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THE INTERNATIONAL CRIMINAL COURT AND CRIME PREVENTION: BYPRODUCT OR CONSCIOUS GOAL?

David Bosco*

INTRODUCTION

Afghan warlord Abdul Rashid Dostum may be one of the world’s most feared and resilient warlords. As a young man in Soviet–occupied Afghanistan, he rose to command thousands of Soviet–backed troops fighting the mujahedeen rebels. Later, after the Soviets withdrew and as Afghanistan descended into chaos, he carved out and ruthlessly controlled a swath of territory in northern Afghanistan, forging and breaking numerous alliances along the way. After a brief period of exile, he returned shortly after the September 11 attacks and again became a critical player in Afghan politics. Frequent allegations of atrocities followed Dostum and his forces, including rumors that his forces executed political opponents and prisoners.1

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In the spring of 2002, Dostum reportedly called together all ninety of his senior commanders and required them to listen as an aide read out loud a human rights report detailing abuses they had committed. The warlord reminded his commanders that an international court was about to come into existence and that they could be prosecuted for any future transgressions. It was precisely this dynamic that advocates of the International Criminal Court ("ICC" or "the court") predicted would occur around the world. They argued that a permanent court would deter violators in ways that geographically limited ad hoc criminal tribunals, such as those in the former Yugoslavia and Rwanda, could not. A standing court would present potential wrongdoers with the constant possibility of investigation and punishment. In short, the court would prevent crime as well as punishing it. Since the court has become operational, influential voices have encouraged the court to embrace this preventive potential, and senior ICC officials have repeatedly proclaimed their intent to do so. Indeed, in June 2009, the ICC prosecutor appointed a special adviser to assist on prevention issues.

Observers are divided over whether the court can serve as an effective preventive mechanism. Legal scholars have tried to predict the court’s preventive effect, drawing on the experience of other international tribunals, the ICC’s architecture, and its first years of experience. A political antitrust matters. Served as a political analyst and journalist in Bosnia and Herzegovina and as deputy director of a joint United Nations/NATO project repatriating refugees in Sarajevo. He would like to acknowledge advice and comments from Edgar Chen, Steve Kostas and Shana Wallace.

3. See, e.g., Parliamentarians for Global Action, A Deterrent International Criminal Court—The Ultimate Objective, http://www.pgaction.org/uploadedfiles/deterrent%20paper%20rev%20Tokyo.pdf (quoting Arthur Robinson, former president of Trinidad & Tobago, arguing that, if a permanent tribunal had existed before violence erupted in Bosnia and Rwanda, those crises might have been avoided or mitigated) (last visited Oct. 4, 2010).
scientist has employed theoretical models of individual behavior to analyze the court’s likely deterrent effect.7 An economist has examined how international prosecution will affect the cost–benefit calculations of national leaders.8 Others have questioned whether crime prevention—and deterrence in particular—is an appropriate objective for the institution and have encouraged the court and the international community to prioritize other goals.9

What has not been adequately examined is the extent to which the goal of prevention is actually influencing the work and decisions of the court. Prevention of future crimes is a natural goal for the court, but it is not the only one that might guide its activities. Other goals could include achieving justice (regardless of the preventive effect), establishing a historical record, fostering reconciliation, and maintaining peace. These goals will sometimes overlap and reinforce each other, but not in all cases, and the court’s own view of its priorities matters.

Examining the policy goals at work in the court is particularly important given the wide latitude that the ICC prosecutor and the judges have in developing a strategy for the institution.10 The court’s statute and other key documents offer little guidance on policy goals or how they should be prioritized. Unlike national courts, there is no expectation that the ICC will pursue all—or perhaps even most—of the crimes that fall under its jurisdiction. As a former international prosecutor has argued, “[t]he main distinction between domestic enforcement of criminal law, and the international context, rests upon the broad discretionary power granted to the international Prosecutor in selecting the targets for prosecution.”11 The court does not have the resources to pursue all the cases over which it has jurisdiction. “If only for reasons of cost and capacity,” one ICC judge

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argued recently, “the Court will never be able to do more than conduct a few, exemplary trials.”

This element of discretion is enhanced by another aspect of the ICC’s architecture. In national legal systems, the legislative and the executive branches will typically establish policy goals and metrics for the judicial system. Policymakers can respond to prosecutorial decisions and court actions via additional legislation or regulation and thereby adjust the priorities of the judicial system. There is, in effect, a dialogue between the branches of government that keeps courts and judges in touch with the policy goals and priorities of the legislative and executive branches. Politically appointed or elected prosecutors, in particular, will respond readily to the policy goals of the government and the public more broadly. It is not clear that this dynamic operates at the ICC. The prosecutor serves one, nonrenewable nine–year term and therefore may not be particularly sensitive to political guidance or pressure. Given that the ICC has more than one hundred member states, the political and policy signals that it does receive are likely to be confused and contradictory.

Moreover, the ICC in many respects lacks the institutional interlocutors that national prosecutors have. The Assembly of States Party (ASP)—comprised of all states that have ratified the Rome Statute—is effectively the legislative arm of the court. It meets annually, elects judges and the prosecutor, and considers statements and resolutions. Seven years after the Rome Statute entered into force, the ASP acquired the ability to amend the statute. Thus far, however, the ASP has not engaged in oversight or dialogue with the court in the way that a national legislature would. The first ever ICC review conference, held in June 2010 in Uganda, offered a more developed format for dialogue between states and the court, but it focused largely on defining the crime of aggression rather than discussing the court’s methods and policy goals.

The UN Security Council (“Council”) might also be a potential communicator of policy goals to the court, but the Council’s role in court

13. Rome Statute of the International Criminal Court art. 42, para. 4, July 12, 1998, 2187 U.N.T.S. 900 [hereinafter Rome Statute]. The prosecutor’s independence was seen as a virtue by many of the drafters of the Rome Statute. But political pressure may not always be negative, and it may contain important signals about the intention of states that should factor into the court’s decisions.
operations is, by design, quite limited.\textsuperscript{16} The Council may refer cases, delay investigations, and expand the jurisdiction of the court to non–states parties, but it otherwise has no role in court decisions on which cases to pursue. The court’s latitude in defining its scope of activity and the absence of close oversight make an examination of the goals and policy considerations influencing the court critical.

This Article will assess in several stages how the goal of crime prevention is affecting the court. First, and briefly, it will outline the relevant structural elements and procedures of the court and define several key concepts related to prevention and deterrence. Second, it will review the debates and discussions that preceded the adoption of the Rome Statute with an eye to what role the drafters believed the goal of prevention should play in the court’s operations. Certain provisions in the Rome Statute, the court’s Rules of Procedure and Evidence, and the Office of the Prosecutor’s own guidelines that bear on prevention will be discussed.

This Article’s most extensive section will survey the court’s more than eight years of operation to assess whether and how court personnel are pursuing the goal of crime prevention. The court’s work is still in the early stages—no case has yet been completed—but it is possible to make an initial assessment. This part of the analysis will move through the various stages of the ICC’s investigations and prosecutions—from preliminary investigation through sentencing. This Article concludes with observations on whether and how the court should attempt to maximize its preventive impact. It notes that discussion of prevention serves a strategic purpose for the court at a time when other more quantifiable achievements are limited. It urges the court to move beyond rhetoric to develop a comprehensive prevention strategy that can guide the court, particularly as the prosecutor decides where to focus its activities and as the court considers how to conduct its public outreach.

I. DEFINITIONS AND DISTINCTIONS

A. The ICC Structure and Role

The ICC was designed as a court of last resort that would prosecute those responsible for certain serious crimes when national jurisdictions proved unwilling or unable to do so. This “complementarity” regime means that the ICC seeks to work together with national judicial systems to investigate and prosecute the crimes listed in the Rome Statute and only launches

\textsuperscript{16} The Security Council’s role in the court’s operations was one of the most divisive issues during the negotiations that led to the Rome Statute. For an examination of this debate, see William A. Schabas, \textit{United States Hostility to the International Criminal Court: It’s All About the Security Council}, 15 EUR. J. INT’L L. 701 (2004).
prosecutions of its own when national courts cannot or will not.\textsuperscript{17} (Indeed, the ICC prosecutor, Luis Moreno–Ocampo, has argued on several occasions that the court could be a success without holding trials, so long as it encourages national court systems to prosecute offenders.)\textsuperscript{18}

The ICC has jurisdiction over genocide, crimes against humanity, aggression, and certain war crimes committed on the territory of a state party or by an individual who is a citizen of an ICC member state. The court’s Statute and the Rules of Procedure and Evidence defined all these crimes, with the exception of aggression.\textsuperscript{19} That crime has been the subject of considerable debate and controversy. The 2010 Review Conference reached agreement on a definition of the crime of aggression but also determined that the court would not acquire jurisdiction until a two-thirds vote by the Assembly of States Parties sometime after January 2017.\textsuperscript{20} The UN Security Council may expand the jurisdiction of the court through a resolution under its Chapter VII powers and has done so in the case of Sudan, which is not a state party.\textsuperscript{21}

The court has three principal components: the Office of the Prosecutor (OTP), the judicial divisions (including pre–trial, trial, and appeals chambers), and the Registry, which is responsible for the non–judicial administration of the court, including certain outreach and informational activities. A president of the court is selected from among the judges and is responsible for the judicial administration of the court. The ICC also has several smaller components, including offices of public counsel for victims and for the defense.

The task of identifying and investigating crimes falls to the OTP. States parties and the Security Council may refer cases, but in all situations the final decision to pursue cases falls to the prosecutor. He or she may also

\textsuperscript{17} Rome Statute, \textit{supra} note 13, art. 17, para. 1(a).


\textsuperscript{20} Scheffer, \textit{supra} note 15.

initiate cases that have not been referred; in this respect, the prosecutor has *proprio motu* powers.\textsuperscript{22} The prosecutor’s discretion is significantly limited, however, by the pre–trial chamber, composed of three judges. This chamber must determine that there is a “reasonable basis” for opening formal investigations and must review requests to issue indictments, summons, and arrest warrants.\textsuperscript{23} Decisions of the pre–trial and trial chambers can be reviewed by an appeals chamber. Upon determination of guilt, the trial chamber issues a sentencing decision, which may also be appealed.\textsuperscript{24}

The ICC has no independent enforcement powers. It is entirely dependent on the ability and willingness of states to provide resources, cooperate with the court’s requests for information and, ultimately, enforce arrest warrants. States parties to the Rome Statute are under an obligation to assist the court, and the Security Council may also create legal obligations to assist the court and enforce its decisions.

B. Deterrence and Prevention

The goals and purposes of criminal law have been widely debated, but there is general acceptance that processes of investigation and punishment have both backward–looking and forward–facing elements.\textsuperscript{25} The prevention of future crimes—the focus of this article—is only one of several purposes that a system of punishment may have. Retribution, in effect, a structured and controlled system of vengeance, is a powerful alternative purpose.\textsuperscript{26} Rehabilitation may also be an alternative purpose that seeks to convert offenders into responsible citizens. Although rehabilitation can have preventive effects, its advocates often see it primarily as a matter of individual rights and basic humanity.\textsuperscript{27}

When discussion does turn explicitly to crime prevention, the concept of deterrence often dominates, and it has done so in the context of the ICC.

\textsuperscript{22} Early drafts of a statute for the court denied the prosecutor this power. See William Schabas, *INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 120 (2001).

\textsuperscript{23} Rome Statute, *supra* note 13, arts. 57-58.

\textsuperscript{24} Id. at arts. 76, 84.


\textsuperscript{27} See, e.g., Ramsey Clark, *CRIME IN AMERICA: OBSERVATIONS ON ITS NATURE, CAUSES, PREVENTION, AND CONTROL* 220 (1970) (arguing first that rehabilitation is a form of “individual salvation,” but also that it is “the one clear way that criminal justice processes can significantly reduce crime.”).
Indeed, one delegate at the Rome Conference in 1998 made the concepts of deterrence and prevention almost one and the same. “A particular advantage [of the ICC] would be its preventive role,” he argued, “through its deterrent effect on potential criminals, thereby strengthening efforts to maintain peace and stability in the world.” As will be discussed below, deterrence does not remotely exhaust the subject of prevention, but it is a critical component.

I. Deterrence

The literature on deterrence and criminal law is vast, although most of it approaches the issue from the perspective of national legal systems. Legal scholars, criminologists, philosophers, sociologists, and economists have all explored the concept. In part because of the volume of contributions on the issue, terminology has varied considerably. For the purposes of this Article, the following concepts will be used. General deterrence refers to the discouragement of criminal activity through fear of punishment among the general public—i.e., those who have not been legally punished. The ICC hopes to deter the crimes it has jurisdiction to prosecute, namely genocide, crimes against humanity, and certain war crimes. As an international institution, the ICC’s general deterrent effect should reach around the globe, and at the very least to the populations of countries that are members of the court.

Specific deterrence refers to the discouragement of subsequent criminal activity by those who have been punished. The concept is of limited relevance to an enterprise like the ICC. As James Alexander has argued, “[o]ne struggles to name any historical occurrence in which an individual has been convicted of a crime like genocide by an international tribunal, served time, was released, and then found himself or herself in a second situation in which he or she might again commit genocide.” Instead, this article uses the term targeted deterrence to refer to attempts by the court to deter specific individuals or groups within a society. The court could pursue targeted deterrence in several ways. First, the court may seek to


30. While 114 countries are now states parties, many of the world’s most populous countries have not joined the court. The United States, China, Russia, India, Pakistan, Indonesia, Malaysia, Turkey, and Egypt among others remain outside the system. Together, non-states parties account for approximately 70 percent of world population.

31. Alexander, supra note 6, at 22.

32. The concept has been used sparingly in legal scholarship. See, e.g., Tom R. Tyler, Trust and Law Abidingness, 81 B.U.L. REV. 361, 396 (2001).
deter selected individuals from continued criminal activity by issuing arrest warrants or summons. In so doing, the court might not expect that the individuals would be detained but may hope that a warrant or summons would nonetheless deter them from further criminal conduct. This scenario is particularly relevant for the ICC, which has already created a small pool of indicted but still at–large individuals.\textsuperscript{33} Targeted deterrence may also take a somewhat broader form. The court might seek to prevent a particular violent scenario from occurring through public statements and warnings directed at political or ethnic leaders. For example, if the context of a previous round of violence and atrocities was a disputed election, the court might seek to prevent a recurrence of that violence during the next round of elections.

At certain points, this article also discusses the concept of restrictive deterrence, which refers to the minimization—rather than the abandonment—of criminal activity. Restrictive deterrence has occurred “when, to diminish the risk or severity of a legal punishment, a potential offender engages in some action that has the effect of reducing his or her commissions of a crime.”\textsuperscript{34} A warlord or militia commander who, in an effort to avoid the ICC’s attentions, instructs his forces to avoid large–scale massacres while continuing to commit certain war crimes covered by the Rome Statute (e.g., the recruitment of child soldiers) would demonstrate the effects of restrictive deterrence.

2. Prevention

A law enforcement system can discourage criminal activity through means other than fear of punishment, and this broader concept of prevention must also be examined. Punishment can incapacitate offenders and thus render these individuals unable to commit new crimes.\textsuperscript{35} If punishment satisfies the retributive desires of those affected by a crime, the system may prevent crimes motivated by the desire for revenge. Individualization of guilt can facilitate group reconciliation and help prevent violent reprisals.\textsuperscript{36} As Johannes Andenaes has argued, public awareness of potential punishment for certain activity can have an educative effect that generates

\textsuperscript{33} Prominent indicted individuals still at large include Sudanese president Omar Al–Bashir, Lord’s Resistance Army commander Joseph Kony, and Congolese warlord Bosco Ntaganda.

\textsuperscript{34} \textit{Deterrence Theory}, supra note 29, at 89.

\textsuperscript{35} \textit{See} Jack P. Gibbs, \textit{Crime, Punishment, and Deterrence} 58-60 (1975) [hereinafter \textit{Crime, Punishment, and Deterrence}].

\textsuperscript{36} \textit{See} Catherine Lu, \textit{The ICC as an Institution of Moral Regeneration, in Bringing Power to Justice? The Prospects of the International Criminal Court} 191, 199 (2006). \textit{But see} David Wippman, \textit{Exaggerating the ICC, in Bringing Power to Justice?}, supra, at 99, 120 (arguing that “members of politically polarized ethnic communities are at least as likely to interpret prosecutions in ways that confirm existing biases as they are to see them as neutral confirmations of individual rather than collective guilt.”).
moral disapprobation of the activity in question and consequently reduces the occurrence of that activity. It may be the disapprobation, rather than the threat of punishment, that reduces the occurrence of the proscribed activity.\footnote{37} Other scholars contend that a system of punishment can validate and strengthen existing norms against proscribed behavior, habituate lawful conduct, and limit the normative influence of perpetrators, thus discouraging imitation.\footnote{38} In this realm, the ICC’s lack of effective enforcement power—so often cited as a critical weakness—may not be debilitating.\footnote{39} According to Catherine Lu, “the moral authority of the ICC is not necessarily undermined by its political weakness; the lack of endorsement by the world’s most powerful states may even boost its moral legitimacy.”\footnote{40}

II. PREVENTION AND THE ROME STATUTE

The language of deterrence was ubiquitous at the Rome Conference in the summer of 1998 as national delegates—supported and prodded by a variety of nongovernmental organizations—negotiated the terms of the new court. A succession of diplomats expressed the view that the court’s existence would deter serious violations of humanitarian law.\footnote{41} Canada’s

\footnote{37. \textit{Johannes Andenaes, Punishment and Deterrence} 35-36 (1974).}
\footnote{38. \textit{See Deterrence Theory}, supra note 29, at 87-93.}
\footnote{39. For notable criticisms of the court on enforcement grounds see, for example, Jack Goldsmith, \textit{The Self-Defeating International Criminal Court}, 70 U. Chi. L. Rev. 89, 92 (2003) (noting that the ICC has no inherent enforcement capacity and is dependent on state enforcement powers); John Bolton, \textit{The United States and the International Criminal Court: The Risks and Weaknesses of the International Criminal Court from America’s Perspective}, 64 LAW & CONTEMP. PROBS. 167, 176 (2001) (“A weak and distant court will have no deterrent effect on the hard men like Pol Pot most likely to commit crimes against humanity.”).}
\footnote{40. Lu, supra note 36, at 203.}
\footnote{41. Representative examples include statements by the South Korean representative (“Bringing to justice the perpetrators of crimes of international concern would serve as an effective deterrent”), U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 2nd plen. mtg. ¶ 81, U.N. Doc. A/CONF.183 (Vol. II) (June 15, 1998); the Romanian delegate (“A permanent, universal, independent and strong international criminal court empowered to prosecute and convict persons responsible for genocide, crimes against humanity and war crimes would not only overcome the disadvantages of ad hoc tribunals but would also act as a potential deterrent.”), U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 3rd plen. mtg. ¶ 57, U.N. Doc. A/CONF.183 (Vol. II) (June 16, 1998); the delegate from Burkina Faso (“The limitations of the ad hoc tribunals set up in connection with those tragedies had demonstrated the need for a permanent international court, which would also serve as a deterrent to potential criminals.”), U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 4th plen. mtg. ¶ 31, U.N. Doc. A/CONF.183 (Vol. II) (June 16, 1998); and the delegate from Bahrain (“the purpose of establishing an international criminal court was to act as a deterrent against the commission of war crimes during armed conflict.”), U.N. Diplomatic Conference of
delegate, for example, insisted that “an independent and effective international criminal court would help to deter some of the most serious violations of international humanitarian law.”42 An international criminal court, predicted one advocacy group, would be “a veritable sword of Damocles hanging over the head of all warlords and their henchmen.”43

Deterrence was also discussed in a variety of more specific contexts during the negotiations. Several delegates argued that it could not be achieved absent a careful and precise definition of the crimes under the court’s jurisdiction.44 Other delegates argued that appropriately severe punishment, including the death penalty, would be necessary to create an effective deterrent.45 Singapore’s delegate expressed concern that the absence of this punishment would reduce the court’s impact, “especially in parts of the world where the deprivation of liberty was not an adequate deterrent.”46

The court’s anticipated deterrent function was a particular concern during debate on the role of the UN Security Council in the court’s operations. The U.S. delegation advocated requiring a decision of the Security Council to initiate an investigation. U.S. officials stated that international criminal justice could only be successful with the support of the powerful countries on the Council. U.S. delegate David Scheffer argued that “because the [Security] Council alone among international institutions exercises police powers, the design of the court must take into account the proper role of the Council.”47 This suggestion that the Security Council should have a central role was vociferously opposed by the “like-minded” states—a group that had emerged as the strongest advocate of an independent court—and by most of the NGOs involved in the process, who

argued that such a structure would dramatically reduce the court’s deterrent impact. The Lawyers’ Committee for Human Rights warned that a large Security Council role would politicize the court’s operations and insisted that the court be “bound by legal considerations only if the Court is to play a meaningful role in the prevention and punishment of genocide, crimes against humanity, and other serious violations of international humanitarian law.”

Other preventive theories were discussed during the negotiations, although far less frequently. Several delegates, for example, predicted that the court would improve chances for reconciliation by offering redress through law and thereby preventing cycles of violence. But, in general, deterrence displaced discussion of broader preventive theories, including incapacitation, rehabilitation, education, stigmatization, and moral pressure.

When the statute was completed, some observers expressed certainty that the court’s mere existence would prevent crimes. William Pace, head of the influential Coalition for an International Criminal Court, predicted significant results:

The ICC will deter; the ICC will prevent; the ICC will cause the greatest strengthening ever of national legal systems prosecution of crimes against humanity. The ICC will save millions of humans from suffering unspeakably horrible and inhumane death in the coming decades. This is an incredible achievement. This will be part of the legacy of this night.

The final text of the Rome Statute itself is considerably less expansive than its advocates on the court’s preventive function. The Statute’s preamble provides that the signatories are “determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.” The phrasing suggests that prevention will be a consequence of the court’s activities rather than a conscious goal; ending impunity will prevent future crimes, but the court’s actual role is prosecution.

The only other explicit reference to deterrence or prevention as a policy goal in the statute comes in Article 58(c)(3), which grants the pre–trial

51. Rome Statute, supra note 13, pmbl.
chamber the authority to issue an arrest warrant or summons to appear in order to, among other reasons, “prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.” 52 This article appears to aim at an incapacitation effect rather than a deterrent one. The presumed intent is to physically remove the individual from the conflict zone rather than to deter him through the threat of punishment. However, it is possible that a targeted deterrent effect was intended as well. It was known to the drafters that the court would have no enforcement arm, and they likely considered the possibility that a warrant issued under Article 58(c)(3) would go unenforced. In that situation, they may have nonetheless hoped that the existence of an arrest warrant would lead the individual in question to modify his behavior, perhaps in anticipation of an eventual trial or out of a desire to demonstrate to observers “clean hands.”

The ICC’s drafting history indicates a strong desire on the part of many drafters to create an institution that would deter and prevent future crimes. But the Rome Statute and the subsequently adopted Rules of Procedure and Evidence offer little guidance on whether and how the court should seek to maximize that effect. The court’s prosecutor, judges, and administrators are now in the process of exploring the court’s preventive potential.

III. THE COURT IN OPERATION

The court is now in its eighth year of operation and has active cases at several different stages. As of late 2010, the court was conducting five formal investigations, had indicted thirteen individuals, and initiated three trials. At least another nine situations were being monitored by the court. The court’s pre–trial chambers and appeals chamber have ruled on several different aspects of the court’s operations, primarily on questions related to opening investigations, the standards for issuing arrest warrants, and victims’ rights and participation. 53 It is possible to make an initial assessment of whether and how the goal of prevention is influencing the court’s deliberations and operations, although certain relevant information—most importantly, the deliberations of the court’s senior leadership—is not available. More than most courts, however, the ICC has attempted to explain its reasoning and strategy through press statements, published papers, and speeches. As representatives of a new and fragile institution,

52. Id. at art. 58(c)(3). Article 28 discusses prevention in the context of command responsibility, but only in a retrospective sense. Military commanders who “failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission” may be individually criminally responsible. Id. at art. 28(a)(ii).

ICC officials feel an obligation to explain their actions and educate a variety of audiences about the court’s operations. In these public statements, prevention is a recurring theme. Indeed, the ICC prosecutor and other senior court officials have claimed on several occasions that the court has already had a notable preventive effect. The cases it has pursued on child soldiers in Africa, it is claimed, have had an impact in Colombia and Sri Lanka. Crimes by the Lord’s Resistance Army in northern Uganda “have dramatically decreased” as a result of the ICC indictment and the group’s recruitment efforts “dried up almost instantly” after the indictments. The prosecutor himself has contended that the Russian armed forces “[tried] to take the Rome Statute into consideration when it planned its military campaign in Georgia.” More broadly, he has argued that “armies all over the world, even those of non–States Parties, are adjusting their standards and rules of engagement to the Rome Statute. This is the way to prevent crimes.”

The prosecutor has pointed to even more specific instances in which the court served as an effective deterrent. Before one audience, he argued that the Rome Statute was influencing the battlefield decisions of individual combatants: “In 2003 an Australian military pilot conducting operations in Iraq realized that if he executed the order received, he could be prosecuted in accordance with the Rome Statute. He returned to his base without dropping the bombs.”

Observers outside the court have also identified situations in which they believe the court’s activities, or at least awareness of the court, has prevented crimes.

- After a coup attempt in the Central African Republic, the nongovernmental International Federation of Human Rights made a widely publicized call for ICC involvement. The Federation claims that the public discussion of an ICC role reduced tension notably in the country and may have prevented further atrocities.

57. Address to Assembly of States Parties, supra note 54, at 3.
It has been reported that the content of government statements in Cote d’Ivoire changed after a senior UN official stated that ethnic violence might fall under the jurisdiction of the court. Statements that had been aggressive turned more conciliatory.60

Human Rights Watch researchers have recounted being told certain militia commanders in eastern Congo are desperate to avoid being sent to The Hague.61

These claims are anecdotal and there is little empirical research yet on whether the ICC has played a preventive role. Indeed, research on the preventive impact of international justice mechanisms in general is limited and inconclusive.62 That senior ICC officials have frequently commented on the court’s preventive function does not necessarily imply that the court is structuring its activity to produce that effect, but it does at least suggest that court officials value prevention and see it as a critical indicator of the court’s effectiveness. As the court’s president stated recently: “If only one warlord has decided to release his child soldiers, then the ICC can already be deemed a success.”63

The frequent references to the court’s preventive effect may therefore serve a pragmatic function. In the absence of convictions, and faced with significant numbers of indictees at large, court officials need some method of demonstrating the court’s effectiveness to the public, member states, and important non-signatory states. The prosecutor’s special adviser on prevention, Juan Mendez, has suggested that prevention serves as a convenient response to criticisms of the ICC.64

A. Preliminary Examination

In advance of a formal investigation, the OTP reviews situations to determine whether crimes that fall within the jurisdiction of the court have been or are being committed. Information and complaints from individuals and organizations outside the court—of which there have been several
thousand—are reviewed by the prosecutor and his staff. A state party or Security Council referral will also lead to a preliminary examination.

The prosecutor’s discretion is broad during this phase of the court’s work. Neither the Rome Statute nor the Rules of Procedure and Evidence offer the prosecutor any significant guidance on how to conduct preliminary examinations, although they do make clear that the prosecutor may seek additional information and may take oral or written testimony during this phase. The prosecutor may monitor a situation without any input from a pre–trial chamber and without any temporal limitation. Perhaps because of this leeway, the OTP has sought to use this phase assertively for the purposes of prevention.

Publicity surrounding a preliminary examination has proved to be a key tool. Certain court documents suggest that the process of pre–investigation will normally be conducted without publicity and without public statements, noting that “[g]enerally, work in a situation does not become public knowledge until the Office opens an investigation.” The court’s Rules of Procedure and Evidence require the prosecutor to “analyse the seriousness of information received” but they do not specify whether this is to be done publicly. The OTP’s own regulations provide only that “the Prosecutor may decide to make public the Office’s activities in relation to the preliminary examination of information . . . .”

During the court’s several years of operation, however, preliminary investigations have regularly become public. In some cases, preliminary investigations appear to have had a notable impact on domestic politics as well as on international mediation efforts. In Kenya, for example, the ICC’s

65. See ICC, Regulations of the Office of the Prosecutor, Reg. 25-28, ICC-BD/05-01/09 (Apr. 23, 2009) [hereinafter Regulations of the Office of the Prosecutor]. The OTP reports that, since July 2002, the court has received more than 8,733 communications from more than 140 countries, with a majority of those communications from individuals in the United States of America, the United Kingdom, Germany, Russia and France. ICC, Office of the Prosecutor – Communications, Referrals, and Preliminary Analysis, http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/ (last visited Oct. 14, 2010).

66. When a case is referred by a state party or by the Security Council, the burden is on the prosecutor to explain the “reasonable basis” for not pursuing the case and the pre–trial chamber may review the decision and ask the prosecutor to reconsider. See Rome Statute, supra note 13, art. 53, para. 3(a); see also ICC, Annex to the “Paper on Some Policy Issues Before the Office of the Prosecutor”: Referrals and Communications, http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91DDB7FA7639E02/143706/policy_annex_final_210404.pdf.

67. Rome Statute, supra note 13, art. 15, para. 2.


70. Regulations of the Office of the Prosecutor, supra note 65, at Reg. 28(2) (emphasis added).
prolonged monitoring occasioned significant national debate and influenced the work of lead international mediator Kofi Annan. The prosecutor’s office has embraced the attention that its preliminary investigations receive. Even in the absence of a formal requirement, the OTP now routinely reports on situations it is monitoring. As the deputy prosecutor stated, “the Office has developed the practice of being as transparent as possible so the international community and our partners will know whether there are situations which may require investigations to be carried out.” In public documents, the OTP has stressed the benefits that awareness of ICC scrutiny can have:

[The announcement of ICC activities can have a preventive impact. The mere monitoring of a situation can deter future crimes. It increases the risk of punishment even before trials begin. This effect is not limited to the situation under investigation but extends to all State Parties and reverberates worldwide.]

In places like Colombia, the prosecutor has argued, scrutiny itself is salutary. “Because we are there watching, they have to do everything perfectly . . . ,” Moreno-Ocampo said. “Colombia shows how important it is to have this back-up system.” In 2008, the prosecutor announced that his office was examining the conduct of Taliban and NATO forces in Afghanistan. At times, he appeared inclined to use that examination as a mechanism for encouraging forward-looking preventive mechanisms. In discussing the inquiry, for example, the prosecutor emphasized policies such as appropriate education for the new Afghan armed forces. “That is the most important [thing] because these massive atrocities are planned. So if those who are planning know they will be prosecuted, they will do something different.”

During certain of its preliminary investigations, the OTP has focused on quite specific preventive goals. The 2008 post-election violence in Kenya

71. See Barney Jopson, Odinga Seeks Help Over Power Struggle, FIN. TIMES (Feb. 16, 2010) (quoting a source close to Odinga describing the ICC’s involvement as “explosive”); Daniel Howden, Prosecutor Arrives in Kenya on Trail of War Crimes; Intervention by International Criminal Court Greeted with Fury by Senior Politicians, INDEPENDENT (London), Nov. 6, 2009, at 32.
was the subject of a preliminary examination for several months before the prosecutor sought permission to open a formal investigation in November 2009. During that period, the prosecutor visited Kenya and made numerous public statements about the situation. He pledged that “[w]e will do justice, we will work together to avoid a repetition of the crimes . . . . It has been two years since the post election violence in Kenya. In two years another election is planned. The world is watching Kenya and this Court.”

He later stressed that the court would try to proceed on a timetable that could maximize the chances for prevention. “Everyone is worried about the next election in Kenya in 2012,” he told the press. “That’s why I understand the importance of speed, and I am working to be sure that during 2010—if the judges authorize investigations—we will be able to complete investigations and to define who are the suspects, who are the accused, that have to have justice in Kenya. And that will clean the situation [so] that you can have peaceful election [seasons] in 2011 and 2012.”

In situations where conflict has broken out abruptly, the OTP has signaled to combatants that it is scrutinizing events, a clear attempt to use its influence to alter the conduct of hostilities. When fighting erupted between Georgian and Russian forces in August 2008, the court released a statement indicating that it was analyzing alleged crimes committed during combat operations. The prosecutor also reportedly met with Russian and Georgian officials about possible violations committed. In other cases, the prosecutor has commented on specific incidents in ongoing conflicts. Just two days after a massacre at a refugee camp in Uganda, the prosecutor released a statement indicating his intent to investigate, which could be seen as an effort to assure the affected Ugandan communities that revenge attacks were unnecessary and to thereby help prevent a spiral of violence. When violence broke out in Cote d’Ivoire after a disputed election, the


prosecutor publicly warned one individual that his incitements to violence might be prosecuted.\footnote{81}

Further, the OTP has incorporated into its latest strategy document the goal of prevention through public monitoring. It states that the office will “make preventive statements noting that crimes possibly falling within the jurisdiction of the Court are being committed . . . [and] make public the commencement of a preliminary examination at the earliest possible stage through press releases and public statements.”\footnote{82} The prosecutor has also expressed his intent to catalogue and assess the preventive impact of these activities, although he has not offered a methodology for doing so.

Public awareness of ICC monitoring could have important benefits in this respect. In particular, the prosecutor can employ monitoring as a form of targeted deterrence in situations where it appears that a recurrence of crimes is likely, as is the case in Kenya. ICC scrutiny may lead combatants and political leaders to modify their future behavior in an attempt to discourage the prosecutor from seeking a formal investigation or to minimize the chances that they will be indicted. At the same time, it may create pressure for national judicial proceedings and the possible incarceration of those responsible for crimes. The prosecutor has, at various times, advanced the idea of “positive complementarity”—the notion that the court should actively encourage and assist states to conduct their own prosecutions and assist them in doing so.\footnote{83} ICC involvement may serve as an effective means of “catalyz[ing] political will toward prosecution in situations under analysis.”\footnote{84}

In theory, the OTP’s choice to highlight and publicize the court’s preliminary investigations could create complications for the methodical building of a case against perpetrators. A high degree of publicity about prosecutorial activities might lead perpetrators to cover up evidence, destroy documentation, and intimidate potential witnesses, steps which could complicate construction of a case for trial. Publicity may also complicate the ultimate enforcement of any warrants, as individuals who expect to be investigated may go into hiding or make preparations to do so. It is for this


84. HUMAN RIGHTS WATCH, MAKING KAMPALA COUNT: ADVANCING THE GLOBAL FIGHT AGAINST IMPUNITY AT THE ICC REVIEW CONFERENCE 34 (2010) [hereinafter MAKING KAMPALA COUNT].}
reason that the International Criminal Tribunal for the former Yugoslavia (ICTY) often kept indictments secret until they could be enforced.\(^8^5\) However, these complications might be unavoidable. It is not clear that the OTP could keep a preliminary examination quiet even if it wanted to. For example, news that the prosecutor was examining crimes committed in Colombia became public in March 2005 when Colombian lawmakers released a letter from Moreno–Ocampo requesting information on alleged crimes.\(^8^6\) Given this reality, the OTP has sought to extract as much preventive value from preliminary examinations as possible.

B. Formal Investigations and Indictments

The Rome Statute provides for increasing judicial oversight of the prosecutor when he seeks to begin a formal investigation or to issue summons or arrest warrants. The pre–trial chamber assigned to the case must approve of major decisions by the prosecutor. Even at this stage, however, the Rome Statute asks the prosecutor to use his discretion in certain limited but important ways. In contrast to the preliminary investigation phase, the prosecutor has at several points resisted the idea of using formal investigations for preventive purposes or of requiring an assessment of the preventive effects of its formal steps.

1. Abstention as Prevention

The simplest way in which the court might factor prevention into its calculus at this stage is by deciding that formal investigation and indictment risk inciting additional crimes and therefore choosing not to pursue them. The possibility that ICC involvement would itself be the cause of violations has been raised as a theoretical possibility by observers and critics. The argument has taken several forms. A court investigation or indictment of a prominent politician or commander might spark a violent backlash by supporters. An existing indictment might make an accused leader more committed to staying in power, including through the use of violent repression and atrocities.

It did not take long for the issue to present itself as more than an abstract possibility. One of the court’s earliest formal investigations was the situation in Uganda, which was referred to the court by the Ugandan


government. The referral specifically referenced the activities of the Lord’s Resistance Army, led by Joseph Kony. The court’s involvement in Uganda soon sparked a vigorous debate about the likely impact of the investigation on prospects for negotiation and reconciliation. At one point, a delegation of senior Ugandan civil society representatives appealed to the prosecutor to drop the case. In essence, their argument was that the ICC’s most important contribution to preventing future atrocities would be discontinuing its investigation. The prosecutor met with the elders and promised to take work cooperatively. He pointedly declined to offer immunity or end the investigation although he did express a willingness to consider delaying the investigation if he was convinced that it was not serving the interests of justice.

Should the prosecutor decide to adopt that line of reasoning, the Rome Statute provides him with a mechanism to decline a formal investigation as a matter of discretion even when the admissibility requirements are met. Article 53(1)(c) provides that the prosecutor may decline to open an investigation when “substantial reasons to believe that an investigation would not serve the interests of justice.” In September 2007, the OTP produced a policy paper on this provision in an effort to clarify how it might be used. It stated that use of the “interests of justice” provision would be

87. The referral, and the prosecutor’s announcement of it, was controversial from its first moments. Moreno-Ocampo appeared together with Ugandan president Yoweri Museveni at a press conference to announce the referral, a move that many human rights groups saw as linking the court too closely to the Ugandan government, which is accused of committing many of its own crimes. See Press Release, Human Rights Watch, ICC: Investigate All Sides in Uganda—Chance for Impartial ICC Investigation into Serious Crimes a Welcome Step (Feb. 4, 2004), http://www.hrw.org/en/news/2004/02/04/icc-investigate-all-sides-uganda (warning that “the ICC prosecutor cannot ignore the crimes that Ugandan government troops allegedly have committed”). For an analysis of the referral’s impact, see Payam Akhavan, The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court, 99 AM. J. INT’L L. 403 (2005).


90. See SCHIFF, supra note 87, at 204.


exceptional.\textsuperscript{93} The OTP noted that Article 53 essentially requires a balancing test, and it acknowledged that alternative justice processes (i.e., truth commissions) and the existence of peace and reconciliation efforts might be relevant to this balancing. But the OTP pointed out that the Security Council has the power to delay proceedings and insisted that questions of peace and security are not its responsibility.\textsuperscript{94} This interpretation makes it unlikely that the court will explicitly decline jurisdiction based on the possibility that its involvement could prolong conflict and thus encourage, rather than prevent, future atrocities, although this possibility may of course factor into the prosecutor’s decision about whether to seek a formal investigation in the first place.

As an empirical matter, the OTP has appeared to cast doubt on the idea that pursuing justice can threaten peace processes or worsen violence. In a paper released during the Kampala Review Conference, the prosecutor’s special adviser on prevention argued forcefully that none of the ICC’s cases to date suggest that justice efforts have hampered peace processes. He presented evidence that indictments in Sudan, in particular, galvanized rather than complicated diplomatic efforts. “Efforts to bring President Al Bashir to justice did not hamper peace,” he asserted, “they may well have had a decisive role in fostering it.”\textsuperscript{95} The paper essentially argued that the oft–discussed tension between justice and peace does not exist. If this reflects the thinking within the OTP, it is very unlikely that the prosecutor will pursue prevention by staying his hand.

\begin{quote}
2. A Deterrence Test? The “Gravity Requirement”
\end{quote}

Article 17 of the Rome Statute, which addresses issues of admissibility, sets out several situations in which cases will be inadmissible. At both the stage of initiating formal investigations and at the stage of issuing warrants or filing charges, the pre–trial chamber must ensure that situations and cases meet these requirements.\textsuperscript{96} This process of review has occasioned explicit discussion about the court’s preventive function.

Subsections 1(a) and 1(b) together exclude those cases that are being or have been genuinely investigated by competent national authorities: these provisions effectuate the court’s well–known complementarity requirement and were debated at length during the Rome Conference.\textsuperscript{97} Subsection 1(c) declares inadmissible cases in which the person concerned has already been tried. Subsection 1(d) provides a distinct test: It provides that a case will be

\textsuperscript{93} Id. at 1.
\textsuperscript{94} Id. at 8-9.
\textsuperscript{96} The wording of Article 17 makes clear that these requirements apply at both stages. Rome Statute, supra note 13, art. 17.
\textsuperscript{97} Rome Statute, supra note 13, art. 17, paras. (1)(a)-(b).
inadmissible if it is “not of sufficient gravity to justify further action by the Court.” 98 This provision appears potentially redundant, given that Articles 5, 7 and 8 of the Statute emphasize that the court should consider crimes that are large-scale or systematic, and define certain crimes accordingly. 99

The Rome Statute’s drafting history does not provide clear guidance on the precise purpose of this separate Article 17 gravity requirement, and the concept of gravity is not defined in the Statute or in the court’s Rules of Procedure and Evidence. Indeed, as William Schabas has argued, “the issue of gravity was virtually ignored in the negotiations of the Rome Statute, and did not manifest itself as an important question until well after the Court had begun to operate.” 100 The provision first appeared during proceedings of the International Law Commission, which produced an early draft treaty, and was apparently intended as a mechanism for allowing the court to manage its caseload and prevent it from being overburdened with minor cases. The provision remained in subsequent drafts even as the definition of the crimes under the court’s jurisdiction was altered to include only the most serious. 101

In reviewing the prosecutor’s request for arrest warrants for Congolese militia leader Thomas Lubanga Dyilo and his deputy, Bosco Ntaganda, the pre-trial chamber (“PTC”) examined in some depth the meaning of this “gravity” threshold for admissibility. 102 The chamber noted that the provision is separate from the gravity considerations included in the selection of the crimes under Articles 6-8 of the Rome Statute and should consequently be analyzed as a distinct requirement. Moreover, the judges held that the court has no choice but to assess whether a case meets the gravity requirement. “The Statute leaves the Chamber no discretion as to the declaration of the inadmissibility of a case once it is satisfied that the case ‘is not of sufficient gravity to justify further action by the Court.’” 103

The PTC also determined that the hurdle provided by the provision must be


99. Article 5(1) states that the court is designed to address “the most serious crimes of concern to the international community as a whole.” Rome Statute, supra note 13, art. 5, para. 1. Article 7 defines a crime against humanity as any of a series of acts “when committed as part of a widespread or systematic attack . . . .” Id. at art. 7. Article 8 provides that the court shall have jurisdiction over enumerated war crimes “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” Id. at art. 8.

100. Prosecutorial Discretion, supra note 10, at 736.


102. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-8-Corr 17-03-2006, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, (Feb. 24, 2006) [hereinafter Lubanga Feb. 24].

103. Id. ¶ 43.
cleared twice: once when an investigation is initiated and again when a case is brought.\footnote{Id. ¶ 44.}

On the substance of the gravity requirement, the chamber found that (1) the conduct in question must be either systematic or large–scale; and (2) that “due consideration must be given to the social alarm such conduct may have caused in the international community.”\footnote{Id. ¶ 46.} Drawing on the reference to prevention in the Rome Statute’s preamble, the chamber concluded that 17(1)(d) required that prosecutions only be initiated against those senior leaders who have committed systematic or large–scale crimes. At the root of this reasoning was the view that deterrence was a principal objective of the court, and that the gravity requirement is “a key tool provided by the drafters to maximize the Court’s deterrent effect.”\footnote{Id. ¶ 48.} The chamber reasoned that “only by concentrating on this type of individual can the deterrence effects of the activities of the Court be maximized because other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large–scale commission of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted by the Court.”\footnote{Id. ¶ 54.}

The chamber found further support for its reasoning in the principles and rules of international law. Specifically, it cited UN Security Council resolutions calling on the ICTY and International Criminal Tribunal for Rwanda (“ICTR”), as part of their completion strategy, to concentrate on “the most senior leaders suspected of being most responsible for crimes . . . .”\footnote{Lubanga Feb. 24, supra note 101, ¶ 55.} For the judges, the fact that the ICC is a permanent rather than an \textit{ad hoc} institution heightened the importance of “ensuring the effectiveness of the Court in carrying out its deterrent function and maximizing the deterrent effect of its activities.”\footnote{Id. ¶ 60.} On the facts presented to it, the chamber found that the case against Lubanga met this test but that the case against Ntaganda did not. According to the judges, not enough evidence was presented that Ntaganda, as the third in command of the militia, “was a core actor in the decision–making.”\footnote{Prosecutor v. Dyilo, Case No. ICC-01/04-01/07, Decision on the Prosecutor’s Application for Warrants of Arrest, ¶ 87 (Feb. 10, 2006).} The case against him was accordingly declared inadmissible.\footnote{Id. ¶ 89.}

\begin{itemize}
  \item 104. \textit{Id.} ¶ 44.
  \item 105. \textit{Id.} ¶ 46.
  \item 106. \textit{Id.} ¶ 48.
  \item 107. \textit{Id.} ¶ 54. Certain commentators have endorsed the view that prosecuting senior leaders will provide the most effective form of deterrence. \textit{See, e.g.,} Greenawalt, \textit{supra} note 10, at 629 (arguing that planners and leaders “provide a relatively narrow target for deterrence, and the deterrence resulting from their punishment, if effective, will have a broader impact than that of individual low-level perpetrators.”).
  \item 108. \textit{Lubanga} Feb. 24, \textit{supra} note 101, ¶ 55.
  \item 109. \textit{Id.} ¶ 60.
  \item 110. Prosecutor v. Dyilo, Case No. ICC-01/04-01/07, Decision on the Prosecutor’s Application for Warrants of Arrest, ¶ 87 (Feb. 10, 2006).
  \item 111. \textit{Id.} ¶ 89.
\end{itemize}
The substance of the chamber’s ruling aside, the decision was an important signal that the judges were inclined to play an active role in supervising the OTP’s work and that they would not hesitate to express themselves on prosecutorial strategy and policy goals. Indeed, the chamber appeared eager to begin filling in the interstices of the Rome Statute and to provide principles that would guide the court in its choice of cases and prosecutions.

Several months after the PTC issued its decision, the court’s appeals chamber rejected this reading of the gravity requirement. In reviewing the refusal to grant the arrest warrant, the appeals chamber found that the pre–trial chamber had erroneously created an additional requirement at the admissibility stage that conduct in question must be “systematic or large–scale.” The appeals chamber reasoned that such a requirement would render meaningless other provisions of the Rome Statute. The judges also found no support for the “social alarm” test set forth by the pre–trial chamber, and it directly questioned the pre–trial chamber’s reasoning on deterrence. In particular, it argued that excluding cases against all lower–level perpetrators might actually weaken the deterrent effect of the court. “It seems more logical to assume that the deterrent effect of the Court is highest if no category of perpetrators is per se excluded from potentially being brought before the Court.” The appeals chamber also expanded on the issue of the Court’s broader preventive function:

The imposition of rigid standards primarily based on top seniority may result in neither retribution nor prevention being achieved. Also, the capacity of individuals to prevent crimes in the field should not be implicitly or inadvertently assimilated to the preventive role of the Court more generally. Whether prevention is interpreted as a long–term objective, i.e. the overall result of the Court’s activities generally, or as a factor in a specific situation, the preventive role of the Court may depend on many factors, much broader than the capacity of the individual to prevent crimes.

On the broad issue of the court’s preventive function, the appeals chamber here showed itself to be essentially agnostic on whether prevention should be conceived of as a byproduct of the court’s activity or whether it should factor into the court’s decision-making. While the appeals chamber rejected the pre–trial chamber’s reasoning, it did not exclude the possibility

112. Situation in the Democratic Republic of Congo, Case No. ICC-01-04, Appeals Chamber, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I Entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58” (July 13, 2006).
113. Id. ¶ 61.
114. Id. ¶¶ 69-70.
115. Id. ¶ 73.
116. Id. ¶ 74.
that the concept of gravity might still involve consideration of the deterrent impact of an investigation or case. It appears unlikely that 17(1)(d) will ultimately be interpreted to require such an assessment; the provision’s text and the Rome Statute more broadly cannot support such an interpretation. The ICC prosecutor has acknowledged at several points that his office is in the process of defining and putting into practice the concept of gravity,\textsuperscript{117} and it appears that the chambers are engaged in the same process.

3. The Conduct of Investigations

Once the pre–trial chamber has authorized a formal investigation, the OTP has responsibility for “extend[ing] the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute . . . .”\textsuperscript{118} The interests of victims and witnesses and the nature of the crime should play a significant role in the development of an investigative strategy.\textsuperscript{119} Throughout the Rome Statute, the Rules of Procedure and Evidence and the OTP’s own guidelines make the protection and wellbeing of victims a high priority during investigations.\textsuperscript{120}

The court’s apparent commitment to both the protection of victims and maximizing its preventive effect creates the possibility of tension. What best serves the victims of crimes already committed may not necessarily be best for those facing ongoing or imminent violence. This tension manifested itself during the early stages of the court’s investigation into crimes committed in the Darfur region of Sudan. Specifically, the question arose as to whether the court’s investigations and the presence of ICC personnel can mitigate or restrain ongoing violence and atrocities by making visible the threat of prosecution. The UN Security Council had referred the case of Darfur to the ICC in March 2005, and the Prosecutor formally opened its first investigation in June of that year.\textsuperscript{121} In July, the pre–trial chamber, acting through Article 103 of the Rome Statute, invited observations from certain eminent international jurists on aspects of the court’s investigation there, notably the protection of victims.\textsuperscript{122}


\textsuperscript{118} Rome Statute, supra note 13, art. 54, para. 1.

\textsuperscript{119} Id.

\textsuperscript{120} See, e.g., Rome Statute, supra note 13, art. 53(1)(c), 54(1)(b), 57(3)(c); ICC Rules of Procedure and Evidence, supra note 69, at Rules 16–19; Regulations of the Office of the Prosecutor, supra note 65, at Regs. 16, 44–48.

\textsuperscript{121} S.C. Res. 1593, supra note 21.

\textsuperscript{122} Situation in Darfur, Sudan, Case No. ICC-02/05, Pre-Trial Chamber I, Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence (July 24, 2006).
In response to the pre–trial chamber’s request, Louise Arbour, United Nations High Commissioner for Human Rights, submitted observations.\textsuperscript{123} She criticized the ICC prosecutor for not conducting investigations in Darfur and for instead relying primarily on refugees and displaced persons for witness testimony. Arbour contended that in crafting its investigative strategy the ICC had placed too much emphasis on the possible risks to witnesses and victims and too little on the benefits that an active investigation in Darfur might yield. She encouraged the prosecutor to consider “the potential deterrent effect of ICC investigations on the perpetrators of the very crimes that put the civilian population at risk and thus of its impact on the general reduction of violence.”\textsuperscript{124} The presence of ICC investigators “can create an atmosphere in which the costs of abuse are more apparent to the perpetrators of violence against civilians.”\textsuperscript{125} The ICC’s position in the international system, she argued, makes it particularly suited to targeted deterrence:

The High Commissioner is of the view that the promise of the ICC is that, contrary to ad hoc tribunals created ex post facto, it has the potential of being effective during armed conflicts and to contribute to the effective prevention of current crimes and general reduction of violence. The ICC’s potential power of deterrence can thus be more situation–specific and makes it a tool without equivalent for the international community.\textsuperscript{126}

A few weeks later, the OTP responded to the Arbour observations.\textsuperscript{127} The Prosecutor acknowledged the reference to prevention in the Rome Statute’s preamble but insisted that the office cannot be expected to help provide physical security in a conflict zone:

The OTP has expressed on many occasions the firm belief in the deterrent power of ICC investigations and prosecutions and the objective of maximizing the deterrent effects of its activities. Still, the OTP’s mandate cannot reasonably be expanded to encompass a duty to protect the security of civilians in areas in which it has chosen not to investigate. As the Preamble acknowledges, deterrence is a consequence of prosecution and accountability, not an independent objective.\textsuperscript{128}

\textsuperscript{124} Id.
\textsuperscript{125} Id. ¶ 70.
\textsuperscript{126} Id. ¶ 76.
\textsuperscript{128} Id. ¶ 12 (emphasis added).
The responsibility for security and prevention in Darfur, argued the prosecutor, lies with the government of Sudan and with the UN Security Council. As an empirical matter, the prosecutor’s office also cast doubt on whether an increased international presence has any deterrent effect. It noted that in the context of the Darfur conflict, “increased international presence . . . has not had the effect of reducing the level of violence in the region.”

The OTP’s broad statement on the place of deterrence in the court’s work should likely be limited to the context of investigations. Even in that limited sense, however, it is not clear that the prosecutor is persuaded by his argument that deterrence should not be an independent objective. The prosecutor has regularly briefed the Security Council on the progress of the Sudan case, and those briefings have included several suggestions that the office would craft its strategy so as to halt ongoing atrocities. He has also stated that prevention will affect how the office directs its resources:

The impact of ICC investigations and prosecutions on the prevention of future crimes is also an important consideration, and particular attention will therefore be given to investigating the crimes currently affecting the lives and safety of the two million displaced civilians, in an effort to contribute to their protection from further attack and to the delivery of humanitarian aid.

The prosecutor does not make clear whether he expects OTP’s activities to prevent ongoing crimes through deterrence or through the arrest and incapacitation of those responsible. In either case, this policy might suggest that the prosecutor is willing to complicate investigations in order to maximize the preventive impact. Ongoing crimes could be significantly harder to investigate than those committed months or years in the past, particularly given the investigative approach the OTP has taken in Darfur. Eyewitnesses and victims of the most recent crimes might not be in refugee camps and might be therefore out of reach for investigators. Moreover, it can be expected that senior commanders and government officials are now more adept at disguising responsibility for crimes than they were in the early stages of the conflict.

Taken together, the prosecutor’s exchange with Arbour and his briefings to the Security Council suggest a calibrated approach to prevention at the investigate stage: the prosecutor will consider prevention in crafting an investigation and prosecution strategy but will not allow prevention or deterrence to influence decisions on where investigators are deployed. In

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129. Id. ¶ 14.
essence, the prosecutor has argued that it may be appropriate for the court to become an instrument of prevention, but not its personnel.

4. Choice of Charges

Once the prosecutor has identified individuals against whom it will bring charges, there remains the question of precisely what charges to bring. The PTC must approve of charges filed, but the Rome Statute and the Rules of Evidence and Procedure offer no guidance on how the prosecutor should choose the precise charges to bring or whether he should prioritize certain crimes over others. The OTP’s regulations provide that the investigative team “shall aim to select incidents reflective of the most serious crimes and the main types of victimization—including sexual and gender violence and violence against children—and which are the most representative of the scale and impact of the crimes.”

In its early cases, the OTP targeted several individuals against whom it was possible to bring a variety of different charges. Militia leaders in the Congo, for example, have been accused of committing or authorizing murder, rapes, pillage, and forced displacement, among a number of other crimes covered by the Rome Statute. It is likely that this will be the situation in many of the court’s future cases. The selection of charges therefore becomes an important element of the prosecutor’s discretion and could be used to maximize the court’s preventive impact.

The court’s indictments related to the conflict in eastern Congo suggest just such a dynamic. The three charges brought against Thomas Lubanga all involved the use of child soldiers. By emphasizing this theme, the prosecutor may have decided to help stigmatize a practice that is accepted as normal in some environments. However common, murder and rape have a basic stigma attached to them, while recruiting child soldiers may not. In media interviews as the case opened, Moreno-Ocampo stressed the broad effect he hoped the prosecution would have. “The charges in the Lubanga case will reverberate around the world . . . in Sri Lanka, in Colombia, in many countries. This trial will make clear that this is a law to be respected. If you conscript, enlist or use child soldiers you will have a problem, you will be prosecuted.”

131. Regulations of the Office of the Prosecutor, supra note 65, at Reg. 34(2). This policy was reiterated in the OTP’s latest strategy document. See Prosecutorial Strategy 2009-2012, supra note 18, at para. 20.


children such as enlisting them as soldiers, are very grave and will be prosecuted.\textsuperscript{134}

The prosecutor runs a risk in seeking to isolate and raise the profile of certain criminal behavior. In the case of the Congo indictments, the court’s narrow focus elicited strong reactions from some quarters. Women’s Initiatives for Gender Justice confronted the prosecutor about the absence of sexually–based offenses:

It is evident that if the Prosecutor, in the exercise of his or her discretion, chose never to prosecute certain types of crimes, the ICC would not have the effect of deterring those types of crimes. Indeed, the ICC might in such circumstances send the signal that such crimes can be committed with impunity. Thus, the selection of the particular charges against those who are accused is even more important than the overall number of accused.\textsuperscript{135}

If the court consciously decides to pursue an educative approach, it might, in some cases, seek to prioritize those crimes within its jurisdiction that are lesser known and where the educational impact can be maximized. As has been demonstrated, however, that approach runs the risk of alienating certain victims groups and those advocating on their behalf.

5. The Preventive Effect of Indictment

To date, the court has issued thirteen indictments, the majority of which remain unenforced, including those against Sudanese President Omar al-Bashir and Lord’s Resistance Army Commander Joseph Kony. From a crime prevention standpoint, unenforced indictments can be analyzed in several different ways. In the case of ongoing crimes, the ICC may hope that issuance of an indictment will lead the indicted individual to modify his or her behavior even if there is little prospect of the individual being apprehended. In effect, the court might be seeking to achieve targeted deterrence that leads the indictee to abandon criminal behavior or at least restrictive deterrence that leads the indictee to reduce, if not completely abandon, criminal activity. The court may also conclude that issuing indictments can have a general educative effect either on the society in question or in the international community as a whole. As discussed above, this may particularly be the case when the indictments focus on crimes that are little known or not widely regarded as serious.


But unenforced indictments can serve to highlight the court’s lack of enforcement power and, potentially, to diminish its ultimate preventive and deterrent effect. Senior government and non-state leaders in a position to prevent major crimes may conclude that the ICC’s indictments are unlikely to threaten them and therefore choose not to modify their behavior. Maintaining the court’s ability to affect the calculations of senior leaders—an important element of preventive effect—may suggest a policy of issuing indictments only when it appears likely that enforcement will occur. It is apparent that the court has not chosen this approach, at least not on a consistent basis. There was little prospect, for example, that President Bashir would be apprehended when the court indicted him. Going forward, the court will have to weigh these considerations and decide whether it should only seek indictments when the prospects for enforcement are high.

There is another dimension to the court’s effort to use indictments to maximize its preventive effect. As suggested by the Lubanga case, the court at times may find itself in the position to take into custody individuals who might not, under normal circumstances, be deemed significant enough to merit the ICC’s attentions but whose apprehension could help prevent future atrocities. In this situation, the court must attempt to weigh that preventive effect and determine whether pursuing an indictment is an appropriate use of the court’s resources. Most accounts suggest that Lubanga, a militia leader who had been detained by the Congolese authorities, was set to be released. When word of his imminent release reached The Hague, the OTP negotiated with the Congolese authorities to transfer Lubanga to the ICC, and the office moved quickly to seek an indictment. The suspect’s likely release was discussed at some length before the pre-trial chamber as it considered whether to authorize an arrest warrant. Several commentators have argued that the ICC’s focus on preventing Lubanga’s release trumped its normal standards for assessing the seriousness of a situation. “One might wonder . . . whether the selection of the Lubanga case was based on gravity or by his ‘possible imminent release.’” From a prevention standpoint, however, the chance to remove a dangerous individual from the conflict zone—and perhaps avoid or limit imminent atrocities—may be hard for the court to ignore.

136. See Schiff, supra note 87, at 220-21; for discussion of Lubanga’s imminent release before the Pre-Trial Chamber, see Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-48, Redacted Version of the Transcripts of the Hearing Held on 2 February 2006 and Certain Materials Presented During that Hearing (Mac. 22, 2006), http://www.icc-cpi.int/iccdocs/doc/doc191916.PDF.

137. Id. at 34-35.

138. El Zeidy, supra note 97, at 41. See also Prosecutorial Discretion, supra note 10, at 741 (“It is difficult to reconcile the prosecutorial discourse about gravity with the decision to proceed against Lubanga.”).

139. Another, more practical, argument for the focus on Lubanga has been advanced: the ICC needed a detainee in order to proceed with the trial phase of its work and to demonstrate that the court was functioning. William Schabas has argued that “the
C. Sentencing

The guidelines for sentencing at the ICC are elaborated in the Rules of Procedure and Evidence, but they do not include any reference to the deterrence function or indeed to any of the traditional purposes of punishment. “The ICC Statute is in effect silent on the purposes and principles that govern the rules on sentencing.”140 Rule 145(a) calls for the Court to “balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime . . . .”141 The Rules outline certain relevant considerations including the damage caused; degree of intent; and the age, education, and social and economic condition of the convicted person. A number of aggravating and mitigating conditions are also listed, but none of them relate specifically to prevention or deterrence. The only sentencing provision that can be considered to focus on prevention appears in Rule 223, which addresses the possible reduction of sentences. It instructs the court to consider whether early release “would give rise to significant social instability.”142 The provision appears to anticipate a situation in which the release of a controversial individual would lead to protests, political instability, or even violence and atrocities. It may also encompass the possibility that the individual released may commit or instigate additional crimes. As such, it can be considered to have a preventive purpose.

The experience of the ICTY and ICTR on sentencing suggests that even in the absence of statutory guidance, the court will likely begin to articulate a sentencing philosophy, although not necessarily a comprehensive one.143 Both of those tribunals adopted the practice of issuing sentencing decisions, and on several occasions they specifically addressed the question of sentencing’s preventive impact, always in deterrence terms. In the Tadic case, the judges determining the sentence went so far as to declare that “deterrence is probably the most important factor in the assessment of

impression remains that in the Lubanga case, the exercise of prosecutorial discretion had more to do with the fact that this was an accused who was accessible to a Court starved for trial work rather than any compelling analysis based upon either gravity or complementarity.” Prosecutorial Discretion, supra note 10, at 744.


142. Id. R. 223(c).

appropriate sentences for violations of international humanitarian law.”144 The ICTR also suggested that deterrence should have pride of place in sentencing decisions:

It is clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on the other hand, at deterrence, namely to dissuade for good, others who may be tempted in the future to perpetrate such atrocities by showing that that the international community shall not tolerate the serious violations of international humanitarian law and human rights.145

The first indication of the OTP’s approach to sentencing came in the Lubanga case. In his opening statement, the prosecutor signaled that he would seek harsh punishment for the accused:

I want to put the Defence on notice that the prosecution anticipates to call for a severe punishment, close to the maximum. The Prosecution believes that the massive crimes litigated in this International Criminal Court, with hundreds or thousands of victims, with entire communities affected, warrant very high penalties. In this case, the defendant stole the childhood of the victims by forcing them to kill and rape.146

One should be wary of extrapolating from this statement a defined philosophy of sentencing, but the prosecutor's statement does suggest an emphasis on retribution and “just deserts” rather than prevention, a notable departure from the emphasis that the OTP placed on stigmatizing and deterring the recruitment of children in other public statements before and during the trial. The ICC judges, for their part, have not yet had the opportunity to elaborate their own approach to sentencing.

D. Public Outreach

The ICTY and the ICTR were often criticized, particularly in their first years of operation, for being distant from and little understood by the people

144. Prosecutor v. Tadic, Case No. IT-94-1, Sentencing Judgment, ¶ 7 (Nov. 11, 1999). In the Furundzija case, the court reasoned somewhat differently, stating that “[i]t is the infallibility of punishment, rather than the severity of the sanction, which is the tool for retribution, stigmatisation and deterrence. This is particularly the case for the International Tribunal; penalties are made more onerous by its international stature, moral authority and impact upon world public opinion, and this punitive effect must be borne in mind when assessing the suitable length of sentence.” Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 290 (Dec. 10, 1998).


146. Lubanga, Opening Statement, supra note 133, at 29.
most affected by their activities. Responding to these concerns, the ICC has developed an active outreach program to publicize and explain the work of the ICC, particularly in countries where active investigations are underway.

The court’s strategic plan for outreach acknowledges that the institution is designed to help foster “long–lasting respect for and enforcement of international criminal justice, the prevention of such crimes, and the fight against impunity.” The prosecutor’s office has stressed the importance of explaining court activity so that “ICC investigations and prosecutions, and in particular the conduct charged . . . are known to all parties to conflicts in order to deter perpetrators.” However, prevention is not listed as one of the explicit goals of the outreach program itself, and perpetrators or potential perpetrators are not discussed as target audiences. The strategic plan does refer somewhat obliquely to prevention when it discusses directing information about the court specifically to those involved in conflicts. “Stigmatised by their families and/or the ethnic groups to which they belong for their active participation in hostilities, they represent a volatile segment of the society and could be the source of significant instability.” Describing combatants in these terms alone appears to intentionally avoid casting them as potential perpetrators of atrocities and to minimize the implication that the outreach program has an explicit deterrent purpose.

In practice, the court’s outreach program has focused on those countries where formal investigations are underway. The court has established offices and stationed some personnel in the Central African Republic, the Democratic Republic of Congo, Sudan, and Uganda. On its own, this choice of limiting major outreach activities to these societies suggests limited ambition as regards prevention. These societies have already experienced extreme violence and, as targets of formal investigations that often receive significant media attention, may be least in need of education about the court’s existence. From a broad prevention standpoint, a focus on vulnerable societies that have not yet experienced major violence might be more effective.

147. For a discussion of the ICTR’s outreach program, see Victor Peskin, Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme, in 3 J. INT’L CRIM. JUSTICE, 951(2005); for discussion of the ICTY’s difficulties, see Ralph Zacklin, The Failings of Ad Hoc International Tribunals, 2 J. INT’L CRIM. JUST. 541, 544 (2004). For a discussion of how the ICC has sought to incorporate the lessons of the ad hoc tribunals see MAKING KAMPALA COUNT, supra note 83, at 38.
148. ICC Assembly of States Parties, Strategic Plan for Outreach of the International Criminal Court, ICC-ASP/5/12, 3 (Sept. 29, 2006) [hereinafter Strategic Plan for Outreach].
150. Strategic Plan for Outreach, supra note 147, at 5, 7-9.
151. Id. at 9.
The content of the court’s outreach activities reflects a strong emphasis on normative and educative approaches and a very limited use of deterrence. Principal outreach strategies have included meetings with civil society representatives, question-and-answer sessions about the work of the court, special briefings for local media, information sessions at schools and universities, coordination with relevant non-governmental organizations, screenings of court proceedings, and selected radio messages. In Uganda, for example, the ICC reports that almost 21,000 people participated in more than 200 interactive sessions and that ICC radio messages may have reached eight million people.152

Targeted groups have included victims groups, former child soldiers, and women. Court officials have designed information sessions for them that have included tailored messages on the rights of victims, the crime of child recruitment, and sexual crimes, respectively.153 In some instances, the court has sought to seek out populations that might be skeptical of or even hostile to the court’s work. In Congo, for example, the court arranged information sessions in areas of the country where support for indictee Jean-Pierre Bemba is high.154

It is notable, however, that the ICC has rarely attempted to communicate targeted messages to senior government officials, military representatives, or militia commanders about their responsibilities or the threat of punishment (the prosecutor’s December 2010 statement on Cote d’Ivoire being a notable exception). It is possible that this type of communication occurs more regularly behind the scenes, but in general, the outreach effort has focused on education rather than targeted deterrence. Given the court’s ambition to alter the calculations of senior leaders, this omission is striking.

CONCLUSION

There can be no doubt that, in the abstract, the ICC prosecutor and judges see crime prevention as an important objective of the court’s work. The court’s Special Adviser on Crime Prevention concedes that “our task is very complicated and difficult,” but argues that the court has no choice but to engage with the complexities of measuring and assessing the institution’s preventive impact:


153. Id. at 35 (noting activities in the capital of Kinshasa included poetry readings and dramatic performances by students that included the message: “the place of the child is not in the armed forces and those who use children as soldiers are committing a war crime.”).

154. Id.
We have a legal but also a moral and political obligation to engage in prevention and to study the way justice can serve the purposes of prevention in specific and detailed ways. We will probably never have the specific evidence because we prosecute and punish this particular case [that] we prevented similar cases to happen in this jurisdiction or in others. But our ability to make arguments that justice is what contributes to a preventive mechanism is important.\footnote[155]{Juan E. Mendez, Special Adviser to the Prosecutor on Prevention, Introduction to the Work of the Special Advisers: Special Adviser on Prevention (Mar. 2, 2010) (emphasis added), http://www.icc-cpi.int/NR/rdonlyres/F57A26F6-30DE-4C47-831E-C3ECAC044BF6/281614/Juan_Mendez02032010.pdf.}

His comments suggest that the court’s prevention discourse may be as much about justification as strategy. More than eight years after it opened its doors, the court still has no convictions. A significant number of the individuals it has indicted remain at large. Tension has emerged between the court and many African member states over the emphasis on African conflicts. The court’s first trial has been characterized by repeated sparring between the prosecutor and the judges and may not be completed.\footnote[156]{Wairagala Wakabi, Judges Issue Warning to Prosecutors as Lubanga’s ICC Trial is Halted, The Lubanga Trial at the International Criminal Court (July 10, 2010), http://www.lubangatrial.org/2010/07/10/judges-issue-warning-to-prosecutors-as-lubanga%E2%80%99s-icc-trial-is-halted/.}

In this context, discussion of the court’s preventive effect and potential can easily become a gloss to cover the absence of more concrete and quantifiable achievements.

At the very least, it is apparent that the broad goal of prevention is not yet accompanied by a coherent strategy on how to do so. One close observer of the court concluded that “the potential of preventive impact is widely unexplored. It requires a systematic approach and use.”\footnote[157]{Statement by Antoine Bernard, supra note 4.}

The evidence to this point suggests that the ICC prosecutor is particularly interested in the preventive impact of preliminary investigations and has sought to maximize that effect through frequent and targeted public statements. The court is also pursuing an active outreach campaign that emphasizes information and education as a preventive tool.

Beyond that, the place of prevention appears uncertain. The prosecutor and his office have sometimes claimed that prevention and deterrence cannot be conscious goals of the institution and at other times have suggested that they are key objectives. The OTP’s discussion of its preventive role at the investigation phase captures this uncertainty well. The appeals chamber, for its part, declined the opportunity to state clearly whether prevention should be conceived of as a byproduct or conscious goal of the court’s work.

It is not surprising that the ICC’s approach to crime prevention is fragmented and, at times, inconsistent. The absence of clear guidance from
the Rome Statute and the court’s other published rules and guidelines create fertile ground for uncertainty. For an institution like the ICC, that lack of clarity may ultimately be an advantage; many international organizations use ambiguity in their underlying charters in an attempt to shape their mandate—converting ambiguity into a form of autonomy. While the ICC will undoubtedly engage in this process, its senior officials are sensitive to accusations that they are abusing their discretion. Prominent court critics have pointed out the danger of the court’s broad discretion and lack of oversight. In response, the prosecutor and other court officials have declared that they will not seek to engage in ambitious interpretations of the court’s role. “I have to respect scrupulously my legal limits,” Moreno–Ocampo said recently. “Our policy is never to stretch the interpretation of the norms adopted in Rome.” As a new institution, the ICC faces an imperative to establish its place in international politics and to demonstrate its effectiveness. In so doing it must respond pragmatically and flexibly to events. At least until the court is better established, consistency will often have to yield to expediency.

There are other significant hurdles to a well developed prevention strategy. The difficulties of measuring and analyzing the preventive effects of criminal justice are well documented. Those difficulties are compounded for the ICC because the small number of prosecutions offers limited data for empirical study and because it is difficult to assess the calculations of those targeted by the court. Moreover, conducting formalized and public assessments of the likely preventive effect of court action would involve political, social, and even psychological calculations that judicial bodies are hesitant and usually ill-equipped to make.

Still, within these constraints, there is room for the court to improve and systematize its approach to prevention. Either within the OTP or the registry, the court should develop a small prevention unit with two principal tasks: assessing the likely impact of possible investigations and recording and analyzing the effects of ongoing investigations and cases. In particular, the court should develop a set of prevention guidelines for use as it considers information it has received and referrals from states parties and


159. See, e.g., Eric Posner, Political Trials in Domestic and International Law, 55 Duke L.J. 75, 148 (2005) (arguing that many ICC trials will be considered politically motivated); Bolton, supra note 39, at 174 (arguing that the court and prosecutor lack “both any semblance of democratic accountability or effective governmental oversight and control”).


the Security Council. These guidelines might include the following considerations:

- Whether there is ongoing conflict that a preliminary or formal investigation might help mitigate.

- If conflict is not ongoing, an assessment of how likely it is that violence will recur and how the court’s involvement might affect that possibility.

- Whether political and military leaders thought to be involved in committing atrocities will be susceptible to the pressure of an ICC investigation.

- The degree of attention that an ICC investigation will likely garner in the country and region.

- Whether the situation would expose types of international crimes that are underpublicized and thereby contribute substantially to the building of awareness.

While the guidelines should be published as part of a broader policy paper on prevention, the court’s assessment should be conducted internally and without rendering formal decisions or evaluations. The efforts of the pre-trial chamber regarding the gravity requirement notwithstanding, it would not be fruitful or plausible to read into the Rome Statute a formal prevention requirement. Without structured internal guidance, however, there is a danger that the focus on prevention may begin to fade as other achievements accumulate. That would be unfortunate. For all its rhetoric, the court has only begun to explore systematically its preventive potential.
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“There can be no keener revelation of a society’s soul than the way in which it treats its children.”

Nelson Mandela

INTRODUCTION

There is no one in a better position to speak to South Africa’s soul than Nelson Mandela. The road he walked—from the small village of Mvezo in Eastern Cape Province¹ to the prison on Robben Island² to the presidency of the Republic of South Africa—compels us to give him that distinction. Although appropriate treatment of children is an obvious moral mandate, Nelson Mandela clearly saw the importance of children’s rights to a successful society. Mandela, a tireless advocate for unity in his country, recognized that if the children of his country were not treated equally nor provided protection under the law, the society he hoped for could not be built in South Africa. Mandela served as president of South Africa from 1994 to 1999. Since the very beginning of his presidency, there developed in that country a growing movement committed to children’s rights.³ The movement recognized that children are among the most vulnerable members of South African society.⁴ During the early years of the Mandela presidency, the government of South Africa began a review of the laws governing the treatment of children in various contexts—including divorce, paternity and child protection.⁵ South Africa’s Children’s Act of 2005 is the culmination of this review.⁶

This comprehensive piece of legislation, designed to protect children, emerged from the meeting of three separate currents in South African society. The first current was the socio-economic conditions brought about by the policies of segregation and apartheid. Those official government

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2. Id. at 382.
3. Briefing from S. Afr. Dep’t of Justice & Constitutional Dev. to U.S. People to People Delegation 7 (Oct. 7, 2009) (on file with author) [hereinafter Briefing to People to People Delegation].
4. Id.
5. Id. at 15.
6. See Id.
policies brought hardship and misery to the lives of many South African children. The second was the Roman–Dutch legal system—brought to the country during the colonial period and developed throughout the legal history of the country. As it developed post–independence, the legal system began to express the ideal that children’s interests were to be protected. While not always realized in practice, the courts were at least expressing those ideals in their legal opinions. The third current was the impact on South Africa of international conventions and declarations from transnational organizations. Throughout the Twentieth Century and into the Twenty–First, various international agreements came into existence whose main focus was to advance the cause of children. South Africa frequently signed on to those child-centered accords. As a result, South Africa created for itself a number of obligations that needed to be fulfilled domestically.

