Florida Journal of International Law

VOLUME 27 AUGUST 2015 NUMBER 2

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Florida Journal of International Law

The *Florida Journal of International Law* (ISSN 1556-2670) is a student-edited legal journal published by the University of Florida. The *Journal* is published three times per year. The *Journal* extends its deep appreciation for the generosity of the University of Florida Fredric G. Levin College of Law in supporting and assisting the *Journal* in its publication of this issue.

Editorial and business address: *Florida Journal of International Law*, University of Florida Levin College of Law, 351 Village Dr., 218 Bruton-Geer Hall, P.O. Box 117635, Gainesville, FL 32611.

Please visit us on the web at www.fjil.org/.

The subscription rate per volume is $55.00 U.S. domestic plus sales tax for Florida residents and $60.00 U.S. international. Single issues are available for $20.00 U.S. domestic and $25.00 U.S. international.

Back numbers (volumes 1-26 inclusive) are available from: William S. Hein & Co., 1285 Main Street, Buffalo, NY 14209.

Manuscripts may be submitted to the Articles Editors:

Florida Journal of International Law
Levin College of Law
University of Florida
351 Village Drive
218 Bruton-Geer Hall
Gainesville, FL 32611
USA

(352) 273-0906

Printed by Western Newspaper Publishing Co., 537 East Ohio St., Indianapolis, IN 46204

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INTERNATIONAL CRIMES AND CASE DEMARCATION: WHAT ARE WE TRYING TO PROVE?

Elinor Fry[*]

I. INTRODUCTION

Cases involving international crimes are not easy to demarcate. International crimes generally occur on a massive scale over a prolonged period of time involving many different perpetrators at various levels of command and resulting in copious amounts of victims. Who did what to whom, when, and where exactly? The degree of specificity to which these elements ought to be defined is not as easy to determine as one might think, and with international crimes lack of specificity seeps in at every level. Temporal, geographical, and personal (meaning the identity and amount of both perpetrators and victims) demarcation of the case present ample challenges. It has done so ever since the first international criminal

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prosecutions. In a memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General dated January 22, 1945 the difficulties of prosecutions of large-scale crimes were forewarned as follows:

> The names of the chief German leaders are well known, and the proof of their guilt will not offer great difficulties. However, the crimes to be punished have been committed upon such a large scale that the problem of identification, trial and punishment of their perpetrators presents a situation without parallel in the administration of criminal justice. In thousands of cases, it will be impossible to establish the offender's identity or to connect him with the particular act charged.[1]

While modern day international criminal tribunals have come a long way in dealing with these challenges, vague indictments—the main document that contains the nature (legal characterization) and the cause (underlying facts) of the charges—remain an issue until this day. This is for two reasons. First, unspecific charges stem from difficulties with, for instance, pinpointing the exact day a crime took place, in which village it happened, or which (physical) perpetrators were involved. These are factual problems of specificity, usually reflected by vaguely-worded indictments with phrases such as 'on or about' to indicate when something happened or with references to entire provinces instead of towns or villages to indicate where something happened. Second, vague charges are caused by more abstract evidentiary matters, such as unclear distinctions between material facts—meaning those encompassed in the charges and subject to proof—and subsidiary facts—meaning those that serve as indirect proof or background information without needing to be judicially established. Questions may arise as to which facts should be part of the indictment, and how different types of facts relate to the evidence supporting the charges. This unclear distinction caused problems in *Gbagbo* at the International Criminal Court (ICC). The Pre-Trial Chamber (PTC) adjourned the hearing on the confirmation of charges and requested the Prosecution to gather more evidence relating to a number of incidents allegedly constituting the "attack" as element of the charged crime against humanity, deeming those incidents material facts, but which incidents the Prosecution itself had *not* regarded as being part of the material facts charged. Rather, it had intended to use those incidents as subsidiary facts to demonstrate a certain pattern.[2] Such

1. Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, International Conference on Military Trials: London, 1945 (Jan. 22, 1945), § IV, *available at* http://avalon.law.yale.edu/imt/jack01.asp.

2. *See* Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11-432, Decision adjourning

confusion of material and subsidiary facts is not only time-consuming to rectify; litigation on this matter went on for almost a year—it also leaves the defense in the dark with respect to the indictment's factual parameters.

Case demarcation solidifies with the charging document or indictment, which then puts the accused on notice as to the case against him or her. Allowing the defense to know the case against him or her is crucial from a fair trial perspective, and the indictment is the core document on which that knowledge depends. This right and the indictment are therefore at the heart of the demarcation dilemmas discussed in this Article. The indictment should not be confused, though, with other official documents such as the arrest warrant, issued by a judicial organ and intended to secure an accused's presence at trial, or to prevent a suspect from obstructing the investigation or committing further crimes,[3] nor with pre-trial briefs, issued by the prosecution or the defense after the indictment has been filed and setting out how that party intends to argue its case.[4]

The indictment's effect of providing notice to the accused demonstrates the unique and fundamental dual purpose of the accusatory instrument: (1) to inform the accused about the charge(s), and (2) to settle the factual scope of the trial.[5] While both aspects are imperative to an effective defense, there are two interests at stake here that seem to pull in opposite directions. On the one hand, the principle of the specificity of charges ensures the right of the defense to be informed promptly and in detail of the nature, cause, and content of the charge as well as the ability to mount his or her defense. On the other hand, prosecutors are faced with considerable challenges of case demarcation caused by international crimes' largely vague factual parameters. In international criminal justice, it is difficult to find definitive answers to the five W's (*who*, *what*,

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the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ¶¶ 36, 44 (June 3, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1599831.pdf [hereinafter Gbagbo Adjournment Decision]; Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11-474, Prosecution's appeal against the "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute," ¶¶ 3, 23, 26, 29 (Aug. 12, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1631903.pdf [hereinafter Gbagbo Prosecution's Appeal].

3. *See, e.g.*, Rome Statute of the International Criminal Court art. 58(1)(b), U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute]; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 19(2), 20(2), adopted May 25, 1993, as amended by S.C. Res. 1877, U.N. Doc. S/RES/1877 (July 7, 2009) [hereinafter ICTY Statute].

4. *See, e.g.*, Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 rule 65 *ter* (E) & (F), U.N. Doc. IT/32/Rev. 49 (May 22, 2013) [hereinafter ICTY RPE].

5. *See* Håkan Friman et al., *Charges*, *in* INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 381, 383 (Göran Sluiter et al. eds., 2013).

when, *where* and *why*?), intended as formula for ascertaining the complete story on any given topic, due to the massive scale of the events, the array of actors involved, the difficult access to direct or high-quality evidence, and investigations taking place long after the events. While the accused's interests are of paramount importance in light of due process protection and the legitimacy of the court and its proceedings in general, the prosecution's task to state a case must remain a realistic endeavor.

This Article seeks to ascertain the following: how specific should the charges in an international crimes case be, which circumstances play a role in answering this question, and what influences specificity, or the lack thereof? The focus is therefore on case demarcation in light of an investigation or case against an identified suspect or accused and centers on the indictment phase of criminal proceedings. It does not include investigation demarcation in the sense of prosecutorial discretion regarding determining who to investigate or indict. Case demarcation can only take form and be examined fruitfully once a suspect or accused has been identified. Investigations of a preliminary nature into situations of mass atrocity, which face prosecutors with complex questions of which potentially responsible persons to focus investigative and prosecutorial efforts on lie outside the ambit of this Article. The law and practice of amending charges is also excluded. Although related, it is beyond this Article's query, because it does not pertain to factual and evidentiary case demarcation in the strictest sense, as it should take form at the indictment stage. Rather, it relates to subsequent procedural matters of *shifting* boundaries, not *placing* them.

Part II starts with reviewing the issue of vague indictments as dealt with by the historical Nuremberg, Tokyo, and Control Council Law No. 10 trials, as well as case law from the modern day U.N. tribunals and the ICC regarding ambiguous charges and general pleading principles. This is the first type of case demarcation, which focuses on factual specificity. Part III deals with the second type of case demarcation, which may be regarded as legal demarcation of evidentiary matters, and that has never before been examined in international criminal justice scholarship. It deals with various types of facts and evidence and the importance of distinguishing them, and explores the differences between material facts and subsidiary facts, pattern evidence and evidence of similar conduct. Part IV highlights the defense's perspective by looking at the right to be put on notice, a number of related rights and the principle of *ne bis in idem*, also known as double jeopardy protection. The analysis of these three issues shows that courts have developed relatively sound pleading principles over the last decades, but have mostly ignored the issue of evidentiary precision in the sense of consistently distinguishing different types of evidence and facts.

II. INDICTMENTS

Disagreements as to how definite the charging instrument ought to be are found in many domestic legal systems and are as such not unique to prosecutions of international crimes. However, it is a recurring theme with international criminal trials, mainly because of the perceived prosecutorial difficulties in proving such complex crimes of a massive scale, which the international crimes of war crimes, crimes against humanity and genocide undoubtedly are when focusing on high-level accused.

Bringing charges is generally done slightly differently in adversarial systems compared to inquisitorial systems; the common law tradition is known for its concise indictments, while the civil law tradition employs more elaborate and comprehensive indictments. It is useful to briefly note this difference, because the drafters of the Nuremberg indictment felt the distinction between the two legal systems indeed played an important role. However, neither legal family represents a pure model. Variations exist among legal systems belonging to one tradition and some systems are mixed.[6] Also, similarities between the two exist where general principles are derived from international human rights instruments.[7] Furthermore, both legal families have had a significant influence on the charging practices of the contemporary international criminal courts and tribunals, which have had to combine and balance the differences between domestic practices, often leading to experimentalism and procedural uncertainty. The importance of distinguishing between the two major legal traditions regarding the isue at hand—indictments involving international crimes—should therefore not be overvalued. In this Article, the problem of case demarcation is approached from a crime-based perspective, not a system-based perspective.[8] This means that the court, or the legal system, in which the crime is prosecuted ought not be a differentiating factor nor eventually the focus; the massive scale and complex nature of international crimes is.

A. *IMT, IMTF, and Control Council Law No. 10*

The form of the first international indictment of the Nuremberg International Military Tribunal (IMT) is said to be the result of a compromise between the common law countries and the civil law countries. The IMT's Chief U.S. Prosecutor Robert Jackson later stated

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6. *Id.* at 460.

7. *Id.*

8. *See generally* Elinor Fry, *The Nature of International Crimes and Evidentiary Challenges: Preserving Quality While Managing Quantity*, *in* PLURALISM IN INTERNATIONAL CRIMINAL LAW (Elies van Sliedregt & Sergey Vasiliev eds., 2014).

that the Soviet lawyers advocated for a detailed indictment with a complete statement of all evidence against the accused, while the American and British lawyers would have found a simple indictment charging the crimes that would later be proved more appropriate. Supported by the French and Soviet (civil law) lawyers and more in accordance with the German (civil law) practice, the indictment at the IMT more or less turned out as envisaged by the Soviet delegation, according to Jackson.[9] Indeed, the Soviet prosecutor, General R.A. Rudenko, left a considerable mark on the endeavor, as he was the one who suggested dividing the indictment into four counts, with each delegation being responsible for one count.[10] Some accounts of the drafting process talk of a slightly less than harmonious process, though, namely one that was controlled by the Americans.[11] Jackson allegedly had a clear strategy to ensure American control over the prosecution's case, as evidenced by a memorandum sent to trial counsel Robert Storey in which Jackson wrote he intended on "keeping control of the bulk of the case in American hands."[12]

The Tribunal's Charter reads, in relevant part, that the "Indictment

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9. *See* Robert H. Jackson, *Some Problems in Developing an International Legal System*, 22 TEMP. L.Q. 147, 151 (1948). For the discussion on the form of the indictment between Justice Jackson and General Nikitchenko, see also REPORT OF ROBERT H. JACKSON, U.S. REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, Document XXI: Minutes of Conference Session of July 3, 1945, London, 1945, at 154, *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf. General Nikitchenko states that:

> [i]n the opinion of the Soviet Delegation this procedure would on the one hand insure a fair trial since the defendant would be given every chance to refute the evidence produced against him and would, on the other hand, insure him promptness of trial since most of the preliminary work would have been done before.

Id.

10. *See* DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT, Vol. I, at 97 (1998).

11. *Id.*

12. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 99 (1992). Taylor quotes a memorandum sent by Jackson to Robert Storey on September 17, 1945, in the midst of drafting, saying:

> I do not think division of work is advisable in view of the situation concerning our fellow-prosecutors. Candidly, I think we must utilize Committee 4 [chaired by Jackson] as the basis for keeping control of the bulk of the case in American hands. To this end, I think . . . that Committee 4 will have to take primary responsibility for the development of the case in all its aspects on the questions of common plan conspiracy and individual and organizational responsibilities.

Taylor himself adds: "For 'Committee 4' read 'Jackson.'" *Id.*

shall include full particulars specifying in detail the charges against the Defendants."[13] The indictment of 66 pages with four counts against 23 individuals and 6 organizations relayed the particulars on individual criminal responsibility, criminality of groups and organizations, and violations of international treaties, agreements, and assurances in three narrating appendices. Count 1 dealt with the common plan and conspiracy, and was done in such a comprehensive manner by Committee 4 led by the Americans that it left very little substance for Committee 1 led by the British in charge of count 2. Count 2 on crimes against peace was a one-pager only charging the actual attacks and occupied countries. Count 3 and 4, drafted by both Committees 2 and 3 headed by the Soviets and the French respectively, dealt with war crimes and crimes against humanity, and were more comprehensive.[14]

The indictment itself (*i.e.*, the four counts), did not mention the accused individually. It only referred to them as "all the defendants." The defendants' names and specific roles were listed in appendix 1, which devoted one short paragraph to each defendant stating their occupation and activities during the war as well as one- or two-sentence explanations of their involvement in each count. The printed version of the indictment's official English translation took up more than 65 pages.[15] Compared to a contemporary international indictment against only one high-level accused, as often encountered at the ICTY for instance, the Nuremberg document was rather concise. For instance, the indictment against Radovan Karadžić at the International Criminal Tribunal for the former Yugoslavia (ICTY) consists of 11 counts explained in 40 pages, and includes 7 tables listing specific incidents relating to the crimes charged.[16] Despite the Nuremberg indictment's potential flaws against modern day standards, the trial record does not reveal any defense grievances with respect to vagueness. Most litigation centered on issues such as fitness to stand trial,[17] and the legality principle.[18]

Nuremberg's counterpart, the International Military Tribunals for the Far East (IMTFE) in Tokyo, has a different history. While the United States was the main driving force behind the tribunal coming into being,

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13. Charter of the International Military Tribunal art. 16(a), Aug. 8, 1982, 82 U.N.T.S. 279.

14. *See* TAYLOR, *supra* note 12, at 79–80.

15. *See* SPRECHER, *supra* note 10, at 104.

16. *See* Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Prosecution's Marked-Up Indictment (Oct. 19, 2009), http://www.icty.org/x/cases/karadzic/ind/en/markedup_indictment_091019.pdf.

17 *See, e.g.*, Motion on Behalf of Defendant Gustav Krupp von Bohlen for Postponement of the Trial as to Him, Nuremberg Trial Proceedings Vol. 1, Nov. 4, 1945, *available at* http://avalon.law.yale.edu/imt/v1-09.asp; Motion on Behalf of Defendant Hess for an Examination by a Neutral Expert with Reference to his Mental Competence and Capacity to Stand Trial, Nuremberg Trial Proceedings Vol. 1, Nov. 7, 1945, *available at* http://avalon.law.yale.edu/imt/v1-26.asp.

18 *See* Motion Adopted by All Defense Counsel, Nuremberg Trial Proceedings Vol. 1, Nov. 19, 1945, *available at* http://avalon.law.yale.edu/imt/v1-30.asp.

it is said that the indictment was completely dominated by the assigned subcommittee's British chair, Comyns-Carr.[19] Others, however, have suggested that Comyns-Carr merely merged various suggestions made by the 11 Allied powers involved in the drafting process, concluding that the indictment was a mix of common law and civil law features.[20] In any event, discussions on the level of detail required in an indictment such as had occurred in Nuremberg, presumably because of the strong Soviet presence, seems not to have occurred during the drafting process in Tokyo.

The IMTFE Charter stated that the "indictment shall consist of a plain, concise, and adequate statement of each offence charged,"[21] which is different than the text of the Nuremberg Charter, which spoke of "full particulars specifying in detail." This difference is likely the result of the U.S. dominance of the entire IMTFE project, but it cannot be said with certainty that this difference in wording directly influenced the difference in form of the indictments. The indictment's drafters probably had the biggest influence, and the end result of their efforts did not go without criticism. The Tokyo indictment departed from the Nuremberg example in the sense that it contained a much greater number of individual charges, creating many overlaps in relation to the underlying factual substance of the charges.[22] Five appendices accompanied the indictment to provide the particulars of the numerous counts, but these were grouped thematically instead of per charge.[23] There were 28 defendants in total and 55 counts that were divided into three groups: (1) crimes against the peace, (2) murder, and (3) conventional war crimes and crimes against humanity.[24] Similar to the Nuremberg indictment, the defendants' names and occupations were listed in one of the appendices, yet hardly any specifics were provided regarding the defendants' individual movements and activities during the war.

Quite some litigation relating to the vagueness of the indictment unfolded. The defense argued that the indictment failed to provide the essential facts to adequately support the charges,[25] and that it neglected

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19. *See* PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945–1951, at 14 (1979); NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL 69 (2008).

20. BOISTER & CRYER, *supra* note 19, at 70.

21. Charter of the International Military Tribunal for the Far East art. 9(a), Jan. 19, 1946, T.I.A.S. No. 1589.

22. *See* BOISTER & CRYER, *supra* note 19, at 70.

23. *See* International Military Tribunal for the Far East (United States v. Araki), Indictment Annex 6 to the Judgment (Apr. 29, 1946), *reprinted in* NEIL BOISTER & ROBERT CRYER, DOCUMENTS ON THE TOKYO MILITARY TRIBUNAL 16–69 (2008), *also available at* http://werle.rewi.hu-berlin.de/tokyo.anklageschrift.pdf [hereinafter IMTFE Indictment].

24. *Id*.

25. *See* International Military Tribunal for the Far East (United States v. Araki), Motion to Dismiss the Indictment (May 25, 1946), Paper no. 85, Motions Presented to the Court Vol. 1 (May

to specify times, places, and their clients' involvement in each of the crimes charged.[26] The Prosecution argued that as long as the beginning and end of the conspiracy are specified, details relating to when important events occurred, where they occurred, and who was involved were to be left as matters of proof.[27] The defense's complaints were all dismissed before the final judgment was rendered. President Webb opined that time and place had to be stated broadly.[28] Furthermore, it was unnecessary to specify the actual role an accused played in a conspiracy or to state the location it took place.[29] In the end, the Tribunal's judgment dismissed 45 of the 55 counts, not due to lack of specificity, but on grounds of redundancy, lack of jurisdiction, and merging counts due to overlap.[30]

Most of the indictments in the ensuing 12 Nuremberg cases—the subsequent trials conducted under Control Council Law No. 10 in Nuremberg by U.S. military tribunals—were rather elaborate; they targeted certain crimes more narrowly and focused on defendants of a lower level than at the IMTs. While elaborateness does not necessarily preclude vagueness, the indictments did not seem to suffer from too much lack of specificity compared to the Tokyo indictment, although that may also only appear to be so because it was not litigated. However, from the indictments alone it is not always clear what role the defendants played in which acts that constituted the crimes. The assertions on underlying facts and personal involvement remained rather vague, and some indictments only specified defendants' positions and related responsibilities in general. For example, the indictment in the *Medical* case (or *'Doctors' Trial*) specified the horrific experiments that were conducted upon concentration camp prisoners during the war, and stated

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3, 1946–Oct. 14, 1946), Northcroft Archive, Macmillan Brown Library, University of Canterbury, New Zealand (cited by BOISTER & CRYER, *supra* note 19, at 71).

26. *See* International Military Tribunal for the Far East (United States v. Araki), Motion for Bill of Particulars (no date), Paper no. 56, Motions Presented to the Court Vol. 1 (May 3, 1946–Oct. 14, 1946), Northcroft Archive, Macmillan Brown Library, University of Canterbury, New Zealand (cited by BOISTER & CRYER, *supra* note 19, at 71).

27. *See* BOISTER & CRYER, *supra* note 19, at 73.

28. *See* International Military Tribunal for the Far East, Proceedings in Chambers, Saturday 25 May 1946: On a Motion by Hiranuma, Kiichiro; Matsuoka, Yosuke; Shigemitsu, Mamoru; Togo, Shigenori; and Umezu, Yoshijiro, for Bill of Particulars; A Motion by All the Accused for a Bill of Particulars; and other motions, Vol. 1, Proceedings in Chambers (May 8, 1946–July 24, 1946), Northcroft Archive, Macmillan Brown Library, University of Canterbury, New Zealand, at 20ff (cited by BOISTER & CRYER, *supra* note 19, at 72).

29. *See* International Military Tribunal for the Far East (United States v. Araki), Order Dismissing Motion for Bill of Particulars (May 25, 1946), Paper no. 86, Orders on Motions Presented to the Court, Vol. I (Apr. 29, 1947–Dec. 27, 1946), Northcroft Archive, Macmillan Brown Library, University of Canterbury, New Zealand (cited by BOISTER & CRYER, *supra* note 19, at 72).

30. *See* International Military Tribunal for the Far East (United States v. Araki), Judgment §§ 447–454 (Nov. 4–12, 1948), *available at* http://werle.rewi.hu-berlin.de/tokio.pdf. *See also* BOISTER & CRYER, *supra* note 19, at 73.

which of the 23 defendants were involved. With respect to most accused, however, it did not specify individual acts or factual connections to the crimes. It merely stated the defendants "are charged with special responsibility for and participation in these crimes."[31] The same format was followed in other cases, too. For instance, in the *Justice* indictment, the Ministry of Justice was named as the main entity that had committed the crimes listed in each of the paragraphs that all ended with a sentence naming the defendants as responsible without specifying their precise actions.[32] The same was done in the *RuSHA* indictment.[33] Similarly, in *Milch*, the sole defendant Erhard Milch's involvement was explained in general terms relating to his membership of the Central Planning Board and his several high positions in the German air force.[34] The same can be said of the defendants in the rather short indictment of *Pohl*. The 17 accused were hardly individualized apart from their held positions.[35]

The more elaborate indictments, such as in the cases of the *Ministries*, *I.G. Farben*, *Krupp*, *High Command*, and *Flick*, of which the last three also included appendices explaining company and military structures as well as defendants' histories, were very similar to contemporary international indictments with respect to the level of detail.[36] Conversely, the *Einsatzgruppen* indictment and the *Hostage* indictment were both concise yet very specific and factually comprehensive in a different way than the other post-war charging documents. The *Einsatzgruppen* indictment identified the number of victims made by the various units and the dates the killings took place.[37] The level of the indictment's specificity was the result of the fact that most of the information supporting the charges came from Otto Ohlendorf's earlier testimony at the IMT. Ohlendorf, who had been Major General of the SS, member of the SD, and Commanding Officer of Einsatzgruppe D, had given a remarkably extensive and candid testimony about the crimes committed

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31. *See* Office of Military Government for Germany (U.S.) Nuremburg 1946, NUERNBERG MILITARY TRIBUNALS 2 (Oct. 25, 1946) (count two—war crimes), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf#page=2.

32. *See id.* at 21 (United States v. Josef Alstötter) (Justice Case).

33. *See id.* at 162 (United States v. Ulrich Greifeldt) (RuSHA Case).

34. *See id.* at 14 (United States v. Erhard Milch) (Milch Case).

35. *See id.* at 36 (United States v. Oswald Pohl) (Pohl Case) (count 1: each paragraph's final sentence(s) stating which defendant was part of which *Amtsgruppe*) (counts 3,4,5 on war crimes, crimes against humanity and membership in a criminal organization only speak of "all of the defendants" without making any reference to the accused individually).

36. United States v. Ernst von Weizsäcker (Ministries Case or Wilhelmstrasse Trial), Indictment, U.S. Military Tribunal, 1947; United States v. Carl Krauch (I.G. Farben Case), Indictment, U.S. Military Tribunal, 1947, § 7; United States v. Alfried Krupp (Krupp Case), Indictment, U.S. Military Tribunal, 1947; United States v. Wilhelm von Leeb (High Command Case), Indictment, U.S. Military Tribunal, 1947; United States v. Friedrich Flick (Flick Case), Indictment, U.S. Military Tribunal, 1947.

37. *See id.* at 176 (United States v. Otto Ohlendorf) (Einsatzgruppen Case).

by his and other units.[38] The *Hostage* indictment displayed a similar level of specificity; dates and numbers of victims were included in the document's four counts.[39] Here, too, the reason for precision of facts had an evidentiary basis. Documentary evidence was readily available and the case benefitted from evidence presented at the IMT trial.[40]

Lack of specificity in charging does not appear to have been argued at the IMT or the subsequent trials in Nuremberg as it had been in Tokyo. However, a certain amount of inevitability in this respect was stipulated in one of the subsequent proceedings. In the *Justice* case judgment, the judges reminded that:

> Defendants are charged with crimes of such immensity that mere specific instances of criminality appear insignificant by comparison. The charge, in brief, is that of conscious participation in a nation-wide governmentally organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts. [. . .] The record is replete with evidence of specific criminal acts, but they are not the crimes charged in the indictment. They constitute evidence of the intentional participation of the defendants and serve as illustrations of the nature and effect of the greater crimes charged in the indictment. Thus it is that the apparent generality of the indictment was not only necessary but proper. No indictment couched in specific terms and in the manner of the common law could have encompassed within practicable limits the generality of the offense with which these defendants stand charged.[41]

Although some of these early (international and military) indictments were very elaborate, the specific acts with which the accused were charged remained vague at times, in the sense that the link between the accused and the crimes charged was mostly demonstrated by the position held by the accused. Moreover, the temporal scopes of these indictments were relatively precise yet very wide, making the cases less defined

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38. *See* Transcript of Otto Ohlendorf's testimony at 311–54 (Jan. 3, 1946), IMT Proceedings vol. 4 (part 1 of 3), *available at* http://avalon.law.yale.edu/imt/01-03-46.asp#ohlendorf; *see also* KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 63–64 (2011).

39. *See* NUERNBERG MILITARY TRIBUNALS, *supra* note 31, at 139 (United States v. Wilhelm List) (Hostage Case).

40. *See* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 80 (Aug. 15, 1949), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf.

41. U.S. GOVERNMENT PRINTING OFFICE, TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10, Vol. III, at 984–85 (1951).

(although to some extent this fits the nature of the charge of conspiracy): the Nuremberg indictment included Hitler's first attempt to come to power in 1923 and covered the entire period until May 8, 1945;[42] the Tokyo indictment covered a span from January 1, 1928 to September 2, 1945;[43] the *I.G. Farben* indictment goes back to 1932 when the alliance of the corporation with Hitler and the Nazi Party was formed, and defendants Beutefish and Gattineau, representing Farben, met with Hitler to discuss business;[44] the *Ministries*, *High Command*, *Krupp*, *Pohl* and *Justice* indictments all cover events from January 1933—when Hitler was appointed Chancellor by President Paul Von Hindenburg—to April or May 1945; the other indictments in the subsequent proceedings covered smaller time spans (from September 1939 to April or May 1945).[45]

Only the IMTFE record shows that litigation occurred on the issue of vagueness, and even there, all objections along these lines were discarded. Were these indictments flawed from a contemporary perspective? They usually contained the following elements: (1) the defendant's link to the legal definition of the crime (X did crime Y), (2) statements of general facts (without reference to defendants), and (3) the defendant's professional position or occupation preceding and during the war. Lacking was the following crucial element, without which conducting a defense becomes an extremely difficult task: the link between the defendant (*i.e.*, the physical person, not their employment position, and the facts, not the crime definition, committed by them). As will become apparent in the next subsection, compared to contemporary international criminal tribunals, these indictments were not nearly specific enough, most notably in relation to the defendants' individual acts.

B. *The Contemporary Ad Hoc and Hybrid Institutions*

The Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both state that the prosecutor "shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute."[46] The Special Court for

42. *See* United States v. Goering, IMT, Oct. 6, 1945, *reprinted in* 1 Trial of the Major War Criminals Before the International Military Tribunal 27, 41 (1948), count 1; United States v. Goering, IMT, Count 2, 3, and 4 (Sept. 1, 1939 to May 8, 1945).

43. *See* IMTFE Indictment, *supra* note 23.

44. *See* NUERNBERG MILITARY TRIBUNALS, *supra* note 31, at 67 (United States v. Carl Krauch) (I.G. Farben Case).

45. With the exception of the temporally narrower *Einsatzgruppen* case indictment, which, apart from the common membership count, only dealt with crimes committed between May 1941 and July 1943.

46. Statute of the Int'l Criminal Tribunal for the Former Yugoslavia, art. 18(4) (2009);

Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL) do not contain such a provision in their statutes, but provide guidance in their Rules of Procedure and Evidence (RPE). The SCSL RPE specifies that "[t]he indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence."[47] It also states that it "shall be accompanied by a Prosecutor's case summary briefly setting out the allegations he proposes to prove in making his case."[48] The STL RPE provides, identical to the equivalent provisions in the ICTY and ICTR RPEs, that "[t]he indictment shall set forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime with which the suspect is charged."[49] The Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ECCC) use a different phrasing, stating that "[t]he Indictment shall be void for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characteri[z]ation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility."[50]

It is important to keep in mind that specificity of charges is something else than the *scope* of indictments. Breadth or narrowness with respect to facts and time periods does not necessarily preclude specificity, even though in practice breadth and vagueness may be linked. In light of this, it is worth noting that when it comes to scope the ad hoc Tribunals have gone through an interesting development, too. Initially, ICTY and ICTR prosecutors' approach to charging mirrored the international precedent of the IMT and IMTF, and many of the early indictments included a wide

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Statute of the Int'l Criminal Tribunal for Rwanda, art. 17(4) (1994), *amended by* S.C. Res. 1431, U.N. Doc. S/RES/1431 (Aug. 14, 2002), U.N. Doc. S/RES/955 [hereinafter ICTR Statute].

47. Rules of Procedure and Evidence of the Special Court for Sierra Leone Rule 47(C) (2002) (amended May 31, 2012) [hereinafter SCSL RPE].

48. *Id*.

49. Rules of Procedure and Evidence of the Special Tribunal for Lebanon Rule 68(D) (2009), U.N. Doc. STL-BD-2009-01-Rev.6-Corr.1 (amended Apr. 9, 2013 and corrected Apr. 3, 2014) [hereinafter STL RPE]; *see also* Rules of Procedure and Evidence of the Int'l Criminal Tribunal for the Former Yugoslavia Rule 47(C), U.N. Doc. IT/32/Rev.37 (2006); Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda Rule 47(C), U.N. Doc. ITR/3/REV.1 (1995) (amended Feb. 2, 2009) [hereinafter ICTR RPE].

50. Internal Rules of the Extraordinary Chambers in the Courts of Cambodia Rule 67(2), Rev. 8 Aug. 3, 2011, *available at* http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20(Rev.8)%20English.pdf [hereinafter ECCC Internal Rules]. The same provision can be found in the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, art. 35 new (a), with inclusion of amendments as promulgated on Oct. 27, 2004 (NS/RKM/1004/006), http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf [hereinafter ECCC Law]. The ECCs Law, however, does not specify what the Closing Order, which refers to either the indictment or a dismissal order issued by the Co-Investigating Judges, must contain.

range of offences and historical background.[51] After Slobodan Milošević's death in March 2006 before the completion of his trial, the judges at the ICTY amended the RPE in order to create more options for trial chambers to encourage prosecutors to reduce indictments.[52] In *Karadžić*, the Trial Chamber (TC) used Rule 73 *bis* to urge the prosecutor to trim the indictment by limiting the number of charges, crimes scenes and witnesses.[53] It noted that Rule 73 *bis* (D) and (E) allow for four forms of direct or indirect action by a Chamber, namely: (1) the Chamber can invite the Prosecution to reduce the number of counts charged; (2) the Chamber can fix the number of crime sites; (3) the Chamber can fix the number of incidents; and (4) the Chamber can direct the Prosecution to select the counts upon which to proceed.[54]

There is no similar provision at the ICTR, but the Rwanda Tribunal has experienced a similar development toward streamlining indictments in pursuance of more manageable cases. The early indictments at the ICTR were grouped thematically, much like the subsequent trials in Nuremberg, and involved many defendants.[55] The Tribunal later

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51. *See, e.g.*, Prosecutor v. Milošević, Case No. IT-02-54-T, Amended Indictment, ¶¶ 52–79 (Int'l Crim. Trib. for the Former Yugoslavia, Nov. 22, 2002), *available at* http://www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-ai040421-e.htm ("additional facts") later amended by Prosecutor v. Milošević, Case No. Case No. IT-02-54-T, Second Amended Indictment (Int'l Crim. Trib. for the Former Yugoslavia July 28, 2004), *available at* http://www.icty.org/x/cases/slobodan_milosevic/ind/en/040727.pdf, containing 66 counts; *see also* Jeffrey Locke, *Indictments*, *in* INTERNATIONAL PROSECUTORS 604, 616 (Luc Reydams et al. eds., 2012).

52. The following sentence (emphasized) was added to ICTY RPE rule 73 *bis* (D) in May 2006, two months after Milošević's death in March 2006: "After having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may *invite the Prosecutor to reduce the number of counts charged in the indictment* and may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged." ICTY RPE, *supra* note 4, r.73 *bis*(D). The following sentence (emphasized) was added to Rule 73 *bis*(E) at the same time:

> Upon or after the submission by the pre-trial Judge of the complete file of the Prosecution case pursuant to paragraph (L)(i) of Rule 65 [ter], the Trial Chamber, having heard the parties and in the interest of a fair and expeditious trial, *may direct the Prosecutor to select the counts in the indictment on which to proceed*. Any decision taken under this paragraph may be appealed as of right by a party.

Id. r.73 *bis*(E).

53. *See* Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Order to the Prosecution under Rule 73 *bis*(D), ¶¶ 5–6 (Int'l Crim. Trib. for the Former Yugoslavia July 22, 2009), http://www.icty.org/x/ cases/karadzic/tord/en/090723.pdf.

54. *See id.* ¶ 3.

55. *See, e.g.*, Press Release, International Criminal Tribunal for Rwanda, Bagosora, Ntabakuze and Nsengiyumva given life sentences; Kabiligi acquitted, ICTR/INFO-9-2-582.EN

switched from a "multi-accused" to a "single-accused" approach, narrowing the scope of indictments.[56] This was given an extra push by the ICTR completion strategy imposed by the U.N. Security Council.[57]

While the scope of indictments is a matter of prosecutorial discretion, requirements relating to specificity of charges are legal matters. These have evolved, too, and the idea that there exists a certain amount of inevitability when it comes to vague indictments has gradually lost support in the jurisprudence of the contemporary international criminal tribunals. An early Trial Chamber decision in *Blaškic* provided that "an indictment, by its very nature and given the very initial phase in which it is reviewed, is inevitably concise and succinct,"[58] and gave the basic principles regarding content: "the indictment must contain certain information which permits the accused to prepare his defence (namely, the identity of the victim, the place and approximate date of the alleged crime and the means used to perpetrate it) in order to avoid prejudicial surprise."[59] The ICTY Appeals Chamber judgment in *Kupreškić et al.* provided more detailed guidance and is a leading authority at the international tribunals with respect to the issue of specificity of charges.[60] The judges reminded that: "[a] decisive factor in determining the degree of specificity with which the Prosecution is required to particularize the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused."[61] In large part, this consideration is influenced by the position—both physically and legally—of the accused:

> In a case based upon individual responsibility where the accused is alleged to have personally done the acts pleaded in the

(Dec. 18, 2008) (Military I Case); Press Release, International Criminal Tribunal for Rwanda, Appeals Chamber Delivers Judgement in Military II Case, ICTR/INFO-9-2-752.EN (Feb. 11, 2014) (Military II Case); *see also* Locke, *supra* note 51, at 618.

56. *See* Locke, *supra* note 51, at 619. *See also, e.g.*, Prosecutor v. Ildephonse Nizeyimana, Case No. ICTR-00-5 5-PT, Second Amended Indictment (Int'l Crim. Trib. for Rwanda Dec. 17, 2010), http://www.unictr.org/Portals/0/Case%5CEnglish%5CNizeyimana%5Cindictment%5Cnizeyimana_indictment_101217e.pdf.

57. *See* Locke, *supra* note 51, at 618; *see generally* Paul Ng'arua, *Specificity of Indictments in ICTR Genocide Trials*, *in* THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS 175 (Ralph Henham & Paul Behrens eds., 2007).

58. Prosecutor v. Blaškic, Case No. IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), ¶ 21 (Int'l Crim. Trib. for the former Yugoslavia Apr. 4, 1997), *available at* http://www.icty.org/x/cases/blaskic/tdec/en/70404DC113291.htm [hereinafter Blaškic Defects Decision].

59. *Id.* ¶ 20.

60. *See generally* Chile Eboe-Osuji, *'Vague' Indictments and Justice at the International Criminal Tribunals: Learning from the World of Common Law*, *in* BRITISH AND CANADIAN PERSPECTIVES ON INTERNATIONAL LAW 105 (Christopher P.M. Waters ed., 2006).

61. *See* Prosecutor v. Kupreškić, Case No. IT-95-16-A, Appeal Judgment, ¶ 89 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001), http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf [hereinafter Kupreškić Appeal Judgment].

> indictment, the material facts must be pleaded with precision – the information pleaded as material facts must, so far as it is possible to do so, include the identity of the victim, the places and the approximate date of those acts and the means by which the offence was committed. Where the prosecution is unable to specify any of these matters, it cannot be obliged to perform the impossible. Where the precise date cannot be specified, a reasonable range of dates may be sufficient. Where a precise identification of the victim or victims cannot be specified, a reference to their category or position as a group may be sufficient. Where the prosecution is unable to specify matters such as these, it must make it clear in the indictment that it is unable to do so and that it has provided the best information it can.[62]

The scale of the crimes plays a role here, too, since magnitude "makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes."[63]

Thus, there are two factors that determine the required degree of specificity: (1) the proximity of the accused to the crime (geographically but more importantly in terms of mode of liability: if the accused *directly* committed the crime, the material facts comprising the crime must be pleaded in great detail); and (2) the nature of the crime, including the scale and magnitude. If the accused is alleged to have personally committed the crime, as opposed to being charged as an accessory or under command or superior forms of liability, the material facts will include such details as the identity of the victim, the location and the approximate date of the events in question, and the means by which the offence was committed.[64] As noted by the ICTR Appeals Chamber, "the

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62. Prosecutor v. Brđanin & Talić, Case No. IT-99-36, Decision on Objections by Momir Talić to the Form of the Amended Indictment, ¶ 22 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), *available at* http://www.icty.org/x/cases/brdanin/tdec/en/ 10220FI214869.htm [hereinafter Brđanin & Talić Decision on Objections by Talić] (summarizing and citing Kupreškić Appeal Judgment, *supra* note 61, ¶ 89 & Prosecutor v. Krnojelac, Case No. IT-97-25, Decision on Preliminary Motion on Form of Amended Indictment, ¶ 18 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 11, 2000), *available at* http://www.icty.org/x/cases/krnojelac/tdec/en/ 00211AI212639.htm [hereinafter Krnojelac, Feb. 11, 2000 Decision]). *See also* Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, Judgment and Sentence, ¶ 32 (Int'l Crim. Trib. for Rwanda Feb. 25, 2004), https://www1.umn.edu/humanrts/instree/ICTR/IMANISHIMWE_ICTR-97-36/IMANISHIMWE_ICTR-99-46-T.pdf [hereinafter Ntagerura Trial Judgment].

63. Kupreškić Appeal Judgment, *supra* note 61, ¶ 89; *see also* Krnojelac, Feb. 11, 2000 Decision, *supra* note 62, ¶ 18; Brđanin & Talić Decision on Objections by Talić, *supra* note 62, ¶ 22.

64. *See* Ntagerura Trial Judgment, *supra* note 62, ¶¶ 32, 35; Prosecutor v. Gatete, Case No. ICTR-00-61-I, Decision on Defence Preliminary Motion, ¶ 8 (Int'l Crim. Trib. for Rwanda Mar. 29, 2004), http://www.unictr.org/Portals/0/Case/English/Gatete/decisions/040326.pdf (citing Kupreškić Appeal Judgment, *supra* note 61, ¶ 89); Prosecutor v. Galić, Case No. Case: IT-98-29-

Prosecution's obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual."[65] The demanded degree of specificity is therefore a sliding scale from extreme precision to the relative ambiguity depending on the position of the accused:

> [a]s the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the prosecution relies to establish his responsibility as an accessory or as a superior to the persons who personally committed the acts giving rise to the charges against him.[66]

Consequently, the required degree of specificity is lower where criminal responsibility is based on accomplice liability or superior responsibility.[67] In this context, it is vital for the accused to know from the indictment just what that alleged proximity is.[68]

In relation to the nature of the crimes, the *Kupreškić* AC explained that when a crime involves an extended number of victims, for instance

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AR72, Decision on Application by Defence for Leave to Appeal, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2001), *available at* http://www.icty.org/x/cases/galic/acdec/en/11130FI317059.htm [hereinafter Galić Decision].

65. Prosecutor v. Ntakirutimana & Ntakirutimana, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Appeal Judgment, ¶ 74 (Int'l Crim. Trib. for Rwanda Dec. 13, 2004), http://www.unictr.org/Portals/0/Case%5CEnglish%5CNtakirutimanaE%5Cdecision2%5C041213_appeal_judgement.pdf [hereinafter Ntakirutimana Appeal Judgment].

66. Galić Decision, *supra* note 64, ¶ 15. *See also* Ntagerura Trial Judgment, *supra* note 62, ¶ 33.

> Where an accused is charged with a form of accomplice liability, the Prosecutor must plead with specificity the acts by which the accused allegedly planned, instigated, ordered, or aided and abetted in the crime. Where superior responsibility is alleged, the relationship of the accused to his subordinates is most material, as are his knowledge of the crimes and the necessary and reasonable measures that he failed to take to prevent the crimes or to punish his subordinates.

Id. (References omitted).

67. *See* Ntagerura Trial Judgment, *supra* note 62, ¶ 35; Prosecutor v. Rasim Delić, Case No. IT-04-83-PT, Decision on the Prosecution's Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, ¶ 85 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006), http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/ac9cb6430e6e0049c12571b50050bed9/60522d262b405a61c12571fe004be5ac/$FILE/Delic%20TCD%2030-06-2006.pdf.

68. *See* Prosecutor v. Brđanin & Talić, Case No. IT-99-36, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, ¶ 13 (Feb. 23, 2001), *available at* http://www. icty.org/x/cases/brdanin/tdec/en/10223FI214978.htm.

because of an exponential amount of attacks over a prolonged period of time and in a great number of locations, the prosecution need not specify every victim. However, if the prosecution possesses such information, it should name the victims.[69] With regard to the scale of international crimes, the SCSL Trial Chamber in Sesay allowed similar vagueness with respect to locations:

> It is inaccurate to suggest that the phrases "various locations" and "various areas including" in the relevant counts are completely devoid of details as to what is being alleged. Whether they are permissible or not depends primarily upon the context. For example, paragraphs 41, 44, 45, and 51 allege that the acts took place in various locations within those districts, a much narrower geographical unit than, for example "within the Southern or Eastern Province" or "within Sierra Leone." This is clearly permissible in situations here the alleged criminality was of what seems to be cataclysmic dimensions. By parity of reasoning, the phrases "such as" and "including but not limited to" would, in similar situations, be acceptable if the reference is, likewise, to locations but not otherwise. It is therefore the Chamber's thinking that taking the Indictment in its entirety, it is difficult to fathom how the Accused is unfairly prejudiced by the use of said phrases in the context herein.[70]

In sum, and as identified by ICTY and STL trial chambers,[71] there are a number of general principles relating to indictments that can be derived from the ad hoc Tribunals' case law: (1) the indictment must contain enough detail to inform the accused clearly of the nature and cause of the charges to allow him or her to prepare a defense;[72] (2) all material facts

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69. *See* Kupreškić Appeal Judgment, *supra* note 61, § 90.

70. Prosector v. Sesay, Case No. SCSL-2003-05-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, § 23 (Oct. 13, 2003), http://www.rscsl.org/Documents/Decisions/RUFR/05-080/SCSL-03-05-PT-080.pdf [hereinafter Sesay Indictment Decision].

71. *See, e.g.*, Prosecutor v. Stanišić & Župljanin, Case No. IT-08-91-PT, Decision on Mićo Stanišić's and Stojan Župljanin's Motions on Form of the Indictment, ¶¶ 7–17 (Mar. 19, 2009), http://www.icty.org/x/cases/zupljanin_stanisicm/tdec/en/090319.pdf [hereinafter Stanišić & Župljanin Decision]; Prosecutor v. Ayyash, Case No. STL-11-01/PT/TC, Decision on Alleged Defects in the Form of the Amended Indictment of 21 June 2013, ¶ 17 (Sept. 13, 2013), *available at* http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/trial-chamber/f1105 [hereinafter Ayyash Decision].

72. *See* Prosecutor v. Furundžija, Case No. IT-95-1711-A, Judgment, ¶¶ 61, 147 (July 21, 2000), http://www.icty.org/x/cases/furundzija/acjug/en/fur-aj000721e.pdf [hereinafter Furundžija Appeal Judgment]; Kupreškić Appeal Judgment, *supra* note 61, ¶ 88; Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeal Judgment, ¶ 209 (July 29, 2004), http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf [hereinafter Blaškić Appeal Judgment]; Prosecutor v Stakić, Case No. IT-97-24-A, Appeal Judgment, ¶ 116 (Mar. 22, 2006),

substantiating the charges must be pleaded, but it is not required to plead the evidence used to prove the material facts;[73] (3) each of the material facts must be pleaded expressly, however, in some circumstances it may suffice if they are expressed by necessary implication;[74] (4) an indictment must be considered as a whole, not as a series of paragraphs existing in isolation;[75] (5) whether a fact is material depends on the nature of the prosecution case;[76] (6) decisive in this respect is the nature of the alleged

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http://www.icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf [hereinafter Stakić Appeal Judgment]; Prosecutor v. Simić, Case No. IT-95-9-A, Appeal Judgment, ¶ 20 (Nov. 28, 2006), http://www.icty.org/x/cases/simic/acjug/en/061128.pdf [hereinafter Simić Appeal Judgment]; *see also* Ntabakuze v. Prosecutor, ICTR-98-41A-A, Appeal Judgment, ¶ 30 (May 8, 2012), http://www.unictr.org/Portals/0/Case%5CEnglish%5CNtabakuze%5CJudgement%5C120508.pdf, and the line of authority at the ICTR cited there.

73. *See* Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-A, Appeal Judgment, ¶ 23 (May 3, 2006), http://www.icty.org/x/cases/naletilic_martinovic/acjug/en/nal-aj060503e.pdf [hereinafter Naletilić & Martinović Appeal Judgment]; Blaškić Appeal Judgment, *supra* note 72, ¶ 210; Stakić Appeal Judgment, *supra* note 72, ¶ 116; Furundžija Appeal Judgment, *supra* note 72, ¶¶ 61, 147, 153; Prosecutor v. Ntagerura, ICTR-99-46-A, Appeal Judgment, ¶ 21 (July 7, 2006), http://www.unictr.org/Portals/0/Case/English/Ntagerura/judgement/060707.pdf [hereinafter Ntagerura Appeal Judgment]; Simić Appeal Judgment, *supra* note 72, ¶ 20.

