after the Cold War when Western nations no longer wanted to provide asylum, so too might the remedy of restitution now be in vogue to meet the needs primarily of Western nations that are not interested in providing asylum to refugees. The return of refugees and emphasis on property restitution is fueled, at least in part, by the political and economic concerns of asylum countries.¹⁴⁵ For example, domestic unrest in Germany helped to prompt the return of more than a quarter of a million refugees to Bosnia.¹⁴⁶ Indeed, Germany's concern over the rapid influx of refugees near the beginning of hostilities in the former Yugoslavia resulted in a UNHCR plan that called for an early return of refugees to Bosnia.¹⁴⁷ At least one observer contends that this marked the genesis of a new right to return for victims of massive forced displacement.¹⁴⁸ Likewise, the prospect of a new wave of repatriations from Germany helped to spur international intervention in Bosnia's return process to remove local barriers to reintegrating ethnic populations.¹⁴⁹

Host countries in the West are not the only states anxious to resettle refugees. States and international organizations responsible for maintaining security in the aftermath of armed conflict may also have an incentive to speed up return to facilitate withdrawal of international peacekeeping forces. After the initial experience of restitution in Bosnia served to consolidate ethnic divisions, international agencies intervened in the repatriation process to coerce ethnic

145. Black & Gent, *supra* note 12, at 16 (noting that "although an emphasis on return can be seen as part of a restrictive attitude toward refugees and asylum seekers in the north, this is far from being a complete explanation."); *see also* Chimni, *supra* note 28, at 163 (asserting that "the return of refugees also coincides with the disinclination of states to host refugees."); Arraiza & Moratti, *supra* note 25, at 422 (reporting that U.N. authorities in Kosovo decided to instigate property restitution in part because of "the need to remove obstacles to refugee repatriation from Western countries).

146. Richard Black, *Return of Refugees: Retrospect and Prospect*, in PALESTINIAN REFUGEE REPATRIATION: GLOBAL PERSPECTIVES 29 (Michael Dumper ed., 2006) [hereinafter *Return*]. Soon after the Bosnian conflict ended in 1996, Germany withdrew safe haven status for Bosnians. *Id.* at 50.

147. Rosand, *supra* note 23, at 1105-06. In response to Germany's failed 1992 call for quotas on the number of refugees that European countries had to admit, the U.N. High Commissioner for Refugees introduced a plan to contend with the refugee crisis that included the return and rehabilitation of refugees to Bosnia. *Id.* This was in the summer of 1992, over three years prior to the signing of the Dayton Accords that put an end to the armed conflict and established a right of return.

148. *Id.* at 1106-07.

149. Heimerl, *supra* note 75, at 382. *See also* discussion of the 1996-97 process of returns *supra* notes 72-74.

reintegration.¹⁵⁰ This intervention occurred within a context of international awareness that ethnic reintegration could help create the conditions for withdrawal of NATO-led security forces.¹⁵¹

Nonwestern states also push to repatriate refugee populations. The return of Rwandan refugees in 1996 reflected concerns in the asylum country of Tanzania regarding the large numbers of refugees and potential security risks associated with this refugee population.¹⁵² Following the Taliban's fall in Afghanistan, neighboring host countries became less hospitable to refugees, contributing to the return home of three million Afghans between 2001 and 2004.¹⁵³ Yet it was only after the large influx of refugees landed in Europe following the breakup of Yugoslavia that Western states began to push for a right to restitution.

If victims of mass forced displacement choose restitution for redress, it does not matter that host states might promote property restitution to address national political and economic difficulties. A problem arises, however, if pressure from host states causes return and restitution to be coerced rather than voluntary. The U.N. has declared that the right to return must be exercised voluntarily.¹⁵⁴ This means the "free and voluntary return to one's country of origin in safety and dignity."¹⁵⁵ One of the core components of voluntary repatriation is a guarantee that refugees and IDPs will have "legal safety" which encompasses "legal support for ownership of property, land and housing."¹⁵⁶ While the existence of a property restitution scheme may provide support for the legal safety required for voluntary repatriation, it may also provide umbrage for host states to maintain that repatriation is voluntary when, in fact, it may be coerced.¹⁵⁷

Furthermore, property restitution provides a convenient excuse for host nations granting temporary asylum to ignore compelling evidence regarding repatriation of refugee populations. The sustainability of return can be enhanced

150. Heimerl, *supra* note 75, at 381.

151. *Id.*

152. Black, *Return*, *supra* note 146, at 29.

153. Fagen, *supra* note 102, at 51.

154. G.A. Res. 428 (V), ¶ 2, U.N. Doc. A/1775 (Dec. 14, 1950).

155. UNHCR, HANDBOOK FOR REPARATION AND REINTEGRATION ACTIVITIES pt. A, module 1, at 2 (May 2004), available at <http://www.unhcr.org/411786694.html>.

156. *Id.* pt. A, module 1, at 3-5.

157. See, e.g., Heimerl, *supra* note 75, at 381 (noting the 1997 policy shift in Bosnia through which the international community directed a more coercive approach to return, "as distinct from a humanitarian or voluntary approach to minority returns"); see also Brad K. Blitz, *Refugee Returns in Croatia: Contradictions and Reform*, 23 POL. 181 (2003) (asserting that refugee returns "are rarely the product of voluntary decisions and many refugees return on the back of repatriation agreements and inter-state arrangements that restrict their rights to choose whether and when they should return home") (citing Khalid Koser, *Return, Readmission and Reintegration: Changing Agendas, Policy Frameworks and Operational Programmes*, in RETURN MIGRATION: JOURNEY OF HOPE OR DESPAIR? 57 (Bimal Ghosh ed., 2001)).

by allowing refugees the ability to move freely between host countries and countries of origin.¹⁵⁸ Migration researchers have determined that a return structure that allows refugees to return temporarily to post-conflict countries while also maintaining the ability to stay connected to networks established in host countries is a better incentive to return than an economic return package.¹⁵⁹ To advance this open-ended approach to return, restitution may be more of a burden than compensation for some refugees. Moreover, a flexible approach to return likely does not meet the needs of host countries as neatly as being able to facilitate restitution then permanently close the doors. To the extent that property restitution schemes may facilitate returns that are coerced, the theory that restitution will promote the rule of law and a host of related benefits is flawed.

2. Restitution May Not Foster Reconciliation

There are at least two ways in which restitution may fail to strengthen the rule of law and increase the prospects for sustainable peace. First, restitution may facilitate the political agendas of returnees and as such, set the stage for revenge rather than reconciliation. The Bosnia experience indicated that “for some return groups, the ‘right to return’ represented the concretization of a political strategy to ‘recapture’ for one ethnic group a town that had been lost to another during the fighting.”¹⁶⁰ Indeed, during the first two years of restitution in Bosnia, the international community allocated power to local authorities to match returnees with their property. Local authorities, however, created conditions for resettling only majority populations, consolidating the territorial separation of communities that had been initiated through violence.¹⁶¹ Manipulating restitution for retributive purposes can ultimately stunt the development of the rule of law and sustainable peace.¹⁶²

Second, the process itself may preclude displaced people from any

158. Black & Gent, *supra* note 12, at 21.

159. *Id.*

160. Black, *Return*, *supra* note 146, at 31 (recounting the *en masse* Serb return to the town of Drvar, previously captured by Croat forces, and the subsequent departure back to Croatia of many of the Croats who had taken the town during the war). In 1997, Croats burned down about 25 abandoned Serb homes in Drvar to obstruct the return of the original Serb residents. Rosand, *supra* note 23, at 1092.

161. Heimerl, *supra* note 75, at 380 (explaining that officials of all ethnic groups actively pursued policies of ethnic exclusivity to preserve their monopolies on power).

162. Restitution proponents likely would respond to this local manipulation of the restitution processes in the same manner in which the international community did in fact respond to this situation in Bosnia: impose international control over the process to prevent such manipulation. See text *supra* notes 72-73 (discussing how international agencies imposed and implemented new property laws after local authorities stalled and manipulated restitution). When international actors assert law and legal processes in a national context however, a host of potential problems arise. See *infra* Part IV. E.

meaningful participation and, as such, can limit the potential for reconciliation and restorative justice. The Working Paper that served as a precursor to the Pinheiro Principles defines restitution as a form of restorative justice.¹⁶³ Restorative justice initially focused on repairing the social connections between perpetrators and victims of ordinary crime, rather than simply punishing an offender.¹⁶⁴ The approach has since been adopted as a means of providing justice in the wake of mass human rights atrocities, either in lieu of, or in addition to, prosecution.¹⁶⁵ One of the three elements of the definition and practice of restorative justice is the active participation of victims to find solutions to conflict.¹⁶⁶ Property restitution for mass displacement seems to preclude this opportunity for meaningful participation.

Settling property restitution claims following mass dislocation will depend largely on an administrative claims process rather than an adjudicative one. Research has indicated that in nearly every restitution program attempted to date, the large numbers of claims preclude the possibility of resolution within a domestic court system.¹⁶⁷ Administrative processes may not allow claimants a forum for recounting how their property was seized or the circumstances of their abandonment. In both the Kosovo and Bosnian restitution processes, for example, claimants only filed a claim and had little or no opportunity to recount the circumstances surrounding the loss of their home and no adjudicative proceedings to witness.¹⁶⁸

The Pinheiro Principles tacitly acknowledge the value of a claimant's participation in the restitution process, but they envision representation of displaced persons in crafting and implementing a program, rather than the

163. *Working Paper*, *supra* note 14, ¶ 11.

164. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 92 (1998).

165. *Id.* at 23 (discussing different approaches to reaching justice following incidents of mass violence, including, for example, the Truth and Reconciliation Commissions established in Chile and South Africa).

166. Chris Cunneen, *Reparations and Restorative Justice: Responding to the Gross Violation of Human Rights*, in *RESTORATIVE JUSTICE AND CIVIL SOCIETY* 84-85 (Heather Strang & John Braithwaite eds., 2001).

167. INT'L ORG. FOR MIGRATION, *supra* note 10, at 2. Even after the terrorist attacks in the United States on September 11, 2001, Congress quickly determined that courts were not the appropriate forum for resolving claims of the survivors and those injured. Samuel Issacharoff & Anna Morawiec Mansfield, *Compensation for the Victims of September 11*, in *THE HANDBOOK OF REPARATIONS* 284, 291, 295 (Pablo de Greiff ed., 2006). Some, however, claim that the decision to establish an administrative compensatory regime as an alternative to tort litigation was based more on fear that litigation would cripple the airline industry than a concern over inundating courts. *Id.* at 288-291.

168. Smit, *supra* note 25, at 68 (describing the administrative claims process in Kosovo, claiming it removed "anything more than token involvement on the part of the interested parties", but noting that claimants in Kosovo had more of an opportunity to participate in the claims process than did their counterparts in Bosnia). *But see* Das, *supra* note 9, at 436 n.33 (describing the claims process in Kosovo as "largely adversarial" and allowing parties to "participate in the procedures and submit written evidence and arguments").

individual participation of claimants in advancing their own claims. Principle Fourteen advises that, “voluntary repatriation and housing, land and property restitution programs be carried out with adequate consultation and participation with the affected persons, groups and communities.”¹⁶⁹ Commentary related to this principle, found in the 2004 Progress Report, elaborates that “affected communities should have a right to ‘an opportunity for genuine consultation’”¹⁷⁰ and that “‘special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and integration’.”¹⁷¹ The fact that the Principles suggest that states develop simple restitution claim forms also underscores the idea that the Principles envision meaningful participation in the creation of a process rather than in the presentation of each individual claim.¹⁷²

In resolving claims for mass violations of human rights and humanitarian law, individualized hearings for every claim will be impossible, particularly if the process takes into consideration the U.N. General Assembly’s pronouncement to provide a “prompt remedy” for gross or serious violations of human rights or humanitarian law.¹⁷³ Accordingly, restitution alone may be insufficient to advance significantly post-war reconciliation or peace, or contribute to building the rule of law in a meaningful way.

3. *Restitution May Not Advance Social and Economic Stability*

The claim that restitution will result in the spillover effects of building social and economic stability is also controversial. Return of property rights may be a component of constructing post-war social and economic stability, but restitution alone is insufficient. Refugees and IDPs returning to their homes also need physical security, access to jobs, educational opportunities, and social services.¹⁷⁴ Returnees in Bosnia who regained their homes in areas without this broader framework for socio-economic stability opted in some instances to relocate elsewhere.¹⁷⁵

Moreover, the very concept of “home” is altered by war. Returnees often face a home that has changed substantially in their absence, requiring a difficult process of integration into a new society.¹⁷⁶ Because the ideal of home is as

169. *Pinheiro Principles*, *supra* note 18, ¶ 14.1.

170. *Progress Report*, *supra* note 17, ¶ 38 (quoting the Committee on Economic, Social and Cultural Rights, general comment No. 7).

171. *Id.*

172. *Pinheiro Principles*, *supra* note 18, ¶ 13.7.

173. *Right to a Remedy*, *supra* note 125, ¶ 14.

174. *See, e.g.,* Stefansson, *supra* note 16, at 131 (finding that repatriated Bosniaks in the Bosnian city of Banja Luka who had returned to their homes lacked the social structures that would enable them to attain any sense of safety or socio-economic stability).

175. *Id.* at 120.

176. Black, *Return*, *supra* note 146, at 33 (citing L. Hammond, *Examining the Discourse of*

much about the memory of customs, traditions or beliefs as it is about a physical place, it may be impossible to return “home.”¹⁷⁷ Concern related to restoring a particular physical “home” has been criticized as representing a “white/First World take on things.”¹⁷⁸ In other words, Western notions of home, and equating home and property rights with citizenship and stability, do not necessarily reflect the reality of a post-conflict society.

The premise that reinstating property rights will lead to social and economic stability tracks an initial assertion of law and development: that economic growth would foster democracy and respect for human rights.¹⁷⁹ Just as economic growth alone proved insufficient for building democracy, reinstating property rights is not enough to foster economic and social stability.

E. Potential Problems with International Involvement

Caution in evaluating the remedy of restitution also is in order, given the degree to which post-conflict property restitution schemes depend on international resources.¹⁸⁰ Property restitution schemes with significant international involvement carry the risk of transplanted law and merit close and critical scrutiny. This is particularly true where international groups write and impose laws and where foreigners help adjudicate property claims.

Here again, the Bosnia experience is instructive. After local officials obstructed the return of ethnic minorities, the international community intervened in the process by, for example, imposing new property laws, dismissing noncompliant officials, and appointing an international officer to monitor implementation of the new laws.¹⁸¹ At least one report on Bosnia suggests that the unlimited legal authority of international actors strongly resembled “an imperial power over its colonial possession.”¹⁸² While ostensibly acting to strengthen the rule of law in Bosnia, the international community may have undermined the development of democracy.¹⁸³ Post-war

Repatriation: Towards a More Proactive Theory of Return Migration, in THE END OF THE REFUGEE CYCLE: REFUGEE REPATRIATION AND RECONSTRUCTION (Richard Black & Khalid Koser eds., 1999)).

177. Black, *Home*, *supra* note 137, at 126.

178. *Id.* at 128 (quoting D. MASSEY, *SPACE, PLACE AND GENDER* 165 (1994)).

179. Trubek, *Rule of Law*, *supra* note 41, at 78-79.

180. Restitution claims programs are marked by a dearth of resources available for administration. INT’L ORG. FOR MIGRATION, *supra* note 10, at 2.

181. Heimerl, *supra* note 75, at 382.

182. Knaus & Martin, *supra* note 73, at 61-62; *see also* KETT & DALRYMPLE, *supra* note 25, at 7.

183. KETT & DALRYMPLE, *supra* note 25, at 7 (citing an unpublished report). Similarly, one faction of the U.N. mission in Kosovo argued that local courts ought to play a substantial role in later phases of property restitution in order to strengthen the capacity of the new judicial system, a suggestion ultimately rejected by a more dominant faction of the U.N. mission. Arraiza & Moratti, *supra* note 25, at 442-43.

political policies were established not by the people of Bosnia, but by international agencies.¹⁸⁴

The international community often inserts itself into the peacemaking process in general and the remedy of human rights violations in particular. However, the specific violation of human rights by home seizure is different from other forms of human rights violations because it is more local and less universal. Remedying forced eviction involves understanding local physical evidence, grappling with secondary occupation problems that have unique geographical and economic contours, and constructing a process that comports with local norms governing human relations with regard to property.

An additional problem with international involvement in restitution is that an emphasis on property restitution processes may cause the international community to give too few resources to help ease the transition for returnees once property rights are restored.¹⁸⁵ This failure potentially undermines the claims of restitution's beneficial role in a post-conflict society. In Bosnia, for example, international workers report that the focus on property restitution came at the detriment of international attention to constructing the context sufficient to support sustainable return—security, jobs, education, and public services.¹⁸⁶ The emphasis on property restitution has been criticized as providing a way for the international community and local actors to avoid addressing complex political issues.¹⁸⁷ “[T]he house” became the measure of success of the return process rather than the actual welfare of the people displaced from their homes.¹⁸⁸

Any rule of law benefit or economic boost from restitution will likely

184. See, e.g., *supra* notes 72-73 and accompanying text.

185. Black & Gent, *supra* note 12, at 20 (citing L. Hammond, *Examining the Discourse of Repatriation: Towards A More Proactive Theory of Return Migration*, in *THE END OF THE REFUGEE CYCLE? REFUGEE REPATRIATION AND RECONSTRUCTION* (Richard Black & Khalid Koser eds., 1999)).

186. Heimerl, *supra* note 75, at 384 (noting in the Bosnia context that “getting uprooted persons back home is only half the task of re-creating a functioning multi-ethnic society. The other half involves fostering the conditions in which returnees and especially minority returnees can survive and reintegrate themselves into their old/new communities.”); Philpott, *Dog Is Dead*, *supra* note 4, at 17-18 (stating that “the focus on restitution has distracted the international community from addressing other problems” but that this focus likely “did not divert significant funding intended to support the overall return process”).

187. KETT & DALRYMPLE, *supra* note 25, at 6-7 (stating that “a house has become a leitmotif for the return process – a material structure for the international agencies, organisations and local municipalities to focus on, a potential asset for the IDP, a quantifiable measure of the success of the return process and redress of property rights”); Stefansson, *supra* note 16, at 132 (stating that international organizations in Bosnia may “have been too preoccupied with the politics of the ‘small home’ [restitution], in their approach to the return of [refugees and IDPs], while downplaying the importance of normalizing the ‘big home’, that is the political and social structures at the local and national level”).

188. KETT & DALRYMPLE, *supra* note 25, at 6-7; see also Philpott, *Dog is Dead*, *supra* note 4, at 18 (noting that restitution was easier to measure than sustainable return).

depend on the success of reintegration programs. Repatriation and restitution of property is the beginning of a long process of building ties again in home communities in order to foster reconciliation and reestablish productivity.¹⁸⁹ The very strategy of focusing on a restitution process to depoliticize return can undermine efforts to build broader programs supporting reintegration. In Kosovo, for example, the restitution process was expressly delinked from return, resulting in a complete lack of coordination with agencies working on reintegration programs.¹⁹⁰ This intentional delinking appears to have prevented the return of some who actually succeeded in regaining their property rights because there was no support available for reintegration should those displaced return home.¹⁹¹ Without more of an infrastructure and reintegration program, the degree to which restitution can contribute to post-war rule of law, reconciliation, national reconstruction, and sustainable economic and social stability is limited.

From a practical perspective, moreover, reliance on the international community for construction and implementation of a property restitution scheme may not be an option in the aftermath of future conflicts. The level of international support that will be available following future conflicts is not clear.¹⁹² For example, where dispossession has been caused primarily by a government's inability or unwillingness to maintain the rule of law throughout its territory, and the need to establish restitution is not supported by gross violations of human rights law, international agencies may lack sufficient incentive or political will to lend technical or financial assistance.¹⁹³

V. CONCLUSION

Much can be said in support of a right to property restitution to remedy mass displacement caused by armed conflict. The worry is that its benefits will blind the international community to the limitations and unintended consequences of the remedy. The Pinheiro Principles prescribe a uniform property restitution process, primarily designed by Westerners with Western

189. UNCHR, STATE OF THE WORLD, *supra* note 5. Former U.N. High Commissioner for Refugees Sadako Ogata remarked that “[r]eturning refugees can only be properly reintegrated if there are comprehensive programmes for political, economic and social construction or reconstruction.” Fagen, *supra* note 102, at 47-48 (quoting Sadako Ogata, Speech at the University of Notre Dame on Sept. 14, 1991).

190. Smit, *supra* note 25, at 72.

191. *Id.* (reporting on an ethnic Serb IDP who chose not to return without knowing if others would also be returning).

192. See Williams, *Significance of Property Restitution*, *supra* note 15, at 40 (suggesting that international support for future conflict resolution will not be as high as was in Bosnia).

193. In Colombia, for example, some attribute the decade's long conflict to the government's lack of political will to impose the rule of law.

notions of property, law, process, and enforcement in mind.¹⁹⁴ This process may initially smooth the way for return by transforming the highly politicized right to return into a technical question of adherence to legal rules. A technical approach to restitution can give the short-term impression of strengthening the rule of law, promoting post-war peace and reconciliation, and developing economic and social stability.

Ironically, the Principles' technical approach may prevent the rule of law and associated benefits from setting root in the longer term. Remaking return into a technical process and divorcing it from political considerations of ensuring adequate security as well as social and economic support for returnees, may undermine the sustainability of return and thus impair the legitimacy of a post-war state and the development of peace and stability. This comes as no surprise to law and development scholars because there is a strong parallel here to critiques of the second law and development movement. In evaluating its own efforts within this movement, for example, the World Bank recognized the counter-productivity of its prior attempts to instill a formalist vision of the rule of law in developing countries—one that viewed institutional legal mechanisms as autonomous from politics.¹⁹⁵

There is also an analogy to the current coalescence of a third law and development movement. This new law and development paradigm cautions that development requires more than a focus on economic growth. Development must incorporate elements of political, social, and legal progress with the goal of facilitating human development.¹⁹⁶ Similarly, sustainable return, as an element in building new post-conflict societies, must focus not simply on technical rules of property restitution, but on the broader tasks of reintegration and building a new sense of home and community.

The potential of a technical focus on restitution to undermine long-term development of the rule of law becomes even more pronounced with direct international authority over local laws and legal processes related to restitution. Indeed, implementation of the Principles to remedy widespread forced displacement will necessarily involve international influence over law and legal processes. While international authority may be justified to prevent local actors from co-opting restitution for partisan political ends, international orchestration

194. Anthropologists studying property restitution similarly have warned of the unintended consequences of restitution programs: "Notions of property and ownership may be transformed, local bureaucracies may be entrenched, spatial patterns of land use that replicate older patterns of racial and economic segregation may be reinstated or consolidated. Moral discourses about righting past injustice through restitution may obscure its exclusionary aspects or its tendency to reinforce existing forms of social differentiation." Derrick Fay & Deborah James, *Restoring What Was Ours: An Introduction, in THE RIGHTS AND WRONGS OF LAND RESTITUTION: 'RESTORING WHAT WAS OURS' 1* (Derrick Fay & Deborah James eds., 2009).

195. Trubek, *Rule of Law*, *supra* note 41, at 91 (quoting World Bank, Legal Institutions of a Global Economy Homepage, available at <http://www1.worldbank.org/publicsector/legal/index.htm>).

196. Trubek & Santos, *supra* note 45, at 7-8.

likely does nothing to enhance state legitimacy or build democratic institutions. The sustainability of return and rule of law development may similarly be undermined to the extent that international involvement in restitution processes is prompted by the needs of host states wishing to repatriate refugees and results in coercing refugee communities into return.

Scholars, human rights workers, and international actors should critically analyze the merits of a uniform system of post-conflict property restitution, in a manner consistent with the third law and development movement's incorporation of simultaneous critique. Past law and development experiences have taught that well-intentioned efforts by Western actors to transplant a uniform vision of law to promote development and the rule of law can have unforeseen, deleterious effects. Further debate over the claims and limitations of property restitution may help avoid some of the unintended consequences that plagued the initial law and development reform movements. In this way, remedies to forced displacement can be modified to enhance the sustainability of return and resettlement of refugees and IDPs.

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A Call to Action: Turning the Golden State into a Golden Opportunity for International Arbitration

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I. INTRODUCTION

We were once asked to advise on whether another jurisdiction was categorically better suited for international arbitration than California. The other jurisdiction was an UNCITRAL Model Law jurisdiction. Our first reaction was that there would be differences, but nothing that categorically rules out California; but we were wrong. We found out that, unintentionally, California does not allow foreign attorneys to represent their clients in international arbitration conducted in California. Amidst both renewed efforts to make California a more likely seat of international arbitration and a legislative opening to revise this aspect of the law, change in the latter makes the former both possible and likely.

In 2011, the current California Code of Civil Procedure Section 1282.4 expires. At that point, out-of-state attorneys will join foreign attorneys in their inability to appear as counsel in international arbitrations in California. This is truly unfortunate, as Section 1282.4 is the only legislation—limited that it may be—enabling non-California counsel to participate in international arbitration in California. It provides procedures by which out-of-state attorneys can complete certification that enables them to participate in California arbitrations. Section 1282.4 never went far enough, however, as foreign attorneys are not allowed even these limited avenues of involvement. For California to join its sister states, like New York, Delaware, Florida, Georgia, New Hampshire, Pennsylvania, and Virginia, that attract international arbitration, international

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attorneys and international arbitrators, legislation must be adopted in California that not only renews Section 1282.4, but goes farther, both by streamlining the procedures by which out-of-state counsel can participate in international arbitrations in California and by inviting foreign counsel to appear under the same requirements.

This Article highlights the challenges facing California in its efforts to become a center of international arbitration, provides examples of legislation for the California Bar and California State Legislature to consider, and suggests various avenues by which to bring California more fully into the international legal community.

II.

THE CURRENT ARBITRAL LANDSCAPE IN CALIFORNIA

A. Out-of-State Attorneys

The ability of attorneys who are not members of the State Bar of California to act as counsel in private commercial international arbitrations is governed by California Code of Civil Procedure Section 1282.4 and California Rules of Court, Rule 9.43. These laws were passed expressly to respond to *Birbrower v. Superior Court* “to provide a procedure for nonresident attorneys who are not licensed in this state to appear in California arbitration proceedings.”¹

Birbrower, Motalbana, Condon & Frank, P.C., a New York law firm, advised a California corporation in California on various matters and in preparation for a private arbitration under the auspices of the American Arbitration Association in San Francisco.² Upon settlement of the case, the California client sued Birbrower for malpractice; Birbrower counterclaimed and included a claim for fees.³ The trial court held that Birbrower, by advising clients in California with attorneys not licensed with the California Bar, had committed the unauthorized practice of law, thus violating Business and Professions Code Section 6125, and therefore its fee agreement was unenforceable.⁴

On appeal, the California Supreme Court considered Birbrower’s request for the creation of an “exception to *section 6125* for work incidental to private

1. CCP § 1282.4(i)(1) available at <http://www.aroundthecapitol.com/code/getcode.html?file=/ccp/01001-02000/1282-1284.3>. The Code of Civil Procedure was amended by Assembly Bill No. 2086 of the 1997-98 Regular Session and became operative on January 1, 2001.

2. *Birbrower, Motalbano, et al. v. Superior Court of Santa Clara County*, 17 Cal. 4th 119, 124-25 (Cal. 1998).

3. *Id.* at 126.

4. *Id.*

arbitration or other alternative dispute resolution proceedings.”⁵ It also considered case law out of New York determining that an arbitral tribunal is not a court of record and its fact-finding processes are not similar to court proceedings, and thus representing a client in arbitration is not the unauthorized practice of law.⁶ The Court ruled, however:

We decline *Birbrower*'s invitation to craft an arbitration exception to *section 6125*'s prohibition of the unlicensed practice of law in this state. Any exception for arbitration is best left to the Legislature, which has the authority to determine qualifications for admission to the State Bar and to decide what constitutes the practice of law.⁷

It dismissed the New York precedent as having limited weight as the *Birbrower* attorneys did not spend their California time “in arbitration.”⁸ The California Supreme Court therefore affirmed the lower court's finding of a violation of Section 6125, and its ruling that the fee contract was therefore unenforceable with respect to its local services.⁹

In response to the problems highlighted in *Birbrower*, the California Rules of Court were amended in 2007 to state at Rule 9.43 that an attorney who is not a member of the State Bar of California, but is a

member in good standing of and eligible to practice before the bar of any United States court or the highest court in any state, territory or insular possession of the United States, and who has been retained to appear in the course of, or in connection with, an arbitration in this state

may participate in a private arbitration so long as he or she “[h]as served a certificate in accordance with the requirements of Code of Civil Procedure section 1282.4 on the arbitrator, arbitrators, or the arbitral forum, the State Bar of California, and all other parties and counsel in the arbitration...,” as well as attained the approval of his or her appearance by the arbitrator, arbitrators, or the arbitral forum.¹⁰

California Code of Civil Procedure 1282.4 was amended to allow for the representation by out-of-state attorneys in California arbitrations, provided that

5. *Id.* at 133.

6. *Id.* (citing *Williamson v. John D. Quinn Const. Corp.*, 537 F.Supp. 613, 616 (S.D.N.Y. 1982)).

7. *Id.* at 133-34.

8. *Id.* at 133.

9. *Id.* at 140. Justice Kennard dissented, arguing that, “under this court's decisions, arbitration proceedings are not governed or constrained by the rule of law; therefore, representation of another in an arbitration proceeding, including the activities necessary to prepare for the arbitration hearing, does not necessarily require a trained legal mind.” *Id.* at 146 (Kennard, J., dissenting).

10. 2009 California Rules of Court, Rule 9.43(a) (Rule 9.43 amended and renumbered effective January 1, 2007; adopted as Rule 983.4 by the Supreme Court effective July 1, 1999). All California Rules of Court cited in this Article are available at http://www.courtinfo.ca.gov/rules/documents/pdfFiles/title_9.pdf.

such attorneys file a certificate (in a form prescribed by the State Bar of California) with the State Bar of California and all parties and counsel, exhibiting the arbitrator's approval of his or her appearance in writing. In addition to various information on the out-of-state attorney, the certificate must also list an active member of the State Bar of California who is acting as the attorney of record.¹¹

Proper certification by the out-of-state attorney, however, does not ensure her ability to participate as counsel in a California-sited arbitration. Upon the completion of all requirements established under the code, "[t]he arbitrator, arbitrators, or arbitral forum *may* approve the attorney's appearance."¹² In addition, repeat players are discouraged: "In the absence of special circumstances, repeated appearances shall be grounds for disapproval of the appearance and disqualification from serving as attorney in the arbitration in which the certificate was filed."¹³

B. Foreign Attorneys

Although authorizing the access of *out-of-state* attorneys to international arbitrations in California, these laws do not permit the participation of *foreign* attorneys as counsel in the same venues.¹⁴ The California State Bar's Office of Special Admissions and Specializations confirms that *all counsel* participating in private arbitrations "physically in California," even those of an international nature, *must be licensed in a United States state or territory*.¹⁵ The California State Bar states that a foreign attorney may participate in a private international commercial arbitration in California only with the assistance of local counsel, and such foreign counsel would not be able to speak before or during the hearing and may otherwise be restricted, though the actual scope of the possible participation of foreign counsel would ultimately be determined by the forum.¹⁶

The inability of foreign attorneys to participate in California arbitrations is underscored by California's multi-jurisdictional ("MJP") practice rules. "New California Rules of Court 9.45, 9.46, 9.47 and 9.48 permit certain categories of attorneys not licensed in California ("non-California attorneys") to practice [in

11. CCP § 1282.4(b),(c).

12. CCP § 1282.4(d).

13. *Id.*

14. From conversations with Daryl McKenzie, California State Bar's Office of Special Admissions and Specializations, Oct. 2 and 9, 2007. There are four exceptions to this rule: (1) in disputes arising from collective bargaining agreements (CCP § 1282.4(h)); (2) with respect to worker's compensation (CCP § 1282.4(i)); (3) in international conciliation (CCP § 1297.351); and (4) by way of ratified treaties or conventions that specify parties may be represented by persons of their choice. *See Birbrower*, 17 Cal. 4th at 146 (Kennard, J., dissenting).

15. Conversations with Daryl McKenzie, Oct. 2 and 9, 2007, *supra* note 14.

16. *Id.*

California] to a limited extent.”¹⁷ The Rules include arbitration under the definition of formal legal proceedings in which out-of-state attorneys may temporarily be involved in certain circumstances, but the State Bar states explicitly that attorneys licensed only in foreign countries are *not* eligible to practice under the MJP rules. “The only eligible attorneys are those who are active members in good standing of the bar of at least one U.S. state, territory, jurisdiction, possession or dependence.”¹⁸ Similarly, California’s *pro hac vice* provisions limit benefits to attorneys licensed in a United States state, territory or insular possession.¹⁹

California does have a “Registered Foreign Legal Consultant Program” by which a foreign attorney is allowed to participate in California in the limited role of a “Registered Foreign Legal Consultant” to “provide legal advice in California limited to the law of the foreign country in which he or she is licensed to practice law.”²⁰ Such attorney must be

admitted to practice and [] in good standing as an attorney or counselor at law or the equivalent in a foreign country; and [have] a currently effective certificate of registration as a Registered Foreign Legal Consultant from the State Bar.²¹

Such consultants are able to render legal services in California but, notably, are not allowed to “[a]ppear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this state or prepare pleadings or any other papers...” or “[o]therwise render professional legal advice on the law of the State of California, any other state of the United States, the District of Columbia, the United States, or of any other jurisdiction other” than the foreign jurisdiction in which he or she is licensed to practice.²² Presumably because of the very narrow nature of this participation, very few attorneys are actually on the list of Registered Foreign Legal Consultants with the California State Bar.²³

17. THE STATE BAR OF CALIFORNIA, MULTIJURISDICTIONAL PRACTICE PROGRAM, FREQUENTLY ASKED QUESTIONS, Answer to Question no. 1, *available at* http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=12441&id=14964.

18. *Id.* Answer to Question no. 11. Under California Rules of Court, Rule 9.47(a)(1) and (c), out-of-state attorneys may participate in “anticipated but [] not yet pending” formal legal proceedings—including arbitrations—in California “in which the attorney reasonably expects to be authorized to appear.”

19. California Rules of Court, Rule 9.40.

20. OFFICE OF SPECIAL ADMISSIONS AND SPECIALIZATION, STATE BAR OF CALIFORNIA, “FOREIGN LEGAL CONSULTANT PROGRAM” (Feb. 2007) at 4, *available at* <http://calbar.ca.gov/calbar/pdfs/certification/FLC-Brochure.pdf>.

21. California Rules of Court, Rule 9.44(a) (former Rule 988).

22. *Id.* Rule 9.44(d)(1), (5).

23. *See* STATE BAR OF CALIFORNIA, LEGAL CONSULTANTS LIST, *available at* http://www.calsb.org/state/calbar/calbar_generic.jsp?cid=10163&id=1306 (as of Mar. 31, 2010, there were only 50 attorneys listed as consultants).

In a final note, it should be mentioned that, although *Birbrower* highlighted important deficiencies for the California arbitral community, with respect to foreign attorneys, it also spawned much confusion with inconsistent dicta. Specifically, the Court relied on Civil Procedure Section 1297.351 in Chapter 7 on Conciliation of the California International Arbitration and Conciliation Act (“the Act”) to state that, “these rules specify that, in an international commercial conciliation or arbitration proceeding, the person representing a party to the conciliation or arbitration is not required to be a licensed member of the State Bar. (*Code Civ. Proc.*, § 1267.351).”²⁴ This interpretation is, however, inconsistent not only with the code itself, which provides that the parties to a dispute *submitted to conciliation*, “may appear in person or be represented by any person of their choice. A person assisting or representing a party need not be a member of the legal profession or licensed to practice law in California,”²⁵ but also with the Court’s earlier dicta in which it explains “[t]his exception [to section 6125 prohibiting the unauthorized practice of law] states that in a commercial *conciliation* in California involving international commercial disputes,” the parties may be represented by any person of their choice.²⁶ Notably, no mention is made under the six previous chapters of the Act governing arbitration regarding who may represent parties to arbitration.

III.

LOOKING TO NEW YORK AND THE MODEL RULE FOR GUIDANCE

A. *New York*

On the other end of the spectrum from California’s current legislative environment is New York’s. Permitting probably the most extensive participation of foreign attorneys in arbitration, federal case law out of New York holds that participation in arbitration is not actually the practice of law and therefore parties can be represented by a lawyer from another jurisdiction and even possibly by a non-lawyer.²⁷ In the seminal case of *Williamson v. John D.*

24. *Birbrower*, 17 Cal. 4th at 133.

25. California International Arbitration and Conciliation Act, Chapter 7 – CONCILIATION, Article 2 REPRESENTATION AND ASSISTANCE, § 1297.351 Choice of parties; Qualification.

26. *Birbrower*, 17 Cal. 4th at 130-131 (emphasis added). This inaccuracy has been noted by other jurists: “... the provision in question, CCP § 1297.351, clearly applies only to international *conciliations*. Indeed, the existence of an express exception for international conciliations but not for international arbitrations supports the contrary argument that persons not admitted to the California bar may not act as advocates in international arbitrations in California.” Richard A. Eastman (Bernard H. Oxman ed.), *International Decision: Birbrower, Motalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119, 70 Cal. Rptr. 2d 304. *Supreme Court of California, January 5, 1998, modified February 25, 1998*, 94 A.J.L.L 400, 404 (2000) (internal citations omitted) (emphasis in original).

27. See generally *Williamson v. John D. Quinn Construction Corp.*, 537 F.Supp. 613, 616

Quinn Construction, the district court for the Southern District of New York noted four differences between arbitration and litigation: (1) an arbitral tribunal is not a court of record; (2) arbitral rules of evidence and procedures differ from courts of record; (3) arbitral fact finding is not equivalent to judicial fact finding; and (4) arbitration does not have provisions for admission *pro hac vice*.²⁸ The court thus noted:

While no case precisely in point has been found either under New York or New Jersey law, the issue has been addressed by the Association of the Bar of The City of New York. Although the report focused on labor arbitration, it considered generally the issue of legal representation before arbitration tribunals. The report states '(it) should be noted that no support has to date been found in judicial decision, statute or ethical code for the proposition that representation of a party in any kind of arbitration amounts to the practice of law.' The report concludes 'the Committee is of the opinion that representation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not the unauthorized practice of law.' Quinn has cited no case nor has the Court's independent research disclosed any to the contrary.²⁹

If participation in arbitration is not the practice of law, any person doing so cannot run afoul of New York Judicial Law § 478, which prohibits the practice of law "without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath."³⁰ Therefore, a foreign attorney should be permitted admission to an arbitration in New York State without difficulty.

If, however, there proves to be any problem with admission upon the argument that arbitration is not the practice of law, a foreign attorney may be able to apply for admission *pro hac vice* from a court with jurisdiction under the equally liberal New York Code Rule and Regulations § 602.2.³¹ This code section specifically provides for the *pro hac vice* admission of *foreign* attorneys and counselors. Section 520.11 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors of Law additionally states that:

[a]n attorney and counselor-at-law or the equivalent, who is a member in good standing of the bar of another state, territory, district or foreign country may be admitted *pro hac vice*: (1) in the discretion of any court of record, to participate in any matter in which the attorney is employed; . . .³²

(S.D.N.Y. 1982).

28. *Id.*

29. *Id.* (quoting Committee Report, Labor Arbitration and the Unauthorized Practice of Law, The Record of The Association of the Bar of The City of New York, Vol. 30, No. 5/6, May/June 1975).

30. N.Y. Jud. Law § 478 (Judiciary Law. Article 15. Attorneys and Counselors), available at http://law.justia.com/newyork/codes/judiciary/jud0478_478.html.

31. 22 NYCRR § 602.2.

32. Part 520. Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, § 520.11(a) (emphasis added), available at <http://www.courts.state.ny.us/ctapps/520rules.htm#11>.

There is one restriction on the otherwise unfettered access of foreign attorneys into New York: in order to participate in “pre-trial or trial proceedings,” the temporary admission under this latter provision requires association of a New York attorney who shall be the attorney of record in the matter.³³

New York also allows for the admission of foreign attorneys to its Bar without examination in certain circumstances. Section 520.10 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law provides that,

[i]n its discretion, the Appellate Division may admit to practice without examination an applicant who: . . . (1)(ii) has been admitted to practice as an attorney and counselor-at-law or the equivalent in the highest court in another country whose jurisprudence is based upon the principles of the English Common Law;

and has practiced in that jurisdiction in five of the seven years immediately preceding the application.³⁴ This provision, however, includes a reciprocity requirement: the foreign attorney petitioning for admission must be currently admitted in at least one jurisdiction that “would similarly admit an attorney or counselor-at-law admitted to practice in New York State to its bar without examination.”³⁵

Finally, New York—like California—also provides for the licensing of foreign “legal consultants.”³⁶ The Appellate Division of the Supreme Court of New York, at its discretion, may license to practice as a legal consultant, without examination, “a member in good standing of a recognized legal profession in a foreign country” who has engaged in the practice of law for three of the five years immediately preceding the application.³⁷ Like California’s, this provision is unlikely to be helpful with respect to the majority of disputes in that a foreign legal consultant may not

appear for a person other than himself or herself as an attorney in any court, or before any magistrate or other judicial officer, in this State (other than upon admission *pro hac vice* pursuant to section 520.11 of this Title).³⁸

In addition, foreign legal consultants are precluded from rendering “professional legal advice” on the law of New York or the United States, except based on the

33. *Id.* § 520.11(c).

34. *Id.* § 520.10(a).

35. *Id.* § 520.10(a)(1)(iii).

36. *See generally* Part 521. Rules of the Court of Appeals for the Licensing of Legal Consultants, available at <http://nycourts.gov/ctapps/521rules.htm>.

37. *Id.* § 521.1(a)(1) and (2). The applicant must also possess good moral character and general fitness, be over 26 years of age, and intend to practice as a legal consultant in New York and maintain an office for that purpose. *See id.* § 521(a)(3)-(5).

38. *Id.* § 521.3(a).

advice of a qualified New York attorney.³⁹

B. Model Rule for Temporary Practice by Foreign Attorneys

In August of 2002, the American Bar Association (“ABA”) adopted the proposed Model Rule for Temporary Practice by Foreign Attorneys.⁴⁰ Under the Model Rule, a lawyer who is admitted only in a non-United States jurisdiction,

[D]oes not engage in the unauthorized practice of law in this jurisdiction when on a temporary basis the lawyer performs services in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;⁴¹ . . .

(3) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice;⁴² . . . or

(5) are governed primarily by international law or the law of a non-United States jurisdiction.⁴³

On April 12, 2010, the ABA released the most recent results of a survey it conducts periodically of the various states to determine to what level they have implemented the ABA MJP Recommendations.⁴⁴ The sixth and last provision surveyed was that of the temporary practice of foreign lawyers. According to this survey, only six states had adopted a rule allowing the temporary practice of foreign attorneys: Delaware, Florida, Georgia, New Hampshire, Pennsylvania, and Virginia.⁴⁵ Three additional states had recommended new rules, but they were still pending: Louisiana, Mississippi, and Washington, D.C. Nineteen states had the MJP recommendation under consideration, but did not currently have a rule: Alaska, Arkansas, California, Hawaii, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, North Dakota, New York, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, and Washington. Another twenty-one

39. *Id.* § 521.3(e).

40. ABA Comm. on Multijurisdictional Practice (“MJP”), Report 201J to the House of Delegates (Aug. 2002), available at <http://www.abanet.org/cpr/mjp/201j.pdf>.

41. *Id.* at 1, 3 (stating that this language is identical to that in proposed Rule 5.5(c)(1) of the ABA *Model Rules of Professional Conduct* for lawyers admitted in a United States jurisdiction).

42. *Id.* (explaining that this language parallels proposed Rule 5.5(c)(3)).

43. *Id.* at 1.

44. AMERICAN BAR ASSOCIATION, STATE IMPLEMENTATION OF ABA MJP RECOMMENDATIONS (Apr. 12, 2010), available at <http://www.abanet.org/cpr/mjp/recommendations.pdf> (hereinafter “ABA Survey”).

45. *Id.* In addition, North Carolina appears to permit the temporary practice of foreign attorneys by omitting the term “U.S. jurisdiction” from its Rule of Professional Code. See Summary of State Action on ABA MJP Recommendation 8 & 9, prepared by Professor Laurel Terry on 9/26/09 based on information contained in a chart prepared by the ABA Center for Professional Responsibility, dated 9/23/09, available at http://www.abanet.org/cpr/mjp/8_and_9_status_chart.pdf.

states declined to address adoption of the recommendation all together. They include: Alabama, Colorado, Connecticut, Idaho, Kansas, Kentucky, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Jersey, New Mexico,⁴⁶ Oklahoma, Rhode Island, Tennessee, Vermont, West Virginia, Wisconsin, and Wyoming. Finally, only one state, Arizona, had considered the recommendation and declined its adoption.

IV.

TRANSFORMING CALIFORNIA INTO AN INTERNATIONAL ARBITRAL CENTER

First, it should be noted that the California State Bar has previously attempted to shift the cool reception currently afforded out-of-state, and especially foreign, attorneys. A 2005 report of the Alternative Dispute Resolution Ad-Hoc Committee of the State Bar of California Business Law Section proposed an amendment to the California International Arbitration and Conciliation Act to add a civil procedure code section explicitly to allow foreign attorneys access to international arbitrations in California.⁴⁷ This report states that, although the provisions drafted by the legislature in response to *Birbrower* permit an out-of-state attorney access into California, “[t]here is no comparable *pro hac vici* [sic] provision—and in fact no provision—allowing foreign (i.e., non-U.S.) attorneys to be able to appear in international arbitrations that are conducted in California under the Act.”⁴⁸ The report additionally notes the discrepancy between arbitration and conciliation: “Curiously, in dealing with the conciliation portion of the Act, the Legislature got it right.”⁴⁹ As support for its proposed amendment, the Committee cites to a proceeding in which a French attorney was removed from an arbitration under the Act upon the argument of opposing counsel that his appearance would constitute the unauthorized practice of law.⁵⁰ When the French attorney applied for *pro hac vice* status, the State Bar advised him that it had no authority under the Act to process such an application.⁵¹

The 2005 Report was a proposal for legislation to be submitted in 2005.⁵² Following a period of public comment, it was submitted to and its submission

46. New Mexico, however, does allow for foreign attorneys to apply for *pro hac vice* status. See ABA Survey, *supra* note 44, at 24.

47. See BUSINESS LAW SECTION, STATE BAR OF CALIFORNIA, REPORT BLS-2005-08 (July 28, 2004), available at <http://calbar.ca.gov/calbar/pdfs/legis/BLS-8.pdf>.

48. See *id.* at 1.

49. *Id.* at 3 (citing CCP § 1297.351).

50. *Id.*

51. *Id.*

52. Such proposals typically have an acceptance rate by the Legislature of approximately 80%. October 2007 discussion with Steven K. Hazen, Advisor, then Vice-Chair for Legislation of the State Bar of California Business Law Section.

was approved by the Board of Governors of the California State Bar. Legislation was not actually proposed, however, as the MJP Recommendations were currently being discussed and the issue was also under consideration by the California Supreme Court.⁵³

The most expeditious avenue for the acceptance of foreign attorneys in international arbitrations sited in California may be to push for the adoption of the Model Rule for Temporary Practice by Foreign Attorneys. The language is already provided, it is uniform and the momentum is building slowly among states.⁵⁴ However, as this rule has been in legislative limbo for years, it may be difficult to sway California to a speedy adoption.

