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NOTES

BRINGING HUMAN RIGHTS HOME: THE CHALLENGE OF ENFORCING JUDICIAL RULINGS IN UKRAINE AND RUSSIA

Andrey Meleshevich, Ph.D[*] and Carolyn Forstein[**] [†]

ABSTRACT

The problem of systemic non-enforcement of judicial decisions, the Ukrainian government's failure to respond to a pilot judgment, and Russia's legislative reform offer important case studies for both rule of law development in the post-Soviet sphere and the efficacy of the European human rights system. This article looks at systemic non-enforcement both as a domestic and international challenge. It first examines Ukraine's history with the European Court of Human Rights and the response to the *Ivanov v. Ukraine*[1] pilot judgment. It unpacks the factors that are responsible for persistent non-enforcement and for preventing domestic reform. It then turns to Russia, and explores the European Court of Human Rights' pilot judgment in the case *Burdov v. Russia (no. 2)*,[2] the Russian response, and implementation of the subsequent reforms. Lastly, the article examines the significance and implications of these cases for the European human rights regime.

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[†] The authors and the *Indiana International & Comparative Law Review* would especially like to thank Viktoriia Serediuk-Buz for her editing assistance.

This Article was completed and submitted to the *The Indiana International & Comparative Law Review* prior to the beginning of the Maidan protests in late 2013 and the end of the Yanukovych presidency in February 2014. Although the ongoing events in Ukraine have significantly changed the political landscape, this Article offers insight into the systemic problems facing the Ukrainian judiciary and some of the interest groups and governance issues, including budgetary shortfalls that have stymied reform in the past. Effective judicial reform remains a major challenge and priority for the current government, which must address the issues discussed within this Article in seeking to meet the international standards for effective and impartial judicial redress. On numerous occasions newly-elected President Petro Poroshenko has confirmed that Ukraine has chosen the European vector for its political and economic development. Adherence to the principles of the rule of law including strict execution of both international and domestic court decisions would signify an important step towards European values and standards.

1. Ivanov v. Ukraine, 2009 Eur. Ct. H.R. 767, *archived at* http://perma.cc/Q8HM-8WSG.

2. Burdov v. Russia (No. 2), 2009 Eur. Ct. H.R., *archived at* http://perma.cc/LK8A-ZHLR.

INTRODUCTION

Over the past several years,[3] Ukraine has garnered international attention concerning challenges to democratic consolidation, widespread corruption in the top echelons of government, and the high-profile trials of former government officials and opposition leaders.[4]

However, one of the most significant obstacles to the development of rule of law in Ukraine is not new: the failure to enforce domestic judgments is an enduring feature of the national legal system. Nina Karpacheva, the former Human Rights Ombudsman of Ukraine, estimated in her 2011 annual report that over 60 percent of all domestic court decisions and 98 percent of the decisions of the European Court of Human Rights against Ukraine had not been fully enforced.[5] While several factors contribute to the development of rule of law, a system in which verdicts regularly go unenforced cannot be said to provide consistent, fair, or meaningful justice.

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to "adequate and timely execution of legitimate judicial decisions."[6] The failure to enforce a court decision violates an individual's right to a fair trial, which the European Court of Human Rights describes as a fundamental component of the rule of law,[7] as well as the right to an effective remedy for the original violation found by the court.

Domestic and international observers, the Ukrainian government, and the Council of Europe have repeatedly acknowledged and discussed this systemic shortcoming. In several of its earliest judgments against Ukraine, delivered in 2004, the European Court of Human Rights found Ukraine guilty of violating article 6 of the European Convention due to the state's failure to effectively enforce domestic court decisions.[8] Through the

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3. The authors also thank Nazar Kulchytsky for his comments on a draft of this Article.

4. OLEKSANDR SUSHKO & OLENA PRYSTAYKO, FREEDOM HOUSE, NATIONS IN TRANSIT 2013, UKRAINE, *archived at* http://perma.cc/ZG4Z-AX3J.

5. Nina Karpacheva, Vystup Upovnovazhenoho Verkhovnoyi Rady Ukrayiny z prav lyudyny Niny Karpachovoyi pid chas predstavlennya Shchorichnoyi dopovidi pro stan dotrymannya ta zakhystu prav i svobod lyudyny v Ukrayini u Verkhovniy Radi Ukrayiny [Speech of the Human Rights Ombudsman of Ukraine Nina Karpachova Presenting the Annual Report on the State of Human Rights in Ukraine], OMBUDSMAN OF THE VERKHOVNA RADA OF UKRAINE FOR HUMAN RIGHTS, 18-19 (Feb. 7, 2012), *archived at* http://perma.cc/G6EW-M84R.

6. Andrey Meleshevich & Anna Khvorostyankina, *Ukraine, in* THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN CENTRAL AND EASTERN EUROPE 576 (Leonard Hammer & Frank Emmert eds., 2012); Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, art. 6.

7. Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) § 55 (1979).

8. *E.g.*, Voytenko v. Ukraine, 2004 Eur. Ct. H.R., *archived at* http://perma.cc/FS6N-K792; Zhovner v. Ukraine, 2004 Eur. Ct. H.R., *archived at* http://perma.cc/5V3N-MXUX\.

beginning of 2012, the court issued 432 similar judgments against Ukraine.[9] In 2009, the European Court of Human Rights issued a pilot judgment, which compelled the Ukrainian authorities to address non-enforcement on an institutional level and set a time period for a sufficient national response.[10] This deadline passed in July of 2011.[11] At the time of writing this Article, the Ukrainian government has not instituted any of the required domestic reforms,[12] arguably making Ukraine the first state to ever fail to respond to a pilot judgment of the European Court of Human Rights.

The Council of Europe has identified non-enforcement of domestic judgments as a systemic, ongoing challenge not only in Ukraine but also in Russia, Moldova, and Romania.[13] Nine months before applying the pilot judgment procedure against Ukraine for non-enforcement of domestic judgments, the European Court of Human Rights issued a pilot judgment against Russia concerning the same issue.[14] In contrast to Ukraine, Russia, a country with its own thorny history of relations with the European Court of Human Rights, responded within the prescribed time period by passing federal legislation designed to tackle the issue.[15]

The problem of systemic non-enforcement of judicial decisions, the Ukrainian government's failure to respond to a pilot judgment, and Russia's legislative reform offer important case studies for both rule of law development in the post-Soviet sphere and the efficacy of the European human rights system. This Article looks at systemic non-enforcement both as a domestic and international challenge. It first examines Ukraine's history with the European Court of Human Rights and the response to the

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9. EUR. CT. HUM. RTS., VIOLATION BY ARTICLE AND BY STATE 1959-2011 (2011), *archived at* http://perma.cc/Y5CT-CSLR. In addition to the 432 decisions concerning violations of the right to a fair trial, the European Court of Human Rights also issued 259 decisions in which it found Ukraine guilty of violating the right to a hearing within a reasonable period of time. *Id*.

10. Ivanov v. Ukraine, 2009 Eur. Ct. H.R., *archived at* http://perma.cc/Q8HM-8WSG.

11. Comm. of Ministers, Communication from the Registry of the European Court Concerning the Pilot Judgment Delivered in the Case of Yuriy Nikolayevich Ivanov against Ukraine 1 (2011).

12. EUR. CT. HUM. RTS., PRESS UNIT, PILOT JUDGMENTS: FACTSHEET 3-4 (2013), *archived at* http://perma.cc/YM7F-FBPG.

13. Eur. Parl. Ass., *States with Major Structural/Systemic Problems Before the European Court of Human Rights: Statistics*, Doc. AS/Jur/Inf (2011) 05 rev 2 (2011), *archived at* http://perma.cc/Q4HA-TGL5.

14. Burdov v. Russia (No. 2), 2009 Eur. Ct. H.R., *archived at* http://perma.cc/LK8A-ZHLR.

15. Council of Eur., Comm. of Ministers, Interim Resolution, *Execution of the Judgment of the European Court of Human Rights Burdov No. 2 Against the Russian Federation Regarding Failure or Serious Delay in Abiding by Final Domestic Judicial Decisions Delivered Against the State and its Entities as well as the Absence of an Effective Remedy*, CM/ResDH (2011) 293 (2011), *archived at* http://perma.cc/4TMK-9ZWJ.

Ivanov v. Ukraine pilot judgment.[16] It unpacks the factors that are responsible for persistent non-enforcement and for preventing domestic reform. It then turns to Russia, and explores the court's pilot judgment in the case *Burdov v. Russia (no. 2),*[17] the Russian response, and implementation of the subsequent reforms. Lastly, the Article examines the significance and implications of these cases for the European human rights regime.

I. A HISTORY OF NON-ENFORCEMENT IN UKRAINE

The non-enforcement of domestic judgments is an enduring problem in post-Soviet Ukraine, as reflected by Ukraine's record at the European Court of Human Rights. Ukraine acceded to the Council of Europe in 1995, ratified the European Convention on Human Rights in 1997, and received its first judgment from the European Court of Human Rights in 2001.[18] In 2004, the court issued a decision in *Zhovner v. Ukraine*, the first case concerning non-enforcement, and since then the number of applications presenting this issue has continued to grow.[19] By 2010, cases about the non-enforcement of domestic decisions comprised over 50 percent of all European Court of Human Rights judgments against Ukraine.[20]

The widespread nature of the issue has not gone unnoticed. The Committee of Ministers, the branch of the Council of Europe responsible for overseeing the execution of European Court of Human Rights judgments, monitored the *Zhovner* decision and subsequent similar rulings. A number of documents produced by the Committee of Ministers confirm that while the Ukrainian government is well aware of the problem of non-enforcement and ready to provide financial compensation to individual claimants at the European Court of Human Rights, it has not made effective efforts at systemic reform.

The first serious international assessment of systemic non-enforcement of judicial decisions in Ukraine was a June 2007 memorandum prepared by the Department for Enforcement of Judgments of the European

16. Ivanov v. Ukraine, 2009 Eur. Ct. H.R. 767, *archived at* http://perma.cc/Q8HM-8WSG.

17. Burdov v. Russia (No. 2), 2009 Eur. Ct. H.R.

18. PRESS UNIT, PILOT JUDGMENTS: FACTSHEET, *supra* note 12, at 1.

19. Zhovner v. Ukraine, 2004 Eur. Ct. H.R., *archived at* http://perma.cc/5V3N-MXUX\. The court ruled on a handful of Ukrainian cases between 2001-2003, and the Zhovner judgment was only the seventeenth judgment regarding Ukraine. *See* Council of Europe, *Judgment and Decisions*, European Court of Human Rights (last visited March 8, 2014), http://www.echr.coe.int/Pages/home.aspx?p=caselaw&c=.

20. Christos Pourgourides, Council of Eur., *Implementation of Judgments of the European Court of Human Rights 7th Report*, Doc. AS/Jur (2010) 36, ¶ 153 (2010) [hereinafter Pourgourides, *7th Report*], *archived at* http://perma.cc/QC86-MFN5.

Court of Human Rights at the Committee of Ministers. The memorandum identified five key underlying factors: a lack of financing in the state budget to enforce judgments against the state or state-owned companies; the complexity of the legal rules for seizure of state-owned accounts; a lack of regulations ensuring compensation for delayed enforcement; a lack of liability for the officials tasked with enforcement; and the inefficiency of the Ukrainian bailiffs' service.[21] The document also specifically praised the National Action Plan for Ensuring Due Enforcement of Courts' Decisions, which was approved by Decree of the President of Ukraine on June 27, 2006, and proposed a number of measures to "increase the efficiency of the state enforcement service and improve the procedure for compulsory enforcement."[22]

In March of 2008, the Committee of Ministers noted positively that Ukraine had developed three draft laws, which sought to end a prohibition on the forced sale of state-owned assets and increase the efficiency of enforcement procedures, but recorded that "little progress has been made so far in resolving the structural problem of non-execution of domestic judicial decisions."[23] A subsequent Interim Resolution in 2009 noted that none of the draft laws had been adopted and "deplore[d]" that "the Ukrainian authorities have continuously failed to give priority to finding effective solutions."[24] While both the Committee of Ministers and the Ukrainian government acknowledged that non-enforcement was a critical and complicated issue demanding reform in multiple sectors, the government made no tangible progress at addressing non-enforcement through the end of 2009. This persistent inaction set the stage for a pilot judgment against Ukraine.

In recent years, a mass of identical applications have accumulated at the European Court of Human Rights, primarily concerning article 6.[25] The

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21. Comm. of Ministers, *Non-Enforcement of Domestic Judicial Decisions in Ukraine: General Measures to Comply with the European Court's Judgments*, CM/Inf/DH (2007) 30, 6 (2007) *revised*.

22. Ukaz Prezydenta Ukrayiny №587/2006 "Pro Natsionalnyi plan dii iz zabezpechennya nalezhnoho vykonannya rishen sudiv" [Decree of the President of Ukraine №587/2006 on the National Action Plan for Ensuring Due Enforcement of Courts Decisions], June 27, 2006, *archived at* http://perma.cc/4LMF-D2JM.

23. Comm. of Ministers, *Final Resolution on the Execution of the Judgements of the European Court of Human Rights in 232 Cases Against Ukraine Relative to the Failure or Serious Delay in Abiding by Final Domestic Judicial Decisions Delivered Against the State and its Entities as Well as the Absence of an Effective Remedy*, CM/ResDH (2008) 1, ¶ 32 (2008).

24. Comm. of Ministers, *Interim Resolution Execution of the Judgments of the European Court of Human Rights in 324 Cases Against Ukraine Concerning the Failure or Serious Delay in Abiding by Final Domestic Courts' Decisions Delivered Against the State and its Entities as Well as the Absence of an Effective Remedy*, CM/ResDH (2009) 1591, ¶ 13 (2009).

25. Christos Pourgourides, Council of Eur., *Report on Implementation of Judgments of*

vast majority of admissible applications are repetitive of earlier cases, revealing systemic violations, and stemming primarily from Russia, Ukraine, Turkey, Italy, Poland, and Romania.[26] The resulting backlog of cases has caused much concern, and consequently, detailed debate within the Council of Europe concerning the structure and future of the European Court of Human Rights.[27]

The pilot judgment procedure is a relatively new function of the court, used for the first time in 2004 in the case of *Broniowski v. Poland*.[28] The procedure is a means to support reform at the national level to eliminate the causes of repeated violations of the European Convention, thereby ameliorating two significant problems. By compelling member states to address their systemic shortcomings, the court ensures the effective protection of the rights guaranteed by the Convention while fully complying with the principle of subsidiarity.[29] Additionally, the pilot judgment procedure reduces the number of repetitive applications to the court, which have become a serious threat to the efficacy of the court.

The central idea of the pilot mechanism is "that where there are a large number of applications concerning the same problem, applicants will obtain redress more speedily if an effective remedy is established at national level than if their cases are processed on an individual basis in Strasbourg."[30] In a pilot judgment, the European Court of Human Rights goes beyond calling for general measures, by specifically identifying "the dysfunction under national law that is at the root of the violation," and proposing steps to the responsible state government to remedy the problem and resolve similar pending cases.[31] Another unique feature of the pilot

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the European Court of Human Rights, Doc. 12455, 38 (2010), *archived at* http://perma.cc/9V5P-R49Z.

26. Eur. Parl. Ass., *supra* note 13, at 4.

27. Three high level conferences took place in 2010, 2011, and 2012 at Interlaken, Izmir, and Brighton, respectively, regarding the future of the European Court of Human Rights. Each conference included official representatives from all member states and produced a declaration, which can be accessed via the European Court's website at http://www.echr.coe.int/ECHR/EN/Header/The+Court/Reform+of+the+Court/Conferences/, *archived at* http://perma.cc/64DZ-ZG3.

28. PRESS UNIT, PILOT JUDGMENTS: FACTSHEET, *supra* note 12, at 1; Broniowski v. Poland, 2004 Eur. Ct. H.R. 307, *archived at* http://perma.cc/SD8K-M4BR.

29. According to the European Court, the principle of subsidiarity is one of the most fundamental principles for the whole Convention system and might have several somewhat different meanings; "however, in the specific context of the European Court of Human Rights, it means that the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court. The Court can and should intervene only where the domestic authorities fail in that task." Eur. Ct. Hum. Rts., *Interlaken Follow-Up, Principle of Subsidiarity* (2010), *archived at* http://perma.cc/W2YL-32JX.

30. Eur. Ct. Hum. Rts., *The Pilot-Judgment Procedure: Information Note Issued By the Registrar*, ¶ 6 (2009), *archived at* http://perma.cc/3RW9-VRQL.

31. *Id.* at ¶ 3.

judgment procedure is that the court has the option of freezing all of the related pending admissible applications to the European Court of Human Rights for a set period of time, giving a government the opportunity and incentive to resolve them on the domestic level.[32]

II. A PILOT JUDGMENT FOR UKRAINE

The case of *Yuriy Nikolayevich Ivanov v. Ukraine*[33] was the first pilot judgment against Ukraine and exemplifies the commonplace challenge of enforcing a domestic judgment in Ukraine. Yuriy Ivanov served in the Ukrainian army and retired in 2000.[34] Upon his retirement, Ivanov was entitled to one-time retirement payment and compensation for his uniform, but did not receive either.[35] Ivanov took his case to court, and in August 2001 a regional military court found in his favor, ordering his military unit to pay him the retirement sum, uniform compensation, and court fees, all of which together totaled 4,012.86 hryvnia, or approximately EUR 800 at the time.[36] Over the next several years, Ivanov pursued his case in multiple courts in an effort to have this decision enforced.[37] At an unspecified point, Ivanov received the 2,515.50 hryvnia owed to him for the retirement lump sum, but nothing towards the awards for his uniform and court fees.[38] In January 2002, bailiffs informed Ivanov that they had frozen the bank accounts of the debtor, his former military unit, but that "no funds had been found in those accounts."[39] The following November, Ivanov received a letter from the Ukrainian Ministry of Defense explaining that he was not entitled to compensation for his uniform as there were "no budgetary allocations for such payments."[40] In April 2004, more than two and a half years after the original judgment was issued against the military unit, the bailiffs informed Ivanov by letter that the unit still had no money and that "forced sale of assets belonging to military units was prohibited by the law," and thus that they had no means of enforcing the judgment.[41]

Following the bailiffs' response in January 2002, Ivanov lodged a separate complaint in a district court about the lack of action.[42] In December 2002, that court ruled that the bailiffs "had not taken the necessary measures" and ordered them to "identify and freeze the bank accounts of

32. *Id.* at ¶ 5.
33. Ivanov v. Ukraine, 2009 Eur. Ct. H.R., *archived at* http://perma.cc/Q8HM-8WSG.
34. *Ivanov* ¶ 8.
35. *Ivanov* ¶ 8.
36. *Ivanov* ¶ 9.
37. *Ivanov* ¶¶ 16-19.
38. *Ivanov* ¶ 10.
39. *Ivanov* ¶ 11.
40. *Ivanov* ¶ 12.
41. *Ivanov* ¶ 14.
42. *Ivanov* ¶ 16.

the debtor military unit in order to seize the money available in those accounts."[43] According to Ivanov, the bailiffs did not comply with this ruling, and in May of 2003 he lodged yet another claim in the same district court against the bailiffs seeking both compensatory and non-pecuniary damages.[44] Finding that the August 2001 judgement was still unenforced "through the fault of the bailiffs," the district court in July 2003 awarded Ivanov 1,500.36 hryvnia in pecuniary damages and another 1,000 hryvnia in non-pecuniary damages.[45] This judgment, in turn, was similarly not executed. By 2009, when the European Court of Human Rights ruled on Ivanov's case, both the remainder of the initial judgment of 2001 and the 2003 judgment against the bailiffs' remained unenforced, amounting to a delay of over seven years.[46]

The near-decade Ivanov spent pursuing what should have been a routine payment prescribed by Ukrainian law is emblematic of the obstacles facing Ukrainian citizens in interacting with the national legal system. The European Court of Human Rights found violations of Ivanov's rights under article 6 section 1, article 13, and article 1 of protocol 1 for the non-enforcement of both the 2001 and 2003 judgments.[47] The court noted that in similar cases against Ukraine it had repeatedly found violations of article 6 section 1, which guarantees the right to a fair trial, including enforcement, and article 1 of protocol 1, which protects property rights.[48] While acknowledging that the delays in enforcement had numerous causes, "including the lack of budgetary funds, omissions on the part of the bailiffs, and shortcomings in the national legislation," the court stressed that "those factors were not outside the control of the authorities," and that the state was responsible for the violations.[49]

Regarding article 13, which protects the right to an effective remedy, the European Court of Human Rights referenced both past cases against Ukraine, and the pilot judgment issued against Russia nine months earlier in *Burdov (2) v. Russia,* which also concerned non-enforcement.[50] Citing Burdov, the court noted that "the burden to comply" with a domestic judgment regarding enforcement "lies primarily with the State authorities."[51] The court also recalled the *Voytenko v. Ukraine* case, in which another veteran seeking compensation from his former military unit faced the same obstacles to enforcement as Ivanov. In *Voytenko*, the court

43. *Ivanov* ¶ 16.
44. *Ivanov* ¶ 17.
45. *Ivanov* ¶ 18.
46. *Ivanov* ¶ 55.
47. *Ivanov* ¶¶ 57, 69-70.
48. *Ivanov* ¶ 56.
49. *Ivanov* ¶¶ 55-58.
50. *Ivanov* ¶¶ 65-67.
51. 2009 Eur. Ct. H.R.

found that the enforcement of judgments against a government institution "can only be carried out if the State foresees and makes provision for the appropriate expenditures in the State Budget of Ukraine," and thus that enforcement of judgments is "prevented precisely because of the lack of legislative measures, rather than by a bailiff's misconduct."[52] Neither individual citizens nor bailiffs or judges have any ability to enforce court decisions concerning a monetary award if the necessary funds are not already in place.

The facts of the *Ivanov* case clearly demonstrated that non-enforcement was a longstanding issue with roots in several aspects of the Ukrainian legal, judicial, and political systems. After discussing the individual merits of the case, the European Court of Human Rights decided to apply the pilot judgment procedure for the first time against Ukraine, citing "the recurrent and persistent nature of the underlying problems, the large number of people affected by them in Ukraine and the urgent need to grant them speedy and appropriate redress at domestic level."[53]

In contrast to past decisions and general measures, the pilot judgment set out specific conditions and deadlines. The court granted Ukraine one year from the date the decision became final to introduce "an effective domestic remedy or combination of such remedies capable of securing adequate and sufficient redress for the non-enforcement or delayed enforcement of domestic decisions."[54] The court decided to adjourn proceedings for the approximately 1,400 pending applications concerning similar issues for the course of this year, during which time the Ukrainian government was encouraged to resolve these cases through individual settlements or the implementation of a new domestic judicial mechanism.[55] Any new applications concerning the same issues that arose during the year would also be adjourned, and the applicants notified.[56] If Ukraine failed to take action and set up a new functional remedy or to resolve the former group of cases, the court would resume consideration of all pending applications, including those received after the pilot judgment became final.[57]

III. UKRAINE'S RESPONSE

The Ukrainian response to the pilot judgment has been minimal. The *Ivanov* judgment was issued on October 15, 2009, and became final on

52. Voytenko v. Ukraine, 2004 Eur. Ct. H.R. ¶ 30, *archived at* http://perma.cc/FS6N-K792.

53. *Ivanov* ¶ 81.

54. *Ivanov* at 27-28 (§ 5 of verdict).

55. *Ivanov* ¶¶ 86, 98-99.

56. *Ivanov* ¶ 97.

57. *Ivanov* ¶ 100.

January 15, 2010.[58] In an interim resolution assessing Ukraine's progress in November 2010, the Committee of Ministers evaluated the execution of the *Ivanov* pilot judgment and 386 other decisions against Ukraine concerning non-enforcement of domestic decisions and the lack of an effective remedy.[59] The Committee of Ministers reported that the Ukrainian authorities had informed them of the preparation of a draft law entitled *On Enforcement of the Court Decisions for which the State is Responsible,* but had not provided either details of its content or a timetable for its passage.[60] The resolution also noted that Ukraine had made little progress in settling the pending individual cases.[61] Christos Pourgourides, the Chair of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (PACE), assessed the Ukrainian response to *Ivanov* in a November 2010 report, stating that "this issue, to my consternation, does not appear to be a priority for the authorities, notwithstanding the clear wording of the Court's pilot judgment."[62]

In December 2010, a month before the initial deadline was set to expire, the Ukrainian government requested a 12-month extension.[63] In response, the European Court of Human Rights granted Ukraine a 6-month extension through July 15, 2011, but noted that non-enforcement "had not improved in the year since the judgment became final," and that the reported draft law on enforcement had not been passed.[64] While some of the individual cases had been settled, approximately 1,100 cases remained unresolved, and the court planned to process another 450 related cases that had been received after the *Ivanov* judgment became final.[65]

In June, the Government Agent of Ukraine before the European Court of Human Rights, Valeria Lutkovska, reported that a draft law entitled *On Guarantees of the State Concerning Execution of Court Decisions*, which "address[ed] problems identified by the Court's pilot judgment and provid[ed] a domestic remedy," had been introduced in the Verkhovna Rada and was awaiting a first reading.[66] This statement did not correspond

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58. *Ivanov* (at the top of the judgment).

59. Comm. of Ministers, *Interim Resolution Execution of the Pilot Judgment of the European Court of Human Rights in the Case Yuriy Nikolayevich Ivanov against Ukraine and of 386 Cases against Ukraine Concerning the Failure or Serious Delay in Abiding by Final Domestic Courts' Decisions Delivered against the State and its Entities as well as the Absence of an Effective Remedy*, CM/ResDH (2010) 222, (2010).

60. *Id.* ¶¶ 9-10.

61. *Id.* ¶ 11.

62. Pourgourides, *7th Report*, *supra* note 20, ¶ 158.

63. Comm. of Ministers, *Communication from the Registry of the European Court concerning the Pilot Judgment Delivered in the Case of Yuriy Nikolayevich Ivanov against Ukraine*, (Application No. 40450/04), DH-DD (2011) 54E, 1 (2011).

64. *Id.*

65. *Id.* at 1-2.

66. Comm. of Ministers, *Communication from Ukraine in the case of Yuriy*

with actual events, as a bill with this name was only introduced in the Rada in September of 2011.

The first version of this draft law had the slightly different title *On Guarantees of the State Concerning Execution of Decisions of the Court* (No. 7562) and was reportedly introduced in the Verkhovna Rada, according to the Rada's official website, on January 14, 2011, one day before the original deadline set by the pilot judgment expired.[67] However, this bill was never introduced for debate and, on September 6, 2011, was removed from the agenda of the Rada.[68] The second version, which was *de jure* a new draft law, entitled *On Guarantees of the State Concerning Execution of Court Decisions* (No. 9127) was introduced in parliament on September 8, 2011, and adopted at first reading the following day.[69]

In July 2011, the government requested another six-month extension.[70] This time, the court rejected the extension request, noting that there had been no improvement in enforcement over the past year and a half.[71] The court emphasized that approximately 1,000 of the frozen cases remained unsettled and pointed to the Committee of Ministers as the best body to assist Ukraine in implementing legislative and administrative reforms.[72]

In correspondence with the Committee of Ministers, the Ukrainian government repeatedly pointed to the proposed draft law as a potential solution. In a September 2011, communication to the Department for the Execution of Judgments of the European Court of Human Rights, Valeria Lutkovska described how the law provides a "new procedure for execution" of court decisions as well as a "solution of the problem concerning the outstanding debt that is to be paid" by amending multiple laws regulating social benefits and other components of the State budget.[73] The Committee

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Nikolayevich Ivanov (Application No. 40450/04) *and the Zhovner group of cases* (Application No. 56848/00) *against Ukraine*, DH-DD (2011) 433E (2011).

67. Proekt zakony pro harantii derzhavy shchodo vykonannya rishen' sudu [Draft Law on Guarantees of the State Concerning the Enforcement of Decisions of the Court], KARTKA ZAKONOPROYEKTU [RECORD OF THE DRAFT LAW] (2011) [hereinafter Draft Law No. 7562], *available at* http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=39454 (last visited May 17, 2014).

68. *Id.*

69. Proekt zakony pro harantyi derzhavy shchodo vykonannya sudovykh rishen' [Draft Law On Guarantees of the State Concerning the Enforcement of Court Decisions], KARTKA ZAKONOPROYEKTU [RECORD OF THE DRAFT LAW], (2011) [hereinafter Draft Law No. 9127], *available at* http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=41092 (last visited May 17, 2014).

70. Comm. of Ministers, *Communication from the Registry of the European Court Concerning the Judgment Delivered in the Case of Yuriy Nikolayevich Ivanov against Ukraine* (Application No. 40450/04), DH-DD (2011) 757E (2011), *archived at* http://perma.cc/3DNC-4FD3.

71. *Id.*

72. *Id.*

73. Comm. of Ministers, *Communication from Ukraine Concerning the Cases of Yuriy*

of Ministers and various officials from the Council of Europe called on Ukraine to pass the proposed draft law without delay.[74] However, the law, which includes a provision authorizing the Cabinet of Ministers to change the amount of the social benefits paid in a given year depending on the size of the annual budget, has faced strong opposition from civil society organizations and social groups.[75]

In December of 2011, the Committee of Ministers passed an interim resolution conveying its regret that Ukraine had yet to fully execute the pilot judgment and stating that this failure "creates a serious threat to the effectiveness of the Convention,"[76] and to the European Court of Human Rights. The Committee of Ministers again stressed the need for the Ukrainian authorities to resolve the pending individual cases, and to "urgently" provide an alternative remedy if the draft law would not be passed.[77] In late February 2012, the European Court of Human Rights examined the state of implementation of the *Ivanov* judgment. Noting that Ukraine had "not adopted the required general measures to tackle the issues of non-enforcement at the domestic level," the court decided to unfreeze and resume consideration of the similar cases pending at the court, which by February numbered approximately 2,500.[78] The court found that the Ukrainian authorities had not only failed to implement reforms that would prevent future violations, but also failed to settle about 700 of the individual cases which the court had directly communicated to the Ukrainian Government.[79] The Committee of Ministers released another decision on March 12, which again emphasized that the pilot judgment had not been implemented in full and called upon the Ukrainian authorities to urgently take steps towards its execution, including making necessary changes to the draft law *On Guarantees of the State Concerning Execution of Court Decisions* (No. 9127) and providing information on the timing of its passage.[80]

Nikolayevich Ivanov against Ukraine (Application No. 40450/04) *and Kharchenko against Ukraine* (Application No. 40107/02), DH-DD (2011) 705E (2011).

74. Comm. of Ministers, *Interim Resolution Execution of the Pilot Judgment of the European Court of Human Rights Yuriy Nikolayevich Ivanov against Ukraine and of 386 Cases against Ukraine Concerning the Failure or Serious Delay in Abiding by Final Domestic Courts' Decisions Delivered against the State and its Entities as Well as the Absence of an Effective Remedy*, CM/ResDH (2011) 184 (2011), *archived at* http://perma.cc/964R-8VH6.

75. *See infra* Sections VI and VIII.

76. Comm. of Ministers, *Decision Cases No. 24 - Yuri Nikolaevich and Zhovner Group against Ukraine,* CM/Del/Dec (2011) 1128/24 (2011).

77. *Id.*

78. Press Release, ECHR 086, Eur. Ct. of Hum. Rts., Court Decides to Resume Examination of Applications Concerning Non-Enforcement of Domestic Decisions in Ukraine (Feb. 29, 2012).

79. *Id.*

80. Comm. of Ministers, *Decision Cases No. 24 - Yuri Nikolaevich and Zhovner Group against Ukraine*, CM/Del/Dec (2012) 1136/24 (2012).

Finally, on June 5, the Verkhovna Rada adopted draft law No. 9127 in its final reading, and on June 22, the President of Ukraine signed the bill into law.[81] Law of Ukraine No. 4901-VI *On Guarantees of the State Concerning Execution of Court Decisions* entered into force on January 1, 2013.[82] Our analysis of Law No. 4901-VI below[83] shows that the law is unlikely to change the dynamics of enforcement of court judgments in Ukraine in the near future.

IV. UNPACKING SYSTEMIC NON-ENFORCEMENT

The reasons for the systemic non-enforcement of Ukrainian judicial decisions and the decisions of the European Court of Human Rights against Ukraine fall into two camps: the social, economic, financial, and administrative norms in modern Ukraine; and the lack of will among the relevant state actors. International and Ukrainian experts acknowledge that non-enforcement of domestic judgments is a systemic, enduring problem with roots in multiple sectors, and demands complex and far-reaching reforms.[84] At the same time, the absence of such reforms, in combination with the Ukrainian government's ongoing failure to settle the pending individual cases at the European Court of Human Rights and inadequate response to the pilot judgment reflects a clear lack of political will.

Practitioners and scholars have identified several factors that influence governments' responses to pilot judgments. One of the most important components is a state's capacity for reform. The issues concerned in pilot judgments are by definition systemic problems, and shortcomings in national responses are due in part to the complexity of effectively addressing these weaknesses. Scholars Philip Leach, Helen Hardman, Svetlana Stephenson, and Brad K. Blitz posit that "a state's non-compliance with a pilot judgment may be the result of 'voluntary' resistance (where there is a conscious decision not to execute the judgment) or 'involuntary' resistance (where there is political will to implement the judgment, but the state is simply not able to bring about the requisite changes)."[85] They

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81. Zakon Ukrayiny pro harantii derzhavy shchodo vykonannya sudovyx rishen' [Law of Ukraine on Guarantees of the State Concerning the Enforcement of Court Decisions], OFITSIYNYY VISNYK UKRAYINY [OFFICIAL JOURNAL OF UKRAINE], 2012 No. 49, Item 1919, [hereinafter Law No. 4901-VI], *archived at* http://perma.cc/HYZ9-5P7Z.

82. *Id*.

83. *See infra* Section VIII.

84. *See, e.g.*, Ihor Bilyk, Garantii derzhavy shchodo vykonannya sudovykh rishen' [State Guarantees regarding Execution of Court Decisions], Soter Law Firm, August 2, 2012, *archived at* http://perma.cc/Z33E-MF52; Nadia Dobryanska & Andrey Meleshevich, *The Rule of Law and the Case Law of the European Court of Human Rights on the Execution of Court Decisions in Ukraine*, 77 NAT'L U. OF KYIV-MOHYLA ACAD. REV., LEGAL STUD. 37, 37-43 (2008).

85. PHILIP LEACH ET AL., RESPONDING TO SYSTEMIC HUMAN RIGHTS VIOLATIONS: AN

observe that involuntary resistance has thus far been more common than voluntary resistance. With this in mind, they suggest that the pilot judgment procedure may be more effective for cases regarding specific issues—such as *Broniowski v. Poland*, which was brought by a group of people who had not received compensation for property lost in World War II—than for endemic problems like non-enforcement.[86]

In cases of voluntary resistance, or absent political will to reform, both political and institutional conditions play a role. National authorities may be particularly reluctant to cooperate with the European Court of Human Rights "if the alleged violation is a politically sensitive one or one that may set the state apart as one that grossly violates human rights."[87] Thus, states' responses may depend in part on "the estimation of the national authorities as to the political and economic advantage in cooperation with the Court."[88] Ongoing supervision of the execution of the judgment by the Committee of Ministers is particularly important, as it may be "sufficiently unpleasant for a minister to have to explain and justify the failings of the national authorities, to provide a clear incentive" to support legislative or political reform.[89] A pilot judgment can serve as a catalyst for national-level reform, by drawing international attention to a problematic category of cases and thereby placing pressure on national authorities.[90]

Much also depends on the commitment and level of knowledge of the professionals working in the government agencies responsible for interaction with the European Court of Human Rights. The individuals working in the Government Agent's office, parliament, the judiciary, other government ministries, civil society and the media, and the extent of their "awareness and in-depth understanding of the European Convention," are critical in determining the national response.[91] Christos Pourgourides, the Chair of the Committee on Legal Affairs and Human Rights of PACE, argues that national parliaments, as democratically elected bodies "are uniquely placed to scrutinize the actions of government so as to ensure the swift and effective implementation of the Court judgments."[92] States "with

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ANALYSIS OF 'PILOT JUDGMENTS' OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THEIR IMPACT AT NATIONAL LEVEL 178 (2010).

86. *Id.* at 177.

87. Janneke Gerards, *The Pilot Judgment Procedure Before the European Court of Human Rights as an Instrument for Dialogue*, CONSTITUTIONAL CONVERSATIONS 9-10 (2011).

88. *Id.* at 10.

89. *Id.* at 16.

90. Francoise Tulkens, *A Typology of the Pilot-Judgment Procedure*, 2 CROSSROADS: THE MACEDONIAN FOREIGN POL'Y J. 131 (2010). Judge Tulkens, the European Court of Human Rights judge from Belgium and current Vice-President of the Court, specifically cites the *Olaru v. Moldova* case an as example of a pilot judgment that compelled national authorities to act.

91. LEACH ET AL., *supra* note 85, at 179.

92. Pourgourides, *7th Report*, *supra* note 20, ¶ 195.

strong implementation records are frequently characterized by strong participation of parliamentary actors in the implementation process" of Strasbourg Court judgments."[93] In addition to the political inclinations of national leaders, changes in national parliaments and administrations as well as institutional knowledge, or the lack thereof, can have a significant influence on a state's response to the European Court of Human Rights.

Which factors explain Ukraine's failure to respond to the European Court of Human Rights? The following sections analyze the root causes of persistent non-enforcement in Ukraine and the structural and political aspects impeding reform. Unpacking the Ukrainian response to *Ivanov* demonstrates that the lack of reform stems from three factors: the specifics of the social, economic, and administrative institutions in modern Ukraine, the budgetary system, and the absence of political will.

V. RESTRICTIONS ON THE FORCED SALE OF DEBTORS' ASSETS

One of the primary causes of the failure to enforce judicial decisions in Ukraine is the legislation governing the sale of state assets and protecting certain debtors from financial responsibility. Former Ombudsman Nina Karpacheva emphasizes that non-enforcement stems from "above all, the restrictions set forth in the procedure for the enforcement of the court's decisions on state-owned enterprises and utilities,"[94] and stresses that the "state does not propose ways to ensure the rights of citizens in these cases."[95] In *Ivanov*, the failure to enforce the original court decision requiring Ivanov's military unit to pay his retirement sum and uniform compensation was connected to a moratorium on the forced sale of state assets.[96]

In November of 2001, the Verkhovna Rada adopted the law *On Introduction of a Moratorium on Forced Sale of Property,* which, for the purpose of "ensuring the economic security of the state," prohibits the forced sale of property of state enterprises or any enterprises in which the State holds at least a 25% stake.[97] The moratorium was imposed

93. Pourgourides, *7th Report*, *supra* note 20, ¶ 197.

94. NINA KARPACHEVA, THE STATE OF OBSERVANCE OF THE EUROPEAN STANDARDS ON HUMAN RIGHTS AND FREEDOMS IN UKRAINE, SPECIAL REPORT OF THE UKRAINIAN PARLIAMENT COMMISSIONER FOR HUMAN RIGHTS 39 (2010), *archived at* http://perma.cc/KM8A-RP9U.

95. Nina Karpacheva, Shchorichna dopovid' Upovnovazhenoho Verkhovnoyi Rady Ukrayiny z prav ludyny pro stan dotrymannya ta zakhystu prav i svobod lyudyny v Ukrayini [Annual Report of the Ombudsman to the Verkhovna Rada of Ukraine on the State of Human Rights in Ukraine], OMBUDSMAN OF THE VERKHOVNA RADA OF UKRAINE FOR HUMAN RIGHTS 21 (2010), *archived at* http://perma.cc/SKS7-RQN3.

96. Yuriy Nikolayevich Ivanov v. Ukraine, 2009 Eur. Ct. H.R. ¶ 14.

97. Zakon Ukrayiny, Pro vvedennya moratoriyu na prymusovu realizatsiyu majna [Law of Ukraine on the Introduction of a Moratorium on the Forced Sale of Assets], VIDOMOSTI

indefinitely[98] and remains in effect at the time of writing of this article. In a case where such an enterprise does not have sufficient funds in its accounts to respond to a judgment—as was the case with the debtor military unit in *Ivanov*—neither the court nor the bailiffs have any means of enforcing the decision.

In 2003, forty-seven members of parliament brought a petition to the Constitutional Court of Ukraine arguing that the 2001 Law on Moratoriums made it practically "impossible for the State Execution Service to implement court decisions of a proprietary nature."[99] However, in its judgment on October 6, 2003, the Constitutional Court ruled that this law was constitutional. The Constitutional Court's decision raised eyebrows, as "this moratorium violate[d] at least two constitutional principles: the rule of law and equality of all forms of property."[100]

A second protected sector is the energy and fuel industry. According to the 1999 Law of Ukraine *On Enforcement Proceedings*, any enforcement proceedings of court decisions must be suspended if the debtor is a fuel or energy enterprise seeking to resolve its debts through the procedure established in the Law of Ukraine *On Measures to Ensure the Stable Operation of Enterprises of the Fuel and Energy Complex*.[101] According to the latter law, if a fuel or energy company wants to resolve its debts, it can register on a list of fuel and energy enterprises kept by the Ministry of Fuel and Energy, after which it is generally exempt from state debt collection procedures.[102]

The scope of companies included on the registry is wide. Nazar Kulchytsky, the Government Agent of Ukraine to the European Court of Human Rights, explains that the list includes "all companies, mines, all

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VERKHOVNOI RADY UKRAINY [VVR] No. 10, Item 77 (2002), *archived at* http://perma.cc/H5AK-H53L.

98. *Id.*

99. Rishennya Konstytutsiynoho Sudu Ukrayiny u spravi za konstytutsiynym podannyam 47 narodnyx deputativ Ukrayiny shchodo vidpovidnosti Konstitutsyi Ukrayiny Zakonu Ukrayiny "Pro vvedennya moratoriyu na prymusovu realizatsiyu mayna" [Decision of the Constitutional Court of Ukraine in the Case of the Constitutional Petition of 47 People's Deputies of Ukraine Concerning the Conformity with the Constitution of Ukraine of the Law of Ukraine "On the Introduction of a Moratorium on the Forced Sale of Assets"], no.11-rp/2003, June 10, 2003, OFITSIYNYY VISNYK UKRAYINY [OFFICIAL JOURNAL OF UKRAINE], No. 25, Item 1217 (2003), *archived at* http://perma.cc/NN5J-BBZK, English summary *archived at* http://perma.cc/HQN8-GN3V.

100. Dobryanska & Meleshevich, *supra* note 84, at 41.

101. Zakon Ukrayiny "Pro vykonavche provadzhennya" [Law of Ukraine on Enforcement Proceedings], VIDOMOSTI VERKHOVNOI RADY UKRAINY [VVR] No. 24, Item 207 (1999), *archived at* http://perma.cc/R9D3-CLEN.

102. Zakon Ukrayiny "Pro zakhody, spryamovani na zabezpechennya staloho funktsionuvannya pidpryemstv palyvno-enerhetychnoho kompleksu" [Law of Ukraine on Measures to Ensure the Sustainable Operation of Enterprises of the Fuel and Energy Complex], VIDOMOSTI VERKHOVNOI RADY UKRAINY [VVR] No. 33, Item 430 (2005), *archived at* http://perma.cc/NSN3-FZE9.

energy sectors or sectors related to this, and even entities which cooperate with such enterprises."[103] Enterprises included on the registry "could be absolutely private, but the state's bailiffs cannot do anything to execute judgments."[104] The law on the fuel and energy complex, which seeks to protect these sectors because of their importance to the national economy, makes it legally impossible for a citizen to recoup arrears or other debts from an energy company, even with a court judgment.[105] Some experts believe that this legislation was forced through by the owners of energy and fuel companies in their own personal interest, and violates the Constitution by effectively placing the fuel and energy complex outside the reach of the law.[106]

One example, described by Ombudsman Nina Karpacheva, provides insight into the extent of the debt of the fuel and energy complex. In 2010, the energy company Donetskoblenergo had an outstanding debt of over 800 million hryvnia—around 80 million euro—out "because Donetskoblenergo [was] an enterprise of the fuel and energy sector, the enforcement proceedings of court judgments [were] suspended."[107] Another exception regards companies with property in the Chernobyl exclusion zone, as Ukrainian law prohibits the sale of property in the exclusion zone without specific government permission.[108] Several former employees of Atomspetsbud, a state-owned construction company that worked in the Chernobyl exclusion zone after the nuclear accident, have brought and won cases at the European Court of Human Rights concerning the failure to enforce judgments of Ukrainian courts.[109] The Ukrainian Helsinski Human Rights Union sums up the situation thusly: "When individuals owe money any property can be taken away in lieu. When the debtor is a State-owned

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103. Interview by Carolyn Forstein with Nazar Kulchytsky, Government Agent of Ukraine to the European Court of Human Rights, in Kyiv, Ukr. (Feb. 3, 2012).

104. *Id.*

105. Mykhailo Honchar & Maksym Alinov, *Energy Debt: Cancellation of (Non) Responsibility*, WEEKLY MIRROR (Kyiv), May 27, 2011, at 19, *archived at* http://perma.cc/K7GD-UFM2.

106. *See*, *e.g.* Anton Kutz, *Untouchable Cast, or Fuel and Energy Enterprises*, LEGAL WEEKLY (Kyiv), Jan. 26 - Feb. 1, 2010, at 4 *archived at* http://perma.cc/K824-TJ75; *see also* Honchar & Alinov, *supra* note 105.

107. Karpacheva, *supra* note 95, at 22.

108. Zakon Ukrayiny "Pro pravovyy rezhym terytorii, shcho zaznala radioaktyvnoho zabrudnennya vnaslidok chornobyl'skoyi katastrofy" [Law of Ukraine on the Legal Status of the Territory of Radioactive Contamination Resulting from the Chornobyl Catastrophe], VIDOMOSTI VERKHOVNOI RADY URSR [VVR] 1991 No. 16, Item 198, *archived at* http://perma.cc/6YT2-8X29.

109. Mykhaylenky and Others v. Ukraine, 2004 Eur. Ct. H.R. 153; Derkach and Palek v. Ukraine, 2004 Eur. Ct. H.R., *archived at* http://perma.cc/5C7E-LSP8; Gaponenko v. Ukraine, 2006 Eur. Ct. H.R., *archived at* http://perma.cc/V45V-YPER; Ishchenko and Others v. Ukraine, 2005 Eur. Ct. H.R., *archived at* http://perma.cc/R2WN-CVQB; Sharenok v. Ukraine, 2005 Eur. Ct. H.R., *archived at* http://perma.cc/MSD2-9TLS.

enterprise, it is virtually impossible to recoup any debt."[110]

The European Court of Human Rights has made it clear through its case law on non-enforcement that a state enterprise's lack of funds does not excuse it from the responsibility to respond to a court judgment.[111] As the existing Ukrainian law makes it impossible to force entities to sell their assets, the European Court of Human Rights stressed that the state should bear responsibility for these debts.[112] While the state budget includes a specific allocation for the enforcement of judgments of the court, it does not currently designate any funding for the enforcement of domestic decisions in which the financial liability falls on the state.[113]

The Ukrainian authorities have previously discussed legislative efforts aimed at resolving these legal issues. In several of the communications between the Ukrainian government and Committee of Ministers prior to the pilot judgment, as described in the previous section, the government reported developing draft laws removing the moratorium on the forced sale of state assets, but to date it remains in place.[114] On December 4, 2007, draft law No. 1105 *On Making Amendments to the Law of Ukraine 'On Restoring a Debtor's Solvency or Declaring his Bankruptcy' (on the order of priority of claims for satisfaction for salary arrears)* was introduced in the Verkhovna Rada seeking to change the law suspending execution in the event of bankruptcy or liquidation procedures.[115] However, shortly after Viktor Yanukovych claimed victory in Ukraine's 2010 presidential election, the newly-formed pro-presidential majority in the Rada voted this bill down on May 13, 2010, and to date "the problem remains unsolved."[116]

On February 11, 2010, the outgoing Cabinet of Ministers under Prime Minister Yulia Tymoshenko approved Resolution 222-p, which laid out a plan to address the systemic issues causing widespread non-enforcement.[117]

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110. Maxim Shcherbatyuk & Volodymyr Yavorsky, *UHHRU: No Optimism Over New Draft Law on State Guarantees Regarding Enforcement of Court Rulings*, UKRAINIAN HELSINKI HUMAN RIGHTS UNION (May 10, 2011), *archived at* http://perma.cc/BA7E-RHTJ.

111. Shmalko v. Ukraine, 2004 Eur. Ct. H.R. ¶¶ 44, 57, *archived at* http://perma.cc/D4GN-SWZV.

112. *Shmalko* ¶¶ 43-46.

113. Shcherbatyuk & Yavorsky, *supra* note 110.

114. *See* Draft Law No. 9127, *supra* note 69.

115. *Property Rights*, *in* HUMAN RIGHTS IN UKRAINE 2009-2010, HUMAN RIGHTS ORGANIZATIONS REPORT 234, 244 (Yevhen Zakharov, ed., 2011), *archived at* http://perma.cc/9MFR-Q5NH.

116. *Id*.

117. Kabinet Ministriv Ukrayiny Rozporyadzhennya 222-p "Pro zatverdzhennya planu pershocherhovykh zakhodiv shchodo usunennya nedolikiv systemnoho kharakteru, shcho pryzvodyat' do nevykonannya rishen' natsional'nykh sudiv" [Resolution of the Cabinet of Ministers of Ukraine 222-p on Approval of the Plan of Priority Measures to Address Systemic Defects Resulting in Non-Enforcement of Rulings of National Courts], Feb. 11, 2010, *archived at* http://perma.cc/6R6C-T5LT.

According to this resolution, the draft law on the budget for 2010 was supposed to designate funds for compliance with the European Court of Human Rights' pilot judgment, but the budget law that was ultimately adopted did not provide for these expenses.[118] The Kharkiv Human Rights Protection Group reports that the Ministry of Labor and Social Policy noted this omission and stressed the "need to provide additional funds for the enforcement of court rulings" in the process of making amendments to the final law on the 2010 budget, but the amendments were not approved.[119] Moreover, the Cabinet of Ministers' resolution noted the need for draft laws which would amend existing laws on limiting the forced sale of debtors' property, regulate enforcement of rulings of national courts against the state or state institutions, and protect creditors' rights.[120] Although several draft laws were submitted in 2009 regarding these issues, they were recalled on March 11, 2010 by the new Cabinet of Ministers formed under Prime Minister Mykola Azarov according to article 105 of *The Law on the Rules of Procedure of the Verkhovna Rada of Ukraine*.[121]

VI. BUDGETARY SHORTFALLS AND THE SYSTEM OF SOCIAL BENEFITS

The second underlying cause of systemic non-enforcement in Ukraine is the country's expansive system of social benefits. The Ukrainian Constitution and legislation entitle numerous categories of people to benefits, a system inherited from Ukraine's Soviet past. By 2011, there were approximately 120 categories of beneficiaries, of which 45 were based on social needs, and 57 on work or professional grounds.[122] At least 15 million Ukrainian citizens were entitled to benefits in 2011, and these benefits total between 3.8 and 5.8 billion US dollars per year.[123] Of this, however, only a fraction is paid. Nazar Kulchytsky, the current commissioner of Ukraine to the European Court of Human Rights, explained that "in practice, it is not possible to pay all these benefits," so "people receive no payments, they go to court, [the] court delivers its judgments and obliges [the] state to pay all these amounts, but since they are not provided in the state budget it is not possible to execute" the

118. *Id.*

119. *Property Rights*, *supra* note 115, at 242.

120. Resolution of the Cabinet of Ministers of Ukraine 222-p on Approval of the Plan of Priority Measures to Address Systemic Defects Resulting in Non-Enforcement of Rulings of National Courts, *supra* note 117.

121. According to Article 105 of the Law on the Rules of Procedure of the Verkhovna Rada of Ukraine, a draft of a law introduced by the Cabinet of Ministers is considered to be void if it has not been passed in the first reading by the time this Cabinet quits office. *See* Law No. 1861-VI, on the Rules of Procedure of the Verkhovna Rada of Ukraine, February 10, 2010 (Ukr.), *archived at* http://perma.cc/NUS7-J27L.

122. Shcherbatyuk & Yavorsky, *supra* note 110.

123. Shcherbatyuk & Yavorsky, *supra* note 110.

decisions.[124] As a result, the state debt continues to grow year by year, while new rounds of judgments go unenforced. Yevhen Zakharov, the director of the Kharkiv Human Rights Protection Group, emphasized that the creation of many of the existing categories of beneficiaries was a form of "populism" designed to win support for politicians, and that to substantively reform the system of social payments, the government would have to target certain categories and eliminate others.[125]

In response to this issue, the Cabinet of Ministers of Ukraine instated regulations that authorize the government to adjust the annual amounts of social benefits, depending on the funds allocated for this purpose in the state budget. For example, the Law on the State Budget for 2012 states that the social benefits for veterans, children of war, Chernobyl liquidators, and many other categories of citizens eligible for social assistance will be determined by the Cabinet of Ministers of Ukraine "within available financial resources."[126]

A group of members of parliament opposed this principle, and challenged the Law on the State Budget for 2011 in the Constitutional Court.[127] In the past, the Constitutional Court had repeatedly found that any government efforts to cut social benefits violated article 22 of the Ukrainian Constitution.[128] In December 2011, the Constitutional Court reversed its

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124. Interview by Carolyn Forstein with Nazar Kulchytsky, *supra* note 103.

125. Interview by Carolyn Forstein with Yevhen Zakharov, Director, Kharkiv Human Rights Protection Group, in Kharkiv, Ukr. (Mar. 3, 2012).

126. Zakon Ukrayiny "Pro Derzhavnyi byudzhet Ukrayiny na 2012 rik" [Law of Ukraine on the State Budget of Ukraine for 2012], VIDOMOSTI VERKHOVNOI RADY UKRAYINY [VVR] 2012,No. 34-35, Item 414, *archived at* http://perma.cc/JUU2-X35N.

127. Rishennya Konstytutsiynoho Sudu Ukrayiny u spravi za konstytutsiynymy podannyamy 49 narodnykh deputativ Ukrayiny, 53 narodnykh deputativ Ukrayiny, i 56 narodnykh deputativ Ukrayiny shchodo vidpovidnosti Konstytutsyi Ukrayiny punktu 4 rosdilu VII "Prykintsevi Polozhennya" Zakonu Ukrayiny "Pro Derzhavnyi byudzhet Ukrayiny na 2011 rik" [Decision of the Constitutional Court of Ukraine in the Case of the Constitutional Petitions of 49 People's Deputies of Ukraine, 53 People's Deputies of Ukraine, and 56 People's Deputies of Ukraine Concerning the Conformity with the Constitution of Ukraine of Item 4 of Chapter VII "Final Provisions" of Law of Ukraine on the State Budget of Ukraine for 2011], OFITSIYNYY VISNYK UKRAYINY [OFFICIAL JOURNAL OF UKRAINE] 2012 No. 3, Item 100, Dec. 26, 2011, [hereinafter Constitutional Court State Budget Case for 2011], *archived at* http://perma.cc/CU2F-W8A7, English summary *archived at* http://perma.cc/Y5QC-NDRD.

128. *See, e.g.*, Rishennya Konstytutsiynoho Sudu Ukrayiny u spravi za konstytutsiynymy podannyamy 54 narodnykh deputativ Ukrayiny shchodo vidpovidnosti Konstytutsyi Ukrayiny (konstytutsiinosti) polozhen statei 44, 47, 78, 80 Zakonu Ukrayiny "Pro Derzhavnyy byudzhet Ukrayiny na 2004 rik" ta konstytutsiynym podannyam Verkhovnoho Sudu Ukrayiny shchodo vidpovidnosti Konstytutsyi Ukrayiny (konstytutsiinosti) polozhen chastyn dryhoi, tretyoi, chetvertoi statti 78 Zakonu Ukrayiny "Pro Derzhavnyy byudzhet Ukrayiny na 2004 rik" (Sprava pro zupynennya dii abo obmezhennya pil'g, kompensatsiy i garantiy) [Decision of the Constitutional Court of Ukraine in the Case of the Constitutional Petitions of 54 People's Deputies of Ukraine Concerning the Conformity with the

stance.[129] For the first time in its own history, the Constitutional Court ruled that social payments should be dependent on the socio-economic resources of the state, thereby granting the Cabinet of Ministers the ability to reduce social benefits based on the need to proportionally balance the social security of the population and the financial capacity of the state.[130] In another decision on January 25, 2012, concerning the Pension Fund, the Constitutional Court again justified this distribution of power based on proportionality and the need to balance the budget.[131]

Constitution of Ukraine (Constitutionality) of the Provisions of Articles 78.2, 78.3 and 78.4 with the Law of Ukraine on Ukraine's State Budget for 2004 (the Case on Suspension or Restriction of Benefits, Compensations and Guarantees)], OFITSIYNYY VISNYK UKRAYINY [OFFICIAL JOURNAL OF UKRAINE] 2004 No. 50, Item 3289, Dec. 30, 2004, *archived at* http://perma.cc/9ZLB-4B4K, English summary *archived at* http://perma.cc/LM8C-E932; Rishennya Konstytutsiynoho Sudu Ukrayiny u spravi za konstytutsiynym podannyam Verkhovnogo Sudu Ukrayiny ta 50 narodnykh deputativ Ukrayiny shchodo vidpovidnosti Konstytutsyi Ukrayiny (konstytutsiinosti) polozhen abzatsiv tretyoho, chetvertoho punktu 13 rozdilu XV "Prykintsevi Polozhennya" Zakonu Ukrayiny "Pro zagal'noobovyazkove derzhavne pensiyne strakhuvannya" ta ofitsiynoho tlumachennya polozhennya chastyny tretyoi statti 11 Zakonu Ukrayiny "Pro status suddiv" (Sprava pro riven pensii i shchomisyachnoho dovichnoho groshovoho utrymannya) [Decision of the Constitutional Court of Ukraine in the Case of the Constitutional Petitions of the Supreme Court of Ukraine and 50 People's Deputies of Ukraine on Conformity with the Constitution (Constitutionality) of Paragraphs 13.3 and 13.4 of Section XV "Final Provisions" of the Law of Ukraine "On General Mandatory State Pension Insurance" and the Official Interpretation of Provisions of Article 11.3 of the Law of Ukraine on Status of Judges (Case on the Pension Level and Lifetime Monthly Monetary Allowance)], OFITSIYNYY VISNYK UKRAYINY [OFFICIAL JOURNAL OF UKRAINE] 2005 No.42, Item 2662, Nov. 2, 2005, *archived at* http://perma.cc/NBQ6-N6TQ, English summary *archived at* http://perma.cc/WF9T-3YAR; Rishennya Konstytutsiynoho Sudu Ukrayiny u spravi za konstytutsiynym podannyam Verkhovnogo Sudu Ukrayiny shchodo vidpovidnosti Konstytutsyi Ukrayiny (konstytutsiinosti) okremykh polozhen statti 36, punktiv 20, 33, 49, 50 statti 71, statei 97, 98, 104, 105 Zakonu Ukrayiny "Pro Derzhavnyi byudzhet Ukrayiny na 2007 rik" (Sprava pro garantii nezalezhnosti suddiv) [Decision of the Constitutional Court of Ukraine in the Case of the Constitutional Petition of the Supreme Court of Ukraine as to the Conformity with the Constitution of Ukraine (Constitutionality) of Separate Provisions of Article 36, Items 20, 33, 49, 50 of Article 71, Articles 97, 98, 104, 105 of the Law of Ukraine on the State Budget of Ukraine for 2007 (Case on Guarantees of Independence of Judges)], OFITSIYNYY VISNYK UKRAYINY [OFFICIAL JOURNAL OF UKRAINE] 2007 No. 54, Item 2184, Aug. 03, 2007, *archived at* http://perma.cc/4YMU-BTKW, English summary *archived at* http://perma.cc/4FKV-LGL7.

129. Constitutional Court State Budget Case for 2011, *supra* note 127.

130. Constitutional Court State Budget Case for 2011, *supra* note 127.

131. Rishennya Konstytutsiynoho Sudu Ukrayiny u spravi za konstytutsiynym podannyam pravlinnya Pensiynoho fondu Ukrayiny shchodo ofitsiynoho tlumachennya polozhen statti 1, chastyn pershoyi, druhoyi, tretyoi statti 95, chastyny druhoyi statti 96, punktiv 2, 3, 6 statti 116, chastyny druhoyi statti 124, chastyny pershoyi statti 129 Konstytutsiyi Ukrayiny, punktu 5 chastyny pershoyi statti 4 Byudzhetnoho Kodeksu Ukrayiny, punktu 2 chastyny pershoyi statti 9 Kodeksu Administrativnoho Sudochynstva Ukrayiny v systemnomu zv'yazku z okremnymy polozhennyamy Konstytutsiyi Ukrayiny [Decision of the Constitutional Court of Ukraine in the Case of the Constitutional Petition of

The issue is both legally and politically controversial. Vsevolod Rechytsky, a constitutional expert with the Kharkiv Human Rights Protection Group, explains that while the Constitutional Court's decision appears reasonable and logical from an economic perspective, it creates "insoluble contradictions" in legal terms.[132] Article 22 of the Ukrainian Constitution states that "the content and scope of the existing rights and freedoms shall not be diminished by an adoption of new laws or by introducing amendments to the effective laws," thereby prohibiting the government from eliminating or decreasing any types of social assistance.[133] Rechytskyi argues that the socio-economic rights enshrined in the constitution are "designed not for the free market, capitalism and freedom, but for the planned economy, state ownership and distributive economic system," one which guarantees set levels of social benefits, regardless of economic development and performance.[134] To effectively reform the system of social protection, the government would have to amend the Constitution, and go far beyond simply reducing benefit amounts based on the yearly budget.

In both of the above decisions, the Constitutional Court referred to European Court of Human Rights case law to justify its position, citing *Airey v. Ireland* and *Kyartan Asmudson v. Iceland*.[135] However, the Constitutional Court overlooked important conclusions and implications of the European Court of Human Rights' rulings. While the European Court of Human Rights acknowledged the connection between the provision of socio-economic rights and the financial capabilities of the state, it also noted that the application of rules concerning this relationship should not create a disproportionate balance between individual human rights and the general interest.[136] In addition, it is not just individual rights at stake, but the general public interest in the effectiveness the judicial system—the cornerstone of any legal system, regardless of the level of financial security

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the Board of the Pension Fund of Ukraine Concerning Official Interpretation of the Provisions of Articles 1, 95.1, 95.2, 95.3, 96.2, 116.2, 116.3, 116.6, 124.2, 129.1 of the Constitution, 4.1.5 of the Budget Code of Ukraine, 9.1.2 of the Code of Administrative Proceedings of Ukraine in Systematic Connection with Some Provisions of the Constitution], OFITSIYNYY VISNYK UKRAYINY [OFFICIAL JOURNAL OF UKRAINE], 2012 No. 11, Item 422, Jan. 25, 2012 [hereinafter Constitutional Court Pension Fund Case], *archived at* http://perma.cc/M6EQ-5ULM, English summary *archived at* http://perma.cc/WA4C-DD8G.

132. *Constitutional Process in Ukraine: 2011-Early 2012, Current Trends and Summary*, *in* HUMAN RIGHTS IN UKRAINE 2010-2011, HUMAN RIGHTS ORGANIZATIONS REPORT 19, 28 (Yevhen Zakharov, ed., 2012) [hereinafter *Constitutional Process in Ukraine*].

133. KONSTYTUTSIYA UKRAYINY [CONSTITUTION OF UKRAINE] June 28, 1996, art. 22, *archived at* http://perma.cc/3VTA-WHVS.

134. *Constitutional Process in Ukraine*, *supra* note 132, at 28.

135. Constitutional Court State Budget Case for 2011, *supra* note 127, at 4; Constitutional Court Pension Fund Case, *supra* note 131, at 4.

136. Kyartan Asmudson v. Iceland, 2004 Eur. Ct. H. R. § 45; Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) § 26 (1979).

of the state.

The proposed cut in benefits was strongly criticized by civil society and sparked protests across Ukraine. In September 2011, in response to the government's proposal to reduce benefits, thousands of veterans of the Soviet war in Afghanistan and the cleanup of the Chernobyl nuclear disaster picketed in front of the Verkhovna Rada in Kyiv.[137] Public outrage continued throughout the fall. On November 15, 2011, dozens of Chernobyl veterans went on hunger strike in Donetsk, while hundreds more gathered in protest.[138] In Kyiv, thousands of protestors repeatedly gathered to protest the proposed cuts, at one point storming the gates of the Verkhovna Rada, and another thirty veterans went on hunger strike.[139] The protests in Kyiv and smaller actions in Kharkiv were spurred onwards by clashes between the Donetsk protestors and local police, where the hunger strike only ended when the local administration promised to pay the veterans' benefits in full for the months of November and December.[140] Following the above-mentioned Constitutional Court decisions, some 100 Chernobyl liquidators held a multi-day protest on Kharkiv's Freedom Square in January 2012.[141]

VII. POLITICAL WILL

The Ukrainian government's persistent failure to craft and pass legislation seeking to ensure the enforcement of court decisions reflects the structural nature of the problem, but also stems from an obvious lack of

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137. *Ukrainian Veterans Protest Planned Cuts in Benefits*, RADIO FREE EUROPE/RADIO LIBERTY (Sept. 20, 2011), http://www.rferl.org/content/ukrainian_veterans_protest_planned_cut_in_benefits/24334723.html, *archived at* http://perma.cc/VDK5-T7Y9.

138. *Ukrainian Pensioners Attack Donetsk Governor's Office*, RADIO FREE EUROPE/RADIO LIBERTY (Nov. 28, 2011), http://www.rferl.org/content/ukrainian_pensioners_attack_donetsk_governors_office/24404893.html, *archived at* http://perma.cc/ZS92-6PCM.

139. *Chornobyl Cleanup Workers Protest Cancellation of Social Benefits*, KYIV POST (Nov. 1, 2011), http://www.kyivpost.com/news/politics/detail/116051/, *archived at* http://perma.cc/KX92-8JNQ; *Ukrainians Rally In Kyiv To Support Donetsk Protesters*, RADIO FREE EUROPE/RADIO LIBERTY (Nov. 30, 2011), http://www.rferl.org/content/ukrainians_rally_in_kyiv_to_support_donetsk_protesters/24406928.html, *archived at* http://perma.cc/9632-354G; *Ukrainian Protestors Start 'Dry' Hunger Strike*, RADIO FREE EUROPE/RADIO LIBERTY (Dec. 8, 2011), http://www.rferl.org/content/ukrainian_protesters_start_dry_hunger_strike/24416056.html, *archived at* http://perma.cc/9WCB-S5U9.

140. *Ukrainian Hunger Strikers End Protest After Pledge of Payments*, RADIO FREE EUROPE/RADIO LIBERTY (Dec. 12, 2011), http://www.rferl.org/content/ukrainian_chornobyl_cleanup_hunger_strikers_end_payments_pledge/24419853.html, *archived at* http://perma.cc/R5LE-VPFU.

141. Yulia Zhuravl'ova, *U Kharkovi Chornobyl'tsi Vystupayut' Proti Rishennya Konstytutsiynoho Sudu shchodo Sotsial'nyx Vyplat* [In Kharkov Chornobyl Veterans Oppose the Decision of the Constitutional Court on Social Benefits], RADIO SVOBODA (Jan. 27, 2012), http://www.radiosvoboda.org/content/article/24465639.html, *archived at* http://perma.cc/J55V-EP9C.

political will on the side of the Ukrainian government. The challenge of reforming ingrained institutions, namely state-owned enterprises and the system of social benefits, is a legacy of communism shared by many post-Soviet countries.[142] In Ukraine, the interests of the political elite and the composition of the country's economy have stymied any serious effort to address these issues.

This gridlock is particularly evident in relation to the current moratoriums on the forced sale of assets of state-owned or energy-related companies. Nazar Kulchytsky explains that "most entities which are protected by different moratoriums have a powerful lobby among all parliamentary factions, and it is not a secret that many of them are either owned directly by members of the Ukrainian parliament or are in their sphere of interests."[143] These deputies have no interest in removing the moratoriums or establishing a mechanism which would effectively hold companies responsible for their debts, and thus might have an impact on deputies' personal financial interests. Under the current system, companies "can make debts, and then the state will pay for the debts," causing a large strain on the state budget but none on the individual finances of politicians.[144]

There are also significant political incentives to delay any reform of the benefits system. Cutting social benefits is enormously unpopular among the Ukrainian population, and elections are still meaningful in Ukraine. This undoubtedly impacted the failure to pass any reform prior to both the 2010 presidential and the 2012 parliamentary elections. Although many benefits often go unpaid, citizens are aware of their legal rights, including their right to apply to the European Court of Human Rights, and feel morally entitled to formally qualify for such benefits, even if they often fail to receive them in practice.[145] The Ukrainian Helsinski Human Rights Union argues that

> [g]iven the lack of funding for these benefits even at the present time when the law clearly establishes their size and everyone has the opportunity to defend their rights in court, it is entirely clear that the way out of the situation proposed by the Cabinet of Ministers is a means of avoiding liability

142. *See, e.g.*, HILARY APPEL, EUR. UNION CTR. OF CAL., INTERNATIONAL IMPERATIVES AND TAX REFORM: LESSONS FROM POSTCOMMUNIST EUROPE (2003), *archived at* http://perma.cc/38TK-QBEC; Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921 (2004); Andrey Meleshevich et al., *Juristocracy and the Protection of the Second-Generation Positive Rights by the Constitutional Court of Ukraine*, 103 NAT'L U. OF KYIV-MOHYLA ACAD. REV., LEGAL STUD. 1, 13-20 (2008).

143. Interview by Carolyn Forstein with Nazar Kulchytsky, *supra* note 103.

144. *Id*.

145. *See supra* Part VI (discussing protests in response to proposed budget cuts).

> for not implementing the socio-economic rights and their guarantees stipulated by law.[146]

This policy would allow the government not only to cut the amount of social benefits available to the population but also to reduce the number of categories of social benefits, and thus the number of potential European Court of Human Rights cases, without addressing the fundamental systemic failure to enforce court decisions. Moreover, individual deputies could thus blame decreases in benefit payments on the budget rather than their own initiatives.

Another factor is the sheer expense of the guaranteed benefits. It is simply less expensive for the government to fail to fulfill legal obligations and only settle debts with those individuals who take their cases to court, than to pay all of its existing debts. Volodomyr Yavorsky, the former chairman of the Ukrainian Helsinski Human Rights Union, explained that many individuals do not pursue their cases through all possible legal measures, with only a small fraction actually taking their cases to the European Court of Human Rights, at which point the government is often willing to pay.[147] While "expenses for the government are getting bigger and bigger from year to year, for example for parliament, for the president and for the Cabinet of Ministers," these actors now "want to cut all expenses on social payments."[148] Yavorsky argues that if the government is seeking to balance the budget, they should "cut all payments, not only to the people."[149] In order to maintain the current wide scope of social benefits and both fully fund them and ensure the enforcement of court decisions, the government would have to cut funds elsewhere, which would likely hurt politicians' individual financial interests.

Looking at Ukraine's history of legislative reform, the larger political context also plays an important role. When Yanukovych and the Azarov government came to power, existing draft laws and past proposals were scrapped, even though the Yushchenko government had been discussing the issue of non-enforcement for years.[150] Additionally, certain actors within the government appear more committed to reform than others. Ivanna Ilchenko at the Ministry of Justice estimated that around 70 percent of the proposals drafted by the Ministry of Justice are not considered by

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146. Maxim Shcherbatyuk & Volodymyr Yavorsky, *New Draft Bill on Enforcement of Court Rulings, Same Old Problems*, UKRAINIAN HELSINKI HUMAN RIGHTS UNION (Sept. 26, 2011, *archived at* http://perma.cc/RD2Q-BBHQ).

147. Interview by Carolyn Forstein with Volodymyr Yavorsky, Director, Ukrainian Helsinki Human Rights Union, in Kyiv, Ukr., (Jan. 20, 2012).

148. *Id.*

149. *Id.*

150. *See e.g.*, Law No. 1861-VI, *supra* note 121.

parliament.[151] The Ukrainian Helsinski Human Rights Union noted that the Ministry of Labor unsuccessfully pushed for enforcement of court decisions to be its own line in the state budget.[152] Even if specific actors in the government work for reform, they can succeed only if political will exists in parliament. Given the current dominance of the Party of Regions in every branch of government, this will must stem at least in part from President Yanukovych and his political organization.[153]

Lastly, the timidity of the European and international communities has impacted Ukraine's response. Since the fall of 2011, international attention has focused on the trial and sentence of Yulia Tymoshenko, with multiple European leaders condemning the verdict as politically motivated and urging the Ukrainian government to secure her release.[154] Comparatively little criticism has focused on the persistent problem of non-enforcement of judicial decisions and Ukraine's contempt for the pilot judgment, despite the fact that this issue is at the heart of rule of law development, and that Ukraine has ignored Europe's premier human rights body. While international pressure is not always successful—as demonstrated by Tymoshenko's continued imprisonment—the lack of international attention or any repercussions from the Council of Europe has made it easier for the Ukrainian government to drag its feet on reform.

VIII. DRAFT LAW № 9127 AND LAW № 4901-VI

The Ukrainian government introduced draft law № 9127 *On Guarantees of the State Concerning the Execution of Court Decisions* in the Verkhovna Rada in September of 2011 as a response to the *Ivanov* pilot judgment.[155] The Rada adopted Law of Ukraine № 4901-VI of the same name in May of 2012.[156] These two documents had significant fundamental

151. Interview by Carolyn Forstein with Ivanna Ilchenko, Lawyer, Ministry of Justice of Ukraine, in Kyiv, Ukr. (Feb. 2, 2012).

152. *Property Rights*, *supra* note 115, at 242.

153. *See, e.g.*, Mykhailo Minakov, Foundation for Good Politics, *Ukraine's Political Development in 2012-2013*, (May 17, 2013, *archived at* http://perma.cc/LHZ5-TBW6).

154. *See, e.g.*, Maria Danilova, *Ukraine's Tymoshenko Sentenced to 7 Years in Jail*, THE WASHINGTON TIMES (Oct. 11, 2011, *archived at* http://perma.cc/7MAA-AAXQ); Steven Pifer, *Ukraine, Europe and Tymoshenko: Does Yanukovych Get It?*, BROOKINGS (Sept. 19, 2011, *archived at* http://perma.cc/4JEE-28KS).

155. *See* Draft Law No. 9127, *supra* note 69; Proyekt Zakony pro harantyi derzhavy shchodo vykonannya sudovyx rishen [Draft Law on Guarantees of the State Concerning the Enforcement of Court Decisions], KARTKA ZAKONOPROYEKTU [RECORD OF THE DRAFT LAW] (Sept. 8, 2011), *available at* http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=41092.

156. *See* Law No. 4901-VI, *supra* note 81; Zakon Ukrayiny "Pro Harantyi Derzhavy shchodo Vykonannya Sudovyx Rishen" [Law of Ukraine "On Guarantees of the State Concerning the Enforcement of Court Decisions"], OFITSIYNYY VISNYK UKRAYINY [OFFICIAL JOURNAL OF UKRAINE], 2012 No. 49, Item 1919, July 6, 2012, [hereinafter Law No. 4901], *archived at* http://perma.cc/MC96-9TW4.

differences. While draft law № 9127 was reviewed by the Committee of Ministers of the Council of Europe, and included several important provisions called for by the European institutions, the majority of these provisions were not included in Law № 4901-VI.[157] Although at the time of this study it is impossible to offer final or even interim conclusions about the impact of this law on the enforcement of court decisions, a preliminary study of the law shows that it does not address several obstacles to effective enforcement, and possibly creates a legal conflict and additional problems.

Draft law No. 9127 consisted of two sections: "Peculiarites [sic] of Execution of Court Decisions" and "Concluding Provisions."[158] As noted above, the bill contained several important provisions, which the Council of Europe had long urged Ukraine to introduce.[159] First, article 3 of the the first section, "Peculiarites [sic] of Execution of Court Decisions," expressly identified the government agency responsible for enforcing court decisions concerning debts owed by public bodies, a gap which had been the source of substantial confusion and inefficiency.[160] According to the draft law, these responsibilities should "be carried out by the State Treasury Service of Ukraine within appropriate budget allocations by debiting funds from a State authority['s] accounts, and in the absence of designated allocations of this State authority—with funds provided by [the] budget program for the execution of court decisions."[161]

Second, article 5 of this same section established the government's responsibility for prolonged non-enforcement of court decisions, and procedures for the payment of compensation for delays. According to the draft law, in the event that the State Treasury Service of Ukraine failed to transfer payment awarded by a court decision within three months, the prevailing party would receive compensation for the delay "in the amount of 3% per annum [of the] unpaid amount . . . at the expense of the budget program for the execution of court decisions."[162]

Third, the bill's second section, "Concluding Provisions," acknowledged that the law "On Introducing a Moratorium on the Forced

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157. *Id.*

158. The English translations of the section titles and articles of the draft law are from a translation of the law provided by the Government Agent of Ukraine to the European Court of Human Rights to the Council of Europe. Letter from the Government Agent of Ukraine to the European Court of Human Rights (July 30, 2012), *archived at* http://perma.cc/F9XR-U5NA. Based on the original Ukrainian, the sections could also be translated as "Aspects of Enforcement of Court Decisions," and "Concluding and Transitional Provisions." For the sake of clarity, we use the translation provided by the Government Agent.

159. Comm. of Ministers, *Decision Cases No. 24 - Yuri Nikolaevich and Zhovner group against Ukraine*, CM/Del/Dec (2012) 1136/24 (2012). See also Draft Law No. 9127, *supra* note 69.

160. Draft Law No. 9127, *supra* note 69.

161. Draft Law No. 9127, *supra* note 69.

162. Draft Law No. 9127, *supra* note 69.

Sale of State Property," had expired.[163] Fourth, the bill eliminated the special rules for the enforcement of court decisions concerning recovery of debts from companies included on the fuel and energy complex registry.[164] As Maxim Shcherbatyuk and Volodymyr Yavorsky of the Ukrainian Helsinski Human Rights Union emphasized, removing these moratoriums is an essential aspect of resolving systemic non-enforcement.[165] Fifth, the second section obligated the Cabinet of Ministers, within three months from the day the law went into effect, to submit bills to the Verkhovna Rada to bring other legislative acts in line with the provisions of this law.[166]

The most controversial innovation of the second section of the draft law was the provision granting the Cabinet of Ministers the right to adjust social spending based on the annual budget.[167] As described above, the bill's proposed reduction of benefits provoked sharp criticism from civil society and nationwide protests.

Despite the draft law's shortcomings, the Committee of Ministers of the Council of Europe called on the Ukrainian parliament in September of 2011 to adopt the document in full and without delay.[168] However, the Verkhovna Rada's response was both delayed and limited. The draft law was passed in its second and final reading nine months later in June of 2012, in a much reduced form.[169] Only the first section of the draft law was included, while the second section with the revised title "Concluding Provisions" was truncated to two sentences: "[T]his Law enters into force on 1 January 2013. The Cabinet of Ministers of Ukraine has until 1 January 2014 to prepare and submit to the Verkhovna Rada of Ukraine proposals for amendments to laws of Ukraine, arising as a result of this Law."[170]

In contrast to the draft law, Law No. 4901-VI did not discuss lifting the moratoriums on the forced sale of property of public companies or entities included on the fuel and energy complex registry.[171] Instead of a period of three months, the Law grants the Cabinet of Ministers a full year, through January 1, 2014, to submit draft legislation to parliament to bring

163. Draft Law No. 9127, *supra* note 69.

164. Draft Law No. 9127, *supra* note 69.

165. Shcherbatyuk & Yavorsky *New Draft*, *supra* note 146.

166. Draft Law No. 9127, *supra* note 69.

167. Draft Law No. 9127, *supra* note 69.

168. Comm. of Ministers, *Interim Resolution Execution of the Pilot Judgment of the European Court of Human Rights Yuriy Nikolaevich Ivanov Against Ukraine and of 386 Cases Against Ukraine Concerning the Failure or Serious Delay in Abiding by the Final Domestic Courts' Decisions Delivered Against the State and its Entities as well as the Absence of an Effective Remedy*, CM/ResDH (2011) 184 (2011), *archived at* http://perma.cc/34Z-5525.

169. *See* Law No. 4901-VI, About Guarantees of the State Concerning Execution of Judgments, June 5, 2012 (Ukr.).

170. *Id.*

171. *See* Law No. 4901-VI, *supra* note 81.

other existing laws into conformity with the provisions of Law No. 4901-VI.[172] Nothing is mentioned about bringing legal acts of the Cabinet of Ministers into compliance with Law No. 4901-VI.[173] This preliminary analysis of the Law of Ukraine *On Guarantees of the State Concerning the Enforcement of Court Decisions* suggests that the law not only fails to remove some of the key obstacles to effective enforcement of Ukrainian court decisions, but also fails to establish a timeline or basis for addressing them in the future.

The circumstances under which the law was passed further explain the differences between the bill and the subsequent law. As argued in the next section, the haste and context in which Law No. 4901-VI was passed indicate that a primary reason for its passage, in this form, was to demonstrate the Ukrainian government's responsiveness to the Council of Europe, rather than to establish an effective mechanism for the enforcement of court decisions.

According to the transcript of a parliamentary session held on June 5, 2012, First Deputy Chairman Adam Martynyuk acknowledged this factor in an address to members of parliament concerning the law in consideration:

> Dear colleagues, we now have to consider a very interesting 'archaic' draft law (9127), on guarantees of the state concerning the enforcement of court decisions. This is its second reading . . . I will explain, why it is today, because tomorrow or the day after there will be the Council of Europe's relevant meeting, where they will consider how Ukraine has responded to these questions. And on Thursday it will already be too late to consider [the law]. It must be considered today, based on the schedule of work of the European bodies.[174]

Martynyuk also explained that the vote would only concern the first part of draft law No. 9127, the section on "Peculiarites [sic] of Execution of Court Decisions," as "we have agreed that we will not consider the concluding and transitional [provisions] at all, because these concern changes to laws that we do not need to speak about."[175]

Despite this substantive cut, the draft law was not fully prepared in time for its second reading, and the final content of the law was not

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172. *See* Law No. 4901-VI, *supra* note 81.

173. *See* Law No. 4901-VI, *supra* note 81.

174. Zasidannya Sorok Tretye [43rd Meeting, Evening], Tenth Session of the Verkhovna Rada of Ukraine, Sixth Convocation, February-July, 2012. Verbatim Report of Plenary Meetings, June 5, 2012, *available at* http://static.rada.gov.ua/zakon/skl6/10session/STENOGR/05061210_43.htm (alteration added).

175. *Id.* (alteration added).

presented to members of parliament. Chairman Martynyuk, with the support of Rapporteur MP Dmytro Prytyka, the former head of the Supreme Economic Court, criticized this shortcoming in the parliamentary session of June 5, 2012, stressing that the committee had been "too lazy to prepare" a final, updated draft of the law, and as a result it was "difficult to formulate" what exactly he was being asked to vote on.[176]

As the draft law was not prepared for a second reading at the time of voting, which took place at 4:32 p.m., it received only 57 votes out of a possible 450, and was rejected.[177] A mere hour and a half after this vote, at the suggestion of MP Mykhaylo Chechetov, the Verkhovna Rada decided to resume consideration of draft law No. 9127.[178] At 6:07 p.m., 259 members of parliament voted to pass this draft law in its second and final reading.[179]

As might have been expected, the Council of Europe's reaction to the passage of Law No. 4901-VI *On Guarantees of the State Concerning the Enforcement of Court Decisions* was restrained. The Committee of Ministers welcomed the passage of this law, and at the same time requested that Ukraine send a copy of the text of the law, together with information on its entry into force and its compliance with the requirements of the European Court of Human Rights's pilot judgment in the *Ivanov* case.[180] On September 19, 2012, the Department for the Execution of Judgments of the European Court of Human Rights issued a Memorandum assessing the current situation pursuant to the *Ivanov* judgment and the *Zhovner* group of cases concerning the structural problem of non-enforcement or delayed enforcement of domestic judicial decisions.[181] Discussing Law No. 4901-VI *On Guarantees of the State Concerning the Enforcement of Court Decisions*, the Memorandum noted that many concerns raised by the court in its earlier documents regarding the problem of execution of judicial decisions in Ukraine "do not appear to have been addressed in the final version of the law as adopted."[182]

On September 20, 2012, the Committee of Ministers endorsed the

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176. *Id*.

177. *Id.*

178. *Id.*

179. *Id*.

180. Comm. of Ministers, *Communication on the Activities of the Committee of Ministers, Report by the Chair of the Committee of Ministers to the Parliamentary Assembly (May - June 2012)*, CM/AS (2012) 5 ¶ 12 (2012), *archived at* http://perma.cc/Y4SW-BB3F.

181. Comm. of Ministers, *Case of Yuriy Nikolayevich Ivanov Against Ukraine, and Group of Cases of Zhovner Against Ukraine. Pilot Judgment and Group of Cases Concerning the Non-Enforcement or Delayed Enforcement of Domestic Judicial Decisions, Assessment of the Measures Already Taken and of the Measures Still Envisaged, and Memorandum Prepared by the Department for the Execution of Judgments of the European Court of Human Rights*, CM/Inf/DH (2012) 29 ¶ 1 (2012), https://wcd.coe.int/ViewDoc.jsp?id=1978383&Site=CM.

182. *Id*. ¶ 19.

evaluation presented in this Memorandum, "urged the Ukrainian authorities once again to take the necessary measures as a matter of utmost urgency in order to resolve the problem of non-enforcement" and "invited the Ukrainian authorities to provide further and detailed information in the light of the above-mentioned memorandum in due time for the 1,157th meeting (December 2012)."[183] In its reply, the Government of Ukraine attempted to address the Memorandum's concerns and informed the Committee of Ministers that, in order to resolve the outstanding problems, the Government had "drafted the Law on amendment of the Law *On Guarantees of the State Concerning the Execution of Court Decisions*" which would be submitted to the Ukrainian Cabinet of Ministers "in the nearest future."[184]

The following Interim Resolution adopted by the Committee of Ministers on December 6, 2012, uses the toughest language to date against Ukraine. The Committee of Ministers recognizes that since 2004 it "has repeatedly called upon the Ukrainian authorities to adopt, as a matter of priority, the necessary measures in its domestic legal system" and reaffirms "most firmly that the High Contracting Parties to the Convention have undertaken to abide by the final judgment of the Court in any case to which they are parties and that this obligation is unconditional."[185] The Resolution again "urges the Ukrainian authorities to adopt as a matter of utmost priority the necessary measures in order to resolve the problem of non-enforcement of domestic judicial decisions and to fully comply with the pilot judgment with no further delay."[186] The Committee of Ministers "profoundly deplor[es]" that the pilot judgment "still remains to be fully executed and that this situation poses a serious threat to the respect of the rule of law and to the effectiveness of the Convention system."[187]

IX. A COMPARISON CASE: RUSSIA

Just nine months prior to its judgment in *Ivanov v. Ukraine,* the European Court of Human Rights issued a pilot judgment against Russia

183. Comm. of Ministers, *Decision Cases No. 26 - Yuriy Nikolayevich Ivanov and Zhovner Group Against Ukraine*, CM/Del/Dec (2012) 1150/26 ¶¶ 6-7 (2012), http://perma.cc/X82X-7R3K.

184. Comm. of Ministers, *Communication from Ukraine Concerning the Case of Yuriy Nikolayevich Ivanov Against Ukraine (Application No. 40450/04)*, DH-DD (2012) 1065 ¶ 6 (2012).

185. Comm. of Ministers, *Interim Resolution Execution of the Judgments of the European Court of Human Rights Yuriy Nikolayevich Ivanov Against Ukraine and the Zhovner Group of 389 Cases Against Ukraine Concerning the Non-Enforcement or Delayed Enforcement of Domestic Judicial Decisions and the Lack of an Effective Remedy in Respect Thereof*, CM/ResDH (2012) 234 (2012), *archived at* http://perma.cc/V6HE-YMRA.

186. *Id*.

187. *Id.* (alteration added).

that similarly concerned the systemic non-enforcement of domestic judgments. In *Burdov v. Russia (No. 2)*, the court found violations of articles 6, 13, and article 1 of protocol 1 of the European Convention, and granted Russia six months to set up a new domestic remedy and twelve months to resolve all pending cases.[188] While Russia exceeded the six-month deadline, the government passed two new federal laws establishing a domestic mechanism and settled all pending cases within a year from the day the judgment became final.[189] The following section looks at the *Burdov (No. 2)* case and Russia's response, and contrasts the impact of the pilot judgment procedure on Russia with its impact on Ukraine.

Anatoliy Burdov, the applicant in *Burdov v. Russia (No. 2),* is a Russian national who was called up by the Soviet authorities to assist in the emergency cleanup of the Chernobyl nuclear disaster.[190] Burdov was not new to the European Court of Human Rights; his first case, *Burdov v. Russia*, was the very first court judgment issued against Russia.[191] Burdov worked at the Chernobyl site for three months between October 1986 and January 1987, where he "suffered from extensive exposure to radioactive emissions."[192] As a result, he was entitled to social payments in compensation for the damage to his health. Burdov repeatedly failed to receive these payments on time and in full, and sued the relevant state authorities multiple times beginning in 1997.[193] The Russian domestic courts repeatedly found in his favor, but several of their judgments went unenforced for significant periods of time.

The first *Burdov v. Russia* case was decided on May 7, 2002.[194] The court found violations of article 6 and of article 1 of protocol No. 1, "on account of the authorities' failure for years to take the necessary measures to comply" with the domestic court decisions issued in Burdov's favor.[195] However, although the Russian authorities compensated him for the delays in enforcement mentioned in the European Court of Human Rights case and initiated several administrative reforms to address the issues underlying the violations, Burdov continued to face delays in receiving his social benefits.[196] He again pursued legal action, resulting in five new domestic decisions in the Shakhty Town Court in his favor beginning in 2003.[197]

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188. Burdov v. Russia (No. 2), 2009 Eur. Ct. H.R., *archived at* http://perma.cc/LK8A-ZHLR.

189. EUR. CT. HUM. RTS., PRESS UNIT, PILOT JUDGMENTS: FACTSHEET 3 (2013), *archived at* http://perma.cc/3W5E-GHLV.

190. *Burdov (No. 2)* ¶ 7.

191. *Burdov (No. 2)* ¶ 9.

192. *Burdov (No. 2)* ¶ 7.

193. *Burdov (No. 2)* ¶ 9.

194. *Burdov (No. 2)* ¶ 9.

195. *Burdov (No. 2)* ¶ 9.

196. *Burdov (No. 2)* ¶ 11-21.

197. *Burdov (No. 2)* ¶¶ 11-21.

These decisions concerned ongoing delays in payments, payment of interest for past delays between 1999 and 2001, raises in his monthly allowances for food and health compensation, and compensation for more recent delays in payments.[198] In the first three cases, it took over a year for the judgment to be executed in full, while the last two, both issued in 2007, were enforced within seven months.[199]

The European Court of Human Rights found that the length of the delays in enforcing the first three judgments constituted violations of article 6 and article 1 of protocol 1, while the last two judgments were enforced in reasonable periods of time.[200] As in the *Ivanov* judgment, the court emphasized that neither "[t]he complexity of the domestic enforcement procedure or of the State budgetary system," nor the "lack of funds or other resources" could be cited as justifications for the failure to enforce a judgment.[201] Burdov did not complain under article 13, but the European Court of Human Rights, noting that many of the past and pending cases concerning non or delayed enforcement complained about the lack of an effective domestic remedy, decided to consider and found a violation of article 13.[202] The court concluded that "there was no effective domestic remedy, either preventive or compensatory, that allows for adequate and sufficient redress in the event of violations of the Convention on account of prolonged non-enforcement of judicial decisions delivered against the State or its entities."[203]

The persistence of this issue led the court to apply the pilot judgment procedure, noting that over 200 previous judgments against Russia concerned the same issues and that prolonged non-enforcement continued to impact a large number of people in Russia.[204] In the *Burdov (No. 2)* judgment, the European Court of Human Rights set a deadline of six months for Russia to "introduce a remedy which secures genuinely effective redress" for individuals whose domestic court decisions go unenforced, and twelve months to resolve over 700 cases "concerning similar facts" which were currently pending at the European Court of Human Rights.[205] The court also decided to adjourn any new cases concerning non-enforcement for one year.[206]

198. *Burdov (No. 2)* ¶¶ 11-21.
199. *Burdov (No. 2)* ¶¶ 11-21.
200. *Burdov (No. 2)* ¶¶ 86, 88.
201. *Burdov (No. 2)* ¶ 70.
202. *Burdov (No. 2)* ¶¶ 89, 117.
203. *Burdov (No. 2)* ¶ 117. Burdov also complained about discrimination under article 14, but this complaint was rejected by the court.
204. *Burdov (No. 2)* ¶ 122.
205. *Burdov (No. 2)* ¶¶ 133, 141-146.
206. *Burdov (No. 2)* ¶¶ 143.

X. RUSSIA'S HISTORY OF NON-ENFORCEMENT

Like Ukraine, prior to being issued a pilot judgment, Russia had long acknowledged and discussed the systemic problems of delayed and non-enforcement of domestic judgments, internally and with the Council of Europe.[207] However, both the nature of the problem in Russia and Russia's past actions and attempts at reform differed from the situation in Ukraine. Following the original *Burdov* case in May 2002, Russia, in addition to fulfilling the individual measures towards Burdov, enforced over 5000 similar domestic judgments concerning allowances for Chernobyl victims and "improved its budgetary process to ensure that the necessary budgetary means are allocated to social security bodies."[208] In April 2004, a Russian law entered into force establishing a new system of indexation, under which the allowances owed to Chernobyl victims are calculated based on the inflation rate, rather than on the less predictable cost of living index used previously.[209] In December 2004, the Committee of Ministers adopted a resolution observing that "the more general problem of non-execution of domestic court decisions in the Russian Federation [was] being addressed by the authorities, under the Committee's supervision, in the context of other pending cases" and resolved to conclude monitoring the implementation of the *Burdov* judgment.[210]

Over the next few years, the Russian government implemented several significant reforms addressing systemic non-enforcement. In 2005, a new federal law added a chapter to the Budgetary Code to include a special execution procedure for judgments against the state and state-financed entities, which made the Federal Treasury responsible for judgments against entities funded by the state budget, and the Ministry of Finance for those against the state itself.[211] The following year, in October

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207. Comm. of Ministers, *Non-Enforcement of Domestic Judicial Decisions in Russia: General Measures to Comply with the European Court's Judgments*, CM/Inf/DH (2006) 19 rev3 ¶¶ 1-5 (2007), *archived at* http://perma.cc/KFJ8-Q2RF.

208. Comm. of Ministers, Appendix to *Resolution Concerning the Judgment of the European Court of Human Rights of 7 May 2002 (Final on 4 September 2002) in the Case of Burdov Against the Russian Federation*, ResDH (2004) 85 (2004), *archived at* http://perma.cc/99R4-LPFN.

209. *Id*.

210. *Id*.

211. *Non-Enforcement of Domestic Judicial Decisions in Russia: General Measures to Comply with the European Court's Judgments*, *supra* note 207, ¶ 4; Federal'nyi Zakon RF o vnesenii izmeneniy v Byudzhetnyy Kodeks Rossiiskoi Federatsii, Grazhdanskiy Protsessual'nyy Kodeks Rossiiskoi Federatsii, Arbitrazhnyy Protsessual'nyy Kodeks Rossiiskoi Federatsii i Federalnyy Zakon 'Ob ispolnitel'nom proizvodstvye' [Federal Law of the Russian Federation on Amending the Budgetary Code of the Russian Federation, the Code of Civil Procedure of the Russian Federation, the Arbitration Code of the Russian Federation, and the Federal Law 'On Enforcement Proceedings'], ROSSIISKAIA GAZETA [ROS. GAZ.] Dec. 30, 2005, No. 3965.

2006, high-level officials from the Russian judicial, legal, and law enforcement systems attended a roundtable held at the Council of Europe in Strasbourg to discuss non-enforcement.[212] Two important legislative reforms were then adopted in 2007. In October, a new Federal Law *On Enforcement Proceedings* came into effect.[213] The Ministry of Finance and the Treasury also revised administrative procedures to improve the enforcement process.[214] The Committee of Ministers praised Russia for these reforms, noting that they reflected the Committee's own recommendations, while cautioning that they had not appeared to fully remedy non-enforcement.[215]

A 2007 memorandum of the Committee of Ministers on Russia, similar to the 2007 memorandum on Ukraine, examines the root causes of non-enforcement and efforts taken to address them. The Russian memorandum notes that the Russian authorities recognized the Committee's concerns, and acknowledged that the main obstacle was not insufficient funding but "complicated budgetary relations between the federal authorities and the authorities of the subjects of the Russian Federation."[216] Primary responsibility for enforcement of judgments changed multiple times between 1997 and 2005, shifting first from the bailiffs service to the regional bodies of the Ministry of Finance, and finally to the federal level Ministry of Finance. Administrative problems, such as "inefficiencies within the bailiff system, a lack of coordination between domestic agencies and the domestic court's failure to clearly identify the debtor," all hindered the practical enforcement of judgments.[217] Moreover, issues with disbursement of payments, namely that "relevant authorities lack[ed] funds and there [was] confusion regarding administrative

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212. *Non-Enforcement of Domestic Judicial Decisions in Russia: General Measures to Comply with the European Court's Judgments*, *supra* note 207, ¶ 5.