74. *See* Prosecutor v. Halilović, Case No. IT-01-48-A, Appeal Judgment, ¶ 86 (Oct. 16, 2007), http://www.icty.org/x/cases/halilovic/acjug/en/071016.pdf [hereinafter Halilović Appeal Judgment]; Blaškić Appeal Judgment, *supra* note 72, ¶ 219; Prosecutor v. Rasević, Case No. IT-97-25/1-PT, Decision Regarding Defence Preliminary Motion on the Form of Indictment, ¶ 18 (Apr. 28, 2004), *available at* http://www.icty.org/x/cases/todovic_rasevic/tdec/en/040428.htm; Prosecutor v. Mrkšić, Case No. IT-95-13/1-PT, Decision on Form of Indictment, ¶ 12 (June 19, 2003), *available at* http://www.icty.org/x/cases/mrksic/tdec/en/030619.htm [hereinafter Mrkšić Indictment Decision]; Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-PT, Decision on Form of Indictment, ¶ 10 (Dec. 7, 2001), *available at* http://www.icty.org/x/cases/hadzihasanovic_kubura/tdec/en/11207FI216966.htm [hereinafter Hadžihasanović & Kubura Decision]; Prosecutor v. Brđanin & Talić, Case No. IT-99-36-PT, Decision on Form of Fourth Amended Indictment, ¶ 12 (Nov. 23, 2001), http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/eea9364f4188dcc0c12571b500379d39/6804b868ef218604c12571fe004be57e/$FILE/Brdjanin%20TCD%2023-11-2001.pdf; Brđanin & Talić Decision on Objections by Talić, *supra* note 62, ¶ 48.

75. *See* Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-T, Judgment, ¶ 266 (Mar. 15, 2006), http://www.icty.org/x/cases/hadzihasanovic_kubura/tjug/en/had-judg060315e.pdf; Prosecutor v. Prlić, Case No. IT-04-74-PT, Decision on Prosecution Application for Leave to Amend the Indictment and on Defence Complaints on Form of Proposed Amended Indictment, ¶ 78 (Oct. 18, 2005), *available at* http://www.icty.org/x/cases/prlic/tdec/en/051018.htm; Prosecutor v. Prlić, Case No. IT-04-74-PT, Decision on Defence Preliminary Motions Alleging Defect in the Form of Indictment, ¶¶ 13 & 50 (July 22, 2005), http://sim. law.uu.nl/sim/caselaw/tribunalen.nsf/8485f17e3db5bb18c12571b5004ee21d/92f1d4e8470e6725c12571fe004d3322/$FILE/Prlic%20TCD%2022-07-2005.pdf; Mrkšić Indictment Decision, *supra* note 74, ¶ 28; Rutaganda v. Prosecutor, Case No. ICTR-96-3-A, Appeal Judgment, ¶ 304 (May 26, 2003), http://www.unictr.org/Portals/0/Case%5CEnglish%5CRutaganda%5Cdecisions%5C030526.pdf; Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Appeal Judgment, ¶ 123 (July 7, 2006), http://www.unictr.org/Portals/0/Case/English/Gachumbitsi/judgement/judgement_appeals_070706.pdf; Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Appeal Judgment, ¶ 27 (Mar. 12, 2008), http://www.unictr.org/Portals/0/Case/English/Seromba/ decisions/080312-Appeals_judg.pdf; *see also* Hadžihasanović & Kubura Decision, *supra* note 74, ¶ 38.

76. *See* Halilović Appeal Judgment, *supra* note 74, ¶ 86; Naletilić & Martinović Appeal

criminal conduct charged against the accused, and more specifically, the proximity of the accused to the events alleged in the indictment;[77] (7) if the accused person is alleged to have personally committed the acts giving rise to the charges against him, the material facts would include such details as the identity of the victim, the place and the approximate date of the events in question, and the means by which the offence was committed. As the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the prosecution relies to establish his responsibility as an accessory or as a superior to the persons who personally committed the acts giving rise to the charges against him;[78] (8) thus, the legal qualification of the accused's liability, including the particulars thereof, must be expressly pleaded in the indictment;[79] (9) if the state of mind (*mens rea*) of the accused is relevant to the charges, the indictment must either (i) contain the state of mind as a material fact, or (ii) set forth the evidentiary facts (*i.e.*, facts that prove material facts, more on which below in Part III) from which the state of mind is to be inferred;[80] and finally, (10) a date—and by analogy other specifics such as location—may be considered to be a material fact if it is necessary to inform the accused clearly of the charges so that he or she may prepare his or her defense, but a reasonable range of dates may be pleaded where precise dates cannot be specified (a broad range of dates does not of itself invalidate a paragraph in an indictment).[81] With respect to these

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Judgment, *supra* note 73, ¶ 24; Kupreškić Appeal Judgment, *supra* note 61, ¶ 89; Blaškić Appeal Judgment, *supra* note 72, ¶ 210.

77. *See* Halilović Appeal Judgment, *supra* note 74, ¶ 86; Ntagerura Appeal Judgment, *supra* note 73, ¶ 121; Prosecutor v. Krnojelac, Case No. IT-97-2S-A, Appeal Judgment, ¶ 132 (Sept. 17, 2003), http://www.icty.org/x/cases/krnojelac/acjug/en/krn-aj030917e.pdf [hereinafter Krnojelac Appeal Judgment]; Kupreškić Appeal Judgment, *supra* note 61, ¶ 89; Blaškić Appeal Judgment, *supra* note 72, ¶ 210.

[78] *See* Galić Decision, *supra* note 64, ¶ 15; Kupreškić Appeal Judgment, *supra* note 61, ¶¶ 88–90.

[79] *See* Simić Appeal Judgment, *supra* note 72, ¶ 22; Krnojelac Appeal Judgment, *supra* note 77, ¶ 138; *see also* Prosecutor v. Đorđević, Case No. IT-OS-S7/1-PT, Decision on Form of Indictment, ¶ 9 (Apr. 3, 2008), http://www.icty.org/x/cases/djordjevic/tdec/en/080403.pdf [hereinafter Đorđević Decision]; Prosecutor v. Krnojelac, Case No.: IT-97-2S-PT, Decision on Form of Second Amended Indictment, ¶ 16 (May 11, 2000), *available at* http://www.icty.org/x/cases/krnojelac/tdec/en/00511FI212948.htm [hereinafter Krnojelac May 11, 2000 Decision]; Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Judgment, ¶ 28 (Feb. 28, 2005), http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf [hereinafter Kvočka Appeal Judgment].

[80] *See* Mrkšić Indictment Decision, *supra* note 74, ¶ 11; Prosecutor Brđanin & Talić, Case IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, ¶ 33 (June 26, 2001), *available at* http://www.icty.org/x/cases/brdanin/tdec/en/10626FI215879.htm. *See also infra* Part III on evidentiary facts.

[81] *See* Ndindabahizi v. Prosecutor, Case No. ICTR- 01-71-A, Judgment, ¶¶ 19, 20 (Jan. 16, 2007), http://www.unictr.org/Portals/0/Case/English/Ndindabahizi/judgement/160107apl.pdf;

principles, ICTY Chambers have stated that when particulars (dates, locations, victims) are known to the prosecution, it should specify those details in the indictment regardless of whether they may be deemed as material facts.[82]

In relation to the eighth principle listed above, there are a few additional clarifications that may be deduced from case law. For instance, the prosecution must include in the indictment whether physical commission or participation in a Joint Criminal Enterprise (JCE) is charged.[83] In other words, it is insufficient to merely make a broad reference to Article 7(1), which deals with individual criminal responsibility, of the ICTY Statute. Whether or not the type of JCE is to be pleaded expressly is unclear. Most chambers at the ad hoc Tribunals dictate that the type of JCE must be specified,[84] but some state that this is only preferable.[85] All chambers seem to agree though that when charging JCE the indictment must also include the nature, purpose, and time or period over which the joint criminal enterprise is said to have existed, the identity of its members insofar this is known, but at least by reference to their category as a group, and the nature of the accused's participation in that enterprise.[86]

In case of accomplice liability, the Prosecutor must plead clearly the acts—meaning the "particular acts" or "the particular course of

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Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 534 (May 7, 1997), http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf; Brđanin & Talić Decision on Objections by Talić, *supra* note 62, ¶ 22; Rukundo v. Prosecutor, Case No. ICTR-2001-70-A, Judgment, ¶ 163 (Oct. 20, 2010), http://www.unictr.org/Portals/0/Case/English/Rukundo/decisions/101020-appeals.pdf; Bagosora & Nsengiyumva v. Prosecutor, Case No. ICTR-98-41-A, Judgment, ¶ 150 (Dec. 14, 2011), http://www.unictr.org/Portals/0/Case/English/Bagosora/Judgement/111214-%20Appeals%20Judgement.pdf.

[82] *See* Kupreškić Appeal Judgment, *supra* note 61, ¶ 90; Prosecutor v. Kvočka, Case No. IT-98-30/1, Decision on Defence Preliminary Motions on the Form of the Indictment, ¶ 23 (Apr. 12, 1999), *available at* http://www.icty.org/x/cases/kvocka/tdec/en/ 90412FI56822.htm.

[83] Simić Appeal Judgment, *supra* note 72, ¶ 22; Krnojelac Appeal Judgment, *supra* note 77, ¶ 138.

[84] Stanišić & Župljanin Decision, *supra* note 71, ¶ 13; Simić Appeal Judgment, *supra* note 72, ¶ 22 referring to Ntagerura Appeal Judgment, *supra* note 73, ¶ 24; Kvočka Appeal Judgment, *supra* note 79, ¶ 28; Ntagerura Trial Judgment, *supra* note 62, ¶ 34.

[85] Krnojelac Appeal Judgment, *supra* note 77, ¶ 138; *see also* Friman et al., *Charges*, *supra* note 5, at 387.

[86] Stanišić & Župljanin Decision, *supra* note 71, ¶ 13; Đorđević Decision, *supra* note 79, ¶ 9; Krnojelac, May 11, 2000 Decision, *supra* note 79, ¶ 16; Kvočka Appeal Judgment, *supra* note 79, ¶ 28; Simić Appeal Judgment, *supra* note 72, ¶ 22; Ntagerura Trial Judgment, *supra* note 62, ¶ 34; Prosecutor v. Brima, Case No SCSL-2004-16-A, SCSL, Appeal Judgment, ¶¶ 72–86 (Feb. 22, 2008), http://www.rscsl.org/Documents/Decisions/AFRC/Appeal/675/SCSL-04-16-A-675.pdf [hereinafter Brima Appeal Judgment]; Prosecutor v. Taylor, Case No. SCSL-03-1-T, Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, ¶¶ 66–68 (Feb. 27, 2009), http://www.rscsl.org/Documents/Decisions/Taylor/752/SCSL-03-01-T-752.pdf [hereinafter Taylor Decision).

conduct"[87]—by which the accused allegedly planned, instigated, ordered, or aided and abetted in the crime.[88] Additional sorts of particulars are required when charging command or superior responsibility. The material facts that must be pleaded in the indictment include the accused's position as a superior of identified subordinates over whom he or she had effective control—in the sense of a material ability to prevent or punish criminal conduct[89]— and the subordinates' acts for which he or she is allegedly responsible.[90] Also, the accused's knowledge—who must have known or had reason to know—of the crimes must be indicated.[91] Finally, the conduct of the accused by which he or she may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them must be specified.[92]

While SCSL Chambers at times appeared to follow ICTY and ICTR case law with respect to indictment specificity,[93] the SCSL prosecution employed a worrisome charging method that in practice circumvented some of the safeguards provided by the general principles listed above, and arguably, failed to provide sufficient notice to the accused. The first Chief Prosecutor David Crane devised a charging strategy that moved away from the practice of relatively detailed indictments at the ICTY and ICTR, which he thought were too long, inexact, and "fraught with potential legal land mines."[94] He opted for what he referred to as a form of 'notice pleading,' making the indictments "simple and direct."[95] This

[87] Blaškić Appeal Judgment, *supra* note 72, ¶ 213; Prosecutor v. Krnojelac, Case No. IT-97-25, Decision on the Defence Preliminary Motion on the Form of the Indictment, ¶ 13 (Feb. 24, 1999), *available at* http://www.icty.org/x/cases/krnojelac/tdec/en/902247325494.htm; Krnojelac, Feb. 11, 2000 Decision, *supra* note 79, ¶ 18; Brđanin & Talić Decision on Objections by Talić, *supra* note 62, ¶ 20.

[88] *See* Brđanin & Talić Decision on Objections by Talić, *supra* note 62, ¶ 20; Ntagerura Trial Judgment, *supra* note 62, ¶ 33.

[89] *See* Prosecutor v. Mucić (Čelebići Camp), Case No. IT-96-21-A, Appeal Judgment, ¶ 256 (Feb. 20, 2001), http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf.

[90] *See* Stanišić & Župljanin Decision, *supra* note 71, ¶ 14; Prosecutor v. Halilović, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, Case No IT-01-48-P, ¶ 14 (Dec. 17, 2004), *available at* http://www.icty.org/x/cases/halilovic/tdec/en/041217.htm; Blaškić Appeal Judgment, *supra* note 72, ¶ 218.

[91] *See* Stanišić & Župljanin Decision, *supra* note 71, ¶ 14; Prosecutor v. Mejakić, Case No. IT-02-65-PT, Decision on Zeljko Mejakić's Preliminary Motion on the Form of the Indictment, ¶ 3 (Nov. 14, 2003), *available at* http://www.icty.org/x/cases/mejakic/tdec/en/031114.htm [hereinafter Mejakić Decision]; Blaškić Appeal Judgment, *supra* note 72, ¶ 218.

[92] *See* Stanišić & Župljanin Decision, *supra* note 71, ¶ 14; Mejakić Decision, *supra* note 91; Ntagerura Trial Judgment, *supra* note 62, ¶ 33.

[93] *See, e.g.*, Brima Appeal Judgment, *supra* note 86, ¶¶ 37–41; Taylor Decision, *supra* note 86, ¶¶ 66–68; Prosecutor v. Taylor, Case No. SCSL-2003-01-T, Decision on "Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment," ¶¶ 14–16 (May 1, 2009), *available at* http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/775/SCSL-03-01-T-775.pdf.

[94] David Crane, *Symposium: International Criminal Tribunals in the 21st Century: Terrorists, Warlords, and Thugs*, 21 AM. U. INT'L L. REV. 505, 511 (2006).

[95] *Id*.

method of charging, reminiscent of the indictments in the subsequent proceedings in Nuremberg and federal civil procedure in the United States,[96] stated the crimes' standard legal categorization and a brief stipulation of the alleged form of liability, but it often failed to include the link between the two and the accused's actual acts and omissions.[97]

The indictment at the SCSL had to be accompanied by a separate case summary setting out the allegations the prosecutor proposed to prove in making the case, potentially remedying the lack of specificity in the indictment if the two were read together. However, the case summary could not plead material facts that were not in the indictment, and the document was not susceptible to amendment by the Court.[98] In other words, the prosecution could change the case summary, which likely contained vital information from a defense's perspective in light of how concise the indictments were at the SCSL, throughout the trial without permission from the Court, because the case summary was not considered part of the indictment.[99] This arguably resulted in ever-fluctuating factual parameters of the case throughout the trial, which was an issue in, for instance, the case against Sesay, Kallon and Gbao, also known as the RUF case. Defense counsel identified the cause of this issue as the erroneous application of two legal standards:[100] (1) overreliance on the exception—as established by the ICTY—that less specificity is required when the crimes' massive scale makes detailed charging unrealistically demanding,[101] and (2) qualifying evidence, sometimes constituting new charges or new material facts, as not new as long as it was a "building block constituting an integral part of, and connected with, the same *res gestae* [things done] forming the factual substratum of the charges in the indictment."[102] The SCSL created a charging practice that will most

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[96] *See* FED. R. CIV. P. 8.

[97] *See, e.g.*, Prosecutor v. Sesay, Case No. SCSL-04-15-PT, Corrected Amended Consolidated Indictment (Aug. 2, 2006), *available at* http://www.rscsl.org/Documents/Decisions/RUF/617/SCSL-04-15-T-619.pdf; *see also* Wayne Jordash & Scott Martin, *Due Process and Fair Trial Rights at the Special Court: How the Desire for Accountability Outweighed the Demands of Justice at the Special Court for Sierra Leone*, 23 LEIDEN J. INT'L L. 585, 591 (2010).

[98] *See* Taylor Decision, *supra* note 86, ¶ 61; Prosecutor v. Norman, Case No. SCSL-04-15-T, Decision on Amendment of the Consolidated Indictment, ¶¶ 51–52 (May 16, 2005), *available at* http://www.rscsl.org/Documents/Decisions/CDF/Appeal/397/SCSL-04-14-T-397.pdf [hereinafter Norman Decision].

[99] *See* Norman Decision, *supra* note 98, ¶ 52.

[100] *See* Jordash & Martin, *supra* note 97, at 593.

[101] *See, e.g.*, Sesay Indictment Decision, *supra* note 70, ¶ 7.

[102] *See, e.g.*, Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-T, Decision on the Defence Motion for the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288, ¶ 11 (Feb. 27, 2006), http://www.rscsl.org/Documents/Decisions/RUF/496/SCSL-04-15-T-496.pdf; Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-T, Decision on Defence Motion Requesting the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-168, TF1-165 & TF1-041, ¶¶ 7, 11 (Mar. 20, 2006), http://www.rscsl.org/Documents/Decisions/RUF/519/

likely cease to exist along with the Court itself, which is now in residual mode, but it is nevertheless an interesting example of blurred case demarcation and confusion of charges and evidence, upon which will be elaborated further below (Part III).

The ECCC, while having a completely different system, applies the specificity requirements as articulated by the ad hoc Tribunals. Modeled on the French civil law system, the Court has a separate Office of Co-Investigating Judges, which conducts the investigation and concludes the pre-trial phase with the issuance of a Closing Order (indictment) comparable to a dossier in an inquisitorial system. The Closing Order, "either indicting a person and sending him or her to trial or dismissing the case," is an elaborate document that forms the parameters of the case if indeed sent to trial.[103] Despite its unique system impacting the way in which charges are brought, and while formally not bound by the jurisprudence of other tribunals, in Case 001 against Kaing Guek Eav alias "Duch," the ECCC's Pre-Trial Chamber decided that international standards will be applied regarding requirements of specificity in the Closing Order because the Internal Rules do not provide further guidance.[104] Indeed, also in Case 002/01 against the two surviving accused, Nuon Chea and Khieu Samphan, the Trial Chamber relied on ICTY and ICTR case law on general pleading principles when discussing the factual parameters of the case and the rights of the accused in this respect.[105] The example of the ECCC is consistent with the crime-based approach of this Article: the legal system does not cause issues of case demarcation to arise, nor does the legal system influence the way in which specificity of charges can be safeguarded. The general pleading principles can be legitimately applied in both dominantly adversarial and inquisitorial systems.

C. *Bringing Charges at the ICC*

Like the ECCC, the ICC has a different procedural framework than the ad hoc Tribunals. Especially regarding the charging instrument, matters are handled differently. At the contemporary international criminal tribunals, as was also standard procedure at the Nuremberg and

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SCSL-04-15-T-519.pdf.

[103] *See* ECCC Internal Rules, *supra* note 50, r.67.

[104] *See* Prosecutor v. Kaing Guek Eav, Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Decision on Appeal Against Closing Order Indicting Kain Guek Eav Alias "Duch," ¶ 46 (Extraordinary Chambers in the Courts of Cambodia Dec. 5, 2008), http://www.eccc.gov.kh/sites/default/files/ documents/courtdoc/D99_3_42_EN_0_1.pdf.

[105] *See* Prosecutor v. Nuon Chea, Case No. 002/19-09-2007-ECCC/TC, Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), ¶¶ 17–23 (Sept. 22, 2011), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E122_EN-1.PDF [hereinafter Nuon Chea Decision].

Tokyo Tribunals, the indictment is the basis for arrest.[106] At the ICC, however, the document providing the basis for arrest is the arrest warrant, which follows a separate procedure and involves a lower standard of proof.[107] Moreover, not every suspect is brought into custody, and an indictment is not a precondition for the issuance of an arrest warrant. Whether or not present—he or she may waive this right[108]—the suspect is subject to a confirmation of charges process whereby the Pre-Trial Chamber decides whether the case will proceed to trial; the charging instrument or indictment is then referred to as the Document Containing the Charges (DCC).[109] Because of these procedural differences, as well as some substantive differences relating to crimes and modes of liability, Pre-Trial Chambers have stated that the ICTY's and ICTR's case law is of limited relevance at the ICC.[110] However, in the Lubanga Appeal Judgment in his conviction of December 1, 20-14, the Appeals Chamber relied heavily on the ad hoc Tribunals' case law dealing with pleading rules without adding such a caveat.[111]

Article 61(3) of the Rome Statute, dealing with the confirmation of charges before trial, holds that the prosecutor must provide the accused with a copy of the DCC and the evidence upon which the prosecutor intends to rely at the confirmation of charges hearing within a reasonable time before that hearing.[112] It does not indicate what should be in the DCC, nor do the Rules provide any particular guidance. However, Regulation 52 of the Regulations of the Court states that the DCC referred to in Article 61 shall include "[a] statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial," as well as "[a] legal characterization of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28." In line with Article 74(2) of the Statute, "a 'charge' is composed

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[106] *See* ICTY Statute, *supra* note 3, art. 19(2) & 20(2); ICTR Statute, *supra* note 46, art. 18(2) & 19(2); *see also* ICTY RPE, *supra* note 4, r.55.

[107] *See* Rome Statute, *supra* note 3, art. 58 (the applicable standard being "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court").

[108] *See id.* art. 61(2)(a).

[109] *See id.* art. 61(3)(a); *see also* Locke, *supra* note 51, at 605, n.4.

[110] *See* Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-648, Decision on the Defences' Motions Regarding the Document Containing the Charges, ¶¶ 6–8 (June 25, 2008), http://www.icc-cpi.int/iccdocs/doc/doc520404.pdf [hereinafter Katanga & Ngudjolo Decision on Defences' Motions]; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1049, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ¶ 44 (Nov. 30, 2007), http://www.icc-cpi.int/iccdocs/doc/doc 371733.PDF. *See also* Rome Statute, *supra* note 3, art. 21(2).

[111] *See* Prosecutor v. Thomas Lubbanga Dyilo, Case No. IC-01/04-01/06-3121-Red, Judgment on the appeals of the Prosecutor and Mr. Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 87 of the Statute," ¶¶ 122, 127 (Dec. 1, 2014), http://www.icc-cpi.int/iccdocs/ doc/doc1877186.pdf [hereinafter Lubanga Appeal Judgment].

[112] *See* Rules of Procedure and Evidence of the ICC rule 121(3), Sept. 3, 2002, ICC-ASP/1/3.

of the facts and circumstances underlying the alleged crime as well as of their legal characterization."[113] Furthermore, Article 74(2) of the Statute makes it clear that it is those facts and circumstances that form the basis for the charges confirmed at the pre-trial stage that are determinative of "the factual ambit of the case for the purposes of the trial and circumscribe [the trial] by preventing the Trial Chamber from exceeding that factual ambit."[114] In fact, this flows directly from the nature of a confirmation of charges decision: it sets the factual subject matter of the trial, and the confirmed charges "fix and delimit [. . .] the scope of the case for the purposes of the subsequent trial."[115]

The "facts described in the charges" have been defined by the Appeals Chamber as those "factual allegations which support each of the legal elements of the crime charged."[116] The facts described in the charges must be distinguished from "the evidence put forward by the Prosecutor at the confirmation hearing to support a charge [. . .], as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged."[117]

There is not an abundance of ICC case law dealing with the lack of specificity of charges. Yet, there are examples of chambers relying amply on ICTY and ICTR case law despite the procedural differences between these courts. For example, the PTC in the *Bemba* case followed and referred to the ad hoc Tribunals when holding that "in case of mass crimes, it may be impractical to insist on a high degree of specificity."[118] It continued by explaining that, similar to the way stated at the ad hoc Tribunals, when dealing with such crimes it is not necessary for the prosecution to show for each individual killing "the identity of the victim

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[113] *See* Prosecutor v. William Samoei Ruto, Henry Kiprono Kogsey & Joshua Arap Sang, Case No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 44 (Jan. 23, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf [hereinafter Ruto & Sang Confirmation Decision].

[114] Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus, Case No. ICC-02/05-03/09-121-Corr-Red, Corrigendum of the "Decision on the Confirmation of Charges," ¶ 34 [Mar. 7, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1036947.pdf [hereinafter Banda & Jerbo Confirmation Decision].

[115] Ruto & Sang Confirmation Decision, *supra* note 113, ¶ 44; Banda & Jerbo Confirmation Decision, *supra* note 114, ¶ 34.

[116] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of July 14, 2009 entitled "Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court," ¶ 90 n.163 (Dec. 8, 2009), http://www.icc-cpi.int/iccdocs/doc/doc790147.pdf [hereinafter Lubanga Regulation 55 Decision].

[117] *Id*. *See also* Ruto & Sang Confirmation Decision, *supra* note 113, ¶ 47.

[118] *See* Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, Decision on the confirmation of charges, ¶ 134 (June 15, 2009), http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf [hereinafter Bemba Confirmation Decision].

and the direct perpetrator," nor is it necessary to specify the precise number of victims; evidence referring to "many" killings or "hundreds" of killings may very well be used.[119]

In *Mbarushimana*, in which the charges against the suspect were not confirmed, the issue of specificity—in this case in relation to locations—played a more prominent role. The defense had raised a number of issues in this respect, namely the prosecutor's wording that locations "include but are not limited to," as well as phrases such as "and neighboring villages," "surrounding villages" and "the village of W673 and W674 [. . .] in Masisi territory in the second part of 2009."[120] The prosecutor took the stance that use of the words "include but not limited to" allowed it to prove other events to establish the same crime, and submitted it was permissible to charge a pattern of crimes in a defined period and geographical area, including specific incidents as examples.[121] In the decision that declined to confirm the charges against Mbarushimana, the Pre-Trial Chamber was alarmed by the prosecution's approach, and gave it valuable guidance as to charging practices:

> The Chamber is concerned by this attempt on the part of the Prosecution to keep the parameters of its case as broad and general as possible, without providing any reasons as to why other locations where the alleged crimes were perpetrated cannot be specifically pleaded and without providing any evidence to support the existence of broader charges, seemingly in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure established under article 61(9) of the Statute. The Prosecution must know the scope of its case, as well as the material facts underlying the charges that it seeks to prove, and must be in possession of the evidence necessary to prove those charges to the requisite level in advance of the confirmation hearing. The DCC must contain a statement of the material facts underlying the charges, to include the dates and locations of the alleged incidents to the greatest degree of specificity possible in the circumstances.[122]

The Chamber further held that broad geographic and temporal parameters lack enough detail to inform the suspect regarding the location

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[119] *Id.*

[120] Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10-465, Decision on the confirmation of charges, ¶ 79 (Dec. 16, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1286409.pdf [hereinafter Mbarushimana Confirmation Decision].

[121] *See* Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10-T-6-Red2-ENG, Transcript of Sept. 16, 2011, at 22–23, http://www.icc-cpi.int/iccdocs/doc/doc1244722.pdf. *See also* Mbarushimana Confirmation Decision, *supra* note 120, ¶ 80.

[122] Mbarushimana Confirmation Decision, *supra* note 120, ¶ 82.

and dates of the alleged crimes.[123] In the *Ruto & Sang* case, the use of the word "including" when referring to specific locations was similarly held to be too ambiguous because it implies that the specified locations are "exemplary and not exhaustive."[124]

In relation to modes of liability, the PTC offered some guidance in *Katanga & Ngudjolo*. When co-perpetration in accordance with Article 25(3)(a) of the Rome Statute is charged, the co-perpetrators' roles and contributions to the common plan must be clearly specified. In this context, it is considered impermissibly vague to use open-ended language such as that the accused contributed "in at least the following ways." However, it is not necessary to identify every single member of a common plan when those others are not considered co-perpetrators of the relevant crimes.[125]

This approach was confirmed and elaborated upon, once again referring to the ad hoc Tribunals, by the Appeals Chamber in the *Lubanga* Appeal Judgment. The Chamber, reminding that Lubanga was charged and convicted based on the notion of co-perpetration based on a common plan, formulated three points of which the accused must then be notified with sufficient detail: "(i) his or her alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused's contribution; (ii) the related mental element; and (iii) the identities of any alleged co-perpetrators."[126] Regarding the underlying criminal acts, the Appeals Chamber stated that "the Prosecutor must provide details as to the date and location of the underlying acts and identify the alleged victims to the greatest degree of specificity possible in the circumstances."[127]

While in the past having reiterated to not follow the ad hoc Tribunals' case law in relation to pleading principles due to alleged limited relevance, there are many overlaps in how the ICC and the ICTY and ICTR deal with issues of lack of specificity. Moreover, in the *Lubanga* Appeal Judgment, the Appeals Chamber relied heavily on the ad hoc Tribunals' case law without asserting its alleged limited relevance. Rightfully so, because the different procedure for bringing charges at the ICC does not necessarily warrant an alternate approach in this respect as shown by, for instance, the ECCC's willingness to be guided by ad hoc Tribunal jurisprudence. As a relatively young court, the IC may therefore benefit from the pleading principles.

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[123] *Id.* ¶ 85.

[124] *See* Prosecutor v. William Samoei Ruto & Joshua Arap Sang, Case No. ICC-01/09-01/11-522, Decision on the content of the updated document containing the charges, ¶¶ 32–33 (Dec. 28, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1532402.pdf.

[125] Katanga & Ngudjolo Decision on Defences' Motions, *supra* note 110, ¶¶ 33–34.

[126] *See* Lubanga Appeal Judgment, *supra* note 111, ¶ 123.

[127] *Id.*

III. CASE DEMARCATION: WHAT IS MATERIAL?

In part, the prosecution's theory of the case becomes clear through context and background information revealing the narrative upon which the case is built. Without such information, the account of the events as pleaded in the indictment accompanied only by a list of evidence could become incomprehensible. This is especially true for international crime cases. Due to the crimes' massive scale, the facts underlying the charges and the supporting evidence are usually of great quantity, and massive amounts of information are hard to navigate for Chambers and the accused without a compass in the form of a little explanation.

The need for this extra narrative element has been recognized by ICC Chambers. Generally, it has been stated that providing a narrative that sheds light on the prosecution's theory of the case is an important aspect of presenting evidence at the confirmation stage of the proceedings. At that stage, the prosecution "must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [the] specific allegations."[128]

As shown by the cases and general pleading principles discussed above, the seemingly simple question of what is part of the case and what is not, or how materiality of a certain fact is determined, has a far from straight-forward answer in international crime cases. It is of course of paramount importance to establish this accurately, because it goes to the very heart of the criminal trial as tool for ascertaining the truth with respect to the conduct of an accused. This has everything to do with standards of proof and the right of the accused to be put on notice of the nature and cause of the charges against him or her, the latter of which will be discussed in Part IV. It is those facts that are material, which include the individual crimes charged, the accused's criminal responsibility and the contextual elements,[129] that need to be proven to the requisite standard of proof—at the trial stage, for instance, beyond a reasonable doubt—and eventually, may form the basis of a conviction. In other words, the material facts are those upon which the verdict is critically dependent,[130] and from which the conclusion of law is eventually drawn.

However, material facts are not the only facts involved in framing a case against a suspect. Evidentiary facts (as they are referred to at the ICTY and ICTR)[131] or subsidiary facts (as they are referred to at the

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[128] *See, e.g.*, *id.* ¶ 39; Prosecutor v. Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09-243, Decision on the Confirmation of Charges, ¶ 37 (Feb. 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc819602.pdf; Banda & Jerbo Confirmation Decision, *supra* note 114, ¶ 37; Mbarushimana Confirmation Decision, *supra* note 120, ¶ 40.

[129] *See* Gbagbo Adjournment Decision, *supra* note 2, ¶ 19.

[130] *See* Nuon Chea Decision, *supra* note 105, ¶ 19.

[131] *See, e.g.*, Blaskić Appeal Judgment, *supra* note 72, at 219; Prosecutor v. Simba, Case No. ICTR-01-76-A, Judgment, ¶ 264 (Nov. 27, 2007), http://www1.umn.edu/humanrts/instree/ICTR/

ICC)[132] are of a particular significance, too. In common law, evidentiary facts have been defined as those subsidiary facts introduced to prove material facts.[133] At the ICC, subsidiary facts have been defined as facts providing background information or indirect proof of material facts.[134] While it seems illogical that facts would prove facts, it may be understood as creating the following chain: *direct* evidence going to subsidiary (evidentiary) facts constitutes *indirect* evidence going to material facts. Material facts are then proven by inference from subsidiary (evidentiary) facts. For the purpose of this Article, it will be assumed that evidentiary facts and subsidiary facts refer to the same type of facts despite the different terminology used at the ad hoc Tribunals and the ICC, and the term 'subsidiary facts' will be used hereinafter.

While the ad hoc Tribunals never devoted much attention to the distinction between facts of a subsidiary nature and material facts, the ICC PTC reiterated in numerous Confirmation of Charges decisions that the facts and circumstances underlying the charges must be distinguished from other facts not mentioned in the charges but otherwise subsidiary or related to them.[135] Yet, it is not always clear how material facts are to be distinguished from subsidiary facts and background information, and what role or status these other types of information have.

In addition to the need for drawing a sharper line between material facts and other facts, a distinction must also be made between facts and evidence. Again, this may seem an easy query. Yet, how is evidence distinguished from facts, for instance, when subsidiary facts are used to support other evidence, to demonstrate the material facts or to show a certain pattern? Can subsidiary facts even take on all these roles? It is well established that material facts must be distinguished from evidence tendered to prove those facts—the latter does not need to be stated by the prosecution in the indictment.[136] However, confusion in this respect was highlighted, for instance, by *Gbagbo* mentioned in the introduction and more elaborately dealt with further below: the prosecution used a number of incidents, which it classified as subsidiary facts, to support evidence demonstrating the features of the charged incidents constituting the attack

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SIMBA_ICTR-01-76/SIMBA_ICTR-01-76-A.pdf.

[132] *See, e.g.*, Banda & Jerbo Confirmation Decision, *supra* note 114, ¶ 37.

[133] *See, e.g.*, Woodard v. Mordecai, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951): "Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts." In common law, material facts are usually referred to as "ultimate facts," but that terminology is not used at the international criminal courts and tribunals. *See also* BLACK'S LAW DICTIONARY 500 (5th ed. 1979).

[134] *See* Banda & Jerbo Confirmation Decision, *supra* note 114, ¶ 37.

[135] *See, e.g.*, *id.* ¶ 36; Ruto & Sang Confirmation Decision, *supra* note 113, ¶ 47.

[136] *See, e.g.*, Kupreškić Appeal Judgment, *supra* note 61, ¶ 88. *See also supra* Part II.B pleading principle no. 2.

(as part of a crime against humanity), but these subsidiary facts were interpreted by the PTC as material facts *constituting* the attack, resulting in the confirmation of charges hearing being adjourned and the prosecution being sent off to conduct further investigations.[137] Moreover, if indeed used to show a pattern or certain features, it raises the question whether these additional incidents perhaps should have been regarded not as subsidiary facts, but as a type of similar fact evidence.

The question whether a fact is a material fact, the answer to which demarcates the case and puts the accused on notice, will therefore be explored here from two different angles: how are material facts distinguished from other facts, and how are facts distinguished from evidence?

A. *Subsidiary Facts and Background Information*

A closer look at the *Gbagbo* pre-trial saga reveals how blurred boundaries between different types of facts and evidence became entangled with the issue of uncertain case delineation. Laurent Gbagbo, former President of Côte d'Ivoire, stands accused of four counts of crimes against humanity in the context of post-electoral violence in his home country between December 16, 2010 and April 12, 2011. On January 17, 2013, the prosecution filed the DCC identifying four incidents ("charged incidents") during which the crimes against humanity allegedly had taken place. In a separate subsection titled "attack against a civilian population" it described a series of attacks, including the four charged incidents, as well as 41 other incidents.[138] This subsection of the DCC was not placed under the heading dealing with the actual charges, in which the four incidents were once again explicitly referred to.

The hearing on the confirmation of charges was held from 19 till February 28, 2013.[139] This hearing is part of the confirmation of charges process—unique to the ICC and unrelated to the issuance of arrest warrants—that is used as screening to make sure only persons against whom a relatively strong case exists are subjected to a trial.[140] On the basis of the hearing, the PTC will determine whether "there is sufficient

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[137] *See* Gbagbo Adjournment Decision, *supra* note 2, ¶¶ 44–45.

[138] *See* Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11-357-Anx1-Red, Document amendé de notification des charges [DCC], § E.1 (Jan. 25, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1545439.pdf [in French only]; *see also* Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11-572, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute," ¶ 1 (Dec. 16, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1700000.pdf [hereinafter Gbagbo Adjournment Appeal Judgment].

[139] *See* Gbagbo Adjournment Decision, *supra* note 2, ¶ 11 (and accompanying footnote 17 for transcripts).

[140] *See* Rome Statute, art. 61. *See also* Friman et al., *Charges*, *supra* note 5, at 399.

evidence to establish substantial grounds to believe that the person committed each of the crimes charged."[141] It may then either (1) confirm the charges and commit the person to trial, after which the case is transferred to a Trial Chamber, (2) decline to confirm the charges, or (3) adjourn the hearing and request the prosecutor to either collect more evidence or amend the charges.[142] In *Gbagbo*, the PTC adjourned the hearing on the confirmation of charges on June 3, 2013—this is possible even though the actual hearing had already taken place.[143] It urged the prosecution to gather more evidence or conduct further investigations, as well as provide an updated DCC and a new list of evidence.[144] More specifically, the Chamber stated that none of the 45 discussed incidents, taken on their own, could establish the existence of an "attack" in the sense of article 7(2) of the Rome Statute. Even though not all 45 incidents needed to be proven to the required threshold, as least "a sufficient number of incidents" must meet the requisite standard of proof.[145]

Putting aside evidentiary issues relating to a high reliance on NGO reports and press articles, which in large part caused the judges to remain unconvinced, the PTC made it clear that it considered *all* 45 incidents to be constituting the attack.[146] Accordingly, none of these incidents were considered to be subsidiary facts or background information, and all of them were treated as being part of the facts and circumstances described in the charges.

The prosecution's appeal of the PTC's decision claimed a different intent with respect to the 41 additional (*i.e.*, not-charged) incidents, and stated that "[the prosecution] also led evidence in relation to another 41 incidents to support evidence from the Charged Incidents that goes to demonstrating the features of the attack, but in relation to which the Prosecution did not plead any material facts [. . .]."[147] It continued by

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[141] *See* Rome Statute, art. 61(7).

[142] *See id.* art. 61(7)(a), (b) & (c).

[143] *See* Prosecutor v. Jean-Pierre Bemba Combo, Case No. ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, ¶ 37 (Mar. 3, 2009), http://www.icc-cpi.int/iccdocs/doc/doc638848.pdf; Gbagbo Adjournment Decision, *supra* note 2, ¶ 13.

[144] *See* Gbagbo Adjournment Decision, *supra* note 2, ¶¶ 44, 45.

[145] *See id.* ¶ 23.

[146] *See id.* ¶ 36.

[147] Gbagbo Prosecution's Appeal, *supra* note 2, ¶ 3. This also follows from the transcripts of the confirmation of charges hearing. *See, e.g.*, Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11-T-14-ENG, Transcript of 19 Feb. 19, 2013, at 45.

> [T]he Prosecution has selected four incidents that are representative of the crimes committed by the pro-Gbagbo forces in a sustained series of attacks put into motion by Mr. Gbagbo during the post-election violence, and during the next few days the Prosecution will summarise its core evidence regarding these four incidents.

explaining that "the purpose of the [41 incidents] was to support evidence from the Charged Incidents that goes to proof of the attacker's pattern of conduct as well as pattern of victimization."[148] Judge Silvia Fernández de Gurmendi sided with the Prosecution in her dissent to the PTC's decision, adding that the prosecution had made a clear distinction between the charged allegations and other facts by adding separate sections to the DCC dealing only with the charges.[149] She opined that the subsidiary facts did not constitute the attack, but "merely serve to prove, together with *all* available evidence, the attack and/or its widespread or systematic nature."[150]

The Appeals Chamber confirmed the PTC's majority decision. It noted that the wording of the DCC does not automatically lead to the conclusion that the prosecution intended to use only the four charged incidents to establish the attack, and it concluded that the prosecution did not make a clear enough distinction between the four charged incidents and the other 41 incidents.[151] Moreover, the AC was not convinced that the distinction between material facts and subsidiary facts was even warranted here, because the incidents were all separate events. It explained: "[T]he prosecutor did not present any contextual information or any other factual allegations that would provide a basis for making such a distinction, or serve to explain the alleged link between the 41 Incidents and the four Charged Incidents."[152] In other words, in order to claim to be using facts as subsidiary facts, the prosecution must at least establish some kind of connection between those facts and the material facts. Bearing in mind subsidiary facts may also be referred to as evidentiary facts, this makes a lot of sense: a piece of evidence connects to an alleged fact.

In *Gbagbo*, the prosecution seemed to have had two different intentions with the additional 41 incidents: to use them to demonstrate a pattern, and to support other evidence that in turn supported the material facts. These two types of usages, however, do not seem to correspond to the definition of "subsidiary fact." PTCs have made it clear that in assessing the prosecution's case at the confirmation stage, subsidiary facts are only to be considered "as background information or as indirect proof of the material facts."[153] In other words, these other factual allegations offer general background information or "indicate

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Id.

[148] Gbagbo Prosecution's Appeal, *supra* note 2, ¶ 18.

[149] *See* Gbagbo Adjournment Decision, *supra* note 2, ¶ 35 (Silvia Fernández de Gurmendi, J., dissenting).

[150] *Id.* ¶ 41.

[151] *See* Gbagbo Adjournment Appeal Judgment, *supra* note 138, ¶¶ 43, 44.

[152] *Id.* ¶ 46.

[153] Banda & Jerbo Confirmation Decision, *supra* note 114, ¶ 37.

intermediate steps in the prosecution's chain of reasoning."[154] Moreover, "subsidiary facts [. . .] are of relevance only to the extent that facts described in the charges may be inferred from them."[155] As the AC noted in *Gbagbo*, a link between the subsidiary facts and the material facts must be discernible.

Other information (*i.e.*, non-essential information or subsidiary facts) indeed seem to have a dual function at the ICC: (1) it may provide a narrative intended to enhance understanding of the alleged events, and (2) it may be used to infer the existence of material facts. Conflating the term "subsidiary" on the one hand and "background information" on the other is likely to cause confusion, though, despite they are indeed linked. While subsidiary facts may lead to a greater understanding of the prosecution's theory of the case, they do not necessarily serve the (exclusive) purpose of providing background information. Strictly speaking, they are intended to demonstrate or support the existence of the facts underlying the charges, in other words the material facts. In a way, they provide a narrative of what factually happened, and act as glue connecting the evidence with the material facts, which indeed provides a background. To illustrate, take a single murder as example. The material facts are likely to be: (1) the victim was killed, (2) the accused did the act that killed the victim, and (3) the accused intended to kill the victim. A subsidiary fact could be, for instance, that the accused was seen beating the victim on the same day the killing took place. That subsidiary fact—which naturally in itself should be supported by evidence, but that taken on its own does not constitute a material fact in a murder case—in turn aids to prove the material fact, creating a chain of reasoning that paints the full factual picture of the prosecution's case.

The *Gbagbo* Pre-Trial Chamber, reiterating the importance of factual and legal demarcation at the confirmation stage, argued for a clear distinction between the facts and circumstances underlying the charges (material facts) and other factual allegations supporting the existence of the material facts (subsidiary facts).[156] It also emphasized that subsidiary

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[154] Prosecutor v. Muthaura & Kenyatta, Case No. ICC-01/09-02/11-536, Order regarding the content of the charges, ¶ 13 (Nov. 20, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1510847.pdf. *See also* Gbagbo Adjournment Decision, *supra* note 2, ¶ 34 n.39 (Silvia Fernández de Gurmendi, J., dissenting), where Judge Silvia Fernández de Gurmendi observed that "facts of a subsidiary nature will usually emerge from 'circumstantial evidence.'" While not clarifying the distinction between material and subsidiary facts any further, the AC has endorsed the use of the term 'subsidiary facts' on several occasions: *see* Lubanga Regulation 55 Decision, *supra* note 116, ¶ 90 n.163; Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07-3363, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of Nov. 12, 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons," ¶ 50 (Mar. 27, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1573822.pdf; Gbagbo Adjournment Appeal Judgment, *supra* note 138, ¶ 37.

[155] Ruto & Sang Confirmation Decision, *supra* note 113, ¶ 47.

[156] *See* Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11-325, Decision on the date

facts are not part of the charges and are therefore not subject to the confirmation of charges process. Judge Christine van den Wyngaert articulated a logical conclusion of such reasoning in a separate opinion to a decision in *Muthaura & Kenyatta* where the Majority explicitly authorized the prosecution to keep other factual allegations (considered to be background information or other information of a subsidiary nature) in the updated DCC.[157] She disagreed with including subsidiary facts in a DCC altogether. She argued that the DCC should only contain the material facts, and should not include any unnecessary background information or subsidiary facts. The correct place for such information is the pre-trial brief.[158] She pointed out that the DCC has a very specific and fundamental purpose: it demarcates the case legally and factually, while the pre-trial brief tells the defense how the prosecution intends to plead the case. It is therefore imperative that the facts and circumstances contained in the DCC are "clear, precise, and unambiguous."[159] Allowing both material facts and subsidiary facts in a DCC complicates matters needlessly, and turns a DCC into a dual-functioning hybrid between a charging instrument and a pre-trial brief.[160]

Indeed, keeping subsidiary facts out of the charging instrument delimits the case more clearly, and reduces any potential confusion as to which facts are material. But it is possible to imagine exceptions to this rule. At the ICTY, for instance, while there is limited case law dealing with the issues surrounding evidentiary or subsidiary facts in general, Trial Chambers have held—this is pleading principle no. 9 discussed in Part II.B—that where the state of mind of the accused is relevant to the charges, the prosecution must plead in the indictment either (1) the specific state of mind as a material fact (in which case the facts by which that material fact is to be established are ordinary matters of evidence and need not be pleaded further); or (2) the evidentiary facts—the term used at the ICTY for subsidiary facts—from which the state of mind is to be inferred.[161] This has only been held with respect to *mens rea* as an exception to having to plead all the material facts explicitly, and nothing similar has been dealt with at the ICC. This is a very logical exemption,

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of the confirmation of charges hearing and proceedings leading thereto, ¶ 27 (Dec. 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1528879.pdf.

[157] *See* Prosecutor v. Muthaura & Kenyatta, Case no. ICC-01/09-02/11-584, Decision on the content of the updated document containing the charges, ¶ 13 (Dec. 28, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1532400.pdf.

[158] *Id*. ¶ 3 (Christine van den Wyngaert, J., separate opinion).

[159] *Id*. ¶ 4 (Christine van den Wyngaert, J., separate opinion).

[160] *Id*. ¶ 5 (Christine van den Wyngaert, J., separate opinion).

[161] *See* Stanišić & Župljanin Decision, *supra* note 71, ¶ 16; Mrkšić Indictment Decision, *supra* note 74, ¶ 11; Blaskić Appeal Judgment, *supra* note 72, ¶ 219; *see also* Prosecutor v. Ayyash, Case No. STL-11-01/PT/TC, Decision on Alleged Defects in the Form of the Amended Indictment, ¶ 58 (June 12, 2013), http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/trial-chamber/f0952.

though, one that perhaps may be transplanted to the ICC. The state of mind of an accused is not likely directly observable and will almost always need to be inferred from other facts.