This Article will focus on the Children’s Act of South Africa in an effort to learn how well it serves the ideals of Mandela and the children of that nation. This analysis will occur in five parts. First, the socio–economic history of the children of South Africa will be discussed. Not simply the plight of children under apartheid, but a discussion of where they were before apartheid and where they have been since its fall. Second, an examination of the legal system’s development in South Africa will occur. Specifically, the history of children under the law of South Africa will be discussed. Third, an analysis will take place concerning some of the international efforts to help children and where South Africa fits in those efforts. Fourth, this analysis will briefly review the Children’s Act and how its provisions are designed to protect children; finally, a reflection on the Act will be offered from an American perspective.

I. THE SOCIO-ECONOMIC HISTORY OF THE CHILDREN OF SOUTH AFRICA

A. Pre–Colonial Period

An inherent problem with textbooks used in schools is that they often begin a discussion of a former colony’s history at a time when the first Europeans arrived. The country of South Africa is no different.7 As with many former colonies, however, such a beginning for South Africa is simply incorrect. In fact, modern man’s history in South Africa’s is quite ancient. Hominids originated in South Africa approximately three million years ago.8 Around one million years ago homo erectus replaced those first hominids.9 Notably, “[t]he earliest fossils . . . [found] anywhere in the

7. See Mandela, supra note 1, at 24 (noting that the standard South African textbooks claim the history of South Africa “began with the landing of Jan Van Riebeek at the Cape of Good Hope in 1652.”).
world[, which] some physical anthropologists attribute to modern Homo sapiens[,] come from [the] Klasies River mouth in . . . eastern Cape Province on the Natal-Swaziland border.”

By the beginning of the Christian era, human communities [of hunter gatherers] had lived in South[ ] Africa . . . for . . . thousands of years.”

“The basic social [structure of these hunter gatherers] was the nuclear family, but several families usually [grouped themselves into larger] bands . . . .” People from the various bands would often intermarry.

These early human communities in southern Africa were the ancestors of the Bushman culture, groups of indigenous hunter gatherers who were still present in South Africa when the first Europeans arrived. Although exact dates are uncertain, pastoralism eventually arrived in South Africa. That arrival could have been as early as 2,500 years ago and probably came from immigrants from the north.

These pastoralist Bushmen became known as Khoikhoi (men of men) as opposed to the hunter–gatherer Bushmen which became known as San. Eventually, these two groups intermarried and their descendants became known as “Khoisan.”

Early in the Christian era, Bantu speaking people began arriving in South Africa from the north. “Between the fourth century . . . and the . . . eighteenth century [of the Christian era], Bantu speaking [hunter gathers] . . .” were building successful communities in eastern South Africa. While there is certainly evidence that some Bantu speakers intermarried with the Khoisan, it is specifically the “Bantu–speaking . . . [peoples]” who are “the ancestors of the majority of . . . [modern South Africans].” Many of the currently existing South African tribes trace their origins to these people—including the Zulu, Xhosa, Swazi, and many more. These are just some of the aboriginal tribal groupings that the Europeans encountered when they arrived on the South African cape and moved inland.

10. THOMPSON, supra note 8, at 6.
11. Id.
12. Id.
13. Id. at 7.
14. See id.
15. THOMPSON, supra note 8, at 6.
16. Id. at 11–12.
17. Id. at 12.
18. READER’S DIGEST, supra note 9, at 20–21.
20. Id. at 26.
21. THOMPSON, supra note 8, at 15–16.
22. Id. at 10.
23. HISTORY OF SOUTHERN AFRICA, supra note 19, at 26 (“Bantu–speakers who came to South[ ] Africa included two main groups: the Nguni, who today include the Swazi, Xhosa, and Zulu, and the Tswana–Sotho, the ancestors of today’s people of Botswana and Lesotho.”).
Although they had not yet experienced the influx of European colonialism, the indigenous people of South Africa had experienced the arrival of new settlers from the northern part of Africa. Indeed, conditions for children in such tribal societies is not ideal, yet the arrival of European colonialism was going to have a much more profound impact on the people in southern Africa and, therefore, on the children of southern Africa.

B. Colonial Period

It was not until the late fifteenth century that this European encounter occurred. The first European to round the Cape of Good Hope was the Portuguese mariner, Bartholomew Dias in 1487. He anchored briefly in Mossel Bay, which is approximately 170 miles further east than the cape. He went “another 170 miles along the [southern] coast [of Africa] to Algoa bay before [turning around and] returning to [Portugal].” It was left to another Portuguese sailor, Vasco De Gama, to round the Cape and travel up the eastern coast of Africa to Mombasa in modern Kenya. Although the Portuguese were the first Europeans to pass by the southern tip of Africa, it would be the Dutch who came to stay. In 1652, the Dutch East India Company set up a service station in South Africa to provide supplies and rest to Dutch merchants trading in the east. The first commander in charge of the company on the Cape was Jan van Riebeeck. He had been instructed to build a fort and supply the Dutch fleets with food and drink as they passed back and forth around the Cape. The Dutch had no intention of creating a permanent settlement there, but simply needed a stopover point for the fleet on its way to the eastern empire of the Netherlands. However, after a few years the colony began to acquire an evident level of autonomy.

In 1657 the company released nine of its employees from their employment contracts and gave them land just south of Table Bay. The purpose of this move was to have them grow crops and sell them back to the company at fixed prices. “In the years that followed, the company [released] more [employees] on similar [terms].” It also brought immigrants into the area and allowed them to create their own settlements.

24. THOMPSON, supra note 8, at 31.
25. Id.
26. Id.
27. Id. at 1.
28. Id. at 32–33.
29. THOMPSON, supra note 8, at 33.
30. Id. at 32.
31. Id. at 33.
32. Id. at 33–35.
33. Id. at 35.
34. THOMPSON, supra note 8, at 35.
35. Id.
By 1793 the company records reflected that 4,032 men, 2,730 women and 7,068 children were living in that colony.\textsuperscript{36}

It should come as no surprise that Europeans taking over land in southern Africa caused displacement of the people who already lived there—and that such displacement caused tension between the Europeans and indigenous communities. The Europeans gave the local pastoralists the option of withdrawing from the land they lived on—which had abundant fresh water and rich soil—or serving the Dutch.\textsuperscript{37} Clearly these were not attractive options for people who had lived on the land for generations. The Dutch also started importing black slaves from other parts of Africa in order to help develop the infrastructure of the colony.\textsuperscript{38} “By the time van Riebeeck [handed command] over . . . to his successor in 1662, the colony had become a . . . racially stratified society.”\textsuperscript{39}

During the time that the Dutch East India Company controlled the Cape, the “white [settlers] and their diseases [wiped out] most of the . . . [Khoisan people] . . . in . . . western . . . South[A]frica.”\textsuperscript{40} “White people did not [start moving into] the eastern part of [S]outh[A]frica . . . until the late eighteenth century.”\textsuperscript{41} The British gained control of the Cape Colony in 1795 and, after briefly surrendering it back to the Dutch, they came to stay in 1806.\textsuperscript{42} As with the Dutch, the British viewed the Cape as merely a stopover point on the way to Asia.\textsuperscript{43} What they did not realize was that they had inherited a very complex and racially structured society. Racial conflict continued not only between whites and blacks, but also between whites of Dutch origins who called themselves Afrikaners, and whites of British or other European origin.\textsuperscript{44} The British rule lasted for slightly more than one hundred years. The South African War, known as the Boer War to the British, began in 1899.\textsuperscript{45} While the war came to a successful military conclusion for the British in 1902,\textsuperscript{46} the turmoil that it left in its wake continued until 1910 when Great Britain granted sovereignty to the Union of South Africa.\textsuperscript{47} It was a “British dominion with [a prime minister of its own and] a population [consisting] of [four] million Africans, 500,000 [coloreds], 150,000 Indians and [1.2 million] [w]hites.”\textsuperscript{48}
The years prior to independence had been difficult on South African children of all races. The children of indigenous peoples were displaced and destroyed by war and diseases just like their parents. While perhaps to a lesser degree, a similar fate awaited children of white settlers during this colonial period. During the Boer Wars alone, nearly 28,000 Afrikaners—most of them children—died of various diseases including dysentery and measles. While the situation for white children was destined to improve in the immediate aftermath of independence, the situation for black children would not see improvement for quite some time.

C. Post-Independence and Segregation

The era between independence in 1910 and the beginning of Apartheid in 1948 was characterized by increasing segregation between the races. “[T]he white population consolidated its control over the [government and] strengthen[ed] its grip on the black population . . . .” Black people were being turned into manual laborers working in the fields, the mines, and in the factories. Black farmers were moved off of their land or turned into renters and sharecroppers. During this period in time, black South Africans adopted many strategies for dealing with their situation. In an effort to simply survive day-to-day, many black men would leave their homes for long stretches of time simply to obtain employment. This left the women at home to maintain the integrity of the community and raise the children. During this period, “[o]ver one-fifth of the children [of black South Africans] died within their first year of life.” Fewer than thirty percent of those children were receiving any formal education.

The basis for future trouble in the black community was also laid during this period. As a result of men leaving their homes for long periods of time, black children were victimized by broken families. Fathers were absent and mothers were overextended. These problems would be compounded as the government tightened its grip in the apartheid era. The black community—the largest in the country—was seeing its most basic social structures undermined by government policies.

49. THOMPSON, supra note 8, at 143.
50. Id. at 154–86.
51. Id. at 154.
52. Id. at 155.
53. See id.
54. THOMPSON, supra note 8, at 155–56.
55. Id. at 171–72 (noting that labor migration disrupted African families causing women to “assume responsibilities [as] household heads [which had] previously [been] reserved to men”).
56. Id. at 164.
57. Id.
D. Apartheid Era

In 1948 the National Party came to power in South Africa’s parliamentary elections. That electoral victory signaled the dawn of a more strident segregation policy. The National Party was a right–wing party that had opposed South Africa’s involvement in World War II on the side of the Allies. Rather, they had urged South Africa’s wartime government to join the war on the side of Germany. Their rise to power in 1948 was the death knell for any future peaceful transition to majority rule. The legislation passed by the National Party parliament “extended the . . . laws of the segregationist era and tightened…the administration of those laws.” Through a series of prime ministers from 1948 until the early 1990’s, the National Party government continued a policy of legalized oppression and marginalization of black and colored South Africans. This policy came to be known as apartheid and touched the lives of all South Africans—regardless of race.

While such policies impacted all members of society, it invariably had the most negative impact on black and colored individuals and their children. Children were hit especially hard by apartheid. One commentator noted:

If there is a group in South Africa which has consistently had their rights denied it is our children and in particular black children. From conception the black child’s life is characterized by hunger and malnutrition, insecurity and trauma, instability, family breakdown and dislocation of communities, a lack of primary health care and educational opportunities; and the absence of adequate housing, electricity, running water and sanitation.

To understand the precarious position of black children during apartheid, it is helpful to look at four basic problem areas: mortality rates, poverty, quality of education and violence.

Mortality rates among black children were more than five times higher than among whites. By the time apartheid ended, twenty–three out of every one thousand white children died in their first year of life. For black children the story was quite different. In the first year of life, 140 out of every one thousand black children died. The most common causes of

58. MANDELA, supra note 1, at 110.
59. Id.
60. THOMPSON, supra note 8, at 189.
61. Id. at 187–220.
63. Id. at 3.
64. Id.
65. Id.
child death in the black and colored communities were “gastro–enteritis, measles and tuberculosis, which were caused in large measure by the poor socio–economic conditions under which these children had to live.”

In the black and colored communities, apartheid also left a legacy of hunger and disease associated with malnutrition. One commentator noted:

Approximately a third of black, coloured and Asian children below the age of 14 years are underweight and stunted for their age. In some areas, e.g. in parts of the Ciskei and Chatsworth in Durban, the situation is worse, (rising to 60 – 70% or more).

This level of poverty, deeply rooted in the black and colored communities, would have understandably left scars on these segments of society.

Apartheid also caused an educational crisis among the black and colored people of South Africa. The educational system reflected the deeply racist policies of apartheid. One commentator noted that by the time apartheid ended, for every one hundred black children entering the first grade only seventy–nine passed to the second grade. Only forty–nine percent passed to the seventh grade. For whites there was a stark contrast. Fully ninety–eight percent of all white children completed twelve years of education by the time apartheid ended. By the fall of apartheid there was also a substantial difference in the per capita spending on education for blacks and whites. South Africa spent R3,739.00 on education for whites and R930.00 on education for blacks. Not only are these figures disturbing, but they also have a long–term impact on the ability of blacks to increase their earning capacity and be successful in running a representative democracy.

Violence against children was not uncommon. “In 1987 . . . the International Commission of Jurists sent four Western European lawyers to South Africa.” In their report, they noted that “an undemocratic government has extended the executive power of the state so as to undermine the rule of law and destroy basic human rights . . . . We stress particularly the widespread use of torture and violence, even against children, which is habitually denied by the government and thus goes unpunished, though plainly illegal.” One can only speculate about the

66. Id. at 5.
67. Id.
69. Id. at 4.
70. Id.
71. Id. at 3.
72. Id.
73. THOMPSON, supra note 8, at 236.
74. Id.
long–term impact on a society of a government that chose to inflict such widespread violence upon its children. According to one commentator, “children may be socialized into vandalism or find themselves having to adopt violent measures as a matter of survival and, in the process, losing any sense of right and wrong. The impact on children’s minds and values of the physical violence that they witness and experience, not least at the hands of the police, is a matter of grave concern.”

One event that brings to light the tragic impact apartheid had on the black children of South Africa was the Soweto uprising and the events that led to it. It brought together the legal and social oppression black children experienced at the time with the sheer violence that was perpetrated on them by the government. In 1976, an uprising of school children began in the Soweto Township in response to the government’s policy that black secondary school children in urban areas should all be taught in the country’s two official languages: Afrikaans and English. In Soweto there were not enough teachers that spoke Afrikaans—so the English language was predominant. Yet, the education department decided to enforce the policy anyway and required that social studies and mathematics be taught in Afrikaans regardless of whether or not a sufficient number of teachers were available. At the same time the education department made that decision, the government abolished the final year of primary school for black students—reducing the number of years required for primary school completion from thirteen to twelve. The action resulted in a merger of senior primary school classes with junior secondary school classes. Overcrowding issues arose, and on June 16, 1976 a student protest erupted. Fifteen thousand school children gathered in Soweto to protest these policies and the impact those policies would have on their education. The students did not want “to learn and the teachers did not want to teach in the language of the oppressors.” The police confronted this group of school children and opened fire without warning. The children fought back with sticks and stones. Hundreds of children were injured, two white men were stoned to death and a black boy named Hector Pieterson lost his life

75. Id. at 201-02.
76. JOHN ALLEN, RABBLE–ROUSER FOR PEACE 156 (2006).
77. Id.
78. Id.
79. Id.
80. Id.
82. MANDELA, supra note 1, at 483.
83. Id.
84. Id.
85. Id.
86. Id.
from the bullet of a police officer.\textsuperscript{87} Hector Pieterson became one more symbol for the victimization of blacks by the white minority.\textsuperscript{88}

It was events like this that brought the attention of the world to South Africa and ultimately caused many members of the international community to push for economic sanctions against the government of South Africa.\textsuperscript{89} On February 11, 1990 Nelson Mandela was released from incarceration—the culmination of the efforts of many people.\textsuperscript{90} Shortly thereafter, discussions got underway that would eventually lead to an interim constitution and a full participatory democracy.\textsuperscript{91} In April 1994 a nationwide election was held and Mandela was elected as the first president of a fully democratic South Africa.\textsuperscript{92} Work was then begun on a new constitution, which was to follow closely the various provisions set out in the interim constitution.\textsuperscript{93}

While it seemed as if the democratic elections in South Africa had finally delivered the country from the evils of apartheid, it was the results of apartheid policies that South Africans in the immediate post–apartheid era would still have to deal with. The newly elected government would have to deal with a population wherein a large segment was poorly fed. A similarly large portion had poor health care. The population was frightened by violence that was often times state sponsored, and also the majority of South Africans were illiterate.

E. Post–Apartheid Era

Against this backdrop of abuse and neglect of South Africa’s children by the apartheid government, the democratically elected government of South Africa made significant commitments to the welfare of children. The commitment to change this socio–economic dislocation of children started with a constitution that contained a bill of rights expressly recognizing

\textsuperscript{87} Mandela, supra note 1, at 483.

\textsuperscript{88} Proof of this symbolism can be seen in the Hector Pieterson memorial just a short distance away from the site where he was killed. Included are a stone monument, photographs and a plaque in Hector’s honor. Next to this monument is the Hector Pieterson Museum, which is dedicated to the events of those days.

\textsuperscript{89} Allen, supra note 76, at 177–79.

\textsuperscript{90} Id. at 313-17 (noting that after Mandela’s release from imprisonment, Arch Bishop Desmond Tutu, quoting God’s promise of liberty to Moses, wrote the following to Anglicans in Cape Town: “The road ahead may be long and hazardous but at long last it seems that what so many have prayed and fasted for, sacrificed and died for, were imprisoned, banned and went into exile for [it]…seems more attainable than ever before.”).

\textsuperscript{91} Mandela, supra note 1, at 594. On December 20, 1991, the first formal negotiations occurred between the government, the African National Congress and other South African parties. Id. The Convention for a Democratic South Africa, known as CODESA, had as one of its goals the writing of a new constitution. Id. at 594–95.

\textsuperscript{92} Thompson, supra note 8, at 263–64.

\textsuperscript{93} Id. at 269.
political and social rights for children. In fact, South Africa’s Constitution was “the first in the world to make an express commitment to children’s socio-economic rights.” It included not only the classic civil and political rights contained in the United States Bill of Rights, but also substantive economic and social rights. These rights included inter alia—basic nutrition, shelter and basic health care services.

Despite this substantial legal commitment made to children, the reality for South African children was something less. In 2001—five years after the constitution was adopted—there were over nineteen million children in South Africa. At that time, “the most significant challenges facing children were poverty, child abuse and violence, HIV/AIDS, and a lack of access to services.” In the year 2000, many of South Africa’s children reported being denied access to basic education because they could not afford to pay school fees or purchase school uniforms. In the same year, over 1.2 million children of school age were not attending school. The reasons related mostly to poverty in their homes. Violence in schools was also a problem—especially for girls.

While the new Constitution and its Bill of Rights were designed to protect children from such social ills, the problem was that the economic realities of the country made it difficult to enforce those rights under law. For example, one “clause . . . gave children the right to security, rudimentary nutrition, and basic health services.” Yet, the government was ill equipped financially to ensure those services were provided.

98. Id. (Three out of every four children in South Africa live in Poverty, and thirty percent of the country’s total population experiencing food uncertainty.).
99. Id. In the year 2000 there were over 72,000 crimes committed against children; the most common type of crime was common and aggravated assault, and the second most common type of crime was sexual crimes—rape being the most prevalent. Id. at 5.
100. Id. at 4. The infant mortality rate due to HIV/AIDS continues to increase among South Africans under five years of age. See Id. at 5.
102. Id. at 5.
103. Id.
104. Id.
105. Id.
106. Thompson, supra note 8, at 257.
107. Briefing from Bianca Robertson – Community Law Centre, Univ. of the W. Cape to U.S. People to People Delegation (October 12, 2009) (noting that one of the key challenges in implementing the services required under the South African Children’s Act is
F. The Socio–Economic Impact of South African History

As one of the three currents leading to the passage of South Africa’s Children’s Act, the impact of socio–economic forces on the lives of South Africa’s children really is self–evident. The majority of children in this society found themselves in such difficult straights that—in a society striving to rejoin the world community—the problem could hardly be ignored. South Africa was a land that saw the earliest human beings emerge from the jungle. Yet, from the arrival of Europeans to the departure of the National Party from the political scene in South Africa, society was increasingly polarized and resources unevenly divided. It started with dislocations resulting from the settler’s need for quality land and—over a period of 340 years—resulted in the injustices of apartheid.

II. CHILDREN AND THE ROMAN-DUTCH HERITAGE IN SOUTH AFRICAN LAW

The legal system in South Africa is a direct reflection of the changing colonial rule that South Africans experienced. It is, in a very real sense, several different legal systems layered on top of each other to form a complete whole. The first layer was already present when Europeans arrived in South Africa. That is, the indigenous people already had their own form of conflict resolution and methods of fostering the success of children. Those forms of conflict resolution continued even after Europeans arrived with their systems of law. The continued struggle between these various systems has been a trademark of the South African legal system and has had a clear impact on the treatment of South African children.

In African pre–colonial societies, the head of the clan was often the one who dispensed justice and resolved conflict between disputing members. This form of individual justice would likely include disputes about care of children and possession of children if the parents were unable to care for them. Yet the resolution of these types of disputes did not focus so much on the interests of the child as an individual, but on the family as a whole. The overall care and welfare of children in these tribal communities belonged to the tribe as a whole. These traditions were generally oral traditions—as there was no particular need for a written standard protecting

that the need for services far outweighs the capacity of the state to respond financially) (on file with author).

108. READER’S DIGEST, supra note 9, at 24–25 (stating that although the word ‘chief’ often implies an autocratic ruler, this was seldom the case in Khoikhoi society. The Chief was assisted by a council of clan heads in dealing with matters such as interclan disputes and relations with other groups. Individual justice was normally dealt with at a gathering of all the males of a particular clan).

109. CHILD LAW IN SOUTH AFRICA 227 (Trynie Boezaart ed., 2009) [hereinafter CHILD LAW].

the welfare of children, because it was tended to by all members of the family or tribe.\footnote{111} This traditional system of resolving conflict and settling family matters continues even to this day. In South Africa, these traditional systems are known as “customary law.”\footnote{112} African customary law has been defined as “those rules of conduct which the persons living in a particular locality have come to recognize as governing them in their relationships between one another and between themselves and things.”\footnote{113} “Customary law derives from social practices that the community concerned accepts as obligatory.”\footnote{114} The European legal systems that were brought to South Africa were essentially layered on top of the customary law. The current South African Constitution specifically protects customary law and requires the courts to enforce customary law as long as it is not inconsistent with the Constitution.\footnote{115}

As the Dutch started to form colonies on the cape, they brought with them the Roman–Dutch legal system.\footnote{116} The Dutch legal system traces its roots to the old Roman legal system.\footnote{117} At the time the Dutch arrived on the cape, that legal system viewed the father as the primary protector of a child’s welfare.\footnote{118} Thus, a father’s interests in and rights to a child were superior to the mother’s rights.\footnote{119} The application of this principle was usually seen in the context of custody cases in divorce.\footnote{120} The British also brought with them their common law system.\footnote{121} Under the English system that came with the British in 1795, the Roman–Dutch law remained the basic common law in South Africa.\footnote{122} Regarding issues of child welfare, the position of the English common law was similar to the Roman–Dutch system. That is, the father’s rights were superior to the rights of the

\footnote{111}{ See BENNETT, supra note 110 at 2 (noting that customary law was unwritten and uncodified). See also T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 61–62 (1995) (noting that in some regions of Africa, attempts were made by colonial governments to codify customary law).}


\footnote{113}{ Id. (citing A.A. KOLAJO, CUSTOMARY LAW IN NIGERIA THROUGH THE CASES 1 (2000)).}

\footnote{114}{ BENNETT, supra note 110, at 1.}

\footnote{115}{ S. AFR. CONST. ch. 12, 1996.}


\footnote{117}{ Id. at 47.}

\footnote{118}{ Id. at 56–57.}

\footnote{119}{ Id.}

\footnote{120}{ Hans Visser, Some Ideas on the “Best Interests of a Child” Principle in the Context of Public Schooling, J. CONTEMP. ROMAN DUTCH L. 459 (2007).}

\footnote{121}{ Kruger, supra note 116, at 56.}

\footnote{122}{ Id.}
mother. Children were viewed as the property of the father, and the best interests of the child were irrelevant to any discussion custody cases. In deferring to a father’s superior position in raising children, one court noted that a “father knows far better as a rule what is good for his children than a Court of Justice.” According to one commentator, the 1892 case of Van Rooyen v Wemer accurately summarized the Roman–Dutch rule prevailing in South Africa:

Firstly, as to the father, he is the natural guardian of his legitimate children until they attain majority. During his lifetime he alone may appoint tutors to take his place after his death, during his children’s minority. He alone is entitled to their custody, has control over their education, and can consent to their marriage. On the other hand he is bound to maintain them until they can maintain themselves. He no longer enjoys a life interest in any part of their property, but where they have means of their own, derived either from their own earnings, or otherwise, he can recoup himself for his expenses of maintenance out of such means. He has the right to administer their property, but he may lose this right by allowing them to live apart from him, and openly to exercise some trade or calling. Until they have thus been virtually emancipated, or until they become majors, either by marriage, or by attaining the age of twenty–one years, he has the management of their property, except such property as has been left to them by others and placed under a different administration.

Near the end of British colonial rule, however, the prevailing view of children as the property of a father started to change. Several South African appellate court cases demonstrate this shift. In the 1907 case of Cronje v Cronje, the custody of three children was at issue. The children were ages fourteen, ten, and eight years. The court found that the mother was living in an adulterous relationship, but also that the father was not mentally healthy and likely unable to care for the children. The court opined that “[t]he father, as the natural guardian of the children, is by law entitled to their custody; but that, of course, is subject to any order the Court may make.” It went on to note that “[i]n all cases the main consideration for

125. In re Agar–Ellis, [1883] Ch.D. 317 at 338 (Eng.).
127. (1892) 9 SC 425.
128. Id. at 428.
129. See Cronje v. Cronje 1907 TS 871 (S. Afr.).
130. Id. at 871.
131. Id.
132. Id. at 873–74.
133. Id. at 872.
the court in making an order with regard to the custody of the children is, what is best in the interests of the children themselves.” The court noted that the best interest of the child is the main consideration in South African law as well as in English law. Another case arising near the end of British rule, *Tabb v Tabb*, involved a post–divorce custody matter. The court started out by recognizing the principle that “[b]y our law a father is the natural guardian of his children, and therefore *prima facie* entitled to their custody.” Yet, in contrast to this long held principle, the court went on to indicate that:

No doubt it is as a general rule best that children of tender years should be left under the care of their mother; because her love induces her to give that personal attention and supervision to their physical and moral welfare which a mother can most effectively supply. And therefore courts often give the custody of children to mothers who have been found guilty of matrimonial offences, provided that their character is not such as to make it prejudicial to the moral welfare of the children that they should remain with them.

In the end, the court in *Tabb* did not affirm the trial court’s awarding of child custody to the mother because her employment prevented her from being fully attentive to the child’s needs. Yet it is a clear indication that the legal preference for the father was changing—to one in which children of “tender years” were more likely to end up living with the mother. Finally, *Kramarski v Kramarski*, was a 1906 case involving the custody of three children ages seven, six, and three. The wife left her husband, taking the three children with her. She went to live with her three brothers. The husband filed suit against the brothers and his wife alleging that he had been wrongfully prevented from having access to his wife and his children. In discussing custody of the children, the appellate court first noted that “[p]rima facie a husband is always entitled to the care and custody of his children, even though the marriage was celebrated out of this country.” However, the court went on to state as follows:

134. *Id.*
136. 1909 TS 1033 (S. Afr.).
137. *Id.* at 1034.
138. *Id.*
139. *Id.*
140. *Id.* at 1036.
141. 1906 TS 937 (S. Afr.).
142. *Id.* at 937.
143. *Id.* at 938–39.
144. *Id.*
145. *Id.* at 939.
146. *Id.* at 941.
In the present case the children are of tender years—there is no question of that. *Prima facie*, therefore, as the Court has more than once laid down, it is better for children of tender years to be under the care of the mother, especially where the mother has a home, as she has in this case with her brothers, and the father has no fixed abode. 147

All three of these cases signaled a shift in the South African legal system away from a father–oriented approach. However, it would not be until after independence that a transformation to a “best interests” standard would be complete.

Despite the changes signaled by *Cronje, Tabb*, and *Kramarski*, the Roman-Dutch principle that fathers had superior rights when it came to children remained intact after independence. In the 1939 case of *Calitz v Calitz*, the appellate court of South Africa expressed the current position in South Africa as follows:

> Although the *patria potestas*149 of the Roman law was not recognized in the Roman–Dutch law and the parental power belongs to the mother as well as the father, there is no doubt that under our law, at any rate as it exists today in the Union, the rights of the father are superior to those of the mother.150

It was not until *Fletcher v Fletcher*151 that a definite departure can be seen from the Roman–Dutch law.152 The *Fletcher* case was a divorce matter pled upon the basis of adultery by the wife.153 There were two children, ages seven and five.154 The trial court had awarded custody of the children to the father.155 In affirming the trial court’s award of custody to the father, the

147. Kramarski, 1906 TS at 941–42.
148. 1939 AD 56.
149. *Patria potestas* is a term from the Roman law meaning “parental authority.” BLACK’S LAW DICTIONARY 1014 (5th ed. 1979) (stating that this term “denotes the aggregate of those peculiar powers and rights which, by the civil law of Rome, belonged to the head of a family in respect to his wife, children (natural or adopted), and any remote descendants who sprang from him through males only.”).
150. See *Calitz*, 1939 AD at 61. (Despite this overarching principal favoring fathers, the *Calitz* court also recognized that the principles favoring the father over the mother could be overcome by proof that the physical or moral well–being of the child would be endangered if custody were to be given to the father.).
151. 1948 (1) SA 130 (A) (S. Afr.) [hereinafter Fletcher].
152. See Sornarajah, *supra* note 123, at 136 (noting that the case of *Fletcher v. Fletcher* “marks a definite departure from the Roman–Dutch law”).
153. Fletcher, *supra* note 151, at 141.
154. Id.
155. Id. at 142–43.
appellate court finally recognized the rule that in custody matters, “the children’s interests must undoubtedly be the main consideration.”\[^{156}\]

In this family court realm, the apartheid government of South Africa continued the transformation of the standard governing custody of children. In 1953, the Matrimonial Affairs Act was enacted.\[^{157}\] That law stated, *inter alia*,

Any provincial or local division of the Supreme Court or any judge thereof may –

(a) on the application of either parent of a minor in proceedings for divorce or judicial separation in which an order for divorce or judicial separation is granted; or

(b) on the application of either parent of a minor whose parents are divorced or are living apart, if it is proved that it would be in the interests of the minor to do so, grant to either parent the sole guardianship . . . or sole custody of the minor . . . .\[^{158}\]

This act clearly resolved any further dispute about the appropriate standard to be applied in custody cases in the context of a divorce. Thus, the South African parliament put an end to the Roman–Dutch standard of paternal preference and required courts to look at the child’s interests.

As the apartheid era came to an end, a new Constitution was written to guide the affairs of the democratically elected government.\[^{159}\] The Constitution contained a bill of rights modeled after various other constitutions from around the world. In a very strong statement on behalf of children, the people of South Africa included in their Constitution a bill of rights that contained specific provisions for the protection of children and advancement of their rights.\[^{160}\] Those specific Constitutional provisions on behalf of children have been “hailed internationally as a good example of a Constitution providing for the protection and advancement of children’s rights.”\[^{161}\]

As a general principle, the Constitution guaranteed that “[a] child’s best interests are of paramount importance in every matter concerning the child.”\[^{162}\] But the Constitution did not stop there. A complete list of substantive rights afforded to South African children was also

\[^{156}\] *Id.* at 134. See also Sornarajah, *supra* note 123, at 136 (noting that “until 1948, the year of the decision in Fletcher v. Fletcher, it could not with certainty be said whether there was one rule governing all custody problems”).

\[^{157}\] See *Parental Custody*, *supra* note 123, at 137.

\[^{158}\] *Id.* (quoting §5(1) of the Matrimonial Affairs Act 1953).

\[^{159}\] See generally *S. Afr. Const.*, 1996.

\[^{160}\] See *infra* notes 163-167 and accompanying text.

\[^{161}\] *Child Law*, *supra* note 109, at 265.

enumerated. Other rights were also provided to children by implication. That is, all South Africans were guaranteed the right to “a basic education.” They were also guaranteed the right to have access to health care services and sufficient food and water. By implication, children are protected under those provisions by virtue of their citizenship in South Africa.

163. *Id.* Under the South African Constitution of 1996, every child has the right: (a) To a name and a nationality from birth; (b) To family care or parental care, or to appropriate alternative care when removed from the family environment; (c) To basic nutrition, shelter, basic health care services and social services; (d) To be protected from maltreatment, neglect abuse or degradation; (e) To be protected from exploitative labour practices; (f) Not to be required or permitted to perform work or provide services that – (i) Are inappropriate for a person of that child’s age; or (ii) Place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development; (g) Not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be – (i) kept separately detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child’s age; (h) To have a legal practitioner assigned to the child by the state, and a state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and (i) Not to be used directly in armed conflict, and to be protected in times of armed conflict.

*Id.* §§ 28(1)(a) –(i).


165. *Id.* § 27(1)(a).

166. *Id.* § 27(1)(b).

167. The basis for including such substantive rights in the South African Constitution can be seen from some of the legislative history of the document:

The struggle for democracy in South Africa was not limited to claims for political rights. It included claims for social and economic rights such as land, housing and education. As such, social and economic rights were always recognized as human rights. To deny the acceptance of these rights as full human rights in the final constitution means that the text will not reflect the aspirations and values of the majority of the population.

Thus, the legal system in South Africa is a composite of customary law, Roman–Dutch law, and finally British common law. As one commentator put it:

[w]hether we cherish the idea or not, during its prolonged sojourn in South Africa the old “two layer cake” has collected a third layer, English law. As Lord Tomlin put it in the otherwise somewhat suspect case of *Pearl Assurance Company v. Union Government* [[1934] AC 570 (PC) at 579], “it would be idle to assert that development of the Roman-Dutch law in the territories now constituting the Union has not been affected appreciably by the English law.”¹⁶⁸

This layered system of law—developed over centuries of colonialism—ultimately arrived at the conclusion that the best interest of the child should be the touchstone in dealing with child related issues. It should be noted that the legal system was dominated by white judges,¹⁶⁹ thus the focus of the jurisprudence undoubtedly had been built in the midst of some inevitable biases.¹⁷⁰ Yet, the mechanics of addressing a child’s best interests had arrived.

III. INTERNATIONAL EFFORTS AFFECTING THE CHILDREN OF SOUTH AFRICA

The international community has made several attempts to advance the interests of children and protect them from various forms of abuse and neglect. These efforts occur not only in the form of conventions, protocols, and charters on behalf of children, but also in the form of agreements that simply advance the protections for human rights in general. While a discussion of all such agreements is beyond the scope of this article, there are a few specific efforts that are noteworthy in the development of children’s law in South Africa.

From the time of independence from Great Britain in 1910 to the democratic elections in 1991, the relationship between South Africa and the international community has certainly ebbed and flowed. Jan Smuts, an author and South African statesman during the first half of the twentieth century, was instrumental in the creation of both the League of Nations and

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¹⁶⁹. Thompson, *supra* note 8, at 265.

¹⁷⁰. Mandela, *supra* note 1, at 149. Nelson Mandela relates the story of appearing in court on behalf of the accused in a criminal case and being asked by the magistrate, “where is your certificate?” The “certificate” being no more than the equivalent of a law school diploma that no attorney ever carries to court. Because he did not have the certificate the magistrate “refused to hear the case, even going so far as to ask a court officer to evict me.” Mandela noted that this was clearly a violation of court practice and he attributed it to his color. *Id.* at 150.
the United Nations. He wrote the Preamble to the United Nations Charter and is the only signatory of both the League of Nations and United Nations Charters. South Africa was one of the original fifty-one founding members of the United Nations—which came into existence on October 24, 1945. Since its inception, membership in the organization has grown to 192 States. Despite its positive participation in formation of the international organization, in 1946 the government of South Africa—led by then–President Jan Smuts—was condemned by a large majority in the United Nations General Assembly for its racist policies. While he had long been an advocate of South Africa’s racial segregation, as his presidential tenure came to an end this international pressure caused Smuts to start advocating for more liberal racial laws. Yet all of those efforts were too little too late—as the National Party came to power in 1948 and started to construct apartheid.

By 1974 pressure from member states in the United Nations reached a point at which apartheid could no longer be ignored. The United Nations General Assembly decided on November 12, 1974 to suspend South Africa from participating in its work—due to international opposition to the policy of apartheid. During the late 1970s and early 1980s United Nations Security Council sanctions were instituted against South Africa, and it was barred from officially participating in almost all United Nations related bodies. Financial support was also given by the United Nations to national liberation movements. Notably, both the Pan African Congress and Africa National Congress obtained observer Missions at the United Nations with United Nations financial support.

172. Id. at 5.
174. Id.
175. JAN SMUTS, supra note 171, at 27.
176. THOMPSON, supra note 8, at 181. Near the end of his tenure as president, Smuts noted that “‘segregation has fallen on evil days.’” Id. “[T]he [Smuts] government [also] appointed numerous committees and commissions, staffed by reform-minded white people, to investigate the racial problems of the country and to [make] plan[s] for the future.” Id. One such report exposed the problems of migrant labor, noting that it was “‘morally, socially, and economically wrong’ and looked forward to ‘its ultimate disappearance.’” Id.
177. Permanent Mission, supra note 173.
178. THOMPSON, supra note 8, at 214. From 1952 onward, the General Assembly of the United Nations passed annual resolutions condemning apartheid. Id. By 1967, the General Assembly had created both a Special Committee on Apartheid and a Unit on Apartheid. Id.
179. Permanent Mission, supra note 173.
180. Id.
181. Id.
182. Id.
democratic elections in South Africa in April 1994 that the way was paved for complete normalization of South Africa’s relations with the United Nations and the reintegration of that country with that world organization.\textsuperscript{183} Since then, South Africa has participated actively in all aspects of the work of the United Nations.\textsuperscript{184}

A. United Nations Declaration of the Rights of the Child

One of the first organized international efforts to protect children in the Twentieth Century occurred in the League of Nations in 1924.\textsuperscript{185} A document known as the Declaration of the Rights of the Child—more commonly referred to as the Declaration of Geneva—was adopted by the Save the Children Union in Geneva, Switzerland on February 23, 1923.\textsuperscript{186} Drafted by Eglantyne Jebb, it was brought before the General Assembly of the League of Nations in 1924.\textsuperscript{187} That body approved it in November 1924 and named it the World Child Welfare Charter.\textsuperscript{188}

The World Child Welfare Charter consisted of five very basic principles to protect the children of the world community:

1. The child must be given the means requisite for its normal development, both materially and spiritually.

2. The child that is hungry must be fed, the child that is sick must be nursed, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succored.

3. The child must be the first to receive relief in times of distress.

4. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation.

\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{187} Id.
5. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.\textsuperscript{189}

While these principles are very basic needs in the life of a child, they are important needs that can be traced through future international agreements and into the South African Constitution of 1996. That is, basic food, health care, and shelter are mandated by both documents. Promoting a child’s material and spiritual well-being—as well as protecting the child from exploitation—are also part of both treatises.

After World War II, several non-governmental organizations lobbied the United Nations to endorse the World Child Welfare Charter.\textsuperscript{190} Thus, on November 20, 1959 the United Nations General Assembly asserted “that the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”\textsuperscript{191} Pursuant to this assertion, that organization adopted a standard of ten principles for the protection of children which were based upon the World Child Welfare Charter.\textsuperscript{192} Those ten principles were as follows:

1. The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.

2. The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

3. The child shall be entitled from his birth to a name and a nationality.

4. The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including


\textsuperscript{192} Declaration of the Rights of the Child, supra note 191.
adequate pre-natal and post-natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services.

5. The child who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his particular condition.

6. The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

7. The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society.

The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.

The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.

8. The child shall in all circumstances be among the first to receive protection and relief.

9. The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.

10. The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that his
energy and talents should be devoted to the service of his fellow men.\textsuperscript{193}

This document became known as the United Nations Declaration of the Rights of the Child (DRC).\textsuperscript{194} It is the forerunner of the United Nations Convention on the Rights of the Child. The World Child Welfare Charter and the DRC form the basis for the advancements in children’s rights worldwide. As was the case with the World Child Welfare Charter, when reviewing the South African constitution of 1996, some of the substantive rights in the DRC can be clearly identified.\textsuperscript{195} In fact, some of the rights afforded children under the DRC can be identified in the South African Children’s Act.\textsuperscript{196}


On November 20, 1989 the United Nations General Assembly adopted the Convention on the Rights of the Child (CRC).\textsuperscript{197} It came into force on September 2, 1990 after it was ratified by the requisite number of nations.\textsuperscript{198} The CRC sets out the specific obligations of signatory nations in protecting the civil, political, economic and social rights of children. Under the CRC, a child is generally defined as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”\textsuperscript{199} It recognizes that every child has some very basic rights.

\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id. (stating that a child “shall be entitled from his birth to a name and a nationality.”). The South African Constitution indicates that each child has the right to “a name and a nationality from birth.” S. AFR. CONST. ch. 2, § 28(1)(a), 1996. The South African Constitution affords children the right to “basic nutrition, shelter, basic health care services and social services.” Id. § 28(1)(c). Declaration of the Rights of the Child, supra note 191 (stating that a child “shall have the right to adequate nutrition, housing, recreation and medical services.”).
\textsuperscript{196} See Children’s Act § 38 of 2005 [hereinafter Children’s Act] (stating that one objects of the Children’s Act is to promote “the sound physical, psychological, intellectual, emotional and social development of children.”). Declaration of the Rights of the Child, supra note 191 (mandating that a child be enabled “to develop physically, mentally, morally, spiritually and socially.”).
\textsuperscript{199} Id. at art. 1.
such as the right to life and the right to be raised by his or her parents within a given social or cultural grouping. It also recognizes that every child has the right to a relationship with both parents and that parents have the right to exercise their parental responsibilities. The CRC recognizes that children have the right to be free from abuse and neglect and to have their opinions heard and acted upon when appropriate. Legal representation must also be provided to children in any judicial dispute regarding a restriction on the child’s liberty. The convention also forbids capital punishment for children. The CRC protects these rights by mandating that signatory states:

[R]espect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Of clear relevance to South Africa is the fact that neither race nor color could be used as a basis to deny children the very basic rights afforded to every human being. The CRC also mandated that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

The world community seemed to be communicating that no longer would children be viewed as mere chattel to be treated like any other piece of property. Consideration of the best interests of the child required that a child be looked at as a human being who had his or her own interests.

As of January 2010, 194 countries have ratified it—including all member states of the United Nations except Somalia and the United States. Further, Somalia’s cabinet ministers have indicated their intent to ratify the convention in the near future. The United Nations Committee on the Rights of the Child is the organization within the United Nations that monitors compliance with the CRC. Within two years of initially

200. Id. at art. 6(1).
201. Id. at art. 7(1).
202. Id. at art. 9.
203. Id. at art. 19(1).
205. Id. at art. 37(d).
206. Id. at art. 37(a).
207. Id. at art. 2(1).
208. Id. at art. 3(1).
209. See id.
211. Convention on the Rights of the Child, supra note 197, at art. 43(1).
ratifying the CRC and thereafter one time every five years, the signatory nations are to submit to the Committee a report on “the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights.” 212 Every two years, the Committee is to provide to the General Assembly of the United Nations a report on its activities. 213

Two additional protocols were adopted on May 25, 2000. 214 The first restricted the ability of signatory states to involve children in military conflicts. 215 The second prohibited the sale of children, child prostitution, and child pornography. 216 Both protocols have been ratified by more than 120 states. 217 With the finalization of the Convention on the Rights of the Child in 1989 came enthusiasm for reform on the international level as well on the national level of various countries. 218 Children had become independent subjects entitled to rights—not just objects of parental rights and protection. 219

South Africa ratified the CRC on June 16, 1995, before the date that its new Constitution was ratified. 220 Under the new Constitution, treaties are to be viewed as legally binding once ratified. 221 Thus, by signing on to this accord, the South African government was undertaking a significant responsibility to its children. Yet, by following up the ratification of the CRC with the implementation of a Constitution that reiterated the significance of children’s rights, South Africa demonstrated that it was among the world’s leaders in advancing the case of children. 222 As can be seen with prior international declarations, many provisions of the CRC appear in the South African Constitution and the South African Children’s

212. Id. at art. 44(1).
213. Id. at art. 44(5).
218. REFORMING CHILD LAW IN SOUTH AFRICA, supra note 95, at 3.
219. Id.
222. One important aspect of effectively constitutionalizing children’s rights is that those rights are justiciable, i.e., if a government fails to ensure the safeguard of those rights, those deprived of their rights can approach the courts for relief. REFORMING CHILD LAW IN SOUTH AFRICA, supra note 95, at 4. The constitutions of Albania, Ecuador, Ethiopia, Gambia, Ghana, Moldova, Namibia, Romania, Poland, Slovenia, South Africa, Uganda and Thailand all provide mechanisms for enforcing children’s rights, but only a few of those provide that those rights are immediately justiciable. Id. South Africa’s 1996 constitution provides for just such a right. Id.
Act. In assessing South Africa’s success in advancing the substantive rights of its children through legislation, one commentator noted that “South Africa continues to lead much of the rest of the world in legislative progress and protective laws that safeguard the well-being of children.”

C. World Children’s Summit of 1990

On September 29-30, 1990 a World Summit for Children was held at the United Nations in New York. It was the largest gathering of world leaders in history. It included seventy-one heads of state and government and eighty-eight other senior officials—mostly at the ministerial level.

The stated purpose of the Summit was to “undertake a joint commitment and to make an urgent universal appeal to give every child a better future.” South Africa, however, was not represented at that summit.

It continued to be excluded from the operations of the United Nations because the worldwide struggle against apartheid was continuing.

Over the two day summit, the World Declaration on the Survival, Protection and Development of Children was adopted. The document recognized that several challenges faced the children of the world. It expressed that “[e]ach day, millions of children suffer from the scourges of poverty and economic crisis—from hunger and homelessness, from epidemics and illiteracy, from degradation of the environment.” It also noted that “[e]ach day, 40,000 children die from malnutrition and disease, including acquired immunodeficiency syndrome (AIDS), from the lack of clean water and inadequate sanitation and from the effects of the drug problem.” And in a clear reference to the problems of South Africa, the Declaration noted:

Each day, countless children around the world are exposed to the dangers that hamper their growth and development. They suffer immensely as casualties of war and violence; as victims of racial discrimination, apartheid, aggression, foreign occupation and annexation; as refugees and

224. REFORMING CHILD LAW IN SOUTH AFRICA, supra note 95, at 10.
226. Id.
228. Id.
229. Id.
231. Id. § 5.
232. Id. § 6.
displaced children, forced to abandon their homes and their roots; as disabled; or as victims of neglect, cruelty and exploitation.\textsuperscript{233}

These were the challenges facing the world’s children—which the world’s political leaders needed to meet. South Africa’s apartheid system was specifically targeted as one of those challenges.

In its effort to embrace past efforts to help children, the Summit specifically recognized the positive impact the Convention on the Rights of the Child had on children.\textsuperscript{234} It noted that the CRC “provides a new opportunity to make respect for children’s rights and welfare truly universal.”\textsuperscript{235} It recognized that improvements in the international climate—such as the movement that created the CRC—could significantly improve the plight of children.\textsuperscript{236} The opportunity to help children was further seized upon by the Summit when it adopted a Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children. The Plan of Action called for the various signatory nations to \textit{inter alia} report on their progress in implementing the Plan of Action.

Despite the fact that South Africa did not participate in the Summit, its new democratically elected government picked up the standard of the Plan of Action. Efforts were made by South Africa to bring itself into compliance with the goals set out at the Summit. To that end, in 2001 South Africa prepared an End–Decade Report on Children to report on its progress in complying with the goals of the Plan of Action. Clearly, the post–apartheid government was trying to rehabilitate its reputation and improve the plight of its children.


In 1990 the Organization of African Unity (OAU) adopted the African Charter on the Rights and Welfare of the Child.\textsuperscript{237} Called the “African Children’s Charter,” it required ratification of at least fifteen of the organization’s members before it could enter into force.\textsuperscript{238} Not until November 29, 1999 did the requisite number of member states approve its terms.\textsuperscript{239} South Africa ratified the document on January 7, 2000.\textsuperscript{240} The

\begin{itemize}
\item \textsuperscript{233} Id. § 4. (emphasis added).
\item \textsuperscript{234} Id. § 8.
\item \textsuperscript{235} Id.
\item \textsuperscript{236} \textit{World Declaration of 1990}, supra note 227, § 9.
\item \textsuperscript{239} \textit{CHILD LAW}, supra note 109, at 331.
\end{itemize}
three anchoring principles of the African Children’s Charter are “the best interests of the child, the principle of non–discrimination, and the primacy of the Charter over harmful cultural practices and customs.”

The African Children’s Charter notes that in all actions concerning children, the best interests of the child “shall be the primary consideration.” Under the Charter, children are entitled to equal enjoyment of the rights guaranteed by the Charter regardless of who they are or who their parents are. Some of the grounds on which discrimination is outlawed include fortune, birth, or other status of the child, parent, or guardian. Demonstrating the desire by participating nations to outlaw certain customary practices deemed harmful to children, the Charter outlaws customs that are prejudicial to the health or life of the child and discriminatory to the child based on sex or other status. Yet the most relevant provision to South Africa at the time it was drafted was the reference to the assistance to be provided to children living under apartheid:

States parties shall undertake to provide whenever possible, material assistance to such children and to direct their efforts towards elimination of all forms of discrimination and Apartheid on the African continent.

As with the World Declaration that came out of the World Children’s Summit, the OAU’s African Charter on the Rights and Welfare of the Child was specifically targeting apartheid as harmful to the development of children.

E. Children’s Charter of South Africa

An International Summit on the Rights of Children in South Africa was held on May 27 – June 1, 1992 in Cape Town, South Africa. It was held as a part of the International Summit on the Rights of Children in South Africa held later in June of that same year. The Summit brought together over 200 children from around South Africa. They represented various

240. Id. at 348.
241. Id. at 336.
243. Id. at art. 3.
244. Id.
245. Id. at art. 21(1).
246. Id. at art. 26(3) (emphasis added).
249. Id.
races, classes, genders, and disabilities.\footnote{Id.} The discussion focused on the various problems they were facing as children in South Africa.\footnote{Id.} They spoke about the fact that apartheid was still affecting them and that children were not being treated with respect and dignity in South Africa.\footnote{Id.} This Summit occurred after the release of Nelson Mandela—but before a democratically elected government took office. With that transitional period as a background, the Summit noted the following:

It is [a]cknowledg[ed] that, at the present time, children have not been placed on the agenda of any political party, or the existing government or within the CODESA negotiations and are not given the attention that they deserve.\footnote{Id.}

From this Summit came a framework for children’s rights in South Africa. Known as the Children’s Charter of South Africa, the framework asserted that “all children are created equal and are entitled to basic human rights and freedoms and that all children deserve respect and special care and protection as they develop and grow.”\footnote{Children’s Charter of South Africa, supra note 247, at pmbl.} Yet, the Children’s Charter also noted that “within South Africa, children have not been treated with respect and dignity, but as a direct result of apartheid have been subjected to discrimination, violence, and racism that has destroyed families and communities and has disrupted education and social relationships.”\footnote{Id.}

Despite this bleak assessment by her own children—and based partly upon its commitment to the international accords noted prior—South Africa set out to transform international principals into concrete domestic laws. As referenced above, South Africa’s Constitution provides an extensive list of fundamental rights that are guaranteed to all of its citizens—including children.\footnote{See supra notes 162–67 and accompanying text.}

However, it was not until 2006, with enactment of the Children’s Act of 2005, that South Africa fully realized the goals set out in the CRC.

F. The Impact of International Agreements

The impact of international agreements on the development of the South African Constitution of 1996 and the South African Children’s Act cannot be overemphasized. The rights afforded children in both documents mirror the rights enumerated by the international agreements that preceded them. More obviously, the South African Children’s Act has as one of its specific
objectives to “give effect to the Republic’s obligations concerning the well–
being of children in terms of international instruments binding on the
Republic.”\textsuperscript{257} As one of the currents that led to adoption of the Children’s
Act, the force of international agreements was specifically enumerated by
the South African Legislature in the Act.\textsuperscript{258}

IV. THE SOUTH AFRICAN CHILDREN’S ACT

In the United States, the importance and relevance of a given piece of
legislation to our society can often be picked up from the legislative history
of that legislation. The goals of proponents and concerns of opponents are
often revealed in the debates that occur and the reports that are prepared by
drafting committees. South Africa is no different. In that respect, the South
Africa Law Reform Commission (SALRC) is an important starting point.
The SALRC was established by the South African Law Reform Commission Act 19 of 1973.\textsuperscript{259} The purpose of the SALRC is:

\begin{quote}
“[t]o do research with reference to all branches of the law of the Republic
and to study and investigate all such branches in order to make
recommendations for the development, improvement, modernisation or
reform thereof . . . . [i]n short, the Commission is an advisory body whose
aim is the renewal and improvement of the law of South Africa on a
continuous basis.”\textsuperscript{260}
\end{quote}

In 1997, the South African Law Reform Commission was asked to
investigate and review South Africa’s Child Care Act of 1983.\textsuperscript{261} The functioning and principles underlying that Act had been the subject of
debate among practitioners, social workers, and child and youth care

\textsuperscript{257}. Children’s Act, supra note 196, § 2(c).
\textsuperscript{258}. \textit{Id}. (identifying the impact that some of the international agreements discussed
above have had on the formation of South Africa’s policy toward children by noting:

the need to extend particular care to the child has been stated in
the Geneva Declaration on the Rights of the Child, in the United
Nations Declaration on the Rights of the Child, in the Convention
on the Rights of the Child and in the African Charter on the Rights
and Welfare of the Child.

(S. Afr.).
\textsuperscript{260}. \textit{Id}.
[hereinafter SALRC Report]. The Child Care Act of 1983 can be viewed as a
forerunner of the Children’s Act. However, the Child Care Act of 1983 was far less
comprehensive and covered far fewer areas of child related issues. \textit{Id} at 29. Thus, in a
sense, the Children’s Act is not simply a revision of prior law, but a departure from it.
workers since it came into operation in 1987. The SALRC was asked to review that Act and make recommendations to the Minister for Social Development for reform of this law. From the beginning of the process, however, the Commission viewed its mandate as broader than simply reviewing the Child Care Act of 1983. Socio–economic forces in South Africa had resulted in a desire by the people for greater protection of substantive rights. These socio–economic forces had been building since the first Europeans arrived on the Cape. International protocols and conventions, which were adopted by South Africa, encouraged and indeed mandated such protections on behalf of children. The legal system in South Africa as a whole had arrived at a place in its historical development wherein the best interest of the child was the guiding principle. These three currents started to converge now that apartheid had ended. The SALRC undertook its review in that environment. The Commission viewed its mandate as one that included a review of all statutory, customary, common, and religious laws affecting children.

The process of review included the publication of an issue paper in May 1998. That paper was followed by a series of research papers on specific areas such as the parent–child relationship, children living with HIV/AIDS, children living on the street, children in residential care, and child protection. In December 2001 a lengthy discussion paper was issued by the SALRC outlining the Commission’s preliminary findings and recommendations. After further deliberations and revisions, in 2002, the SALRC issued a final report on its review of the Child Care Act of 1983.

One of the most basic issues to address was who would be covered by the new Children’s Act, i.e., what was the definition of a child? In a country as diverse and culturally rich as South Africa, the question was not necessarily easy. As it analyzed this issue, the SALRC reviewed the test of childhood under various international protocols and under the laws of various other countries. They also reviewed the various standards that existed within South Africa itself. In the end, the recommendation made by SALRC and the one adopted in the Children’s Act was consistent with the international trend, i.e., a child is defined as a person under the age of eighteen.

263. SALRC Report, supra note 261, at 1.
264. Id. at 3.
265. Id.
266. Id. at 1.
267. Id.
268. SALRC Report, supra note 261, at 2.
269. Id.
271. Id.
272. Id. at 53–54.
It was to benefit this group of South Africans that in June 2006 President Thabo Mbeki signed into law Act Number 38 of 2005—the South African Children’s Act. It was the culmination of many years of work by South Africans committed to the concept that protecting children was essential to the success of their republic. South African children were to be treated as individuals with rights of their own rather than simply relying on parents for protection. As one South African judge noted:

> Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his parents, umbilically destined to sink or swim with them.

To that end, the Act was a very comprehensive piece of legislation. It contained twenty–two chapters and addressed, in one act, custodial rights in family court situations, child protection, termination of parental rights, adoption, kidnapping, trafficking of children, and surrogacy.

The purposes of the Act were very clearly delineated. According to its terms, the Act was designed with the following goals in mind:

(a) to promote the preservation and strengthening of families;
(b) to give effect to the following constitutional rights of children, namely-
   (i) family care or parental care or appropriate alternative care when removed from the family environment;
   (ii) social services;
   (iii) protection from maltreatment, neglect, abuse or degradation; and
   (iv) that the best interests of a child are of paramount importance in every matter concerning the child;
(c) to give effect to the Republic’s obligations concerning the well-being of children in terms of international instruments binding on the Republic;
(d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;
(e) to strengthen and develop community structures which can assist in providing care and protection for children;

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273. Children’s Act 38 of 2005 (S. Afr.).
275. Children’s Act, supra note 196, at ch. 3.
276. Id. at chs. 7, 9.
277. Id. at ch. 3 § (28).
278. Id. at chs. 15, 16.
279. Id. at ch. 17.
280. Children’s Act, supra note 196, at ch. 18.
281. Id. at ch. 19.
(f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;

(g) to provide care and protection to children who are in need of care and protection;

(h) to recognize the special needs that children with disabilities may have;

and

(i) generally, to promote the protection, development and well-being of children.\(^{282}\)

These goals were designed by the SALRC because the Child Care Act of 1983 did not contain such goals and a need for them existed.\(^{283}\) That is, such a list was needed to guide decision-makers in implementing the provisions of the new Act.\(^{284}\) Such guidance would also be needed by decision-makers when determining how they should allocate scarce social resources and services to the children who are most at risk and how they can ensure that the needs of the most vulnerable children are met.\(^{285}\) The SALRC also opined that such a clearly formulated list of goals was needed because of the recent rise in the number of reported cases of child abuse and neglect as well as the crisis faced by South Africa with the HIV/AIDS pandemic.\(^{286}\)

After setting forth these goals for the Act, the SALRC recommended—and the legislature adopted—a separate chapter devoted exclusively to outlining the general principles to be used as a guide when interpreting the Act. The prefatory comments to the general principles chapter are very enlightening. They note:

1. The general principals set out in this section guide—
   a. The implementation of all legislation applicable to children, including this Act; and
   b. All proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.\(^{287}\)

These prefatory comments make the Act an incredibly sweeping piece of legislation—given that the Children’s Act is intended to guide all aspects of legislation related to children and is intended to guide all actions by any organ of the state when dealing with children’s issues.

\(^{282}\) Id. at ch. 1, § 2.

\(^{283}\) SA Law Commission Executive Summary Review of the Child Care Act, iv (Dec. 2001) (S. Afr.) [hereinafter SALRC Executive Summary]. SALRC noted that in determining what basic goals should be set for the new piece of legislation, various sources could be used. Id. Such goals could “be derived from international law such as the African Charter on the Rights and Welfare of the Child, from policy documents . . . , from South African common law and case law, as well as from accepted social work practice. Id.

\(^{284}\) Id.

\(^{285}\) Id.

\(^{286}\) SALRC Executive Summary, supra note 283, at iv.

\(^{287}\) Id.
The central focus of the chapter on general principles is that “[i]n all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied.” While the Act does not specifically set forth a definition of the best interest of the child, it does set forth a list of factors that must be weighed in the balance in a given set of circumstances. This is the set of factors that must be considered when analyzing a child’s best interests in any court proceeding, governmental action or legislative process involving a child.

A. The Best Interests of the Child in the Balance

In its Discussion Paper of 2002, the SALRC addressed the existence of a dispute about whether the “best interest of the child” standard should be left to courts to define or whether legislative input was appropriate. The SALRC came down squarely on the side of legislative input. It noted:

The commission is convinced of the need to include guidance to the courts and other users of the new children’s statute as to what exactly it means when it is said that a particular decision or action must be in the best interests of a particular child. In this regard, we recommend that such guidelines be included in the body of the substantive act, ideally following on the confirmation that in all matters concerning children, the best interests of the child shall be paramount.

The way in which the SALRC arrived at its recommended standard for best interest of the child is notable. Understandably, it started by looking at South African judicial precedent. Specifically, it discussed two court cases. The first was the 1994 case of McCall v McCall and the second was the 1991 case of Märtens v Märtens. In McCall, the appellate court, in its discussion of the appropriate method to assess the best interest of the child, held as follows:

In determining what is in the best interests of the child, the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following:

289. SALRC Discussion Paper, supra note 270, at 81.
290. Id. at 85.
291. 1994 (3) SA 201 (C) (S. Afr.).
292. 1991 (4) SA 287 (T) (S. Afr.).
(a) The love, affection and other emotional ties which exist between parent and child and the parent’s compatibility with the child;
(b) The capabilities, character and temperament of the parent and the impact thereof on the child’s needs and desires;
(c) The ability of the parent to communicate with the child and the parent’s insight into, understanding of and sensitivity to the child’s feelings.
(d) The capacity and disposition of the parent to give the child the guidance which he requires;
(e) The ability of the parent to provide for the basic physical needs of the child, the so-called ‘creature comforts’, such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security;
(f) The ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
(g) The ability of the parent to provide for the child’s emotional, psychological, cultural and environmental development;
(h) The mental and physical health and moral fitness of the parent;
(i) The stability or otherwise of the child’s existing environment, having regard to the desirability of maintaining the status quo;
(j) The desirability or otherwise of keeping siblings together;
(k) The child’s preference if the Court is satisfied that in the particular circumstances the child’s preference should be taken into consideration;
(l) The desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy…should be placed in the custody of his father; and
(m) Any other factor which is relevant to the particular case with which the Court is concerned.293

The SALRC report then turned to the parental custody case of Märtens v Märtens. In that case the appellate court relied on earlier case law when setting out this shorter list of guidelines:

1. The sense of security of the children, involving an examination of the extent to which a parent makes the children feel wanted and loved;
2. The suitability of the custodian parent involving and examination of the character of the custodial parent, with particular reference to the ability of the parent to guide the moral, cultural and religious development of the children;
3. Material consideration relating to the well-being of the children; and
4. The wishes of the children.294

This analysis of prior judicial precedent in South Africa seems quite normal for a legislative consulting body such as the SALRC. The analysis

293. SALRC Discussion Paper, supra note 270, at 80–81 (citing McCall v McCall 1994 (3) SA 201 (C) (S. Afr.)).
that followed, however, demonstrates the extent to which South Africa is open to ideas from the outside. That is, the SALRC turned to a discussion of three foreign sources for analyzing the best interests of a child.

The first foreign source that was discussed was the Canadian Special Joint Committee on Child Custody and Access.295 The report issued by that Committee was entitled For the Sake of the Children.296 This Committee listed fourteen separate factors that ought to be considered in analyzing a child’s best interests in custody cases.297 Many of those factors are similar to the ones ultimately adopted by South Africa’s legislature.

Next, the SALRC turned to a discussion of Australia’s child custody statute.298 That statute had twelve factors that needed consideration by a court when addressing a child’s best interests.299 It is significant to note that, while the discussion paper issued by the SALRC was over 1,300 pages long, the discussion of this Australian legislation was little more than one page in length. Yet, the SALRC noted that “such a list can be adapted to South African circumstances with little difficulty.”300 It then recommended that South Africa adopt a list of factors that is virtually identical to the Australian statute.

The Act that was eventually signed into law reflected a list of fifteen factors—slightly longer than the Australian version. Those factors are part of the chapter on general principles—and are as follows:

7. (1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-

    (a) the nature of the personal relationship between—
        (i) the child and the parents, or any specific parent; and
        (ii) the child and any other care–giver or person relevant in those circumstances;
    
    (b) the attitude of the parents, or any specific parent, towards—
        (i) the child; and
        (ii) the exercise of parental responsibilities and rights in respect of the child;
    
    (c) the capacity of the parents, or any specific parent, or of any other care–giver or person, to provide for the needs of the child, including emotional and intellectual needs;
    
    (d) the likely effect on the child of any change in the child’s circumstances, including the likely effect on the child of any separation from-

295. SALRC Discussion Paper, supra note 270, at 82.
296. Id.
297. Id.
298. Id. at 83.
299. Id. at 83–84.
300. Id. at 84.
(i) both or either of the parents; or
(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need for the child—
   (i) to remain in the care of his or her parent, family and extended family; and
   (ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) the child’s—
   (i) age, maturity and stage of development;
   (ii) gender;
   (iii) background; and
   (iv) any other relevant characteristics of the child;

(h) the child’s physical and emotional security and his or her intellectual, emotional, social and cultural development;

(i) any disability that a child may have;

(j) any chronic illness from which a child may suffer;

(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

(l) the need to protect the child from any physical or psychological harm that may be caused by—
   (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behavior; or
   (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behavior towards another person;

(m) any family violence involving the child or a family member of the child; and

(n) which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child.

(2) In this section “parent” includes any person who has parental responsibilities and rights in respect of a child.301

8. (1) The rights which a child has in terms of this Act supplement the rights which a child has in terms of the Bill of Rights.

(2) All organs of state in any sphere of government and all officials, employees and child has in terms of the Bill of Rights.302

301. Children’s Act, supra note 196, at ch. 2, § 7.
302. Id. § 8.
It is ironic that—in light of South Africa’s unique history and the stated desire to Africanize its legislation—such a wholesale adoption of a foreign family code would have occurred. Especially that such a foreign code would be from a non–African country. Yet this might be seen as simply an indication that South Africa is open to ideas from foreign sources without any parochial concerns or prejudice.

The factor that is notably missing from the above list is “the wishes of the child.” However, as an indication of the importance of the child’s wishes, the South African Children’s Act sets forth that factor in a separate section immediately following the above list of factors. It notes that “[e]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.”

Thus, the voices of children are to be heard in any matter involving them.

B. The Impact on Customary Law Related to Children

Customary law remains a very real part of South African jurisprudence, albeit a difficult one to manage because of its basis in oral tradition. Nevertheless, nothing in the South African Children’s Act changes that legal reality. As related above, customary law is defined as “those rules of conduct which the persons living in a particular locality have come to recognize as governing them in their relationships between one another and between themselves and things.” While the Constitution makes it very clear that such customary laws are enforceable, some of that customary law could have very negative consequences for children. To that end, the South African Children’s Act specifically prohibits some of the most egregious customary law practices and provides that “every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.” In Africa as a whole, some of those practices include such things as female genital mutilation, killing of baby twins, arranged marriages, male primogeniture, and child marriages.

Thus, the Children’s Act of South Africa remains faithful to its multilayered legal system but attempts to limit some of the most harmful aspects of tribal law. As one commentator put it, “[c]ustomary law is an active and integral part of the South African community and its application is bound to bring about some challenges to the courts. There is no doubt that within the constitutional dispensation, in any dispute where parties rely

303. Id. § 10.
304. See Kent, supra notes 115–17 and accompanying text.
305. Children’s Act, supra note 196, at ch. 2, § 12.
306. CHILD LAW, supra note 109, at 337 (noting that many of these practices are specifically prohibited by the Children’s Act.).
on customary law pertaining to or affecting children, such law will have to be measured against the best interest of the child.\textsuperscript{307}

C. Specific Substantive Provisions

As mentioned above, the South African Children’s Act addresses a broad range of child related issues including the rights and responsibilities possessed by parents and those filling the role of parents. The Children’s Act indicates that under the law of South Africa, a person may have the following rights and responsibilities regarding a child: the right to care for a child; the right to maintain contact with the child; the right to act as guardian of the child; and the right/responsibility to contribute to the maintenance of the child.\textsuperscript{308} These basic rights are the ones addressed in various sections of the Act and can be possessed and exercised by parents, relatives or—under certain circumstances—third parties.\textsuperscript{309} In addition to outlining the rights of parents, the Act also has various substantive provisions that impact the rights of children and define the mechanisms for enforcing those rights.

The Act addresses the operation of children’s courts\textsuperscript{310} and methods for addressing children in need of care and protection.\textsuperscript{311} The provisions related to children in need of care and protection not only set out the circumstances under which a child will be found in need of care and protection but also the procedures to be followed when such a finding is made. In addition, the Act creates two nation–wide registers for purposes of monitoring cases involving children in need of care and protection:

(1) The Director–General must keep and maintain a register to be called the National Child Protection Register.
(2) The National Child Protection Register consists of a Part A and a Part B. National Child Protection Register.\textsuperscript{312}

Part A of the Register is used to keep a record of abuse or neglect inflicted on specific children—as well as a record of the circumstances surrounding such abuse or neglect.\textsuperscript{313} This information is to be used to

\begin{itemize}
\item \textsuperscript{307} Id. at 242.
\item \textsuperscript{308} Children’s Act, supra note 196, at ch. 3, § 18(2).
\item \textsuperscript{309} Id. § 22 (noting that “the mother of a child or other person who has parental responsibilities and rights in respect of a child may enter into an agreement providing for the acquisition of such parental responsibilities and rights in respect of the child, with . . . any other person having an interest in the care, well–being and development of the child.”).
\item \textsuperscript{310} Id. at ch. 4, § 45 (stating that children’s courts may adjudicate most issues related to children including \textit{inter alia} maltreatment, abuse, neglect, degradation, exploitation, paternity, support, and adoption).
\item \textsuperscript{311} Id. at ch. 9.
\item \textsuperscript{312} Id. at ch. 7, § 111.
\item \textsuperscript{313} Id. § 113.
\end{itemize}
protect these children from further abuse or neglect. Part B of the Register is established for the purpose of having a record of people who are unsuitable to work with children in order to protect children in general from abuse by this population of individuals.

The South African legislature also addressed a chronic health problem for children in that country when it included in the Children’s Act several provisions related to HIV/AIDS. That public health menace has impacted large numbers of South African children. If a particular child has not actually been killed or infected with HIV/AIDS, then the child has likely been affected by the illness in other ways. Testing children for HIV/AIDS is addressed in Chapter 7 of the Children’s Act:

(1) Subject to section 132, no child may be tested for HIV except when—
   (a) it is in the best interests of the child and consent has been given in terms of subsection (2); or
   (b) the test is necessary in order to establish whether—
      (i) a health worker may have contracted HIV due to contact in the course of a medical procedure involving contact with any substance from the child’s body that may transmit HIV; or
      (ii) any other person may have contracted HIV due to contact with any substance from the child’s body that may transmit HIV, provided the test has been authorized by a court.

(2) Consent for a HIV-test on a child may be given by—
   (a) the child, if the child is—
       (i) 12 years of age or older; or
       (ii) under the age of 12 years and is of sufficient maturity to understand the benefits, risks and social implications of such a test;
   (b) the parent or care-giver, if the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test;
   (c) the provincial head of social development, if the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test;
   (d) a designated child protection organization arranging the placement of the child, if the child is under the age of 12 years and is not of sufficient maturity
   (e) the superintendent or person in charge of a hospital, if—
(i) the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test; and 
(ii) the child has no parent or care–giver and there is no designated child protection organization arranging the placement of the child; or 

(f) the children’s court, if 
    (i) consent in terms of paragraph (a), (b), (c) or (d) is unreasonably withheld; or 
    (ii) the child or the parent or care–giver of the child is incapable of giving consent.⁴¹⁹

The very notion that a child–centered law like the South African Children’s Act needs to specifically address the rights and obligations of children and government institutions in testing for HIV/AIDS demonstrates the severity of the problem and the extent to which the people and government of that nation recognize the issue they are facing. This growing menace to the lives of Africa’s children was also addressed at the World Children’s Summit³²⁰ and identified in the Children’s Charter of South Africa.³²¹

Domestic and inter–country adoptions are also regulated by the Children’s Act. The focus of the inter–country adoption provisions was to give effect to the Hague Convention on Inter–Country Adoptions.³²² The Act notes that the Hague Convention has been enacted by the South African legislature and its provisions are “law in the Republic.”³²³ In a step that seems to implicate its own sovereignty, the South African legislature included the provision that “[t]he ordinary law of the Republic applies to an adoption to which the Convention applies but, where there is a conflict between the ordinary law of the Republic and the Convention, the Convention prevails.”³²⁴

The Children’s Act also addresses the issues of Child Abduction and Child Trafficking. Both issues are addressed by adopting international accords to which South Africa is a signatory nation. The Hague Convention on International Child Abduction has been adopted and is recognized as “the law in the Republic.”³²⁵ The United Nations Protocol to Prevent

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³¹⁹. Children’s Act, supra note 196, at ch. 7, § 130.
³²⁰. Id. at pmbl.
³²¹. Children’s Charter of South Africa, supra note 247, at pt. 2, art. 8 (noting that “[a]ll children have the right to education on issues such as sexuality, AIDS.”).
³²². Children’s Act, supra note 196, at ch. 16, § 254(a).
³²³. Id. at § 256(1).
³²⁴. Id. at § 256(2).
³²⁵. Id. at ch. 17, § 275.
Trafficking in Persons has also been adopted.\textsuperscript{326} It too is recognized as “the law in the Republic.”\textsuperscript{327}

The final topic addressed by the Act is surrogate motherhood.\textsuperscript{328} Prior to the Children’s Act, South Africa did not have any statutory guidance in surrogate situations.\textsuperscript{329} Thus, the only way that a couple commissioning a surrogate mother could become the parents was through an adoption after the birth of the child.\textsuperscript{330} In addition, any agreements that were made between a surrogate and a commissioning couple would be unenforceable as against public policy.\textsuperscript{331} The Children’s Act changed that situation and put in place specific laws governing surrogacy including, \textit{inter alia}, the enforceability of surrogacy agreements as long as they are in writing.\textsuperscript{332}

Clearly, in crafting the South African Children’s Act, policymakers in that country wanted to protect the best interests of the child. They did so in essentially three ways: First, they established a list of criteria that courts must weigh in the balance when determining what is in the best interests of children. Second, they respected the customary law of the indigenous people while at the same time precluding the enforcement of that customary law if it is harmful to children. Third, they set out some substantive provisions to specifically address certain aspects of child related law. Given the manner in which the SALRC workedshopped the legislation and discussed the various currents of South African society, the Act clearly reflects the experience of that country and its children.

