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The Contours of Habeas Corpus After *Boumediene v. Bush* in the Context of International Law

Paola Bettelli*

I. Introduction

The purpose of this article is to examine the contours of the writ of habeas corpus within the context of international humanitarian law and human rights law after the landmark decision by the United States Supreme Court in *Boumediene v. Bush*.[1] *Boumediene* was the culmination of a series of prior decisions by the Court on the rights of detainees in Guantánamo and other detention centers with respect to the exercise of the writ. In *Boumediene*, the Court held that the Military Commissions Act of 2006 § 2241(e), which strips the jurisdiction of federal courts to hear these cases, is unconstitutional.[2]

The Court held that "Art. I, § 9, clause 2 of the Constitution [the Suspension Clause] has full effect at Guantánamo Bay."[3] The Court also held that the process provided by the Detainee Treatment Act (DTA) for review of status of aliens detained as enemy combatants at the United States Naval Station at Guantánamo Bay, Cuba, did not provide an adequate substitute for habeas corpus, given lack of opportunity for detainees to present relevant exculpatory evidence not made part of the record in earlier proceedings.[4] The Court remanded the case to the District Court of the District of Columbia for further consideration, and the District Court granted petitions for habeas corpus to five petitioners under *Boumediene,* except for one, Belkacem Bensayah.[5]

This article will examine the District Court's decision on remand, particularly the reasons for which Bensayah was denied habeas corpus, along with recent decisions by United States federal courts in *Munaf v. Geren*, *Kiyemba v. Obama*, and *Al Maqaleh v. Gates*.[6] Consideration of these cases will help determine how federal courts are interpreting the writ of habeas corpus after *Boumediene*.

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1. *See* Boumediene v. Bush, 553 U.S. 723 (2008).
2. Military Commissions Act (MCA), 28 U.S.C. § 2241(e)(1) (stating "No court, justice, or judge shall have jurisdiction for a writ of habeas corpus filed by or behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.").
3. *See Boumediene*, 553 U.S. at 771.
4. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680 (codified as amended at 28 U.S.C. § 2241); *see Boumediene*, 553 U.S. at 792.
5. Boumediene v. Bush, 579 F. Supp. 2d 191 (D.D.C. 2008), *rev'd & remanded*; Bensayah v. Obama, 610 F.3d 718 (D.D.C. 2010).
6. *See* Munaf v. Geren, 553 U.S. 674 (2008); *see* Kiyemba v. Obama, 559 U.S. 131 (2010); Kiyemba v. Obama, 605 F.3d 1046 (D.C. Cir. 2010); Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 559 U.S. 131 (2010); *see* Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010).

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Part II will provide a background on the international and domestic law governing habeas corpus. Part III will examine the consistency of decisions by United States federal courts regarding habeas corpus petitions that concern international law. Part IV will undertake an analysis of such consistency. Part V will conclude with a brief overview of the discussion and analysis.

II. International and Domestic Legal Framework

As a result of the Hague Convention and the Geneva Conventions (and their 1977 Protocols), detentions of prisoners of war and unprivileged enemy combatants were determined to be permissible for a limited period of time, after which judicial determinations had to be made regarding their status.[7] Indefinite detention is barred under these Conventions, international customary law, and international human rights law.[8] The writ of habeas corpus is recognized as a fundamental right under both regimes. The question is how the United States complies with these international standards and principles when making decisions about the detention of prisoners held in detention centers like Guantánamo.

In the United States, the constitutional guarantee to habeas corpus is reflected in the Suspension Clause, which reads as follows: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."[9] *Eisentrager v. Forrestal* remained the governing precedent concerning the jurisdiction of United States courts over habeas petitions on behalf of foreigners held outside the sovereign territory of the United States, until the Court reconsidered the question in *Rasul v. Bush*.[10] In *Eisentrager*, 21 German nationals petitioned the court for writs of habeas corpus. In this case, petitioners had been convicted by a military commission in China of "engag[ing] in military activity against the United States after surrender of Germany and before surrender of Japan."[11] Because the United States and Germany were no longer at war, hostile acts by German citizens against the United States were violations of the laws of war; therefore, petitioners were captured in China, tried there, and repatriated to Germany to serve their sentences in Landsberg Prison, a facility under the joint control of the United States and the Allied Powers during post-war occupation.[12]

The United States Court of Appeals for the District of Columbia Circuit held that "the right to habeas corpus is an inherent common law right," and a jurisdictional statute could not deprive anyone of a right asserted in the Constitution.[13] The Court ruled that the District Court that had jurisdiction over the superior officers of the immediate jailer would have juris-

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7. *See* Hague Convention With Respect to the Laws and Customs of War on Land, July 29, 1899, http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=CD0F6C83F96FB459C12563CD002D66A1&action=openDocument.; *see* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, https://www.icrc.org/ihl/INTRO/375?OpenDocument.

8. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) art. 1 and 9, www.un.org/en/documents/udhr/index.shtml#a30.

9. U.S. CONST. art. I, § 9, cl. 2.

10. Eisentrager v. Forrestal, 174 F.2d 961 (D. C. Cir. 1949); *see* Rasul v. Bush, 542 U.S. 466 (2004).

11. *Eisentrager,* 174 F.2d at 965.

12. *Id.*

13. *See id.* (citing U.S. CONST. art. I, § 9, cl.2).

diction to hear the petition and grant or deny the writ.[14] The Supreme Court granted certiorari and reversed, holding that the writ was unavailable to enemy aliens outside the sovereign territory of the United States.[15] It also noted that the trial of the writ "would hamper the war effort and bring aid and comfort to the enemy."[16]

Contrary to what was held in *Eisentrager*, in *Rasul v. Bush*, a majority of the Court held "that the prisoner's presence within the territorial jurisdiction of the district court is not an 'invariable prerequisite' to the exercise of district court jurisdiction under the federal habeas statute."[17] The Court in *Rasul* held that the habeas statute extended geographically to the base at which the petitioners were held in Guantánamo. In this regard, the majority stated "there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.'"[18] In *Rasul*, petitioners were foreigners (not from nations at war with the United States) who were captured abroad during the war against the Taliban, and transported to a naval base at Guantánamo Bay, Cuba, which the United States holds under a 1903 lease agreement specifying that: "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]."[19]

In response to the *Rasul* decision, Congress passed the Detainee Treatment Act of 2005 (DTA), which President Bush signed into law on December 30 of that year.[20] Among other things, the Act added a new provision to the Habeas Act, which provided that "no court, justice, or judge shall have jurisdiction to hear and consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay . . ."[21]

In *Hamdan v. Rumsfeld*, the Court ruled that the DTA did not operate to strip the federal courts of jurisdiction to hear petitions for writs of habeas corpus on behalf of Guantánamo detainees that were pending at the time of the DTA's enactment.[22] Specifically, the Court held that section 1005(e) of the DTA was inapplicable to cases pending when the DTA was enacted.[23] The *Hamdan* Court also held that the procedures adopted to try Hamdan also violated the Geneva Conventions, and ruled that "the rules applicable in court-martial must apply."[24] In response to the *Hamdan* decision, Congress passed the Military Commissions Act

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14. *Id.* at 967.
15. *See* Johnson v. Eisentrager, 339 U.S. 763 (1950).
16. *Id.* at 944.
17. Rasul v. Bush, 542 U.S. 466, 478 (2004).
18. *Id.* at 482.
19. *Id.* at 470–71.
20. Detainee Treatment Act of 2005, Pub.L. No. 109-148, 119 Stat. 2739 (codified as amended at 28 U.S.C. § 2241).
21. *Id.*
22. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 575–76 (2006).
23. *See Boumediene*, 553 U.S. at 724 (citing *id.*).
24. *See Hamdan*, 548 U.S. at 624–25.

of 2006 (MCA).[25] The MCA prohibited courts from hearing or considering "an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such a determination."[26] The MCA also provides that

> no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States . . . relating to the detention, transfer, treatment, trial or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.[27]

In addition to this, the MCA will be applied retroactively, without exception, to cases relating to "any aspect of the detention, transfer, treatment, trial or conditions of detention of an alien detained by the United States since September 11, 2001."[28]

These provisions are a clear statement of congressional intent to strip the federal courts of jurisdiction to consider petitions for habeas corpus and, not surprisingly, gave rise to a determination regarding the statute's constitutionality in light of the Suspension Clause.[29] That opportunity for the Supreme Court came in *Boumediene v. Bush*.[30] In this case, the Supreme Court held that the statute was unconstitutional because, among other things, "the [Suspension] Clause not only protects against arbitrary suspensions of the writ but also guarantees an affirmative right to judicial inquiry into the causes of detention."[31] The Court also concluded that the MCA did not entail a formal suspension of the writ and, hence, "the Suspension Clause has full effect at Guantanamo."[32] The Court rejected the Government's argument that the Clause affords petitioners no rights because the United States does not claim sovereignty over the naval base.[33] The Court also held that "for the habeas writ, or its substitute, to function as an effective and meaningful remedy in this context, the Court conducting the collateral proceeding must have some ability to correct any errors, to assess the sufficiency of the government's evidence, and to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding."[34]

Before arriving at these conclusions, the Court had to determine whether petitioners were barred from seeking the writ or invoking the protections of the Suspension Clause either

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25. Military Commissions Act (MCA) of 2006, 10 U.S.C. §§ 948 *et seq.* (West Supp. 2007); *see Boumediene*, 553 U.S. at 735 (referring to § 2241(e) of the MCA).

26. 28 U.S.C. § 2241(e); *see Boumediene*, 553 U.S. at 724 (referring to § 2241 of the MCA).

27. 28 U.S.C. § 2241(e).

28. *Id.*

29. U.S. Const. art. I § 9, cl. 2.

30. *See Boumediene*, 553 U.S. at 723.

31. *Id.* at 744.

32. *Id.* at 771.

33. *See id.*

34. *Id.* at 783.

because of their status, such as a designation by the Executive Branch as enemy combatants, or because of their physical location.[35] The government contended that "non-citizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus."[36]

Based on "common thread" language from *Eisentrager* and on the reasoning of other extra-territorial opinions, the Court concluded that "at least three factors are relevant in determining the reach of the Suspension Clause:[37] (1) the citizenship and status of the detainee and the adequacy of the process through which the status determination was made, (2) the nature of the sites where apprehension and detention took place, and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[38]

Considering these factors, the Court concluded "that Art. I, § 9, cl.2, of the Constitution has full effect at Guantánamo Bay."[39] As a result, "petitioners have the constitutional privilege of habeas corpus."[40] The Court considered it irrelevant that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation of relevant law."[41]

In *Boumediene v. Bush,* petitioners were foreigners designated as enemy combatants and detained at the United States Naval Station at Guantánamo Bay, Cuba. In 2002, Lakhdar Boumediene and five others were apprehended by police in Bosnia and Herzegovina. Their apprehension and subsequent arrest was based on suspicion by U.S. intelligence about their involvement in bombings that took place at the U.S. Embassy in Saravejo.[42] This is an unusual case because, at the time of their arrest, all six petitioners, who are native Algerians, were residing over a thousand miles away from the Afghanistan battlefield.[43] Petitioners held Bosnian citizenship or lawful permanent residence along with their native Algerian citizenship.[44] Petitioners challenged their detention at the United States Naval Station military base in Guantánamo Bay, Cuba, as well as the constitutionality of the MCA. In October 2008, petitioners filed the first-ever evidentiary response ("traverse"), refuting the government's grounds for detention at Guantánamo.[45] As a result of this challenge, the U.S. government dropped its more serious charge, namely that petitioners were planning to attack the U.S. Embassy in Sarajevo.[46]

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35. *See id.* at 739.
36. *Id.*
37. *See id.* at 766; *see also* Johnson v. Eisentrager, 339 U.S. 763 (1950).
38. *Boumediene*, 553 U.S. at 766.
39. *Id.* at 771.
40. *Id.*
41. *Id.* at 779.
42. Boumediene v. Bush, 579 F. Supp. 2d 191, 193 (D.D.C. 2008).
43. *Id.*
44. *Id.*
45. *See generally Guantanamo: Boumediene v. Bush*, WILMERHALE, http://www.wilmerhale.com/boumediene/ (last visited Sept. 28, 2014).
46. *See id.*

After the Supreme Court held that the MCA was unconstitutional and that petitioners were entitled to the writ of habeas corpus, it remanded the case to the United States District Court for the District of Columbia for further proceedings. On November 20, 2008, the District Court granted Boumediene's petition for writ of habeas corpus because it concluded that the government had not met its burden with respect to the existence of a plan by five of the petitioners to travel to Afghanistan to engage U.S. and coalition forces.[47] However, it denied the writ of habeas corpus to petitioner Belkacem Bensayah because the government had met its burden by providing additional evidence that sufficiently corroborated its allegations from an unnamed source, which communicated to them that Bensayah was an al-Qaeda facilitator.[48] The U.S. government decided not to appeal the decision and on December 16, 2008, three of the petitioners returned to Sarajevo where they were met by family and friends.[49] This was the first time that the U.S. government had released Guantánamo prisoners. The remaining two successful petitioners, Boumediene and Saber Lahmar, were released and transferred to France in 2009.[50]

Bensayah appealed the denial of habeas to the United States Court of Appeals for the District of Columbia Circuit. However, the government notified the Court of Appeals "that it could no longer rely on evidence that this Court had based its decision on when it denied habeas to the petitioner on November 20, 2008."[51] Accordingly, the Court of Appeals reversed the District Court's decision, and on December 5, 2013, Bensayah was transferred from Guantánamo into Algerian government custody.[52]

III. Federal Court Habeas Decisions

The issue discussed in this article is whether the decision of the United States Supreme Court in *Boumediene v. Bush* is consistent with international humanitarian law and international human rights law, and if so, whether the cases that have been decided thereafter by federal courts are consistent with these two bodies of international law.

A. Relationship Between International Humanitarian Law and Human Rights Law

Initially, this article will discuss the relationship between international humanitarian law and international human rights law in terms of which body of law applies and when it may apply. Traditionally, *lex specialis*, or laws governing a specific subject matter, take precedence over laws that are general in nature. Views vary regarding application of this statutory canon to international humanitarian and human rights law.

For example, the European Court of Human Rights believes that international human rights law contains non-derogable components which are applicable during both times of peace

47. *See Boumediene*, 579 F.Supp. at 197.

48. *Id.* at 198.

49. *See generally* WILMERHALE, *supra* note 45.

50. *Id.*

51. Bensayah v. Obama, No. 1:04CV1166(RJL), 2014 U.S. Dist. LEXIS 13073, at *4 (D.D.C. Feb. 1, 2014).

52. *Id.*

and of war and, as such, are *lex specialis*.[53] The Inter-American Commission on Human Rights takes a similar view when it states that

> it is well-recognized that international human rights law applies at all times, in peacetime and in situations of armed conflict . . . the protections under international human rights law and humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity.[54]

This precept is reflected in the Martens clause, which is common to the Geneva Conventions and to the Hague Convention of 1899, according to which

> human persons who do not fall within the protection of those treaties or other international agreements remain under the protection of the principles of the law of nations, as they result from the usages established among the civilized peoples, from the laws of humanity, and the dictates of the public conscience.[55]

A set of non-derogable rights is also recognized in Article 75 of Additional Protocol I of 1977 of the Geneva Conventions.[56] Article 75 covers the fundamental guarantees for persons who are detained by a Party and who do not benefit from more favorable treatment under the Conventions or under this Protocol.[57] These sets of minimum guarantees include prohibitions against murder, torture, corporal punishment, mutilation, and outrages upon human dignity.[58] Article 75 also provides that, except for arrest or detention for penal offences, detainees "shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist."[59] While the United States is not a party to Additional Protocol I, the International Committee of the Red Cross has stated that "there can be no doubt that Article 75 constitutes a minimum standard which does not allow for any exceptions; such persons must regain all the rights and privileges laid down by the Convention as soon as circumstances permit."[60] Also, the International Court of Justice (ICJ), in its advisory opinion rendered on July 8, 1996 regarding the *Legality of the Threat of Nuclear Weapons*, confirmed that it was appropriate to refer to international humanitarian law (IHL) as

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53. *See* PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS LAW 413 (Oxford Univ. Press ed., 2013).

54. *Id.* at 417.

55. *Id.* at 418.

56. *See* Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 75 (June 8, 1977), 1125 U.N.T.S. 3, https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=086F4BB140C53655C12563CD0051E027.

57. *See id.*

58. *See id.*

59. *Id.*

60. INTERNATIONAL COMMITTEE OF THE RED CROSS, Comment No. 3032 (June 8, 1977), http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=086F4BB140C53655C12563CD0051E027.

lex specialis to determine what could be considered as an arbitrary deprivation of life."[61] This means the set of non-derogable rights under IHL, including Article 75 API provisions, would be applicable to indefinite detention.

On the other hand, the United States is of the view that "international human rights law is not applicable to the conduct of hostilities or the capture and detention of enemy combatants, which are governed by the more specific laws of armed conflict."[62] The interpretation by the United States of the interface between the two bodies of law is important because it bears on whether enemy combatant detainees are protected by human rights laws or not. According to the executive branch, detainees in Guantánamo, for example, cannot seek action by the Inter-American Commission on Human Rights regarding their detention or treatment because these issues cannot be framed in terms of human rights law, "ignoring the separate and distinct humanitarian law rules at issue."[63] The judicial branch has recognized that Common Article 3 of the Geneva Conventions is applicable to enemy combatants detained in detention centers like Guantánamo.[64]

Since the six petitioners under *Boumediene* were not arrested in the battlefield, but miles away from Afghanistan, it is not entirely clear whether they ought to be considered as enemy combatants, unprivileged enemy combatants, or as civilians. If petitioners are characterized as enemy combatants, they are protected under Common Article 3 of the Geneva Conventions. If petitioners are deemed unprivileged enemy combatants in connection with the conflict in Afghanistan, they would fall under Article 5 of Geneva IV and under the customary rules set forth in API, Article 75.[65] On the other hand, if petitioners are viewed as civilians, they are protected under international human rights law.

If the United States only recognizes the application of international humanitarian law to detainees in Guantánamo and other such bases, but not the application of human rights law according to which no one shall be subjected to arbitrary arrest detention or exile, it remains unclear whether detainees have a writ.[66] In *Boumediene,* the United States Supreme Court held that the detainees have a writ of habeas corpus for a number of reasons, including the fact that the framers of the Constitution considered the writ to be a vital instrument for the protection of individual liberty and an essential mechanism in the separation-of-powers scheme.[67] The Court also concluded that the "privilege of habeas corpus entitles a prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the 'erroneous application or interpretation' of relevant law."[68]

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61. ALSTON & GOODMAN, *supra* note 53, at 412 (citing Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8)).

62. *Id.* at 419.

63. *Id.*

64. Rasul v. Bush, 542 U.S. 466 (2004).

65. *See* THOMAS MICHAEL MCDONNELL, THE UNITED STATES, INTERNATIONAL LAW, AND THE STRUGGLE AGAINST TERRORISM 111 (2009).

66. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), http://www.un.org/en/documents/udhr/.

67. Boumediene v. Bush, 553 U.S. 743 (2008).

68. *Id.* at 779.

With this holding, the Court implicitly recognized that petitioners were protected under human rights provisions contemplated under Articles 3, 8 and 9 of the Universal Declaration of Human Rights, according to which (1) everyone has the right to life, liberty and security of person, (2) everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law, and (3) no one shall be subjected to arbitrary arrest, detention or exile.[69]

Moreover, Article 9 of the International Covenant on Civil and Political Rights (ICCPR) provides that everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[70]

The Court also implicitly acknowledged the set of non-derogable rights under Common Article 3 of the Geneva Conventions and of 75 of API. This view is supported by the fact that in *Hamdan v. Rumsfeld*, the Court held that Common Article 3 is applicable to the conflict with al-Qaeda.[71] Citing the commentary to Article 3 by the ICRC, the Court stated, "The scope of application of the Article must be as wide as possible."[72] Furthermore, the *Hamdan* plurality recognized that Article 75 of the Additional Protocol I to the Geneva Conventions had ripened into customary international law.[73] More specifically, the Court stated that many of the trial protections described under Article 75 were requirements under customary international law.[74]

Therefore, under both international humanitarian law and human rights law, indefinite detention is banned. Consistent with this determination, in *Boumediene* the Court concluded that the "privilege of habeas corpus entitles a prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law."[75] With this holding, the Court implicitly recognized that petitioners were protected under the set of non-derogable rights of common Article 3 of the Geneva Conventions and under Article 75 of Additional Protocol I.[76] A ban on arbitrary detention is also reflected in Article 9 of the ICCPR and Section 702 of the Restatement (Third) of Foreign Relations, which expressly prohibits "prolonged arbitrary detention."[77]

Since the U.S. Supreme Court's decision in *Boumediene* is consistent with principles contained both in international humanitarian law and in international human rights law, it is fair

69. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), http://www.un.org/en/documents/udhr/.

70. International Covenant on Civil and Political Rights art. 9 (Dec. 16, 1966), http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

71. *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

72. *Id*. at 631.

73. *Id.* at 632.

74. *Id.* at 633.

75. *Boumediene*, 553 U.S. at 779.

76. *Id*.

77. International Covenant on Civil and Political Rights art. 9 (Dec. 16, 1966), http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

to say that court decisions after *Boumediene* are bound by these sets of principles. If this is the case, it is important to consider whether decisions by the United States federal courts in *Munaf v. Geren, Kiyemba v. Obama*, *Maqaleh v. Hagel*, and *Bensayah v. Obama* have been consistent with the principles of habeas corpus delineated by the United States Supreme Court in *Boumediene*.[78]

B. Indefinite Detention Cases

1. *Munaf v. Geren*

The United States Supreme Court decided *Munaf v. Geren* on the same day as *Boumediene*.[79] *Munaf* involved two American citizens who voluntarily traveled to Iraq and allegedly committed serious crimes, including kidnapping of journalists. Petitioners were captured and detained by U.S. forces during intelligence operations.[80] With their petition for habeas corpus, petitioners sought to enjoin their transfer from the detainee camp operated by the Multinational Force (MNF-I) in Iraq, where they were being held, to the custody of the Central Criminal Court of Iraq.[81] In other words, petitioners were seeking to avoid criminal prosecution in Iraq. Because petitioners wanted to be released in the United States and not in Iraq, the principle known as "release-plus" was invoked.[82] The Court held that while the United States courts had jurisdiction over habeas corpus petitions filed on behalf of American citizens held overseas in detainee camps operated by a multinational force such MNF-I, the federal district courts may not exercise their habeas jurisdiction to enjoin the United States from transferring those individuals to local courts for criminal prosecution.[83]

On whether United States district courts may exercise habeas jurisdiction to enjoin the United States armed forces from transferring individuals detained within another sovereign's territory to that sovereign's government for criminal prosecution, the Court held that habeas relief is not appropriate in these cases.[84] The Court clarified its position when it stated, "Habeas is at its core a remedy for unlawful executive detention."[85] Given the fact petitioners allegedly committed serious crimes, including kidnapping in the territory of Iraq, this country has the "sovereign right to prosecute Omar and Munaf for crimes committed on its soil."[86] Petitioners did not "dispute that they voluntarily traveled to Iraq, that they remain detained

78. Kiyemba v. Obama, 555 F.3d 1022 (2009); Maqaleh v. Hagel, 738 F.3d 312 (D.C. Cir. 2013); Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. 2010); Bensayah v. Obama, No. 1:04CV1166(RJL), 2014 U.S. Dist. LEXIS 13073, at *4 (D.D.C. Feb 1, 2014).

79. Munaf v. Geren, 553 U.S. 674 (2008); *Boumediene*, 553 U.S. at 723.

80. *See Munaf*, 533 U.S. at 674.

81. *Id.*

82. Samuel Chow, *The* Kiyemba *Paradox: Creating a Judicial Framework to Eradicate Indefinite, Unlawful Executive Detentions*, 19 CARDOZO J. INT'L & COMP. L. 776, 792 (2011).

83. *Munaf*, 553 U.S. at 674–75.

84. *Id.* at 694.

85. *Id.*

86. *Id.*

within the sovereign territory of Iraq or that they are alleged to have committed serious crimes in Iraq."[87]

In *Munaf*, the Court limited the right to the writ of habeas corpus to non-criminal cases.[88] Such application is consistent with principles of international humanitarian and human rights law. Article 75 of API expressly states that persons have a right to be released with the minimum delay possible, except in cases of arrest or detention for penal offences.[89] This view is also consistent with Article 9 of the Universal Declaration of Human Rights, which states that "no one shall be subjected to arbitrary arrest, detention or exile."[90] Arrest is not arbitrary punishment for a penal offense.

However, the Court, in this case, invoked the "rule of non-inquiry," according to which courts hearing extradition cases will not inquire into the procedures or treatment in the state requesting the extradition, even if they may possibly involve torture or physical abuse of the detainees.[91] The rule of non-inquiry is meant to conform to the traditional rule of state sovereignty, according to which states have the right to prosecute and punish crimes committed within their own territory.[92] Pursuant to this rule, Iraq would have the right to prosecute detainees for committing crimes in its territory.[93]

On the other hand, transferring a detainee to a place where it is reasonably certain that he will be subject to torture or other types of cruel or inhumane treatment infringes minimum standards and norms of IHL and human rights law, which forbid this kind of treatment. In this regard, the United Nations Convention Against Torture (CAT) prohibits extradition of a person to another state "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[94] To determine whether there are such grounds, "the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass

87. *Id.*

88. *Id.*

89. *See* Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75 (June 8, 1977), 1125 U.N.T.S. 609, https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=086F4BB140C53655C12563CD0051E027.

90. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), http://www.un.org/en/documents/udhr/.

91. John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973, 1975 (2010).

92. *Id.*

93. *Id.*

94. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A./RES/39/49, art. 3(1) (Dec. 10, 1984), http://www.ohchr.org/Documents/ProfessionalInterest/cat.pdf [Convention Against Torture].

violations of human rights."[95] In *Munaf*, detainees would be transferred to Iraq, which is well-known for its torture practices. Hence, the Court's ruling in this case is contrary to the CAT.

In *Ahmed v. United Kingdom*, the European Court of Human Rights held that extradition of detainees held in custody by the United Kingdom to a high security prison in the United States, where solitary confinement and other such harsh measures are often practiced, did not amount to cruel and inhumane treatment and, as such, did not violate article 3 of the Geneva Conventions.[96] The distinction between *Munaf* and *Ahmed* is the fact that the treatment of prisoners in high-security prisons in the United States does not rise to the level of torture as does the treatment of prisoners held in Iraqi confinement facilities.

In contrast, in *Omar v. Harvey*, the U.S. District Court for the District of Columbia took a position more consistent with international law.[97] In *Omar*, the District Court granted preliminary injunctive relief to petitioners to avoid extradition to Iraq because transfer entailed a threat of irreparable harm to petitioners.[98] The threat involved exposing petitioners to "a substantial risk of torture, even death by Iraqi authorities."[99] The decision by the Supreme Court in *Munaf* clearly contradicts the principles against cruel and inhuman treatment of both IHL and international human rights law.