Looking at the definition of subsidiary facts, and how they are only found in the indictments at the ad hoc Tribunals by way of a narrow exception, the question arises whether in *Gbagbo* the 41 incidents were supposed to have been used as subsidiary facts, material facts, or as something else. If they were included to support the material facts, for instance the attack, they may be considered subsidiary facts. If this had been crystal clear, it may even not have been that detrimental to have them in the DCC, because confusion was likely avoided. If they were indeed crucial to, or part of, the attack, they may be regarded as material facts and must form part of the charges. If the additional incidents were not as such directly linked to the primary charged incidents, namely the attack, but were used to show a pattern, they may be a type of similar fact evidence, in which case they should not have been in the DCC as it would have been a matter of proof.

B. *Between Proof and Pleading: Patterns of Conduct and Similar Fact Evidence*

In the June 2013 *Gbagbo* Decision, the PTC pulled the other 41 incidents into the realm of material facts, which need to be proven to the required standard of proof. This did not lead to the factual parameters of the case drastically changing, though. Still speaking of four charged incidents (during which four counts of crimes against humanity—rape, murder, other inhumane acts or attempted murder, and persecution—were allegedly committed), the PTC eventually confirmed the charges on June 12, 2014, after the prosecution had gathered more evidence as it had been directed to do.[162] Other acts were mentioned in the Confirmation of Charges Decision as well, but their exact purpose remained ambiguous.[163] They were not part of the four charged incidents during which the four counts of crimes against humanity took place; some acts were used to show a pattern,[164] while in relation to other acts the Chamber merely stated it took "note of the evidence establishing that the following events took place."[165]

The prosecution in this case had stated earlier that it intended to use the other not-charged incidents not as material facts as such nor to support

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[162] *See* Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges Against Laurent Gbagbo, ¶¶ 267–77 (June 12, 2014), http://www.icc-cpi.int/icc docs/doc/doc1783399.pdf.

[163] *See id*. ¶¶ 73–77.

[164] *Id*. ¶ 75.

[165] *Id*. ¶ 77.

the material facts, but to support the evidence underlying the material facts in relation to proof of the accused's pattern of conduct and the pattern of victimization.[166] This does not seem to adhere to the definition of subsidiary facts, which are used to prove material facts, not to support the underlying evidence. The ensuing decision confirming the charges did not touch upon this subject, but the use of the word "incident" was perhaps unfortunate, too. The definition of crimes against humanity does not speak of "incidents;" it only demands the commission of multiple acts.[167] In this case, one incident already encompassed a plurality of acts, and moreover, one incident did not correspond one-on-one to one count of a crime against humanity. In any event, matters got very confused, but strangely, none of the actors involved suggested that all of this might have been a misinterpretation of pattern of conduct evidence, despite its similarities and hints in that direction.

In international crime cases, information about other events or acts not charged in the indictment is often introduced to demonstrate a certain pattern. For a series of acts or incidents to be qualified as a pattern, they must show common features of, for instance, the perpetrator, the victims or the modus operandi.[168] Pattern evidence, often equated with the notion of "similar fact evidence" or "evidence of similar conduct," is a well-known phrase from common law systems and it is also used at the ad hoc Tribunals. It may be further defined as evidence of crimes not alleged in the indictment, but nevertheless used to establish guilt for the acts with which the accused is charged.[169] Such type of evidence, also known as character evidence, is generally inadmissible where it goes to show the accused's propensity or disposition to do the type of acts charged and is therefore guilty of the crime in the indictment.[170] Moreover, in relation to international crimes evidence relating to the accused's character is considered to have very little probative value: the nature of international crimes, which take place during a national or international emergency, is

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[166] *See supra* Part III.A.

[167] *See* Rome Statute art. 7(2)(a): "'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."

[168] *See* Xabier Agirre Aranburu, *Sexual Violence: Using Pattern Evidence and Analysis for International Cases*, 23 LEIDEN J. INT'L L. 609, 610 (2010).

[169] *See* WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 790 (2010) [hereinafter SCHABAS COMMENTARY].

[170] *See* Prosecutor v. Kupreškić, Case No. IT-95-16, Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque, § 4 (Feb. 17, 1999), *available at* http://www.icty.org/x/cases/kupreskic/tdec/en/90217MS25407.htm [hereinafter Kupreškić Tu Quoque Decision]; Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, ¶ 12 (Sept. 18, 2003), http://41.220.139.198/Portals/0/Case/English/Bagosora/Trail%20and%20Appeal/180903.pdf [hereinafter Bagosora DBY Decision].

such that they are often committed by persons with no prior convictions or history of violence.[171]

Pattern evidence can be quite prejudicial to the defense, and it potentially erodes the presumption of innocence.[172] Under certain circumstances it may be admissible, though. The RPEs of the ICTY, ICTR and SCSL share the same Rule 93 dealing with this type of evidence, providing that it may be admissible in the interests of justice.[173] The ICTY AC has endorsed using this evidentiary method pointing out that:

> [U]nder the so-called principle of "similar fact evidence", courts in England and Wales, Australia and the United States admit evidence of crimes or wrongful acts committed by the defendant other than those charged in the indictment, if the other crimes are introduced to demonstrate a special knowledge, opportunity, or identification of the defendant that would make it more likely that he committed the instant crime as well.[174]

The admission of such evidence always requires respecting and balancing the rights of the accused. Although comprised of professional judges and not juries, Chambers ought not be distracted by hearing endless testimony on irrelevant and prejudicial evidence, as this may cause the trial to lose focus and be unduly lengthened.[175]

There are a number of international cases in which similar fact evidence was used. For example, in *Galić*, similar fact evidence with respect to an additional (not-charged) sniping incident was admitted, as it corroborated the accused's consistent pattern of conduct in relation to the charged sniping incidents.[176] In *Kvočka et al.*, similar fact evidence was admitted against two accused. One woman's testimony relating to

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[171] *See* Kupreškić Tu Quoque Decision, *supra* note 170, § 4. *See also* Alette Smeulers et al., *Sixty-Five Years of International Criminal Justice: The Facts and Figures*, *in* THE REALITIES OF INTERNATIONAL CRIMINAL JUSTICE 7, 34 (D.L. Rothe et al. eds., 2013).

[172] *See* SCHABAS COMMENTARY, *supra* note 169, at 791.

[173] *See* ICTY/R RPEs & SCSL RPE, r.93(A); RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 105–06 (2002); Prosecutor v. Ngeze & Nahimana, Case No. ICTR-99-52-A, Décision sur les appels interlocutoires, ¶ 20 (Sept. 5, 2000) (Shahabuddeen, J., separate opinion), *available at* http://www.legal-tools.org/uploads/tx_ltpdb/doc906823_02.pdf.

[174] Kupreškić Appeal Judgment, *supra* note 61, ¶ 321.

[175] Bagosora DBY Decision, *supra* note 170, ¶ 28; *see also* Prosecutor v. Milutinović, Case No. IT-05-87-T, Decision on Evidence Tendered Through Witness K82, ¶ 19 (Oct. 3, 2006), *available at* http://www.icty.org/x/cases/milutinovic/tdec/en/061003.pdf.

[176] *See* Prosecutor v. Galić, Case No. IT-98-29-T, Decision on the Motion for the Entry of Acquittal of the Accused Stanislav Galić, ¶ 3 n.1 (Oct. 3, 2002), http://www.icty.org/x/cases/galic/tjug/en/021003.pdf; Prosecutor v. Galić, Case No. IT-98-29-PT, Decision on the Defence Motion for Indicating that the First and Second Schedule to the Indictment Dated Oct. 10, 2001 Should Be Considered as the Amended Indictment, ¶ 23 (Oct. 19, 2001) *available at* http://www.icty.org/x/cases/galic/tdec/en/11019FI117058.htm.

Mlado Radić, who encouraged a guard to have sex with the witness in exchange for a meeting with her husband, was admitted into evidence under Rule 93(A) ICTY RPE,[177] as well as a second testimony relating to a witness's actual rape by Radić.[178] The other accused in this case, Zoran Žigić, also had similar fact evidence admitted against him in relation to a number of assaults of which the victims were not listed on the Amended Indictment or Schedules.[179] Also, in *Popović et al.*, evidence relating to the Bišina execution site, which did not form part of the indictment, was admitted into evidence, because it was nevertheless "still relevant and highly probative as to [Popović's] knowledge, intent and "pattern of conduct" during the relevant time period, particularly in relation to the alleged joint criminal enterprise to murder the able bodied Bosnian Muslim men."[180]

In *Bagosora et al.*, the leading decision in this respect, the ICTR TC discussed a number of ways in which similar fact evidence may be used, relying mostly on the often-cited separate opinion of Judge Shahabuddeen to a decision from *Ngeze & Nahimana*. The context of the former decision was dealing with extra-temporal evidence in light of the Tribunal's jurisdiction. Such extra-temporal evidence from before 1994, the year from which the Tribunal's mandate allows it to exercise jurisdiction, is generally inadmissible at the ICTR bar three exceptions: (1) evidence relevant to an offence continuing into 1994; (2) evidence providing a context or background; and (3) similar fact evidence.[181] With respect to similar fact evidence, the *Bagosora* TC held that the rule must be understood from the perspective of the general principle that evidence regarding the character of the accused is not admissible if that evidence is only introduced to blacken the accused's reputation by showing that he or she committed the same crime before, is inclined to commit the crime or is capable of committing the crime.[182] Similar fact evidence is admissible, however, when it serves "to prove a pattern, design or systematic course of conduct by the accused where his explanation on the basis of coincidence would be an affront to common sense."[183] Thus, for

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[177] *See* Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 547 (Nov. 2, 2001), *available at* http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf.

[178] *Id*. ¶ 556.

[179] *Id*. ¶¶ 652, 663, 664.

[180] 05-88-T, Decision on Motion to Reopen the Prosecution Case, ¶¶ 33, 39 (May 9, 2008), *available at* http://www.icty.org/x/cases/popovic/tdec/en/080509.pdf.

[181] *See* Bagosora DBY Decision, *supra* note 170, ¶¶ 9–14; Prosecutor v. Simba, Case No. ICTR-01-76-I, Decision on Defence Motion to Preclude Prosecution Evidence, ¶ 3 (Aug. 31, 2004), http://www.unictr.org/Portals/0/Case/English/Simba/decisions/310804.pdf; Prosecutor v. Ndindiliyimana, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Motion to Exclude Parts of Witness AOG's Testimony, ¶ 22 (Mar. 30, 2006), http://www.unictr.org/Portals/0/Case/English/Ndindiliyimana/decisions/300306.pdf.

[182] Bagosora DBY Decision, *supra* note 170, ¶ 12.

[183] *Id.* ¶ 13.

similar fact evidence to be admissible it must show more than a mere propensity to commit the crime; it must be "probative of some peculiar feature of the case which substantially enhances its probative value in relation to the charge."[184] Judges will need to assess whether the evidence serves such a specific goal on a case-by-case basis keeping in mind the evidence should not be unfairly prejudicial towards the accused.[185]

The ICC has thus far remained silent with respect to the phrase "similar fact evidence" and there is no mention of pattern evidence in the Rome Statute or RPE. In fact, Rule 93 of the ad hoc Tribunals' RPEs is the only original evidentiary rule that was not included in the ICC's equivalent.[186] However, there have been cases where patterns played a prominent role. One commentator noted the connection with pattern evidence when he discussed the use of evidence of other (not charged) attacks in *Katanga & Ngudjolo* with respect to context.[187] Indeed, in that case, under the heading *Theory of similar events: mode of proof by analogy*, the Pre-Trial Chamber allowed evidence regarding other attacks than the charged attack (which had taken place in the town Bogoro in the Democratic Republic of the Congo) in order to establish the overall context of the conflict. Referring to the *Lubanga* Confirmation of Charges Decision, the PTC held that "providing evidence which may assist [the Chamber] in establishing the overall context in which the crimes are alleged to have occurred is not only helpful to its understanding of the evidence supporting the charges but is also highly relevant and probative in respect of the contextual elements of the crimes under articles 7 and 8 of the Statute."[188] It must be assumed from the wording of the Chamber that the only type of context the evidence was used for were the contextual elements in the crime definitions, which are every bit a part of the material facts as the other legal elements of the crimes.[189] However, once again, this was not exactly what the prosecution had had in mind. They had submitted that evidence of other attacks was also probative regarding the suspects' intent and knowledge.[190] In a later submission, the prosecution linked this evidence to the doctrine of "similar fact evidence" referring to the ICTY and ICTR case law,[191] but

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[184] *Id.* ¶ 14.

[185] *Id.*

[186] *See* Christopher Gosnell, *Admissibility of Evidence*, *in* PRINCIPLES OF EVIDENCE IN INTERNATIONAL CRIMINAL JUSTICE 375, 431 (Karim A.A. Khan et al. eds., 2010).

[187] *Id*.

[188] Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-717, Decision on the confirmation of charges, ¶ 228 (Sept. 30, 2008), *available at* http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf [hereinafter Katanga & Ngudjolo Confirmation Decision].

[189] *See supra* Part III.A.

[190] *See* Katanga & Ngudjolo Confirmation Decision, *supra* note 188, ¶ 226.

[191] *See* Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-1645, Prosecution's Consolidated Response to "Defence Objections to Admissibility in Principal and in Substance" (ICC-01/04-01-07-1558) and Requête de la Défense en vue d'obtenir

unfortunately, ICC Chambers have never clarified matters as they never used this terminology themselves nor devoted any substantial consideration to the notion.

With respect to the use of patterns at the ICC, it is also worth noting the dissenting opinion of Judge Anita Ušacka to the *Lubanga* Appeal Judgment. She observed that the charges—the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities—were divided into a "pattern" section and "individual cases" section, causing confusion as to the relationship between the two. Also, the evidence relating to the individual cases was, unforeseeably, rejected by the Trial Chamber only at the end of trial, leaving the "vague formulations" of the pattern charges as the basis for the conviction.[192] In Judge Ušacka's view, the pattern charges merely provided contextual or background information, incapable of adequately informing the accused of the charges. Moreover, by having to rely on the pattern charges after the evidence regarding the individual cases was thrown out, the Prosecutor effectively was forced to reclassify the individual cases from "core factual allegations underlying the charges" to evidence, or in the words of the Prosecutor, as "sample episodes chosen as evidence."[193] While sampling of data—meaning, in general terms, the process of (1) selecting units such as people, organizations or events from a population or pool of interest, (2) studying the sample in order to (3) generalize the results back to the population or pool from which they were chosen—as method of investigating crime patterns is beyond the scope of this Article, sampling of incidents is a common technique for building a case in the legal sense at the international courts and tribunals. As one senior investigator pointed out, "[i]ncidents are chosen in a way like 'case studies' as representative of the overall pattern."[194] Especially in international crime cases, patterns often play a role since most cases involve a large number of incidents.[195] Key in this respect is making a clear distinction between (material and subsidiary/evidentiary) facts and (pattern of conduct) evidence. While the former are found in the charging instrument when deemed material or, if one follows ICTY case law, when used as evidentiary facts to establish *mens rea*, the latter are matters of proof and are therefore not found in the indictment. If parties are clear on

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une decision d'irrecevabilité des documents liés aux témoins décédés référencés sous les numéros T-167 et T-258 (ICC-01/04-01/07-1556), ¶¶ 65–66 n.68 (Nov. 16, 2009), http://www.icc-cpi.int/ic cdocs/doc/doc781779.pdf.

[192] *See* Lubanga Appeal Judgment, *supra* note 111, ¶ 12 (Anita Ušacka, J., dissenting).

[193] *Id.* ¶ 18 (Anita Ušacka, J., dissenting); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04—01/06-2969-Red, Prosecution's Response to Thomas Lubnaga's Appeal Against Trial Chamber I's Judgment Pursuant to Article 74, ¶ 104 (Feb. 18, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1555036.pdf.

[194] *See* Aranburu, *supra* note 168, at 620.

[195] *Id.*

how they intend to use different facts and evidence at their disposal, the types of evidence discussed in this section do not influence case demarcation in the strict sense, meaning when taking the charging instrument as the foundation of demarcation. It does, however, have an effect on the scope of the case in a broader sense. Additional incidents, although not charged, factually widen the amount of issues dealt with at trial, and therefore inevitably affect the interests of the accused with respect to the length of trial and the disclosure of evidence. However, as elaborated upon next, this is usually a different matter than the right of the accused to be given notice of the nature and cause of the charge against him or her, which relates to the charging instrument.

IV. THE SPECIFICITY OF CHARGES AND THE RIGHT TO BE PUT ON NOTICE

The purpose of the charging instrument or indictment is to fix the factual and legal parameters of the case at trial and to inform the accused about the charges.[196] Vague charges and conflation of subsidiary and material facts, and facts and evidence corrode these fundamental goals and have a dire effect on the rights of the defense. Both parts of the charging instrument's dual function express a number of essential fair trial rights. This includes the fundamental principle to be presumed innocent when charged with a criminal offense and granting adequate opportunity to prepare a defense,[197] as well as safeguarding the *ne bis in idem* principle (protection from repeated charges of the same offense, also known as the double jeopardy protection).[198] The fair trial rights at play here comprise the normative boundaries in light of this Article's main query: lack of specific case demarcation finds its limits in the rights of the accused to be given fair notice of the charges against him or her, discussed in Part IV.A, and to be protected against subsequent charges of the same crime, discussed in Part IV.B.

A. *Notice: Preparing a Defense*

Defense complaints relating to the vagueness of charges are commonly heard at the international criminal courts and tribunals.[199] Such objections are based on the right of the accused to be informed of the case against him or her.[200] The ICTY, ICTR, SCSL and STL statutes

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[196] *See* Friman et al., *Charges*, *supra* note 5, at 383.

[197] *See, e.g.*, Jordash & Martin, *supra* note 97, at 588; Friman et al., *Charges*, *supra* note 5, at 454.

[198] Friman et al., *Charges*, *supra* note 5, at 436–37.

[199] ICTY Statute, art. 21(4)(a).

[200] *Id.*

all follow the major international human rights instruments—the ICC and ECCC do as well, but use slightly different language—in guaranteeing that an accused will "be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her."[201] The nature of the charge translates as the legal qualification and the cause of the charge as the underlying material facts,[202] both of which the accused must be made aware of.[203] It has been observed by the European Court of Human Rights that "in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair."[204] The accused's right to be informed, or in other words, to be put on notice enables preparing an effective defense, which is the touchstone criterion in relation to sufficient specificity of charges.[205] Moreover, it relates closely to the right to have adequate time and facilities for the preparation of the defense, and already encompasses the right to have information translated into a language the accused understands. Obviously, an effective defense starts with knowing in detail what one is being accused of, and consequently, these rights also apply to any amendments to charges.[206]

Because the ultimate objective of these fair trial provisions is allowing an effective defense, which is a notoriously subjective notion, the assessment whether an accused has received sufficient notice is inherently one that must be conducted on a case-by-case basis. Allowing special features to be taken into consideration in this respect does not deviate from international human rights standards per se.[207] As previously noted, the *Kupreškić* AC held that the massive scale of international crimes might justify a lower degree of specificity, which in and of itself is not unreasonable. However, especially in the early days of the ad hoc Tribunals, it opened the door to using this claim of "uniqueness" as an excuse for "loose drafting, less particularization, and less rigorous

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[201] *Id.*; ICTR Statute, art. 20(4)(a); SCSL Statute, art. 17(4)(a); STL Statute, art. 16(4)(a). *See also* Rome Statute, art. 67(1)(a); ECCC Internal Rules, *supra* note 50, r.21(1)(d).

[202] *See, e.g.*, Ntagerura Trial Judgment, *supra* note 62, ¶ 29.

[203] *See* Pélissier & Sassi v. France, App. No. 25444/94, Eur. Ct. H.R. (1999), ¶ 52.

[204] *Id.*

[205] *See* Blaškic Defects Decision, *supra* note 58, ¶ 32. *See also* Wayne Jordash & John Coughlan, *The Right to be Informed of the Nature and Cause of the Charges: A Potentially Formidable Jurisprudential Legacy*, *in* JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 286, 289 (Shane Darcy & Joseph Powderly eds., 2010).

[206] *See, e.g.*, Mattoccia v. Italy, App. No. 23969/94, Eur. Ct. H.R. (2000), ¶¶ 59–61.

[207] *See, e.g.*, Fox, Campbell & Hartley v. United Kingdom, App. No. 12244/86; 12245/86; 12383/86, Eur. Ct. H.R. (1990), ¶ 40 (observing that "[w]hether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.").

scrutiny of indictments."[208] Fortunately, this tendency has changed, and recent case law at the ICTY and ICTR shows adequate charging standards consistent with international human rights law.[209] At the ICC, the practice of the ICTY and ICTR is largely followed, too.[210] The SCSL's practice remained problematic though. Commentators have noted that the concise charging instrument supplemented with a case summary fell short of international standards.[211]

The idea that the nature of international crimes leaves prosecutors with unparalleled challenges has at times inspired a search for creative solutions outside of indictment requirements. For instance, in *Ntakirutimana* at the ICTR, the Trial Chamber allowed indictment defects to be cured through disclosure of evidence, holding that it depends on the circumstances of the case and as long as this is done before the commencement of trial. To be more specific, one of the indictments was found to lack specificity, but the pre-trial brief included eighty witness statements of the witnesses who would be called to testify at trial. This additional information was submitted one month before trial, and the Chamber held that this was most indicative of the material facts of the case.[212] Thus, where there had been sufficient notice to the accused through pre-trial disclosure of evidence, charges were not dismissed. This is controversial. In another case, a different ICTR Trial Chamber refused to allow other submitted information to so easily cure defects in the indictment: it held that all material facts must be properly pleaded in the indictment and pre-trial submissions and disclosure are not adequate substitutes.[213] If a paragraph in the indictment is indeed defective, the Chamber continued, it could be disregarded.[214] This does not mean, however, that the Chamber cannot take the evidence supporting said paragraph into consideration.[215] Moreover, referring to *Kupreškić*, the Chamber noted it "might understandably be reluctant to allow a defect in the form of the indictment to determine finally the outcome of a case in which there is strong evidence pointing towards the guilt of the

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[208] Jordash & Coughlan, *supra* note 205, at 289.

[209] *See* Friman et al., *Charges*, *supra* note 5, at 456.

[210] *See supra* Part III.

[211] *See, e.g.*, Jordash & Martin, *supra* note 97; Friman et al., *Charges*, *supra* note 5, at 456.

[212] *See* Prosecutor v. Ntakirutimana & Ntakirutimana, Cases No. ICTR-96-10 & ICTR-96-17-T, Judgment and Sentence, ¶ 63 (Feb. 21, 2003), http://www.unictr.org/Portals/0/Case/English/Elizaphan/index.pdf. The judgment and sentence were upheld on appeal. However, some factual finding by the Trial Chamber were quashed because they were not in the indictment, making it defective, and this was not remedied for the facts were not specified in the Pre-Trial brief or witness statements. *See* Ntakirutimana Appeal Judgment, *supra* note 65, ¶¶ 86, 99, 289, 555.

[213] *See* Ntagerura Trial Judgment, *supra* note 62, ¶ 66.

[214] *Id.* ¶ 67.

[215] *Id.*

accused."[216] In other words, in exceptional instances solutions may indeed be found through other avenues as long as a balance is struck. Underscoring the case-by-case nature of the assessment, it held that "[i]f strong evidence of guilt is found to exist, the Chamber will take into consideration to what extent the lack of notice and the ambiguity influenced the evidence and will adjust its findings if necessary."[217]

The right to be put on notice and its attached rights relate primarily to the charging instrument, which should contain all the material facts. However, at the ad hoc Tribunals, a narrow exception exists that allows disclosed evidence or other information (such as a pre-trial brief) to have a curing effect on an otherwise defective indictment (*i.e.*, one that lacks specificity). This exception can only be allowed when the accused is given "timely, clear and consistent information detailing the factual basis underpinning the charges."[218] This exception is far from ideal and should be avoided whenever possible. It is highly problematic to require from the defense that it sift through large amounts of disclosures in order to ascertain which facts may underpin the charges, especially when such information is not made available until the eve of trial.[219] Moreover, "in light of the factual and legal complexities normally associated with [international] crimes" the number of cases in which indictment defects may be cured through such means is extremely limited.[220]

Until recently, it was not clear whether the ICC allowed a curing effect by other document s in the same way as at the ad hoc Tribunals.[221] Commentators even thought the ICC's Approach might turn out to be stricter.[222] As a general rule, the DCC must be read in conjunction with the prosecution's list of evidence.[223] This means that when items on this list can remedy a certain amount of ambiguity in the DCC, a defense's claim that the DCC is too vague has no merit.[224] Both documents are provided simultaneously, which arguably, makes it rather unproblematic if the list can remedy a certain degree of vagueness. However, in the *Lubanga* Appeal Judgment, the Appeals Chamber seemed to have opened the door to a worrisome practice. It reiterated the importance of the prosecution's list of evidence in remedying vagueness of charges, but

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[216] *Id.* ¶ 68 (citing Kupreškić Appeal Judgment, *supra* note 61, ¶ 125).

[217] *Id.*

[218] Kupreškić Appeal Judgment, *supra* note 61, ¶ 114. *See also* Blaškić Appeal Judgment, *supra* note 72, ¶ 237; *Fofana & Kondewa*, AC, SCSL, May 28, 2008, ¶ 443; Ntakirutimana Appeal Judgment, *supra* note 65, ¶ 125.

[219] *See* Ntagerura Trial Judgment, *supra* note 62, ¶ 66.

[220] *See* Kupreškić Appeal Judgment, *supra* note 61, ¶ 114.

[221] *Cf.* Bemba Confirmation Decision, *supra* note 118, ¶ 207. *See also* Friman et al., Charges, *supra* note 5, at 423.

[222] *See* Friman et al., *Charges*, *supra* note 5, at 423.

[223] *See* Bemba Confirmation Decision, *supra* note 118, ¶ 150.

[224] *See* Katanga & Ngudjolo Decision on Defences' Motions, *supra* note 110, ¶ 25.

added "other auxiliary documents" to the list of possible curing items.[225] It found that "all documents that were designed to provide information about the charges, including auxiliary documents, must be considered to determine whether an accused was informed in sufficient detail of the charges."[226] The Appeals Chamber then continued by adding a couple of conditions, namely: (i) this relates only to information made available before the start of the trial hearings,[227] and (ii) "where submissions by the Prosecutor made in advance of the trial hearings related to the factual allegations provide additional detail, this can be taken into account when determining whether the accused's right to be information in detail of the charges has been violated."[228] In the case at hand, the Appeals Chamber referred, in additional to the DCC, to the Amended DCC and the Summary of Evidence,[229] but this second prerequisite theoretically adds a very wide range of documents capable of curing defective indictments.

B. *Ne bis in idem*

An often neglected yet related issue in relation to the importance of indictment specificity is the protection against double jeopardy. In common law, preventing multiple jeopardy for the same crime, also known as the *ne bis in idem* principle, is a function of indictments given substantial attention. In *Hagner*, the U.S. Supreme Court observed that:

> [t]he true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged "and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."[230]

Protection against double jeopardy may be regarded as the basis of the prerequisite that the pleading sets forth the essential elements of the crime, and that it provide sufficient specificity as to the underlying facts.[231] It is a principle found in nearly every system—national, regional and international—in the world.[232] *Ne bis in idem* literally means "not

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[225] *See* Lubanga Appeal Judgment, *supra* note 111, ¶ 124.
[226] *Id.* ¶ 128.
[227] *Id.* ¶ 129.
[228] *Id.* ¶ 130.
[229] *Id.* ¶ 132.
[230] Hagner v. United States, 285 U.S. 427, 431 (1932).
[231] *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 915–16 (5th ed 2009).
[232] *See* Friman et al., *Charges*, *supra* note 5, at 471–77, 482.

twice for the same." The principle's details vary per system, but in most national systems "the same" entails a factual approach (the historical facts and conduct) as opposed to a legal approach (a particular criminal offense, which offers narrower protection).[233]

Due to the relationship international criminal courts and tribunals have with states, double jeopardy plays a role in different ways that are "trans-jurisdictional" or "transnational,"[234] and which may be characterized as downward and upward vertical *ne bis in idem* (*i.e.*, externally between national and international systems), as opposed to horizontal (*i.e.*, internally within one national or international system). As Article 10 of the ICTY Statute and Article 9 of the ICTR Statute say: "no person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal."[235] Such downward vertical double jeopardy protection is absolute. While some commentators have suggested it is not clear whether it entails a factual or a legal approach, most seem to agree that *idem* is to be understood as 'same offense,' making it a legal approach.[236] Upward vertical double jeopardy protection is not absolute. The ICTY, ICTR and SCSL may try a person already tried by a national court (1) in case the person was tried for an act characterized as an ordinary crime, or (2) when the national proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.[237] Only the second exception applies to the STL.[238] The ordinary crime exception with upward *ne bis in idem* underscores that the conduct's legal qualification is indeed relevant, making it a legal approach. The statutes of the ad hoc Tribunals do not include horizontal *ne bis in idem* provisions, probably because the drafters found the occurrence of a retrial at the same tribunal very unlikely.[239]

At the ICC, the *ne bis in idem* provision in Article 20 of the Statute

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[233] *Id*. at 475–76. *See generally* Gerard Conway, *Ne Bis In Idem in International Law*, 3 INT'L CRIM. L. REV. 217 (2003); WIENE FRANCINE VAN HATTUM, NON BIS IN IDEM : DE ONTWIKKELING VAN EEN BEGINSEL (2012).

[234] Friman et al., *Charges*, *supra* note 5, at 482.

[235] The statutes of the SCSL and STL only prohibit Sierra Leonean and Lebanese courts from trying persons already tried by these international tribunals, because their founding agreements do not bind other states than Sierra Leone and Lebanon. *See* SCSL Statute, art. 9(1), STL Statute, art. 5(1). *See also* Sarah M.H. Nouwen & Dustin A. Lewis, *Jurisdictional Arrangements and International Criminal Procedure*, in INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 116, 121 (Göran Sluiter et al. eds., 2013).

[236] *See* Friman et al., *Charges*, *supra* note 5, at 440.

[237] *See* ICTY Statute, art. 10(2)(a)–(b); ICTR Statute, art. 9(2)(a)–(b); SCSL Statute, art. 9(2)(a)–(b). *See also* ICTY/R RPEs, r.13.

[238] *See* STL Statute, art. 5(2).

[239] *See* Friman et al., *Charges*, *supra* note 5, at 439.

must be read in light of the principle of complementarity. Pursuant to Article 20(3), which mirrors Article 17 of the ICC Statute that deals with admissibility of cases and provides the division of labor between the ICC and national jurisdictions, no person who has been tried by another court for conduct also proscribed under Articles 6, 7, or 8 shall be tried by the ICC with respect to the same conduct unless the proceedings in the other court were (1) for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (2) otherwise not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.[240] This upward vertical *ne bis in idem* entails a factual approach, which means that it does not matter whether the national court qualified the conduct as an ordinary crime or not. In other words, the ICC Statute, like the STL Statute, does not contain the "ordinary crime" exception like the statutes of the other Tribunals do.[241] The downward vertical *ne bis in idem* specified in Article 20(2) entails a legal approach, though, which means that national courts are free to try crimes outside the jurisdiction of the ICC. Another difference with the ad hoc Tribunals is that the ICC includes an internal, horizontal *ne bis in idem* provision in Article 20(1), which employs a factual approach.[242]

The *ne bis in idem* principle expresses "the uniqueness of the criminal trial."[243] The principle's inclusion here is necessary, because—similar to the right to prepare an effective defense—it is a tool that helps determine how specific a case must be delineated. This is especially so when a factual approach to double jeopardy is applicable. While offering more protection than the legal approach, the factual approach "typically encounters significant problems in determining the precise limits of the object of a trial."[244] This provides all the more reason to be as specific as possible from the beginning. When drafting indictments, a useful hypothetical question would be how it would stand under the *ne bis in idem* principle test. If repeated charges are easily conceivable, the indictment is too vague under the specificity of charges principle.

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[240] *See* Rome Statute, art. 20(3).

[241] *Cf. id.* ("with respect to the same conduct"). *See also* Prosecutor v. Al-Islam Gaddafi and Al-Senussi, Case No. ICC-01/11-01/11-344-Red, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ¶ 86 (May 31, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1599 307.pdf.

[242] *See generally* Friman et al., *Charges*, *supra* note 5, at 442–45.

[243] *Id*. at 436.

[244] *Id*. at 476.

V. CONCLUSION

Throughout the history of international criminal courts and (military) tribunals, the complex nature of international crimes has been stated as reason to forgive lowering standards of specificity of charges. From the Control Council Law No. 10 *Justice* judgment to contemporary ICTY, ICTR, SCSL, and ICC decisions, judges have expressed the idea that with crimes of "cataclysmic dimensions"[245] the prosecution "cannot be obliged to perform the impossible,"[246] and requiring a high degree of indictment specificity is "impracticable."[247] Indeed, the factual parameters of international crime cases are not easily set, and a prosecutor's perspective in this is easily sympathized with. The challenges are undoubtedly tremendous. In practice, however, this has led to vague indictments. This is not only due to a lack of factual specificity. It is also caused by evidentiary imprecision—conflating material facts and subsidiary/evidentiary facts on the one hand, and facts and (pattern) evidence on the other.

While allowing exceptions to specificity based on international crimes' uniqueness is most certainly not without merit, it finds its limit in the 10 general pleading principles and related fair trial rights discussed in this Article. Accordingly, the effect of international crimes' massive scale on their prosecution should be left to a minimum. This corresponds with how case law developed over the past two decades. While the early post-World War II judgments showed much more leniency in respect of scale-related prosecutorial challenges, the contemporary cases have been faced with much higher demands. The argument that the nature of international crimes pardons a lower degree of specificity of charges has slowly been losing ground, and the "unique nature" argument therefore no longer carries as far as it once did.

The rights of the accused comprise the normative boundaries of how unspecific charges are allowed to be and how much confusion of facts and evidence is remediable fairly. They form a two-prong test in this respect: (1) is the accused in a position to prepare an effective defense, and (2) can a double jeopardy assessment be made? These two questions are to be kept in mind when applying the 10 pleading principles as well as when making a distinction between different types of facts evidence, for tolerating erosion of the rights of the accused in deference of perceived challenges is not the way to go. If something needs to give due to the challenging nature of the crime, it should not be the rights of the accused. Rather, answers should be sought in prosecutorial methods of framing the case, which goes back to the investigation stage of the

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[245] Sesay Indictment Decision, *supra* note 70, ¶ 23.
[246] Brđanin & Talić Decision on Objections by Talić, *supra* note 62, ¶ 22.
[247] Kupreškić Appeal Judgment, *supra* note 61, ¶ 89.

proceedings.

Admittedly, international crimes' complexities and associated evidentiary challenges, as described by, amongst others, Nancy Combs in her book *Fact-Finding without Facts*,[248] lead to unparalleled fact-finding impediments. There is indeed a certain amount of uniqueness to proving international crimes, but where fact-finding becomes so challenging that it lacks adequate precision, this will be reflected in the indictment and throughout the presentation of evidence during trial. This in turn affects the rights of the accused to be sufficiently informed of the charges. In other words, a well-defined indictment must be preceded by precise fact-finding; if the latter lacks accuracy, the charging document will inevitably be vague, too. The link between available evidence through adequate fact-finding and indictment specificity was already illustrated very early on by *Einsatzgruppen*.[249] The *Einsatzgruppen* indictment had reached its high level of specificity because most of the evidence came from elaborate previous testimony by defendant Otto Ohlendorf in the IMT trial where he had testified as a witness.

International crime cases still suffer from vague charges and imprecise categorization of facts and evidence too often, resulting in ambiguous case demarcation to the detriment of the accused. This unwanted result is usually approached from the perspective of specificity of charges, which indeed sets the factual and legal boundaries of a case at trial and puts the accused on notice. An understudied topic thus far, however, has been the use of facts and evidence in this respect. This Article has shown that all parties, but most importantly prosecutors and judges, need to be much clearer and more explicit in how they use and characterize different types facts, pattern evidence, and evidence of similar conduct. While seemingly simple in theory, such distinctions are notoriously complicated to make in practice. This kind of confusion not only hurts the prosecution, but also violates the rights of the accused as it renders the question of what it is we are trying to prove without a straightforward answer.

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[248] *See generally* NANCY A. COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2010).

[249] *See supra* Part II.A.

ISRAEL'S LAWS ON REFERENDUM: A TALE OF UNCONSTITUTIONAL LEGAL STRUCTURE

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I. INTRODUCTION

On November 28, 2010, the Law and Administration (Annulment of the Application of the Law, Jurisdiction and Administration) (Amendment) Law, 2010 (Referendum Law) was endorsed and published in *Reshumot* (the Official Governmental Journal) by the Israeli Parliament (Knesset), thus entered into force as a binding law.[1]

The law was enacted as an amendment to an earlier legislation called "The Law and Administration (Annulment of the Application of the Law, Jurisdiction and Administration) (Amendment) Law, 1999" (Golan Heights Entrenchment Law), which granted the executive branch in Israel the power to make decisions regarding the annulment of the law, jurisdiction, and administration of the State of Israel over the Golan Heights, together with its power to relinquish this area subject to a binding referendum, held in accordance with a Basic Law on referendum, to be enacted later on by the Knesset.[2] In other words, the Golan Heights Entrenchment Law was declaratory; thus calling upon the need to enshrine such referendum apparatus in a Basic Law enactment.

1. The Book of Laws, no. 2263 (Nov. 28, 2010).
2. The Book of Laws, no. 1703 (Feb. 9, 1999).

Despite of the Knesset's manifest declaration—as provided by the Golan Heights Entrenchment Law—for the need to a Basic Law legislation that normatively enshrines the referendum system as a binding law in Israel, at least regarding the application of the Israeli law, jurisdiction and administration over the Golan Heights—such constitutional legislation, has not come to exist.

Surprisingly however, instead of the enactment of a Basic Law—as provided in the Golan Heights Entrenchment Law—an ordinary legislation, in the shape of the Referendum Law was made, thus not only enshrining the concept of referendum in an ordinary law, but also providing a complete set of rules for the implementation of such referendum—rules that resemble the proceedings applicable in times of holding elections to the Knesset.

Remarkably, the Referendum Law does not limit its application to the saga surrounding the Golan Heights, but rather enlarges its scope to any area that is subject to the law, jurisdiction and administration of the State of Israel.[3] Namely, even though the law does not state it straight forward, the Golan Heights and East Jerusalem.

On December 13, 2010, I decided to challenge the constitutionality of the Referendum Law by submitting a petition to the Supreme Court of Israel, sitting as the High Court of Justice (HCJ or the Court), against the Knesset et al. (petition).[4] In principle, I argued that if a constitutional democracy is about to adopt a binding referendum system, then this must be done through a constitutional amendment and not an ordinary legislation. In addition, I asserted that the concept of binding referenda contradicts the basic and fundamental constitutional principles on which constitutional democracies stand; for it violates the required political, social, and legal balances that otherwise such democracies may strike, especially in the context of protecting the rights of minorities in multicultural societies.[5] In response to the petition, the respondents opposed to my arguments *per se*.[6]

During the first hearing session before the HCJ, on December 25, 2011, and following the Court's remarks, I agreed to limit the scope of the petition to the constitutional queries concerning the proper form of enactment for the Referendum Law, namely in a Basic Law, as distinguished from an ordinary law.[7] The idea behind making such a decision is that no actual referendum was at stake, and thus a problem of judicial review could have been emerged. At this stage, the Court urged the respondents to agree on the issuance of a decree *nisi*, thus addressing

3. Referendum Law, art. 3(1A)(a).
4. *See* HCJ 9149/10 (Isr.).
5. *Id.*
6. *Id.*
7. *Id.*

the petition substantively, but the latter refused. At the end of the day, the Court decided to hear the respondents' arguments against the issuance of a decree *nisi* in a larger panel of seven judges, instead of three, basically due to the important constitutional questions at stake.[8]

Accordingly, the respondents argued in depth before the HCJ during the second hearing session on November 20, 2012. Their basic argument was that although it is constitutionally preferable to enshrine the referendum system in a Basic Law legislation rather than an ordinary law, still it is not necessary.[9] In addition, the respondents asserted that even if I was right in my argument, the Court had no judicial power to intervene, thus declaring the Referendum Law void.[10] It was the respondents' contention that the Court's power for judicial review is limited in scope to extreme cases of unique circumstances that move heaven and earth. In their view, this was not the case in this particular petition. At this stage, the Court addressed the respondents again, seeking their consent to the issuance of a decree *nisi*, but the latter were not ready to make any concession. It was remarkable that during the long hearing at this session, the judicial panel did not approach me with even a single question.

On December 25, 2011, following the second hearing session, and despite the respondents' position, the HCJ issued a decree *nisi*, thus requiring the latter to address the petition substantively.[11]

A third hearing session before the HCJ, in which my arguments and the respondents' assertions were supposed to be discussed in depth, was scheduled for June 17, 2014. However, shortly before, on March 12, 2014, the Knesset enacted Basic Law: Referendum (Referendum Basic Law), which incorporated the referendum system, as a binding apparatus, in a Basic Law, thus leaving the details concerning the referendum's structure and its application valid as set forth in the Referendum Law.[12] Ironically, this happened at the time the petition was pending before the HCJ, where the respondents'—which included the Knesset and the Government—argued against the need for such Basic Law legislation.

In any case, and to this extent, the petition became irrelevant, for the legal remedy sought by submitting it before the HCJ was achieved, ultimately, by legislation. Accordingly, on May 13, 2014, the petition was withdrawn.

In this Article, I aim at discussing the question whether it was necessary to enact the Referendum Basic Law instead of, or in addition to, the Referendum Law in order for the Knesset to incorporate the referendum system as a binding mechanism in the Israeli law, or so

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. The Book of Laws, no. 2443 (Mar. 19, 2014).

preferable as argued by the Knesset and the Government before the HCJ. In addition, I purport to discuss the inadequacy of the referendum system to legal systems of constitutional democratic features, regardless of the question whether such a system was adopted by an ordinary legislation or enshrined in a constitutional amendment. It is worthwhile to remember that due to the Court's remarks, the latter argument was omitted from the petition and accordingly was not discussed at all before the Court.

In the first Part of the Article, I provide a broad normative survey of the entire legal infrastructure, in the light of which the constitutionality of the laws on referendum must be examined. Further, I examine the status of the substantive principle of the rule of law, as a binding normative legal principle and not merely as a declarative interpretive principle. Subsequently, I present the constitutional pillars upon which Israel's Basic Laws rely. In this connection, I also discuss the HCJ's power for judicial review, including the mandate to invalidate unconstitutional laws. This constitutional debate necessarily entails an examination of the constitutional mechanisms for amending Basic Laws in Israel and the way in which protected fundamental rights may be violated. This discussion in turn requires scrutinizing the primary concepts that underlie the most basic legal principles on which the legal regime in Israel is founded—both in terms of the civilian and political identity of the State, and in terms of the relationship between the central branches of the State (particularly, the legislative and executive branches), and the role of the People as the sovereign in this relationship.

In the second Part of the Article, I engage in a concrete legal debate regarding the constitutionality of the laws on referendum, led by the basic principles, as described in the first Part of this Article.

Finally, in the third Part, I summarize the issue by indicating the constitutional legal grounds that undermine the constitutionality of the laws on referendum. Ultimately, this constitutional scrutiny of the laws on referendum leads to one conclusion, namely, that these laws are unconstitutional, and, as such, are void *ab initio*. This conclusion results not only from the fact that the laws on referendum completely contradict the constitutional system in the State of Israel—in relation to the amendment of basic legislation—but also from their inherent contradiction to the substantive principle of the rule of law. As such, they afflict a fatal blow to the protected basic rights of its citizens in general and of the Arab citizens of Israel, as a national minority, in particular, all the more so Israel's Arab residents of the Golan Heights and East Jerusalem. Among the violated fundamental rights are: the right to vote, the right to be elected, the right to dignity and the right to equality. Thus, the laws on referendum undermine the extremely delicate political, legal, and constitutional balance on which the State of Israel was founded and in which light its legal tradition was developed.

In the following chapters, I intend to address the hereunder questions in depth:

(1) Does the Referendum Law contradict or violate the substantive principle of the rule of law?

(2) Whereas material modifications were initially effected through ordinary legislation, namely, the Referendum Law, rather than through basic legislation, does the Referendum Law materially modify substantive constitutional provisions under Basic Law: The Knesset and/or Basic Law: The Government and/or Basic Law: Jerusalem, Capital of Israel—otherwise than in accordance with accepted and binding judicial rulings in the Israeli legal system?

(3) Do the Referendum Basic Law and the Referendum Law (laws on referendum) violate fundamental rights, including the collective rights of the Arab minority in the State of Israel—all the more so Israel's Arab residents of the Golan Heights and East Jerusalem—protected by Basic Law: Human Dignity and Liberty, otherwise than in accordance with the provisions of the limitation clause enshrined in Section 8 of Basic Law: Human Dignity and Liberty?

(4) Do the laws on referendum violate fundamental rights, including the collective rights of the Arab minority in the State of Israel—all the more so Israel's Arab residents of the Golan Heights and East Jerusalem—protected by Basic Law: The Knesset, otherwise than in accordance with the judicial provisions of the limitation clause?

Before stepping forward, I would like to emphasize, that although this Article concerns solely with the Israeli case surrounding the referendum saga, it still stands on comparative and conceptual grounds, such that apply to every democracy, all the more so to constitutional democracies.

II. THE NORMATIVE FRAMEWORK

The laws on referendum test the Israeli legal system afresh. It poses a serious legal challenge to the legal system. In this Part of the Article, I will sketch the normative framework that shapes Israel's governmental and constitutional systems. In light of my conclusions herein, I will, in the next section, deal separately with the issue of the constitutionality of the laws on referendum. As I will explain in detail below, the initial enactment of the Referendum Law, and the legal position as provided by the respondents to the petition before the HCJ, draws us, to a large extent, back to the *United Mizrachi Bank Ltd* case (*Mizrachi Bank* case),[13] and

13. *See generally* CA 6821/93 United Mizrachi Bank Ltd. v. Migdal Cooperative Village, 49(4) PD 221 [1995] (Isr.), *available at* http://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-bank-part-i. This is deemed as a touchstone case in the constitutional

reconsiders some of the judicial rulings and declarations made in that case.

A. *The (Formal and Substantive) Principle of the Rule of Law*

The rule of law, in its substantive sense, deals with the aspiration for governmental actions to comply with certain fundamental requirements. These requirements are intended to guarantee the internal morality of the law, which is critical to ensuring that the public feels committed to the law and complies with its provisions out of recognition of the law's binding validity. Safeguarding these principles allows the law to fulfill its mission as a social institution; the purpose of which is to enable human beings to live together, increase the public's sense of security and protect individual freedoms. Respect for the rule of law is essential to ensure the legitimacy of law enforcement among the members of the public who are subject to that law.[14]

In this context, I am not referring to the concept of "law" in its narrow sense (*Gesetz* in German, *loi* in French, *ley* in Spanish, and *law* in English), but rather to the term "Law" in a broader sense that even equates to "justice." Law is binding not because it has been enacted in a proper formal procedure by a duly elected legislature, but because it is just and proper (*Recht* in German, *droit* in French, and *derecho* in Spanish).[15]

The essence of this concept lies in the distinction between formal and substantive democracy. While formal democracy is only interested in the opinion of the majority and seeks to enforce the majority's decisions, whether these are good or bad, substantive democracy respects the opinion of the majority yet, at the same time, guarantees that minorities (weakened groups) are protected, particularly in circumstances where the majority misuses its powers to abuse these minorities. In this context, in another place I once wrote:

> The Athenian state had a constitution and a supreme court. Neither Socrates nor Plato criticized democracy as such. Socrates was inciting the aristocratic young men of Athens to revolt against the democracy of Athens, namely, against the rule of the majority. This is what captured Plato's mind in offering *The Republic*, the

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legal history of the state of Israel, where the normative status of Israel's Basic Laws was discussed, as well as the HCJ's power on judicial review.