Therefore, the better route may be to push for a renewal of California Civil Procedure Section 1282.4 on January 1, 2011 (or hopefully before). At that time, section (b) can be rewritten to include three small words with enormous effect: “an attorney admitted to the bar of any other state *or foreign jurisdiction* may represent the parties in the course of, or in connection with, an arbitration proceeding in this state, provided that” the attorney satisfies the requisites listed.

To make California even more attractive to international arbitration while stopping short of deeming the participation in arbitration to not constitute the practice of law (the practice of New York, but most likely unattainable on the warmer coast), the list of requirements for such attorneys could also be reduced and streamlined. In addition, the language of section (d) whereby the arbitrator(s) *may* approve the attorney’s appearance upon compliance with the stated requirements, should be replaced with mandatory language.

Finally, the second half of section (d) that states that repeated appearances of an attorney, in the absence of special circumstances, shall be grounds for disapproval of appearance and disqualification must be removed from the legislation. In its place should be a provision for the exact opposite: a program should be established similar to that of the Foreign Legal Consultants, whereby foreign attorneys can be certified for a period of time (preferably a lengthy one) by the completion of the requirements under section (c) to practice as counsel in international arbitration in California. Therefore, they would need to qualify only once and thereafter their right of appearance would be assured. This will not only encourage counsel to bring subsequent international arbitration to California but will also provide a ready list for arbitral parties seeking counsel already qualified to represent their interests here.

In addition to changes to Section 1282.4, California Code of Civil Procedure Section 1297.11 *et seq.* (California International Arbitration and Conciliation Act) should also be amended as suggested in a proposal recently

53. *Id.*

54. The momentum is slow, however, as only Virginia has joined the ranks of States adopting temporary practice rules in the last two years.

endorsed by the Bar Association of San Francisco (“BASF”).⁵⁵ The proposal offers the addition of a new Section 1297.197 to Chapter 5 of the Act (Manner and Conduct of Arbitration). This new section, entitled “Choice of parties; qualification,” would enable a party to be “represented or assisted by any person of that party’s choice who is a member in good standing of a recognized legal profession (in the United States or a foreign jurisdiction) ...”⁵⁶

Although these changes to the language of the code appear limited and attainable, they belie a much greater effort for their passage, requiring a concerted effort by the California State Bar and a receptive California State legislature. We note that several California firms are working towards making this legislative change a reality, including Munger Tolles & Olson and Jones Day who drafted the above proposal, and O’Melveny & Myers and Gibson, Dunn & Crutcher who have joined in its promotion. We hope that this comment serves as the call to action that it is and that effective change can be brought to California law, making our golden state a golden opportunity for international arbitration.

55. Draft Proposal to the BASF Board from the BASF International Law Section (Jerome C. Roth, Chair) re: *Legislative Proposal: Opening California to International Arbitration* (Apr. 20, 2010). The proposal was originally drafted and presented by Jerome Roth and Yuval Miller of Munger Tolles & Olson San Francisco, and Caroline N. Mitchell and Anderson Berry of Jones Day San Francisco.

56. *Id.* The requirement of “good standing” is substantially identical to Subsection (b) of the ABA Model Rule for Temporary Practice by Foreign Attorneys.

The Alien Tort Statute: Comments on Current Issues

WITH AN INTRODUCTION BY PROFESSORS RICHARD BUXBAUM & DAVID CARON

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The Alien Tort Statute: An Overview of the Current Issues

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The Alien Tort Statute: An Overview of the Current Issues

Richard M. Buxbaum*
David D. Caron**

I. INTRODUCTION

If it may be said that in the 19th century U.S. courts were led to consider international law incidentally to considering prize and piracy, then these same courts for the last thirty years have been particularly drawn to consider international law because of the Alien Tort Statute (“ATS”).¹ Although this brief statute was adopted near the birth of the nation in 1789 as a part of the first Judiciary Act,² it remained almost unused until the 1980 Second Circuit Court of Appeals decision in *Filartiga v. Peña-Irela*.³ That judgment held that the ATS granted federal jurisdiction over a civil claim for damages by the Paraguayan sister and father of a young man who had been tortured and killed in Paraguay. The claim was brought against a particular Paraguayan citizen: the

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1. Judiciary Act of 1789, ch. 20, §9(b), 1 Stat. 73, 76-77 (1789), codified at 28 U.S.C. §1350. We note that sometimes the Statute is referred to as ATS (“Alien Tort Statute”) and other times as ACTA (“Alien Tort Claims Act”). For the purposes of this commentary, we have used the former acronym. M.G. Kaladharan Nayar has discussed U.S. consideration of international law prior to the last thirty years. See M.G. Kaladharan Nayar, *Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT’L L.J. 813 (1978).

2. *Id.* As enacted in 1789, the statute read: “the district courts shall have... cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” *Id.* at 77.

3. *Filártiga v. Peña-Irela*, 630 F.2d 876 (2d Cir. 1980).

former Inspector General of Police in Asunción and the alleged torturer. In terms of the international protection of human rights, this decision must count as one of the most significant judicial judgments ever rendered, placing the ATS at the center of human rights adjudication. This focus necessarily raised questions about the scope and limits of claims under this statute. Although the statute was increasingly utilized and debated, the United States Supreme Court did not address the ATS directly until its 2004 decision in *Sosa v. Alvarez-Machain*.⁴ Fundamentally, that decision reaffirms the basic availability of the statute. But that decision did not address all of the issues that existed regarding the ATS and itself opened up a series of new questions. For the last six years, the trial courts and Courts of Appeal have been grappling with these matters.

The faculty, students and alumni of Berkeley Law have been deeply involved over the past thirty years with the ATS. In 1980, Stefan A. Riesenfeld, both a graduate of Berkeley Law and then emeritus member of the faculty, while serving as the Counselor on Public International Law at the U.S. Department of State, was one of the principal authors of the U.S. government's *amicus* brief in *Filartiga*. Since then, faculty, students and alumni have been involved in scholarship, the submission of *amici* briefs and much of the key litigation as counsel for plaintiffs, defendants and *amici* expressing the United States's view. It is amidst this period of coalescence and confusion, and with the tradition of Berkeley Law bringing excellence to bear on the most pressing questions of the day, that these student comments are offered.

This collection of eight student articles was written in an advanced international law writing seminar focused on the ATS in the fall of 2009. These comments are intended to provide clear statements of the current situation in the various judicial circuits of the United States inasmuch as there is often a majority and minority view on the various ATS issues addressed. Where the author passes into his or her own analysis as to the preferred approach, this is made clear to the reader. This introductory essay seeks to capture the range of questions that exist concerning the ATS and place the contributions of this symposium in the context of that overview.

II. THE QUESTIONS IN ATS JURISPRUDENCE ADDRESSED BY THE CONTRIBUTIONS

There are essentially three different periods in the ATS's history: (1) the dormant Pre-*Filartiga* period from 1789 to 1980 when the statute was little utilized; (2) the *Filartiga* period from 1980 to 2004 when the statute was given a new life, and was increasingly both utilized and debated; and (3) the Post-*Sosa* period when the Supreme Court simultaneously reaffirmed the statute and

4. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

opened a set of questions to answer. These three periods, although they are helpful rough divisions, do not capture the complicated and sometimes heated debate of the last thirty years.⁵ The present Post-*Sosa* period is one in which the issues being debated concern the refinement of the guiding language set forth in *Sosa*, the adaptation of ATS jurisprudence to a fact pattern that has increasingly involved corporate defendants, and issues of the *Filartiga* period on which the various circuits continue to have different views.

The following overview of ATS jurisprudence is divided into a discussion of (A) jurisdiction and justiciability, (B) immunity and other notable preliminary issues, and (C) theories of liability for non-state actors. The eight student contributions are placed as appropriate within these three categories. We close by noting a few patterns in the line of disagreement in the Courts of Appeal on basic questions.

A. Jurisdiction and Justiciability

ATS litigation presents issues of both jurisdiction and justiciability. As in all other areas, the Federal courts must possess jurisdiction both over the defendant (personal jurisdiction) and the dispute (subject matter jurisdiction). As regards personal jurisdiction, the basic question is whether ATS litigation should be viewed any differently from litigation in other areas. The answer has been almost uniformly that the same standards apply.⁶

As regards subject matter jurisdiction, *Sosa* tells us that the provision of subject matter jurisdiction is the primary purpose of the ATS. “In sum, we think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.”⁷ Broadly, *Sinaltrainal*⁸ advises, and we agree, that “Federal subject matter jurisdiction exists for an ATS claim when the following three elements are satisfied: (1) an alien⁹ (2) sues for a tort (3) committed in violation of the law of nations.”¹⁰

5. An alternate way of viewing the history of the Statute is to observe the three waves of the litigation structure following *Filartiga*: First, cases like *Filartiga* which involved a foreign government official as the defendant; second, and later, cases which involved private corporations as defendants; and third, and most recently, cases which name an official of the U.S. government as the defendant.

6. *But see* *Bauman v. DaimlerChrysler Corp.*, 578 F.3d 1088, 1098-1106 (9th Cir. 2009) (Reinhardt, J., dissenting). Other jurisdictional issues not addressed by contributions include standing and class actions in the ATS context.

7. *Sosa*, 542 U.S. at 714.

8. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009).

9. For a discussion the word “alien,” see M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 BERKELEY J. INT’L L. 316 (2009).

10. *Sinaltrainal*, 578 F.3d at 1261 (quoting *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1246 (11th Cir. 2005)). Despite the fact that the statute has been described as a “legal Lohengrin” and the history surrounding its adoption is unclear or unhelpful, a number of valuable articles examine its past. See, e.g., William S. Dodge, *The Historical Origins of the Alien Tort*

Sosa in particular provided guidance, albeit somewhat cryptic, as to what is encompassed by the phrase “tort committed in violation of the law of nations.”

Given the many cases at this point, the courts have slowly built up a catalog of acts widely accepted as a “tort committed in violation of the law of nations.” Torture is one example. However, in some cases, the plaintiff points to an act never before raised as such a violation of the law of nations in the ATS context. The question of how the courts were to evaluate such assertions was a central element of the debate concerning the ATS. The Supreme Court in *Sosa* sought to provide guidance particularly in this regard.

First, *Sosa* suggests that the ATS was not intended to address all violations of international law, but rather that the “jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”¹¹ The Court in *Sosa* then goes on to say that given that the First Congress

understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, . . . courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.¹²

Second, the Court notes that there are several developments in the law of the United States since 1789 that suggest some measure of caution in Federal court recognition of new torts committed in violation of the law of nations. Thus the Court concludes “the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”¹³

In the end, however, the Court’s guidance is only slightly more specific than that outlined already. We quote the key paragraph in full:

We must still, however, derive a standard or set of standards for assessing the particular claim Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under §1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted. *See, e.g., United States v. Smith*, 5 Wheat. 153, 163–180, n. a (1820) (illustrating the specificity with which the law of nations defined piracy). This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court. *See Filartiga, supra*, at 890 (“[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind”); *Tel-Oren, supra*, at 781 (Edwards, J., concurring) (suggesting that the “limits of

Statute: A Response to the “Originalists,” 19 HASTINGS INT’L & COMP. L. REV. 221 (1996).

11. *Sosa*, 542 U.S. at 724.

12. *Id.* at 724-25.

13. *Id.* at 729.

section 1350's reach" be defined by "a handful of heinous actions—each of which violates definable, universal and obligatory norms"); *see also* *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (CA9 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory"). And the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.¹⁴

Kathleen Jaeger's comment in this Symposium explores these statements by examining the treatment by the courts of "environmental" claims, a possible area of torts under the ATS that is on the periphery of existing international law.¹⁵

The concept of justiciability is concerned with the appropriateness of a court addressing a particular matter brought before it. It asks, for example, whether the matter before it presents a case or controversy, or instead seeks only an advisory opinion. More relevant to the ATS context, justiciability also asks whether a particular dispute presents a "political question" which the court should abstain from deciding. The possible political sensitivity of some ATS litigation has been noted and argued about for thirty years. The Supreme Court in *Sosa* writes:

This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this case. For example, . . . Another possible limitation that we need not apply here is a policy of case-specific deference to the political branches. For example, there are now pending in federal district court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa. . . . In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy.¹⁶

The question of the practice of, and the force to be given U.S. Government Statements of Interest in general and in the ATS context in particular is a subject requiring academic study. Amy Endicott's contribution addresses the question of the effect to be given to such statements through the application of the political question doctrine.¹⁷

14. *Sosa*, 542 U.S. at 731-33.

15. *See* Kathleen Jaeger, *Environmental Claims Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 519 (2010).

16. *Sosa*, 542 U.S. at 733 n.21.

17. *See* Amy Endicott, *The Judicial Answer? Treatment of the Political Question Doctrine in Alien Tort Claims*, 28 BERKELEY J. INT'L L. 537 (2010).

B. Immunity and Other Notable Preliminary Issues

1. Immunity

The question of immunity to be afforded a defendant depends, of course, on the defendant's identity. The questions concerning immunity in the ATS has been uncovered progressively, with successive cases each peering deeper into the extent of identity.

At the first level, the question was whether the immunity of a State named in an ATS suit was to be analyzed under the Foreign Sovereign Immunities Act ("FSIA") or whether the ATS, in granting federal court jurisdiction, also implicitly indicated that State defendants were not entitled to immunity. The Supreme Court addressed this issue in *Amerada Hess v. Argentina*, deciding that the FSIA is the sole basis on which to determine whether a "state" as defined in that Act is entitled to immunity.¹⁸ The second level, and an issue before the Supreme Court as this Volume goes to press, inquires into the proper method of analyzing the immunity to be afforded state officials named in ATS litigation. In the *Filartiga* case, the court did not question or discuss the possible immunity of the defendant, a former police chief. There are many factual variations in such situations. Is the named official a current or former official? Is the named official a head of state, a low ranking official or someone holding a significant, for example ministerial, position? Has the individual claimed immunity or has the state of which the individual is an official sought to cloak the individual with the state's immunity? The question before the Supreme Court at present in *Mohamed Ali Samantar v. Bashe Abdi Yousuf* regards the applicable source of law for judicial analysis of such questions. The Court of Appeals for the 4th circuit held that the FSIA "does not, upon examination of its plain language and the context of its drafting, apply to individual officers of foreign states," declining therefore to extend the reasoning and effect of *Amerada Hess v. Argentina* to State officials.¹⁹ But if the FSIA is not applicable to state officials, where are the courts to look in such instances?

Although the questions regarding immunities involve a discussion internal to U.S. law, the content of that law historically has been influenced by changing state practice regarding immunity. It is that practice outside the United States that is addressed in Michele Potestà's contribution.²⁰

18. *Amerada Hess Shipping Corp. v. Argentine Republic*, 488 U.S. 428 (1989).

19. *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009), *cert granted*.

20. See Michele Potestà, *State Immunity and Jus Cogens Violations: The Alien Tort Statute Against the Backdrop of the Latest Developments in the 'Law of Nations'*, 28 BERKELEY J. INT'L L. 571 (2010).

2. Other Notable Preliminary Issues

There are several other notable preliminary issues in ATS litigation that are coming to the fore as courts deal with a growing docket of cases. For example, how does the doctrine of *forum non conveniens* apply in the ATS context? Likewise, one may ask how the idea of a statute of limitations is to be addressed in this context. The Court in *Sosa* notes exhaustion of local remedies as a third possible area to be considered:

This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this case. For example, the European Commission argues as *amicus curiae* that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other fora such as international claims tribunals. . . .²¹

Regina Waugh's contribution addresses this third notable preliminary issue: exhaustion of local remedies, which for some is viewed as a question of ripeness.²²

C. Theories of Liability for Non-State Actors

The question of the liability of non-State actors under the ATS is probably the most pressing one in the post-*Sosa* era. Ordinarily, a tort in violation of the law of nations is committed by a state inasmuch as the obligations of the law of nations are placed on states. The state act that results in the breach is ordinarily done by one or more state officials. The issue addressed in three student contributions is how the act committed in violation of the law of nations might be done by a non-state actor. This is one of the particular questions that *Sosa* recognized, but did not address.²³

Sometimes the non-state actor may commit such a tort because the tort is of the relatively rare type where an international law obligation is directly applicable to private actors. The examples of piracy and certain war crimes are most notable.²⁴ The pressing issue is when the relationship between a private actor and a state might be said to be sufficiently close that the private actor should be held to have violated the law of nations. There is no doubt that a private actor under the law of state responsibility may be a *de facto* agent of the State.²⁵ At the time of this writing, U.S. courts have taken different approaches

21. *Sosa*, 542 U.S. at 733 n.21

22. See Regina Waugh, *Exhaustion of Remedies and the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 555 (2010).

23. *Sosa*, 542 U.S. at 732 n.20 ("A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual . . .").

24. See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995)(discussing the war crimes exception).

25. International Law Commission, *Responsibility of States for Internationally Wrongful Acts*

as to the analysis of this relationship and even as to what law should govern the issue broadly.

Charles Ainscough in his contribution addresses the fundamental question of what law should be looked to when approaching the issue.²⁶ The other two contributions examine two of the primary approaches used to examine the issue: Ryan Lincoln looks at theories of aiding and abetting and accessorial liability,²⁷ while Anna Sanders examines the theories of conspiracy and joint criminal enterprise.²⁸

D. The Relationship of the ATS to Other Statutes

As is clear from the discussion of immunity above, the ATS does not stand apart from other statutes. The Supreme Court's decision in *Amerada Hess* made clear that it is the FSIA, and not the ATS, that governs questions of state immunity. Another statute discussed in several cases, including *Sosa*, is the Federal Tort Claims Act, an act that addresses claims against the U.S. government or its officials. Ekaterina Apostolova's contribution to this Symposium addresses the relationship of the ATS to the Torture Victim Protection Act.²⁹

III. CONCLUSION

This brief overview of issues in the ATS context is by no means exhaustive. Although ATS litigation is often consumed with the issues already mentioned, we can expect that as the docket grows, more cases will reach adjudication as to the merits of the cases. As this occurs, we can expect a new set of issues: The application of the act of state doctrine in ATS context, as well as the proper choice of law relating to damages.

For all the issues mentioned, this is a time of significant clarification in the Courts of Appeal of the United States. The contributions repeatedly identify the differences in approach in U.S. courts. In our assessment, these differences for the most part still remain fluid and the next decade will likely be one of refinement and coalescence in ATS jurisprudence.

Art. 8, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)*, chp.IV.E.1 (2001).

26. See Charles Ainscough, *Choice of Law and Accomplice Liability Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 588 (2010).

27. See Ryan Lincoln, *To Proceed with Caution? Aiding and Abetting Liability Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 604 (2010).

28. See Anna Sanders, *New Frontiers in the ATS: Conspiracy and Joint Criminal Enterprise Liability After Sosa*, *infra* 28 BERKELEY J. INT'L L. 619 (2010).

29. See Ekaterina Apostolova, *The Relationship between the Alien Tort Statute and the Torture Victim Protection Act*, 28 BERKELEY J. INT'L L. 640 (2010).

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Environmental Claims Under the Alien Tort Statute

Kathleen Jaeger*

“[P]laintiffs’ imaginative view of this Court’s power must face the reality that United States district courts are courts of limited jurisdiction. While their power within those limits is substantial, it does not include a general writ to right the world’s wrongs.”

Judge Rakoff
*Aguinda v. Texaco Inc.*¹

I. INTRODUCTION

Transnational companies operating in developing countries have in a number of instances caused large scale environmental harm where they operate.² A combination of lax environmental laws and weak enforcement meant corporate environmental accountability was non-existent. This situation changed somewhat with the landmark case *Filártiga v. Peña-Irala*.³ In this case the Alien Tort Statute (ATS) was first utilized – the statute provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁴ *Filártiga* opened up U.S. courts to address human rights abuses that

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1. *Aguinda v. Texaco Inc. (Aguinda II)*, 945 F. Supp. 625, 628 (S.D.N.Y. 1996).

2. For a more general background on how multi-national corporations (MNCs), especially extractive industries, can be involved in environmental destruction and human rights abuses, see Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE L. REV. 745, 749-751 (2004).

3. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

4. 28 U.S.C. § 1350. The Alien Tort Statute (ATS), originally enacted by Congress in 1789 and was also referred to as the Alien Torts Claims Act (ATCA) but after the Supreme Court in *Sosa*

occurred abroad and the same seemed possible for cases of environmental harm. Over the last two decades a number of suits have been brought in U.S. courts against large corporations to hold them accountable for environmental harm, yet so far none have been successful. In a concise manner, this Article seeks to comment and give some background on the present state of environmental litigation under the ATS by looking at how environmental claims have been received by the courts and how these claims can be classified doctrinally. While I briefly introduce the salient procedural and substantive law issues characteristic of an ATS case, this Article is not intended as an advocates' guide for litigating environmental claims under the ATS⁵ nor is it a manifesto of how a broad range of environmental torts *should* be recognized under the ATS.⁶ Part II briefly explains what characterizes an environmental ATS claim and how these claims can be brought either utilizing an international environmental law approach or a human rights based approach. Part III provides an inventory of the existing case law. Part IV assesses the range of environmental ATS claims that have been put forward in litigation or literature to determine which of these are likely to withstand the scrutiny of the courts. I conclude that under the current reading employed by the Supreme Court *Sosa v. Alvarez-Machain*,⁷ environmental law norms are not yet part of "the law of nations" and presently environmental harm may only be addressed in an ATS case where human rights abuses and environmental wrongs overlap.

II.

BASIC PRINCIPLES OF AN ENVIRONMENTAL CLAIM UNDER THE ALIEN TORT STATUTE

For a plaintiff to address environmental harm under the ATS he has to meet the requirements of the statute, namely bringing the suit as an alien, suing in tort only, and showing that the tort violates the law of nations or a treaty of the United States.⁸

A. Environmental Torts

A tort is traditionally defined as a "civil wrong, other than a breach of contract, for which a remedy may be obtained, usually in the form of damages; a

v. *Alvarez-Machain*, 542 U.S. 692 (2004) used the term "Alien Tort Statute," courts have generally adopted that name.

5. For this purpose an extensive and very instructive "practical assessment" is provided by Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545 (2000).

6. An instructive article of this kind includes Abadie, *supra* note 2, at 787 (advocating that transboundary pollution be cognizable under the ATS).

7. *Sosa*, 542 U.S. at 731-32.

8. On the statutory requirements "alien" and "in tort only" see PETER HENNER, *HUMAN RIGHTS AND THE ALIEN TORT STATUTE: LAW, HISTORY, AND ANALYSIS* 16-19 (2009).

breach of duty that the law imposes on persons who stand in a particular relation to one another.”⁹ In an ATS case the duty must be imposed on the defendant by the “law of nations” or “a treaty of the United States.” It is important to note that even though we might speak of an environmental ATS case, legally it is still the plaintiff that was injured by the defendant’s actions, not the environment.¹⁰ The plaintiff does not act as an agent for the environment and his claim does not generally require a certain relationship to the environment.¹¹

B. Different Avenues for Environmental ATS claims

The statutory language of the ATS provides for two separate avenues a plaintiff can pursue as a basis for his claim; a plaintiff can claim a tort either in violation of “the law of nations” or “a treaty of the United States.”

1. Torts in Violation of the Law of Nations

The large majority of ATS cases, including those concerned with environmental harm, were brought under the “law of nations” prong of the ATS. The “law of nations” to some extent resembles customary international law.¹² Just how the two overlap is a matter of constant debate in courts and among scholars, with some arguing that only that subset of customary international norms that are preemptory (*jus cogens*)¹³ should form the “law of nations.” In the first “modern” ATS case, *Filártiga v. Peña-Irala*, where a Paraguayan family sued a former Paraguayan police member for having tortured and

9. BLACK’S LAW DICTIONARY (8th ed. 2004).

10. In the present context assigning rights directly to the environment remains “unthinkable.” CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING* 6 (1974).

11. Of course, in most ATS cases involving environmental damage the plaintiff will allege that full enjoyment of his rights depends on an unharmed environment.

12. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987) defines customary international law as resulting from “a general and consistent practice of states followed by them from a sense of legal obligation.” The sense of legal obligation is often referred to as *opinio juris* (short for *opinio juris sive necessitatis*).

13. *Jus cogens* is defined as “a preemptory norm of general international law” which is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” See Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332.

In *Doe v. Unocal Corp.*, for example, the court argued that only *jus cogens* norms are actionable. 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000), *vacated on other grounds*, 403 F.3d 708 (9th Cir. 2005). Similarly, in *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995) the court found that *jus cogens* norms are the standard. Scholars advocating this narrow view of the “law of nations” include David D. Christensen, Note, *Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After Sosa v. Alvarez-Machain*, 62 WASH. & LEE L. REV. 1219, 1223, 1245-1249, 1268-70 (2005); Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26 U. PA. J. INT’L ECON. L. 193, 265-66 (2005), cited in Bradford Mank, *Can Plaintiffs use Multinational Environmental Treaties as Customary Law to Sue under the Alien Tort Statute?*, 2007 UTAH L. REV. 1085 n.43.

eventually killed a member of their family, the Second Circuit found that torture violated the law of nations and was therefore actionable under the ATS.¹⁴ As to what fell under the law of nations the court instructed that “courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”¹⁵ The court instructed that the law of nations is to be determined by looking at the “works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.”¹⁶ In the wake of *Filártiga* many courts have required that a norm actionable under the ATS be specific or definable, universal and obligatory.¹⁷ In 2004 the Supreme Court in *Sosa v. Alvarez-Machain*, its first decision concerning the modern day scope of ATS, instructed that courts may allow ATS suits based on present day customary international law rules, but required for those rules to be comparable to the international law rules recognized at the time the ATS was enacted in 1794.¹⁸ As to the recognition of new ATS claims, the court advised that “judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”¹⁹

Thus, the current standard for bringing environmental claims under the ATS is that the allegedly violated norm must be as definite and universally accepted as the norms constituting the “law of nations” when the ATS was enacted more than 200 years ago.

2. *Torts in Violation of a Treaty of the United States*

The other, by far less frequently employed avenue the ATS provides for is a tort violating a “treaty of the United States.”²⁰ While plaintiffs in an ATS case will often refer to international treaties (to which the United States may or may not be a party) to support their claim, this is not the same as actually basing an

14. *Filártiga*, 630 F.2d at 880.

15. *Id.* at 881.

16. *Id.* at 880.

17. *See, e.g.*, In re Estate of Ferdinand Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 370, 383 (E.D. La. 1997); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988). An analysis of this standard from an environmental perspective is provided by Herz, *supra* note 5, at 553-56.

18. *Sosa*, 542 U.S. at 732 “[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”

19. *Id.* at 729.

20. On this basis for an ATS claim *see also* HENNER, *supra* note 8, at 21-22. Henner predicts that *Medellin v. Texas*, 552 U.S. 491 (2008), might preclude ATS claims brought under the Treaty of the United States prong in the future.

ATS claim on a treaty provision.²¹ Article VI clause 2 of the U.S. constitution prescribes that treaties are part of the “supreme law of the land,” however, treaties do not generally contain private rights enforceable in courts.²² A treaty provision may serve as a basis for an ATS claim only if the treaty is self-executing, meaning that the treaty itself creates a private cause of action.²³ If a plaintiff seeks to enforce a non-self-executing treaty he can only do so if Congress has passed legislation which creates a private right of action.²⁴ Self-executing treaties form the exception.²⁵

C. Approaches to Bringing an Environmental ATS Claim

1. International Environmental Law

Bearing the distinction between ATS claims brought under the “law of nations” and “treaty of the United States” in mind, two further divisions can be drawn when considering the source of law for environmental claims under the ATS. Firstly, a claim may be based on norms of international environmental law, whether part of customary law (and thus falling under the “law of nations” prong) or of an international environmental treaty (consequently falling under the “treaty of the United States” prong of the ATS). A subpart of international law,²⁶ international environmental law encompasses “the entire corpus of international law, both public and private, relevant to environmental issues or problems.”²⁷ In ATS cases it is mainly public international environmental law that is invoked as “law of nations.” Apart from international treaties and customary international law, the third group of norms that make up a large portion of international environmental law falls into a grey area between “hard” and “soft law”: these norms can be described as an “ever growing number of

21. Also stressing this distinction, Mank, *supra* note 13, at 1093.

22. As discussed in *Sosa*, 542 U.S. at 728.

23. See, e.g., *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (“It is only when a treaty is self-executing, when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights.”). For a broader approach, see Herz, *supra* note 5, at 553 n.44 (arguing in favor of allowing ATS suits based on non-self-executing treaties, saying that otherwise the treaty provision in the ATS is redundant because plaintiffs can already sue to enforce self-executing treaties under 28 U.S.C. § 1331 “arising under” jurisdiction.).

24. See *Jama v. U.S. L.N.S.*, 22 F. Supp. 2d 353, 362 (D.N.J. 1998).

25. In addition, the United States often signs treaties only after having made reservations, understandings, and declarations limiting the domestic effect of the treaty. In some instances Congress expressly declares that a treaty is not self-executing. See *Sosa*, 542 U.S. at 728.

26. Indeed it has been argued that international environmental law is nothing more than the application of international law to environmental problems. See Ian Brownlie, *Editor’s Preface* of BRIAN D. SMITH, *STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT: THE RULES OF DECISION* (1988).

27. PATRICIA W. BIRNIE AND ALAN E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 2 (2d ed. 2002). A concise history of international environmental law is provided by DAVID HUNTER, JAMES SALZMAN AND DURWOOD ZAEKKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 162 (3d ed. 2007).

amorphous ‘concepts’ and ‘principles,’ whose nature and normative quality are far from clear.”²⁸ It is partly due to this “relative normativity”²⁹ and consequent lack of definitiveness of environmental norms that courts have been reluctant to accept environmental ATS claims.

2. Human Rights

Human rights forms the other field of international law on which an environmental ATS claim may be based. Ecologically destructive projects often face harsh opposition from the affected community, especially if there is no chance of having the public’s concerns heard throughout the planning process. Quashing such protests government forces, often with some MNCs’ involvement, has led to brutal civil rights violations. But while such human rights violations may well be addressed in an ATS suit³⁰ they differ from an environmental ATS claim in which the human rights violation was a result of the environmental harm itself. In this sense ATS claims may argue that environmental degradation violated individual human rights such as the right to life as a classic first generation civil and political right,³¹ the right to health as a second generation social and economic right,³² or as an environmental right, the right to a clean environment as a third generation human right that is yet to be widely accepted.³³ Collective human rights that could possibly be brought as group claims in an environmental ATS case include claims of a violation of the

28. Ulrich Beyerlin, *Different Types of Norms in International Environmental Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 425-26 (Daniel Bodansky et al., eds. 2007).

29. *Id.*

30. Such an ATS suit arose out of protests against Chevron’s oil exploration activities in the Niger Delta. Nigerian military, allegedly acting under Chevron’s orders, killed and injured several of the protesters who had in large numbers occupied an oil platform. *Bowoto v. Chevron Corp.*, 557 F.Supp.2d 1080 (N.D. Cal. 2008).

31. The right to life has been recognized by the international community in a number of human rights instruments. Examples include International Covenant of Civil and Political Rights, art. 6, Dec. 6, 1966, 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, 213 U.N.T.S. 222, 224; Universal Declaration of Human Rights, art. 3, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); and American Convention on Human Rights, art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

32. As laid out in International Covenant on Economic, Social, and Cultural Rights, art. 12, Dec. 19, 1966, 993 U.N.T.S. 4, 5 and also contained in Convention on the Rights of the Child, art. 24, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

33. A number of international and regional human rights instruments contain references of a right to environment. CRC, art. 24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 11, Nov. 14, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 58 (1989); African Charter of Human and Peoples Rights, June 27, 1981, art. 24, 1520 U.N.T.S. 217. For a detailed discussion of the right to environment, see Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT’L L. 103 (1991).

right to sustainable development,³⁴ racial discrimination,³⁵ and claims of genocide.³⁶

D. Procedural Hurdles

Claimants in ATS cases, environmental or other, have mainly had to grapple with four procedural hurdles. First, the doctrine of *forum non conveniens* allows courts to dismiss a case involving actions by non-U.S. citizens on the grounds that a foreign court is a more adequate forum to resolve the case as this would serve the convenience of the parties and the interest of justice better. The court will on the one hand weigh the public interest which includes the foreign state's interest, burdens on the court, and conflict of law considerations, and on the other hand the private interest, looking at the access of evidence.³⁷ A second possible hurdle to an ATS claim is the act of state doctrine which states that a U.S. court is prohibited from adjudicating claims when doing so would require the court to invalidate the official acts of a foreign sovereign which the latter performed on its territory, unless the official acts form a violation of *ius cogens* or of an international treaty.³⁸ Third, a court may dismiss a case on the basis of the political question doctrine when it finds it inappropriate for the judiciary to accept a case as doing so would interfere with the constitutional or policy prerogatives of the legislative or executive.³⁹ Fourth,

34. The World Charter for Nature states: "1. Nature shall be respected and its essential processes shall not be impaired . . . 11. Activities which might have an impact on nature shall be controlled, and the best available technologies that minimize significant risks to nature or other adverse effects shall be used." G.A. Res. 37/7, ¶ 1, U.N. Doc. A/37/51 (Oct. 28, 1982). Similarly, Principle 1 of the Rio Declaration announces: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." Rio Declaration on Environment and Development, principle 1, June 14, 1992, U.N. Doc. A/CONF.151/5/Rev.1.

35. Racial discrimination is prohibited by a number of human rights treaties. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, S. Exec. Doc. C, 95-2 (1978); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, arts. 1, 7, Dec. 18, 1990, G.A. Res. 45/158 annex, U.N. GAOR, 45th Sess., Supp. 49A, U.N. Doc. A/45/49 (1991). For a detailed discussion of framing environmental ATS claims as a violation of racial discrimination, see Sarah M. Morris, *The Intersection of Equal and Environmental Protection: a New Direction for Environmental Alien Tort Claims after Sarei and Sosa*, 41 COLUM. HUM. RTS. L. REV. 275 (2009).

36. Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

37. See James Boeving, *Half Full... Or Completely Empty? Environmental Alien Tort Claims Post Sosa v. Alvarez-Machain*, 18 GEO. INT'L ENVTL. L. REV. 109, 120 n.68 (2005). Abadie points out that corporate defendants have great interest in having their case heard in a foreign forum where they often have close ties with, and likely a certain amount of influence on local government. Abadie, *supra* note 2, at 768.

38. Mank, *supra* note 13, at 1099, clarifying that the doctrine might also be inapplicable in other cases of clear violations of customary international law.

39. *Id.* at 1099 and n.93. The Supreme Court in *Baker v. Carr* laid out a six factor test for applying the doctrine, 369 U.S. 186, 217 (1962). See also Amy Endicott, *The Judicial Answer?*

the international comity doctrine allows courts to use their discretion in deciding whether it is appropriate for an American court to hear a case that involves issues of great concern to a foreign sovereign.⁴⁰

III.

ATS ENVIRONMENTAL JURISPRUDENCE⁴¹

Starting with *Amlon Metals, Inc. v. FMC Corp.*⁴² in 1991 courts have addressed a number of environmental claims under the ATS. None of them has been successful. The most common “fact pattern,” if one can call it that, is that of a multinational company operating in a developing country as the defendant and an alien plaintiff who claims to have suffered harm through environmental damage allegedly caused by the company.⁴³

A. *Amlon Metals, Inc. v. FMC Corp.*

In *Amlon Metals, Inc. v. FMC Corp.* plaintiffs sued for defendant’s failure to ensure that the copper residue Amlon shipped to England was free from harmful impurities and that the transported material would not be a hazardous waste.⁴⁴ Plaintiffs brought suit under the ATS⁴⁵ alleging that defendant’s conduct violated the “law of nations,” in particular the Stockholm Principles.⁴⁶ Principle 21 of the Stockholm Declaration grants states the “sovereign right to exploit their own resources pursuant to their own environmental policies” and imposes on them the “responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”⁴⁷ In order to support their

Treatment of the Political Question Doctrine in Alien Tort Claims, 28 BERKELEY J. INT’L L. 537 (2010).

40. Mank, *supra* note 13, at 1100 and n.95.

41. Not included in this inventory of case law is *Bano v. Union Carbide Corp.*, which came out of the chemical disaster in Bhopal, India in 1984. 273 F.3d 120 (2d Cir. 2001). The court never decided on substantive ATS claims as the case was dismissed on the grounds that the case was “fully litigated and settled in India.” *Id.* at 127. See Natalie L. Bridgeman, *Human Rights Litigation under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1 at 23 (lamenting this dismissal as a lost opportunity for a court to examine the relationship between human rights and the environment on a drastic set of facts.)

42. *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991).

43. See Mank, *supra* note 13, at 1100. Oil companies make up a considerable share of these defendants. For an assessment of holding oil companies liable under the ATS after *Sosa* (but not including any environmental ATS cases), see James Goodwin & Armin Rosencranz, *Holding Oil Companies Liable for Human Rights Violations in a Post-Sosa World*, 42 NEW ENG. L. REV. 701.

44. *Amlon Metals*, 775 F. Supp. at 669-670.

45. Not discussed in this Article are the claims brought under the Resource Recovery and Conservation Act, 44 U.S.C. §§ 6901-6992 (1985). *Id.* at 669.

46. *Id.* at 671.

47. *Amlon Metals*, 775 F. Supp. at 671 (quoting Report of the U.N. Conference on the Human

claim plaintiffs also referred to the Restatement (Third) of Foreign Relations Law section 602(2).⁴⁸ The court found that the plaintiffs' reliance on the Stockholm Principles was "misplaced" because the Principles "do not set forth any specific proscriptions, but rather refer only in a general sense to the responsibility of nations to insure that activities within their jurisdiction do not cause damage to the environment beyond their borders."⁴⁹ As to the Restatement (Third) the court decided that it does not "constitute a statement of universally recognized principles of international law. At most . . . the Restatement iterates the existing U.S. view of the law of nations regarding global environmental protection."⁵⁰

Compared to later environmental ATS cases *Amlon Metals* was unusual in the way that both parties were corporations. The case was a first test for how courts would receive claims based on general principles of international environmental law but it did not provide guidance as to what is sufficient to state such claims.⁵¹ The lack of international consensus that the courts identify when speaking of the (only) general sense of responsibility that Principle 21 conveys has been pointed out as a characteristic weakness of an environmental ATS claim.⁵²

B. *Beanal v. Freeport-McMoran, Inc.*⁵³

Freeport operated mines in Tamika, Irian Jaya (Indonesia) and was accused by plaintiff Beanal, a resident of Tamika, of having committed cultural genocide of his Amungme tribe, environmental torts and human rights abuses.⁵⁴ For the purposes of this Article only the environmental torts and cultural genocide, both

Env't, Stockholm, Swed., June 5-16, 1972, *Declaration of Principles* [Stockholm Declaration], principle 21, U.N. Doc. A/CONF.48/14, reprinted in 11 I.L.M. 1416 (1972)).

48. The RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 602(2) (1987) discusses the standards of "Remedies for Violation of Environmental Obligations," and states that "[w]here pollution originating in a state has caused significant injury to persons outside that state, or has created a significant risk of such injury, the state of origin is obligated to accord to the person injured or exposed to such risk access to the same judicial or administrative remedies as are available in similar circumstances to persons within the state."

49. *Amlon Metals*, 775 F. Supp at 671.

50. *Id.* Herz criticizes the court for not looking further at the Restatement for an interpretation of Principle 21 as he reads the Restatement to show sufficient definitiveness of the Principle. Herz, *supra* note 5, at 636.

51. See also *Bridgeman*, *supra* note 41, at 19.

52. Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145, 156.

53. *Beanal v. Freeport-McMoran, Inc. (Beanal I)*, 969 F. Supp. 362 (E.D. La. 1997), *aff'd*, 197 F.3d. 161 (5th Cir. 1999).

54. *Beanal I*, 969 F. Supp. at 366. The human rights abuses complained of are (1) arbitrary arrests and detention, (2) torture, (3) surveillance, (4) destruction of property, and (5) severe physical pain and suffering. *Beanal I*, 969 F. Supp. at 369.

made under the ATS, are of interest.⁵⁵

As a basis for his environmental torts claims, plaintiff alleged that Freeport's activities caused "destruction, pollution, alteration, and contamination of natural waterways, as well as surface and ground water sources; deforestation; destruction and alteration of physical surroundings."⁵⁶ Beanal invoked three international environmental law principles to support his ATS claim:⁵⁷ (1) the Polluter Pays Principle,⁵⁸ (2) the Precautionary Principle,⁵⁹ and (3) the Proximity Principle.⁶⁰ Relying heavily on an international environmental law treatise⁶¹ the court rejects all three claims on the grounds that the "principles relied on by Plaintiff, standing alone, do not constitute international torts for which there is universal consensus in the international community as to their binding status and their content."⁶² Importantly, the court went on to find that the invoked principles "apply to members of the international community rather than non-state corporations. . . . A non-state corporation could be bound by such principles by treaty, but not as a matter of international customary law."⁶³ Beanal also complained that the alleged human rights abuses and environmental violations had resulted in "the demise of the culture of the indigenous tribal people," which amounted to a "cultural genocide."⁶⁴ Noting that genocide requires the "destruction of a group, not a culture,"⁶⁵ the court dismissed Beanal's claim for failure to make his allegation

55. The torture claim was brought also under the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 n.1 (1992). The court found that as a corporation Freeport was not bound by the TVPA. *Beanal I*, 969 F. Supp. at 382.

56. *Beanal I*, 969 F. Supp. at 369.

57. *Id.* at 383.

58. This principle states that the costs of pollution are to be borne by the polluter. See PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I: FRAMEWORKS, STANDARDS AND IMPLEMENTATION 213-17 (1995).

59. "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." Rio Declaration, principle 15, *supra* note 34.

60. The proximity principle suggests that hazardous waste should be disposed of in the state of its creation, to the extent that such disposal is reasonable. SANDS, *supra* note 58, at 517.

61. Namely SANDS, *supra* note 58.

62. *Beanal I*, 969 F. Supp. 363 at 384. Without further comment the courts cite Sands when he compares three said principles with two other principles (principle 21 of the Stockholm Declaration and the good neighbourliness/international co-operation principle) which Sands finds to be "sufficiently substantive at this time to be capable of establishing the basis of an international cause of action; that is to say, to give rise to an international customary legal obligation the violation of which would give rise to a legal remedy." *Id.*; SANDS, *supra* note 58, at 184.

63. *Id.* Citing *Xuncax*, 886 F.Supp. at 186. To support this finding the court notes that the Restatement (Third) in the section on international environmental law (§§ 601-602) also mentions only state obligations and liability. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 601-602.

64. *Beanal I* at 372. The court starts off noting that plaintiff's complaint was "less than crystal clear." *Id.*

65. *Id.* at 373.

sufficiently specific.⁶⁶

The judgment was affirmed by the Fifth Circuit Court of Appeals⁶⁷ which noted that the principles of international environmental law invoked by Beanal “merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernible standards and regulations to identify practices that constitute international environmental abuses or torts.”⁶⁸ Beanal’s reference to the Rio Declaration was found inappropriate in the sense that the Declaration seeks to prevent transboundary environmental harm; Beanal never made any claims of this nature.⁶⁹ As a matter of policy the court advised that “federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments.”⁷⁰ Though urged by plaintiff and various *amici* briefs⁷¹ to recognize cultural genocide as a discrete violation of international law the court declined to merge the “amorphous right to ‘enjoy culture’, or a right to ‘freely pursue culture,’ or a right to cultural development” with the concept of genocide, as it deemed it “imprudent for a United States tribunal to declare an amorphous cause of action under international law that has failed to garner universal acceptance.”⁷²

The *Beanal* decisions emphasize courts’ wariness of equating broad concepts of environmental responsibility with obligations under international customary law that could form a cognizable tort under the ATS.⁷³ Similarly, the courts stress that for ATS purposes individuals and not (merely) states must be the addressees of the allegedly violated obligations. The court of appeals reasoned that federal courts should exercise “extreme caution” when deciding environmental ATS cases as to not interfere with environmental policies of other governments, a valid concern that is frequently echoed in later decisions.

66. *Id.* (“If Beanal in fact means that Freeport is destroying the Amungme culture, then he has failed to state a claim for genocide. On the other hand, if Beanal intended to state that Freeport is committing acts with the intent to destroy the Amungme group, i.e. its members, then he has failed to make this allegation sufficiently explicit.”)

67. *Beanal II*, 197 F.3d 161 (5th Cir. 1999).

68. *Id.* at 167.

69. *Id.*

70. *Id.* The court added that “the argument to abstain from interfering in a sovereign’s environmental practices carries persuasive force especially when the alleged environmental torts and abuses occur within the sovereign’s borders and do not affect neighboring countries.” *Id.*

71. *Amici Curiae* included the Sierra Club, Earthrights International, Center for Constitutional Rights, Center for Justice and Accountability, and the Four Directions Council. *Id.* at 164 n.1.

72. *Id.* Especially, as the court acknowledges in a footnote, when the drafters of the Genocide Convention rejected proposals to include cultural genocide. *Id.* n.8.

73. See Jean Wu, *Pursuing International Environmental Tort Claims under the ATCA: Beanal v. Freeport-McMoran*, 28 *ECOLOGY L. Q.* 487 at 498 (2001).

C. *Jota v. Texaco, Inc. and Aguinda v. Texaco, Inc.*

Aguinda v. Texaco Inc. arose out of Texaco's oil exploration activities in Ecuador and Peru which allegedly included large-scale disposal of inadequately treated hazardous wastes and destruction of tropical rain forest habitats causing harm to indigenous peoples living in the rain forest and their properties.⁷⁴ The District Court in a preliminary decision seemed rather responsive to claims based on Principle 2 of the Rio Declaration.⁷⁵ Judge Broderick contemplated that the "Rio Declaration may be declaratory of what it treated as pre-existing principles just as was the Declaration of Independence."⁷⁶ Pointing to domestic and international commitments the United States has made to control hazardous wastes the court further suggested that plaintiffs could possibly have a valid claim under the ATS so long as there "were established misuse of hazardous waste of sufficient magnitude to amount to a violation of international law."⁷⁷ The case was delayed and Judge Broderick died before he could decide on the merits. His successor Judge Rakoff dismissed the case.⁷⁸

Aguinda was consolidated with another case and its dismissal reversed and remanded by the Second Circuit in *Jota v. Texaco, Inc.*⁷⁹ After Texaco had agreed to accept Ecuador's jurisdiction the district court in *Aguinda III* dismissed the case applying the *forum non conveniens* doctrine, as the cases had "everything to do with Ecuador and nothing to do with the United States."⁸⁰ As to the specific claims plaintiffs sought to bring under the ATS "that the Consortium's oil extraction activities violated evolving environmental norms of customary international law," the court found them to "lack any meaningful precedential support" and appeared "extremely unlikely to survive a motion to dismiss."⁸¹ The Second Circuit later affirmed the dismissal on grounds of *forum*

74. *Aguinda v. Texaco, Inc. (Aguinda I)*, 1994 WL 142006 (S.D.N.Y.) (Apr. 11, 1994) at 1. The plaintiffs sought certification of a class of about 30,000 Ecuadorans.

75. Principle 2 reiterates Principle 21 of the Stockholm Declaration: The sovereign right to exploit own resources and responsibility to ensure that no damage is caused in other states or outside national jurisdiction. Rio Declaration, *supra* note 34.