213. Federal'nyi Zakon RF ob ispolnitel'nom proizvodestvye [Federal Law of the Russian Federation on Enforcement Proceedings], ROSSIISKAIA GAZETA [ROS. GAZ.] Oct. 6, 2007, No. 4486; Comm. of Ministers, *Interim Resolution Execution of the Judgments of the European Court of Human Rights in 145 Cases Against the Russian Federation Relative to the Failure or Serious Delay in Abiding by Final Domestic Judicial Decisions Delivered against the State and its Entities as well as the Absence of an Effective Remedy*, CM/ResDH (2009) 43 (2009), *archived at* http://perma.cc/7MDH-RW2Q.

214. Philip Leach et al., *Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? Burdov and the Failure to Implement Domestic Court Decisions in Russia*, 10 HUM. RTS. L. REV. 346, 349 (2010).

215. Comm. of Ministers, *Interim Resolution Execution of the Judgments of the European Court of Human Rights in 145 Cases Against the Russian Federation Relative to the Failure or Serious Delay in Abiding by Final Domestic Judicial Decisions Delivered against the State and its Entities as well as the Absence of an Effective Remedy*, CM/ResDH (2009) 43 (2009), *archived at* http://perma.cc/QC2M-PUK2.

216. Comm. of Ministers, *Non-Enforcement of Domestic Judicial Decisions in Russia: General Measures to Comply with the European Court's Judgments*, *supra* note 207, ¶ 4.

217. Leach et al., *supra* note 214, at 348.

procedures to claim the necessary funds from the Ministry of Justice," further held up execution.[218]

The issue continued to attract attention from top authorities in the Russian government. In his 2007 report, Vladimir Lukin, the Commissioner for Human Rights of the Russian Federation, stressed that without unconditional execution of court decisions "the system of legal justice would transform to legal fiction."[219] He criticized the widespread perception "not only in society but also in government bodies" that domestic judgments are merely "non-compulsory recommendations."[220] In our opinion, the report clearly noted awareness of the non-enforcement problem—extending even to some judgments of the Constitutional Court—among authorities in Russia. Discussions took place in all federal circuits between December 2006 and March 2007 with representatives from both regional governments and the presidential administration, and these meetings developed the idea of "setting up a national filter mechanism that would allow for examination of Convention complaints at the domestic level."[221] The Commissioner emphasized that "joint efforts should be deployed with a view to eliminating the roots of the problem rather than simply reducing the number of complaints."[222]

Former Russian President Dmitry Medvedev also publicly emphasized the prevalence and endemic nature of non-enforcement. In an address to the Federal Assembly in November 2008, Medvedev specifically attributed the problem to the "lack of real accountability on the part of officials together with citizens themselves who neglect to execute court decisions" and called for the creation of a domestic mechanism to compensate citizens who had faced undue delays in execution of court decisions.[223] A Moscow-based public interest lawyer, Olga Shepeleva, also pinpointed the lack of accountability as the main factor in an interview with British scholars Philip Leach, Helen Hardman, and Svetlana Stephenson.[224] Shepeleva stressed that, although multiple institutions are responsible for guaranteeing enforcement, "in practice none of them takes the lead."[225] She further explained that the execution of judgments providing compensation

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218. Leach et al., *supra* note 214, at 348.

219. Vladimir Lukin, Doklad Upolnomochennoho po pravam cheloveka v Rossiyskoy Federatsii za 2007 god [Report of the Ombudsman for Human Rights in the Russian Federation for 2007], ¶ 7.6, Rossiaskaya Gazeta, Mar. 14, 2008 *archived at* http://perma.cc/5ZJX-8WE2.

220. *Id*.; *accord* Burdov v. Russia (No. 2), 2009 Eur. Ct. H.R., *archived at* http://perma.cc/LK8A-ZHLR.

221. *Burdov (No. 2)* ¶ 25.

222. *Id.* ¶ 25.

223. Dmitry Medvedev, President of Russia., Address to the Federal Assembly of the Russian Federation (Nov. 5, 2008), *archived at* http://perma.cc/8SDU-AQ2G.

224. Leach et al., *supra* note 214, at 352.

225. Leach et al., *supra* note 214, at 353.

against public authorities are rarely prioritized by regional governments, as "the regional authorities lack the necessary funds to pay these sums," since "regional taxes are mostly channeled into the federal budget."[226] While administrative confusion and uncertainty were clearly responsible for some of the problems in enforcing domestic decisions, the lack of personal liability also played a large role.

In 2008, two draft laws addressing non-enforcement were introduced in the Duma. The first, the Compensation Bill, sought to set up "a domestic legal remedy in respect of violations of the rights to judicial proceedings within a reasonable time and to the execution of an enforceable judicial decision within a reasonable time."[227] The bill provided that courts of general jurisdiction could consider these violations, outlined procedures for such a challenge, and specified that the Ministry of Finance would be the defendant.[228] The second draft law amended other legislative acts, thereby establishing the Federal Treasury as responsible for providing compensation for damages found in such cases.[229] The Russian Supreme Court, which decided to submit these bills to the Duma in September 2008, also described in an attached memorandum "the needs for additional budgetary allocations to ensure the implementation of the Compensation Bill," taking into account that the average amount awarded per case by the European Court of Human Rights was around €3,050.[230] When the court issued its judgment in the *Burdov v. Russia (No. 2)* case on January 15, 2009, these bills remained in the Duma.[231] Notably, in February 2009 the Russian judge in the European Court of Human Rights, Anatoliy Kovler, emphasized the need for reform but criticized the bills as having been "cut to the roots" and no longer serving as effective solutions.[232]

XI. RUSSIA'S RESPONSE TO THE PILOT JUDGMENT

The Russian response to the pilot judgment was relatively cooperative and proactive, although it did exceed one of the set deadlines. The judgment became final on May 4, 2009, after which Russia had six months to set up a new domestic remedy and twelve months to resolve all pending cases.[233]

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226. Leach et al., *supra* note 214, at 353.

227. Burdov v. Russia (No. 2), 2009 Eur. Ct. H.R. ¶ 35, *archived at* http://perma.cc/LK8A-ZHLR.

228. *Id.*

229. *Id*. ¶ 37.

230. *Id*. ¶ 36.

231. *Id.* ¶¶ 34-37.

232. Leach et al., *supra* note 214, at 355.

233. *Execution of the Judgment of the European Court of Human Rights Burdov No. 2 Against the Russian Federation Regarding Failure or Serious Delay in Abiding by Final Domestic Judicial Decisions Delivered Against the State and its Entities as well as the Absence of an Effective Remedy*, *supra* note 15.

Although November 4, 2009 came and went with no legislative reform, in April of 2010 the Duma passed two new federal laws that entered into force on May 4, 2010, the day the court was set to resume consideration of the cases that had been adjourned for the previous year.[234] Law FZ-68 "On Compensation for a Violation of the Right to a Trial within a Reasonable Time or the Right to the Enforcement of a Judgment within a Reasonable Time," known as the "Compensation Act," established the required domestic remedy, while FZ-69 amended other legislative acts.[235] Following the pilot judgment, the Russian government also immediately began working to resolve the pending similar cases through ad hoc means, and "examined all applications within the time limits set by [the] Court."[236] In total, the European Court of Human Rights struck out 785 applications that the Russian authorities successfully resolved domestically.[237]

The Committee of Ministers and the European Court of Human Rights both positively assessed the measures taken by Russia in response to the *Burdov (No. 2)* judgment. In September 2010, the court declared two new cases regarding non-enforcement to be inadmissible because of the new Compensation Act and referred them back to the domestic level.[238] Perhaps most critical for the effectiveness of the new remedy, the Committee of Ministers confirmed that "appropriate funds were allocated to the federal budget, budgets of the subdivisions of the Russian Federation and local budgets" to guarantee the execution of decisions stemming from the Compensation Act.[239] From May 2010 to June 2011, Russian courts considered 287 complaints about non-enforcement and granted compensation in 145 of the cases.[240] Following a visit to Russia, Christos Pourgourides, the PACE rapporteur for the implementation of European Court of Human Rights judgments, acknowledged the efforts to tackle non-enforcement and other systemic issues offering that "[w]e can now see the light at the end of the tunnel."[241]

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234. *Execution of the Judgment of the European Court of Human Rights Burdov No. 2 Against the Russian Federation Regarding Failure or Serious Delay in Abiding by Final Domestic Judicial Decisions Delivered Against the State and its Entities as well as the Absence of an Effective Remedy*, *supra* note 15.

235. Comm. of Ministers, Appendix to Interim Resolution, *Execution of the Judgment of the European Court of Human Rights Burdov No. 2 Against the Russian Federation Regarding Failure or Serious Delay in Abiding by Final Domestic Judicial Decisions Delivered Against the State and its Entities as well as the Absence of an Effective Remedy*, CM/ResDH (2011) 293 § 1 (2011), *archived at* http://perma.cc/3QMJ-BA4W.

236. *Id.* § 2.

237. *Id.* § 2.

238. *Id.* §3.

239. *Id*. § 1(b).

240. *Id*.

241. PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUR., COMM. ON LEGAL AFFAIRS AND HUMAN RIGHTS (2010), *archived at* http://perma.cc/A4U2-ZEXQ.

XII. UKRAINE AND RUSSIA: DIFFERENT APPROACHES TO ENFORCEMENT OF COURT DECISIONS

Given the systemic nature of non-enforcement, why was Russia able to craft, pass, and implement reform following a pilot judgment, while Ukraine was not? The answer lies in the specifics of the problem, history of cooperation with the Council of Europe, and internal politics of both countries. In Russia, as described above, non-enforcement was largely an administrative issue, with multiple agencies theoretically responsible for enforcement, compounded by a lack of measures to ensure accountability. In Ukraine, while administrative issues are present, both the existing moratoriums on sale of state assets and energy-related companies and the social benefits are directly tied to the financial and political interests of politicians. Moreover, Russia had been working for years, in cooperation with the Committee of Ministers, to address the underlying issues. Unlike Ukraine, which reported the creation of a national plan and draft laws but did not actually engage in any legislative reform prior to the pilot judgment, Russia passed three major pieces of legislation between 2005 and 2007 aimed at improving enforcement.[242] When it came time to respond to the pilot judgment, the Russian authorities had a history of substantive debate and consideration of the underlying issues in the judicial, presidential, and legislative spheres, which may have made it easier to craft and set up a concrete mechanism. Additionally, the Russian government also did not experience a major power shake-up, while the 2010 election of Viktor Yanukovych and the formation of the new Cabinet led by Mykola Azarov in Ukraine led to scrapping past efforts at reform.[243]

Reform may also have been easier to achieve in Russia due to the country's finances. In the 2007 memorandum, the Russian authorities themselves noted that the issue was not financial but organizational.[244] The Committee of Ministers, in their 2011 evaluation of the pilot judgment, noted that Russia had allocated the necessary budgetary resources to enforce any judgments under the Compensation Act.[245] In contrast, non-enforcement in Ukraine is tied to budget shortages, which are reflected every year in the large percentage of social benefits which go unpaid and in the debate over granting the executive branch the ability to adjust the levels

242. *See supra* Part X for a discussion of the 2005 and 2007 reforms to the Budgetary Code and the 2007 Federal Law on Enforcement Proceedings.

243. *See* Law No. 1861-VI, *supra* note 121.

244. *Non-Enforcement of Domestic Judicial Decisions in Russia: General Measures to Comply with the European Court's Judgments*, *supra* note 207, ¶ 4.

245. *Execution of the Judgment of the European Court of Human Rights Burdov No. 2 Against the Russian Federation Regarding Failure or Serious Delay in Abiding by Final Domestic Judicial Decisions Delivered Against the State and its Entities as well as the Absence of an Effective Remedy*, *supra* note 15.

of benefits in proportion to the budget.[246] Nazar Kulchytsky, the Government Agent of Ukraine to the European Court of Human Rights, emphasized the monetary factor, arguing that "Russians didn't resolve this problem, they just have enough money to pay compensation to everyone whose right for execution in a reasonable time was violated."[247] He posited that the Russian remedy is "going to work for a few years, but when a lot of people will find out about this mechanism, and when they will see that it is effective, the amount of those compensation [sic] will be much larger than the amount of the debt itself," and "that it's not possible to make things in such a way for a long time."[248] Kulchytsky emphasized with fewer available funds, such a solution is not an option for Ukraine.[249]

Lastly, another factor in Russia's response is the political context of Russia's relationship with the European Court of Human Rights. While responding to the *Burdov (No. 2)* judgment may constitute a success, Russia has long had a contentious relationship with the court. The court has ruled on hundreds of cases from Chechnya and neighboring North Caucasus republics concerning violations of article 2, the right to life, or article 3, freedom from torture.[250] These cases remain partially unenforced, as Russia has resisted any general measures related to the Chechen cases, which have been the subject of much condemnation by the court.[251] Antoine Buyse, a Dutch scholar of the court, explained the court's application of the pilot judgment procedure thusly: "[T]o put it mildly, it is no secret that Russia is not very happy with the Court's judgments in the many Chechen cases. No surprise then that the Court has found a (somewhat) less sensitive area to find a systemic problem."[252] Responding to the pilot judgment cooperatively, substantively, and relatively on time may have been a means of creating some political goodwill at the Council of Europe towards Russia, in the context of years of directed criticism.

XIII. IMPLICATIONS FOR UKRAINE AND THE EUROPEAN HUMAN RIGHTS REGIME

The Ukrainian and Russian responses to the pilot judgments and to the issue of non-enforcement more generally have implications for both

246. *See supra* Part VI.

247. Interview by Carolyn Forstein with Nazar Kulchytsky, *supra* note 103.

248. Interview by Carolyn Forstein with Nazar Kulchytsky, *supra* note 103.

249. Interview by Carolyn Forstein with Nazar Kulchytsky, *supra* note 103.

250. EUROPEAN COURT OF HUMAN RIGHTS, COUNTRY FACTSHEET, RUSSIA 9, *archived at* http://perma.cc/5LQU-UCSM.

251. *Id.*; Case of Aslakhanova and Others v. Russia, 2013 Eur. Ct. H.R., *archived at* http://perma.cc/ML5B-E49C.

252. Antoine Buyse, *Pilot Judgment on Russian Non-Enforcement*, ECHR BLOG (Jan. 21, 2009, 11:00 AM), http://echrblog.blogspot.com/2009/01/pilot-judgment-on-russian-non.html, *archived at* http://perma.cc/Q3Q3-8QCE.

future domestic reforms and the European system of human rights protection. Ukraine's failure to respond to the *Ivanov* judgment within the time period demonstrates a key weakness of the pilot judgment procedure: it is entirely predicated on the national government in question implementing reform. Ukraine is the first country to fail to respond and has seemingly faced no tangible consequences. Volodymyr Yavorsky recounted how even the Council of Europe "was simply surprised" at Ukraine's response, particularly as "even Russia did something."[253] Additionally, the hundreds of applicants whose cases were frozen for the period of the pilot judgment and were not resolved domestically were effectively denied an opportunity to seek justice for over two years.

At the same time, while Ukraine's response was scant, the pilot judgment pushed the government to consider non-enforcement in a more serious light than it had previously. This sentiment has been echoed by multiple Ukrainian officials. Kulchytsky emphasized the importance of international pressure, describing the pilot judgment as "the only possibility" for compelling "our authorities to make some changes."[254] The European Court of Human Rights first recognized that non-enforcement was an issue in Ukraine over eight years ago, but only after the pilot judgment did the government "finally start asking [the Ministry of Justice] what the problem is" and what should be done "to change the situation."[255] Ivanna Ilchenko went further, describing the "incredible impact" of the pilot judgment: for over 2000 cases, the government is responsible for paying not only "the amount which was owed by the judgment which was not executed, but also the amount of penalty from the government for the non-execution period."[256] While far short of European Court of Human Rights's goal, the Ukrainian government's settlement of over 1000 of the pending cases, and its obligation to compensate applicants not only for the original debt but for the delay in enforcement is a concrete result. While these statements do not mitigate the extent to which Ukraine failed to meet the obligations set forth in the *Ivanov* judgment, they emphasize the level of attention that the decision garnered among the legal professionals in the government.

The Ukrainian and Russian responses to the pilot judgments also highlight the continued importance of the European Court of Human Rights as a guarantor of human rights, particularly in the countries which produce the most applications. This is particularly relevant given the ongoing debate about the future of the court. Three high-level meetings of the past few years, at Interlaken in 2010, Izmir in 2011, and most recently Brighton in

253. Interview by Carolyn Forstein with Volodymyr Yavorsky, *supra* note 147.

254. Interview by Carolyn Forstein with Nazar Kulchytsky, *supra* note 103.

255. Interview by Carolyn Forstein with Nazar Kulchytsky, *supra* note 103 (alteration added).

256. Interview by Carolyn Forstein with Ivanna Ilchenko, *supra* note 151.

2012, have focused attention on the overwhelming backlog of cases at the court, seeking ways to decrease the caseload and improve the effectiveness of the court.[257] The 2012 Brighton Declaration included several proposals for reducing the current and future caseload, and called on the Committee of Ministers to "ensure that States Parties quickly and effectively implement pilot judgments," and on states to fulfill their Convention obligations.[258]

While reducing the court's caseload is clearly a necessary step towards improving the efficiency and functionality of the court, it cannot be achieved at the cost of individuals' human rights. The *Ivanov* and *Burdov* judgments demonstrate the need for the court to continue to consider repetitive article 6 violations, and to continue to attempt to find creative solutions to systemic problems such as the pilot judgment procedure. Although the pilot judgment mechanism did not work in full in Ukraine, it has had a greater impact—as measured by the 1000 plus cases resolved domestically—than any other effort to address non-enforcement since Ukraine joined the Council of Europe. Though such cases are time consuming and repetitive, the European Court of Human Rights stands as a last resort for the majority of Ukrainians who take a case to court and find that their domestic decisions go unenforced. As the outgoing Commissioner for Human Rights for the Council of Europe, Thomas Hammarberg, emphasized in a speech at the opening of the 2012 judicial year in Strasbourg, "the problem is not that people complain, but that many of them have reasons to do so."[259] The failure to enforce judgments is directly tied to quality of life and to the rule of law, and though it plays out in small numbers and individual experiences, it adds up to a major human rights shortcoming, which cannot be abandoned.

Given the significance of the issue, one takeaway from the Ukrainian case may be the need for the Council of Europe to apply increased pressure on recalcitrant national governments. The Council of Europe has a number of measures at its disposal, which it can use on states which are not living up to their obligations, including suspending membership in the organization or applying sanctions on a state.[260] Nazar Kulchytsky criticized the Committee of Ministers for being "afraid to use strong phrases,"

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257. *See* the reports of the 2010, 2011, and 2012 Interlaken, Izmir, and Brighton conferences, *supra* note 27.

258. Council of Eur. High Level Conference on the Future of the European Court of Human Rights, *Brighton Declaration,* ¶ 27 (Apr. 19-20, 2012), *available at* http://hub.coe.int/20120419-brighton-declaration.

259. Thomas Hammarberg, Council of Eur. Comm'r for Human Rights, The Court of Human Rights Versus the 'Court of Public Opinion,' CommDH/Speech (2012) 1 (Jan. 27, 2012), *archived at* http://perma.cc/6PWL-Q89A.

260. Statute of the Council of Europe, May 5, 1948, arts. 3, 8, *archived at* http://perma.cc/EJA6-JUHT; Pourgourides, *7th Report*, *supra* note 20, ¶ 213.

explaining that even "when we are telling them it's not going to work in Ukraine in such a way, we need strong formulations, the Committee of Ministers also very often is not ready to take such strong steps."[261]

The criticism and public spotlight which has been focused on the Yanukovych administration for the *Tymoshenko* and *Lutsenko* trials should also be applied to non-enforcement, which is just as much a stumbling block to rule of law as is a biased judiciary. The government's failure to respond to *Ivanov* should not be allowed to fly under the radar of the international community or dismissed by domestic proponents of rule of law, particularly as Ukraine seeks closer economic integration with Europe. As Europe considers the future of the Council of Europe and of international human rights protection, it should take into account not only its ability to serve as a guardian of human rights and a monitor of violations, but also its role as an active enforcer.

261. Interview by Carolyn Forstein with Nazar Kulchytsky, *supra* note 103.

TRENDS IN FREE TRADE: LEGAL AND POLICY PERSPECTIVES ON JORDAN'S REGIONAL TRADE ARRANGEMENTS

Mohammad F.A. Nsour, Abdullah Dmour* and Lana Nimri**

INTRODUCTION

Since the establishment of the World Trade Organization (WTO) in 1995, the number of Regional Trade Arrangements (RTAs) has grown dramatically.[1] At present, more than half of the world's trade takes place within RTAs.[2] According to the WTO, as of July 31, 2013, the GATT/WTO had received some 575 notifications of RTAs (counting goods and services separately),[3] as compared with forty such notifications in 1990.[4] Corresponding to this increase in volume, the coverage of RTAs has also expanded over time to include services, trade and investment, competition, government procurement, electronic commerce, and labor and environmental standards, in addition to preferential liberalization of tariffs and other measures governing merchandise trade.[5]

This "new regionalism," which increasingly involves webs of agreements covering a range of issues at varying depths, is the reality of the international trading system today. Excluding Mongolia, every WTO Member is party to one or more RTAs.[6] As such, most developing countries

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1. The term "Regional Trade Arrangements," as used here refers to free trade agreements, customs unions, or common markets consisting of two or more countries or partners. DICTIONARY OF TRADE POLICY TERMS (5th ed. 2007), *archived at* http://perma.cc/6Y85-FRT2.

2. Jo-Ann Crawford & Roberto V. Fiorentino, THE CHANGING LANDSCAPE OF REGIONAL TRADE AGREEMENTS 1-2, http://www.wto.org/english/res_e/booksp_e/discussion_papers8_e.pdf, *archived at* http://perma.cc/7B3R-59YV (the authors use the term Preferential Trade Agreements while this Article uses the synonymous Regional Trade Agreements); *see also* WORLD TRADE ORG., WORLD TRADE REPORT 2011, WTO AND PREFERENTIAL TRADE AGREEMENTS: FROM CO-EXISTENCE TO COHERENCE, 67, *archived at* http://perma.cc/XR44-J22M [hereinafter REPORT 2011].

3. *Regional Trade Agreements*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Sept. 22, 2013, *archived at* http://perma.cc/FUZ2-RBLX).

4. Jo-Ann Crawford & Sam Laird, *Regional Trade Agreements and the WTO*, 12 N. AM. J. ECON. FIN. 193, 194 (2001).

5. REPORT 2011, *supra* note 2.

6. *See Participation in Regional Trade Agreements*, WORLD TRADE ORG.,

are actively pursuing regionalism as a route to integrate their economies into the global system and promote sustainable economic development.[7] Jordan is no exception.

Jordan has followed a liberalization policy in an attempt to increase foreign investment and create more job opportunities.[8] Currently, Jordan is ranked as one of the most open economies in the world.[9] Jordan acceded to the WTO in 2000 and became party to trade liberalization arrangements with various countries, including the United States, the European Union, and, most recently, Canada.[10]

This Article is both part of and funded by the WTO Chair Program at the University of Jordan. It presents an overview of the legal and factual status quo of Jordan's regional trade arrangements, touching upon their development and coverage, as well as surveying/examining Jordan's existing foreign trade policy. This Article is not meant to be an extensive analysis of Jordan's free trade arrangements; rather, it is designed to tackle legal and policy concerns regarding some essential aspects of Jordan's regional trade policies. While the Article does not analyze the economic consequences of these RTAs, it does use several points of economic data in the arguments presented herein.

Part I defines the WTO's legal framework with respect to regional and preferential trade and also outlines the theoretical foundation of regional and preferential trade. Part II sheds light on Jordan's trade policy and underlines historical milestones achieved during its progression. Part III is connected with Part II and it considers Jordan's regional and preferential trade agreements in order to pave the road for the discussion in the ensuing parts. Part IV proceeds to define each trade agreement to which Jordan is a party and offers certain remarks on each of these agreements. Finally, Part

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http://www.wto.org/english/tratop_e/region_e/rta_participation_map_e.htm (last visited Aug. 15, 2014, *archived at* http://perma.cc/FHA5-QQZY); *see also Welcome to the Regional Trade Agreements Information System (RTA-IS)*, WORLD TRADE ORG., http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?MemberCode=496&lang=1&redirect=1 (last updated Aug. 14, 2014, *archived at* PERMA).

7. *See Participation in Regional Trade Agreement*, *supra* note 6.

8. *See Jordan Foreign Trade Policy*, MINISTRY OF INDUSTRY AND TRADE: THE HASHEMITE KINGDOM OF JORDAN, http://www.mit.gov.jo/tabid/475/Jordan%20Foreign%20Trade%20Policy.aspx (last visited Aug. 15, 2014, *archived at* http://perma.cc/WW8G-STMY). 1 (2007), *available at* http://www.luc.edu/orgs/meea/volume9/PDFS/Squalli%20Wilson%20-%20paper.pdf.

9. *See generally* Jay Squalli & Kenneth Wilson, *How Open Are Arab Economies? An Examination with the CTI Measure*, 9 TOPICS IN MIDDLE EASTERN AND NORTH AFRICAN ECONOMIES, Middle East Economic Association and Loyola University Chicago, September, 2007, http://www.luc.edu/orgs/meea/.

10. *Jordan Foreign Trade Policy*, *supra* note 8; *Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments*, Canada Treaty Information, http://www.treaty-accord.gc.ca/text-texte.aspx?id=105176 (last visited Apr. 23, 2014, *archived at* http://perma.cc/SA2K-JJYT).

V reflects upon Jordan's trade policy and agreements and provides observations thereon. This Article concludes that Jordan's agreements were largely politically driven, and that in the course of crafting its trade agreements, Jordan often gave up some of the flexibility that it would have been afforded under the multilateral trading system. Accordingly, after more than a decade of active regionalization, Jordan's trade and economic balances remain, unsurprisingly, negative.

I. THE WTO LEGAL FRAMEWORK

Provided certain conditions are met, WTO Members are allowed to enter into preferential arrangements that depart from the most-favored-nation (MFN) treatment.[11] In the 1940s, the original General Agreement on Tariffs and Trade (GATT) rules for RTAs were introduced.[12] At that time, little attention was given to non-tariff measures and, more importantly, it was not expected that the exception embodied in GATT Article XXIV would be heavily invoked.[13] That understanding was valid, since the number of existing RTAs at that time was insignificant.[14] Though the creation of GATT in 1948 did not rescind previous bilateral agreements, it did introduce a new reality: agreements had to be brought into accordance with the rules of the GATT or any exceptions thereunder. This grandfathering process materialized most notably in preferential treatment between trading partners; accordingly, many colonial powers, including the United States, the United Kingdom, Belgium, and the Netherlands, maintained their preferential trade agreements with their respective colonies.[15]

The RTA *tsunami* occurred in the 1990s, particularly after the collapse of the Berlin Wall and the creation of the WTO in 1995.[16] Not only did the number of RTAs skyrocket,[17] but the coverage of RTAs also became more extensive, expanding to include non-tariff barriers with respect to

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11. *See* General Agreement on Tariffs and Trade art. XXIV, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; *see also* General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 1167 [hereinafter GATS].

12. *See* GATT, *supra*.

13. *See* SOUTH CENTRE, ARTICLE XXIV AND RTAS: HOW MUCH WIGGLE ROOM FOR DEVELOPING COUNTRIES? 4 (2008).

14. *See generally* Andrew Stoler, *The WTO Dispute Settlement Process: Did We Get What the Negotiators Wanted?*, 3 WORLD TRADE REV. 99 (2004).

15. Joanne Gowa & Soo Yeon Kim, *An Exclusive Country Club: The Effects of the GATT on Trade, 1950-94*, 57 WORLD POL. 453, 459 (2006), *archived at* http://perma.cc/LUZ2-NHZE.

16. Marc Bungenberg & Christoph Herrmann, *Common Commercial Policy after Lisbon*, Eur. Y.B. of Int'l Econ. Law 3-4 (2013).

17. *Regional Trade Agreements, supra* note 3.

trade-in goods,[18] as well as services, intellectual property, and investment.[19] These agreements have also substantively expanded to encompass items on competition policy, government procurement, labor and environmental standards, electronic commerce, and human rights.[20]

The essence of the rules of the global trading system reflects the principles of non-discrimination. The preamble of the Marrakesh Agreement Establishing the World Trade Organization clearly states that one of the main objectives of the Organization is to promote "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations."[21] The principles of non-discrimination are substantive legal obligations placed on all WTO Members and are reflected in numerous provisions of the WTO Agreement.

In WTO law, there are two main concepts of non-discrimination: 1) the most-favored-nation treatment obligation (MFN); and 2) the national treatment obligation (NT).[22] In the General Agreement on Tariffs and Trade (GATT), the principle of MFN is set out in article I and also appears in various forms in articles II.1, V.5, IX.1, and XIII.1, while the principle of NT appears in article III.[23] In the General Agreement on Trade in Services (GATS), article II sets out the principle of MFN and article XVII sets out that of NT.[24] In the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the principles of MFN and NT are found in articles 3 and 4, respectively.[25] These two key principles are also found in

18. *See generally* Natalie Shimmel, *Welcome to Europe, but Please Stay Out: Freedom of Movement and the May 2004 Expansion of the European Union*, 24 BERKELEY J. INT'L L. 760 (2006) (outlining different aspects and consequences of the EU 2004 expansion).

19. *See e.g.*, *Foreign Investment Promotion and Protection (FIPAs)*, FOREIGN AFFAIRS, TRADE AND DEV. CANADA, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng (last updated Dec. 18, 2013, *archived at* http://perma.cc/J72K-V73V).

20. Crawford & Fiorentino, *supra* note 2, at 1.

21. Marrakesh Agreement Establishing the World Trade Organization pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement], *archived at* http://perma.cc/CK37-G498. Under the Uruguay Round package 1992-1993, negotiations finally produced agreement on text of the TRIPS, thereby extending the multilateral trading system to cover intellectual property (IPs). Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994. *See id.* Annex 1C.

22. *Principles of the Trading System*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Aug. 16, 2014, *archived at* http://perma.cc/CZ97-5NQL).

23. GATT, *supra* note 11.

24. GATS, *supra* note 11, art. 2.

25. Marrakesh Agreement, *supra* note 21, Annex 1C.

other WTO agreements.[26] However, WTO Members are permitted to depart from the non-discrimination rules under specific conditions, which vary depending on the level of integration sought, mainly according to article XXIV of the GATT, article V of the GATS for MFN and the Tokyo Round's Decision on Differential and More Favorable Treatment, Reciprocity, and Fuller Participation of Developing Countries (the Enabling Clause).[27]

It was initially hoped that GATT Article XXIV would be the system's instrument for "both managing RTAs and encouraging their transformation into multilateral GATT trade agreements"[28] and that was applicable also to Article V of the GATS. However, many view RTAs' proliferation, which has resulted in RTAs constituting an essential portion of the world trade, as a threat to the multilateral system itself.[29]

RTAs are recognized as reciprocal trade agreements between two or more partners and include FTAs, CUs, and common markets.[30] PTAs in the WTO "are unilateral trade preferences," that include the Generalized System of Preferences (GSP) schemes, as well as other non-reciprocal preferential schemes granted a waiver by the WTO General Council[31] pursuant to Article IX (*Decision Making*) of the WTO Agreement.[32]

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26. *See e.g.*, GATT, *supra* note 11, art. I, ¶ 1 (regarding the principle of non-discrimination, stating that members "shall unconditionally offer to all other contracting parties (members) any advantage, favour, privilege or immunity affecting customs duties, charges, rules and procedures that they give to products originating in or destined for any other country.").

27. Decision, *Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries*, ¶ 1 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) (1980) [hereinafter Enabling Clause].

28. *See generally* Donald A. Calvert, How the Multilateral Trade System Under the World Trade Organization is Attempting to Reconcile the Contradictions and Hurdles Posed by Regional Trade Agreements: An Analysis of Article XXIV of the General Agreement on Tariffs and Trade 4 (Dec. 6, 2002) (unpublished Master's Capstone Thesis, George Mason University), *archived at* http://perma.cc/T6G8-TT2W.

29. *See Welcome to the Regional Trade Agreements Information System (RTA-IS)*, *supra* note 6. The recent proliferation of RTAs in the form of free trade agreements demonstrates countries' favoritism of these over customs unions. *Welcome to the Regional Trade Agreements Information System (RTA-IS)*, *supra* note 6. This suggests that if the GATT framers had been aware of the potential use of Article XXIV, they would have included a customs union-only requisite, something that might have deterred many of current RTAs from forming. *See* Kerry A. Chase, *Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV*, 5 WORLD TRADE REV. 1 (2006).

30. *Regional Trade Agreements and Preferential Trade Agreements*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm (last visited Aug. 16, 2014, *archived at* http://perma.cc/8BXD-7XWR).

31. *Id.*

32. *See* Preferential Tariff Treatment for Least Developing Countries, July 17, 1999 (WT/L/304). On June 15, 1999, the WTO General Council adopted a decision (WT/L/304) that grants a General Agreement on Tariffs and Trade (GATT) waiver to the preferential

Free Trade Agreements (FTAs) are the most popular mode of regionalism. FTAs encompass an arrangement that allows for the unimpeded flow of trade in goods between members at either a very low, or a zero tariff rate, subject to the conditions of the specified rules of origin.[33] FTAs have proliferated mainly because they offer flexibility to their members.[34] These agreements do not entail the mandatory adoption of similar trade policies; they simply require economic compatibility and probably political compatibility as well.[35] While the conventional form of FTAs simply liberalizes trade in goods, these agreements have taken many forms that vary from this basic model, such as FTAs that contain provisions on investment, as in the NAFTA, or FTAs that encompass non-trade issues related to human rights and democracy, as in several EU agreements.[36]

When members of FTAs wish to achieve deeper economic integration, they can adopt common external tariff rates, commonly termed "customs unions."[37] If members of a customs union allow the unimpeded movement of products, capital, and people, then the customs union becomes a common market.[38] Monetary union is another deeper integration model

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tariff treatment by developing countries for exports from the least developed countries. *Id.* The waiver would effectively provide a legal cover to those initiatives pledged and engaged in by several developing countries to facilitate market access for the least developed countries. *Id.* The waiver authorizes derogation from the most-favored-nation (MFN) principle until June 30, 2009 by developing country WTO members that grant unilateral preferential tariff treatment to products imported from the least developed countries members. *See* Decision on Waiver, *Preferential Tariff Treatment for Least-Developed Countries*, WT/L/304 (June 17, 1999) (*adopted* June 15, 1999); Request for Extension of Waiver, *European Communities—Autonomous Preferential Treatment to the Countries of the Western Balkans*, G/C/W/552; G/C/W/556 (May 5, 2006). Examples of preferential trade agreement include the Lomé IV Agreement, preferential arrangements for the Caribbean by the United States and Canada, or a recently agreed waiver permitting more advanced developing countries to extend duty-free preferences on a non-reciprocal basis to LDCs.

33. *See supra* note 32 and accompanying text. I thank the WTO external reviewer who noted that tariff peaks often remain.

34. Mohammad F.A. Nsour, *Regional Trade Agreements in the Era of Globalization: A Legal Analysis*, 33 N.C. J. INT'L L. & COM. REG. 359, at 369 (2007) (stating that FTAs are the most popular RTAs).

35. Martin Richardson, *Why a Free Trade Area? The Tariff Also Rises*, 6 ECON. & POL. 79, 88 (1994).

36. *See* Nsour, *supra*, at 371.

37. HARRY JOHNSON, THE ECONOMIC THEORY OF CUSTOMS UNION, IN TRADING BLOCS: ALTERNATIVE APPROACHES TO ANALYZING PREFERENTIAL TRADE AGREEMENTS, 127, 133 (Jaqdish N. Bhaqwati et al., eds., 1999).

38. *See e.g.*, Case C- 221/89, The Queen v. Sec'y of State for Transp. *ex parte* Factortame Ltd., 1999 E.C.R. 3905, ¶ 20. The difference between a Customs Union and a FTA is the authority to change tariffs on imports from non-member countries. *Id.* Countries within a Customs Union introduce common tariff rates against all non-member countries, and they cannot change tariff rates voluntarily without prior consultation with other member countries. *Id.* However, countries in a FTA can set their own tariff rates independently; if a country is a WTO Member, then the tariff rates set under the FTA must not be higher than its WTO-bound rates. *See e.g.*, *id.* (the EU Court of Justice confirmed this in *Factortame II* with

which entails that common markets fix exchange rates and agree on common monetary policies.[39] Of course, deeper models of integration require higher cooperation, the European Union, arguably, being the best example of such a model.

In the Tokyo Round in 1979, GATT members agreed on a legal framework for preferential trade concerning developing countries.[40] Under the Enabling Clause,[41] developing countries can exchange virtually any trade preference.[42] The Generalized System for Tariff Preferences among Developing Countries (GSTP)[43] enables developed countries to give developing countries one-way trade preferences.[44] For example, under the CARIBCAN agreement, Canada accords duty-free non-reciprocal access to most Caribbean countries.[45] By the same token, the Enabling Clause permits developing countries to exchange trade preference without offering the same preference to developed countries.[46] Hence, Jordan receives trade preferences under the GSP from Belarus, Canada, the EU, Japan, New Zealand, the Russian Federation, Switzerland, Turkey, and the United States.[47]

In 1996, the WTO created the Committee on Regional Trade

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regard to the freedom of establishment by emphasizing that "the concept of establishment within the meaning of Article 52 et seq. of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period.").

39. *See* Joshua M. Wepman, Note, *Article 104(c) of the Maastricht Treaty and European Monetary Union: Does Ireland Hold the Key to Success?*, 19 B.C. INT'L & COMP. L. REV. 247 (1996) (defining Monetary Unions).

40. Enabling Clause, *supra* note 27.

41. *See* Enabling Clause, *supra* note 27.

42. Robert Howse, *India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for "Political" Conditionality in US Trade Policy*, 4 CHI. J. INT'L L. 385, 387 (2003); *see also* Enabling Clause, *supra* note 27, art. 2c (allowing developing countries to agree on reciprocal agreements among themselves, without giving the same preferences to developed countries).

43. *See generally* Howse, *supra*.

44. Footnote 3 of the Enabling Clause refers to the GSP system initiated at UNCTAD II. The UNCTAD II participants adopted Resolution 21(II), recognizing "unanimous agreement in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences which would be beneficial to the developing countries." *See Report of the United Nations Conference on Trade and Development on Its Second Session,* UNCTAD, 2d Sess. Annex 1, Agenda Item 11, U.N. TDBOR, , U.N. Doc. TD/97/Annexes (1968) at 38.

45. *Caribcan*, BELIZE TRADE & INVESTMENT ZONE, http://www.belize.org/tiz/caribcan (last visited Aug. 16, 2014, *archived at* http://perma.cc/5L2N-UM2Q) ("Approximately 98% of total CARICOM merchandise exports currently enter Canada duty free under MFN, CARIBCAN (CCT) or General Preferential Tariff (GPT).").

46. *See* Enabling Clause, *supra* note 27, art. 5.

47. UN CONFERENCE ON TRADE AND DEV., GENERALIZED SYSTEM OF PREFERENCES: LIST OF BENEFICIARIES 11, *archived at* http://perma.cc/8VP7-3UKE.

Agreements (CRTA) to oversee all RTAs and to consider the implications of such agreements on the multilateral trading system.[48] However, the CRTA proved unable to effectively carry out its duties of examining the consistency of RTAs with RTA rules and overseeing their implementation.[49] In this light, WTO Members agreed in July 2006 on a new mechanism for transparency that drew specific guidelines for reporting RTAs and outlined clear timetables for that purpose.[50] This Transparency Mechanism enables the WTO Secretariat to assume the guiding role in addressing the factual aspects of the notified agreements.[51]

II. OVERVIEW OF JORDAN'S FOREIGN TRADE POLICY

Jordan's preferential trade initiatives began to evolve in the late 1950s. In 1962, Jordan entered into an economic cooperation agreement with Saudi Arabia to exempt specific products from duties according to each country's ability.[52] Jordan also signed agreements with India in 1964, Iraq in 1967, and a cooperation agreement with the European Communities that entered into force in 1977.[53] The latter specifically allowed Jordan to export some agricultural products with reduced tariffs.[54] The foregoing agreements were all exclusive to goods.[55] Other regional agreements took place under the Umbrella of the Council of Arab Economic Unity, but with limited success.[56]

In the early 1970s, Jordan strengthened its Import Substitution Industrialization Strategy, originally implemented in the mid-1950s, which aimed at diversifying the industrial base of the economy.[57] Hence, Jordan

48. World Trade Org., Committee on Regional Trade Agreements Decision of February 1996, WTO Doc WT/L/127 (Feb. 7, 1996).

49. *See* WORLD BANK, GLOBAL ECONOMIC PROSPECTS 2005: TRADE, REGIONALISM AND DEVELOPMENT 141 (2004).

50. *See* Decision—*Transparency Mechanism for Regional Trade* Agreements, WT/L/671 (June 29, 2006).

51. *See Transparency Mechanism for Regional Trade Agreements - Final Decision*, WTO, WT/L/671 (Dec. 18, 2006).

52. Economic Agreement Between the Hashemite Kingdom of Jordan and Saudi Arabia, Jordan-Saudi Arabia, Oct. 30, 1962, *archived at* http://perma.cc/9UXJ-PV9C.

53. Press Release, European Union, The EU and Jordan: Long-Standing Relationship (Feb. 21, 2012), *archived at* http://perma.cc/K5LL-SF7A.

54. Working Party on the Accession of Jordan, *Report of the Working Party on the Accession of the Hashemite Kingdom of Jordan to the World Trade Organization*, WT/ACC/JOR/33 (Dec. 3, 1999).

55. *See* ELAINE DENNEY ET AL., INTERNATIONAL ECONOMIC DEVELOPMENT PROGRAM, SUSTAINABLE WATER STANDARDS FOR JORDAN (2008), *archived at* http://perma.cc/KTP5-MAFE.

56. *See generally* YEARBOOK OF INTERNATIONAL ORGANIZATIONS (33d ed. 1996).

57. Jane Harrigan et al., *The IMF and the World Bank in Jordan: A Case of Over Optimism and Elusive Growth*, 1 REV. INT. ORG. 263, 265 (2006).

introduced several tariff and non-tariff barriers including financial subsidies to local producers, particularly the smaller ones.[58] However, due to the expansionary policies and the nearly unlimited external borrowing the government followed at the time, the total public debt had grown significantly and the government became unable to respond to its debt obligations.[59]

To deal with the struggling economy, Jordan had to defer to the IMF and the World Bank, which required Jordan to adopt comprehensive measures, including reducing import restrictions and eliminating domestic subsidies.[60] By 1999, the import weighted average tariff rate had declined to 25 percent, down from 35 percent in 1987.[61] The maximum tariff rate was also reduced from 70 percent in 1993 to 35 percent in 1999, to reach on average 8.98 percent by 2010.[62] In 2000, the Government announced that it accelerated economic "reforms" through further privatization and trade liberalization measures including the introduction of a 10 percent sales tax for the first time.[63] The sales tax rate increased to 16 percent in 2004, and the weighted average tariff rate fell from 35 percent in 1987 to 13.5 percent in 2000, with the maximum tariff rate declining to 30 percent.[64]

By the end of 2000, Jordan had joined the WTO in record time, and by 2001, Jordan had signed a Free Trade Agreement (FTA) with the United States, after signing an Association Agreement with the European Community in 1997.[65] Regionally, Jordan was a member of various agreements that promoted economic cooperation between Arab states, such as the Agreement for Facilitating and Developing Trade Exchange among Arab States, which was later replaced with the Greater Arab Free Trade Agreement (GAFTA).[66]

In several areas, Jordan introduced legislation that was compatible with its liberalization policy, including, *inter alia*, legislation addressing

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58. Trade Policy Review: Report by Jordan, *Trade Policy Review Body*, WT/TPR/G/206 (Oct. 6, 2008), *archived at* http://perma.cc/MJL3-ZAY7.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*; *see also Jordan – Tariff Rate*, INDEX MUNDI, http://www.indexmundi.com/facts/jordan/tariff-rate (last visited Sep. 23, 2013, *archived at* http://perma.cc/B7GR-ZAQD).

63. *See* Trade Policy Review: Report by Jordan, *Trade Policy Review Body*, WT/TPR/G/206 (Oct. 6, 2008), *archived at* http://perma.cc/MJL3-ZAY7.

64. Harrigan et al., *supra* note 57.

65. Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Oct. 24, 2000, U.S.-Jordan, 115 Stat. 2875, *archived at* http://perma.cc/5AKK-3C57. [hereinafter U.S.-Jordan FTA].

66. Basheer Zobi et al., *The Intra Arab Trade under the Umbrella of the Greater Arab Free Trade Area in* THE ARABIC ECONOMIC COMPLEMENTARY UNDER THE GREATER ARAB FREE TRADE AREA 2 (Amman, Jordan: Jordan University Press, 2004).

intellectual property rights,[67] competition,[68] and trade remedies,[69] as well as legislation establishing free and development zones.[70] Jordan also adopted other policies to facilitate trade and transport. For instance, Jordan Customs adopted the World Customs Organization's (WCO) Framework of Standards to Secure and Facilitate Global Trade through the "Golden List" program, which was established in 2005. In July 2008, Jordan Customs signed a Mutual Recognition Agreement with the United States Customs and Border Protection, which recognized the compatibility of the Golden List program with the U.S. C-TPAT.[71] Similarly, Jordan has expedited clearance times by using the current ASYCUDA in most of its customs houses.[72] Jordan also has an MOU with the Common Market for Eastern and Southern Africa (COMESA), as "[a] preliminary step towards full membership . . . ."[73]

At the multilateral level, and in line with accession commitments,[74] Jordan has signed the WTO Information Technology Agreement and is currently in an advanced stage of negotiations for its accession to the Government Procurement Agreement (GPA).[75] Jordan also supported the unsuccessful Doha Agenda, which aimed to remove export subsidies and allowed developing countries to designate special and sensitive products, in addition to creating a new regime for safeguards to phase out export subsidies by 2015.[76]

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67. For a list of these laws, *see Jordan (62 Texts)*, WORLD INTELLECTUAL PROP. ORG., http://www.wipo.int/wipolex/en/profile.jsp?code=JO (last updated Mar. 18, 2013, *archived at* http://perma.cc/B8LZ-MMSK).

68. *See* Competition Law No. 33/2004.

69. *See* National Production Protection Law No. 21/2004; *see also Laws*, MINISTRY OF INDUSTRY AND TRADE: THE HASHEMITE KINGDOM OF JORDAN, http://www.mit.gov.jo/Default.aspx?tabid=428 (last visited Aug. 18, 2014, *archived at* http://perma.cc/JA6B-QHWB).

70. *See* Free and Development Zones Law No. 2/2008, *archived at* http://perma.cc/E4Q3-K8HM.

71. *Id.*

72. DR. QAIS G. NOAMAN, ANTHONY PURDY, MARWAN GHARAIBEH, JOINT EVALUATION MISSION:
ASYCUDA PROGRAMME IN JORDAN 4 (2002), *archived at* http://perma.cc/9V9R-8VW3.

73. *Jordan, COMESA Sign Agreement*, COMESA TRADEHUB, Mar. 21, 2007, http://lasco.comesatradehub.com/NewsDetail.asp?news_id=344 (alteration in original).

74. *Information Technology Agreement*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm (last visited Sep. 23, 2013, *archived at* http://perma.cc/A73W-QLVR).

75. *Government Procurement Agreement/WTO*, EUROPEAN COMMISSION, http://ec.europa.eu/internal_market/publicprocurement/rules/gpa-wto/index_en.htm (last visited Sep. 23, 2013, *archived at* http://perma.cc/AA24-CXNL) ("Negotiations with China, Jordan, the Republic of Moldova and Armenia are ongoing.").

76. The Doha Agenda collapsed. *See World Trade Talks End in Collapse,* BBC NEWS, July 29, 2008, http://news.bbc.co.uk/2/hi/business/7531099.stm, *archived at* http://perma.cc/Y9C3-3V54.

In 2005, Jordan developed its 10-year National Agenda (2006-2015), a long-term development plan that primarily aims to improve the quality of life for Jordanians through the creation of income-generating opportunities, increased standards of living, and guarantees of social welfare.[77] These initiatives are to be undertaken over three consecutive phases and developed along three main dimensions: Government and Policies, Basic Rights and Freedoms, Services, Infrastructure, and Economic Sectors.[78] Under the latter dimension, the Jordanian Ministry of Industry and Trade developed a National Foreign Trade Strategy (2010-2014), which, along with the Industrial Support Programme, was approved by the Council of Ministers in May of 2010.[79] The National Foreign Trade Strategy aims to increase consistency and harmony with other policies and sectoral strategies, both those in place and under preparation, as well as ensuring that these strategies are in accordance with the goals and objectives of the National Agenda (2006-2015).[80] These strategies include the Agriculture Strategy, the National Transportation Strategy, the National Tourism Strategy, the E-commerce Strategy, the strategy of the Ministry of Environment ("approach towards the green economy"), and the National Industrial Policy.[81]

III. JORDAN'S TRADE LIBERALIZATION ARRANGEMENTS

Regionally, Jordan has the highest number of free trade and preferential market access agreements when compared to other Arab countries.[82] The table below lists Jordan's current FTAs:

Agreement	Date of Signature	Date of Entry into Force
Greater Arab Free Trade Agreement (GAFTA)[83]	Feb. 29, 1997	Jan. 1, 1998

77. THE MINISTRY OF GOVERNMENT PERFORMANCE WITHIN THE PRIME MINISTRY, *JORDAN NATION AGENDA (2006-2015) – THE JORDAN WE STRIVE FOR* 7 (2006), *archived at* http://perma.cc/5MNU-JMJT.

78. *Id.*

79. *See* الإستراتيجية الوطنية للتجارة الخارجية [National Strategy for Foreign Trade], *archived at* http://perma.cc/B84U-QUXU.

80. According to the authors' conversation with officials at the Ministry of Trade, this work is still in the making.

81. *See* DR. JAMAL MAHASNEH, JORDAN'S INDUSTRIAL POLICY, FOSTERING ENTREPRENEURSHIP THROUGH PROACTIVE POLICIES (2008), *archived at* http://perma.cc/K7FJ-M7US.

82. "Jordan, economy of," THE NEW PALGRAVE DICTIONARY OF ECON., Online Edition (Steven N. Durlauf & Lawrence E. Blume, eds. 2014), *archived at* http://perma.cc/HJ8Q-FT3B.

83. *See Greater Arab Free Trade Area (GAFTA)*, MINISTRY OF INDUSTRY & TRADE,

Jordan-EU Association Agreement	Nov. 24, 1997	May 1, 2002
Jordan-US Free Trade Area Agreement	Oct. 24, 2000	Dec. 17, 2001
Jordan-EFTA Free Trade Agreement	June 21, 2001	Jan. 1, 2002
Agadir Agreement	Feb. 25, 2004	July 6, 2006
Jordan-Singapore Free Trade Agreement	May 16, 2004	Aug. 22, 2005
Jordan-Turkey Free Trade Agreement	Dec. 1, 2009	Mar. 1, 2011
Jordan Canada Free Trade Agreement	June 28, 2009	Oct. 1, 2012[84]

As will be demonstrated below: all these agreements provide for a gradual reduction of import duties on products over a specified period of time. Most of them grant immediate tariff-free access for Jordanian products into the markets of the trading partners. However, Jordan has not yet fully benefited from all these preferential market access opportunities. In fact, there are arguments indicating that trade diversions have taken place.[85] Jordan's inability to benefit fully from trade has also been facilitated by the fact that Jordan's production capacity of any one product is limited, and by the fact that very little development has actually taken place over the last decade.[86]

The Government of Jordan continues to spearhead plans for further bilateral pacts with Iraq, Kazakhstan, and Pakistan, while also continuing to push for FTAs with MERCOSUR and Russia.[87] Moreover, in 2010, a Customs Union between Jordan and Egypt was first proposed, with the goal of establishing the Union by 2015.[88] While technical committees were established and bilateral meetings were held between the two sides, the generally known developments brought about by the Arab Spring rendered

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http://www.mit.gov.jo/Default.aspx?tabid=732 (last visited Sep. 23, 2013, *archived at* http://perma.cc/3A32-W5EG).

84. *Welcome to the Regional Trade Agreements Information System (RTA-IS)*, *supra* note 6.

85. *Jordan Foreign Trade Policy*, *supra* note 8.

86. Jordan's trade deficit is on the rise. *See Trade: Jordan trade deficit jumps to 8.6 percent in 2013*, ANSA MED, http://www.ansa.it/ansamed/en/news/sections/economics/2014/01/23/Trade-Jordan-trade-deficit-jumps-8-6-percent-2013_9949393.html (Jan. 23, 2014, *archived at* http://perma.cc/6EL6-6A32).

87. BILATERALS.ORG, http://www.bilaterals.org/?-Jordan (last visited Sep. 23, 2013, *archived at* http://perma.cc/MG8G-6F5T).

88. Agreement Free Trade Between the Government of the Hashemite Kingdom of Jordan and the Government of the Arab Republic of Egypt, Oct. 12, 1998, *archived at* http://perma.cc/76XK-FTS4.

the prospect of establishing a Customs Union, both bilaterally and at the Arab regional level, stalled indefinitely. During this period, Jordan also took part in another failed attempt at economic integration, for the same latter reasons, together with Turkey, Syria, and Lebanon, in hopes of establishing a regional free trade zone among the countries of the Mashreq.[89]

Following the internal unrest arising from the Arab Spring, Jordan's past efforts to strengthen formal economic relations with the Cooperation Council for the Arab States of the Gulf (GCC) were positively welcomed in early 2011, when Jordan's almost fifteen-year-old request to join the economic bloc was accepted by the six oil-rich Gulf states (Saudi Arabia, Kuwait, Qatar, United Arab Emirates, Oman, and Bahrain).[90] However, the course changed, and members of the GCC no longer support full Jordanian membership in the GCC.[91] Instead, the proposal diverted to an aid support initiative—unsurprisingly for the already loose alliance.[92] But in any event, in the authors' view, Jordan does not need full membership in the GCC. Jordan's core interests at this stage are the following: facilitated access to the GCC labor market, which may be treated within a separate labor movement agreement for skilled and highly skilled workers;[93] financial and monetary aid packages for alleviating the pressures on the budget deficit;

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89. SANDOR RICHTER, REGIONAL TRADE INTEGRATION IN THE MIDDLE EAST AND NORTH AFRICA: LESSONS FROM CENTRAL EUROPE (2012), *archived at* http://perma.cc/87RA-NKJ4.

90. *Jordan, Morocco to Join GCC*, KHALEEJ TIMES, May 11, 2011, http://www.khaleejtimes.com/DisplayArticle09.asp?xfile=data/middleeast/2011/May/middleeast_May233.xml&section=middleeast, *archived at* http://perma.cc/5JKY-ACNC.

91. Johan Weick, *GCC States Remain Split Over EU-Styled Union*, Feb. 12, 2014, http://gulfbusiness.com/2014/02/gcc-states-remain-split-eu-styled-union/, *archived at* http://perma.cc/ZGZ7-SVHF.

92. Walid Abdmoulah, *Arab Trade Integration: Evidence from Zero-Inflated Negative Binomial Mode*, 32 J. OF ECON. COOPERATION AND DEV. 39 (2011), *archived at* http://perma.cc/LLP6-3XE6. The GCC countries are parties to GAFTA, giving preferential access to Jordanian-originating goods. *Id.*

93. Labour Markets Integration Agreements provide that the GATS

> shall not prevent any of its Members from being a party to an agreement establishing full integration of the labour markets between or among the parties to such an agreement, provided that such an agreement: (a) exempts citizens of parties to the agreement from requirements concerning residency and work permits; [and] (b) is notified to the Council for Trade in Services.

GATS, *supra* note 11, art. 5 (internal citation omitted) (alteration added). Footnote to the Article further states that "[t]ypically, such integration provides citizens of the parties concerned with a right of free entry to the employment markets of the parties and includes measures concerning conditions of pay, other conditions of employment and social benefits." GATS, *supra* note 11, art. 5, at n.2 (alteration added). Note also here that the GATS Annex on Movement of Natural Persons Supplying Services under the Agreement clearly provides that the GATS "shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis." GATS, *supra* note 11, at 1189.

and preferential oil and gas prices.[94]

IV. JORDAN'S FREE TRADE AGREEMENTS

A. Jordan-EU Association Agreement (towards the Euromed Free Trade Area)

The European Union (EU) is a significant user of FTAs in the framework of region-to-region negotiations. The EU utilizes free trade arrangements in combination with other policies and agreements to promote economic, political and security considerations.[95] In general, the EU's bilateral and regional arrangements not only cover a range of new issues at deeper depths than traditional FTAs, but they are distinctively European in that they promote the EU model of integration, using legal linkages and tie-ins to encourage regional integration among and between the partner countries, while simultaneously pushing for harmonization with the *acquis communautaire*.[96]

The EU's "Southern Mediterranean Region" includes Jordan, Morocco, Algeria, Tunisia, Egypt, Israel, Lebanon, Syria,[97] the Palestine Authority, and Turkey.[98] The trade relations between the EU and these countries are managed by the "Euromed Partnership,"[99] which was

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94. *Jordan, GCC Approve Action Plan 2012-2017*, BREITBART, Nov. 7, 2012, *archived at* http://perma.cc/6CFZ-FHU6.

95. *See* generally DONAH BARACOL PINHAO, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, THE ASEAN-EU FREE TRADE AGREEMENT: IMPLICATIONS FOR DEMOCRACY PROMOTION IN THE ASEAN REGION, *archived at* http://perma.cc/NMQ3-UM3D.

96. Community Acquis, EUROVOC: MULTILINGUAL THESAURUS OF THE EUROPEAN UNION (last visited Aug. 19, 2014), http://eurovoc.europa.eu/drupal/?q=request&uri=http://eurovoc.europa.eu/210682, *archived at* http://perma.cc/72KG-BMC7 (*acquis communautaire* is the body of EU law contained in all legislation adopted under the treaties establishing the European Union, including regulations, directives, decisions, recommendations and opinions).

97. *Syria*, EUR. UNION: EXTERNAL ACTION (last visited Aug. 19, 2014), http://www.eeas.europa.eu/syria/index_en.htm, *archived at* http://perma.cc/EE5X-DT8J (with respect to Syria, negotiations of the Association Agreement were concluded since 2004; however, due to the political situation and position on both sides, the Agreement was never signed; Libya has had observer status since 1999).

98. *EU-Turkey Relations*, EUR. UNION: EXTERNAL ACTION (last visited Aug. 19, 2014), http://www.eeas.europa.eu/turkey/index_en.htm, *archived at* http://perma.cc/U8JL-X2YG (Turkey and the European Community concluded a *first generation* AA with it in the 1960s, which resulted in a Customs Union that entered into force on January 1, 1996, and in 1999, Turkey was officially recognized as a candidate country for full membership of the EU).

99. *Barcelona Process: Union for the Mediterranean*, EUROPA: SUMMARIES OF EU LEGISLATION (last visited Aug. 19, 2014), http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/mediterranean_partner_countries/rx0001_en.htm, *archived at* http://perma.cc/6YRY-6LCX. Also referred to as the Barcelona Process. *Id.* In

launched in 1995 as a platform for regional economic, political, and social cooperation.[100] An essential feature of the Euromed Partnership is the Association Agreements (AA) entered into between the EU and its Mediterranean Partners.[101] The table below lists the current AAs.

Country	Signed on:	Entry into force on:
Algeria	4/22/2002	9/1/2005
Egypt	6/25/2001	6/1/2004
Israel	11/20/1995	6/1/2000
Jordan	11/24/1997	5/1/2002
Lebanon	6/17/2002	4/1/2006
Morocco	2/26/1996	3/1/2000
Palestinian Authority[102]	2/24/1997	7/1/1997
Tunisia	7/17/1995	3/1/1998[103]

While the provisions of the Euromed AAs vary from one Partner to the other, they inevitably have certain common characteristics[104] including the establishment of a Free Trade Area (also known as the Barcelona Process).[105]

2008, the Partnership was re-launched as a Union for the Mediterranean (UfM) to infuse new vitality and raise the political level of the strategic relationship. *Id.*

100. *The EuroMed Partnership*, EU NEIGHBOURHOOD INFO CENTRE (last visited Aug. 19, 2014), http://www.enpi-info.eu/medportal/content/340/About%20the%20EuroMed%20Partnership, *archived at* http://perma.cc/HJT8-LDEW.

101. *Euromed – Euro Mediterranean Partnership*, THE NAT'L ARCHIVES (last visited Aug. 19, 2014), http://webarchive.nationalarchives.gov.uk/+/http://www.dti.gov.uk/europeandtrade/regional-trade/euregionaltradeagreementundernegotiation/eumediterranean/page10110.html, *archived at* http://perma.cc/A44X-PEE9.

102. Euro-Mediterranean Interim Association Agreement on Trade and Cooperation between the European Community, of the One Part, and the Palestine Liberation Organization (PLO) for the Benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the Other Part was signed in 1997. Palestine, EUR. UNION: EXTERNAL ACTION (last visited Aug. 19, 2014), http://www.eeas.europa.eu/palestine/index_en.htm, *archived at* http://perma.cc/R5P3-DZ5H.

103. *Trade Agreements*, EUROPEAN COMMISSION, http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/agreements/ (last visited Oct. 27, 2013, *archived at* http://perma.cc/U2YQ-8D43).

104. For comparison of the text of the AAs, *see* IÑIGO DE PRADA LEAL & JOANNA DEKA, EURO-MED ASSOCIATION AGREEMENTS IMPLEMENTATION GUIDE (REFLEX F) (2004).

105. *Tenth Anniversary of the Euro-Mediterranean Partnership*, EUROPA: SUMMARIES OF EU LEGISLATION (last visited Aug. 20, 2014), http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/mediterranean_partner_countries/r10156_en.htm, *archived at* http://perma.cc/32CT-44BD. The Euro-Mediterranean Partnership focuses on three main objectives: (1) creation of an area of peace and stability based on the principle of human rights and democracy; (2) creation of an area of shared prosperity through the progressive establishment of free trade between the EU and its Mediterranean partners and amongst the partners themselves; and (3) improvement of mutual understanding

AAs are organized according to three pillars.[106] The first is political, an essential element of which is the respect for human rights and democracy, an element that also provides for political dialogue.[107] The second is the economic and financial pillar, pursuant to which free trade in goods (industrial and agricultural) is to be established between the EU and the Med Partner in accordance with WTO rules over a transitional period, which may last up to 12 years.[108] Trade in services is also to be gradually liberalized.[109] They include maintenance of a high level of protection for intellectual property rights, gradual liberalization of public procurement, adjustment of provisions relating to competition, state aid and monopolies, provisions on the liberalization of capital movements, and economic cooperation in a wide range of sectors.[110] Under the third pillar of social and cultural cooperation, the AAs contain provisions on workers' rights and other social matters, as well as for the readmission of nationals and non-nationals illegally arriving in the territory of one party from that of another.[111] The AAs also provide for EU financial assistance for the Med Partner(s), except Israel.[112] The AAs also include procedures for the resolution of disputes relating to the application or interpretation of the Association Agreement.[113]

The Jordan-EU Association Agreement (AA) was signed in 1997, and it came into force on May 1, 2002 (prior to that Jordan's and the EU's (then

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among the peoples of the region and the development of a free and flourishing civil society. *Id.*

106. *See* Press Release, European Commission, EU and Central America Sign Association Agreement (June 29, 2012), *archived at* http://perma.cc/W96E-ANVN.

107. *Id.*

108. *Id.*

109. Euro-Med services and right of establishment negotiations were launched in 2006 \ and have sense stalled due to the global economic crises and the political unrest in the Med Partner countries. In 2011, bilateral negations were opened with Jordan, Morocco, Tunisia and Egypt. *Euro-Med Trade Talks in Marrakech Will Launch Services Talks and Boost FTA Plans*, EU AT UN (last visited Aug. 20, 2014), http://www.eu-un.europa.eu/articles/fr/article_5836_fr.htm, *archived at* http://perma.cc/7FDV-UCJJ; *see also* Press Release, European Commission, EU Agrees to Start Trade Negotiations with Egypt, Jordan, Morocco and Tunisia (Dec. 14, 2011), *archived at* http://perma.cc/D5V4-8FXD.

110. *See* Press Release, European Commission, Comprehensive Association Agreement between Central America and the European Union (Jun. 29, 2012), *archived at* http://perma.cc/G7KY-72GD.

111. *See id*.

112. *European Neighbourhood & Partnership Instrument*, EUROPEAN COMMISSION (last updated Oct. 17, 2012), http://ec.europa.eu/europeaid/how/finance/enpi_en.htm, *archived at* http://perma.cc/DQ4D-UPH9 (EU financial aid to the Med Partners is governed by a unilateral policy and instrument of the European Neighbourhood Policy (ENP) and the European Neighbourhood and Partnership Instrument (ENPI)).

113. *See* Press Release, European Commission, Comprehensive Association Agreement between Central America and the European Union (Jun. 29, 2012), *archived at* http://perma.cc/G7KY-72GD.

the EC) relations were governed by the 1977 Cooperation Agreement).[114] Under the AA, an Association Council (headed by Jordan's Minster of Foreign Affairs) is established, as the political arm for cooperation with the power to amend certain provisions or arrangements (such as progressive tariff dismantlement schemes and amendments to the rules of origin (ROO)).[115] An Association Committee (headed by Jordan's Secretary General of the Ministry of Planning and International Cooperation) is also established as the technical arm for cooperation in addition to an institutionalized Economic Dialogue.[116]

The EU is also pursuing the establishment of a more efficient dispute settlement mechanism for the trade provisions of the Association Agreements.[117] In this context regional negotiations were formally launched at the fifth Euro-Med Trade Ministerial Conference held in Marrakech on March 24, 2006.[118] Jordan signed a Dispute Settlement Protocol in Brussels in June 2011, which created a dispute settlement process inspired by the WTO Dispute Settlement Understanding, replacing the less reliable diplomatic approach contained in Article 101 of the Jordan-EU AA, though only as related to trade issues.[119]

At the ninth Jordan–EU Association Council meeting held in Brussels on October 26, 2010, the EU agreed to grant Jordan the "Advanced Status," a designation that indicates closer ties in all areas; this includes deeper integration, which goes beyond removing tariffs to cover other issues of economic integration, investment, government procurement, and regulatory issues.[120] Negotiations for the further liberalization of trade in services pursuant to article 40 of the AA will be embedded in the context of a comprehensive free trade area.[121] Additionally, these negotiations will pursue the Agreement on Conformity Assessment and Acceptance

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114. *Jordan*, COUNTRIES AND REGIONS (last updated May 13, 2014), http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/jordan/, *archived at* http://perma.cc/5DFA-R3YV.

115. Euro-Mediterranean Agreement Establishing an Association Between the European Community and its Member States, of the One Part, and the Hashimite Kingdom of Jordan, of the Other Part, Eur. Communities-Jordan, Nov. 24, 1997, O.J. (L129) 15/05/2002, *archived at* http://perma.cc/E97J-8ZLC [hereinafter Euro-Mediterranean Agreement].

116. *Id.* arts. 61, 92.

117. *Id.* art. 97.

118. *See* 5TH EUROMED TRADE MINISTERIAL CONFERENCE CONCLUSIONS (2006), *archived at* http://perma.cc/PQD5-2MBZ.

119. European Council TV Newsroom, *Signing Ceremony of the EU-Jordan Dispute Settlement Protocol*, (Nov. 2, 2011), http://tvnewsroom.consilium.europa.eu/video/signing-ceremony-of-the-eu-jordan-dispute-settlement-protocol, *archived at* http://perma.cc/K3M8-WXLP.

120. Statement by the European Union, *Ninth Meeting of the EU-Jordan Association Council, Statement by the European Union* (Oct. 26, 2010), 15539/10, PRESSE 288 *archived at* http://perma.cc/HEX9-T53S.

121. *See generally* Euro-Mediterranean Agreement, *supra* note 115.

(ACAA), which is an agreement entailing regulatory convergence in line with EU standards on industrial products.[122]

On the sectoral level, Jordan and the EU have entered into a number of bilateral arrangements to enhance cooperation in energy, aviation, and air management.[123] Furthermore, towards the achievement of the Euromed Free Trade Area, Jordan has entered into bilateral agreements with all the Euromed partners.[124] The agreements with the EU cover issues such as intellectual property, competition, state aid, government procurement and dispute settlement, and related institutional provisions at the political and technical levels that are central to the management and progression of the partnerships.[125] In this Article we have elected to offer a snapshot of the Rules of Origin (ROOs) and Services.

1. Rules of Origin (ROOs)

ROOs have an important role within FTAs. Simply put, ROOs specify the origin of traded goods, thus countries can determine the goods which should or should not benefit from free trade rules. This eligibility mechanism would prevent "Trade Deflection."[126] In the context of the

122. *Agreements on Conformity Assessment and Acceptance of Industrial Products (ACAA)*, EUROPEAN COMMISSION (last updated Oct. 28, 2013), http://ec.europa.eu/enterprise/policies/single-market-goods/international-aspects/acaa-neighbouring-countries/index_en.htm, *archived at* http://perma.cc/T6AJ-R75H.

123. Press Release, European Commission, Developing External Energy Policy for the EU (Nov. 30, 2007), *archived at* http://perma.cc/3HN2-5S6Z. These are the 2007 Joint Declarations on Energy Cooperation that provide a basis for enhancing energy relations and include a possibility for cooperation on nuclear safety: the 2008 Horizontal Aviation Agreement as a first step to integrate Jordan further into the European air transport market, pursuant to which Jordan and the EU, on December 15, 2010 signed a Comprehensive Air Services Agreement, which will establish a "Euro Mediterranean Aviation Area" based on common rules and a liberalization of the air markets. Press Release, European Community Signs a Science & Technology Cooperation Agreement with Jordan (Nov. 30, 2009), *archived at* http://perma.cc/4LGZ-YSFM. Also the 2009 Science and Technology (S&T) Cooperation Agreement will help structure and enhance S&T cooperation in areas of common interest. *See* Press Release, Europa, EU and Jordan Sign Air Transport Agreement (Dec. 15, 2010), *archived at* http://perma.cc/C43A-4829.

124. *Jordan*, *supra* note 114.

125. *Jordan-EU Association Agreement Overview: Executive Summary*, Ministry of Planning & Int'l Cooperation (last visited Aug. 20, 2014), http://www.mop.gov.jo/pages.php?menu_id=228, *archived at* http://perma.cc/GA93-K7MA.

126. The creation of preferential trade areas "normally leads to the expansion of trade between its members, but economic theory postulates that a share of the increased trade experienced by participants is merely due to a redirection of their trade, and not increased trade due to the arrangement. This effect can be demonstrated convincingly in models. In practice, trade diversion has always been very difficult to isolate because of other factors. These include technological innovation, global reduction in tariffs, changes in investment policies, etc." *See* DICTIONARY OF TRADE POLICY TERMS, *supra* note 1.

Euromed partnership, ROOs are central to the establishment of the Euromed free trade area, and the AAs include agreed-upon ROOs in the form of Protocols attached to each agreement.[127] Initially, however, the AA ROO protocols of the Med Partners were not harmonized. "For example, the ROOs applicable to the [AAs] with Egypt and Jordan were virtually identical to the Pan-European rules, whereas the agreements with Morocco and Tunisia were slightly different for certain product categories."[128]

The Pan-European ROOs model emerged in the 1990s as an effort to harmonize the origin rules embedded in the EU's different/various FTAs.[129] In 1994, the European Commission (EC) submitted a report presenting a strategy for harmonizing the preferential ROOs to reduce the underutilization of trade preferences and to maximize the gains from trade in a European context.[130] At the Euro-Med Trade Ministerial Meeting held

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127. PATRICIA AUGIER ET AL., THE EU-MED PARTNERSHIP AND RULES OF ORIGIN 1 (2003), *archived at* http://perma.cc/MT8Z-B8Y9 ("All preferential trading arrangements have detailed protocols on rules of origin").

128. *Id.* at 1.1.

129. Teruo Ujiie, *Rules of Origin: Conceptual Explorations and Lessons from the Generalized System of Preferences* (Asian Dev. Bank, ERD, Working Paper No. 89, 2006), *archived at* http://perma.cc/RHK8-G72U. The EU is the only regional bloc that also adopted a common set of non-preferential ROOs. *System of Pan-Euro-Mediterranean Cumulation*, EUROPEAN COMMISSION (last updated July 27, 2014), http://ec.europa.eu/taxation_customs/customs/customs_duties/rules_origin/preferential/article_783_en.htm, *archived at* http://perma.cc/3PM7-JLYD. "Goods whose production involved more than one country shall be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose, and resulting in the manufacture of a new product or representing an important stage of manufacture. This basic concept is interpreted into process criterion, percentage criterion, or combination of these two criteria in determining the country of origin. The importance of the EU non-preferential rules of origin lay down specific rules on a product-specific basis reflecting the EU's interest such as radios, televisions, tape recorders, integrated circuits, photocopiers, and textiles and clothing." *Id.* at 16. The EU now applies its MFN tariff to only nine trading partners. These include: Australia, Canada, Chinese Taipei, Hong Kong, China, Japan, Korea, New Zealand, Singapore, and the US. *Third Euromed Trade Ministerial: Stepping Stones Towards Greater Regional Integration*, EUROPEAN COMMISSION (last updated July 4, 2003), http://trade.ec.europa.eu/doclib/events/index.cfm?id=179, *archived at* http://perma.cc/S2QN-STS6.

130. Communication from the Commission to the Council Concerning the Unification of Rules of Origin in Preferential Trade Between the Community, the Central and East European Countries and the EFTA Countries (Nov. 30, 1994), *archived at* http://perma.cc/3A7K-UDPF. The European Council adopted the proposal in December 1994. By 1997, harmonized protocols replaced the preexisting ones, covering an area composed of the EU, the European Economic Area (EEA), Switzerland and the associated Central and Eastern European Countries (CEEC). *EFTA through the Years*, EFTA (last visited Aug. 20, 2014), http://www.efta.int/about-efta/history, *archived at* http://perma.cc/KJP8-LRQQ. The EU's decision to harmonize its preferential ROOs extended to the FTAs with the Med Partner countries; this approach was endorsed in March 2002 at the EU-Mediterranean Trade Ministerial Conference held in Toledo where, in

in Palermo on July 7, 2003, the decision was taken to replace the ROOs protocols contained in the previously adopted AAs, with the "Pan-Euro-Mediterranean protocol on rules of origin."[131]

Since then, the Pan-Euro-Med Protocol has been available for the progressive adoption by the Med Partners.[132] Jordan adopted the Protocol in 2006.[133] The creation of the Pan-Euro-Med ROOs, through the extension of the Pan-Euro zone to the Med Partners (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia, the Palestinian Authority, and the Faroe Islands), allows for diagonal cumulation between these territories.[134] This means that goods consisting of components made in more than one participating country are treated in the same way as domestically produced goods. In other words, material can be sourced and manufactured in a number of countries within the Pan-Euro-Med cumulation area without the finished product losing the benefit of preferential customs tariffs when it enters the country of destination.[135] However, the generalization of the system of diagonal cumulation requires the fulfillment of the following three conditions: (i) FTAs with identical ROOs should be in place between both the EU and the Southern Mediterranean countries; (ii) among these countries, all administrative procedures have to be harmonized; and (iii) all draw-back provisions should be withdrawn.[136]

Additionally, materials and products must have acquired originating status by the application of rules of origin identical to those given in this Protocol.[137] The conditions aim at ensuring that a set of harmonized

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principle, it was agreed to extend the Pan-European system of cumulation of rules of origin to the Barcelona group of countries. Press Release, Conclusions of the Presidency - Euro-Mediterranean Ministerial Conference on TRADE Toledo, 19 March 2002 (Mar. 19, 2002), *archived at* http://perma.cc/9P67-SEHU.

131. Council Regulation No. 1617/2006, 2006 O.J. (L 300) 5 (EC) *archived at* http://perma.cc/WLE6-2WXX.

132. Council Decision 9526/5 preamble, 2002 O.J. (L 129) 3, *archived at* http://perma.cc/728Y-6DW4 ("In accordance with the Joint Declaration on Article 28 of the Agreement, the extension of the system of cumulation is desirable making it possible to use materials originating in the Community, Bulgaria, Romania, Iceland, Norway, Switzerland (including Liechtenstein), the Faeroe Islands, Turkey or in any other country which is a participant in the Euro-Mediterranean partnership, based on the Barcelona Declaration adopted at the Euro-Mediterranean Conference held on 27 and 28 November 1995, in order to develop trade and promote regional integration").

133. *See generally*, *European Commission, Taxation and Customs Union*, EUROPEAN COMMISSION (last updated July 31, 2014), http://ec.europa.eu/taxation_customs/, *archived at* http://perma.cc/RJ2A-HQLV.

134. Council Decision 9526/5, *supra* note 132.

135. *See* Explanatory Notes Concerning the Pan-Euro-Mediterranean Protocols on Rules of Origin, 2007 (C 83) 1, *archived at* http://perma.cc/K6N8-JFTJ.

136. *Common Provisions*, EUROPEAN COMMISSION (last updated July 27, 2014), http://ec.europa.eu/taxation_customs/customs/customs_duties/rules_origin/preferential/article_774_en.htm#no_drawback_rule, *archived at* http://perma.cc/3KDN-L2UY.

137. *See* Regional Convention on Pan-Euro-Mediterranean Preferential Rules of Origin, June 15, 2011, *archived at* http://perma.cc/5W2Z-RT8W.

preferential ROOs, i.e., the Pan-Euro-Med ROOs, is adopted by all partner countries, which will allow for the implementation of cumulation among several of these partners, thereby paving the way for the establishment of the Euro-Med Free Trade Area.[138]

At the region-to-region level, the EU has introduced the Regional Convention on preferential Pan-Euro-Med rules of origin that was opened for signature as of June 15, 2011.[139] This Convention is to replace the network of bilateral protocols, whereby the bilateral FTAs, whether those of the EU and its different partners (which, according to the EU website, number about sixty)[140] or those between its partners, would no longer contain an annex on ROOs, but would instead incorporate by reference, the rules of the Regional Convention.[141] Indeed, many of the Med Partner countries, including Jordan, have long been calling for the simplification of the Pan-Euro-Med rules of origin system, which remains too complex,[142] accordingly, all Med Partner countries have signed the Regional Convention, including Jordan.[143]

Jordan's utilization of the benefit afforded by the ROOs Protocol remains below expectation, due to a number of factors, such as the lack of sufficient businesses that are girded to take advantage of the ROOs regime.[144] The challenge, therefore, is to develop the local capacities as well as the industrial linkages, whether at the national or regional level, to be

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138. *See* Joseph F. Francois et al., *European Union – Developing Country FTAs: Overview and* Analysis, 33 World Development 1545 (2005), *archived at* http://perma.cc/9HMV-NEAS. Other significant FTAs that include the Pan-Euro-Med ROOs are: the Agadir Agreement (between Egypt, Jordan, Morocco and Tunisia), Egypt – Turkey, Israel – EFTA, Israel – Turkey; Jordan – Israel (Agreement of Trading and Economic Cooperation between the Hashemite Kingdom of Jordan and the Government of the State of Israel), Jordan – Turkey, Jordan-EFTA, Morocco – Turkey and Tunisia – Turkey. Regional Convention on Pan-Euro-Mediterranean Preferential Rules of Origin, June 15, 2011, *archived at* http://perma.cc/5W2Z-RT8W.

139. *System of Pan-Euro-Mediterranean Cumulation*, *supra* note 129.

140. Regional Convention on Pan-Euro-Mediterranean Preferential Rules of Origin, at preamble, June 15, 2011, *archived at* http://perma.cc/5W2Z-RT8W.

141. *Id.*

142. STEFANO INAMA, RULES OF ORIGIN IN INTERNATIONAL TRADE 555 (2009).

143. *See European Commission Taxation and Customs Union*, EUROPEAN COMMISSION, www.ec.europa.eu/taxation_customs/ (last visited Oct. 14, 2013, *archived at* http://perma.cc/5V5A-BFFS); *see also* Regional Convention on Pan-Euro-Mediterranean Preferential Rules of Origin, June 15, 2011, *archived at* http://perma.cc/5W2Z-RT8W.

144. It should be noted here that this paragraph only addresses the issue concerning the Pan-Euro-Med ROOs and does not touch upon the overall trade relations between Jordan and Israel, such as the 1997 agreement establishing the Qualified Industrial Zones (QIZ), were in 2004 fifty manufacturing plants created 45,000 new jobs and increased Jordan's exports to the US, while Israeli inputs into production exported to America through the QIZs totaled $65 million. Deputy Prime Minister Ehud Olmert, *Israel's Redeployment and Economic Relations with Its Arab Neighbors*, 3 JERUSALEM ISSUE BRIEF (2004), *archived at* http://perma.cc/YP8P-YLWJ.

able to effectively penetrate EU markets. This requires long-term planning and covering issues including TBTs to marketing. Simply put, Jordan's industries need to develop and modernize to be able to meet the demands of the sophisticated and complex EU markets. The following visuals show the types of goods that do not benefit from Jordan's preferential ROOs, with the first showing volume in million Jordanian Dinars.[145]

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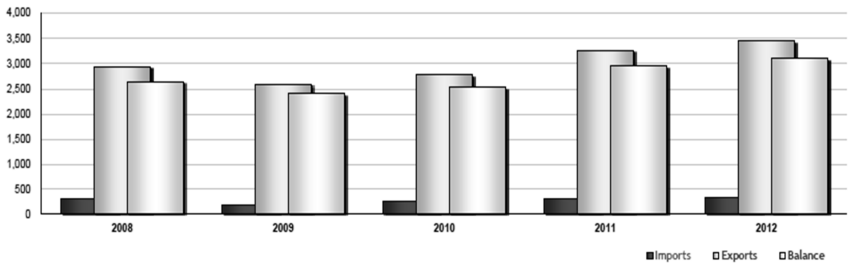

SITC Rev.3 (UN, WTO/ITS) & AMA/NAMA** (WTO) Product Groups	2008		2010		2012		Share of Partner in EU Imports (2012)
	Millions euro	%	Millions euro	%	Millions euro	%	
0000 - Total	298	100.0%	249	100.0%	342	100.0%	0.0%
1000 - Primary products	95	31.9%	81	32.7%	147	43.0%	0.0%
1100 - Agricultural products (Food (incl. Fish) & Raw Materials)	17	5.7%	19	7.5%	23	6.8%	0.0%
1200 - Fuels and mining products	78	26.2%	63	25.2%	124	36.2%	0.0%
2000 - Manufactures	189	63.4%	139	55.7%	164	48.1%	0.0%
2100 - Iron and steel	0	0.0%	0	0.0%	0	0.1%	0.0%
2200 - Chemicals	105	35.3%	63	25.4%	97	28.4%	0.1%
2300 - Other semi-manufactures	14	4.6%	10	3.9%	8	2.3%	0.0%
2400 - Machinery and transport equipment	45	15.0%	38	15.1%	32	9.3%	0.0%
2410 - Office and telecommunication equipment	6	2.0%	5	1.9%	5	1.5%	0.0%
2420 - Transport equipment	23	7.6%	10	4.1%	12	3.6%	0.0%
2430 - Other machinery	16	5.4%	23	9.1%	14	4.2%	0.0%
2500 - Textiles	1	0.5%	3	1.0%	1	0.2%	0.0%
2600 - Clothing	10	3.5%	10	3.8%	10	3.0%	0.0%
2700 - Other manufactures	14	4.5%	16	6.5%	16	4.7%	0.0%
3000 - Other products	13	4.3%	28	11.4%	27	7.8%	0.0%
Agricultural Products (AMA)	17	5.7%	18	7.4%	22	6.5%	0.0%
Non-Agricultural Products (NAMA)	276	92.4%	226	90.7%	310	90.7%	0.0%
Other Products	6	1.9%	5	1.9%	10	2.8%	0.1%

2. Services

The EU-MED agreements contain rendezvous clauses for the liberalization of trade in services.[147] The Jordan-EU Association Agreement contains a more sophisticated chapter on "services and right of establishment" vis-a-vis other Med Partners' AAs, which are generally limited to the provision on simply pursuing services liberalization.[148] This Article holds that the Jordan-EU's AA approach to services liberalization

145. EUROPEAN COMMISSION, EUROPEAN UNION, TRADE IN GOODS WITH JORDAN (2014), *archived at* http://perma.cc/GJH4-Y2WY [hereinafter TRADE IN GOODS WITH JORDAN]; *Jordan*, *supra* note 114.

146. TRADE IN GOODS WITH JORDAN, *supra* note 145.

147. EUROPEAN COMMISSION, EURO-MED ASSOCIATION AGREEMENTS: IMPLEMENTATION GUIDE REFLEX F 61-74 (2004), *archived at* http://perma.cc/7UY5-8JSY; *see also* EUROPEAN COMMISSION, UPDATE: INTERIM ECONOMIC PARTNERSHIP AGREEMENTS (2007), *archived at* http://perma.cc/DL2U-NTC6.

148. *See Agreements*, EUROPEAN COMMISSION, http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/agreements/#_mediterranean (last visited Oct. 14, 2013, *archived at* http://perma.cc/ABG-6QDV).

follows from the GATS, as it covers the four known modes of supply, but it also adds the "right of establishment."[149] This is an example of how the EU approach differs from the WTO's four modes formula of economic integration.[150] By using the "right of establishment" approach, the EU has effectively introduced different forms of investment, including acquisitions, mergers, and takeovers, to non-services activities (such as commerce or manufacturing).[151]

Pursuant to the aforementioned rendezvous clause of the AAs (article 40 of the Jordan-EU AA) at the Euromed Trade Ministerial Conferences in Palermo on July 7, 2003, Ministers agreed on establishing a Framework Protocol for the liberalization of trade in services common to all Euromed Partners.[152] Throughout 2006–2008, a number of negotiation rounds were held.[153] Following the Ministers' decision at the last Euromed Trade Ministerial Conference in Brussels on December 9, 2009,[154] bilateral negotiations on the liberalization of trade in services and the right of establishment were launched with Egypt, Morocco, and Tunisia, and with Israel in July.[155] Since then, a number of informal consultations have taken place between Jordan and the EU, including the development of a "Scoping Paper" addressing the scope of issues to be covered by the future negotiation.[156]

B. The Agadir Agreement

With EU support, Egypt, Jordan, Morocco, and Tunisia entered into the Arab Mediterranean Free Trade Agreement (the Agadir Agreement), a

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149. *The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited Oct. 12, 2013, *archived at* http://perma.cc/JL9K-9UWP).

150. For WTO's modes of service providing *see Services: Rules for Growth and* Investments, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm (last visited Aug. 25, 2014, *archived at* http://perma.cc/96FW-KUEL).

151. *See 6.5.1. Right of establishment in the EU*, EUROPEDIA, http://www.europedia.moussis.eu/books/Book_2/3/6/05/1/?all=1 (last visited Aug. 25, 2014, *archived at* http://perma.cc/P742-8TLF).

152. Conclusions of the Euro-Mediterranean Trade Ministerial Conference, July 7, 2003, EUROPA, http://trade.ec.europa.eu/doclib/docs/2003/september/tradoc_113840.pdf, *archived at* http://perma.cc/G6W-B4ZF.

153. Press Release, 8th Union for the Mediterranean Trade Ministerial Conference, Dec. 9, 2009, EUROPA, http://europa.eu/rapid/press-release_MEMO-09-547_en.htm, *archived at* http://perma.cc/R5MT-7GNZ.

154. *Id.*

155. *Id.*

156. Press Release, ENP Package, Country Progress Report – Jordan, May 15, 2012, EUROPA, http://europa.eu/rapid/press-release_MEMO-12-336_en.htm?locale=en, *archived at* http://perma.cc/AXL3-FQ43.

regional plurilateral trade agreement.[157] In February 2004, this FTA was signed in Rabat and entered into force in July 2006.[158] The Agreement creates an integrated market of over "100 million people with a combined domestic product of nearly €150 billion."[159] It aims at the total elimination of customs tariffs, the harmonization of laws in economic matters, invigoration of trade exchanges, promotion of industries, stimulating economic activities and employment, and improving productivity and living standards.[160] Moreover, the Agreement covers services.[161]

The ROOs adopted by the Agadir Agreement are the Pan-Euro-Med ROOs, which allow for diagonal cumulation between the Agadir countries and the EU.[162] The Agadir ROOs protocol is identical to the Pan-Euro-Med protocols of the AAs, save in one aspect related to the government agency authorized to issue the proof of origin.[163] Article (16) of Annex II to the Agadir Agreement provides that the Certificate of Origin (CO) may be issued by the "customs authority or the relevant authorized government authority," while under the Pan-Euro-Med procedure, such proof of origin may only be issued by the customs authority.[164]

C. Jordan-EFTA FTA

The FTA between Jordan and the European Free Trade Association (EFTA) (composed of Iceland, Liechtenstein, Norway, and Switzerland) was signed in June 2001 and entered into force in September 2002.[165] This Agreement covers goods trade and contains a 12-year translational period.[166] Hence, by 2014, all customs duties on trade in industrial goods and fish and other marine products will be eliminated, excluding some

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157. *See Greater Arab Free Trade Area (GAFTA)*, *supra* note 83. *See* Tomer Broude, *Regional Economic Integration in the Middle East and North Africa: A Primer*, 2009 EUR. Y.B. OF INT'L ECON. L. 1, 6-7 (2009).

158. Agadir Technical Unit, Workshop on Challenges and Opportunities for the Textiles and Clothing Sector in the Euro-Mediterranean Region (Mar. 12, 13, 2012), *archived at* http://perma.cc/FF5E-Z7QE; it should also be noted that this agreement has not been notified to the WTO. *Id*.

159. *Commissioner Patten's Speech on the Signature of the Agadir Agreement at the EP*, EUROPA (Feb. 26, 2004), http://www.eu-un.europa.eu/articles/en/article_3243_en.htm, *archived at* http://perma.cc/5C9D-D4BH.

160. *Id.*

161. *Id.*

162. *Id.*

163. *See* The Agadir Agreement, at Annex II, Feb. 25, 2004.

164. *Id.*; Euro-Mediterranean Agreement, *supra* note 115.

165. *Jordan*, EFTA, http://www.efta.int/free-trade/free-trade-agreements/jordan (last visited Aug. 28, 2014, *archived at* http://perma.cc/ABG6-NJ2W).

166. Agreement Between the EFTA States and the Hashemite Kingdom of Jordan art. 22.5, June 21, 2001, *archived at* http://perma.cc/42W2-X6UA [hereinafter EFTA-Jordan Agreement].

targeted products such as beverages and tobacco on which tariff protection levels are generally maintained.[167] The Agreement contains bilateral agreement on agricultural products between Jordan and the individual EFTA states.[168]

With respect to ROOs incorporated into the Jordan-EFTA FTA, they are the standardized European rules of the Pan-Euro-Med ROOs, granting diagonal cumulation in the same manner as the Agadir Agreement.[169]

Article 28 on services and investment provides that, in the context of the Euro-Med integration, the parties will cooperate, with the aim of services liberalization and promoting investment.[170] However, services negotiations have gone nowhere thus far.[171]

D. Jordan-Turkey FTA

The Jordan-Turkey FTA was signed in December 2009 and entered into force in March 2011.[172] This Agreement, also applying the Pan-Euro-Med ROOs, covers goods trade and initiates a gradual reduction of tariffs over twelve years.[173] However, the FTA contains quotas and an extensive negative list of goods not benefiting immediately from the agreed preferential tariff.[174] Article 36 of the Agreement envisions the possible future liberalization of trade in services, taking into account the GATS as well as ongoing negotiations within the WTO.[175]

Article 48 provides for a dispute settlement procedure that is political in nature but includes the establishment of a three-member tribunal and offers the complaining party the right to take measures.[176] The article also foresees the development of detailed rules for this arbitration tribunal procedure.[177]

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167. *See* Decision of the EFTA-Jordan Joint Committee, at annex to protocol B, Apr. 20, 2012, *archived at* http://perma.cc/XV3-HE69.

168. *See* EFTA-Jordan Agreement, *supra* note 166, art. 13.

169. EFTA-Jordan Agreement, *supra* note 166, art. 4.

170. EFTA-Jordan Agreement, *supra* note 166, art. 28.

171. Agreement on the European Economic Area, Mar. 17, 1993, 37 I.L.M. 572, *archived at* http://perma.cc/F6NS-4AT3.

172. The Association Agreement Establishing a Free Trade Area Between the Hashemite Kingdom of Jordan and the Republic of Turkey, Dec. 1, 2009, *archived at* http://perma.cc/K6MG-W5XM.

173. *Id.* art. 2.

174. *Id.* Annex II.

175. *Id.*

176. *Id.* art. 25.

177. *Id.*

E. Greater Arab Free Trade Agreement (GAFTA)

At the Arab regional level, Jordan is a member of the Greater Arab Free Trade Agreement (GAFTA), which covers full liberalization of trade in goods among the seventeen Arab League member states (Algeria, Bahrain, Egypt, Iraq, Kuwait, Lebanon, Libya, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen).[178]

With regard to the ROOs, GAFTA states decided to adopt more stringent origin rules stemming from the desire, as well as the need, to confront trade deflection, and these rules are envisioned to be part of the work plan for establishing the free trade area.[179] The adoption of GAFTA ROOs Protocols is based on the Pan-Euro-Med Model.[180]

Regarding services, in 2003, the Arab League Social and Economic Council approved Draft General Provisions.[181] However, except for Jordanian-Egyptian bilateral offers to liberalize three services sectors (computer, education, and telecommunications), little progress has been made.

F. Jordan-US FTA

The Jordan-US FTA was signed in October 2000 and entered into force in December 2001.[182] The Agreement was the United States' fourth free trade agreement and its first ever with an Arab state.[183] The FTA provides for significant and extensive liberalization across a wide spectrum of trade issues; it eliminates all tariff and non-tariff barriers to bilateral trade in virtually all industrial goods and agricultural products within ten years.[184] Electronic commerce is explicitly covered in the Joint Statement on Electronic Commerce, whereby both parties are committed to promoting a

178. Javad Abedini & Nicolas Péridy, *The Greater Arab Free Trade Area (GAFTA): An Estimation of the Trade Effects* 23 J. OF ECON. INTEGRATION 848 (2008).

179. For text of the GAFTA Declaration *see Greater Arab Free Trade Area (GAFTA)*, *supra* note 83.

180. THE ARAB NGO NETWORK FOR DEVELOPMENT, FREE TRADE AGREEMENTS IN THE ARAB REGION 8 (2006), *archived at* http://perma.cc/WT39-YUBY.

181. *Id.* at 15.

182. U.S.-Jordan FTA, *supra* note 65.

183. Abdul Quader Shaikh, *Bilateral Accords and U.S. Trade with the Middle East: A Track Record of Success*, INT'L TRADE ADMIN, http://trade.gov/press/publications/newsletters/ita_0408/middle-east_0408.asp (last visited Aug. 28, 2014, *archived at* http://perma.cc/6F44-6T79) (since then, the US has entered into an FTA with Morocco, Bahrain, and Oman).

184. *See* Press Release, The White House: Office of the Press Secretary, Fact Sheet: U.S.-Jordan Free Trade Agreement (Sept. 28, 2001), *archived at* http://perma.cc/LJ22-AFC4; *see* U.S.-Jordan FTA, *supra* note 65.

liberalized trade environment for electronic commerce that should encourage investment in new technologies and stimulate the innovative use of networks to deliver products and services.[185] "Both countries agreed to avoid imposing customs duties on electronic transmissions, [to avoid] imposing unnecessary barriers to market access for digitized products, and [to avoid] impeding the ability to deliver services through electronic means."[186] A separate Memorandum of Understanding on Transparency in Dispute Settlement was also established.[187] The Agreement also deals, *inter alia*, with intellectual property, trade in services, electronic commerce, government procurement and dispute settlement, as well as environmental and labor issues.[188] In this Article, the novel issue of labor and the issue of rules of origins will be highlighted.

1. Labor

Specific legal features of the Agreement include labor provisions within the body of the FTA, which not only reaffirm the parties' respect and enforcement of core labor standards, but also support this reaffirmation by a dispute settlement process.[189] In May 2006, the National Labor Committee issued a report[190] stating that foreign workers in the Qualifying Industrial Zones (QIZ) were forced to work long and arduous shifts in unhealthy conditions while being paid below-poverty wages.[191] At the same time, employers were withholding workers' paychecks and passports, in effect

185. *See* Press Release, The White House: Office of the Press Secretary, Fact Sheet: U.S.-Jordan Free Trade Agreement (Sept. 28, 2001), *archived at* http://perma.cc/LJ22-AFC4.

186. MONTAGUE J. LORD, ECONOMIC IMPACT AND IMPLICATIONS FOR JORDAN OF THE U.S. – JORDAN FREE TRADE AGREEMENT (2001), *archived at* http://perma.cc/5CN5-LJEQ.

187. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, MEMORANDUM OF UNDERSTANDING ON TRANSPARENCY IN DISPUTE SETTLEMENT UNDER THE AGREEMENT BETWEEN THE UNITED STATES AND JORDAN ON THE ESTABLISHMENT OF A FREE TRADE AREA (2000), *archived at* http://perma.cc/H3JH-38S2.

188. *Jordan FTA*, OFFICE OF THE US TRADE REP., http://www.ustr.gov/trade-agreements/free-trade-agreements/jordan-fta/final-text (last visited Aug. 28, 2014, *archived at* http://perma.cc/YT3V-Q2PN). Jordan also has an FTA with Singapore (2004) which contains agreed origin determination criteria. Agreement Between the Government of the Hashemite Kingdom of Jordan and the Government of the Republic of Singapore on the Establishment of a Free Trade Area, Jordan-Sing., May 16, 2004, *archived at* http://perma.cc/8WYE-EP24.

189. U.S.-Jordan FTA, *supra* note 65, art. 6.

190. *See* AFL-CIO, Home Page, AFL-CIO, http://www.aflcio.org (last visited Aug. 28, 2014, *archived at* http://perma.cc/MDM-433C).

191. *U.S. Jordan Free Trade Agreement Descends into Human Trafficking & Involuntary Servitude*, INSTITUTE FOR GLOBAL LABOUR AND HUMAN RIGHTS (May 2006), http://www.globallabourrights.org/reports?id=0619, *archived at* http://perma.cc/5MMY-Y6EQ.

making them virtual prisoners and slave workers.[192] Put differently, that report and others like it accused Jordan of ignoring its responsibilities under the FTA and claim the United States has done little to nothing to enforce the labor provision of the Agreement.[193]

The issue of trade and core labor standards has been the subject of intense debate both among and within certain WTO member governments.[194] The proposal to bring labor standards within the WTO rules and disciplines is a controversial one, in which no clear consensus exists among the WTO Members.[195] In the alternative, proponents of the WTO proposal to include core labor standards within the WTO's competences have moved to build labor provisions that aim to promote and protect workers' rights into the fabric of their trade agreements.[196] Article 6 of the Jordan-US FTA is such a provision.[197] The obligations placed on Jordan are two-fold: the first is to adopt or modify its domestic labor laws and regulations in line with Jordan's international obligations and internationally recognized core labor rights.[198] The second is to enforce its labor laws and not to relax domestic legal enforcement in favor of encouraging trade with the other party.[199]

The FTA allows all violations of the Agreement, including labor rights, to be remedied through "appropriate and commensurate

192. *See* Bremen Donovan, *The Made and the Madame: Rights for Migrant Workers in Jordan*, NAMATI: INNOVATIONS IN LEGAL EMPOWERMENT (Feb. 18, 2014), http://www.namati.org/entry/the-maid-and-the-madame-rights-for-migrant-workers-in-jordan/, *archived at* http://perma.cc/YM63-8NXZ.

193. *Hashemite Kingdom of Jordan*, HUMAN TRAFFICKING & MODERN-DAY SLAVERY, http://gvnet.com/humantrafficking/Jordan.htm (last visited Aug. 29, 2014, *archived at* http://perma.cc/G9Q4-FSQM).

194. *Trade and Labour Standards Subject of Intense Debate*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm (last visited Aug. 29, 2014, *archived at* http://perma.cc/WL54-EAUB).

195. *Id.* (at the first WTO Ministerial Conference in Singapore in December 1996, the issue was taken up and addressed in the Ministerial Declaration. At Singapore, Ministers stated: "We renew our commitment to the observance of internationally recognized core labor standards. The International Labor Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labor standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.").

196. *See generally* MARY JANE BOLLE, OVERVIEW OF LABOR ENFORCEMENT ISSUES IN FREE TRADE AGREEMENTS (2014), *archived at* http://perma.cc/L5HP-73VK.

197. U.S.-Jordan FTA, *supra* note 65, art. 6.

198. U.S.-Jordan FTA, *supra* note 65, art. 6.

199. U.S.-Jordan FTA, *supra* note 65, art. 6.

measure[s]."[200] The decision to proceed with an investigation, consultation, or arbitration; assess a penalty; or order the imposition of sanctions is made by the Agreement's state parties.[201] Under the Agreement, state parties can submit allegations of labor rights violations either (i) in ministerial consultations leading to non-binding recommendations,[202] or (ii) applying dispute settlement procedures[203] which may ultimately result in the imposition of trade sanctions, such as placing or raising quotas and tariffs.[204] The role of non-governmental parties is confined to the presentation of their views during governmental consultations on the Agreement and the submission of *amicus curiae* briefs to "dispute settlement panels" convened by the parties to address allegations of non-compliance.[205] Article 6(4)(b) of the Agreement states:

> The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.[206]

This subparagraph asserts the right of each state party to make decisions as such party may find appropriate in its discretion, concerning, *inter alia,* the adoption of procedures to maintain the internationally accepted standards. In response to the above-referenced report, the Jordanian Ministry of Labor took emergency administrative measures and put into place a strategic plan to ensure the enforcement of the labor laws and regulation in the Qualified Industrial Zones (QIZs) in Jordan.[207]

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200. Agreement Between the United States of America and The Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U,S.-Jordan, Oct. 24, 2000 [hereinafter U.S.-Jordan Agreement], *archived at* http://perma.cc/7U7M-4QR8. The JUSFTA establishes a Joint Committee to supervise the proper implementation of the agreement and to review the trade relationship between the parties. *Id.* art. 15.

201. *Id.*

202. *See id.* art. 16.

203. *See id.* art. 17.

204. *Id.*

205. *Id.*

206. *Id.* art. 6(4)(b).

207. Qualifying Industrial Zone, Int'l Trade Admin., http://web.ita.doc.gov/tacgi/fta.nsf/7a9d3143265673ee85257a0700667a6f/196ed79f4f79ac0085257a070066961d (Aug. 29, 2014, *archived at* http://perma.cc/3CAM-NJKC). The QIZ

2. Rules of Origin

The ROOs contained in the Jordan-U.S. FTA, as set out in Annex 2.2, have three origin criteria.[208] First, is a wholly obtained/substantial transformation requirement, which means that goods imported to either Party must be made entirely in one of the FTA countries, or, if any third-country materials are used, those materials must be "substantially transformed" into Jordan-U.S. origin products as a result of a manufacturing or processing operation.[209] For textile and apparel products, the FTA has a special set of "substantial transformation" rules.[210] Second, is the 35 percent domestic content requirement, which indicates that 35 percent of the customs value of the imported product must be attributable to Jordanian or US-origin materials and/or to direct costs of processing carried out in the FTA partner.[211] However, the cost or value of either Jordanian-origin materials or US-origin materials incorporated in the imported product can be counted in the other country, but only up to 15 percent of the customs value of the good.[212] And third, is the direct transport requirement, which is intended to ensure that qualifying goods are not mixed with non-qualifying goods while en route to Jordan or the United States.[213]

Compared to the European Union approach, the origin criteria for gaining preferential treatment under the Jordan-US FTA are straightforward. While the United States has embraced, adopted, or utilized

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scheme is a special free trade zone established pursuant to Section 9 of the United States-Israel Free Trade Area implementation Act of 1985, Proclamation No. 6955 of the President of the United States of America and approved by the US Congress. *Id.* The first QIZ in Jordan was established in 1996 as a method to support the Middles East peace process through strengthen economic ties between Jordan and Israel and as such allows for tariff and quota free imports into the US market of goods. *Id.* To qualify, goods produced in these zones must contain a small portion of Israeli input set at 8 percent and Jordanian input of at least 11.7 percent. *Id.* In addition, a minimum 35 percent value added to the finished product. *Id.* The scheme has contributed significantly increasing Jordan's exports to the US primarily however in apparel goods with mainly Asia investors. *Id.* The QIZs offered a window of opportunity, the utility and sustainability of which is in question given the elimination since 2010 of tariffs under the Jordan–US FTA tariff dismantlement arrangement, the continued challenges facing the Middle East peace process, notwithstanding other factors such as the termination in 2005 of the WTO Agreement on Textiles and Clothing which had first encourage footloose investments into the QIZs. *Id.*

208. BRIAN J. O'SHEA & SHERI ROSENOW, U.S.-JORDAN FREE TRADE AGREEMENT: RULES OF ORIGIN MANUAL (2001).

209. *Id.*; *see also U.S.-Jordan Free Trade Agreement*, EXPORT.GOV, http://export.gov/FTA/jordan/eg_main_017718.asp (last updated May 12, 2008, *archived at* http://perma.cc/7XU2-SQZ5).

210. OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF PRESIDENT, Jordan Free Trade Agreement, U.S.-Jordan, Annex 2.2: Rules of Origin, ¶¶ 1, 3-4, Oct. 24, 2000, *archived at* http://perma.cc/Z2XH-PRXN.

211. *Id.* ¶ 5.

212. *See U.S.-Jordan Free Trade Agreement*, *supra* note 209.

213. OFFICE OF THE U.S. TRADE REPRESENTATIVE, *supra* note 210, ¶ 8.

these ROOs in other FTAs, it does not adopt a unification approach in its use of preferential ROOs.[214] These ROOs are special and may be explained by political and developmental considerations that the US has for Jordan. Moreover, these ROOs are substantially compatible with the application of the rules on the overall US economy.[215]

Finally, it is to be noted that these simple ROOs are also used under the Agreement of Trading and Economic Cooperation between Jordan and Israel, signed in October 1995.[216] The Agreement aims at encouraging economic and commercial cooperation between the two countries and includes the reduction of customs tariffs on products of both countries.[217] In 2005 the Agreement was upgraded by including the Pan-Euro-Med ROOs, which allow for diagonal cumulation of origin, making this Agreement—to the knowledge of the authors—the only agreement to have two separate and co-existing systems of ROOs, leaving it to a trader's discretion to selectively use the set of ROOs that best suits its export and import requirements.[218]

3. Intellectual Property

A central feature of the Jordan-US FTA is the WTO TRIPS-plus intellectual property rules.[219] Data exclusivity was a requirement of Jordan's accession to the WTO and was reflected in the Jordanian Trade

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214. *See, e.g.*, ROOs in the Bahrain Free Trade Agreement (OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF PRESIDENT, Bahrain Free Trade Agreement, U.S.-Bahr, Sept. 14, 2004, *archived at* http://perma.cc/3TJX-6Z7D); *see also* Morocco Free Trade Agreement (OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF PRESIDENT, Morocco Free Trade Agreement, U.S.-Morocco, June 15, 2004); Oman Free Trade Agreement (OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF PRESIDENT, Oman Free Trade Agreement, U.S.-Oman, Jan. 19, 2006, *archived at* http://perma.cc/MX9D-82CJ). All contain similar origin rules.

215. *See* Wolfgang W. Lierer, *Rules of the Origin under the Caribbean Basin Initiative and ACP-EEC LOME IV Convention and Their Compatibility with the GATT Uruguay Round Agreement on Rules of Origin*, 16 U. PA. J. INT'L. BUS. L. 483 (1995), *archived at* http://perma.cc/3UNA-NKT2. This regime of the ROO is being used by the US Customs Service to administer its various trade preference arrangements such as the GSP scheme, the Caribbean Basin Initiative, and the Qualified Industrial Zone (QIZ) program. *See* ECON. & COMMERCE BUREAU, THE EMBASSY OF JORDAN, YOUR GUIDE TO QIZ, *archived at* http://perma.cc/M2RD-UU25.

216. Agreement of Trading and Economic Cooperation Between the HKJ and the Government of the State of Israel (SI), Isr.-Jordan, Oct. 25, 1995, The World Bank Group [WBG], *archived at* http://perma.cc/4QZQ-BP6A.

217. *Id.*

218. *Id.*

219. *See generally* MEMORANDUM OF UNDERSTANDING ON ISSUES RELATED TO THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS UNDER THE AGREEMENT BETWEEN THE UNITED STATES AND JORDAN ON THE ESTABLISHMENT OF FREE TRADE AREA (2000).

Secrets and Unfair Competition Law,[220] which introduced a five-year data exclusivity period that commences on the medicine's date of registration in Jordan.[221] Under article 22 of the Jordan-US FTA, this period was further extended an additional three years for new uses of already known chemical entities.[222] According to several studies, these intellectual property obligations under the Jordan-US FTA have created obstacles to accessing new technologies in Jordan.[223] Given this result, the question is why Jordan has agreed to tie itself up in such harsh obligations. A likely explanation is that Jordan had both zero negotiating power with the US and lacked sufficient expertise in free trade dynamics at the time the Agreement was negotiated.

4. The Substantive Clause

Another intriguing legal feature is the "substantive clause" found in article 10 of the Jordan-US FTA, which provides that safeguards may be taken when increased quantities of imports are a substantial cause of serious injury or present a threat of serious injury to domestic industries.[224] A substantial cause is defined as "important and not less than any other cause."[225] This is not different from the standard contained in the WTO Safeguards Agreement, which permits the use of safeguard measures when increased imports cause or threaten to cause serious injury to the domestic industry.[226]

G. Jordan-Singapore FTA

The Jordan-Singapore FTA was concluded in May 2004 and came into force in August 2005.[227] The FTA eliminates tariffs on all goods (excluding 2.4 percent of Jordan tariff lines) within ten years from entry

220. Trade Secrets and Unfair Competition Law, Official Gazette No. 4423 (Law No. 15/2000) (Jordan).

221. *See id.*

222. U.S.-Jordan FTA, *supra* note 65, art. 22.

223. *See, e.g.*, OXFAM INT'L, ALL COSTS, NO BENEFITS: HOW TRIPS-PLUS INTELLECTUAL PROPERTY RULES IN THE US-JORDAN FTA AFFECT ACCESS TO MEDICINES (2007), *archived at* http://perma.cc/6UR5-64BY. This study shows that the prices of medical products have skyrockted in Jordan since the FTA, partly as a result of TRIPS-plus rules. *See id.* at 2. It concludes that the FTA measures have not benefited from direct investment or research and development. *Id.*

224. U.S.-Jordan FTA, *supra* note 65, art. 10.

225. *Id.*

226. *Id.*

227. Agreement Between the Government of the Hashemite Kingdom of Jordan and the Government of the Republic of Singapore on the Establishment of a Free Trade Area, Jordan-Sing., May 16, 2004, *archived at* http://perma.cc/TK4C-RQAE [hereinafter Jordan-Singapre FTA].

into force at an asymmetrical manner over a five-to-ten-year period.[228] The Agreement also allows for the creation of new goods export opportunities to other markets by applying a diagonal cumulation of origin with countries that have an FTA with both Jordan and Singapore, namely the European Free Trade Agreement and the United States.[229]

The fourth chapter deals with trade-in Services. It ensures that service suppliers in Jordan and Singapore are guaranteed access to each other's markets.[230]

Some examples of service-related sectors benefitting from the Agreement are computer and related services, educational services, research and development services, and services incidental to manufacturing and convention services.[231]

The Agreement provides for further liberalization in a number of services sectors by both parties exceeding current liberalization pace within the scope of the WTO.[232] With the aim of attracting joint investments, Jordan offers extra liberalization for Singaporean services providers for research and development in fields of natural, social, and human sciences; in advertising services; and in services incidental to manufacturing, convention services, and water treatment services.[233] Conversely, Singapore also offers extra liberalization for Jordanian services providers in a number of sectors. The most important of these are computer and related services and research and development services in the fields of natural, social, and human sciences; advertising services; management consultancy services; real estate services; renting and leasing without operators; technical testing and analysis; and building cleaning, photography, and packaging services.[234] "The [A]greement also addresses cooperation in financial and transport services of all forms (sea, road, and air) between the two countries."[235]

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228. *See id*. Annex II, *archived at* http://perma.cc/H87G-VHXP ("2. Aside from products listed in paragraphs 3, 4, 5, 6 and 7 of this Annex, customs duties and any other charges having equivalent effect on products originating in Singapore and exported directly into Jordan shall remain at base rates for the first five years of implementation. Thereafter, beginning January 1 of year six from date of entry into force of the Agreement, the rates of duty shall be progressively abolished in five equal annual stages over five consecutive years. Such goods shall be duty-free effective January 1 of year ten.")

229. *See generally id.*; COMMITTEE ON REGIONAL TRADE AGREEMENTS, REPORT BY THE SECRETARIAT, REVISION: FACTUAL PRESENTATION: FREE TRADE AGREEMENT BETWEEN JORDAN AND SINGAPORE (GOODS AND SERVICES), WT/REG215/2/Rev.1, 9, tbl.III.1A (2008).

230. *Id.* ch. 4.

231. *See generally Greater Arab Free Trade Area (GAFTA)*, *supra* note 83.

232. *See* Jordan-Singapre FTA, *supra* note 227, art. 4.

233. ANNEX II TO THE AGREEMENT (JORDAN'S SCHEDULE OF SPECIFIC COMMITMENTS), *archived at* http://perma.cc/RP5V-T5PD.

234. *Id.*

235. *Id.*

Chapter 5 of the FTA with Singapore also contains obligations relating to electronic commerce in which each party agrees to forego deviating from its existing practices of not imposing customs duties on electronic transmissions, imposing unnecessary barriers on electronic transmissions, including digitized products, and impeding the supply through electronic means of services subject to a commitment under Chapter 4.[236] Jordan and Singapore have a Bilateral Investment Treaty that came into force on August 22, 2005.[237]

H. Jordan-Canada FTA

Jordan and Canada signed a Free Trade Agreement in June 2009 that came into force in October 2012, together with a Labour Cooperation and Environment Agreement that came into force at the same time.[238] The FTA allows Jordan to export goods, tax-free, to Canada, and it allows Canadian firms to export to Jordan, thereby increasing competition.[239] The ROOs set out in this Agreement are based on altering harmonized system codes that take into account the comparative advantage and competitive capabilities of local industries,[240] which is an easy method when compared with other preferential ROOs.

The Agreement establishes a free trade area in goods only, and as such does not cover services liberalization.[241] In Chapter 3 on electronic commerce, parties agree not to apply customs duties to products delivered electronically.[242] On June 28, 2009, Jordan and Canada also signed the Foreign Investment Protection and Promotion Agreement (FIPA),[243] which came into force on December 14, 2009.[244]

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236. *See* Jordan-Singapre FTA, *supra* note 227, ch. 5.

237. Bilateral Investment Treaty between the Government of the Hashemite Kingdom of Jordan and the Government of the Republic of Singapore, May 16, 2004, *archived at* http://perma.cc/Q4X-NRK7.

238. *Foreign Affairs and International Trade Canada*, FAST FACTS: FREE TRADE WITH JORDAN (July 18, 2011), http://www.international.gc.ca, *archived at* http://perma.cc/KRR7-NHZB. *See* also Anne Amos-Stewart et al., *Chapter 4: All Talk and No Action: Access to Canadian Markets under the General Agreement on Trade in Services*, 11 Asper Rev. Int'l Bus. & Trade L. 91 (asserting that Jordan- Canada deals with goods only).

239. *Id.*

240. MINISTRY OF INDUSTRY & TRADE, www.mit.gov.jo (last visited Dec. 28, 2012, *archived at* http://perma.cc/ET4A-9MQB). The Jordan-Canada FTA has not been notified to the WTO to date.

241. *See* Jordan-Singapre FTA, *supra* note 227, art. 2.

242. Jordan-Singapre FTA, *supra* note 227, ch. 3.

243. Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments, Can.-Jordan, June 28, 2009, *archived at* http://perma.cc/LZ55-7NG5.

244. *Id.*

The FIPA is a common feature in Canada's free trade deals.[245] In the Jordanian case, specifically, the FIPA was strangely imbalanced and biased to offer Canadian investors in Jordan more rights and privileges than domestic investors, including the Jordanian government.[246] For instance, the Canada-Jordan FIPA's dispute settlement mechanism allows Canadian investors to forgo the domestic judicial system (whether courts or arbitration) and refer to international arbitration if there has been any alleged breach of treaty protection.[247] Of course, international arbitrators might show bias in favor of international investors and influential states such as Canada.[248] This has particular importance especially if the dispute concerns public policy matters such as public order, health, and environment. Furthermore, the FIPA has clauses that protect against indirect expropriation.[249] In other words, if a domestic law or a regulation undermines the value of a foreign investment, compensation could be ruled for. In such case, and because a country generally cannot be forced to amend laws, an international arbitration panel may impose exaggerated compensation.[250]

This is probably a standard Canadian FIPA that applies to all of its preferential partners. Likewise, Jordan's FIPA with Canada does not on its face favor Canada; rather, it is a *de facto* imbalance in favor of the developed and more capable partner in the equation.[251] However, Jordan could have insisted on keeping local adjudication an option and mitigated the language that provides for compensation on the so-called "regulatory expropriation."[252]

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245. Agreement Between Canada and [ ] for the Promotion and Protection of Investments, art. 10 (2004), *archived at* http://perma.cc/QL2J-JJLY [hereinafter 2004 Canada Model BIT].

246. Full text *archived at* http://perma.cc/KR27-VPJZ.

247. *See Canada-Jordan Free Trade Agreement*, FOREIGN AFFAIRS, TRADE, AND DEVELOPMENT CANADA, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/jordan-jordanie/chapter14-chapitre14.aspx?lang=eng (last updated Mar. 16, 2012, *archived at* http://perma.cc/4BR-U4VT).

248. *See* Susan Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 Va. J. Int'l. L. 977 (2011) (stating that bias is possible in favor of developed countries in international arbitration); *see also Is Investment Treaty Arbitration Biased Against Developing Countries?*, INT'L. L. & ECON. POL'Y. BLOG, http://worldtradelaw.typepad.com/ielpblog/2011/06/is-investment-treaty-arbitration-biased-against-developing-countries.html (last visited Aug. 29, 2014, *archived at* http://perma.cc/ET4F-SUFT).

249. Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments, *supra* note 243.

250. Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments, *supra* note 243.

251. *See* Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments, *supra* note 243, art. 13.

252. For information on the notion of regulatory expropriation, *see* BILATERAL

PART V. LESSONS LEARNED ON JORDAN'S REGIONALIZATION

Developing countries face challenges arising from the increasing number of RTAs.[253] This is particularly true for a small country like Jordan, strategically situated in an unstable region of the world, in which political consideration drives much of Jordan's national socioeconomic measures and its international relations. This increased number of RTAs possibly will disturb Jordan's decision-making process with respect to its options in multilateral, regional, and preferential trade. Nevertheless, the basic economic premise of comparative advantage remains valid. As evidenced by Jordan's case, trade openness alone does not and cannot generate economic growth. However, the linkages between a country's external trade policy and its international obligations, namely how they properly reflect the national economic framework (legal and otherwise) and whether they are supported by national economic development projects, are key to benefitting from the possibilities that RTAs offer.

Jordan's choice of trade partners clearly shows a variety in both the levels of development (Jordan has both south-south and north-south RTAs) and geographic proximity (ranging from the Americas to Asia).[254] The reasons that might explain this mixed selection of Jordan's RTA partners are to a large extent rooted in political considerations. The economic merits of these RTAs (current or planned) for a small and troubled economy such as Jordan's are essentially based on the traditional premise that such agreements provide trade advantages that allow for improved competitiveness and better insertion into the international economy.[255]

An examination of the nineteen-page National Foreign Trade Strategy and its annexes reveals an overly simple text with limited analyses, a list of actions and/or goals more resembling a policy note, and provisions that can ultimately be described as containing procedural rather than targeted measures intended to stimulate growth.[256] With respect to Jordan's regionalization, the strategy reaffirms the current course, and clearly provides for the "entering into bilateral trade agreements" (objective 4/1) and "the active involvement in the multilateral negotiations in the framework of the WTO, the Arab League and the Organization of the

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INVESTMENT TREATIES: A CANADIAN PRIMER 2, *archived at* http://perma.cc/KQ8C-9B8Y.

253. *See generally* JIM ROLLO, THE CHALLENGE OF NEGOTIATING RTA'S FOR DEVELOPING COUNTRIES: WHAT COULD THE WTO DO TO HELP? (2007), *archived at* http://perma.cc/DCC3-FX63.

254. *See generally* WORLD BANK, WORLD BANK LIST OF ECONOMIES (JULY 2012), *archived at* http://perma.cc/7ZKD-XUUL.

255. *See Jordan's Foreign Trade Policy*, MINISTRY OF INDUSTRY & TRADE, http://www.mit.gov.jo/tabid/475/Jordan%20Foreign%20Trade%20Policy.aspx (last visited Dec. 28, 2012, *archived at* http://perma.cc/Y4BZ-5L3Y).

256. Trade Policy Review Body Report, *Report by Jordan*, WT/TPR/G/206 (Oct. 6, 2008), *archived at* http://perma.cc/M49L-BVBR.

Islamic Conference" (objective 4/2).[257]

The tables below provide a statistical snapshot of Jordan's trade balance in goods, services, and overall trade balance.

Jordan's goods imports and exports under its RTA for 2011 (in million Jordanian Dinars)		
Agreement	Exports	Imports
GAFTA	2,262.7	4,849.1
Jordan-EU AA	223.5	2,675.9
Jordan-US FTA	733.8	765.1
Jordan-EFTA	13.8	123.4
Agadir	105.6	556.7
Jordan-Singapore	4.6	17.9
Jordan-Turkey	62.6	389.8
Jordan-Canada	9.1	60.7[258]

Balance of Payments (Standard Presentation)					
Year / Services Account	2011	2010	2009	2008	2007
	470.7	838.5	523.0	249.6	22.0
Travel (Net)**	1,305.8	1,429.5	1,311.4	1,376.2	1,012.5
Receipts	2,129.8	2,545.3	2,066.8	2,088.5	1,638.3
Payments	824.0	1,115.8	755.4	712.3	625.8
Transportation (Net)**	-931.6	-714.9	-817.5	-996.6	-817.7
Receipts	843.6	794.2	564.5	593.1	468.4
Payments, o/w:	1,775.2	1,509.1	1,378.6	1,589.7	1,286.1
Freight	1,208.0	992.5	907.7	1,083.8	873.6
Government Services (Net)	201.6	193.5	150.7	-53.6	-34.7
Receipts	285.9	269.4	253.9	88.6	79.6

257. National Strategy for Foreign Trade, *supra* note 79, at 16 (the text is translated from the Arabic as it appears in the Strategy, in which a differentiation is made between multilateral negotiations in the meaning of the WTO on the one hand, and, on the other hand, negotiations in the context of multilateral negotiations within the Arab League or the Organization of the Islamic Conference); *see also Jordan's Foreign Trade Policy*, MINISTRY OF INDUSTRY AND TRADE: THE HASHEMITE KINGDOM OF JORDAN, http://www.mit.gov.jo/tabid/475/Jordan%20Foreign%20Trade%20Policy.aspx (last visited Sep. 7, 2014, *archived at* http://perma.cc/Q2N4-QWS8);

258. *External Trade by Economic Function of Commodity Groups*, DEPARTMENT OF STATISTICS, http://www.dos.gov.jo/dos_home_e/main/index.htm (last visited Sep. 7, 2014).

Payments	84.3	75.9	103.2	142.2	114.3
Other Services (Net)	-105.1	-69.6	-121.6	-76.4	-138.1
Receipts	389.0	367.1	348.3	408.0	329.5
Payments	494.1	436.7	469.9	484.4	467.6

Balance of Payments (Standard Presentation)		
Year	Month	Trade Balance (Net) (Million JD)
2005	12	-3556.3
2006	12	-3584.7
2007	12	-4574.2
2008	12	-5084.4
2009	12	-4448.8
2010	12	-4823.8
2011	12	-6261.7[259]

The tables above suggest that Jordan's free trade and, more specifically, regional trade were not on the whole a success story as Jordan's trade deficit is worsening. In other words, Jordan's regional and preferential trade arrangements did not fully and significantly improve Jordanian economic (and perhaps political) welfare. Arab inter-regional trade remains weak in areas where it is argued that many of the economies have competing sectors rather than complementary ones.[260] In the context of the Euro-Med Free Trade Area, goods trade between the EU and Jordan continues hub-and-spoke rather than regionally, even with cumulation offered by the Pan-Euro-Med preferential rules of origin found in the Agadir Agreement, as well as in Jordan's FTA with EFTA and Turkey. Additionally, Turkey, with its growing and dynamic economy, poses a real threat on the national industries' ability to meet local demand at competitive quality and pricing.[261] Except for trade with the US, which is largely based on a short-term tariff advantage textile sector, the overall equilibrium of regional trade for Jordan is unsustainable in the long run.

The economic implications of induced trade liberalization on

259. CENTRAL BANK OF JORDAN, http://statisticaldb.cbj.gov.jo/index?lang=en (last visited Sep. 1, 2014, *archived at* http://perma.cc/JT6W-4EZJ).

260. ARAB NGO NETWORK FOR DEVELOPMENT, THE ARAB REGION AND TRADE LIBERALIZATION POLICIES 16, *archived at* http://perma.cc/KNM5-AWS4.

261. *See Turkey GDP Growth Rate*, Trading Economics, http://www.tradingeconomics.com/turkey/gdp-growth (last visited Sep. 1, 2014, *archived at* http://perma.cc/4JLF-4FWF).

aggregate economic performance in Jordan, as well as its effects on welfare and income distribution of heterogeneous households, are continuously being investigated.[262] Generally, trade liberalization has contributed to decreasing prices of imported goods.[263] This causes the prices of investment and consumption to decrease since investment goods are composites of foreign and domestically produced goods.[264] Incentives for investment increased, which in turn spurred faster capital accumulation, i.e. a higher steady state value of aggregate capital.[265] However, while the Jordanian government transfers have decreased due to foregone import duties, the loss in government revenue due to this import duty reduction is partially offset in the long run by the expansion in the tax base and the development of a more sophisticated sales tax structure (e.g., GST on mobile telecommunication services is currently 18 percent).[266] The fear exists, however, that a widening income gap follows from the resulting higher capital income.[267] This means that it is not certain that trade liberalization benefits all segments of society; rather, it could result in the magnification of the wealth of the few at the expense of the majority.[268]

The composition of the Jordanian GDP stands at 4.5 percent agriculture, 30.8 percent manufacturing, and 64.7 percent services, in which 98 percent of all private firms in Jordan are micro-and small enterprises that employ only 1 to 4 and 5 to 19 workers, respectively.[269] The services sector holds the biggest potential, and Jordan already possesses many of the

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262. OMAR FERABOLI & TIMO TRIMBORN, TRADE LIBERALIZATION AND INCOME DISTRIBUTION: A CGE MODEL FOR JORDAN, *archived at* http://perma.cc/JKA8-4RZW. This is done by introducing heterogeneous households into a standard neoclassical dynamic computable general equilibrium model (CGE). Therefore, individual households' tax rate, wage rate, initial endowment of assets, transfers from government and abroad, as well as individual preferences, are calibrated by data from a household survey.

263. *See* DIANA TUSSIE & CARLOS AGGIO, ECONOMIC AND SOCIAL IMPACTS OF TRADE LIBERALIZATION 89, *archived at* http://perma.cc/JD9-NNC6 (discussing how trade liberalization makes prices go down).

264. *Id.*

265. *Id.* at 95.

266. *See* The World Bank, *Paying Taxes in Jordan*, DOING BUSINESS: MEASURING BUSINESS REGULATIONS, http://www.doingbusiness.org/data/exploreeconomies/jordan/paying-taxes/ (last visited Sep. 1, 2014, *archived at* http://perma.cc/C8YT-PPJ7).

267. For Jordan's income economic indicators *see Jordan – Income Distribution*, Index Mundi, http://www.indexmundi.com/facts/jordan/income-distribution (last visited Sep. 1, 2014, *archived at* http://perma.cc/4LZ7-M72G); *Economic Indicators – Jordan*, EarthTrends, http://www.unep.org/dewa/WestAsia/Data/Knowledge_Bases/Jordan/WRI/Eco_cou_400.pdf (last visited Sep. 1, 2014, *archived at* http://perma.cc/XRZ3-SC9L).

268. *See* Donald R. Davis, *Trade Liberalization and Income Distribution* (Nat'l Bureau of Econ. Research, Working Paper No. 5693, 1996), *archived at* http://perma.cc/V5UM-ANES (detailing the possible adverse effects of trade liberalization).

269. *See* DEP'T OF STATISTICS – JORDAN, www.dos.gov.jo (last visited Oct. 20, 2013, *archived at* http://perma.cc/S3VL-G3T5).

capabilities (such as a young, educated workforce and technological openness) needed to move forward.[270] While Jordan's industrial policy continues to develop, largely pushed by international and other donors, its government continues to suffer, generally due to limited financial resources, high nepotism, and deep corruption.[271] Additionally, other non-economic but equally vital elements such as limited capacities and expertise, shortage or lack of updated or accurate data, as well as short-term private interests weigh heavily on the overall economic planning process.[272]

The idea of international trade as advocated by Ricardo and Viner was predicated on the comparative advantage theory.[273] Both scholars found that free good exchange offers reciprocal economic benefits.[274] When each party in trade specializes in producing the product at which it excels, each party will obtain the other's at a lower cost while still efficiently producing their own.[275] But to apply this theory correctly, Jordan has to excel by specializing in producing certain goods and services. Jordan also must be mindful of certain clauses under its FTA commitments, such as the investment clause in its agreement with Canada and the intellectual property commitments under its agreement with the US. If Jordan cannot amend burdensome clauses in its FTAs, then remedying actions must take place to rectify the negatives. For instance, if Jordan cannot revisit its agreement with the US with respect to intellectual property clauses, it should allocate more resources and spending on public health and technology to "offset the

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270. *See* WORLD TRAVEL AND TOURISM COUNCIL, TRAVEL AND TOURISM ECONOMIC IMPACT: 2012: JORDAN (2010) (generally showing that export of services offers Jordan an opportunity to increase exports and to reduce its trade balance.).

271. *A Snapshot of Corruption in Jordan*, BUSINESS ANTI-CORRUPTION PORTAL (Feb. 2014), http://www.business-anti-corruption.com/country-profiles/middle-east-north-africa/jordan/snapshot.aspx, *archived at* http://perma.cc/HRE9-QD7W.

272. WORLD BANK, JORDAN ECONOMIC MONITOR, MAINTAINING STABILITY AND FOSTERING SHARED PROSPERITY AMID REGIONAL TURMOIL 6 (2013), *archived at* http://perma.cc/R4NF-R8Z3 (describing the aspects of deterioration in the Jordanian economy).

273. *See generally* JACOB VINER, STUDIES IN THE THEORY OF INTERNATIONAL TRADE 438 (1960); *see also* Jacob Viner, *The Customs Union Issue, in* TRADING BLOCS, ALTERNATIVE APPROACHES TO ANALYZING PREFERENTIAL TRADE AGREEMENTS (Jadish Bhagwati & Arvind Panagariya, eds., 1999).
105 at.

274. Kirk Kennedy, *Deconstructing Protectionism: Assessing the Case for a Protectionist American*
Trade Policy, 28 Case W. Res. J. Int'l L. 197, 203 (1996) (explaining Ricardo's Comparative Advantage Theory); *but see* Robert W. Benson, *Free Trade as an Extremist Ideology: The Case of*
NAFTA, 17 U. Puget Sound L. Rev. 555, 557 (1994) (implying that Ricardo's theory is flawed).

275. *Id.*

impact of TRIPS-plus rules on consumers."[276] Similarly, if Jordan cannot revisit its agreement with Canada regarding investment treatment, it must take measures to enhance the competitiveness of Jordanian investors, particularly in this phase of Jordan's history which has witnessed unprecedented economic and political transformations,[277] a nearly impossible mission as the agreement has recently entered into force.

CONCLUSION

This Article has attempted to shed light on some matters related to Jordan's free trade policy and agreements after more than a decade from the signing of its first FTA with the US. The rationale behind trade liberalization remains the achievement of economic benefit, yet Jordan continues to pursue trade liberalization with a political mentality that does not necessarily coincide with its economic interests. Jordan has even limited its capacity to make use of the trade preferences offered under its FTAs, some of which deprive Jordan of the flexibility awarded to developing countries within the multilateral system (such as the FTA with the United States, which introduced tougher intellectual property protection).

In conclusion, Jordan is seeking regional trade deals without doing its due diligence. It is true that Jordan's liberalization has increased its exports, but it also increased its imports in rapid and significant manners. This has led to a worse "chronic trade deficit."[278] Jordan has too willingly believed in, and depended on, the "Washington Consensus." The due diligence that Jordan should conduct involves a national strategy for trade that encompasses a national export strategy with a proactive action plan. This strategy must make a full use of the privileges given to developing countries. The strategy must outline Jordan's comparative and competitive advantages and evaluate Jordan's FTAs from all angles, both economic and legal. Jordan must invest more in its services capital especially when engaging in regional and preferential trade agreements as Jordan does possess potential in providing services. All in all, Jordan needs to create a new philosophy for trade with a goal of welfare creation, not trade liberalization and random regionalization. This is not a call for

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276. Ryan Abbott, *Access to Medicines and Intellectual Property in Jordan*, BILATERALS.ORG (July 23, 2012).
http://www.bilaterals.org/spip.php?article21839, *archived at* http://perma.cc/Y8DJ-R2HH.

277. *See* Musa Hattar, *Jordan Fuel Price Hike Protests Turn Violent*, MIDDLE EAST ONLINE (Nov. 15, 2011), http://www.middle-east-online.com/english/?id=55510, *archived at* http://perma.cc/WK9B-RMMA (discussing the latest rise in fuel prices and the violence that besieged Jordan).

278. Taleb Awad Warrad, WTO Chairs Programme Annual Conference, The Potential Economic Effects of FTA Between Jordan and Canada (June 21, 2011), https://www.wto.org/english/tratop_e/devel_e/train_e/Jordan.pdf, *archived at* http://perma.cc/G448-E3CE.

protectionism. This is a call for a better use of the tools that developing countries have under WTO law to enjoy the benefits of trade liberalization.

TARGETED KILLING IN INTERNATIONAL LAW: SEARCHING FOR RIGHTS IN THE SHADOW OF 9/11

Dr. Saby Ghoshray*

"[T]he bottom line is: 'whose 4-year-olds get killed?' "[1]

I. INTRODUCTION

"After hundreds of drone strikes, how could the United States possibly still be working its way through a 'top 20' list?"[2] This exclamation of comical despair from the Pakistani military Chief General Ashfaq Parvez Kayani raises many questions. His quizzical outburst during a recent meeting with his American counterpart, Navy Admiral Michael Mullen, is a telling encapsulation of the continuous saga of military actions. Cloaked under secrecy, these actions fall outside the prescribed limits of international law. Yet, American drone strikes in sovereign territories have largely been ignored within contemporary discourse.[3] This is predominantly due to the success of military planners in propagating a palatable narrative to the general populace.[4] This narrative is simple. It provides assurance that drone strikes eliminate known terrorists which in turn makes America safer.[5] This simple narrative also alleviates the public's concerns about human rights violations by emphasizing that the surgical precision of drone

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1. *See infra* note 7 (quoting Joe Klein in a television interview justifying the usage of drones, even if it kills children).

2. *See* Greg Miller, *Plan for Hunting Terrorists Signals US Intends to Keep Adding Names to Kill Lists*, WASH. POST, Oct. 23, 2012, http://articles.washingtonpost.com/2012-10-23/world/35500278_1_drone-campaign-obama-administration-matrix, *archived at* http://perma.cc/365X-DYM3.

3. *See* Mathew Feeney, *Most Americans Are OK with Drone Strikes, Rest of the World Mostly Unconvinced*, HIT & RUN BLOG (Oct. 3, 2012, 4:52 PM), http://reason.com/blog/2012/10/03/most-americans-are-ok-with-drone-strikes, *archived at* http://perma.cc/N2GJ-YWQR.

4. Larry Everest, *The Illegality, Illegitimacy and Immorality of US Drone Strikes*, GLOBAL RESEARCH, Nov. 5, 2013, http://www.globalresearch.ca/the-illegality-illegitimacy-and-immorality-of-u-s-drone-strikes/5356886, *archived at* http://perma.cc/WY7Q-7W2Z.

5. *Id.*

strikes minimizes civilian collateral casualties.[6]

However, this narrative of targeted killing is false. Often times, its convoluted logic relies on pure inhumanity.[7] Borne out of a faulty conception of American exceptionalism and military hubris,[8] this narrative gained momentum in the fertile ground of post-9/11 fear psychosis.[9] It has continued unabated until today.[10] By placing against the hard rubric of international law, this Article is designed to rescue the narrative of targeted killing by drones from its existing legal framework.

Drones for targeted killing are relatively cheap to build, remotely controlled, and devoid of both emotions and physiological limitations. The Predator drone can strike with deadly finality.[11] Since a spike in the year 2010, Predator drone strikes continue unabated in Pakistan and Afghanistan.[12] While the American forces targeted mostly members of Al-Qaeda and the Taliban,[13] evidence reveals that the innocent civilians killed

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6. *See id*.

7. *See* Glenn Greenwald, *Joe Klein's Sociopathic Defense of Drone Killings of Children*, THE GUARDIAN (Oct. 23, 2012, 11:29 EDT), http://www.theguardian.com/commentisfree/2012/oct/23/klein-drones-morning-joe, *archived at* http://perma.cc/6SGB-LSJ6.

8. *See generally* Saby Ghoshray, *Guantánamo: Understanding the Narrative of Dehumanization through the Lens of American Exceptionalism and Duality of 9/11*, 57 WAYNE L. REV. 163 (2011) [hereinafter *Narrative of Dehumanization*] (explaining the shaping effect of 9/11 in both American law and social consciousness).

9. *Id.*

10. *See* Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=1&_r=4&pagewanted=all&, *archived at* http://perma.cc/K7HN-B8WD (noting how the Obama administration has been escalating drone strikes while defending civilian killings by employing linguistic innovations).

11. *See* Christopher Drew, *Drones Are Weapons of Choice in Fighting Qaeda*, N.Y. TIMES, Mar. 16, 2009, http://www.nytimes.com/2009/03/17/business/17uav.html?_r=1&hp, *archived at* http://perma.cc/N96B-LJA9.

12. *See* Bill Roggio & Alexander Mayer, *Charting the Data for US Airstrikes in Pakistan, 2004 – 2014*, THE LONG WAR J., Dec. 25, 2013, http://www.longwarjournal.org/pakistan-strikes.php, *archived at* http://perma.cc/S24Z-VQXF (detailing statistical data which comprises current and past drone strikes in the broader Pakistan region); *see also* Yochi J. Dreazen, *Despite Pakistani Denials, U.S. Keeps Drone Operations Inside Country*, NAT'L J. DAILY, July 1, 2011 ("CIA operations at the Shamsi air base in western Pakistan, a short distance from the Afghan border, were continuing unabated and that no American personnel had been withdrawn from the facility. The base is the hub of the CIA's escalating campaign of drone strikes. . .").

13. *See generally* INT'L HUMAN RIGHTS & CONFLICT RESOLUTION CLINIC OF STANFORD LAW SCH. (STANFORD CLINIC) & THE GLOBAL JUSTICE CLINIC AT N.Y. UNIV. SCH. OF LAW (NYU CLINIC), LIVING UNDER DRONES: DEATH, INJURY AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN (2012) [hereinafter Living Under Drones], *archived at* http://perma.cc/HG46-QLLM; *see also* Jonathan Masters, Targeted Killing, Council on Foreign Relations, May 23, 2013, http://www.cfr.org/counterterrorism/targeted-killings/p9627, *archived at* http://perma.cc/UCM3-KVFF ("Since assuming office in 2009,

vastly outnumber the militants.[14] This ability to fire missiles at enemy targets from unmanned aerial vehicles ("UAVs")[15] has not only transformed the twenty-first century conflict into an array of ubiquitous battlefields, it has also called into question some of the fundamental assumptions of the law of armed conflict ("LOAC"), or international humanitarian law ("IHL").[16] While some commentators have called these killings "extrajudicial,"[17] or "targeted,"[18] some have also attempted to advance the

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Barack Obama's administration has escalated targeted killings, primarily through an increase in unmanned drone strikes on al-Qaeda and the Taliban. . .").

14. *See* LIVING UNDER DRONES; *see also* Jack Serle, *Drone Warfare: More than 2,400 dead as Obama's Drone Campaign Marks Five Years*, BUREAU OF INVESTIGATIVE JOURNALISM, Jan. 23, 2014, http://www.thebureauinvestigates.com/2014/01/23/more-than-2400-dead-as-obamas-drone-campaign-marks-five-years/, *archived at* http://perma.cc/Y3HL-WSQ3. Even if the number of civilian killed has slightly reduced, the number is still substantial when you consider that even as recent as 2009:

> Press reports suggest that over the last three years drone strikes have killed about 14 terrorist leaders. But, according to Pakistani sources, they have also killed some 700 civilians. This is 50 civilians for every militant killed, a hit rate of 2 percent — hardly "precision." American officials vehemently dispute these figures, and it is likely that more militants and fewer civilians have been killed than is reported by the press in Pakistan. Nevertheless, every one of these dead noncombatants represents an alienated family, a new desire for revenge, and more recruits for a militant movement that has grown exponentially even as drone strikes have increased.

David Kilcullen & Andrew McDonald Exum, Op-Ed., *Death From Above, Outrage Down Below*, N.Y. TIMES, May 16, 2009, http://www.nytimes.com/2009/05/17/opinion/17exum.html?_r=1, *archived at* http://perma.cc/4V2-4EC4 [hereinafter *Death From Above*].

15. *See Death from Above*, *supra* note 14 (noting that the use of drones—a type of unmanned aerial vehicle ("UAV")—in military operations has steadily grown); *see also* Mary Louise Kelly, *Officials: Bin Laden Running Out of Space to Hide*, NPR, Jun. 5, 2009, http://www.npr.org/templates/story/story.php?storyId=104938490, *archived at* http://perma.cc/Z4RQ-QQL6 (stating that the pace and precision of drone attacks has increased steadily); *see generally Effective Counterinsurgency: The Future of the US-Pakistan Military Partnership*: *Hearing on H.A.S.C. No. 111-43 Before the H. Comm. on Armed Serv.,* 111th Cong. 7 (2009) (statement of Dr. David Kilcullen, Partner, Crumpton Group, LLC, Senior Fellow, EastWest Institute, Member of the Advisory Board, Center for a New American Security) (discussing the unpopularity of drone strikes and the casualties caused to civilians when using drones for military purposes).

16. By international humanitarian law (IHL), I generally refer to the rich corpus of codified international customs of warfare that has evolved through the centuries and has been modified by various wars in modern times. This phrase is used as a reference to the body of laws governing the conduct of hostilities, such as The Hague and Geneva stream of laws, and therefore, is used synonymously as the laws of armed conflict. *See generally* MICHAEL E. HOWARD ET AL., THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD (Yale Univ. Press. 1997) (providing general information on the Laws of War); *see also* Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 408-9 (2009).

17. *See* Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions, Extrajudicial, Summary or Arbitrary Executions*, paras. 37, 39, submitted pursuant to Commission on Human Rights resolution 2002/36, U.N. Doc. E/CN.4/2003/3 (Jan. 13,

legitimacy argument on the pretext of self-defense.[19] Objective analysis, however, must decouple from rhetoric, and focus on fundamental issues brought up by technology-driven changes in modern warfare.

More than a decade removed from the events of 9/11, targeted killing has now become the *de jure* of international jurisprudence, largely riding the shadow of 9/11 and more importantly, drawing its legal potency from the occurrence of 9/11.[20] Scholars have defined targeted killing in various ways. Some have provided an expanded definition that includes the "premeditated, preemptive, and intentional killing of an individual or individuals."[21] Some have examined targeted killing within the hostilities framework by encapsulating such actions as falling in a continuum within war.[22] Few scholars, however, categorized targeted killing as extrajudicial killing within an expanded conception of hostilities.[23] This Article examines these diverging viewpoints and places the contentious issue of targeted killing on a robust legal framework.

Besides divergence in scholarly viewpoint, targeted killing of terrorism suspects outside of judicial due process has caused much consternation in international law,[24] and rightfully so. Driven by profound anxieties over the extrajudicial nature of these killings, and an alarm for the complex human rights issues they expose, these acts have already become the focal point of legal controversy. This controversy, however, is not without historical roots. State-sponsored targeted killing is almost as old as international law. The attempt to encapsulate these killings within the interpretative gloss of The Hague and the Geneva streams of international law, however, is rather recent. Prompted by global condemnation of the targeted killing of Palestinian terror suspects by the Israeli Defense Forces

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2003), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/103/27/PDF/G0310327.pdf?OpenElement (characterizing the November 2002 killing via drone strikes inside Yemen of Qaeda Sinan Harithi, an alleged planner of USS Cole bombing as extrajudicial).

18. *See* Murphy & Radsan, *supra* note 16, at 406-407.

19. *See generally* Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319 (2004).

20. *See generally* Masters, *supra* note 13 (noting the post-9/11 legal landscape has allowed targeted killing to become part of legal manipulations in international law).

21. Thomas B. Hunter, *Targeted Killing: Self-Defense, Preemption, and the War on Terrorism*, 2:2 J. STRATEGIC SEC. 1, 3 (2009), *archived at* http://perma.cc/JN3V-CU8X.

22. *See supra* note 19 and accompanying text (while the text examines why the legal community is divided as to the efficacy of the two anti-terrorism models, the work by Professor Guiora attempts to seek legitimacy in targeted killing by self-defense as one of the essential drivers for such an act and thus, conveniently placing such right within a spectrum).

23. *See generally* Mary Ellen O'Connell, Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009 (July 2010) (unpublished legal studies research paper, Notre Dame Law School), *archived at* http://perma.cc/KR9Y-9GJX [hereinafter Unlawful Killing with Combat Drones] (noting that a strike on Yemen in 2003 was concluded to be a clear extrajudicial killing).

24. *Id.*

("IDF"), the formalized efforts to legally capture such acts of state violence began in the 1990s.[25] As a result, the framework of customary international law began its normative change to incorporate such state conduct of hostilities, until it encountered one of the biggest stressors in international law in over half a century—the 9/11 terrorist attacks. Subsequently, the post-9/11 global landscape has shaped the theoretical discussions surrounding targeted killing on two main fronts. First, by allowing a *de facto* blanket approval on pervasive targeted killings by nation states, international law has remained largely complicit. Second, by infusing a nebulous paradigm of "the law of 9/11,"[26] legal justification for targeted killings has transmogrified into an unregulated space within international law. This Article will explore both areas in detail.

Scholarship on targeted killing reveals diverging perspectives. In

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25. *See* AMNESTY INT'L, ISRAEL/GAZA: OPERATION 'CAST LEAD': 22 DAYS OF DEATH AND DESTRUCTION 1 (2009), *archived at* http://perma.cc/4DED-FWDK ("At 11:30 a.m. on 27 December 2008, without warning, Israeli forces began a devastating bombing campaign on the Gaza Strip codenamed Operation 'Cast Lead.'"). Israeli drones have caused civilian casualties that have gone virtually unnoticed. *Id.* For example, these remote strikes have caused the loss of thousands of innocent lives during the Israeli incursion in Gaza from December 2008 to January 2009. *Id.*; *see also* Robert Perry Barnidge, *The Principle of Proportionality Under International Humanitarian Law and Operation Cast Lead*, *in* NEW BATTLEFIELDS/OLD LAWS: CRITICAL DEBATES ON ASYMMETRICAL WARFARE (William C. Banks ed., 2011) *archived at* http://perma.cc/PCT2-3VQT (noting that a study conducted by the Israel Defense Force ("IDF") concluded that Operation Cast Lead produced over 1,300 Palestinian casualties); Clancy Chassay, *Cut to Pieces: The Palestinian Family Drinking Tea in Their Courtyard*, THE GUARDIAN (Mar. 23, 2009, 11:57 EDT), http://www.guardian.co.uk/world/2009/mar/23/gaza-war-crimes-drones, *archived at* http://perma.cc/8FVE-ARQK (recounting a story of a Palestinian family that was hit by an Israeli drone flying overhead).

26. By the "law of 9/11," I refer to a general trend in the post-9/11 jurisprudence that promotes a broader right to kill and is premised on a US political thought process that is decoupled from the accepted framework of international law. The law of 9/11 can be identified through scholarships premised on US entitlement to a flexible regime that allows for acts, such as, indefinite detention, targeted killing by extrajudicial means, torture in secret CIA prisons, etc. For literature that exemplifies the "law of 9/11" in the context of targeted killing, *see, e.g.*, Kenneth Anderson, *Targeted Killing in US Counterterrorism Strategy and Law* (The Brookings Institution, Georgetown University Law Center, and the Hoover Institution, Working Paper of the Series on Counterterrorism and American Statutory Law, 2009), *archived at* http://perma.cc/3WCY-7AM5; Saby Ghoshray, *Untangling the Legal Paradigm of Indefinite Detention: Security, Liberty and False Dichotomy in the Aftermath of 9/11*, 19 ST. THOMAS L. REV. 249 (2006) [hereinafter *Paradigm of Indefinite Detention*] (providing a general discussion of how the law of 9/11 has impacted almost every aspect of American Law); Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 COLUM. J. TRANSNAT'L L. 435 (2005), *archived at* http://perma.cc/8RBT-RBMD (explaining why the evolving law of 9/11 may fall outside the legal norms of international law); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004), *archived at* http://perma.cc/M7UF-X3Z5 (discussing the law of 9/11 in the context of the general US right in global war).

general, scholars have placed the act of targeted killing within the existing framework of international law via two different pathways. The first pathway traces the rights issue within a complex web of statutory provisions constructed out of the two mainstream international law paradigms: IHL and HRL.[27] The second pathway attempts to inject legitimacy within the law by mostly invoking an expanded conception of state right premised on post-9/11's Neolithic framework, or the "law of 9/11."[28] Regardless of how the legality of targeted killing by drones is crafted, this type of killing stands against the continued relevance of human rights strands within international law. Because such extrajudicial killings are not only asymptotic with human rights law's sanctity of life paradigm, but they also stand in contradiction to customary international law's due process paradigm.[29] Debate and difficulties notwithstanding, targeted

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27. *See* David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Execution or Legitimate Means of Defence*, 16:2 EUR. J. INT'L L. 171, 171, 183-192 (2005) [hereinafter *Targeted Killing of Suspected Terrorists*], *archived at* http://perma.cc/HL6-TE9N (examining the difficulties and relevance in some existing scholarship on targeted killing under both HRL norm and IHL).

28. *See generally* Philip Alston, *The CIA and Targeted Killings Beyond Borders* (New York University School of Law, Public Law & Legal Theory Research Paper Series, Working paper No. 11-64, (2011)), *archived at* http://perma.cc/XDT6-SC7S (examining in general how post-9/11 awareness has resulted in framing exigencies to legalize targeted killing of suspected terrorists via drone strikes).

29. While discussing the scope distinction between IHL and HRL, there is a tendency of the states to invoke IHL in order to avoid HRL's stricter guidelines for behavior in hostilities while being governed by IHL's more permissive guidelines supervising killing. In this context, Special Rapporteur recently observed:

> [B]oth the US and Israel have invoked the existence of an armed conflict against alleged terrorists ("non-state armed groups"). The appeal is obvious: the IHL applicable in armed conflict arguably has more permissive rules for killing than does human rights law or a State's domestic law, and generally provides immunity to State armed forces. Because the law of armed conflict has fewer due process safeguards, States also see a benefit to avoiding compliance with the more onerous requirements for capture, arrest, detention or extradition of an alleged terrorist in another State. IHL is not, in fact, more permissive than human rights law because of the strict international humanitarian law requirement that lethal force be necessary. But labeling a situation as an armed conflict might also serve to expand executive power both as a matter of domestic law and in terms of public support.

Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Addendum: Study on Targeted Killings*, Human Rights Council, para. 47, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) (alteration added) (internal citations omitted) [hereinafter U.N. Doc. A/HRC/14/24/Add.6]. In the context of the legality of killing, HRL and IHL may apply coextensively and simultaneously unless there is a conflict between them. *See* Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights Including the Questions of Disappearances and Summary Executions*, Comm'n on Human Rights, para. 50, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004) (by Philip Alston) [hereinafter U.N. Doc. E/CN.4/2005/7]; Special Rapporteur on Extrajudicial, Summary or Arbitrary

killing, therefore, raises intriguing questions of law and philosophy. Where does the act fall within the rights framework? Does it have explicit legal support within the manifold of legal strands that constitute international law? Does 9/11 necessitate recognizing a derivative right within international law that takes the form of targeted killing? This Article seeks these answers.

To interject a more comprehensive revelatory gloss into the emerging menace of targeted killing, I approach this from a right-based paradigm. Because any act motivated and sanctioned by law must claim its force from some right. This inquiry will, therefore, focus on whether targeted killing, as a right, falls within the rights manifold of international law. For it to be legitimized within international law, the act of targeted killing must be a manifestation of an expressed right within such law. Guided by an understanding of the shaping effect of 9/11 on emerging jurisprudence,[30] this study goes beyond a limited dimensional security-centric analysis, in the process placing such right within the broader rubric of international law.

A right-based analysis will provide additional clarity for normative reasons. Governments engaged in targeted killings often provide an *ex post facto* explanation without a component level analysis of such acts. This provides neither clarity, nor legitimacy. By mapping the acts of targeted killing within a binary rights framework, it is possible to conceptualize a right as either falling within or outside the existing manifold. Identifying the former could allow us to construct a framework, if needed, to incorporate such rights by any one of the existing pathways through which various rights within international law have been conceived. Identifying the latter may propel us to conclude that such rights of targeted killing in their

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Executions, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, Human Rights Council, paras. 18-19, U.N. Doc. A/HRC/4/20 (Jan. 29, 2007) (by Philip Alston) [hereinafter U.N. Doc. A/HRC/4/20]; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Addendum: Mission to the United States of America*, Human Rights Council, paras. 71-73, 83, U.N. Doc. A/HRC/11/2/Add.5 (May 28, 2009) (by Philip Alston) [hereinafter U.N. Doc. A/HRC/11/2/Add.5]; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Addendum: Summary of Cases Transmitted to Government and Replies Received*, Human Rights Council, 342-58, 358-61, U.N. Doc. A/HRC/4/20/Add.1, (Mar. 12, 2007) [hereinafter U.N. Doc. A/HRC/4/20/Add.1]; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions, Addendum: Summary of Cases Transmitted to Governments and Replies Received*, Comm'n on Human Rights, 264–65, U.N. Doc. E/CN.4/2006/53/Add.1 (Mar. 27, 2006) (by Philip Alston) [hereinafter U.N. Doc. E/CN.4/2006/53/Add.1]. In situations that do not involve the conduct of hostilities, where law enforcement operations during NIAC can be supported, the *lex generalis* of human rights law would apply. *See* MICHAEL N. SCHMITT ET AL., THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: WITH COMMENTARY § 1.2 (2006) [hereinafter THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT].

30. *See generally Narrative of Dehumanization*, *supra* note 8 (discussing post-9/11 evolution of law towards a more security-centric and a less individual liberty based jurisprudence).

existing operational variant are inconsistent with international law, and thus, we may not proceed any further. However, identifying the former has the danger of further propelling international law towards a state-hijacked unregulated space. This is an eventuality we must avoid at all cost.

One difficulty in encapsulating targeted killing within international law comes from its temporal divergence with customary international law. Customary international law is a product of legal philosophies which emerged in response to the hostilities framework of an earlier era.[31] Targeted killing on the other hand, is a product of modern innovation—characterized by technological sophistication and structural asymmetry between the actors involved. Thus, fundamental questions must be asked of this divergence. Has maturation of The Hague and Geneva streams of law kept pace with the post-modern technological infusion in hostilities? Can the existing law overcome the accountability gap created by the long simmering asymmetric warfare? Must we attempt to expand the framework appropriately? This Article strives to answers these questions.

Placing targeted killing in an appropriate rights dimension will require teasing out all relevant technical components, for which there are fundamental roadblocks. Even before 9/11, right to life analysis was subsumed and apparently lost within the intersecting statutes of IHL and HRL.[32] Since 9/11, a severely flawed apocalyptic apprehension has engulfed people's constructs to such an alarming extent that, often times, even the killing of innocent children is being justified under exigencies of self-defense.[33] Introduction of a rights dimension could lift the fog from people's minds by appropriately illuminating the discussion of targeted killing based on law's legitimacy.[34] However, framing the appropriate rights

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31. *Customary International Law – Introduction*, PEACE PALACE LIBRARY, http://www.peacepalacelibrary.nl/research-guides/public-international-law/customary-international-law/ (last visited May 5, 2014, *archived at* http://perma.cc/86UR-KZYE).

32. *See e.g.*, Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19 EUR. J. OF INT'L L. 168 (2008) (arguing that although HRL does not guarantee an absolute right to life, protection against arbitrary deprivation of life during armed conflicts can be secured by extracting applicable restrictive covenants within IHL).

33. *See* Greenwald, *supra* note 7 (examining the mindset that gave rise to the justification principle of "we have to kill their children in order to protect our children.").

34. The principle of military necessity indicates that there must be some military advantage that could be gained from the attack. The Nuremberg Tribunal defines "military necessity" as:

> Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money . . . . It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but does not permit the killing of innocent inhabitants for purposes of revenge or the

dimensions is both complex and difficult, for reasons I list below.

First, a rights dimension needs a paradigmatic framework to evolve within in order to adequately illuminate conceptualization of relevant rights. Existing frameworks could partially address elements of targeted killing, but leave us to contemplate law's reach within a more comprehensive framework. Second, relevant state actors' reluctance in adopting a normative targeted killing framework is forcing the development of customary international law, based mostly on the reactive instantiation of isolated elements of law. This has the untenable legal consequence of conflating customary international law with biased state mandate, such as, manufacturing legal support for extrajudicial killing of terrorists.[35] Such development has further decoupled the emerging targeted killing legal framework from the enduring principles of *necessity*, *proportionality*, *distinction,* and *humanity*.[36] On the contrary, these principles are the set of foundational pillars of international law that my analysis below will benefit form.

Thus, this Article examines how the lack of accountability in the current targeted killing framework presents a fundamental dilemma of enforcement in IHL's modern applicability. Even though the *complementarity* between HRL and IHL provides enhanced protection of civilians in some situations, "accountability gaps"[37] and absence of granularity in identifying "legitimate targets"[38] would make a legal case for

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> satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.

Jefferson D. Reynolds, *Collateral Damage On the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle For a Moral High Ground*, 56 A.F. L. REV. 1, 15-16 (2005) (alteration added), *archived at* http://perma.cc/XJJ3-FYCT; *see also* Michael N. Schmitt*, The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 148-49 (1999).

35. *See* Guiora, *supra* note 19.

36. *See* Saby Ghoshray, When Does Collateral Damage Rise To The Level of a War Crime?: Expanding The Adequacy Of Laws Of War Against Contemporary Human Rights Discourse, 41 CREIGHTON L. REV. 679, 690 (2008) [hereinafter *Collateral Damage*]. I argued that, while much scholarship analyzes the three pillars of proportionality, necessity, and distinction, often times, scholarship falls short of incorporating its fourth dimension of humanity, thus rendering it to be a vanishing pillar of international law. *Id.* However, some scholars have contributed to a much-needed discussion on humanity. *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L. L. 239, 239 (2000); Michael Bothe, *War crimes*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY. VOL. 1, 379, 423 (A. Cassese et al. eds., Oxford Univ. Press 2002); *see also* Unlawful Killing with Combat Drones, *supra* note 23, at 24 ("[T]he principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets.") (alteration added).

37. *See*, *Collateral Damage*, *supra* note 36, at 689.

38. *See*, *Collateral Damage*, *supra* note 36, at 685-86.

targeted killing difficult. Similarly, IHL's assertion of *lex specialis* rule and HRL's dependence on the relationship between individual and a "controlling state"[39] would make the applicability of HRL in cases of targeted killing via drones problematic. This is more prevalent when drone strikes continue to kill innocent civilians. Similarly, IHL's assertion of *lex specialis* rule does not provide any additional opening for legitimizing targeted killing. Rather, the mounting civilian casualties in this new warfare paradigm[40] compel us to re-examine the key principles of IHL: the principle of distinction, the principle of proportionality, and the principle of military necessity.

Therefore, this Article proceeds in three steps. First, following some of the expanded definitions on the three principles of *distinction, proportionality,* and *military necessity* established in my earlier work,[41] the current analysis revitalizes these key humanitarian law principles by providing a more interpretive gloss on their applicability in technology enhanced asymmetric warfare. Second, considering the ever-expanding list of participants in today's asymmetric warfare, the Article examines the emerging applicability of "legitimate target,"[42] which allows for a more principled answer to the rhetorical question of *whether an Al-Qaeda leader has the right to attend a wedding at night without dying*.[43] Third, the development of these first two segments allows for commenting on the continued relevance of the critical principles of IHL in protecting the core human rights values of The Hague and Geneva streams of law. In summary, this Article examines the legitimacy of targeting via drones by following the theoretical constructs of the scope and jurisdiction developed in my earlier work.[44]

Moving forward in this Article, Part II places the rights discussion within the proper context while questioning the legitimacy of the existing targeted killing framework of the combatants. Part III reexamines, revitalizes, and discusses the continued relevance of the principles of *distinction, proportionality,* and *necessity* for applicability in targeted killing within the context of IHL. Discussion of targeted killing's IHL

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39. *See* Noam Lubell, *Human Rights Obligations in Military Occupation*, 94 INT'L REV. OF THE RED CROSS 317 (2012), *archived at* http://perma.cc/4NRJ-H9FZ.

40. *See* LIVING UNDER DRONES, *supra* note 13, at 62 n.330 (citing field research to show escalating incidents of civilian casualties in drone strikes).

41. *See generally Collateral Damage, supra* note 36 (proposing a set of expanded interpretations of the three foundational pillars of the laws of war in light of escalations in asymmetric warfare).

42. *Collateral Damage, supra* note 36, at 694 (discussing who can be legally targeted).

43. A reexamination of "legitimate target" would adequately respond to this hypothetical wedding question by carefully categorizing who can be lawfully targeted and under what circumstances. *See* sources cited *infra* note 46 (providing a discussion of targeting outside of the zone of hostilities).

44. *See Collateral Damage, supra* note 36, at 686.

applicability will lead to the continued analysis in Part IV, which examines whether this practice can be validated under IHL law. By introducing newer considerations that have not been discussed in detail, Part V addresses the need to consider whether the evolving paradigm can locate the right to targeted killing within the epistemology of international law. Finally, Part VI concludes by noting that the right to targeted killing mostly does not arrive by accidents of international events, and rather, must have a fundamental basis located within the human rights dimension of international law.

II. THE RIGHT TO TARGETED KILLING: CONTROLLING SCENARIOS

A significant precondition for legitimizing a right to targeted killing would be that all available legal parameters controlling the act are adequately identified and understood. From a normative framework, targeted killing without due process is in violation of the sanctity of human life. Thus, a discussion of targeted killing must accompany a rigorous theoretical analysis delineating the panoply of controlling scenarios where laws governing such killing must evolve with stringent preconditions attached to the act. Consequently, the legal parameters for targeted killing have to be identified along distinctly applicable categories, as I highlight below.

A. Categorizing the Target

The first category involves whether the target is within a geographical boundary of active hostilities. This category of targets can be further decomposed into two separate subgroups based on the nature of hostilities – as defined in (i) the non-international armed conflict ("NIAC"); and (ii) the international armed conflict ("IAC").[45]

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45. *See generally* INT'L COMM. OF THE RED CROSS, HOW IS THE TERM "ARMED CONFLICT" DEFINED IN INTERNATIONAL HUMANITARIAN LAW? (2008), [hereinafter ICRC OPINION PAPER] *archived at* http://perma.cc/T72K-FQB6 (discussing the differences between NIAC and IAC. Within HRL, two types of armed conflicts are generally recognized, IAC, having at least two States on opposing sides of each other, and NIAC, where there may be one State pitted against non-State actors or non-governmental armed groups, or between non-State actors only. HRL treaty law is instrumental in distinguishing between IAC and NIAC within the meaning of Common Article 3 of the Geneva Conventions of 1949. In addition, NIAC can be governed by the definition provided in Article 1 of AP II. Statutes and international jurisprudence may not recognize any other type of armed conflict. However, opinions vary as to the various types of NIAC that may be recognized, the details of which are outside the scope of this discussion. In the context of HRL treaty, Common Article 2 to the Geneva Conventions of 1949 states that:

> In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting

> Parties, even if the State of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 3.1, Aug. 12, 1949, 6 UST. 3516, 75 U.N.T.S. 287 [hereinafter Convention IV]. This would therefore entail, that IACs by definition may be opposed to "High Contracting Parties," or States, opening up the possibilities of NIAC to be triggered in most situations. Reading into the meaning of Common Article 2, author Schindler notes, "the existence of an armed conflict within the meaning of Article 2 common to the Geneva Conventions can always be assumed when parts of the armed forces of two States clash with each other. [. . .] Any kind of use of arms between two States brings the Conventions into effect." *See* ICRC OPINION PAPER, *supra* at 2 (alteration added); *see also* D. SCHINDLER, THE DIFFERENT TYPES OF ARMED CONFLICTS ACCORDING TO THE GENEVA CONVENTIONS AND PROTOCOLS 131 RCADI, Vol. 163 (1979-II). According to the ICRC:

> An international armed conflict occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation . . . . The existence of an international armed conflict, and as a consequence, the possibility to apply International Humanitarian Law to this situation, depends on what actually happens on the ground. It is based on factual conditions. For example, there may be an international armed conflict, even though one of the belligerents does not recognize the government of the adverse party.

ICRC OPINION PAPER, *supra* at 1 (alteration added); *see also Joint Services Regulations (ZDv) 15/2 of the German Army*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 527-28 (Dieter Fleck, ed., Oxford Univ. Press 1995).The Commentary of the Geneva Conventions of 1949 observes:

> [A]ny difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.

Geneva Convention (II) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 UST. 3114, 75 U.N.T.S. 31 [hereinafter Convention II]; *see also* COMMENTARY ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (Jean S. Pictet ed., 1952) [hereinafter COMMENTARY ON THE GENEVA CONVENTION]. Similarly AP I's art. 1, para. 4 observes that:

> [S]ituations referred to in [Article 2] include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), Jun. 8, 1977, 1125 U.N.T.S. 3 (alterations added) [hereinafter AP I]. Commenting on when IAC triggers, H.P. Gasser explains that:

> [A]ny use of armed force by one State against the territory of another, triggers the applicability of the Geneva Conventions between the two States . . . . It is also of no concern whether or not the party attacked resists . . . . [A]s soon as the armed forces of one State find themselves with wounded or surrendering

The second category involves a target residing outside of active hostilities, for which any act of targeted killing has to be conducted from a remote location.[46] Despite having some characteristics of the IAC framework, targeted killing under this category is problematic on two specific grounds. First, the geographical remoteness between the targeting

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> members of the armed forces or civilians of another State on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy State, then they must comply with the relevant convention.

H.P. Gasser, *International Humanitarian Law: An Introduction*, *in* HUMANITY FOR ALL: THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT, 510–11 (H. Haug ed., 1993) (alterations added).

46. In this context, there are two clear issues: first, the issue is that of targeting—referring to striking individuals outside the zone of hostilities. The second is that of command and control—referring to executing strikes from thousands of miles away. If the legality of the first is the center of immense debate, the second should clearly be illegal under international law, as I have discussed in this Article. The US' adoption of targeted killing of suspected terrorists from remote locations is well documented. *See* AP, *US Kills Al-Qaeda Suspects in Yemen,* USA TODAY, (Nov. 5, 2002, 7:14 AM), http://usatoday30.usatoday.com/news/world/2002-11-04-yemen-explosion_x.htm, *archived at* http://perma.cc/7YXN-6CYD; *See also* Doyle McManus, *A US License to Kill*, L.A. TIMES (Jan. 11, 2003), http://articles.latimes.com/2003/jan/11/world/fg-predator11, *archived at* http://perma.cc/J8V6-ZV5S (stating the US government maintains that its actions were appropriate under the international law of armed conflict and that the Commission and its special procedures have no mandate to address the matter); Michael J. Dennis, *Human Rights in 2002: The Annual Sessions of the UN Commission on Human Rights and the Economic and Social Council*, 97 AM. J. INT'L L. 364, 367, n.17 (2003). Although opinions about the legality of military strikes outside of hostilities differ, I concur with scholars who view this type of actions as unlawful. *See generally* Mary Ellen O'Connell, *Lawful Use of Combat Drones,* Congress of the United States House of Representatives Subcommittee on National Security and Foreign Affairs Hearing: Rise of the Drones II: Examining the Legality of Unmanned Targeting, Apr. 28, 2010, *archived at* http://perma.cc/YWA9-VGKG (presenting a set of restrictive covenants that may eliminate perceived conditions for denial of rights). With respect to the second issue, it has been established that military drones are being remotely controlled from within the US for striking in Pakistan. As documented by Jane Mayer:

> The US government runs two drone programs. The military's version, which is publicly acknowledged, operates in the recognized war zones of Afghanistan and Iraq, and targets enemies of US troops stationed there. As such, it is an extension of conventional warfare. The C.I.A.'s program is aimed at terror suspects around the world, including in countries where US troops are not based . . . . The program is classified as covert, and the intelligence agency declines to provide any information to the public about where it operates, how it selects targets, who is in charge, or how many people have been killed.

Jane Mayer, *The Predator War*, THE NEW YORKER, Oct. 26, 2009, http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer, *archived at* http://perma.cc/3B7G-BZBK (alteration added). As incredible as it sounds, some drones are being remotely operated from as far as the US State of Nevada. *See* Peter Bergen & Katherine Tiedemann, *The Drone War*, NEW AMERICA FOUNDATION, Jun. 3, 2009, http://www.newamerica.net/publications/articles/2009/drone_war_13672, *archived at* http://perma.cc/M6QE-XNPT.

actor and the target might require encroachment of a third-party's physical space. This calls for a legal determination to ensure the targeting does not violate the territorial sovereignty during the act of killing.[47] Second, prior to killing, the targeting actor must identify whether the target has ceased to become part of active hostilities. Once adequate due diligence determines an act is not an active hostility, the act in question must go through the rigors of the law enforcement framework, which provides a much higher threshold for legitimizing extrajudicial acts of violence.[48]

Technological superiority of the targeting actors in today's asymmetric warfare has promoted the rise of a third category of targets. From a targeting perspective, the physical locations of these targets change over time, from inside the hostilities, to proximately near the hostilities, to outside the hostilities. Thus, the identification of the legitimate target becomes very difficult, which makes legal determination even more puzzling. The availability of such a wide range of targets, therefore, calls for establishing a legal framework to define the individual profile of who could be a legitimate target under international law.

B. Profiling the Target

Legitimizing an individual as a target for assassination is based on accepting any one of the three categories identified above. The post-9/11 legal analysis has extensively used "enemy combatant"[49] as the prototypical

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47. *See* Bergen & Tiedemann, *supra* note 46 (noting that the operators of drones may be geographically isolated while striking individuals from these remote locations, the actual strikes are taking place in a physical space, causing territorial violation of geographical border).

48. The legal community has been divided since 9/11 as to the efficacy of the anti-terrorism model, as the debate centers around "law enforcement mechanism" vs. "military justice." Some commentators suggest that adherence to the accepted rule of law and law enforcement methods may have better results against terrorism. *See, e.g.*, SETH G. JONES & MARTIN C. LIBICKI, HOW TERRORIST GROUPS END: LESSONS FOR COUNTERING AL QA'IDA (2008), *archived at* http://perma.cc/SR3D-2QLC. In an earlier work, I presented the difference between the two models and examined their appropriateness in various cases. *See Paradigm of Indefinite Detention, supra* note 26 (delineating between the laws of war model and its law enforcement counterpart to tease out the shaping effect of 9/11 in dealing with alleged terrorists).

49. Immediately after 9/11, the United States Administration coined the term "enemy combatant" to broadly categorize individuals detained by the US military and its allied forces in its global initiative on terrorism. This term included those who have the maximum likelihood of being tried under the rules of military tribunal or any individuals that the United States government deemed to be members of Al-Qaeda or the Taliban, or to be participants in armed conflict against the United States. *See generally Guantanamo Bay: Military Commissions and Enemy Combatants*, JURIST, http://jurist.org/feature/2013/07/guantanamo-bay-military-commissions-and-enemy-combatants.php, *archived at* http://perma.cc/CKZ4-LSAN. The original idea was driven by the assumption that, once the designation of "enemy combatant" is assigned to a person, he or she could be detained indefinitely and would have no right under the

model for targeting individuals for extrajudicial detentions and assassinations. I have analyzed this model's deficiency both in the context of detention and extrajudicial killing elsewhere.[50] More importantly, the enemy combatant model is problematic within the context of targeted killing, especially within the non-hostile and hybrid hostilities paradigms. To overcome this difficulty, some commentators have used the term "functional combatant,"[51] which may be applicable in most situations if we

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laws and customs of war or the Constitution to meet with counsel regarding detention or to understand the charges against the individual. *Id.*; *see also* William Haynes, Gen. Counsel of the Dep't of Def., *Enemy Combatants*, COUNCIL ON FOREIGN RELATIONS (Dec.12, 2002), http://www.cfr.org/international-law/enemy-combatants/p5312, *archived at* http://perma.cc/FPW5-HAPM. This is in violation of the IHL under the guidelines provided in the four Geneva Conventions of 1949. *See generally* Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST. 3316, 75 U.N.T.S. 135 [hereinafter Convention III] (outlining the permissible conditions and allowable treatments of prisoners); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 7,1978, 1125 U.N.T.S. 609 [hereinafter AP II] (outlining the essential rule of the law of armed conflict to wars inside a country or sovereign territory); Convention II*, supra* note 45; Convention IV, *supra* note 45; AP I, *supra* note 45. The detainees of the war in Afghanistan have the legitimate right to POW status accorded to them under the Third Geneva Convention. "[POWs] . . . are . . . [m]embers of the armed forces of a Party to the conflict . . . [who have] fallen into the power of the enemy." Convention III, *supra*, arts. 4.A(1)–(5) (alterations added). "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." *Id.* art. 118. Clearly, the terminology "enemy combatant" does not have support in the corpus of laws that illuminate laws of war or HRL, as scholars and activists repeatedly question the legitimacy of applying the terminology to deny prisoners of wars status to the Taliban members who were captured in the battlefield in Afghanistan. "The Bush Administration has used the term 'unlawful combatant' or 'enemy combatant' interchangeably [and with effective use] to stress that the detainees are not considered POWs." *See* Saby Ghoshray, *Hamdan's Illumination Of Article III Jurisprudence In The Wake of The War on Terror*, 53 WAYNE L. REV. 991, 1011, n. 84 (2007) [hereinafter *Hamdan's Illumination of Article III*]. However, the Administration, in its zeal to combat terrorism, has failed to comply with its obligation under customary international law to make a clear distinction between combatants and noncombatants. As a result, many civilian noncombatants were captured and detained as enemy combatants, which has been documented heavily in the literature, and I shall refrain from readdressing them here.

50. *See generally* Saby Ghoshray, *On the Judicial Treatment of Guantánamo Detainees in International Law*, *in* CLARK BUTLER, GUANTÁNAMO BAY AND THE JUDICIAL-MORAL TREATMENT OF THE OTHER 80, 85–86 (Purdue Univ. Press 2006) [hereinafter *On the Judicial Treatment of Guantánamo Detainees*].

51. As the usage of "enemy combatant" has become legally burdensome for states involved in indefinite detention and targeted killing, the term "functional combatant" has entered the legal vernacular to read a broader meaning into combat related role for suspected terrorists. Invocation of such term, in my view, advances a broader right to kill, by incorporating a wide range of functionalities into the role of a combatant. *See generally* Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force, in* 13 Y.B. OF INT'L HUM. L. 3 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=1754223 (explaining how the article 51 right to self-defense can be invoked in justifying the killing of Anwar al-Awlaki, an American citizen without due process of law).

expand the meaning of "functional." This definitional flaw comes from its inability to adequately distinguish between civilians and combatants – an area that must be elaborated on for a better appreciation of its nuances. Understanding the implication of using the term functional combatant for targeted killing analysis, therefore, would require identifying the applicable assumptions and the limiting cases. Next, I embark on such an analysis to examine the profile of a functional combatant in appropriate detail.

Who is a functional combatant? For the purpose of our current inquiry, could such an individual, if not actively engaged in hostilities, be targeted for killing? When there is no publicly available information about an individual, how can the legal community ensure that individuals are not being randomly targeted for killing?[52] These are some of the poignant issues that must be brought to the forefront. Therefore, the right to targeted killing must be premised on recognizing targeted killing as an act that flows from rights under international law. In order to place such rights within an appropriate epistemological dimension of law,[53] the act must be scoped,

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52. *See Death from Above, supra* note 14. The authors estimate that between 2006 and 2009 (data up to first quarter), 700 persons died in attacks killing 14 intended targets. *Death from Above, supra* note 14. Peter Bergen and Katherine Tiedemann have found similar ratios of intended to unintended victim: "Since 2006, our analysis indicates, 82 US drone attacks in Pakistan have killed between 750 and 1000 people. Among them were about 20 leaders of al Qaeda, the Taliban, and allied groups, all of whom have been killed since January 2008." PETER BERGEN & KATHERINE TIEDEMANN, VOICES FOR CREATIVE NONVIOLENCE, REVENGE OF THE DRONES (2009), *archived at* http://perma.cc/4GQX-V76L. The United States government, however, does not provide official data on this. However, some websites do provide such information. *See generally* Peter Bergen & Katherine Tiedemann, *The Year of the Drone,* NEW AMERICA FOUNDATION (Feb. 24, 2010), http://www.newamerica.net/sites/newamerica.net/files/policydocs/bergentiedemann2.pdf, *archived at* http://perma.cc/XSE6-SWPR (tracking strikes in Pakistan).

53. Drawing from the methodologies used in complexity analysis, I have introduced the concept of ontological and epistemological dimension in discussing "rights paradigm." *See* Ghoshray, *Narrative of Dehumanization*, *supra* note 8. This theory was introduced and popularized in the 1970s to understand complex paradigms in organizational or social framework. Ontological and epistemological constructs were created by social scientists. *See generally* GIBSON BURRELL & GARETH MORGAN, SOCIOLOGICAL PARADIGMS AND ORGANISATIONAL ANALYSIS: ELEMENTS OF THE SOCIOLOGY OF CORPORATE LIFE (Heinemann Educational Books 1979); NORMAN BLAIKIE, APPROACHES TO SOCIAL INQUIRY 25 (Polity Press 2007). The concept of epistemology and its ontological counterparts were known in the early times of Plato. *See generally* Phil Johnson &. Catherine Cassell, *Epistemology and Work Psychology: New Agendas* 74 J. OCCUPATIONAL & ORG. PSYCHOL. 125, 125 (2001) (highlighting the importance of epistemology in dissecting inferences drawn from psychological evaluations). Despite, the long histories of these methodologies for the construction of social realities, awareness of their clear distinctions were only recently made clear. *See generally* Dennis Gioia, *Give It Up: Reflections on the Interpreted World*, 12 *J OF MGMT. INQUIRY* 285, 285 (2003) (observing ontology as a relationship between the observer and the nature of the social phenomenon being observed, while noting epistemology as the mechanism through which to conceptualize such phenomenon). Given the complexity of the rights narrative, it is important to construe a proper epistemology of a phenomenon's full

defined, and defended within law.

Right to targeted killing requires legitimizing a series of antecedent acts that form the basis of such extrajudicial killing. In this context, the relevant legal paradigm is still in a maturation process, which makes it difficult to fully appreciate or endorse such rights appropriately. This is because an act within the context of international law should flow naturally from a legally developed right that may have either sprung up as a fundamental force or have been derived from explicit mandates of international law. To find this mandate we must examine separately the strands that collectively comprise international law. These three strands include: (1) IHL—acting alone as a self-sustaining legal framework; (2) HRL—acting alone in a self-sufficient capacity; and (3) the evolving legal paradigm post-9/11, either working outside the IHL-HRL dyad or working interactively and complementarily with the dyad.

III. IS TARGETED KILLING SUPPORTABLE UNDER INTERNATIONAL HUMANITARIAN LAW ALONE?

Can a functional combatant identified above be killed within the framework of targeted killing? To adequately respond to this, the constructed profile must be tested for its IHL's applicability. An assessment is required on the nature of the conflict to determine where the related hostility in question should fall, given the binary choice between the NIAC[54] paradigm and its IAC counterpart.[55] Common Article 2 of the Geneva Convention governs the scope and conduct of hostilities under IAC.[56] On the other hand, Common Article 3 governs the scope and

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scope, evolution, and future trajectory. We can construe ontological dimension as the set of dimensions that allows us to understand the nature of a phenomena, whereas, epistemology is the dimension through which we perceive that phenomena. In this sense, according to the scholars mentioned above, both ontological and epistemological assumptions give us the meaning that something can be described in accordance with what someone believes about the state of that complex framework, such that the reality of that phenomenon is understood from a mediated social interpretation. The concept of ontological dimensions brought to distinguish between human cognitive experience of social and natural reality and its independent existence prior to that cognition. More specifically, where ontology provides us with the vehicle through which to construe independent existence, decoupled from cognitive bias, epistemology alerts us to the causal relationships amongst variables such that our reality is constructed outside of the individual through the multitude of sensory stimuli that shapes our experience. According to Gioia, "The reality people confront is the reality they construe." *Id.* at 287. For a detailed discussion of rights narrative in international law within the context of war on terror consider an earlier work of mine. *See* Ghoshray, *Narrative of Dehumanization*, *supra* note 8.

54. *See* ICRC OPINION PAPER, *supra* note 45 (discussing NIAC in general, and the types of NIAC which may be recognized under statutes and international jurisprudence).

55. *See* ICRC OPINION PAPER, *supra* note 45 (noting that an IAC occurs when one or more states have recourse to armed force against another state).

56. *See* Convention IV, *supra* note 45, art. 2 (stating that the Convention applies to

conduct of NIAC.[57] Yet, difficulties might arise in categorizing a conflict when parties do not follow the norm. For example, if one of the state parties in armed conflict either does not explicitly accept or implicitly denies occurrence of such a conflict, we might be left with resorting to interpretation based on emerging case laws. In this regard, the expanded

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armed conflict which may arise between two or more parties).

57. Emerging consensus in jurisprudence suggests, in the context of NIAC, Common Article 3 to the Geneva Conventions of 1949 should be considered the governing law. *See* Ghoshray, *Hamdan's Illumination of Article III Jurisprudence in the Wake of The War on Terror*, *supra* note 49 (charting the trajectory of Hamdan Court's broader observations related to Common Article 3's applicability on NIACs). However, in the absence of a legally binding HRL definition of Common Article 3, it may be incumbent upon us to review the facts surrounding a specific scenario, for a determination of its applicability. In this regard, a given situation can be analyzed within the framework developed based on state practices and case laws. The dual imposition of state practices and case laws is noteworthy here, because lacking a force of applicability from treaty obligations, case laws could become obligatory in force. Recent case laws brought forth important elements into the evolving definition of an armed conflict in the context of NIAC within the meaning of Common Article 3, which do not find explicit textual reference, but must therefore be implicitly acquired in meaning. *See* Prosecutor v. Tadic, Case No. IT-94-I-T, Opinion and Judgment, paras. 561-68 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) [hereinafter Tadic Judgment] (discussing the protracted armed violence between governmental forces and organized armed groups); *see also* Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, paras. 84, 135-70, (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) [hereinafter Fatmir Judgment] (observing that, first, the hostilities must reach a minimum level of intensity, as it defines a minimum threshold level during when the hostilities have a collective character or, when a government is compelled to use military force against the opposition). Thus, judgments and decisions of the ICTY further elaborate on applicable definitions of NIAC. In the context of NIAC, ICTY judgment supports characterizing prolonged armed violence between governmental authorities and organized armed entity, or that between organized armed groups within a state as armed conflict. Tadic Judgment, *supra*, para. 628. The ICRC opinion supports this view, "Common Article 3 applies to 'armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties.'" ICRC OPINION PAPER, *supra* note 45, at 3. It therefore can be interpreted that, when there is armed conflicts in which one or more non-governmental armed group is involved or, armed conflicts between governmental armed forces and non-governmental armed groups, or between such groups, the hostilities would be covered under NIAC. ICRC further notes that, since the universal ratification of the four Geneva Conventions, the requirement of armed conflict occurring "in the territory of one of the High Contracting Parties" may have lost its practical significance. ICRC OPINION PAPER, *supra* note 45, at 3. Moreover, in my view, given the escalating number of asymmetric wars taking place globally, we must infer that, any armed conflict between State and non-State actors indeed must take place on the territory of one of the Parties to the Convention. This would also imply that in order to distinguish an armed conflict, in the meaning of Common Article 3, from less serious forms of violence, such as internal disturbances and tensions, riots or acts of banditry, the situation must reach a certain threshold of confrontation. *See* SCHINDLER, *supra* note 45, at 147. (identifying various instances of NIAC under Common Article 3); *see also* Jelena Pejic, *The Protective Scope of Common Article 3: More Than Meets the Eye,* 93:881 INT'L REV. OF THE RED CROSS 189, 193–95 (2011), *archived at* http://perma.cc/59F7-JXCY (arguing that Common Article 3 to the Geneva Conventions may be given an expanded geographical reading as a matter of treaty law).

reading of the 1949 Geneva Convention's "High Contracting Parties"[58] has become the norm, most notably by virtue of the 1995 *Tadic*[59] case of the International Criminal Tribunal for the former Yugoslavia ("ICTY"). Contemporary application of the Common Article 2's protection paradigm will still encapsulate most instances of hostilities involving two state parties. This is regardless of whether or not the state parties are thrust into such conflict by intention or happenstance, and, whether or not all or parts of the state's armed forces take part in the hostilities.[60] This protection paradigm also extends to a range of hostilities, including *hors de combat*,[61] which poses a rather high threshold for a state willing to invoke a right to targeted killing. Having identified the distinction between NIAC and IAC, the following analysis will further clarify whether there can be a potential target for state sponsored killing under IHL.

A. Exploring the Non-International Armed Conflict/International Armed Conflict Distinction

Here, two points are noteworthy. First, IHL provides clear demarcation between IAC and NIAC by determining whether state parties are involved or not.[62] Second, IAC provides a much higher threshold of protection for combatants, which flows from the full suite of Additional Protocols, including I ("AP I"), II ("AP II"), and III ("AP III"), in addition to the 1949 Geneva Conventions.[63] Therefore, the first step toward legitimizing a potential target under IHL would be to explicitly categorize

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58. *See* ICRC OPINION PAPER, *supra* note 45, at 1 (noting the 1949 Geneva Convention's discussion of the High Contracting Parties).

59. ICRC OPINION PAPER, *supra* note 45, at 2 (discussing the ICTY's definition of an armed conflict in the *Tadic* case).

60. ICRC OPINION PAPER, *supra* note 45, at 1–2 (noting that an IAC occurs, regardless of the reasons or intensity, when one or more states have armed recourse against another state).

61. *See* Int'l Comm. of the Red Cross, *Customary IHL*, *Rule 47: Attacks against Persons Hors de Combat* (2014), *archived at* http://perma.cc/N9VS-M87D (explaining the framework in which combatants are normally granted special protection under IHL, providing they do not take part in hostilities and as such remain "outside the fight.").

62. *See* ICRC OPINION PAPER, *supra* note 45 (discussing the governing doctrines for IACs and NIACs).

63. *See* AP I*, supra* note 45; AP II, *supra* note 49. The United States has not ratified these Protocols; however, many foreign countries recognize these Protocols as customary International Law. *See* Michael J. Matheson, *The United States Position on the Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. UNIV. INT'L L. REV. 415, 420 (1987) (identifying specific military conducts in the war zone that insulates military personnel from being charged with a war crime); *see also* Dietrich Schindler & Jiří Toman, *Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare, in* THE LAWS OF ARMED CONFLICTS 259 (Martinus Nijhoff Publishers 1965).

the related hostility in either the IAC or the NIAC category. According to the Common Article 2, at least one of the parties from the two opposing sides must be a state, in which case, the IHL applicability might turn on the member state's treaty obligations.[64] Therefore, it is important to isolate and distinguish the category of the hostilities.

Looking through the prism of continued hostilities post-9/11, the United States can be recognized as the designated state party and either Al-Qaeda[65] or Al-Qaeda in the Arabian Peninsula[66] can be considered the opposing faction. Evaluating the given elements here, there is no legal basis to categorize the hostilities as IAC. Thus, targeted killing of a functional combatant within the context of IAC may not be legally justified. Once such legal combatant status review rejects targeted killing under IAC,[67] analysis should default to a NIAC status review, which automatically triggers an evaluation based on provisions under the Common Article 3.

Warfare in the twenty-first century has been going through a metamorphosis. Manifested both in their asymmetric nature and increased participation by non-state actors, hostilities categorized under NIAC continue to increase in frequency. Therefore, the current inquiry to determine a target's justifiability under NIAC may be accomplished by proceeding along two specific lines of investigation. First, how much of an expanded reading of Common Article 3 is legally justifiable in instances involving non-state actors? Second, from where would the right to targeted

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64. *See* ICRC OPINION PAPER *supra* note 45 (discussing armed conflicts including non-governmental groups and state actors).

65. Al-Qaeda (AQ) is a loose conglomeration of global Islamist organization that is driven by Osama Bin Laden's ideology. Various articles and commentaries during the last decade have attempted to define and describe the ideology, objective and framework of Al-Qaeda. *See* Jason Burke, *What Exactly Does al-Qaeda Want*? THE GUARDIAN (Mar. 21, 2004 11:08 PM), http://www.guardian.co.uk/world/2004/mar/21/alqaida.terrorism, *archived at* http://perma.cc/D5UZ-4LUM; *Al-Qaida*, GLOBALSECURITY, http://www.globalsecurity.org/military/world/para/al-qaida.htm (last visited Oct. 28, 2013, *archived at* http://perma.cc/KWZ5-JPV3); Andrew Wander, *A History of Terror: Al-Qaeda 1988-2008*, THE GUARDIAN (Jul. 12, 2008), http://www.guardian.co.uk/world/2008/jul/13/ history.alqaida, *archived at* http://perma.cc/7PM4-8RX3; Yassin Musharbash, *The Future of Terrorism: What al-Qaida Really Wants*, SPIEGEN ONLINE (Aug. 12, 2005, 3:53 PM), http://www.spiegel.de/international/the-future-of-terrorism-what-al-qaida-really-wants-a-369448.html, *archived at* http://perma.cc/87T8-J33A; *see also* Ghoshray, *Narrative of Dehumanization*, *supra* note 8, at 164-70.

66. The branch of Al-Qaeda that is active in Arabian Peninsula, especially in Saudi Arabia and Yemen is abbreviated as AQAP in the contemporary discourse. *See* Jonathan Masters & Zachary Laub, *Al-Qaeda in the Arabian Peninsula (AQAP)*, COUNCIL ON FOREIGN RELATIONS (Aug. 22, 2013), http://www.cfr.org/yemen/al-qaeda-arabian-peninsula-aqap/p9369Cfr.org, *archived at* http://perma.cc/3HUS-2N4P.

67. *See* Pejic, *supra* note 57. Here I draw attention to the fact that, based on IAC's definition requiring "at least two [State] parties," a broader definition of combatant belonging to non-State actors may be rejected.

killing flow in cases dealing with individuals already in enemy hands? In this context, an increase in the frequency of NIACs since 9/11 may provide the strongest rationale for bringing armed conflicts involving non-state actors within the framework of Common Article 3.[68] However, this will require setting up a basis for such categorization. Identifying the geographical context of the hostilities in question will be the first step in that direction.

Given that the majority of US acts of targeted killing have been concentrated in three specific regions—Afghanistan, Pakistan, and Yemen[69]—let us evaluate the status of a functional combatant under Common Article 3 by focusing on these theaters. In all three scenarios, the state actor, the United States, has officially declared war against either the members of Al-Qaeda[70] or the members of Al-Qaeda in the Arabian Peninsula.[71] While Al-Qaeda is operationally active in both Afghanistan and Pakistan, Al-Qaeda in the Arabian Peninsula is primarily active only in Yemen.[72] However, for the purpose of legal determination, integrating facts on the ground with "treaty obligation" under Common Article 3 might render NIAC applicability problematic.[73] This rejection of Common Article 3 would create an unregulated IHL space, creating temptation for some state actors to operate with impunity. Such an untenable scenario can be avoided by crafting a set of deterministic criteria based on expanded interpretation of IHL's legal and policy framework. This would then form the basis of support for a NIAC application of the hostilities in question.

Current jurisprudence assesses NIAC under two main criteria: intensity of violence[74] and parties to the violence. First, it is incumbent upon us to carefully isolate and analyze all the elements of a conflict involving a non-state actor and to determine whether the threshold of intensity has met the requirements of NIAC within the meaning of Common

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68. Pejic, *supra* note 57 (noting that in the context of NIAC, Common Article 3 should be considered governing law).

69. *See* VOICES FOR CREATIVE NONVIOLENCE, *supra* note 52 (discussing targeted killings in Pakistan and other areas).

70. On September 21, 2001 President George Bush, "vowed the US would use all its resources to avenge the worst-ever attacks on American soil." *2001: US Declares War on Terror*, BBC, http://news.bbc.co.uk/onthisday/hi/dates/stories/september/12/newsid_2515000/2515239.stm (last visited Nov. 26 2013, *archived at* http://perma.cc/EJP4-ERMW); *See also* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF].