14. AMNON RUBINSTEIN & BARAK MEDINA, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL: FUNDAMENTAL PRINCIPLES vol. 1, at 284–85 (2005) (in Hebrew).

15. MOHAMMED S. WATTAD, THE MEANING OF CRIMINAL LAW: THREE TENETS ON AMERICAN & COMPARATIVE CONSTITUTIONAL ASPECTS OF SUBSTANTIVE CRIMINAL LAW 124–25 (2007); RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN 11 (1990); JOHN RAWLS, A THEORY OF JUSTICE (1971); IAN SHAPIRO, DEMOCRATIC JUSTICE (1999); NORBERTO BOBBIO, THE AGE OF RIGHTS (Allan Cameron trans., 1996); LOUIS HENKIN, THE AGE OF RIGHTS (1990).

> challenge of providing a true definition of justice, a philosophy of just and good society; for him, democracy is the rule of Law, namely, the rule of Good and Justice . . . While formal democracy is the rule of the majority, constitutional democracy considers the voice of the majority as another factor in determining what is fair and just, thus preventing any likelihood of abuse of minority rights (those whose interests are not protected by the majority). Formal democracy acts in accordance with the rule of the legislature, no matter how right, decent, just, and fair the legislature might be; what the legislature says the law is becomes binding law. Constitutional democracy scrutinizes the legislature's actions for their compatibility with the fundamental principles of fairness, reason, justice, and good. Finally, formal democracy represents the rule of law, but constitutional democracy is driven by the rule of Law. As Plato once argued against formal democracy, those who belong to the majority are concerned only with their own immediate pleasure and gratification, and therefore a democracy that relies on the rule of the majority cannot produce good human beings.[16]

The principle of the rule of law is counted, therefore, among the fundamental and central principles of any legal system, shaping the content and interpretation of the legal norms and often determining their validity. The fundamental principles are superior to ordinary legislative provisions.[17] This approach reflects the view that the constitution itself is not always paramount, as even the constitution is subject to these fundamental principles.[18] In this context, the remarks of Justice Aharon Barak in the matter of the *Laor Movement—One Heart and a New Spirit* are apt:

> In theory-principle, it is possible for a court in a democratic society to declare that a law, which violates fundamental principles of the system, is void; even if these fundamental principles are not anchored in a rigid constitution or in an entrenched Basic Law. There is nothing axiomatic in the approach that a law is not invalidated because of its content. The invalidation of a law by the court because it seriously infringes fundamental principles does not violate the principle of the sovereignty of the legislature, as

16. *See* WATTAD, *supra* note 15, at 196–98.

17. EA 1/65 Yardur v. Chairman of the Central Elections Committee of the Sixth Knesset 19(3) P.D. 365, 389 [1965] (Isr.).

18. SHMUEL SAADIA & LIAV ORGAD, REFERENDUM 123 (2000) (in Hebrew).

sovereignty is always limited.[19]

B. *Constitutional Characteristics of the Basic Laws*

Israel's Basic Laws were adopted in an atmosphere where it was intended to formulate supra legal constitutional norms. They certainly include elements characteristic of constitutions.[20] As such, through its rulings, the HCJ elevated these Basic Laws to a supreme normative status rising above that of other laws called "ordinary laws." Accordingly, when a legal norm in a Basic Law conflicts with another one of an ordinary law, the first will prevail and the latter yields.[21]

Most of the fundamental rights protected on the constitutional level are grouped within the provisions of Basic Law: Human Dignity and Liberty. Nonetheless, this Basic Law does not accord explicit protection to all utopian fundamental rights. Over the years, especially and particularly following the adoption of Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, as well as the judgment in the *Mizrachi Bank* case[22]—but also earlier[23]—the HCJ enshrined some of the unprotected fundamental rights within the right to dignity. Among the rights which are not expressly protected one may find the right to freedom of expression and the right to equality.[24]

C. *The Force of Basic Laws as the Basis for Judicial Review*

> Political liberty is to be found only in moderate governments; and even in these it is not always found. It is there only when there is

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19. HCJ 142/89 Laor Movement—One Heart and a New Spirit v. Knesset Speaker 44(3) P.D. 529, 555 [1989] (Isr.).

20. EITAN INBAR, CONSTITUTIONAL LAW AS REFLECTED IN JUDICIAL RULINGS 69 (2001) (in Hebrew).

21. RUBINSTEIN & MEDINA, *supra* note 14, at 98.

22. *Mizrachi Bank*, CA 6821/93.

23. *See generally* HCJ 355/79 Catalan v. Israel Prisons Service 34(3) PD 294 [1979] (Isr.); CA 294/91 Burial Society "Jerusalem Community" v. Kastenbaum 46(2) PD 464 [1991] (Isr.); HCJ 98/69 Bergman v. Minister of Finance 23(1) PD 693 [1969] (Isr.); HCJ 114/78 Burqan v. Minister of Finance 32(2) PD 800 [1978] (Isr.); HCJ 73/53 "Kol Ha'am" Ltd. v. Minister of the Interior 7 PD 871 [1953] (Isr.); HCJ 253/64 J'aris v. Haifa District Commissioner 18(4) PD 673 [1964] (Isr.); HCJ 1/49 Bejerano v. Minister of Police 2 PD 80 [1949] (Isr.); HCJ 337/81 Mitrani v. Minister of Transport 33(3) PD 337 [1981] (Isr.).

24. *Cf.* HCJ 5394/92 Hofert v. "Yad Vashem" Holocaust Martyrs and Heroes Remembrance Authority 48(3) PD 353 [1992] (Isr.); HCJ 4674/94 Mitral Ltd. v. The Knesset 50(5) PD 15 [1994] (Isr.); HCJ 5688/92 Weichselbaum v. Minister of Def. 47(2) PD 812 [1992] (Isr.); HCJ 3299/93 Weichselbaum v. Minister of Def. 49(2) PD 195 [1993] (Isr.); HCJ 4541/94 Miller v. Minister of Def. 49(4) PD 94 [1994] (Isr.); CA 4463/94 Golan v. Israel Prisons Serv. 50(4) PD 136 [1994] (Isr.); HCJ 4804/94 Station Film Ltd. v. Film & Play Review Bd. 50(5) PD 661 [1994] (Isr.).

> no abuse of power; but constant experience shows us that every man invested with power is apt to abuse it, and carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits? To prevent this abuse, it is necessary, from the very nature of things that power should be a check to power.[25]

The HCJ, by virtue of the supra-legal constitutional authority vested in it by Section 15(c) of Basic Law: The Judiciary and, especially, following the judicial decisions rendered in the wake of the *Mizrachi Bank* case[26]—as well as in accordance with earlier case law,[27] has jurisdiction to consider and determine the legality of laws. The process of reviewing the legality of laws is essentially interpretive, where the task of interpretation is one of the chief powers wielded by the judiciary.[28]

There is no dispute as to the authority of the HCJ to interpret laws, Basic Laws, regulations and other legal norms. When the HCJ interprets an ordinary law in light of a Basic Law, which it is also authorized to interpret, and a conflict is discovered between the Basic Law and the ordinary law, that conflict essentially relates to the interpretation of the relevant laws.[29]

The ruling in the *Mizrachi Bank* case further strengthened the position of the HCJ in terms of its authority to review not only the legality of laws but also the constitutionality of laws.[30] A chief aspect of this latter authority is that it enables the Court to fulfill its mandate to maintain the rule of law.[31] After all, the primary function of the HCJ is to instill democratic values in society and enforce the rule of law, primarily on the governmental authorities, where the legitimacy of the constitution and the Basic Laws grant legitimacy to the judicial review.

Another key aspect of the legitimacy of the HCJ's authority to review the constitutionality of laws may be found in the implementation of the fundamental constitutional principle concerning the separation of powers—in the substantive sense of that principle (*i.e.*, in the sense of the

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25. BARON DE MONTESQUIEU, THE SPIRIT OF LAWS Vol. 1, ch. 4 (1748).

26. *See Mizrachi Bank*, CA 6821/93; *see also* Basic Laws of Israel, Judiciary § 15(c) (1984) [hereinafter Judiciary].

27. *Cf.* RUBINSTEIN & MEDINA, *supra* note 14, at 182; HCJ 246/81 Derech Eretz Ass'n v. Broad. Auth., 35(4) PD 1 [1981] (Isr.); HCJ 141/82 Rubinstein v. Speaker of the Knesset 33(3) PD 141 [1982] (Isr.); HCJ 726/94 Clal Ins. Co. v. Minister of Fin. 48(5) PD 441 [1994] (Isr.).

28. INBAR, *supra* note 20, at 84; RUBINSTEIN & MEDINA, *supra* note 14, at 151–63. *See generally* Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L.Q. 457 (2012).

29. INBAR, *supra* note 20, at 89.

30. *See Mizrachi Bank*, CA 6821/93.

31. RUBINSTEIN & MEDINA, *supra* note 14, at 265–311.

implementation of checks and balances).[32]

This is true *a fortiori*, given that the Basic Laws were accorded constitutional supra-legal normative status—particularly following the judgment in the *Mizrachi Bank* case.[33] That judgment laid out clear rules relating not only to the normative status of the Basic Laws but also to the normative mechanism involved in implementing them, including amendments and violations of rights protected by the laws, and examined the nature of formally entrenched Basic Laws and others which are substantively entrenched.[34]

D. *The Constitutional Operating Mechanism and its Implications: Varying Basic Laws versus Violating Protected Constitutional Rights; Formal Entrenchment versus Substantive Entrenchment*

A Basic Law may be varied only by means of another Basic Law; it cannot be varied through "ordinary legislation," whether the original Basic Law has been formally entrenched or not.[35] Moreover, a violation of a fundamental right protected by Basic Law: Human Dignity and Liberty is permitted only where that violation meets the cumulative conditions set by the limitation clause, as embodied in Section 8 of this Basic Law. In effect, the limitation clause, with its varied requirements, substantively entrenches the fundamental rights protected by Basic Law: Human Dignity and Liberty.

Apart from the latter Basic Law, fundamental rights are also protected by other basic legislation; for instance Basic Law: The Knesset, such as the right to vote and the right to be elected. This should be mentioned though that Basic Law: The Knesset does not incorporate any clause providing for substantive entrenchment (*e.g.*, the limitation clause). In cases where a fundamental right is violated in the latter context, a judicial limitation clause is applied. The judicial limitation clause, in essence, takes the content and requirements of the limitation clause familiar to us from Basic Law: Human Dignity and Liberty and "exports" it to other basic legislation, such as Basic Law: The Knesset, and consequently accords constitutional protection to fundamental rights where no statutory limitation clause exists (judicial limitation clause).[36]

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32. *Id*. at 127–28; HCJ 73/85 "Kach" Faction v. Speaker of the Knesset 39(3) PD 141 [1986] (Isr.); HCJ 306/81 Plato-Sharon v. Knesset Committee of the Knesset 35(4) PD 118 [1982] (Isr.); HCJ 5364/94 Welner v. Chairman of the Israeli Labor Party 49(1) PD 758 [1995] (Isr.).

33. *See Mizrachi Bank*, CA 6821/93.

34. *Id*.

35. *See id.*

36. HCJ 3434/96 Hoffnung v. Speaker of the Knesset 50(3) PD 57 [1997] (Isr.); HCJ 212/03 Herut Nat'l Movement v. Chairman of the Elections Comm. to the Sixteenth Knesset 57(1) PD (1) 750 [2004] (Isr.); EA 92/03 Mofaz v. Chairman of the Elections Comm. to the Sixteenth Knesset 57(3) PD 793 [2004] (Isr.).

The formula which should be applied to the judicial limitation clause, and consequently the interpretation which should be given to the elements of the judicial limitation clause, are identical to the formula and interpretation given to the wording of the limitation clause appearing in Basic Law: Human Dignity and Liberty, namely:[37]

> There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required or by regulation enacted by virtue of express authorization in such law.

To summarize these issues it should be emphasized:[38]

> (1) When considering Basic Laws which provide for both formal and substantive entrenchment (i.e., at present just Basic Law: Freedom of Occupation), any variations to such a Basic Law must be tested in accordance with the formal entrenchment, provided that the variation is effected by means of a Basic Law with a majority of 61 Knesset members, or any other majority which the particular Basic Law itself requires. However, a violation of fundamental rights under such a Basic Law must be tested on the basis of the substantive entrenchment (the requirements of the limitation clause).[39]
> (2) When considering Basic Laws, which provide for only substantive entrenchment (the limitation clause) (i.e., at present just Basic Law: Human Dignity and Liberty), any variations to such a Basic Law must be effected by means of a Basic Law albeit without the need for a particular majority. However, a violation of fundamental rights under such a Basic Law must meet the conditions of the substantive entrenchment provision (the requirements of the limitation clause).[40]
> (3) When considering a Basic Law which does not contain a provision for substantive entrenchment, then:
>
> (i) If it is formally entrenched, a variation to such a Basic Law must be carried out through a Basic Law adopted with the required majority, whereas a violation of a protected fundamental right must be carried out through and in accordance with the judicial limitation clause.

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37. Basic Laws of Israel, Human Dignity and Liberty § 8 (1992) [hereinafter Human Dignity and Liberty].

38. *Cf.* RUBINSTEIN & MEDINA, *supra* note 14, at 109–21.

39. HCJ 1368/94 Porath v. Government of Israel 57(5) PD 913 [1995] (Isr.).

40. HCJ 6055/95 Zemach v. Minister of Def. 53(5) PD 241 [1996] (Isr.).

> (ii) If not formally entrenched, a variation to such a Basic Law must be carried out through a Basic Law adopted by any majority in the Knesset, whereas a violation of a protected fundamental right must be carried out through a variation of the Basic Law itself, or through and in accordance with the judicial limitation clause.

E. *The Nature of the Regime of the State of Israel as a (Liberal and Constitutional) Representative Parliamentary Democracy: The Legislature, the Executive and the Idea of a Referendum*

> Accordingly we, members of the People's Council, representatives of the Jewish Community of *Eretz*-Israel and the Zionist Movement, are here assembled on the day of the termination of the British Mandate over *Eretz*-Israel and, by virtue of our natural and historic right and on the strength of the resolution of the United Nations General Assembly, hereby declare the establishment of a Jewish state in *Eretz*-Israel, to be known as the State of Israel. We declare that, with effect from the moment of the termination of the Mandate being tonight, the eve of Sabbath . . . (May 15th, 1948), until the establishment of the elected, regular authorities of the State in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948, the People's Council shall act as a Provisional Council of State, and its executive organ, the People's Administration, shall be the Provisional Government of the Jewish State, to be called "Israel."[41]

The language of the Israeli Declaration of Establishment is sharp, clear and explicit: "until the establishment of the elected, regular authorities of the State, in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly . . ."[42] In other words, the governmental authorities, their identity, nature, structure and operative mechanisms were to be established in the constitution to be adopted by the Constituent Assembly. That is to say, the identity of the governmental authorities, including the manner of their election, would be determined within the framework of constitutional legal norms and not through ordinary legislation. This was put into effect with the adoption, *inter alia*, of Basic Law: The Knesset, Basic Law: The Government and Basic Law: The Judiciary.

The Declaration of Establishment does not possess statutory or

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41. DECLARATION OF ESTABLISHMENT OF THE STATE OF ISRAEL ¶¶ 10 & 11 (Isr. 1948) ("*Eretz*-Israel" means "The Land of Israel.").

42. *Id.*

constitutional status. It is an interpretative source only. The Declaration of Establishment does not create binding positive law. It merely reflects the vision and credo of the People. Consequently, it is necessary to consider the statements made by the Supreme Court when interpreting and giving meaning to the laws of the state.[43] This is true especially in light of the explicit reference to the Declaration of Establishment within the "Basic Principles Clause" of Basic Law: Human Dignity and Liberty.[44] This clause states that human rights "under this Basic Law" must be interpreted in the spirit of the principles of the Declaration Establishment of the State of Israel.[45] The comments of Justice Dov Levin in the *Clal* case are apposite in this context:

> Although the Declaration of Establishment was not recognized as possessing constitutional validity and in any event did not purport to express binding law, it expressed principles and values, which according to the perception of the People deserved to be our guiding principles, an oracle, when interpreting the law applicable to the state and its citizens. Accordingly, from the early days this Court saw the Proclamation of Independence as a primary source for interpretation of the law. Above all – it is a beacon that illuminates our path when shaping basic civil rights and implementing them in practice.[46]

F. *The Legislature and the People: The Reciprocal Relationship Between the Legislature and the Executive*

The State of Israel is a liberal, constitutional, representative, parliamentary democracy. This is evident from the arrangements put in place for holding elections in Israel under both Basic Law: The Knesset and the Knesset Elections Law [Consolidated Version], 1969 (Knesset Elections Law).[47] The elections to the Knesset are the highest expression of the democratic nature of the regime in Israel. The constitutional and statutory arrangements express the desire for "self-government;" their purpose is to ensure that legislators represent the views of the public and use their legislative powers to advance the public interest. The elections to the Knesset express the ideal whereby every citizen is granted an equal opportunity to express his/her nature as a "political creature," by

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43. HCJ 10/48 Ziv v. Acting Director of the Municipal Area of Tel Aviv 1 PD 85 [1949] (Isr.); HCJ 7/48 al-Karbutali v. Minister of Def. 2 PD 5 [1949] (Isr.); CA 450/70 Rogozinski v. State of Israel 26(1) PD 129 [1970] (Isr.); RUBINSTEIN & MEDINA, *supra* note 14, at 43.

44. *See* Human Dignity and Liberty, *supra* note 37, § 1.

45. *Id.*

46. *See supra* text accompanying note 27; Judgment of Justice Dov Levin ¶ 19.

47. The Book of Laws, no. 556 (Apr. 14, 1969).

recognizing the Knesset's power to act as the primary "public platform" for staging a public discourse regarding the proper nature of the State, while maintaining a "free market" of ideas and opinions.[48]

Israel's legislature is the Knesset; it is this body that has the exclusive power to make laws, as an expression of the will of the People. The People express their will through their representatives in the Knesset. Section 4 of Basic Law: The Knesset establishes the system of elections to the Knesset as follows: "The Knesset shall be elected by general, national, direct, equal, secret and proportional elections, in accordance with the Knesset Elections Law; this section shall not be varied save by a majority of the members of the Knesset."[49]

As we are concerned with a provision in a Basic Law, it is evident that it can only be varied by means of another basic legislation, adopted with the majority required by Section 4, namely, 61 Knesset members—given that the full number of the Members of the Knesset (MKs) is 120.[50] In other words, Section 4 cannot be varied by means of ordinary legislation, even if the entire Knesset unanimously adopts that legislation (*i.e.,* 120 MKs voting in favor).

The essence of the electoral system is to guarantee the democratic parliamentary nature of the Knesset, within the framework of which the People are represented by the parliamentary factions. The People vote for parties vying for a place in the Knesset. The elected party members, acting as a faction rather than in their personal capacity, choose the MK upon whom they recommend that the President impose the task of forming the government. Only the President is authorized to decide on the identity of the MK who will be charged with the duty of forming the government.

The parliamentary representative democracy is essentially intended to replace the classical concept of direct democracy, which originated in ancient Greece. That concept required all eligible voters to gather in the central square of Athens and vote "for" or "against." In a modern representative parliamentary democracy, the legislature is not comprised of the People but representatives of the People. And as its name denotes: "The Knesset is the parliament of the State."[51]

Evidence of this can be found in the fact that once the 120 representatives of the People are elected (who together comprise the legislature, namely, Israel's Knesset), the ability of the People (the sovereign) to make direct decisions is eliminated. Once the 120 representatives of the People have been elected, the power of the sovereign (the People) can only be expressed in the political arena

48. RUBINSTEIN & MEDINA, *supra* note 14, vol. 2, at 557.
49. Knesset, *infra* note 51, § 4.
50. *See Mizrachi Bank*, CA 6821/93; Knesset, *infra* note 51, § 4.
51. Basic Laws of Israel, The Knesset § 1 (1958) [hereinafter Knesset].

through its various representatives in the Knesset, and through them alone. This concept has many practical implications.

To start with, MKs are not directly elected by the People, but rather by their parties—and sometimes solely by the head of these parties—and presented to the People as candidates for the Knesset (factions).[52]

In addition, in Israel, members of the executive branch are generally elected from among the MKs. Indeed, as a matter of statutory duty, some executive branch positions must be filled by MKs; for example the positions of Prime Minister,[53] Acting Prime Minister,[54] and deputy ministers.[55]

Furthermore, the Knesset's ability to disperse does not depend on the People, as they actually have no power to dissolve the Knesset. The Knesset's power to dissolve itself before the completion of its four-year term can be implemented only by means of a law, for which a majority of 61 MKs is needed.[56] More specifically, not only is the dissolution of the Knesset independent of the People who elected it—that dissolution depends, first and foremost, on the executive branch, namely, the government. This is because the only cases in which the Knesset can disperse prematurely are: (a) when it has failed to approve the State's budget submitted to it by the executive branch, within the first three months of the fiscal year;[57] and (b) when the Prime Minister recommends, and the President agrees, to disperse the Knesset on the grounds that a majority in the Knesset opposes the executive branch, thereby prevents the Government from functioning properly.[58]

Besides, legislative work, which is exclusively within the province of the Knesset, is not, and cannot be, directly affected or directed by the People. Only MKs, the Government, and the Knesset committees have the authority to table bills. The Knesset plenum and committees, assisted by legal advisers of the Knesset, participate in the various stages of the legislative process and (unless otherwise statutorily provided, as explained above) it is the Knesset plenum that enacts laws by majority vote of the participants.

Moreover, where the Knesset seeks to extend its term, in view of the existence of special circumstances that prevent the holding of timely elections, it has the power to do so even without having to go back to the People. Such an extension may be achieved by the enactment of a law

52. *Id.* § 5A.
53. Basic Laws of Israel, The Government § 5(b) (2001) [hereinafter Government].
54. *Id.* § 5(d).
55. *Id.* § 25.
56. Knesset, *supra* note 51, § 34.
57. *Id.* § 36A.
58. Government, *supra* note 53, § 29.

passed by a majority of 80 MKs.[59]

Not only that, but also the salaries of the MKs are prescribed by statute which the MKs themselves enact. MKs, when setting their own wages, do not consult with the People, and the latter have no impact whatsoever on such decisions.[60]

Another argument is that, whereas the election of MKs to the Knesset, as representatives of the People, depends, largely, on the People—through the parties that select their representatives in the Knesset—this is not the case with regard to an MK resignation. This last issue is the sole prerogative of the MK concerned.[61]

Furthermore, in view of the provisions of Basic Law: The Knesset in this regard, which cannot be stipulated against, when it comes to the termination of an MK tenure by virtue of his/her appointment to a position, the holder of which is barred from standing as a candidate for the Knesset,[62] or termination or suspension because the MK has been convicted of an offense entailing moral turpitude, he cannot continue in office even if the entire nation so desires.[63]

Additionally, the Knesset elects the President of the State,[64] the State Comptroller,[65] the two MKs who represent it on the Judicial Selection Committee and the two MKs who represent it on the electoral body of the Chief Rabbinical Council.[66] In these activities, the Knesset, as a body, operates in accordance with its absolute discretion, in a manner consistent with the thinking of the People's representatives. The representatives of the People do not turn to the People for advice.

Moreover, the power to remove the President of the State, the State Comptroller and the Prime Minister from their positions is entrusted to the Knesset.[67] In practicing their power, in this regard, MKs do not have to consult with the People on that issue.

Added to all these is the provision concerning the replacement of MKs, according to which any MK who has vacated his/her seat, will be automatically replaced by his/her party's appointed candidate whose name appears first in the party's list of candidates who were not elected

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59. Knesset, *supra* note 51, § 9A.

60. *Id.* § 39.

61. *Id.* § 40.

62. *Id.* § 42.

63. *Id.* §§ 42 & 42A.

64. The Basic Laws of Israel, The President of the State § 3 (1964) [hereinafter President of the State].

65. The Basic Laws of Israel, The State Comptroller § 7 (1988) [hereinafter State Comptroller].

66. *See* President of the State, *supra* note 64, § 3(A); State Comptroller, *supra* note 65, § 7(A); Judiciary, *supra* note 26, § 4(B); The Rabbinical Judges Law of 1955, § 6(A).

67. President of the State, *supra* note 64, § 20; State Comptroller, *supra* note 65, § 13; Government, *supra* note 53, § 18.

to the Knesset.[68] This provision, like the crystallization and finalization of the party's MKs candidates list, does not consider the will of the People at all; a will that could have changed after the initial list of candidates for the Knesset has been completed.

A final example in this context concerns the quasi-judicial role of the Knesset, as a body, in relation to the removal of the procedural immunity of MKs.[69] While the People elect their representatives in the Knesset "directly" or almost directly, the MKs may remove the procedural immunity of another Knesset member, without first consulting with the People, even though this immunity is required in order for the MKs to discharge the mandate which they were elected to serve in the Knesset. In this regard, it should be noted that this mandate is entrusted to them in accordance with their declaration of allegiance under Section 15 of Basic Law: The Knesset.

Thus, immediately upon their election, the umbilical cord between the 120 representatives to Israel's parliament and the People is severed. Even if the elected MKs breach the terms of the manifesto upon which they were elected, the People would still lack the power to replace them at this stage, and would have to wait for the next election to do so. Thus, not only is the influence of the People indirect, insofar as concerns the dealings of the legislature following elections, but is indirect in general.

In conclusion, to this latter point, it should be emphasized that the Knesset's decisions are reached by a majority within the Knesset,[70] and not by a majority of the People, albeit the underlying assumption is that the various MKs accurately reflect the distribution of the People's views on a concrete issue. In fact, this is not the case. The 120 elected representatives' commitment to voters is confined to the moral and declarative arena only, and indeed one should note Section 15 of Basic Law: The Knesset, in this regard, according to which, following his/her election to the Knesset, the MK declares his/her allegiance as follows: "I pledge myself to bear my allegiance to the State of Israel and faithfully discharge my mandate in the Knesset."[71]

The moral and declarative credibility of the representatives of the People is scrutinized every four years when elections are held for the Knesset. Beyond this, there is no direct correlation between the functioning of MKs, including their decision making process, and the People. Basic Law: The Knesset also refrains from establishing any primary legal norm that would allow MKs to return to the People for the purpose of making decisions; this is part of the broader understanding of the structure of the representative parliamentary system, which binds the

68. Knesset, *supra* note 51, § 43.
69. *Id.* § 13; Knesset Members Immunity, Rights and Obligations Law, 1951, § 13.
70. Knesset, *supra* note 51, § 25.
71. *Id.* § 15.

State of Israel.

Why is that so? The answer lies in the governmental system in Israel, under which the People wield power in relation to parties and factions but not in relation to the members of the parties elected to the Knesset. This power manifests itself every four years. It should be recalled that not all parties operate a system of primary elections. Within its four-year term, the legislative authority is therefore limited by and subordinate to the personal desires of its members; the collective party discipline of the members of each faction; operational, professional and non-professional considerations of the executive authority; professional and non-professional parliamentary considerations of each individual Knesset member; and professional and non-professional political, narrow, broad, regional, nationalistic, national and international considerations.

Again, it is worth emphasizing that MKs are elected representatives. After the elections, they operate within the framework of their parties. The parties and the MKs represent a wide range of attitudes and opinions on various topics. These attitudes and opinions are reflected in the Knesset's plenum and committees' discussions and decisions. This is also the source of the concept of "party discipline," which often imposes certain opinions on MKs that do not necessarily reflect the will of the voters (*i.e.*, the People). Hanna Fenichel Pitkin has lucidly articulated the nature of the representative parliamentary electoral system, as follows:

> representing here means acting in the interest of the represented, in a manner responsive to them. The representative must act independently, his action must involve discretion and judgment; he must be one who acts. The represented must also be (conceived as) capable of independent action and judgment, not merely being taken care of. Moreover, despite the resulting potential for conflict between representative and represented about what is to be done, that conflict must not normally take place. The representative must act in such a way that there is no conflict, or if it occurs an explanation is called for. He must not be found persistently at odds with the wishes of the represented without good reason in terms of their interest, without a good explanation of why their wishes are not in accord with their interest.[72]

In this context, it is also worth quoting the remarks of Justice Aharon Barak in the *Mizrachi Bank* case:

> Our political and legal culture is not based upon a special appeal to the People by means of a referendum. No referendum has taken

72. HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 209–10 (1972).

> place in the past. Our political and legal culture is not built upon "direct" democracy, but upon "representative" democracy. Our political and legal culture also maintains *that the appeal to the People takes place in the context of the elections for the Knesset*.[73]

G. *The Executive Authority and the People: The Reciprocal Relationship Between the Executive and Legislative Branches*

Not only do the People have no real impact on the legislature, they also have no real influence over the government. Interaction exists only between the legislative and the executive authorities. As I have already shown, the argument that the legislature represents the People is answered by the fact that the People's influence over the legislature is confined to Election Day, once every four years, and even then only to a limited extent.

In the State of Israel, it is customary for most of the members of the executive authority to be selected from among the 120 MKs; sometimes positive law itself requires this.[74] Nonetheless, neither the Prime Minister nor the Government are directly elected by the People. If anything, it could be argued that because of the Israeli practice as described above, the People have some influence over the abstract identity of the members of the Government. Yet, even if the latter were true, presently the People do not have the capacity to decide on the identity of the Prime Minister, as the authority to impose the task of forming the Government on any of the 120 MKs is vested exclusively in the President, following consultation with the representatives of the parliamentary parties.[75]

In addition, the Government is collectively responsible towards the Knesset; whereas the ministers, who in the main are themselves MKs, are accountable to the Prime Minister in respect of the functions they are appointed to fulfill.[76] No Prime Minister, minister, or Government is, as a single large entity, accountable to the People as such. Instead, the Government alone, as a cohesive body, is collectively responsible to the Knesset in the latter's capacity as the representative body of the People. Consequently, when examining the Government's responsibility, it is necessary to refer to the Knesset as a body, rather than to the People as a nation.

In support of this position, we must consider Section 3 of Basic Law: The Government, according to which: "The Government holds office by virtue of the confidence of the Knesset;" in other words, not by virtue of

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73. *Mizrachi Bank*, CA 6821/93; Judgment of Justice Barak ¶ 49 (emphasis added).
74. *See supra* text accompanying notes 53–55.
75. Government, *supra* note 53, § 7.
76. *Id.* § 4.

the direct trust of the People, but by their implied confidence—shown through the Knesset.[77]

In this spirit, we must read the words of the declaration of allegiance spoken by the Prime Minister: "I (name), as Prime Minister, undertake to uphold the State of Israel and its laws, to faithfully fulfill my role as the Prime Minister and to comply with the decisions of the Knesset," as well as the declaration of allegiance spoken by the ministers: "I (name), as a member of the Government, undertake to uphold the State of Israel and its laws, to faithfully fulfill my role as a member of the Government and to comply with the decisions of the Knesset."[78] These two declarations give effect to the obligations of the executive branch toward the legislative body, known as the "Knesset," and not to the People who have elected their representatives who constitute the "Knesset." This conceptual approach is reinforced by a consideration of Section 15 of Basic Law: The Government, in relation to the need for the Knesset's approval before an additional minister may be co-opted to the Government.[79]

The People, as such, also lack the power—save through their representatives in the Knesset—to affect the status of the Prime Minister, his/her government or his/her ministers.[80] We have already seen that the People have no real influence on their representatives in the Knesset, whereby, the People have no influence either over the executive authority, save on a single occasion, once every four years.

Moreover, oversight of the Government is entrusted to the Knesset. This is reflected in the plenum through the submission of motions for the agenda and parliamentary questions, as well as discussions in Knesset committees to which ministers or their representatives are summoned to report on their activities in their capacity as the executive branch.[81]

Even the salaries of ministers and deputy ministers, including other fees paid to them during their term of office or thereafter, or their next of kin after death, are determined by law—enacted, as noted, by the Knesset—or by a decision by the Knesset or one of its committees, authorized by the Knesset for that purpose.[82]

The life of the Government, its functioning and efficiency therefore, depend largely on the life of the Knesset as the body representing the People, and not on the People directly. Government decisions to go to war[83] or enter into peace agreements are subject, at most, to the approval

77. *Id.* § 3.
78. *Id.* § 14.
79. *Id.* § 15.
80. *See, e.g.*, Government, *supra* note 53, § 18.
81. Knesset Law, 1994; Knesset Regulations.
82. Knesset Law, 1994, § 16.
83. Government, *supra* note 53, § 40.

of the Knesset, but not to the approval of the People. The mandate is given from the start to the Knesset alone, and it is the supreme body from which the executive branch draws its vitality; it and it alone. The authority of this body, as the house of representatives of the People, remains in effect as long as it has not dispersed in accordance with the grounds prescribed by law and as long as no further elections have been held in Israel. Until then, the People do not wield direct power, which would enable them to influence the activity of the Knesset, and certainly not the activity of the Government. A weighty question arises: What are the powers of the Government? The answer to this question is found in Basic Law: The Government.

At this point, it should be emphasized that Basic Law: The Government, including all its sections and subsections, is formally entrenched. In other words, this law cannot be varied, save by a Basic Law adopted by the Knesset with a majority of 61 MKs.[84]

As provided in Section 32 of Basic Law: The Government, which states: "The Government is authorized to perform in the name of the State and subject to any law, all actions which are not legally incumbent on another authority," the principle authority of the executive branch is residual in nature.[85] This provision is entrenched, as stipulated in Section 44 of the same Basic Law, so that varying the residual powers of government, as provided in Section 32, requires the adoption of a Basic Law by a majority of 61 MKs.[86]

On its face, this residual power erodes the status of the Knesset as the body that determines the functions of government and the scope of its powers in basic legislation or by statute. This is because the principle of the rule of law and the principle of administrative legality require that the executive authority act only within the scope of the powers conferred upon it by law—by the Knesset.[87] However, the scope of the activity imposed on the executive branch is immense and accordingly cannot be regulated in its entirety by statute.[88] This requires the Government to act routinely in areas that the Knesset has not yet regulated through primary legislation.[89]

The Government's residual power is designed for this purpose, and is applied only where the subject matter of the authority has not been imposed by law on another authority, and is always subject to any

84. *Id.* § 44.

85. *Id.* § 32.

86. *Id.*

87. HCJ 36/51 Chet v. Municipality of Haifa 5 PD 1553 (Isr.); HCJ 347/84 Petach Tikvah v. Minister of the Interior 39(1) PD 813, 817 (Isr.).

88. RUBINSTEIN & MEDINA, *supra* note 14, at 159–62.

89. HCJ 5128/94 Federman v. Minister of Police 48(5) PD 647 (Isr.).

applicable law.[90] In order to enable the Government to properly fulfill its role as the executive branch,[91] Section 32 of Basic Law: The Government is designed to build a constitutional bridge between the principles of administrative legality and the rule of law and the daily needs of the country.

The powers of the Government, therefore, are subject formally, legally and, primarily administratively, to the Knesset. Certainly, the Government is responsible for managing the daily life of the People, but its decisions are not subject to the approval of the People, and, at most, require the approval of the People's representatives in the Knesset.

H. *Interim Conclusion*

Without entering into a discussion about the advantages and disadvantages of the representative parliamentary system, the remarks made above leave no doubt that the People, as the sovereign, lack any function, formal or substantive, in the political game. This is because interaction is confined primarily to the legislative and the executive authorities. The role of the People and their power to directly—or almost directly—exert serious influence is expressed only on Election Day by which, once every four years, the People exert their influence. In the interim, the representatives of the legislative authority and the representatives of the executive authority—who often are the same—must engage in a balancing process between the mandate, which they were elected or appointed to carry out, and other considerations required by the job and the needs of the hour. These representatives must weigh political, factional, partisan, regional, national, nationalistic, international, parliamentary and diplomatic considerations, some of which are professional and some unprofessional, some narrow and some broad, some formal and some substantive.

This conceptual and practical approach is mandated, *inter alia*, first by the fact that the citizens, who constitute the People, are in large laymen, and second by the need to engage in numerous balancing processes, among a broad variety of considerations, as part of the process of parliamentary and operational decision-making. The laymen citizens are often unaware of, or at minimum unable to digest, these balancing processes and considerations. Finally, when engaged in faithfully performing its work, the executive authority often comes to arrangements of which the layman citizen has no knowledge whatsoever, and which, if exposed to, would almost certainly undermine their success. For example, decisions to sign or avoid signing peace agreements, or decisions to start

90. HCJ 8600/04 Shimoni v. Prime Minister 59(5) PD 673 (Isr.).

91. HCJ 1163/03 Supreme Monitoring Committee for Arab Affairs v. Prime Minister (Isr.) (unpublished).

or avoid a war, or decisions to engage in or reject a prisoner exchange.

I. *Basic Rights in Israel: The Right to Vote, the Right to be Elected, the Right to Dignity and the Right to Equality*

The rights to vote and to be elected are fundamental rights in any democratic regime. Ensuring the right of individuals to participate in elections is an essential service in a democracy. The rights to vote and to be elected do not exist in a vacuum; they are founded and supported by the entire mechanism of the election laws, as established, in Israel, by Basic Law: The Knesset and the Knesset Elections Law. The election process is not limited to the formal meaning of the proceedings, but rather has substantive, practical and conceptual implications. These implications relate, *inter alia*, to the ability of the citizens to exert a substantive, and not only formal, influence over the democratic process, both as voters and as candidates for election.

The realization of the rights to vote and to be elected—especially in a society that is polarized and torn on politic, ethnic, national, religious and gender lines—is largely dependent on a deep and substantive understanding of the right to dignity and the right to equality.

The principle of equality is one of the cornerstones of any democracy, and essentially refers to equal treatment being accorded to all human beings, without attaching importance to the various characteristics of human beings, such as social status and family affiliation, sex, age, religion, language, skin color and so on. The principle of equality underlies liberal thought and forms the basis for additional democratic principles.

It is possible to understand the increasing recognition given to the centrality of the principle of equality, as part of the transition from a class society where the individual is perceived as possessing a status from birth—a status which frames his/her rights, duties, and expectations—to a contractual society, where the individual must reach his/her position on the basis of individual initiative. In order to enable real participation and competition in the contractual decision-making process,[92] the legitimacy of such a contractual society should depend on ensuring equal opportunities to all its members.

Notwithstanding the recognition of the importance of the principle of equality in Israeli law following the adoption of Basic Law: Human Dignity and Liberty, the right to equality was not expressly entrenched at the constitutional level. Accordingly, as we shall see, the constitutional protection of the right to equality in Israeli law is primarily a creature of

92. Frances Raday, *"On Equality*," 24 MISHPATIM (THE LAW) 241, 245 (1994) (in Hebrew).

case law. In its rulings, the HCJ has referred to the principle of equality as a supra principle, which is "the heart and soul of our whole constitutional system" and infringement of which creates "a particularly harsh feeling."[93]

Like a number of other democratic principles, equality has a dual meaning, one formal and the other substantive. The principle of formal equality refers to the operation of the law by the courts in an impartial manner and without distinction between litigants (equality before the law). In contrast, the principle of substantive equality does not consider only the equal operation of the law but rather the law itself (equality in law). The principle of substantive equality was first recognized in a clear and definitive manner in article 6 of the French Declaration of Human and Civil Rights dated August 26, 1789, under which:

> The law . . . must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents.[94]

In modern constitutional and liberal thinking, the principle of equality is not formal. It is a fundamental concept that embodies fairness, justice and morality. There is no "pure" principle of equality. Equality, justice and morality cannot be completely separated. Equality is a mixture of all these concepts. Thus, for example, equality and equal opportunity may actually be expressed by giving preference to persons bearing certain characteristics who have suffered discrimination in the past and who are now at an unequal starting point (affirmative action).

The principle of equality has been recognized in many human rights documents[95] as well as in the British Mandate for Palestine.[96] Likewise, in the Declaration of Establishment of the State of Israel, the founding fathers promised that "Israel . . . will ensure complete equality of social and political rights to all its inhabitants, irrespective of religion, race or sex."[97]

The early days of the State of Israel also witnessed the enactment of various primary statutes providing protection for equality, such as the

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93. HCJ 98/69 Bergman v. Minister of Finance 23(1) PD 693 (Isr.).

94. *See* The French Declaration of Human and Civil Rights 1789.

95. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

96. British Mandate of Palestine arts. 2 & 15; Palestine Order-in-Council, arts. 17–19a (1922) (restricting the legislative powers of the High Commissioner, in view of the requirement that "no Ordinance may be passed which shall tend to discriminate in any way between the inhabitants of Palestine on the ground of race, religion or language").

97. *See supra* note 41.

Equal Rights for Women Law, 1951; Section 42(A) of the Employment Service Law, 1959; and the Equal Opportunities at Work Law, 1988.[98] This legislative protection may be found in the judicial presumption whereby the purpose of legislation is to promote and maintain equality. In other words, in order to contradict this presumption, express language is required. For example, the Equal Rights for Women Law proclaims the existence of a value which should properly encompass our entire legal system.[99] Therefore, where this law is not expressly contradicted, an interpretation of the law that is consistent with the principle of equality between the sexes should be preferred.[100]

There is no dispute as to the importance, and even critical nature, of the right to equality within a bill of rights, especially in democratic regimes. Thus in Basic Law: Human Dignity and Liberty bill, the right to equality was included among the list of rights protected by the Basic Law.[101] However, due to opposition by the religious parties, the right to equality was omitted from the final version of the Basic Law. This opposition was due to the religious parties' concern that a constitutional right to equality would lead to equal recognition of women, homosexuals, and, even worse (in their eyes), the reform movement. Accordingly, in order to preserve the *status quo* (at least formally) *vis-à-vis* the religious parties, the Knesset deliberately waived the inclusion of the right to equality within the Basic Law. Thus, at least *prima facie*, the arrangement is a negative one. Nonetheless, a perusal of the Knesset records indicates that some MKs—in their "constitutional" capacity—believed that it was the HCJ that should eventually interpret the Basic Law and hold that human dignity included the right to equality. In other words, the omission of the right to equality in the Basic Law would not negate the protection of this right within the framework of the right to dignity.

Either way, it should be noted that it is not possible to deny the existence of constitutional protection of the principle of equality, as a value and not as a right. This is true particularly in light of the addition of a new Section 1 to the Basic Law, in 1994, according to which: "Fundamental human rights in Israel . . . shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel,"[102] and in light of the language and purpose of Section 1A of the Basic Law, according to which: "The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the

98. The Book of Laws, no. 1240, (Mar. 3, 1988).

99. The Book of Laws, no. 82, (July 26, 1951).

100. HCJ 104/87 Nevo v. Nat'l Labor Court 44(4) PD 749, 764 (Isr.); HCJ 301/63 Schtreit v. Chief Rabbi of Israel 18(1) PD 612 (Isr.).

101. *See* Yehudit Karp, *Basic-Law: Human Dignity and Liberty: A Biography of Power-Struggles*, 1 MISHPAT UMIMSHAL (Law & Governance) 323, 336 (1993) (in Hebrew).

102. Human Dignity and Liberty, *supra* note 37, § 1.

values of the State of Israel as a Jewish and democratic state."[103] This approach is based on a broad interpretation of the right to "human dignity and liberty" and the reference to the principles of the Declaration of Establishment.[104] This is because this approach accords supra legal normative status to the principle of equality.[105] Yet, one may ask, what connection does equality have to dignity?

Section 4 of Basic Law: Human Dignity and Liberty states: "All persons are entitled to the protection of their life, body and dignity."[106] In the past, consideration was often given to the nature of the right to dignity as a framework right. As such, the right to dignity merely provided a source of recognition of other basic rights, for example, the right to freedom of expression. Both the legal literature and the rulings of the Supreme Court expressed the view that the constitutional right to dignity also embraced constitutional protection of the right to equality. In other words, where primary legislation violates the right to equality, it must meet the requirements of the limitation clause set out in Section 8 of the Basic Law, otherwise, it would be unconstitutional.

It is permissible to contemplate a distinction between two individuals based on relevant considerations but not on irrelevant ones.[107] The right to equality and the right to dignity are closely related to each other. The core meaning of the right to equality is that the social order must reflect recognition of all human beings as equals. As such, the right to dignity provides, at minimum, the means to attain equality. The core meaning of the right to dignity is that which seeks to emphasize the treatment of a person as an end in itself, and not as a means to achieve other goals. Use of a person as a means is nothing but more refined language for describing the humiliation and degradation of a man. The terms "degradation," "humiliation" and "dignity" are intertwined with the concept of "equality." In the words of the philosopher Aristotle: "Democracies have arisen from supposing that those who are equal in one thing are so in every other circumstance."[108] In the past, the Supreme Court of Israel occasionally considered the question of recognizing the right to equality within the boundaries of the right to dignity as a framework right (or basket right). Much ink has been spilt on the nature of the right to dignity as a basket right. As such, it encompasses many rights which are not

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103. *Id.* § 1A.

104. *See supra* note 41.

105. HCJ 453/94 Israel's Women Network v. Gov't of Israel 48(5) PD 501 (Isr.); HCJ 721/94 El Al Israel Airlines Ltd. v. Danielowitz 48(5) PD 749 (Isr.).

106. Human Dignity and Liberty, *supra* note 37, § 4.

107. FH 10/69 Boronowsky v. Chief Rabbi of Israel, 25(1) PD 7 (Isr.), and in the language of Justice Or: "unlawful discrimination means different treatment of equals." *See* HCJ 678/88 Cfar Vradim v. Minister of Fin. 43(2) PD 501 (Isr.).

108. Aristotle, THE POLITICS OF ARISTOTLE, Bk. V, Ch. 1 (William Ellis trans. 1947).

expressly referred to in the Basic Law. By its very nature, the right to dignity also includes equality. The dignity, which is inviolable and is entitled to protection, does not only embrace a person's good name, but also his/her status as equal among equals. His/Her dignity is violated not only through slander, insults or abuse but also by discrimination or treatment of him/her in a biased, racist or demeaning way. Protection of human dignity is also reflected in securing equal rights and preventing any discrimination on grounds of sex, race, language, opinion, social affiliation, family affiliation, marital status, ethnic origin and the like.

This deep understanding of the right to dignity and the right to equality highlights the critical nature of the rights to vote and to be elected. The latter are not only official state procedures expressed through the participation or possibility of participation in the political game. Recognition must be given to the capacity of the political process to have a significant impact. This is particularly true in the case of a representative parliamentary democracy based on compromises and balances, as distinct from formal and technical dichotomies.

Violation of an individual's fundamental rights is serious in itself. Violation of fundamental rights on a group or collective basis is even more severe. Collective injury perpetuates a certain kind of inferiority, one imposed by the discriminatory authority on the discriminated group. Group discrimination perpetuates severe social stigmas, and entails the humiliation and degradation of the individual members of the group against whom discrimination is being shown. Group discrimination illustrates the use of human beings as a tool to achieve other goals, more than anything else does; a treatment that leads to acute harm to the dignity of man.