2. *Kiyemba v. Obama*[100]

In *Kiyemba*, 17 Chinese citizens detained as enemy combatants at Guantánamo, whose enemy combatant statuses had been removed, sought federal habeas relief in the form of release inside the United States (another case of "release-plus").[101] The 17 petitioners were Uighurs, or Turkic Muslim minorities, who arrived in Afghanistan after fleeing from Chinese oppression.[102] Once in Afghanistan, the petitioners lived together in Uighur camps.[103] The U.S. government claimed that the camps were run by a group that supported the Taliban, but the government produced scant evidence in this regard.[104] Despite the fact that the government relieved petitioners of enemy combatant status, their detention continued.[105]

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95. *See id*.

96. *See generally,* Ahmed v. United Kingdom, H.R., (1998), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58222.

97. *See* Omar v. Harvey, 461 F. Supp. 2d 19, 28 (D.D.C 2006).

98. *See id.* at 29.

99. *Id.* at 28.

100. *See* Kiyemba v. Obama, 559 U.S. 131 (2010); *see* Kiyemba v. Obama, 605 F.3d (D.C. Cir. 2010); *see* Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009).

101. *See Kiyemba,* 555 F.3d at 1023.

102. *In re* Guantánamo Bay Detainee Litigation, 581 F. Supp. 2d 33, 34 (D.D.C. 2008).

103. *Id.* at 34.

104. *Id.* at 37

105. *Id.*

The United States District Court for the District of Columbia granted relief and ordered petitioners' release in the United States.[106] The District Court found that petitioners' indefinite detention was unconstitutional because petitioners are not members of the Taliban or al-Qaeda, leaving no other grounds for their detention.[107] The Court of Appeals reversed, holding that federal courts lacked authority to grant the relief sought because the Court lacked express authorization to review the executive branch's exclusion decision.[108]

The petitioners were ethnic Uighurs, who reside in the Xinjiang province of western China.[109] Evidence produced at hearings before Combatant Status Review Tribunals in Guantánamo indicated that at least some petitioners intended to fight the Chinese government, and that they had received firearms training at the camp of Tora Bora for this purpose.[110] Releasing petitioners to their country of origin posed a problem because petitioners feared that if they were returned to China, they would be subject to torture and mistreatment. Petitioners did not seek to comply with the immigration laws governing alien entry into the United States.[111] The United States government undertook diplomatic efforts to locate an appropriate third country in which to re-settle petitioners. Countries willing to accept most of the petitioners were found, but some petitioners were unwilling to re-settle in those countries and insisted on being re-settled in the United States.[112]

The question before the United States Court of Appeals for the District of Columbia was whether petitioners were entitled to an order requiring the government to bring them to the United States and release them here.[113] The Court held that petitioners were not entitled to such extraordinary relief. The Court indicated that "ever since national States have come into being, the right of the people to enjoy the hospitality of a State of which they are not citizens has been a matter of political determination by each State, a matter wholly outside the concern and competence of the Judiciary."[114] The Court emphasized that petitioners were not seeking "simple release."[115] They asked for, and received, much more: "a court order compelling the Executive to release them into the United States outside the framework of immigration laws."[116] The Court also stated that "whatever may be the content of common law habeas corpus, we are certain that no habeas court, since the time of Edward I ever ordered such an extraordinary remedy."[117]

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106. *Kiyemba*, 559 U.S. at 132.

107. *In re* Guantánamo Bay Detainee Litigation, 581 F. Supp. 2d 33, 38 (D.D.C. 2008).

108. *Id.* at 42.

109. *Id.*

110. *Id.* at 35.

111. *Id.*

112. *Id.*

113. *See* Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009).

114. *Id.* at 1026 (citing Harisiades v. Shaughnessy, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring)).

115. *Kiyemba*, 555 F.3d at 1028.

116. *Id.* at 1028.

117. *Id.*

The Supreme Court granted certiorari on the question of whether a federal court exercising habeas jurisdiction has the power to order the release of prisoners held at Guantánamo Bay where the Executive detention is "indefinite and without authorization in the law, and release into the continental United States is the only [possible effective] remedy."[118] However, by the time the case was before the Court "each of the detainees at issue had received at least one offer of resettlement in another country."[119] Most of the detainees had accepted an offer of re-settlement but five detainees had rejected such offers and were still being held at Guantánamo Bay.[120] As a result of this change in the underlying facts, the Supreme Court remanded the case to the United States Court of Appeals for the District of Columbia Circuit to determine what further proceedings in that Court or in the District Court were necessary and appropriate for the full and prompt disposition of the case in light of the new developments.[121]

On remand from the Supreme Court, the United States Court of Appeals for the District of Columbia Circuit reinstated its original opinion, as modified to take account of the new developments.[122] The Court of Appeals clarified that its original decision was made in light of resettlement offers to all petitioners, determining that there are no new relevant facts.[123] Procedurally, the "petitioners wanted the Court to remand the case to the district court for an evidentiary hearing on whether any of the resettlement offers were 'appropriate.'"[124] The Court rejected this and reiterated that it was within "the exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms."[125] The Court emphasized that the statutes suspend nothing because "petitioners never had the constitutional right to be brought to the United States and released."[126]

An analysis of *Kiyemba* indicates that the ruling by the Court conforms to international law norms because petitioners were given reasonable alternative locations for release other than in the United States. In *Kiyemba*, petitioners were Chinese citizens, stationed at camps in Afghanistan, fleeing from oppression by the Chinese government. Petitioners were found neither to be enemy combatants nor pose any threat to the United States.[127] As a result, they should have been released without delay. However, petitioners wanted to be released in the United States, and did not apply for asylum to this end.[128] The United States government made a good faith attempt to relocate petitioners in countries such as Bermuda, Palau, and Switzerland, but some petitioners refused these offers and preferred to continue being held in Guantánamo.[129]

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118. Brief for Respondent at 51, Kiyemba v. Obama, 559 U.S. 969 (2009) (No. 08-1234).

119. Kiyemba v. Obama, 559 U.S. 131 (2010).

120. *Id.*

121. *Id.*

122. *See* Kiyemba v. Obama, 605 F.3d 1046, 1047 (D.C. Cir. 2010).

123. *See id.*

124. *Id*. at 1047.

125. *Id.* (citing Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009)).

126. *Kiyemba*, 605 F.3d at 1048.

127. *Id.*

128. *Id.*

129. *Id.*

The right to asylum is protected under international law.[130] However, because it is often a political question, asylum is a non-justiciable matter under the U.S. Constitution and under the separation of powers doctrine. Hence, it is up to the executive, not the judiciary, to decide whether to grant asylum in specific cases. Here, petitioners never sought asylum, but rather sought release from Guantánamo into the United States. There is an important legal distinction between the two. While petitioners have the right, under international law, to be released from indefinite detention, the U.S. has no duty to grant asylum if petitioners have not applied for it. The government did not violate international law when it denied petitioners release in the United States because there were other reasonable alternatives for release, and because the U.S. is under no duty under international law to grant asylum if it has not been requested.

3. *Maqaleh v. Gates*

In *Maqaleh v. Gates*, foreign detainees petitioned for writs of habeas corpus, challenging their detention by the U.S. government as enemy combatants at Bagram Airfield in Afghanistan.[131] The United States District Court for the District of Columbia denied the government's motion to dismiss for lack of jurisdiction based on the Military Commissions Act (MCA), but certified the three habeas cases of interlocutory appeal under 28 U.S.C § 1292(b).[132] Pursuant to that certification, the government filed a petition for interlocutory appeal that was granted. All three petitioners were being held as unlawful enemy combatants at the Bagram Theater Internment Facility on the Bagram Airfield Military Base in Afghanistan.[133] At the time of the suit, the detainees had been held at Bagram Base for nine years. The United States entered into an "Accommodation Consignment Agreement for Lands and Facilities at Bagram Airfield" with the Islamic Republic of Afghanistan in 2006.[134] The Agreement refers to Afghanistan as the "host nation" and the United States "as lessee."[135]

Applying the "common thread" analysis of *Eisentrager* used by the *Boumediene* court on the question of whether U.S. courts have jurisdiction to consider habeas petitions from detainees in Guantánamo, the Court held that there were practical obstacles inherent in resolving the prisoner's entitlement to the writ, given that Afghanistan was still a zone of armed conflict. The "common thread" analysis factors considered by the *Boumediene* court are (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination is made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.[136]

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130. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), http://www.un.org/en/documents/udhr/.

131. Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010).

132. *Id.*

133. *Id.*

134. *Id.* at 87.

135. *Id.*

136. *Id.* at 94.

The United States Court of Appeals for the District of Columbia Circuit, applying these *Boumediene* factors to *Maqaleh*, rejected the proposition that *Boumediene* adopted a bright-line test with the effect of substituting *de facto* for *de jure* in the otherwise rejected interpretation of *Eisentrager.* The Court noted that the fact that that all petitioners were apprehended abroad weighed against the application of the writ. Combined with the second factor (obstacles inherent in resolving the prisoner's entitlement to the writ), the balance weighs overwhelmingly in favor of not extending the writ to detainees in Bagram.[137] The Court finally held that "the jurisdiction of the courts to afford the right to habeas relief and the protection of the Suspension Clause does not extend to aliens held in executive detention in the Bagram detention facility in the Afghan theater of war."[138]

An analysis of *Maqaleh* indicates that the ruling by the Court runs counter to norms of international law. Since all but one of petitioners in *Maqaleh* were captured outside the theater of war (outside of Afghanistan) and brought to the base in Bagram by the United States, they cannot be held to be enemy combatants. It is also uncertain whether they could be held as unprivileged enemy combatants since there seemed to be insufficient evidence to indicate that they were engaged in hostile activities against the United States. Petitioners had been held for more than nine years in Bagram. In these circumstances, petitioners were being held unlawfully and should have been released without delay.

The fact that the United States Court of Appeals for the District of Columbia ruled that petitioners could continue being held captive in Bagram because of "practical obstacles inherent in resolving the prisoner's entitlement to the writ" not only contravenes international law, but also the principles set forth in *Boumediene*.[139] Applying *Boumediene,* Bagram detainees who are not Afghan citizens, who were not captured in Afghanistan, and who have been held for an unreasonable amount of time (six years) without adequate process may invoke the protections of the Suspension Clause, and hence the privilege of habeas corpus.[140]

Moreover, the decision in *Maqaleh* contravenes principles of international human rights law because the status of the Bagram detainees is determined not by a Combatant Status Review Tribunal, but by an "Unlawful Enemy Combatant Review Board" (UECRB). "Proceedings before the UECRB afford even less protection to the rights of detainees in the determination of status than the case with the CSRT."[141] The United Nations Special Rapporteur on Torture "finds that the military commissions—even after legislative amendments were introduced in the Military Commissions Act of 2009—simply maintain a sub-standard system of justice and do not meet international fair trial standards."[142] The UECRBs standards that were used to determine the status of detainees at Bagram clearly fall below international law standards of due process. Arbitrary indefinite detention is a violation under both IHL and

137. *See id.* at 97.

138. *Id.* at 99.

139. Maqaleh v. Gates, 605 F.3d 84, 97 (D.C. Cir. 2010).

140. Maqaleh v. Gates, 604 F. Supp 2d 205, 235 (D.D.C. 2009).

141. *Maqaleh,* 605 F.3d at 96.

142. Juan E. Mendez, Statement of the United Nations Special Rapporteur on Torture at the Expert Meeting on the Situation of Detainees Held at the U.S. Naval Base at Guantánamo Bay (Oct. 3, 2013), http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13859&LangID=E.

international human rights law.[143] In this regard, the United Nations Special Rapporteur on Torture asserts that "the situation in Guantánamo Bay, including the practice of torture, indefinite detention and the lack of accountability for State's actions or their complicity in counter terrorism measures that have violated human rights is a cross-cutting issue."[144]

4. *Bensayah v. Obama*

In a group of consolidated cases, detainees held as enemy combatants at the United States Naval Station at Guantánamo Bay, Cuba, petitioned for writ of habeas corpus.[145] In the first set of cases, the United States District Court for the District of Columbia granted government's motion to dismiss, and Detainees appealed.[146] In the second set of cases, the District Court granted in part and denied in part the government's motion to dismiss. The government brought an interlocutory appeal, and detainees cross-appealed. The Court of Appeals vacated and dismissed. On remand, the District Court granted the habeas petition of five detainees and denied petition of a sixth detainee named Bensayah, who appealed.[147]

Bensayah, an Algerian citizen, was arrested by the Bosnian police on immigration charges in late 2001.[148] He was later told that he and five other Algerian men arrested in Bosnia were suspected of plotting to attack the United States Embassy in Sarajevo.[149] Because the ensuing three-month investigation failed to uncover evidence sufficient to continue the detention of the six men, the Supreme Court of the Federation of Bosnia and Herzegovina ordered that they be released.[150] The men were then turned over to the United States government and transported to the U.S. Naval Station at Guantánamo Bay, where they were detained beginning in January 2002.[151] In 2004, Bensayah and five other detainees petitioned the district court for habeas corpus.[152] Although their petitions were originally dismissed, they were reinstated after the Supreme Court in *Boumediene* held that detainees at Guantánamo Bay were constitutionally entitled to the privilege of habeas corpus to challenge the legality of their detention.[153]

On remand, the District Court entered a case management order (CMO) establishing the procedure that would govern this case.[154] The CMO placed upon the government the burden of establishing by a preponderance of the evidence the lawfulness of the petitioner's detention.

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143. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Geneva Convention, art. 5, art. 3 (1948).

144. Mendez, *supra* note 142.

145. Bensayah v. Obama, No. 1:04-1166 (RJL), 2014 WL 395693, at *1 (D.D.C. 2014); Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. 2010); Boumediene v. Bush, 597 F. Supp. 2d 191 (D.C. Cir. 2008).

146. *Bensayah*, 2014 WL 395693, at *1.

147. *Bensayah*, 610 F.3d 718.

148. *Id.* at 720.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *See Bensayah*, 610 F.3d at 721.

The CMO allowed discovery only by leave of the Court for good cause shown, and required that requests for discovery (1) be narrowly tailored; (2) specify why the request is likely to produce evidence both relevant and material to the petitioner's case; (3) specify the nature of the request, and (4) explain why the burden on the Government to produce such evidence is neither unfairly disruptive nor unduly burdensome.[155] The CMO also required the Government to provide to the petitioner any exculpatory evidence "contained in the material reviewed in developing the return for the petitioner and in preparation for the hearing for the petitioner."[156]

The District Court granted habeas to each petitioner other than Bensayah, "holding the government had failed to show by a preponderance of the evidence that they had planned to travel to Afghanistan to fight against the United States."[157] The District Court denied Bensayah's petition because it determined that "the government has met its burden by providing additional evidence that sufficiently corroborates its allegations from this unnamed source that Bensayah is al-Qaida."[158]

There were some developments after the District Court's decision, including the fact that the government eschewed reliance upon a portion of the evidence that Bensayah was "senior Al-Qaeda facilitator."[159] On appeal, Bensayah challenged the District Court's reliance upon the preponderance of the evidence standard, its refusal to require the government to search for reasonably available exculpatory evidence in its possession, and its denial of his discovery requests and admission of the government's "rebuttal" evidence.[160]

In its decision, the Court of Appeals held that requiring the government to prove the lawfulness of detainee's detention by a preponderance of the evidence, rather than beyond a reasonable doubt, did not violate the Constitution, and the District Court did not abuse its discretion by placing upon detainee the burden of explaining why each of his discovery requests would be neither unfairly disruptive nor unduly burdensome to the government.[161] However, the Court held that the evidence was insufficient for the government to hold detainee pursuant to the Authorization for Use of Military Force (AUMF) on grounds that he was functionally a part of al-Qaeda.[162] Bensayah requested that the Supreme Court consider the Court of Appeals' decision. The writ of certiorari was granted, but Bensayah was released by the government before the Supreme Court heard the case.[163]

An analysis of *Bensayah* indicates that the ruling by the Court is contrary to international law principles. Indefinite detention does not vary much from life imprisonment, and for this

155. *Id.*

156. *Id.* at 721.

157. *Id.* at 721 (citing Boumediene v. Bush, 579 F. Supp. 2d 191, 197–98 (D.C. Cir. 2008)).

158. *Id.* at 721–22 (citing *Boumediene*, 579 F. Supp. 2d at 198).

159. *Id.* at 722.

160. *Id.*

161. *Id.* at 723–24.

162. *Id.* at 727.

163. *Id.*

reason, the standard of proof to determine detention should be "beyond a reasonable doubt," or at the very least "clear and convincing evidence," rather than merely "preponderance of the evidence." Hence, in deciding that the proper standard of proof is preponderance of the evidence, the Court of Appeals infringed principles of international humanitarian law contained in Article 75 of Additional Protocol I to the Geneva Conventions. According to this article,

> No sentence may be passed and no penalty may be executed on a person found guilty of a penal offense related to armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure . . .[164]

Indefinite detention, without due process, also violates international human rights principles. The corresponding provision in the International Covenant on Civil and Political Rights (ICCPR) is Article 9, paragraph 1, which stipulates, "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."[165] In this regard, the High Commissioner for Human Rights and the Inter-American Commission on Human Rights find that "the continuing and indefinite detention of individuals, without the right to due process, is arbitrary and constitutes a clear violation of international law."[166]

IV. Analysis

In the aftermath of *Boumediene v. Bush*, federal courts have attempted to grapple with the application of the writ of habeas corpus to a variety of fact patterns. These differ from *Boumediene*'s, in that petitioners have sought release from detention centers other than Guantánamo Bay, as in Iraq (*Munaf v. Geren)* or in Afghanistan (*Kiyemba v. Bush* and *Maqaleh v. Gates*). In two of the aforementioned cases, in addition to the fact that petitioners were held in detention centers located in foreign nations, requests for habeas corpus were not simply for release, but were conditioned on release to a specific location ("release-plus"). In both of the instances of "release-plus" petitions, the courts have held that the writ of habeas corpus is not available to grant extraordinary remedies such as these. However, in *Munaf,* release as ordered by the court resulted in extradition to a place where torture was likely to occur. Such practices are barred by the United Nations Convention against Torture and by other provisions of international law that protect prisoners against cruel and inhuman treatment.

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164. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art 75 (June 8, 1977), 1125 U.N.T.S., https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument.

165. International Covenant on Civil and Political Rights art. 9 (Dec. 16, 1966), http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

166. Stephanie Selg, Assoc. Human Rights Expert, Office of the High Commissioner for Human Rights, Statement of the United Nations Special Rapporteur on Torture at the Expert Meeting on the Situation of Detainees held at the U.S. Naval Base at Guantánamo Bay (transcript http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx? NewsID=13859&LangID=E).

Courts have said that the writ cannot be used to circumvent the jurisdiction of criminal courts in countries where petitioners had committed serious crimes. Also, it cannot be used to circumvent immigration laws to grant asylum or residency in the United States to individuals who had not even applied for such status. In *Kiyemba,* some petitioners had the option to be released from Guantánamo Bay to other countries, but declined the offer because they wanted to specifically be re-located in the United States (offers for relocation were made by countries such as Switzerland, Bermuda and Palau). Stretching the remedy of habeas corpus beyond simple release to release in a specific place or in specific conditions to avoid criminal prosecution or the requirements of immigration law is clearly not supported by the original purpose of the writ under domestic or under international law.

Another issue that the courts are dealing with post-*Boumediene* are the boundaries of extra-territorial jurisdiction of the courts to consider the petition. In *Munaf*, the Court held that the writ of habeas corpus extends to American citizens held overseas by American forces operating subject to an American chain of command, even when those forces are acting as part of a multi-national coalition.[167] However, the United States Court of Appeals for the District of Columbia rejected the notion that the United States has jurisdiction over detainees held in United States military bases in the territory of sovereign nations such as Afghanistan. Given that *Boumediene* established that jurisdiction extended to places under control of the United States government where the detainees were held, the meaning of the rulings in cases like *Maqaleh* is not entirely clear. For the time being, jurisdiction of the United States' federal courts over detainees held in sovereign territory of another country such as Afghanistan cannot be exercised to grant relief under habeas corpus.

The ruling under *Maqaleh* runs contrary to principles of international humanitarian and human rights law because it translates into indefinite detention without due process of law. It also seems to retract from the scope that *Boumediene* seems to have drawn in terms of establishing that U.S. courts have jurisdiction over territories controlled *de facto* by the United States such as the Naval Base at Guantánamo Bay. Nonetheless, *Boumediene* did leave room for the federal courts to define the scope of the application of the writ when applied outside U.S. territory to aliens when it outlined the "common thread" factors that it derived from *Eisentrager* referring to (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination is made, (2) the nature of the sites where apprehension and then detention took place, and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.[168]

Consequently, *Boumediene* does not draw a bright line in this regard, and leaves it open to the courts' ability to decide on the exercise of their jurisdiction based on these factors as applied to the specific facts of a case. This may be a gray area which in some cases, such as *Maqaleh*, may leave petitioners in a limbo where they may be detained indefinitely in camps controlled by the United States government in foreign nations such as Iraq or Afghanistan. In such places, the United States courts have held that they do not have jurisdiction to consider petitions of

167. *See* Munaf v. Geren, 553 U.S. 674, 675 (2008).

168. Boumediene v. Bush, 555 U.S. 723, 727 (2008).

habeas corpus. Furthermore, there is no clarity as to whether Afghan courts would have jurisdiction to consider such petitions either. This lack of legal clarity and of alternative legal recourse for petitioners contravenes minimum due process rights and guarantees for detainees under Common Article 3 of the Geneva Conventions, Article 75 of Additional Protocol I. These due process rights are also reflected in Article 9 of the International Covenant on Civil and Political Rights (ICCPR), according to which:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of judicial proceedings, and should occasion arise, for the judgment.[169]

Furthermore, Article 9, cl. 4 of the ICCPR provides that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[170]

Until detainees held by the U.S. Government in detention facilities in Iraq and Afghanistan have effective access to the writ of habeas corpus and its remedies, before U.S. courts or before local courts, these detentions do not comply with norms of international human rights law and with the minimum due process guarantees under the Geneva Conventions and their protocols. With regard to the situation of detainees at Guantánamo Bay, the United Nations Special Rapporteur on Torture, the High Commissioner for Human Rights and the Inter-American Commission on Human Rights, "find that the continuing and indefinite detention of individuals, without the right to due process, is arbitrary and constitutes a clear violation of international law."[171]

Last, the Court in *Boumediene* did not spell out the procedural standards according to which the petition would be considered or granted in places outside the United States, such as Guantánamo Bay. It left it up to the District Court to come up with these standards. It left open, for instance, the standard of proof the government must meet in order to defeat a petition for habeas corpus. That is why in *Bensayah v. Obama,* the District Court entered a case management order (CMO), establishing case governance procedures. The CMO placed upon the government the burden of establishing by a preponderance of the evidence the lawfulness of the petitioner's detention.[172] Bensayah argued that because he is liable to be held "for the duration of hostilities that may last a generation or more," requiring the government to prove the lawfulness of his detention by a mere preponderance of the evidence is inappropriate.[173] He

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169. International Covenant on Civil and Political Rights art. 9 (Dec. 16, 1966), http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

170. *Id.*

171. Selg, *supra* note 166.

172. Bensayah v. Obama, 610 F.3d 718, 721 (D.C. Cir. 2010); *see* CMO, Boumediene v. Bush, 583 F. Supp. 2d 133 (D.D.C. 2008).

173. *Bensayah*, 610 F.3d at 723.

contended that the District Court should have required the government to prove its case beyond a reasonable doubt, or at least, clear and convincing evidence. The Court of Appeals held that requiring the government to prove the lawfulness of detainee's detention by a preponderance of evidence, rather than beyond a reasonable doubt, did not violate the Constitution. A determination of the standard of proof for indefinite detention deserves a closer look in light of international human rights and international humanitarian law and the decisions made by the international courts in these fields.

V. Conclusions

Despite the promises of *Boumediene* in terms of extending jurisdiction of U.S. courts to foreign prisoners held in military bases where the United States government is in complete control exercising *de facto jurisdiction*, subsequent decisions by U.S. courts have cut back this ruling. In the *Boumediene* aftermath, U.S. courts have said that their jurisdiction does not extend to bases in Afghanistan, that preponderance of the evidence is a sufficient standard of proof for indefinite detention, and that extradition of detainees to places where they customarily practice torture is acceptable based on the rule of non-inquiry. The laws and Constitution are designed to survive, and remain in force, in extraordinary times.[174]

The rulings discussed above also contradict principles and norms of international humanitarian law and of human rights law, because they infringe upon the common set of non-derogable rights under Article 75 API, which are also reflected in Article 9 of the ICCPR.

Even though the United States is not a Party to Additional Protocol I (API), the United States Supreme Court and the ICRC have recognized that the common set of non-derogable rights contained in Article 75, have ripened into customary international law. This set of non-derogable rights requires that sentence or penalty be passed "pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure."[175] Unfortunately, the selection of post-*Boumediene* decisions discussed in this article, except for *Kiyemba,* seem to be chipping away at the set of non-derogable rights under Article 75 of AP I that are binding under customary international law. *Boumediene* seems to have had little impact in terms of changing the traditional way in which courts have interpreted the writ, which is based on a strict and narrow interpretation of territorial jurisdiction. This traditional interpretation, under the unusual current circumstances of "war on terrorism," does not conform with modern international human rights and humanitarian law—much to our Nation's detriment.

The United Nations Special Rapporteur on Torture considers the practice of indefinite detention can amount to torture in some cases. He recalls that "torture is unacceptable and abhorrent from a moral and legal perspective, and that its prohibition is absolute and non-derogable . . . States cannot limit the application of this prohibition under their domestic law for reasons of public emergencies, anti-terrorism measures or in the context of armed con-

174. Boumediene v. Bush, 553 U.S. 723, 727 (2008).

175. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art 75 (June 8, 1977), 1125 U.N.T.S., https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument.

flicts."[176] Arguably, the 46 detainees who are currently being held indefinitely at Guantánamo are being subject to an abhorrent form of torture that is unacceptable and a blatant infringement of international law.

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176. Selg, *supra* note 166.

Enforcing an Expert Determination Award Under the New York Convention

Marcin Tustin*

I. Introduction

Expert determination, also known as appraisal in the United States,[1] together with related mechanisms such as dispute resolution boards, are private summary dispute resolution mechanisms intended to provide faster resolution than the quasi-judicial process of arbitration, in part because they usually escape the local supervisory mechanism for arbitration. The possibility of enforcing an award under the New York Convention[2] issuing from an expert determination raises two broad issues. First, is an award from such a process capable of falling within the Convention as such? And second, would an expert's award fall afoul of the various requirements laid down by Article V of the Convention?

This article addresses the first issue. The conclusion is that there is a split between the countries that require awards to have the effect of a judgment in the country of origin, and so will not enforce foreign experts' awards, and on the other hand those countries that either assimilate to the category of arbitration every procedure that produces a final determination of the parties' rights as such, or those countries which interpret the New York Convention as applying that rule in the international context. There are also those countries like the U.S., England, and Wales that do not have any articulated rule that determines whether they definitely would or would not enforce a foreign expert's award.

