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Table of Contents

Summer 2017

Winter 2018

Case Summary

Recent Decisions

NEW YORK INTERNATIONAL LAW REVIEW

Summer 2017
Vol. 30, No. 2

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Table of Contents

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The Tribunal Secretary in International Arbitrations

Francisco Blavi & Gonzalo Vial[1]

I. Introduction

Arbitrations are usually carried out with some sort of administrative support, which may be provided by an official arbitral institution, secured by the parties themselves, or by the arbitral tribunal.[2] In this regard, the appointment of an arbitral secretary has grown in popularity,[3] particularly when handling complex cases and voluminous filings.[4]

The use of arbitral secretaries has been a practice in Europe for a while,[5] and is a growing tendency in more "recently-developed jurisdictions such as Latin American countries."[6] Some estimate that their use takes place only in 35% of arbitrations;[7] being more used more in civil law arbitrations (46%) than in common law procedures (24%).[8]

The role of the secretary has been described as an "enormously grey area that has been subject to instances of abuse."[9] Controversy would usually not arise so far as the tasks handled by the secretary remain "purely organizational,"[10] but that situation may change "if the tasks include legal research and other professional assistance to the arbitral tribunal."[11] Generally, the problems with the appointment of an arbitral secretary are related to the delegation of part of the arbitrator's personal mandate to examine the dispute and decide the conflict.[12]

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2. Doug Jones, *Ethical Implications of Using Paralegals and Tribunal Secretaries*, 17 HORS SERIE 251, 251 (2014), https://www.victoria.ac.nz/__data/assets/pdf_file/0004/920119/Jones.pdf.

3. *Id.*

4. International Council for Commercial Arbitration (ICCA), *Young ICCA Guide on Arbitral Secretaries*, ICCA Reports No. 1, (2014). As stated by an author, it is a well-established practice in large and complex cases for a secretary to be appointed to assist the arbitral tribunal; *see also* Michael Polkinghorne & Charles Rosenberg, *The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard*, 8 DISP. RES. INT. 107, 108 (2014).

5. *See* Jones, *supra* note 2.

6. *Id.*

7. *Id.*

8. *Id.*

9. *See* Polkinghorne & Rosenberg, *supra* note 4, at 107.

10. *See* Jones, *supra* note 2, at 254.

11. *Id.*

12. *See Young ICCA Guide on Arbitral Secretaries*, *supra* note 4, at 25, 42–43.

Recently, the appointing of secretaries by the arbitral tribunal has been under increasing scrutiny and debate[13] due to different factors,[14] such as the attention given by prominent arbitral institutions and the attempts made to record the opinion of the arbitral community regarding the matter.[15] Particularly, the issue gained attention after the *Yukos Arbitration*,[16] in which the "largest publicly-known arbitral award in history" was attacked in the Dutch courts.[17] On that occasion, one of the arguments given to challenge the award was that "the tribunal had improperly delegated its duties to . . . the tribunal's secretary,"[18] which was referred as the "fourth arbitrator."[19]

Despite the decision of the Dutch courts to set aside the award based on reasons not related to the role of the secretary,[20] the "notorious Yukos v. Russia long-running saga demonstrates with some irony, that the improper involvement of an arbitral secretary can lead to intricate situations."[21] Similarly, some authors contend it is possible to conclude from a 2015 decision by the Supreme Court of Switzerland that there could be legal basis to challenge the tribunal's excessive delegation to the secretary of the tribunal, so far as credible evidence is available.[22]

The aforementioned shows that it is essential to correctly analyze the issue of arbitral secretaries in international arbitration, not only because the benefits that the proper use of them can offer in terms of efficiency and cost savings,[23] but also because failure to do so could affect one of the most valuable attributes of international arbitration: the integrity of arbitral awards.[24]

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13. James Menz & Anya George, *How Much Assistance Is Permissible? A Note on the Swiss Supreme Court's Decision on Arbitral Secretaries and Consultants*, 33 J. OF INT. ARB. 311 (2016).

14. *Id.* at 315.

15. *Id.* at 316.

16. Dmytro Galagan, *The Challenge of the Yukos Award: An Award Written by Someone Else – a Violation of the Tribunal's Mandate?,* KLUWER ARB. BLOG (Feb. 27, 2015), http://kluwerarbitrationblog.com/2015/02/27/the-challenge-of-the-yukos-award-an-award-written-by-someone-else-a-violation-of-the-tribunals-mandate/.

17. Kabir Singh, Shobna Chandran, Andrew Foo & Siddhartha Premkumar, *Tribunal secretaries: a tale of dependence and independence*, KLUWER ARB. BLOG (Dec. 11, 2016), http://kluwerarbitrationblog.com/2016/12/11/tribunal-secretaries-a-tale-of-dependence-and-independence/.In this regard, the Russian Federation filled three writs before The Hague District Court. Galagan, *supra* note 16.

18. Singh, Chandran, Foo & Premkumar, *supra* note 17.

19. *Id.*

20. Ben Knowles, Khaled Moyeed & Nefeli Lamprou, *The US $50 billion Yukos award overturned – Enforcement becomes a game of Russian roulette*, KLUWER ARB. BLOG (May 13, 2016), http://arbitrationblog.kluwerarbitration.com/2016/05/13/the-us50-billion-yukos-award-overturned-enforcement-becomes-a-game-of-russian-roulette/ . The referred courts "ruled on 20 April 2016 to reverse a PCA tribunal's decision against Russia to pay damages in excess of US$50 billion to the former majority shareholders of Yukos Oil Company, which was once the largest oil company in Russia . . . The Hague Court held that there was no valid arbitration agreement and therefore, the PCA tribunal did not have jurisdiction in the arbitration brought against Russia under the Energy Charter Treaty."

21. Alexandre-Yacine Souleye, *Fourth chair: the controversial role of arbitral tribunal secretaries*, YOUNG ICCA BLOG, (Feb. 16, 2017), http://www.youngicca-blog.com/fourth-chair-the-controversial-role-of-arbitral-tribunal-secretaries/. As stated by the author, one of the questions ". . . that the Russian Federation, the losing party in the USD 50 billion arbitration, submitted to the District Court of The Hague in late 2014 was whether 'an arbitral award can be challenged on the basis that an arbitral secretary was substantially involved?'" *Id.*

22. *See* Menz & George, *supra* note 13, at 322.

23. *See Young ICCA Guide on Arbitral Secretaries*, *supra* note 4.

24. *See* Singh, Chandran, Foo & Premkumar, *supra* note 17.

In order to address some of the relevant issues relating to the use of arbitral secretaries, this article will first define the concept and explain the secretaries´ scope of duties. It will then discuss the advantages and risks involved in the selection of such functionaries and the problematic issues that could arise with their appointment. It will also take a look to other relevant matters associated with this figure, to finally draw the conclusions of the authors.

II. The Concept of the Secretary of the Tribunal

An arbitral secretary, also referred to as a tribunal secretary or administrative secretary, is the person in charge of providing assistance to the arbitral tribunal.[25] The role of an arbitral secretary is different from that of a consultant of the arbitral tribunal. A tribunal consultant is sometimes appointed when the issues involved are so complex that the arbitrators will not be able to fully comprehend them without expert help.[26]

Arbitrators, and particularly those having to review extensive submissions, "are often well served by any arbitral secretary, the primary purpose of whom is *intended* to provide help in organizing the proceedings."[27] Traditionally, arbitral secretaries were supposed to occupy only an administrative position, but have become increasingly more involved in other tasks while assisting the tribunal in the global management of an arbitration.[28] As we will observe in this article, the extent to which secretaries are entitled to participate in non-administrative functions has been the source of great debate.[29]

III. Scope of Duties of Arbitral Secretaries

There seems to be a consensus with regard to the fact that secretaries are expected to conduct administrative tasks.[30] However, actually defining "administrative task" has proven to be more difficult.[31]

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25. Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 Am. Rev. Int'l Arb. 4, 575 (2006) [hereinafter Joint Report].

26. *See* Menz & George, *supra* note 13, at 314.

27. *See* Joint Report, *supra* note 25, at 575.

28. *See Young ICCA Guide on Arbitral Secretaries*, *supra* note 4, at 1.

29. *See* Menz & George, *supra* note 13, at 319.

30. Sofia Andersson, *A Fourth Arbitrator or an Administrative Secretary? A Study on the Appointment and Authority of Arbitral Secretaries in Swedish Arbitral Proceedings*, 30 ECTS 49 (2015), https://www.diva-portal.org/smash/get/diva2:817193/FULLTEXT01.pdf. Some state that their scope of duties is supposed to incorporate "logistics, filing, communication with parties, arbitrators and institutions, taking notes or minutes, legal research, collecting case law or published commentaries, preparing summaries, attending hearings, accounting and financial matters including opening a bank account." *See* Jones, *supra* note 2.

31. *See* Andersson, *supra* note 30, at 49. The aforementioned is explained in the following terms: "The general opinion amongst legal commentators is that a secretary is allowed to perform tasks of an administrative character. Some commentators argue that the secretary solely should perform administrative tasks and consequently, not perform tasks of a judicial character. Tasks that usually are described as being of an administrative nature include inter alia organizing travels, arranging hearing rooms, and administering the parties' written submissions. However, no uniform definition of "administrative" is to be found. It is uncertain when a task goes from being strictly administrative to including legal elements. Thus, even though there is a consensus among legal commentators that arbitral secretaries may perform administrative tasks, it does not provide much guidance in practice."

In addition to the aforementioned problem, there is also a controversy—in fact the main controversy surrounding the figure of arbitral secretaries—regarding "the extent to which arbitral secretaries may exercise duties beyond the purely administrative."[32]

The issue with assigning arbitral secretaries substantive tasks is that arbitrators are appointed *intuitu personae*,[33] which means that they "must fulfill their mandate personally, without delegation to a third party,"[34] and therefore, "delegation vitiates the spirit of such mandate."[35] This is why, unsurprisingly, the most common objection to the idea of an arbitral secretary is the risk of delegating the decision-making process.[36]

In other words, despite the fact that there are "those who advocate for broad responsibilities, alleging that it benefits the arbitral process, and those who advocate for a limited role for tribunal secretaries,"[37] authors generally agree that appointing a secretary for the tribunal "should never result in the derogation of a tribunal's decision-making powers."[38] This fundamental concept is reflected in Article 1(4) of the Young International Council for Commercial Arbitration (ICCA) Guide, in the sense that it is "the responsibility of each arbitrator not to delegate any part of his or her personal mandate to any other person, including an arbitral secretary."[39]

In fact, a survey conducted by the International Council for Commercial Arbitration showed that the main reason for avoiding the appointment of a secretary was the fear of affecting the decision-making powers of the tribunal.[40] In general, the more substantive the task, the fewer respondents are willing to permit the secretary to discharge it.[41] Regarding the aforementioned, a 2015 decision by the Swiss Supreme Court stated that, as a matter of principle, arbitrators are allowed to rely on the assistance of secretaries if arbitrators do not delegate their fundamental decision-making role to the secretaries.[42]

Although the main question regarding the scope of duties of an arbitral secretary is related to which roles they could assume without affecting the decision-making process of the tribunal,[43] it is not always easy to determine which tasks accomplish this. For instance, on occasion, secretaries have been in charge of preparing a complete first draft of the award[44] while there are

32. *See* Menz & George, *supra* note 13, at 319.

33. *Id.* at 313.

34. *Id.*

35. *See* Souleye, *supra* note 21.

36. *See Young ICCA Guide on Arbitral Secretaries*, *supra* note 4, at 6.

37. *See* Souleye, *supra* note 21.

38. *See* Singh, Chandran, Foo & Premkumar, *supra* note 17.

39. Markus Altenkirch & Benedic Schmeil, *The Substantial Involvement of Arbitral Secretaries*, GLOBAL ARBITRATION NEWS (Sept. 17, 2015), https://globalarbitrationnews.com/the-substantial-involvement-of-arbitral-secretaries-20150917/.

40. *See* Singh, Chandran, Foo & Premkumar, *supra* note 17.

41. Menz & George, *supra* note 13, at 319.

42. *See id.* at 311.

43. *See* Singh, Chandran, Foo & Premkumar, *supra* note 17.

44. *See* Souleye, *supra* note 21.

those who are concerned that "any research performed or draft prepared by the arbitral secretary necessarily finds its roots in the secretary's perspective, and thus might improperly influence the arbitrator's own evaluation."[45]

A survey conducted by the International Council for Commercial Arbitration revealed that some tasks the secretary could assume are highly controversial,[46] such as reviewing evidence and submissions, participating in the tribunal's deliberations, and drafting relevant parts of the awards.[47] Unsurprisingly, "Russia's arguments on setting aside the award . . . in Yukos centered on [the] undertaking of these three tasks."[48]

Regarding the scope of work that secretaries are expected to undertake, most arbitral institutions are either silent on the issue or unwilling to give them non-administrative tasks.[49] Reviewing certain provisions on this matter is useful to observe different approaches to the question under analysis.

The Secretariat of the International Chamber of Commerce ("ICC") International Court of Arbitration promulgated a "Note on the Appointment, Duties and Remuneration of Administrative Secretaries," which "sets out the policy and practice of the ICC International Court of Arbitration […] and its Secretariat regarding the engagement of the Administrative Secretaries by Arbitral Tribunals."[50] This document states that "[u]nder no circumstances may the Arbitral Tribunal delegate decision-making functions to an Administrative Secretary. Nor should the Arbitral Tribunal rely on the Administrative Secretary to perform any essential duties of an arbitrator."[51]

The London Court of International Arbitration ("LCIA") permits a tribunal to appoint a secretary to assist with the internal management of the case and "review draft awards and provide comments on non-substantive issues."[52] However, it provides that the duties of the arbitral secretary should not "constitute any delegation of the Tribunal's authority," and should "confine their activities to such matters as organizing papers for the Tribunal, highlighting relevant legal authorities, maintaining factual chronologies, keeping the Tribunal's time sheets and so

45. *Id*.

46. *See* Singh, Chandran, Foo & Premkumar, *supra* note 17.

47. *Id*.

48. *Id*.

49. *See* Menz & George, *supra* note 13, at 319.

50. *Note on the Appointment, Duties and Remuneration of Administrative Secretaries*, INTERNATIONAL CHAMBER OF COMMERCE (Aug. 1, 2012), https://actuarbitragealtana.files.wordpress.com/2015/04/note-on-administrative-secretaries-icc.pdf [hereinafter International Chamber of Commerce].

51. *Note on the Use of a Secretary*, 2016, THE ARBITRATION INSTITUTE OF THE FINLAND CHAMBER OF COMMERCE, (Oct. 1, 2017 8:00 AM), http://arbitration.fi/wp-content/uploads/sites/22/2016/07/note-on-the-use-of-a-secretary.pdf.

52. Paula Hodges & Hannah Ambrose, *The LCIA provides guidance notes to the LCIA Rules 2014 – the pertinent points*, HERBERT SMITH FREE HILLS ARBITRATION NOTES (July 3, 2015), http://hsfnotes.com/arbitration/2015/07/03/the-lcia-provides-guidance-notes-to-the-lcia-rules-2014-the-pertinent-points/.

forth."[53] On October 26, 2017, the LCIA implemented changes to its processes which strengthened the parties' consent requirements in connection with the identity, tasks and remuneration of the tribunal secretary for reducing the risk of challenges.

The American Arbitration Association ("AAA"), in its 2004 Code of Ethics for Arbitrators in Commercial Disputes, which codifies acceptable standards of practice, expressly considers the possibility to appoint an arbitral secretary by allowing an arbitrator to "obtain help from an associate, a research assistant or other persons . . . if the arbitrator informs the parties of the use of such assistance," but prohibits an arbitrator from "delegat[ing] the duty to decide to any other person."[54]

The Hong Kong International Arbitration Centre ("HKIAC") Rules provide that an arbitral secretary may be appointed to conduct "organizational and administrative tasks." However,

> unless the parties agree or the tribunal directs otherwise, the tribunal secretary may also: (i) conduct legal research; (ii) collect case law or published commentaries on legal issues defined by the tribunal; (iii) research discrete questions relating to factual evidence and witness testimony; (iv) draft memoranda summarizing the parties' submissions and evidence; (v) attend the tribunal's deliberations; and (vi) prepare drafts of non-substantive parts of the tribunal's orders, decisions and awards (such as procedural histories and chronologies of events). [55]

The Administrative and Financial Regulations of the International Centre for the Settlement of Investment Disputes ("ICSID"), provides that, for each ICSID tribunal, a secretary shall be appointed.[56] The Regulations allow the secretary to perform functions at the request of the president or the tribunal, but preclude secretaries from attending deliberation without the consent of the tribunal.[57] In fact, in *Compañía de Aguas v Argentina*, Professor Jan Hendrik Dalhuisen explained that the role of the arbitral secretary was of "administration and support," and that the secretary was "not the fourth member of ICSID Tribunals."[58]

The IBA Guidelines on Conflicts of Interest in International Arbitration applies standards to arbitral or administrative secretaries and assistants, requiring them to maintain the same duty of independence and impartiality, including the duty of disclosure, as arbitrators.[59]

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53. *Frequently Asked Questions,* LONDON COURT OF INTERNATIONAL ARBITRATION, (Oct. 1, 2017, 8:10 AM), www.lcia.org/Frequently_Asked_Questions.aspx#Secretaries.

54. *See* Polkinghorne & Rosenberg, *supra* note 4, at 113.

55. *Id.* at 115.

56. *Id.* at 114.

57. *See id.*

58. *Compañía de Aguas del Aconquija SA & Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/97/3 (Annulment Proceeding), Additional Opinion of Professor JH Dalhuisen under Art. 48(4) of the ICSID Convention, ¶¶ 3, 21 (July 30, 2010), www.italaw.com/sites/default/files/case-documents/ita0221.pdf.

59. International Chamber of Commerce*, supra* note 50.

The International Counsel for Commercial Arbitration ("ICCA") Guide on Arbitral Secretaries explains that "with appropriate direction and supervision by the arbitral tribunal, an arbitral secretary's role may legitimately go beyond the purely administrative," adding that they may be involved in "undertaking administrative matters," "communicating with the arbitral institution and parties," "organizing meetings and hearing with the parties," "handling and organizing correspondence, submissions and evidence on behalf of the arbitral tribunal," "researching questions of law," "researching discrete questions relating to factual evidence and witness testimony," "drafting procedural orders," reviewing the parties' submissions and evidence, and drafting factual chronologies and memoranda summarizing the parties' submissions and evidence," "attending the arbitral tribunal's deliberations" and "drafting appropriate parts of the award."[60]

The 1996 Notes on Organizing Arbitral Proceedings of the United Nations Commission on International Trade Law ("UNCITRAL") "provide[s] some guidance concerning the appointment and use of secretaries," such as noted in articles 26 and 27.[61] Article 26 states that "the extent of the tasks . . . are purely organizational."[62] However, Article 27 acknowledges that "differences in views . . . may arise if the tasks include legal research and other professional assistance to the Arbitral Tribunal."[63] Such a role may be seen as inappropriate or only appropriate under certain conditions.[64]

JAMS´s "Guidelines for Use of Clerks and Tribunal Secretaries in Arbitrations", permits arbitrators to use tribunal secretaries, on condition that all parties agree and complete "a separate conflicts disclosure form."[65] The Guidelines also state that "[a]t no time can a . . . Secretary engage in deliberations or decision-making on behalf of an arbitrator or tribunal."[66]

From the aforementioned flows that there is broad agreement on the idea that arbitral secretaries should only exercise tasks that do not unduly affect the non-delegable duties of the arbitrators. However, blurred lines remain as to their exact scope of work.[67] Additionally, as several provisions reflect different views on the role that secretaries are expected to assume, an arbitrator should act prudently when appointing one, given that he "is the ultimate person to control the limits on the use of legal assistance."[68]

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60. *See Young ICCA Guide on Arbitral Secretaries*, *supra* note 4.
61. *See* Joint Report, *supra* note 25, at 579.
62. *Id*.
63. *Id.*
64. *Id.*
65. *See* Polkinghorne & Rosenberg, *supra* note 4, at 113.
66. *Id.*
67. *See* Singh, Chandran, Foo & Premkumar, *supra* note 17.
68. *See* Jones, *supra* note 2.

IV. Advantages and Disadvantages of Appointing an Arbitral Secretary

A. Advantages

The use of an arbitral secretary provides great advantages to international arbitration, especially in complex disputes, because they can add value in terms of efficiency and cost-saving, as well as improving the quality of the arbitrator's work by giving a "better understanding of the factual and legal basis of the dispute."[69]

Arbitral secretaries can provide efficiency because their role allows arbitrators to focus on substantive work,[70] a measure that has been considered enormously cost saving.[71] Additionally, being an arbitral secretary is a great opportunity to train future arbitrators, described as "excellent training and education for young professionals."[72]

Moreover, appointing a secretary might allow top-notch arbitrators to get the assistance that they need for the purpose of managing concurrent appointments.[73] In this regard, some authors note that the need for secretaries can be explained in the growing "volume and complexity of party submissions and the pressure on arbitrators to conclude arbitrations more quickly, as well as the fact that there is a trend towards the professionalization of arbitrators, some of whom now handle multiple arbitrations in parallel."[74]

The advantages of appointing an arbitral secretary have been explained in the following terms:

> It is not a well-kept secret in the arbitration community that arbitrators are generally people with well-filled agendas. This is easily explained by the nature of their mandate that is necessarily ephemeral. Concurrently with their ad hoc mandates, arbitrators generally perform other various additional duties: a significant number of them practice in law firms; some of them teach and are committed to knowledge sharing and capacity building; and many others are professionals working full time in eclectic sectors.
>
> It is for those reasons that the delegation of administrative tasks performed originally by the arbitrators to arbitral secretaries has gained wide popularity over the years. Arbitrators who make an efficient and wise use of an arbitral secretary would be allowed to focus on the essentials of the case and not lose sight of the forest for the trees.[75]

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69. *See Young ICCA Guide on Arbitral Secretaries*, *supra* note 4.
70. *See* Jones, *supra* note 2.
71. Id.
72. *Id.*
73. *See* Singh, Chandran, Foo & Premkumar, *supra* note 17.
74. *See* Menz & George, *supra* note 13, at 318.
75. *See* Souleye, *supra* note 21.

In sum, it is clear that the use of an arbitral secretary provides some advantages for the arbitration procedure. Perhaps the referred advantages explain why a survey conducted by the International Council for Commercial Arbitration Congress in Singapore informed that 95% of respondents approved the use of arbitral secretaries.[76]

B. Disadvantages

The use of arbitral secretaries entails the risk of "ex parte communications, violation of the arbitrator's *intuitu personae* mission"[77] and the "arbitrators' omission of critical supervision and review of the tribunal secretaries'/paralegals' activities."[78]

Perhaps the main disadvantage in using an arbitral secretary is that, if handled improperly, it could affect the *intuitu personae* nature of the arbitrator's appointment[79], which in turn could threaten the integrity of arbitral awards.[80] For instance, when Russia challenged the tribunal's decision before the Dutch courts in the *Yukos case*, they argued an excessive involvement of the tribunal´s secretary, coining the term "fourth arbitrator."[81] Situations like that can affect the legitimacy of arbitration procedures,[82] explaining why—as previously mentioned—the most common objection for the appointment of an arbitral secretary is the risk of delegating the decision-making process that is exclusive of the tribunal.[83] As stated, although secretaries are expected to handle mainly administrative work, their involvement in research, deliberations and drafting may pose a threat to the arbitration system.[84]

Additionally, the use of an arbitral secretary could present a disadvantage to the parties because by considering additional payments to the arbitrator's fees, the costs of arbitration may increase.[85] Although some have stated that the use of an arbitral secretary is not expected to pose an additional financial obligation to the parties,[86] different opinions can be found with

76. *See Young ICCA Guide on Arbitral Secretaries*, *supra* note 4.
77. *See* Jones, *supra* note 2, at 253.
78. *Id.*
79. *See* Menz & George, *supra* note 13, at 313.
80. *See* Singh, Chandran, Foo & Premkumar, *supra* note 17.
81. *Id.*
82. Constantine Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 ARBITRATION INTERNATIONAL 147, 148 (2014).
83. *See Young ICCA Guide on Arbitral Secretaries*, *supra* note 4.
84. *See* Polkinghorne & Rosenberg, *supra* note 4, at 108.
85. *See* Joint Report, *supra* note 25, at 584.
86. *See* International Chamber of Commerce, *supra* note 59.

respect to this topic.[87] In this regard, it is important to take into consideration the fact that costs have been identified as a relevant concern for the parties of international arbitrations.[88]

Finally, the use of an arbitral secretary may present challenges for the arbitration regarding different issues, such as the parties consent to their appointment,[89] the possibility of attending to deliberations,[90] or confidentiality duties that they shall assume.[91] If issues like these are not handled properly, they could lead to situations that could affect the final award, the swiftness of the procedure, or other perceived virtues of arbitration. In the following section, we will discuss these and other problematic issues related to the appointment of an arbitral secretary.

V. Problematic Issues

While arbitral secretaries may provide useful assistance to the arbitrators and for the arbitral proceeding itself, in addition to defining the scope of the arbitral secretary's role, it is important to consider and weigh several problematic issues secretaries that may arise from the existence of arbitral secretaries.

A. Parties' Consent

It is necessary to consider to what extent "parties [should] be required to consent to the appointment of an arbitral secretary,"[92] if they can object to the appointment of a secretary,[93] and the extent of the duties allocated to the secretary.[94]

Generally, arbitral secretaries should only be appointed with "the knowledge and consent of the parties."[95] This gives the parties the chance to object to their selection and be heard regarding their roles and functions. In a survey focused on the role of arbitral secretaries conducted by the international law firm Berwin Leighton Paisner, which had respondents from

87. *See* Menz & George, *supra* note 13, at 318.

88. *2015 Int'l Arbitration Survey: Improvement and Innovations in Int'l Arbitration*, QUEEN MARY U. LONDON (2015), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf ("The potential costs of a dispute are highly relevant when deciding *whether* and *where* to arbitrate a dispute.") ("According to the 2015 Queen Mary Survey on International Arbitration, the item "costs" was voted as the worst attribute of arbitrations, being "by far the most complained of characteristic [of international arbitrations]." Accordingly, among other practical considerations, the fees charged by local lawyers and evidence finding costs highly influence the selection of a particular forum as a place of arbitration.") [hereinafter Int'l Arbitration Survey], *see also* Gonzalo Vial & Francisco Blavi, *Santiago as a Seat for International Commercial Arbitration*, 18 OR. REV. INT'L L. 38 (2016).

89. *See* Jones, *supra* note 2.

90. *See* Polkinghorne & Rosenberg, *supra* note 4, at 124.

91. *See* Singh, Chandran, Foo & Premkumar, *supra* note 17.

92. *Id.*

93. *Id.*

94. *Id.*

95. *See Young ICCA Guide on Arbitral Secretaries*, *supra* note 4.

America, Africa, Asia, Europe and the Middle East, "76% felt that all party consent should be a requirement for the appointment of a tribunal secretary."[96]

However, in a 2015 decision by the Swiss Supreme Court, that tribunal stated that even though parties could agree to exclude the option of selecting an arbitral secretary,[97] appointing one did not require their approval.[98] In sum, despite a majority within the arbitration community having the sense that "an arbitral secretary should only be appointed with the consent of the parties."[99] it is also possible to find opinions from the other side of the spectrum.

B. Remunerations

Arbitrators should always keep in mind that avoiding unnecessary costs is an essential part of their duties, as costs are usually a major concern for the parties of an international arbitration.[100] Therefore, who should pay for the services of a secretary is a relevant issue. However, "the arbitral community does not appear to have a clear majority position on whether the parties or the tribunal should pay for the secretary."[101]

Indeed, while some do not object that parties should pay an extra fee for the work of a secretary, others believe that those payments should be deducted from the tribunal's fees, although the parties could remain "responsible for reimbursement of the secretary's reasonable expenses incurred in connection with the arbitration, including travel and lodging expenses."[102] It was noted from interviews with twenty-two prominent international arbitrators in North America, Latin America, Europe and Asia that conventionally, parties pay secretaries a "modest hourly rate" in addition to the arbitrator's fees.[103] In other instances, such as in ICC arbitrations, "the general rule is for the arbitral tribunal to be responsible for paying the secretary's fees,"[104]—an idea that explicitly or in practice seems to be supported by the Stockholm Chamber of Commerce (SCC) and the Swiss rules.[105]

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96. Carol Mulcahy, *The Fourth Arbitrator: BLP arbitration survey on the use of tribunal secretaries in international arbitration,* THOMSON REUTERS ARBITRATION BLOG (Feb. 2, 2016), http://arbitrationblog.practicallaw.com/the-fourth-arbitrator-blp-arbitration-survey-on-the-use-of-tribunal-secretaries-in-international-arbitration/.

97. *See* Menz & George, *supra* note 13, at 313.

98. *Id.*

99. *See id.* at 316. *See also Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT'L ARB. 4, 589 (2006) (stating the integrity of the arbitral process would only be safeguarded if the party is given the right to voice their opinion regarding the secretary and its tasks).

100. *See* Int'l Arbitration Survey, *supra* note 88. As noted on a previous work by these authors: "The potential costs of a dispute are highly relevant when deciding *whether* and *where* to arbitrate a dispute. According to the 2015 Queen Mary Survey on International Arbitration, the item "costs" was voted as the worst attribute of arbitrations, being 'by far the most complained of characteristic [of international arbitrations].' Accordingly, among other practical considerations, the fees charged by local lawyers and evidence finding costs highly influence the selection of a particular forum as a place of arbitration." *See also* Vial & Blavi, *supra* note 88.

101. *See* Menz & George, *supra* note 13, at 318.

102. *See* Polkinghorne & Rosenberg, *supra* note 4, at 127.

103. *See* Joint Report, *supra* note 25, at 584.

104. *Id.* at 590.

105. *See* Menz & George, *supra* note 13, at 318.

In any case, it is advisable that the remuneration of arbitral secretaries should be reasonable, transparent from the beginning of the arbitration, and proportionate to the particular circumstances of the case. [106]

C. Attendance at Deliberations

A survey conducted by the International Council for Commercial Arbitration revealed that one of the tasks that secretaries could assume that has proven to be controversial is their participation in the tribunal's deliberations.[107] The risk in such activity is that it threatens the exclusive decision-making role expected from the tribunal.[108]

However, the assistance of secretaries to deliberations "can be very useful, as well as time and cost-efficient . . . particularly if the secretary will prepare drafts of procedural orders and non-substantive portions of awards."[109] In fact, the secretary is expected to keep "the arbitral tribunal fully informed of the issues at hand when questions arise, whether they be before a hearing, in the hearing room or during deliberations."[110]

D. Drafting

Drafting can be extremely time-consuming; the assistance of a secretary for this purpose could therefore be a cost effective measure. Some arbitrators, however, refuse to assign any drafting responsibilities to the secretary.[111]

Others are of the view that the arbitral secretary should be able to draft procedural orders and non-substantive portions of the award, such as the procedural background or the position of the parties, but should never be allowed to draft substantive parts of the award.[112] Arbitrators with this view note that the "substantive portion of an award goes to the heart of the arbitration and hence its drafting is an essential duty of the arbitrators."[113] The "*intuiti personae* principle thus dictates that this task must remain with the arbitrators,"[114] and that there is "too great a risk that the reasoning or dispositive section of the award might bear the secretary's perspective and hence improperly influence the arbitrators' evaluation."[115] In an interview conducted with prominent arbitrators, it was found to be a common practice for secretaries to draft certain portions of awards that were considered to be descriptive or non-substantive. [116]

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106. *See Young ICCA Guide on Arbitral Secretaries*, *supra* note 4.
107. *See* Singh, Chandran, Foo & Premkumar, *supra* note 17.
108. *Id.*
109. *See* Polkinghorne & Rosenberg, *supra* note 4, at 124.
110. *See Young ICCA Guide on Arbitral Secretaries*, *supra* note 4.
111. *See* Joint Report, *supra* note 25, at 585.
112. *See* Polkinghorne & Rosenberg, *supra* note 4, at 126.
113. *Id.*
114. *Id.*
115. *Id.*
116. *See* Joint Report, *supra* note 25, at 585.

In a more liberal view, a decision by the Swiss Supreme Court stated that when drafting part of an award, a secretary should do so "under the supervision and in accordance with the instructions of the arbitral tribunal,"[117] noting that the aforementioned decision focused on whether the arbitrator was delegating its decision functions, and not on the particular task assumed by the secretary.[118]

In sum, when it comes to drafting, it is possible to observe that some refuse to give secretaries any responsibilities,[119] others are willing to do so only if they draft descriptive or non-substantial parts of the award,[120] while the more liberal are concerned with an actual delegation of the decision-making functions of the tribunal, and not in the exact drafting task that is being accomplished.[121]

E. Confidentiality

In many jurisdictions, arbitrators are obliged by obligations of confidentiality, which is usually extremely valued by the parties.[122]

In this regard, it has been noted that "secretaries, if properly appointed, should also owe obligations of confidentiality to the parties."[123] Some examples include the Singapore International Arbitration Centre ("SIAC") which requires each secretary to execute a contract of confidentiality prior to his/her appointment, and the HKIAC which places secretaries under express obligations to uphold confidentiality.[124]

When secretaries are not formally appointed, the obligation to uphold confidentiality becomes watered-down, becoming unclear and ambiguous.[125] It seems that greater certainty will be achieved through formal appointment of arbitral secretaries.[126] As stated, "if a tribunal secretary is not formally appointed, the existence and scope of his/her obligations of confidentiality are less clear . . . with regard to both the existence and the enforcement of a tribunal secretary's obligations of confidentiality."[127]

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117. *See* Menz & George, *supra* note 14, at 313.
118. *Id.* at 322.
119. *See* Joint Report, *supra* note 25, at 585.
120. *See* Polkinghorne & Rosenberg, *supra* note 4, at 126.
121. *See* Menz & George, *supra* note 13, at 322.
122. Gonzalo Vial & Francisco Blavi, *New Ideas for the Old Expectation of Becoming an Attractive Arbitral Seat*, 25 TRANSNAT'L L. & CONTEMP. PROBS. 283 (2015–2016) (citing Stephen Bond, *Expert Report of Stephen Bond in Esso v. Plowman*, 11 ARB. INT'L 273 (1995)).
123. Singh, Chandran, Foo & Premkumar, *supra* note 17.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*

F. Liability

It is common for different legal systems to "accord arbitrators a substantial degree of quasi-judicial immunity from civil claims arising out of their conduct of the arbitration."[128] However, the referred "immunity does not apply with the same universality to tribunal secretaries,"[129] despite the fact that some institutional guidelines could provide them with some protection in this sense, as it occurs with the HKIAC Guidelines, which "shield tribunal secretaries from liability save in the case of dishonesty, and oblige parties not to make a secretary a party or witness in proceedings arising out of the arbitration."[130]

G. Qualifications

Questions have also been raised regarding the specific qualifications that arbitral secretaries should have.[131] Arbitral tribunals are expected to appoint a secretary who is qualified and with the skills required for the job.[132] That is to say, "one who is suitably trained and free of conflicts of interest and possessing the ability to act with the same independence and impartiality as members of the arbitral tribunal."[133]

The different problematic issues that could arise in the context of appointing an arbitral secretary suggest that arbitrators should handle their respective appointments very carefully. Despite the rules and guidelines that could provide some useful assistance in this regard, it is advisable to act always in a very prudent and transparent way.[134]

H. Unofficial Secretaries

Some arbitrators are commonly assisted by arbitral secretaries "without any formal appointment process, or, in some circumstances, without identifying these assistants to the parties."[135] Several authors have analyzed the ethical implications of using arbitral secretaries when no formal appointment has been made.[136] In any case, to ensure transparency and legitimacy, it is advisable to avoid this practice, informing the parties, as soon as possible, of the arbitrator's intention to use an arbitral secretary.[137]

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128. Singh, Chandran, Foo & Premkumar, *supra* note 17.

129. *Id.*

130. *Id.*

131. *See* Jones, *supra* note 2.

132. *See* Joint Report, *supra* note 25, at 587.

133. *Id.*

134. *See* Singh, Chandran, Foo & Premkumar, *supra* note 17. For instance, an author suggests that, when appointing a secretary, the tribunal should follow these guidelines: (1) obtain the express written consent of the parties before appointing the secretary; (2) define the tasks that the secretary is going to assume; (3) determine the work for which the secretary would be remunerated; (4) arbitral institutions should decide objections raised against the appointment of a secretary; and (5) institutions should provide formal accreditation and training of secretaries.

135. *See Young ICCA Guide on Arbitral Secretaries*, *supra* note 4.

136. *See* Jones, *supra* note 2.

137. *See Young ICCA Guide on Arbitral Secretaries*, *supra* note 4. For instance, when unofficially appointed, the obligation of confidentiality is imprecise and unclear. *See* Singh, Chandran, Foo & Premkumar, *supra* note 17.

VI. Calls for Uniform Standards

Debates regarding the role of arbitral secretaries are said to result from a lack of uniform standards.[138] This can affect the overall integrity and perceived legitimacy of the arbitral process, as well as the resulting award, as "questions might arise in the absence of a uniform standard as to whether the secretary has exceeded his or her position as an assistant to the tribunal."[139] As noted, clearly establishing "the nature of what arbitral secretaries can and cannot do would not only have the potential of providing further certainty as to the precise role of arbitral secretaries, but could also reduce the possibility and frequency of challenges in the future."[140]

The challenges posed by the figure of the secretary of the tribunal have led many institutions to provide some guidelines on the topic, such as the ones launched by the Australian Centre for International Commercial Arbitration, which are designed to "encourage transparency with respect to the appointment, duties and remuneration of tribunal secretaries."[141] However, different guidelines have led to diverging approaches regarding this topic, illustrating a spectrum of views,[142] being possible to observe "two competing philosophies with regard to the appointment of tribunal secretaries—consent and efficiency—with the tribunal being the master of the procedure,"[143] which have resulted in the different positions adopted by arbitral institutions.[144]

Perhaps the fact that there is not only one philosophy when it comes to creating particular provisions "indicates the propensity for institutions to develop their own approaches on such matters, even where those approaches clearly build upon existing institutional rules and guidelines."[145] This highlights "the particular unlikelihood of a uniform standard developing to guide practice in this area in the future."[146] As noted, "while most arbitral institutions now provide guidance on the appointment and use of arbitral secretaries, important differences in the sub-

138. Obosa Akpata, *The Role of Tribunal Registrars in Maritime Arbitration: A Practitioner's Perspective* (Nov. 20, 2015), http://www.patrelipartners.com/wp-content/uploads/2016/03/The-Role-of-Tribunal-Registrars.pdf.

139. *See* Polkinghorne & Rosenberg, *supra* note 4, at 121.

140. Joshua Fellenbaum, *Arbitral Secretaries: A Growing Trend Towards Codification*, CLYDE & CO. (May 5, 2016), https://www.clydeco.com/insight/article/arbitral-secretaries-a-growing-trend-towards-codification.

141. Esme Shirlow, *The Australian Centre for International Commercial Arbitration's Guideline on the Use of Arbitral Secretaries*, KLUWER ARBITRATION BLOG (Feb. 23, 2017), http://kluwerarbitrationblog.com/2017/02/23/the-australian-centre-for-international-commercial-arbitrations-guideline-on-the-use-of-arbitral-secretaries/. As noted by the author, "[c]onsistent with the goal of increasing transparency, the Guideline stipulates particular expectations as to the matters subject to consultation between the tribunal and disputing parties and further identifies a number of matters subject to disputing party agreement. This includes, for example, a requirement that the parties consent to any appointment or modification to the terms of appointment of arbitral secretaries."

142. *See* Menz & George, *supra* note 13, at 320 ("[T]here is a spectrum of views, with the ICC and LCIA representing the most restrictive and Young ICCA the most liberal.").

143. *See* Singh, Chandran, Foo & Premkumar, *supra* note 17.

144. *Id.* For instance, some authors refer to the position adopted by the Swiss Supreme Court in a decision rendered in May 2015, that the "Supreme Court, in obiter dicta, expressed some clear-cut opinions on those issues, anchoring itself quite decisively at the more liberal end of the "spectrum." *See* Menz & George, *supra* note 13, at 311.

145. *See* Shirlow, *supra* note 141.

146. *Id.*

stance of such regulation remain."[147] For instance, provisions "differ both as to substance and the amount of guidance they provide," regarding the scope of duties of the arbitral secretary,[148] or on the "approach taken in each set to the calculation of the secretary's remuneration."[149]

The aforementioned shows that despite the benefits that could arise from uniform standards regulating arbitral secretaries, it is not clear whether that is going to be possible. This may prove to be even more difficult, considering all arbitrations are different, and as a globally-used mechanism, in certain procedures it could be advisable to respect particular local traditions.

VII. Conclusions

Arbitral secretaries perform useful tasks in international arbitrations, assisting both the arbitrators and the parties in administrative or organizational matters. However, it is important to weigh up their usefulness with the risks associated with performing substantive functions, particularly with those entailing the risk of affecting the decision making process of the tribunal. As explained, arbitrators are appointed *intuitu personae*.

Should the arbitral secretary be required to sign a confidentiality agreement? Should secretaries be allowed to research questions of law? Should they be allowed to draft awards? Can they play a part in the arbitrator's decision-making functions? These and other questions, particularly those related to the scopes of duties of arbitral secretaries, present a challenge to the certainty of international arbitration's most valued asset: the effectiveness of arbitral awards.

In this regard, it is imperative to highlight and encourage the work that has been done by arbitral institutions and other players by drafting guidelines, soft law norms and other provisions. These arbitral actors have played an important role in the quest to clarify aspects that are controversial or uncertain when it comes to the appointment of an arbitral secretary.

However, it is unclear whether an agreed-upon uniform standard will be possible. For this reason, the participants of an arbitration are expected to act especially carefully when appointing a secretary of the tribunal. Consequently, arbitrators should encourage transparency and impartiality in the aforementioned process, while conducting it all the time according to the *intuitu personae* nature of their appointment.

As noted, good judgment is a virtue that cannot be applied by legislation, and which involves "the ability to distinguish between the tasks and duties that should not or cannot be delegated as it will vitiate the decision making process, and those whose delegation will enhance the efficiency of the proceedings."[150] Therefore, so far as the problematic issues regarding the appointment of arbitral secretaries are not solved—as is the case today—it seems advisable for arbitrators to act prudently and always bear in mind that they—and they alone—hold decision-making power.

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147. *Id.*

148. *Id.*

149. *Id.*

150. *See* Souleye, *supra* note 21.

A Bridge Too Rigid: A Comparative Study of American and German Constitutional Rigidity

Tyler J. Smith[1]

I. Introduction

Despite the time and effort that is put into the formation of constitutions by those charged with drafting them, flaws or defects are inevitably discovered. These discoveries occur by way of the application of a certain provision or the social reordering of priorities when faced with several broad external factors. For example, the democratization of former Soviet Bloc and Latin American countries provided an impetus to change existing constitutions and draft new constitutions.[2] The shift from localized to national economies and, more recently, to globalized economies and international political orders also triggered important constitutional developments in various countries.[3] Even developed federal democracies, such as Canada and Germany, have faced new challenges to their constitutional orders, which have led to debates about constitutional restructuring.[4] Not surprisingly, when changes to the constitutions of federal systems are required, actually carrying out those changes is a tall task.

Some scholars have declared, "No part of the constitution is more important than the rules that govern its amendment and its entrenchment against it."[5] An amendment to a constitution is conceptually distinct from a revision.[6] The word "amend," which comes from the Latin word "*emendere*," means "to correct or improve." It does not mean "to deconstitute and reconstitute," or to "replace one system with another or abandon its primary principles."[7] Though most constitutions allow for amendment, it is often deliberately not easy to do.

This article explores to what extent the United States ("U.S.") Constitution's amendment provisions parallel, in terms of rigidity, the German Basic Law's amendment provisions. Part I outlines the concepts of "rigid" and "flexible" constitutions. Part II discusses American and German constitutional histories. Part III outlines the current American and German constitutional amendment procedures, discussing these procedures in terms of their rigidity or flexibility. Part IV evaluates the impact of constitutional rigidity within American and German governmental systems, specifically with respect to the American and German courts that interpret each country's respective constitution.

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1. LL.M., 2017, Notre Dame Law School; J.D., 2015, Indiana University Robert H. McKinney School of Law.
2. Arthur Benz & Felix Knüpling, Changing Federal Constitutions: Lessons from International Comparison 15 (2012).
3. *Id.*
4. *Id.* at 15–16.
5. Richard Albert, *Amending Constitutional Amendment Rules*, 13 Int'l J. Const. L. 655, 655 (2015).
6. Norman Dorsen et al., Comparative Constitutionalism: Cases and Materials 89 (3d ed. 2016).
7. *Id.* (quoting Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity, in* Responding to Imperfection: The Theory and Practice of Constitutional Amendment 163, 177 (Sanford Levinson ed., 1995)).

II. "Rigid" or "Flexible"?

The distinction made between "rigid" and "flexible" constitutions is not new. In 1884, British jurist and politician James Bryce discussed it in two lectures to students at Oxford University.[8] The distinction between "rigid" and "flexible" constitutions, Bryce contended, improved upon the "old fashioned" distinction made between constitutions that were written and those that were unwritten.[9] He saw the distinction between written and unwritten constitutions as failing to draw any clear or sharp lines.[10] However, compared to the "written" and "unwritten" distinction, the "rigid" and "flexible" distinction better reflected the circumstances of the constitutions' origins, and a survey of constitutions revealed that most constitutions conform with one of these two types, falling either into the more rigid or more flexible category.[11]

A. Flexible Constitutions

Flexible constitutions tend to be much older than those of the rigid type. The name "flexible" suggests that they are in a perpetual state of flux in which "[n]ot only are new laws constantly passed which more or less affect them, but their mere working tends to alter them daily."[12] Given this, it would seem natural to assume that flexible constitutions are alterable by ordinary legislation (as opposed to a constitutional amendment), are "not . . . contained in any special sacred document," and "furnish an insufficient guarantee for public order and for the protection of private rights."[13] As of the early 20th century, however, this seemingly was not the case. The paradox that flexible constitutions are stable can partly be explained by the fact that "[t]he stability of any constitution depends not so much on its form as on the social and economic forces that stand behind and support it."[14] The stability of a flexible constitution is sometimes traced to "the very conditions which have enabled it to grow out of isolated laws and mere usages into a settled Frame of Government."[15]

B. Rigid Constitutions

The stability of so-called rigid constitutions is "determined by the comparative difficulty or ease of carrying changes" in one or more of the methods of amendment.[16] Bryce likened the implications of a rigid constitution to "an iron railway-bridge built solidly" to withstand great wind or water pressure.[17] The fact that a very strong bridge can handle "small oscillations or

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8. JAMES BRYCE, CONSTITUTIONS 3, n.1 (Oxford Univ. Press 1905).
9. *Id*. at 5–6.
10. *Id*. at 6 (noting that in written constitutions, "there is and must be . . . an element of unwritten usage," and in the unwritten ones, there is a strong tendency to "treat the written record of custom or precedent as practically binding," which makes the "record almost equivalent to a formally enacted law").
11. *Id*.
12. *Id.* at 18.
13. *Id.* at 19.
14. *Id.* at 20.
15. *Id*. at 21.
16. *Id.* at 62.
17. *Id*. at 68.

disturbances, may aggravate great ones."[18] In other words, because of its tight construction, the entire bridge may collapse. Bryce observed that a rigid constitution, "which has arrested various proposed changes, may be overthrown by a popular tempest which has gathered strength from the very fact that such changes were not and under the actual conditions of politics could not be made by way of amendment."[19]

The American Civil War is an example of the "tempest" Bryce spoke of. Both the Union and the Confederacy claimed that the Constitution of 1787, which enshrined the institution of slavery, was on their side. Bryce speculated that if the Constitution had been easier to amend, the majority in Congress may have been able to deal with the question of slavery much earlier, thereby avoiding the Civil War altogether.[20] Various economic, societal, and political factors, in addition to the inability to constitutionally compromise, likely contributed to the hardening of both sides that ultimately led to the Civil War.[21]

The rigidity and almost divine reverence of the U.S. Constitution is apparent when looking back upon the American Civil War. The war seemingly vindicated the principle that the permanent Union of States created by the Constitution could not simply be abandoned without cost, merely because certain states disagreed with the movement to abolish slavery. Following the words of Abraham Lincoln, the Supreme Court confirmed shortly after the Civil War that "the Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States."[22] That may have ultimately proven true, but the cost to get there was extraordinarily high.

III. The American and German Constitutional Experiences

A. The American Constitution

As the oldest and shortest written Constitution of any "major" government in the world, the U.S. Constitution contains just 4,400 words.[23] It consists of seven original articles, and to date has been amended twenty-seven times, with the most recent amendment ratified on May 7, 1992.[24] A host of innovative ideas and practices surrounded this founding document.[25]

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18. *Id.*

19. BRYCE, *supra* note 8, at 68.

20. *Id*. at 69.

21. This is certainly an interesting suggestion, but the historical merits are beyond the scope of this paper.

22. Texas v. White, 74 U.S. 700, 725 (1869).

23. *Fascinating Facts About the* Constitution, OAKHILL PUBLISHING, https://www.constitutionfacts.com/us-constitution-amendments/fascinating-facts/ (last visited Jan. 12, 2018).

24. Richard L. Berke, *1789 Amendment Is Ratified But Now the Debate Begins*, N.Y. TIMES (May 8, 1992), www.nytimes.com/1992/05/08/us/1789-amendment-is-ratified-but-now-the-debate-begins.html. The 27th Amendment was originally submitted to the States along with eleven other Amendments for ratification on September 25, 1789. Ten of these amendments became the Bill of Rights. Largely forgotten until the 1980's, the 27th Amendment was revived when a student at the University of Texas began a campaign to urge states to pass it, and Michigan became the 38th state to ratify it on May 7, 1992. *Id.*

25. GEORGE ATHAN BILLIAS, AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776-1989: A GLOBAL PERSPECTIVE 4 (2009).

These ideas and practices included the new vogue of written constitutions, the principle that constituent constitutional conventions should draft constitutions, the ratification of charters by the people or their representatives, and the process of amending constitutions.[26]

While several members of the Constitutional Convention of 1787 in Philadelphia did not see the need for the ability to amend, Colonel George Mason of Virginia did. He urged the necessity of an amendment provision because "[t]he plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust chance and violence."[27] Prior to this, the Pennsylvania State Constitution of 1776 had institutionalized an amendment process for the first time by providing for a council of censors charged with determining if the Constitution had been violated or an amendment was warranted.[28] Due to imperfections in practice, only Vermont adopted the Pennsylvania model, and less than half of the states had a constitutional amendment procedure by 1780.[29] However, by the end of the revolutionary era, the principle that the people could amend the Constitution had been established.[30]

B. German Federalism and the German Basic Law

Much like the American colonies, the German states called *Länder* existed well before the current German federation, which was founded later, after WWII.[31] The *Länder*, which fluctuated in name and number, almost always existed as separate and distinct units from one another.[32] Though the rights of the dynastic house to remain sovereign had been destroyed at the end of the monarchical system, the *Länder* continued to thrive through the November Revolution.[33] Despite attempts to unite the German states into a single republic after WWI, strong state feelings and regional identities required a compromise in the Constitution of the German Commonwealth between a strong central government and the sovereign rights of the *Länder*.[34]

Following the highly centralized regime during the Nazi era, the focus was on how to best organize Germany both politically and constitutionally. The allies planned to split Germany into a number of states; they fully intended for Germany to have a democratic and federal system and "believed 'that the idea of the return to federalism would appear to the German people

26. *Id*.

27. The Records of the Federal Convention of 1787: Volume I 202–03 (Max Farrand ed., 1911). *See* Responding to Imperfection: The Theory and Practice of Constitutional Amendment 4 (Sanford Levinson ed., 1995).

28. Billias, *supra* note 25, at 25.

29. *Id.* at 25–26.

30. *Id*. at 26.

31. Arthur Gunlicks, The Länder and German Federalism 53 (2003).

32. *Id.*

33. Wolf D. Gruner, *Historical Dimensions of German Statehood: From the Old Reich to the New Germany*, *in* German Public Policy and Federalism: Current Debates on Political, Legal, and Social Issues 32 (Arthur Gunlicks ed., 2003).