III. FROM THE GENERAL TO THE PARTICULAR

This Article deals with the issue of the constitutionality of the laws on referendum. In the earlier sections I laid the normative foundation of the legal system and regime in the State of Israel, and it is within this normative framework that I shall examine the constitutionality of the Israeli laws on referendum.

A. *Conceptual and Israeli Aspects of a Referendum*

The existence of a mandatory referendum regime, as proposed by the laws on referendum, subordinates governmental decisions and the will of the legislature to the results of such referendum. Therefore, it has numerous legal, statutory, constitutional, administrative, national, international and political implications. Shmuel Saadia and Liav Orgad,

in their comprehensive essay on referenda, addressed this issue in detail and particularly discussed the considerations militating against the adoption of the institution of the referendum.[109]

A referendum, in relation to the question being posed, is a tool used as a substitute for the legislature, particularly when it fetters the executive branch and the legislative branch and is not merely a consultative referendum, leaving the interpretation of the results to the legislature.

The existence of referenda weakens the power of the elected government in that they indicate that the electorate does not trust the government to make certain decisions. In addition, a referendum can be skewed by the nature of the question and the imposition of limitations on the scope of the response available to the voter.

Furthermore, considerable technical knowledge is required in order to make informed decisions on a variety of issues on the public agenda, knowledge which most of the public lacks, and for this reason alone, any reached outcome could work out to be against the public interest.

A constitutional democratic regime, particularly in divided and multicultural societies, is characterized as a substantive democracy (*i.e.*, a regime that reflects the majority opinion, but at the same time protects minority groups). In such a regime, acute importance attaches to the governmental decision-making process led by the representative parliamentary system. In the representative system, the executive and the legislative branches have room to make decisions based on political compromises or a desire to show tolerance towards vulnerable groups in the society; namely, groups which are unable to express their wishes through a built-in majority in the society.

In contrast, in a regime that incorporates referenda, the governmental system is based on dichotomous decisions of "yes" or "no" ("for" or "against") in relation to the question addressed directly to the public, on a particular topic. Decisions by referenda are circumscribed, rigid and irreversible, and embody the repugnant concept of formal democracy which most of the modern substantive constitutional democracies in the West have long abandoned.

Moreover, a referendum may be used as a political and legal tool to exploit the democratic process, by way of formal democracy, while ignoring the rights and interests of the minority, as well as oppressing the rights of this minority, both as individuals and as a collective. A referendum may reinforce the numerical inferiority of the minority and even translate it into material and legal inferiority; that which deals a mortal blow to the principle of equality before the law, and *a fortiori*, the principle of substantive equality.[110] A referendum can create a tyranny of

109. SAADIA & ORGAD, *supra* note 18, at 56–79.

110. *Cf.* AHARON BARAK, INTERPRETATION IN LAW, LEGISLATIVE INTERPRETATION 522

the majority, and lead to the misuse of the democratic apparatus. Elsewhere I wrote:

> Constitutional democracy bears some unique features. Constitutional democracy is not merely a representative system, it is not only the voice of the majority, and it is not solely the voice of the legislature. Constitutional democracy is a balancing system, it is the voice of the majority but also the guard for minorities and their human rights, and it is the voice of the legislature only when it enacts laws in accordance with the fundamental highest principles of the Law, namely, justice, reasonableness, and proportionality. Constitutional democracy is not a melting democracy, so-called defensive democracy, but still it is not a suicide pact. Constitutional democracy is not a total system of deprivation, suppression, and criminal punishment, but a system of tolerance.[111]

Referenda thus weaken the power of the Knesset and expose its misuse. Referenda as a means of direct democracy are problematic devices in a democratic society with ethnic nationalistic characteristics. Use of referenda as a governmental process may turn the referenda into effective barriers against the influence of the minority on the decision-making processes and indeed remove any remaining influence over the legislature.[112]

Moreover, the referendum mechanism brings substantive acutely disputed issues for final decision, while undermining social and public stability and indeed potentially negating social cohesion. This is particularly true in highly divisive societies, where often the absence of decisions on such complex and sensitive issues—is the key to the development of a political dialogue that allows balanced and considered political decisions to be made. In the case of *Ram Engineers and Contractors Ltd.*, Justice Aharon Barak explained this point as follows:

> Tolerance is a central value of public order. If every individual in a democratic society would seek to fully satisfy his desires, society would end up unable to fulfill even a few aspirations. In the natural course of things, a healthy society is based on mutual concessions

(1993) (in Hebrew).

111. Mohammed S. Wattad, *The Meaning of Wrongdoing*—A Crime of Disrespecting the Flag: Grounds for Preserving "National Unity"? 10 S.D. INT'L L.J. 5 (2008).

112. Amal Jamal, *Direct Democracy, Ethnic Democracy and the Limits of Influence: Referendum and the Palestinians in Israel*, *in* PHANTOM IN POLITICS: REFERENDA IN ISRAEL (Dana Arieli-Gorowitz ed., Jerusalem: Magnes 2006) (in Hebrew).

and mutual tolerance.[113]

The importance of these comments is reinforced when considering whether the purpose underlying the laws on referendum is a proper purpose or not. In other words, a purpose may be considered improper if it undermines the fabric of life and the stability of society. See also:

> Democracy is based on tolerance . . . Indeed, tolerance constitutes both an end and a means. It constitutes a social goal in itself, which every democratic society should aspire to realize. It serves as a means and a tool for balancing between other social goals and reconciling them, in cases where they conflict with one another.[114]

The ability of politicians to bypass parliament and appeal directly to citizens, particularly in democratic regimes lacking a formal written constitution, could allow a charismatic leader to present himself/herself as someone who, contrary to the elected politicians, is carrying out the "will of the People." The weakening of parliamentary institutions before a deeply rooted democratic political tradition that has been formed is dangerous and could lead to personalization of government.

B. *The Referendum Law: Its Characteristics, Nature and Application*

Israeli democracy has not implemented a referendum since 1948, even though the demand to make use of this device for one-time decision making purposes or as a permanent mechanism has occasionally been voiced.

The use of the device of the referendum as a mechanism, which subordinates the decisions of the Government and even the Knesset decisions—whether in a general and sweeping manner or in relation to concrete issues—however worthy it may be, touches upon the core of the system of government in Israel. It would be appropriate, as we learned from the Declaration of Establishment, quoted above, to determine this matter within the context of a constitution or a constitutional legislation such as Basic Law enactment.

Indeed, the electoral system in Israel is regulated by Section 4 of Basic Law: The Knesset, as well as other constitutional provisions in the body of this Basic Law. As noted, Section 4 of this Basic law (The Electoral System) may only be varied by a Basic Law passed by a majority of the MKs.

In support of this analysis it should be recalled that on May 28, 1995

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113. CA 105/92 Ram Engineers and Contractors Ltd. v. Upper Nazareth Municipality, 47(5) PD 189, 211 (Isr.).

114. AHARON BARAK, THE JUDGE IN A DEMOCRACY 28 (2006).

the Israeli Minister of Justice, at that time, Professor David Libai, appointed an internal committee, headed by Deputy Attorney General Shlomo Guberman, to prepare a draft law for a referendum on a specific topic to be determined.[115] The committee report discussed, at length, the difficulty of changing the electoral system through a referendum. This difficulty ensued from the formal entrenchment provided by Section 4 of Basic Law: The Knesset. In other words, in the committee's view, the Knesset alone was competent to change the electoral system; the People could not do so through a referendum. That is, Basic Law: The Knesset could not be indirectly varied through a referendum,[116] because the option of a referendum regarding any change in the electoral system did not appear within the language of Section 4 of Basic Law: The Knesset.

Moreover, subjecting government decisions to referenda means constricting the residual authority of the Government as anchored in Section 32 of Basic Law: The Government; a constitutional legal norm which is formally entrenched, and which cannot be varied save by a Basic Law passed by a majority of the MKs (as required by Section 44 of this Basic Law).

In any event, where the State of Israel wishes to hold a "referendum," as a positive binding device, it is incumbent upon it to do so through a Basic Law, adopted by a majority of the MKs, both by virtue of Section 4 of Basic Law: The Knesset and in compliance with Section 44 of Basic Law: The Government. This is because these are the two Basic Laws that establish, *inter alia*, the principles of the regime and regulate the powers of the two main branches of government in Israel. This is a fundamental issue of the first order and certainly, not a technical one. As a matter of principle, a change to the system of government, even without the explicit language of Section 4 of Basic Law: The Knesset and Section 44 of Basic Law: The Government, must be implemented through the enactment of basic legislation.

Support exists for this view. In the *Mizrachi Bank* case itself, Justice Cheshin addressed the question whether the Knesset is permitted to enact an entrenchment provision that requires the approval of a particular statutory amendment by means of a referendum. In his comments, he avoided making a decision relative to the validity of such a provision, but at the same time cast doubt on the Knesset's power to act in this way.[117] In this context, it is apt to quote again the remarks of Justice Aharon Barak, in the *Mizrachi Bank* case:

> Our political and legal culture is not based upon a special appeal

115. The State of Israel, Ministry of Justice, "Referendum – Committee Report" (in Hebrew).

116. SAADIA & ORGAD, *supra* note 18, at 147.

117. *Mizrachi Bank*, CA 6821/93 (Isr.).

> to the People by means of a referendum. No referendum has taken place in the past. Our political and legal culture is not built upon "direct" democracy, but upon "representative" democracy. Our political and legal culture also maintains *that the appeal to the People takes place in the context of the elections for the Knesset*.[118]

A provision of this type was created in Section 3 of the Golan Heights Entrenchment Law. It is worth emphasizing that Section 4 of this Law stated that the provisions of Section 3 would commence only "on the commencement of a Basic Law which will regulate the conduct of the referendum." Clearly, the Knesset itself was aware of the normative supra-statutory constitutional weight of the adoption of a governmental system, conducted, *inter alia*, by means of a "referendum," and the corresponding need to anchor this system in basic legislation, and not in mere ordinary enactment.

However, and to the contrary, as we have witnessed in 2010, the Knesset enacted the Referendum Law, as an ordinary law, rather than a Basic Law. It was then—as I view it—that the petition before the HCJ and its evolvement during the first two hearing sessions that forced, in 2014, the Knesset to alter its initial ordinary legislation to a Basic Law enactment, as crystalized in the shape of the Referendum Basic Law.

In my opinion, by enlarging the judicial panel and issuing a decree *nisi*, the Court indicated to the Knesset and the Government that it is ready to exert its power of judicial review against the constitutionality of the Referendum Law, thus declaring its form of enactment as unconstitutional.

There cannot be any other explanation to the Knesset's shifting moods other than the one mentioned above. Especially, due to the fact that by legislating the Referendum Basic Law, the Knesset acted contradictory to its official position before the Court, at the time the petition was pending before the Court. If the Knesset was so serious about its arguments, I see no reason why it did not take the legal challenge seriously all the way until the final line, hence, allowing the Court to make its legal and judicial decision on the arguments spread out through the petition.

C. *Referendum and its Impact on the Issue of the Golan Heights*

In this context, it is necessary to briefly examine the Golan Heights Entrenchment Law, if only because of its importance to the issue at hand. The Golan Heights Law, 1981 (Golan Heights Law) was enacted by the Knesset on December 14, 1981, and provided that "The law, jurisdiction

118. *Id*. Judgment of Justice Aharon Barak ¶ 49 (emphasis added).

and administration of the State shall apply to the Golan Heights." The public perceived the law as annexing the Golan Heights and making it part of the territory of the State of Israel. This was also the way the law was referred to by its opponents. However, the Government deliberately avoided using the word "annexation."

The law led to fierce international criticism directed against Israel, and no country in the world, including the United States of America, ever recognized this law. The U.N. Security Council even responded by passing Resolution 497, thus declaring that this "annexation" was "without international legal effect." The practical consequences of this law are few. This is because, since the enactment of the law, many governments in Israel have conducted, overt or covert, political negotiations with Syria; negotiations which reached an advanced stage, and even discussed the return of the Golan Heights, in whole or in part, to Syria.

In 1999, the Knesset passed the Golan Heights Entrenchment Law, according to which a government decision to give up territory of the State would require the approval of a majority of the Knesset members (61 or more) and a majority of the voters in a referendum—this would apply immediately upon the adoption of a Basic Law regulating the same; basic legislation.

In 2010 the Referendum Law was passed, in essence amending the Golan Heights Entrenchment Law, and subordinating the decisions of the executive branch regarding cessation of the application of the law, jurisdiction and administration of the State of Israel to the "territory"—not only to Knesset approval but also to the approval of the People, within the framework of a referendum.[119] The Golan Heights Entrenchment Law was basically amended by the Referendum Law, thus replacing the requirement for the adoption of a referendum mechanism using basic legislation (under the original Golan Heights Entrenchment Law) with the actual adoption of the referendum mechanism through ordinary legislation alone.[120]

A perusal of the provisions of the Referendum Law reveals that it relates to the adoption of a referendum, which binds the legislature and the executive authority; and that as a corollary, in absence of the final and binding seal of approval of the People, no legal or administrative significance attaches to the decisions of these two governmental branches, a seal of approval which may only be obtained through a referendum.

However, it should be noted that in my view the provisions of the

119. The territory to which the law, jurisdiction and administration of the State of Israel applies.

120. *See* RUBINSTEIN & MEDINA, *supra* note 14, at 122.

Referendum Law contain a self-neutralization mechanism. That is because according to this law it will not be necessary to refer to a referendum where the Government's decision is approved by 80 MKs. Namely, the above-mentioned law requires the reference to a referendum only in case the Knesset confirms the Government's decision by votes of 61 MKs. It is remarkable that should the Knesset reject the Government's decision, then no reference to the People is required (*i.e.*, no referendum would be exerted).[121]

The Referendum Law establishes a concrete arrangement for elections to the legislative branch—elections for all intents and purposes—in relation to a specific issue, with all that implies in procedural and substantive terms.

Furthermore, a note shall be made that the Referendum Law lacks constitutional logic insofar as it requires a special majority of 61 MKs in order to refer the Government's decision to exert a referendum, while it finds it sufficient that a simple majority of participants in the referendum confirm the Government's decision. This is being mentioned especially due to the importance of the topic referred to by the referendum. If the issue put forward for the public's decision is so significant, then a special majority should have been sought.

D. *The Referendum Law: Unconstitutional Variation of Basic Legislation*

The Referendum Law embraces a complete basic and fundamental electoral order—which I contend is improper—within the framework of an ordinary law. It does so despite the clear and explicit intention of the Knesset, as revealed in the original version of the Golan Heights Entrenchment Law of 1999, despite the judicial determinations in the *Mizrachi Bank* case,[122] including the subsequent binding rulings of the HCJ, and in spite of the clarity and specificity of Section 4 of Basic Law: The Knesset and Section 44 of Basic Law: The Government, which refer explicitly to the need for Basic Law enactment when seeking to change the electoral system or modify (expand or narrow) the powers of the executive authority.

Above all, and in addition, by reading the latter above-mentioned Basic Laws, it becomes clear that the concept of a referendum is foreign to both of them. It follows, therefore, that in essence, according to its provisions, the Referendum Law limits the powers of the executive authority, including its residual authority in particular, and explicitly alters the system of government and the electoral system in Israel.

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121. Referendum Law, *supra* note 3, § 4(2)(b).

122. *Mizrachi Bank*, CA 6821/93 (Isr.).

To make the argument clearer, time then to emphasize, in further details, how the initial Referendum Law materially changes other constitutional provisions in Basic Law: The Knesset. To elaborate on this point, allow me to provide the following examples:

First, the Referendum Law creates another source of authority for "dissolving" the Knesset, in the sense that it compels an election—albeit in an *ad hoc* manner—including all the procedures involved therein.

Second, the Referendum Law affects the continuity of the term of the Knesset, though Section 8 of Basic Law: The Knesset explicitly provides for a term of four years. Thus, in absence of any of the grounds for shortening the term of the Knesset, as stipulated in Basic Law: The Knesset, there is no statutory ground which would allow even the temporary forfeiture of the Knesset's term of office or the continuity of its decision-making process, for even a single hour. Clearly, there is also no ground, under Basic Law: The Knesset, for allowing a change in the election date as prescribed in Section 9 of Basic Law: The Knesset, including the relevant provisions for early elections or postponed elections.

Third, the Referendum Law materially varies Basic Law: The Knesset with regard to the rights to vote and to be elected.[123] This is because these two rights are not formal in the sense that they allow the implementation of the rights to vote or to be elected. Rather, these are substantive rights, which are realized in accordance with the dates and grounds explicitly stated in Basic Law: The Knesset. In this context, it must be reemphasized that the right to vote and the right to be elected are founded on, and as part of, the complete mechanism of election law established by Basic Law: The Knesset and the Knesset Elections Law (*i.e.*, insofar as these relate to the fulfillment of the right to influence the democratic process), whether as a voter or as a candidate for election. The latter two players, by virtue of the provisions of Basic Law: The Knesset and the Knesset Elections Law, both in relation to the dates for holding elections, and in relation to the grounds on which the term of the elected Knesset may be shortened or extended, have a reliance interest. Basic Law: The Knesset does not contain provisions allowing for the creation of a temporary Knesset convened by the People, which can reach decisions that override the decisions of the existing elected Knesset.

To this extent, it is not constitutionally preferable then for the Knesset to have enacted the Referendum Basic Law; it must have done so from the beginning. This is what Israel's constitutional structure requires. It is not by chance, therefore, that the Knesset enacted the Referendum Basic Law shortly before the third hearing session of the petition before the HCJ.

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123. Knesset, *supra* note 51, §§ 5–6.

E. *The Referendum Law and its Impact on Basic Law: Jerusalem, Capital of Israel*

Since 1948, the legal and international status of Jerusalem, and more specifically of East Jerusalem, has been complicated and obscure. According to the U.N. General Assembly's Resolution 181, quoted in the Declaration of Establishment, international territory, which would include Jerusalem, was supposed to have been established. This resolution was not accepted; nonetheless, much of the world continues to see it as reflecting the correct legal position and refers to the legal status of Jerusalem accordingly.

In 1949, the State of Israel declared Jerusalem to be the capital of the State of Israel. Since the Six Day War in 1967, Israel has controlled all the territory of Jerusalem, and on July 30, 1980—when Basic Law: Jerusalem, Capital of Israel was adopted—the entire city of Jerusalem became an integral part of the State of Israel by virtue of Israeli law. In response, on August 20, 1980 the U.N. Security Council adopted Resolution 478 calling for the cancellation of this Basic Law.

Under the Oslo Accords, signed on September 13, 1993, the final status of East Jerusalem would be determined at a later date following negotiations between the State of Israel and the Palestinian Authority.

Apart from being a Basic Law, and as such possesses supra-legal constitutional status, Basic Law: Jerusalem, Capital of Israel, contains a formal entrenchment provision in the form of Section 7, which states: "Clauses 5 and 6 shall not be modified except by a basic law passed by a majority of the members of the Knesset." Sections 5 of the Basic Law states: "The jurisdiction of Jerusalem includes, as pertaining to this Basic Law, among others, all of the area that is described in the appendix of the proclamation expanding the borders of municipal Jerusalem beginning . . . June 28th, 1967, as was given according to the Cities' Ordinance." Section 6 of the Basic Law states: "No authority that is stipulated in the law of the State of Israel or of the Jerusalem Municipality may be transferred either permanently or for an allotted period of time to a foreign body, whether political, governmental or to any other similar type of foreign body." It seems, therefore, that the Referendum Law may have serious legal and constitutional implications regarding the legal status of East Jerusalem, within the framework of a future political settlement with the Palestinian Authority. The legal framework prescribed by the Referendum Law materially changes the provisions of Section 7 of Basic Law: Jerusalem, Capital of Israel, which clearly requires that such a change be made by a Basic Law enactment rather than an ordinary legislation. Therefore, the Knesset had no discretion in choosing between ordinary law and Basic Law legislation. It should have chosen the latter option from the very beginning. Here we are again; it is not out of free

choice that the Knesset ultimately made its mind in enacting the Referendum Basic Law. It was, in my modest view, a direct consequence of the petition and its evolvement before the HCJ.

F. *Interim Conclusion*

In essence, the Referendum Law enables the current parliamentary majority in the Israeli Knesset to misuse its power by fettering the legislature and the executive authority in the future. Fettering that, as mentioned, should be confined to basic legislation and not allowed through ordinary legislation; fettering that has no moral, legal, constitutional or historical justification. This is particularly true in light of the fact that the application of the law, jurisdiction and administration of the State of Israel to the Golan Heights and to East Jerusalem was not made by way of a referendum, and therefore there is no room to revoke the application of law, jurisdiction and administration to these areas by way of a referendum. All this is true, moreover, in view of the historic, political and international—diplomatic and legal—conflict regarding the legal status of the Golan Heights and East Jerusalem.

Thus, the Referendum Law materially changes fundamental provisions in Basic Law: The Knesset, Basic Law: The Government, and Basic Law: Jerusalem, Capital of Israel. The Referendum Law was not initially passed in accordance with the Israeli constitutional structure, namely through basic legislation, and therefore it was a "bad law." Yet, four years after the original enactment of the 2010 law, the Knesset, luckily, regained its composure. However, better late than never. To this extent the Knesset corrected then a fundamental constitutional flaw, that otherwise would have required the intervention of the HCJ—a judicial review that the Knesset succeeded to avoid at the last minute of the judicial hearing before the Court.

The question becomes then: does the latter legislative amendment fully resolve the constitutional flaws in the Referendum Law? In my view, the Referendum Law is substantively flawed as it unlawfully violates fundamental constitutional human rights. Before approaching this issue, a note ought to be made.

The arguments at this level were not discussed before the HCJ, since already in the first hearing session of the petition, and in light of the Court's remarks, I have agreed to limit the scope of the petition, particularly given that no actual referendum was taking place at the time the petition was heard by the Court.

This way or the other, and for the sake of academic research, I would like to provide the readers with my arguments in this context.

G. *The Referendum Law: Unconstitutional Violation of Protected*

Fundamental Rights

The Referendum Law, including the governmental mechanism contained therein, violates protected constitutional rights. These protected fundamental rights include the right to dignity and the right to equality (equality before the law and the principle of substantive equality) under Basic Law: Human Dignity and Liberty,[124] and the right to vote and the right to be elected under Basic Law: The Knesset.[125] These rights are violated by the Referendum Law not in accordance with the terms of the limitation clause set out in Basic Law: Human Dignity and Liberty,[126] and not in accordance with the judicial limitation[127] clause applied in relation to Basic Law: The Knesset.[128]

1. The Right to Vote and the Right to be Elected

According to Section 5 of Basic Law: The Knesset, the right to vote in elections to the Knesset is given to every person who meets the following cumulative criteria: he/she is (a) an Israeli citizen; (b) 18 years old or older; and (c) the court has not deprived him/her of this right by virtue of any law. The right to be elected to the Knesset is given to any person who meets the following cumulative criteria: he/she is (a) an Israeli citizen; (b) included in a list of candidates submitted by a party; and (c) on the date of filing the list of candidates he/she is twenty-one years of age or over.

The election process is not limited to the formal meaning of the process, but has substantive, practical and conceptual implications. These implications relate, *inter alia*, to the Israeli citizens' ability to influence the democratic process, both as voters and as possible candidates for election. A citizen has a reliance interest in relation to the date of holding the election for the Knesset as well as in relation to the full term of the serving Knesset, subject, as noted, to the grounds listed in Basic Law: The Knesset[129] regarding the extension or shortening of the term of the Knesset.

Violations of these rights, according to the mechanism outlined in the Referendum Law,[130] must be carried out in compliance with the constitutional standards set out in the judicial limitation clause, before such violations can be deemed constitutional. In absence of such

124. Human Dignity and Liberty, *supra* note 37, §§ 2 & 4.
125. Knesset, *supra* note 51, §§ 5 & 6.
126. Human Dignity and Liberty, *supra* note 37, § 8.
127. *See supra* note 36.
128. *See supra* note 51.
129. *See id.*
130. The Book of Laws, No. 2263 (Nov. 28, 2010).

compliance, the scourge of unconstitutionality taints these violations. This is especially true in light of the understanding of the referendum mechanism as an apparatus for establishing a temporary superior Knesset (superior to the serving Knesset).

The Referendum Law violates the integrity of the preceding election process by virtue of which the current Knesset serves. It also violates the right to vote and the right to be elected of Israeli citizens who wish to participate in the decision-making process on crucial matters in an organized and established manner, within the framework of the classical procedure of elections to the Knesset—the manner prescribed in Basic Law: The Knesset.[131]

Moreover, the right to vote and the right to be elected are derived from the representative electoral system used in Israel, both by virtue of Basic Law: The Knesset and the Knesset Elections Law.[132]

This broad and substantive understanding of the two rights support a perception of the governmental process as a representative process, which encompasses decisions based on balances rather than on dichotomies. In contrast, the Referendum Law actually adopts a dichotomous approach of "yes or no" and "for or against." The latter approach is foreign to the Israeli electoral system and, as such, violates the right to vote and the right to be elected.

2. The Arab Minority in Israel: The Right to Dignity, the Right to Equality, and the Referendum Law[133]

Another aspect of the violation of the right to vote and the right to be elected relates to the collective rights of the Arab minority in Israel, especially, but not only, the residents of the Golan Heights and East Jerusalem.

The Referendum Law entrenches the Arab collective's status as a minority in the State of Israel and, as a result, sweepingly, technically and formally prevents the Arab citizens from engaging in genuine and influential participation in the electoral process, either as voters or as candidates for election. This is because a national ethnic minority is best able to exert its influence in a representative democracy by allowing the public's representatives to show the necessary flexibility and discretion to engage in political and principled compromises. In other words, flexibility that allows the management of a constitutional democratic society (substantive democracy), and that which rejects the validity of a formal numerical democracy.

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131. *See supra* note 51.

132. The Book of Laws, No. 556 (Apr. 14, 1969).

133. *See generally* Priscilla F. Gunn, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 URB. L. ANN.; J. URB. & CONTEMP. L. 135 (1981).

The Referendum Law creates a regime of formal democracy, which implements the rights of the Arab minority in Israel to vote and be elected in a completely technical manner, but does not grant this minority a genuine opportunity to influence the election process. This is because the Referendum Law creates a regime of "yes or no," that negates the possibility of compromises and balances. In essence, the Referendum Law perpetuates the numerical inferiority of the Arab minority in Israel, and creates serious concern that the formal power of the referendum may be abused. This should not be the way of substantive democracy. Substantive democracy protects the rights of minorities and prevents abuse on their part.

The Referendum Law significantly erodes the ability of the Arab minority in Israel to exert real and representative influence—enabling balances and compromises—in the political process, including the political decision-making process in Israel. Thus, the Referendum Law violates the right of the Arab minority in Israel to formal and substantive equality relative to the Jewish citizens of Israel. The Arab Minority's right to equality is violated by the Referendum Law's attitude toward the Arab minority, which fosters a means to achieve another purpose—the nature of which will be examined below. Regardless of how greatly this purpose may be justified, the very use of the Arab minority as a means, based on its ethnic national character, is humiliating and degrading, and consequently breaches the dignity of the Arab minority.

Nevertheless, and above all, the Referendum Law is nothing but a story of irony, for it aims at determining the future of the residents of East Jerusalem and the Golan Heights, by a referendum, in which these residents are not allowed to participate in, for they are not allowed, in the first place, to take part in the elections to the Knesset—neither as voters nor as candidates.

3. The Referendum Law and the Constitutionality of the Violation of Human Rights: Analysis of the Terms of the Limitation Clause

When a petitioner challenges the constitutionality of a statue, the government bears the burden of establishing that the statute is constitutional under the limitation clause.[134] Nonetheless, I shall refer to

134. Compare the debate on this issue: *See* (1) AHARON BARAK, PROPORTIONALITY IN LAW, VIOLATION OF THE CONSTITUTIONAL RIGHT AND ITS LIMITATIONS 529–31 (2010) (in Hebrew); (2) HCJ 6055/95 Zemach v. Minister of Def. 53(5) PD 241, at 269 [1999] (Isr.); (3) HCJ 8150/98 Jerusalem Arts Theater v. Minister of Labour 54(4) PD 443, at 445 (Isr.); (4) HCJ 366/03 Commitment to Peace & Soc. Justice Movement v. Minister of Fin. 60(3) PD 464 (Isr.); (5) HCJ 8035/07 Eliahu v. Gov't of Israel [2008] (Isr.) (Published in Nevo on Mar. 21, 2008); (6) HCJ 124/09 Dawiyat v. Minister of Def. [2009] (Isr.) (Published in Nevo on Mar. 18, 2009); (7) HCJ 1993/03 Movement for Quality in Gov't v. Prime Minister, 57(6) PD 817 [2003] (Isr.).

the requirements of the limitation clause, including the subtests of the requirement of proportionality contained in that clause.

A constitutional democracy is characterized by the fact that it is not sufficient for lawful consent to be given to a violation of a constitutional right. Legality is insufficient. The violation of a constitutional right must be supported by a material and legitimate justification. An element of legitimacy is required. One characteristic of this explicit requirement is a worthy goal; another is that the means used to achieve that goal do not impair the constitutional right beyond a proper extent.

Constitutional rights are so unique, *inter alia*, for it may only be violated for the attainment of objectives, which can morally justify a violation of the constitutional right. Such an objective is derived from the values on which society is based (*i.e.*, democratic values in a constitutional democracy,[135] and in the State of Israel, as a Jewish and democratic state,[136] these are its values).

The *Mizrachi Bank* case considered the general standard applied in Israeli law when determining whether the purpose under consideration is proper or not: "the purpose fits if it is intended to fulfill important social goals for the establishment of a social framework that recognizes the constitutional importance of human rights and the need to protect them."[137] It was further held in that case that:[138]

> a purpose that is positive from the point of view of human rights and the values of society, including the purpose of establishing a reasonable and fair balance between the rights of different People who hold interests that are sometimes inconsistent with each other. A proper purpose is one that creates a foundation for living together, even if it entails a compromise in the area of granting optimal rights to each and every individual, or if it serves interests that are essential to the preservation of the state and society.

The declared subjective purpose, and indeed the objective and implied purpose, of the Referendum Law is to subordinate government decisions not only to the approval of the Knesset but also to the approval of the People, insofar as the decisions concern the application of the law, jurisdiction and administration of the State of Israel to certain areas, such as the Golan Heights and East Jerusalem.

As legitimate as this purpose can be, it is, in my view, improper. It undermines the validity of the election to the Knesset as a result of which the current Knesset serves, and violates the right to vote and the right to

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135. SAADIA & ORGAD, *supra* note 18, at 125.
136. BARAK, *supra* note 114, at 295.
137. *Mizrachi Bank*, CA 6821/93; Judgment of Justice Aharon Barak, at 435.
138. *Id*., Judgment of Chief Justice Meir Shamgar, at 342.

be elected of Israeli citizens who wish to take part in the critical decision-making process in the established classical election process, namely, elections held in accordance with the constitutional criteria set out in Basic Law: The Knesset and the Knesset Elections Law.

Political compromise is a preferable way to make decisions on complex and weighty issues such as the borders of the State, national identity and constitutional rules. In contrast to compromise, a referendum fosters the illusion that there is a kind of legitimate political knife that cuts one way or another. Consideration of problems in this 'black and white' way, confronting "justice" with "injustice" or "truth" with "lies," in terms of the majority versus the minority, is foreign to the spirit of democracy, and *a fortiori*, liberal democracy.[139]

Moreover, where issues are complex from a legal, national and international point of view, such as that relating to the Golan Heights and East Jerusalem, it would seem that using the device of a referendum would only deepen the existing chasms in society in general, and on this specific issue, in particular, rather than bridge them.

The mechanism of the referendum results in substantive controversial issues being decided with finality, in a manner that undermines social and public stability and impairs social cohesion. This is particularly relevant in the case of the State of Israel, which is divided, and where often the absence of decisions on these substantive, complex and sensitive issues is the key to the development of a political dialogue that allows balanced and considered political decisions to be made.

Over the years, the HCJ has pursued a consistent policy of refraining from ruling on the legal status of the Golan Heights—the essence of the Referendum Law—leaving this issue open, as far as possible, to the interpretation of the relevant national and international decision makers.[140] In this context, it is worth quoting the words of Justice Aharon Barak, in the *Abu Salah* case:

> By virtue of the Golan Heights Law all the legal norms applicable in the country are applied to the Golan Heights, in such manner that where, in any statute, the words "Israel" or the "State" or the "State of Israel," are used the Golan Heights shall also be implied . . . there is no doubt that the purpose of the legislation – and the language of the provision – is to equate the Golan Heights, with regard to law, jurisdiction, and administration, to the State of Israel itself.[141]

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139. Yaron Ezrachi, *Arguments against the Use of a Referendum in the Israeli Democracy*, *in* DANA ARIELI-HOROWITZ, REFERENDA IN ISRAEL 59 (1993) (in Hebrew).

140. SAADIA & ORGAD, *supra* note 18, at 291.

141. HCJ 205/82 Abu Salah v. Minister of Interior 37(2) PD 718, at 720–21 (Isr.).

In a young and inexperienced democracy, such as that of the State of Israel, we must avoid creating centers of authority outside the institutions of the legislative, executive and judicial branches, and the political framework of the parties. Such centers of authority may tempt irresponsible political entities to harm the status of the legislature or the government, in a manner that endangers the accepted democratic political processes. A referendum can undermine the political stability of the democratic system rather than strengthen it.

Moreover, the purpose of the Referendum Law negates the possibility of creating potential critical balances that are needed in order to deem the law's purpose as worthy. Democracy, particularly of the liberal kind, is not based only on the principles of the People's sovereignty and majority rule. A democratic regime also includes principles of pluralism, protection of minority rights, consensus and compromise. Naturally, we must accept the view that decisions in a democracy should be made by "a government consisting of representatives," both in view of the size of modern democratic societies and because of the complex nature of the issues that demand resolution. This is also the case in Israel.

From this perspective, the referendum comes across as a populist device, which may not only undermine representative democracy and its institutions, but also divide the complex fabric of Israel's democratic and multi-cultural society.[142] The society in the State of Israel is subject to conflict between the Jewish majority and the Arab minority. In this situation, a referendum—cutting across and dividing the majority from the minority based on national identity—is dangerous to society and to the democratic state. This situation encourages the use of the referendum as a means for conducting narrow nationalist policies under the guise of democracy.

Even if I assume that the violation of fundamental rights is made for a proper purpose, in accordance with the values of the State of Israel as a Jewish and democratic state, I must still consider the proportionality of the violation. If the harm is disproportionate, the Referendum Law is, a priori, unconstitutional.

The requirement for proportionality consists of three subtests: (a) the rational connection test: the existence of a rational connection between the means chosen and the purpose that the legislature seeks to achieve through this measure; (b) the necessity test: the existence of a means which causes the least harm to the protected basic right; and (c) the test of proportionality in the narrow sense: balancing benefits.

Even if I assume that there is a rational connection between the means

142. Dana Blander & Gideon Rahat, *Referendum: Myth and Reality* (position paper of the Israel Democracy Institute) (vol. 20) 55 (2000) (in Hebrew).

(the Referendum Law) and the purpose for which this law was enacted,[143] the means that was selected is not the least drastic in terms of the violation of the protected fundamental rights in question. An alternative means was available, namely, early elections in accordance with the rules of Basic Law: the Knesset and the Knesset Elections Law.[144]

It should be emphasized that underlying the necessity test is the concept that legislative measures are needed only if it is not possible to achieve the legislative objective by other hypothetical means that comply with the requirement of a rational connection with equal or greater intensity, and which may cause a lesser harm to the constitutional rights.[145]

Further, even if one assumes that the Referendum Law is a less harmful measure, a balance must still be drawn between the benefits ensuing from the implementation of the purpose and the resulting harm to the constitutional right.[146] This is because the measure established by the law must create a proper relationship between the benefit gained from, and the scope of the harm to the constitutional human right.[147]

In light of the broader above detailed considerations, militating against the institution of the referendum, the harm to protected constitutional rights resulting from the operation of the mechanisms under the Referendum Law far exceeds the practical usefulness in complying with this law.

IV. INSTEAD OF A CONCLUSION: THE REFERENDUM LAW IN PERSPECTIVE

"Incidentally, in this context there are those who believe that it would be inappropriate to hand over certain issues to the general public for decision – unlike general decisions, such as the adoption of a constitution – by way of a referendum."[148] The electoral system in Israel is a democratic parliamentary system of representative government.[149] Thus, according to constitutional legal norms prescribed in this context, as the People do not have power to decide issues on the agenda of the executive or legislative branch through a referendum.

In other words, the People do not have a right to engage in a

143. *See generally* BARAK, *supra* note 110, at 289–388.

144. The Book of Laws, no. 556 (Apr. 14, 1969).

145. HCJ 8276/05 Adala—The Legal Ctr. for Arab Minority Rights v. Minister of Def. (published in Nevo, on Dec. 12, 2006) (Isr.); Judgment of Chief Justice Aharon Barak ¶ 12.

146. *See* BARAK, *supra* note 110, at 419–21. For the general proposition that when deciding domestic issues, judges should balance the public interest and individual human rights.

147. HCJ 1030/99 Oron v. Speaker of the Knesset 56(3) PD 640, at 668 (Isr.).

148. RUBINSTEIN & MEDINA, *supra* note 14, at 163–64.

149. *See* Knesset, *supra* note 51, § 4.

"referendum," and in any event the Knesset does not have a mandate to pass legislation providing for formal entrenchment which is reflected in the existence of a referendum. Only the Knesset, as a constitutive, and not as a legislative body, is competent to change the electoral system and not the People through the device of a referendum. Put differently, it is not possible to vary Basic Law: The Knesset indirectly by means of referenda[150] as, according to the language of Section 4 of Basic Law: The Knesset, it is not possible to hold referenda to change the electoral system.

To this extent, the Knesset's ultimate decision, in 2014, to incorporate the referendum's concept in a Basic Law was not out of generosity, nor was it because the Knesset finally got convinced that this is the only right way to properly act, but rather because the HCJ gave enough bold hints,[151] during the hearing sessions of the petition before it, that as it stood then, and in the absence of a Basic Law legislature, a constitutional problem calls upon judicial review. This becomes evident by the decision to enlarge the judicial panel, sitting in the petition, to seven judges, already after the first hearing session, as well as to issue a decree *nisi*.[152]

The Referendum Law materially modifies the system of government of the State of Israel, and as a corollary materially modifies Basic Law: The Knesset, Basic Law: The Government, and Basic Law: Jerusalem, Capital of Israel. It does so by significantly eroding the foundations of the powers of the Knesset as the sole legislature of the State of Israel, as well as, *inter alia*, the residual authority of the executive branch. As explained, such modifications can only be performed by means of basic legislation.[153]

This way or the other, in a democratic regime premised on the principle of the separation of powers, where the political authority is empowered to determine policy and the implementation of its policy in the political, military, economic, and social arenas, it is of paramount importance to preserve the power and status of the political authority. The creation and modification of the political culture should be, first and foremost, the province of the political forces themselves.

Even if the Knesset would have had a mandate to adopt basic legislation enabling formal entrenchment expressed through the holding of a referendum—as it ultimately did in 2014—such power would be limited if abused.[154] The application of the law, jurisdiction, and administration of the State of Israel to the Golan Heights and East Jerusalem was not made by way of a referendum and therefore should not

150. SAADIA & ORGAD, *supra* note 18, at 147.
151. *See supra* note 4.
152. *Id.*
153. *See Mizrachi Bank*, CA 6821/93.
154. RUBINSTEIN & MEDINA, *supra* note 14, at 122.

be annulled by way of a referendum. The existence of the historic, political, international, diplomatic, and legal dispute in relation to the Golan Heights and East Jerusalem support this view.

The Referendum Law strikes a mortal blow to the principle of the rule of law, both formal and substantive. The rule of law is the foundation upon which the Basic Laws of the State of Israel rest; particularly those dealing with the establishment of its parliamentary, executive, and judicial regime.

In light of the delicate constitutional fabric of the State of Israel, the institution of the referendum can be a valid and legitimate solution only in relation to the question of the need for the establishment of a formal written and orderly constitution for the State of Israel.

Either way, a constitutional legislation that incorporates the idea of referendum as a binding tool does not cure the constitutional deficiencies of such legislation. This is because it violates fundamental constitutional rights, in general, and others of the Arab minority in Israel, in particular. These rights concern the right to vote and the right to be elected, and the right to dignity and the right to equality with regard to the rights to vote and be elected. Worse, the Referendum Law ignores the constitutional rights of Israel's Arab residents of East Jerusalem and the Golan Heights. They are not full citizens of Israel but only permanent residents and, as such, they have no right to vote, neither for the Knesset nor in a referendum. This is an awkward legal and constitutional situation, especially given that the Referendum Law primarily affects them.

I am aware that even constitutional rights are not absolute, and that as such they can be violated by the governmental branches. However, when this happens, such violation must meet the requirements set forth by the formula as drafted in the limitation clause of Basic Law: Human Dignity and Liberty. This has not been the case for the Referendum Law. Therefore, the Referendum Law is unconstitutional, because it is completely contrary to written and unwritten binding supra-legal constitutional norms as well as to legal rulings possessing a supra-legal constitutional nature.

Finally, it is valuable to quote the remarks of the founder of the political vision of the State of Israel, Theodor Herzl, in his work "*The Jewish State*":

> [A] settling of questions by the referendum to be an unsatisfactory procedure, because there are no simple political questions which can be answered merely by Yes and No. The masses are also more prone, even than Parliaments, to be led away by heterodox opinions and to be swayed by vigorous ranting. It is impossible to formulate a wise internal or external policy in a popular

assembly.[155]

155. THEODORE HERZL, THE JEWISH STATE, ch. 5 (1896) (trans. Jewish Virtual Library).

TRADING IN HUMAN RIGHTS: QUESTIONING THE ADVANCE OF HUMAN RIGHTS INTO THE WORLD TRADE ORGANIZATION

Sayed M. Zonaid [*]

I. INTRODUCTION

The renowned international lawyer and judge Sir Hersch Lauterpacht wrote "as a rule, the political activities of states in the field of international relations are primarily devoted to safeguarding collective economic interests, no matter under what disguise they happen to appear."[1] Although penned a century ago, Sir Lauterpacht's assertion still

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1. HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL

holds true even today. Indeed, when one examines the engine powering the relentless spread of globalization today one finds the neoclassical notion of free trade.[2] Applied to international trade, the neoclassical school of economics emphasizes the importance of economic liberalization by way of open markets and unburdened trade.[3] More specifically, the neoclassical trade theory uses the Ricardian comparative advantage theory to demonstrate how resource endowments (capital/labor ratios) color a state's decision to trade.[4]

At its core, the World Trade Organization (WTO) represents the convergence and crystallization of neoclassical ideas into a tangible international political institution.[5] The WTO seeks to promote and, where applicable, enforce the neoclassical notion of unfettered trade.[6] With 159 states currently endorsing its framework,[7] the WTO can rightly be described as a resounding triumph of neoclassical economics in the international arena.

Viewed from the perspective of human rights, however, there is a darker side to the meteoric ascent of neoclassical economics and the influential institutions that adhere to it such as the WTO.[8] Critics argue, for example, that free trade results in the exploitation of developing countries by promoting the overuse of the resources that comprise their comparative advantage.[9] Moreover, rules promoting free trade generally limit the ability of states to place economic sanctions[10] on states engaging in human rights violations.[11] Owing to the "splendid isolation"[12] in which international trade and human rights norms have emerged, critics have also argued that trade law has failed to encourage compliance with human

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LAW: WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION 72–73 (Archon Books, reprint 1970) (Longmans, Green and Co. Ltd., 1927).

2. *See generally* NATALIE GOLDSTEIN, GLOBALIZATION AND FREE TRADE (2008).

3. RICHARD L. BERNAL, GLOBALIZATION, TRADE AND ECONOMIC DEVELOPMENT: THE CARIFORUM-EU ECONOMIC PARTNERSHIP AGREEMENT 120 (2013).

4. *Id.*

5. *Id.*

6. *Id.*

7. WORLD TRADE ORGANIZATION, MEMBERS AND OBSERVERS (2013), *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [hereinafter MEMBERS AND OBSERVERS].

8. BERTA ESPERANZA HERNANDEZ-TRUYOL & STEPHEN J. POWELL, JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS 4 (2009).

9. *Id.*

10. As human rights conditions do not typically impact the quality of goods, a WTO Member will violate Article I (Most Favored Nation) of the GATT if they ban products from a specific Member country. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. I, 61 Stat. A-11, 55 U.N.T.S. 194 (General Most-Favored-Nation Treatment) [hereinafter GATT].

11. HERNANDEZ-TRUYOL & POWELL, *supra* note 8, at 7.

12. *Id.*

rights norms.[13]

Although violations of the most serious degree are alleged, such as human trafficking and child enslavement, no significant progress has been made with respect to linking human rights with market access within the WTO.[14] In fact, the WTO's conspicuous silence on the issue of labor standards and human rights law in general has been a source of continuous ire for critics of globally integrated markets.[15] Currently, the only WTO provision referencing labor standards is Article XX(e) of the General Agreement on Tariffs and Trade (GATT), which allows WTO Members to prohibit the importation of prison labor products.[16] However, like many of the justified violations to the WTO, this provision is not easily invoked, as the chapeau of Article XX presents evidentiary hurdles to be surmounted before the exception is met.[17] In addition to meeting an exception listed under Article XX, the chapeau requires that the excepted measure be implemented in a manner that does not constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail."[18] Moreover, the excepted measure cannot also be "a disguised restriction on international trade."[19]

Criticisms aside, however, it would be erroneous to say that the WTO has not at all impacted the global human condition.[20] Trade and globalization, for example, has and will continue to be a major force in eradicating poverty.[21] By increasing business profits and spurring technological innovation, trade benefits rich and poor consumers alike by decreasing the prices of goods and services.[22] For developing nations in particular, trade raises living standards and creates new, previously unavailable jobs and opportunities.[23] Vividly illustrating this phenomenon is the fact that during the late 20th century, an era characterized by increased participation in free trade agreements, the percentage of people around the world living on an adjusted two dollars per day fell from forty-four percent to an astonishing eight percent.[24]

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13. *Id.* at 5.

14. Drusilla K. Brown et al., *Labor Standards and Human Rights: Implications for International Trade and Investment* 1 (IPC Working Paper Series No. 119, Univ. of Michigan, 2011), *available at* http://ipc.umich.edu/working-papers/pdfs/ipc-119-brown-deardorff-stern-labor-standards-human-rights-international-trade-investment.pdf.

15. *Id.*

16. GATT, *supra* note 10, art. XX (General Exceptions).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. HERNANDEZ-TRUYOL & POWELL, *supra* note 8, at 6.

23. *Id.*

24. *Id.*

Amazingly, during that period, the population of the world increased by two-thirds.[25] Indeed, so great has the impact of trade been that Clive Crook has written in the *Economist* that, "Globalization, far from being the greatest cause of poverty, is its only feasible cure."[26]

Apart from stimulating economic development, free trade also plays an important role in reducing the global conflict.[27] In a free trade setting, where interstate violence has the potential to disrupt the continuous flow of trade, states are less likely to engage in acts of aggression.[28] Even accounting for factors such as the size of the actor and geographic proximity—the main considerations of the gravity model[29] of international relations—this fact holds true.[30] Truly, given that disastrous global conflicts have ensued from the erection of trade barriers, free trade's role in promoting comity and interdependence between states cannot be understated.[31]

Although a number of specialized international organizations tackle human rights issues, few, if any, can match the WTO with respect to compliance.[32] Currently, respondent states comply with adverse decisions rendered by the WTO over ninety percent of the time.[33] If taken as true, Sir Lauterphact's assertion[34] regarding the international behavior of states sheds light on why the WTO is so successful in this regard. If the ultimate objective of states in the international arena is to safeguard collective economic interests, then it follows that states would acquiesce to the demands of an organization specifically designed to dispense and guard those economic interests. Noneconomic concerns, such as human rights, are, under this line of reasoning, secondary objectives, and, as such, inspire deference so long as they are incidental to the economic interests of states.