A. A Brief History of Expert Determination

Expert determination in English law has a long history; indeed it became popular because the law of England was for a long time hostile to arbitration, and expert determination was able to play a role in private dispute resolution. Likewise, the U.S. Supreme Court, writing in 1910, was able to draw on a rich case law in handing down the classic U.S. statement of the nature of the procedure.[3] New York has enjoyed a specific statute enabling expert determination since 1962.[4] The Civil Law jurisdictions surveyed herein all provide for a procedure equivalent to expert determination (of the "intermediate kind" defined below) or simple appraisal.

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1. Comm. on Int'l Commercial Disputes, *Purchase Price Adjustment Clauses and Expert Determinations: Legal Issues, Practical Problems, and Suggested Improvements*, ASS'N OF THE BAR OF THE CITY OF NEW YORK, 2013, http://www2.nycbar.org/pdf/report/uploads/20072551-PurchasePriceAdjustmentClausesExpertDeterminations--LegalIssuesPracticalProblemsSuggestedImprovements.pdf (PPA Clauses and Expert Determinations).

2. United Nations, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 U.S.T. 2517, 330 U.N.T.S. 53 (the New York Convention).

3. *See generally* City of Omaha v. Omaha Water Co., 218 U.S. 180 (1910).

4. N.Y. Civil Practice Law & Rules 7601 (CPLR).

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The classic statement of the nature of expert determination comes from Lord Esher in *Re Carus-Wilson and Greene* (1886) 18 QBD 7 (England and Wales):

> If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator.[5]

The "cases of an intermediate kind" motivate this article, and exist in the law of Commonwealth jurisdictions as an alternative to arbitration defined solely by the intention of the parties.[6] As will be seen below, both Germany and Italy provide for similar intermediate institutions in their civil codes.[7] In the U.S., this institution is more familiar under the name "appraisal," and probably only exists as what Lord Esher calls "valuation," and not in the "intermediate kind."[8] This does not mean that the U.S. and countries which similarly assimilate the "intermediate kind" of expert determination to arbitration (France and Switzerland in particular, as discussed below) do not have to deal with attempts to enforce awards from jurisdictions where the "intermediate kind" does exist.

The existence of expert determination is well attested in the U.S. case law, with the classic statement of the distinction between expert determination and arbitration given by the Supreme Court in *City of Omaha v. Omaha Water Co.*, 218 U.S. 180 (1910):

> An arbitration implies a difference, a dispute, and involves ordinarily a hearing and all thereby implied. The right to notice of hearings, to produce evidence and cross-examine that produced, is implied when the matter to be decided is one of dispute and difference. But when, as here, the parties had agreed that one should sell and the other buy a specific thing, and the price should be a valuation fixed by persons agreed upon, it cannot be said that

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5. *In re* Carus-Wilson and Greene (1886) 18 QB 7, 9 (Eng.).

6. *See* JOHN KENDALL ET AL., EXPERT DETERMINATION ¶¶16.1–16.7(4th ed. 2008) (citing to a variety of English, Canadian, and Australian cases).

7. Roberto Ceccon, *International Commercial Arbitration in Italy in* THE COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS 34 (Dennis Campbell ed., 2012) (reports that the Italian institution of *arbitrato irrituale* has existed in case law since the start of the 20th century, but was only codified in 2006).

8. PPA Clauses and Expert Determinations, *supra* note 1; Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 487 (2005).

> there was any dispute or difference. Such an arrangement precludes or prevents difference, and is not intended to settle any which has arisen. This seems to be the distinction between an arbitration and an appraisement, though the first term is often used when the other is more appropriate.

Insofar as this definition controls, it precludes the "intermediate kind." However, New York enjoys a specific expert determination statute in the form of CPLR 7601, enacted in 1962 providing for a much wider definition.

CPLR 7601 provides that "[a] special proceeding may be commenced to specifically enforce an agreement that a question of valuation, appraisal *or other issue or controversy* be determined by a person named or to be selected"[9] (emphasis added). This wording is sufficiently wide to encompass expert determinations of the "intermediate kind," and has been so interpreted by the Appellate Division for the First Department, upholding the validity of a submission under a clause whereby an "accountant mutually agreed to by the parties, acting as an expert, not as an arbitrator, was to resolve the 'dispute,' which determination was to be final."[10] Likewise, the Court of Appeals has addressed a case where an expert determination fully resolved a dispute:[11]

> In short, the appraisal award resolved the entire dispute between the parties, and thus there are no issues left for a plenary trial. This unusual circumstance, however, does not mean that the appraisal award was actually an arbitration award. It simply means that this is the apparently rare case in which the appraisal award actually does resolve the parties' dispute in its entirety. The distinction is important because an award made in an appraisal proceeding, conducted in the informal manner accepted in such proceedings, should not be subject to challenge for failure to observe the formalities suited only to arbitrators.

It is clear from the above-mentioned cases that New York law does support expert determinations or appraisals of the "intermediate kind" which motivate this article,[12] and although apparently rare, New York practitioners may find themselves seeking enforcement of an award from such a proceeding in a foreign country on behalf of their clients.

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9. CPLR 7601.

10. Cargill Inc. v. Bunge Foods, Ltd., 762 N.Y.S.2d 53, 54 (App. Div. 2003); *cf.* Amerez Grp., Inc. v. Lexington Ins. Co., No. 07 CIV.3259, 2010 WL 3790637, at *3 (S.D.N.Y. Sept. 28, 2010), *aff'd*, 678 F.3d 193 (2d Cir. 2012) ("[E]ven if the appraisal proceeding here bore some resemblance to an arbitration, the mechanism to confirm the award would be the same.").

11. *In re* Penn Cent. Corp., 56 N.Y.2d 120, 127 (N.Y. 1982) (internal paragraph break omitted).

12. *But see generally* PPA Clauses and Expert Determinations, *supra* note 1 at 1.

II. What Is Expert Determination?

A. According to the Commentators

Expert determination, also known as appraisal, is a private method of summary dispute resolution characterized by the intention that the expert should not be bound by the same rules of natural justice and procedures as an arbitrator. It is so-called because it is frequently used in contracts where there is a desire to have an expert finally settle a matter such as in purchase price adjustment clauses, in business sales, and in purchase agreements.[13] However, expert determination may be used as a general dispute resolution mechanism not limited to matters of professional expertise. The type of expert determinations of interest for the purposes of this article are described by Douglas Jones:

> A new and distinct category of expert determination has emerged. Here, expert determination is used as a mechanism for resolving all or particular categories of disputes arising under a contract, a role previously played by arbitration.[14]

Jones provides in the same paper an overview of the relative practical merits of expert determination and an indication of the growing significance of the procedure. These cases motivate this article to finally resolve the dispute rather than solely consisting of findings of fact.[15] Specifically, this article focuses on the enforcement of foreign experts' awards under the New York Convention. For the purposes of this article, foreign experts' awards are awards issuing from an expert determination conducted under the legal system of a country foreign to that of the legal system in which enforcement is sought.

Unhelpfully, the New York Convention itself provides no definition of an award for experts or for arbitrators to comply with, although a final resolution is generally considered a requirement.[16]

1. Approaches to Distinguishing Expert Determination From Arbitration

This article uses the term "substantive approach" to denote approaches which focus on elements of the substantive nature of the dispute resolution process (such as the question asked, the manner in which the procedure is carried out, and the nature of the award produced). The term "formalist approach" denotes a focus on the consequences of the categorization and the juridical nature and status of the dispute resolution process rather than its actual contents.

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13. PPA Clauses and Expert Determinations, *supra* note 1, at 1.

14. Douglas Jones, *Expert Determination and Arbitration*, 67 ARB. 17 (2001).

15. *Cf. In re* Carus-Wilson and Greene (1886) 18 QB 7, 9 (Eng.) (the dictum of Lord Esher MR is that expert determination is usually chosen "to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen"; instead this article is concerned with Lord Esher's "cases of an intermediate kind").

16. Judith Gill, *The Definition of Award Under the New York Convention*, 2 NO. 1 DISP. RESOL. INT'L 114, 120 (2008).

Under a formalist approach, processes carried out otherwise identically may attract a different categorization, for instance because of party intention.

2. Formalist Definitions

Kendall offers the following summary of the formalist distinction:

> The crucial difference between expert determination and arbitration lies in the procedure and the absence of remedies for procedural irregularity in expert determination. An arbitration award may be set aside because the procedure fails to conform to the statutory standard of fairness which is closely derived from the principles of natural justice: no such remedy is generally available to invalidate an expert's decision. An expert can adopt an inquisitorial, investigative approach, and need not refer the results to the parties before making the decision. An arbitrator needs the parties' permission to take the initiative, and must refer the results to the parties before making the award.[17]

But note that the substantive elements mentioned may be dispensed with in look-sniff arbitrations (see below) and for example under the CIETAC Rules, arbitral tribunals may adopt an inquisitorial approach.[18]

Liebscher offers that expert determinations are those binding processes conducted by a third party that lead to an award not having the effect of a judgment.[19]

3. Substantive Definitions

The major commentators on arbitration have generally drawn their substantive definitions to define away the category of expert determination with which this article is concerned. Fouchard, Gaillard, Goldman states "If the parties confer a power of decision [. . .] on a third party to whom they refer to as an expert, that third party is in fact either an arbitrator, or in the absence of a dispute, an agent of the parties."[20] Park gives the following illustration:

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17. KENDALL ET AL., EXPERT DETERMINATION ¶1.1 (4th ed. 2008) (this appears to be the only book devoted to the law of expert determination in the English language. The entirety of chapter 16 is devoted to the distinction between arbitration and expert determination.).

18. China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules, Art 33(3) Feb. 3, 2012, http://www.cietac.org/index/rules/47607adcbb68427f001.cms ("Unless otherwise agreed by the parties, the arbitral tribunal may adopt an inquisitorial or adversarial approach in hearing the case having regard to the circumstances of the case.").

19. CHRISTOPH LIEBSCHER, THE HEALTHY AWARD: CHALLENGE IN INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer Law International ed. 2003); see pp. 115–39 for a different review of what constitutes an arbitration in five jurisdictions. Liebscher's analysis, although having a different focus, is consistent with the present analysis in so far as the two overlap.

20. PHILIPPE FOUCHARD ET AL., INTERNATIONAL COMMERCIAL ARBITRATION, ¶26 (Emmanuel Gaillard & John Savage, eds. 1999); *cf.* JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 15 (Stephen V. Berti & Annette Ponti trans., Sweet & Maxwell Ltd. 2d ed. 2007) (2002) (Expert determination resolves "a point of fact" or a "disputed element of a legal relationship").

> For example, a building contractor and his customer, fighting over the non-payment of a bill, might ask the decision-maker "Was the roof completed?" Or they might ask, "Does Customer owe $10,000 to Contractor?" An expert would be more likely to answer the first question, while the second would normally be for an arbitrator.[21]

It follows that what these commentators believe that expert determination can never be enforceable under the New York Convention because courts enforce orders and rights, rather than facts. Likewise, expert determinations that ask the expert to determine "what are the legal rights of the parties?" fall within these authors' definition of arbitration. As the Committee on International Commercial Disputes of the Association of the Bar of the City of New York puts it:

> The decision maker's authority is limited to its mandate to use its specialized knowledge to resolve a specified issue of fact. The parties agree that the expert's determination of the disputed factual issue will be final and binding on them. The parties are not, however, normally granting the expert the authority to make binding decisions on issues of law or legal claims, such as legal liability.[22]

B. According to the Courts

The approaches of various national courts have been more mixed although most surveyed would assimilate expert determination (of the sort under consideration) to arbitration. Those jurisdictions include France, Switzerland, Italy (in relation to international, but not domestic awards) and arguably the U.S. (under the Federal Arbitration Act), applying a substantive criterion to identify arbitration. Germany applies a formalist approach and does not allow enforcement of experts' awards. The UK applies a formalist approach, and would seem likely to allow enforcement, although no case in point has come before the courts for decision.

This section sets out the various national approaches. The consequences of those approaches for enforcement under the New York Convention are analyzed in the subsequent section of this article.

1. France and Switzerland

The approach taken in France and Switzerland is to distinguish between arbitration, which finally determines the rights and obligations of the parties,[23] and expert determination, which rules on a point of fact notwithstanding that that fact may be fully determinative of the

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21. WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE 437 (2nd ed. 2006).

22. PPA Clauses and Expert Determinations, *supra* note 1 at 4.

23. A decision to that effect in Switzerland is that of the Bundesgericht in i.S. Nachmann gegen German und Mitb. Bundesgericht [BGer] [Federal Supreme Court] Dec. 9, 2003, 130 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 125, upholding a German arbitration award.

disputed obligations between the parties. This is a substantive approach because it draws the classification by reference to the features of the procedure as actually undertaken in the case.

The Swiss Bundesgericht puts it in a case where a contract provided for a third party to determine whether termination of that contract was reasonable:[24]

> The expert may rule only on whether the termination is justified or not, he is not authorised to certify the mutual obligations of the parties [. . .]. Under these rules the decision so provided is certainly not comparable to a judgment pronounced and the contractual clause is therefore not an arbitration agreement.[25]

The Swiss Bundesgericht has applied the same approach to decide what is an international arbitration in *i.S. Nachmann gegen German und Mitb*.[26] The Bundesgericht upheld enforcement of a German award in Switzerland (in part) on the basis that it was an arbitral award because it provided a binding determination of the parties' rights. Although it appears that the arbitration agreement in that case described the process as arbitration, the Bundesgericht did not give that consideration the greatest weight, and did inquire into the presence of a binding determination of the parties' rights.

The French Cour d'Appel de Paris, applying reasoning almost identical to that of the Swiss Bundesgericht quoted above, has held that a decision of a doctor fixing the proportion of damages to be paid by an insurance company was an expert determination because the doctor was not asked to draw a legal conclusion from his factual conclusions;[27] and that a procedure to determine the value of a car (which would then be the amount owed by the insurer to the insured) was an expert determination because the decision was one of pure fact, and could not function as a judgment.[28]

National courts following this approach ("the French approach") consider both the agreement to ascertain the nature of the question that the third party should be answering and whether the answer in form amounts to an order determining the legal rights and obligations of the parties, or a pure determination of fact. It can be seen that this maps out the distinction drawn by Park,[29] Fouchard, Gaillard, Goldman, and Poudret and Besson,[30] above.

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24. Bundesgericht [BGer] [Federal Supreme Court] Dec. 14, 2006, ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] Garage A. et fils v. Z. AG, BGer Dec. 14, 2006, 4P.299/2006, 29 ASA Bulletin 391 (2011).

25. *Id.* Translation by author. The original text reads: "L'expert ne peut statuer que sur le point de savoir si la résiliation du contrat est justifiée ou non; il n'est pas habilité à constater les obligations réciproques des parties. [. . .] Au regard de ces modalités, la décision ainsi prévue n'est certainement pas un prononcé assimilable à un jugement et la clause contractuelle qui la prévoit n'est donc pas non plus une convention d'arbitrage."

26. *i.S. Nachmann gegen German und Mitb*., *supra* note 23.

27. Mutuelle Fraternelle d'Assurances v. Chetouane, Cour d'Appel [CA] [regional court of appeal] Paris, 1e ch., Dec. 21, 2000, 2001 Revue de l'Arbitrage 178.

28. Thouzery v AXA Assurances, Cour d'Appel [CA] [regional court of appeal] Paris, 1e ch., Mar. 14, 2002, 2002 Revue de l'Arbitrage 772.

29. PARK, *supra* note 21.

30. POUDRET & BESSON, *supra* note 20.

Fouchard, Gaillard, Goldman support this analysis. They rely on the New York Convention Article II (1) that "parties submit 'differences' to arbitration" and on Article 1496 of the French New Code of Civil Procedure, "stating that '[t]he arbitrator shall resolve the dispute'"[31] for their position that a defining characteristic of an arbitration is that it resolves disputes. They continue, "[E]xperts will only be acting as the parties' agents where they confine themselves to making comments and leave the parties or arbitrators to review the contract or to resolve the dispute themselves."[32]

2. Germany

The distinction drawn by the German,[33] Swiss[34] (formerly), and Italian[35] (in domestic cases) courts is that arbitral procedures are those which by definition result in an award having equivalent status to a court judgment under the legal system of the seat of the arbitration. This is a formalist approach because it centers on the juridical classification of the procedure, rather than an assessment of the features of the procedure as it actually occurred in the case. According to Born, this insistence that the juridical nature is judicial also determines certain substantive aspects of German arbitrations, such as that they cannot be limited to certain issues, and that the proceedings must have a judicial-style process.[36]

The binding effect of expert determinations (*Schiedsgutachten*) in Germany is equivalent to that in England,[37] that the parties are contractually bound to respect the award, which does not have the effect of a judgment, and that award must be sued on (or "confirmed") in order to produce a judgment.[38] This is so even though the procedure may resolve legal disputes.[39]

Liebscher reports that in the domestic context, German courts and legal scholars have applied a variety of formal and substantive criteria to distinguish expert determinations from arbitrations.[40] The substantive criterion employed is the task entrusted to the decision maker. The two formalist criteria are: (a) whether the decision maker resolves a dispute (arbitrator) or amends the legal relationship (expert); or (b) whether the parties intended that the court

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31. GAILLARD & SAVAGE, *supra* note 20, ¶ 30.

32. *Id.* ¶ 32.

33. Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 8, 1981, VIII Y.B. Com. Arb. 366; 1982 Eur. Com. Cases 516. Despite being 30 years old, and an intervening update of the German arbitration statutes, that decision remains good law, according to Stefan M. Kröll, *Recognition and Enforcement of Foreign Arbitral Awards in Germany*, 5(5) INT'L ARB. L. REV. 160 (2002) (noting that despite being 30 years old, and an intervening update of the German arbitration statutes, that decision remains good law).

34. *See* Zanetta & Moretti c. Comune di Vacallo [BGer] [Federal Supreme Court] May 13, 1981, 107 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] Ia 318 (Switz.).

35. *See* Gaetano Butera c. Pietro e Romano Pagnan, Cass., sez. un., 18 settembre 1978, n. 4167, IV Y.B. Com. Arb. 296.

36. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 226 (2d ed. 2009).

37. *See infra* Part II.

38. POUDRET & BESSON, *supra* note 20, ¶ 15.

39. *Id.*

40. LIEBSCHER, *supra* note 19, at 131.

should be able to review the decision on its merits, in which case the decision maker will be an expert.

Liebscher reports two different ways of using the task entrusted to a decision maker in order to classify them as expert or arbitrator, and not entirely consistent with each other. First, the rendering of a final decision concerning rights or legal relationships of the parties is the mark of an arbitrator, versus the determination of facts or elements of a right or legal relationship, a task entrusted to an expert. Examples of expert tasks under this scheme are a binding amendment of an agreement; binding clarification of the meaning of an agreement; or binding determination of factual or legal elements of a claim "or other operative facts."[41] The second approach is simply to treat experts as determining solely factual issues while arbitrators determine legal issues.[42]

It can be seen that the two formalist criteria respectively map to Lord Esher's formulation of the distinction between expert and arbitrator[43] and Kendall's description of the consequences of the distinction.[44] The first substantive approach maps to the French Approach;[45] the second substantive approach is the most restricted approach seen in this article and thus has the effect that only determination of pure facts and not legal issues are subject to review by the German courts.[46]

The quite extraordinary reasoning given by the German Bundesgerichtshof for the rule that only an award with the status of a judgment in the originating legal system is enforceable under the New York Convention is that: (a) the word "arbitration" in the English text of the New York Convention should be analogised to the German *Schiedsverfahren* procedure;[47] (b) accordingly foreign arbitration awards should also have the effect of a judgment, as do *Schiedsverfahren* awards; and (c) the prior Geneva Convention of 1927[48] by dint of requiring double

41. *Id*.

42. *Id.* at 132.

43. *See In re Carus-Wilson*,18 Q.B.D. 7.

44. KENDALL ET AL., *supra* note 17, ¶ 1.1.2.

45. *See supra* note 20.

46. LIEBSCHER, *supra* note 19, at 132.

47. Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 8, 1981, VIII Y.B. Com. Arb. 366,367 ("The word 'arbitration' in the English text and the word '*arbitrage*' in the French text, like the word '*Schiedsverfahren*' under German law . . . , at least mean a procedure in which the task is entrusted to arbitrators to decide a legal controversy in lieu of a State Court.").

48. Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301 (Geneva Convention of 1927).

exequatur[49] required awards to have the status of a judgment and that the New York Convention was not intended to apply to any wider class of awards than the Geneva Convention.

First, the arguments given by the Bundesgerichtshof for this chain of reasoning were that they considered that to analogize between the term in the text and the local procedure promotes autonomous interpretation of the New York Convention. That appears to this author to be the very definition of a contradiction, but see below for an argument that this is motivated by a concern for the due process rights of parties.

Second, the Bundesgerichtshof considered that the purpose of the New York Convention is to harmonize the law of enforcement of foreign arbitral awards and that such harmonisation would be undermined if an award could have different effects in different states. In this case, an award from an Italian *arbitrato irrituale*[50] did not automatically have the status of a judgment in Italy (instead it would have to be sued in Italy to produce a judgment), but if it had been granted enforcement in Germany it would have attained the status of a judgment in Germany while remaining merely contractual in Italy.

This harmonization argument seems far from substantial, for two reasons. First, the permissive nature of Article V(1)(2) criteria is to refuse enforcement and seems explicitly to contemplate such diversity of effect, both with respect to binding the parties, and to the possibility of the award having been set aside at the seat. Second, because Article III explicitly states that the purpose of the Convention is to assimilate the treatment of foreign awards to the treatment of local awards on enforcement ("[e]ach 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 on"). Article III prohibits discrimination against foreign awards ("[t]here shall not be imposed substantially more onerous conditions [. . .] than are imposed on the recognition or enforcement of domestic arbitral awards"), and does not refer to parity with or status in the legal system at the seat of the arbitration.

The only reference to the *status* of the award in the legal system of the seat is in the criteria of Article V(1)(e), which does not contain any criterion of parity. The only criterion for the award as made is that it be binding.[51] There is no specification of any particular juridical doc-

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49. *Id.* (The term "double exequatur" refers to the requirement of the Geneva Convention of 1927 that as a precondition to recognition of a foreign award under that treaty "the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending." The significance is that for an award to be final in the sense required by the Geneva Convention of 1927, a foreign award would have to have obtained exequatur in the originating legal system in order to preclude any possibility of setting aside, and to preclude a defendant from commencing proceedings to contest the validity of the award.).

50. It seems that Italian law recognizes at least two procedures equivalent to expert determination—in addition to *arbitrato irrituale* referred to in *Gaetano Butera v Pietro e Romano Pagnan* (*supra* note 35), there is also *arbitraggio*—see the decision of the German Bundesgerichtshof reported at [1969] C.M.L.R. 123, equating *arbitraggio to Schiedsgutachten*; POUDRET & BESSON, *supra* note 20, ¶ 15 (describing *Schiedsgutachten* as being the German equivalent of expert determination, although those authors use the term *perizia contrattuale* for the Italian equivalent of expert determination, and treat *arbitrato irrituale* under a separate heading); CECCON, *supra* note 7, at 29 (noting the brief history of the procedure.).

51. New York Convention art. V, § (1)(e) ("Recognition and enforcement of the award may be refused . . . if . . . (e) [t]he award has not yet become binding on the parties").

trine creating that binding effect or any requirement that the binding effect has any particular content (for instance that the subject of the award be *res judicata*). Instead Article V(1)(e) seems directed at the possibility of revision, or set-aside at the seat, of the award—that is to say, it seems to be directed to the circumstance where enforcement would be premature[52] or "too late" in the sense that the award had ceased to be valid.

Nevertheless, this argument of the Bundesgerichtshof has found some academic support. Poudret and Besson[53] consider (attributing the position to Van den Berg) that to allow such recognition, giving the award the status of a judgment in the foreign country would be "paradoxical."

The third argument of the Bundesgerichtshof for its decision was that the New York Convention is not (according to the Bundesgerichtshof) intended to provide recognition to a wider class of procedures or awards than would have been enforceable under the Geneva Convention of 1927, and that the purpose of Article V(1)(e) is to restrict enforceability to awards which would have been eligible for "double exequatur" under the Geneva Convention of 1927. To treat the language and scope of the New York Convention as being restricted by a requirement of the previous international instrument, which prior requirement the New York Convention has explicitly abandoned, is a quite extraordinary approach to construction.

Kröll[54] considers that the restriction to arbitration as such falls within the fundamental public policy of Germany as established by Article 101 of the German *Grundgesetz*[55] (which provides that "[n]o one may be removed from the jurisdiction of his lawful judge") that no one can be deprived of access to the courts without a valid arbitration agreement. If that is so, the public policy ground under New York Convention Article V(2)(b) would be made out.[56] It is unfortunate that the Bundesgerichtshof did not articulate this argument as part of its reasoning rather than importing this policy into its construction of Article V(1)(e).

Had the Bundesgerichtshof relied on Article V(2)(b), the basis of the rule adopted would be clear, and it would have avoided giving a strained reading of Article V(1)(e) while purporting to interpret the New York Convention autonomously. Given the importance of Germany in international trade, and the status of the Bundesgerichtshof, this decision invites enforcing courts in other countries to adopt the same rule, that an award equivalent to a judgment is

52. PARK, *supra* note 21, at 167; LIEBSCHER, *supra* note 19, at 415–16.

53. *See* POUDRET & BESSON, *supra* note 20, ¶ 21.

54. *See* Kröll, *supra* note 33, at 165 (2002).

55. ALEMANHA, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY] (Christian Tomuschat & David P. Currie trans., German Bundestag 2010) (2003).

56. New York Convention, *supra* note 2, § (2)(b) ("Recognition and enforcement of an arbitral award may also be refused . . . if . . . (b) [t]he recognition or enforcement of the award would be contrary to the public policy of that country.").

required. This leads to confusion of the correct interpretation of the Convention, and because the interpretation strays so far from the text, it invites other national courts to develop their own idiosyncratic interpretations, rather than converging on an internationally accepted autonomous interpretation.

3. The Italian International Approach

The approach taken by the Italian Corte di Cassazione[57] in relation to foreign awards was simply to address whether or not the award is final and binding. The court's reasoning was that first, the language of a multilateral treaty such as the New York Convention is intended to operate in a variety of different legal systems and thus cannot be read restrictively.

Second, a literal reading of the treaty does not disclose any requirement that the award have the status of a judgment, only that the award be final and binding and that the agreement comply with the New York Convention Article II(2) formality requirements. The finality requirement does not appear on the face of the Convention; it seems inferred from the ground, permitting refusal if the award is "*not yet* binding on the parties."[58] Articles V(1)(e), VI, also contemplate adjournment or refusal of enforcement while an application for set-aside or suspension is under way in the originating legal system. Article V(1)(e) treats lack of binding effect as alternative to set-aside or suspension; by contrast, Article VI deals only with set-aside or suspension, not lack of binding effect, which strongly implies that the concept of lack of binding effect is distinct from the concept of set-aside or suspension. Indeed, it has been argued that to treat set-aside or suspension as being an aspect of lack of finality amounts to a reintroduction of double exequatur[59] and given that lack of double exequatur plays an important part of the court's reasoning, it would not appear that lack of set aside or suspension proceedings forms a part of the finality referred to by the court.