71. The concern over AQAP is clear. As noted, "[w]hile core AQ remains a serious threat, I believe the most serious threat to the homeland today emanates from members of AQAP." MARK F. GIULIANO, THE POST 9/11 FBI: THE BUREAU'S RESPONSE TO EVOLVING THREATS 2 (2011) (alteration added), *archived at* http://perma.cc/797T-FRVZ.

72. *See id.* (discussing threats from AQAP specific to Yemen).

73. *See* Pejic, *supra* note 57.

74. Pejic, *supra* note 57.

Article 3.[75] In the absence of a legally binding IHL based definition, a higher threshold of intensity should generally be applied to distinguish NIAC from internal disturbances within a state. Despite powerful states not showing fidelity to this threshold rule,[76] international judicial bodies strongly recommend adhering to such delimiting criteria in distinguishing between NIAC and IAC under the Common Article 3.[77] Measuring an appropriate threshold, however, may not be so straightforward from an implementation perspective.

How do we measure the threshold of intensity to ensure it has been elevated to the desired level? Jurisprudence[78] identifies a number of factors as indicative characteristics to determine such a threshold. Without such a threshold, states could simply invoke NIAC for the purpose of targeted killing. Thus, one of the goals of such an assessment is to prevent the

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75. Within the context of Common Article 3, armed hostilities, not every incident can rise to the level of NIAC, as jurisprudence has developed to guide us based on threshold of intensity. AP I to the Geneva Conventions set a higher threshold of applicability than Common Article 3, even though some would suggest that their scope of applicability should have been the same. Common Article 3's lack of treaty obligations provides a much restricted textual guidance under AP II, which is to be read as an armed conflict in which the non-State party must "exercise such control over a part of [the territory of a State party] as to enable [it] to carry out sustained and concerted military operations and to implement this Protocol." AP II, art. 2, *supra* note 49 (alteration added). This sets the scope of application of AP II on a much narrower threshold than that of Common Article 3, with Article 3 maintaining a separate legal significance even when AP II is also applicable. The relationship between applicable rules in this context comes from article 1.1 of AP II, pursuant to which the Protocol "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application." *Id.* *See* Pejic, *supra* note 57, at 190, n.1 (arguing that Common Article 3 to the Geneva Conventions and AP II taken together may have provided a higher threshold of intensity, while identifying some specific criteria). Literature and case law further implies that assessments of NIAC, which turn on an examination of events on the ground, where indicative factors might include, the number: (1) duration and intensity of individual confrontations; (2) the type of weapons and other military equipment used; (3) the number and caliber of munitions fired; (4) the number of persons and types of forces partaking in the fighting; (5) the number of casualties; (6) the extent of material destruction; and (7) the number of civilians fleeing combat zones. *See* Fatmir Judgment, *supra* note 57, para. 90; Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, para. 84 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008) [hereinafter Haradinaj Judgment]; *see also* Tadic Judgment, *supra* note 57, para. 561. As I note in this Article, at the end of the day, final assessment is to be based on a case-by-case scenario analysis against the slew of indicative factors discussed here. *See* SCHINDLER, *supra* note 45; *see generally* NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW (2008).

76. *See* SCHINDLER, *supra* note 45, at 256 (presenting a more nuanced framework of hostilities that can account for emerging difficulties borne out of complexities of asymmetric warfare).

77. SCHINDLER, *supra* note 45, at 256.

78. *See* Tadic Judgment, *supra* note 57, para. 561; *see also* Haradinaj Judgment, *supra* note 75, para. 51.

inclusion of isolated and fragmented hostilities from coming under the purview of the Common Article 3 definition of NIAC. Thus, contradistinction must be made between NIAC and lower threshold hostility by reviewing a set of factors characterizing the nature, scope, duration, and sophistication of weaponry.[79] In this evaluation, the humanitarian impact of the hostility must also be taken into account before identifying the conflict as NIAC for the purpose of IHL application. Application of a threshold test would be the most manageable way to determine the qualifying intensity under NIAC. Due to the multiple interacting factors that might shape the required threshold intensity, a general functional expression can be developed as an equation in the following:

Intensity = f (duration, frequency of attacks, sophistication of weaponry, military nature, extent of civilian displacement, severity of victimization, territorial control issues).

This characterization, a mathematical equation, would be both robust and manageable. This framework would allow for all the necessary factors to be considered for a determination of whether the intensity of hostilities has risen to the occasion of NIAC under Common Article 3.[80]

It is instructive to note that each of the indicative factors have been specifically addressed in the expanded reading of Common Article 3 application. For example, both the *Tadic* decision of the ICTY and the Statute of the International Criminal Court ("ICC") apply "protracted armed violence" or "protracted armed conflict" as a Common Article 3 trigger for NIAC.[81] This has been further corroborated by a recent ICRC position paper.[82] According to this position paper, IHL applicability of NIAC is triggered in situations where:

> *Protracted armed confrontations* are occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach *a minimum level of intensity* and the parties involved in the conflict must show a *minimum of* [*organization*].[83]

This ICRC observation not only presents a strong rejoinder against

79. *See* Tadic Judgment, *supra* note 57.

80. *See* VOICES FOR CREATIVE NONVIOLENCE, *supra* note 52 (discussing the intensity of hostilities necessary under NIAC).

81. *See* Tadic Judgment, *supra* note 57, para. 561.

82. *See* ICRC OPINION PAPER, *supra* note 45, at 4.

83. ICRC OPINION PAPER, *supra* note 45, at 5.

rejection of Common Article 3's applicability for NIAC under the "intensity of violence" criteria,[84] but also supports applicability under the second criteria of "parties to armed conflict."[85] While the state party in the present case is conspicuous by its ability to engage in targeted killing, a question arises whether Al-Qaeda or Al-Qaeda in the Arabian Peninsula constitutes the second "party" to the precondition of "at least two parties."[86] Indicative factors of organizational capability of these groups have been well studied. By assessing their command, control, and planning capabilities,[87] scholars agree that these groups meet the criteria for NIAC.[88] As observed in my earlier work,[89] the US Supreme Court in *Hamdan v. Rumsfeld*, noted that the conflict with Al-Qaeda satisfies the Common Article 3 applicability under NIAC, thereby pointing to the flexibility in Common Article 3's application for protecting combatants in armed conflict.[90] Common Article 3 in the context of the US war on terror would,

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84. *See* Pejic, *supra* note 57, at 192.

85. *Pejic, supra* note 57, at 206.

86. *See* Pejic, *supra* note 57, at 191 (arguing that, "Common Article 3 expressly refers to 'each Party to the conflict', [sic] thereby implying that a precondition for its application is the existence of at least two 'parties').

While it is usually not difficult to establish whether a state party exists, determining whether a non-state armed group may be said to constitute a 'party' for the purposes of Common Article 3 can be complicated, mainly because of lack of clarity as to the precise facts and, on occasion, because of the political unwillingness of governments to acknowledge that they are involved in a non-international armed conflict. *Pejic, supra* note 57, at 191.

87. *See* MELZER, *supra* note 75, at 256–57 (contending that, on the basis of the intensity of hostilities and the organizational structure of the insurgency, an isolated incident can be brought under the purview of HRL within the context of NIAC).

88. MELZER, *supra* note 75, at 256–57.

89. *See generally*, *Hamdan's Illumination of Article III*, *supra* note 49.

90. Hamdan v. Rumsfeld, 548 US 557, 635 (2006). *The Hamdan* Court's reliance on Geneva Convention's Common Article 3 is not only significant at several levels, but also exudes brilliant jurisprudence by Justice Stevens, as I have noted elsewhere. *See Hamdan's Illumination of Article III*, *supra* note 49. My view is that *Hamdan* as case law would imply that Common Article 3 of Geneva Conventions applies to members of al-Qaeda in the US government's ongoing war on terror. Moreover, by recognizing the binding impact of the relevant provisions of Article 3 in *Hamdan*, cases can be made against all signatory states to keep them from passing sentences or carrying out executions against members of Al-Qaeda without any previous judgment pronounced by a regularly constituted court. This is corroborated in Justice Stevens' observation: "Common Article 3, then, is applicable here and . . . requires that Hamdan be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'" *Id.* at 631–32 (alteration added). While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines "regularly constituted" tribunals to include "ordinary military courts" and "definitely exclude[] all special tribunals." *Id*. at 729 (alteration added). Similarly, commenting on military tribunals' requirement of uniformity Laws of War, Justice Kennedy

thus, apply unequivocally to members of Al-Qaeda or Al-Qaeda in the Arabian Peninsula, as it did to Salim Hamdan. Failure to characterize the current global war on terror as a NIAC leads to a denial of an applicable protection paradigm of the Geneva Conventions, which is *not* legally sustainable. It is important to note that the various targets of these NIACs must, therefore, be rescued from the unregulated space of IHL, for which, the inquiry must now develop a nuanced understanding as to who could be a member for the purpose of its application.

B. Who is a Member for Applicability of International Humanitarian Law?

Analysis of the legitimacy of targeted killing requires a comprehensive evaluation of the target who may be a functional combatant in the war conflict paradigm equation. In this paradigm, a target cannot be decoupled from the theater of hostilities, as the characteristics of the physical location grants the target certain rights based on the nature of hostilities, a framework that can be recognized as regionalizing a functional combatant. The analysis thus far can infer that the current hostilities between the United States and Al-Qaeda or Al-Qaeda in the Arabian Peninsula, for the most part, would fall under NIAC. The next level of inquiry is to identify whether international law—more specifically, IHL—provides guidance to an evaluation of who can be targeted. Setting aside the rather complex interaction between two competing rights—the right to life of the targeted individual versus the right to targeted killing—the analysis now must examine the membership of the functional combatant.

Driven primarily to support indefinite detention, the legal landscape post-9/11 has developed a new class of combatants, called "enemy combatant[s]," whose legal status has been the subject of numerous commentaries and court opinions.[91] Arguably as the enemy combatant classification presented structural hurdles for targeted killing, a newer class of combatants was coined under the rubric of functional combatant. As the frequency of NIACs continues to rise on the global stage, lines between civilians and combatants are increasingly being blurred. To argue that the functional combatant designation would allow flexibility in categorizing

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noted:

> Common Article 3's standard of a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples,' . . . supports, at the least, a uniformity principle similar to that codified in § 836(b). The concept of a 'regularly constituted court' providing 'indispensable' judicial guarantees requires consideration of the system of justice under which the commission is established, though no doubt certain minimum standards are applicable.

Id. at 643 (internal citations omitted) (alteration added). *See* ICRC OPINION PAPER, *supra* note 45, at 3; *On the Judicial Treatment of Guantánamo Detainees, supra* note 50, at 1006, n. 48.

91. *See On the Judicial Treatment of Guantánamo Detainees, supra* note 50, at 88-90.

individuals who may or may not be actively engaged in combat, and yet, can be a legitimate target for killing by the state, would be conceptually flawed for various reasons.

What can be viewed as flexibility by the targeting state in conveniently identifying a wide range of individuals is, indeed, difficult to reconcile with the international law framework. This difficulty stems from the indeterminacy of categorization that comes from an absence of adequate disaggregation of functionalities. The existence of two overlapping theories to categorize the nature of a combatant—either defining them under continuous fighting function ("CFF"),[92] or under continuous combat function ("CCF")[93]—creates a functional indeterminacy in designating a functional combatant. This creates operational difficulty for IHL application for designating a target within the context of NIAC.

Linguistically, "fighting" may have a more restrictive connotation than "combat." Therefore, the restriction placed on the CFF model can be relaxed by converting to the CCF model. This would allow the imposition of the functional combatant status on individuals who may function in support roles without actually engaging in direct combat. Perhaps by including roles as varied as participants in political and religious leadership activities, financial contributors, informants against occupying or invading forces, collaborators and insurgent sympathizers, or, even vehicle drivers and other service providers, CCF designation can encapsulate a larger number of individuals. This expanded interpretation of operational

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92. Post-9/11 escalation of asymmetric warfare has given rise to various models to adequately define insurgents or terrorists involved in armed hostilities with states. Difficulties in legally encapsulating "enemy combatants," prompted the legal community to tinker with various definitional paradigms applicable to combatants, based on duration, scope and intensity of hostilities. The continuous fighting function (CFF) vs. continuous combat function (CCF) distinction is one such example, on which no consensus has emerged as of yet. Melzer takes the position that CFF would better capture the essence of combatant in evolving hostilities paradigm of today. *See* MELZER, *supra* note 75, at 321. Chesney argues that, "[t]he CFF test is the 'CCF' (CCF) standard to which the ICRC refers in the Interpretive Guidance." Chesney, *supra* note 51, at 44, n. 174 (alteration added). Commenting on CCF, Chesney notes:

> On this model, not all persons associated with the non-state party would count as combatants for purposes of distinction. Rather, only those members who directly participate in hostilities on a regular base would so qualify; other group members would remain civilian. From a policy perspective, the desirability of this approach of course depends entirely on how one interprets the concept of 'direct participation' and the requirement of continuity.

Chesney, *supra* note 51, at 44. I concur with Chesney that both models could invite controversy and might exclude some members to the inclusion of some others who decidedly may not belong. Chesney has rightly noted that "[t]he law on point, unfortunately, is simply not determinate enough to resolve that dispute." Chesney, *supra* note 51, at 44 (alteration added).

93. Chesney, *supra* note 51, at 44.

functionalities[94] could, therefore, subject a larger group of individuals to the hostilities paradigm. Therefore, CCF can bring a much larger group of individuals under the broader umbrella of functional combatant, regardless of whether or not such characterization immunizes a state from charges of extrajudicial killing.[95]

Whether we follow CCF's broader meaning of combatant or CFF's restricted meaning, none of these frameworks can fully address a state's heightened obligation towards minimizing civilian casualties.[96] The framework of targeted killing is conceptually complex. Thus, to adequately determine the status of an individual within the conflict paradigm, we are required to delineate between the legal legitimacies of two interacting paradigms: the functional combatant paradigm and the civilian protection paradigm. For example, if a state deliberately targets a functional combatant and knowingly becomes complicit in protecting civilians in order to eliminate such combatant via targeting, the act may be deemed illegal. Thus, any analysis of the legitimacy of targeted killing would turn on fully evaluating the context and scope of such acts. In such evaluation, the predominant focus must be on establishing whether imputing an expanded meaning of functional combatant would necessarily translate into a gross denial of civilian rights to live in the proximate vicinity of hostilities. Evaluating through this prism, it can be argued that, widespread civilian deaths arising out of continued drone strikes in Pakistan,[97] Afghanistan,[98] and in the Arabian Peninsula,[99] can be characterized as state complicity. Despite the targeting state's focused pursuit on suspected terrorists, targeted killing can never rise to a level of legal legitimacy in such circumstances.

The above discussion prompts us to question why there is a severe lack of accountability mechanisms for civilian protection. Could this be attributed to the United States' failure in adopting a legally permissible means to kill by expanding the definition of a combatant? Or, is it because the state conducting the targeted killing strikes is not providing transparency related to the killings? Focusing on either one of these issues would propel us to seek the much needed parameters to define functional combatant targeted for such strikes. Yet, constructing such definitional parameters might be difficult to achieve in practice. This is because if there is a right to kill functional combatants, this right cannot be exercised

94. Chesney, *supra* note 51, at 44.

95. Here I draw attention to the dangers of an expanded reading of a wrong model, whereby civilians or individuals not explicitly belonging to terrorists groups can be wrongfully targeted.

96. *See supra* notes 91, 93-94 and accompanying text.

97. *See* Bergen & Tiedemann, *supra* note 46 (discussing air strikes by US drones in Pakistan and Afghanistan).

98. Bergen & Tiedemann, *supra* note 46.

99. Bergen & Tiedemann, *supra* note 46.

without an appropriate status determination of the target. Such determination becomes difficult and imprecise under the existing IHL guidelines,[100] and the CFF/CCF dichotomy,[101] for the following suggested reasons.

First, if an individual is determined to be a functional combatant under the CFF/CCF model, no temporal delimiting criteria exists in practice to prevent him from remaining a target in perpetuity. This raises a significant question that is somewhat akin to the temporal expansion of indefinite detention: when does a target cease to become a target?

Second, the scope, content, and membership of hostilities depend to a large extent on ground intelligence, which suffers from imprecision,[102] coercion,[103] and unreliability.[104] Imprecise intelligence[105] based drone strikes from remote locations inevitably invites a higher probability of civilian deaths. The CCF model neither provides assurance of robustness of the evidence collection mechanism, nor exhibits confidence in the deliberation mechanism that uses such evidence to execute a targeted killing. Therefore, in expanding the functional combatant framework from CFF to CCF, a state can enhance the potential for larger civilian casualties during conflicts. Unfortunately, such designation framework does not have an adequate preventive mechanism to prevent, minimize, or eliminate excessive civilian casualties.

For the proponents of state-sponsored targeted killing, CCF is a very attractive model, as it allows the flexibility to incorporate targeted killing under Common Article 3's invocation of NIAC.[106] Despite this flexibility, this is a fundamentally flawed model. While a CCF can theoretically exist, it is practically impossible to implement such paradigm under international law,[107] because its proponents may argue for a combat to have neither

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100. *See* Chesney, *supra* note 51.

101. *See* Chesney, *supra* note 51, at 44 (discussing the differences between the CFF and CCF categorizations of combatants).

102. *See* Bergen & Tiedemann, *supra* note 46 (noting that in 82 drone attacks, 750–1000 civilians died between 2006 and 2009, while only 20 intended targets were killed).

103. I have discussed this issue at length elsewhere; *see On the Judicial Treatment of Guantánamo Detainees, supra* note 50 (noting how often times evidence collected for terrorist prosecution or targeting terrorist have been unreliable on account of having been obtained via coerced confession).

104. *See supra* note 13 (stating that 700 persons have died in attacks killing 14 intended targets).

105. *See supra* note 13 (discussing two clear issues regarding operating drones from remote locations: (1) targeting; and (2) command and control).

106. *See* Pejic, *supra* note 57.

107. Some scholars reject CFF on the grounds of excluding individuals who primarily act as a support function in the broader organization of insurgencies. *See* MELZER, *supra* note 75, at 320–21. Therefore, not including political and religious leaders, financial backers, informants and collaborators would imply that they may not be part of CFF, and thus cannot be targeted, which goes against the proponents of the broader right to kill. *See* Kenneth

temporal nor geographical limitation, yet, its invocation would certainly invite untenable logical consequences.[108] Such flawed conflict models described here can neither continue in a legal vacuum, nor could they evolve in an unregulated IHL paradigm.[109] They can only be supervised under Common Article 3 within a NIAC context. Since Common Article 3 has neither envisioned combat scenarios that are unending, perpetual,[110] and co-existing across multiple non-contiguous regions,[111] nor endorsed an all-pervasive combatant designation,[112] targeted killing based on a CCF model

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Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 645–46 (2010). If we are to embrace the paradigm that does not include these service providers, we would default to embracing either the CCF or some variant of a CCF model. As I have noted in this Article, adopting CCF would expand the pool of individuals allowing States to target more civilians under a fuzzy framework of combatant model that does not adequately distinguish between civilians and combatants.

108. *See supra* note 107 and accompanying text.

109. Here I draw attention to State practice where States prefer to operate under IHL paradigm, while the elements of hostilities might point to international humanitarian rights law applicability. This lack of synchrony between theoretical developments in law and practical elements on the ground creates an uncertainty surrounding permissive conduct of hostilities within the context of HRL. In this scenario, a State might invoke IHL guidelines, yet might be able to exhibit behaviors that fall outside IHL norms, effectively relegating the conduct of hostilities to conduct in an unregulated space. *See supra* text accompanying note 31 (discussing the scope of HRL and international IHL). The US' official position is noteworthy, both in the context of its invocation of specific legal dimension and its assertion of a specific policy position. While articulating the government position on targeted killing, the legal adviser to the Department of State recently provided the administration's legal justifications for targeted killings, noting that "the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute 'assassination.'" STEPHEN L. CARTER, THE VIOLENCE OF PEACE: AMERICA'S WAR IN THE AGE OF OBAMA (2011). This adoption of targeted killing, according to Harold Koh, was based on right to self-defense under HRL, as "the United States is 'in an armed conflict with Al Qaeda, as well as the Taliban and associated forces . . . .'" Harold Koh, Legal Adviser, Dep't of State, Keynote Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010) (alteration added). Clearly, while this is a policy statement, it does not address details, such as scope, transparency, and criteria. The questions of who can be targeted, how we can be assured that civilians are not being killed indiscriminately and if personnel involved are properly trained continue to rise above the broad stroke justifications. We are compelled to ask a multitude of questions as to where the substantive procedural safeguards against escalating evidences of civilian deaths are and what steps are being taken to close the accountability gap.

110. *See* W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769 (2010) (explaining why continuity requirement of HRL may be relaxed for State actors).

111. *See* sources cited *supra* note 75 (discussion on Common Article 3, providing guidelines for its trigger) and Tadic Judgment, *supra* note 57 (examining the judgment's main holdings while articulating how this judgment may have open the door for various other extrapolations in asymmetric warfare).

112. *See* sources cited *supra* note 92.

may not find legitimacy in IHL. Moreover, as I shall identify below, IHL's *necessity-proportionality-distinction* triad would further reject targeted killing based on a CCF model of functional combatant.

C. Proportionality vs. Right to Self-Defense

Within the broader context of armed conflict, the idea of self-defense has not only invoked strong emotive sentiments, it has also generated significant jurisprudence on state rights.[113] International law prescribes a set of specific guidelines in which a state under attack can exercise its right to self-defense.[114] Such doctrine of self-defense emanates from a multi-dimensional manifold of international law that straddles various individual paradigms, such as the UN Charter, IHL, and HRL.[115] Given that international law manifests itself through these dimensions, any right to targeted killing must spring forth from these dimensions only. Logically, we ponder whether such a right to targeted killing can also spring from NIAC or, must it be acquired as a derivative right under the self-defense right in article 51 of the UN Charter.[116] The International Court of Justice

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113. *Compare* Thomas M. Franck, *Who Killed Article 2(4)? or Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 809–10 (1970), *with* Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544, 544–45 (1971). Jurisprudential developments provide guidance regarding timing and context of self-defense rights trigger mechanism. *See also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. US), 1986 I.C.J. 14, at paras. 194, 246 (June 27) [hereinafter Military and Paramilitary Activities]; Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1633–34 (1984) (noting that in the context of self-defense, force is proportionate only if it used defensively and if it is confined to the objective). Pakistan and Yemen may have even consented to targeted drone killings by the United States in their territory. Eric Schmitt & Mark Mazzetti, *In a First, US Provides Pakistan with Drone Data,* N.Y. TIMES, May 13, 2009, http://www.nytimes.com/2009/05/14/world/asia/14drone.html, *archived at* http://perma.cc/QN6E-JEQZ; Mary Ellen O'Connell, *Drones Under International Law*, *in* WASHINGTON UNIVERSITY LAW: WHITNEY R. HARRIS WORLD LAW INSTITUTE INTERNATIONAL DEBATE SERIES 5 (2010), *archived at* http://perma.cc/H2LM-W9V4 (making observations on when the right to self-defense gets triggered under terrorist threat); Joby Warrick & Peter Finn, *CIA Director Says Secret Attacks in Pakistan Have Hobbled al-Qaeda*, WASH. POST, Mar. 18, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031702558.html, *archived at* http://perma.cc/FUP3-8WHH.

114. Article 2(4) of the United Nations Charter prohibits member States from using force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. U.N. Charter arts. 1(1), 2(4). In this context, the right to self-defense is triggered under (i) Article 2(4)'s exceptions, (ii) Article 51's preservation of the right of self-defense, and (iii) Chapter VII mechanism whereby the Security Council may authorize the use of force. *See* U.N. Charter arts. 39, 42, 51.

115. *See* M.A. Weightman, *Self-Defense in International Law*, 37 VA. L. REV. 1095-1115 (1951).

116. U.N. Charter art. 51.

("ICJ") mandates an inordinately high threshold[117] for States triggering the article 51 self-defense right that may not necessarily permit remotely operated targeted killings on most occasions, especially when a state violates the sovereignty of another state to attack non-state actors. The United Nations' Security Council resolutions, 1368[118] and 1372[119] do not explicitly impute armed attack by non-state actors on the state whose physical territory was used. Therefore, the issue of violations of territorial sovereignty of a state presents complex dynamics. This complexity does not go away even if the targeted killing is not designed to violate the sovereignty of the state, or if it is being executed with state consent.

Against the above backdrop, a "robust self-defense model" to justify targeted killing[120] has been advanced in recent scholarship.[121] This is inconsistent within the NIAC context of IHL, as it is predominantly a misapplied invocation of the *lex specialis* rule of international law.[122] The robust self-defense model attempts to validate extrajudicial killings by providing interpretative gloss of legal justifiability by contradicting various delimiting principles of IHL and HRL.[123] Some of these contradictions come in part by impermissibly conflating *jus ad bellum* and *jus in bello*,[124] and, in part by misapplying the ICJ's nuclear weapons advisory opinion.[125] Although misapplied, this attempted doctrinal foray could mistakenly attribute new derivative rights on states from scenarios that do not reconcile with their applicable legal principles.[126] The invocation of an extreme

117. *See* Military and Paramilitary Activities*, supra* note 113.

118. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

119. S.C. Res. 1372, U.N. Doc. S/RES/1372 (Sept. 28, 2001).

120. *See Targeted Killing as Active Self-Defense, supra* note 19.

121. *See Targeted Killing: Self-Defense, Preemption, and the War on Terrorism, supra* note 21.

122. For textual support of *lex specialis* in this context, *see* Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907), art. 5. Commentators have noted that IHL and HRL apply coextensively and simultaneously unless there is a conflict between them. *See* U.N Doc. E/CN.4/2005/7, *supra* note 29, paras. 46–53; U.N. Doc. A/HRC/4/20, *supra* note 29, paras. 18–19; U.N. Doc. A/HRC/11/2/Add.5, *supra* note 29, paras. 71–73, 83; U.N. Doc. A/HRC/4/20/Add.1, *supra* note 29, at 342–61; U.N Doc. E/CN.4/2006/53/Add.1, *supra* note 29, at 264-65. For additional discussion of its applicability, *see* Parks, *supra* note 110, at 799.

123. *See Targeted Killing as Active Self-Defense, supra* note 19.

124. *See* Robert Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 52 (2009).

125. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 25 (July) [hereinafter Nuclear Weapons Advisory Opinion]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, para. 106 (July 9) [hereinafter Construction of a Wall]; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 168, para. 216 (Dec. 19) [hereinafter Congo v. Uganda].

126. *See Collateral Damage, supra* note 36, at 680 n.7.

circumstance for justifying an application in a different circumstance with a much lower threshold is an unfortunate trend in international law that has emerged after 9/11. The motivation behind such an anomalous legal argument is not the objective of my inquiry. Yet, states have been engaged in invoking such a flawed self-defense argument to immunize themselves from war crimes charges.[127] It is, therefore, imperative, to recognize this emerging trend of a misguided invocation of article 51, especially within the broader context of protecting human rights of civilians in post-9/11 hostilities framework.

Relaxing the preconditions for triggering article 51's right to self-defense would allow for a nuanced discussion by focusing on specific constraints to determine how the right to targeted killing might flow. In this context, all three different strands of international law—article 51's customary right,[128] IHL's *just ad bellum*,[129] and HRL's *jus in bello*[130]—make one thing clear: the right to self-defense comes with the compliance requirements of *necessity, proportionality,* and *distinction*.

D. Necessity in International Humanitarian Law

The requirements of necessity are more clearly articulated within the context of customary self-defense. Consensus emerging from existing jurisprudence would indicate that the requirement of necessity turns on two specific steps: (1) the *least harmful means* test[131] and (2) the *imminence* test.[132] Predicated on granulating necessity as composed of three parts—

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127. *See Collateral Damage, supra* note 36 (discussing the divergence between state's invocation of self defense right and targeted civilians' right to life).

128. *See* U.N. Charter art. 51.

129. *See generally* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 133 (2004) (noting that the war on terror may have brought significant changes in the law of self-defense, while questioning the legitimacy of military powers' triggering regime changes for vested interest); Robert Kolb, *Origin of the Twin Terms Jus ad Bellum/Jus in Bello*, 320 INT'L REV. RED CROSS 554 (1997) (seeking clarity to the sources of laws of war in literature and practice); Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 411 (1993) (dissecting the interaction between proportionality and force within the context of laws of war).

130. *See* Gardam, *supra* note 129, at 411.

131. Jurisprudence on application of "least harmful means" test in satisfying the military necessity component has matured in the context of asymmetric war. *See* HCJ 769/02 The Public Committee Against Torture in Israel v. Israel 2006(2) PD 459, ¶ 16 [2006] (Isr.); *see also* Construction of a Wall*, supra* note 125 (Separate Opinion of Judge Higgins). Melzer finds the test's support in international law as well. *See also* MELZER, *supra* note 75, at 95–112.

132. For legal analysis of "imminence," *see generally* Chesney, *supra* note 51; *see also Targeted Killing of Suspected Terrorists*, *supra* note 27 (examining the legality of targeted killing of suspected terrorists under both IHL and HRL). In this Article, I question the

qualitative, quantitative, and *temporal* necessity—a newer necessity analysis has also been proposed.[133] The elegance of this analysis comes from its granularity. It allows for the stand-alone deconstruction of its constituent elements, while allowing both the *least harmful means* and the *imminence* requirements to be tested separately across each, as noted in comments elsewhere.[134] I will analyze both of these methodologies separately.

Under the *least harmful means* test, the engaging state must determine whether there exists a comparable and compatible alternative to killing with a concomitant lesser threshold of violence as a means of self-defense.[135] Applying this test to the US involvement in any one of the current theaters of hostilities would invite us to assess a set of indicative factors. Evaluating the various factors—administrative stability of the region,[136] uncertainty over the military-terrorist nexus,[137] and confusion over willingness versus capability of the countries involved[138] might render the applicability of a *least harmful means* test difficult or, non-deterministic. Yet, this non-availability may not provide iron clad reasoning for the necessity principle to trigger a state's right to targeted killing. Even if the *least harmful means* test yields no deterministic outcome, the entire deliberative process must be defaulted under the second criterion of *imminence* test,[139] which turns the inquiry into two distinct requirements that can be met by answering in the affirmative to the following questions: (1) is the threat imminent;[140] and (2)

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application and context of "imminence" as has been discussed in the aforementioned two works.

133. *See* MELZER, *supra* note 75, at 100–102.

134. *See infra* Part IV.D.

135. The crux of the issue is whether "military necessity" can be fulfilled without resorting to lethal force or without loss of life, an inquiry that turns into adequately capturing the full scope and context of military necessity. Although Israeli domestic court opinions are cited as framework for how this test should be applied in practice, some scholars find both the absence of under developed theory behind necessity paradigm in international law and reliance on domestic cases somewhat problematic. *See* MELZER, *supra* note 75, at 101. For other studies on this test, *see generally* R.S. Schondorf, *The Targeted Killings Judgment: A Preliminary Assessment*, 5 J. INT'L CRIM. JUST. 301 (2007) (examining the judgment of Israeli Court in cases of targeted killing in offering a nuanced view of the judgment's relationship to the development of the laws of armed conflict).

136. *See* Mosharraf Zaidi, *The Lies They Tell Us: Can the Pakistani Government's Web of Deceit Survive the Death of Osama Bin Laden?*, FOREIGN POLICY, May 2, 2011, http://www.foreignpolicy.com/articles/2011/05/02/the_lies_they_tell_us, *archived at* http://perma.cc/9SVT-6NKR.

137. *See* Peerzada Ashiq, *'Pakistan Army, Terror Groups Nexus Exposed"* HINDUSTAN TIMES, Oct. 2, 2011, http://www.hindustantimes.com/india-news/pakistan-army-terror-groups-nexus-exposed/article1-752724.aspx, *archived at* http://perma.cc/S6AV-W2PV.

138. *See id.*

139. *See* sources cited *supra* notes 131, 132 and accompanying text.

140. The inquiry of whether the threat is imminent finds its force in *The United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials* which are widely adopted by police throughout the world. Article 9 provides that:

will the elimination of threats eliminate potential future attacks?[141]

Pronging out the second distinct requirement, proponents of targeted killing would argue, that any elimination of a threat would result in the removal of future related threats.[142] The legitimacy of this line of argumentation turns on determining what is meant by "related" in this context. However, related could sometimes be a nebulous concept,[143] especially, when it is stripped of its underlying parameters and is used as a 'means to an end' in justifying actions related to a targeted killing. Given the relative weakness in structuring arguments on the meaning of "related," I shall not belabor a detailed inquiry. Rather, let us relax the condition and assume that, the criterion in question is satisfied with respect to a determination of whether the threat could be eliminated via killing, such

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> Law enforcement officials shall not use firearms against persons except in self-defence or defence [sic] of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles for the Use of Force and Firearms by Law Enforcement Officials, Havana, Cuba, Art. 9 (Aug. 27-Sept. 7 1990) [hereinafter UN Basic Principles]. Scholars caution about the restricted framework needed for the use of lethal force. *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 167 (2001) (describing the restrictive approach). Author Alston noted in this context, "The third key area of controversy is the extent to which States seek to invoke the right to self-defense not just in response to an armed attack, but in anticipatory self-defense, or alternatively, as a pre-emptive measure in response to a threat that is persistent and may take place in the future, but is not likely to take place imminently." *See* Alston, *supra* note 28, para. 4. Some scholars expand this restricted approach somewhat by incorporating into permissibility some necessity that is characterized by instant need for action. *See also* Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 619 (2003); THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS (2002); R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 92 (1938); Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L LAW 359, 378–83 (2009). However, no one advocates the scorched earth policy the US government has advocated in codifying into practice policy premised on lethal force at the slightest evidence of threat.

141. This refers to a subjective evaluation that must accompany pre-attack deliberation to carefully identify if the elimination of the instant threat will necessarily prevent future attacks.

142. *See* Guiora, *supra* note 19.

143. This Article challenges the various rationales put forth by the proponents of targeted killing via drone strikes. In this context, I draw attention to the fact that, oftentimes when a particular individual or a group of individuals are killed via remotely operated drone strikes, the administration immediately justifies the killing as part of a self-defense mechanism and attempts to link such targeted assassinations as a preventive mechanism against killing of American citizens or destruction of American interests. As has been highlighted in this work, not much concrete proof has ever been put forward in terms of linking most of these targeted killings with future prevention of terrorism.

that no future attack would take place. Now, the analysis would logically turn to evaluating the context and complexity of imminence for the necessity analysis.

Assessing an imminent threat is becoming increasingly difficult in today's asymmetric warfare. Or rather, assessing the legal justification of recent targeted killings, at times solely based on the criteria of *imminence*,[144] has become an Achilles heel of international jurisprudence.[145] First, by its very nature alone, obtaining credible evidence to determine whether an attack is imminent is difficult. The difficulty might be even more pronounced when asked to determine whether or not the magnitude of such attack would be sufficiently intense. Yet, nations like the United States[146] and Israel[147] have engaged in targeted killing by simply applying one of these two criteria. Second, most times the lack of transparency surrounding the perceived threat makes it difficult to assess a true imminence from a manufactured imminence—more importantly, when such threat is to be used specifically to justify a targeted killing. National security invocation allows classified material to remain closed to third party review, making independent verification of a state claim of imminent threat a difficult proposition. This lack of transparency makes it virtually impossible to judge a state's compliance against the *imminence* requirement. However, the recent surge in targeted killings by the United States makes it imperative to engage in a stricter review of such acts against prescribed IHL guidelines. Moreover, escalating frequency of targeted killings and the remoteness of regions where they occur[148] make it difficult to corroborate the state rationale of imminent threat. Consequently, applying the *imminence* doctrine has become legally indeterminate.

The necessity argument for targeted killing under article 51 within the context of "imminent threat" resides on even weaker fundamentals. The frequency of recent killings, lack of transparency surrounding necessary deliberations, and publicly available evidence surrounding the lack of

144. *See* sources cited *supra* notes 131, 132 and accompanying text.

145. Here I draw attention to the uncertainty surrounding what constitutes "imminent."

146. *See* Alston *supra* note 28.

147. *See* Asa Kasher, *Operation Cast Lead and the Ethics of Just War*, AZURE (2009), http://www.azure.org.il/include/print.php?id=502, *archived at* http://perma.cc/Q6MV-LH68; *See also* THE OPERATION IN GAZA - FACTUAL AND LEGAL ASPECTS, ISRAEL MINISTRY OF AFFAIRS 14–26 (2009), *archived at* http://perma.cc/7A73-8PWN; *Report of the Independent Fact-Finding Committee on Gaza: No Safe Place*, JEWS FOR JUSTICE FOR PALESTINIANS (2009), http://jfjfp.com/?p=2649, *archived at* http://perma.cc/K7S8-8X3R [hereinafter *Report of the Independent Fact-Finding Committee*]. For the Organization of the Islamic Conference's response, *see* ISLAMIC CONFERENCE, FINAL COMMUNIQUE OF THE EXPANDED EXTRAORDINARY MEETING OF THE EXECUTIVE COMMITTEE AT THE LEVEL OF FOREIGN MINISTERS ON THE ONGOING ISRAELI ASSAULT ON GAZA (2009), *archived at* http://perma.cc/Z9V9-UQML.

148. *Report of the Independent Fact-Finding Committee*, *supra* note 147, ¶ 7.

imminent threat bolster this viewpoint. Moreover, the *imminence* test centers on making value judgments on whether the elimination of the target would necessarily result in such threats being eviscerated.[149] Again, given the invocation of classified material used in scoping and defining such targets, it is very difficult to judge *prima facie* the sanctity of such assertions. Especially instructive in this context, is the disturbing trend of elevating the status designation of a target after the consummation of the killing. Often times, a virtually unknown individual has been elevated and classified as belonging to a higher echelon of either Al-Qaeda or Al-Qaeda in the Arabian Peninsula.[150] For example, in a recent example of targeted assassination involving Anwar al-Awlaki, evidence suggests, that his organizational status has been elevated post-assassination.[151] Besides bolstering the *imminence* requirement, this *ex post facto* elevation introduces implementation difficulties. Interestingly however, these examples of the post-mortem status elevation provide indication that there are other preconditions that must be reviewed—including a combatant's ability to inflict intense violence and a confirmation that elimination of such combatant would necessarily prevent future threats. Both would be difficult to achieve in practice within the context of such extrajudicial killings.

E. Proportionality in the Context of Targeted Killing in International Humanitarian Law

The right of self-defense is a legitimate right of the state that flows naturally out of the multi-dimensional space of international law. While each strand of this multi-pronged legal space can support the right to self-defense, its derivative right of targeted killing must be restricted within appropriate constraints. Despite IHL's ever-changing doctrinal development, few of its tenets remain ontologically fixed.[152] A right to life springs forth more naturally than a derivative right such as the right to targeted killing. This conceptual dichotomy might explain why there may exist a natural conflict between the two rights. In this context, IHL promises to guide humanity to legally identify at a fundamental level what is a

149. *See* sources cited *supra* note 132 and accompanying text.

150. *See* Dina Temple-Raston, *Eliminating Al-Qaida's No. 3, Again and Again*, NPR, June 2, 2010, http://www.npr.org/templates/story/story.php?storyId=127352134, *archived at* http://perma.cc/PNR6-HVH3.

151. *See* Greg Miller & Alice Fordham, *Anwar al-Aulaqi Gets New Designation in Death*, THE WASHINGTON POST NATIONAL (Sept. 30, 2011), http://www.washingtonpost.com/blogs/checkpoint-washington/post/aulaqi-gets-new-designation-in-death/2011/09/30/gIQAsbF69K_blog.html, *archived at* http://perma.cc/PR9U-3UFR.

152. *See Narrative of Dehumanization*, *supra* note 8, at 161-63 (discussing ontological dimensions in understanding various instances of interactions between source of right and framework to exert such right).

"right"[153] and whether the civilians' "rights"[154] prevail over those of the combatants. This must remain true even when politicized global events bring in a natural tendency to shape the law's contour via the distorting effect of military power. Thus, Justice Aharon Barak has rightfully cautioned us against the deleterious effect of military power, as he noted, "[e]ven when the cannons speak and the Muses are silent, law exists and operates, determining what is permitted and what forbidden, what is lawful and what unlawful."[155] With such spirit of law in mind, we must critically examine whether the right to targeted killing by remote drone strikes can be contextualized within the proportionality principles of IHL.

In the current context, the principle of proportionality[156] requires that

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153. *Narrative of Dehumanization*, *supra* note 8, at 708.

154. *Narrative of Dehumanization*, *supra* note 8, at 709.

155. HCJ 7015/02 Ajuri v. IDF Commander 56(6) PD 352, ¶ 41 [2002] (Isr.) (citing HCJ 2161/96 Sharif v. Home Guard Commander IsrSC [35], at 491 (citing the remarks of then-Vice-President Justice Landau in HCJ 390/79 Dawikat v. Government of Israel [36], at 4)).

156. In my view, the principle of proportionality provides the strongest civilian protection available in customary international law. In defining "civilian" and "civilian populations" AP I States, "The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character." AP I, *supra* note 45, art. 50(3). AP I further States that civilian populations are protected from indiscriminate attacks, including attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." AP I, *supra* note 45, art. 51(5)(b). The principle of proportionality makes it mandatory for the military planners, under article 57(2)(a)(ii) of AP I, to "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects." AP I, *supra* note 45, art. 57(2)(a)(ii). The humanitarian spirit of HRL makes it incumbent for a military planner to engage in a two-step process before targeting a particular object. This includes, (1) ensuring the aggressive maneuver is a viable military objective, and then (2) determining with reasonable accuracy whether the resulting collateral damage is proportional to the intended military objective. The principle of proportionality does not invalidate a military objective, but it provides some restrictive covenants surrounding military objectives to reduce civilian casualties in military operations. This restrictive framework of proportionality has come under attack from the military establishments, especially those who are engaging in aggressive military exercises predominantly on civilians. *See* Michael Byers, *The Laws of War*, *US-Style*, LONDON REV. OF BOOKS, Feb. 20, 2003, http://www.lrb.co.uk/v25/n04/byer01_.html, *archived at* http://perma.cc/WXE3-QFVM. Additionally, in 2001 Secretary Rumsfeld referenced United States bombs hitting a civilian warehouse in Afghanistan in 2001, stating, "We're not running out of targets, Afghanistan is." Ben Kiernan, "*Collateral Damage" Means Real People*, BANGKOK POST, Oct. 20, 2002, http://www.yale.edu/gsp/publications/collateral_damage.html, *archived at* http://perma.cc/F2V3-ZTCK. The focal point of contention is the definitional confusion surrounding the concept of "military objective," because unless the military community is able to agree on what a military objective is, the military cannot agree on proportionality. *See* UNDERSTANDING COLLATERAL DAMAGE WORKSHOP: PROJECT ON THE MEANS OF INTERVENTION CARR CENTER FOR HUMAN RIGHTS POLICY, JOHN F. KENNEDY SCHOOL OF GOVERNMENT HARVARD UNIVERSITY (2002), *archived*

there must be a balance between an original terrorist attack and the responding force of self-defense that may take the form of targeted killing. Some scholars have advanced the proposition that IHL's proportionality does not necessarily imply that state response of lethal force must not exceed in intensity in accordance with the level of original attack.[157] However, self-defense mechanisms under article 51 of the UN Charter are rooted in constructing a calibrated response against initial attack.[158] This is corroborated by textual interpretation of the Geneva stream of laws premised in defining proportionality within the twin context of prohibition and precaution in the AP I.[159]

Let us assume that, the state's article 51 self-defense right has been triggered in any one of the hostilities framework the US is currently involved in. Let us also accept the factual assumption of imminent threat in a non-strict sense—where no immediate attack has been identified. Now, let us introduce into the test scenario a set of functional combatants—spotted within a family compound in Waziristan.[160] What happens if one of the options considered would involve launching Hellfire missiles from a UAV operated from a command center in Nevada[161] with a specific objective of eliminating some identified members of Al-Qaeda? Does this right of targeted killing spring from AP I's two-pronged framework? If no civilian assessment is done *a priori* and, no balancing test comparing target value

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at http://perma.cc/W25J-2YSY (noting proportionality and objectivity may have some mutual exclusivity, from a military perspective, making the implementation rather difficult). This has been adequately addressed by Judge Higgins in her dissent to the Nuclear Weapons Advisory opinion. Judge Higgins contended that:

> The principle of proportionality, even if finding no specific mention, is reflected in many provisions of the Additional Protocol I to the Geneva Conventions of 1949. Thus, even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.

Nuclear Weapons Advisory Opinion*, supra* note 125, dissenting opinion of Judge Higgins, *archived at* http://perma.cc/6RHR-7H86.

157. *See* Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 418 (2009); Sean D. Murphy, *The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan*, 85 INT'L L. STUD. SER. US NAVAL WAR COL. 109, 127 (2009).

158. *See* U.N. Charter art. 51. Proportionality requires an assessment of whether an attack that is expected to cause incidental loss of civilian life or injury to civilians would be excessive in relation to the anticipated concrete and direct military advantage. *See* AP I*, supra* note 48, arts. 51(5)(b), 57; JEAN- MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW RULES, ICRC, Rule 14 (2005) [hereinafter ICRC Rules].

159. *See* U.N. Charter art. 51.

160. *See* Mayer, *supra* note 46 (providing a detailed description of various drone strikes); *see also*, Scott Shane, *C.I.A. Is Disputed on Civilian Toll in Drone Strikes*, N.Y. TIMES, Aug. 11, 2011, http://www.nytimes.com/2011/08/12/world/asia/12drones.html?_r=1&pagewanted=print, *archived at* http://perma.cc/YY2U-STAH.

161. *See* Bergen & Tiedemann, *supra* note 46.

against the quantum of civilian casualty is performed, would the right to targeted killing still exist? What if, indicative assessment signals a civilian-to-combatant ratio higher than 25:1,[162] could we still operate in a right to kill framework under IHL?

Looking through the prohibitory lens of the proportionality doctrine would remind us of article 51(5)(b)'s caution against state attacks such as those that "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[163] Targeted killing in the hypothetical Waziristan scenario above would certainly violate this provision. Articles 57(2)(a)(iii)[164] and 57(2)(b)[165] provide similar admonition within the context of precautionary measure. Taken together, these two articles provide supervisory oversight over a broader continuum of military activities with explicit focus on minimizing indiscriminate loss of civilian lives. Despite the authoritative provisions of these articles, some commentators challenge AP I's implied constraint on United States forces precluding them from exercising their derivative rights to targeted killing in most circumstances. Contrary to this view, AP I and its progeny statutes' non-binding status with non-state actors do not immunize states from compliance.[166] Moreover, legal constraints upon states stem from both customary international law as well as AP I and its progeny articles.

While textual interpretation remains a viable force in locating rights within international law, development of customary norms after significant world events often introduce lack of synchronization between theory and

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162. Reports indicate that US is killing civilians at the rate of fifty per one intended target. *See* Kilcullen and Exum, *supra* note 14. Some research put that percentage somewhere around thirty. *See* Cyril Almedia, *Civilian Deaths in Drone Attacks: Debate Heats Up*, DAWN.COM, May 9, 2005, http://archives.dawn.com/archives/44038, *archived at* http://perma.cc/CXW7-MTLC.

163. *See* AP I, *supra* note 156, art. 51(5)(b).

164. AP I, *supra* note 48, art. 57(2)(a)(iii).

165. AP I, *supra* note 48, art. 57(2)(b).

166. Development in international law in the context of the customary law's provisions of Common Article 3 would imply that, State's obligation under IHL may not necessarily derogate, as it has been reflected in article 6 of Additional AP II with respect to NIAC that meets the requisite threshold. Author Pejic notes:

> [Article 75 of Additional Protocol I.] is a fundamental guarantee of human rights law of both a binding and a non-binding nature ('soft law') . . . A State party may derogate from (modify) its obligations under those provisions of the treaty under very strict conditions, one of which is the existence of a public emergency threatening the life of the nation. While armed conflict is an example of such a public emergency, it is important to note that measures derogating from States' obligations under the ICCPR may 'not (be) inconsistent with their other obligations under international law.

Pejic, *supra* note 57, at 211–12 (alterations added).

practice. The proportionality doctrine relies on a balancing test that measures both the quantum of force and the quantum of derived military advantage. Yet, flawed interpretations of this balancing test have been injected after the two recent major military campaigns by the US and coalition forces, causing divergence between law's intent and state's action.[167] This balancing test is designed to determine whether applied force runs afoul of inherent doctrinal constraints by measuring the response attack against such attack's "concrete and direct military advantage anticipated."[168] Here, the structural difficulty comes from the fact that identification of the right to attack under the test turns on quantifying a set of imprecise qualifiers like "concrete," "direct," "anticipated" and "advantage."[169] Even if quantification for the test's application is achieved, measuring its precision in asymmetric warfare relies on a set of functional assumptions. For example, asymmetric warfare in the twenty-first century thus far has progressed mainly on two fronts. The two adversaries in the first consisted of a military superpower like Russia, the United States, or Israel on one hand, and a smaller state, breakaway republic, or occupied territory on the opposing end.[170] The second and the most prolonged

167. I draw attention to the expanded military paradigm enjoyed by the US forces since 9/11. The question of extrajudicial killings, working outside of acceptable norms of international law has been well documented. For context specific to balancing HRL's proportionality principle, *see Collateral Damage, supra* note 36, at 690.

168. *See Frits Kalshoven***,** *Implementing* Limitations *on the Use of Force: The Doctrine of Proportionality and Necessity*, 86 AM. SOC'Y INT'L L. PROC 39, 44 (1992).

169. In the storied history of the modern Laws of War, perhaps no other movement can better capture the humanitarian dimension of the Nuremberg Trials than the formalized incorporation of the principle of necessity. Scholars have both discussed the development of necessity doctrine and its continued difficulty in modern times. *See Id.* at 40–45; *see also* THE UNITED STATES ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL 247–49 (2007) (discussing the principles of distinction and proportionality in the context of war on terror). However, with the advent of modern weaponry, military operations during times of armed conflict have undergone substantial changes over the last sixty years, which have resulted in confusion regarding the proper definition and application of military concepts, such as the concept of military necessity. For example, military planners and human rights organizations disagree about both the fundamentals and the interpretation of military necessity and, consequently, their understandings have diverged. State complicity in abiding by the HRL standards of necessity has made assessment of collateral damage and the determination of culpability of crime problematic. On one hand, necessity in HRL requires States to evaluate whether targeted killing will achieve the goals of the military operation and is in compliance with the other rules of HRL. States on the other hand, invoke right to self-defense without fully being accountable. Legal principles on State responsibility make abundantly clear that States may not invoke self-defense as justification for their violations of HRL. Int'l Law Commission [ILC], *Draft Articles on State Responsibility*, at 166-7, A/56/10 (2001).

170. For conflicts involving Israel, *see* AMNESTY INT'L, *supra* note 25. For conflicts involving Russia, *see Russia 'Kills' Chechen Warlord*, BBC NEWS, Apr. 25, 2002, http://news.bbc.co.uk/2/hi/europe/1950679.stm, *archived at* http://perma.cc/6MTZ-W86D.

hostilities thus far have been those between the United States and non-state actors like Al-Qaeda or Al-Qaeda in the Arabian Peninsula.[171] When the balancing test of proportionality is applied in these cases, functional assumptions become inherently a product of partial and partisan interests of battlefield commanders.[172] This observation has been tested time and again in recent years with catastrophic consequences for civilians.[173] More importantly, because measuring the outcome of the balancing test is inherently predicated on assessing parameters related to the decision making of the commander, the results have been the creation of incoherent jurisprudence on IHL's proportionality doctrine.

After the NATO bombing of Yugoslavia in 1999,[174] the review committee in its final report to the prosecutor of the ICC provided a set of parameters to further calibrate the balancing test of proportionality.[175]

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171. *See* BBC *supra* note 70; AUMF, *supra* note 70; GIULIANO, *supra* note 71 and text accompanying notes 70-72.

172. I draw attention to the facts, or lack thereof, on the ground that may impact the true test of proportionality of necessity, where the assessment by the battlefield commanders are increasing being given deference to in testing the military necessity against civilian casualties.

173. *See generally Collateral Damage, supra* note 36 (noting military exigencies articulated by commanders on ground has been successful in circumventing the prohibitory frameworks of laws of war resulting in killing innocent civilians).

174. *See* James Bovard, *Kosovo Déjà Vu*, FREEDOM DAILY (July 2003), http://www.fff.org/freedom/fd0307d.asp, *archived at* http://perma.cc/7BDJ-VYGS. An American pilot bombed a passenger train on a railway bridge on April 12, 1999, killing fourteen people. *Id.* NATO's supreme commander, General Wesley Clark said:

> [W]hen all of the sudden, at the very last instant, with less than a second to go, he caught a flash of movement that came into a screen and it was the train coming in. Unfortunately, he couldn't dump the bomb at that point. It was locked, it was going into the target and it was an unfortunate incident which he and the crew and all of us very much regret.

Id. However, the public later learned from the Frankfurter *Rundschau* in 2000, that the video of the passenger train bombing was played on television at triple the speed of the real time video, making the bombing of the train appear more "inevitable" than it truly was. *Id.* For discussions on reports from the review committee, *see* FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA para. 49, (8 June 2000), *archived at* http://perma.cc/CB4R-Z9XU [hereinafter FINAL REPORT TO THE PROSECUTOR].

175. *See* FINAL REPORT TO THE PROSECUTOR, *supra* note 174, paras. 45–54; *see also* Michael Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY*, 12 EUR. J. INT'L L. 531, 534 (2001); Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 735-36 (2008). Author Robert Barnidge believed the report:

> [A]ttempted to provide some general parameters to these and other questions related to the proportionality balancing test. It did this by collapsing the heavy burden of decision making on the shoulders of the "reasonable military commander." At the same time, however, it acknowledged that the decision maker's values, background, education, and combat experience will likely

Justifying the reasonableness of a military commander's decision through a set of value-laden parameters, this report has shifted the proportionality test from a more precise objective framework to a subjective paradigm,[176] which is vulnerable to manipulation by political forces. Interpretation of the Rome Statute by the ICC's Chief Prosecutor in the aftermath of the Iraq War may have further diluted the full force of the proportionality principle.[177] Article 8(2)(b)(iv)[178] of the Statute examines proportionality of an "attack on military objective" by balancing "incidental civilian injuries" against "anticipated military advantage."[179] The Rome Statute would grant a right of targeted killing as long as accompanied civilian injuries can be established as not "clearly excessive"[180] in relation to military advantages to be derived thereof. The Chief Prosecutor's observations in 2006 in response to allegations of war crimes perhaps best capture the deliberate erosion of the proportionality doctrine via politicization of IHL: "Under IHL and [the] Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime."[181]

If we were to go by the Chief Prosecutor's observation, it would be rather straightforward to legitimize the act of targeted killing as each one of the incidents can be proven to be both conducted under armed conflict and to have secured a military advantage. However, this observation is fundamentally flawed for the following reason: any loss of civilian life can be supported by employing a loose and expanded interpretation of the Rome Statute on grounds of military advantage. Thus, even the most expansive reading of the Rome Statute can support the decoupling of civilian deaths from consideration as shown above. Moreover, since bias in such prosecutorial observation is provable, it presents a structural impediment for the continued significance of the ICC. Commentators have correctly noted this disturbing trend in IHL, by pointing out the law's

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> influence what can conceivably be considered excessive, or less than, or perhaps even just not quite, excessive.

Barnidge, *supra* note 25 (alteration added).

176. *See* Barnidge, *supra* note 25.

177. *See* LUIS MORENO-OCAMPO, THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, THE HAGUE (2006), *available at* http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

178. *Id*. For textual interpretation and discussion of the Rome Statute, *see* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 art. 8(2)(b)(iv) (July 17, 1998), *archived at* http://perma.cc/3WUU-MWNU [hereinafter U.N. Doc. A/CONF. 183/9]; *See also* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 127 (Cambridge Univ. Press, 3d ed. 2008).

179. U.N. Doc. A/CONF. 183/9, *supra* note 178, art. 8(2)(b)(iv).

180. U.N. Doc. A/CONF. 183/9, *supra* note 178, art. 8(2)(b)(iv); *see also* Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT'L REV. RED CROSS 445-56, n. 41 (2005), *archived at* http://perma.cc/7N7A-G6J9.

181. *See* MORENO-OCAMPO, *supra* note 177.

inability to "provide a clear-cut answer,"[182] and need for "a common currency of evaluation."[183] Indeed, a right to targeted killing within the context of the IHL law principle of proportionality may not be justified because proportionality "[is] not a recognized rule of the law of war."[184]

Often the state actors involved in targeted killing tinker with the threshold of proportionality in an attempt to craft a scale of response that legitimizes targeted killing. Despite the evolving nature of hostilities, the reference point of appropriate threshold in the context of proportionality must not be allowed to vacillate from conflict to conflict simply to manufacture legitimacy for targeted killing. Moreover, proportionality brings in other legal conundrums to the entire deliberation process for evaluating the legitimacy of targeted killing. First, the framework of targeting without judicial review is structurally untenable for proportionality compliance. Second, the duality between *jus ad bellum* and *jus in bello* in dealing with proportionality might render the act of targeted killing unsupportable as an event under law.[185] Fundamentally, proportionality calls for measuring the response to the initial attack by calibrating it with a specific quantum of force. Balancing a future quantum of attack might be more complicated if we were to measure the proportionality of attack that has not yet occurred but is expected to occur in the future. This introduces a logical anomaly. Application of proportionality calls for measuring a future event based on imprecise information. Any attempt to calibrate a response would be imprecise because neither the quantum of force nor the timing of the future initial attack could be measured with certainty. Constructing an article 51 self-defense argument under proportionality to validate targeted assassination based on a future imminent threat, is therefore, highly problematic under IHL. Especially in the context of targeted killing via UAVs in Pakistan, Afghanistan and the Arabian Peninsula, as IHL's *just ad bellum* rules may invite a higher prohibitory threshold than currently being recognized by the responsible state actors.

F. Distinction – Languishing in the Shadow of Military Necessity

In armed asymmetric warfare, distinction is the final arbiter of life and death. Against a backdrop of a war on terror-focused hostilities landscape, often confounded by a perplexing maze of international law,

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182. *See Kalshoven*, *supra* note 168, at 44.

183. Michael N. Schmitt, *Faultlines in the Law of Attack in* TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 278, 293 (S. Breau, & A. Jachec-Neale, eds., 2006) *archived at* http://perma.cc/CMZ9-DGH4.

184. *See* W.J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 102 (1982).

185. *See* Sloane, *supra* note 124.

distinction provides the final guarantee of right to life. Undoubtedly, the right to targeted killing must go through a careful deliberation process to satisfy a series of thresholds as has been highlighted in discussion thus far. For example, a progressive series of analyses must determine (i) whether armed conflict exists, (ii) whether the target has been identified as a functional combatant, (iii) whether military necessity has been established, and, (iv) whether a proportionality analysis has been conducted. The right to targeted killing must go through all these evaluations before embarking on carefully distinguishing between civilians and combatants.[186] Current practices however, do not adhere to the distinction doctrine as can be seen through the surge of recent civilian deaths from state targeted killing attempts.

A major problem within the current practices of targeted killing comes from the states' inability to decouple the three principles of necessity, proportionality and distinction. Oftentimes, these doctrines are subsumed within each other, and many other times, these doctrines are conflated with each other during analysis. Yet, their stand-alone analysis is vitally important in ensuring not only protection of civilian lives but also, in appreciating the scope and significance of these doctrines for their continued viability in IHL. Moreover, distinction is seen to reside at the heart of inquiry surrounding proportionality's balancing test and necessity's granulated approach discussed earlier.

Whether civilians lose immunity by virtue of their proximate relationship with the operational aspect of the conflict is not the specific focus of this inquiry. A broader definition of functional combatant could efficiently eliminate the indeterminacy aspect of any civilian-combatant dichotomy. Therefore, the determination must default to the state's obligation in reliably distinguishing between functional combatant and non-functional combatant. Target identification review at this stage becomes an exercise in correctly identifying only the correct half of the binary. Therefore, distinction under IHL might rely on developing a robust model of the functional combatant. Once the model is constructed with sufficient rigor and due diligence, a simplistic determination is theoretically achievable. For example, once we are satisfied with the parameters of the functional combatant, anyone falling outside the definitional framework of a functional combatant could automatically come under the protection from lethal force under the IHL's distinction principle. Targeted killing comes with a heightened obligation for civilian protection under distinction,[187] a

186. *See* U.N. Doc. A/CONF. 183/9, *supra* notes 180-82 and accompanying text.

187. According to the AP I in article 51(2) of the Geneva/Hague Conventions, "[t]he civilian population as such, as well as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread the terror among the civilian population are prohibited." AP I, *supra* note 48, art. 51(2) (alteration added). Additionally, Article 52(1) further stipulates that "[c]ivilian objects shall

requirement that is gradually being written out of the books by states in their recent shift towards developing a more security-centric model of the functional combatant. Once the parameters to define a functional combatant are completed, we are obligated under IHL to protect the non-functional combatant. However, even if a workable model of the functional combatant is achievable in practice, the interaction amongst the three fundamental compliance requirements makes IHL application of targeted killing extremely problematic.

Under the principle of distinction, an attacking state must distinguish between military targets, and non-functional combatants or civilian objects before the attack begins. The distinction principle has been codified in IHL based on AP I's prohibition on indiscriminate attack, an area I have dissected in Section E above. Additionally, I have noted in an earlier work[188] that, from the three doctrines of distinction, necessity, and proportionality, the doctrine of distinction provides the most support for upholding a right to life—a right that gets further elevated status under HRL discussed later. For example, regardless of interpretation related to proportionality and necessity, correct interpretation of distinction allows for a particular target to be confronted with deadly force. The principle of distinction, therefore, will *not* support such actions as targeting a functional combatant within a crowded bazaar in Afghanistan, inside a mosque in Yemen or in the midst of a nighttime wedding reception in the tribal region of Pakistan. Similarly, firing remotely controlled Hellfire missiles at civilian dwellings in villages of Waziristan from operational centers

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not be the objects of attack." AP I, *supra* note 48 (alteration added). Similarly, the 1998 Rome Statute of the ICC makes categorical provisions against, "intentionally directing attacks against civilian population as such" or "civilian objects." Rome Statute of the International Criminal Court art. 8(2)(b)(i)-(ii), July 17, 1998, A/CONF.183/9. By the language "civilian population as such," the statute makes careful distinction between damage caused by direct intentional attack or civilians where no military installation in either present, or no military advantage is to be gained from the attack in which, civilian casualties take place by being in the vicinity of the hostilities. The indiscriminate attacks are laden with wanton disregard for civilian lives and, accordingly, should be interpreted as premeditated acts under AP I, and are defined as:

> (a) Those that are not directed at a specific military objective;
> (b) Those that employ a method or means of combat which, cannot be directed at a specific military objective;
> (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Id. art. 51(4). Thus, HRL imposes heightened restrictions on distinction between civilians and combatants. For discussion and commentary see Nuclear Weapons Advisory Opinion, *supra* note 125, para. 78; Vincent Chetail, *The Contribution of the International Court of Justice to International Humanitarian Law*, 85 INT'L REV. RED CROSS 252, 256 (2003); *see also* AP I, Commentary, *supra* note 48, art. 57, para. 2191.

188. *Collateral Damage*, *supra* note 36.

thousands of miles away should be considered violations of IHL under the principle of distinction. The principle of distinction may foreclose any derivative right the state might claim as flowing from its article 51 of the UN Charter's right to self-defense under most circumstances.

Therefore, given the structural difficulties identified in this analysis and as noted elsewhere,[189] the distinction requirements remain a vulnerable spot for the IHL application of targeted killing. More importantly, discussion thus far does not support a right to targeted killing under the principle of distinction acting alone within the context of hostilities presented here.

IV. TARGETED KILLING FROM A STANDALONE INTERNATIONAL HUMAN RIGHTS LAW ANALYSIS

If rights in international law are to flow within a multi-dimensional space, each of its dimensions need to be explored adequately to identify a derivative right to targeted killing. Therefore, if a right to targeted killing can be established under IHL, it may not necessitate a distinct HRL analysis. However, analysis thus far indicates a right to targeted killing under IHL is problematic at best and legally impermissible at the worst. Therefore, my inquiry now turns to finding scenarios under HRL that might generate a right to targeted killing. This rights narrative around targeted killing then would prompt us to seek clarity on whether a functional combatant's human rights were ever recognized or even envisioned within the context of HRL. This would require identifying the framework under which a functional combatant's human rights are currently being processed at various stages of deliberations within the context of targeted killing. Understanding the human rights paradigm of targeted killing would allow us to envision a construct where parties with disparate interests can interact, allowing for various rights to emerge within its intended ontological space.

A. Seeking the Right to Targeted Killing in International Human Rights Law

Several factors prompt us to seek a right to targeted killing under HRL in this phase of the inquiry. First, to summarize from the previous Section's observation and analysis, IHL supervises types of NIAC where at least one state actor is involved such that participation in hostilities is characterized by clearly designated military personnel. This would necessitate bringing the participants to the hostilities within the purview of specific codes of military justice. However, targeted killing is being conducted in types of hostilities where remotely executed missile strikes via

189. *Collateral Damage*, *supra* note 36.

UAV have been the norm. These remote strikes have been approved and operated by either CIA personnel or CIA contractors.[190] These actors are neither trained in the law of armed conflict nor bound by the Uniform Code of Military Justice (UCMJ). This has several untenable difficulties under IHL.[191] These actors are neither expected to exhibit fidelity to IHL, nor do they legitimately fall as designated actors under IHL.[192] Moreover, the history of IHL suggests, no matter how egregious or illegitimate an act might appear on the surface, unless encapsulated within specific identifiable statutes of international law, criminal culpability may not be recognized under legal principles.[193]

Thus, the central inquiry in codifying the right to targeted killing within the framework of international law should now shift to HRL, as it permits specialized circumstances within evolving military scenarios under its *lex specialis* principle. Other commentators have supported this view of seeking further clarity under HRL:

> Persons with a right to take a direct part in hostilities are lawful combatants; those without a right to do so are unlawful combatants. Having a right to participate in hostilities means that the person may not be charged with a crime for using force. CIA operatives, like the militants challenging authority in Pakistan, have no right to participate in hostilities and are unlawful combatants.[194]

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190. Author Alston observed:

> States must ensure that training programs for drone operators who have never been subjected to the risks and rigors of battle instill respect for international human rights law and adequate safeguards for compliance with it . . . the use of drones for targeted killing is almost never likely to be legal. A targeted drone killing in a State's own territory, over which the State has control, would be very unlikely to meet human rights law limitations on the use of lethal force.

See U.N. Doc. A/HRC/14/24/Add.6, *supra* note 29 (alteration added).

191. *See* Murray Wardrop, *Unmanned Drones Could be Banned, Says Senior Judge*, THE TELEGRAPH, July 6, 2009, http://www.telegraph.co.uk/news/uknews/defence/5755446/Unmanned-drones-could-be-banned-says-senior-judge.html, *archived at* http://perma.cc/G8R-QA79. In this context, the general prohibition under HRL is against weapons that violate the principle of distinction or cause unnecessary suffering. *See* PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE§ C (3) (2009).

192. *See* O'Connell, *supra* note 26 and accompanying text.

193. Here I specifically draw attention to the binding nature of HRL, discussed in this Article in detail. *See supra* Part III B, C.

194. Author O'Connell observes, "CIA operatives, like the militants challenging authority in Pakistan, have no right to participate in hostilities and are unlawful combatants. They may be charged with a crime." O'Connell, *supra* note 26, at 22.

Second, as identified in the previous Section, deterministic complexity comes from the bedrock principles of IHL. The parties and actors involved in hostilities must be adequately trained in the complex conceptual norms surrounding the interacting principles of military necessity, proportionality and distinction. This becomes problematic when non-military personnel are instructed by the state to engage in remotely operated UAV strikes on combatants under extrajudicial capacity.[195] Not only does this conduct run afoul of applicable military principles and laws of war statutes but also might invite war crime investigations if taken to its logical conclusion via chain of causation.

Thirdly, while *jus ad bellum* principles of IHL provide guidance on when military activities can be triggered,[196] *jus in bello* principles guide us on permissible conducts and behaviors once military actions initiate.[197] Since the context of our inquiry falls under the purview of NIAC, a paradigm that is in a continuous flux and is subject to periodic review and update, HRL analysis may be more conducive to providing interpretative gloss where IHL analysis has failed to yield a deterministic outcome. Fundamentally, *jus in bello* sovereignty issues are in conflict with the use of force by a state against non-state actors outside of the state's own territory.

Since targeted killing generally takes place within the active hostilities framework, evaluating the technical elements of the asymmetric warfare must be performed once hostilities have been initiated. This would also allow for an expanded reading into HRL's scope for the discussion of rights. Especially, a combination of *jus in bello* with HRL's rights-based analysis would keep the trajectory of discussion focused on the need to balance state rights with the combatant-civilian dichotomy within a human rights framework.[198] This is particularly true when hostilities evolve in confusion. Often this is marked by imprecise distinction between functional combatants and their non-functional counterparts or triggered when parties to the action are conflated with the coexistence of non-state actors with state-sponsored actors.[199]

B. Guiding Principles Illuminating the Rights Discussion

HRL conduct of hostilities is distinguished from IHL conduct of hostilities in that HRL applicability comes with a higher threshold of state obligations in conducting hostilities.[200] This is in part because more bulwark

195. O'Connell, *supra* note 26, at 22.

196. *See* Sloane, *supra* note 124 at 49.

197. Sloane, *supra* note 124 at 49.

198. Sloane *supra* note 124 at 49.

199. Here I draw attention to the escalating problem of distinction caused by over expanding the definition of combatant, discussed thoroughly in this Article.

200. *See, e.g.*, Armed Activities on the Territory of the Congo (Dem. Rep, Congo v.

principles have been codified within HRL with the explicit aim of minimizing casualties and protecting human lives.[201] These principles flow out of HRL's explicit recognition that, as conflicts become more asymmetric, the potential for the unconventional and non-state actors to suffer casualties increases.[202] On the surface, it might be difficult for a state to overcome HRL's fundamental recognition of the sanctity of life as this explicit promise of inherent right to life is in conflict with the state's derivative right to targeted killing. This is evident from HRL providing a higher threshold of civilian protection than IHL in asymmetric conflict. The recent International Committee of the Red Cross ("ICRC") guidance corroborates such viewpoint:

> In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL. The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.[203]

Such restraint espoused by HRL should fundamentally guarantee that

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Uganda), 2005 I.C.J. 168, ¶ 216 (Dec. 19); Nuclear Weapons Advisory Opinion, *supra* note 125; Construction of a Wall, *supra* note 125, para. 106; THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT, *supra* note 29 (discussing the guidance provided in contemporary legal manuals and case laws).

201. *See* E/CN.4/2006/53, *supra* note 29, ¶¶ 28-29; E/CN.4/2005/7, *supra* note 29, ¶¶ 71–74. ICRC guidelines prescribe a set of norms to prevent civilian casualties and minimize excessive loss of lives. *See* ICRC Rules, *supra* note 158, at 521. Author Melzer notes: "Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations." MELZER, *supra* note 75, at 365. Significantly enough, in its 2009 interpretative guidance on direct participation in hostilities (DPH), the ICRC has introduced new terminology for members of non-State actor involved in hostilities, members of an organized armed group with a CCF. NILS MELZER, INT'L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, 75–76 (2009) [hereinafter INTERPRETATIVE GUIDANCE], *archived at* http://perma.cc/4EQU-6NVE.

202. *See* INTERPRETATIVE GUIDANCE, *supra* note 201, at 74.

203. INTERPRETATIVE GUIDANCE, *supra* note 201, at 80–81.

there is no unlimited choice by state actors to inflict casualties. On its face, this must foreclose most means of assassination without judicial due process. How could the state, therefore, still acquire the right to targeted killing within the context discussed thus far?

HRL's focus on the inherent right to life informs us of a broader and expanded obligation to restrict states from engaging in lethal force even when article 51 of the UN Charter is triggered.[204] Two significant observations follow from this principle. First, HRL's framework places a much higher burden on states for application of proportionality, which would require developing an appropriate balance between achieving military objective and minimizing excessive (disproportionate) loss of civilian lives. This will require conducting drone strikes with such precision that disproportionate loss of civilian lives must be eliminated in most cases.[205] This places a heavy burden on both intelligence gathering and target selection; however, ground intelligence cannot reliably determine the proximate surroundings of an individual target,[206] nor has it been possible to precisely determine the coordinates of a high value functional combatant. Yet, the drone strikes are being advertised as causing minimal collateral civilian damage.[207] However, reality tells a different story, for reasons highlighted below.

Evidence suggests that missile strikes via UAVs have killed a disproportionately large number of individuals compared to the intended single individual or the handful of individuals being targeted.[208] Despite

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204. *See* Nuclear Weapons Advisory Opinion, *supra* note 125, ¶¶ 38-42.

205. U.N. Doc. A/HRC/14/24/Add.6, *supra* note 29 states:

> This means that under human rights law, a targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the *sole objective* of an operation. Thus, for example, a "shoot-to-kill" policy violates human rights law. This is not to imply, as some erroneously do, that law enforcement is incapable of meeting the threats posed by terrorists and, in particular, suicide bombers. Such an argument is predicated on a misconception of human rights law, which does not require States to choose between letting people be killed and letting their law enforcement officials use lethal force to prevent such killings. In fact, under human rights law, States' duty to respect and to ensure the right to life entails an obligation to exercise "due diligence" to protect the lives of individuals from attacks by criminals, including terrorists. Lethal force under human rights law is legal if it is strictly and directly necessary to save life.

U.N. Doc. A/HRC/14/24/Add.6, *supra* note 29, ¶ 33; *See also* E/CN.4/2006/53, *supra* note 29, ¶¶. 44–54; E/CN.4/2005/7, *supra* note 29, ¶¶ 71–74; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, 52, U.N. Doc. A/6316, art. (II)(1) (Dec. 19, 1966), *entered into force* Mar. 23, 1976.

206. *See* sources cited *supra* notes 102, 104 and accompanying text.

207. *See supra* note 3.

208. *See supra* note 3.

having the most sophisticated technology and precision-guided weapons, it has been virtually impossible to either effectuate a "clean surgical kill," or, minimize the loss of civilian lives, while targeting functional combatants in crowded neighborhoods and dwellings. Evidence further indicates that most of the strikes since 2002 have taken place in crowded dwellings, inside dwellings shared by children, elderly, and sick people, in public transport vehicles and in cars with multiple occupancy.[209] But, there is lack of reliable information. Due in part to inaccurate evidence on the ground, and due in part to absence of transparency associated with such operations. As a result, the relative proportions of functional combatants and civilians killed in remote UAV strikes cannot be reliably evaluated. Although the HRL's proportionality principle does not provide a specific ratio of combatant to civilians, evidence uncovered thus far presents some disturbing trends in recent drone strikes. First, a disproportionate number of the old, infirm, and children have been killed,[210] in direct violation of HRL's proportionality principle's "qualitative" aspect of the balancing test.[211] Second, if statistics on drone strikes of the last few years are compiled, it might establish that in most of these instances, less than 10 percent of the killed individuals would be deemed functional combatants under the most expansive definition of the term.[212] Thus, recent targeted killings do not comport with the HRL principle of proportionality.

Sanctity of human life is one of the animating principles of HRL. Thus, locating a right to targeted killing under HRL would require balancing such rights with an inherent right to life. In this evaluation, right to kill a suspected terrorist would flow from the savings gained from a targeted strike in preventing even bigger damage. This savings has to be balanced against a proportionality that compares the harm caused after the targeted strike. Moreover, the right to life analysis cannot be regionalized or made target-specific, as all civilians regardless of the geography should have the same right to life. Unfortunately however, some scholars have taken this "inherent right to life" doctrine to construe an isolated right to life for American citizens in order to carve out an exclusive right to targeted killing of suspected terrorists.[213] Such analysis would be fundamentally

209. *See Collateral Damage*, *supra* note 36.

210. *See Collateral Damage*, *supra* note 36.

211. *See* sources cited *supra* notes 3, 46, and accompanying text.

212. For any strike to have a percentage of combatant kill to be above 10% of all kills, this would require the ratio of combatants to civilians killed in the battlefields of Pakistan, Afghanistan and the Arabian Peninsula to be below 1:10. On the basis of available data and corroborative evidence, it is clear that such ratio is significantly higher than 1:25 in relative abundance of civilian deaths.

213. Prohibition against deprivation of life without due process of law is a bedrock principle of the American Constitution, enshrined in its Fifth Amendment. If this is taken to its logical extension and used as a precondition for protection against imminent threat to the US and doing anything to prevent such losses of lives can trigger both a self-defense right

flawed under HRL.

At the minimum level, a right to targeted killing emanates from a self-defense right against imminent threats to other lives. A fully transparent and legally robust targeted killing framework would, therefore, call for an authentic evaluation of all concomitant factors when a target is identified in the battlefields of Pakistan, Afghanistan, or in the Arabia Peninsula area (for example, Yemen or nearby Somalia). For Americans, the conflict between imminent threat and the right to self-defense are influenced by factors, such as, the remoteness of the physical location, the actual geographical boundaries of the continental United States, and the weapon delivery mechanism available to the suspected terrorists. It can be argued, in a majority of the situations, the attack against American citizens is at best plausible, but far removed from being possible. For this plausibility to have a remote chance of success a set of definitive pathways must be identified and their chances of success have to be evaluated. Yet, such remotely plausible events are being recognized as definitive in order to construe a right to targeted killing by the state. Such instances of using a logical extreme to satisfy compliance requirements of a limiting case must be recognized as not only legally impermissible, but highly deceptive to have any legitimacy within HRL. It must be recognized that, the inherent right to life is not an exclusive right preserved only for some citizens, as this right to life places both a prohibitive barrier and an insurmountable threshold for application under HRL for all citizens of the world.

C. Proportionality, Distinction, and Military Necessity in International Human Rights Law

A comprehensive inquiry seeking a derivative right to kill cannot be completed without discussing HRL's focus on proportionality in the context of *lex specialis*. As per the ICRC guidelines, respect for civilian status must be the illuminating principle in determining strategies for conducting military hostilities, including identifying and targeting for the assassination of suspected terrorists.[214] A *presumptive civilian status rule* must therefore be read into the analysis of the HRL's proportionality principle.[215] The

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and the ability to use force to prevent harm to life. However, this causal chain of reasoning is fraught with multiple conditions that cannot be adequately evaluated and thus fulfilled deterministically for the argument to have any force.

214. *See, e.g.*, Int'l Comm. of the Red Cross, *Committee of the Red Cross in the Event of Violations of International Humanitarian Law or of other Fundamental Rules Protecting Persons in Situations of Violence*, 87 INT'L REV. OF THE RED CROSS 858 (2005).

215. Presumptive civilian status has been codified in jurisprudential development of international humanitarian rights law. "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . . ." *Convention IV*, *supra* note 45, art. 3 (emphasis added) (alteration added); *Convention II, supra* note 45, art.3; *Convention III*, *supra* note 45, art. 3 (emphasis

ICRC guidelines would suggest applying a presumptive civilian status to all persons during hostilities at the onset of evaluation. Therefore, prior to determination, all individuals must be recognized as having either a civilian or a non-functional combatant status.[216] Any change in status to a functional combatant would then be done through actual and verifiable evidence. Such comparatively heightened civilian protection in HRL comes from a set of significant observations. First, in asymmetric conflict, civilians are thoroughly unmatched compared to the dominant party's available firepower. Second, characterizing a functional combatant for the purpose of targeting is difficult in the NIAC context.

Applying a presumptive civilian status to all participants would then allow for a narrower definition to become operationalized for functional combatant status review. Thus, by changing the targeted killing framework from IHL to HRL, civilian deaths could be reduced significantly. Given the escalation of disproportionate civilian deaths in the current asymmetric hostilities, this is a much-needed framework. Not only would such a bulwark prevent the continuous orgy of civilian killings, it might ultimately find it difficult to legitimize states' right to targeted killing.

Unfortunately, the ICRC's presumptive civilian status guideline has remained as such—a guideline without much binding power for widespread implementation. Adherence to this guideline has neither been followed nor given any practical validity from state policy perspectives, especially states engaged in targeted killing. In the end, however, HRL's recognition of inherent right to life provides a much difficult threshold for UAV-based targeted killing to overcome.

D. Necessity in International Humanitarian Rights Law

An analysis of targeted killing under HRL cannot be completed without a nuanced analysis of the necessity doctrine, especially in light of the recent work by Niels Melzer.[217] By introducing a component level granulation of the broader necessity principle, Melzer attempted to develop a more robust HRL paradigm.[218] Some of the granular aspects of his

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added); *See also* AP I, *supra* note 48, arts. 47, 67.1 (regarding the definition of mercenary and dealing with civil defense, respectively). By the customary international law principle of proportionality, reflected in articles 51.5(b), 57.2(a)(iii), and 57.2(b) of AP I, "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" is prohibited. AP I, *supra* note 48, art. 51.; *See also* UNITED KINGDOM MINISTRY OF DEFENSE-JOINT DOCTRINE AND CONCEPTS CENTER, THE JOINT SERVICE MANUAL ON THE LAW OF ARMED CONFLICT § 5.3.2 (2004) [hereinafter JOINT SERVICE MANUAL] *archived at* http://perma.cc/K7TW-QUPW.

216. JOINT SERVICE MANUAL, *supra* note 215; *Convention II, supra* note 45, art.3; *Convention III*, *supra* note 45, art. 3.

217. *See* MELZER, *supra* note 75, at 227–230.

218. *See* MELZER, *supra* note 75, at 227–230.

proposed framework have already been elaborated on by other commentators elsewhere.[219] My review of Melzer's analysis, therefore, would focus on issues that may not have been addressed before, yet, might help us in locating a right to kill within the HRL space. Teasing out the qualitative and the quantitative dimensions of *necessity* might represent an elegant way of determining whether an engaging state has satisfied the HRL criterion for article 51 of the UN Charter's right of self-defense. However, from the implementation perspective, such granulated distinction may still give a state the right to targeted killing. For example, Melzer's qualitative necessity would not prevent the United States from targeting Baitullah Mehsud on the ground in Waziristan using the *least-harmful means* test. This is because the alternatives of capturing him alive via ground forces, or immobilizing him via different types of weapons is hopelessly "ineffective or without any promise of achieving the intended result."[220] Similarly, Melzer's quantitative necessity would not necessarily prevent the killing of a suspected terrorist by a Hellfire missile from an American drone, since the quantitatively lesser threshold of violence cannot be applied here. In such an instance, the relevant American commander may not agree on either disengaging or, attempting to immobilize the target by anything less than the quantum with fatal consequence. Thus, while these doctrines are elegant from a theoretical framework, they lack any meaningful bulwark against random civilian death and therefore, fail to comport with HRL's right to life principle.

Melzer has proposed a temporal necessity that imposes a heightened standard of *imminence* requirement for the purpose of targeted killing.[221] This is significant, as the commanders on the ground in current hostilities with Al-Qaeda or Al-Qaeda in the Arabian Peninsula use a relaxed threshold that uses a much broader timeframe to determine what is an imminent threat. An elevated threshold of imminence would restrict such commonly used application by fixing a quantum of temporal window for conducting targeted killing. In this context, some scholars have espoused a more relaxed targeting framework, mostly in order to legitimize the state's objective by interpreting that, targeting may be legitimate under HRL up until the very moment of the lethal force's application. This provision would allow for the exigent scenarios to evaporate just immediately before the actual and intended strike. However, the paradigm would create delineation problems between when it is *not yet* and when it is *no longer* absolutely necessary to achieve the desired purpose in cases of exigencies.[222] Reading a strict imminence standard to this requirement

219. *See* Chesney, s*upra* note 51, at 54–57.
220. UN Basic Principles, *supra* note 140, ¶ 4.
221. *See* MELZER, *supra* note 75.
222. Chesney, s*upra* note 51, at 54.

invites real problems in satisfying HRL requirements in scenarios involving credible threats of terrorism during hostilities. This is because a strict imminence version views a potential target as an executioner within temporal proximity. Moreover, it does not take into consideration the target's ability as the coordinator and planner of an operation. In this strict imminence sense, Baitullah Mehsud in our example could *not* be a legitimate candidate for targeted killing.[223] Rejection of this strict imminence model because of impracticability prompts us to a default discussion on a more relaxed version of imminence.

Some might argue that, impractical restriction of imminence calls for a more relaxed interpretation to adequately place the necessity doctrine in the HRL context, more specifically, to trigger article 51's self-defense. Toying with the *imminence* threshold could, however, be self-defeating. If the more restricted version of imminence suffers from impracticality, a more relaxed version would suffer from a lack of transparency within current asymmetric warfare. For example, when a state invokes the HRL's *necessity* doctrine under non-strict imminence, there is virtually no guarantee that conditions conducive to such imminence actually exist. Scholars have attempted to overcome this doctrinal weakness of factual uncertainty by introducing an exigency consideration under the "last window of opportunity."[224] However, placed against the more fundamental strand of "right to life" doctrine of HRL, this weakness of factual assumption creates an insurmountable barrier for the necessity doctrine to prevail over imposition against acquiring a right to targeted killing.

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223. *See generally* Mayer, s*upra* note 46 (describing the targeted killing of Mehsud).

224. As I have noted in this Article, legal scholarship surrounding targeted killing seem to be diverging along two distinct stands. Proponents who espouse an expanded conception of State's right who finds a broader right to kill within the legal firmament. One such scholar crafted a legal reasoning for targeted killing posited on the last window of opportunity, even if the certainty for threat may be questionable. He notes:

> [T]argeting of suspected terrorists must be restricted to cases in which there is credible evidence that the targeted persons are actively involved in planning or preparing further terrorist attacks against the victim state and no other operational means of stopping those attacks are available. As there is always a risk that the persons attacked are not in fact terrorists, even in such a case lethal force may be used against the suspected terrorists only when a high probability exists that if immediate action is not taken another opportunity will not be available to frustrate the planned terrorist attacks.

Kretzmer, *supra* note 27, at 203 (alteration added). Some scholars do not explicitly mention such window to propagate a theory of killing, however, attempts to straddle the contour of a right to kill based on international humanitarian rights law's human rights protection doctrine structured via the lost opportunity to save lives. *See, e.g.*, Michael N. Schmitt, *US Security Strategies: A Legal Assessment,* 27 HARV. J. L. & PUB. POL'Y. 737, 756 (2004).

E. Military Necessity Based on Imminence Within International Human Rights Law

Principles of distinction and proportionality are more intricately linked to HRL application, as long as we can adequately immunize from the conflation problem. HRL's restriction on force is further legitimized by the structural connectivity between proportionality and distinction evidenced in a manner manifested by each of these principles which seem to be enhancing the force of the other. In essence, they emanate from each other. There is an inherent dichotomy with the parameters of twenty-first century warfare. The act of war is conducted with highly sophisticated technology, capable of delivering disproportionately asymmetric firepower to the enemy on the ground. On the contrary, ground intelligence and theater of operation are marked by unreliable human intelligence,[225] unfriendly terrain,[226] and unsophisticated delivery mechanisms.[227] All of these characteristics render the process of reliable determination of the functional combatant difficult, if not impossible. Therefore, when reliable distinction between functional combatant and its binary equivalent of non-functional combatant is unavailable, the proportionality analysis must be conducted with enhanced due diligence. If the proportionality factor is determined to be unreliable or rendered insignificant, eliminating or reducing civilian casualties is highly probable. Thus, by conducting a proportionality analysis, military planners can develop a buffer against human error, thereby reducing human casualties, objectives that are inherent to the animating principles of HRL framework.

Now turning the focus to HRL's necessity and imminence principles, I am concerned with the contemporary tendency to construe a right to targeted killing from an illegitimate analysis. Some analysis has taken the *imminence* requirement and structured a more conducive scenario for targeted killing, without carefully processing the evidentiary concerns, distinctive principles, and remoteness of connections, any one of which could render targeted killing under IHL difficult. In this context, Melzer's granular approach in articulating the necessity doctrine into three separate constituent elements may be a more promising possibility.[228] Although the "temporal" necessity requirement provides a much more prohibitive bar, attempts have been made to use temporal necessity for legitimizing targeted killings under the framework of the "last window of opportunity."[229]

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225. *See* sources cited *supra* notes 102, 104, and accompanying text.

226. *See* Stephanie Carvin, *The Trouble with Targeted Killing*, 21 SECURITY STUDIES 3 (2012).

227. *Id*. at 3-4.

228. *See* MELZER, *supra* note 75.

229. *See* Michael N. Schmitt*, Preemptive Strategies in International Law,* 24 MICH. J. INT'L. L. 513, 534-36 (2003).

However, this last window of opportunity model does not follow from the fundamental tenets of IHL's inherent right to life. Yet, it is an elegant construction developed by the need to legitimize targeted killing of combatants within the current continuum of hostilities.

Ultimately, even HRL on a standalone basis cannot fully provide legal legitimacy for targeted killing. Thus, neither taking its constituent principles separately, nor combining them may provide international law with a meaningful paradigm to allow states' right to targeted killing.

V. IS THERE AN EVOLVING PARADIGM FOR THE RIGHT TO TARGETED KILLING?

If either IHL or HRL acting alone could legitimize a right to targeted killing, perhaps no further inquiry would have been needed at this stage. Nonetheless, as I have identified in the preceding sections, finding a legitimate right within international law may be problematic under both IHL and HRL. Seeking such a right within the larger manifold of international law, I now examine the hybrid strands constructed out of both IHL and HRL. Although there have been instances where either the IHL or the HRL may apply in incorporating some elements at isolated phases of either the NIAC, or in the IAC, it would be instructive to evaluate whether taken together they could construct a legitimate right of targeted killing for all instances.

A. Locating the Right to Targeted Killing Within Shared IHL/HRL Space

Ultimately, whether operating stand-alone or evolving within the hybrid IHL-HRL context, right to life is in existential conflict with the right to targeted killing. Tracing the origin of these doctrines could shed light on their dichotomy. As a doctrinal development, right to life emanates spontaneously from distinct threads of settled international law. On the contrary, right to targeted killing is a geopolitical derivative of unilateral state action that has never been intended as part of customary international law. Right to targeted killing can best be recognized as a derivative right that must be acquired through interactions of rights and events. Thus, to exist within the framework of international law, at a basic minimum, the right to targeted killing must satisfy the basic fundamentals of necessity, proportionality, and distinction. In this narrative of rights' adequacy, the combinations of combatant characteristic and hostility types might differ, but the component level analysis of these principles must never lose force for such right to exist in any scenario.

Careful analysis of various hybrid scenarios containing parameters of IHL and HRL must be put through various threshold tests. Even by stretching the limits of our imagination and relaxing the thresholds of *imminence* and *proportionality*, a right to targeted killing within the shared

manifold of IHL-HRL seems to suffer from existential difficulty. Thus, rejection of such rights now prompts us to seek sanctuary within domestic developments of law, for which, the analysis would turn on determining whether the combination of domestic US law foundation, and existing strands of international law together could provide justification for targeted killing.[230]

B. Can The US Domestic Law Extend to a Right to Self-Defense?

President Bush's September 18, 2001 Authorization for the Use of Military Force (AUMF) provided an expanded authorization to use lethal force against entities determined by the President to have been responsible for the 9/11 attacks.[231] Presidential authority to use "all necessary and appropriate force" could be interpreted by some as *a de facto carte blanche* to use any variant of unrestrained and unlimited force including lethal force to selectively target individuals the state recognizes as an enemy. This interpretation suffers from various fatal flaws. First, by engaging in a component level analysis of the AUMF's relevance, intent, and scope, the substantive deficiency of the argument becomes quite apparent. Second, the AUMF's disconnect from the basic tenets of international law makes it inherently incongruent for any application related to targeted killing. Third, the temporal divergence between the AUMF's original invocation and the still continuing hostilities make connection between such Presidential authorization and a right to targeted killing logically untenable.

Indeed, the AUMF triggers the self-defense right under article 51 of the UN Charter, the fruits of which the United States forces have enjoyed all too well. The important questions are: whether the AUMF is still applicable more than a decade later? Is there a temporal statute of limitations on such domestic declarations? Or, is it an example of what some scholars characterize as the "laws of 9/11"[232] shaping international

230. *See infra* Section V.B.

231. *AUMF*, *supra* note 70. AUMF grants authority for use of United States Armed Forces against those responsible for the attacks on September 11, 2001. By the explicit mandate under the authority of AUMF, signed by President George W. Bush on September 18, 2001, the United States President has full power to use all "necessary and appropriate force" against those whom he determined "planned, authorized, committed, or aided" the September 11th attacks, or who harbored said persons or groups. Clearly, AUMF contained deterministic elements, such as, "all necessary and appropriate," "determined," "full power," all of which could be subject to diverging interpretation. *AUMF*, *supra* note 70; *see also* The Authorization for Use of Military Force Against Iraq, Pub. L. 107–243, 116 Stat. 1498(enacted on Oct. 16, 2002). This was a joint resolution passed by the United States Congress under H.J. Res. 114 which authorized military action against Iraq without United Nations mandate. H.R.J. Res. 114, 107th Cong. (2002), *archived at* http://perma.cc/FMJ9-A7JN.

232. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the*

jurisprudence? Let us again relax the restrictions for the argument to proceed.

We assume the AUMF has continued sustenance and article 51's self-defense trigger is valid. To evaluate whether such authorization can fundamentally support targeted killing would require identifying the operating elements of the AUMF and analyzing them for their relevance in creating such a right. This would include interpreting the elements, such as, "all necessary and appropriate force" and entities "responsible for the 9/11 attacks."[233] A quick review would reveal that, the invocation of targeted killing under the operating phrase "all necessary and appropriate force" is highly problematic—fundamentally, legally, and morally. As international law is not based on moral arguments, we can ignore the moral reprehension any attempted statutory connection to targeted killing might produce. On the other hand, international law's fundamentals must certainly be indexed at legally supportable doctrines. This would prompt us to analyze the AUMF's core legal principles to search for a right to targeted killing within the NIAC framework.

First, focusing on the term limit of the AUMF passed in September 2001, we must inquire if there is a sunset provision to such authorization. This is significant, as the AUMF was a response to a specific act and was construed to be under a different scope and context. Can that authorization continue to provide legal legitimacy to trigger article 51's self-defense rights in the current scenarios? Although there has been no discernible legal precedent to support or reject, we can construct our logic by carefully analyzing the antecedent elements. The events on 9/11 were significantly violent. Retaliatory events that followed are no less violent and comprehensive in dehumanizing more people that have been remotely impacted by 9/11. The aftermath has been the subject of much legal debate, and has already given rise to multiple full-scale wars and hostilities that have continued unabated.[234] Moreover, both the perpetrators and the responsible actors have already been rendered inert and inactive. Any article 51's self-defense trigger to connect targeted killing must therefore be recognized as new and should be framed out of a new reality and consequently, must derive force from a new authorization. Thus, envisioning a right to targeted killing must not be based on the 2001 AUMF and must certainly be based on renewed legal arguments.[235] Therefore, the AUMF's continued validity should no longer be used for justification of force in the international context, most specifically in IAC or NIAC.

War on Terrorism, 118 HARV. L. REV. 2047, 2068 (2005) (discussing the interpretive relevance AUMF within the context of HRL); *see also* HOWARD ET AL., *supra* note 16.

233. *See AUMF*, *supra* note 70.

234. *See Narrative of Dehumanization*, *supra* note 8.

235. *See generally,* Chesney, *supra* note 51 (examining under what circumstances authorization based on AUMF might collapse within the context of targeted killing, while advancing an argument for developing additional legal criteria for such targeted killing).

Stepping away from the above temporal disconnects and the derived irrelevance of the AUMF, my inquiry now turns to the operating interpretation of "all necessary and appropriate force."[236] The last decade has seen tremendous technological advancement in military capabilities. A powerful state can deliver a much more lethal response to its enemy than it would otherwise have been able to prior to 9/11.[237] A broad interpretation of "all" would significantly expand states' right to use a wider range of weapons, including UAVs and drones. This may not necessarily comport with the intended meaning enshrined in HRL's inherent right to life doctrine. Thus, the meaning of "all" must be restricted to such "all," whose applications are governed by international law. Hostilities conducted in Iraq have clearly uncovered this naked asymmetry in international law.[238] For example, despite US and British forces using "cluster bombs,"[239] the Chief Prosecutor of the ICC was unable to review the allegations involving such weapons owing to the lack of available legal guidelines.[240] Extending this argument to the applicability in UAVs, the United States should recognize their obligations under HRL and balance the need to apply "all" against prohibitions under law and restrictions on a definitional paradigm.

Further, applying the terms "necessary and appropriate" in an unrestrained manner within the context of a predicated response may be structurally inconsistent with HRL's aspirations. Therefore, usage of such terms should come with appropriate preconditions for an act to be considered "necessary and appropriate."[241] Moreover, it raises complex questions surrounding the reality of today's asymmetric warfare. Does being a bomb maker living in the remote mountains of the frontier province of Pakistan make one a target to be dealt with "all necessary and appropriate force" under HRL? Given the AUMF's limited applicability in NIAC, HRL's principles must be recognized as the guiding legal framework for rules of engagement. Contextually, the analyses conducted in Sections III and IV should provide the appropriate implementation steps. Moreover, we must recognize in this context, that the AUMF only provides a triggering mechanism. Once that trigger occurs, applicable international law must take over. Therefore, an expanded conception of such

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236. *See* sources cited *supra* note 70 and accompanying text.