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25. *Id.*

26. Clive Crook, *Globalisation and Its Critics*, ECONOMIST (Sept. 27, 2001).

27. Håvard Hegre et al., *Trade Does Promote Peace: New Simultaneous Estimates of the Reciprocal Effects of Trade and Conflict*, 47 J. PEACE RES. 763, 771–72 (2010) (confirming that even after accounting for size and proximity, trade promotes peace).

28. *Id.*

29. A theory of international economics, gravity models of international relations uses economic size and geographic proximity to predict trade flows. THE GRAVITY MODEL IN INTERNATIONAL TRADE: ADVANCES AND APPLICATIONS 1 (Peter A. G. van Bergeijk & Steven Brakman eds., 2010).

30. Hegre et al., *supra* note 27, at 771–72.

31. John Forrer et al., *How Business Can Foster Peace*, U.S. INST. OF PEACE, Sept. 7, 2012, at 3.

32. Gary Horlick & Judith Coleman, *A Comment on Compliance with WTO Dispute Settlement Decisions*, *in* THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES 771, 772 (Merit E. Janow et al. eds., 2008).

33. Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 697–98 (2011).

34. LAUTERPACHT, *supra* note 1, at 72–73.

Regardless of what makes the WTO successful, what is perhaps most important to human rights activists today is that trade is power in the modern world. With trillions of dollars being exchanged in trade yearly, trade is an enormously lucrative enterprise—one hardly any state can afford to ignore.[35] For this reason, as the WTO holds enormous sway on matters of trade, it is an institution that should be utilized in the global struggle for human rights.[36] Given WTO's influence, unprecedented compliance with human rights could be achieved.[37] Used as an instrument of leverage, for example, market access can be used to cease violations of human rights in targeted countries as it has the power to deteriorate a state's political and economic well-being.[38]

However, there is a problem with the view of human rights proponents and that is it ignores the possibility that the WTO's relative flaws with respect to human rights are what is driving its success. As a specialized body with explicitly enumerated rights and powers, it is doubtful that the WTO was intended to continuously address matters beyond its prescribed limits.[39] Indeed, if the WTO abandons its specific focus, there is a risk that its influence will wane. As treaties are functionally contractual agreements between states,[40] the introduction of new rights and obligations into the WTO has the potential to provoke hostility and resistance from Members—particularly from those who expect their interests to be harmed by injection of new rights and obligations.

The purpose of this Article is to demonstrate that while human rights considerations can play an important role in the WTO, such considerations cannot play an excessive role in WTO affairs. As a specialized international body devoted to trade, the WTO must accord its place of pride to trade. Unless the current framework of the WTO is modified, trade will and should be the focal point of the WTO's energies. Indeed, for the sake of institutional integrity and continued stability, it is preferable for the WTO to retain its narrow focus.

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35. WORLD TRADE ORGANIZATION, INTERNATIONAL TRADE STATISTICS 2013, at 8 (2013).

36. HERNANDEZ-TRUYOL & POWELL, *supra* note 8, at 5.

37. *Id.*

38. Susan Ariel Aaronson, *Human Rights*, *in* PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT: A HANDBOOK 431 (Jean-Pierre Chauffour & Jean-Christophe Maur eds., World Bank Publ'ns 2011).

39. Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 755 (2002).

40. *See generally* William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law*: *Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251 (2006).

II. LEGAL FRAMEWORK OF THE WTO

A. *Legal Foundations and Limits*

The Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) is a treaty under Article 38(1)(a) of the International Court of Justice (ICJ) Statute,[41] and, as such, its terms and the additional agreements referenced therein (the covered agreements) are binding on Members of the WTO and even the organization itself.[42] By the very terms of its establishing treaty, the WTO is an organization with limited scope and jurisdiction.[43] Article II(1) of the WTO agreement provides that "the WTO *shall* provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement."[44] Within the context of a treaty, the use of "shall" is authoritative in nature and denotes a mandatory obligation.[45] As treaties bind states only to the reasonable extent of the treaty's terms, states are not obliged to defer to an organization governed by a treaty acting beyond or contrary to its prescribed framework.[46]

With respect to treaty interpretation, the Vienna Convention on the Law of Treaties (VCLT) is instructive.[47] Article 31(1) of the VCLT provides that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[48] By referencing context and purpose, Article 31(1) clearly provides for flexibility in interpretation.[49] Indeed, as Professor Anthony D'Amato notes, the substance of this provision is to negate "unintended and literal interpretations of words that might result in one of the parties gaining an unfair or unjust advantage over another party."[50]

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41. Statute of the International Court of Justice art. 38(1), June 26, 1945, 33 U.N.T.S. 993.

42. DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 49 (2004).

43. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, at 1867 U.N.T.S. 154 [hereinafter WTO Agreement].

44. *Id.*

45. Germana D'Acquisto & Stefania D'Avanzo, *The Role of SHALL and SHOULD in Two International Treaties*, *in* 3 CRITICAL APPROACHES TO DISCOURSE ANALYSIS ACROSS DISCIPLINES 36, 40 (2009).

46. *Id.* at 38.

47. *Id.*

48. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

49. ANTHONY D'AMATO, ENCYCLOPEDIA OF INTERNATIONAL LAW 599 (Rudolf Bernhard ed., 1992).

50. *Id.*

Although the WTO is bound by explicit limits, the interpretative function of the dispute settlement nevertheless provides a living quality to the treaties comprising the WTO. On occasion, the Appellate Body has interpreted provisions of the WTO agreements as containing rights and obligations not readily discernable from the text of the agreement.[51] In the *Korea—Beef* decision, for example, the Appellate Body elucidated the meaning of the word "necessary" as it appeared in Article XX(d) of the GATT.[52] Rejecting Korea's argument that a dual retail system for distributing beef was necessary to prevent consumer fraud, the Appellate Body stated:

> [I]n the context of Article XX(d), the reach of the word "necessary" is not limited to that which is "indispensable" or "of absolute necessity" or "inevitable". . . . [O]ther measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term" necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensible"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensible" than to the opposite pole of simply "making a contribution to".
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> . . . .
>
> [D]etermination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation go Article of XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[53]

As applied to the specific facts of *Korea—Beef*, the Appellate Body honed in on the reasonable availability of alternate measures

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51. FEDERICO ORTINO & ERNST-ULRICH PETERSMAN, THE WTO DISPUTE SETTLEMENT SYSTEM 1995–2003, at 203 (2004). For example, "Article XX(d) has been invoked not infrequently, but panels have generally rejected the defense on the grounds that the GATT-inconsistent measure is not necessary." *Id.*

52. *Id*.

53. *Id.* (quoting Appellate Body Report on *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161&169/AB/R, *adopted on* Jan. 10, 2001, ¶¶ 162, 164).

> in construing the meaning of necessity under Article XX(d).[54] In rejecting Korea's argument that an alternative measure must guarantee the level of enforcement sought, the Appellate Body held:
>
> We are not persuaded that Korea could not achieve its desired level of enforcement with respect to the origin of beef sold by retailers using conventional WTO-consistent enforcement measures, if Korea would devote more resources to its enforcements efforts on the beef sector. . . . Korea's argument about the lack of resources to police thousands of shops on a round-the-clock basis is, in the end, not sufficiently persuasive. Violations of law and regulations . . . can be expected to be routinely investigated and detected through selective, but well-targeted, controls of potential wrongdoers.
>
> . . . .
>
> It is pertinent to observe that, through its dual retail system, Korea has in effect shifted all, or the great bulk, of these potential costs of enforcement . . . to imported goods . . . In contrast, the more conventional, WTO-consistent measures of enforcement do involve such onerous shifting of enforcement costs which ordinarily are born by the Member's public purse.[55]

Although decided within the context of China's obligations to grant trade rights under its WTO Ascension Protocol,[56] the *China—Publications and Audiovisual Products* decision nevertheless illustrates how the Appellate Body can even modify its own interpretations.[57] In *China—Publications and Audiovisual Products*, the United States brought a complaint against China alleging that the content review mechanism and system China established to regulate the import of publications, audiovisuals, and other media forms discriminated against foreign suppliers of audiovisual services and foreign suppliers of distribution services for publications.[58] In its defense, China invoked

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54. *Id.*

55. *Id.* at 203–04.

56. *See generally* World Trade Organization, Protocol on the Accession of the People's Republic of China, Decision of Nov. 10 2001, WT/L/432 (2001).

57. Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, (Dec. 21, 2009) [hereinafter *China-Audiovisual Products*].

58. *Id.* ¶¶ 2–4.

Article XX(a) of the GATT,[59] which provides a general exception to measures "necessary to protect public morals."[60] In support of this position, China contended that, given the public policies at stake—specifically "the cultural nuances of Chinese public morals"—the execution of content review by State-owned entities was inevitable.[61]

The Appellate Body did not agree with China and, in reaching its decision, clarified the meaning of GATT Article XX(a)'s "public moral exception."[62] Consistent with the Appellate Body's findings in other cases dealing with Article XX of the GATT, the Appellate Body stated it would analyze the "public morals" through "a sequential process of weighing and balancing factors involved ("sequential balancing test")."[63] In applying the sequential balancing test and ultimately ruling against China, however, the Appellate Body went beyond its approach in in *United States—Gambling Services*, an earlier Appellate Body decision dealing with an identically worded "public morals" exception to the General Agreement on Trade in Services (GATS).[64] Unlike that case, here, the Appellate Body, in examining the "less restrictive means" element of the sequential balancing test of "necessity," stated that, despite the fact that GATT Article XX(a) provides no guidance on the issue of whether a panel may consider "only the restrictive effect the measures have on imports of relevant products, or whether a panel may also consider the restrictive effect of the measures on importers or potential importers," there nevertheless may be instances where further inquiry into the restrictive impacts on international commerce is appropriate.[65] The Appellate Body then proceeded to apply the "less restrictive means" test to two types of restrictive impacts: first, "on the actual importation of the subject goods," and then, "on the right to trade of those who wish to engage in such importation in the future."[66]

Aside from its elaboration of the language of GATT Article XX's "public morals" exception, the Appellate Body also blurred evidentiary burdens in regards to demonstrating reasonability of available alternatives.[67] Here, although the United States proposed that the Chinese government solely administer content review, it is not clear whether the Panel required the United States to prove the reasonableness and

59. *Id.* ¶ 7.

60. GATT, *supra* note 10, art. XX(a) (General Exceptions).

61. Diane A. Desierto, *Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-Making*, 26 FLA. J. INT'L. L. 51, 77 (2014).

62. *Id*.

63. *Id*. at 77–78.

64. *Id*. at 77.

65. *Id*. at 77–78.

66. *Id.* at 78–79.

67. *Id*. at 79.

feasibility of its suggested provision.[68] Indeed, the United States merely asserted that considerable evidence existed for finding that China was capable of executing the measure the United States advanced as China was also performing a similar function for items such as films imported for theatrical release and electronic publications.[69] Despite this, however, the Appellate Body ultimately endorsed the Panel's methodology for ascertaining the existence of reasonably available alternative measures and provided no further guidance on the issue of requisite proof.[70]

Although *China—Publications and Audiovisual Products* was the first decision to interpret the public morals exception under Article XX of the GATT, as previously noted, the Appellate Body analyzed an identical exception under GATS in *United States—Gambling Services*.[71] In that case, Antigua challenged a medley of US laws regulating the cross-border supply of gambling services as being inconsistent with the United States' obligations under GATS.[72] In response, the United States, like China in the *China—Publications and Audiovisual Products* case, invoked a public morals defense.[73] GATS, like the GATT, provides an exception for measures "necessary to protect public morals or to maintain public order."[74]

However, unlike in the *China—Publications and Audiovisual Products* decision, the Appellate Body here merely identified the two factors relevant in determining the "necessity" of a measure in light of the "less restrictive means" element of the sequential balancing test.[75] Moreover, with respect to evidentiary burdens, the Appellate Body here unambiguously stated that it is the burden of the *complaining party* to show that reasonably available alternative measures exist.[76] In fact, it is only when a *complaining party* identifies a WTO-consistent alternative that a responding party must demonstrate the necessity of its challenged measure.[77]

B. *WTO Case Law*

Under Article 38(1)(d) of the Statute of the ICJ, "judicial decisions"

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68. *Id*. at 79–80.
69. *Id*.
70. *Id*.
71. *See generally* Appellate Body Report, *U.S.—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) (in the context of Article XIV(a) of the GATS).
72. *Id*. ¶ 2.
73. *Id*. ¶ 3.
74. *Id*. ¶ 74.
75. Desierto, *supra* note 61, at 76 n.82.
76. *Id*. at 79.
77. *Id*.

are classified as non-binding secondary sources of international law.[78] Despite falling under this category, in practice, the decisions of prior dispute settlement tribunals bind subsequent tribunals on the same matter.[79] Truly, without such a system in place, the WTO would not enjoy the efficiency it does today. If required to reinvent the wheel every time a dispute arose, dispute settlement would move at a glacial pace. Typically, nine months is all the time currently required to render a verdict on the WTO-consistency of challenged measure.[80] By international standards, nine months is a highly remarkable feat considering that other international tribunals, such as the ICJ, proceed at an excruciatingly slow pace.[81] Indeed, highlighting this fact is that in a little over 18 years, the WTO has decided more cases than the ICJ has in over 60 years of existence.[82]

C. *Non-WTO Law in WTO Dispute Settlement*

Generally speaking, the WTO has gravitated away from the non-relevancy approach to non-WTO law taken by its predecessor the GATT.[83] The decision of the GATT Panel in *U.S.—Tuna II* illustrates this now outdated approach.[84] There, the Panel rejected arguments made under treaties other than the GATT and stated "these treaties were not relevant as a primary means of interpretation of the text of the General Agreement."[85] In contrast to this older view, the Appellate Body has stated in *U.S.—Gasoline* that Article 3.2 of the Dispute Settlement Understanding (DSU), which states that the purpose of the WTO dispute settlement is "to clarify the existing provisions of [WTO] agreements in accordance with the customary rules of public international law,"[86] suggests "a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law."[87]

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78. PALMETER & MAVROIDIS, *supra* note 42, at 51.

79. *Id*. at 55.

80. Marceau, *supra* note 39, at 759.

81. John R. Crook, *The International Court of Justice and Human Rights*, 1 NW. U. J. INT'L HUM. RTS. 6 (2004). Apart from being incredibly protracted, ICJ decisions also have a tendency to be unwieldy and expensive. *Id.*

82. Alford, *supra* note 33, at 697.

83. HOLGER P. HESTERMEYER, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES 223 (2007).

84. *Id*.

85. DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.2, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].

86. *Id.* at 223–24.

87. *Id.* at 223.

Further evidence of this more inclusive approach to non-WTO is found in the Appellate Body's decision in *E.C.–Computer Equipment*.[88] There, the Appellate Body criticized the Panel for *not* considering, as context under the VCLT, relevant non-WTO law—namely the International Convention on the Harmonized Commodity Description and Coding System and the rulings of the Harmonized System Committee of the World Customs Organization—in interpreting a tariff schedule of the European Community.[89] Going further, the Appellate Body even suggested that the use of relevant treaties and other international documents is *appropriate* even where membership to the treaty in question does not include all WTO members.[90]

Other prominent examples of the Appellate Body encouraging the use of non-WTO in dispute settlement can be found in the *U.S.—Shrimp* and *E.C.—Bananas* cases.[91] In *U.S.—Shrimp*, the Appellate Body stated that terms of the GATT were not static and, in doing so, interpreted the meaning of "natural resources" in Article XX(g) of the GATT by examining outside sources such as the Convention on Biological Diversity and U.N. Convention on the Law of the Sea (UNCLOS).[92] Similarly, in *E.C.—Bananas*, the Appellate Body consulted the Lomé Convention in analyzing a waiver granted to the European Community by the WTO.[93]

Finally, although not a decision of the Appellate Body, the Panel in *E.C.—Biotech* also addressed the issue of using non-WTO law in interpreting WTO Agreements.[94] In doing so, however, the Panel went further than any decision before it.[95] Referencing both Article 31(3)(c) ("any relevant rules of international law applicable in the relations between the parties")[96] and 31(1) of the VCLT (good faith interpretation of treaties),[97] the Panel concluded that non-WTO treaties may be consulted *even where the disputing parties have not adopted those treaties*.[98] The Panel further noted that the mere fact that parties are not members to a particular treaty "does not necessarily mean that a convention cannot shed light on the meaning and scope of a treaty term to be interpreted."[99]

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88. HESTERMEYER, *supra* note 83, at 223–24.
89. *Id.* at 224.
90. *Id.*
91. *Id.*
92. *Id*.
93. *Id*.
94. *Id*.
95. *Id*.
96. VCLT, *supra* note 48, art. 31.
97. *Id*.
98. HESTERMEYER, *supra* note 83, at 224.
99. *Id*. at 224–25.

D. *References to Human Rights in the WTO Framework*

The WTO Agreements are noticeably silent on the issue of human rights.[100] Although the preamble to the WTO Agreement states that trade relations "should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income," no explicit reference to human rights is provided.[101] Indeed, when examined as a whole, the WTO Agreements provide, at best, only indirect references to human rights.[102]

Further evidence of the WTO's indirect approach to human rights is provided in the TRIPS Agreement.[103] Article 7 ("Objectives") of the TRIPS Agreement states:

> [T]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.[104]

Although language such as "conducive to social and economic welfare" can encapsulate the concept of human rights, again, like the preamble of the WTO Agreement, no explicit reference to human rights is made.[105]

Despite the general silence of the WTO agreements on the issue of human rights, WTO Members nevertheless have discretion to address human rights concerns (whether at home or abroad) under the exceptions found in Article XX of the GATT.[106] Article XX(e), for example, allows Members to adopt measures limiting the importation of prison labor products—normally a violation of the Article I of the GATT requirement.[107] Similarly, Article XX(a) permits "measures necessary to protect public morals.[108] Although difficult to invoke given the hurdles associated with surmounting Article XX's chapeau and terms like

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100. *Id*.
101. *Id.*
102. *Id.*
103. *Id.*
104. TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, art. 7, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, 323 I.L.M. 1197 (1994) [hereinafter TRIPS].
105. HESTERMEYER, *supra* note 83, at 101.
106. GATT, *supra* note 10, art. XX (General Exceptions).
107. *Id.*
108. *Id.*

"necessary," once met, these exceptions override conflicting WTO obligations.[109]

Although they limit the ability of Members to pursue important policy concerns like human rights compliance, the restrictions on the use of Article XX exceptions nevertheless perform an important gatekeeping for the WTO in that they test for genuineness on the part of the Member raising the exception.[110] The official position of the WTO is that such measures exist to prevent Members from using issues like human rights as a "smokescreen" (or guise) to justify protectionism.[111] Indeed, if the mere invocation of human rights could waive obligations under the WTO, a race to the bottom would ensure. Given the opportunity, Members would scramble to erect barriers protecting politically popular but relatively uncompetitive industries.

As the WTO is a member-driven, consensus-based organization, however, human rights can play a larger role in WTO affairs if the Members of the WTO, acting in unison, wish it to.[112] Indeed, this fact is exemplified by the *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds*.[113] The Kimberley Process provides certification to diamonds not originating in States in which an illegal trade in diamonds is funding gross violations of human rights.[114] Issued by the WTO General Council in 2003, this waiver permits Members participating in the Kimberley Process to ban imports of uncertified diamonds—typically a violation of Article I of the GATT.[115]

The "TRIPS waiver on compulsory licensing to make essential drugs available to developing countries" is yet another example of WTO Members acting collectively to address human rights issues.[116] Adopted by the General Council in August 2003 to address the increasing concerns about health in developing countries, this waiver allows for "any least-developed country Member or Member with insufficient pharmaceutical manufacturing capacity to make use of the Decision to import any

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109. *Id.*

110. World Trade Organization, 3d WTO Ministerial Conference, *Top 10 Reasons to Oppose the World Trade Organization? Criticism, Yes . . . Misinformation, No!*, *available at* https://www.wto.org/english/theWTO_e/minist_e/min99_e/english/misinf_e/00list_e.htm [hereinafter 3d WTO Ministerial Conference].

111. *Id.*

112. Desierto, *supra* note 61, at 51.

113. *See* Decision of the General Council of May 15, 2003, *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds*, WT/L/518 (May 27, 2003) [hereinafter Kimberley Waiver].

114. Desierto, *supra* note 61, at 53.

115. Kimberley Waiver, *supra* note 113.

116. *See* Decision of General Council, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 (Sept. 1, 2003).

pharmaceutical product needed to address public health problems."[117] Although TRIPS typically requires Members to extend protections to intellectual property rights regardless of human rights concerns, this waiver remarkably permits Members to bypass TRIPS if the Member is either a least developed country or "has made a notification to the Council for TRIPS of its intention to use the system as an importer."[118]

E. *Lex Specialis*

Under the doctrine of *lex specialis*, the more specific law takes precedence over the more general.[119] Through the use of this doctrine, specialized international bodies are permitted to narrow their institutional focus to a particular set of norms and remedies. Therefore, if the WTO wishes to confine itself to matters of trade law, it is permitted to do so under international law.

Given that the WTO is a member-driven organization, however, consensus among Member governments may alter the scope and function of the WTO at any time.[120] In fact, as international organizations are subjects of international law, the WTO has the ability to extend recognition or seek membership in other treaty regimes.[121] So far, however, the WTO has not elected to join human rights convention nor can be said that the WTO is incurring human rights obligations, as it is not a specialized U.N. agency.[122]

Despite the WTO's reluctance to assume outside obligations, the WTO nevertheless maintains links with international bodies in the U.N. system.[123] In fact, under Article V of the WTO Agreement, the WTO is encouraged to reach out to other international organizations, as the provision states, "The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO."[124] With respect to the United Nations, WTO relations are governed by the "Arrangements for Effective Cooperation with other Intergovernmental Organizations-Relations Between the WTO and the United Nations"

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117. Emily Ng & Jillian Clare Kohler, *Finding Flaws: the Limitations of Compulsory Licensing for Improving Access to Medicines—An International Comparison*, 16 HEALTH L.J. 143, 146 (2008).

118. *Id.* at 150.

119. HERNANDEZ-TRUYOL & POWELL, *supra* note 8, at 69.

120. Desierto, *supra* note 61, at 51.

121. HESTERMEYER, *supra* note 83, at 100.

122. *Id.*

123. ARTHUR E. APPLETON & MICHAEL G. PLUMMER, THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 72 (2005).

124. WTO Agreement, *supra* note 43, art. V.

signed on November 15, 1995.[125] Under this arrangement, the WTO coordinates various activities with the U.N. universe of organizations.[126] The WTO, for example, takes part, along with the executive heads of the U.N. and Bretton Woods systems, in the Chief Executive Board for Coordination.[127] Lead by the U.N. Secretary General, this collection of leaders seeks to align the vision of various specialized international organizations on social, economic, and related matters.[128] In addition, although not a member of the U.N. Economic and Social Council (ECOSOC), the WTO both engages in roundtable talks with the ECOSOC on matters such as Financing for Development and attends the ECOSOC's Annual Ministerial Substantive review.[129]

Although not related to the WTO's agreement with the United Nations, another WTO link with the United Nations can be found in Article XXI of the GATT.[130] Article XXI (security exceptions) provides that "Nothing in this Agreement shall be construed . . . to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."[131] Under this provision, WTO Members are permitted to place sanctions on Members—normally a violation of WTO's nondiscrimination provisions—if the U.N. Security Council acting pursuant to Chapter VII of the U.N. Charter authorizes those sanctions.[132] Notably, however, the security exceptions have not played a significant role under either the GATT or WTO and this is perhaps for the best.[133] Indeed, if Article XXI were frequently invoked, it is possible that WTO operations would come to a grinding halt. Given Article XXI's self-judging component (Members decide when measures are appropriate) and its unclear reviewability by the WTO, one American drafter of this provision commented that there "was a great danger of having too wide an exception . . . that would permit anything under the

125. Arrangements for Effective Cooperation with other Intergovernmental Organizations-Relations Between the WTO and the United Nations, WT/GC/W/10 Nov. 15, 1995 [hereinafter WTO-U.N. Agreement].

126. Note by the Executive Director of the U.N. Environment Programme, *United Nations Specialised Agencies Versus United Nations Programmes* 3 (June 7, 2010), http://www.unep.org/environmentalgovernance/Portals/8/documents/Specialized%20Agency%20vs%20Programme%20IEG%20paper_FINAL_07-06-10.pdf.

127. *Id.*

128. *Id.*

129. *Id.*

130. GATT, *supra* note 10, art. XXI.

131. *Id.*

132. Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence*, 2 IDLO VOICES OF DEVELOPMENT PAPER SERIES 7 (2005).

133. ARTHUR PETER VAN DEN BOSSCHE & WENER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 595 (2008).

sun."[134]

III. FREE TRADE AGREEMENTS

Under Article XXIV of the GATT (Territorial Application—Frontier Traffic—Customs Unions and Free-trade Areas), WTO Members are permitted to formulate and adopt free trade agreements (FTAs) granting rights and benefits in excess of those provided the GATT ("WTO plus"[135] benefits essentially).[136] In relevant part, Article XXIV states, "the provisions of this [GATT] shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area."[137] Indeed, not only are such agreements permitted, but they are also encouraged.[138] Article XXIV further states that

> The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.[139]

Currently, 90% of all WTO Members are participants of either FTAs or regional trade agreements (RTAs).[140] In fact, so popular are these agreements that there are over 200 of them currently in effect.[141] Among these agreements, the four most prominent are the North American Free Trade Agreement (NAFTA), the European Union, Mercado Común del sur or Southern Common Market (MERCOSUR), and the Association of

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134. Alford, *supra* note 33, at 698–99.

135. Masahiro Kawai & Ganeshan Wignaraja, *Asian FTAs: Trends, Prospects, and Challenges* 17–18 (Asian Development Bank, Working Paper 226, 2010).

136. Monika Mrázová et al., *Is the GATT/WTO's Article XXIV Bad?*, 89 J. INT'L ECON. 216, 216–17 (2012).

137. GATT, *supra* note 10, art. XXIV(5).

138. *Id.* art. XXIV(4).

139. *Id.*

140. Mitsuo Matsushita, *Legal Aspects of Free Trade Agreements: In the Context of Article XXIV of the GATT 1994*, *in* WTO AND EAST ASIA PERSPECTIVES 497 (Mitsuo Matsushita & Dukgeun Ahn eds., Cameron May 2004).

141. Colin B. Picker, *Regional Trade Agreements v. the WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat*, 26 U. PA. J. INT'L ECON. L. 267, 270 (2005).

Southeast Asian States (ASEAN).[142] Collectively, in the year 2000, these four agreements accounted for 69.5% of the global import trade and 64.54% of the global export trade.[143]

The popularity of these agreements lies in the fact that under these agreements, WTO Members are free to address more contentious issues, such as human rights and the environment.[144] Particularly with respect to human rights, for example, NAFTA stands out, as it was among the first agreements of its kind to address labor concerns.[145] Coming into force in 1994, NAFTA reduced or eliminated tariffs well beyond the WTO between the United States, Canada, and Mexico.[146] In exchange for opening its doors, however, the United States insisted that labor rights and environmental concerns be given due consideration in executing NAFTA.[147] Among the obligations, for example, all three nations must enforce its current laws and legislation regarding labor rights and that each country strive to reduce its negative impact on the environment.[148]

Apart from NAFTA, the European Union has also actively sought to induce compliance to human rights through trade agreements.[149] Since the 1990s, the preferential E.U. trade agreements have included "human rights clauses."[150] Typically, these clauses require that the parties to the treaty "respect human rights and democratic principles."[151] One such clause, for example, included in an agreement between the European Union and Central America in 2012 provided

> Respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, and for the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement.[152]

As evidenced by NAFTA and European Union—Central agreements,

142. Matshushita, *supra* note 140, at 497.

143. *Id.*

144. *Id.*

145. David A. Gantz, *Labor Rights and Environment Protection Under NAFTA and Other U.S. Free Trade Agreements* 9 (Arizona Legal Studies Discussion Paper No. 11-13, 2011).

146. *Id.* at 29.

147. *Id.* at 2.

148. *Id.* at 11, 17.

149. Lorand Bartels, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements* 1 (University of Cambridge Faculty of Law Legal Studies Research Paper Ser. No. 24/2012, 2012).

150. *Id.*

151. *Id.*

152. Agreement Establishing an Association Between Central America, on the one hand, and the European Union and its Member States, on the other art. 1, June 29, 2012, *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=689.

the scope of these agreements go beyond that of the GATT in that they contain explicit references to human rights.[153] Whereas the GATT and the WTO agreements are virtually silent on the issue of human rights and contain no references to outside human rights instruments, these agreements go as far as to embrace the Universal Declaration of Human Rights (UDHR), which although, being a declaration, is not independently binding on states,[154] includes a fairly extensive list of human rights, such as the right to be free from slavery and the right to freedom of expression.[155] Notably, labor rights are also featured prominently in the UDHR as it "expressly recognizes the right to work; free choice of employment; just and favorable conditions of work; protection against unemployment; non-discrimination and the right to equal pay for equal work; and the right to form and join trade unions."[156]

IV. THE CASE FOR HUMAN RIGHTS

A. *The Global Madhouse that Trade Built*

Even considering the WTO's focus on trade law, the WTO does not exist in a vacuum; rather the WTO, as evidenced by Article V of the WTO Agreement,[157] operates in conjunction with the greater international system—a system that happens to unequivocally demand respect for human rights. Indeed, history,[158] textual evidence,[159] and WTO jurisprudence[160] all suggest that collaboration with the public international system at large is meant to a play role in guiding WTO affairs. Given that our globalized world has given rise to globalized problems, now, more than ever, is the time for the WTO to align its focus with public international law and entities.

The problems faced by our world today are not ordinary problems. These problems traverse borders and are largely invisible except to the

153. JAN ORBIE & LISA TORTELL, THE EUROPEAN UNION AND THE SOCIAL DIMENSION OF GLOBALIZATION: HOW THE EU INFLUENCES THE WORLD 67–68 (2009).

154. ERIC HEINZE, WAGING HUMANITARIAN WAR: THE ETHICS, LAW, AND POLITICS OF HUMANITARIAN INTERVENTION 65 (2009).

155. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948), art. 4, 19.

156. Gantz, *supra* note 145, at 8.

157. WTO Agreement, *supra* note 43, art. V.

158. *See* HERNANDEZ-TRUYOL & POWELL, *supra* note 8, at 65.

159. *See* WTO Agreement, *supra* note 43, art. V.

160. *See generally* Panel Reports, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R / WT/DS292/R / WT/DS293/R (Nov. 2, 2006).

individuals who come into contact with them. Pollution, blood diamonds, and human trafficking are all products of our globalized world, but they are also progeny of trade, as globalization itself is fueled by trade. Given the link between trade and human rights, human rights proponents are baffled at the fact that the WTO has not taken a more aggressive stance on human rights. Perhaps now is also the time for the WTO to leave the shade of "splendid isolation" and face the monsters it has helped create.[161]

Tracing the history and development of the public international system, it can be inferred that all states were meant to be bound by human rights norms—whether they are WTO Members or not.[162] During the First and Second World Wars, the world witnessed an era of violence unseen in the annals of history. Millions upon millions perished, and millions more were subject to unfathomable horrors. State sanctioned use of torture, genocide, and rape were fairly common instruments employed to subjugate undesirable populations and silence dissidents.

Moved by these atrocities and the lack of moral restraint on the part of individual States, the world community mobilized to secure perpetual peace and buttress the burgeoning notion of universal human rights.[163] From this collective effort, the modern international system was born. Beginning with the UN—the successor to the now defunct League of Nations—a host of international organizations sprang forth.[164]

It was during this era that global human rights instruments also arose.[165] After the adoption of the landmark UDHR in 1948, two subsequent conventions reinforced the ideas enshrined therein—the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[166] Owing to differences in political ideologies and cultural nuances, many States have not ratified both treaties.[167] Nevertheless, the overwhelming majority of today's States are members of either the ICCPR or the ICESCR.[168]

Regardless of the nature of these organizations and instruments, however, the one commonality shared among them is that they all strive to achieve a more humane international environment. Like the individual cogs in a machine, each of these organizations and instruments work to power the international system in its path to create a world without strife, oppression, and abuse—one imbued with noble norms and the ability to

161. HERNANDEZ-TRUYOL & POWELL, *supra* note 8, at 7.
162. *Id.* at 56.
163. *Id.* at 52.
164. *Id.* at 53.
165. *Id.* at 56–57.
166. *Id.*
167. *Id.* at 57.
168. *Id.* at 140–41.

enforce these norms. Indeed, in order to move beyond the barbarity of the past, the world community had to guarantee the civility of the future.

Further evidencing the newfound global commitment to human rights is the fact a new breed of customary international law protecting universally recognized bedrock human rights arose—*jus cogens* or preemptory norms.[169] Essentially "super" versions of international customs, *jus cogens* norms include the right to be free from torture, genocide, and slavery. These are norms from which no derogation is permitted under any circumstances.[170] In fact, it is said to be the duty and obligation of every State to vigorously prosecute violations of these norms no matter where they occur.[171] Indeed, so important are *jus cogens* norms that they are recognized under the VCLT as having the ability to override even treaties where they conflict.[172] In relevant part, the Article 53 of the Vienna Convention on the Law of Treaties (VCLT) states:

> A treaty is *void* if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[173]

Human rights concerns, however, need not be captured under the concept of *jus cogens* to impose obligations on international actors. In the *Barcelona Traction Case*, for example, the ICJ stated

> [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[174]

The term *erga omnes* denotes an affirmative obligation imposed on

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169. *Id.* at 15–16.

170. *Id.*

171. PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS: THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT 164 (2013).

172. HERNANDEZ-TRUYOL & POWELL, *supra* note 8, at 19–20.

173. VCLT, *supra* note 48, art. 53 (emphasis added).

174. HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 147 (2014).

states to respect and defend human rights.[175] Under this characterization of human rights, states are bound by human rights norms whether or not they are WTO Members. As human rights derive from natural law and because treaties cannot override natural law,[176] it makes no sense to say that WTO Members leave their human rights obligations at the door when they enter the WTO.

Despite the increased global focus on human rights, there still exists much debate on the role human rights plays in the WTO. Sadly, much of this debate stems from the fact that trade and human rights have developed in a state of "splendid isolation" from one another.[177] Fearing the readiness to which the politicians of their era subscribed to harmful economic policies (high tariff barriers) and the role such policies played in inciting conflict during the early twentieth century, the architects of the modern international system sought to move the world's economic and financial entities away from the public U.N. system and into private hands.[178] It is from this divide that we can trace the modern tension between trade and human rights.[179]

Attesting to the severity of this split, it is argued, for example, that the WTO is a "self-contained regime."[180] This argument states that the WTO "operates, at least to some extent, in isolation from public international law, which comprises human rights law, in that it seeks to maintain a monopoly over interpretation and application of its law and it seeks to exclude recourse to other fora."[181] If accepted as true, this characterization of the WTO would prohibit recourse to outside law even when dealing with the exception found under Article XX of the GATT.[182]

A number of a key WTO provisions and decisions, however, clearly undermine the idea that the WTO was meant to be a closed self-contained regime. Article 3.2 of the DSU, for example, states the purpose of WTO dispute settlement is "to clarify the existing provisions of [WTO] agreements *in accordance with the customary rules of public international law*."[183] Reinforcing the notion encapsulated in Article 3.2 of the DSU, the Appellate Body stated in *U.S.—Gasoline* that Article 3.2 "reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law."[184]

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175. ALSTON & GOODMAN, *supra* note 171, at 164.

176. HERNANDEZ-TRUYOL & POWELL, *supra* note 8, at 19.

177. *Id.* at 7.

178. *Id.* at 64.

179. *Id.*

180. CHRISTIANE R. CONRAD, PROCESSES AND PRODUCTIONS METHODS (PPMS) IN WTO LAW: INTERFACING TRADE AND SOCIAL GOALS 123 (2014).

181. *Id.*

182. *Id.*

183. DSU, *supra* note 85, art. 3.2.

184. HESTERMEYER, *supra* note 83, at 223.

Indeed, as WTO jurisprudence demonstrates, instruments outside of the WTO covered agreements can be consulted to clarify obligations under the WTO. In *U.S.—Shrimp*, for example, the Appellate Body, in interpreting Article XX(g) of the GATT, examined, among other instruments, the Convention on Biological Diversity and UNCLOS.[185] Likewise, in *E.C.—Bananas*, the Lomé Convention played a critical role in determining the European Union's rights and obligations pursuant to the Lomé Waiver.[186]

Undoubtedly, non-WTO policy considerations also colored the WTO's decision to grant waivers in the cases of the Kimberley Process Certification Scheme and the compulsory licensing of essential drugs to developing countries.[187] Whereas the Kimberley Process addresses the gross violations of human rights associated with "conflict diamonds," the compulsory drug licensing waiver concerned the protection of the right to life and health in developing countries.[188] As the policy concerns underscoring these waivers go beyond matters of trade, these waivers present additional examples contradicting the contention that the WTO is a closed regime.

Furthermore, although governed by an agreement that merely delineates the coordination of activities, in reality, the linkage between the WTO and the United Nations goes far deeper.[189] Indeed, nowhere is this strong linkage more apparent than in Article XXI(c) of the GATT (security exceptions), which states "Nothing in this Agreement shall be construed . . . to prevent any contracting party from taking any action in pursuance of its obligations under the *U.N. Charter* for the maintenance of international peace and security."[190] Under Chapter VII of the U.N. Charter, the Security Council may, pursuant to Article 41 of the Charter, place economic sanctions on States threatening international peace and security.[191] As Article 25 of the Charter requires that States *must* comply with the decisions of the Security Council concerning mandatory economic sanctions, Article XXI(c) ensures that WTO and UN obligations will not conflict.[192]

Given the role the WTO plays in creating the global problems we face today, and given its ability to coordinate with other international instruments and organizations, it is disappointing that the WTO has not taken a more assertive stance on promoting human rights. Considering

185. *Id.* at 224.
186. *Id.*
187. Desierto, *supra* note 61, at 53.
188. *Id.*
189. WTO-U.N. Agreement, *supra* note 125.
190. GATT, *supra* note 10, art. XXI.
191. *Id.*
192. U.N. Charter art. 5, para. 25.

that human rights violations are also being "dumped" alongside goods onto politically, socially, and economically vulnerable countries such as Colombia and Bangladesh, the WTO should take it upon itself to bear some responsibility, as its nondiscrimination provisions mandate the entry of these violations. Indeed, the WTO should acknowledge the fact that although comparative advantage increases the global economic pie, it nevertheless has distribution costs—meaning not everyone benefits equally. Those who lose out on free trade suffer profusely. As activists have noted, it is the voiceless peoples of the developing world that unfairly bear the brunt of free trade.[193]

Despite being subjected to exploitative wages and ghastly working conditions, the poor of the developing world must continue to toil nonstop as the economic and political health of their countries rests upon their participation in the global trade regime. Truly, once embroiled in the global economic system, there is no escape—no matter how abusive the relationship becomes. This, then, is the dark side of free trade and interdependency.

B. *Suggested Solutions*

Given the inequality that stems from the normal functioning of the WTO, WTO policies must be recalibrated in a manner that more strongly serves the interest of human rights. At the very least, for example, WTO rights and obligations should be interpreted in a manner that does not erode human rights protections. This approach to public international law would essentially mirror the "Charming Betsy canon" approach.[194] Stemming from the U.S. Supreme Court's decision in *Murray v. The Charming Betsy*,[195] the Charming Betsy Cannon holds that U.S. laws must be construed so as to not conflict with international law.[196] Interestingly, if *U.S.—Gasoline* is any indication, the Appellate Body may already be headed down this road. Nevertheless, further efforts should also be made to consult relevant intergovernmental human rights organizations regularly so as to *anticipate* potential conflicts *before* they arise. As such actions are explicitly permitted under Article V of the WTO Agreement, which states "The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO,"[197] the WTO here would simply be taking the path of

193. HERNANDEZ-TRUYOL & POWELL, *supra* note 8, at 2.

194. Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 ARTHUR GEO. L.J. 480, 482 (1998).

195. Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

196. Bradley, *supra* note 194, at 482.

197. WTO Agreement, *supra* note 43, art. V.

least resistance with respect to human rights.

The Appellate Body could also reduce the evidentiary burdens associated with invoking the exceptions to the WTO agreements. Members will need to bypass the WTO's nondiscrimination provisions if they are to seek human rights compliance abroad (limiting market access for Members engaged in human rights violations) and within their own borders (using licenses to block imports). Indeed, judging by the current state of WTO jurisprudence, this approach is entirely possible. As illustrated by the *China—Publications and Audiovisual Products* decision, the Appellate Body has discretion to reconfigure evidentiary standards.[198] Although decided with regards to China's Ascension Protocol, the Appellate Body in *China—Publications and Audiovisual Products* nevertheless imposed a different, more rigorous standard for invoking the "public morals" exception under GATT Article XX than it did for an identical exception under GATS in *U.S.—Gambling Services*.[199]

Although it may be argued that lowering evidentiary standards would trigger a race to the bottom, it should be noted that WTO Members continue to exercise considerable restraint with respect to security exceptions found under Article XXI of the GATT.[200] As noted previously, the security exceptions, given their self-judging component and unclear reviewability, are essentially the ultimate loopholes for escaping WTO obligations.[201] Despite this fact, however, Members have displayed remarkable conservatism with respect to these provisions[202] and this may be because, echoing Sir Lauterpacht,[203] the prime goal of States in the international arena is to protect collective economic interests. In the eyes of Members then, a world with *a* global free trade system may be better than a world *without* one.

On a more extreme note, the WTO framework is also modified to offset the harsh realities associated with trade liberalization in the developing world. Although treaties bind members no more than reasonably necessary to satisfy the object and purpose of the treaty,[204] as discussed previously, the WTO is a Member-driven enterprise. Acting in consensus, WTO Members have the ultimate discretion to determine what the terms of the WTO Agreement are.

198. Desierto, *supra* note 61, at 27.
199. *Id.*
200. BOSSCHE & ZDOUC, *supra* note 133, at 595.
201. Alford, *supra* note 33, at 698–99.
202. BOSSCHE & ZDOUC, *supra* note 133, at 595.
203. LAUTERPACHT, *supra* note 1, at 72–73.
204. D'Acquisto & D'Avanzo, *supra* note 45, at 38.

V. THE CASE FOR LIMITING THE ADVANCE OF HUMAN RIGHTS

A. *The Value of Simplicity*

The ongoing contentions surrounding human rights and the fact that little overlap exists between trade and human rights goals[205] should lead one to question the unrestrained comingling of trade and human rights, especially in the context of the WTO—the world's most influential trade organization. Long driven by its specific focus, the WTO, through the efficiency and interdependency it fosters, continues to pave the way for more sustainable global peace and prosperity. Considering its vast potential to be used as a guise for protectionism,[206] however, human rights has the potential to undercut the WTO's success.

The concept of human rights continues to remain a nebulous one.[207] Despite the fact that six decades have passed since the adoption of the UDHR, the world still does not have a clue as to what the notion of human rights entails or even what rights are included under its canopy.[208] The creation of two distinct conventions, ICCPR and ICESCR, delineating and binding the rights enshrined in the UDHR signifies that a rift exists as to the prioritization of rights.[209] Whereas the West favors civil and political rights, the East is more apt to emphasize the value of socioeconomic rights.[210]

Given the ambiguity and contention surrounding human rights, excessively embroiling the WTO with human rights considerations carries with it a number of undesirable consequences. Trade proponents argue that injecting additional human considerations into the trade-oriented framework of the WTO amounts to "legal inflation."[211] Legal inflation denotes the practice of states using trade agreements to globalize *their* norms and values.[212] As the WTO is global in nature, the introduction of additional human rights considerations may place the WTO in the uncomfortable position of deciding to *whose* formulation of human rights it wishes to adhere.

Expanding the existing framework WTO to incorporate additional non-trade considerations may also have the effect of diluting the potency of existing WTO rights and obligations. Overinclusiveness and excessive complexity carries with it the risk of abuse. Members will undoubtedly

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205. Whereas trade is driven by economic considerations, human rights are driven by moral considerations. HERNANDEZ-TRUYOL & POWELL, *supra* note 8, at 64.

206. 3d WTO Ministerial Conference, *supra* note 110.

207. HERNANDEZ-TRUYOL & POWELL, *supra* note 8, at 20.

208. *Id*. at 244.

209. *Id*.

210. *Id*.

211. Aaronson, *supra* note 38, at 443.

212. *Id*.

attempt to contort ambiguity in a manner that allows them to wiggle out of their trade obligations. Truly, turning the WTO into a legal minefield advances no one's interests, as developing and developed countries alike would suffer from having no clear understanding of their rights and obligations.

Furthermore, as the dispute settlement process is one of the prime drivers of WTO's success, any and all changes affecting it should be given the utmost consideration. As noted previously, the WTO's dispute settlement process moves at a remarkable pace.[213] Under the current framework, typically, it only takes nine months to a deliver a verdict on the WTO-consistency of a disputed measure—an incredible feat considering the sloth-like pace of most international tribunals.[214]

Piling additional human rights considerations on top of trade considerations jeopardizes the existing efficiency of WTO dispute settlement. Additional fact finding, for example, may be required to render decisions consistent with human rights obligations. With a docket that is already always full,[215] the Appellate Body may find itself in the precarious situation of addressing not just only more complaints, but complaints of a more complex nature as well. As predictability and consistency are the lifeblood of international trade and business, failure on part of the WTO to deliver prompt verdicts may trigger political backlash against the WTO, as trade and business interests generally tend to comprise a powerful political contingent *in any country*.

If evidentiary burdens tied to the exceptions to the WTO are lowered, the institutional legitimacy of the WTO may be jeopardized. Indeed, the legal barriers surrounding the justified violations perform an important gatekeeping function in that they seek to prevent Members from conjuring smokescreens to evade their obligations. Truly, allowing Members to play fast and loose with treaty obligations undermines the very idea of capturing obligations in a treaty. If merely invoking human rights was all that is required to be accepted from a WTO obligation, a proverbial race to the bottom would ensue. Members would simply invoke human rights to advance their interests.

Moreover, as demonstrated by the justified violations of the WTO such as those found under Article XX of the GATT, consideration for human rights already exists within the WTO.[216] If met, the justified violations of the WTO, permit a Member to suspend, within reason, their binding trade obligations.[217] Indeed, the fact non-trade considerations can completely override trade considerations within the WTO evidences that

213. Marceau, *supra* note 39, at 759.
214. *Id*.
215. Alford, *supra* note 33, at 698.
216. GATT, *supra* note 10, art. XX.
217. *Id*.

the WTO recognizes that, where genuine, certain policy considerations are deserving of primacy.