Third, the court inferred that the change from the Geneva Convention of 1927 requirement of double exequatur indicates an intent that awards that not capable of obtaining exequatur can still be enforced under the Convention. This reasoning has considerable force—if the convention was to be limited to awards having the effect of a judgment, or otherwise capable of exequatur in the seat country, it would have been a simple matter to include that as one of the grounds for refusal in Art V(1).

It can be seen that this is a formal approach, but one quite different from that taken by the German courts—it focuses solely on a single legal factor, whether the award is binding (and final). This approach appears to be equivalent to Poudret and Besson's articulation of the criterion for (non)vulnerability under Article V(1)(e) of the New York Convention, that there must no longer be the possibility of "a complete judicial review of the award on the merits by a judge or a superior arbitral authority."[60]

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57. *Gaetano Butera c. Pietro e Romano Pagnan*, *supra* note 35.

58. New York Convention, *supra* note 2, § (1)(e).

59. BORN, *supra* note 36.

60. POUDRET & BESSON, *supra* note 20, ¶ 918.

4. England and Wales[61]

The courts of England and Wales have not directly addressed whether an award from a foreign expert determination is capable of enforcement under the New York Convention. Analysis indicates that the better view is that such an award would be enforceable. However, the formalist domestic approach creates a risk that such a decision might go the other way.

In the domestic context, the courts of England approach the question of whether or not a procedure is an arbitration or expert determination as a matter of construction of the dispute resolution clause[62] subject to certain minimal requirements[63] that expert determinations will generally also fulfil.[64] From that determination certain consequences flow (most notably for present purposes that an award may or may not be enforceable as if a judgment of the court). As Park has stated, "[i]t is often easier to describe the consequences of characterizing a decision-maker as an arbitrator or an expert than to describe how the characterization should be made."[65] It is certainly not determinative that an expert may be asked to make decisions of law, and declare the respective rights of the parties.[66] It is submitted that the correct understanding is that in England there is no substantive distinction between arbitration and expert determination—instead, they are merely two juridically distinct dispute resolution procedures, presenting a similar distinction as that between arbitration and *arbitrato irrituale* in Italy. Accordingly, the courts of England take a formalist approach domestically.

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61. Like the United States of America, the United Kingdom is not a unitary legal country. Just as the U.S. is composed of the 50 states and District of Columbia, the U.K. is composed of the separate legal countries of England and Wales, Scotland, and Northern Ireland. There is no first instance court for the U.K. exercising general civil or commercial jurisdiction similar to the U.S. District Courts. For brevity, this article uses the terms "England" and "England and Wales" interchangeably.

62. British Telecommunications PLC v. SAE Group INC, [2009] EWHC (TCC) 252, [2009] Q.B. 231 (Eng.); Inmarsat Ventures Plc v. APR Limited, [2001] EWHC1323, [2002] WL 1039556 ("It is, of course, axiomatic and exemplified in these passages that the question of construction was critical to the question whether the court will have any power to intervene as to the substance of the decision, whether before or after the determination.").

63. David Wilson Homes Ltd. v. Survey Services Ltd, [2001] EWCA Civ 34 para. 11, adopting the criteria laid out at MUSTILL & BOYD *infra* note 64.

64. SIR MICHAEL J. MUSTILL & STEWART C. BOYD, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 41 (Butterworths 2d ed.) (1989). The criteria are:

> (i) The agreement pursuant to which the process is, or is to be, carried on ("the procedural agreement") must contemplate that the tribunal which carries on the process will make a decision which is binding on the parties to the procedural agreement. (ii) The procedural agreement must contemplate that the process will be carried on between those persons whose substantive rights are determined by the tribunal. (iii) The jurisdiction of the tribunal to carry on the process and to decide the rights of the parties must derive either from the consent of the parties, or from an order of the court, or from a statute the terms of which make it clear that the process is to be arbitration. (iv) The tribunal must be chosen, either by the parties, or by a method to which they have consented. (v) The procedural agreement must contemplate that the tribunal will determine the rights of the parties in an impartial manner, with the tribunal owing an equal obligation of fairness towards both sides. (vi) The agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law. (vii) The procedural agreement must contemplate a process whereby the tribunal will make a decision upon a dispute which is already formulated at the time when the tribunal is appointed.

65. PARK, *supra* note 21, at 436.

66. *See generally* Inmarsat Ventures Plc v. APR Ltd., EWHC (QB) 2001 Folio No.1323, 2002 WL 1039556; Mercury Commc'ns Ltd. v. Dir. Gen. of Telecomms., UKHL [1996], 1 W.L.R. 48, [1996] 1 All E.R. 575, [1995] C.L.C. 266, [1998] Masons C.L.R. Rep. 39, Times, February 10, 1995, Independent, February 16, 1995.

It does not appear that there has ever been an attempt to enforce an award from a foreign expert determination (that is, one arising under a contract not under English law) in the courts of England.[67] It is therefore impossible to say definitively whether such an award would be enforceable in England under the New York Convention. However, the analysis of Article V of the New York Convention by the UK Supreme Court in *Dallah Real Estate & Tourism Holding Co v. Pakistan*[68] strongly suggests that the Supreme Court would be persuaded by the reasoning of the Corte di Cassazione in *Gaetano Butera c. Pietro e Romano Pagnan*:[69]

> One of the attractions of international arbitration is that it gives the parties the power to insulate the proceedings from local jurisdictions. The effect of requiring foreign courts to defer to the courts of the country where the arbitration has its seat would be to reinstate in all but name the "double exequatur" rule which the Convention displaced and would significantly increase the influence of the courts of that jurisdiction.[70]

Note in particular the reference to insulation from local jurisdictions (suggesting that local law should not be finally determinative of status) and also the suggestion that to do so would be to reinstate a requirement for double exequatur—the elimination of double exequatur in favor of the simple test that the award be binding also forms an important part of the reasoning supporting the Italian International approach.

In a decision relating to the enforcement of a set-aside award, the High Court of England and Wales has accepted that "even when a ground for refusing enforcement is established, the court retains a discretion to enforce the award."[71] That suggests that an English court would enforce an expert's award arising from a proceeding that meets the substantive requirements of arbitration in England and contains an enforceable determination of the rights of the parties. Merely for the defendant to establish the award is "not . . . binding" under Article V(1)(e) New York Convention would not be the end of the court's inquiry. This conclusion is strengthened by the rule that it is an implied term of an arbitration agreement that the parties will perform the award,[72] as in the case of a dispute resolution agreement that provides for a process that determines the rights of the parties and stipulates that determination to be binding. It follows from the fact that it is binding that there is an action on the award, and that is the basis of the implied term. This is so whether the agreement provides that the process is arbitration or expert determination, so long as the process is to be binding on the parties, rather than merely advisory.

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67. This author has been unable to locate any such case through his own research or in the literature on the subject.

68. Dallah Real Estate & Tourism Holding Co. v. Pakistan, [2010] UKSC 46, [2011] 1 A.C. 763, [2010] 3 W.L.R. 1472, [2011] Bus. L.R. 158, [2011] 1 All E.R. 485, [2011] 1 All E.R. (Comm) 383, (2010) 2 Lloyd's Rep. 691, [2010] 2 C.L.C. 793, 133 Con. L.R. 1, [2010] 160 N.L.J. 1569.

69. *See Gaetano Butera c. Pietro e Romano Pagnan*, *supra* note 35.

70. *Dallah Real Estate & Tourism Holding Co.*, *supra* note 68.

71. IPCO (Nigeria) Ltd. v. Nigerian Nat'l Petroleum Corp. (2005) EWHC (Comm) 726.

72. Assoc. Elec. & Gas Ins. Servs. Ltd. v. European Reinsurance Corp. of Zurich, [2003] UKPC 11 [2003] 1 W.L.R. 1041, [2003] 1 All E.R. (Comm) 253 [2003] 2 C.L.C. 340. Principle applied in England in *C v D* [2007] EWHC (Comm) 1541.

Against this principled approach to enforcement, it is possible that an English court would apply to questions of international enforcement the same formalist approach applied domestically. That would be to decide that arbitration and expert determination are simply two different creatures with the consequence that only procedures labeled "arbitration" in the originating legal system can be arbitration for the purposes of enforcement under the New York Convention.

5. United States of America[73]

It appears that the U.S. takes the French approach domestically and would almost certainly take the same approach internationally. Born describes the approach as, "a defining and distinguishing characteristic of arbitration is its mandatory use of adjudicatory procedures to resolve the disputes and claims presented by the parties."[74] Under this approach, "what is important is that the parties clearly intended to submit some disputes to their chosen instrument for the definitive settlement of [their] grievances."[75]

Unfortunately, the question of the appropriate international approach has been directly addressed only once in the U.S., in the case (well known in the literature, but never cited by another U.S. court, according to the Westlaw online citator at the time of writing) of *Frydman v. Cosmair, Inc.*[76] In that case, the court suggested that it would not enforce an "award" from a French price appraisal, both because the procedure supplied a term of a contract rather than resolving a dispute and because of the juridical status of the procedure in France (which as seen above, also does not have the status of arbitration there):

> First, while general arbitrations are conducted as a means of resolving disputes, Article 1592 price arbitrations are conducted as a means of providing the price term for contracting parties. Second, and more importantly, a general arbitral award, under normal circumstances, takes on the status of a judgment; the same is never true for an Article 1592 price appraisal. It is for these two primary reasons that an Article 1592 appraisal cannot be recognized as falling under the Convention.[77]

It is submitted that the juridical status in France is something of a red herring, as the same substantive criterion is applied in France as in the U.S. in order to decide that the procedure

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73. This article deals with the application of the New York Convention and accordingly refers only to Federal law in respect of this topic. For an introduction to the New York State law on expert determination, see section II of this article, and *see generally* PPA Clauses and Expert Determinations, *supra* note 1.

74. BORN, *supra* note 36, at 229.

75. McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co., 858 F.2d 825, 830–31 (2d Cir. 1988) (internal punctuation omitted); likewise, "So it should not be too surprising to find many American courts simply unable to find any reason at all why the legal regime of arbitration should not now extend equally to appraisals or expert determinations." Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 487 (2005) (internal punctuation omitted).

76. Frydman v. Cosmair, Inc., 1995 WL 404841, at *1 (S.D.N.Y. July 6, 1995).

77. Marcin Tustin, *Do Awards from Expert Determination and other Private Summary Dispute Resolution Mechanisms Fall Within the New York Arbitration Convention?*, NYSBA BLOG (May 10, 2013), http://nysbar.com/blogs/lawstudentconnection/2013/05/do_awards _from_expert_determin.html.

does not produce an award having the effect of a judgment. It is to be hoped that this decision will not be received by subsequent American courts as laying down that the true test for enforceability under the New York Convention is that a foreign procedure must both meet the U.S. substantive test for an arbitration, and also have the status of a judgment in its home country. Instead, it should be understood as applying a single substantive test, which exists in both U.S. and French domestic law to identify an arbitration.

At the appellate level, the enforcement of awards from *arbitrato irrituale* proceedings have twice[78] come before the U.S. courts in relation to motions to stay enforcement proceedings until such time as set-aside proceedings have been completed in Italy. In each case, the appellate court was able to avoid addressing the issue of enforceability directly, remanding the question of a stay to the lower court. Crucially, in both cases, the appellate court did not accept the defendants' argument that *arbitrato irrituale* does not fall within the ambit of the New York Convention, and that accordingly, the federal courts lacked subject matter jurisdiction to hear the claim at all. In both cases the court did not dismiss the proceedings, without deciding affirmatively that *arbitrato irrituale* does fall within the Convention, leaving the question open.

III. Consequences of the Approaches for Enforcement Under the New York Convention

The diversity of approaches above occurs, and is of significance, because the New York Convention defines neither arbitration nor an award. Accordingly, it is necessary to examine what each country requires of awards produced abroad in order for those awards to be considered to be within the ambit of the New York Convention. These approaches can be evaluated on two criteria: (a) whether the approach is apt to produce uniform decisions between courts of different jurisdictions and facilitates autonomous construction of the New York Convention; and (b) whether the approach can be applied efficiently.

The purpose of the New York Convention is the efficient enforcement of foreign "arbitral awards" in all signatory nations.[79] Autonomous and uniform interpretation of the New York Convention means that what counts as an "arbitral award" under the Convention will be same in each contracting state. Without it, the very scope of the Convention will vary between states,[80] undermining the Convention's core purpose. Enforcement proceedings under the New York Convention are not supposed to be a substantial bar to enforcement.[81] Any standard which requires an extended or expensive inquiry into whether an award falls under the convention also undermines the purpose of the Convention in respect of awards falling within the grey area of the standard, as the enforcement of those awards will be considerably more onerous than that of other awards.

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78. *See generally* Europcar Italia, S.p.A., v. Maiellano Tours, Inc., 156 F.3d 310 (2d Cir. 1998); Spier v. Calzaturificio Tecnica S.p.A., 663 F. Supp. 871 (S.D.N.Y. 1987).

79. New York Convention, *supra* note 2, art. III: "There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

80. *See id.* at art. I(1): "This Convention shall apply to 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."

81. *See id.* at art. III.

The advantage of the French approach to distinguishing arbitral awards, for the purposes of enforcement under the New York Convention, is that it allows the enforcing court to have regard solely to the materials brought before it: that is, to the award, and to the alleged arbitration agreement. Accordingly, it facilitates autonomous construction of the New York Convention, by reducing inquiry into the status of the award in the legal system of the seat to only whether the award has become finally binding by whatever legal doctrine applicable in that system.

The French approach also largely solves the problem of deciding what the necessary contents of an award are, in order to be enforceable: it must disclose a declaration of the legal rights of the parties, by way of an order that a court can enforce. For the reasons discussed above, a court cannot enforce a finding of fact or a determination of a price, because it falls at least one step short of a determination of the rights of the parties. However, when there is an order capable of enforcement,[82] there is no fundamental reason that a court *could not* enforce it, and the New York Convention does not disclose a reason on its face why it *should not* simply for being an expert's award. Likewise, the title and form of the award do not matter—whether the tribunal title their award "interim award," "procedural order," or anything else, what matters is not the title, but that there is a declaration of the respect rights and duties of the parties which responds to the dispute brought to the tribunal.

In contrast, the German approach requires the enforcing court to inquire into whether the legal classification of the dispute resolution procedure at its seat leads to something with the same status as an arbitral award in the enforcing legal system; the criterion actually used by the Bundesgerichtshof,[83] that the award has the status of a judgment, appears to be imported from Germany's own legal system (notwithstanding that that may be true of other civil law systems), despite the purported "autonomous" interpretation. It is submitted that this provides two sources of inconsistency in enforcement proceedings: (1) national standards regarding the nature and effect of arbitral awards may vary from place to place; and (2) various national courts may reach conflicting decisions regarding the status and nature of foreign dispute resolution proceedings. Further, such an inquiry is likely to be substantially more expensive (both in terms of monetary expenditure by the parties, and in terms of time), requiring experts to educate the enforcing court about the juridical nature and status of the proceedings in the seat country, rather than, as under the French and Italian International approaches, merely requiring experts to—at most—answer the two relatively simple questions "Is this award final, or open to revision or capable of being superseded?,"[84] and "Is this award binding on the parties, or is compliance optional?"

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82. As noted above, this is not a simple concept: the New York Convention does not offer a definition of an award, and there has been considerable variation as to what orders produced by a tribunal undisputedly sitting as arbitrators constitute "awards" for the purpose of the Convention. *See generally,* Judith Gill, *The Definition of Award under the New York Convention*, 1 DISP. RESOL. INT'L 114 (2008).

83. Decision of Bundesgerichtshof, *supra* note 23.

84. The finality requirement is articulated in *Gaetano Butera c. Pietro e Romano Pagnan*, *supra* note 35, and implicit in the refusal to enforce where "the decision [is] not comparable to a judgment pronounced" in *Garage A. et fils v. Z. AG*, *supra* note 24.

To illustrate the shortcomings of the German approach: it would seem to imply that if, for example, the U.K. repealed the provision of the Arbitration Act 1996[85] providing for awards to be enforceable as a judgment (presumably leaving them to be enforceable by summary judgment), awards from arbitrations seated in the UK would then not be enforceable in Germany.

The Italian international approach is even more productive of uniformity than the French approach, because in addition to the benefits of the French approach, it does not require the enforcing court to correctly construe the terms and nature of the arbitration agreement to determine the nature of the question referred, as demonstrated by the Corte di Cassazione in *Gaetano Butera c Pietro e Romano Pagnan*,[86] where notwithstanding its (almost certainly) erroneous classification of the proceedings in England as expert determination (*arbitrato irrituale*), the court enforced that English award under the New York Convention. Subject to any differences among expert witnesses regarding the finality and binding effect of an award, the Italian international approach eliminates all scope for inconsistent decisions between enforcing courts regarding the admissibility of an award as an arbitral award as such.

Apart from the practical merits of the Italian International approach, it is preferable because it is derived solely from the text of the New York Convention. Its limiting factor is the first clause of Article V(1)(e) of the Convention, that "the award has not yet become binding on the parties." In contrast, the German approach requires (a) analogizing the term found in an authentic text of the convention ("Arbitration") with a procedure in the (German) national legal system (*Schiedsgericht*); (b) an inquiry into whether the foreign award is analogous to one that would be produced under the (German) domestic procedure; and (c) an inquiry into whether the foreign award would be capable of enforcement under the Geneva Convention of 1927.[87] So much for the autonomous interpretation of multilateral treaties.

The Italian international approach has the same effect as the application of the French approach in the international context: in both cases, the test for enforceability is whether the procedure produces an award intended to provide a binding determination of the legal rights of the parties as such. This is striking, as the French approach appears to focus on substantive factors, while the Italian international approach focuses on the binding nature of the award as such. In the end, the difference is only that the French approach does not recognize that a process producing a genuine award can be other than arbitration, while the Italian approach is that notwithstanding any juridical differences, the valid production of a genuine award is considered to be arbitration under the New York Convention.

Accordingly, while Germany is not alone among the European jurisdictions surveyed in using the juridical status of the award in the originating country to determine enforceability under the New York Convention, it is alone in importing the specific requirement that the award be enforceable as a judgment. As that requirement does not appear on the face of the Convention, and no other jurisdiction appears to have taken that approach, it would seem from an international perspective that Germany has erred in importing a requirement of

85. Arbitration Act, 1996, § 66, c. 23 (U.K.).

86. *Gaetano Butera c. Pietro e Romano Pagnan*, *supra* note 35.

87. Geneva Convention of 1927, *supra* note 48.

domestic arbitration law into the international sphere. This is so despite the academic support for Germany's approach.[88]

In relation to the U.S., the fact that U.S. federal circuit courts have not generally accepted that the federal courts lack jurisdiction to enforce *arbitrato irrituale* awards suggests at the very least that such an argument is not especially persuasive to them, and that enforcement of a foreign expert's award would likely be possible in the U.S. The acceptance of the rule enunciated in *Frydman*[89] would amount to the U.S. taking the German approach, with all of the attendant problems identified above, and without the public policy explanation that Germany has. This would be particularly regrettable, as it seems that in general (as discussed above), U.S. courts generally apply the French approach domestically to deciding what is or is not an arbitration under the Federal Arbitration Act.[90] It would also place the U.S. and Germany as the only countries to use a substantive test domestically, but to impose a formalist distinction on foreign awards.

The possible formal approach which might be taken in England—that foreign procedures must carry a label which identifies them as being arbitration in the original legal system (the Analogical Approach)—carries some, but not all of the disadvantages of the German approach. The Analogical Approach is not apt to produce capricious results based on quirks of national procedural law (such as lack of special status for awards resulting in there being no "arbitration" in a signatory state); however, it still creates problems of uniformity: for example, does *arbitrato irrituale* translate to "informal arbitration" in English, and so count as "arbitration," or does it translate to "expert determination"? That sort of question is also an invitation to extended (and expensive) litigation over the meaning of expert linguistic or legal evidence, leading to the possibility of different courts in the same national legal system reaching different conclusions about the equivalence of certain foreign procedures.

It would seem that in general, countries taking a substantive approach to classification of procedures always assimilate expert determination to arbitration (including Italy, notwithstanding the formalist distinction used domestically), and of countries drawing a formalist distinction, only Germany has extended its formalist distinction between arbitration and expert determination to its treatment of the New York Convention. The Italian international approach provides the maximum possible international uniformity and efficiency, by requiring the court only to examine the award, while the French approach comes a close second, requiring the court to have regard to the scope of the dispute resolution agreement to determine whether the award is capable of enforcement. The German approach is likely to produce the most widely varying results, as it requires courts to analogize effects in a foreign legal system with those in their own, and it opens the possibility of corner cases where the status of an award in the seat system maps poorly to the effect of procedures in the enforcing system. The German approach will likely be more expensive and difficult to administer, as it will require a greater amount of expert testimony about the arbitration regime at the seat.

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88. POUDRET & BESSON, *supra* note 20, at 23.

89. Frydman v. Cosmair, Inc., 1995 WL 404841 (S.D.N.Y. July 6, 1995).

90. Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 487 (2005)

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Even if the diversity of approaches reflects local sensitivities, it is clear that formalist international approaches which require analogies between effects in the enforcing and originating legal systems (such as the German approach) give rise to the sorts of problems which the Convention is intended to eliminate. One such possibility is that a procedure considered arbitration in the originating country might not qualify for enforcement in Germany if the originating country did not provide for arbitral awards to have a special status. Such approaches also invite enforcing courts to hear expert evidence about the foreign legal system, increasing the length and cost of enforcement proceedings. This is to be expected, given the differences in detail between national legal systems, and the New York Convention for the most part avoids that problem by using general terms.[91] In addition, the New York Convention, through Article V, delimits the grounds on which signatory states *may* validly refuse enforcement in accordance with their local legal traditions, including grounds of public policy. That is the gateway through which they are supposed to bring their own traditions to bear.

One possible solution to the problem of non-uniformity would be to amend the New York Convention to provide a definition of arbitration or an arbitral award, preferably in terms of the French approach, but alternatively in terms of the Italian international approach. Such an amendment would resolve two of the main ambiguities in the Convention; clarifying the scope of the Convention as to what is an award (in which case, interim determinations declaring the legal rights and responsibilities of the parties as between each other would be awards), and what is arbitration (any process by a neutral arbiter resolving a question as to the legal rights and responsibilities of the parties as between each other).

To frame such a definition in substantive terms, rather than in terms of juridical effect, would provide the greatest uniformity possible, as it would eliminate the scope for courts of one signatory state to misconstrue the effect and nature of a dispute resolution process in another state. For that reason, an amendment, as sketched in the preceding paragraph, codifying the French approach, is preferable to one codifying the Italian international requirement that the award be binding under whatever legal theory. Either approach would allow commercial parties to choose to conform their contracts to the definition given in the amended Convention, either by explicitly declaring the point at which the award becomes binding, or by declaring that the scope of the decision maker's mission will extend to their legal rights and responsibilities.

IV. Conclusion

In every case where enforcement of a foreign expert's award has been granted, it has been through the application of a substantive criterion to decide what is or is not arbitration for the purposes of the New York Convention. Such substantive criteria examine the nature of the award itself (whether it contains a declaration of the legal rights of the parties), or the nature of

91. That is not to say that there is no scope for ambiguity or variation between legal systems. For example, in relation to what is "duly authenticated" under art. IV(1), or even what it means for an agreement to be in writing under art. II. Nevertheless, the New York Convention avoids language like Geneva Convention of 1927 art. I(d): "the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist)," which specifically refer to identified artifacts of certain national legal systems, so inviting problematic analogies to be drawn between very different legal systems.

the proceeding (whether it is a purely fact-finding exercise, for example). The use of such a criterion is right in principle, because it facilitates the autonomous construction of the New York Convention, by avoiding the need to draw tenuous analogies between the institutions of disparate legal systems. As demonstrated above, to apply a formalist criterion requiring analogies between the effects and nature of arbitration in different legal systems invites capricious results, and the possibility that what is a bona fide arbitral award both at its seat, and in many other places, would fail to qualify if the seat legal system did not meet the formalist requirements of the legal system where enforcement is sought.

The consequence for the kind of dispute-resolving experts' awards under consideration is that expert determination disappears as a separate juridical category, and becomes assimilated to arbitration for the purposes of the New York Convention. This is convenient for both practitioners seeking enforcement and the judges dealing with enforcement proceedings because it avoids the need to explain foreign legal concepts, and draw fine (and possibly insupportable) analogies between foreign and domestic law. This is consistent with the concept that international awards have a certain autonomy from national legal systems. As demonstrated above both in the German and English sections, to apply a formalist criterion amounts to the reinstitution of the requirement for double exequatur, which the New York Convention was instituted to abolish.

The French, Swiss, and Italian courts implement this by inquiring whether the award issues from a procedure intended to declare the legal rights of the parties, or merely to find facts. The French and Swiss courts apply the same criterion domestically, while the Italian courts apply a formalist distinction in respect of domestic procedures, because they recognize that a substantive test is appropriate in applying an international instrument such as the Convention. The German courts are the only national courts surveyed by this article to apply their domestic formalist distinction between arbitration and other dispute resolution mechanisms to the New York Convention.

The courts of England and Wales and the U.S. federal courts have not addressed the topic of this article directly. In England, notwithstanding that a formal distinction exists between arbitration and expert determination, the courts have expressed a preference for treating arbitral awards autonomously of national laws. In the U.S., the domestic rule would appear to be to assimilate the type of expert's award and proceeding under consideration to arbitration,[92] and there is certainly no good reason why the U.S. courts would adopt a formalist approach in relation to the New York Convention.

In respect of expert determinations conducted under New York law, even where the enforcing court demands that the arbitration award have the status of a judgment, as the German courts do, New York's expert determination statute provides that status.[93]

The courts of New York Convention signatory countries (except Germany), based on the sample surveyed, are open to the enforcement of expert's awards which resolve disputes, with-

92. PPA Clauses and Expert Determinations, *supra* note 1 at 27.

93. CPLR 7601: "[T]he court may enforce such an agreement as if it were an arbitration agreement."

out regard to formal considerations, and without the need to explore the juridical nature of the procedure in the seat legal system. This should hearten users of both arbitration and expert determination.

Why We Have International Crimes: The True Scope of International Criminal Law

Joseph William Davids*

Introduction

For the last 70 years, International Criminal Law (ICL) has been avant-garde in terms of the modern transformation of international law from a framework exclusively concerned with the relationships between sovereigns into a body of rules that establishes rights and duties for individual persons. The nature of this relatively new legal discipline epitomizes modern changes that have led to a new international law. There are multiple propositions for the basis of ICL. Two of the most widely accepted explanations are that it works to end impunity and that it exists to prevent atrocity crimes. This article will explore these and other justifications to try and identify the systemic basis of this important field of international law.