V. REFLECTIONS ON SOUTH AFRICA’S CHILDREN’S ACT: AN AMERICAN PERSPECTIVE

Although there has certainly been some criticism of the South African Children’s Act, it has been a success if for no other reason than the fact that it put children’s issues at the forefront of discussion and debate. It is an example of a country trying to improve the situation of children within its borders—when those children have been routinely subjected to all forms of racism, abuse and neglect. While it is very much a “South African” piece of legislation, there are some very informative reflections that can be made on the Act.

\textsuperscript{326} \textit{Id.} at ch. 18, § 282.
\textsuperscript{327} \textit{Id.}
\textsuperscript{328} Children’s Act, \textit{supra} note 196, at ch. 19.
\textsuperscript{329} SALRC Report, \textit{supra} note 261, at 55.
\textsuperscript{330} \textit{Id.}
\textsuperscript{331} SALRC Discussion Paper, \textit{supra} note 270, at 162–63.
\textsuperscript{332} Children’s Act, \textit{supra} note 196, at ch. 19, § 292(1)(a).
A. The Currents of American Society

The extent and depth of the three currents that led to the South African Children’s Act are specific to that country. The United States has not undergone some of the socio–economic troubles that faced South Africa. Yet there was a period in United States history when members of our society with colored skin were treated with the same level of dehumanizing conduct that people of color met in South Africa. The United States Constitution initially viewed a black person as being equal to three–fifths of a white person.333 Native Americans, those who resided in this land before white settlers, were not counted as individuals under the United States Constitution.334 These groups—and their children—faced issues similar to the ones faced by South African blacks during apartheid. For the children of black slaves in the American South, mortality rates were very high:

In the United States in 1850, 51 percent of all black deaths were children younger than nine. Until age fourteen, the mortality rate of slave children was twice that of the white population. A slave infant was 2.2 times more likely to die than a white baby, and white children between five and fourteen survived 1.9 times more often than did slave children of the same ages.335 Life was very short for the average child of a black slave. If the child’s life was not short, it was generally marked by poverty and malnutrition. One commentator, noting the specific level of malnutrition on the part of slave children in Appalachia, indicated that “slave children were malnourished in patterns that parallel conditions in contemporary poor nations.”336 What is more startling is the fact that in Appalachia this malnutrition was part of the profit generating strategy of white masters.337 For the same group of Appalachian slaves, education was almost nonexistent. By 1870, five years after the ratification of the XIII Amendment to the United States Constitution, three quarters of black Appalachians were illiterate.338 Violence was also a daily event for black children in the American South—especially in the immediate aftermath of the Civil War.339

Although this socio–economic oppression did not change overnight, the passage of Amendment XIII to the United States Constitution in 1865

334. Id.
336. Id. at 148.
337. Id. at 145.
338. Id. at 255.
339. Id. at 243–49.
started to change some of these patterns.\textsuperscript{340} However, unlike the elective process which swept away apartheid, the American transition out of the era of slavery was accompanied by the bloodiest conflict in our nation’s history. Even then, Jim Crow laws re-enforced a situation of \textit{de facto} racial separation in our country until the 1960’s. Perhaps the singular difference between these two currents in South Africa and the United States is the percentage of the population that was affected. In South Africa the racist policies of apartheid hit 84\% of the population by the end of apartheid.\textsuperscript{341} The remaining percentage was white. In the United States the percentage of African Americans is significantly smaller. That smaller percentage of racially oppressed people would not have the same political influence when set free as did the same group of people when set free in South Africa. The children in both situations would have been impacted, but the ground swell of support for sweeping change along the lines of an American Children’s Act would have been substantially less in the United States at the end of the slavery era.

The societal current seen in the South African court system’s progression to a “best interest of the child” standard was also seen in American jurisprudence.\textsuperscript{342} As with South Africa, the United States was impacted by English common law. Unlike South Africa, the United States was largely unaffected by Roman Dutch law. Nevertheless, the English law of paternal preference was brought to the United States during the colonial period. Just as in South Africa, the American courts struggled with this preference and eventually transitioned away from it. The transition generally occurred in the form of replacing the paternal preference with a maternal preference, or “tender years” doctrine. That doctrine would then be ultimately replaced with a “best interests” standard. Thus, both nations followed that same path in their jurisprudence.

One striking difference between the South African progress toward development of the Children’s Act and the experience of the United States is the reception received by international agreements in the two nations. As a society, the United States of America was built with input from other countries and other cultures. We have been able to take the best from other countries and other cultures and combine it into something better and something all our own. Yet, in the realm of accepting input from beyond our borders on children’s issues, we have been less than receptive. The

\textsuperscript{340} Amendment XIII to the United States Constitution prohibited slavery and involuntary servitude, except as a punishment for a criminal conviction, within the borders of the United States. U.S. Const. amend. XIII.

\textsuperscript{341} THOMPSON, supra note 8, at 221–22 (noting that by the end of the 1970s, the proportion of white people in South Africa was 21% of the total population).

United States still has not adopted the Convention on the Rights of the Child. It shares that distinction with Somalia. President Barak Obama has indicated that the failure of our country to adopt the CRC is embarrassing. Other examples could be given, but just in the context of this discussion we can see the rejection by the United States of the Charter for the League of Nations. Yet it was the League of Nations that participated in the initial advancement of children’s issues by passing the World Child Welfare Charter. President Woodrow Wilson, very much a proponent of that organization, was unable to convince the United States Congress that participation was in our national interests.

The reasons for this disinterest by United States policy makers are varied. Yet, it is often the case that the true value of something depends entirely on what it is compared with. In that sense, looking at the legislative actions of other countries and of international organizations would help the United States continue the process of infusing new ideas into our nation. The SALRC recognized that very fact when it opined that “[i]nternational instruments on children’s issues, by their very nature, represent a common pool of wisdom, and a culmination of efforts to ensure recognition of children’s rights.” South Africa was very willing to look at the community of nations to see if someone might be doing it better. A review, for example, of the South African Children’s Act by United States policymakers may assist in legislative efforts to protect and advance the interests of children in this country. As one American commentator noted, “[m]uch of the product of our courts and lawyers could be improved by taking more of an international and comparative view.”

B. Nationwide Legislation and Law Reform

The Children’s Act is different from what would be found in the United States because, as a general rule, family related issues are seen in this country as being within the purview of state legislatures and state courts. Clearly, that creates inefficiencies for practitioners and those that use the system. Fifty different sets of laws dealing with family court, child protection, termination of parental rights and adoption makes a complex legal situation within the United States. Certainly the history of the United States is different than that of South Africa. American history brings to its citizens a different political reality—including the desire of individual states to maintain the rights and independence they historically had before our Federalist system came into being. Yet, it is interesting to note that the

344. SALRC Issue Paper, supra note 263, at 33.
Commission which drafted the Child Custody Jurisdiction and Enforcement Act opined that “[a]s with child support, state borders have become one of the biggest obstacles to enforcement of custody and visitation orders.”

Despite that political and social history, there have been a number of efforts in various realms to create uniform laws that would be applicable throughout the American Union. These efforts have occurred in various areas of the law, but in the family court realm they include the Uniform Child Custody Jurisdiction Act and its successor the Uniform Child Custody Jurisdiction and Enforcement Act, the Parental Kidnapping Prevention Act, the Uniform Interstate Family Support Act, and the Uniform Adoption Act, just to name a few. As opposed to South Africa, however, most of these efforts to create uniformity across the country have been through independent organizations rather than by a government entity.

That results in the need for such an organization to lobby each state legislature for passage of the uniform legislation. It also results in each state legislature having the ability to change the uniform law before it is passed. Thus, each state may have their own version of the “uniform” law. South Africa’s Law Reform Commission does not have a counterpart doing similar work in the United States. Several states have law reform committees whose purpose is to review laws within those states. Yet nothing similar exists on a nationwide basis. The process used by SALRC to assess existing law and propose changes is based heavily on the workshop model. This brings input from across the country and across different groups of interested parties. Such a commission in the United States would be beneficial to assist in bringing some uniformity not only in family law matters, but also in the myriad of other areas of the law in the United States.

C. Constitutional Protection

One of the most notable differences between the treatment of children in South Africa versus the treatment of children in the United States is the

constitution of each nation. As mentioned above, the South African Children’s Act builds upon very fundamental protections expressly afforded to children in South Africa’s Constitution. One could read the South African Constitution as a virtual mandate for the creation of a Children’s Act. When looked at from that vantage point the creation of such a comprehensive piece of legislation regarding children seems almost to be expected.

The Constitution of the United States is significantly different. Our Constitution was created in a different era—with different motivations and different historical imperatives. It has a Bill of Rights that is applicable to children, but does not specifically outline child related rights or child related obligations of the State. This is not surprising, as in 1787 America was more concerned about how it was going to govern itself than it was with specifically caring for its children. With the exception of non-white children as mentioned above, the children of colonial America were generally cared for commensurate with the standards of the time and place in which they were born. It simply was not an overriding concern. Further, child related issues have generally been addressed on a satisfactory basis by statutory law within each state.

CONCLUSION

Nelson Mandela believed that the soul of a society could be seen in the way it treats its children. The South African Children’s Act allows the outside world to take a look at the soul of South Africa. The socio-economic currents that have been flowing in the part of the world that makes up South Africa brought the population to the point where it demanded broad protections for its children. The legal system adequately arrived at a point when it was already looking to protect the best interests of children. These factors combined with the desire of that country to fulfill international obligations it had undertaken as a member state of the United Nations and the African Union. The process undertaken by South Africa and the legislative results it achieved on behalf of children are models for other countries around the world.

The financial resources to implement that framework are far from complete. UNICEF cautioned that “major implementation challenges remain in translating the act into concrete actions to improve the care and protection of South Africa’s children.” Yet, the legal framework to advance the cause of children is in place. In its review of the Act, the Southern African Catholic Bishops Conference noted as follows:

350. Briefing to People to People Delegation, supra note 3, at 15.
The Act puts children’s issues squarely on the agenda: it emphasises that services to children must be prioritised by government at all levels, and that all spheres of government should review their services and budgets, and co-operate with each other, to ensure that children get the services they need. All of this is most welcome and, although there are certain provisions with which the Church must take issue, the Act has the potential to have a strongly positive impact on the lives of children, especially the most vulnerable.352

In many respects the South African Children’s Act represents some of the very same values and principals embodied in the family codes of the several United States of America. It asserts a commitment to the best interests of the child in legal proceedings and to the protection of children who are victims of abuse or neglect. In other respects, however, the Children’s Act is a foreign piece of legislation that would not fit in with American jurisprudence. Yet in all respects it reveals the character of the South African people and reflects well on the soul of that nation.

INTRODUCTION

A. Purpose of the Paper

I. THE GOVERNANCE OF CONVENTIONAL BANKS

II. THE GOVERNANCE OF ISLAMIC BANKS

A. Islamic Banking Law

B. Prohibition of Interest

C. The Governance of Islamic Banks

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Banking is the industry that failed. Banks are meant to allocate capital to businesses and consumers efficiently; instead they ladled credit to anyone who wanted it. Banks are supposed to make money skillfully managing the risk of transforming short-term debt into long-term loans; instead, they were undone by it. They are supposed to expedite the flow of credit through economies; instead they ended up blocking it.

“Give not unto the foolish your wealth which Allah has made a means of support for you.” – Qur’an, 4:5

INTRODUCTION

The years 2008 and 2009 have brought the world considerable problems, many stemming from bank failures. The conventional Western system of finance is in a quagmire. There is a banking system however, that has not

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suffered much in the present crisis; the Islamic Banking System.3 Islamic banks seem to have emerged mostly unscathed in the current phase of the crisis, and industrialized Western countries are looking at them to see why, and to see if they provide some better ways of doing business.4 Regulators in many countries are asking whether the Islamic paradigm has any answers.5 Even before the crisis occurred, the United States Department of the Treasury unveiled a plan to teach Islamic finance to U.S. bank regulatory agencies.6 Islamic banking seems to have been on the minds of many Western financiers for a while.

The University of Reading, in England, recently started a Masters degree in Investment Banking and Islamic Finance, as have other universities throughout the United Kingdom. John Board, director of Reading’s International Capital Markets Association Centre says that “[w]e started to get prospective students asking us if we knew about it [Islamic finance], while current students going to job interviews, even for non–Islamic posts, said it came up as a conversation piece.”7 Islamic banking has been proliferating around the world since the 1970’s. There are in excess of 300 Islamic financial institutions in the


A. Purpose of the Paper

The measure of the effectiveness of any system of governance is the degree to which the governed organization achieves its purpose. One must look at the purpose of the various systems, and ask the question, does the system achieve its purpose? Indeed, does the current global economic order perforce call for a change in the purpose? 9

This paper intends to describe the governance system of Islamic banks in order to see the differences that exist between the Islamic banking paradigm and that of its conventional Western counterpart. This is a timely topic since within that governance paradigm there may be elements that can be useful in shoring up the risks that conventional banks have faced and which have precipitated the current banking crisis. Certainly the current governance paradigm of Western banks is coming under increased scrutiny. According to some researchers, “bank regulation will top the global policy agenda.” 10 It certainly is on the minds of policymakers, commentators and the public alike. 11 The Federal Reserve is working on new regulations. 12 The British are doing the same. 13

Since the late 1990’s, and especially in the early 2000’s, there has been a world-wide dramatic increase in the interest in, and concern for, corporate governance. 14 Conventional Western bankers also have been concerned about widely acceptable and effective principles of corporate governance,
so as to make for an effective and transparent international banking system in which shareholders, depositors and borrowers alike have confidence.\textsuperscript{15} National and international banking authorities agree that banks must be supervised—not simply to avoid chicanery, fraud, theft and bank failures—but also to provide for a system in which businesses and consumers have confidence.\textsuperscript{16} The officials of the Basel Committee believe that effective supervision cannot take place unless effective systems of corporate governance are in place.\textsuperscript{17}

The Basel Committee heartily endorses the principles and definition of corporate governance as espoused and published by the Organisation for Economic Co-operation and Development (OECD), which state:

Corporate governance involves a set of relationships between a company’s management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. Good corporate governance should provide proper incentives for the board and management to pursue objectives that are in the interests of the company and its shareholders and should facilitate effective monitoring. The presence of an effective corporate governance system, within an individual company and across an economy as a whole, helps to provide a degree of confidence that is necessary for the proper functioning of a market economy. As a result, the cost of capital is lower and firms are encouraged to use resources more efficiently, thereby underpinning growth.\textsuperscript{18}

So for the purposes of this study, the starting point is the proposition that any organization—whether it be simply a club, a company or a state—has a controlling mechanism composed of rules, procedures and customs by means of which decisions are taken and the organization is run. Whatever

\textsuperscript{15} See Basel Committee on Banking Supervision, Enhancing Corporate Governance for Banking Organizations (Sept. 1999), http://www.bis.org/publ/bcbs56.pdf?noframes=1 [hereinafter Enhancing Corporate Governance 1999]. The Basel Committee on Banking Supervision is a committee of banking supervisory authorities which was established by the central-bank Governors of the Group of Ten countries in 1975. It consists of senior representatives of bank supervisory authorities and central banks from Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, Netherlands, Sweden, Switzerland, United Kingdom and the United States. It usually meets at the Bank for International Settlements in Basel, where its permanent Secretariat is located. \textit{id.}

\textsuperscript{16} See generally id.

\textsuperscript{17} \textit{id.} at 1.

\textsuperscript{18} OECD Principles, supra note 14.
its system and body of rules and decision-making procedures by which the organization is run is the organization’s system of governance.\textsuperscript{19}

In any corporation, the need for a system of governance arises from the inherent agency problem. In a sole proprietorship, the most prevalent type of business entity,\textsuperscript{20} the owner manages the enterprise, and knows where the money goes and where it comes from. However, in the corporation, owners are separated from managers, and it is the latter who actually control the operations and finances of the corporation. These managers are the agents of the shareholders, and the shareholders, who wish that their investments be fruitful, will want to ensure that the managers do not engage in self-dealing; rather, the shareholders will desire that the managers act in the best interest of the corporation, and thus of the shareholders’ investment. The main objective of a system of corporate governance is to overcome this agency problem—to provide a monitoring system to oversee the activities of the agents.\textsuperscript{21} So, according to some, even though the Western system of economic activity considers itself a system of capitalism and therefore an ownership system, its system of organization and management of corporations is, in effect, a system of agency rather than ownership.\textsuperscript{22} The questions many are asking today in that Western system—especially in the financial system—is whether the agents are doing their job properly and whether they are being properly monitored.

Banks are essential in any economy, as they provide financing for commercial enterprises, financial services to the population in general and a system for making all manner of payments.\textsuperscript{23} For conventional Western banks, the Basel Committee has been very active in providing rules by which the banks within its system are governed.\textsuperscript{24} Government regulatory agencies and the banks which they supervise have generally adopted these principles, of course taking into account their national and local constraints. That is why the conventional banking systems work in much the same way on a world–wide basis.

\textsuperscript{19} Scheherazade Rehman & Frederick V. Perry, \textit{The Global Convergence of Corporate Governance Systems: Is it Really Happening?}, J. CURRENT RES. GLOBAL BUS. (Fall 2004).


\textsuperscript{21} See \textsc{Kenneth A. Kim} \& \textsc{John R. Nofsinger}, \textsc{Corporate Governance} 3 (2004).


\textsuperscript{23} See \textsc{Basal Committee}, \textsc{Enhancing Corporate Governance 1999}, \textit{supra} note 15.

\textsuperscript{24} These include \textsc{Principles for the Management of Interest Rate Risk} (1997), \textsc{Framework for Internal Control Systems in Banking Organizations} (1998), \textsc{Enhancing Bank Transparency} (1998), and \textsc{Principles for the Management of Credit Risk} (1999).
In the conventional Anglo–American system of corporate governance, the main objective of the company is to make a profit and increase shareholder wealth. In other words, it is the interest of the shareholders which the managers and directors of the corporation should be looking out for. In this paradigm, the “exclusive focus of corporate governance should be to maximize shareholder value.” The Franco–German model of corporate governance, or what has been also termed the European bank-based system of governance, looks at a broader base of what has been termed “stakeholders” to include employees, lenders, customers and vendors, among others. So in this latter paradigm, management is concerned with protecting the interests of a much broader base of stakeholders than in the Anglo–American model. This at times gives rise to conflicts, since there will be times when the interests of such a diffuse group will clash. The manager is faced with a whom–do–you–protect–first dilemma in such an event.

Generally—at least in the Anglo–Saxon model—owners of a corporation, the shareholders, wish to increase their wealth. They are familiar with the old maxim “the more the risk, the more the reward,” and so often owners will wish that the managers take certain risks in order to reap more rewards. A non–shareholder manager often has no incentive to take risk, since he or she knows that if the enterprise fails, he or she will have no job. This is where the alignment of shareholder interest with manager’s interest comes in by providing incentives that align the manager’s rewards with the shareholders’ interests. Stock awards and stock options, and sometimes bonuses, do just that.

Lenders, on the other hand, have no such interest; lenders do not wish the corporate borrower to take risk. The lender wants to be assured that its loan will be repaid. Loan covenants are a means by which lenders have a very strong influence on the governance of their corporate borrowers. In this sense, banks are themselves important elements of the governance of corporations in the places in which they operate.

I. THE GOVERNANCE OF CONVENTIONAL BANKS

Banks are an essential cog in the wheel of commerce in any society. Banks differ markedly from general corporations insofar as governance needs are concerned:

Banks Matter. When banks efficiently mobilize and allocate funds, they lower the cost of capital to firms and accelerate capital accumulation.

26. See generally Jonathon Charkham, Keeping Good Company: A Study of Corporate Governance in Five Countries (1994); see also Perry & Rehman, supra note 9.
When banks allocate credit to entrepreneurs with the best ideas (rather than to those with the most accumulated wealth or strongest political connections) productivity growth is boosted and more people can pursue their economic dreams. And, when banks manage risk prudently, the likelihood of systemic crises is reduced.27

Others have said that “when banks efficiently mobilize and allocate funds, this lowers the cost of capital to firms, boosts capital formation, and stimulates productivity growth. So, weak governance of banks reverberates throughout the economy with negative ramifications for economic development.”28 The corporate and financial structures of banks differ from the typical corporation. Banks are opaque; it is hard to determine where exactly the money is and how much risk is covering the funds out on loan. Opacity makes monitoring for governance purposes difficult. The relative risk of loans outstanding on a bank’s balance sheet is difficult to determine simply by looking at the balance sheet.

A second problem is regulation.29 This may seem counterintuitive, since many would say that the regulation of banks is a good thing as it protects banks, their shareholders, and their depositors. But regulation may have the opposite effect. As mentioned above, in the typical corporate scenario, an outside lender has an ameliorating effect on shareholders’ propensity to take risks—with the lender’s money. With a bank, the depositor is, in effect, a lender to the bank. But such lenders take no interest in the governance of the bank or in the level of risk that it runs in its operations. Generally the depositor/lender does not require more or less interest be paid to him or her on the deposit dependent on the level of risk the bank runs. So the “debt holders” do not share in the upside potential, no matter the level of risk. In fact, because depositors feel comfortable that the government will protect their “loan” to the bank, they take no interest whatsoever in the bank’s practices. Some studies have shown that government regulations generally have an adverse impact on the governance of banks.30 It has been suggested that such regulation often encourages low capital–asset ratios.31 It has even been argued that banking regulation brought about the destruction of AIG.32

As a practical matter, the stakeholders in the typical bank, even in those countries where the Anglo–American model of corporate governance prevails, are multiplied. The bank not only has the owners, that is, the

30. See Levine, supra note 29.
31. Polo, supra note 30, at 5.
shareholders, but there are depositors and society in general, which depend on the viability of its banks for its economy to run smoothly. So banks should be looking out for a variety of interests. It is questionable whether they actually do. Lest anyone continue to say that the interest and profit of shareholders—the only relevant stakeholders—and their say in management and governance in the Anglo–Saxon model is the way the truth and the light, one need only look at who has bailed them out and where the money came from for that bailout: the governments and the taxpayers. So for financial institutions at least, many stakeholders abound, even in the Anglo–Saxon model.

Concerned over renewed problems in the international commercial world and the ethical and other failures in the governance systems of companies around the world, and mindful of the fact that certain banking structures around the world lack transparency and that many banks exist in jurisdictions that purposefully impede information flows, the Basel Committee issued a revision to its 1999 guidance in 2006.\textsuperscript{33} That revision set forth eight principles by which sound banks were to be governed.\textsuperscript{34} This system presupposued that the governance systems would ensure that the banks in question would adhere to the guidelines respecting such things as

\begin{quote}
Principle 1: Board members should be qualified for their positions, have a clear understanding of their role in corporate governance and be able to exercise sound judgment about the affairs of the bank.

Principle 2: The board of directors should approve and oversee the bank’s strategic objectives and corporate values that are communicated throughout the banking organisation.

Principle 3: The board of directors should set and enforce clear lines of responsibility and accountability throughout the organisation.

Principle 4: The board should ensure that there is appropriate oversight by senior management consistent with board policy.

Principle 5: The board and senior management should effectively utilise the work conducted by the internal audit function, external auditors, and internal control functions.

Principle 6: The board should ensure that compensation policies and practices are consistent with the bank’s corporate culture, long-term objectives and strategy, and control environment.

Principle 7: The bank should be governed in a transparent manner.

Principle 8: The board and senior management should understand the bank’s operational structure, including where the bank operates in jurisdictions, or through structures, that impede transparency (i.e. “know-your-structure”).
\end{quote}

\textit{Id.}

\textsuperscript{33} \textit{Basel Committee on Banking Supervision, Enhancing Corporate Governance for Banking Organisations} 3 (Feb. 2006), available at http://www.bis.org/publ/bcbs122.pdf.

\textsuperscript{34} Those principles are:
the management of interest rate risk, the management of credit risk, transparency and internal controls systems.

Even so, there has not been an intense scrutiny and push for enhanced corporate governance in banks, at least not in the U.S., where some of the world’s largest banks are headquartered.35

In the U.S. there are some problems going forward even after the financial debacle and the infusion of billions of dollars in the banking system by the U.S. government. Compensation and risk taking, according to some governance experts, have not been curbed, despite the rhetoric of the U.S. Congress and the infusion of billions of dollars. For example, directors have been left in place—those same directors who allowed the problems to arise in the first place—and compensation levels that encourage risk-taking are not really controlled in a meaningful way.36 The British, in their bailout program, have at least replaced a number of directors.37

The corporate governance of the typical US bank is shown in the following diagram:

Diagram 1.1

**Corporate Governance of US Banks**

<table>
<thead>
<tr>
<th><strong>External Regulators</strong></th>
<th><strong>Internal Regulators</strong></th>
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<tbody>
<tr>
<td>Stock Market Regulations</td>
<td>Board of Directors</td>
</tr>
<tr>
<td>Corporation Law</td>
<td>Shareholders</td>
</tr>
<tr>
<td>National Bank Regulatory Authority</td>
<td></td>
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<tr>
<td>Lenders to Bank/Corporation</td>
<td></td>
</tr>
</tbody>
</table>

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37. Id.
II. THE GOVERNANCE OF ISLAMIC BANKS

Islamic banks are governed differently than Anglo–American banks. In order to understand how and why they are different, it is first necessary to understand a modicum of Islamic law, since the law, as Muslims define it, is the normative basis and indeed the reason for the existence of Islamic banking.

The source of the law and the definition of law are different between the typical Western legal tradition and that of Islam. Even though some highly regarded U.S. practitioners have suggested that to ask “what is law” is a meaningless question, in most industrialized countries—and certainly in the United States—law is considered to be “a body of rules of action or conduct prescribed by controlling authority, and having binding legal force. That which must be obeyed and followed by citizens subject to sanction or legal consequence . . .” The Mexican jurist defines law as a norm or rule that sets the limits of human conduct, in order to settle social conflict, and to which all people must forcibly subject themselves. Another Western, civil law example is the Mexican Constitution, which states that all the resolutions of the Congress will be considered law. In the United States, the source of all law is the Constitution of the United States, and its source is the people. The Constitution gives authority to the Congress to make the laws, and the Congress is also elected by “the People of the several States.” In a typical civil law country, such as Mexico, law is considered as “emanating from legitimate authority.”

Islamic law is different, and Muslims believe differently. Since in the West the lawgiver is man and the institutions of man, the law can be changed by man. But for Muslims “[t]he absolute knowledge which is required to lay down a path for human life is not possessed by any group of people.” For Shari’ah, which is the Muslim concept of law, God is the


39. Gilmer v. Interstate/Johnson Lane Co., 500 U.S. 20 (1991). The foregoing is a definition from a Common Law jurisdiction, and in practice, that definition fairly represents the operation of “law” in most industrialized countries. However the Civil Law tradition, which often deals with such subjects from both a broader and more theoretical approach, defines law as; “A rule of conduct . . . (which is) . . . the combination of rules that govern social relations.” Eugene Petit, 21 DERECHO ROMANO 15 (2005). See also Charles Louis de Secondat, Baron de La Brède et de Montesquieu, Del Espiritu de las Leyes, Editorial Porrúa, México, Capítulo Primero (1992). Of course in this tradition, there is a distinction between droit and loi, or derecho and ley, which distinction is not easy to translate into English, but the Common Law concept and word law is broad enough to cover them.


42. U.S. CONST. pmb.


44. De Pina, supra note 42, at 44.

lawgiver, and no one—no power on earth—has the authority to change the law. The source of Islamic law is the Qur’an, considered by Muslims to be the holy word of God, and the Sunna, the sayings and way of life of the Prophet Mohammed.

Shari’ah, or the law for Muslims, is an all-encompassing set of concepts and rules that govern nearly every aspect of daily life, including the laws of contract and commerce; in light of this, according to most legal and religious scholars, Islamic law is divinely inspired and revealed, and therefore not given to changes by man—as are the laws in the other two traditions. The other two legal traditions, which govern most of the world’s citizens and its commerce, are what are known as the Common Law tradition and the Civil Law tradition. The laws in both a Civil Law society and a Common Law society are made by human beings, and therefore are changeable by them. This is not so in divinely revealed Shari’ah, the revelation of which has been interpreted to some extent, but not changed. This can be problematic in finance law since we need to bridge the gap of one thousand years of jurisprudential development to meet today’s modern financial needs. At about 1000 A.D., the Ulema declared that enough interpretation had taken place, and most schools of Islamic law did not develop their jurisprudence any further despite radical changes in other societies thereafter. In contrast, Western systems of law change with society’s changing circumstances.

Even though the first bank to use Islamic concepts can be traced to Egypt in 1963, the truly modern idea of an Islamic bank and Islamic banking industry was raised at the Islamic Summit in Lahore, Pakistan in 1975.

46. DAVID M. NEIPERT, LAW OF GLOBAL COMMERCE 27 (2002).
47. RAHMAN, supra note 46, at chs. 2-4.
49. Siegfried H. Elsing & John M. Townsend, Bridging the Common Law and Civil Law Divide in Arbitration, 18 ARBITRATION INT’L 1, 1. For a list of countries governed by the common law tradition, see Common Law, WIKIPEDIA (Oct. 21, 2010, 10:46 AM), http://en.wikipedia.org/wiki/Common_law (“The common law constitutes the basis of the legal systems of: England and Wales, Northern Ireland, Ireland, federal law in the United States and the law of individual U.S. States (except Louisiana), federal law throughout Canada and the law of the individual provinces and territories (except Quebec), Australia (both federal and individual states), Kenya, New Zealand, South Africa, India, Malaysia, Brunei, Pakistan, Singapore, Hong Kong, and many other generally English-speaking countries or Commonwealth countries (except Scotland, which is bjuridicial, and Malta). Essentially, every country that was colonised at some time by England, Great Britain, or the United Kingdom uses common law” with few exceptions. “The main alternative to the common law system is the civil law system, which is used in Continental Europe, and most of the rest of the world.”).
52. Id.
Banking in the Arab world has traditionally been identified with the colonial powers, and freedom from colonial rule sparked an interest in a return to the culture and customs of the people—that is, to Islam. Oppression would, it was believed, be eliminated through the fairness and justice that Islam espoused. Locally owned banks did not start in the Arab world until the 1920’s. The Western banking system was seen as an instrument of Western corruption and exploitation; so for the people to have confidence in the banking system that was to be home grown, it had to be based on Islamic principles and not Western principles. Banking activities were to be associated with the tenets espoused by the Prophet Mohammed and the Qur’an. Commercial ventures, borrowing, and lending therefore could all be associated with acts of piety. But for this to happen, people had to be assured that what the banks were doing actually was sanctioned by Shari’ah.

The banks, which started proliferating in the Middle East in the 1970’s, covered this requirement by using Shari’ah boards to “bless” their activities and their financial instruments. The idea was that since Islamic banks were new, they must submit all new types of transaction to a “Shari’ah committee” in order to ensure that they conformed with Islamic principles. It was essential that the expectations of the Muslim community be met in order to give the banks legitimacy. An Islamic organization must serve God, and “act within the framework of an Islamic formula, so that any person approaching an Islamic bank should be given the impression that he is entering a sacred place to perform a religious ritual, that is the use and employment of capital for what is acceptable and satisfactory to God.” There has been a broad interest in the use and function of the Shari’ah boards, since it is believed that compliance with Shari’ah is the raison d’être of the Islamic financial services industry. Indeed “the core mission of an Islamic financial institution is to meet its stakeholders’ desire to conduct their financial business according to Shari’ah principles.”

55. Islamic Banks, supra note 54.
56. Sulieman, supra note 8.
58. ISLAMIC FIN. SERVS. BD., EXPOSURE DRAFT: GUIDING PRINCIPLES ON SHARI’AH GOVERNANCE SYSTEM 1 (Dec. 2008) [hereinafter EXPOSURE DRAFT].
Just like a modern day Catholic may turn to her priest to answer certain questions about her religion, Muslims turn to experts also when interpreting their religion and in order to answer certain wooly questions; they turn to the scholars—the *Ulema.* The word *Ulema* is the plural form of the Arabic *Alim,* and means a learned man or scholar. Such men are learned in Shari’ah and all aspects of Muslim traditions, are knowledgeable in divine law, and serve as its guardians and interpreters. They are the closest thing to a priest that the religion has, but they are not priests, and they do not rule over Islamic society (aside from the exception of Iran after the revolution of 1979).

In order to fill this need for legitimizing Islamic banking, the bankers invented the concept of the Shari’ah board, made up of *Ulema* who could interpret and evaluate the operations and transactions of the bank. All new ways of doing business and new types of transactions—including contracts—are submitted to the Shari’ah board for scrutiny and approval.

A. Islamic Banking Law

Islam looks at wealth as something to be used efficiently to sustain life; and justice and fairness for all concerned are the theoretical and religious basis for the institution of Islamic finance. The idea is to ensure the equitable distribution of wealth, so that wealth does not simply circulate among only the wealthy. Shari’ah prohibits the charging of interest. Many in the West are not unfamiliar with the prohibition of interest, but in Islamic banking there are four other important elements. Essentially there are five basic principles of Islamic Banking:

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60. RAHMAN, supra note 46 at 5-6.
61. 2 MARSHALL G.S. HODGSON, THE VENTURE OF ISLAM 438-39 (1974) (explaining that the word *Ulema* is the plural form of the Arabic *Alim,* and means a learned man or scholar, and such men are learned in Shari’ah and all aspects of the Muslim traditions).
63. See Siddiqi, Finance, supra note 55.
64. See id.
68. Id. at 12.
1) In a loan any predetermined payment over and above the actual amount of principal is prohibited, that is, no interest.

2) Arising from the interest prohibition, the lender must share in the profits or losses arising out of the enterprise for which the money was lent.

3) Making money from money is not acceptable, as money has no intrinsic value.

4) Gharar (uncertainty, risk or speculation) and the related Maysir (gambling, bets and wager) are also prohibited.

5) Investments can only support practices or products that are not forbidden (alcohol, pornography, investment in real estate for a casino, etc. are forbidden).

B. Prohibition of Interest

The reason set forth in the Qur’an and Shari’a for the prohibition of interest is that the depositor (or the lender) should not profit unduly from the hard work and risk bearing of others. Although Islam prohibits interest, it encourages profit and return from investment where the investor takes a calculated risk; commerce and trade are encouraged, so banks can give an investor a share of their annual profits (and losses) in proportion to the investor’s (depositor’s) deposit based on the share of an individual’s deposit in relation to total assets of the bank being lent out.

This rate of return to the investor is different from interest in two important ways: the amount to be paid is not known at the outset of the transaction (there are no guarantees as to amount of return), and the investor (read lender or depositor) has to accept more risk. On the other hand, as an example, the depositor in the conventional western bank takes less of a risk because the bank’s capital (that is, the capital investment of the stockholders of the bank) is first at risk before the capital of the depositors.

Because of the foregoing, equity participation and profit and loss sharing are the basis of Islamic banking. Such banks do not charge interest; rather they participate in the profits arising from the use of lent funds. The depositors also share in the profits arising from the use by the bank of their funds in lending activities based on a predetermined ratio. However, in the event of losses (for certain types of deposits, as will be explained), the depositor also loses a proportional share of his or her funds on deposit. The bank also is arguably more at risk than is a conventional Western bank,

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69. But see infra note 123.
70. See Suleiman, supra note 8; Mohammad Netjatullah Siddiqi, The Wisdom of Prohibition of Interest, Lecture at LaRiba Annual Meeting at Los Angeles (Mar. 30, 2002); Siddiqi, Finance Lecture, supra note 66.
71. Qur’an 4:32.
since the bank cannot require a guarantee or security in the form of collateral to cover a potential loss in the event of default on repayment. Theoretically, the liability of the borrowing entrepreneur is limited to their ability to repay based on success of the enterprise, absent negligence or mismanagement, in which case the borrower can be liable for repaying the lender’s financial loss.\footnote{72}

The source and use of funds are a bit different with Islamic banks. Reserves are fractioned; that is, deposits are not simply mingled and placed wherever the banks wish. Not all depositor accounts are used by the bank for the same purpose. Some are used for financial investments and commercial loans, and some are not; it depends on the type of deposit account. Further, some deposit accounts give the depositor the claim to the full amount of the deposit, along with a premium payment or an amount based on the bank’s earnings. The deposit of funds into an investment deposit account allows the bank to use the funds in a long term loan. The depositor may lose some or all of his funds if the bank incurs losses; however, the returns to the depositor—if there are returns—are normally higher.\footnote{73} Rather than a depositor earning a fixed rate of interest as in conventional western banks, the depositor only earns money if she subjects herself to the same risk that the bank undergoes, and thus receives only a share in the profits.\footnote{74}

In sum, Shari’ah and Islam in general seek economic fairness and justice; in fact, Muslims are commanded to seek justice and fairness.\footnote{75} A loan from a conventional Western bank requires repayment no matter the outcome of the business venture of the borrower, but Islam considers this unfair—ergo the prohibition of interest—and a sharing in the profit and loss is considered to be fairer, more legitimate, and thus this principle is the basis for Islamic banking.\footnote{76}

C. The Governance of Islamic Banks

Islamic banks are typically organized as corporations under the laws of their jurisdictions of incorporation. Those laws differ from place to place in their vision of the relationships among the stakeholders and the role that the corporation is to play in society,\footnote{77} but they all have a governance system,
varied though it may be, which conforms to the commercial laws and customs of the jurisdiction in question. So it is that the typical corporation—for example, in the case of a bank under the Anglo–Saxon model—has both an internal and an external governance system. The external system is made up of the stock exchange rules, the corporation or company laws of the jurisdiction, and any central bank regulatory authority and lenders, who require certain restrictive covenants in their loan documents. On the other hand, the Islamic bank has a more complex governance system.

It must be remembered that in the Franco–German model of the corporation, there are a variety of stakeholders in addition to the shareholders whose interests are looked after in the running of the corporation, and in countries like Germany, there is a two-tiered board of directors. In this sense, the Islamic bank is similar to the German corporation in its governance model. In essence it has two boards: the one required by secular law, and the one required by religious law. So the Islamic bank has to comply with the laws of man and the laws of God at the same time. This is not always easy, since it also has to compete within the marketplace.

The Islamic bank has at least one further outside governance body: the Islamic Accounting Standards Board, also known as the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI).

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78. CHARKHAM, supra note 27, at 14.
79. The AAOIFI website provides:

The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) is an Islamic international autonomous not-for-profit corporate body that prepares accounting, auditing, governance, ethics and Shari'a standards for Islamic financial institutions and the industry. Professional qualification programs (notably CIPA, the Shari'a Adviser and Auditor "CSAA", and the corporate compliance program) are presented now by AAOIFI in its efforts to enhance the industry’s human resources base and governance structures.

AAOIFI was established in accordance with the Agreement of Association, which was signed by Islamic financial institutions on 1 Safar, 1410H, corresponding to 26 February 1990, in Algiers. Then, it was registered on 11 Ramadan 1411, corresponding to 27 March 1991, in the State of Bahrain.

As an independent, international organization, AAOIFI is supported by institutional members (155 members from 40 countries, so far) including central banks, Islamic financial institutions, and other worldwide participants from the international Islamic banking and finance industry.

AAOIFI has gained assuring support for the implementation of its standards, which are now adopted in the Kingdom of Bahrain, Dubai International Financial Centre, Jordan, Lebanon, Qatar, Sudan and Syria. The relevant authorities in Australia, Indonesia, Malaysia,
AAOIFI develops, recommends, and promulgates accounting standards for Islamic banks, and while its standards do not generally have the effect of being rules of law or having sanctions for their transgression, they have been adopted by many Muslim and Western countries, and for a bank to state that it adheres to them is good for its reputation and provides yet another measure of comfort for the bank’s customers.

In addition to the outside regulators, however, the internal regulators are multiplied for the Islamic bank. First, there are the two boards: the one required by law and the one “required” by God. Then there are, of course, the shareholders. In addition, the depositors are stakeholders; they share in the profits and losses of the bank’s operation. The borrowers are also stakeholders, since the bank is in essence a partner with the borrower in the borrower’s business ventures.

The Shari’ah board and its use can give rise to a number of thorny issues for the bank. The members of the Shari’ah board are supposed to be objective outsiders who make their decisions in consultation with the other Shari’ah board members, but in a way that is to be unbiased by any financial or other interests respecting the bank or the transaction.

An Islamic bank has its Shari’ah board, which is supposed to be external and independent (though its members are paid by the bank), revising policies and documents, but answerable only to themselves and God. Additionally, the bank will often, and usually does, have an internal Shari’ah compliance person or committee, whose job it is to ensure that the bank complies with that which the Shari’ah board has mandated through its fatwas.

The Islamic Financial Services Board is working toward better governance in Islamic banking. In a speech before the meeting of the Arab Bank-
ing Association of North America, the executive vice president in charge of the Bank Supervision Group at the Federal Reserve Bank of New York and a member of the Bank’s Management Committee commented that:

To this end, institutions like the Accounting and Auditing Organization for Islamic Financial Institutions and the Islamic Financial Services Board [IFSB] are serving a critical function . . . the IFSB recently released exposure drafts of capital adequacy and risk management standards for Islamic financial institutions. These standards will help regulators both in countries that already have well–developed Islamic financial systems and in Western countries, to understand and supervise Islamic finance . . . [the IFSB] is also working to strengthen the corporate governance framework for the Islamic financial services industry, and the Federal Reserve Bank of New York . . . [involvement to date has been its via in the 2007 IFSB–sponsored summit on Islamic finance] . . . of course, corporate governance issues and compliance have become particularly important . . . [to the Fed over the past few years] . . . and some of the approaches [the Fed] has taken to address this issue already have much in common with the practices of Islamic finance.  

The IFSB has issued a set of principles on corporate governance for Islamic banks, as has the AAOIFI. In fact, the AAOIFI has commenced a training program to educate the market and practitioners about its standards. Other organizations have been formed to standardize the initiatives on industry related issues, as well as organises roundtables, seminars and conferences for regulators and industry stakeholders.


85. The AAOIFI, whose main objective is to promulgate standards for accounting and audit for Islamic banks, also issued its “Accounting, Auditing and Governance Standards” (for Islamic Financial Institutions) in 2008. See AAOIFI Overview, supra note 80.

system, such as the International Islamic Rating Agency, the International Islamic Financial Market and the Liquidity Management Center. None have the force of law. While the IFSB principles do call for a variety of measures to strengthen the governance of Islamic banks, they do not really push in a meaningful way for global standardization; rather, they take the view that “there is no single model of corporate governance that can work well in every country.” These principles go on to say that “[a]ny rigid, rule based approach adopted in haste with the aim of strengthening the corporate governance of [Islamic banks] may hinder their potential and healthy growth.” These principles accept the principles promoted by the OECD, and the Basel Committee’s “Enhancing Corporate Governance of Banking Institutions.” This may be unfortunate, since those companies complying with the OECD principles are a varied group of all sorts of companies, and global standardization is not essential for their ability to interact and compete. Financial transactions are different, and do require more standardization. According to the Basel Committee:

Implementation of the Basel II Framework continues to move forward around the globe. A significant number of countries and banks already implemented the standardized and foundation approaches as of the beginning of this year. In many other jurisdictions, the necessary infrastructure (legislation, regulation, supervisory guidance, etc) to implement the Framework is either in place or in process, which will allow a growing number of countries to proceed with implementation of Basel II’s advanced approaches in 2008 and 2009.

But the original Basel Capital Accord introduced by the Basel Committee in 1998 has been introduced in “virtually all countries with internationally active banks.” Banks are not as dissimilar as industrial corporations are dissimilar, and the conventional Western style banks of the world are attempting to comply with the Basel standards—as opposed to the more loose OECD standards. Thus, a conventional loan in Mexico City, New York, Paris or London is fairly uniform. On the other hand, the financial instruments and offerings used by Islamic banks around the world are quite dissimilar, as will be discussed below.

Given all this, if asked, most Muslim financiers appear to say that the Islamic controls provide for a more regulated, less risky, user friendly,
community friendly, ethical way of doing business\textsuperscript{91} and they believe that any effects of the current crisis on Islamic banks will be limited.\textsuperscript{92} Many Muslims believe that their system has the answer. The Prime Minister of Malaysia, in speaking about the current world–wide crisis, stated in a conference on Islamic banking that:

We have inherited a system where people can trade what they do not own and the resulting inflationary pressure in the global market has caused immense damage to the economic well–being of the world’s poor . . . . Such is the impact of unbridled greed in the financial system where there is no accountability on money lending . . . . The world is beginning to appreciate the need for alternative financial arrangements.\textsuperscript{93}

In March of 2009, “Muslim presidents, prime ministers and prince[s] . . . called on the world to adopt Islamic financial practices to overcome the global crisis and urged Islamic banks to undertake ‘missionary work’ in the west to promote Shariah banking.”\textsuperscript{94}

D. Standardization

While Muslims may feel confident that the bank they go to adheres to Islamic principles, it appears that those principles are not uniformly defined, and that banks and their Shari’ah boards differ in their interpretations of Islamic principles. This makes for difficulties in cross–border banking activities and a truly globalized system of Islamic banking and finance. Many are calling for standardization. John B. Taylor, a former Under Secretary for International Affairs of the U.S. Treasury Department, in discussing Islamic banking, has said that “[t]here needs to be some level of consistency in regulatory treatment across the board . . .”\textsuperscript{95} However, with

\begin{footnotes}
\item[91] Rafei, supra note 8; Islamic Finance Sector Resilient, supra note 3; Adnan Yusuf: Arab, Gulf Banks Not Hurt by Global Mortgage Crunch, DUBAI FINANCIAL BROKERAGE, LLC (Aug. 26, 2008), http://ae.zawya.com/researchreports/p_2008_08_06_08_07_34/20080826_p_2008_08_06_0 8_07_34_093131.pdf.


\item[93] Rafei, supra note 8.


\end{footnotes}
the growth of and proliferation of Islamic banks, efforts at standardization have become even more difficult.\textsuperscript{96}

There are some problems respecting standardization. The IFSB and Basel II are attempting to nudge banks in the direction of standardized practices, but a major stumbling block to the development of an internationally accepted Islamic banking industry is the lack of broadly accepted standards. The Shari’ah board of an Islamic bank in Malaysia may approve a financial product, and that same product may not be acceptable or approved in a country within the Gulf Cooperation Council.\textsuperscript{97} Some countries set up Shari’ah compliance and Shari’ah boards at the national level. Malaysia, Pakistan, Sudan, and Iran have set up Shari’ah boards for approving banking standards at the level of the central bank. In most other countries, the finance industry appoints its own Shari’ah board,\textsuperscript{98} which in many cases is at the institutional level; that is, within each bank or finance house. This gives rise to a variety of different interpretations. Khaled Yousaf, head of business development in the Islamic finance sector of the Dubai International Finance Center, states that “Egypt and Malaysia have very liberal interpretations of Shari’ah law, while Saudi Arabia and Kuwait are quite strict. Dubai is somewhere in the middle.”\textsuperscript{99}

Moreover, there is the lack of trained Islamic legal scholars with knowledge of the world of finance to become members of banks’ Shari’ah boards. This can prove to be a disadvantage for the industry.\textsuperscript{100} Additionally, there do not appear to be enough trained business people and economists who understand the Islamic financial industry to man the banks.\textsuperscript{101}

For a Western trained banker, the term “standardization” is fairly common and easy to understand. This is not so easy for proponents of Shari’ah law. Religious views are not easily changed or compromised. In addition to the varying level of conservatism versus liberalism regarding Islam in the various Islamic countries, the matter is further complicated by the fact that there are four main schools of Sunni Islamic jurisprudence and one Shi’a school.\textsuperscript{102} Accordingly, “the lack of clarity in Shari’ah practices


\textsuperscript{97} The Gulf Cooperation Council was formed for mutual self defense and consists of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.


\textsuperscript{99} Id.

\textsuperscript{100} Id.

\textsuperscript{101} Zubair, supra note 68.

\textsuperscript{102} The Sunni schools (Hanbali, Shafi, Malik and Hanbal) do not differ on major issues, but do on certain essential smaller issues. The Shi’a school is known as the Jafaria
leads to lower mobility of these practices within the same country and across borders, which handicaps the growth of the industry.\textsuperscript{103}

Some Islamic scholars are now espousing a supreme Shari‘ah board that will oversee all Shari‘ah boards and which will bear responsibility for supervising the activities and the fatwas of all other boards.\textsuperscript{104} In fact, Indonesia, the most populous Muslim nation, has set up such a “super” Shari‘ah board. The Indonesian Council of Ulema has set up a National Shari‘ah Board, which issues fatwas that are binding on the other Shari‘ah boards. And under this system, the board members of the individual banks must be highly qualified in order to be able fully to understand the fatwas and to be able to draft and approve contracts that comply with such fatwas.\textsuperscript{105}

On an international basis, it appears that both the regulators of banks and the Shari‘ah scholars agree that the Shari‘ah standards and the methods of their interpretation and application must be standardized, especially if the Islamic Banking system really wants to grow in an international way and wants to appeal to a broad array of international commercial capital consumers. But it is also clear that this will require close cooperation and collaboration among the interested parties.\textsuperscript{106} This does not appear to be an easy task. Despite a lot of vocal chords being exercised and ink being spilled on the matter, no one has to date clearly and fully defined the term “Shari‘ah Governance System.”\textsuperscript{107}

To that end—and in order to strengthen and standardize the Islamic financial services industry—the Islamic Financial Services Board, in a meeting in Jeddah, Saudi Arabia, promulgated an exposure draft on Guiding Principles on Shari‘ah Governance System and requested comments on that draft to be sent in by May 15, 2009.\textsuperscript{108} This document goes a long way in an attempt to standardize the industry; however, even when it is finally agreed upon, it is unlikely to be anything more than a set of guiding principles, with no real sanctions for non-compliance. In fact, other international institutions have issued their own guidelines regarding Shari‘ah governance.\textsuperscript{109} One area of interest for the IFSB is that of the professionalism of the members of the Shari‘ah boards.

As noted above, and according to the IFSB, the word “scholar” in the context of Islam refers to a translation of the Arabic alim, the plural of ulema, which are people who are learned and expert in the study of the

\textsuperscript{103} Zaaidi, supra note 5, at 3.
\textsuperscript{104} Id. at 4.
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 5.
\textsuperscript{107} Exposure Draft., supra note 59.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at n.4.
Qur’an and Islam. However, when the IFSB use the term “Shari’ah Scholar,” they refer to a more specialized person, someone who is an expert in commercial law in the Islamic context—as opposed to someone who is simply well versed in Islamic studies. On Shari’ah boards, the IFSB wants people who, more specifically, are specialized in providing expert opinions and resolutions related to Islamic financial services. They want professionals as opposed to merely academics. Accordingly, the IFSB prefers the term “Shari’ah Board” as opposed to “Shari’ah Scholars” in referring to the phenomenon of using Islamic legal experts in the administration of Islamic banks and banking instruments. Of utmost importance to the IFSB is the independence of the Shari’ah Board.

Ideally, according to the IFSB, the Shari’ah Board should have at least three members; it would be good if they were of different nationalities or at least trained in different schools of Islamic law, and they “should possess some exposure in the areas of commerce or finance . . . .”

The IFSB suggests that there be either a department or a person within the bank, a sort of Shari’ah compliance officer or department (ISCU), who will disseminate the fatwas and monitor day-to-day compliance with them by bank operations and financial instruments. This person should also be independent from other departments, just as the audit function in most any standard publicly traded corporations or banks in the United States is independent. The third organism of Shari’ah compliance at the bank or corporation level would be the internal Shari’ah compliance review and audit function (ISRU), the task of which is to verify compliance with Shari’ah as defined in the fatwas and to recommend the strengthening or modification of systems to ensure such compliance if weaknesses are detected. This function is similar to that of an internal audit department in most any standard publicly traded corporations or banks in the United States, but its task is more specific and targeted than that of a standard corporate audit department. An annual Shari’ah compliance review—much like the typical annual financial audit of a Western bank—is a further recommendation of the IFSB.

110. Id. at 3-4.
111. Id. at n.5.
112. Id. at 7.
113. EXPOSURE DRAFT, supra note 59, at 7.
Accordingly, the corporate governance framework recommended by the IFSB for an Islamic bank would be along the lines set forth in the following Diagram:

Diagram 1.2\[114\]

<table>
<thead>
<tr>
<th>FUNCTIONS</th>
<th>TYPICAL FINANCIAL INSTITUTION</th>
<th>ADDITIONS IN ISLAMIC BANKS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Governance</td>
<td>• Board of directors</td>
<td>• Shari`ah board</td>
</tr>
<tr>
<td>Control</td>
<td>• Internal auditor</td>
<td>• ISRU[115]</td>
</tr>
<tr>
<td></td>
<td>• External auditor</td>
<td>• External Shari`ah review</td>
</tr>
<tr>
<td>Compliance</td>
<td>• Regulatory and financial compliance officers, unit or department</td>
<td>• ISCU[116]</td>
</tr>
</tbody>
</table>

As already mentioned, the major Western banks follow the Basel Accords in accordance with and interpreted by their own national regulatory structures. Because the major Western banks are the ones who, as a practical matter, control most of the finances for the world’s commerce, they are the ones that count in conventional banking. For this reason, among others, Basel II is respected and fairly well followed around the world. As we have seen, this is why banking activities are similar in the major world capitals.

The IFSB, on the other hand, and other such institutions recognize “the detailed scope of the Shari’ah Governance System may vary from one jurisdiction to another, depending on the types of structures adopted.”\[117\] The IFSB promulgates merely “guiding principles.” Nothing is mandated, monitored, or controlled.

The AAOIFI, headquartered in Bahrain, also understands the problems of standardization in an industry that is located in many countries with differing political, commercial and religious standards, and expects that the

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114. Id.
115. Internal Shari`ah review/audit unit.
116. Internal Shari`ah unit/department. If the ISCU is part of the IIFS’s compliance team, the internal Shari`ah review/audit unit/department (ISRU) may be established to function in a similar manner to the IIFS’s internal audit team. The major difference is that while the internal auditor will usually report to the Audit Committee, the ISRU will report to the Shari`ah board. EXPOSURE DRAFT, supra note 59 at 3.
117. Id. at 4.
institutions will implement its standards to the extent that they wish to do so or are able to do so.\footnote{118}

Despite all the hype and the successes of Islamic banks and the recent favorable press, all is not milk and honey. The Financial Times has reported that Islamic banking could play a useful role in our troubled financial world, but that it would not be a “silver bullet” for the crisis.\footnote{119} It

\footnote{118. Accounting and Auditing Standards Board, The Accounting and Auditing Organization for Islamic Financial Institutions, http://www.aaoifi.com/aaoifi/TheOrganization/AAOIFIStructure/AccountingandAuditingStandardsBoard/tabid/68/language=en-US/Default.aspx (last visited Nov. 6, 2010). The powers of the Standards Board include, among others, the following:

1. To prepare, adopt and interpret accounting and auditing statements, standards and guidelines for Islamic financial institutions.

2. To prepare and adopt code of ethics and educational standards related to the activities of Islamic financial institutions.

3. To review with the aim of making additions, deletions or amendments to any accounting and auditing statements, standards and guidelines.

4. To prepare and adopt the due process for the preparation of standards, as well as regulations and by-laws of the Standards Board.

The powers of the Shari’a Board include, among others, the following:

1. Achieving harmonization and convergence in the concepts and application among the Shari’a supervisory boards of Islamic financial institutions to avoid contradiction or inconsistency between the fatwas and applications by these institutions, thereby providing a pro-active role for the Shari’a supervisory boards of Islamic financial institutions and central banks.

2. Helping in the development of Shari’a approved instruments, thereby enabling Islamic financial institutions to cope with the developments taking place in instruments and formulas in fields of finance, investment and other banking services.

3. Examining any inquiries referred to the Shari’a Board from Islamic financial institutions or from their Shari’a supervisory boards, either to give the Shari’a opinion in matters requiring collective Ijtihad (reasoning), or to settle divergent points of view, or to act as an arbitrator.

4. Reviewing the standards which AAOIFI issues in accounting, auditing and code of ethics and related statements throughout the various stages of the due process, to ensure that these issues are in compliance with the rules and principles of Islamic Shari’a.


appears that greater transparency and standardization are required throughout the industry as a whole, since “[t]he . . . combination of requirements of Shari’ah compliance and business performance raises specific challenges and agency problems, and underlines the need for distinctive [corporate governance] structures.” The CEO of the recently formed and licensed BBK Capanova, the investment bank owned by the Bank of Bahrain and Kuwait, has said the industry needs to improve its transparency, and others have echoed this call.

Even though Islamic banking and financial institutions contend that they base themselves on piety, concern for social justice and the laws of God, some, such as Nobel Laureate Economist Hirschman, have contended that generally businesses, individuals, and organizations suffer legal and ethical lapses. Islamic bankers have proven to be no exception, and “[t]he history of Islamic finance shows that cases of [corporate governance] failures, neglect of minority shareholders’ interests, imprudent lending and excessive risk taking by management.”

There appear to be at least three possible reasons why the Islamic banks have not suffered much in the current stage of the world economic crisis, and they all stem from their governance based on Shari’ah principles. First, because the banks share in the profits or losses of their borrowers’ ventures (and in the case of mortgages, generally the mortgage is on the books of the bank until paid off), which is a result of the principle of no interest, the Islamic bank is very careful about where they put their money; credit worthiness is therefore a paramount concern. Second, since money is not be made from money and uncertainty or gambling is prohibited, the bundling and securitization of financial instruments is prohibited.

120. Grais & Pellegrini, supra note 60, at 7.
122. ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970), cited in Grais & Pellegrini, supra note 60, at 6.
123. Grais & Pellegrini, supra note 60, at 6.
124. Bright and creative bankers are attempting to come up with new financial instruments in order to compete with conventional banks and finance houses and thus capture more of the market. The International Islamic Financial Market (IIFM) has submitted to its Shari’ah board a scheme for making and selling derivatives. Cecilia Valente, Sharia
The bank generally keeps the paper and this not only makes the bank concerned about proper credit checks, but it inhibits the bank’s ability to multiply capital; that is, continue to lend based on a fixed amount of reserves. And finally, because Islamic banking does not allow the same level of the fractionalizing of reserves as conventional banks, (that is, not all deposits can be used for certain types of—or long term—lending) theoretically the bank puts a lower amount of its total reserves at risk. Even so, Islamic bankers believe that the recent world financial crisis has “level led the playing field,” making it easier for Islamic banks to compete; but they also believe that the industry has to work to come up with new and innovative financial instruments in order to appeal to a broader market.\(^{125}\)

CONCLUSION

No international institution governs, monitors or controls the internal corporate governance standards in the far–flung Islamic banks, and because an important aspect of the internal standards is Shari’ah compliance, this gives rise to differing standards for financial instruments and financial operations from place to place. So of course, in order for Islamic banks to have universal appeal and full cross–border application, most believe that they will have to have standardized practices. This will require standardized governance structures. How long this will take is an open question. Conventional banks took centuries to evolve into what they are today, while Islamic banks are still in their infancy.\(^{126}\)

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\(^{125}\) Derivative Standard out by Year-End - IIFM, Arabian Bus., Sep. 11, 2009, http://www.arabianbusiness.com/sharia-derivative-standard-out-by-year-end-iifm-12913.html. They are still waiting for it to be approved by the Shari’ah board. Even if some do approve such derivatives, it is questionable whether even a majority of the mainstream Islamic Shari’ah boards will approve such instruments, since they have traditionally been a violation of Islamic tenets. IIFM is a non-profit international infrastructure development institution supported by the central banks and government agencies of Bahrain, Brunei, Dubai, Indonesia, Malaysia, Pakistan, Sudan and the Islamic Development Bank, Saudi Arabia, in addition to number of financial institutions from various jurisdictions. Founding and Permanent Members, International Islamic Financial Market, http://www.iifm.net/default.asp?action=category&id=60 (last visited Nov. 6, 2010).


Zubair, supra note 68, at n.3.
**U.S. INTERNATIONAL NARCOTICS EXTRADITION CASES: LEGAL TRENDS AND DEVELOPMENTS WITH IMPLICATIONS FOR U.S.–CHINA DRUG ENFORCEMENT ACTIVITIES**

*David Aronofsky* & Jie Qin†

**INTRODUCTION**

Professor Edward M. Morgan notes that “extradition, as opposed to domestic prosecution, has become the law enforcement vehicle of choice for governments willing to engage with the United States in the anti–drug campaign.”¹ This Article will review U.S. international drug trafficking...

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extradition cases with the dual objectives of identifying (a) contemporary legal issues, trends and developments; and (b) analyzing how these trends, issues and developments might reasonably apply to future U.S.–China cooperation in international drug enforcement efforts. Special attention will be paid to the recent Valencia–Trujillo court decision\(^2\) as an example of why extradition treaties may not be needed for effective drug trafficking enforcement and prosecution in certain instances.

Part I of this Article discusses general international extradition legal rules and principles applied in U.S. courts, based on both treaties and comity. Part II describes how U.S. courts have applied these extradition rules and principles to select international narcotics cases during the past several years. Part III looks at the Valencia–Trujillo case and why it may prove useful in bolstering international enforcement. Part IV analyzes how the U.S. approach to extradition in drug cases, particularly extradition not based on treaties, might reasonably be used in future U.S.–China collaborative efforts to combat international drug trafficking through proactive use of the U.S.–China Mutual Legal Assistance Agreement (approved between the two countries in June 2000), even as the two countries consider the much more complicated issue of whether to negotiate a bilateral extradition treaty.

I. GENERAL U.S. INTERNATIONAL EXTRADITION CASE LEGAL RULES AND PRINCIPLES

The United States utilizes two legal approaches to extradition. The primary one involves extradition pursuant to a specific extradition treaty, usually bilateral, which involves either the U.S. or the other treaty party requesting the return of a fugitive to the requesting state. The second approach, which is far less used, is extradition by comity, whereby the court of one country, in the interest of averting real or perceived jurisdictional conflicts with another country’s legal system, will defer to that country’s judicial order or request for a fugitive’s return to face prosecution.\(^3\)

Three legal principles apply to both extradition approaches. First, the alleged crime must constitute an extraditable offense, i.e., the extraditing country must agree that the alleged offense is one suitable for extradition. This is easy enough when a treaty contains a list of such offenses, but is not so readily apparent with comity–based extradition.\(^4\) Second, the offense must constitute a crime in both countries, a requirement often referred to as

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4. Id. at 205-06.
“dual criminality” or “double criminality.” Although the definitions and elements of the offense in each country need not be identical, some similarities will normally be present under both extradition approaches and both approaches require some form of serious punishment even though this need not be identical.\(^5\) The third principle, “specialty,” prohibits the requesting state from prosecuting the fugitive for any crime other than the one for which extradition is sought, although the U.S. generally allows requesting states to add additional criminal charges related to the extraditable offense if permitted under the laws of the requesting state.\(^6\) The U.S. also allows the receiving state to consider pre-extradition illegal conduct in both sentencing phases.\(^7\)

Federal statutes govern U.S. extradition procedures.\(^8\) The statutes establish a two-step procedure that divides responsibility for extradition between a federal judicial officer and the U.S. Secretary of State. The judicial officer, upon complaint, issues an arrest warrant for an individual sought for extradition, provided that there is an extradition treaty between the United States and the requesting foreign country and that the crime charged is covered by the treaty. If a warrant issues, the judicial officer then conducts a hearing to determine whether there is sufficient evidence to sustain the charge under the treaty. If the judicial officer finds sufficient evidence, the judicial officer certifies to the Secretary of State that a warrant for the surrender of the person(s) subject to the extradition request may be issued. The judicial officer must also provide the Secretary of State with a copy of the testimony and evidence from the extradition hearing. The Secretary of State has sole discretion to decide whether extradition should occur. Extradition by non-treaty means generally functions through similar processes.\(^9\)

Even when the above three principles are present, a country may nonetheless refuse to extradite a fugitive based on a legal exception. One such exception involves a political offense, based upon the extraditing state’s own national interpretation of what constitutes such an offense when a treaty does not specify otherwise.\(^10\) U.S. courts have developed a two-part test for determining when an offense is sufficiently “political” in nature to fall under this exception based on whether there was some form of violent disturbance or uprising in the requesting country; and if so, whether the alleged offense is incidental to or in furtherance of the uprising.\(^11\) As one legal commentator notes, “[e]ven a purely political offense, however,
when linked to a common crime such as murder, loses its political character, and may thus be the proper ground of an extradition request.\textsuperscript{12} Moreover, political offenses normally do not include international crimes such as genocide, piracy, war crimes, and at least arguably, international narcotics trafficking.\textsuperscript{13} Another important exception to extradition under U.S. and international law rests on a prohibition (reflected in the U.S. FARR Act,\textsuperscript{14} which in turn implemented the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment\textsuperscript{15}). Judicial review of this exception in U.S. courts is nonetheless all but nonexistent based on a 2008 U.S. Supreme Court decision deferring to the U.S. Executive Branch determination of when these conditions are met, with legal challenges seldom successful under the sole mechanism of habeas corpus.\textsuperscript{16}

As noted above, most extraditions occur pursuant to treaty and the cases tend to be fairly straightforward in U.S. courts, with all but a handful of extradition requests made to the U.S. government resulting in the grant of extradition. Extradition pursuant to comity, however, is a more complicated and far less common approach. The United States makes comity–based extradition especially difficult by limiting its application to third country nationals and barring it altogether with regard to U.S. citizens and permanent resident aliens.\textsuperscript{17} This restriction does not restrict the U.S. from using non–treaty comity principles to exercise jurisdiction over alleged criminals once they enter the U.S. prosecutorial system, as seen below in the Valencia–Trujillo case.

II. SELECT U.S. EXTRADITION CASES INVOLVING NARCOTICS

Both U.S. and non–U.S. courts have experienced increased activity in international narcotics extradition proceedings. The U.S. has been especially assertive in requesting extradition of drug traffickers who seek refuge abroad, including traffickers who are citizens of the countries where extradition is sought, and at times perhaps surprisingly, these countries seem inclined to cooperate by sending these drug traffickers to the U.S. for prosecution.\textsuperscript{18} Professor Morgan notes: “The case law reveals that when the

\textsuperscript{12} Warneck, supra note 3, at 207.
\textsuperscript{13} Id. Prasoprat v. Benov, 421 F.3d 1009 (9th Cir. 2005) (ordering extradition of an alleged international drug trafficker to Thailand), cert. denied, 546 U.S. 1171 (2006).
\textsuperscript{18} See Joshua H. Warmund, Comment, Removing Drug Lords and Street Pushers: The Extradition of Nationals in Colombia and the Dominican Republic, 22 Fordham Int’l
United States calls for drug extraditions, the fugitives tend to come; or more accurately, tend to be sent.\(^{19}\) Below are brief descriptions of how the U.S. courts handle these cases when they arrive.

A. U.S. Appellate Court Extradition Treaty Decisions

*U.S. v. Thomas\(^{20}\)* considered the 1972 U.S. extradition treaty with the United Kingdom, as applied to a large scale U.S. marijuana trafficker who, upon learning he would be arrested in the U.S., fled first to Jamaica and then to the England, from where he was extradited. The specific treaty issue was whether the charges against Thomas for operating a “continuing criminal enterprise” conflicted with dual criminality principles because neither the Treaty nor U.K. law expressly included the “continuing criminal enterprise” offense. Because the U.K. criminalizes marijuana trafficking, the Court had no difficulty rejecting Thomas’ challenge by concluding that what an offense is called in each country is not especially pertinent as long as the conduct subject to prosecution constituted a serious crime in each country. This case may well be typical of how U.S. courts handle dual criminality challenges in drug cases, as the “continuing criminal enterprise” offense under U.S. law imposes very strong penalties.

*U.S. v. Cuevas\(^{21}\)* addressed the issue of when U.S. courts can ignore extraditing country’s efforts to limit a sentence as an extradition condition, although the effort here seems legally specious. The Dominican Republic took custody of defendant and extradited him to the U.S. pursuant to both the 1909 bilateral extradition treaty and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances\(^{22}\) on various narcotics trafficking charges. Following extradition, however, the Dominican Republic unilaterally issued a decree declaring that the applicable sentence for the charged offenses should not exceed thirty years. The Court had little difficulty rejecting this after-the-fact effort by the sending country to condition sentencing and defendant’s specialty challenge based on the purported condition, because the U.S. had never agreed to the condition (nor been asked to) when extradition was sought and obtained. Required to interpret the U.N. Convention (to which both the U.S. and the Dominican Republic are parties), as well as the bilateral treaty, the Court found that the Convention did not require a receiving country to limit a sentence to the maximum allowed by the sending country’s laws if the


19. Morgan, supra note 1, at 420.
sending country never required this condition in the extradition proceeding. Interestingly, the trial court sentence of 390 months did not notably exceed the 360–month sentence proposed by the Dominican Republic and because of a non–extradition U.S. law sentencing issue requiring remand of the case to the trial court, it was likely that the defendant would receive a lighter U.S. sentence anyway.

_Ramanauskas v. U.S._\(^{23}\) addresses the issue of when and how double jeopardy and extradition intertwine. The case involves the 2003 U.S.–Lithuania extradition treaty applied to a Lithuanian citizen convicted of counterfeiting offenses in the U.S. pursuant to a plea agreement that acknowledged, but did not include, drug trafficking charges. Ramanauskas was also charged in Lithuania with a drug trafficking offense for which Lithuania sought extradition from the U.S. He argued unsuccessfully that the U.S. plea agreement barred the Lithuanian drug charges extradition based on the treaty provision precluding extradition for charges resolved by plea agreement in the requested country, because another treaty provision expressly permitted extradition for any charges not filed against the person. The U.S. Court found that the decision not to prosecute defendant for drug offenses meant that he could be charged in Lithuania for the alleged drug offenses there.

_Prasoprat v. Benov\(^{24}\) may well be the most controversial U.S. extradition case to date involving narcotics. Prasoprat, a U.S. citizen, was criminally charged in both Thailand and the U.S. with heroin trafficking between the two countries. Thailand sought extradition pursuant to the 1983 bilateral extradition treaty and the defendant opposed this on the ground that he would face the death penalty in Thailand for what is a non–capital offense in the U.S. Although the treaty permitted either party to deny extradition on this basis except for murder crimes, the treaty did not require it. The Court denied defendant the opportunity to contest extradition on this ground based on deference to the U.S. Executive Branch decision to permit extradition, and ordered the case dismissed. Undaunted, however, Prasoprat then filed a second habeas corpus challenge to extradition based on alleged torture if he were returned to Thailand and although the Court recognized there may be a viable legal claim on this basis, the Court nonetheless concluded Prasoprat had provided little credible evidence this would occur and recommended dismissal, with his case apparently still pending on appeal.\(^{25}\) Although the 2005 appellate decision has been sharply criticized, the rule of judicial non–inquiry into Executive Branch determinations of requesting state conditions still prevails and seems unlikely to change.\(^{26}\)

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23. 526 F.3d 1111 (8th Cir. 2008).
24. _Prasoprat_, 421 F.3d 1009.
B. U.S. District Court Treaty Decisions

_In the Matter of the Extradition of Jacques Pelletier_ illustrates how identity of the person being sought for extradition is proved based on a combination of photographs, customs and immigration declarations, interviews with other law enforcement agencies, etc. even when there is no corroborating witness. Brought under the 1908 U.S.–Portugal extradition treaty, the case involved a Canadian citizen sought by Portugal for alleged large-scale drug smuggling. Pelletier owned a large boat seized by the Portuguese navy while carrying a large illegal narcotics shipment, and he was arrested in the U.S. when Portugal sought his extradition. After determining he was the same person as that sought by Portugal, the Court then found extradition proper based upon evidence presented from the Portuguese trial of the captain and crew that Pelletier intended to ship the illegal drugs to Portugal for sale, a crime in both the U.S. and Portugal.

_In re Gon_ involves the application of the 1978 U.S.–Mexico extradition treaty to a Chinese–born Mexican citizen in some interesting U.S. judicial process contexts. Gon was first arrested in the U.S. on methamphetamine distribution charges and while in U.S. custody awaiting trial, Mexico sought his extradition for major drug and related crimes (far more serious in nature than the U.S. charges). Gon tried unsuccessfully to argue that (1) the extradition case should be deferred until after his U.S. case was disposed of; (2) he should be released on bail; (3) he should not be extradited for humanitarian and political offense reasons; and (4) he should be allowed to conduct evidentiary discovery of the Mexican charges. The Court rejected deferral based on the long–established principle that extradition proceedings should precede domestic prosecution because of U.S. treaty obligations, although deferral of the extradition removal itself could occur afterward. The Court refused bail because bail is seldom if ever granted in extradition cases and also because Gon posed a serious flight risk. The Court likewise rejected the humanitarian and political offense arguments as legally improvident. The Court then refused discovery of Mexico’s evidence as a violation of Mexican sovereignty, but did allow limited discovery of the U.S. for the


purpose of seeing whether any U.S. evidence could negate probable cause for the Mexican arrest warrant.

_U.S. v. Blackiston_²⁹ involves a 1982 U.S.–Costa Rica extradition treaty specialty challenge to the sentencing of a U.S. citizen extradited to the U.S. for prosecution of various marijuana trafficking charges. After his return to the U.S., the government added Ecstasy trafficking to the list of crimes Blackiston eventually pleaded guilty to. The issue before the Court was whether Blackiston’s sentence could be enhanced for the Ecstasy charges not expressly included in the Costa Rican extradition order because of treaty language stating a person could be “punished” only for the offense(s) subject to the extradition decision absent exceptions inapplicable to the case. Although noting various bases for sentence enhancement in extradition contexts based on crimes either committed in connection with the extraditable offenses of after extradition occurred, the Court expressed concern about the difference between Ecstasy and marijuana and decided to have the U.S. government notify the Costa Rican Government of the proposed sentence enhancement to ascertain whether the latter would object.