Owing to trade's many positive spillover effects, preserving the WTO's limited focus may, in the long run, provide a greater aggregate benefit to humanity.[218] As the world's only multilateral trade regime, the WTO has enormous potential to improve the global human condition even without ever having to lift a finger for human rights. It is documented, for example, that free trade sustains and encourages peaceful relations and reduces aggression among states.[219] Indeed, trade liberalization leads to specialization, which in turn leads to economic interdependence among States, and once economic interdependence becomes a fixture of world affairs, little incentive exists for states in breaching the peace.[220]

Infusing more consideration for human rights into the WTO framework, however, will endanger the relative peace that has ensues from trade. If the evidentiary burdens for meeting an exception to the WTO's requirements are lowered, for example, certain Members, like China and Vietnam,[221] will undoubtedly face more institutional scrutiny given ubiquity of concerns surrounding their human rights records. Indeed, the resulting alienation and hostility may even provoke some Members to leave the WTO—a highly undesirable consequence.

As WTO membership requires that states continually open their borders to trade, States expose themselves to outside scrutiny when they join the WTO. For the purposes of human rights, this fact is crucial because WTO membership, at the very least, provides a glimpse into the lives of people residing in even the most oppressive and censored countries. When trade relations are formed, continuity and dialogue is established with the world at large, and when this occurs, human rights abuses are easier to detect. Indeed, it is arguable that if North Korea were a Member of the WTO, its people would not live in the extreme of conditions they do today. Global scrutiny and economic interdependence would have likely chipped away at their government's excesses.

Further, as noted by scholars, free trade may be the only solution to global poverty.[222] Oftentimes it is inefficiencies within a country that give rise to poverty.[223] As free trade advantages the efficient, States can be

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218. HERNANDEZ-TRUYOL & POWELL, *supra* note 8, at 5.

219. Hegre et al., *supra* note 27, at 771–72.

220. *See id*.

221. *See* Elad Benari, *Saudi Arabia, Russia and China Elected to UNHRC*, ARUTZ SHEVA (Nov. 13, 2013 5:43 AM), http://www.israelnationalnews.com/News/News.aspx/173950#.VS7HKJTF8Vc.

222. *See* HERNANDEZ-TRUYOL & POWELL, *supra* note 8, at 6.

223. *See generally* PASCAL LAMY, THE GENEVA CONSENSUS: MAKING TRADE WORK FOR ALL (2013).

rendered more economically capable and efficient by joining the WTO.

Reductions in "rent-seeking" practices illustrate how States can be made more efficient by trade liberalization.[224] Rent-seeking is the practice of increasing profits without increasing value for customers or, as the Economist describes it, "Cutting yourself a bigger slice of the cake rather than making the cake bigger."[225] Although a number of different practices constitute rent-seeking, in the typical rent-seeking scenario, a firm or group of firms lobby the government for favorable policies at the expense of taxpayers, consumers, or rivals.[226] While profits soar for the lobbying firms, a nation's economy often suffers as a whole because of the rent-seeking—a practice that both stifles competition and retards innovation.[227]

Complicating matters is the fact that rent-seeking behavior creates and perpetuates monopolies. As monopolies enjoy disproportionate bargaining power in the markets in which they operate, monopolies inherently have dangerous potential to stagnate a State's economy by creating and sustaining artificial inefficiencies. By setting prices below market, for example, a monopoly can squeeze out all competition in a given market. When businesses exit in droves, they leave unemployment in their wake. Unemployment, in turn, gives rise to misery and tension within a state.

Conducted properly, free trade offers a potent solution to the problem of rent-seekers. Indeed, once a state opens its borders and markets to foreign competition, states may begin to realize that the inefficiencies caused by monopolies and rent-seekers constitutes a *comparative disadvantage*. In this situation, a State would most likely move to curb the rent-seeker's influence or eliminate it altogether. Moreover, in the event that a state continues to accommodate or outright favor rent-seekers, legal remedies are available for WTO members in the event that rent-seekers are benefiting from prohibited or discriminatorily administered policies.[228]

Illustrating this phenomenon is the WTO's recent decision in *China—Electronic Paper Services*.[229] In that case, the United States alleged that China discriminated against U.S. bank card issuers by favoring a state-

224. *See* Arye Hillman, *International Trade Policy: Departure from Free Trade*, *in* READINGS IN PUBLIC CHOICE AND CONSTITUTIONAL POLITICAL ECONOMY 481, 493 (Charles Rowley & Friedrich Schneider eds., Springer 2008).

225. *Economics A–Z Terms Beginning with R*, ECONOMIST.COM, http://www.economist.com/economics-a-to-z/r (last visited Apr. 5, 2014).

226. Paul M. Johnson, *A Glossary of Political Economy Terms*, AUBURN.EDU, http://www.auburn.edu/~johnspm/gloss/rent-seeking_behavior (last visited Apr. 5, 2014).

227. *See id.*

228. *See* GATT, *supra* note 10, art. III (National Treatment).

229. Panel Report, *China—Certain Measures Affecting Electronic Payment Services*, WT/DS413/R (July 16, 2012).

owned enterprise called China UnionPay (CUP) that enjoys monopoly power.[230] By permitting only CUP to handle renminbi-based electronic card transactions, foreign purveyors, such as Visa and American Express, were forced to service only electronic card transactions involving foreign currency.[231] Whereas foreign card service purveyors would need to negotiate with individual merchants for access, China guaranteed that CUP would have access to all merchants.[232] Finding that China failed to provide national treatment to foreign purveyors of electronic card services as required by GATS, the Panel held that CUP illegally controlled the Chinese market.[233]

B. *Suggested Solutions*

Although trade benefits can be extended by means of a simple trade agreement, WTO membership nevertheless carries with it several special benefits. First, the WTO is a truly global enterprise. With a membership roster consisting of the vast majority of the world's states, including all of the major trading states, WTO membership provides states with access to an unparalleled trade network. Illustrating is the fact that "WTO Member States and applicant countries account for 99.95 percent of world trade, 99.97 percent of the world Gross Domestic Product (GDP), and 99.30 percent of the world's population."[234] Upon ascension to the WTO, Members instantaneously gain access to valuable benefits, such as Most Favored Nation status, without having to negotiate individually with over a hundred different states.[235]

Second, WTO membership provides access to a highly competent and efficient dispute settlement procedure. Whereas volatility may follow in the event of a breach of a regular bilateral treaty obligation, WTO members and their individual business sectors have, at the very least, the comfort of knowing their grievances will be addressed quickly by a readily accessible and competent dispute settlement procedure. As international businesses strive to achieve predictability and consistency, the value of the WTO's dispute settlement procedure cannot be understated.

Third and last, WTO membership considerably levels the playing field between smaller, economically insignificant states and large, powerful

230. *See id*. ¶ 2.4.
231. *Id*.
232. *Id*.
233. *Id*. ¶¶ 8.1 & 8.2.
234. Alford, *supra* note 33, at 697.
235. *Understanding the WTO: Principles of the Trading System*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Apr. 15, 2015).

states. In *U.S.–Gambling Services*, the Appellate Body ruled in favor of the small island nation of Antigua in complaint it brought against the United States.[236] There, Antigua alleged that the cumulative impact of three U.S. anti-racketeering laws effectively barred the provision of gambling services by Antiguan-domiciled sources.[237] Finding that the United States committed its gambling sector when it made its original Uruguay Round commitments in 1995, the Appellate Body ruled that Antigua was entitled to suspend concessions to the United States.[238] Although such David and Goliath situations typically result in a victory for Goliath on the international stage, WTO membership clearly has the potential to provide an occasional victory for David.

For the 37 states[239] that are not currently members of the WTO, the WTO undoubtedly looks like a highly lucrative venture from the outside looking in. By taking advantage of this fact in the *admissions* process, the WTO has a valuable opportunity to shape the human rights records of prospective members. As many of the 37 nonmember states also happen to be major human rights offenders, such as North Korea and Somalia,[240] from the human rights perspective, it would make sense to condition membership on the improvement of human rights records. Indeed, the WTO would both benefit itself and the progress of human rights with little or no cost to itself.

To guarantee human rights compliance after admission into the WTO, a framework incorporating a graduation provision like China's WTO Ascension Protocol could be implemented. Under this system, in exchange for continued compliance to both trade and human rights norms, new Members will eventually graduate into full WTO benefits. Such a solution is ideal as it will in no way, shape, or form impinge upon the rights and obligations of existing Members.

VI. THE MIDDLE GROUND: BILATERAL FREE TRADE AGREEMENTS

Given their limited reach, it is in FTAs and RTAs that human rights concerns should be addressed. Consideration for contentious issues in FTAs and RTAs pose no major threat to the overall framework of the WTO, as only the parties to the FTA or RTA are bound by the agreement. As stated under Article XXIV of the GATT, Members are permitted to form free trade areas and customs unions so long as they keep their other

236. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 373, WT/DS285/AB/R (Apr. 7, 2005).

237. *Id*. ¶ 2.

238. *Id*. ¶ 374.

239. MEMBERS AND OBSERVERS, *supra* note 7.

240. *Id*.

WTO obligations intact.[241] Provided they abide by the terms set forth by the WTO, no matter what policy considerations underscore the FTA or RTA, Members are free to engage in "WTO plus" arrangements with other Members.[242]

Interestingly, consideration for human rights in such agreements dates back thousands of years.[243] Although the ancients, for example, recognized the value of trade, they were nevertheless uncertain as to the intentions of those with whom they traded.[244] Along with bringing valuable goods, foreign traders, for example, could also bring looting and slavery.[245] In order to curb the likelihood of hostility, the ancients devised agreements with trading partners that would ensure basic freedoms and opportunities.[246]

In the same vein, modern states have also begun to use agreements to advance human rights concerns.[247] Both the European Union and the United States, for example, frequently address human and labor concerns in their FTAs.[248] In fact, so ubiquitous are these agreements that they now comprise an important facet of international relations.[249]

Under modern FTAs or RTAs, relatively less powerful states are given "WTO plus" concessions by powerful agenda driven international actors such as the European Union and the United States in exchange for increased human rights compliance.[250] NAFTA, for example, requires that Mexico, provide adequate labor protections and also limit its negative impact on the environment—two concerns neither clearly nor adequately addressed under the more general WTO agreements.[251] Although a particular interpretation of labor and environment may be imposed on Mexico by NAFTA, such as those held by activists and lobbyists in the United States, the fact that Mexico is receiving valuable economic incentives in exchange for the assumption of "WTO plus" trade obligations nevertheless makes these NAFTA provisions less disagreeable.

Despite the fact that the WTO Agreement binds and limits state

241. GATT, *supra* note 10, art. XXIV.

242. Kawai & Wignaraja, *supra* note 135, at 17–18.

243. Susan Ariel Aaronson & Jean Pierre Chauffour, *The Wedding of Trade and Human Rights: Marriage of Convenience or Permanent Match?*, WORLD TRADE ORGANIZATION, *available at* http://www.wto.org/english/res_e/publications_e/wtr11_forum_e/wtr11_15feb11_e.htm.

244. *Id*.

245. *Id*.

246. *Id*.

247. Bartels, *supra* note 149, at 1.

248. *Id*.

249. *Id*.

250. *Id*. at 6.

251. *See generally* Gantz, *supra* note 145.

sovereignty on matters of trade, WTO Members nevertheless have considerable discretion in pursuing their policy agendas even where it implicates WTO rights and obligations. This happens to be why exchange of "WTO plus" benefits and obligations is permitted under FTAs.[252] The inclusion of exceptions to the WTO obligations and Article XXIV of the GATT, for example, reflects the belief that States should be given leeway where their objectives mirror the overarching objective of the WTO—which is to promote free trade and facilitate global integration.[253] Indeed, if this were not the case, it is arguable that the WTO would not enjoy the popularity it does today as states generally tend to strongly rebuff encroachments onto their sovereign rights.

Given the global nature of the WTO, this arrangement is a preferable one. As noted previously, the existence of the ICCPR and ICESCR suggests that a rift exists with respect to the prioritization of human rights concerns.[254] By excluding direct references to human rights in the overarching WTO Agreement and by permitting the consideration of contentious issues in individual FTAs, the WTO essentially freed itself from deciding to *whose* formulation of human rights it should adhere. States, for example, with strong national identities and histories of struggling against colonialism, such as China and India, would have most likely resisted joining an organization like the WTO if it had meant they would resubmitting to the paternalism of their former colonial oppressors. Whereas alienation and the formation of trade blocs would plague a more exhaustive human rights oriented treaty, by remaining general in its rights and obligations, the WTO is essentially able to capture a greater audience, and, therefore, play a greater role in trade affairs.

In the event of fallout between states party to an FTA, having a specific overarching agreement that continues to govern is important for a number of reasons. First, with respect to global peace and security, states are less likely to engage in aggression if dialogue continues even after a particular disagreement occurs. By requiring that States extend their concessions on an MFN basis, the WTO ensures precisely this scenario.[255] WTO Members cannot, without violating the WTO Agreement, suspend trade relations with another Members solely on the basis that a conflict occurred with that particular Member.[256] Indeed, this would be a clear violation of the Article I of the GATT's MFN requirement.[257] In this situation, the Member on the receiving end of trade

252. GATT, *supra* note 10, art. XXIV(5).
253. *Id*. art. XXIV(4).
254. HERNANDEZ-TRUYOL & POWELL, *supra* note 8, at 244.
255. GATT, *supra* note 10, art. I.
256. *Id*.
257. *Id*.

suspensions is empowered to initiate dispute settlement in order to force strict compliance.

Second, as previously stated, continuously keeping borders open is critical to monitoring human rights violations. When states open their borders to trade, they subject themselves to international scrutiny with respect to their internal affairs whether they like it or not. This is essentially a positive byproduct of the interdependency that results from linking states with specialized economies together. If it chooses to partake in the global framework for free trade, even the most despotic and controlling of regimes must reveal some of its inner workings for the purposes of conducting trade relations. In this sense, trade is a powerful means by which the international community can expose human rights abuses.

VII. CONCLUSION

With respect to WTO affairs, it is not the mere consideration of human rights that should cause alarm; rather, it is the *unrestrained* advance of human rights considerations. Truly, the WTO's specialization can be likened to an American tax court. One would not, for example, seek to prosecute a war criminal in a tax court, as there are separate and more appropriate forums suited for that purpose. Likewise, as specialized alternative forums exist for the consideration of human rights matters, such as the ICJ and the International Criminal Court, one should not expect to bring such issues before a trade tribunal.

The fact that trade implicates serious human rights concerns is both inevitable and regrettable. Trade and human rights are both fundamental fixtures of world affairs and do not, as previously thought, exist in isolation from one another. For this reason, our attitudes toward these two endeavors should not be colored by personal beliefs and motivations, as a balancing of both interests is required to solve today's borderless problems. Whereas trade creates the infrastructure for global interdependency, human rights reinforces this interdependency and, in turn, gives it a more moral, human touch.

A collaborative spirit is needed now more so than any other time in history given that our interconnected world has spawned interconnected problems. Where possible and convenient, the WTO should work with human rights organizations to craft solutions that provide due respect to both trade and human rights interests. Treading the path of least resistance, tremendous strides can be made to limit the most egregious abuses associated with trade such as child labor and human trafficking.

The WTO, however, should not blindly subscribe to human rights norms, as there are cognizable dangers associated with allowing non-

economic considerations to dictate trade relations. This concern underscores the evidentiary burdens tied to the current exceptions found in the WTO framework. Although recognizing that noneconomic public policy concerns should at times be given priority, it is only when these concerns rise to the level of genuineness that a WTO Member is permitted to suspend trade obligations.

We should not overlook the fact that trade concessions are negotiated. Truly, there is manifest injustice in allowing one Member to unilaterally suspend benefits to another Member while still requiring the latter to extend benefits to the former. It is for this reason that restrictions must be placed on matters tangential to the overarching framework.

States seeking an outlet in trade affairs to address human rights concerns need not end their search with the WTO. Alternative measures in the form of free trade agreements are more than reasonably available. Permitted and encouraged by the WTO, these agreements allow states to barter, in exchange for benefits beyond those conferred by WTO, for enhanced human rights obligations. NAFTA is one prominent example of how human rights concerns can be incorporated a trade agreement conferring "WTO plus" benefits.

Given the differing worldviews of WTO members, it would be wise of the WTO to steer clear of moral politics. Moreover, from a functional perspective, an umbrella agreement supplemented by independent, self-contained extensions just makes sense. This is due to the fact that even if the more specialized agreement dissolves, the overarching trade framework and the benefits that accompany it remain intact. For the sake of peace and security, it is preferable—even necessary—to preserve the steady flow of trade at all times. If the aggressions that stemmed from trade restrictions during the Interwar period are any indication, the world suffers when economic links deteriorate.

NOTE

REALISM ABOUT REMEDIES AND THE NEED FOR A CDA TAKEDOWN: A COMPARATIVE ANALYSIS OF § 230 OF THE CDA AND THE U.K. DEFAMATION ACT 2013

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I. INTRODUCTION

Jane Doe logs onto ProfessionalNetworking.com, a website forum where professionals can network with other professionals around the world. She discovers a defamatory post saying, "Jane Doe is a cheating slut who cannot be trusted." Jane wants the defamatory statement taken down from the website. In the United States, Jane cannot get the statement taken down, yet had Jane lived in the United Kingdom, she would be able to get the statement taken down.

The problem encountered by the above victim of cyber defamation is the limited avenues for relief in the United States, specifically the lack of a takedown remedy. Cyber misconduct victims sometimes have the ability to pursue a civil remedy against the author of a defamatory statement provided the author's identity is ascertainable.[1] However, the Internet has presented a unique problem in that cyber victims face difficult statutory, judicial, and technological obstacles in seeking the takedown of the defamatory statement from the Internet. Notably, victims of cyber misconduct are generally precluded from bringing suit against the interactive computer service provider (ISP)[2] to seek the removal of

1. *See* Tara E. Lynch, *Good Samaritan or Defamation Defender? Amending the Communications Decency Act to Correct the Misnomer of § 230 . . . Without Expanding ISP Liability*, 19 SYRACUSE SCI. & TECH. L. REP. 1, 17 (2008) ("For plaintiffs who could identify their online defamer, the loss was simply monetary.").

2. 47 U.S.C. § 230(f)(2) ("The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."). The courts have interpreted ISP "to include all intermediaries," especially website operators. Nancy S. Kim, *Website Design and Liability*, 52 JURIMETRICS J. 383, 393 (2012) (citing Fair Hous. Council of San Fernando Valley v. Roommates.com LLC, 521 F.3d 1157, 1161–63 (9th Cir. 2008) & Carafano v. Metrosplash.com, Inc., 207 F. Supp. 2d 1055, 1065 (C.D. Cal. 2002)).

the defamatory statement.[3] As the number of Internet users steadily increases,[4] there has been a corresponding increase in the amount of online defamation.[5]

Section 230 of the Communications Decency Act (CDA), which regulates the Internet and ISP liability, serves as a statutory obstacle to the ultimate goal of a victim of cyber defamation of restoring his or her reputation.[6] Specifically, § 230 precludes cyber defamation victims, as well as all plaintiffs from bringing suit against the ISP, for either civil or equitable relief, as the publisher or distributor of the defamatory content.[7] Section 230 has enabled the Internet to become a forum where people, behind the safety of their computer screens or smart phones, have the ability to post defamatory content without any regard for the consequences of their conduct or the subsequent harm to the victim's reputation.[8] In fact, the "judiciary's inflated interpretation of § 230 has created a legal environment that is ideal for injury and difficult for redress."[9] Although there is general agreement among legal scholars that § 230 should be updated to address the unique aspects of the Internet and include a takedown remedy for cyber misconduct,[10] currently, no U.S.

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3. *See* 47 U.S.C. § 230; David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 16 (2013) ("§ 230 . . . grants . . . [ISPs] broad protection from defamation claims based on the speech of third parties, including protection from injunctive relief.").

4. A recent statistic has shown that global Internet use has increased 566.4% from 2000 to 2012. Internet World Stats: Usage and Population Statistics, Internet Usage Statistics: The Internet Big Picture, http://www.internetworldstats.com/stats.htm (last visited Feb. 23, 2014).

5. *See* Ardia, *supra* note 3, at 11 ("Today, bloggers, users of social media, and 'citizen journalists' are more often the targets of defamation claims.").

6. *See id.* at 15–16 ("A study conducted in the 1980s . . . found that only 20 percent of plaintiffs sued to obtain money as compensation for their reputational harms. Instead, . . . what libel plaintiffs desire most is a correction or retraction.").

7. *See* 47 U.S.C. § 230; David E. Hallett, *How to Destroy a Reputation and Get Away with it, the Communication Decency Act Examined: Do the Policies and Standards Set Out in the Digital Millennium Copyright Act Provide a Solution for a Person Defamed Online*, 41 IDEA 259, 274 (2001) ("The CDA statutorily limits ISP liability by making it impossible to find an essential element of the claim, publication.").

8. "The CDA does not adequately protect society from would be online defamers." Hallett, *supra* note 7, at 277. Sarah H. Ludington, *Aiming at the Wrong Target: The "Audience Targeting" Test for Personal Jurisdiction in Internet Defamation Cases*, 73 OHIO ST. L.J. 541, 542 (2012) ("With a few keystrokes, I can publish an injurious falsehood accessible to anyone in the world with an Internet connection and the desire to read it.").

9. Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 341 (2005). "ISPs have no obligation to remove tortious materials, to prevent the reposting of objectionable materials, or to help victims track down the primary wrongdoers." *Id.*

10. *See* Allison E. Horton, *Beyond Control?: The Rise and Fall of Defamation Regulation on the Internet*, 43 VAL. U. L. REV. 1265, 1314 (2009) (discussing how the Internet's development

scholar fully analyzes the practical aspects of implementing and enforcing a takedown decree for post-publication defamatory speech.[11]

Conversely, other countries[12] have enacted takedown provisions to provide remedies for cyber defamation. Notably, the United Kingdom recently passed the U.K. Defamation Act 2013[13] which reformed U.K. defamation law to account for the uniqueness of the Internet and its pervasive use throughout society. The U.K. Defamation Act 2013 provides website operators a defense from liability[14] while also providing U.K. courts with the power to require a website operator to take down defamatory content.[15]

This Article provides a proposed method for instituting a federal takedown remedy for a state tort without subjecting ISPs to liability. This proposed solution effectively balances a successful mechanism for remedying harm caused by cyber misconduct with allowing free speech and the continuing growth of the Internet as a popular medium for communication.

Part II examines the unique aspects of the Internet, provides a brief background of traditional defamation law, and discusses the current obstacles to recovery victims of cyber defamation encounter under § 230. Part III reviews the background of the CDA, judicial interpretation of § 230, and the growing dissatisfaction with the broad interpretation of § 230. Part IV studies the background of U.K. defamation law, the influence of the E.U. Electronic Commerce Directive on the creation of the U.K. Defamation Act 2013, and analyzes the pertinent sections of the U.K. Defamation Act 2013. Part V presents a proposed solution and framework for amending § 230 to include a federal takedown remedy. Part V also addresses jurisdictional or other potential concerns that could arise in response to the proposed solution.

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and interplay with the CDA has "produced cries for reformation.").

11. One such problem with implementing a takedown decree is that defamation law is a state tort remedy and therefore creating a federal remedy creates a host of enforcement problems.

12. *See, e.g.*, Defamation Act 2013, c. 26 (U.K.); Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market ('Directive on Electronic Commerce') [hereinafter E.U. Electronic Commerce Directive] (directing E.U. Member States to create a notice and takedown requirement for Internet defamation).

13. Defamation Act 2013, c. 26 (U.K.); David Hooper et al., *Defamation Act 2013 – What Difference Will It Really Make?*, 24 ENT. L.R. 2013, 199, 205 (2013) ("The Act is a welcome and long overdue reform of the law of defamation.").

14. Defamation Act 2013, c. 26 § 5 (U.K.).

15. Defamation Act 2013, c. 25 § 13 (U.K.).

II. SECTION 230 OF THE CDA NEEDS TO BE AMENDED TO ADDRESS THE INTERNET'S IMPACT ON U.S. DEFAMATION LAW

The Internet is a medium of communication that presents unique legal concerns. The Internet is omnipresent throughout all facets of life in modern society.[16] It is concerning that the CDA, which regulates the Internet's use, has not been updated, since its passage eighteen years ago, to address the Internet's pervasive presence.[17] Accordingly, the expansive judicial interpretation of § 230 and the scope of § 230 immunity is now too broad in light of the unique aspects of the Internet and the growing inequities facing modern cyber defamation victims.

A. *Unique Aspects of the Internet*

The Internet's global presence enables easy accessibility of information to a mass audience.[18] This exponential spread of information[19] helped create a global culture that encourages people to impulsively share their every thought with the click of a button.[20] The Internet's function as a faceless medium creates a lack of accountability for online communications, for which editorial control and legal

16. *See* Phillip Adam Davis, *The Defamation of Choice-of-Law in Cyberspace: Countering the View that the Restatement (Second) of Conflicts of Law is Inadequate to Navigate the Borderless Reaches of the Intangible Frontier*, 54 FED. COMM. L.J. 339, 348 (2002) ("Cyberspace is no longer a 'new frontier,' but a fixed communication device that is commonplace and woven into the fabric of American society.").

17. 47 U.S.C. § 230 (2006).

18. Scott Sterling, *International Law of Mystery: Holding Internet Service Providers Liable for Defamation and the Need for a Comprehensive International Solution*, 21 LOY. L.A. ENT. L. REV. 327, 347 (2001) ("[A]nything published on the Internet has the ability to reach a worldwide audience."). Further, the rapid growth of Internet users has increased the sheer volume of "mass" communications. MATTHEW COLLINS, THE LAW OF DEFAMATION AND THE INTERNET 3 (3d ed. 2010) (The Internet "brings mass communication to the mass: anyone with a computer and an Internet connection or, increasingly, an Internet-enabled device, can utilize its potential.").

19. "[T]he presently existing Internet within cyberspace functions to '[enable] people to communicate with one another with unprecedented speed and efficiency and is rapidly revolutionizing how people receive and share information.'" Kimberly Quon, *Implementing a Standard of Care to Provide Protection from a Lawless Internet*, 31 WHITTIER L. REV. 589, 606 (2010) (quoting Blumenthal v. Drudge, 992 F. Supp. 44, 48 (D.D.C. 1998)).

20. *See* Kim, *supra* note 2, at 400–01 (commenting that impulsive posting of content is one "regrettable online behavior" associated with modern online culture). The computer, smart phone, or other method of Internet access serves as a shield, to embolden people to say more, than they would in face-to-face interactions. *See* Jennifer Benedict, *Deafening Silence: The Quest for a Remedy in Internet Defamation*, 39 CUMB. L. REV. 475, 479 (2009) ("There are no gatekeepers in cyberspace and anyone with a computer is capable of targeting anyone else."); Doug Rendleman, *The Defamation Injunction Meets the Prior Restraint Doctrine* 19 (Wash. & Lee Pub. Legal Studies Research Paper Series, Working Paper No. 2014-8, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404560 ("People who previously lacked access to widespread communication can now scream vitriol from their virtual rooftops.").

regulation is difficult.[21] Further, once defamatory content appears on the Internet, it is difficult to remove[22] due to the advent of mirror websites[23] and the growing trend of ISPs to refuse to allow posters to remove content.[24]

Finally, the Internet stretches jurisdictional boundaries,[25] creating additional obstacles for cyber victims. Obtaining jurisdiction over the author of the defamatory content or the ISP becomes almost impossible, if neither the author nor the ISP is subject to the forum court's jurisdiction.[26] Defamation law is a state tort action, but the problem of cyber defamation is global in scope. Consequently, recognition and enforcement of a state tort defamation action both in the United States and in foreign countries is problematic.[27] All the characteristics that make the Internet an appealing medium of communication, "also make [the Internet] a devastatingly effective tool to ruin the lives of innocent citizens."[28] Thus, in light of the Internet's pervasiveness and the expansive immunity provided to ISPs under § 230, the quantum of harm suffered by cyber defamation victims is greater than the quantum of harm suffered by defamation victims in other mediums of communication.[29]

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21. *See* Rendleman, *supra* note 20, at 19 ("Observers think that social media, like alcohol, is disinhibiting because it undermines judgment and exacerbates impulsive and emotional responses."); *see* Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn From John Doe?*, 50 B.C. L. REV. 1373, 1375 (2009) [hereinafter Lidsky, *John Doe*].

22. Terence J. Lau, *Towards Zero Net Presence*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 237, 242 (2011) ("scrubbing content becomes more and more difficult as time progresses and the content replicates."); *see* Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1112 (2011) [hereinafter Lipton, *Victimization*] ("Even where information about a victim is removed from one website, it may be cached and copied on other websites.").

23. Mirror websites publish "the same files, format, and HTML as the original website." Phil Cameron, *Internet Travel Purchases*, 30 NO.3 GPSOLO 48, 53 (2013). The purpose of a mirror website is to ensure "the site is available from more than one location—[for] sites at risk of being hacked or banned." John Alan Farmer, *The Spector of Crypto-Anarchy: Regulating Anonymity-Protecting-Peer-to-Peer Networks*, 72 FORDHAM L. REV. 725, 740–41 (2003).

24. *See* Kim, *supra* note 2, at 415–16; Lidsky, *John Doe*, *supra* note 21, at 1390.

25. *See* Yuval Karniel, *Defamation on the Internet – A New Approach to Libel in Cyberspace*, 2 J. INT'L MEDIA & ENT. L. 215, 220 (2009) (noting the Internet is "[w]ithout geographical borders.").

26. *See* Barry J. Waldman, *A Unified Approach to Cyber-Libel: Defamation on the Internet, A Suggested Approach*, 6 RICH. J.L. & TECH. 9, *8 (1999) (noting that determining jurisdiction for cyber-libel cases can present several difficulties for plaintiffs); Amanda Groover Hyland, *The Taming of the Internet: A New Approach to Third-Party Internet Defamation*, 31 HASTINGS COMM. & ENT. L.J. 79, 109 (2008) ("These problems are compounded by the wide range of possible jurisdictions where a web operator may be called into court[.]").

27. *See* 28 U.S.C. §§ 4101–05; *see generally* Bruce D. Brown & Clarissa Pintado, *The Small Steps of the Speech Act*, 54 VA. J. INT'L L. DIG. 1 (2014).

28. Lau, *supra* note 22, at 253.

29. *See* Robert D. Richards, *Sex, Lies, and the Internet: Balancing First Amendment Interests, Reputational Harm, and Privacy in the Age of Blogs and Social Networking Sites*, 8 FIRST AMEND. L. REV. 176, 212 (2009) ("[the] ability to disseminate potentially damaging and

B. *Defamation and the Internet*

As the Internet's popularity grows, there is an increasing amount of online defamation.[30] The tort of defamation is designed to provide remedies to defamation victims, however the application of the tort to the Internet is inadequate because it fails to provide sufficient remedies for cyber defamation victims.[31] In order to fully understand why § 230 needs to be amended to include a takedown remedy for cyber defamation, it is essential to understand the tenets of defamation law, both common law foundations and constitutional limitations, as well as current obstacles to recovery.

1. Traditional Elements of Defamation

The defamation[32] tort provides a mechanism for individuals to recover for harm to their reputation.[33] The tort reconciles "the competing interests of freedom of expression and the protection of individual reputation."[34] In order for a plaintiff to prevail under the common law, the plaintiff had to prove: (1) the existence of a defamatory communication;[35] (2) identification of the plaintiff to a third party;[36] and (3) publication of the communication to at least one third party.[37] The United States Supreme Court in *New York Times Co. v. Sullivan* constitutionalized the tort of

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false information about another to a mass audience with little more than a keystroke's worth of effort threatens to devalue reputation to a point never before experienced in American culture."). *See also* Lipton, *Victimization*, *supra* note 22, at 1116 ("Much online conduct will damage a victim's reputation permanently with little recourse because many laws are focused on physical world conduct rather than online communications.").

30. *See* Ardia, *supra* note 3, at 12 ("[A]necdotal evidence indicates that defamation claims are actually increasing.").

31. *See id.* at 18 ("Not surprisingly, defamation plaintiffs are frustrated with the remedies available to them.").

32. "The term 'defamation' encompasses the twin torts of libel and slander." LYRISSA BARNETT LIDSKY & R. GEORGE WRIGHT, FREEDOM OF THE PRESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 63 (Jack Stark ed. 2004) [hereinafter LIDSKY, FREEDOM OF THE PRESS].

33. *See id.* Moreover, "[p]ublic policy recognizes that individuals have the right to enjoy their reputation, free from false attacks that tend to diminish their reputation in the eyes of the community." Lynch, *supra* note 1, at 6.

34. COLLINS, *supra* note 18, at 4.

35. A defamatory statement is "a statement that tends to harm an individual's reputation in the eyes of his or her community. LIDSKY, FREEDOM OF THE PRESS, *supra* note 32, at 66. The court will "'presume[] damages' based solely on the nature of the defamatory statements." *Id.*

36. *Id.*

37. ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 2-70 (PLI, 3d ed. 1999). Publication occurs when defamatory words are "expressed purposely or negligently to a third party." *Id.* (citing Lyons v. Nat'l Car Rental Sys., 30 F.3d 240, 244 (1st Cir. 1994)).

defamation[38] and added two additional elements for the plaintiff to prove: (4) falsity of the communication;[39] and (5) some type of fault of the defendant, such as actual malice or negligence.[40]

Additionally, there are three types of secondary liability in a defamation action: publisher (re-publisher) liability, distributor liability, and common carrier (or conduit) liability.[41] Both re-publisher liability[42] and distributor liability[43] are relevant to the problem of cyber defamation. The key distinction between re-publisher and distributor liability is that a critical element for the imposition of distributor liability is a finding by the court that the party (distributor) had notice that the statement was defamatory.[44] Yet the question when addressing cyber defamation and ISP liability is "whether the traditional law of defamation 'fits' the Internet."[45]

2. Obstacles to Recovery in Internet Defamation Cases

Prior to the passage of § 230 of the CDA, many legal scholars initially believed courts would apply defamation law to the Internet in the same manner courts applied it to all other print medium.[46] This belief included

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38. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

39. *Id.* Proving the truth of the statement used to be a defense to defamation; now proving the statement's falsity is incorporated into the elements a plaintiff must prove. LIDSKY, FREEDOM OF THE PRESS, *supra* note 32, at 74; Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

40. *See N.Y. Times*, 376 U.S. 254. The fault of the defendant varies based on whether the plaintiff is a public official or public figure versus a private figure. *See* LIDSKY, FREEDOM OF THE PRESS, *supra* note 32, at 66–74.

41. Amanda Groover Hyland, *The Taming of the Internet: A New Approach to Third-Party Internet Defamation*, 31 HASTINGS COMM. & ENT L.J. 79, 81 (2008) ("Those who republish a libelous statement do not escape liability simply because they did not originally create the content.").

42. Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1298 (D.C. Cir. 1988); RESTATEMENT (SECOND) OF TORTS § 578.

43. RESTATEMENT (SECOND) OF TORTS § 581 (Distributor liability occurs when a person "only delivers or transmits defamatory matter published by a third person.").

44. *Id.*

45. Bryan P. Werley, *Aussie Rules: Universal Jurisdiction Over Internet Defamation*, 18 TEMP. INT'L & COMP. L.J. 199, 220–21 (2004) ("Whether the technical definition of publication with regards to defamation can really be applied to the Internet, which is unlike anything else the common law definition has been applied to, both in terms of its reach and the way in which it is accessed.").

46. *See* Sean P. Trende, *Defamation, Anti-SLAPP Legislation, & the Blogosphere: New Solutions for an Old Problem*, 44 DUQ. L. REV. 607, 619 (2006); *see also* Jeffrey M. Tayler, *Liability of Usenet Moderators for Defamation Published by Others: Flinging the Law of Defamation into Cyberspace*, 47 FLA. L. REV. 247, 267 (1995) (acknowledging that many legal commentators asserted that traditional standards of defamation law would still apply to the Internet).

the availability of traditional defamation remedies such as damages[47] and equitable relief such as an apology, a retraction of the statement,[48] or in limited cases an injunction.[49] However, the Internet's global scope and § 230 immunity provide obstacles to the availability of remedies in cyber defamation cases.

First, the Internet's global structure creates an obstacle to the ability of a victim of cyber defamation to ensure the court has jurisdiction over the claim and the parties.[50] In many situations, the case begins and ends with a determination as to whether the court has jurisdiction to adjudicate the matter.[51] Moreover, determining personal jurisdiction has proven to be a "difficult proposition" for victims of cyber defamation[52] as the test courts use for evaluating jurisdiction differs based upon each state or federal court.[53] Thus, the ability of a court to exercise jurisdiction over a local or foreign ISP for a state tort claim presents an obstacle to the institution of recovery proceedings, as the Internet's reach has no set boundaries.

Even if a court were able to assert jurisdiction over an ISP, the remedies available for prevailing cyber defamation plaintiffs are inadequate.[54] Specifically, § 230 ISP immunity prevents plaintiffs from joining the ISP as a party to the lawsuit.[55] At best, provided the plaintiff

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47. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 620–23 for a discussion of the types of damages a defamation plaintiff could seek.

48. *Id.* at 11–13 ("Legislatures of thirty-three states have enacted statutes that govern the procedure to be followed in demanding and publishing revocation."). However, there is "no judicial authority for right of retraction absent the existence of an applicable statute." *Id.* at 10–56.

49. *See* Ardia, *supra* note 3, at 48–51; *See generally* Tory v. Cochran, 544 U.S. 734, 738 (2005).

50. *See* Ludington, *supra* note 8, at 543 (there is a "jurisdictional safe harbor (ironically) provided by the very ubiquity of the Internet.").

51. Jacqueline D. Lipton, *Law of the Intermediated Information Exchange*, 64 FLA. L. REV. 1337, 1365 (2012) [hereinafter Lipton, *Intermediated Information Exchange*].

52. Waldman, *supra* note 26, at *8.

53. *Id.* at *9–15 (the tests range from totality of the contacts, effects test approach, and the Keeton test); *Id.* ("courts usually decline to exercise jurisdiction over interstate or foreign defendants where the principal or only connection with the forum state is that it is the place of residence of the plaintiff."); COLLINS, *supra* note 18, at 593–95 (However, courts will exercise jurisdiction in situations where there is a manifest intent by the defendant to "target and focus on the forum," and when "commercial and other contacts [exist] between the defendant and the forum state.").

54. *See* Lidsky, *John Doe*, *supra* note 21, at 1389–90.

55. *See* Ardia, *supra* note 3, at 17 ("Unless these online intermediaries voluntarily remove the defamatory speech, a court cannot force them to do so."); Kraig J. Marton et al., *Protecting One's Reputation – How to Clear a Name in a World Where Name Calling is so Easy*, 4 PHX. L. REV. 53, 60 (2010) ("the Communications Decency Act insulates the owners of websites from liability for defamation, sometimes presenting unique challenges for the defamed party to get the remedy they are seeking.").

knows the identity of the poster of the defamatory statement,[56] a successful plaintiff will recover damages[57] and possibly a takedown decree against the poster. However, this decree does not guarantee that the defamatory content will be removed from the Internet, and damages fail to adequately compensate cyber defamation victims because damages do not restore a victim's online reputation or remove the defamatory statement from the Internet.[58]

III. THE CDA

The Internet has changed dramatically since Congress enacted the CDA. In order to fully understand why § 230 is outdated, it is important to understand the impact it had in changing the application of defamation law to the Internet, specifically the immunity § 230(c) provided ISPs.

A. *Intent Behind the Creation of the CDA*

Prior to 1996, the common law determined Internet defamation actions, and held ISPs responsible for moderating defamatory content posted on the website by a third party.[59] As a result of the perverse incentives created by two decisions, *Cubby, Inc. v. CompuServe, Inc.*[60] and *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, Congress felt compelled to intervene and pass the CDA.[61] Both cases had similar facts and were adjudicated within the state of New York, yet arrived at two completely different conclusions. In the first case, *Cubby*, the court held that the defendant was a distributor and therefore not liable for defamatory remarks posted on its forum boards.[62] In the second case,

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56. *See* Lidsky, *John Doe*, *supra* note 21, at 1374.

57. *Id.* at 1389–90.

58. *See id.* ("Libel law gives successful plaintiffs compensatory and occasionally punitive damages, remedies that are virtually meaningless when the defendant has no money to satisfy a judgment.").

59. *See* Molly Sachson, *The Big Bad Internet: Reassessing Service Provider Immunity Under § 230 to Protect the Private Individual from Unrestrained Internet Communication*, 25 J. CIV. RTS. & ECON. DEV. 353, 357–58 (2011).

60. Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

61. Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. 1995), superseded by statute, Communications Decency Act of 1996, 47 U.S.C. § 230 (2006).

62. *See Cubby*, 776 F. Supp. at 141. In *Cubby*, defendant ISP CompuServe, provided its subscribers access to over thousands of information services and forums. *Id.* at 137. One such forum contained the publication "Rumorville USA" which plaintiffs claimed published "false and defamatory statements" about their competing business and the individual plaintiffs. *Id.* at 138. The Southern District of New York treated CompuServe as a distributor, finding that CompuServe did not moderate or filter the content that was posted. *Id*. at 141. Therefore, as CompuServe did not know or have reason to know of the defamatory content, CompuServe was not liable. *Id.*

Stratton, the court held that a similarly situated defendant was a publisher and liable for the defamatory content on its forum boards.[63]

Congress was concerned with the divergent results of the above two cases because Congress wanted to encourage ISPs to self-regulate the dissemination of material on their websites without fear of liability.[64] To address its concerns with the diverse incentives created by *Cubby* and *Stratton*,[65] Congress passed the Cox-Wyden Amendment to the Telecommunications Act of 1996.[66] The intent of the Cox-Wyden Amendment was to reverse the *Stratton* decision and to eliminate corresponding disincentives for intermediaries to screen content.[67] On February 8, 1996, the Communication Decency Act became effective as Title V of the Telecommunications Act of 1996.[68] The Cox-Wyden amendment was codified as § 230—Protection for private blocking and screening of offensive material—of the CDA.[69] The advent of § 230 was viewed as a successful merger of Congress's goals and of ensuring the continued growth of the Internet by providing protection for ISPs from liability for third-party comments.[70]

B. *The Ambiguity Created by § 230*

In retrospect, § 230's language was ambiguous and failed to provide

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63. *See Stratton*, 1995 WL 323710 at *1-*2. *Stratton* was decided four years after *Cubby*. *Id.* In *Stratton*, the Supreme Court of New York, in a state court trial on facts similar to *Cubby*, held defendant Prodigy liable as a publisher of the defamatory statements the plaintiff complained were posted on one of Prodigy's bulletin boards. *Id.* at *1, *3, *6. The court granted the plaintiff's motion for partial summary judgment finding Prodigy was a publisher because Prodigy and its agents moderated the content on the bulletin boards. *Id.* Therefore, Prodigy was liable for any defamatory content posted on its websites by third parties. *Id.* at *1.

64. *See* 47 U.S.C. § 230(b)(4).

65. The Cox-Wyden Amendment was also designed to address Congress's concern with the ease of accessibility of the Internet to children, especially to pornography on the Internet. *See* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 52–59 (1996).

66. *See* Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 315–16 (2011); Cannon, *supra* note 65, at 67.

67. *See* Wu, *supra* note 66, at 316; 47 U.S.C. § 230.

68. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as 47 U.S.C. §§ 230, 560, 561).

69. *Id.*; *see also* Wu, *supra* note 66, at 315–17. Congress's goals for passing § 230 include objectives designed "to promote the continued development of the Internet," to encourage the development of technology, and "to remove disincentives for the development and utilization of blocking and filtering technologies." 47 U.S.C. § 230(b). "Congress sought to encourage providers and users of Internet services to practice self-regulation with respect to offensive material." Jae Hong Lee, *Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third-Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 470 (2004).

70. *See* Wu, *supra* note 66, at 316.

guidance as to the scope of intermediary (ISP) liability.[71] The main source of ambiguity originates in § 230(c), where Congress attempted to structure the provision in a manner that would effectively promote self-regulation of ISPs.[72] Section 230(c), also known as the "Good Samaritan" provision,[73] was designed to give ISPs special protections from liability for publishing third-party content.[74]

This additional protection for ISPs from re-publisher liability is a protection not provided to the print or broadcast mediums.[75] Section 230(c) provides a medium-specific protection and holds ISPs liable for content that may be properly attributed to it.[76] Thus, for an ISP to be liable, the ISP must be deemed an "information content provider" meaning "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[77]

The ambiguity in § 230(c) arises in determining whether the ISP qualifies for protection from liability, essentially whether the ISP is a

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71. *Id.* at 317; 47 U.S.C. § 230.

72. 47 U.S.C. § 230(c). § 230(c) provides:

> (1) Treatment of publisher or speaker
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
> (2) Civil liability
> No provider or user of an interactive computer service shall be held liable on account of--
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Id.

73. In fact, § 230(c) is titled "[P]rotection for 'good samaritan' blocking and screening of offensive material." 47 U.S.C. § 230(c).

74. *Id.* Hong Lee, *supra* note 69, at 470 ("The CDA was designed to encourage self-regulation by permitting Internet service providers (ISPs) to exercise their editorial powers in regulating offensive material without incurring strict liability for defamation as publishers of third-party content.").

75. *See* Ardia, *supra* note 3, at 10–11 ("More recently, defamation law took on a decidedly medium-specific aspect when Congress passed § 230 of the Communications Decency Act, which granted operators and users of websites and other interactive computer services broad protection from defamation claims based on the speech of third parties.").

76. 47 U.S.C. § 230(c)(1).

77. 47 U.S.C. § 230(f)(3).

publisher[78] or "responsible" for the "creation or development" of the disputed defamatory content.[79] This determination is relevant because the language of § 230 only addresses publishers, and makes no reference whatsoever to "distributors."[80] Despite the confusion surrounding whether § 230(c) also included distributors, Congress neither amended § 230(c) nor provided guidance as to what the definition of "publisher" encompassed.

C. *Judicial Interpretation of § 230(c)—A Divergence from Congress's Underlying Objective and the Creation of Immunity for Both Publishers and Distributors*

The burden fell to the courts to interpret § 230(c) and the courts have broadly interpreted the scope of § 230(c) immunity.[81]

1. *Zeran v. America Online, Inc.*

A court first addressed the ambiguity of § 230(c)(1) in the seminal case of *Zeran v. America Online, Inc.*[82] In *Zeran*, the plaintiff Ken Zeran was the victim of an "unidentified third party's hoax" posting on an AOL bulletin board advertising the sale of "Naughty Oklahoma T-Shirts," six days after the April 1995 Oklahoma City bombing.[83] Following this "anonymously perpetrated prank," Zeran received a "high volume" of angry phone calls.[84] Zeran notified an AOL representative of the hoax and was assured the post would be removed, however additional messages continued to be posted on AOL boards and the harassment continued.[85] Zeran ultimately filed suit against AOL seeking to hold AOL liable as a distributor for the defamatory content posted by a third party.[86]

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78. *See* Quon, *supra* note 19, at 597.

79. *See* 47 U.S.C. § 230(c).

80. *Id.*

81. *See* Sachson, *supra* note 60, at 359. In fact, "courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition of 'interactive computer service' and a relatively restrictive definition of 'information content provider.'" *See* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003); *see also* Sachson, *supra* note 59, at 360.

82. Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997).