76. *Aguinda I*, 1994 WL 142006 at 7.

77. *Id.* at 24.

78. *Aguinda v. Texaco Inc. (Aguinda II)*, 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated by Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998), *aff'd*, *Aguinda v. Texaco, Inc.* 303 F.3d 470 (2d Cir. 2002). The three (separate) grounds for dismissal were: (1) *forum non conveniens*, (2) international comity, (3) plaintiffs' failure to join two indispensable parties – the Republic of Ecuador and its state-owned oil company, Petroecuador, which were exempt from suit under the Foreign Sovereign Immunities Act.

79. The dismissal was reversed and remanded because in *Aguinda II* the District Court had granted the dismissal without an agreement by Texaco to accept Ecuador's jurisdiction. *Jota v. Texaco Inc.*, 157 F.3d 153, 155, 159 (2d Cir. 1998) (consolidating actions *Aguinda v. Texaco Inc.*, No. 93 Civ. 7527 (VLB), 1994 U.S. Dist. (S.D.N.Y. Aug. 13, 1997)).

80. *Aguinda v. Texaco, Inc. (Aguinda III)* 142 F.Supp.2d 534 S.D.N.Y., 2001, *aff'd* 303 F. 3D 470 (2d Cir. 2002).

81. *Aguinda III*, 303 F. 3D at 552.

non conveniens.⁸²

With their strong factual background the *Jota* and *Aguinda* cases had the potential to reach a decision on the merits and produce instructive precedent on environmental ATS claims relying on environmental law. As it is the decisions testify to the importance of the *forum non conveniens* doctrine in ATS cases and again imply that environmental policy is seen by the courts as a sovereign matter.⁸³

D. *Flores v. Southern Peru Copper, Corp.*⁸⁴

In *Flores* Peruvian residents sued defendants for pollution caused by defendant's copper mining, refining, and smelting operations which allegedly caused fatal lung disease to them. Plaintiffs based their claim on a violation of their "right to life, health, and sustainable development."⁸⁵ The District Court found that plaintiffs failed to demonstrate that "high levels of environmental pollution within a nation's borders, causing harm to human life, health, and development" violated "well-established, universally recognized norms of international law."⁸⁶

The decision was affirmed by the Second Circuit on appeal.⁸⁷ The rights to life and health⁸⁸ were found far from meeting the "clear and unambiguous" *Filártiga* standard. As to the statements relied on by plaintiffs the court deems them as "vague and amorphous" and the principles expressed in these statements as "boundless and indeterminate."⁸⁹ The court then considered (and eventually rejected) plaintiffs' claims under a more narrowly-defined customary international law rule against intra national pollution which involved a careful look at the different types of evidence plaintiffs had submitted.⁹⁰

82. *Id.* at 470 – 480.

83. Judge Rakoff in *Aguinda II*, for instance, approvingly quoted the Fifth Circuit in *Beanal III*: "Federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments." *Id.* at 552-553 (quoting F.3d 161, 167 (5th Cir. 1999)).

84. *Flores v. S. Peru Copper, Corp. (Flores I)*, 253 F.Supp. 2d 510, 514 (S.D.N.Y. 2002), *aff'd*, *Flores v. S. Peru Copper, Corp. (Flores II)* 414 F. 3d 233 (2d Cir. 2003).

85. *Flores I*, 253 F. Supp. 2d at 519, 520.

86. *Id.* at 525. Citing *Filártiga*, 630 F.2d at 888. Consequently, the court granted defendants' motion to dismiss for lack of federal subject matter jurisdiction and failure to state an ATS claim. Finding Peru an adequate forum the court also dismissed the case on *forum non conveniens* grounds. *Flores I*, 253 F. Supp. 2d at 531-41.

87. *Flores II*, 414 F.3d at 266.

88. On appeal, plaintiffs only pursued their claims based on a violation of their rights to life and health; they no longer based their argument on a right to sustainable development. *Id.* at 238, n.3.

89. *Flores II*, 414 F.3d at 255.

90. *Id.* Plaintiffs had submitted (1) treaties, conventions, covenants; (2) non-binding declarations of the United Nations General Assembly; (3) other non-binding multinational

Plaintiffs in *Flores* for the most part concentrated on a human rights based approach to bring their environmental ATS claims. Rejecting the notion that a human rights approach distinguished the case from *Aguinda*, *Amlon* and *Beanal* the District Court stressed that “labels plaintiffs affix to their claims cannot be determinative.”⁹¹ Although plaintiffs did not bring their claims under the “treaty of the United States” prong of the ATS, the courts still found the fact that the United States had only ratified one of the treaties plaintiffs relied on as evidence of “law of nations” rendered this evidence unpersuasive. The *Flores* decisions illustrate that environmental ATS claims brought under a human rights approach are, unsurprisingly, still have to contain norms well-established as “law of nations.”⁹² UN General Assembly resolutions, which are not binding, non-UN declarations, and decisions of international tribunals were rejected as evidence of a “law of nations” prohibition of intra-national pollution because they were not found to be authoritative sources of international law.⁹³

E. *Sarei v. Rio Tinto PLC*

The *Sarei* case is so far the only post-*Sosa* decision to address environmental ATS claims. In fact the district court’s decided *Sarei I*⁹⁴ before the *Sosa* decision was issued, but the Ninth Circuit had the case reargued so it could consider the Supreme Court’s decision.⁹⁵

In *Sarei I* residents of Papua New Guinea brought suit against an international mining group for dumping tailings from the mine into the local river system which destroyed the island’s environment and harmed the health of its people.⁹⁶ The district court rejected plaintiffs’ claims based on violations of their right to life and right to health⁹⁷ as it viewed these rights not sufficiently

declarations of principle; (4) decisions of multinational tribunals, and (5) affidavits of international law scholars.

91. *Flores I*, 253 F. Supp. 2d 510, 519.

92. See Bridgeman, *supra* note 41, at 24.

93. See Boeving, *supra* note 37, at 127.

94. *Sarei v. Rio Tinto PLC and Rio Tinto Ltd (Sarei I)*, 221 F.Supp. 2d 1116 (C.D. Cal. 2002), *aff’d in part, vacated in part*, 456 F. 3d 1069 (9th Cir. 2006), *aff’d in part, vacated in part, reversed in part*, 487 F.3d 1193 (9th Cir. 2007), *en banc rehearing granted*, 499 F.3d 923 (9th Cir. 2007), *heard on exhaustion of remedies (Sarei IV)* 650 F.Supp. 2d 1004 (C.D. Cal. 2009).

95. *Sarei v. Rio Tinto, PLC; Rio Tinto Ltd (Sarei II)*, 456 F.3d. 1069.

96. *Sarei I*, 221 F.3d. at 1120. Irrelevant for the purpose of this Article are plaintiffs’ claims accusing the defendants of war crimes, crimes against humanity, and racial discrimination committed during a long-lasting internal conflict in Papua New Guinea.

97. Similarly to *Flores* plaintiffs in *Sarei* referred to the following international documents as evidence of an established “right to life” and “right to health”: International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter of Human and Peoples’ Rights, and the Charter of Fundamental Rights of the European Union. *Sarei I*, 221 F. Supp. 2d 1116, 1156.

specific to support an ATS claim. Additionally, the court was not convinced that there was universal consensus among nations that these rights can be violated by perpetrating environmental harm.⁹⁸ Plaintiffs also asserted that the environmental harm stated an ATS claims under the principle of sustainable development and the United Nations Convention on the Law of the Sea (UNCLOS).⁹⁹ As to the principle of sustainable development the court found that it did not constitute a “specific, universal, and obligatory” norm that could form a rule part of the law of nations.¹⁰⁰ Plaintiffs had claimed that marine pollution caused by the defendant violated two provisions of UNCLOS regarding pollution.¹⁰¹ While noting that the US was not a party to UNCLOS the court recognized its provisions as customary international law and “and thus [it] appears to represent the law of nations.”¹⁰² The court then concluded that plaintiffs had a cognizable ATS claim.¹⁰³ As the activities of the defendant were closely connected to acts of a foreign sovereign (in fact, defendant’s mining activities were regulated by an agreement with the Papua New Guinean government¹⁰⁴) the court eventually used its discretion to dismiss the entire case based on the act of state doctrine.¹⁰⁵

The district court’s decision that UNCLOS could be the basis for an ATS claim was upheld by a divided three-judge panel on appeal.¹⁰⁶ The court expressly stated that “*Sosa*’s gloss on [the specific, universal and obligatory norms] standard does not undermine the district court’s reasoning” but also distinguished the UNCLOS claim from the other remaining claims (namely war

98. *Id.* at 1158.

99. *Id.* at 1160. United Nations Convention on the Law of the Sea, *opened for signature* December 10, 1982, 1833 U.N.T.S. 3, *reprinted* at 21 I.L.M. 1261 (1982) [hereinafter UNCLOS].

100. *Sarei I*, 221 F. Supp. 2d at 1156.

101. The court considered the following two provisions (citing plaintiff’s memorandum of points and authorities in Opp. to Motion to Dismiss at 32-33):

(1) one requiring that “states take ‘all measures . . . that are necessary to prevent, reduce and control pollution of the marine environment’ that involves ‘hazards to human health, living resources and marine life through the introduction of substances into the marine environment;’ and

(2) another mandating that states “adopt laws and regulations to prevent, reduce, and control pollution of the marine environment caused by land-based sources.”

Id. at 1161. *Mank*, *supra* note 13, identifies the first rule as referring to UNCLOS article 194 and article 1 ¶ 4, and the second as referring to UNCLOS article 207.

102. *Sarei I*, 221 F. Supp. 2d at 1161. Amongst other sources the court points to *United States v. State of Alaska*, 503 U.S. 569, 588 n.10 (1992) (“The United States has not ratified [the United Nations Convention on the Law of the Sea], but has recognized that its baseline provisions reflect customary international law.”).

103. *Sarei I*, 221 F. Supp. 2d at 1161.

104. *Id.* at 1184.

105. *Id.* at 1193. Before the court had declined to dismiss on the basis of the *forum non conveniens* doctrine as it deemed “the private interests [that] favor retaining jurisdiction and the public interests [were] neutral.” *Id.* at 1175.

106. *Sarei II*, 456 F.3d at 1078.

crimes, violations of the laws of war, racial discrimination¹⁰⁷) in that only the other claims “assert *jus cogens* violations that form the least controversial core of modern day ATCA jurisdiction.”¹⁰⁸ Following a petition for rehearing and for rehearing en banc the three judge panel withdrew its earlier opinion and issued a new opinion (and dissent) overriding the earlier decision.¹⁰⁹ In its final opinion the court did not ultimately decide whether the UNCLOS claims fell under the “law of nations” as its adjudication was blocked because of the act of state doctrine.¹¹⁰

The district court’s deliberation on UNCLOS provisions as a basis for an ATS claim—despite it being dismissed later—is viewed by commentators as being highly instructive for future plaintiffs.¹¹¹ *Sarei* is different from other environmental ATS cases in the way that plaintiffs’ loss was more procedural and political in nature and less substantive.¹¹² As plaintiffs also brought claims for racial discrimination *Sarei* could be instructive for future ATS plaintiffs seeking to bring claims on grounds of environmental injustice.¹¹³

IV.

WHERE DO ENVIRONMENTAL CLAIMS STAND IN 2010

Sosa v. Alvarez-Machain did not provide a clear and easily utilized standard as to what claims will be recognized under the ATS and specifically how environmental claims should be treated by courts.

A. Environmental Claims

Applying the *Sosa* standard to international environmental law norms it seems clear that they do not yet pass the test of universal recognition comparable to 18th century norms; for now they cannot support an environmental ATS claim under the “law of nations” prong.¹¹⁴ Principles contained in declarations such as the Stockholm and Rio Declaration are not legally binding and their status and content as customary international law is in dispute. Among the soft law of declarations it is Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration that are most frequently

107. *Id.* at 1172.

108. *Id.*

109. *Sarei III*, 487 F.3d at 1196-1197, *en banc hearing granted*, 499 F. 3d 923 (9th Cir. 2007).

110. *Id.* at 1210. A different outcome would only have been possible if the invoked UNCLOS norms were part of *jus cogens*.

111. A detailed discussion of how plaintiffs could utilize this decision is provided by Mank, *supra* note 13, 1135-36.

112. See Bridgeman, *supra* note 41, at 2 (evaluating plaintiffs’ claims in *Sarei* as “viable”).

113. See Morris, *supra* note 35.

114. See also Mank, *supra* note 13, 1145; Boeving, *supra* note 37; Wu, *supra* note 71, at 494-95; Bridgeman, *supra* note 41, at 2.

granted the status of customary law. Laying out a state's right to exploit its own resources pursuant to its own environmental policies they only speak of states as duty bearers and not private actors, at the outset they do not cover corporate conduct. The same can be said for the proximity principle and the precautionary principle but—despite what the court found in *Beanal*—not so easily for the polluter pays principle which allocates the responsibility for bearing the cost of pollution to the “person responsible for causing the pollution.”¹¹⁵ It is noteworthy that international environmental law in general is much aware of the fact that damage to the environment is almost always caused by private actors.¹¹⁶ Yet in past cases plaintiffs in an environmental case did not face less difficulty in showing that it is indeed the defendant as a non-state actor that is bound by the alleged norms.

A range of treaties are being suggested as a basis for claims under the “Treaty of the United States” prong of the ATS, often in the expressed hope that for environmental claims treaties might prove to be more easily accepted by courts.¹¹⁷ Such treaties need to create binding obligations, clearly encompass conduct of private actors, and have been ratified by the United States (or else be self-executing¹¹⁸).¹¹⁹ They include the International Convention for the Prevention of Pollution from Ships (MAPROPOL) which limits the discharge of certain pollutants from ships.¹²⁰

B. Human Rights Claims

So far no human rights claims have been successfully litigated in an environmental ATS case. But with human rights norms being recognized as

115. See SANDS, *supra* note 58, at 279.

116. See Daniel Bodansky, Jutta Brunnée, & Ellen Hey, *International Environmental Law: Mapping the Field*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 6, *supra* note 28.

117. See, e.g., Lauren A. Mowery, *Earth Rights, Human Rights: Can International Environmental Human Rights Affect Corporate Accountability?*, 13 FORDHAM ENVTL. L.J. 343, 372 (2002).

118. See *supra* Part II.B. and Boeving, *supra* note 37, at 136-37.

119. Other treaties are clearly unfit to serve as a basis for an ATS claim. These include treaties that are merely aspirational in nature, such as the Convention on Wetlands of International Importance Especially as Waterfront Habitat, Feb. 2, 1971, *as amended* in 1982 and 1987), 996 U.N.T.S. 245, [Ramsar Convention], and the International Tropical Timber Agreement, done Jan. 27, 2006, available at http://untreaty.un.org/English/Opening_Signature/english_19_46.pdf. Other treaties not likely to give rise to an ATS claim are those whose subject matter is not expected to apply to an ATS case, because they are concerned with Antarctica, space and nuclear weapons. See Stephen L. Kass & Jean M. McCarroll, *After 'Sosa': Claims Under The Alien Tort Claims Act - Part I*, N.Y.L.J. Aug. 27, at 3.

120. See International Convention for the Prevention of Pollution from Ships, art. 1(b), done Nov. 2, 1973, 94 Stat. 2302, 1340 U.N.T.S.184, reprinted in 12 I.L.M. 1319, amended by Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, concluded February 17, 1978, 1340 U.N.T.S.61, reprinted in 17 I.L.M. 546. See also Boeving, *supra* note 37, at 137.

viable bases for ATS claims this approach to bringing environmental ATS claims has the most potential for success. Among human rights claims it is the civil and political rights such as the right to life that are most likely to pass the *Sosa* standard of universal recognition among nations. As seen in past environmental ATS cases, especially *Beanal* and *Flores*, courts are not yet inclined to recognize human rights claims based on second and third generation human rights.

V.
CONCLUSION

The quite limited number of environmental cases that have been decided by courts under the ATS does not yet form a clear picture. However, until environmental norms have gained the status required to become part of the “law of nations” it is both the usage of environmental treaties and human rights claims (in a situation where human rights abuses and environmental harm overlap) that might allow courts to address environmental harm in an ATS case.

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The Judicial Answer?

Treatment of the Political Question Doctrine in Alien Tort Claims

Amy Endicott*

I.

INTRODUCTION: “QUESTIONS, IN THEIR NATURE POLITICAL”¹

After *Sosa v. Alvarez-Machain*, the plaintiff who successfully asserts a claim under the Alien Tort Statute (ATS) may have reason to rejoice, but the struggle for adjudication does not end with the grant of jurisdiction.² The international scope of ATS claims leaves broadly pleaded complaints vulnerable to dismissal on “political question” grounds.³ The Supreme Court first articulated the political question doctrine in *Marbury v. Madison*, when it held that the constitutional separation of powers renders certain claims nonjusticiable because adjudicating those claims would encroach on the powers of the political branches.⁴ The ATS, as a jurisdictional vehicle for asserting violations of the law of nations, often necessitates this political question analysis.⁵ Realizing the

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1. *Marbury v. Madison*, 5 U.S. 137, 170 (1803).

2. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724, 732 n.21 (2004) (limiting the range of causes of action available under the ATS and cautioning that any cause of action is still subject to the need for “deference to the executive.”).

3. *See* *Alperin v. Vatican Bank*, 410 F.3d 532, 560 (9th Cir. 2005) (explaining that the ability to adjudicate claims depends on the context in which they are presented).

4. *Id.* This conflict became known as a “political question” and is one of several traditional justiciability doctrines. *See* *U.S. v. Jones*, 137 U.S. 202, 212 (1890) (referring to the power of the executive to recognize another government as a political question). The other traditional justiciability doctrines include advisory opinions, mootness, standing and ripeness, which are outside the scope of this paper. *See* 13B CHARLES WRIGHT, ET AL., *FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS*. § 3531.12 (3d ed. 2009).

5. *See* *Kadic v. Karadzic*, 70 F.3d 232, 248-49 (2d Cir. 1995) (acknowledging that ATS cases naturally “pose special questions concerning the judiciary’s proper role when adjudication might have implications in the conduct of this nation’s foreign relations” and may “implicate sensitive

potential for these conflicts in ATS litigation, the Supreme Court, in *Sosa*, warned that “attempts by federal courts to craft remedies for the violation of new norms of international law . . . should be undertaken, if at all, with great caution.”⁶

The cautious approach urged by *Sosa*⁷ has led the lower courts to meticulously scrutinize political questions in ATS claims.⁸ Yet, after having done their due diligence, courts have continued to find ATS claims justiciable in the majority of cases.⁹ Recent case law reveals that a sense of constitutional duty has driven the development of this new post-*Sosa* norm of justiciability.¹⁰ This judicial persistence in hearing ATS claims renders the role of the political question doctrine unclear. This uncertainty has reignited the separation of powers debate that initially gave rise to the political question doctrine. While some scholars advocate an increased need for judicial deference in light of the expanding scope of the law of nations,¹¹ others insist that systematic dismissal of ATS claims on political question grounds will create ambiguous precedent and harm the reputation of the American judiciary abroad.¹² With these considerations in mind, this Article will focus on the role of the political question doctrine in ATS cases and will examine the separation of powers debate they have reignited.

II.

MARBURY TO THE MODERN DAY: AN OVERVIEW OF THE POLITICAL QUESTION DOCTRINE

The political question doctrine represents a judicial effort to ensure courts do not hamper the functioning of the political branches. As a procedural mechanism, the doctrine mandates dismissal of a claim if adjudication revolves around “policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”¹³

matters of diplomacy”).

6. *Sosa*, 542 U.S. at 728.

7. *Id.* at 702, 725.

8. See *Alperin*, 410 F.3d at 545; *Al Shimari v. CACI Premier Technology, Inc.*, 657 F. Supp. 2d 700 (E.D.Va 2009). Note: the *Sosa* opinion lists four other grounds for caution but this Article focuses on the need for “case specific deference.” *Sosa*, 542 U.S. at 725-28.

9. For example, of ten cases since *Sosa* raising political question claims, seven have been held justiciable.

10. See, e.g., *Alperin*, 410 F.3d at 547.

11. See Lucien J. Dhooge, *The Political Question Doctrine and Corporate Complicity in Extraordinary Rendition*, 21 TEMP. INT’L & COMP. L. J. 311 (2007).

12. Jeffrey Rabkin, *Universal Justice: The Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2147 (1995).

13. *Japan Whaling Ass’n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986); see FED. R. CIV. PRO. 12(h)(3)(providing the procedural mechanism for dismissal).

Jurisprudentially, the doctrine seeks to preserve the separation of powers between the judiciary and the “political branches” of the government articulated in the Constitution.¹⁴

In the international context of foreign affairs, however, a traditional textual analysis of the Constitution proves less instructive to courts because the executive branch routinely exercises powers not enumerated in the text of the Constitution.¹⁵ Some scholars classify these non-textual powers as “plenary.”¹⁶ They maintain that plenary powers can be derived from the Constitution by extrapolating from the broad language of the enumerated powers and the Article II vesting clause.¹⁷ An alternative theory, following the Supreme Court reasoning in *United States v. Curtiss-Wright Export Corporation*, suggests that these powers are not implied but actually extra-constitutional.¹⁸ This view holds that a court conducting a political question inquiry at the international level may take into account powers that arise from traditional notions of sovereignty, rather than treating the Constitution as the sole source of authority for government action.¹⁹

Ultimately, both theories validate the exercise of powers beyond those enumerated in the Constitution. However, the plenary powers insistence on an implied constitutional grant of authority stemming from a textual link to the Constitution renders it difficult to understand elements of the political question analysis that bear no direct relation to the text.²⁰ The extra-constitutional theory offers a more expansive rationale for recognizing non-enumerated powers and acknowledges the influence of the origins of that rationale on the political question analysis. Because understanding that historical link is essential to understanding political question dismissals for ATS claims, this Article will employ the extra-constitutional theory to examine the genealogy of the political

14. *Baker v. Carr*, 369 U.S. 186, 216 (1962; *see* U.S. CONST. art. II, §§ 2-3, art III, § 2 (delineating the powers of the executive and judiciary branches).

15. *See* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-16 (1936) (“The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.”); RONALD ROTUNDA & JOHN NOWAK, 1 TREATISE ON CONST. L. § 6.1(a) (4th ed. 2010).

16. ROTUNDA AND NOWAK, *supra* note 15, §6.1(b)-(d).

17. *Id.* §6.1(b)-(d); H. JEFFERSON POWELL, THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION 44-45 (2002); *see* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (articulating but not applying the theory of plenary powers implied from Article II).

18. *See* *Curtiss-Wright*, 299 U.S. at 315-16, 319.

19. *Id.*

20. Of the six factors in the test for political question established by *Baker* only the first factor directly references the Constitution as a guideline for determining whether adjudication violates the separation of powers. *See Baker*, 692 U.S. at 217. As explained later, few of the ATS cases dealing with political question dismiss a case solely on the basis of this first factor. Therefore, to understand what drives the political question analysis requires looking beyond constitutionally enumerated powers.

question doctrine.

A. The Separation of Powers and the Authority of Sovereignty

The extra-constitutional view recognizes that the Constitution plays a different role in international law than it does domestically. In domestic law, the Constitution *prescribes* the powers of government and authorizes federal action. Nonetheless, “[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution . . . is categorically true only in respect of our internal affairs.”²¹ Internationally, the Constitution acts as a law within the law of nations for the United States rather than as the only original source of law.²² In this role, the Constitution *proscribes* the sovereign rights of the United States reified by the law of nations. Therefore, for a court to successfully analyze separation of powers in an international case, it must examine the Constitution as a limit on the authority of sovereignty rather than as the sole source of that authority.

One way the Constitution imposes this limit on the authority of sovereignty is by granting courts the power of judicial review.²³ Specifically, Article III of the Constitution gives courts the power to adjudicate cases arising from international treaty obligations.²⁴ The ATS, legitimated by the constitutional authority of the judicial powers clause, supplements the courts’ power to interpret treaties by specifically granting courts the power to hear claims for violations of the law of nations brought by aliens.²⁵ Together, Article III and the ATS, curtail the broad sovereign powers authorized by the law of nations, by subjecting actions performed under color of that law to judicial scrutiny.

To justify limiting the sovereign rights of nations in this manner, the separation of powers requires any court examining a law of nations claim to engage in a two-part inquiry. First, courts must decide whether the Constitution specifically authorizes the action taken by the political branches.²⁶ If the action is constitutionally delegated to either the executive or the legislature, the court’s

21. *Curtiss-Wright*, 299 U.S. at 315-16.

22. See VED NANDA & DAVID PANSIUS, 3 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 14:4 (2010).

23. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 462 (1964) (White, J., dissenting) (noting that the broad scope of the constitutional judicial mandate to adjudicate claims forecloses the possibility of “exclusive jurisdiction of the executive” over foreign affairs); *Japan Whaling Ass’n*, 478 U.S. at 230 (holding that executive decisions in foreign affairs may still be subject to compliance with the judiciary’s interpretation of international law).

24. See U.S. CONST. art. III, cl. 2. This clause also includes the power to adjudicate claims between any state and a foreign state.

25. See 28 U.S.C. §1350; but see, M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute* 27 BERKELEY J. INT’L L. 316 (2009) (noting that ATS jurisdiction may be limited to foreign nationals resident in the United States).

26. *Goldwater v. Carter*, 444 U.S. 996, 998 (1979).

inquiry stops.²⁷ Any further judgment on the action would unjustly encroach on rights granted to the political branches.²⁸ However, if the Constitution does not apportion the power exercised to the political branches, the court must determine if customary international law does. If the rights exercised are customarily delegated to the political branches the court's final step is to ensure this categorization is consistent with the Constitution's allocation of powers. If the political branches' exercise of these powers does not conflict with the Constitution, the court's inquiry ends because actions conducted under this international authority are beyond the constitutional scope of judicial review: they are non-justiciable.²⁹

Nonetheless, when these customary powers of the political branches affect the rights of individuals, as in ATS claims, the exercise of these powers may still give rise to causes of action that trigger the courts' Constitutional obligation to adjudicate claims. Gauging the limits of judicial powers to resolve these cases is complicated in ATS claims, because international law, rather than the Constitution, defines both the political powers and the individual rights at issue.³⁰ In the absence of constitutional guidelines, the political question doctrine arose to set this limit and to preserve the balance of power between sovereign rights and judicial review.³¹

B. The Political Question in Case Law

One of the first cases to recognize the need for judicial self-restraint was *Marbury v. Madison* in 1803.³² In *Marbury*, the Supreme Court held that "questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."³³ The disjunctive syntax of this statement highlights the extra-constitutional aspect of the political

27. Arguably, under this logic any inquiry into a violation of the law of nations committed by the U.S. government would be estopped by the fact that the Constitution delegates the right to define and punish offenses against the law of nations to Congress. U.S. CONST. art. I, § 8., cl. 9. As discussed below, direct involvement of the U.S. government does normally yield dismissal on political question grounds; however this clause in the Constitution is never cited.

28. *Chicago & S. Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (holding that resolution of those issues would require "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry").

29. U.S. CONST. art. III (limiting the powers of the courts to interpretation of domestic law, treaties and the Constitution).

30. *Sosa*, 542 U.S. at 714.

31. Ironically, the doctrine is only given force by the discretion of the courts determining its applicability and thereby limiting themselves. Nonetheless, from their beginnings, the federal courts have heeded this guiding principle of compartmentalized powers and recognized that some cases are nonjusticiable. See *Atlee v. Laird*, 347 F.Supp. 689, 692 n.4 (D.C. Pa. 1972) *aff'd*, *Atlee v. Richardson*, 411 U.S. 911 (1973).

32. *Marbury*, 5 U.S. at 170.

33. *Id.*

question. The wording indicates that “questions, in their nature political” are not limited to those constitutionally “submitted to the executive”.³⁴ While this holding acknowledged the existence of non-justiciable questions, it left later courts to determine just what those questions were.³⁵

To aid in this determination, in *Baker v. Carr*, the Supreme Court attempted to provide a standard for measuring the impact of judicial review on sovereign rights and other extra-constitutional prerogatives.³⁶ To this end, the Court established a six-factor test for determining non-justiciability on political question grounds. These factors are:

- [1]) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
- [2]) a lack of judicially discoverable and manageable standards for resolving it; or
- [3]) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
- [4]) the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
- [5]) an unusual need for unquestioning adherence to a political decision already made; or
- [6]) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³⁷

The presence of any one of these factors may render a case non-justiciable.³⁸ Nonetheless, it is important to note that the phrasing of the *Baker* test operates on a presumption of justiciability. “Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for

34. *Id.*

35. Courts after *Marbury* applied the political question principle to render certain issues of foreign affairs categorically nonjusticiable. See *Alperin*, 410 F.3d at 545; *Baker*, 369 U.S. at 212, nn.35-37. For example, in 1918 the Supreme Court held that the executive’s decision to recognize another nation’s government lay beyond the scope of judicial review. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). The court justified this holding stating, “[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—‘the political’—departments of the government, and . . . is not subject to judicial inquiry or decision.” *Id.* at 302. Yet, the *Oetjen* court does not cite the text of this constitutional grant. Instead, the Court supports its determination by citing rules of “international law” and principles of law that have “always been.” *Id.* The Court notes that these rules are enshrined in precedent and cites an 1890 case, *United States v. Jones*, which directly attributes authority to the “law of nations, recognized by all civilized [sic] states.” *United States v. Jones*, 137 U.S. at 212 (cited in *Oetjen* for the principle that “who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges”). The opinion makes clear that the *actual* basis of its authority is the precedent of customary international law; though *Oetjen* is more frequently cited for its unsubstantiated reference to the Constitution as a basis for the case’s non-justiciability. The tendency to overlook *Oetjen*’s significant extra-constitutional reliance on international law highlights a problem in the application of the political question doctrine.

36. *Baker*, 369 U.S. at 217.

37. *Id.*

38. *Id.*

non-justiciability.”³⁹ This syntax takes the form of an imperative to adjudicate, which may be disobeyed *only* if one of these factors is present.

Baker’s emphasis on maintaining a norm of justiciability stems from the tension between the constitutionally defined tasks of the court and the common law genesis of the political question doctrine.⁴⁰ The case law explicitly notes that courts, constitutionally bound to hear “cases and controversies”⁴¹ may not arbitrarily refuse to hear a valid claim merely because it presents a thorny political issue.⁴² To avoid this result, the Supreme Court, in *Baker*, held that analysis of the political question mandates “the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.”⁴³

The *Baker* factors guide this inquiry by first addressing the scope of judicial power and then examining the extent of the authority of the political branches. The first factor mandates the textual analysis of the Constitution alluded to in *Marbury*.⁴⁴ The other *Baker* factors attempt to grapple with less definite divisions of powers and each factor presents concerns farther removed from the idea of a constitutional authorization.⁴⁵ While the first three factors explore the limits of the judicial review and competence, the last three factors focus more on the powers of the executive branch.

Factors four through six focus on the powers of the political branches and address situations where the exercise of judicial powers would infringe on sovereign rights in a manner unlicensed by the Constitution. In particular, these factors relate to the importance of the sovereign will as the single and enduring voice of the nation. The Supreme Court explained the importance of this idea stating, “[r]ulers come and go . . . but sovereignty survives. A political society

39. *Baker*, 369 U.S. at 217 (emphasis added).

40. See, U.S. CONST., art. III, cl. 2. (obligating courts to “hear cases and controversies”).

41. *Id.*

42. *Baker*, 369 U.S. at 217; see also *Alperin*, 410 F.3d at 538 (“The Constitution gives no explicit support to the theory that federal courts may properly decline to hear cases or decide particular issues merely because they involve political questions”); *Japan Whaling Ass’n*, 478 U.S. at 230.

43. *Baker*, 369 U.S. at 217.

44. See *id.* (requiring a determination as to whether the powers are “textually committed” to a political branch); compare *Marbury*, 5 U.S. at 170 (distinguishing powers which are, “by the Constitution submitted” to the political branches).

45. The second factor, “a lack of judicially discoverable and manageable standards,” establishes the impropriety of adjudicating a claim without authoritative legal standards. While it does not directly reference the Constitution, the second factor acknowledges that the constitutional character of the courts depends on foundation of judgment in principles of positive law. The third factor—“the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion”—sets the limits of judicial power by positing a situation in which there are no laws to guide the court’s decision. In this situation, the issue becomes non-justiciable, since any decision would be founded purely in policy rather than reasoned by law.

cannot endure without a supreme will somewhere.”⁴⁶ While the Constitution makes no explicit recognition of this necessity, the case law designates the executive branch as the keeper of that sovereign will. Thus, the last three *Baker* factors⁴⁷ aim at ensuring that the courts do not encroach on this power.⁴⁸

Taken as a whole, the factors create a discretionary framework that provides guidelines for analyzing issues of international law and sovereign rights and pose the option of dismissing such issues on political question grounds. By addressing first the limits on judicial powers and then the bounds of executive powers, the *Baker* factors engage in the separation-of-powers rationale espoused by the Constitution. This framework is particularly useful in ATS cases, where adjudication necessarily involves an analysis of the law of nations and therefore implicates many principles of international law and sovereign rights.

III.

A CAUTIONARY TALE: “CASE-SPECIFIC DEFERENCE” IN *SOSA V. ALVAREZ-MACHAIN*

The six-factor test established by *Baker* is all the more relevant in the ATS context because the Supreme Court has failed to provide concrete guidelines for determining if ATS claims conflict with executive powers of foreign policy. In *Sosa*, though it did not consider the political question doctrine, the Court addressed the issue of executive powers in foreign affairs by expounding the propriety of caution and restraint when the exercise of judicial review involved the assessment of foreign policy.⁴⁹ At the same time, the *Sosa* Court acknowledged that neither international law nor the Constitution categorically barred judicial review of international questions.⁵⁰ The court verified that the purpose of the ATS was to explicitly grant jurisdiction over these questions to federal courts.⁵¹ Despite recognizing the courts’ ability to hear these international claims, the *Sosa* Court, in *dicta*, urged caution in exercising that ability and, even then, recommended deference to the political branches subject to case-by-case analysis.⁵²

46. *Curtiss-Wright*, 299 U.S. at 316-17.

47. The last three factors are: the need to avoid expressing lack of the respect due coordinate branches of government or for unquestioning adherence to a prior political decision or to avoid possible embarrassment from multifarious pronouncements on one question. *Baker*, 369 U.S. at 217.

48. *Id.*

49. *Sosa*, 542 U.S. at 728.

50. *Id.* at 712, 714. Indeed, the Court explained that customary international law actually authorized judicial review of individual’s claims under the law of nations.

51. *Id.*

52. *Id.* at 733 n.21. In this regard, the *Sosa* opinion deviates from the strong presumption of adjudication favored in earlier political question cases.

In reaching this conclusion, the *Sosa* Court traced the history of the ATS to its roots in the law of nations.⁵³ While performing this regression, the Court bifurcated the law of nations into two “spheres”—one dedicated to the political branches and the other to the judiciary.⁵⁴ The two spheres were considered distinct in that the law of nations did not include a sphere for judicial determination of norms of conduct between states.⁵⁵ Yet, the opinion also relates that, in practice, this distinction broke down giving rise to a third set of cases in which the “rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships.”⁵⁶ ATS claims, by virtue of their requirement that the subject tort be “committed in violation of the law of nations” fall squarely and consistently into this set of cases.⁵⁷ In effect, the ATS codified an expanded scope of the judicial sphere by allowing judicial review of international norms in the context of claims by individuals.

The Court, in *Sosa*, was quick to limit this expansion of judicial power. Its opinion narrowed claims cognizable under the ATS to those traditionally recognized as violations of the laws of nations.⁵⁸ While the majority of the opinion is focused on establishing this line, footnote 21 to the opinion suggests establishing further limitation of judicial review through the judiciary’s exercise of judicial self-restraint.⁵⁹ In addition to suggesting an exhaustion requirement,⁶⁰ the court proposed, “a policy of case-specific deference to the political branches” as another possible limitation on judicial review of customary international law claims.⁶¹ While this language essentially restates the rationale of the political question doctrine in the context of ATS claims, it reverses the presumption favoring adjudication expressed in *Baker*.⁶²

Instead of couching dismissal on political question grounds as a last resort,

53. *Id.* at 714-15.

54. The Court distinguished these spheres by content, explaining that the political aspect of the law of nations was concerned with the formation and maintenance of norms of state behavior whereas the judicial aspect was concerned with the “more pedestrian” matters of individual conduct. The judicial sphere consisted of “a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor.” *Id.*

55. *Id.* at 714. (“This [political] aspect of the law of nations thus occupied the executive and legislative domains, *not* the judicial.”) (emphasis added). Such a prohibition on judicial determination of norms harkens back to the necessity for a “supreme” sovereign will. *See Curtiss-Wright*, 299 U.S. at 316-17.

56. *Sosa*, 542 U.S. at 715.

57. Indeed, the *Sosa* opinion posits that the purpose of the ATS was to ensure federal courts had jurisdiction over this type of claim, “admitting of a judicial remedy and at the same time threatening serious consequences in international affairs.” *Id.*

58. *Id.* at 712.

59. *Id.* at 733 n.21.

60. Regina Waugh, *Exhaustion of Remedies and the Alien Tort Claims Act*, 28 BERKELEY J. INT’L L. 555 (2010).

61. *Sosa*, 542 U.S. at 733 n.21.

62. *See Baker*, 369 U.S. at 214-17.

the Court in *Sosa* advised that, in ATS cases, “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”⁶³ The Court rationalized this switch by arguing that the potential for ATS cases to make international rules privately actionable could seriously impinge the discretion of political branches in managing foreign affairs.⁶⁴ From this logic in *Sosa*, a reduced role for federal courts in the realm of customary international law emerges, limited to the adjudication of individual claims asserting traditional and narrowly defined causes of action.⁶⁵ This limitation marks a more distinct separation of powers than that suggested by the *Baker* test and yet retains *Baker*’s discretionary dynamic. In short, *Sosa* demands a cautious case-by-case inquiry into the propriety of judicial review but falls short of mandating categorical deference to the political branches in international affairs.⁶⁶

IV.

ALL THINGS IN MODERATION: THE STATUS OF THE POLITICAL QUESTION

In the absence of a strict mandate of deference, however, courts have been reticent to relinquish their constitutional duties to adjudicate claims and the jurisdiction bestowed on them by the ATS.⁶⁷ In keeping with this concern, courts have rejected the *Sosa* indication that ATS claims, in deference to the executive, will more often than not require dismissal.⁶⁸ Instead, courts across the country employed “a surgical approach rather than a broad brush in benchmarking the *Baker* formulations against the individual claims.”⁶⁹ This approach pays heed to the *Sosa* dicta by ensuring that the political question issue is thoroughly analyzed on a case-by-case basis.

Nonetheless, though the courts are diligent in performing this analysis, they have curtailed both its depth and its application. A survey of nineteen ATS cases in which a defendant raised a political question, revealed that, after *Sosa*, courts dismissed over ten percent fewer cases on political question grounds.⁷⁰

63. *Sosa*, 542 U.S. at 733 n. 21.

64. *Id.* at 727.

65. *Id.* at 712.

66. Dhooge, *supra* note 11, at 339 (“*Sosa* represents the underlying complexity of ATS actions, including the need for courts to exercise caution so as not to intrude upon the province of the executive and legislative branches.”).

67. The Ninth Circuit opined, “in our system of separation of powers, we should not abdicate the court’s Article III responsibility—the resolution of ‘cases’ and ‘controversies’—in favor of the Executive Branch.” *Alperin*, 410 F.3d at 538.

68. See, e.g., *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 281 (S.D.N.Y. 2009) [hereinafter *South African*] (“footnote 21 [in *Sosa*] merely provides guidance concerning the need for deference with regard to foreign policy matters; it does not mandate summary dismissal.”).

69. *Alperin*, 410 F.3d at 547.

70. This survey was conducted through Westlaw by running a search string in the “all federal”

This low number of dismissals should not be surprising as the fact that ATS claims “arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question.”⁷¹ Yet, this statement contrasts sharply with the dicta in *Sosa* that seems to urge that deference, including political question analysis, is all the more fitting in these cases because of the international nature of ATS claims.⁷²

In practice, however, courts have found that the international nature of ATS claims limits the effectiveness of the political question analysis. The result is that while courts hearing ATS claims diligently undergo that analysis, as encouraged by *Sosa*, they adapt the traditional *Baker* method to account for their specific grant of jurisdiction to hear ATS claims. These adaptations have taken two forms. The Second Circuit advances the theory that the specific jurisdictional grant of the ATS obviates the need to engage in the first three factors of the *Baker* analysis, which address concerns of judicial powers and competencies of courts.⁷³ The crux of this argument is that the ATS both grants court jurisdiction to hear ATS claims and ensures judicial competence by providing a manageable standard that obviates the need for policy determinations.⁷⁴

In *Alperin v. Vatican Bank*, the Ninth Circuit rejected this simplification of the *Baker* test and instead embraced a context-dependent approach to the applicability of all the *Baker* factors. This approach examined both the type of claim presented and the immediacy of the impact of adjudication.⁷⁵ In applying the first three *Baker* factors, the court held that if certain claims presented in a case invoked recognized causes of action, the court could adjudicate those claims, regardless of whether other causes of action alleged in the case lay

database for cases containing the terms “political question” and “alien tort” in their syllabus description. The survey is current as of December 16, 2009.

71. *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991).

72. *Sosa*, 542 U.S. at 733 n.21.

73. In an exercise of the discretion granted by the political question doctrine and in recognition of the adjudicatory powers granted by §1350, the Second Circuit and several lower courts have scaled back the *Baker* factors in their political question analysis. See generally *Kadic*, 70 F.3d at 249; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 744, 797 (D.C. Cir. 1984) (Edwards, J., concurring); *South African*, 617 F.Supp.2d at 282; *Mujica v. Occidental Petroleum Corp.*, 381 F.Supp.2d 1164, 1193 (C.D. Cal. 2005) (“After all, in *Sosa*, the Supreme Court recently concluded that the ATS provided a substantive cause of action and set out the framework . . . for discerning cognizable theories under that statute.”).

74. See, e.g., *Kadic*, 70 F.3d at 243 (holding that “universally recognized norms of international law provide judicially discoverable and manageable standards” for adjudicating ATS suits and that these standards obviate any need to make “initial policy decisions reserved for nonjudicial discretion”). Building on this reasoning the court also eliminated the first factor explaining that the existence judicial standards “undermines the claim that such suits relate to matters that are constitutionally committed to another branch.” *Id.* While *Sosa* narrowed the set of norms recognized, this distinction does not prevent those norms from serving as “judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act.” *Id.*

75. See *Alperin*, 410 F.3d at 538.

beyond the scope of judicial competence.⁷⁶ In addressing the last three factors, the Ninth Circuit reasoned that conflict arose only if the impact of litigation on foreign policy would be immediate and direct.⁷⁷ These contextual distinctions represent another move away from blanket dismissal of ATS claims.

Indeed, the context-driven Ninth Circuit approach, focusing the political question analysis on the specificity and immediacy of a claim as alleged, has gained a following. Notably, courts have relied on contextual distinctions to deny dismissal when claims are brought against corporations.⁷⁸ These courts have emphasized, that claims against government contractors were justiciable because “[d]efendants [were] private corporations and civil tort claims against private actors for damages do not interfere with the separation of powers between the executive branch and the judiciary.”⁷⁹ This holding echoes the *Alperin* logic of distinguishing the causes of action by their elements rather than their overtones and adjudicating all claims that fall within traditional judicial competence, even if those claims arise in a politically charged context.

This approach has transformed the case-by-case analysis urged by *Baker* into a claim-by-claim inquiry. In doing so, courts have managed to follow both the *Baker* test and the *Sosa* suggestion while avoiding a categorical dismissal of ATS claims. Yet, in many of these cases, compliance with *Sosa* has been simplified by the silence of the executive branch. This silence diminishes the possibility for expressing deference to the executive branch’s views as urged by the Court in *Sosa*. Both the Ninth and Second Circuits note that when the executive branch discards silence in favor of active admonishment of judicial review the political question analysis becomes more complicated.

Indeed, almost every court to engage in a political question analysis of an ATS case has admitted that a Statement of Interest (SOI) by the executive is

76. In *Alperin*, plaintiffs presented claims both for conversion of property and for war crimes. *Id.* at 551, 555. The court reasoned that the political nature of the war crimes claims did not negate its competency to hear the property claims and accordingly dismissed only those claims for atrocities of war. *Id.*

77. The court held that given the absence of policies already in place and the lack of current objections by the executive the claims could not be said to violate the fourth or fifth *Baker* factors. *Id.* at 555-56 (noting that the defendant’s government had last lodged objections to the claim with the State Department four years previously and the State Department had not issued any expression of interest).

78. See, e.g., *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 15 (D.D.C. 2005); *Al Shimari*, 657 F. Supp. 2d at 709, 724-25; *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1236 (11th Cir. 2004) (“Federal courts adjudicate claims against foreign corporations every day and can consider the nation’s foreign policy interests and international comity concerns in their decisions.”); but see *Industria Panificadora, S.A. v. U.S.*, 763 F. Supp. 1154, 1160-61 (D.D.C. 1991), *aff’d*, 957 F.2d 886, (D.C. Cir. 1992), *cert. denied*, 506 U.S. 908 (1992) (“[W]hile plaintiffs carefully worded their amended complaint to suggest a basis in traditional tort concepts of due care and negligence, their allegations implicate broader political questions that encompass U.S. foreign policy and military operations.”).

79. *Al Shimari*, 657 F. Supp. 2d at 704.

entitled to consideration.⁸⁰ No court, however, has categorically found such an expression of executive views to be dispositive.⁸¹ Instead, the case law has begun to define various standards of deference depending on both the presence and presentation of an SOI. First, it is almost universally established that where the executive declines to comment courts are less inclined to dismiss a case.⁸² Second, courts have emphasized that the specificity and tone of the SOI affects its impact on the litigation.⁸³ Finally, courts generally limit any impact the SOI has to only the fourth through sixth factors of the *Baker* analysis.⁸⁴ Accordingly, courts adjudicating ATS claims normally consider any SOI presented but require a high standard of specificity and urgency in order for it to impact their political question analysis.⁸⁵

Despite the judicial reluctance to defer to SOIs, submissions by the executive have played a pivotal role in the dismissal of some cases on political question grounds. Cases that are dismissed under the *Baker* test normally involve issues in which the executive has had either direct involvement or has pronounced a policy that disfavored adjudication. This executive involvement normally falls within the category of a constitutionally mandated power. Therefore, the cases dismissed typically implicate the first *Baker* factor. Most frequently, cases that place wartime alliances and policies under judicial review without alleging liability of non-governmental actors end up dismissed on

80. *E.g., Alperin*, 410 F.3d at 556 (Had the State Department expressed a view, that fact would certainly weigh in evaluating this fourth *Baker* formulation.).

81. *See Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 23 (D.D.C. 2005), *appeal dismissed*, 473 F.3d 345 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 2931 (2008) (“Courts do not abdicate their Article III responsibilities on executive command.”); *see also Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1207 (9th Cir. 2007) (“We are mindful of *Sosa’s* instruction to give ‘serious weight’ to the views of the executive, but we cannot uphold the dismissal of this lawsuit solely on the basis of the SOI.”); *Kadic*, 70 F.3d at 250 (“even an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication”).

82. *See Sarei*, 487 F.3d at 1206 (“Without the SOI, there would be little reason to dismiss this case on political question grounds, and therefore . . . the SOI must carry the primary burden of establishing a political question.”); *see also Kadic*, 70 F.3d at 250.