34. *Id.*

as emanating from themselves and not imposed by the foreign conqueror.'"[35] Fortunately, the prevailing view was "that 'any internal organization of Germany c[ould] be carried out only by the German people themselves.'"[36] Owing to Nazi propaganda, the Weimar system was discredited, and perhaps due to a lack of political democracy at the national level, the Western-style Weimar Constitution was considerably "too modern" for the Germans; instead, they preferred "to build the foundations for a strong German democracy organized on federal principles."[37]

In July 1948, the *Länder* set up a Constituent National Assembly to draft a constitution, to redraw state boundaries, and to establish a federal system of government for postwar Germany.[38] Still in the shadow of Nazi Germany and the watchful eye of the Communist-dominated East Germany, the sixty-five members of the Parliamentary Council "proceeded to create a constitutional democracy that would rebuild the *Rechsstaat*, secure political stability, protect human rights, and maintain peace."[39] As a result, the Constitution of the Federal Republic of Germany, the "Basic Law," or *Grundgesetz*, went into effect on May 24, 1949.[40] It had strong unitary features concerning the distribution of powers between the federation and the *Länder*.[41]

The name "Basic Law" implies its provisional nature: it was adopted merely "as a provisional framework for the basic organization of the state until German reunification."[42] However, from the very beginning, and even after reunification in 1990, the Basic Law has "contained all the features of a constitution and has functioned effectively as one for more than 60 years."[43] Shortly after the war, it became clear that the reconstruction and revival of Europe seemed impossible without Germany, which would be a member of the Council of Europe within ten years.[44] One of the problems with the Basic Law that appeared early on in the European integration process in the 1950's concerned the role, the rights, and responsibilities of the *Länder* in the process.[45] The *Länder* were not fully involved in this process and began asking to be equally represented in the Consultative Assembly of the Council of Europe.[46]

By the late 1950's, the view that the *Länder* could improve their positions via the federation had declined, and during the 1960's the Federation took over a number of responsibilities

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35. *Id.* at 36.
36. *Id.* at 35.
37. *Id*.
38. *Id*.
39. Donald P. Kommers, *The Basic Law: A Fifty Year Assessment*, 53 S.M.U. L. REV. 477, 477 (2000).
40. Gruner, *supra* note 33, at 36.
41. *See id*. at 37–38.
42. *Constitution of the Federal Republic Germany*, FED. MINISTRY OF THE INTERIOR, www.bmi.bund.de/EN/topics/constitution/constitutional-issues/constitutional-issues.html (last visited Dec. 17, 2017).
43. *Id.*
44. Gruner, *supra* note 33, at 38–39.
45. *Id*. at 39.
46. *Id.* at 40.

from the *Länder*, including social legislation, higher education, university planning, and financing.[47] These measures served to reduce the jurisdiction of the *Länder* and "affected the financial constitution of the Federal Republic."[48]

The Basic Law, as drafted in 1949, was approved by the parliaments of the *Länder*, but this approval did not make the Federal Republic a true product of the *Länder*.[49] Rather, as the Preamble states, "Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law."[50] The original version of the Basic law consisted of 146 articles.[51] By 1999, the Basic Law, which consisted of 181 articles, still retained 110 paragraphs from the original document, even though it had been amended forty-six times and fifty-eight articles had been revised.[52] Today, the Basic Law consists of 146 articles, divided into eleven parts. In total, since 1949, the Basic Law has been amended sixty times.[53]

Given the historical origins briefly described in the previous section, the Basic Law should be viewed as a constitution of human dignity, rather than a constitution of freedom. Despite the fact that the Basic Law was originally considered a provisional framework, due to its comprehensive and statute-like structure, it has a prescriptive nature. A number of provisions in the first section, which detail the basic rights, begin with the phrases "All persons" and "Every person."[54] In contrast, the Amendments contained in the Bill of Rights of the U.S. Constitution place restrictions on what the government can or cannot do with respect to speech, religion, deprivation of property, and other individual rights.[55]

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47. *Id.*

48. *Id.*

49. GUNLICKS, supra note 31, at 53. Only Bavaria did not approve the Basic Law; however, the Basic Law still applies to Bavaria. *Id.*

50. GRUNDGESETZ [GG] [BASIC LAW], *translation available at* www.gesetze-im-internet.de/englisch_gg/index.html.

51. Donald P. Kommers, *The Basic Law of the Federal Republic of Germany: An Assessment After 40 Years*, *in* THE FEDERAL REPUBLIC OF GERMANY AT FORTY: UNION WITHOUT UNITY 141 (Peter H. Merkl ed. 1989).

52. *See* THE BASIC LAW (GRUNDGESETZ) 2016: THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (MAY 23RD, 1949) – INTRODUCTION AND TRANSLATION (Axel Tschentscher trans., Jurisprudentia Bern Würzburg 4th ed. 2016), *available at* www.jurisprudentia.de (last visited Jan. 19, 2018).

53. *Id.*

54. *See id.* at arts. II–V.

55. *See* U.S. CONST. amends. I–X.

IV. American and German Constitutional Amendment Procedures

A. U.S. Constitutional Amendment Procedures

One legal scholar has posited that were a survey conducted of Americans asking whether the U.S. Constitution is amendable at all that most would likely answer in the affirmative.[56] The same scholar has suggested that if the same individuals were surveyed as to whether the entire Constitution can be changed, their answers would likely vary.[57] Some might answer that the provisions contained in the Bill of Rights cannot be amended, but this response would not be incorrect. There is only one constitutional provision that expressly cannot be amended: Article V, which guarantees each state equal suffrage in the Senate.[58] Such responses to such a hypothetical survey would hardly be surprising given how little attention the U.S. Supreme Court has given the matter and how rarely the limitations on the subject matter of Constitutional amendments has been debated in Congress or in the state legislatures.[59]

Presidents and members of Congress have proposed numerous amendments, but relatively few amendment proposals have ever passed the threshold required by the Constitution. Article V provides two ways to amend "the nation's fundamental charter."[60] First, it authorizes Congress to propose amendments with a two-thirds majority in both the House and Senate.[61] Second, it authorizes two-thirds of the State legislatures to call a constitutional convention, also known as an "Article V Convention."[62] Though none of the twenty-seven amendments have been proposed by an Article V Convention, a number of states have proposed measures in their respective legislatures calling for such a convention.[63] By either process, any proposed amendment requires the approval of three-fourths of the states, Congress has the authority to choose the method the states use to ratify the amendment once it meets the three-fourths threshold, and amendments ratified under either of the two methods have the same force and are essentially indistinguishable.[64]

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56. *See* Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 717 (1981). *But see Americans Are Poorly Informed About Basic Constitutional Provisions*, ANNENBERG PUB. POL'Y CENT. (Sept. 12, 2017), www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions ("Many Americans are poorly informed about basic constitutional provisions").

57. *Id.*

58. *Id.* at 717–18. *See* U.S. CONST. art. I, § 3 ("[t]he Senate of the United Sates shall be composed of two Senators from each State . . . "); U.S. CONST. art. V ("no State, without its Consent, shall be deprived of its equal Suffrage in the Senate").

59. *Id.* at 718.

60. THOMAS H. NEALE, CONG. RESEARCH SERV., R42592, THE ARTICLE V CONVENTION TO PROPOSE CONSTITUTIONAL AMENDMENTS: CONTEMPORARY ISSUES FOR CONGRESS 1 (Oct. 22, 2012).

61. *Id*. at 4. *See* U.S. CONST. art. V.

62. NEALE, *supra* note 60, at 1.

63. *Id*. at 2.

64. *Id.* at 3–4.

Additionally, "three elements not included in the Constitution, have been customarily incorporated in the ratification process."[65] First, "amendments are not incorporated into the existing text of the Constitution" (James Madison once suggested that the Bill of Rights be so incorporated) but are instead added as supplementary articles.[66] Second, Congress may set a time limit on the ratification process, and the requisite number of states must approve the amendment within that time limit.[67] Third, the Constitution does not require the President to approve proposed amendments, and proposed amendments are not subject to the President's veto or pocket veto.[68]

1. The Article V Convention

Though an Article V Convention has yet to be called, the failure is not from a lack of trying. More than 700 proposals for an Article V convention have been filed since the first proposal was filed in 1789.[69] However, most of these applications were received between 1900 and 1999.[70] As a result, the Article V Convention is sometimes referred to as a "20th century phenomenon."[71] Campaigns to encourage states to pass legislation to call for Article V Conventions have covered a number of issues throughout the years, but efforts in the mid-to-late 20th century calling for an Article V Convention only had "mixed success."[72] Only two 20th century campaigns came close to reaching the thirty-four state threshold.[73] More interest has reawakened in the last decade. In 2016, Indiana became the sixth state to pass a joint resolution calling for an Article V Convention.[74] The perceived overreach of the federal government into the state's affairs seemed to be the impetus for doing so.[75]

What then is the purpose of the Article V Convention if one has never been successfully called? The late Antonin Scalia, then a professor of law, commented in 1979 that the Founders

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65. THOMAS H. NEALE, CONG. RESEARCH SERV., R42589, THE ARTICLE V CONVENTION TO PROPOSE CONSTITUTIONAL AMENDMENTS: CONTEMPORARY ISSUES FOR CONGRESS 2 (Mar. 29, 2016).

66. *Id.*

67. *Id.* Congress set a seven-year limit for the 18th Amendment and the 20th through the 28th Amendments, but it did not set a time limit on ratification of the 27th Amendment. *Id.* As such, many were stunned and questioned the Amendment's "viability" when Michigan became the 38th state to ratify it over 200 years after its proposal. Berke, *supra* note 24.

68. NEALE, *supra* note 65, at 2.

69. NEALE, *supra* note 60, at 8.

70. *Id.*

71. *Id*. at 9.

72. *Id.* at 10.

73. *Id.*

74. S.J. 14, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016). The resolution calls for a convention "limited to proposing Amendments to the Constitution of the United States that impose fiscal restraints of the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for members of Congress." *Id.*

75. Dan Carden, *Indiana Senate Calls for Constitutional Convention to Limit Federal Power*, NWI TIMES (Feb. 5, 2016), www.nwitimes.com/news/local/govt-and-politics/indiana-senate-calls-for-constitutional-convention-to-limit-federal-power/article_3737ff28-1151-526a-8d0a-77ad8e2133fa.html (noting also that should an Article V Convention ever be called, "Indiana has [also] taken steps to prevent a 'runaway convention' by providing for the recall and jailing of [any Indiana] delegate who fails to follow the instructions of the General Assembly.").

"inserted this alternative method of obtaining constitutional amendments because they knew the Congress would be unwilling to give attention to many issues the people are concerned with, particularly those involving restrictions on the federal government's own power."[76] While this purpose has yet to be realized in reality, the Article V Convention did prove to have a "prodding effect" on Congress, leading to the proposal of the 17th Amendment.[77]

The campaign for the 17th amendment began in response to the political problem of the inability of "deadlocked state legislatures" to agree on suitable candidates to fill vacant U.S. Senate seats.[78] While the House proposed an amendment to resolve this problem as early as 1893, the first "direct election amendments in the Senate never reached the floor."[79] States had also previously petitioned Congress to propose a direct election amendment, but in 1893 Nebraska revived the long dormant Article V Convention.[80] In 1899, the Pennsylvania legislature adopted and distributed among the states a model application for an Article V Convention, reflecting the growing support for an Article V Convention.[81] Twenty-five states in the following decade applied for a convention, while other states adopted the "Oregon Plan" of choosing candidates, which involved a number of measures that allowed voters to express their choice for senator.[82] As a result, attitudes in the Senate eventually changed, and they joined the House in proposing what became the 17th Amendment.[83]

B. German Constitutional Amendment Procedures

Article 79 of the Basic Law provides the authority and the conditions necessary in order for it to be amended. Article 79 (1) provides that "[t]his Basic Law may be amended only by a law expressly amending or supplementing its text."[84] Each amendment adding a new clause acts much like an amendment to a statute. That is, the new clause replaces the previous formulation, unlike amendments to the U.S. Constitution, which are attached and numbered without altering the original text. This seemingly minor technicality points to the "different perceptions of the integrity of the constitutional text."[85]

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76. A CONSTITUTIONAL CONVENTION: HOW WELL WOULD IT WORK, AM. ENTERPRISE INST. PUB. POL'Y RES. 6 (May 23, 1979), available at www.aei.org/wp-content/uploads/2016/02/AEI-Forum_A-Constitutional-Convention.pdf.

77. NEALE, *supra* note 60, at 10.

78. *Id.* at 9. Direct election of Senators did not occur until ratification of the 17th Amendment on April 8, 1913. Prior to this, the Constitution, as adopted, stated that state legislators would elect senators. *See Landmark Legislation: The Seventeenth Amendment to the Constitution*, U.S. SENATE, www.senate.gov/artandhistory/history/common/generic/SeventeenthAmendment.htm (last visited Dec. 17, 2017).

79. NEALE, *supra* note 65, at 9.

80. NEALE, *supra* note 60, at 9.

81. *Id.* at 10.

82. *Id.*

83. *Id. See Landmark Legislation*, *supra* note 78.

84. GRUNDGESETZ [GG] [BASIC LAW] art. 79, *translation available at* www.gesetze-im-internet.de/englisch_gg/index.html.

85. Patrick Bahners, *What Distinguishes Germany's Basic Law from the United States Constitution?*, NOTRE DAME NEWS (May 18, 2009), http://news.nd.edu/news/human-dignity-and-freedom-rights.

Similar to the U.S. Constitution, any amendments to the Basic Law must be passed by two-thirds of the Members of the National Parliament, called the *Bundestag*, and two-thirds of the votes of the legislative body that represents the *Länder*, called the *Bundesrat*.[86] However, unlike the U.S. Constitution, the thresholds required to amend the Basic Law are much easier to reach in practice, as evidenced by the fact that the U.S. Constitution has been amended only twenty-seven times in over 200 years, while the Basic Law has been amended sixty times in sixty-eight years.[87]

Though subjected to substantially more amendments relative to its age and the provisional nature of its origins, the Basic Law contains rights, values, and principles that are considered supreme and permanent.[88] The Basic Law "represents the fundamental law of the nation," deriving its authority directly from the people, and the government derives its authority from the Basic Law.[89] In addition to its supremacy, the Basic Law "establishes its core principles in perpetuity."[90] Its principles are, in other words, permanent.

Article 79(3) provides, "[a]mendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible."[91] This clause, the so-called "eternity clause," prohibits any amendment that would "affect or undermine the dignitarian principles" found in Article 1 or structural principles of the constitutional order set forth in Article 20.[92] According to the framers, the best way to "safeguard human dignity and preserve the 'democratic and social federal state'" was to put certain principles of the government beyond the ability of the people to amend.[93] Thus, the Basic Law explicitly prohibits the amendment of the basic rights and structural provisions of articles 1 and 20 but provides for relative ease of amendment for the rest of the provisions contained in the document, which is also true in practice. In contrast, the U.S. Constitution only has a single provision in Article V that explicitly cannot be amended and is otherwise amendable in theory but untouchable in practice.

1. Basic Law Amendments

Many amendments of the Basic Law, considered "repair work," occurred during the periods 1954–1956, 1968–1969, and 1990–1994.[94] Each of these periods took place in a legisla-

86. Kommers, *supra* note 39, at 483.

87. *See* THE BASIC LAW (GRUNDGESETZ) 2016: THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (MAY 23RD, 1949) – INTRODUCTION AND TRANSLATION (Axel Tschentscher trans., Jurisprudentia Bern Würzburg 4th ed. 2016), *available at* www.jurisprudentia.de (last visited Jan. 19, 2018).

88. Kommers, *supra* note 39, at 479.

89. *Id.*

90. *Id.*

91. GRUNDGESETZ [GG] [BASIC LAW] art. 79, *translation available at* www.gesetze-im-internet.de/englisch_gg/index.html.

92. Kommers, *supra* note 39, at 479.

93. *Id.*

94. *Id.* at 482.

tive environment in which it was relatively easy to reach the two-thirds vote necessary and represented "transformative moments in German Constitutional politics."[95] Amendments during the first period served to restore the sovereignty and remilitarization of West Germany. The first post-war Chancellor's decision to join the European Defense Community in 1952 ignited much debate about whether the Basic Law would permit Germany to remilitarize.[96] Two years later, the government succeeded in amending the Basic Law to provide for the country's defense and a military draft.[97]

The second period consisted of two successive waves of constitutional change, with the first in 1968 during which time sixteen new articles were added and three old articles were repealed.[98] The new articles expanded "the powers of the Federation to pass bills, issue directives, and take other measures to meet a foreign invasion or major civil disturbance."[99] The second wave in 1969 affected twenty articles of the Basic Law that dealt with budgetary and fiscal affairs.[100]

The third period, beginning in 1990, consisted mostly of amendments required to extend the Basic Law to the five new *Länder* of the old German Democratic Republic. In 1993 and 1994, several amendments brought the Basic Law in accord with the Maastricht Treaty on European Union, clarified the rights of the *Länder* in the affairs of Europe, and enlarged the *Länder*'s powers of consent in the *Bundesrat*.[101]

A modern day Justice John Marshall might suggest that, "the Basic Law has been distended into an unwieldy bulk that mocks the contrast between triviality and fundamentality."[102] Though the Basic Law looks quite different from the document originally adopted in 1949, the three periods of amendment are especially important because, despite textual evolution, none of the amendments changed the "fundamental principles and structures of the Basic Law."[103] Many parts have remained largely unchanged, including those concerning German federalism, separation of powers, and the rule of law.[104] More importantly, although textual changes were made to the Basic Law's Bill of Rights (Articles 1-17), nine of those articles protecting fundamental rights have also remained unchanged.[105] These provisions include guarantees of freedom of religion, freedom of speech, freedom of assembly, the right to property, and parental rights in education.[106] Amendments to four of these articles actually expanded the

95. *Id.* at 483.
96. *Id.*
97. Kommers, *supra* note 39, at 483.
98. *Id.* at 484.
99. *Id.*
100. *Id.*
101. *Id.* at 486.
102. *Id.* at 487.
103. Kommers, *supra* note 39, at 487.
104. *Id.*
105. *Id.*
106. *Id.* at 487–88.

original right, and several adjusted the requirements for remilitarization and emergency defense.[107] These adjustments to the German Bill of Rights are in stark contrast to the U.S., where the Bill of Rights has never been amended.

V. Impact on Other Branches

The rigidity of constitutions has an impact on the other branches of government. At the most basic level, courts have the task of interpreting the constitutional text. Thus, what is written in the Constitution originally or changed through amendments has a direct impact on the work of the courts that interpret it.

A. American Judicial Review

The U.S. Supreme Court reviews statutes, regulations, and other laws against the backdrop of the Constitution. The Constitution is "designed to provide for a national government sufficiently strong and flexible to meet the needs of the republic, yet sufficiently limited and just to protect the guaranteed rights of citizens."[108] Accordingly, the Court plays a prominent role in maintaining the balance of the Constitution and, in turn, the rights of citizens through checks and balances on the Executive and Legislative branches.[109] Though the authority of the Court to judicially review the Constitution is not explicitly written in it, many of the Founding Fathers anticipated that the Court would assume this role. James Madison and Alexander Hamilton underlined the importance of judicial review in the Federalist Papers.[110] The Court's actual power of judicial review was then confirmed in 1803 in *Marbury v. Madison*, in which Chief Justice Marshall wrote that, "[I]t is emphatically the province of the judicial department to say what the law is."[111]

B. German Constitutional Court

Since its establishment in 1951, the Federal Constitutional Court's duty has been to ensure that all governmental bodies obey the Basic law.[112] Should a conflict arise, the Constitutional Court's jurisdiction may be invoked.[113] The Court, consisting of two Senates with eight

107. *Id*. at 488.

108. *The Court and Constitutional Interpretation*, SUP. CT. www.supremecourt.gov/about/constitutional.pdf (last visited Dec. 17, 2017).

109. *Id.*

110. *The Court and Constitutional Interpretation*, *supra* note 108. In the Federalist Papers, Alexander Hamilton explained that limitations to legislative authority "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." THE FEDERALIST NO. 78 (Alexander Hamilton).

111. Marbury v. Madison, 5 U.S. 137, 177 (1803).

112. *The Court's Duties*, BUNDESVERFASSUNGSGERICHT, www.bundesverfassungsgericht.de/EN/Das-Gericht/Aufgaben/aufgaben_node.html (last visited Dec. 17, 2017).

113. *Id.*

judges each, receives more than 6,000 constitutional complaints a year.[114] To handle this high volume of complaints, the judges from both Senates of the Constitutional Court form three-member Chambers to filter out frivolous constitutional complaints.[115] Approximately ninety-nine percent of the complaints have no constitutional significance.[116] The Court only admits a complaint for review "if it has general constitutional significance, or if this appears necessary to enforce the complaint's own rights under the Constitution."[117]

A case of high constitutional significance is one that challenges the very constitutionality of an amendment. In one particular case, called the "Privacy of Communication Case," the Court addressed the constitutionality of an amendment to Article 10 of the Basic Law. In doing so, the court relied on the interpretation of other amendments because "Constitutional amendments must not be interpreted in isolation, but rather so they are consistent with the Basic Law's fundamental principles and its system of values."[118]

Separation of powers concerns and the fear of an overly active Court have dominated discourse in Germany, especially as it pertains to equality cases.[119] Critics have warned against excessive intervention and the risk of the court becoming "the repair shop for the legislature."[120] Judicial intervention in equality cases is considered more dangerous than in other types of cases because there is a fear of a state of total conformity.[121] The resemblance of the idea of *too much* equality to the substantive equality promoted in fascist Nazi Germany and in the socialist German Democratic Republic has contributed to a fear of a "strong, interventionist equality interpretation."[122]

C. Constitutional Interpretation

On the general level, "just about everybody" interprets a constitution.[123] Judges are the most visible interpreters, but every public official implicitly or explicitly interprets the Constitution at some point.[124] Nearly every constitutional democracy has some form of judicial review; notably, Germany and the U.S. have "apparently ordained judicial supremacy."[125] The

114. *Court and Constitutional Organ*, BUNDESVERFASSUNGSGERICHT, www.bundesverfassungsgericht.de/EN/Das-Gericht/Gericht-und-Verfassungsorgan/gericht-und-verfassungsorgan_node.html (last visited Dec. 17, 2017).

115. *Id.*

116. *Id.*

117. *Constitutional Complaint*, BUNDESVERFASSUNGSGERICHT, www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Verfassungsbeschwerde/verfassungsbeschwerde_node.html (last visited Dec. 17, 2017).

118. Bundesverfassungsgericht [BverfGE] [Federal Constitutional Court], Dec. 15, 1970, 30 BVerfGE 1 (1970) (Ger.), *available at* www.servat.unibe.ch/dfr/bv030001.html.

119. Susanne Baer, *Equality: The Jurisprudence of the German Constitutional Court*, 5 COLUM. J. EUR. L. 249, 273 (1999).

120. *Id.*

121. *Id*.

122. *Id.*

123. WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 463 (2007).

124. *Id.*

125. *Id.* at 466.

enterprise of constitutional interpretation when resolving conflicts involving the Constitution is the domain of those courts charged with interpreting their respective documents. This much is fairly obvious. What is not quite so obvious, however, is the impact of the rigidity of a constitution, meaning the relative ease or difficulty in amending the document, and the level that politics plays in the court's make-up and methodologies of interpretation.

When constitutional provisions remain unchanged and nearly impossible to amend, constitutional interpretation has played, and will continue to play, an integral part in steering the direction of rights for the people. If the U.S. Supreme Court interprets a provision in such a way that displeases the Legislature or the Executive branches, given the difficulty of passing an amendment, there is really not much that can be done to change the specific provision of the Constitution itself that the court interpreted. Congress or the Executive can only change the law or rule at issue or attempt to select Justices more suited to the political ideologies of the Congress.[126] Thus, how the Court interprets the Constitution and how the ideological leanings of individual justices affect how the Court decides an important case have enormous implications.

On the other hand, in Germany, while the German Constitutional Court plays an integral part of maintaining the German republic, the relative ease at which the Basic Law can be amended means the Court has less political impact on the country when it comes to constitutional interpretation. That is not to downplay the role of the Court in shaping the Basic Law, remedying violations of constitutional rights, and in deciding the constitutionality of laws. However, in comparison to the U.S. Supreme Court, the nationwide impact of the Constitutional Court seems more muted. This muted impact stands in stark contrast to when the U.S. Supreme Court makes a decision on some fundamental right or the constitutionality of a healthcare law that potentially impacts millions of Americans.

Additionally, there seems to be, at least from the American perspective, far less political and social impact from a single German Constitutional Court Justice than from an American Justice sitting on the Supreme Court. Though measuring the exact political and social impact of each respective court's justices is beyond the scope of this paper, the judicial selection process itself gives a glimpse at how the German system has a much less politically divisive judicial system. The Constitutional Court justices are very non-political and the selection process does not typically garner much media attention.[127] The *Bundesrat* (the representatives of the German states) selects half the justices and the *Bundestag* (the parliament) selects the other half.[128] An electoral committee formed specifically for the purpose of selecting justices proposes a secret ballot by which the *Bundestag* then choose the justices without prior debate.[129] The *Bundesrat* also elects justices by a two-thirds majority, though they do not form an election committee to do so.[130] After being elected, justices serve twelve-year terms and cannot maintain outside

126. Of all the Supreme Court cases interpreting the Constitution, the last case that can be seen as an impetus for an amendment was Oregon v. Mitchell, in which a divided Court held that Congress can establish a voting age for federal elections but not for state or local elections. 400 U.S. 112, 117–18 (1970).

127. Jenny Gesley, *How Judges Are Selected In Germany*, LIBR. CONG. (Mar. 3, 2016), https://blogs.loc.gov/law/2016/05/how-judges-are-selected-in-germany.

128. *Id.*

129. *Id.*

130. *Id.*

employment, with an exception for teaching as a law professor.[131] Half of the current justices were law professors before their appointment to the Court.[132]

This method for selecting German Constitutional Court justices stands in stark contrast to the highly politicized and cut-throat nature of the American Supreme Court justice selection process. The origins of the deep political divide that can surround a judicial nomination in the U.S. are beyond the scope of this paper, but the implications reach far beyond the judiciary. A common phrase among Americans when speaking about Congress, a body of lawmakers with an honesty rating slightly above those who sell used cars, is often that Congress is ineffective.[133] In recent years, as seen with healthcare and tax bills, the majority party may then resort to changing the rules and altering the traditional legislative process to pass legislation deemed important to their agendas.[134]

If one of the most effective ways in which a body of 535 members can pass legislation on healthcare or taxes is by changing the traditional rules, then the likelihood that this body can collectively agree upon changes to fundamental rights contained in the Constitution seems low. Thus, the rights contained in the Bill of Rights can essentially be considered "informally unamendable."[135] This shield surrounding the Bill of Rights forces the Supreme Court to be the sole branch to interpret the Constitution and give full effect and meaning to its provisions. The centrality of the Supreme Court in this role and its "assumed neutrality" but "highly political reality" highlights the significant political interest in the selection process of each Justice.[136] Each Justice that is nominated by the sitting President and confirmed by Congress has an enormous political impact on the future jurisprudence of the Supreme Court and in turn, on the fundamental rights of Americans. One could speculate that if the Constitution were slightly less difficult to amend, the political implications of the court might be lessened and Congress, instead, could have a greater impact on the Constitution. The potential for this to happen and the merits of a more easily amendable Constitution are up for debate.

VI. Conclusion

In practice, the U.S. Constitution seems to be equally as rigid as Articles 1 and 20 of the Basic Law that are considered to be a part of the Eternity Clause. Though in theory the more flexible nature of the Basic Law could allow for the amendment of article 79 (3) itself to allow

131. *Id.*

132. *Id.*

133. Ariel Edwards-Levy, *Americans Find Congress Slightly More Honest Than Car Salesmen: Poll*, HUFFINGTON POST (Dec. 6, 2017), www.huffingtonpost.com/2012/12/03/congress-approval-rating_n_2231322.html.

134. *See* Glenn Kessler, *History Lesson: How the Democrats Pushed Obamacare Through the Senate*, WASH. POST (June 22, 2017), www.washingtonpost.com/news/fact-checker/wp/2017/06/22/history-lesson-how-the-democrats-pushed-obamacare-through-the-senate; Deirdre Shesgreen, *How Will the Tax Bill Conference Committee Work? Not the Usual Way*, USA TODAY (Dec. 4, 2017), www.usatoday.com/story/news/politics/2017/12/04/how-tax-bill-conference-committee-work-not-usual-way/919605001.

135. *See* Albert, *supra* note 5, at 668.

136. Alex Gatenby, *Why Trump's Supreme Court Nomination is More Important Than We Realise*, HUFFINGTON POST (Jan. 2, 2017), www.huffingtonpost.co.uk/alex-gatenby/neil-gorsuch-supreme-court_b_14549234.html. *See* Taylor Kate Brown, *Trump Supreme Court Pick: Why is the U.S. Top Court So Important*, BBC NEWS (Feb. 1, 2017), www.bbc.com/news/world-us-canada-38707720.

for changes to be made to articles 1 and 20, this seems only slightly less likely than another significant Amendment to the U.S. Constitution. However, beyond the "fundamental rights" provisions of both constitutions, the Basic Law, though still relatively rigid, is significantly more amendable that the U.S. Constitution. The rigidity of the U.S. Constitution has implications beyond the text that are really only visible upon comparison with the Basic Law and the German Constitutional Court.

Looters and Traffickers and Destroyers, Oh My: Criminals Must Be Held Liable For Violating *Jus Cogens* and Prosecuted By the International Criminal Court

Laina Rose Boris[1]

I. Introduction

The art trade market—an international and complex market that revolves around dealings in art objects[2]—is broken.[3] Compared to other trade sectors and international markets, the art market is more vulnerable to illegal activity and faces a higher risk of exposure to dubious trade practices due to a noticeably higher number of questionable transactions.[4] One of the most disconcerting illegal activities embedded within the art market is the looting and illicit trafficking of antiquities,[5] which has only gotten worse given the significant (and well documented) increase in the looting of archaeological sites[6] and "the proliferation of antiquities trafficking networks throughout the Middle East, Latin America, Southeast Asia, and . . . Africa."[7] Various art trade market operators, who have too often been found participating in the illicit antiquities trade, include auction houses, galleries, art dealers, art brokers, individual collectors, museums,

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2. *See* Thomas Christ & Claudia von Selle, *Basel Art Trade Guidelines* 1, 10 (Basel Inst. on Governance, Working Paper No. 12, 2012), https://www.baselgovernance.org/sites/collective.localhost/files/publications/basel_art_trade_guidelines.pdf ("According to international law[,] art objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science."); *see also* Emily Behzadi, *Harmonizing the Law to Protect Cultural Diplomacy: The Foreign Cultural Exchange Jurisdictional Immunities Clarification Act*, 12 J. INT'L L. & INT'L REL. 9, 10 (2016) ("[A]rt objects . . . serve as cultural ambassadors . . . [they] enlighten the world of the unique cultures and heritage of other nations.").

3. *See* Dr. Christ & von Selle, *supra* note 2, at 1, 10; *see also* Steven Lee Myers & Nicholas Kulish, *'Broken System' Allows Isis to Profit From Looted Antiquities*, N.Y. TIMES (Jan. 9, 2016), https://www.nytimes.com/2016/01/10/world/europe/iraq-syria-antiquities-islamic-state.html ("[T]he booming trade in antiquities, estimated to be worth billions of dollars a year. . . . '[is] a broken system that ISIS or anyone else . . . can play into.'").

4. Christ & von Selle, *supra* note 2, at 5; *see also* Tess Bonelli, *The Art Market Database: Preventing Art Crime and Regulating the New Global Currency*, 20 HOLY CROSS J.L. & PUB. POL'Y 119, 119, 124 (2016).

5. *See* Paul R. Williams & Christin Coster, *Blood Antiquities: Addressing a Culture of Impunity in the Antiquities Market*, 49 CASE W. RES. J. INT'L L. 103, 108 (2017) ("There is technically nothing illegal about owning and purchasing antiquities; the legality of the trade revolves around how the antiquities have been acquired."); Donna Yates, *The Global Traffic in Looted Cultural Objects*, OXFORD RESEARCH ENCYCLOPEDIA, CRIMINOLOGY & CRIMINAL JUSTICE 1, 12 (2016), http://criminology.oxfordre.com/view/10.1093/acrefore/9780190264079.001.0001/ acrefore-9780190264079-e-124; Hannah D. Willett, *Ill-Gotten Gains: A Response to the Islamic State's Profits from the Illicit Antiquities Market*, 58 ARIZ. L. REV. 831, 846 (2016).

6. *See* Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336, 375 (2016).

7. Jennifer Tribble, *Antiquities Trafficking and Terrorism: Where Cultural Wealth, Political Violence, and Criminal Networks Intersect* 19, http://www.miis.edu/media/view/37908/original/illicit_antiquities_networks_final_1.pdf.

curators, museum workers, experts, insurers, conservators, archeologists, and restorers.[8] Today, regrettably, this list includes even terrorists.[9]

The surge in looting and illicit trafficking of antiquities coincides with an increase in an overall lack of appreciation and respect for art. For too long, cultural heritage[10] has been undervalued and overlooked as a basic need.[11] For some, tradition is archaic, no longer relevant, and unnecessary during modern times,[12] but this line of thought is gravely misguided. "It is unfortunate [that] the world community has not advanced in its understanding of the significance of cultural heritage,"[13] for it is imperative[14] and should be widely recognized and protected because it enables us to better understand prior generations and our history.[15] Although cultural heritage should be outliving many generations of people,[16] tragically, that is not always the case. Today, more than ever, cultural heritage is in danger.[17] It has seen an increase of threatened destruction[18] by terrorists who have turned to the intentional destruction of cultural heritage to further their agenda.[19]

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8. *See* Dr. Christ & von Sell, *supra* note 2, at 1, 10; *see also generally* CRIME IN THE ART AND ANTIQUITIES WORLD: ILLEGAL TRAFFICKING IN CULTURAL PROPERTY 21 (Stefano Manacorda & Duncan Chappell eds., 2011).

9. *See* Yaya J. Fanusie & Alexander Joffe, *Monumental Fight: Countering the Islamic State's Antiquities Trafficking*, FOUND. FOR DEF. OF DEMOCRACIES, CTR. ON SANCTIONS & ILLICIT FIN. 1, 5 (2015), http://www.defenddemocracy.org/content/uploads/documents/Monumental_Fight.pdf (explaining that ISIS is "deeply involved in antiquities looting, which provides a significant funding source – estimated . . . as high as $100 million annually"); *see also* Claire Stephens, *Blood Antiquities: Preserving Syria's Heritage*, 92 CHI.-KENT L. REV. 353, 353 (2017).

10. *What is Meant by "Cultural Heritage"?*, U.N. EDUC., SCI. & CULTURAL ORG., http://www.unesco.org/new/en/%20culture/themes/illicit-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/frequently-asked-questions/definition-of-the-cultural-heritage (last visited Mar. 3, 2018). This Note focuses only on tangible cultural heritage, which consists of monuments, groups of buildings, and sites. *See* UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage art. 1, *adopted* Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 (defining monuments, groups of buildings, and sites).

11. *See Cultural Heritage & Development*, CULTURE IN DEV., http://www.cultureindevelopment.nl/Cultural_Heritage/Cultural_Heritage_&_Development (last visited Mar. 3, 2018).

12. *See The Importance of Cultural Heritage*, CULTIVATING CULTURE, http://www.cultivatingculture.com/2013/04/05/the-importance-of-cultural-heritage/ (last visited Mar. 3, 2018).

13. Gerstenblith, *supra* note 6, at 380.

14. *Cultural Heritage & Development*, *supra* note 11.

15. *See The Importance of Cultural Heritage*, CULTIVATING CULTURE, http://www.cultivatingculture.com/2013/04/05/the-importance-of-cultural-heritage/ (last visited Mar. 3, 2018); Mark S. Ellis, *The ICC's Role in Combatting the Destruction of Cultural Heritage*, 49 CASE W. RES. J. INT'L L. 23, 35 (2017); *Antiquities Coalition Partners with UNESCO, Italy, and Jordan on New Initiative*, ANTIQUITIES COALITION, https://theantiquitiescoalition.org/blog-posts/antiquities-coalition-partners-with-unesco-italy-and-jordan-on-important-initiative/ (last visited Mar. 3, 2018).

16. Jamie B. Perry, *Cultural Carnage: Considering the Destruction of Antiquities through the Lens of International Laws Governing War Crimes*, 64 U.S. ATT'YS BULL. 57, 59 (Mar. 2016); *See generally* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR U.S. ATTORNEYS, OFFICE OF LEGAL EDUC., BULL. VOL. 64, NO. 2, CULTURAL PROP. L. 59 (2016), https://www.justice.gov/usao/file/834826/download (last visited Mar. 3, 2018) [hereinafter CULTURAL PROP. L.].

17. *See* Ellis, *supra* note 15, at 24 ("The willful destruction of cultural property is in no sense a modern phenomenon. Increasingly, however, this centuries-old practice has become . . . an instrument . . . of war . . . .").

18. UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, *supra* note 10, at 1.

19. *See generally* CULTURAL PROP. L., *supra* note 16, at 57; *see also* Ellis, *supra* note 15, at 61–62.

Part I of this Note provides an overview of the crimes of looting and illicit trafficking of antiquities and the intentional destruction of cultural heritage, highlighting the deficiencies in prosecuting perpetrators of such crimes. Part II discusses previous global attempts made through the use of international law in hopes of punishing the perpetrators for their crimes. Finally, Part III argues that looters, traffickers, and destroyers of cultural property must be held criminally responsible for violating *jus cogens*. Accordingly, Part III also suggests that the Rome Statute should be revised in order to provide the International Criminal Court ("ICC") with original jurisdiction to prosecute looters, traffickers, and destroyers of cultural property for violations of *jus cogens*. Part IV concludes.

II. An Overview of the Crimes

A. The Crimes of Looting and Illicit Trafficking of Antiquities

Although looting[20] and illicit trafficking[21] of antiquities are separate crimes, they often go hand in hand,[22] as both involve the possession of stolen property.[23] Most commonly, a stolen antiquity completes the following journey: first, a looter steals the antiquity from a museum, archeological site, excavation, warehouse, temple, tomb, or elsewhere in the source country;[24] second, the looter gives the stolen antiquity to a person in a criminal network or terrorist organization;[25] third, a trafficker receives the stolen antiquity and smuggles it out of the source country.[26] Because millions of dollars of antiquities can easily be concealed in small spaces,[27] the trafficker often illegally exports the stolen antiquity into the transit country with much ease.[28]

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20. *See* Dr. Stefan Gruber, *Perspectives on the Investigation, Prosecution and Prevention of Art Crime in Asia,* in CONTEMPORARY PERSPECTIVES ON THE DETECTION, INVESTIGATION AND PROSECUTION OF ART CRIME: AUSTRALIAN, EUROPEAN AND NORTH AMERICAN PERSPECTIVES 221, 223 (Duncan Chappell & Saska Hufnagel, ed., Ashgate 2014) , https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2515178 (last visited Mar. 3, 2018) ("Looting, one of the most destructive types of art crime, damages cultural heritage, destroys archaeological evidence, and culturally impoverishes the nations in which it occurs.").

21. *Illicit Trafficking Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/i/illicit-trafficking/.

22. *See* Yates, *supra* note 5, at 1, 12.

23. *See* Press Release, New York County District Attorney's Office, Manhattan DA's Office Returns 2nd Century C.E. Buddhist Sculpture to Pakistan (Apr. 27, 2016), http://manhattanda.org/press-release/manhattan-das-office-returns-2nd-century-ce-buddhist-sculpture-pakistan (on file with author) (according to Manhattan District Attorney Cyrus Vance, Jr., "Possessing stolen property is a crime, plain and simple.").

24. *See* Asif Efrat, GOVERNING GUNS, PREVENTING PLUNDER: INTERNATIONAL COOPERATION AGAINST ILLICIT TRADE 117–19 (2012); *see also generally* Thomas Meena, *Night at the Museum: The Value of Cultural Property and Resolving the Moral and Legal Problems of the Illicit International Art Trade*, 31 LOY. L.A. INT'L & COMP. L. REV. 581, 588 (2009) (defining source countries as nations "from which cultural objects enter the international art trade.").

25. *See generally* Efrat, *supra* note 24, at 119.

26. *Id.*

27. *See, e.g.*, Myers & Kulish, *supra* note 3; Matthew Bogdanos & William Patrick, THIEVES OF BAGHDAD: ONE MARINE'S PASSION TO RECOVER THE WORLD'S GREATEST STOLEN TREASURES 5 (2005) ("[t]he coins and the cylinder seals, some of which were worth $250,000 a pop. Given their size, anyone could carry off ten million dollars' worth in a single fanny pack."); Suzanne Charlé, *Antiques; Tiny Treasures Leave Big Void In Looted Iraq*, N.Y. TIMES (July 18, 2003), http://www.nytimes.com/2003/07/18/arts/antiques-tiny-treasures-leave-big-void-in-looted-iraq.html ("[O]ne [cylinder] seal sold at Christie's in New York in 2001 for $424,000.").

28. *See, e.g.*, Fanusie & Joffe, *supra* note 9, at 12.

Fourth, the stolen antiquity is laundered in the transit country.[29] Through whatever means necessary, an export license is obtained for the stolen antiquity, and a sudden legitimacy is established.[30] Fifth, the stolen antiquity is exported out of the transit country and imported into the destination country where a dealer sells it to an art gallery, a museum, or a private collector.[31]

There are two main problems associated with the looting and illicit trafficking of antiquities. The first problem is that antiquity sales are poorly regulated in the art industry.[32] A prudent homebuyer relies on a title search to determine ownership rights; yet, despite the fact that some antiquities are worth much more than houses,[33] antiquities purchasers are forced to rely on a remarkably inferior account of title in determining ownership rights.[34] This documented chain of ownership is referred to as "provenance".[35] Moreover, because sellers regularly offer buyers antiquities that lack provenance[36] or have clandestine provenance[37] or illegal provenance,[38] buy-

29. *See* Efrat, *supra* note 24, at 119. Switzerland is a transit country; it is well-known by smugglers around the world for its poor import/export regulations.

30. *Id*.

31. *Id*. The United States is a popular destination country; *see also* Neil Brodie, *How to Control the Internet Market in Antiquities? The Need for Regulation and Monitoring*, ANTIQUITIES COAL., 2 (July 2017), http://thinktank .the-antiquitiescoalition.org/wp-content/uploads/2017/07/Policy-Brief-3-2017-07-20.pdf (The U.S. is "the world's largest art market and a major center for the internet market in antiquities.").

32. *See* Tess Davis, *Buyer Beware: US Market for Ancient Asian Art Still the Wild, Wild East*, THE DIPLOMAT (Mar. 14, 2017), https://thediplomat.com/2017/03/buyer-beware-us-market-for-ancient-asian-art-still-the-wild-wild-east/ (last visited Mar. 3, 2018).

33. *See, e.g.*, Daniel Trotta, *Sotheby's Auctions Ancient Sculpture for $57 Million*, REUTERS (Dec. 5, 2007), https://www.reuters.com/article/us-auction-sculpture/sothebys-auctions-ancient-sculpture-for-57-million-idUSN0517331220071206. Standing at 3.25 inches tall, the Guennol Lioness holds the record for the most expensive antiquity sale; it was sold at auction for approximately $57 million.

34. *See* Bonelli, *supra* note 4, at 124; Justine Mitsuko Bonner, *Let Them Authenticate: Deterring Art Fraud*, 24 UCLA ENT. L. REV. 19, 30–31 (2017).

35. Leila A. Amineddoleh, *Are You Faux Real: An Examination of Art Forgery and the Legal Tools Protecting Art Collectors*, 34 CARDOZO ARTS & ENT. L. J. 59, 73 (2016) ("To ensure that a work originated with a particular artist, historians create a chronology, supported by documentation and historical records. . . . The strongest provenance is that which can be traced back to the artist, without any gaps.").

36. *See* Efrat, *supra* note 24, at 117; *see also* Paul R. Williams & Christin Coster, *Blood Antiquities: Addressing a Culture of Impunity in the Antiquities Market*, 49 CASE W. RES. J. INT'L L. 103, 108 (2017) ("The majority of antiquities on the market are sold with no provenance documentation, which is a strong indication that they were looted.").

37. *See generally* Manacorda, *supra* note 8, at 130; *see also* ART CRIME: TERRORISTS, TOMB RAIDERS, FORGERS AND THIEVES 207 (Noah Charney, 2016) ("auction houses *do not* publish everything openly and, in fact, hide parts of the object's collecting history"); Christos Tsirogiannis, *Mapping the Supply: Usual Suspects and Identified Antiquities in 'Reputable' Auction Houses in 2013*, TRAFFICKING CULTURE, 112, 114 (2015), http://traffickingculture.org/publications/tsirogiannis-christos-2016-mapping-the-supply-usual-suspects-and-identified-antiquities-in-reputable-auction-houses-in-2013-cuadernos-de-prehistoria-y-arqueologia-25-2015-107/ (last visited Mar. 3, 2018) (It is "the standard policy of auction houses not to reveal the consigner and the buyer of any object in an auction." The term "Private collection, Switzerland" is often used to cover convicted dealers of illicit antiquities).

38. See What Every Art Collector Needs to Know About Provenance, *supra* note 35; Rachel Shabi, Looted in Syria – and Sold in London: The British Antiques Shops Dealing in Artefacts Smuggled by Isis, THE GUARDIAN (July 3, 2015), https://www.theguardian.com/world/2015/jul/03/antiquities-looted-by-isis-end-up-in-london-shops ("A common practice is to fudge provenance by claiming an antiquity has been in the family for a long time – and so could not have recently been smuggled.").

ers often have little or nothing to rely on. Thus, the antiquities trade ostensibly relies solely on trust.[39] This, arguably, may be acceptable if the buyer and seller have previously dealt with one another or meet face to face, however, it is otherwise very problematic because "the art world's aura of sophistication creates a false sense of security."[40] Aside from the fair share of stolen antiquities sold surreptitiously on the black market,[41] a number of stolen antiquities are sold rather conspicuously on the legal market,[42] especially via the Internet to unsuspecting buyers.[43] But how trusting can a buyer really be of a seller in an Internet transaction where it is fathomable that the only information the buyer has about the seller is his or her username?

Most antiquities sold on the Internet have fake provenance or no provenance at all.[44] Nonetheless, more and more people are turning to the Internet to satisfy their hunger for antiquities. The Internet has exacerbated the consequences of the already existent vicious supply and demand cycle, whereby an increasing demand for antiquities drives looting and looting creates a larger supply of antiquities, thereby increasing the demand for such items.[45] As such, despite the efforts of law enforcement, the illicit trade of antiquities is getting worse, not better.[46]

The second problem is that the looting and illicit trafficking of antiquities are often classified as significantly less serious than other crimes around the world,[47] but this is an abysmal mistake.[48] Despite the common misconception,[49] looting and illicit trafficking of antiquities have never been victimless crimes.[50] These crimes are akin to human rights violations because

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39. *See* Shabi, *supra* note 38.

40. Patty Gerstenblith, *Getting Real: Cultural, Aesthetic and Legal Perspectives on the Meaning on Authenticity of Art Works*, 35 COLUM. J. L. & ARTS 321, 323 (2012).

41. *See* Ashley Flynn, *Lending Loot: The Cost of Cultural Exchange under the Immunity from Seizure Act*, 44 HOFSTRA L. REV. 1287, 1289 (2016); Myers ET AL., *supra* note 3 ("The main buyers [on the black market] are . . . history enthusiasts and art aficionados in the United States and Europe.").

42. *See* Manacorda, *supra* note 8, at 104 ("the sale of antiquities, however illegal their origins, tends to be open and licit in the major commercial centers that provide the demand which drives this market.").

43. *See* Brodie, *supra* note 31, at 2.

44. *See* Manacorda, *supra* note 8, at 21.

45. Brodie, *supra* note 31, at 2.

46. Lawrence Rothfield, *How Can We Fund the Fight Against Antiquities Looting and Trafficking? A "Pollution" Tax on the Antiquities Trade*, ANTIQUITIES COAL., 10 (2016), http://thinktank.theantiquitiescoalition.org/wp-content/uploads/2015/10/Policy-Brief-2-December-2016-.pdf (last visited Mar. 3, 2018).

47. *See generally* Gerstenblith, *supra* note 6, at 347. *See also* Fromme, *supra* note 35(This view is likely due to the fact that "for centuries . . . exploration, colonization, and war, returning with stolen loot was standard practice. And the cultural implications of thefts weren't recognized").

48. *See* CULTURAL PROP. L., *supra* note 16, at 5 (It is an abysmal mistake because the information learned from cultural objects "is a destructible, non-renewable cultural resource. Once it is destroyed, it cannot be regained. The looting of archaeological sites destroys this knowledge and forever impairs our ability to understand our past and ourselves").

49. *See* Matthew Bogdanos, Opinion, *The Terrorist in the Art Gallery*, N.Y. TIMES (Dec. 10, 2005), http://www.nytimes.com/2005/12/10/opinion/the-terrorist-in-the-art-gallery.html (last visited Mar. 3, 2018) (eluding to a common misconception in its mention of a "self-delusion," in which "some feel that, while technically illegal, the market in purloined antiquities is benign—victimless").

50. THIEVES OF BAGHDAD, *supra* note 27, at 289 ("Antiquities trafficking has never been a victimless crime . . . While it will never merit the same attention or resources as terrorism, drugs, human trafficking, or violent street crime, at the very least it deserves to be on the same list.").

they strip people of their right to their heritage and culture[51] and often drive violence.[52] Many people, archaeologists,[53] museum employees,[54] and guardians of museums and archeological sites have been threatened, coerced, exploited, injured, and even murdered by looters.[55] Furthermore, most of the money generated from illicitly trading antiquities funds various criminals, gangsters, and terrorists, who use it to further their criminal enterprises.[56] This is especially true for the Islamic State of Iraq and Syria ("ISIS") terrorist organization, also known as the Islamic State ("IS"), the Islamic State of Iraq and the Levant ("ISIL"), or Daesh.[57] ISIS

51. *See* Kousch, *supra* note 21, at 60, 64-65 ("the Right to Culture [i]s an inalienable right of every human being, and humanity as a whole. . . . illicit antiquities trafficking . . . deprives humanity of the right to access its common cultural heritage"); *see also* Yates, *supra* note 5, at 2-3 (Looting "prevents everyone from gaining a better understanding of their collective origins. . . . the loss of a cultural object may be equated with the loss of how a community defines itself.").

52. Davis, *supra* note 4. *See also* Kimberly L. Alderman, *Honor Amongst Thieves: Organized Crime and the Illicit Antiquities Trade*, 45 IND. L. REV. 601, 602-03 (2012) ("The illicit antiquities trade has been linked to organized criminal activities including . . . extortion, the drug and arms trades, terrorism and insurgency, and slavery.").

53. *See e.g.*, Douglas Martin, *Donny George, Protector of Iraq's Ancient Riches, Dies at 60*, N.Y. TIMES (Mar. 14, 2011), http://www.nytimes.com/2011/03/15/world/middleeast/15george.html (last visited Mar. 3, 2018) (Dr. Donny George Youkhanna, "an esteemed Iraqi archaeologist who tried to stop the looters ransacking the Iraq National Museum . . . fled Iraq in 2006 because of threats to his family. . . . He left after receiving an envelope containing a Kalashnikov bullet and a letter accusing his younger son of disrespecting Islam and threatening his life.").

54. *See e.g.*, Kareem Shaheen & Ian Black, *Beheaded Syrian Scholar Refused to Lead Isis to Hidden Palmyra Antiquities*, THE GUARDIAN (Aug. 19, 2015), https://www.theguardian.com/world/2015/aug/18/isis-beheads-archaeologist-syria (last visited Mar. 3, 2018) (Khaled al-Asaad, the museum's head of antiquities, was held for more than a month and interrogated, and eventually even beheaded by ISIS in front of dozens of people when he refused to reveal the location of valuable antiquities. ISIS militants then hung his mutilated body on a column in a main square in the city, and a board in front of the body set out the charges against him: "loyalty to the Syrian president, maintaining contact with senior regime intelligence and security officials and managing Palmyra's collection of 'idols.'").

55. *See* Hannah Pethen, *The Myths About Illegal Antiquities and Why You Should Never Buy Them!*, ARCHEOLOGY & EGYPTOLOGY IN THE 21ST CENTURY (July 26, 2017), https://hannahpethen.com/2017/07/26/why-you-should-never-buy-illegal-antiquities/ (last visited Mar. 3, 2018).

56. Davis, *supra* note 32 ("antiquities have financed some of the . . . worst actors — from organized criminals to drug cartels, mafia syndicates, the Nazis, the Khmer Rouge, the IRA, al-Qaeda, the Taliban, and Islamic State. . . . brutal regimes, extremists, and organized criminals all traffic in [cultural] heritage to fund their activities").

57. Katie A. Paul, *Culture in Conflict: Where Can ISIS Get $1 Million?*, ANTIQUITIES COAL. (Mar. 26, 2015), https://theantiquitiescoalition.org/blog-posts/culture-in-conflict-where-can-isis-get-1-million/ (last visited Mar. 3, 2018) ("ISIS . . . ha[s] earned 'millions' by looting . . . archaeological sites, and then selling . . . [antiquities] to the highest bidder. . . . looting and trafficking is not just a side enterprise, but a massive illegal industry" for ISIS).

uses the following methods to raise money from the illicit trading of antiquities: licensing and taxation;[58] theft and direct looting;[59] and direct marketing.[60] Although people have been looting and smuggling antiquities for centuries, terrorist involvement is new[61] and frightening.

The scarcity of appreciation for the gravity of the crimes of looting and illicit trafficking of antiquities likely explains why looters and traffickers are capable of operating under the radar, often undetected by law enforcement. Import and export regulations are not homogenous across the globe[62] and are seriously lacking in certain countries.[63] Moreover, even when countries have adequate regulations, often due to a lack of resources or corruption, those regulations are overlooked or go unenforced.[64] Criminals and terrorists are aware of this and, unfortunately, use it to their advantage to launder stolen antiquities[65] and continue their illicit trade operations largely unscathed. Moreover, on the rare occasion that law enforcement learns of persons who have been looting or illicitly trafficking antiquities, there are often "no arrests, no indictments, and no convictions, not even for those who lied on the customs form."[66] Even

58. *See* Rachel Van Bokkem, *History in Ruins: Cultural Heritage Destruction Around the World*, AM. HISTORICAL ASSOC. (Apr. 2017), https://www.historians.org/publications-and-directories/perspectives-on-history/april-2017/ history-in-ruins-cultural-heritage-destruction-around-the-world (last visited Mar. 3, 2018) (Daesh "issues permits to potential looters authorizing the plundering of sites within its territory. Daesh then receives between 20 and 80 percent of profits made from selling the artifacts. . . . taxes derived from selling antiquities [a]re an important form of side revenue for Daesh. . . . between 2014 and 2015.").

59. Rothfield, *supra* note 46, at 3–4; Jed Lipinski, *How is ISIS Funding Itself with 'Blood Antiquities'? Thursday Event Explains*, NOLA.COM (Oct. 14, 2015), http://www.nola.com/politics/index.ssf/2015/10/isis_blood_antiquities_syria.html (last visited Mar. 3, 2018); Matthew Bogdanos, Tess Davis, & Atheel al-Nujaifi, *Save Statues, Save Lives: Stopping the Islamic State's Destruction of the Middle East's Heritage and History Must Go Hand in Hand with Defeating the Extremist Group*, FOREIGN POL'Y (June 2, 2015), http://foreignpolicy.com/2015/06/02/save-statues-save-lives-isis-palmyra-antiquities-syria-iraq-trafficking/ (last visited Mar. 3, 2018).

60. *See* Fanusie, *supra* note 9, at 10–11 (ISIS has become "a kind of investor by marketing metal detectors for local residents" and ISIS "is actually marketing stolen antiquities . . . through social media applications . . . Looters, smugglers, and middlemen use such platforms to . . . sell them").

61. *Id*. at 4–5.

62. *See* Yates, *supra* note 5, at 9; *see also generally* Judith Staines & Julio Piñel, *Moving Art: A Guide to the Export and Import of Cultural Goods Between Russia and the European Union,* 13–14 (2007), http://www.unesco.org/culture/natlaws/media/pdf/russianfederation/ru_moving_art_handbook_engorof.pdf (last visited Mar. 3, 2018).