237. Here, I draw attention to the fact that, since 9/11, two parallel developments—one via a predominantly security-centric jurisprudence and, the other, through a product of modern innovation characterized by technological sophistication of military capabilities—have created structural asymmetry between the actors involved in conflicts. Thus, allowing a more expansive and all-pervasive capability to state actors is tantamount to distort the foundational principles and underlying spirit of international law.

238. *See Collateral Damage*, *supra* note 36.

239. *Collateral Damage*, *supra* note 36, at 682.

240. *See* sources cited *supra* note 174 and accompanying text.

241. *See* Chesney, *supra* note 51 (discussing elements related to preconditions of article 51 self-defense).

authorization must not be construed to provide additional rights beyond what is already available under IHL and HRL. Rather, any legitimacy such authorization might draw must be garnered by juxtaposing laws external to the AUMF in question.

The AUMF inquiry must therefore flow along two foundational strands. First, it must be ascertained how a state can acquire the right to targeted killing from its invocation of the AUMF.[242] Second, such determination must be based on applicable law surrounding the state's obligation under hostilities the state is engaged in.[243] Thus, any legal conjecture that the AUMF incorporates IHL or HRL by implication is simply not there. Any construction of derived power under the AUMF, therefore, only comes from conflating the meaning of the authorization within the hybrid strands of IHL-HRL. Rather, the AUMF can be interpreted to provide a proxy for a domestic law authority as an alternative to legislative authorization under the President's war power. In this construction, the authority under the AUMF is better interpreted within the category of presidential power under Article II of the US Constitution,[244] whereas, the President is allowed a degree of flexibility without legislative authorization. Thus, even if, for argument's sake, we assume that the AUMF triggers a self-defense right, the follow up analysis defaults to a nuanced discussion on IHL and HRL as argued in Sections II, III and IV above.

Thus, the AUMF can provide legitimacy in the use of force only up to the point where it triggers the right to self-defense. Wider implication of the authorization has been erroneously invoked on multiple grounds. First, as I have highlighted here, the AUMF's all necessary and appropriate force characterization cannot function outside of international law, as the authorization can only be used as a triggering principle, which may be more limiting than it is expansive. Second, even restricting the plain language meaning of the AUMF[245] would trigger a separate two-pronged inquiry. The first focusing on the mechanism by which the President makes a determination and the second, evaluating on the substantive force of such determination that must conclusively establish that the individual being targeted is responsible for the 9/11 attacks. In an altered geographical

242. *See generally* Chesney*, supra* note 51 (examining in detail the continued relevance of AUMF in conducting remote controlled targeted killing and identifying some of the core issues in allowing AUMF to provide authorization for such killings).

243. *See supra* Section III, IV.

244. *See generally* Saby Ghoshray, *Illuminating the Shadows of Constitutional Space While Tracing the Contours of Presidential War Power*, 39 LOY. U. CHI. L. J. 295 (2008) (identifying the various instances of presidential power in war time scenarios).

245. *See* AUMF, *supra* note 70; *see generally* Chesney, *supra* note 51 (explaining the general framework of how AUMF can be interpreted to provide authorization for targeted killing).

topography and geopolitical landscape, it becomes logically unacceptable and legally impermissible to assign culpability of 9/11 attacks to all current actors operating in remote locations in Pakistan and the Arabian Peninsula.

Finally, based on available evidence, the majority of the United States targeted killings are being conducted by CIA and CIA contractors[246]—where does the element of presidential determination fall in this scenario? Perhaps, the Supremacy Clause of the United States Constitution[247] might provide some context to an invocation of domestic law. However, domestic law could only provide a trigger to an external conduct, norms of which ultimately could be governed by existing rules of international law. This supremacy clause has not been invoked until recently in a government brief related to the Al-Awlaki lawsuit.[248] As this invocation lacks proper construction, it ultimately misconstrues a right to targeted killing by conflating it as a right that derives from international law with a right that is borne out of obligation under the treaty principles. Regardless of the conflation, the argument against a right to targeted killing is grounded on solid legal reasoning, as I have attempted to establish throughout this Article. Even if the Supremacy Clause of the Constitution triggers the article 51 self-defense right, it can go only as far as the Clause's foundational aspiration would allow it to go. Thus, for the right to targeted killing to flow out of a self-defense right, it must arrive via the pathway of a derivative right, for which the only available vehicle would be through the behavioral norms of international law. Based on the arguments presented here, it can be argued, right to targeted killing has not arrived yet within the expanded confines of international law.

VI. CONCLUSION

This inquiry began with a question—do states have a right to kill suspected terrorists by means of remote controlled operations under international law? The objective of this inquiry has been to locate such a right within the multidimensional manifold of international law. The

246. *See Collateral Damage*, *supra* note 36.

247. The text of the Supremacy Clause, contained in Article VI, Clause 2 of the United States Constitution mandates that, the US Constitution, US Treaties, and Federal Statutes, together form "the supreme law of the land." US CONST. art. VI, cl. 2. The text of the Clause mandates that all state judges must follow federal law when a conflict arises between federal law and either the State constitution or State law of any State. *Id.* The use of the word "shall" in the Clause is noteworthy as it makes it a necessity. *Id.* Significance can be derived from the inclusion of the phrase "in pursuance thereof," within the Clause which implies that the Supremacy Clause only applies if the federal government is acting in pursuit of its constitutionally authorized powers. *Id*.

248. *See* Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss, Al-Awlaki v. Obama, 727 F.Supp.2d 1 (D.D.C. Sept. 25,, 2010) (No. 10-cv-1469(JDB)).

pathway to seek such a right has been through a rights paradigm. Having carefully researched the existing principles of international law and after evaluating their implications with domestic law's evolution, I have identified significant difficulties in construing such a right.

Targeted killings are state sponsored violent acts that are fundamentally inconsistent with the right to life doctrine. For targeted killing to be recognized as legitimate, the act must be associated with a legitimate right of the state involved in such killings. Therefore, a search for legitimacy in seeking such a right prompted my inquiry into reviewing current guidance, jurisprudence, and emerging scholarship in international law. While my analysis reveals structural weakness and logical inconsistency in supporting a legitimate right to targeted killing in all scenarios, it leaves open some possibilities due to law's inability to catch up with developments on the ground. Yet, questions remain as to whether such possibilities can be justifiably realized.

From a procedural point of view, the possibility remains open simply because more research is needed to fully evaluate the nuances surrounding the unregulated space of international law. From a customary point of view, possibilities exist mostly because the state right to targeted killing has been perilously hijacked by powerful state interests. In the absence of an explicit mandate from established legal principles, states attempt to construe a derivative right to targeted killing from their existential needs codified under the right to exist. As a result, international law's core continues to be distorted through states' faulty constructions of their compliance requirements of proportionality, necessity, and distinction under the hostilities framework. Searching for the right to targeted killing, this Article evaluated the framework behind such state actions.

The post-9/11 landscape has allowed powerful nation states to trample traditional norms of international law in construing their right to targeted killing. A state's violation, however, does not stem from imprecision of text, nor does it emanate from the difficulty in synchronizing theory with practice. Rather, invocation of any right to kill by a state has been the product of incoherent and fractured jurisprudence, generated from the bowels of international law, distorted by political machination of states. Despite international law's promise of equality, its supervisory capability has been diminished in a crowded landscape of players and parties with diverging interests. As nation states jockey for political supremacy, their political origin has been unglued. As the various restraining principles of armed conflicts become weakened, violent norms like targeted killing have claimed a stake for legitimacy. It is within this cacophony of international law's unregulated sphere that the right to targeted killing gains currency for its emergence.

Therefore, a right to targeted killing must be construed within the regulated space of international law, where legal rights are not created in a vacuum. Whenever there is a physical entity or a living entity residing

within that physical space, legal rights are created. Universally, we can frame legal rights as those that are created whenever a physical space or a living entity is recognized. Therefore, whenever any combination of physical space and living entity is recognized, legal rights are created. These legal rights act as a supervisory framework that define the movement of living entities within the physical space, without taking away the set of inherent inalienable right to which all humans are entitled. So, the focal point of my analysis centered on identifying the nature of physical space and the categories of conflicts that might form the background for a right of targeted killing to evolve.

For targeted killing to be legitimized as an act, therefore, such right has to be envisioned in order for it to be executed.[249] Any rights discussion, however, would bring ancillary queries. Could we envision a right to targeted killing without conceptualizing a remedy for such rights? Or, could this right to targeted killing automatically evolve from the interacting statutes and case laws that illuminate the vast firmament of international law? In my view, answers to these questions go back to the fundamental issue of whether rights can be recognized if the parties on the other side of this right were never part of the original discussion. If there is a unilateral play, however, the answer depends on whether we recognize remedy without rights, which is part of what the targeted assassination issue is centered upon. The context here takes us to the next level of discussion vis-à-vis targeted killing—can we locate a right, even without recognizing its emergence?

The contemporary human rights jurisprudence guides us to deal with a set of doctrinal conditions along the lines of which each individual human, functional combatant, or non-functional combatant, must be allowed to evolve within a physical space. By virtue of rights that emanate from being in a physical space, the doctrinal developments of HRL are at odds with a "lack of rights" or "suspension of rights" construct used in framing a paradigm of targeted killing. We are not necessarily focusing on the severity of the punishment that may be the logical outcome for some of these functional combatants, or by following the logical outcome of a causal chain where people's lives may actually be at stake. However, not having the adequate procedure to get to that endpoint would defy logic according to contemporary human rights jurisprudence. Thus, while we might locate inherent rights to life for functional combatants, its counterpart—the right to target killing by the state is not flowing so spontaneously after all, despite the exigencies and shaping effect of an apocalyptic future propagated by the states. Therefore, I remain convinced the right to targeted killing does not exist under the auspices of international law as we know of it today.

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249. *See Narrative of Dehumanization, supra* note 8, at 193-96.

DEAR MOM AND DAD

Justice Steven H. David*

Dear Mom and Dad,[1]

You two were the ideal role models for parents, demonstrating a total devotion to the family. You taught us to believe in ourselves, to be loyal to our beliefs, and to work hard every day. And most importantly, you told all of us kids to just do our best: "Try to do your best and that is all you can do." If I heard that once, I heard it a thousand times growing up (and was still hearing it many years into adulthood). And then, of course, the famous follow-up: "Did you do your best? If you did, then that is all you did and we are proud of you."

I have tried to write this letter a few times as I mulled over things I wanted to share with you about my experience as Chief Defense Counsel for the Military Commissions at Guantanamo Bay, Cuba. My thoughts, of course, reflect so much more than just my experience of being mobilized, because I feel like I have failed for many years to capture the words to express what you two have provided to me and instilled in me—and thus how you prepared me for what I was tasked to do. But I hope my actions reflected more favorably upon your guiding hands. I tried to do my best.

I remember when I was first contacted about the vacancy of the Chief Defense Counsel at Guantanamo Bay. I responded that I really didn't want to be the Chief Defense Counsel and asked if I could be the Chief Prosecutor instead. I was told "not to worry" because I probably wouldn't be nominated by the Army's Judge Advocate General; and even if I were nominated by the Army, the other military branches could nominate someone, too; and the Secretary of Defense's office would make the final selection anyway. So the life lesson here, that I think you both experienced, is that if someone says not to worry—worry.

Remember, Dad, when I ultimately received the final telephone call from Washington, D.C., advising me that I was going to be mobilized from my civilian position as the Circuit Court Judge in Boone County to become the Chief Defense Counsel at Guantanamo Bay? You had a little trouble understanding exactly what I was going to be doing. Well trust me, you

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* Justice Steven H. David was appointed to the Indiana Supreme Court in 2010. Prior to that, he served as the Circuit Judge of Boone County, Indiana. He also has nearly thirty years of service in the United States Army's Judge Advocate General's Corps, in positions ranging from trial counsel to military judge. From July 2007 until August 2008, he served as the Chief Defense Counsel for the Military Commissions at Guantanamo Bay, Cuba.

1. This is a letter I never composed. My mother passed away during my mobilization and my father passed away shortly before his ninetieth birthday. But they, like most of us, struggled to grasp the complexities, challenges, and ramifications of Guantanamo Bay.

were not the only one—I was still trying to understand and accept the life-changing experience I was about to embark upon myself.

I finally said to you, a World War II B-24 bomber pilot and career Air Force veteran, "Dad, I am going to be defending the 9/11 terrorists." You hesitated for a second or two, then cracked that very subtle delayed smile and responded, "Well don't work too hard, Stevie." Within a second or two you also added, "I hope you get to play a lot of golf." It wasn't exactly the response I thought I would get, but it wasn't too far off, either.

And then you got very serious and said, "Do your duty, son. Do your duty." Again, this was not what I expected—but it was what I needed. And Mom, you said—like probably all mothers say to their soldier children—"I love you," and "be careful."

But I must tell you, Dad, I was totally unprepared for the day—many months after I returned home to Indiana and was serving again as the Circuit Court Judge in Boone County—that you said there was something you needed to talk to me about. I was worried, thinking you had received some bad medical news or that something tragic had happened to someone. Instead, you said words I will never forget. You said, "Stevie, I got to tell you, what you did in Cuba was wrong. Those people are terrorists and they don't deserve any rights at all."

I must have appeared a little stunned to you, but I remember my response was, "That's okay, Dad. It is okay. You are not the only one that feels that way. It's okay." And we never talked about it again. I deeply regret that, Dad. I am sorry.

I think it would have been a very good thing to talk to you about what I did while I was doing it—and why. And it may not have changed your mind, but maybe it would have helped you to know that I did what you and Mom always told me to do: to do the very best I could, and to do my duty.

For starters, in 2008, while mobilized, I sent a note back home to the Boone County Bar Association[2]—and I should have sent it to you as well. I was trying to explain how frustrated I was with the Military Commissions and the apparent lack of concern about the lack of fundamental due process afforded the detainees and, even more basically, the fundamental human rights being stripped from some of them. We were losing sight of the Rule of Law, and I asked my fellow lawyers,

> [a]fter all, isn't it all about J-U-S-T-I-C-E not R-E-V-E-N-G-E? Isn't this what separates us from the uncivilized? My point is that I firmly believe that history will look back on this period and neither the wealth of our great nation nor its technological advances will define our legacy. Instead, how

2. Letter from Hon. Steven H. David to Boone Cnty. Bar Ass'n, (Nov., 2008) (on file with author).

> this period of history will be looked upon will be whether, in a time of national fear and perceived uncertainty, we followed the Rule of Law, practiced fundamental principles of Due Process, demonstrated to the world that human rights apply to all humans—not just Americans. Did we demonstrate to ourselves that we are that shining city on the hill—that great experiment—and even under most difficult times did we practice what we had been preaching to the world, or did we let fear and the fear of the Rule of Law consume us?[3]

I concluded several paragraphs later by urging them to

> [a]dvocate zealously, reasonably. Always act professional, even in the most unprofessional circumstances. Try not to make it personal. Take the high road or you will look like your nemesis and no one will be able to tell you apart. Be a protector of the Constitution, our laws and our system. Be proud of our Rule of Law. Each day you are the men and women who really do make a difference in the lives of those you represent.[4]

And I think maybe if I had stopped to share more with you about why I believed in the Rule of Law, you might have understood it better. I probably should have explained to you how important it was that the Rule of Law be followed—especially in a place like Guantanamo. And I know you always thought it was kind of funny that I had wristbands made that said "The Rule of Law Always," but I think it's important to remind myself—and everyone I can—that without the Rule of Law, we will not survive as a democracy.

Within the last several years, I ran across the most profound definition of what the law is, and in the most unlikely place. I should have shared it with you. I think it underscores that the law affects everyone every day, and without it we are doomed: "The law is defined as the system of rules of conduct established by the sovereign government of a society to correct wrongs, maintain the stability of political and social authority, and *deliver justice*."[5]

That kind of says it all, doesn't it? It makes no difference what someone does, or how much education they have. Everyone can appreciate

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3. *Id.*

4. *Id.*

5. *Lawyer*, WIKIPEDIA, http://www.en.wikipedia.org/wiki/Lawyer (last updated Mar. 7, 2014, *archived at* http://perma.cc/Z5RM-7D2N) (emphasis added).

and understand that definition. Dad, you spent twenty-two years in the Air Force and twenty years with the United States Postal Service, and all the while you helped to support that definition of the law. Mom, you taught us as kids to follow the rules and live good lives. And little did we realize that by doing so in our everyday lives, we—like every other law-abiding citizen in this country—were promoting the law and helping to preserve the Rule of Law.

I also should have sent you a portion of the Officer Evaluation Report Support Form[6] which set forth my duties and responsibilities as Chief Defense Counsel:

> Supervise and manage all defense activities, personnel and resources of the Office of the Chief Defense Counsel-Military Commissions, a unified Command. Facilitate the proper and zealous representation of all accused referred to trial before a military commission. Support the National Security Strategy of the United States by ensuring conformity with the Rule of Law and a vigorous, ethical, adversarial process that will withstand domestic and international scrutiny and enhance the global image of the United States. Monitor compliance with all rules, regulations, and instructions governing military commissions within the Office of Chief Defense Counsel. Fulfill duties under the Military Commissions Act, the Rules for Military Commissions, and the Regulations for Military Commissions. Coordinate with service TJAGs on policies and procedures affecting personnel from each branch of service.[7]

I am sure that you would have appreciated the magnitude of those words, but I suspect you would have had difficulty understanding the full scope of them. I certainly did at the time. And as it turned out, those 127 words were pretty significant.

Everyone understands *"Supervise and manage"* but *"all defense activities, personnel and resources"* is pretty broad. You would be proud that at least I recognized from this that the success of the Office of the Chief Defense Counsel was not dependent on my efforts alone, but on the efforts

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6. Army officers' work performance is assessed on a standard form known as the Officer Evaluation Report, or "OER." *See* DEP'T OF THE ARMY, PAMPHLET 623-3: EVALUATION REPORTING SYSTEM, § 2-3 (2012), *archived at* http://perma.cc/56X9-Z26H. The OER Support Form is provided to the rated officer shortly after he or she assumes his or her duties, and includes the officer's duty description and performance objections. *Id.* § 2-1.

7. OER Support Form for Chief Defense Counsel Position (Sept. 17, 2007) (original completed form on file with author).

of many dedicated men and women. I was just fortunate to be in the mix. But it still came with challenges.

For example, I remember being directed to advise the Government on what I needed in terms of personnel—a request to "tell us now what you need, and be specific!" I recall laughing out loud, because how was I supposed to know what I needed? There was no history with which to compare. So I asked to see the Prosecution's projections on their numbers of lawyers, paralegals, and staff. I was denied; told it was none of my business. Ultimately, I just said I wanted one more of everything that the Prosecution wanted.

"Facilitate the proper and zealous representation of all accused" is something that every attorney understands to be the legacy of John Adams, but also clearly understands is easier said than done.[8] And related to that was my responsibility to "*[s]upport the National Security Strategy of the United States by ensuring conformity with the Rule of Law and a vigorous, ethical, adversarial process that will withstand domestic and international scrutiny and enhance the global image of the United States*." This became the hardest personal and professional challenge I have faced.

I tried to do exactly what you two taught me to do: to do the very best I could do, and to do my duty. But I am just not sure how well I did either of those things—I suppose history will tell.

I was the third Chief Defense Counsel (there have been three since I departed). I only reported to one person, Mr. Paul Koffsky—a career servant-leader, a civilian, who was the Deputy General Counsel for the Department of Defense. Mr. Koffsky and I didn't have many conversations during my tenure, but when I asked for his assistance he never let me down.

During one of our first conversations, in explaining his role as it related to mine, he asked if I was familiar with the British form of government. "Somewhat," I replied. He explained to me, "Steve, consider me the Queen of England and you, you are the Prime Minister." At first I

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8. Long before serving as our second President, John Adams accepted the unenviable—yet inestimably important—task of defending the British soldiers charged with responsibility for the Boston Massacre. In their defense, he famously argued that

> It is of more importance to the community that innocence should be protected, than it is that guilt should be punished; for guilt and crimes are so frequent in this world, that they cannot all be punished . . . . But when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, it is immaterial to me whether I behave well or ill, for virtue itself is no security. And if such a sentiment as this should take place in the mind of the subject, there would be an end to all security whatsoever.

EDMUND TROWBRIDGE, THE TRIAL OF THE BRITISH SOLDIERS, OF THE 29TH REGIMENT OF FOOT, FOR THE MURDER OF CRISPUS ATTUCKS, SAMUEL GRAY, SAMUEL MAVERICK, JAMES CALDWELL, AND PATRICK CARR, ON MONDAY EVENING, MARCH 5, 1770, at 83 (2012); *see also* Steven H. David, *The Rule of Law Always*, 56 RES GESTAE 46 (2012), *archived at* http://perma.cc/EF98-PP6K.

thought that was really cool. It meant I was really in charge of it all.

Soon thereafter, though, it dawned on me that it actually meant I was alone. I wasn't physically alone, because I had wonderfully talented people around me, but at times it felt like it was me against them. Our caseload, personnel, office space, and challenges all increased dramatically during my tenure. Khalid Sheik Mohammed and the other 9/11 conspirators were all charged and arraigned during my tenure. We faced issues accessing our clients. And we were constantly short of resources to do our job. And when I was asked to visit the Pentagon to justify something that I had said or done, or when I pushed for more resources or more access to our clients or more flights to Guantanamo, or whatever the issue was, I truly felt alone.

Fortunately, you instilled in me a strong work ethic and stressed the importance of humility. So I surrounded myself with the most talented and intelligent people I could and took their advice more often than not. Isn't that what you taught me? "Don't be afraid to listen to others, but don't be afraid to make a decision. Just try to make the best decision you can. Don't be afraid of what anyone else thinks or says about you. Just do your best."

I never got to tell you how much I have relied upon that advice so many times in my life—as a lawyer, a Circuit Court Judge, and at Guantanamo. Too many "leaders" worry about being criticized by the media, the pundits, and the armchair quarterbacks, and no action is often times the most common course of action. But like Teddy Roosevelt said, "In a moment of decision, the best thing you can do is the right thing, the next best thing is the wrong thing, and the worst thing you can do is nothing."[9]

In our office, we were under significant pressure to ensure that the detainees got the best possible defense—it was, after all, my specific duty. And the challenges we faced then may be a little different than the challenges the current Defense team faces in Guantanamo, but they were every bit as real.

Back then, the biggest fight for us was whether or not the United States Constitution even applied to the detainees. It's hard to believe that was something in contention, but it's true. Of course we now know that the Constitution does apply, but it took the United States Supreme Court to resolve this. On one side, the position was that the detainees have no rights other than those we choose to give them—the same sort of pre-Civil War approach that our country took towards African-Americans. And on the

9. This quote was attributed to President Theodore Roosevelt by John M. Kost in 1995, in testimony presented before the Subcommittee on Oversight of Government Management and the District of Columbia, a subcommittee of the Senate Committee on Governmental Affairs. *S. 946, the Information Technology Management Reform Act of 1995: Hearing Before the Subcomm. on Oversight of Gov't Mgmt. and the D.C. of the S. Comm. on Governmental Affairs*, 104th Cong. (1995) (statement of John M. Kost, Chief Information Officer, State of Michigan).

other side was the position that the Constitution must apply, or else we have allowed fear of the Constitution to control. And why should we have been afraid of the Constitution?

I know you were not sympathetic to the detainees, Dad, but being the Chief Defense Counsel wasn't about sympathy for detainees. The issue was guaranteeing that their rights were protected—and ours, too. Because if we started cutting corners in Guantanamo Bay, where would it stop? So the issues weren't just about the detainees, either—the issues were about us.

Of course everyone serving at Guantanamo was under tremendous pressure, and all were trying to do the right thing. I still know many of those serving there today, and I know they all are trying to do the right thing as well. Unfortunately, we have a tendency to categorize people based upon their jobs, duties, and positions, instead of being open-minded and trying to learn more and understand more.

For example, I remember being accused of being unethical and gaming the system. Trust me, I am not that smart—nor was that how you taught me to act. But it was because I was trying to *"facilitate the proper and zealous representation of all accused."* In other words, it was because I was trying my best to do my duty.

In response, I took the opportunity to address all of the Prosecutors, and I talked about how we all wore uniforms that said "U.S.," meaning United States. It meant we all served our government, but in different ways. And regardless of whether we were Prosecutors or Defense Counsel, we had all taken the same oath—we were all sworn to support and defend the Constitution of the United States. My point was that but for the grace of God, each of us could be on "the other side," and each of us had an obligation to do our respective jobs—to do our duty. To do our best.

On Sunday, November 3, 2013, *60 Minutes* did a story on Guantanamo Bay.[10] I wish we could have watched it together. And I wish we could have talked about what happens next, because much has changed for the better at Guantanamo, but much has not. There still remain serious questions to be answered.

How do we bring this to closure? Will we just hold all the detainees without charges? Why do we even need to think about introducing statements made by detainees without the right to counsel and as a result of waterboarding? Do we think we can't prove the cases without this tainted evidence? And why do we seek the death penalty for a detainee who wants to be a martyr? Isn't that attempting to give them what they want—immortality? Wouldn't a sentence of life in prison be the most horrible sentence they could imagine and maybe more appropriate? What are we afraid of?

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10. *60 Minutes: Inside Guantanamo* (CBS television broadcast Nov. 3, 2013), *archived at* http://perma.cc/V2KL-48HD.

And what was wrong with the federal court system? What was wrong with the Uniform Code of Military Justice? Why did we invent a new system fraught with unknowns specifically to deal with these detainees? Why didn't we prosecute the worst of the worst for war crimes that are recognized throughout the world? Why did we try to get legally cute and creative? Hasn't that dogged us ever since we conjured up the notion that somehow the Constitution doesn't apply to those we chose to detain at Guantanamo Bay, Cuba?

And that day back in Boone County, after I came home, I should have shared with you the evaluation I received from Mr. Koffsky: "COL David took on one of the most challenging positions in International Law today and exceeded all demands."[11] Or I should have shared the comments from the General Counsel for the Secretary of Defense on my service to my country:

> COL David was masterful in his leadership of the Office of the Chief Defense Counsel. He led by advocating the Rule of Law and establishing faith and confidence in the ability of his office to zealously represent detainees charged under the Military Commissions Act. With the eyes of the world fixed on the United States and the world fixed upon his Office, he performed his mission superbly, resulting in not only the superior defense of those detainees who are charged but in a genuine and well-earned respect throughout the international legal community for the men and women under his command and for their work.[12]

I should have shared these comments with you, but not because I am anyone special. Hundreds and maybe thousands of men and women deserved—and hopefully received—similar comments and compliments.

But I missed the opportunity to help you understand that I tried to do just exactly what you two taught all of us to do—to do the very best we could do. That is all you ever asked of us; all you ever expected of us—and all we can ever really ask or expect of those around us. Who knows how well any of us did at Guantanamo, whether we were Prosecutors, Defense Counsel, or serving in connection with the Military Commissions. It certainly is impossible to wash all the dirt away from some of the bad things that have happened to some.

Nevertheless, whether lawyers or not, we were—and are—part of something that had a profound impact upon all of us personally and upon our country for years to come. It is something many would rather not talk

11. OER Support Form for Chief Defense Counsel Position, *supra* note 8.
12. OER Support Form for Chief Defense Counsel Position, *supra* note 8.

about or think about, and something that neither our Congress nor any President has yet to fully come to grips with. It is not about a Republican thing, or a Democrat thing. It is about an American thing. It is about justice. It is about the foundation of our government. It is about our past, our present, and our future. It is about the Rule of Law.

Mom, I know you liked show tunes and big band numbers, and Frank Sinatra, and Dad, I know you were never much of a music fan at all. But I've always liked country music myself, and like the country artist Toby Keith says, there "ain't no right way to do the wrong thing."[13] My time as Chief Defense Counsel for the Military Commissions at Guantanamo Bay was my duty—and it was also my duty to do the right thing, the right way. I gave it my best.

I just wish we could've talked about it.

Love,
Stevie

13. TOBY KEITH, *Ain't No Right Way*, *on* WHITE TRASH WITH MONEY (Slow Dog Nashville 2006) ("Ain't no right way to do the wrong thing; You can justify, but it's still black and white; Paint it any shade, but it won't change; Ain't no right way, to do the wrong thing.").

THE RECENT FINANCIAL CRISIS AND ITS IMPACT ON INTEREST RATE SWAPS: A ROAD TO RECOVERY THROUGH THE FRUSTRATION OF COMMERCIAL PURPOSE DOCTRINE

Zachary Ahonen*

I. INTRODUCTION

The global financial crisis of 2007 and 2008 continues to affect many different aspects of the financial industry; everything from governmental regulations to the number of players in a once robust lending market. In June 2009, the US Department of the Treasury described the situation, saying, "Over the past two years we have faced the most severe financial crisis since the Great Depression."[1] Different parties pointed the figurative finger at one institution or another as being the culprit responsible for the damage, but it was not a single factor; rather, it was a combination of excessive speculation and egregious wrong-doing by a multitude of entities.[2] The derivatives market was front-and-center in this ordeal, with some of the more detailed and complicated derivatives lying at the heart of the financial meltdown.[3] This Note deals with vanilla interest rate swaps, the simplest form of derivative,[4] and the financial crisis' effects on both parties to interest rate swap transactions. Despite the so-called simplistic or vanilla nature of traditional interest rate swaps, this Note discusses the financial downturn's drastic and complicated effect on these transactions.

First, this Note provides a general overview of the derivatives market—interest rate swaps more specifically—and the financial crisis' actual effect on the swaps. Second, this Note discusses the causes of action both American and British parties negatively affected by the swaps have brought in court and the manner in which the courts have disposed of these cases. As this Note will discuss, these traditional causes of action have almost exclusively failed in America, providing little consolation for the losers in these transactions. Third, this Note explains the doctrine of frustration of commercial purpose. Fourth and finally, this Note advocates the effectiveness of the doctrine of frustration of commercial purpose as a means of financial recovery for the losers in interest rate swaps during the

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1. Daniel J. Morrissey, *After the Meltdown*, 45 TULSA L. REV. 393, 396 (2010).
2. *Id.* at 397.
3. *Id.* at 408.
4. Thomas J. Molony, *Still Floating: Security-Based Swap Agreements After Dodd-Frank*, 42 SETON HALL L. REV. 953, 954 (2012).

financial crisis.

II. THE ONE HUNDRED FOOT VIEW OF DERIVATIVES, INTEREST RATE SWAPS, AND THE FINANCIAL CRISIS

A. An Overview of the Derivatives Market

In order to fully appreciate the inner workings of interest rate swaps, it is essential to have an understanding of derivatives in general. A derivative is the name given to a financial instrument that derives its value from something else.[5] Derivatives come in many forms including, for example: credit default swaps, credit linked notes, basket default swaps, synthetic collateralized debt obligations, currency swaps, and of course, interest rate swaps.[6] Swaps are just one of the broad categories of financial derivatives and are further divided into two classifications: commodity swaps and financial swaps.[7] Commodity swaps involve the swapping of products such as crude oil or grain.[8] Financial swaps involve the exchange of bonds, foreign currencies, stocks, or other financial assets or liabilities.[9] There are three types of financial swaps: foreign currency swaps, interest rate swaps, and equity swaps.[10] As evidenced simply by the sheer number of derivatives within the swap category, the financial realm of derivatives can be confusing and tedious. In recognition of that complexity, this Note focuses solely on interest rate swaps to illustrate the overall applicability of a frustration of purpose cause of action.

B. An Overview of Interest Rate Swaps: One of the Most Common Forms of Derivatives

An interest rate swap involves two parties exchanging interest rate streams from two separate debt instruments.[11] For example, if "Business A" needs to obtain capital, they may sell a debt bond and receive capital at a floating interest rate. The prospect of maintaining a floating rate on the loaned principal obviously creates a certain risk to Business A, so it may

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5. Michael S. Bennett & Michael J. Marin, *The Casablanca Paradigm: Regulatory Risk in the Asian Financial Derivatives Market*, 5 STAN. J.L. BUS. & FIN. 1, 12 (1999).

6. *See generally* Jongho Kim, *From Vanilla Swaps to Exotic Credit Derivatives: How to Approach the Interpretation of Credit Events*, 13 FORDHAM J. CORP. & FIN. L. 705 (2008).

7. *Id.* at 727.

8. *Id.*

9. *Id.*

10. *Id.*

11. Stuart Somer, *A Survey of Legal and Regulatory Issues Relevant to Interest Rate Swaps*, 4 DEPAUL BUS. L.J. 385, 387 (1992). Note that in addition to two party swaps, there are also three party swaps involving a bank as an intermediary between the other two parties. For simplification purposes, this example is portrayed as a two-party swap.

desire to hedge that risk. One option is to engage in an interest rate swap, which will allow Business A to "manage [its] financial risks" and "protect [itself] against unfavorable market movements."[12] For purposes of this hypothetical, the interest rate Business A has agreed to through its bond is called the "Corporate Bond Rate."[13]

Financial institutions or other entities recognize that they are in a more favorable position to take on the high-risk, high-reward gamble of carrying a variable rate.[14] As a result, "Swap dealers aggressively market their transactions . . . ."[15] A bank or financial institution, for purposes of this hypothetical named "Bank 1," will offer to exchange with Business A the Corporate Bond Rate for a "fixed" interest rate. In this transaction, no money will exchange hands as a result of the principal but only as part of the interest differential. This is a so-called off-balance sheet transaction.[16]

In this hypothetical transaction, there will be three pertinent interest rates. The first is the aforementioned Corporate Bond Rate, which is a floating rate. It is important to recognize that this rate stays with Business A and does not affect Bank 1 in this transaction. The second relevant interest rate is the standard floating rate index, or simply the rate index.[17] A very common rate index in swap transactions is LIBOR, or the London Interbank Offered Rate, which is tied to the rate at which large banking institutions can get loans for themselves at a single point in time.[18] In this hypothetical, assume that Bank 1 and Business A agree that the swap will be tied to LIBOR as the index rate. The third and final relevant interest rate is the fixed rate. This is the rate that Bank 1 provides to Business A to hedge or counterbalance Business A's floating Corporate Bond Rate. The parties agree to a notional amount of principal for each term of the transaction, which the LIBOR rate will eventually be multiplied against to determine which party will owe an interest payment to the other for that term.[19] The

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12. Bennett & Marin, *supra* note 5, at 18 (alterations added).

13. The examples in this Note are merely illustrative; they are not a comprehensive or full description of the details comprising an interest rate swap. After all, these transactions are complex; therefore, the examples are intended to be simplistic in order to demonstrate specific aspects of the transactions. There may be inaccuracies as a result, but this Note's primary focus is on applying the general mechanisms at work to the frustration of purpose doctrine.

14. Somer, *supra* note 11, at 388; *see also* Dan Fischer, *WPPSS and Hammersmith: Increased Credit Risk Protection Resulting from Unprecedented Defaults*, 9 ARIZ. J. INT'L & COMP. L. 513, 521 (1992).

15. Frank Partnoy, *The Shifting Contours of Global Derivatives Regulation*, 22 U. PA. J. INT'L. ECON. L. 421, 442 (2001) (alteration added).

16. Kim, *supra* note 6, at 727.

17. Somer, *supra* note 11, at 387.

18. Somer, *supra* note 11, at 387. There are multiple LIBOR rates tied to different time frames and currencies. Assume for the purposes of this Note and more specifically this example that LIBOR refers to the three-month LIBOR rates for the US dollar.

19. Molony, *supra* note 4.

amount of principal tied to an individual term likely will vary and can be used as a strategic means for one party or the other to project which periods might bring higher reward for that party.[20]

To clarify the transaction, an injection of numbers into the hypothetical is helpful.[21] First, Business A takes out a corporate bond for $100 at the floating Corporate Bond Rate from "Bank 2." Next, Bank 1 and Business A agree to use LIBOR as the index rate. It is crucial to recognize that LIBOR (or the chosen index rate) must track the Corporate Bond Rate very closely to effectively allow for Business A to hedge its interest risks. Bank 1 provides Business A with a fixed rate of 5 percent for each of four terms. Each term will relate to twenty-five dollars of the principal and will be spaced evenly throughout the duration of the loan. At the end of the first term, LIBOR happens to be 4 percent. What this means is that Bank 1 has won this term, and Business A will make a twenty-five cent payment to Bank 1.[22] At the end of the second term, LIBOR ends at 7 percent. That would mean that Business A has won this term, and Bank 1 will make a fifty cent payment to Business A.[23]

The last two terms will operate in the same manner, with the LIBOR rate ending above the fixed rate as a win for Business A and the LIBOR rate ending below the fixed rate as a win for Bank 1. This works as a hedge for Business A in this way: if LIBOR rises to 10 percent for a term, then in a properly functioning swap, the Corporate Bond Rate will be right around 10 percent as well. Business A will receive a payment from Bank 1 roughly equivalent to what it must pay for that term of the bond to the original lending institution, Bank 2; thus, Business A approximately breaks even or hedges its risk.

If LIBOR falls to 2 percent for a term, then in a properly functioning swap, the Corporate Bond Rate will be right around 2 percent as well. Business A will pay Bank 1 roughly the equivalent to the amount it would have had to pay to Bank 2 as interest on the Corporate Bond Rate had it been equal to the fixed rate at 5 percent. In this way, Business A effectively pays 5 percent interest regardless of the way LIBOR moves; the variable within the transaction is whether Bank 1 is paying for any excess interest over 5 percent during that term or whether Business A is paying Bank 1 for

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20. Molony, *supra* note 4.

21. Once again, the author acknowledges that this hypothetical and the numbers presented suffer from simplicity; however, the necessary functions of the interest rate swaps for purposes of this Note are highlighted in order to allow application of the frustration of purpose doctrine.

22. Calculation: (0.05 Fixed Rate * $25 Loan Principal for 1st Term) - (0.04 LIBOR Rate * $25 Loan Principal for 1st Term) = $0.25 payment from Business A to Bank 1.

23. Calculation: (0.05 Fixed Rate * $25 Loan Principal for 2nd Term) - (0.07 LIBOR Rate * $25 Loan Principal for 2nd Term) = $-0.50 payment from Business A to Bank 1 (in other words, Bank 1 owes Business A $0.50 for this term).

a reduction in the interest rate below 5 percent. Theoretically, Bank 1 will enter into interest rate swap transactions in which it believes Business A will end up paying the difference between the LIBOR rate and the fixed rate (i.e. when LIBOR falls below the fixed rate) more often than it will have to pay the difference to Business A (i.e. when LIBOR rises above the fixed rate). For Business A, it can calculate a reasonably fixed cost for the bond, which allows better budgeting and financial planning: when adding what it receives from or pays to Bank 1 with what it owes Bank 2 on the Corporate Bond Rate, it should come out to approximately a 5 percent total interest payment.

C. An Overview of The Global Financial Crisis of 2007 and 2008

The global financial crisis of 2007 and 2008 created a "fundamental disruption" and a "financial upheaval" that "wreaked havoc in communities and neighborhoods across the country."[24] Since then, there has been much debate amongst politicians, academics, and the general populous concerning who exactly is at fault for the meltdown.[25] The government-created Financial Crisis Inquiry Commission made a determination in 2011 that it was indeed a combination of factors amalgamating to create the drastic effect. Amongst these factors were the practice of shadow banking, the increase in securitization and derivatives, the deregulation of the financial and banking industries, and increases in subprime lending.[26] Of importance to this Note is the "conclu[sion that] over the counter derivatives contributed significantly to th[e] crisis," and an understanding of how the downturn directly affected interest rate swaps in a significant way.[27]

1. The Effect of the Global Financial Crisis on Interest Rate Swaps in America: Divergence Causes a Hedging Failure

As America experienced its financial spiral, floating interest rate indexes plummeted. This brought about an "unforeseen and precipitous drop in interest rates . . . [causing the impairment of] borrowers' (as Fixed Rate Payors) financial position under their swap contracts, causing them to owe substantial interval, settlement, and/or early termination payments to

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24. THE FINANCIAL CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES xv (2011).

25. *Id.* at xvii; *see also* Brenda Cronin, *Economists Debate Financial Crisis Causes, Cures*, WALL ST. J. (Dec. 14, 2011, 5:15 PM), http://www.blogs.wsj.com/economics/2011/12/14/economists-debate-financial-crisis-causes-cures/, *archived at* http://perma.cc/K9Y5-LH5E.

26. *See* THE FINANCIAL CRISIS INQUIRY COMM'N, *supra* note 24, at xv-xxviii.

27. THE FINANCIAL CRISIS INQUIRY COMM'N, *supra* note 24, at xxiv (alterations added).

their counterparty Floating Rate Payors."[28] These index rate drops turned the interest rate swaps into consistent losers for the parties who had the fixed rate, as each term ended with the LIBOR or the index rate below the fixed rates.[29] The inverted effect of this was a windfall for the institutions holding the floating rate.[30] However, the loss by the fixed rate holders due to the hedging was a foreseeable risk that those parties had knowingly taken on as part of their agreement. What was not foreseen and what caused these holders to lose on a much larger scale was the divergence of the Corporate Bond Rate and the LIBOR rate.[31] Recall that a basic assumption for the effectiveness of an interest rate swap as a hedge is that the indexing rate, such as LIBOR, and the Corporate Bond Rate will track one another; that did not happen during the financial crisis.[32] Instead, the company had to pay the historic difference between the low indexing rate and the unmoving fixed rate to the bank—in the previous example, Bank 1—as part of the swap agreement.[33] But in addition, the company had to pay a large amount to the holder of the bond—in the previous example, Bank 2—at the Corporate Bond Rate since the Corporate Bond Rate increased or held steady, and the indexing rate plummeted; the companies stuck in these transactions were paying two parties and effectively there was no hedge.[34]

Recalling the example used previously with Business A, Bank 1, and Bank 2, it is once again easier to visualize the loss of a hedge with numerical values. As a reminder, assume that Business A pays a fixed rate set at 5 percent to Bank 1. For this example, Business A's corporate bond is $100 and the Corporate Bond Rate is tied to the Federal Funds Rate, while the indexing rate is LIBOR. Finally, recall that LIBOR and the Corporate Bond Rate or here, the Federal Funds Rate set by the Federal Reserve, need to track. Assume for the first twenty-five-dollar term, the LIBOR rate is 4 percent, the Corporate Bond Rate is 4.25 percent, and the fixed rate is the standard 5 percent; for this term, Business A makes a $0.25 payment to Bank 1 and must pay Bank 2 $1.06.[35] Under these conditions, the hedge

28. Jaimee Newman, *Impact of the Financial Crisis on Fixed Rate Swap Payors*, NEW ENG. REAL ESTATE J. (Nov. 2010, *archived at* http://perma.cc/GE4W-JELE) (alterations added).

29. *See* Matthew Jensen, *The Uses of LIBOR and the Victims of Its Manipulation: A Primer*, AMERICAN (Aug. 23, 2012, *archived at* http://perma.cc/6A6S-Y6HG).

30. *Id.*

31. Kimberly Amadeo, *LIBOR Rate History: LIBOR Compared to the Fed Funds Rate During the Financial Crisis*, ABOUT.COM, http://useconomy.about.com/od/monetarypolicy/a/history_LIBOR.htm (last updated Sept. 16, 2013, *archived at* http://perma.cc/6VPU-7GBG).

32. *Id.*

33. *Id.*

34. *Id.*

35. Calculation: (0.05 Fixed Rate * $25 Loan Principal for 1st Term) - (0.04 LIBOR rate * $25 Loan Principal for 1st Term) = $0.25 payment from Business A to Bank 1 and

works because Business A is paying a total rate of 5.25 percent, which is near the 5 percent fixed rate. However, assume that between the first and second term the financial crisis occurs. When it comes time for the second payment, the fixed rate is still 5 percent, LIBOR has plummeted to 2 percent, and the Corporate Bond Rate has also fallen, but to 3.5 percent; LIBOR and the Corporate Bond Rate are no longer closely tracking. For this term, Business A must pay Bank 1 $0.75 and must pay Bank 2 $0.88.[36] Under these conditions, the hedge has failed and Business A must pay 6.52 percent for this term instead of their fixed 5 percent. For this transaction, it may not seem like much of a difference; however, for a larger dollar volume corporate bond and over the course of multiple terms, this higher payment could be a large blow for a business.

Moving on to the third term, assume that conditions continue to deteriorate and LIBOR has fallen to 1 percent while the Corporate Bond Rate falls to 3.25 percent; although both rates have fallen, the difference between the rates has increased even more. In this term, the hedge has failed again and Business A must pay Bank 1 $1.00 and must pay Bank 2 $0.81.[37] The total rate paid for the term is 7.24 percent. In the fourth term, assume that the LIBOR rate fell to 0.5 percent and the corporate bond rate fell to 3 percent. For this term, Business A owes Bank 1 $1.12 and Bank 2 $0.75, for a total payment of $1.87 and a total rate of 7.48 percent.[38]

As this example demonstrates, an unexpected and unprecedented divergence in the LIBOR rate and Corporate Bond Rate all with a falling LIBOR rate increases the "fixed" interest rate the borrower was supposed to pay. On a large scale, even seemingly small divergences can create drastic losses. This is what occurred during the financial crisis of 2007 and 2008. For example, from January of 2006 until June of 2006, the difference between LIBOR[39] and the Federal Funds Rate hovered between 0.2 percent

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(0.0425 Corporate Bond Rate * $25 Loan Principal for 1st Term) = $1.06 payment from Business A to Bank 2. The total payment for Business A in the 1st Term is $1.31 or 5.25% = ($1.31 Total Payment / $25 Loan Principal for 1st Term).

36. Calculation: (0.05 Fixed Rate * $25 Loan Principal for 2nd Term) - (0.02 LIBOR rate * $25 Loan Principal for 2nd Term) = $0.75 payment from Business A to Bank 1 and (0.035 Corporate Bond Rate * $25 Loan Principal for 2nd Term) = $0.88 payment from Business A to Bank 2. The total payment for Business A in the 2nd Term is $1.63 or 6.52% = ($1.63 Total Payment / $25 Loan Principal for 2nd Term).

37. Calculation: (0.05 Fixed Rate * $25 Loan Principal for 3rd Term) - (0.01 LIBOR rate * $25 Loan Principal for 3rd Term) = $1.00 payment from Business A to Bank 1 and (0.0325 Corporate Bond Rate * $25 Loan Principal for 3rd Term) = $0.81 payment from Business A to Bank 2. The total payment for Business A is $1.81 or 7.24% = ($1.81 Total Payment / $25 Loan Principal for 3rd Term).

38. Calculation: (0.05 Fixed Rate * $25 Loan Principal for 4th Term) - (0.005 LIBOR Rate * $25 Loan Principal for 4th Term) = $1.87 payment from Business A to Bank 1 and (0.03 Corporate Bond Rate * $25 Loan Principal for the 4th Term) = $0.75 payment from Business A to Bank 2. The total payment for Business A is $1.87 or 7.48% = ($1.87 Total Payment / $25 Loan Principal for 4th Term).

39. References to LIBOR in this Note refer specifically to the 3 Month LIBOR Rate.

and 0.25percent.[40] However, once the crisis hit in September of 2007, the difference was much higher, reaching at its height a difference of 2.8 percent in October of 2008.[41]

2. The Legal Ramifications in The United States: A Legal Barricade from Recovery

After the divergence between the Corporate Bond Rates and LIBOR, entities attempted to recover from their drastic losses. They began by attempting to bring lawsuits against the banks, but they ran up against the built-in legal safeguards of the standardized ISDA agreements they had signed.[42] The International Swaps and Derivatives Association (ISDA) standardized the form of swap agreements in an attempt to reduce disputes and transaction costs associated with the deals.[43] However, the ISDA agreement is only one of three parts of an agreement, the other two being the Schedule and the Confirmation Letter.[44] These three documents combined tend to insulate the banks from claims after a loss occurs, as they include many waivers on the part of the entity entering into the deals with the banks.[45] Furthermore, a large majority of American litigation in the derivatives arena falls under the jurisdiction of the Federal District Court for the Southern District of New York and New York state law as a result of the form documents offered by the banks.[46]

a. Lack of Authority or Agency

One of the more common claims brought in attempts to invalidate swap agreements, at least initially, was that the execution on the part of the company was performed with a lack of authority or agency. In such cases, the customer claims that the employee or employees who entered into the transaction did not have the corporate authority to engage in that level of decision-making.[47] The claim relies on "the assertion that the employee was somehow a renegade and the corporation was unaware of what was actually

40. Amadeo, *supra* note 31.

41. Amadeo, *supra* note 31.

42. Kim, *supra* note 6, at 752-53; *see also* Victor Vital & Aimee M. Minick, *Swap Agreements: The Who, What, Where, When and Why of Litigating a Swap Case*, 1, 14-15, http://www.martindale.com/members/Article_Atachment.aspx?od=291099&id=247408&filename=asr-247410.pdf, *archived at* http://perma.cc/8SGE-8CN5.

43. Kim, *supra* note 6, at 752.

44. Kim, *supra* note 6, at 753-54.

45. Kim, *supra* note 6, at 753-54.

46. Vital & Minick, *supra* note 42, at 9, 15.

47. Aaron Rubinstein, *Common Law Theories of Liability in Derivatives Litigation*, 66 FORDHAM L. REV. 737, 741 (1997).

being done."[48] However, these claims were not widely successful due to the doctrine of apparent authority, which places liability on a company or employer that gives a false impression that the employee engaged in the transaction does have the authority to execute the deal; it is a theory that promotes reasonable reliance on a person's authority when he or she purports to be a decision maker.[49] For apparent authority to not apply in such a situation, the facts would require a person of questionable authority involved in the transaction to begin with, which is not likely considering the impliedly important nature of these hedging techniques.[50]

As a typical example of how US courts deal with agency claims in this context, Ables & Hall Builders (Ables) attempted to avoid its losses due to interest rate swaps by claiming a lack of authority to enter the agreement.[51] Ables had entered into a swap with US Bank National Association, which brought a breach of contract action to enforce the payment terms of the swap against Ables.[52] As a defense against enforcement, Ables claimed that Darlene, a bookkeeper, did not have authority to bind the company with the interest rate swap transaction yet proceeded to sign the Master Agreement and Schedule.[53] The bank realized a while later that Darlene had not been authorized to sign on behalf of Ables, and it contacted Ables to have the contract officially executed.[54] Eventually, Ables consented to sign the forms again; however, there was some question as to whether management fully understood the agreement.[55] The court found that, by performing under the contract for over three years after execution, Ables had ratified the agreement in terms of agency law.[56] The court did not discuss whether Darlene may have had apparent authority.[57] This case emphasizes the struggle an entity has in utilizing this legal defense against enforcement. Even if the court somehow determines that there was a lack of apparent authority on the part of an employee, the barrier of ratification by performance makes this legal tool virtually obsolete in instances where the transaction has already begun.

b. Fraud

In addition to agency claims, entities trying to recover from interest

48. *Id.*; *see also* Partnoy, *supra* note 15, at 470-74.
49. *See* Rubinstein, *supra* note 46, at 741-42.
50. Rubinstein, *supra* note 46, at 741-42.
51. *See* U.S. Bank Nat'l Ass'n v. Ables & Hall Builders, 696 F. Supp. 2d 428, 437 (S.D.N.Y. 2010).
52. *Id.* at 433.
53. *Id.* at 435.
54. *Id.*
55. *Id.* at 435-36.
56. *Id.* at 439.
57. *Id.*

rate swaps gone wrong have attacked the formation of the transaction, saying that the bank either engaged in fraud or a negligent misrepresentation. The fraud claims are highly case-specific and can become very complex to resolve in the derivatives context.[58] Because of the relatively difficult and complicated nature of derivatives, it can be difficult to prove that a misunderstanding, on the part of a business entity, was a material misstatement made by the bank.[59] Businesses have attempted to assert fraud in everything from a misrepresentation of the nature of the risks involved to a misrepresentation of the value of the derivatives.[60]

Even in a less financially volatile time with fewer claims, American courts have not given much heed to fraud arguments relating to interest rate swaps. In *Procter & Gamble Co. v. Bankers Trust Co.*, an Ohio federal court held that a transaction for interest rate swaps did not constitute fraud.[61] Procter & Gamble (P & G) argued that Bankers Trust Co. (BT) had represented to them, through advertisements and presentations, that they would be using expertise in the area to advise them in the complex area of derivatives.[62] The court found that

> BT was not acting for or on behalf of P & G as that relationship is generally construed in the customer-broker context. As counterparties, P & G and BT were principals in a bilateral contractual arrangement. This is not to say that BT had no duties to P & G. . . . However, P & G has no private right of action under § 4b [of the Commodity Exchange Act].[63]

In *K3C Inc. v. Bank of America, N.A.*, the Fifth Circuit Court of Appeals also determined that there was not an action for fraud in the transaction for an interest rate swap.[64] The court emphasized the stringent standard to be met in order for the plaintiff to succeed on the fraud claim saying,

> To prevail on their fraud claim, [K3C, Inc.] must prove that: (1) BOA made a material representation that was false; (2) BOA knew the representation was false or made it recklessly as a positive assertion without any knowledge of

58. Partnoy, *supra* note 15, at 462-63.
59. Partnoy, *supra* note 15, at 462-63.
60. Rubinstein, *supra* note 47, at 744.
61. Procter & Gamble Co. v. Bankers Trust Co., 925 F. Supp. 1270, 1286 (S.D. Ohio 1996).
62. *Id.*
63. *Id.* (alterations added).
64. K3C Inc. v. Bank of America, N.A., 204 F. App'x 455, 463 (5th Cir. 2006).

> its truth; (3) BOA intended to induce [K3C, Inc.] to act upon the misrepresentation; and (4) [K3C, Inc.] actually and justifiably relied upon the representation and thereby suffered injury.[65]

The Fifth Circuit's opinion further cemented the trouble in overcoming the burden of proving fraud when it mentioned that the language contained in the ISDA Master Agreement makes it difficult to prove the justifiable reliance prong.[66] Although as a general rule fraud claims have not found much success in this arena, most parties seeking to recover for losses on interest rate swaps bring a fraud claim since the facts of the individual case could potentially bring a different outcome.[67]

c. Negligent Misrepresentation

Though closely related to fraud, negligent misrepresentation claims are a slightly different method of approaching recovery from a losing interest rate swap. In order to succeed on a negligent misrepresentation claim, an injured plaintiff must show the defendant breached a duty to the plaintiff.[68] In a commercial context, such as that of the derivatives market, the defendant must possess some form of expertise or be in a position of trust with the injured party such that reliance on the defendant's negligent misrepresentation was warranted.[69] Typically, those entities bringing negligent misrepresentation claims allege that the marketing campaign of the financial institution has portrayed the transaction in a simpler and less risky manner than is appropriate; this is despite the typical contractual language in which the business agrees that it is fully informed of what it is entering into and discloses the potential for financial loss.[70] Furthermore, "[t]he law of negligent misrepresentation is more complex than that of fraud and generates some additional difficulties in derivatives disputes."[71] A similar but subtly different corollary to this argument has come more recently in the form of attempts to void the transactions as an equitable remedy due to the LIBOR-rigging scandal occurring at the same time that banks were still selling and marketing interest-rate swaps. Under this theory, a party often claims that the banks were negligently misrepresenting

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65. *Id.* (alterations added).

66. "Moreover, even if the Companies proved that BOA made a false material representation, the Companies' reliance on that representation would not have been justifiable in light of the explicit disclaimer of reliance in the Master Agreement." *Id.*

67. Rubinstein, *supra* note 47, at 744.

68. Partnoy, *supra* note 15, at 468.

69. Partnoy, *supra* note 15, at 468.

70. Partnoy, *supra* note 15, at 468.

71. Partnoy, *supra* note 15, at 468 (alteration added).

that the swaps worked as a hedge when those swaps already executed were failing due to artificial LIBOR deflation.[72]

Cases previous to the financial crisis demonstrated that negligent misrepresentation claims were not likely to get past the safeguards of ISDA. Additionally, the barrier of a counterparty relationship between the banks and those entering the transaction with them and a difficulty in proving statements that constitute a negligent misrepresentation combine to largely discount this cause of action.[73] After the crisis, there was little to no change in this outcome.[74] Additionally, statute of limitations issues add another obstacle to recovery under negligent misrepresentation.[75]

The court in *Yountville Investors, LLC v. Bank of America, N.A.* provides an opinion demonstrating the difficulty parties have in bringing negligent misrepresentation claims.[76] After their interest rate swap cost Yountville Investors dearly, they brought several claims for declaratory relief, restitution, and damages.[77] Yountville alleged "defendant possesse[d] 'unique and specialized expertise and superior knowledge with respect to interest swap agreements[,]' and therefore had a duty to disclose any profit it would realize on entering the agreement, as well as to 'correctly represent the manner and method by which it calculated any termination amount.'"[78] The court, however, dismissed the claim saying,

> Even viewing the facts alleged by plaintiff in the most favorable light, the Court finds that plaintiff has failed to allege either a relationship that is in any way distinct from that between a "plain-vanilla" borrower and lender, or a duty of care arising from any source external to the swap agreement. The law does not impose liability for negligent

72. *See* Harry Wilson, *Barclays in Court Over Mis-selling Claims*, TELEGRAPH (Oct. 28, 2012, *archived at* http://perma.cc/BBH4-97QA).

73. "On appeal, [K3C, Inc. has] not identified any statements of fact . . . that were actually false. . . [or] were so incomplete as to be misleading. Nor, where [Bank of America] representatives made statements of opinion, have Appellants shown that [they] did not genuinely possess those opinions." K3C Inc. v. Bank of America, N.A., 204 F. App'x. 455, 462 (5th Cir. 2006) (alterations added); "[A]lleged misrepresentations that contradict the express words of a written instrument are inadmissible to avoid an obligation knowingly assumed." St. Matthew's Baptist Church v. Wachovia Bank Nat'l Ass'n, No. Civ.A. 04-4540 (FLW), 2005 WL 1199045, at *5 (D.N.J. May 18, 2005) (explaining that the Master Agreement contained language precluding a negligent misrepresentation claim) (alteration added).

74. *See* Regions Bank v. SoFHA Real Estate, Inc., No. 2:09–CV–57, 2010 WL 3341869 (E.D. Tenn. Aug. 25, 2010); *see also* Yountville Investors, LLC v. Bank of America, N.A, No. C08–425RSM, 2009 WL 2342462 (W.D. Wash. July 28, 2009).

75. *See, e.g.*, *K3C Inc.*, 204 F. App'x. at 462.

76. *See Yountville Investors, LLC*, 2009 WL 2342462 at *3.

77. *Id*.

78. *Id.* at *6 (alterations added).

> misrepresentations in such a context. Plaintiff's claim for negligent misrepresentation must therefore be dismissed.[79]

In general, negligent misrepresentation claims for interest rate swaps end up meeting the same end as most other traditional claims brought against the behemoth that is the financial system and its built-in legal protections.

3. The Effect on Interest Rate Swaps in the United Kingdom: A Similar Divergence Issue Overseas

The effects of the financial crisis of 2007 and 2008 were not isolated to the United States of America.[80] When the US government allowed the investment bank Lehman Brothers to fail in September of 2008, the crisis came to a global head; for a period, every bank was considered to be risky.[81] Shortly thereafter, there were legitimate fears of a global financial domino effect; this fear forced western governments to serve as capital life support for many of their banks in order to avoid collapse.[82] It is in this financial background that interest rate swaps became losing transactions in the United Kingdom just as they had in the United States.[83] In England alone, an estimated 28,000 interest rate swaps were sold to small businesses between the years of 2001 and 2007.[84]

4. The Legal Ramifications in the United Kingdom: A More Friendly Recovery Regime

There are two main distinguishing factors between judicial determinations relating to interest rate swaps in the United States and the United Kingdom. The first was the decision handed down in *Hazell v. Hammersmith and Fulham London Borough Council* by the House of Lords in 1991.[85] *Hazell* was a unanimous determination by the highest court of

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79. *Id.* at *9.

80. *See* Larry Elliott, *Global Financial Crisis: Five Key Stages 2007-2011*, GUARDIAN (Aug. 7, 2011, 11:49 AM), http://www.guardian.co.uk/business/2011/aug/07/global-financial-crisis-key-stages, *archived at* http://perma.cc/KU9Y-72W9.

81. *Id.*

82. *Id.*

83. *See* Matt Scuffham & Myles Neligan, *Special Report: UK Banks Face Scandal Over Toxic Insurance Products*, REUTERS (Aug. 22, 2012, 7:24 AM), http://www.reuters.com/article/2012/08/22/us-banks-insurance-idUSBRE87L09E20120822, *archived at* http://perma.cc/U4AX-UZYG.

84. *Id.*

85. Hazell v. Hammersmith and Fulham London Borough Council, [1991] 2 W.L.R. 372 (H.L.) (appeal taken from Eng.).

appeal in the United Kingdom[86] that the interest rate swaps at issue were *ultra vires* of the local authorities who had entered into them and thus illegal.[87] The second aspect that separates the legal ramifications of the global financial crisis on interest rate swaps in the United Kingdom versus the United States is the judicial handling of claims for restitution or rescission since the crisis. In the United Kingdom, it is possible such claims are more likely to succeed due to both the rise of mis-selling claims after the LIBOR scandal has come to light[88] and the Financial Services Authority (FSA) process for payouts to uninformed purchasers of the swaps.[89]

a. The Hazell *Decision and its Fortunate Consequences*

Although both businesses and local governments have utilized interest rate swaps as a funding mechanism in the United States, the *Hazell* case in 1991 removed local governments from the market in the United Kingdom. The decision would seem a fortuitous piece of foresight after the global financial crisis turned several swap transactions into toxic losers. In *Hazell*, the Hammersmith and Fulham London Borough Council ceased making payments toward the interest rate swaps they had entered into.[90] At the time, this was the largest default on an interest rate swap transaction in history.[91] The Local Government Act of 1972 divided England into counties, districts, London boroughs, and parishes; it also created the Hammersmith and Fulham London Borough Council and other similar local bodies.[92] The authority of these local bodies was circumscribed by the 1972 Act specifically limiting the purpose and methods of borrowing for local authorities.[93] The Council entered into several interest rate swaps through

86. At the time of the *Hazell* decision, the House of Lords was the highest court of appeal in the United Kingdom. However, in 2009 the government separated the judiciary and Parliamentary functions of the House of Lords and endowed the judicial authority of the highest court of appeal on the Supreme Court. *See From House of Lords to Supreme Court*, PARLIAMENT (July 23, 2009), http://www.parliament.uk/business/news/2009/07/from-house-of-lords-to-supreme-court/, *archived at* http://perma.cc/Y6YE-NWZF.

87. *Hazell*, 2 W.L.R. 372, at *3.

88. *See* Lucy McCann, *Swap Mis-selling:* Grant Estates Ltd (in Administration) v. The Royal Bank of Scotland PLC, IN-HOUSE LAWYER (Nov. 6, 2012), http://www.inhouselawyer.co.uk/index.php/scotland-home/10018-swap-mis-selling-grant-estates-ltd-in-administration-v-the-royal-bank-of-scotland-plc, *archived at* http://perma.cc/TT89-LPPJ; *see also* Julia Werdigier, *UBS Posts $2 Billion Loss Tied to Legal Settlements*, N.Y. TIMES (Feb. 5, 2013, 2:13 AM), http://dealbook.nytimes.com/2013/02/05/ubs-posts-2-billion-loss-on-libor-fines/, *archived at* http://perma.cc/4NNM-JVX4.

89. *See* Scuffham & Neligan, *supra* note 83.

90. Dan Fischer, *supra* note 14, at 513.

91. Dan Fischer, *supra* note 14, at 513.

92. Dan Fischer, *supra* note 14, at 518-19.

93. Dan Fischer, *supra* note 14, at 519.

the years in an attempt to correctly predict the rise or fall of interest rates and earn a profit on the transactions in order to apply the earnings to the interest of their borrowing.[94]

On January 24, 1991, the House of Lords determined all of the Council's interest rate swaps were illegal and invalid.[95] The court interpreted the 1972 Act to not include interest rate swaps as an ancillary or incidental function of the Council's borrowing power.[96] As a result of the swap transactions being *ultra vires*, the Council was excused from making its contractually obligated payments of $843.5 million to $1.012 billion to the banks with which it had entered into the transactions.[97]

Despite the immediate impact of the Council's ability to excuse payment, there was a much broader and longer-lasting effect stemming from the *Hazell* decision. There were two central consequences arising from the decision. First, the local authorities in the United Kingdom no longer entered into interest rate swaps.[98] This would be important a decade and a half later when English local authorities and institutions watched as their US counterparts suffered through bankruptcy or financial stress nearing bankruptcy as a result of toxic swaps.[99] The second, more chaotic action was a "triggering of a rash of litigation."[100] Once the *Hazell* decision came down, it unraveled hundreds of other transactions entered into by other local authorities as *ultra vires*.[101] Overall, the central effect of the *Hazell* decision on the global financial crisis in 2007 and 2008 was that when the crisis hit, some local governments in the US were damaged severely by holding interest rate swaps while the local authorities in the United

94. Dan Fischer, *supra* note 14, at 519.

95. Dan Fischer, *supra* note 14, at 528.

96. Dan Fischer, *supra* note 14, at 528.

97. Dan Fischer, *supra* note 14, at 528-29. The valuation of the excused payments rely on the currency exchange calculation performed by the author of the cited article. The British value of the excused payments was £500 to £600 million. Dan Fischer, *supra* note 14, at 528-29.

98. GARRY J. SCHINASI ET AL., MODERN BANKING AND OTC DERIVATIVES MARKETS: THE TRANSFORMATION OF GLOBAL FINANCE AND ITS IMPLICATIONS FOR SYSTEMIC RISK 28 (2000).

99. *See The Big Losers in the Libor Rate Manipulation: Local Governments Which Entered Into Interest Rate Swaps Got Scalped*, RITHOLTZ.COM (July 5, 2012, 1:30 AM), http://www.ritholtz.com/blog/2012/07/the-big-losers-in-the-libor-rate-manipulation/, *archived at* http://perma.cc/P5GH-LL3M; *see also* Craig Douglas, *Boston University Gets $200 Million Capital Call Amid Interest Rate Swoon*, BOS. BUS. J. (Oct. 19, 2012, 4:39 PM), http://www.bizjournals.com/boston/news/2012/10/19/boston-university-gets-200m-capital.html, *archived at* http://perma.cc/KZB4-B5E7; Michael McDonald et al., *Harvard Swaps are So Toxic Even Summers Won't Explain (Update3)*, BLOOMBERG.COM (Dec. 18, 2009, 4:28 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aHQ2Xh55jI.Q, *archived at* http://perma.cc/N5Z9-YQPE.

100. *See* SCHINASI ET AL., *supra* note 98, at 28.

101. SCHINASI ET AL., *supra* note 98, at 28.

Kingdom had been banned from entering such arrangements since 1991.

b. The Rise of Mis-Selling Claims

More recently, the divergence between the handling of interest rate swap disputes in the United Kingdom and the United States has increased with the prevalence of what the British financial world has dubbed "mis-selling."[102] The reason behind the term is the idea that the banks selling and marketing the transactions did not make clear the consequences of a drop in one of the tracking rates more than the other, and that they had not revealed initially the penalty-sized termination fees in the event the company needed to end the contract early.[103] Though nominally different, the claim for mis-selling closely mirrors the American common law negligent misrepresentation or fraud claims.[104] A stark difference is the general success realized by British companies in bringing these claims versus their American counterparts.

With claims for mis-selling from all forms and sizes of businesses, the FSA[105] has taken on the task of sifting through the interest rate swap swamp in the United Kingdom. It is easiest to sort the mis-selling claims into two categories: those utilizing the LIBOR-rigging scandal as a central part of the mis-selling argument and those claims not necessarily focused on the LIBOR-rigging scandal. It is important to note that both of these areas of British law are rapidly changing as multitudes of these claims are raised, judicially or administratively determined, or settled virtually daily.[106]

The claims of mis-selling made without a focus on the LIBOR scandal have been relatively successful depending on the business bringing the claim. In 2012 the large public concern in the United Kingdom over the havoc interest rate swaps had wreaked on small and medium-sized companies (SMEs) culminated in a review of the transactions by the

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102. *See* Scuffham & Neligan, *supra* note 83.

103. Scuffham & Neligan, *supra* note 83.

104. *See supra* Section II(C)(2)(c).

105. The FSA is an independent agency charged with regulating the financial services industry in the United Kingdom. The FSA has rule-making, investigatory, and enforcement powers. *About the FSA*, FIN. SERVICES AUTH., http://webarchive.nationalarchives.gov.uk/20130201171633/http://www.fsa.gov.uk/about (archived in Feb. 2013, *archived at* http://perma.cc/8ZP3-DC4Q). Note that the FSA became two separate regulatory agencies: The Financial Conduct Authority and the Prudential Regulation Authority during the publication process of this Note. *About the FSA*, FIN. SERVICES AUTH., http://www.fsa.gov.uk/about (last updated Mar. 23, 2013, *archived at* http://perma.cc/6WUA-3KMQ). As such, consider all references to the FSA in the Note as references to the FSA prior to its split.

106. *See e.g.*, *Interest Rate Swap Mis-Selling Claims*, COOKE, YOUNG, & KEIDAN, http://www.cyklaw.com/interest-rate-swap-mis-selling-claims (last visited Feb. 7, 2014, *archived at* http://perma.cc/PUC6-QZKK) (an example of a law firm specifically advertising its ability to handle these claims).

FSA.[107] At that time, a number of banks based in the United Kingdom[108] agreed with the FSA to provide appropriate remedies without a suit in instances of mis-selling.[109] Part of the reason for the banks' acquiescence was the FSA's finding that 90 percent of deals with unsophisticated purchasers violated at least one of the FSA's rules.[110] The question then arose about what to do with the claims not based on LIBOR manipulation in court having been brought by SMEs prior to the banks' agreements with the FSA.[111] An answer came in the form of a decision in *Grant Estates, Ltd. v. The Royal Bank of Scotland*.[112] In that case, the court held that the contract forming the interest rate swaps precluded a mis-selling claim, similar to the results in American courts; this left Grant Estates, Ltd. solely with a remedy through the agreements between the FSA and the banks for restitution.[113]

Although it was clear that the banks would be compensating SMEs for the mis-selling of interest rate swaps, as of January 31, 2013, there was not an established method or calculation of how the payments were to be made or administered, though payments under non-terminated agreements had been suspended.[114] Additionally, there were certain specifications for the SMEs that would be eligible under the agreements. Originally, the FSA determined only businesses with less than £6.5 million of sales, fewer than fifty employees, or assets worth less than £3.26 million would be eligible.[115] The purpose of this classification was to hopefully capture only the subset of businesses that were non-sophisticated and would not be likely to have understood the full financial complexities of an interest rate swap.[116] Inversely, the FSA did not want to bail out companies that had the financial complexity and capacity to understand the risky transaction they were entering.[117] However, the FSA soon realized that this was an oversimplification and that categorizing businesses in this way did not best

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107. McCann, *supra* note 88.

108. Included in the list of banks making such an agreement with the FSA were: Barclays, HSBC, Lloyds, NatWest, and the Royal Bank of Scotland. *See* McCann, *supra* note 88. Later, more banks were added, including Santander, Co-operative Bank, Allied Irish Bank, Bank of Ireland, Clydesdale and Yorkshire banks, and Northern Bank. *See* James Hurley, *FSA Extends Probe Into Rate Swap Mis-selling Scandal*, TELEGRAPH (July 23, 2012, 11:28 AM), http://www.telegraph.co.uk/finance/yourbusiness/9420370/FSA-extends-probe-into-rate-swap-mis-selling-scandal.html, *archived at* http://perma.cc/JDF6-4UX6).

109. McCann, *supra* note 88.

110. *Banks to Pay for 'Swap' Mis-selling, FSA Demands*, BBC NEWS (Jan. 31, 2013, 8:32 AM), http://www.bbc.co.uk/news/business-21272606, *archived at* http://perma.cc/AR8D-FGTC.

111. McCann, *supra* note 88.

112. McCann, *supra* note 88.

113. McCann, *supra* note 88.

114. *Banks to Pay for 'Swap' Mis-selling, FSA Demands*, *supra* note 110.

115. McCann, *supra* note 88.

116. McCann, *supra* note 88.

117. *See Banks to Pay for 'Swap' Mis-selling, FSA Demands*, *supra* note 110.

serve the purpose sought.[118] An example of this strict categorization would be a company that operated a seasonal business and had more than fifty employees due to a large amount of work in a small amount of time; more specifically, an institution like a bed and breakfast[119] or a small orchard might be classified as complex enough to understand the inner-workings of an interest rate swap.[120] From a policy-perspective, the FSA knew it must change course; the exact nature of this change in categorization is still being contemplated as of the writing of this Note.[121]

Furthermore, there has been much debate on how those SMEs qualifying for the FSA agreement with the banks will be compensated. The FSA has made a general statement expressing that redress for mis-selling of interest rate swaps "should aim to put customers back in the position they would have been in, had the breach of regulatory requirements not occurred."[122] The company must demonstrate it would not have purchased an interest rate swap had the bank not mis-sold in order to receive full compensation or that it would have purchased a different product for partial compensation.[123] Those aspects of compensation may seem straightforward, but many SMEs also desire compensation for consequential damages stemming from their toxic swap contracts. Some of the claims for consequential damages include requests for compensation due to laying off employees, selling off assets, overdrafting charges, or additional borrowing costs; termination fees are typically considered to be a direct damage from the swap transactions.[124] At this stage, it is unclear exactly how the consequential damages will factor into redress for mis-selling.[125]

By excluding larger, more complex companies from utilizing the FSA agreement with the banks, the FSA prompted a new type of mis-selling claim; one that focuses on the artificial deflation of the LIBOR rate during the global financial crisis. At the time of the writing of this Note, it is not exactly clear how the courts in the United Kingdom will handle mis-selling cases in which the impropriety of LIBOR depression by the bank involved in the transaction is utilized as a justification for restitution. However, there are indications that the banks are concerned with what the future might hold. For example, Barclays set aside $1.6 billion for legal costs it anticipated for mis-selling claims as of February 5, 2013—including a large portion not allocated for forced payments through its agreement with the

118. *Banks to Pay for 'Swap' Mis-selling, FSA Demands*, *supra* note 110.
119. *Banks to Pay for 'Swap' Mis-selling, FSA Demands*, *supra* note 110.
120. *Banks to Pay for 'Swap' Mis-selling, FSA Demands*, *supra* note 110.
121. *Banks to Pay for 'Swap' Mis-selling, FSA Demands*, *supra* note 110.
122. *Banks to Pay for 'Swap' Mis-selling, FSA Demands*, *supra* note 110.
123. *Banks to Pay for 'Swap' Mis-selling, FSA Demands*, *supra* note 110.
124. *Banks to Pay for 'Swap' Mis-selling, FSA Demands*, *supra* note 110.
125. *Banks to Pay for 'Swap' Mis-selling, FSA Demands*, *supra* note 110.

FSA to restore SMEs to pre-swap position.[126] Additionally, UBS reported that it had spent $2 billion on legal fees in 2012; this included $1.5 billion in fines for its role in the LIBOR-rigging scandal in addition to fighting other legal battles related to the scandal.[127] One final demonstration of how large banks might fear legal precedent for LIBOR-rigging claims is The Royal Bank of Scotland, which settled for £25 million with businessman David Agar over his interest rate swap claims.[128]

III. THE CARNAGE: REAL EXAMPLES OF THE GLOBAL FINANCIAL DESTRUCTION DUE TO TOXIC INTEREST RATE SWAPS

It is difficult to overstate the devastating financial consequences the crisis in 2007 and 2008 and the conditions that followed have had on businesses, local governments, and other "fixed rate" holders of derivatives, most specifically interest rate swaps. Jefferson County in Alabama, which contains the city of Birmingham, underwent the largest municipal bankruptcy on record due to its derivatives used to finance sewage improvements in 2008.[129] Boston University suffered at the hand of interest rate swaps to the tune of a net operating loss of $162.6 million for fiscal year 2011; this forced the university to ready and liquidate $200 million in the event that it had to cancel the transactions and pay termination fees.[130] Even worse was neighboring Harvard University, whose interest rate swaps became so toxic that it was willing to terminate them at a fee of around $1 billion.[131] Businesses from Wisconsin's Metavante, which supplied financial technology services and software to the British Chinese restaurant chain Hakkasan, lost considerable amounts of money on interest rate swaps.[132] It was under this climate of financial annihilation and loss that disenchanted and disgruntled entities brought legal claims attempting to

126. Mark Scott & Julia Werdigier, *Barclays Sets Aside $1.6 Billion More for Legal Costs*, N.Y. TIMES (Feb. 5, 2013, 3:02 AM), http://dealbook.nytimes.com/2013/02/05/barclays-sets-aside-extra-1-6-billion-for-legal-costs/, *archived at* http://perma.cc/4ZGQ-S76U.

127. Werdigier, *supra* note 88.

128. Harry Wilson, *RBS Pays More Than £25m to Businessman David Agar Over Interest Rate Swaps*, TELEGRAPH (July 28, 2012, 9:36 PM), http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9434489/RBS-pays-more-than-25m-to-businessman-David-Agar-over-interest-rate-swaps.html, *archived at* http://perma.cc/9KC5-8YWK.

129. *The Big Losers in the Libor Rate Manipulation: Local Governments Which Entered Into Interest Rate Swaps Got Scalped*, *supra* note 100.

130. Douglas, *supra* note 99.

131. McDonald et al., *supra* note 99.

132. *See* Harry Wilson, *Restaurant Boss Starts Pay Revolt on Bank Swaps*, TELEGRAPH (Nov. 25, 2012, 7:00 AM), http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/9700596/Restaurant-boss-starts-pay-revolt-on-bank-swaps.html, *archived at* http://perma.cc/JR7K-5QTT.

recover anything they could get their hands on.

IV. THE FRUSTRATION OF PURPOSE DOCTRINE: A SEEMINGLY INAPPLICABLE APPLICATION

A. The Tests for Frustration of Purpose: A Common Law Defense to Enforcement

As a relatively rare common law defense to enforcement, frustration of purpose may seem like an unlikely theory to enter the complicated and complex derivatives market as a savior for holders of toxic swaps. However, applying the facts of the recent and unprecedented global financial crisis within the interest rate swap context to a frustration scenario, it actually makes quite a bit of sense as a claim against enforcement.

The Restatement (Second) of Contracts states that the frustration of purpose doctrine applies:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.[133]

The rationale behind this defense to enforcement of a contract is to protect a party when the other party's performance becomes virtually worthless due to something unforeseen to either party prior to agreeing to the deal.[134] It is crucial first that the purpose being frustrated was the principal purpose or consideration of the contract; in other words, without the existence of the frustrated portion of the contract, the transaction would have made little sense.[135] Additionally, the frustration must not be slight; rather, it must be of a substantial nature.[136] Finally, the non-occurrence of the frustrating event must have been so strongly assumed that it was a basic assumption upon which the contract was made.[137]

In essence, the doctrine of frustration of purpose is a judicially imposed condition on all contracts that both parties agree at the time of contracting that either party will be excused from performance if the conditions change in a way unforeseen to either party in a way relating to

133. RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981).
134. *Id.* § 265 cmt. a.
135. *Id.*
136. *Id.*
137. *Id.*

something that is a fundamental basis of the deal.[138] In order for frustration of purpose to apply, the value of the parties' performance must be completely or almost completely abrogated by the frustrating event.[139] The rationale behind the foreseeability requirement is that if the occurrence of the frustrating event is reasonably foreseeable, then the parties to the contract should have negotiated terms addressing the potential occurrence of the event and indicating which party would bear the burden or risk of its occurrence.[140] Furthermore, the general view amongst the legal community is that "[t]he doctrine of commercial frustration should be limited in its application and narrowly applied to preserve the certainty of contracts."[141]

B. The Beginning of the Frustration of Purpose Doctrine: A Cancelled Parade

The history of the frustration of purpose doctrine in both America and the United Kingdom actually took root in the same decision. *Krell v. Henry* is the archetypal case for frustration of purpose and finds itself in most first-year contract law courses.[142] In *Krell*, the two parties to the lawsuit had entered into a contract in which Mr. Henry would rent Mr. Krell's apartment for two days.[143] Though not expressed in the language of the contract, the principal purpose of the rental was for Mr. Henry to view the coronation parade of the King from Krell's balcony apartment.[144] The intent behind the renting was evidenced by the short term of the rental and the fact that the "price to be paid . . . was fixed with reference to the expected procession"—in other words, at a much higher price than would typically be the case.[145] When it came time for the parade, the King fell ill and the parade did not take place as planned.[146] Mr. Henry refused to pay for the room as the contract required, and this suit commenced.[147]

The court ultimately held that Mr. Henry did not have to pay for the room as agreed upon in the contract.[148] The court set the following parameters for determining whether frustration of purpose should excuse enforcement of a contract:

> Each case must be judged by its own circumstances. In

138. 30 RICHARD A. LLOYD, WILLISTON ON CONTRACTS § 77:95 (4th ed. 2012).
139. *Id.*
140. *Id.*
141. *Id.*
142. *See* Krell v. Henry, [1903] 2 K.B. 740 (Eng.).
143. *Id.* at 741.
144. *Id.* at 740.
145. *Id.* at 742.
146. *Id.* at 740.
147. *Id.*
148. *Id.* at 751.

> each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative . . . , I think both parties are discharged from further performance of the contract.[149]

When applying the facts of the case to that framework, the court determined that the basis of the contract was to rent the room in order to view the coronation.[150] The non-occurrence of the coronation prevented the performance of the contract in that the bargained-for consideration was no longer in existence.[151] Finally, the event frustrating the agreement, or the cancellation of the coronation, was not something the parties would have reasonably foreseen when agreeing to the terms of the contract; in other words, there was a presumption by both parties that the procession would occur and the non-occurrence was reasonably determined to be so unlikely that the contract did not specifically state that the contract was conditioned on the occurrence of the coronation.[152]

C. The Current Relevance of the Frustration of Purpose Doctrine

Frustration of purpose is generally rare as an affirmative defense to the enforcement of a contract. It does, however, have a contemporary application,[153] especially within the confines of New York state law, which governs most interest rate swaps under ISDA form agreements. There are many different types of contracts in which performance is excused under frustration of purpose, and even seemingly complex business and financial contracts between seemingly knowledgeable and experienced parties can result in frustration of purpose.[154] The particular context is of little importance; rather, as long as the elements for frustration of purpose are present, the defense to enforcement is valid.

In *D&A Structural Contractors Inc.*, the court found frustration of

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149. *Id.*

150. *Id.* at 746.

151. *Id.* at 747.

152. *Id.* at 743-44.

153. *See* D&A Structural Contractors Inc. v. Unger, No. 001112-08, 2009 WL 3206596 (N.Y. Sup. Ct. Aug. 20, 2009); *see also* 528-538 W. 159th St. LLC v. Soloff Mgt. Corp., No. 3778/05 (N.Y. Sup. Ct. May 3, 2010); State Mut. Life Assur. Co. v. Gruber, 54 N.Y.S.2d 729 (App. Div. 1945).

154. For examples, see cases listed in *supra* note 153.

purpose a legitimate defense to enforcement in the insurance context.[155] More specifically, a married couple had their mutual property destroyed by a fire.[156] The wife entered into a contract for the restoration of the destroyed house, with the contracted price to be the insurance proceeds.[157] However, prior to the contract, the couple had become estranged and initiated a divorce; as such, the matrimonial court prohibited the wife from transferring any of her marital assets, which included the insurance proceeds.[158] The divorce proceedings and the restraint on the distribution of the insurance money prevented the wife from paying on the contract, and a lawsuit followed.[159] The court ultimately held that her performance was excused since the court order preventing her from disbursing the insurance proceeds had frustrated the purpose of the contract to rebuild the house.[160] The court determined that "the central element of the Restoration Contract was the renovation of the home."[161] Essentially, "[the wife's] objective was to renovate her home with the insurance proceeds, and this was the basis upon which [the parties] contracted."[162] As such, the court "conclude[d] that the issuance of the restraining order was an unanticipated event that frustrated the contracts' purpose, thereby discharging [the wife's] obligation to make payment pursuant to the . . . [contract]."[163]

Another recent example of a New York court enforcing the frustration of purpose doctrine comes in *528-538 W. 159th St. LLC*.[164] In this case, Soloff Management was hired to manage a set of apartment buildings.[165] In a breach not related to frustration of purpose, an action was commenced in which an arbitration administered by the traditional Jewish arbitration panel dubbed the Beis Din was to arbitrate based upon Din Torah, or Jewish law.[166] Two of the three arbitrators on the Beis Din removed themselves from the arbitration, which led to a whirlwind of reshuffling amongst the Jewish leaders and an ultimate determination that the Beis Din was unable to make a judicial decision since they could not compel discovery of essential information to the issue.[167] These facts led the court to excuse the parties from arbitration, since "the Beis Din [was] unable to fully arbitrate

155. *D&A Structural Contractors Inc.*, 2009 WL 3206596, at * 5.
156. *Id.* at *1.
157. *Id.*
158. *Id.* at *2-3.
159. *Id.* at *3.
160. *Id.* at *4.
161. *Id.*
162. *Id.* (alterations added).
163. *Id.* (alterations added).
164. 528-538 W. 159th St. LLC v. Soloff Mgt. Corp., No. 3778/05, slip op. at *4 (N.Y. Sup. Ct. May 3, 2010).
165. *Id.* at *1.
166. *Id.*
167. *Id.* at *5.

the dispute, which [was] the obvious purpose of the agreement."[168] Overall, the court determined that "defendants' failure to complete discovery has frustrated the entire purpose of the arbitration agreement."[169]

D. Murphy-Hoffman Co. v. Bank of America, N.A. *Brings the Frustration of Purpose Doctrine into the Realm of Interest Rate Swaps*

Murphy-Hoffman Co. v. Bank of America, N.A.[170] is a little-known piece of case law with drastic importance for utilizing a commercial frustration argument to unwind an interest rate swap. It is not necessarily significant in terms of judicial precedent; rather, its functional use is as a guidepost for how to structure the argument. The decision was made by the US District Court for the Western District of Missouri using New York law for the frustration of purpose claim.[171] Murphy-Hoffman Co. (MH) sold and leased trucks at a variety of facilities across ten states.[172] Bank of America (BoA) approached MH about the possibility of entering into an interest rate swap in order to insure that MH had a fixed interest rate for the money it had recently borrowed.[173] BoA gave a presentation to MH in which BoA demonstrated how the transaction would benefit MH.[174] In the explanation, MH was informed that the purpose of the transaction was to hedge its floating interest rate.[175]

After and during the global financial crisis, the hedging function of the interest rate swap failed and MH stopped paying BoA.[176] Essentially, the two floating rates generally tracked as they were supposed to from the inception of the agreement until 2007.[177] However, from September 2007 until MH terminated the transactions in March of 2009, the two floating rates substantially diverged from one another and caused the transaction to be an ineffective hedge for MH.[178] MH was forced to pay a high variable interest rate for its original loan while not receiving an equally high variable interest rate as a result of the interest rate swap.[179]

In its claim for frustration of purpose, MH stated that both parties

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168. *Id.* at *7 (alterations added).
169. *Id.*
170. Murphy-Hoffman Co. v. Bank of America, N.A., No. 09–00227–CV–W–FJG, 2009 WL 2524773 (W.D. Mo. Aug. 14, 2009).
171. *Id.* at *1, *5.
172. *Id.* at *1.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*

were aware that an interest rate hedge was the purpose of the agreement.[180] However, MH also alleged that neither party was aware that the tracking rates would substantially diverge.[181] In an argument to have the frustration of purpose claim dismissed, BoA argued that the theory did not apply because the frustrating event was foreseeable.[182] In the eyes of BoA, the parties had both contemplated loss as a risk of the agreement due to the difference between MH's fixed rate payments to BoA and BoA's floating rate payments to MH.[183] As an additional argument, BoA claimed that since the agreement was based on something that was inherently risky, volatile, and contingent on many factors, the frustration of purpose doctrine should not unwind the agreement.[184]

After determining that § 265 of the Restatement (Second) of Contracts would provide the elements[185] of the theory for frustration of purpose, the court determined that the central issue of contention was the foreseeability of the divergence.[186] As the court was simply making a determination on a motion to dismiss the claim, it did not need to make an official determination as to the foreseeability; rather, it held "[w]hile [MH] could certainly foresee losses from engaging transactions within the swap agreement, it is entirely plausible that neither party reasonably foresaw the divergence between the interest rate indices."[187] In its explanation, the court emphasized the difference between the interest rate swap—which was inherently risky—and the overall strategy to hedge the floating interest rate—which was not purported to be inherently risky.[188] As an illustrative point of this distinction between foreseeability and non-foreseeability, the court brought up the case of *Strauss v. Long Island Sports, Inc.*, a case based on legendary NBA basketball player Julius "Dr. J" Erving and a trade sending him to another team.[189] As the court in *Strauss* explained, a season ticket holder bringing a frustration of purpose claim must fail because the possibility of a player trade is foreseeable.[190] In its conclusion that it would deny BoA's motion to dismiss the frustration of purpose claim, the court profoundly stated,

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180. *Id.* at *3.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. "A party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." *Id.* at *4.

186. *Id.*

187. *Id.* (alterations added).

188. *Id.*

189. *Id.* (citing Strauss v. Long Island Sports, Inc., 60 A.D.2d 501, 504 (N.Y. App. Div. 1978)).

190. *Strauss*, 60 A.D.2d at 510-11.

> It is plausible that nearly identical movements of the two floating rates was not an uncertain or contingent event; in fact, it would make sense that the rates would track each other given that the tracking of the two floating rates would be necessary to effectively hedge . . . .[191]

Unfortunately for those seeking some form of a definitive answer as to whether this common law theory can invalidate highly structured and complex financial instruments, *Murphy-Hoffman Co.* did not substantively proceed past BoA's motion for dismissal.[192] Instead, the two parties reached a settlement, and the case was dismissed with prejudice by a stipulation from MH.[193] With an undisclosed settlement agreement, it is unclear what the motivation was for BoA in failing to fight a lawsuit over interest rate swaps when all relevant case law was on its side. It raises a question as to whether BoA was more concerned specifically with the frustration of purpose claim; after all, the other claims brought by MH were not anything with much likelihood of success given legal precedents. It could be that BoA simply provided MH a small offer, and MH accepted it to recover something from its losses. However, if the terms of the settlement were substantial, BoA could have been guarding against legal precedent accepting frustration of purpose as a legitimate claim for recovery and opening the floodgates for litigation and payouts for all toxic interest rate swaps.

Even without a definitive answer from the US District Court for the Western District of Missouri as to whether MH's interest rate swaps were rescinded due to commercial frustration of purpose, one might have still expected the litigation floodgates to open after the claim passed muster for a motion to dismiss. However, the decision in *Murphy-Hoffman Co.* allowing the frustration of purpose claim was handed down in August of 2009.[194] Since then, there has not been another decision in any American jurisdiction taking the claim further. This begs the question of why a newly successful claim in a realm of unsuccessful attempts at recovery has not become a mainstream method for unwinding interest rate swaps affected by the global financial crisis. A simple search in an electronic legal database such as Westlaw demonstrates that there is no negative legal treatment of the decision to allow the frustration of purpose claim in *Murphy-Hoffman Co.*[195] One possible explanation could be that the claims have come prior to litigation and have been settled once the banks realized the potential

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191. *Murphy-Hoffman Co.*, 2009 WL 2524773, at *4 (alteration added).

192. *See* Docket, Murphy-Hoffman Co. v. Bank of America, N.A., 2009 WL 2524773 (No. 4:09-CV-00227).

193. *Id.*

194. *Murphy-Hoffman Co.*, 2009 WL 2524773.

195. *See id.*

dangers of fighting and losing a frustration of purpose battle.

There is some support for the theory that banks are eager to settle in order to avoid case law allowing frustration of purpose. The Superior Court of North Carolina in Mecklenburg County allowed a frustration of purpose claim to survive a motion to dismiss in *Press Communications, LLC v. Wachovia Bank, N.A.*[196] In an attempt to recover from toxic swaps, Press Communications filed a brief in response to the defendant's motion to dismiss the complaint, citing *Murphy-Hoffman Co.*[197] The case settled after the motion to dismiss was denied.[198] Additionally, a claim of frustration of purpose in an interest rate swap transaction was transferred to the US District Court for the Middle District of North Carolina.[199] Once again, the party seeking to avoid the swaps cited the decision in *Murphy-Hoffman Co.*[200] Unsurprisingly, the case was settled outside of court early on in the process and Overlook Properties, L.P. stipulated to a dismissal.[201]

E. Wells Fargo Bank, N.A. V. CTD Moorefield Retail, LLC *and the Potential for a Definitive Answer*

Although to this point there has not been a definitive resolution to the question of whether a frustration of purpose claim will routinely succeed in unwinding an interest rate swap, there is a chance that an answer is on the way. *Wells Fargo Bank, N.A. v. CTD Moorefield Retail, LLC* is currently pending in the US District Court for the Northern District of Texas.[202] However, the case started in the US District Court for the Southern District of New York.[203] While in the Southern District of New York, a motion to dismiss the frustration of purpose claim alleged by CTD Moorefield Retail, LLC was denied.[204] The question becomes whether this case goes as the others of this ilk and ends in settlement in order to prevent the Northern District of Texas from making a decision under New York law, or whether

196. Order on Motion to Dismiss, Press Commc'ns, LLC v. Wachovia Bank, N.A. (No. 09-CVS-21335), 2010 WL 8749672, (N.C. Super. Apr. 12, 2010).

197. Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss, Press Commc'ns, LLC v. Wachovia Bank, N.A. (No. 09-CVS-21335), 2010 WL 8749672 (N.C. Super. Apr. 12, 2010).

198. Order on Motion to Dismiss, Press Commc'ns, LLC v. Wachovia Bank, N.A. (No. 09-CVS-21335), 2010 WL 8749672 (N.C. Super. Apr. 12, 2010).

199. Response in Opposition to Suntrust Bank's Motion for Judgment On the Pleadings, Overlook Properties, L.P. v. Suntrust Bank, No. 11CV00662, 2012 WL 6725053, (M.D.N.C. Feb. 16, 2012) (No. 11CV00662).

200. *Id.*

201. *See* Docket, Overlook Properties, L.P. v. Suntrust Bank, 2012 WL 6725053 (M.D.N.C. Feb. 16, 2012) (No. 11CV00662).

202. *See* Docket, Wells Fargo Bank, N.A. v. CTD Moorefield Retail, LLC, 3:2012-CV-01219.

203. *Id.*

204. *Id.*

the court has the opportunity to provide a more clear answer as to whether the claim is sufficient to pass stricter scrutiny than a mere motion to dismiss.

V. PUTTING IT ALL TOGETHER

The global financial crisis fundamentally changed the LIBOR rate and the range in which it generally cycles.[205] Years later, it has come to light that the international banking community may have colluded to artificially depress this rate.[206] At the same time, many businesses found ever rising Corporate Bond Rates. Ultimately, the businesses were paying twice on their loans: once for the differences between LIBOR and the fixed rate in their interest rate swaps to the banks and once for the differences between LIBOR and the Corporate Bond Rate to the loaning parties on their bond transactions.[207] The Corporate Bond Rate was so much higher than LIBOR that at a point, the consideration for the interest rate swaps initially—the hedging—was no longer functioning.[208]

It is yet to be determined whether the courts will generally recognize the validity of the commercial frustration of purpose defense to interest rate swaps. To this point, the cases have settled or been withdrawn before a verdict has been handed down. This, however, may not change anytime soon. If banks determine that they do not want to risk the chance that this defense becomes precedential, then they may settle when parties bring this cause of action. A separate dimension to this claim is the statute of limitations. Since commercial frustration of purpose is a common law contract defense, its statute of limitations might follow the same track, which could be six years, for example. The issue to be settled would be whether the frustration occurs at one point in time or whether it is a continuous frustration; that finding would be crucial to determine when the statute of limitations begins tolling. With a six-year statute of limitations, it is possible that time is running short for many parties looking to make a recovery from a deal in place during 2007 and 2008. At the same time, it is possible that with the now-recognizable risk that the floating interest rate indexes might diverge, a party could succeed by arguing that there is a continuous frustration of purpose for the transaction; the transaction had lost its hedging capability at any moment within a certain time frame.

In addition to the concerns surrounding the statute of limitations running out on transactions in place during the global financial crisis, there

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205. *See supra* Section II(C)(1).

206. James O'Toole, *Explaining the Libor Interest Rate Mess*, CNN Money (July 10, 2012, 12:07 PM), http://money.cnn.com/2012/07/03/investing/libor-interest-rate-faq/, *archived at* http://perma.cc/BA8U-JTZA.

207. *See supra* Section II(C)(1).

208. *See supra* Section II(C)(1).

are also questions about damage calculations if the claims succeed. One possibility is that courts would place parties in the positions they were in previous to entering into the agreement. Another possibility is that the termination fee would be the only portion included in recovery. It is unlikely that a court would award consequential damages due to the general reluctance to award these in most circumstances; however, the consequential damages have been extensive in some instances. For example, if a company became financially strapped, it might have taken out an additional loan to cover the interest rate payments. There is an endless list of damages one can think of being caused by a massive and unexpected cost of doing business. As with statute of limitation issues, the damage calculation might turn on the exact moment the swap's purpose was frustrated. Overall though, one would think that many of the businesses affected by the toxic interest rate swaps will likely accept any relief they can recover within reason at this point.