_U.S. v. Wathne_³⁰ saw the Court wrestle with the complicated issue of appropriate remedies for violation of the dual criminality rule. Wathne was an Icelandic citizen residing in Russia when he was detained by Russian authorities pursuant to a U.S. law enforcement assistance request for questioning about alleged LSD money laundering activities. Wathne claimed the Russians tortured him and fled to India, where he was arrested upon landing at the airport pursuant to an Interpol notice and subjected to a U.S. extradition request under the 1999 U.S.–India extradition treaty. While extradition proceedings in India were pending, Wathne voluntarily agreed to come to the U.S. on the condition that he could raise any defenses allowed under the treaty (he had already succeeded in persuading at least one India court that the treaty did not permit extradition for the alleged offense he was charged with in the U.S.). The parties conceded that extradition from Russia would not have occurred because of both the absence of a treaty and the general unwillingness of Russia to extradite or otherwise send fugitives to the U.S. for prosecution. Wathne successfully persuaded the Court of a dual criminality violation by proving that the money laundering offense he was charged with was not a crime in India when allegedly committed. The Court then considered various remedy options before deciding that it lacked both the power to dismiss the charges (the remedy sought by Wathne) and jurisdiction over the case. The Court noted that if Wathne failed to leave the U.S. he would be considered to waive his right to be free of prosecution, and then pointed out that Wathne probably had nowhere to go because he would likely be extradited from almost any other country he fled to. This is

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an interesting case because in essence Wathne won his legal battle but it is far from clear he could ever win the legal war.

*U.S. v. Mondragon–Garcia*\(^1\) illustrates the difference between extradition and conditional release into the custody of a requesting state. Two Mexican citizens attempting to leave Panama were stopped at the airport and detained for investigation of alleged money laundering. A few weeks later, a U.S. federal court in Florida issued indictments against the two for what were probably similar money laundering offenses. The U.S. Embassy in Panama then requested the conditional release into U.S. custody of the two pursuant to the U.S.–Panama law enforcement cooperative agreement and Panamanian law, deliberately choosing not to request extradition. The Embassy diplomatic note described the two as dangerous members of the Sinaloa, Mexico drug cartel involved in large scale cocaine trafficking, although there was apparently no evidence presented to support this in the note. They were then bought to the U.S. for prosecution. The defendants unsuccessfully tried to convince the Court that their detention and conditional release were predicated on U.S. Government misrepresentations to the Panamanian authorities and a lack of evidence to support their release into U.S. custody. The Court rejected these arguments by ruling that procedural flaws could not negate the charges. This particular court opinion is not especially well–reasoned because even though extradition was apparently never sought, the Court nonetheless analyzed the case pursuant to extradition treaty law and in the end correctly concluded that procedural flaws in an extradition process will not normally negate a court’s power to criminally try the extradited persons.

*Germany v. U.S.*\(^2\) illustrates how U.S. courts decide extradition disputes arising from trials and convictions of fugitives *in absentia*. The case appears to involve two separate extradition treaties, namely the one between the U.S. and Jamaica, where Germany was in preventive custody, and the 1996 U.S.–France treaty. Only the U.S.–France treaty is pertinent here, as it was the basis for the Court’s decision finding adequate evidence to support the extradition request. Germany was convicted in absentia in two separate French courts of various cocaine trafficking offenses. Applying well–established case law, the Court determined that the trials in absentia posed no barrier to extradition because the legal test is the same as that for establishing adequacy of probable cause that the crimes occurred. In this case France provided more than ample evidence to meet the standard.

*In the Matter of the Extradition of Giovanni Gambino*\(^3\) reflects the complexities of interpreting extradition treaty offense language when the English and non–English versions differ from one another. The case involved sophisticated heroin trafficking conspiracies in both the U.S. and

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\(^1\) No. 8:07-cr-119-T-26MAP, 2007 U.S. Dist. LEXIS 86118 (M.D. Fla. 2007).

\(^2\) No. 06 CV 01201 (DLI), 2007 U.S. Dist. LEXIS 65676 (E.D.N.Y. 2007).

Italy, with convictions obtained on some of the conspiracy charges in the U.S. and extradition sought by Italy under the 1983 U.S.–Italy treaty for certain conspiratorial acts similar in nature to those resulting in the U.S. convictions. The Court considered the opinions of multiple U.S. and Italian legal experts to determine that the treaty provision precluding extradition for the same or substantially similar offenses conclusively resolved in the requested state did not apply; but then finding that one set of conspiracy charges subject to Italy's extradition requests was not adequately presented or substantiated as required by the treaty, while another could be certified for extradition.

_U.S. v. Hunte_ addresses certain procedural aspects of extradition requests from foreign states arising from the U.S.–Barbados extradition treaty in a marijuana smuggling case. Barbados sought Hunte's extradition based on information obtained from two other persons arrested in Barbados in connection with the same criminal activity. Hunte unsuccessfully argued inadequate probable cause for the extradition because the Court found the testimony by the other arrestees sufficient to support it even though there was a partial recantation by one of them. The Court further found as not credible Hunte's argument she was promised immunity from extradition by U.S. drug officials because she failed to obtain or produce written evidence to support it.

_C. Some Key Non–Treaty Decisions_

_U.S. v. Alvarez–Machain_ is a significant U.S. Supreme Court case which establishes the legal rule in the U.S. that once a fugitive or criminal suspect comes within the criminal jurisdiction of U.S. courts the person stays within such jurisdiction regardless of how the person arrives there. Here Alvarez–Machain, a Mexican physician suspected and charged with aiding in the torture and murder of U.S. DEA agents in Mexico by a Mexican drug cartel head, was kidnapped in Mexico by U.S. federal agents and brought into the U.S. for criminal prosecution. Mexico formally protested the seizure, claiming it violated the U.S.–Mexico extradition treaty. The Court ruled that the treaty was not the exclusive means of bringing Mexican fugitives into the U.S., and despite a general outcry of opposition from the international community objecting to the abduction as an egregious international law violation, the Court also ruled that he could

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be criminally prosecuted. Interestingly, he was acquitted of the criminal charges and in separate litigation, unsuccessfully sued the U.S. Government in a civil tort action. The decision is very important because it supports proceeding with prosecution without regard to how drug offenders find themselves in U.S. jurisdiction regardless of whether there is an extradition treaty in place.

*Fiocconi v. U.S. Attorney General*[^37] is perhaps the seminal U.S. non-treaty extradition case involving narcotics. The U.S. sought extradition of two French citizens on narcotics trafficking conspiracy charges even though the applicable 1868 U.S.–Italy treaty did not include narcotics offenses. Using comity as the basis for granting the U.S. extradition request, Italy turned over the two to U.S. authorities on the conspiracy charges issued in a Massachusetts federal court. After their return, the two were subjected to additional charges involving trafficking in a New York federal court. Citing specialty, the defendants argued that they should not be subjected to the New York charges because Italy never agreed to grant extradition on these. With some difficulty the Court determined that the spirit of the comity-based extradition was complied with by concluding that the offenses were closely enough connected to obviate any argument that the U.S. was acting in bad faith towards Italy. The Court acknowledged the viability of defendants’ arguments but nonetheless sided with the prosecution. It may well have mattered that the U.S. had returned to the Italian courts to seek a broadening of the narcotics charges, and that at the time of the U.S. decision Italy had not objected to the U.S. charges.

*U.S. v. Gardiner*[^38] upheld the use of non-treaty means to obtain U.S. custody over a Bahamian national who entered the Dominican Republic illegally and was subsequently charged in a U.S. court with cocaine trafficking conspiracy. Although the U.S. alerted Interpol of the charges with the apparent intent of seeking extradition, the Interpol alert was in fact used to trigger a Dominican Republic law authorizing the expulsion of any non-citizen subject to an arrest warrant. The Dominican Government turned over Gardiner to U.S. custody and he then tried to argue that the U.S.–Dominican Republic extradition had been violated. The Court rejected this argument by concluding that Gardiner was in effect never extradited to the U.S. but instead was properly handed over to U.S. custody pursuant to Dominican law. Although not an extradition case per se, this decision illustrates how international narcotics crimes can be combated through creative means of obtaining custody over fugitives.

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[^38]: 279 Fed. App’x 848 (11th Cir. 2008).
U.S. v. Valencia–Trujillo appears to be a significant new case in the area of non–treaty extradition for narcotics offenses. Convicted on various drug–related crimes, Valencia–Trujillo argued that both specialty and the U.S.–Colombia extradition treaty were violated because matters not in the indictments against him were used to convict him and also because he was charged with offenses not facially within the parameters of the treaty. The Court rejected these arguments by concluding that he was extradited pursuant to non–treaty means because the U.S.–Colombia treaty was not in effect at the time of his extradition, and then concluding that he lacked standing to raise the specialty issue at all as this could only be done in treaty–based extraditions. The potentially far–reaching implications of the Court ruling are elaborated below.

III. Valencia–Trujillo Implications in Future International Narcotics Enforcement

The Valencia–Trujillo case has significant implications for international narcotics enforcement and prosecution activities involving the United States because it offers some effective alternatives to the use of extradition treaties as a means of receiving and sending fugitives, suspects, and criminal defendants. The Court ruled that persons extradited by non–treaty means have no legal standing to challenge alleged specialty violations, i.e., to claim that they are being prosecuted for offenses other than those for which they were surrendered. In 2002, Valencia–Trujillo was indicted by a U.S. federal court for alleged drug conspiracy and criminal enterprise activities as a member of the Cali, Colombia drug cartel. Colombia arrested him at U.S. request with a diplomatic note also requesting that Colombia extradite him to the U.S. to face these specific charges. The Colombian Justice and Interior Ministries approved the extradition subject to the condition that he could be tried “only for those charges for which he was requested, and for those acts which took place after December 17, 1997.” This 1997 date had legal importance in that Colombia had amended its Constitution to permit extradition of Colombian citizens with or without a treaty for offenses committed after this date.

Before his trial Valencia–Trujillo raised the specialty argument that certain conspiracy counts based on acts allegedly occurring before December 1997 be stricken from the case. The trial court refused and he was convicted on all counts. The appellate court rejected his specialty argument.

39. 573 F.3d 1171.
40. Id. at 1173-74.
41. Id. at 1176.
argument by ruling that he had no right to raise this argument because he was extradited by non–treaty means.\textsuperscript{43} In other words, defendants may only challenge specialty violations if they were extradited pursuant to treaty. This tends to undermine the above \textit{Fiocconi} case allowing specialty challenges in comity–based extraditions and some subsequent federal court decisions also allowing specialty challenges in non–treaty cases.\textsuperscript{44} The Court also rejected Valencia–Trujillo’s argument that specialty protected him under customary international law by noting that specialty probably does not constitute customary international law, and even if it does, no private right of action to enforce it exists because extradition is a diplomatic act between governments.\textsuperscript{45}

The \textit{Valencia–Trujillo} case allows U.S. drug enforcement officials and prosecutors to use non–treaty extraditions more aggressively by eliminating surrendered fugitive specialty challenges. The practical effect means that a person within U.S. criminal court jurisdiction has no legal means to challenge prosecutions and convictions based on charges and offenses not part of the non–treaty surrender process. Although the surrendering country can certainly file diplomatic objections, this would not necessarily affect decisions that disregard specialty. For these reasons the case has been sharply criticized by one commentator as “a message . . . that the United States cannot be trusted to live up to the promises that it makes in order to secure extradition.”\textsuperscript{46} Moreover, the case appears to bar persons subject to comity–based extradition from the U.S. to other countries to raise specialty challenges. In other words, the case provides a great incentive to use means other than treaties as the basis for extradition. Because a number of countries, including the U.S. and China, lack extradition treaties with each other and will necessarily require extensive diplomatic efforts over lengthy periods of time to get them, the \textit{Valencia–Trujillo} decision provides an easier means to facilitate extraditions far less vulnerable to legal attack.

IV. U.S.–CHINA DRUG ENFORCEMENT COLLABORATION THROUGH NON–TREATY EXTRADITION: PROSPECTS AND ISSUES

The U.S. and China have something of an inconsistent history regarding drug enforcement collaboration. It is not altogether clear that any significant collaboration occurred until the late 1980s, when the infamous Goldfish heroin smuggling case reflected both the promise of such

\textsuperscript{43} Valencia–Trujillo, 573 F.3d at 1181.
\textsuperscript{44} Recent Case, supra note 42, at 575-76.
\textsuperscript{45} Id. at 577-79.
\textsuperscript{46} Amie Cafarelli, \textit{Extradition Law – Criminal Defendants Extradited Outside of Treaties Lack Standing to Assert Rule of Specialty – United States v. Valencia–Trujillo, 573 F.3d 1171 (11th Cir. 2009), 33 Suffolk Transnat’l L. Rev. 377, 388 (2010). Whether this criticism is valid is questionable, in that extradition was never used as the U.S. jurisdictional basis for trying the fugitive.
collaboration—at least initially—and a major setback which could have curtailed such collaboration altogether.\textsuperscript{47}

A. The Goldfish Heroin Case: A Troubled Beginning

The Goldfish case began in 1988, when Chinese customs brokers at the Shanghai Airport discovered heroin hidden inside a shipment of goldfish destined for San Francisco. Chinese police officials arrested Wang Xong Xiao, a Chinese citizen, for arranging the shipment. During interrogations, Wang allegedly confessed to assisting Hong Kong resident Leung Tak Lun ship the drugs to the United States. Chinese officials arrested Leung, and notified the United States Drug Enforcement Agency of the pending shipment. DEA agents seized the shipment when it arrived in San Francisco and arrested Chico and Andrew Wong. The Chinese government extradited Leung to the U.S., where federal prosecutors indicted Leung and the two Wongs for conspiracy to import and possess heroin with intent to distribute.\textsuperscript{48}

In what apparently was the first time China cooperated with another country to prosecute a defendant charged with a criminal offense, China sent Wang and five Chinese investigating officials to the U.S. to assist the U.S. Government at the criminal trial. The Chinese officials testified during the first month of the trial. Wang was then called as a witness, and he testified for several days. Wang then shocked all concerned by filing a petition for political asylum and testifying to the trial court that his Chinese captors had coerced and tortured him to confess falsely. He claimed his Chinese captors ordered him to testify falsely at trial, with the threat that failure to comply with their demands would lead to a death sentence when he returned to China.\textsuperscript{49} The trial court immediately declared a mistrial but refused to dismiss the case against defendants, who were convicted in the subsequent retrial.

Meanwhile, Wang’s asylum petition became subject to sharp legal conflict as U.S. Government officials sought his removal from the U.S. in apparent retaliation for his changed testimony. The U.S. courts which heard Wang’s challenge to the attempted removal found that U.S. prosecutors had engaged in serious misconduct in connection with the decision to bring Wang to the U.S. to testify and further found that Wang should be allowed to remain in the U.S. as his due process rights would be violated if he were involuntarily returned to China to face likely torture and death.\textsuperscript{50} Both the trial and appellate courts excoriated U.S. Government officials for not

\textsuperscript{47} U.S. v. Leung Tak Lun, 944 F.2d 642 (9th Cir. 1991).
\textsuperscript{48} Id. at 643.
\textsuperscript{49} Id. at 643-44.
\textsuperscript{50} Wang v. Reno, 81 F.3d 808, 810 (9th Cir. 1996), aff’d 837 F.Supp. 1506 (N.D. Cal. 1993).
independently corroborating the legitimacy of Wang’s trial testimony against the defendants, and then trying to remove him from the U.S. after placing him in his position in the first place. One commentator has written that “[t]he Wang case demonstrated the importance of a neutral court’s capacity to exercise its supervisory powers to protect a witness and to ensure that witness testimony in U.S. proceedings is free of the taint of coercion.” Although this case might well have ended further China–U.S. drug enforcement cooperation, this in fact did not occur and instead the two countries developed new legal means to develop it.

B. The Lui Kin–Hong Case: Extradition Via Hong Kong

Although not a narcotics case, *U.S. v. Lui Kin–Hong* deserves mention here because it addressed whether extradition from the U.S. to Hong Kong was permissible in the aftermath of the Goldfish decisions as Hong Kong was about to revert to China’s jurisdiction on July 1, 1997.

In 1995, when Hong Kong was still subject to British sovereignty, a Hong Kong criminal court charged Lui with large scale bribery involving tobacco imports and pursuant to the applicable U.S.–U.K. extradition treaty which extended to Hong Kong, U.S. officials apprehended Lui at a U.S. airport when he tried to enter the country on a business trip. After extradition proceedings began, a U.S. trial court released Lui on bail contrary to the general rule that bail is not normally allowed in extradition cases but a federal appeals court reversed this decision and ordered Lui held pending the extradition case outcome.

The crux of the case was whether Lui could be lawfully extradited to a Hong Kong criminal court system subject to China’s control. Lui argued unsuccessfully that his rights could not be protected in Hong Kong; that there was no extradition treaty between the U.S. and China; and that even if there were an applicable treaty, he was entitled to a political offense exception for the crimes he was charged with. The Court noted that the U.S. and Hong Kong (specifically the Hong Kong Special Administrative Region) had signed an extradition treaty in 1996 which contemplated extradition after the reversion of Hong Kong to China and further noted that both the U.K. and the Hong Kong treaties were in effect. The Court also rejected Lui’s effort to show he could not be fairly tried by relying on the non-inquiry rule discussed above, because the Secretary of State has sole

51. *Id.* at 819-20.
53. *Kin–Hong*, 110 F.3d 103.
54. *Id.* at 107.
55. *Id.* at 108; see also *U.S. v. Kin–Hong*, 83 F.3d 523 (1st Cir. 1996).
discretion to determine whether Lui could and should be extradited.\textsuperscript{56} Finally, the Court found both dual criminality and specialty present in the case while rejecting Lui’s evidentiary sufficiency challenges and he was ordered extradited.\textsuperscript{57}

Although there is no mention of the Goldfish case in any of the various U.S. court opinions involving Lui, this is in and of itself significant because the U.S. Court of Appeal for the Ninth Circuit decided both. This Court could well have cited Goldfish to block Lui’s extradition based on concerns about Lui’s rights, but instead opted to rely on explicit treaty language plus the non-inquiry rule to support Lui’s extradition. In other words, while knowing Hong Kong would be subject to China’s jurisdiction the U.S. Court did not seem concerned about it and assumed the legitimacy of Hong Kong jurisdictions. Three years later a different federal appeals court followed the \textit{Lui Kin–Hong} decision, using the same arguments, in affirming the extradition of another criminal fraud fugitive to Hong Kong in \textit{Cheung v. U.S.}.\textsuperscript{58} These cases have positive implications for virtually all narcotics cases involving Hong Kong and they help lay a foundation for non-treaty extraditions with China.

C. The 2000 U.S.–China Agreement on Mutual Legal Assistance in Criminal Matters

On June 19, 2000, the U.S. and China signed an important bilateral Agreement on Mutual Legal Assistance in Criminal Matters\textsuperscript{59} in Beijing. This Agreement, similar to others entered into by the U.S., China, and many other nations, authorizes law enforcement and prosecutorial officials to collaborate in a number of specific areas related to criminal investigations, prosecutions, and related proceedings. These areas include serving documents; taking witness testimony; providing documentary evidence assistance; expert evaluations; making witnesses available for testimony; locating or identifying persons; executing requests for inquiry, searches,

\textsuperscript{56} \textit{Id.} at 110-11.


\textsuperscript{58} 213 F.3d 82 (2d Cir. 2000). \textit{See also In re Extradition of Grace Chan Seong}, 346 F. Supp. 2d 1149 (D. N.M. 2004) (allowing the extradition of a U.S. citizen to Hong Kong pursuant to the U.S.-Hong Kong Treaty to face commercial bribery charges. Extradition would not have been allowed to China because of the absence of a treaty and the bar against comity-based extradition of U.S. citizens).

\textsuperscript{59} Agreement on Mutual Legal Assistance, U.S.-China, June 19, 2000, \textsc{state Dep’t Doc No. 01-44}. 
freezes and evidence seizures; helping with asset forfeitures; and perhaps most importantly, “transferring persons in custody for giving evidence or assisting in investigations; and . . . any other form of assistance which is not contrary to the laws in the territory of the Requested Party.” The Agreement resulted from serious U.S. concerns, shared by China, of heroin and methamphetamine activities affecting both countries. To avoid the coercive problems seen in the Goldfish debacle, the Agreement requires consent of anyone whose help is sought in the requesting country’s territory to consent to go there, even if the person is in the custody of the requested country; the Agreement also adopts extradition principles by allowing a party to refuse assistance if the request pertains to conduct which is not a crime in both countries unless the parties agree otherwise or which constitutes a political offense, among other exceptions.

These kinds of Mutual Legal Assistance Agreements (MLATs) are used, often effectively, to combat international narcotics and other crimes, although they face criticism for tending to be too much an “Americanized” approach to enforcement with a tendency to sacrifice the rights of individuals subject to the jurisdiction of countries other than the U.S. Commentators seem especially concerned about the issue of rights in China, but at least on the face of the U.S.–China Agreement itself, there are safeguards built into the Agreement to avoid this problem; and organized crimes related to narcotics and other illicit activity involving the two countries are admittedly serious problems for both. Perhaps more significantly, the Agreement gives the two countries a specific framework for potentially effective collaboration in narcotics enforcement and prosecution. Although to date, there are no reported U.S. court decisions utilizing the Agreement, it is quite probably only a matter of time before these cases emerge. This collaboration includes transfer of persons in extradition–like proceedings, subject to the consent requirement.

D. Post–2000 MLAT Agreement Collaborative Activity

The U.S. and China have sought to cooperate with each other in narcotics cases since the 2000 MLAT Agreement, which took effect March 8, 2001. In May 2003, the two countries joined India and Canada in taking down a

60. Id. at art. 1(2)(a)-(j).
61. Whedbee, supra note 52, at 561-62.
62. Agreement on Mutual Legal Assistance, supra note 59, at arts. 3.1, 9, 11, 12.
63. Whedbee, supra note 52, at 569-74.
64. Id. at 592-93. Article 11.2 expressly provides: “The Requested Party may request the Requesting Party to make a commitment that a person who has been asked to be present in the territory of the Requesting Party . . . not be prosecuted, detained . . . or subject to any other restriction of personal liberty, for any acts or omissions or convictions which preceded such person’s entry into the territory of the Requesting Party . . . .” Agreement on Mutual Legal Assistance, supra note 59, at art. 11(2).
major heroin trafficking network centered in Fujian. The case involved an elaborate sting operation conducted jointly by U.S. and Chinese officials in China. Annual U.S. State Department International Narcotics Strategy Reports (INSCR) cite other examples of collaboration, and in 2005 the U.S. DEA signed a cooperative memorandum with Chinese authorities to strengthen joint investigative efforts. This in turn may have helped the countries break a major Colombian drug smuggling ring centered in Zhongshan City, southern China, and Hong Kong. Then a few years later, the two countries engaged in Operation Vulture Hunting to break a heroin smuggling ring that involved China, the U.S., and Canada. These collaborative efforts have been somewhat hampered by the absence of a formal Letter of Agreement between the two countries on how drug enforcement efforts should be formally and systematically coordinated so the countries continue their case–by–case approach.

E. The U.S., China and Extradition – Current Issues and Developments

Because of human rights concerns, countries have been reluctant to enter into extradition treaties with China even though, as noted above, extraditions from the U.S. to Hong Kong have proceeded with U.S. judicial and Executive Branch blessings since 1997. In 2005, however, Spain became the first country to enter into an extradition treaty with China with France, Portugal and Australia soon to follow. China now has some twenty bilateral extradition treaties, most with less developed countries, with the impetus for most of them being China’s aggressive efforts to seek the return of corrupt government officials who fled the country with ill–gotten gains.

Extradition activities between China and the U.S. have been conducted on a case–by–case basis because of the absence of a treaty. The U.S. has proved willing (in the non–Hong Kong context) to use comity and domestic immigration laws to help China gain custody of its own nationals who do not enjoy freedom from extradition under U.S. law. This approach has its advantages—the main one being flexibility—and disadvantages, including inconsistency in approaches and lack of predictability. To the extent Chinese nationals find themselves extradited to the U.S. through non–treaty means, there appear to be few practical limits on their prosecution as

69. Id. at 189-90.
70. Id. at 200-02.
discussed above. For drug enforcement purposes, extradition of Chinese to the U.S. for prosecution clearly requires no treaty, and this provides a viable mechanism for effective enforcement.

Whether the U.S. and China will have an extradition treaty has been the subject of recent speculation.\(^{71}\) Now that western European countries and Australia have signed such treaties with China, the U.S. faces an interesting dilemma. It can continue to conduct case–by–case extradition review on a non–treaty basis; or alternatively, follow these other countries with a treaty. It is nonetheless unclear whether a treaty is needed, because as the Valencia–Trujillo case suggests, Chinese who find themselves subject to an extradition proceeding seeking either U.S. retention of prosecutorial jurisdiction or U.S. return to China for prosecution have no apparent legal basis for seeking judicial intervention in their plights. Therefore, non–treaty approaches can work. Of course, the U.S. cannot apply such approaches to U.S. citizens and permanent resident aliens regarding transfer to China, but as long as the issue remains one of international narcotics enforcement and prosecution, it seems unlikely that these particular criminal activities will not somehow find themselves, at least partly, within U.S. jurisdiction in some respect.

CONCLUSION

Extradition continues to be the primary U.S. enforcement approach to international narcotics offenses. Although treaties have traditionally been the primary means of obtaining extradition of alleged drug traffickers both to and from the U.S., Valencia–Trujillo and various of the other cases discussed above demonstrate that treaties are neither needed, nor necessarily even always desired, for extradition to occur. Comity–based extradition offers the advantage of eliminating judicial challenges to the basis for such extraditions, while necessarily limiting these extraditions from the U.S. to persons other than U.S. citizens or permanent resident aliens. Because the U.S. and China may well require a long time before agreeing to a bilateral extradition treaty, non–treaty extraditions offer an attractive alternative whenever the U.S.–Hong Kong treaty cannot be feasibly used. Despite the Goldfish case fiasco, which could have permanently eliminated U.S.–China cooperation in drug cases, the countries have found ways to increase collaborative enforcement and prosecution efforts to attack their common objective of waging war on international narcotics trafficking involving their respective borders. These authors believe that such collaboration will continue, and most likely expand, as the countries become more familiar and comfortable with how each goes about the business of eradicating the traffickers.

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HUMANITARIAN LAW AND HUMAN RIGHTS LAW: 
THE POLITICS OF DISTINCTION

Alejandro Lorite Escorihuela*

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Humanity is the sovereignty which has been offended and a tribunal is convoked to determine why.†

War is essentially an evil thing.‡

A QUESTION OF DEFRAAGMENTATION

The relationship between international humanitarian law and human rights has been made into an issue of scholastic debate.¹ As it ultimately

† United States v. Ohlendorf (The Einsatzgruppen case), 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 497 (1949).


concerns issues of legitimate violence, life and death, the legal questions posed by that debated relationship need to be rescued from the grips of legal idealism, and their political content recovered in the process. Triggering a conversation around this project is the main objective of this contribution. Highlighting the political fabric of the type of technocratic policy-making based on one understanding of that relationship is the particular angle that will be taken to initiate the discussion.

Whatever the answer that will ultimately be preferred, the question of a relationship between human rights and humanitarian law rests always on a series of premises. First, we are in the presence of two presumably identifiable objects, understood as two normative systems or two areas of practice, with presupposed distinctive traits. Second, the distinctiveness is related to some internal coherence, which permits a determination of what is included in each one of them. Third, some form of relationship is possible, which in turn suggests a fundamental or overarching commonality that allows for comparison, contradistinction, and other ways of juxtaposing those two objects of study and practice. In contemporary international law, those premises make the present question to fall into the more general issue of “fragmentation” of international law. That notion refers to the accelerating proliferation and diversification of international rules, which has raised for some the specter of looming contradictions, conflicts,

overlaps and other difficulties in their coexistence and concurrent operation. Among those problems, some are of a normative kind, as when two rules appear to say different things on the same issue. And some are of an institutional kind, as when two institutions appear to say different things about the same issue. When they meet, we have the mixed kind where specialized institutions appear to fragment issues by ignoring rules outside of their specialization. The term “fragmentation” suggests a passing or lost unity among the emerging fragments, and it is generally approached as a problem to be managed. Proposed solutions should have as an aim to help recover the lost unity, by confirming the existence of an actual system, either on normative grounds or institutional grounds, or both. From that perspective the coexistence of human rights law with humanitarian law has been a paradigmatic case in the fragmentation debate, both in terms of the issues it raises in concrete situations where the law is applied, and in terms of the general legal strategies designed to address those issues.


4. Under that generic label one finds a series of issues, such as conflicts between successive norms, conflicts between so-called universal (or general) and regional (or special) norms, or conflicts between overlapping treaty regimes. These are dealt with in the bulk of the ILC’s fragmentation report. See Fragmentation of International Law, supra note 2, ¶¶ 46–294.

5. The fragmentation report mentions for instance the fact that the European Court of Human Rights (and then other human rights bodies) understands itself as institutionally different from the International Court of Justice, which justifies differentiating its practice regarding the European Convention from the general practice of the ICJ reading international treaties, including human rights treaties. See id. ¶ 131.

6. As noted in the fragmentation report, the twin issues of normative and institutional fragmentation (otherwise labeled as substantive conflicts and jurisdictional conflicts) appear frequently in debates concerning international trade law. See id. ¶¶ 165–85.
On that basis, the pages below argue in favor of fragmentation. The relationship between human rights and humanitarian law is approached from the perspective of trends or ideas that actually suggest their defragmentation, that is, their variously defined or even explicit integration into a greater whole. Given that all talk about fragmentation is at the same time a set of propositions about the type of unity that exists or existed among the fragments, and the way in which the loss of unity is understood, the argument below favors one type of fragmentation, *i.e.* substantive or normative fragmentation, against the backdrop of a particular type of formal commonality, *i.e.* common belonging to the political system of international law. In other words, one side of the argument seeks to entrench the notion that human rights and humanitarian law are distinct fragments, in the sense of being separate parts of a greater whole. In terms of being distinct parts, each one has its own internal dynamics and structural orientation (or bias); and in terms of belonging to a whole, they share the common ground that allows for the discussion of their coexistence. The other side of the argument seeks to justify the entrenchment of both legal distinctness and commonality as necessary from the perspective of international law as a political discourse on government. Conversely, thereby, the argument suggests that any handling of the relations of human rights and humanitarian law that glosses over their difference in sameness needs to become aware of itself as part of an alternative political discourse to that of international law. The present contribution therefore weighs in a tangential way on the variety of arguments that try to make sense of the relationship between these two bodies of law, by focusing on the legal frame within which that debate occurs, and what it leaves out of the conversation.

I proceed as follows. The premise is that distinct legal regimes have loose but distinct normative bents, or structural biases. Although the structural bias does not overrule the possible inner contradictions of each regime, I proceed first (Part II) to boiling down both bodies of rules to what could arguably be seen as their respective animating principles: distinction

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for humanitarian law (Section A), and non–discrimination for human rights (Section B). I suggest that these separate and apparently contradictory principles are both rooted in the same political liberal tradition, which I evoke through the use of loose social contract imagery in the description of both distinction and non–discrimination. That leads me, in the spirit of the era of fragmentation, to revisit some judicial encounters with the relationship between human rights and humanitarian law (Part III). Starting with the canonical moment when the International Court of Justice suggested the interpretive principle of *lex specialis* as a panacea (Section A), I move to an examination of the respective case law related to humanitarian law in the three regional human rights systems—Europe (Section B), the Americas (Section C) and Africa (Section D). Paying close technical attention to that practice will serve to give some depth, through the variety of situations and particular position of human rights bodies, to the implicit connection between *lex specialis* and jurisdiction, that is, formal sovereignty. Once the political form of sovereignty is put back in place as the basis for the *lex generalis / lex specialis* trope—and therefore also the argumentative line between peace and war—concluding thoughts will follow concerning the political message of defragmentation.

I. A QUESTION OF PRINCIPLES

The basic starting point in the received conversation about the relations between human rights and humanitarian law is that one is obviously considering some form of relationship between two distinct bodies of rules. Whatever the preferred outlook and conclusions reached—and regardless of the depth and nature of the relationship that is thus presented—the discussion inevitably starts from a received boundary. Jurisprudentially, standard legal keywords in the discussion, such as “complementarity” or *lex specialis*, suggest that there is proximity but never conflation. In terms of the realities of the field, the relationship will in turn refer to institutional examples of proximity, such as the turn of quintessentially “human rights” organizations towards humanitarian law for their work, within which such organizations will speak of humanitarian law rather than human rights, whereas, precisely because they are human rights organizations, one will assume that it is still somehow human rights work. And conversely, the


10. *See*, *e.g.*, *Human Rights Watch, Up In Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia* (2009).
relationship will be also exemplified by the primordial humanitarian law organization, the International Committee of the Red Cross (ICRC) and its cautious engagement with human rights law, both in the type of field work that leads it to cross the armed conflict / peace divide, and through its presence as a permanent observer at the sessions of the United Nations Commission on Human Rights (later replaced by the Human Rights Council)—an institutional presence that would suggest at least some subjective sense of mutual relevance.

The depth of the boundary between human rights law and humanitarian law is sometimes, especially for didactic purposes, posited in historical terms. According to received narratives, the contemporary shape of


12. “The ICRC strives to ensure that the rank and file of armed, security and police forces know and apply IHL and human rights law as they go about their daily work, and that other weapon bearers respect IHL and support, or refrain from actively opposing, humanitarian action.” E.g., Int’l Comm. of the Red Cross, Annual Report 2008, at 48 (May 2009) (emphasis added). The ICRC is generally active also on the front of disseminating rules of conduct to all agencies that wield the State’s power of physical coercion. See, e.g., Int’l Comm. of the Red Cross, Guide for Police Conduct and Behavior (2004).

international human rights law is informed by the foundational mold of the 1948 Universal Declaration and, behind it, the Charter of the United Nations—although prehistoric roots extend deeper back in time to encompass League of Nations era experiences such as the minority regimes and scattered winks by the Permanent Court of International Justice, and some would extend those roots to a variety of moral, religious, or philosophical systems that have supposedly shaped the idea of "human rights."

International humanitarian law, in turn, would emerge in its modern codified form from, on the one hand, the St. Petersburg Declaration of 1868 and the Hague peace conferences of 1899 and 1907, and—on the other hand—the historical development of the system of the Geneva Conventions since 1864 down to 1949 and beyond. This schematized


18. An important moment in that retrospective narrative would be the Permanent Court of International Justice’s involvement in seemingly novel issues relating to international law’s entanglement with constitutional questions relating ultimately to the protection of individual freedoms. See Conformity of Certain Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 65, at 41 (Sept. 4). The retrospective reading would then be reinforced by the powerful defense of a seemingly “traditionalist” vision of interstate international law in Judge Anzilotti’s dissent. See id. at 60 (Anzilotti, J., dissenting).


bifurcation is what is used to didactically separate humanitarian law into two subgroups of rules. Out of the 1899–1907 time period comes the lineage of the laws of war referred to as “Hague Law,” that is, the rules governing means of warfare (weapons and weapon systems such as antipersonnel lasers, asphyxiating gas or cluster ammunition) and


26. It should be noted that the labels “Geneva Law” and “Hague Law” have a conventional meaning within international humanitarian law. That is what I am referring to here. The terms are sometimes used in a different way. “Geneva Law” has sometimes been used, especially recently, to refer to international humanitarian law as such. See, e.g., Aya Gruber, Who’s Afraid of Geneva Law?, 39 ARIZ. ST. L. J. 1017 (2007). Hague Law is sometimes used to refer exclusively to international law contained in the Hague Conventions of 1899 and 1907, which extends it beyond “Hague Law" strictly sensu and into "Geneva Law" issues (such as the treatment of POWs), but also extends it beyond the confines of humanitarian law as a whole and into the domain of peaceful dispute resolution. See, e.g., Peter J. Van Krieken & David McKay, Introduction to THE HAGUE: LEGAL CAPITAL OF THE WORLD 3, 13 (Peter J. van Krieken & David McKay eds., 2005).


methods of warfare (tactics such as the manipulation of hunger or fear among the enemy’s civilian population, the use of treachery or perfidy against enemy combatants, or the manipulation of the environment for hostile purposes, and possibly the extension of war tactics to the use of the cyberspace or “cyber weaponry”). Out of 1864 comes the other branch of humanitarian law, the so-called “Geneva Law,” which governs in essence the treatment of “protected persons,” that is, persons who are generally in the hands of the enemy Power (such as civilians in occupied territory or prisoners of war in the case of international conflicts). Beyond that more contemporary lineage, humanitarian law is also—as a notoriously archaic branch of international law—echoed in pre–modern normative systems, such as codes of chivalry, and various religious traditions, infiltrating from there also the literary canon.

The foregoing only serves to suggest that the distinctiveness of both human rights and humanitarian law is traditionally presented in terms of origins, regardless of whether those historical narratives are convincing or

30. API, supra note 24, arts. 54(1), 54(2), 54(3); APII, supra note 24, art. 14; Rome Statute of the International Criminal Court, art. 8(2)(b)(xxv), opened for signature July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].
31. API, supra note 24, at art. 51(2); APII, supra note 24, art. 13(2).
32. Rome Statute, supra note 30, art. 8(2)(e)(xi).
33. API, supra note 24, art. 37.
36. The distinction between the two branches is helpful for didactic purposes and for clarifying, as done below, the idea of “distinction.” As such it should be understood as a functional divide, not a historical reality. As the narrative of that historical evolution goes, the two branches are said to have been reunited in 1977 when the Additional Protocols included Hague Law into the Geneva corpus. Yet as we know, the 1907 Hague Regulations dealt already with the treatment of prisoners of war, long before the first Geneva Convention on the topic, adopted in 1929. See Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 192, 213–14 (1929). Some suggest that existing law is precisely not adapted for the extension of war operations onto cyber terrain. See, e.g., Duncan B. Hollis, Why States Need an International Law for Information Operations, 11 LEWIS & CLARK L. REV. 1023 (2007).
39. See, e.g., the now classic THEODOR MERON, HENRY’S WARS AND SHAKESPEARE’S LAWS (1993).
not. In all cases the backdrop to the issue of relating human rights and humanitarian law is one where the two bodies of law are recognized as separate, whether we look at it in terms of current practice or in terms of historical narratives. Only starting from that basic assumption can one then spot instances where they can be said to overlap in one way or another. Something that also is presented in terms of historical evolution, such as when humanitarian law has borrowed from the language of human rights, or when human rights treaties have included rules which would seem to have a humanitarian law pedigree. As suggested above, the fact that they have a relationship—whatever the relationship—is thereby premised on their identifiable distinctness, and by the same token a commonality which triggers the question of their relationship in the first place.

If we move to the nature of that relationship, a variety of positions exist on the topic, and those possible relations have even been the objects of dispassionate doctrinal classification. Instead of immediately entering the domain of that discussion, however, one can ask here why similar doctrinal production does not exist on the relationship between humanitarian law and

40. On the process of influence of human rights over humanitarian law, see generally Meron, supra note 1. A specific case of linguistic influence is that of API, supra note 24, at art. 75, which says that individuals not benefiting from better protection from the rest of humanitarian law are entitled to the “fundamental guarantees” listed in the provision, “without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.” This is an important instance in the narrative of a convergence of purpose or motive of the two bodies of law. See, e.g., Doswald–Beck & Vité, supra note 1.


1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Id.

42. See sources cited supra note 1.

international trade law, or between humanitarian law and the law of international investment. Out of a disciplinary sense of obviousness the answer could arguably be: humanitarian law and human rights law share something in a way that has no parallel in humanitarian law’s relationship—or even human rights law’s relationship—to any other sub-body of international legal norms.\(^\text{44}\) That it does not make that much sense to juxtapose international investment law and international humanitarian law means essentially that there is no immediately obvious practical or theoretical point of contact that would suggest the comparison or interrogation. From any legally relevant perspective, it would seem that they are—to say it simply—more different than they are the same. That is not the case apparently for our normative couple. If we try to pin down that something which connects human rights and humanitarian law more precisely, the available literature and legal commentary will quickly reveal a loosely consensual functionalist attitude. What they have in common is variously felt to be the objective that they serve\(^\text{45}\) or—in a different version—the values that they embody.\(^\text{46}\) They meet because they perform a

\(^{44}\) This sense of obviousness lies behind the use, most notoriously by the United Nations General Assembly for a long time but also by others, of expressions such as “human rights in armed conflict.” An early document adopting this terminology is the Resolution XXIII, Human Rights in Armed Conflicts, adopted by the International Conference on Human Rights in Teheran (May 12, 1968). See Human Rights in Armed Conflicts, International Conference of Human Rights Resolution XXIII (May 12, 1968), reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 261, 261-62 (Dietrich Schindler & Jiri Toman eds., 1988). On the adoption of the expression by the General Assembly, see ERIK DAVID, PRINCIPE DE DROIT DES CONFLITS ARMÉS 83–84 (1st ed. 1994).

\(^{45}\) When speaking of human rights and humanitarian law, what is meant by a common goal is what some see as a shared mission of protecting the life and dignity of individuals, as evidenced for instance by a common prohibition of torture or common modalities of fair trial. See, e.g., Iguyovwe, supra note 1. That leads also to the issue of advocating further cooperation between, or integration of, the two sets of norms, for the purpose of achieving that common goal, particularly in situations of armed conflict. See, e.g., Elizabeth Mottershow, Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law, 12 INT’L J. HUM. RTS. 449, 449-70 (2008).

\(^{46}\) That perspective is based on the notion that humanitarian law and human rights instruments both form part of the larger category of “humanitarian” provisions or treaties, which is mentioned in different parts of general international law, and are otherwise part of the group of “peremptory norms” (jus cogens). In the law of treaties, suspension or termination in response to a material breach of the treaty is not possible with regard to “provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.” See Vienna Convention on the Law of Treaties art. 60(5), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. In the law of State responsibility, countermeasures (considered a legitimate breach of the law in response to a prior violation) cannot affect three types of provisions: “the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations,” “obligations for the protection of fundamental human rights,” and
similar function, albeit possibly in different ways, in different places, at different times, and maybe even for partially different reasons.

Beyond the details of the varied positions on the substantive meeting of the two bodies of law, the shared goal and purpose of the two sets of norms is usually stated in terms transcending immediate political references or controversy, like “common humanist ideal.” The possibility of framing a non–political objective common to human rights and humanitarian law is significant because of what the label “political” may mean in the meeting of those two types of norms. One can think here of the ICRC’s long–held sense that human rights could be excessively close to politics for professional neutrality’s comfort—an attitude that had been shared, for functionally identical reasons, by the World Bank until recently. The political element that appears here in humanitarian law’s encounter with human rights refers, as it does in the World Bank’s escape from the

“obligations of a humanitarian character prohibiting reprisals.” As the last subparagraph of that provision makes clear, what they have in common is that they are norms of jus cogens. In its commentary on the provision, incidentally, the International Law Commission itself uses the Geneva Conventions to illustrate the second type of norms (fundamental rights), presumably with the idea that what is illustrated is the general idea of not affecting fundamental interests of the international community while responding to a breach. See [2007] 2 Y.B. Int’l L. Comm’n 132, U.N. Doc. A/CN.4/SER.A/2001/Add.1. The Commission speaks of jus cogens as “[t]he obligations [that] arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.” See id. at 112. Because human rights and humanitarian law supposedly express or protect the same values, the general idea is that they should be looked at as one single type of norm under general international law, particularly for the sake of special treatment in the application of secondary rules, such as the rules of State responsibility and the law of treaties. See also Florentino Ruiz, The Succession of States in Universal Treaties on the Protection of Human Rights and Humanitarian Law, 7 INT’L J. HUM. RTS. 42 (2003).
political, to the baggage of international contestation that can plausibly be feared to come with the invocation of “human rights” themselves. At a political minimum, “human rights” as such evoke almost by definition the possibility of questioning the sovereign’s own prerogatives and responsibilities over its people and territory. More specifically, however, “human rights” have been deemed too close to political controversy, as they are recurrently associated with the global North–West’s (neo)colonialisms.

53. This is how Antony Anghie describes the self-understanding of the human rights project in international law:

The emergence of international human rights law is characterized axiomatically, in virtually all the literature on the subject, as a revolutionary and unprecedented moment in the history of international law because it undermined the fundamental principle of territorial sovereignty, which had been in existence since the emergence of the modern European nation-state and the writings of Vattel.

54. Beyond the examples provided in Third-World-Approaches-to-International-Law literature, exemplified above by Antony Anghie, Obiora Okafor, and Makau Mutua, see
imperialisms,\textsuperscript{55} universalisms,\textsuperscript{56} and other outright political endeavors. In a specific perspective from within human rights work, considering human rights “political” can be seen as equivalent to soiling the project of human rights.\textsuperscript{57} The ties to the political would lead to equating a “human rights” claim with a mere partisan claim—or worse—a gesture of disloyalty.\textsuperscript{58} From such a perspective on “human rights,” being non–political and therefore immune from political indictment gives them in that sense even greater affinity with humanitarian law, in particular through their association with the meta–sovereign status of \textit{jus cogens},\textsuperscript{59} \textit{erga omnes},\textsuperscript{60} or discussions of some historical dimensions of the political coexistence of human rights and colonialism in Kirsten Sellars, \textit{Human Rights and the Colonies: Deceit, Deception and Discovery}, 93 \textsc{The Round Table}, 709 (2004) and Alice L. Conklin, \textit{Colonialism and Human Rights: A Contradiction in Terms? The Case of France and West Africa}, 1895–1914, 103 \textsc{Am. Hist. Rev.} 419 (1998). See Note, \textit{Saving Amina Lawal: Human Rights Symbolism and the Dangers of Colonialism}, 117 \textsc{Hary. Rev.} 2365 (2004), for a discussion of neocolonialism in a recent case of North–South debate mediated by human rights.

Outside of legal analysis \textit{stricto sensu}, an interesting association made between human rights and imperialism can be found in David Holloway, \textit{The War on Terror Espionage Thriller, and the Imperialism of Human Rights}, 46 \textsc{Comp. Literature Stud.} 20 (2009). The very first words of the essay explain its purpose as follows: “This essay describes the war on terror espionage thriller as a popular literary form which legitimates human rights abuses by the West, particularly state sanctioned torture, by depicting the West, rhetorically, as the virtuous bringer of rights.” \textit{Id.}


57. Apolitical conceptions of human rights as such can extract their apolitical character by taking on an ethical or moralizing form. For a particularly sharp critique of that discursive tradition in international relations, see \textit{David Chandler, From Kosovo to Kabul: Human Rights and International Intervention} (2002).


59. As is already apparent in the International Law Commission’s cross–referencing of its own work between State responsibility and the law of treaties, the relationship between human rights and \textit{jus cogens} is a topic of never–ending speculation, especially given the
non-derogable norms. As a result of the fact that humanitarian and human rights law therefore meet on presumably non-political ground, be it in the realm of technical practice or else values, discussions of the relations of human rights to humanitarian law will not take into consideration the background of political contestation that has followed human rights since their post-war rebirth.

The process of defragmentation of those bodies of law is shown here to be intimately linked to a downplaying of their individual origins and

60. In international law, *erga omnes* effects were first considered with regards to obligations. See the dictum of the International Court of Justice in Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5). The ICJ has however also accepted that rights, specifically the right of peoples to self-determination, can have an *erga omnes* character. See East Timor (Port. v. Austl.) (East Timor Case), Judgment, 1995 I.C.J. 90, 102 (June 30). This was confirmed in: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Palestinian Wall), Advisory Opinion, 2004 I.C.J. 136, ¶ ¶ 155–56 (July 9), where the Court incidentally joins together *erga omnes* rights and *erga omnes* obligations (whereas they have legally speaking inverse effects one from the other), where the latter arise from humanitarian law. See id. ¶ 157. For a critique of the Court’s use of the *erga omnes* label, see the individual opinion filed by Judge Rosalyn Higgins, id. ¶ 216 (Higgins, J., dissenting).

61. See Coard v. United States, Case 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ ¶ 38–44 (1999). Some compare human rights and humanitarian law based on the notion that “humanitarian law” can be meaningfully called “non-derogable” (which is at least debatable from a technical point of view if the term non-derogable is connected, as it is intimately in the context of human rights, to the notion of the state of emergency or necessity.) See Droege, *Affinities*, supra note 9, at 521 ("[W]hile most international human rights are with few exceptions derogable, humanitarian law is non-derogable (with the sole exception of Article 5 of the Fourth Geneva Convention). ").


63. That is the implicit basis for the notion that the “Asian values” debate, mentioned above in references relating to human rights universalism, may be of any relevance at all to humanitarian law. See Alfred M. Boll, *The Asian Values Debate and Its Relevance to International Humanitarian Law*, 83 INT’L REV. RED CROSS 45 (2001).

separate political and diplomatic trajectories as complex sets of rules of practice. That downplaying is performed in favor of a higher order of commonality that is found in technique, function, purpose, and values. In that inverted picture of fragmentation, we witness agreement and convergence between “laws of war” and the “rights of humans,” based on the same bases as the general process of fragmentation: the two bodies of rules are part of a greater formal system, and they have their own idiosyncratic constraints, biases, and immediate functions. The diagnosis of fragmentation, as it was presented by the International Law Commission’s working group in charge of analyzing the issue, was the following:

The problem—as lawyers have seen it—is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices, and possibly the loss of an overall perspective on the law.65

The response that was proposed by the ILC was to approach the process as essentially a complex technical problem. If the issue is defined as one of the emergence of specialized regimes resulting in contradictions, oversight, and general problems caused by poor coordination, those are the issues that are to be solved, not fragmentation per se, especially given the fact that people are divided on how bad fragmentation itself is.66 And so this is the ILC’s method:

The fragmentation of the international legal system into technical “regimes,” when examined from the point of view of the law of treaties, is not too different from its traditional fragmentation into more or less autonomous territorial regimes called “national legal systems.” This is why it is useful to have regard to the wealth of techniques in the traditional law for dealing with tensions or conflicts between legal rules and principles.67

In the case of human rights and humanitarian law—both in descriptive and normative terms—the issue is one of coping with defragmentation (is it happening? and should it happen at all?). Against the general picture of fragmentation, what makes defragmentation familiar is that it is also a process emptied of political content, in favor of technical management or—in our case—overriding ethical references, or both. Yet fragmentation appears as the objects of regulation differentiate, causing coordination problems. By implication, defragmentation—as a reverse of

65. Fragmentation of International Law, supra note 2, ¶ 8.
66. Id. ¶ 9.
67. Id. ¶¶ 17–18.
fragmentation—implies de-specialization and therefore merger not so much of norms (since they are always seen as different) as of objects. The respective objects of the law of the sea and the law of indigenous rights are distinct in a way that the objects of humanitarian law and human rights are not. That this appears against a background where the nuances of State violence as a political phenomenon disappear in favor of humanity and common humanisms is the basis for defragmentation, regardless of the practical realities of the meeting between human rights and humanitarian law.

At this point I suggest that we recover the deep political content of human rights, and by the same token seek the deep political content of humanitarian law. The general backdrop for a recovery of the political in the conversation on human rights and humanitarian law is the following. Each body of rules has its autonomous structure, regardless of those elements that are interpreted to constitute objective overlaps between them. The organization of each body of rules, when we imagine them from the outside, shows a direction or structural bias. Each body of rules frames reality in a specific and partial way, as determined by its inner logic and purposes, which may not be fully coherent or systematic but are sufficiently so to provide an identity to the body of rules. From there the distinction between human rights and humanitarian law is related to the bias in each regime. What I suggest is that human rights law’s bias is expressed by the organization of human rights norms around the fundamental principle of “non-discrimination.” Humanitarian law in turn is organized around the principle of “distinction.” The meaning of those fundamental principles is essentially political, in the specific sense of being rooted in a political worldview. That worldview structures each body of norms by defining its object and organizes the relationship that they have between them by projecting the relationship that those respective objects have with one another. That worldview, with all its inner tensions, thereby structures the whole normative space within which human rights and humanitarian law will meet. That normative space is international law.

In more specific legal terms, the argument is that the distinction between human rights and humanitarian law is intimately linked to the “principle of distinction” within humanitarian law. By the same token, the idea of non-discrimination in human rights is linked to the idea of a separation between humanitarian law and human rights, in so far as humanitarian law’s object is wartime relations, and human rights’ idea of war is connected to the core object of human rights law, i.e. the legitimacy of the State’s exercise of coercive power. The relationship between human rights and humanitarian law is organized around their respective takes on State violence, and their separation reflects a political conception of legitimacy. The un-political

68. Koskenniemi, supra note 8, at 12.
reading of those bodies of law is therefore not un–political. It contributes to hiding from political view the deeper reason for the differences and shields technocratically what should otherwise be the object of political debate—that is, the shift from one normative universe to another one.

A. Humanitarian Law: The Principle of Distinction

The modern formulation of the principle of distinction—in Articles 48 \(^{69}\) and 51 \(^{70}\) of the 1977 Additional Protocol I to the 1949 Geneva

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\(^{69}\) “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” API, supra note 24, at art. 48.

\(^{70}\) Article 51 reads as follows:

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

   (a) Those which are not directed at a specific military objective;

   (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or

   (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

   (a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

   (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.
Conventions—comes to us from a line of codification endeavors expressing in different ways the general notion that, in war, combatants and noncombatants should be distinguished at all times. The importance of that principle is now fixed in the idea that it constitutes a “cardinal” rule of international humanitarian law. Distinction is a principle, that is, a normative foundation of a general character developed into a variety of more specific rules. One formulation of the rule’s high normative status puts it as follows: “[c]ompliance with this concept of distinction is the fundamental difference between heroic Soldier and murderer.” As insightfully remarked by two military legal officers in this profound statement, the principle of distinction is more than simply fundamental—it is a fundamentally distinguishing principle. Distinction is framed as compliance with a concept, not a rule. That suggests immediately that the distinction (between noncombatant and combatant) branches out into other and more specific distinguishing rules, such as the distinction between the figure of the “Soldier” and the figure of the criminal. Compliance with the “conception” of distinction contributes to marking thereby also the limit between war and peace, considered as two fundamentally distinct perspectives on death and killing. The uncontroversial claim here is simply that the principle of distinction can be understood—not only

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

API, supra note 24, art. 51.

71. Whereas the 1907 Hague regulations do not as such refer to the idea of “distinction,” an early and quite peculiar formulation of the principle of distinction can be found in the Institut de droit international’s 1880 Oxford Manual, Article 7 of which declares that “[i]t is forbidden to maltreat inoffensive populations.” See The Laws of War on Land (1880), reprinted in The Laws of Armed Conflicts, supra note 44, at 35, 38. Before Additional Protocol I, the General Assembly had proclaimed distinction a principle applicable to all situations of armed conflict in the following terms: “distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.” G.A. Res. 2444 (XXIII), U.N. GAOR, 23rd Sess., Supp. No. 18, U.N. Doc. A/7218 (Dec. 19, 1968).


philosophically but also legally—as the foundation of the whole system of international humanitarian law. To explain what that means, I turn to the best exposition of the policy considerations and goals that sustain the modern project of humanitarian law: the Preamble to the 1868 St. Petersburg Declaration.\footnote{St. Petersburg Declaration, \textit{supra} note 21, at 159.}

If one accepts for the sake of argument that the Declaration can serve as a succinct exposition of the logic of humanitarian law through its particular take on the idea of distinction, two structural features of the principle emerge. First, the principle refers at a basic level to an issue of means in relation to an end. And, second, the principle of distinction is not mentioned by name or even in any apparent fashion in the Declaration. Yet, the twin cardinal principle of “prohibition of unnecessary suffering,”\footnote{Nuclear Weapons Legality, 1996 I.C.J. 226, ¶ 78.} as well as its associated—yet more controversially fundamental—principle of the “prohibition of means rendering death inevitable,”\footnote{See the inspiring discussion in DAVID, \textit{supra} note 44, at 307.}—both of which explicitly mentioned in the Declaration (§ 5)—should be understood as corollaries of the principle of distinction. The prohibition of unnecessary suffering is presented in the logic of the Preamble as a normative implication of the Declaration’s statement on the legitimate ends of war, which in turn refers implicitly to the idea of distinction (§ 3). In other words, the prohibition of unnecessary suffering should be understood as a reformulation of the obligation to distinguish between combatants and non—

\begin{quote}
St. Petersburg Declaration, \textit{supra} note 21, at 159.

[¶1] On the proposition of the Imperial Cabinet of Russia, an International Military Commission having assembled at St. Petersburg in order to examine the expediency of forbidding the use of certain projectiles in time of war between civilized nations, and that Commission having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity, the Undersigned are authorized by the orders of their Governments to declare as follows:

Considering:

[¶2] That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

[¶3] That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

[¶4] That for this purpose it is sufficient to disable the greatest possible number of men;

[¶5] That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

[¶6] That the employment of such arms would, therefore, be contrary to the laws of humanity . . .

\textit{Id.}
\end{quote}
combatants. Instead of discriminating among individuals, the obligation here is that of discriminating between the combatant and the non–combatant in the same physical person: legitimate violence will be that which is necessary to put the physical individual hors de combat (§§ 4–5) or—in other words—necessary to kill the (present) combatant without killing the (past / future) non–combatant in the physical individual. This imagery is where the recovery of the political frame of humanitarian law begins.

1. Rousseau Distinguishes War

This edifice of humanitarian law finds its axiomatic base in a vision of war that sets discursively the St. Petersburg Declaration in the broad political universe of social–contract theories of the State. Rooting the principle of distinction in the social contract is how we come to a clearer association of humanitarian law with a political discourse on legitimate violence. I use one specific episode of the social contract tradition for the purpose of expounding the political roots of the principle of distinction, and that is the disagreement between Jacques Rousseau and Thomas Hobbes on the nature of war. In it the question of war takes on a fundamental role in the understanding of the legitimacy of the State, because of its cardinal place in explaining the transition to the political state from the state of nature. The precise moment to be highlighted here happens when Rousseau—agreeing with Hobbes that “war” is a state, rather than an event—interjects that for it to be a state it has to be by necessity a public phenomenon. The use of violence among individuals qua individuals, as opposed to agents of the sovereign, is not war, and that is so for several reasons, which will contribute to produce a particular, but very familiar, picture of the nature of war.

77. The purpose here is not a historical reconstruction of the association between “war” and international law, but rather a more substantial depiction of what is at stake in the peculiar vision of war presented in the St. Petersburg Declaration. An attempt at doing the former can be found in the important Stephen Neff, War and the Law of Nations: A General History (2007). In that context, Neff quite helpfully talks of Rousseau, although in passing (yielding a legally justified first role to Grotius), as defending a “nationalization” of war. See id at 101.

78. The following can only be a shocking simplification of a complex and much commented debate at the origins of modern political liberalism. The importance of a reference to Hobbes and Rousseau here lies in the fact that their (ambiguous) disagreement on foundational notions within the social–contract tradition have an impact on the understanding of “war” and its connection to ideas of sovereignty and citizenship, which are important to international law, notably because of international human rights law. Given the particular political projects defended by Rousseau, a good starting point is his disagreement with Hobbes concerning the deep psychological nature of the human being that comes in Rousseau’s extended presentation of his view on the state of nature. See his Discours sur l’origine, et les fondements de l’inégalité parmi les hommes [1755] [hereinafter Rousseau, Discours], in Jean-Jacques Rousseau, Œuvres complètes III (Bernard Gangnebin & Marcel Raymond eds., 1964) 131–223.
Hobbes, at least as Rousseau reads him, describes the state of nature as a state of war. For Rousseau however, relations among human beings living in their “primitive independence,” as he puts it, do not enjoy the kind of permanence that a “state” requires. Contrary to Hobbes, who sees human beings as naturally adventurous and prone towards conquest, Rousseau says that one should consider human beings as naturally fearful. This leads Rousseau to say that human beings are naturally not enemies of one another (as opposed to Hobbes’ often quoted “homo homini lupus” and “solitary, poor, nasty, brutish, and short” formulas). Besides, as a state or condition, war is a relationship to and between things, not between individuals—in the sense that war is about controlling, moving, stealing, and destroying things, as opposed to an exchange between individuals qua monads or billiard balls. As a result, as far as individual human beings are concerned, war is always “accidental.” War is neither universal nor permanent, nor general, both because of human beings’ psychological make-up and because of the nature of war as an activity involving essentially property. In other words, it is only tangential to their existence as pre-social "human beings" because of the very idea of “war” understood as a social condition or set of social relations.

In positive terms, Rousseau’s republican position is expressed therefore also in his own conception of war, which is the exact opposite of Hobbes’ indistinct war as the natural state of individuals. War needs political society to exist on both psychological and conceptual grounds. Psychologically, the constitution of political society through the social contract permits the growth of feelings that will offset man’s natural fear, such as honor, prejudice, or vengeance. Those will make war as war possible. Conceptually, and more importantly, the constitution of political society gives rise to the possibility of a “state” of war, a set of permanent, or at least continuous, relations among things, based on the fact that property relations

79. THOMAS HOBBES, LEVIATHAN 88 (Richard Tuck ed., 1996) (1651) (in which Hobbes famously describes the state of nature as a permanent state of fear and risk, and describes such state as a “condition” akin to a type of weather.).
80. Jean Jacques Rousseau, Du contrat social, ou Principes du droit politique [1762], [hereinafter Contrat social], in ŒUVRES COMPLETES III, supra note 78, at 357.
81. Rousseau, Discours, supra note 78, at 136.
82. Rousseau, Contrat social, supra note 80, at 357.
84. HOBBES, LEVIATHAN, supra note 79, at 89.
85. Rousseau, Contrat social, supra note 80, at 357 (“C’est le rapport des choses et non des hommes qui constitue la guerre, et l’état de guerre ne pouvant naître des simples relations personnelles, mais seulement des relations réelles, la guerre privée ou d’homme à homme ne peut exister.”)
87. Id. at 601
are given stability and durability by law. In simple terms, if war is to be a “state,” it needs States.

For Rousseau, war is still not possible among individuals after the transition to the political state, because—under the sovereign—individuals have renounced the power to dispose of their own life and that of their partners in the social contract. More dramatically—and this is where the full import of the discussion with Hobbes shows itself—Rousseau suggests that the (hypothetical) first constitution of a civil society triggers the formation of others, until the “whole face of the Earth” has changed, in the sense of there being no human beings left. That is, the natural freedom and independence of the primordial human being has disappeared in the constitution of societies, which have replaced human beings with citizens. Those societies have inherited the total independence of pre-social human beings, with the crucial difference that they—unlike humans—are artificial beings with no naturally determined limits to their size or strength, and—by necessity—a very strong suspicion towards neighboring societies, who are equally situated. A permanent state is created. Within that state, “war” may be the essence of the relations among jealous States, but it will always be—by necessity—an accident for human beings within them, in the sense that they will just happen to be affected sometimes by war, which is always and only a relation among States. War is the very result of the formation of political societies, as opposed to being their cause or origin.

From the inter-state perspective, Hobbes and Rousseau may be seen to converge. That limited convergence is however based on different notions of what “war” is, and—very importantly—against the backdrop of a fundamental disagreement on whether the state of nature is a state of “war.” From that disagreement as to what war is, Rousseau goes on to draw the consequences for his own idea of “war” as an intimate political, socially

88. Rousseau, *Contrat social*, supra note 80, at 357.
90. Id. at 603.
91. Id. at 604–05.
92. Rousseau, *Contrat social*, supra note 80, at 357.
93. According to Hobbes’ famous description:

[T]hough there had never been any time, wherein particular men were in a condition of warre one against another; yet in all times, Kings, and Persons of Soveraigne authority, because of their Independency, are in continuall jealousies, and in a state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdomes; and continuall Spyes upon their neighbours, which is a posture of War.

HOBBS, *LEVIATHAN*, supra note 79, at 90.
constructed, and socially contracted event. As he says, human beings decide
to attack one another only after they have (been) socialized, and they
become soldiers only after becoming citizens.94 Being a soldier is possible
only based on citizenship, that is, membership in a socially contracted
polity. Therefore in war, human beings meet on the battlefield only
accidentally. The “accident” is constituted by the meeting of soldiers, who
on the battlefield are not citizens (“members of the homeland”) but,
precisely, soldiers (defenders of the homeland).95 As a result of this, the
killing of human beings is itself an “accident” of war; it is not the objective,
but it can happen as a result of the activity that is otherwise carried out in
the pursuit of the actual objective in war. As described by Rousseau, the end
of war is the destruction of the enemy State, so that it is legitimate to
destroy its defenders while they are fighting. As soon as they cease to be the
“instruments” of the State, for instance if they lay down their weapon, they
become human beings again, and the enemy power loses its right over their
life.96 As such the State is not supposed to hurt human beings, but rather
soldiers, with the knowledge that the soldiers were once—and can become
again—mere human beings. The consequence is that since the State acts
through its “instruments” against the enemy’s own instruments, human
beings very rarely meet one another on the battlefield, and as such they have
no animosity against one another despite the ongoing violence.97

In other words, the right to legitimate killing is attached to the notion of
the human being carrying out the function of soldiering, i.e. the idea that the
human being is enveloped in that function in a way that makes him an
instrument of the State. In the most striking way, Rousseau suggests on that
basis that it is possible to “kill the State and not kill a single one of its
members.”98 That is the ultimate consequence of the notion that war, as
Rousseau expresses it, does not give any more rights than are necessary to
its ends. It is possible to kill the instruments of the State while not killing
the human beings who carry out the function of instruments of the State’s
will.99 All that is necessary is to put the “instruments” out of function, which
is done by converting as many fighters into human beings again. In the
lingo of the laws of war, one would talk of putting soldiers out of combat,
hors de combat. That again, is based on the notion that in the business of
war the only enemies are public authorities for whom human beings are
fighting: citizens of different societies are not one another’s enemies, and

94. Jean-Jacques Rousseau, Que l’état de guerre naît de l’état social, supra note 86,
at 601.
95. Rousseau, Contrat social, supra note 80, at 357.
96. Id.
97. According to the now famous formula: “les particuliers ne sont ennemis
qu’accidentellement, non point comme hommes, ni même comme citoyens, mais comme
soldats.” Id.
98. Id. at 357–58.
99. Id. at 357.
the enemies faced by the State are other States, not the individuals that just happen to carry out the will of those enemies (or, as Rousseau puts it, there can be no such type of relationship between entities of different kinds, such as an individual and a State.) 100 The foreigner who just kills and destroys without declaring war in those terms—be it a king or a people or an individual—is not an “enemy,” but rather a bandit. 101

When one says, therefore, that the objective in war is the destruction of the enemy State, that means that the target is the abstraction constituted by the social contract; if one could break the social contract in one strike, the State would _eo ipso_ disappear and the war would be over, yet no life would have been lost. 102 The killing of human beings in war is a means and not the end, 103 so that the killing of human beings is a means to the hurting of the State, given that they embody its instruments. But again, it is one means, and not a necessary means to that particular end, since human death is always to be seen as an accident. As Rousseau sees it, in ways that will be technically amplified by the contemporary laws of war, the ill–treatment or enslavement of human beings condoned by classic writers of the law of nations, including the ill–treatment of prisoners of war, is from that perspective rightly looked upon with indignation. 104

One can understand the powerful summary that Rousseau makes of his disagreement with the “horrible system” proposed by Hobbes of a war of all against all—a system that constituted visibly the chief motivation for Rousseau to expand specifically on the issue of war. Rousseau simply says: war is born of peace (“la guerre est née de la paix”). 105 The elimination of the possibility of (hypothetical) “particular wars” in the state of nature (i.e. the state of war described by Hobbes) through the creation of social contracts is the cause of (actual) “general wars” (wars between societies, that is, “general wills”), which are, says Rousseau, much more terrible. 106

Both understandings of “war”—Hobbes’ and Rousseau’s—are significantly attached to the liberal tradition, and both are important to the idea of the State as the sole source of legitimate violence. A schematic notion of the difference as it will play out here, would depict Rousseau’s “war” as legal and politically constructed (war exists because of the State), whereas Hobbes’ “war” would be seen as the sociological backdrop to the

100. _Id._
101. _Id._
104. _Id._ at 614–15.
existence of the State (the State exists because of war). From there, the St. Petersburg Declaration can be read against Rousseau’s position, especially in association with Rousseau’s extensively discussed understanding of human nature, and the relationship of citizen to human being.\textsuperscript{107} Here it takes the form of the known proposition that war does not exist between individuals but between societies or—in practice—between armed forces as instrumentalties of the State apparatus. The notion that in war there is no personal animosity between soldiers who face one another on the battlefield\textsuperscript{108} is therefore not the product of humanitarian afterthoughts, although it may certainly find added support in them. It is a direct product of the mechanism of State legitimacy, which—under a different outlook—supports also the monopoly of the “legitimate use of physical force” by the sovereign within its territory.\textsuperscript{109}

2. Privileged and Unprivileged Agents of War

A legal translation of the foregoing is that war is waged by agents or “organs” of the State, resulting thus in “the privilege of the combatant” or “combatant immunity.”\textsuperscript{110} The privilege in question refers to the very idea of “war” developed above with the help of Rousseau (if one follows the notion that Rousseau’s and humanitarian law’s conceptions of war are related). The combatant is not engaged in a private enterprise but is fighting on behalf of a society represented by a State.\textsuperscript{111} As such, the regular actions

\begin{itemize}
  \item[(107)] For a different take on the linkage between Rousseau’s general outline of the social contract and his take on the idea of “war,” see Allan Ross, \textit{J.J. Rousseau and the Law of Armed Force, in Law at War: The Law as It Was and the Law as It Should Be}. Liber Amicorum Ove Brin 219–30 (2008).
  \item[(108)] The received intellectual lineage between St–Petersburg and Rousseau would come from this passage from Rousseau, \textit{Contrat Social}, supra note 80, at 156–57.
  \item[(111)] In line with what Rousseau was cited above as saying about the difference between soldiers and bandits, the celebrated decision of the international military tribunal in the \textit{Einsatzgruppen} case explained the difference between members of the Resistance and private individuals engaged in violence against Nazi occupation in these terms:

\begin{quote}
Many of the defendants admitting that they had conducted executions, explained that they had not killed any innocent persons but had merely shot partisans, to be sure, not in combat, but punitively. This bald statement in itself does not suffice to exonerate one from a charge of unlawful killings. Article I of the Hague Regulations provides:
\end{quote}
of the soldier are privileged, in the sense that it is the combatant’s exclusive “privilege” to be entitled to kill and destroy as a matter of principle, simply because the combatant is acting precisely not in its quality as a human being, but rather in representation of the sovereign. As such, just like as the official agents of the State, as organs of the State, are not to be punished personally for actions that they have performed under orders of their State (even and especially with a portion of its legitimate means of coercion), so are the soldiers covered by an immunity from reproach and prosecution for the actions that they have carried out in regular fashion as the pawns of the State. The killing and the destruction are done by the State, which

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates.
2. To have a fixed distinctive emblem recognizable at a distance.
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

It is unnecessary to point out that, under these provisions, an armed civilian found in a treetop sniping at uniformed soldiers is not such a lawful combatant and can be punished even with the death penalty if he is proved guilty of the offense. But this is far different from saying that resistance fighters in the war against an invading army, if they fully comply with the conditions just mentioned, can be put outside the law by the adversary. As the Hague Regulations state expressly, if they fulfill the four conditions, “the laws, rights, and duties of war” apply to them in the same manner as they apply to regular armies. Many of the defendants seem to assume that by merely characterizing a person a partisan, he may be shot out of hand. But it is not so simple as that. If the partisans are organized and are engaged in what international law regards as legitimate warfare for the defense of their own country, they are entitled to be protected as combatants.

See The Einsatzgruppen case, supra note †, at 491–92.

112. This is the root of the whole Rainbow Warrior affair between France and New Zealand. See, e.g., Michael Pugh, Legal Aspects of the Rainbow Warrior Affair, 36 INT’L & COMP. L.Q. 655 (1987).

113. As none other than Telford Taylor put it, in the best possible fashion:

War consists largely of acts that would be criminal if performed in time of peace . . . . Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors. But the area of immunity is not unlimited, and its boundaries are marked by the laws of war.
leads to the conclusion that the individual is not liable for those violent acts—only the State is.\footnote{114} This derives simply and again from the notion that war—the activity in which the combatant is engaged—occurs between “public persons,” as Rousseau put it.\footnote{115} Private war is in this sense a contradiction, expressed legally in the form of minimal tolerance for the private use of violence in the midst of war. A clear expression of that rejection of private violence in war is found in the “Lieber Code”—the set of legal instructions prepared by Francis Lieber for the Union Army in 1863. The Code uses the term “public enemies” to distinguish members of the hostile army from those who—engaging in hostilities illegitimately—should according to Lieber’s rules be treated as “highway robbers” and “pirates.”\footnote{116} That mirrors the situation of the ones that Rousseau himself called “bandits.”\footnote{117}

The “nationalization” of war, common to Rousseau and the St. Petersburg Declaration’s foundations for contemporary humanitarian law, allows here to determine that the identity of war as a distinct activity revolves around the identity of those who perform it (rather than what the activity is). Delimiting the activity requires imagining therefore those who are not regular agents of war. The principal irregularity would be constituted by an association of war with private individual interest. Such privatization of war is what has prompted the notion that the term “unlawful combatant” be reserved to mercenaries, which is how Additional Protocol I

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\footnote{114} In technical terms, this is the link between Articles 43 and 44 API, the first one dealing with the definition of the regular armed forces, which constitute the core of the category of combatants, and the second one with the relationship between the status of combatant and the status of prisoner of war. The status and treatment of prisoners of war follows the idea of combatant privilege, in the sense that despite the fact that POWs may have been caught after killing and destroying, they are not detained as a form of punishment, but only as a means to keep them away from active hostilities. A good opportunity for clarification of those points arose precisely with the amendments to the definition of “combatants” by Additional Protocol I in 1977, which aimed at conferring POW status to captured members of national liberation movements, among other things. \textit{See generally W. Thomas Mallison \\& Sally V. Mallison, The Juridical Status of Privileged Combatants under the Geneva Protocol of 1977 Concerning International Conflicts, 42 LAW \\& CONTEMP. PROBS. 4 (1978) [hereinafter Mallison].}

\footnote{115} Rousseau, \textit{Que l’état de guerre naît de l’état social}, supra note 86, at 607–08.