The role played by ICL is important for understanding international law generally. If the basic principle of ICL were to prevent impunity for those who commit crimes, punishment would find a central place as one of the foundational principles on which international law operates. If punishment of the individual is a central principle of the international system, it would not be out of place to suggest that the punishment of a collectivity that gave rise to the State or organization responsible for the commission of such crimes would also be proper. The international community has heretofore rejected any suggestion of collective punishment. If there were to be a change and recognition of a central role for punishment, this proposition may be ripe for reconsideration, and the law ready to evolve. On the other hand, prevention of atrocity crimes as the goal of ICL could bring the conclusion that the role of the law is to bring such acts to an end even if that means prosecution must be forgone and the perpetrators left unpunished. Such views have given rise to the justice versus peace debate. These exercises in logic may bring us to certain conclusions about the nature of international law regarding collective responsibility or impunity.

This article suggests that the purpose behind ICL is the prevention (through the threat of individual punishment) of those acts that threaten the international system as it has come to exist today. This being the only way to explain the co-existence of all acts, from genocide to piracy, that are treated as crimes of universal concern to the international community as a whole.[1] This article will start by tracing the evolution of ICL into its modern form today. The first section will set out some of the prior characterizations of ICL and demonstrate how they do not sufficiently describe the phenomenon. The following section will address the nature of criminal law generally. The last section of this article will connect the nature of the criminal law

1. *See* Prosecutor v. Nikolić, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning the Legality of Arrest, ¶¶ 24–25 (Int'l Crim. Trib. for the Former Yugoslavia June 5, 2003).

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and the international nature of ICL by setting out how the ICL aims to protect the international system.

A Brief History of International Criminalization

ICL is a relatively new development in international law, and as such, a review of its evolution over the last seven decades will elucidate its present scope and form. The most commonly referenced types of acts directly regulated by international law can be grouped into one of three "core" categories: War Crimes, Crimes Against Humanity and Genocide.[2] "Direct regulation" is used here to describe acts criminalized by international law without intervention by individual States through the penalization of crimes under their domestic laws. ICL's ability to directly and solely criminalize individual acts, while at times controversial, is firmly established under international law.[3] Modern ICL, and consequently modern international crimes, finds its genesis in the evolution of the discipline into a set of norms directly binding on the individual, i.e., crimes committed in violation of international law.[4] Notwithstanding the ability of international law to directly regulate individual behavior, this has not always been the mechanism chosen by the international community.

As recently as the period following the Second World War, treaties enacted in part to punish War Crimes still included a two-tier criminalization process that relied on the States' party to include the prohibited acts in their national criminal codes.[5] In other words, the international obligation created by these treaties fell on the States' party and not directly on the individuals who would be punished based on the requirements of the treaty.[6] These obligations, in turn, were limited to those who fell within the authority of the States' party to the specific treaty.[7]

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2. These are the crimes punished by the major international criminal tribunals. *See* S.C. Res. 827, Art. 2-5, U.N. SCOR 48th Sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993); S.C. Res. 955, Art. 2-4, U.N. SCOR 49th Sess., 3453rd mtg, U.N. Doc. S/RES/955 (1994); 33 ILM 1598 (1994); UN Doc. A/CONF. 183/9, Art. 5-8; 37 ILM 1002 (1998); 2187 UNTS 90.

3. *See*, *e.g.*, United Kingdom of Great Britain and Northern Ireland et al. v. Göring et al., 41 AM. J. INT'L L. 172, 216–21, Judgment, (Int'l Military Trib. 1946) (*Göring et al.*); Prosecutor v. Tadić, IT-94-1, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 55-60 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (*Tadić*); Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶¶ 308–311 (Int'l Crim. Court January 29 2007); International Covenant on Civil and Political Rights, article 15(1), 999 UNTS 171, 6 ILM 368 (1967).

4. ANTONIO CASSESE, LINEAMENTI DI DIRITTO INTERNAZIONALE PENALE, VOL. I DIRITTO SOSTANZIALE, 24 (il Mulino 2005) (Cassese).

5. *See*, *e.g.*, 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art. 146–147, 75 UNTS 287/1958 ATS No 21.

6. *See* GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW (6th ed.), Professional Books LTD, p. 91 (1976) ("On the present level of world organization, occasional attempts to create substantive international crimes by way of treaty have necessarily remained freaks. The exception of the London Agreement of 1945 [. . .] is deceptive; for an international agreement is the simplest way for Power which exercise *co-imperium* over a territory to co-ordinate their own policies in binding form").

7. This is the consequence of the international rules of *pacta sunt servanda* and *pacta tertiis nec nocent nec prosunt*, essentially meaning that agreements between States are binding on those States and cannot create obligations for third parties.

In any case, the idea that crimes can be committed in violation of international law—or the law of nations as it was traditionally known—is as old as the idea of a community of nations itself, even if it has not always been employed. Pirates, for example, were considered to be *hostis humani generis*, or enemies of all mankind, and so not benefiting from the shield of "citizenship" that would prevent their arrest and punishment by any State for acts committed on the high seas. The idea that individual States could punish such crimes was incorporated into the Constitution of the United States of America, which gives the authority to the United States Congress to define and punish crimes against the laws of nations.[8] However, while this authorization allowed for universal jurisdiction over such crimes, it did not necessarily directly criminalize the act, thereby requiring congressional action to avoid constitutional prohibitions on *ex post facto* criminal laws. Piracy was just one such crime. Others would join it as susceptible to universal jurisdiction under international law after the conclusion of treaties in their regard in the pre-modern era. These included the Atlantic slave trade and cutting underwater communication cables.[9]

Many of the acts addressed by international legal instruments during this period were not truly considered international crimes because their criminality was predicated on an additional requirement that the national legislatures penalize the behavior in question. The treaties giving rise to these obligations in turn are better seen as jurisdiction sharing agreements between the States' party to the agreement rather than as penal legislation.[10] As noted, since non-party States are not bound by the obligations contained in treaties neither are their nationals, absent a connection placing them under the jurisdiction of a signatory State. Conceptualizing obligations under this framework, as purely between States, was a primary characteristic of the classical period of international law.[11]

Signs that the breadth of international law was beginning to expand beyond the limits of State-to-State relationships first appeared at the conclusion of the First World War. The victorious powers included a provision for the arrest and trial of Kaiser Wilhelm of the German Empire for the "supreme offence against international morality and the sanctity of treaties" in the treaty concluding the war.[12] However, this first attempt to prosecute an individual for violations of international law would fail. The Kaiser fled to the Netherlands where he received asylum. Some trials of other German officials were held; however, they were generally seen as ineffective. Qualitative change would not come until the end of the Second World War.

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8. U.S. CONST., art. 1, § 8, cl. 10. (Even though the clause says "define," the scope of this term is merely to set out the scope of the provision in accordance with international law); *see*, Michael T. Morley, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 YALE L.J. 109 (2002).

9. WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS, 154 (Cambridge 2006) (SCHABAS).

10. *See*, *e.g.*, *Ex parte Pinochet (no. 3)*, [2000] AC 147, [1999] 2 All ER 97, [2000] 1 AC 147, [1999] UKHL 17, [1999] 2 WLR 827, opinion of Lord Seville of Newgate; U.S. v. Yousef, 327 F.3d 56, 96 (2d Cir. 2003).

11. *See*, *e.g.*, *Danzig Railway Officials Case*, Series B, No.15, p. 17 (Permanent Court of Int'l Justice, 1928) ("It may be readily admitted that, according to a well established principle of international law, the [agreement], being an international agreement, cannot, as such, create direct rights and obligations for private individuals.").

12. Treaty of Peace between the Allied and Associated Powers and Germany (Versailles Peace Treaty), Art. 227, June 28, 1919, UKTS 4.

The Allied powers during the World War II may not have known the full extent of the Nazi regime's crimes, but they were aware of their existence. On October 30, 1943, the Allies issued the Moscow Declaration. This proclamation was designed to put the Axis States on notice that there would be prosecutions for crimes committed and related to the global conflict then in course. With the end of the war, the Allies followed through on this pronouncement. On 8 August 1945, they promulgated the London Agreement, which included the Charter of the International Military Tribunal. This agreement created an *ad hoc* institution that would pass into history as the Nuremberg Tribunal. The court was created to have jurisdiction over the major war criminals of Nazi Germany. For the first time in history, an international tribunal was created to try individuals for crimes committed in violation of international law. The judges of the tribunal discussed the nature of the law they applied when they wrote:

> The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.[13]

With this judgment, international law changed.

Following the war, States sporadically applied this "international criminal law" to prosecute those suspected of having committed serious violations of the laws and customs of war during the conflict.[14] The Nuremberg Principles declaring certain crimes as against international law were explicitly approved in 1948 by the newly created world organization, the United Nations. The Genocide Convention of the same year would go a long way toward adding Genocide as another crime prohibited by international law. Moreover, the rise of internationally recognized human rights would provide further confirmation of the shift in international law through its explicit reference to international criminalization.[15]

This flurry of work in the postwar period came to an end with the start of the Cold War.[16] Further developments would have to wait for a fundamental shift in world politics. That moment came in 1993, 40 years after things came to a halt, when the United Nations Security Council (UNSC) created the International Criminal Tribunal for the Former Yugoslavia (ICTY), pursuant to its Chapter VII authority, to try those responsible for war crimes and crimes against humanity committed during the Yugoslav wars of the late 20th and early 21st centuries.[17] In 1994, in large part because of the magnitude of reported violations and atrocities, the International Criminal Tribunal for Rwanda (ICTR) was created to prosecute those

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13. *Göring et al. supra* note 3 at 216.

14. *See* Nicholas Kulish, *Twice Guilty, Hungarian, 97, Is Acquitted in World War II Massacre*, N.Y. TIMES, July 19, 2011, p. A4. (The most celebrated of these trials was possibly the 1961 prosecution of Adolph Eichmann in Israel. Individuals have stood for trial on allegations of crimes committed during the Second World War as recently as 2011).

15. *See Göring et al. supra* note 3.

16. *See generally*, ANTONIO CASSESE, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Oxford University Press 2008); ANTONIO CASSESE, FROM NUREMBERG TO ROME: INTERNATIONAL MILITARY TRIBUNALS TO THE INTERNATIONAL CRIMINAL COURT, IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 9–10 (2002).

17. CASSESE, FROM NUREMBERG TO ROME, 12–13.

responsible for international crimes during the civil war in that country.[18] The UNSC as the organ of the United Nations (UN) is responsible for the creation of these tribunals and was frequently occupied with issues related to their administration.[19] Other courts were later set up, not under Chapter VII, but pursuant to treaties with the countries where the crimes were committed.[20]

In 1998 the Rome Statute of the International Criminal Court (ICC) was adopted at the diplomatic conference in Rome, Italy.[21] The treaty entered into force after its ratification by 60 countries and brought the first permanent international criminal court into being on 1 July 2002.[22] The ICC has jurisdiction over genocide, war crimes and crimes against humanity in those cases where the crimes took place within the territory of a State party, were committed by a national of a State party or where the situation was referred to the court by the United Nations Security Council.[23]

Until this point the discussion has been on the historical development of international criminal law, the how of international criminalization. None of the preceding discussion addresses the purpose of such criminalization or the why of international criminalization. As noted, the purpose has often been asserted to be the characterization of the offense as an "atrocity" crime or its non-punishment, impunity. The next section will explore some prior characterizations to ascertain whether they sufficiently explain the phenomenon.

Theories of International Crimes

The preamble to the Rome Statute of the International Criminal Court, a document that in many ways represents the fruition of the post-war historical evolution of international law, states that the court was created out of the international community being "[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the consciousness of humanity."[24] Some national courts that have addressed the issue recognize the need for international criminal law.[25] Moreover, this view has found significant support in academic literature.[26] Accordingly, it is possibly the most prevalent description of the purpose underlying international criminal law.[27] Notwithstanding this fact, there is good reason to believe this explanation is incorrect.

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18. *Id*. at 14.
19. *Id*. at 15.
20. *Id*.
21. INTERNATIONAL CRIMINAL COURT, *About the Court*, http://www.icc-cpi.int/Menus/ICC/About+the+Court/.
22. *Id*.
23. Rome Statute of the Int'l Criminal Court, art. 13 (No. A/CONF.183/9) (Rome Statute).
24. *Id.* at pmbl.
25. *See*, *e.g.*, Attorney General of Israel v. Eichmann, 36 I.L.R. 277, 291–93 [1962] (Isr.); Demjanjuk v. Petrovsky, 776 F.2d 571, 581–82 (6th Cir. 1985); U.S. v. Bellaizac-Hurtado, 700 F.3d 1245, 1258 (11th Cir. 2012).
26. *See*, *e.g.*, SCHABAS, *supra* note 9, at 155.
27. *See* PHILIP ALSTON ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 243–1244 (3rd ed. 2008). (Chapter 14 is entitled "Massive Tragedies: Prosecutions and Truth Commissions" and refers to international criminal law as an outgrowth of "massive human rights tragedies" and other materials referring to international criminal law as a response to "mass atrocity").

Core international crimes—Genocide, War Crimes and Crimes Against Humanity—at first glance all appear to be cases of atrocity crimes that universally shock the conscience of mankind. There are, however, a few problems with this characterization. First of all, if universal condemnation were the reason for the *international* criminalization of particular acts, one would expect to find a far greater number of international crimes in the definition. It has been noted that murder, rape and theft are universally condemned; yet they are not in and of themselves international crimes.[28] Each of those acts is only addressed at the international level if they also satisfy the required contextual elements of international crimes.[29] The same is true for other serious crimes such as serial killing, widespread fraud, or other crimes committed by organized cartels or syndicate groups. Universal condemnation of an act is therefore not enough by itself to catapult it to the international plane.

Secondly, and on the other side of the spectrum, not all international crimes must amount to mass atrocities either. The clearest example of this can be found in the possibility of a relatively isolated incident of murder being legally cognizable as an act of genocide. In order for an individual homicide to constitute an act of genocide it must be committed with specific intent, i.e., the desire to destroy in whole or in part a racial ethnic or religious group.[30] There is no requirement that the act be connected to an armed conflict or that it be part of a widespread or systematic attack against a civilian population.[31] It is true that the intent must reach a significant number of the group in question; however, there is no need for the "genocide" to be successful. In other words, the group need not actually be destroyed in whole or in part. A single act is sufficient to be categorized as genocide as long as the elements of the crime have been satisfied.[32] A single isolated act of murder (or a relatively limited incidence thereof) can hardly be classified as an atrocity, let alone a mass atrocity, if the term is to retain any real meaning.

The terms "universal condemnation" and/or "mass" scale do not describe the phenomenon of international crimes. The question remains as to the true purpose or motive underpinning international criminal law. At least three additional theories have been put forward in the relevant academic literature: to "end impunity"; the involvement of the State in the crimes; and

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28. This is not to say that their definition is universally agreed upon, only that these types of acts are universally penalized. For more on the insufficiency of universal condemnation, *see* SCHABAS, *supra* note 9, at 152.

29. *See* ANTONIO CASSESE & PAOLA GAETA, LE SFIDE ATTUALI DEL DIRITTO INTERNAZIONALE 175 (2008) ("I crimini internazionali hanno una struttura complessa. In linea generale, si può osservare che essi si sostanziano in fattispecie che, solitamente, costituiscono reati all'interno degli ordinamenti nazionali [. . .], ma presentano un *quid pluris* atto ad elevarli a crimini internazionali."). In the case of war crimes, this is the commission of the act during and in connection with an armed conflict. Crimes against humanity are "elevated" because of their connection to a widespread or systematic attack against any civilian population. Genocide is an international crime because of the heightened mental state necessary to commit the crime.

30. *See* Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-I, Judgment, ¶ 175 (Dec. 13, 2006); Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgment, ¶ 46 (July 5, 2001).

31. *See* SCHABAS, *supra* note 9, at 1638.

32. *See* Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, Judgment, ¶ 2117 (Dec. 18, 2008); Prosecutor v. Simba, Case No. ICTR-01-76-T, Judgment, ¶ 414 (Dec. 13, 2005); Prosecutor v. Brđjanin, Case No. IT-99-36-T, Judgment, ¶ 642 (Sep. 1, 2004). This is not to say that international enforcement mechanisms will automatically be engaged to investigate and prosecute the crime, only that the legal elements of the crime will have been satisfied, allowing investigation and prosecution based on international criminal law and taking advantage of all the attendant legal tools (e.g., universal jurisdiction).

that these crimes are issues of international concern. Each of these justifications alone is deficient in some way for explaining the existence of international criminal law.

Different campaigns to enforce ICL and other branches of international law designed to protect human rights have called for an end to impunity, the call to ensure that crimes do not go unpunished. The website of the International Criminal Tribunal for Rwanda states that the court is "challenging impunity." The International Criminal Tribunal for the Former Yugoslavia asserts that "undoubtedly [it] has [. . .] contribute[d] to ending impunity."[33] In its preamble, the Rome Statute of the International Criminal Court identifies ending impunity as a foundational cornerstone for the court's existence. Considering its centrality to the framework of these institutions, can we say that impunity is the motivation for international criminal law? I do not believe we can.

It is unsurprising that there is an impunity problem when it comes to the commission of international crimes. Very often, they are committed in the context of armed conflict by one side against the other (or reciprocally). The victims have no ability to arrest and prosecute the individual perpetrators. Also, it is unlikely that the side for which the perpetrators are fighting will take interest in their prosecution. An example can be found in the pirate that by definition operates outside the scope of any State's authority. Impunity is an objective fact when it comes to international criminality. It also serves as a good explanation for the creation of international mechanisms, such as the ICTY and ICTR, to enforce the law. Nonetheless, to say impunity forms the basis of international criminal law is to put the cart before the horse; there can be no impunity for the failure to prosecute without a violation of already existing criminal law.[34]

If the failure to prosecute the perpetrator is not the basis of ICL, but rather an impetus behind the creation of international criminal tribunals, what is? Another possible explanation is the nature of the crimes; *i.e.*, their connection to State action. State involvement as the basis of international criminal law closely resembles the classic view of international law as "inter-State law," or that governing the relationship between States. After all, most international crimes prosecuted at the international level are in some way related to State acts or were committed during international armed conflicts. However, like the other bases already discussed, State connection fails to account for the full panorama of international crimes. A few examples will help illustrate its shortcomings.

Crimes Against Humanity demonstrate that the absence of State action does not serve as a bar to international criminality. The issue was recently discussed at length before the International Criminal Court in the context of violence in Kenya, arising out of the 2008/2009 post-election. The Office of the Prosecutor wanted to investigate the allegations of Crimes Against Humanity against leaders of different political/ethnic groups that clashed after the election. During the episode of instability the different groups violently attacked, killed and raped members of the other groups. The judges of the court had to determine whether State action, by way

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33. The International Criminal Tribunal for the Former Yugoslavia, *About the ICTY*, http://www.icty.org/sections/AbouttheICTY (last visited Oct. 22, 2014).

34. To do otherwise, to create *post hoc* criminal law, which would be a violation of the international principle of *nullum crimen sine lege* or the prohibition on *ex post facto* laws. *See*, *e.g.*, U.N.H.R., *International Covenant on Civil and Political Rights*, art. 15 (Dec. 16, 1966).

of a plan or policy, was a necessary element of Crimes Against Humanity. If State action was a necessary element, there could be no investigation, let alone a trial. If it were not, the proceedings could move forward. Ultimately, the court decided that State involvement was not an essential element of the charges to be brought. The court reasoned that the significance of the Rome Statute's "organizational policy" requirement is ambiguous, and that while

> some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values: the associative element, and its inherently aggravating effect, could eventually be satisfied by "purely" private criminal organizations, thus not finding sufficient reasons for distinguishing the gravity of patterns of conduct directed by "territorial" entities or by private groups, given the latter's acquired capacity to infringe basic human values[35] (internal quotations omitted).

The ICC is certainly not alone in coming to this conclusion about the elements of Crimes Against Humanity. Both the ICTY and the ICTR broke ground on this point by finding there is no need for State involvement in the commission of Crimes Against Humanity.[36]

War Crimes provide another example illustrating that State involvement is not a requirement for the commission of international crimes. The statutes of the major international criminal tribunals define War Crimes to include grave breaches of the Geneva Conventions of 1949 and their additional protocols. While the majority of the Conventions' articles only apply to "international" armed conflicts, or a war between two States, Common Article 3 and the other protocols also apply to "armed conflicts not of an international character."[37] This means the articles can be violated, and a War Crime committed, if an armed conflict exists absent State involvement. International law provides detailed rules regarding the existence of armed conflicts. These are defined as existing

> whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and *organized armed groups or between such groups within a State*. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved[38] (emphasis added).

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35. *Situation in the Republic of Kenya*, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya. ¶ 90 (Mar. 31, 2010).

36. *See* Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgment, ¶ 98 (June 12, 2002). Also, the *ad hoc* tribunals eventually abandoned the added requirement of a policy in the commission of crimes against humanity. *See, e.g.*, Prosecutor v. Blaskić, Case No. IT-95-14-A, Appeal Judgment, ¶ 120 (July 29, 2004).

37. *International Humanitarian Law Applicable in Non-International Armed Conflicts*, ASSER INST., http://www.asser.nl/default.aspx?siteid=9&level1=13336&level2=13374&level3=13 463 (last visited Nov. 4, 2014).

38. *Tadić*, *supra* note 3, at ¶ 70. *See* ECJ, Case C-285/12, Diakité v. Commissaire général aux réfugiés et aux apatrides, Chamber Judgment, 2014 EUR-Lex CELEX LEXIS 612CJ0285 (Jan. 30, 2014).

If War Crimes—international crimes—can be committed in a conflict between two non-State entities, there is no need for State involvement. Therefore, State involvement cannot be the reason for international criminality.

A final example demonstrating that States do not need to be involved can be seen in the internationally prohibited crime of piracy. Piracy, the first to be considered an international crime, exists exactly because no State is involved. The pirate, by committing a crime on the high seas and abandoning the protection of his home State, declares himself against all States. Because he is against all States, every State has the right to prosecute and punish the pirate. He becomes *hostis humani generis*, or an enemy of all human society, and a threat to the society of nations by operating outside its rules and protections.[39]

Piracy, and its relationship to the international system, indicates another possible justification for international criminalization: the conduct in question threatens the interests of the international community as a whole. But what interests? *Erga omnes* or human rights obligations, such as those protected by the criminalization of Crimes Against Humanity? Those related to war, such as War Crimes? Where does piracy fit into this complex of norms? Some postulate that common interests are not enough.[40] Accordingly, the expression "interest of the international community as a whole" needs to be clarified and given fuller form.

Until this point the focus has been on the context of ICL as *international* law. However, as a hybrid branch of public law it is also by nature a *penal* law, and must also find its roots in the doctrines of this additional branch of law. The answer to the nature of the interest protected by ICL will therefore need to pass through the nature of the criminal law before returning to the international level.

The Purpose of the Criminal Law

Legal philosophers have debated the purpose of punishment for almost as long as the creation of criminal law. The inquiry here, however, is distinct from the purpose to be achieved by punishment (e.g., rehabilitation, retribution etc.). The scope of the present analysis is limited to identifying the nature of the acts that are prohibited by the criminal law. More specifically, why certain acts and not others are legitimately subject to penal sanction by a legal system. The objects to be obtained by the trial and punishment, *e.g.*, conflict resolution or restoration of peace, will not be covered by the breadth of this evaluation.

Depending on the political nature of the State, laws can be created *inter alia* through the passing of a formal bill by a legislature, by judicial creation or by customary acceptance of usage. Laws are, in all cases, the creation of the legal system according to the procedures provided for in that normative order.[41] Penal laws proscribe particular behavior in order to prevent

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39. *See* PCIJ, France v. Turkey (SS Lotus), [1927] PCIJ Ser. A (Judgments) No. 10 (Judgment N. 9) (1929). *See also* United Nations Convention on the Law of the Sea, art. 101–102, Dec. 10, 1982, 1994 UNTS 396.

40. CASSESE & GAETA, *supra* note 29, at pp. 25–26.

41. *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 111 (Anders Wedberg trans., The Law Book Exchange 3rd ed. 2009) (1945).

it.[42] Consequently, the question then is why some acts are to be prevented while others are not. It may prove useful to determine what acts are not properly subject to penal legislation in order to better understand what acts legitimately fall within the scope of the criminal law.

Legal systems are not abstract entities, but are rather systems populated by individuals that have come together pursuant to the understanding that by giving up some of their individual freedom (that is by agreeing to obey common rules) they will provide for their greater well-being.[43] In a single State the authority to safeguard the system was classically described as being vested in the "sovereign,"[44] a concept that at this point in history might better be expressed as being vested in the government of the State. In any case, the society that is governed by the rules will not accept prohibitions it views as counter its general interests.[45] On the other hand, rules are acceptable when they are deemed necessary to maintain that society.[46]

The above principles can be summarized in this fashion: valid criminal laws are those that work to deter individual behavior considered to be a danger to the functioning of the rule generating system itself. Defining the nature of the penal law in this manner explains why *malum in se* acts are criminalized (such as murder) as well as *malum prohibitum* acts (such as parking in a no-parking zone).[47] In the first case, if the individual members of society were able to threaten each other's existence they would not have much of an incentive to follow the rules of the system. In the second scenario, the need to organize a complex society is an essential prerequisite for being able to administer that society. There is obviously an issue of degree here; however, that does not undermine the substantive point, or its application in this case.

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42. A classic and well-reasoned argument for this way of interpreting the criminal law can be found in OLIVER WENDELL HOLMES, JR., THE COMMON LAW 46 (1881) ("[T]here can be no case in which the law maker makes certain conduct criminal without his thereby showing a wish and purpose to prevent that conduct. Prevention would accordingly seem to be the chief and only universal purpose of punishment."); *see also* Rodrigo Dellutri, *The Nullum Crimen Sine Lege Principle in the Main Legal Traditions: Common Law, Civil Law and Islamic Law Defining International Crimes Through Limits Imposed by Article 22 of the Rome Statute*, 25 N.Y. INT'L L. REV. 37, 37 (2012) (stating "Criminal legislation has proved to be an effective tool for exercising formal social control through the application of punishments"); *see also* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 117 (1823).

43. In historical order, *see*, *e.g.*, HUGO GROTIUS, DE JURE BELLI ET PACIS BOOK I, § XIV 44 (Oxford 1925) (1625) ("The state is a complete association of free men, joined together for the enjoyment of rights and for their common interest"); EMRICH VATTEL, LE DROIT DE GENS 161 (London 1958) ("Le Droit du punir, qui, dan l'état de Nature, appartient à chaque particulier, est fondé sur le doit de sureté."); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 26 (London 1878) ("The peculiar subjects of international law are Nations, and their political societies of men called States. Cicero, and, after him, the modern public jurists, define a State to be, a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage by their combined strength."); PASQUALE FIORE, IL DIRITTO INTERNAZIONALE CODIFICATO, § 37 (Unione Tipografica 1890) ("Lo Stato è una riunione di genti politicamente organizzate in un territorio determinate con un Governo proprio, che ha il potere ed I mezzi adatti a conservare l'ordine e a tutelare il diritto dei consociate e che è capace di assumere la responsabilità dei propri atti nelle sue relazioni cogli altri Stati").