63. *See e.g.*, Michele Kunitz, *Switzerland & the International Trade in Art & Antiquities*, 21 NW. J. INT'L L. & BUS. 519, 519–20 (2001) (explaining that in Switzerland, one can legally purchase antiquities stolen from archaeological sites in Italy, Turkey, Egypt, Tunisia, Greece, Jordan, and elsewhere, thereby illustrating that "Switzerland's role as perhaps the single most important player in th[e] illicit trade [of antiquities] is well acknowledged. Even the Federal Bureau of Cultural Heritage in Switzerland concedes that [it] is the chief country for the laundering of art from Mediterranean source countries").

64. *See* Efrat, *supra* note 24, at 119.

65. *See* Yates, *supra* note 5, at 9.

66. Ricardo A. St. Hilaire, *How to End Impunity for Antiquities Traffickers: Assemble a Cultural Heritage Crimes Prosecution Team*, ANTIQUITIES COAL., 4 (2016), http://thinktank.theantiquitiescoalition.org/wp-content/uploads/2015/10/Policy-Brief-1Nov.17-2016.pdf (last visited Mar. 3, 2018). *See also* Williams ET AL., *supra* note 36, at 106; Stephens, *supra* note 9, at 358; Kousch, *supra* note 21, at 61 (explaining that the burden of proof remains an extremely difficult obstacle to overcome, so, "[v]ery often it is almost impossible to" prosecute perpetrators because it must be proved "that the artifact in question has been illicitly excavated in a certain country, illicitly exported after the entry into force of a legal instrument to be enforced, then illicitly imported and sold on the market"); Gruber, *supra* note 20, at 6, 8 ("it is often difficult to link recovered items to specific sites once they are removed" and "[p]rocedural and jurisdictional complications add to the difficulties surrounding the prosecution of criminals.").

rarer, when the perpetrators are caught and prosecuted, they receive either non-incarcerative or marginal incarcerative sentences with very little, if any, deterrent effect.[67] But this cannot go on any longer—more and better prosecution on a global scale is a must. Each of the previously discussed problems would likely be significantly mitigated, if not resolved, if future looters and traffickers are prosecuted by the ICC for violations of *jus cogens*.

B. The Crime of Intentional Destruction of Cultural Heritage

Looters and traffickers often destroy antiquities and archeological sites unknowingly, in a careless or reckless manner. In contrast, this section focuses on persons who intentionally[68] annihilate antiquities, archeological sites, and cultural heritage sites. I have termed these criminals "destroyers," because their modus operandi involves the "deliberate decimation of a country's past."[69]

The intentional destruction of cultural heritage has been a problem for centuries,[70] but today, it is worse than ever.[71] This is particularly true in the Middle East,[72] where cultural heritage has suffered immeasurably at the hands of ISIS.[73] Unlike most historical atrocities, ISIS's destruction of cultural heritage has been well documented by the perpetrators themselves, as ISIS revels in their carnage and boasts of it using various media outlets.[74] The resultant propaganda is both an effective marketing tool[75] and a powerful weapon in furtherance of ISIS's reign of terror.[76] Coincidentally, ISIS has been increasingly referred to as Daesh, despite its objec-

67. *See* Tom Mashberg, *Law Enforcement Focuses on Asia Week in Inquiry of Antiquities Smuggling*, N.Y. TIMES (Mar. 17, 2016), https://www.nytimes.com/2016/03/18/arts/design/law-enforcement-focuses-on-asia-week-in-inquiry-of-antiquities-smuggling.html (last visited Mar. 3, 2018).

68. *See* Gerstenblith, *supra* note 6, at 385–86.

69. Frederick Deknatel, *Tearing the Historic Fabric: The Destruction of Yemen's Cultural Heritage*, ANTIQUITIES COAL. (Feb. 21, 2017), https://theantiquitiescoalition.org/ac-news/tearing-the-historic-fabric-the-destruction-of-yemens-cultural-heritage/ (last visited Mar. 3, 2018).

70. *See* Ellis, *supra* note 15, at 24; CULTURAL PROP. L., *supra* note 16, at 57.

71. *See* Derek Fincham, *Intentional Destruction and Spoliation of Cultural Heritage under International Criminal Law*, 23 U.C. DAVIS J. INT'L L. & POL'Y 149, 152 (2017); Tess Davis, *Cultural Property: Current Problems Meet Established Law*, ANTIQUITIES COAL. (Apr. 8, 2015), https://theantiquitiescoalition.org/blog-posts/cultural-property-current-problems-meet-established-law/ (last visited Mar. 3, 2018).

72. *See Seeking Common Ground: Digging for Answers*, ANTIQUITIES COALITION (Apr. 29, 2015), https://theantiquitiescoalition.org/blog-posts/seeking-common-ground-digging-for-answers/ (last visited Mar. 3, 2018); CULTURAL PROP. L., *supra* note 16, at 3.

73. *See* CULTURAL PROP. L., *supra* note 16, at 57; Van Bokkem, *supra* note 58; Flynn, *supra* note 41, at 1288 (ISIS "has destroyed and looted numerous ancient sites in what is being called 'the largest-scale mass destruction of cultural heritage since the Second World War.'").

74. *See War in the Arab World Has Devastated the Region's Heritage*, THE ECONOMIST (Aug. 19, 2017), https://www.economist.com/news/middle-east-and-africa/21726750-jihadists-are-not-only-ones-blame-war-arab-world-has-devastated (last visited Mar. 3, 2018).

75. Alyssa Buffenstein, *A Monumental Loss: Here Are the Most Significant Cultural Heritage Sites That ISIS Has Destroyed to Date*, ARTNET (May 30, 2017), https://news.artnet.com/art-world/isis-cultural-heritage-sites-destroyed-950060 (last visited Mar. 3, 2018); FANUSIE ET AL, *supra* note 9, at 7 (ISIS' destruction presents an image of imminent scarcity, thereby raising the value of smuggled goods on the black market").

76. Ned Suesat-Williams, *What Is the Role of the Media Spectacle in Cultural Heritage Policy Shifts: Exploring Cultural Heritage Policy Changes in Response to IS's Spectacles of Destruction*, 17 J. ART CRIME 17, 18–19 (2017); Gerstenblith, *supra* note 6, at 361, 373.

tions, likely because the name alone conveys terror.[77]Daesh is very close to the Arabic words "*Dahes*," which means "one who sows discord" and "*Daes*," which means "one who crushes something underfoot."[78] In this case especially, Daesh is the better suited name because the terrorist organization is responsible for literally crushing the cultural heritage of the Middle East.[79]

The main problem associated with the intentional destruction of antiquities, archeological sites, and cultural heritage sites is that it is often not recognized as a crime.[80] That simply cannot stand; not only should it be recognized as a crime,[81] it should be recognized as a victimizing crime.[82] Similar to the crimes of looting and illicitly trafficking antiquities, the crime of intentional destruction of cultural heritage is akin to a human rights violation[83] and often drives violence.[84] Some speculate that Daesh's destruction of works of art at museums, mosques, and churches is merely a political tool,[85] but it is much more than that; Daesh's intentional destruction of cultural heritage is motivated by its consideration of representational art as idolatrous,[86] effectively meaning it is a form of iconoclasm.[87] Daesh's purposeful destruction of cultural heritage is "a profound attack on the identity, the memory and, therefore, the future of entire populations."[88] Thus, Daesh's intentional destruction of cultural heritage is a form of ethnic cleansing[89] that must not be taken lightly.[90]

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77. *See* Nicola Oakley & Suchandrika Chakrabarti, *What Does Daesh Mean? ISIS 'Threatens to Cut Out the Tongues' of Anyone Using This Word*, THE MIRROR (Nov. 22, 2017), http://www.mirror.co.uk/news/world-news/what-daesh-mean-isis-threatens-6841468 (last visited Mar. 3, 2018).

78. *Id*.

79. *See, e.g.*, Gerstenblith, *supra* note 6, at 372–73.

80. *See id*. at 347.

81. *See id*. at 392; Fincham, *supra* note 71, at 159–60.

82. *See* CULTURAL PROP. L., *supra* note 16, at 57, 59–60 (Intentional destruction of cultural heritage is "a form of systematic cultural cleansing, rising to the level of serious international crimes. . . . the aim is to 'destroy identities, tear apart social fabrics, and fuel hatred.' . . . crimes constituting cultural cleansing are inseparable from atrocity crimes against people and communities.").

83. *Id*. at 62 ("'cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion . . . its intentional destruction . . . ha[s] adverse consequences on human dignity and human rights'").

84. *See generally id.* at 59 (pointing out that "acts of cultural destruction work hand in hand with other tactics, such as torture and killings").

85. *See* Suesat-Williams, *supra* note 76, at 19.

86. Buffenstein, *supra* note 74; Fanusie ET AL., *supra* note 9, at 7.

87. Oxford Online Dictionary, 2017 (Mar. 3, 2018) (defining "iconoclasm" as the "action of attacking or assertively rejecting cherished beliefs and institutions or established values and practices," or the "rejection or destruction of religious images as heretical").

88. Ellis, *supra* note 15, at 35.

89. Oxford Online Dictionary, 2017 (Mar. 3, 2018) (defining "ethnic cleansing" as the "mass expulsion or killing of members of one ethnic or religious group in an area by those of another"); Suesat-Williams, *supra* note 76, at 18 ("intentional destruction of cultural property is often considered as ethnic cleansing").

90. Gerstenblith, *supra* note 6, at 392; Ellis, *supra* note 15, at 62; *see generally* Press Release, United Nations International Criminal Tribunal for the former Yugoslavia, ICTY Paved Way for Accountability for Attacks on Cultural Heritage (June 10, 2016), http://www.icty.org/en/press/icty-paved-way-for-accountability-for-attacks-on-cultural-heritage ("Where there is cultural destruction there may be genocide. Where there is cultural cleansing there may be ethnic cleansing. . . . we cannot afford to downplay crimes against cultural heritage.").

For too long, destroyers have operated essentially untouched by law enforcement.[91] Admittedly, under international criminal law, a person may be prosecuted for the intentional destruction of antiquities, archeological sites, and cultural heritage sites when that act is treated as a war crime or a crime against humanity.[92] The first prosecutions for the intentional destruction of cultural heritage may have been of Nazis during the Nuremberg Trials.[93] The first prosecution in an international court with limited jurisdiction was in *Prosecutor v. Tadíc*, which was decided by the International Criminal Tribunal for the former Yugoslavia ("ICTY") in 1995.[94] Most recently, the first prosecution in an international court with widespread jurisdiction occurred in *Prosecutor v. Ahmad Al Faqi Al Mahdi*, decided by the ICC in 2015.[95] This also happened to be the first international criminal prosecution solely for the intentional destruction of cultural heritage; the perpetrator did not commit any other war crimes or crimes against humanity.[96] The ICC was the first international court to recognize the distinct nature of the crime against cultural heritage in *Ahmad Al Faqi Al Mahdi*,[97] which was a landmark decision that has set strong precedent, namely that the intentional destruction of our shared heritage will not be tolerated, and those who intentionally destroy it will be held accountable for their actions.[98] Consequently, the case has become a significant development in international law and has contributed to a recent increase in worldwide appreciation for the gravity of intentional destruction of cultural heritage.[99] Unfortunately, however, this case has yet to become anything other than an anomaly from present practice. Today, in the rare case where a person is prosecuted and found guilty of destroying cultural heritage, the punishment is often disproportionate to the crime, offering little to no deterrent value for future offenses.[100] But, as in looting and trafficking, this cannot go on any longer—prosecution on a global scale is a must.[101] This problem would likely be significantly mitigated, if not resolved, if future destroyers are prosecuted by the ICC for violations of *jus cogens*.

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91. *See generally* Fincham, *supra* note 71, at 171 (pointing out that cultural destruction is "alive and spreading" and "doing so under the radar").

92. *See id*. at 162.

93. *See id*. at 165.

94. Ellis, *supra* note 15, at 43-44; *see Prosecutor v. Tadíc*, Case No. IT-94-1-I, Opinion & Judgment, ¶ 149, 465 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507-JT2-e.pdf (Defendant was prosecuted for targeting Non-Serb cultural and religious symbols, mosques, and other religious and cultural institutions for destruction, and seizing property belonging to Muslims and Croats.).

95. *See* Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Judgment & Sentence, ¶ 10 (Sept. 27, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_07244.pdf (Defendant was prosecuted for intentionally directing attacks against ten religious and historical buildings in Timbuktu, Mali.).

96. Gerstenblith, *supra* note 6, at 387.

97. *See id*.

98. *In Support of the ICC's War Crimes Case on Heritage Destruction*, ANTIQUITIES COALITION (Sept. 30, 2015), https://theantiquitiescoalition.org/blog-posts/in-support-of-the-international-criminal-courts-icc-war-crimes-case-on-heritage-destruction/.

99. *See* Gerstenblith, *supra* note 6, at 387.

100. Matthew Smart, *An Issue of Monumental Proportions: The Necessary Changes to Be Made before International Cultural Heritage Laws Will Protect Immoveable Cultural Property*, 91 CHI.-KENT L. REV. 759, 792 (2016); *see also* Gerstenblith, *supra* note 6, at 373 ("The difficulty of imposing any criminal punishment on these actors becomes one of an applicable legal instrument under which to prosecute them and of a venue in which to do so.").

101. *See* Ellis, *supra* note 15, at 23.

III. International Attempts

International law is often defined as "the body of rules and principles of action[,] which are binding upon civilized states in their relations with one another."[102] As enumerated in the Statute of the International Court of Justice ("ICJ Statute"), the principle sources of international law are as follows: international conventions or treaties; customary international law; general principles of law recognized by civilized nations; and judicial decisions and teachings of the most highly qualified publicists.[103] Below is a chronological outline of the most relevant sources of international law intended to punish those who commit the crimes of looting and illicit trafficking of antiquities as well as intentional destruction of cultural heritage.

A. The 1863 Lieber Code[104]

The 1863 Lieber Code, also known as General Order No. 100, Instructions for the Government of Armies of the United States in the Field ("Lieber Code"), was a set of army regulations implemented by President Abraham Lincoln to regulate the conduct of the Union army during the American Civil War.[105] The Lieber Code constituted the "first codified rules of warfare acknowledging the importance of cultural heritage property."[106]

Under Article 31, a victorious army could appropriate public money and seize public movable property, however, under Article 38, a victorious army could only seize private property by way of military necessity.[107] Article 34 stipulated that any property belonging to museums of the fine arts or sciences was protected private property.[108] Article 35 required that classical works of art, libraries, scientific collections, and precious instruments be secured against all avoidable injury during armed conflict; moreover, Article 36 instructed that such antiquities could never be privately appropriated, or wantonly destroyed or injured.[109] Finally, Article 44 provided that destruction and pillage or sacking of property were "prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense."[110] The adoption of the Lieber Code was "a turning point in the history of cultural property law[, which] provided the foundation for all the following laws."[111]

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102. Doug Tedeschi, M. Erin Rodgers & Stuart Harding, *A Guide to the Basics of International Law*, THE WRITING CTR., GEORGETOWN UNIV. L. CTR., 1 (2012), https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/AGuidetotheBasicsofIntlLaw.pdf.

103. *Id*. (citing Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993).

104. *See also* Lieber Code, *Instructions for the Government of Armies of the United States in the Field,* Gen. Order No. 100 (1863), reprinted in 2 F. Lieber, Misc. Writings, pp. 153, 273 (1880), https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Instructions-gov-armies.pdf.

105. Fincham, *supra* note 71, at 161.

106. Smart, *supra* note 100, at 771.

107. *Id*.; *Gen. Orders No. 100: The Lieber Code*, *Instructions for the Government of Armies of the United States in the Field* art. 31, 38, THE AVALON PROJECT, YALE L. SCH., LILLIAN GOLDMAN L. LIBRARY (2008), http://avalon.law.yale.edu/19th_century/lieber.asp (last visited Mar. 3, 2018).

108. *See General Orders No. 100*, *supra* note 107, at art. 34.

109. *Id*. at art. 35–36.

110. *Id*. at art. 44.

111. Smart, *supra* note 100, at 772.

B. 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land[112]

The 1899 Hague Convention resulted in three treaties and three declarations.[113] The second treaty, the Convention with Respect to the Laws and Customs of War on Land ("1899 Convention II"), "was the first binding international treaty that included multiple sections on the protection of cultural property."[114]

Article 46 prohibits confiscation of private property, and Articles 28 and 47 prohibit pillage.[115] Additionally, Article 27 requires that all necessary steps be taken to spare edifices devoted to religion, art, or science during armed conflict.[116] Article 56 is the only provision that offers explicit protection to historical monuments;[117] it prohibits the seizure or destruction of, or intentional damage to religious or arts and science institutions, historical monuments, and works of art or science.[118] Article 56 is also the only provision that provides for any type of enforcement mechanism, i.e., it requires signatories to prosecute those who violate Article 56 "in their respective domestic courts."[119] Finally, Article 23 contains the military necessity loophole, which permits the destruction and seizure of an enemy's property when it is "imperatively demanded by the necessities of war."[120]

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112. *See Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 29 July 1899*, Commentaries, INT'L COMMITTEE OF THE RED CROSS, https://ihl-databases.icrc.org/ihl/INTRO/150?OpenDocument (binding 52 signatories); *see also Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.*, States Parties, INT'L COMMITTEE OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=150 (The 1899 Hague Convention is "considered as embodying rules of customary international law" so it is "also binding on states which are not formally parties to it.").

113. Smart, *supra* note 100, at 772.

114. *Id*.

115. *Laws of War: Laws and Customs of War on Land (Hague II); July 29, 1899,* art. 28, 46-47, THE AVALON PROJECT, YALE L. SCH., LILLIAN GOLDMAN L. LIBRARY (2008), http://avalon.law.yale.edu/19th_century/hague02.asp (last visited Mar. 3, 2018).

116. *Id*. at art. 27.

117. Smart, *supra* note 100, at 773.

118. *Laws of War: Laws and Customs of War on Land (Hague II)*, *supra* note 115, at art. 56.

119. Smart, *supra* note 100, at 773–74.

120. *Id*. at 772–73; *Laws of War: Laws and Customs of War on Land (Hague II)*, *supra* note 115, at art. 23.

C. 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land[121]

The 1907 Hague Convention was convened to expand upon the rules promulgated at the 1899 Hague Convention.[122] The fourth treaty, the Convention Respecting the Laws and Customs of War on Land ("1907 Convention IV"), adopted many of the provisions from 1899 Convention II, including Articles 23, 28, 46, 47, and 56 examined above.[123] It also expanded upon Article 27 of 1899 Convention II by providing for the protection of historic monuments.[124]

Thus, Article 27 of 1907 Convention IV requires that all necessary steps be taken to spare buildings devoted to religion, art, or science, and historic monuments during armed conflict.[125] Article 3 of 1907 Convention IV also expanded upon Article 56 of 1899 Convention II;[126] in addition to prosecution, it provided that those in violation of the treaty could also be held liable to pay compensation.[127]

D. The 1945 Charter of the International Military Tribunal[128]

After World War II, the International Military Tribunal ("IMT") was established for purposes of prosecuting Nazi Party officials and high-ranking military officers, among others.[129] The IMT had jurisdiction over violations of the laws and customs of war,[130] and was "regarded as a milestone toward the establishment of a permanent international court, and an important precedent for dealing with later instances of genocide and other crimes against humanity."[131]

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121. *See Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907*, States Parties, INT'L COMMITTEE OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=195 (binding 38 signatories); *see also See Convention (II) with Respect to the Laws and Customs of War on Land and its Annex.*, Commentaries, *supra* note 112(The 1907 Hague Convention is "considered as embodying rules of customary international law" so it is "also binding on states which are not formally parties to them").

122. Smart, *supra* note 100, at 774.

123. *See id.*

124. *Id.*

125. *Laws of War: Laws and Customs of War on Land (Hague IV); October 18, 1907*, Annex to the Convention art. 27, THE AVALON PROJECT, YALE L. SCH., LILLIAN GOLDMAN L. LIBRARY (2008), http://avalon.law.yale.edu/20th_century/hague04.asp (last visited Mar. 3, 2018).

126. *See generally* Ana Filipa Vrdoljak, *The Criminalisation of the Illicit Trade in Cultural Property*, UNIV. OF TECH., SYDNEY, 5–6 (Haidy Geismar et al. eds., Routledge 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676451 (last visited Mar. 3, 2018).

127. *Laws of War: Laws and Customs of War on Land (Hague IV)*, *supra* note 125, at art. 3.

128. *See generally Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945*, Treaties, States Parties and Commentaries, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=350 (last visited Mar. 3, 2018) (binding 20 signatories).

129. *See generally* Fincham, *supra* note 71, at 165; *Nuremberg Trials*, HISTORY.COM (2010), http://www.history.com/topics/world-war-ii/nuremberg-trials (last visited Mar. 3, 2018).

130. Fincham, *supra* note 71, at 173.

131. *Nuremberg Trials*, *supra* note 129.

Article 6 provided the IMT with the power to try and punish persons who committed crimes against peace, war crimes, and crimes against humanity.[132] War crimes were defined as "violations of the laws or customs of war."[133] The 1945 Charter of the IMT ("IMT Charter") set forth a non-exclusive list of war crimes, which included plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.[134] Article 24 of the IMT Charter provided the IMT with the power to deliver judgments and pronounce sentences, and under Article 27, the IMT could impose upon defendants conviction, death, or any other punishment it deemed just.[135] Under Article 28, the IMT could also deprive defendants of stolen property.[136] Lastly, Article 26 stipulated that the IMT's judgments were final and not subject to review.[137]

E. The 1949 Geneva Conventions[138]

The 1949 Geneva Conventions (collectively "Geneva Conventions", separately, "Convention I," "Convention II," "Convention III," or "Convention IV"), a series of international treaties limiting the barbarity of war,[139] have "established the standards of international law for humanitarian treatment in times of war."[140] The Geneva Conventions identify a number of grave breaches, including the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly under Article 50 of Convention I, Article 51 of Convention II, and Article 147 of Convention IV.[141] The Geneva Conventions also provide that persons responsible for grave breaches must be sought, tried, or extradited, regardless of their nationality.[142]

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132. *See Nuremberg Trial Proceedings Vol. 1 Charter of the International Military Tribunal* art. 6, THE AVALON PROJECT, YALE L. SCH., LILLIAN GOLDMAN L. LIBRARY (2008), http://avalon.law.yale.edu/imt/imtconst.asp (last visited Mar. 3, 2018).

133. *Id*.

134. *Id*.

135. *Id*. at art. 24, 27.

136. *Id*. at art. 28.

137. *Id*. at art. 26.

138. *See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Details, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/showDetails.aspx?objid=080000028015847c&clang=_en; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, Details, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801591b0&clang=_en; *Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949*, States Parties, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages _NORMStatesParties&xp_treatySelected=375; *Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949*, States Parties, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380 (binding 196 signatories).

139. *The Geneva Conventions of 1949 and Their Additional Protocols*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm.

140. CULTURAL PROP. L., *supra* note 16, at 60.

141. *Id*.

142. *The Geneva Conventions of 1949 and Their Additional Protocols*, *supra* note 139.

F. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[143]

The 1954 Hague Convention for the Protection of Cultural Property in the Even of Armed Conflict ("1954 Hague Convention") was the "first multilateral treaty to focus exclusively on the protection of cultural heritage during hostilities."[144] It prohibits the destruction, seizure, and trafficking of cultural property seized during armed conflict.[145] Ultimately, the 1954 Hague Convention established individual responsibility for the destruction of cultural heritage and became precedent for the idea that international criminal law prohibits the destruction of cultural heritage.[146]

According to Article 1, the 1954 Hague Convention protects groups of buildings and centers of cultural property, as well as public and private movable and immovable cultural heritage, which includes archaeological sites, groups of buildings that are of historical or artistic interest, works of art, manuscripts, books, scientific collections, and archives.[147] Article 4 requires all parties to respect cultural property by refraining from exposing it to destruction or damage during armed conflict and by refraining from any act of hostility directed against it.[148] Additionally, the 1954 Hague Convention prohibits parties from and requires them to prevent theft, pillage or misappropriation of, and vandalism directed against cultural property.[149] Parties must refrain from requisitioning movable cultural property and retaliating against it.[150] Like the treaties before it, the 1954 Hague Convention also contains the military necessity loophole in Article 4.[151]

Article 18 indicates that the 1954 Hague Convention is applicable to armed conflicts of an international character; Article 19 indicates that it is also applicable to armed conflicts not of an international character.[152] The 1954 Hague Convention is applicable to non-parties if they declare that they accept the provisions.[153] Further, all parties to a conflict within the terri-

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143. *See Convention for the Protection of Cultural Property in the Event of Armed Conflict*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280145bac&clang=_en (last visited Mar. 3, 2018) (binding 132 signatories).

144. *Introduction by Irina Bokova, Director-General of UNESCO to Basic Texts for the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Two (1954 and 1999) Protocols*, U.N. EDUC., SCI. & CULTURAL ORG., http://unesdoc.unesco.org/images/0018/001875/187580e.pdf (last visited Mar. 3, 2018).

145. Katherine D. Vitale, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 NOTRE DAME L. REV. 1835, 1839 (2009).

146. *See* Fincham, *supra* note 71, at 163–64.

147. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1, 14 May 1954, 249 U.N.T.S. 240. (entered into force 7 August 1956).

148. *Id.* at art. 4.

149. *Id.*

150. *Id.*

151. Smart, *supra* note 100, at 780.

152. *Id.* at 777.

153. *Id.*

tory of a contracting party are bound by its terms.[154] The 1954 Hague Convention is the "first example of a treaty protecting cultural property that is enforceable against third parties."[155] Nonetheless, it fails to provide an efficient mechanism to hold persons accountable for such violations.[156] Under Article 28, each party has original jurisdiction and is responsible for prosecuting violators, however, violators often go unprosecuted or unpunished due to a variation of insufficient domestic laws.[157]

G. The First Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[158]

The First Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Even of Armed Conflict ("First Protocol"), adopted at the same time as the 1954 Hague Convention, applies exclusively to moveable cultural property.[159] More specifically, the First Protocol concerns the removal and return of cultural property illegally exported from territories occupied during armed conflict.[160] Paragraph 1 requires parties to prevent the exportation of cultural property from territories under their control, and Paragraph 2 requires parties not involved in armed conflict to take possession of cultural objects removed from occupied territories for safekeeping.[161] Further, when an occupation ends, Paragraph 3 requires that the parties not involved in armed conflict return the cultural objects to the formerly occupied territories.[162]

H. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property[163]

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention") is the "primary legal instrument used to address the pillaging of archaeological sites and the illicit cultural property trade."[164] It established "a comprehensive international mechanism to prohibit the illicit import, export, and transfer . . . of cultural property,"[165] and sanctioned the repatriation of stolen and illegally exported antiquities.[166]

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154. *Id.*

155. *Id.*

156. Stephens, *supra* note 9, at 362.

157. *See* Smart, *supra* note 100, at 780–81.

158. *See Protocol for the Protection of Cultural Property in the Event of Armed Conflict*, Details, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280145a26&clang=_en (last visited Mar. 3, 2018) (binding 69 signatories).

159. Smart, *supra* note 100, at 782.

160. Vrdoljak, *supra* note 125, at 8.

161. *Id*. at 9.

162. *Id.*

163. *See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,* Details, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801170ec&clang=_en (last visited Mar. 3, 2018) (binding 125 signatories).

164. Stephens, *supra* note 9, at 365.

165. Vitale, *supra* note 144, at 1840.

166. *See* Williams ET AL., *supra* note 36, at 111.

In Article 2, the parties recognize that the illicit import, export, and transfer of ownership of cultural property is one of the main causes of the impoverishment of cultural heritage and, consequently, vow to oppose such practices.[167] In Article 5, the parties pledge to set up national services for the protection of the cultural heritage within their territories.[168] Under Article 6, the parties must institute a practice of prohibiting the export of any and all cultural property unaccompanied by a proper export certificate.[169] Additionally, under Article 7 of the 1970 UNESCO Convention, the parties must take measures to (1) prevent museums and similar institutions from acquiring illegally exported cultural property, (2) prohibit the import of cultural property stolen from museums, religious or secular public monuments, and similar institutions, and (3) recover and return cultural property.[170] Furthermore, under Article 8, the parties must impose penalties or sanctions on violators.[171] Finally, Article 9 provides a mechanism by which parties can assist each other in cases of archaeological and ethnological pillage,[172] and calls for import and export controls on each party's cultural patrimony.[173]

I. The 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage[174]

The 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage ("1972 UNESCO Convention") was the "first . . . permanent framework . . . for international cooperation in safeguarding mankind's cultural and natural heritage," which "introduce[d] the specific notion of a 'world heritage' whose importance transcends all political and geographic boundaries."[175] Through the 1972 UNESCO Convention, the parties vowed to protect their national heritage and conserve the World Heritage sites situated within their territory.[176]

Under Article 6, the parties must refrain from taking any deliberate measures which might directly or indirectly damage cultural and natural heritage situated on the territories of other parties.[177] Under Article 11, each party must submit to the World Heritage Committee (established in Article 8), an inventory of the cultural and natural heritage situated within its terri-

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167. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, art. 2, Nov. 14, 1970, 823 U.N.T.S. 231 (1972).

168. *Id*. at art. 5.

169. *Id*. at art. 6.

170. *Id*. at art. 7.

171. *Id*. at art. 8.

172. Stephens, *supra* note 9, at 365.

173. Vitale, *supra* note 145, at 1844.

174. *See* Convention for UNESCO Concerning the Protection of the World Cultural and Natural Heritage, *supra* note 10, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800fece0&clang=_en (last visited Mar. 3, 2018) (binding 193 signatories).

175. *Chapter 1, The World Heritage Convention: An Overview*, ICOMOS Tourism Handbook for World Heritage Site Managers, Int'l Council on Monuments & Sites 1, 5, http://www.icomos.org/publications/93touris1.pdf (last visited Mar. 3, 2018).

176. *See generally* UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, *supra* note 10, at art. 4.

177. *Id*. at art. 6.

tory.[178] In return, the Committee is to establish and publish a "World Heritage List" and a "list of World Heritage in Danger."[179] Furthermore, Article 15 establishes the "World Heritage Fund" to assist parties in identifying, preserving, and promoting World Heritage sites, and to provide emergency assistance to parties in need of help repairing damage caused by man-made or natural disasters.[180]

J. The Two Protocols to the 1949 Geneva Conventions[181]

The First Protocol Relating to the Protection of Victims of International Armed Conflicts and the Second Protocol Relating to the Protection of Victims of Non-International Armed Conflicts (collectively "the Protocols") were adopted in 1977.[182] The Protocols place limits on the way international and non-international armed conflicts are fought.[183] Accordingly, Article 53 of the First Protocol and Article 16 of the Second Protocol prohibit parties from committing acts of hostility directed against historic monuments, works of art, and places of worship, which constitute the cultural or spiritual heritage of peoples, from using such objects in support of military efforts, and from retaliating against such objects.[184] The Second Protocol "was the first-ever international treaty devoted exclusively to situations of non-international armed conflicts."[185]

K. The 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia[186]

The UN Security Council adopted the 1993 Statute of the ICTY ("ICTY Statute"), which created the ICTY in response to the effects of the civil war in the former Yugoslavia.[187] Article

178. *Id*. at art. 8, 11.

179. *Id*. at art. 11.

180. *Id*. at art. 15; *see The World Heritage Convention, Benefits of Ratification*, U.N. EDUC., SCI. & CULTURAL ORG., http://whc.unesco.org/en/convention/ (last visited Mar. 3, 2018).

181. *See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Details, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3586&clang=_en (last visited Mar. 3, 2018) (binding 174 signatories); *see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Details, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3cb8&clang=_en (last visited Mar. 3, 2018) (binding 168 signatories).

182. *See The Geneva Conventions of 1949 and Their Additional Protocols*, *supra* note 139.

183. *See id*.

184. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 53, *adopted* June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 16, *adopted* June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978).

185. *See The Geneva Conventions of 1949 and Their Additional Protocols*, supra note 139.

186. *See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993*, art. 8, Treaties, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=E4A3A64A9C0D3975C12563FB004926D3 (last visited Mar. 3, 2018) [hereinafter "Statute of the International Tribunal for the Former Yugoslavia"].

187. Smart, *supra* note 100, at 788.

1 authorized the ICTY to prosecute all war crimes committed during the civil war.[188] Ultimately, it authorized the ICTY to "prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[189]

Article 2 delineates eight grave breaches of the 1949 Geneva Conventions, which involve acts against persons or property protected under the Geneva Conventions,[190]including the extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.[191] Article 3 offers protection to cultural property[192] by authorizing the ICTY to prosecute persons who violate the laws or customs of war, namely by seizing, destroying, or willfully damaging institutions dedicated to religion, the arts and sciences, historic monuments, and works of art and science, and by plundering public or private property.[193] Under Article 7, the ICTY is also authorized to prosecute persons who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of such violations of the laws or customs of war.[194] Lastly, under Article 24, the ICTY may impose the penalty of imprisonment and order the return of any property and proceeds acquired by criminal conduct to their rightful owners.[195]

L. The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects[196]

At the request of UNESCO, the International Institute for the Unification of Private Law drafted the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects ("UNIDROIT Convention") to complement the 1970 UNESCO Convention, thereby adapting it to changes in the international art world.[197] The UNIDROIT Convention offers further guidance as to the requisite standard of conduct expected of persons involved in the trade of cultural objects,[198] and provides for "an equitable and comprehensive mechanism for the recovery of stolen cultural objects."[199]

Article 1 defines the scope of the UNIDROIT Convention, indicating that it applies to international claims for the restitution of stolen cultural objects and the return of cultural

188. *See id*.

189. U.N. Security Council, Statute of the International Tribunal for the Former Yugoslavia (as amended on May 17, 2002), adopted by UN Doc S/RES/827/93 (May 25, 1993) art. 1.

190. *Id*. at art. 2.

191. *Id*.

192. Smart, *supra* note 100, at 788.

193. *Statute of the International Tribunal for the Former Yugoslavia*, *supra* note 186, at art. 3.

194. *Id*. at art. 7.

195. *Id*. at art. 24.

196. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, Details, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800617f5 (last visited Mar. 3, 2018) (binding 28 signatories).

197. Meena, *supra* note 24, at 598, 600.

198. Vrdoljak, *supra* note 126, at 17.

199. Meena, *supra* note 24, at 599.

objects removed from a party's territory in violation of its law regulating the export of cultural objects for the purpose of protecting its cultural heritage.[200] Under Article 3, "a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained" is considered stolen, and any possessor of a stolen cultural object is required to return it.[201] Additionally, under Article 5, a party may request that a court or other competent authority of another party order the return of a cultural object which was illegally exported from its territory.[202]

M. The 1996 Draft Code of Crimes Against the Peace and Security of Mankind[203]

At the request of the UN General Assembly, the International Law Commission adopted the 1996 Draft Code of Crimes Against the Peace and Security of Mankind ("Draft Code")[204] for purposes of affirming the Nuremberg principles and codifying international crimes.[205] Article 1 defines the scope of the Draft Code, indicating that it applies to crimes against the peace and security of mankind that are punishable under international law.[206] Under Article 2, persons who commit such crimes will be held responsible and, under Article 3, liable for punishment commensurate with the character and gravity of the crimes.[207] Further, under Article 8, parties must take measures to establish jurisdiction over crimes of genocide, crimes against humanity, and war crimes, irrespective of where or by whom they were committed.[208] Lastly, under Article 20, the following war crimes are considered crimes against the peace and security of mankind: extensive destruction and appropriation of property in violation of international humanitarian law and not justified by military necessity and carried out unlawfully and wantonly; seizure of, destruction of, or willful damage to institutions dedicated to religion, the arts and sciences, historic monuments, and works of art and science in violation of the laws or customs of war; and plunder of public or private property in violation of the laws or customs of war.[209]

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200. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects art. 1, June 24, 1995, 2421 U.N.T.S. 457.

201. *Id*. at art. 3.

202. *Id*. at art. 5.

203. *See generally Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-A, Judgment, ¶ 428 (Special Court for Sierra Leone Sept. 26, 2013), http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf (last visited Mar. 3, 2018) (The 1996 Draft Code "is generally regarded as an authoritative international legal instrument that, although non-binding, may '(i) constitute evidence of customary law, or (ii) shed light on customary rules which are of uncertain contents or are in the process of formation, or, at the very least, (iii) be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world.'").

204. Jean Allain & John R. W.D. Jones, *A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind*, 1 EUR. J. INT'L L. 100, 100 (1997), http://www.ejil.org/pdfs/8/1/1401.pdf (last visited Mar. 3, 2018).

205. *See Code of Crimes against the Peace and Security of Mankind*, ENCYCLOPEDIA OF GENOCIDE & CRIMES AGAINST HUMANITY, ENCYCLOPEDIA.COM (2005), http://www.encyclopedia.com/international/encyclopedias-almanacs-transcripts-and-maps/code-crimes-against-peace-and-security-mankind (last visited Mar. 3, 2018).

206. *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, U.N. GAOR Supp. (No. 10), U.N. Doc A/51/10, 17 (1996), http://legal.un.org/ilc/documentation/english/reports/a_51_10.pdf (last visited Mar. 3, 2018).

207. *Id*. at 18–19, 22.

208. *Id*. at 27.

209. *Id*. at 53.

N. The 1998 Rome Statute of the International Criminal Court[210]

In 1998, the Rome Statute of the International Criminal Court ("ICC Statute") established the ICC and transformed the human rights landscape.[211] Even to date, the ICC remains a powerful instrument of international justice and a deterrent against future atrocities.[212] According to Article 1, the ICC has the power to exercise its jurisdiction over persons for the most serious crimes of international concern, but its jurisdiction is only complementary to each party's national jurisdiction.[213]

Under Article 5, the ICC has jurisdiction over crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.[214] War crimes, as per Article 8, encompass a number of grave breaches of the 1949 Geneva Conventions, including: the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; intentionally directing attacks against civilian objects; intentionally launching an attack knowing that it will cause damage to civilian objects; intentionally directing attacks against buildings dedicated to religion, art, or science historic monuments; destroying or seizing the enemy's property unless it is imperatively demanded by the necessities of war; and pillaging a town or place, even when taken by assault.[215] However, Article 12 outlines preconditions that must be met before the ICC can exercise jurisdiction; accordingly, the ICC can exercise jurisdiction only if the State is a party to the Rome Statute or a non-party State accepts the jurisdiction of the ICC.[216]

Article 25 establishes that persons who commit crimes within the ICC's jurisdiction are individually responsible and liable for punishment.[217] According to Article 77, that punishment may consist of imprisonment for a specified number of years (subject to a maximum of 30 years) or life imprisonment when justified by the extreme gravity of the crime and the circumstances under which it was committed.[218] The ICC can also order a fine or a forfeiture of proceeds, property, and assets derived directly or indirectly from the crime.[219]

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210. *See Rome Statute of the International Criminal Court*, Details, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280025774&clang=_en (last visited Mar. 7, 2018).

211. *See generally Summary of the Key Provisions of the ICC Statute*, HUMAN RIGHTS WATCH (Dec. 1, 1998), https://www.hrw.org/news/1998/12/01/summary-key-provisions-icc-statute (last visited Mar. 7, 2018) (binding 123 signatories).

212. *See id.*

213. Rome Statute of the International Criminal Court art. 1, 17 July 1998, entered into force 1 July 2002, 2187 U.N.T.S. 38544.

214. *Id.* at art. 5.

215. *Id.* at art. 8.

216. *Id.* at art. 12.

217. *Id.* at art. 25.

218. *Id.* at art. 77.

219. *Id.*

O. The Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[220]

The Second Protocol to the 1954 Hague Convention was finalized in 1999, but did not enter into force until 2004.[221] It establishes a more detailed framework than the 1954 Hague Convention,[222] making advances in a few areas.[223] First, it explained what constitutes military necessity and when the military necessity exception applies.[224] Article 6 clarified that cultural property cannot be destroyed or used for military purposes when there is a feasible alternative available.[225] Moreover, Article 22 of the Second Protocol defined internal conflicts and clarified which protections are afforded to cultural property during internal conflicts.[226] Third, Article 22 of the Second Protocol also eliminated the ability of one party to intervene in the internal conflicts of another party in the name of cultural property.[227]

Fourth, the Second Protocol addressed the shortcomings of Article 28 of the 1954 Hague Convention by presenting specific criminal violations which could serve as a basis for prosecution, and requiring parties to enact domestic law to criminalize such conduct.[228] The following are serious violations under Article 15 of the Second Protocol: making protected cultural property or cultural property afforded enhanced protection an object of attack; using cultural property afforded enhanced protection in support of military action; extensively destroying or appropriating protected cultural property; and committing theft, pillage, or misappropriation or acts of vandalism directed against protected cultural property.[229] Article 15 requires parties to adopt measures which would establish these violations as criminal offences under its domestic law and make them punishable by appropriate penalties.[230] Fifth, the Second Protocol included specific enforcement mechanisms in Articles 15 and 16, but because it still fails to grant jurisdiction to an international court to prosecute, violations are still exclusively prosecuted and punished by each party according to its domestic law.[231]

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220. *See Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Details, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280076dd2&clang=_en (last visited Mar. 8, 2018) (binding 68 signatories).

221. Stephens, *supra* note 9, at 364.

222. *Id*.

223. Smart, *supra* note 100, at 782.

224. *Id*.

225. *Id*.

226. *Id*.

227. *Id*. at 783.

228. Stephens, *supra* note 9, at 364.

229. Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 15, 26 Mar. 1999, 2253 U.N.T.S. 172, 38 I.L.M. 769.

230. *Id*.

231. *See* Smart, *supra* note 100, at 783–84.

IV. Discussion

In a utopian world, there would be one law to combat the looting and illicit trafficking of antiquities and intentional destruction of cultural heritage that would apply to every nation. There are currently "196 nations officially recognized as independent countries in the world."[232] This number includes the 193 member states of the UN, Kosovo, Holy See (the Vatican), and Taiwan.[233] Will all 196 nations ever agree and submit to be governed by one law?

There were 196 parties to the four Geneva Conventions of 1949, so it is technically possible.[234] Unfortunately, however, as time passed, only 174 nations ratified Protocol I,[235] and just 168 nations ratified Protocol II.[236] Some treaties regarding cultural property "have acquired a near-universal character, as almost all states have become parties to them."[237] We came quite close to achieving ratification from all 196 nations with the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, which boasts of ratification by 193 parties.[238] So, the question becomes whether international law on the protection of cultural property remains confined to treaty law or whether it has developed "into a body of customary rules and general principles applicable independently of states' consent to be bound by ad hoc treaties?"[239] In other words, aside from the international conventions or treaties concerning cultural property that are binding on their signatories, is there any binding customary international law that protects cultural property regardless of whether parties have agreed to be bound by it? Is it necessary for all 196 nations to agree and submit to be governed by one law at this point?

More and more, issues relating to the looting and illicit trafficking of antiquities and intentional destruction of cultural heritage are being recognized as issues of international humanitarian law.[240] This trend is moving in the right direction, but it is still not enough; in order to achieve compliance of all 196 nations, we must take one step further and declare that the looting and illicit trafficking of antiquities and intentional destruction of cultural heritage are violations of *jus cogens*, or peremptory norms under which derogation is prohibited through international agreements.[241] For if they rise to the level of *jus cogens*, then they are *obligatio erga omnes*, i.e., obligations to the global community, and rise to the level of international law appli-

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232. Matt Rosenberg, *Capitals of Every Independent Country: The 196 Capital Cities of the World*, THOUGHTCO. (June 5, 2017), https://www.thoughtco.com/capitals-of-every-independent-country-1434452 (last visited Mar. 10, 2018).

233. Matt Rosenberg, *The Number of Countries in the World*, THOUGHTCO. (Nov. 22, 2017), https://www.thoughtco.com/number-of-countries-in-the-world-1433445 (last visited Mar. 10, 2018).

234. *See generally Convention (I)*; *Convention (II)*; *Convention (III)*; *Convention (IV)*, *supra* note 138.

235. *See generally Protocol I*, *supra* note 181.

236. *See generally Protocol II*, *supra* note 181.

237. Francesco Francioni, *The Human Dimension of International Cultural Heritage Law: An Introduction*, 22 EUR. J. INT'L L. 9, 11 (2011), https://academic.oup.com/ejil/article/22/1/9/436703 (last visited Mar. 10, 2018).

238. *See The Convention*, 41ST SESSION OF THE WORLD HERITAGE COMM. POLAND 2017, http://whc.unesco.org/archive/2017/whc17-41com-18-en.pdf (last visited Mar. 10, 2018).

239. Francioni, *supra* note 237, at 11.

240. *See generally id*. at 10–12, 14 (discussing the increase in the legal relevance of cultural property and cultural heritage in contemporary international and human rights law).

cable to all states irrespective of specific treaty obligations.[242] Consequently, they would also be non-derogable in times of war and peace.[243] As such, perpetrators of such crimes would be subject to universal jurisdiction irrespective of where they were committed, by whom they were committed, and whether they occurred during a time of war or peace.[244]

Why do the crimes of looting and illicit trafficking of antiquities deserve to be considered violations of *jus cogens*? As per the 2015 Operational Guidelines for the Implementation of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,

> Cultural heritage is among the priceless and irreplaceable inheritance, not only of each nation, but also of humanity as a whole. The loss, through theft, damage, clandestine excavations, illicit transfer or trade, of its invaluable and exceptional contents constitutes an impoverishment of the cultural heritage of all nations and peoples of the world and infringes upon the fundamental human rights to culture and development.[245]

Further, looting and illicit trafficking of cultural heritage constitute acts of "cultural genocide-for-profit,"[246] because the proceeds from such thefts are used to perpetuate genocide itself.[247] U.N. Security Council Resolution 2199 recognized that terrorist organizations are looting and smuggling cultural heritage to fund recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks.[248] U.N. Security Council Resolu-

241. *See* Anne Lagerwall, *Jus Cogens*, OXFORD BIBLIOGRAPHIES ONLINE, OXFORD UNIV. PRESS (May 29, 2015), http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml (last visited Mar. 10, 2018) ("No exhaustive list of peremptory norms has been drawn officially, but it is commonly accepted as including the prohibition of the use of force between states, the prohibition of slavery, racial discrimination, torture and genocide, as well as peoples' right to self-determination."); *see also* M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63, 68 (1997), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1016&context=lcp (last visited Mar. 10, 2018) ("the following international crimes are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture").

242. Bassiouni, *supra* note 241, at 68–69, 72; *see also* Ardit Memeti & Bekim Nuhija, *The Concept of Erga Omnes Obligations in International Law*, NEW BALKAN POLITICS (2013), http://www.newbalkanpolitics.org.mk/item/the-concept-of-erga-omnes-obligations-in-international-law#.WqSVHJPwZPN (last visited Mar. 10, 2018).

243. *See Absolute and Non-Derogable Rights in International Law*, HUMAN RIGHTS L. CTR., 2 (July 21, 2011), https://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/supplementary_info/263_-_Addendum.pdf (last visited Mar. 10, 2018) (Non-derogable means that states cannot suspend their legal obligation "even in a declared state of emergency").

244. Bassiouni, *supra* note 241, at 65–66.

245. *Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* ¶ 1, C70/15/3.MSP/11, U.N. EDUC., SCI. & CULTURAL ORG. (2015), http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/OPERATIONAL_GUIDELINES_EN_FINAL_FINAL.pdf (last visited Mar. 10, 2018).

246. *See generally Turning Global Resolve into Global Action: The Antiquities Coalition Joins UN Ambassadors for Emergency Roundtable in New York*, ANTIQUITIES COAL. (June 6, 2015), https://theantiquitiescoalition.org/blog-posts/turning-global-resolve-into-global-action-the-antiquities-coalition-joins-un-ambassadors-for-emergency-roundtable-in-new-york/ (last visited Mar. 10, 2018).

247. *See* Gerstenblith, *supra* note 6, at 388–89.

248. Bogdanos ET AL., *supra* note 59.

tion 2347, which was unanimously passed, forcefully condemned the destruction and illicit trade of cultural heritage and called for additional measures to counter the illegal cross-border trade of artifacts of archaeological, historical, cultural, and religious importance.[249] Further, when the looting and illicit trafficking of cultural property is carried out on a large scale and for the purpose of promoting armed conflict, it may even be characterized as another form of intentional destruction of cultural property.[250]

Why does the crime of intentional destruction of cultural heritage deserve to be considered a violation of *jus cogens*? The destruction of cultural heritage shocks the conscience of all humanity and generates extreme anxiety about the future; thus, it must be regarded as an offense against the law of nations.[251] Because cultural heritage is often a source of sustainable economic development for local populations, the intentional destruction of cultural heritage is a deprivation of a group's economic means of survival.[252] Ultimately, the intentional destruction of cultural heritage is genocide because it menaces the existence of a social group that exists by virtue of its common culture.[253] The intentional destruction of culture and cultural heritage should be regarded as a distinct form of genocide, [254] or at the very least a part of physical genocide.[255] It is a form of terrorism carried out against local populations that should never be tolerated,[256] for "acts of terrorism mirror the essential essence of crimes against humanity."[257]

Thus, simply put, the crimes of looting and illicit trafficking of antiquities deserve to be considered violations of *jus cogens* because they violate fundamental human rights to culture and development and contribute to cultural genocide. The crime of intentional destruction of

249. Deborah Lehr, *UN Moves to Stop Terrorist Financing — But More Action Needed*, HUFFPOST (Mar. 27, 2017), https://www.huffingtonpost.com/entry/un-moves-to-stop-terrorist-financing-but-more-action_us_58d93593e4b06c3d3d3e700e (last visited Mar. 3, 2018).

250. *See* Gerstenblith, *supra* note 6, at 391.

251. *See* Fincham, *supra* note 71, at 169.

252. Gerstenblith, *supra* note 6, at 391.

253. *Raphael Lemkin, Culture, and the Concept of Genocide*, THE OXFORD HANDBOOK ON GENOCIDE STUD. 25 (A. Dirk Moses et al. eds., Oxford Univ. Press, 2010); *see also* Bogdanos ET AL., *supra* note 27 ("history warns us that worse is coming. Once you erase a people's historical identity, the next step is to erase the people themselves. The Holocaust followed the razing of old Warsaw; Cambodia's Killing Fields followed the destruction of churches, mosques, and pagodas").

254. Gerstenblith, *supra* note 6, at 343. ("Cultural genocide extends beyond attacks upon the physical and/or biological elements of a group and seeks to eliminate its wider institutions. . . Elements of cultural genocide are manifested when . . . national treasures, libraries, archives, museums, artifacts, and art galleries are destroyed or confiscated.").

255. *Id*. at 392.

256. *See id*. at 391.

257. *See* Cóman Kenny, *Prosecuting Crimes of Int'l Concern: Islamic State at the ICC?*, 33(84) UTRECHT J. OF INT'L & EUR. L. 120, 132 (2017), https://www.utrechtjournal.org/articles/10.5334/ujiel.364/ (last visited Mar. 18, 2018).

cultural heritage deserves to be considered a violation of *jus cogens* because it constitutes racial discrimination[258] and contributes to ethnic cleansing and cultural genocide. Each of these crimes are crimes against humanity[259] making them direct violations of *jus cogens*.

The failure of international law to protect cultural property has been glaringly and painfully obvious.[260] As of now, "international law has achieved limited success in preventing the illicit trade and intentional destruction of cultural property and punishing those responsible."[261] This is mainly because the general inability to acquire jurisdiction over those responsible has made it near impossible to prosecute perpetrators in an international arena.[262] Although the ICJ is the principal legal organ of the U.N., and all 193 member states of the U.N. are thereby inevitably parties to the ICJ Statute, the ICJ only has jurisdiction over parties that consent to submit cases to it for decision.[263] Also, despite its name, the ICJ is limited to hearing only disputes between governments, and cannot prosecute.[264] Likewise, the European Court of Human Rights also cannot prosecute because it only has jurisdiction to hear allegations of violations of the European Convention on Human Rights (ratified by only 47 states), and can do so only on account of individual or inter-State applications.[265] Conversely, the ICC does have the ability to prosecute. The ICC is the most logical international venue for prosecutions of looters, traffickers, and destroyers because it was set up to end impunity for the perpetrators of the most serious crimes of concern to the international community,[266] yet it is infeasible. Although the ICC was intended to have global jurisdiction, only 123 states have ratified the Rome Statute.[267] It is also a court of last resort that can intervene only when national authorities cannot or will not prosecute.[268]

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258. *See* Gerstenblith, *supra* note 6, at 382.

259. *See* Bogdanos ET AL., *supra* note 27 (Stopping the devastation of regions' "identity and ending the humanitarian crisis must go hand in hand"); *Unprecedented Forum Unites Global Government Leaders with Archaeology, Art, Museum Communities in Fight Against "Cultural Cleansing,"* ANTIQUITIES COALITION (Sept. 25, 2015), https://theantiquitiescoalition.org/press-releases/unprecedented-forum-unites-global-government-leaders-with-archaeology-art-museum-communities-in-fight-against-cultural-cleansing/ (last visited Mar. 11, 2018); Gerstenblith, *supra* note 6, at 385, 389, 392.

260. Gerstenblith, *supra* note 6, at 337.

261. Smart, *supra* note 100, at 791.

262. *Id*. at 792.

263. *See Handbook on Accepting the Jurisdiction of the International Court of Justice*, SWISS FED. DEP'T OF FOREIGN AFFAIRS FDFA, DIRECTORATE OF INT'L LAW, 6 (2014), http://legal.un.org/avl/pdf/rs/other_resources/Manual%20sobre%20la%20aceptacion%20jurisdiccion%20CIJ-ingles.pdf (last visited Mar. 11, 2018).

264. *What Does the International Criminal Court Do?*, World, BBC NEWS (June 25, 2015), http://www.bbc.com/news/world-11809908 (last visited Mar. 11, 2018).

265. *The ECHR in 50 Questions*, European Court of Human Rights, COUNCIL OF EUR., 5 (Feb. 2014), http://www.echr.coe.int/Documents/50Questions_ENG.pdf (last visited Mar. 11, 2018)*; Chart of Signatures and Ratifications of Treaty 005: Convention for the Protection of Human Rights and Fundamental Freedoms*, Conventions, Treaty Office, COUNCIL OF EUR., https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=7Hhz4pPa (last visited Mar. 11, 2018).