Factoring in the unresolved issues of statutes of limitations, damage calculations, and the other complexities of unraveling a detailed financial derivative, this Note contends that from a purely legal perspective, interest rate swaps operating during the global financial crisis and tied to floating rates that diverged like LIBOR and the Federal Funds Rate should be held unenforceable under the frustration of purpose doctrine. It should be noted that this argument is more relevant currently for the American legal system. In the United Kingdom, many of the losers from interest rate swaps have been afforded restitution either through the FSA agreement with the banks, or through the still-pending decisions on whether LIBOR-rigging banks will be punished for selling interest rate swaps at the same time. In America, however, the companies and local governments who have lost in their interest rate swap transaction can really only hold out hope for success through the frustration of purpose doctrine.

Given the background information regarding the legal theory of frustration of purpose provided earlier in this Note, there are three chief reasons why the doctrine should successfully be applied to interest rate swaps during the global financial crisis. As an aside, one can assume with rather inarguable certainty that the only contested element of the frustration of purpose argument in this context is that of reasonable foreseeability. The principal purpose, or the hedging function, was substantially frustrated without any doubt. The individual institution entering into the interest rate swap did not have any way of being at fault for the loss of the hedging. The remaining question is whether the loss of a hedging function was an event the non-occurrence of which the parties had assumed at the time of the transaction. It is this question that can be answered with three contentions. The first is that the non-occurrence of the loss of hedging was unforeseen due to the unprecedented magnitude of the global financial crisis. The second is that it was unforeseen that many of the largest lenders in the world would artificially manipulate the LIBOR rate. Third, it was not

foreseeable that the American federal government would move the Federal Funds Rate to an astonishingly low rate and choose to bail out the financial institutions and banks with drastic consequences for small businesses and local or small government institutions.

The global financial crisis was both unexpected and unexpected in extent. It was not foreseeable that the global economy would crash, nor that rates that had historically tracked very closely would suddenly diverge exponentially. Typically, the indexes would vary by between zero and .25%, with rare occurrences of divergences of more than that. However, during the Financial Crisis, the divergence reached new heights. It is safe to say that an unprecedented event, rivaling only the Great Depression, would not have been planned for in the interest rate swap contracts. Neither party to the transaction would have reasonably believed it necessary to include language for the occurrence of such a crisis. The clearest way to prove the assertion that the contracts for interest rate swaps were founded on the basis that the hedging function would not fail due to a divergence in the floating rates stems from the fact that the transactions were entered into to begin with; why would a company or local government enter into a hedging transaction geared toward avoiding risk with knowledge that it was potentially increasing its interest rate exposure with a rate divergence?

Although artificial depression of the LIBOR rates would not have increased the divergence between the floating rates once the Federal Reserve began lowering the Federal Funds rate, the manipulation of one of the floating rates exposed the hedge to a new risk. The hedging of interest rate exposure was substantially frustrated—there was a great unforeseen risk once the banks began illegally controlling the rate—and the hedging function was no longer a reasonably secure hedge. The "LIBOR Market" was not a true reflection of the rate at which the banks were able to borrow. What made the LIBOR manipulation egregious was that many of the same banks illegally deflating the LIBOR rate were also selling and marketing interest rate swaps as properly functioning hedging mechanisms. If they sold the swaps while LIBOR was deflated artificially, they knew or should have known that there was a chance the rate would return to an accurate rate and then the divergence in floating rates would increase; this would, of course, destroy the hedging function of the interest rate swaps they had sold while the rate was depressed. The LIBOR manipulators were an unbargained-for variable in the interest rate swap transactions; it was not foreseeable that banks would illegally cause the hedging functions of these contracts to fail.

Finally, it was not foreseeable that the Federal Reserve would historically and precipitously reduce the Federal Funds Rate in an attempt to stave off the economic downturn. In response to the global financial crisis, the Federal Reserve precipitously lowered the Federal Funds Rate to zero percent, where it has remained since. The issue with that is the rate had been around four percent before the crisis hit. As the Federal Funds Rate

plummeted, there was not a chance that LIBOR would be able to keep up in its fall for swaps tied between these two rates; the result was a large divergence and a frustration of the hedging purpose in many interest rate swaps. Even if one were to argue that a global financial crisis was a foreseeable event at the time of entering the swaps, it would be difficult to say that in the event of such a crisis, the Federal Reserve would allow the Federal Funds Rate to drop so low and at such a quick pace.

Although the arguments against frustration of purpose as applied to interest rate swaps during the global financial crisis should not succeed, it is interesting to analyze the failures of the swaps. The main contention is that the presumed knowledge and expertise of the entities agreeing to the swaps with the banks demonstrates foreseeability. In other words, the complexity of the organizations entering into the swaps indicated that they knew or should have known that the interest rates might not track. However, this presumes too much. Just because a business or its decision makers might have complex and advanced knowledge of banking or business, that does not mean that they would know about the inner-workings of interest rate swaps. Even if they did know how the swaps worked, historic numbers demonstrated that the tracking would not fail.

VI. CONCLUSION

Overall, it may be that many types of interest rate swaps will become a derivative dinosaur and claims for recovery will be irrelevant. However, the entities still suffering from the effects of the swaps during the global financial crisis are searching for recovery and restitution now. As a legal theory for unwinding interest rate swaps, the frustration of purpose doctrine only suffers from its unusual position in the realm of a complex global financial market, a stigma that may give pause to courts that have consistently held for the large financial institutions and the formal ISDA contracts. For the time being, whether in the United Kingdom or the United States, there are questions unanswered as to whether there is a road to recovery from the grand losers of the global financial crisis.

THE EQUITY FOR VISUAL ARTISTS ACT OF 2011 (EVAA): CRAFTING AN EFFECTIVE RESALE ROYALTY SCHEME FOR THE UNITED STATES THROUGH COMPARATIVE MEDITATION

Elisa D. Doll*

"A visible and tangible artwork is a kind of persisting event. One or more artists made it at a certain time and in a specific place, even if no one knows just who, when, where, or why. Although created in the past, an artwork continues to exist in the present, long surviving its times. The first painters and sculptors died thirty thousand years ago, but their works remain . . . ." - Gardner's Art Through the Ages[1]

"Recognition of the role of copyright and related rights leads us to see that artists face a problem of optimizing their earnings over time. . . . Why artists should have to suffer for their art is an equity question that economists cannot easily discuss."
- Ruth Towse[2]

I. INTRODUCTION

In recognition of the special relationship that exists between authors and their work, international copyright laws sometimes provide resale royalties for visual artists—a legal right otherwise known as the *droit de suite* (French for "right to follow").[3] Resale royalty legislation is

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* J.D., 2013, Indiana University Robert H. McKinney School of Law; B.S., 2010, Kelley School of Business, Indiana University, Indianapolis, Indiana. I would like to thank Professor Lea Shaver, Associate Professor of Law, who contributed her considerable expertise in writing and was endlessly supportive. I am especially thankful for the day that Prof. Shaver placed a copy of Madhavi Sunder's book, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE, in my hands. *See infra* note 6. Prior to reading this book, I never had occasion to question the United States' almost singular focus on the trade-off between incentivizing the creation of works and public access to those works. I also wish to give thanks to the reference staff of the Ruth Lilly Law Library, Indiana University Robert H. McKinney School of Law—particularly, Constance Matts and Richard Humphrey who are adept at finding the un-findable. Finally, I would like to thank my family for all of their love and support throughout the writing process. As indicated in Appendix B, additional research is available on a companion WordPress website at http://elisadoll.wordpress.com/.

1. GARDNER'S ART THROUGH THE AGES xxxiii (David Tatom ed., 11th ed. 2001).

2. RUTH TOWSE, MARKET VALUE & ARTISTS' EARNINGS, THE VALUE OF CULTURE: ON THE RELATIONSHIP BETWEEN ECONOMICS AND ARTS 97-99 (Arjo Klamer ed., Amsterdam University Press 1996).

3. Christina Saunders, *The Resale Right: American Copyright Law and the Moral Right*, NOUVEAU LAW, LLC (May 15, 2012), http://www.nouveaulaw.com/art-news/the-resale-right-american-copyright-law-and-the-moral-right/, *archived at* http://perma.cc/5B2G-

occasionally described academically as another stick in the bundle of intellectual property rights commonly referred to as "*le droit moral*" or "moral rights," especially when discussing its remedial purpose.[4] But in practice, it is often described as an "economic right" because of an inherently fiscal aspect that causes it to differ from other more vague or elusive moral rights.[5] The apparent classification conflict between the economic and equitable aspects of resale royalty rights can create several hurdles to designing and implementing effective legislation from inception.

Despite such difficulties, more than fifty countries have adopted some type of resale royalty legislation.[6] The federal United States has historically been reluctant to do so.[7] The United States likely abstained initially from adopting some form of this right because of the sweeping changes ratification would require to an arguably increasingly mercantilist Copyright system[8] that relied heavily on formalities in copyright

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4. *See generally* SIMON STOKES, ART AND COPYRIGHT 83-109 (Hart Publ'g 2d ed. 2012) (discussing the resale right in the context of moral rights).

5. *Id*. at 97 (discussing how to classify the right is debatable); *cf.* Marina Santillini, *United States' Moral Rights Developments in European Perspective*, 1 MARQ. INTELL. PROP. L. REV. 89, 106-07 (1997) (discussing the strong academic distinction between the resale right and moral rights but suggesting that resale royalties complement or supplement moral rights). The difficulty in classification likely arises from inalienability. Without this element, it is easier to say the right is not tied to the author and is, therefore, economic.

6. CONTEMPORARY ART GALLERIES ASSOCIATION, ESTABLISHING THE ARTISTS' RESALE RIGHT IN CANADA: BILL C-11—COPYRIGHT 3 (2011), *archived at* http://perma.cc/PU2K-35WE.

7. *See* Katreina Eden, *Fine Artists' Resale Royalty Right Should Be Enacted in the United States*, 18 N.Y. INT'L L. REV. 121, 127-36 (2005); *see also* LILIANE DE PIERREDON-FAWCETT, THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 99 (John M. Kernochan ed., Louise-Martin-Valiquette trans., Columbia Univ. School of Law 1991). Resale royalty legislation was incorporated into the Berne Convention for the Protection of Literary and Artist Works of 1886 (the Berne Convention) in 1948 at Brussels and adopted by several other countries but was not embraced by the United States in any major way, until it adopted the Visual Artists' Rights Act of 1990 (VARA). Stephanie B. Turner, *The Artist's Resale Royalty Right: Overcoming the Information Problem*, 19 UCLA ENT. L. REV. 329, 340 (2012) (discussing how VARA as enacted did not contain a resale royalty provision but directed the Copyright Register to perform a feasibility study for implementation in the United States).

8. MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 23-32 (Yale Univ. Press 2012) ("mercantilist" is describing Sunder's view that constitutionally mandated "progress" is equivalent to maximum creative output). Under this view, legislation is perpetuated based upon an economic rationale comporting with utilitarian business economics that is overly narrow—balancing incentives versus access—because it fails to address the practical import of the legislation. Sunder suggests this view is problematic because it necessarily "reduces to the claim that the ability to pay [to exchange money for goods, in other words, commercial activity], as evidenced by the marketplace, should determine the production and distribution of knowledge and culture [for society as a whole]." *Id*. at 29 (alterations added); *see also* Saunders, *supra* note 3 (discussing how the United States emphasizes profits over personalty).

application.[9]

Despite federal reluctance, at least twelve states had individually adopted some type of moral rights legislation by 1990.[10] Resale royalties, however, remained unpopular. To date, California is the only state to move such a law, as it is traditionally conceived, beyond the proposal stage—the California Resale Royalty Act of 1977 (CRRA).[11] However, two other states, Georgia and South Dakota, each have adopted extremely narrow renditions that are applicable only to state-owned works of visual art.[12] Further, the US territory of Puerto Rico has adopted a resale royalty right.[13]

Discussions of federal resale royalty legislation for the United States have been largely theoretical, but in late 2011 the talk turned into action for several reasons. First, in late 2011, a combined class-action suit was filed against auction power-houses Sotheby's, Christie's, and eBay under the CRRA.[14] The suit was later dismissed by the District Court for the Central

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9. Jimmy A. Frazier, *On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law*, 70 TUL. L. REV. 313, 342 (1995); *see also* Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 414-26 (2009); s*ee generally* Copyright Act of 1909, 17 U.S.C.A. § 101, repealed by 90 Stat. 2541 (West 2012) (discussing in more detail information about the four requirements of notice, publication, registration and deposit).

10. Channah Farber, Comment, *Advancing the Arts Community in New Mexico through Moral Rights and Droit de Suite: The International Impetus and Implications of Preemption Analysis*, 36 N.M. L. REV. 713, 731-32 (2006) (listing California, Connecticut, Louisiana, Maine, Massachusetts, New Jersey, New York, Pennsylvania, and Rhode Island as having enacted moral rights legislation and Utah, Georgia, and Montana as having enacted a more limited form of moral rights legislation).

11. CAL. CIV. CODE ANN. § 986 (West 2012); *see also* Edward J. Damich, *Moral Rights Protection and Resale Royalties for Visual Art in the United States: Development and Current Status*, 12 CARDOZO ARTS & ENT. L.J. 387, 405 (stating California is the only state to adopt a law akin to the European resale royalty right); DAVID NIMMER, NIMMER ON COPYRIGHT § 8C.04 (2012); *cf.* Turner, *supra* note 7, at 339, n. 57.

12. GA. CODE ANN. § 8-5-7 (West 2012) (providing in relevant part: "If provided by written contract, the right to receive a specified percentage of the proceeds if the work of art is subsequently sold by the state to a third party other than as part of the sale of the building in which the work of art is located. The rights . . . may by written contract be extended to such artist's heirs, assigns, or personal representatives until after the end of the twentieth year following the death of such artist. . . . Prior to execution of a written contract, the artist shall be informed in writing of the rights . . . which may be granted by contract to the artist or to the artist's heirs, assigns, or personal representatives.") (alterations added); S.D. CODIFIED LAWS § 1-22-16(5),(6) (West 2012) (providing in relevant part: "If provided by written consent, the right to receive a specified percentage of the proceeds if the work of art is subsequently sold by the state to a third party other than as part of a sale of the building in which the work of art is located; If provided by written consent, the artist's rights may extend to the artist's heirs, assignees, or personal representative until the end of the twentieth year following the death of such artist.").

13. P.R. LAWS ANN. TIT. 31 § 1401(h) (West 2012).

14. *See generally* Estate of Graham v. Sotheby's Inc., 860 F. Supp. 2d 1117 (C.D. Cal. 2012).

District of California in May of 2012.[15] The court held that the CRRA violated the commerce clause and was unconstitutional on its face because its express language made the law applicable to sales wholly outside of California so long as the owner was a resident of California.[16] Second, because of a deferment option, the last four member states of the European Union lacking full implementation of the EU directive harmonizing resale royalties for member states completed implementation at the start of 2012.[17] Third, in December of 2011 identical bills proposing a federal resale royalty right were introduced before the House (H.R. 3688) and the Senate (S. 2000) under the short title "the Equity for Visual Artists Act of 2011 (EVAA)."[18]

Some suggest that the EVAA as introduced goes both too far and not far enough.[19] An examination of the EVAA in light of prior US efforts and alongside the legislative efforts and experiences of other countries reveals that this statement is an accurate assessment. For instance, the practical experience of other countries sheds light on some problems that spring from resale royalty legislation that the EVAA fails to address.[20] Yet, the EVAA proposes a complex revenue sharing scheme not yet contemplated by most other countries.[21] Hence, there is reason to believe that the EVAA as introduced would be ineffective.

Part II of this Note begins with a brief overview of the history of resale royalty legislation. Part III examines the draft EVAA provisions in light of the problems that have been found to exist in designing and implementing resale royalty legislation, and determines whether the EVAA is likely to be effective as written. Part IV addresses how the EVAA might be optimized. Questions concerning the wisdom of adopting federal resale royalty legislation are outside the scope of this Note.[22] Instead, this Note

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15. *Id.* at 1126-27.

16. *See id.* at 1125.

17. Henry Lydiate, *Deceased Artists*, ARTQUEST (2008), http://www.artquest.org.uk/articles/view/deceased-artists1, *archived at* http://perma.cc/GQ7T-R7R6.

18. *See, e.g.*, Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. (2011) (referred to the subcommittee for Intellectual Property, Competition, and the Internet), *archived at* http://perma.cc/5HNM-XSEB (THOMAS); *see also* S. 2000, 112th Cong. (2011), *archived at* http://perma.cc/Q3F5-Z2GM (THOMAS).

19. Bill Davenport, *US Congress Considers Resale Royalties for Visual Artists in New Equity for Visual Artists Act*, GLASSTIRE.COM (Jan. 3, 2012), http://glasstire.com/2012/01/03/us-congress-considers-resale-royalties-for-visual-artists-in-new-equity-for-visual-artists-act/, *archived at* http://perma.cc/DTS5-QSGH.

20. *See infra* Part III.A (analyzing how the EVAA handles various recognized problems of resale royalty legislation).

21. *See infra* Part III (particularly Part III.B.4 and B.14, discussing collection and enforcement under the EVAA).

22. *See* THE FEDERALIST NO. 43 (James Madison) (discussing the superiority of federal legislation under the intellectual property clause and the basis for it). "The public good fully coincides in both cases with the claims of individuals." *Id*.

focuses on the best way to structure resale royalty legislation in the event it is adopted. Specifically contemplated are the key elements of resale royalty legislation—scope, covered works, minimum price (if any), collection and remittance policy, duration, rate, alienability, waiver, devise, exclusions, formalities, attendant information rights, foreign application, and enforcement.[23] Notably absent is the issue of the "author." Questions concerning who qualifies as an "author" are generally addressed in a country's primary copyright statute. While some resale royalty legislation might specifically address multiple or corporate authors, these issues are outside the scope of this Note because they are more tangential. This note assumes that in all cases there is one human "author" who might receive a royalty. Further, in order to enhance the usefulness of this article, only free internet sources of international legislation, already translated into the English language or readable via Google Translation and WIPO translation services, were consulted.[24]

II. THE EVOLUTION OF RESALE ROYALTY LAW

A. International Origins—History and a Few Examples

France was the first country to recognize resale royalty legislation because its leaders were moved by public awareness of the plight of artists, who reputedly died in squalor while their works sold for small fortunes to the benefit of others.[25] The purpose of this legislation was *equitable* at its core, but *economic* in effect—it sought to remedy a power imbalance between poor artists and market dealers that allowed dealers to flip paintings, and to address the unfairness of speculation rewarding middlemen and owners whose investment expertise had less to do with increases in value than the artist's creative efforts.[26]

Then, in 1896 a union of countries signed the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention).[27] The Berne Convention was revised at Brussels, in 1948, to include Article

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23. These are the categories I chose to explore after reading through DE PIERREDON-FAWCETT'S book and several pieces of legislation. DE PIERREDON-FAWCETT, *supra* note 7. I consider this list a slight variation upon the categories indicated by de Pierredon-Fawcett in her "Chart of Droit de Suite Laws." DE PIERREDON-FAWCETT, *supra* note 7, at 284-91.

24. For more information on my research process, see Elisa Doll, *Droit de Suite – An International Comparison*, ELISADOLL (Mar. 10, 2013), http://elisadoll.wordpress.com/2013/03/10/droit-de-suite-an-international-comparison/, *archived at* http://perma.cc/P2CY-ASGX.

25. DE PIERREDON-FAWCETT, *supra* note 7, at 1-4.

26. DE PIERREDON-FAWCETT, *supra* note 7, at 1-4.

27. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. TREATY DOC. NO. 99-27 (1896), *archived at* http://perma.cc/M4BE-X9QX [hereinafter Berne Convention].

14bis, a resale royalty provision.[28] A later revision at Paris, in 1971, retained the original language but moved the resale royalty provision to Article 14ter,[29] which provides:

> The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.[30]
>
> . . .
>
> The procedure for collection and the amounts shall be matters for determination by national legislation.[31]

The rights conferred under the Berne Convention were extremely vague and largely left to the signatory countries to ferret out. Additionally, the Berne Convention contains a significant limitation—"[t]he protection provided . . . may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed."[32] This provision came to be known as the "principle of reciprocity." Additionally, because adoption of the resale royalty was not made mandatory by the treaty, the royalty could be circumvented.[33] Other major international treaties adopted since the Berne Convention—namely, the WIPO Copyright Treaty[34] of 1996, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)[35] of 1994, and the Universal Copyright Convention (UCC)[36] of 1952 (largely superseded by TRIPS)—each adopt portions of the Berne Convention by reference but do not contain separate provisions

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28. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Brussels on June 26, 1948, 331 U.N.T.S. 217 (1896), *archived at* http://perma.cc/C2NK-C482; *see also* DE PIERREDON-FAWCETT, *supra* note 7 and accompanying text.

29. Berne Convention, *supra* note 27, art. 14ter; *see also* NIMMER, *supra* note 11, app. 27.

30. Berne Convention, *supra* note 27, § 1.

31. Berne Convention, *supra* note 27, § 3.

32. Berne Convention, *supra* note 27, § 2.

33. Irma Sirvinskaite, *Toward Copyright "Europeanification": European Union Moral Rights*, 3 J. INT'L MEDIA & ENT. L. 263, 285-86 (2010-2011).

34. WIPO Copyright Treaty art. 1, Dec. 20, 1996, 2186 U.N.T.S. 121, S. TREATY DOC. NO. 105-17 (1997), *archived at* http://perma.cc/X7H9-SGFX.

35. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), *archived at* http://perma.cc/4P29-KT54 (providing in Article 9 for the incorporation of portions of the Berne Convention).

36. DE PIERREDON-FAWCETT, *supra* note 7, at 101.

for resale royalties. The following provides a history, as well as some examples, of the ways in which this type of legislation might be drafted.

1. Resale Royalties in the European Union (EU)[37]

The resale royalty did not gain significant force until 2001 when the EU adopted a directive harmonizing copyright law among member nations—EU Directive 2001/84/EC. The directive contained a clear statutory purpose:

> The resale right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works.[38]

The royalty applies to "all acts of resale involving as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art."[39] It applies to "works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs . . . [that] are made by the artist himself or are copies considered to be original works of art"—termed "original works of art."[40] Also included are copies "made in limited numbers by the artist himself or under his authority" or that are "numbered, signed or otherwise duly authorised by the artist."[41] The minimum price may not exceed EUR

37. By "EU" I mean Austria (1995), Belgium (1952), Bulgaria (2007), Cyprus (2004), Czech Republic (2004), Denmark (1973), Estonia (2004), Finland (1995), France (1952), Germany (1952), Greece (1981), Hungary (2004), Ireland (1973), Italy (1952), Latvia (2004), Lithuania (2004), Luxembourg (1952), Malta (2004), Netherlands (1952), Poland (2004), Portugal (1986), Romania (2007), Slovakia (2004), Slovenia (2004), Spain (1986), Sweden (1995), and the United Kingdom (1973). This differs somewhat from the European Economic Trading Area (EEA), which includes the EU members plus Iceland, Liechtenstein, and Norway. *See Europa - Countries*, EUROPA.EU, http://europa.eu/about-eu/countries/index_en.htm (last visited Jan. 7, 2014, *archived at* http://perma.cc/LXH-34XZ) (listing 27 members and year joined); *EEA Agreement*, EFTA, http://www.efta.int/eea/eea-agreement.aspx (last visited Jan. 7, 2014, *archived at* http://perma.cc/AG79-HWPP) (summarizing EEA agreement).

38. Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, § (3) pmbl., 2001 O.J. (L 272) 32, *archived at* http://perma.cc/QD8G-3JQP.

39. *Id.* art. 1, § 2.

40. *Id.* art. 2, § 1.

41. *Id.* art. 2, § 2.

3,000,[42] but Member states have the option of adding a further restriction—that the resale royalty not apply to works sold by owners that were purchased from the author within the past three years, and are sold for less than EUR 10,000.[43] The seller has to pay the royalty.[44] However, the EU leaves collection and remittance specifics to Member countries.[45] The EU duration is the life of the author plus seventy years.[46] The harmonizing directive provides for a rate schedule:

> (a) 4 % for the portion of the sale price up to EUR 50[,]000;
> (b) 3 % for the portion of the sale price from EUR 50[,]000[.]01 to EUR 200[,]000;
> (c) 1 % for the portion of the sale price from EUR 200[,]000[.]01 to EUR 350[,]000;
> (d) 0[.]5 % for the portion of the sale price from EUR 350[,]000[.]01 to EUR 500[,] 000;
> (e) 0[.]25 % for the portion of the sale price exceeding EUR 500[,]000.
> However, the total amount of the royalty may not exceed EUR 12[,]500.[47]

The resale royalty is inalienable.[48] It is payable to "the author of the work and . . . after his death to those entitled under him/her."[49] Finally, the EU affords authors a three-year post-sale right to information that can compel "art market professionals" to furnish information necessary to facilitate collection of a resale royalty.[50]

By most accounts the EU legislation has been successful. Reports from London indicate that £15.5 million have been paid to living artists since 2006.[51] The European Commission reports that French and German markets all experienced varying degrees of increase in sales between 2010 and 2011.[52] Additionally, the European Commission reports that the "EU

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42. *Id.* art. 3, §§ 1-2.
43. *Id.* art. 1, § 3.
44. *Id.* art. 1, § 4.
45. *Id.* § (28) pmbl.
46. *Id.* § (17) pmbl.
47. *Id.* art. 4, § 1 (alterations added).
48. *Id.* art. 1, § 1.
49. *Id.* art. 6, § 1.
50. *Id.* art. 9.
51. Daniel Grant, *'Droit de Suite' Debate Heats Up*, ARTNEWS (Jan. 11, 2012), http://www.artnews.com/2012/01/11/droit-de-suite-debate-heats-up/, *archived at* http://perma.cc/3WYV-C8VH.
52. SUBMISSION OF COMMENTS FOR THE EQUITY FOR VISUAL ARTISTS ACT OF 2011 BY *AKKA/LAA* 2 (2012), *archived at* http://perma.cc/A6HU-JV58 (containing commentary in

market share in the works of living EU artists has risen from 60% in 2002 to 66% in 2010, and the UK market share from 40% to 42%."[53] Importantly, the average estimated cost per transaction was just EUR 50.[54] Roughly 45 percent of sales fell below the EUR 3,000 tier, garnering royalties of up to EUR 150, and another 39 percent were one bracket higher, earning royalties up to EUR 2,030.[55]

As of 2013, resale royalty legislation exists outside the United States at both regional and national levels. The Member countries of the EU and the European Economic Trading Area (EEA) only account for roughly half of all countries with resale royalty legislation. The Andean Community (AC)[56] and the Organisation Africaine de la Propriété Intellectuelle (OAPI)[57] are examples of other regional trade blocs with resale royalty legislation. Individual countries also have adopted national-level legislation, such as Australia[58] and Brazil.[59] Over the past two years, Canada[60] and China[61] have both considered adopting resale royalty legislation.

2. Andean Community (CAN)[62]

The Andean Community's Decision 351 has a structure similar to EU Directive 2001/84/EC. Decision 351 provides a set of minimum guidelines and, at the same time, expressly commands Member countries to fill in the gaps and details accordingly.[63] However, CAN guidelines are far less

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response to Notice, 77 Fed. Reg. 58,175 (Sept. 19, 2012) (notice of inquiry) and Notice, 77 Fed. Reg. 63,342 (Oct. 16, 2012) (extension of comment period)).

53. EUROPEAN COMMISSION, REPORT ON THE IMPLEMENTATION AND EFFECT OF THE RESALE RIGHT DIRECTIVE (2001/84/EC) 5 (2011), *archived at* http://perma.cc/W2UP-9HLH.

54. *Id*. at 8. Costs were largely attributed to "staff costs associated with (i) the determination of qualifying artists; (ii) the determination and location of heirs and other right holders (iii) processing omissions and refunds; together with IT system costs." *Id*.

55. *Id*. at 10.

56. *See infra* Part II.A.2.

57. *See infra* Part II.A.3.

58. *See infra* Part II.A.4.

59. *See infra* Part II.A.5.

60. CONTEMPORARY ART GALLERIES ASSOCIATION, *supra* note 6.

61. Katie Hunt, *China Debates Droit de Suite: Some Say It Will Stifle the Market, Others Think It Could Stop Fakes at Auction*, ART NEWSPAPER (Feb. 18, 2013), http://www.theartnewspaper.com/articles/China-debates-droit-de-suite/28565, *archived at* http://perma.cc/AWN4-8CNQ. For a little more information on this topic see Hong Xue, *One Step Ahead, Two Steps Back: Reverse Engineering the Second Draft for the Third Revision of the Chinese Copyright Law*, 28 AM. U. INT'L L. REV. 295 (2012) (containing useful sources as well).

62. *About Us*, COMUNIDAD ANDINA, http://www.comunidadandina.org/ingles/who.htm (last visited Jan. 7, 2014, *archived at* http://perma.cc/EV4B-T6R4) (listing four Member Countries: Bolivia, Republic of Colombia, Ecuador, Peru).

63. Decisión 351—Régimen Común sobre Derecho de Autor y Derechos Conexos [Decision 351—Common Provisions on Copyright and Neighboring Rights], arts. 12 and 42,

demanding than those of the European Union. For instance, Decision 351's resale royalty provision simply states that "authors of works of art and, on their death, their successors in title shall have the inalienable right to be granted a share in the successive sales of the work by public auction or through a professional art dealer. The Member Countries shall enact provisions on the said right."[64] Similarly, Member countries must establish duration of no less than the life of the author plus fifty years,[65] and refrain from adopting formal prerequisites.[66] Member Countries must determine limitations on transfer or assignment,[67] and participation in collective administration is voluntary unless a Member Country legislates otherwise.[68]

Because of the relative flexibility of CAN guidelines, there is significant variation in resale royalty legislation across its Members. As of 2011, only one of the four CAN Member Countries has not enacted a resale royalty provision: Colombia.[69] Bolivia has the oldest statute, and even though it has not been updated substantially as of 2013,[70] its terms are not very different from those of Ecuador[71] and Peru.[72] One exception is that the latter two have both adopted longer terms of protection like the European Union—life of the author plus seventy years[73]—while Bolivia retains life

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Dec. 21, 1993 Gaceta Oficial del Acuerdo de Cartagena [Official Gazette of the Cartagena Agreement], X—No. 145, *archived at* http://perma.cc/5HG4-DRRN (English language translation by the International Bureau of WIPO).

64. *Id.* art. 16.

65. *Id.* art. 18.

66. *Id.* art. 52.

67. *Id.* art. 30.

68. *Id.* art. 44.

69. *See generally*, L. 23 art. 3, enero 28, 1982, DIARIO OFICIAL [D.O.] (Colom.), *archived at* http://perma.cc/N73V-EB33 (English language translation). L.23 was amended by L. 44, febrero 5, 1993, DIARIO OFICIAL [D.O.] (Colom.), *archived at* http://perma.cc/9HJA-EHXU (regarding collecting societies); *see also* L. 719, diciembre 24, 2001, DIARIO OFICIAL [D.O.] (Colom.) (also regarding collecting societies); L.1403, julio 19, 2010, DIARIO OFICIAL [D.O.] (Colom.) (regarding remuneration for performers in images and sounds); L. 1450, junio 16, 2011, DIARIO OFICIAL [D.O.] (Colom.) (implementing National Development Plan: 2010-2014), *archived at* http://perma.cc/7QLL-MHNZ (unofficial translation by Google Translator); L. 1520, abril 13, 2012, DIARIO OFICIAL, [D.O.] (Colom.) (implementing US-Colombia trade agreement for greater trademark protection and anti-piracy provisions).

70. L. 1322, abril 13, 1992, sobre el Derecho el Autor (Bol.), *archived at* http://perma.cc/P93E-VPKR (English language translation by the International Bureau of WIPO); *see also infra* Appendix A, Bolivia; *but see* Sup. Dec. No. 23907 §§ 1-9, diciembre 7, 1994, *archived at* http://perma.cc/U9XA-FGCV (English language translation by the International Bureau of WIPO) (updating rules for collection societies).

71. Codification No. 2006-13 (Supplement to Official Register No. 426, Dec. 28, 2006) (Ecuador), *archived at* http://perma.cc/W6PW-T6WE (English language translation by the International Bureau of WIPO); *see also infra* Appendix A, Ecuador.

72. Decreto Legislativo No. 822, abril 24, 1996, Ley Sobre el Derecho de Autor (Peru), *archived at* http://perma.cc/NQ8M-24XL (English language translation by the International Bureau of WIPO); *see also infra* Appendix A, Peru.

73. Decreto Legislativo No. 822 art. 52-56 (term of protection).

plus fifty years.[74] Second, their royalty rates are not necessarily the same.[75] Third, all three royalty schemes cover "works of three-dimensional art," but royalties in Bolivia and Ecuador also cover manuscripts.[76] Similarly, all three schemes exclude from coverage architectural works but differ as to applied art, audiovisual works, and photographs.[77] Peru is the only Member that has a cultural preserve mechanism—a provision that forwards unclaimed royalties to its National Institute of Culture "for cultural promotion purposes."[78] In spite of these differences, all Members agree that the right is inalienable and cannot be waived; the right may be devised; no formalities are needed for the right to vest; the royalty shall apply to all resale transactions involving a public auction or art dealer; and, that rights holders may entrust their rights to collective management.[79]

On the whole, it seems that the CAN legislation is much less extensive than that of the European Union. The broad grant of Decision 351 leaves much more to its Members than EU Directive 2001/84/EC. There also appears to be slightly less consistency in key provisions across Members; variation exists in roughly half the elements. However, unlike the European Union, there does seem to be a consensus that a flat rate is the best approach despite no guidance as to the optimal rate scheme.[80] Some scholars suggest, though, that such minimal standards at the regional level were likely the result of a rapid policy change and probably explain a lack of consistency in content and procedure, as well as in transparent legislative process.[81] Additionally, Decision 351 was unable to eliminate internal

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74. Codification No. 2006-13, *supra* note 71, arts. 80-81 (duration).

75. *See* L. 1322, *supra* note 70, art. 50 (noting that Bolivia's rate is five percent of sales price); Codification No. 2006-13, *supra* note 71, art. 38 (noting that Ecuador's rate is five percent of sales price "unless otherwise agreed"); Decreto Legislativo No. 822, *supra* note 72, art. 82 (noting that Peru's rate is three percent of sales price, "it being possible to agree on a different percentage").

76. L. 1322, *supra* note 70, art. 50; Codification No. 2006-13, *supra* note 71, art. 38; Decreto Legislativo No. 822, *supra* note 72, art. 82.

77. L. 1322, *supra* note 70, arts. 6(j), 50, 51 (noting that Bolivia excludes applied art); Codification No. 2006-13, *supra* note 71, art. 38 (showing that Ecuador excludes photos and A/V works and doesn't mention applied art in this regard); Decreto Legislativo No. 822, *supra* note 72, arts. 5(f), 82 (showing that Peru excludes photos and A/V works and specifically includes applied art).

78. Decreto Legislativo No. 822, *supra* note 72, art. 84 (implementing a three-year limitation on claims from notice of resale).

79. L. 1322, *supra* note 70, arts. 2, 50, 64; Sup. Dec. No. 23907, *supra* note 70, § 27(4); Codification No. 2006-13, *supra* note 71, arts. 5, 38, 109; Decreto Legislativo No. 822, *supra* note 72, arts. 3, 82, 147.

80. *See infra* Appendix A, Belgium, Greece; *infra* Appendix B (chart indicating that Belgium and Greece apply a flat rate rather than the mandated tiered rate).

81. Alberta J. Cerda Silva, *Copyright Convergence in the Andean Community of Nations*, 20 TEX. INTELL. PROP. L.J. 429, 435-36 (2012) (noting that the European Union has fared much better in these areas).

market distortions that favored some producers over others and caused unfair advantages among CAN Members.[82] The light infrastructure might also be a factor in reported enforcement issues.[83] But that is not to say that the European Union is immune from such internal inconsistencies. Some EU countries also appear to have lagged behind in implementation.[84]

3. Organisation Africaine de la Propriété Intellectuelle[85]

The OAPI is an economic trading bloc like the EEA.[86] The relevant resale legislation provides:

> (1) Authors of graphic and three-dimensional works, and of manuscripts, shall have an inalienable right, regardless of any transfer of the original work, to participate in the proceeds of any sale of such work or manuscript by public auction or through a dealer, whatever the conditions under which the transaction was carried out by the latter.
> (2) The above provision shall not apply to works of architecture or to works of applied art.
> (3) The conditions for exercising such right, as also the rate of participation in the proceeds of sale, shall be determined by the competent national authority.[87]

Information as to the effectiveness of their regional scheme was not readily available. English language translations were available for only half of the member states.[88] Generally speaking, however, the OAPI has been

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82. *Id*. at 440.

83. RONALD KIRK, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2012 SPECIAL 301 REPORT 41-43, 48 (2012), *archived at* http://perma.cc/L7JU-JT3D (reporting all four members as part of the "watch list" and discussing under each country continuing various problems with enforcement, level of protection, and internet piracy).

84. *See, e.g., infra* Appendix A, Belgium; *infra* Appendix B, chart column for Belgium.

85. *Member States*, OAPI, http://www.oapi.int/index.php/en/aipo/etats-membres (last visited Mar. 9, 2013, *archived at* http://perma.cc/YTV5-UXM5) (Google Translate) (listing the Republics of Benin, Burkina Faso, Cameroon, Central African Republic, DR Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Senegal, Chad, and Togo).

86. *History*, OAPI, http://www.oapi.int/index.php/en/aipo/historique (last visited Mar. 9, 2013, *archived at* http://perma.cc/7KBP-JGF5) (Unofficial Google Translator Translation).

87. Accord portant révision de l'Accord de Bangui du 02 mars 1977 instituant une Organisation Africaine de la Propriété Intellectuelle [Agreement Revising the Bangui Agreement of 02 March 1977 establishing an African Intellectual Property] art. 10, Mar. 2, 1977 (amended Feb. 24, 1999), *archived at* http://perma.cc/ZCB6-VM4Z (English language translation by the International Bureau of WIPO).

88. *See infra* Appendix A, Benin, Burkina Faso, Cameroon, DR Congo, Guinea-Bissau, Senegal, Chad, and Togo; *infra* Appendix B, chart columns for Benin, Burkina Faso,

recognized as having a good intellectual property framework, despite some enforcement issues.[89]

4. Australia[90]

Australia is one example of an individual country that has crafted a national-level resale royalty. It has enacted a detailed, flat-rate royalty scheme that has been largely effective.[91] Its success might be attributable to its most distinguishing feature—Australian resale royalty legislation is far more centralized than other schemes.[92] However, many of Australia's key royalty elements are similar to those of the European Union.

In Australia, the royalty applies to each commercial resale of "original work[s] of visual art"[93] that involves an art market professional,[94] so long as the sales price meets or exceeds AUD $1,000 or foreign currency equivalent.[95] This scheme allows authors to pursue the right on their own or through one government approved collective management entity.[96] However, authors and their successors must pass a residency test in order to claim the right.[97] In a position that varies slightly from that of EU or CAN

Cameroon, DR Congo, Guinea-Bissau, Senegal, Chad, and Togo.

89. *Make the Most of Africa's IP Organisations*, MANAGING INTELLECTUAL PROPERTY (Oct. 1, 2009), http://www.managingip.com/Article/2306369/Make-the-most-of-Africas-IP-organisations.html, *archived at* http://perma.cc/E7GL-3Y58.

90. *Resale Royalty Right for Visual Artists Act 2009* (Austl.), *archived at* http://perma.cc/X7CJ-TNMC.

91. *See* RESALE ROYALTY, http://www.resaleroyalty.org.au/ (last updated Aug. 8, 2013, *archived at* http://perma.cc/86GS-89WG). Between its inception in June of 2010 and Jan. 31, 2013, Copyright Agency Ltd. distributed $1.4 million to more than 530 artists, 85 percent of whom were living and 60 percent of whom were indigenous; and, most royalties paid fell between $50-500. *Id.*; *see also* COPYRIGHT AGENCY LTD. AND VISCOPY, SUBMISSION TO US COPYRIGHT OFFICE ON ARTISTS' RESALE ROYALTY RIGHT 4 (2012), *archived at* http://perma.cc/H66Y-7C37 (commentary in response to Notice, 77 Fed. Reg. 58,175 (Sept. 19, 2012) (notice of inquiry) and Notice, 77 Fed. Reg. 63,342 (Oct. 16, 2012) (extension of comment period)) (characterizing efforts as "successful").

92. COPYRIGHT AGENCY LTD. AND VISCOPY, *supra* note 91 (noting one website that reports auction sales); *Resale Royalty Scheme*, ATTORNEY GENERAL OF AUSTRALIA, http://arts.gov.au/visual-arts/resale-royalty-scheme (last visited Oct. 24, 2013, *archived at* http://perma.cc/PZ2P-FNWW) (noting that Copyright Agency Ltd. is the singular entity appointed by the government to manage resale royalties for a period of five years); *Resale Royalty Right for Visual Artists Act 2009*, *supra* note 90, § 35.

93. *Resale Royalty Right for Visual Artists Act 2009*, *supra* note 90, §§ 7, 13 (including but not limited to artists' books, batiks, carvings, ceramics, etc.) (alteration added).

94. *Resale Royalty Right for Visual Artists Act 2009*, *supra* note 90, § 8 (excluding some transfers per §§ 8, 9, and 11 and defining "art market professional" as an auctioneer, owner, or operator of a gallery or museum, art dealer, or other person involved in the business of dealing in artworks).

95. *Resale Royalty Right for Visual Artists Act 2009*, *supra* note 90, § 10 (minimum price).

96. *Resale Royalty Right for Visual Artists Act 2009*, *supra* note 90, §§ 19-31, 35-38.

97. *Resale Royalty Right for Visual Artists Act 2009*, *supra* note 90, § 14 (residency test

Members, Australia provides that unclaimed funds should first be distributed to any co-authors, then remitted back to the seller, and, if neither is possible, retained to cover administrative costs.[98] Like the European Union and the majority of CAN, the right is exercisable for the life of the author plus seventy years.[99] The remuneration rate is 5 percent of the sales price net of buyer's premiums and taxes, except the goods and services tax, or GST.[100] This differs from the EU royalty which is calculated from the net of all taxes and uses a sliding scale rather than a flat rate.[101] Similar to EU and CAN royalties, the Australian royalty is considered personal, is absolutely inalienable, and cannot be waived.[102] These rights may only be devised or descend where a four-pronged succession test is met.[103]

5. Brazil[104]

A very different example is found in the country of Brazil. It also employs a national-level resale royalty scheme. Brazil's legislation simply provides that "[t]he author has the irrevocable and inalienable right to collect a minimum of 5 per cent of any gain in value that may be achieved in each resale of an original work of art of [sic] manuscript that he has disposed of."[105] The right is exercisable for the life of the author plus seventy years,[106] and may be devised per "the order of succession under civil law."[107] Additionally, authors may choose to form non-profit organizations for the exercise and defense of their rights.[108] Either way, "[w]here the author does not collect his resale royalty at the time of the resale, the vendor shall be considered the depositary of the sum payable to him, except where the operation has been conducted by an auctioneer, in

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applies to natural and legal persons).

98. *Resale Royalty Right for Visual Artists Act 2009*, *supra* note 90, § 31 (return of royalties after 6 years).

99. *Resale Royalty Right for Visual Artists Act 2009*, *supra* note 90, § 32 (duration).

100. *Resale Royalty Right for Visual Artists Act 2009*, *supra* note 90, § 18 (consideration threshold); *see generally GST Overview*, AUSTRALIAN TAXATION OFFICE, http://www.ato.gov.au/content/57709.htm (last updated Jul. 24, 2013, *archived at* http://perma.cc/9M4R-EUJZ) (describing the GST); *GST in Australia*, MY MOTHER HEN: CHARTERED ACCOUNTANTS, http://www.gstaustralia.com.au/ (last visited Jan. 10, 2014, *archived at* http://perma.cc/Y345-FKU2) (explaining that the GST is comparable to the European Union's value-added tax, or VAT).

101. *See supra* Part II.A.1.

102. *Resale Royalty Right for Visual Artists Act 2009*, *supra* note 90, §§ 33-34.

103. *Resale Royalty Right for Visual Artists Act 2009, supra* note 90, § 15.

104. Decreto No. 36, de 19 de Fevereiro de 1998, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20192020.2.1998 (Braz.), *archived at* http://perma.cc/BAZ5-NANN (English language translation by the International Bureau of WIPO).

105. *Id*. art. 38 (alteration added).

106. *Id*. arts. 41-45 (duration).

107. *Id*. art. 41 (succession).

108. *Id*. arts. 97-100 (collective management).

which case the latter is considered the depositary."[109]

This particular scheme is very shallow and adopts the percentage-of-increase model that Liliane de Pierredon-Fawcett reported in the early 1990s had proved unworkable because of the complexities and costs associated with tracking both purchase and sale prices.[110] The insufficiency of Brazil's intellectual property protection generally, relative to other countries, has already been noted.[111] However, the scheme that Brazil sets out is worth reviewing because it is typical of the way many countries used to structure the right.[112]

B. Prior Resale Royalties in the United States

1. Early Federal Efforts

Resale royalties were advocated in the United States as early as the 1940's by individual authors and creative unions.[113] But, these movements did not gain traction until the media circulated reports of a public physical altercation between an artist and an art dealer who flipped the artist's work at auction.[114] After that event, there were three failed attempts at adopting federal resale royalty legislation.[115] The following provides a history as well as some examples of the ways in which this type of legislation might be drafted.

a. Visual Artist's Residual Rights Act of 1978[116]

This first attempt at crafting a federal resale royalty called for an

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109. *Id*. art. 38 (sole paragraph).

110. DE PIERREDON-FAWCETT, *supra* note 7, at 12-13, 108-110; *see also* U.S. COPYRIGHT OFFICE, DROIT DE SUITE: THE ARTIST'S RESALE ROYALTY xii (1992), *archived at* http://perma.cc/J4W7-JFSP (noting that successful implementation requires the simple and practical method of taking from the resale price).

111. KIRK, *supra* note 83, at 41-42 (indicating that amendments are pending but that they could be better; Brazil continues to face problems of enforcement, increasing instances of piracy and counterfeit goods); Marjolein van der Heide, *Brazilian Collecting Society ECAD Faces Fraud Charges*, FUTURE OF COPYRIGHT (Feb. 5, 2012), http://www.futureofcopyright.com/home/blog-post/2012/05/02/brazilian-collecting-society-ecad-faces-fraud-charges.html, *archived at* http://perma.cc/Y57S-WFN8.

112. DE PIERREDON-FAWCETT, *supra* note 7, at 201-58 (noting twenty out of thirty countries with portion-of-proceeds type legislation – e.g., Chile (1970), Czechoslovakia (1926), Italy and Holy See (1941), Luxembourg (1972), Poland (1935), Uruguay (1938), etc.).

113. Farber, *supra* note 10, at 724-25.

114. Farber, *supra* note 10, at 725.

115. *See* Doll, *supra* note 24 (comparing US national resale royalty legislative efforts).

116. *See generally* Visual Artists' Residual Rights Act of 1978, H.R. 11403, 95th Cong. (1987).

extensive regulatory scheme that included provisions for the creation of a National Commission on the Visual Arts (NCVA) that would administer the Act and promulgate regulations accordingly, and for the establishment of a Visual Arts Fund.[117]

The resale royalty applied to sales of all "work[s] of visual art"[118] that were also considered "works of fine art,"[119] which were sold in interstate commerce.[120] The royalty would not apply to works priced less than $1,000 or exchanged for goods with a fair market value less than $1,000 and that are not visual works of art, or to works resold for less than 105% of the seller's purchase price.[121] The royalty rate was 5 percent of the sales price or the fair market value of goods exchanged that were not visual works of art.[122] After each sale, the seller had thirty days to remit the royalty alongside a statement of the details of the transaction to the NCVA before sanctions could apply.[123] Information remitted in statements to the NCVA was confidential unless waived in writing or by order of the court for good cause.[124]

The resale royalty duration was life plus the period within fifty years of the author's date of death. Collection of the royalty by the author[125] was voluntary—it was contingent on the author having registered and filed a written claim with the NCVA, and was limited to a seven-year claim period.[126] The royalty was inalienable, and authors could not waive or assign their interests, but they could devise them according to a specific order of priority: desired beneficiary, surviving spouse, any surviving legal children, surviving parents, the estate, or according to state intestacy laws.[127]

Additionally, authors reselling their work and dealers making a resale

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117. *Id.* § 6 (directing the NCVA to establish a fund with a "payments" account and an "operations" account).

118. *Id.* § 2. "The term 'work of visual art' means an original two-dimensional or three-dimensional work of art which is a painting, sculpture, drawing, photograph, print, etching, or lithograph. . . . [and] does not include any category of items which the [NCVA] shall determine by regulation not to be a category of *works of fine art*." *Id*. (emphasis added) (alterations added).

119. *Id*.

120. *Id.* § 2(5), 4(a)(1).

121. *Id.* § 4(a), 4(e) (describing minimum price, minimum appreciation in value, and other exclusions).

122. *Id.* § 4(a) (also fair market values were subject to NCVA review).

123. *Id.* § 4(d) (indicating that should a seller fail to submit the royalty or statements, the NCVA could bring an action to enforce within the three-year period following the sale date, or within the one-year period following notice of a sale, whichever occurs last).

124. *Id.* § 3(k).

125. *See id*. § 5(b), 4(e)(3) (giving special treatment to disbursement of royalties to joint authors and authors of commissioned works).

126. *Id*. § 5(c), (d).

127. *Id*. § 5(f).

within two years of the purchase date were excluded from the royalty.[128] Finally, art work integrated with a permanent structure and sold as part of the structure was also excluded.[129]

b. Visual Artists Rights Amendment of 1986[130]

This legislation would have added a resale royalty as an exclusive right under section 106 of the Copyright Act.[131] The purpose of this legislation was "to provide for resale royalties" and other moral rights.[132] The resale royalty provision applied to each sale after the initial sale by the artist.[133] It covered "pictorial, graphic, or sculptural works."[134] There was a minimum price as well—a "gross sales price" of "$500" or an "exchange for property with a fair market value" of "$500" so long as the seller received at least "140 percent of the purchase price paid by the seller."[135] The seller was required to "pay to the artist or to the artist's agent . . . [or] to the National Endowment for the Arts for use in the visual arts program."[136] The duration was the artist's life plus "fifty years after his death."[137]

The royalty rate was "7 percent of the difference between the seller's purchase price and the sale price or the fair market value of any property received in exchange for the work."[138] The royalty could not be waived[139] or devised or descend.[140] However, the royalty might be assigned during the author's lifetime so long as the assignment did not, in effect, constitute a prohibited waiver.[141] Hence, the powers of assignment were available but limited. Finally, registration was required for the copyrighted work and for

128. *Id*. § 5(e).

129. *Id*.

130. *See generally* Visual Artists Rights Amendment of 1986, S. 2796, 99th Cong. (1986).

131. *Id*. § 3(d)(1); *see also* H.R. 5722, 99th Cong. (1986) (identical); *see generally* Copyright Act of 1976, 17 U.S.C.A. § 106 (West 2012) (providing copyright owners with certain exclusive rights).

132. S. 2796 at § 3(d)(1).

133. *Id*.

134. *Id.*

135. *Id*.

136. *Id*.

137. S. 2796 at § 3(d)(1).

138. *Id*.

139. *Id.*

140. *Id*. ("[W]here the artist is deceased at the time of the sale, and the sale occurs within fifty years . . . royalty shall be paid to the National Endowment for the arts . . . .") (alterations added).

141. *Id*. ("An artist may assign the right . . . provided however, such assignment shall not have the effect of creating a [prohibited] waiver . . . .") (alterations added); *see also* S. 2796 at § 3(d)(1). This also suggests a further limitation on assignments—that they terminate with the author's death.

the sale or transfer subject to the royalty.[142]

c. Visual Artists Rights Act of 1987[143]

This version only differed in some regards from the 1986 legislation. The minimum price was a "gross sales price" of $1,000 or an "exchange for property with a fair market value" of $1,000 so long as the seller received at least "150 percent of the purchase price paid by the purchaser."[144] The royalty rate was "7 percent of the difference between the seller's purchase price and the amount the seller receive[d] in exchange for the work."[145] The royalty did not apply to works made for hire.[146] The seller was required to pay "to the author . . . [or] to the estate of the author."[147] Since the royalty could go to the estate it is likely that it was devisable or descendible in some fashion, unlike the 1986 version. But similar to the 1986 version, the right could not be waived but the author was free to assign it provided the assignment did not constitute a prohibited waiver.[148] Registration was required for the copyrighted work and for the sale or transfer subject to the royalty within ninety days of the transaction.[149]

d. Visual Artists Rights Act of 1990 (VARA)[150]

There were five versions of VARA,[151] but none of them contained a separate provision granting resale royalty rights. Instead, the final bill enacted directed the Copyright Office to conduct a study to determine the feasibility of implementing a resale royalty right.[152]

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142. Visual Artists Rights Amendment of 1986, S. 2796, 99th Cong. § 3 (1986).

143. *See generally* Visual Artists Rights Act of 1987, H.R. 3221, 100th Cong. (1987).

144. *Id.* § 3(d)(2). For example, an author sells a work of fine art to a purchaser for $10. The purchaser then sells the same work to a buyer. If the purchaser-seller sells the work for $12 there is no royalty. If the work sells for $16 the royalty would apply. Instead of a minimum price, the statute looks to a minimum percentage gain in value, comparing purchase price to sales price, to determine whether to apply the royalty.

145. *Id.* § 3(d)(2) (alteration added).

146. *Id.* § 8.

147. *Id.* § 3(d)(1). ("[W]here the author is deceased at the time of the sale, and the sale occurs within fifty years . . . royalty shall be paid to the estate of the author . . . .") (alterations added).

148. *Id*.

149. *Id.* § 3(d)(2).

150. Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2012).

151. *See generally* Visual Artists Rights Act of 1990, H.R. 2690, 101st Cong. (1990), *archived at* http://perma.cc/5UP4-NWYY.

152. *Id.* § 8(b); *see generally* U.S. COPYRIGHT OFFICE, *supra* note 110. This report essentially concludes that there was not enough empirical evidence as to the effectiveness of the various efforts in practice, that more study is needed, and that the issue should be revisited once Europe has harmonized. U.S. COPYRIGHT OFFICE, *supra* note 110, at xv-xvi.

2. State and Territory Efforts

While federal efforts failed to bear fruit, other portions of the United States were able to put forth resale royalty legislation. Two entities—California and Puerto Rico—enacted statutes crafted like those already in place internationally.

a. California

The resale royalty applies "[w]henever a work of fine art is sold and the seller resides in California or the sale takes place in California."[153] "Fine art" means "an original painting, sculpture, or drawing, or an original work of art in glass."[154]

The royalty does not apply to works sold for less than $1,000, or to barters or combined property and cash barters where the value of the exchange is less than $1,000.[155] The seller or the seller's agent pays the artist, or if unable to locate the artist within ninety days, the California Arts Council.[156] The royalty is payable for the life of the artist plus twenty years.[157] The rate is a flat 5 percent of the sales price.[158] The royalty right may be waived

> only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale. An artist may assign the right to collect the royalty payment provided by this section to another individual or entity. However, the assignment shall not have the effect of creating a waiver prohibited by this subdivision.[159]

An artist may devise his right to collect royalties to her "heirs, legatees, or personal representative."[160] However, works of fine art resold within ten years strictly between dealers, and works of stained glass artistry permanently affixed to real property and sold as part of the real property are excluded from the royalty.[161]

153. CAL. CIV. CODE § 986(a) (West 2012).
154. *Id.* § 986(c)(2).
155. *Id.* § 986(b)(2), (5).
156. *Id.* § 986(a).
157. *Id.* § 986(a)(7).
158. *Id.* § 986(a).
159. *Id.*
160. *Id.* § 986(a)(7).
161. *Id.* § 986(b)(6), (7).

b. Puerto Rico

The Puerto Rican resale royalty statute is very brief, but presents a different perspective from the California and proposed federal statutes:

> Any person who creates a work of art is entitled to receive five (5) percent of the increase in the value of said work at the moment it is resold. Said amount shall be deducted from the seller's earnings and his/her agent or proxy shall be jointly responsible for that amount. In those cases in which the whereabouts of the author are not known, the resulting amount shall be deposited in his/her name in a special account to be opened by Copyright Registrar.[162]

Hence, the Puerto Rican statute applies only to works whose value appreciates.[163]

III. THE EQUITY FOR VISUAL ARTISTS ACT OF 2011 (EVAA)[164]

Like prior efforts, this legislation would add a resale royalty as an exclusive right under section 106 of the Copyright Act.[165] The Act does not contain a statement of purpose.[166] The resale royalty applies "[w]henever a work of visual art is sold as the result of auction of that work by someone other than the artist who is the author of the work."[167] A "work of visual art" means:

> (1) a painting, drawing, print, sculpture, or photograph, existing either in the original embodiment or in a limited edition of 200 copies or fewer that bear the signature or other identifying mark of the author and are consecutively numbered by the author, or, in the case of a sculpture in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the

162. P.R. LAWS ANN. TIT. 31, § 1401(h) (2012).

163. *See generally* DE PIERREDON-FAWCETT, *supra* note 7, at 5 (noting that the appreciation in value method typically failed because of the complexity of tracking and remitting along the chain of sales).

164. *See generally* Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. (2011).

165. *Id*. § 3(2).

166. *See generally id.*

167. *Id.* § 3(2) (alteration added).

author.[168]

The term "auction" means "a public sale run by an entity that sells to the highest bidder works of visual art in which the cumulative amount of such works sold during the previous year is more than $25,000,000 and does not solely conduct the sale . . . on the Internet,"[169] and "sale" means a "transfer of ownership or physical possession of a work as the result of the auction of that work."[170]

The resale royalty "shall not apply to the sale of a work for a gross sales price of less than $10,000, or in exchange for property with a fair market value of less than $10,000."[171] The selling entity must remit payment to a collecting society within ninety days.[172] The Act does not explicitly state the relevant duration, but because the right was added as a Section 106 right, presumably the duration is the same as the other rights: life plus seventy years.[173] The royalty is 7 percent of the price.[174] Price means "the aggregate of all installments paid in cash or in-kind by or on behalf of a purchaser for a work as the result of auction of that work."[175] However, the visual artist will realize no more than 3.5 percent:

> [N]o fewer than 4 times per year, [a collecting society will distribute] 50 percent of the net royalty to the artist or his or her successor as copyright owner. After payment to the artist or his or her successor as copyright owner, the remaining 50 percent of the net royalty shall be deposited into an escrow account established by the collecting society for the purposes of funding purchases by nonprofit art museums in the United States of works of visual art authored by living artists domiciled in the United States."[176]

The term "net royalty" means "the royalty amount collected less administrative expenses of the visual artists' collecting society. In no case shall the administrative expenses of the visual artists' collecting society subtracted from the royalty amount collected exceed 18 percent."[177]

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168. *Id.* § 2(5) (amending the definition of "works of visual art" in 17 U.S.C. § 101 to include photographs).
169. *Id*. § 2(1) (amending 17 U.S.C. § 101 to add "auction").
170. *Id.* § 2(1) (amending 17 U.S.C. § 101 to add "sale").
171. *Id.* § 3(2).
172. *Id*.
173. 17 U.S.C. §§ 302-05.
174. H.R. 3688 § 3(2).
175. *Id*. § 2(2) (amending 17 U.S.C. § 101 to include a new definition).
176. *Id*. § 3(2) (alterations added).
177. *Id.*

Additionally, the Copyright Office may deduct up to 5 percent of annual collections prior to the deduction of collecting society fees.[178] Both the right to receive a royalty and the obligation to deposit in escrow may not be waived.[179] The Copyright Office is charged with administering the statute.[180]

At the outset, then, US-proposed statutes were very detailed, complex schemes. Later versions were severely stripped down. The most recent version, the EVAA, presents a sort of middle ground.

A. How the EVAA Handles the Recognized Problems of Resale Royalty Legislation

It is important to recognize at the outset that no single law can anticipate every possible factual situation. Legal professionals learn early in their education that this is what makes writing and administering laws so difficult, and what ultimately generates case law. The experience of other countries has highlighted several fact situations common to resale royalty legislation which might be useful in crafting a US version. Curiously, the EVAA addresses only some of these concerns, causing some commentators to report that the law, as introduced, goes both too far and not far enough.[181]

1. Problems of Market Efficiency

Differences in copyright coverage can impede the proper functioning of the market.[182] If a resale royalty encumbers future sales, patterns of demand, pricing, and velocity may be affected.[183] Some scholars argue that dealers and galleries have fixed costs to consider and would have to decrease purchase prices on the front end to handle the higher cost to them on the back end.[184] If visual artists are unwilling to lower prices,[185] then

178. *Id.* § 6.

179. *Id.* § 3(2).

180. *Id.* § 5.

181. *See* Bill Davenport, *supra* note 19 and accompanying text.

182. Silva, *supra* note 81, at 433 (examining copyright unity in the Andean Community); *see also* Council Directive 2001/84, §14, 2001 O.J. (L 272) 37 (EC) (discussing how differences in national resale right provisions impeded proper market functioning within the EU).

183. Elliot C. Alderman, *Resale Royalties in the United States for Fine Visual Artists: An Alien Concept*, 40 J. COPYRIGHT SOC'Y U.S.A. 265, 279-80 (1992).

184. Eden, *supra* note 7, at 155-57.

185. *See* Maryam Dilmaghani & Jim Engle-Warnick, *The Efficiency of Droit de Suite: An Experimental Assessment*, 9 REV. OF ECON. RES. ON COPYRIGHT ISSUES 93, 102-103, 117-118 (2012) (phrasing the analysis in terms of the artist's willingness to accept, or WTA, the investor's price; while not specifically stated, if artists are unwilling to fully discount the initial price to off-set the future earnings attributable to resale royalties, then basic economics suggests that investors would be less likely to demand works because a higher

purchase demand could be impacted. Hence, scholars have argued that velocity is much more likely to be affected than previously thought.[186]

Additionally, some fear that imposition of a resale royalty could cause market flight to areas where the right is legally the least burdensome,[187] or drive sales into the private sector.[188] This forum shopping might also occur at a national level if states are allowed to retain or promulgate their own resale royalty statutes.[189] Similarly, sham sales may occur. Sham sales involve moving sales outside areas where the right applies in contravention of the law to avoid paying the royalty that is owed.[190]

However, the practical experiences of many countries that have implemented a resale royalty debunk these concerns. First, many factors determine the location of a market–geographic proximity, public taste, market size or structure, tradition, the presence of experts, the expertise and proactivity of operators, legislation, taxes, etc.[191] The art market began in Europe and progressed to other areas as the demand for luxury goods grew.[192] Globalization of markets has also had a hand in opening up markets in China, Russia, and India.[193] In 2011, European reports indicated that the arts markets in the United States and Switzerland declined while the markets in the United Kingdom, France, and Germany expanded[194]—the

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WTA means a higher price); *see also* Shane Ferro, *What Would Importing Droit de Suite to the U.S. Mean for the Art Market?*, ARTINFO.COM (Aug. 5, 2011), http://www.artinfo.com/news/story/38274/what-would-importing-droit-de-suite-to-the-us-mean-for-the-art-market, *archived at* http://perma.cc/6QUS-UVQV (noting that resale royalty legislation may decrease demand for art generally).

186. Dilmaghani & Engle-Warnick, *supra* note 185, at 117.

187. *See* Eden *supra* note 7, at 151-53.

188. Benjamin C. Fishman & Jo Backer Laird, *Artist Resale Royalties in America: California Law Struck Down. National Legislation Proposed*, LEXOLOGY (Aug. 28, 2012), http://www.lexology.com/library/detail.aspx?g=75a56f7b-a942-4abb-b5bb-1abe3d2868f9, *archived at* http://perma.cc/9WFN-6Z6J (asserting that resale royalty legislation will "chase more sales out of public view").

189. Mara Grumbo, Note, *Accepting Droit de Suite as an Equal and Fair Measure Under Intellectual Property Law and Contemplation of its Implication in the United States Post Passage of the EU Directive*, 30 HASTINGS COMM. & ENT L.J. 357, 361-75 (2008).

190. *See* Eden, *supra* note 7, at 146; *see also* U.S. COPYRIGHT OFFICE, *supra* note 110, at xiv.

191. EUROPEAN GROUPING OF SOCIETIES OF AUTHORS AND COMPOSERS, NOTICE OF INQUIRY ON RESALE ROYALTY RIGHT GESAC COMMENTS (GESAC) 2 (2012) (commentary in response to Notice, 77 Fed. Reg. 58,175 (Sept. 19, 2012) (notice of inquiry) and Notice, 77 Fed. Reg. 63,342 (Oct. 16, 2012) (extension of comment period)), *archived at* http://perma.cc/4VWR-6ZFA.

192. *Id*.

193. *Id.*

194. EUROPEAN VISUAL ARTISTS (EVA), SUBMISSION OF COMMENTS FOR THE EQUITY FOR VISUAL ARTISTS ACT OF 2011 BY EVA (EUROPEAN VISUAL ARTISTS) 3 (2012) (commentary in response to Notice, 77 Fed. Reg. 58,175 (Sept. 19, 2012) (notice of inquiry) and Notice, 77 Fed. Reg. 63,342 (Oct. 16, 2012) (extension of comment period)), *archived at* http://perma.cc/K92C-M6S6 (citing European Commission 2011 Report, *archived at*

very opposite of what should have happened, had forum shopping actually occurred. Similarly, growth of the arts market in China was likely due to a general rise in disposable income rather than any forum shopping.[195] It would seem that as long as the collection rate is no higher than other transactional costs, the market has been shown to absorb them.[196] The EVAA employs a 7 percent rate, an amount less than standard auction house fees,[197] and not much different from taxes.[198] Therefore, the EVAA is not likely to cause any significant forum shopping or sham sales.

2. Problems of Doctrinal Conflict

When the legal basis for a statute is unclear, the public may criticize the law and fail to take it seriously.[199] One legal basis on which the resale right might be predicated is that of unjust enrichment. Under this precept, a subsequent owner is unjustly enriched by increases in value which cannot be attributed in any major way to the actions or abilities of the owner, but can reasonably be attributed to the artist "whose efforts and increasing popularity have had an appreciable impact."[200]

Alternatively, the legal basis might be conceived as one of "just desserts" or "participation of the author" in the exploitation of the author's works. Because of factual differences in methods of creating, authors of graphic and plastic works can neither fully participate in the reproductive right nor leverage the distribution right to the same extent as writers and

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http://perma.cc/YJF2-MDBE).

195. *Id.* at 3-4; *see also* SARAH THORNTON, SEVEN DAYS IN THE ART WORLD xvi (2009) (noting that art is popularly considered a luxury good or a status symbol).

196. Eden, *supra* note 7, at 149-50, 157 (noting fees including a ten to twenty-percent buyer's premium on top of a ten to twenty-percent auction house commission); Shira Perlmutter, *Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report*, 40 J. COPYRIGHT SOC'Y U.S.A. 284, 298 (1992-1993) (predicting this effect).

197. Eden, *supra* note 7, at 157.

198. Ferro, *supra* note 185 (referring to the royalty as a "tax"); *see also* Letter from Derek Wilson, (commentary in response to Notice, 77 Fed. Reg. 58,175 (Sept. 19, 2012) (notice of inquiry) and Notice, 77 Fed. Reg. 63,342 (Oct. 16, 2012) (extension of comment period)), *archived at* http://perma.cc/5BGU-UC65 ("For any gains in art sales, collectors already pay a 28% cap gains, a (soon) 3.8% healthcare tax and roughly a 10% commission to sell. So they are already paying 42% in selling costs."); Alex Rogers, *5 New Obamacare Taxes Coming in 2013*, TIME (Dec. 7, 2012), http://swampland.time.com/2012/12/07/5-new-obamacare-taxes-coming-in-2013/, *archived at* http://perma.cc/ATQ2-F5PX (confirming 3.8% capital gains tax increase for 2013).

199. *See, e.g.*, Alexander Bussey, *Equity for Visual Artists Act 2011*, ALEXANDERKAIM BLOG (Dec. 22, 2011, 7:25 AM), http://alexanderkaim.blogspot.com/2011/12/equity-for-visual-artists-act-2011.html, *archived at* http://perma.cc/ZLD5-MZWP (suggesting the law would not do what it sets out to do); *see also* W.W. Kowalski, *A Comparative Law Analysis of the Retained Rights of Artists*, 38 VAND. J. TRANSNAT'L L. 1141, 1173 (2005) (noting that a common problem of droit de suite legislation is that its statutory form sometimes contradicts its essence).

200. DE PIERREDON-FAWCETT, *supra* note 7, at 13.

composers, which suggests an inequity that needs to be addressed.[201] Accordingly, the just reward theory that sometimes underpins moral rights legislation generally[202] can also be the basis for a resale royalty because it asks: "[A]re not visual artists just as deserving of royalties for their creative efforts as writers and composers?"

Others contemplate a more cynical view—that capitalists benefit from intellectual property rights, which serve as a basis for economic power.[203] Laws which protect intellectual property commoditize it and perhaps falsely assume that some sort of equilibrium is achievable.[204] Related is the idea that dominant ideas are those of the ruling class.[205] Combined, these statements flag the need for legislation to find an equilibrium which is likely shifted more towards those who have the economic power: art market professionals.[206] However, this view might not reflect the realities of the art market.[207]

Also, because resale royalties are arguably moral in character, there is some latitude for a natural rights or personality foundation. This view derives from Lockean theory of property in one's own person—that a man is entitled to "the Labour of his Body," "the Work of his Hands."[208] Related is the idea that the artist's work is an extension of the artist's personality. This view holds that everyone is entitled to claim protection for his or her personality and anything that flows from it.[209] However, the former view, at least, is not a good fit for the United States, which has disavowed that the

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201. DE PIERREDON-FAWCETT, *supra* note 7, at 17-20 (noting that such inequities are not new, that drafts for popular reform in the early 1900's frequently contained the slogan "*le droit d'auteur aux artistes*" (author's rights for artists), and that participation in each sales price is appropriate; explaining further that the factual differences between types of authors is exacerbated by technologies which allow writers and composers to produce works on a near mass scale).

202. STOKES, *supra* note 4, at 15. *But see* STOKES, *supra* note 4, at 15-16, 16 n.22 (indicating that the problem with the just rewards theory is determining how much or how little reward is sufficient under the circumstances).

203. *See* Ronald V. Bettig, *Copyright and the Commodification of Culture*, 50 MEDIA DEVELOPMENT 3 (2003).

204. *Id*.

205. Roderick T. Long, *Can We Escape the Ruling Class?,* FORMULATIONS (1994), *archived at* http://perma.cc/J2TJ-HPSK.

206. THORNTON, *supra* note 195, at xii (noting the art world is about control mediated by trust; it is a "statusphere;" great art does not arise, it is made). Artists who aren't institutionalized risk being shut-out. THORNTON, *supra* note 195, at 118.

207. Lindsay Sullivan, SUITE AND SOUR: An Analysis of the Legal and Economic Woes of The Droit De Suite (2010) (unpublished M.B.A. thesis) (on file with Sotheby's Institute of Art – New York). (Sullivan indicates that this view is probably antiquated and has a tendency to paint art market professionals as villains). *Id*. at 19-20.

208. *See* STOKES, *supra* note 4, at 17-21.

209. STOKES, *supra* note 4, at 19. *But see* STOKES, *supra* note 4, at 20-21 (discussing the problems of natural rights and personality theories—namely, how much effort is to be rewarded, and that creations derive from much more than just the artist's personality).

"sweat of the brow" doctrine has a place in US copyright law.[210] Viewing the right as attached to the author somehow, as an extension of himself so to speak, might work as the United States has already done this to some extent with VARA.[211]

Most countries structure the resale royalty right as an economic right,[212] but espouse some sort of equitable purpose.[213] This is the problematic dual nature that spurs many arguments[214] over the benefits of such a right. But, scholars remind us that the point is not to give artists a piece of economic pie, but to recognize certain types of art as a special kind of property important enough in our culture due to its uniqueness that we should create laws which favor a certain kind of *exploitation*—namely, purchase by museums or other institutions where many people can benefit from viewing the objects.[215] It is not about economics, but exploitation. Hence, some countries refer to the royalty as a remuneration right.[216] Structuring the royalty as a right reminds people that the object and the rights are distinct, that it is a right tied to the artist, not the object.

All of these doctrines are dancing around the idea of "purpose." As stated above, when the purpose and the effect of the statute mismatch, the statute may engender criticism.[217] Is the right meant to aid visual artists new to the market, or to help visual artists more generally? How the right is framed matters.[218] The EVAA does not include any mention of a purpose apart from its long title.[219] This concern might be remedied with the inclusion of express language that states the purpose in clear terms.

3. Problems of Statutory/Tradition Conflict

At first blush, the first-sale right granted under US copyright law

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210. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991). "The 'sweat of the brow' doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement-the compiler's original contributions-to the facts themselves. . . . Without a doubt, the 'sweat of the brow' doctrine flouted basic copyright principles. . . . [T]he 1976 revisions to the Copyright Act leave no doubt that originality, not 'sweat of the brow,' is the touchstone of copyright protection . . . " *id*. at 353, 354, 359-60 (alterations added).

211. Visual Artists Rights Act of 1990, H.R. 2690, 101st Cong. § 3 (1990).

212. *See, e.g.*, *infra* Appendix A, Spain, Sweden; *infra* Appendix B, chart columns for Spain, Sweden.

213. *See*, *e.g.*, 2001/84/EC §§ (3), (4), (11) (pmbl.).

214. STOKES, *supra* note 4, at 97.

215. Eden, *supra* note 7, at 124-25 (citing DE PIERREDON-FAWCETT, *supra* note 7, at 19); *see also* DE PIERREDON-FAWCETT *supra* note 7, at 19-20 (citing Abel Ferry and talking about participation in exploitation versus participation in speculation).

216. *See, e.g.*, *infra* Appendix A, Estonia; *infra* Appendix B, chart column for Estonia.

217. *See supra* Part III.A.2.

218. Alderman, *supra* note 183, at 278-79.

219. Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. (2011).

seems incompatible with resale royalty legislation:

Notwithstanding the provisions of section 106(3) [17 USCS sec. 106(3)], the owner of a particular copy or phonorecord lawfully made under this title [17 USCS secs. 101 et seq.], or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.[220]

Indeed, scholars argue that resale rights are in direct conflict with well-settled first-sale principles.[221] Some academics suggest that the first-sale doctrine cannot exist simultaneously with a resale royalty right.[222] However, the first-sale doctrine exhausts the copyright interest owner's exclusive *distribution rights* and in so doing increases competition by allowing for parallel importation and a secondary market.[223] Resale royalties characterized as moral rights or other express intangible rights are easily distinguished because they attach to the person, not the tangible item that is the subject of a resale transaction.[224] The limited moral rights already adopted by the United States are illustrative.[225] Without consideration for the principle that the material object and the author's rights are distinct, these rights appear to conflict with the first-sale doctrine.[226] The EVAA as introduced would slightly restructure the Section 106 exclusive rights of the Copyright Act such that the traditional six would fall under prong "(a)" and the EVAA would fall under "(b)."[227] This separation is useful, but it might not be enough since it would still fall under the preamble which reads "[s]ubject to sections 107 through 122 . . . ."[228] Thus it does little to relieve the confusion over Section 109's first-sale doctrine. The bill should make a provision for a positive statement within Section 109 that it is applicable only to the distribution right, and not to the resale royalty right.

Closely related to the first-sale doctrine is the principle of free-

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220. 17 U.S.C. § 109(a) (2012).

221. Benjamin S. Hayes, *Integrating Moral Rights Into U.S. Law and the Problem of the Works for Hire Doctrine*, 61 OHIO ST. L. J. 1013, 1022 (2000).

222. *See* Alderman, *supra* note 183, at 279.

223. Silva, *supra* note 81, at 446-47 (noting the US first sale doctrine while discussing how to achieve a common market between nations).

224. *See* 17 U.S.C. § 202 (2012) (stating that ownership of rights is not the same thing as ownership of a material object).

225. 17 U.S.C. § 106A(a)(3) (2012) (codifying VARA's right of integrity– stating that an author may prevent the intentional distortion, mutilation, or other modification of the author's work, or prevent intentional or grossly negligent destruction of the author's work if it is of "recognized stature").

226. *Id*. VARA rights are not the only ones which appear to conflict with the first sale provision. For further information *see* John Wiley & Sons, Inc. v. Supap Kirtsaeng, 654 F.3d 210, 218 (2d Cir. 2011), *archived at* http://perma.cc/542J-XTAZ; Sebastian Int'l, Inc. v. Consumer Contacts (PTY) Ltd., 847 F.2d 1093, 1097, 1099 (3rd Cir. 1988), *archived at* http://perma.cc/LF7L-KUYR.

227. Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. § 3(1)-(2) (2011).

228. *Id*. § 3(1) (alteration added).

alienation; the United States, like many common law countries, has a strong tradition of free alienability of tangible property. Some argue that to the extent that the imposition of a duty to share the receipts of a future resale operates as a disincentive to market visual works of art, it may violate this principle.[229] However, where this contention is aimed at the material object, it is, essentially, a straw man[230] because the author has no control over what happens to the material object he created beyond the first sale. But, where this contention is aimed at the author's bundle of rights, a real concern may exist.[231] Other economic intellectual property rights are typically freely transferrable, and sequestering the royalty may impinge on the freedom to contract.[232] However, this restriction is usually not an oversight or unintended effect; if this right were freely alienable, the purpose of this type of legislation as it is generally iterated—to participate in future proceeds—would likely be undermined by the ability to contract.[233] This is a real concern given differences in the level of sophistication between the bargaining parties and the relatively unregulated nature of the arts market.[234] This is perhaps why so few countries allow this right to be

229. Turner, *supra* note 7, at 346-47 (noting this popular argument); Kuno Fischer, *Switzerland without Resale Right (Droit de Suite): Supplementary Paper Based on Practical Experience*, 3/4 JOURNAL KUNST UND RECHT [KUR] (2008), (Ger.), *archived at* http://perma.cc/GUY4-XXTL (suggesting inalienability requirement is meant to secure a certain volume of business to collective management entities).

230. DESIGN AND ARTISTS COPYRIGHT SOCIETY, DACS RESPONSE TO THE INQUIRY INTO THE RESALE ROYALTY RIGHT BY THE U.S. COPYRIGHT OFFICE 2 (2012) (commentary in response to Notice, 77 Fed. Reg. 58,175 (Sept. 19, 2012) (notice of inquiry) and Notice, 77 Fed. Reg. 63,342 (Oct. 16, 2012) (extension of comment period)), *archived at* http://perma.cc/WSZ7-446A.

231. DE PIERREDON-FAWCETT, *supra* note 7, at 33-35 (discussing the basis of this requirement as treating unequal bargaining power between artists and art market professionals and suggesting that this requirement is a substantial restriction precisely because it lacks a true protective purpose).

232. Sullivan, *supra* note 207, at 31-32.

233. U.S. COPYRIGHT OFFICE, *supra* note 110, at ix. *See also* NICHOLAS L. GEORGAKOPOULOS, PRINCIPLES AND METHODS OF LAW AND ECONOMICS: BASIC TOOLS FOR NORMATIVE REASONING 95-126 (2005) (discussing Coasean irrelevance theorem – particularly, the suggestion that if the reaction to a judicial opinion would cancel the effect of that opinion, then the law is irrelevant. At a very basic level, the argument makes sense. Art market professionals would not want the cost of the royalty later on (they are harmed by the amount they have to pay)). Artists want the right and would be harmed by the loss of the right; but, the harm to the artist is less since the royalty is not certain. Professionals would want artists to transfer that right to them, and artists would do so if the professional offered a certain sum now that was at least enough to off-set the loss of the possible future royalty. Hence, the law would be pointless. Obviously, it is more complex than that because the difference in relative bargaining powers between the professionals and the artists makes it doubtful that the artist would receive fair compensation, but it is easy to see where a colorable argument for inalienability might originate. Arguments against waiver would be much the same.

234. *See* Turner, *supra* note 7, at 344-47, n.97 (discussing the common rationales behind

transferred, assigned, or waived except for purposes of collective management or other agency.[235] Similarly, the EVAA forbids waiver, but lacks a positive statement that the right is inalienable.[236] This is a glaring problem which could prevent the act from functioning as intended.[237]

Some view resale royalties as a taking.[238] This can cause negative sentiment, particularly against private entities collecting royalties. Scholars suggest that

> one's comfort level that the funds will be distributed fairly and in a way that promotes the best interests of the museums and the public is only as high as one's confidence in the collection societies themselves. . . . The delegation of this sort of official authority to private, profitmaking organizations may be seen by some as troubling.[239]

It seems that these arguments might be addressed by enhancing the transparency of the actions of collection societies.[240] As part of this, the societies could be subrogated to the Copyright Register's authority for reporting and audit purposes, as other countries subrogate their societies to government agencies, such as a Ministry of Culture.[241] The greater a society's tie to the government, the more likely it is that they will perform as agents of the government.[242]

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and criticisms of the resale royalty right for visual artists and the economic aspects of these).

235. U.S. COPYRIGHT OFFICE, *supra* note 110, at xx (noting that the U.S. Copyright Office recommends transferability for this purpose); *see also infra* Appendix A (only one of forty-one countries is not described as "inalienable" or "absolutely inalienable" apart from transfer for agency purposes: Estonia).

236. Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. (2011).

237. For an international comparison see *supra* Part III.B.7.

238. Emily Eschenbach Barker, *The California Resale Royalty Act: Droit de [Not So] Suite*, 38 HASTINGS CONST. L.Q. 387, 387-88, 390-93 (2011) (discussing the collection system in California.

239. Fishman & Laird, *supra* note 188. *Cf.* Kelo v. City of New London, 545 U.S. 469 (2005) (concerning complaints over a city exercising its eminent domain powers to confiscate homes in order to give the property to Pfizer, a private company).

240. *See* Virginia J. Morrison, *Ancient Culture and Contemporary Art: Protecting Australia's Indigenous Cultural Expression in a Modern IP Framework*, 5 LANDSLIDE 33 (2013), *archived at* http://perma.cc/MPR4-X7VY.

241. For example, Cameroon does this. *See infra* Appendix A.

242. Barker, *supra* note 238, at 393-96 (suggesting that if the royalties were funneled through the government it might legitimize it as a tax). The same suggestion could work outside the context of taxes because the key concerns that money is spent "for the benefit of all." Because the US copyright system has a utilitarian basis, an argument may be made that benefitting the individual benefits us all—society has an interest in progressing the arts.

4. Problems of Information (Tracking, Remitting, and Enforcement)

Secrecy norms, which permeate the art market, make tracking sales of specific works difficult.[243] Artists employ a mechanism to overcome lesser bargaining power that exacerbates the problem—blacklisting people who "flip" their work.[244] The secrecy norm is also problematic because it interferes with the establishment of provenance,[245] which is important not only to museums,[246] but to any owner of a work of visual art. Such "information asymmetry" may distort the working of the market and open the door to many "inefficient outcomes"—valuation errors, fraud, deceit, money laundering, theft, adverse possession, etc.[247] Some of these outcomes could leave a good faith purchaser vulnerable to replevin or repatriation.[248]

Similarly, secrecy norms in the art market also interfere with collection and remittance of royalties through the inability to locate relevant parties.[249] Secrecy norms in the art market make enforcement of the law difficult because they allow parties to actively work against the law[250]—sellers can circumvent the royalty by limiting sales to individuals who transact privately without the aid of dealers or anonymous forums.

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243. *See generally* Turner, *supra* note 7, at 350-56 (giving a detailed discussion of secrecy norms in the art market). Significantly, the author notes that roughly sixty percent of the art market is comprised of private sales. Turner, *supra* note 7, at 350-51.

244. Edward Winkleman, *The Case for Droit de Suite in New York: What's Up With All the Secrecy and Touchiness About a Simple Transaction?*, ART NEWSPAPER (Apr. 28, 2010), http://www.theartnewspaper.com/articles/The-case-for-droit-de-suite-in-New-York/20673, *archived at* http://perma.cc/US8T-V3CR; *see also* THORNTON, *supra* note 195, at 8 (noting that in modern times primary dealers try to avoid selling works to people who will flip them because it affords the dealer more control over pricing of the artist's works).

245. *Provenance Research*, MUSEUM FOLKWANG, http://www.museum-folkwang.de/en/collection/painting-sculpture-media-art/provenance-research.html (last visited Oct. 9, 2013, *archived at* http://perma.cc/L846-79HK).

246. *Id.; see also Provenance Research Project*, METROPOLITAN MUSEUM OF ART, http://www.metmuseum.org/research/provenance-research-project (last visited Nov. 9, 2013, *archived at* http://perma.cc/S5V9-J5VV) (discussing importance of provenance work).

247. Turner, *supra* note 7, at 355-56; Malcom Bell III, *Who's Right? Repatriation of Cultural Property: Two Experts Debate Whether Art and Artifacts Should be Repatriated*, IIP DIGITAL (Nov. 2, 2010), http://iipdigital.usembassy.gov/st/english/publication/2010/10/20101022140412aidan0.7519953.html#ixzz2N1Wu7SfT, *archived at* http://perma.cc/KTS3-4HRQ (noting that cultural property is often repatriated); Aaron Milrad, *The Discovery Rule*, ART CELLAR EXCHANGE, http://www.artcellarexchange.com/artlaw4.html (last visited Sept. 20, 2013, *archived at* http://perma.cc/NX4L-9D6Q) (noting that innocent purchasers can still be affected by replevin through the discovery rule).

248. Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49, 49 (1995), *archived at* http://perma.cc/83KX-UYY7; Milrad, *supra* note 247.

249. Turner, *supra* note 7, at 357-59.

250. *See* Turner, *supra* note 7, at 357-59.

Curiously, all forty-one countries limit the scope of resale royalties to works sold publicly or through dealers.[251] Hence, the legislation in all forty-one countries avoids addressing the potential problem of a sales shifting to the private sector. Some scholars suggest that the best way to address this issue is through the maintenance of a register.[252] Conversely, others maintain that this type of problem simply does not exist, or at least has no real impact on the collection of royalties.[253] Even where this is true, it may be beneficial to revisit the idea.[254]

B. The Key Elements of the EVAA Compared with Established International Provisions

The following sections comment on the EVAA and examine resale royalty legislation of forty-one countries: Algeria, Australia, Austria, Belgium, Benin, Bissau, Bolivia, Brazil, Burkina Faso, Bulgaria, Cameroon, Colombia, DR Congo, Czech Republic, Denmark, Ecuador, Estonia, Finland, Germany, Greece, India, Hungary, Iceland, Ireland, Latvia, Liechtenstein, Lithuania, Malta, Norway, Peru, Poland, Portugal, Romania, Senegal, Slovakia, Slovenia, Spain, Sweden, Chad, Togo, Tunisia, and the United Kingdom. Colombia, France, Italy, Luxembourg, the Netherlands, Central African Republic, Côte d'Ivoire, Equatorial Guinea, Guinea, Gabon, Mali, Mauritania, Niger, and the Russian Federation were also investigated. Colombia and Niger have not implemented a resale royalty right, despite commands to do so from their respective trading blocs,[255] and as of this writing there were no reliable English translations via the internet for the remaining countries.[256]

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251. *See infra* Appendix B (comparing the scope of various legislations reveals a trend to limit coverage to public sales or sales involving dealers); *see also infra* Appendix A (see, for example, Hungary whose provisions are extensive and still do not mention this).

252. Turner, *supra* note 7, at 366-70.

253. *See supra* Part III.A.I (discussing the traits of the arts market and practical experience of countries employing a resale royalty). Hence, it is reasonable that legislators have not seriously considered this aspect. However, exponential changes in modern technology may make this worth reconsidering.

254. *See infra* Part IV.C (suggesting that sales between private individuals may be coverable if a desire to self-report is generated).

255. For example, the Andean Community and the African Organization on Intellectual Property have commanded Colombia and Niger, respectively, to implement a resale royalty right. *See infra* Appendix A. The chart on royalty legislation for the Andean Community (CAN), African Organization on Intellectual Property (OAPI), Columbia, and Niger depicts similar information. *See infra* Appendix B.

256. There is a chart for international legislation indicating countries assessed for this Note and which countries had no reliable English language translation. *See infra* Appendix B.

1. Scope

The EVAA restricts application of resale royalties to auction re-sales, meaning sales at public auction houses in which prior year sales totaled more than $25 million.[257] International sources are quite different. Internationally, the scope devolves into four categories of increasing breadth: public auction re-sales only;[258] public auction re-sales plus re-sales by a dealer or art market professional;[259] any resale by any professional who regularly works in the art market;[260] and any resale.[261] The majority of the countries fall into the middle two categories.[262] Thus, the scope of resale royalties under the EVAA is the minority position.

2. Covered Works

Internationally, the covered works category has two important aspects: specific works covered and the requirement of originality. These are combined in ways that produce several different categories of covered works. The European Union along with many other countries employ a general phrase such as "graphic or plastic art works,"[263] "graphic or three-dimensional works of art,"[264] "works of fine art,"[265] or "works of art,"[266] followed by a non-inclusive list of specific examples to describe the works covered.[267] The EVAA is somewhat different in that it employs a general

257. Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. §§ 2(1), 3(2) (2011).

258. Belgium and Latvia define the scope of resale royalties narrowly. Latvia is less certain since it says "public resale" but I feel it best fits here. *See infra* Appendix A. The chart on royalty legislation for Belgium and Latvia depicts similar information. *See infra* Appendix B.

259. Algeria, Benin, Bolivia, Burkina Faso, Cameroon, DR Congo, Ecuador, Germany, Greece, Peru, Senegal, Chad, Togo, and Tunisia all utilize this definition for the scope of resale royalties. *See infra* Appendix A. Also look for these countries' information on royalty legislation chart. *See infra* Appendix B.

260. *See infra* Appendix A, Australia, Austria, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Iceland, Liechtenstein, Lithuania, Malta, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and United Kingdom. All utilize this definition for the scope of resale royalties. Also look for these countries' information on royalty legislation chart. *See infra* Appendix B.

261. Brazil, Guinea-Bissau, and India have the broadest scope of resale royalties. *See* infra Appendix A. Also look for these countries' information on royalty legislation chart. *See infra* Appendix B.

262. *See generally infra* Appendix A; *infra* Appendix B.

263. *See infra* Appendix A, European Union and the United Kingdom, for example.

264. *See id*. Benin, for example.

265. *See id.*, Greece, for example.

266. *See id.*, Ireland, for example.

267. Sixteen countries and the European Union including the, for example, Bulgaria, and Australia. *See id. See also infra* Appendix B, row for "covered works."

phrase, "work of visual art,"[268] but seems to limit that term to a concrete list: "a painting, drawing, print, sculpture or photograph."[269] This definition seems very narrow compared to others and might rule out future forms of visual art not now known.

In terms of originality, there is a prevailing trend of stating an explicit originality requirement.[270] Only seven out of forty-one countries have no such requirement.[271] Of the three wider regions examined, only the European Union has an originality requirement.[272] Further, among those countries and regions with an originality requirement, the European Union and twenty countries allow copies in limited quantity, typically numbered, signed, and authorized in some manner, to constitute "original" works.[273] With some countries, the originality requirement is very broad,[274] with others it is very narrow.[275] The EVAA has an explicit originality requirement which allows for certain copies.[276] Hence, the EVAA accords with the largest international position.

3. Price Floors and Ceilings

Of the three regions examined, only the European Union has a minimum price.[277] Internationally, seventeen out of forty-one countries examined have no minimum price.[278] Of the remaining countries, minimum price floors range from approximately $83 to $4,900 equivalent,[279] with

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268. Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. § 2(5) (2011) (definition of "work of visual art").

269. *See infra* Appendix A.

270. *See id*. (noting thirty countries explicitly require originality; Denmark, Finland, Spain, and the United Kingdom impliedly require it). *See also infra* Appendix B, row for "covered works."

271. *See infra* Appendix A, Bolivia, DR Congo, Malta, Peru, Chad, Togo, Tunisia.

272. *See infra* Appendix A.

273. *See infra* Appendix A., Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Hungary, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom, Liechtenstein, Norway.

274. Tunisia is an example. *See infra* Appendix A.

275. For example, Brazil defines "original" as the "initial creation." *See infra* Appendix A (Brazil); Appendix B (column for Brazil, row for covered works).

276. Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. § 2(5) (2011) (definition of "work of visual art").

277. *See infra* Appendix A, European Union; *infra* Appendix B (chart column for European Union).

278. Algeria, Benin, Bolivia, Brazil, Burkina Faso, Cameroon, DR Congo, Ecuador, Guinea-Bissau, Greece, Iceland, Latvia, Peru, Senegal, Slovenia, Togo, and Tunisia have no minimum price. *See infra* Appendix A; *see also* corresponding chart columns *infra* Appendix B.

279. Estimates were calculated Mar. 10, 2013, using Google Bar Currency Calculator; the minimum price range excludes Sweden whose minimum price is based on an amount set by the Swedish National Insurance Act 1962:381, which is not available on the internet in

most countries having a minimum price of approximately $4,000 or less.[280] By comparison, the EVAA sets a minimum price of $10,000.[281] At first blush, this seems extremely high. However, some countries provide that within three years of an artist's initial sale to a dealer, the applicable minimum is EUR 10,000.[282] Since the EVAA is narrowly tailored to apply only to public auction sales,[283] it likely hits more dealers than not,[284] thereby revealing some similarity between the two. However, the EVAA would still be relatively high because as a minimum price it applies universally. Also, those countries with the special provision represent the minority view.

At the other end of the price spectrum, the European Union imposes a cap on royalties of EUR 12,500.[285] Accordingly, twenty of the twenty-two EU countries examined, plus Iceland and Norway, employ such a cap.[286] Liechtenstein also has a cap that is slightly higher.[287] None of the countries existing outside of the European Economic Trading Area which were examined employ a cap.[288] The EVAA similarly has no cap.[289] Some suggest that having a cap might limit the impact of the royalty to the arts market. [290] Presumably this view stems from the certainty that results in knowing the maximum out-of-pocket expense one might have to pay. However, it is not clear whether having a cap makes a significant difference, given that countries without caps have achieved success.[291]

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the English language.

280. *See infra* Appendix B. Nine countries have a minimum price of approximately $1,500 or less as calculated Mar. 10, 2013, using Google Bar Currency Calculator; twenty-two countries have a minimum price of approximately $3,000 or less; and only Liechtenstein has a minimum price with an approximate value above $4,000. *Id.*; *see also infra* Appendix A. It should be noted that Belgium is an EU Member, but they have not yet made available to WIPO any implementing legislation. *See also Belgium*, WORLD INTELLECTUAL PROPERTY ORG., http://www.wipo.int/wipolex/en/profile.jsp?code=BE (last updated Apr. 19, 2013, *archived at* http://perma.cc/AZ4V-M2W8).

281. H.R. 3688 § 3(3).

282. Austria, Bulgaria, Liechtenstein, Malta, Spain, and United Kingdom are all examples. *See infra* Appendix A. *See also infra* Appendix B (corresponding countries' chart columns indicating that this special provision is optional at the EU regional level and applied for five countries—Austria, Bulgaria, Malta, Spain, United Kingdom; Liechtenstein has a similar provision that is set slightly higher at 15,600 francs).

283. H.R. 3688 § 3(2).

284. THORNTON, *supra* note 195, at 8.

285. *See infra* Appendix A; *infra* Appendix B.

286. *See infra* Appendix A, Austria, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Ireland, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom, Iceland, Norway; *infra* Appendix B, columns for same.

287. *See infra* Appendix A, Liechtenstein; *infra* Appendix B, chart column for Liechtenstein.

288. *Id*.

289. *See* Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. (2011).

290. DESIGN AND ARTISTS COPYRIGHT SOCIETY, *supra* note 230, at 10.

291. *See, e.g.,* RESALE ROYALTY, *supra* note 91 and accompanying text.

Hence, the lack of a cap likely has little impact on the functioning of the EVAA.

4. Collection and Remittance

Of the three regions examined, only the European Union commands its Members to use collective management.[292] Eight of the forty-one countries examined have legislation that is absent or not clear as to whether collective management was required.[293] Eighteen countries have express or implied provisions for mandatory collective management; of these, only twelve are EU Members.[294] Two countries, Australia and Peru, have default provisions for collective management which authors may choose not to use.[295] The remaining twenty-two countries make use of collective management optional.[296] The EVAA has a mandatory collective management provision.[297] This provision is likely to be crucial to the functioning of the statute. Although use of collective management bodies appears to be in the minority view, the best data available on the functioning of royalty statutes comes from these countries.[298]

5. Duration

Under the EVAA, the royalty right applies for the life of the author plus seventy years.[299] This provision accords with all three regions examined and a vast majority of the countries as well.[300]

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292. *See infra* Appendix A; *infra* Appendix B.