\footnote{116} See Instructions for the Government of Armies of the United States in the Field, Gen. Order No. 100 (1863), art. 82, \textit{reprinted in The Laws of Armed Conflicts, supra note 44}, at 3, 14 [hereinafter Lieber Code]. Despite its formally domestic ambitions, it is regarded as one of the first contemporary codifications of the laws of war, given especially its influence on other codification attempts, such as the already cited Oxford Manual adopted by the Institute of International Law in 1880. \textit{See Green, supra note 20, at 279} (discussing the significance of the Lieber Code in the development of international humanitarian law).

\footnote{117} See Rousseau, \textit{Contrat social}, supra note 80.
seems to consider them.\textsuperscript{118} If one leaves aside more contemporary debates on unlawful participation in combat, particularly in the context of the “War on Terror,”\textsuperscript{119} the delimitation of “war” through a clear identification of its regular agents leads to the distinction between “unlawful” participation in hostilities and “unprivileged” participation in hostilities. The latter would be, in contrast to that of mercenaries, the situation of spies\textsuperscript{120} under both the Hague Regulations and Additional Protocol I.\textsuperscript{121} The presence of the unlawful participant on the battlefield is by definition refused. The presence of the unprivileged combatant is acknowledged and tolerated to a certain extent, given that it is precisely not branded as unlawful. The distinction is crucial for understanding how the idiosyncrasies of humanitarian law relate to the fundamental worldview expounded above.

The clandestine character of the spy’s activity clashes with the openness and visibility that characterizes the figure of the combatant—which derives itself from the fact that war is “public.” As a result, the activity of spying itself is covered by immunity only to the extent that it is carried out openly, just like the activity of other combatants. Under contemporary treaty law, therefore, a spy who is caught in the middle of spying while not in their soldier’s uniform can possibly be executed for the very fact of spying,\textsuperscript{122} because of the secrecy of what is otherwise a legitimate activity if not carried “under false pretenses”, as the law puts it.\textsuperscript{123}

\begin{enumerate}
\item\textsuperscript{118} API, supra note 24, art. 47.
\item\textsuperscript{120} Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to the Hague Convention on the Laws and Customs of War on Land arts. 29, 31, Oct. 18, 1907 [hereinafter HCIV], reprinted in RULES OF INTERNATIONAL HUMANITARIAN LAW AND OTHER RULES RELATING TO THE CONDUCT OF HOSTILITIES, supra note 21; API, supra note 24, art. 46. See also Lieber Code, supra note 116, arts. 88, 104.
\item\textsuperscript{121} On the question of illegitimate participation, see Mallison, supra note 114 (providing a very helpful analysis of API). On spies, see also THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 321 (Dieter Fleck & Michael Bothe eds., 1999).
\item\textsuperscript{122} Mallison, supra note 114, at 26–27.
\item\textsuperscript{123} Again, the Lieber Code expresses it best. In Section V, covering “Safe-conduct, Spies, War–traitors, Captured Messengers, Abuse of the Flag of Truce” one can find the recurrent threat of capital punishment for a series of activities such as those mentioned in the Section heading. As for the spy, the Code says that: “[t]he spy is punishable with death by hanging by the neck, whether or not he succeeds in obtaining the information or in conveying it to the enemy.” Lieber Code, supra note 116, art. 88. The reason for both the hostility against spies and the grouping of spies with traitors is made explicit towards the end of the Section, where we find an otherwise curiously inoperative provision: “[w]hile deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable
situation of the spy reveals that the public / political nature of war carries with it an element of openness and publicity that allows for the (easy) discrimination between legitimate and illegitimate hostility. Spying requires secrecy, and therefore, as made clearer in Additional Protocol I, not wearing one’s uniform. However, that precisely makes it illegitimate, in that it implies a serious difficulty for the spied—on power in recognizing what kind of activity it is. Spies are therefore engaged in a treacherous activity, as the Lieber Code puts it, “because they are so dangerous, and it is difficult to guard against them.” In all other cases, being a combatant is a privilege and carries immunity from moral and legal reproach insofar as it remains within the rules by which international humanitarian law and international criminal law make war a regulated social activity of a public character. To confirm this, the universal rule is—not so curiously—that although spies can be executed for spying if caught in the act, they cannot be punished for past spying if they were not caught then. Although past spying activity constituted at the time a treacherous act (the gravity of which would depend on the kind of “false pretenses” used), it went unnoticed, and will be deemed ex post facto an act of the enemy State for which the individual is not responsible. From the perspective of the law, however, if caught in the act, the spy is individually in a very serious breach of the principle of distinction.

The specific example of the successful spy serves to bring forward the more general situation of the prisoner of war, and lead us thereby to the key figure in the legal operationalization of the principle of distinction. As such, a prisoner of war who tries to escape from a POW camp can be forcefully prevented from doing so, and can be legitimately killed in the process. However, if the escape is successful, but then the escapee happens to be captured at a later point in time, the initial escape cannot be legitimately punished. That is so because it is understood that it is the soldier’s duty as a soldier to try and escape from the enemy’s hands. This reminds us that being a prisoner of war is not a punishment, given that soldiers cannot be punished for participating in combat. That is very concretely the meaning of warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is difficult to guard against them.” Id. at art. 101. In line with contemporary codifications, the most significant element in the act of spying is secrecy: “[a] spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy.” Id. at art. 88.  

124. Id. at art. 101.  
125. Id. at art. 102.  
127. GCIII, supra note 24, art. 91.  
128. For the U.S. case, see for example, George S. Prugh, Jr., The Code of Conduct for the Armed Forces, 56 COLUM. L. REV. 678 (1956).
their privilege. Prisoners of war are therefore “detained,” 129 that is, they literally are “held back” from returning to combat, rather than imprisoned as a result of their position of hostility. 130 Prisoners of war are all “detainees” in so far as they are under the responsibility of a “Detaining Power,” 131 pace Secretary Rumsfeld’s once compulsive use of the term “detainee” to avoid granting implicitly “War on Terror” captives any legal status. 132 As such, the law insists that “[p]risoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them.” 133 The public character of war culminates in the famously alien sounding provisions concerning the release of prisoners of war on parole, 134 that is, on the promise of not going back to combat after release. 135 The Hague Regulations, in this case, unlike the Geneva Conventions, add that the soldier caught in violation of the terms of the parole falls out of the status of prisoner of war and can be tried for the use of violence itself. 136

129. The description of the situation of the POWs says that “they have fallen into the power of the enemy.” GCIII, supra note 24, art. 4.
130. As a result, and except when dictated by necessity, prisoners of war cannot be detained in penitentiary establishments. See GCIII, supra note 24, art. 22.
131. That is the term used throughout the Geneva Convention Relative to the Treatment of Prisoners of War, starting with the framing provision of Article 13:

Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.

GCIII, supra note 24, art. 13.
133. GCIII, supra note 24, art. 12.
134. GCIII, supra note 24, art. 21. See also 3 Jean Pictet, Commentary on the Geneva Conventions of 12 August 1949 Relative to the Treatment of Prisoners of War 178 (1958).
136. HCIV, supra note 120, art. 12. Given that the possibility of parole is entirely based on the law of the prisoners’ own State, if upon their return they are told to go back to the front coercion will be a mitigating circumstance. See also 3 Jean Pictet, Commentary on the Geneva Conventions of 12 August 1949 Relative to the Treatment of Prisoners of War 178 (1958).
3. From Privileged Agents to Legitimate Means of Warfare

From general ideas of legitimate violence based on public–ness and publicity attached to the agents and targets of war (the “armed forces”), the St. Petersburg Declaration derives the notion that the aim of war not only results in a delimitation of the nature of participants, but also imposes a delimitation of the nature of the activity itself. That is the immediate object of the Declaration, which constitutes a quintessential “Hague Law” instrument, for which the Preamble gives us the most philosophical of rationales.

Against the social contract background, private violence is most likely a crime. But public violence is not as such necessarily legitimate war, insofar as to be legitimate an act of war must be specifically aimed at weakening the military forces of the enemy. Rousseau had anticipated the Declaration’s formulation, according to which the objective could be attained by disabling the greatest possible number of men. Any means used in the course of war that exceed that objective are not legitimate, that is, not legitimated by the aims of war. By the terms of the introductory paragraph to the Preamble, which states that the mission of the military commission that drafted the declaration was to fix “the technical limits at which the necessities of war ought to yield to the requirements of humanity,” the use of means that exceed the goal of disabling men, would then break the limits of military necessity and infringe on the requirements of humanity. Such means—or their use—are therefore considered to be in breach of the “laws of humanity.”

The foregoing happens—by definition—in the case of means of combat that produce “superfluous injuries,” “unnecessary suffering,” or “inevitable death.” Analytically, an “excessive” act violates the agreed upon common framework of understanding on the nature of the activity in which different States are involved. That activity here is “war.” As a breach it is ipso facto not an act pertaining to that activity as defined by the law. The act is something else than war: just like private acts of war were once termed acts of banditry, here excessive public acts of war will also lose their warlike quality and potentially become crimes, that is, unlawful acts of (private) individuals.

In the case of the St. Petersbourg Declaration, that much is manifested in the staging of the text as the expression of the “technical limits” between

137. The Declaration, at its second preambular paragraph, declares quite famously “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.” St. Petersbourg Declaration, supra note 21, at 159.
138. Id. ¶ 3.
139. Id. ¶ 4.
140. Id. ¶ 5.
141. Id. ¶ 4.
military necessity and humanity that have been fixed “by common agreement.” The breach of the common agreement in the case of “war” will always boil down to a breach of the foundational principle of distinction, a failure to differentiate between civilians and combatants, or between the combatant and the human being that hides behind the uniform of the combatant. Means of combat that fail to do either one of those violate by definition the idea of distinction, and are therefore in contradiction with the “laws of humanity,” which otherwise, according to the Declaration, contribute to making war a distinct activity. From that liberal perspective, deliberate attacks against civilians, attacks of an indiscriminate nature or with indiscriminate means, and attacks against legitimate military objectives with means that will prolong suffering beyond war all constitute in the end the same violation. International criminal law will implement that idea by categorizing particularly egregiously excesses of that type as crimes. As in the case of the spy or the paroled prisoner of war, breach of the law makes the private individual reappear; that individual is considered then the immediate author of the act, as opposed to the State itself.

4. Distinction and the Construction of War by International Law

This construction of war as depending on the functional splitting of human beings is important on several fundamental counts. First, it supports the idea that “war” is a legitimate activity and as such finds grounds for legitimacy beyond the rules of the game constituted by the “laws of war.” In

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142. Id. ¶ 1.


144. Rome Statute, supra note 30, art. 8(2)(b).

145. API, supra note 24, art. 51(4)(a).

146. Id. at art. 51(4)(b), 51(4)(c).

147. The idea that the effects of war must disappear when war ends is intimately connected to the notion of “war” that is contemplated by humanitarian law. This is evident in the way in which the protection of the environment is framed, see for example, API, supra note 24, art. 35(3), or in the justifications presented for the banning of certain means of combat that continue causing harm after the end of hostilities. See Convention on Cluster Munitions, supra note 29, pmbl.
that sense, the “laws of war” never discuss the legitimacy of “war” as an
existing context, but rather police its boundaries, which results in the very
possibility of a “correct” way of performing warlike activities. Second, it
is the basis for the idea that wartime killing and destruction are legitimate if
directed at the “forces of the enemy,” which includes the possibility of
legitimately ending the life of human beings, as an unfortunate accident
(and sometimes a necessary byproduct) in the activity of war, rather than its
objective (the objective in war being to render the enemy incapable of
participating in war by taking its soldiers out of combat.) As a result, not
only is war as such a legitimate activity, but also deliberate ending of life
itself is acceptable. Third, both the unquestioned existence of war and the
possibility of agreeing on its definition imply that there is a larger frame
within which the agreement can be reached. Concretely, it means, on the
one hand, that there is at least a theoretical possibility of agreeing that a
given situation of war indeed exists, starting with the notion that the two or
more enemies recognize one another as legitimate enemies (as opposed to
“bandits.”) On the other hand, it means also that the two enemies will find it
significant to come up with common rules of a legal nature, which will be
assumed to be enforceable and enforced by all the parties to the activity of
war.

That common frame of agreement today is the international legal system.
The consequences of framing the laws of war in international law are in turn
the following. (1) First comes the sovereign State, and the framework in
which States interact as mutually recognized States, or in contemporary
terms “equal sovereigns,” in which they are equal precisely by their
exclusive sovereign function of using war, if need be, against one another
on behalf of their respective communities. Outside international law, the
idea of an encounter between two sovereigns is meaningless, since without
a common law to coordinate sovereigns, starting with their mutual
recognition as identical entities, sovereignty as a set of privileges against
others is indistinguishable from greater brute force. (2) The principle of
distinction is from there fundamentally implemented through the legal
delimitation of the identity of the “State agent,” from where other identities
are derived in one way or another, starting with the identity of the non–
combatant by excellence, the civilian. Soldiers, combatants, prisoners of

148. The idea is not new. See Chris af Jochnick & Roger Normand, The Legitimation
of Violence: A Critical History of the Laws of War, 35 HARV. INT’L. L.J. 49 (1994); DAVID

149. Everything in the system of the Geneva Convention starts with Article 4 of the
Geneva Convention Relative to the Treatment of Prisoners of War, which defines the persons
entitled to the status (and persons entitled to the treatment) of prisoners of war. GCIII, supra
note 24, art. 4. The definition of civilians protected by the Fourth Geneva Convention,
which is given in its Article 4, defines civilians as those not covered by the three other
Conventions. GCIV, supra note 24, at art. 4. The personal scope of application of the first
two Conventions is identical to Article 4(A) of GCIII (with the exception of the persons
war, civilians and other inhabitants of the land of war are not natural occurrences, but rather constructions of the mind situated within common systems of meaning. In our case, such a system is designated implicitly by the St. Petersburg Declaration to be international law and the political theory that animates it. (3) Functional splitting and recombination is a permanent feature of war, given the presumption that behind the legal identity always lies a human being—just like behind the hospital identity marked by the Emblem lies a building, which can be very functionally hijacked. The existence of war is in all cases premised on the possibility of that splitting being accepted. (4) From that perspective, deliberate killing of human beings is in all (theoretical) cases illegitimate, given that it is a transgression of the deeper notion of “distinction,” that is, the distinction between human beings and their given functional identity. (5) Similarly, at the periphery of “war” activity, the soldier can be functionally split into human being and State agent for the purpose of criminal sanction (independently of the State’s own responsibility on other grounds). Rules are (theoretically) agreed upon for the purpose of circumscribing the possible circumstances of that splitting, which implies the development of rules external to humanitarian law, into which humanitarian law expels individuals who are split from their function. Any act that is codified as a crime is rooted in a breach of distinction, a breach the seriousness of which makes the incriminated act slide out of the world of war, and therefore puts the individual behind the uniform in the spotlight. The act is punished as a crime in the very same sense that domestic crimes are punished, that is, as grave acts that pose a danger to society as a whole, beyond their immediate victim.

The marginal case of war criminality entrenches the fact that the fabric of international humanitarian law is marked with the principle of distinction in the form of identity assignments, and in so doing constructs “war” as an implementation of the basic statements of the St. Petersburg Declaration. In concrete terms, “war” is something defined by humanitarian law itself and is not received from the sociological facts of the outside world. As a result, humanitarian law may not have the same understanding of “war” as other possible perspectives on the phenomenon of “war,” including other academic and professional disciplines. More specifically here, humanitarian law’s war can be different from the “war” imagined in other bodies of law, such as the jus ad bellum and international human rights law.

described in Part B of Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War, who are not entitled to the status but only to the treatment of POWs). See GCI, supra note 24, art. 13; GCII, supra note 24, art. 14; GCIII, supra note 24, art. 4(A). When API describes the category of civilians in the context of the conduct of hostilities (and the protection of civilians against the effects of those hostilities), it essentially repeats (not to get into too much detail here) the maneuver of Article 4 GIIV, by referring in the negative to Article 43 API (definition of the "armed forces" as those "who have the right to participate directly in hostilities") and Article 4(A) GCIII. See API, supra note 24, art. 50.
5. Combatant Immunity as a Basis for all Rights and Obligations

The foundational move of the *jus in bello*—considered as the law that applies when war is a given—is the designation of the agent of the State through which the State operates and carries out the activity of war. The cornerstone of the whole legal edifice is therefore the set of rules regulating the assignment of the status of prisoner of war. Those rules articulate practically the recognition that violence performed by a given individual was in fact public violence. The definition of those who are entitled to the status of prisoner of war is then the foundation for the residual definition of the category of civilians. This implementation of distinction is generalized as the central structural connection among the four Geneva Conventions through the articulation of the personal scope of application of each one of them, which in all cases depends on the definition of the prisoner of war. That is also true of the Additional Protocols, once the new definition of those entitled to the status of prisoner of war is integrated with the operation of all the Conventions.

The implementation of distinction through combatant immunity, implicit in the definition of the prisoner of war, gives retrospective coherence to the development of the Geneva Conventions themselves. The original and immediate purpose of what would become the system of the Geneva Conventions was to ensure protection for the medical personnel of the armed forces operating on the battlefield. The protection of the permanent medical personnel of the armed forces, and from there the medical

150. The Inter-American Commission puts it best:

The combatant’s privilege in turn is in essence a license to kill or wound enemy combatants and destroy other enemy military objectives. A privileged combatant may also cause incidental civilian casualties. A lawful combatant possessing this privilege must be given prisoner of war status, as described below, upon capture and immunity from criminal prosecution under the domestic law of his captor for his hostile acts that do not violate the laws and customs of war.

Report on Terrorism and Human Rights, Inter–Am. Comm’n H. R., OEA/Ser.L./V/II.116/, doc. 5 rev. ¶ ¶ 68–70 (2002). In other words, “lawful combatant and prisoner of war status directly flow from the combatant’s privilege.” Id.

151. PICTET, supra note 134, at 178.

152. Compare, as suggested supra note 149, GCIII, supra note 24, art. 4(A) and GCI, supra note 24, arts. 13–14.

153. API, supra note 24, at art. 44.


155. GCI, supra note 24, art. 24; GCII, supra note 24, art. 36.
is a by–product of the created category of the *hors de combat*, since the latter need to be protected so that the aims of war are not overreached by their death through carelessness or negligence. This explains the fact that military medical personnel, the core of the medical function in war, are part of the armed forces and yet not entitled to the status of prisoner of war: they are “retained” if needed for the care of the *hors de combat*, prisoners or civilians, and not “detained” based on status, since the status would otherwise make them a legitimate target. Protected medical personnel are as such the direct outgrowth of the principle of distinction: they signal that on the battlefield there is indeed a difference between human beings and their functional identity. Deliberate targeting of medical personnel is understandably considered a crime, that is, an act that is threatening to the legal system and not only harmful to its victim. Similarly, perfidy, a mocking manipulation of the rules establishing that minimum of trust that allows for the system of legal protection based on distinction to function, is almost naturally singled out as a war crime when resulting in death or injury.

This exercise in connecting the normative dots against the large picture of distinction could be easily pursued with all categories of individuals—from journalists to spies to mercenaries to civil defense—with more or less illuminating conclusions. Here the importance of the case of medical personnel lies in the strong association of distinction with the didactically named “Geneva law,” that is, the body of rules dealing with “protected persons.” The very idea of “protection” comes from distinction, again understood as the functional splitting of human beings between human life and variously adopted social roles, starting presumably, as Rousseau saw it, with citizenship. The principle of distinction is however strongly associated also with “Hague Law,” or the law regulating the conduct of hostilities, the means and methods of weakening the enemy forces.

The principle of distinction signals simply that the enemy must differentiate between the human body and the public identity that it carries around. In the absence of such public identity, there is no enemy. In cases where the public identity is spotted, means should be used to kill it (the identity) without (necessarily) killing the human body that carries it, since that is not necessary to the overall war aim of weakening the State’s

156. API, supra note 24, arts. 12, 13, 16 (protection of medical units, civilian medical units, and medical duties).
157. GCI, supra note 24, art. 28; GCII, supra note 24, art. 37; GCIII, supra note 24, arts. 33, 35.
159. API, supra note 24, art. 85(3)(f).
capacity resist submission to its enemy’s will, as Clausewitz saw it. The greater unity between Hague Law and Geneva Law does not come from the fact that Additional Protocol I or the Hague Regulations actually contain both types of rules. It comes from the fact that the torture of POWs, strategic aerial bombings, and the use of explosives generating non-detectable fragments all constitute the same infraction: transgressing the difference between agents of the public cause and human beings. When the affected target is a combatant, and not a civilian, we call that more specifically “unnecessary suffering,” suffering beyond the threshold that puts the soldier hors de combat. As suggested above, this cardinal principle is therefore more than a twin to the principle of distinction; it is its legal offspring.

The merger of distinction and unnecessary suffering under the same logic of means / ends relationship confirms the image of war as a legally constructed tool. The law defines war by starting from its assigned goal, which then serves to constrain the activity, the means to pursue the objective of the game of war by precisely setting rules to the game of war. Humanitarian law, as organized around distinction, is a system that contributes to the definition of war as a meaningful activity. More precisely, it designates the objective in war, as opposed to the objective of war. Once one knows what war is and what it is to wage war, one can imagine how we will use it. War as an activity is itself a means towards an end, and from a legal perspective that end is a question for the jus ad bellum to settle. For instance, it can be a collective understanding of States that war is not an appropriate tool of foreign policy, or that war is to be eliminated by regulating the use of force by States against one another. Thus Clausewitz and international humanitarian law converge in the general proposition that war is a tool, with its logic and necessities, and it can be put to a variety of uses, which are determined by political considerations. These political considerations today have to be publicly expressed to the society of sovereign communities in the language of the jus ad bellum. This comes from the collective agreement contained in the Charter of the United Nations and again based on the premise of formal sovereign equality as

161. See Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 94 L.N.T.S. 57 (stating that the Kellogg Briand Pact signatories “condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.”).
162. Article 2(4) of the Charter of the United Nations is given a particular place in the political architecture of the Charter because the preamble of the Charter opens the statement of purpose with the words: “We the People of the United Nations, determined to save succeeding generations from the scourge of war .” which is followed in the second part of the preamble by two mentions of “peace” and one of “armed force” in the four lines describing the general means to the ends just described. See U.N. Charter, pmbl.
precisely unpacked in the seven articulations it finds in Article 2 of the Charter.

6. Civil Wars and the Limits of Distinction

However unwieldy the above generalizations may be, their abstraction can seem magnified by the recurrent notion that most “wars” nowadays are internal to States as opposed to among States. There is a thesis out there concerning even the fact that wars are now of a new type, a type essentially defined as not being the one depicted in theoretical terms above. Without entering that debate here, a few words need to be said about civil wars as wars, in a way that would maintain the integrity of the political and legal articulation of war suggested above. Clarifying the idea of civil wars as “wars” will be a basis for a discussion of wars outside of the framework presented above, which is naturally the main humanitarian law concern about the “War on Terror.” Here, however, the issue is that of understanding how distinction operates in civil wars. What I suggest is that civil wars are “wars” only because they are made to fit into the above worldview.

In cases of international wars the operation of the principle of distinction and the prohibition of unnecessary suffering depend on the legal construction (at both domestic and international levels of law–making) of the category of combatant, which is attached to the figure of the sovereign State from which a combatant receives the privilege of legitimate destruction. As a result, in civil wars, the issue for law will be that the principle of distinction cannot operate, because as far as the State is concerned, the other warring party is constituted by the State’s own citizens. As a general consequence of this, the functional classification of human

167. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 art. 4, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 7, 1950) (starting point for analysis of combatants as a category); API, supra note 24, arts. 43-44 (starting point for analysis of combatants as a category). See also the still very important HCIV, supra note 120, arts. 1–3.
beings is not operational in the same way as it is in international conflicts.\textsuperscript{168} Rousseau’s logic of public war clearly does not hold, or at least does not hold immediately as well as in a war among sovereign communities.

The principle of distinction in civil wars is therefore thwarted essentially by sovereignty, which very pragmatically constitutes an obstacle to the international regulation of civil wars.\textsuperscript{169} In political terms, rejecting distinction in principle is tied to the notion that the State is the source of the law’s political legitimacy at both domestic and international levels. From a jurisprudential perspective—and from the perspective of international law—a party rebelling against the State is illegitimate at least until it is victorious.\textsuperscript{170} Out of the difficulty of having “combatants” in the functional sense outlined above, comes by implication the strange position of the notion of “civilian.”\textsuperscript{171} In black letter law, the “category” of civilians, although used (as in Additional Protocol II), is left undefined in a way that should not be surprising given that in international armed conflicts civilians are those who (to simplify just slightly) are not eligible for prisoner of war status if fallen in the hands of the enemy.\textsuperscript{172} We do have a mention of civilian populations, but the contours of that category are left undefined. The legal incongruity is a mere reflection of the notion that the principle of distinction cannot formally apply, because there are agents only on one side of the conflict; yet the principle of distinction has to apply somehow functionally, because distinction is the only reference that tells war apart from any other kind of violence, including law enforcement. The

\begin{itemize}
\item \textsuperscript{168} Marco Sassòli, \textit{Uses and Abuses of the Laws of War in the War Against Terrorism}, 22 LAW AND INEQ. 195, 196–97 (2004).
\item \textsuperscript{169} See GREEN, supra note 20, at 52 (“In accordance with the principle of absolute sovereignty over domestic affairs, such non-international conflicts were considered to be within the domestic jurisdiction of the State concerned”). Marco Sassòli, \textit{Transnational Armed Groups and International Humanitarian Law} 8 (Program on Humanitarian Policy and Conflict Research, Harvard Univ., Occasional Paper Series, No. 6, Winter 2006) (mentioning that concerns over sovereignty have resulted in the law of non-international armed conflicts being “more rudimentary”). For a detailed historical account of international law’s tightening grasp on “non international armed conflicts” as against notions of “absolute sovereignty,” see generally ANTHONY CULLEN, \textit{THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW} (2010). See in particular id. at 25–61 (regarding the adoption of common Article 3 as a fundamental innovation, perceived by most States as affecting their sovereignty); see also id. at 93–101 (indicating that similar reactions occurred when the ICRC presented its draft of what would become Additional Protocol II in 1977).
\item \textsuperscript{170} More specifically, secession is thus not condoned by international law, although it is not really prohibited either, because in very simple terms secession is a disruption to the factual units that create international law. The real issue is that of the international effects of the outcome of such a rebellion, whether it results in changes of territory or only changes of government. See, e.g., the discussion of secession in international law in the Supreme Court of Canada decision in Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).
\item \textsuperscript{171} APII, supra note 24, pt. IV.
\item \textsuperscript{172} Again, see GCIV, supra note 24, art. 4; GCIII, supra note 24, art. 4; API, supra note 24, arts. 43, 44, and 50.
\end{itemize}
association of war with sovereignty poses demands that civil wars be similarly defined in terms of sovereignty for the sake of humanitarian law’s theoretical applicability and concrete application.

The Geneva Conventions do not define what an “armed conflict” is, apart from a reference to the notion that “war” is implicitly considered as the legally formalized state of armed conflict. 173 Given this lack of definition and the fact that the term armed conflict is used in the Conventions and Protocols to refer to inter–State and intra–State situations, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia famously stated, on the basis of a transversal examination of the four Geneva Conventions, including their common Article 3, and the two additional Protocols, that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”174 Simply stated, the ICTY confirms that the phenomenon of war can be apprehended by the law regardless of whether it is internal to the State or across its borders. Civil and international wars—declared or not—are species of the genus “armed conflict.”175 If civil wars are added to the description of “war,” the configuration of the participants and the nature of the activity must be susceptible to a legal approach similarly based on distinction.176

In both common Article 3 of the Geneva Conventions and Article 1 of the Additional Protocol II, what one can say is that non–international armed conflicts are seen as armed conflicts because the nature of violence affects—directly or indirectly—the sovereign itself. The paradigmatic case may occur when the representative of the sovereign is being overthrown, but another case can be that characterized by the government’s loss of control over the sovereign’s territory to the point that a “war” is being

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175. According to the ICRC Commentary, common Article 3 can be understood as following the above–mentioned idea that “armed conflicts” are factually existing, rather than legally established, situations. See PICTET, supra note 173, at 48. (“Its observance does not depend upon preliminary discussions as to the nature of the conflict or the particular clauses to be respected”).

176. It is important to mention that, contrary to what appears at first sight, such an analysis supports more complex sociological descriptions of war, i.e. descriptions of war that are precisely not based directly on the motives or objectives of the participants. See Stathis N. Kalyvas, The Ontology of “Political Violence”: Action and Identity in Civil Wars, 1 PERSP. ON POL. 475 (2003), but see Paul Collier & Anke Hoeffler, Greed and Grievance in Civil War (World Bank Policy Research, Working Paper No. 2355, 2005), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2000/06/17/000094946_00060205420011/additional/115515322_20041117154030.pdf.
waged on it, with or without its own participation. The rather loose definition provided by the ICTY hinges upon the existence of a particular type of violence, defined by its extension in time, and a reference to the participants being essentially armed organizations. By armed organizations one can understand groups that either represent the State or are capable of challenging State control by the use of violence. As such, and as further limited by the lower threshold of “civil strife,” the notion of “armed conflict” would reach out to cover any long–term violence implying a threat to, or breakdown of, the legal order itself, such as in the case of the State facing paramilitary criminal organizations.\footnote{177} In all these cases, the term “armed groups” imply a permanence of violence resting on the existence of discreet entities essentially dedicated to the exercise of violence.\footnote{178}

From that perspective, and despite the formal absence of civilians and combatants in civil wars, one can search the law for functional equivalents that would allow distinction to operate. The equivalence will be based on the notion that the struggle is between agents of the sovereign and agents of a would–be sovereign—signaled for instance by the fact that for all intents and purposes sovereignty, in the form of effective control, has ceased on a segment of the State’s territory. In international law, that view aligns humanitarian law with the rules of the law of State responsibility for international wrongful acts, which make States responsible for the pre–governmental actions of their government if it gained control of the State as an insurrectional movement.\footnote{179} The idea of a functional equivalence

\footnote{177} Hence the critique of the militarization of law enforcement, which effectively transforms policing into war. \textit{See}, e.g., Stephen Hill\ &\ Randall Beger, \textit{A Paramilitary Policing Juggernaut}, 36 SOC. JUST. 25 (2009). On the militarization of law enforcement due to the militarization of non–State entities including criminal organizations, see HUMAN RIGHTS WATCH, BREAKING THE GRIP? OBSTACLES TO JUSTICE FOR PARAMILITARY MAFIAS IN COLOMBIA (2008); HUMAN RIGHTS WATCH, UNIFORM IMPUNITY: MEXICO’S MISUSE OF MILITARY JUSTICE TO PROSECUTE ABUSES IN COUNTERNARCOTICS AND PUBLIC SECURITY OPERATIONS (2009).

\footnote{178} There is some discussion as to what constitutes an “armed group” and whether, in particular, criminal armed groups should, or even can, be distinguished from political armed groups. This last question as an impact on the sociology of war, but it does not immediately affect the question at hand, insofar as the issue is for now limited to the possibility of having a war between anything else than two or more States. On the issue of who is an “armed group.” \textit{See}, e.g., INT’L COUNCIL ON HUMAN RIGHTS POLICY, ENDS & MEANS: HUMAN RIGHTS APPROACHES TO ARMED GROUPS 5 (1999), available at http://www.reliefweb.int/library/documents/2001/EndsandMeans.pdf (“In this report, by ‘armed groups’ we mean groups that are armed and use force to achieve their objectives and are not under state control.”) For an attempt at defining “armed groups” for the purpose of international humanitarian law (within which they are not defined), see Nils Meltzer, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 27 (2009).

between the State as a public power and “armed groups,” understood to be would-be sovereigns or stand-ins for the sovereign, allows then for the hypothetical construction of “civilians” a contrario. Even though there cannot be an equivalent to prisoner of war status as a matter of international status in civil wars, the description of the civil war equivalent of the civilian can be based on the idea of the civil war type of combatant, which is implied in the ICTY definition of armed conflicts.

That is what the ICRC has proposed by defining the essence of the civil-war combatant with the notion of “continuous combat function.” The immediate purpose of the ICRC was, in the context of discussions about the nonexistent “illegal-combatant” status, to define what “direct participation” in hostilities means for the purpose of cancelling civilian status. In the course of doing so, a contrario reasoning defines direct participation as necessarily something other than the participation by fighters in hostilities, which in turn suggests that, even in civil wars, there is such a thing as a fighter, which can be distinguished from a civilian. So much is clear from the provisions relating to the loss of civilian status themselves, since they are identical for international and non-international armed conflicts. The idea of a factually permanent fighter status responds in legal terms to the idea that there is a civilian status defined by the fact of never participating in hostilities, and the notion that—as common Article 3 seems to suggest—in civil wars also there are persons hors de combat (i.e. who are not simply not fighting, but are rather out of combat capacity). The existing law seems to acknowledge implicitly all these categories. In other words, a civil war is a war, because of its connection to the State, both in terms of it being a challenge to sovereign rule, and in terms of being legally characterized by the overall application of the public/private distinction formalized in the St. Petersburg Declaration. Regardless of what one thinks of the functionalization of status for the purpose of maintaining the possibility of the laws of war being applicable in non-international settings, which certainly shifts the background idea of legitimate force towards a de facto force-makes-legitimacy generalization, the reasoning


181. That discussion was triggered by the Supreme Court of Israel’s decision relating to targeting rules that govern military operations against individuals belonging to armed groups in the Occupied Territories (referred to generally as “targeted assassinations”). HCJ 768/02 The Pub. Comm. Against Torture in Israel v. The Gov’t of Israel PD [2006] (Isr.). The ICRC study on “direct participation” is a response to the Court’s conclusions and method.

182. API, supra note 24, arts. 51(2), 13(2).

183. MELTZER, supra note 178, at 28.

highlights that civil “wars” are considered and imagined as wars in relation to distinction. Even if only by the analogy of civil wars to the general social phenomenon of war, the connection of war to the sovereign is always there. Beyond the merely practical difficulties in implementing distinction in civil wars, that suggests that the idea of a war outside of the laws of war would mean a political disconnection of war from sovereignty.\textsuperscript{185}

Violence below the threshold marked by common Article 3 is criminal. It involves the operation of the legal order, rather than its continued existence, which is an overall objective common to international and non–international armed conflicts. In that sense, the case of civil “wars” justifies—just like the case of international wars—the designation of fighting individuals as the “enemy” (of the State). That is again well illustrated by the Lieber code, which is founded on a similarly public notion of war while in the context of a clearly designated “civil war,” a war over secession.\textsuperscript{186} “Wars”, of whichever kind, are always associated with the exercise of public power, and more precisely a direct challenge to the holders of public power through military means (including cases where the sovereign has lost its public power in part of the territory). In this sense all “wars” are indeed associated with the sovereign border as the border of the space of operation of a government, the border of that space with the international plane, and its border with neighboring sovereigns.

That brings us to the end of the excursion through international humanitarian law. The contrived exhibition of the principle of distinction here serves the purpose of proposing a vision of international humanitarian law as a coherent system based on deceivingly simple ideas about the world and human beings in it. Distinction is a principle, a general guiding standard that needs further implementation and interpretation to be more immediately understandable in the midst of everyday life. As such it is the object of debate and contestation. The overwhelming majority of people and States—if not everyone on the planet—agrees on the idea of distinction as a normative guide. But there is no consensus on what it means in practice: who is a legitimate target, who is a combatant, who is a civilian, when is someone a civilian, does only behavior or also circumstances affect civilian status, all those are legitimate questions. Depending on the answers, targeting and its corollaries, and especially proportionality, can be

\textsuperscript{185} The exporting of the “continuous combat function” back into the realm of international armed conflicts results in applying the adapted logic of civil wars to a situation that should be entirely governed by formal distinctions. In that sense, it entrenches the factual realities of contemporary warfare, such as massive privatization of war-making, without paying attention to the political message that underlies the collapse of formal distinctions. As such it is significant that “permanent combat function” is used in the inter-State context (or rather, regardless of the type of conflict in which one is) in the case of private military contractors. See Meltzer, supra note 178, at 38.

\textsuperscript{186} See Lieber Code, supra note 116, art. 82.
dramatically altered.\textsuperscript{187} Even at the operational basis of distinction, there is a fundamental lack of consensus. States disagree over Articles 43 and 44 of the Additional Protocol I, which amend the basis for distinction in the system of the Geneva Conventions, in conjunction with the amendment of the definition of “armed conflict” in Article 1(4) of the Protocol.\textsuperscript{188} There is disagreement over the legal definition of proportionality, a corollary of distinction, in terms of whether acceptable civilian loss should be measured against military advantage for the operation or advantage for the overall campaign.\textsuperscript{189} And there is also the notion that more fundamental disagreement possibly exists—however marginal in actual military and diplomatic practice—on whether the system of the Geneva Conventions contains the sole possible approach to the idea of distinction. In other

\footnotesize{\textsuperscript{187} Schmitt, supra note 64, at 169. The issue of calculating “proportionality” in cases of contemporary asymmetric violent conflicts is highlighted in a particularly dramatic fashion in exchanges concerning turn-of-the-millennium instances of use of force by the State of Israel against non-State actors based in Lebanon and Palestine. Proportionality was, for instance, central to the United Nations experts’ report concerning the 2006 war in Lebanon, and particularly as a frame for evaluating and then condemning Israel’s use of force as in many cases illegal. See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mission to Lebanon and Israel, Human Rights Council, UN Doc. A/HRC/72/2 (Oct. 2, 2006); Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Mission to Lebanon and Israel, Human Rights Council, UN Doc. A/HRC/72/2 (Oct. 2, 2006); Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Mission to Lebanon and Israel, Human Rights Council, UN Doc. A/HRC/72/2 (Oct. 2, 2006); and the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari, Mission to Lebanon and Israel, (Sept. 7-14, September 2006), Human Rights Council, 2d session, UN Doc. A/HRC/27/2 (Oct. 2, 2006). Proportionality is also the terrain on which Israel’s use of force is defended and its military opponents’ use of force is criticized. See Alan Dershowitz, Israel’s Policy Is Perfectly ‘Proportionate’: Hamas Are the Real War Criminals in this Conflict, WALL ST. J., Jan. 2, 2009, http://online.wsj.com/article/SB123085925621747981.html. Some have, as a result of these experiences, proposed to reevaluate the notion and calculation of proportionality itself. See, e.g., Michael L. Gross, The Second Lebanon War: The Question of Proportionality and the Prospect of Non-Lethal Warfare, 7 J. MIL. ETHICS 1 (2008).}

\footnotesize{\textsuperscript{188} As regards the definition of combatants, an important example is the rejection by a number of States of the amendments to Article 4 of the Third Geneva Convention by Articles 43 to 45 of Additional Protocol I in 1977. The position of the United States has been outlined carefully, most often by components of the Armed Forces. See, e.g., Arthur John Armstrong, Mercenaries and Freedom Fighters: The Legal Regime of the Combatant Under Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 30 JAG J. 125, (1978); API, supra note 24. Donald E. Hacker, The Application of Prisoner-of-War Status to Guerrillas Under the First Protocol Additional to the Geneva Conventions of 1949, 2 B.C. INT’L & COMP. L. REV. 131, 131-62 (1978); George S. Prugh, American Issues and Friendly Reservations Regarding Protocol I, Additional to the Geneva Conventions, 31 MIL. L. & L. WAR REV. 223 (1992).}

\footnotesize{\textsuperscript{189} See, e.g., U.S. DEPT. OF DEFENSE, The Role of the Law of War, in REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN GULF WAR, 31 ILM. 615 (1992) (providing a clear statement on proportionality as it is defended by the United States).}
words, there is an ultimate interrogation, given these mounting practical difficulties, as to whether distinction between civilian and combatant can hold at all as a theoretical proposition for today’s wars, as epitomized by the “War on Terror.” The changing realities of war in the field have prompted some to suggest that the expansion of the theater of war to include most often cities and other zones of civilian habitation, as well as the transformation of war into a partially privatized activity, would force the distinction between civilian and combatant to eventually yield to a distinction between innocent and guilty.

Those are important questions. The fact is, however, that no one will defend a position of principle that says that distinction as such is not a valid idea, even though many will say that in practice it is implemented only with careful approximation and extreme difficulty. Getting rid of distinction, whichever distinction it is, will render war as we know it impossible—distinction introduces logic, order and regulation, which are indispensable for war, as opposed to chaotic destruction, to take place. In the terms used for framing this discussion, a vision of war that is disconnected from distinction yields a war disconnected from the sovereign and from the political legitimacy of force. It is a vision of war as a natural phenomenon or, in other words, Hobbes’s weather–like vision of war. As such, that image of war is defendable—like any other position on the subject—and can be debated on political grounds, but that discussion is not the immediate question here. Here, the proposition is that humanitarian law, as we know it, is precisely not attached to that vision but is set up against that vision. The most important idea backing the whole system of international humanitarian law is that war as such is legitimate—war, to be war, must be accompanied by some notion of right. Whether war exists or does not exist or should not exist is unimportant to humanitarian law; but when war is, it is grasped as a public phenomenon that can be essentially legitimate, if conducted according to the rules. In the alternative vision, what truly governs is nature’s laws. The system of humanitarian law is therefore set up with the image of a polity using force against the return to the state of nature, either by civil war or foreign invasion, all acts that can dissolve the social contract and thereby dissolve the polity. In the other vision, war is natural; it comes

190. In the course of the “War on Terror” the claim has been made that the non-state armed groups operate on the basis of a fundamentally different principle of distinction. See, e.g., MOHAMMAD–MAIMHOUH OULD MOHAMEDOU, PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, HARVARD UNIVERSITY, NON-LINEARITY OF ENGAGEMENT TRANSNATIONAL ARMED GROUPS, INTERNATIONAL LAW, AND THE CONFLICT BETWEEN AL QAEDA AND THE UNITED STATES 3 (JULY 2005). See also the examples from Iraq provided in Gabriel Swiney, Saving Lives: The Principle of Distinction and the Realities of Modern Warfare, 39 INT’L LAW. 733, 744–45 (2005). It should be noted that the author’s thesis is that the principle of distinction “rests on an outdated view of the world.” Id. at 733.

191. VAN CREVELD, supra note 37, at 225.

192. Id. at 90.
from the state of nature and continues into the polity under a different guise.\textsuperscript{193}

That general picture of peace within and war outside, created by the metaphor of the social contract, could also be tracked into different parts of international law, down to the constitutionalist Preamble of the Charter of the United Nations. The relationship of international law to war is a rather pessimistic one but one that is founded on the fundamental idea that social bonds will both end war inside and propel it outside, as shown by the UN Charter itself.\textsuperscript{194} International human rights law shares this general picture, including the image of the social phenomenon of war itself. The idea of human rights has many complicated connections with constitutionalism and social contract theory already as such. But, beyond human rights law's own history and internal life, humanitarian law and human rights coexist within the larger political universe that gives humanitarian law, but also the \textit{jus ad bellum}, the direction and orientation depicted above. What I want to discuss now in much briefer fashion is how human rights law can be read to express that same vision of political society, and highlight how the common ideological frame maintains human rights completely separate from the laws of war. That will constitute the political background to the technical magic of \textit{lex specialis} in the era of fragmentation.


In the next section of this discussion, I will approach the encounter of humanitarian law with human rights in the context of human rights adjudication. The perspective is that of human rights' reception and treatment of war in parallel to the existence of humanitarian law. The premise of that reception of war into human rights law is that humanitarian law and human rights may share something in their respective relations to the phenomenon of war. In the present section, the purpose is to go into an exposition of the inner logic of human rights law, although not to the same extent or detail as what was done above with humanitarian law. What is needed is a suggestion of the depth of human rights law's identity in corresponding terms. The purpose is, similarly, not to defend a coherent image of the body of rules for its own sake, but rather, just like in the case of humanitarian law, to revive the notion that a very specific worldview is necessary for the idea of having an international law of human rights, which would be different from "trade law" or "the law of the sea." As announced


\textsuperscript{194} U.N. Charter art. 107 ("Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.").
at the beginning of the discussion, if distinction constitutes the substantive *Grundnorm* of international humanitarian law, then I would suggest that non-discrimination plays the same role for human rights law.

1. Not Humanitarian Law’s Politics

The body of human rights law is political in the very deep sense of engaging the operation of the State and sovereignty. It speaks of right and wrong ways for the State to use its sovereign means of regulation and coercion in relation to those subjected to them. In fundamental jurisprudential terms, what human rights and humanitarian law have in common is the regulation, and thereby legal construction, of relationships.195 Like all law, they do not address things (weapons or hospitals) or relationships between persons and things (property or speech), but relationships between persons, natural or fictional. In the case of both bodies of law, legal norms define relations between the sovereign, other sovereigns, groups, individuals, and possibly corporate legal persons. What the contents of these relationships should be is subject to negotiation, reevaluation, and contestation in terms of creating rights, duties, privileges, and so on and so forth.

In the realm of humanitarian law, Canada thought for instance that protective power should be extended to non–recognized but habitually used emblems of humanitarian organizations, a proposition that was for all intents and purposes rejected in the final drafting of relevant international black–letter law.196 In the realm of human rights, Spain, for its part, still thinks that discrimination against women in the line of dynastic succession to the throne of the kingdom should be acceptable, in the sense of being in conformity with the object and purpose of a treaty that seeks the elimination of all forms of discrimination against women.197 And Australia, to take a last example at random, thinks that indigenous peoples do not have a right to self–determination.198 The rights of individuals and groups—the construction of spheres of autonomy, frames of emancipation, and spaces of

195. See generally, for instance, Alf Ross, Tū-tū, 70 Harv. L. Rev. 812 (1957); Wesley N. Hohfeld, Some Fundamental Legal Conceptions as Applied in Legal Reasoning, 23 Yale L.J. 16 (1913–14).
interaction in which they express their social existence or in which they are made to disappear—are obviously subject to dissensus and ensuing political persuasion, influence, and coercion. This happens at various points and levels of networks of social life, but in terms of international regulation it occurs within available spaces of diplomatic dialogue. Human rights law is one of those areas where lack of consensus has been made more visible, if only through the notorious issue of the number and content of reservations to human rights treaties.  

The process of legalization of human rights is a political process. That process is, in its basic features, the same as that of international humanitarian law. From within the space of public dialogue and regulatory diplomacy, human rights law and humanitarian law can therefore also influence each other indirectly through the political process that gives birth to them and in which a variety of actors are involved. If the Geneva Conventions were not directly influenced by the parallel negotiation of the Universal Declaration of Human Rights (“UDHR” or “Declaration”), Additional Protocol I of 1977 displays, even beyond the centrality of the absorption of a right of peoples to self-determination in its Article 1, some terminological parallels with human rights law. That proximity highlights again that these bodies of law have different histories, but a shared political process from within which they talk to one another. That shared political process points to a fundamental commonality rooted in the international legal process itself: self-regulation by the sovereign. Each legal sub-system concerns itself with regulating a set of relationships involving the Sovereign. The two sets of relationships are distinct from one another, but


200. See generally Meron, supra note 1.

201. Droege, Affinities, supra note 9, at 504.

202. Article 75 API on minimum guarantees is usually singled out for its echoes of human rights law. See INT’L RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 863 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987). One could also, however, mention the terminology used by common Article 3.
they overlap in the figure of the sovereign State and the exercise of its broadly defined sovereign means of coercion.

Human rights law is about the regulation of legitimate State power over individuals, groups, and the society at large. Once the meaning of that deep idea is forcibly made to pervade the whole body of otherwise random rules in the human rights corpus, it then becomes clearer how humanitarian law is formally and substantively different.\(^\text{203}\) The Preamble of the St. Petersburg Declaration was used above to extract a political narrative that would make the project of humanitarian law somehow coherent. Its counterpart in human rights law, from a parallel didactic viewpoint, is the Preamble to the 1948 Universal Declaration of Human Rights. As a public explanation of, and policy justification for, the operative parts of the Declaration, the Preamble can be seen as supporting ideologically the whole human rights corpus, whether universal or regional.\(^\text{204}\) The sense that the Declaration is, as any other international instrument, the outcome of complicated political

\(^{203}\) From the foregoing, it should be clear that the argument does not affect the possibility of adopting similar or even identical phrasing across the divide, or the sense of family resemblance which would prompt Amnesty International or Human Rights Watch to feel at home in the laws of war. The argument seeks here to clarify what type of family this is, and what type of family relationship we are assuming.

processes and compromises on various fronts would certainly be obvious from the examination of its own drafting saga. But from the perspective of humanitarian law’s relationship to human rights, what matters in the Declaration’s Preamble, considered a political platform, is the vision of coherence that is proposed, independently of its authors or its authors’ intentions. Unlike the image depicted in the St. Petersburg Declaration, the Universal Declaration’s Preamble is a statement on the universal socio–political condition of human beings. As such, it derives the project of an international law of human rights from a principle that seems, as a starting point, to be diametrically opposed to the foundational and animating principle of distinction in humanitarian law, i.e. the principle of non–discrimination.

Following revolutionary constitutionalist statements that justified rebellion against something suddenly described as an illegitimate exercise of power, the Declaration asserts that the foundation of human rights law lies in human dignity, the pre–legally given worth of individuals grounded in their humanity. The social–contract vibe emanating from the structure of the Preamble comes here not from the specter of Hobbes’ or Rousseau’s state of nature, but instead from allusions to the legitimacy of State power being bounded by respect for human dignity and the potential for rebellion that stems from its possible disrespect (a motif that is more Lockean than anything else). According to the Preamble, human dignity is to be protected by the rule of law, from the rest of the Declaration and especially the contents of the actual rights, one is to understand that legal protection to mean the regulation of the sovereign’s coercive power over the individual in a variety of dimensions of social life. In all cases the ground


207. UDHR, supra note 15, pmbl., ¶ 1 (stating that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”).


209. UDHR, supra note 15, pmbl., ¶ 3.
for constraining or channeling sovereign power is a version of “human nature” endowed with dignity independently of social life,\textsuperscript{210} which results in all human beings being endowed with the same rights by the mere fact of their being human. Existential equality generates the necessity for the State not to make distinctions among human beings.

The choice of regulatory tool is, in concrete terms, that of expressing the bounded legitimacy of sovereign violence, in whatever shape or form it comes, in a set of rights held permanently by all individuals on the one hand, and a set of corollary duties that frame that exercise of power by the State on the other hand. How this is, formally speaking, unlike humanitarian law is arguably self–evident, if one focuses on the type of legal relationship that is envisaged between the relevant legal subjects.\textsuperscript{211} The formal frame of human rights law is based on the notion of presupposed perfect equality among human beings; that leads to a delegation of coercive power that will be constrained by a duty for the holder of that power to relate to all in a way that acknowledges that equal worth and value. What is meant is not that the State should not discriminate, but rather that the State cannot, as a State, discriminate. Non–discrimination is in the essence of legitimate State power—discrimination makes State power illegitimate and the operator of that power a usurper. Hence the presupposition of a pre–political or pre–contractual “right” to rebel, a mere flipside of the pre–political “right” to contract the polity into existence.

2. Not Humanitarian Law’s Sovereignty

The fundamental or foundational character of non–discrimination is reiterated and reinforced throughout the law of human rights. At its most structurally obvious, it shows its mysterious Grundnorm dimension in the

\textsuperscript{210} For a famously critical stance on this approach, see Exec. Bd. of the Am. Anthropological Ass’n, Statement on Human Rights, 49 AM. ANTHROPOLOGICAL ASS’N 539, 539–43 (1947). In political thought, the social approach to human rights as that of rights of “man in civil society” was provided by Edmund Burke. See, e.g., EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 218 (J.C.D. Clark ed., 2001) (1790).

\textsuperscript{211} I should insist that it is naturally always possible to look at human rights and humanitarian law from a perspective that purports to see beyond legal relations and into the substance of life. Such are perspectives that treat human rights and humanitarian law as instruments for a seemingly consensual objective, moral, ethical, or otherwise independent of all political debate. In that case it is quite understandable that legal categories may be mixed and matched, since law and legal language are not considered to contribute meaningfully to the political construction of the world. See, e.g., MARY KALDOR, NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA 12 (2nd ed. 2007). The author describes contemporary wars as “a mixture of war, crime and human rights violations, so the agents of cosmopolitan law-enforcement have to be a mixture of soldiers and police.” Id. In that case, it is indicative that one will encounter the all-encompassing referent of “violence,” which produces a sense of indistinction that must obviously be as politically meaningful as distinction is. E.g., INT’L COMM. OF THE RED CROSS, VIOLENCE AND THE USE OF FORCE (2008).
fact that the duty not to discriminate has, strictly speaking, no fully independent normative status and is indeed approached as part of the operation of (legitimate) sovereign power itself.\textsuperscript{212} Non–discrimination refers not to a discrete right–duty relationship between State and individual, but to the manner in which the State discharges any and all of the duties corresponding to any and all of the rights held by (or conferred to) the relevant individuals. The structural necessity of non–discrimination goes thus to the heart of the operation of the State apparatus. More than simply a formal requirement, it speaks to the impossibility for legitimate power to consider irrelevant differences that are otherwise made to count in the life of human beings only through an arbitrary organization of society. It means therefore also an obligation for the State to treat differently individuals who are situated differently.\textsuperscript{213} But, even further along, it is understood to require a showing by the State that it is not contaminated by (civil) society’s own discriminatory biases,\textsuperscript{214} both in its actual operation (\textit{i.e.} in fulfilling duties to respect and protect) and in its setting of examples and other educational activities (\textit{i.e.} in abiding by the duties to promote and fulfill).\textsuperscript{215} The prohibition of discrimination is tied in black–letter law to all rights, based on the very definition of the State duties corresponding to those rights in international instruments.\textsuperscript{216} Moreover, the prohibition of discrimination

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\item \textsuperscript{212} E.g., X and Y v. The Netherlands, 91 Eur. Ct. H.R. (ser. A) at 32 (1985) (“Article 14 has no independent existence; it constitutes one particular element (non-discrimination) of each of the rights safeguarded by the Convention. The Articles enshrining those rights may be violated alone or in conjunction with Article 14.”).
\item \textsuperscript{215} See generally, in line with the Velikova–Nachova line of development in the ECHR, the case of Regina v. Immigration Officer at Prague Airport ex parte European Roma Rights Centre (\textit{Roma Rights Centre}) UKHL 55 (appeal taken from Eng.) [2004], where the United Kingdom’s House of Lords finds a violation by the United Kingdom of the prohibition of racial discrimination in the absence of actual exercise of jurisdiction, based on the independent obligation to promote the abolition of racial discrimination. The distinction between the four types of State duties corresponding to each human right is now standard in human rights practice. \textit{See, e.g.}, Social and Economic Rights Action Campaign v. Nigeria, African Comm’n on Human & Peoples’ Rights, 15th Activity Report, Comm’n No. 155/96, 37 ¶ 46, AU Doc. ACHPR/COMM/A044/1/ACHPR/COMM/A044/1 (2002).
\item \textsuperscript{216} International Covenant on Civil and Political Rights art. 2, \textit{opened for signature Dec. 16, 1966, 999 U.N.T.S. 171} (entered into force Mar. 23, 1976) [hereinafter ICCPR] and ICESCR, \textit{supra} note 204, art. 2. (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race,
remains, with its meta-status, in situations of emergency, which in human rights law codify the customary institution of the “state of necessity” by allowing non-respect of human rights norms to be excused and explained in the form of a suspension of the law. Logically, when the State is defending its own life, it is still defending it as a State, and what makes it act like a State is its non-discriminatory use of power even while substantive rights are curtailed.

Non-discrimination is a political program based on the more general idea of perfect equality. In its implementation it is contested, as shown by divergent conceptions on the proper scope of a norm of equality based on a common human nature. At the international level, that the idea of non-discrimination is politically expounded, as opposed to being ethically transparent, is plainly demonstrated by the fact that it took about sixty years for States to legally acknowledge that the human dignity of persons with disabilities needed particular protection. The centrality of “non-discrimination,” as it relates to the idea of human dignity, can be seen as contingent on the Declaration’s historical context, in the sense that the historical process of implementation of non-discrimination starts with its assertion and the reasons for making it the primordial legal expression of human dignity. As the basis of the universalism of international human rights law, understood as a positivist legal tool for the protection of human dignity, the contingency of the human rights project is shown in additional, contextualized formulations of human dignity, particularly in regionalist human rights enterprises. In that sense, human dignity itself is subject to debate, regardless of a possible consensus on the formal notion of common human dignity. The endeavor of legal protection for human dignity can be associated, depending on the larger social and political surroundings, with the establishment of continental public order or even with anti-colonialism, the protection of peoples’ rights, and social duties towards the community.

217. ICCPR, supra note 216, at art. 4.
219. For the framing role given to democratic institutions, even before the expression of human dignity, see for example, American Convention on Human Rights pmbl., Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.
Non–discrimination, as intimately tied to the idea of universal human rights, is not necessarily accepted as the center of human rights by visions that do not associate human rights with legal protection. But as a matter of legal architecture for international human rights, non–discrimination is unavoidably at the heart of the political matter. Given the prescriptive (and not descriptive) nature of human rights instruments, the legal principle of non–discrimination reinforces the notion that human rights standards and norms are enshrined in international law as a reminder of the State’s constitutional structure, in which its agents operate legitimately over territorial subjects. Various notions of the relationship between State, individual, and society will fuel political debate within the frame of human rights law on the different ways for the State to relate to human beings on a basis that acknowledges in society their pre–social equality. This has notoriously been the focus of critical analysis in relationship to other modes of struggles for emancipation that are not obsessed with the State, the individual, or rights. The background to those conversations is the overall question of the relationship between the State and individuals under their power, even when that exclusive formalization of the political realm in the


223. A famous instantiation of this idea would be the statement of political theory pronounced by the United States of America on the occasion of States’ comments on a draft document produced by the Chairperson of the UN Working Group on the Right to Development:

There is no international consensus on the precise meaning of the right to development. Given the lack of conceptual clarity that has surrounded the right to development since its inception, we believe that it will be very difficult for the international community to arrive at a consensus on its implementation. The most fundamental flaw reflected in the approach of the Independent Expert concerning the development compact is the idea that economic, social and cultural rights are entitlements that require correlated legal duties and obligations. At best, economic, social and cultural rights are goals that can only be achieved progressively, not guarantees. Therefore, while access to food, health services and quality education are at the top of any list of development goals, to speak of them as rights turns the citizens of developing countries into objects of development rather than subjects in control of their own destiny.


figure of the State and its legal system is rejected. What comes as an unsurprising conclusion is that the image of the realm where human rights operate as a framing guide for the legitimate power of the State over its liberal subjects is not that of “war.” If war, in the social–contract image displayed above, is the relationship resulting from the constitution of the polity, then human rights law refers to a description of the ideal polity in its daily operation, within the boundaries that fence off the real state of war among communities.

The best illustration of human rights as a regulatory framework for the normal operation of sovereignty on the basis of non–discrimination is given by so–called economic, social, and cultural rights. This is so especially when they are adjudicated, as they are in the most prevalent but not exclusive way, in the form of a judicial examination of the rationality, reasonableness and transparency of State–designed policy within the framework of the separation of powers.\textsuperscript{225} The importance of economic and social rights in this context lies in the fact that they highlight the association of human rights with the legitimacy of State action \textit{qua} State action, including when it takes the form of so–called “policy” and not simply that of a discreet action or omission. One of the criteria for the legitimacy of the State’s operation in devising and implementing policy is precisely its regard for discriminatory biases and effects,\textsuperscript{226} which brings into focus the relation between legitimacy, discrimination, and human dignity.\textsuperscript{227} When trying to recapture from a legal perspective the meaning of “human dignity” some jurisdictions have unsurprisingly expounded it in terms of a respect for equality, devising thus as the test for a violation of human dignity the evidence of discrimination among or against human beings on irrational bases.\textsuperscript{228} Human dignity in society cannot but be a relational notion, and the

\begin{footnotesize}
\begin{enumerate}
\item This is the approach to economic and social rights notoriously followed by the Constitutional Court of South Africa. See for instance the landmark case, Soobramoney v. Minister of Health (Kwazulu–Natal) 1998 (1) SA 765 (CC) (S. Afr.). See also Minister of Health and Others v. Treatment Action Campaign and Others 2002 (5) SA 721 (CC) (S. Afr.).
\item See, e.g., Khosa v. Minister of Social Development/ Mahlaule and Another v. Minister of Social Development 2004 (6) SA 505 (CC) (S. Afr.) (dealing with the element of discrimination in the application of the constitutional standard of reasonableness as regards implementation of economic and social rights in general, and access to social security in particular.).
\item As the Constitutional Court of South Africa said of South Africa’s basic law, “The socio-economic rights in our Constitution are closely related to the founding values of human dignity, equality and freedom.” \textit{Id.} at ¶ 40.
\item In Law v. Canada (Minister of Employment and Immigration) [1999] 1 S.C.R. 497, 501 (Can.), the Supreme Court of Canada explained the purpose of Section 15 of the Canadian Charter of Rights and Freedoms, relating to “equality rights,” as follows:
\begin{quote}
to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy
\end{quote}
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respect for human dignity in society manifests itself as the recognition that from the perspective of sovereign power all individuals are of equal worth.

The centrality of non–discrimination sets human rights apart from humanitarian law in that non–discrimination is a rule that becomes relevant for the laws of war only once distinction has occurred (i.e. discrimination based on belonging to a legally relevant and defined group or class).\textsuperscript{229} The operational logic of humanitarian law is manifestly unlike that of human rights, since it yields an understandable prescriptive discrimination based on rank, within the already normatively segregated class of those entitled to prisoner–of–war status.\textsuperscript{230} The difference in logic is intimately connected with the fact that there is a “war,” or more precisely that there is a “war” as understood in terms of humanitarian law. Against the social contract metaphor, the notion of a war as a threat to the polity and therefore the social contract itself is illuminating here for legal purposes. From the perspective of non–discrimination, the proposed normative framework for cases of “civil strife” or “internal disturbances”\textsuperscript{231} expresses the point of

\begin{center}
equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.
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\begin{itemize}
\item \textsuperscript{229} For instance, see GCIII, supra note 24, at art. 12, regarding non–discrimination after POW designation, or see GCIV, supra note 24, at art. 27, regarding non–discrimination after designation of individuals as “protected person.”
\item \textsuperscript{230} \textit{E.g.}, GCIII, supra note 24, at arts. 44, 49, 60. As the European Court of Human Rights observed, significantly not in the terms of a \textit{lex generalis} / \textit{lex specialis} relationship:
\begin{quote}
The hierarchical structure inherent in armies entails differentiation according to rank. Corresponding to the various ranks are differing responsibilities which in their turn justify certain inequalities of treatment in the disciplinary sphere. Such inequalities are traditionally encountered in the Contracting States and are tolerated by international humanitarian law (paragraph 140 of the Commission’s report: Article 88 of the Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War). In this respect, the European Convention allows the competent national authorities a considerable margin of appreciation.
\end{quote}
\item \textsuperscript{231} The notion of that space of violence as an autonomous space in need for specific regulation comes from Article 1(2) APII: “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” APII, supra note 24. The formulation of a limit, seemingly defined as a threshold intensity, to what the law of non-international armed conflict applies is repeated in the amended Protocol on landmines and booby–traps to the Conventional Weapons Convention when, among other objectives of the process, the amendments extended the original Protocol to conflicts not of an international character. See Convention on Certain Conventional Weapons, supra note 143. See Protocol on Prohibitions or Restrictions on the Use of Mines, Booby–Traps and Other Devices, As
\end{itemize}
contact between international humanitarian law and human rights law. Legally speaking, those situations constitute the point at which the sovereign declares the state of necessity for the purpose of saving its own life,\textsuperscript{232} that is, saving the sovereign legal order as the depository of a power otherwise regulated and channeled by human rights norms.

For that particular purpose the temporary suspension of rights is warranted in that the disappearance of the State would mean the definitive annihilation of human rights law by automatic implication. Yet the suspension of human rights law is not followed by the application of humanitarian law, given that the level of violence required for a “state of emergency to exist” is not necessarily that of a “war.”\textsuperscript{233} In the proposed regulatory frameworks for that in–between space,\textsuperscript{234} one finds the principle of non–discrimination (contained in Article 4 of ICCPR, for instance) effectively coexisting with the principle of distinction (as indicated in the proposed “minimum standards” for the regulation of the grey zone of violence between peace and armed conflict).\textsuperscript{235} The sovereign is, in other words, foreseen as caught between the exercise of law enforcement and the


232. The European Convention puts it very well, by framing the codification of the “state of necessity” as a “time of war or other public emergency threatening the life of the nation.” Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, Nov. 4, 1950, 312 E.T.S. 5 [hereinafter ECHR] (emphasis added). This formulation connects with the definition of the “state of necessity” as a specific circumstance precluding wrongfulness in the law of State responsibility (a circumstance that, in the peculiar case of human rights, transforms a violation into a legitimate “suspension”). See Rainbow Warrior Affair (N.Z. v. Fr.) 20 R.I.A.A. 254 (1990).

233. This is the classic way of presenting the state of emergency as situated somehow “between” the respective scopes of application of human rights law and humanitarian law. See, e.g., FRANÇOISE BOUCHET-SAULNIER, THE PRACTICAL GUIDE TO HUMANITARIAN LAW 113 (Laura Brav ed., Laura Brav trans., Rowman & Littlefield Publishers 2nd ed. 2007) (2001).


defense of the legal order itself against individuals on the verge of being “enemies.”

The relationship between human rights and humanitarian law on the terrain where formal sovereignty is under threat confirms the loosely common social contract image that allows one to picture, or narrate, the relationship of individuals to States in international law, following what was done above in examining humanitarian law. First, the State is formed to provide for the (variously understood) security of individuals. But then, the escalation of violence and disorder (re)opens the possibility of a return to a situation of generalized risk (the “state of nature”). At bottom, the situation is not (anymore) regulated and sanctioned by a centralized power mandated to speak “the law” and guarantee social normalcy. In that general background picture, human rights law is concerned with the legitimacy and modes of imposition of State power, and defines its abuse and prevents or channels its arbitrariness. Humanitarian law, in turn, is concerned with the defense of the sovereign legal order, within which arbitrariness is an issue for the legitimacy of the Sovereign's power over its legal subjects.

3. Human Dignity Against War: Legitimacies of Ending Life

Humanitarian law’s logic, as translated into the principle of distinction, is not based on formal and universal equality but rather, in fundamentally contrary fashion, on status. It absorbs the prohibition of discrimination within a system of pervasive and necessary discrimination among classes of individuals in relationship to a variety of sovereigns. Saying that the laws of war are preoccupied with the protection of “human” dignity is therefore ambiguous at best. An immediate problem for “human dignity” as hypothetical focus of humanitarian law is the apparent lack of deliberate regulation by the laws of war of the sovereign’s relation to its own agents (if we leave aside loopholes, gaps, contradictions, and other gifts to legal interpretation). The idea that humanitarian law has human dignity as its first concern would amount therefore to saying that the dignity of soldiers is nonexistent or unimportant. That would actually constitute an exactly opposite result to that of the traditional account of humanitarian law based on distinction. The latter would explain how the State’s own citizens may

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come back under the scope of the State’s own humanitarian obligations through the application of traditional status categories. From there, one can see that putting human dignity at the center of humanitarian law conveys, in more abstract fashion, that the situation of war does not fundamentally alter the very issue of human dignity in society. At bottom, human rights law is in many different ways developed for the purpose of not only recognizing and guarding human dignity, but also excavating it, highlighting it, concretizing it, and implementing it for the purpose of generating true equality. From there, the continuity of law’s concern for “human dignity” into the situation of armed conflict would imply that human dignity can still be realized despite war, where, apart from everything else that may intuitively seem inimical to human rights, discrimination among individuals is even factually a given.

Unlike human rights law, the laws of war confer very limited individual rights to persons. Individual rights are a very secondary regulatory tool, and these rights, which are not necessarily attached to “human dignity,” are based in all cases on the labeling of individuals. This includes the general safety net of Article 75 in Additional Protocol I, which itself implies that the lack of categorization constitutes some sort of anomaly, and grants fundamental protections (which look like human rights standards) based explicitly on the lack of categorization (i.e. individuals do not get better treatment precisely because they do not fall neatly in the category of

239. An early example is the Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], supra note 204. The object and purpose of the Convention has been defined in the following terms, in the context of a discussion of the special measures mandated by the Convention to compensate for historical discrimination (i.e. positive discrimination, or affirmative action):

The scope and meaning of article 4, paragraph 1, must be determined in the context of the overall object and purpose of the Convention, which is to eliminate all forms of discrimination against women with a view to achieving women’s de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms. States parties to the Convention are under a legal obligation to respect, protect, promote and fulfill this right to non-discrimination for women and to ensure the development and advancement of women in order to improve their position to one of de jure as well as de facto equality with men.


240. For instance, the right of petition given both to prisoners (see GCIII, supra note 24, at art. 42) and civilian internees (see GCIV, supra note 24, at art. 24).

241. E.g., GCIII, supra note 24, at art. 78 (regarding the right of prisoners of war to file complaints).
interned civilians or detained prisoners). Regarding what was suggested above about the jurisprudential relationship between human dignity and equality, the principle of distinction should therefore be deemed itself fundamentally incompatible with human dignity. That incompatibility would in turn give some sort of legitimacy to the emergence of human rights lingo when distinctions are deemed not to be possible.

242. In Law v. Canada, the Supreme Court of Canada said that the “imposition of disadvantage, stereotyping or political or social prejudice” would constitute “a violation of essential human dignity.” See Law, supra note 228, at 501.

243. That would apply also then to the context of non-international armed conflicts, where formal distinctions are not made. See GCI, supra note 24, at art. 3.

244. Vienna Convention, supra note 46, at art. 30.


246. ECHR, supra note 232, art. 2.
right to life.\textsuperscript{247} This legal construction of the right to life, which requires humanitarian law to make lawful something that presumably would be structurally abhorrent under human rights\textsuperscript{248} (like discrimination based on status, national origin, language, religion or whatever other social label, for the exclusive purpose of killing), is the fundamental meaning of the \textit{lex specialis} story and points to the deep difference between the two bodies of law.

The point of contact between human rights and humanitarian law is not the dignity of the human being, but the sovereign border, the space of sovereign power. Associating human rights and humanitarian law on the basis of some substantive standard, moral or otherwise, may sound reasonable or even desirable. It has, however, deep consequences in the sense of normalizing the operation of the logic of one of those bodies of law in the “normal” domain of operation of the other. At a very fundamental level, as intuited above in the European Convention’s dealings with war–deaths, human rights are associated with peace,\textsuperscript{249} not in the sense of their material scope of application, but in the sense of their \textit{raison d’être}. The universal human rights regime, as derived from the Charter of the United Nations, shares in the general project of preventing war,\textsuperscript{250} a goal reasserted in one way or another in a variety of human rights instruments\textsuperscript{251} and an idea that should be taken very seriously when considering human rights as part of the process of contemporary international law. Human rights law should be approached as fundamentally hostile to war, given that war carries the risk of disappearance of the State as the provider of human rights protection, not to mention the physical disappearance of human beings and their social environment, as constituted by the social contract. As the Inter–American Commission said very simply with reference to human rights instruments in general, “one of their purposes is to prevent warfare.”\textsuperscript{252}

Conversely, humanitarian law is for its part foundationally agnostic about war, within the limits of its relationship to the \textit{jus ad bellum}.\textsuperscript{253} This

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\item \textsuperscript{247} ECHR, \textit{supra} note 232, art. 15.2.
\item \textsuperscript{248} As indicated by human rights bodies, the notion that limitations to the exercise of human rights must be provisions previously laid down in the law is to be understood as referring not only to domestic law but also international law. \textit{See}, e.g., Jawara v. The Gambia, African Comm’n on Human & Peoples’ Rights, 13\textsuperscript{th} Activity Report, Comm’n Nos. 147/95 and 149/96 (2000), 102, 104, 106 ¶ ¶ 43, 58, 68, \textit{reprinted in}, \textit{Compendium of Key Human Rights Instruments of the African Union, supra} note 221, at 211–14.
\item \textsuperscript{249} UDHR, \textit{supra} note 15, at pmbl., ¶ 1.
\item \textsuperscript{250} U.N. Charter pmbl., art. 1(1).
\item \textsuperscript{251} \textit{E.g.}, ICCPR, \textit{supra} note 216, at pmbl.; International Convention on the Elimination of All Forms of Racial Discrimination, \textit{supra} note 204, at pmbl.; ICESCR, \textit{supra} note 204.
\item \textsuperscript{253} If one leaves aside more contemporary debates about humanitarian intervention, the "responsibility to protect", and other marks of a resurgence of just war theory, a nice
indifference about whether war should or should not exist is how humanitarian law legitimates war; it essentially receives it as a fact and then proceeds to regulate it as a social activity within international law. Human rights law in turn legitimates State violence by the standard legal process of inclusive/exclusive regulation; for instance, under the definition of torture and inhumane treatment, the State is allowed to abandon inmates to the formally unsolicited and unsponsored yet known, tolerated, and potentially extreme violence of prisons.\textsuperscript{254} But human rights cannot be used as easily for facilitating or favoring war in ideological terms.\textsuperscript{255} The importance of human rights law’s stance towards war, understood against the background of a loose contractualist vision of political society, makes sense of the otherwise strange fact that two prohibitions targeting duties potentially extending to individuals are inserted, within one common provision, among

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example of the attitude of humanitarian law to the \textit{jus ad bellum} appears in the way in which the first sentences of the Preamble to the Institute of International Law’s 1880 \textit{Oxford Manual} frame the whole codification exercise:

War holds a great place in history, and it is not to be supposed that men will soon give it up – in spite of the protests which it arouses and the horror which it inspires – because it appears to be the only possible issue of disputes which threaten the existence of States, their liberty, their vital interests. But the gradual improvement in customs should be reflected in the method of conducting war. It is worthy of civilized nations to seek, as has been well said, “to restrain the destructive force of war, while recognizing its inexorable necessities.”

\textbf{The Laws of War on Land}, \textit{supra} note 71, at 36. See \textbf{The Laws of Armed Conflicts}, \textit{supra} note 44, at 37.

\textsuperscript{254} See, \textit{e.g.}, \textit{Human Rights Watch, No Escape: Male–Rape in U.S. Prisons} (2001) (charging State authorities with the legal responsibility for preventable and widespread sexual violence perpetrated in penitentiary establishments in the United States).