266. *See* Kenny, *supra* note 257, at 121.

267. *The States Parties to the Rome Statute*, Assembly of States Parties, INT'L CRIMINAL COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Mar. 11, 2018).

268. *What Does the International Criminal Court Do?*, *supra* note 264.

If the crimes of looting and illicit trafficking of antiquities and intentional destruction of cultural heritage were considered violations of *jus cogens*, all nations would have a duty to prosecute them (under the principle of universal jurisdiction), and an obligation not to grant impunity to perpetrators of such crimes.[269] However, nations have generally not been successful at, and perhaps even avoiding,[270] prosecuting and sentencing perpetrators of such crimes. Therefore, the ICC should seek to assert jurisdiction over the crimes of looting and illicit trafficking of antiquities and intentional destruction of cultural heritage, rather than leave prosecution to domestic forums.[271] The ICC should no longer remain a court of last resort when it comes to violations of *jus cogens*. Instead, the ICC should have original jurisdiction over violations of *jus cogens*, and the Rome Statute should be amended to establish such. This amendment would enable the ICC, as it was tasked, to effectively handle the worst criminal matters affecting the international community and address the shortcomings of domestic jurisdictions.[272] It would also send a clear signal that the ICC is capable of dealing with matters of pressing international concern and ensuring that perpetrators of some of the most egregious violations of international law do not go unpunished.[273]

V. Conclusion

Terrorist organizations like ISIS pose significant threats to the international community as a whole.[274] ISIS has "undermined stability" around the world "through its terrorist acts and crimes against humanity, and poses an immediate threat to international peace and security."[275]

ISIS is capable of carrying out terrorist acts and crimes against humanity because it is well funded by controversial antiquities, or "cultural objects looted and trafficked from archaeological sites in war zones by armed groups to finance hostilities."[276] The sale of a stolen antiquity can bring in a profit of $1 million, which ISIS can then use to purchase 11,667 AK-47s and 2.5 million bullets or 1,250 rocket launchers and 5,000 mortars.[277] Hence, one stolen antiquity

269. *See* Bassiouni, *supra* note 241, at 65–66.

270. *See e.g.*, Kenny, *supra* note 257, at 121–22. States may be unwilling to prosecute and ultimately avoid prosecution for security reasons if it is too dangerous because of the potential risk that a suspect might become a high-profile figure and incite extremist rallies and unrest.

271. *See id.* at 121.

272. *See id*. at 122.

273. *See id.* at 122, 127.

274. *Consolidated FATF Strategy on Combatting Terrorist Financing*, FIN. ACTION TASK FORCE, 3 (Feb. 19, 2016), http://www.fatf-gafi.org/media/fatf/documents/reports/FATF-Terrorist-Financing-Strategy.pdf (last visited Mar. 11, 2018).

275. *Financing of the Terrorist Organisation Islamic State in Iraq and the Levant (ISIL)*, FATF REPORT, FIN. ACTION TASK FORCE, 10 (Feb. 2015), http://www.fatf-gafi.org/media/fatf/documents/reports/Financing-of-the-terrorist-organisation-ISIL.pdf (last visited Mar. 11, 2018).

276. *Conflict Antiquities: A Terrorist Financing Risk*, Infographic, ANTIQUITIES COALITION (Aug. 4, 2017), https://theantiquitiescoalition.org/wp-content/uploads/2015/09/rsz_1rsz_1rsz_conflictantiquities_170713-01-1.png (last visited Mar. 11, 2018).

277. *Culture in Conflict: Where Can Daesh Get $1 Million?*, Infographic, ANTIQUITIES COALITION (Mar. 26, 2015), https://theantiquitiescoalition.org/wp-content/uploads/2015/09/Daesh-1-million.jpg (last visited Mar. 11, 2018).

alone can arm a terrorist militia.[278] "No one knows just how much money terrorists are making on antiquities looting and trafficking, but . . . even the most conservative estimates have grave implications for security around the globe."[279] It is estimated that the November 13, 2015 attack on Paris cost ISIS just $88,160;[280] meanwhile, the shootings and bombings cost the international community 130 lives.[281] It is also estimated that the September 11, 2001 attacks in New York cost between $400,000 and $500,000;[282] a terrorist organization could sell just one stolen antiquity to fund terrorist attacks and kill 2,977 people.[283]

The international community is also confronted with ISIS's less traditional weapons of warfare. Presently, the world is facing the largest cultural emergency since World War II, as ISIS continues to deliberately and systematically decimate cultural heritage.[284] ISIS has intentionally destroyed cultural heritage, including Shiite mosques and shrines, Christian churches and monasteries, and pre-Islamic Assyrian and Roman sites, on an unprecedented scale in Syria and Iraq.[285] Although the international community deplores ISIS's undertakings, it is seemingly unable to take appropriate action against the terrorist organization.[286] Unfortunately, "international law and institutions are not adequately equipped to respond to the threat ISIS poses to cultural heritage and global security."[287]

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278. *See* Katie A. Paul, *Culture in Conflict: Where Can ISIS Get $1 Million?*, ANTIQUITIES COAL. (Mar. 26, 2015), https://theantiquitiescoalition.org/blog-posts/culture-in-conflict-where-can-isis-get-1-million/ (last visited Mar. 3, 2018).

279. *Conflict Antiquities: A Terrorist Financing Risk*, ANTIQUITIES COAL. (Aug. 4, 2017), https://theantiquitiescoalition.org/blog-posts/conflict-antiquities-a-terrorist-financing-risk/ (last visited Mar. 11, 2018).

280. *Conflict Antiquities: A Terrorist Financing Risk*, Infographic, *supra* note 276.

281. *See Paris Attacks: What happened on the Night*, Europe, BBC NEWS (Dec. 9, 2015), http://www.bbc.com/news/world-europe-34818994 (last visited Mar. 11, 2018).

282. *Antiquities Coalition Chairman Testifies on Capitol Hill*, ANTIQUITIES COAL. (May 12, 2016), https://theantiquitiescoalition.org/blog-posts/following-the-money-examining-current-terrorist-financing-trends-and-the-threat-to-the-homeland/ (last visited Mar. 11, 2018).

283. *See September 11th Terror Attacks Fast Facts*, CNN Library, CNN.COM (Aug. 24, 2017), https://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html (last visited Mar. 11, 2018).

284. Stephanie Billingham ET AL., *Culture in Crisis: Preserving Cultural Heritage in Conflict Zones*, ANTIQUITIES COAL. & JOHNS HOPKINS UNIV., PAUL H. NITZE SCH. OF ADVANCED INT'L STUD. (SAIS), xi (2017), http://media.wix.com/ugd/b976eb_fd1b6c924a3f4743897d6990327e99d1.pdf (last visited Mar. 11, 2018).

285. *Id*. at 4. *See also e.g.*, Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed*, NAT'L GEOGRAPHIC (Sept. 1, 2015), https://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/ (last visited Mar. 11, 2018). ISIS has damaged and destroyed the following sites in Syria: Palmyra (a metropolis on the Silk Road) (Temple of Baalshamin, Temple of Baal), Mar Elian Christian monastery, Apamea (a rich Roman-era trading city), Dura-Europos (a Greek settlement on the Euphrates river), and Mari. Moreover, ISIS has damaged and destroyed the following sites in Iraq: Hatra (a trading center on the Silk Road), Nineveh (Mosul Museum, Nirgal Gate, Mosque of the Prophet Yunus dedicated to Jonah), Nimrud (the first Assyrian capital), Khorsabad (an ancient Assyrian capital), Mar Behnam Catholic monastery, and the Inam Dur Mausoleum.

286. *See* Billingham ET AL., *supra* note 284, at 87.

287. Tess Davis, *Tomb Raiders and Terrorist Financing: Cutting Off ISIS' Traffic in "Blood Antiquities" NOLA Conference*, ANTIQUITIES COAL. (Oct. 27, 2015), https://theantiquitiescoalition.org/blog-posts/tomb-raiders-and-terrorist-financing-cutting-off-isis-traffic-in-blood-antiquities-nola-conference/ (last visited Mar. 11, 2018).

In 2015, the Antiquities Coalition urged the ICC prosecutor to open an investigation into ISIS.[288] The prosecutor assessed the prospects of exercising personal jurisdiction over persons within the ranks of ISIS and concluded that the jurisdictional basis for opening a preliminary examination was too narrow.[289] The prosecutor added, "considering the defined jurisdiction of the Court, many allegations of crimes, no matter how grave, may fall beyond the reach of this institution. . . .the ICC is designed to complement, not replace national jurisdictions."[290] Both Syria and Iraq have national laws that prohibit the looting and illicit trafficking and intentional destruction of cultural heritage, and thus have national jurisdiction, but "[g]iven the ongoing conflicts in both states . . . there is no practical means to enforce the law[s]."[291] Although it appears the ICC should be able to intervene because the national authorities in Iraq and Syria cannot or will not prosecute ISIS members, the general consensus seems to be that, because neither Iraq or Syria is a party to the Rome Statute, the ICC cannot intervene.[292]

For years, ISIS has been looting and illicitly trafficking antiquities and intentionally destroying cultural heritage, yet not one ISIS member has been prosecuted for such crimes. If these crimes are considered violations of *jus cogens*, and the Rome Statute is amended to provide the ICC with original jurisdiction over violations of *jus cogens*, then ISIS members can finally be prosecuted by the ICC.[293] The time has come for the international community to fight back and for the ICC to launch a campaign of legal warfare against ISIS once and for all, for its commission of atrocious crimes.[294] If looters, traffickers, and destroyers are held criminally responsible for violations of *jus cogens* by the ICC, they will face punishment up to life imprisonment or will have to pay a fine or forfeit any proceeds, property, or assets derived from their crimes.[295]

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288. Deborah Lehr & Tess Davis, *Letter* to Fatou Bensouda, ANTIQUITIES COAL. (Mar. 6, 2015), https://theantiquitiescoalition.org/wp-content/uploads/2016/07/AC-Letter-to-ICC-2015-3-6.pdf (last visited Mar. 11, 2018).

289. Letter from Mark P. Dillon, Head of Info. & Evidence Unit, Int'l Criminal Court Office of the Prosecutor, to Katie Paul, (July 2, 2015), https://theantiquitiescoalition.org/wp-content/uploads/2015/03/2015-07-02-Letter-to-ICC-Resposne.pdf.

290. *Id.*

291. Ellis, *supra* note 15, at 56. *See also* Kenny, *supra* note 257, at 122 (Arguably, even if there was a practical means to enforce the laws in these states, ISIS "constitutes a transnational criminal threat of such degree that piecemeal domestic prosecution is unsuitable.").

292. *See* Ellis, *supra* note 15, at 62.

293. *See generally* Kenny, *supra* note 257, at 124 (It seems likely that the Rome Statute will be amended because prosecuting ISIS members is "in the national interests of all UN members . . . as concerns over . . . [ISIS'] radicalism are near universal.").

294. *See id*. at 120, 127, 139 ("international criminal law should play a role in tackling one of the major criminal concerns of our time and ensure that impunity for those responsible for IS's atrocities is avoided. . . . [we must] explore the utility of the ICC as a potent judicial weapon in the war against terrorism." The "threat posed by IS and clear lack of serious judicial reckoning for its crimes inexorably leads to the conclusion that the ICC should pursue all possible avenues to ensure justice is done." The ICC does not belong "on the sidelines in the face of a criminal threat to international peace and security.").

295. *See* Rome Statute of the International Criminal Court, *supra* note 213, at art. 77.

Puerto Rico v. Sanchez Valle

136 S. Ct. 1863 (2016)

The Supreme Court of the United States held that Puerto Rico and the United States are not separate sovereigns for double jeopardy purposes. The Court used a historical analysis and applied the "dual-sovereignty doctrine" to assess whether an entity's authority to enforce criminal law comes from its ability to self-rule or whether that authority comes from Congress. The Court determined that while U.S. states derive their sovereign power from a source separate from the federal government, U.S. territories do not.

I. Holding

In *Puerto Rico v. Sanchez Valle*,[1] the Supreme Court concluded[2] that the Double Jeopardy Clause of the Fifth Amendment[3] prohibited the federal government and Puerto Rico from successively prosecuting a defendant on like charges for the same conduct.[4] Although the Double Jeopardy Clause carves out an exception under the "dual-sovereignty doctrine," the Supreme Court has long held that two prosecutions are not for the same offense, if brought by different sovereigns. This is true even when those actions target identical criminal conduct through equivalent criminal laws.[5] Here, the Supreme Court concluded that Puerto Rico and the United States are not separate sovereigns for purposes of the Double Jeopardy Clause.[6]

II. Facts and Procedure

Respondents Luis Sánchez Valle and Jaime Gómez Vázquez both sold guns to an undercover police officer.[7] Each of their actions occurred on separate occasions, but were combined for the purposes of this case.[8] The prosecutors of the Commonwealth of Puerto Rico (the "Commonwealth") indicted them for selling a firearm without a permit in violation of the Puerto Rico Arms Act of 2000.[9] While the Commonwealth charges were pending, United States federal grand juries indicted the Respondents based on the same transaction. The

1. 136 S. Ct. 1863 (2016).
2. Justice Elena Kagan delivered the opinion of the Court in which Chief Justice Roberts, Justice Kennedy, Justice Ginsburg and Justice Alito, joined. Justice Ginsburg filed a concurring opinion in which Justice Thomas joined. Justice Thomas filed an opinion concurring in part and concurring in the judgment. Justice Breyer filed a dissenting opinion in which Justice Sotomayor joined.
3. U.S. CONST. AMEND. V.
4. *Sanchez Valle*, 136 S. Ct. at 1867.
5. United States v. Lanza, 260 U.S. 377 (1922).
6. *Sanchez Valle*, 136 S. Ct. at 1868.
7. *See id.* at 1869.
8. *Id.*
9. *See* 25 Laws P.R. Ann. § 458 (2008).

Respondents were analogously charged with violating United States gun trafficking statutes.[10] Both Respondents pled guilty to the federal charges of the United States.[11]

After pleading guilty, the Respondents moved to dismiss the pending Commonwealth charges based on the Double Jeopardy Clause.[12] The prosecutors in both cases opposed those motions, arguing that Puerto Rico and the United States are different sovereigns for double jeopardy purposes, and thus could bring successive prosecutions against the two Respondents.[13] The trial court, however, disagreed and dismissed the charges.[14] After the dismissal, the Puerto Rico Court of Appeals intervened and reversed those decisions.[15] The Supreme Court of Puerto Rico granted review and held that Puerto Rico's gun sale prosecutions violated the Double Jeopardy Clause.[16] The Supreme Court of the United States granted certiorari to determine whether the Double Jeopardy Clause bars the federal government and Puerto Rico from successively prosecuting a respondent on like charges for the same conduct.[17]

III. Discussion

A. Dual-Sovereignty Doctrine

The Double Jeopardy Clause of the Fifth Amendment prohibits more than one prosecution for the "same offence."[18] However, the dual-sovereignty doctrine recognizes that a single act can give rise to distinct offenses and negate double jeopardy if the act violates the laws of separate sovereigns.[19] To determine whether two prosecuting authorities are different sovereigns for double jeopardy purposes, the Court asked a narrow, historically focused question.[20]

1. Historical Context

Puerto Rico and the United States have created a unique political relationship, built on the island's evolution into a constitutional democracy exercising local self-rule.[21] Under the U.S. Constitution's Territory Clause, Congress initially established a "civil government" for Puerto Rico possessing significant authority over internal affairs.[22] This civil government allowed the United States President, with the advice and consent of the Senate, to appoint the Governor,

10. *See* 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D), 924(a)(2).
11. *See Sanchez Valle*, 136 S. Ct. at 1869.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 1870.
18. *Id.* at 1867.
19. *Id.*
20. *Id.*
21. *Id.* at 1868.
22. *Id.*

the Supreme Court, and the upper house of the legislature. The Puerto Rican people elected the lower house themselves.[23] Gradually, Congress granted Puerto Rico additional autonomy.[24]

This additional autonomy by Congress enabled Puerto Rico to embark on the project of constitutional self-governance.[25] Public Law 600 allowed Puerto Rico to organize a government pursuant to a constitution of their own adoption.[26] However, only Congress could make Public Law 600 effective by their dispositive vote.[27] Before approving Public Law 600, Congress removed a provision recognizing various social welfare rights, added a sentence prohibiting certain constitutional amendments (including any that would restore the welfare-rights section), and inserted language guaranteeing children's freedom to attend private schools.[28] The changes in the provisions demonstrated that Congress was the ultimate source of this Puerto Rican constitution.

Since Congress passed the Puerto Rico Constitution it created a new political entity: the Commonwealth of Puerto Rico.[29] The Constitution of Puerto Rico is structured similarly to the Constitution of the United States.[30] The Commonwealth's power, the Constitution proclaims, "emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States."[31]

2. The Ultimate Source

The Fifth Amendment of the United States Constitution states that a person cannot be prosecuted twice for the same offense.[32] The Court has long held that the same offense brought by different sovereigns does not fall under the Double Jeopardy Clause, but rather is governed under the dual-sovereignty doctrine.[33] The dual-sovereignty doctrine states: "When the same act transgresses the laws of two sovereigns, it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences."[34] Therefore, double jeopardy does not exist when the entities that seek successively to prosecute a respondent for the same course of conduct are separate sovereigns.

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23. *Id.*
24. *See* Organic Act of Puerto Rico, Law of Mar. 2, 1917 ch. 145, §§ 5, 26, 39 Stat. 953, 958 (repealed 1950); *see also* Act of July 3, 1950, 48 U.S.C. §§ 731(b)–731(e) (1950).
25. *See Sanchez Valle*, 136 S. Ct. at 1868.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 1869.
30. *Id.*
31. *Id.; see also* P.R. CONST. art. I, §1.
32. *See* U.S. CONST. AMEND. V (nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb).
33. *See Sanchez Valle*, 136 S. Ct. at 1870; *see, e.g.,* United States v. Lanza, 260 U.S. 377, 382 (1922).
34. *See* Heath v. Alabama, 474 U.S. 82 (1985).

The issue with the dual-sovereignty doctrine is that the word "sovereignty" does not carry its original meaning.[35] The test that the Court used to decide whether two governments are distinct for double jeopardy purposes overtly disregards any common indicia of sovereignty.[36] The degree to which an entity exercises self-governance—whether autonomously managing its own affairs or continually submitting to outside direction—plays no role in the analysis.[37] The test, then, focuses on a single criterion: the "ultimate source" of the power undergirding the respective prosecutions.[38] This ultimate source depends on whether the sovereigns draw their authority to punish the offender from distinct sources of power.[39] If two entities derive their power to punish from wholly independent sources (imagine here a pair of parallel lines), then they may bring successive prosecutions.[40] Conversely, if those entities draw their power from the same ultimate source (imagine now two lines emerging from a common point, even if later diverging), then they may not.[41]

Under the approach above, the States of the United States are separate sovereigns from the federal government because the States rely on authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment.[42] Similarly, Indian tribes also count as separate sovereigns under the Double Jeopardy Clause. After the formation of the United States, tribes became "domestic dependent nations," subject to plenary control by Congress; hardly "sovereign" in one common sense.[43] However, unless Congress withdraws tribal power, including the power to prosecute, the Indian community retains that authority in its earliest form.[44] The "ultimate source" of a tribe's "power to punish tribal offenders" thus lies in its "primeval" or, at any rate, "pre-existing" sovereignty. A tribal prosecution, like a State's, is "attributable in no way to any delegation… of federal authority."[45]

The Supreme Court has held that a municipality cannot qualify as a sovereign distinct from a State, no matter how much autonomy over criminal punishment the city maintains.[46] Since the municipality had received its power from the State those two entities could not bring successive prosecutions for the same offense.[47] Additionally, the Court concluded in the early decades of the last century that United States territories, including an earlier incarnation of Puerto Rico itself, are not distinct sovereigns from the United States.[48]

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35. *Sanchez Valle*, 136 S. Ct. at 1870.
36. *Id.*
37. People of Puerto Rico v. Shell Co. (P.R.), Ltd., 302 U.S., 253, 261–62, 264–66 (1937).
38. United States v. Wheeler, 435 U.S. 313, 320 (1978).
39. *Heath*, 474 U.S. at 88.
40. *Sanchez Valle*, 136 S. Ct. at 1870.
41. *Id.* at 1871.
42. *Id.*
43. *Id.* at 1872.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 1873.

Moreover, in *Grafton v. U.S.*,[49] the Supreme Court held that the Philippine Islands (then a U.S. territory, also acquired in the Spanish-American War) could not prosecute a respondent for murder after a federal tribunal had acquitted him of the same crime.[50] The Court reasoned that a State does not derive its powers from the United States, but a territory does.[51] Just like the Philippine courts held in *Shell Co.*,[52] the Supreme Court held that territories (including Puerto Rico) exert all their power by authority of the federal government.[53]

B. Do the Prosecutorial Powers Belonging to Puerto Rico and the Federal Government Derive from Wholly Independent Sources?

If the powers derive from wholly independent sources, then criminal charges can go forward in Puerto Rico and the United States. However, if the powers derive from the same source, then criminal charges can only go forward once, and would be barred in other sovereigns based on the Double Jeopardy Clause. After 1952, Puerto Rico became a new kind of political entity, still closely associated with the United States, but governed in accordance with, and exercising self-rule through, a popularly ratified constitution.[54] This change of government required the Court to revisit the dual-sovereignty question. While revisiting the question, the Court found itself facing the same historical analysis and "ultimate source" discussion.[55]

In 1952, Congress relinquished its control over Puerto Rico's local affairs, giving the Commonwealth a sense of autonomy comparable to that of the States.[56] This newfound authority, including local criminal laws, brought mutual benefit to the Puerto Rican people and the United States.[57] However, this autonomy was not the Court's focus within the dual-sovereignty test in this case;[58] instead of focusing on which entity should apply the rule, the Court focused on where the rule came from.[59]

The Court emphasized that the analysis must go back to the ultimate source: "the 'inherent,' 'primeval,' and 'pre-existing' capacities of the tribes and states—the powers they enjoyed prior to the Union's formations."[60] The Commonwealth's power to enact and enforce criminal law proceeds from the Puerto Rico Constitution as "ordained and established by the people."[61]

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49. 206 U.S. 333 (1907).
50. *Sanchez Valle*, 136 S. Ct. at 1873.
51. *Id.*
52. People of Puerto Rico v. Shell Co. (P.R.), Ltd., 302 U.S., 253, 261–62, 264–66 (1937).
53. *Grafton*, 206 U.S. at 355.
54. *Sanchez Valle*, 136 S. Ct. at 1874.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 1874–75.
60. *Id.*
61. *Id.* at 1875.

The ultimate source of Puerto Rico's prosecutorial power, however, remains the U.S. Congress just as the authorization of a city's charter lies with a state government.[62] Put simply, Congress conferred the authority to create the Puerto Rico Constitution, which in turn confers the authority to bring criminal charges, making the federal government the ultimate source.[63] Although Puerto Rico has gained its own autonomy, the roots of Puerto Rico's prosecutorial power lie in federal soil.[64]

IV. Conclusion

As a result of its analysis, the Supreme Court of the United States held that Puerto Rico and the United States cannot successively prosecute a person for the same conduct under equivalent criminal laws due to the Double Jeopardy Clause of the Fifth Amendment.[65] The dual-sovereignty test makes it clear that if an entity's authority to enact and enforce criminal law ultimately comes from Congress, then it cannot follow a federal prosecution on its own.[66] The Double Jeopardy Clause bars both Puerto Rico and the United States from prosecuting a single person for the same conduct under equivalent criminal laws.[67]

The Court based its decision on a historical analysis. The Court determined that while the States derive their sovereign power from a source separate from the federal government, United States territories do not. Although Puerto Rico functions as a separate sovereign in many ways—because the federal government has delegated much of its power to the people of Puerto Rico—the delegation cannot ignore the fact that, historically, the authority to govern Puerto Rico is ultimately derived from the United States Constitution.

Danielle Connolly

62. *Id.*
63. *Id.* at 1875–76.
64. *Id.* at 1868.
65. *Id.* at 1876.
66. *Id.*
67. *Id.*

Republic of the Marshall Islands v. United States

865 F.3d 1187 (9th Cir. 2017)

The Ninth Circuit Court of Appeals dismissed the Republic of the Marshall Islands' suit against the United States alleging a breach of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons on the grounds that the claims were non-justiciable.

I. Holding

The Supremacy Clause guarantees, "all Treaties […] shall be the supreme Law of the Land."[1] However, not all treaties are created equal in terms of enforceability. Indeed, "the power to enforce the law of the land [is] only constitutionally allocated to the courts in cases of a Judiciary nature."[2] *Republic of the Marshall Islands v. United States* asked whether judicial enforcement power extends to Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons. The Ninth Circuit held that enforcement of Article VI was beyond the court's judicial powers as Article VI is non-self-executing, presents a non-redressable injury, and implicates a political question.

II. Facts and Procedure

A. The History of the Marshall Islands And Nuclear Weapons.

The Republic of the Marshall Islands ("Marshall Islands") is a nation of islands and atolls in the Pacific Ocean.[3] From 1946 to 1958, the United States conducted sixty-seven nuclear weapons tests in the Marshall Islands.[4] Twenty-three tests were conducted in Bikini Atoll and forty-four were conducted in Enewetak Atoll.[5] These nuclear weapons tests have resulted in horrific and multi-generation consequences including rendering several of these islands and atolls uninhabitable due to radiation.[6]

The Treaty on the Non-Proliferation of Nuclear Weapons ("Treaty") entered into force in 1970.[7] Over one hundred eighty countries are parties to the Treaty including both the United

1. U.S. CONST. art. VI, cl. 2.
2. Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties,* 89 AM. J. INT'L L. 695, 713 (1995).
3. Marlise Simons, *Marshall Islands Can't Sue the World's Nuclear Powers, UN Court Rules,* N.Y. TIMES: ASIA PACIFIC, (Oct. 5, 2016), https://www.nytimes.com/2016/10/06/world/asia/marshall-islands-un-court-nuclear-disarmament.html.
4. U.S. Embassy Marshall Islands, *The Legacy of U.S. Nuclear Weapons Testing and Radiation Exposure in the Marshall Islands*, U.S. EMBASSY IN THE REPUBLIC OF THE MARSHALL ISLANDS, (Sept. 15, 2012) https://mh.usembassy.gov/the-legacy-of-u-s-nuclear-testing-and-radiation-exposure-in-the-marshall-islands.
5. *Id.*
6. Emily Rhode, *Marshall Islands Radiation Still Too High Decades Later,* SCIENCE CONNECTED: GOT SCIENCE MAGAZINE, (Jun. 22, 2016), https://www.gotscience.org/2016/06/marshall-islands-radiation/.
7. *See* Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

States and the Marshall Islands.[8] To promote the Treaty's goal of nuclear disarmament, Article VI provides that "[e]ach of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."[9]

B. The District Court's Decision.

In April 2014, the Marshall Islands sued the United States in federal district court claiming that the United States breached its obligations under Article VI of the Treaty by failing to pursue good-faith negotiations.[10] The Marshall Island's prayer for relief was twofold. First, the Marshall Islands requested that the district court issue a declaration that Article VI imposed obligations on the United States to (1) "pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament" and (2) "bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective control."[11] Further, the Marshall Islands requested the district court also issue a declaration that the United States was in continuing breach of these obligations.[12] Second, the Marshall Island's sought injunctive relief requiring the United States – within one year following entry of the requested declaratory judgment – to all necessary steps to comply with its Article VI obligations, including calling for and convening negotiations for nuclear disarmaments in all aspects.[13] The United States moved to dismiss the complaint.[14]

The district court granted the United States' motion to on two grounds.[15] First, the district court concluded the Marshall Island's lacked standing to bring the suit.[16] The district court reasoned that it had no power to bind other state parties not before the court and that the asserted injury "cannot be redressed by compelling the specific performance by only one nation to the Treaty."[17] Second, the court also concluded that the case presented a nonjusticiable political question.[18]

The United States also argued that Article VI is not self-executing and therefore not directly enforceable in domestic courts.[19] However, the district court declined to consider this argument.[20]

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8. *See id.*
9. *Id.* at art. VI.
10. *See* Republic of Marshall Islands v. United States, 865 F.3d 1187, 1191 (9th Cir. 2017).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*

The district court reasoned that this issue was irrelevant to the enforcement by a state party that is signatory to the Treaty.[21] The Marshall Islands appealed the district court's judgment.[22]

III. Discussion

The Ninth Circuit affirmed the district court's dismissal of the Marshall Islands' complaint for three reasons.[23] First, the court concluded that both Article VI's text and history indicate that it is a non-self-executing treaty provision and therefore not enforceable in domestic courts.[24] Second, the court determined that the Marshall Island's injuries were not redressable because Article VI is a non-self-executing provision.[25] The court explained that it lacked the power to redress the claimed injury where a party violates a non-self-executing treaty provision.[26] Third, the court concluded that the case presented a nonjusticiable political question under the *Baker* factors analysis.[27]

A. Article VI Is Non-Self-Executing.

The Supremacy Clause establishes all treaties as the supreme law of the land equal to that of the Constitution and federal statutes.[28] However, this does not answer the question of whether a treaty provision may be enforced in domestic courts.[29] Indeed, the question of whether a treaty is supreme law is distinct from the question of whether a treaty's provision creates a rule of decision.[30]

A treaty provision must be self-executing to create a rule of decision.[31] A self-executing treaty provision is one that is judicially enforceable upon ratification.[32] Conversely, a non-self-executing treaty provision requires congressional action through implementing legislation or action by the executive branch.[33] Thus, when courts are asked to enforce a treaty provision, the court must determine to which branch of government the provision was intended to address

21. *Id.* at 1191–92.
22. *Id.* at 1192
23. *See id.*
24. *See id* at 1193–99.
25. *Id at* 1199.
26. *Id.*
27. *See id.* at 1200–01.
28. *See* U.S. CONST. art. VI, cl. 2.
29. *See* United States v. Alvarez-Machain, 504 U.S. 655, 667 (1992).
30. *See* Michael D. Ramsey, *A Textual Approach to Treaty Non-Self-Execution*, 2015 BYU L. REV. 1639, 1648 (2016) (explaining that only rules of decision enable courts to resolve disputes).
31. *See Republic of Marshall Islands*, 865 F.3d at 1193.
32. *See id.* at 1192.
33. *See id.*

itself to.[34] "Only if the provision serves as a directive to domestic courts may the judiciary enter the fray to enforce it."[35]

At the heart of this distinction is the separation of powers principle.[36] Indeed, although the Supremacy Clause establishes treaties as the supreme law of the land and Article III extends the judicial power to all cases arising under treaties, the power to enforce the law of the land was constitutionally allocated to courts only in cases of a Judiciary nature.[37] Thus, claims seeking to enforce non-self-executing treaties are non-justiciable since resolving them would require the court to exceed its "judicial Power."[38]

1. The Text of Article VI Indicates It Is Non-Self-Executing.

The Marshall Island's argued that the court was bound by precedent to interpret the Treaty and, as valid law, require the Executive to comply with it.[39] The court observed that this argument ignored the question of self-execution.[40] Although the Marshall Island's argued a self-execution analysis was irrelevant because Article VI created direct rights between the parties, the court emphasized that self-execution concerns both where and how such rights are asserted.[41] Thus, the court determined an analysis of whether Article VI was self-executing was necessary.[42]

> The court concluded that the text of Article VI indicated that it was a non-self-executing provision.[43] The court considered several factors in coming to this conclusion. First, the court concluded that the text of Article VI indicated that it was directed primarily to the political branches.[44] Indeed, the court emphasized that the nature of the obligation under Article VI required an action that only the Executive could take – negotiations with other nations.[45] Similarly, the court concluded that Article VI was also implicitly addressed to the Senate because the conclusion of a disarmament treaty would require both the President's signature and the Senate's consent under the Constitution.[46]

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34. *See id.* at 1193 ("When courts are asked to enforce a treaty provision, they must determine whether the provision addresses itself to the political, not the judicial department.").
35. *See id.*
36. *Id.*
37. Vázquez, *supra* note 2, at 713
38. *See Republic of Marshall Islands*, 865 F.3d at 1193.
39. *See id.*
40. *See id.*
41. *See id.* at 1199.
42. *See id.*
43. *See id.* 1193–99.
44. *See id.* at 1195.
45. *See id.*
46. *See* U.S. CONST. art. II, § 2, cl. 2. (providing that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

In the same vein, the court also reasoned that Article VI could not be self-executing due to the consequences of permitting enforcement by domestic courts.[47] A provision cannot be judicially enforced if doing so would compel courts to assume a role constitutionally assigned to one of the other branches of government.[48] Diplomatic negotiations with foreign nations are exclusively within the authority of the Executive.[49] Thus, the court reasoned that it could not grant the Marshall Islands' prayer for relief without impermissibly trespassing into the realm of the Executive.[50] Indeed, to interpret Article VI as self-executing – and therefore judicially enforceable – would violate core separation of powers principles.[51]

Second, the court concluded that Article VI was not intended to take immediate effect in domestic courts.[52] Indeed, the court observed that Article VI did not contain express language calling for judicial enforcement.[53] The court found that Article VI's silence as to an enforcement mechanism demonstrated that neither the President nor the Senate intended it to be self-executing.[54]

Further, the court found that Article VI anticipated future action of the parties through their political branches.[55] The court observed that "[u]nder Article VI, the United States 'undertakes to pursue' future negotiations on 'effective measures' to end 'the nuclear arms race at an early date' and ultimately 'on a treaty on general and complete disarmament.'"[56] The court found that the phrase "undertakes to pursue" in this context reflected "a commitment on the part of [the Treaty's parties] to take future action through their political branches."[57] Moreover, even if Article VI created an imminent obligation to negotiate, essential details such as the time, place, and nature of the obligations were unspecified at ratification thereby framing the provision a promise of future action.[58] Thus, the court concluded that Article VI represented a commitment on the part of the Treaty's parties to take future actions through their political branches.[59]

Third, the court concluded that Article VI's indeterminate language was incapable of providing a rule of decision.[60] The court observed that Article VI is riddled with vague terms that

47. *See Republic of Marshall Islands*, 865 F.3d at 1196–97.

48. *See id.* at 1197.

49. *See generally* U.S. CONST. art. II, §§ 2, 3.

50. *See Republic of Marshall Islands*, 865 F.3d at 1197 ("Granting the Marshall Islands' requested relief would essentially appoint the district court as a Special Master overseeing the United States' nuclear treaty negotiations.").

51. *See id.*

52. *See id.* at 1195.

53. *See id.*

54. *See id.* at 1197 (explaining that a treaty failing to evince such executor intention sis non-self-executing); *see also* Cardenas v. Stephens, 820 F.3d 197, 202, n.5 (5th Cir. 2016).

55. *See Republic of Marshall Islands*, 865 F.3d at 1195.

56. *Id.*

57. *See id.* (quoting Medellin v. Texas, 552 U.S. 491, 508 (2008)).

58. *See* David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy,* 36 U.C. DAVIS L. REV. 1, 24 (2002) ("[I]f a treaty obligates the United States to take unspecified steps toward achieving an agreed objective at an unspecified future time . . . then action by the political branches is necessary to execute the treaty.").

59. *See Republic of Marshall Islands*, 865 F.3d at 1195.

60. *Id.*

fail to provide courts with a specific standard to apply.[61] The court pointed to Article VI's call for negotiations on "effective measures" to cease the nuclear arms race and achieve disarmament as an example.[62] The court commented that what constitutes "effective measures" to cease the nuclear arms race and achieve disarmament is known only to nuclear experts and the negotiators of the Treaty. Thus, the court concluded that the use of nebulous terms like "effective measures" – which are never defined in the Treaty -- demonstrated that Article VI was never intended to be a directive to domestic courts giving rise to domestically enforceable federal law.[63]

Finally, the court determined that Article VI's use of aspirational language also indicated it was not intended to be self-executing.[64] Courts have viewed "[a]spirational language [a]s the hallmark of a non-self-executing treaty."[65] Aspirational language is reflected in Article VI's hope for successful negotiations to culminate "at an early date."[66] Similarly, the court also found such language present in the Treaty's preamble.[67] The court concluded that rather than reflect a directive towards domestic courts, the aspirational language of Article VI reflects the reality that "the state parties could only agree that they hope to usher in a nuclear-free future."[68] For these reasons the court concluded that Article VI's text indicated it was non-self-executing.

2. Pre-Ratification and Post-Ratification Evidence Also Indicates That Article VI Is Non-Self-Executing.

The court next turned to the Article VI's pre-ratification and post-ratification history to support its interpretation.[69] The court turned to pre-ratification statements made by Senator Fulbright as evidence that Article VI was viewed as non-self-executing.[70] The court emphasized that as then-Chairman of the Senate Foreign Relations Committee, Senator Fulbright's statements shed light on the Senate's views as to Article VI.[71] The court emphasized that Senator Fulbright consistently denied that Article VI created a binding obligation on the United States.[72] Thus, the court concluded that Senator Fulbright's pre-ratification testimony did not convey the intention that Article VI was self-executing or otherwise "ratified on [those] terms."[73]

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61. *Id.*

62. *Id.*

63. *See id.*

64. *See id.*

65. Doe v. Holder, 763 F.3d 251, 255 (2d Cir. 2014); *see also* INS v. Stevic, 467 U.S. 407, 429, n.22 (1984) (concluding Article 34 of the Refugee Convention was precatory and non-self-executing based on its use of aspirational language).

66. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 7, at art. VI.

67. *See Republic of Marshall Islands*, 865 F.3d at 1196 (highlighting in the Treaty's preamble that the "state parties '[d]eclar[e]' their 'intention' to end the arms race 'at the earliest possible date' and to move 'in the direction of nuclear disarmament'" as aspirational language).

68. *Id.*

69. *See id.* at 1197.

70. *See id.*

71. *See id.*

72. *See, e.g., id.* at 1198 ("A treaty may create certain obligations in the mind of a foreign country, but domestically it does not.") (quoting 115 CONG. REC. 6204 (1969)).

73. *Republic of Marshall Islands*, 865 F.3d at 1196.

Likewise, Article VI's post-ratification history also supported this conclusion.[74] The court pointed to the actions taken by the legislative and executive branches following the Treaty's ratification.[75] Congress had delegated matters relating to the United States' participation in the Treaty to the President[76] and the Secretary of State[77]. The court emphasized that both the President and Secretary of State were required to report to Congress about the United States' "adherence . . . to obligations undertaken in arms control, nonproliferation, and disarmament agreements."[78] Finally, the court noted that ongoing treaty review conferences also indicated that Article VI was not self-executing.[79] For these reasons the court concluded that Article VI was non-self-executing.

B. The Marshall Islands' Injuries Were Not Redressable.

The court also concluded that the Marshall Islands lacked standing because its injuries were not redressable.[80] "To establish standing, a plaintiff must show an injury in fact, causation, and redressability."[81] "Redressability requires an analysis of whether the court has the power to right or prevent the claimed injury."[82] Where a treaty provision is non-self-executing, judicial courts lack the constitutional power necessary to remedy or prevent the wrong.[83] Thus, the court concluded that the Marshall Islands' asserted injuries were not redressable because Article VI was not self-executing.[84]

C. The Marshall Islands' Claims Presented An Inextricable Political Question.

Finally, the court also concluded the Marshall Island's claims presented a nonjusticiable political question.[85] To determine if a particular claim raises a political question, courts look to

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74. *See id.*

75. *See id.*

76. *See* 22 U.S.C. § 2574(a) (delegating the responsibility of preparing, conducting, and managing the United States' participation in all international measures for arms control to the Secretary of State).

77. *See id.* (granting the President the power to appoint representatives to conferences and activities "relat[ed] to the field of nonproliferation, such as the preparations for and conduct of the review relating to the Treaty on the Non-Proliferation of Nuclear Weapons.").

78. *See* 22 U.S.C. § 2593a(a)(2)–(3).

79. *See Republic of Marshall Islands*, 865 F.3d at 1198 (observing that state parties indicated "responses to concerns over compliance with any obligation under the Treaty by any state party should be pursued by diplomatic means."); *see also id.* (emphasizing the Senate reaffirmation of the Treaty's objectives was predicated on Senator Boschwitz testimony the Treaty was not self-executing).

80. *See id.* at 1199.

81. *Id.*

82. Gonzales v. Gorsuch, 688 F.2d 1263, 1267 (9th Cir. 1982).

83. *See* Head Money Cases, Edye v. Robertson, 112 U.S. 580, 598 (1884).

84. *See Republic of Marshall Islands*, 865 F.3d at 1199.

85. *See id.* at 1200.

the *Baker* factors.[86] The first three factors are "constitutional limitations of a court's jurisdiction."[87] The remaining three factors are "prudential considerations."[88] Only one factor must be present for the court to determine a case presents a political question.[89]

The court concluded that the Marshall Islands' claims presented an inextricable political question. The court relied on the first two *Baker* factors.[90] Under the first factor, the court concluded that the Marshall Islands' claims involved "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[91] Executive or legislative action taken pursuant to such a political power is not subject to judicial inquiry or decision.[92] The court observed that the Constitution commits the power to conduct foreign relations solely to the political branches of government.[93] Specifically, the court emphasized to the "primacy of the Executive in the conduct of foreign relations and the Executive Branch's lead role in foreign policy."[94] Indeed, the call for and to convene negotiations for nuclear disarmament falls within the powers committed to the Executive.[95] Thus the court concluded the first *Baker* factor was present.

The court also concluded that the second *Baker* factor – a lack of judicially manageable standards for resolving the issue – was present.[96] The court reiterated Article VI's use of vague terms and lack of applicable standards in coming to this conclusion.[97] The court rejected the Marshall Islands' argument asking the Court to focus only on the United States' obligation to negotiate in "good faith" – a term commonly applied by courts.[98] The court reasoned that to

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86. The *Baker* factors consider whether the claim involves:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

87. *See* Corrie v. Caterpillar, Inc., 503 F.3d 974, 981 (9th Cir. 2007).

88. *See id.*

89. *See* Schneider v. Kissinger, 412 F.3d 190, 194 (D.C. Cir. 2005) ("To find a political question, we need only conclude that one factor is present, not all.").

90. *See Republic of Marshall Islands*, 865 F.3d at 1200; *see also* Alperin v. Vatican Bank, 410 F.3d 532, 545 (9th Cir. 2005) (recognizing the first two *Baker* factors likely the most important).

91. *Baker*, 369 U.S. at 217.

92. *See* Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918).

93. *See* U.S. CONST. art II, §§ 2, 3.

94. Taiwan v. U.S. Dist. Court for the N. Dist. Of Cal., 128 F.3d 712, 718 (9th Cir. 1997).

95. *See Republic of Marshall Islands*, 865 F.3d at 1201.

96. *See id.*

97. *See* Carlos Manuel Vázquez, *Treaties as Law of the Land: the Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L. Rev. 599, 631 (2008) (explaining that treaties that are too vague to enforce may be regarded as nonjusticiable under the political question doctrine).

98. *See Republic of Marshall Islands*, 865 F.3d at 1201 ("This surgical attempt would read that term in isolation and out of context.").

narrow the issue in such a fashion is incompatible with the analysis required under the second *Baker* factor.[99] Thus the court held that enforcement of Article VI presented a political question.

IV. Conclusion

The Ninth Circuit's holding leaves the enforcement of Article VI claims in legal purgatory. Indeed, the self-execution doctrine has been invoked time and again to avoid domestic enforcement of binding international obligations.[100] In the case of the Marshall Islands, the International Court of Justice ("I.C.J.") has also dismissed the Marshall Islands' Article VI enforcement claims on jurisdictional grounds.[101] This demonstrates that where there is no possibility of domestic enforcement, there may be no possibility of enforcement at all. Thus, the self-execution doctrine creates grave concerns for the binding force of obligations under international law.

However, it is possible that the Marshall Islands simply asked for too much in requesting injunctive relief. There is a strong argument that the court had the power to issue the Marshall Islands' requested declarative relief.[102] The distinction between self-executing and non-self-executing provisions likely only applies to the enforcement of treaties, and may not matter when only declaratory relief is sought.[103] Indeed, declaratory relief seeks only treaty interpretation as opposed to treaty enforcement.[104] Since non-self-executing provisions are still treaties for the purposes of the Supremacy Clause, courts should retain the power to interpret these treaties and issue declaratory relief.[105] This leaves some hope for future federal actions in court.

Michael Joseph

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99. *See* El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 842 (D.C. Cir. 2010) ("The political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters . . . constitutionally committed to their discretion.").

100. Medellin v. Texas, 552 U.S. 491, 508 (2008) (explaining that Article 94 of the United Nations Charter was not enforceable in United States domestic courts despite constituting a binding international law obligation on the United States).

101. Maitê de Souza Schmitz, *Decision of the International Court of Justice in the Nuclear Arms Race Case*, HARV. INT'L J., (Nov. 21, 2016), http://www.harvardilj.org/2016/11/decision-of-the-international-court-of-justice-in-the-nuclear-arms-race-case (explaining that the lack of evidence of a dispute between the parties precluded the I.C.J. from hearing the case).

102. Katherine Maddox Davis, *Promise Despite Overreach in Marshall Islands v. United States*, 30 EMORY INT'L L. REV. 2063 (2016) (arguing that the self-execution doctrine may only apply to enforcement of treaties and thus would not bar requests for declaratory relief).

103. *See* Republic of the Marshall Islands v. United States, 79 F. Supp. 3d 1068, 1074, n.2 (N.D. Cal. 2015) (highlighting that the issue of self-execution was "irrelevant to the *enforcement* by a state-party that is a signatory to the Treaty.") (emphasis added).

104. *See* William J. Carter, Jr., *Treaties as Law and the Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation*, 69 MD. L. REV. 344, 346 (2010) (explaining that "even non-self-executing treaties are amenable to domestic judicial enforcement in a manner consistent with both separation of powers principles and the rule of law.").

105. *See* John F. Coyle, *The Modern Doctrine(s) of Non-Self-Executing Treaties*, OPINIO JURIS, (Feb 16, 2017), http://opiniojuris.org/2017/02/16/the-modern-doctrines-of-non-self-executing-treaties ("This doctrine posits that non-self-executing treaties are the Law of the Land for purposes of the Supremacy Clause but that judges are powerless to enforce them irrespective of whether they are invoked by public or private actors.").

Maestracci v. Helly Nahmad Gallery

155 A.D.3d 401, 63 N.Y.S.3d 376 (1st Dep't 2017)

The First Department overruled a Supreme Court ruling and held: (1) a French citizen and domiciliary could follow an alternative procedure from what is listed in EPTL 13-3.5 to pursue a claim in the United States; and (2) the claim was not barred by a statute of limitations under the recently enacted Holocaust Expropriated Art Recovery Act, which states that the statute of limitations to recover artwork that had been previously looted by the Nazis is six years from the date of actual discovery.

I. Holding

In *Maestracci v. Helly Nahmad Gallery, Inc.*,[1] the First Department concluded that a French citizen and domiciliary could pursue a claim in the United States without having a court-appointed administrator bring the action.[2] The court sanctioned the French citizen and domiciliary to follow an alternative procedure from what is set out in Estates,[3] Powers, and Trusts Law 13-3.5, and allowed the petitioners to present specific documentation providing proof of French inheritance rights.[4] Second, the court held that petitioner's claim was not barred by a statute of limitations under the recently enacted Holocaust Expropriated Art Recovery Act ("HEAR"), which states that the statute of limitations to recover artwork that was previously looted by the Nazis is six years from the date of actual discovery.[5]

II. Facts and Procedure

This case is premised around the ownership battle of a 1918 painting titled, *Seated Man with a Cane*, ("the painting"), by Amedeo Modigliani.[6] The painting was recently valued at approximately 25 million U.S. dollars.[7] According to Maestracci, the original owner of the painting was his grandfather, Oscar Stettiner, a Jewish art dealer who resided in Paris.[8] Stettiner fled Paris in 1939 to escape the Nazi regime and was forced to leave the painting behind.[9] In 1944, before Paris was liberated, the painting was allegedly sold by the Nazis without Stettiner's consent.[10] In 1946, after World War II, Stettiner brought suit pursuant to French legislation

1. 155 A.D.3d 401, 63 N.Y.S.3d 376 (1st Dep't 2017).
2. *Id.* at 403.
3. *Id.*
4. *Id.*
5. *Id.* at 405.
6. *Id.* at 401.
7. Doreen Carvajal, *Estate Sues Nahmad Gallery Network for Modigliani Portrait,* N.Y. TIMES, (Nov. 24, 2015), https://www.nytimes.com/2015/11/25/arts/design/estate-sues-nahmad-gallery-network-for-modigliani-portrait.html.
8. *Maestracci,* 155 A.D.3d at 401.
9. *Id.* at 402.
10. *Id.*

which voided sales of looted property by Nazis during the war.[11] As a result, Stettiner was granted an emergency summons that invalidated the sale of the painting, and directed that it be returned to him. At that point in time, however, Stettiner was unable to track down the painting.[12] According to Maestracci's research, French court records from 1947 show that the man who bought the painting from the Nazis in 1944 entrusted the painting to another man who then declared that he resold it the same year to an unknown American officer.[13] Stettiner died in 1948 without ever retrieving the painting.[14]

The painting did not resurface until 1996, when Christie's put it up for auction in London.[15] The painting was sold in 1996 to International Art Center, S.A., which in 2005 exhibited the painting at Defendant Helly Nahmad Gallery, Inc.[16] In 2008, Helly Nahmad Gallery, Inc. included the painting in an auction conducted by Sotheby's New York. The painting was not sold during this auction.[17]

Maestracci first commenced suit in 2010 when his representative contacted Sotheby's Restitution Department inquiring about the consignor of the painting.[18] Maestracci's representative made continuous efforts to get in contact with Helly Nahmad Gallery, but was repeatedly ignored.[19] As a result, Maestracci filed suit in federal court against Helly Nahmad and his art gallery in Manhattan District Court in 2012.[20] The suit was discontinued without prejudice the same year when Defendants alleged that they were not the owners of the painting and that the International Art Center was the rightful owner.[21]

In 2014, Maestracci refiled the suit, this time in state court, naming multiple defendants, including International Art Center.[22] The International Art Center argued that Maestracci lacked standing and, as a result, did not have jurisdiction to bring the claim in New York.[23] Defendants argued that Maestracci merely asserted that he is a beneficiary of a foreign decedent, which does not confer legal standing for him to bring suit on behalf of Stettiner's estate.[24] After the motion court declared that Maestracci lacked standing due to his French citizenship, another Plaintiff pursued the case on Mastracci's behalf.[25] Maestracci's attorney, George Gowen,

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 403.
23. *Id.*
24. *Id.*
25. *Id.*

was enlisted to act as the estate's representative.[26] However, in 2017, the appellate court overruled the lower court's ruling and held that Maestracci did in fact have legal standing to bring the action in the United States, and that his claim was not barred by the statute of limitations.[27]

III. Discussion

A. Questions Presented

This case presented two questions at issue. First, the court assessed whether Maestracci, as a citizen and resident of France, lacked standing to bring his claim in New York. Second, the court evaluated whether Maestracci's claim was barred under a statute of limitations.

1. Personal Jurisdiction: Standing

Standing means a litigant is entitled to have a court decide the merits of his claim.[28] A court will decide the issue of a litigant's standing after weighing several limits on the exercise of federal jurisdiction.[29] After considering the issue of federal jurisdiction, the lower court held that Maestracci did not have proper standing under New York EPTL section 13-3.5, since he did not establish that he was a duly appointed representative of the non-domiciliary Stettiner estate.[30] However, the Appellate Division overruled the previous holding by reading EPTL section 13-3.5 more expansively.[31]

a. Estates, Powers, and Trusts Law 13-3.5

EPTL section 13-3.5 stipulates:

> A personal or other legal representative of a non-domiciliary decedent, duly appointed or authorized by the law of any other state, territory or other jurisdiction of the United States where the decedent was domiciled, may sue in any court of this state in his capacity as personal or other legal representative in the same manner and under the same restrictions as a person residing outside of the state may sue.[32]

The Appellate Division construed EPTL section13-3.5 to "permit certain representatives of estates in foreign countries to bring suit in New York without first obtaining New York letters of administration by the alternative procedure of filing an affidavit and supporting docu-

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26. *Id.*
27. *Id.*
28. Fed. Prac. & Proc. Juris. § 3531 (3d ed.) ("Standing doctrines are employed to refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct the litigant advancing it is not properly situated to be entitled to its judicial determination.").
29. *Id.*
30. *Maestracci,* 155 A.D.3d at 401.
31. *Id.* at 403.
32. N.Y. EST. POWERS & TRUSTS LAW 13-3.5(a).

ments establishing their right to pursue claims on behalf of the estate under the foreign law".[33] The court found that Maestracci could follow an alternative procedure that broadens EPTL section 13-3.5, by filing documents demonstrating proof of his French inheritance rights.[34] Therefore, his right to bring action on behalf of the Stettiner estate was feasible, and he was no longer required to have a court-appointed administrator bring suit on his behalf.[35]

b. Schoeps v. Andrew Lloyd

The *Maestracci* court relied on the forms of proof that were permitted in *Schoeps.* These forms consisted of an affidavit from an expert in the law of the foreign jurisdiction concerning inheritance rights, and the foreign jurisdiction's equivalent of an *acte de notariete* (French act drawn up by a notary in the context of the settlement of an estate that establishes the hereditary status of the successors recognized by the law)[36] formally certifying the party's right to pursue claims on behalf of the estate.[37] Here, Maestracci relies precisely on these forms of documentation to prove his standing.[38] Thus, when dealing with foreign law, courts have the authority to stray from the rigid confines of the EPTL when specific foreign documentation is provided.[39] Therefore, standing was not an issue in *Maestracci.*

B. Statute of Limitations

1. 'Holocaust Expropriated Art Recovery Act'

The Court found that Maestracci was properly granted leave to add his attorney, George Gowen, as a co-plaintiff, and did not exceed the statute of limitations in doing so.[40] Defendants claimed that Maestracci only sought leave from the claim after serving a complaint naming George Gowen as a co-plaintiff, thus exceeding the statute of limitations.[41] However, the Holocaust Expropriated Art Recovery Act replaced the statute of limitations provisions that would otherwise be applicable to a civil claim such as this.[42]

Pursuant to HEAR, the statute of limitations ends six years from the date of "actual discovery" of "the identity and location of the artwork".[43] Section 5(c) states that for the purposes of beginning the six-year statute of limitations set forth in section 5(a), a preexisting claim pro-

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33. *Maestracci,* 155 A.D.3d at 403.
34. *Id.*
35. *Id.*
36. *Act of Notoriety*, NOTAIRES PARIS-LLE-DE-FRANCE (Dec. 21, 2016), http://www.notaires.paris-idf.fr/actualites/le-mot-du-mois-definition-dun-acte-de-notoriete.
37. *Maestracci*, 155 A.D.3d at 404 (citing Schoeps v. Andrew Lloyd Weber Art Found., 66 A.D.3d 137, 143–44, 844 N.Y.S.2d 396 (1st Dep't 2009)).
38. *Id.*
39. *Id.*
40. *Maestracci,* 155 A.D.3d at 404.
41. *Id.*
42. *Id.*
43. *Id.* (citing Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016)).

tected by HEAR is "deemed to have been actually discovered on the date of enactment of [HEAR]."[44] However, section 5(c) can only be followed subject to the exception provided in section 5(e), which states that HEAR does not save a preexisting claim that was either barred on the day before the enactment of HEAR by a Federal or State statute of limitations, where "not less than 6 years have passed from the date the claimant…acquires such knowledge and during which time the civil claim or cause of action was not barred by a Federal of State statute of limitations."[45]

Therefore, in order to establish that HEAR did not save the subject of Maestracci's claim, defendants would have had to prove that Maestracci discovered the claim on or before December 15, 2010, six years prior to the date HEAR was enacted.[46] Defendants failed to reach this conclusion, because they ultimately could not prove that Maestracci had actual knowledge of the identity and location of the painting prior to December 22, 2011, when HNGallery informed him that IAC had owned the painting since 1996.[47] Therefore, the court found that Maestracci's claim was not barred by the statute of limitations.