83. *See, e.g., South African*, 617 F.Supp.2d at 282 (citing *City of New York v. Permanent Mission of India to the United States*, 446 F.3d 365, 376 n.17 (2d Cir. 2006) (“The Executive Branch’s views will not prevail if they are ‘presented in a largely vague and speculative manner’ or if the Executive’s concerns are not ‘severe enough or raised with the level of specificity required to justify . . . a dismissal on foreign policy grounds.’”); *see also, Sarei*, 487 F.3d at 1208.

84. In the absence of an SOI one court has held that a statute, expressing a codified consensus reached among the executive and legislative branches of government, might serve a similar function and have an analogous effect on a court’s analysis of the last three *Baker* factors. *See Al Shimari*, 657 F. Supp. 2d at 713.

85. This limited application is predicated on *Baker’s* requirement that nonjusticiable questions be *inextricable* from the claim presented. *Baker* 369 U.S. at 217. The intractable nature of the issue must be conveyed in an SOI in order for the statement to be persuasive. *See, e.g., Sarei*, 487 F.3d at 1206-07, 1206 n.12 (dismissing an SOI by noting that, “[t]he State Department explicitly did *not* request that we dismiss this suit on political question grounds.”).

political question grounds.⁸⁶

An ongoing example of such wartime conflicts is claims against Israeli government actors brought by Palestinian nationals.⁸⁷ In *Matar v. Dichter*, the Eleventh Circuit dismissed plaintiff's claims for extrajudicial killing during a bombing carried out by defendant Israeli secret service on political question grounds.⁸⁸ The court held that because the Israeli policy "involved a response to terrorism in a uniquely volatile region," it could not ignore the impact of adjudication on "the Middle East's delicate diplomacy."⁸⁹ The court went on to remark that the status of Israel as an ally of the U.S. presented "unique foreign policy implications."⁹⁰

Similarly, in *Doe I v. State of Israel*, plaintiffs sought redress for a variety of violent torts committed by the Israeli government and its officials in coordination with the U.S. government.⁹¹ The D.C. district court dismissed the claim on political question grounds reasoning that the first *Baker* factor was "undeniably implicated."⁹² Adopting the contextual approach used in the Ninth Circuit, the court reasoned that the claims presented were not ordinary torts but "would require the Court to characterize the ongoing armed conflict in the West

86.

A plurality of the Supreme Court recently reaffirmed that the judicial branch 'accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide.

Alperin, 410 F. 3d at 559 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)); but see *Alperin*, 410 F.3d at 559 n.17 (We stress, however, that courts are not powerless to review the political branches' actions during wartime); see also *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (Fed. Cir. 2006) (dismissing a claim over U.S. support of the Pinochet government).

87. Dismissals are by no means limited to conflicts in the Middle East. Several Latin American cases indicate that, where adjudication of claims necessarily passes judgment on policies developed to further the executive branch's war time objectives, the claim will be barred because war powers are constitutionally delegated to the executive and because war calls for adherence to previous decisions. See, e.g., *Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (holding that "broad allegations of the claims . . . against the defendant organizations . . . which comprise the entire military and political opposition in Nicaragua, are non-justiciable); *Mujica*, 381 F. Supp. 2d at 1194 (holding that "the fourth *Baker* factor applies to the instant case because proceeding with the litigation would indicate a "lack of respect" for the Executive's preferred approach of handling the Santo Domingo bombing and relations with Colombia in general."); *Gonzalez-Vera*, 449 F.3d at 1264 (holding that actions taken to place and keep President Pinochet of Chile in power "were 'inextricably intertwined with the underlying' foreign policy decisions constitutionally committed to the political branches").

88. *Matar v. Dichter*, 500 F. Supp. 2d 284, 293 (S.D.N.Y. 2007), *aff'd*, *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009).

89. *Id.* at 295.

90. *Id.*

91. *Doe I v. State of Israel*, 400 F.Supp.2d 86, 97 (D.D.C. 2005).

92. *Id.* at 111-12. (noting the political nature of the conflict) ("It is hard to conceive of an issue more quintessentially political in nature than the ongoing Israeli-Palestinian conflict, which has raged on the world stage with devastation on both sides for decades.").

Bank as either ‘genocide,’ or ‘self-defense’ [to genocide]’.⁹³ The court concluded that such a ruling required a policy determination rather than a legal analysis.⁹⁴ These Israel-Palestine ATS cases, along with the handful of others that have been dismissed on political question grounds, demonstrate that, in exercising their discretion, courts have set a high bar for dismissal. This standard requires concerns on the level of ongoing armed conflict or a direct exercise of the executive’s constitutional powers to justify a political question dismissal. Clearly, these cases are exceptions to the norm of justiciability.

Though the *Baker* test lays out six factors for determining justiciability, courts have recently held that ATS claims are justiciable unless adjudication would conflict with the constitutional mandate of the executive or foreign policies in a time of war. Even these concerns are usually entertained only after an express statement by the executive branch. No matter the context, to be persuasive an SOI must relate specifically to the case at hand and be corroborated by other evidence.⁹⁵

In claims where the government does not submit an SOI, courts tend to focus on the first three *Baker* factors. In analyzing these factors, courts examine the temporal and claim-specific impact of adjudication. In doing so, they frequently treat the ATS as a constraint on the political question doctrine by noting that § 1350 expressly provides standards for adjudication and jurisdiction to the courts.⁹⁶ An examination of the cases that employ this carefully-framed analysis reveals reluctance among the judiciary to dismiss cases on political question grounds. In the absence of an immediate negative effect on clearly declared foreign policies, the courts frequently reiterate that not “every case or controversy which touches foreign relations lies beyond judicial cognizance.”⁹⁷

V.

THE DEBATE OVER THE ROLE OF THE POLITICAL QUESTION IN ATS CLAIMS

The uncertain status of the political question doctrine in the wake of *Sosa*’s suggestions of deference and caution has sparked new debate over the role of separation of powers in the international sphere. As the court noted in *Sosa*, hearing individual claims for violations of the law of nations is a quintessentially judicial task. This function, however, inevitably overlaps with the role of the

93. *Id.* (citing *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 260 (D.D.C. 2004)).

94. *Id.*

95. Interestingly, this evidence has begun to include statements by the nation where the alleged tort occurred. Courts have treated these foreign state-authored statements as tools for evaluating the weight of an SOI or have relegated discussion of foreign government statements to a segment of their opinion analyzing comity arguments. *See generally, South African*, 617 F. Supp. 2d at 277; *Lizarbe v. Rondon*, 642 F.Supp.2d 473, 483 (D.Md. 2009), *Sarei*, 487 F.3d at 1207 n.15.

96. *See, e.g., Kadic*, 70 F.3d at 243.

97. *Baker*, 369 U.S. at 211.

political branches to create and define the norms of international law, which give rise to causes of action for individuals' claims. The debate centers on the role of the judiciary in adjudicating law of nations claims, and the way in which such adjudication facilitates the participation of individual actors in shaping that law.

Proponents of increased executive oversight of judicial review in ATS claims emphasize that the creative role of the executive has expanded with the increased popularity of the treaty-making process.⁹⁸ They warn that adjudication of ATS claims allows individuals to preempt this process and effectively enables judicial policymaking.⁹⁹ Advocates of executive oversight emphasize that this policy-making can be particularly troublesome when it pertains to war-type activities such as rendition.¹⁰⁰ They conclude that the credibility of the treaty process and the security of the nation depend on the executive's ability to assert the political question as grounds for non-justiciability in ATS claims.¹⁰¹

On the other side of the debate, proponents of judicial review insist that the constitutional mandate to adjudicate claims requires at most *limited* application of the political question doctrine in ATS claims. They argue that the specific grant of the ATS, allowing courts to hear *individuals'* claims for violations of international law, supplements and reinforces the judiciary's Article III prerogative as it pertains to international law.¹⁰² Proponents of adjudication of ATS claims argue that the increased prominence of individual actors in international law necessitates and creates a greater role for the judiciary.¹⁰³ They argue that the judiciary's effectiveness in this role requires that it remain free of unwarranted constraints by the executive branch.¹⁰⁴ They emphasize that this helps ensure that decisions to adjudicate create a consistent and reliable

98. See, e.g., John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and The Original Understanding*, 99 COLUM. L. REV. 1955, 1972-74 (1999) (discussing treaty power generally but also citing to its implication in an ATS case); see also John C. Yoo, *Response Essay: Rejoinder: Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305 (2002); contra Michael Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 896 (2003-2004).

99. See, e.g., Lisa Rudikoff Price Note, *Banishing the Specter of Judicial Foreign Policymaking: A Competence-Based Approach to the Political Question Doctrine*, 38 N.Y.U. J. INT'L L. & POL. 323 (2006).

100. Dhooge, *supra* note 11.

101. *Id.* at 342.

102. Harold Hongju Koh, *Keynote Address: The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1, 12 (2004).

103. Andrew M. Scoble, Comment, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CALIF. L. REV. 127, 132 (1986).

104. Graham O'Donoghue, *Precatory Executive and Permissible Judicial Responses in the Context of Holocaust-Claims Litigation*, 106 COLUM. L. REV. 1119, 1124 (2006).

body of case law.¹⁰⁵ Advocates for more frequent adjudication of ATS claims argue that such a body of case law is essential to national security by demonstrating the ramifications of violating the law of nations and by representing the United States as a country that opposes such violations.¹⁰⁶

VI.

CONCLUSION: DOES THE JUDICIAL ANSWER BEG THE QUESTION?

Recent ATS case law demonstrates that courts have embraced the pro-judiciary side of the political question debate. In part, this willingness to adjudicate ATS claims may be viewed as a judicial endorsement of the role of individuals in shaping international law. Less optimistically, the refusal to dismiss ATS claims may merely stem from a historical judicial reluctance to bend to an overzealous executive. This latter view draws support from the courts repeated invocations of their constitutional obligation to adjudicate controversies and their insistence that the ATS verifies the extension of that duty to individuals' claims for violations of the law of nations.

Opponents of this pro-adjudication view argue for the revival of a statist approach to international law and point to a modern trend toward treaty making to justify their view.¹⁰⁷ While this argument fails to overcome the judiciary's interpretation of the ATS as empowering federal courts to adjudicate claims arising from codified norms, it may carry more weight in areas where norms are not expressly codified.¹⁰⁸ In areas of foreign affairs, such as the war on terror or the war on drugs, the judiciary may truly lack standards for adjudicating cases and, in these instances, courts have reasoned that proceeding without discernible rules could seriously threaten foreign relations.¹⁰⁹

Ultimately, the difficulty in defining the role of the political question doctrine in ATS claims stems from the statute's extra-constitutional reach.¹¹⁰ In ATS claims, where conflicts are international, constitutional constraints become marginalized and the manifestation of the separation of powers paradigm

105. *See id.*; *see also* Rabkin, *supra* note 12, at 2121-22.

106. Rabkin, *supra* note 12, at 2147; *see also* Scoble, *supra* note 103, at 185.

107. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, Introductory Note (1987) ("In our day, treaties have become the principal vehicle for making law for the international system; more and more of established customary law is being codified by general agreements"). In fact, the increased number of treaties may well serve as an indication that international codification of customary international law norms has become a norm itself.

108. This is especially true in light of the *Sosa* decision limiting adjudication of ATS claims to cases arising in response to violations of well-established rules of international law. *See Sosa*, 542 U.S. at 721.

109. *See, e.g., Mujica*, 381 F. Supp. 2d at 1183 (dismissing a case on political question grounds where adjudication would have required an assessment of the U.S. military policy towards the war on drugs).

110. Scoble, *supra* note 103, at 183.

becomes amorphous. The discretionary nature of the political question provides the judiciary the means to reshape the paradigm's dividing lines. Yet this ability seems to jeopardize the balance of powers even as it seeks to establish that equilibrium.¹¹¹ Ironically, any requirement of categorical deference to the executive with regard to ATS matters would upset that equilibrium and violate of the separation of powers by constituting an executive intrusion into the judicial sphere.¹¹² As a result, the ultimate decision to dismiss a case remains within the discretion of the judiciary.¹¹³

While *Sosa* sought to limit the exercise of this discretion to ATS cases involving traditionally recognized causes of action, this restriction fell short of clearly separating judicial powers from those of the political branches. Though *Sosa* prohibits courts from creating new norms beyond those "traditionally recognized," it does not curtail the courts' power to define the scope of those permissible norms. Yet, under the political question doctrine even the act of definition could raise a non-justiciable question.¹¹⁴ Courts have yet to address this issue, perhaps because to do so would question the viability of judicial self-restraint and threaten to render the judicial answer just another political question.

111. Theoretically, a narrow reading of the *Baker* factors could allow courts to constrain the executive powers in foreign affairs to near constitutional levels.

112. Unless, of course, the political branches amended the ATS. Though this has yet to happen, judicial consideration of SOIs demonstrates that the executive branch is not powerless to assert its own theories on the judiciary's role.

113. See *Sarei*, 487 F.3d at 1227.

114. If an ATS case were to raise a violation not explicitly covered by a treaty, such as extraordinary rendition, a court hearing the claim would have to decide if that tort fell within one of the recognized norms. Yet this decision itself would theoretically constitute a political question, since the judiciary rather than the executive would be defining the scope of an international norm. The act of definition would require a policy determination by the court and so, under the third *Baker* factor, it would fall beyond the scope of the judiciary's powers.

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Exhaustion of Remedies and the Alien Tort Statute

Regina Waugh*

I.

INTRODUCTION

The purpose of this Article is to explore the concept of exhaustion of remedies in the context of the Alien Tort Statute (ATS). While there is no explicit mention of exhaustion in the ATS, the concept has appeared repeatedly throughout ATS jurisprudence and remains a subject of interest for courts wrestling with the statute.

The Article begins with a brief exploration of exhaustion of remedies in both the international and domestic contexts. Part III considers Supreme Court jurisprudence in this area, with special attention to *Sosa v. Alvarez-Machain*, the Court's first major comment on the ATS and the only Supreme Court case to consider exhaustion in the ATS context specifically. Part IV addresses the intersection between the ATS and two other statutes, the Torture Victim Protection Act (TVPA) and the Federal Tort Claims Act (FTCA), both of which have explicit exhaustion requirements. Part V provides an overview of exhaustion jurisprudence in the district and circuit courts. Finally, I conclude with an examination of the consequences of the possible exhaustion requirements for ATS claims.

II.

WHAT IS EXHAUSTION OF REMEDIES?

Exhaustion of remedies in the United States is principally discussed in the context of administrative remedies. The doctrine provides that "if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available."¹ Like the

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standing doctrine, the exhaustion requirement serves to restrict which disputes will be adjudicated in court. Unlike standing, the basis for the exhaustion of remedies doctrine is not found in the Constitution. Rather, the typical policy rationale for the exhaustion doctrine is efficiency—it conserves the resources of the courts, permits expert agencies to adjudicate the disputes that arise from their decision-making processes, and provides the reviewing court with a more complete record on which to base its decision. In the domestic context, exhaustion of remedies can also refer to the requirement that a petitioner exhaust their remedies in state court prior to bringing their claim in federal court.²

Exhaustion of remedies in international law requires that a claimant seek relief first in the forum where the harm occurred.³ There are numerous rationales for this requirement. They include the notion that “the citizen going abroad is presumed to take into account the means furnished by local law for the redress of wrongs.”⁴ The exhaustion requirement is also supported by the principle that national courts and administrative organs should be granted deference by foreign states.⁵ Finally, exhaustion allows the host State a sufficient opportunity to remedy the injury.⁶ The United States Congress has also noted that allowing a State to remedy a violation that took place within its borders encourages the development of “meaningful remedies in other countries.”⁷ Exhaustion of local remedies under international law has generally, however, been found to include an exception for those cases where seeking relief under local remedies would be futile or impossible.⁸

Various human rights instruments also incorporate an exhaustion

1. BLACK'S LAW DICTIONARY 613-14 (7th ed. 1999).

2. The classic example of this type of exhaustion is the requirement that a state prisoner seeking habeas relief in federal court first exhaust all of the available state court remedies. *See, e.g., Darr v. Burford*, 339 U.S. 200 (1950).

3. *See, e.g.* EDWIN MONTEFIORE BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS* 817 (1915). *See also* PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 104 (1958); Theodor Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, 35 *BRIT. Y.B. INT'L L.* 83, 83 (1959).

4. BORCHARD, *supra* note 3, at 817.

5. *See, e.g.* CHITTHARANJAN FELIX AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW* 200 (2d ed., 2004) (“Respect for the sovereignty of the respondent or host State constitutes the foundation of the rule that local remedies must be exhausted.”).

6. *See* David R. Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 *AM. J. INT'L L.* 389, 391 (1964); *Interhandel (Switz. v. U.S.)*, 1959 *I.C.J.* 6, 27 (Mar. 1959) (“[I]t has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.”).

7. H.R. REP. NO. 102-367, at 1, 3-5 (1991).

8. *See, e.g.*, AMERASINGHE, *supra* note 5; *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 713 (1987) (“Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged.”).

requirement, generally following the international law standard. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides that “[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law”⁹ Similarly, Article 41 of the American Convention on Human Rights requires that “the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.”¹⁰ Finally, the International Covenant on Civil and Political Rights refers to exhaustion of local remedies “in conformity with the generally recognized principles of international law.”¹¹ The futility exception to the exhaustion requirement is particularly valuable in the human rights context, where litigants may face violent retaliation or even death for attempting to seek redress for their harms in the local courts.

III.

THE SUPREME COURT AND THE ATS

The ATS, codified at 28 USC § 1350, provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹² There is little legislative history to indicate the original purpose of the ATS and the courts have been similarly silent on the subject; despite the fact that the ATS has been part of American law since 1789,¹³ there was almost no judicial action on the Act prior to 1980.¹⁴ Although ATS jurisprudence grew exponentially following the Second Circuit decision in *Filartiga v. Pena-Irela*, Supreme Court jurisprudence on the ATS is scant. A search turns up three cases, only one of which, *Sosa v. Alvarez-Machain (Sosa)*, directly addresses the ATS. *Sosa* is also the only Supreme Court case on the ATS to even mention exhaustion.¹⁵

In a paragraph summarizing the legal conclusion that any international norm must be sufficiently definite in order to constitute a cause of action under the ATS, and encouraging judicial constraint in identifying torts that would be

9. The European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 35(1), Nov. 4, 1950, 213 U.N.T.S. 221.

10. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

11. International Covenant on Civil and Political Rights, art. 41 (1)(c), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

12. 28 USC § 1350.

13. The ATS was part of the Judiciary Act of 1789, 1 Stat. 73, § 9.

14. According to Kenneth C. Randall, the ATS was used only twenty-one times during this period and used as a basis of jurisdiction only twice. Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT’L L. & POL. 1, 4 n.15 (1985). The two cases using the ATS to establish jurisdiction are: *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961); *Bolchos v. Darrel*, 3 F. Cas. 810, 1 Bee 74 (D. S.C. 1795).

15. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

actionable under the ATS, the Court included the following footnote:

This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law. . . the European Commission argues as amicus curiae that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals.... We would certainly consider this requirement in an appropriate case.¹⁶

A look at the European Commission's amicus brief is instructive. The primary thesis of the brief, which was not written on behalf of either party to the case, is that because the United States is adopting substantive international law in construing which claims are actionable under the ATS, courts should also adopt the jurisdictional constraints found in international law. Specifically, the European Commission urges the Court to adopt the international law doctrine of exhaustion of remedies, which, as noted above, requires that the judicial remedies in the place where the harm occurred be exhausted before the case is heard by an international tribunal or court.¹⁷

The Commission cites the "Charming Betsy" canon in U.S. statutory interpretation, which requires that a statute be construed so as to not interfere with international law.¹⁸ The Commission also notes the principle of comity underlying international exhaustion requirement: in order to "preserve harmonious international relations, States must respect the limits imposed by international law on the authority of any individual State to apply its laws beyond its own territory."¹⁹ Finally, the Commission refers to the limits underpinning universal civil jurisdiction, the principle that there are some violations of law so fundamental that they can be adjudicated by any state, as evidence that the international exhaustion of remedies doctrine should be adopted in ATS cases.²⁰ The Commission notes that limits on universal civil jurisdiction require that a State exercise universal civil jurisdiction "only when the claimant would face a denial of justice in any State that could exercise jurisdiction on a traditional basis, such as territory or nationality."²¹ In short,

16. *Id.* at 733, n.21 (internal citations omitted).

17. Brief for European Commission as Amicus Curiae in Support of Neither Party at 19, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339).

18. *Id.* at 3. The canon referenced by the Commission refers to the case *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), in which the Court concluded: "It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."

19. Brief for the European Commission, *supra* note 17, at 2.

20. The Commission does note that both jurists and academics are divided over the existence and scope of universal civil jurisdiction. *Id.* at 19.

21. *Id.* at 5. The Commission later cites the TVPA as "a prime example" of an approach to universal civil jurisdiction that favors "the pursuit of remedies in States that may regulate the

the Commission argues that action by an international court should only be taken when there is no domestic remedy available, a proposition that cannot be determined without an attempt to exhaust those remedies.

The referenced footnote is the only mention in *Sosa* of exhaustion of remedies in the ATS context. Interestingly, the Court did not provide any additional information of what type of case might be an “appropriate” one in which to require exhaustion of judicial remedies. Given its cryptic nature, it is not surprising that this brief reference has been a point of analysis in the ATS jurisprudence in the lower courts, discussed more expansively in Part V, *infra*.

I turn now to an exploration of the intersection between the ATS, the Torture Victim Protection Act (TVPA) and the Federal Tort Claims Act (FTCA), and introduce some of the themes found in lower court ATS jurisprudence.

IV. THE ATS, TVPA, AND FTCA

The lower courts have been much more active than the Supreme Court in ATS jurisprudence generally, and the exhaustion issue particularly. In the majority of ATS cases in which district and circuit courts have considered exhaustion, the court addressed exhaustion in the context of one of two statutes: the Torture Victim Protection Act (TVPA) and the Federal Tort Claims Act (FTCA). Therefore, a discussion of exhaustion under the ATS necessarily requires an analysis of the relationship between these statutes.

A. *Interaction of the ATS and TVPA*²²

As will become apparent from the review of ATS case law in the lower courts found in Section IV, claims under the ATS and the TVPA often appear in the same lawsuit. The Torture Victim Protection Act of 1991, which was codified as a note to the ATS, provides:

An individual who, under actual or apparent authority, or color of law, of any foreign nation— (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.²³

The TVPA goes on to add, “[a] court shall decline to hear a claim under

offensive conduct on traditional bases of jurisdiction.” *Id.* at 23.

22. See Ekaterina Apostolova, *The Relationship between the Alien Tort Statute and the Torture Victim Protection Act*, 28 BERKELEY J. INT’L L. 640 (2010), for a thorough treatment of the ATS and TVPA relationship.

23. Torture Victim Protection Act of 1991 (TVPA), Pub.L. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)).

this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.”²⁴

The courts have fleshed out the exhaustion requirement, relying heavily on the legislative history of the TVPA, which is much more extensive than that of the ATS, and on the treatment of exhaustion under domestic and international law. Under international law, exhaustion of remedies is an affirmative defense.²⁵ Once the defense has demonstrated that there are remedies available, the burden is on the plaintiff to demonstrate why those remedies are futile, ineffective, or otherwise unavailable.²⁶

In *Wiwa v. Royal Dutch Petroleum Co.*, the court cited the Senate Report’s discussion of exhaustion of remedies under the TVPA for the proposition that the burden of proof in exhaustion cases ultimately lies with the defense:

[T]he committee recognizes that in most instances the initiation of litigation under this legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred. The committee believes that courts should approach cases brought under the proposed legislation with this assumption.... Once the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile. The ultimate burden of proof and persuasion on the issue of exhaustion of remedies, however, lies with the defendant.²⁷

The TVPA has impacted ATS case law regarding exhaustion in two major ways. In most ATS cases in which exhaustion is mentioned, it is mentioned because claims are also brought under the TVPA.²⁸ In these cases, the court only considers exhaustion in the context of the TVPA. In other cases, the courts have substituted the TVPA, including its exhaustion requirement, for ATS claims related to torture and extrajudicial killing.²⁹ As discussed further below, and indicated by the TVPA’s legislative history, in many TVPA cases the court has found that plaintiffs’ claims are exempted from the exhaustion requirement on futility grounds.

Because the role of exhaustion in the ATS remains unclear, and because it seems likely that the TVPA will continue to play a role in how exhaustion is treated under the ATS, it is instructive to review how the courts have considered the various elements of the TVPA exhaustion requirement.³⁰ These elements

24. *Id.* § 2(b).

25. S. REP. NO. 102-249, at 9-10 (1991).

26. AMERASINGHE, *supra* note 5, at 166-71, 187-207.

27. *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

28. *See, e.g., id.*; *Chiminya Tachiona v. Mugabe*, 216 F. Supp. 2d 262 (S.D.N.Y. 2002); *Lizarbe v. Rondon*, 2009 WL 2487083 (D. Md. Aug. 12, 2009); *Chavez v. Carranza*, 407 F. Supp. 2d 925 (W.D. Tenn. 2004); *Jean v. Dorelian*, 431 F.3d 776 (11th Cir. 2005).

29. *See, e.g., Enahoro v. Abubakar*, 408 F.3d 877, 879 (7th Cir. 2005); *Ruiz v. Martinez*, 2007 WL 1857185 (W.D. Tex. May 17, 2007)

30. The following cases are those in which the court has considered both ATS and TVPA

include what it means to exhaust remedies under the TVPA, the extent of the defendant's initial burden, and the circumstances under which the court has found attempts to exhaust local remedies to be futile.

The content of the TVPA's exhaustion requirement is not entirely clear. In *Ruiz v. Martinez*, for example, the court dismissed plaintiff's ATS claims (characterized as TVPA claims) for failure to exhaust local remedies.³¹ The court found the filing of "numerous grievances" against United States and Mexican officials to be insufficient, and concluded that the federal court would lack jurisdiction until "Ruiz exhausts the 'adequate and available remedies' of Mexico."³² The court did not provide additional detail as to what those adequate and available remedies were.

As noted above, exhaustion of remedies under the TVPA is considered an affirmative defense, and, therefore, the defendant bears the initial burden of demonstrating available local remedies that plaintiff has failed to exhaust. That initial burden has proven to be a difficult hurdle for many TVPA defendants to clear.³³ Some courts have found that alternative dispute resolution mechanisms, such as the Oputa Commission in Nigeria, designed to investigate serious human rights abuses, are insufficient alternative forums because they are not designed to provide remedies.³⁴ For example, in *Jean v. Dorelien*, the Eleventh Circuit rejected defendant's suggestion that because plaintiffs had successfully filed suit and won a judgment against defendant in Haiti in 1994, the Haitian courts remained an adequate forum in 2004, following a regime change which returned defendant's party to power.³⁵ However, in *Corrie v. Caterpillar, Inc.*, a case in which the mother of a peace activist killed by an Israeli bulldozer in the Occupied Territories sued the bulldozer's manufacturer, the court found that the Israeli courts "are generally considered to provide an adequate alternative forum for civil matters."³⁶

In many more cases, the courts have excused the exhaustion requirement on the grounds that attempts to exhaust local remedies would be futile.³⁷ Citing State Department reports, expert testimony and other evidence provided by

claims.

31. *Ruiz v. Martinez*, 2007 WL 1857185 (W.D. Tex May 17, 2007).

32. *Id.* at *6.

33. *See, e.g.*, *Sinaltrainal v. Coca Cola*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003); *Barrueto v. Fernandez Larios*, 291 F. Supp. 2d 1360 (S.D. Fla. 2003); *Lizarbe v. Rondon*, 2009 WL 2487083 (D. Md. Aug. 12, 2009); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (S.D.N.Y. 2002); *Jean v. Dorelian*, 431 F.3d 776, 782 (11th Cir. 2005).

34. *Wiwa*, 2002 WL 319887, at *18.

35. *Jean*, 431 at 783 (11th Cir. 2005).

36. *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005) *aff'd*, *Corrie v. Caterpillar, Inc.*, 2007 WL 2694701 (9th Cir. 2007).

37. In some cases where the court has found that defendant failed to sustain their burden, the court has still determined that even if defendant had sustained their burden, any attempt by the plaintiff to exhaust those remedies would be futile.

plaintiffs, courts have found futility due to: corruption in the judiciary and/or the judiciary under the control of those who caused the harm,³⁸ risk of retaliation for even filing the claim,³⁹ and amnesty or other governmental mechanism that would prevent relief.⁴⁰

B. Interaction of the ATS and FTCA

The Federal Tort Claims Act (FTCA) has had a considerable impact on the viability of ATS claims. Under the FTCA, which is often raised in cases where the defendants are employees or entities of the United States government, plaintiffs are required to exhaust their administrative remedies before the federal court exercise subject matter jurisdiction.

Under the Federal Employees Liability Reform and Tort Compensation Act of 1988, otherwise known as the Westfall Act, the United States can choose to be substituted as a defendant in any action in which the original defendant is a government employee accused of committing a common law tort within the scope of their employment.⁴¹ Once the United States enters the case as a defendant it is protected by sovereign immunity.

The FTCA provides a limited waiver of the United States' sovereign immunity which, under the Westfall Act is "exclusive of any other civil action or proceeding for money damages" for any tort committed by a federal official or employee "while acting within the scope of his office or employment."⁴² Therefore, once the United States has entered into the case as defendant, plaintiffs' claims can no longer be brought under the ATS. In addition, in order to be eligible for the FTCA's limited waiver, a plaintiff is required to exhaust any available administrative remedies.⁴³

38. *Bowoto v. Chevron*, 557 F.Supp.2d 1080 (N.D. Cal. 2008); *Chiminya Tachiona v. Mugabe*, 216 F. Supp. 2d (S.D.N.Y. 2002); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

39. *Estate of Rodriguez v. Drummond Co., Inc.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004); *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005).

40. *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004); *Doe v. Saravia*, 348 F.Supp.2d 1112 (E.D. Cal. 2004); *In re XE Services Alien Tort Litigation*, 2009 WL 3415129 (E.D. Va. 2009); *Chavez v. Carranza*, 407 F. Supp. 2d 925 (W.D. Tenn. 2004).

41. The Westfall Act provides, in pertinent part: "Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant." 28 U.S.C. § 2679.

42. 28 U.S.C. § 2679(b)(1) (2006).

43. "An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate

Generally, courts have found that plaintiffs have not exhausted their administrative remedies at the time they bring their ATS suits.⁴⁴ Because plaintiffs are required to bring “a timely administrative claim before bringing suit against the government,” the failure to exhaust administrative remedies deprives the plaintiff of the chance to bring their ATS claims under the FTCA.⁴⁵ However, in *In re Iraq and Afghanistan Detainees Litigation*, the district court of D.C. found that “pursuant to the Westfall Act, the United States having been substituted as the sole defendant for those claims brought under the Alien Tort Statute, those claims shall be dismissed *without prejudice* for lack of subject matter jurisdiction pending the exhaustion of all administrative remedies,” indicating that plaintiffs in that case may have the opportunity to exhaust their administrative remedies and then bring their case under the FTCA.⁴⁶

There are two exceptions to the FTCA exclusivity requirement. Under 28 U.S.C. § 2679(b)(2), Westfall Act immunity does not apply to a civil action against a federal employee “(A) which is brought for a violation of the Constitution of the United States or (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.”⁴⁷ ATS plaintiffs have argued that the ATS is such a statute. The courts have uniformly rejected this argument on the ground that the ATS is a jurisdictional statute rather than one that confers substantive rights.⁴⁸

Federal agency and his claim shall have been finally denied by the agency in writing.” 28 U.S.C.A. § 2675(a) (2006).

44. See, e.g., *Rasul v. Myers*, 512 F.3d 644, 654 (D.C. Cir. 2008), *vacated on other grounds*, by *Rasul v. Myers*, 129 S.Ct. 763 (2008) (“plaintiffs have presumably been able to comply with the exhaustion requirements of FTCA—indeed, they do not argue otherwise. The record is devoid, however, of any suggestion that they complied with any of the procedures governing the filing of an administrative claim with the DoD or one of the military departments. Accordingly, the district court properly dismissed the three ATS claims for lack of subject matter jurisdiction.”); *Czertwytynski v. U.S.*, 514 F. Supp. 2d 592 (S.D.N.Y. 2007) (letters to the State Department did not constitute an administrative claim for the purposes of the FTCA).

45. *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 39 (D.D.C. 2006), *vacated on other grounds*, *Rasul v. Myers*, 129 S.Ct. 763 (2008); see also *Czertwytynski v. U.S.*, 514 F. Supp. 2d 592, 597 (S.D.N.Y. 2007).

46. *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 119 (D.D.C. 2007).

47. 28 U.S.C. § 2679(b)(2) (2006).

48. See, e.g., *Turkmen v. Ashcroft*, 2006 WL 1662663 *50 (E.D.N.Y. 2006). (“[The ATS] is analogous to 42 U.S.C. § 1983, which creates a cause of action against state actors for violations of federal rights committed under the color of state law. Section 1983 and the [ATS] do ‘not create substantive rights, but simply provide[] the procedural mechanism[s] through which a plaintiff may bring . . . suit for violation[s] of . . . federal right[s]’ and the law of nations or a treaty of the United States.”); *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26 (D.D.C. 2006) (“The Supreme Court, however, recently held that the [ATS] is strictly a jurisdictional statute available to enforce a small number of international norms.”); *Harbury v. Hayden*, 444 F. Supp. 2d 19, 38 (D.D.C. 2006) (“the [ATS] cannot be the subject of ‘a violation’ of a federal statute because the [ATS] provides no substantive rights that could be the subject of any claimed violation”); *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 112 (D.D.C. 2007) (“The question whether the Alien Tort Statute falls within the statutory exception to the Westfall Act was answered by the Supreme Court’s decision in [*Sosa*] where it held that ‘the ATS is a jurisdictional statute creating no new causes of

V.
ATS IN THE LOWER COURTS

Both before and after the Court's decision in *Sosa*, the lower courts considered the role of exhaustion of remedies in the context of the ATS. While the *Sosa* decision did much to elucidate the Supreme Court's position on how the lower courts should treat ATS claims more generally, the brief mention of exhaustion in footnote 21 provided little guidance for lower courts on how to treat the issue. As a result, the case law issuing from the lower courts after *Sosa* reveals as much diversity in decisions with relation to exhaustion as do lower court decisions before *Sosa*.

A. Circuit Court Decisions

The Seventh, Ninth, Eleventh and DC Circuits have all considered an ATS case in which exhaustion of remedies was at issue. Of particular interest is the Ninth Circuit's opinion in *Sarei v. Rio Tinto*, heard on appeal from the district court's decision, considered first by a regular panel and then by the Ninth Circuit, sitting en banc. The *Sarei* case will be considered at length later in this section.

In *Enahoro v. Abubakar*, the plaintiffs, Nigerian nationals, brought ATS claims against a former Nigerian head of state, claiming grave human rights violations, including torture and extrajudicial killing.⁴⁹ The Seventh Circuit held that plaintiffs could only get relief for their torture and extrajudicial killing claims under the Torture Victim Protection Act (TVPA): "the cause of action Congress provided in the Torture Victim Protection Act is the one which plaintiffs alleging torture or extrajudicial killing must plead."⁵⁰ Noting the TVPA's exhaustion requirement and the lack of evidence that plaintiffs exhausted Nigerian remedies, the Seventh Circuit remanded the case back to the district court, "for a determination regarding whether the plaintiffs should be allowed to amend their complaint to state such a claim and, if they do, whether, in fact, the exhaustion requirement in the Torture Victim Protection Act defeats their claim."⁵¹ Judge Cudahy, in dissent, disagreed with the court's decision that the TVPA was the only available remedy for the torture and extrajudicial killing.⁵² Citing both the plain language and the legislative history of the TVPA, Judge Cudahy noted that the TVPA "was meant to expand, not restrict, the remedies available under the [ATS]."⁵³

action.' Accordingly, the plaintiffs cannot rely on the Alien Tort Statute to waive the Westfall Act because the plaintiffs have no claim for a violation of that statute itself").

49. *Enahoro v. Abubakar*, 408 F.3d 877, 879 (7th Cir. 2005).

50. *Id.* at 885.

51. *Id.* at 886.

52. *Id.* at 886 (Cudahy, J., dissenting).

53. *Id.* at 886-87.

The Eleventh Circuit considered ATS and TVPA claims brought by Haitian nationals in *Jean v. Dorelian*.⁵⁴ The court found that the district court erred in dismissing plaintiffs' ATS claims for failure to exhaust local remedies, holding that "the exhaustion requirement does not apply to the [ATS]."⁵⁵ The court went on to conclude that plaintiffs' claims under the TVPA should also not have been dismissed for failure to exhaust local remedies because defendant had "not in any way met the requisite burden of proof to support an affirmative defense of nonexhaustion of remedies and the district court erred in failing to require him to do so."⁵⁶

In *Rasul v. Myers*, plaintiffs, detainees at Guantanamo Bay, brought ATS claims against the Secretary of Defense and commanding officers for alleged torture, arbitrary detention, and cruel, inhuman or degrading treatment.⁵⁷ The D.C. Circuit agreed with the district court that because defendants were employees of the United States, acting within the scope of their employment while committing the alleged torts, the United States could be substituted in as defendant, pursuant to the Westfall Act.⁵⁸ The court also upheld the district court's holding that because of the substitution of the United States as defendant, plaintiffs' sole avenue for relief was the FTCA.⁵⁹ As a result, the court concluded that plaintiffs' ATS claims were properly dismissed since they failed to exhaust their administrative remedies, as required by the FTCA.⁶⁰

B. The Ninth Circuit: *Sarei v. Rio Tinto*

The most thorough treatment of the ATS exhaustion issue to date can be found in the Ninth Circuit's consideration of *Sarei v. Rio Tinto*. *Sarei* moved from the Central District of California (*Sarei I*), to a panel of Ninth Circuit judges (*Sarei II*), to the Ninth Circuit sitting en banc (*Sarei III*), and, finally, back to the Central District of California (*Sarei IV*).

Sarei v. Rio Tinto was an ATS action for international law violations committed in connection with the operation of a copper mine in Papua New Guinea. The Ninth Circuit first considered the case in April 2007 (*Sarei II*), on appeal from the Central District of California.⁶¹ The court ultimately held that plaintiffs were not required to exhaust local remedies before bringing their ATS case in the US. Before moving on to conduct a statutory analysis of the ATS, the majority noted that "[t]his circuit has sustained the justiciability of [ATS]

54. *Jean v. Dorelian*, 431 F.3d 776 (11th Cir. 2005).

55. *Id.* at 781.

56. *Id.* at 784.

57. *Rasul v. Myers*, 512 F.3d 644, 654 (D.C. Cir. 2008), *vacated on other grounds*, *Rasul v. Myers*, 129 S.Ct. 763 (2008).

58. *Id.* at 660.

59. *Id.*

60. *Id.* at 661.

61. *Sarei v. Rio Tinto*, 487 F.3d 1193 (9th Cir. 2007).

claims, both before and after *Sosa*, without requiring exhaustion.”⁶² The court observed that there is nothing in the plain language of the ATS related to the exhaustion requirement and that the legislative history on the ATS is also silent on the subject.⁶³ The court then considered the TVPA as further evidence of Congressional intent on the subject of exhaustion and concluded that the TVPA legislative history indicates that the ATS should be left intact.⁶⁴ In addition, the court noted that Congress was certainly aware of the ATS when it added the TVPA and had the opportunity then to amend the statute to include the exhaustion requirement.⁶⁵ Judge Bybee, in dissent, considered *Sarei* to be exactly the kind of case that would fall into *Sosa*’s category of “appropriate” to consider the exhaustion requirement.⁶⁶ Judge Bybee also noted that principles of comity and separation of powers are served by following the international standard for exhaustion.⁶⁷

Defendants appealed the Ninth Circuit panel decision and *Sarei* was reheard on the exhaustion issue before the Ninth Circuit, sitting en banc (*Sarei III*).⁶⁸ The majority in *Sarei III* found that the Court in *Sosa* seemed to consider exhaustion a prudential requirement and determined that whether exhaustion applies depends on the defendant’s ability to plead and justify an exhaustion requirement.⁶⁹ The majority was careful to note that the exhaustion requirement is not absolute in ATS cases, rather “[w]here the ‘nexus’ to the United States is weak, courts should carefully consider the question of exhaustion, particularly—but not exclusively—with respect to claims that do not involve matters of ‘universal concern.’”⁷⁰ The majority argued that the prudential exhaustion requirement for ATS purposes mirrors the gatekeeping function in habeas cases and serves the principle of comity, particularly in area where the nexus of the case to the United States is weak.⁷¹

The majority also laid out a framework for evaluating whether exhaustion is required. Under this framework, consistent with the domestic exhaustion principles such as the TVPA, the defense bears the burden of raising exhaustion.⁷² Also like the TVPA, the court would require that the remedy be effective, not futile, based on a review of the totality of the circumstances

62. *Id.* at 1214.

63. *Id.* at 1214-15.

64. *Id.* at 1216.

65. *Id.* at 1217.

66. *Id.* at 1224 (Bybee, J., dissenting).

67. *Id.* at 1225.

68. *Sarei v. Rio Tinto*, 550 F.3d 822 (9th Cir. 2008) (en banc).

69. *Id.* at 824.

70. *Id.*

71. *Id.* at 829.

72. *Id.* at 832. The court, borrowing a definition from the *Interhandel* case, describes exhaustion as a “final decision of the highest court in the hierarchy of courts in the legal system at issue.”

surrounding access to the remedy, the ultimate utility of the remedy to the petitioner, the enforceability of the decision, and any delay in getting such a decision.⁷³ The majority remanded *Sarei* back to the district court for proceedings to determine whether exhaustion was required in plaintiff's case.

Judges Bea and Callahan concurred in the judgment, but found an exhaustion requirement in the ATS.⁷⁴ They agreed with Judge Bybee's dissent in the panel decision that exhaustion is mandatory under international law.⁷⁵ The concurring judges expressed concern about the prudential exhaustion requirement proposed by the majority which, they argued, would allow a single district court judge to inject the judicial branch into international affairs.

Judge Reinhardt, writing for four judges, dissented from the majority opinion. They disagreed with the majority's conclusion that the *Sosa* Court counseled the adoption of a prudential requirement.⁷⁶ The dissenters also argued that while the ATS incorporates substantive international law, there was no need to also incorporate the exhaustion requirement.⁷⁷

In July 2009 the Central District of California took up the case following the direction of the Ninth Circuit en banc opinion.⁷⁸ Applying the framework set out by the Ninth Circuit, the district court found the nexus between plaintiffs' claims and the United States to be weak, based on the fact that Rio Tinto is a foreign corporation, that the alleged torts took place on foreign soil, and that the victims were all aliens with no connection to the United States.⁷⁹ The court also found that plaintiffs' war crimes, crimes against humanity, and racial discrimination claims were matter of "universal concern" to the point that they outweighed the weak nexus to the United States and would therefore not be subject to the prudential exhaustion requirement.⁸⁰ The court found that the remaining claims were subject to the prudential exhaustion analysis.⁸¹

C. The District Courts

District courts in the Second, Third, Fourth, Fifth, and Sixth Circuits have also considered exhaustion of remedies in ATS cases. The Southern District of New York has considered four ATS cases that included a claim for exhaustion of remedies. In two of these cases, *Wiwa v. Royal Dutch Petroleum Co.* and *Chiminya Tachiona v. Mugabe*, exhaustion of remedies was raised in the context

73. *Id.*

74. *Id.* at 833 (Bea, J., concurring).

75. *Id.* at 834.

76. *Id.* at 841, (Reinhardt, J., dissenting).

77. *Id.* at 846.

78. *Sarei v. Rio Tinto PLC*, 650 F. Supp. 2d 1004 (C.D. Cal. 2009).

79. *Id.* at 1031.

80. *Id.* at 1030-31.

81. *Id.* at 1031.

of the Torture Victim Prevention Act.⁸² In both cases, the court found that plaintiffs' claims were not barred by the TVPA's exhaustion requirement.⁸³ In the case *Presbyterian Church of Sudan v. Talisman Energy* the court rejected defendant's argument that plaintiffs were required to exhaust remedies before bringing their ATS claims.⁸⁴ Finally, in *Turkman v. Ashcroft*, the Eastern District of New York concluded that plaintiffs ATS claims could only be brought under the Federal Tort Claims Act (FTCA) once the United States was substituted in as a defendant in the case.⁸⁵ Under the FTCA, plaintiffs were required to exhaust all available administrative remedies.⁸⁶

The district courts in the remaining circuits considered many of the same issues as those faced by the Eastern and Southern districts of New York. In *Lizarbe v. Rondon* (District of Maryland) and *Chavez v. Carranza* (Western District of Tennessee), the courts rejected defendants' claims that plaintiffs' TVPA claims were defeated by failure to exhaust local remedies.⁸⁷ In *The Hereros v. Deutsche Afrika-Linien GMBLT & Co* (District of New Jersey) and *In re XE Services Alien Tort Litigation* (Eastern District of Virginia), the courts failed to find plaintiffs' ATS claims barred by failure to exhaust local remedies.⁸⁸

Finally, in *Ruiz v. Martinez*, an unpublished decision out of the Western District of Texas, the court, like the Seventh Circuit in *Enahoro v. Abubakar*, considered defendant's torture claim under the TVPA, despite the fact that

82. *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); *Chiminya Tachiona v. Mugabe*, 216 F. Supp. 2d 262 (S.D.N.Y. 2002).

83. *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, at *17 (S.D.N.Y. Feb. 28, 2002) (“[defendant] does not demonstrate that a Nigerian court would be amenable to a suit for violations of international law... Even if [defendant] had demonstrated that a Nigerian court could exercise jurisdiction over such a suit, plaintiffs have provided sufficient evidence of the inadequacy of that forum Nigerian courts remain an uncertain forum for justice.”); *Chiminya Tachiona v. Mugabe*, 216 F. Supp. 2d 262, 275 (S.D.N.Y. 2002) (“the plaintiffs have fulfilled the exhaustion requirement of the TVPA by demonstrating that the Zimbabwean judicial system is sufficiently under the control of President Mugabe, the principal officer of ZANU-PF, so as to render it inaccessible to the plaintiffs.”).

84. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 343 n.44 (S.D.N.Y. 2003) (“Whether or not the [ATS] generally requires exhaustion of local remedies, the Court is aware of no case, nor does Talisman cite any, in which plaintiffs were required to exhaust local remedies in the courts of an allegedly genocidal state, where doing so would be futile and would put plaintiffs in great danger.”).

85. *Turkmen v. Ashcroft*, 2006 WL 1662663 (E.D.N.Y. June 14, 2006).

86. *Id.* Plaintiffs' ATS claims were also barred for failure to exhaust administrative remedies under the FTCA in *Czetwertynski v. U.S.*, 514 F. Supp. 2d 592 (S.D.N.Y. 2007).

87. *Lizarbe v. Rondon*, 2009 WL 2487083, at *2 (D. Md. Aug. 12, 2009) (“[Defendant] bears the burden of showing the availability and adequacy of the foreign remedies he contends Plaintiffs failed to exhaust, and he has not carried it.”); *Chavez v. Carranza*, 407 F. Supp. 2d 925 (W.D. Tenn. 2004).