44. *See* CESARE BECCARIA, DEI DELITTI E DELLE PENE 12 (Einuadi 2002) (1764); *see also* GROTIUS, *supra* note 43, at Book I, § VI, at 36.

45. *See* HOLMES, *supra* note 42, at 50 ("[A] law which punished conduct [that] would not be blameworthy in the average member of the community would be too severe for that community to bear").

46. *See* BECCARIA, *supra* note 44, at 25 (discussing the right to punish and paraphrasing Montesquieu, stating "ogni atto di autorità di uomo a uomo che non derivi dall'assoluta necessità è tirannico").

47. Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, THE HERITAGE FOUND., http://www.heritage.org/research/reports/2003/04/the-over-criminalization-of-social-and-economic-conduct.

International Crimes Are Those That Threaten the International System

ICL is the penal law of the international community, and as such, must be a series of norms designed to discourage behavior that tends to threaten the international order, the international system itself.[48] Such an interpretation is in line with the idea of international crimes, principally War Crimes, Crimes Against Humanity and Genocide, as those acts that are of interest to the international community as a whole. These crimes are "of interest" to the international community, therefore, because they threaten the system as it currently exists. This last section will analyze this hypothesis to see if it is consistent with the different types of international crimes. I believe that it is.

War Crimes as defined by the Rome Statute of the International Criminal Court are any one of a series of enumerated acts "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."[49] These individual crimes include willful killing, torture, extensive destruction, deportation and the taking of hostages.[50] Other crimes include attacking civilian objects and attacking UN Peacekeeping forces.[51] While different in detail, the lists of crimes applicable to international and non-international conflicts are for the most part the same.[52] All of these crimes share the characteristic that if they are committed in sufficient number they can threaten the existence of a State, and by extension, the system of inter-State relations that is the basis of international law. Some examples will help elucidate this point.

It is a fundamental principle of the modern international order that borders do not change because of military victory or occupation.[53] By the same token, occupation does not extinguish the international legal personality of a State, and therefore the existence of the State.[54] War Crimes committed on a large scale, or the combined impact of many small-scale instances thereof, run the risk of de facto breaking this rule. States are made up of their populations, often but not always made up of individuals of the same ethnic or national background. At the very least, the populace self-identifies as the inhabitants of the State in question. Programs of murder, expulsion, and directly targeting civilians during a conflict often cause those populations to flee. Taking possession of territory in this way can be the first step in transferring members of the occupying State's population into the territory and the de facto modification of the borders between the States.[55] Forced modification of borders, and those acts that tend to result in their forced modification, are therefore a threat to the stability of the current fixed border system. Similar threats can be seen in the context of other types of international crimes.

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48. *See* Cass., sez. un., 6 Nov. 2003, n.5044, Foro It. I 2004 (characterizing international crimes as those that "threaten all of humanity and threaten the very foundations of international coexistence").
49. Rome Statute, *supra* note 23, art. 8(1).
50. *See id.* at art. 8(2)(a).
51. *See id.* at art. 8(2)(b).
52. *Compare* Rome Statute, *supra* notes 49–51, *with* Rome Statute, art. 8(2)(c) and (d).
53. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 500–01 (6th ed. 2008).
54. *See, e.g.*, JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 131–32 (2d ed. 2006).
55. This was known as "ethnic cleansing" during the wars in the former Yugoslavia.

Crimes Against Humanity are an outgrowth of War Crimes in that they find their genesis in what otherwise would have been War Crimes but for having been committed against "Axis allied" populations during the Second World War.[56] These crimes remain a threat to the international system because of their tendency to destabilize the State wherein they occur, which in turn can threaten regional peace and security. Destabilization can come by way of mass population outflows (much as may occur in non-international armed conflicts) or by the desire of other States to intervene to protect linguistic or ethnic minorities (thereby raising the threat of armed conflict). Crimes Against Humanity therefore, at their origins, protect against the same harms as War Crimes, only in a different context.

Last of the core international crimes, Genocide, would be conceived of in this way. Genocide is the extreme to be deterred and punished by the other two classes of core crimes: the destruction of an entire people, the destruction of the very thing a State is based upon.[57] Unlike Crimes Against Humanity or War Crimes, both of which require contextual elements to raise individual crimes to the international plane, the very attempt or single instance of a genocidal act presents a danger to the system so great that it is enough to attract the international eye to ensure such acts are punished and deterred.

Piracy and terrorism might appear on the surface to be outliers that do not fall into the paradigm set out above. However, it is the very nature of the pirate and terrorist which elevates their crimes to the level of international concern. These individuals work outside the "State system." In the first case, the pirate acts for private gain. In the second, the terrorist acts outside the existing political system out of a desire to force action by attacking civilian objects and causing a state of terror (whether it be within a single State or at the international level).[58] Even if not on this exact basis, the threat of terrorism has been recognized as a threat to international peace and security.[59]

As seen above, international crimes are composed of acts that entail a threat to the international system as it stands today. This is either because the individual acts take place in a particular context that renders them particularly dangerous to the system (such as War Crimes and Crimes Against Humanity) or because the harm which they may cause is particularly dangerous to the system (such as Genocide). The same is true for those antisocial acts that are by definition a rebuke to the validity of the international system itself (such as piracy and terrorism).

Conclusion

Explanations of international criminal law being a tool to end impunity or prevent mass atrocity crimes do not adequately describe the phenomenon of international criminality. Moreover, these explanations can lead to well-meaning but inaccurate proposals for the activation of

56. CASSESE, *supra* note 4, at 86; *see* Joseph William Davids, *From Crimes Against Humanity to Human Rights Crimes*, 18 NEW ENG. J. INT'L & COMP. L. 225, 228–29 (2012).

57. To a certain extent, this could be conceived of as the "murder" of the State.

58. *See, e.g.*, Special Tribunal for Lebanon [STL], Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, *Prosecutor v. Ayyash et al*. Case No. STL-11-01/11, Appeals Chambers, 2011.

59. *See* S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

international judicial mechanisms, such as the prosecution of corporate human rights violations or large-scale financial crimes before the ICC. Understanding the proper scope of international criminal law will help focus the discussion and international efforts on prosecuting and preventing those acts that truly warrant international attention, those acts that threaten the international system itself and, as such, international peace and security.

"Anti-Haitianismo": From Violence to a Travesty of Justice in the Dominican Republic

Emily M. Borich*

Introduction

Injustice anywhere is a threat to justice everywhere.

– Dr. Martin Luther King[1]

Due to the hostility toward Haitians in the Dominican Republic, a new Court ruling plans to displace thousands of people who have always lived in the Dominican Republic, raising many human rights questions about this displacement and calling for an international remedy. Part I of this article will cover the history between the Dominican Republic and the Republic of Haiti. It begins by explaining the colonial roots and tensions between the French and the Spanish. It shows the continuous control of the Dominican Republic and the lasting resentment from that control. Today, Haiti is at the mercy of the Dominican Republic as a nation not having the monetary resources to keep up or the power to combat the historical human rights violations.

Part II of this article tracks the recent ruling by the Constitutional Court of the Dominican Republic (Constitutional Court), Judgment TC/0168/13 (Judgment). The section begins with another ruling in 2004 that held an "in transit" exception to gaining nationality. This exception was then integrated in the 2010 amendment of the Dominican Republic Constitution and has an effect that goes back to 1929.[2]

Part III discusses the arguments on each side. On the one hand, international law allows States to decide issues of nationality. On the other hand, the other argument explains the extensively developed amount of international law that calls for the prohibition of race-based discrimination in issues of nationality. Part IV examines the impact that this will have on about 200,000 people of Haitian descent who have lived in the Dominican Republic their entire lives. Additionally, international assistance is discussed as peremptory norms of international law recognize the fact that a human rights violation is not a domestic issue or one against one State, but an issue that affects the entire global population. In conclusion, this article calls for international assistance and commitment to combating this human rights violation.

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1. Ali B. Ali-Dinar, Ph.D., *Letter from a Birmingham Jail [King, Jr.],* African Studies Center, University of Pennsylvania, https://slought.org/media/files/19630416_mlk_letterfrombirmingham.pdf (last visited Nov. 4, 2014).

2. *See* CONSTITUCION DE LA REPUBLICA DOMINICANA Jan. 26, 2010, http://pdba.georgetown.edu/Constitutions/DomRep/vigente.html (last visited Oct. 16, 2014).

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I. History of the Tension Between Haitians and Dominicans

The story surrounding the tension between Dominicans and Haitians has a long, complicated, and bloody history. Nonetheless, the history lays the groundwork for why, in the 21st century, this tension still remains. The Dominican Republic and the Republic of Haiti share an island that was first settled by the French (on the western part) and the Spanish (on the eastern part). France and Spain were competing for control in the New World but managed to settle their hostilities by the Treaty of Ryswick of 1697 and officially divided the island between them.[3] The French imported thousands of slaves from Africa to develop their part of the island into sugar cane plantations.[4] While both sides were racially stratified and slave-based colonies, the French side was overwhelmingly devoted to plantation slavery.[5] Over 90% of people on the French side were African slaves, while on the Dominican side, less than 50% were Africans in bondage.[6]

At the time, Haitian slaves were in revolt against France. In 1801, the slaves began controlling the entire island.[7] However, it was not until 1804 that the slave revolt resulted in the independence of the Republic of Haiti.[8] This revolt marked the first group of African slaves to fight and win their independence.[9] To the East, Haiti took over the Spanish side of the island as well. In 1805, Haitian troops invaded the Dominican Republic, killing most of its residents and helping to lay the foundation for two centuries of animosity between the two countries.[10] In 1808, the *criollos*[11] of the eastern side revolted against the French rule and returned the Dominican Republic to Spanish control.[12] On December 1, 1821 the Dominican Republic gained independence from Spain but was then ruled by Haiti until February 27, 1844 (but not recognized by Haiti until 1867, marking the longest war in the Republic's history).[13] After another stint of control by Spain and then the United States, the Dominican Republic ulti-

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3. Encyclopedia Britannica, *Treaty of Rijswijk*, http://www.britannica.com/EBchecked/topic/503697/Treaty-of-Rijswijk (last visited Sept. 28, 2014).

4. Thayer Watkins, *Political & Economic History of Haiti,* SAN JOSE STATE UNIV. DEP'T OF ECON., http://www.sjsu.edu/faculty/watkins/haiti.htm (last visited Sept. 28, 2014).

5. *See* Christopher Woolf, *There's a Long Story Behind 'anti-Haitianismo' in the Dominican Republic,* PUBLIC RADIO INTERNATIONAL (Nov. 14, 2013, 1:45 pm), http://www.pri.org/stories/2013-11-14/theres-long-story-behind-anti-haitianismo-dominican-republic.

6. *Id.*

7. JACK R. CENSER & LYNN HUNT, LIBERTY, EQUALITY, FRATERNITY: EXPLORING THE FRENCH REVOLUTION (Penn State University Press, 2001).

8. NATIONAL ARCHIVES, LIBERTE OU LA MORT., http://www.nationalarchives.gov.uk/dol/images/examples/haiti/0001.pdf (last visited Nov. 4, 2014).

9. *See* Richard A. Haggerty, *Haiti—A Country Study* (Dec. 1989), http://www.kreyol.com/history005.html.

10. *See* Jalisco Lancer, *The Conflict Between Haiti and the Dominican Republic,* http://www.allempires.com/article/index.php?q=conflict_haiti_dominican (last visited Nov. 4, 2014); Dr. Ernesto Sagas, *An Apparent Contradiction? Popular Perceptions of Haiti and the Foreign Policy of the Dominican Republic* (Oct. 15, 1994), http://windowsonhaiti.com/windowsonhaiti/esagas2.shtml.

11. TULIO HALPERÍN DONGHI, THE CONTEMPORARY HISTORY OF LATIN AMERICA, 49 (Duke Univ. Press) (1993) *(Criollos* is a social class in the caste system of Spanish colonies).

12. WIKIPEDIA, http://en.wikipedia.org/wiki/French_occupation_of_Santo_Domingo (last visited Nov. 4, 2014).

13. *See* EMBASSY OF THE DOMINICAN REPUBLIC IN THE UNITED STATES, *An Introduction to the Dominican Republic,* http://www.domrep.org/gen_info.html (last visited Nov. 4, 2014).

mately gained its independence on July 12, 1924 (despite the fact that United States troops remained there for several years following).[14] Therefore, the Dominicans' long war of independence was fought not against the French or the Spanish but against Haiti. Experts say that today, two centuries later, the elite in the Dominican Republic still feel humiliated for having had to answer to black overlords in their history.[15]

From about 1930 onwards, anti-Haitianismo was an official policy in the Dominican Republic when dictator Rafael Leónidas Trujillo Molina (Trujillo) was President of the country.[16] Additionally, there was an enormous amount of stress on the European heritage rather than on the African heritage.[17] One of Trujillo's many irrational military crusades occurred in 1937, when the brutal dictator ordered troops to clear the country's borderlands of Haitians, contending that the Haitians were thieves.[18] In only five days nearly 20,000 people were killed.[19] The Haitian government only issued a mild protest in response.[20] Another example of anti-Haitianism during this time period is that the Dominican Republic government was aggressively deporting Haitians while simultaneously trying to bring in migrant workers to work the state-owned plantations. The Dominican Republic's counterintuitive policies of organized migration and simultaneous deportations occurred because the Dominican Republic needed cheap labor, but it did not want outsiders to become part of the society. Thus, while the policies were primarily anti-Haitianism, there were also monetary issues at the root of this conflict.[21] Today the Dominican Republic's Gross Domestic Product (GDP) per capita is six times greater than that of Haiti.[22] Consequently, many Haitians have tried to go to the Dominican Republic for work and a better quality of life. However, the lack of money is not the only reason that Dominicans see Haitians as so different.

The first reason Dominicans see Haitians as so different is that Spanish is the primary language spoken in the Dominican Republic while Haitians speak French-based Creole. Second, Haitians are considered black while Dominicans identify with the European descent rather than African heritage. As a result, Haitians have experienced institutional racial discrimination. Nevertheless, DNA testing confirms that Dominicans have some African ancestry in their family tree.[23] Race is seen differently in the Caribbean as people describe themselves by various

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14. BBC NEWS, *Timeline: Dominican Republic* (May 28, 2012, 10:07am), http://news.bbc.co.uk/2/hi/americas/country_profiles/1217771.stm.
15. Woolf, *supra* note 5.
16. *See id.*; HISTORY.COM STAFF, HISTORY.COM, http://www.history.com/topics/rafael-trujillo (last visited Nov. 4, 2014).
17. Woolf, *supra* note 5.
18. *See A Storm in Hispaniola,* THE ECONOMIST (Dec. 7, 2013), http://www.economist.com/news/americas/21591203-and-no-agreement-how-many-have-been-cut-citizenship-storm-hispaniola [*A Storm in Hispaniola*].
19. *Id.; see also* History.com staff, *Rafael Trujillo,* HISTORY.COM, http://www.history.com/topics/rafael-trujillo (last visited Nov. 4, 2014).
20. *See A Storm in Hispaniola, supra* note 18.
21. *See* Woolf, *supra* note 5.
22. *Id.*
23. *Id.*

degrees of mixed races or colors such as *moreno*, *trigueno*, and *blanco-oscuro*, but few will use the term "black."[24]

Society continued to recognize that the racial discrimination was and still is deeply rooted in the Dominican culture. In a 2007 United Nations report, the Office for the High Commissioner for Human Rights described what it called a "profound and entrenched problem of racism and discrimination in Dominican society, generally affecting blacks and particularly such groups as black Dominicans, Dominicans of Haitian descent and Haitians." While there is no Government policy of racism and no legislation that is "on the face of it clearly discriminatory." the report said, there clearly was a "discriminatory impact" from "certain laws, particularly those relating to migration, civil status and . . . citizenship."[25] Nonetheless, the Dominican government and Dominican elites strongly deny racist policies. Despite these denials, on September 23, 2013, the Dominican Republic's Constitutional Court ruled in Judgment TC/0168 that the current policy, under which those born in the country are only granted citizenship if at least one of their parents was a legal resident, should apply retroactively to anyone born after 1929 (well before it was implemented in 2004) onwards, under a constitutional clause declaring all others to be either in the country illegally or "in transit." "According to human-rights groups, that leaves over two hundred thousand people of Haitian descent stateless."[26] While the judgment is final, human rights groups plan to challenge this policy before the Inter-American Court of Human Rights, where it could, in theory, still be overruled.[27]

II. Recent Change in Dominican Republic Policy

The Dominicans and Haitians no longer launch violent attacks on one another; however, there are still human rights violations vis-à-vis legal atrocities. Just one example of such human rights violations: "For decades, the government [of the Dominican Republic] granted citizenship to all children born on Dominican soil, except those considered in transit, such as foreign diplomats posted in the country."[28] Therefore a large number of children of immigrant citizens were automatically granted citizenship once their birth was registered. However, in 2004, the Dominican Republic government introduced a migration law, which redefined and expanded the definition of "in transit." This law did not grant citizenship to children of immigrant citizens who did not have proper documentation—a law which was rejected by the Inter-American Court of Human Rights in a 2005 judgment in the case of *Dilcia Yean and Violeta Bosico v.*

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24. *Id.*

25. *United Nations Experts on racism and minority issues call for recognition, dialogue and policy to combat the reality of racial discrimination in the Dominican Republic*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS (Oct. 29, 2007), http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=1424&LangID=E.

26. *A Storm in Hispaniola*, *supra* note 18.

27. *See* Ricardo Rojas, *Dominican court ruling renders hundreds of thousands stateless*, REUTERS (Oct. 12, 2013, 10:43 AM), http://www.reuters.com/article/2013/10/12/us-dominicanrepublic-citizenship-idUSBRE99B01Z20131012.

28. *Id.*

Dominican Republic (*Dilcia Yean*).[29] In *Dilcia Yean*, the mothers of Yean and Bosico went to the civil registry to ask for copies of their daughters' birth certificates; this request, which occurred in 1997, was denied. Both mothers and daughters had been born in the Dominican Republic and had documents proving their place of birth. However, because they were of Haitian descent, the civil registry refused to give them copies of their birth certificates, and insisted that they produce a list of documents that were impossible to obtain.[30] While the Constitution of the Dominican Republic grants nationality to anyone born in the country under the principle of *jus solis* (whereby citizenship is determined by place of birth rather than by descent), it does not apply to those born "in transit." The government retrospectively decided to interpret this provision to mean that Haitian migrants, their children, and their grandchildren should permanently be considered "in transit" and therefore lost their citizenship. This practice denied thousands their citizenship, as well as the two daughters.[31]

The Inter-American Court of Human Rights (the Court) issued a landmark decision in October 2005, affirming the human right to nationality as the prerequisite to the equal enjoyment of all rights as civic members of a state.[32] The Court had several key reasons for its decision. First, "Racial discrimination is prohibited as binding *jus cogens* norm of international law. Direct and indirect discrimination are prohibited. Once a *prima facie* case of discrimination is made out, the burden shifts to the state to justify the difference in treatment."[33] Second, the Court recognized that racial discrimination in access to nationality is a global problem in countries such as Burma (Myanmar), Russia, Kenya, Thailand, Kuwait, Democratic Republic of the Congo, and Bhutan. Also, the Court ordered the State not to adopt arbitrary rules that ignore the enduring links that long-term migrants develop with the country, noting that "to consider that a person is in transit, irrespective of the classification used, the State must respect a reasonable temporal limit and understand that a foreigner who develops connections in a State cannot be equated to a person in transit."[34] Finally, the Court made clear that the migratory status of parents could not be transmitted to children born on national territory and must never constitute justification for depriving a person of the right to nationality.[35] Several other Dominicans of Haitian descent have challenged the denials of their requests for identity documents in the national judicial system and most of them have received favorable rulings in first instance courts; however, the Dominican Central Electoral Board (*Junta Central Electoral*) has not complied with any of these rulings and has appealed all the decisions.[36]

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29. *See* Case of the Yean and Bosico Children v. The Dominican Republic, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, (Sept. 8, 2005) (holding that state authority to determine rights to nationality must be reconciled with principles of equality), http://www.corteidh.or.cr/docs/casos/articulos/seriec_130_%20ing.pdf.

30. *Yean and Bosico v. Dominican Republic,* OPEN SOCIETY FOUNDATIONS (July 1, 2009), http://www.opensocietyfoundations.org/litigation/yean-and-bosico-v-dominican-republic.

31. *See id.*

32. *See id.*

33. *See id.*

34. Comm. on the Elimination of Racial Discrimination, Submission to the Committee on the Elimination of Racial Discrimination: Review of the Dominican Republic, OPEN SOCIETY JUSTICE INITIATIVE, 11 n.3 (2013), http://www2.ohchr.org/english/bodies/cerd/docs/ngos/OSJI_CEJIL_DominicanRepublic82.pdf [Review].

35. *Id*.

36. *Id*. at 10.

Despite rulings by the Inter-American Court of Human Rights, efforts by human rights groups and international prohibitions on this sort of policy, the Dominican Republic incorporated its 2004 General Law on Migration (Law 285-04) into its Constitution when the latter was amended in 2010. In addition to regulating the entry, stay, and employment of immigrants, the 2004 General Law on Migration (Law 285-04) effectively ended the automatic grant of Dominican nationality to anyone born on the territory, with very limited exceptions. For example, Article 28 states: "In cases in which the father of the child is Dominican, he can register the child before the corresponding Dominican civil registry according to the laws regulating this matter."[37] Article 18 of the new Constitution defines the following persons as Dominican nationals:[38]

> 3.) People born in the national territory, with the exception of children of members of foreign diplomatic and consular missions of foreign nationals in transit or reside illegally in Dominican territory. Any foreign person or foreign defined as such in Dominican law is considered in transit;[39]

The September 23, 2013 decision, Judgment TC/0168, came as a result of a challenge by Juliana Deguis Pierre (a Dominican woman of Haitian descent) against the Dominican Electoral Board for refusing to issue her an identification card. The Dominican Electoral Board stated that, although she was born in the "national territory," she was the daughter of migrants in transit and did not have the right to Dominican citizenship.[40] The Constitutional Court based its ruling on Article 11.1 of the Dominican Constitution of November 29, 1966, which held sway when Pierre was born. After the Constitutional Court entered Judgment, Dominican Republic President Danilo Medina signed a decree (Decree) establishing the terms and conditions for what he called the "regularization of foreigners in an irregular situation" in the country.[41] The President said the Decree of the "National Plan for Regularization" fulfilled the mandate of the country's General Migration Law and the provisions of Constitutional Court

37. *Id*. at 11 n.3 (2013) (The full text of the General Law on Migration no. 285-04 (*Ley General de Migración* No. 285-04*)* was published in the *Gaceta Oficial* on August 27, 2007. It is available (in Spanish) at http://ww.seip.gov.do/cnm.php).

38. DOMINICAN REPUBLIC CONSTITUTION OF 2010, Jan. 26, 2010, art. 18.

39. Section 3 was taken from the Dominican Republic Constitution as of 2010, the full text of Article 18—Nationality is as follows, Dominicans are (1) the sons and daughters of a Dominican mother or father; (2) those who enjoy Dominican nationality before the entry into force of this Constitution; (3) people born in the national territory, with the exception of children of members of foreign diplomatic and consular missions of foreign nationals in transit or reside illegally in Dominican territory; any foreign person or foreign defined as such in Dominican law is considered in transit; (4) the foreign-born, father and Dominican mother, despite having acquired, by birthplace, a different nationality of their parents. After reaching the age of 18, they may express their will, to the competent authority, to assume the dual citizenship or renounce one of them; (5) those who marry a Dominican, opt for the nationality of their spouse and meet the requirements established by law; (6) the direct descendants of Dominicans living abroad; (7) the naturalized persons in accordance with the conditions and formalities required by law. The Constitution notes that the authorities apply special policies to preserve and strengthen the bonds of the Dominican nation with their nationals abroad, with the ultimate goal of achieving greater integration. DOMINICAN REPUBLIC CONSTITUTION OF 2010, Jan. 26, 2010, art. 18.

40. Peter James Hudson, *Haiti, Antihaitianismo, and the Dominican Republic,* BLACK AGENDA REPORT (Oct. 7, 2013, 9:21 PM), http://www.blackagendareport.com/content/haiti-antihaitianismo-and-dominican-republic.

41. The President signed the Decree on November 29, 2013. *Dominican Republic President Signs Decree on New Citizenship Policy*, CARIBBEAN J. (Dec. 2, 2013, 8:36 AM), http://www.caribjournal.com/2013/12/02/dominican-president-signs-decree-on-new-citizenship-policy/.

Judgment TC/0168/13.[42] Articles 151 and 152 of the Decree require the Dominican government to develop a National Regularization Plan that would regularize the status of "non-residents" based on criteria such as how long they have lived in the Dominican Republic, whether they immigrated to the country under the previous migration law, their links to Dominican society, and their socioeconomic situation.[43] However, the question now becomes whether this new policy comports with international law and decisions such as the one by the Inter-American Court of Human Rights in the case of *Yean and Bosico*, which established that "the migratory status of a person is not transmitted to the children, and the fact that a person has been born on the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born."[44]

III. Arguments on Each Side

While Dominican Republic President Danilo Medina has stated that he plans to present a naturalization bill as part of the commitment he made to the European Union, United Nations and others, he has failed to make clear whether the bill will resolve the conflict created by the Constitutional Court ruling. Ultimately, however, this new policy has created a global outcry about the Dominican Republic's violation of human rights and international law generally. Many of the arguments that remain against this policy are similar to the arguments made in the *Yean and Bosico* case years before. Although immigration and nationality are generally within the sovereign power of each state, international human rights law has placed some limits on the exercise of these sovereign powers.

First, the right to nationality is an international human right. The Inter-American Commission has explained, "[Nationality] is one of the most important rights of man, after the right to life itself, because all other prerogative guarantees and benefits man derives from his membership in a political and social community—the States—stem from or are supported by this right."[45] Similarly, Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws decreed that

> It is for each State to determine under its own laws who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.[46]

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42. *Id.*

43. *Review, supra* note 34, at 5.

44. *The Yean and Bosico Children*, *supra* note 29 (holding that state authority to determine rights to nationality must be reconciled with principles of equality).

45. James A. Goldston, *Written Comments on the Case of Dilcia Yean and Violeta Bosico v. Dominican Republic, A Submission from the Open Society Justice Initiative to the Inter-American Court of Human Rights,* OPEN SOCIETY JUSTICE INITIATIVE, 20 (2005), http://www.opensocietyfoundations.org/sites/default/files/yean_20050401.pdf.

46. *Id*. at 21.