IV. Conclusion

Despite the New York Supreme Court's determination that Maestracci, a French citizen and domiciliary, lacked standing to bring his claim in the jurisdiction of New York, the Court of Appeals correctly overruled this decision. The court correctly applied case law to show that there are circumstances when the stringent margins of the EPTL can be broadened to allow exceptions for foreign citizens. Therefore, since Maestracci provided the proper documentation required of a foreign citizen, he did not lack standing to bring his claim in New York. Also, The Court of Appeals correctly affirmed the Supreme Court's prior holding which granted Maestracci leave to add his attorney, George Gowen, as a co-plaintiff on the case. The recent enactment of the Holocaust Expropriated Art Recovery Act supersedes the statute of limitations otherwise applicable to a civil claim. Under HEAR defendants were required to show that Maestracci knew about the identity and location of the painting on or before December 15, 2010. However, they were unable to prove that he had any knowledge of the painting prior to December 22, 2011. Consequently, the Amedeo Modigliani painting "Seated Man with a Cane", priced at approximately 25 million dollars, rightfully belongs to the heir of its original owner prior to being looted by Nazis. This heir is plaintiff Phillippe Maestracci.

Carina Vitucci

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44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*

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Beyond "Sex Slaves" and "Tiny Terrorists": Toward a More Nuanced Understanding of Human Trafficking Crimes Perpetrated by Da'esh

Caroline A. Fish[1]

I. Introduction

In the Sinjar region of northern Iraq, fighters from the terrorist group Da'esh[2] swept in from a nearby base and besieged a Yazidi village.[3] In the attack, women and girls were separated from the men and transported to holding sites where they, terrified, were forced to give up valuables and sorted into groups of the "married" and "unmarried."[4] The women and girls were later transported to new sites, brought to "market," and sold as slaves.[5]

Meanwhile, online, a Da'esh fighter met a young Muslim student from France.[6] In befriending her, he listened to her describe her life and struggles in France, and he described his own life in Da'esh-controlled territory, which he called the true land of Allah.[7] She began to feel increasingly isolated in her own country.[8] He convinced her to join him in Syria and sent her 1800 euros for a flight.[9] She decided to go, but upon her arrival in Raqqa, Da'esh militants locked her in a room, confiscated her phone and papers, and told her she would not be released unless she agreed to marry her recruiter.[10] Such a marriage entailed carrying out domestic duties, maintaining a household, submitting to sex, and bearing children for the so-called "Islamic State."[11] After 15 days in captivity, she agreed.[12]

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2. This article will use "Da'esh" to refer to the Islamic State, also known by IS, ISIS, or ISIL. *See* U.S. DEP'T OF STATE, SYRIA 2016 HUMAN RIGHTS REPORT 3 (2016).

3. *See* Hum. Rts. Council, "They came to destroy": ISIS Crimes Against the Yazidis, U.N. Doc. A/HRC/32/CRP.2, ¶ 1 (June 15, 2016).

4. *See id.* at ¶¶ 30, 44, 47.

5. *See id.* at ¶¶ 52–54.

6. *See, e.g.*, *Une Jeune Française Revenue de Syrie Raconte le Djihad*, LE FIGARO (June 24, 2015), http://madame.lefigaro.fr/societe/une-jeune-francaise-revenue-du-djihad-en-syrie-raconte-240615-97164. *See also* Fulya Ozerkan & Emmanuelle Baillon, *Frenchwoman Describes Her Harrowing Journey to ISIS*, BUS. INSIDER (June 24, 2015, 9:13PM), www.businessinsider.com/afp-frenchwomans-journey-to-is-in-syria-2015-6.

7. *See, e.g.*, *Une Jeune Française Revenue de Syrie Raconte le Djihad*, *supra* note 6.

8. *See id.*

9. *See id.*

10. *See id.*

11. *See* Jasmine Opperman & Claire Davis, *Female Foreign Fighters in Syria and Iraq*, TERRORISM RES. & ANALYSIS CONSORTIUM, www.trackingterrorism.org/article/female-foreign-fighters-syria-and-iraq (last visited Nov. 1, 2017).

12. *See Une Jeune Française Revenue de Syrie Raconte le Djihad*, *supra* note 6.

While the facts of these two stories appear on the surface to present dramatically different situations, under the international legal definition of human trafficking, both constitute such a crime.[13] However, the second scenario has received much less, if any, attention in discussions of the trafficking crimes committed by Da'esh and in the conversation about crimes for which the group should be held accountable.[14] This article proposes that human trafficking perpetrated by the terrorist group in the Syrian Arab Republic and the Republic of Iraq falls into two main categories — "combat trafficking" and "institutional trafficking" — and that institutional trafficking, although oft-overlooked, merits attention as a crime that requires a differentiated legal response and accountability strategy.[15]

The need for accountability is clear. Both the United Nations Security Council (UNSC) and the General Assembly (UNGA) have taken a strong stance in this regard. In December 2016, the UNSC condemned trafficking perpetrated in conflict situations when it unanimously passed Resolution 2331.[16] The Resolution emphasized, in reaction to the acts of Da'esh, "the importance of collecting and preserving evidence" for future accountability[17] and called for "decisive and immediate action to prevent, criminalize, investigate, prosecute and ensure accountability of those who engage in trafficking" in all conflicts.[18] The following day, the UNGA passed a resolution to establish an international mechanism to "assist in the investigation and prosecution of persons responsible for the most serious crimes" that have occurred in the conflict.[19] Nine months later, in September 2017, the UNSC took another decisive step and unanimously requested in Resolution 2379 that the UN Secretary-General "establish an Investigative Team, headed by a Special Adviser, to support domestic efforts to hold . . . [Da'esh] accountable."[20] The Resolution expressly names human trafficking as one crime to be addressed under the team's mandate.[21]

Yet, even with these steps toward action, achieving full accountability is a daunting task: It requires assessing all the crimes that have occurred in the conflict and bringing all perpetrators to justice in the appropriate court or tribunal. The task is complex and difficult to undertake. This article does not seek to provide a solution for all the challenges that accompany this endeavor. Rather, its scope is limited. It seeks to draw attention to and distinguish "institutional trafficking" perpetrated by Da'esh from other forms of trafficking committed in the con-

13. *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Protocol].

14. For a general overview of the conflict, *see Syria – Timeline*, BBC (Oct. 31, 2017), www.bbc.com/news/world-middle-east-14703995 (from June 2014, Da'esh "militants declare[d] 'caliphate' in territory from Aleppo to eastern Iraqi province of Diyala," which they controlled until they were largely destabilized and dispersed by attacks in late 2017).

15. These terms "combat trafficking" and "institutional trafficking" were crafted for the purposes of this article and do not constitute legal terms for this form of trafficking.

16. U.N.S.C., 71st yr., 7847th mtg, U.N. Doc. S/PV.7847 (Dec. 20, 2016).

17. S.C. Res. 2331, ¶ 11 (Dec. 20, 2016).

18. *Id.* at ¶2.

19. GA Res. 71/248, U.N. Doc. A/RES/71/248 (Dec. 21, 2016). *See* GA, 71st Session, 66th Plenary Meeting, U.N. Doc. A/71/PV.66 (Dec. 21, 2016).

20. S.C. Res. 2379, ¶ 2 (Sept. 21, 2017).

21. *Id.*

flict and discuss possible responses to this under-discussed crime. It views such a discussion as critical to ensuring that this crime is uniquely recognized in the international community's movement toward ending impunity in the conflict.

In the subsequent sections, Part I distinguishes institutional trafficking from combat trafficking, outlining the unique characteristics of this particular crime. Part II then introduces the framework of the international system of Transnational Criminal Law (TCL) as the system best suited to addressing institutional trafficking. It looks at how trafficking has been defined within this system and how the TCL definition of trafficking applies to Da'esh's acts in cases of institutional trafficking. Part III argues that full accountability is two-fold, requiring recognition of institutional trafficking and enforcement of its criminalization. It discusses considerations for enforcement necessary to facilitate a robust legal response to institutional trafficking. This article concludes that it is only with regard to all Da'esh's sexual and gender-based crimes that the international community's legal response and strategy for accountability can ever be considered adequate or complete.

II. Distinguishing Forms of Trafficking Within Da'esh[22]

Human trafficking, particularly in the form of sexual slavery, has occurred as a matter of policy in most major conflicts throughout history.[23] Yet, trafficking within Da'esh has presented a historically unique dimension: at its peak of power, Da'esh employed two distinct forms of trafficking as one of its primary vehicles for subverting other groups and establishing what it envisions to be a proper "Islamic State."[24]

The first of these two forms of trafficking can be described as "combat trafficking," which occurred primarily through the active invasion of territory, whereby Da'esh abducted women and girls and subjected them to sexual slavery. This form of trafficking served to subjugate conquered populations and primarily affected non-Muslim women and girls. The second form of trafficking by the group can be described as "institutional trafficking," which occurred outside the active conflict, whereby Da'esh recruited women and girls to join the group then subjected them to forced marriage and domestic servitude. It served to develop Da'esh's power as a state-like entity and has primarily affected Muslim women and girls.

A. Distinguishing Trafficking Crimes: Combat Trafficking

Combat trafficking is widely publicized, documented, and discussed in popular media and international circles as a form of trafficking, and one constituting an international crime, com-

22. This article relies on reports by organizations and journalists to assess Da'esh's crimes, while seeking to avoid sensational or inaccurate accounts of Da'esh's actions. *See* Simon Bonnet, *Western Women in Jihad, Triumph of Conservatism or Export of Sexual Revolution?*, DIPLOWEB (June 12, 2015), www.diploweb.com/Western-women-in-jihad-triumph-of.html (discussing anti-Da'esh propaganda that affects the credibility of the real crimes reported).

23. *See, e.g.*, Patricia Viseur Sellers, *Wartime Female Slavery: Enslavement?,* 44 CORNELL INT'L L.J. 115, 115–17 (2011).

24. *See Women Under ISIS Rule: From Brutality to Recruitment: Hearing Before the H. Comm. on Foreign Aff.*, 114th Cong. 5 (2015) (statement of Rep. Eliot Engel, Ranking Member) ("Sexual violence has a long, dark history as a tool of war, yet . . . this type of violence is central to [Da'esh] ideology.") [hereinafter Women Under ISIS].

mitted by the terrorist group.[25] In combat trafficking, through territorial invasion, Da'esh systematically abducted primarily Yazidi and Assyrian Christian women and girls[26] and transported them to areas under Da'esh control.[27] In various locations, women and girls were kept in prisons[28] or other buildings maintained for the purpose of holding them in captivity.[29] Survivors report that Da'esh fighters conducted an inventory of the captives before either gifting or selling them.[30] To facilitate these transfers of ownership, Da'esh established formal markets.[31] Within these markets, captives were sold at set prices, according to a verified price list obtained by UN officials,[32] and, at times, Da'esh-run courts issued notarized sales contracts to certify a transfer of ownership.[33]

Once gifted or sold, most women and girls were subjected to ongoing sexual abuse. Several survivors described being forced to submit to sex with multiple men in the course of their captivity, including becoming sexual slaves for entire households.[34] One survivor described how "[Da'esh] militants would come to the house to select girls for their pleasure and take them away with them."[35] Others were sold for the purposes of "marriage."[36] Many survivors also described being subjected to reproductive abuse.[37]

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25. *See, e.g.*, Hum. Rts. Council, *supra* note 3; Jomana Karadsheh & Chris Jackson, *Fighting to bring ISIS to justice for war crimes against Yazidis*, CNN (Oct. 11, 2017, 9:29 AM), www.cnn.com/2017/10/11/middleeast/isis-yazidi-war-crimes-tribunal-investigation/index.html.

26. 3,000-4,000 Yazidi women and children and 230 Assyrian Christians have been captured in Da'esh operations. U.S. Dep't of State, *supra* note 2, at 3, 55.

27. *Iraq: ISIS Escapees Describe Systematic Rape*, Hum. Rts. Watch (Apr. 14, 2015, 11:45 PM), www.hrw.org/news/2015/04/14/iraq-isis-escapees-describe-systematic-rape.

28. Comm. on the Rts. of the Child, Concluding Observations on the Combined Second to Fourth Periodic Reports of Iraq, ¶44, U.N. Doc. CRC/C/IRQ/CO/2-4, (Mar. 3, 2015). *See also* Seivan Salim, *Escaped*, Map of Displacement, www.mapofdisplacement.com/escaped (last visited Nov. 1, 2017) (recounting stories of captives held in prisons in various locations).

29. *Iraq: ISIS Escapees Describe Systematic Rape*, *supra* note 27.

30. *See* U.N. Doc. A/HRC/28/18, *supra* note 27, at ¶ 37; Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, N.Y. Times (Aug. 13, 2015), www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html.

31. U.S. Dep't of State, Trafficking in Persons Report 357 (2016); Comm. on the Rts. of the Child, *supra* note 28, at ¶ 44; Hum. Rts. Council, *supra* note 3, ¶ 2.

32. Sangwon Yoon, *Islamic State Circulates Sex Slave Price List*, Bloomberg News (Aug. 4, 2015, 7:00 PM), www.bloomberg.com/news/articles/2015-08-03/sex-slaves-sold-by-islamic-state-the-younger-the-better.

33. U.S. Dep't of State, *supra* note 31, at 207.

34. *See* Salim, *supra* note 28 (interviews with 22-year-old Azhin, 27-year-old Delvin, and 22-year-old Shirin).

35. *Id.* (from an interview with 20-year-old Dlo).

36. *See id.* (interview of 22-year-old Nasima); Amnesty Int'l, Escape From Hell: Torture and Sexual Slavery in Islamic State Captivity in Iraq 9 (2014).

37. Rukmini Callimachi, *To Maintain Supply of Sex Slaves, ISIS Pushes Birth Control*, N.Y. Times (Mar. 12, 2016), www.nytimes.com/2016/03/13/world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html; Comm. of Experts on Terrorism, *The Roles of Women in Da'esh: Discussion Paper*, CODEXTER (2016) 19, 12 (Oct. 26, 2016), https://rm.coe.int/16806b33a7; U.N. Doc. A/HRC/28/18, *supra* note 27, at ¶¶ 39, 41.

Formally, Da'esh resolutely acknowledged its sexual enslavement of "unbelieving women"[38] and institutionalized the crime. Da'esh's "war spoils" branch processed the women and children as slaves;[39] the group issued rules to be followed in the treatment, ownership, and sale of captives;[40] and Da'esh-affiliated clerics sanctioned giving the women and girls as gifts by decree and by fatwa.[41] Further, two articles issued in *Dabiq*, the group's official English-language publication, declared the enslavement of non-Muslim women and girls to be both justified and desirable.[42] Through these statements and acts, Da'esh unequivocally admitted and celebrated its own engagement in the crime of combat trafficking.

B. Distinguishing Trafficking Crimes: Institutional Trafficking

Institutional trafficking is strikingly different from the capture and enslavement of non-Muslim women and girls in combat trafficking.[43] While it is relatively easy to feel sympathy when Da'esh systematically captures individuals from their homes in the midst of conflict and enslaves them, it is tempting to frame Muslim women and girls who join Da'esh as aspiring terrorists themselves, who only have themselves to blame for any victimization.[44]

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38. Kenneth Roth, *Slavery: The ISIS rules*, HUM. RTS. WATCH (Sept. 5, 2015, 10:14 AM), www.hrw.org/news/2015/09/05/slavery-isis-rules.

39. Jonathan Landay, Warren Strobel, & Phil Stewart, *Exclusive: Seized Documents Reveal Islamic State's Department of 'War Spoils'*, REUTERS (Dec. 28, 2015, 1:10 AM), www.reuters.com/article/us-usa-islamic-state-documents-group-exc/exclusive-seized-documents-reveal-islamic-states-department-of-war-spoils-idUSKBN0UB0AW20151228.

40. Roth, *supra* note 38.

41. Lisa Davis, *Iraqi Women Confronting ISIL: Protecting Women's Rights in the Context of Conflict*, 22 SW. J. INT'L L. 27, 28 (2016).

42. *See The Revival of Slavery Before the Hour*, 4 DABIQ 1, 14–17, https://clarionproject.org/docs/islamic-state-isis-magazine-Issue-4-the-failed-crusade.pdf (last visited Nov. 1, 2017); Umm Sumayyah al-Muhajirah, *Slave-girls or prostitutes?,* 9 DABIQ 1, 44–49 https://clarionproject.org/docs/isis-isil-islamic-state-magazine-issue+9-they-plot-and-allah-plots-sex-slavery.pdf (last visited Nov. 1, 2017). *But see* Bernard Kenneth Freamon, *ISIS, Boko Haram, and the Human Right to Freedom from Slavery Under Islamic Law*, 39 FORDHAM INT'L L.J. 245, 249 (2015) (although Da'esh justifies slavery under Islamic law, many argue its acts are "not justified by any rational interpretation" of such law).

43. This form of trafficking is also distinct from the plight of local women under Da'esh rule, who likewise have experienced a myriad of abuses. *See* Hum. Rts. Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic: Rule of Terror: Living under ISIS in Syria, ¶¶ 16, 20, 32–36, 45, 47–51, U.N. Doc. A/HRC/27/CRP.3 (Nov. 19, 2014); Comm. of Experts on Terrorism, *supra* note 37, 9–10, 12.

44. *See, e.g.*, Robert Sharp, *These Jihadi Brides Are Fully Culpable Victims* (Feb. 13, 2015), www.robertsharp.co.uk/2015/02/23/these-jihadi-brides-are-fully-culpable-victims; Aamer Anwar, *The 'Jihadi Bride': Victim, Scapegoat ... and Sacrificial Lamb*, HERALD SCOT. (Mar. 15, 2015), www.heraldscotland.com/opinion/13205742.the_jihadi_bride_victim_scapegoat_ and_sacrificial_lamb ("[A] teenage girl brainwashed by Isis, then trafficked to be married off to an unknown Jihadist, has only herself to blame.").

The debate as to whether these women and girls are terrorists or victims has opinions on either extreme. Some wonder whether they are "tiny terrorists" comparable "to the Hitler Youth"[45] or, rather, victims "brainwashed"[46] "'by an appalling death cult.'"[47] Some suggest that radicalized young people are in need of programs similar to those for child soldiers that allow for a "deprogramming of the hate."[48] Others have threatened that even "women under 18 . . . will go to jail for a very long stretch," if they are caught joining Da'esh.[49]

Rather than characterize all women and girls who join Da'esh as either victims or terrorists, this article distinguishes institutional trafficking from the experiences of those recruits who embrace Da'esh's ideology and its activities. Although women and girls who join Da'esh do not "lend themselves easily to profiling"[50] and reports of the crime are thin,[51] it is possible to determine that a number of women and girls recruited to join Da'esh were recruited through deception, or abuse of positions of vulnerability, for the purposes of exploitation. These purposes include forced marriage and domestic servitude.

Da'esh has actively recruited Western women through the Internet,[52] and it especially did so at the height of its territorial acquisitions.[53] With a view toward its future as a state-like entity, Da'esh saw recruiting women and girls as key to the success of its state-building effort.[54] Because Da'esh focused on capturing and ruling territory as a "state," the presence of women in the group helped ensure that Da'esh thrived.[55] Women were considered a "pillar" of the community "whose everyday commitment toward children [would] help more than anything else in advancing the cause of Jihad."[56]

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45. Women Under ISIS, *supra* note 24, at 26 (statement of Rep. Christopher Smith).

46. *Id.* at 3 (statement of Rep. Edward Royce, Chairman, Comm. on Foreign Aff.).

47. Mah-Rukh Ali, *ISIS and Propaganda: How ISIS Exploits Women*, Reuters Inst. for the Study of Journalism 16 (2015), http://reutersinstitute.politics.ox.ac.uk/sites/default/files/research/files/Isis%2520and%2520Propaganda-%2520How%2520Isis%2520Exploits%2520Women.pdf.

48. Women Under ISIS, *supra* note 24, at 26 (statement of Rep. Christopher Smith).

49. *Threats to the Homeland: Hearing Before the Senate Comm. on Homeland Security and Governmental Aff.*, 114th Cong. 22 (2015) (statement of James Comey, Director, Federal Bureau of Investigation).

50. Women Under ISIS, *supra* note 24, at 20 (statement of Sasha Havlicek, Chief Executive Officer, Institute for Strategic Dialogue).

51. In addition to stigma and fear of liability, this form of trafficking may not be reported because women and girls are unable to escape alive. *See* Stephen Loiaconi, *Women Drawn to ISIS 'Utopia' Despite Reports of Rape*, WJLA (Oct. 12, 2015), http://wjla.com/news/nation-world/women-drawn-to-isis-utopia-despite-reports-of-rape-sex-slavery (quoting a terrorism analyst who suggests "likely many" attempt escape "but fail and are executed").

52. Jasmine Opperman, *Hashtag (#) Jihad: Islamic State (ISIS) Online Recruitment*, Terrorism Research & Analysis Consortium, www.trackingterrorism.org/article/hash-tag-jihad-islamic-state-isis-online-recruitment (last visited Nov. 1, 2017).

53. From mid-2014, Da'esh gained "military dominance over 127 important places," a swath of territory it governed as a so-called "Islamic State." However, attacks in late 2017 forced the group to relinquish many of its strongholds. Sarah Almukhtar, Troy Griggs, K.K. Rebecca Lai, & Tim Wallace, *The Islamic State: From Insurgency to Rogue State and Back*, N.Y. Times (Oct. 22, 2017), www.nytimes.com/interactive/2017/10/22/world/middleeast/isis-the-islamic-state-from-insurgency-to-rogue-state-and-back.html.

54. Women Under ISIS, *supra* note 24, at 14–15, 18.

55. Bonnet, *supra* note 22.

56. *Id.*

To this end, in its recruitment efforts online, Da'esh engaged in gender-specific messaging, promoting to young girls "the idea of jihadis as love interests, playing up the possibility of an exciting, adventurous romance with a handsome young warrior who needs and wants you."[57] Recruiters reportedly glorified jihad and spoke of the honor of being a jihadi wife.[58] In particular, Da'esh promoted to women "the satisfaction of serving as the emotional and domestic bulwarks of individual fighters and of the newly emergent Caliphate."[59] Da'esh also encouraged married women to leave their husbands and join the group on the basis that their marriages were offensive to Islamic law.[60]

Women and girls experiencing isolation and discrimination in Western countries were particularly vulnerable to the calls of Da'esh.[61] Da'esh offered them love, recognition, and the reassurance that they would be cared for by people who understood them.[62] In some cases, their recruitment online was undertaken by a "loverboy" who wooed the woman or girl.[63] In other instances, women themselves served as "propagandists and recruiters" in a "peer-to-peer" marketing strategy.[64] For example, in Spain, a woman was arrested for recruiting teenage girls online and for arranging their travel to Syria.[65] Another British woman, Aqsa Mahmood, maintained Twitter and Tumblr accounts through which she portrayed life with Da'esh and urged other women and girls to join her.[66] Ultimately, Da'esh's compelling, albeit distorted,[67] message enticed a number of women and girls, who made up approximately 12% of all of Western recruits, as reported in 2016.[68]

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57. Opperman, *supra* note 52.

58. Ashley Binetti, *A New Frontier: Human Trafficking and ISIS's Recruitment of Women from the West*, GEO. INST. FOR WOMEN, PEACE AND SECURITY 3 (2015), https://pdfs.semanticscholar.org/9be3/ea35dc650270ba02585f790da1b51dbbaa30.pdf.

59. Isha Aran, *Becoming Mujahida*, JEZEBEL (Aug. 8, 2014), http://jezebel.com/becoming-mujahida-recruiting-western-wives-for-islamis-1617224894.

60. Umm Sumayyah al-Muhājirah, *They Are Not Lawful Spouses for One Another*, 10 DABIQ 1, 44, http://clarionproject.org/wp-content/uploads/Issue%2010%20-%20The%20Laws%20of%20Allah%20or%20the%20Laws%20of%20Men.pdf (last visited Nov. 1, 2017).

61. Comm. of Experts on Terrorism, *supra* note 37, at 4.

62. *See id.*; Erin Marie Saltman & Melanie Smith, *'Till Martyrdom Do Us Part': Gender and the ISIS Phenomenon*, INST. STRATEGIC DIALOGUE 10 (2015).

63. FONDATION SCELLES, *Terrorism and Sexual Exploitation*, *in* 4TH GLOBAL REPORT: PROSTITUTION: EXPLOITATION, PERSECUTION, REPRESSION 82, 90 (2016); Susan S. M. Edwards, *Cyber-Grooming Young Women for Terrorist Activity: Dominant and Subjugated Explanatory Narratives*, *in* CYBERCRIME, ORGANIZED CRIME, AND SOCIETAL RESPONSES: INTERNATIONAL APPROACHES 23, 27–28 (Emilio C. Viano ed., 2017).

64. Women Under ISIS, *supra* note 24, at 6 (statement of Sasha Havlicek, Chief Executive Officer, Institute for Strategic Dialogue).

65. Jacqueline Klimas, *Islamic State Uses Women to Recruit, Raise Next Generation of Fighters*, WASH. TIMES (July 29, 2015), www.washingtontimes.com/news/2015/jul/29/islamic-state-uses-women-to-recruit-raise-next-gen.

66. Ali, *supra* note 47, at 15; Tim Molloy, *How ISIS Uses Sexual Predators' Techniques to Lure Western Women (Podcast)*, PBS (Nov. 12 , 2014), www.pbs.org/wgbh/frontline/article/how-isis-uses-sexual-predators-techniques-to-lure-western-women-podcast.

67. Binetti, *supra* note 58, at 2; FONDATION SCELLES, *supra* note 63, at 9–10 ("The reality of life in the IS is very different from the image presented to young girls.").

68. Comm. of Experts on Terrorism, *supra* note 37, at 2.

However, some women and girls reported that, once recruited, they were held captive, forced into marriages and domestic servitude, and sexually abused in Da'esh territory.[69] One woman recruited from France described how she was locked up with other women upon her arrival in Syria.[70] Her phone and papers were confiscated, and she was forced into a marriage with a Da'esh fighter.[71] She described the situation as follows: "We are merchandise for the men, they have a list: 'I want *this* kind of woman of *that* age.'"[72]

Far from becoming "jihadi power-girl[s],"[73] many women and girls who arrived in Da'esh-controlled territory were quickly married[74] and denied any ability to choose or refuse their husbands.[75] One survivor, who escaped, stated that a Da'esh fighter tried to force her into a marriage she did not want and that the would-be husband attacked her for refusing.[76] After being married off, some women and girls described then being "passed around" by their new husbands to have sex with different fighters.[77] One woman stated that she was given to a fighter who told her "as she was his gift, he could give her to his friends and colleagues."[78]

In addition to forced marriage and sexual abuse, female recruits were also expected to fulfill domestic roles commensurate with their standing as women or girls in the strictly patriarchal society,[79] and contrary to propaganda suggesting they might become militants themselves.[80] According to a Da'esh guidebook, women recruited to the group were expected

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69. The U.S. State Department also reports that some who went to Syria "with promises of marriage" were "sold into sexual slavery." U.S. DEP'T OF STATE, *supra* note 31, at 360.

70. Ozerkan & Baillon, *supra* note 6.

71. *Une Jeune Française Revenue de Syrie Raconte le Djihad*, *supra* note 6.

72. Ozerkan & Baillon, *supra* note 6.

73. Women Under ISIS, *supra* note 24, at 3.

74. *See, e.g.*, Opperman & Davis, *supra* note 11 (quoting a teenager who was married immediately because "[t]hat's the process here. They don't let a girl stay alone.").

75. Binetti, *supra* note 58, at 4. *See, e.g.*, *Une Jeune Française Revenue de Syrie Raconte le Djihad*, *supra* note 6.

76. Binetti, *supra* note 58, at 4.

77. *Id.* at 4. *See, e.g.*, Lizzie Dearden, *Isis Austrian poster girl Samra Kesinovic 'used as sex slave' before being murdered for trying to escape*, IND. (Dec. 31, 2015, 11:00 GMT), www.independent.co.uk/news/world/middle-east/isis-austrian-poster-girl-samra-kesinovic-used-as-sex-slave-before-being-murdered-for-trying-to-a6791736.html.

78. Binetti, *supra* note 58, at 4.

79. David Cook, *Women Fighting in Jihad?*, 28 STUD. CONFLICT & TERRORISM 375, 379 (2005).

80. *Compare* Ali, *supra* note 47, at 16 (describing propaganda where women and girls are shown with Kalashnikov rifles) *with* Opperman & Davis, *supra* note 11, *and* Cook, *supra* note 79, at 379 (stating women in Da'esh rarely fight and must have permission to do so).

to "tak[e] care of husbands' children and property," "encourage[their men," and "patiently bear[] all the consequences thereof."[81] Raising children was touted as "the most important role women can play in Jihad,"[82] and the women's "fundamental function" was to stay behind closed doors.[83] Women were permitted to go outside only "in exceptional circumstances," and if they did, they had to obey strict "guidelines" on behavior and dress.[84]

In addition, some women and girls reported that Da'esh used extreme violence as a means of intimidation and control.[85] Experiences included witnessing or being subjected to "domestic violence, honor killings, stonings, beheadings, [and] female genital mutilation."[86] Disobedience alone invoked "the most severe physical punishments,"[87] and a woman or girl could face death for attempting escape.[88] One woman reported that before she herself escaped, a disobedient recruit was "eviscerated and chopped up into several pieces."[89]

The experiences of women and girls who decided to join Da'esh and instead found themselves trapped in situations of exploitation are decidedly different from those who were recruited but who embrace Da'esh's regime and ideology, serving as its active promoters.[90] Those recruits can be described as "committed actors accomplishing a goal they view as fundamental to their faith" and fully aware of Da'esh's vision.[91] To the contrary, women and girls who survived institutional trafficking did not revel in the reality of life with Da'esh; rather, their experience was one of deceptive recruitment and subsequent exploitation.

III. Framework to Address Institutional Trafficking

Combat trafficking is often discussed as an international crime requiring a response from the International Criminal Law (ICL) system.[92] Yet, the ICL system may not be the ideal

81. Opperman & Davis, *supra* note 11.

82. *Id.*

83. *Quilliam Translation and Analysis of Islamic State Manifesto on Jihadist Brides*, QUILLIAM FOUND. (Feb. 5, 2015), www.quilliaminternational.com/quilliam-translation-and-analysis-of-islamic-state-manifesto-on-jihadist-brides.

84. Josh Halliday, *Female Jihadis Publish Guide to Life Under Islamic State*, THE GUARDIAN (Feb. 5, 2015, 5:08 AM), www.theguardian.com/world/2015/feb/05/jihadist-girl-marry-liberation-failed-islamic-state.

85. Loiaconi, *supra* note 51.

86. Binetti, *supra* note 58, at 4.

87. Women Under ISIS*, supra* note 24, at 30 (statement of Edward Watts, Director and Producer, Escaping ISIS).

88. *See, e.g.*, Jamie Grierson and Vikram Dodd, *British Girl Believed Killed in Syria 'Was Too Scared to Flee Isis,'* THE GUARDIAN (Aug. 12, 2016, 1:46 PM), www.theguardian.com/world/2016/aug/12/british-girl-believed-killed-in-syria-was-too-scared-to-flee-isis; Lizzie Dearden, *supra* note 77.

89. Binetti, *supra* note 58, at 4.

90. Comm. of Experts on Terrorism, *supra* note 37, at 3.

91. Comm. of Experts on Terrorism, *supra* note 37, at 3.

92. *See, e.g.*, Amal Clooney, *'Finally, We Have A Coordinated Effort To Bring ISIS To Justice,'* HUFFINGTON POST (Sept. 22, 2017, 8:32 PM), www.huffingtonpost.com/entry/amal-clooney-isis_us_59c569bae4b01cc57ff22947.

forum to address Da'esh's institutional trafficking crimes.[93] Rather, Da'esh's institutional trafficking crimes will likely need to be addressed under the Transnational Criminal Law system. At its most basic elements, the TCL system is an "indirect system" of interstate obligations to enact and enforce certain national penal laws.[94] In the TCL system, crime control treaties set forth state obligations to suppress crimes with transnational aspects, like trafficking, and to cooperate in the investigation and prosecution of such activity.[95] This section focuses on the institutional skeleton of the TCL system, how trafficking has been interpreted and defined to date within this system, and how the TCL definition of trafficking applies to Da'esh's acts of institutional trafficking.

A. The Transnational Criminal Law System

The United Nations Convention on Transnational Organized Crime ("Organized Crime Convention")[96] and its accompanying protocols, counterterrorism conventions, and bilateral extradition and mutual legal assistance treaties all form part of the "fabric" of TCL.[97] Within this fabric, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("Protocol") contains the international legal definition of trafficking.[98] Of these instruments, the Organized Crime Convention and the Protocol are inextricably linked: A state must ratify the Organized Crime Convention before it can ratify the Protocol, and no state party to the Organized Crime Convention is bound by the Protocol until it ratifies it.[99] Together, these instruments apply to any *transnational* trafficking offence that involves an organized criminal group and constitutes a "serious crime."[100]

For the implementation of the Convention and the Protocol, member states are obliged to undertake a number of steps, three of which are key to prosecuting trafficking: they must ratify the Organized Crime Convention and the Protocol; they must enact penal statutes criminalizing behavior within the international definition of trafficking; and they must provide jurisdiction for trafficking crimes that allows them to prosecute, at a minimum, crimes committed on their territory or on board their vessels or aircrafts.[101] The Organized Crime Convention and Protocol further urge states to enter into extradition and mutual legal assistance treaties to bet-

93. An in-depth discussion of the many ways in which the ICL system may not effectively address institutional trafficking is beyond the scope of this article. However, one key consideration is that Da'esh's acts in institutional trafficking very arguably do not meet the threshold contextual elements of a war crime or a crime against humanity. *See* Rome Statute of the International Criminal Court, Arts. 7, 8, July 17, 1998, 2187 U.N.T.S. 90.

94. Neil Boister, *'Transnational Criminal Law'?* 14 EUR. J. INT'L L. 953, 962 (2003); Dan E. Stigall & Christopher L. Blakesley, *Non-State Armed Groups and the Role of Transnational Criminal Law During Armed Conflicts*, 48 GEO. WASH. INT'L L. REV. 1, 4 (2015).

95. Stigall, *supra* note 94, at 4; Boister, *supra* note 94, at 954, 966.

96. United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209 [hereinafter Convention].

97. Stigall, *supra* note 94, at 4, 10, 12, 19; Boister, *supra* note 94, at 966.

98. Protocol, *supra* note 13.

99. ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 73 (2010).

100. Convention, *supra* note 96, at art. 2 (a "serious crime" is conduct punishable by a "maximum deprivation of liberty of at least four years or a more serious penalty").

101. *See* Convention, *supra* note 96, at art. 15; U.S. DEP'T OF STATE, *supra* note 31, at 36–37.

ter cooperate with others in prosecuting trafficking,[102] and the Organized Crime Convention sets forth a broad "extradite or prosecute" principle.[103] Under this principle, states may confer extraterritorial jurisdiction for trafficking crimes through laws that enable states to prosecute any offenders found present on their territory.[104] Under these mechanisms, TCL aims to ensure the prosecution of all perpetrators of trafficking.

B. The Definition of Trafficking in Transnational Criminal Law

The Protocol definition of trafficking has three main elements: an act, a means,[105] and a purpose. The acts enumerated are the "recruitment, transportation, transfer, harbouring or receipt of persons."[106] These acts include both the "process" of trafficking (recruitment, transportation, transfer) and the "end situation" (harbor, receipt).[107] The means is by

> the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.[108]

Specifically, the *travaux préparatoires* of the Protocol explain that "an abuse of a position of vulnerability" includes "any situation in which the person involved has no real and acceptable alternative but to submit to the abuse."[109] Positions of vulnerability that might be abused by a trafficker include all "the factors that make persons, especially women and children, vulnerable to trafficking," and the Protocol includes an open-ended list of examples "such as poverty, underdevelopment, and lack of equal opportunity."[110] Some domestic jurisdictions have also specifically acknowledged "discrimination" as a factor contributing to a person's vulnerability to trafficking.[111] Moreover, the Protocol makes clear that people under 18 are considered trafficked if they "are recruited, transported, held, or received for exploitation, regardless of the methods used to recruit, transport, hold, or receive them."[112]

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102. Convention, *supra* note 96, at arts. 16, 18.

103. *Id.* at art. 15.

104. *Id.* at art. 15; *The obligation to extradite or prosecute (aut dedere aut judicare): Final Report of the International Law Commission*, ¶¶ 10, 33, UNITED NATIONS (2014). *See* Caroline Fish, *Extraterritorial Human Trafficking Prosecutions: Eliminating Zones of Impunity Within the Limits of International Law and Due Process*, 91 ST. JOHN'S L. REV. 529, 543–44 (2017).

105. For children under 18, "means" are not required. Protocol, *supra* note 13, at art. 3(c).

106. *Id.* at art. 3(a).

107. GALLAGHER, *supra* note 99, at 30.

108. Protocol, *supra* note 13, at art. 3(a).

109. Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 HARV. WOMEN'S L.J. 137, 162 (2004); Kara Abramson, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT'L L.J. 473, 477 (2003).

110. Cheryl Nelson Butler, *Kids For Sale: Does America Recognize Its Own Sexually Exploited Minors As Victims of Human Trafficking?*, 44 SETON HALL L. REV. 833, 863 (2014); Protocol, *supra* note 13, at art. 9(4).

111. *See, e.g.*, 22 U.S.C. § 7101(b)(4) (2000).

112. Abramson, *supra* note 109, at 496.

Ultimately, the act and means must be done "for the purpose of exploitation."[113] Exploitation under this definition includes "the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs."[114] This list is open-ended and non-exhaustive.[115] Other forms of exploitation that are non-enumerated but considered within the definition of "exploitation" include trafficking for forced marriage and trafficking for domestic servitude.[116] Furthermore, "for the purpose of" entails a *mens rea* of intending the action—and, in cases of adults, the means—to lead to the specified end result.[117]

For the purposes of "slavery" means that the end result intended is a situation where the perpetrator exercises "any or all of the powers attaching to the right of ownership" over the victim.[118] The powers attaching to the right of ownership include that the individual may be made an object of purchase and the ownership may be transferred.[119] For the purpose of "practices similar to slavery" entails an end result where the victim is subjected to a "servile status," including servile forms of marriage and certain forms of exploitation of children.[120]

Closely related to "practices similar to slavery," "servitude" is not clearly defined in international law, although it is commonly understood to entail "less far-reaching forms of restraint" than slavery.[121] The UN Office on Drugs and Crime (UNODC) Model Law on Trafficking suggests that servitude includes "the obligation to work or to render services from which the person in question cannot escape and which he [or she] cannot change."[122] Likewise, "sexual exploitation" is undefined in the Protocol.[123] A broad definition of "sexual exploitation" is used by the UN, which defines it as "any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another."[124] The UNODC Model Law proposes a more narrow definition that entails the obtaining of "benefits" by involving a person in "sexual services."[125]

Despite some lack in definitional clarity as regards certain forms of "exploitation," the very inclusion of several tiers of exploitation under the Protocol, from slavery to sexual exploitation, serves to refute any limitation of the definition of trafficking to the most extreme forms of

113. Protocol, *supra* note 13, at art. 3(a).

114. *Id.*

115. *See* GALLAGHER, *supra* note 99, at 35.

116. *See id.* at 196.

117. *Id.* at 34.

118. *Id.* at 179.

119. *Id.* at 184.

120. *See* Supplementary Convention, *supra* note 118, at art. 1(c) & (d).

121. GALLAGHER, *supra* note 99, at 182.

122. *Id.* at 37, footnote 109. This same definition has been endorsed by the European Commission on Human Rights. *Id.* at 182, n. 218.

123. *Id.* at 38–39, n.118.

124. *Id.* at 39, n.118.

125. *Id.* at 39, n.118.

"slavery" and "practices similar to slavery."[126] Rather, the Protocol clearly indicates that trafficking is to be understood to encompass situations of lesser restriction and those situations that involve agency on the part of the victim.[127]

The Protocol, through its enumerated list of coercive "means" by which a perpetrator might traffic an individual, sets out a number of situations where the agency of the victim is made "irrelevant" by behavior that "undermine[s] consent."[128] Framed in terms of vulnerabilities, rather than consent,[129] the Protocol's definition of trafficking encompasses, for example, a situation where an individual consents to be smuggled across a border or willingly seeks the services of labor recruiters but then is forced into exploitative labor or "deceived as to the terms or nature of her employment."[130] This definition of trafficking addresses numerous forms of vulnerability and encompasses a range of acts, means, and purposes for which a person might be trafficked.[131]

C. Da'esh's Crimes Under the Transnational Criminal Law Definition of Trafficking

Combat trafficking readily fits the definition of trafficking. Through abduction from their villages, women and girls were held captive, and their captors exercised "powers attaching to the right of ownership" over them, including subjecting them to purchase and sale. Such acts rise to the highest tier of exploitation: slavery. However, it is in institutional trafficking that the breadth and nuance of the TCL definition of trafficking becomes critical.

The experiences of women and girls recruited to join Da'esh are multi-faceted and can include aspects of agency and victimization. Critically, the phenomenon of women and girls joining Da'esh can be seen as a politically expressive act.[132] However, under the TCL definition of trafficking, seeing women and girls recruited to Da'esh as empowered agents making a choice[133] does not excuse eliding the reality that these same women and girls may be exploited once they arrive in Syria. An initial act of agency does not automatically entail consent to a situation of violation and oppression.

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126. Janie Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INTL. L. 609, 632–34 (2014); GALLAGHER, *supra* note 99, at 177–78. In the international human rights system, the European Court of Human Rights also has rejected a narrow construction of "trafficking" as only applying to conditions of slavery and servitude. *See Affaire Chowdury et Autres c. Grèce*, 21884/15, Judgment, ¶¶ 99–100 (Mar. 30, 2017).

127. *See* Chuang, *supra* note 126, at 636 ("[T]he vast majority of trafficked persons' narratives begin with an act with agency—a desire to move or to search for a livelihood.").

128. Balos, *supra* note 109, at 161–64.

129. Butler, *supra* note 110, at 862–63 ("[V]ulnerability, rather than consent . . . is the yardstick for developing anti-trafficking policy").

130. Abramson, *supra* note 109, at 481–82.

131. *Id.* at 496.

132. *See* CARON E. GENTRY AND LAURA SJOBERG, BEYOND MOTHERS, MONSTERS, AND WHORES: THINKING ABOUT WOMEN'S VIOLENCE IN GLOBAL POLITICS 115–16 (2015) (ebook) (implying that at least some women's "participation is either voluntary or political.").

133. *See* Anne Aly, *'Jihadi Brides' Aren't Oppressed. They Join Isis for the Same Reasons Men Do*, THE GUARDIAN (Mar. 3, 2015, 16:36 EST), www.theguardian.com/commentisfree/2015/mar/04/jihadi-brides-arent-oppressed-they-join-isis-for-the-same-reasons-men-do.

Further, the proper approach to institutional trafficking under the TCL definition is one that acknowledges that in the same group of recruits there could be both women who experience victimization and those who do not. Some women, indeed, may join Da'esh and become propagandists and recruiters themselves. Even if they, too, were deceptively recruited, it is another matter to turn into active promulgators of Da'esh's violence.[134] Rather, addressing institutional trafficking requires an individual assessment of the facts of each woman or girl's experience on a case-specific basis.

A case of institutional trafficking under the TCL definition occurs each time Da'esh recruits, transports, transfers, harbors or receives a woman or girl transnationally, through coercion, deception, or the abuse of a position of vulnerability, primarily for the purposes of forced marriage and domestic servitude. The individual perpetrators of this crime are all those who participate in the chain of trafficking, from the recruiter to the eventual "husbands" of the woman or girl. This chain includes those who arrange for her travel and those who receive her and force her into a marriage.

The means involve, where it concerns an adult woman, deception at the first stage of recruitment and transportation. Through propaganda and promises, recruiters may convince a woman that she will have romance and even a choice as to whom she will marry and how she will contribute to the jihadist cause. The recruiters successfully convey all the promising ways her life will be better when she joins the group. Further, at the recruitment stage, perpetrators may exploit a particular aspect of this woman's vulnerability: the discrimination she faces and her isolation as Muslim woman in the West. The perpetrators take advantage of this vulnerability to convince her to join them.

After a woman joins Da'esh, in a case of institutional trafficking, the means used to keep her there include threats, use of force, or the abuse of power or a position of vulnerability. In addition to physical violence to the woman herself, Da'esh fighters may kill or beat other female recruits as a threat of what happens to those who defy them or try to escape. Even where there is no physical violence, a woman may be in a position of vulnerability in that she has no real and acceptable alternative but to submit to marriage with any fighter who picks her, to carry out domestic duties, and to bear children for him. The perpetrators may also take away travel documents and means of communication and confine her, which further isolates the woman and exacerbates her vulnerability. As for girls under 18 deceived into joining Da'esh, they are trafficked regardless of the means employed to recruit and hold them in situations of exploitation.

The exploitive purposes for which a woman or girl might be trafficked include forced marriage, domestic servitude, or sexual exploitation. While it is not clear that powers attaching to the right of ownership are exercised over the women and girls, those trafficked into the group may find themselves forced into marriages they do not want, subjected to rape, and faced with the possibility of bearing children for Da'esh, regardless of their actual wishes. Further, the servitude to which they may be subjected includes being forced to carry out domestic duties,

134. *See, e.g.*, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Dominic Ongwen*, INT'L CRIM. CT. (Dec. 6, 2016), www.icc-cpi.int/legalAidConsultations?name=2016-12-06-otp-stat-ongwen ("[H]aving suffered victimization in the past is not a justification . . . to victimise others").

child rearing, and maintaining the homes of Da'esh fighters. There are also aspects of sexual exploitation present in certain situations, where the perpetrators benefit from the sexual abuse of the women and girls. These benefits can include any benefits gained by offering the sexual services of the forced wife to friends and colleagues. Furthermore, the perpetrator gains social, political, and religious benefits by the exploitation of these forced wives, as it is through these marriages and any subsequent childbearing that the perpetrators of this form of trafficking participate in the promulgation of the future generation of jihadists.

Finally, this form of trafficking is perpetrated by individuals with the intent to exploit women and girls through forced marriage and domestic servitude, as evidenced by the fact that perpetrators readily deceive women and girls and exert rigid control through often-violent means in order to guarantee these women and girls participate as wives and mothers in Da'esh's envisioned Islamic utopia. Ultimately, institutional trafficking resembles a classic case of transnational human trafficking: It has a transnational aspect, involves an organized criminal group, and constitutes the "serious crime" of trafficking under the Organized Crime Convention and Protocol. As such, the TCL system provides a clear avenue for addressing this form of trafficking.

IV. Da'esh Accountability: Recognition and Enforcement

In devising effective accountability mechanisms for Da'esh's institutional trafficking crimes, the effort is two-fold: it requires both (1) recognition of the crimes that have occurred and (2) enforcement of the law against the crimes that have occurred. The first of these, recognition, is not a matter of recognition as a matter of law because TCL provides a comprehensive legal definition of trafficking that encompasses these trafficking crimes. Rather, recognition is a matter of a political and institutional will to address this form of trafficking amongst competing demands and in face of the many different crimes that must be addressed. The second of these, enforcement, is a matter of mobilizing the appropriate mechanism for accountability. Where properly marshaled into action, the TCL system can ensure full accountability for institutional trafficking.

A. Recognition: The Will to Recognize Institutional Trafficking As Trafficking

While combat trafficking fits more readily into traditional notions of a crime with "ideal victims,"[135] institutional trafficking falls into a more controversial debate on female agency. Currently, women and girls who join Da'esh are far more likely to be criminalized than recognized as survivors of victimization. One 16-year-old girl recruited by Da'esh militants currently faces the death penalty in Iraq.[136] Other women who claim to be escapees of their militant abusers have been arrested and prosecuted for supporting the group.[137] Women and girls

135. Rose Corrigan & Corey S. Shdaimah, *People With Secrets: Contesting, Constructing, and Resisting Women's Claims About Sexualized Victimization*, 65 CATH. U. L. REV. 429, 437 (2016) (describing characteristics of a so-called "ideal victim").

136. *German Authorities Fight to Stop Teenage Isis Bride Being Executed by Iraqi Authorities*, IND. (Sept. 6, 2017, 13:51 BST), www.independent.co.uk/news/world/middle-east/germany-isis-bride-teenage-schoolgirl-execution-iraq-linda-wenzel-stop-a7931866.html.

137. *See, e.g.*, Janene Pieters, *Woman Back in NL After ISIS Escape; Arrested in Schiphol*, NL TIMES (Aug. 2, 2016, 7:32 AM), http://nltimes.nl/2016/08/02/woman-back-nl-isis-escape-arrested-schiphol.

"freed" by Iraqi forces have been placed into prisoner-of-war camps, where they are shamed and threatened with death for joining Da'esh.[138] In some instances, both Da'esh recruiters and their recruited have been swept up in raids and treated equally as criminals.[139] Yet, it is only through recognizing this form of trafficking that jurisdictions can resist the "historic invisibility" of crimes against women and girls and provide meaningful redress to survivors.

History is rife with examples of failures to acknowledge and effectively prosecute sexual and gender-based crimes.[140] For one, following World War II, sexual slavery was not prosecuted at all in the International Military Tribunal (IMT) in Germany and charged in the IMT in Japan without success.[141] The incredible inadequacy of the IMTs to address the sexual crimes that occurred in World War II motivated activists to push for the express recognition of sexual violence in conflict, including sexual slavery, in later international mechanisms.[142] However, as the ad hoc tribunals of the 1990s would reveal, mere enumeration of sexual crimes in a statute did not guarantee accountability.[143] For instance, while the ICTR Statue listed rape, enforced prostitution, and "any form of indecent assault" as crimes against humanity and war crimes, they were not initially charged at the ICTR.[144]

It was mainly through the work of activists "lobbying to get prosecutors to pay attention to sexual offenses"[145] and through the responsiveness of judges to these issues that any sexual crimes ever were prosecuted in the ICTR.[146] Yet, even after the ICTR Prosecutor brought the first charges and convictions for sexual and gender-based crimes in the *Akayesu* case,[147] this success was short-lived.[148] Pervasive investigative and prosecutorial "errors, missteps, and omissions" meant that many victims' testimonies were excluded in other cases, which ultimately resulted in the acquittal of several perpetrators for their sexual crimes.[149]

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138. Katrin Kuntz & Marcel Mettelsiefen, *A German Love Story Goes Awry in the 'Caliphate*, SPIEGEL ONLINE (Sept. 29, 2017, 5:34 PM), www.spiegel.de/international/world/isis-a-german-love-story-goes-awry-in-the-caliphate-a-1170226.html.

139. *See Spain IS: Seven Held in Raids on Women Recruiters*, BBC (Dec. 16, 2014), www.bbc.co.uk/news/world-europe-30492509 (reporting "[s]even people have been detained in Spain and Morocco in raids targeting a network recruiting women to join [Da'esh]" and "[a] 14-year-old girl and a woman were arrested . . . on suspicion of trying to join [Da'esh]").

140. *See, e.g.*, Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 295 (2003).

141. Sellers, *supra* note 23, at 118–20; Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425–26 (1993).

142. GALLAGHER, *supra* note 99, at 211.

143. *See, e.g.*, Beth Van Schaack, *Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson*, 17 J. GEND. SOC. POL'Y & L. 361 (2009).

144. Statute of the International Criminal Tribunal for Rwanda, S/Res/955, Nov. 8, 1994, art. 4.

145. Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICHIGAN J. INT'L L. 1, 16 (2008).

146. *See, e.g.*, Michelle Jarvis, *An Emerging Gender Perspective on International Crimes*, *in* INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY 182–84 (Gideon Boas & William A. Schabas, eds. 2003).

147. Halley, *supra* at note 145, at 17.

148. Van Schaack, *supra* note 143, at 373–74.

149. *Id.* at 373–74.