88. *The Hereros v. Deutsche Afrika-Linien GMBLT & Co.*, 2006 WL 182078 (D. N.J. Apr. 10, 2007); *In re XE Services Alien Tort Litigation*, 2009 WL 3415129 (E.D. Va. Sep. 8, 2009).

plaintiff brought his allegations under the ATS.⁸⁹ The court ultimately concluded that plaintiff failed to exhaust his local remedies, even though he had filed some grievances against the Mexican authorities:

[N]one of these filings satisfy the exhaustion requirements of the TVPA. Until Ruiz exhausts the ‘adequate and available remedies’ of Mexico, the ATS bars his torture claim in the United States, and the Court has no jurisdiction over this issue.⁹⁰

VI.

WHAT ARE THE CONSEQUENCES OF AN ATS EXHAUSTION REQUIREMENT?

The ATS jurisprudence in the lower courts illustrates the range of approaches for treating exhaustion under the ATS. There are three main possibilities for an exhaustion requirement in the ATS, all laid out in the Ninth Circuit’s opinion in *Sarei III*: 1) Exhaustion of remedies is never required under the ATS; 2) Exhaustion of remedies is always required under the ATS; 3) Exhaustion of remedies may be required in some ATS cases.

There is a good argument to avoid finding any kind of exhaustion requirement in the ATS. First, there is nothing in the plain language of the statute to indicate that Congress intended there be an exhaustion requirement. In drafting the TVPA, Congress had the opportunity to make any desired changes to the ATS, including extending the exhaustion requirement to the ATS. Congress chose not to do so. Indeed, in the legislative history to the TVPA, Congress indicated that the intention of the TVPA was to expand rather than contract the reach of the ATS. Leaving an exhaustion requirement out of the ATS would not only realize this legislative intent, it would also be consistent with the majority of ATS jurisprudence to date.

Reading an absolute exhaustion requirement into the ATS, as advocated by Judge Bybee, would satisfy those concerned about comity and respect for other nation’s judicial systems and the burden on the U.S. federal courts. This approach would also be consistent with international law, which may make sense given that the ATS looks to international law for its substantive elements. It seems likely that in adopting this position the courts would consider the exhaustion requirement in a manner similar to the way exhaustion is analyzed under the TVPA.

The final option is to follow Judge McKeown’s position in *Sarei III* and consider the exhaustion analysis to be a prudential requirement in ATS cases, essentially following the Court’s dicta in *Sosa*. This prudential exhaustion requirement would be employed when the nexus between the United States and the acts in question is weak, and when the acts in question are not “universal” in the international human rights law sense. While a prudential exhaustion

89. Ruiz v. Martinez, 2007 WL 1857185 (W.D. Tex. May 17, 2007).

90. *Id.* at *6.

requirement would allow courts to conduct a more nuanced case-by-case analysis of whether exhaustion is appropriate, this approach would also result in a wide variety of outcomes in ATS jurisprudence and a lack of predictability for future ATS litigants.

Despite these three distinct options, it seems that whether or not there is an exhaustion requirement in the ATS may be a moot point, by and large. Presuming that the requirements for ATS exhaustion would closely mirror those of the TVPA, it seems likely that most ATS cases would not be dismissed for failure to exhaust, just as most are not dismissed under the TVPA. Like TVPA cases, many ATS plaintiffs experience human rights violations in places where exhausting their local remedies would be futile, ineffective or impossible. As a result, including an exhaustion requirement would likely make little difference, as the requirement would generally be waived on futility grounds.

What is much more dangerous to plaintiffs' ability to bring claims under the ATS is the Westfall Act and the FTCA. In cases against U.S. government employees, once the United States is substituted in for the named defendant, after trial has begun, the case comes under the constraints of the FTCA in terms of the exhaustion of administrative remedies. At this point, plaintiffs often no longer have the opportunity to exhaust those remedies and the requirement proves fatal to the case.

Given the number of recent ATS cases generated by the global "War on Terror," it seems likely that the FTCA may come to impact a greater proportion of ATS cases in the future. Of course, now that the courts have spoken almost unanimously on the consequences of failing to exhaust administrative remedies before bringing an ATS case against US government employees, plaintiffs should be on notice to consider their administrative remedies before bringing their cases to court.

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State Immunity and *Jus Cogens* Violations: The Alien Tort Statute Against the Backdrop of the Latest Developments in the ‘Law of Nations’

Michele Potestà*

I. INTRODUCTION

On 23 December 2008, Germany instituted proceedings before the International Court of Justice (ICJ) against Italy.¹ In its Application to the Court, Germany contended that Italy should bear international responsibility for the conduct of its judiciary, which had “repeatedly disregarded the jurisdictional immunity of Germany as a sovereign State.”² The dispute arose out of a series of judgments delivered in the last few years by the Italian Supreme Court (Corte di Cassazione). In those rulings, the Corte di Cassazione held that Germany was not entitled to sovereign immunity before the Italian Courts in cases where plaintiffs were seeking civil redress for acts committed by the Third Reich in violations of preemptory norms of international law (*jus cogens*).

This currently pending case presents the ICJ with the opportunity to clarify the state of the art in international law on the relationship between sovereign State immunity and *jus cogens* violations, a topic which has been extensively

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1. ICJ Press Release no. 2008/44, (Dec. 23, 2008), available at www.icj-cij.org. Germany brought the case under Article 1 of the 1957 European Convention for the Peaceful Settlement of Disputes, Apr. 29, 1957, 320 U.N.T.S. 243, 244 (which provides for the parties to submit “any international legal dispute” to the Court).

2. Jurisdictional Immunities of the State (Germany v. Italy), Application of the Federal Republic of Germany, December 2008, at 2.

debated in the last decades amongst scholars, as well as examined by a number of domestic and international courts. The ruling by the ICJ could also have an impact within the U.S. domestic context, where the relationship between *jus cogens* and state immunity has been argued many times before the courts, mostly in the context of suits brought under the Alien Tort Statute (ATS). While in Italy there is formally no statutory mechanism similar to the ATS, the rulings by the Corte di Cassazione allowing suits for civil damages against torts committed in violation of international law make those proceedings structurally very similar to suits brought under the ATS. It is therefore reasonable to expect that the forthcoming ICJ judgment might contribute to discussions on the possibility for U.S. courts to hear complaints of gross human rights violations against foreign States in the context of ATS claims.

Part II of this article will begin with a description of the relationship between the ATS and State immunity.³ After a brief examination of the concept of sovereign immunity within the U.S. context, and an analysis of the scope of the Foreign Sovereign Immunities Act (FSIA) of 1976, this section will turn to the question of the interplay between the ATS and the FSIA.

Part III will address the current stance of U.S. case law as to the issue of State immunity and allegations of *jus cogens* violations brought under the ATS. As will be seen, plaintiffs in ATS cases have often resorted to the “implied waiver” exception to immunity to argue in favor of the existence of a *jus cogens* exception under the FSIA. Courts have almost invariably been unwilling to follow that path.

Part IV will explore in some detail the attitude of non-American courts to the issue of state immunity for violations of peremptory norms of international law. The most important decisions by national (Italian, Greek, British, and other jurisdictions) and international (European Court of Human Rights) courts will be taken into consideration. This part of the article will discuss whether a norm of customary international law has developed to the extent of denying foreign state immunity in cases of civil suits based on *jus cogens* violations brought before domestic courts of another state.

The final part of the article will provide some brief conclusions on the current status of customary law with respect to the issue of *jus cogens* and state immunity, and on its possible impact within the U.S.

II.

THE RELATIONSHIP BETWEEN THE ATS AND THE FSIA

A. *Sovereign Immunity in the U.S.: The Path to the FSIA*

The foundation of the rule whereby states enjoy immunity from the

3. This article does not address the relationship between the ATS and the immunity of state officials.

jurisdiction of domestic courts of other states is usually found in the principles of sovereign equality, independence, and dignity of states, as well as in foreign relations considerations.⁴

In the U.S., the principle was first affirmed in 1812 by the Supreme Court in *The Schooner Exchange*, where Chief Justice Marshall linked the principle of foreign state immunity to “[the] perfect equality and absolute independence of sovereigns.”⁵ International law at that time was characterized by the concept of “absolute immunity,” *i.e.*, the sovereign was completely immune from foreign jurisdiction in all instances regardless of the type of governmental conduct at issue in the case. Although “the narrow holding” in *The Schooner Exchange* did not announce a rule of absolute sovereign immunity,⁶ absolute immunity prevailed in practice over the ensuing 140 years because the courts consistently deferred to the Executive Branch, which applied the principle *par in parem non habet imperium* and “ordinarily requested immunity in all actions against friendly foreign sovereigns.”⁷

The pivotal “Tate letter” of 1952 signaled the shift from the doctrine of absolute immunity to the theory of restrictive immunity.⁸ Under this theory, immunity was confined to suits involving the foreign sovereign’s public acts (*acta jure imperii*), and did not extend to cases arising out of a foreign state’s strictly commercial acts (*acta jure gestionis*).⁹ The Tate letter brought the U.S. within the then-emerging consensus among capitalist States around the restrictive doctrine. Belgian and Italian case law had already abandoned absolute immunity in the last decades of the 19th century and the first decades of the 20th century, and French and German courts followed suit some decades thereafter.¹⁰ Even in the years following the Tate letter, however, immunity decisions continued to be made on a case-by-case basis by the U.S. State Department and communicated to courts through “suggestions of immunity.” As a consequence, foreign states were often able to place diplomatic pressure on

4. See generally MALCOLM NATHAN SHAW, *INTERNATIONAL LAW* 621 (2003); Stefan A. Riesenfeld, *Sovereign Immunity in Perspective*, 19 *VAND. J. TRANSNAT’L L.* 1 (1986).

5. *The Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116, 137 (1812).

6. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

7. *Id.* In the U.S., foreign sovereign immunity is viewed not as rule of customary international law, but rather as a matter of “grace and comity.” See *id.* (“As *The Schooner Exchange* made clear, however, foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution”). See also *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (9th Cir. 2004).

8. Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 *Dept. of State Bull.* 984-985 (1952), and in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, app. 2 at 711 (1976).

9. *Verlinden B.V.*, 461 U.S. at 487.

10. See Riesenfeld, *supra* note 4 (reporting on non-U.S. case law – in particular French, German and Italian – on the topic of restrictive immunity). See also *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* ch. 5, introductory note (1987).

the State Department when seeking immunity.¹¹

With the goal of reforming this situation of political pressure and uncertainty, Congress enacted the FSIA in 1976.¹² The power to make sovereign immunity decisions was thus transferred from the executive to the judicial branch. As a result, the executive branch was freed from the case-by-case diplomatic pressures, and furthermore, decisions would now be made by courts on purely legal grounds and under procedures that would ensure due process.

As the Supreme Court held in *Verlinden*, the FSIA codifies “for the most part” the doctrine of restrictive immunity.¹³ It gives federal district courts subject-matter jurisdiction over all civil actions against a foreign state, so long as the state is not entitled to foreign sovereign immunity by statute or treaty. The statute is centered around a rebuttable presumption of immunity. Pursuant to § 1604 of the FSIA, foreign states, including their agencies and instrumentalities, are entitled to immunity from the jurisdiction of both federal and state courts in the U.S., unless the claim is governed by an international agreement to which the U.S. was a party when the FSIA was enacted or falls in one of the exceptions listed in §§ 1605 to 1607 of the statute. For instance, the foreign state will not enjoy immunity in the event that it has explicitly or impliedly waived its immunity;¹⁴ the action is based upon a commercial activity carried on by the state in the U.S.;¹⁵ or it concerns certain non-commercial torts within the U.S.¹⁶ If the court finds one of the exceptions listed in the FSIA to apply, then pursuant to § 1606 FSIA “the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.”

B. The Interplay Between the ATS and the FSIA: Argentine Republic v. Amerada Hess

Private parties who have suffered damages as a result of foreign states’ violations of international law have tried to circumvent the application of the FSIA through the use of the ATS. The ATS, in fact, provides district courts with jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁷

Jurisdiction under the ATS over a foreign state was first exercised in 1985 in *Von Dardel v. U.S.S.R.*¹⁸ In *Von Dardel*, the plaintiffs sued the Soviet Union

11. *Verlinden B.V.*, 461 U.S. at 487.

12. Foreign Sovereign Immunities Act of 1976, codified at 28 U.S.C. §§ 1330, 1602-11 (1976) [hereinafter FSIA].

13. *Verlinden B.V.*, 461 U.S. at 488.

14. FSIA § 1605 (a)(1).

15. FSIA § 1605 (a)(2).

16. FSIA § 1605 (a)(5).

17. 28 U.S.C. § 1350 (1982).

18. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985).

for the arrest and subsequent disappearance of Swedish diplomat Raoul Wallenberg in Hungary in early 1945. The district court held that the FSIA did not preclude jurisdiction over the Soviet Union, based on several grounds. With regard to the ATS, the court found that the statute did indeed apply because interfering with a diplomat violated both contemporary international law and the law of nations at the time the statute was enacted.¹⁹

In 1989 the U.S. Supreme Court in *Argentine Republic v. Amerada Hess Shipping Corp.* had the chance to rule on the relationship between the ATS and the FSIA.²⁰ The case arose out of an event that occurred during the Falkland/Malvinas war between the United Kingdom and Argentina. The Liberian oil tanker *Hercules* was repeatedly bombed by Argentine aircraft in international waters, incurred extensive damages, and had to be eventually scuttled off the Brazilian coast. The two Liberian corporations that owned and chartered the tanker sued Argentina in the U.S. District Court for the Southern District of New York, claiming jurisdiction, *inter alia*, under the ATS.²¹ The district court dismissed the suit, holding that Argentina was immune under the FSIA and that it was not empowered to create an *ad hoc* exception to a congressional statute in order to hear the case.²² A divided panel of the U.S. Court of Appeals for the Second Circuit reversed.²³ It found in the ATS an independent basis for jurisdiction over the claim. In the court's reasoning, Congress could not have intended to exempt foreign states from the jurisdiction of U.S. courts when those foreign states had committed "violations of international law."²⁴ The Supreme Court granted certiorari. Arguing from the "comprehensiveness of the statutory scheme of the FSIA," the Court unanimously held that the text and structure of the FSIA demonstrated Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts.²⁵ The Court found that none of the immunity exceptions applied in the case at bar. Moreover, the Court noted that Congress had considered violations of international law—and not just commercial concerns—when it enacted the FSIA. As an example, the Court pointed to the exception that denies immunity in suits "in which rights in property taken in violation of international law are in issue."²⁶ Therefore, the Court concluded that Congress must have intended to grant immunity in cases involving

19. *Id.* at 256-59.

20. 488 U.S. 428 (1989).

21. Plaintiffs had also brought suit under the general admiralty and maritime jurisdiction (28 U.S.C. § 1333) and "the principle of universal jurisdiction, recognized in customary international law." *Id.* at 432.

22. *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73 (S.D.N.Y. 1986).

23. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987), *rev'd*, 488 U.S. 428 (1989).

24. *Id.* at 426-27.

25. *Amerada Hess*, 488 U.S. at 434.

26. *Id.* at 435-36.

violations of international law.²⁷

The Court's ruling certainly resolved some of the major uncertainties arising from the interplay between the ATS and the FSIA. First of all, it clarified that the ATS cannot be used to override the presumption of immunity granted to foreign states by the FSIA and that the conduct that is attributable to the state and which has caused damages to plaintiffs needs in any case to fall within one of the exceptions set forth in the statute. Second, it made clear that the FSIA also covers violations of international law, and that states therefore continue to enjoy immunity even in cases of such violations.

III.

THE *JUS COGENS* EXCEPTION IN U.S. COURTS

The Supreme Court decision in *Amerada Hess*, however, did not touch upon the issue of *jus cogens*. The definition of *jus cogens* can be found in Art. 53 of the Vienna Convention on the Law of Treaties, which reads: "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."²⁸

U.S. courts called to examine allegations of *jus cogens* violations usually refer to a dictum from the D.C. Circuit, which noted that "[s]uch [peremptory norms of international law], often referred to as *jus cogens* (or "compelling law"), enjoy the highest status in international law and prevail over both customary international law and treaties."²⁹

Amerada Hess did not involve allegations of gross and systematic human rights violations or torture (commonly held to constitute examples of *jus cogens* violations). It concerned Argentina's bombing of a neutral merchant ship, which plainly does not amount to a violation of a peremptory norm of international law. It might therefore be asked whether a violation of peremptory norms of international law would have warranted a different ruling by the Supreme Court in terms of the possible denial of immunity.

In U.S. courts, the debate surrounding the possible denial of state immunity in cases of violations of peremptory norms of international law has developed around the topic of waiver of immunity.

As has been already noted, one of the exceptions to immunity set forth in the FSIA – indeed the first one on the list – concerns the case where the foreign state has waived immunity. Section 1605 FSIA provides that:

- (a) A foreign state shall not be immune from the jurisdiction of courts of the

27. *Id.*

28. Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).

29. *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988).

United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

Plaintiffs have tried to circumvent the application of the FSIA's presumption of immunity by arguing before U.S. courts that because observance of *jus cogens* is so universally recognized as vital to the functioning of a community of nations, every nation implicitly waives its immunity by violating such fundamental norms. They thus followed a suggestion which had been developed in early scholarly commentary, in which the authors had criticized the Supreme Court in *Amerada* for not having recognized that suits alleging violations of peremptory norms of international law could be brought under the FSIA itself, using the FSIA's implied waiver provision.³⁰ This argument rested upon the idea that the changing structure of the international legal system, with its recognition that individuals enjoy certain rights under international law, dictated an evolutionary approach to the doctrine of sovereign immunity. Under this perspective, the rise of the concept of *jus cogens* requires that municipal courts deny sovereign immunity when a state's violation of a rule of *jus cogens* injures an individual. Since Congress intended the FSIA to be informed by international law, the FSIA should respond where possible to those continuing developments under international law, and the implied waiver provision constitutes a possible mechanism for incorporating such developments.³¹

The first case considering the relationship between *jus cogens* and sovereign immunity in depth was *Siderman De Blake v. Argentina*.³² The Ninth Circuit, despite finding that the allegations leveled against Argentina – torture – amounted to violations of *jus cogens*, deemed this circumstance not sufficient to confer jurisdiction under the FSIA. The court, interpreting the FSIA “through the prism of *Amerada Hess*,” found that the FSIA did not “specifically provide for an exception to sovereign immunity based on *jus cogens*.”³³ Although the Ninth Circuit acknowledged that *Amerada Hess* had not been concerned with *jus cogens* violations, it found the Supreme Court's approach to the interpretation of the FSIA to require an express statutory *jus cogens* exception in order to override immunity. “If violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so.”³⁴

30. Adam C. Belsky, Mark Merva & Naomi Roht-Arriaza, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CALIF. L. REV. 365 (1989).

31. *Id.* at 397.

32. *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699 (9th Cir. 1992).

33. *Id.* at 718.

34. *Id.* at 719. The court found, however, that Argentina had waived its immunity by using the assistance of American courts. *Id.* at 720-22. The Second Circuit in *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 243 (2d Cir. 1996), criticized *Siderman* for reasoning that “the Supreme Court's decision in *Amerada Hess* precludes viewing *jus cogens* violations as an implied waiver.” According to the Second Circuit “[t]hat contention is questionable since no claim

The next and most often discussed case, *Princz v. Federal Republic of Germany*, decided by the D.C. Circuit in 1994, concerned allegations of deportation and forced labor in Nazi concentration camps suffered by a Jewish-American Holocaust survivor.³⁵ Along the same line as *Siderman*, the court did not deny Germany immunity based on the implied-waiver-*jus-cogens* theory. The court stated that “something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world”³⁶ Judge Wald dissented, and argued that by engaging in violations of *jus cogens* norms Germany had implicitly waived its immunity from suit. Following her reasoning, denial of immunity would appear to ensue from the superior position enjoyed by *jus cogens* norms, which “[sit] atop the hierarchy of international law” and “enjoy the greatest clout, preempting both conflicting treaties and customary international law.”³⁷

Judge Wald’s dissent has not enjoyed success in the ensuing practice of U.S. courts. Several district and circuit courts have concluded that, although the argument for a *jus cogens* exception through the implied waiver mechanism might appear “appealing” and not devoid of “emotional power,”³⁸ it was not persuasive enough to deny immunity.³⁹ Courts have usually examined the “waiver by implication” exception by starting from the relevant examples provided in the House Report:

With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsible pleading in an action without raising the defense of sovereign immunity.⁴⁰

Although those advocating in favor of a recognition of a *jus cogens* exception under the implied waiver clause have argued that the list provided by the House Report “is by no means comprehensive,”⁴¹ courts have usually held that the examples from the House Report suggest a close relationship with the litigation process.⁴² For instance, the Second Circuit in *Smith* noted that

of waiver arising from a *jus cogens* violation was made in *Amerada Hess*.” *Id.* at 245.

35. *Princz v. F.R.G.*, 26 F.3d 1166, 1176 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121 (1995).

36. *Id.* at 1174, n.1.

37. *Id.* at 1180.

38. *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 101 F.3d 239, 242, 244 (2d Cir. 1996).

39. *Id.* at 244. *See also* Hana Hilsenrath v. the Swiss Confederation, 2007 U.S. Dist. LEXIS 81118 (N.D. Cal. Oct. 23, 2007); Hwang Geum Joo, et al. v. Japan, 332 F.3d 679 (D.C. Cir. 2003).

40. H.R. REP. NO. 1487 at 18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610-11 at 6617.

41. Belsky et al., *supra* note 30, at 395.

42. *See Princz*, 26 F.3d at 1174 (arguing that “an implied waiver depends upon the foreign government’s having at some point indicated its amenability to suit”). *See also Smith*, 101 F.3d at

“examples are persuasive evidence that Congress primarily expected courts to hold a foreign state to an implied waiver of sovereign immunity by the state’s actions in relation to the conduct of litigation.”⁴³

This argument is usually accompanied by the statement that a waiver has to be construed narrowly.⁴⁴ This position appears to be in line with recent developments in the codification work carried out by the International Law Commission (ILC). The ILC dealt in recent years with the topic of “unilateral acts of states,” which was first put on its agenda in 1996 and ended with the approval of a set of “Guiding Principles” in 2006.⁴⁵ Amongst the unilateral acts of states which the ILC considered, waivers constituted one of the most-used examples.⁴⁶ In addressing the standard of interpretation governing unilateral acts, the ILC stressed the need, amongst other criteria, to adopt a “restrictive” canon of interpretation.⁴⁷

U.S. courts have therefore correctly rejected the use of the waiver exception as a sort of back-door through which violations of *jus cogens* norms can be adjudicated by domestic courts.⁴⁸ The idea that a state, by way of gross misconduct, automatically waives immunity before foreign courts to which it is entitled would in fact appear to be untenable and does not find any support in the current practice of domestic courts of other States, with the exception of a single Greek court decision addressed in the following section.

IV.

NATIONAL AND INTERNATIONAL JUDICIAL PRACTICE ON *JUS COGENS* AND STATE IMMUNITY

The following section will review domestic and international case law dealing with the relationship between *jus cogens* and state immunity.

243-44; *Certain Underwriters at Lloyds London, et al. v. Great Socialist People’s Libyan Arab Jamahiriya*, 2007 U.S. Dist. LEXIS 49032 (D.C. Cir. Dec. 14, 2007), at 8-9; *Sampson v. F.R.G.*, 250 F.3d 1145, 1154 (7th Cir. 2001).

43. *Smith*, 101 F.3d at 243-44.

44. *Id.* at 243 (citing *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990); *Joseph v. Office of the Consulate General of Nig.*, 830 F.2d 1018, 1022-23 (9th Cir. 1987); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985))

45. See GUIDING PRINCIPLES APPLICABLE TO UNILATERAL DECLARATIONS OF STATES CAPABLE OF CREATING LEGAL OBLIGATIONS (International Law Commission 2006), available at <http://www.un.org/law/ilc> [hereinafter “ILC Guiding Principles”].

46. See, e.g., Special Rapporteur, *Seventh report on unilateral acts of States*, ¶¶ 80, 88, U.N. DOC. A/CN.4/542, (Apr. 22, 2004).

47. See ILC Guiding Principles, Principle 7.

48. See Richard Garnett, *The Defence of State Immunity for Acts of Torture*, 18 AUSTL. Y.B. INT’L L. 97, 106-115 (1997) (assessing U.S. practice on foreign sovereign immunity for acts of torture).

A. *Italian Case Law: Ferrini v. Germany*

The judgment delivered in 2004 by the Italian Corte di Cassazione in *Ferrini* was the first case in which the Italian courts addressed the issue of the relationship between foreign state immunity and violations of fundamental human rights norms, expressly invoked by the plaintiff.⁴⁹ The plaintiff had been captured in 1944 on Italian soil by Nazi troops, deported to a German concentration camp, and used for forced labor at German firms. In 1998 he instituted proceedings before Italian courts to claim damages on account of his imprisonment, deportation and forced labor. The Court of first instance held that jurisdiction was barred by the application of the international norm guaranteeing foreign state immunity for those acts performed by states in the exercise of their sovereign powers, such as acts of war. The Court of Appeals upheld the finding of the lower court. The Corte di Cassazione reversed and held that a foreign state cannot enjoy immunity in respect to sovereign acts that can be classified as “international crimes.”

It is useful to recapitulate the main passages in the reasoning of the Corte di Cassazione. The Court started from the assumption that there is a rule on the international plane that accords foreign states immunity from jurisdiction in domestic courts of another state. According to the Court, this norm is part of customary international law, and is therefore automatically operative within the Italian legal system through Art. 10(1) of the Italian Constitution.⁵⁰ This provision is understood by scholars and the judiciary to impose on courts an obligation to automatically and directly apply the entire corpus of customary international law as if it were domestic law.⁵¹

The Court acknowledged that the acts committed by Germany, as acts of war, were acts *jure imperii*. However, it immediately turned to the question of whether immunity from jurisdiction is capable of operating even in respect of conduct which . . . is so extremely serious that, in the context of customary international law, it belongs to that category of international crimes which are so prejudicial to universal values that they transcend the interest of individual States.⁵²

The first step in the Court’s reasoning was to try to demonstrate that deportation and forced labor are international crimes under customary international law. As evidence of that, the Court cited various sources (United Nations General Assembly resolutions, the Nuremberg judgments, the ILC Principles of International Law of 1950, the Security Council resolutions establishing the *ad hoc* international criminal tribunals, the statutes of the two *ad*

49. *Ferrini v. Repubblica Federale di Germania*, Cass., sez. un., 11 mar. 2004, no. 5044, 87 RIVISTA DI DIRITTO INTERNAZIONALE 539 (2004) (English translation available at 128 I.L.R. 658 (2004)) [hereinafter *Ferrini*].

50. *Id.* para. 5.

51. See Carlo Focarelli, *Denying Foreign State Immunity for Commission of International Crimes: The Ferrini Decision*, 54 INT’L & COMP. L.Q. 951, 951-52 (2005).

52. *Ferrini*, para. 7.

hoc tribunals, the Rome Statute establishing the International Criminal Court). It then devoted its attention to what was at that time the most important judicial precedent of a Court recognizing the overriding effect of *jus cogens* over state immunity: the case decided by the Greek Supreme Court in *Prefecture of Voiotia v. Germany*.⁵³ In that case, the Greek Supreme Court had held that the violation by Germany of peremptory norms designed to protect fundamental human rights implied a waiver of the benefits of state immunity. The Italian Corte di Cassazione in *Ferrini* criticized the reasoning of the Greek Court. According to the Corte di Cassazione, waiver of immunity must be concretely proven, not abstractly presumed, and it appears unlikely that a State which commits serious violations wishes to waive those benefits from which it derives immunity from jurisdiction.⁵⁴ Although critical of the waiver argument resorted to by the Greek Court, the Corte di Cassazione nonetheless reached the same conclusion, i.e. it denied state immunity, but based on other grounds. The Court pointed out that there is an incompatibility within the international legal order between the principle of immunity on the one hand, and the fundamental rights of the human being, protected by norms which prohibit international crimes and impose certain reaction and repression obligations on states, on the other hand. The heart of the Court's argument is that *jus cogens* norms such as those protecting human rights are at the peak of the international legal order, and they therefore prevail over all other treaty or customary rules, including those pertaining to state immunity.⁵⁵ Granting immunity to states in such situations would mean hindering, rather than furthering, the protection of those values which must be considered fundamental for the international community as a whole.⁵⁶

B. *Subsequent Cases Decided by the Italian Corte di Cassazione*

The landmark decision in *Ferrini* was subsequently re-affirmed by the Corte di Cassazione in later judgments. In particular, in a series of rulings of almost identical content delivered on May 29, 2008, the Court upheld its earlier position and expanded upon it.⁵⁷ Once more, jurisdiction over Germany for acts

53. The Greek Supreme Court denied immunity to Germany in its May 4, 2000, decision. See Maria Gavouneli & Elias Bantekas, *Case Report: Prefecture of Voiotia v. Federal Republic of Germany*, 95 A.J.I.L. 198 (2001). The decision was reversed by the Greek Special Supreme Court on September 17, 2002; see Elena Vournas, *Prefecture of Voiotia v. Federal Republic of Germany: Sovereign Immunity and the Exception for Jus Cogens Violations*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 648 (2002).

54. *Ferrini*, para. 8.2.

55. See Andrea Gattini, *War Crimes and State Immunity in the Ferrini Decision*, 3 J. INT'L CRIM. JUST. 230 (2005).

56. *Ferrini*, para. 9.1.

57. See the fourteen rulings delivered by the Italian Corte di Cassazione on May 29, 2008 (Judgment No. 14199 and Order Nos. 14200 to 14212), reported by Carlo Focarelli, *Federal Republic of Germany v. Giovanni Mantelli and Others*, 103 A.J.I.L. 122, 128 (2009). Reference will be made to the paragraphs of one of those rulings: *Federal Republic of Germany v. Mantelli*, Cass.,

committed during World War II was affirmed and the plea of sovereign immunity denied. Although the outcome of those cases is the same as in *Ferrini*, the Court took a more cautious and balanced approach. In the May 29, 2008, rulings, the Court said it was aware that, in denying Germany immunity with respect to *jus cogens* violations, it was not applying an already existing norm of customary international law but rather contributing to its formation in a framework of legal uncertainty.⁵⁸ Further, the reasoning suggested that the Court, despite invoking the normative hierarchy that characterizes *jus cogens*, was reaching its conclusions based not on a purely formal priority of *jus cogens*, but on a systematic interpretation of the international legal order in light of its substantial fundamental values.⁵⁹

In a later judgment delivered on January 13, 2009, the Court made it clear that it was adhering to the positions that it had expressed in former judgments, and that denial of immunity for *jus cogens* violations should now be considered a “firm stance” in its case law.⁶⁰

C. Critical Remarks on Italian Case Law

The judgments by the Corte di Cassazione analyzed above (especially the decision in *Ferrini*) are well-structured and full of references to national (including U.S.) and international case law, as well as to domestic legislation of other states, treaties, and other international acts. The Court also examined the work carried out by the ILC on State responsibility. It referred to Articles 40 and 41 of the ILC Draft Articles, and showed how the requirement to uphold values of particular importance, such as those violated through the commission of individual crimes, leads to deep changes in terms of state responsibility. As noted by commentators, the Court emphasized that the idea that such grave violations must bring about a qualitatively different (and stronger) reaction than that arising from other wrongful acts is becoming better established also in relation to states.⁶¹

sez. un., 29 may 2008, n.14201, reprinted in 45 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 651 (2009) [hereinafter *Mantelli*]. It has to be mentioned that one of the rulings, namely Judgment No. 14199, addressed the issue of whether Italy should recognize the Greek Special Supreme Court decision requiring Germany to pay litigation expenses in the case discussed above in Part IV A. See also the European Court of Justice’s Judgment in Case C-292/05, *Lechouritou v. F.R.G.*, 2005 E.C.R. 243 (excluding claims for compensation for acts perpetrated by armed forces in the course of warfare from the scope of the Brussels Convention of September 27, 1968, on jurisdiction and the enforcement of judgments in civil and commercial matters).

58. *Mantelli*, at 654-55.

59. See Focarelli, *supra* note 57, at 128. It is worth noting that, while the Corte di Cassazione in *Ferrini* (para. 10) appeared to place great importance on the argument that the alleged crimes had been partly committed in the forum state, the same argument appeared less weighty in the May 2008 rulings. See *id.* at 126.

60. See Corte di Cassazione, 13 Jan. 2009, No. 1072, reprinted in 92 RIVISTA DI DIRITTO INTERNAZIONALE 619, 626 (2009).

61. See Pasquale De Sena & Francesca De Vittor, *State Immunity and Human Rights: The*

Despite the remarkable efforts shown by the Court towards a systematic interpretation of the international legal order, the judgments are not devoid of significant weaknesses.

A first criticism concerns the use by the Court of the concept of “international crimes.” The Court does not appear to distinguish between the individual dimension (*i.e.*, criminal responsibility of individuals under international law) and the state dimension (the wrongful act of the state of committing particularly grave violations of international law, once labeled “international crime of the state”).⁶² The way these concepts are used by the Court is very general, and serves the purpose of demonstrating the increasing legal role played by the value of human rights protections within the international legal system, which should not give way to immunity from jurisdiction.⁶³

However, the major criticism of the Court’s reasoning concerns the main argument that *jus cogens* is able to trump sovereign immunity. The conclusions reached by the Court on that point do not seem to reflect the current status of customary international law. Certain international rules may be aimed at protecting fundamental values of the international community as a whole and therefore be peremptory. However, it does not follow that the alleged violation by one state allows courts of another state to deny immunity to the former.⁶⁴ The only norm which is higher in the hierarchy is the one having substantive content, that is, the norm prohibiting acts which violate fundamental rights of the human being. Implying, as the Court does, that the importance of a norm in terms of protected values automatically entails procedural effects, such as the denial of immunity, does not appear correct, at least in the absence of state practice in this regard.

A similar “deductive” approach, aimed at presupposing special procedural effects from the scope of substantive *jus cogens* norms, has been recently rejected by the ICJ in the *Armed Activities* judgment of February 3, 2006.⁶⁵ The ICJ had to determine whether the alleged violation of *jus cogens* norms, *i.e.* the prohibition of genocide and of racial discrimination, implied its jurisdiction even though the defendant state had not given its consent by attaching a reservation to the compromissory clause of the treaty on which the ICJ’s jurisdiction was based. The Court noted that “assuredly” the prohibition of genocide has a *jus cogens* character.⁶⁶ However, it found that this could not “of itself provide a

Italian Supreme Court Decision on the Ferrini Case, 16 EUR. J. INT’L L. 89, 100 (2005).

62. See Gattini, *supra* note 55, at 229-30.

63. See De Sena & De Vittor, *supra* note 61, at 110.

64. See Focarelli, *supra* note 57, at 126.

65. *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*, Jurisdiction and Admissibility, Feb. 3, 2006, available at www.icj-cij.org [hereinafter *Armed Activities*]. See also Carlo Focarelli, *Promotional Jus Cogens: A Critical Appraisal of Jus Cogens’ Legal Effects*, 77 NORDIC J. OF INT’L L. 429, 431-433 (2008).

66. *Armed Activities*, para. 64.

basis for the jurisdiction of the Court to entertain” the dispute.⁶⁷ Commentators have pointed out that the ICJ “excluded that *jus cogens*’ ‘special’ effects can be inferred by way of logical implication and more specifically that procedural effects could be drawn from the nature of substantive norms.”⁶⁸

It would be reasonable to argue in a similar way with regard to immunity in cases of *jus cogens* violations, and to consider the two sets of rules as addressing two different perspectives, which do not interact with each other. A substantive *jus cogens* prohibition does not necessarily encompass the further *jus cogens* rule which grants the forum state the right to deny immunity to the respondent state.⁶⁹ Unlike what the Corte di Cassazione appears to think, upholding such a view does not give rise to any incoherence in the international legal system. As has been noted, incoherence would only arise if one were to assume that the right of access to justice itself constitutes a *jus cogens* norm or that a violation of peremptory norms necessarily entails the right to civil redress.⁷⁰ Neither assumption appears to be supported by international practice.

Italian case law thus seems to have gone too far in recognizing that *jus cogens* norms entail the specific effect of denial of sovereign immunity. The Corte di Cassazione appeared to become aware of that in the May 2008 rulings, where it held that it was contributing to the emergence of a (new) rule, rather than simply stating or applying an already existing one. The case law of the Corte di Cassazione can thus be seen as an attempt to influence the process of transformation of current customary international law such that it would be more in harmony with the protection of those fundamental values which appeared to be at the core of the Court’s concerns. There is nothing anomalous in this. A state’s “deviating” conduct will necessarily be seen as an unlawful act at the beginning. However, if that conduct is followed by other states in a sufficiently consistent way and with the belief that such behavior depends on a legal obligation, a new customary rule with that specific content may be formed.⁷¹

D. Domestic and International Judicial Practice Other than Italian on *Jus Cogens* and State Immunity

To be able to recognize a new rule of customary international law as the one that the Corte di Cassazione in *Ferrini* thought it was able to find (or to the emergence of which it wanted to contribute, as it held in later judgments), one has to look to whether there is consistent state practice on this issue. The main

67. *Id.*

68. See Focarelli, *supra* note 65, at 432.

69. Andreas Zimmermann, *Sovereign Immunity and Violations of International Jus Cogens – Some Critical Remarks*, 16 MICH. J. INT’L L. 433, 438 (1995).

70. See Gattini, *supra* note 55, at 236-37.

71. On issues of formation of customary international law, see Tullio Treves, *Customary International Law*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, available at www.mpepil.com.

problem with the position taken by the Italian Supreme Court is that judicial practice of other states (as well as of international courts) appears to be exactly opposite to the conclusions reached by the Corte di Cassazione.

The only precedent that has denied immunity was the already quoted case decided by the Greek Supreme Court in 2000,⁷² whose conclusions the Corte di Cassazione has shared, although it criticized the reasoning behind it. Even in that case, however, the subsequent enforcement proceeding in Greece failed and immunity was upheld: The Greek Ministry of Justice blocked the enforcement of the judgment by denying the necessary authorization, and the Supreme Court of Greece confirmed the correctness of such a denial.⁷³

All other practice has invariably granted immunity. In the famous *Al-Adsani* judgment, the European Court of Human Rights recognized that torture is an international crime and that the prohibition of torture belongs to *jus cogens*.⁷⁴ However, it held that in the absence of practice in favor of denial of immunity, granting immunity to the state was “not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity.”⁷⁵ A minority opinion was appended to the Court’s judgment. The group of dissenting judges took the position that, if a norm enjoys *jus cogens* character, then it is hierarchically superior to any other international norm not having the same status, with the consequence that the *jus cogens* norm trumps the “ordinary” customary international rule on immunity.⁷⁶

Canadian, German, and French higher courts also have refused to deny immunity on the basis of *jus cogens* violations.⁷⁷ The House of Lords decision in *Jones and Mitchell v. Saudi Arabia* of 2006 provides a good example of the reasoning that would appear to be more in line with the current status of customary international law on this issue.⁷⁸ The House of Lords took *Ferrini* into consideration and heavily criticized it. The English judges acknowledged that torture was prohibited by *jus cogens*, but refused to infer from the peremptory character of such norms the procedural consequence that jurisdictional immunity had to be denied.⁷⁹ In other words, the House of Lords correctly considered the two sets of norms as having two different objects.

72. See *supra* Part IV A.

73. See Vournas, *supra* note 53.

74. *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79.

75. *Id.* at para. 66.

76. See *id.* (joint dissenting opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic. See also *Kalogeropoulou v. Greece*, App. No. 59021/00 (Eur. Ct. H.R. Dec. 12, 2002) (admissibility).

77. See cases quoted in Focarelli, *supra* note 57, at 124.

78. *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26, noted in Elna Steinerte & Rebecca Wallace, *Untitled*, 100 A.J.L.L. 901 (2006).

79. *Jones*, [2006] UKHL 26, at para. 49.

V.
CONCLUSIONS

The examination of domestic and international practice on the issue of the relationship between *jus cogens* violations and state immunity shows that the stance taken by Italian courts appears to be (at least for the time being) an isolated position on the international level. Practice appears in fact to lean towards the opposite conclusion to the one reached by the Corte di Cassazione on the existence of a customary rule regarding denial of state immunity in the event of *jus cogens* violations. It is therefore highly unlikely that the ICJ will endorse the Italian position and recognize that a rule of customary international law with this specific content has already emerged. This should also leave little doubt as to the futility of invoking a *jus cogens* exception in the U.S. context. As highlighted above, the *jus cogens* argument has so far enjoyed little success in ATS cases. Even in the event that a rule of customary international law denying state immunity should emerge in the future, the path to its direct applicability in U.S. courts would nevertheless prove difficult, due to the still unsettled issue of the place of custom in the U.S. legal system.⁸⁰ The absence of an explicit exception for *jus cogens* violations would appear to be an insurmountable obstacle to denying sovereign immunity in cases of gross human rights violations. In the past, efforts have been made to amend the FSIA so as to include an express “human rights exception,” but have proven fruitless.⁸¹ Without such an amendment to the FSIA approved by Congress, states committing *jus cogens* violations will continue to successfully shield themselves behind sovereign immunity.

80. On the hotly contested issue of the domestic status of customary international law in the U.S., see Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Eire*, 120 HARV. L. REV. 870 (2007).

81. See Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Prinz v. Federal Republic of Germany*, 16 MICH. J. INT’L L. 403, 405, 418-432 (1995).

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Choice of Law and Accomplice Liability Under the Alien Tort Statute

Charles Ainscough*

I.

INTRODUCTION

In *Khulumani v. Barclay National Bank Ltd.*, a coalition of South African plaintiffs' groups sued dozens of major U.S. and foreign multinational corporations under the Alien Tort Statute.¹ The plaintiffs alleged that the corporations, including household names such as GM, Citigroup, Royal Dutch Shell and BP, had aided and abetted the South African government in its maintenance of the apartheid regime.² While historically many ATS cases focused on governments or individual officials,³ *Khulumani* is part of a growing trend of suits against corporations.⁴ This trend raises issues of accomplice liability⁵ because while few companies directly commit acts that amount to international crimes, there is a significant risk that companies will face allegations of "complicity" in such crimes.⁶

Although the Supreme Court has implied that international law should provide the standard for liability in ATS cases where non-state actors directly

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1. 504 F.3d 254 (2d Cir. 2007) (per curiam).

2. *Id.*

3. See *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

4. Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 276 (2009).

5. This paper will use the term "accomplice liability" as shorthand for the various forms of third-party liability including aiding and abetting.

6. U.N. Human Rights Council, Report of the Special Representative of the Secretary-General, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 30, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) (prepared by John Ruggie), available at http://www.hks.harvard.edu/mrcbg/CSRI/publications/workingpaper_38_ruggie.pdf.

violate the law of nations,⁷ the source of law potentially applicable to accomplice or “complicity” liability is less certain. The issue is important and centrally relevant in a growing number of cases. Yet few courts have considered the issue in sufficient detail;⁸ indeed, the issue remains unresolved in most circuits.

This article will evaluate the reasoning and persuasiveness of the two competing theories on the choice of law for accomplice liability: first, the minority opinion that courts should analyze accomplice liability under federal common law, and second, the majority opinion that courts should derive accomplice liability standards from international law. After this descriptive analysis of the positions, this article will argue that the latter position is correct.

The trend towards ATS suits against accomplice corporations stems from the substantive and procedural rules of ATS jurisprudence, which have left many plaintiffs mired in legal dilemmas. Governments, or governmental officials, are often the main perpetrators of violations against the laws of nations. However, plaintiffs have difficulty suing such actors in their own country, especially when the government which committed such abuses remains in power. The ATS, with the ability to bring suits in U.S. courts, overcomes some of this difficulty, but raises new problems. For example, the doctrine of sovereign immunity restricts plaintiffs’ ability to bring successful actions against foreign governments. Meanwhile, suits against government officials might fail for lack of personal jurisdiction, and even if plaintiffs’ win, the official may have few resources on which a court can attach damages.

ATS suits against corporations offer a potential solution to these legal barriers because corporations, unlike foreign governments, cannot necessarily rely upon sovereign immunity. Furthermore, corporations, unlike individual government officials, more likely have assets and presence inside the United States.⁹ To adequately and accurately resolve ATS cases, courts and counsel should understand the choice of law issues regarding the ATS and accomplice liability and whether international or national law applies.

II.

THE SEARCH FOR RULES OF DECISION: HOW DOMESTIC COURTS IMPLEMENT SUITS ALLEGING INTERNATIONAL LAW VIOLATIONS.

The Supreme Court’s decision in *Sosa* read the ATS to rely upon the established principle that while domestic courts can implement international law, such courts resolve international law violations within the framework of domestic legal procedures because international law does not prescribe the

7. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 707 (2004).

8. *But see, e.g., Khulumani*, 504 F.3d 254 (2007); *John Doe I v. Unocal Corp.*, 395 F.3d 932, 965 (9th Cir. 2002).

9. *Ramsey*, *supra* note 4 at 279.

means and methods of enforcement.¹⁰ Furthermore, “*Sosa* clarified the central choice of law issues in ATS cases by holding: (1) the substantive violation is governed by international law; and (2) federal common law provides the cause of action and, therefore, governs non-substantive issues.”¹¹

While nations can agree on a binding set of international principles, these states do not have to reach a consensus on the types of actions available and how those actions should proceed in their respective courts.¹² Thus, the “international system relies on domestic courts to provide the rules necessary to resolve complex claims. International law does not provide the level of detail necessary to resolve the many ancillary issues triggered by domestic litigation.”¹³

International law cannot provide every rule of decision in a national court case. The law of nations does not define with great specificity, let alone to the level of a specific, universal, and obligatory norm, many of the procedural issues arising in these cases, such as rules bearing on the statute of limitations, standing, or evidence.¹⁴ A reading of the ATS to require every rule of decision to meet a universal obligatory norm would by definition incapacitate every case and defeat the purpose of the ATS to provide a remedy for violations of the law of nations.¹⁵ Supreme Court precedent requires only that the substantive violation in ATS cases reach that level of specificity.¹⁶ Nevertheless, this uncontroversial principle only introduces the problem of choice of law in ATS accomplice liability cases; it does not resolve it.

10. *Khulumani*, 504 F.3d at 286 (Hall, J., concurring).

11. BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 36-37 (2d ed. 2008). The *Sosa* Court had ample historical support for a this position going back to at least 1792 when the Supreme Court stated that “the law of nations, or of nature and reason, is . . . enforced by . . . the municipal law of the country; which latter may . . . facilitate or improve the execution of its decisions, by any means they shall think best, provided the great universal law remains unaltered.” *Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (1792).

12. *Xuncax v. Gramajo*, 886 F. Supp. 162, 180 (D. Mass. 1995); see also *Kadic v. Karadzic* 70 F.3d 232, 246 (2d Cir.1995) (holding that “[t]he law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations.”).

13. STEPHENS, *supra* note 11 at 37.

14. Paul Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT’L & COMP. L. REV. 47, 53 (citing *Xuncax v. Gramajo*, 886 F. Supp at 180, which held that “while it is demonstrably possible for nations to reach some consensus on a binding set of principles, it is both unnecessary and implausible to suppose that, with their multiplicity of legal systems, these diverse nations should also be expected or required to reach consensus on the types of actions that should be made available in their respective courts to implement those principles.”).

15. Hoffman, *supra* note 14, at 53 (stating “This is true because every rule of law requires subsidiary rules in order to be applied to a particular fact situation. As courts become more involved in the analysis of a particular case, however, subsidiary rules will also develop their own subsidiaries, and so on. Thus, in order for all levels of subsidiary rules to gain universal acceptance, every case would have to be identical.”).