Second, the prohibition against racial discrimination is a *jus cogens* norm. As numerous courts around the world have explained, racial discrimination is a particular evil which international law accords high priority to combating and redressing. For example, in *Brown v. Board of Education*, the United States Supreme Court found that racial segregation in public education violated the equal protection clause of the Fourteenth Amendment to the United States Constitution and noted the particularly "detrimental effect" on minority children.[47] Additionally, in the case *East African Asians v. United Kingdom*, the European Court of Human Rights held that immigration legislation, which singled out for exclusion a particular racial group, constituted "degrading treatment" under the European Convention of Human Rights. The court also noted "a special importance should be attached to discrimination based on race."[48]

Specifically, the United Kingdom acted incompatibly with Articles 3 (freedom from torture, inhuman and degrading treatment), 5 (right to liberty), 8 (the right to respect for private and family life) and 14 (prohibition on discrimination) of the European Convention on Human Rights by introducing the "Special Quota Voucher Scheme" which discriminated on the basis of gender, as only heads of households could apply to become a voucher holder.[49] Furthermore, the Inter-American Court of Human Rights has also affirmed:

> [T]he principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.[50]

Third, international law prohibits both direct and indirect discrimination. Articles 1(1) and 24 of the American Convention explicitly prohibit direct discrimination. Indirect discrimination is addressed in *Hugh Jordan v. United Kingdom*, in which the European Court of Human Rights held that "[w]here a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at the group."[51] Similarly, Article 2(b) of the European Union's Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (EU Race Directive), provides that

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47. Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan., 347 U.S. 483, 494 (1954), *sub nom*. Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294, (1955).

48. East African Asians v. UK, No. 4403/70, [1973] Eur. Ct. H.R. 2 (1973).

49. *Id.*

50. Juridical Conditions and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003).

51. Goldston, *supra* note 45, at 18.

> [i]ndirect discrimination shall be taken to occur when an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.[52]

Fourth, international and comparative laws bar states from refusing to grant nationality on the basis of race. By discriminating against Dominicans of Haitian descent in access to nationality, the Dominican Republic is violating its obligation under Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which provides that "states parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law," notably in the enjoyment of rights enumerated in that provision, which include the right to nationality in Article 5(d)(iii).[53] Furthermore, in General Recommendation No. 30 on Discrimination against Non-Citizens, the UN Committee on the Elimination of Racial Discrimination addressed racially discriminatory policies by affirming that "deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States parties' obligations to ensure non-discriminatory enjoyment of the right to nationality."[54] Ultimately, this argument could go on forever, quoting various conventions from the United Nations Commission on Human Rights to the European Convention on Nationality. It is obvious, however, from the enormous number of sources of international law that have unequivocally prohibited the behavior of the Dominican Republic, that there is a customary international norm against race-based discrimination, particularly for the purposes of granting nationality.

To address both sides of this issue, it is important to note a similar situation that arose in *Liechtenstein v. Guatemala*,[55] in which the International Court of Justice held that nationality depends on which state the individual is most closely connected with. In the situation at hand, most of the people in the Dominican Republic have lived there their entire lives and know nothing else. However, the International Court of Justice also stated that "international law leaves it to each state to lay down the rules governing the grant of its own nationality."[56] This power clearly works in favor of the Dominican government; however, *jus cogen* norms such as not discriminating on the basis of race are non-derogable. It is also important to note, however, that the Inter-American Court of Human Rights made clear in the *Yean and Bosico* case that although states enjoy wide discretion in determining who has the right to be a national, its regulations cannot be discriminatory or have discriminatory effects on particular groups of peo-

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52. *Id.*

53. International Convention on the Elimination of All Forms of Racial Discrimination art. 5, July 7, 1966–Sept. 24, 2013, 660 U.N.T.S. 195.

54. U.N. CERD General Recommendations No. 11: Non Citizens and No. 30: Discrimination Against Non Citizens (Gen. Rec. 11) paras. 2, 3, 14 (Jan. 10, 2004).

55. Nottebohm Case (Liechtenstein v. Guat.), 1955 I.C.J. 4 (Apr. 6).

56. *See id.*

ple.[57] Furthermore, Article 20 of the American Convention on Human Rights, "Pact of San Jose, Costa Rica," provides the right to nationality as follows:[58]

> 1. Every person has the right to a nationality.
>
> 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
>
> 3. No one shall be arbitrarily deprived of his nationality or of the right to change it.[59]

On September 7, 1977 the Dominican Republic became a signatory, making only one declaration at the time of signature. The declaration states, "[t]he Dominican Republic, upon signing the American Convention on Human Rights, aspires that the principle pertaining to abolition of the death penalty shall become purely and simply that, with general application throughout the states of the American region, and likewise maintains the observations and comments made on the aforementioned Draft Convention which it distributed to the delegations to the Council of the Organization of American States on June 20, 1969."[60] The Dominican Republic then ratified the American Convention on Human Rights, "Pact of San Jose, Costa Rica" (Convention) on January 21, 1978, thereby making it binding upon the Dominican Republic. The Court in the *Yean and Bosico* case also referred to the Convention's Articles 62(3) and 63(1) in rendering its decision. Specifically Article 63(1) states,

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.[61]

However, the Constitutional Court in the recent Judgment referred to the Convention by stating that (loosely translated), not all signatories to the American Convention on Human Rights have the same realities and particularities that should be taken into account.[62] The Constitutional Court focused mainly on the issue of being "in transit."

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57. *See Review, supra* note 34, at 11, n.2.

58. Organization of American States, American Convention on Human Rights (Nov. 22, 1969), http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf.

59. *See id.*

60. *Id.*

61. *Id.*

62. *See* Sentencia TC/0168/13, Suprema Corte de Justicia (Sept. 23, 2013) (Dominican Rep.), http://tribunalconstitucional.gob.do/node/1764.

IV. The Projected Impact on Haitians and the Role of the United Nations and Other Human Rights Activists

"How can you be in transit for 40 years? Transit means coming through the airport for a brief stay on the way to somewhere else," asked Eduardo Gamarra, a Caribbean expert at Florida International University in Miami who has done government consulting work in both Haiti and the Dominican Republic.[63] These are the kinds of questions people around the world are asking in terms of the implementation of this recent decision. The Electoral Board has one year to create the list of people who will be affected by this ruling. As previously mentioned, the President of the Dominican Republic has alluded to a bill, but its effects on the Constitutional Court ruling are still unclear as well. It is possible that many of these people could end up stateless, meaning they would not be considered a national by any state. The International Justice Resource Center recognizes statelessness as a global problem—it estimates 12 million people do not have a nationality even though there is a right to a nationality.[64] The United Nations High Commissioner for Refugees stressed that those affected by the judgment are not migrants and that they have deep roots in the country.[65] The agency also encouraged the government to take immediate action to resolve this human rights problem. Furthermore, a network of human rights activists is drafting a letter to Secretary of State John Kerry and working to petition the Inter-American Commission on Human Rights (IACHR) and the U.N. Human Rights Committee based on alleged violations of international law.[66] As with the case of *Yean and Bosico*, the human rights groups may successfully sue the Dominican government again in the IACHR. The United Nations has already expressed concern that the ruling could result in a human rights crisis. The decision could have "disastrous" implications, leaving those affected "stateless and without access to basic services for which identity documents are required," Ravina Shamdasani, spokesperson for the Office of the High Commissioner for Human Rights, told reporters in Geneva.[67]

Conclusion

Legally, the Dominican Constitutional Court has committed an injustice. It is obvious that a constant stream of abhorrence and resentment that has gone from bloodshed and violence to a travesty of justice has overshadowed the relationship between the Dominicans and the Haitians. After World War II, the world no longer accepted the notion that human rights are a domestic concern. When there is a human rights violation in one country, the effects are felt by all countries. As was discussed, numerous cases, treaties and customs have shown that international law prohibits race-based discrimination. It has been echoed so often that one can argue that it has crystalized into customary international law as a *jus cogens* norm. Further, in the present Judgment, race-based discrimination for purposes of immigration and/or determin-

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63. *A Storm in Hispaniola, supra* note 18.

64. *See* Int'l Justice Res. Cent., *Citizenship & Nationality,* http://www.ijrcenter.org/thematic-research-guides/nationality-citizenship/ (last visited Nov. 4, 2014).

65. U.N. News Cent., *UN agency urges Dominican Republic to restore nationality of people of Haitian descent* (Dec. 6, 2013), https://www.un.org/apps/news/story.asp?NewsID=46681&Cr=dominican+republic&Cr1=#.Uxz4Tf16flL.

66. *See A Storm in Hispaniola, supra* note 18.

67. *Id.*

ing nationality should not be left within the sovereign power of individual states to decide. It is widely accepted that states should no longer have the power to practice genocide. The same principle should apply to the *jus cogens* norm discussed throughout this article. Nevertheless, it is a terrible fate that states continue to exercise their sovereign power in violating fundamental customary international law. The widespread consensus against the Judgment and the long-term institutional discrimination in the Dominican Republic demands that the international community intervene to prevent thousands of people from potentially becoming stateless. The prevention of these human rights violations will take not only state effort but also efforts by the United Nations, non-governmental organizations and inter-governmental organizations. The Dominican Republic should adapt its immigration laws and practices in accordance with the provisions of the American Convention on Human Rights. Until state policies change, there will be no hope or incentive for internal personal resentments on the part of individual actors to change either. While the Act of State Doctrine exists to protect the sovereignty of individual states, it should not shield human rights violations. Aside from the amount of legal evidence of the Dominican Republic's judicial travesty, there is also the simple fact that the society of the Dominican Republic will also likely be affected by the removal of thousands of Dominicans of Haitian descent. Society will likely see uproar from torn families to torn businesses. The Dominican Republic will not be the same without the thousands of Haitians who, in actuality, are Dominicans. As was discussed, the tension between Dominicans and Haitians has always been complicated. That is just how it started, it may end the same way.

L.A.B. v. B.M.

44 Misc. 3d 1209(A), 2014 N.Y. Slip Op. 51069(U) (Sup. Ct., Westchester Co. July 9, 2014)

The New York Supreme Court, Westchester County, held that the divorce action, to which a Nicaraguan citizen was a party, should be transferred to Nicaragua, finding that the significance of judicial economy outweighed the defendant's connections to New York, and therefore declined to exercise jurisdiction in the pending action.

I. Holding

In the recent case *L.A.B. v. B.M.*, a divorce action was brought before the New York State Supreme Court, Westchester County.[1] The court considered whether it had jurisdiction to hear the action and whether New York was a convenient forum. L.A.B., the plaintiff, moved for *pendente lite* relief for interim counsel fees and fees on the motion.[2] The defendant, B.M., cross-moved to have the petition dismissed and sought his own *pendente lite* relief.[3] The court denied all motions.

The court determined that it did have jurisdiction over the matter. However, defendant's motion for forum non conveniens was granted, as the court found that Nicaragua was the better-suited forum to hear the action. The court considered mitigating factors as well, including, but not limited to, the location of the couple's assets and familial roots.

II. Facts and Procedural History

The wife L.A.B., a homemaker, is a citizen of Nicaragua, while the husband B.M., a Risk Manager for Credit Suisse Securities, is a citizen of the United States.[4] The plaintiff resides at their joint residence in Nicaragua and the defendant lives in a condominium in White Plains, New York.[5]

The parties met and were married in Nicaragua in a civil ceremony, which was followed the next year by a religious ceremony.[6] After their marriage, the parties resided in New York in the defendant's Manhattan apartment.[7] The parties had two children: R.M., who was born in New York, and B.M., who was born in Nicaragua.[8] After the birth of R.M., L.A.B. returned to Nicaragua, while B.M. remained in New York for work. B.M. would spend the majority of his

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1. L.A.B. v. B.M, 44 Misc. 3d 1209(A), 2014 N.Y. Misc. LEXIS 3117, 2014 N.Y. Slip Op. 51069(U) (Sup. Ct., Westchester Co. 2014).
2. *Id.* at 1.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 1.

time in New York, but received permission to work remotely, part time each month, from Nicaragua.[9] The parties made this arrangement so that the defendant could spend time with his family, who were now permanently based in Nicaragua.[10]

On October 14, 2013, L.A.B. informed B.M. that she would be filing for divorce.[11] L.A.B. informed B.M.'s lawyer that she would be filing in Nicaragua rather than in New York, as both were legally acceptable forums in which to commence the action.[12] In addition, L.A.B's lawyer advised B.M. to retain a Nicaraguan lawyer.[13] L.A.B. subsequently filed for divorce in New York "based upon the claimed irretrievable breakdown of the parties' marriage pursuant to Domestic Relations Law (DRL) § 170(7)" before B.M. was able to find appropriate legal representation in Nicaragua.[14]

The defendant responded to plaintiff's divorce action by filing his own divorce action three weeks later in Nicaragua. A week after B.M.'s action for divorce, L.A.B. filed her verified complaint in New York.[15]

III. Discussion – Court's Analysis

A. Residency

B.M. contended that L.A.B. did not meet the residency requirements required to file her divorce action in New York.[16] New York's Domestic Relations Law states that in order to proceed with a divorce action in the state, at least one of five requirements must be met.[17] However, the court made clear that only two of the five residency requirements were relevant to this case.[18] To maintain her action in New York, L.A.B. had to prove either (1) that the parties have resided in New York as husband and wife and either party was a resident thereof when the action was commenced and has been a resident for a continuous period of one year immediately preceding; or (2) that either party has been a resident of the state for a continuous period of at least two years immediately preceding the commencement of the action.[19]

Courts have noted that residency in this context may be established "by either the traditional method of proving a party has been domiciled or, in the alternative, has resided in New York State for the continuous period of time specified above."[20] Residence, in contrast to domi-

9. *Id.*
10. *Id.*
11. *Id.* at 2.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 2.
16. *Id.*
17. N.Y. Dom. Rel. Law § 230.
18. *L.A.B.*, 44 Misc. 3d 1209(A) at 3.
19. Dom. Rel. Law § 230(2), (5).
20. Unanue v. Unanue, 141 A.D.2d 31, 38–39 (2d Dep't 1988).

cile, is determined by "objective fact findings as to where the party physically lived," not the party's subjective intent.[21] A party may maintain more than one residence.[22] Where a party maintains more than one residence, the court will determine whether any other place exists where a party frequently or regularly returned.[23]

The parties disputed "whether [B.M.] was, and had been, a New York resident for at least one year prior to filing this action."[24] B.M. argued that neither he nor L.A.B. was a resident of New York; however, the court found contrary to that assertion.[25] B.M. owned the Manhattan apartment before the parties' marriage and then maintained a residence in White Plains, and thus was a resident of the state of New York.[26] Additionally, B.M. listed his White Plains address as the one for important financial documents, such as federal income tax returns, W-2s, a mortgage, a home equity loan, and a checking account.[27]

The court ultimately held that B.M. was a resident of New York due to his roots in New York, coupled with the insufficient proof that he was only commuting to New York from Nicaragua for work.[28] Therefore, the court found it had jurisdiction over the proceeding.[29]

B. Personal Jurisdiction

L.A.B. served B.M. with notice at the White Plains Metro North railroad station to establish personal jurisdiction.[30] B.M. admitted to being properly and correctly served while physically present in New York. Therefore, the court determined that it had proper personal jurisdiction over B.M.[31]

C. Forum Non Conveniens

Pursuant to CPLR 327(a), "when the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party may stay or dismiss the action in whole or in part on any conditions that may be just."[32] The court retains

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21. *Id.* at 39.
22. Davis v. Davis, 144 A.D.2d 621 (2d Dep't 1988) (citing Antone v. General Motors Corp., Buick Motor Div., 64 N.Y.2d 514 (1984)).
23. Weslock v. Weslock, 280 A.D.2d 278, 278 (1st Dep't 2001).
24. *L.A.B.* at 3.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *L.A.B.* at 3.
31. *Id.*
32. NY CPLR 327(a).

the ultimate decision-making power, and even when a court does establish jurisdiction, "it is not, of course, compelled to retain jurisdiction if the claim has no substantial nexus with New York."[33]

The burden of proof "is on the movant to demonstrate the relevant factors that militate against a New York court's acceptance of the litigation."[34] A court must balance between the private and public interest factors when deciding motions for forum non conveniens and will consider the "burden on the New York courts, the potential hardship to the defendant, the availability of an alternative, more convenient forum, the residency of the parties, and where the transaction out of which the cause of action arose occurred."[35]

As to the parties' children and their relationship to the case, the court recognized the children as "Nicaraguan domiciliaries and residents."[36] The court noted that the older child spent time in New York only as an infant, while the other child had never resided in New York.[37] Further, the court reasoned that the connection between the children and New York was attenuated, in that the children never had substantial roots in the state, having spent their entire lives in Nicaragua.[38]

The parties have considerable assets located in Nicaragua, including three properties, which B.M. estimated to cost $1,000,000 to obtain and develop. In order for the parties to purchase their properties,[39] L.A.B. set up a Nicaraguan corporation, Castin Inversiones SA.[40] B.M., however, contests his interest in the corporation, alleging, "Castin was actually set up in the names of plaintiff and her mother."[41]

In order for B.M. to properly establish his interest in the company, he contended that many of the witnesses he would need to call resided in Nicaragua, "including plaintiff's parents, plaintiff's uncle and members of his law firm, plaintiff's siblings, the secretary of Castin, and contractors who worked on the properties purchased through Castin."[42] B.M. also asserted that "Nicaraguan courts may not honor subpoenas and directives issued by this Court, making it impossible to present his case for equitable distribution."[43]

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33. *See* Banco Ambrosiano, S.p.A v. Artoc Bank & Trust Ltd., 62 N.Y.2d 65, 74 (1984) (holding that defendant failed to establish plaintiff's choice of a New York court was inappropriate and the circumstances were not such that a different forum would be better suited to litigate the matter).
34. Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 478–79 (1984).
35. *Id.* at 479.
36. *L.A.B.*, 44 Misc. 3d 1209(A) at 4.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 4.
42. *Id.* at 5.
43. *Id.*

Conversely, L.A.B. argued there were sufficient assets to maintain the action in New York. B.M. possessed a 401K and Roth IRA in New York and continued to maintain his White Plains condominium.[44]

Ultimately, the court held, "the location of the operative facts in this case is clearly Nicaragua."[45] Due to the plaintiff and her two children being domicilaries of Nicaragua, in addition to the majority of assets being located in Nicaragua, the court found that Nicaragua was the appropriate forum for the litigation.[46] Further, the court reasoned that dividing the couple's assets would create undue delays, because the interests were in Nicaragua rather than in New York.[47] As previously established, "it is the convenience of the court, not that of either litigant, that controls this determination [as to where the action will be litigated]."[48] The court found that it would be "saddled with adjudicating the instant case involving significant assets while a foreign court could decide the case differently."[49] Therefore, while L.A.B. filed the divorce action in New York before B.M. filed his divorce action in Nicaragua, the court did not apply the first-to-file rule, finding the Nicaraguan filing as evidence that an alternative forum was available for the litigation.[50]

The court found that B.M. would be financially responsible for producing witnesses from Nicaragua to New York as well as the majority of the property appraisals and the translation of the documents.[51] Because L.A.B. established her status as a housewife during the parties' marriage and thus did not produce an income, a court would likely find the defendant responsible for a majority, if not all, of the financial responsibilities stemming from the pre-trial discovery process.[52]

IV. Conclusion

The court established that it was in the best interests of both the parties and judicial economy of the courts to remove the action to Nicaragua. The court held that the parties had a greater nexus to Nicaragua than to New York, finding B.M.'s connections to the state did not weigh heavily enough in favor of keeping the proceeding in New York. Thus, the court correctly exercised its discretion in stepping aside, and leaving the case open to be accepted or not accepted by the foreign court. While forum non conveniens cases are certainly not unprecedented or uncommon, it is important to note that judicial economy was more important to the court than were personal considerations. Considering the wide variety of nationalities and citi-

44. *Id.*

45. *Id.*

46. *Id.* at 5.

47. *Id.*

48. *See* Vaage v. Lewis, 29 A.D.2d 315 (2d Dep't 1968) (citing William v. Seaboard A.L.R. Co., 9 A.D.2d 268 (1st Dep't 1959)).

49. *See* Sturman v. Singer, 213 A.D.2d 324, 325 (1st Dep't 1995).

50. *L.A.B.*, 44 Misc. 3d 1209(A) at 5; *see also* Cetenaro v. Poliero, 2009 N.Y. Slip Op. 51992[U] at *4 (Sup. Ct., Queens Co. July 23, 2009).

51. *L.A.B.*, 44 Misc. 3d 1209(A) at 6.

52. *Id.*

zenships of New York's ever-growing immigrant population, New York courts will undoubtedly apply *L.A.B. v. B.M.* in determining whether they have jurisdiction to hear future divorce proceedings.

Lauren E. Russo

City of Pontiac Policemen's and Firemen's Retirement System v. UBS AG

752 F.3d 173 (2d Cir. 2014)

As a matter of first impression, the United States Court of Appeals for the Second Circuit affirmed that the Securities Exchange Act precludes claims by investors in a foreign issuer on a foreign exchange, even when the shares were cross-listed on a United States exchange. Also, the mere placement of a buy order for foreign securities that is then executed outside the United States does not warrant an individual to bring a cause of action under the Securities Exchange Act.

I. Holding

The recent case, *City of Pontiac Policemen's and Firemen's Retirement System v. UBS AG*,[1] considered whether a group of foreign and domestic institutional investors who purchased shares that were listed on both foreign and domestic exchanges (New York Stock Exchange (NYSE)) will incur irrevocable liability in the United States, such that Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") governs the purchase of these securities.[2] Also, the court considered whether statements regarding these shares were fraudulent; if they were found to be fraudulent, they would violate Section 10(b).[3] Further, the court considered whether UBS's alleged false statements in its cross-border banking business were in compliance with the Exchange Act and United States tax laws or would constitute tax fraud.[4] The United States Court of Appeals, Second Circuit, affirmed the judgments of the United States District Court for the Southern District of New York, denying the investors leave to amend their complaint.[5]

The court's decision in *City of Pontiac* followed precedent set by the Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*[6] In *Morrison*, the Court held that Section 10(b) does not provide foreign plaintiffs the ability to sue foreign and American defendants for misconduct in connection with securities traded on foreign exchanges.[7] *Morrison* explained that the Exchange Act's focus isn't on where the deception originated, but rather on purchases and sales of securities in the United States.[8] The Court went on further to clarify that Section 10(b) is applicable only to transactions in securities listed on domestic exchanges and domestic transactions in other securities.[9] A securities transaction is considered to be domestic when the

1. City of Pontiac Policemen's and Firemen's Retirement System v. UBS AG, 752 F.3d 173, 177 (2d Cir. 2014).
2. *See* 15 U.S.C. § 78j(b).
3. *City of Pontiac* at 177.
4. *Id.* at 177
5. *Id.* at 189.
6. *Id.* at 176.
7. Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010).
8. *Id.* at 249.
9. *Id.*

parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States.[10]

II. Facts and Procedural History

Plaintiffs here are a group of foreign and domestic institutional investors who brought a class-action suit against UBS AG and a number of UBS AG officers and directors (UBS), alleging violations of the Exchange Act in connection with the purchase of UBS securities between August 13, 2003 and February 23, 2009.[11] These UBS ordinary shares were listed both on foreign exchanges and on the NYSE.[12] Plaintiffs contended that defendants violated Section 10(b) by making fraudulent statements regarding UBS's mortgage-related assets portfolio.[13]

Four of the plaintiffs, three of whom are foreign investors and one a domestic investor, purchased their securities on a foreign exchange.[14] The foreign investors alleged that, although they were foreign investors who made their purchases on a foreign exchange, Section 10(b) is still applicable, because those securities were also listed on the NYSE.[15] The domestic investor also alleged that it fell within the purview of Section 10(b), even though its purchases were executed on a Swiss exchange, because it placed a buy order in the United States.[16]

The plaintiffs, collectively, alleged that defendants had accumulated and overvalued $100 billion in residential mortgage-backed securities (RMBS) and collateralized debt obligations (CDO), between the above stated dates, without informing its shareholders and in contravention of its risk management policies regarding its representation.[17] The acquisition of the $100 billion portfolio began with an internal hedge fund run by John Costas, CEO of UBS's Investment Bank.[18] According to the plaintiffs, the hedge fund started to acquire billions of dollars' worth of the RMBS/CDOs and that, following a significant write-down, defendants closed the hedge fund and reintegrated its $20 billion portfolio into the Investment Bank.[19] Plaintiffs argued that defendants concealed the scope of the Investment Bank's portfolio by disclosing $23 billion rather than $100 billion and concealed the losses in that portfolio by failing to reveal the mortgage-related assets.[20]

On September 13, 2011, due to the holding in *Morrison*, the district court dismissed the claims of foreign and domestic plaintiffs who purchased the securities on foreign exchanges.[21]

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10. *See* Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 69 (2d Cir. 2013).
11. *City of Pontiac,* 752 F.3d at 177.
12. *Id*.
13. *Id.* at 177.
14. *Id*. at 179.
15. *Id* at 180.
16. *Id*.
17. *Id*. at 177.
18. *Id*. at 177–78.
19. *Id*. at 178.
20. *Id*.
21. *See id.* at 178; *In re* UBS Securities Litigation, 2011 WL 4059356 (S.D.N.Y. Sept. 13, 2011).

On September 28, 2012, the district court further dismissed all of the remaining claims against the defendants under the Exchange Act for "failure to adequately plead the elements of fraud."[22] Plaintiffs then timely appealed.[23]

III. Discussion – Court's Analysis

A. Standard of Review; Standard of Proof

The Court of Appeals reviews de novo a district court judgment granting a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).[24] To survive a motion to dismiss, a complaint must contain adequate factual matter, accepted as true, to state a claim to relief that is plausible on its face.[25] The court adds that in making this determination, it may consider "any written instrument attached to [the Complaint] as an exhibit or any statements or documents incorporated in it by reference, as well as public disclosure documents required by law to be, and that have been, filed with the SEC, and documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit."[26]

However, a complaint alleging securities fraud under Section 10(b) must satisfy the heightened pleading requirements.[27] These "well-known standards require, in relevant part, that 'securities fraud complaints specify each misleading statement . . . [and] state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'"[28]

B. *Morrison*

Morrison dealt with three Australian plaintiffs who sued National Australian Bank ("Australian Bank"), alleging violation of Section 10(b) for losses they suffered on purchasing the bank's securities on Australian exchanges.[29] Australian Bank listed its securities on the Australian Stock Exchange Limited and on other foreign exchanges, but did not list them on any exchange in the United States.[30] However, on the NYSE, Australian Bank had listed American Depositary Receipts (ADRs), which represent the right to receive a specified number of Australian Bank's securities.[31] Plaintiffs contended that Australian Bank and its chief executive officer were aware of a deception that made the company's mortgage-servicing rights appear more valuable than they really were.[32]

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22. *City of Pontiac,* 752 F.3d at 179; *In re* UBS AG Securities Litigation, 2012 WL 4471265.
23. *City of Pontiac,* 752 F.3d at 179.
24. *Id.*
25. *Id*.
26. *Id*. (quoting Rothman v. Gregor, 200 F.3d 81, 88 (2d Cir. 2000)).
27. See *id.* at 184; FED. R. CIV. P. 9(b); 15 U.S.C. § 78u-4.
28. *Id*. (quoting Anschutz Corp. v. Merrill Lynch & Co., Inc., 690 F.3d 98, 108 (2d Cir. 2012)).
29. Morrison v. National Australia Bank Ltd., 561 U.S. 247, 252–53 (2010).
30. *Id*. at 250.
31. *Id*.
32. *Id*. at 247.