These historic failures on the international level show that lack of acknowledgment and prioritization of sexual and gender-based crimes has consequences that "reverberate through subsequent proceedings and cases."[150] This phenomenon is not unique to international criminal law. Rather, domestic jurisdictions share the same problems of failing to effectively acknowledge, prosecute, and provide redress for sexual and gender-based crimes.[151] In particular, many states still regularly overlook or criminalize trafficking victims, failing to identify them as victims at all.[152]

Yet, recognition is a critical element of providing survivors with meaningful redress. Such redress entails recognizing criminal offences both in word and in deed so that justice may truly be "done" and "seen to be done."[153] A striking example of this need for meaningful redress lies in the story of the so-called "comfort women," who were failed by the IMT in Japan. For over 20 years, survivors of these crimes sat in protest before the Japanese embassy in Korea, waiting for official recognition of the crimes.[154] Although official recognition and closure still remains tenuous,[155] an informal "people's tribunal" was constituted in the early 2000s to symbolically "prosecute" the Emperor and the state of Japan, albeit decades after the actual crimes occurred.[156] As this situation demonstrates, recognizing sexual crimes at the outset of the pursuit of accountability can prevent decades of ongoing anguish and enable survivors to see justice done in their lifetimes.[157]

Meaningful redress also entails enabling survivors of sexual and gender-based crimes to access state resources in their pursuit of justice.[158] UNSC Resolution 2331 recognizes this critical link between recognition, redress, and access to resources, affirming, "[V]ictims of trafficking in persons in all its forms, and of sexual violence, committed by terrorist groups should be classified as victims . . . with the purpose of rendering them eligible for official support, recognition and redress."[159] In this spirit, the UNSC called on states to "implement robust victim, and possible victim, identification mechanisms and provide access to protection and assistance

150. *Id.* at 375.

151. *See* Aaron Horth, *Toward a Comprehensive Gender-Based Violence Court System*, 24 B.U. PUB. INT. L.J. 221 (2015) (discussing "America's legal history of ambivalence" to gender-based violence, including domestic violence and sexual assault).

152. *See* U.S. DEP'T OF STATE, *supra* note 31, at 26.

153. HILMI M. ZAWATI, FAIR LABELLING AND THE DILEMMA OF PROSECUTING GENDER-BASED CRIMES AT THE INTERNATIONAL CRIMINAL TRIBUNALS 3–4 (2014).

154. Jessica Chin, *Weekly 'Comfort Women' Protest at Japan Embassy in Seoul in its 24th Year*, JOURNALISM WITHOUT WALLS (July 14, 2016), www.journalismwithoutwalls.com/korea2016/photo-essays/comfort-woman-demonstration.

155. *Japan / S. Korea: "The long awaited apology to 'comfort women' victims is yet to come,"* OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS. (Mar. 11, 2016), www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17209.

156. *See* The Prosecutors and the Peoples of the Asia-Pacific Region v. Hirohito Emperor Showa et al., Case No PT-2000-I-T, Judgement, The Women's International War Crimes Tribunal For the Trial of Japan's Military Sexual Slavery, ¶¶1-6 (Dec. 4, 2001)

157. *See* M. Cherif Bassiouni, *Perspective on International Criminal Justice*, 50 VA. J. INT'L L. 269, 294 (2010).

158. Corrigan & Shdaimah, *supra* note 135, at 483.

159. S.C. Res. 2331, ¶ 10 (Dec. 20, 2016).

for identified victims without delay."[160] Without recognition, survivors remain unidentified, or are denied support and resources, and true accountability remains elusive.

To move toward this essential recognition, the first step is to abandon notions of those who experience institutional trafficking as merely "disillusioned" jihadists[161] who "regret" their experiences,[162] as "tiny terrorists" or criminals,[163] and to pursue approaches based in sensitivity for individual experiences of exploitation at the hands of the terrorist group.

B. Enforcement: Accountability Under Transnational Criminal Law

Recognition alone, while critical as a threshold matter, is only an initial hurdle to effectively addressing Da'esh's institutional trafficking crimes. The next step, enforcement, requires a robust accountability strategy. Under the TCL system, this strategy requires positive state action to criminalize and provide jurisdiction over the trafficking crimes.

This requirement of positive action by states is one of the largest challenges to effectively holding perpetrators of these crimes accountable. Indeed, in Resolution 2331, the UNSC reminds states of the need for such action by urging them to ratify the Organized Crime Convention and the Protocol, to enact statutes that criminalize trafficking offenses, and to establish jurisdiction over transnational trafficking crimes.[164] However, while most countries are parties to both the Organized Crime Convention and the Protocol,[165] a number of countries do not have statutes that adopt the Protocol definition of trafficking. For example, both Iraq and Syria have ratified the Protocol without reservation as to this definition,[166] but the trafficking laws of Syria and Iraq are themselves not in accord with the Protocol definition of trafficking.[167] Syria's Decree No. 3 "does not include a clear definition of human trafficking,"[168] and Iraq's 2012 anti-trafficking law fails to prohibit all forms of trafficking, including some forms of child sexual exploitation.[169]

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160. *Id.* at ¶ 2.

161. *Countering the Virtual Caliphate: The State Department's Performance: Hearing Before the H. Comm. on Foreign Aff.*, 114th Cong. 2 (2016) (statement of Rep. Ed Royce, Chairman, Comm. on Foreign Aff.).

162. Loiaconi, *supra* note 51.

163. *See* Janet Reitman, *The Children of ISIS*, ROLLING STONE (Mar. 25, 2015), www.rollingstone.com/culture/features/teenage-jihad-inside-the-world-of-american-kids-seduced-by-isis-20150325 (discussing case of teenage girl whose lawyer challenged idea "that providing one's body to a terrorist group can be considered 'material support'").

164. S.C. Res. 2331, ¶ 2 (Dec. 20, 2016).

165. 170 countries are parties to both the Organized Crime Convention and the Protocol. *Ratification Status*: *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, U.N. DOC. XVIII 12A (Nov. 15, 2000), https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12-a.en.pdf

166. *Id.*

167. U.S. DEP'T OF STATE, *supra* note 31, at 358, 208.

168. *Id.* at 358.

169. *Id.* at 208.

Moreover, some countries that have adopted the Protocol definition of trafficking[170] may not have jurisdictional statutes that would allow them to effectively prosecute institutional trafficking. Those countries would need to establish jurisdictional statutes to, at the very least, prosecute their own nationals,[171] who may be foreign fighters for Da'esh, or, at the broadest level, prosecute any perpetrator of human trafficking found present on the territory.[172] Although it appears that no domestic jurisdictions are yet prosecuting institutional trafficking as trafficking per se, where states have adopted the requisite statutes, local authorities must now proceed to prosecute institutional trafficking in a coordinated and aggressive manner.

Thus, at the most basic level, the pursuit of full accountability for Da'esh's institutional trafficking crimes will require that states undertake positive steps to criminalize and provide jurisdiction over the trafficking crimes, as defined under the TCL system. Where these steps have already been taken, the next steps require that states actively pursue prosecutions of Da'esh fighters for these serious crimes of institutional trafficking.

V. Conclusion

The risk that institutional trafficking crimes will not be effectively addressed in the pursuit of accountability for crimes committed by Da'esh remains present and foreboding. The global community of nations is faced with a myriad of heinous crimes committed by the group, and overlooking those trafficking crimes committed in situations of institutional trafficking as, perhaps, "less heinous" crimes, not crimes at all, or its victims as criminals themselves is quite possible. However, a failure to recognize every survivor's lived experiences at the hands of Da'esh fighters is to return to the dark days of criminal jurisprudence where sexual and gender-based crimes are misunderstood, mishandled, or ignored. Critically, a failure to recognize is a failure to enforce. The international community and domestic jurisdictions will need to reckon with the crimes of institutional trafficking and develop responses that fully and adequately consider this form in order to ensure that all survivors are provided with redress.

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170. *See, e.g.*, *id.* at 385, 388 (describing the Modern Slavery Act of the U.K. and the Trafficking Victims Protection Act of the U.S.).

171. *See, e.g.*, R.S.C. 1985, c. C-46, s. 7(4.11) (Can.) (granting jurisdiction over trafficking committed extraterritorially where committed by Canadian nationals).

172. *See, e.g.*, 18 U.S.C. § 1596(a)(2) (2008) (expanding jurisdiction for trafficking committed outside the U.S. to any traffickers found present in the U.S.).

A New Exception to the Autonomy Principle for Standbys and Letters of Credit? The Negative Stipulation Heresy and the Creation of Commercial Uncertainty in Australia

Richard Q. Sterns[1]

I. Introduction

Commercial letters of credit and standby letters of credit (also known as standby guarantees)[2] are independent undertakings that have long facilitated international trade in commercial goods and guarantees for the performance of contractual obligations respectively.[3] A letter of credit (LC) is an instrument whereby the issuer, typically a bank, makes an independent commitment, at a customer's request, to honor a third party's demand for payment, as long as the demand complies with specified conditions expressed in the LC.[4] In these transactions, the bank's customer is the applicant and the third party demanding payment is the beneficiary.[5] A standby letter of credit (Standby LC) is different from a LC since the parties "trust that the contract will proceed without hitches," and only the beneficiary is entitled to draw if the applicant fails to perform or performs unsatisfactorily according to the beneficiary.[6]

The independence principle, which has long governed commercial and standby LCs, "has been called 'the cornerstone of the commercial vitality of letters of credit'" because, without it, the purpose of the instrument is undermined.[7] The principle stands for the idea that the underlying transaction and the LC or standby guarantee are totally separate from each other; this means that "the issuer's duty to honor the [instrument] is entirely independent of the underlying . . . contract" between the applicant and the beneficiary.[8] The principle is not absolute because "material fraud"[9] or forgery in a presentation of documents to draw on an LC or standby guarantee has long been recognized as an exception to the independence principle.[10] However, since the use of LCs and standby guarantees became widespread in international

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2. The terms "standby letter of credit" and "standby guarantee" are used interchangeably throughout this paper. The term "independent undertaking" is used to refer to all independent instruments generally.
3. *See* JOHN F. DOLAN, FUNDAMENTALS OF COMMERCIAL ACTIVITY 57–59, 61–62 (1991).
4. George P. Graham, *International Letters of Credit and Choice of Law: So Whose Law Should Apply Anyway?*, 47 WAYNE L. REV 201, 202–03 (2001).
5. *See* U.C.C. § 5-102(a)(2)–(3) (AM. LAW INST. & UNIF. LAW COMM'N 1995) (defining applicant and beneficiary).
6. John F. Dolan, *Standby Letters of Credit and Fraud (Is the Standby Only Another Invention of the Goldsmiths in Lombard Street?)*, 7 CARDOZO L. REV. 1, 3–4 (1985).
7. Graham, *supra* note 4, at 211 (quoting Ward Petroleum Corp. v. FDIC, 903 F.2d 1297, 1299 (10th Cir. 1990)).
8. *Id.*
9. Material fraud is also known as Letter of Credit Fraud or "LC Fraud." The term "fraud" is understood differently in common law jurisdictions and civil law jurisdictions, so "material fraud" is the appropriate term for the exception. *See* JAMES E. BYRNE, INTRODUCTION TO DEMAND GUARANTEES AND STANDBYS 92–93 (2012).
10. *See* U.C.C. § 5-109(a) (AM. LAW INST. & UNIF. LAW COMM'N 1995); *Sztejn v. J. Henry Schroder Banking Corp.*, 31 N.Y.S.2d 631, 721–22 (Sup. Ct. 1941) (recognizing the fraud exception to the independence principle).

commerce, many applicants have attempted to argue that there should be additional exceptions to the independence principle to ensure that beneficiaries do not make abusive draws on LCs and standby guarantees.[11] As such, the extent to which fraud or illegality in the underlying transaction should prevent a beneficiary from drawing on a LC or standby guarantee has been widely debated by courts and scholars.[12] Unconscionability has recently been recognized as an additional exception to the independence principle in several jurisdictions, including Singapore[13] and Australia.[14] Moreover, Australian courts have recently recognized a third exception to the independence principle: the negative stipulation doctrine.[15]

Australian courts have defined a negative stipulation as existing "where a condition, if not satisfied, will operate to prevent the making of a claim under the documentary credit" (i.e., under a LC or standby guarantee).[16] Australian courts recognize that the presence of a condition not satisfied in the underlying contract can potentially prevent a beneficiary from drawing on an independent guarantee related to the underlying contract. Section II of this article will examine the case law surrounding the negative stipulation doctrine and how it gained acceptance as a recognized exception to the independence principle in Australia. It examines the slippery slope of Australia's uncertain unconscionability standard that allowed the negative stipulation doctrine to gain acceptance and briefly illustrates how the uncertain unconscionability standard conflicts with various international rules of practice for independent undertakings.

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11. *See* In Re: Irrevocable Standby Letter of Credit No. SE44393W, 336 F. Supp. 2d 578, 581–83 (M.D.N.C. 2004) (holding that the applicant's substantial performance of the underlying contract is not grounds for a preliminary injunction to prevent the issuer from paying the beneficiary); *Mid Am. Tire, Inc. v. PTZ Trading Ltd.*, 768 N.E.2d 619, 637, 639, 644 (Ohio 2002) (holding that fraud in negotiations related to the underlying contract is grounds for a permanent injunction to prevent beneficiary from drawing on letter of credit); *Shanghai Electric Grp. Ltd. v. PT Merak Energi Indon. and another* [2010] SGHC 2, ¶ 47 (Sing.) (holding that the unconscionability exception to the independence principle followed by Singapore courts can prevent the beneficiary from drawing on a letter of credit).

12. *See* Gerald T. McLaughlin, *Letters of Credit and Illegal Contracts: The Limits of the Independence Principle*, 49 OHIO ST. L.J. 1197, 1197 (1989) (arguing that the fraud exception to the independence principle should be extended broadly to illegality in the underlying transaction); *but see* Roger W. Reinsch & Mark Blodgett, *An International Trade Argument to Limit "Fraud in the Transaction" in Letters of Credit*, 13 MIDWEST L. REV. 92, 97 (1995) (arguing that the fraud exception must remain narrow because otherwise it will undermine the commercial purpose of letters of credit).

13. *See, e.g.*, *Kvaerner Sing. Pte Ltd. v. UDL Shipbuilding (Sing.) Pte Ltd.* [1993] 3 SLR 350 (holding that it was unconscionable for a beneficiary to call on a standby guarantee for a breach induced by its own default). In Singapore, unconscionability "'involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party.'" Raymond Chan & Tan Joo Seng, *Unconscionability Prevents Call on Performance Bond*, INT'L L. OFF. (Nov. 11, 1999), www.internationallawoffice.com/Newsletters/Construction/Singapore/Chan-Tan-Partners/Unconscionability-Prevents-Call-on-Performance-Bond (quoting *Raymond Constr. Pte Ltd. v. Low Yang Tong & Anor* [1996] SGHC 136).

14. *See, e.g.*, *Olex Focas Pty Ltd. v. Skodaexport Co. Ltd.* [1998] 3 VR 380 (rejecting a beneficiary's attempt to call on a standby guarantee in the context of a large commercial transaction because the beneficiary was engaged in unconscionable conduct).

15. *See, e.g.*, *Best Tech & Eng'g Ltd. v. Samsung C&T Corp. [No.2]* [2015] WASC 447 ¶ 59–60 (granting injunctive relief to applicant on the basis that a "loss requirement" for calling upon the standby guarantee in underlying contract had not been met by the beneficiary).

16. *ALYK (H.K.) Ltd. v. Caprock Commodities Trading Pty Ltd. and Anor* [2012] NSWSC 1558 ¶ 85.

Section III argues that this negative stipulation doctrine is a doctrinal heresy that clearly violates the independence principle and undermines independent undertaking law by failing to allocate risk during disputes as intended by the parties. In essence, the addition of the negative stipulation as another exception to the independence principle forces beneficiaries to litigate claims arising from the underlying contract in conjunction with any disputes surrounding the independent guarantee, thereby eroding the independence principle. It also inhibits the beneficiary from holding funds during litigation, as independent undertakings are designed to do. This article suggests alternative procedures parties may use when a negative stipulation is desired, such as an ancillary agreement, traditional suretyship undertaking, or other form of dependent undertaking for this purpose. In an attempt to offer an alternative to Australian courts' "whole contract doctrine," Section III argues that negative stipulations about when an independent undertaking may be drawn upon should be superseded by any language in the credit which references an "irrevocable" or "unconditional" right to call upon the independent undertaking. Finally, this article discusses the consequences of Australia's negative stipulation regime, identifies concerns for beneficiaries with respect to the effects of the negative stipulation doctrine on commercial dealings in Australia, and offers potential solutions for those concerns.

II. The Development of the Negative Stipulation Doctrine in Australia

In examining how the negative stipulation doctrine arose in Australia, a review of the relevant case law illustrates how the Australian courts' willingness to recognize exceptions to the independence principle allowed for disputes regarding LCs and standby guarantees to become muddled by irrelevant lines of legal reasoning. A review of the case law provides analysis as to where Australian courts went wrong in their formation of the negative stipulation doctrine. A brief investigation of the unconscionability exception in Australia also serves to demonstrate the slippery slope that can arise when introducing new exceptions to the independence principle and how these exceptions conflict with international rules of practice for independent undertakings.

A. The Procedural Posture of Disputes Involving the Negative Stipulation Doctrine

The procedural posture of negative stipulation cases illustrate the nature of these disputes and the positions the parties find themselves in when a negative stipulation becomes an issue in an LC or standby LC dispute. In disputes involving a negative stipulation issue, the procedural posture of each case is nearly identical. Generally, the applicant (buyer) is suing the beneficiary (seller) to enjoin it from calling upon the LC, standby LC, or demand guarantee on the grounds that there is a negative stipulation in the underlying contract or the independent undertaking that prevents the beneficiary from doing so.[17] In conjunction with the lawsuit by the applicant against the beneficiary, the applicant will also sue the issuer (bank) to enjoin it from honoring the beneficiary's presentation on the same grounds.[18] However, the issuer typically takes no position as to the outcome of the dispute other than to state that it will take actions consistent with the court's decision, meaning it will honor a beneficiary's compliant

17. *See id.* at ¶ 1 (discussing how the buyer is attempting to restrain the seller from making a demand upon the standby letter of credit because of a negative stipulation).

18. *See Clough Eng'g Ltd. v. Oil & Nat. Gas Corp. Ltd.* [2008] FCAFC 136 ¶ 13.

presentation absent an injunction from a court of competent jurisdiction.[19] The issue presented to the court in these cases is whether a negative stipulation exists in the underlying contract, independent undertaking, or some other agreement that would lead a court to enjoin the beneficiary from calling upon the LC, standby LC, or demand guarantee.[20] There are some slight variations to this general procedural posture depending if the dispute is over whether an implied negative stipulation exists[21] or whether one exists in another agreement.[22] An implied negative stipulation, discussed at length in subsequent sections of this article, has been defined as a condition that is not expressly in the underlying contract, independent undertaking, or other agreement but still qualifies a beneficiary's ability to make demand under an LC or standby LC.[23] Given the similarities in the general procedural posture of cases involving negative stipulation issues, this article will not discuss procedure any further.

B. A Review of Key Cases Involving the Negative Stipulation Exception

Following is a close review of the case law that has led Australian courts to identify the negative stipulation doctrine as an exception to the independence principle. Particularly illustrative are the recent cases that move from the mere recognition of negative stipulation as an exception to the independence principle to actually enjoining beneficiaries from calling upon an independent guarantee because of a negative stipulation.[24] In 2008 and earlier, Australian courts began to explicitly recognize two additional exceptions to the independence principle governing independent undertakings other than LC fraud: (1) unconscionable conduct in contravention of trade practices legislation (S. 51AA of the Trade Practices Act); and (2) a breach of an express or implied contractual promise not to call upon the independent undertaking.[25] This recognition of these two additional exceptions to the independence principle led Australian courts down a slippery slope towards eroding the independence principle and damaging the commercial practicability of independent undertakings in Australia.

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19. *See Kell & Rigby Holdings Pty Ltd. v. Lindsay Bennelong Dev. Pty Ltd.* [2010] NSWSC 777 ¶ 17 (discussing the bank's position that it would pay the beneficiary unless it was enjoined from doing so by a set date and time).

20. *See ALYK (H.K.) Ltd. v. Caprock Commodities Trading Pty Ltd. and Anor* [2012] NSWSC 1558 ¶ 87 ("The issue here is whether the claimed negative stipulation exists and prevents Caprock from demanding payment under the standby LC").

21. *See id.* at ¶ 112.

22. *See Sulzer Pumps (S. Afr.) (Proprietary) Ltd. v. Covec-MC Joint Venture* [2014] ZAGPPHC 695 ¶ 9 (S. Afr.) (discussing whether an agreement by the parties to prevent the beneficiary from calling upon the standby guarantee pending arbitration proceedings was a negative stipulation in the form of another contract). Although the *Sulzer Pumps* case was decided in South Africa, the South African Court applied Australian law for the relevant portions of the opinion; consequently, this case will be discussed in detail in this article.

23. *ALYK (H.K.) Ltd. v. Caprock Commodities Trading Pty Ltd. and Anor* [2012] NSWSC 1558 ¶ 112.

24. *See Best Tech & Eng'g Ltd. v. Samsung C&T Corp. [No.2]* [2015] WASC 447 ¶ 61 (holding that the beneficiary was not entitled to call upon the standby guarantee); *Clough Eng'g Ltd. v. Oil & Nat. Gas Corp. Ltd.* [2008] FCAFC 136 ¶ 77 (holding that there are three exceptions to the independence principle).

25. *See Clough Eng'g Ltd. v. Oil & Nat. Gas Corp. Ltd.* [2008] FCAFC 136 ¶ 77.

1. Understanding the Development of the Negative Stipulation Doctrine in Australia

In *Clough Engineering Ltd. v. Oil & Natural Gas Corp. Ltd.*, the applicant ("Clough") sued to enjoin the beneficiary (ONGC) from calling upon standby guarantees issued by three different Australian banks.[26] Clough argued that ONGC's call upon the standby guarantees was unconscionable in violation of S. 51AA of the Trade Practices Act and a breach of a negative stipulation contained in clause 3.3.3 of the underlying contract ("on breach of contract"), which stated that ONGC could only call upon the standby guarantee in the event Clough failed to honor any of the commitments entered under the contract.[27] In the appellate opinion, the Court quickly dispatched with the unconscionability claim,[28] but recognized without question that there is a third exception to the independence principle: the negative stipulation exception, which the Court referred to as an "over-riding rule"[29] because "it emphasises that the 'primary focus' [of the court] will always be the proper construction of the contract."[30] Although the Court in *Clough* eventually came to the conclusion that the language in clause 3.3.3 did not mean there must be actual breach before the beneficiary could call upon the standby guarantee,[31] the reasoning behind the court's decision illustrates why Australian courts have departed so far from a standard interpretation of the independence principle. Rather than read the language "notwithstanding any disputes pending" in clause 2 of the guarantee to mean that ONGC was entitled to invoke the guarantee regardless of existing disputes pertaining to the underlying contract, the Court concluded that clause 3.3.3 of the *underlying contract*, "when read with clause 2 of the performance guarantee," entitled ONGC to call upon the guarantee.[32] This reasoning effectively applied the "over-riding rule" that courts must look to the underlying contract for negative stipulations in order to determine the proper construction of the contract as a whole.[33]

The court's conclusion that the negative stipulation exception is an over-riding rule presents several issues because it fundamentally undermines the purpose of an independent guarantee by instructing courts to look immediately to the underlying contractual language to determine if a negative stipulation exists. This erroneous conclusion is reached based on the idea set forth in *Clough* and its precedent cases, that despite independent undertakings being "unconditional," terms in the underlying contract "may qualify the right to call on the undertaking contained in a performance guarantee."[34] Thus, *Clough* and the precedent cases it cites

26. *Id.* at ¶¶ 1, 11.
27. *Id.* at ¶¶ 60, 87.
28. *Id.* at ¶ 129 (stating that unconscionable conduct was not a serious issue to be tried in this case).
29. *Id.* at ¶ 77.
30. *Id.* at ¶¶ 77–78.
31. *See Clough Eng'g Ltd. v. Oil & Nat. Gas Corp. Ltd.* [2008] FCAFC 136 ¶ 93.
32. *Id.* at ¶ 94.
33. *Id*. at ¶ 77.
34. *Id. See Bachmann Pty Ltd.* [1999] 1 VR 420 ¶¶ 14, 28 (holding that a promise forming a part of an underlying contract can prevent a beneficiary from calling upon a standby guarantee if that promise is to not to call upon the standby guarantee, except if a certain event occurs); *Baulderstone Hornibrook Pty Ltd.* [2000] FCA 672 ¶ 12 (holding that the words "may be entitled" are plainly conditional and, thus, a negative stipulation could potentially exist in the underlying contract).

illustrate the major issue with Australian courts' interpretation of independent undertakings and the underlying contracts for which they serve as security: the tendency to read them as one set of interlocking contracts instead of as independent instruments that have distinct rights and obligations attached to them. This article will discuss below, in Part I(C), how this practice conflicts with standard international rules of practice for LCs and standby guarantees.

2. Recognizing Implied Negative Stipulation as an Exception to the Independence Principle

Implied negative stipulations are conditions that are not expressly in the underlying contract but still qualify the beneficiary's ability to call upon an LC or standby guarantee.[35] As one can imagine, this ambiguous definition presents even more issues for beneficiaries attempting to draw upon an independent guarantee than the concept of express negative stipulations. In *Orrcon Operations Pty Ltd. v. Capital Steel & Pipe Pty Ltd.*, the applicant ("Orrcon") sued to enjoin the beneficiary ("Capital Steel") from drawing on LCs for three shipments of steel pipe that Capital Steel claimed were non-compliant on the grounds these drawings were unconscionable under S. 51AA of the Trade Practices Act and in violation of an implied negative stipulation that prevented Capital Steel from making a claim for payment under the LCs unless all pipe delivered complied with all specifications.[36] The court quickly dispensed with Orrcon's argument that an implied negative stipulation existed, holding that it was not a serious issue to be tried because there was no support that such a stipulation existed.[37] However, the court recognized that an implied negative stipulation could potentially provide grounds for enjoining a beneficiary from calling upon an LC, discussing *Clough* in particular and mentioning another case *Codelfa Construction Pty Ltd. v. State Rail Authority of New South Wales*.[38]

Although brief, referencing these two cases demonstrates part of the reason why Australian courts have been so quick to depart from the independence principle, while maintaining that they continue to recognize it as a commercial necessity.[39] The court in *Orrcon* references *Clough* and *Codelfa* as affirmative precedent that an implied negative stipulation is a recognized exception to the independence principle, but neither of those cases deals with a true implied negative

35. *ALYK (H.K.) Ltd. v. Caprock Commodities Trading Pty Ltd. and Anor* [2012] NSWSC 1558 ¶ 112.

36. *Orrcon Operations Pty Ltd. v. Capital Steel & Pipe Pty Ltd.* [2007] FCA 1319 ¶ 25.

37. *Id.* at ¶ 97.

38. *See id.* at ¶¶ 68–70, 97. The Court mentions the *Codelfa* case in passing where it asserts, "Nor . . . can [it] be said that there is a serious question to be tried that there was an implied term to that effect, having regard to the factors referred to in Codelfa." *Id.* at ¶ 97. However, the court's reference to these *Codelfa* factors is highly relevant, as the factors will be recited again in the 2012 case *ALYK (H.K.) Ltd. v. Caprock Commodities Trading Pty Ltd.*, discussed subsequently in Part(I)(B)(4). *See Codelfa Constr. Pty Ltd. v. St. Rail Auth. NSW* (1982) 149 CLR 337 ("The conditions necessary to ground the implication of a term [are summarized as follows] . . . : (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.").

39. *See, e.g.*, *United City Merch. (Inv.) Ltd. and others v. Royal Bank of Can. and others* [1982] 2 AII ER 720, 725 ("The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment").

stipulation in the LC context.[40] *Clough* mentions implied negative stipulations but deals primarily with the efficacy of an express negative stipulation in the underlying contract, and *Codelfa* is concerned with implied terms in the general context of commercial contracts, which are completely removed from the LC space.[41] As illustrated, this reliance on weak precedent serves to introduce further uncertainty into the use of independent undertakings under Australian law.[42]

3. Is the right to call upon an independent guarantee "asserted" or "established"?

In *Kell & Rigby Holdings Pty Ltd. v. Lindsay Bennelong Developments Pty Ltd.*, the applicant ("Kell & Rigby") sued the beneficiary ("Lindsay") to enjoin the beneficiary from calling upon an unconditional bank guarantee that was issued in its favor, after the beneficiary issued an advance payment bond to the applicant in conjunction with a building contract.[43] Lindsay called upon the guarantee because they claimed: (1) the advance payment was due and had not been repaid; (2) the guarantee was unconditional; and (3) the underlying contract contained no express or implied negative stipulation that they would not call upon the guarantee even if the advance payment was not due.[44] However, Kell & Rigby argued that the advance payment was not due and there was a negative stipulation in the underlying contract that Lindsay could only call upon the guarantee if the advance payment was due and not repaid.[45] Although the guarantee was clearly unconditional, the court held that there was an implied negative stipulation in the underlying contract that prevented the beneficiary from calling upon the guarantee if the advance payment was not due and issued an injunction.[46] The court reasoned that because the guarantee was intended to serve as repayment, it could only be called upon if repayment was indeed due.[47] Moreover, the court said that the beneficiary's right to call upon the guarantee was only "asserted" and not "established" by the terms of the guarantee, as the beneficiary had argued.[48]

The court's analysis in *Kell & Rigby Holdings* is another example of unremarkable reasoning that has led to the erosion of the independence principle in Australia. In the face of a

40. *Orrcon Operations Pty Ltd. v. Capital Steel & Pipe Pty Ltd.* [2007] FCA 1319 ¶¶ 68–70, 97.

41. *Clough Eng'g Ltd. v. Oil & Nat. Gas Corp. Ltd.* [2008] FCAFC 136 ¶¶ 53, 86, 92–93 (discussing "express" or "implied" negative stipulation but only addressing the applicant's claim that there was an express negative stipulation in the underlying contract); *Codelfa Constr. Pty Ltd. v. St. Rail Auth. NSW* (1982) 149 CLR 337 ("The appellant's case is that a term has to be implied in the contract to give it business efficacy, to make it workable.").

42. There are other Australian cases that more explicitly recognize implicit negative stipulation as an exception to the independence principle, but they also present fairly weak precedent for applying the proposition generally. *See Pearson Bridge (NSW) Pty Ltd. v. State Rail Auth. (NSW)* [1982] ACLR 81 (holding that an implied negative stipulation prevented the beneficiary from drawing upon the independent guarantee primarily because of the *commercial detriment* that would come to the applicant if the draw was made absent the implied negative stipulation); *Fletcher Constr. Austl. Ltd. v. Varnsdorf Pty Ltd.* [1998] 3 VR 812, 821, 826 (holding that a similar clause to the one in *Pearson Bridge* did not amount to an implied negative stipulation).

43. *Kell & Rigby Holdings Pty Ltd. v. Lindsay Bennelong Dev. Pty Ltd.* [2010] NSWSC 777 ¶¶ 6–8, 19.

44. *Id.* at ¶ 23.

45. *Id.* at ¶ 19.

46. *Id.* at ¶ 27.

47. *Id.* at ¶ 31.

48. *Id.* at ¶ 29.

facially unconditional guarantee, the court immediately moved to an analysis of the underlying contract, barely pausing to render the guarantee meaningless.[49] Perhaps the greatest threat to the independence principle raised in this case is the notion that the right to call upon an independent guarantee is "asserted," rather than "established."[50] This type of reasoning further undermines the independence principle because it essentially demands that disputes related to the independent guarantee are to be litigated alongside disputes concerning the underlying contract.[51] Such a decision prevents parties from allocating risk as intended and negatively affects the commercial practicability of demand guarantees.[52] The analysis section will suggest possible solutions to problems such as those raised in this case.

4. The Prima Facie Case for Implied Negative Stipulations

In *ALYK (H.K.) Ltd. v. Caprock Commodities Trading Pty Ltd.*, the applicant ("ALYK") sued the beneficiary ("Caprock") to enjoin Caprock from calling upon a standby LC issued in conjunction with an underlying contract for the shipment of iron ore fines.[53] ALYK argued that Caprock was only entitled to call upon the standby LC in connection with its failure to pay for a shipment of iron ore fines, whereas Caprock argued that it was entitled to call upon the standby LC for all perceived breaches of contract conditions.[54] ALYK's argument turned on its contention that the underlying contract contained an implied negative stipulation that Caprock could not call upon the standby LC unless ALYK failed to pay for a shipment of iron ore fines.[55] ALYK contended that the implied negative stipulation was necessary to give the underlying contract "business efficacy."[56] Although this court recognized the purpose of a standby LC more explicitly than the courts did in other Australian cases,[57] it held that there was no necessity for an implied negative stipulation, given that the standby LC was incorporated into the underlying contract.[58]

In reaching its holding, the court provided a prima facie test for implied negative stipulations that only serves to create more uncertainty in the law concerning implied negative stipulations. In analyzing whether an implied negative stipulation existed in the underlying contract,

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49. *Kell & Rigby Holdings Pty Ltd. v. Lindsay Bennelong Dev. Pty Ltd.* [2010] NSWSC 777 ¶ 25 (discussing the notion that the guarantee's issue was not overly important but had to be dealt with nevertheless).

50. *Id.* at ¶ 29.

51. *Id.* at ¶ 30 ("[T]here is no provision in the Contract which indicates that payment must be made notwithstanding the pendency of a dispute").

52. *Id.* at ¶ 23 ("The defendant . . . put that the Contract evinces an allocation of risk that in the event of a dispute it would be the Contractor [or Applicant] who would be out of pocket"). Given that the guarantee was issued as security for an advance payment bond, it is possible that the parties did not intend for the undertaking to be unconditional. However, if that was the case, the drafters should not have used language indicating a facially unconditional guarantee.

53. *ALYK (H.K.) Ltd. v. Caprock Commodities Trading Pty Ltd. and Anor* [2012] NSWSC 1558 ¶ 3.

54. *Id.* at ¶ 77.

55. *Id.* at ¶ 111.

56. *Id.* at ¶ 113.

57. *Id.* at ¶ 115 ("The Contract works without" the implied negative stipulation "but with the standby LC operating according to its terms as a risk allocation mechanism, for Caprock to obtain prompt payment notwithstanding disputes about alleged breaches of the Contract").

58. *ALYK (H.K.) Ltd. v. Caprock Commodities Trading Pty Ltd. and Anor* [2012] NSWSC 1558 ¶ 115.

the court recited five requirements: "(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the Contract so that no term will be implied if the Contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express terms of the contract."[59] Although this test is facially stringent, it further illustrates Australian court's issues with analyzing independent undertakings separately from underlying contracts, comes from weak precedent, and creates uncertain standards for contracting parties.

First, applying all five standards requires a court to look to underlying contract regardless of whether the standby LC or LC in question is unconditional on its face. Although the court here recognized that the standby LC was clearly incorporated, providing a wide range of factors for future courts to imply a negative stipulation further erodes the independence principle.[60] Second, as in *Orrcon*, the court finds these "usual requirements" for implied negative stipulations in cases outside the LC context.[61] This reliance on precedence discussing the implying negative stipulations in general commercial contracts serves to further muddle the legal framework by which independent undertakings are analyzed. Finally, the standards are vague and difficult for contracting parties to plan for, particularly if the intention is for the independent guarantee to serve as a risk allocation method while litigating ongoing disputes concerning the underlying contract. However, this case's reasoning does present some actions that beneficiaries can take to ensure independence is recognized, which are discussed in the analysis section.

5. Mixing Unconscionability and Negative Stipulation

In *Sulzer Pumps (South Africa) (Proprietary) Limited v. Covec-MC Joint Venture*, the applicant ("Sulzer Pumps") sued to enjoin the beneficiary ("Covec") from calling upon a performance guarantee concerning an underlying building contract on the grounds that the call was unconscionable and that it violated a separate agreement between the parties; in the separate agreement, the beneficiary agreed not to call upon the guarantee before arbitration proceedings concerning the underlying contract had been finalized.[62] The South African court, applying Australian law for the relevant portions of the opinion, held that the beneficiary's call upon the performance guarantee was unconscionable because of the negative stipulation included in the separate agreement made by the parties, which stated that Covec would not call upon the performance guarantee until arbitration proceedings were finalized.[63] Although some of the court's analysis indicates it may not have sought to reach this conclusion, it is the only reasonable holding given that the court cites unconscionable conduct and not a violation of a negative stipulation as its reason for issuing the injunction.[64]

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59. *Id.* at ¶ 112.

60. *Id.* at ¶ 115.

61. *Id.* at ¶ 112 (citing *Codelfa Constr. Pty Ltd. v. St. Rail Auth. NSW* (1982) 149 CLR 337, 346; *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* [1977] 180 CLR 266, 283).

62. *See Sulzer Pumps (S. Afr.) (Proprietary) Ltd. v. Covec-MC Joint Venture* [2014] ZAGPPHC 695 ¶¶ 9, 35 (S. Afr.).

63. *Id.* at ¶¶ 41, 87, 125.

64. *Id.* at ¶ 125.

In finding that a negative stipulation in a totally separate agreement can render a beneficiary's call upon a performance guarantee unconscionable, the *Sulzer Pumps* court issued a confusing opinion that severely undermines the independence principle. The court is essentially saying that it is unconscionable to call upon an independent guarantee in violation of a negative stipulation, wherever that negative stipulation may come from and even if the beneficiary believes in good faith that the guarantee is independent.[65] To be sure, as Part II of this article analyzes, ancillary agreements and traditional suretyship undertakings can be an alternative or supplement to independent undertakings when parties contract for a dependent undertaking.[66] However, when the beneficiary has explicitly reserved its right to demand payment under the performance guarantee,[67] this type of holding only serves to further muddle the case law concerning independent instruments under Australian Law.

6. The Apex of the Negative Stipulation Doctrine

Best Tech & Engineering Ltd v. Samsung C&T Corporation [No. 2] represents the most extensive use of the negative stipulation doctrine by an Australian court to date. The applicant ("Best Tech") sued the beneficiary ("Samsung") to enjoin Samsung from calling upon unconditional demand guarantees related to obligations from an underlying contract for the beneficiary to purchase steel from the applicant.[68] Best Tech argued that clause 3.2 of the underlying contract contained both a notice requirement and a loss requirement, necessitating that Samsung show its losses, damages, or substantial breaches no later than when it gave the requisite 10 days' notice that it would call upon the guarantee.[69] Illustrating how far the independence principle in Australia has been eroded, Samsung conceded that it had to comply with clause 3.2 in order to call upon the guarantee but argued that it had done so via a letter to Best Tech stating its losses.[70] However, the appellate court found that since Samsung had sent the letter stating its losses 21 days after the notice, it had not complied with clause 3.2 and thus an interim injunction was appropriate.[71] Although the court held that Samsung could reissue its 10 days' notice and regain the ability to call upon the guarantees, the reasoning in this case still represents a decisive departure from the independence principle.[72]

As with many of the cases discussed in this section, the *Best Tech* court immediately proceeded to consideration of the underlying contract without regard for the independent undertaking, despite the fact that Appendix B of the contract set out a form for that guarantee, which stated it would be irrevocable and unconditional.[73] All of the subsequent analysis in the case virtually ignored the guarantee and focused predominately on whether Samsung had met the

65. *See id.* at ¶ 45.

66. *See infra* Section III.

67. *See Sulzer Pumps (S. Afr.) (Proprietary) Ltd. v. Covec-MC Joint Venture* [2014] ZAGPPHC 695 ¶ 45 (S. Afr.).

68. *Best Tech & Eng'g Ltd. v. Samsung C&T Corp. [No.2]* [2015] WASC 447 ¶¶ 1, 5.

69. *Id.* at ¶ 31.

70. *Id.* at ¶¶ 28, 48.

71. *Id.* at ¶¶ 49, 61.

72. *Id.* at ¶ 63.

73. *Id.* at ¶ 8.

conditions laid out in Clause 3.2 to call upon the guarantee.[74] In addition to eroding the independence principle, this reasoning allows applicants to undermine the commercial purpose of independent undertakings by preventing payment via interim injunctions for long periods of time. For instance, the *Best Tech* case had a subsequent iteration after Samsung re-issued its notice to call upon the guarantee, and Best Tech again sued to enjoin payment (this time on unconscionability grounds).[75] As this article examines in the analysis in Part II, a substantive reformation of the way independent undertakings are interpreted under Australian law is necessary for these instruments to maintain their commercial practicability as means of risk allocation in the event of a dispute concerning the underlying contract.

C. International Rules of Practice: How the Unconscionability and Negative Stipulation Exceptions Present Direct Conflicts

As discussed, Australian courts firmly recognize unconscionability and negative stipulations as two additional exceptions to the independence principle.[76] This recognition of additional exceptions to the independence principal conflicts dramatically with international rules of practice for LC's, Standby LC's, and other forms of independent undertakings. It partially explains why Australian courts reach perplexing conclusions when determining whether a beneficiary may call upon an independent undertaking. The Uniform Customs & Practice for Documentary Credits ("UCP 600"), which LC's are often subject to, makes no mention of unconscionability or negative stipulations in the underlying contract as being grounds for noncompliance and even advises banks issuing LC's to discourage applicants from including copies of the underlying contract as an integral part of the LC.[77] Further, UCP 600 makes clear that presentations to call upon an LC are subject only to documentary conditions in the LC and that an issuer must honor any compliant presentation.[78] To be sure, it's unclear from much of the case law to what extent LC's issued in Australia are made subject to UCP 600 (as courts rarely even address the issue), but it can be assumed that major Australian banks doing business internationally are making their LC's subject to some rules of practice. However, even when Australian courts have acknowledged that an LC is subject to UCP 600 (or its predecessor UCP 500), they have still moved quickly to consider the additional exceptions to the independence principle and all but ignored the UCP.[79]

Even if LC's issued in Australia are being issued subject to other international rules of practice, the additional exceptions of unconscionability and negative stipulations still directly conflict. International Standby Practices 98 ("ISP98"), the most common international rules of practice for standby LC's, also explicitly states that standby LC's are irrevocable and the beneficiary's right to call upon the standby does not depend on "a reference in the standby to any

74. *Best Tech & Eng'g Ltd.,* WASC 447 ¶¶ 10–65.

75. *See Best Tech & Engineering Ltd v. Samsung C&T Corporation [No. 3]* [2015] WASC 459 ¶ 34 (holding that the beneficiary did not act unconscionably by providing notice under clause 3.2 and then not responding to a letter from applicant disputing the issues raised in the notice.).

76. *See supra* Section (III)(B).

77. *See* UCP 600 Art. 4(b) (Int'l Chamber Com. 2007).

78. *Id.* at Art. 15(a).

79. *See, e.g.*, *Orrcon Operations Pty Ltd. v. Capital Steel & Pipe Pty Ltd.* [2007] FCA 1319 ¶ 55.

reimbursement agreement or underlying transaction."[80] Even the Uniform Rules for Demand Guarantees 758 ("URDG 758"), which are acknowledged as most applicant friendly set of rules,[81] state that a guarantee is independent by nature and that "a reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee."[82] It is worth noting that these international rules of practice are not laws and thus Australian courts do not violate international law by failing to abide by them even when independent undertakings explicitly subject themselves to international rules of practice.[83] However, most courts worldwide defer to the UCP as a primary source of LC practice and the United States Uniform Commercial Code Revised Article 5 ("UCC"), the United Nations LC Convention, and Chinese LC Rules all expressly defer to it as well.[84] Similarly, ISP98 is deferred to worldwide for both Standby LC's and demand guarantees.[85]

The reason as to why Australian courts have departed so significantly from international rules of practice and the independence principle has no easy answer. However, the specific way in which Australian courts recognize the unconscionability exception sheds some light on how this phenomenon has occurred and led to the prevalence of the negative stipulation doctrine today. The unconscionability exception in Australia comes from S. 51AA of the Trade Practices Act which forbids "engaging in conduct that is unconscionable within the meaning of the unwritten law from time to time, of the States and Territories."[86] This vague standard for unconscionability while "engaged in trade" invites courts to actively create an evolving standard of unconscionable conduct for commercial transactions; despite the fact that the legislative history of S. 51AA indicated that it was not intended to apply to commercial transactions and the legislature later went back and amended S. 51AA to explicitly exclude "financial services".[87] Given Australian courts' failure to recognize that S. 51AA was not intended to apply to commercial dealings between sophisticated parties, it's unsurprising that they also felt it appropriate to recognize the negative stipulation doctrine despite directly conflicting international rules of practice. The close relationship between recognizing unconscionability and negative stipulation as exceptions to the independence principles is best illustrated by the *Sulzer Pumps* case where a South African court applying Australian law found it unconscionable for a beneficiary to call upon an independent guarantee in violation of a negative stipulation in the underlying contract.[88]

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80. *See* ISP98 § 1.06 (c)(iii) (INST. INT'L BANKING L. & PRAC. 1999).

81. *See* JAMES E. BYRNE, LC RULES & LAWS CRITICAL TEXTS FOR INDEPENDENT UNDERTAKINGS 77 (2014) ("Overall, URDG 758 favors the applicant or instructing party over the beneficiary.").

82. *See* URDG 758 Art. 5(a) (INT'L CHAMBER COM. 2010).

83. *See* BYRNE, *supra* note 81, at 1 ("UCP 600 is applicable to credits made subject to it.").

84. *Id.*

85. *See id.* at 29.

86. *Orrcon Operations Pty Ltd. v. Capital Steel & Pipe Pty Ltd.* [2007] FCA 1319 ¶ 50.

87. *See* Dr. Paul Vout, *Unconscionability and Good Faith in Business Transactions*, NAT'L COMM. L. SEMINAR SERIES (Oct. 21, 2013), www.monash.edu/__data/assets/pdf_file/0013/142042/unconscionability-and-good-faith-in-business-transactions-paul-vout.pdf (discussing the financial services exception to S. 51AA and the legislative history of the Trade Practices Act.).

88. *See supra* Section II(B)(5).

III. Analysis, Recommendations, and Solutions

This section identifies the principal reasons why the negative stipulation doctrine is a violation of the independence principle because of its failure to allocate risk during disputes as the parties' intended. Further, it offers an alternative procedure where if a negative stipulation is desired the parties would use an ancillary agreement, traditional suretyship undertaking, or other form of dependent undertaking for this purpose. In addition, an alternative to Australian courts' "whole contract doctrine" for reviewing disputes related to the ability of a beneficiary to call upon independent undertakings when negative stipulations are involved is provided. Finally, it discusses consequences to Australia's negative stipulation regime, identifies concerns beneficiaries should have if they hold an independent guarantee subject to Australian law, and offers potential solutions to beneficiary concerns about the effects of the negative stipulation doctrine on their commercial dealings in Australia.

A. The Negative Stipulation Doctrine is a Violation of the Independence Principle

As this article has laid out in Part I, the negative stipulation exception egregiously violates the independence principle that governs independent undertakings for several reasons. First, courts immediately looking to the underlying contract to determine whether a beneficiary can call upon an independent guarantee directly conflicts with all international rules of practice for LC's, standby LC's, and demand guarantees.[89] While Australian courts have maintained that they continue to recognize the independence principle as necessary for the commercial efficacy of independent undertakings, the case law demonstrates that this recognition is fleeting at best.[90] In all of the recent cases reviewed where the negative stipulation exception was at least recognized, Australian courts looked to the underlying contract for negative stipulations despite the fact that the independent undertakings were acknowledged as irrevocable and unconditional.[91]

Perhaps most importantly, Australian courts' abandonment of the independence principle fails to allocate risk during disputes as the parties intended; it forces beneficiaries to litigate claims arising from the underlying contract; and it forces them to litigate these claims in conjunction with disputes concerning the independent guarantee, which violates the independence principle and inhibits the beneficiary from holding funds during litigation as independent undertakings are designed to do. The *Best Tech* case provides an illustrative example in this regard, as the beneficiary had to litigate its position to call upon the independent guarantee

89. *See* UCP 600 Arts. 4(b), 15(a) (INT'L CHAMBER COM. 2007); ISP98 § 1.06 (c)(iii) (INST. INT'L BANKING L. & PRAC. 1999); URDG 758 Art. 5(a) (INT'L CHAMBER COM. 2010).

90. *See Orrcon Operations Pty Ltd. v. Capital Steel & Pipe Pty Ltd.* [2007] FCA 1319 ¶ 56.

91. *Id.* at ¶ 102 (noting that applicant "agreed to the issuing of a letter of credit and that it would be governed by UCP rules [which] make it clear that the letter of credit transaction is quite separate."); *Clough Eng'g Ltd. v. Oil & Nat. Gas Corp. Ltd.* [2008] FCAFC 136 ¶ 8 ("It was agreed the guarantee was irrevocable."); *Kell & Rigby Holdings Pty Ltd. v. Lindsay Bennelong Dev. Pty Ltd.* [2010] NSWSC 777 ¶ 8 ("[P]laintiff provided two advance payment bonds in the form of an unconditional bank guarantee."); *ALYK (H.K.) Ltd. v. Caprock Commodities Trading Pty Ltd. and Anor* [2012] NSWSC 1558 ¶ 79 ("Express statements in bank guarantees, bank undertakings and letters of credit that they are "unconditional", should not be qualified by implied conditions in those instruments."); *Best Tech & Eng'g Ltd. v. Samsung C&T Corp. [No.2]* [2015] WASC 447 ¶ 20 ("[T]he unconditional nature of the bank's promise to pay on demand cannot be qualified by reference to the terms of the contract in relation to which the security is provided.").

three times before the court determined that it had met the negative stipulation in the underlying contract and that it had not acted unconscionably.[92] When viewed in light of international rules of practice and the commercial purposes of independent undertakings, this outcome is entirely unreasonable. One of the central purposes of independent undertakings is to allocate risk in the form of an agreement that determines which party will bear the costs during litigation concerning the underlying contract.[93] Earlier Australian precedent from the High Court of Australia acknowledged that adding conditions to independent undertakings "deprive[] them of the quality which gives them commercial currency" and that independent undertakings should be treated like the equivalent to cash, so long as the call upon the guarantee is not fraudulent.[94] However, the recent precedent has rendered this longstanding truism mute and greatly undermines the commercial practicability of independent undertakings in Australia going forward.

B. Alternative Procedures: The Use of Traditional Suretyship Undertakings or Ancillary Agreements

It seems clear that one of the reasons that Australian courts have so readily abandoned the independence principle is that parties have entered into facially independent undertakings while intending that the guarantee actually be dependent on a negative stipulation or condition in the underlying contract. The *Kell & Rigby* case illustrates this situation, as the applicant provided two advance payment bonds in the form of unconditional bank guarantees because the beneficiary had advanced a portion of the underlying contract price to the applicant.[95] Although advanced payment bonds can be independent undertakings,[96] it's unclear in this case if the parties intended them to be independent, given that the beneficiary only "faintly pressed" its right to call upon the guarantee unconditionally.[97] Moreover, clause 42A.4(d)(iii) of the underlying contract notes that if the advance payment bond is not paid on or before certain project dates, the outstanding balance will become a debt due and payable by the contractor (applicant) to the principal (beneficiary).[98] This language more closely mirrors a relationship associated with a dependent undertaking, such as a suretyship bond rather than an independent undertaking.[99] Thus, although the court in *Kell & Rigby* undoubtedly erred in ignoring the unconditional nature of the guarantee, the parties may also be partially at fault for the confusion. In situations such as the one described above, it may better suit the parties to enter into

92. *See Best Tech & Engineering Ltd v. Samsung C&T Corporation [No. 1]* [2015] WASC 355 ¶ 28 (issuing temporary injunction enjoining beneficiary from calling upon guarantee); *Best Tech & Eng'g Ltd. v. Samsung C&T Corp. [No.2]* [2015] WASC 447 ¶ 61 (issuing interim injunction pending beneficiary's compliance with negative stipulation); *Best Tech & Engineering Ltd v. Samsung C&T Corporation [No. 3]* [2015] WASC 459 ¶ 36 (holding that the beneficiary's subsequent call upon the guarantee was not unconscionable).

93. *See* Dolan, *supra* note 6, at 7.

94. *Wood Hall Ltd v. Pipeline Authority* [1979] 141 CLR 443, 445, 457.

95. *Kell & Rigby Holdings Pty Ltd. v. Lindsay Bennelong Dev. Pty Ltd.* [2010] NSWSC 777 ¶¶ 6–8.

96. *See* JAMES E. BYRNE, STANDBY AND DEMAND GUARANTEE PRACTICE: UNDERSTANDING UCP600, ISP98 & URDG 758 12 (Spencer R. Nelson & Peter Traisak eds., 2014) ("[T]he name bond has been applied in some situations to undertakings that are independent for . . . Advance Payment Bonds.").

97. *Kell & Rigby Holdings Pty Ltd. v. Lindsay Bennelong Dev. Pty Ltd.* [2010] NSWSC 777 ¶ 25.

98. *Id.* at ¶ 10.

99. BYRNE, *supra* note 96, at 12.

a dependent undertaking in the form of a traditional surety bond, where the obligation to pay would arise if the performing party failed to meet its obligations in the underlying contract.[100] In that case, such a dependent undertaking would probably better represent the intentions of the parties and prevent the muddling of independent undertaking law.

One other option for parties who wish to condition calling upon a guarantee on a negative stipulation would be an ancillary agreement separate from the underlying transaction, which would provide the terms for when the guarantee could be called upon. An attempt at this occurred in the *Sulzer Pumps* case, where the parties allegedly reached an agreement whereby the beneficiary agreed not to call upon the unconditional performance guarantee prior to finalization of arbitration proceedings.[101] As that case's confusing holding illustrates, the use of any ancillary agreement without *explicitly amending* the independent guarantee is highly problematic and the use of ancillary agreements is not advisable in most circumstances involving independent undertakings because it naturally undermines the independence of the credit.[102] However, if circumstances necessitate the use of an ancillary agreement, parallel construction between the ancillary agreement and the amendments to the independent undertaking are of the utmost importance to ensure the guarantee will operate as intended.[103]

C. An Alternative to the Australian Courts' "Whole Contract Doctrine"

The case law to date indicates that Australian courts' will look to underlying contracts related to independent undertakings with little regard for the independence principle, international rules of practice, and explicit unconditional language. Given the state of the Australian law in this area currently, it's important to think practically about alternative readings that don't solely rely on the age-old independence principle. Therefore, this article offers an alternative approach to the Australian courts' "whole contract doctrine": It argues that negative stipulations in the underlying contract concerning when an independent undertaking may be drawn upon should be superseded by any language in the credit that references an "irrevocable" or "unconditional" right to call upon the independent undertaking. To be sure, this proposed regime is not strictly in compliance with international rules of practice. As this article has reiterated, no rules of practice encourage judges or banks to look to the underlying contract for any reason when the dispute concerns an independent undertaking.[104] However, given how far afield Australia's regime has gone, an alternative to the whole contract doctrine is needed. The *Clough* case demonstrates a similar line of thinking in some respects because the court did resolve the issue in favor of the LC, albeit while still analyzing whether the underlying contract contained any pertinent negative stipulations, despite the fact the independent undertaking was unconditional.[105]

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100. *See Right of Surety To Subrogation Against Third Party*, 17 WASH. & LEE L. REV. 112, 113–14 (1960).