16. STEPHENS, *supra* note 11, at 36-37.

Both sides of the debate over the source of aiding and abetting liability generally agree that international law cannot provide all the rules of ATS decisions. The two sides disagree over whether accomplice liability constitutes a substantive violation, and whether international or domestic federal common law should provide the standard for liability.

III.

THE ANCILLARY QUESTION APPROACH: FEDERAL COMMON LAW SHOULD PROVIDE THE STANDARD FOR ACCOMPLICE LIABILITY

In *Doe v. Unocal*, Judge Reinhardt, concurring, argued that domestic federal common law provides the standard for accomplice liability.¹⁷ The plaintiffs claimed that Unocal, a California-based oil company, aided and abetted the Burmese military regime in committing various international law violations while constructing a gas pipeline through the country.¹⁸ Judge Reinhardt differed from the majority in finding that Unocal's liability for aiding and abetting Burma stemmed from federal common law rather than international law.¹⁹ Judge Reinhardt stated that the text of the ATS demonstrates that international law applies to determine whether a substantive violation has occurred, but that ATS remains silent as to what body of law applies to "ancillary issues" that may arise in the case.²⁰ He concluded that accomplice liability standards constituted an "ancillary issue."²¹

Judge Reinhardt argued that federal courts apply federal common law in areas where the U.S. government has an interest in a uniform body of law.²² ATS cases fit this description as these cases often implicate the United States' relations with foreign nations.²³ He also cited *United States v. Kimbell Foods*²⁴ for the proposition that courts must apply federal common law to resolve ancillary issues and fill "the interstices of federal legislation."²⁵ Because Congress passed the ATS to create a federal tort action for violations of international law,²⁶ Reinhardt believed that the judiciary should resort to domestic common law principles to fill the gaps in the ATS policy of

17. *John Doe I v. Unocal Corp.*, 395 F.3d 932, 965 (9th Cir. 2002). Although the Ninth Circuit vacated the *Unocal* decision as part of the settlement in that case the decision still stands on its persuasive value. See also Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT'L HUM. RTS. 304, 320 (2008).

18. *Unocal Corp.*, 395 F.3d at 932.

19. *Id.* at 963 (Reinhardt, J., concurring).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. 440 U.S. 715, 727 (1979).

25. *Unocal Corp.*, 395 F.3d at 965-966 (Reinhardt, J., concurring).

26. *Id.* at 966.

establishing a forum and remedies for violations of customary international law, including in that category the choice of law to govern accomplice liability.²⁷ These arguments stemmed in part from an article written by plaintiff's counsel in *Unocal*, Paul Hoffman and Daniel A. Zaheer, two years before the case reached the appellate court. The authors argued that using federal domestic common law protects uniquely federal interests, and effectuates the congressional intent of the ATS.²⁸ Hoffman and Zaheer argued that while *Erie*²⁹ generally restricts the creation of federal general common law, the Constitution and federal statutes³⁰ support the conclusion that federal institutions should determine matters of international significance.³¹ Hoffman and Zaheer used the *Boyle v. United Techs. Corp.*³² two-part test to demonstrate how courts can decide whether to use federal common law.³³ First, courts consider whether the federal interest is strong enough to displace state law.³⁴ Second, courts consider whether the use of federal common law avoid otherwise significant conflicts between a federal policy or interest and the operation of state law.³⁵ Hoffman and Zaheer argued that in ATS cases, the federal interest in providing a uniform application of international law and maintaining federal control over foreign relations satisfy these two prongs.³⁶

Judge Reinhardt also wrote that absent a statutory mandate, courts should not substitute international law principles for established federal common law.³⁷ Nevertheless, courts can still apply constructive or helpful rules of international law, as federal common law sometimes incorporates principles of the laws of nations.³⁸ Thus, according to Reinhardt, federal courts can use the vast experience of federal common law, as well as appropriate supplemental international law principles to provide the appropriate rule of decision.³⁹

27. *Id.* Courts have applied this principle by using federal common law implement policies underlying a federal statute. *E.g.* *Illinois v. City of Milwaukee*, 406 U.S. 91, 100-04 (1972) (holding that federal courts may fashion federal common law remedies to implement the policies of federal water pollution statutes, because the federal legislation did not address the specific legal issue presented).

28. Hoffman, *supra* note 14, at 54-55.

29. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

30. U.S. CONST. art. I, §§ 8, cls. 3, 10 art. III, § 2; 28 U.S.C. §§ 1251 (a)(2), (b)(1), (b)(3), 1332 (a)(2), 1333, 1350-51.

31. Hoffman, *supra* note 14, at 55 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)).

32. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988).

33. Hoffman, *supra* note 14, at 55.

34. *Id.* at 55-56.

35. *Id.* at 56 (citing *Boyle*, 487 U.S. at 507).

36. *Id.*

37. *Unocal*, 395 F.3d at 967 (Reinhardt, J., concurring).

38. *Id.* (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

39. *Id.*

Finally, Judge Reinhardt applied the Restatement (Second) of Conflict of Laws' seven-part analysis,⁴⁰ and held that almost all the factors, including ease of determination of the applicable law, certainty and predictability, militate in favor of applying federal common law.⁴¹

Hoffman and Zaheer also argued that international decisions such as *United States v. Flick*,⁴² and *Prosecutor v. Furundzija*,⁴³ point to the application of federal common law, where the courts must first look to international and federal positive law addressing the particular subject.⁴⁴ If the standard under these sources is not the same, the court should look to the underlying policies in the ATS and the international norm in choosing which source of law furnishes the most appropriate rule.⁴⁵ Hoffman believes that this approach would allow a uniform application of international law in U.S. courts and protect the foreign relations interests of the political branches as these are impacted by the ATS.⁴⁶

In *Khulumani*, Judge Hall agreed that federal common law should provide the standard for accomplice liability.⁴⁷ Citing an *amici curiae* brief for International Law Scholars, Judge Hall stated that it is a "hornbook principle that international law does not specify the means of its domestic enforcement."⁴⁸ Judge Hall felt that this principle required courts to apply

40. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

41. *Unocal*, 395 F.3d at 967 (Reinhardt, J., concurring).

42. *United States v. Flick*, (Dec. 22, 1947), in 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIB. UNDER CONTROL COUNCIL LAW NO. 10 (1952) (involving the International Military Tribunal presiding over the Nuremberg trials referring to the common law in finding rules for applying the necessity defense. The court in *Flick* also found that international law provided a basis for mitigating a punishment under a claim of necessity or coercion by violence).

43. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A (July 21, 2000) involved the International Criminal Tribunal for the Former Yugoslavia (ICTY) (deriving an aiding and abetting standard by looking to the precedent of military courts which had tried individuals for violations of international humanitarian law). These courts relied, in part, on common law. The *Furundzija* court ruled that finding legal rules for international claims must start with international authority, but that if such authority cannot provide express rules, courts can supplement such international norms with generally recognized principles of criminal law.

44. Hoffman, *supra* note 14, at 88.

45. *Id.*

46. *Id.* at 54.

47. 504 F.3d 254, 284 (Hall, J., concurring).

48. *Id.* at 286. Judge Hall based this conclusion on other authorities including: *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring); *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir.1995); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703 cmt. c (1987) (stating that in general "individuals do not have direct international remedies against a state violating their human rights except where such remedies are provided by international agreement. Whether they have a remedy under the law of a state depends on that state's law"); and various international law scholars including L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 224 (1972) (stating that "while international law is part of the law of the United States . . . [i]nternational law itself . . . does not require any particular reaction to violations of law specifically . . . [w]hether and how the United States wished to react to such violations are domestic, political questions: the courts will not assume any particular reaction, remedy, or consequence");

domestic law to establish accomplice liability standards.⁴⁹ None of the authorities Judge Hall cited, however, directly address the issue of whether domestic law provides the sole standard for accomplice liability in any case applying international law norms.

Judge Hall also noted that when faced with a choice between domestic and international law, courts should follow Oppenheim's admonishment to choose domestic law.⁵⁰ As to the ATS specifically, Judge Hall stated that *Sosa* at best lends "Delphian guidance" as to whether federal common law or international law should provide the standard for aiding and abetting liability.⁵¹ Without greater guidance, Judge Hall argued that courts should derive the standard from the traditional source of federal common law.⁵²

In another ATS case, *Bowoto v. Chevron*, Professor Ralph Steinhardt argued in a declaration for the plaintiffs that the ATS' application to claims in "tort only, committed in violation of the law of nations"⁵³ established that common law tort doctrine determines what conduct amounts to an actionable violation of international law.⁵⁴ Professor Steinhardt's declaration argued that requiring international consensus on accomplice liability does not accord with the use of "tort" in the statute, which indicates that courts should use principles of tort law, not international law, to effectuate the jurisdiction granted in the ATS.⁵⁵

Furthermore, several historical statements and cases seem to assume that domestic common law rules would provide the standard for third party liability. In 1795, Attorney General Bradford interpreted the ATS stating that the statute included liability for committing aiding or abetting violations of the laws of war.⁵⁶ Because there were no law-of-war treaties or customary norms defining an "aiding or abetting" standard, the Attorney General Bradford's statement implied that courts could draw upon the common law of torts.⁵⁷ In the same

OPPENHEIM, 1 INTERNATIONAL LAW 44-46 (8th ed.1955); L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 116 (1980); 4 WILLIAM BLACKSTONE, COMMENTARIES *72 (noting that the law of nations recognized certain universal offenses but that accessorial liability can be made available "by statute").

49. *Khulumani*, 504 F. 3d. at 287.

50. OPPENHEIM, *supra* note 48, at 44-46.

51. *Khulumani*, 504 F.3d at 286.

52. *Id.* Paul Hoffman and Daniel A. Zaheer support Judge Hall's position and have written that "[c]ourts must look first to international and federal positive law addressing the particular subject" and that only after such an inquiry, and if federal domestic law cannot provide an answer, should courts look to customary international law. Hoffman, *supra* note 14, at 68.

53. 28 USC § 1350.

54. Declaration of Ralph G. Steinhardt, *Bowoto v. Chevron*, 312 F.Supp.2d 1229 (N.D. Cal. 2004), *available at* <http://ccrjustice.org/files/Raplgh%20Steinhardt%20Declaration%20in%20Bowoto.pdf>.

55. *Id.*

56. Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795).

57. *Id.*

year, the Supreme Court held that a French citizen who aided a U.S. citizen in unlawfully capturing a Dutch ship acted in violation of the law of nations.⁵⁸ The Court imposed civil liability upon the French citizen although the Court did not provide an international law standard for accomplice liability.⁵⁹ Finally, Blackstone stated that individuals who aid or abet pirates are liable as pirates.⁶⁰ Nevertheless, no treaty or law of nations defined the standard for aiding or abetting pirates.⁶¹ Thus, because international law recognized that pirates could violate the law of nations with varying degrees of complicity, national courts would have to provide the standard for such complicity.⁶²

The referenced arguments rely heavily upon the claim that a third party's complicity in such a primary violation constitutes an ancillary question properly analyzed under federal common law. Other courts, however, have ruled that accomplice liability is to be categorized as a primary violation, and that the ATS thus requires that international law provide the standard for accomplice liability.

IV.

THE CONDUCT-REGULATING APPROACH: INTERNATIONAL LAW SHOULD PROVIDE THE STANDARD FOR ACCOMPLICE LIABILITY.

The idea of a "conduct-regulating norm"⁶³ underpins much of the view that international law should provide the standard for accomplice liability. Professor William Casto has argued that in accordance with the general principle that tort plaintiffs must prove that the defendant has violated a substantive norm regulated by law, and read *Sosa* to hold that in ATS cases the federal courts must find a conduct-regulating norm in international law.⁶⁴ For other rules of decision which do not regulate conduct, courts should use ordinary federal common law.⁶⁵

Professor Casto argued that the ATS provides the rules of decision for conduct-regulating norms by analogy to 41 U.S.C. § 1983,⁶⁶ which authorizes a remedy for violations of rights protected by the U.S. Constitution.⁶⁷ In § 1983

58. *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795).

59. *Id.*

60. 4 WILLIAM BLACKSTONE, COMMENTARIES * 5.

61. *Id.*

62. *Id.* See STEPHENS, *supra* note 11 at 319, for a valuable and thorough evaluation of this position.

63. A "conduct-regulating norm" would include any rule which determined what a defendant could do and actions were substantive violations.

64. William R. Casto, *Regulating the New Privateers of the Twenty-First Century*, 37 RUTGERS L. J. 671, 695 (2005) [hereinafter *Regulating*].

65. *Id.*

66. William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L. J. 635, 639-641 (2005) [hereinafter *New Federal Common Law*].

67. 42 U.S.C. § 1983 (2008).

cases, the right or norm—regulating conduct—derives from the Constitution, but courts apply their own procedural rules. In ATS cases, this principle would mean that international law answers all questions as to whether the defendant has acted unlawfully.⁶⁸ The Supreme Court has agreed that aiding and abetting, a form of accomplice culpability, is a conduct-regulating norm.⁶⁹ Thus, while domestic law governs procedural issues, “the norm for which a remedy is provided in ATS litigation is clearly governed by international law.”⁷⁰

Several courts have agreed with Professor Casto’s analysis of conduct-regulating norms as applied to the ATS. In *Khulumani*, Judge Katzmann’s concurrence concluded that international law provides the standard for aiding and abetting violations.⁷¹ Judge Katzmann read *Sosa* to stand for the proposition that courts should use international law to provide the standard for ATS aiding and abetting claims.⁷² *Sosa*, in footnote twenty, discussed the liability of non-state actors and held that “whether a norm is sufficiently definite to support a cause of action” raises a “related consideration [of] whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”⁷³ Thus, the *Sosa* Court implied that courts should look to international law when deciding whether each particular norm extends liability to non-state actors, which would logically include accomplice liability. Judge Katzmann held that in accord with *Sosa*’s emphasis on the narrowness of the ATS jurisdictional grant, the court’s most effective means of maintaining the narrow scope of jurisdiction required it to allow ATS suits only against defendants who commit violations of international law.⁷⁴

If Judge Katzmann and Professor Casto are correct in reading *Sosa* and the characterization of the relationship between federal common law and international law, courts should use international law for accomplice liability standards. The ATS’s jurisdictional grant “enable[s] federal courts to hear claims in a very limited category *defined by the law of nations*.”⁷⁵ Under this framework, if a court finds that a defendant’s conduct violates the modest number of international law norms, then the court considers whether the common law provides a cause of action for plaintiffs’ claims.⁷⁶ “Subject to

68. *New Federal Common Law*, *supra* note 66, at 639.

69. *Id.* at 650.

70. *Id.* at 643.

71. Judge Katzmann left open the possibility that federal common law might also provide aiding and abetting liability “even if such liability did not exist under international law.” *Khulumani*, 504 F.3d at 277 n.13. (Katzmann, J., concurring).

72. *Id.* at 269.

73. *Sosa*, 542 U.S. at 732 n.20.

74. *Khulumani*, 504 F.3d at 269-70 (Katzmann, J., concurring).

75. *Sosa*, 542 U.S. at 712 (emphasis added).

76. *Id.* at 724.

vigilant doorkeeping,” courts determine whether the common law permits judicial recognition of actionable international norms.⁷⁷ This narrow jurisdictional grant forces courts to exercise caution in determining whether to hear a claim under the ATS, and thus they “should first determine whether the alleged tort was in fact ‘committed in violation of the law of nations’ . . . and whether this law would recognize the defendants’ responsibility for that violation.”⁷⁸ This determination should include not just the primary responsibility of a state, but a non-state actor’s responsibility as well.

While *Sosa* did not consider this issue, Judge Katzmman also rejected the argument that *Central Bank of Denver v. First Interstate Bank of Denver*⁷⁹ precludes aiding and abetting liability under the ATS.⁸⁰ In *Central Bank* the Supreme Court held that

[w]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant’s violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.⁸¹

The *Khulumani* defendants interpreted *Central Bank* as stating that courts impose civil aiding and abetting liability only when Congress deliberately chooses to do so.⁸² Judge Katzmman disagreed, and citing the Casto article,⁸³ argued that the Court’s reliance on congressional intent in *Central Bank* did not apply to ATS cases because “under the [ATS], the relevant norm is provided not by domestic statute but by the law of nations.”⁸⁴ While Judge Katzmman dismissed the applicability of the direct holding in *Central Bank*, Professor Casto argued that in fact both the majority and dissenting justices in *Central Bank* agreed that accomplice liability is a conduct-regulating norm.⁸⁵ “In other words, there is no liability unless the aiding-and-abetting norm proscribes assisting direct violators of another norm.”⁸⁶ *Central Bank* holds that courts should analyze the source of the principal norm—in ATS cases, international law—when deciding upon the availability of accomplice liability.

77. *Id.* at 729.

78. *Khulumani*, 504 F.3d at 270 (Katzmann, J., concurring).

79. *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 182 (1994).

80. *Id.* at 282 (Katzmann, J., concurring).

81. *Cent. Bank*, 511 U.S. at 182.

82. See Brief for the United States of America as Amicus Curiae at 12, *Khulumani*, 504 F.3d 254 (Nos. 05-2141-cv, 05-2326-cv). Defendants commonly make such a claim in ATS aiding and abetting cases. See, e.g., Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Defendant-Appellee Talisman Energy, Inc., and in Support of Affirmance at 19-22, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 07-0016-cv (2d Cir. May 8, 2007).

83. *New Federal Common Law*, *supra* note 66, at 650.

84. *Khulumani*, 504 F.3d at 282 (Katzmann, J., concurring).

85. *New Federal Common Law*, *supra* note 66, at 650.

86. *Id.*

The *Khulumani* decision, although discussing the issue of choice of law on accomplice liability in detail, produced no definitive ruling on the matter.⁸⁷ The court could not arrive at a consensus on the issue, and thus accomplice liability remained an unsettled issue in the Second Circuit. And although the Ninth and Second Circuit courts have ruled upon a number of ATS claims, until October 2009, neither court had produced a binding ruling on ATS accomplice liability choice of law.

The Second Circuit in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,⁸⁸ has at last provided a definitive ruling on the issue. The Second Circuit drew heavily upon Judge Katzmann's opinion in *Khulumani* and found that international law provides the standard.⁸⁹ The *Talisman* court, like Judge Katzmann, relied upon *Sosa*'s footnote twenty and the command that ATS cases apply to violations of international law with definite content and acceptance among civilized nations.⁹⁰ The court read footnote twenty as standing for the principle that scope of liability in ATS cases should "be derived from international law."⁹¹ Accomplice or secondary liability would fall under the principle's scope. Also, "[r]ecognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place."⁹² Thus, the *Sosa* Court's admonishment to allow actions based only upon certain definite violations of the laws of civilized nations applies equally in force to secondary liability.

Many scholars agree that international law should provide the standard as to choice of law.⁹³ Professor Keitner classifies the two approaches to choice of law for accomplice liability in ATS cases as the "ancillary question" approach and the "conduct-regulating" approach.⁹⁴ Professor Keitner rejected Judge Reinhardt's approach to ancillary questions in *Doe v. Unocal* stating "[t]he ancillary question approach fails because it does not offer a principled account of why a defendant's mode of liability should be treated differently from the state's underlying violation for choice of law purposes."⁹⁵ Instead, Professor Keitner applied a conduct-regulating rules approach which treats the defendant's

87. In line with Judge Hall and Katzmann's concurrence, Judge Korman also agreed that accomplice liability standards should arise under international law, but argued that courts must separately consider each norm of international law, and whether that norm provides for accomplice liability. *Khulumani*, 504 F.3d at 326, 331 (Korman, J., concurring in part and dissenting in part).

88. 582 F.3d 244 (2d Cir. 2009).

89. *Id.* at 258-59.

90. *Id.*

91. *Id.*

92. *Id.* at 259.

93. Chimene I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008).

94. *Id.* at 73-74.

95. *Id.* at 79.

accomplice participation as an integral part of the alleged violation.⁹⁶ While the ancillary question approach applies domestic common law, the conduct-regulating approach applies international law to both the conduct of the state and the accomplice.⁹⁷

Professor Keitner argued that some confusion results from the language in both the ATS and *Sosa*.⁹⁸ For instance, the *Sosa* Court held that the ATS was “in terms only jurisdictional” and that this grant “enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”⁹⁹ Nevertheless, Keitner argued that the First Congress viewed international law as part of the common law, such that the ATS provides a “federal forum for violations of international law that were already cognizable at common law.”¹⁰⁰ This meant that for the First Congress, there was no choice of law issue since both domestic and international law were part of natural law.¹⁰¹ Thus, much of the discussion of the ATS and *Sosa*’s reading must take into account the fact that references to “common law” do not signify a preference for domestic law.

Professor Keitner dismisses the view of Judge Reinhardt and Judge Hall and the ancillary question approach as not providing a principled reason why applying domestic law should be a court’s default in ATS cases.¹⁰² “To the contrary, given that ATS was intended to provide a federal forum for adjudicating international law violations, one should not “substitute” domestic law standards for well-established international law standards on accomplice liability, as the ancillary question approach does.”¹⁰³ The conduct-regulating approach avoids this conceptual and doctrinal inconsistency by providing a principled method to differentiate between substantive and ancillary matters through the application of international law to a statute remedying international law violations.¹⁰⁴ For Professor Keitner, and in contrast to Judge Reinhardt, a company liable under the ATS for aiding and abetting an international law violation will have itself acted in violation of international law and thus have committed a substantive offense.¹⁰⁵ Supplemental domestic law simply provides the particular type and contours of remedy in a tort action.¹⁰⁶

Keitner also argues that besides being conceptually and doctrinally

96. *Id.* at 74.

97. *Id.*

98. *See id.* at 65-66.

99. *Sosa*, 542 U.S. at 712 (emphasis added).

100. Keitner, *supra* note 93, at 77.

101. *Id.*

102. *Id.* at 76.

103. *Id.*

104. *Id.* at 79.

105. Keitner, *supra* note 93, at 79.

106. *Id.*

inconsistent, applying domestic law to aiding and abetting liability raises the specter of “illegitimately applying U.S. law to the extraterritorial conduct of non-U.S. defendants, exceeding the limits of domestic prescriptive jurisdiction based on territory or nationality.”¹⁰⁷

Finally, in the *Sosa* litigation, other international bodies, including the European Commission, called for the Court to “rigorously apply international law” to both “determine the conduct that gives rise to a violation of the law of nations” and “to determine the actors who may be subject to liability.”¹⁰⁸ Part of determining what actors may be subject to the ATS includes accomplice liability.

Although both sides of the debate concerning choice of law in ATS accomplice liability cases have merit, the better position is that U.S. courts should apply international law as the standard for accomplice liability. This position is more coherent with regards to the purpose of the ATS.

V.

THE CONDUCT-REGULATING APPROACH PROVIDES A MORE COMPELLING ANSWER TO THE QUESTION OF ACCOMPLICE LIABILITY IN THE ATS.

Professor Keitner’s approach to accomplice liability is the only approach that accords with the intent and purpose of the ATS. Although little legislative history survives regarding the ATS, the statute makes clear that the First Congress intended to provide federal jurisdiction for certain violations of the law of nations. Corporations, or other entities, engage in unlawful conduct when they aid and abet other violators of international law. Aiding and abetting is itself a substantive violation of the law. To hold otherwise would contravene the congressional intent of the ATS and apply domestic law to substantive violations of international law.

While federal courts should apply international law to find accomplice liability standards, it makes sense for courts to apply domestic law for matters such as personal jurisdiction, evidence, damages, etc. Nevertheless, accomplice liability shares little with these procedural issues. Although the comparison is not exact, domestic principles on choice-of-law help demonstrate why federal courts should apply international law to accomplice liability. *Erie v. Tompkins* generally requires that federal courts apply state law in diversity jurisdiction cases.¹⁰⁹ “Under the *Erie* doctrine, federal courts sitting in diversity apply state

107. *Id.* at 77. See, e.g., Ramsey, *supra* note 4 (discussing how extraterritorial application of national law may conflict with international law).

108. Brief of Amicus Curiae the European Commission in Support of Neither Party at 3-4 (Jan. 23, 2004), *Sosa*, 542 U.S. 692 (2004).

109. *Erie*, 304 U.S. at 78.

substantive law and federal procedural law.”¹¹⁰ This situation is comparable to ATS cases where federal courts must apply the substantive international law while utilizing federal procedures.

Several cases provide precedent for federal courts in deciding whether a rule is procedural or substantive. The logic of these cases applied to the question of accomplice liability in the ATS point to the application of international law. In *Guarantee Trust Co. v. York* the Court created the “outcome-determinative test” where the Court held that if a rule determines the outcome of the case, federal courts should apply state law.¹¹¹ The Court created the test with the aim that the outcome of litigation in federal court should be substantially the same as if the case were tried in state court.¹¹²

This reasoning applies to ATS cases to support courts using international norms of accomplice liability. The question of accomplice liability goes to the very heart of a tort case; were the defendant’s actions illegal? Accomplice liability governs the conduct, and thus legality of a defendant’s actions. Furthermore, while international plaintiffs have few options for tort cases, the principle of *Guarantee Trust* counsels that courts applying another system’s substantive law should strive to reach the same conclusion. Here, allowing multifarious nations to apply their own accomplice liability standards could substantially alter the outcome of a case depending upon which jurisdiction plaintiffs brought a case. Such a situation would conflict with a general purpose of *Erie* to alleviate “forum-shopping.”¹¹³

Furthermore, the United States does not have a strong federal interest to apply domestic law to aiding and abetting liability as federal courts necessarily apply international law in ATS cases.¹¹⁴ Accomplice liability standards are quite different from the Federal Rules of Civil Procedure (FRCP) which *Hanna v. Plumer* allowed federal courts to apply.¹¹⁵ *Hanna* thus signified that at least part of the distinction between substantive and procedural law concerns whether the rule fits within the FRCP. Unlike the rules in the FRCP, accomplice liability determines what conduct is illegal. Thus, the logic of federal practice and precedent calls for courts to use the “conduct-regulating approach.”

Although recourse to the “conduct-regulating approach” does solve a primary matter for choice of law in ATS accomplice liability cases, in no small fashion the issue relocates to a lower-level matter. Primarily, it seems

110. *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 427 (1996).

111. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

112. *Id.*

113. *See Erie*, 304 U.S. at 78. Although I am aware of no state which has a similar statute to the ATS, every state is capable, under international law, of enacting such a statute. Thus, while the fear of forum shopping may not currently be present, the danger remains.

114. *See Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958) (discussing how a strong federal interest can override the outcome-determinative test).

115. *Hanna v. Plumer*, 380 U.S. 460 (1965).

unavoidable that federal courts must have some recourse to domestic law to apply international law norms to particular fact situations. For instance, if a court applied an international law “mere knowledge” test to determining accomplice liability, substantial questions may arise applying that international norm to the facts of a particular case. Furthermore, while this hypothetical international law norm may not speak as to all issues, this silence should not suggest that the rule is not universal or binding. This dilemma arises at the heart of public international law, for while an established rule of public international law governs an issue, each nation interprets its details individually, and sometimes contradictorily. ATS cases are no different, and while federal courts should use international law to provide the standard for accomplice liability, federal common law understandably still retains a place.

Although the “ancillary question” approach does not accord with the purpose of the ATS, or the logic of federal precedent, it is understandable why many judges and plaintiffs wish courts to apply domestic federal common law; courts and judges often have greater familiarity with domestic common law. It may be more difficult in certain situations to discern principles of international law as opposed to domestic law, but this does not excuse federal courts from the task of applying the law of nations. In ATS cases, federal courts must necessarily apply international law to the substantive violation, whether this includes accomplice liability or not. Going one step further in applying international law for accomplice liability should present few unique problems.

Beyond doubt, international law cannot provide every rule for courts to apply in reaching a decision in international law cases. Nevertheless, because Judge Reinhardt and other commentators have not provided compelling reasons why accomplice liability standards fall within this “ancillary question” category, courts should apply international law. Nevertheless, federal common law very likely retains a place in deciding ATS accomplice liability cases and primarily when the facts of an individual’s actions amount to a violation of that international law standard.

VI. CONCLUSION

The two sides of the debate concerning choice of law for ATS accomplice liability argue that federal courts should use either domestic or international law. For judges and commentators arguing for the application of domestic law, accomplice liability is often viewed as an “ancillary question.” Despite this view, the emerging consensus is that international law should provide the standard. Using international law to find accomplice liability standards gives effect to both the purpose and intent of the ATS, and accords with the logic of federal precedent. This approach avoids applying U.S. domestic law extraterritorially. Finally, the conduct-regulating approach provides a more principled basis to determine what law courts should apply beyond accomplice

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To Proceed with Caution?

Aiding and Abetting Liability Under the Alien Tort Statute

Ryan S. Lincoln*

I.

INTRODUCTION

Accomplice liability is central to many of the Alien Tort Statute (ATS) cases that have arisen since *Filártiga v. Peña-Irala*.¹ Many plaintiffs bring ATS claims against non-state actors for aiding and abetting tortious conduct by state actors and other principals, instead of against the principals themselves. The proliferation of actions against alleged accomplices is not merely an attempt to get around doctrines that shield state actors from liability, such as the act of state doctrine or the Foreign Sovereign Immunities Act. Rather, a globalizing economy has increased the involvement of third-party actors in regions of the world where alleged tortious activity often occurs. This has increased the number of ATS claims against defendants for aiding and abetting violations of the law of nations, and resulted in doctrinal confusion concerning the contours of these types of violations.

While the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*² narrowed the scope of claims that could violate the law of nations and therefore be actionable under the ATS, it did not specifically address the question of accomplice liability. In footnote 20 the Court noted, but did not take up, the issue of "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."³ Following *Sosa*, plaintiffs have brought

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1. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).
2. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).
3. *Id.* at 733 n.20.

several aiding and abetting complaints in district courts under the ATS, with a few cases receiving appellate review.⁴ However, a split has emerged at the appellate level regarding the proper standard for finding aiding and abetting liability. Without a Supreme Court ruling on this issue, significant ambiguity remains regarding the aiding and abetting rule for those involved in ATS litigation.

This Article's purpose is threefold: (1) to parse the state of ATS adjudication regarding aiding and abetting liability, (2) to evaluate reasons underlying the circuit court split in order to clarify the complex factors that surround the aiding and abetting standard, and (3) to assess what the aiding and abetting standard should be.

Part II discusses the circuit split regarding the aiding and abetting standard. Part III addresses what facts would be sufficient under the standards adopted by the different circuit courts. Part IV discusses possible reasons underlying the split. Finally, Part V gives a brief suggestion for what the aiding and abetting standard should be.

II.

THE MULTIPLE STANDARDS OF ACCOMPLICE LIABILITY UNDER ATS

Sosa left open the question of whether the aiding and abetting standard should be drawn from domestic or international law.⁵ While subject to debate, this choice of laws question is outside the narrow scope of this Article.⁶ Instead, this Article adopts the trend that international law, rather than federal common law (or even domestic law of foreign states) is the proper source for determining the aiding and abetting standard. Furthermore, this Article assumes that corporations may be sued under the ATS, even though many debate this issue. The thrust of this Article, then, is to analyze the way courts have discerned the aiding and abetting standard under international law. The following section discusses the different approaches taken by courts regarding the sources of international law that bear on the rule.

A. *John Doe I v. Unocal Corp.* (9th Circuit 2002)

Unocal is one of only three appellate decisions to discuss aiding and abetting liability under the ATS.⁷ While it was vacated as part of settlement, *Unocal* remains an important exemplar of the reasoning underlying the liability

4. See Douglas Cassell, *Corporate Aiding and Abetting of Human Rights: Confusion in the Courts*, 6 NW. U. J. HUM. RTS. 304-05 (2008) (listing corporations that have been sued as accomplices under the ATS).

5. *Sosa*, 542 U.S. at 733 n.20.

6. See Charles Ainscough, *Choice of Law and Accomplice Liability Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 588 (2010).

7. *John Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

standard. In *Unocal*, the Ninth Circuit considered a summary judgment motion submitted by defendant Unocal—a California-based gas company operating in Burma—on charges of aiding and abetting under the ATS. The petitioners, Burmese villagers, alleged that Unocal was an accomplice to the Myanmar Military Governments' rape, murder, and torture of villagers carried out in the context of forced labor that was used to build a pipeline.⁸

The court, by *de novo* review, found that forced labor, murder, rape, and torture are violations of the law of nations⁹ and that certain violations, when done “in furtherance of other crimes like slave trading, genocide or war crimes” do not require state action to be justiciable.¹⁰ After engaging in a choice of laws analysis, the court looked to international law for the aiding and abetting standard.¹¹

Judge Pregerson, noting that international human rights law has largely developed in the context of criminal law, reasoned that “what is a crime in one jurisdiction is often a tort in another jurisdiction, and this distinction is therefore of little help in ascertaining the standards of international human rights law.”¹² The court noted with approval recent decisions from the district courts to follow aiding and abetting standards from international criminal law, and looked to opinions from the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) for guidance on the proper international law standard.¹³

First, the court cited *Prosecutor v. Furundzija*,¹⁴ noting that the decision was based on an “exhaustive analysis of international case law and international instruments.”¹⁵ The court also referenced *Prosecutor v. Musema*,¹⁶ calling it “especially helpful” on the issue of aiding and abetting liability.¹⁷ From these cases, the court defined the international standard for aiding and abetting as “knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”¹⁸

8. *Id.* at 936.

9. *Id.* at 945.

10. *Id.* at 946 (holding that forced labor is a modern variant of slavery and thus under the law of nations does not require state action).

11. *Id.* at 948.

12. *Id.* at 949.

13. *Id.* at 950.

14. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998).

15. *Unocal*, 395 F.3d at 950 n.26.

16. *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment (Jan. 27, 2000).

17. *Unocal*, 395 F.3d at 951.

18. *Id.* at 951 (noting that this standard is very similar to the domestic tort law standard for aiding and abetting in the Restatement (Second) of Torts). The court left aside the question of liability for moral support for the purpose of reviewing the grant of summary judgment, given that there was sufficient evidence that Unocal gave assistance and encouragement to the Myanmar Military.

B. *Khulumani v. Barclay National Bank* (2d Circuit 2007)

The Second Circuit also considered the question of aiding and abetting in *Khulumani*, yet arrived at a different standard, introducing a circuit split that has not been resolved.¹⁹ In *Khulumani*, plaintiffs sued approximately fifty corporate defendants alleging that they had “actively and willingly” maintained the apartheid system in collaboration with the South African Government.²⁰ In its *per curiam* opinion, the Second Circuit vacated the district court’s decision that the ATS provided no jurisdiction for aiding and abetting. The circuit court instead held that the ATS does support aiding and abetting, but the three judge panel split on the standard for liability.

Unlike the majority in *Unocal*, which predated *Sosa*, the *Khulumani* court could draw upon the *Sosa* decision, and Judge Katzmann used this Supreme Court benchmark for his opinion.²¹ Judge Katzmann began his analysis from *Sosa*’s standard that “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”²² Under *Sosa*, the norm in question must be specific, universal, and obligatory under international law.²³ Therefore, reasoned Judge Katzmann, federal courts must undertake two distinct analyses in ATS cases. First, the court must determine whether jurisdiction exists under the ATS and, second, whether a common-law cause of action exists, following the *Sosa* standard.²⁴

The district court, Judge Katzmann said, correctly asked whether international law contains specific recognition of liability for aiding and abetting law of nations violations, highlighting footnote 20 of *Sosa* as a general principle that international law should define the scope of aiding and abetting liability.²⁵ In sum, he wrote, “[b]ut to assure itself that it has jurisdiction to hear a claim under ATS, [a court] should first determine whether the alleged tort was in fact ‘committed in violation of the law of nations.’”²⁶

With regard to aiding and abetting liability, Judge Katzmann noted that individual liability for aiding and abetting a violation of international law is

19. *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (*per curiam*).

20. *Id.* at 258.

21. *Id.* at 264. (Katzmann, J., concurring).

22. *Id.* at 266 (Katzmann, J., concurring) (quoting *Sosa*, 542 U.S. at 692, 732).

23. *Sosa*, 542 U.S. at 732 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (suggesting that the “limits of section 1350’s reach” be defined by “a handful of heinous actions—each of which violates definable, universal and obligatory norms”)); *Id.* (quoting *In re Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) (“Actionable violations of international law must be of a norm that is specific, universal, and obligatory.”)).

24. *Khulumani*, 504 F.3d at 266.

25. *Id.* at 269.

26. *Id.* at 270 (quoting 28 U.S.C. § 1350).

universally recognized, thus meeting the *Sosa* requirement.²⁷ As evidence, he cited the tribunals following World War II, the ICTY, the ICTR and the Rome Statute of the International Criminal Court, which have all recognized a cause of action for aiding and abetting.²⁸

Of these sources, Judge Katzmman found the Rome Statute especially significant regarding the *mens rea* standard for aiding and abetting which finds liability for conduct done “for the purpose of facilitating the commission of such a crime.”²⁹ Judge Katzmman also cited the ICTY *actus reus* standard in *Furundzija*: “[T]he *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a *substantial effect* on the perpetration of the crime.”³⁰

In conclusion, Judge Katzmman stated that aiding and abetting is sufficiently well-established and universally recognized to meet the *Sosa* standard and held that “a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime.”³¹ Judge Katzmman did, however, qualify his proposed rule by recognizing that international law may shift, and pointed out that the ICTY and ICTR set a lower *mens rea* standard of “knowledge.”³²

Judge Korman took a different stance. With regard to aiding and abetting liability, Judge Korman maintained that while the language of ATS could support liability, it does so only if the plaintiff *first* invokes an international law norm actionable under the ATS.³³ Only if the norm at issue passed the *Sosa* standard, should the question of aiding and abetting be raised. Thus, Judge Korman said, a court must first engage in a norm-by-norm analysis under *Sosa*, and then, if necessary, determine whether the defendant aided and abetted the violation of that norm. To hold, as Judge Katzmman did, that aiding and abetting is actionable *per se* violates the dictates of *Sosa*.³⁴ Ultimately, however, Judge Korman agreed with Judge Katzmman that the Rome Statute’s “purpose” standard reflects international consensus on the aiding and abetting standard and has the added advantage of comports with domestic law.³⁵

27. *Id.*

28. *Id.*

29. *Id.* at 275 (quoting Rome Statute of International Criminal Court art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90).

30. *Id.* at 277 (quoting Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 235 (Dec. 10, 1998)).

31. *Id.*

32. *Id.* ¶ 279.

33. *Id.* at 327 (Korman, J., concurring).

34. *Id.*

35. *Id.* at 333.

C. *Presbyterian Church of Sudan v. Talisman Energy, Inc* (2d Circuit 2009)

Khulumani ultimately left the standard for aiding and abetting unresolved. In *Talisman*, the Second Circuit answered the open question.³⁶ There, the Second Circuit held that the district court correctly dismissed the case because plaintiffs could not show that Talisman provided substantial assistance to the Government of Sudan with the purpose of aiding its unlawful conduct.

Talisman Energy Inc.—a Canadian energy company—held a 25 percent stake in oil development operations of the Greater Nile Petroleum Exporting Company (GNPOC) that operated in Sudan. Against the backdrop of the Sudanese civil war, the GNPOC relied on Sudanese military forces for security while conducting its resource development operations.³⁷ Many GNPOC activities—such as building airstrips—both furthered the development projects and proved advantageous for the Sudanese military.³⁸ Plaintiffs argued that Talisman knew that these activities furthered Sudanese military actions, and brought suit alleging that Talisman aided and abetted the Government of Sudan in committing genocide, torture, war crimes, and crimes against humanity.

The Second Circuit framed the “live” question, following *Khulumani*, as whether the ATS imposes accessorial liability “absent a showing of purpose.”³⁹ Following the reasons given in *Sosa* for vigilant door-keeping of the ATS statute,⁴⁰ the Second Circuit held that determining whether a norm is sufficiently definite to support a cause of action necessarily entails judgment regarding the “practical consequences of making that cause available to litigants in the federal courts.”⁴¹

The court relied heavily on Judge Katzmann’s concurrence from *Khulumani*, passing over international law sources that specify a “knowledge” standard for aiding and abetting in favor of the Rome Statute’s “purpose” standard.⁴² Thus, the Second Circuit held that purpose, rather than “knowledge

36. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

37. *Id.* at 249.

38. *Id.* at 249-50.

39. *Id.* at 255.

40. “First . . . the [modern] understanding that the law is not so much found or discovered as it is either made or created[.] . . . [s]econd, . . . an equally significant rethinking of the role of the federal courts in making it[.] . . . [t]hird, [the modern view that] a decision to create a private right of action is one better left to legislative judgment in the great majority of cases[.] . . . [f]ourth, . . . risks of adverse foreign policy consequences[.] . . . fifth[.] . . . the lack of a congressional mandate to seek out and define new and debatable violations of the law of nations.” *Id.* at 255-56 (quoting *Sosa*, 542 U.S. at 725-28).

41. *Id.* at 256 (quoting *Sosa*, 542 U.S. at 732-33).

42. *Id.* at 259.

alone,” is the *mens rea* standard for aiding and abetting under the ATS.⁴³ Employing the purpose standard, the Court found that Talisman’s activities were of the type that normally accompany development projects, and that Talisman’s knowledge of the Sudanese Government’s international law violations did not rise to the *mens rea* level necessary to hold the company accountable.⁴⁴

III.

CURRENT STATE OF THE RULE

Talisman introduced a split within the circuit courts regarding the standard for aiding and abetting with its holding that aiding and abetting requires purpose, as opposed to *Unocal*’s knowledge standard.⁴⁵ It seems settled that aiding and abetting is actionable under the ATS and that international law provides the source for a cause of action. Granting this assumption, can the rule be synthesized across circuits? Such a synthesis requires looking at the sources of international law that provide the basis for the causes of action pleaded in these cases, parsing the elements of the rule as stated in each case, and evaluating how each circuit treats the facts under the rule.

In reversing summary judgment, the Ninth Circuit in *Unocal* discussed conduct that, at least, presented a genuine issue of material fact under the court’s aiding and abetting rule.⁴⁶ The district court had found evidence that Unocal knew forced labor was being used by the Myanmar Military to construct a pipeline in the mining areas and that Unocal gave practical assistance to this violation of international law by hiring the Myanmar Military to provide security and build infrastructure along the pipeline route.⁴⁷ Additionally, Unocal had used photos, surveys, and maps in daily meetings with the Myanmar Military to show them where the company needed such security and infrastructure.⁴⁸ In a footnote, Judge Pregerson reasoned that further evidence might support a finding that Unocal “encouraged” the Myanmar military to use forced labor through daily meetings in which Unocal knew that forced labor might be used and paying the Myanmar Military to provide these services.⁴⁹

The court held that a reasonable factfinder could determine that Unocal met

43. *Id.*

44. *Id.* at 260-61.

45. There is one district court decision, *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002), that has considered the aiding and abetting question, and it set the *mens rea* standard at knowledge. The Eleventh Circuit in 2005 in *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005), found a defendant guilty of aiding and abetting under the ATS by virtue of “active participation”—defined as substantial assistance given to the principal done with knowledge that would assist the activity at the time the assistance was provided.

46. *Unocal*, 395 F.3d at 947.

47. *Id.* at 952.

48. *Id.*

49. *Id.* at 952 n.29.

the *mens rea* standard through actual or constructive knowledge that the Myanmar Military used forced labor.⁵⁰ Judge Pregerson stated that “Unocal knew or should reasonably have known that its conduct—including the payments and the instructions where to provide security and build infrastructure—would assist or encourage the Myanmar Military to subject plaintiffs to forced labor.”⁵¹ In another footnote, Judge Pregerson cited a company Vice President’s testimony that Unocal knew that using the Myanmar Military for security might result in actions beyond Unocal’s control and of which Unocal would disapprove.⁵² Finally, in assessing the possibility of Unocal’s aiding and abetting the Myanmar Military’s acts of murder and rape, Judge Pregerson again referred to *Furundzija* citing under that *mens rea* standard, actual or constructive knowledge of the *specific* acts is not necessary, but rather if a defendant knows that “one of a number of crimes will probably be committed and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime.”⁵³

On the *actus reus* element of assistance that requires the action in question to have a “substantial effect” on the violation of the norm, the court held that the use of forced labor would not have occurred in the same way without Unocal’s hiring of the Myanmar Military and assistance in showing them where to employ security forces and build infrastructure.⁵⁴

Talisman provides marginally more guidance on what facts suffice under its aiding and abetting rule. Setting the *mens rea* standard at purpose, Judge Jacobs evaluated whether the facts could support an inference that *Talisman* aided and abetted the Sudanese Government’s international norm violations. On the *actus reus* prong, four activities—upgrading airstrips, designating certain geographical areas for oil exploration, paying royalties to the Sudanese Government, and giving general logistic support to the Sudanese military—were actions that, Judge Jacobs said, accompany any development operation and do not rise to the level of aiding and abetting.⁵⁵

More importantly, Judge Jacobs determined that none of these activities was done with “improper purpose,” even if they were possibly carried out “notwithstanding awareness” of the Sudanese government’s activities.⁵⁶ Even evidence that GNPOC (of which *Talisman* was a stakeholder) coordinated activities with the Sudanese Military did not support an inference of purpose because the company had a legitimate need for military protection while

50. *Id.* at 953.

51. *Id.*

52. *Id.* at 953 n.32.

53. *Id.* at 956 (quoting *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 246 (Dec. 10, 1998)).

54. *Id.* at 952-53.

55. *Talisman*, 582 F.3d 244, 260-61 (2d Cir. 2009).

56. *Id.* at 262.

working in this area.⁵⁷ In short, while plaintiffs could show that the Sudanese Government violated international law, they could not show that *Talisman* purposely aided and abetted this violation.⁵⁸ While not ruling out the possibility that intent could be inferred in certain situations, the facts of *Talisman* did not warrant such an inference.⁵⁹

From this reasoning we may draw a few conclusions. First, the courts have given dispositive weight to the *mens rea* element of the aiding and abetting standard. While Judge Jacobs granted that *Talisman* was aware that some of its activities aided Sudanese military operations, he consistently found that the plaintiffs failed to prove the requisite purpose.⁶⁰ Second, the door to inferring purpose based on actions may still be open, but we do not know what set of circumstances might warrant such an inference. Judge Jacobs did seem to give some evidentiary weight to facts that *Talisman* was angered by the Sudanese military's actions, undertook some activities to remedy the problems faced by Sudanese civilians, and eventually abandoned its operations due to Sudanese military activities, all of which are factors that might weigh against inferring purpose.⁶¹ Third, Judge Jacobs seemed troubled by the policy outcome of using a knowledge standard coupled with "commercial activities such as resource development" that could allow "private parties to impose embargos or international sanctions through civil actions in United States courts," which are the preserve of governments and multinational organizations.⁶²

Side-by-side, the decisions from *Unocal* and *Talisman* offer a few points of comparison. For both circuits the dispositive element is *mens rea*. Had *Unocal* not settled, there may be guidance on what actions satisfy the *actus reus* and *mens rea* standards, but all that remains is the reasoning of a vacated decision. *Talisman* focused primarily on the *mens rea* standard—with some dicta that "development activities" fall short of the *actus reus* requirement. On the higher *mens rea* bar of purpose, *Talisman*'s actions did not warrant a finding of aiding and abetting liability. For potential litigants and any future Supreme Court ruling on aiding and abetting, the key issue will likely be the *mens rea* standard.