293. Algeria, Austria, Burkina Faso, DR Congo, Germany, Guinea-Bissau, Ireland and Portugal. *See infra* Appendix A; *infra* Appendix B, columns for same.

294. Czech Republic, Denmark, Estonia, Finland, Hungary, Latvia, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom, Benin, Bolivia, Iceland, Norway, Togo, and Tunisia all had mandatory collective management provisions. *See infra* Appendix A; *infra* Appendix B. *But see infra* Appendix A, India. India's provisions are voluntary pending the establishment of a national collective management organization, at which time it becomes compulsory.

295. *See infra* Appendix A, Australia, Peru; *infra* Appendix B, columns for same.

296. *Id*. *But see infra* Appendix A, India. India's provisions are voluntary pending the establishment of a national collective management organization, at which time it becomes compulsory.

297. Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. § 3(2) (2011) ("royalty shall be paid to a visual artists' collecting society.").

298. *See supra* Parts II.A.1, 4 (discussing various successes).

299. H.R. 3688 § 3 (amending the exclusive rights of the Copyright Act which are subject to the duration requirements therein); 17 U.S.C. §§ 302-305 (2012) (duration).

300. *See infra* Appendix A; *infra* Appendix B, chart row indicating "duration" for the regions and countries.

6. Rate

Of the three regions examined, only the European Union provides for a specific rate.[301] Twenty of the twenty-two EU countries examined employ a multi-tiered rate, as do Iceland, Norway, and Liechtenstein; the remaining two employ a flat rate of the sales price.[302] Of the remaining countries, nine employ a flat rate of the sales price;[303] one employs a percent of increase in price up to a certain point and then a flat rate on the sales price after;[304] one employs a percent of gain in value;[305] three employ a percent-of-the-proceeds approach;[306] one lets the collectives decide the flat rate percentage so long as it does not exceed 10 percent;[307] and one has never set a rate.[308] No one outside the EEA has adopted a multi-tiered approach.[309]

The EVAA is most similar to countries employing a flat-rate percentage. The two countries with the lowest rates have rates of 3 or 4 percent.[310] The two countries with the highest rates are both set at 10 percent.[311] The remaining flat rate countries, excluding India whose scheme is atypical, employ a flat rate of 5 percent.[312] The EVAA imposes a flat rate of 7 percent of the sales price, but goes further and reserves half, after costs, for a cultural fund so that less than half of what was initially collected actually disburses to the artist.[313] In other words, an artist could receive between 2.5% and 3.5% of the royalty, depending on the amount of costs deducted. Compared to other countries, this range seems woefully low.

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301. *See infra* Appendix A.

302. Belgium and Greece employed a flat rate of the sales price. *See infra* Appendix A; *see also infra* Appendix B, chart columns for Belgium and Greece.

303. *See infra* Appendix A, Algeria, Australia, Burkina Faso, Bolivia, Cameroon, Ecuador, Peru, Senegal, Chad; *infra* Appendix B, chart columns for same.

304. *See infra* Appendix A, Guinea-Bissau; *infra* Appendix B, chart column forsame.

305. *See infra* Appendix A, Brazil; *infra* Appendix B, chart columns for same.

306. *See infra* Appendix A, Benin, Togo, Tunisia; *infra* Appendix B, chart columns for same.

307. *See infra* Appendix A, India; *infra* Appendix B, chart column for same.

308. *See infra* Appendix A, DR Congo; *infra* Appendix B, chart column for same.

309. *See generally infra* Appendix A; *infra* Appendix B.

310. *See infra* Appendix A, Belgium; *infra* Appendix B, chart columns for Belgium, Peru.

311. *See infra* Appendix A, Burkina Faso, Chad; *infra* Appendix B, chart columns for same.

312. *See infra* Appendix A, Australia, Bolivia, Cameroon, Ecuador, Greece, Senegal; *infra* Appendix B, chart columns for same.

313. Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. §§ 3(2), 6(2) (2011) (providing for collective management fees of up to eighteen percent and copyright office fees of up to five percent).

7. Alienability

The alienability debate seems to have been resolved, since all but one country has concluded the right should be inalienable.[314] Additionally, the decision is unanimous at the regional level.[315] However, textually speaking there is some strangeness about the way countries handle this right. Despite the label of "inalienable," many countries allow for or require transfer of the right to a collective management entity, as well as continuing rights after death.[316] This suggests that something less than "absolute inalienability" and more like "checked inalienability" is being applied in support of agency principles. The EVAA differs in this regard because it does not expressly state that the right is inalienable.[317] With so many countries choosing to make the resale royalty right inalienable, it is curious that the United States did not do so. The lack of explicit terms regarding transfer could render the legislation ineffective. The concept of inalienability intertwines with the public benefit purpose in the resale royalty context. If authors can freely assign their rights to others then it becomes less clear whether the purpose of the statute is being properly served, especially where there is differential bargaining power between the contracting parties.

8. Waiver

Internationally, waiver is much the same as inalienability. Many countries do not mention waiver at all,[318] but for those that do, all but one has said no waiver.[319] All three regions unanimously state that there should be no waiver.[320] The EVAA is not different in this regard.[321]

9. Devise or Descent

Devise or descent of the resale royalty right is generally handled in

314. Estonia has not concluded the right to be inalienable. *See infra* Appendix A; *infra* Appendix B, chart columns for Estonia.

315. CAN, European Union, and OAPI show unanimous decisions. *See infra* Appendix A; *infra* Appendix B, chart columns for CAN, European Union, OAPI.

316. Germany and Lithuania are examples. *See infra* Appendix A; *infra* Appendix B, chart columns for same.

317. H.R. 3688 § 3(2).

318. *See infra* Appendix A, Greece, Hungary, Ireland; *see also infra* Appendix B, columns for Greece, Hungary, Ireland.

319. *See infra* Appendix A. Denmark has a limited form of waiver. *See infra* Appendix B.

320. *See infra* Appendix A, CAN, European Union, OAPI; *infra* Appendix B, columns for CAN, European Union, OAPI.

321. H.R. 3688 § 3(2).

one of two ways: the right may pass to heirs only, or the right may pass to heirs or other legal successors, such as legatees.[322] However, there are some variations on this theme. Two countries have allow a "successor in title" to take,[323] and eleven countries provide that if there are no heirs the right shall pass to the government or to an approved collective management entity.[324] Curiously, the EVAA contains no provisions regarding devise of the right.[325] This could engender litigation or otherwise create legal uncertainty upon the death of a qualified author.

10. Exclusions

The European Union and the OAPI both exclude architectural work and applied art.[326] The European Union also excludes manuscripts.[327] Internationally, countries tend to varyingly exclude architectural works, applied art, manuscripts, audiovisual works, and photographs.[328] The EVAA does not contain any specific exclusions,[329] but as it was introduced none were needed because the covered works were defined narrowly and inclusively.[330] If the covered works were redefined in the legislative process then the exclusions should be revisited as well.

11. Formalities

At this time only Austria has any formality requirements.[331] Austria acceded to the European Union in 1995[332] and as part of that accession should be working towards eliminating such formalities. In fact, they may

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322. For examples of the former, see *infra* Appendix B, columns for Algeria, Greece, Poland. For examples of the latter, see *infra* Appendix B, columns for DR Congo, Ecuador, Latvia.

323. *See infra* Appendix A, Germany, Chad; *see also infra* Appendix B columns for same.

324. *See infra* Appendix A, Bulgaria, Czech Republic, Denmark, Finland, Romania, United Kingdom, Bolivia, Iceland, Norway, Senegal, Tunisia; *infra* Appendix B, columns for same .

325. *See* H.R. 3688.

326. *See infra* Appendix A, European Union, OAPI; *infra* Appendix B, columns for European Union, OAPI.

327. *See infra* Appendix A, European Union; *infra* Appendix B, column for European Union.

328. *See infra* Appendix B (offering a variety of exclusions across the "Excludes" row of the international legislation chart).

329. *See* H.R. 3688 §2(5).

330. *See id.*

331. *See infra* Appendix A, Austria; *infra* Appendix B, column for Austria.

332. *Austria*, EUROPA.EU, http://europa.eu/about-eu/countries/member-countries/austria/index_en.htm (last visited Jan. 23, 2014, *archived at* http://perma.cc/TW8E-5E3V).

have already done so, but an English language translation of a more modern law might simply be lacking at the time of this writing. Likewise, there are no formalities necessary to receive benefits under the EVAA; the usual creation requirement under the Copyright Act[333] is sufficient.

12. Information Rights

More than half of the countries examined provide the author or relevant collective management entity a right to certain information in order to facilitate royalty collection.[334] Generally, a time limit of three years is placed on the ability to exercise this right that runs from the resale date or from notice to the author or collection entity.[335] However, there is some variation that includes no mention of a time frame, a very short time frame, or an annual ability.[336] Importantly, the EVAA does not provide such a right to information,[337] which is unfortunate because an information right provides a partial solution to the information problem that plagues this type of law.[338] Hence, the EVAA should be revised to include such a right.

13. Foreigners

The European Union prescribes reciprocal rights for foreigners at the regional level, CAN delegates the decision to Member countries, and OAPI provides that collective management entities may choose to deal with foreigners according to the terms of relevant conventions and agreements.[339] Of the forty-one countries examined, twenty-nine have a reciprocal rights requirement for foreigners;[340] four are silent on the

333. *See* 17 U.S.C. § 102 (2012).

334. *See generally* Appendix A, Austria, Belgium, Bulgaria, Czech. Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovenia, Spain, Sweden, United Kingdom, Australia, Cameroon, Iceland, Liechtenstein, Norway, Senegal; *infra* Appendix B columns for same.

335. *See infra* Appendix A, nineteen countries – Austria, Bulgaria, Czech. Republic, Estonia, Finland, Germany, Hungary, Ireland, Latvia, Poland, Portugal, Romania, Slovenia, Spain, Sweden, United Kingdom, Iceland, Liechtenstein, Norway; *infra* Appendix B, columns for same.

336. *See e.g.,* Appendix A, Belgium (no time frame mentioned), Australia (60 day period), Greece (once per year); *infra* Appendix B, columns for same.

337. *See* Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. (2011).

338. *See generally* Turner, *supra* note 7.

339. *See infra* Appendix A, CAN, European Union, OAPI; *infra* Appendix B, columns for CAN, European Union, OAPI.

340. *See generally infra* Appendix A, Belgium, Bulgaria, Algeria, Czech. Republic, Denmark, Estonia, Finland, Germany, Hungary, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Tunisia, Australia, Bolivia, Brazil, Cameroon, DR Congo, Iceland, Liechtenstein, Norway, Senegal; *infra* Appendix B columns for same countries, row for "foreigners".

issue;[341] two provide the royalty can apply regardless of nationality or domicile;[342] and six limit the right to qualified individuals or territories or pursuant to relevant treaties in force where the country was a signatory.[343] The EVAA has no similar provision.[344] This could become problematic if any non-US residents attempt to collect in the United States. Because there is no provision for this sort of thing, their rights are uncertain.

14. Enforcement

Eighteen countries have specific provisions reinforcing the right to a royalty or the right to information in order to collect the royalty, or both, apart from the usual remedies for copyright violations.[345] This type of provision tends to provide for fines or damages whenever the party charged with liability for the royalty—such as an art market professional—fails to remit the funds or the necessary information.[346] The EVAA provides that failure of the "entity collecting the money or other consideration resulting from the sale of the work to pay the royalty provided under this section shall constitute an infringement . . . subject to statutory damages under section 504."[347] Section 504 damages generally means "a sum of not less than $750 or more than $30,000 as the court considers just,"[348] unless mitigated by innocent conduct to "a sum not less than $200"[349] or aggravated by willful conduct to "a sum not more than $150,000."[350] Thus, this provision accords with the provisions of other countries. However, if in the legislation process an information right is added then separate enforcement provisions for this right should be considered.

IV. COMMENT/CONCLUSION

A. How Effective Is the Legislation Likely to Be?

An examination of the EVAA in light of prior US efforts, and

341. *See infra* Appendix A, Austria, Guinea-Bissau, Greece, India; *infra* Appendix B columns for same.

342. *See infra* Appendix A, Ecuador, Peru; *infra* Appendix B columns for same.

343. *See infra* Appendix A, Ireland, United Kingdom, Australia, Benin, Burkina Faso, Chad; *infra* Appendix B columns for same.

344. *See* Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. (2011).

345. *See infra* Appendix A, Belgium, Czech Republic, Denmark, Estonia, Finland, Latvia, Malta, Poland, Romania, Slovenia, Australia, Benin, Burkina Faso, Cameroon, , Iceland, Norway, Chad, Togo; *infra* Appendix B columns for same.

346. *See infra* Appendix B, row for "enforcement."

347. H.R. 3688 § 3(2).

348. 17 U.S.C. § 504(c)(1) (2012).

349. 17 U.S.C. § 504(c)(2).

350. *Id.*

compared with the legislative efforts and experiences of other countries, reveals that there are several aspects of resale royalty legislation that could prove problematic, and which the EVAA fails to address. Perhaps most important are the problems with alienability and information, which are not reflected in the text of the bill. Beyond these concerns, there are problems with the narrow scope of the right and the inclusion of an unusually high resale price threshold. Together, this tetrad of problems could create a substantial barrier to meaningful implementation of the right. Hence, there is reason to believe that the EVAA, as introduced, would be ineffective.

B. What Specific Changes Are Necessary to Make the Legislation Effective?

There are several changes that might make the EVAA more effective and bring it more in line with international legislation. First, drafters should decide on a purpose and incorporate it clearly so the statute sends a cohesive message as to its aims. Second, the scope should be enlarged to include all art market professionals, whether galleries or private dealers. Third, the works covered should be rephrased as a non-inclusive list with a small sub-set of exclusions to provide some flexibility for future creations. Fourth, the price threshold should be lowered to a more reasonable amount, such as $500 or $1,000. At $10,000, it is possible that most authors will not benefit from the right.[351] It may also be worth considering whether a cap on the royalties would work better—with this route, presumably more authors would benefit and purchasers could be assured of a maximum expenditure. Fifth, if legislators want to have an up-front split of the royalty, then the rate needs to be higher. Other countries with cultural funds take from the back—from royalties which cannot be distributed, rights that escheat after death, a right of the government after the duration has expired, or rights held by the government *bona vacantia*.[352] Sixth, and most critical, the EVAA should be revised to clearly state that the right has either absolute or checked inalienability—with absolute it is a right personal to the author and that collective management entities may act as the author's agents in this regard; with checked, that the right may not be transferred except to collective management entities. Seventh, and related, is the subject of devise. Because the resale royalty right is a quasi-moral right, the EVAA must have a provision that addresses this so authors may feel certain that their bequests are legal and will be honored. Eighth, the EVAA needs a right of information to ease enforcement. Finally, the EVAA needs to have some sort of provision clarifying whether the right may apply to foreigners.

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351. DE PIERREDON-FAWCETT, *supra* note 7, at 119 (noting that even $1,000 is "extraordinarily high").

352. *See infra* Appendix A, Bulgaria, Hungary, Malta, Peru, Romania; *infra* Appendix B, columns for Bulgaria, Hungary, Malta, Peru, Romania, for example.

C. What Else Might Be Tried?

One of the major obstacles to resale rights in general is the natural secrecy of the arts market.[353] Scholars have recognized this problem and have suggested that the best way to address this problem is to provide an information right and to demand that a registry of sales be kept.[354] While these are excellent ideas, the latter, at least, is not without problems. The concept of a registry was attempted very early on, but was ultimately rejected as unworkable due to its estimated expense.[355] Later, concerns as to privacy rights were noted in the Copyright Register's 1992 report.[356] However, these complaints are very old—decades old. This two-pronged approach provides a convenient starting point.

Ultimately, it has been observed that the EVAA would be relatively easy to enforce since it would apply to very few sales; all that would be needed is to "police an elite group of auction houses, including Christie's and Sotheby's."[357] This cannot be good policy. Additionally, Moore's Law,[358] which describes the rapid growth of technology, has been interpreted to include concurrent decreases in cost.[359] Accordingly, since the idea of a registry was last seriously considered more than twenty years ago, the cost of technology has likely dropped considerably. It is for this reason that it is time to reconsider the idea of a registry. Further, the registry should not be limited to just elite sellers. With modern technology, there is little reason why a secured database could not be established, with a simple interphase which would allow anyone to enter information while at the same time restricting database users to information entered by them. With a supporting right to information and a confidentiality provision that are both separately enforceable, privacy rights could be maintained. Legislators could then consider expanding the scope of the right even further. Eventually, the technology might even allow for voluntarily reported private transactions to be entered as well.[360] Because some suggest that collection of private sales may be too burdensome and expensive to administer,[361] remittance on a voluntary basis could be an option if it were

353. *See supra* Part III.A.4.

354. Turner, *supra* note 7, at 366-70.

355. DE PIERREDON-FAWCETT, *supra* note 7, at 3.

356. U.S. COPYRIGHT OFFICE, *supra* note 110, at ix.

357. Turner, *supra* note 7, at 364.

358. Michael Kanellos, *Moore's Law to Roll on For Another Decade*, CNET NEWS (Feb. 10, 2003, 2:27 PM), http://news.cnet.com/2100-1001-984051.html, *archived at* http://perma.cc/8DVV-8FM6.

359. Robert W. Keyes, *The Impact of Moore's Law*, 11 SOLID-STATE CIRCUIT NEWSLETTER 25 (2006) (means decreasing costs).

360. *See* Edward Winkleman, *supra* note 244 (noting that a majority of the arts market is private sales between individuals).

361. Alderman, *supra* note 183, at 278; *see also* U.S. COPYRIGHT OFFICE, *supra* note

somehow appealing. Ease of completing the transaction could serve this aim. Also, if the EVAA could be considered in the larger framework, tax incentives may also help—for instance, a break in the capital gains tax that generally attaches to such transactions.[362]

Another idea worth considering is the issuance of a title. Chain of title on visual works of art is a real concern for museums that deal with issues of provenance.[363] When the concept of a registry was initially being considered, it was contemplated that in exchange for taking the time to enter information onto the registry, users would be rewarded with a certificate of authenticity.[364] This idea is worth investigating again. Since certificates of authenticity currently can function as valuable aspects of sales by artists,[365] it would be better to consider a certificate of title which may be used in addition to certificates of authenticity. The title could be maintained electronically and updated with each sales transaction, with copies obtainable for a small fee. In this way, the registry could give something of value back to owners. As previously indicated, if title is uncertain a *bona fide* purchaser could wind up facing replevin or repatriation problems.[366] Certificates of clean title then, could give purchasers value from certainty that might otherwise be lacking. This type of title might even serve to support an artist's certificate of authenticity by helping establish provenance.

In sum, the EVAA as introduced has several potential flaws. The practical experience of other countries has highlighted problems with purpose, doctrinal conflict, and information. Yet, the EVAA proposes a complex revenue sharing scheme not yet contemplated by other countries without ever addressing these issues. This stance potentially ignores the knowledge amassed by others and risks generating new problems. Consequently, the EVAA needs to be revised to lessen the risk that the legislation will be ineffective.

110, at 66, n.21 (noting objection to California act due to expense).

362. *See* sources cited *supra* note 198.

363. *See supra* notes 245-48 and accompanying text.

364. DE PIERREDON-FAWCETT, *supra* note 7, at 3.

365. Fiona Morgan, *All About the Artist's Certificate of Authenticity*, WHERE FISH SING (Sept. 12, 2009), http://spacesbetweenthegaps.wherefishsing.com/2009/09/all-about-artists-certificate-of.html, *archived at* http://perma.cc/6PFE-5U6A.

366. *See supra* Part III.A.4.

APPENDIX A: SOURCES OF DDS LEGISLATION

Andean Community (CAN)

Decisión 351. Régimen Común sobre Derecho de Autor y Derechos Conexos [Common Provisions on Copyright and Neighboring Rights], Gaceta Oficial del Acuerdo de Cartagena [Official Gazette of the Cartagena Agreement], X—No. 145, Dec. 21, 1993 (CAN), *archived at* http://perma.cc/V93J-UY4E (English language translation by the International Bureau of WIPO).

European Union (EU)

Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, §§ (3), (15), 2001 O.J. (L 272) 32, *archived at* http://perma.cc/9KT-H6LX.

Organisation Africaine de la Propriété Intellectuelle (OAPI)

Accord portant révision de l'Accord de Bangui du 02 mars 1977 instituant une Organisation Africaine de la Propriété Intellectuelle [Agreement Revising the Bangui Agreement of 02 March 1977 establishing an African Intellectual Property], signed Mar. 2, 1977 (amended Feb. 24, 1999) (OAPI), *archived at* http://perma.cc/HC33-D5V9 (English language translation by the International Bureau of WIPO).

Algeria

رقم أمر 03-05 مؤرخ في 19 جمادى الأولى عام 1424 الموافق 19 يوليو عام 2003, يتعلق بحقوق المؤلف والحقوق المجاورة [Copyrights and Neighboring Rights Act of July 19, 2003] (Alg.), *archived at* http://perma.cc/B38S-6CGK (English language translation by the International Bureau of WIPO).

Australia

Resale Royalty Right for Visual Artists Act 2009 (Austl.), *archived at* http://perma.cc/AVR2-Q5DS.

Austria

BUNDESGESETZ UBER DAS URHEBERRECHT AN WERKEN DER LITERATUR UND DER KUNST UND ÜBER VERWANDTE SCHUTZRECHTE (URHEBERRECHTSGESETZ) 1980 [FEDERAL LAW ON COPYRIGHT IN WORKS OF LITERATURE AND THE ARTS AND RELATED RIGHTS 1980 (COPYRIGHT ACT) (AS AMENDED 2010)], BUNDESGESETZBLATT I

[BGB1. I.] NR. 58/2010 (Austria), *archived at* http://perma.cc/B8SR-J2E6 (automatic translation tool version); *see also Austria: 5.1 General Legislation: 5.1.7 Copyright Provisions*, COMPENDIUM, http://www.culturalpolicies.net/web/austria.php?aid=517 (last visited Jan. 23, 2014, *archived at* http://perma.cc/J9YU-CW3N); *Resale Royalties*, Dorotheum, http://www.dorotheum.com/fileadmin/user_upload/media/Dateien/agbs_neu/Folgerecht_neu_2012_EN.pdf (last visited Jan. 23, 2014, *archived at* http://perma.cc/57SV-EVPW).

Belgium

Loi relative au droit d'auteur et aux droits voisins [Law on Copyright and Neighboring Rights] du 30 juin 1994, modifiée par la loi du 3 avril 1995 9 (Belg.), *archived at* http://perma.cc/N4F6-VS5P (coordinated version of the law created by WIPO).

Benin

Loi n° 2005-30 du 5 avril 2006 relative à la protection du droit d'auteur et des droits voisins en République du Benin [Copyright and Related Rights of the Republic of Benin, Apr. 5, 2006] (Benin), *archived at* http://perma.cc/4E7-CVS2 (English language translation by the International Bureau of WIPO). For additional information, written in French, on what constitutes an "artist" as well as what rights accrue to such an artist see Décret n°2011-322 du 2 avril 2011 portant statut de l'artiste en République du Bénin [Decree No. 2011-322 of 2 April 2011 on the Status of the Artist in the Republic of Benin] (Benin), *archived at* http://perma.cc/HR98-S7TD (French).

Bolivia

Ley N° 1322 del 13 de abril de 1992 sobre el Derecho el Autor [Law. No. 1322 on Copyright] (Bol.), *archived at* http://perma.cc/X2TX-CJC9 (English language translation by the International Bureau of WIPO); Decreto Supremo N° 23907 del 7 de diciembre de 1994; Reglamento de la Ley de Derecho de Autor [Sup. Decr. No. 23907, Regulations to the Law on Copyright] (Bol.), *archived at* http://perma.cc/6DLK-K2PH (English language translation by the International Bureau of WIPO).

Brazil

Decreto No. 36, de 19 de Fevereiro de 1998, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.2.1998 (Braz.), *archived at* http://perma.cc/HU5Y-GW4S (English language translation by the International Bureau of WIPO).

Bulgaria

Закон за авторското право и сродните му права (както е изменен през 2011 г.) [Law on Copyright and Neighboring Rights (as amended in 2011)] (Bulg.), *archived at* http://perma.cc/7TGV-99EW (English language translation by the International Bureau of WIPO).

Burkina Faso

Loi n° 032-99/AN du 22 décembre 1999 portant protection de la propriété littéraire et artistique [Law No. 032-99/AN of December 22, 1999 on the Protection of Literary and Artistic Property] (Burk. Faso), *archived at* http://perma.cc/85U9-D764 (English language translation by the International Bureau of WIPO); Décret n° 2000-573/PRES/PM/MAC/MCPEA/MJPDH portant tarification du droit de suite sur les oeuvres graphiques et plastiques [Decree N° 2000-573/PRES/PM/MAC/MCPEA/MJPDH on Fixing the Rate of the Droit de Suite (Resale Royalty Right) on Graphic and Three-dimensional Works] (Burk. Faso), *archived at* http://perma.cc/69WH-G6K6 (English language translation by the International Bureau of WIPO).

Cameroon

Loi n° 2000/011 du 19 décembre 2000 relative au droit d'auteur et aux droits voisins [Law No. 2000/011 of December 19, 2000 on Copyright and Neighboring Rights] (Cameroon), *archived at* http://perma.cc/3UQT-U26N (English language translation by the International Bureau of WIPO); Décret n° 2001/956/PM du 1er novembre 2001 fixant les modalités d'application de la loi n° 2000/11 du 19 décembre 2000 relative au droit d'auteur et aux droits voisins [Decree No. 2001/956/PM of November 1, 2001 implementing Law No. 2000/11 of December 19, 2000 on Copyright and Neighboring Rights] (Cameroon), *archived at* http://perma.cc/P9JD-E8RA (English language translation by the International Bureau of WIPO).

DR Congo

Loi n° 24/82 du 7 juillet 1982 sur le droit d'auteur et les droits voisins [Law No. 24/82 of July 7, 1982 on Copyright and Neighboring Rights] (DR Congo), *archived at* http://perma.cc/P9JD-E8RA (English language translation by the International Bureau of WIPO).

Czech Republic

Zákon č.121/2000 Coll. (konsolidované), o právu autorském a právech souvisejících s právem autorským ao změně některých zákonů (autorský zákon), ve znění zákona č. 81/2005 Sb., zákona č. 61/2006 Sb. a

zákona č. 216/2006 Sb. [Law No. 121/2000 (consolidated), on Copyright and Rights Related to Copyright and on Amendment to Certain Acts (the Copyright Act), as amended by Act No. 81/2005 Coll., Act No. 61/2006 Coll. and Act No. 216/2006 Coll.] (Czech.), *archived at* http://perma.cc/TXC9-SSGK (English language translation by the International Bureau of WIPO).

Denmark

Bekendtgørelse af lov om ophavsret [The Consolidated Act on Copyright] (Den.), *archived at* http://perma.cc/3FQP-2CJZ (English language translation by the International Bureau of WIPO).

Ecuador

Codification No. 2006-13 (Supplement to Official Register No. 426, December 28, 2006) (Ecuador), *archived at* http://perma.cc/TJY4-JW5F (English language translation by the International Bureau of WIPO); Reglamento a la Ley de Propiedad Intelectual [Regulations under the Law on Intellectual Property] (Ecuador), *archived at* http://perma.cc/7BLW-JFUU (English language translation by the International Bureau of WIPO).

Estonia

Autoriõiguse seadus Vastu võetud 11.11.1992 RT 1992, 49, 615 [Copyright Act, 1992] (Est.), *archived at* http://perma.cc/6B5E-CFB6 (English language translation by the International Bureau of WIPO).

Finland

Tekijänoikeuslaki [Copyright Act (Act No. 404 of July 8, 1961, as amended up to April 30, 2010)] (Fin.), *archived at* http://perma.cc/X7PU-AB8G (English language translation by the International Bureau of WIPO). For another unofficial translation of the Copyright Act, *see* http://www.finlex.fi/en/laki/kaannokset/1961/en19610404.pdf (last visited Jan. 23, 2014, *archived at* http://perma.cc/QDL5-8VZJ).

Germany

Gesetz über das Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) (geändert am 17. Dezember 2008) [Law on Copyright and Related Rights (Copyright Act) (as amended on 17 Dec. 2008)], BGBl. I at 2586 (Ger.), *archived at* http://perma.cc/84RQ-HVV2 (translation by Ute Reusch).

Greece

Νόμος 2121/1993, Πνευματική Ιδιοκτησία, Συγγενικά Δικαιώματα και Πολιτιστικά Θέματα [Competition, Copyright and Related Rights (Neighboring Rights), Enforcement of IP and Related Laws, Industrial Property, IP Regulatory Body, Layout Designs of Integrated Circuits, Patents (Inventions), Trademarks, Undisclosed Information (Trade Secrets)], όπως τροποποιήθηκε τελευταία από τον ν. 3057/2002 (άρθρο 81) και από τον νόμο 3207/2003 (άρθρο 10 παρ.. 33) [as amended by Law No. 3057/2002 (article 81) and Law 3207/2003 (article 10 par. 33)] (Greece), *archived at* http://perma.cc/7FUE-KKBK (translation courtesy of UNESCO).

Guinea-Bissau

Código do Direito de Autor (aprovado pelo Decreto-Lei n° 46.980 de 27 de Abril de 1966) [Copyright Code (approved by Decr.-Law No. 46.980 of April 27, 1966)] (Guinea-Bissau), *archived at* http://perma.cc/D53T-D3PQ (English language translation by the International Bureau of WIPO).

Hungary

1999. évi LXXVI. törvény a szerzői jogról [Act No. LXXVI of 1999 on copyright (consolidated text as of Jan. 1, 2014)] (Hung.), *archived at* HUNGARIAN INTELLECTUAL PROPERTY OFFICE http://perma.cc/86AB-PS6U (English language translation courtesy of HIPO). For more unofficial translations see, 1999. évi LXXVI. törvény a szerzői jogról [Act No. LXXVI of 1999 on copyright (consolidated text as of Jan. 1, 2012)] (Hung.), *archived at* http://perma.cc/4QD2-MNPM (English language translation courtesy of Viktória Kerék, Legal officer of International Copyright Affairs Unit, Hungarian Intellectual Property Organization); 1999. évi LXXVI. törvény a szerzői jogról [Act No. LXXVI of 1999 on copyright (consolidated text as of Jan. 1, 2007)] (Hung.), *archived at* http://perma.cc/6W9S-DVG2 (English language translation courtesy of UNESCO).

Iceland

Copyright Act No. 73 of May 29, 1972, as last amended by Act No. 97 of 30 June 2006 (Ice.), *archived at* http://perma.cc/6B5K-8N7S.

India

The Copyright (Amendment) Act, 1957, No. 14 (as amended by Act No. 49 of 1999), Acts of Parliament, 1999 (India), *archived at* http://perma.cc/377Q-37V8 (English language translation by the

International Bureau of WIPO).

Ireland

European Communities (Artist's Resale Right) Regulations 2006 (S.I. No. 312/2006) (Ir.), *archived at* http://perma.cc/322W-QVLD; European Communities (Artist's Resale Right) Regulations 2006 (S.I. No. 312/2006) (Ir.), *archived at* http://perma.cc/U62K-2TNR.

Latvia

Autortiesību likums I nodaļa Vispārīgie noteikumi [Copyright Law (as last amended on Dec. 6, 2007)] (Lat.), *archived at* http://perma.cc/X9EJ-WG53 (English language translation by the International Bureau of WIPO).

Liechtenstein

Gesetz über das Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz, URG) [Law on Copyright and Related Rights (Copyright Law)], Jahrgang 1999 [July 23, 1999], Liechtensteinisches Landesgesetzblatt [Liechtenstein Law Gazette] No. 160 (Liech.), *archived at* http://perma.cc/SR7D-PC6Q (automatic translation tool).

Lithuania

1999 m. gegužės 18 d. Autorių teisių ir gretutinių teisių įstatymas Nr. VIII-1185 (su pakeitimais, padarytais 2010 m. sausio 19 d. įstatymu Nr. XI-656) [Law on Copyright and Related Rights No. VIII-1185 of May 18, 1999 (as amended on Jan. 19, 2010 – by Law No. XI-656)] (Lith.), *archived at* http://perma.cc/DU22-RS3A (English language translation by the International Bureau of WIPO).

Malta

Att XIII tal-2000, Kap. 415. Att Dwar Id-Drittijiet ta' L-awtur, kif emendat bl-Atti VI ta 'l-2001, IX tal-2003 u IX tal-2009. [Act XIII of 2000, Cap. 415. Rights Act of The author, as amended by Acts VI of 2001, IX of 2003 and IX of 2009], *archived at* http://perma.cc/QV99-8TLY (English language translation by the International Bureau of WIPO). *See also* L.N. 174 of 2006. Regolamenti ta' l-2006 dwar id-Dritt ta' Bejgh mill-Ġdid li ghandu Artist [Artists' Resale Right Regulations, 2006] (Malta), *archived at* http://perma.cc/DNV7-7BQP (English language translation by the International Bureau of WIPO).

Norway

LOV 1961-05-12 nr 02: Lov om opphavsrett til åndsverk m.v. (åndsverkloven) [Act relating to intellectual property rights (Copyright Act)] (as amended through Dec. 22, 2006) (Nor.), *archived at* http://perma.cc/9DQR-3Q66.

Peru

Ley sobre el Derecho de Autor - Decreto Legislativo N° 822 del 23 de april de 1996 [Copyright Law - Legislative Decree No. 822 of April 23, 1996] (Peru), *archived at* http://perma.cc/VY73-JBJG (English language translation by the International Bureau of WIPO).

Poland

Ustawa nr 83. Ustawa z dnia 4 lutego 1994 roku o prawie autorskim i prawach pokrewnych [Law No. 83 of February 4, 1994 on Copyright and Neighboring Rights (as last amended on Oct. 21, 2010)] (Pol.), *archived at* http://perma.cc/58FS-D6Y5 (English language translation by the International Bureau of WIPO).

Portugal

Decreto-Lei n.º 63/85, de 14 de Março, Código do Direito de Autor e dos Direitos Conexos [Code of Copyright and Related Rights], (e alterado pelas Leis n.ºs 45/85, de 17 de Setembro, e 114/91, de 3 de Setembro, e Decretos-Leis n.ºs 332/97 e 334/97, ambos de 27 de Novembro, pela Lei n.º 50/2004, de 24 de Agosto, pela Lei n.º 24/2006 de 30 de Junho e pela Lei n.º 16/2008, de 1 de Abril) [(amended by Law n. º s 45/85 of Sept. 17, and 114/91 of 3 Sept., and Decree-Law No. Nos 332/97 and 334/97, both of Nov. 27, by Law No. º 50/2004 of 24 August, by Law No. º 24/2006 of June 30 and Law No. º 16/2008 of 1April)] (Port.), *archived at* http://perma.cc/WG5G-R45H (automatic translation tool); Lei n.° 24/2006 de 30 de Junho (Artist's Resale Right) [Law No. 24/2006 of 30 June (Artist's Resale Right)] (Port.), *archived at* http://perma.cc/D48K-JDBJ (automatic translation tool).

Romania

Lege nr. 8 din 14 martie 1996 privind dreptul de autor si drepturile conexe [Law No. 8 of March 14, 1996 on Copyright and Neighboring Rights] (Rom.), *archived at* http://perma.cc/LH8U-EUYQ (English language translation by the International Bureau of WIPO).

Senegal

Loi n° 2008-09 du 25 janvier 2008 sur le droit d'auteur et les droits voisins [Law No. 2008-09 of January 25, 2008 on Copyright and Related Rights] (Sen.), *archived at* http://perma.cc/DVM2-SD5R (English language translation by the International Bureau of WIPO).

Slovakia

618/2003 Z.z. Zákon zo 4. decembra 2003 o autorskom práve a právach súvisiacich s autorským právom (autorský zákon) [Act No. 618/2003 on Copyright and Rights Related to Copyright] (Slovk.), *archived at* http://perma.cc/GKG5-UYKS (English language translation by the International Bureau of WIPO).

Slovenia

Copyright and Related Rights Act of 1995 (as last amended on Dec. 15 2006) Official Gazette RS Nos. 21/95, 9/01, 30/01, 43/01, 17/06, 44/06, 139/06 and 16/07 (in force Jan. 13, 2007) (Slovn.), *archived at* http://perma.cc/6FDY-PWQ6 (English language translation by the International Bureau of WIPO).

Spain

Texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las Disposiciones Legales Vigentes sobre la Materia (aprobado por Real Decreto Nº 1/1996, de 12 de abril de 1996, y modificado por la Ley Nº 5/1998 de 6 de marzo de 1998, que incorpora la Directiva Nº 96/9/CE del Parlamento Europeo y del Consejo de 11 de marzo de 1996 relativa a la Protección Jurídica de las Bases de Datos) [Consolidated text of the Law on Intellectual Property, regularizing, clarifying and harmonizing the Applicable Statutory Provisions (approved by Royal Legislative Decree No. 1/1996 of April 12, 1996, and amended by Law No. 5/1998 of March 6, 1998, incorporating Directive 96/9/EC of the European Parliament and of the Council of March 11, 1996 on the Legal Protection of Databases)] (Spain), *archived at* http://perma.cc/G48Q-DWBW (English language translation by the International Bureau of WIPO). This version does not reflect the changes made by Law 3/2008. For another unofficial translation see, Ley 3/2008, de 23 de diciembre, relativa al derecho de participación en beneficio del autor de una obra de arte original [Law 3/2008 of 23 December on the resale right for the benefit of the author of an original work of art.] (Spain), *archived at* GOBIERNO DE ESPANA: MINISTERIO DE LA PRESIDENCIA [Government of Spain: Ministry of the Presidency], http://perma.cc/4S6Q-AXA2 (unofficial

English language translation readable with Google Translate).

Sweden

Lag om upphovsrätt till litterära och konstnärliga verk [Act on Copyright in Literary and Artistic Works (1960:729)] (Svensk Författningssamling [SFS] 1960:729) (Swed.), *archived at* http://perma.cc/3VL2-CUUH (English language translation by the International Bureau of WIPO). For a more recent English language translation see also Lag om upphovsrätt till litterära och konstnärliga verk [Act on Copyright in Literary and Artistic Works (1960:729)] (Svensk Författningssamling [SFS] 1960:729) (Swed.) (English).

Chad

Loi n° 005/PR/2003 du 2 mai 2003 portant Protection du Droit d'Auteur, des Droits Voisins et des Expressions du Folklore [Law No. 005/PR/2003 of May 2nd, 2003 on the Protection of Copyright, Neighboring rights and Expressions of Folklore] (Chad), *archived at* http://perma.cc/PPB2-5SDQ (English language translation by the International Bureau of WIPO).

Togo

Loi n° 91-12 du 10 juin 1991 portant protection du droit d'auteur, du folklore et des droits voisins [Law No. 91-12 of June 10, 1991 on the Protection of Copyright, Folklore and Related Rights] (Togo), *archived at* http://perma.cc/8HJM-W8N7 (English language translation by the International Bureau of WIPO).

Tunisia

والفنية الأدبية بالملكية يتعلق 1994 فيفري 24 في مؤرخ 1994 لسنة 36 عدد قانون [Law No. 94-36 of February 24, 1994, on Literary and Artistic Property] (Tunis.), *archived at* http://perma.cc/9B64-99WJ (English language translation by the International Bureau of WIPO).

United Kingdom (UK)

Copyright, Design, and Patents Act, 1988, C.48 (U.K.), (Jan. 21, 2014, 10:39 PM), http://www.legislation.gov.uk/ukpga/1988/48/contents, *archived at* http://perma.cc/V9SF-XN7E; The Artist's Resale Right (Amendment) Regulations, 2011, S.I. 2011/2873 (U.K.), http://www.legislation.gov.uk/uksi/2011/2873/contents/made, *archived at* http://perma.cc/J392-E84M; The Artist's Resale Right (Amendment) Regulations, 2009, S.I. 2009/2792 (U.K.), http://www.legislation.gov.uk/uksi/2009/2792/contents/made, *archived at*

http://perma.cc/9UVB-BFK3; The Artist's Resale Right Regulations, 2006, S.I. 2006/346 (U.K.), http://www.legislation.gov.uk/uksi/2006/346/contents/made, *archived at* http://perma.cc/QP4P-NCPP. For unofficial copies see, Copyright, Design, and Patents Act, 1988, C.48 (U.K.), *archived at* http://perma.cc/D4QA-6ZGL; The Artist's Resale Right (Amendment) Regulations, 2011, S.I. 2011/2873 (U.K.), *archived at* http://perma.cc/BE3W-P32D; The Artist's Resale Right (Amendment) Regulations, 2009, S.I. 2009/2792 (U.K.), *archived at* http://perma.cc/52ZR-GL8R; The Artist's Resale Right Regulations, 2006, S.I. 2006/346 (U.K.), *archived at* http://perma.cc/CB72-UQBD.

APPENDIX B: DDS LEGISLATION CHARTS

Viewable and downloadable charts of resale royalty legislation compiled from information freely available from the internet, in the English language, may be found at the companion website to this Note. The relevant web address is http://elisadoll.wordpress.com/, *archived at* http://perma.cc/BF4U-5M7S. Charts were prepared for easy comparison of international law and for US national law.

CLIMATE CHANGE AND THE INUIT: BRINGING AN EFFECTIVE HUMAN RIGHTS CLAIM TO THE UNITED NATIONS

Andrew D. Emhardt*

INTRODUCTION

I think over again,
My small adventures,
My fears,
Those small ones that seemed so big,
For all the vital things
I had to get and to reach
And yet there is only one great thing:
To live to see the great day that dawns
And the light that fills the world.
- Old Inuit Song[1]

There is a strong connection between climate change and human rights infringements in the Arctic.[2] Global warming poses severe threats to the livelihood of the native Arctic people.[3] The levels of sea ice in the arctic were the lowest they have ever been in 2012.[4] Because most Inuit live along coastlines and river valleys, their health and culture depends on the harvest of fish, whales, and other wildlife. As sea ice levels continue to drop, the populations of these sources of food are dropping as well.[5] With the

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1. *See Inuit Literature*, INDIGENOUS PEOPLES LITERATURE, http://www.indigenouspeople.net/inuit.htm (last updated Dec. 18, 2013, *archived at* http://perma.cc/V7DB-T4WG).

2. *See* Jennifer Cassel, *Enforcing Environmental Human Rights: Selected Strategies of U.S. NGOs*, 6 NW. U. J. INT'L HUM. RTS. 104 (2007).

3. DONALD M. GOLDBERG, GLOBAL WARMING AND HUMAN RIGHTS: A CASE STUDY FROM THE ARCTIC 4-6 (2002).

4. Maria-José Viñas, *Arctic Sea Ice Minimum in 2013 Is 6th-Lowest on Record*, NAT'L AERONAUTICS & SPACE ADMIN. (Sept. 23, 2013), http://climate.nasa.gov/news/986, *archived at* http://perma.cc/5TA7-VS7S.

5. GOLDBERG, *supra* note 3, at 5; *see also* Ed Struzick, *As Arctic Melts, Inuit Face Tensions with the Outside World*, ENVIRONMENT 360 (2012), *archived at* http://perma.cc/WH8Y-KWNL. This news article states "the rapid retreat of the sea ice that has defined the Arctic ecosystem for thousands of years is threatening the existence and movements of creatures that have long been at the heart of Inuit subsistence culture –

thawing of permafrost, the frozen surface layer of soil, the Inuit must rethink their old ways of construction or lose their homes.[6] This thawing is causing damage to houses, roads, airports, and pipelines.[7]

There is no easy solution to the problems presented by climate change in the Arctic, but it is now clear that a court-based approach cannot make an impact. Real solutions must be the result of a concerted effort by the developed world, but the world will not take action unless there is clear support. There, non-governmental organizations (NGOs) must take up the call and collaborate with the Inuit populations that face significant threats to their cultural freedom.

This Note is divided into seven parts. Part I addresses two legal approaches to the intersection of climate change and Inuit rights. Part II addresses the history of the Inuit peoples and their special relationship to the wildlife and surrounding lands. Part III discusses the impact of climate change in the Arctic region and how it threatens this way of life. Part IV addresses the primary strategies for change and policymaking, with a discussion on the successes and failures. Part V focuses on the unique role of NGOs and non-profits in affecting Inuit's issues. Finally, Part VI discusses the need for NGOs to increase collaboration and include Inuit in their organizational structure. Part VII concludes that, despite the significant pressures for economic development, NGOs must ensure that Inuit, not industry, decide the path of these indigenous people.

I. LEGAL APPROACHES

There are two major approaches to correcting the impact of climate change on Inuit populations. First, localized groups can bring claims against those responsible for global warming in federal court.[8] The claim can be of public nuisance or other property rights issues.[9] The second alternative is to bring a human rights claim to the United Nations. This is the better alternative for two reasons. First, since Inuit are spread across seven nations,[10] a ruling in one state is unlikely to have a lasting impact in another. Second, global warming and climate change are not issues that a court alone can remedy. Therefore, the appropriate body to which to bring these claims is the United Nations.

However, bringing a claim to the United Nations is not a simple task. This Note argues that NGOs must carry the burden of bringing an effective

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whales, seals, polar bears, and fish."

6. Struzick, *supra* note 5.

7. GOLDBERG, *supra* note 3, at 5.

8. *E.g.,* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013).

9. *Id.* at 855; Cassel, *supra* note 2, at 106.

10. United States, Canada, Norway, Sweden, Greenland, Russia, and Finland. INDIGENOUS PARLIAMENT, *infra* note 46, at 8.

human rights claim, but this can only work with overwhelming public support. Though there are many NGOs in the field, their efforts are disjointed. NGOs must make greater efforts to collaborate with local Inuit leaders to effectively rally public opinion and awareness.

A. The Failures of Public Nuisance

In *Native Village of Kivalina v. ExxonMobil Corp.*,[11] the Ninth Circuit of the United States exposed the critical problems of a court-based approach. In *Kivalina*, concerned villagers brought a claim of public nuisance against ExxonMobil and twenty-two other "Energy Producers" for their contribution to global warming.[12] The villagers claimed that the Energy Producers'Tgreenhouse gas (GHG) emissions forced them to relocate.[13] The District Circuit in *Kivalina* ruled that the villagers brought a nonjusticiable political question and that the tribe and the city lacked standing.[14] On appeal, the Ninth Circuit emphasized that federal law, through the Clean Air Act, had displaced the claim.[15]

The village of Kivalina is a 400-member tribe of Inuit on the tip of a barrier reef, seventy miles north of the Arctic Circle.[16] The village is self-governing and federally recognized.[17] The villagers "depend on the sea ice that forms on their coastline in the fall, winter, and spring each year to shield them from powerful coastal storms."[18] In recent years, however, the sea ice has formed later, broken up earlier, and been much thinner than expected, meaning the village has lost its "shield" from coastal storms.[19] The village blames the inevitable destruction of its lands on global warming, with the GHGs emitted from the defendants as the culprit.[20] They allege that this "constitute[s] a substantial and unreasonable interference with public rights, including the rights to use and enjoy public and private property in Kivalina."[21]

The Energy Producers moved to dismiss the action for lack of subject matter jurisdiction, arguing that Kivalina's claims raise "inherently nonjusticiable political questions because to adjudicate its claims, the court would have to determine the point at which GHG emissions would become

11. *Kivalina*, 696 F.3d at 849.
12. *Id.* at 853.
13. *Id.*
14. *Id.* at 854.
15. *Id*. at 857.
16. *Id.* at 853.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 854.

excessive without the guidance from the political branches."[22] They further asserted that Kivalina was unable to establish any facts that its injuries were "fairly traceable" to the defendants.[23]

The Ninth Circuit drew on the Supreme Court's decision in *American Electric Power Co., Inc. v. Connecticut*, where eight states and the city of New York brought a public nuisance claim against the five largest emitters of carbon dioxide in the United States.[24] The Supreme Court held that the Clean Air Act and Environmental Protection Agency (EPA) regulations displaced the cause of action and any remedy.[25] The Ninth Circuit reasoned:

> The doctrine of displacement is an issue of separation of powers between the judicial and legislative branches, not the judicial and executive branches. When the Supreme Court concluded that Congress had acted to empower the EPA to regulate greenhouse gas emissions, it was a determination that Congress had "spoken directly" to the issue by legislation. Congressional action, not executive action is the touchstone of displacement analysis.[26]

The Ninth Circuit concluded its analysis by stating, "Kivalina's dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law."[27]

That final observation underlines the problems of a court-based approach. There are simply too many barriers to effectively bring a claim under public nuisance. Even if Congress were to take any more steps to abate GHG emissions, there would still be a crucial question remaining: What will the rest of the world do?[28] Particularly in the case of Inuit peoples, the action must come from the United Nations, with all developing nations united in their decision to take measures for real change.

B. The Hope of a Human Rights Claim

The Universal Declaration of Human Rights provides a glimmer of

22. *Id.*
23. *Id.*
24. *Kivalina*, 131 S. Ct. at 2527, 2529 (2011).
25. *Id.* at 2537.
26. *Kivalina*, 696 F.3d at 857 (citations omitted).
27. *Id.* at 858.
28. While the Inter-American Court of Human Rights (IACHR) could hear these claims, the problem of a ruling resulting in action is the same; the IACHR's jurisdiction is limited and contribution to climate change is a global problem. *Rules of Procedure of the Inter-American Commission on Human Rights*, ORGANIZATION OF AMERICAN STATES (Sept. 2, 2014), *archived at* http://perma.cc/ZK5-4NFN.

hope for the Inuit.[29] Article 22 of the Declaration explicitly provides the right to cultural freedom, although the document itself has no binding effect.[30] The 1978 World Conference to Combat Racism and Racial Discrimination "endorses the right of indigenous peoples to maintain their traditional structure of economy and culture, including their own language, and also recognizes the special relationship of indigenous peoples to their land and stresses that their land, land rights and natural resources should not be taken away from them."[31]

In specific application to the Inuit, the Canadian Constitution secures "[t]he existing aboriginal and treaty rights of the aboriginal peoples . . . . '[T]reaty rights'nincludes rights that now exist by way of land claims agreements or may be so acquired."[32] Therefore, the right to minimal self-determination can be understood to give the Inuit people, at the very least, the fundamental right to exist. This right grants the Inuit protection from "ethnocide" and secures their right to cultural participation.[33]

As indigenous populations depend on the environment to survive, the developed world's intrusions through environmental degradation deny their right to exist.[34] When advocating for the protection of his native lands, the Coordinator of the Indian Nations Unions stated:

> The only possible place for [indigenous] people to live and to re-establish our existence, to speak to our Gods, to speak to our nature, to weave our lives is where our God created us . . . . We are not idiots to believe that there is possibility of life for us outside of where the origin of our life is. Respect our place of living, do not degrade our living conditions, respect this life . . . . [T]he only thing we have is the right to cry for our dignity and the need to live in our land.[35]

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29. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948).

30. *Id.* art. 22.

31. The Declarations and Programmes of Action adopted by the First (1978) World Conference to Combat Racism and Racial Discrimination, U.N. Sales No.E.79.XIV.2, ch. II (Aug. 14-25, 1978), *archived at* http://perma.cc/TT5L-XARD.

32. Rights of the Aboriginal Peoples of Canada, 35, Part II of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) *archived at* http://perma.cc/WS2P-H6BL.

33. William Andrew Shutkin, Note, *International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*, 31 VA. J. INT'L L. 479, 489 (1991).

34. *Id.* at 490.

35. *Id.* (quoting A. Krenak at the World Commission on Environment and Development).

This, however, is the constant plight of indigenous populations. "[T]he history of indigenous people is . . . the chronicle of their unsuccessful attempts to defend their land against invaders."[36] Now that the climate is changing, the Inuit's need to defend their land is more necessary, yet more elusive than ever. When members of the international community deny that climate change is actually a problem, naming the specific culprit of this new invasion is next to impossible.

Instead of outlining new plans or forums for the United Nations to implement to a change in policy, the focus should be on fostering a bottom-up movement. The United Nations has recognized the importance of this approach, stating that it "allows us to appraise the most pressing needs of a highly inequitable global society, with greatly differing social, environmental and economic levels of development."[37] The High Commissioner further stated: "A human-rights based approach must be taken so that progress is not made at the cost of the most vulnerable and discriminated against members of society."[38]

The High Commissioner Report stated that "a human rights-based approach to climate change is also pragmatically necessary because litigation alone is not working."[39] The report stated that while States are legally obligated to respect human rights, "efforts to invoke environmental legal obligations have not created the tangible results necessary to be a sufficient solution."[40]

Another critical element of the High Commissioner Report is that it encourages "stronger cooperation between the human rights community and the climate change-awareness community."[41] The report emphasizes that "[t]he significant problem is a lack of cooperation, coordination, and coherence"[42] between the two groups. The report points to the lack of communication at the domestic and international level between civil society and government agencies, and states that this will continue to create a "protection gap" until the two communities are "coordinated and successfully operationalized."[43]

The High Commissioner Report, though immensely important in defining the scope of a human rights-based approach, does not clearly

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36. Hurst Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649, 667 (1988).

37. Human Rights Council, Rep. of the United Nations High Commissioner for Human Rights on the Outcome of the Seminar Addressing the Adverse Impacts of Climate Change on the Full Enjoyment of Human Rights, 4, Apr. 10, 2012, UN Doc. A/HRC/20/7 (2012) [hereinafter High Commissioner Report].

38. *Id.*

39. *Id.* at 8.

40. *Id.*

41. *Id.* at 10.

42. *Id.* at 12.

43. *Id.*

elucidate the issue of human rights versus climate change for two reasons. First, there are already organizations that recognize the link between human rights and climate change. Second, it ignores the deficiencies of a top-down approach to the problem. The best solution is not only for NGOs to collaborate with one another, but also to collaborate with the indigenous people they seek to represent.

This Note explores the relationship of Inuit peoples to NGOs and asserts that NGOs must make greater efforts to collaborate with the indigenous Arctic groups in order to bring an effective human rights claim to the United Nations.[44] In this arena, NGOs have the financial resources and willpower to create a lasting change, but there is still work to be done. NGOs should open their organizational doors to increase collaboration and make more efforts to include Inuit leaders in their management structure. The ultimate goal is to foster a "grassroots" movement that gives the Inuit a voice loud enough to be heard—and addressed—with the United Nations. But first, it is important to address the history of the Inuit and impact of climate change in the Arctic.

II. THE INUIT

A. Pre-European Contact

Prior to their encounters with Europeans, Inuit were completely self-sufficient.[45] Inuit inhabit Arctic and Subarctic regions of Alaska, Canada, Greenland, Norway, Russia, Finland, and Sweden.[46] While the term "Inuit" describes a series of distinct cultures,[47] they all share a common history; and most importantly, they share a common future. To a "southerner," life in the Arctic is harsh, as winter temperatures can reach negative forty degrees Fahrenheit,[48] and northern villages face months without a sunrise.[49]

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44. This Note is limited in scope to the Inuit in order to explore in appropriate depth the issues presented by such an approach. However, the Inuit are not the only indigenous population that can benefit from this approach.

45. PAUKTUTIT INUIT WOMEN OF CANADA, THE INUIT WAY: A GUIDE TO INUIT CULTURE 4 (2006) [hereinafter THE INUIT WAY].

46. KATHRIN WESSENDORF, AN INDIGENOUS PARLIAMENT?: REALITIES AND PERSPECTIVES IN RUSSIA AND THE CIRCUMPOLAR NORTH 8 (2005) [hereinafter AN INDIGENOUS PARLIAMENT].

47. *Id.*

48. HELEN DWYER & MICHAEL BURGAN, INUIT: HISTORY AND CULTURE 18 (2012).

49. Mike Heard, *Barrow Alaska Has Sunlight after 65 Days of Darkness*, KBZK.COM (Jan. 23, 2013, 8:42 AM), http://www.kbzk.com/news/barrow-alaska-has-sunlight-after-65-days-of-darkness/, *archived at* http://perma.cc/N3QU-T9D4. At the North Pole, the sun does not rise between October and March. *Daylight, Darkness and Changing of the Seasons at the North Pole*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., http://www.arctic.noaa.gov/gallery_np_seasons.html (last visited Jan. 15, 2014, *archived at* http://perma.cc/KAE2-WWP3).

Before European contact, Inuit lived in small nomadic groups and were dependent on hunting, fishing, and gathering to meet their needs.[50] To resolve disputes, they followed community customs.[51] That is, they used nothing more than informal structures to maintain peace between groups.[52]

In the early 1950s, the Canadian government began to move Inuit into permanent settlements.[53] While many adopted the features of southern life, many more continued to live according to their traditional values and maintained "close ties to the land and consider their relationship to the land to be essential to their culture and to their survival as a distinct people."[54]

B. Diet and Hunting

The traditional Inuit diet relies heavily on blubber, oil, and fat from hunting seals, whales, caribou, and fish.[55] While the modern diet is a bit different from what it once was, nutritious food from the south is expensive, so the foods that are able to make it into the homes of the Inuit are processed foods.[56] As a result, many Inuit rely on the traditional ways of gathering food.[57]

Hunting is a critical part of social interaction for the Inuit.[58] In the summer, small groups hunt caribou, while in the winter, many groups hunt seal.[59] For centuries however, whale hunting was the central ritual of their culture and the Inuit relied on whale as their primary form of sustenance.[60] Anthropologists refer to the Inuit as "People of the Whale" because the two are inextricably linked to one another.[61] The ability to hunt is essential to the Inuit's psychological health.[62] Prior to a hunt, some whalers "enter a period of sexual abstinence, intensive meditation, and spiritual preparation."[63] Not surprisingly, an Inuit leader once stated:

> The whale is more than food to us. It is the center of our

50. THE INUIT WAY, *supra* note 45.
51. THE INUIT WAY, *supra* note 45.
52. THE INUIT WAY, *supra* note 45.
53. THE INUIT WAY, *supra* note 45.
54. THE INUIT WAY, *supra* note 45.
55. THE INUIT WAY, *supra* note 45, at 42.
56. THE INUIT WAY, *supra* note 45, at 42.
57. THE INUIT WAY, *supra* note 45, at 43.
58. THE INUIT WAY, *supra* note 45, at 30.
59. THE INUIT WAY, *supra* note 45.
60. Rupa Gupta, Note, *Indigenous Peoples and the International Environmental Community: Accommodating Claims Through a Cooperative Legal Process*, 74 N.Y.U. L. REV. 1741, 1771 (1999).
61. *Id.* at 1745.
62. *Id.* at 1746.
63. *Id.* at 1747 (quoting NIGEL BONNER, WHALES OF THE WORLD 61 (1989)).

> life and culture. We are the People of the Whale. The taking and sharing of the whale is our Eucharist and Passover. The whaling festival is our Easter and Christmas, the Arctic celebrations of the mysteries of life.[64]

While whale hunting is essential to many Inuit groups, others depend on seals, walrus, polar bears, and land mammals such as caribou, reindeer, moose, and musk ox.[65] To hunt, catch, and share these foods is the essence of Inuit culture."[66] When the numbers of these animals decline, it "threatens not only the dietary requirements of the Inuit, but also their very way of life."[67]

C. Inuit Role as Lawmakers

Indigenous peoples have moved from the object to the subject of international law in the last decades.[68] Indigenous peoples have gained recognition of their "legal personality as distinct societies" with special collective rights and a role in national decision-making.[69] International efforts have been shifting to the creation of "practical programs for indigenous self-development."[70] These efforts have secured international legal recognition for the Inuit,[71] and they have established themselves as relatively autonomous groups.[72]

The United Nations has attempted to define "good" practices when it comes to indigenous peoples'orole in decision-making.[73] The Human Rights Security Council stated: "The most significant indicator of good practice is likely to be the extent to which indigenous peoples were involved in the design of the practice and their agreement to it."[74] The Council then listed other factors: "(a) Allows and enhances indigenous

64. *Id.* (quoting *The People of the Whale: A Fight for Survival,* 98 INDIAN AFFAIRS Fall-Winter 7 (1978-79)).

65. SUSAN JOY HASSOL, ARCTIC CLIMATE IMPACT ASSESSMENT: IMPACTS OF A WARMING ARCTIC 93 (2004).

66. *Id.* at 94.

67. *Id.*; *see also* Gupta, *supra* note 60, at 1748 ("From the Inuit's perspective, the disruption of this use not only raises the specter of losing the whale meat in their diet and economy, but also poses the threat of cultural, social, and spiritual starvation.").

68. Russell Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law*, 7 HARV. HUM. RTS. J. 33, 35 (1994).

69. *Id.* at 34.

70. *Id.*

71. *Id.* at 35.

72. *Id.* at 57.

73. *See* Human Rights Council, Final report of the study on indigenous peoples and the right to participate in decision-making, Aug. 17. 2011, UN Doc. A/HRC/18/42 (2011) [hereinafter Indigenous Decision-Making].

74. *Id.* at 4.

people's participation in decision-making, (b) Allows indigenous peoples to influence the outcome of the decisions that affect them, (c) Realizes indigenous peoples' right to self-determination, (d) Includes, as appropriate, robust consultation procedures and/or processes to seek indigenous peoples' free, prior, and informed consent."[75]

The Inuit have distinctly different experiences with self-determination and legal rights depending on their "nationality."

1. Sami Parliaments

In Sweden, Norway, and Finland, the Inuit peoples are referred to as the Sami.[76] In each of these nations, the indigenous peoples have their own parliament.[77] In Sweden, the Sami Parliament has special responsibilities in regard to decision-making.[78] The Swedish Sami Parliament decides on the distribution of financing, the members of the Sami schools, and participates in decisions affecting the interests of the reindeer industry.[79]

In Finland and Norway, authorities are required to negotiate with the Sami Parliament in all matters that would affect the status of the indigenous people.[80] The Norwegian Sami also have the right to set out procedures applicable to the government in all issues directly affecting Sami interests.[81]

2. Greenland's Home Rule

Greenland's Parliament is entirely indigenous.[82] Under the Home Rule Act of 1979, Denmark slowly transferred control to Greenlandic authorities and its population of 56,000.[83] The result of the process "is often considered a model for other indigenous peoples, perceived by some as being the maximum degree of autonomy that a small indigenous group can hope to achieve."[84] Greenland is now a self-governing region in nearly full control of its own daily affairs.[85] Greenland does, however, rely on Denmark for nearly half of its public expenditures, "a fact that

75. *Id.*
76. Permanent Forum on Indigenous Issues, Indigenous participatory mechanisms in the Arctic Council, the Circumpolar Inuit Declaration on Resource Development Principles in Inuit Nunaat and the Laponia management system, May 7-18, 2012, 11, UN Doc. E/C.19/2012/10 (2012) [hereinafter Indigenous Participatory Mechanisms].
77. Indigenous Decision-Making, *supra* note 73, at 7.
78. Indigenous Decision-Making, *supra* note 73, at 7.
79. Indigenous Decision-Making, *supra* note 73, at 8.
80. Indigenous Decision-Making, *supra* note 73, at 8.
81. Indigenous Decision-Making, *supra* note 73, at 8.
82. Indigenous Decision-Making, *supra* note 73, at 8.
83. AN INDIGENOUS PARLIAMENT, *supra* note 46, at 150.
84. AN INDIGENOUS PARLIAMENT, *supra* note 46, at 150.
85. AN INDIGENOUS PARLIAMENT, *supra* note 46, at 150.

psychologically at least perpetuates a dependency complex reminiscent of colonialism."[86] While Greenland is not fully independent, Home Rule grants the indigenous population a high level of autonomy.

3. The United States' Alaska Native Claims Settlement Act

In the United States, on the other hand, the Alaska Native Claims Settlement Act of 1971 granted the Inuit 45 million acres of land and $962.5 million to compensate for the remaining 88 percent of the Inuit land claims.[87] The agreement lacked any recognition of self-determination.[88] For-profit corporations received the compensation, and "they have not been characterized as examples of good corporate governance or corporate democracy."[89] On the other hand, Alaska has granted local control through borough governments.[90] The Inuit are able to participate extensively in governance in the North Slope Borough and Northwest Arctic Borough.[91]

The United States' system is in direct violation of articles 20 and 33 of the Declaration on the Rights of Indigenous Peoples, which grant indigenous peoples the right to "maintain and develop their political, economic, and social systems and institutions," and to "determine their own identity or membership in accordance with their customs and traditions."[92] The International Covenant on Economic, Social and Cultural Rights of 1966 also states that "[i]n no case may a people be deprived of its own means of subsistence,"[93] and the Alaska Native Claims Settlement Act did just that.[94]

4. Canadian Land Agreements

In Canada, the approximately 56,000 Inuit benefit from land agreements that enable them to exercise a great deal of control over their futures.[95] These land agreements were the James Bay and Northern Quebec

86. AN INDIGENOUS PARLIAMENT, *supra* note 46, at 152.
87. *See* Indigenous Participatory Mechanisms, *supra* note 76, at 6.
88. Indigenous Participatory Mechanisms, *supra* note 76, at 7.
89. Indigenous Participatory Mechanisms, *supra* note 76, at 7.
90. Indigenous Participatory Mechanisms, *supra* note 76, at 7.
91. Indigenous Participatory Mechanisms, *supra* note 76, at 7.
92. Indigenous Participatory Mechanisms, *supra* note 76, at 7.
93. Indigenous Participatory Mechanisms, *supra* note 76, at 7.
94. Indigenous Participatory Mechanisms, *supra* note 76, at 8. It should be noted, however, that the United States has signed but not ratified the International Covenant on Economic, Social and Cultural Rights. *Chapter IV: Human Rights*, UNITED STATES TREATY COLLECTION (Aug. 27, 2014, 9:12 PM), https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty, *archived at* http://perma.cc/D6UD-RMTW.
95. *Inuit*, HISTORICA CANADA (Aug. 6, 2010), http://www.thecanadianencyclopedia.ca/en/article/inuit/, *archived at* http://perma.cc/MWZ6-FPLJ.

Agreement, the Inuvialuit Final Agreement, the Nunavut Land Claims Agreement, and the Labrador Inuit Land Claims Agreement.[96] The Canadian government needed to establish a common understanding of law, as Inuit's community customs had run counter to the basic principles of Canadian law.[97] There was no formal authority to decide how a social infraction should be punished, as "the entire community was responsible for the maintenance of peace and order."[98] Social issues were addressed as an entire group, and the response focused more on the individual than on the offense.[99]

The major differences between the Alaska Native Land Claims Agreement and the James Bay and Northern Quebec and Inuvialuit Land Claims Agreement are that the Canadian agreements included "actual and extensive negotiations," rather than an act of Congress, and a "full and formal" referendum that allowed for free, prior, and informed consent.[100] Additionally, the agreements formally recognized the fishing, hunting, and gathering rights of the indigenous peoples.[101] While the Nunavut Land Claims Agreement has been unsuccessful, the Labrador Inuit Land Claims Agreement of 2004 contains key provisions in favor of Inuit interests.[102] It addresses offshore water rights and specifies self-government.[103]

5. Russian Limitations

The United Nations points out that in Russia, "neither local nor national authorities have provided any substantive response to the appalling conditions facing the approximately 1,700 Siberian Yup'ik. . . ."[104] The United Nations further states that "[t]he Inuit do not have any measure of control over or direct participation in" the rapid industrialization in the northern part of Russia.[105] In 2001, however, the Russian Federation passed a law to grant permanent legal status to indigenous communities, but "[f]ew, if any, of these minimal laws have been implemented to date."[106]

Because every nation has a unique approach to the status of the Inuit population, each must work together in other forums and with NGOs in order to raise awareness of their claims to human rights, particularly as they apply to climate change.

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96. *See* Indigenous Participatory Mechanisms, *supra* note 76, at 8-10.
97. THE INUIT WAY, *supra* note 45, at 15.
98. THE INUIT WAY, *supra* note 45, at 15.
99. THE INUIT WAY, *supra* note 45, at 13.
100. Indigenous Participatory Mechanisms, *supra* note 76, at 8.
101. Indigenous Participatory Mechanisms, *supra* note 76, at 8.
102. Indigenous Participatory Mechanisms, *supra* note 76, at 9.
103. Indigenous Participatory Mechanisms, *supra* note 76, at 9.
104. Indigenous Participatory Mechanisms, *supra* note 76, at 6.
105. Indigenous Participatory Mechanisms, *supra* note 76, at 6.
106. Indigenous Participatory Mechanisms, *supra* note 76, at 6.

III. CLIMATE CHANGE IN THE ARCTIC

A. Global Warming

Global warming is a very real phenomenon that will have profound effects on the entire world, particularly the Arctic.[107] Earth's average temperature has increased by 1.4 degrees Fahrenheit over the last century, and could rise another 2 to 11.5 degrees Fahrenheit in the next.[108] These small changes can lead to significant changes in the climate and weather.[109] Data from tree rings show that the summer temperatures over the last decades are the highest they have been in 2,000 years, and snow cover in May and June has decreased by 20 percent.[110] The Arctic is one of the parts of the globe that is warming up the fastest.[111]

There are five reasons why the Arctic is warming faster than lower parts of the world.[112] First, melting snow exposes darker land, absorbing more light.[113] Second, "a greater fraction of the extra energy received at the surface due to increasing concentrations of greenhouse gases goes directly into warming the atmosphere,"[114] while in the tropics, more goes to evaporation.[115] Third, the atmospheric layer is shallower in the Arctic, which means that the air is able to heat more quickly.[116] Fourth, the retreating sea ice exposes more water, and "solar heat . . . is more easily transferred to the atmosphere . . . ."[117] Finally, oceanic circulation transfers heat to the Arctic.[118]

GHG emissions are a major culprit.[119] GHGs like carbon dioxide, methane, and nitrous oxide trap heat into Earth's atmosphere, causing global temperatures to rise.[120] In general, GHGs contribute to a necessary

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107. HASSOL, *supra* note 65, at 8.

108. *Climate Change: Basic Information*, US ENVTL. PROTECTION AGENCY, http://www.epa.gov/climatechange/basics/ (last visited Jan. 16, 2014, *archived at* http://perma.cc/YW6T-NM7T).

109. *Id.*

110. Margareta Johanasson, *Effects of Climate Change in Arctic More Extensive Than Expected, Report Finds*, SCIENCEDAILY (May 4, 2011), http://www.sciencedaily.com/releases/2011/05/110504084032.htm, *archived at* http://perma.cc/6B8V-WFC4.

111. *Id.*

112. HASSOL, *supra* note 65, at 20.

113. HASSOL, *supra* note 65, at 20.

114. HASSOL, *supra* note 65, at 20.

115. HASSOL, *supra* note 65, at 20.

116. HASSOL, *supra* note 65, at 20.

117. HASSOL, *supra* note 65, at 20.

118. HASSOL, *supra* note 65, at 20.

119. *See Climate Change: Basic Information*, *supra* note 108.

120. HASSOL, *supra* note 65, at 20.

process that regulates the global temperatures.[121] Carbon sinks like plants, trees, and oceans absorb excess GHGs to stabilize the amount in the atmosphere.[122] Global carbon dioxide emissions from fossil fuels alone have increased by 1,600 percent since the turn of the twentieth century.[123]

In the past several decades, the Arctic Ocean has warmed two to three degrees Celsius and is expected to warm by as much as ten degrees Celsius by 2100.[124] The concern is that the warming could be so rapid that adaptation would be impossible, and migration would be the only solution.[125] In addition to Kivalina,[126] two Alaskan villages have already been forced to relocate as a result of permafrost thaw, one of which must move to the outskirts of a Canadian town, which would threaten its subsistence, lifestyle, and identity.[127]

Permafrost thaw and changes in hunting patterns are two areas where the impact of climate change will be the greatest.[128] Permafrost is "soil, rock, or sediment that has remained below 0^{o}C for two or more consecutive years."[129] It exists under most land surfaces and can range from a "few meters to several hundred meters thick."[130]

Much of the region's industrial activities depend on the frozen ground for transportation.[131] When the top layer of permafrost thaws, the roads become muddy and unstable.[132] Northern villages rely on frozen roads to receive groceries and other materials.[133]

Permafrost thaw can also cause damage to houses, roads, airports, and pipelines.[134] Current projections indicate that it is very likely that

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121. ANNETTE SALIKEN, COCKTAIL PARTY GUIDE TO GLOBAL WARMING 23 (Heritage House Publ'g 2010).

122. *Id.* at 28.

123. *Global Greenhouse Gas Emissions Data*, US ENVTL. PROTECTION AGENCY, http://www.epa.gov/climatechange/ghgemissions/global.html (last visited Jan. 16, 2014, *archived at* http://perma.cc/53ZK-3LFZ).

124. GOLDBERG, *supra* note 3, at 4.

125. GOLDBERG, *supra* note 3, at 4.

126. *See* discussion *supra* Part I.A.

127. *See* discussion *supra* Part I.A.; *see also* Thin Lei Win, *Alaksan Villagers Become Climate Refugees as Homeland Melts,* THOMSON REUTERS FOUND. (April 24, 2012, 3:11 PM), http://www.trust.org/alertnet/news/alaskan-villagers-become-climate-refugees-as-homeland-melts, *archived at* http://perma.cc/A4PS-CKE8.

128. Brad Plumer, *Permafrost Thaw- Just How Scary Is It?,* WASHINGTON POST (Dec. 19, 2011, 1:07 PM), http://www.washingtonpost.com/blogs/ezra-klein/post/just-how-scary-is-permafrost-thaw/2011/12/19/gIQAUE4j4O_blog.html, *archived at* http://perma.cc/L7ER-854B.

129. HASSOL, *supra* note 65, at 87.

130. HASSOL, *supra* note 65, at 87.

131. HASSOL, *supra* note 65, at 86.

132. HASSOL, *supra* note 65, at 86.

133. HASSOL, *supra* note 65, at 86.

134. GOLDBERG, *supra* note 2, at 5.

permafrost thaw will cause settling. In Yakutsk, Russia, more than 300 buildings have been damaged by permafrost thaw.[135] These buildings include several residential buildings, a power station, and the airport's runway.[136] While some argue that poor construction caused the buildings to collapse, there are serious limitations to the quality of construction while permafrost continues to thaw.[137] Complete thawing is expected to take centuries, and the benefits of easier construction will not occur until after that time.[138] Therefore, the consequences over the next century will be "primarily negative (that is, destructive and costly)."[139]

Another crucial aspect of permafrost thaw is that permafrost is also an important carbon sink.[140] As permafrost melts, more and more of the trapped methane and carbon dioxide are released.[141] There is evidence that by the year 2100, the carbon released from permafrost could be five times greater than current models indicate.[142]

Climate change also affects the Inuit's ability to hunt. In the Nunavut territory, the sea ice is thinning, and there is a reduction in the number of seals in some areas.[143] In an Inuit community's spring narwhal hunt, where villagers rely on hunting about sixty narwhal every year, hunters were only able to harvest three whales.[144] Furthermore, populations of marine mammals, caribou, and polar bears are declining.[145] Seals and walruses are losing their "platform" to rest, and there are reports of caribou falling through sea ice.[146] There is also a shorter hunting season because of the shorter freezing period.

The Arctic Climate Impact Assessment compiled indigenous observations in its report and stated that "a number of common themes clearly emerge."[147] These are: "the weather seems unstable;" "snow quality and characteristics are changing;" "there is more rain in the winter;" "seasonal weather patterns are changing;" "water levels in many lakes are dropping;" "species not seen before are now appearing in the Arctic;" "sea ice is declining, and its quality and timing are changing;" "storm surges are increasing erosion in some areas; more groups are reporting sunburn;" "climate change is occurring faster than the people can adapt;" and "climate

135. HASSOL, *supra* note 65, at 89.
136. HASSOL, *supra* note 65, at 89.
137. HASSOL, *supra* note 65, at 89.
138. HASSOL, *supra* note 65, at 89.
139. HASSOL, *supra* note 65, at 89.
140. SALIKEN, *supra* note 121, at 28.
141. SALIKEN, *supra* note 121, at 28.
142. SALIKEN, *supra* note 121, at 28.
143. SALIKEN, *supra* note 121, at 28.
144. Struzik, *supra* note 4.
145. GOLDBERG, *supra* note 2, at 5.
146. GOLDBERG, *supra* note 2, at 5.
147. HASSOL, *supra* note 65, at 93.

change is strongly affecting people in many communities, and in many cases, threatening their survival."[148]

B. Prospect of Increased Trade and Development

Despite the clear impacts on the Inuit, climate change in the Arctic will have positive effects for some.[149] The opening of the "Northwest Passage," the long-awaited waterway through the arctic, will increase trade, fishing, and mining in once-inaccessible areas.[150] While this may bring economic prosperity to some, there will be many adverse effects on the Inuit way of life.[151]

Explorers have been searching for the Northwest Passage since 1497 when Italian navigator John Cabot attempted the voyage.[152] Many others made unsuccessful attempts, and it was not until 1905 that Roald Amundsen's vessel completed the journey.[153] Since this journey about 110 vessels have completed the voyage.[154] It has never been considered a truly viable trade option because it has been impossible to have a consistent trade route.[155] In 2007, however, the prospect of a viable route was closer than it has ever been as Europe's Space Agency reported that the levels of sea ice were so low that the passage was fully navigable for the first time since satellite records began.[156] In 2007, Roger Swanson, "a 76-year-old pig farmer turned yachtsman from Minnesota," was able to complete the journey in just forty-five days and described the journey as "smooth sailing."[157]

Shell Oil has worked to secure oil rights in the area for the last six years,[158] knowing that the thawing of the sea ice will make oil wells a viable

148. HASSOL, *supra* note 65, at 93.

149. GOLDBERG, *supra* note 2, at 7.

150. Alistair MacDonald, *Inuit Group Seeks to Attract Mining Investment in Arctic*, WALL ST. J. (Sept. 26, 2012, 12:43 PM), http://online.wsj.com/article/SB10000872396390443916104578020330254195480.html, *archived at* http://perma.cc/L7ER-854B.

151. Jonathan Montpetit, *Economic Benefits of Northwest Passage Opening Not Without Costs: Researchers*, REDORBIT (Aug. 13, 2007), http://www.redorbit.com/news/science/1032743/economic_benefits_of_northwest_passage_opening_not_without_costs_researchers/, *archived at* http://perma.cc/8RXN-YBR9; GOLDBERG, *supra* note 2, at 4.

152. TONY SOPER, THE NORTHWEST PASSAGE ATLANTIC TO PACIFIC: A PORTRAIT AND GUIDE 7, (Bradt 2012).

153. *Id.*

154. Kathryn Westcott, *Plain Sailing on the Northwest Passage*, BBC NEWS (Sept. 19, 2007, 12:18 PM), http://news.bbc.co.uk/2/hi/americas/6999078.stm, *archived at* http://perma.cc/DS9L-NGZQ.

155. *Id.*

156. *Id.*

157. *Id*.

158. Clifford Krauss, *Shell Delays Arctic Oil Drilling Until 2013*, N.Y. TIMES (Sept. 17,

option. Shell Oil has recently been forced to halt its completion of oil wells in the Alaskan Arctic until 2013 after a "spill containment dome was damaged during a testing accident."[159] Energy experts say that there could be up to a million barrels of oil a day from the region, which would be the equivalent of about 10 percent of the current United States domestic production.[160]

Put simply, climate change is not an ephemeral issue. Soon every nation will be competing for oil rights and trade passages throughout the Arctic, which will only accelerate environmental degradation in the area and further deepen the human rights infringements against the Inuit from the developed world.

C. The Environmental Justice Movement

In recent years, protection of the environment has regained momentum. One of these areas of concern is called "Environmental Justice." The US EPA defines Environmental Justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to development, implementation, and enforcement of environmental laws, regulations, and policies."[161] The EPA further adds, environment justice "will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work."[162]

Since the 1980s, the US population has become more aware of the disparate effects of environmental degradation, including the realization that[163] most environmental damage is done in low-income, high-minority areas.[164] Minorities are disproportionately affected by environmental change.[165] In fact, "people of color now comprise a majority in neighborhoods with commercial hazardous waste facilities."[166]

Furthermore, "from extraction to distribution to consumption, Indigenous peoples in the U.S. are disproportionately impacted all along the

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2012), http://www.nytimes.com/2012/09/18/business/global/shell-delays-arctic-oil-drilling-until-next-year.html?pagewanted=all, *archived at* http://perma.cc/9V8D-5PMD.

159. *Id.*

160. *Id.*

161. *Environmental Justice*, UNITED STATES ENVTL. PROTECTION AGENCY, http://www.epa.gov/environmentaljustice/ (last updated Nov. 19, 2013, *archived at* http://perma.cc/VG8Y-TH5N.

162. *Id.*

163. ROBERT BULLARD, ET AL., TOXIC WASTES AND RACE AT TWENTY: 1987-2007, 38 (United Church of Christ 2007), *archived at* http://perma.cc/S7NG-G86J.

164. *Id.* at 52.

165. *Id.* at 63.

166. *Id.*

road of destruction."[167] The United Church of Christ made the following statement of solidarity:

> We, the undersigned, have met in a gathering on climate change and environmental justice. We have heard from scientists and policy analysts, from Arctic communities and residents of ecosystems already impacted by the effects of climate change . . . . The urgency of responding to climate change is undeniable; to ignore the issue means environmental and social disaster for all. The sins we commit against Mother Earth today will haunt our children and children's children tomorrow.[168]

That said, it is important to note that human rights violations through global warming do not present the only violations that other indigenous populations face. Indigenous populations throughout the world must contend with large-scale operations that utterly destroy their homelands.[169] The impacts of these techniques are outside the scope of this Note and present issues that are no less complicated.

IV. THE ROLE OF NGOS

A. NGOs and the United Nations

As *Native Village of Kivalina* indicates, there are few options for the Inuit to voice their concerns. In an attempt to encourage real change, NGOs have taken up the cause to defend the Inuit in forums[170] and to bring these concerns to the United Nations.[171] NGOs play a critical part in the formation of policies and treaties regarding the intersection of climate change and human rights; however, NGOs in the field largely overlook a critical element of the process—the Inuit themselves.[172]

Without the Inuit's active participation in these organizations, NGOs will continue to fall short of their goals of creating change for the Inuit peoples. To bring more effective claims to international bodies, NGOs must make a more concerted effort to include the Inuit voices, their people, and

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167. *Id.* at 121.

168. *Id.* at 122.

169. *See, e.g.*, SHELL'S ENVIRONMENTAL DEVASTATION IN NIGERIA, CENTER FOR CONSTITUTIONAL RIGHTS (2009), *archived at* http://perma.cc/X3QY-8ZXM.

170. For a list of non-governmental organizations with consultative status, see *infra* note 181.

171. Gupta, *supra* note 60, at 1771.

172. As an observation based on the author's research: outside of the organizations created by the Inuit, Inuit leaders are rare within the NGOs that focus on the relationship of human rights and climate change.

their leaders into their strategies to effect more lasting changes to the policies and decisions of international bodies. The ultimate goal is to encourage a grassroots movement to bring the Inuit concerns to the United Nations. The most effective way to do this would be to increase collaboration with Inuit populations.

NGOs are "private, independent, non-profit, goal-oriented and not founded or controlled by a government."[173] NGOs make up a part of "civil society" and have many virtues. A strong civil society is able to oppose an oppressive government and speak with the voice of the people.[174] Civil society is able to organize the public for democratic participation, no matter what form of government the civil society is.[175] Civil society builds trust and increases social capital.[176] These are essential aspects of any grassroots movement, which is best suited to effectuate change in the United Nations.

Human rights NGOs have had a profound effect on UN policy since the United Nations'ucreation. Gay McDougall states "NGOs frame policies and influence key government decisions. They give voice to causes that have been ignored, forgotten or marginalized. They raise legal awareness within targeted communities, often providing basic legal representation in high-risk or neglected human rights cases."[177] NGOs made significant contributions to the negotiation of the UN Charter and nearly all major human rights policies enacted under the Universal Declaration of Human Rights.[178]

NGOs have access to the United Nations through article 71 of the UN Charter.[179] Article 71 provides the legal basis for NGOs to receive United Nations "consultative status." It states: "The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and,

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173. George E. Edwards, *Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) From the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs*, 19 MICH. ST. J. INT'L. L. 165, 170 (2010). The definition of an NGO is not without dispute; however, these are the assumed minimal characteristics of an NGO.

174. NANCY L. ROSENBLUM & ROBERT C. POST, INTRODUCTION TO CIVIL SOCIETY AND GOVERNMENT 17 (Nancy L. Rosenblum and Robert Post eds., 2002).

175. *Id.* at 18.

176. *Id.*

177. Edwards, *supra* note 173, at 175 (quoting Gay McDougall, *Decade of NGO Struggle*, 11 HUM. RTS. BRIEF 12 (2004)).

178. Edwards, *supra* note 173, at 176; *see also* William Korey, *NGOs and the Universal Declaration of Human Rights*: *"A Curious Grapevine"*, 22 HUM. RTS. Q. 298 (2000) (book review) (declaring that human rights NGOs have been "instrumental" in making human rights discourse significant).

179. U.N. Charter art. 71.

where appropriate, with national organizations . . . ."[180] Currently, there are seven NGOs with a stake in Inuit affairs that have consultative status with the United Nations.[181] Article 71 has been considered a great success, as former Secretary-General of the United Nations, Kofi Annan stated: "Close engagement with civil society was seen then as vital for the Organization's health and for people's well-being. That is as true today as it was then—if anything, even more so."[182]

B. Effective Strategies for Human Rights NGOs

Professor George Edwards of Indiana University Robert H. McKinney School of Law outlines ten characteristics of effective Human Rights NGOs. These are: (1) mission, (2) adherence to human rights principles, (3) legality, (4) independence, (5) funding, (6) non-profit status and commitment to service, (7) transparency and accountability, (8) adaptability and responsiveness, (9) cooperative and collaborative nature, and (10) competence and reliability.[183]

The same characteristics should hold true for successful NGOs that pursue environmental justice claims. These characteristics are important when considering a change in the organizational make-up of major NGOs with a stake in Inuit affairs and well-being.

Three major NGOs, Earthjustice, the Center for International Environmental Law, and Earthrights International, have established three different techniques for advancing environmental human rights claims.[184] The first of these, championed by Earthjustice, is to work through the UN system toward establishing environmental rights as enforceable law.[185] The

180. *Id.*

181. *See* UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, LIST OF NON-GOVERNMENTAL ORGANIZATIONS IN CONSULTATIVE STATUS WITH THE ECONOMIC AND SOCIAL COUNCIL AS OF 1 SEPTEMBER 2011 (2011), *archived at* http://perma.cc/P7Y-Y66S. The seven organizations are the Inuit Circumpolar Council; Pauktuutit Inuit Women's Association of Canada; Earthjustice; the Association of Indigenous Peoples of the North, Siberia and Far East of the Russian Federation; the Batani International Development Fund for Indigenous People of the North, Siberia and the Far East of the Russian Federation; the International Work Group for Indigenous Affairs; and the Netherlands Centre for Indigenous Peoples. Each of these, according to their mission statements, has an interest in Inuit affairs. *See, e.g.*, *Mission Statement*, INT'L WORK GROUP FOR INDIGENOUS AFFAIRS, http://www.iwgia.org/iwgia/who-we-are-/mission-statement (last visited Jan. 20, 2014, *archived at* http://perma.cc/EQ89-RZS6).

182. Edwards, *supra* note 173, at 177 (quoting Press Release, U.N. Secretary-General, Without vital role of NGOs, world could hardly respond to myriad crises U.N. Secretary-General Annan tells DPI/NGO Conference, U.N. Press Release SG/SM/10085 (Sept. 9, 2005)).

183. Edwards, *supra* note 173, at 168.

184. Cassel, *supra* note 2, at 107.

185. Cassel, *supra* note 2, at 107.

second strategy is to enforce human rights claims on a regional level, particularly through the submission of petitions to the Inter-American Commission of Human Rights (IACHR), as the Center for International Environmental Law (CIEL) has been doing.[186] Third, Earthrights International submits amicus briefs in litigation in US Federal Courts under the Alien Torts Claims Act.[187]

The submission of Environmental Rights Reports to the UN Human Rights Commission has its limitations.[188] Because the Commission is unable to produce "concrete, immediate benefits" for the parties involved, it may not be the most desirable approach.[189] CIEL's approach of petitioning the IACHR also has its limitations, most notably in regard to enforcement.[190] Moreover, '[m]any of the governments with which the Inter-American Commission . . . [has] had to work have been ambivalent towards [it] at best and hostile at worst.'"[191]

Given the deficiencies of a court-based approach, all three of these organizations would benefit immensely by increasing their efforts to collaborate with Inuit leaders and assist in creating a more grassroots approach.

V. CURRENT STATUS OF NGOS

A. Human Rights and Climate Change

Currently, the United Nations has recognized the impact of climate change on human rights; however, little more has been done to combat the problem. In Resolution 10/4, the Human Rights Council decided to hold a panel discussion on the relationship between climate change and human rights.[192] In the discussions, the United States denied that there was a link between climate change and human rights as a legal matter but did recognize that climate change could impede the full enjoyment of rights.[193] Other nations recognized the critical problems with climate change and human rights and stated that the issues impacted their own people as well.[194]

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186. Cassel, *supra* note 2, at 107.

187. Cassel, *supra* note 2, at 107.

188. Cassel, *supra* note 2, at 110.

189. Cassel, *supra* note 2, at 110.

190. Cassel, *supra* note 2, at 118.

191. Cassel, *supra* note 2, at 118. (quoting HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 938 (2d ed. 2000)).

192. *See generally* OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, SUMMARY OF DISCUSSIONS, HUMAN RIGHTS COUNCIL PANEL DISCUSSION ON THE RELATIONSHIP BETWEEN CLIMATE CHANGE AND HUMAN RIGHTS (2009), *archived at* http://perma.cc/A86X-NXK3.

193. *Id.* at 8.

194. *Id.* at 7. China, Azerbajian, the EU, Turkey, and others stated that their respective populations were already affected by climate change. *Id.*

It is important to point out that the discussions were silent on the impact of climate change on the Inuit populations.[195] The most concrete resolution, however, was to "explore in more detail how a human rights approach could strengthen policies and measures and enhance the protection of human rights in the face of the climate."[196]

In October 2011, the Human Rights Council made greater strides in the relationship of human rights and climate change, as it recognized the intersection as a true problem.[197] Resolution 18/22 emphasizes that:

> Climate-change related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights, including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and the right to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence.[198]

The resolution further recognizes that climate change is "a global problem requiring a global solution, and that effective international cooperation . . . is important in order to support national efforts."[199] The resolution asks for a seminar addressing the adverse impacts of climate change on human rights to forge a "stronger interface and cooperation between human rights and climate change communities"[200] and asks for the invitation of civil society organizations and representatives from "those segments of the population most vulnerable to climate change."[201]

Indigenous peoples, however, are often weary of a top-down approach. An author for an indigenous peoples'nnews outlet, mediaINDIGENA, asked the question: "Do non-Aboriginal people have the right to lead aboriginal struggles?"[202] The article came after a lawyer acted "on behalf" of Inuit in their land claims.[203] The author's assumption, and

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195. *See id.* Canada did note that while changes should be enacted by the States, if anyone within its borders had a claim, its domestic laws would apply. *Id.*

196. *Id.* at 17.

197. *See generally* Human Rights Council Res. 18/22, Rep. of the Human Rights Council, 18th Sess., Sept. 30, 2011, U.N. Doc A/HR/RES/18/22 (Oct. 17, 2011).

198. *Id.* at 2.

199. *Id.* at 2-3.

200. *Id.* at 3.

201. *Id.*

202. Rick Harp, *Do Non-Aboriginal People Have the Right to Lead Aboriginal Struggles?*, MEDIAINIDIGENA (Jan. 15, 2011, 3:11 PM), http://www.mediaindigena.com/rickharp/issues-and-politics/do-non-aboriginal-people-have-their-right-to-lead-aboriginal-struggles *archived at* http://perma.cc/J76B-LW2J.

203. *Id.*

the assumption from others, is that the attorney was simply looking to collect money from a settlement.

While the skepticism that the attorney was predatory may be meritless, there is a strong point to be made about the distrust of non-indigenous by indigenous peoples. If an attorney attempting to represent indigenous peoples in their land claims is considered predatory, how can an organization that lacks active internal participation of the people it seeks to serve be given any credibility?

Generally, people have a different attitude towards civil society than they do to lawyers as a group. The essential question, however, is how civil society can bring more effective claims to the United Nations. By seeking out more Inuit leaders for management positions and increasing efforts for collaboration, the active NGOs will be able to build a stronger culture of leadership.

B. The Effectiveness of Inuit Voices

The Inuit Circumpolar Council (ICC) and Arctic Council are organizations designed to voice concerns for Inuit people. The ICC was founded in 1977 as an NGO to represent the 150,000 Inuit of Alaska, Canada, Greenland, and Russia and now has special consultative status with the United Nations.[204] On its website, the ICC states that "to thrive in their circumpolar homeland, Inuit had the vision to realize they must speak with a united voice on issues of common concern and combine their energies and talents toward protecting their way of life."[205] The organization has four principal goals: (1) "to strengthen unity among Inuit of the circumpolar region;" (2) "to promote Inuit rights and interests on an international level;" (3) "to develop and encourage long-term policies that safeguard the Arctic environment;" and (4) "to seek full and active partnership in the political, economic, and social development of circumpolar regions."[206]

The ICC and the Inuit have "long been champions of the environment."[207] According to the *ICC Principles* in 1992:

> It is a fundamental objective of the Arctic policy to protect the delicate environment, including the marine and other resources on which the Inuit depend. The right to a safe and healthy environment is an emerging human right and is

204. *Inuit Circumpolar Council (ICC)*, INUIT CIRCUMPOLAR COUNCIL (CANADA), http://inuitcircumpolar.com/index.php?ID=16&Lang=En (last visited Jan. 18, 2014, *archived at* http://perma.cc/3HB8-R2LN).

205. *Id.*

206. *Id.*

207. BARRY ZELLEN, ON THIN ICE: THE INUIT, THE STATE, AND THE CHALLENGE OF ARCTIC SOVEREIGNTY 36 (Lexington Books 2009).

> especially important to the Inuit . . . . Within the vast Inuit homeland, Inuit have the right and responsibility to ensure the integrity of the circumpolar environment and its resource, as a continuing source of life, livelihood and well-being for present and future generations.[208]

The United Nations recognizes the ICC as a "good example of regional cooperation between indigenous peoples."[209] The United Nations cites the ICC's quadrennial general assemblies and associate Inuit leaders' summit as examples of the organization bringing together the leaders of the Inuit nations.[210] The United Nations also underlines the important cooperative relationship that the Greenland branch of the ICC has with the government of Greenland.[211]

Established in 1996, the Arctic Council is an intergovernmental forum to "provide a means for promoting cooperation, coordination, and interaction among the Arctic States with the involvement of the Arctic Indigenous communities."[212] The Arctic Council has a particular focus on sustainable development and environmental protection in the Arctic.[213]

The Arctic Council is very active in releasing publications regarding the impact of climate change in the region and has called for a reduction in global emissions.[214] It states that "the fight against climate change is an imperative common challenge for the international community and requires immediate global measures."[215]

In September 2012, the International Union for the Conservation of Nature (IUCN), the world's largest environmental network, "overwhelmingly approved" voting status for the Indigenous People's Union in a motion co-sponsored by the Inuit Tapiriit Kanatami (ITK).[216] The ITK and Indigenous People's Union represent Inuit people's

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208. *Id.*

209. Indigenous Decision-Making, *supra* note 73, at 9.

210. Indigenous Decision-Making, *supra* note 73, at 9.

211. Indigenous Decision-Making, *supra* note 73, at 12.

212. *About Us*, ARCTIC-COUNCIL, http://www.arctic-council.org/index.php/en/about-us/arctic-council/history (last visited Nov. 18, 2012, *archived at* http://perma.cc/7AKE-VVZK).

213. *Id.*

214. *Arctic States Call for Measures to Reduce Emissions*, ARCTIC COUNCIL (Dec. 11, 2012), http://www.arctic-council.org/index.php/en/resources/news-and-press/news-archive/274-arctic-council-statement-for-durban, *archived at* http://perma.cc/9YLV-VW3Z.

215. *Id.*

216. *International: IUCN To Establish Committee to Consider Ways to Bring Indigenous Groups to the Table*, INDIGENOUS PEOPLES ISSUES AND RESOURCES (Sept. 17, 2012, 10:45 PM), http://indigenouspeoplesissues.com/index.php?option=com_content&view=article&id=16238:international-iucn-to-establish-committee-to-consider-ways-to-bring-indigenous-groups-to-the-table&catid=34&Itemid=73, *archived at* http://perma.cc/CEV8-SHZS.

concerns,[217] which makes the motion a critical step in fostering a grassroots movement. The leader of the ITK stated that "for Inuit, it could mean a significant shift in the way conservation organizations view our relationship with the Arctic species, which will help in the wider recognition of our knowledge about wildlife and the environment."[218]

Another important organization is the Russian Association of Peoples of the North (RAIPON), which, given Russia's reluctance to grant any level of autonomy to the indigenous people, grants the Russian Inuit an important voice. RAIPON represents forty indigenous groups with a total population of 200,000 people.[219] RAIPON has been steadily increasing its influence on the Russian government.[220] For some time, RAIPON considered the possibility of urging the Russian government to allow an indigenous parliament like the parliaments of Finland, Norway, and Sweden.[221] Though the organization recognized the hurdles to such a move, RAIPON remained optimistic about the possibility of securing its status as the official body to voice Inuit concerns.[222]

In November 2012, however, this all ended when the Russian Ministry of Justice ordered RAIPON to close down.[223] Earth Peoples, a blog that provides updates on environmental and human rights, stated that "[d]espite Russia's horrendous environmental record in the Far North, the country is rushing to open new hydrocarbon and mineral resources in the region without necessary environmental impact assessments or public consultations."[224] Because RAIPON has opposed the government's actions to exploit natural resources in the Far North and because the organization represented the growing civil society, the Russian government shut the organization down, but reopened it in March of 2013.[225] During the shutdown, Anja Salo, an adviser on indigenous people's issues, stated that "the indigenous peoples in Russia will lack a common political voice in

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217. *About ITK*, INUIT TAPIRIIT KANATAMI, https://www.itk.ca/about-itk (last visited Nov. 17, 2012, *archived at* http://perma.cc/E7UZ-TYCP).