\textsuperscript{255} This opens up the whole issue of humanitarian intervention and its contemporary avatar, the “responsibility to protect” or “R2P.” This is not the place to engage fully with those issues. But one can say at least that R2P, and similar discussions concerning human rights and the demise of traditional sovereignty, are based on an alternative reading of human rights, in which they are not considered formal and subsumed structurally under international law, but are rather approached as substantive and of a moral character. Human rights are thereby used for the purpose of redefining sovereignty in reverse: sovereignty exists so long as human rights are protected, as opposed to the vision discussed above, which says that human rights exist as long as sovereignty exists. From the latter perspective, the International Court of Justice’s frowning upon the idea that the use of military force could be justified by an appeal to human rights is still comprehensible as a political take. From the former perspective it is an unwanted excess of formalist legalism. See \textit{Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)}, Judgment, 1986 I.C.J. Judgment 14, 268 (June 27). For a recent example of the systematically substantivist reading of human rights, which results in a substantivist reading of sovereignty, see the programmatic Anne Peters, \textit{Humanity as the A and Ω of Sovereignty}, 20 EUR. J. INT’L L. 513 (2009). Compare then with the project developed by Ruti Teitel, mentioned \textit{supra} note 7.
the list of civil and political rights: the prohibition of war propaganda and the prohibition of incitement to discrimination.\textsuperscript{256} Those two are intimately tied by their common association with the legitimation of extra–contractual State authority and exercise of authority by virtue of force.

4. Human Indignity in the Convergence of Humanitarian Law and Human Rights

From the perspective of the relationship between the two bodies of norms, one should then slowly attune to the sense of perversion that comes with the infiltration of human rights lingo into the domain of war. That infiltration happens here, and quite beside the direct legitimation of physical force by the assumed program or grand ideal of human rights,\textsuperscript{257} through the idea that humanitarian law is ultimately concerned with human dignity or, more loosely speaking, the idea that human rights and humanitarian are part of the same substantive ideal or project. Both implementing the distinction between human rights and humanitarian law, on the one hand, and neglecting it, on the other hand, have operational ramifications. Given their separate original purposes, there is nothing extraordinary in their operating side by side. Yet from that statement what follows is that the protection of human dignity mandated by human rights can always also inform the operation of the laws of war. Of particularly transcending, if not disturbing, interest is the fact that the protection of human dignity within the jurisdiction of the State may factor into the calculation of proportionality when dealing with foreign civilians in international armed conflicts.\textsuperscript{258} Human rights would in this case normalize, under the heading of "human dignity", the process by which the cost of "force protection" is externalized onto the enemy civilian population. In other words, we would see human rights provide a legal–ideological justification for tipping the balance of

\textsuperscript{256} ICCPR, supra note 216, at art. 20:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.


\textsuperscript{258} Again, one can profitably refer to the arguments developed in Benvenisti, \textit{Human Dignity}, supra note 238.
proportionality “in favor” of minimizing military casualties, and therefore, if necessary, “against” minimizing civilian casualties and destruction.259 And the logic should also be extended to the case of civil wars, for the relationship between the State, its own agents, and the insurgent side, and including the “civilian” population caught in the middle.

The foregoing does not imply denying across the board that these two bodies of law have things in common and have influenced each other in the past sixty years. What matters is however that their respective logic remains separate as long as one considers that they are indeed distinct bodies of rules and have not merged as of yet. Sometimes the implications of the operationalization of these two bodies of rules puts them at odds with one another, simply because of the distinctive facet of sovereign power that they address. As a matter of fact, one could also suggest that human rights and humanitarian law share “something” with international refugee law, yet the latter will also remain a distinct body of rules for very fundamental reasons having to do with the system in which these rules can occur in the first place.260 Discursive adventures in the confusion of genres and discourses, for whichever purpose one may favor, are perfectly acceptable. Yet positions favoring one fashion or another of merger between human rights and humanitarian law should be then accompanied by the awareness of the political and otherwise normative underpinnings and possible consequences of one’s position.

The foregoing serves in the end to reinforce a view on humanitarian law’s relationship to human rights that is otherwise a very classic position, at least from the perspective of humanitarian law. The suggestion is that they are animated by different principles and that their overlap is more than a technical question. Now, to switch perspectives, I turn to the practical encounter of human rights with war, in which human rights has to deal with the existence of humanitarian law. The encounter in judicial terms confirms the centrality of sovereignty in the construction of war, through the meeting point of human rights’ own reliance on sovereignty with war as a public

259. See Thomas W. Smith, Protecting Civilians...or Soldiers? Humanitarian Law and the Economy of Risk in Iraq, 9 INT’L STUD. PERSP. 144 (2008) (providing an illustrative and interesting discussion on the possibly disruptive place of “force protection” in the logic of humanitarian law).

260. A good discussion of practical issues raised by the distinct character of refugee law from the perspective of human rights can be found in Deborah E. Anker, Refugee Law, Gender, and the Human Rights Paradigm, 15 HARV. HUM. RTS. J. 133 (2002). A particular re-reading of refugee law as informed by human rights is defended by James Hathaway. See James C. Hathaway, Reconceiving Refugee Law as Human Rights Protection, 4 J. REFUGEE STUD. 113 (1991), and Daniel Warner & James Hathaway, Refugee Law and Human Rights: Warner and Hathaway in Debate, 5 J. REFUGEE STUD. 162 (1992). Although, as noted by B.S. Chimni, the same trends of merger and acquisition seem to have been happening to that relationship, at least rhetorically, as have been supposedly affecting human rights’ relationship to humanitarian law. See B. S. Chimni, Globalization, Humanitarianism and the Erosion of Refugee Protection, 13 J. REFUGEE STUD. 243 (2000).
phenomenon. That encounter brings into technical focus the central expression of the difference between them, understood as rooted in their separate approach to the regulation of sovereign coercion. The new element in sight is the issue of jurisdiction, both in terms of the limits to the State’s exercise of legitimate power and in terms of the possible authority that can discriminate between application of human rights and application of humanitarian law in practical terms.

II. A QUESTION OF JURISDICTION

The courtship of war by human rights has been occurring for some time already, despite the young age of human rights law. The dealings of human rights institutions, and particularly courts and associated bodies, with questions of war and humanitarian law is instructive in exploring what the relationship of humanitarian law and human rights means when one discusses practically rights, duties, and breaches of obligations. In the foregoing discussion I have insisted on the fact that the difference between the two bodies of law should be maintained for structural reasons, even if one decides that the distinction then in practical terms should be overcome in one way or another. In particular, what comes out of the discussion is that human rights law does not and should not relate to war in the same way as humanitarian law, even though it appears that human rights will relate to humanitarian law for the purpose of delimiting the border of war. In the pages below I want to examine some of the most important case-law dealing with that issue, for two specific reasons.

The first reason is that the “lex specialis” slogan has been used and abused as the ultimate expression of the relationship between them in practice. What it means at a deeper structural level, against the picture given above, is however unclear, especially if one takes seriously the relationship between humanitarian law and human rights as a relationship of opposition between distinction and non-discrimination as they relate to the exercise of legitimate State violence. The second reason for this exercise is that the wielding of legal arguments relating to war, especially in the contrast between courts of general jurisdiction like the International Court of Justice on the one hand, and specialized courts like the regional human rights institutions on the other hand, offers the opportunity of witnessing the constraints of legal argument over a quintessentially political discourse such as war. In that examination, I seek also to capture the importance of intertwining legal systems for the purpose of defining what war is, and showing how war is essentially constructed by law, in ways that make Rousseau’s vision of war technically visible. Human rights case law confirms quite naturally the unconscious attachment to a social contract-based vision of war, even when it seems to ignore the actual occurrence of war or even appears to condone it.
A. Lex Specialis in the World: The ICJ’s Position

At the universal level, the now notorious position adopted by the International Court of Justice (“ICJ” or “Court”) is that humanitarian law relates to human rights law as the lex specialis to the lex generalis. That general articulation of the relationship, derived from the general law of treaties, has been examined by the United Nations International Law Commission as the overall method for a discussion of relations among legal regimes under the heading of the “fragmentation of international law.” As noted in the report prepared by Martti Koskenniemi for the International Law Commission, the meaning of lex specialis is not transparent. The use of the formula suggests two possible views on what it actually means or commands: either human rights law yields to humanitarian law in toto when humanitarian law is applicable ratione materiae; or else the specifically relevant norms of human rights law yield to somehow corresponding norms of international humanitarian law when the latter is materially applicable and to the extent that human rights law and the laws of war appear to be in conflict. In line with what one would do in applying rules concerning the interpretation of conflicting treaties or treaty rules, the ICJ chose the second reading. The Court’s conviction, otherwise shared by specialized human rights institutions, is that human rights do not as such cease their operation in times of armed conflict. As a result, the “lex” that we are considering in juggling with the general and special “leges” is not a given body of rules with its own worldview, but rather a specific rule in conflict with another rule, detached from its normative context. This detachment of rules from their systemic home is what allows for a dispassionate technical and apolitical management of legal argument when facing war. That is how concealing the ideological implications of each regime’s “structural bias” becomes part of technocratic legal argument.

From a technical perspective, the most important consequences of resorting to the lex specialis trope from the perspective of the ICJ, not only as a judicial body but more precisely a judicial body of general international jurisdiction, are the following. First, the theoretical applicability of human rights rules to occupied territories in international armed conflicts is made

262. See Fragmentation of International Law, supra note 2.
263. Id. ¶s 56–67.
264. The report suggests distinguishing two general uses of the lex specialis, one in cases where two rules conflict, and another in which one rule is more specialized than the general one but does not contradict it. See id. ¶s 56–57, 88–107. Here I follow a narrower notion, against the systemic backdrop presented above, which seeks to highlight the question of whether regimes or else rules within regimes are deemed to be in conflict.
266. Vienna Convention, supra note 46, at art. 53. See also Fragmentation of International Law, supra note 2, ¶s 251–266.
unremarkable. And, second, human rights rules (as generalized from the specific example of the right to life) are only applicable to the extent that they conform to the rights and duties provided by the *lex specialis*, i.e., humanitarian law (in this case combatant immunity from prosecution for lawful killing, and the corollary of acceptable intentional killing by the State). The application of human rights law to situations of occupation has been found also by others to be based on the notion that occupation is a functional equivalent of sovereignty, amounting to *de facto* jurisdiction. That idea, accepted by the ICJ, triggers thus the operation of human rights standards in times and concrete situations of war, *i.e.* in times where humanitarian law is applicable materially. The application of human rights standards in situations of occupation should however logically, from that standpoint at least, not conflict with rules of humanitarian law.

Based on the more systemic account given above of the political dynamic at work in both human rights law and humanitarian law, the notion that the point of contact between the two regimes is the space of occupation is not surprising. The operation of human rights targets the government of people, while humanitarian law governs in this case occupation (as a result of armed conflict), which is a temporary, yet total, replacement of the sovereign’s authority over people and territory. The International Court of Justice adopted this view and confirmed that human rights law is applicable

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271. It should be repeated, even though it is not really crucial in this particular context, that the scope of application of humanitarian law is not limited to situations of armed conflict, but extends also to peacetime issues (such as the dissemination the Conventions, or the regulation of the uses of the Emblem), which are however directly related to the fact that humanitarian law needs to be actually applicable in times of armed conflict. This means that humanitarian law is formally applicable in times of “peace,” *i.e.* beyond the duration of the hostilities *stricto sensu*. *See*, e.g., Tadić, Decision on Defence Motion, Case No. IT–94–1, ¶ 67. As far as the Geneva Conventions are concerned, critical examples are of course provisions relating to prisoners of war after the end of hostilities (e.g., GCIII, *supra* note 24, at art. 5, 119) and implementation or enforcement of treaties (e.g., GCIV, *supra* note 24, art. 146).

272. HCIV, *supra* note 120, arts. 42, 43.
to “acts done by a State in the exercise of its jurisdiction outside of its territory,” as exemplified by situations of occupation.\textsuperscript{273} More specifically, Articles 42 and 43 of the Hague Regulations of 1907 define who the Occupying Power and what occupation essentially is in terms of a temporary but complete substitution of controlling authorities over a territory, which carries the obligation of enforcing law and order on the occupied territory in the absence of the sovereign. For the Court, this “obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.”\textsuperscript{274}

The expression “exercise of its jurisdiction,” used by the Court as a general description of the State’s exercise of power, is ambiguous when taken outside of context, given that it thus flattens the difference between jurisdiction based on sovereignty, on the one hand, and temporary exercise of power based on other reasons, be it a legally expressed international agreement or extra–legal unilateral deployment of State power. On a formal level, humanitarian law and human rights law have in common, from the ICJ’s perspective, the fact of being bodies of international legal rules necessarily based in one way or another on sovereignty. But in a more substantive way, one should remember that the mode or facet of sovereignty regulated by each body of norms is distinct, which explains the generally different shape of their respective norms, but also the resulting different shape of the monitoring or enforcement mechanisms, and the fact that these mechanisms do not generally coincide.\textsuperscript{275} The ICJ, however, has hypothetically general jurisdiction over international law and all of its discreet parts, on the basis of them being all primary rules of international law subjected to the same secondary rules (such as the sources of law, that determine whether the rules are hand are really "law", or the rules of international responsibility, which determine what happens if rules of international law are breached.) In the case of the two advisory opinions in which the \textit{lex specialis} policy is suggested, the ICJ exercises interpretive jurisdiction over all of international law, by virtue of its material jurisdiction not being bound at all by the consent of States.\textsuperscript{276} But the perspective of

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  \item \textsuperscript{274} Id. ¶ 178.
  \item \textsuperscript{275} The lack of complete overlap, despite contextual coincidence, is the reason why “human rights” as a special regime, or "self-contained regime", is a recurring example in the report of the International Law Commission’s Working Group on the Fragmentation of International Law. \textit{See generally} Fragmentation of International Law, supra note 2. \textit{See also}, Martti Koskenniemi & Päivi Leino, \textit{Fragmentation of International Law? Postmodern Anxieties}, 15 LEIDEN J. INT’L L. 553 (2002).
  \item \textsuperscript{276} \textit{Palestinian Wall}, 2004 I.C.J. 136, ¶ 46 (rejecting in particular the notion that the Court should not exercise jurisdiction in the case at hand for the reason that the underlying
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institutions designed for the implementation of one of those bodies of law is not the same, given that in the case of those institutions there is a jurisdictional limit to the possibility of such an encounter between different types of rules, while that limit does not exist \textit{a priori} for a court of general jurisdiction. Moreover, the perspective on the encounter will be shaped by the substantive mission of the institution. The era of fragmentation has been exemplified most notoriously by the visibility of a bitter dialogue between the ICTY and the ICJ around the proper interpretation of international law across sub–disciplinary borders, in relation to issues of responsibility in cases of violations of humanitarian law.\textsuperscript{277} Of importance is that the ICJ here asserts its unique access to general international law, while insisting on the specialized perspective of international criminal law, \textit{i.e.} the limited functional perception of international law by a specialized organ like the ICTY.\textsuperscript{278} What comes out of the exchange for the purpose of the relationship

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277. As is generally known by now, the inter-institutional dialogue had to do with the proper “control” test to be used in assessing whether an individual can be legally considered to be a \textit{de facto} agent of a State. Military and Paramilitary Activities in and against Nicaragua, (Nicar. v. U.S.), 1986 I.C.J. at Judgment 14, 115 (June 27). The exchange starts with the classic formulation of the “effective control” test in the context of the relationship between the United States and counter-revolutionary guerrillas in Central America. \textit{Id.} Then comes the rejection of the “effective control” test by the ICTY in deciding who was an agent of the State in context of the wars in former–Yugoslavia, in Prosecutor v. Tadić, Case No. IT–94–1–A, Judgment, ¶ 112 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999). And the last step comes in the shape of the ICJ’s reassertion of its \textit{Nicaragua} test, and rebuking of the ICTY for its inept incursions into the world of general international law, in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Merits, Judgment 2007 I.C.J. 91, ¶ 402 (Feb. 26).

278. \textit{Id.} ¶ 403:
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The Court has given careful consideration to the Appeals Chamber’s reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber’s view. First, the Court observes that the ICTY was not called upon in the Tadić case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY’s trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.
between human rights law and humanitarian law, considered in our present context to be respectively the *lex generalis* and the *lex specialis*, are the following. The institutional organs of the *lex generalis*, in our case human rights law, have a perspective that is based on the *lex generalis* itself, which does not solve its own relationship to the *lex specialis*. Those organs, from the perspective of international law, are specialized organs in the sense of being jurisdictionally limited to one area of substantive international law. Their relationship to even general international law (like the law of treaties and the law of State responsibility) will be mediated by that limitation—as the ICTY–ICJ dialogue demonstrates in practice.

More generally, war–situations have given rise, because of the available institutional fragmentation in international law, to multi-jurisdictional litigation processes. In each fragment of the litigation process the “war” in question is by necessity re-described according to the particular dynamic of the law being applied, and according to the institutional setting in which it was applied. Unsurprisingly, even from the intra-disciplinary perspective of law, there is potentially a variety of legal perspectives on war. Those need not be compatible, since after all, from the perspective of the *lex specialis* of humanitarian law question itself, human rights is necessarily another *lex specialis*. Against the background presented above, which gives meaning to the notion that human rights and humanitarian law are separate fragments of the same whole, now we can envisage the encounter of human rights with humanitarian law on the basis of what human rights and humanitarian law have in common, but also what they do not have in common.

The three regional human rights systems have had different encounters with war, and as part of those encounters have had the opportunity of saying a few things about the relationship between human rights and humanitarian law in institutional and substantive terms. A close examination of those encounters will say three things. First, there is a jurisdictional difference between the two bodies of law, which expresses in formal terms the fact that they are interested in different aspects of sovereignty, where sovereignty is

279. The NATO operation in Belgrade in March of 1999 gave rise to a few international legal proceedings. Before the International Court of Justice it took the shape of the FRY suing member States of NATO, yielding the ICJ decision on Legality of Use of Force (Serb. & Mont. v. Belg.), (Serb. & Mont. v. Can.), (Serb. & Mont. v. Fr.), (Serb. & Mont. v. F.R.G.), (Serb. & Mont. v. Italy), (Serb. & Mont. v. Neth.), (Serb. & Mont. v. Port.), and (Serb. & Mont. v. U.K.), Preliminary Objections, 2004/3 I.C.J. 1 (Dec. 15). Before the European Court of Human Rights, the Kosovo campaign took the shape of the case of *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. 333. And before the International Criminal Tribunal for former-Yugoslavia, the NATO bombing gave rise to a review process on the possibility for the ICTY Prosecution to start proceedings against State members of NATO. See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000), reprinted in 39 I.L.M. 1257, 1257–83 (2000).
From the jurisdictional perspective of human rights, humanitarian law as such is never met, because human rights law never meets “war,” be it civil or international, as a relevantly distinct state of affairs. Second, human rights’ ignorance of war is an assertion of material (subject matter) jurisdiction and, following what was said above about human rights law in general, is a political gesture. As a political gesture, the reaching out of human rights jurisdiction into a domain that is otherwise considered sufficiently special to have its lex specialis, needs to be debated but should not be seen as a set of simply “technical” questions. In other words, the political meaning of fragmenting sovereignty into different areas of regulation must be recovered, behind the seemingly formal notion of jurisdiction. Third, case law across the three regional human rights systems is not homogeneous. Yet the only system that has taken heed of the political foundations of human rights is the African Human Rights system. As will be shown below, the African Commission’s facing up to the intimate abhorrence of human rights for war is an antidote in particular to the European Court’s own take so far, which displays a lack of explicit awareness in relation to the political nature of jurisdiction, and a resulting incoherent attitude towards jurisdiction itself.

We begin, however, with the Inter–American system’s very clear exposition of the question of jurisdiction as a background.

B. Lex Generalis and War in the Americas: Ambivalence

1. The Court: Jurisdictional Orthodoxy

The Inter–American Court stated its position in fairly clear terms in the case of Las Palmeras, while lecturing the Inter–American Commission on how to deal with the legal analysis of war–time claims:

280. Sovereignty is legally speaking exclusive and absolute jurisdiction. According to the celebrated formulas used by Judge Max Huber, “Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.” Island of Palmas Arbitration (U.S. v. Neth.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928). The translation of the political notion of sovereignty into the legal image of absolute and exclusive competence is especially well expressed from a non-legal, sociological perspective concerned with the effects of conflict on the State entity if one considers it seriously as a jurisdictional space. See Jieli Li, State Fragmentation: Toward a Theoretical Understanding of the Territorial Power of the State, 20 SOC. THEORY 139, 141 (2002). If sovereignty concerns the way in which exclusive jurisdiction is exercised over respective territories of an empire or a nation-state, then the power of a sovereign state is more than the authority of bureaucratic administration; it hinges on territorial integrity. By viewing the state in terms of territorial integrity, attention is drawn to the extreme uncertainties of territorial boundaries in constant interstate conflict. One considers then not only how the incumbent government could survive politically, but more importantly, how statehood being viewed as the quality of both a physical and a legal entity could be preserved.
The Court is . . . competent to determine whether any norm of domestic or international law applied by a State, in times of peace or armed conflict, is compatible or not with the American Convention. In this activity, the Court has no normative limitation: any legal norm may be submitted to this examination of compatibility. In order to carry out this examination, the Court interprets the norm in question and analyzes it in the light of the provisions of the Convention. The result of this operation will always be an opinion in which the Court will say whether or not that norm or that fact is compatible with the American Convention. The latter has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions.281

The Inter–American Court, while making clear that it does not have jurisdiction over humanitarian law claims in the sense of not having formal jurisdiction over humanitarian law treaties such as the Geneva Conventions (and implying that neither does the Commission possess such jurisdiction), concurs with the Commission in considering that humanitarian law is however relevant to the interpretation of human rights standards. Whether that is done along the lines of the interpretive rule of lex specialis is unclear. The position is simply that the Court considers international humanitarian law as factual data, which as any other relevant fact may be useful in interpreting the applicable law.282

What the Court means as the final position on the matter within the Inter–American system becomes clearer in its broader jurisprudential context. The Court’s moderately stern jurisprudential position is, first of all, set against the more adventurous stance of the Commission. In a more teleological perspective, the Commission suggested that the Geneva Conventions and the American Convention “share a common nucleus of non–derogable rights and a common purpose of protecting human life and

282. Along the same lines, in considering in a different context how to apply the right to freedom of movement to the situation of displaced communities, the Court noted:

Of particular relevance to the present case, the UN Secretary General’s Special Representative on Internally Displaced Persons issued Guiding Principles in 1998, which are based upon existing international humanitarian law and human rights standards. The Court considers that many of these guidelines illuminate the reach and content of Article 22 of the Convention in the context of forced displacement.

The Commission reiterated its understanding of a normative convergence between the two regimes in the context of the Guantánamo detention facilities, and more particularly the legal situation of their inmates, concerning whom the Inter–American Commission issued precautionary measures initially in 2002. The United States government, following a strict separationist position which had been deployed also against other human rights bodies who had attempted to deal with the Guantánamo issue, suggested that the question was one of humanitarian law, and therefore beyond the jurisdictional reach of the Commission. In the course of multiple reiterations of its mandated interim measures, the Commission decided to propose its own understanding of the general relation that the two bodies entertain with one another, as an alternative to both the United States’ position and also what we have seen to be the final position of the Court. Given the specificity of the position, it is worth quoting at length:

[T]he Commission has drawn upon certain basic principles that inform the interrelationship between international human rights and humanitarian law. It is well–recognized that international human rights law applies at all times, in peacetime and in situations of armed conflict. In contrast, international humanitarian law generally does not apply in peacetime and its principal purpose is to place restraints on the conduct of warfare in order to limit or contain the damaging effects of hostilities and to protect the victims of armed conflict, including civilians and combatants who have laid down their arms or have been placed hors de combat. Further, in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non–derogable rights and a common purpose of promoting human life and dignity. In certain circumstances, however, the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law, including the jurisprudence of this Commission, dictates

283. Juan Carlos Abella, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 158 (emphasis added). See also Coard, supra note 61, at ¶ 39.
285. See U.N. Comm. Against Torture, 36th Sess., 703d mtg. at 4, U.N. Doc. CAT/C/SR.703, (May, 12 2006) (stating that in the presentation of its second periodic report on the implementation of the convention against torture, the government of the United States, before engaging in a detailed discussion of the question of individuals captured in the course of the “War on Terror,” mentioned that the issue was governed by the “laws of war” and therefore beyond the scope of the Convention and beyond the jurisdiction of the Committee).
that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis.*

This argumentative line, which the Commission incidentally justifies as supported by “*the jurisprudence of the Commission,*” is more expansive than that of the Court. The latter motivated its own conclusion on the jurisdictional notion that, as an organ established by the American Convention, it does not have the power to interpret norms of humanitarian law *qua* norms (and neither does the Commission, as far as the Court can tell). The discrepancy between the two—which is understandable given that the Inter–American Commission is not a judicial body and seemingly enjoys a greater leeway for the purpose of its promotional and advocacy functions—is highlighted by the pre–*Palmeras* cases that the Commission refers to under the heading of “the jurisprudence of the Commission.”

### 2. The Commission: Creative Heterodoxy

Of particular interest in this context is the *Abella* case. In it, the Commission follows a decidedly purposive and teleological interpretation of the legal bases for its power to use humanitarian law alongside human rights law, and unpacks in detail what appears only superficially in the Guantánamo orders on provisional measures. Of importance here are the clarifications that it brings on the issue of sovereignty and State jurisdiction, given the jurisdictional stance taken by the Court in *Las Palmeras*. The central passage in which the Commission discusses the issue of applying humanitarian law says the following:

> Though it is true that every legal instrument specifies its own field of application, it cannot be denied that the general rules contained in international instruments relating to human rights apply to non–international armed conflicts as well as the more specific rules of humanitarian law. For example, both Common Article 3 and Article 4 of the American Convention protect the right to life and, thus, prohibit, *inter alia*, summary executions in all circumstances. Claims alleging arbitrary deprivations of the right to life attributable to State agents are clearly within the Commission’s jurisdiction. But the Commission’s ability to resolve claimed violations of this non–derogable right arising out of an

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armed conflict may not be possible in many cases by reference to Article 4 of the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore, the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations. To do otherwise would mean that the Commission would have to decline to exercise its jurisdiction in many cases involving indiscriminate attacks by State agents resulting in a considerable number of civilian casualties. Such a result would be manifestly absurd in light of the underlying object and purposes of both the American Convention and humanitarian law treaties.\textsuperscript{289}

To supplement this, the Commission displays, as always, great legal ingenuity. By virtue, it says, of obligations under the Geneva Conventions, and particularly common Articles 1 and 3, States have a duty to respect (and ensure respect of) those instruments and otherwise implement them as part of their domestic law. Once this is done, Article 25 of the American Convention, which provides that an individual under the State’s jurisdiction has a right “to a competent court or tribunal for protection against acts that violate his [sic] fundamental rights recognized by the constitution or laws of the state concerned or by this Convention,” provides a basis for the Commission to assess how humanitarian law is violated via the violation of domestic law.\textsuperscript{290} And the Commission does not stop at one creative step, but proceeds further.

The Commission turns first to Article 29 (b) of the American Convention,\textsuperscript{291} which prohibits, as other human rights treaties do,\textsuperscript{292} (mis)using the legal instrument for the purpose of “restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said

\textsuperscript{289} Juan Carlos Abella, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ ¶ 160–161.
\textsuperscript{290} Id. ¶ ¶ 161–162 (emphasis added).
\textsuperscript{291} Id. ¶ 164.
\textsuperscript{292} E.g., ICCPR, supra note 216, at art. 22(3) (relating the issue of abuse of rights to the exercise of freedom of association, and specifying that nothing in the Convention should be used to diminish responsibilities of State Parties under ILO Convention No. 87 (Freedom of Association and Protection of the Right to Organize Convention, opened for signature July 9, 1948, 68 U.N.T.S. 17 (entered into force July 4, 1950))). More generally, Article 23(b) of CEDAW declares that nothing in the text of the treaty should be interpreted as affecting other international legal obligations that are more conducive to the advancement of the elimination of gender discrimination. Convention on the Elimination of All Forms of Discrimination Against Women, supra note 204, at art. 23(b).
The result of that provision, as far as humanitarian law is concerned, would then be that:

where there are differences between legal standards governing the same or comparable rights in the American Convention and a humanitarian law instrument, the Commission is duty bound to give legal effort to the provision(s) of that treaty with the higher standard(s) applicable to the right(s) or freedom(s) in question. If that higher standard is a rule of humanitarian law, the Commission should apply it.

Then the Commission turns to Article 27 of the Convention, relating to derogations, and particularly the limitation clause, which states that suspension of rights by a State should not be “inconsistent with that State’s other obligations under international law.” The Commission interprets that provision quite candidly in the following terms:

[W]hile it cannot be interpreted as incorporating by reference into the American Convention all of a State’s other international legal obligations, Article 27(1) does prevent a State from adopting derogation measures that would violate its other obligations under conventional or customary international law.

The key moment in this argument highlights also the core of the argument in the Guantánamo context. It consists here in drawing the ambiguous connection between the two parts of that last sentence: the Convention under the Commission’s jurisdiction does not include humanitarian law, even if it is relevant, yet at the same time it should not be interpreted, per its express provisions, as affecting it if it is relevant. To operationalize that proposition, the Commission refers to Judge and Professor Thomas Buergenthal’s commentary on the state of emergency in ICCPR, a text that is all the more contextually relevant since Buergenthal was once President of the Inter–American Court, later a member a the United Nations Human Rights Committee (in charge of monitoring the ICCPR), and still later a judge on the ICJ. Under Article 4 of ICCPR (the equivalent of the cited Article 27(1) of the American text), says the Commentary, a suspension of rights that violates other obligations of the State would constitute a violation both of those obligations and of the Covenant. The Commission endorses this statement, based on the parallel wording adopted by ICCPR and the American Convention:

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295. Id. ¶ 168.
296. Id. ¶ 169 (referring to Thomas Buergenthal, To Respect and to Ensure: State Obligations and Permissible Derogation, in The International Bill of Rights: The Covenant on Civil and Political Rights 72, 82 (Louis Henkin ed., 1981)).
When reviewing the legality of derogation measures taken by a State Party to the American Convention by virtue of the existence of an armed conflict to which both the American Convention and humanitarian law treaties apply, the Commission should not resolve this question solely by reference to the text of Article 27 of the American Convention. Rather, it must also determine whether the rights affected by these measures are similarly guaranteed under applicable humanitarian law treaties. If it finds that the rights in question are not subject to suspension under these humanitarian law instruments, the Commission should conclude that these derogation measures are in violation of the State Parties obligations under both the American Convention and the humanitarian law treaties concerned.297

From that vantage point, if we look back at the (later) exchange between the United States government and the Inter-American Commission regarding the Guantánamo situation, the debate boils down to two preliminary legal issues. The first is that in times of war, the lex specialis comes into play, and the institution in charge of implementing the lex generalis needs to make that practically relevant. That is a substantive issue, a question of what norms apply to what situation, which is what the ICJ presented as solved precisely by the lex specialis principle. The second point is, however, that the Commission is a human rights body: it is both created by a human rights treaty and has a delimited jurisdiction ratione materiae, constituted by the text of its founding treaty, and the precise competence and functions that States have attributed to the Commission directly. That is not faced at all by the ICJ, because its position is dictated first by its position as a court of theoretically general jurisdiction, and second by the immediate context of an advisory opinion, where it has for all intents and purposes general jurisdiction (i.e. it is not limited by the consent of States expressed in jurisdictional limitations, and can “apply,” or at least interpret, any international legal norm that might seem relevant).

In Abella, the ingenious argumentative line developed by the Commission is really two–dimensional, as the Commission implicitly tries to deal with those two preliminary issues at the same time. The first line is based on teleological interpretations of humanitarian law treaties and the American Convention.298 The second line is the one that connects humanitarian law to the American Convention, through references by the Convention to the rest of international law. The problem is that these arguments do not, quite paradoxically, answer the jurisdictional question, which generated a fundamental problem for the practical implementation of the lex specialis idea, given that lex specialis is a principle of interest for treaty interpretation by a judge or equivalent institution. The first line

297. Id. ¶ 170.
298. The Commission follows the same type of interpretive line in Coard, supra note 61, at ¶ 39.
establishes a substantive relationship between human rights and humanitarian law, with which one can agree or disagree. On the basis of what was said above, and with the considerable amount of respect due to the Commission, I would personally disagree with it, most of all on the basis of its political implications. In any event, the second argumentative line adopted by the Commission boils down to saying that humanitarian law may bind the State as part of the body of international rules outside of the Convention, and to which the Convention refers in Articles 27 and 29. That a violation of international law in the terms posited by Thomas Buergenthal would actually also constitute a violation of the Convention is plausibly as undeniable as the Commission makes it sound. Yet this does not mean that the Commission has jurisdiction to decide that such violation has occurred. Prima facie, in very positivistic terms, a striking issue of discrepancy between procedure and substance appears, as had appeared significantly several times before the ICJ. That there is a violation of international law does not mean that we can say that there is a violation of international law; that is the result of consensual jurisdiction as the basis for all institutional activity in the inter–State system.299 Here the notion is that it may well be a violation of humanitarian law, or for that matter it may well be a violation of anything else in international or domestic law. But the Commission may not be entitled to say that it is. The first argumentative line is there seemingly to by-pass the substance/procedure divide, by proposing that in the end human rights (which are within the Commission’s jurisdiction) and humanitarian law (which is not) have the same objective, so that presumably we can treat them in the same way from the perspective of the Commission’s institutional mission. The Court did not buy that confusion of genres.

The Palmeras case quoted at the beginning of this discussion would seem therefore to align the Inter–American approach on the general jurisprudential view of the ICJ, within which we could assume that the lex specialis statement would not lead to a derogation of the substance/procedure or merits/jurisdiction distinction. In other words, as the Court mentioned it, the Inter–American human rights organs are not legally justified in interpreting humanitarian law qua law in the same way as they do interpret the American Convention. That does not contradict the notion that humanitarian law is a lex specialis to the lex generalis of human rights. The technical issue of jurisdiction, however, which was obscured by the ICJ’s ethereal position, draws attention to sovereignty and sovereign consent. Disregarding the issue of material jurisdiction means disregarding the importance of the sovereign border for a differentiation between war and any kind of violence, including crime or State brutality. Blurring the process/substance in the implementation of international law is

299. For a classic example, see East Timor Case, 1995 I.C.J. 90. See also Fisheries Jurisdiction Case (Spain v. Can.), Jurisdiction, 1998 I.C.J. 432 (Dec. 4).
unsurprisingly connected to a weakening of the position of formal sovereignty as a spatial and political reference. Supporting justification for the leap is here found in normative proximity (created for instance by the fact that implementation of a convention can be imagined to result in a weakening of other relevant provisions), which seems to be a formal relationship, but rests rather on the fundamental assumptions that bodies of rules can conflict because they talk about the same thing, but should however not conflict, because they have the same objective.

3. Clarifying Lex Specialis: The Guantánamo Exchange

If one tries to recapitulate, two important points are raised in the exchange between the United States government and the Inter–American Commission in the context of the Guantánamo situation. The first point is that everyone and their neighbor now relies on the ICJ’s “lex specialis” dictum, from the Commission to the Court to the (defendant) State(s). Yet each one of them seems to have their own understanding of what the meaning of “lex specialis” is and what the principle really mandates in terms of the enforcement of special, or would–be self–contained, international legal regimes. The divergence of views was rehearsed at each juncture where a human rights body would meet “war” in the form of the Guantánamo Bay detention facilities. It occurred most visibly first in the United States’ exchange with the United Nations Committee Against Torture,300 and then in even sharper contrast in its dialogue with the Human


The Committee regrets the State party’s opinion that the Convention is not applicable in times and in the context of armed conflict, on the basis of the argument that the “law of armed conflict” is the exclusive lex specialis applicable, and that the Convention’s application “would result in an overlap of the different treaties which would undermine the objective of eradicating torture.

The summary record manifests then the plasticity of the lex specialis method in the best possible fashion when it concludes that:

[the discussions with the United States delegation on the question of lex specialis had been noteworthy. While he recognized that that principle might be used in determining the primacy of one convention over another, public opinion expected the application of rules which provided greater protection to defenceless individuals, who should enjoy the presumption of innocence.

Rights Committee. In those exchanges, as in the dialogue with the Inter–American Commission, nobody contradicts the ICJ, including the United States Government. To the above mentioned statement by the Inter–American Commission on the fact that human rights keep applying to the Guantánamo captives (whether there is a war or there is none), the government of the United States responds (and this is quite significant given the United States Government’s supposedly tense relationship with the ICJ in general since the Nicaragua days) that the Commission has failed to follow the “methodology” developed by the ICJ for dealing with the relationship between the two bodies of law. That failure is, incidentally, only an addition to the primary fact that the Commission had manifestly acted beyond its jurisdiction. In other words, the United States’ second line of legal defenses consists in telling the Commission exactly what the Human Rights Committee later told the United States Government: it is indeed a question of lex specialis, but you don’t understand what applying the lex specialis method means.

A second point that is highlighted in the exchange between the United States and the Commission is that, beyond the fact that there is disagreement on the actual contents of the lex specialis interpretive maxim, there is visibly a split between substance and procedure within the question of the lex specialis. As a matter of fact, the first line of lawyerly defense

301. The position of the United States on the lex specialis issue was expressed in the following simple terms:

The United States is engaged in an armed conflict with al Qaida, the Taliban, and their supporters. As part of this conflict, the United States captures and detains enemy combatants, and is entitled under the law of war to hold them until the end of hostilities. The law of war, and not the Covenant, is the applicable legal framework governing these detentions.

U.S. Dep’t of State, U.S. Government’s One-Year Follow-up Report to the [Human Rights] Committee’s Conclusions & Recommendations 2 (2007), available at http://2001-2009.state.gov/documents/organization/100845.pdf. The position of the Human Rights Committee was that the United States did not understand the ICJ’s decision and should therefore revise its position on the relationship between the Covenant and the laws of war. Based on its concern about “the restrictive interpretation made by the State party of its obligations under the Covenant, as a result in particular of . . . its position that the Covenant does not apply . . . in time of war, despite the contrary opinions and established jurisprudence of the Committee and the International Court of Justice[,]” it recommended therefore that the United States “should in particular . . . acknowledge the applicability of the Covenant . . . in time of war.” Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: United States of America, 87th sess., July 10–28, 2006, ¶ 10, U.N. Doc CCPR/C/USA/CO/3/Rev.1 (emphasis added).


303. Id. at 1020.
was to say that, even if there is a way in which human rights is a lex generalis to the lex specialis of the laws of war (and regardless why it would be so), the issue of jurisdiction is not solved by that interpretive maxim. Simply stated, no human rights body has jurisdiction over the lex specialis just because they have jurisdiction over the supposed lex generalis. After all, one could say that international refugee law is also a lex specialis to human rights law, but in this case too there is a host of issues, both institutional and substantive, that are raised by the peculiar relationship between the two bodies of law, and that are not clarified in any way by the mere mention of the lex generalis/lex specialis principle. The ICJ, who started the whole lex specialis mania out of an otherwise innocuous maxim on the interpretation and application of contrary treaty norms, is a court of (theoretically) general jurisdiction, which is exactly what human rights bodies are not. And so, when the United States Government says that the
relationship between humanitarian law and human rights within the Inter–American system is settled by the *Palmeras* case (a precedent that is then precisely not followed by the Inter–American Commission), what it points to is the fact that, whatever way one may choose to look at the *lex specialis* issue, a human rights body cannot enforce the Geneva Conventions or even customary humanitarian law *qua* law, for lack of material jurisdiction. Whether facts of war comes up on the radar screen of human rights is another question, which has been for now implicitly answered in the affirmative, but which will need more examination below. As a result, the notion that humanitarian law may have merged with human rights in any more substantive fashion remains relegated, as far as the Inter–American *lex lata* is concerned, to the domain of individual opinions. But otherwise, the discussion has shown that the general notion of humanitarian law as a *lex specialis* to the *lex generalis* of human rights is not immediately obvious from the perspective of bodies in charge of enforcing or monitoring limits *ratione materiae*, resulting partly from the complicatedly dual nature of that judicial institution (half general and half specialized), are obviously offset by the restricted limitations *ratione personae* and *ratione loci* known also to the other two regional systems. The wording of Article 29 is the following:

The Court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relate to:

a) the interpretation and application of the Constitutive Act;

b) the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity;

c) the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned;

d) any question of international law;

e) all acts, decisions, regulations and directives of the organs of the Union;

f) all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court;

g) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union;

h) the nature or extent of the reparation to be made for the breach of an international obligation.

*Id.* at art. 29.


human rights norms, *i.e.*, the *lex generalis* to the *lex specialis* of humanitarian law, but still a *lex specialis* to the *lex generalis* of international law. Managing the concurrent material scope of application of humanitarian and human rights law does not solve the problem. Sovereign jurisdiction does. The politics of the jurisdictional issue comes forward in clearer form in the European jurisdictional context.

C. **Lex Generalis and War in Europe: Repression**

In the handful of cases within the corpus of European human rights jurisprudence in which humanitarian law or war were either mentioned or implied, the European Court has had the opportunity of facing very plainly the difference between concurrent applicability and jurisdiction. The specificity of the European Court’s position, in relationship to its American counterpart, is its management of the jurisdictional issue posed by war–contexts in the form of a repression of both war and humanitarian law. They both appear as a non–issue, in massive contrast with the juggling exercise and academic engagement performed by the American institutions. The Court managed notoriously to deal with claims arising from the situation in Chechnya in the 1990s and early 2000s without referring in its reasoning to humanitarian law or war, aside from reporting that the claimants had done so in their claims, 308 or that other institutions had reported on the situation in terms of humanitarian law violations,309 and without seemingly paying any attention to the otherwise meaningful question of whether there actually was an “armed conflict” or not. The background instance here, the equivalent of the *Las Palmeras* opinion, comes in the following statement by the European Court:

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Article 2 [*i.e.*, the right to life] must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally–accepted role in mitigating the savagery and inhumanity of armed conflict . . . . The Court therefore concurs with the reasoning of the Chamber in holding that in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities. This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to
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wounds, the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so.  

The European Court seemingly takes notice of the "international conflict," humanitarian law, the ICRC, "protected persons," combatants, and so on. In other words, the Court encounters in its own way the principle of distinction, which would open up the possibility, if not the necessity of imposing humanitarian law on the interpretation of "arbitrary" deprivations of life. Dealing then with the notion of people being in the power of the Enemy in times of hostilities, the Chechen situation would come out of the "state of emergency" framework of human rights law, and fall into the situation of an armed conflict. However, the paragraph cited above constitutes the only reference in the decision at hand to humanitarian law or the notion of distinction. More importantly, when it comes to discussing the claims relating to, precisely, the deprivation of the right to life, the Court falls back onto its traditional rhetoric, including that used in all cases relating to the situation in Chechnya, and consisting in finding a violation of the due diligence obligation of investigating deaths occurring under the control of the State.

The overall approach of the European Court does not therefore mirror the formalist traditionalism displayed by the Inter-American Court, or the militant creativity of the Inter-American Commission, when it comes to translating lex specialis into a workable relation between substance and jurisdiction. What comes out of the European Court in terms of the interpretation of the lex specialis idea is the notion that, as the ICJ said, human rights continue in times of war. When jurisdiction is added to the mix, the result is that human rights is blind to humanitarian law, and is therefore blind to war as a specific social phenomenon. The only question is whether there is an “emergency” in formal terms. If there is no such derogation from the normal situation, the underlying conditions will be normal as far as human rights are concerned.

1. Normalizing Chechnya: The Invisibility of War to Human Rights

The line of reasoning in approaching the Chechnya situation does not engage the lex specialis question. From the human rights’ jurisdictional point of view, humanitarian law is possibly irrelevant for the examination of


311. Id. ¶ 194.
a situation otherwise approachable as one of internal armed conflict; and that is so, if the situation in question can otherwise be portrayed as a law enforcement operation, i.e. a “regular” exercise of State police power. Here we can see a follow-up from the Inter-American position; the human rights jurisdiction bumps into something that could be a “war” and covered by the “laws of war,” but unlike the Inter-American institutions, the specificity of the encounter is not acknowledged and the material jurisdiction of human rights erases the material jurisdiction of the laws of war.

That some may want to dispute the possibility of discussing the Chechen situation without treating it as something different from a mere police operation, as seen in the fact that NGOs cited by the Court do regard the situation as covered by humanitarian law, highlights the regularizing effect of human rights law over war-like violence in the life of the State. In terms of the construction by human rights law of authorized State–based lethal violence, one should remember that counter-insurrectional violence is a law enforcement measure for the purpose of the right to life (Article 2), whereas the evaluation of war operations is declared to be outside the scope of human rights by their exclusion from the list of lawful instances of intentional deprivation of life (Article 15).

313. Asserting the applicability of human rights would suggest in that very precise sense that there is no “war” where war is associated with the restoration of the nation’s health rather than the daily (if brutal) operation of the sovereign.

In very basic terms, leaving the legal relevance of the existence of an armed conflict un–discussed means before anything else that material jurisdiction is not in question for a court like the European Court. The question is very concretely: should the lex generalis ignore the special circumstances that make the lex specialis applicable if the application of the lex specialis is not possible for jurisdictional reasons? We can see how the looming legal invisibility of war in this context shares something, though not yet fully distinct, with the blending of functional and actual sovereignty in cases of occupation—i.e. when human rights meet humanitarian law in international conflicts as opposed to civil war situations. Making war invisible as a special set of circumstances for human rights legitimates a priori decision–making by the court just like it legitimizes decision–making

312. Musayev, ¶ 118.

313. Although, in order not to lose sight of the general issue at stake here, one has to remember that the perceived contemporary landscape of war, within and beyond the “War on Terror,” has changed the terms of the difference regardless of the traditional framework. Even though a term like “counter-insurgency” was already a challenge to the traditional frame by being a war-like police-operation (or vice versa), especially as it depicted the strategy deployed against national liberation movements, the type of “insurgency” that it is designed to “counter” in contemporary environments is presented as the source of all confusion. See the opinion of the chief strategic advisor on counter-insurgency to the United States Armed forces in Afghanistan, in David Kilcullen, Counter-insurgency Redux, 48 Survival 111 (2006).
by the State in occupied territory. Human rights law, as the yardstick of political normalcy, simply normalizes that to which it extends its gaze. As a result, the issue of irrelevance of humanitarian law points, formally speaking, to the fact that the only question that will be asked is whether a state of emergency has been declared, to then proceed to an evaluation of the proportionality of force used to restore order based on the existence or inexistence of a declared emergency.  

Given that the only consideration in a human rights case is whether the State acted legitimately within its jurisdiction, it appears therefore that the human rights perspective is logically blind to the notion of civil war, and can consider with an epistemologically straight face that the use of the air force and artillery is a regular form of anti-terrorist law enforcement.

In terms of legal argument, however, that line is not even minimally outlandish, given that human rights law governs the behavior of States towards non-State actors within a defined jurisdictional scope (like territory), and bombing people constitutes such a type of State behavior. Moreover, because of the premises on which human rights law rests, that specific kind of State behavior does not differ in kind from any other State action, from taxation to providing health care, as far as human rights law is concerned. Contrary to (traditional) human rights law, humanitarian law in civil wars also addresses the behavior of non-State actors, as a result of forcing the principle of distinction into the insides of State sovereignty. It addresses therefore also individuals, most notably through criminalization of certain violations, but not exclusively.

Disregarding “war” as a legally relevant set of specific facts—which could require referring to humanitarian law as a set of meaningful facts for the sake of interpretation—amounts to making non-State actors visible only as a circumstantial element in evaluating State action. Here evaluation of State action means approaching it as State action presumed to be legitimate (otherwise human rights would make no sense as a constitutional yardstick), something that is obviously not true from the perspective of the opposing side in a civil war. Human rights

314. Isayeva, ¶ 125.
315. Id. ¶ 174.
316. Compare Mines Protocol II, supra note 231, art. 3, ¶ 2 (“Each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all mines, booby-traps, and other devices employed by it....”) with Mines Protocol II, supra note 231, art. 1, ¶ 2:

This Protocol shall apply, in addition to situations referred to in Article 1 of this Convention, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

See Use of Mines, Booby-traps and Other Devices, supra note 231, art. 1, 3.
makes the context of a civil war into a just war situation, by implicitly rejecting the idea of equality of parties, despite what the passing reference to “combatants” seems to anticipate. Human rights law has to disregard the essential circumstance of shaky State legitimacy and the use of military violence for political purposes, because those circumstances are foreign to the core of human rights in the precise sense of putting the traditional concept of human rights law at risk. When the situation is a de facto state of emergency, but is not so in legal terms because the State has not declared it, we can see how the domain of normalcy has expanded to encompass the daily shelling of entire regions as normal State behavior. In simple words again, civil war means the repression of extra-constitutional contestation of State action as legitimate State action, and normal human rights cannot see it outside of the state of emergency. By very natural implication and definition, the operation of human rights law in all cases legitimates state action by discussing its modalities, never its principle.

Human rights law as a whole simply cannot address a situation of civil war qua civil war in any legally meaningful way, beyond punctual instances such as the dwindling and indirect presence of war as a justification for the death penalty,317 or for the already mentioned prohibition of war propaganda.318 It treats the deployment of war machinery, in the enigmatic terms of the European Court, as any other “situation in which it is permitted to ‘use force’ which may result, as an unintended outcome, in the deprivation of life.”319 More generally, it is considered as any act of sovereign power that interferes with individual rights for the benefit of the community, or, in the European case, in light of what is necessary in a “democratic society.”320 Human rights law evaluates therefore the deployment of force in terms of the standard of “arbitrary” deprivation of life, where arbitrariness is interpreted as the negative yardstick of a reasoned, rational, reasonable calculation: “the force used must be strictly proportionate to the achievement of the permitted aims.”321

Here, one could note in passing the important fact that proportionality as a tool of evaluation is a point of contact that is otherwise implicitly assumed between humanitarian law and human rights. This is what one will find also behind the extension of human rights into the domain of military occupation, which is otherwise governed by humanitarian law. The

318. ICCPR, supra note 216, art. 20(1).
319. Isayeva, supra note 308, ¶ 169.
320. Id.
321. Id.
European Court adopts into its language, beside the brief mention of “combatants,” words like “civilian,” and frames the assessment of proper governmental response (in a context of what from the Court’s own description looks like an armed conflict) in the general language of balancing and proportionality. That suggests “proportionality” in the very sense of humanitarian law. It is undeniable that the reference to proportionality is inherent to the implementation of human rights, but that idea of proportionality refers to a means/ends relationship that is, as should be clear from the European Court’s own idea of proportionality, significantly different from that of humanitarian law. However, proportionality here serves clearly as a substantive bridge for any situation where the State is engaged in systematic violence, regardless of its magnitude, under the province of human rights; the implicitly exclusive limitation is that the State must have jurisdiction. The European Court does not therefore ignore humanitarian law because it does not have jurisdiction over that body of law; that issue is left un-discussed given that the Court precisely does not even engage with the need for humanitarian law to enter the frame. What appears, rather, is that the Court does not look at humanitarian law because (civil) war is nothing special for human rights, as long as jurisdiction of the State is not in question. In general terms, the possibility that civil war may remain invisible in a human rights perspective such as that of the European Court is therefore an illustration of the legal construction of “war” and the connection of that legal construction with distinction and sovereignty. War here is a set of facts, which from the perspective of human rights are seen as any other set of facts. When war is reabsorbed by human rights, as opposed to being kept outside of the bounds of the social contract, it logically disappears.

2. Legalizing Occupation by Facts

The European Court has also had the opportunity of considering the operation of humanitarian law itself within the jurisdiction of the State. It has done so only in terms of approaching it as a relevant fact in deciding whether a Convention right had been violated: in that specific instance the proper application of humanitarian law was itself the subject of a complaint concerning fairness in a war crimes trial. Significantly, dissenting judges considered that the majority of the Court had effectively engaged in a mistaken interpretation of humanitarian law as a fact, even in the absence of


a power to interpret humanitarian law as law.\textsuperscript{324} Considering the difference between interpreting the law as a fact and actually correcting the interpretation of the law by the national courts, the Court’s majority was chastised by dissenting judges for doing the former while pretending to be doing the latter, \textit{i.e.} treating humanitarian law as law over which it can impose an interpretive supremacy that it has only over the Convention.\textsuperscript{325}

In other words, in the Chechnya cases, the issue was that of human rights being blind to war as a legally meaningful situation, which would have otherwise triggered questions relating to the application of humanitarian law. Here the issue is that of a human rights body being limited to considering humanitarian law as a fact, and of being structurally enjoined from interpreting it as relevant law. What these positions have in common is that they do not deal with the relationship between humanitarian law and human rights as two bodies of law, but rather with the application of human rights standards to humanitarian law as a fact, as in the case of talking about “civilians” while not applying the law that defines entities as being “civilian,” that is, individuals who under the laws of war are not legitimate

\textsuperscript{324} \textit{Id.} ¶¶ 8-14 (Costa, Kalaydjieve, Poalelungi, J.J., dissenting). It should be noted that when the case was then transferred to the Grand Chamber of the Court, the decision got into the development and contents of international humanitarian law in even greater detail (including a lengthy discussion of the evolution of the “principle of distinction”), without either the Court, the applicant, the respondent, or the dissenting judges mentioning anything concerning the Third Section dissenters’ view on the jurisdictional difficulty of treating humanitarian law as indeed a fact and not law (except for mentioning in passing that the European Court is not an appellate criminal court.) See Kononov v. Latvia, App. No. 36376/04, Eur. Ct. H.R., Grand Chamber (2010), http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=867803&portal=hbkm &source=externallybydocument&table=F69A27FD8FB86142BF01C1166DEA398649.


In its recapitulation of general principles, the judgment reiterates that it is not normally the Court’s task to substitute itself for the domestic courts and that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. It rightly points out that this also applies where domestic law refers to rules of general international law or international agreements, the Court’s role being confined to ascertaining whether the effects of such an interpretation are compatible with the Convention … Nevertheless, the majority, without any explanation, head off in a different direction and, on a flimsy, uncertain basis, quite simply substitute their own findings of fact for those of the Hungarian judicial authorities.

(Lorenzen, Tulkens, Zagrebelsky, Fura–Sandstrom and Popovic, J.J., dissenting).
combatants, not legitimate targets, and therefore not entitled to prisoner–of–war status in the context of an international armed conflict.

The foregoing provides in any event a basis for the application of human rights to situations of occupation. Whereas for international law occupation is a separate legal regime and part of the *lex specialis* (just like "civilians" or "unnecessary suffering"), human rights standards are here applied by human rights bodies in the discussion of “war” situations because occupation is considered *de facto* jurisdiction. The transition from legal regime to facts makes the issue as to whether there is or was a “war” disappear, as far as human rights are concerned. The context of occupation is approached in deliberately general abstraction from the essential difference between jurisdiction and occupation as two fundamentally opposed legal regimes. 326 This is done in turn on the basis of the notion that, to the axiomatic jurisdictional attitude of considering any extra–jurisdictional law as a fact, 327 corresponds the possibility of considering “occupation” as a factual deployment of the power of the State as a State, and not a particular legal regime which otherwise gives meaning to that deployment in the first place. In the words of the European Court:

> In this respect the Court recalls that, although Article 1 [*i.e.*, States respect and protect rights of individuals under their jurisdiction] sets limits on the reach of the Convention, the concept of “jurisdiction” under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case–law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3 [*i.e.*, the prohibition of torture and inhumane and degrading treatment], and hence engage the responsibility of that State under the Convention . . . . In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities,

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326. There is a historical reading of the development of the law of occupation, which places emphasis on the notion that “occupation” was devised against the backdrop of the development of “sovereignty” and in systematic contrast with it. See generally Eyal Benvenisti, *The Origins of the Concept of Belligerent Occupation*, 26 LAW & HIST. REV. 621, 621–48 (2008).

327. For reference to the canonical statements, see Payment of Various Serbian Loans Issued in France (Fr. v. Serb.), 1929 P.C.I.J. (ser. A) No. 20/21, at 18–20 (July 12); and Certain German interests in Polish Upper Silesia (F.R.G. v. Pol.), Merits, Judgment, 1925 P.C.I.J. (ser. A) No. 7, at 19 (May 25). A particular famous discussion of this version of legal dualism can be found in the *Nottebohm* case, where the ICJ explained the relationship between invalidity and inopposability of a domestic legal act, stating in the course of the presentation that domestic law is just a fact and the invalidity of the domestic legal act is a question of domestic law, not international law. *Nottebohm* Case (Liech. v. Guat.), Judgment, 1955 I.C.J. 4 (Apr. 6). On that topic, an early reminder of this traditional position in international law was provided by the already mentioned dissent by Judge Anzilotti regarding the assessment of the constitutionality of domestic legal decrees under the Constitution of the Free City of Danzig. See Consistency of Certain Legislative Decrees with the Constitution of the Free City, 1935 P.C.I.J. (ser. A/B) No. 65, at 60–66 (Anzilotti, J., dissenting).
whether performed within or outside national boundaries, which produce effects outside their own territory . . . . Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it is exercised directly, through its armed forces, or through a subordinate local administration.

The jurisdictional gaze of human rights makes war disappear by ironing out the legal construction of war, and such corollaries as “occupation”; that constitutes the basis for generalizing the notion that the use of artillery and air power can be significantly translated into human rights lingo as something akin to law enforcement. Significantly in the case of occupation, we have moved from civil wars to international wars, thus functionally analogizing deployments of force not only across the police/military divide, but also across the internal/international divide. The perspective of the Court is very naturally that of generalizing the condition of normalcy as simply that of there not being a situation of emergency, understood to constitute the breaking point of the State’s margin of appreciation in defending its own existence. Adding “factual” jurisdiction seems in that sense not only innocuous but also quite unsurprising, in that the possible background “illegality” constituted by a violation of the jus ad bellum is irrelevant simply by virtue of being legally invisible (although mentioned in passing) — occupation is “like” sovereignty as far as human rights are concerned. In that sense the legal endpoint for the European Court’s trajectory of engagement with armed conflict will be the Bankovic decision, decided again without resorting to humanitarian law (and again despite the applicants’ formal suggestions). Bankovic tries to make sense jurisprudentially of the implications of extending human rights to factualized State power, and bumps into the notion that human rights and war do not fare well together.

3. The Bankovic Containment Strategy

Following the Lotus dictum on the nature of State jurisdiction, the Court here asserts that extraterritorial application of the Convention is

330. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7):
exceptional, and the Convention does not accept a general “cause–and–effect” theory of jurisdiction, which would otherwise impose human rights standards onto any action of the State, just because it emanates from the State. That is an interpretive statement on the seemingly unstoppable reach of the Loizidou pronouncement concerning the possibility of factualizing jurisdiction and sovereignty. As applied to the case at hand, the Court's decision is that an act of killing someone by dropping a bomb on them is not governed or measurable by human rights standards if it happens on foreign territory in the course of a punctual military operation. The otherwise obvious link of control that exists between the victim and the agent of the State (the military aircraft) does not constitute a link that can be assimilated to “jurisdiction.” For the assimilation to be possible, one needs a theory of jurisdiction that fragments the Convention into a variety of standards governing a variety of situations of “control” by the State, each duty/right relationship arising when a particular type or degree of control exists. For instance, for the purpose of imposing on a State the duty not to deprive an individual of their life arbitrarily, one needs a situation where the State has at least control over the relevant aspect of that person protected by the right to life, i.e. it has the capacity of ending that person's life. That is not, says the Court, what States understand "jurisdiction" to mean for the purposes of the Convention.

[T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts 'outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts 'outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

332. Id. ¶¶ 57, 69.
Stated from another perspective, the general principle is that the Convention is a European constitutional bill of rights, which explains why the jurisdiction of the Court (whose job it is to interpret the Convention in applying it to State action) is tied to the jurisdiction of States (who are by the terms of the Convention a discreet number of States each deploying their own jurisdiction according to received principles of international law.) As a result, for the Court at least, instances involving anything below effective control over a foreign territory (such as in cases of occupation), or equivalent control of a person abroad (such as in consular facilities), whether in a lawful or unlawful situation (which is obviously irrelevant as such given that all extra-jurisdictional law is a fact), will be deemed to be beyond the scope of the Convention. Those situations are beyond the scope of the stated human rights duties of the State, simply because such duties are tied to jurisdiction; one asks whether there is jurisdiction to see whether there are duties, as opposed to the opposite. In plainer terms, the State cannot in principle act as a State beyond its jurisdiction, because that would mean that it is acting outside of itself; for human rights purposes, jurisdiction is territorial, and any actions beyond that domain are, as far as human rights are concerned, not State actions at all. The borders of the domain of jurisdiction may be blurry, because of such phenomena as military occupation and exercise of State power within the facilities of diplomatic missions in foreign territory. But there is a border, and that is in principle the border of the State’s territory.

The position of the Court in Banković is however untenable and, after Loizidou, any argument on the limits of “jurisdiction” based on a textual or contextual interpretation of Article 1 of the Convention will be largely unconvincing. That was already obvious when the Court deemed it proper to justify the extension of human rights to factual–control situations on the grounds of good human rights policy. Citing approvingly the United Nations Human Rights Committee, the Court had explained that: “Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could

Furthermore, the applicants’ notion of jurisdiction equates the determination of whether an individual falls within the jurisdiction of a contracting state with the question of whether that person can be considered to be a victim of a violation of rights guaranteed by the Convention. These are separate and distinct admissibility conditions, each of which has to be satisfied in the afore-mentioned order, before an individual can invoke the Convention provisions against a contracting state.
not perpetrate on its own territory.” In Bankovic the European Court sets formal jurisdictional limits to the obligations of State parties based on the notion that obligations follow jurisdiction, and so jurisdiction must be based on something other than obligations (which was the position of the claimants). But the policy reasons behind the move to extend obligations to occupation situations is that obligations should follow the State when it steps out of its formal jurisdicitional space; as a State bound by the Convention, it would appear strange that it could behave contrary to the Convention at all.

In other words, the Court expounds its understanding of the jurisdicitional limits of human rights obligations in a way that converges its factual understanding of war and its factual relationship to humanitarian law, and moves towards entrenching its formal and strict image of human rights as associated with the exercise of sovereignty. Not formal sovereignty, however, but rather the substance or effect of sovereignty is what is required for the purpose of extending the Convention to situations of occupation. The weakness of the effort to contain the extension of human rights’ evaluative reach, once the idea of jurisdiction has been factualized, becomes little less than blatant when the Bankovic Court deems it necessary, in line with what it does with situations of de facto jurisdiction, to support its textual and contextual interpretation of Article 1 with teleological policy considerations. While the parties insist quite legitimately that a gradualist vision of jurisdiction is precisely implied in the application of human rights to situations of occupation, the Court turns eventually to an even broader justification, which is borrowed from the foundational reasoning in Loizidou and lies at the root of the above quoted Issa dictum borrowed from the Human Rights Committee. According to the Court, the Convention aims at establishing a “European public order,” geographically defined by the outer jurisdicitional limits of the State parties. Speaking of the turn to functional equivalents of sovereignty, the Court explains that “the desirability of avoiding a gap or vacuum in human rights’ protection has so far been relied on by the Court in favour [sic] of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention”; by a territory “normally covered,” the Court explains that one should mean a territory within the regional space of public order. The Court thus justifies that, in cases of occupation, de facto jurisdiction is the equivalent of de jure jurisdiction for the purpose of Article 1 of the Convention, on the grounds

335. Issa, ¶ 71.
336. See Bankovic, 2001-XII Eur. Ct. H.R. 333, ¶ 81 (noting the ambiguous arguments of the Court when trying to distinguish Bankovic from the Issa and Ocalan cases, both dealing with armed activities of the State abroad).
337. Id. ¶¶ 47–48.
338. Loizidou, ¶ 75.
that, had the occupation not happened, human rights norms would have been in force for the responsible (and now ousted) sovereign. It is the reverse of the Human Rights Committee’s statement according to which a State should not do something abroad that would be internationally wrongful if done at home. The ousting of the sovereign through occupation of the territory is necessarily, as far as the Court is concerned, equivalent to the acceptance by the occupying power of the human rights responsibilities of the ousted sovereign.

Why that is, and why one should accept that acquiescence and occupation are functionally equivalent, is far from clear, even though the whole argumentative line is supposed to support that position. The series of steps can be seen to match in reverse the positions of the Inter–American system, in which the Court finally settled for formal limitations mandated by sovereign consent. Here the Court, in order to first extend jurisdiction to occupation and then contain it there, follows the Commission in sliding from formal to substantive arguments, but in reverse. The Court bases its argument on Article 1, which is said to naturally limit obligations to de jure and de facto jurisdiction, but then decides to contain it by saying that although the European public order may seem to mandate that all member States should behave everywhere in the same way, they should not because otherwise human rights would follow them and that is not what jurisdiction means. The Loizidou argument is impossible to contain, yet in the course of doing so, the Court has made the distinctions between normalcy and exception, between norm and fact, between domestic and international, and between peace and war considerably less persuasive. Yet it has done so for the benefit of human rights and public order.

Witnessing the steps taken by the Court, in reference to issues relating to war, is instructive for the purpose of understanding how factualizing sovereignty is the key to a complete merger of human rights and humanitarian law, into some sort of non–legal human rights talk that would effectively render the political meaning of the system invisible. In Bankovic, to limit the expansion of the “jurisdiction” of States for the purpose of human rights, the Court cannot plausibly rely on factual criteria, such as “overall control,”340 “effective overall control,”341 or “authority and control”342 on their own. How having the ability to destroy one person’s right to life is not effective control is unclear, especially if one has also to establish the essential difference between being under the control of an aircraft and being under the control of embassy officials (which counts as effective control),343 and especially if we abandon, as we should, the notion

340. Issa, ¶ 73.
341. Loizidou, ¶¶ 49–50.
that diplomatic missions are territorial enclaves of the sending State.\textsuperscript{344} One would have to find parameters that would provide a solid basis for the distinction with a case where punctual physical control by agents of law enforcement is sufficient, in foreign or international territory, to establish a jurisdictional link for purposes of Article 1 of the Convention.\textsuperscript{345}

The policy considerations, referring to gaps in the regional public order, produce complications. In situations of occupation, the State is said by the Court to be responsible for human rights, on the one hand, if under the previous (normal) circumstances human rights were applicable on that territory. But it is responsible, on the other hand, also because it is exercising “all or some” of the competences of the sovereign. The two grounds are jurisdictionally different, since the first refers to the occupier’s jurisdiction and the second to the occupied country’s (lost) jurisdiction. Saying that occupation is equivalent to sovereignty for the purpose of human rights because of control is one theory, which has certainly been accepted by most if not all human rights bodies,\textsuperscript{346} even though it is never fully explained. Sovereigns are responsible for human rights even when they are not in full control, and the direct analogy between sovereign jurisdiction and effective control for the purpose of responsibility, if intuitively plausible, is therefore not undeniable.\textsuperscript{347} Yet even if one admits the connection between jurisdiction and effective control, the “gap–in–the–European–public–order” argument cannot support it, since it could just as well support the arguments for the gradual-jurisdiction approach to human rights duties of the State. That becomes more apparent when one asks what the difference is between a situation where the territory of a non–party is occupied and the situation where the territory of a state party is occupied, if in both cases we are talking about a State party performing the occupation and exercising effective control. In the first case, there is a stated risk of a “gap” in the regional public order, while in the second there is no such risk, and that is the only thing that the Court can tell us. The gap argument has

\textsuperscript{344} An early judicial rejection of the idea that diplomatic missions are territorial enclaves, deriving from the move towards a functional idea of what diplomatic immunities are, can be found in \textit{Fatemi v. United States}, 192 A.2d 525 (D.C. 1963).

\textsuperscript{345} \textit{Ocalan}, ¶ 92.


\textsuperscript{347} One aspect of that notion comes in the form of a debate about responsibility of States for acts occurring outside of their territory and committed by non-State agents. See, e.g., Robert McCorquodale & Penelope Simons, \textit{Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law}, 70 Mod. L. Rev. 598, 598–625 (2007). Another aspect of that comes in the notion that the “duty to promote,” and possibly also the “duty to fulfill,” which constitute two of the four duties attached to each right, do not need exercise of jurisdiction or even control over anybody and can apply to abstract acts of legislation or regulation themselves. See the already mentioned \textit{Roma Rights Centre, Regina v. Immigration Officer at Prague Airport} [2004] UKHL 55.
nothing to do with effective control, as a justification for the implementation of the Convention extraterritorially, even though it also sounds like a plausible, yet independent, policy consideration presumably relating to vested rights, expectations, and the relatively more stable nature of human rights regimes in the law of treaties.\textsuperscript{348} If one accepts effective control only within the sphere of public order, that seems to imply collective responsibility for the implementation of the Convention, an argument that is also hypothetically defensible, but that thankfully the Court does not try to develop.

The result is that the reference to the goals of the treaty effectively tries to limit the otherwise impossibly contained idea of \emph{de facto} jurisdiction in an era where extraterritoriality abounds. There is a pressing need at work to abide by the formal borders of the human rights regime, which hinges on the sovereign border, and here that need is manifested by the fact that the Court resorts to almost every single one of the available tools for treaty interpretation\textsuperscript{349} including consideration of the \emph{travaux préparatoires} and a discussion of sister treaties (which interestingly it rejects as a valuable tool, while mentioning in the same breath the \emph{travaux} leading to the ICCPR).\textsuperscript{350}

At the end of the day, the Court’s creative dealing with the ultimate consequences of factualizing sovereignty sustains the message that there always is an inside and an outside of the sphere of application of human rights, and the ideal marker of the border is sovereignty. The turn to effectiveness is however slippery in that it recognizes the extra–jurisdictional (and therefore out–of–body) exercise of power by the State as plausibly legitimate under human rights law and therefore analogous to normal behavior by the State. That the bombing of "civilians" outside of the State’s territory is invisible to human rights law is only an extension of the invisibility of war operations within the State, or the invisibility of occupation as a situation resulting from war. From its inherent hostility to war, human rights law is made into a normalizing machine for the worst of political violence.

As far as legitimation of State coercion is concerned, it should be noted that the inside/outside distinction marked by the sovereign border has certainly been noticed by States who have attempted to do abroad what is not allowed at home, on the basis that in most situations they precisely do not have “jurisdiction” abroad, even though they are actually exercising State power.\textsuperscript{351} As far as the \textit{Bankovic} idea is concerned, and with regard to the European Court’s dealing with the relationship between human rights

\textsuperscript{348} See supra note 46, at 112 (referring to the International Law Commission’s discussion of “humanitarian” provisions, including human rights treaties, which are not subject to the mechanism of suspension for material breach).

\textsuperscript{349} Vienna Convention, supra note 46, arts. 30–33.

\textsuperscript{350} Id. at art. 32.

\textsuperscript{351} See Roma Rights Centre [2004].
and war, the most important aspect is the rhetorical insistence on the distinctiveness of the normal space of operation of human rights within an “inside” (the “espace juridique”) that can possibly be stretched at times, but that is contrasted with an “outside” (the “world”) to which the European instrument was not meant to be applicable.\footnote{352} The idea that, even after the factualization of jurisdiction, there is still an ideal border between the inside and the outside finally explains the otherwise not–so–straightforward rejection by the Court of what it depicts as the alternative position on jurisdiction presented by the claimants. That interpretation, the Court says: “equates the determination of whether an individual falls within the jurisdiction of a contracting state with the question of whether that person can be considered to be a victim of a violation of rights guaranteed by the Convention.” That, the Court says, constitutes a confusion of “separate and distinct admissibility conditions, each of which has to be satisfied in the afore–mentioned order, before an individual can invoke the Convention provisions against a contracting state.”\footnote{353}

What we learn from the European Court here is that the issue of dealing with war–like situations through human rights is substantively dictated by the fact that human rights law is concerned with the effects of the State’s (abuse of) coercive power on individuals. The above suggests that the operation of human rights in zones of occupation is therefore the continuation of the invisibility of civil war for human rights standards. The factual treatment of civil war situation by human rights normalizes civil war by making it functionally equivalent to “counter–terrorist” law enforcement, which makes that mode of reasoning resonant with larger issues in the contemporary political setting. Similarly, the operation of human rights in occupation entrenches a technocratic notion according to which occupation is functionally equivalent to sovereignty, which is in turn based on the premise that sovereignty is plausibly seen as a (bunch of) function(s).\footnote{354} Finally, the issue of jurisdiction, which is the bridge for the extension of human rights normalcy, allows the Court to reject the relevance of the ICJ’s lex specialis idea by normalizing everything legal that would be outside of the State’s jurisdiction as being invisible to the Court itself. That is rendered equally shaky by the fact that the Court has been able to observe human rights and their violation far away from the borders of the European public order.\footnote{355}

\footnote{352} {Bankovic, 2001–XII Eur. Ct. H.R. 333, ¶ 78.}
\footnote{353} {Id. ¶ 75 (emphasis added).}
\footnote{354} {See Martti Koskenniemi, Occupied Zone – “A Zone of Reasonableness?”, 41 ISR. L. REV. 13 (2008).}
\footnote{355} {See, e.g., Al–Adsani v. United Kingdom, 2001–XI Eur. Ct. H.R. 79, ¶ 58 (accepting that an individual has been the victim of torture, within the meaning of Article 3, while the acts of torture themselves, as well as their relevant effects, are not within the jurisdiction of the Court or any State party to the Convention.).}
The more or less convincing break presented by Bankovic constitutes an attempt at establishing the centrality of the distinction between *de jure* and *de facto* sovereignty, meaning here the importance of the form of sovereignty for the logic of human rights, as it emanates from the Preamble to the Universal Declaration of Human Rights. The problem is that, as noted by the European Court itself, one cannot second-guess the State in its appreciation of the means to be deployed to defend itself. By introducing the logic of the “margin of appreciation” into the domain of war, suddenly we have lost sight of the fact that human rights law does not regulate war—it is supposed to oppose it.

D. *Lex Generalis* and War in Africa: Redemption

A creative alternative to that type of ambiguous courtship of war by human rights starts with the idea that war itself is a problem for human rights, if not a violation of human rights. That leads then to a more complicated and less compromising relationship between human rights and humanitarian law. That starting point is provided in the jurisprudence of the African Commission on Human and Peoples’ Rights.