IV. ACCOUNTING FOR DIFFERENCE

There are two possible ways to account for the different *mens rea* standards. Either one of the courts erred in its interpretation of international law, or the caution mandated by *Sosa* accounts for the difference between the

57. *Id.*

58. *Id.* at 263.

59. *Id.*

60. *Id.* at 264.

61. *Id.* at 263-64.

62. *Id.* at 264.

pre and post-*Sosa* decisions. The second is more speculative than the first, but absent Supreme Court rulings on the issues, an evaluation of each is useful both for the practitioner and for considering what rule the Supreme Court might hand down if it takes up the issue.

The first possibility for distinction lies in the weight given to different sources of international law. Each circuit court included the Nuremberg tribunals, ICTY and ICTR jurisprudence, and the Rome Statute of the International Criminal Court within its scope of analysis, yet came down differently on the *mens rea* standard.

The Ninth Circuit, citing *Filártiga* that the law of nations “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law,” approved a district court practice of looking to international criminal tribunals to determine aiding and abetting standards and said that recent decisions by the ICTY and ICTR were “especially helpful for ascertaining the current standard for aiding and abetting under international law as it pertains to the ATS.”⁶³ The court then briefly engaged with *Furundzija*—carefully noting its “exhaustive analysis of international case law regarding the *actus reus* and *mens rea* requirements⁶⁴—and *Musema* to formulate its “modified” *Furundzija* rule of “knowing practical assistance which has a substantial effect on the perpetration of the crime.”⁶⁵ The court’s treatment of international law is slim, and it seems to let *Furundzija* do the heavy lifting of a comprehensive international law review. It supports its choice to look only at the ICTY and ICTR on recent district court practice—citing two cases—and a conclusion that international human rights law has developed more from criminal than civil law.⁶⁶

Talisman, however adopted the higher purpose standard set by the Rome Statute, following Judge Katzmann’s concurrence from *Khulumani* and noting that Judge Korman would have agreed with the proposed rule were he not

63. *Unocal*, 395 F.3d at 949. See U.N. Human Rights Council, Special Representative of the Sec’y-Gen. on the issue of human rights and transnat’l corps. and other bus. enterps., *Bus. and Human Rights: Mapping Int’l Standards of Responsibility and Accountability for Corporate Acts* ¶¶ 22-32, U.N. Doc. A/HRC/4/35 (Feb. 9, 2007) (noting the expanding risks of liability for corporations operating abroad and the ICTY and ICTR aiding and abetting *mens rea* standard of “knowledge”).

64. *Unocal*, 395 F.2d at 950 n.26, 951 n.27.

65. *Id.* at 951.

66. *Id.* at 949, 950. This latter statement is curious, given that criminal law *mens rea* standards align more closely with the higher bar of “purpose” rather than the typical, lower civil standard of “knowledge.” This potential discrepancy might be reconciled by the Ninth Circuit’s reliance on international law—specifically ICTY and ICTR jurisprudence—rather than domestic law for the *mens rea* standard. Thus, the Ninth Circuit’s interpretive move is based on the *source* of international law it analyzes, rather than on a choice of law analysis. See BETH STEPHEN ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (2008). See also Ainscough, *supra* note 6.

dissenting on other grounds.⁶⁷ *Sosa's* requirement that a norm obtain universal acceptance under the ATS was central for Judge Katzmman.⁶⁸ The *Talisman* court approved both Judge Katzmman's choice of laws analysis and his assessment that the purpose standard best meets the universal acceptance criteria. The court relied heavily on Judge Katzmman's international law survey in *Khulumani* that concluded that the ICTY and ICTR jurisprudence are only "sporadic forays in the direction of a knowledge standard" and that the Rome Statute better signals the universally accepted purpose standard.⁶⁹ The court then cited *United States v. von Weizsaecker* (The Ministries Case) for the proposition that the international law standard, even at the time of Nuremberg, recognized aiding and abetting liability based on a purpose standard.⁷⁰ The court concluded that only the purpose standard satisfies *Sosa's* universal acceptance standard.⁷¹

What accounts for the different weight the courts placed on the sources of international law? First, neither the Ninth nor Second Circuit engaged in its own rigorous analysis. Rather, both rested on other courts' assessments of the aiding and abetting standard. *Unocal* relied heavily on *Furundzija*, giving strong deference to the ICTY's analysis of the current international aiding and abetting standard, mirrored by the ICTR's decision in *Musema*. It gave much less weight to the Rome Statute, reasoning that the lack of jurisprudence surrounding the aiding and abetting standard makes it less reliable as a rule. *Talisman*, too, yielded much of its analytical prerogative to other jurisprudence, adopting almost wholesale Judge Katzmman's preference for the Rome Statute. It did, however, reference the Ministries Case from Nuremberg, but gave no attention to the claim made by the Ninth Circuit that *Furundzija* embodies the current state of the rule in international law, or that the consensual nature of international law would caution against adopting the older Nuremberg standard.

Such lack of analysis is problematic, and one could argue that the Second Circuit employed the wrong standard.

First, the Ministries Case was not representative of the state of aiding and abetting liability in customary international law, even at that point in time. Professor Chimene Keitner notes that in that case the acquittal of defendant Rasche on the purpose standard was accompanied by a concurrent conviction of the banker Emil Puhl as an accomplice for crimes against humanity for knowingly disposing of valuables looted from holocaust victims.⁷²

Second, there is evidence that the ICTY and ICTR are much more than

67. *Talisman*, 582 F.3d at 258.

68. *Id.* at 259 (quoting *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring)).

69. *Id.* at 259.

70. *Id.*

71. *Id.* (citing *Sosa*, 542 U.S. at 732).

72. See Chimene Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 86 (2008).

“sporadic forays” into the knowledge standard. International tribunals, according to the Secretary-General of the United Nations, emphasize the “legality principle” that requires them to “apply rules of international humanitarian law which are beyond any doubt part of customary law.”⁷³ As a result, the ICTY jurisprudence that established the knowledge standard had taken “great pains to establish the customary international law foundation that it applies, including the elements of aiding and abetting.”⁷⁴

Finally, reliance on the Rome Statute is itself problematic. The language of the statute contains two references to aiding and abetting liability. The first, article 25(c) does call for a purpose standard.⁷⁵ Article 25(d)(ii), however, establishes liability for anyone who

[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall [. . .] (ii) [b]e made in the knowledge of the intention of the group to commit the crime.⁷⁶

This reveals that there is not a uniform standard within the Rome Statute, a tension complicated by the fact that most violations asserted under ATS litigation will implicate aiding and abetting for groups acting with a common purpose.⁷⁷ In short, the Second Circuit’s conclusion that the international consensus on aiding and abetting liability sets the *mens rea* standard at purpose is likely incorrect.

Another possibility is that the difference is attributable to *Sosa*. The *Sosa* court struck a vigilant posture regarding what violations of the law of nations could be brought under the ATS. Thus, another plausible reading of *Talisman* is that the Second Circuit interpreted international law with caution taken from *Sosa*, and, encountering what the court considered to be a discrepancy in international law regarding the *mens rea* standard, it conservatively opted for the higher bar of purpose.

Sosa’s cautious approach, however, was not new—*In re Estate of Marcos* and several subsequent cases from Ninth Circuit required the norms of

73. *Id.* at 76-77.

74. *Id.* See also Kevin Jon Heller, *Talisman Energy – Amateur Hour at the International Law Improv*, OPINIO JURIS, Oct. 6, 2009, available at <http://opiniojuris.org/2009/10/06/talisman-energy-amateur-hour-at-the-international-law-improv> (noting that the Special Court for Sierra Leone and Special Court for Cambodia also follow the knowledge standard. Only the Rome statute and the Special Panels for Serious Crimes in East Timor whose statute is based on the Rome Statute follow the purpose standard).

75. Rome Statute, *supra* note 7, art. 25(c) (“In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . (c) [f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”).

76. *Id.* art. 25(d)(ii).

77. Heller, *supra* note 74.

international law to be “specific, universal, and obligatory.”⁷⁸ *Sosa* held that the ATS, by way of federal common law, “furnish[es] jurisdiction for a relatively modest set of actions alleging violations of the law of nations.”⁷⁹ So, after *Sosa*, while the door is still “ajar” for allowing recognition of violations of international law that did not exist at the time the ATS was enacted, any alleged violation must be of the same “definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”⁸⁰ *Sosa* attempted to ensure that the crack in the door remained narrow by cautioning judges to weigh other “practical considerations” when ascertaining a norm, including United States or foreign government opinion and the possible impact of the litigation on United States’ foreign relations.⁸¹ In short, *Sosa* suggested strong caution to courts hearing ATS claims.⁸²

The majority opinion in *Talisman* was aware of *Sosa*’s caution. Judge Jacobs followed *Sosa* not only by looking to international law for the aiding and abetting standard,⁸³ but also by conservatively appraising that standard. Judge Jacobs cited *Sosa*’s “five cautions”⁸⁴ and acknowledgment of an “element of judgment about the practical consequences of making a cause of action available”⁸⁵ prior to addressing the aiding and abetting question left open by *Khulumani*. Judge Jacobs reasoned that “[r]ecognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place.”⁸⁶ As such, he adopted purpose as the aiding and abetting standard.

While he never made the point explicitly, Judge Jacobs seemed to be taking *Sosa*’s caution into consideration. A purpose standard is more likely than the lower knowledge standard to keep the ATS door ajar, but not let it swing open too wide. If there is some debate within sources of international law about the aiding and abetting *standard*, but not about aiding and abetting as a violation of international law in and of itself, this move is understandable. Nevertheless, it introduces an issue that may remain open until the Supreme Court takes up the aiding and abetting issue: can such caution restrict interpretation of the elements of a rule recognized in international law? The answer remains to be seen.

78. *In re Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994); *see also* *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) and *Alvarez-Machain v. United States*, 331 F.3d 604, 612 (9th Cir. 2003) (quoting *In re Estate of Marcos*, 25 F.3d at 1475).

79. *Sosa*, 542 U.S. at 720.

80. *Id.* at 732.

81. *Id.* at 732 n.21.

82. *See* Teddy Nemeroff, *Untying the Khulumani Knot: Corporate Aiding and Abetting Liability Under the Alien Tort Claims Act After Sosa*, 40 COLUM. HUM. RTS. L. REV. 231 (offering a more lengthy discussion of *Sosa*’s cautionary approach to international norms).

83. *Talisman*, 582 F.3d at 247 (2d Cir. 2009).

84. *See supra* note 40.

85. *Talisman*, 582 F.3d at 256 (quoting *Sosa*, 542 U.S. at 722-23).

86. *Id.* at 259.

V.

WHAT SHOULD THE STANDARD BE?

The Second Circuit's cautious consideration of the aiding and abetting standard in light of *Sosa* is, at first glance, both appropriate and warranted. The *Talisman* Court's decision came in an ATS landscape mapped by *Sosa*—even if all the ATS ground has not been authoritatively covered. Judge Pregerson's reasoning in *Unocal* did not carry the imprimatur of *Sosa* that *Talisman* displays, but it did incorporate the persuasive urge of caution that came from *Filártiga*. It is important, then, to give full consideration to the role *Sosa* played in the *Talisman* decision. This point, I think, gives the best guidance for the proper discernment of the aiding and abetting standard.

It is possible that the Second Circuit used *Sosa's* caution to guide its approach to the elements of the international law norm as to which there was some ambiguity. If the court thought that the norm *itself* met the *Sosa* standard of specificity and universal obligation but that its elements—in particular, the *mens rea* standard—were unclear, it may be reasonable to choose the higher standard of purpose. However, this over-interprets *Sosa*. While urging caution, *Sosa* gave definite guidance on *how* federal courts are to employ this caution. The standard of specific and universal acceptance that is the central holding of *Sosa* is the built-in manner by which courts are to discern what violations of international norms are covered by the ATS. If a norm has the requisite specificity and acceptance, then it is actionable under the ATS. Such specificity and universal acceptance should entail the elements that comprise the rule. It would be anomalous for a norm to reach universal acceptance and contain the appropriate specificity if its constitutive elements, and the standards by which those elements are satisfied, were in flux.

Judge Katzmann's choice of purpose for the aiding and abetting standard recognizes this. His reliance on the Rome Statute depends heavily on the number of states that have ratified the statute. To the extent that the *Talisman* Court adopted this reasoning, its decision was sensible. If, however, the *Talisman* court tried to impose *Sosa's* caution on the elements of the rule, then it takes *Sosa* too far.

The ultimate problem, then, lies in the analysis of international law. The weight of international authority is toward a knowledge standard, as discussed above. *Sosa's* standard of specificity and universal acceptance must extend to the norm writ large—that is, aiding and abetting as a justiciable norm under the ATS cannot exist independently of its elements. The knowledge standard extends across the international criminal tribunals, Nuremberg, and the text of the Rome Statute. On balance, aiding and abetting based on a *mens rea* standard of knowledge meets with such specificity and universal acceptance to be actionable following *Sosa*, and should be the standard despite any forays into a purpose standard.

VI.
CONCLUSION

Currently aiding and abetting liability under the ATS has taken rough shape, but is probably not in its final form. It seems that most districts recognize aiding and abetting as a viable theory of liability, and agree that the rule should be drawn from international law. Furthermore, there may also be a trend toward a purpose standard, following the *Talisman* decision, but the trend is not without significant counterweight. The Second Circuit could be wrong in its analysis of international law, and the proper international consensus should instead be read as knowledge. However, it may also be that *Sosa* colors not only reference to international law in the analysis of the rule, but also the way courts should read international law so that the higher *mens rea* standard should be adopted. This, however, seems to take *Sosa* too far. Currently, this situation puts two obstacles in front of plaintiffs pursuing aiding and abetting claims. To be successful a plaintiff would have to argue not only against the jurisprudential trend towards a purpose standard, but might also have to argue that *Sosa*'s caution does not extend to the way a court should read international law.

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New Frontiers in the ATS: Conspiracy and Joint Criminal Enterprise Liability After *Sosa*

Anna Sanders*

I.

INTRODUCTION

The 2004 Supreme Court ruling in *Sosa v. Alvarez-Machain*¹ resolved much of the controversy over which international law violations were cognizable under the ATS, but has left courts with little concrete guidance about how to apply the various theories of indirect liability. This conspicuous gap in the *Sosa* ruling has led to confusion, and an animated debate among courts about whether they must turn to international legal norms or federal common law as the basis for assessing and applying theories of indirect liability. The two liability doctrines examined in this Article, conspiracy and Joint Criminal Enterprise (JCE), present particular challenges to the courts, as they can be slippery and ill-defined concepts,² and because their development within international jurisprudence is more controversial than other modes of vicarious liability, such as aiding and abetting.

Although conspiracy and JCE are often seen as one and the same, they are in fact distinguishable, both in their elements and form, as well as in their treatment in U.S. and international case law. This Article will begin in Part II

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1. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) [hereinafter *Sosa*].

2. JCE and conspiracy are often used interchangeably by courts, thus blurring the lines that distinguish them. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 260 (2d Cir. 2009) [hereinafter *Talisman IV*]. Furthermore, conspiracy as a theory of liability is often confused with its other juridical function as a standalone inchoate crime, in part due to the divide between common law and civil law countries. See *infra* Part II.B.; William A. Schabas, *General Principles in the International Criminal Court Statute* (Part III), 6 *Eur. J. Crime Crim. L. & Crim. Just.* 400, 413 (1998).

with a brief discussion of the challenges and opportunities that conspiratorial and JCE liability present under international law generally, and as tool for ATS plaintiffs specifically. Part III will look at the use of conspiratorial liability in ATS litigation, highlighting the debate over whether international or federal common law should provide the source of law for indirect liability, and then turning to U.S. courts' assessment on whether conspiracy is a cognizable norm under international law. Part IV will outline the development and various conceptualizations of JCE under international law, review the very nascent ATS case law on this mode of liability, and then return to a brief analysis of JCE's status as an international law norm. The final section will synthesize the conclusions of the previous discussions on U.S. and international treatment of these liability doctrines, and consider the future of JCE and conspiracy liability under the ATS.

II.

CONSPIRACY AND JCE: FILLING A GAP?

Before moving into more formalistic legal arguments, it is helpful to first contextualize the discussion of JCE and conspiratorial liability by considering the role these doctrines may serve under a statute that fundamentally stands for accountability and justice. Though it is unlikely that such considerations will be taken up by the courts, they provide a frame for understanding both the limits and possibilities of these legal doctrines as tools of accountability in human rights civil litigation.

Conspiracy and JCE are usually pled in conjunction with other theories of liability, such as aiding and abetting, command responsibility, or even direct liability. However, unlike these other modes of liability, conspiracy and JCE have the potential to cast a particularly wide net of responsibility, encompassing defendants who never materially participated in the violations in question, and who did not occupy a leadership position among those who did physically perpetrate the acts alleged. On the one hand, this expanded conceptualization of liability gives a much needed tool to plaintiffs and human rights attorneys to hold individuals responsible for crimes which they helped orchestrate but not necessarily perpetrate; on the other hand it runs the risk of diluting concepts of culpability and individual liability for violations of international law.

The controversies surrounding JCE and conspiracy liability are perhaps reflective of the uneasiness that states and jurists still feel towards the very concept of international criminal justice. International criminal law in many ways incorporates two contradictory purposes. International criminal justice is decidedly committed to holding only individuals responsible for the most egregious international law violations, and rejects attempts to criminalize an

entire society.³ However, because of the generally massive scale on which they occur, and the involvement of states or well-organized armed groups, international crimes by nature suggest collective culpability.⁴ International criminal law thus far has tried to reconcile the individual and collective culpability at play by targeting the individual actors who bear the greatest responsibility for the violations.

JCE and conspiracy straddle these dual purposes in a precarious way. They each create individual liability for actors who may not have participated in the physical perpetration of the crimes themselves, but whose role in the violations is viewed as particularly severe because they were part of the genesis of the collective criminal enterprise or plan. Further, because JCE and conspiracy hinge on the existence of a criminal enterprise or plan that implicate actors beyond the specific defendant, its pleading necessitates a finding of collective planning and action to perpetrate human rights violations. As one commentator has explained:

The JCE doctrine serves to link crimes to several persons (perpetrators and accomplices); it, conversely, connects persons with distinct crimes and, last but not least, it manages to portray the interaction and cooperation between members of a group or organization, showing the dynamics of collective action without which, according to many, international crimes cannot be understood.⁵

However, at the same time that JCE is an individual liability doctrine, it potentially explodes the scope of individual liability by casting the net so wide as to encompass every individual who participated in the criminal enterprise.⁶ This concern has been mostly tempered at the international tribunals with the “gate-keeping” role that prosecutors play, and explicit limits on potential defendants enshrined in the court statute.⁷ Furthermore, the courts themselves

3. “[C]rimes against international law are committed by men, not by abstract legal entities.” Nuremberg Judgment in L. FRIEDMAN, *THE LAW OF WAR, A DOCUMENTARY HISTORY*, VOL. II 940 (1972).

4. See Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. INT’L CRIM JUST. 109, 110 (2007).

5. Harmen van der Wilt, *Joint Criminal Enterprise: Possibilities and Limitations*, 5 J. INT’L CRIM. JUST. 91, 92 (2007).

6. This is particularly so with the third level of JCE, described *infra* Part IV.A.

7. See Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510, 518-22 (2003). Although JCE was revived in modern international law in the International Criminal Tribunal for the former Yugoslavia (ICTY) case against Dusko Tadic, who was admittedly a relatively low level perpetrator, this was primarily due to a dearth of apprehended defendants at the fledgling court which was being closely watched to see if it would deliver on its promise of providing accountability for the atrocities that defined the conflicts in the former Yugoslavia. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 104 (2005). Subsequent cases, however, have better captured the intent of JCE to go after high-level officials, who used their rank and/or political position to physically separate themselves from the direct commission of crimes. van der Wilt, *supra* note 5, at 98.

have refused to randomly use JCE to create liability for an overly-broad class of defendants. Much of the most important jurisprudence regarding JCE developed in the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) has been in decisions rejecting its use.⁸

Nonetheless, JCE and conspiratorial liability may have an important role to play where other theories of liability do not account for the particular nature and organizational qualities of massive human rights violations. Consider for example a defendant who was a member of a militia with diffuse hierarchical structures, who nonetheless helped organize and instigate others to commit severe human rights abuses. Such a defendant would not be liable under a theory of direct liability, and indirect liability doctrines of aiding and abetting or command responsibility would have problematic application.⁹ Similarly, impunity would likely result for a political leader who acquiesced to or even helped implement a plan of ethnic cleansing within his jurisdiction.¹⁰ On an intuitive and moral level, it is hard to see why these individuals should escape liability for their actions and support of egregious human rights violations.

JCE and conspiratorial liability offer an innovative way to extend liability

The statute for the Special Court for Sierra Leone has limited its mandate to prosecuting “persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law.” Statute of the Special Court for Sierra Leone art. 1(1), Jan. 16, 2002, 2178 U.N.T.S. 145. *But see* Cecily Rose, *Troubled Indictments at the Special Court for Sierra Leone*, 7 J. INT’L CRIM. JUST. 353 (2009) (citing concerns that SCSL indictments misuse JCE by trying to shift responsibility for a panoply of crimes to the few accused). The statute of the International Criminal Court (ICC) is laden with references to the requirement that prosecution may only be brought for particularly grave offenses. *See* Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute] (arts. 5(1) (“jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole”); 17(1) (a case will be deemed inadmissible if it “is not of sufficient gravity to justify further action by the Court”); 53 (allowing prosecutors to decline charges where there are “substantial reasons to believe that an investigation would not serve the interests of justice”)).

8. *See, e.g.*, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgement (Sept. 1, 2004) [hereinafter *Brđanin*] (rejecting JCE liability allegations because none of the members of the JCE actually committed the crimes); *Prosecutor v. Mpambara*, Case No. ICTR-01-65, Judgement (Sept. 11, 2006) (dismissing JCE because it was not proven beyond a reasonable doubt that the accused had the requisite *mens rea* with regards the substantive crime); *Prosecutor v. Limaj and others*, Case No. IT-03-66-T, Judgement, paras. 665-670 (Nov. 30, 2005) (dismissing a charge based on JCE because it was not proven that the accused’s role was “substantial”).

9. *See* *Prosecutor v. Tadic*, No. IT-94-1-A, Judgement, para. 229 (July 15, 1999) [hereinafter *Tadic*] (explaining the difference between aiding and abetting and JCE liability under international law); Beth Van Schaack, *Command Responsibility: The Anatomy of Proof in Romagoza v. Garcia*, 36 U.C. DAVIS L. R. 1213 (2003) (outlining the elements of command responsibility including the existence of a superior-subordinate relationship, and a duty to prevent or punish); Ryan Lincoln, *To Proceed with Caution? Aiding and Abetting Liability Under the Alien Tort Statute*, 28 BERKELEY J. INT’L L. 604, 608 (2010) (explaining that at least one of the U.S. circuit courts appears to be settling on a heightened standard of “purpose” to substantially assist in crimes that were contemplated by the defendant).

10. *See, e.g.*, *Prosecutor v. Stakic*, Case No. IT-97-24-A paras. 93-97 (Mar. 22, 2006).

to actors who certainly have a high degree of individual culpability, but who would otherwise be shielded from liability because of the multilayered and complex ways in which massive human rights violations are carried out. There are reasons to be cautious moving forward with applications of these traditionally criminal doctrines to the civil arena, but without them, meaningful accountability under the ATS may be significantly eroded.

III.

CONSPIRACY LIABILITY UNDER THE ATS

Conspiratorial liability extends liability to individuals who entered into an agreement to commit a particular offense, in instances where the planned event was in fact executed by at least one of the co-conspirators.¹¹ While the use of JCE is a relatively new phenomenon in ATS litigation, plaintiffs have alleged conspiracy as a theory of liability quite frequently in the last two decades, including in several landmark ATS cases.¹² Often pled in conjunction with more contentious theories of liability or substantive offense,¹³ the application of conspiratorial liability has generally been accepted without much scrutiny on the part of the courts.

The 2004 *Sosa* decision, which put to rest much of the controversy about the standards for substantive offense recognized under the ATS, appears to have opened the door to a new frontline of ATS litigation focusing on indirect liability.¹⁴ The Court held that the source of law for ATS jurisdiction must derive from universally recognized international legal norms and be

11. Although under Anglo-Saxon law and to a more limited extent international criminal law, conspiracy exists both as a mode of liability and a substantive offense as an inchoate crime, for the purposes of this Article, we will be focused exclusively on conspiracy as an indirect liability doctrine. See *infra* discussion at Part III.B.

12. See, e.g., *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) [hereinafter *Hilao*]; *Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 1988); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1091 (S.D. Fla. 1997) [hereinafter *Eastman Kodak*].

13. See, e.g., *Hilao*, 103 F.3d at 776-77 (in which the defendants did not challenge the conspiratorial theory of liability, but did object to the application of command responsibility liability for a head of state); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1157 (E.D. Cal. 2004) (holding that assassination of the archbishop of El Salvador constituted “crimes against humanity” and was actionable under the ATS); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005) [hereinafter *Corrie*] (holding that the sale of a “legal, non-defective product” does not constitute a violation of the laws on nations).

14. See Nilay Vora, *Federal Common Law and Alien Tort Statute Litigation: Why Federal Common Law Can (and Should) Provide Aiding and Abetting Liability*, 50 HARVARD INT’L L. J. 195 (2009); Teddy Nemeroff, *Untying the Khulumani Knot: Corporate Aiding and Abetting Liability under the Alien Tort Claims Act after Sosa*, 40 COLUMBIA HUMAN RIGHTS L.R. 231 (2008); Lucien J. Dhooge, *Accessory Liability of Transnational Corporations Pursuant to the Alien Tort Statute: The South African Apartheid Litigation and the Lessons of Central Bank*, 18 TRANSNAT’L L. & CONTEMPORARY PROBLEMS 247 (2009).

“sufficiently definite to support a cause of action.”¹⁵ Notably, however, the ruling did not clarify whether this same standard should apply to theories of liability as well.

Faced with this unsettled question, the post-*Sosa* judicial inquiry of conspiratorial liability addresses two different issues: First, must theories of liability derive from universally recognized international norms in conformity with the standard articulated in *Sosa*, or can they be based on federal common law? And second, assuming that international law must provide the basis for an allegation of conspiratorial liability, does this mode of indirect liability reach the high bar set by *Sosa* as a universally recognized international norm?

A. Establishing conspiratorial liability: must courts look to international law or federal common law standards?

The *Sosa* Court clarified that the ATS is purely a jurisdictional statute that allows courts to hear torts cases alleging violations of well-settled international law. The Court went on to explain that federal common law, and not the ATS, must provide the cause of action for remedies for these violations. The practical effect of this holding is that it requires courts to perform two levels of judicial inquiry, each involving a distinct body of law.¹⁶ Courts must first determine whether the violation alleged is a universally recognized norm under international law in order to claim jurisdiction. Where the plaintiff alleges direct liability, recognition of a cause of action should be unproblematic. However, where a theory of indirect liability is alleged, such as conspiracy, the Court left unanswered whether international law or federal common law is the appropriate *source of law* from which to derive the cause of action. While this debate applies to all forms of indirect liability related to the international law norm, it is a particularly critical issue for claims alleging conspiracy, as conspiratorial liability may indeed have its firmest groundings in federal common law and not international law.¹⁷

In the pre-*Sosa* case of *Eastman Kodak*, the district court first set out that in the absence of more specific guidelines from the Supreme Court, “plaintiffs must demonstrate that international law, whether contained in universal custom or convention” includes a direct prohibition on conspiracy for the crimes alleged

15. *Sosa*, 542 U.S. at 725, 732 (2004) (holding that “courts should require any [ATS] claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized.”). While many courts already followed this standard, the ruling in *Sosa* definitively put to rest any lingering doubts about whether still developing or controversial international law norms could be applied under the ATS.

16. See *Corrie*, 403 F. Supp. 2d at 1027 (“While international law may recognize accomplice liability in some instances, the conduct alleged must first rise to the level of a claim under *Sosa*.”).

17. See *infra* Part III.B.

in that case.¹⁸ However, the Supreme Court soon backed away from this proposition, and cited with apparent approval other district courts' decisions that conspiracy was allowed under the ATS, by relying on U.S. federal common law. The *Eastman Kodak* Court explained that the use of federal laws to elucidate whether conspiracy can attach liability for violations that generally can only be committed by the state, "while not dispositive, [is] at least persuasive in the absence of any other guidelines."¹⁹

The *Sosa* decision is conspicuously silent on modes of vicarious liability, and as one Second Circuit judge described, the decision "at best lends Delphian guidance on the question of whether the federal common law or customary international law represents the proper source" for deriving standards of indirect liability.²⁰ The emphasis in *Sosa* on looking to firmly settled customary international law as a basis for ATS jurisdiction certainly appears to encourage courts to look to international norms even for questions of indirect liability. The only mention of liability doctrines under the ATS in the entire *Sosa* ruling comes in a footnote, in which the Court approvingly recognizes that lower courts have turned to international law to determine certain direct liability questions.²¹ However, besides the fact that this footnote in *Sosa* may be properly seen as non-binding *dicta*, it concerned direct liability—which *actors* may be liable, and left unclear whether the Court intended this fleeting mention to extend to the determination of the source of law for indirect liability, which governs what *behavior* may incur liability.²²

No court decision yet has engaged the debate over source of law for conspiratorial liability in ATS suits, and explicitly defended the use of federal common law over international law as a source of law, although the issue has been touched upon by a handful of cases. In a concurring opinion in *Khulumani*, which dealt with aiding and abetting and not conspiracy, Judge Hall vigorously argued for the application of federal common law in assessing indirect liability claims.²³ His approach was ultimately not adopted by the Second Circuit's ruling on whether conspiracy and other vicarious liability may rely on federal

18. *Eastman Kodak*, 978 F. Supp. At 1091. However, other pre-*Sosa* cases have looked directly and unequivocally to federal common law to supply the elements and pleading standards for conspiratorial liability. See, e.g., *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 125 (E.D.N.Y. 2000).

19. *Eastman Kodak*, 978 F. Supp. at 1092.

20. *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 286 (2d Cir. 2007) [hereinafter *Khulumani*] (Katzmann, J., concurring).

21. *Sosa* at 732, n.20 (looking at whether non-state private actors who commit offenses that are generally seen as state-related crimes can be held individually responsible).

22. *Id.* See also *Khulumani*, 50 F.3d at 269 (Katzmann, J., concurring) ("While this footnote specifically concerns the liability of non-state actors, its general principle is equally applicable to the question of where to look to determine whether the scope of liability for a violation of international law should extend to aiders and abettors.").

23. *Khulumani*, 504 F.3d at 286-87.

law.²⁴ However, his reasoning—that determinations on the scope of liability are within the domain of the cause of action, and as such is a question best left to federal common law²⁵—may still prove helpful to other litigants and courts.²⁶

In *Cabello*, the Eleventh Circuit upheld the application of conspiratorial liability in an ATS suit and articulated the elements for such a theory of liability from federal common law, without reference to international law.²⁷ The court again affirmed ATS conspiratorial liability in *Aldana*, citing to both the *Cabello* holding and a Second Circuit ATS decision in which another federal statute was used as the source of agency law.²⁸ The Ninth Circuit in *Sarei*, a case in which plaintiffs alleged conspiratorial liability, acknowledged that a post-*Sosa* assessment of whether vicarious liability claims are admissible under the ATS was in order, but ultimately left the question unresolved. However, in surveying the competing sources of potentially available law for conspiracy liability, the *Sarei* court exclusively referenced federal common law standards of vicarious liability in ATS suits.²⁹

In contrast, other decisions have explicitly rejected the use of federal common law as a source of law for conspiratorial liability in ATS suits. The district court in *Talisman III* acknowledged the *Cabello* decision but declined to follow it, insisting instead that customary international law must form the basis of relevant legal authorities.³⁰ On appeal, the Second Circuit affirmed the district court's approach, explaining, "[a]s a matter of first principles, we look to international law to derive the elements for any such cause of action."³¹ The court's decision relied heavily on Judge Katzmann's concurring opinion in *Khulumani*, and affirmed his assertion that while federal common law should be referenced to determine whether there is a cause of action within federal courts, this analysis only comes after the threshold jurisdictional question of whether international law in fact recognizes the offense in question.³² The court further

24. See *Talisman IV*, 582 F.3d 244 (2d Cir. 2009).

25. *Khulumani*, 504 F.3d at 286-87.

26. The pre-*Sosa* Ninth Circuit decision in *Unocal* included a concurring opinion similar to Judge Hall's. Judge Reinhardt argued that federal law and *not* international law should provide the basis for evaluating indirect liability. He explained, "the fact that the underlying conduct violated customary international law is sufficient to support liability not only on the part of the governmental actor, but also on the part of a third party whose liability is derivative thereof." *Doe I v. Unocal Corp.*, 395 F.3d 932, 963 (9th Cir. 2002) (Reinhardt, J., concurring).

27. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1159 (11th Cir. 2005).

28. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005).

29. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202 (9th Cir. 2007) [hereinafter *Sarei*].

30. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 665 n.64 (S.D.N.Y. 2006) [hereinafter *Talisman III*] (rejecting the Eleventh Circuit's holding in *Cabello*, which relied on domestic law for conspiratorial liability).

31. *Talisman IV*, 582 F.3d 244, 260, n.11 (2d Cir. 2009).

32. *Id.* at 258. See also *Khulumani*, 504 F.3d at 266-270 (Katzmann, J., concurring). It is important to note, however, that Judge Katzmann ultimately withheld judgment on whether federal law could indeed provide a basis for modes of indirect liability. See *Khulumani*, 504 F.3d at 331,

reasoned that in keeping with *Sosa*, secondary liability could not be derived from the norms recognized in the forum country, as this could authorize such a significant expansion of liability that it would be as flagrant a judicial overstepping as the creation of a whole new tort.³³

The district court in *In Re South Africa Apartheid Litigation* similarly held that it must “look to customary international law as the source of relevant authority” for conspiratorial liability.³⁴ The court explained that in addition to an assessment of whether the norm stated in the cause of action is universally recognized as part of international law, the “language and logic of *Sosa* requires that this [c]ourt turn to customary international law to ascertain the contours of secondary liability as well.”³⁵ The district court cautioned that extending liability based on the laws of the domestic venue could lead to the backdoor inclusion of new and distinct ATS claims.³⁶ Presumably, the court reasoned that if an individual can be held liable for a crime which he did not actually commit, and for which he would not be responsible under international law, by applying such a broad scope of responsibility, the courts will have created a new cause of action for the culpable but not necessarily criminal behavior of the defendant. The jurisdictional role of the court, the decision went on to clarify, is that of recognizing firmly settled international law, and not creating new causes of action.³⁷

Whether federal common law may be used to formulate indirect liability remains an unsettled question, especially for courts outside of the Second and Eleventh Circuit. However, proponents of using federal common law are at a noticeable disadvantage given the present case law addressing this issue. The Eleventh Circuit’s adoption of federal law elements for conspiratorial liability in *Cabello* did not provide any reasoning of why this source of law was appropriate, nor did it engage in a discussion of how this approach can be reconciled with *Sosa*. Further, although the argument in the *In Re South Africa Apartheid Litigation* decision that reliance on domestic regimes for secondary liability could create new and heretofore unrecognized international offenses appears somewhat alarmist and unfounded, it does echo the concerns of the Second Circuit *Talisman* reasoning that substantially expanding the scope of liability could overstep the *Sosa* standard of only recognizing a narrow and well defined set of international law violations.

n.13.

33. *Talisman IV*, 582 F.3d at 259.

34. *In re South African Apartheid Litigation* [hereinafter *In re South African Apartheid Litigation*], 617 F. Supp. 2d 228, 263 (S.D.N.Y. 2009).

35. *Id.* at 256.

36. *Id.* See also *infra* p. 111 and accompanying n.50.

37. *In re South African Apartheid Litigation*, 617 F. Supp. 2d at 256.

B. Is conspiracy a cognizable international law norm under the ATS?

Assuming that courts settle on international law as the source of law for indirect liability, there still remains the hurdle of establishing that conspiratorial liability is recognized and well-settled under international law. ATS federal case law has not yet produced a clear answer on whether conspiratorial liability should be considered a universally recognized international legal norm in accordance with *Sosa*. Further clouding this issue is a series of district court decisions that base their rejection of conspiratorial liability on the conflation of conspiracy as an inchoate standalone offense, and as a theory of indirect liability for other completed offenses.

The 2006 U.S. Supreme Court decision in *Hamdan v. Rumsfeld*, though not an ATS case, has been erroneously relied on by courts in ATS cases to determine international legal character of conspiratorial liability.³⁸ In this case, the defendant had been charged with the singular *substantive offense* of conspiracy,³⁹ and the Court set out to determine whether conspiracy was considered a recognized crime under the laws of war.⁴⁰ The *Hamdan* Court conducted a thorough review of American military tribunals, international criminal tribunal statutes and jurisprudence, and the scholarly writing of international jurists,⁴¹ and concluded that “the only ‘conspiracy’ crimes that have been recognized by international war crimes tribunals are conspiracy to commit genocide and common plan to wage aggressive war.”⁴² (emphasis added).

Despite that fact that the *Hamdan* Court explicitly and unambiguously limited its scope of review and findings to conspiracy as a standalone offense,⁴³

38. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) [hereinafter *Hamdan*].

39. *Id.* at 570. The Court further acknowledged that the overt actions he had taken in furtherance of this conspiracy were by themselves not crimes triable by a military commission. *Id.* at 612.

40. *Id.* at 563.

41. The authors of at least one law review article have pointed out legal sources that the court failed to consider that may have weighed against such a definitive exclusion of conspiracy as a standalone offense for war crimes. See Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUMBIA L.R. 1090, 1101, n.20, nn.412-23 and accompanying text (2009).

42. *Hamdan*, 548 U.S. at 610. The court further pointed out that conspiracy as a substantive crime belongs to the Anglo-American common law tradition, and does not constitute an internationally recognized norm. *Id.* at 611.

43. *Id.* (“Finally, international sources confirm that the crime charged here is not a recognized violation of the law of war. As observed above . . . none of the major treaties governing the law of war identifies conspiracy as a violation thereof. And the only ‘conspiracy’ crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a ‘concrete plan to wage war.’”) (citations omitted) (emphasis added). Additionally, there are no references whatsoever to conspiracy as a form of

at least two district courts have relied on this ruling to deny claims involving conspiracy as a *form of liability* for other recognized violations of international legal norms.⁴⁴

The court in *In Re South Africa Apartheid Litigation* incorrectly applied the *Hamdan* findings. The plaintiffs in this case had alleged violations of several well established international norms, and included conspiracy as a form of indirect liability for the completed offenses.⁴⁵ After supplying a muddled string of international authorities meant to show the unrecognized status of conspiratorial liability,⁴⁶ the court concluded that it was bound by the *Hamdan* decision, which it paraphrased as stating “that the law of war provides liability only for ‘conspiracy to commit genocide and common plan to wage aggressive war.’”⁴⁷ The district court’s substitution of the *Hamdan* Court’s clearly stated reference to “conspiracy crimes” in favor of the conceptually distinct “liability,” effectively changes the meaning of the narrow finding in *Hamdan*.⁴⁸ The court then follows on the heels of this striking misreading to state that it “declines to recognize conspiracy as a distinct tort.”⁴⁹ Considering that the plaintiffs did not ask the court to recognize a “distinct tort,”⁵⁰ the only explanation for this strange assertion is that the court has taken the extreme and unjustified view that conspiracy liability itself creates a new tort.⁵¹

Similarly, the court in *Talisman* cited *Hamdan* for the proposition that *the charge* of conspiracy can only be made in relation to genocide or aggression.⁵² As in *In Re South Africa Apartheid Litigation*, the plaintiffs never leveled a

vicarious or secondary liability.

44. See *In re South Africa Apartheid Litigation*, 617 F. Supp. 2d at 263; *Talisman III*, 453 F. Supp. 2d at 663 (S.D.N.Y. 2006).

45. Plaintiffs alleged crimes of apartheid, denial of a nationality, torture, extrajudicial killings, and cruel, inhumane or degrading treatment, and prolonged unlawful detention. *In re South Africa Apartheid Litigation*, 617 F. Supp. 2d at 247-48.

46. In only three sentences, the court managed to recognize the development of JCE, which it confusingly equated to conspiracy, in the International Criminal Tribunal for the former Yugoslavia, but countered such developments by citing to the International Criminal Court’s hesitation of employing conspiratorial liability, and then made a sweeping statement that conspiracy as an Anglo-American concept has never enjoyed international recognition. *Id.* at 263.

47. *Id.*

48. *Id.*; see *Hamdan*, 548 U.S. at 610.

49. *In re South Africa Apartheid Litigation*, 617 F. Supp. 2d at 263.

50. See *supra* note 45.

51. See *In re South Africa Apartheid Litigation*, 617 F. Supp. 2d at 256, and accompanying n.133 (citing Judge Katzmann’s concurring opinion in *Khulumani* for the proposition that “an allegation of aiding and abetting a violation of international law or conspiring to violate international law asserts a distinct claim”). If *Khulumani* is the source of the district court’s assertion that conspiracy liability creates a new tort, it is even more puzzling, as Judge Katzmann does not mention conspiracy at all in his concurrence, and in fact finds that aiding and abetting liability is a recognized form of international liability, thus not a distinct tort. *Khulumani* at 264-84 (Katzmann, J., concurring).

52. *Talisman III*, 453 F. Supp. 2d at 663 (S.D.N.Y. 2006).

charge of conspiracy in their complaint, but rather included it as a theory of indirect liability for other internationally recognized violations. The court continued on to incorrectly equate *Hamdan*'s finding of the international law status of inchoate conspiracy crimes with indirect liability, stating, "[a]s of today, therefore, liability under the ATS for participation in a conspiracy may only attach where the goal of the conspiracy was either to commit genocide or to commit aggressive war."⁵³ On appeal, the Second Circuit correctly identified the *Hamdan* finding as being limited to inchoate offenses, but inexplicably did not address the lower court's misguided reliance on *Hamdan* as a basis for granting summary judgment in favor of the defendants.⁵⁴

Beyond the above cases, federal courts have made no serious inquiries into the status of conspiratorial liability in modern international law.⁵⁵ Besides a reference in *Sarei* that vicarious liability appears to have been accepted as part of the laws of nations at the time the ATS was created,⁵⁶ there is only a pre-*Sosa* decision in *Talisman I*, since overruled, which included a confusing survey of international legal resources and concluded that "the concept of complicit liability for conspiracy or aiding and abetting is well-developed in international law."⁵⁷

Despite the flawed reasoning in the cases that defer to *Hamdan*, there is reason to believe that in fact conspiratorial liability is not a well developed norm in international law. Although many countries have conspiratorial liability statutes in their criminal codes,⁵⁸ the use of this mode of liability at the

53. *Id.* at 665.

54. *Talisman IV*, 582 F.3d at 260. The court ultimately affirmed the district court's dismissal of the conspiracy liability theory by finding that the conspiracy claim the plaintiffs advanced, which was based on the *Pinkerton* doctrine of liability for any crimes that were the natural and foreseeable consequence of the criminal conspiracy, had not been proven to be a "universally recognized international law norm." *Id.*

55. See *Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 490 (D. Md. 2009) [hereinafter *Lizarbe*] (concluding that "numerous U.S. and international bodies have recognized causes of action under ATS/TVPA based on theories of conspiracy and aiding and abetting" with only a brief reference to other cases).

56. *Sarei*, 487 F.3d at 1202.

57. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 322 (S.D.N.Y. 2003). The international juridical sources and the court's accompanying analysis, however, do not clearly distinguish between conspiratorial and aiding and abetting liability.

58. See Alex Obote-Odora, *Conspiracy to Commit Genocide: Prosecutor v Jean Kambanda and Prosecutor v Alfred Musema*, 8 MURDOCH U. ELEC. J. OF L. No. 1, paras. 14-34 (2001) (surveying the various conspiracy provisions in the criminal law of France, Hungary, China, Italy, Spain, Sweden, Germany, Poland, Israel, Canada, New Zealand, India and Nigeria). However, it does appear to be correct that conspiracy as an inchoate crime is an Anglo-American legal concept, largely unshared with the rest of the world. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 702, n.14 (2006); *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgement, para. 187 (Jan. 27, 2000) (explaining that under the civil law tradition "[A] person cannot be punished for mere criminal intent or for preparatory acts committed.").

international level has been relatively scant.⁵⁹ Nonetheless, this is a judicial undertaking that has not been approached with the seriousness that it deserves, and the question remains open as to whether conspiratorial liability meets the *Sosa* standard of firmly settled international law.

IV.

JOINT CRIMINAL ENTERPRISE: THE NEW FRONTIER IN CONSPIRATORIAL LIABILITY

The use of JCE as a theory of liability in ATS suits is a relatively recent phenomenon, and has only been alleged in a handful of cases to date.⁶⁰ The Second Circuit explained in *Talisman* that JCE is the international law equivalent of conspiracy.⁶¹ Though this is not entirely correct, as JCE and conspiracy liability have different elements (described below), it is true that JCE represents the primary if not lone “conspiratorial” theory of liability in modern international tribunals. There is scant ATS case law on this theory of liability, but based on its historic role in the WWII era tribunals, and its rapid development in international tribunals in the past decade and half,⁶² JCE likely reaches the *Sosa* standard, and may come to replace conspiracy liability in the post-*Sosa* era.

A. The elements and forms of JCE

After a decades-long hiatus following the WWII-era tribunals, JCE has emerged as a prominent and controversial legal theory following its enthusiastic affirmation in the ICTY and ICTR jurisprudence.⁶³ Like conspiracy, it attaches liability to individuals who may have never materially contributed to the violation alleged. However, there are important differences between conspiracy and JCE.

First, JCE is solely a mode of liability and does not have a standalone offense equivalent to that for conspiracy. Second, although JCE like conspiracy requires that there be a “plurality of persons” involved, JCE is not premised on

59. Conspiracy as a form of indirect liability for completed offenses is not included in the statute of any modern international tribunal, and has been a controversial concept in international law since Nuremberg. See COMMENTARY ON THE ROME STATUTE ON THE INTERNATIONAL CRIMINAL COURT: OBSERVER’S NOTES, ARTICLE BY ARTICLE (Otto Triffterer ed., 2d ed. 2008). Furthermore, the Statute for the International Criminal Court purposefully excluded the term “conspiracy” from article 25, which establishes modes of indirect liability. See *Schabas*, *supra* note 2, at 413, and accompanying n.100.

60. Running a search on Westlaw in the databases “brief-all, motions, pleadings” and with search terms “28 /5 1350 & “joint criminal enterprise” will yield about ten different ATS cases, all pleading JCE.

61. *Talisman IV*, 582 F.3d at 260.