218. *International: IUCN To Establish Committee to Consider Ways to Bring Indigenous Groups to the Table*, *supra* note 216.

219. AN INDIGENOUS PARLIAMENT, *supra* note 46, at 24.

220. AN INDIGENOUS PARLIAMENT, *supra* note 46, at 24.

221. AN INDIGENOUS PARLIAMENT, *supra* note 46, at 67.

222. AN INDIGENOUS PARLIAMENT, *supra* note 46, at 67.

223. Atle Staaleson, *Russia's Ministry of Justice Orders Close-Down of RAIPON in What is Another Crackdown on NGOs in Russia*, BARENTSOBSERVER (Nov. 12, 2012), http://www.barentsobserver.com/en/arctic/moscow-orders-closure-indigenous-peoples-organization-12-11, *archived at* http://perma.cc/CN8N-J8L7.

224. *RAIPON (or the Russian Association of Indigenous Peoples of the North) Ordered by Russia to Cease its Activity*, EARTH PEOPLES, http://earthpeoples.org/blog/?p=2800 (last visited Jan. 18, 2014, *archived at* http://perma.cc/ANV9-49TR).

225. *Staged RAIPON Election Taints 7th Congress*, INT'L WORK GROUP FOR INDIGENOUS AFFAIRS (April 16, 2013), http://www.iwgia.org/news/search-news?news_id=776, *archived at* http://perma.cc/5MW8-7FNL.

order to influence the decision-making process on the federal level."[226]

The recent situation means the rest of the world must increase its efforts in this arena. The largest arctic nation temporarily shut down its most crucial body in voicing indigenous concerns at a time when it is needed most. While the framework is present, and there are other forums for Inuit people to voice their concerns, American organizations must open their doors to indigenous people to achieve greater change to force States to take real measures to reduce the impacts of climate change.

VI. GRASSROOTS AND COLLABORATION

A. Grassroots Movements

Grassroots organizations "offer the poor the prospect of self-help and representation in the political system and development process."[227] When assisting grassroots efforts, NGOs are commonly referred to as Assisting Institutions (AIs).[228] NGOs and AIs consistently provide these movements and groups with the "knowledge, resources, and personnel they lack; support them politically; and help them join forces to effect changes in regional or national-level policies."[229] They are also able to provide alliances and act as the liaison to other organizations.[230]

There is a debate over the role of AIs and NGOs in shaping a grassroots movement, as many of these organizations create a culture of dependency.[231] As Mina Silberberg of Rutgers University-Camden states, "self-management by the poor and the enhancement of democracy are central aims for many community organizations; dependence, or lack of autonomy, undercuts this aim by definition."[232] NGOs and AIs must "provide community groups with the resources and training they need while preserving their capacity for self-management."[233] In order to do so, Silberberg argues that the NGOs must create linkages that provide help while limiting their attempts to influence the grassroots affairs.[234]

In application to the Inuit, key to striking this balance is that NGOs in

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226. Staaleson, *supra* note 223.

227. Mina Silberberg, *Evolution of Assistance to Grassroots Organizations: The Impact of Linkage*, 20 PUBLIC PRODUCTIVITY & MGMT. REV. 432, 432 (1997), *archived at* http://perma.cc/3RZ7-MWGK.

228. *Id.*

229. *Id.*

230. Mina Silberberg, *Balancing Autonomy and Dependence for Community and Nongovernmental Organizations*, 72 SOCIAL SERV. REV. 47, 47 (1998), *archived at* http://perma.cc/KZP3-YKLS.

231. *Id.*

232. *Id.* at 48.

233. *Id.*

234. *Id.*

the field of Inuit rights and climate change must effectively collaborate with one another. Most importantly, however, the NGOs must be willing to collaborate with the Inuit in order to foster a grassroots effort. Given the lack of transportation and struggles of communication, NGOs in this field can provide the essential alliances necessary to build an effort that spans around the Arctic Circle.

B. The Importance of Collaboration

In 1977, the International Whaling Commission (IWC) released a statement that the populations of bowhead whales have been depleted to a population of 1,300 and ordered the Inuit to cease their whale hunting.[235] The IWC further predicted that bowhead whales would go extinct even if hunting stopped.[236] In response, the Inuit insisted that the bowhead whale populations had been rebounding, but the scientists dismissed these claims as "anecdotal and self-interested."[237]

The Inuit claimed that the counting technique of simply picking a spot along the migration route, counting the number of visible whales, and making a statistical adjustment failed to account for the actual numbers for two reasons.[238] First, the migratory paths were much wider than the scientists assumed, and second, the whales often swam beneath the ice, as the natives "could hear them day and night spouting through holes in the ice."[239]

In 1984, with the help of two scientists, the Inuit were able to devise a system to collect accurate data on the numbers of bowhead whale. By placing hydrophones in the water, these researchers were able to pinpoint the locations of individual whales.[240] After two years of research, this technique revealed that the actual number of bowhead whales was over 10,000.[241] The IWC rose the Inuit's hunting quota and, in 2002, reached a level with which the natives were willing to agree.[242]

Inuit techniques proved to be more accurate than the peer-reviewed scientific numbers. The scientists "had to accept that there was another valid way of knowing complex facts about the environment. Indeed, for this system of many parts in constant change, the [Inuit] were able to draw broad, useful conclusions in real time, something hypothesis-based science

235. CHARLES WOHLFORTH, THE WHALE AND THE SUPERCOMPUTER: ON THE NORTHERN FRONT OF CLIMATE CHANGE 17 (North Point Press 2004).
236. *Id.*
237. *Id.*
238. *Id.* at 18.
239. *Id.*
240. *Id.* at 20.
241. *Id.* at 21.
242. *Id.* at 22.

couldn't come close to doing."[243]

This does not discount the importance of scientific research and Western approaches to these studies, but it underlines the importance and the need to collaborate with the indigenous populations. They have lived there for thousands of years and understand the nuances of their surrounding environment.

C. Elements of Collaboration

An essential element of effective NGOs is the strength of their internal culture. Russell Linden, a management educator at the University of Virginia, writes that there are seven critical elements for a successful NGO seeking to increase collaboration.[244] His approach relates to American agencies and organizations, but his theories can be extrapolated into an international context. The approach is also to those in board of director positions, but collaboration can also apply on a general participant level. These following factors for collaboration can fit easily into the argument that NGOs seeking to represent the Inuit human rights claims must focus first on collaborating with the Inuit peoples.

The factors for successful collaborative NGOs are: (1) "partners have a shared, specific interest or purpose that they are committed to and can't achieve (as well) on their own;" (2) "the partners want to pursue a collaborative solution now and are willing to contribute something to the effort;" (3) "the appropriate people are at the table;" (4) "the partners have an open, credible process;" (5) "the effort has a passionate champion (or champions), with credibility and clout;" (6) "the partners have trusting relationships;" and (7) "the partners use the skills of collaborative leadership."[245]

All members of the process share the same desire to protect Inuit homes and their livelihood, but none more so than the Inuit themselves. While it may be obvious, this first part of the framework is a threshold issue: any goal is irrelevant if the members involved do not share a commitment to it.[246]

The second factor emphasizes the importance of timing, and as it applies to the Inuit, there is no better time than now to make serious pushes toward focusing the debate on climate change. As Linden points out, "it's one thing to say that you and others have a common interest in a goal, and quite another for all of you to show your desire to contribute time and

243. *Id.*

244. RUSSELL M. LINDEN, LEADING ACROSS BOUNDARIES: CREATING COLLABORATIVE AGENCIES IN A NETWORKED WORLD 37 (Jossey-Bass 2010).

245. *Id.* at 38.

246. *Id.*

resources right now."[247] While Linden outlines examples on how to create immediacy,[248] there is little doubt that the indigenous people of the Arctic know that climate change is profoundly changing their lives.

The third factor is critical. Having the appropriate people "at the table" streamlines priorities and projects. Linden states that when bringing people to the organization, it is important to invite people who "[r]epresent an organization that has an interest in the issue, and can speak for that organization, have expertise and knowledge related to that issue, have a strong interest in the use, can make time to work on the team, and can bring resources to bear, if needed."[249]

This latter element of the third factor presents the crucial challenge to increasing Inuit participation. They simply do not have the "resources to bear," and they are needed. This, however, is unpersuasive. While it is undeniably important to bring resources to the table, it is not the only way to effect change. A voice with the backing of an entire indigenous population will be louder than any money can buy.

The fourth factor emphasizes the NGO's transparency.[250] Given the mediaINDIGENA example of an author intensely skeptical of an attorney acting on behalf of indigenous populations,[251] there can be no more open and transparent process than one that includes the individuals for which the NGO is advocating. Transparency "builds trust and confidence, which are essential for collaboration to flourish."[252]

The fifth factor also weighs in favor of collaboration with Inuit leaders. A champion is "someone with credibility and clout who is totally committed to the project."[253] The fact that the champion must be directly involved with the outcome of the NGOs' efforts is crucial. The Inuit leader can be the face of the organization, giving it a great deal of clout. In combination with other experts and concerned individuals, an Inuit champion can be a perfect complement to an organization.

The sixth and seventh factors must be built over time, as the obvious barriers of travel and language must be overcome if NGOs take on a fully collaborative effort. Relationships are "critical to partnerships" because they help the participants stay together whenever there are setbacks.[254] Knowing that the partners are fully transparent and committed to the mission, however, will quicken this process.

The largest barrier to collaboration is the cost and time of travel.

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247. *Id.* at 40.
248. *Id.*
249. *Id.*
250. *Id.* at 47.
251. Harp, *supra* note 202.
252. LINDEN, *supra* note 244, at 47.
253. LINDEN, *supra* note 244, at 49.
254. LINDEN, *supra* note 244, at 56.

From Chicago, Illinois, to Barrow, Alaska, the round-trip cost of a flight is more than $1,000 and would take nearly twenty-four hours.[255] To get to Arctic villages, the rest of the trip could take multiple days by car or snowmobile. The Inuit inhabit the entire Arctic Circle, and this only represents a small portion of what the travel costs and time would be.

D. Horizontal Collaboration

Collaboration, however, is not just limited vertically, but horizontally as well. As the High Commissioner Report stated, the lack of coherence between human rights and climate change organizations poses a significant obstacle appropriately assessing the link between global warming and human rights infringements.[256] While it is undeniably important that the two groups of organizations communicate with one another, the organizations that already understand the relationship must first collaborate with the indigenous peoples they seek to represent.

E. Inuit Leaders in Board Positions

According to a variety of resources the first criterion for selecting a board member is to ensure that he or she has "direct knowledge about the organization's mission."[257] Where an organization's mission is to improve the plight of Inuit as they are affected by human rights problems through climate change, it would be consistent to have representatives from every population they are seeking to serve. While the Center for International Environmental Law does represent indigenous voices, there is a crucial lack of any Inuit on their board.[258]

Although the selection of boards of directors is an "inherently risky endeavor[],"[259] and there are significant limitations to including Inuit leaders on an organization's board of directions, one of the most important

255. These figures are according to a search through www.kayak.com on March 10, 2013, for flights from Chicago O'Hare to Wiley Post-Will Rogers Memorial Airport.

256. High Commissioner Report, *supra* note 37, at 12.

257. Kendra James, How to Choose a Board of Directors for a Nonprofit Organization, HOUSTON CHRONICLE, http://smallbusiness.chron.com/choose-board-directors-nonprofit-organization-911.html (last visited Jan. 18, 2014, *archived at* http://perma.cc/ZBX9-Z7V2); *see also* Samantha Herman, *How to Choose Your Board Members for a Nonprofit*, EHOW, http://www.ehow.com/how_6297584_choose-board-members-nonprofit.html (last visited Jan. 18, 2014, *archived at* http://perma.cc/72L9-P9JA); Greg McRay, *Nonprofit Board Members – Choose Wisely*, FOUNDATION GROUP (Sept. 24, 2009), http://www.501c3.org/blog/nonprofit-board-members-choose-wisely/, *archived at* http://perma.cc/G8JR-69HX.

258. *Board of Trustees*, CENTER FOR INT'L ENVTL. LAW, http://www.ciel.org/About_Us/Board_Trustees.html (last visited Nov. 13, 2013, *archived at* http://perma.cc/A5NP-CDML).

259. ROSEMARY O'LEARY & LISA BLOMGREN BINGHAM, THE COLLABORATIVE PUBLIC MANAGER: NEW IDEAS FOR THE TWENTY-FIRST CENTURY 54 (Georgetown Univ. Press 2009).

considerations is to seek board members who enhance legitimacy. The previous elements of collaboration apply to the selection of boards of directors and the strategic selection of leaders, and NGOs seeking the highest degree of collaboration with Inuit people should consider the invitation of Inuit leaders to their boards of directors. Although there are significant barriers in regard to the cost and time of travel, international NGOs can improve their legitimacy by including Inuit leaders in major positions of their organizations.

VII. CONCLUSION

Bringing the factors of collaboration, the United Nations'rtask to establish a coherent organizational network, and the existing practices of Inuit-based NGOs, the NGOs in the field must reach out to the Inuit populations if they are going to affect real change in the arena of climate change and human rights. The Inuit populations of the Arctic have existed for thousands of years, but as *Kivalina* exposes, villages are being threatened due to climate change. In order to slow down climate change, a court-based approach is insufficient. NGOs must build a grassroots effort so the United Nations has no choice but to act.

Clearly, there are barriers to acting, as major industries will see the economic gain of global warming in the Arctic; however, the Inuit peoples must have the right to preserve their homelands and determine their own fate. Only international action resulting in regulations can combat this problem.

While there are obstacles to the full implementation of collaborative efforts, the fundamental mission of these organizations is to promote the well-being of peoples everywhere. The Inuit is one of the most deeply affected cultures by climate change. Strides have been made, but not nearly enough. Indigenous people of the Arctic can become the voice of the environment most deeply impacted by global climate change.

Ultimately the forum that must make the appropriate changes is the United Nations. The United Nations will not act, however, without an outpouring of support. Remediating the human rights claims of the Inuit in the face of climate change runs directly counter to the prospect of mining and trade through the Northwest Passage. Without curbing the effects soon, there will be no way to stop it later. Adding indigenous people to the well-funded NGOs will quicken this process by adding credibility to those who will present the claims to the United Nations. Increased indigenous participation will impress on these leaders the Inuit need for international recognition and action in order to maintain their livelihood.

Economic forces, geopolitical demands, and the prospect of mining and drilling in the Arctic are salient enough that humans can lose sight of the homes, people, and cultures they will utterly change. As Ed Stuzik states:

> In the not-too-distant future, the forces of climate change are going to transform this icy world into a new economic frontier. The end of the Arctic, as we once knew it, will be the beginning of a new chapter in history. That new chapter in history must be co-authored by the people who live there."[260]

260. ZELLEN, *supra* note 207, at 184.

FROM THE BIG APPLE TO BIG BEN: INTERNATIONAL GUIDANCE FOR ABU DHABI'S MODERN HERITAGE PRESERVATION INITIATIVE

Sarah P. Harrell*

"We shape our buildings; and afterwards our buildings shape us." – Winston Churchill[1]

I. INTRODUCTION

Preserving our "built environment" enriches our lives with history. Many great cities of the world formed over hundreds, or even thousands, of years; their skylines are a majestic mix of new and old. These cities have struck a balance between development and preservation through the use of laws and policies. But how does a city with relatively little "history" form a meaningful built environment for its people?

This Note starts by highlighting the unique issue of architectural preservation in Abu Dhabi, a city whose built environment is remarkably modern. Competing views of modernization and preservation are pulling this particular city in opposite directions.[2] In 2011, in an effort to protect Abu Dhabi's modern heritage, a cultural organization launched the Modern Heritage Preservation Initiative, aimed at developing strategies for managing preservation in the midst of urban renewal.[3] As of the writing of this Note, surveys, record gathering, and other assessments are still in process, but this Note discusses the goals of the initiative and the rationales behind it.

Next, this Note discusses theories of why the law should help protect historically significant architecture in cities—both in general and in Abu Dhabi specifically. This portion includes an explanation of the "built environment" and why it merits protection and regulation. This Note then discusses how the goals of urban development and modernization compete

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1. Winston Churchill, Speech to the House of Commons (Oct. 28, 1943), *in Famous Quotations and Stories*, CHURCHILL CENTRE AND MUSEUM, http://www.winstonchurchill.org/learn/speeches/quotations (last visited Aug. 21, 2014, *archived at* http://perma.cc/UD3R-TGYM).

2. *See generally* John Henzell, *In a Growing City Like Abu Dhabi, What Makes a Building Worth Keeping?*, NATIONAL (Aug. 4, 2012), http://www.thenational.ae/news/uae-news/heritage/in-a-growing-city-like-abu-dhabi-what-makes-a-building-worth-keeping, *archived at* http://perma.cc/K7V7-9C9G; Amel Chabbi & Hossam M. Mahdy, *Virtuous Circle or Viscious Cycle?: Modern Heritage and Development in Abu Dhabi*, 17 INT'L COUNCIL ON MONUMENTS & SITES GEN. ASSEMBLY 75 (2011).

3. Chabbi & Mahdy, *supra* note 2.

with the goals of preservation and how and why these goals may be reconciled.

In an effort to find guidance for the future of Abu Dhabi, the next section of this Note describes the legal protection of architecture in two cities famous for their historical landmarks: New York City and London. This Note provides an overview of the legal protections provided by the New York City Landmarks Preservation Act and the United Kingdom's Planning (Listed Buildings and Conservation Areas) Act. This section also explains the functions of related commissions and other regulations.

Finally, this Note analyzes the potential application of the aforementioned laws to Abu Dhabi and suggests different aspects of those laws that would be beneficial to achieve the goals of Abu Dhabi's Modern Heritage Preservation Initiative. Some aspects of the laws in New York City and the United Kingdom could serve as models for Abu Dhabi, while others either would be inappropriate or would require adaptation.

II. A MODERN CONTROVERSY IN ARCHITECTURAL PRESERVATION: ABU DHABI, UNITED ARAB EMIRATES

Abu Dhabi's transformation over the past few decades is remarkable. The city's unique history makes for a particularly interesting discussion of architectural preservation. On the one hand, developers and others are focused on making the city continuously bigger and better, tearing down and replacing buildings along the way.[4] On the other hand, cultural heritage proponents insist that some buildings are worth preserving, even if they are not especially old or historical.[5] Through a new initiative, the emirate[6] is working to resolve these seemingly conflicting views.[7]

A. Abu Dhabi's History

Abu Dhabi is the capital of and most populous city in the United Arab Emirates.[8] The city experienced a "rebirth" in the 1960s thanks to an oil boom,[9] and it developed rapidly from a small settlement into a major city.[10]

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4. *See infra* notes 22-23 and accompanying text.

5. *See infra* notes 24-26 and accompanying text.

6. An emirate is an Islamic state or jurisdiction that is ruled by an emir. *See* MERRIAM-WEBSTER DICTIONARY 378 (10th ed. 1994). The United Arab Emirates includes seven emirates: Abu Dhabi, Dubai, Sharjah, Ajman, Umm al-Qaiwain, Ras al-Khaimah, and Fujairah. *United Arab Emirates*, EMIRATES.ORG, http://www.emirates.org/ (last visited Nov. 26, 2013, *archived at* http://perma.cc/T8JR-5PFP). The federation lies on the southeastern tip of the Arabian Peninsula. *Id.*

7. *See infra* Part II.C.

8. *Abu Dhabi*, EMIRATES.ORG, http://emirates.org/abudhabi.html (last visited Nov. 26, 2013, *archived at* http://perma.cc/DH3U-45A6).

9. *See, e.g.*, Henzell, *supra* note 2; Chabbi & Mahdy, *supra* note 2, at 76.

In the late 1960s when Abu Dhabi's population was only 40,000, Sheikh Zayed commissioned a city planner to design the new Abu Dhabi.[11] Less than forty years later, the population had already grown past the 600,000 that the plan accommodated, so a new city planner redesigned the city to hold up to 3,000,000 people.[12]

When it comes to built environment, "Abu Dhabi's situation is unique because . . . the entire city—with the lone exception of [one building]—dates from the modern era."[13] Even the majority of those buildings built during the rebirth period have been torn down and replaced, often because they had been hastily built to accommodate for rapid growth and were of "mediocre quality."[14]

Building renewal in Abu Dhabi is also due to changes in planning by-laws that have allowed for increasingly higher-rise buildings.[15] The rules for permissible building heights were updated frequently, as developers suddenly found shorter structures less economically attractive.[16] The constant replacement of buildings has become commonplace, so demolition threatens many buildings before their style has the opportunity to become classic.[17]

> This change came about to satisfy the increasing demand for apartments and offices and the desire to utilize the limited amount of land in a denser way. This was coupled with the wish to give Abu Dhabi an increasingly modern image and with the availability of funds, which the Government wished to pump into the construction sector to keep this vital economic sector rolling.[18]

Expatriate designers and builders have largely been responsible for Abu Dhabi's aggressive development.[19] These foreigners, who make up the majority of the emirate's population, tend to come in waves, so they have less knowledge of and appreciation for Abu Dhabi's architectural history.[20]

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10. *See, e.g.*, SALMA SAMAR DAMLUJI, ARCHITECTURE OF THE UNITED ARAB EMIRATES 101 (Salma Samar Damluji ed., 2006); Chabbi & Mahdy, *supra* note 2.

11. Henzell, *supra* note 2; Chabbi & Mahdy, *supra* note 2, at 77.

12. Henzell, *supra* note 2.

13. Henzell, *supra* note 2.

14. DAMLUJI, *supra* note 10, at 117; *see also* Chabbi & Mahdy, *supra* note 2, at 77 (explaining that buildings erected in the 1970s were often of inferior quality because demand was high and there were not enough quality control mechanisms in place).

15. DAMLUJI, *supra* note 10, at 117; Chabbi & Mahdy, *supra* note 2, at 78.

16. Chabbi & Mahdy, *supra* note 2, at 78.

17. Chabbi & Mahdy, *supra* note 2, at 78.

18. DAMLUJI, *supra* note 10, at 117.

19. Chabbi & Mahdy, *supra* note 2, at 77.

20. *See* Chabbi & Mahdy, *supra* note 2, at 77 ("This exceptionally big percentage of foreigners and the fast cycles of their turnover have threatened the collective memory of the

B. The Modern Architecture Preservation Conflict in Abu Dhabi

Modern buildings in Abu Dhabi face dangers of "unsuitable intervention such as modifications and renovations, lack of awareness and appreciation, damage and real estate bidding."[21] Developers in Abu Dhabi have a passion for the new, and they have the money to destroy relatively recently constructed buildings and start from scratch.[22] Thus, Abu Dhabi is caught in a permanent state of change and development.[23]

Meanwhile, cultural heritage activists in Abu Dhabi believe many modern buildings in the city "capture a moment in time" and should be "saved from demolition and restored to their former glory."[24] They consider buildings erected during the 1960s to be "testimonies to the features of the development and success of the emirate."[25] The rationale for preserving buildings from each of Abu Dhabi's stages is that it will create a meaningful architectural record of the city's modern evolution.[26]

The cultural heritage activists' goals are not without opposition, of course. According to the Abu Dhabi Authority for Culture and Heritage (ADACH), "[l]ack of awareness and appreciation [is] one of the threats faced by Abu Dhabi's unique post-oil architectural heritage."[27] In addition, "[u]nlike archaeological and historical buildings, the modern heritage faces an additional threat represented in the usual demand for modernisation in order to keep up with the latest, cleanest and smartest designs and tastes."[28] Another problem is that most of the professional class in Abu Dhabi only lives in the city for a few years, so they do not have the same connection to the city's past or a "vested interest" in its future.[29]

One example of "a conflict that will occur again and again in Abu Dhabi" is the controversy over a bus station.[30] It was built in the 1980s and already seems "quaintly old fashioned" compared to the more modern skyscrapers surrounding it.[31] The Department of Transport wants "to entice drivers to switch to public transport by offering modern and comfortable

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emirate.").

21. Press Release, Abu Dhabi Authority for Culture and Heritage Launches Initiative for Preserving Abu Dhabi's Post-Oil Heritage (Aug. 7, 2011), *archived at* http://perma.cc/KBU8-S5MC.

22. Henzell, *supra* note 2; *see also* Press Release, *supra* note 21.

23. *See* Press Release, *supra* note 21.

24. Henzell, *supra* note 2 (quoting Deborah Bentley, a member of the Royal Institute of British Architects who is based in Abu Dhabi).

25. Press Release, *supra* note 21.

26. Henzell, *supra* note 2.

27. Henzell, *supra* note 2.

28. Henzell, *supra* note 2; *see also* Press Release, *supra* note 21.

29. Henzell, *supra* note 2.

30. Henzell, *supra* note 2; *see also* Press Release, *supra* note 21.

31. Henzell, *supra* note 2.

facilities."[32] Still, the bus station is well known in the city for its mint green color and "sweeping concrete curves that are the key to its passive solar design."[33] According to one architectural expert, the bus station is environmentally sound and with some minor changes could easily be enjoyed by future generations.[34]

Two clear philosophies have emerged with regard to Abu Dhabi's architectural future: modernization and preservation. These two conflicting goals are what some call "the vicious cycles of Abu Dhabi's urban renewal."[35] With the proper legal mechanisms, however, these two philosophies could perhaps be reconciled.

C. Current Modern Heritage Preservation Efforts in Abu Dhabi

In 2011, ADACH launched its so-called Modern Heritage Preservation Initiative.[36]

"The goal of the initiative is to develop strategies, policies and economic incentives that will ensure that these [modern heritage] resources are protected and appreciated for their inherent merit while seen as boosters in the competitive real estate market, and valued as assets in Abu Dhabi's growing cultural portfolio."[37] The initiative is in its study phase, in which ADACH is doing surveys, block by block, assessing buildings for their "age, condition, use, and threat [level] . . . ."[38] ADACH is also gathering various records and conducting case studies.[39]

ADACH recognizes that several elements of change must coincide in order to successfully save Abu Dhabi's modern architectural history.[40] First, in the cultural context, the public's understanding of heritage must recognize and include modern architecture.[41] To achieve this end, ADACH will use its surveys and studies to understand and define the aesthetic vocabulary of modern architecture in Abu Dhabi.[42] Second, in the social context, people need to view living and working in modern heritage

32. Henzell, *supra* note 2.

33. Henzell, *supra* note 2.

34. Henzell, *supra* note 2 (quoting Deborah Bentley).

35. Henzell, *supra* note 2 (quoting Amel Chabbi and Hossam Mahdy of the Abu Dhabi Authority for Culture and Heritage).

36. Chabbi & Mahdy, *supra* note 2, at 75.

37. Chabbi & Mahdy, *supra* note 2, at 81; *see also* Press Release, *supra* note 21 (explaining that the initiative aims to understand and protect modern architectural heritage, which is "a precious contribution to the growing cultural dossier of Abu Dhabi").

38. Chabbi & Mahdy, *supra* note 2, at 81. "Threat level" refers to the extent of the possibility the building may be demolished. *See* Chabbi & Mahdy, *supra* note 2, at 81.

39. Chabbi & Mahdy, *supra* note 2, at 81.

40. *See generally* Chabbi & Mahdy, *supra* note 2.

41. Chabbi & Mahdy, *supra* note 2, at 82.

42. Chabbi & Mahdy, *supra* note 2, at 82.

buildings as attractive and desirable.[43] Third, in a technical and economic context, owners and users of modern heritage buildings need assistance and incentives to maintain or refurbish those buildings rather than to replace them.[44] Fourth, in the political context, different governmental agencies need to work together to create new plans for development and to enforce owners' duties to maintain their buildings.[45] Fifth, in the legal context, regulations are needed to establish what protections shall be granted to significant buildings, and mechanisms need to be in place to approve alterations and demolitions.[46]

Currently in Abu Dhabi, federal law requires developers to apply for a preliminary cultural resource survey, which ADACH carries out.[47] Before the launch of the Initiative, ADACH's focus had been on impacts only to paleontological, archaeological, and pre-oil historic resources; now, however, ADACH is "testing out the waters for preservation" of modern heritage as well.[48]

During its relatively short history, Abu Dhabi has experienced enormous growth and renewal on top of renewal. Those who wish to preserve examples of Abu Dhabi's stages of growth face challenges of apathy, resident turnover, and demand for modernization. The 2011 Initiative shows ADACH's firm commitment to enacting legislation aimed at reconciling these conflicting views. The preservationist goals of ADACH and others are certainly not unique. As is discussed in the following section, there are many reasons to protect architectural history. With some work, Abu Dhabi can change its laws to reflect preservationist values.

III. THEORIES OF PRESERVATION AND PROTECTION OF URBAN ARCHITECTURAL HISTORY

A. Values Associated with Architectural Preservation

One can frame a discussion of the values associated with architectural preservation in terms of the "built environment." A rather clinical definition of "built environment" is "[t]he buildings, roads, utilities, homes, fixtures, parks and all other man-made entities that form the physical characteristics of a community."[49] Abu Dhabi's built environment can be seen as

43. Chabbi & Mahdy, *supra* note 2, at 82.
44. Chabbi & Mahdy, *supra* note 2, at 82.
45. Chabbi & Mahdy, *supra* note 2, at 82.
46. Chabbi & Mahdy, *supra* note 2, at 82.
47. Chabbi & Mahdy, *supra* note 2, at 82.
48. Chabbi & Mahdy, *supra* note 2, at 82.
49. *Healthy Places Terminology*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/healthyplaces/terminology.htm (last updated Aug. 14, 2013, *archived at* http://perma.cc/AHM2-29X3).

consisting of two parts: commercial/residential buildings and larger office buildings for corporations.[50] The former is marked by experimental and fashionable architectural styles, as well as traditional Arab-Islamic features which embody an effort to create a local identity.[51] "These features also reflected [plot owners'] taste[s] in architectural style which in most cases represented a simplistic understanding of heritage, modernity, regionalism and internationalism."[52] The buildings in the latter category "have a distinctly higher architectural quality" because they were built on bigger plots and were designed by expensive architectural firms.[53]

But the importance of the "built environment" involves more than just the buildings themselves. Professor John Nivala of Widener University Law School calls the "built environment" "a richly representative setting which infuses our lives with an identity and a sense of continuity essential to our well-being."[54] The "built environment" has cultural values: "The structures [of a built environment] provide a physical framework for daily use and an associational framework connecting us to the history, ideology and civic systems of our culture."[55] In Abu Dhabi, as mentioned in Section II.C. above, the cultural importance of architecture is one of the driving forces behind the Modern Heritage Preservation Initiative.[56] Protecting important buildings in Abu Dhabi will "provide benchmarks" of the city's "physical and cultural transformation."[57]

In addition to cultural values, preservation of architecture is motivated by the goals of inspiration and aesthetics. Such goals are evident in the purposes behind preservation laws in some of the most historically significant areas of the world. One of the purposes of the New York City Landmarks Preservation Act[58] is to "foster civic pride in the beauty and noble accomplishments of the past . . . ."[59] The purpose of English Heritage[60] is "to make sure the best of the past is kept to enrich our lives today and in the future."[61] The legal mechanisms for architectural preservation in New York City and England both seem to be at least partially motivated by the intangible values that architecture imparts on

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50. *See* DAMLUJI, *supra* note 10, at 111.

51. *See* DAMLUJI, *supra* note 10, at 112-13; Chabbi & Mahdy, *supra* note 2, at 77.

52. DAMLUJI, *supra* note 10, at 113.

53. DAMLUJI, *supra* note 10, at 116.

54. John Nivala, *Saving the Spirit of Our Places: A View on Our Built Environment*, 15 UCLA J. ENVTL. L. & POL'Y 1, 5 (1997).

55. *Id.* at 11.

56. *See supra* note 37 and accompanying text.

57. Chabbi & Mahdy, *supra* note 2, at 81.

58. *See infra* Part IV.A.1.

59. N.Y.C., N.Y., ADMIN. CODE § 25-301(a) (2012).

60. English Heritage is discussed *infra* Part B.1.

61. *What We Do*, ENGLISH HERITAGE, http://www.english-heritage.org.uk/about/interactive/ (last visited Aug. 22, 2014, *archived at* http://perma.cc/XA55-XB4H).

society. "A landmark . . . help[s] foster community cohesion. A frequent rationale for landmark designation is the building's association with past events or notable persons; its physical presence can unite the community by reminding members of a common past."[62]

Community building is another value behind ADACH's Initiative. One of the future goals for planning in the emirate is "to celebrate the individuality of neighborhoods, districts, and cities by understanding the history of their development and integrating these findings with future expansion plans."[63] In Abu Dhabi, most of the buildings now standing were built within the lifetimes of current and recent generations.[64] Those buildings, therefore, give the people of the city a sense of place.[65] Landmark status for Abu Dhabi buildings like the bus station, among others, would potentially serve the community, reminding residents of the city's unique history, even those residents who are not natives of the city or even the country.[66]

Finally, architectural preservation also serves the economic functions of real estate marketability and tourism. One of the stated purposes of the New York City Landmarks Preservation Act is to "stabilize and improve property values in [historically and aesthetically important] districts."[67] Numerous studies across the United States suggest that landmark designation increases property values and makes neighborhoods attractive to buyers and developers.[68] A special historical designation sets a building or district apart from others, and many buyers are drawn to the "unique qualities and ambiance of a historic property."[69]

Abu Dhabi's real estate market is already on the upswing due to various government projects, the merger of two major developers, and job

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62. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 497 (1981).

63. Chabbi & Mahdy, *supra* note 2, at 82.

64. *See* Henzell, *supra* note 2.

65. Chabbi & Mahdy, *supra* note 2, at 81.

66. A significant portion of Abu Dhabi residents are not from the city and do not live there long. *See* Chabbi & Mahdy, *supra* note 2, at 77.

67. N.Y.C., N.Y., ADMIN. CODE § 25-301(a) (2013).

68. *See* Rebecca Birmingham, *Smash or Save: The New York City Landmarks Preservation Act and New Challenges to Historic Preservation*, 19 J.L. & POL'Y 271, 283 (2010); KEN BERNSTEIN, THE TOP TEN MYTHS ABOUT HISTORIC PRESERVATION 1, *archived at* http://perma.cc/R8H3-QYAJ; *Preservation Ordinance FAQ*, NAT'L TRUST FOR HISTORIC PRES., http://www.preservationnation.org/information-center/law-and-policy/legal-resources/preservation-law-101/local-law/ordinances.html#.UkyCxT-mWjI (last visited Nov. 3, 2013, *archived at* http://perma.cc/83MH-HAKW) ("In addition to instilling pride within a community, historic preservation laws have been helpful in spurring tourism, generating new investment in otherwise forgotten areas, and increasing local tax revenue and property values.").

69. BERNSTEIN, *supra* note 68.

growth.[70] However, "[a]gents remain skeptical that the new initiatives alone will be enough to lead to a full recovery for Abu Dhabi property."[71] As developers build more affordable housing options, the presence of designated landmarks or neighborhoods might help distinguish certain properties from the rest and make them more valuable and attractive.

Preservation of architecture in urban areas is of interest not only to residents, but also to visitors. New York City legislators recognized their city's position as a tourism capital, stating in the Landmarks Preservation Act "that the standing of this city as a world wide tourist center and world capital of business, culture and government cannot be maintained or enhanced by disregarding the historical and architectural heritage of the city and by countenancing the destruction of such cultural assets."[72]

In 2012, Abu Dhabi's tourism market was "subdued" and was expected to remain that way in 2013.[73] Currently, some of the emirate's biggest tourism draws are Ferrari World, camel racing, and shopping malls.[74] If Abu Dhabi could put more emphasis and value on its built environment, it could build a reputation as a unique tourist destination for architecture lovers. A growth in tourism would likely lead to a growth in retail spending as well.[75]

A city's built environment helps define its identity. That identity includes culture, community, and economy. Cities like New York and London have long recognized the importance of assigning value to the built environment. As Abu Dhabi grows, so too does the need for its government and its people to recognize their city's unique architectural history and the benefits that history gives them.

B. The Necessity of Legal Protection for Architectural Heritage

Because preservation of architecture serves many culturally, historically, and economically valuable purposes, it is important for a city's or country's laws to reflect a public policy recognizing those purposes. The

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70. Lucy Barnard, *Abu Dhabi's Property Market to Shine by 2015*, NATIONAL (Jan. 16, 2013), http://www.thenational.ae/business/industry-insights/property/abu-dhabis-property-market-to-shine-by-2015, *archived at* http://perma.cc/FWP4-WFJA.

71. *Id.*

72. ADMIN. § 25-301(a).

73. Andy Sambidge, *Abu Dhabi Retail, Tourism Seen Subdued in 2013*, ARABIANBUSINESS.COM (Dec. 22, 2012, 9:47 AM), http://www.arabianbusiness.com/abu-dhabi-retail-tourism-seen-subdued-in-2013-483588.html, *archived at* http://perma.cc/34HJ-W322.

74. These are some of the things listed under "Most visited" on Abu Dhabi's main tourism website. VISIT ABU DHABI, http://visitabudhabi.ae (last visited Jan. 19, 2013, *archived at* http://perma.cc/WRQ6-URRA).

75. *See* Sambidge, *supra* note 73 (noting that in the emirate of Dubai, an increased number of tourists in 2012 had benefited its retail market).

US federal government, states, municipalities, and foreign nations all share the belief that historical preservation laws are necessary, and all have various laws regulating the preservation of architecture.[76] These legislative measures—at least in the United States—represent the recognition of two different concerns: first, that many structures have been and continue to be destroyed without prior consideration for their historical importance or the potential to successfully preserve them; and second, that certain architectural treasures are beneficial to the general public's quality of life.[77] Regulations are therefore needed "to protect the public's interest in their heritage," as private owners and private property rights are not enough to internalize and capture the full cultural and historical value of architectural preservation.[78]

Some experts point to the downfalls of historical preservation laws. One argument is that they restrict new construction of affordable housing and therefore make cities more expensive and effectively exclude anyone who is not wealthy.[79] However, one could just as easily argue that while progress and affordable housing are desirable, loss of cultural values in a city is just as regrettable as some loss of affordability.

Another argument is that preservation laws create a fear of modernism to the point that they do a disservice to an area's architectural development.[80] After all, "the city that contains not enough new buildings is as robbed of the reality of time as the one that contains not enough old ones."[81] This argument was once answered by New York City's Deputy Mayor for Planning, who said the landmarks process is meant not only to preserve the past, but also to foster creativity for present architects to create

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76. Various US federal laws promulgated over the years have regulated government actions and facilitated the keeping of landmark registers. *See generally* Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 29 NEW ENG. L. REV. 63 (1993). In addition, all fifty US states have their own Historic Preservation Offices that assist the federal government, and many states carry out their own preservation programs. *Understanding Preservation Law*, NAT'L TRUST FOR HISTORIC PRES., http://www.preservationnation.org/information-center/law-and-policy/legal-resources/#.UkyLVz-mWjI (last visited Nov. 3, 2013, *archived at* http://perma.cc/FH54-VVSE). Even smaller, local preservation ordinances create boards that may designate local landmarks. *Id.*

77. *See* Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 107-08 (1978).

78. J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665, 675 (2012) ("Regulation may be done well or poorly, but regulation must exist.").

79. *See, e.g.*, EDWARD L. GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER (2011). Even Glaeser admits that "there is much worth keeping in our cities," but says that preservation "always comes at a cost." *Id.* For a critique of Glaeser's book, see generally Byrne, *supra* note 78.

80. *See, e.g.*, Paul Goldberger, *Architecture View; A Commission that has Itself Become a Landmark*, N.Y. TIMES (Apr. 15, 1990), *archived at* http://perma.cc/Z3YJ-ELL4.

81. *Id.*

buildings that will become landmarks in the future.[82] Professor Carol Rose mentions in an article that "it is arguable that restrictions on landmark alteration might encourage builders, knowing that their investment may be preserved indefinitely, to strive for creative excellence."[83] Rose seems to suggest that this incentive rarely exists in reality.[84] However, it could be a relevant consideration to builders in Abu Dhabi, where many poor quality buildings have had a short life. A legal reassurance that important and high quality structures are valued could help replace the old "demolish and replace" mindset that has been the norm during Abu Dhabi's development.

Ultimately, "[p]reservation and progress can be mutually sustaining. The challenge is to come up with legal standards and procedures that advance the individual and cultural benefits of preservation . . . without stifling the city's necessary growth."[85] In Abu Dhabi, this means protecting cultural icons like the bus station from demolition, but recognizing when they are due for improvements or when they no longer hold value to the community.

IV. THE EFFECTIVENESS OF ESTABLISHED ARCHITECTURAL PRESERVATION PROGRAMS IN NEW YORK CITY AND LONDON

This Note uses the preservation laws of New York City and London as guidance for Abu Dhabi as it works toward a successful preservation regime. New York City and London are used as examples because they represent two urban areas in different parts of the world, and both are popular tourist destinations famous for their landmarks.[86] Both cities' preservation laws have been in place for decades. New York City has its

82. *Id.*

83. Rose, *supra* note 62, at 501.

84. Rose, *supra* note 62, at 502 ("To be sure, this argument would be far more persuasive if there were no private law devices (such as easements and covenants) by which the original builder could attain the same protection. I raise it only to suggest the ambiguity of incentives for the original builder to invest in creative and dramatic construction.").

85. Nivala, *supra* note 54, at 41.

86. In 2011, there were 50.9 million visitors to New York City. *NYC Statistics*, NYCGO.COM, http://www.nycgo.com/articles/nyc-statistics-page (last visited Nov. 3, 2013, *archived at* http://perma.cc/5BF6-2N48). London saw 15.5 million visitors in 2012. *Inbound Tourism Facts*, VISITBRITAIN.ORG, http://www.visitbritain.org/insightsandstatistics/inboundtourismfacts/index.aspx (last updated Apr. 2013, *archived at* http://perma.cc/SF6-NKEG). Famous New York City designated landmarks include the Chrysler Building, the Empire State Building, and the main building at Ellis Island. *See* BARBARALEE DIAMONSTEIN-SPIELVOGEL, THE LANDMARKS OF NEW YORK: AN ILLUSTRATED RECORD OF THE CITY'S HISTORIC BUILDINGS (2011). London's listed buildings include Westminster Abbey and the British Museum. *See Grade I Listed Buildings in Greater London, England*, BRITISH LISTED BUILDINGS, http://www.britishlistedbuildings.co.uk/england/greater+london/I (last visited Nov. 6, 2013, *archived at* http://perma.cc/R2BA-CT8T).

own local legislation,[87] while London follows a U.K.-wide act.[88] Some aspects of the two acts are similar, and for the purposes of this Note, portions of one act that overlap with the other are not discussed in great detail. Some less relevant provisions of both acts are not mentioned.

A. The New York City Landmarks Preservation Act

1. Overview of the Act and Related Authority

Mayor Robert Wagner signed the New York City Landmarks Preservation Act (hereinafter "NYC Act") into law in 1965 after it was found that many historically or aesthetically important buildings in the city had been destroyed even though their preservation was both possible and desirable.[89] The NYC Act declared that it was public policy to protect, enhance, and perpetuate use of such buildings "in the interest of the health, prosperity, safety and welfare of the people."[90]

The NYC Act created the Landmarks Preservation Commission.[91] Per the statute, the eleven members "shall include at least three architects, one historian qualified in the field, one city planner or landscape architect, and one realtor."[92] The mayor appoints the commissioners.[93] All but one receive no salary.[94] The Commission also employs about sixty full-time staff, including "architects, architectural historians, restoration specialists, planners, and archaeologists, as well as administrative, legal, and clerical personnel."[95] Various departments carry out functions such as awarding restorations grants to homeowners, researching proposed landmarks, assisting applicants with proper building materials, and ensuring

87. *See* N.Y.C., N.Y., ADMIN. CODE §§ 25-301 - 25-322 (2012).

88. *See* Planning (Listed Buildings and Conservation Areas) Act, 1990, c. 9, §§ 1-94 (U.K.).

89. *About LPC*, N.Y.C. LANDMARKS PRES. COMM'N, http://www.nyc.gov/html/lpc/html/about/about.shtml (last visited Mar. 10, 2013, *archived at* http://perma.cc/3TWM-SFWQ); *see also* ADMIN. § 25-301(a).

90. ADMIN. § 25-301(b).

91. James Barron, *Celebrating 45 Years of Preserving New York*, N.Y. TIMES (Apr. 19, 2010, 6:15 PM), http://cityroom.blogs.nytimes.com/2010/04/19/celebrating-45-years-of-preserving-new-york/, *archived at* http://perma.cc/TKJ7-KKUH.

92. N.Y.C., N.Y., CHARTER § 3020(1) (1989); *see also FAQ: About the Landmarks Preservation Commission*, N.Y.C. LANDMARKS PRES. COMM'N, http://www.nyc.gov/html/lpc/html/faqs/faq_about.shtml (last visited Nov. 29, 2013, *archived at* http://perma.cc/EQP4-LBXD).

93. CHARTER §§ 31, 3020(2)(a); *see also About LPC: Commissioners*, N.Y.C. LANDMARKS PRES. COMM'N, http://www.nyc.gov/html/lpc/html/about/about_commissioners.shtml (last visited Nov. 6, 2013, *archived at* http://perma.cc/4LFG-K8RV).

94. CHARTER § 3020(3).

95. *FAQ: About the Landmarks Preservation Commission*, *supra* note 92.

compliance with the NYC Act.[96]

The procedure for listing a site as a landmark under the NYC Act has been described as "daunting."[97] However, the opportunity to nominate a landmark is accessible to all; the Commission welcomes suggestions from interested citizens, asking them to submit a simple, one-page Request for Evaluation and to attach photographs if possible.[98] Commission members and staff may also identify potential landmarks themselves.[99]

The Commission decides if a proposal merits further consideration, then votes on whether to schedule a public hearing,[100] which the NYC Act requires before any designation.[101] The Commission must put a notice of an upcoming hearing in the City Record and give notice directly to the owner of the parcel on which a landmark designation has been proposed.[102] At these hearings,

> the commission shall afford a reasonable opportunity for the presentation of facts and the expression of views by those desiring to be heard, and may, in its discretion, take the testimony of witnesses and receive evidence; provided, however, that the commission, in determining any matter as to which any such hearing is held, shall not be confined to consideration of the facts, views, testimony or evidence submitted at such hearing.[103]

A member of the Commission's Research Department also presents a report at the hearing.[104]

Then, the Commission holds a vote.[105] If six or more members of the Commission vote to designate the proposed property, the protections of the

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96. *About LPC: Departments*, N.Y.C. LANDMARKS PRES. COMM'N, http://www.nyc.gov/html/lpc/html/about/departments.shtml (last visited Nov. 6, 2013, *archived at* http://perma.cc/ZRH8-2N8U).

97. Birmingham, *supra* note 68, at 279.

98. *Propose a Landmark*, N.Y.C. LANDMARKS PRES. COMM'N, http://www.nyc.gov/html/lpc/html/propose/landmark.shtml (last visited Nov. 6, 2013, *archived at* http://perma.cc/D3KZ-BSFF). A copy of the request form is available at http://www.nyc.gov/html/lpc/downloads/pdf/forms/request_for_evaluation.pdf, *archived at* http://perma.cc/PS6R-XMYZ.

99. *FAQs: The Designation Process*, N.Y.C. LANDMARKS PRES. COMM'N, http://www.nyc.gov/html/lpc/html/faqs/faq_designation.shtml (last visited Nov. 6, 2013, *archived at* http://perma.cc/N94L-UY6R).

100. *Id.*

101. N.Y.C., N.Y., ADMIN. CODE § 25-303 (2012).

102. *Id.* § 25-313(a); *FAQs: The Designation Process*, *supra* note 99.

103. ADMIN. § 25-313(b); *see also FAQs: The Designation Process*, *supra* note 99.

104. *FAQs: The Designation Process*, *supra* note 99.

105. *FAQs: The Designation Process*, *supra* note 99.

NYC Act go into effect immediately.[106] But the designation process still is not complete. Next, the City Planning Commission enters the mix and must hold its own public hearing[107] and submit to the City Council a report "on the effects of the designation as it relates to zoning, projected public improvements, and any other city plans for the development or improvement of the area involved."[108]

The City Council may modify or disapprove a landmark designation by a majority vote.[109] All votes are filed with the Mayor, who is allowed to veto the decision; the Council may then override the veto with a two-thirds vote.[110]

Once designated, the Act provides significant protection to the building's preservation:

> Once a building is officially designated a landmark, significant limitations apply to construction projects undertaken at the building's site. Most alterations, especially those that affect the remarkable architectural aspects of a building, must be submitted to and approved by the Landmarks Commission. However, minor exterior work and maintenance does not require the Commission's approval.[111]

In addition, designated building owners must maintain a state of good repair.[112]

An official landmark designation in New York City, however, does not mean a complete and indefinite ban on all building alterations. Through a system of three different permits, the Commission may approve alterations to a landmark in some instances.

First, the Commission may issue a "certificate of no effect" (CNE) "when the proposed work . . . does not affect the protected architectural features of a building" or "detract from the special character of a historic

106. *FAQs: The Designation Process*, *supra* note 99; ADMIN. § 25-303(e).

107. ADMIN. § 25-303(g)(1)(a).

108. *FAQs: The Designation Process*, *supra* note 99; *see also* ADMIN. § 25-303(g)(1)(b).

109. ADMIN. § 25-303(g)(2).

110. *Id.*

111. Birmingham, *supra* note 68, at 280; *see also* ADMIN. § 25-305 (making it unlawful to "alter, reconstruct or demolish any improvement" that is part of a designated landmark site or in a designated historic district); *FAQs: Making Changes to a Landmarked Building*, N.Y.C. LANDMARKS PRES. COMM'N, http://www.nyc.gov/html/lpc/html/faqs/faq_permit.shtml (last visited Nov. 8, 2013, *archived at* http://perma.cc/RLD9-5VPR) ("You do not need a permit from the Landmarks Commission to perform ordinary repairs or maintenance chores.").

112. ADMIN. § 25-311.

district."[113] An example of work that may be permitted with a CNE is installation of plumbing and heating equipment.[114]

Second, the Commission may issue a "permit for minor work" (PMW) when the work does not require a building permit from the city, but does affect protected features of the landmark.[115] Examples of work that would require a PMW are window replacement and restoration of architectural details.[116] The Commission evaluates the appropriateness of such work before approving the permit.[117]

The third and last permit is a "certificate of appropriateness" (C of A). Work such as "[a]dditions, demolitions, new construction, and removal of architectural features" that "will affect significant protected architectural features" requires a C of A.[118] If someone applies for and is denied a CNE, he or she may then apply for a C of A.[119] In deciding whether to issue this certificate, the Commission must decide if the proposed work is consistent with the purposes of the NYC Act,[120] meaning it must "consider . . . the perpetuation and use of the exterior architectural features of such landmark which cause it to possess a special character or special historical or aesthetic interest or value."[121]

In response to the NYC Act, the City Planning Commission updated its Zoning Resolution to allow owners of landmark buildings to more easily transfer their unused development rights to adjacent parcels.[122] This means that a property owner whose development options are limited due to the landmark status of his building can essentially "over"-develop an adjacent lot that he also owns, or he can sell those rights to someone else.[123] Specifically, the owner of the adjacent parcel may, among other things, increase the normal maximum floor space,[124] decrease the normal minimum

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113. *FAQs: Making Changes to a Landmarked Building*, *supra* note 111; *see also* ADMIN. § 25-306(a)(1).

114. *See FAQs: Making Changes to a Landmarked Building*, *supra* note 111.

115. *FAQs: Making Changes to a Landmarked Building*, *supra* note 111.

116. *FAQs: Making Changes to a Landmarked Building*, *supra* note 111.

117. *FAQs: Making Changes to a Landmarked Building*, *supra* note 111; *see also* ADMIN. § 25-310.

118. *FAQs: Making Changes to a Landmarked Building*, *supra* note 111. A public hearing is held, and at least six Commission members must vote in favor. *FAQs: Making Changes to a Landmarked Building*, *supra* note 111. "The actual C of A permit is not issued until the staff has reviewed the final construction drawings to make sure that the final plans are consistent with the proposal approved by the Commissioners." *FAQs: Making Changes to a Landmarked Building*, *supra* note 111.

119. ADMIN. § 25-307(a).

120. *Id.*

121. *Id.* § 25-307(d).

122. *See* N.Y.C., N.Y., ZONING RESOLUTION § 74-79 (1969).

123. *See id.*

124. "The floor area of a building is the sum of the gross area of each floor of the building, excluding mechanical space, cellar space, floor space in open balconies, elevators

open space,[125] and vary from normal front height and setback[126] regulations.[127] The amendment redefined "adjacent" to include parcels across a street or intersection from a designated landmark.[128]

The Commission, in enacting this more flexible rule, recognized that "quite a few of the landmarks most valuable to preserve for aesthetic and historic reasons are also located on lots whose economic potential greatly exceeds their present use. The proposed amendments would permit the owners of designated landmarks to realize some of this potential value without destroying their landmarks."[129]

However, there are also limits on how much a property owner can stray from the usual zoning regulations on the adjacent property. For example, a building's floor space may be increased only up to 20 percent.[130] Such limits were put in place "to promote architecture that will relate to and enrich the area surrounding the City's landmarks" and to ensure "no single zoning lot will become burdened with an excessive concentration of bulk."[131] New York City's transferable development rights seem to attempt to strike a balance between property owners' rights and the recognized values of architectural preservation.

It is possible to rescind a property's designation as a landmark under the NYC Act. The rescission process is very similar to the complex steps required for designation in the first place: a public hearing, a City Planning Commission report, review by the City Council, and review by the Mayor.[132] In reality, though, the rescission option is not often used.[133]

A federally funded grant program is available to certain New York

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or stair bulkheads and, in most zoning districts, floor space used for accessory parking that is located less than 23 feet above curb level." *NYC Zoning – Glossary*, N.Y.C. DEP'T OF CITY PLANNING, http://www.nyc.gov/html/dcp/html/zone/glossary.shtml (last visited Nov. 8, 2013, *archived at* http://perma.cc/KM6B-QW48).

125. *Id.* ("Open space is the part of a residential zoning lot (which may include courts or yards) that is open and unobstructed from its lowest level to the sky, except for specific permitted obstructions, and accessible to and usable by all persons occupying dwelling units on the zoning lot.").

126. *Id.* ("A setback is the portion of a building that is set back above the base height (or street wall or perimeter wall) before the total height of the building is achieved. The position of a building setback in height factor districts is controlled by sky exposure planes and, in contextual districts, by specified distances from street walls.").

127. ZONING RESOLUTION § 74-79.

128. Sarah J. Stevenson, Note, *Banking on the TDRS: The Government's Role as Banker of Transferable Development Rights*, 73 N.Y.U. L. REV. 1329, 1334 (1998); ZONING RESOLUTION § 74-79.

129. N.Y.C. PLANNING COMM'N, REPORT CP-20253 (1968), *archived at* http://perma.cc/4N46-3KHP.

130. ZONING RESOLUTION § 74-792(b)(4).

131. N.Y.C. PLANNING COMM'N, *supra* note 129.

132. *See* N.Y.C., N.Y., ADMIN. CODE § 25-303(h) (2012).

133. Joachim Beno Steinberg, Note, *New York City's Landmarks Law and the Rescission Process*, 66 N.Y.U. ANN. SURV. AM. L. 951, 972 (2011).

City homeowners and nonprofits that need to do exterior restoration or repair work on their landmark properties.[134] Other grants and loans are offered through private organizations, such as the New York Landmarks Conservancy.[135]

The NYC Act was put to the test in the United States Supreme Court in 1978. Penn Central Transportation, the owner of Grand Central Terminal in New York City—an eight-story building that opened in 1913[136]—claimed "that the application of the Landmarks Preservation Law had 'taken' their property without just compensation in violation of the Fifth and Fourteenth Amendments . . . ."[137] The terminal had been designated a landmark under the NYC Act "as a magnificent example of the French beaux-arts style,"[138] and the owners sought permission to construct an office building on top of the terminal.[139] The plaintiffs submitted two different plans, both of which the Commission rejected, stating that an office building on top of the beaux-arts terminal would be an "aesthetic joke."[140] The Commission went on to say that urban design must be preserved "in a meaningful way—with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it."[141]

Significant in the Penn Central case was the Supreme Court's affirmation that historical preservation laws are related to the public's health, safety, morals, or general welfare.[142] The Court held there was no taking because the NYC Act's restrictions were "substantially related to the promotion of the general welfare," and they still allowed "reasonable beneficial use" of the building and left the owners with other opportunities to alter it.[143] The Court specifically noted that the plaintiffs had not sought approval of any alternate construction, and there was no reason to believe that the Commission would deny *all* construction above the terminal.[144] The Court also explained that the transferable development rights[145] help

134. *See About LPC: Historic Preservation Grant Program*, N.Y.C. LANDMARKS PRES. COMM'N, http://www.nyc.gov/html/lpc/html/about/hpgp.shtml (last visited Nov. 8, 2013, *archived at* http://perma.cc/P2X4-PGLP).

135. *See Programs & Services*, N.Y. LANDMARKS CONSERVANCY, http://www.nylandmarks.org/programs_services/ (last visited Nov. 8, 2013, *archived at* http://perma.cc/XHQ6-2DDC).

136. Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 115 (1978).

137. *Id.* at 109.

138. *Id.* at 115.

139. *Id.* at 116.

140. *Id.* at 116-18.

141. *Id.* at 118.

142. *See id.* at 125.

143. *Id.* at 138.

144. *Id.* at 136-37.

145. *See supra* notes 122-23 and accompanying text.

"mitigate whatever financial burdens the law has imposed on [plaintiffs] . . . ."[146]

The Landmarks Preservation Commission is central to the landmark designation process in New York City. It facilitates the review of proposed landmarks and is the first step in approval. The Commission interacts with the public and addresses community concerns. Most alterations to a landmarked building require approval by the Commission in order to protect the building's unique features. However, the Zoning Resolution's transferable development rights provide an alternative for developers when the landmark status of their property would otherwise limit their options. Rescission of landmark status is possible but rare—an issue that is discussed in more detail in section V.

2. Success and Criticism of the NYC Act

The NYC Act has both fans and critics. Under the NYC Act, more than 1000 individual buildings in the city's five boroughs have been landmarked; that number does not include buildings within designated historic districts.[147] New York City residents who remember the destruction of Pennsylvania Station would likely say the NYC Act has helped prevent other beloved buildings from experiencing a similar fate.[148] Overall, the NYC Act seems to recognize and successfully protect the various values associated with a city's built environment.[149]

On the other hand, some believe the attitude that historic districts and buildings should stay exactly the same is "inconsistent with [New York's] nature and identity as a city."[150] Another critic, Edward Glaeser, says the NYC Act has led to over-landmarking, impeding new construction and making real estate prices go up.[151] In addition, Glaeser says many of the buildings in designated historic districts are "uninteresting" and "less

146. *Penn Cent.*, 438 U.S. at 137 (alterations added).

147. As of 2008, the count was near 1200 individual landmarks. N.Y. LANDMARKS PRES. COMM'N, GUIDE TO NEW YORK CITY LANDMARKS (4th ed., 2008). The number of buildings within designated historical districts is much higher—around 25,000. Edward L. Glaeser, *Preservation Follies: Excessive Landmarking Threatens to Make Manhattan a Refuge for the Rich*, CITY JOURNAL (2010), *archived at* http://perma.cc/X6T5-7PWV.

148. Pennsylvania Station was a massive, ornate Beaux-Arts style building erected in New York City in 1910, and it was torn down over a three-year period starting in 1963. *Pennsylvania Station*, N.Y. PRES. ARCHIVE PROJECT, http://www.nypap.org/content/pennsylvania-station (last visited Nov. 8, 2013, *archived at* http://perma.cc/7BZJ-PYKU). Many consider Penn Station's destruction a factor in the passing of the NYC Act because it "increased public awareness of the need to protect the city's architectural, historical, and cultural heritage." *About LPC*, *supra* note 89.

149. *See supra* Part III.A.

150. Barron, *supra* note 91.

151. *See* Glaeser, *Preservation Follies*, *supra* note 147, at 5.

attractive and exciting than new structures that could replace them."[152]

Also a critic of the NYC Act, Justice Rehnquist in his dissent to the *Penn Central* decision articulated concern that the Act placed the costs of preservation entirely on the shoulders of those who happen to own landmarked buildings.[153] He noted that at the time Grand Central Station was designated as a landmark, the owners were in financial trouble, making it difficult for them to comply with the requirements of the NYC Act.[154]

The NYC Act also faces criticism from preservationists who think the city could be doing more to efficiently and effectively designate landmarks. Many preservationists will attest that the designation process in New York is long, and many requests come to a dead end.[155] The New York Times carried out a six-month investigation of the Landmarks Preservation Commission, in which it found the Commission was "an overtaxed agency that has taken years to act on some proposed designations."[156] An even bigger issue for some preservationists is the way Requests for Evaluations are handled.[157] The Requests are funneled through the Commission chair Robert Tierney—who has no architectural or planning expertise—and his staff.[158] The rest of the Commission does not see many of the Requests.[159]

Finally, the NYC Act's rescission process is weak and rarely used.[160] Landmark status for perpetuity may not be appropriate in every circumstance, yet the law provides little guidance or opportunity for de-designating a building.[161]

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152. Glaeser, *Preservation Follies*, *supra* note 147, at 5.

153. Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 139 (1978) (Rehnquist, J., dissenting). For more commentary on Justice Rehnquist's dissent in *Penn Central*, *see generally* Chauncey L. Walker & Scott D. Avitabile, *Regulatory Takings, Historic Preservation and Property Rights Since* Penn Central*: The Move Toward Greater Protection*, 6 FORDHAM ENVTL. L.J. 819, 821-25 (2011).

154. *Penn Cent.*, 438 U.S. at 141 (Rehnquist, J., dissenting).

155. Robin Pogrebin, *An Opaque and Lengthy Road to Landmark Status*, N.Y. TIMES (Nov. 25, 2008), http://www.nytimes.com/2008/11/26/arts/design/26landmarks.html, *archived at* http://perma.cc/53QP-RA6Q. For example, preservationists in 1998 requested landmark status for the 1940 Tiffany & Co. store on Fifth Avenue. *Id.* The Commission replied that it would take the building "under consideration," but did not respond again until three years later, after the group resubmitted its request. *Id.* This time, the response said the Tiffany building was potentially eligible, but still no further action has been taken a decade later. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *See generally* Steinberg, *supra* note 133.

161. *See* Steinberg, *supra* note 133, at 971.

B. The United Kingdom's Planning (Listed Buildings and Conservation Areas) Act

1. Overview of the Act and Related Authority

The U.K. Planning (Listed Buildings and Conservation Areas) Act (hereinafter U.K. Planning Act) was enacted in 1990.[162] The government's prerogative in enforcing the Act "is that the historic environment and its heritage assets should be conserved and enjoyed for the quality of life they bring to this and future generations."[163] Planning objectives include sustainable development, conservation, and education.[164]

As in New York City, the United Kingdom has a process for listing buildings in order to protect them from alteration and destruction. A building may be listed[165] only if it has "special architectural or historic interest."[166] "Architectural interest" may be present in buildings with important design, decoration, or craftsmanship, or in buildings that display technological innovation.[167] "Historic interest" may be present in buildings that "illustrate important aspects of the nation's social, economic, cultural, or military history and/or have close historical associations with nationally important people."[168] In the United Kingdom, the government and English Heritage provide extensive guidance for deciding what sorts of buildings are worthy of listing.[169]

The United Kingdom's regime divides listed buildings into three categories depending on their level of importance: Grade I is the highest

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162. Planning (Listed Buildings and Conservation Areas) Act, 1990, c. 9, §§ 1-94 (U.K) [hereinafter U.K. Planning Act].

163. DEP'T FOR CMTYS. AND LOCAL GOV'T, PLANNING POLICY STATEMENT 5: PLANNING FOR THE HISTORIC ENVIRONMENT, 2010, at 2 (U.K.) [hereinafter PPS5]. Planning policy statements are documents that describe national policies on various aspects of planning in England; PPS5 contains policies regarding historical conservation. *Id.* at 1. The policies apply to planning authorities' responsibilities under the U.K. Planning Act. *Id.*

164. *Id.* at 2.

165. In the context of the U.K. Planning Act, saying a building is "listed" is the equivalent of saying it has been officially designated as a landmark.

166. U.K. Planning Act § 1.

167. DEPT. FOR CULTURE, MEDIA AND SPORT, PRINCIPLES OF SELECTION FOR LISTING BUILDINGS 4 (2010) (U.K.), *archived at* http://perma.cc/QBZ9-MY9Z.

168. *Id.*

169. The Department for Culture, Media and Sport has published a general set of principles to be applied by the Secretary of State. *See id.* In addition, English Heritage has published its own guidelines for selecting heritage assets for designation. *Listing Selection Guides*, ENGLISH HERITAGE, http://www.english-heritage.org.uk/caring/listing/criteria-for-protection/selection-guidelines/ (last visited Nov. 9, 2013). There are twenty different publications for building selection alone, each one focusing on a particular genre of buildings, such as Places of Worship, Industrial Structures, Commemorative Structures, and various types of Domestic Structures. *Id.*

category and applies to the smallest number of listed buildings; Grade II* ("two plus") is the intermediate category; and Grade II, the lowest designation, applies to the majority of listed buildings and is the most common category for homes.[170]

The Secretary of State for Culture, Olympics, Media and Sport assigns listed building status, either by his or her independent decision, or by the suggestion of the Historic Buildings and Monuments Commission for England or other persons or groups.[171] The Commission, now commonly known as English Heritage, is an executive non-departmental public body that manages historical sites and monuments and advises the government and local authorities, among other functions.[172] English Heritage is a commission of up to seventeen people who the Secretary of State appoints based on their skills or professions in special areas of expertise.[173] Many current members have previous experience in government and in various museums.[174]

Before officially listing a building, the Secretary must consult with English Heritage or "with such other persons or bodies of persons as appear to him appropriate as having special knowledge of, or interest in, buildings of architectural or historic interest."[175] It is English Heritage who reviews applications from the public, researches the suggested buildings, and puts together reports on their historical background.[176] English Heritage may play a key role in recommending a building for listing, although the final listing decision belongs to the Secretary of State.[177]

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170. *Listed Buildings*, ENGLISH HERITAGE, http://www.english-heritage.org.uk/caring/listing/listed-buildings/ (last visited Nov. 9, 2013, *archived at* http://perma.cc/6HMG-J8SY).

171. U.K. Planning Act § 1(1). The public application form is archived at http://perma.cc/QY5J-CPSM.

172. *What English Heritage Does*, ENGLISH HERITAGE, http://www.english-heritage.org.uk/about/who-we-are/how-we-are-run/what-we-do/ (last visited Nov. 10, 2013, *archived at* http://perma.cc/A5FR-D6AS).

173. *The Commission at English Heritage*, ENGLISH HERITAGE, http://www.english-heritage.org.uk/about/who-we-are/how-we-are-run/commission/ (last visited Nov. 10, 2013, *archived at* http://perma.cc/53RS-DAY4).

174. *See Executive Board Member Biographies*, ENGLISH HERITAGE, http://www.english-heritage.org.uk/about/who-we-are/how-we-are-run/executive-board/biographies/ (last visited Nov. 28, 2013, *archived at* http://perma.cc/J8KV-SBNS). For example, Chief Executive Simon Thurley was Director of the Museum of London and Curator of Historic Royal Palaces before becoming a member of the English Heritage Executive Board. *See Biography*, SIMONTHURLEY.COM, http://www.simonthurley.com/bio.html (last visited Nov. 10, 2013, *archived at* http://perma.cc/T3UD-5G84).

175. U.K. Planning Act § 1(4).

176. *Consultation Process*, ENGLISH HERITAGE, http://www.english-heritage.org.uk/caring/listing/listed-buildings/consultation-process/ (last visited Nov. 10, 2013, *archived at* http://perma.cc/ZCQ3-UXAW).

177. *See* U.K. Planning Act § 1.

The U.K. Planning Act also provides for temporary building preservation notices in the event that an unlisted building of architectural or historic interest is in danger of demolition or damaging alteration.[178] A building preservation notice will stay in force for up to six months, during which time the building is treated as if it were a listed building.[179] In the meantime, the Secretary of State may decide whether or not to permanently list the building.[180]

Once a building is listed, subject to certain provisions, no one may demolish, alter, or extend it "in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorised."[181] A proposed alteration, extension, or demolition of a listed building may be authorized by the written consent of the local planning authority.[182] Local planning authorities will seek the expert advice of the English Heritage Commission if the consent request involves a Grade I or II* building, a demolition, or a particularly complicated case.[183]

When the local planning authority or Secretary of State considers whether to grant consent for alteration, extension, or demolition, it "shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."[184] A consent decision should be a balancing act weighing the significance of the heritage asset against the desirability of new development.[185] In a 2009 case, English Heritage challenged a Secretary of State decision to permit the construction of a mixed-use site in London that would have an impact on a Grade I listed building, Somerset House.[186] The Secretary believed the site would bring important social benefits such as employment and local economic growth.[187] Deciding that these factors outweighed the damage to Somerset House, the judge did not quash the permit.[188]

When the planning authority or Secretary consents to the alteration, extension, or demolition of a listed building, it may do so subject to certain

178. *Id.* § 3(1).
179. *Id.* §§ 3(3), 3(5).
180. *Id.* §§ 3(2), 3(4).
181. *Id.* § 7.
182. *Id.* § 8(1).
183. *Listed Building Consent*, ENGLISH HERITAGE, http://www.english-heritage.org.uk/professional/advice/our-planning-role/consent/lbc/ (last visited Nov. 10, 2013, *archived at* http://perma.cc/FP5Z-ZZQC).
184. U.K. Planning Act § 16(2).
185. *See* PPS5, *supra* note 163, HE7.1-7.5.
186. Historic Buildings and Monuments Comm'n for Eng. (English Heritage) v. Sec. of State for Communities and Local Gov't, [2009] EWHC (Admin) 2287, [1]-[3] (appeal taken from Eng.).
187. *Id.* at [8].
188. *Id.* at [6], [115].

conditions. It may require the preservation of certain building features or the repair or reconstruction of any damage that occurs during the course of the work.[189]

English Heritage offers landmark owners the opportunity to apply for grants to pay for urgent structural repairs on Grade I and Grade II* buildings.[190] Owners can also pursue grants through various charitable organizations.[191]

As in New York, landmark status in the United Kingdom can be rescinded, or "de-listed." Requests for de-listing are made to the English Heritage Commission just like listing applications and should include evidence supporting the de-listing.[192] An application for de-listing may be appropriate when new evidence suggests the building does not have special historical or architectural interest, or when the building's circumstances have materially changed.[193]

The decision process for de-listing is complex—taking about five months[194]—but it is clearly laid out.[195] The Commission makes an initial assessment of the application before notifying the local authority, at which point owners and local planners can submit feedback.[196] The Commission inspects the building and publishes a report describing the building's history and other background information.[197] After considering all the relevant responses to its report, the Commission makes its recommendation to the Secretary of State.[198] The Secretary of State will de-list a landmark only if it no longer meets the "special architectural or historic interest" standard; he may not take into account any other considerations.[199] The Commission receives an average of 150 requests per year, about half of which lead to a de-listing.[200]

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189. U.K. Planning Act § 17(1).

190. *See Grants for Historic Buildings, Monuments and Designed Landscapes*, ENGLISH HERITAGE, http://www.english-heritage.org.uk/professional/funding/grants/grants-available/hbmdl/ (last visited Feb. 9, 2013, *archived at* http://perma.cc/D2D9-ENQ3).

191. *See generally* FUNDS FOR HISTORIC BUILDINGS, http://www.ffhb.org.uk/ (last visited Nov. 28, 2013, *archived at* http://perma.cc/8YH2-3Q33). A directory of funding sources is maintained at the Funds for Historic Building's website at http://www.ffhb.org.uk/results.php?action=full, *archived at* http://perma.cc/T3ET-9GQW.

192. ENGLISH HERITAGE, REMOVING A BUILDING FROM THE LIST 2 (2010) (U.K.), *archived at* http://perma.cc/9VPG-QVE2.

193. *Id.* at 1.

194. *Id.* at 3.

195. *See generally id.*

196. *Id.* at 2.

197. *Id.* at 3.

198. *Id.*

199. *Id.* at 1.

200. *Id.* at 3.

V. SUGGESTIONS FOR ADACH'S MODERN HERITAGE PRESERVATION INITIATIVE

A. How Abu Dhabi and ADACH Can Draw Guidance from the NYC Act and the U.K. Planning Act

The architectural preservation regimes in New York City and London can serve as a jumping-off point for ADACH as it works toward an effective regime for Abu Dhabi. The former cities have many things in common when it comes to how they choose to preserve their architectural heritage: they have a similar policy behind their laws, they employ a special commission, they encourage public participation, they provide similar protections for landmarks, they use a permit system for alterations, and they allow for rescission of landmark status. Each city also has unique features that may be of interest to ADACH: New York City allows for transferable development rights, and the United Kingdom provides for a temporary listing. While New York City and London's programs can provide valuable guidance to a new city's quest for effective preservation laws, they need to be adapted to fit a modern city such as Abu Dhabi. This section addresses which aspects of the NYC and UK programs Abu Dhabi should replicate, which it should ignore, and which it should adapt.

1. Underlying Policies

In general, it seems that New York City's policy reasons for enacting its landmark law are similar to Abu Dhabi preservationists' beliefs.[201] New York saw buildings destroyed unnecessarily to the detriment of the city,[202] just like what is happening currently in Abu Dhabi. Thus, the NYC Act's policy statement might be a good starting point for ADACH. However, New York's goals to protect, enhance, and perpetuate use of landmarks clearly are bent strongly toward preservation and little change. Similarly, the United Kingdom's policy of conserving heritage assets for future generations[203] seems to strongly favor conservation. Considering Abu Dhabi's ever-changing landscape, perhaps an appropriate verb to add to its policy statement would be "manage." Management of landmarks suggests a recognition of landmark buildings' value, but also suggests a mindfulness of changing circumstances and of the competing interests within a

201. *See* N.Y.C., N.Y., ADMIN. CODE § 25-301(b) (2012) ("It is hereby declared as a matter of public policy that the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people.").

202. Recall the destruction of Pennsylvania station, discussed *supra* note 148.

203. *See supra* note 163 and accompanying text.

community.

2. A Commission to Facilitate Preservation

The Landmarks Preservation Commission and English Heritage are integral to the landmark designation processes in New York City and London, respectively. It is important to have a group of people dedicated to making the important decision of what buildings are worthy of special treatment, especially because the special treatment may limit property owners' rights. English Heritage seems to be a rather loose assembly of people deemed worthy of commission membership for unclear reasons.[204] New York's commission, on the other hand, is a good model for Abu Dhabi because the statute requires it to include professionals of diverse backgrounds who represent sometimes competing views.[205] In Abu Dhabi, a good way to manage preservation and development within the landmark designation process would be to institute a commission of people with varied viewpoints.

A historian would be valuable for his knowledge of the intricacies of Abu Dhabi's past and how it became the city that it is today. An architect would have an understanding of the relative importance and quality of various buildings. An Islamic scholar would also be valuable because Abu Dhabi is part of a Muslim nation, so religion is an integral part of everyday life. A city planner would be important for her expertise on how a landmarked building would fit in with its surroundings, and on how future development might affect the building and its neighborhood. Someone with experience in real estate and development would also be critical in Abu Dhabi's commission, because he could represent views opposite to preservationists and help facilitate compromises. These are just a few examples of individuals who would help comprise an effective landmark committee in Abu Dhabi.

3. The Building Selection Process

The New York and London procedures for selecting buildings for designation may also provide guidance for Abu Dhabi. First, both cities allow members of the public to suggest buildings for landmark consideration.[206] This only seems appropriate considering architectural

204. The English Heritage commission was not created under the U.K. Planning Act. According to English Heritage's website, "[t]he Commission comprises a maximum of 17 individuals, appointed by the Secretary of State for the Department for Culture, Media and Sport, for their skill or professional standing in one or more areas of expertise." *The Commission at English Heritage*, *supra* note 173 (alteration added).

205. *See supra* text accompanying note 92.

206. *See supra* text accompanying notes 98 and 171.

preservation laws are intended to benefit the welfare of the public.[207] New York also holds public hearings, which again allow the people who are supposed to be benefitted to express their views. In Abu Dhabi, it would be difficult for a government commission to make a determination of "the public's" best interests without a public hearing. Abu Dhabi natives with more of a connection to the local culture may feel particularly invested in the future of buildings in their neighborhoods. Wealthy developers likely want to ensure they will have options to build in the future. Real estate owners might desire landmark recognition for their buildings, or they might worry about the costs and obligations of owning a landmark. All of these views can be aired at a public hearing and weighed by the committee.

When it comes time to make the final decision to designate, the United Kingdom's approach seems simpler, while the New York approach involves more steps but is more democratic.[208] The downside to the United Kingdom's process is that allowing one person to have the say over experts could defeat the purpose of having a diverse commission. However, if the final decision-maker is simply a formality, and he or she adheres to the commission's suggestion, a conflict may be avoided. The downside to New York's approach, of course, is that there are more steps and more government entities involved, which only increases the danger that political agendas will influence outcomes of decisions.[209] In New York City, it is really the City Council that makes the decision whether a building receives landmark status.[210] Thus there exists the same potential problem as in the United Kingdom, where a "higher up" government entity can easily overrule the carefully crafted and diversely educated commission.

Perhaps it is impossible to craft the perfect landmark designation process that avoids the aforementioned problems. For Abu Dhabi, the final decision-maker should be required by law, at a minimum, to consult with the commission and others with special knowledge or interest in the building. Such a requirement would resemble Section 1(4) of the U.K. Planning Act.[211] The decision-maker must then be held accountable for any

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207. *See supra* text accompanying note 77.

208. Recall that in the United Kingdom, the Secretary of State for Culture, Media and Sport makes the final listing decision. *See supra* note 177 and accompanying text. In New York City, the Landmarks Preservation Commission votes, then the City Council votes, then the mayor may veto, and the Council may override the veto. *See supra* notes 105-10 and accompanying text.

209. *See* Birmingham, *supra* note 68, at 295 (noting that some preservationists have suggested the Commission has avoided designating landmarks when the mayor has endorsed a construction plan on the site or when the site is owned by a group with political clout).

210. *See supra* notes 109-10 and accompanying text.

211. *See* U.K. Planning Act § 1(4) ("Before compiling, approving (with or without modifications) or amending any list under this section the Secretary of State shall consult—(a) in relation to buildings which are situated in England, with the [English Heritage] Commission; and (b) with such other persons or bodies of persons as appear to him

decisions that are clearly arbitrary or without proper support.

The question of what sorts of buildings are worthy of landmark protection is central to the preservation conflict in Abu Dhabi.[212] Therefore, one of the key parts of ADACH's initiative will be to develop policies outlining which kinds of structures are important to preserve. The United Kingdom does a better job than New York City of articulating exactly how buildings should be evaluated and which buildings are worthy of landmark status.[213] Abu Dhabi should publish similar guidelines—whether in statutes or in official policy statements—to establish standards for its landmarks commission to follow.

Of course, the standards for designation in London (and the United Kingdom in general) are very different from standards that would likely be promulgated in Abu Dhabi. London's history goes back many centuries, and the city is still home to numerous buildings from the medieval period to Victorian times.[214] Despite the vast differences in London's and Abu Dhabi's architectural histories, Abu Dhabi could still use the basic standard of "special architectural or historical interest" from the U.K. Planning Act,[215] but define that interest based on its own unique situation. In Abu Dhabi, perhaps "special architectural interest" would mean particular Islamic architectural features and innovative building technologies. Perhaps "special historical interest" would mean pre-oil boom buildings and rare examples of past architectural trends.

While many elements of New York's and the United Kingdom's statutes for designating landmarks are effective in their respective jurisdictions, some standards for selecting landmark-worthy structures would be less effective in Abu Dhabi. Most importantly, the NYC Act defines "landmark" to mean "any improvement" that, *inter alia*, is at least thirty years old.[216] Therefore, the NYC Act falls short of protecting "modern history," which is exactly what is at issue in Abu Dhabi. However, Abu Dhabi could easily adjust its definition of "landmark" to include a younger age requirement, or no age requirement at all. Considering Abu Dhabi developers are already demolition-happy, an age requirement could create the incentive to demolish buildings just before they reach the necessary age for landmark designation.[217]

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appropriate as having special knowledge of, or interest in, buildings of architectural or historic interest.").

212. *See generally supra* Part II.B.

213. *See supra* notes 166-69 and accompanying text.

214. *See generally London History*, BRITAIN EXPRESS, http://www.britainexpress.com/London/history-of-london.htm (last visited Nov. 11, 2013, *archived at* http://perma.cc/46ZR-MJBA).

215. U.K. Planning Act § 1.

216. N.Y.C., N.Y., ADMIN. CODE § 25-302(n) (2012).

217. This happens to some extent in New York City already. *See* Gregory A. Ashe, *Reflecting the Best of Our Aspirations: Protecting Modern and Post-Modern Architecture*, 15 CARDOZO ARTS & ENT. L.J. 69, 85 (1997).

In the United Kingdom, while there is not a statutory age threshold like in the NYC Act, there is a clear "older is better" mentality when it comes to listing buildings. The newer the building is, the stricter the criteria for listing becomes.[218] The rationale is that if a building is so old that there are few surviving examples of its kind, the more likely it is to have the "special interest" required by the U.K. Planning Act.[219] Obviously this is not the sort of thinking that ADACH seeks to encourage with its initiative to protect *modern* heritage. The concern in Abu Dhabi is that in the future, the city might be culturally poorer due to the loss of buildings that were torn down when they were too young to be recognized as culturally significant. The answer to this concern is to place a duty on the current generation to protect buildings—regardless of age—"not only until at least enough time has passed so that the next generation can make a knowledgeable decision about whether to preserve such buildings, but also to leave the next generation a rich heritage to preserve."[220]

4. Protections for Landmarked Buildings and Rights for Developers and Property Owners

Once a building has been officially listed as a landmark, the NYC Act and the U.K. Planning Act both provide essentially the same protection: alterations are generally not allowed if they would affect the special elements that made the building landmark-worthy in the first place.[221] As the purpose of architectural preservation laws is primarily to preserve, Abu Dhabi would be remiss not to include such a requirement in its regime.

Just as New York City and London permit alterations and demolitions in certain circumstances, so too should Abu Dhabi. The NYC Act describes three named categories of permits depending on the type of work proposed,[222] while the U.K. Planning Act calls for simply a "consent" to any type of alteration, extension, or demolition.[223] It does not seem to matter whether the permits or consents are categorized or given special names, as long as the law gives property owners the opportunity to receive permission to make reasonable alterations to their landmarked buildings.

A permit system is necessary to account for the interests of landmark

218. *Listed Buildings*, ENGLISH HERITAGE, *supra* note 170. All buildings built before 1700 are listed as long as they remain remotely like their original condition. *Listed Buildings*, ENGLISH HERITAGE, *supra* note 170. Only two-tenths of a percent of all listed buildings in the United Kingdom were built after 1945. *Listed Buildings*, ENGLISH HERITAGE, *supra* note 170.

219. DEPT. FOR CULTURE, MEDIA AND SPORT, *supra* note 167, at 5.

220. Ashe, *supra* note 217, at 72.

221. *See supra* notes 111 and 181 and accompanying text.

222. *See supra* notes 113, 115, 118 and accompanying text.

223. U.K. Planning Act § 8(1).

owners who may have acquired or constructed their buildings before they became designated. In Abu Dhabi, the owner of a relatively new building might be upset and surprised to find out that he must preserve his building exactly as it stands because the government has decided its preservation serves the public's best interests. To expect property owners anywhere—and particularly in the fast-growing Abu Dhabi—not to make any updates to their buildings is unreasonable.

The commission responsible for recommending landmarks should also be responsible for approving or denying requests to alter, extend, or demolish those landmarks. U.K. policy nicely lays out considerations for deciding whether to approve a request: First, the commission "should take into account: the desirability of sustaining and enhancing the significance of heritage assets, and of utilising their positive role in place-shaping; and the positive contribution that conservation of heritage assets and the historic environment generally can make to . . . communities. . . ."[224] Second, the commission "should take into account the desirability of new development making a positive contribution to the character and local distinctiveness of the historic environment."[225] These two considerations address the conflicting views of preservation in Abu Dhabi, and therefore hopefully would lead to appropriate compromises. It would be up to the commission, with its diverse backgrounds and expertise, to decide which consideration should win out in each case. In order to allow more alterations while still protecting heritage assets, the commission should be able to approve a request subject to conditions, as in the U.K. Planning Act.[226]

Assuming there is adequate funding, ADACH could attempt to provide grants for certain repairs like English Heritage does.[227] Otherwise, ADACH might seek the cooperation of other private entities—like those in New York City and in England[228]—willing to provide grants. Financially strapped landmark owners should not be punished for their inability to maintain their buildings and properly preserve important features. Likewise, if the true goal is to preserve important architecture for the benefit of the people of Abu Dhabi, the people should not have to see their landmarks crumble simply because the owner had nowhere to turn for assistance.

While Abu Dhabi's permit system would allow some alterations and even destructions in appropriate circumstances, it would deny many other requests because of the negative impact the proposed work would have on the architectural features of the building. In order to appease those property owners whose requests are denied, New York's transferable development

224. PPS5, *supra* note 163, HE7.4.
225. PPS5, *supra* note 163, HE7.5.
226. *See supra* text accompanying note 189.
227. *See supra* text accompanying note 190.
228. *See supra* text accompanying notes 135 and 191.

rights[229] would be a particularly good mechanism for Abu Dhabi to institute.[230] Such a mechanism would allow developers to recoup some of their lost rights and profits while leaving landmarks intact.

When instituting such a rule, ADACH may want to consider the limits and policies of New York's resolution, and whether Abu Dhabi should adopt or redefine those limits and policies. New York only allows transfer of rights to "adjacent" properties,[231] but Abu Dhabi may want to broaden its geographical limits to provide more opportunities for developers. An extended "receiving area"[232] can have both positive and negative implications. On the one hand, allowing developers to transfer their rights to an unrelated or distant area can mean the receiving area neighbors are burdened with larger buildings and do not feel the benefits of the far-off preservation.[233] On the other hand, extending the receiving area increases the number of potential TDR purchasers, adding value and increasing the possibility that developers will actually make the transfers.[234]

Extending receiving areas also furthers policy goals of preservation: "For instance, a very tall building near a preserved landmark may ruin the scaled-down effect which the landmark regulation meant to preserve in the first place."[235] New York limits how much over-development is allowed so surrounding buildings will not detract from a landmark and so zoning areas do not become overly concentrated with large buildings.[236] However, if Abu Dhabi were to implement an extended receiving area, it would not have this same concern.

Another potentially beneficial mechanism for Abu Dhabi is the U.K. Planning Act's provision for temporary or emergency listing of a

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229. Recall that New York's Zoning Resolution allows owners of landmarks to transfer development rights to their adjacent properties or sell those rights to other owners of adjacent properties. *See* N.Y.C., N.Y., ZONING RESOLUTION § 74-79 (1969).

230. For more information and advice on designing transferable rights regimes, see James T.B. Tripp & Daniel J. Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Programs*, 6 YALE J. ON REG. 369, 374-77 (1989) (outlining eight suggestions for transferable rights regimes, covering technical, legal, and institutional considerations).

231. *See* ZONING RESOLUTION §§ 74-79.

232. The "receiving area" in a TDR program is where landowners use the additional development rights; the "sending area"—usually a preservation area—is where property owners can trade their unused development rights. Matthew P. Garvey, Student Article, *When Political Muscle is Enough: The Case for Limited Judicial Review of Long Distance Transfers of Development Rights*, 11 N.Y.U. ENVTL. L.J. 798, 800-01 (2003). An "extended" receiving area refers to a TDR program in which the receiving area is far removed from the sending area in distance or character of use. *Id.* at 799.

233. *See id.*

234. *Id.* at 807.

235. *Id.*

236. *See supra* note 131.

building.[237] Whatever designation process Abu Dhabi ends up creating, it will likely take months—or longer, depending on the commission's workload and available resources—to come to a decision on designating a building.[238] In New York City, the Commission sometimes "has taken so long to act that the building in question has been demolished or irretrievably altered."[239] Adopting the United Kingdom's temporary listing provision would help Abu Dhabi architecture avoid a similar fate.

5. Removing a Building from Landmark Status

As mentioned previously, the NYC Act's rescission process is not terribly accessible. For Abu Dhabi, clear and not-too-strict standards for de-designating landmarks would be advisable. Because of Abu Dhabi's fast-paced development and ever-changing tastes, a building that is thought worthy of saving one year might not retain that value in ten or twenty years. For example, if a building is landmarked because it represents a certain style or genre of architecture, but better examples of that style are built and landmarked later, it may no longer be desirable to protect the former building, especially if the land can be put to more beneficial use.[240]

In other situations, economic circumstances of landmarked property might change,[241] or the cost of maintaining the property might come to far outweigh the benefits to the city.[242] Under such circumstances, the owner of the landmarked property should be given the opportunity to prove to the commission that those changes have occurred and that landmark rescission is therefore justified.[243] While neither the designation nor de-designation of landmarks should be taken lightly, a clear and accessible rescission process could "lead to greater accommodation between preservationists and developers [because] [t]here would be less of a reason to fight landmark designations if they were not perpetual."[244]

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237. *See supra* notes 178-80 and accompanying text.

238. During the 2008 fiscal year, the NYC Landmarks Preservation Commission received about 200 Requests for Evaluation from the public in addition to the Commission's own nominations. *See* Pogrebin, *supra* note 155.

239. Pogrebin, *supra* note 155.

240. *See* Steinberg, *supra* note 133, at 991-92 (suggesting that New York City should allow rescission of landmark status "when the landmark is one of the least valuable examples of a style of architecture that is over-protected in the city").

241. Steinberg, *supra* note 133, at 990.

242. Steinberg, *supra* note 133, at 994.

243. Steinberg, *supra* note 133, at 991 ("Placing the burden on owners to show that [a substantial change in conditions] exists would limit the dangers of re-litigation and would still allow for reconsideration when appropriate.").

244. Steinberg, *supra* note 133, at 998. Steinberg is of course referring to the fight between preservationists and developers in New York City, but because of the similar conflict in Abu Dhabi, the theory is also applicable here.

A similar option is to give a building a preliminary listing as a landmark for a certain number of years, at which point the commission would reassess it for its continuing significance as a landmark. If the building has maintained or increased its cultural value, it would gain a more traditional, permanent status as a landmark. If in hindsight, however, the building does not meet the standards for landmark designation, the preliminary designation would be rescinded.[245]

This idea of a preliminary listing is not practiced by New York City or London, but it incorporates the U.K. Planning Act's temporary building preservation notice[246] and the NYC Act's rescission process.[247] A preliminary listing might be employed under the same circumstances as the U.K. Planning Act's temporary notice—namely, when an unlisted building is in danger of demolition or alteration.[248] The standards for preliminary listing would be less stringent than the standards for a traditional designation. After a term of years, the building would be up for either permanent listing or rescission, whether or not the public has suggested either. The goal of a preliminary listing system in Abu Dhabi would be to protect modern buildings that have the potential to become landmarks, but without freezing them in time for perpetuity in case their significance wanes over the years.

6. Summary of Proposed Application of the NYC Act and the UK Planning Act to Abu Dhabi

In summation, Abu Dhabi's policy goals should reflect a desire to preserve architecture for future generations and to manage architectural heritage in a way that is mindful of the city's progress. Abu Dhabi should create a commission to oversee landmark designation. That commission should consist of people with diverse backgrounds who can properly represent the varied viewpoints on preservation and modernization. The commission should allow input from the public regarding which buildings should be landmarked. The final decision-maker should be required to take into account the commission's recommendation and the recommendation of any other parties with special interest in the building. Abu Dhabi should develop guidelines that outline the criteria for granting landmark status. These criteria should include special architectural or historic interest, but should include a very young age requirement or none at all. Abu Dhabi should use landmark status as a shield against some alterations and demolitions, but it should permit them in some circumstances. Landmark

245. This idea is inspired by Gregory Ashe's proposed "Architectural Landmark Designation." *See generally* Ashe, *supra* note 217.

246. *See* U.K. Planning Act § 3(1).

247. *See* N.Y.C., N.Y., ADMIN CODE § 25-303(h) (2013).

248. *See supra* note 178 and accompanying text.

status should require proper upkeep, but the government should try to provide grants to landmark owners in need. Abu Dhabi should also provide for transferable rights for developers. Abu Dhabi should provide for temporary listing of a building in urgent situations. Abu Dhabi should have an accessible process for rescinding landmark status, including a preliminary listing and reassessment option.

B. How These Suggestions Would Further ADACH's Five Goals

Recall that ADACH has outlined the five goals of its Modern Heritage Preservation Initiative.[249] The goals include cultural, social, economic, political, and legal considerations.[250]

The cultural goal is to include modern architecture in people's definition of heritage.[251] Giving certain modern architecture landmark status, and providing accessible information about those landmarks will gradually introduce to the public the idea that modern buildings are an important part of Abu Dhabi's culture.

The social goal is to make modern heritage buildings desirable.[252] Status as a protected landmark is sort of a stamp of approval on a building's importance and value. It means that a building is special enough that the government wants to preserve it. Landmark status can make a building and its surrounding area more valuable, which in turn can make it more desirable.[253]

The economic goal is to create incentives for building owners.[254] Offering transferable development rights would help calm concerns that preservation laws will stifle new construction and expansion. A company might even seek out landmark status for its building in order to gain the opportunity for larger expansions elsewhere (not to mention the landmark status would make the building more prestigious and valuable). Further, a grant program might keep building owners from resisting landmark designation because of their fear of costly maintenance.

The political goal is to help government agencies work together to plan development and enforce owners' duties.[255] Under the suggestions made in this Note, Abu Dhabi would create a new entity in the landmarks commission, whose members would likely be selected by a government official. Developing policies and regulations governing preservation will require the cooperation of the commission, ADACH, city planners, and lawmakers.

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249. *See supra* Part II.C.
250. *See supra* text accompanying notes 41, 43-46.
251. *See* Chabbi & Mahdy, *supra* note 2, at 82.
252. Chabbi & Mahdy, *supra* note 2, at 82.
253. Chabbi & Mahdy, *supra* note 2, at 82.
254. Chabbi & Mahdy, *supra* note 2, at 82.
255. Chabbi & Mahdy, *supra* note 2, at 82.

The legal goal is to create regulations for protecting buildings and approving alterations.[256] Per the suggestions in the preceding section of this Note, Abu Dhabi can draw guidance from the established regulations in New York City and London. By merging and adapting many of the elements of those cities' laws, Abu Dhabi can create effective mechanisms to select buildings worthy of landmark status and protect them from inappropriate alterations and demolitions.

Thus, by adopting the suggestions in this Note, ADACH can further all five goals of its initiative.

VI. CONCLUSION

The city of Abu Dhabi makes for an interesting case study of how best to preserve what is not yet "history." Because Abu Dhabi was essentially reborn in the mid-twentieth century, it has few buildings that would fit the traditional definition of a landmark. Despite the "newer is better" mentality of some developers in Abu Dhabi, preservationists still recognize that modern architecture is part of the built environment, which deserves protection.

The built environment of any community holds cultural, aesthetic, and economic value for the people of that community. As such, a city or country's laws should demonstrate a public policy in favor of protecting its most important buildings. In New York City, the Landmarks Preservation Act has been in place since 1965. Under the direction of the Landmarks Preservation Commission, thousands of landmarks have been designated. The designation process is long and complex, but the Act provides significant protection against alterations. On the other hand, the city's Zoning Resolution makes up for some of the limitations placed on landmark owners, which is part of the reason the Act survived the Supreme Court's scrutiny.

London's significant architecture has been protected under the Planning (Listed Buildings and Conservation Areas) Act since 1990. With the expertise of English Heritage and its extensive published guidelines for selection, the Secretary of State has listed hundreds of buildings in London. As in New York City, landmarks are protected from alteration unless consent is granted.

By drawing from these two preservation regimes, ADACH can develop the necessary legal mechanisms to begin preserving Abu Dhabi's modern buildings. It will be important, however, to consider the unique nature of Abu Dhabi's history and to adapt the regulations of these much older cities into something that will be appropriate and effective. In doing so, ADACH should be able to successfully address the five goals of its 2011 initiative.

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256. Chabbi & Mahdy, *supra* note 2, at 82.

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