101. *Sulzer Pumps (S. Afr.) (Proprietary) Ltd. v. Covec-MC Joint Venture* [2014] ZAGPPHC 695 ¶ 9 (S. Afr.).

102. *See supra* Section (II)(B)(5).

103. *See Sulzer Pumps (S. Afr.) (Proprietary) Ltd. v. Covec-MC Joint Venture* [2014] ZAGPPHC 695 ¶¶ 48–49 (S. Afr.) (finding that beneficiary's counsel had inserted entitlements to immediately demand payment under the guarantee that had not been included in a previous extension of the guarantee.).

104. *See supra* Section (III)(A).

105. *See supra* Section (II)(B)(1).

D. Commercial Consequences of the Negative Stipulation Doctrine

Setting aside the legal analysis on the failings of the negative stipulation doctrine, it is important to note that the current Australian precedent could mean significant commercial consequences for parties looking to utilize independent undertakings. First, given the uncertainty surrounding whether beneficiaries will be able to draw on independent undertakings in the event negative stipulations exist in the underlying contract, its likely transaction costs to enter into independent undertakings will increase. Independent undertakings always have transaction costs but the potential for misallocation of risk under Australian case law could lead to higher costs.[106] For example, issuers could increase the fees charged to applicants if they believe they could be put in uncertain situations in disputes over negative stipulations in the underlying contract. Beneficiaries may drive harder bargains if they believe that any dispute that might lead them to call upon an independent undertaking will lead them to litigating underlying contractual disputes that are intended to be resolved in arbitration. Perhaps most importantly from a macroeconomic perspective, these increased costs could hinder or prevent net beneficial transactions from taking place because of concerns about risk allocation.

Moreover, if the Australian regime concerning negative stipulations continues down its current path, parties may be forced to turn to more costly forms of risk allocation that could hurt less creditworthy businesses. For instance, beneficiaries may find that independent undertakings are no longer as good as cash and thus force applicants to set aside percentages of contracts in interest-bearing escrow accounts. International companies doing business in Australia may undertake wholesale review of credits in their benefit to determine whether they need to take more protective measures. Finally, it's possible that parties may attempt to develop another form of independent undertaking in an attempt to avoid the negative stipulation doctrine. Although unlikely, a new form of independent undertaking would have immense consequences and costs and would not yet have international rules of practice governing its use.

E. Concerns for Beneficiaries

Given the current state of the negative stipulation doctrine, beneficiaries holding independent undertakings subject to Australian law certainly will have many concerns going forward. First, the uncertain standards by which courts may imply a negative stipulation that could prevent a beneficiary from calling upon an independent undertaking are sure to trouble beneficiaries generally. The *ALYK* case laid out an ambiguous five-part test for implying negative stipulations that is ripe for judicial overreach.[107] While express negative stipulations present uncertainty in their own right, implied negative stipulations can be conjured up with no express language to give a contract "business efficacy" in the eyes of the court when the parties have already negotiated the risk allocation they desire. Second, the notion expressed in *Kell & Rigby* which stated that a right to call upon an independent undertaking was "asserted" and not established" puts beneficiaries in a very risky position and further undermines the unconditional nature of inde-

106. *See* Dolan, *supra* note 6, at 7.

107. *ALYK (H.K.) Ltd. v. Caprock Commodities Trading Pty Ltd. and Anor* [2012] NSWSC 1558 ¶ 112. *See supra* Section (II)(B)(4).

pendent undertakings.[108] The very point of independent undertakings is that nothing outside of what is required in the documentary credit is necessary to call upon it. Although this paper has discussed the underlying issues surrounding the *Kell & Rigby* case,[109] asking that beneficiaries assert a right to call upon an independent undertaking when they have an established right to call upon it at any time is certainly cause for concern. Finally, the mixing of the unconscionability exception and the negative stipulation doctrine is also quite distressing.[110]

F. Potential Solutions for Beneficiaries

Although the state of beneficiary rights under the negative stipulation doctrine in Australia is uncertain, there are steps beneficiaries can take to protect themselves under this developing regime. *Clough* offers a blue print for beneficiaries to ensure that Australian courts applying the negative stipulation doctrine don't find reason to enjoin a call upon an independent undertaking. The inclusion of the phrase "notwithstanding any dispute(s) pending" in clause 2 of the performance guarantee helped demonstrate that the beneficiary had contracted to allocate risk in the event of any dispute, regardless of whether the applicant had failed to honor any of the commitments in the underlying contract.[111] Further, even when clause 3.3.3 of the underlying contract was implicated by the court, the court found that there was no way to read "on breach of contract" to mean that an actual breach was necessary for the beneficiary to exercise its rights under the standby LC.[112] This situation demonstrates the desired outcome for beneficiaries and should be mimicked. It allows the independent undertaking to remain divorced from the underlying contract despite the negative stipulation doctrine's "whole contract" approach. It's also important to note that the independent undertaking in *Clough* was subject to the UCP600's predecessor (UCP500), helping to solidify its independence.

Other more general solutions are also options for beneficiaries. For instance, the language in *Clough* and dicta in other cases suggests that explicit reference to the independent undertaking as a risk allocation mechanism in the underlying contract could help establish independence as the Australian courts apply the negative stipulation doctrine. Another more obvious solution is to make sure that independent undertakings reference international rules of practice. As mentioned previously, because of the Australian courts' focus on analyzing underlying contracts, it's unclear in many cases as to which rules of practice parties have chosen, if any.[113] Finally, the option of last resort for beneficiaries would be to explicitly opt out of Australian law as it relates independent undertakings. Although this sounds promising and could work in certain instances, it's not likely a practicable solution for most beneficiaries.

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108. *Kell & Rigby Holdings Pty Ltd. v. Lindsay Bennelong Dev. Pty Ltd.* [2010] NSWSC 777 ¶ 29.

109. *See supra* Section (II)(B)(3).

110. *See supra* Section (II)(B)(5).

111. *Clough Eng'g Ltd. v. Oil & Nat. Gas Corp. Ltd.* [2008] FCAFC 136 ¶¶ 93–96.

112. *Id.*

113. *See supra* Section (II)(C).

IV. Conclusion

Independent undertakings in the form of LC's, standbys, and demand guarantees have long facilitated international trade and commercial dealings and a solidified third exception to the independence principle in one jurisdiction will not change that. Yet, the recognition of the negative stipulation doctrine in Australia represents perhaps the most dramatic departure from the independence principle by a well-developed nation-state fully engaged in international commerce. Any other additional avenues for enjoining draws on independent undertakings naturally weaken their commercial practicality. The review of case law in this article demonstrates how hard beneficiaries may have to work in order to call upon their LC's, Standby LC's, and demand guarantees in the future. On the other hand, this article aims to not only help explain the negative stipulation doctrine but also provide analysis on how to find solutions to its pitfalls. The hope is that this article can serve as primer for anyone facing a negative stipulation issue in Australia, as the number of cases in this area may only increase. One thing is certain, the independence principle is on the decline in Australia, the negative stipulation doctrine is at its apex, and beneficiaries must be prepared for what comes next.

Patently Obvious: Why the United Kingdom's Participation in the Unified Patent Court & the Unitary Patent in a Post-Brexit Regime Will be Beneficial for UK Citizens

Erin P. Seery[1]

I. Introduction

"The results are in: the citizens of Texas have voted to leave the United States."[2] A Texan succession from the United States, or "Texit," would surely be a shock to the American public, as it stands among the top ten states, economically.[3] Although unrealistic, it is quite possible to imagine "Texit" in light of Texas' own independence, traditions, and history. Texas has continuously experienced an influx of immigrants looking for new opportunities, which arguably may be causing a sense of dilution of the Texan culture. Weary of the federal government's failure to respect Texas's laws and wishes regarding immigration, jobs, and state sovereignty, it is conceivable that Texas could declare its exit from the United States. While Texas has not voted to secede from the United States, this imagined scenario is strikingly similar to the United Kingdom's 2016 referendum to leave the European Union (EU).

Since the 1950s, Europe has endeavored to change the way of the world and the means by which states interact with each other. Tired of fighting high-mortality wars, the war-torn countries of Europe set out to unite in order to form a "more perfect union," not to be confused with the United States. The creation of the EU led to the creation of a single market, the free movement of goods, services, capital, and people, and lenient borders that allow all EU citizens to freely cross into other member states. While all these benefits have been sticking points for encouraging European countries to join the EU, some of them have dissuaded the United Kingdom (UK) from continuing its membership in the "picture-perfect" union.

In a nationwide referendum held on June 23, 2016, a majority of the citizens of the UK, including England, Northern Ireland, Scotland, and Wales, voted to leave the EU.[4] The desired exit from the EU became popularly known as "Brexit." While the UK once fancied being part of a single market, today, its citizens have become concerned with the nation's sovereignty and the increasing number of migrants that have entered the country due to the development and rapid growth of the refugee crisis. While these may be valid concerns and reasons for the UK to leave the EU, did its British, Scottish, Welsh, and Irish citizens consider how Brexit will impact other sects of the government, economy, and society? Whether or not they contemplated such an

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2. Zack Beauchamp, *Brexit, explained by an analogy to Texas leaving the United States*, VOX (June 24, 2016, 11:26 AM), https://www.vox.com/2016/6/24/12023670/brexit-results-referendum-america.

3. *Economy Rankings: Measuring states' economic stability and potential*, U.S. NEWS & WORLD REP., https://www.usnews.com/news/best-states/rankings/economy (last visited Mar. 4, 2018).

4. *EU Referendum Results*, BBC NEWS, http://www.bbc.com/news/politics/eu_referendum/results (last visited Mar. 4, 2018).

effect, there is no turning back since UK Prime Minister (PM), Theresa May, began the Brexit process by invoking Article 50, as will be discussed below. Since the UK is on its way to once again being an independent country, this paper asserts that the UK government should take certain steps to ensuring participation in certain agreements and regimes that will advance the interests of not only the government, but, more importantly, its citizens; this Note specifically concerns post-Brexit UK's participation in the Unified Patent Court and the Unitary Patent.

Intellectual property laws are a crucial part of today's society because they promote the arts and sciences that society enjoys and foster growth in the economies around the world. While all forms of intellectual property play a vital role in our everyday lives, this Note discusses patent protection, specifically in the EU and the UK, post-Brexit. This Note emphasizes that the UK should remain part of the Unified Patent Court (UPC) after it leaves the EU, and furthermore, allow its citizens to take part in the Unitary Patent. There are numerous agreements that contribute to intellectual property within the EU, however, the main focus of this Note is the Agreement on a Unified Patent Court ("UPC Agreement"). The UPC Agreement, an international agreement, provides for a unified court system, i.e., the UPC, to resolve a designated set of patent disputes throughout the EU's member states.[5] Under the current system, there are many ways by which an individual or entity may obtain patent protection within the EU. However, the Unitary Patent, when in effect, will revolutionize patent protection by creating a uniform system for patent protection throughout the EU by allowing patentees to receive the same protection in each EU member state, rather than protection subject to the varying laws of each state.

Part II of this Note discusses the background of the EU, the UK, and Brexit, including the development of the EU and the UK's motivation for leaving the EU. Part III examines intellectual property in the EU, the various regimes that make up the intellectual property system within the EU, and the future of intellectual property in the EU post-Brexit. Part IV considers the implications of Brexit on intellectual property within the EU as well as its effect on intellectual property within post-Brexit UK. Finally, this Note argues that post-Brexit UK should remain part of the UPC and allow its citizens to participate in the Unitary Patent; pros and cons are discussed and its benefits offered as justifications for why the UK should act accordingly.

II. Background

A. The European Union

The EU, an economic and political alliance of twenty-eight European states,[6] was organized with the intent of ending the gruesome fighting between neighboring countries in

5. Arnold, R., Bently, L. Derclaye, E., & Dinwoodie, G., *The Legal Consequences of Brexit through the Lens of IP Law*, 101 JUDICATURE 1 (Feb. 17, 2017). *See generally*, Agreement on a Unified Patent Court, [2013] 56 OFFICIAL JOURNAL OF THE EUROPEAN UNION O.J./C/175/01 [hereinafter "UPC Agreement"].

6. Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom. *See The 28 Member Countries of the EU by Alphabetical Order*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/countries_en (last visited Mar. 17, 2018).

Europe. To become a member, the applying country must meet the Copenhagen criteria as set forth in the Treaty on European Union.[7] The Copenhagen criteria requires a country to have: (a) stable institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities, (b) a functioning market economy and the capacity to cope with competition and market forces in the EU, and (c) the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union.[8] States accede to the EU by becoming parties to its founding treaties,[9] thereby subjecting themselves to the privileges and obligations of EU membership, including submission to the jurisdiction of the European Court of Justice (CJEU).[10]

In 1957, Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands signed the Treaty of Rome,[11] which created the European Economic Community ("Community"), also known as the Common Market.[12] The Treaty of Rome proposed to create a single market for the movement goods, services, people, and capital throughout the member states of the Community.[13] In 1973, the EU expanded to embrace Denmark, the UK, and Ireland.[14] Over the next fifteen years, the Community enlarged to include Greece, Portugal, and Spain.[15] In

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7. Consolidated Version of the Treaty on European Union, [2002] C/ 326/ 13 (establishing the Copenhagen criteria) [hereinafter "Treaty on European Union," or "TEU"].

8. *Id.*; *European Neighborhood Policy and Enlargement Negotiations: Conditions for Membership*, European Commission (Mar. 15, 2015), https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership_en; Eur. Parl. Ass., *Presidency Conclusions*, Copenhagen European Council, (June 21-22, 1993) (stating "membership requires that candidate country has achieved stability of institutions guaranteeing democracy, the rule of law [of the EU], human rights, respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidates' ability to take on the obligations of membership including adherence to the aims of political, economic, and monetary union.").

9. The relevant founding treaties of the EU are the Treaty on European Union (TEU) (originally the Maastricht Treaty, signed in 1992), establishing the EU, and The Treaty of Rome (subsequently, the Treaty establishing the European Economic Community), signed in 1957, establishing the European Economic Community. The Treaty of Rome was renamed the Treaty on the Functioning of the European Union ("TFEU") after the Treaty of Lisbon, a series of amendments to the founding treaties of the EU, entered into force in 2007, *infra* note 101; *see EU law and related documents, Founding treaties*, http://eur-lex.europa.eu/collection/eu-law/treaties/treaties-founding.html; *see also Treaty of Lisbon: Introduction*, http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:ai0033&rid=1 (stating, the Treaty of Lisbon reforms the EU institutions and improves the EU decision-making process; strengthens the democratic dimension of the EU; reforms the internal policies of the EU; strengthens the external; policies of the EU.).

10. *European Neighborhood Policy and Enlargement Negotiations: Conditions for Membership*, European Commission (Mar. 15, 2015). The founding treaties of the EU are a set of international treaties between the EU member states which set out the EU's constitutional basis and laws. *See EU law and related documents, Founding treaties*, *supra* note 9. These treaties establish various EU institutions, as well as their procedures and objectives. *Id.* The EU can only act within the competences granted to it through these treaties. *Id.*

11. *About the EU: The history of the European Union*, https://europa.eu/european-union/about-eu/history_en.

12. Rome Treaty, art. I, Mar. 25, 1957, 298 U.N.T.S. 1.

13. *Id.* at art. 3(a), (c).

14. *See The 28 Member Countries of the EU by Year of Entry*, EUROPA.EU, https://europa.eu/european-union/about-eu/countries_en#tab-0-1.

15. *Id.*

1985, the Schengen Agreement[16] was signed, allowing for the gradual removal of internal border controls and the introduction of the freedom of movement for all nationals of a majority of the signatory countries,[17] as well as several non-member states.[18] In 1986, the EU member states signed and enacted the Single European Act, which created the EU's Single Market.[19] In 1992, the Single Market was completed with the signing of the Maastricht Treaty, establishing the four freedoms, i.e., the movement of goods, services, money, and people.[20] The four freedoms, which aim to remove trade barriers and harmonize national laws at the EU level, lie at the heart of the EU and secure the single market. The free movement of goods eliminates customs duties and other trade barriers so that goods can move freely across borders as if they are within national borders.[21] The free movement of services allows EU companies to establish and provide services in other EU member states.[22] Free movement of capital bans restrictions on capital movements and payments between member states as well as between member states and third countries.[23] Finally, the most controversial of the four freedoms, the free movement of people, provides EU migrants the right to live and work in any EU member state.[24]

The Maastricht Treaty, formally known as the Treaty on European Union (TEU), transformed the EU from an economically oriented project to a politically oriented project; it subsequently led to the creation of a single European currency: the euro.[25] In 2002, the euro bank notes and coins replaced the currency of twelve of the original EU member states.[26] Today, the

16. *See generally* Agreement between Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Schengen Agreement, June 14, 1985, 2000 O.J. (L 239) 13 [hereinafter "Schengen Agreement"].

17. *The Schengen Area*, European Commission (Dec. 12, 2012), http://biblio.ucv.ro/bib_web/bib_pdf/EU_books/0056.pdf (the EU member states that allow EU citizens to cross internal borders without being subjected to border checks are Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, and Sweden).

18. *Id.* (stating that the non-EU member states that allow EU citizens to cross internal borders without being subjected to border checks are Iceland, Norway, Switzerland, and Liechtenstein).

19. The Single European Act art. 13, Feb. 1, 1986, (L 169) 1, 7, http://eur-lex.europa.eu/resource.html?uri=cellar:a519205f-924a-4978-96a2-b9af8a598b85.0004.02/DOC_1&format=PDF. As the first major revision to the 1957 Treaty of Rome, the Single European Act set an objective of establishing a single market in the EU by December 31, 1992 after entering into force on July 1, 1987. *Id.*

20. Treaty on European Union art. 3, *supra* note 7, at 17.

21. *Single Market, Four Freedoms, Sixteen Facts*, KOMMERSKOLLEGIUM NATIONAL BOARD OF TRADE, (May 2015), https://www.kommers.se/Documents/dokumentarkiv/publikationer/2015/Publ-single-market-4-freedoms-16-facts.pdf. The principle of the free movement of goods was established by the Treaty of Rome in 1957. *Id.*

22. *Id.* at 6. The principle of the free movement of services was established in 1957 by the Treaty of Rome. *Id.*

23. *Id.* at 10. The principle of free movement of capital was established by the Treaty of Rome in 1957 and reinforced by the Treaty of Maastricht, which established that all restrictions on the movement of capital are prohibited across the single market. *Id.*

24. *Id.* at 12. The principle of free movement of persons was established in 1957 by the Treaty of Rome. *Id.* In 1993, the Maastricht Treaty established EU citizenship, granting EU citizens the right to reside in any EU member state. *Id.*

25. Treaty on European Union, *supra* note 7.

26. European Commission, *The History of the Euro*, https://ec.europa.eu/info/about-european-union/euro/history-euro/history-euro_en. The euro coins and banknotes were launched on Jan. 1, 2002, and the biggest cash changeover in history took place in twelve EU countries (i.e., Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain). *Id.*

euro is the second largest reserve currency in the world, as it is the currency of nineteen EU member states.[27] The EU experienced its largest addition in 2004 when ten countries joined,[28] seven of which have since adopted the euro as their form of currency.[29] Since the early 2010s, the EU has been tested by several issues including debt crises in certain EU countries and increased refugee migration from the Middle East into EU member states. The most relevant EU controversy for purposes of this note is the UK's decision to leave the EU.

B. The United Kingdom, the EU, and Brexit

The UK became a member of the EU on January 1, 1973.[30] Since October 2015, groups within the UK's Independence Party (e.g., Leave.EU and Grassroots Out),[31] the Conservative Party (e.g., Vote Leave),[32] and the Labour Party (e.g., Labour Leave)[33] have campaigned for the UK to leave the EU. Proponents for leaving the EU argue that the UK is constricted by the EU and its laws because of the EU's imposition of countless rules on businesses and high membership fees (i.e., billions of pounds per year) for few benefits in return.[34] More important, this Note focuses on Brexit advocates in support of the UK's sovereignty and democracy as reasons for becoming independent from the EU.[35] Consequently, supporters of Brexit no longer wish to be subject to the jurisdiction of the CJEU or to be bound by its legislation.[36] Moreover, the foremost reasons why most citizens voted in favor of Brexit were: (1) the principle that deci-

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27. *Id*. *See* European Commission, *What is the Euro area?*, https://ec.europa.eu/info/business-economy-euro/euro-area/what-euro-area_en.

28. Elitsa Vucheva, *EU still 'digesting' 2004 enlargement five years on*, EU OBSERVER (May 1, 2009), https://euobserver.com/enlargement/28049 (stating the ten new member states in 2004 were Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia).

29. European Commission, *EU Countries and the Euro*, https://ec.europa.eu/info/business-economy-euro/euro-area/euro/eu-countries-and-euro_en (Slovenia in 2007; Cyprus and Malta in 2008; Slovakia in 2009, Estonia in 2011, Latvia in 2014; and Lithuania in 2015).

30. European Commission, *EU Member Countries in Brief: United Kingdom*, https://europa.eu/european-union/about-eu/countries/member-countries_en.

31. Leave.EU, launched in September 2015, and Grassroots Out, formed in Jan. 2016, both campaigned for a leave vote in the Brexit referendum. Leave.EU was endorsed Nigel Farage and was run by entrepreneurs and businessmen rather than politicians. *See EU-exit campaign group 'Grassroots Out' is launched*, BBC NEWS (Jan. 23, 2016); *see generally* http://leave.eu.

32. Vote Leave was created in October 2015 and became the lead organization campaigning for a leave vote in the Brexit referendum. On Apr. 13, 2016, Vote Leave was designated by the Electoral Commission as the official campaign in favor of leaving the EU for the United Kingdom referendum on European Union membership. Jon Stone, *Vote Leave designated as official EU referendum Out campaign*, THE INDEPENDENT (Apr. 13, 2016). Vote Leave is supported by MPs such as Gisela Stuart, a Labour MP, and Michael Gove, as well as politician Boris Johnson, a key figurehead for the group. *See generally* http://www.voteleavetakecontrol.org/index.html.

33. Labour Leave campaigned with the UK's Labour Party for the UK to leave the EU. The group is led by Chair, John Mills, and MPs Kate Hoey, and Frank Field. *See generally* http://www.labourleave.org.uk.

34. Alex Hunt & Brian Wheeler, *Brexit: All you need to know about the UK leaving the EU*, BBC NEWS (Mar. 4, 2018).

35. *Id*.

36. *See* The European Union, *Court of Justice of the EU*. The CJEU, established in 1952, ensure that Union law is interpreted and applied the same way in every EU country and that EU institutions abide by EU law such as giving preliminary rulings to national courts that are in doubt about the interpretation or validity of an EU law, enforces the law through infringement proceedings, and sanctions EU institutions through actions for damages for harming EU citizens or companies. *Id.*

sions concerning the UK should be taken in the UK[37] (2) that voting to leave offered the best chance for the UK to regain control over immigration and its own borders,[38] and (3) because remaining meant the UK would have little or no choice about how the EU expanded its membership or powers.[39] Subsequent to the vote in favor of Brexit, Theresa May vowed to take back control of the UK's sovereignty, to make UK law supreme over the CJEU, and to take back full control of its borders, in turn reducing the number of non-citizens entering the country.[40] Despite its various reasons, the UK's desire to leave the EU stems from the underlying principle that the UK's citizens no longer wish to be subject to and bound by the laws and jurisdiction of the EU and CJEU, respectively.[41]

On June 23, 2016, the UK held a referendum to decide whether the UK should leave the EU or remain part of the political and economic alliance.[42] More than thirty million UK citizens voted, and over seventeen million citizens (51.9%) voted in favor of leaving the EU.[43]

In 2007, after the signing of the Treaty of Lisbon,[44] the TEU granted EU member states, for the first time, the explicit legal right to depart from the EU and provided the procedure for doing so.[45] A state that wishes to leave the EU must first notify the European Council before it may terminate its membership; thereafter, Article 50 of the TEU[46] must be invoked. Article 50 gives the withdrawing state and the EU two years to negotiate the terms of the breakup.[47] The relevant sections of TEU Article 50 provide:

> 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

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37. *How the United Kingdom voted on Thursday…and why*, LORD ASHCROFT POLLS (June 24, 2016), https://lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why/ (last visited Mar. 21, 2018). Nearly 49% of voters voted to leave the EU based on sovereignty. *Id.*

38. *Id*. (stating "[o]ne third of leave voters (33%) cited the main reason as leave offering the best chance for the UK to regain control over immigration and its own borders").

39. *Id.* About one eighth of leave voters (13%) voted in favor of leaving for this reason.

40. *See Theresa May's Brexit speech in full: Prime Minister outlines her 12 objectives for negotiations*, INDEPENDENT (Jan. 17, 2017), https://www.independent.co.uk/news/uk/home-news/full-text-theresa-may-brexit-speech-global-britain-eu-european-union-latest-a7531361.html (last visited Mar. 29, 2018); *see also* Charlie Moore, *'I will solve the migrant crisis': New PM Theresa May vows to bring back control of British Borders and end free movement for EU citizens*, DAILY MAIL (Jul. 12, 2016)., http://www.dailymail.co.uk/news/article-3687520/I-solve-migrant-crisis-New-PM-Theresa-vows-bring-control-British-borders-end-free-movement-EU-citizens.html (last visited Mar. 29, 2018).

41. *Theresa May's Brexit speech in full: Prime Minister outlines her 12 objectives for negotiations*, *supra* note 40.

42. Hunt & Wheeler, *supra* note 34.

43. *See* EU Referendum Results, The Electoral Commission, http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information. *See also* EU Referendum Results, *supra* note 4.

44. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec 13, 2007, 2007 O.J. (C 306) 1 [hereinafter "Treaty of Lisbon"].

45. TEU, *supra* note 7, at art. 50.

46. *Id*.

47. *Id.* at 50(3).

> 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union . . .
>
> 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period . . . .[48]

Since the TEU fails to explicitly mention the British Parliament, it is important to understand how exactly the British government has the authority to trigger Article 50. Article 50(1) states that an EU member state may withdraw in accordance with its own constitutional requirements.[49] The UK government proposed that it was allowed to use its prerogative powers to withdraw from the EU by serving the European Council with Notice of its intent to do so;[50] however, the Supreme Court of the UK begs to differ.[51]

On January 24, 2017, in reading the judgment for *R (Miller) v. Secretary of State for Exiting the European Union*,[52] the Supreme Court of the United Kingdom President Lord Neuberger stated: "By a majority of eight to three, the Supreme Court today rules that the government cannot trigger Article 50 without an act of Parliament authorising it to do so."[53] The Supreme Court judgment held that an act of Parliament is required to authorize ministers to give notice of the decision of the UK to withdraw from the European Union.[54] While the reasoning for the Supreme Court's decision is important for Brexit, the particularly lengthy, complex discussion it requires is not necessary for this Note; consequently, it is briefly described below.

The European Communities Act 1972 gave domestic effect to UK obligations under EU treaties and set forth the process by which EU law effectively becomes a source of UK law and takes precedence over UK law.[55] Withdrawal from the EU will result in a fundamental change in the UK's constitutional arrangements to the extent that UK domestic laws and EU laws differ.[56] Thus, such a fundamental change will be the inevitable result if the UK government serves

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48. *Id.* at art. 50.
49. *Id.* at 50(1).
50. R (Miller) v. Secretary of State for Exiting the European Union (2017) UKSC 5, 5 para. 5, (Jan. 24, 2017) https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf.
51. *Id.* at 40 para. 122.
52. *See* R (Miller) v. Secretary of State for Exiting the European Union, *supra* note 50.
53. *Brexit: Supreme Court says Parliament must give Article 50 go-ahead*, BBC NEWS (Jan. 24, 2017), http://www.bbc.com/news/uk-politics-38720320.
54. R (Miller) v. Secretary of State for Exiting the European Union, *supra* note 50 at 34–35, para. 101, 104–05; 39–40, para. 121–24.
55. *Id.* at 20–21, para. 60.
56. *Id.* at 26–27, para. 78–80.

notice of its intent to withdraw on the European Council.[57] Moreover, the UK Constitution requires such fundamental changes to be affected by Parliamentary legislation.[58] Therefore, although a majority of the country's citizens wish to leave the jurisdiction of the EU, the British Parliament must first invoke Article 50 of the TEU, before the UK may officially leave the EU.[59]

On February 1, 2017, the House of Commons formally authorized Prime Minister Theresa May to trigger Article 50 and begin the Brexit process.[60] On March 29, 2017, PM May notified President Donald Tusk of the European Council of her decision to invoke Article 50,[61] meaning that the UK will effectively leave the EU by March 2019, unless the parties otherwise agree to extend the negotiation process.[62] Until the withdrawal process is complete, the UK will remain a member of the EU and will continue to be subject to its jurisdiction and treaties.[63] After the terms of Brexit have been negotiated, the treaties of the EU will cease to apply to the UK.[64] In furtherance of the withdrawal process, PM May has promised a Great Repeal Bill, which passed its second reading in the British Parliament on September 11, 2017; upon its entry into force on the effective date of the UK's withdrawal from the EU, it will end power of the CJEU in the UK, as well as the Union's legal supremacy in the UK by converting about 12,000 pieces of EU law into British constitutional law.[65] The Bill will allow the British government to decide which EU laws it desires to keep, change, or remove.[66] Additionally, as of now, there is a great deal of uncertainty as to what will happen in the weeks, months, and years to come; however, this paper predicts that, since Prime Minister May has triggered Article 50, the UK will ultimately leave the jurisdiction and single market of the EU and be governed by its own laws.

III. Intellectual Property in the European Union

Intellectual property refers to creations of the mind, such as inventions, literary and artistic works, designs, and symbols used in commerce, created by an individual or entity, which gives the individual or entity an advantage over the general public by providing recognition or

57. *Id.* at 27–28, para. 81.

58. *Id.* at 28, para. 82.

59. TEU, *supra* note 7, at art. 50.

60. Angela Dewan, *House of Commons OKs Brexit bill*, CNN (Feb. 8, 2017), https://www.cnn.com/2017/02/08/europe/brexit-bill-parliament-vote-article-50/index.html.

61. *The Prime Minister's letter to President Tusk,* BBC (March 29, 2017), p. 1, http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/29_03_17_article50.pdf.

62. TEU, *supra* note 7, at art. 50(3).

63. *Id.*; *The Legal Consequences of Brexit through the Lens of IP Law*, *supra* note 5 at 1.

64. *Id.*

65. *EU Withdrawal Bill (Repeal Bill)*, INST. FOR GOV. (Oct. 30, 2017), https://www.instituteforgovernment.org.uk/explainers/repeal-bill; *EU Withdrawal Bill: A guide to the Brexit repeal legislation*, BBC NEWS (Nov. 13, 2017), http://www.bbc.com/news/uk-politics-39266723; *What is the EU Withdrawal Bill? The only explanation you need to read*, THE TELEGRAPH POLITICS (Feb. 12, 2018), https://www.telegraph.co.uk/politics/0/eu-withdrawal-bill-explanation-need-read/.

66. *Id.*

financial benefits for what they invent or create.[67] Depending on the type of intellectual property an individual has created, he or she may be eligible to receive protection for those creations by means of the Intellectual Property Rights set forth by the World Intellectual Property Organization (WIPO). There are three main types of intellectual property for which protection may be sought: patents, copyrights, and trademarks.[68]

Patents allow a patentee, i.e., the individual or entity holding the rights to the patent, to prevent third parties from making, using, or selling the invention for a specified period of up to 20 years.[69] Under WIPO,[70] patent protection is available for any inventions which are susceptible of industrial application, that are *new* and involve an *inventive* step.[71] A copyright informs others that an individual (as an author) intends to control the production, distribution, display, or performance of his or her work.[72] Under WIPO, copyright protection is available for books, music, films, software, etc.[73] Finally, trademarks protect the name of a company or product by preventing other businesses from using the mark or selling a product under the same mark.[74] Under WIPO, trademark protection is available for words, logos, devices, or other distinctive features (i.e., brands), provided they meet certain requirements.[75] While each form of intellectual property protection is as important as the next, this Note focuses on patent protection in the EU and the UK post-Brexit. At the most basic level, patentees may file for patent protection, subject to approval, in each state where protection is desired (i.e., national patents).

A. The Convention on the Grant of European Patents

The Convention on the Grant of European Patents (EPC),[76] signed in Munich, in 1973,[77] created a system of law, common to the contracting states, for the grant of European patents for inventions.[78] It empowers the European Patent Office (EPO) to grant bundles of national patents (i.e., a European patent) to patentees through a single application process,[79]

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67. What is Intellectual Property, WORLD INTELLECTUAL PROP. ORG., http://www.wipo.int/about-ip/en/ (last visited Mar. 12, 2018) [hereinafter "WIPO"].

68. *Id*.

69. WIPO: About IP, Patents (March 12, 2018), http://www.wipo.int/patents/en/.

70. WIPO currently has 191 member states including all 28 EU member states. *See* WIPO: Member States, http://www.wipo.int/members/en/.

71. Convention on the Grant of European Patents, art. 52(1), Oct. 5, 1973, 1065 U.N.T.S. 271 [hereinafter "EPC"]. The EPC is in force for Belgium, Federal Republic of Germany, France, Luxembourg, Netherlands, Switzerland and United Kingdom. Austria, Denmark, Finland, Greece, Northern Ireland, Italy, Lichtenstein, Monaco, Norway, Portugal, Sweden, Turkey and Yugoslavia are also parties to the agreement.

72. *See* Copyrights, WIPO, http://www.wipo.int/copyright/en/. (last accessed Mar. 21, 2018).

73. *Id.*

74. *See* Trademarks, WIPO, http://www.wipo.int/trademarks/en/ (last accessed Mar. 21, 2018).

75. *Id.*

76. EPC, *supra* note 71. The EPC is an international organization with thirty-eight member states and without any ties to the EU. *See* Thomas Jaeger, *Reset and Go: The Unitary Patent System Post-Brexit* 3 (Dec. 13, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2884671.

77. *See* Case C-1/09, Council of the European Union, 2011 E.C.R. I-1148.

78. EPC *supra* note 71, at art. 1, 2(1). A European patent is available to any natural or legal person. *Id.* at art. 58.

79. *Id.* art. 64(1).

rather than requiring patentees to file applications in each state where protection is desired. Under the EPC, the European patent shall have the same effect and be subject to the same conditions as a national patent granted by the state, unless otherwise provided.[80] For example, an Italian patentee who wishes to receive patent protection in Italy, Spain, the UK, and Germany may file one application with the EPO to receive protection in all four countries; however, even assuming the patentee's invention is granted protection in each of the countries, the patent will remain subject to each state's national laws, thus causing uncertainty as to whether the patent is valid or infringing on another patentee's rights, or what the outcome of a lawsuit might be. Thus, the patentee's invention will receive the same protection as it would if the patentee had filed separate applications in Italy, Spain, the UK, and Germany. The members of the EPC are a mixture of EU member states and non-member states because the EPC is an international treaty rather than solely an EU treaty.[81]

B. The European Patent Organization

The European Patent Organization ("Organization"), an intergovernmental organization created in 1977,[82] grants European patents under the EPC.[83] The Organization is comprised of two bodies: the European Patent Office and the Administrative Council.[84] The Organization currently has thirty-eight member states,[85] including both EU member and non-EU member states.[86] These non-EU member states are permitted to participate in the Organization because the Organization is not an EU entity, i.e., it is not legally bound to the EU.

1. The European Patent Office

The EPO is the executive body of the Organization.[87] Under the EPC, the EPO provides inventors with a uniform application procedure that allows them to seek patent protection in any member state of the Organization, which now includes up to forty-two states.[88] Such European patents are not EU Patents *per se*; rather, they are a bundle of national patents of the contracting member states. The bundle includes the individual states in which the patentee is seeking patent protection for his or her invention. Under the EPC, any infringement of a Euro-

80. *Id.* art. 2(2).

81. Richard Gordon & Tom Pascoe, *Re the Effect Of 'Brexit' on the Unitary Patent Regulation and the Unified Patent Court Agreement*, para. 2, 8, 14(c) (Sept. 12, 2016), http://www.eip.com/assets/downloads/gordon-and-pascoe-advice-upca-34448129-1-.pdf [hereinafter "Advisory Opinion"].

82. EPO: European Patent Office, https://www.epo.org/about-us/governance.html.

83. EPC, *supra* note 71, at art. 4(3); *EU Patent Court to remain in London despite Brexit…for now*, EPO (last visited Mar. 14, 2018).

84. EPO: European Patent Office, *supra* note 82.

85. EPO: List of Member States According to Date of Accession, https://www.epo.org/about-us/organisation/member-states/date.html.

86. *Id.* EPO members that are not EU members are Albania, Former Yugoslav Republic of Macedonia, Iceland, Lichtenstein, Monaco, Norway, San Marino, Serbia, Switzerland, and Turkey. *See The 28 Member Countries of the EU by Alphabetical Order*, *supra* note 6.

87. EPO: European Patent Office, *supra* note 82. The Administrative Council is the supervisory and legislative body of the Organization. *Id.*

88. *Id.* *See* EPC, *supra* note 71, at art. 64(1).

pean patent or other related claim is dealt with by the national law of the state where the claim is brought.[89] The European patent was created with the intention of allowing individuals and companies to apply for patents in multiple EU countries without the hassle of filing for national patents, i.e., filing in each country where patent protection is desired. A patentee seeking patent protection for his or her inventions can apply for a European patent through the EPO; however, before protection takes effect, European patents must be validated by each national patent office where the applicant seeks protection.[90]

C. The Future of Patents in the EU: The Unified Patent Court & the Unitary Patent

The Unified Patent Court ("UPC" or "Court") is an international court[91] comprising of members from twenty-six EU Member States;[92] however, it not an EU institution, meaning that the UK has elected to participate in the Court notwithstanding the its main reasons for Brexit, i.e., to regain sovereignty and control over its laws.[93] The UPC was designed to provide more efficient means by which patentees seeking patent protection in multiple countries can quickly litigate patent issues, as compared to litigating in each country where a claim has been brought. Each judgement rendered by technically qualified UPC judges will have effect throughout all member states at the time the judgment is issued.[94] Additionally, the Court will have the exclusive competence over disputes regarding both European patents and Unitary Patents,[95] which will be discussed in detail below. While European patents are governed by the laws of each separate nation and subject to a great deal of uncertainty, the implementation Unitary Patent is aimed at the idea of uniformity in patent protection. Consequently, a Unitary Patent filed in accordance with the UPC Agreement will receive uniform protection in all EU member states.

1. The Agreement on the Unified Patent Court

The Agreement on the Unified Patent Court ("UPC Agreement"), an international agreement providing for a unified court system to resolve a designated set of patent disputes throughout the EU's member states,[96] was completed in Brussels on February 19, 2013.[97] In furtherance

89. EPC, *supra* note 71, at art. 64(3).

90. *Id*. at art. 2(2).

91. The Unified Patent Court was established by an international treaty on Feb. 19, 2013. EPO: FAQ on the Unified Patent Court, https://www.epo.org/law-practice/unitary/upc/upc-faq.html (last updated Apr. 14, 2017) (Mar. 14, 2018).

92. *Id*.

93. *UK signals green light to Unified Patent Court Agreement*, UK.Gov (Nov. 28, 2016), https://www.gov.uk/government/news/uk-signals-green-light-to-unified-patent-court-agreement.

94. FAQ on the Unified Patent Court, *supra* note 91.

95. *Id*. "This exclusive competence is however subject to exceptions with regard to European patents: cases may still be brought before national courts, and proprietors of European patents may opt out from the UPC's exclusive competence during a transitional period of seven years." *Id*. For European patents and unitary patents, the UPC will replace national courts; however, patentees will still have the opportunity to file for national patents outside the jurisdiction of the UPC. Jaeger, *Reset and Go: The Unitary Patent System Post-Brexit*, *supra* note 76, at 11.

96. Advisory Opinion, *supra* note 81, para. 2. The UPC Agreement applies only EU member states. Jaeger, *Reset and Go: The Unitary Patent System Post-Brexit*, *supra* note 76, at 19. This will be discussed in more detail below.

97. The Unified Patent Court (Immunities and Privileges) Order 2018 No. 184, 2 (Feb. 8, 2018) [hereinafter "Immunities and Privileges Order"].

of this process, the UK Parliament passed a new Intellectual Property Act in May 2014, which authorized ratification and implementation of the UPC Agreement.[98] However, as previously mentioned, before the UPC Agreement can enter into force, it must be ratified by at least thirteen countries, including the three states in which the highest number of European patents were in force in the preceding year—currently Germany, France, and the UK.[99] Therefore, the UPC Agreement can only enter into force after it has been ratified by the UK.[100] PM Theresa May announced, on November 28, 2016, that the UK will ratify the UPC Agreement, regardless of Brexit, with the goal of bringing the UPC into operation as soon as possible.[101] More recently, Her Majesty and Her Majesty's Most Honourable Privy Council signed off on the Unified Patent Court (Immunities and Privileges) Order,[102] which was the final piece of secondary legislation required for the UK to ratify the UPC Agreement.[103] Thus, as of February 8, 2018, the UK is finally in a position to formally ratify the UPC Agreement when the time comes.[104] Commentators on the subject, such as Alan Johnson, believe it is quite possible that the UK will formally ratify the UPC Agreement in early April, 2018, which would make it the first mandatory country (under Art. 89 of the UPC Agreement) to complete the ratification process.[105]

The UPC Agreement specifies that the UPC must apply Union law in its entirety, respect its primacy, and cooperates with the CJEU to ensure its correct and uniform application.[106] The UPC must cooperate with the CJEU in properly interpreting Union law by relying on the latter's case law and by requesting preliminary rulings in accordance with Art. 267[107] of the Treaty on the Functioning of the European Union (TFEU).[108] Article 267 of the TFEU differentiates between the right and the duty of national courts to seek a preliminary ruling.[109] Under the discretionary reference in Article 267, a national "court or tribunal" *may* ask the

98. Alan Johnson, *UK Finally Ready for the Unified Patent Court*, KLUWER PATENT BLOG (Feb. 13, 2018), http://patentblog.kluweriplaw.com/2018/02/13/uk-finally-ready-for-the-upc/.

99. Unified Patent Court Agreement, art. 89 (Feb. 19, 2013) [hereinafter "UPC Agreement"].

100. *Id.*

101. *UK signals green light to Unified Patent Court Agreement*, *supra* note 93.

102. Immunities and Privileges Order, *supra* note 97.

103. Johnson, *UK Finally Ready for the Unified Patent Court*, *supra* note 98.

104. *Id.*

105. *Id.*; UPC Agreement, *supra* note 99, at art. 89.

106. UPC Agreement, *supra* note 99, at art. 21.

107. UPC Agreement, *supra* note 99, at art. 21.

108. Consolidated Version of the Treaty on the Functioning of the European-Union, art. 267, May 9, 2008) O.J. (C 115) 47 [hereinafter "TFEU"] (amended by the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec 13, 2007, 2007 O.J. (C 3016) 1 [hereinafter "Treaty of Lisbon"]). The TFEU is one of two primary Treaties of the European Union, alongside the Treaty on European Union. Originating as the Treaty of Rome, the TFEU forms the detailed basis of EU law, by setting out the scope of the EU's authority to legislate and the principles of law in those areas where EU law operates.

109. TFEU, *supra* note 108 at art. 267.

CJEU to give a preliminary ruling if it considers that a decision on the question is "necessary" to enable it to give a judgment in a particular case.[110] The obligatory duty[111] to refer cases is established in two cases: with respect to national courts adjudicating at last instance[112] and with respect of all courts faced with a question of the validity of EU law.[113] Furthermore, what constitutes a "court or tribunal" is a matter of Union law and it is not to be determined by reference to national law.[114]

In 1997, the CJEU found that the Benelux Court was considered a court under Union law, as it was a Court common to several member states.[115] Similarly, the UPC, as a court common to several EU member states, is subject to seeking preliminary rulings from the CJEU. Additionally, Article 24 of the UPC Agreement provides that, among other sources,[116] judges should base their decisions on Union law, including the Unitary Patent Regulation.[117]

Furthermore, the UPC Agreement provides for a seven-year transitional period during which the UPC will have non-exclusive jurisdiction over revocation and infringement actions.[118] Therefore, "actions for infringement or for revocation of a European patent may still be brought before a national court"[119] and before the UPC. At the end of the transitional

110. *Id.*

111. *Id.* The obligation of national courts to refer for a preliminary ruling is subject to exceptions (e.g., (i) when EU law questions are not relevant to the decision in the main proceedings, (ii) in a situation before a national court is "materially identical with a question which has already been subject of a preliminary ruling in a similar case," or (iii) when the proper interpretation of EU law is "so obvious as to leave no scope for any reasonable doubt"). *See* Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health, 283/81 ECR 3415, para. 10 (1982).

112. TFEU, *supra* note 108 at art. 267.

113. *Id.* at art. 267(b).

114. Pierre Corbiau v. Administration des Contributions, C-24/92, judgment, para. 15 (Mar. 30, 1993).

115. Matthew Parish, *International Courts and the European Legal Order*, 23 EUR. J. OF INT'L L., 141, 146 (2012); Case C-1/09, *supra* note 77, at 1173, para. 82; Parfums Christian Dior v. Evora, C-337/95, judgment, para. 21–23 (Apr. 29, 1997).

116. UPC Agreement, *supra* note 99, at art. 24 (naming sources of law judges should base their decisions on including, but not limited to, Union law, the UPC Agreement, the EPC, other international agreements applicable to patents and binding on all the member states, and national law).

117. *Id.*

118. *Id.* at art. 83(1).

119. *Id.*

period, however, the UPC will have exclusive jurisdiction over certain issues.[120] The UPC Agreement designates several Courts of First Instance with locations in various member states[121] and a Court of Appeal located in Luxembourg.[122] The central division of the Court of First Instance will have its seat in Paris and specialist divisions in London and Munich.[123] The London court will handle matters for patents on chemistry, including pharmaceuticals and biotechnology, human necessities, and metallurgy;[124] the Munich court will handle matters for patents based on mechanical engineering, lighting, heating, weapons, and blasting;[125] the Paris Seat will deal with matters regarding performing operations, transporting, textiles, paper, fixed constructions, physics, and electricity.[126]

2. Unitary Patents

Under Article 142 of the EPC, "[a]ny group of Contracting States, which has provided by a special agreement that a European patent granted for those States has a unitary character throughout their territories, may provide that a European patent may only be granted jointly in respect of all those States."[127] The Unitary Patent is an attempt to create a single approach for patent protection and litigation across the EU.[128] Upon request of the patentee, the Unitary Patent will allow a person or entity seeking patent protection to file one patent application which, upon approval, will then grant equal rights in all EU member states participating in the

120. *See id*. at art. 32:

> Article 32 states: The Court shall have exclusive competence in respect of: (a) actions for actual or threatened infringements of patents and supplementary protection certificates and related defences, including counterclaims concerning licences; (b) actions for declarations of non-infringement of patents and supplementary protection certificates; (c) actions for provisional and protective measures and injunctions; (d) actions for revocation of patents and for declaration of invalidity of supplementary protection certificates; (e) counterclaims for revocation of patents and for declaration of invalidity of supplementary protection certificates; (f) actions for damages or compensation derived from the provisional protection conferred by a published European patent application; (g) actions relating to the use of the invention prior to the granting of the patent or to the right based on prior use of the invention; (h) actions for compensation for licences on the basis of Article 8 of Regulation (EU) No 1257/2012; and (i) actions concerning decisions of the European Patent Office in carrying out the tasks referred to in Article 9 of Regulation (EU) No 1257/2012.

Id.

121. *Id*. at art. 7(1).

122. *Id*. at art. 9(5). *See* FAQ on the Unified Patent Court, *supra* note 91.

123. *Id*. at art. 7(2).

124. *Id*. at Annex II; *See* FAQ on the Unified Patent Court, *supra* note 91.

125. *Id.*; *See* FAQ on the Unified Patent Court, *supra* note 91.

126. *Id.; See* FAQ on the Unified Patent Court, *supra* note 91.

127. EPC, *supra* note 71, at art. 142.

128. Bird & Bird, *The Unitary Patent & the Unified Patent Court*, 2 (Mar. 14, 2018), https://www.twobirds.com/~/media/pdfs/brochures/intellectual-property/upc/the-up--the-upc.pdf. Croatia, Poland, and Spain are not participating in the unitary patent system, although Croatia intends to join at a later date. *Id*.

Unitary Patent system.[129] Furthermore, in the event of litigation over a patent, the laws governing the Unitary Patent will be uniform throughout each of the twenty-six participating member states and judgments rendered will cover all participating member states.[130] The laws governing the Unitary Patent are set forth in the Unitary Patent Regulation (Regulation 1257/2012) ("Regulation"). Article 5(2) of the Regulation provides for a uniform scope of rights throughout the participating EU countries.[131] Article 7 identifies the appropriate national law to govern each Unitary Patent as a piece of property.[132] Article 7 also states that Unitary Patents will be governed according to the laws of the participating EU country in which the applicant resides or has a principal business. For example, if an Italian patentee resides in or has a principal place of business in Italy, his unitary patent is governed by Italian law, even when filed in other member states.[133] If the applicant has no principal place of business or residence in a member state, then the governing law of the Unitary Patent will be the laws of the state where the patentee had a principal place of business at the time of filing.[134] Finally, where a Unitary Patent applicant has no principal place of business within Europe, the Unitary Patent will be governed by the laws of the state where the EPO's headquarters is located, i.e., Germany.[135] For example, the patent of a Japanese applicant with no place of business in a participating EU member state will be governed by German law. This Unitary Patent system is in contrast with the traditional European patent system that is now in place; although a party seeking protection in many states can file for such protection through the EPO (i.e., through obtaining a European patent) the patent must be validated in each state where protection is sought and, in the event of litigation, is subject to the individual laws of each state where the patent is registered.[136] This has become problematic in the sense that it: (1) creates uncertainty as to where the patent in question may or may not be valid; (2) increases litigation costs; (3) promotes forum shopping; and (4) allows for inconsistent judgements in different states.[137] The creation of the Unitary Patent aimed to correct the flaws of the current "bundle of patents" filing system under the EPO.

Under the UPC, the Unitary Patent system is not a requirement for member states to be part of. Alternatively, patentees will still have the ability to choose from three ways to obtain patent protection such as: the traditional European patent, the European patent with a unitary effect (i.e., the Unitary Patent), and national patents. With a traditional European patent, patentees will receive protection for patents validated in the patentee's EU member states of

129. *See* EPO: Unitary Patent & Unified Patent Court (Mar. 14, 2018), https://www.epo.org/law-practice/unitary/unitary-patent.html. The unitary patent is not yet available because although its two establishing regulations entered into force on Jan. 20, 2013, they are not applicable until the entry into force of the Agreement on a Unified Patent Court. In Order for the UPC Agreement to enter into force, it must be ratified by thirteen states including Germany, France and the UK, which has not yet happened. UPC Agreement, *supra* note 99, at art. 89.

130. FAQ on the Unified Patent Court, *supra* note 91; EPO: Unitary Patent & Unified Patent Court (Mar. 14, 2018).

131. Unitary Patent Regulation No. 1257/2012 of the European Parliament and of the Council of 17 Dec. 2012, art. 5(2) [hereinafter "Regulation"].

132. *Id*. at art 7.

133. *Id.*

134. *Id.*

135. *Id*.

136. EPC, *supra* note 71, at art. 64(1).

137. Advisory Opinion, *supra* note 81, para. 7, 22.

choice,[138] whereas, as previously discussed, a patentee who files for a Unitary Patent will receive uniform protection in all the participating member states, without the need to validate it in each country. Unitary Patent holders will have the option to obtain a traditional European patent for protection in the remaining twelve EPC countries.[139] Finally, if the patentee does not wish to take part in the Unitary Patent system, he or she will still have the opportunity to apply for a series of national patents by applying through the EPO for a European patent or going through the national patent offices where protection is desired. Such national or European patents will continue to be governed by the national laws of the state where the patent application has been filed and the dispute is brought.[140]

a. The Unitary Patent Regulation

While the UPC Agreement is an international treaty, the Unitary Patent Regulation[141] is an instrument of the EU, which has its basis in the TFEU.[142] The Regulation establishes a Unitary Patent enforceable in all participating member states.[143] Article 3(2) of the Regulation provides that the main feature of a Unitary Patent is to provide uniform protection and have equal effect in all the participating member states.[144] Additionally, the Regulation provides for references to the CJEU for the interpretation of Union law.[145] Therefore, a state's participation in the Unitary Patent means they will be subject to the jurisdiction of the CJEU.

Since the Regulation is an instrument of the EU, Brexit means that the UK will neither be bound by nor a party to it. However, if the UK determines to remain a party to the UPC Agreement, the idea of the UK being subject to the jurisdiction of the CJEU by way of the Regulation will continue to be a point of contention regarding whether the UK should participate in the Unitary Patent post-Brexit.

IV. Brexit: Implications on Patent Protection

The process of leaving the EU is governed by Article 50 of the TEU.[146] The relevant section of Article 50 states, "[t]he Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification [to the European Council], unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."[147] Therefore, after Brexit negotiations between the UK and the EU are completed, all EU treaties will cease to apply to the UK.

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138. EPC, *supra* note 71, at art. 2.
139. The Unitary Patent in Practice, NLO European Patent and Trademark Attorneys (last accessed Mar. 14, 2018), https://www.nlo.eu/en/services/unitary_patent/about_the_unitary_patent.
140. EPC, *supra* note 71, at art. 64(1).
141. Regulation, *supra* note 131, at para. 2, 23.
142. TFEU, *supra* note 108.
143. Regulation, *supra* note 131, at para. 7; *see* EPO: Unitary Patent & Unified Patent Court, *supra* note 129.
144. Regulation, *supra* note 131, at art. 3(2).
145. *See generally* Regulation, *supra* note 131.
146. TEU, *supra* note 7, at art. 50.
147. *Id*. at art. 50(3).