1. From War as Law

Considering the European Court’s engagement with war, an alternative starting point is that, logically, war should be understood as an exceptional situation, and *lex specialis* would therefore mean that we have first of all (from the perspective of human rights, and not that of the ICJ) crossed the border of normalcy into the domain of anomaly, where the exceptions apply. Such an exception would be for instance constituted by an amendment to the otherwise general right to life, in the spirit of what is noted by Article 15 of the European Convention, according to which lawful acts of war resulting in death are a “derogation” from Article 2. This is so because “war,” understood from the model of inter-State war, is the breach of sovereignty by another sovereign—that is, the breach of (legal) normalcy. And in contemporary terms, this notion forces the meeting of human rights with the *jus ad bellum*, the issue of the legality of war itself. If in contexts otherwise approachable by humanitarian law as “non-international armed conflicts,” “war” disappears for human rights, the fact that we can extend human rights to situations of occupation without paying attention to the fact that it is a “war” makes human rights suddenly agnostic about “war” in general. That can be seen as a problem, and therefore one can choose another approach, which starts with an expression of human rights’ existential opposition to war as war. Human rights law rejects war not because it is violence, but because it is an instantiation of violence precisely conceived of as a war or, more technically, an “armed conflict.”

“War” can be accepted, as far as international law is concerned, as the result of the operation of particular norms, as opposed to a fact of life that is
received passively by law. This is confirmed by the European Court's mistreatment of war following its factualization of both war and sovereignty. The upsetting (and now generally rejected) conclusion above was that as long as human rights operate there is legally no “war,” in that Chechnya is not a (civil) war in any distinctive way visible to human rights law, in the same way that the context of the Basque country can be talked about without taking seriously any claim about the legitimacy of a violent struggle for self-determination.\footnote{Ass’n Ekin v. France, 2001-VIII Eur. Ct. H.R. 323, ¶ 48.} Again, from the perspective of “human rights,” the only question is whether there is a state of emergency, because the state of emergency encompasses (the state of) war. This means concretely that, in the terms of Article 15 of the European Convention, the issue will be whether the state has acknowledged a state of “war,” since otherwise there is no deference to humanitarian law at all.\footnote{I leave aside the obvious, yet here largely irrelevant, issue of whether a given State has or has not declared such state of emergency, a gesture that conditions the actual operation of the state of emergency within human rights law. In more practical terms, as we turn to the African regional system of human rights, the issue becomes irrelevant given the absence of the “state of emergency” or any derogation clause in the Banjul Charter. See a reminder in Amnesty International v. Sudan, Comité Loosli Bachelard v. Sudan, Lawyers Committee for Human Rights v. Sudan, and Association of Members of the Episcopal Conference of East Africa v. Sudan, African Comm’n on Human & Peoples’ Rights, 13th Activity Report, Commc’ns Nos. 48/90, 50/91, 52/91, 89/93, 137, ¶ 79, AU Doc. AHG/222 (XXXVI) (1999).} That civil wars are theoretically invisible to human rights \emph{qua} wars is therefore the flipside of the fact that war is indeed a legal construct, \emph{i.e.} the result of the operation of other norms. But additionally, this sequence of steps from human rights to war shows also the strangeness of the application of human rights to occupied territory; on top of normalizing through rights a temporary and necessarily abnormal situation (under the \emph{jus ad bellum}), the operation of human rights here disregards the fact that there is an international war going on. The connection of occupation to (international) war should at a minimum trigger the question of whether the occupied territory is not precisely and by definition under a state of emergency, expressed in the special regime of the Fourth Geneva Convention. The problem lies in the fact that the operation of humanitarian law does not depend on a formal deferral by human rights, but depends on the factual situation of “armed conflict,” or possibly on the \emph{jus ad bellum} having been implemented or breached. The blindness of human rights, which is otherwise plausibly connected to the fact that human rights is hostile to war, has to meet the fact that the existence of war does not depend only on the sovereign, but also on other sovereigns.
2. Towards War as a Violation of Human Rights

The alternative take on human rights’ reading of war must therefore start with human rights’ hostility to war, and the notion that, contrary to the human rights regime, the structure of humanitarian law implies the existence or hypothetical existence of several sovereigns. Some clues as to what that alternative view is come from the African Commission on Human and Peoples’ Rights in its landmark case on the situation in the Democratic Republic of the Congo (landmark if only because it was its first decision on a State–to–State complaint). The Commission faces in this case the exact same situation that had been presented also to the ICJ, but from the perspective of a human rights body, i.e. a body not benefiting from the god’s eye point of view that arbitrates between lex specialis and lex generalis.

To summarize a case that has received too little attention of the type advocated here, the Commission produced a series of legal maneuvers that express in a less normalizing way that war can be approached by human rights as a bad thing before anything else. That approach would contrast with the alternative, observed in the case of the European Court, which is for human rights to approach war as some set of brute facts to be governed or managed, without any “structural bias” against the very phenomenon, despite the Universal Declaration’s and so many other treaties’ preambles. In other words, the perspective here would be that human rights can plausibly approach war in the way it approaches genocide, as something that is meaningful to its normative system, as opposed to approaching war only as human rights law also approaches crime, which is only indirectly meaningful to it (for instance in talking about war propaganda). That shift of perspective constitutes also a return to the political message of human rights, which connects humans, the Sovereign, and the repulsion of the state of nature to the borders of the polity and into the domain of the “state of war.”

The way the African Commission implements the alternative sensibility of human rights follows a few simple steps. The preliminary is that, for an institutional body created by international law, the forceful invasion and occupation of one country by another country is a violation of sovereignty, territorial integrity, and the general obligation to settle international disputes peacefully, that is, a violation of the purposes (Article 1) and principles (Article 2) of the Charter of the United Nations. Those violations,
including the violation of the *jus ad bellum* as enshrined in the UN Charter, constitute a violation of the African Charter on Human and Peoples’ Rights also, in that they constitute violations of the right of peoples to peace and security (Article 23), as well as the all-important right of peoples to self-determination (Article 20).\(^{360}\) From there, “the Commission having found the alleged occupation of parts of the provinces of the Complainant State by the Respondents to be in violation of the Charter cannot turn a blind eye to the series of human rights violations attendant upon such occupation.”\(^{361}\)

In other words, occupation is by definition an illegal situation in which the human rights of individuals and peoples are being denied as such, without the need for the occupier to do anything else beyond occupying. Any other wrongdoing in the course of the situation of occupation will simply be added to the list, but all actions, whether they are legal or not for international humanitarian law, will be seriously tainted, as far as human rights are concerned, because they all stem from an original violation of human rights law. That initial violation, a situation that lives in legal anomaly, is precisely what justifies the application of humanitarian law, which as we saw is agnostic about how we got there and who is to be blamed. But human rights law on its part is not agnostic; it is a firm believer in the evil nature of war, to the point that it even prohibits advocating it.

When we get to humanitarian law, which we undeniably reach because there has been a war, the problem will be again that of dealing with it from the perspective of human rights, the *lex generalis*. The Commission does that unsurprisingly in terms of interpreting the standards of the African Charter, over which it has interpretive jurisdiction, as opposed to dealing with humanitarian law itself. Technically, that sounds like the Inter-American Commission, whom the African Commission incidentally holds in great esteem.\(^{362}\) The African Commission, however, deals with the issue of the *lex specialis* in a way that parallels exactly the key issue at stake in the legal relationship between the two bodies of law, that is, the connection between the supervising bodies’ jurisdiction and each body of law’s relationship to sovereignty. On the basis of the Banjul Charter,\(^{363}\) and “[b]y

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360. *Id.* ¶ 68.
361. *Id.* ¶ 69 (emphasis added).
362. Article 60 reads as follows:

The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on Human and Peoples’ Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples’ Rights, as well as from the provisions of various instruments adopted within the Specialised
virtue of Articles 60 and 61 the Commission holds that the Four Geneva Conventions and the two Additional Protocols covering armed conflicts constitute part of the general principles of law recognized by African States, and take same into consideration in the determination of this case. After considering the violation of the jus ad bellum as a violation of human rights, that interpretive ground allows the Commission to translate violations of the jus in bello into violations of human rights standards. In an important interpretive move, the idea that human rights do not cease to operate in war is reinterpreted to mean that the process of war does not put an end to human rights, but rather constitutes a violation of it. All the violations that follow are simply ramifications of the fact that the invasion is a violation of the foundational human right, the right to self-determination, and its corollary right to peace and security. And both rights happen to be within the material jurisdiction of the African Commission.

This sequence of arguments allows the Commission to dare the incredible statement that, from the perspective of human rights law, killing as part of war is indeed a problem. Human rights cannot, pace what the Bankovic Court suggests however sweepingly, close its eyes on wartime killing, simply because it is war, or because it occurs abroad. War is a human rights issue qua war, not simply as violence; the structure or form of war, which distinguishes it from crime or law enforcement, and is then legally translated into such operative ideas as the principle of distinction, make it an issue of relevance to human rights. In particular, and astonishingly so, if one considers an alternative worldview that considers

Agencies of the United Nations of which the Parties to the present Charter are members.

African Charter, supra note 221, at art. 60. Article 61 in turn reads as follows:

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on Human and Peoples’ Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine.

Id. The text is also reproduced in HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 1457 (2d ed., 2000).


364. This would be the general backdrop to the lex specialis dictum, which otherwise would be pointless in the matter. See Nuclear Weapons Legality, 1996 I.C.J. 226, ¶ 25; Palestinian Wall, 2004 I.C.J. 136, ¶ 106.

365. African Charter, supra note 221, at arts. 20, 23 (referring to the right of peoples to existence, and peace and security, respectively).
artillery a legitimate means of law enforcement, wartime killing is still a violation of the right to life, because as far as human rights are concerned, it is quite simply done discriminately, on the basis of national origin.\footnote{Democratic Republic of Congo v. Burundi, Rwanda, Uganda, Commc’n No. 227/1999, ¶¶ 73–89.} This otherwise mind–blowing statement simply echoes in substance the fact that the African Charter counts among its specificities the absence of any provision on the state of emergency and associated derogations.\footnote{See also, Liesbeth Zegveld and Mussie Ephrem v. Eritrea, African Comm’n on Human & Peoples’ Rights, 17\textsuperscript{th} Activity Report, Commc’n No. 250/2002, AU Doc. EX.CL/279 (2003).} If one takes seriously the fact that, first, human rights do not cease in times of war, and second, occupation is equivalent to sovereignty in functional terms, then occupation as a forcible extension of jurisdiction is a forcible extension of the operation of human rights law itself. This results in this forcible exercise of sovereignty being both a violation of human rights in itself, and additionally subject in its modalities to the operation of human rights as interpreted through the \textit{lex specialis} (humanitarian law), which is in turn triggered by the act of extending jurisdiction across borders in such a way. This is in essence a rejection of the possibility of States having out–of–body experiences, exercising State power outside of their jurisdiction. In all cases there will be the crossing of a border and that crossing is neither a detail in international law nor meaningless to human rights themselves. The spotlight on the exceptional character of war, through a reminder that the State is a legal creature and cannot therefore exist outside of its own legal operation, makes suddenly the line of thought behind (and including) \textit{Bankovic} very apparent as a legitimization of extra–territorial exercises of violence as State acts.

In that light, human rights do not either flatten the specificity of wartime violence into a normal operation of State coercive power or, as the case displays it well, leave unnoticed the temporary and forceful change of sovereignty over a territory. As a human rights body, the Commission actually “disapproves” of the instance of foreign occupation and finds it contrary to Article 23 of the African Charter. It seems reasonable to add that the \textit{(jus ad bellum)} interests of the invading States would be better served within the limits of their own territory—in this case the interest in defending oneself against alleged incursions from neighboring sanctuaries.\footnote{Democratic Republic of Congo v. Burundi, Rwanda, Uganda, Commc’n No. 227/1999, ¶ 76.} Everything starts therefore from the fact that the ousting of sovereignty is a violation of human rights, as opposed to the notion that human rights claims simply arise because of \textit{de facto} sovereignty, without notice being taken of the \textit{de jure/de facto} transformation being by definition a breach of some social contract somewhere, \textit{i.e.} war. Another important example of the ramifications of the fact that the breach of \textit{jus ad bellum} is considered (a set
of violation(s) of human rights is in this context the further conclusion that the plunder of natural resources, while also a violation of the *jus in bello* through the prohibition of pillage, is also a violation of the right of people to self-determination and in particular their permanent right to ownership over the natural resources of their legitimately sovereign territory. In that last case, insisting on the continuity of human rights, and in particular the foundational right to self-determination, leads to the further important point that there are limits to the power of the *lex specialis* maxim. What is implied here by necessity is that the use of resources on occupied territory, when seen from the right to self-determination, will not be examined by the *jus in bello* if it contradicts human rights.

From a human rights perspective, there is something importantly similar between *Bankovic* and the DRC case: jurisdiction matters. The difference is that in the former, the Court tries to reinforce some notion of formal sovereignty against its unstoppable functional alternative, whereas in the latter case the Commission signals that violation of formal sovereignty is a human rights violation that taints all further acts of the violating State as a problem. Occupation for the African Commission is illegal in itself, and we should be wary of the perversion of treating the result of a violation of international law simply in terms of “proportionality.” Extending the logic of the Chechnya cases to the DRC situation would mean discussing war-violence of that sort in terms of the proportionality of means in relation to the (implicitly) legitimate (public order) ends of the State, something that in the Chechen context was already obscene, but here would certainly rise one or two pegs along the scale of legal cynicism.

As a conclusion, one can note here that the DRC case as treated by the African Commission serves the function of reawakening human rights from the managerial slumber so well displayed by the European Court’s Chechen file. The relationship between human rights and war is one of antagonism, since human rights is ultimately a tool for the preservation and development of peace. What the DRC case points to is that the relationship between humanitarian law and human rights is mediated by sovereignty’s framing of how human rights conceive of normalcy and emergency. The application of distinction implies a situation of exceptional risk for human beings where the protection of their life is diminished by law by allowing for plausibility of being killed because of a uniform. The triggering of that situation implies the (possible, feared or actual) weakening of State structures and therefore the weakening of the frame that supports the system of human rights. The

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369. Lieber Code, *supra* note 116, art. 44.
370. *Id.* at art. 93.
371. This is also implicit in the ICJ’s dealings with the right to self-determination of the Palestinian people in relationship to the “separation barrier.” But it is not in that context recognized as a reversal of the *lex generalis*/*lex specialis* relationship as it is posited in general terms by the Court. *See Palestinian Wall,* 2004 I.C.J. 136, ¶ 122.
importance of those State structures is recognized both by human rights law (from below) and by international law in general (from above). As such, the next obvious step would be to extend the conversation to the particular meeting point of the *jus in bello*, human rights, and the *jus ad bellum*, given that they share a central but differentiated interest in both war and sovereignty. If armed attacks are plausibly a violation of human rights, then what is the relationship between humanitarian law and armed attacks, or self-defense, for that matter, given the particular relationship of human rights to humanitarian law? The encounter between humanitarian law and human rights supports the notion that war is a legal construction attached to humanitarian law, which then explains the host of legal complications arising from too much proximity between human rights and war. Now, the question would be simply whether there is a similar relation between *jus ad bellum* and *jus in bello*, where the *jus in bello* would build its specificity both through its distant relationship with the neighboring legal field of human rights, and through its monopoly over the construction of war as war. What will remain as a background for a conversation to be had on issues of humanitarian intervention, "responsibility to protect," human security, and similar notions is that war is a legal construct attached to the forms of sovereignty, which is politically important to the distinct projects of human rights and humanitarian law.

A QUESTION OF REFRAGMENTATION

The foregoing discussion has tried to force some meaning into the formalistic distinctions that are being blurred in descriptions of humanitarian law and human rights as kin projects or related legal regimes. The relationship of human rights to humanitarian law, and a series of other formal distinctions that accompany both of them in their respective operation, are based on their different relationships to formal sovereignty and jurisdiction. The formalism of the distinction is warranted by the fact that the end of factual distinctions in contemporary conflicts (civilians/military, internal/international, private/public, and so on) can be perceived only on the basis of a backdrop constituted by a legal understanding of war, constructed on the otherwise arbitrary idea of "distinction" as a legal and a political artifact. The move to substantive, or functional, criteria yields difficulties that are therefore not only doctrinal, but also rather political, in the sense of the respective foundational principles of human rights and humanitarian law being precisely foundational. And because ultimately we are talking about war, the African Commission wakes us up from our technocratic slumber by reminding everyone that war is still a political issue and essentially a political problem, and the whole of contemporary international law beyond its technical artifices is still supposed to be dedicated to solving it. In other words, human rights and humanitarian law are deeply rooted in a political
worldview, which says something about what legitimate violence is. The
delicate balance between the two bodies of law is organized around the idea
of formal sovereignty and what it represents as the international legal
formalization of the existence of many socially–contracted polities, who are
trying to diminish the risk of violence associated with existence in a deeply
assumed, and poorly assimilated, state of nature. Moving causally towards a
functional or factual equivalent of the legal forms, which justify their
arbitrary existence not from functional success but political theory, signifies
a move towards another political universe. There is nothing inherently bad
about moving from inter–governmental cooperation to global governance. It
is however not “simply” a technical or even legal issue. It is a political
program. It is an alternative political program to that of international law.

What matters is that, as in the casual treatment of war by human rights
law, “war” can disappear from sight as a result of the dismissal of
formalisms that are otherwise generated by abstract political projects, such
as political liberalism and social contract theory. The disappearance of war
from legal sight constitutes a normalization of the state of war in the same
way as human rights helps normalize police repression of crime, and more
generally, State violence as presumably legitimate within its jurisdiction. To
close the ideological circle, one would therefore logically need to turn to the
jus ad bellum’s relationship to humanitarian law, that is, the relationship
between the seemingly prohibitive regulation of war’s emergence and the
exceptionalist regulation of the conduct of that prohibited, yet regulated,
war. Based on the foregoing, the discussion of that relationship will occur
against the backdrop of human rights’ propaganda for a type of peace that is
essentially the absence of war. Undoubtedly the rise of contemporary
enthusiasm for humanitarian intervention will appear here as the product of
an equally casual dismissal of formal distinctions for seemingly higher
purposes, as witnessed in the expansion of the lingo of global governance
with such notions as “human security” or the unavoidable “R2P.” The
passing legal framework will then hopefully help us keep together, before it
fades completely, the notion that war is not a natural occurrence. War is and
should be in all cases a politically assumed project, in the way it is asserted
in unison by Clausewitz and the St. Petersburg Declaration, and as opposed
to an exercise in the management of populations, containment of risk, or
moral redemption.

372. See, e.g., Study Group on Europe’s Sec. Capabilities, A Human Security
Doctrine for Europe (2004) (presented to EU High Representative for Common Foreign
**PLAYING FAIR IN THE BOARDROOM: AN EXAMINATION OF THE CORPORATE STRUCTURES OF EUROPEAN FOOTBALL CLUBS**

*Ryan Murphy*†

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“Every disadvantage has its advantages” — Johan Cruyff

I. INTRODUCTION

Every four years, the World Cup provides a visible reminder that football is the world’s game. European football clubs have capitalized on this popularity to generate billions of dollars from fans, media companies, and commercial advertisers. The emergence of football as a revenue generating enterprise has naturally led to an examination into who reaps the riches of football success.

Successful clubs demonstrate a few main characteristics. Before considering these characteristics, it is important to note that football clubs have a unique position in European society. Clubs exist because a community of fans has associated themselves based on a love of football. Any successful club must try to incorporate fans because fans are the reason why the club exists and continues to exist. One of the most important aspects of a successful club is on the field success. For the top clubs, this usually means winning every competition the club competes in. For less successful clubs, this may mean finishing in a particular league position. Another characteristic is less visible than winning on the field of play. A successful club is one that lives within its financial means—a club that makes neither a profit nor a loss. A club with sizable yearly losses runs the risk of bankruptcy or seriously interfering with the integrity of the competition. A club that is too profitable risks complaints from fans regarding a lack of investment in the team. The challenge of successful managers is navigating these constraints. Club finances are not merely determined by on the field results, but are impacted by the ownership

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* Johan Cruyff Football Quotes, EXPERTFOOTBALL.COM, http://expertfootball.com/gossip/quotes.php?search=Johan_Cruyff. Johan Cruyff is a Dutch football legend. He is considered one of the best five players to play the game. After his playing days ended, he turned to management and reestablished FC Barcelona as a force in football.

1. This paper will use the term football to describe the game that Americans know as soccer.

2. The 665 first division generated a record €11.7 billion in revenue in 2008/09. Jonathan Clegg, Soccer Clubs Warned Over Finances, WALL ST. J., Jan. 12, 2011, http://online.wsj.com/article/SB10001424052748703791904576075982800093382.html. However, a great deal of this revenue was spent on player salaries. 64% of the club revenues were spent on salaries and 73 clubs spent more than 100% of their revenues on salaries. Id. The twenty richest clubs collectively generated revenues in excess of €4.3 billion during the 2008/09 season. SPORTS BUSINESS GROUP, DELOITE, FOOTBALL MONEY LEAGUE 2 (2011), available at http://www.deloitte.com/assets/Dcom-UnitedKingdom/Local%20Assets/Documents/Industries/Sports%20Business%20Group/UK_SBG_DFML2011.pdf.
structure of the club. Clubs controlled by fans may wish to spend money on tangible things like players, whereas clubs controlled by investors may wish to earn a return on their investment. The recent economic crisis has disrupted the delicate equilibrium that many clubs had previously maintained.

In an effort to establish some guidelines for the proper governance of a club, UEFA\(^3\) has formulated a new set of regulations. Part I will examine these new regulations. Part II will look to the nature of the corporate structure of football clubs in Spain, in particular FC Barcelona and Real Madrid. Part III will analyze the various club structures allowed in Germany through the examples of Bayern Munich and BVB Borussia Dortmund. Part IV will address the nature of club ownership in England. This examination will include a look at clubs owned by a benefactor and clubs run as a normal business. Finally, Part V will attempt to decide which corporate form best promotes a sustainable and successful football club.\(^4\)

II. UEFA Financial Fair Play Rules\(^5\)

The Financial Fair Play Rules owe their existence to Michel Platini, President of UEFA.\(^6\) Shortly after Platini took office in 2007, reform efforts took on greater significance due to the global recession. The recession has prompted a thorough reexamination of the financial conditions of clubs. Many clubs, including some of the leading clubs in Europe, faced and continue to face serious financial difficulties as a result of changes in the European business world.\(^7\) Platini decided that something must be done to encourage financial reform. Because of European Union regulations, UEFA is limited in the measures that it can take.\(^8\) Any measure must comply with the provisions of the Treaty of Lisbon. For instance, the Bosman decision prevents UEFA from controlling costs by imposing caps upon the number

\(^3\) FIFA (International Federation of Association Football) is the governing body of world football. UEFA (Union of European Football Associations) is the governing body of football in Europe. Each country has a federation or football association that governs the sport in the particular country. The United Kingdom is an anomaly in that it contains individual football associations for England, Scotland, Wales, and Northern Ireland. Despite unequal market size, each national association has equal voting power in UEFA.

\(^4\) As mentioned earlier, success can be defined both on the field and financially. This paper deals entirely with the financial definition of success with only brief mentions of on the field successes.

\(^5\) UEFA, UEFA CLUB LICENSING AND FINANCIAL FAIR PLAY REGULATIONS EDITION 2010 (2010) [hereinafter UEFA FAIR PLAY REGULATIONS].


of foreign, but European Union nationals in a team or preventing them from changing clubs after the player’s contract has expired.\(^9\)

Due to UEFA’s limitations, Platini formed an advisory group, the Professional Football Strategy Council, to examine what could be done to improve the financial regulation of the game.\(^10\) An American–style salary cap was considered, but ultimately discarded because of the difficulties in designing a system that complies with European Union law.\(^11\) Platini recognized that any regulation would have no chance of success if the most marketable clubs were opposed; therefore he also consulted with their representatives.\(^12\) Any reforms that UEFA may propose must abide by European Union labor and competition law.\(^13\) Although the European Union recognizes sports are a special case when considering competition law, it has not completely exempted sports leagues from European regulations.\(^14\)

As part of his efforts, Platini unsuccessfully petitioned the European Union Parliament to grant this sporting exemption from its competition law.\(^15\) Ultimately, the Executive Committee of UEFA approved a plan called the

13. See Schiera, supra note 11.
14. Snyder, supra note 11, at 516–18. However, the EU Sports Commissioner has recently stated that the EU will investigate options such as caps on transfer fees. Commissioner Vassiliou: ‘I’m Shocked by Size of Football Transfer Fees’, Euractive.com (Feb. 23, 2011), http://www.euractiv.com/en/sports/commissioner-vassiliou-im-shocked-size-football-transfer-fees-interview-502414 [hereinafter Commissioner Vassiliou].
Financial Fair Play Rules with the support of wealthy owners.\textsuperscript{16} The European Union has recently stated that it approves of the rules laid out by UEFA.\textsuperscript{17} The Financial Fair Play rules have not yet taken effect, but Platini remains firm in his assertion that clubs will be excluded from the Champions League\textsuperscript{18} if they do not meet the requirements.\textsuperscript{19}

The Financial Fair Play Rules provide a basis for how a club should operate in order to obtain a license to compete in a UEFA competition\textsuperscript{20} like the Champions League. Although UEFA sets the standards for licensing, the actual licensing itself is every year done by the national association or the national league.\textsuperscript{21} The regulations require that the applicant be either a registered member of the association or have a contractual relationship with the registered member.\textsuperscript{22} However, any alterations within the past three years to the legal form of the club to evade the regulations and gain a license are forbidden.\textsuperscript{23} This would seem to be targeted toward preventing the creation of subsidiaries or other related companies solely to hold debt or to cover the club’s losses. The regulations take great care to inform applicants that the clubs have a continuing duty to provide any information required to make a decision concerning licensing.\textsuperscript{24} The Fair Play Rules are not just financial regulations, but include structural requirements for proper


\textsuperscript{18} The UEFA Champions League is an UEFA–wide competition run by UEFA. The Champions League includes the best clubs in Europe, including those that have not won their league the previous year. The competition takes place from September until May. Clubs play on Tuesdays and Wednesdays throughout the year. A number of clubs are given automatic places in the group stage, while other clubs must proceed through qualifying rounds. England, Spain, and Italy each have 3 guaranteed places in the group stage and 1 place in the final qualifying round. Germany has 2 automatic places and 1 qualifying place. The 32 team group stage contains eight groups of 4 teams. Each team in the group plays the other teams home and away. The top two teams in each group advance to the knockout rounds. The teams are drawn in a playoff system with the winner after the home and away legs advancing to the next round. The final is a single game played in May on a neutral field.


\textsuperscript{20} UEFA competitions include the UEFA Champions League and the UEFA Europa League.

\textsuperscript{21} UEFA FAIR PLAY REGULATIONS, supra note 5, art. 5. The license can be withdrawn if the club becomes bankrupt or is liquidated. Id. art. 14.

\textsuperscript{22} Id. art. 12.

\textsuperscript{23} Id.

\textsuperscript{24} Id. art. 13.
operations. Among the requirements are a youth development program, player registration, training facilities, a general manager, a financial officer, a media officer, a supporter liaison officer, a head coach, and assistants.\textsuperscript{25}

The organizational requirements are not very onerous for clubs that compete in European competitions because most clubs have required infrastructure in place. The challenge for clubs is to fulfill the break–even requirement.\textsuperscript{26} UEFA determines that a club has broken even for the year when the relevant expenses exceed the relevant income by less than €5 million for the prior year.\textsuperscript{27} UEFA permits small losses because on the field upsets and disappointments are expected in an unpredictable business like sports. UEFA recognized that many large clubs could not currently pass the break even requirement, thus the amount of any acceptable deviation will gradually decrease to the €5 million goal. A loss of €45 million for the 2013/14 and 2014/15 monitoring periods is acceptable, but this threshold is then lowered to €30 million for the following two periods.\textsuperscript{28} Although the losses are permitted, UEFA requires that these losses be covered by contributions from an equity holder.\textsuperscript{29} This ensures that creditors, especially other football clubs, will be paid. Although short term financial results may be acceptable, the applicant must demonstrate the future ability of the club to continue as a going concern.\textsuperscript{30} Required documentation includes information about the club, the club’s subsidiaries,\textsuperscript{31} and controlling parties.\textsuperscript{32} UEFA has stated that a club that has a wage to revenue ratio greater than 70\% or a net debt greater than 100\% of revenue will be closely scrutinized.\textsuperscript{33} Because the owners of many of the clubs have sufficient resources to evade these simple requirements, UEFA has set out a list of relevant income and expenses and required that they be valued at their fair market value in an arm’s length transaction.\textsuperscript{34}

Although many of Fair Play provisions are already in place, this is the first time that UEFA has managed to impose some strict standards of corporate governance on its member clubs. With the state of the economy,

\begin{enumerate}
\item[25.] Id. arts. 17–18, 20, 25, 28–30, 35, 36–39.
\item[26.] UEFA Fair Play Regulations, supra note 5, art. 57.
\item[27.] Id. art. 61. Platini noted at a press conference in January 2011 that 11 clubs would potentially have been excluded from the 2010/11 Champions League and the 2010/11 Europa League. Clegg, supra note 2. Platini also noted that despite the €11.7 billion in revenue, the top division clubs collectively lost €1.2 billion. Id.
\item[28.] UEFA Fair Play Regulations, supra note 5, art. 61. The 2013/14 monitoring period begins with the 2011/12 season.
\item[29.] Id.
\item[30.] Id. art. 52.
\item[31.] Many clubs own their own stadium or have other commercial interests related to the professional team. Separating these from the professional team has benefits in regard to limiting liability.
\item[32.] UEFA Fair Play Regulations, supra note 5, art. 46.
\item[33.] Id. art. 62.
\item[34.] Id. art. 58.
\end{enumerate}
football clubs can only benefit from moving towards a sustainable financial model. Although firm rules are in place, it remains to be seen if UEFA will actually exclude high profile clubs that fail to meet the break even requirement or bow to sponsorship and political pressure.

III. SPANISH SOCIO MODEL

The Spanish governance model adopted by FC Barcelona (“Barcelona”) and Real Madrid CF (“Real Madrid”) is a model that has remained relatively unchanged in the century since the foundation of both clubs. Fans who pay a modest fee are given the opportunity to exercise some measure of control over club governance. Even among Spanish clubs, this fan-controlled structure is anomaly. This model has been named the “socio” model after the Spanish word for fan.

A. FC Barcelona

Futbol Club Barcelona is one of the most famous clubs in the world. Barcelona has transformed itself into a global brand through television exposure and summer tours of North America and Asia. The result of these efforts is shown in the five million Barcelona jerseys that have been sold in the last five years.  

Barcelona was founded by Swiss, British, and Spanish players in 1899. From humble beginnings, Joan Gamper provided the driving force that led to a club with 12,000 members after only 25 years. From the 1920s until Franco’s death in 1975, the Spanish government attempted to extinguish Catalan culture. Only at Barcelona games were Catalans allowed to publicly speak in Catalan. As a result, Barcelona became inextricably identified as a symbol of the region of Catalunya.

The organization of the club gives the fans considerable influence. In keeping with the club’s original theme, the governing power resides in its


37. Id. at 82.


39. Id. at 195, 204–05.

40. Despite Franco’s disfavor, the club did manage to build Camp Nou, its 99,000 seat stadium, and win numerous trophies during the Franco era. BURNS, supra note 36, at 41, 172. Barcelona fans adamantly believe that Franco influenced the transfer of Alfredo DiStefano to Real Madrid instead of Barcelona. DiStefano was an Argentinean that sought to play in Spain during the 1950s. Barcelona had extensive negotiations with DiStefano before the Spanish Federation imposed a ban on the signing of foreign players. As a result of the ban, the Federation told Barcelona and Madrid that they would be forced to share the player. Id. at 158–59.
members. Barcelona currently has over 170,000 socios as a result of a worldwide campaign to generate revenue and loyalty to the club. Despite the global reach of Barcelona, non-Spanish members constitute less than 20% of the socios. The requirements to become a member and maintain membership are simply the payment of a relatively modest annual fee as well as good behavior by the member. Every socio is subject to regulation of the five person disciplinary commission, which can remove a member for failure to pay dues or a violation of club behavioral regulations. Because the typical socio is distant from the governing of the club, a member’s trustee serves as an independent advisor and defender of the socio’s rights.

Club membership entitles the fan to privileges like a bimonthly magazine and a monthly email as well as the right to vote. The socio may vote to elect the President and the Board of Directors that manage the day to day operations of the club. The socio may also occasionally be called upon to vote on extraordinary issues affecting the club.

44. FC BARCELONA, FC BARCELONA STATUTES 12–13 (2009) [hereinafter BARCELONA CLUB STATUTES], http://www.fcbarcelona.com/web/downloads/sala_presma/estatuts/ESTATUS_ANGLES_2009_COMPLETS_baixa.pdf. Barcelona has recently controversially closed membership to the general public, limiting membership to former members and members who have a family member who is a member. Members Zone, Advantages, Information and Special Offers, FC BARCELONA, http://www.fcbarcelona.cat/web/english/socis/fes-te_soci/nova/info_senior.html (last visited Nov. 11, 2010). The cost to join the club is currently €161.50. 
45. BARCELONA CLUB STATUTES, supra note 44, at 12–13, 58, 66–69.
46. Id. at 55–57. The member’s trustee must be a member of the club and serves a 5 year term. The selection by the Board of Directors is ratified by the Assembly of Delegates. Id. at 56.
48. Hamil, supra note 41, at 496. As with US citizens, the right to vote does not necessarily mean that a member will exercise it. The record turnout for a Barcelona election is only 54.7%. Id. at 482.
49. Id. at 486. An example of an extraordinary issue is the vote on shirt sponsorship. Barcelona traditionally has never had a shirt sponsor. In 2005, the members approved a proposal to allow shirt sponsorship. Although the board favored passage in order to increase revenue for playing operations, Barcelona later decided to place UNICEF on its shirt at no cost to UNICEF. A number of the members were not pleased about this loss of potential revenue. Id. at 493. Barcelona has recently announced that it will be sponsored by the Qatar foundation for 5 seasons, commencing at the start of the 2011/12 season. The Qatar foundation will pay the club €30 million per year. Paolo Bandini, Barcelona Are More Than Just a Club. They Are a Business, GUARDIAN.CO.UK (Dec. 10, 2010).
A club with significant business interests like Barcelona cannot feasibly be directly governed by votes of its thousands of members. In order to create a structure that is better suited to govern, Barcelona has an Assembly of Delegates. The Assembly of Delegates consists of three thousand members serving two year terms. The vast majority of Delegates are club members chosen at random, but board members, former presidents, members of the disciplinary and economic commissions, and up to twenty five members chosen by the board are also included. The Assembly is tasked with general supervisory functions like approving the club’s budget and annual report. The Assembly is also given the power to censure the Board and the President as well as to appoint the members of the economic commission, which advises the Board of financial matters involving the club.

An effectively run business must have a small core of individuals running the day to day business. At Barcelona, this role is fulfilled by the Board of Directors and the President. The President and Board of Directors are elected on a single electoral slate for six year terms. The Board is given the function of managing club operations while the President oversees the club. The Board does not have a fixed membership and can vary between fourteen to twenty one members depending upon how the President and Board wish to divide responsibilities. The club has wisely chosen to set up a series of checks on the power of the President and the Board. The President is not permitted to serve more than two terms as president. Because the President and Directors are jointly liable for any financial damage to the club resulting from malfeasance, the President and every Director must provide a €1.5 million guarantee to the club as part of the election process. The President and Board are not only subject to regular


50. There is a club that is directly governed by its supporters. Ebbsfleet United is owned by myfootballclub, an online venture. myfootballclub allows its members to vote directly on club policies, but not to pick who plays on the field. David Conn, AFC Wimbledon and Ebbsfleet Have Different Reasons for FA Cup Hope, THE GUARDIAN (U.K.), Nov. 5, 2010, http://www.guardian.co.uk/football/blog/2010/nov/05/afc-wimbledon-ebbsfleet-united-fa-cup.

51. Hamil, supra note 41, at 480; BARCELONA CLUB STATUTES, supra note 44, at 18.
52. Hamil, supra note 41, at 480.
53. BARCELONA CLUB STATUTES, supra note 44, at 15–17.
54. See Hamil, supra note 41, at 480; BARCELONA CLUB STATUTES, supra note 44, at 27, 43–44.
55. BARCELONA CLUB STATUTES, supra note 44, at 27, 43–44.
56. Hamil, supra note 41, at 483.
57. BARCELONA CLUB STATUTES, supra note 44, at 24.
58. Hamil, supra note 41, at 483. A board member is allowed to serve an unlimited number of terms. BARCELONA CLUB STATUTES, supra note 44, at 27.
59. Hamil, supra note 41, at 483; BARCELONA CLUB STATUTES, supra note 44, at 32–33. Spanish sports law provides that a board of directors must provide a guarantee of 15% of
elections, but also to no confidence votes if 5% of the voting members are not satisfied with the club’s governance.  

As with transitions in national governments, presidential succession at Barcelona can be a difficult time for the club. In the summer of 2010, Sandro Rosell was elected president to replace the outgoing Joan Laporta. Rosell and Laporta were once allies, but a dispute arose in 2005 that prompted Rosell’s resignation from his vice presidency. Predictably, this tension continued after Rosell came to power. Laporta had previously reported that Barcelona had made a €11 million profit for 2009–2010. Rosell instituted a Deloitte & Touche audit that uncovered a loss of €79.60 million. Rosell also stated that Barcelona had €392 million in debt at the end of the 2009–10 season. This debt promoted Barcelona to take out a £130 million loan to meet short term commitments. Rosell proposed personally suing Laporta for €48.7 million on the basis of financial mismanagement of the club. The member assembly voted narrowly in favor of the suit.


60. BARCELONA CLUB STATUTES, supra note 44, at 51–52. However, removal requires a two third majority of the votes cast. Id. at 54.


64. Id.


66. Barcelona Take Out £130m Santander and La Caixa Loan to Pay Wages, GUARDIAN.CO.UK (July 14, 2010), http://www.guardian.co.uk/football/2010/jul/14/barcelona-loan-santander-la-caixa.

67. Lowe, End of an Expensive Era, supra note 63.

68. Id. Interesting enough, Rosell himself abstained from voting. Id. As the legal process is not yet complete, Laporta has not yet been forced to relinquish his guarantee.
Barcelona is probably the most famous example of the fan–owned club in the world. Barcelona has exploited this unique situation in positioning itself as a club of the people. In conjunction with the club’s attractive style of play, the club’s democratic structure is very appealing to potential fans outside of Spain. The club’s structure also has economic advantages. The members provide a substantial amount of financial support to the club through their member dues. Additionally, the widespread membership forces the Barcelona leadership to look beyond their parochial interests.

Despite the club’s significant fan involvement, there are substantial drawbacks to the Barcelona model. Because Barcelona is committed to ownership by its fans, its legal structure does not permit equity to be sold in the club. If the club confronts a future cash crisis, the club is limited in the ways that it can raise cash. This problem is tempered by the fact that Spanish banks have been extremely willing to lend money to other football clubs, as well as Barcelona itself. A bank that is a creditor of Barcelona would be extremely unwilling to be seen as the bank that forced the dissolution of the club. Along with the weaknesses in the share structure, the populist leadership of the club can be seen as a negative. As with any democratic election, there is the danger of politics and nasty campaigning. Furthermore, the Catalan character of the club makes the club a tool for political gain in Catalunya, as demonstrated by Laporta’s campaign for the Parliament of Catalunya. These aspects can distract from the underlying purpose of the club as a sporting entity. Additionally, the elective structure allows for the leadership of the club to change rather suddenly. Barcelona appears to have had rather good luck with its leaders, but it is certainly possible that an ill–advised choice of president could create significant financial difficulties. Barcelona’s club structure allows for fan input but lacks the continuity in leadership that a corporation can offer.

B. Real Madrid

Real Madrid is a probably the most famous club in the world. Through adept marketing of its superstars, Real Madrid has sold over 6 million jerseys over the past six years and has topped the Deloitte Money List as the

69. Barcelona utilizes a ball possession style of play that emphasizes the use of many short passes. This results in a many scoring opportunities, but also has the advantage of denying scoring chances to the opponent. The December 2010 5–0 victory over Real Madrid is a great example of Barcelona’s style. See, e.g., Brian Phillips, All Hail Barcelona, SLATE.COM (Dec. 23, 2010), http://www.slate.com/id/2278915/.
70. Duff, supra note 42.
71. BURNS, supra note 36, at 349.
richest club in the world. However, Real Madrid did not become world-famous overnight. Real Madrid was founded as Madrid Futbol Club on March 6, 1902. At the outset of the club, the governing structure was very important as evidenced by the fact that the club’s board of directors was elected even before the formal paperwork was filed. By 1912, the club had 450 members and the members were able to build a stadium. In 1920, the club had received sufficient prominence to receive the “real” designation from King Alfonso XIII. During Franco’s dictatorship, Real Madrid became a public relations device both internationally and domestically because of its location in the capital of Spain. Real Madrid’s fame results not only from its marketing success but also its nine European Cups, including the first five cups staged.

The club is organized in a similar manner to Barcelona. Members of Real Madrid vote for the President and Board of Directors of the club. As of the 2009 annual report, Real Madrid has 93,587 members that paid €143 per year for member privileges. These members not only had to pay the required yearly fee, but also gain the recommendation of two current socios in order to join the club. These privileges include not only the right to vote, but also priority in the purchasing of tickets. Like Barcelona, Real Madrid socios are also subject to discipline if the socios fail to pay dues or conduct themselves in an appropriate manner.

As decisions can be better considered by a relatively small body, the members are represented at the Member Assembly. Unlike Barcelona’s decision to randomly select delegates to its member assembly, Real Madrid has chosen to elect its 1,992 ordinary members for 4 year terms. Because of the interest in the election by socios, the club has required that the voting

73. Miller, supra note 35; Deloitte, supra note 2, at 2.
74. Phil Ball, White Storm: 101 Years of Real Madrid 50 (rev. ed. 2003). Ironically, the meeting took place in a store owned by Catalans. Id. at 45–46.
75. Id. at 50–51. On March 9, the club’s first game was played after the members’ dues were collected. The monthly dues were 2 pesetas. Id.
76. Id. at 52.
77. Id. at 53. The real designation is a mark of royal patronage and permits the club to include a crown in its seal.
78. Id. at 109.
82. Real Madrid Club Statutes, supra note 80, at 7.
84. Real Madrid Club Statutes, supra note 80, at 9–10.
85. Real Madrid 2009 Report, supra note 81, at 32.
for delegates take place in person. Like Barcelona, the Member Assembly also includes a number of extraordinary members, including the 13 members of the Board of Directors, the President, and former club presidents. The Member Assembly is tasked with regular annual matters like approving the budget as well as extraordinary measures like disciplining the President and authorizing the club to borrow money.

The socios elect the President as the head of an electoral slate that includes the President and the Board of Directors. At the time of the election, the President must be Spanish and a member of the club for ten or more consecutive years. When standing for the 4 year term, the candidates for President must provide a substantial bank guarantee. In 2009, the socios of Real Madrid elected Florentino Perez to serve as president. This is currently Perez’s second stint as president. His first stint lasted from 2000 until his resignation in 2006. The latter half of his term was characterized by on the field disappointment. Perez had lured a number of stars from other clubs at great cost in order to create a team of superstars. Since the Champions League victory in 2003, Real Madrid has failed to advance from the first knockout round of the Champions League every year. Despite the

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86. Id.
87. Id.
88. REAL MADRID CLUB STATUTES, supra note 80, at 16–17.
90. REAL MADRID CLUB STATUTES, supra note 81, at 19.
91. Id. For the 2009 race, the guarantee amounted to €57 million. Election Rules, REAL MADRID C.F., http://www.realmadrid.com/cs/Satellite/en/1202772523299/noticia/Noticia/Election_rules.htm (last visited Nov. 13, 2010). At Barcelona, the guarantee does not have to be formalized until just before the Board assumes office. BARCELONA CLUB STATUTES, supra note 44, at 51.
95. Sid Lowe, Lyon Send Cristiano Ronaldo’s Real Madrid Packing, GUARDIAN.CO.UK (Mar. 10, 2010), http://www.guardian.co.uk/football/2010/mar/10/real-
disappointing on the field results, the Galacticos project\(^\text{96}\) was a tremendous commercial success, propelling Real Madrid into the title of the world’s richest club.\(^\text{97}\) When Perez was elected again in 2009, he instituted a similar project. The club took out a €152 million loan to finance purchases in the summer of 2009.\(^\text{98}\) The club surpassed the world record transfer fee\(^\text{99}\) twice in the span of a few weeks. The Brazilian forward Kaka was signed for €68.5 million from AC Milan before the Portuguese forward Cristiano Ronaldo was signed for €93.5 million from Manchester United.\(^\text{100}\) Despite the substantial outlay, the club still failed to advance to the second knockout round of the Champions League or win the Spanish League title. During the summer of 2010, Perez wisely decided to refrain from wild spending on players and hired the accomplished manager Jose Mourinho.\(^\text{101}\)

The club structure of Real Madrid has a number of similar characteristics to the Barcelona structure, especially in regard to fan engagement. Additionally, because of the wealth requirements to gain elective office, the club is usually run by competent businessmen. These businessmen have managed the Real Madrid brand quite well. The commercial success has led to Real Madrid’s placement at the top of the Deloitte Football Money League. However, the same businessmen who have shown such great judgment in building their fortunes often have abandoned good sense for on the field matters. Money is often spent on star offensive players that the manager does not necessarily want and that unbalance the team. The pressure that the fans and the President place on the team can be suffocating, thus resulting in a high turnover rate of its managers. The club has changed managers about every year since the last Champions League trophy. This impatience has a severely negative impact upon developing the

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96. In English, galacticos means star. Real Madrid gained this derisory designation because it had acquired a number of world stars based on marketing potential and apparently without regard as to how so many offensive players could play together.

97. Deloitte, supra note 2, at 9.


99. Unlike in American sports, neither free agency nor trading players is very common. Players usually change clubs when a second club pays a transfer fee to the first club for the registration rights of the player. Cristiano Ronaldo’s transfer was the most paid by any club for a single transfer.

100. Manchester United’s Cristiano Ronaldo Seals Six-Year Deal with Real Madrid, Guardian.co.uk (June 26, 2009), http://www.guardian.co.uk/football/2009/jun/26/cristiano-ronaldo-manchester-united-real-madrid. As of January 1, 2010, Ronaldo has been a huge on the field success while Kaka has struggled with poor form and injury.

product on the field for the medium term. Perez has apparently resolved this problem by appointing Mourinho as manager, but it remains to be seen whether the socios will turn on Mourinho if Real Madrid do not win this year. The short term thinking brought on by officials with relatively short terms can damage the club in the long term.

C. S.A.D.s

At their founding, Real Madrid and Barcelona were not alone in having a socio club structure. Virtually every club in Spain was formed in a similar way. However, the limited success of the other clubs limited the financial performance of the clubs and the clubs lived beyond their financial means. In 1990, the Spanish government required all clubs to form themselves into a Sociedades Anonimas Deportiva (S.A.D.).\(^{102}\) The clubs’ debts were canceled and shares were given to the individual members.\(^ {103}\) Gradually, the shares were collected by wealthy supporters and the poor financial performance continued.\(^{104}\) As of March 2010, the overall debt in the Spanish league is estimated at €3.5 billion.\(^ {105}\) The third most successful club over the past five years, Valencia C.F. owes €600 million.\(^ {106}\) Despite the best intentions of the Spanish government, the required reorganization has done nothing except transfer control from the club’s fans to a few wealthy individuals. The lesson of Spain shows that one type of club structure is not preferable to the other if the same bad management remains in charge.

IV. GERMAN MODEL

The Bundesliga, Germany’s top professional division, has the unique distinction of being the only major European football league where its teams collectively make a profit.\(^ {107}\) The Bundesliga also has the highest average attendance of the five major European leagues in part because of its fan-


103. Hamil, supra note 41, at 479.

104. Id.


106. Id.

friendly measures of low ticket prices and direct fan involvement in club affairs.\textsuperscript{108} This financial strength may have come at the cost of success in the Champions League, as no Bundesliga team has won the Champions League since 2001.\textsuperscript{109} The governing body of German Football, the Deutscher Fußball–Bund, has made certain provisions for governance that has helped lead to such great financial strength. In 1998, the Bundesliga permitted its member clubs to adopt a few different club structures as long as the club controls the new structure (known as the 50+1 Rule).\textsuperscript{110} These provisions allow for a number of unique options in structuring a club.

A. The Traditional Structure (e.V.)

Until the late 1990s, the typical Bundesliga club was organized as an eingetragener verein (e.V.).\textsuperscript{111} The e.V. has legal personhood and provides for restricted legal liability for its members.\textsuperscript{112} The e.V. has a limited set of requirements that includes at least seven members, a board, and a charter.\textsuperscript{113} The e.V. is attractive to a more informal grouping of individuals because it has no capital requirements, no accounts publication requirements, and no fixed organizational structure other than the requirement of a board.\textsuperscript{114} Another advantageous feature of German corporate law allows for an e.V. to own profit-seeking enterprises.\textsuperscript{115} As a football club structure, the e.V. provides a strong voice for the member–fans who ultimately control the club. However, many larger German clubs have moved away from this structure for a variety of reasons. Although the fan input is important, the club management can be distracted by petty issues like parent complaints about their children’s playing time. These minor disputes can paralyze or fracture the management of the club. The minimal central control makes it difficult to make long-term decisions necessary for the large professional club and poses an obstacle when attempting to exploit important commercial revenue streams.

\textsuperscript{108} Id. La Liga attracted an average of 28,478 fans, Ligue 1 (France) 21,034, Serie A (Italy) 25,304 and the Premier League 35,592. These figures are dwarfed by the Bundesliga’s average of 41,904. Id.

\textsuperscript{109} Id. In this period of time, only Spanish (3), Italian (3), English (2), and Portuguese teams have won Champions League titles. However, German teams have made two losing appearances in the final.

\textsuperscript{110} Uwe Wilkesmann & Doris Blutner, \textit{Going Public: The Organizational Restructuring of German Football Clubs}, 3 SOCCER & SOC. 19, 27 (2002).

\textsuperscript{111} Bürgerliches Gesetzbuch [BGB] [Civil Code], Aug. 18, 1896, as amended, §§ 21, 65 (Ger.), \textit{available at} http://bundesrecht.juris.de/bgb/index.html, \textit{translated at} http://bundesrecht.juris.de/englisch_bgb/index.html.

\textsuperscript{112} Id. §§ 31, 31a.

\textsuperscript{113} Id. §§ 25, 26, 56, 57.


\textsuperscript{115} BGB § 22.
B. AGs

A number of clubs have moved to the Aktiengesellschaft (AG) structure, including Bayern Munich, Germany’s most successful club. The AG is the German equivalent of the public limited company or American corporation. An AG is characterized by a dual board structure. The supervisory board (Aufsichtsrat) is elected at the shareholders’ general meeting. The Aufsichtsrat is charged with appointing, consulting and supervising the managing board (Vorstand). A member of the Aufsichtsrat is forbidden from membership on the Vorstand in order to eliminate conflicts of interest. German law also limits the terms of members of the Aufsichtsrat to five years to ensure that the stockholders have the opportunity to choose whether to continue with the management composition. The Vorstand is charged with running the operations of the AG. German law does not provide a limit to the number of members of the Vorstand, but does provide that the term of a member may not exceed five years without reappointment. In AGs with a wide range of business interests, each member of the multi-person Vorstand may be given different responsibilities. The members on the Vorstand act jointly for liability purposes and thus all members of the Vorstand must agree on an action unless the articles of incorporation provide otherwise. Because of its popularity in German business, German law provides a very defined corporate structure for organizations that adopt the AG model.

Bayern Munich serves as a good model for demonstrating the AG structure in football. As Bundesliga rules prevent the club from constituting itself as an AG owned entirely by individual shareholders, Bayern Munich’s...
130,000 members pay an annual fee of €50 to belong to Bayern Munich e.V. The members elect their president—currently Uli Hoeneß—and two vice presidents. By virtue of its 87.4% stake in Bayern Munich AG, which owns the professional part of the club, the e.V. complies with the Bundesliga’s 50+1 control requirement. The remaining stake in the AG is owned by Adidas and Audi. As required by law, Bayern Munich AG is governed by an Aufsichtsrat and a Vorstand. Bayern Munich AG’s articles of incorporation provide for a nine member Aufsichtsrat. Significant members of the Aufsichtsrat include Hoeneß, the chairman of Audi, and the CEO of Adidas. This ensures that the most powerful shareholders can exercise some measure of control over the company. Bayern Munich AG is ultimately run by the four member Vorstand, chaired by Karl-Heinz Rummenigge, a former Bayern Munich player.

Bayern Munich is an exceptionally well–run club from a financial perspective. The club has made a profit for seventeen straight years. In the latest Deloitte Football Money League, Bayern had the fourth highest turnover at €323.0 million. Bayern Munich has managed to achieve this financial prosperity in a balanced manner. Bayern Munich owns its own stadium, the Allianz Arena, which generates 21% of the club’s revenue while keeping ticket prices affordable for fans. Bayern Munich’s commercial sponsorships bring in a football record €172.9 million, which constitutes 553 of the club’s revenue. Most remarkable is that Bayern has managed to pay only 48% of its turnover on wages while still remaining incredibly effective on the field.
Bayern Munich serves as a good model for the AG/e.V. structure, but may be a model that is difficult to emulate for less successful clubs. The club model allows for the fans to feel invested in the club through their membership and express their wishes in electing management. However, the overall AG is somewhat insulated from any disruptions in the e.V. This allows for the professional football operations to be managed more smoothly. The club can raise capital easily through the AG structure, provided that the e.V. retains a controlling stake. Bayern Munich has provided an example of how the AG can accommodate local business leaders, like leaders at Audi and Adidas, who provide corporate advice as well as valuable connections to commercial income. The emphasis on increasing access to commercial revenue has the benefits of increasing money available for the on the field product while keeping ticket prices for the members relatively low. The AG structure does bring the negatives that any public corporation has. The management of the AG can become too isolated from the members of the e.V.\textsuperscript{138} Because the same people, namely former players, tend to be elected to positions of leadership in the club and the AG, there does not tend to be much exposure to different management viewpoints.\textsuperscript{139} Additionally, the presence of the corporate leaders on the AG supervisory board can lead to the club being more business driven than fan–driven. Although Bayern Munich provides a model for a successful football AG, this may be case because of its leading position in German football.

C. GmbHs

The Bundesliga’s reforms also allowed for the club to be constituted in a Gesellschaft mit beschränkter Haftung (GmbH) provided that the club itself owned a majority of the GmbH.\textsuperscript{140} The GmbH is the German equivalent of the American limited liability company.\textsuperscript{141} As a limited liability corporation, the flexibility of the GmbH makes it a favored corporate form for small entities.\textsuperscript{142} The GmbH structure can share many of the same characteristics with the AG form, including the shareholder meeting, Aufsichtsrat, and Vorstand.\textsuperscript{143} However, the GmbH is not required to have an Aufsichtsrat if

\textsuperscript{138} Schalke 04 has addressed this concern by providing that a representative of the official fan group must be on the supervisory board. Wilkesmann & Blutner, supra note 110, at 31.

\textsuperscript{139} The on the field success and financial success of Bayern suggests that Bayern leadership does not need to be changed.

\textsuperscript{140} Wilkesmann & Blutner, supra note 110, at 27–28.

\textsuperscript{141} Drude & Oltmanns, supra note 91, at 94.

\textsuperscript{142} Id.

the articles of incorporation specify a different structure.\textsuperscript{144} The ability of small investors to influence the GmbH is demonstrated by the right of shareholders holding at least 10% of the shares to call a general meeting of the shareholders.\textsuperscript{145} The GmbH is attractive to smaller entities because it provides a great deal of flexibility in the company’s structure but also limits the liability of the shareholders only to the amount of their contribution to the GmbH.\textsuperscript{146} Additionally, the shareholders are permitted to transfer their shares through sale or inheritance.\textsuperscript{147} One aspect of the GmbH that would be very unfavorable as a club structure in football is the provision for capital calls to be made on the shareholders.\textsuperscript{148} Sporting clubs are often unprofitable because of unrealistic dreams or unexpected failures, thus the cash call might be exercised on a regular basis. Although fans may voluntarily meet the financial requirements, they would probably not want to be required to do so.

Very few clubs exist in the GmbH form. The most prominent examples are Bayer Leverkusen and VfL Wolfsburg.\textsuperscript{149} Bayer Leverkusen is a wholly owned subsidiary of the chemical giant Bayer AG while VfL Wolfsburg is owned by Volkswagen.\textsuperscript{150} The GmbH is primarily designed for small, entrepreneurial companies, thus clubs are unlikely to pick this form. If a club is of sufficient size with enough financial resources to consider the GmbH form, additional complexities of the AG are probably not too great of a difficulty to confront. If the club is too small to be an AG, remaining as an e.V. is probably the wisest choice. This dynamic probably explains the rarity of this form among Bundesliga clubs.

D. KGaAs

The third corporate form that is permitted in the Bundesliga is the Kommanditgesellschaft auf Aktien (KGaA).\textsuperscript{151} The KGaA is a form of partnership that combines a general partner with limited partners.\textsuperscript{152} Investors can become limited partners by purchasing shares that can be

\textsuperscript{144} Id. § 52.
\textsuperscript{145} Id. § 50.
\textsuperscript{146} Id. § 13.
\textsuperscript{147} Id. § 15.
\textsuperscript{148} Id. § 26.
\textsuperscript{150} James Callow, Thoughts for Manchester United: How Other Clubs Are Owned, \textsc{Guardian.co.uk} (Mar. 2, 2010), http://www.guardian.co.uk/football/2010/mar/02/manchester-united-ownership-models. This was permitted for historical reasons when the 50+1 rule was adopted. Wilkesmann & Blutner, supra note 110, at 29.
\textsuperscript{151} Wilkesmann & Blutner, supra note 110, at 27.
\textsuperscript{152} \textsc{Hannes Schneider & Martin H. Heidenhain, The German Stock Corporation Act 3} (2000).
traded on a stock exchange. Like the AG, the KGaA has an Aufsichtsrat and shareholders. However, the KGaA lacks a Vorstand. The management is instead entrusted to the general partner who assumes an unlimited personal liability for actions of the KGaA. As a result, the Aufsichtsrat has no influence over appointment of the management of the KGaA, but does retain the supervisory function. The shareholding limited partners retain the rights of AG shareholders to elect the Aufsichtsrat and to vote on extraordinary matters, but many of the shareholders’ resolutions can be vetoed by the general partner. The KGaA form is ideal for a corporation wishing to retain a great deal of control while still being able to raise capital. Although the KGaA general partner retains control, the general partner is subject to unlimited personal liability. German law permits this to be mitigated through the use of an AG or a GmbH as a general partner.

The best example of the KGaA structure in the Bundesliga is BVB Borussia Dortmund GmbH & Co. KGaA. The club, BVB Borussia Dortmund e.V., follows the spirit of the 50+1 rule by maintaining control of the general partner, Borussia Dortmund Geschäftsführungs–GmbH, while selling shares in the KGaA. The GmbH is solely owned by the e.V. The members of BVB Borussia Dortmund e.V. elect an economic council, which also becomes the advisory council of the KGaA. The advisory council then appoints the managing board of the GmbH. As required in a KGaA, BVB Borussia Dortmund GmbH & Co. KGaA does have a supervisory board, but the articles of incorporation do not grant it the power to hire or remove the managing directors of Borussia Dortmund Geschäftsführungs–GmbH or to restrict the directors’ decisions. As a result of this structure, the members of the e.V. ultimately direct the operations of the KGaA, but are several layers removed from any personal liability. The shareholders of the KGaA have essentially no power.

Despite its complicated structure, the GmbH & KGaA has certain interesting aspects. The structure of the club is such that it grants

153. Id.
156. AktG § 278.
157. Id. § 285.
158. One prominent non–football example is Merck KGaA.
159. AktG § 279.
160. Wilkesmann & Blutner, supra note 110, at 27.
161. General Information on Corporate Governance at Borussia Dortmund GmbH & Co. KGaA, BORUSSIA DORTMUND INVESTOR RELATIONS, http://eng.borussia-aktie.de/%9FY%1B%E4%F4%9D (last visited Nov. 14, 2010).
162. Wilkesmann & Blutner, supra note 110, at 32.
163. Id.
164. Id.
considerable autonomy to the managers of the various aspects of the organization. In addition, the members directly have a voice as members of the e.V. and as shareholders, albeit largely symbolic. The share structure allows for the club to raise cash through offerings of equity, provided that the 50+1 control is maintained. However, the KGaA stock has limited appeal for an investor because it grants very little power. The nature of a football club KGaA means that essentially only fans will be interested in any new share offerings by the club. 165

The same autonomy that is granted to the managers of the operations can prove fatal to the club if the proper managers are not chosen. BVB Dortmund is a prime example of this danger. BVB Dortmund initially issued shares in 2000 at €10 per share. 166 As a result of poor financial planning, the club faced bankruptcy in 2005. 167 New management managed to save the club through an outside loan and the generosity of the Dortmund community. 168 As part of these efforts, BVB Dortmund GmbH & Co. KGaA issued approximate €50 million in new shares. 169 The issuance of new capital and the poor history of management have driven the share price down to €2.60. 170 However, this financial rebalancing has come at the expense of on the field success. 171

By any financial measure, German football clubs are the model for the rest of Europe. They collectively make a profit and have the highest attendance in the major European leagues. 172 German clubs provide fans a voice in the governing of their clubs in a variety of unique corporate forms while also allowing for outside investment. The 50+1 rule plus the flexibility in the allowed corporate forms allows clubs to balance commercial interests with the interests of its members. German football

165. Money can be made by investing in football clubs. See infra Part V. However, a club usually seeks investors who are not fans because fans do not have the same type of expectations as an investor. The fan is motivated out of loyalty to the club and probably sees the purchase of shares more like a souvenir than an investment. A fan is motivated by the ability to voice an opinion about the playing capabilities of the team not only in the stands, but also in the boardroom.

166. Basic Data, BORUSSIA INVESTOR RELATIONS, http://eng.borussia-aktie.de/?_%1B%E4%F4%9D (last visited Nov. 14, 2010).


168. Id.

169. Basic Data, supra note 164.

170. Borussia Dortmund (BVB.DE), YAHOO! FINANCE, http://uk.finance.yahoo.com/q?s=BVB.DE (last visited Jan. 9, 2011). The share price has seen a 1.5 Euro increase in the last three months, probably in large part due to BVB Borussia Dortmund’s league leading performance this year.

171. Borussia Dortmund has failed to qualify for the Champions League in each of the last seven seasons, but appears poised to qualify for the 2011/12 Champions League. At the halfway point of the season, Borussia Dortmund led the Bundesliga by ten points.

governance seems to be the envy of Europe, yet this appears to have come at the cost of European success.

VI. ENGLISH MODELS

Despite being the most popular league worldwide, the English Premier League (EPL) has faced a number of problems. The top players that once joined the top EPL teams are now joining the best teams in Spain and Italy. Furthermore, 70% of English clubs lost money in the 2008/09 season.173 Last year saw one of its clubs, Portsmouth, enter bankruptcy during the season.174

The typical English club is constituted as a public limited company (PLC), which is the equivalent of the American corporation. The benefit of a PLC is that it is permitted to sell shares to the general public and trade shares on a stock exchange.175 The PLC is required to have a board of directors, but is only required to have two directors and a secretary.176 The interesting characteristics of the English football clubs is not how they are constituted, but how they are controlled. There are two basic categories of clubs. One type of club is controlled by a rich individual who acts as a benefactor for the club. The other type is controlled by an individual or group of individuals that treats the club like a normal business.

A. The Benefactor Model

1. Chelsea

Chelsea F.C. is a club that has been historically unsuccessful until a renaissance in the last decade and a half. Since the club’s establishment in 1905, Chelsea has played its home matches at Stamford Bridge in West London.177 Despite its wealthy location, Chelsea had won only one league title, in 1955, until its recent run of three titles in the past six years.178

176. Id. at 23.
177. See Robert Booth, Chelsea in Talks to Leave Stamford Bridge and Move to Earls Court, GUARDIAN.CO.UK (Nov. 8, 2010), http://www.guardian.co.uk/football/2010/nov/08/chelsea-leave-stamford-earls-court. Ironically despite its name, Chelsea FC is not located in Chelsea, but in the borough of Fulham.
178. RICK GLANVILL, CHELSEA FC: THE OFFICIAL BIOGRAPHY 370 (rev. ed. 2006); Kevin McCarra, Chelsea and Carlo Ancelotti Are Worthy Winners of Premier League Title,
Although Chelsea fans are among England’s richest, Chelsea has continually had financial difficulties. The blame for this financial hardship can be blamed both on the mediocre on the field results and on the costs incurred in renovating Stamford Bridge. During one financial crisis, the club devised a scheme to thwart the efforts of a developer eager to exploit the valuable property. A nonprofit group, Chelsea Pitch Owners, P.L.C., was created to own the property on which Stamford Bridge sits.\(^\text{179}\) The group is constituted in a manner that caps the voting rights of individual shareholders in order to prevent a takeover.\(^\text{180}\) The club also transferred ownership of the name Chelsea F.C. to Chelsea Pitch Owners, P.L.C. to exercise a check upon later owners wishing to move the club elsewhere.\(^\text{181}\) During the 1990s, Chelsea followed the trend of modernizing English stadia with its Chelsea Village project.\(^\text{182}\) The Chelsea Village project included a hotel and shopping complex that were not as successful as originally planned.\(^\text{183}\) Ultimately, the debts incurred during redevelopment financially crippled the club and later led to its sale.\(^\text{184}\)

Chelsea’s history of financial woes came to an abrupt end in June 2003. As the club prepared to enter bankruptcy, the Russian oil magnate Roman Abramovich purchased the assets of the club for £60 million and assumed the club’s £80 million in debt.\(^\text{185}\) Abramovich has embarked on a remarkable spending spree since assuming control. He is estimated to have spent well over £500 million on the acquisition of players.\(^\text{186}\) As a result of his lavish spending, Chelsea has recorded financial losses every year during his ownership.\(^\text{187}\) Despite a pledge to balance the books by 2010, Chelsea still incurred a £71 million loss on revenue of £209.5 million in 2010.\(^\text{188}\) This actually been an improvement on a record loss of £140 million in

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\(^{179}\) GLANVILLE, \textit{supra} note 178, at 91.
\(^{180}\) \textit{Id.} at 91.
\(^{181}\) \textit{Id.} at 91–92.
\(^{183}\) \textit{Id.}
\(^{184}\) See \textit{id.}
\(^{185}\) \textit{Id.}
\(^{187}\) When Will Chelsea Reach Their Target, \textit{supra} note 186.
Further prudence is shown in the cost cutting that has led to a wage to revenue ratio of 73%. Abramovich has funded these lavish expenditures through £726 million in interest free loans to the club. The looming Fair Play Rules have made this debt extremely unfavorable to maintain on the balance sheet, thus Abramovich has recently converted the loans into equity. As a result of Abramovich’s vast injections of capital into Chelsea, the club has enjoyed by far its most successful period in its history.

2. Manchester City

Manchester City FC has a reputation as an unlucky club that continually languished in the shadow of its more successful neighbor, Manchester United. Manchester City was founded in 1880 and had its most successful period during the 1960s and 1970s. However, since its heyday in the 1970s, Manchester City has failed to win a single trophy and has been relegated. The club lived on a relatively modest income until it was acquired for £81.6 million in June 2007 by the former Prime Minister of Thailand Thaksin Shinawatra. Shinawatra had been exiled from Thailand in 2006 as the result of a coup. Because he wished to return from exile, he wanted a way to generate positive publicity in Thailand. Despite having an estimated £800 million in assets frozen by the coup leaders because of allegations of fraud and corruption, Shinawatra managed to purchase Manchester City as well as fund player purchases in the short term. Eventually his problems in Thailand caught up with him. Shinawatra did not
have sufficient free cash to continue to fund the club. At the same time, the Thai authorities issued warrants for his arrests. The legal actions prompted the Premier League to consider declaring him an unfit and improper owner. With problems mounting, Shinawatra sold the club to the Abu Dhabi United Group.

The Abu Dhabi United Group has generated a great deal of controversy in its short term of ownership, but this controversy has generally centered around the vast sums of money spent by the owners. The Abu Dhabi United Group is headed by Sheikh Mansour bin Zayed al Nahyan. The backing of a prominent member of the Abu Dhabi royal family meant that considerable money was and is available for the club. Sheikh Mansour originally appointed Dr. Sulaiman Al–Fahim to be his agent for the takeover. After Al–Fahim made outlandish and controversial statements about the resources now available to the club, Al Fahim was removed and a more reserved chairman was appointed. In the two years since Sheikh Mansour’s takeover, Manchester City has spent an astounding £300 million on player acquisitions. This lavish spending has had predictable effects upon the financial statements. Manchester City followed a loss of £92.6 million in 2009 with a £121 million loss in 2010. The wage to revenue ratio has alarmingly increased from 95% in 2009 to 107% in 2010. These

199. Id.
200. Hamil & Walters, supra note 197, at 365.
203. Id. Al Fahim later resurfaced as the owner of Portsmouth FC, but sold the majority of his stake after only a few weeks. Jamie Jackson, Sulaiman al-Fahim Says His Work At Portsmouth Is Not Yet Finished, THE GUARDIAN (U.K.), http://www.guardian.co.uk/football/2009/oct/07/sulaiman-al-fahim-portsmouth-ambassador.
204. Scott, supra note 201.
205. How Manchester City Could Break Even, SWISS RAMBLE (Oct. 5, 2010), http://swissramble.blogspot.com/2010/10/how-manchester-city-could-break-even.html. Qualifying for the Champions League would alleviate much of the financial pressure through increased television, ticket, and prize revenue. Another option would be to generate added revenue through their stadium. Manchester City leases the City of Manchester Stadium from the City of Manchester. The terms of the lease initially specified that Manchester City was to pay a percentage of their match day revenue. Manchester City appears to have renegotiated the lease to provide for a flat lease payment. There may be plans for alterations to the stadium. Mike Keegan, Manchester City Give Council An Extra £1m, MANCHESTER EVENING NEWS, Oct. 2, 2010, http://menmedia.co.uk/manchestereveningnews/news/s/1338690_manchester_city_give_council_an_extra_1m.
206. How Manchester City Could Break Even, supra note 205.
are certainly not acceptable under the Fair Play Rules. Sheikh Mansour has directly financed £400 million of these expenditures through equity offerings as well as shareholder loans that are later converted to equity. Despite the lavish spending, Manchester City has still failed to finish in the fourth place spot in the EPL necessary to qualify for the Champions League.

3. Blackburn Rovers

Although Roman Abramovich was the first foreign benefactor in the EPL, the model did not originate with him. Rich men have always funded their local clubs as a type of community service, but the scale seen in the last twenty years is completely new. Despite the benefits of a benefactor, there are dangers associated with it. One of the best examples of the negatives of the benefactor model is Blackburn Rovers F.C. The Blackburn Rovers were acquired in the early 1990s by the steel magnate Jack Walker. Under Walker, Blackburn spent £25 million in the transfer market during the early 1990s, including two British record signings. The spending culminated in the 1994–95 Premier League title. Walker died in 2000, but provided for the club in his will. For a decade, the club was managed by the Jack Walker Trust. The trustees ended up writing off £100 million in loans made by Walker and the trust as well as loaning a further £5 million to the club. The trustees put the club up for sale in 2007, but it took until November 2010 to find a buyer. Due to a lack of certainty as to the future of the club as well as the limited ability of the trust to fund the club, the club has lacked a clear direction since Walker’s death.

207. See Scott, supra note 201.
209. Id. at 75–77.
210. Blackburn are still the only club other than Manchester United, Arsenal, and Chelsea to win the Premier League since its formation in 1992.
213. Conn, Trustees Desperate, supra note 212.
214. Id.
4. Benefactor Model Analysis

As Chelsea, Manchester City, and Blackburn have demonstrated, the benefactor model has positives and negatives. The benefactor can directly inject cash into the club to acquire new and better players.\textsuperscript{215} Because the benefactor holds all the control in the club, the benefactor can make quick decisions for the club without needing to gain the approval of others. However, the strengths of the benefactor model are also its great weakness. Because all of the power rests in one person, the fans can feel marginalized. The benefactor can alleviate most but not all of this feeling through success on the field. The benefactor may be forced to make decisions that are best for the financial health of the club at the expense of the sense of community that the fans have.\textsuperscript{216} In the benefactor model, fans have very few concrete ways of expressing their views on the direction of the club other than at the game.\textsuperscript{217}

The total influence of the benefactor over club affairs can be dangerous. Although the benefactors are typically extremely successful businessmen, sports are a unique type of business. Success in the business world does not necessarily translate into on the field success.\textsuperscript{218} Failing to take the advice of individuals experienced in football team building can lead to on the field failure. Additionally, the influence of the owner can taint the image of the club. Roman Abramovich gained his immense fortune in 1990s Russia by means that could be considered illegal today. Abramovich’s negative reputation has led to rival fans calling Chelsea “Chelski.” A similar type of venom may be targeted at Manchester City because of its Emirati ownership.

The presence of a single man in charge can lead to chaos when that one man becomes incapacitated. This phenomenon can be also observed in politics and in other types of business. Sophisticated businessmen like the benefactors mentioned above obviously have estate planning mechanisms in place of such an eventuality. However, the example of Blackburn shows that when the one man in charge is no longer in charge, there is a leadership void that ensues. That void may be filled by the relatives of the benefactor, but there is no guarantee that these relatives will be as vested in the club’s success as the benefactor. That void may linger for quite a long time and lead to stagnation if the club is unlucky. The power collected in a single

\textsuperscript{215} The Fair Play Regulations will limit this ability.
\textsuperscript{216} The best example of this idea is the raising of ticket prices.
\textsuperscript{217} One exception is the Chelsea Pitch Owners, PLC. Chelsea fans who own shares in Chelsea Pitch Owners, PLC have the ability to exercise a veto over any moving plans that Chelsea may have. See supra notes 179–81.
\textsuperscript{218} An example of this idea can be seen in the Washington Redskins. Owner Dan Snyder is a tremendously successful businessman, but continually spends lavish amounts on the Redskins with very little success to show for it.
benefactor ultimately has the potential to shape the club in a positive or negative manner.