62. See Danner & Martinez, *supra* note 7, at 111.

63. See Cassese, *supra* note 4, at 110, 114; Rose, *supra* note 7, at 360.

an “agreement” but rather on a “common plan,”⁶⁴ which the ICTY has deemed may develop extemporaneously and be inferred from several individuals acting in unison to carry out the specific criminal enterprise.⁶⁵ The most noticeable difference, however, in the *actus reus* of JCE is that the accused must actually participate in the “execution” of the “common plan.”⁶⁶ The ICTY, relying on a report from the U.N. War Crimes Commission, has specifically distinguished conspiracy from JCE through this *actus reus* requirement explaining,

[w]hilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, that the parties to that agreement took action in furtherance of that agreement.⁶⁷

The ICTY was the first international tribunal to broadly recognize and articulate JCE as its own theory of liability. In the trial of Dusko Tadic, the accused was acquitted of the murder of several Bosnian Muslim civilians who were killed during a raid on their village, in which the accused took part. The Appeals Chamber applied JCE through the provisions in article 7(1) of the Tribunal’s Statute, stating that although liability was “first and foremost the physical perpetration of a crime by the offender himself,” the Tribunal might also assert its jurisdiction over the substantive crimes in question “through participation in the realization of a common design or purpose.”⁶⁸ After finding that the ICTY statute allowed for JCE as a theory of liability, the Tribunal further concluded that “the notion of common design as a form of accomplice liability is firmly established in customary international law.”⁶⁹

The Appeals Chamber in *Tadic* went on to identify three forms of JCE or “common purpose” that are derived from customary international law, and which continue to be referred to as the scope of JCE. The first and second levels are relatively uncontroversial and are well grounded in the jurisprudence of the earlier WWII tribunals. The first level reflects the basic premise of JCE, and attaches liability where the accused willingly and with criminal intent, participated in a common design to commit specific offenses.⁷⁰ The second

64. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, para. 611 (Aug. 2, 2001) [hereinafter *Krstic*] (citing *Tadic*, Case No. IT-94-1-A, para. 227).

65. Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgement, para. 119 (July 21, 2000) (citing *Tadic*, Case No. 94-1-A, para. 227).

66. *Krstic*, Case No. IT-98-33-T, para. 611 (citing *Tadic*, Case No. IT-94-1-A, para. 227).

67. Prosecutor v. Milutinovic *et al.*, Case No. IT-99-37-AR72, Judgement, paras. 23, 97-98 (May 21, 2003).

68. *Tadic*, Case No. IT-94-1-T, Judgment, para. 188. Additionally, the ICTY has pointed out that the use of the term “or otherwise aided and abetted” indicates that these articles were not meant to be exhaustive.

69. *Id.* para. 220.

70. *Id.* para. 196. Category one reflects the “common plan” liability in the WWII era tribunals. These cases involved German soldiers and civilians who were convicted of murder for their role in group lynchings of POWs, even though they may not have directly participated in the crimes. In many if not all of these cases, the defendants were all found to have been present or in the

level of JCE concerns “systems of ill treatment/repression,” and requires a showing that the accused was aware of the repressive nature of the “system” and participated in the enforcement and furtherance of the system.⁷¹ The last form of JCE is the broadest and attaches individual liability for crimes that were not contemplated as part of the “common design” if those offenses are the “natural and foreseeable consequences” of the realization of the common design.⁷² Because this third category appears to be a modern conceptualization of JCE created at the ICTY, and not based on Nuremberg jurisprudence, its status as customary law is more precarious.

B. The nascent use of JCE in ATS litigation

Because of the recent and scant use of JCE in ATS litigation, there is little U.S. case law to refer to, amounting to only one direct ruling and a few references to JCE in *dicta*. In *Lizarbe v. Rondon*, the district court dismissed the defendant’s objections to the pleading of JCE, and stated that case law supported the application of JCE in ATS cases.⁷³ The court explained that

numerous U.S. and international bodies have recognized causes of action under ATS/TVPA based on theories of conspiracy and aiding and abetting, and that the concept of civil recovery based on a theory of joint criminal enterprise has at least been acknowledged.⁷⁴

The court further cited to ICTY jurisprudence and a footnote in another district court decision which refers to JCE as “liability for the violation of an international law norm,” indicating an implicit recognition of JCE as an acceptable theory of liability under the ATS.⁷⁵

However, references to JCE in other ATS decisions have indicated it is not a doctrine that is likely to be uncritically accepted by the courts. In *In re South African Apartheid Litigation*, the court implied that the *Hamdan* holding that conspiracy was not an internationally recognized crime, extended to JCE as well.⁷⁶ The scope of JCE conspiracy also appears likely to be a matter of

immediate vicinity of the murders, and were not charged with any larger conspiracy. See *Danner & Martinez, supra* note 7, at 111.

71. *Danner & Martinez, supra* note 7, at 105-06 (citing *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, para. 203 (Sept. 17, 2003)). This second level is almost identical to the “systems of repression” liability recognized in the WWII era tribunals, which involved the criminal convictions of staff in German concentration camps for having participated in a “common design” to commit the offenses charged. In these cases, the fact of having been part of the concentration camp structure was enough to assert a “common design” by which offenses that took place at the camps could be alleged against the guards and other workers of the camps. See *id.* at 11.

72. *Id.* at 106 (citing *Tadic*, Case No. IT-94-1-T, Judgment, para. 204).

73. *Lizarbe*, 642 F. Supp. 2d at 491.

74. *Id.* at 490.

75. *Bowoto v. Chevron Corp.*, 2006 WL 2455752, at *8, n.13 (N.D. Cal. 2006).

76. *In re South African Apartheid Litigation*, 617 F. Supp. 2d at 263. Note, however, that this reasoning reflects the court’s confusion over conspiracy as a standalone inchoate offense (which

dispute among the courts. In accepting JCE, the *Lizarbe* court adopted the controversial third level of JCE that attaches liability for crimes outside of the common plan, as long as they were foreseeable.⁷⁷ This formulation, however, stands in contrast to the decision in *Talisman*, in which the court held that the defendant “could not be held liable under the ATS for the conduct of a co-conspirator merely because that conduct was foreseeable.”⁷⁸ The *Talisman* court rejected the plaintiffs’ argument that conspiracy liability under the ATS extended to include the *Pinkerton* doctrine. The *Pinkerton* doctrine postulates that a

defendant who does not directly commit a substantive offense may nevertheless be liable if the commission of the offense by a co-conspirator in furtherance of the conspiracy was reasonably foreseeable to the defendant as a consequence of their criminal agreement.⁷⁹

The court explained that while the ICTY and ICTR statutes both allow for conspiracy liability, neither of the tribunals’ statutes contain language supporting the application of the expansive *Pinkerton* mode of liability.⁸⁰

Because U.S. courts have issued very little guidance or reflection on the JCE liability theory, there are few conclusions to be drawn from the available case law. However, the rapid development of JCE in international tribunals over the last decade means that the doctrine could very likely meet the *Sosa* standard of firmly settled international law for purposes of ATS cases.

C. The modern development of JCE in the international legal arena

While JCE is still often referred to as a controversial doctrine, recent and extensive international jurisprudence provides the basis for a strong argument that it has reached the status of an accepted international legal norm. Court decisions in themselves do not necessarily constitute international law, but their recognition of JCE confers a degree of legitimacy that it forms part of customary

Hamdan dealt with) and conspiracy as a theory of liability. JCE has never been proposed as a substantive offense, but rather has been consistently understood as a mode of liability.

77. *Lizarbe*, 642 F. Supp. 2d at 490. Under international case law:

Responsibility under the third category of JCE, that is for a crime other than the one agreed upon in the common plan perpetrated by one or more other members of the JCE, arises only if (i) the crime charged was a natural and foreseeable consequence of the execution of [the] enterprise, and (ii) the accused was aware that such a crime was a possible consequence of the execution of [the] enterprise, and, with that awareness, participated in [the] enterprise.

Brdanin, Case No. IT-99-36-T, Judgment, para. 265.

78. *Talisman III*, 453 F. Supp. 2d at 665.

79. *Id.* at 663.

80. *Id.* at 665. See also *Talisman IV*, 582 F.3d at 260 (“plaintiffs have not established that ‘international law [universally] recognize[s] a doctrine of conspiratorial liability that would extend to activity encompassed by the *Pinkerton* doctrine.’” (citing *Talisman III*, 453 F. Supp. 2d at 663)).

international law,⁸¹ and federal courts have often referred to international tribunal decisions as legal authorities on the status of international law norms.⁸²

The acceptance of JCE in the ICTY and ICTR may help form a presumption about its status as customary international law, but it is certainly not dispositive of this. Because the ICTY and ICTR are both tribunals governed by a nearly identical statute, and with similar origins, courts will likely look to other international law fora to determine whether JCE is indeed a well established legal doctrine, or whether its development still remains controversial among states and international jurists.⁸³ A review of other non-ICTY/ICTR judicial treatment of JCE is especially likely as this doctrine is currently being litigated in several recently established tribunals.⁸⁴

The Rome Statute, which was the founding instrument of the International Criminal Court (ICC), allows for indirect liability for ordering, and aiding and abetting crimes, and additionally attaches liability where the accused “in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.”⁸⁵ Although the negotiations on the Statute predate the ICTY *Tadic* decision on JCE,⁸⁶ it was not opened for signing until after the seminal JCE ruling, and so states certainly had warning of how such language was likely to be understood in the court.⁸⁷ To date, there have been no indictments alleging JCE, but the matter is far from foreclosed.

The Special Panel for Serious Crimes established in East Timor

81. See *Prosecutor v. Tadic*, No. IT-94-I-T, Judgement, para. 662 (May 7, 1997) (“[T]he International Tribunal is only empowered to apply international humanitarian law that is ‘beyond any doubt customary law.’”) (quoting *Sec’y General Report*, para. 34); Cassese, *supra* note 4, at 114 (“[T]he definitions of the crimes over which the Tribunal is vested with jurisdiction can only be found in customary international law, as was emphasized inter alia by the UN Secretary-General when he submitted the Statute to the Security Council for approval. Moreover, it is in customary international law that whenever the Statute is silent the Tribunal can find the general concepts of criminal law that it must apply on such matters as modes of responsibility, defences, etc.” (citations omitted)).

82. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 338 (S.D.N.Y. 2005) (“ICTY and ICTR opinions typically engage in nuanced and exhaustive surveys of international legal sources, and as such, they are exceedingly useful as persuasive evidence of the content of customary international law norms.”) (also cited with approval in *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 287 (E.D.N.Y. 2007)).

83. In his concurring opinion discussing aiding and abetting liability in *Doe I*, J. Reinhardt resisted relying on ICTY jurisprudence as a source of law for “an undeveloped principle of international law promulgated by a recently-constituted ad hoc international tribunal.” *Doe I v. Unocal Corp.* 395 F. 3d 932, 967 (9th Cir. 2002) (Reinhardt, J., concurring).

84. See *Sosa*, 542 U.S. at 728 (noting that Congress’ intent was that ATS should “‘remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law’”) (quoting H.R.Rep. No. 102-367, at 3 (1991)).

85. ICC Statute, *supra* note 7, art. 25(3)(d).

86. Danner & Martinez, *supra* note 7, at 154.

87. See ICC Statute, *supra* note 7.

incorporated the exact language from the ICC statute regarding “common purpose,” and has issued several indictments citing to this liability.⁸⁸ The U.S. military commission also recognizes “common criminal purpose” in the regulations for elements of crimes triable at the commission.⁸⁹

The Special Court for Sierra Leone (SCSL), and the Extraordinary Chambers in the Courts of Cambodia (ECCC) were both established after the ICTY *Tadic* opinion recognized JCE as a theory of liability under international law, and after the Rome Statute was opened for signing. Although neither contains reference to JCE, or common plan or design in their statutes, both tribunals have recognized the applicability of JCE liability.⁹⁰ Of the four active cases at the SCSL, the prosecutor has pled JCE liability in three of them.⁹¹ In the so-called AFRC case, the SCSL Appeals Court overturned the trial court’s dismissal of JCE liability, and reinstated it in the indictment.⁹² At the ECCC, JCE has yet to be included in an indictment, but a recent order issued by the Office of the Co-investigating Judges at the ECCC, clarified that JCE was an applicable form of liability for international crimes.⁹³ The order further stated that all three levels of JCE can be alleged against defendants.⁹⁴

88. U.N. Transitional Administration in East Timor, Reg. No. 2000/15, on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses, §14.3(d), U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000); Danner & Martinez, *supra* note 7, at 156.

89. 32 C.F.R. § 11.6(c)(6)(i) (2003).

90. “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.” United Nations, Statute of the Special Court for Sierra Leone, at art. 6(1), U.N. Doc. S/2002/246, appendix II (2000), available at <http://www.scs-l.org/scsl-statute.html>.

91. Second Amended Indictment, Taylor, SCSL-03-01-PT (May 29, 2007); Further Amended Consolidated Indictment, Brima, Kamara and Kanu, SCSL-04-16-PT (Feb. 29, 2005); Corrected Amended Consolidated Indictment, Sesay, Kallon and Gbao, SCSL-04-15-T (Aug. 2, 2006).

92. Interestingly, the trial court’s rejection of JCE liability was not based on its lack of explicit inclusion in the SCSL statute, but rather was premised on the fact that the prosecution did not plead it in relation to one of the enumerated offense in the statute. Prosecutor v. Brima, Judgment, Case No. SCSL-04-16-T, paras. 56-85 (Spec. Ct. Sierra Leone, Trial Chamber II, June 20, 1997). In reversing this decision, the Appeals Chamber arguably expanded the scope of JCE as recognized by the ICTY, by stating that statute crimes need only be “contemplated” in the JCE, whereas the ICTY required that the crime be “involved” in the JCE. Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-2004-16-A, Judgment, para. 84 (Feb. 22, 2008). See also, Rose, *supra* note 7, at 362.

93. Extraordinary Chambers in the Courts of Cambodia, Order on the Application of the ECCC of the Form of Liability Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC-OCIJ (Dec. 8, 2009) available at http://www.eccc.gov.kh/english/cabinet/courtDoc/198/D99_3_42_EN.pdf. JCE has also been argued in the pending case against Kaing Guek Eav, alias Duch. See Extraordinary Chambers in the Courts of Cambodia, Public Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias “Duch”, Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02) (Dec. 8, 2008) available at http://www.eccc.gov.kh/english/cabinet/courtDoc/482/D97_13_EN.pdf.

94. Extraordinary Chambers in the Courts of Cambodia, Order on the Application of the ECCC of the Form of Liability Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC-OCIJ paras. 14-17 (Dec. 8, 2009).

U.S. courts may question the customary international law nature of JCE liability in light of the fact that four of the six international tribunal statutes contain no explicit reference to JCE or common plan/design.⁹⁵ Customary international law is not formed exclusively through judicial decisions, but rather primarily depends on evidence of state ascension.⁹⁶ While the conspicuous absence of JCE liability in statutes established *after* the ICTY decision in *Tadic* will likely force the courts to confront this issue, there are still solid indicators that this jurisprudence cannot be dismissed as the work of activist tribunals. The Rome Statute, which does explicitly adopt the “common purpose” language, has been ratified by 111 countries.⁹⁷ Furthermore, the tribunals recognizing JCE—whether by statute or judicial interpretation—hail from three different continents, indicating that JCE is a universally recognized international law norm.

The recent international jurisprudence recognizing JCE favors a presumption that the doctrine is a cognizable international norm for the purposes of the ATS, regardless of whether the individual cases actually yield convictions based on JCE liability. U.S. courts may, nonetheless, choose to proceed with caution until decisions on these pending cases are reached for further guidance on the contours of JCE under international law.

V.

CONCLUSION: THE FUTURE OF JCE AND CONSPIRACY IN ATS CASES

Although often thought of as similar if not identical forms of liability, the future of JCE and conspiracy likely have divergent and almost mutually exclusive paths in ATS litigation.

If courts decide that federal common law should be relied on for indirect liability, conspiratorial liability will survive while JCE will not. Conspiracy liability has a long and robust history in federal common law, while JCE is a theory unknown outside of international tribunals. On the other hand, if courts are instead persuaded that the *Sosa* standard of firmly settled international law must be the source of law for vicarious liability, the result will be the opposite. While the inchoate crime of conspiracy to commit aggression and genocide exists, as detailed in the *Hamdan* decision, international law has little developed history on conspiracy as a *mode of liability* for attaching responsibility for the completed offense. JCE, however, though a relatively new international law norm, has potentially already assumed the status of customary international law through its adoption in every modern international criminal tribunal in the past

95. The ICC and the Special Panel for Serious Crimes established in East Timor make reference to “common plan,” while the ICTY, ICTR, SCSL and ECCC do not.

96. See, Statute of the International Court of Justice, arts. 38, 59, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993; *Flores v. Southern Peru Copper Corp.*, 414 F. 3d 233, 251 (2d Cir. 2003).

97. <http://treaties.un.org> (see Status of Treaties, Penal Matters).

decade. The only challenge to plaintiffs would be to present the JCE doctrine as not only being a universally accepted norm, but also as providing the requisite level of specificity as outlined in *Sosa* to be recognized as a cognizable cause of action.⁹⁸ In any case, JCE, as a continually evolving (and solidifying) international law concept, is ripe for a more searching judicial review.

Because of the almost mutually exclusive trajectories that conspiratorial and JCE liabilities have under the ATS, pleading both JCE and conspiracy liability would potentially force the courts into an interesting dilemma. By applying either domestically derived federal common law or international law, one of the theories may necessarily be excluded while the other accepted.

However, the *Sosa* decision poses a final discretionary challenge to the use of conspiratorial or JCE liability regardless of the choice of law settled upon. The *Sosa* Court strongly cautioned the courts to use their discretion in creating new causes of action, and dedicated a significant portion of the decision outlining the reasons for such judicial caution.⁹⁹ *Sosa* tasked the lower courts with being “vigilant doorkeep[ers]” in order to limit the reach of the ATS to only a “narrow class of international norms.”¹⁰⁰ The Court explained that “the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”¹⁰¹

U.S. federal common law has an indisputably well established standard of conspiracy, which can be quite elastic in assigning liability to co-conspirators.¹⁰² Similarly, JCE, by incorporating the third level of liability for unplanned but “foreseeable” crimes, represents an expansive reach of legal responsibility. Given the firm admonition from the Supreme Court, lower courts may be hesitant about creating causes of actions that could potentially extend liability well beyond the “most responsible.” However, the fear that JCE and conspiracy will open the floodgates to ATS litigation against low-level defendants whose participation in the criminal enterprise was relatively insignificant seems alarmist at this point in time. Despite “gate keeping” role of prosecutors, the international tribunals have been far from permissive in their acceptance of JCE, and in fact, much of the most important jurisprudence issued

98. *Sosa* 542 U.S. at 725 (2004).

99. *Id.* at 725-29. “[T]here are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.” *Id.* at 725.

100. *Id.* at 729.

101. *Id.* at 732.

102. See, e.g., Heather J. Sigler, *Federal Criminal Conspiracy*, 46 AM. CRIM. L. REV. 589 (2009); Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J. CRIM. L. & CRIMINOLOGY 147 (2007).

on JCE under the ICTY and ICTR has been in decisions rejecting its use.¹⁰³ U.S. courts are equally free to evaluate and reject claims that overreach liability and culpability standards. Furthermore, conspiracy has been used in ATS cases since the statute's reemergence in the 1980s, and JCE has been in the international legal arena for over a decade, and still there are less than a dozen ATS cases that have relied on JCE as a theory of liability, and no indication of abusive use of the conspiratorial liability doctrine by plaintiffs.

In order to pre-empt courts from taking the backdoor option highlighted in *Sosa*—to decline to recognize a cause of action based on the “practical consequences”—plaintiffs’ attorneys would be wise to maintain the integrity of these doctrines by using it for what it was ostensibly created: a theory of liability to fill the gap where defendants played a substantial role either as the *auteur intellectuel*, or when their participation in the common plan or conspiracy, though not amounting to a crime in itself, was particularly egregious.¹⁰⁴ JCE and conspiracy liability can be a powerful tool for human rights litigation, but they are certainly not unassailable.

103. See cases cited *supra* note 8.

104. *Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 490 (D. Md. 2009) provides an excellent example. In this case, the plaintiffs alleged several well established violations of criminal law under the indirect liability theories of conspiracy, JCE, and aiding and abetting. The defendant, then a lieutenant in the Peruvian Army, is alleged to have taken part in the planning of a massacre against civilians. During the commission of the killings and torture, the defendant and his troops allegedly burned house, fired shots and stood guard outside of the village blocking escape routes for fleeing survivors. Complaint, *Lizarbe v. Rivera Rondon*, No. 8:07-cv-01809-PJM (D. Md. July 11, 2007), available at http://cja.org/downloads/Rondon_Complaint_1.pdf.

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The Relationship Between the Alien Tort Statute and the Torture Victim Protection Act

Ekaterina Apostolova*

I.

INTRODUCTION

The Torture Victim Protection Act (“TVPA”) and the ATS share much in common. They serve similar purposes and the TVPA was enacted as a note to the ATS. Claims under the ATS and the TVPA are often filed in conjunction with each other. Nonetheless, federal courts have struggled for almost two decades to discern the proper connection between the two statutes. Congress has offered little guidance and the Supreme Court has not yet been asked to reflect on the proper relationship between the two statutes.

Part II of this Article, compares the ATS and the TVPA in terms of their respective forms and summarizes the legislative history of the TVPA. Part III outlines the two approaches which the federal courts have developed to define the relationship between the ATS and the TVPA. The majority rule states that the TVPA does not preclude causes of action under the ATS and that each statute provides a distinct cause of action for claims of torture and extrajudicial killing. At the same time, federal courts have found that the ATS and the TVPA inform one another in some respects but not in others. Courts have imported certain provisions from the more detailed TVPA into the ATS, thus making the two statutes not fully independent. The minority view holds that claims for torture and extrajudicial killing must be brought exclusively under the TVPA. Part IV contains the concluding remarks.

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II.
TEXT AND LEGISLATIVE HISTORY

The TVPA stands in contrast to the ATS in terms of its detailed provisions and extensive legislative history. The TVPA was enacted in 1992, more than two hundred years after the ATS and was included in the United States Code as a note to the ATS. It provides a cause of action for both United States nationals and aliens for extrajudicial killing and for torture, stating in relevant part that:

An individual who, under actual or apparent authority, or color of law, of any foreign nation—

- (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
- (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.¹

Thus, in contrast to the ATS, the TVPA is not jurisdictional in nature, but rather creates a substantive cause of action. Moreover, the TVPA defines its cause of action with further details. Section 3 contains an in depth definition of extrajudicial killing and torture.² The TVPA also contains an exhaustion of remedies provision, requiring that the claimant exhausts all “adequate and available remedies in the place in which the conduct giving rise to the claim occurred.”³ The House Report explains the need for this requirement, which “ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred.”⁴ This also “avoids[s] exposing U.S. courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries.”⁵ Additionally, the TVPA subjects claims to a ten-year statute of limitations so that the courts “will not have to hear stale claims.”⁶

Thus, in terms of form, the TVPA and the ATS differ greatly.⁷ While the ATS is short and ambiguous in nature, the TVPA provides more guidance. While the ATS does not provide definitions for what constitutes “law of nations” or a “tort. . . committed in violation” of that law, the TVPA contains a detailed definition of extrajudicial killing and torture. Unlike the TVPA, the ATS does not contain an express exhaustion of remedies requirement or a statute of limitations provision. The table below summarizes the main differences

1. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)) [hereinafter TVPA].

2. *Id.* § 3.

3. *Id.* § 2(b).

4. H.R. REP. NO. 102-367, at 5 (1991).

5. *Id.* at 6.

6. H.R. REP. NO. 102-367, at 4; *see* TVPA § 2(c).

7. Philip Mariani, *Assessing the Proper Relationship between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U.P.A. L. REV. 1383, 1385 (2008).

between the two statutes.

ATS	TVPA
Jurisdictional	Substantive
Definitions not detailed	Detailed definitions
No exhaustion of remedies requirement	Exhaustion of remedies requirement
No statute of limitations	10 year statute of limitations
Largely unknown legislative history	Detailed legislative history

As shown in the table, unlike the ATS's legislative history, which is largely unknown,⁸ the TVPA possesses an extensive record of codification. Specifically, the House and Senate Reports list three main purposes for the TVPA. First, the House Report clarifies that the need for the TVPA lies in providing a clear grant by Congress for a private right of action for torture, whose availability under the ATS Judge Bork questioned in *Tel-Oren v. Libyan Arab Republic*.⁹ Judge Bork reasoned that the principle of separation of powers required a clear grant by Congress if courts were to consider cases that might affect U.S. foreign policies. The TVPA provides such a grant. Second, the TVPA provides a remedy not only for aliens but also for U.S. citizens who may have been tortured abroad. Its purpose is to "enhance the remedy already available under [the ATS] . . . [by] extend[ing] a civil remedy also to U.S. citizens who may have been tortured abroad."¹⁰ Third, the Senate Report states that the purpose of the TVPA consists in "carry[ing] out the intent of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."¹¹ The U.S. ratified this Convention in 1990.¹²

Regrettably, the House and Senate Reports do not expressly clarify the relationship between the TVPA and the ATS. Indirectly, however, the legislative history provides some guidance as to the interaction between the ATS and the TVPA. The fact that the TVPA was codified as a note to the ATS implies that they are intended to interact closely. The legislative history states that the ATS "has other important uses and should not be replaced."¹³ Both the Senate Report and the House Report state that ATS "claims based on torture or

8. The Supreme Court stated that there is "poverty of drafting history" of the ATS which makes it "fair to say that a consensus understanding of what Congress intended has proven elusive." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718-19 (2004).

9. H.R. REP. NO. 102-367, at 4; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

10. H.R. REP. NO. 102-367, at 4.

11. S. REP. NO. 102-249, at 3 (1991).

12. Convention against Torture, *entered into force*, June 26, 1987, 1465 U.N.T.S. 85, *signatories available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.

13. *Id.* at 4-5; H.R. REP. NO. 102-367, at 3.

summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. Consequently, that statute should remain intact.”¹⁴ Courts in different Circuits diverge in their reading of the legislative history—some courts have cited it in support of the proposition that the TVPA and the ATS provide two separate claims for torture and extrajudicial killing while other courts have interpreted it as weakening this proposition.

The above description of the TVPA and the table illustrate that while the TVPA and the ATS differ in form, they serve a similar purpose. Moreover, often TVPA and ATS claims are filed in conjunction with each other.¹⁵ However, the issue of how exactly the two statutes interact still remains ambiguous. Does the TVPA supplement or limit claims under the ATS? Since both the ATS and the TVPA are silent on this issue and the Supreme Court has offered no clear guidance, a discussion of the relevant federal cases analyzing the relationship between the two statutes is necessary. Section III discusses these two interpretations of the interaction between the ATS and the TVPA.

III.

THE RELATIONSHIP BETWEEN THE TVPA AND THE ATS

Courts have found two ways in which the TVPA and the ATS interact with each other. First, courts have argued that the TVPA replaces torture and extrajudicial killing claims under the ATS. A second interpretation holds that the TVPA and the ATS offer distinct claims for torture and extrajudicial killing, with the TVPA informing the ATS in certain ways.

A. The TVPA Replaces Torture and Extrajudicial Killing Claims Under the ATS

The minority view holds that claims for torture and extrajudicial killing must be brought exclusively under the TVPA. The Seventh Circuit endorsed this view. In *Enahoro v. Abubakar*, the Seventh Circuit held that all torture and extrajudicial killing claims should be brought under the TVPA and plaintiffs must comply with all requirements of this statute. Thus, it found that the two statutes do not provide “two bases for relief against torture and extrajudicial killing.”¹⁶

In *Enahoro*, plaintiffs brought a suit against a general of the military junta in Nigeria for atrocities committed from 1993 to 1999.¹⁷ Plaintiffs only brought claims under the ATS and did not make a simultaneous claim under the TVPA.

14. S. REP. NO. 102-249, at 5; *see also* H.R. REP. NO. 102-367, at 4.

15. BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 76 (2008).

16. *Enahoro v. Abubakar*, 408 F.3d 877, 884 (7th Cir. 2005).

17. *Id.* at 879.

The district court, following precedents from other circuits, held that plaintiffs did not need to plead their case under the TVPA, implying that the two statutes offer two separate bases for relief.¹⁸ The Seventh Circuit disagreed with this proposition and overturned the decision of the district court.

The Seventh Circuit declared that unless the TVPA “occup[ied] the field” for torture claims, it would be “meaningless.”¹⁹ The court further stated that “[n]o one would plead a cause of action under the Act and subject himself to its requirements if he could simply plead under international law.”²⁰ The court discussed the limitations the TVPA imposes in requiring exhausting the remedies in the jurisdiction where the conduct occurred and bringing the claim within ten years. The court also found support for its interpretation of the relationship between the ATS and the TVPA in the legislative history of the TVPA and in *Sosa v. Alvarez-Machain*. The Seventh Circuit interpreted the House and Senate Reports stating that the ATS should “remain intact” to mean that “the enactment of the Torture Victim Protection Act did not signal that torture and killing are the *only* claims which can be brought under the Alien Tort Statute.”²¹ Other claims can still be brought under the ATS. The majority also interpreted *Sosa* as confirming the preclusive effect of the TVPA. The court argued that since the Supreme Court directed courts to exercise “great caution” and require “vigilant doorkeeping” in finding what claims are allowed under the ATS and since the court also stated that “a clear mandate” for suits for torture and extrajudicial killing exists under the TVPA, the *Sosa* Court would not approve of utilizing the ATS for torture claims.²² The Seventh Circuit then remanded the case to the district court because plaintiffs had to plead under the TVPA.

There are two main advantages to the Seventh Circuit interpretation of the relationship between the ATS and the TVPA. First, this interpretation clarifies the relationship between the two statutes in a very straightforward way.²³ By submitting that the TVPA “occup[ies] the field” of claims for torture and extrajudicial killing, it becomes clear that all restrictions contained in the TVPA, such as exhaustion of remedies and the statute of limitations, always apply. This simplifies the position taken in other circuits, which allows for claims to be brought under both of the statutes but which reads certain conditions from the TVPA into the ATS in an ambiguous way.²⁴ Second, requiring all claims for torture and extrajudicial killing to be submitted under the TVPA ensures

18. *Id.* at 884.

19. *Id.* at 884-85.

20. *Id.*

21. *Id.* at 885-86 n.2.

22. *Id.* at 885-89.

23. Mariani, *supra* note 7, at 1404.

24. See *infra* Part III.3 (discussing how courts have found that the TVPA supplements the ATS).

consistent treatment of aliens and U.S. citizens.²⁵ Because the TVPA applies equally to aliens and U.S. citizens while the ATS speaks only to aliens, non-U.S. citizens can circumvent the requirements under the TVPA by bringing claims under the ATS. The Second Circuit interpretation remedies this problem.

In his dissenting opinion, however, Judge Cudahy disagreed with the majority holding. He argued that the legislative history of the TVPA shows Congress meant to expand the TVPA's reach to U.S. citizens and not restrict the application of the ATS to foreign citizens, on the grounds that the ATS applies only to aliens.²⁶ Accordingly, the TVPA is not "meaningless," as the majority asserted. Moreover, the plain text of the TVPA did not contain any implicit amendment to the ATS and since repeals by implications are disfavoured, the relationship between the TVPA and ATS should not be interpreted as preclusive.²⁷ In addressing the Seventh Circuit argument that *Sosa* supports the majority holding, Judge Cudahy noted the majority "stands *Sosa* on its head" by using it as a support.²⁸ Nothing in *Sosa* suggests the preclusive effect of the TVPA. Thus, Judge Cudahy argued that the two statutes "are meant to be complementary and mutually reinforcing."²⁹

The majority circuit courts in the U.S. have also rejected the view followed by the Seventh Circuit in *Enahoro*. They have ruled that the TVPA and the ATS can be used simultaneously for claims of torture and extrajudicial killing.

B. *The TVPA and the ATS Offer Separate Claims*

The majority view is that the TVPA and the ATS provide two distinct causes of action. Thus, claims for torture and extrajudicial killing can be brought under both the ATS and the TVPA simultaneously.

For example, the Eleventh Circuit has ruled that "[t]he TVPA creates no new liabilities nor does it impair rights. Rather, the TVPA extended the ATS, which had been limited to aliens, to allow citizens of the United States to bring suits for torture and extrajudicial killing in United States courts."³⁰ More expressly with reference to the torture claims, the Eleventh Circuit has ruled that "a plaintiff may bring distinct claims for torture under each statute."³¹ The Eleventh Circuit supported this interpretation of the relationship between the two statutes through an analysis of the plain meaning of the statutes, canons of statutory interpretation discouraging repeals by implication, *Sosa*, and the legislative history of the TVPA.

25. Mariani, *supra* note 7, at 1404-05.

26. *Enahoro v. Abubakar*, 408 F.3d 877, 886-88 (2005) (Cudahy, J., dissenting in part).

27. *Id.* at 887.

28. *Id.* at 889.

29. *Id.* at 888.

30. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005).

31. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1249-50 (11th Cir. 2005).

The Eleventh Circuit looked at the text of the statutes and concluded that since both contain two different definitions of torture, they provide separate means for recovery “as that term separately draws its meaning from each statute.”³² The ATS provides means for recovery for a “violation of the laws of nations,” which the Supreme Court stated is drawn from:

the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.³³

The TVPA, on the other hand, contains a direct and detailed definition of torture:

- (1) the term ‘torture’ means any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
- (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from
 - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
 - (B) the administration of application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the sense or the personality;
 - (C) the threat of imminent death; or
 - (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.³⁴

Moreover, after further statutory interpretation through canons, the court concluded that to find that the TVPA provides the exclusive remedy for torture is to rule that the TVPA amends the ATS.³⁵ There is no such intent to amend that is apparent from the legislative history of the statute and, as noted above, “amendments by implications are disfavoured.”³⁶

32. *Id.*

33. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (citing *Paquete Habana*, 20 S.Ct. 290, 299 (1900)).

34. TVPA § 3(b).

35. *Aldana*, 416 F.3d at 1251.

36. *Id.* at 1250-51 (citing *Patel v. Quality Inn So.*, 846 F.2d 700, 704 (11th Cir. 1988)).

The court also found support in *Sosa*. The Eleventh Circuit argued that while the Supreme Court did state that the TVPA provides a “clear mandate” for recovery for torture and extrajudicial killing, it did not assert that the TVPA provided the exclusive authority.³⁷ In addition, the Supreme Court in *Sosa* ruled that “Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute.”³⁸

The Second Circuit,³⁹ the Fifth Circuit,⁴⁰ the Ninth Circuit,⁴¹ and the District Court of Columbia⁴² also have declared that the TVPA does not limit the scope of the ATS. A district court in the First Circuit supported this approach.⁴³ A district court in the Sixth Circuit also analyzed claims for torture and extrajudicial killing under both the ATS and the TVPA simultaneously.⁴⁴ All these courts have suggested that claims under the ATS and TVPA are independent from each other.

The main benefit of the majority view is that it follows the well-established principles of statutory interpretation.⁴⁵ Since the plain meaning and the legislative history are ambiguous, the courts should apply canons of statutory interpretation, as the Eleventh Circuit did, and read both statutes to their fullest capability. The practical consequences pointed out in the discussion of the Seventh Circuit precedent above are an outcome of a proper analysis of the relationship between the two statutes.⁴⁶ The courts should not circumvent this relationship by utilizing legislative powers.

While the majority of courts have recognized that the ATS and the TVPA offer distinct claims for torture and extrajudicial killing, they have not found the two statutes to be fully independent from each other. In adjudicating claims under the ATS, most courts have imported provisions from the more detailed TVPA into the ATS. Following are the ways in which courts have found the TVPA supplements the ATS.

37. *Id.*

38. *Sosa*, 542 U.S. at 724-25.

39. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260-61 (2d Cir. 2007) (discussing torture claims under both the ATS and the TVPA). *See also* *Wiwa v. Royal Dutch Petroleum*, 2002 WL 319887, at 4 (S.D.N.Y. Feb. 28, 2002) (stating that “the TVPA simply provides an additional basis for assertion of claims for torture and extrajudicial killing”).

40. *Beanal v. Freeport-McMahon, Inc.*, 197 F.3d 161 (5th Cir. 1999) (discussing claims under the ATS and the TVPA separately).

41. *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994). This reasoning was followed more recently in *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1086 (N.D. Cal. 2008) (stating that “the TVPA does not limit the scope of ATS claims for summary execution and torture”).

42. *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24-28 (D.D.C. 2005) (recognizing simultaneous claims under the TVPA and the ATS).

43. *Xuncax v. Gramajo*, 886 F. Supp. 162, 176-94 (D. Mass. 1995).

44. *Chavez v. Carranza*, 413 F. Supp. 2d 891, 899-903 (W.D. Tenn. 2005)..

45. *Mariani*, *supra* note 7, at 1406-07.

46. *Id.* at 1418.

1. Exhaustion of Remedies

The language of the ATS does not require exhaustion of remedies while the TVPA has an explicit provision that does.⁴⁷ In *Sosa*, the Supreme Court in *dicta* suggested that exhaustion of remedies could provide a possible defense in ATS claims.⁴⁸ However, the court left the issue unresolved and noted that it would consider it in another case. Circuit courts have considered this question and have refused to apply the exhaustion of remedies requirement from the TVPA to the ATS.

In *Sarei v Rio Tinto*, the Ninth Circuit found that the exhaustion of remedies requirement should not be read into the ATS.⁴⁹ It considered the benefits of doing so, as explained in the dissenting opinion in *Enahoro*. Judge Cudahy in *Enahoro* stated that such a reading would be justified on the basis of considerations of equity and consistency since “otherwise American victims of torture would be bound by an exhaustion requirement under the TVPA and foreign plaintiffs could avoid such strictures by pleading under the [ATS].”⁵⁰

Nevertheless, the Ninth Circuit found that no Congressional intent to apply the TVPA’s exhaustion requirement to ATS claims exists. The court reasoned that since Congress included this requirement in the TVPA, “it could have amended the [ATS] to include an exhaustion requirement similar to the one contained in the TVPA.”⁵¹ It did not do so, however. Moreover, “if Congress understood that the [ATS] *already* contained an exhaustion provision, it is not clear why it would add a superfluous exhaustion provision to the TVPA.”⁵² In addition, Congress applied the exhaustion requirement in the TVPA to specific claims, torture and extrajudicial killing, which require “a caution against importing an across-the-board exhaustion requirement into [ATS] based on what Congress did in the TVPA.”⁵³ For the above reasons, the Ninth Circuit found that the exhaustion of remedies requirement from the TVPA should not be read into the ATS.

However, this case was heard *en banc* and while the majority did not impose an “absolute requirement of exhaustion,” it discussed it as a possibility under a discretionary standard. The *en banc* opinion stated that it is not necessary to consider this issue in comparison to the TVPA but rather approached exhaustion as a prudential or judicially-imposed principle.⁵⁴ Other

47. See Regina Waugh, *Exhaustion of Remedies and the Alien Tort Statute*, 28 BERKELEY J. INT’L L. 555 (2010), for a thorough treatment of exhaustion of remedies under the ATS.

48. *Sosa*, 542 U.S. at 733 n.21.

49. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1197 (9th Cir. 2007).

50. *Enahoro v. Abubakar*, 408 F.3d 877, 890 (7th Cir. 2005) (Cudahy, J., dissenting in part).

51. *Sarei*, 487 F.3d at 1217.

52. *Id.*

53. *Id.* at 1217-18.

54. *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 827-28 (9th Cir. 2008) (“Not only does this TVPA

courts have also avoided the discussion by finding that even if the requirement of exhaustion of local remedies was to be applied, the remedies were not adequate in the particular case.⁵⁵

In *Jean*, the Eleventh Circuit ruled that “the exhaustion requirement does not apply to the [ATS]” but did not elaborate further.⁵⁶ A district court in the Third Circuit has declared that “there is nothing in the ATS which limits its application to situations where there is no relief available under domestic law.”⁵⁷ There is no court that has imported TVPA’s exhaustion of remedies requirement into the ATS.

2. Statute of Limitations

The statute of limitations from the TVPA is applied to claims arising under the ATS in accordance with traditional principles of analogizing statutes. Since the ATS does not contain an express statute of limitations, courts apply a two-step rule in determining what the statute of limitations should be. They look to the closest state-law analogue unless there is a closer analogy in another federal law.⁵⁸ When a federal statute “clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law.”⁵⁹ Courts have found that since both the ATS and the TVPA were enacted to protect human rights, both provide for a civil action to do so, and both were codified in the United States Code, they are very similar and should have the same statute of limitations.⁶⁰ The Eleventh Circuit,⁶¹ the Ninth Circuit,⁶² the Sixth Circuit,⁶³ the District of Columbia,⁶⁴ a district court in the Second Circuit⁶⁵ and a district

comparison not particularly forward the discussion, *Sosa’s* pronouncement relieves us of the need to engage in the comparison in the first place.”)

55. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 343 n.44 (S.D.N.Y. 2003); *see also Enahoro*, 408 F.3d at 892 (Cudahy, J., dissenting in part).

56. *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005).

57. *Jama v. INS*, 22 F. Supp. 2d 353, 364 (D.N.J. 1998).

58. *Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989) (proclaiming the rule that “statutes of limitation are to be borrowed from state law”).

59. *DelCostello v. Int’l Bhd. Of Teamsters*, 462 U.S. 151, 172 (1983).

60. *Arce v. Garcia*, 400 F.3d 1340, 1345-46 (11th Cir. 2005).

61. *Id.* at 1346.

62. *Deutsch v. Turner Corp.*, 324 F.3d 692, 717 (9th Cir. 2003) (“The statute of limitations under the [ATS] is 10 years.”). This is followed by the district court in a more recent case in *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1099 (2008).

63. *Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir. 2009) (“Like all courts that have decided this issue since the passage of the TVPA, we conclude that the ten-year limitations period applicable to claims under the TVPA likewise applies to claims made under the ATS.”).

64. *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 119 (D.D.C. 2003).

65. *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, at *19 (S.D.N.Y. 2002).

court from the Third Circuit⁶⁶ have adopted this view.

When finding that the TVPA statute of limitations applies to the ATS, courts have also applied equitable tolling to both statutes.⁶⁷ Equitable tolling provides for adjusting the limitations period to account for, for example, the time of absence of the defendant from a jurisdiction where plaintiff can bring an action, the time when defendant had immunity from suit, or the time where plaintiff was imprisoned. The TVPA does not contain a specific reference to equitable tolling. However, the House Report states that “equitable tolling remedies may apply to preserve a claimant’s rights.”⁶⁸ The Senate Report also affirms that “[t]he statute of limitations should be tolled. . . .”⁶⁹ In light of this expressed intent by Congress, equitable tolling is applied to the TVPA and in keeping with the rule of analogizing statutes, equitable tolling is also applied to the ATS.

3. *Definition of Torture and Extrajudicial Killing*

Some courts import the definition for torture from the TVPA to the ATS. Other courts, however, look at international sources for a definition of what constitutes torture under the law of nations. The Eleventh Circuit in *Aldana v. Del Monte Fresh Produce* looked to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) to find that definition.⁷⁰ The Convention defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁷¹

The Eleventh Circuit recognized that in some cases the variations in the definitions contained in the TVPA and CAT might make a difference but did not find it did so in the particular case.⁷² Nevertheless, the court acknowledged that torture might be read more broadly in the TVPA since the Supreme Court has instructed courts to read the ATS narrowly but no such direction exists as to the

66. *Hereros v. Deutsche Afrika-Linien GMBLT & Co.*, 2006 WL 182078, at *6-7 (D.N.J. 2006).

67. *Arce v. Garcia*, 400 F.3d 1340, 1262 (11th Cir. 2005).

68. H.R. REP. NO. 102-367, at 5 (1991).

69. S. REP. NO. 102-249, at 11 (1991).

70. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250 (11th Cir. 2005).

71. *Convention Against Torture Part I*, art.1(1) *entered into force*, June 26, 1987, 1465 U.N.T.S. 85.

72. *Aldana*, 416 F.3d at 1251-52.

TVPA. Moreover, a significant divergence between the TVPA and CAT is that the TVPA requires the victims to be “in the offender’s custody or physical control.”⁷³ This makes a difference, for example, when victims receive phone calls that cause them mental suffering; in that case they can claim torture under CAT but not under the TVPA.⁷⁴ In addition to the Eleventh Circuit, a district court in the Second Circuit also applied the CAT definition to claims of torture under the ATS.⁷⁵

As for the definition of extrajudicial killing, courts analyzing ATS claims have relied on the definition contained in the TVPA. A district court in the Sixth Circuit expressly recognized that the definition is the same.⁷⁶ Other courts have not expressly recognized that the definition from the TVPA should be applied. Nevertheless, they have done so in analyzing simultaneous ATS and TVPA claims for extrajudicial killing in that way.⁷⁷

4. *Standing to Sue*

The victims of torture and extrajudicial killing can sue for damages. However, cases exist where plaintiffs are a relative or other representative of the victim, not the victim herself. The court must then answer the question whether the relationship is legally sufficient for a claim to proceed. Courts have taken different approaches in looking for the proper law to answer this question. Some courts have followed the TVPA as “the most analogous federal statute.”⁷⁸ The TVPA provides that for an extrajudicial killing claim a legal representative of the victim or “any person who may be a claimant in an action for wrongful death” shall have standing to sue.⁷⁹ The House Report guides the courts to look at the law of the forum state in determining who may be a plaintiff in such cases.⁸⁰ However, state law sometimes directs courts to look at the foreign law to answer this question.⁸¹ Thus, in the end, there might not be any practical difference in whether the courts adopt the TVPA standard or apply foreign law to determine who has standing to sue.

73. TVPA § 3(b).

74. STEPHENS ET AL., *supra* note 15, at 143.

75. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 326 (S.D.N.Y. 2003).

76. *Chavez v. Carranza*, 559 F.3d 486, 899-900, 902-03 (6th Cir. 2009).

77. *Doe v. Alvaro Rafael Saravia*, 348 F. Supp. 2d 1112, 1148, 1153-54 (E.D. Cal. 2004). Only recently did a district court in the Second Circuit recognize that extrajudicial killing can be pleaded under the ATS. *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 383 n.4 (S.D.N.Y. 2009) (overruling its prior decision in *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 465 (S.D.N.Y. 2006)).

78. *Xuncax v. Gramajo*, 886 F. Supp. 162, 189-92 (D. Mass. 1995).

79. TVPA § 2(a)(2).

80. H.R. REP. NO. 102-367, at 4 (1991).

81. STEPHENS ET AL., *supra* note 15, at 233.

Nevertheless, some courts have expressly recognized that the TVPA standard should be imported into the ATS. A district court in the Ninth Circuit has stated that “[t]he ATS does not address standing. Both parties agree, however, that the standard from the TVPA should govern plaintiffs’ standing under the ATS.”⁸² A district court in the Eleventh Circuit and a district court in the Fifth Circuit applied the same standard on standing to sue.⁸³ A district court in the First Circuit also applied the standard in the TVPA but at the same time, looked at state and Guatemalan law.⁸⁴

IV. CONCLUSION

A lack of clarity exists as to the exact relationship between the TVPA and the ATS. Courts have interpreted the interaction between the statutes in different ways. The majority view is that the TVPA and the ATS offer independent causes of action for torture and extrajudicial killing claims, with the more detailed TVPA informing the ATS in certain ways. Generally, courts import the statute of limitations from the TVPA, don’t import the exhaustion of remedies requirement from it, and sometimes read the TVPA’s definition of torture, its definition of extrajudicial killing, and its standard on standing into the ATS.

The Seventh Circuit, however, has stated that the TVPA precludes torture and extrajudicial claims from the scope of the ATS and, thus, plaintiffs should bring these causes of action only under the TVPA. The Supreme Court to date has offered no guidance as to the proper interpretation since in *Sosa* the court was not called on to reflect on the proper interaction between the two statutes directly. The law on this issue is still evolving.

82. *Bowoto v. Chevron Corp.*, 2006 WL 2455761, at *11 (N.D. Cal. 2006).

83. *Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1356-58 (S.D. Fla. 2001); *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 368 (E.D. La. 1997).

84. *Xuncax v. Gramajo*, 886 F. Supp. 162, 189-92 (D. Mass. 1995).