This creates a major area of concern as to the UK's continuing participation in the UPC Agreement and the Unitary Patent, and the operation of the UPC once the withdrawal agreement enters into force.[148]

Although the UK has not yet ratified the UPC Agreement, this paper assumes that it will do so in order to have the Court up and running as soon as possible, as stated by Prime Minister Theresa May.[149] The concern then becomes whether the UK will be allowed to remain part of the UPC Agreement and participate in the Unitary Patent after its exit from the EU.

In March 2011, the Council of the European Union made a request to the CJEU pursuant to Article 218(11) TFEU[150] to determine the compatibility of the draft agreement creating a Unified Patent Litigation System with the Treaty establishing the European Community.[151] In Case C-1/09, the Court opined that the agreement was not compatible with EU law.[152] As a result, the draft Agreement was amended to strip non-EU member states of the opportunity to participate in the UPC.[153] In 2011, the European Commission was then asked to give an Advisory Opinion regarding the effect of Brexit on the Unitary Patent Regulation and the UPC Agreement.[154] The threshold issue for the Commission was whether it is possible for the UK to participate in the UPC Agreement following Brexit, since it would no longer be an EU member-state.[155] The European Commission's interpretation of Case C-1/09 found that non-EU member states may participate in a UPC arrangement of sharing patent jurisdiction if they, *inter alia*, make certain agreements and commit to the supremacy of EU law.[156]

A. UK Participation in the Agreement on a Unified Patent Court Post-Brexit

Scholars such as Richard Gordon and Tom Pascoe have also stated that, notwithstanding Brexit, the UK will be permitted to remain a party to the UPC Agreement.[157] In short, so long as the UK reaches an international agreement during its negotiations with the EU, enacts certain safeguards (e.g., amending the UPC Agreement and adopting EU Treaties to protect the suprem-

148. *Id*. EU treaties will continue to apply to the UK, meaning the UK will still be able to participate in the UPC Agreement until the UK's withdrawal from the EU enters into force.

149. *UK signals green light to Unified Patent Court Agreement*, *supra* note 93.

150. TFEU, *supra* note 108 at art. 218(11).

151. Case C-1/09, *supra* note 77, at para. 1. The Unified Patent Litigation System was a proposed agreement aimed at creating an "optional protocol to the European Patent Convention which would commit its signatory states to an integrated judicial system, including uniform rules of procedure and a common appeal court." EPO: European Patent Litigation Agreement. It differs from the Unified Patent Court Agreement in that the EPLA negotiations were coordinated from the side of the European Patent Office, rather than from the European Council and Commission and therefore also offered the possibility for non-EU states to participate. *Id.*

152. Case C-1/09, *supra* note 77, at para. 16.

153. UPC Agreement, *supra* note 99, at art. 1 and 2(b).

154. *See generally* Gordon & Pascoe, *supra* note 81.

155. *Id*. at para. 5.

156. *Id*. at para. 52.

157. *Id*. at para. 40.

acy of EU law), and is willing to submit to the jurisdiction of the EU with regard to patents and governing laws, the UK's continued participation in the UPC Agreement will be permissible.[158]

Additionally, Professor Thomas Jaeger notes that some commentators have suggested an alternative reading to Opinion 1/09 to allow for the participation of non-EU member states without altering the UPC Agreement if the UK effectively ratifies the UPC Agreement prior to Brexit, i.e., while it is still an EU member.[159] Jaeger states that Brexit subsequent to ratification of the UPC Agreement would "not affect its position as a UPC participant: "However, if the UK leaves it is nowhere written that they have to leave the UPC. There is…no provision in the UPC [Agreement] which states that they have to leave the UPC." [160] It is true that the present UPC Agreement does not allow the participation of non-EU Member States, but there is no provision for the situation in which a Member State having ratified the UPC Agreement becomes a non-Member State.[161] While Jaeger believes this view problematic,[162] this Note agrees with other commentators who have opined that, for reasons not discussed at length in this Note, the UK will eventually be permitted to remain a participating party to the UPC Agreement following Brexit, assuming it ratifies the UPC Agreement before enforcing its withdrawal agreement.

As a matter of UK domestic constitutional law, it is unlikely that the UK would be prohibited from participating in the Agreement following Brexit. There is, however, an elephant in the room concerning the UK's continuing participation, i.e., whether it will be politically acceptable for post-Brexit UK to participate in an international agreement which requires the UK to accept the primacy of EU law in its entirety and remain bound by EU law with regard to patent disputes within the UPC's jurisdiction.

The European Commission acknowledged that, by accepting the supremacy of EU law with regard to patent disputes that fall within the jurisdiction of the UPC, the UK may be subject to areas of EU law such as competition law, fundamental rights arising under the Charter and general principles of EU law, and possible future EU legislation.[163] Such subjection to the jurisdiction of the CJEU over a wide range of EU law will unquestionably raise political eyebrows in the UK. It is important to recall that fifty-two percent of the electorate voted in favor of leaving the EU and that one of the foremost concerns leading to the Brexit vote was the obligation to follow EU law. If the UK adheres to its position of regaining its sovereignty and ceas-

158. *Id*. at para. 48; *see generally* Dr. Winfried Tilmann, *The Future of the UPC after Brexit*, HOGAN LOVELLS (Mar. 14, 2018). http://www.theunitarypatent.com/the-unitary-patent-regulation-and-upc-agreement-after-brexit.

159. Jaeger, *Reset and Go: The Unitary Patent System Post-Brexit*, *supra* note 76, at 21.

160. *Id*; *See* Tilmann, *The Future of the UPC after Brexit*, GRUR 2016, 753; Darren Smyth, *A possible way for a non-EU UK to participate in the Unitary Patent and Unified Patent Court?*, IPKAT BLOG (June 28, 2016, 7:44 PM), http://ipkitten.blogspot.co.at/2016/06/a-possible-way-for-non-eu-uk-to.html; Willem Hoyng, *Does Brexit mean the end of the UPC?*, EPLAW PATENT BLOG (June 24, 2016), http://eplaw.org/upc-does-brexit-mean-the-end-of-the-upc/.

161. *See generally* UPC Agreement, *supra* note 99.

162. Jaeger, *Reset and Go: The Unitary Patent System Post-Brexit*, *supra* note 76, at 21.

163. Gordon and Pascoe, *supra* note 81, para. 76.

ing to be subject to EU law and the jurisdiction of the CJEU, then Brexit will likely be a barrier to the UK's participation in the UPC and beyond.[164] Thus, because of the vast opposition to EU law, it will be politically sticky for the proponents of UK participation in the UPC to pitch an international treaty that proposes continuing commitment to EU law and its supremacy over UK law.

Despite the aversion to EU law, this Note argues that, during its negotiations with the EU, the UK should enter into an international agreement that allows it to remain a member of the UPC Agreement post-Brexit. Although a majority of UK citizens voted to leave the EU, and therefore to no longer be subject to the jurisdiction of the EU and its treaties, the UPC is not strictly an EU entity. While the UPC Agreement confers an obligation on the UPC to follow EU law (e.g., Union law governing compulsory licensing, property issues, and all other issues not exclusively covered by the Regulation or the UPC Agreement), patentees are not required to file for patents that are subject to the jurisdiction of the UPC. UK patentees will still have the option to file for national patents in different countries and for European patent bundles, assuming they remain a party to the EPC, in connection with the unitary patent.

Remaining a party to the UPC Agreement, however, would make it easier for patentees to litigate claims, because they would be brought in one court, the UPC, and could provide UK patentees the opportunity to choose which type of patent to file, assuming the UK elects to take part in the Unitary Patent. Similarly, for patentees who wish to file patents all over the EU (likely a large number of patentees due to the wide array of benefits provided by patent protection), subjecting themselves to the jurisdiction of the UPC will afford them many benefits including (1) the ability to obtain a Unitary Patent with a unitary effect throughout the EU, (2) fewer filing fees because of the ability to litigate patents in one court rather than in every state where the patent in question has been filed, and (3) more timely judgments. A decision to leave the UPC following Brexit would close many doors for patentees in the UK and illogical considering that the UK is one of the largest patent markets in Europe, if not the world.[165]

B. UK Participation in the Unitary Patent Post-Brexit

The European Commission's Advisory opinion addressed whether the UK will be allowed to participate in the Unitary Patent post-Brexit.[166] Recital (25) of the Regulation makes it clear that, in order for a state's citizens to participate in the Unitary Patent system, the state must be a member of the UPC;[167] likewise, the Commission states that it will be legally possible for the UK to continue its participation in the Unitary Patent only if the UK and the EU can reach an international agreement regarding such participation.[168] An international agreement between the EU and the UK must be reached for the UK to participate in the Unitary Patent because, as an EU regulation, the Unitary Patent Regulation will cease to apply to the UK once the UK's

164. Bently, Derclaye, & Dinwoodie, *supra* note 5, at 5.

165. *See* UPC Agreement, *supra* note 99, at art. 89 (Before the Agreement can enter into force, it must be ratified by at least thirteen countries, including the three states in which the highest number of European patents were in force in the preceding year—currently Germany, France, and the UK).

166. Advisory Opinion, *supra* note 81, at para. 40.

167. Regulation, *supra* note 131, at para. 25.

168. Advisory Opinion, *supra* note 81, at para. 42.

withdrawal from the EU enters into force.[169] Additionally, the UK will be required to implement the international agreement by domestic legislation.[170] Assuming sufficient safeguards are implemented (e.g., references to the CJEU, obligation to respect primacy of EU law, CJEU acceptance of preliminary references from the UK, etc.), the UK will have the ability to participate in the Unitary patent. This Note does not discuss in detail the precautions that must be taken in order for the UK to participate in the Unitary Patent post-Brexit, but rather whether it would be practical for the UK to do so.[171]

1. The UK Should Participate in the Unitary Patent Post-Brexit

If the UK negotiates an agreement with the EU and decides to remain a party to the UPC Agreement following Brexit, it should also allow its citizens to participate in the Unitary Patent. The Unitary Patent offers attractive alternatives for patentees within the EU that UK citizens will not be afforded if the UK forgoes UPC participation and, furthermore, participation in the Unitary Patent. For example, the inability to be subject to one set of laws while having a patent in every EU country will hurt many patentees, both individuals and companies, who wish to file patent applications throughout the EU, yet are afraid of the unknown laws that may apply. These benefits are similar to those that patentees will receive as members of the UPC. For example, filing and translation fees will be substantially reduced and it will cost patentees less money to file patent infringement claims with the UPC, rather than patentees filing in each state and being subject to numerous different judgments regarding the validity or infringement of a patent in that state. Arguably the most important benefit of a Unitary Patent is the certainty of the law governing the patent since the patent will be governed by the national law of the state where the patentee has its principal place of business or residency.[172] This is in stark contrast to the system that is currently in place.

Today, there is a great deal of uncertainty as to whether a patent is valid because, under both the national patent and the European patent regimes, patents are subject to the laws of each individual state where patent protection is sought. Therefore, a patent that may be deemed valid by the courts of one state may be found invalid under the laws of another. Such uncertainty makes it difficult for patentees to determine how to structure their patent claims that allows for validity in each state where protection is filed.

In a first-to-file regime, as is currently in place in the EU, the Unitary Patent may cause current patentees and would-be patentees to cease inventing. In a market as large as the EU, it is likely that more than one person fabricates the same idea and creates a similar, if not the same, invention. If patentees are aware of this possibility, it is probable that many patentees will not waste time or money on an invention that will likely be invented by someone else. Today, many people monopolize smaller markets within in their country of citizenship or principal place of business, meaning there may be more than one patent for an invention in different countries. The EU's vast market may, however, incentivize patentees to keep inventing because

169. TEU, *supra* note 7, at art. 50(3).

170. Advisory Opinion, *supra* note 81, at para. 43.

171. *See id.* at para. 46.

172. Regulation, *supra* note 131, at art. 7.

of how large the market is; patentees would be able to monopolize all the EU for one invention, therefore putting them in a position to obtain more benefits and make much more money than they would have by only participating in the market of one or a few states.

While the Unitary Patent would be extremely beneficial to patentees, it would also be advantageous for the UK and its consumers. If patentees have the ability to receive uniform patent protection throughout the EU and thus, target more consumers, there will be room for more competition amongst businesses in the manufacturing sector. Consequently, because there will be more competition, there will be lower prices for consumers, which will lift the UK's economy and provide a benefit to UK citizens and the government, alike.

V. Conclusion

After an idealistic union of states to create the EU in an effort to end the gruesome fighting and war-ridden lifestyle, UK citizens have determined that the EU has served its purpose and that the UK should now take back its sovereignty and control over its laws to protect and promote its own citizens.

Although Brexit will affect many facets of UK law and how the country will operate, this Note has focused on the nuanced subject of patent law as it currently exists in the EU and its potential path post-Brexit.

Were the UK unable or unwilling to participate in the Unitary Patent, UK patent applicants would still be able to obtain patent protection for their inventions through the EPO through the exact process that is currently in place; however, so long as the UK continues to have one of the largest patent markets in Europe, continuing on the current route simply unreasonable. In today's day and age where the patent regime in the EU is evolving into a more succinct system, the UK should be at the forefront of those developments as it is currently a leading country, economically and politically, in the EU and throughout the world.

The UK should negotiate an agreement during its Brexit negotiations with the EU to remain a party to the UPC Agreement and furthermore, to allow its citizens to participate in the Unitary Patent after its withdrawal from the EU. While remaining a party to the UPC Agreement may receive some pushback due to the continuing obligation of the UK to be subject to and bound by EU laws and the jurisdiction of the CJEU, the UK government must protect its citizens and act in their best interest. While large-corporation patentees have the resources to determine in which states it would be best to file for patent protection, how the laws of each state govern patent validity and infringement claims, and whether their patent applications would be approved in different states, the majority of patentees are individuals or small business that do not have access to those same resources. Thus, those unequipped citizens would deeply benefit from the UK's participation in the UPC Agreement and, further, in the Unitary Patent. Providing all citizens with the opportunity to file for a Unitary Patent will provide a substitute for resources they might not otherwise have access to; they will have certainty as to the laws that will govern their patents, i.e., UK law, rather than having to research the laws of each individual state, and will save large amounts of money in filing and litigation fees.

Finally, although the UK's foremost reason for leaving the EU is to regain its sovereignty and be in control of its laws, citizens who voted in favor of Brexit were focused on the ability of the UK to control its own laws regarding, most importantly, immigration control. Although participation in the UPC Agreement, the Court, and the Unitary Patent would subject the UK and its citizens to EU law and the jurisdiction of the CJEU, such subjection would be minimal and would not be counterintuitive to the UK's reasons for leaving the EU. Citizens of the UK did not, and could not have possibly contemplated all the beneficial laws and treaties that the UK would be leaving behind or forfeiting the right to remain a party to, such as the UPC Agreement, the Court, and the Unitary Patent.

Therefore, because (1) being party to the UPC Agreement, the Court and the Unitary Patent would provide important benefits to inventors in the UK, (2) leaving such a beneficial regime could not have been contemplated by all leave voters on June 23, 2016, and (3) subjection to EU law and the jurisdiction of the CJEU would be minimal and limited to patent claims, the UK should seek to maintain its status as a party to the UPC Agreement and allow its citizens to participate in the UPC and the Unitary Patent system after it exits the EU.

Data Protection Commissioner v. Facebook Ireland Ltd.

[2016] Unreported (H. Ct.) (Ir.).

I. Brief Summary

This is a case regarding data protection in the context of a cross-border transfer. Here, the High Court of Ireland ("High Court") joined the view of Mr. Schrems, a Facebook user, and the Irish Data Protection Commissioner (DPC), that the absence of effective remedies in the United States may violate European fundamental rights under Articles 7, 8, and 47 of the European Charter of Fundamental Rights ("the Charter")[1] when personal data is sent to the United States (U.S.).

The High Court referred the question concerning the validity of standard contractual clauses (SCCs), which are the current mechanism allowing the transfer of personal data from the E.U. to the U.S., to the Court of Justice of the European Union (CJEU).

II. Facts

The European Union (E.U.) is a political union. While each member state remains independent, they are unified through common policies under the watch of the European Commission (E.C.), which is the equivalent of the executive branch, and the European Parliament, which is the equivalent of the legislative branch.

In the hierarchy of law within the E.U., European Rules and Directives come first and must be implemented under the national law of the member states. Therefore, this case must be analyzed through European Law, rather than Irish law, since the E.U. Charter of Fundamental Rights is binding on each member state.

III. Background

A. European Law

Articles 7 and 8 of the Charter of Fundamental Rights grant E.U. citizens the right to respect their "private, and family life, home and communications" and the "right to protection of personal data."[2] Article 47 of the Charter guarantees E.U. citizens the right to an effective remedy and to a fair trial.[3] The General Data Protection Regulation defines personal data as "any information relating to an identified or identifiable natural person ('data subject')."[4]

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1. Charter of Fundamental Rights of the European Union, 2010 O.J. C 83/02.
2. *Id*. art. 7, 8.
3. *Id.* art. 47.
4. Regulation 2016/679 of the European Parliament and of the Council of Apr. 27, 2016 on the Protection of Natural Persons with Regard to Processing of Personal Data and on the Free Movement of Such Data, and repealing Directive 95/46/EC, 2016 O.J. (L 119), art. 4(1).

Within the E.U., the determination of whether the protections afforded to personal data are adequate falls under the European Commission (the "Commission")'s authority. To this respect, the Commission determined three bases for a lawful transfer of E.U. personal data to the U.S.:

(1) A voluntary arrangement, "Safe Harbor," under which the U.S. organizations self-certify compliance with the privacy principles;

(2) Standardized contractual commitments ("SCCs") between the data controller and the data processor; and

(3) A similar agreement through binding non-contractual rules applicable to corporate groups.[5]

In other words, the member states have the duty to provide that the transfer to a third country complies with the national provisions adopted pursuant to E.U. laws and that the third country in question ensures an adequate level of protection.[6] To this effect, each member state has one or more public authority in charge of monitoring the transfer of data.

B. Facebook's E.U.-U.S. data transfers

Facebook operates its international business outside of the U.S. and Canada via a separate company in Ireland called "Facebook Ireland Ltd." 85.9% of all worldwide Facebook users (everyone except the U.S. and Canada) are managed in Dublin,[7] which is understood to be part of Facebook's tax avoidance scheme. Facebook currently sends all user data to its parent company, "Facebook Inc.," in the U.S. for processing. The European law, which protects the privacy of its citizens' data, appears to be in conflict with U.S. surveillance laws, under which Facebook's European data is accessible to the U.S. National Security Agency (N.S.A.).

C. Standard Contractual Clauses

In principle, E.U. law prohibits all data transfers outside of the E.U., where the strict E.U. privacy laws do not apply. However, there is an exception:[8] the "Safe Harbor," which Facebook used before it was invalidated by the CJEU in 2015. Since then, the company uses SCCs between "Facebook Ireland" and "Facebook Inc."[9] Those SCCs have an "emergency clause,"

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5. *Id*. art. 24, 26; Directive 95/46/EC of the European Parliament and of the Council of Oct. 24, 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281).

6. *Id.*

7. Facebook Newsroom, *Statistics*, FACEBOOK, https://de.newsroom.fb.com/company-info/ (last visited Oct. 26, 2017).

8. *Id.*

9. Data Transfer and Processing Agreement between Facebook Ireland and Facebook, Inc., (Nov. 20, 2015), http://www.europe-v-facebook.org/comp_fb_scc.pdf.

whereby the local data protection authority can stop the data flows whenever there is a conflicting law in a foreign country.[10]

IV. Procedure

In 2013, Mr. Schrems filed a complaint against Facebook, alleging that Facebook's transfer of data to the U.S. was unlawful under E.U. law; Mr. Schrems filed his complaint with the DPC.[11] Following the DPC's refusal to hear the complaint, Mr. Schrems took the case to the CJEU, which ruled in his favor in 2015.[12] In its decision, the Court ruled that the DPC had to hear Mr. Schrems's case and that the Safe Harbor mechanisms—which were used for the transfer of data at that time—were invalid. Subsequently, Facebook started to use SCCs.

After Mr. Schrems's reformulation of his complaint,[13] the Irish DPC decided to join his view that the SCCs were not efficient in terms of proper legal remedies under U.S. law. However, the DPC refused to use Article 4 of the SCCs and brought proceedings against Facebook Ireland Ltd. and Mr. Schrems before the Irish High Court.

V. Arguments

Mr. Schrems argued that the SCCs were perfectly valid and that the Irish DPC should have used Article 4 of the SCCs to stop specific data sharing for Facebook, only. This view has been described as the "targeted solution."[14]

The Irish DPC argued they could not use Article 4 because it would result in an unfair treatment of Facebook. They argued that the solution needed to be uniform among other member states so that they challenged the validity of SCCs.

Finally, Facebook's submission pointed out that the entire subject matter of the case fell outside the scope of the law of the European Union and the Charter of Fundamental Rights because it was a question of national security activities, which are excluded from the scope of application of E.U. law.

The case was heard in February 2017. The U.S. government was joined as amicus, along with two industry lobby groups and the U.S. privacy non-profit "EPIC."

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10. Commission Decision 2004/915/EC of Dec. 27, 2004, Amending Decision 2001/497/EC as Regards the Introduction of an Alternative Set of Standard Contractual Clauses for the Transfer of Personal Data to Third Countries, 2004/915/EC, O.J. (L 385).

11. *See* Complaint Against Facebook Ireland Ltd - 23 "PRISM" to the DPC (Jun. 25, 2013), http://www.europe-v-facebook.org/prism/facebook.pdf.

12. Case C-362/14, Schrems v. Data Protection Commissioner, 2015 EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0362&from=EN.

13. *See* Complaint Against Facebook Ireland Ltd. (Dec. 1, 2015), http://www.europe-v-facebook.org/comp_fb_ie. pdf.

14. *See* Irish High Court rules on Facebook surveillance case: Irish DPC has "well founded concerns" over US surveillance of Facebook EU-US data transfer complaint referred to European Court of Justice—for a second time (Oct. 3, 2017), http://www.europe-v-facebook.org/sh2/PA.pdf.

VI. Issue

Only the Court of Justice of the European Union has jurisdiction to rule on the validity of a European measure. Therefore, the High Court referred two questions:

(1) Whether the CJEU has jurisdiction to grant the relief sought;

(2) If so, whether the court should refer the issue of the validity of the SCC Decisions to the CJEU for a preliminary hearing.[15]

VII. Holding

First, the Irish High Court found the basis for their jurisdiction to refer the question to the CJEU for a preliminary ruling on the validity of CSS under Article 267 of the Treaty on the Functioning of the European Union.[16] In particular, the High Court held that the Irish DPC had "well-founded concerns" as to whether U.S. practice of processing of data by U.S. law enforcement and intelligence agencies was compatible with E.U. standards, in particular with the Charter of Fundamental Rights, since the Charter guarantees a "high level of protection to E.U. citizens as regards the processing of their personal data within the E.U."[17]

Second, the High Court found that E.U. citizens "are entitled to an equivalent high level of protection when their personal data are transferred outside the European Economic Area" in accordance with Article 47 of the Charter.

Third, the Court found that the adequacy of the SCCs could not be assessed in a vacuum. In case of fundamental inadequacies in U.S. laws with E.U. law, the SCCs cannot compensate for them because they are not binding upon sovereign authority of the U.S. and its agencies. In particular, remedies under U.S. law are not available for E.U. citizens. Accordingly, the High Court upheld the Data Protection Commissioner's finding that the U.S. law lacks an effective remedy for E.U. citizens whose data are transferred to the U.S. where they might be at risk of being assessed and processed by U.S. state agencies for national security purposes, which would be incompatible with Articles 7 and 8 of the Charter.

As such, the Irish High Court required a decision of the CJEU to determine whether the Data Protection Commissioner has the discretionary power to suspend or ban the transfer of data to a data importer on the basis that the legal regime of this importer would be sufficient to secure the validity of the SCC.[18]

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15. *See* Executive Summary of the Judgment of Oct. 3, 2017, DPC v. Facebook Ireland Ltd. (Oct. 3, 2017), http://www.europe-v-facebook.org/sh2/ES.pdf.

16. Data Protection Commissioner v. Facebook Ireland Ltd. [2016] Unreported (H. Ct.) (Ir.).

17. *Id*. § 334.

18. *Id*. § 335.

VIII.Perspective

First of all, a referral to the CJEU takes approximately 15 to 20 months for a ruling. Until a decision is rendered, the SCCs remain in place as a valid mechanism for the transfer of personal data from the E.U. to the U.S. and elsewhere.

Secondly, if confirmed by the CJEU, this case would have strong implications, far beyond Facebook's data processing agreement, or even the SCCs themselves. It is unlikely that the current bases for the lawful transfer of E.U. personal data to the U.S. will survive without changes to U.S. law, but under the current political climate, it is uncertain.

If the CJEU decides that E.U. citizens are granted the right for individual remedies for E.U. data subject to foreign national security agencies, this precondition for the transfer of data would have strong consequences.

Quentin Alexandre

Thai-Lao Lignite Co. v. Government of the Lao People's Democratic Republic

864 F.3d 172 (2d Cir. 2017)

The United States Court of Appeals for the Second Circuit held that rules of procedure for motions for relief from judgment apply to enforcement of a foreign arbitral award, when that award is later set aside by courts in the arbitral seat.

Additionally, the Second Circuit held that courts have discretion to order posting security for costs and to enforce a foreign court judgment pursuant to the Convention on Recognition and Enforcement of Foreign Arbitral Awards and the Federal Arbitration Act.

I. Holding

In *Thai-Lao Lignite Co. v. Government of the Lao People's Democratic Republic*,[1] the United States Court of Appeals for the Second Circuit analyzed the Petitioner's motion to vacate the prior judgment confirming an arbitral award that had been subsequently vacated in the primary jurisdiction pursuant to the Federal Rule of Civil Procedure 60(b)(5). The court concluded that the district court did not exceed the permissible bounds of its discretion under Rule 60(b)(5) when it vacated its prior judgment confirming a foreign arbitral award. The court considered the interaction between Rule 60(b)(5) and the primary jurisdiction's annulment of the arbitral award. Further, the circuit court held that the district court did not abuse its discretion by refusing to order the Appellant to post security during the pendency of its Rule 60(b) motion and did not err by refusing to enforce the English Judgment. The circuit court held that the circumstances potentially bearing on the Rule 60(b) motion did not bar the district court from vacating its judgment and the Petitioners failed to show that vacatur would offend basic notions of justice in the United States.

II. Facts and Procedure

In the early 1990s, a Thai corporation (TLL) and its subsidiary HLL (hereinafter collectively the "Petitioners") worked with Laotian Government (hereinafter "Laos") to develop plans for mining lignite in the Hongsa region.[2] In order to achieve its goal, TLL entered into successive contracts (the "Mining Contracts") with Laos, in which Laos granted TLL the right to conduct certain mining operations in the Hongsa region and TLL agreed to conduct these operations and to form HLL.[3]

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1. 864 F.3d 172 (2d Cir. 2017).

2. HLL is a Laotian corporation partly owned by a state owned enterprise of Laos. The Petitioners partnered with Laos to produce electricity by the mining operations to sell to Thailand. The Hongsa region of Laos was in the northwest of the country, near the Thai Border. *Id.*

3. *Thai-Lao Lignite,* 864 F.3d at 177.

In addition, in 1994, TLL and Laos entered into the Project Development Agreement (the "PDA"), in which "Laos granted TLL the right to build at its own expense and manage a plant located near the mines to generate electrical power."[4] However, in 1997, funding negotiations failed and resources for the project dried up due to the Asian Financial Crisis.[5] In 2006, Laos wrote to the Petitioners and expressed its concerns that the Petitioners would fail to fulfill their obligations under the PDA.[6] In September 2006, Laos first sent a notice of default to the Petitioners.[7] Following that, on October 5, 2006, Laos sent the Petitioners a notice terminating the PDA.[8] Finally, Laos sent a second letter, in which it announced its termination of the Mining Contract.[9]

The Petitioners argued that by terminating both agreements, Laos failed to comply with the PDA's termination procedures and terminated both agreements without cause thereby breaching the PDA.[10] Under the PDA, the parties had agreed that "any dispute arising out of the agreement would be submitted to arbitration in Kuala Lumpur, Malaysia, and conducted under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules."[11] On the other hand, under the Mining Contracts, the parties agreed that the "disputes would be resolved by the Laotian Board of Economic Conciliation, the Laotian Court, or the International Economic Dispute Settlement Organization."[12]

In June 2007, the Petitioners initiated arbitral proceedings in Malaysia pursuant to the PDA.[13] In November 2009, the Arbitral Panel issued an award in favor of the Petitioners.[14] The Panel found that Laos was liable to the Petitioners for damages caused by the breach and awarded $57,210,000 to the Petitioners.[15] Under the Malaysian law, Laos had 90 days to make an application to set aside the arbitral award.[16] However, Laos made no set-aside application during that period, which ended in February 2010.[17]

In the summer of 2010, the Petitioners began efforts to enforce the arbitral award under the Convention on Recognition and Enforcement of Foreign Arbitral Awards ("New York

4. *See id.*
5. *See id*. The Asian Financial Crisis lasted from 1997 roughly through 2000 and left the region with severe economic troubles. *Id*.
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *Id.*
12. *Id.* at 177–78.
13. *See id.* at 178.
14. *See id.* The Panel found that that the Petitioners' failure to raise funds following the Asian Financial Crisis did not put them in breach of the PDA, but Laos breached the PDA by not properly terminating the PDA. *Id*.
15. *See id.*
16. *See* Laws of Malaysia, Arbitration Act 646, Section 37(4).
17. *See id*.

Convention").[18] Under the New York Convention, the state where the award is granted or whose laws governed the arbitration process is referred to as the "primary jurisdiction," and all other signatory states are considered as "secondary jurisdictions."[19] Under the New York Convention, a secondary jurisdiction's review of an award is relatively limited, and the Convention provides that the secondary jurisdiction shall enforce the award unless one of the exceptions apply.[20] In June 2010, the Petitioners filed an action in New York state court seeking confirmation of the Award and Laos removed the action to the United States District Court for the Southern District of New York, and then moved to dismiss the action.[21]

The district court rejected Laos's argument to not enforce the award. On August 5, 2011, the district court entered a judgment enforcing the Award in favor of the Petitioners.[22] Laos appealed the decision to the United States Court of Appeals for the Second Circuit, but the Second Circuit affirmed the district court's judgment.[23] The Petitioners also attempted to enforce the Award in the United Kingdom and in France. In November 2010, the High Court of Justice of England and Wales entered judgment enforcing the Award.[24] After that, in February 2013, the Petitioners filed a second action in the Southern District of New York, asking the district court to enforce the English judgment under New York's Uniform Foreign Country Money-Judgments Recognition Act.[25]

In October 2010, Laos opposed the Petitioners' action for enforcement of the award and requested that the district court stay the proceeding.[26] Laos represented to the court that it had moved to set aside the award in Malaysia.[27] The Malaysian High Court initially denied Laos's application; however, the Court of Appeal of Malaysia reversed the decision and remanded the case to the High Court of Malaysia.[28] On December 27, 2012, the Malaysian High Court annulled the award and ordered the arbitration of the dispute before a new panel.[29] On Febru-

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18. *See* N.Y. Convention Art. I. The Convention governs the "recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." *Id.*

19. *See* Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997).

20. *See Thai-Lao Lignite,* 864 F.3d at 178–79 (explaining that Article III of the Convention provides that the secondary jurisdiction shall enforce the award "unless the party opposing enforcement furnishes proof that one (or more) of seven exceptions described in Article V [applies]."). *Id.*

21. *See id.* at 179. Laos argued that the Arbitral Panel had exceeded its jurisdiction when it resolved disputes subject to the Mining Contracts, not just the PDA and incorporated costs incurred under the Mining Contracts into its Award. *Id.*

22. *See id.* The court concluded that the Laos's objections did not fall under one of the grounds for non-enforcement under Article V of the New York Convention. (citing Thai-Lao Lignite (Thailand) Co., Ltd. v. Gov't of the Lao People's Democratic Republic, No. 10 Civ. 5256, 2011 WL 3516154, at *15 (S.D.N.Y. Aug. 3, 2011)).

23. *See id.*

24. *See id.*

25. *See id.* (citing N.Y. CPLR 5301–09).

26. *See id*. at 179–80.

27. *See id*. at 180.

28. *See id.* The Court of Appeal of Malaysia found that the delay to set aside the award was the result of the sovereign's asserted lack of knowledge of the local law and inadequate advice from its legal advisors and to refuse the extension of time would be tantamount to shutting out the Government of Laos from challenging the award. *Id.*

29. *See id.* The High Court explained that the Panel had exceeded its jurisdiction by addressing disputes arising not just under the PDA, but under the Mining Contracts as well. *Id.*

ary 11, 2013, Laos moved under Federal Rules of Civil Procedure 60(b)(5) to vacate the August 2011 judgment of the district court.[30] The Petitioners objected to the motion and requested the court to deny vacatur.[31] On February 6, 2014, the district court granted Laos's Rule 60(b) motion and vacated its August 2011 judgment.[32] The district court held that it was required to give effect to the Malaysian court's set-aside judgment and vacate the August 2011 judgment.[33] Therefore, the district court vacated its August 2011 judgment and denied the Petitioner's additional request for security for costs by Laos during the pendency of an appeal.[34] Finally, on March 2014, the district court denied the Petitioners' application to enforce the English judgment under New York's Uniform Foreign Country Money-Judgments Recognition Act.[35]

III. Discussion

The Petitioners challenged three orders entered by the district court: (1) order granting Laos's Rule 60(b)(5) motion to vacate the August 2011 judgment; (2) order denying the Petitioners' request for Laos to post a bond for security for costs during the pendency of its Rule 60(b)(5) motion and any appeals; and (3) order denying Petitioners' application to enforce the English judgment.

A. Rule 60(b)(5) Motion to Vacate the August 2011 Judgment

Rule 60(b)(5) provides that "on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding" if one of several enumerated bases for relief is established.[36] One of the bases for relief is that the judgment "is based on an earlier judgment that has been reversed or vacated."[37] The Second Circuit previously held that the district courts have discretion to grant such relief, and the courts should aim to "strike a balance between serving the ends of justice and preserving the finality of judgments" in exercising that discretion."[38] The motion for relief under Rule 60(b) must be made "within a reasonable time."[39] In exercising discretion, the courts should consider "the particular circumstances of the case" and factors such as any reason for any delay, any possible prejudice to the non-moving party, and the interest of finality.[40] Furthermore, the motion for relief under Rule 60(b) is

30. *See id.*

31. *See id.*

32. *See Thai-Lao Lignite (Thailand) Co., Ltd. v. Gov't of the Lao People's Democratic Republic,* 997 F. Supp. 2d 214 (S.D.N.Y. 2014).

33. *See Thai-Lao Lignite,* 864 F.3d at 180-181. The court explained that it was required to recognize the new judgment pursuant to the New York Convention and give effect to that judgment unless giving effect to that judgment would violate fundamental notions of what is decent and just (internal citations omitted).

34. *See id.* at 181.

35. N.Y. CPLR 5304(b)(5). The courts have discretion to refuse to recognize a foreign judgment if the judgment conflicts with another final and conclusive judgment.

36. Fed. R. Civ. P. 60(b)(5).

37. *See id.*

38. *See In re Terrorist Attacks on Sept. 11, 2011*, 741 F.3d 353, 357 (2d Cir. 2013) (decision on Rule 60(b) motion in district court's discretion); *see also Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986).

39. *See* Fed. R. Civ. P. 60(c).

40. *See PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 897 (2d Cir. 1983).

an equitable remedy; therefore, the courts may deny Rule 60(b)(5) relief if the moving party has acted unfairly.[41] Finally, the burden is on the moving party to demonstrate that it is entitled to relief.[42] The courts will generally broadly construe Rule 60(b) to grant substantial justice and respect the final judgments made.[43]

Under Article III of the New York Convention, it provides that "each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles."[44] In addition, under Article V of the New York Convention, there are exceptions that allow the courts to refuse to recognize and enforce the award against a party. The courts may refuse to enforce an award if a party demonstrates that the award "has been set aside or suspended by a competent authority of the country, in which, or under the law of which, that award was made."[45] However, both the Second Circuit and the D.C. Circuit previously held that the text of Article V(1)(e) of the New York Convention leaves the district courts with discretion to enforce an award that has been annulled in the primary jurisdiction.[46]

In *Pemex*, the Court of Appeals for the Second Circuit held that the scope of the discretion to enforce an award that has been annulled in the primary jurisdiction is "constrained by the prudential concern for international comity."[47] There, the court held that refusal to recognize a foreign judgment nullifying an award is "appropriate only to vindicate fundamental notions of what is decent and just in the United States."[48] The court explained that there was a "*strong presumption in favor of the following the primary jurisdiction's ruling*."[49] However, in *Pemex*, the court did not consider the interaction between Rule 60(b) and the primary jurisdiction's annulment of an arbitral award. In this case, the court considered how it should precede with a Rule 60(b)(5) motion when there is a judgment confirming an arbitral award that had been subsequently vacated in the primary jurisdiction.[50]

First, the court held that Rule 60(b)(5) applies to motions to vacate judgments confirming arbitral awards that are subsequently set aside in the primary jurisdiction.[51] The court explained that under Article III of the Convention, the contracting states are required to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon."[52] Then, the court explained that the district

41. *See Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 127 (2d Cir. 2009).

42. *See Thai-Lao Lignite,* 864 F.3d at 182.

43. *See id*. at 182–83.

44. *See* N.Y. Convention Art. III.

45. *See* N.Y. Convention Art. V(1)(e).

46. *See TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007); *see also Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploracion y Produccion ("Pemex")*, 832 F.3d 92 (2016), *cert. dismissed*.

47. *See Pemex,* 832 F.3d at 106.

48. *See id*.

49. *See id*.

50. *See Thai-Lao Lignite,* 864 F.3d at 184.

51. *See id.*

52. *See id*. (citing N.Y. Convention Art. III).

courts should consider that under the Convention, the power and authority of the local courts of the primary jurisdiction remain the most important during the adjudication of a Rule 60(b) motion.[53] The court explained that the party opposing the vacatur of a judgment can support its opposition by showing that giving effect to the judgment annulling the award would offend fundamental notions of fairness in the United States.[54] However, the court explained that in the absence of such a public policy concern, the annulment of the award in the primary jurisdiction should weigh heavily in a district court's Rule 60(b)(5) analysis.[55] The court elaborated on the factors that the district courts should consider in its analysis such as whether the motion was made within a reasonable time, whether the movant acted equitably, and whether vacatur would strike an appropriate balance between serving the ends of justice, preserving the finality of judgment and the prudential concern for international comity.[56]

Here, the Second Circuit found that the district court gave explicit consideration to the interests of justice. The court explained that although it did not agree with the merits of the Malaysian courts' judgments, there were not any grounds for concerns related to offending the basic notions of justice.[57] Second, the court agreed with the district court for not assigning any weight to the alleged misconduct of Laos.[58] Third, the court agreed with the district court's conclusion that Laos's failure to timely comply with the district court's discovery orders was not evidence of bad faith or serious and studied disregard for the orderly process of justice and did not require to warrant a sanctions award.[59] The court explained that Laos's non-compliance was substantially justified since it took a reasonable legal position and the information sought was not available.[60] Finally, the court addressed the interest in finality, which protects the prevailing party's tangible interest to avoid costs, uncertainty and disrespect to the courts' judgments. The court found that the finality interests did not stand in the way of district court's decision to give effect to the Malaysian set-aside judgment and to vacate the court's August 2011 judgment.[61] The court explained that as the party seeking to enforce the award, the Petitioners knew proceedings to set aside the award in the primary jurisdiction were ongoing before the district court entered judgment, and Laos sought relief promptly after the award was annulled in the primary jurisdiction.[62]

Therefore, the court held that the district court did not exceed the permissible bounds of its discretion by vacating its August 2011 judgment. The court concluded that the circum-

53. *See id.* at 186 (internal citations omitted).

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.* at 187.

58. *See id.*

59. *See id.*

60. *See id.* (citing *Thai Lao Lignite (Thailand) Co., Ltd. v. Gov't of the Lao People's Democratic Republic,* No. 10 Civ. 5256, 2013 WL 3970823 (S.D.N.Y. Aug. 2, 2013), *Thai Lao Lignite (Thailand) Co., Ltd. v. Gov't of the Lao People's Democratic Republic,* No. 10 Civ. 5256, 2011 WL 4111504 (S.D.N.Y. Sept. 13, 2011)).

61. *See Thai-Lao Lignite,* 864 F.3d at 189.

62. *See id.*

stances relating to the Rule 60(b) motion did not bar district court from vacating its judgment. Hence, the court affirmed the district court's order vacating its judgment since the vacatur would not offend basic notions of justice in the United States.[63]

B. Request for Security for Costs

The Petitioners argued that the district court should have required Laos to post security before it considered the Rule 60(b) vacatur motion.[64] The Petitioners contended that both Rule 60(b) and the New York Convention authorized the courts to require security.[65]

The court referred to the reasons for which the district court had declined to order security. First, the district court ruled that it would violate the Foreign Sovereign Immunities Act (FSIA) to order Laos post security since Laos was a foreign sovereign.[66] The district court recognized that there may be exceptions to foreign sovereign immunity if the foreign sovereign has waived its immunity or if the property was "used for a commercial activity."[67] Additionally, the district court explained that the courts had discretion to not order the parties to post security even if there was no bar under the FSIA. Following that, the district court concluded that it "would decline to exercise its discretion to order the Petitioner's request for Laos to post security.[68]

The Second Circuit affirmed the district court's order denying the Petitioner's motion for a security.[69] The court explained that the district court did not to abuse its discretion by not ordering Laos to post security and did not address whether the FSIA would bar the district court from ordering Laos to post security.[70]

C. Action to Enforce the English Judgment

The Petitioners filed an action before the district court to enforce an English judgment that they had obtained under the New York Uniform Foreign Country Money-Judgments Recognition Act.[71] This Act provides that a "foreign country judgment," defined as filing "an action on the judgment that may enforce a judgment of a foreign state granting or denying recovery of a sum of money."[72] In addition, the Act states that "a foreign country judgment need not be recognized if the judgment conflicts with another final and conclusive judgment."[73]

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63. *See id.*
64. *See id*.
65. *See id.* Under Rule 60(b), the relief may be granted "on motion and just terms." *Id*.
66. *See id.*
67. *See Thai-Lao Lignite,* 997 F. Supp. 2d at 228–30.
68. *See id.*
69. *See id.*
70. *See id.*
71. *See id.*
72. *See* N.Y. CPLR 5301, 5303.
73. *See* N.Y. CPLR 5304(b)(5).

Initially, Laos did not file an answer, and the district court entered a notice of default against it.[74] However, Laos later appeared and moved to vacate the default and the district court directed the Petitioners to show cause why it should not dismiss the petition to enforce the judgment since the English judgment relied heavily on and deferred to the vacated August 2011 judgment.[75] The district court had the discretion to credit the Malaysian courts' judgment in annulling the arbitral award over the English judgment enforcing the award.[76]

The Petitioners argued in their appeal that Laos's default on the English judgment enforcement action precluded the district court from considering the merits of the enforcement claim.[77] The Second Circuit explained that under New York law, the discretionary bases for non-recognition of enforcement judgments were affirmative defenses and that the courts could consider *sua sponte* the grounds for non-recognition.[78] Finally, court held that the non-movant bears the burden of proving a discretionary basis for non-recognition.[79]

The Second Circuit rejected the Petitioners' argument and affirmed the district court's decision denying enforcement of the English judgment enforcing the award.[80] The court explained that equity favored giving heavier weight to the Malaysian courts' judgment annulling the arbitral award particularly when the English judgment was closely related to the district court's judgment, which had also been vacated.[81]

IV. Conclusion

The United States Court of Appeals for the Second Circuit affirmed all three orders by the district court and rejected the Petitioners' argument that the district court abused its discretion by not enforcing its prior judgment. The court affirmed the district court's decision granting motion to vacate its August 2011 judgment to enforce Malaysian arbitral award following the reversal of the award by the Malaysian courts. Further, the court affirmed the district court's order rejecting the Petitioner's request for Laos to post security during the pendency of the appeal and rejected Petitioners' application to enforce the English judgment under New York's Uniform Foreign Country Money-Judgments Recognition Act.

In this decision, the United States Court of Appeals for the Second Circuit expanded its prior decision in *Pemex* by addressing the interaction between a Rule 60(b)(5) motion and the primary jurisdiction's annulment of an arbitral award. The Second Circuit explained that the district courts should evaluate enforcement of an arbitral award by taking into consideration full range of Rule 60(b) factors. However, the Second Circuit explained that the consideration

74. *See Thai-Lao Lignite,* 864 F.3d at 190.

75. *See id.*

76. *See id.* The court explained that equity favored giving the Malaysian judgment priority over the English judgment. *Id.*

77. *See id.* at 190–91.

78. *See id.* at 191.

79. *See id.*

80. *See id.*

81. *See id.*

of these factors in this case would not have changed the district court's decision to vacate its prior judgment. Therefore, the Second Circuit affirmed the district court's order vacating its August 2011 judgment and concluded that the district court did not abuse its discretion in refusing to order Laos to post security nor in its refusing to enforce the English judgment.

Ipek Basaran

Water Splash, Inc. v. Menon

137 S. Ct. 1504 (2017)

The Supreme Court of the United States held that Article 10(a) of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters does not preclude service by mail, as long as the state or any otherwise applicable law does not object to its use.

I. Holding

In *Water Splash, Inc. v. Menon,*[1] the Supreme Court of the United States vacated and remanded Petitioner's allegations and concluded that The Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (hereinafter the "Hague Service Convention," "Convention" or "Treaty") did not prohibit service of process abroad by mail, so long as any otherwise applicable law does not object to its use.[2] In coming to its conclusion, the Court relied on the Convention's text, scope, and drafting history.[3] The Court also examined how foreign courts have interpreted the Hague Service Convention for clarification.[4]

II. Facts and Procedure

Water Splash (Petitioner) sued Tara Menon (Respondent) for unfair competition, conversion, and tortious interference with business relations.[5] Petitioner is a Texas corporation that specializes in the production of aquatic playground systems.[6] Respondent is a former employee of Petitioner.[7] In 2002, the Respondent began working for a competitor, while still employed by the Petitioner.[8] As a result, Petitioner obtained permission to effect service by mail to the Respondent, who is a Canadian resident.[9] The Respondent was properly served, but failed to appear or answer the service.[10] Subsequently, the Petitioner moved for default judgment, alleging it diligently sought service by using methods allowed for substituted service[11] and a default judgment was entered in favor of Petitioner.[12]

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1. 137 S. Ct. 1504 (2017). Justice Alito delivered the opinion of the Court. Justice Gorsuch took no part in the consideration or decision of the case.
2. *Id.* at 1507.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 1513.
7. *Id.*
8. *Id.* at 1507.
9. *Id.*
10. *Id.*
11. Menon v. Water Splash, Inc., 472 S.W.3d 28, 30 (Tex. App. 2015), *vacated and remanded*, 137 S. Ct. 1504, 197 L. Ed. 2d 826 (2017).
12. *Water Splash,* 137 S. Ct. at 1507.

Respondent moved to set aside the judgment on the grounds that the service was not proper.[13] The trial court rejected the motion,[14] holding that Texas Rule of Civil Procedure permitted service by mail.[15] The Respondent appealed arguing that article 10(a) of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters prohibits service of process by mail.[16] The United States is a signatory to the Convention.[17] The Texas Court of Appeals affirmed the holding that the Convention's use of "send" instead of "service" in article 10(a) prohibited service of process by mail.[18] The Texas Court of Appeals affirmed the appeal and denied review of the matter en banc.[19] The Texas Supreme Court subsequently denied discretionary review[20] and the Supreme Court granted certiorari.[21]

III. Discussion

The Court considered whether the Hague Service Convention prohibits service of process by mail.[22] The Convention is a multilateral treaty that establishes the permissible methods of service of process on a defendant within signatory party borders.[23] To determine this issue, the court looked to various methods of treaty interpretation.

A. Interpretation of the Treaty Through the Primary Text

First, the Court looked to the text of the Treaty itself.[24] Article 10 states:

> [The] Convention shall not interfere with . . . (a) the freedom to send judicial documents, by postal channels, directly to persons abroad, (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination, (c)

13. *Id.* at 1508.
14. *Id.*
15. *Menon*, 472 S.W.3d at 30; *see* Water Splash, Inc. v. Menon, 2013 WL 12156506 (Tex.Dist.), 1; *see also* Tex. R. Civ. P. 108a.
16. *Menon*, 472 S.W.3d at 30.
17. The Hague Conference on Private International Law, 14: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, https://www.hcch.net/en/instruments/conventions/status-table/?cid=17 (last visited Dec. 14, 2017).
18. *Menon*, 472 S.W.3d at 32.
19. *Water Splash,* 137 S. Ct. at 1508.
20. *Id.*
21. *Id.* at 1504.
22. *Id.* at 1507.
23. Eric Porterfield, Too Much Process, Not Enough Service: International Service of Process Under the Hague Service Convention, 86 Temp. L. Rev. 331, 332 (2014).
24. *Water Splash,* 137 S. Ct. at 1508–09.

> the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.[25]

The Court held that, in the context of the Convention itself, Article 10 must have been intended to address the issue of service of process, because any other reading would be "structurally implausible" and render the text "superfluous."[26] Though the text of the treaty did not use the word "service," the Court was unconvinced by the argument that the word "send," while broader, did not encompass "service."[27] Furthermore, the Court concluded that the scope of the Convention is limited to the service of documents, and to exclude Article 10 from that scope would be unreasonable.[28]

B. Interpretation of the Treaty Through Drafting History

Second, the Court assessed the drafting history of the Hague Service Convention and found that the history strongly suggests that the Convention permits the use of mail for service of process.[29] The Court took into consideration an article written three month prior to the Convention's signing, authored by a U.S. delegate, in which the delegate stated "[a]rticle 10 permits direct service by mail . . . unless [the receiving] state objects to such service."[30] Furthermore, the Court concluded that the differences between the drafts and final version of the Convention revealed that the drafters expressly rejected the notion that registered mail or postal channels were not permissible means of service.[31] For example, the draft version included a provision that permitted service by telegram and rejected a proposal limiting service to registered mail only.[32] These actions, taken together, indicated to the Court that a liberal interpretation of the provision was required.[33]

C. Interpretation of the Treaty by the U.S. Executive Branch and Foreign Courts

Third, the Court considered the Executive Branch's interpretation of the Convention.[34] The Court noted that the Executive Branch has "consistently maintained that the Hague Service Convention allows service by mail."[35] Additionally, the State Department and the President of the United States both addressed the ability to perform service by mail under the

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25. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, 363 1969.
26. *Water Splash*, 137 S. Ct. at 1509.
27. *Id.* at 1510.
28. *Id.* at 1506.
29. *Id.* at 15011.
30. *Id.* (quoting The Proposed International Convention on the Service of Documents Abroad, 51 A.B.A.J. 650, 653 (1965)).
31. *Id.*
32. *Id.* (quoting 1 B. Ristau, International Judicial Assistance § 4–1–4(2), p. 112 (1990)).
33. *Id.*
34. *Id.* at 1512.
35. *Id.*

Convention, most notably during the Johnson Administration.[36] Specifically, the Court referred to a report by Secretary of State Dean Rusk which stated, "[a]rticle 10 permits direct service by mail . . . unless [the receiving] state objects to such service."[37] President Johnson went on to send this report to the Senate for advice and consent.[38]

In addition, the State Department expressly opposed the holding in *Bankston v. Toyota Motor Corp.*,[39] a case that held service of mail was impermissible by the convention.[40] The State Department expressly stated that service of process by registered mail is permissible under the Convention.[41]

The Court also looked to foreign courts' interpretations of the Convention for guidance.[42] The Court cited to multiple foreign courts—including Canada, United Kingdom, Greece, and Italy—that permit service by mail and considered the view of the issue as "essentially unanimous."[43] However, this view is limited to jurisdictions that do not have local or national laws that prohibit it otherwise.[44]

IV. Conclusion

The Court concluded that the Convention did not prohibit service by mail. The Court analyzed four sources in coming to this decision: (1) the plain meaning, structure, and context of the Convention; (2) the expressed written intent of the drafters prior to the signing of the Convention; (3) the U.S. Executive Branch's interpretation; and (4) foreign court interpretations of the Convention.

Notably, the Court pointed out that "permit" does not mean "authorize."[45] Accordingly, to permit service by mail in a given jurisdiction, two conditions must be met: (1) the "receiving state has not objected to service by mail; and (2) service by mail is authorized under otherwise-

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36. *Id.*; *see* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Message From the President of the United States, S. Exec. Doc. C, 90th Cong., 1st Sess., 5 (1967).

37. *Water Splash*, 137 S. Ct. at 1512 (quoting the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Message From the President of the United States, S. Exec. Doc. C, 90th Cong., 1st Sess., 5 (1967)).

38. *See id.*

39. 889 F.2d 172 (1989).

40. *Water Splash*, 137 S. Ct. at 1512. (citing Notice of Other Documents (1), United States Department of State Opinion Regarding the *Bankston* Case and Service by Mail to Japan Under the Hague Service Convention, 30 I. L. M. 260, 260–61 (1991) (excerpts of Mar. 14, 1990 letter)).

41. *Id.* (citing Dept. of State, Legal Considerations: International Judicial Assistance: Service of Process, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Service-of-Process.html (stating that "[s]ervice by registered . . . mail . . . is an option in many countries in the world… [and]…should therefore not be used in the countries party to the Hague Service Convention that objected to the method described in Article 10(a) (postal channels)").

42. *Id.*

43. *Id.*

44. *Id.* at 1513 (citing Brockmeyer v. May, 383 F.3d 798, 802 (C.A.9 2004)).

45. *Id.*

applicable law."[46] Therefore, the Supreme Court found that the lower court erred in concluding that the Convention prohibited service by mail.[47]

Joshua Lahijani

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46. *Id.* (citing *Brockmeyer*, 383 F.3d at 803–04).

47. *Id.*