B. The Normal Business Owner Model

The other model of English clubs is what I have termed the normal business owner model. The normal business owner model is a company that is run, or is intended to be run, like a sustainable business. This can take a number of forms depending upon the ownership. The club may be owned by a single individual or group of individuals. In many ways, this can resemble the benefactor model, but the business owner model generally features more restrained spending.

1. Manchester United

Manchester United has dominated English football for the past two decades. Since the Premier League was formed in 1992, Manchester United has won eleven league titles as well as two Champions League trophies. This remarkable run of success has come under the direction of manager Sir Alex Ferguson who has been in charge of Manchester United since 1986.

Manchester United had a humble beginning in 1878 as a club founded by railway workers in the Newton Heath area of Greater Manchester. Only when the club joined the professional Football League in 1892 was the club incorporated. The incorporating members took this step to limit their liability rather than to obtain equity for later sale. For many years, shares were of negligible monetary value. The club periodically issued shares to its fans when it faced financial hardships, but the shares entitled the shareholders only to minor perks like a season ticket.

In the 1950s, Louis Edwards became involved in Manchester United. At first he held only a few shares, but when his company began trading on the stock exchange, Louis Edwards began a quest to buy Manchester United shares. By 1964, Edwards had obtained 2,223 shares, giving him 54% control of the club. Later purchases in the 1970s took the Edwards shareholding up to 74%. Up until the early 1980s, the English Football Association had maintained regulations that forbade paying club directors

221. Conn, supra note 208, at 32.
222. Id.
223. Id. at 32–33.
224. Id. at 31–34.
225. Id. at 34.
226. Id. at 36.
and restricted the dividends that could be paid.\textsuperscript{227} Because of the five pence per share restriction on dividends, Louis Edwards created a right for each shareholder to buy 208 new shares for each existing £1 share that the shareholder owned.\textsuperscript{228} As a result, there were 209 times as many shares to pay out the five pence dividend. By evading the restrictions, Louis Edwards was able to dramatically increase the amount of money paid out of the club in dividends.\textsuperscript{229} Sensing that the club could command a large amount of money, Louis Edwards attempted to sell the club to a number of individuals.\textsuperscript{230} After those plans fell through, Louis Edwards created a holding company for Manchester United and traded shares in the holding company on the London Stock Exchange.\textsuperscript{231} Louis’s son Martin Edwards gradually sold the family’s entire holding in the club, making a profit of approximately £88 million on the initial £800,000 investment.\textsuperscript{232}

Manchester United’s time on the London Stock Exchange was an interesting period. In 1998, Rupert Murdoch launched a £625 million takeover bid that was thwarted by the UK government on competition reasons.\textsuperscript{233} Following the failure of the Murdoch bid, the Irish investors John Magnier and J.P. McManus built up a significant stake in the club by the end of 2001.\textsuperscript{234} In March 2003, the American Malcolm Glazer announced that he had acquired a small stake in the club.\textsuperscript{235} By October 2004, Glazer had raised his stake to 28.11%.\textsuperscript{236} After Glazer acquired Magnier and McManus’s 28.7% shareholding, Glazer continued to acquire shares until he owned the entire club.\textsuperscript{237}

\begin{itemize}
\item \textsuperscript{227} Conn, supra note 208, at 35.
\item \textsuperscript{228} Id.
\item \textsuperscript{229} Id.
\item \textsuperscript{230} Id. at 37–39.
\item \textsuperscript{231} Id. at 41.
The Glazer acquisition was very costly and controversial. The entire cost of acquisition was approximately £831 million. The most controversial part of the takeover was that Glazer transferred loans amounting to £559 million of the acquisition cost to the club. The debt was both in bank loans as well as “payment in kind” loans, which carried an initial interest rate of 14.25%. Unlike a normal loan where interest is repaid regularly, the high interest rate on the “payment in kind” loans continue to accumulate until the time of repayment. As a result, Manchester United went from a financially successful club to one that was heavily laden with debt.

This heavy debt load is very unpopular with fans who believe that the Glazers have diverted the club’s revenue to paying the interest on the debt. The fans worry that the Glazers have not invested sufficient resources in players to win trophies as a result of interest payments on the debt. Because fans have lost their voice in the boardroom, they have organized a number of protests. Just after the takeover, a group of fans formed a new club called FC United of Manchester. In 2010, another round of protests began under the title of Green and Gold. An offshoot of this movement, calling themselves the Red Knights, prepared a £1 billion offer for the club. Ultimately, the Glazer family has stood firm and has steadfastly ignored the protests about their ownership.

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239. Id.

240. Id. The Glazer family issued a £521.7 million bond in January 2010 to alleviate the loan pressure. Owen Gibson, David Gill Says Manchester United Are Healthy Despite Record Losses, GUARDIAN.CO.UK (Oct. 8, 2010), http://www.guardian.co.uk/football/2010/oct/08/david-gill-manchester-united-losses. The bond issue cost resulted in a loss of £83.6 million. Id. One controversial portion of the bond issue allowed the Glazer family to withdraw up to £127 million from the club. Id. Recently the Glazer family announced that they were in the process of paying off the payment in kind loans, which had reached £220 million and were increasing at 16.25% per year. Tariq Panja, Manchester Utd. to Pay Off 220 Million Pounds of Team’s Debt, BLOOMBERG (Nov. 15, 2010), http://www.bloomberg.com/news/2010-11-15/manchester-united-to-pay-off-353-million-of-soccer-team-s-corporate-debt.html.


Despite strong revenue generation, Manchester United faces an uncertain future. A substantial portion of the club’s revenue is allocated to servicing the acquisition debt. At some point the debt may grow to a point where it cannot be financed any further. Alternatively, the club may fail to reach the Champions League, thus depriving the club of a substantial amount of revenue needed to service the debt. The fate of Manchester United rests, as it has for two decades, on manager Sir Alex Ferguson’s ability to generate a winning product on the field. Sir Alex is now in his late sixties and expects to retire within the next few years. The debt has placed an immense pressure on him and his future successor to continue to deliver consistent revenue growth on minimal reinvestment. Ultimately, the Glazer acquisition resolved some short term uncertainty in ownership but has posed new, longer term questions about the financial viability of the club.

2. Liverpool

Liverpool is one of the most famous clubs in world football. The club has won five European cups, more than any other English team. Although Liverpool dominated the 1970s and 1980s, it has failed to win a league title since 1990. Despite the recent failings, the memory of Liverpool’s greatness remains and gives the club considerable worldwide marketing potential.

Liverpool was founded in 1892 by the owner of its stadium, Anfield, to utilize the vacant stadium after the departure of Everton F.C., Liverpool’s other major club. For most of the past half century, the club was under the control of the Moores family. In the mid-2000s, the majority shareholder David Moores decided that he could not compete in the changing climate in football as evidenced by Roman Abramovich’s acquisition of Chelsea. Moores entertained a number of bids, including bids from Thaksin Shinawatra and Dubai Investment Capital, before deciding to sell to Americans Tom Hicks and George Gillett.

The Hicks and Gillett group paid £218 million for the club and took out £350 million in loans to fund the acquisition as well as the planning phases of a new stadium. Despite initially claiming that their takeover was not like the Glazer takeover of Manchester United, Hicks and Gillett managed to transfer about half of the debt to the club. As at Manchester United,
this action did not endear Hicks and Gillett to the Liverpool fans. Hicks and Gillett also were fortunate in the timing of their takeover of the club. A centerpiece of their business plan was to build a new stadium. When the acquisition was completed, Hicks and Gillett decided to revise the existing plans. By the time the plans were revised, the credit crisis made obtaining a loan to build a new stadium virtually impossible. Due in part to the financial pressures from the loan repayment, Hicks and Gillett developed a great deal of animosity toward each other and toward manager Rafael Benitez. Adding to the soap opera between Hicks and Gillett and Benitez was an incident where Hicks’s son sent a derogatory email to a fan and was forced to resign from his club position. The many controversies and perceived lack of investment in the club made Hicks and Gillett very unpopular with the fans.

The financing structure of the takeover deal ultimately proved to be the undoing of Hicks and Gillett. A large portion of the debt was due in April 2010. The holder of the debt, Royal Bank of Scotland (RBS), granted Hicks and Gillett a six month extension in an effort to find a buyer for the club. However, RBS instituted a number of conditions for this extension. Among these conditions were that Martin Broughton, chairman of British Airways, was to be made chairman of the holding company. RBS also required that Liverpool’s articles of association be amended to grant the chairman the exclusive right to appoint or remove directors. Broughton was given the task of finding a buyer that would serve the best interests of the club. The sale was complicated not only by conflicts between the


251. Id. There still are no concrete plans for a new stadium.

252. Id.


255. Id. It is also important to note that RBS is currently owned by the British government.

256. Id.


owners and the manager, but also by Liverpool’s failure to qualify for the 2010/11 Champions League.

As the October deadline approached, a bid from New England Sports Ventures (NESV) emerged. The bid proposed repaying the RBS loan, but left no money for the shares of Hicks and Gillett or the loans to the holding company made by Hicks and Gillett. Hicks and Gillett were not pleased with the bid and attempted to replace two of the five directors of the club’s holding company with Hicks appointees. Broughton then launched a legal action to prevent Hicks and Gillett from blocking the sale to NESV. The English High Court granted Broughton’s request for an injunction. Before the sale could proceed, Hicks obtained a temporary restraining order from a Texas court to block the sale. Broughton responded by obtaining an order from the English High Court preventing the enforcement of the Texas injunction. Eventually, the sale was completed before the RBS deadline. The new owners at NESV have refrained from any public relations disasters in the short time they have owned the club, but so far have not given much indication as to future actions.

3. Arsenal

Although the club has not won anything in five seasons, Arsenal F.C. remains one of the most successful clubs in English football history and one of the most famous names in world football. Arsenal originated as a club of workers at the Woolwich Arsenal in Southeast London. The club later incorporated to limit the liability of the members. The club struggled financially in Southeast London, but came under the influence of Sir Henry Norris in the years leading up to World War I. Sir Henry moved the club

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259. Conn, supra note 257. NESV owns the Boston Red Sox.
260. Id.
261. Id.
262. Id. This case does present interesting questions regarding the ability of a board to make decisions that are not in the best interests of the asset, but not in the best interest of the shareholders.
263. Royal Bank of Scotland, PLC v. Thomas Hicks, [2010] EWHC (Ch) 2568 (Eng.).
265. Royal Bank of Scotland, PLC v. Thomas Hicks, [2010] EWHC (Ch) 2579 (Eng.).
to the Highbury area of North London, where the club has remained every since.\textsuperscript{269} After Sir Henry left the club, Sir Samuel Hill–Wood gained control of the club.\textsuperscript{270} For much of the past eighty years, the Hill–Wood family, including Peter Hill–Wood, the current chairman, has controlled the club.\textsuperscript{271}

Around the same time that Louis Edwards began extracting money from Manchester United, a trader named David Dein purchased 16\% of Arsenal for £292,000.\textsuperscript{272} Dein later increased his shareholding dramatically, but sold a substantial portion of his shares to diamond trader Danny Fiszman throughout the 1990s.\textsuperscript{273} Although he was only vice–chairman of the club, Dein had considerable influence over football matters, including the responsibility for hiring manager Arsene Wenger.\textsuperscript{274} Since hiring Wenger in 1996, Arsenal has won three English Premier League titles and four FA Cups. Because the nature of Arsenal’s stadium constrained further development, plans were made to move the club to a modern stadium which could generate much more revenue. Dein was initially not a supporter of the move, but Fiszman pushed the idea through.\textsuperscript{275} The costs of the stadium project amounted to approximately £390 million.\textsuperscript{276} The project was financed with a combination of £260 million of debt and cash from naming rights, equity offerings, and an advance on commercial revenues.\textsuperscript{277} Although the stadium has resulted in a tremendous increase in revenue, the debt restricted the ability of the club to invest in players until a large amount of the property associated with the project was sold.\textsuperscript{278}

The financial restrictions imposed by the stadium as well as the emergence of Abramovich’s Chelsea led to a fracture in the ownership

\begin{thebibliography}{99}
\bibitem{} Id.
\bibitem{} Id.
\bibitem{} \textit{Id}. The plan provided for some of the debt to be offset by property development sales. The debt was later paid for by a bond. \textit{Arsenal Sell £260m Bond to Help Finance Stadium}, SOCCERNET.COM (July 13, 2006), http://soccernet.espn.go.com/news/story?id=373845&cc=5901.
\end{thebibliography}
group. Dein believed that the club needed a billionaire benefactor for Arsenal to achieve the success it desired. Dein took steps toward that goal by introducing American billionaire Stan Kroenke to the club through the sale of a 10% stake in the club owned by ITV. Dein subsequent sold his 14.58% stake in the club to Uzbek billionaire Alisher Usmanov. Faced with the threat of a takeover by Usmanov, the Arsenal board subsequently decided that Kroenke was the sort that they wanted at the club and made him a board member. In an effort to counter a takeover, the board entered into a lockdown agreement that prevented the board members from selling their shares to a nonapproved person until October 2010. In the midst of the controversy, the Arsenal board also forced out Nina Bracewell-Smith, who holds 15.9% of the shares. As of November 2010, Arsenal’s ownership seems to have reached some measure of stability, with Usmanov owning 27% and Kroenke owning 29.9%. The controversy regarding the ownership of Arsenal greatly concerned many fans. Although Arsenal, through its holding company Arsenal Holdings, PLC, is quoted on the PLUS exchange, shares trade currently

279. Conn, supra note 275.
280. Id.
285. David Conn, Arsenal Step Back From Era of Rich Owners and Offer Fans a Voice, THE GUARDIAN (U.K.), Aug. 18, 2010, http://www.guardian.co.uk/football/david-conn-inside-sport-blog/2010/aug/18/arsenal-kroenke-usmanov-owners-fanshare. It is crucial to note that both are under the 30% threshold that mandates an offer for all of the shares. Kroenke is currently a board member and effectively controls the club with the voting power of the board. One of the major reasons why a full takeover bid has not yet been launched is that Arsenal’s market cap is approximately £681 million. Arsenal Holdings PLC, PLUS, http://www.plusmarketsgroup.com/home.html (search for “Arsenal Holding” link) (last visited Nov. 17, 2010).
trade in excess of £10,000. The price of the Arsenal share is far outside the reach of most fans, but Arsenal has begun an initiative called the Arsenal Fanshare. The Fanshare is a plan that allows fans to make monthly contributions to a pool of money that will buy shares when they become available. If a fan contributes at least 1% of the cost of a share, the fan will be able to vote as a shareholder and attend the shareholder meeting. Although the impact of this initiative will be small in view of the considerable obstacles to blocking a takeover, it is a step toward making Arsenal fans more involved in the decision-making at the club.

Although Arsenal has experienced mixed results on the field, the financial situation is excellent. Arsenal recorded a £56 million profit while reducing the net debt by £154 million in the 2010 annual report. The future is not quite as promising as it may appear at first glance. Manager Arsene Wenger has been responsible for a large part of the impressive performance by finding great value in players, but when Wenger eventually leaves Arsenal, there is no guarantee that his successor will be able to keep it up. Despite Usmanov’s announcement that he plans to raise his stake to just under 30%, the cold war between Kroenke and Usmanov could become hot at any moment. There is also the potential that a takeover bid could be launched by Kroenke or Usmanov or from unknown third party. The danger is that such a takeover bid would likely be financed by debt and thus lead to a Manchester United or Liverpool situation. Arsenal’s ownership appears precariously balanced for the time being.

4. Normal Business Owner Model Analysis

As the examples of Manchester United, Liverpool, and Arsenal show, the business owner model has advantages and disadvantages. The primary advantage of a PLC is the easy ability to raise capital. In a situation like Arsenal or Manchester United before the Glazer takeover, the ability to own

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287. Arsenal Holdings PLC, supra note 285.
289. Id.
290. Id.
291. Cash City Rockers, supra note 278. The financial results were not so promising for the first six months of the 2011 annual report. The club reported a £6.2 million loss before taxes as a result of a decrease in income from property sales, player sales, and less home matches, coupled with an increase in player salaries. Arsenal Holdings, PLC, Results for the Six Months Ended November 30, 2010 (2011), available at http://www.arsenal.com/assets/_files/documents/feb_11/gun__1298899376_Arsenal_Holdings_plc_-_Half_Ye.pdf.
292. Matt Scott, Alisher Usmanov’s Attempt to Increase Arsenal Stake Looks Set to Fail, GUARDIAN.CO.UK (Dec. 21, 2010), http://www.guardian.co.uk/football/2010/dec/21/alisher-usmanov-arsenal-stake. Once a shareholder reaches 30%, the shareholder is obliged to make an offer for the remaining shares of the company. If the bid fails, the shareholder must reduced the stake to just under 30%. See id.
shares in the club allows for fans to play at least a minor role in club decisions. The lack of a benefactor guaranteeing losses necessitates that the club break even every year. Only with the introduction of the Fair Play Rules has this become a benefit. Additionally, the absence of a benefactor drives the owners of the club to maximize all available revenue sources. This added revenue then can be expended upon players and facilities.

As Manchester United and Liverpool have demonstrated, the business owner model has a number of great flaws. The ability of a club to trade on the stock exchange makes it vulnerable to attempts to take over the club because of a limited ability for fans to block the action. The more alarming aspect of the takeovers is the acquisition debt that owners place upon the clubs. This crushing debt diverts money from the on the field expenditures to interest repayment. As Arsenal and Liverpool have shown, the presence of multiple owners has a potential to create a great deal of problems for the club. At Liverpool, the owners were at war with themselves, the manager, and the fans. As a result, the club was thrown into chaos and was a contributing factor to the club’s failure to qualify for the 2010/11 Champions League. The Arsenal crisis was confined to the boardroom, but this was probably due only to the great influence of Arsene Wenger over the club. The lack of one clear decision-maker often creates a void of leadership that can cripple a club. Although the business owner model often gives the fan some amount of involvement in the club, the fan involvement has been almost nonexistent in practice. When the fan feels excluded from the club and sees that large sums of money are diverted to interest payments, dividends, or club bank accounts, the fan can feel quite unhappy with the state of the club.

VI. WHAT MODEL IS BEST?

A number of models for ownership of a football club have been explained above: the socio model of Spain, the variety of mixed models in Germany, and the benefactor and business owner PLC models of England. The variety of corporate forms has grown out of the cultural differences in the business and sports of each nation. It is important to note that every corporate model can meet UEFA’s Financial Fair Play Regulations with competent managers and realistic on the field expectations.

As Europe becomes more integrated, a unified model may be appropriate for UEFA to create a level playing field for clubs competing in UEFA competitions. This UEFA model needs to balance the desire of the club’s fans to influence club decisions about buying and selling players and choosing managers with the commercial realities of the modern club. Aspects of an ideal form can be derived from examining the structures currently in place. The socio model provides for heavy involvement of the fans in club decisions, but is not a great model commercially or financially because equity cannot be sold and management can get distracted in club
politics. The PLC model run by a benefactor provides excellent resources and central direction but leaves fans on the outside. The normal business owner PLC model can allow for fans to gain some voice in club decisions but is very vulnerable to a leveraged buyout. The KGaA model provides fans a small voice, but grants its managers too much leeway while neglecting shareholders. The AG model combines a measure of fan involvement with the ability to raise equity and effectively manage the business operations of the club.

The UEFA model club should adopt the features of the German AG. The fans have control of the underlying club while also allowing for equity investment. The dual board structure characteristic of German AGs allows for much active corporate governance than the single board that exists in PLCs and clubs like Barcelona and Real Madrid. As Bayern Munich demonstrates, the AG best attempts to balance the desire for fan involvement with the commercial and financial realities of the competitive club.

The implementation of the model club structure would be extremely difficult. The process of convincing clubs to adopt this type of structure while remaining within European Union law would be difficult. Although the AG structure might be best for the club, club owners have their own interests to protect. For instance, the Glazer family will never give control of the Manchester United to the fans when they have such a valuable asset and so much debt. For clubs like Barcelona and Real Madrid, the possibility of a conversion is not quite so remote. Because these types of clubs have no single owner, a change in structure would not be so financially painful, but very culturally painful.

Any UEFA regulation must also comply with European Union law, therefore any UEFA rule must be carefully drafted. Any move to enforce a model club structure would most likely violate European Union law. The implementation efforts would first require the European Union to grant a general sporting exemption in European Union law or, at the very least, an ad hoc exemption. Despite football’s unique place in European culture, the European Union refuses to accept UEFA’s advocacy for an exemption and likely will continue to do so in the future. Although UEFA may argue that this is the best way to balance fan interest and commercial realities, the European Union is extremely unlikely to agree to implement a plan that effectively deprives many owners of a multi–million Euro asset.

293. The European Union has considered this issue, but has chosen to reject any further steps at this time. See, e.g., Commission Communication, supra note 17, at 12. However, there continue to be investigations into these areas. See Commissioner Vassilieau, supra note 13.
VII. CONCLUSION

As the financial crisis in football worsens, the Financial Fair Play Rules have provided a basis to consider what types of football club structures might be preferable for a financially sustainable club. Although it may be practically impossible to force significant changes without governmental involvement, adopting a German style model is the preferable option. The German model provides the optimum amount of fan involvement in club affairs while providing the benefits of centralized control. Despite different club structures, a financially sustainable club is possible with the right leadership and realistic expectations. Revenue in football has saturated the European market and the tantalizing North American and Asian markets may never by fully exploited by clubs. It is important that clubs exercise sufficient discipline to ensure that the club exists for the fans of the future.
INTRODUCTION

International corporate governance changes swiftly amid major global economic developments; these changes are made from country to country—and now these changes must accommodate an international global marketplace. Today, as the pressures of an increasingly interdependent global economy are thrust upon the corporate world, corporations and boards of directors must be cautious of every decision they make—and of the risks associated with such decisions. “Corporate governance involves a set of relationships between a company’s management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.”1 Corporations today are no longer simply domestic entities;

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instead, many corporations are now expanding into international markets and adding international representatives to their boards. Now more than ever companies and their boards of directors must place an increased emphasis on their corporate governance procedures. Boards of directors face numerous challenges in today’s struggling economy. Boards of directors are faced with the tasks of planning a corporation’s long-term strategy, monitoring performance and compliance, determining executive compensation, dealing with risk management, handling shareholder proxy access, and working effectively as a functioning board of directors. As the global economy undergoes major changes, governmental agencies in the U.S. and abroad are looking into these issues in hopes of stabilizing and developing the global economy. Previously, corporate governance issues in the U.S. have dealt with actions of the board of directors in the face of hostile takeover bids and whether the board fulfilled their fiduciary duties owed to their shareholders under the “Business Judgment Rule”—the fiduciary duties of loyalty and due care. Since the 2007–2008 financial crisis, these issues now represent only a small part of the puzzle that is corporate governance.

Part I presents a general background of corporate governance measures and principles. This section discusses the importance of the “Business Judgment Rule,” the “Enhanced Scrutiny Test,” and the “Entire Fairness Test.” This section also discusses the background of corporate governance in the areas of shareholder proxy access, executive compensation, risk management, and the goals sought by regulation in such areas on an international scale. Part I then discusses the controversy surrounding current corporate governance issues. Part II discusses and compares the board of directors’ duties regarding the issues of executive remuneration and risk management. Parts III and IV discuss the trends of international corporate governance, the impact it will have globally, and potential resolutions to the upcoming problems that face international corporate governance. Part IV will also discuss potential solutions to the problems facing corporations in the United States and European Union.

3. Memorandum from Wachtell, Lipton, Rosen & Katz, Risk Management and the Board of Directors (Nov. 2009) [hereinafter Board of Directors].
4. Id.
5. Memorandum from Wachtell, Lipton, Rosen & Katz on Some Thoughts for Boards of Directors in 2010 (Nov. 30, 2009) at 1–3 [hereinafter Thoughts for Boards].
7. “The business and affairs of every corporation . . . . shall be managed by or under the direction of a board of directors . . . .” DEL. CODE ANN. tit. 8, § 141(a) (West 2010).
9. See infra Part I, Part II.
10. See infra Part III, Part IV.
I. GENERAL PRINCIPLES AND HISTORY OF CORPORATE GOVERNANCE MEASURES

A. United States

United States corporate governance principles are "grounded in the common interests of shareholders, boards and management teams in the corporate objective of long-term value creation, the accountability of management to the board, and ultimately the accountability of the board to shareholders for such long-term value creation."\(^\text{11}\) Stockholders are suppliers of capital for corporations and are expected "to want corporate efficiency, honesty, productivity and profitability."\(^\text{12}\) The corporate governance responsibilities for a board of directors are cumbersome and require that directors act as the primary vehicle for oversight and accountability.\(^\text{13}\) In dealing with this daunting task, directors are faced with tough decisions: how to organize the board, how the board should function, and what priorities the board should set for the corporation.\(^\text{14}\)

Corporate governance in the United States typically follows the lead of the Delaware Chancery Court and the Delaware General Corporation Law ("DGCL")—which because of its well established legal history of dealing with the complexities of corporate and business law has been established as a leading authority in the field.\(^\text{15}\) Corporations choose to incorporate in Delaware because of the flexibility allowed by the DGCL.\(^\text{16}\) In order to understand the general principles and background of corporate governance in Delaware and the United States, the first step is to understand the DGCL statute and the goals it attempts to accomplish through established case law. The relationship between the board of directors of a corporation and its shareholders is akin to an "agency" relationship between an agent and principal.\(^\text{17}\) Courts have commonly recognized that corporations are organized and continued primarily for the profit of the stockholders.\(^\text{18}\)

\(^{11}\) NAT’L ASS’N OF CORP. DIRS., KEY AGREED PRINCIPLES TO STRENGTHEN CORPORATE GOVERNANCE FOR U.S. PUBLICLY TRADED COMPANIES 5 (2008) [hereinafter KEY AGREED PRINCIPLES].

\(^{12}\) MANTYSAAARI, supra note 1, at 1.

\(^{13}\) KEY AGREED PRINCIPLES, supra note 11, at 5.

\(^{14}\) Id.


\(^{16}\) See id.

\(^{17}\) See RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.").

\(^{18}\) See Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (“The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the
Within this agency relationship, laws are set in place in order to protect shareholders from abuse of the agency relationship. Actions of the board of directors must align with specific standards of conduct; they must fulfill the fiduciary duty of care and the duty of loyalty. Delaware Courts—along with other U.S. courts—follow three different standards of review. These standards of review are the: (1) Business Judgment Rule, (2) Entire Fairness Test, and (3) Enhanced Scrutiny Test. The “Business Judgment Rule” protects decisions made by the board of directors. There are also pre-conditions that must be met before the board is accorded protection under the “Business Judgment Rule.” These pre-conditions are five-fold. First, the board must exercise “process due-care” in coming to an informed decision. Second, the board must exercise reasonable business judgment. Third, the board must be composed of disinterested and independent directors, which establishes that the board had no conflict of interest. Fourth, there must be an absence of fraud or illegality in the transaction made by the board to demonstrate that the board acted lawfully. Lastly, the board must show that the decision is attributed to any rational business purpose. However, when fraud, illegality, self-dealing or gross negligence are present, the “Business Judgment Rule” does not apply; instead, Courts apply the “Entire Fairness Test.”

The “Entire Fairness Test” has two parts: fair dealing and fair price. Fair dealing relates to the circumstances surrounding the transaction: the timing, or, in other words “how it was initiated, structured, negotiated, disclosed to the directors and how approval from the directors and stockholders were obtained.” On the other hand, fair price looks towards the economic and financial considerations of a proposed course of action.
In determining the overall fairness of a transaction entered into by a board, both parts of the “Entire Fairness Test” must be met.\(^\text{34}\) Furthermore, the “Entire Fairness Test” requires a duty of candor as part of fair dealing.\(^\text{35}\) However, when a board makes a decision that looks self–interested, Delaware courts review using the “Enhanced Scrutiny Test.”\(^\text{36}\)

The “Enhanced Scrutiny Test” is a takeover test, which, in order to satisfy, the board must “show that they had “reasonable grounds for believing that a danger to corporate policy and effectiveness existed . . . .”\(^\text{37}\) This burden can be satisfied by a showing of “good faith”\(^\text{38}\) and “reasonable investigation.”\(^\text{38}\) Under the “Enhanced Scrutiny Test,” the decision of the board must be reasonable in relation to the threat posed.\(^\text{39}\) Additionally, boards must show that their chosen action falls within the “range of reasonableness” in proportion to the threat posed.\(^\text{40}\) If the court finds that the board satisfied this burden in showing that the decision was within the range of reasonableness, then the “Business Judgment Rule” applies.\(^\text{41}\) However, if the court finds the decision of the board to be “draconian,” the “Entire Fairness Test” applies.\(^\text{42}\) In addition to the takeover circumstances that implicate the Unocal “Enhanced Scrutiny Test,” another specific subset of facts triggers application of the test. When it becomes apparent that the breakup of a company is inevitable due to takeover bids, and the board of directors then recognizes that the company is for sale, the board’s duties owed to the stockholders changes from the preservation of the company as a corporate entity to the maximization of the company’s value at a sale for the stockholder’s benefit.\(^\text{43}\) At this point, “[t]he directors’ role changes from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.”\(^\text{44}\)

In an effort to protect the stockholders from directors who may abuse the corporation, Delaware Courts have applied the DGCL to preserve and any other elements that affect the intrinsic or inherent value of a company’s stock.”\(^\text{44}\) Id. at 711.

\(^{34}\) Id.

\(^{35}\) Weinberger, 457 A.2d at 701.

\(^{36}\) See Unocal, 493 A.2d at 954.


\(^{38}\) Id. at 555.

\(^{39}\) Unocal, 493 A.2d 955 (applying the “Enhanced Scrutiny Test” is when board decisions pertain to defensive measures implemented during or resulting from a perceived hostile takeover threat). See also id. (“Examples of such concerns may include: inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on ‘constituencies’ other than shareholders…, the risk of nonconsummation, and the quality of securities being offered in the exchange.”).


\(^{41}\) Id. at 1388.

\(^{42}\) Id. at 1387.


\(^{44}\) Id. at 182.
stockholder rights. Stockholders are entitled to be present at annual or special meetings of the corporation—either by means of remote communication or by proxy. Stockholders have the right to vote at meetings and make amendments to the corporation’s Articles of Incorporation. A survey performed by Directorship Magazine shows that since the recent financial crisis, investors have lost confidence in corporate boards.

These protections are often helpful; yet, it is often easier for small investors to remain passive in corporations due to the cost of becoming active within the corporation. Stockholder activism is commonly regarded as a positive aspect of corporate governance; however, much of the time stockholder activism can be regarded as unnecessary due to the lack of sufficient knowledge and expertise in knowing how to vote or what they are voting on.

1. The Corporate Governance Marketplace Today – Resulting Regulation from the Wild Rollercoaster Ride of the Last Decade

Since 2000, market activity has been a rollercoaster ride of peaks and valleys. This has resulted in advancements in the area of corporate governance. With the “dot-com” bubble bursting between 2000 and 2001, the terrorist attacks of September 11th, 2001, and the Enron and WorldCom corporate scandals—the markets were extremely unstable. Investors began to lose confidence in public companies, public accounting, and in the marketplace itself as more and more large companies filed for bankruptcy. The market was able to briefly regain some stability until the financial crisis of 2008 ensued and resulted in one of the deepest recessions in United States history. As market recovery continues to remain a focus for

45. See generally About Agency, supra note 15.
47. tit. 8, § 212 (West 2010).
48. tit. 8, § 242(b)(2) (West 2010).
50. Mantysaari, supra note 1, at 1.
51. Id.
52. Id.
54. Id.
55. Id. at 11.
56. Id.
regulators and investors in the United States, market volatility presently continues and investors remain wary of what the future holds.\(^{57}\) In particular, investors are concerned with the pace and sustainability of the economic recovery in the United States and Europe.\(^{58}\)

As a result of the events of the last decade, there has been increased corporate governance and disclosure regulation. In an effort to restore investor confidence in capital markets, Congress adopted the Sarbanes–Oxley Act of 2002.\(^\text{59}\) Sarbanes–Oxley addressed corporate governance in several significant ways.\(^\text{60}\) The Act established the Public Company Accounting Oversight Board, thereby regulating public accounting companies used by publicly–listed companies; increased independence standards for auditors; required certification by officers for quarterly and annual reports; and established up–to–date reporting rules expanding the range of current reports.\(^\text{61}\) Since Sarbanes–Oxley, the Securities and Exchange Commission (“SEC”) has implemented numerous additional public disclosure requirements for public companies.\(^\text{62}\) Since the SEC’s adoption of these rules, companies must now provide disclosure for “new executive compensation and related person transactions,”\(^\text{63}\) notice and access of proxy materials for shareholder meetings,\(^\text{64}\) and “enhanced proxy statement disclosure regarding risk management, compensation consultants, background and qualification of directors, diversity of directors, board leadership structure, and real-time disclosure of shareholder meeting results.”\(^\text{65}\) Companies must also provide proxy access policies that allow flexibility for longer–term shareholders or shareholder groups that hold at least three–percent of the company’s stock for at least three years in order to gain access to a company’s proxy statement.\(^\text{66}\)

In addition to Sarbanes–Oxley’s additional requirements, the New York Stock Exchange (“NYSE”) made enhancements to its corporate governance requirements.

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57. Id. at 12.
60. See generally id.
62. Id. at 19.
regulations in the NYSE Listing Requirements at the behest of the SEC.\textsuperscript{67} The NYSE also requires that the make–up of boards be comprised of a majority of independent directors;\textsuperscript{68} the independent directors meet regularly without management directors for executive meetings held on a regular basis;\textsuperscript{69} companies issue charters for nominating governance, compensation and audit committees, where each committee holds specific responsibilities for various issues within each committee’s respective subject area;\textsuperscript{70} companies gain shareholder approval for all equity compensation plans;\textsuperscript{71} the CEO annually complete certification of compliance with corporate governance standards;\textsuperscript{72} the company include disclosure requirements within proxy materials or annual reports of different corporate governance requirements;\textsuperscript{73} and companies provide disclosure of several corporate governance matters on the company’s website.\textsuperscript{74} On a similar note, Delaware General Corporation Law made several changes affecting the governance structure of corporations.\textsuperscript{75} One of the most notable changes involved permitting proxy access in a corporation’s bylaws.\textsuperscript{76}

As swiftly as Sarbanes–Oxley followed the Enron and WorldCom scandals, other congressional legislation quickly followed the financial crisis of 2008 and 2009. Specifically, the “Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010” (“Dodd–Frank”) made numerous significant changes to corporate governance in the United States.\textsuperscript{77} The changes arising from Dodd–Frank mainly addressed financial reform issues arising from the economic crisis of 2008 and 2009; numerous topics of corporate governance also were addressed in the legislation, including public disclosure of compensation, “say on pay,” proxy access, board

\textsuperscript{67} Report of N.Y.S.E., supra note 53, at 18.
\textsuperscript{69} See N.Y.S.E., supra note 68, § 303A.03; see also Report of N.Y.S.E., supra note 53, at 18.
\textsuperscript{70} See N.Y.S.E., supra note 68, § 303A.04–07; see also Report of N.Y.S.E., supra note 53, at 18–19.
\textsuperscript{71} See N.Y.S.E., supra note 68, § 303A.08; see also Report of N.Y.S.E., supra note 53, at 19.
\textsuperscript{72} See N.Y.S.E., supra note 68, § 303A.12; see also Report of N.Y.S.E., supra note 53, at 19.
\textsuperscript{73} See N.Y.S.E., supra note 68, § 303A.00, .02–05, .07, .09–11; see also Report of N.Y.S.E., supra note 53, at 19.
\textsuperscript{74} See N.Y.S.E., supra note 68, § 303A.04–05, .07(b), .09–10; see also Report of N.Y.S.E., supra note 53, at 19.
\textsuperscript{75} See generally Report of N.Y.S.E., supra note 53, at 21.
\textsuperscript{76} See Del. Code Ann. tit. 8, § 112 (West 2010); see generally Report of N.Y.S.E., supra note 53, at 21.
composition, and independence of committee members. Specifically in the area of corporate governance, Dodd–Frank authorizes the SEC to adopt rules regarding proxy access, requires enhanced stock exchange listing standards on independence of compensation committee members and hiring of advisors, mandates further disclosure of the relationship between financial performance and executive compensation, and demands corporate policies regarding clawback of executive compensation in particular situations. The implementation of new corporate governance regulations—whether followed under the DGCL, NYSE, SEC or Congress—attempt to provide greater investor confidences in the capital markets. Resulting impacts from such regulations extend beyond the United States’ borders and have a profound impact globally on international firms.

B. European Union History, General Principles, and Goals

The principal focus of European Union company law is the freedom of establishment. Corporate governance regulation in the EU focuses on: (1) freedom to decide what form the company should take in the EU, (2) widespread coordination of regulating securities markets and financial reporting in the EU, and (3) EU binding rules and non–binding Commission recommendations. Company law in the EU has a minimal number of binding rules that make up the field of corporate governance. Even so, regulations exist in the area of share capital and mergers or divisions which are within the breadth of EU law. In addition to the binding rules, non–binding EU Commission recommendations exist relating to the role and compensation of directors, quality assurance baseline standards for statutory audits and the independent status of the statutory auditors. The European Community Treaty (“EC Treaty”) acts in furtherance of the principal goal of EU company law by prohibiting any restrictions on the freedom of establishment of citizens of Member States in the territory of another Member State within the EU.

Early on, European Community institutions were wrought with disorganization; no clear–cut goal or agreed upon rationale for company law

79. See Dodd–Frank Act.
80. MANTYSAARI, supra note 1, at 35.
81. Id. (“The disclosure of information to investors is largely governed by derivative EU law.”).
82. Id.
83. Id.
84. Id.
85. Id.
After several Company Law Directives failed, the Commission took aim at passing a Statute for the European Union. Starting in the 1990s, the EU company law legislative process has changed allowing more political deference to national laws of Member States, including more references to national rules of Member States in the legislative proposals. The legal rationale behind this methodology lies in the principle of “subsidiarity.”

This harmonization approach allowed for more flexibility which ultimately “resulted in the adoption of the Regulation of the European Company Statute (Societas Europaea) in October 2001.” Presently, the traditional continental European approach to corporate governance is commonly followed, which assumes that companies will finance privately opposed to the more recent trend of corporations publicly financing through capital markets. However, companies are regulated and must still follow mandatory provisions of Company Company Law, which were put into effect to protect minority stockholders and creditors. In the past, EU legislation concentrated on the maintenance and alteration of capital, representation of the company and its transactions with third parties, financial reporting standards, and issues regarding disclosure of information to investors.

In 2003 the Commission proposed its Action Plan. The goals of the plan sought: (1) strengthening stockholders’ rights along with providing protection for employees, creditors and other parties interacting with companies and (2) promoting efficiency and competitiveness of business, specifically targeting issues of cross-border transactions. The Commission believed that the European regulatory framework required modernization and explained that its reasoning occurred because of: (i) the increasing trend of European companies operating cross-border within the internal market;

87. See MANTYSAARI, supra note 1, at 37.
88. Id. at 37.
89. Id. at 38.
90. EC Treaty art. 5 (as in effect 2006) (now TFEU art. 5) (“In areas which do not fall within its exclusive competence, the Community shall take action . . . only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”). GERT-JAN VOSSESTEIN, MODERNISING COMPANY LAW AND ENHANCING CORPORATE GOVERNANCE IN THE EUROPEAN UNION-A PLAN TO MOVE FORWARD 19 (2010) [hereinafter MODERNISING COMPANY LAW AND ENHANCING CORPORATE GOVERNANCE].
91. MANTYSAARI, supra note 1, at 38. See also Council Regulation 2157/2001/EC, of 8 October 2001 on the Statute for a European company (SE), 2001 O.J. (L 294) 1.
92. MANTYSAARI, supra note 1, at 47.
93. Id.
94. Id. at 47–48.
96. Id. at 8–9.
(ii) the ongoing incorporation of European capital markets; (iii) the high-speed of growth in new information and communication technologies; (iv) the imminent expansion of the European Union to ten new Member States; and (v) the disastrous effect of financial scandals.97

European Company Law protects stockholders through the use of directives.98 These directives are implemented within EU member states “to the extent necessary”99 with the perspective that such stockholder safeguarding directives will become standard and mutually similar throughout the European Community.100 In following EU Company Law and the objective of freedom of establishment, the EC Treaty also provides that any procedure which would stand in the path of the freedom of establishment, by means of directives will be abolished.101 The principles behind the adoption of Article 44(2)(g) of the EC Treaty rest on the premise that allowing freedom of establishment based on a minimum number of requirements allows easier start–up for companies to establish themselves in different Member States where the regulatory structure is comparable; they also rest upon the idea of building trust between firms which enter into cross-border economic relationships102 by “ensuring legal certainty in intra-Community operations” due to the existence of common safeguards.103

In addition to freedom of establishment, European Union Company Law seeks to accomplish many other goals. European Union company law seeks to remove obstacles to trade that interfere with the internal market and adjust the structures of production to the European Community (“Community”) sphere.104 Companies transact business beyond national boundaries, creating choice of law problems; these conflicts between laws of conflicting Member States give rise to legal and cultural difficulties.105 In order to help foster efficiency and competitiveness of businesses, the Commission recommended implementing EU initiatives that tackle only specific cross–border issues, where subsidiarity cannot be accomplished and Community intervention is the only means to accomplish the goals.106 Also, these initiatives allow for reduced uncertainties stemming from the harmonization of the defined national issues.107 Companies operating within

97. Id. at 6–7.
98. EC Treaty art. 44(1) (now TFEU art. 50).
99. EC Treaty art. 44(g) (now TFEU art. 50(2)(g)).
100. MANTYSAARI, supra note 1, at 35.
101. EC Treaty art. 44(2)(c) (now TFEU art. 50(2)(c)).
102. Id.
103. MANTYSAARI, supra note 1, at 36.
104. Id.
105. Id.
106. Modernising Company Law, supra note 95, at 9 (“e.g. cross-border merger or transfer of seat, cross-border impediments to the exercise of shareholder rights.”).
107. Id.
the Member States are also given flexibility in circumstances where governance structures are considered comparable.\textsuperscript{108}

In responding to stockholder protection, EU Company Law states that “it is necessary to ensure minimum equivalent protection for both shareholders and creditors of companies as well as other people doing business with companies.”\textsuperscript{109} EU legislation finds it necessary to guarantee that the “principles of equal treatment of shareholders in the same position are observed and harmonised.”\textsuperscript{110} This is necessary to guarantee that competition within the internal market is not disrupted by differences in the laws of Member States so that Community companies may be able to compete equally in global markets.\textsuperscript{111} Along those same guidelines, legal hurdles that hinder company development on the European front must be eliminated to allow companies to operate throughout Europe in the same fashion they would in their Member State.\textsuperscript{112} Another important objective of EU company law is ensuring protection of investors and the safeguarding of investor confidence in the financial markets.\textsuperscript{113} The Commission provided that strengthening shareholder rights and third parties protection was a key objective in its Action Plan.\textsuperscript{114} The Commission indicated this objective to be at the core of company law policy and that effectuating a sound framework for protection of shareholders and third parties creates a high degree of confidence in the business relationship.\textsuperscript{115} The relevancy of this protectionism increases continually due to the increased mobility of companies within EU Member States.\textsuperscript{116} The Commission provided guidelines to aide European companies in achieving and maintaining efficient protection for stockholders and third parties.\textsuperscript{117} These guidelines provide for the Commission to contemplate new initiatives aimed at shareholder rights and providing clarity as to duties of management.\textsuperscript{118} The proposed guidelines also provide for a distinction between the different

\textsuperscript{108} Id.


\textsuperscript{111} \textsc{mantysaari}, supra note 1, at 36.

\textsuperscript{112} Id. See also Council Regulation 2157/2001/EC, recital 6, 2001 O.J. (L 294) 1.


\textsuperscript{114} \textit{See} Modernising Company Law, supra note 95, at 8.

\textsuperscript{115} Id.

\textsuperscript{116} Id.

\textsuperscript{117} Id.

\textsuperscript{118} Id. (“The provisions related to the protection of creditors should be modernised with a view of maintaining a high quality framework.”).
categories of companies and provide that company law should facilitate and support the use of current information and communication technologies by companies in their various relationships with stockholders and third parties. Lastly, the Commission sought protection of stockholders and third parties by implementation of carefully constructed, yet limited amount of measures designed at preventing fraud and abuse of legal forms. Aimed towards boosting investor confidence, the Commission recommended that “a common approach should be adopted at EU level with respect to a few essential rules and adequate coordination of corporate governance codes should be ensured.”

After the “dot–com” bubble burst and the financial crisis of Enron and WorldCom, the Commission took aim at enhancing corporate governance disclosure at the EU company level. Under the Action Plan, the Commission recommended specific disclosures that should be required in a company “Annual Corporate Governance Statement.” Specifically, listed companies should be required to include at least the following items: (1) “the operation of the shareholder meeting and its key powers, and the description of the shareholder rights and how they can be exercised;” (2) the make–up and functionality of the board of directors and its committees; (3) the majority shareholders whom own major holdings and those shareholders voting rights, control rights and key agreements; (4) other direct and indirect relationships among major shareholders and the company; (5) any and all material transactions with other related parties; (6) existence and character of a risk management system; and (7) “a reference code on corporate governance, designated for use at national level, with which the company complies or in relation to which it explains deviations.”

These suggestions work side–by–side with strengthening stockholders’ rights because such disclosures allow for access to information by investors. Stockholders of listed companies should be furnished relevant information regarding the company by use of electronic means in a timely manner in advance of the corporation’s Annual General Meetings. The Commission

119. Id. (“A more stringent framework is desirable for listed companies and companies which have publicly raised capital. They should be subject to a certain number of appropriate detailed rules, in particular in the area of disclosure.”).
120. Modernising Company Law, supra note 95, at 8.
121. Id. at 9.
122. Id. at 12.
123. See generally id.
124. Id.
125. Id.
bases its strengthening of shareholders’ rights on the principles of providing shareholders with information regarding their numerous existing rights and how these rights are utilized, as well as developing the services essential to ensure that these rights are effectively employed.\textsuperscript{128} Stockholders require disclosure as a safeguard to ensure the boards of companies they invest in are not being mismanaged. One responsibility of a board of directors is ensuring the shareholder–director relationship remain strong, since it is essential if companies are to continue to raise capital at the lowest cost through public financing. In a continued effort to restore confidence in the markets, the Commission enhanced directors’ responsibilities by holding the entire board collectively responsible for key non–financial and financial statements.\textsuperscript{129}

The Commission’s Action Plan recommended a modernization of the board of directors as part of its plan to modernize EU corporate governance policy.\textsuperscript{130} The Commission recommended three areas for modernization: (1) “Board composition,”\textsuperscript{131} (2) “Directors’ remuneration,”\textsuperscript{132} and (3) “Directors’ responsibilities.”\textsuperscript{133} The Commission recognized the importance of implementing new measures designed primarily for restoration of confidence in the markets by its adoption of Commission Directive 2010/43/EU on July 1, 2010.\textsuperscript{134} One key area where the Commission recommended modernizing deals was with regard to conflicts of interest among executive directors, which are directors who are paid for the work they perform on the board.\textsuperscript{135} Decisions which could be considered within the spectrum of “conflict of interest” should instead be left to non–executive or supervisory directors who are in the majority independent.\textsuperscript{136} As far as nomination of directors for appointment under national law, the Commission recommended that this responsibility be assigned to a group mainly comprised of executive directors because of their vast knowledge of the obstacles that face the company and the experience and skill required to

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\textsuperscript{128}. Modernising Company Law, supra note 95, at 14.
\textsuperscript{129}. Commission Directive 2010/43; see also Modernising Company Law, supra note 95, at 16.
\textsuperscript{130}. See generally Modernising Company Law, supra note 95, at 15.
\textsuperscript{131}. Id.
\textsuperscript{132}. Id. at 16.
\textsuperscript{133}. Id.
\textsuperscript{135}. See, e.g., Modernising Company Law, supra note 95, at 15 (“remuneration of directors, and supervision of the audit of a company’s accounts.”).
\end{flushleft}
handle these obstacles.\textsuperscript{137} In an attempt to ensure that a satisfactory control mechanism is in place, the EU adopted requiring a permanent compliance function and an internal audit function.\textsuperscript{138} The goal of the audit function is to ensure and evaluate that the different control mechanisms which the company implemented are followed.\textsuperscript{139}

In addition to the enforcement of the control mechanisms, the Commission recommended that the appropriate regulatory scheme regarding directors’ remuneration should consist of four key components.\textsuperscript{140} The first two key components involve disclosure of the “remuneration policy in the annual accounts [and] disclosure of details of remuneration of individual directors in the annual accounts.”\textsuperscript{141} The last two components involve “prior approval by the shareholder meeting of share and share option schemes in which directors participate [and] proper recognition in the annual accounts of the costs of such schemes for the company.”\textsuperscript{142}

C. Lithuania

Member States within the EU have their own national laws and their own corporate governance regulations... One of these member states is Lithuania. The Republic of Lithuania amends its “Law on Companies” as needed, and has amended such Company Law Company Law as recently as July 17, 2009.\textsuperscript{143} In accordance with EU Company Law, the National Stock Exchange of Lithuania Corporate Governance Code provides a recommended framework of measures companies in the Republic of Lithuania should follow.\textsuperscript{144} The objectives of the Code are to provide basic principles which seek to ensure transparent management and operation for both domestic and foreign investors; to encourage listed companies to continuously improve their governance framework and continuously

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137. \textit{See Modernising Company Law, supra note 95, at 15.} \\
139. \textit{See Modernising Company Law, supra note 95, at 15 (“In view of the recent accounting scandals, special emphasis will be placed on the audit committee [or equivalent body], with a view to fostering the key role it should play in supervising the audit function, both in its external aspects [selecting the external auditor for appointment by shareholders, monitoring the relationship with the external auditor including non-audit fees if any] and its internal aspects [reviewing the accounting policies, and monitoring the internal audit procedures and the company’s risk management system]”); see also Commission Directive 2010/43.} \\
140. \textit{See Modernising Company Law, supra note 95, at 16.} \\
141. \textit{Modernising Company Law and Enhancing Corporate Governance, supra note 90, at 16 (alteration in original).} \\
142. \textit{Id. (alteration in original).} \\
143. \textit{Law on Companies, 2000 07 13, No. VIII-1835, as amended by 2009 07 17, No. XI–354 (Lith.).} \\
\end{flushleft}
improve disclosure of information; to promote listed companies to develop quality management as a method of increasing performance of the company; to promote activities which involve the listed companies at the international level while at the same time improve domestic and foreign investor confidence, as well as the confidences of stakeholders within the companies and their corporate governance structure; and to promote internationally the activities of the National Stock Exchange of Lithuania to improve domestic and foreign investor confidence in the Lithuanian capital markets.\textsuperscript{145} The goals of Company Law in the Republic of Lithuania are aligned with those of EU Company Law. Similar to EU Company Law, the Republic of Lithuania provides property and non–property rights for shareholders.\textsuperscript{146} Non–property shareholder rights include the right to attend General Meetings of Shareholders; submit of questions to the Company in advance of the General Meeting of Shareholders regarding issues on the agenda; vote at General Meetings of Shareholders; receive information about the company; and file a derivative claim of damages arising out from nonfeasance or malfeasance for conduct by a manager of the company and members of the Board of their duties listed under the Law on Companies and the company’s Articles of Incorporation.\textsuperscript{147}

In an effort to provide adequate transparency, the Republic of Lithuania requires that companies provide a response to questions regarding issues on the agenda of the General Meeting.\textsuperscript{148} Questions from shareholders to the company must be received no later than three working days before the General Meeting.\textsuperscript{149} Lithuanian Company Law does not require that companies reveal trade secrets or other confidential information; yet it does require that companies inform the shareholders that answering such a question would reveal confidential information and thus cannot be answered.\textsuperscript{150} Lithuanian Company Law provides shareholders with the right to vote in accordance with the rights carried by the type of shares owned.\textsuperscript{151} With the common goal of regaining confidences in capital markets, the Lithuanian Company Law affords shareholders the right to information concerning the company.\textsuperscript{152} In order for shareholders to provide shareholders with information, a written request must be sent to the

\begin{itemize}
\item \textsuperscript{145} Id.
\item \textsuperscript{146} See generally Law on Companies, art. 14.
\item \textsuperscript{147} Law on Companies, art. 15.
\item \textsuperscript{148} Law on Companies, art. 16. See also First Council Directive 68/151/EEC, art. 58, 1968 O.J. Spec. Ed. ("on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies . . . with a view to making such safeguards equivalent throughout the Community.").
\item \textsuperscript{149} Law on Companies, art. 16.
\item \textsuperscript{151} Id.
\item \textsuperscript{151} Law on Companies, art. 17.
\item \textsuperscript{152} Law on Companies, art. 18.
\end{itemize}
company and within seven days of receiving such a request, the company is required to provide access or copies of the information to the shareholder.\textsuperscript{153} In order to protect the rights of shareholders, Lithuanian Company Law provides that “the management organs of the company must act for the benefit of the company and its shareholders . . . .” The structure of management in Lithuania is governed by a single company manager, a collegial supervisory body composed of the Supervisory Board and a collegial management organ (the “Board.”)\textsuperscript{154} The Supervisory Board may or may not be formed within the company; if the Supervisory Board is not formed from within the company, then the duties allocated to its scope of powers shall be executed by the company manager.\textsuperscript{155} In furtherance of providing corporate governance transparency, companies may elect or remove the manager of the company either by the Board, or—if there is no Board—by the General Meeting of Shareholders.\textsuperscript{156} In addition to electing the manager, this governing body will also set the manager’s salary, approve his job description, including the duties he must fulfill while in office, offer incentives and impose penalties.\textsuperscript{157} Possessing both a Supervisory Board and a separate Management Board facilitates a clear separation of management and functions delegated to the Supervisory Board allowing for a transparent and efficient management process.\textsuperscript{158} In the formation of the Management Board, the Stock Exchange of Lithuania posits that providing a mechanism that ensures objective and fair monitoring operates to safeguard shareholder rights and impart accountability upon the Supervisory Board to the shareholders.\textsuperscript{159} To ensure independence, the Stock Exchange of Lithuania proposes that for a member

153. Id. Upon a written request from shareholders, companies must give access or provide copies of the following documents:

[T]he Articles of Association of the company, set of annual financial statements, annual reports of the company, the auditor’s opinion and audit reports, minutes of the General Meetings of Shareholders or other documents executing decisions of the General Meetings of Shareholders, the recommendations and responses of Supervisory Board to the General Meetings of Shareholders, the lists of shareholders, the lists of members of the Supervisory Board and the Board, also other documents of the company that must be publicly accessible under laws as well as minutes of the meetings of the Supervisory Board and the Board or other documents executing decisions of the above-mentioned company organs, unless these documents contain a commercial (industrial) secret of the company, confidential information.

\textit{Id.}

154. Law on Companies, art. 19.
155. Id.
156. Law on Companies, art. 37.
157. Id.
158. Nati’l Stock Exch. of Lith., supra note 144, at 3.
159. Id. at 3.
to serve on the Management Board, the member is not deemed independent when the member: (1) is connected or is the controlling shareholder of the company; (2) previously served as chief executive officer or another empowered employee of the company within the previous three years; (3) served as head of the company that consulted with the company within the previous three years; (4) currently is a client or major supplier of the company or head, employee, or member of said supplier or client; (5) currently is bound by material contractual agreements with the company; (6) previously served as a member of a collegial body of the company for a period that may be considered long enough to influence the determination of that member to act in the best interests of the company; and (7) has relations that potentially can cause a conflict of interest and influence the determination of that member to act in the best interests of the company.\footnote{160}{Id. at 3–4.}

In comparison, Delaware General Corporation Law § 144 takes aim at the independence of the directors of Delaware incorporated firms.\footnote{161}{See Del. Code Ann. tit. 8, § 144 (West 2010).} The DGCL permits interested directors to attend, participate, or even vote so long as: (1) material information regarding the interested director’s relationship to the subject transaction are made known to the board and the board acts in good faith in voting affirmatively for the transaction, even if disinterested directors make up less than quorum, or; (2) the interested director discloses such material information to the shareholders and the shareholders in good faith vote affirmatively for the subject transaction, or; (3) the subject transaction is fair to the corporation at the time it is authorized, approved or ratified, by the directors, a committee or by the stockholders.\footnote{162}{tit. 8, § 144(a)(1) – (3) (West 2010).} For the Board to avoid possible conflicts of interest, the Stock Exchange of Lithuania recommends the Board establish an Audit Committee, a Remuneration Committee, and a Nomination Committee.\footnote{163}{NAT’L STOCK EXCH. OF LITH., supra note 144, at 4.} The tasks these Committees perform offer greater management transparency and continue the restoration of confidence in the Lithuanian capital markets.

The Board’s powers enumerated in Lithuanian Company Law also serve the goal of protecting shareholders and offering transparency.\footnote{164}{Law on Companies, art. 34.} The Board is entrusted with determining the proper operating strategy of the company and the proper management structure and placement of its employees.\footnote{165}{Id.} To further the confidence in Lithuanian capital markets, Lithuanian Company Law provides checks and balances by requiring that the Board oversee information offered by the manager of the company regarding the implementation of the company’s operating strategy and the organization of the company’s financial status and activities.\footnote{166}{Law on Companies, art. 34.}
Shareholders offer many exclusive rights involving actions of the company, including (1) amending the Articles of Incorporation of the company; (2) electing or removing members of the Supervisory Board, collegial board or the manager of the company; and (3) selecting and removing auditors of the firm that perform the audit of financial statements.\textsuperscript{167}

II. EXECUTIVE REMUNERATION AND RISK MANAGEMENT

Boards have increased their focus on risk management techniques and issues of executive remuneration in an attempt to restore investor confidence in the capital markets after the volatility of the previous decade. After the financial crisis in 2008, public outcry grew over the excessive executive compensation policies and over the intertwining connection between these policies and the risk taking and short term mindset.\textsuperscript{168} In the United States, this has led to regulation under Dodd–Frank regarding “say–on–pay,” “clawbacks,” and “compensation consultant independence.”\textsuperscript{169} Due to the changes enacted by Dodd–Frank, proxy disclosure regulations require information concerning executive compensation in regards to the relationship of compensation policies to risk, to the compensation consultant independence and to the reporting of stock options and other equity awards.\textsuperscript{170} As a result of Dodd–Frank, disclosure of compensation risk is only mandated in a few limited situations.\textsuperscript{171} With the new regulations in force, corporations must now disclose compensation policies used for all employees, “and their risk management philosophy only if the risks arising from their compensation programs are ‘reasonably likely to have a material adverse effect’ on the company.”\textsuperscript{172} Shearman & Sterling’s Survey of Corporate Governance (“Shearman Survey”) found proxy statements to be consistent regarding components listed to support a corporation’s finding that policies dealing with compensation do not pose a risk to the venture.\textsuperscript{173} The Shearman Survey provided that of the Top 100

\begin{footnotesize}
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\item \textsuperscript{167} Law on Companies, art. 20.
\item \textsuperscript{168} Thoughts for Boards, supra note 5, at 4–5.
\item \textsuperscript{169} See generally Dodd–Frank Act.
\item \textsuperscript{170} Survey from Shearman & Sterling LLP, 2010 Corporate Governance of the Largest US Public Companies – Director & Executive Compensation (2010), available at https://reaction.shearman.com/reaction/pdf/Eighth_Annual_Director_&_Executive_Compensation_Survey.pdf [hereinafter 2010 Corporate Governance].
\item \textsuperscript{171} Id. at 4.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id. at 5 (including listed items such as: “providing a mix of cash and equity and of annual and longer-term incentives; using multiple metrics to determine payout in order not to put too much emphasis on any single measure; caps on incentive and award payouts; share ownership guidelines that require employees to retain award shares for a specific period, or through retirement, so that they retain the risks of share ownership; multi–year vesting periods; and implementing and enforcing clawback policies”).
\end{itemize}
\end{footnotesize}
Companies in the United States, eighty–six provided disclosure of some level of “risk” in their proxy statement.\(^\text{174}\) Additionally, of the Top 100 Companies, seventy–one indicated that they maintain a “clawback policy,” which triggers after the occurrence of specific events that affect the corporation’s financial statements.\(^\text{175}\)

The perplexing problem regarding how improvements in boardroom corporate governance can be made often draws regulators’ attention to investigating what actions may have caused the investors to lose confidence in the first place. Investors list executive remuneration as a key reason for their lack of confidence in the capital markets.\(^\text{176}\) Compensation by means of stock options, bonuses, and cash incentives at corporations has been a method of rewarding boards and other executives for risky, but profitable, business measures undertaken on behalf of the corporation.\(^\text{177}\) This dilemma begins with a review of compensation programs previously in place, which rewarded directors for short–term goals as opposed to the corporation’s long–term corporate strategy.\(^\text{178}\) Regulations are being enacted in hopes of restoring investor confidence after the financial crisis... In order for investor confidence to return, investors must once again believe that a “board’s risk oversight responsibility derives primarily from state law fiduciary duties, federal laws and regulations, stock exchange listing requirements and certain established (and evolving) best practices.”\(^\text{179}\)

Delaware—as the primary authority for corporation law—has developed a framework for the fiduciary duties of corporations.\(^\text{180}\) Generally, the rule laid out in Caremark imposes director liability only for a failure of oversight where there is “sustained or systemic failure of the board to exercise oversight—such as an utter failure to attempt to assure [that] a reasonable information and reporting system exists.”\(^\text{181}\) The Caremark court also indicated that this is a “demanding test.”\(^\text{182}\) Since Caremark, Delaware courts have stressed their interpretation of its holding, positing that no Caremark liability would ensue unless the “directors intentionally failed entirely to implement any reporting or information system or controls or, having implemented such a system, intentionally refused to monitor the

\(^{174}\) Id. at 18 (“None of these companies concluded that compensation–related risks are reasonably likely to have a material adverse effect on the company.”)

\(^{175}\) Id. at 28. (Noting that eight more Top 100 Companies disclosed adoption of a clawback policy that will go into effect after 2010.

\(^{176}\) See generally Board of Directors, supra note 3; see generally Where Main Street Meets the C–Suite, supra note 49; See generally 2010 Corporate Governance, supra note 170.

\(^{177}\) See generally Thoughts for Boards, supra note 5.

\(^{178}\) See generally Board of Directors, supra note 3.

\(^{179}\) Id. at 2.

\(^{180}\) Id. at 2–4.

\(^{181}\) In re Caremark International Inc. Derivative Litigation, 698 A.2d 959, 971 (Del. Ch. 1996).

\(^{182}\) Id. at 971.
The Delaware perspective views risk oversight on the small scale dealing with risk oversight by a board of directors on individual decisions. In comparison, the recently enacted Dodd–Frank legislation imposes risk oversight fiduciary duties on a larger scale dealing with risk oversight and the series of decisions and rationale behind those decisions.

The Dodd–Frank legislation concerning itself more with risk management disclosure issues rather than solely focused on risk oversight functions. While both aspects of risk are important, Dodd–Frank takes aim at directors of corporations who follow risk oversight procedures, but make short–term decisions out-of-line with the corporation’s long–term corporate strategy. The conflict arises between the directors’ short–term decisions being linked to director compensation and the short–term decisions not being in the best interests of the company and their long–term corporate strategy. Dodd–Frank has thus imposed new rules relating to executive remuneration by requiring a non–binding shareholder vote on executive pay and establishing new guidelines as to independence of members of compensation committees. Regarding executive remuneration, the Act also requires disclosures of executive pay in comparison to the financial performance of the company and the ratio of the Chief Executive Officer’s pay to the median pay of every all other employees of the said company. Dodd–Frank also requires “clawbacks,” which mandate recovery by the company of funds dispersed to executive officers for improprieties or other certain financial restatements made by the company and its executive officers. One of the most controversial provisions in the Dodd–Frank Act involves proxy access. This somewhat controversial provision in Dodd–Frank would provide shareholders the right—contingent on the shareholder’s ownership stake in the company—to include a list of candidates for board positions in the company.

As the United States adapts to investors’ call for executive compensation regulation, the European Union adapts as well. In the EU numerous member states currently mandate executive remuneration for listed companies be associated with individual and corporate performance. This required association has brought additional focus on ensuring that compensation is

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183. Board of Directors, supra note 3, at 3.
184. Id. at 4.
185. See generally id. at 4–8.
186. See generally id. at 4–8.
188. Id. § 952.
189. Id. § § 953.
190. Id. § 954.
191. Id. § 971. Dodd–Frank allows for this action by way of authorizing the SEC to adopt rules regarding Proxy Access. See also Securities and Exchange Act of 1934, Rule 14a–11, 17 C.F.R. § 240.14a–11 (2010).
192. 2010 Corporate Governance, supra note 170, at 6.
structured to not incentivize and avoid inappropriate risk taking. As recently as April 2009, the European Commission issued a non-binding recommendation in an effort to institute controls on risk taking. The recommendation provides that “the compensation of executives of all listed companies should be principally based on performance and be in the long-term interests of the company.” The Commission recommends that certain measures be enacted to further this goal: “(1) limits on the amount of variable compensation; (2) the deferral of a significant portion of variable compensation; (3) imposing performance conditions on variable compensation; and (4) clawbacks of variable compensation awarded on the basis of data that proves to be manifestly misstated.” Clawback provisions are becoming more common in the United States, yet such policies are few and far between among EU countries. However, a number of EU countries have adopted advisory “say-on-pay” shareholder voting procedures that have helped voice shareholder concerns for executive compensation procedures. Nevertheless, if shareholders vote significantly against procedures disclosed to them for vote, the results from the non-binding vote provide great feedback for boards so that they may consider alternatives to avoid future backlash. While both the United States and the European Union indicate progress in regulation of executive compensation, neither indicates whether such changes have affected investor confidence in capital markets.

III. INTERNATIONAL TRENDS IN CORPORATE GOVERNANCE

Currently in the United States, federal regulation has increasingly targeted actions which previously were regulated solely by state law. State laws previously regulated such actions as disclosure and shareholders voting rights until federal regulation usurped these actions in order to provide greater transparency and confidence in the capital markets. Regulation in the United States has and continues to be bountiful and swift since recent financial crises. In the United States each crisis has been followed almost immediately with some form of regulation. This trend will likely continue perpetually until market equilibrium is found. The Sarbanes–Oxley Act of 2002 followed after the “dot–com” bubble burst, the September 11th terrorist attacks, and the Enron and WorldCom financial scandals. The Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 and other regulatory actions followed as a result of the financial crisis of 2008.

193. Id. at 6.
194. Id.
195. Id. at 6–7.
196. Id. at 7.
197. See generally 2010 Corporate Governance, supra note 170, at 10.
198. See generally id. at 13–14.
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and 2009—which stemmed from the “sub–prime meltdown”—causing the “housing bubble” to burst.

In the European Union, the trend follows a continued improvement approach towards modification of corporate governance. This EU approach to modification of corporate governance may be largely due to the fact that the EU is a relatively new body, whereas the United States is relatively old in comparison. As a result, the EU approach seems to be aimed at discovering what the law of the land should be and to continue to modify the law. Alternatively, the U.S. tweaks its corporate governance laws over time, only after crises or other similar situations provoke action necessary to remedy existing problems. Although the EU approach to corporate governance regulation is more time consuming, it seems to be broader and forward–looking at potential stumbling blocks that could interfere with progress. Unlike the EU, the United States’ traditional approach takes aim at removing the stumbling blocks after an event occurs, which requires making a change to the regulation. This difference can be summarized simply as the U.S. living and learning from their mistakes, whereas the EU approach seems to use a slow yet forward looking method of preparation to avoid future potential obstacles of its regulation. Recently, the pattern of U.S. regulation seems to have made a change from the “learn from mistake” approach through enacting the Dodd–Frank Act. In adopting Dodd–Frank, the United States has taken a forward looking approach to corporate governance by providing proxy access to shareholders, allowing for non–binding “say–on–pay” voting, and providing “clawback” provisions. It seems the U.S. is starting to aim at both providing a remedy for problems past and at solving future potential problems in the shareholder–director relationship. However, opponents of Dodd–Frank argue that Congress does not have the Constitutional power to enact such broad sweeping legislation as it did in Dodd–Frank—causing several aspects of Dodd–Frank to remain contested and not in force.

Not only must the European Union make necessary changes reflecting the capital markets in the EU—it must also make regulatory changes in reaction to events occurring in the United States. After the enactment of the Sarbanes–Oxley Act of 2002, European Union corporations seeking expansion into the United States are required to follow U.S. laws relevant to their operation. Specifically, EU corporations operating in the United States were required to follow disclosure requirements implicated by Sarbanes–Oxley. Additionally, with recent adoption of Dodd–Frank, EU incorporated companies are required to follow additional requirements. EU–based companies must now inquire as to what the laws of the United States require of them and adapt. This problem results in a barrier of entry for cross–border expansion. Finding a resolution to this problem helps improve the capital markets of both EU–based companies and U.S.–based companies alike by providing growth opportunities into the markets.
IV. AN INTERNATIONAL PROBLEM WITH AN INTERNATIONAL SOLUTION

The future of international corporate governance is headed towards the general framework currently utilized in the European Union. The EU framework sets out a few broad directives—which must be followed by all—and then the EU Commission provides recommendations for smooth transitions cross-border. While the United States and European Union both operate differently, the focus of corporate governance in the United States begins at local or state regulation followed by federal regulation. As corporations today grow into global conglomerates, cross-border issues continue to arise resulting in the need for a set of international guidelines on corporate governance. Companies seeking global expansion often find expansion difficult due to confusion and a lack of clarity in interpreting the rules and regulations imposed by other countries. The United States operates with state to state jurisdictional differences and there remain several federal regulations placed upon each and every company. Unlike the United States, the EU operates by placing several directives upon corporations as to how they may or may not operate and additionally provides them with recommendations that the EU Commission believe to be actions considered “good” governance. As corporations continue the outward trend of becoming international conglomerates, problems arise when boards are not familiar with the rules and regulations of the countries in which they seek expansion.

To remedy this problem, I propose the establishment of an International Corporate Governance Regulatory Agency (“ICGRA”). The purpose of this Agency will be to establish a set of cross-border guidelines that are to be followed by both the United States and the European Union, and thus will synthesize the similarities between both entities in order to provide standards when companies seek cross-border expansion. These cross-border guidelines would be followed by corporations with operations in more than one country or member state, in either the United States or European Union. The fusion of the corporate governance similarities will provide companies opportunities to expand into new markets and help remove obstacles that previously stood in the way of growth. This would be similar to the European Union corporate governance ideology of freedom to establishment. These synergies will provide a foundation for companies seeking expansion and how they should begin their expansion efforts.

The ICGRA would also act similar to the EU Commission by providing recommendations for what it believes to be “good” governance features. The ICGRA would provide recommendations for major issues such as: executive remuneration, risk management, proxy access and fiduciary duties owed by boards of directors. The ICGRA’s recommendations would not apply solely to the EU or United States, but such recommendations would

199. See generally Mantysaari, supra note 1, at 35.
be offered for companies operating in both the United States and EU capital markets. These synergies would have a wide-range effect that would allow EU companies and U.S. companies alike to expand into new global markets that were previously unavailable to them.

In providing such synergies, the ICGRA would be able to operate in tandem with local and national regulatory authorities in dealing with corporate governance issues because both are seeking the same goal of improved corporate governance regulations. These regulations, whether enacted regionally, nationally or by the ICGRA would act to pre-empt further problems typically not addressed by both United States and European Union based corporations. Implementation of these ICGRA recommendations would take regulations that were previously solely United States based or solely European Union based and work to implement a recommendation that would aim towards both the United States and European Union. Such regulations would have the effect of allowing efficiencies in the market place where previously one market has fallen behind the other.

The ICGRA would be managed by an international committee composed of members from corporate governance regulatory agencies in the United States and the EU. Members on the committee would include congressional committee members and representatives from the SEC and NYSE for the United States delegation. In the EU, committee members will be selected from the EU Commission and representatives from different Member States in order to provide an international perspective to the ICGRA committee. The diversity gained from such widespread representation will aid the ICGRA in forming recommendations that address issues at the forefront of each regulatory body. With the trend of international representatives on the board of directors of global companies, forming the ICGRA committee in a similar fashion helps the ICGRA stay abreast to potential communication issues that companies encounter and resolve such issues by forming recommendations to account for potential communication conflicts. This format gives the ICGRA an opportunity to learn about problems other regulatory agencies face before they become problems on a larger scale. Learning about these problems earlier and enacting recommendations to resolve potential issues can halt or at least slow down a potentially global problem by addressing it during its early stages. Such diverse representation on the international committee will enhance the transparency and understandability of the ICGRA’s recommendations. Another benefit of committee diversity is the opportunity of each member to voice any issues or concerns they may find while forming recommendations. By raising issues or concerns prior to issuing a formal recommendation, the ICGRA can work together and resolve potential conflicts before they arise while at

200. See Banham, supra note 2.
the same time providing clarity for companies located in both the United States and European Union.

Everyday corporations are facing new obstacles in the marketplace, some local, some regional, some national, and now even global obstacles challenge corporations. With implementation of the ICGRA, the United States and European Union will be taking a prospective approach toward corporate governance. By working together, the ICGRA will look to remove potential obstacles that could stand in the way of corporate development and growth across borders. The elimination of confusion and guidance from the ICGRA will provide easier entry into foreign markets than ever before. Effectively utilizing the ICGRA will have short-term and long-term benefits. In the short-term, the ICGRA will provide clarity to regulations and standards required for entry into cross-border marketplaces. In the long-term, when investors begin seeing the benefits provided from the ICGRA, the decrease in crises because of early actions and the growth in corporate expansion due to the clarity provided by the ICGRA, investor confidences in the markets will be restored.

CONCLUSION

The international corporate governance marketplace changes with each transaction, decision, or meeting; from the smallest family-owned shop to international conglomerates, addressing issues these companies face is a daunting task. Difficulties arise when determining which issues require most immediate action. Addressing these issues properly can prevent future crises, provide smooth transitions into markets and help stabilize and restore investor confidences in the marketplaces. By establishing an international agency whose job is to address potential future issues that could arise in the United States and European Union marketplaces, ICGRA could help prevent a small issue from developing into a crisis. The ICGRA will provide clarity to regulations and standards that corporations are required to abide by in order to expand into new marketplaces. By addressing the issues that investors are most concerned with, the ICGRA will offer an opportunity for restoring investor confidence in the markets.