83. *Id.* at 329. The shirts featured "offensive and tasteless slogans" about the Oklahoma City bombing. *Id.* The hoax message instructed "those interested in purchasing a shirt to call" Ken and provided Zeran's phone number. *Id.*

84. *Id.* Zeran could not change his phone number to avoid the harassing phone calls because his phone number's availability was critical to "running his business out of his home." *Id.*

85. *Id.*

86. Zeran was unable to bring any "action against the party who posted the offensive messages," because the party's identity was unknown. *Id.* Zeran alleged that once "he notified

AOL asserted § 230 as an affirmative defense, and the district court granted AOL's motion for judgment on the pleadings, which Zeran appealed.[87]

The Fourth Circuit examined § 230 and held that "[b]y its plain language, § 230 creates a federal immunity to any cause of action that would make [ISPs] liable for information originating with a third-party user of the service."[88] Accordingly, the court concluded that § 230(c)(1) "forbids the imposition of publisher liability on a[n] [ISP] for the exercise of its editorial and self-regulatory functions."[89] The court also rejected Zeran's argument that § 230 left "distributor liability intact."[90] The Fourth Circuit held that distributor liability is "merely a subset, or a species, of publisher liability, and is therefore also precluded by § 230."[91] Consequently, the court affirmed AOL's motion for judgment on the pleadings as it found that AOL fell "squarely" within the definition of publisher and was protected by § 230 from suit.[92]

The Fourth Circuit's analysis and interpretation of § 230 in *Zeran* has been extoled as *clarifying* the ambiguity surrounding the meaning of § 230(c), specifically the meaning of "publisher" for purposes of § 230(c)(1).[93] *Zeran* established a broad immunity for ISPs under § 230(c)(1), protecting service providers from virtually all liability for content "originating with third parties."[94] Moreover, the *Zeran* opinion set the basic foundation for distributor immunity by holding that the term "publisher" in § 230(c)(1) encompassed liability protection for both publishers and distributors.[95] *Zeran* remains the leading case on intermediary immunity.[96]

AOL of the unidentified third party's hoax, AOL had a duty to remove the defamatory posting promptly, to notify its subscribers of the message's false nature, and to effectively screen future defamatory material." *Id.* at 330.

87. *Id.* at 329–30.

88. *Id.* at 330. The Fourth Circuit also recognized that Congress's purpose in enacting § 230 was to reverse the *Stratton* decision. *Id.*

89. *Id.* at 331.

90. *Id.* at 332.

91. *Id.* In rejecting Zeran's notice liability argument, the court found that "liability upon notice would defeat the dual purposes advanced by § 230 of the CDA" because such notice liability would deter service providers from self-regulating and increase incentives to restrict speech. *Id.* at 333.

92. *Id.* at 332.

93. *Id.*

94. *See Zeran*, 129 F.3d at 332–33; Mark D. Quist, "*Plumbing the Depths" of the CDA: Weighing the Competing Fourth and Seventh Circuit Standards of ISP Immunity Under Section 230 of the Communications Decency Act*, 20 GEO MASON L. REV. 275, 288 (2012).

95. *Zeran*, 129 F.3d at 332–33.

96. *See* David Lukmire, *Can the Courts Tame the Communications Decency Act? The Reverberations of* Zeran v. American Online, 66 N.Y.U. ANN. SURV. AM. L. 371, 385 (2010) ("*Zeran* laid the groundwork for future expansive readings of section 230."); Varty Defterderian,

2. Post-*Zeran* and § 230 Immunity

Zeran created a national standard for the interpretation of § 230(c). Since *Zeran*, a majority of courts have followed its analysis.[97] Courts in the First,[98] Second,[99] Third,[100] Fourth,[101] Fifth,[102] Seventh,[103] Eighth,[104] Ninth,[105] Tenth,[106] and Eleventh[107] Circuits have followed *Zeran*'s holding and provided broad immunity to ISPs protecting them from both publisher and distributor liability.[108]

The courts developed a three-prong test to determine ISP immunity from liability pursuant to § 230(c)(1).[109] To be afforded § 230(c)(1) protection, the ISP must prove that: (1) the defendant website provider is an "interactive computer service" within the meaning of § 230(f)(2)[110]; (2) the plaintiff is seeking to hold the defendant website provider liable as the publisher;[111] and (3) the information was "provided by another

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Fair Housing Council v. Roommates.com: A New Path for Section 230 Immunity, 24 BERKELEY TECH. L.J. 563, 570 (2009) ("*Zeran* remains the preeminent case on section 230 immunity.").

97. Notably, due to § 230 immunity protecting ISPs, there has been limited cyber defamation litigation reaching the federal circuit court level. Of the seventy federal circuit court cases that quote some portion of § 230, forty-five of the cases reference § 230(c)(1). Search of Westlaw database, March 24, 2015. Twenty-seven federal circuit court cases quote *Zeran*. Search of Westlaw database, March 24, 2015.

98. Universal Comm. Sys., Inc. v. Lycos, 478 F.3d 413, 417, 422 (1st Cir. 2007).

99. Ricci v. Teamsters Union Local 456, No. 14-1732, 2015 WL 1214476 (2d Cir. Mar. 11, 2015) (noting that the court was going to join the consensus of other courts that have applied to immunity provisions of the Communications Decency Act to a growing list of Internet-based service providers).

100. DiMeo v. Max, 248 Fed. Appx. 280, 282 (3d Cir. 2007); Green v. Am. Online, 318 F.3d 465, 471 (3d Cir. 2003).

101. Nemet Chevrolet v. Consumeraffairs.com, Inc., 591 F.3d 250 (4th Cir. 2009).

102. Doe v. MySpace, Inc., 528 F.3d 413 (5th Cir. 2008).

103. Chicago Lawyers Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008); Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003).

104. *See* Johnson v. Arden, 614 F.3d 785, 792 (8th Cir. 2010).

105. *See* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1105–06 (9th Cir. 2009); *see* Batzel v. Smith, 333 F.3d 1018, 1026 (9th Cir. 2003).

106. *See* F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1195 (10th Cir. 2009); Ben Ezra, Weinstein & Co., Inc. v. Am. Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000).

107. Whitney Info. Network, Inc. v. Xcentric Venture, LLC, 199 F. App'x 738, 739–40 (11th Cir. 2006); *see* Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321–22 (11th Cir. 2006).

108. "Circuit courts have interpreted the CDA to broadly immunize almost all interactive website operators from defamation actions stemming from third-party content." Andrew Bluebond, *When the Customer is Wrong: Defamation, Interactive Websites, and Immunity*, 33 REV. LITIG. 679, 684 (2014).

109. *See* Matthew G. Jeweler, *The Communications Decency Act of 1996: Why § 230 is Outdated and Publisher Liability for Defamation Should be Reinstated Against Internet Service Providers*, 8 U. PITT. J. TECH. L. & POL'Y 3 (2007).

110. *See* 47 U.S.C. § 230(c)(1), (f)(2).

111. *See* 47 U.S.C. § 230(c)(1).

information content provider" within the meaning of § 230(f)(3).[112] The *Zeran* opinion has become firmly entrenched with the analysis of § 230. Not only has *Zeran* influenced and shaped CDA case law, it has turned § 230(c)(1) into a formidable obstacle for cyber defamation plaintiffs to overcome.[113]

D. *Growing Dissatisfaction with the Broad Interpretation of § 230*

Section 230 falls short of accomplishing Congress's goal of encouraging ISPs to self-regulate. Although Congress assumed ISPs would engage in self-regulation, as § 230 does not require ISPs to self-regulate and protects ISPs from liability if they do not, Congress's goal of ISP self-regulation has not been achieved.[114] As one commentator noted, "[t]he conferral of section 230 immunity has led to egregious results, which make a mockery of the term *good Samaritan* when applied to certain websites."[115]

First, there is disagreement over the language of § 230 and whether the term "publisher" in § 230(c)(1) actually includes distributor liability.[116] On one side, judicial interpretation, starting with the Fourth Circuit's holding in *Zeran*, ignores the fact that the text of § 230 makes "no separate reference to distributors."[117] By disregarding Congress's decision to exclude "distributors" from the language of § 230, the courts have created a broad general immunity for ISPs that was not explicitly mentioned in § 230's text.[118] Critics of the *Zeran* interpretation note that one of Congress's express reasons for passing § 230 was to reverse the

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112. *See* 47 U.S.C. § 230(c)(1), (f)(3).

113. *See* Ken S. Myers, *Wikkimunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 163, 174 (2006) (noting the "expanding scope of § 230(c)(1)'s application to various potential 'gatekeepers' of Internet content . . . .").

114. *See* Sewali K. Patel, *Immunizing Internet Service Providers From Third-Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647, 678 (2002).

115. Kim, *supra* note 2, at 398.

116. *See* Quist, *supra* note 94, at 287–88. In addition to the disagreement over the scope of the term publisher, circuit courts have split over whether "the defense established by § 230(c)(1) is properly understood as an 'immunity' defense." *See* Hare v. Richie, No. ELH-11-3488, 2012 WL 3773116, at *14 (D. Md. Aug. 29, 2012) (comparing Johnson v. Arden, 614 F.3d 785, 791 (8th Cir. 2010) and Almeida v. Amazon.com, Inc. 456 F.3d 1316, 1321 (11th Cir. 2006) with City of Chicago v. StubHub!, Inc., 624 F.3d 363, 366 (7th Cir. 2010) and Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100 (9th Cir. 2009)).

117. *See* Quist, *supra* note 94, at 287–88; Zeran v. Am. Online, Inc., 129 F.3d 327, 332–33 (4th Cir. 1997).

118. *See* Quist, *supra* note 94, at 287–89. The statute merely states that § 230(c) is a defense to liability. *See* 47 U.S.C. § 230(c). Yet the *Zeran* opinion "suggests that the grant of immunity is not only implied, but explicitly envisioned by the plain meaning of the language of Section 230(c)(1)." Quist, *supra* note 94, at 289.

Stratton decision and preclude publisher liability.[119] Thus, Congress's failure to include distributor liability in the language of § 230 demonstrates an intent to leave distributor liability as the only available form of ISP secondary liability.

Section 230 created an environment in which the ISP can hold dichotomous roles and use each classification to its advantage.[120] As one commentator observed, ISPs are able to "exploit inflexible and dichotomous regulatory classifications to qualify as both creators and managers of content, and as intentionally neutral conduits of content created by others. With nimble maneuvering, ISPs can toggle between claiming First Amendment-protected speaker rights and invoking 'safe harbor' exemptions from liability for the content they carry."[121] Section 230 immunity provides ISPs an unfair advantage, the ability to utilize the classification that best suits its needs to the injured party's detriment.[122]

Moreover, there are limited avenues for relief under § 230, making § 230's application and remedies in comparison to other laws governing the Internet.[123] For example, other federal statutes provide notice and takedown remedies while also protecting the ISPs from liability.[124] Finally, the absence of a takedown provision in § 230 effectively creates a wall of immunity around harmful speech. By immunizing ISPs from liability and from the equitable relief of an injunction, § 230 enables the defamatory statements to remain online even after they have been found defamatory, becoming a statutory shield for wrongful conduct. In this manner, the ISP becomes a vehicle for permanent dissemination of the defamatory content. Accordingly, an amendment is needed to update § 230 to address the Internet's landscape and growing dissatisfaction with the ambiguity of § 230(c) immunity.

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119. *See* Cannon, *supra* note 65, at 63.

120. *See* Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits*, 12 U. PA. J. CONST. L. 1279, 1281 (2010).

121. *Id.*

122. *See* Lipton, *Intermediated Information Exchange*, *supra* note 51, at 1355 (noting the need to refocus the cyberlaw field to create an effective framework for remedying the "facially disparate areas of law like intermediary liability for defamation.").

123. For example § 230 is inconsistent with 17 U.S.C. § 512, the Digital Millennium Copyright Act of 1998 (DMCA). *Compare* 47 U.S.C. § 230, *with* 17 U.S.C. § 512. The DMCA, which was drafted around the same time as the CDA, also includes a safe harbor from liability for ISPs provided the ISP complies with the notice and takedown provision of § 512(c). 17 U.S.C. § 512(c).

124. Under the DMCA, ISPs still receive protection from liability for user-generated content; however the DCMA provides victims of copyright infringement with sufficient avenues to remedy the infringement. *See* 17 U.S.C. § 512. In comparison, there are limited avenues for relief under § 230 for victims of cyber defamation.

IV. THE INTERNET, THE UNITED KINGDOM, AND DEFAMATION LAW

Examining the relationship between defamation law and the Internet in countries such as the United Kingdom is "of critical importance" to proposing an amendment to § 230 of the CDA because of the Internet's global scope.[125] Of particular interest to the United States is the newly passed U.K. Defamation Act 2013, which became effective January 2014. The Act was designed to amend the previous defamation statute and address several concerns that had arisen with the increase in popularity of the Internet. Before analyzing the Act, it is important to understand the interplay between the U.K. laws and the European Union Electronic Commerce Directive prior to the passage of the U.K. Defamation Act 2013.

A. *The 1996 U.K. Defamation Act and the European Union Electronic Commerce Directive*

In 1996, the same year Congress passed § 230 of the CDA, the United Kingdom codified the Defamation Act of 1996 (1996 U.K. Act).[126] The 1996 Act did not contain any provisions addressing the Internet or ISPs.[127] However, four years after the 1996 U.K. Act came into effect, the European Union set forth its Legislation Directive on Electronic Commerce.[128] The European Union's purpose in creating the Electronic Commerce Directive was "to remove obstacles to cross-border provision of on-line services in the Internal Market and to provide legal certainty to businesses and citizens."[129] To further this goal, Articles 12 to 14 of the Directive established "precisely defined limitations on the liability of intermediary service providers who offer mere conduit, caching and hosting."[130]

Specifically, Article 14(1) created a safe harbor provision from liability for ISPs.[131] Under the safe harbor provision, an ISP would be

125. GEORGE B. DELTA & JEFFREY H. MATSUURA, § 11.04 DEFAMATION AND THE INTERNET AROUND THE WORLD (3d ed. 2013).

126. Defamation Act, 1996, c. 31 (U.K.). Prior to the enactment of the 1996 U.K. Defamation Act, defamation law in the United Kingdom was defined solely by common law. *See* DELTA & MATSUURA, *supra* note 125, at 1.

127. Defamation Act, 1996, c. 31 (U.K.).

128. E.U. Electronic Commerce Directive, *supra* note 13. The European Union Electronic Commerce Directive contained numerous findings relating to ISPs, liability, and the Member States. *Id.* at 45, 46, 52, 64.

129. *Study on the Liability of Intermediaries*, at 4 (Nov. 12, 2007), *available at* http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf.

130. *Id.*

131. Article 14(1) provides in pertinent part:

> 1. Where an information society service is provided that consists of the storage

immune from liability if the ISP complied with the notice-and-takedown requirements of the Directive.[132] This safe harbor provision and the 2000 E.U. Directive as a whole altered the application of laws governing ISP liability within each E.U. Member State, including the United Kingdom.[133] In 2012, the U.K. courts essentially adopted the safe harbor provisions of Article 14(1) in *Tamiz v. Google*, where the court held that Google could face potential liability as a publisher for failing to take down defamatory content after receiving notice that the content was defamatory.[134] The *Tamiz* decision changed the U.K. standard for ISP liability by deeming the ISP a publisher and subject to liability for allegedly defamatory content if "it fails to take action within a reasonable time after the complaining party notifies it."[135]

B. *The "New" U.K. Defamation Act of 2013*

The widespread growth of the Internet combined with the requirement to comply with the E.U. Directive culminated in the U.K. Parliament amending the 1996 U.K. Act.[136] In April 2013, the new U.K. Defamation Act of 2013 (2013 U.K. Act) passed by Royal Assent.[137] The 2013 U.K.

> of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:
> (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
> (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

See E.U. Electronic Commerce Directive, *supra* note 12, art. 14(1).

132. *Id.*

133. *See id.* Because the E.U. Directive is a form of legislation governing its Member States, the Directive sets the floor for the laws in Member States. *Application of EU Law: Directives Definition*, (June 11, 2012), http://ec.europa.eu/eu_law/directives/directives_en.htm. The Member States are subsequently tasked with enacting or amending laws to remain in compliance with the Directive; however, the Directive is the minimum the Member States have to meet. *See* KLAUS-DIETER BORCHARDT, THE ABC OF EUROPEAN UNION LAW, 88–90 (Publ'n Office of the European Union 2010), *available at* http://europa.eu/documentation/legislation/pdf/oa8107147_en.pdf.

134. *See* Tamiz v. Google Inc., [2012] EWHC 449 (QB).

135. *Id.*; DELTA & MATSURA, *supra* note 125.[quote not found in article]

136. *See* Jennifer Agate, *The Defamation Act 2013 – Key Changes for Online*, C.T.L.R. 2013, 19(6), 170–71 (2014) [unable to find source] ("The Act also introduces two new defences for online publishers, a recognition of the unique nature of online publication and an apparent attempt to place more responsibility on the authors of web posts, a group who (with a few notable exceptions) have until recently been fairly confident of their untouchability.").

137. Defamation Act, 2013, c. 26 (U.K.).

Act's relevant changes to the existing defamation law include a tightening of the requirements for plaintiffs to prevail on a defamation claim and an incorporation of the E.U. Directive safe harbor provision.[138] Sections 5 and 13 of the 2013 U.K. Act are particularly relevant for U.S. proposals to amend § 230 of the CDA to address cyber misconduct.

Notably, the U.K. tailored the act to address cyber defamation by adding a section pertaining solely to website operators.[139] Section 5 of the 2013 U.K. Act, titled "Operators of Websites" is applicable when "an action for defamation is brought against the operator of a website in respect of a statement posted on the website."[140] Similar to the CDA, Section 5 provides website operators increased protection from defamation liability for user-generated content by creating a defense from liability.[141] Under Section 5, the website operator bears the burden of proving that the defamatory content was user-generated; and if the website operator meets this burden, then the website operator is entitled to a defense from liability.[142] However, the defense provided to website operators under Section 5 is a conditional defense and is "defeated" if the plaintiff proves that:

> (a) it was not possible for the claimant to identify the person who posted the statement,
> (b) the claimant gave the reporter a notice of complaint[143] in relation to the statement, and
> (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.[144]

The United Kingdom further tailored the 2013 U.K. Act to address the unique problem of cyber defamation with Section 13 of the Act.[145] Section 13 provides courts with the authority to enforce a takedown decree for defamatory content against website operators.[146] Section 13(1) provides:

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138. *See id.*; Corey Omer, *Intermediary Liability for Harmful Speech: Lessons From Abroad*, 28 HARV. J.L. & TECH. 289, 309 (2014) (noting that the "2013 Defamation Act clarified and made several significant changes to the law on intermediary liability for defamatory content in the U.K.").

139. *See* Defamation Act, 2013, c. 26, § 5 (U.K.).

140. Defamation Act, 2013, c. 26, § 5(1) (U.K.)

141. *See* Defamation Act, 2013, c. 26, § 5(2) (U.K.).

142. Defamation Act, 2013, c. 26, § 5 (U.K.).

143. Defamation Act, 2013, c. 26, § 5(3) (U.K.). Section 5(6) of the 2013 U.K. Act sets out what needs to be included in a notice of complaint. Defamation Act, 2013, c. 26, § 5(6) (U.K.).

144. Defamation Act, 2013, c. 26, § 5(3) (U.K.).

145. Defamation Act, 2013, c. 26, § 13 (U.K.).

146. *Id.*

> Where a court gives a judgment for the claimant in an action for defamation the court may order –
> (a) the operator of a website on which the defamatory statement is posted to remove the statement, or
> (b) any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement.[147]

Under Section 13, the court's authority to enforce a takedown decree against the website operator is not triggered until the court has entered a judgment in the plaintiff's favor by finding the content defamatory. Section 13 also enables the court to order the website operator to takedown defamatory content in situations where the author of the defamatory content "may not always be in a position to remove or prevent further dissemination of material which has been found to be defamatory."[148] Thus, Section 13 promotes efficiency in responding to and remedying the harm caused by the defamatory content because it enables courts to enter "an order for removal of the material to be made during or shortly after the conclusion of proceedings."[149]

C. *Potential Areas of Concern for the United States*

With its enactment, the 2013 U.K. Act brought renewed attention worldwide to amending laws governing cyber misconduct, specifically cyber defamation.[150] Although the 2013 U.K. Act has provided a framework for updating cyber laws, there are several sections of the 2013 U.K. Act that would prove problematic application in the United States.

First, although U.K. and U.S. defamation law are derived from the same base common law principles, each respective country places different weight and importance on the fundamental interests of free speech and reputation. In the United Kingdom, an individual's reputation interest is valued above the interests of free speech, whereas in the United States, free speech interests are valued above an individual's reputation interests.[151]

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147. Defamation Act 2013, c. 26, § 13(1) (U.K.).

148. *See* comment 76 to Defamation Act 2013, c. 26, § 13 (U.K.).

149. *Id.*

150. The 2013 U.K. Act is a product of the concerted U.K. effort to update U.K. defamation law to properly account for the increased prevalence of the Internet as a modern day medium of communication. It has drawn attention to the account for the unique qualities and the pervasiveness of the Internet.

151. *See* DELTA & MATSURA, *supra* note 125. The differing emphasis placed on the free speech and reputation values has led the U.S. to view the U.K. defamation law as a mechanism for individuals to silence critics as opposed to protecting free speech and an open marketplace of

Additionally, under U.K. defamation law, the burden is placed on the defendant to prove the three elements of the defense to defamation.[152] In comparison, under U.S. common law defamation, the burden is placed on the plaintiff to prove that "the defendant was not an innocent disseminator."[153] Thus, where the 2013 U.K. Act does provide a defense for ISPs like § 230 does, the U.K. allocation of the burden of proof would not be well received in the United States.[154]

Finally, there is some ambiguity in the 2013 U.K. Act that needs clarification. Similar to the ambiguity in § 230 surrounding the meaning of the word "publisher,"[155] the 2013 U.K. Act does not define the term "website operator."[156] The failure to define website operator under the 2013 U.K. Act could create ambiguity as to whether any social media website or ISP could qualify for the conditional defense from liability pursuant to Section 5 of the Act.[157]

Despite the potential concern U.S. law and policy makers might have with the 2013 U.K. Act, there is one section, which adequately addresses the defamation victim's underlying goal of removing the defamatory material from the Internet. Section 13 of the 2013 U.K. Act provides the

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ideas and discourse. *See* Sterling, *supra* note 18, at 338–40.

152. Defamation Act 2013, c. 26 (U.K.); *see* Sterling, *supra* note 18, at 338–40.

153. *See* DELTA & MATSURA, *supra* note 125, at 2.

154. In a similar vein, the Section 5 defense afforded website operators is conditioned upon the website operator identifying the third-party poster to the plaintiff pursuant to a notice request. *See* Defamation Act 2013, c. 26, § 5 (U.K.). Specifically, the website operator would have to provide the plaintiff "sufficient information to bring proceedings against the" unidentified third party poster. Defamation Act 2013, c. 26, § 5(4) (U.K.). This approach to providing a website operator defense from liability would not be feasible in the United States because it encourages website operators to disclose an unidentified poster's identity to the plaintiff. This would not only encroach on First Amendment interests, it could also have a chilling effect on free speech.

155. *Cf.* 47 U.S.C. § 230(c).

156. *See* Defamation Act 2013, c. 26, § 5 (U.K.); DELTA & MATSURA, *supra* note 125, at 9; Farrer & Co, *A Quick Guide to the Defamation Act 2013*, ENT. L.R. 2014, 25(2), 55–60 (2014).

> It is notable that key terms including "operators" and "posted on the website" are not satisfactorily defined, a situation not helped by the fact that the legislation uses relatively old-fashioned terms at a time when a lot of user generated content is nowadays published via mobile platforms and apps.

Id.

157. *See* Farrer & Co., *supra* note 156.

> It seems likely that there will be litigation over the scope of s.5. For example, will a website that temporarily suspends access to and later reinstates a post be determined to have posted the content? Further, who is the operator, the owner of the website, the ISP, the body with day to day control over its functions or two or more of these three?

Id.

courts with equitable power to enforce an injunction and takedown of the defamatory content following a judgment in plaintiff's favor after a trial on the merits.[158] It is this Section that Congress should focus on in drafting an amendment to § 230 of the CDA.

Moreover, if the United States creates a takedown notice provision then there will be a somewhat consistent application of this specific equitable remedy requirement for ISPs in the United States, United Kingdom, and E.U. Member States. This would be a positive step towards creating uniformity of laws and expectations pertaining to ISP liability in this multi-jurisdictional, global Internet.

V. PROPOSED SOLUTION: AMEND § 230 TO INCLUDE A FEDERAL TAKEDOWN REMEDY

As the use of the Internet as a primary medium of communication continues to grow, there is growing dissatisfaction with the safe harbor provision of § 230 of the CDA and the blanket immunity provided to ISPs from virtually all lawsuits.[159] With this growing dissatisfaction, legal scholars have recognized the need to amend § 230 to provide a takedown remedy for cyber defamation victims, yet no scholar has addressed the practicalities of implementing a federal takedown remedy for a state tort action. The CDA is the only federal statute that impedes the ability of victims of cyber misconduct to obtain an appropriate remedy. Thus, although other aspects of § 230 need to be updated, at a minimum § 230(c) needs to be amended to permit equitable relief such as a takedown remedy for victims of cyber misconduct, specifically cyber defamation. The solution this paper proposes would provide a practical mechanism for victims of cyber misconduct to enforce a takedown remedy against ISPs throughout all U.S. jurisdictions without subjecting ISPs to civil liability.

A. *Jurisdictional Concerns*

The crux of the problem facing proposed amendments to § 230 is that there is no federal defamation law. Absent a federal defamation law, challenges arise as to the enforcement of state court orders outside of the state, especially when the ISP is not a party to the lawsuit. The Supreme Court addressed this precise issue in *Baker by Thomas v. General Motors Corp.*[160]

158. Defamation Act 2013, c. 26, § 13 (U.K.).

159. *See, e.g.*, Kim, *supra* note 2; Horton, *supra* note 10; Quon, *supra* note 19; Jeweler, *supra* note 109.

160. Baker by Thomas v. Gen. Motors Corp., 522 U.S. 222 (1998).

In *Baker*, the Court was faced with determining whether an injunction issued in the state of Michigan should be recognized and enforced pursuant to the Full Faith and Credit Clause in other states.[161] The Court distinguished between the credit owed by states to judgments and to mechanisms for enforcing judgments.[162] It held that for judgments, "the full faith and credit obligation is exacting."[163] A "final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land . . . [thus] the judgment of the rendering state gains nationwide force."[164]

Although a judgment against a party would be recognized throughout the nation pursuant to the Full Faith and Credit Clause, the Court acknowledged that the question of *enforcing* an injunction or other equitable decree was still unanswered. The Court noted that equity decrees still fall within the purview of the "full faith and credit domain."[165] However, the *enforcement* of a judgment or equitable decree does not have credit nationwide,[166] "such measures remain subject to the evenhanded control of forum law."[167] The Court concluded that the Michigan injunction would not have full faith and credit nationwide, because the Michigan court lacked authority to "command obedience" in other states against parties not subject to the Michigan lawsuit or to the jurisdiction of the court.[168]

If Congress amended § 230 to allow courts in cyber defamation claims to issue takedown decrees for ISPs after a finding in plaintiff's favor, the question then presented is how would a state court judgment and injunction be enforced against an ISP when the ISP is not party to the suit and potentially when the ISP is domiciled in a sister state? Justice Scalia's concurring opinion in *Baker* addressed this exact dilemma.[169] Justice Scalia noted that "[n]o execution can issue upon such judgments without

161. *Id.* at 226.

162. *Id.* at 232.

163. *Id.* at 232–33.

164. *Id.* at 233.

165. *Id.* at 234 ("Equity decrees for the payment of money have long been considered equivalent to judgments at law entitled to nationwide recognition.").

166. *See id.*

167. *Id.* at 235 ("Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments."); *see* McElmoyle *ex rel.* Bailey v. Cohen, 38 U.S. (13 Pet.) 312, 325 (1839).

168. *Id.* at 239–41 (citing Thomas v. Wash. Gas Light Co., 448 U.S. 261, 282–83 (1980) ("Full faith and credit must be given to [a] determination that [a State's tribunal] had the authority to make; but by a parity of reasoning, full faith and credit need not be given to determinations that it had no power to make.")).

169. *Id.* at 241–42 (Scalia, J., concurring).

a new suit in the tribunals of other States."[170] Further, Justice Scalia stated that for a state court judgment to be effective in a sister state, "it must be made a judgment there; and can only be executed in the latter as its laws may permit."[171]

Therefore, numerous jurisdiction and enforcement obstacles would arise when enforcing a state tort defamation judgment and subsequent injunctive takedown order in other states against ISPs not party to the underlying defamation action. Moreover, it would be tedious to create a statutory remedy that requires the successful plaintiff to go into each individual state court and domesticate the original court takedown order to have the other state courts enforce it.

B. *The Interplay Between the Full Faith and Credit Clause and the Full Faith and Credit Statute*

Before the solution this Article proposes can be fully understood and set out, it is important to understand how the interplay between the Full Faith and Credit Clause of the Constitution and 28 U.S.C. § 1738 the Full Faith and Credit Statute, factor into and assist the successful enforcement of a federal takedown remedy.

The Full Faith and Credit Clause, Article IV § 1 of the Constitution of the United States, provides that "Full Faith and Credit shall be given in each State to. . . . judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such . . . Proceedings shall be proved, and the Effect thereof."[172] In June of 1948, Congress used the authority granted to it under the Full Faith and Credit Clause to enact the Full Faith and Credit Statute.[173] The Full Faith and Credit Statute provides that:

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.[174]

Congress established, *via* 28 U.S.C. § 1738, a federal statute

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170. *Id.* (quoting Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 462–63 (1873)).

171. *Id.* at 242 (quoting Lynde v. Lynde, 181 U.S. 183, 187 (1901)); *see* McElmoyle *ex rel.* Bailey at 325.

172. U.S. CONST. art. IV, § 1.

173. 28 U.S.C. § 1738 (2006).

174. *Id.*

mandating that judgments of state courts shall have nationwide force.[175] Therefore, a judgment issued by a state court will be recognized by state and by federal courts.[176]

When an issue reaches a federal court, the court is required to give the state judgment the same force and effect it has in the state in which it was rendered, including preclusive effect in any future proceeding or action.[177] While the courts are required to give the judgment full faith and credit, they are still not required to give full faith and credit to enforcement measures.[178] Thus, an equitable decree such as a takedown remedy is binding and enforceable throughout the United States, only if a federal court issues it.[179]

C. *Amend § 230 to Include a Federal Takedown Remedy Provision*

After examining the current state of Internet defamation law, Congress's goals behind § 230 of the CDA and the inequities victims of cyber misconduct face, the only practical solution is to amend § 230 to add a section creating a federal takedown remedy. This federal takedown remedy will not interfere with an ISP's protection from civil liability; instead, it will enable successful defamation plaintiffs[180] to enforce a takedown remedy in federal court against the ISPs.

There are two possible methods by which a Federal Takedown Remedy Provision could be added to § 230 of the CDA. The federal takedown remedy provision could be added as a new subpart of § 230(c) the Good Samaritan provision. However, adding the federal takedown remedy provision as a new subpart to § 230(c) would add more confusion to an already ambiguous provision. The second option, adding a completely new provision to § 230, would be the most practical method of adding a federal takedown remedy provision to the CDA. The creation of a new provision under § 230 would not only assist cyber defamation plaintiffs in achieving the true remedy they desire, takedown of the defamatory content, it also updates § 230 to account for the unique aspects of the Internet.

A full version of the proposed draft of the Federal Takedown Remedy Provision is attached as Appendix A. The major focus, aside from creating the ability to seek a takedown remedy, is ensuring that the

175. *Id.*

176. *Id.*

177. *See id.*

178. *See id.*

179. *See* 28 U.S.C. § 1738. An equitable decree issued by a federal court will not encounter the enforcement problem discussed in *Baker* for state court equitable decrees. Compare 28 U.S.C. § 1738, with Baker by Thomas, 522 U.S. at 239–41.

180. By successful defamation plaintiffs, I am referring to plaintiffs in situations where a judge has adjudicated the content defamatory.

takedown decree will have nationwide enforcement subject to federal jurisdiction. In adding a Federal Takedown Remedy to § 230 of the CDA, the majority of the statute would remain unchanged. The only change to the pre-existing language would be to § 230(c) to add a reference to the federal takedown remedy of § 230(g). This would incorporate the new provision so there would not be confusion as to whether § 230(c) or the new § 230(g) applied.

The new provision, the proposed federal takedown remedy of § 230(g) bestows jurisdiction upon the federal district courts to grant and enforce an injunction, a takedown decree, against an interactive computer service. Proposed § 230(g)(1) provides:

> (g)(1) Takedown Process: to qualify for the federal takedown remedy:
>
> (A) The plaintiff shall file a suit for defamation in the appropriate state court against the author or poster of the defamatory statement. No later than the third day after service of process on the author or poster, the plaintiff shall request the court to issue a Notice of Action and Right to Intervene to the interactive computer service.
>
> (i) The plaintiff's complaint shall include the following:
>
> (1) the identity and address of the interactive computer service;
> (2) a Notice of Action and Right to Intervene addressed to the interactive computer service;
> (3) reference the plaintiff's intent to file for the takedown remedy pursuant to this section of § 230 after the conclusion of a trial in plaintiff's favor; and
> (4) the plaintiff's request for a referral to the district court if the plaintiff prevails.
>
> (ii) The Notice of Action and Right to Intervene shall include the following:
>
> (1) a copy of the complaint;
> (2) a statement that plaintiff seeks to enforce a takedown decree pursuant to this section of § 230 after the conclusion of a trial in plaintiff's favor;
> (3) a statement that the interactive computer service has the right to intervene; and
> (4) inform the interactive computer service of a deadline to intervene which shall be no later than the 20th day after the date

> that the interactive computer service is served with the notice of Action and Right to Intervene.
>
> (iii) The Interactive Computer Service's Right to Intervene. If the interactive computer service elects to intervene, then the interactive computer service shall file a notice to intervene and a motion to remove the case to the appropriate district court pursuant to this statute.
>
> (B) If the interactive computer service does not intervene, then the state court case proceeds without the interactive computer service as a party. If the plaintiff prevails and a judgment is entered in plaintiff's factor, then the plaintiff may qualify for the takedown remedy.
>
> (C) If the plaintiff prevails, the plaintiff may register the state court judgment with the appropriate district court. The plaintiff shall file a motion in the district court requesting the court to recognize the state court judgment and issue a takedown decree directing the interactive computer service to takedown the defamatory statement(s) pursuant to this provision of § 230.

Under proposed § 230(g)(1)(a), the plaintiff is required to provide notice of intent to assert the federal takedown remedy pursuant to the statute or they may be precluded from qualifying for and enforcing the federal takedown remedy. With the notice and right to intervene aspect of § 230(g)(1)(A), if the interactive computer service (ISP) elects to intervene, then the matter will be removed to district court bringing the matter directly under federal jurisdiction. The next provision § 230(g)(1)(B) requires the plaintiff prevail on the state court defamation claim. This provision would ensure that a court has determined the speech is defamatory and thus no longer subject to First Amendment protection before the order of takedown. Then under § 230(g)(1)(C), if a plaintiff prevails, the plaintiff is able to register the judgment with the appropriate district court pursuant to the terms of this federal takedown statute. By registering the judgment, the state court judgment turns into a federal judgment and corresponding federal injunction, enforceable in the United States.

Proposed § 230(g)(2) provides the safe harbor provisions to provide ISPs with defenses from monetary liability in keeping with the overall spirit of § 230, it provides:

> (g)(2) Safe Harbor: Defense to and Protection from Federal Takedown Remedy

> (A) If the interactive computer service permits users to delete and edit content after the user has posted the content on the website, then the interactive computer service is not subject to this provision of § 230 and is afforded the protection under § 230(c).
>
> (B) If the interactive computer service, upon receipt of Notice of Action and Right to Intervene from (1)(a), elects not to intervene, the interactive computer service may consent in writing to takedown the defamatory content should a judgment be entered in plaintiff's favor. If the interactive computer service files its written consent in the state court and takes down the defamatory content after it receives notice of a judgment in plaintiff's favor, then the interactive computer service is not subject to this provision of § 230 and is afforded the protection under § 230(c). If the interactive computer service fails to takedown the defamatory content, no later than the 20th day after notice of judgment is received, then the interactive computer services is not protected from the federal takedown remedy and the plaintiff may register the judgment with the appropriate district court.
>
> (C) This provision shall not subject an interactive computer service to monetary relief. However, if the interactive computer service fails to comply with a takedown decree pursuant to this section, the interactive computer service shall be held in contempt and subject to monetary sanctions.

Section 230(2)(A) provides that if the ISP enables its users to have editorial control, then the state court will be able to issue an injunction against the poster to have the defamatory content taken down. Further § 230(g)(2)(B), promotes efficiency by enabling the ISP to save costs by allowing them to provide notice of intent to comply in writing after they receive notice of a judgment in plaintiff's favor. The ISP will not have to intervene, and so long as they comply within the specified time, they will not be subject to the federal takedown and will be immune from liability. However, if the ISP fails to comply within the specified time period, then the plaintiff can proceed under the terms of the statute by registering the judgment in district court. Finally, § 230(g)(2)(C) includes a statement reiterating that the section only subjects ISPs to takedown decrees without opening the door for monetary liability. The only caveat is that if the ISP fails to comply with the federal injunction, it would be subject to the court's contempt power, which includes a monetary fine.

Instituting a federal takedown remedy in a manner similar to the one proposed above will ensure that a prevailing plaintiff is able to enforce a

judgment for cyber defamation against the ISP nationwide, even though the ISP might not be a party to the underlying defamation action.

D. *Potential Concerns with and Objections to Proposed Federal Takedown Remedy*

A federal takedown remedy such as the one proposed above might encounter opposition from interested parties such as ISPs. While there are several possible objections that may be presented, I will address each in turn and demonstrate how this solution nullifies such concerns.

First, as defamation is a state tort action, there are different standards for defamation in each state. Unless Congress enacts a federal defamation law, the standards will always differ to some extent, yet the foundation for each state defamation action is the same. As long as the victim is able to prove the content defamatory, the differing standards by state should not matter. Further, there could be concerns about added litigation costs for enforcing the takedown remedy pursuant to the statute. This concern could be easily remedied by placing the cost on the defendant of paying the fees to enact the takedown remedy.

Additionally, as the § 230 broad immunity has been consistently upheld since *Zeran*, the creation of a federal takedown remedy could be viewed as opening the doors for enforcing other causes of action against ISPs. However, the proposed addition to § 230 only permits the enforcement of the federal takedown remedy against ISPs and explicitly provides that ISPs are protected from all other civil liability.

The proposal and availability of a federal takedown remedy for Internet defamation action is a subject of controversy in the legal field. Most scholars in examining the remedies available in defamation cases have focused on the no-injunction rule and issues relating to prior restraint of speech in violation of the First Amendment.[181] However, "much of the current action in defamation cases," specifically cyber defamation, revolves around the issue of post-publication injunctions.[182] Generally, courts have consistently invoked the no-injunction rule in defamation cases.[183] Plaintiffs have been required to overcome the law's preference for legal over equitable remedies[184] and the First Amendment prior restraint doctrine.[185]

The First Amendment prior restraint doctrine also presents a sturdy

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181. *See* Ardia, *supra* note 3, at 83; Rendleman *supra* note 20, at 4 ("A large grey area blurs the border between the background interests in reputation and expression.").

182. Ardia, *supra* note 3, at 83.

183. *Id.* at 20–21; *see* Rendleman *supra* note 20, at 5–6.

184. Ardia, *supra* note 3, at 32–34; Rendleman *supra* note 20, at 6 ("Maxim that 'Equity will not enjoin defamation.'").

185. Ardia, *supra* note 3, at 32–34; Rendleman *supra* note 20, at 6.

barrier to seeking an injunction in defamation cases.[186] In the seminal case of *Near v. Minnesota*, the Supreme Court first invoked the First Amendment's free speech guarantees to invalidate an injunction.[187] Following *Near*, courts utilized a case-by-case application of the prior restraint doctrine.[188] The Court first entertained the possibility of allowing an injunction in certain speech cases in *Pittsburgh Press Co. v. Pittsburgh Commission of Human Relations*.[189] The Supreme Court in *Pittsburgh Press* remarked that the concern with "prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment."[190] The Court left the door open for determining whether an injunction following a finding of defamation would be constitutional.[191]

Accordingly, there is an emerging trend "within both state and federal courts that permits injunctions if the speech in question was adjudged to be defamatory."[192] After examining the issue of injunctions in defamation cases, several scholars have concluded that injunctions may be permitted as a remedy to enjoin defamatory speech in certain contexts, such as when there has been an adjudication deeming the speech defamatory.[193] Thus, as proposed in the solution above, in the post-publication, post-adjudication context of Internet defamation, an injunction requiring the takedown of the defamatory content should not be barred by the First Amendment.[194] The proposed federal takedown remedy would be narrowly tailored and limited to post-publication speech found to be defamatory after a judgment on the merits.

Further, an interesting and somewhat novel concern could be the burden of a federal takedown remedy on ISPs. Here, requiring ISPs to remove defamatory content authored by a third party would not be unduly burdensome because ISPs are required to do this routinely in other countries.[195] There is one final characteristic of the proposed federal

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186. *See* Ardia, *supra* note 3, at 32–33; Rendleman *supra* note 20, at 23.

187. Near v. Minnesota, 283 U.S. 697, 723 (1931) (invalidating an injunction because it "imposes an unconstitutional restraint upon publication" violating the First Amendment).

188. Ardia, *supra* note 3, at 33.

189. Pittsburgh Press Co. v. Pittsburgh Comm'n of Human Relations, 413 U.S. 376 (1973).

190. *Id.* at 390.

191. *See id.*; Ardia, *supra* note 3, at 41 (citing Tory v. Cochran, 544 U.S. at 738–39 ("the Tory Court left the door open by stating that an injunction 'may still be warranted,' if it were 'tailored to these changed circumstances'.")).

192. *See* Ardia, *supra* note 3, at 51.

193. *See* Rendleman, *supra* note 20, at 90 ("strong recent scholarship by Professor Ardia and Dean Chemerinsky supports a limited defamation injunction.").

194. *See* Ardia, *supra* note 3, at 58, 60, 62; Rendleman *supra* note 20, at 92 ("a judge should consider an injunction to be an appropriate remedy for a defendant's proved defamation.").

195. *See* Defamation Act 2013, c.26 (U.K.); E.U. Electronic Commerce Directive, *supra* note 12.

takedown remedy that is necessary to quell concern. The federal takedown remedy will only be enforceable in the United States, its territories and possessions. The federal takedown remedy will not address situations where the ISP is not domiciled in the United States and enforcement is difficult.[196] This will always be a problem regardless of changes to § 230 until there is a global Internet law with takedown remedies enforceable against all ISPs.

VI. CONCLUSION

Eighteen years have passed since Congress enacted the CDA with the goal of promoting the growth of the Internet.[197] Today, the Internet is a pervasive part of everyday life, and the CDA, specifically § 230, is no longer equipped to adequately address the legal problems that arise due to the unique aspects of the Internet. While U.S. scholars have remarked on the need to amend § 230 to include a takedown remedy, no scholar has considered the jurisdictional and practical problems of enforcing a federal takedown remedy for a state tort defamation claim.

The U.K. Defamation Act 2013 provides insight into methods for amending § 230 of the CDA to account for the problem of cyber defamation on the Internet. This Article, after studying the 2013 U.K. Act and both the jurisdictional and constitutional problems associated with cyber defamation in the United States, provides guidance for how to effectively amend § 230 of the CDA. The proposed solution in this Article will restore the inequities facing victims of cyber defamation to a proper balance. This solution sets forth a framework for amending § 230 to include a federal takedown remedy, which will be enforceable throughout all U.S. jurisdictions. While this solution will not address the problem of global cyber defamation, this solution will bring § 230 in line with similarly situated countries. Cyber defamation victims will be in a better position to seek and achieve the remedy they desire, takedown of the defamatory content. Although § 230 broad ISP immunity needs to be re-evaluated, a federal takedown remedy will remain crucial and necessary to maintaining a balanced and fundamentally fair legal system for cyber defamation victims in light of the unique aspects of the Internet.

196. Rendleman, *supra* note 20, at 56 ("The Internet is international. An injunction that forbids defendant's Internet defamation may not be effective because the injunction may be followed by copying and mirror sites, some overseas. Potential defendants may be beyond the court's jurisdiction over persons and territory.").

197. 47 U.S.C. § 230 (1998).

Appendix A: Proposed Draft of Federal Takedown Remedy Provision

230(c) Protection for "good samaritan" blocking and screening of offensive material

(2) Civil liability
No provider or user of an interactive computer service shall be held liable for monetary relief, or except as provided in subsection (g), for injunctive or other equitable relief,[1] on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(g) Proposed Federal Takedown Remedy: (new provision)[2]

(1) Takedown Process: To qualify for the federal takedown remedy:

(A) The plaintiff shall file a suit for defamation in the appropriate state court against the author or poster of the defamatory statement. No later than the third day after service of process on the author or poster, the plaintiff shall request the court to issue a Notice of Action and Right to Intervene to the interactive computer service.

(i) The plaintiff's complaint shall include the following:

(1) the identity and address of the interactive computer service;
(2) a Notice of Action and Right to Intervene addressed to the interactive computer service;
(3) reference the plaintiff's intent to file for the takedown

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[1] This added language comes from the language of the notice-and-takedown provision of the DMCA. 17 U.S.C. § 512(c).
[2] This provision bestows jurisdiction upon the federal district courts to grant and enforce an injunction, a takedown decree, against an interactive computer service.

remedy pursuant to this section of § 230 after the conclusion of a trial in plaintiff's favor; and
(4) the plaintiff's request for a referral to the district court if the plaintiff prevails.

(ii) The Notice of Action and Right to Intervene shall include the following:

(1) a copy of the complaint;
(2) a statement that plaintiff seeks to enforce a takedown decree pursuant to this section of § 230 after the conclusion of a trial in plaintiff's favor;
(3) a statement that the interactive computer service has the right to intervene; and
(4) inform the interactive computer service of a deadline to intervene which shall be no later than the 20th day after the date that the interactive computer service is served with the Notice of Action and Right to Intervene.

(iii) The Interactive Computer Service's Right to Intervene

If the interactive computer service elects to intervene, then the interactive computer service shall file a notice to intervene and a motion to remove the case to the appropriate district court pursuant to this statute.

(B) If the interactive computer service does not intervene, then the state court case proceeds without the interactive computer service as a party. If the plaintiff prevails and a judgment is entered in plaintiff's favor, then the plaintiff may qualify for the takedown remedy.

(C) If the plaintiff prevails, the plaintiff may register the state court judgment with the appropriate district court. The plaintiff shall file a motion in the district court requesting the court to recognize the state court judgment and issue a takedown decree directing the interactive computer service to takedown the defamatory statement(s) pursuant to this provision of § 230.

(2) Safe Harbor: Defense to and Protection from Federal Takedown Remedy

(A) If the interactive computer service permits users to delete and

edit content after the user has posted the content on the website, then the interactive computer service is not subject to this provision of § 230 and is afforded the protection under § 230(c).

(B) If the interactive computer service, upon receipt of Notice of Action and Right to Intervene from (1)(a), elects not to intervene, the interactive computer service may consent in writing to takedown the defamatory content should a judgment be entered in plaintiff's favor. If the interactive computer service files its written consent in the state court and takes down the defamatory content after it receives notice of a judgment in plaintiff's favor, then the interactive computer service is not subject to this provision of § 230 and is afforded the protection under § 230(c). If the interactive computer service fails to takedown the defamatory content, no later than the 20th day after notice of judgment is received, then the interactive computer service is not protected from the federal takedown remedy and the plaintiff may register the judgment with the appropriate district court.

(C) This provision shall not subject an interactive computer service to monetary relief. However, if the interactive computer service fails to comply with a takedown decree pursuant to this section, the interactive computer service shall be held in contempt and subject to monetary sanctions.