Throughout its analysis in *Morrison*, the Supreme Court illustrated that the Exchange Act was never intended to regulate foreign securities exchanges and was only to apply to securities listed on U.S. securities exchanges.[33] The Supreme Court then adopted a transactional test that asks, "Whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange."[34] Because none of the securities were listed on a domestic exchange, the Supreme Court held that the petitioners had therefore failed to state a claim on which relief can be granted.[35]

The Second Circuit adopted this two-pronged transactional test that illustrates *Morrison's* holding.[36] *City of Pontiac* illustrates *Morrison's* holding that "Section 10(b) only provides a private cause of action arising out of transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[37] Also, the Second Circuit, in *Absolute Activist Value Master Fund Ltd.*, held that "a securities transaction is to be considered domestic when the parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States."[38] Therefore, the Second Circuit concluded that *Morrison* did not support the application of Section 10(b) to claims by a foreign purchaser of foreign-issued securities on a foreign exchange simply because they were also listed on a domestic exchange.[39]

C. Exchange Act

Section 10(b) of the Exchange Act states that:

> [i]t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[40]

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33. *Id.* at 267.
34. *Id*. at 269–70.
35. *Id.* at 273.
36. *See City of Pontiac,* 752 F.3d at 179; *Absolute Activist Value Master Fund Ltd.*, 677 F.3d at 69.
37. *City of Pontiac,* 752 F.3d at 179.
38. *Absolute Activist Value Master Fund Ltd.*, 677 F.3d at 69.
39. *City of Pontiac,* 752 F.3d at 180.
40. 15 U.S.C. § 78j(b).

A complaint alleging securities fraud or deceit under Section 10(b) must meet the requirement that the complaint specify each misleading statement and that it state with particularity facts giving rise to a strong inference that the fraud or deceit was acted on with scienter.[41]

Scienter may be established by facts "(1) showing that the defendants had both motive and opportunity to commit the fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness."[42] Reckless conduct has been defined as conduct that is "highly unreasonable."[43] This "highly unreasonable" conduct would represent "an extreme departure from the standards of ordinary care" to the extent that the danger was either known to the defendant or that the defendant should have known.[44] The requisite of "strong circumstantial evidence" is evidence that is "*at least as likely as* any" reasonable defense interpretation.[45]

D. Claims

i. Foreign Investors; Foreign Markets

The three foreign investors argued that the *Morrison* bar is limited to claims arising out of securities "not listed on a domestic exchange" and that the relevant securities being "cross-listed" on the NYSE further brought them within the purview of Section 10(b).[46] The plaintiffs contended that, because of this cross-listing, the first prong of *Morrison* is fulfilled.[47]

Prior to *City of Pontiac*, the Second Circuit used a "conduct and effects" test and held that "the Exchange Act [applies] to transactions regarding stocks traded in the United States which are effected outside the United States. . . ."[48] In *Schoenbaum v. Firstbrook*, the Second Circuit stated that it "believed that Congress intended for the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities."[49] However, in *City of Pontiac,* the Second Circuit, reading *Morrison* as a whole, rejected this prior "conduct and effects" test applied in *Schoenbaum* in favor of this bright-lined rule.[50] The court concluded that plaintiffs' view, which the court referred to as the "listing theory," is irreconcilable with *Morrison*.[51]

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41. *City of Pontiac,* 752 F.3d at 184.
42. *Id*.
43. *Id*. (quoting Novak v. Kasaks, 216 F.3d 300, 308 (2d Cir. 2000)).
44. *Id*. (quoting *Novak*, 216 F.3d at 308.)
45. *Id*. at 185 (quoting Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 328 (2007) (emphasis in original).
46. *Id*. at 179–80.
47. *Id*. at 180.
48. *Id*. (quoting Schoenbaum v. Firstbrook, 405 F.3d 200, 206 (2d Cir. 2010)).
49. *Schoenbaum*, 405 F.3d at 206.
50. *City of Pontiac*, 752 F.3d at 180.
51. *Id*.

As emphasized in *Morrison*, "the focus of the Exchange Act is . . . upon purchases and sales of securities in the United States."[52] Therefore, the court concluded that *Morrison* does not support the application of Section 10(b) claims by a foreign investor in foreign-issued shares on a foreign exchange simply because these securities are also listed on a domestic exchange.[53] Accordingly, the court affirmed the judgment of the district court dismissing these three foreign investors' claims.[54]

ii. Domestic Investor; Foreign Market

The domestic investing plaintiff who purchased securities on a foreign exchange by placing its "buy order" in the United States argued that its purchase satisfied the second prong of *Morrison*, because it constituted a "purchase . . . of [a] security in the United States."[55] This plaintiff contended that "[w]hen a purchaser is a U.S. entity, 'irrevocable liability' is not incurred when the security is purchased on a foreign exchange [; rather it is incurred] in the U.S. where the buy order is placed."[56]

As explained by the Second Circuit in *Absolute Activist Value Matter Fund Ltd.*, "[a] securities transaction is domestic when the parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States."[57] Plaintiff being a U.S. entity, however, has no effect on whether or not the transaction was foreign or domestic.[58] The court also concluded that even though plaintiff placed its buy order in the United States, the transaction was then executed on a foreign market, which does not establish that the parties incurred irrevocable liability in the United States.[59]

Therefore, the court affirmed the judgment of the district court dismissing this claim insofar as it was based on purchases of foreign securities on foreign exchanges.[60]

iii. Section 10(b) Claims

The plaintiffs that were able to bring a Section 10(b) cause of action allege two categories of misstatements involving the statements regarding UBS's mortgage-related assets portfolio ("CDO/RMBS fraud").[61] Plaintiffs assert these facts to support that the defendants "knew, or recklessly disregarded, that their representations to investors were materially false and misleading."[62]

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52. *Id.*
53. *Id.* at 181.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Absolute Activist Value Master Fund Ltd.*, 677 F.3d at 69.
58. *City of Pontiac*, 752 F.3d at 181.
59. *Id.*
60. *Id.*
61. *Id.* at 185.
62. *Id.*

Plaintiffs contended that the statements regarding the RMBS/CDO portfolio were material "[b]ecause [UBS] represented that the avoidance of asset concentrations was vital to [its] business and success."[63] The court disagreed and stated that these facts averred by the plaintiff do not support the inference of knowingly or recklessly disregarding their representations.[64] The court noted that, to be material, an alleged misstatement must be "sufficiently specific for an investor to reasonably rely on that statement."[65] However, defendants did disclose that they were seeking to expand their fixed income business by pursuing opportunities in asset-backed securities and disclosed increases as much as "69 billion Swiss Francs" in their portfolio.[66] The district court recognized that these disclosures undercut the inference that the defendants knew or recklessly disregarded that their accumulation of the portfolio was inconsistent with their representations.[67]

The court of appeals concluded that plaintiffs had not adequately alleged that these representations were materially misleading or that the defendants were consciously reckless in making such representations.[68]

Plaintiffs' next argument was that defendants "disregarded . . . observable market inputs and red flags demonstrating that [its] mortgage-related asset portfolio was materially impaired."[69] The court also rejected this argument.[70]

Plaintiffs alleged that the defendants should have predicted the impairment of the highly rated assets held by the Investment Bank, based on their knowledge of the write-downs in certain lower-grade mortgage-related assets.[71] However, the complaint failed to create a strong inference that defendants recklessly disregarded facts contradicting their public valuation or that their behavior was an extreme departure from ordinary care.[72] "While the collapse in the entire subprime market revealed UBS's failure to recognize the vulnerability of *all* its mortgage-related assets to have been poor judgment, poor business judgment – even if attributable to monetary incentives – does not establish an inference of recklessness that is 'cogent and compelling [and] thus strong in light of other explanations.'"[73] Therefore, the court did not recognize allegations of "fraud by hindsight."[74]

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63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 186.
67. *Id.*
68. *Id.*
69. *Id.* at 187.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 187–88.
74. *Id.* at 188.

In conclusion, the court affirmed the district court's holding that plaintiffs' Section 10(b) claims were properly dismissed for failure to plead materiality or a strong inference of scienter.[75]

IV. Conclusion

The court in *City of Pontiac* took advantage of the opportunity to decide, as an issue of first impression, whether the mere placement of a buy order in the United States for the purchase of a foreign securities on a foreign exchange is sufficient to incur irrevocable liability in the United States, such that Section 10(b) governs the purchase of the securities.[76] The court concluded that it is not.

The court, in concluding that the placement of a buy order within the United States does not incur liability under the Exchange Act, applies this new interpretation and reads *Morrison* as a whole, as opposed to this circuit's past history as depicted in *Schoenbaum*.[77] *Schoenbaum* took a "conduct and effects" approach, looking at whether the conduct would affect domestic securities markets.[78] Instead, the Second Circuit took this "*Morrison* as a whole" approach and both prongs of *Morrison* have to be met.[79]

With this new approach, the court made clear that a purchaser's citizenship or residency has no effect on where a transaction occurs.[80] Therefore, a plaintiff's argument that it is a U.S. citizen, thus falling within the second prong of *Morrison*, has no effect on whether the transaction was foreign or domestic.[81] *Morrison* explained that liability is incurred only when the transaction is to be carried out in the United States or when title is transferred within the United States.[82] Furthermore, the fact that a buy order was placed in the United States and executed on a foreign exchange is not a sufficient basis for liability under Section 10(b).[83] Again, noting *Morrison*, the court held that a buy order being placed in the United States does not support liability under Section 10(b) unless the transaction is carried out on a U.S. exchange or otherwise within the United States.[84]

Daniel Gili

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75. *Id*. at 189.
76. *Id.* at 181.
77. *Id*. at 180.
78. *Schoenbaum*, 405 F.3d at 206.
79. *City of Pontiac*, 752 F.3d at 181.
80. *Id.* at 181.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*

Transaero, Inc. v. Graham Chappell and International Aviation Services Pty Ltd.

2014 WL 1783732 (E.D.N.Y. May 6, 2014)

The United States District Court for the Eastern District of New York held that the plaintiff New York company had established a prima facie case for long-arm jurisdiction pursuant to NY CPLR 302, by alleging that the defendant former employee had earned his living by working for a New York-based company and conducted his daily business activities through New York.

I. Holding

In the recent case, *Transaero, Inc. v. Graham Chappell and International Aviation Services Pty Ltd.*,[1] Judge Bianco of the United States District Court for the Eastern District of New York concluded that Transaero made a prima facie showing of long-arm jurisdiction over Chappell pursuant to CPLR 302.[2] Judge Bianco granted the motion of International Aviation Services (IAS) to dismiss for lack of personal jurisdiction, because Transaero failed to make a prima facie showing that IAS transacted business in New York or committed a tort outside New York causing injury within New York.[3] The court found the plaintiff had sufficiently alleged that Chappell earned his living by working for a New York-based company over a number of years and that there was a nexus between Chappell's New York business transactions and Transaero's cause of action.[4]

II. Facts and Procedure

According to the complaint, which the court assumes, without deciding, to be accurate, Transaero, based in Melville, New York, is a company that distributes aerospace products to airline, life support, and military industries around the world.[5] Chappell was an Australia-based sales representative working for Transaero from September 1999 until December 2011.[6] Chappell was responsible for Transaero's sales in Australia, New Zealand, and Papua New Guinea.[7] Chappell operated through IAS.[8] While Chappell was working as a sales representative, Transaero paid him a salary and a commission on each sale he generated.[9] Most of the products that Chappell sold were stored in Transaero's New York warehouse.[10] Chappell would operate through IAS and after each sale he would place an order with Transaero, which packaged and

1. No. 13-CV-5752 JFB GRB, 2014 WL 1783732 (E.D.N.Y. May 6, 2014).
2. *Id.* at 7.
3. *Id.*
4. *Id.*
5. *Id.* at 1.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Transaero* at 1.

invoiced the products in its New York warehouse, then sent them from New York directly to the buyer.[11]

While working at Transaero, Chappell allegedly had access to much of Transaero's confidential information, including "product bundling, numerous product and/or parts applications, pricing information, financial information and forecasts, sales analyses [and] global market analyses."[12] Chappell also had access to customer information, including quotations, "the identity of Transaero's customer base and their purchasing history, . . . the names and addresses of contact persons, . . . sales and pricing history, and the identity of Transaero's vendors, suppliers, and potential suppliers."[13] All of the above information and documentation was maintained at Transaero's Melville, New York office.[14]

On February 7, 2011, Transaero's relationship with Chappell allegedly "entered a new phase."[15] Transaero decided to "move in another direction" and hired a new sales representative to service the Australian market.[16] Transaero and Chappell entered into a Letter Agreement, in which Chappell agreed to work at Transaero through the end of 2012 in order to assist with the new sales representative's transition.[17] The Letter Agreement prohibited Chappell "from entering into any business that [would] conflict with the interest of Transaero for a period of two (2) years after the conclusion of the transition period."[18] The prohibition covered "(i) representing, owning or consulting with any company that markets products that would interfere with Transaero's business in the Australian market; (ii) contacting existing customers or principals without the written consent of Transaero; and (iii) making disparaging remarks to customers, contacts or principals regarding Transaero, its employees and/or principals."[19]

In December 2011, Transaero allegedly learned that Chappell had failed to inform Transaero about two former employees who had been competing unlawfully with Transaero.[20] Chappell not only failed to inform Transaero about the two employees, but also attempted to participate in the unlawful competition.[21] Transaero discovered an email dated December 2010, in which Chappell was attempting to sell certain products to the Filipino army, a customer of Transaero.[22] Transaero terminated Chappell's employment once it uncovered the December 2010 e-mail.[23]

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11. *Id.*
12. *Id.* at 2.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Transaero* at 2.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Transaero* at 2.
23. *Id.*

Transaero also alleged that Chappell and IAS unlawfully solicited the business of other Transaero customers, including the Australian military.[24] Transaero claimed that three of its suppliers, Communication and Ear Protection, Inc. (CEP), Signature Industries, and Aqua Lung, had terminated their agreements with Transaero, subsequently turning to Chappell and IAS to distribute their products.[25] According to Transaero, Chappell and IAS were using Transaero's confidential information in order to compete unlawfully with Transaero.[26]

On June 13, 2013, Transaero commenced an action in the Supreme Court of the State of New York, County of Suffolk.[27] Transaero alleged that Chappell and IAS had unlawfully used Transaero's confidential information and trade secrets to compete unfairly.[28] Under New York law, Transaero asserted breach of contract, conversion, unfair competition, misappropriation of confidential and proprietary information, tortious interference with business relations, and breach of the duty of loyalty.[29] Transaero sought damages and injunctive relief.[30] Defendants, Chappell and IAS, removed the action to the U.S. District Court for the Eastern District of New York.[31] Defendants then filed a motion to dismiss for lack of personal jurisdiction on February 2, 2014.[32]

III. Discussion

A. Personal Jurisdiction

Resolving issues of personal jurisdiction requires a "two-part analysis."[33] First, a district court must determine whether there is personal jurisdiction over the defendant under the laws of the forum state.[34] Under New York law, there are two bases for personal jurisdiction over an out-of-state defendant: (1) general jurisdiction pursuant to CPLR 301 and (2) long-arm jurisdiction pursuant to CPLR 302.[35] If the court concludes that the exercise of jurisdiction is proper under the law of the forum state, "the court then must decide whether such exercise comports with the requisites of due process."[36] If a plaintiff alleges more than one cause of action, the court must consider whether it has personal jurisdiction for each separate claim.[37]

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24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 3.
28. *Id.* at 1.
29. *Id.*
30. *Id.*
31. *Id.* at 3.
32. *Id.*
33. *Id.* at 4 (quoting Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2d Cir. 1999)).
34. *Id.*
35. *Id.*
36. *Id.* (quoting Bensusian Rest. Corp. v. King, 126 F.3d 25, 27 (2d Cir.1997)).
37. *Id.*

Section 302(a)(1)[38] provides for personal jurisdiction "only over a defendant who has purposefully availed himself of the privilege of conducting activities within New York and thereby invoked the benefits and protections of its laws."[39] To establish personal jurisdiction under this statute, the defendant must have transacted business within the state and the claim asserted must arise from that business activity.[40] Factors that determine whether an out-of-state defendant transacts business in New York are whether the defendant has an ongoing contractual relationship with a New York entity; whether the contract was negotiated or executed in New York and whether, after executing a contract with the New York entity, the defendant visited New York to conduct meetings regarding the relationship; and the choice-of-law clause in any such contract.[41] The determination is based on the totality of the defendant's interactions with New York.[42]

i. Chappell

The issue here was whether the plaintiff had made a prima facie case that the court had long-arm jurisdiction over Chappell and IAS, who were non-domiciliaries of New York.[43] Transaero is a company based in New York.[44] The court noted that Transaero alleged that it paid Chappell's salary from its New York headquarters through a New York bank and that Chappell routinely received sales support from New York-based employees.[45] Sales support included "access to confidential pricing and product information" and Transaero's "customer base and their purchasing history," all of which is maintained in New York.[46] Chappell submitted orders and invoices to New York for the purchase of aerospace products.[47] Chappell traveled to New York for one week each year to participate in Transaero's annual sales meeting, "where products, pricing and proprietary information were discussed."[48] Chappell also traveled to New York several times per year to receive training and to conduct business.[49] In addition, Chappell and Transaero executed a Letter Agreement, in which Chappell agreed to "refrain from entering into any business that would conflict with the interests of Transaero for a period of ***two years***" after the end of his employment.[50]

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38. There are four bases for specific jurisdiction over an out-of-state defendant under Section 302(a). *Id.* Section 302(a)(2) does not apply in this case, because there is no allegation that a tortious act occurred in New York. Section 302(a)(3) does not apply, because the defendant does not own, use or possess any real property in New York. *Id.* Lastly, Section 302(a)(3), which provides for jurisdiction over an out-of-state defendant who committed a tort outside New York where the tort caused injury within New York, does not apply because the plaintiff did not rely on this section in the instant case. *Id.* at 5 n.4.

39. *Id.* at 5 (quoting Fort Knox Music Inc. v. Baptiste, 203 F.3d 193, 196 (2d Cir. 2000)).

40. *Id.*

41. *Id.* (citing Sunward Elecs., Inc. v. McDonald, 362 F.3d 17, 22–23 (2d Cir. 2004)).

42. *Id.*

43. *Id.*

44. *Id.* at 5.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 5.

50. *Id.*

The district court held that Transaero made at least a prima facie showing of long-arm jurisdiction over Chappell pursuant to Section 302(a)(1).[51] The court found that several recent decisions with similar facts held that an out-of-state sales representative who worked for a New York company had transacted business in New York.[52] In *LeCroy Corp. v. Hallberg*, the court held that an out-of-state defendant had transacted business in New York, because the defendant had "made his living by working for a New York-based company."[53] In another supporting case, the court held that out-of-state employees of a New York company had transacted business in New York, because they had "interacted with their employer's New York headquarters, accessed data maintained by their employer in New York, availed themselves of the benefit of being employed by a New York company, and generated profits for a New York company."[54] The court in *Mercator Risk Services Inc. v. Girden* also noted that some of the employees had traveled to New York on business.[55] In *Opticare Acquisition Corp. v. Castillo*, the court held that out-of-state sales representatives transacted business in New York, because they "had systematic, ongoing relationships with a New York company."[56] Furthermore, the sales representatives in *Opticare* entered into contracts on behalf of their New York employer, obligated that employer to ship products from New York, and created accounts payable and receivable.[57]

Judge Bianco considered *LeCroy*, *Mercator*, and *Opticare* "to be analogous to the instant case."[58] Accordingly, the court concluded that Chappell made his living by working for a New York-based company and therefore he transacted business in New York.[59]

Judge Bianco further held that Transaero made a prima facie showing that its claims were based on Chappell's business transactions in New York.[60] Transaero's claims arose out of Chappell's alleged breach of the Letter Agreement and his alleged misappropriation of confidential information.[61] The court reasoned "but for his employment activities for a New York employer, Chappell would not have had access to the confidential information at issue" in Transaero's causes of action.[62] Therefore, the court concluded, Transaero demonstrated the nexus between Chappell's New York business transactions and its causes of action, thus prima facie authorizing the exercise of personal jurisdiction pursuant to Section 302(a)(1).[63]

The court found that the plaintiff had made a prima facie showing that there was an adequate basis for the exercise of specific jurisdiction over Chappell; it then concluded that the

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51. *Id.* at 6.
52. *Id.* at 7.
53. No. 09-CV-8767, 2010 WL 3958761, at 3 (S.D.N.Y. Oct. 4, 2010).
54. No. 08-CV-10795 (BSJ), 2008 WL 5429886, at 3 (S.D.N.Y. Dec. 12, 2008).
55. *Id.*
56. 25 A.D.3d 238, 806 N.Y.S.2d 84 (2d Dep't 2005).
57. *Id.*
58. *Transaero*, 2014 WL 1783732 at 7.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* (quoting LaChapelle v. Torres, No. 12 CIV. 09362 AJN, 2014 WL 805955 (S.D.N.Y. Feb. 28, 2014)).
63. *Id.*

exercise of personal jurisdiction over Chappell was in line with traditional notions of fair play and substantial justice, satisfying the reasonableness inquiry of the Due Process Clause.[64] The Due Process Clause of the Fourteenth Amendment requires "some acts by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[65] Judge Bianco reasoned that Chappell's choice to conduct business in New York in the past suggested that it was not an unreasonable burden to defend himself in the state.[66] Chappell purposefully "engaged in a major contractual relationship—an employment relationship with a New York corporation," traveled to New York on numerous occasions in connection with that employment, and acquired information belonging to that New York corporation."[67] Chappell had sufficient minimum contacts with New York so that the exercise of personal jurisdiction over him satisfied due process.[68] Accordingly, the court held that a prima facie showing had been made that the exercise of jurisdiction would not be unreasonable.[69]

ii. IAS

The district court granted IAS's motion to dismiss for lack of personal jurisdiction.[70] The court stated that IAS was hardly mentioned in the complaint, which vaguely alleged that Chappell organized IAS and sold products through IAS.[71] It was also noted that each cause of action refers to "Defendant" in the singular, clearly referencing to Chappell only, adding to the court's uncertainty about IAS.[72] Concluding that there were no concrete allegations concerning IAS's action or its relationship to Chappell, the court held that Transaero failed to make a prima facie showing that IAS either transacted business in New York or committed a tort outside New York causing injury within New York.[73]

B. Sufficiency of the Allegations

i. Breach of Contract

"The elements of a breach of contract claim in New York are the existence of a contract, performance by the party seeking recovery, nonperformance by the other party, and damages attributable to the breach."[74] The court disagreed with Chappell's argument that Transaero

64. *Id.* at 9 (citing Chloe v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 173 (2d Cir. 2010)).

65. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985); *see also* World–Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

66. *Transaero*, 2014 WL 1783732 at 9 (citing Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 129–30 (2d Cir. 2002)).

67. *Id.* at 8 (citing *Mercator*, 2008 WL 5429886, at 4).

68. *Id.*

69. *Id.* at 9.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 10.

failed to allege all of the necessary elements. The Letter Agreement signed by both parties stipulated that Chappell would be employed through 2012 and, in exchange, Chappell would refrain from entering into any business that would conflict with the interest of Transaero for a period of two years after Chappell's tenure at Transaero ended.[75] Transaero allegedly performed all of its obligations under the Letter Agreement until it discovered Chappell's breach.[76] The alleged breach occurred when Chappell contacted and sold products to Transaero's clients by executing agreements with Transaero's distributors and by using Transaero's confidential information to compete.[77] The damages attributable to the breach were the lost profits.[78] As a result, the court held that Transaero met its burden, as the damages could be reasonably inferred from the allegations concerning Chappell's actions to take business away from Transaero.[79]

ii. Conversion

When someone intentionally and without authority assumes or exercises control over personal property belonging to someone else, and interferes with that person's right of possession, a conversion has taken place.[80] Here, the court held that Transaero's conversion claim failed as a matter of law, because the types of property allegedly converted, Transaero's confidential and proprietary information, are "not amenable to claims for conversion."[81] Transaero did not allege that Chappell excluded Transaero from possession or use of its own confidential and proprietary information, so the court dismissed the cause of action for conversion.[82]

iii. Unfair Competition

The misappropriation theory of unfair competition "usually concerns the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property."[83] An unfair competition claim based on a theory of misappropriation requires proof of two elements, that "the defendant misappropriated the plaintiff's labors, skills, expenditures, or good will, and that the defendant displayed some element of bad faith in doing so."[84]

Here, Chappell's only objection to Transaero's unfair competition claim was that Transaero failed to allege the likelihood of confusion by the public.[85] However, the court noted that "likelihood of confusion by the public is not an essential element in a misappropriation-based

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75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 10.

80. *Id.* (citing Colavito v. N.Y. Organ Donor Network, Inc., 8 N.Y.3d 43, 49–50, 827 N.Y.S.2d 96 (2006)).

81. *Id.* at 11 (citing Ferring B.V. v. Allergan, Inc., No. 12-CV-2650, 2014 WL 988595, at 14 (S.D.N.Y. Mar. 7, 2014)).

82. *Id.*

83. *Id.* (citing ITC Ltd. v. Punchgini, Inc., 9 N.Y.3d 467, 476, 850 N.Y.S.2d 366 (2007)).

84. *Id.* (citing Bar Bagallo v. Marcum LLP, 820 F. Supp. 2d 429, 446 (E.D.N.Y. 2011)).

85. *Id.* at 12.

unfair competition claim."[86] Thus, the court concluded that, when an unfair competition claim is not based on trademark infringement, but rather misappropriation of confidential information, the plaintiff need not establish actual confusion or a likelihood of confusion.[87] Accordingly, the court held that the unfair competition claim was sufficiently alleged.[88]

iv. Misappropriation

The plaintiff must allege that the defendant used the plaintiff's confidential information for the purpose of securing a competitive advantage to state a claim for misappropriation.[89] In addition, if both defendant and plaintiff are parties to a contract, the plaintiff must allege a breach of a duty independent of the duties under the contract.[90] The court held that the allegations in the complaint met all of the misappropriation elements.[91] Transaero alleged that Chappell retained confidential, financial, and client information including client histories, sales data, and financial reports.[92] Furthermore, the complaint alleged that Chappell was using this information to solicit plaintiff's customers and suppliers.[93] Transaero also alleged that by misappropriating the confidential information of his employer, Chappell breached a duty independent of his duties under the 2011 Letter Agreement.[94] The court concluded there was a plausible misappropriation claim against Chappell.[95]

v. Tortious Interference with Business Relations

There are four elements for a claim for tortious interference with business relations: (i) the plaintiff had business relations with a third party; (ii) the defendant interfered with those business relations; (iii) the defendant acted for a wrongful purpose or used dishonest, unfair, or improper means; and (iv) the defendant's acts injured the relationship.[96] The court noted Transaero's relationships with the Filipino army, the Australian military, Communication and Ear Protection, Inc., and Signature Industries, and that Chappell interfered with those relationships by competing directly with Transaero for the business of its clients and distributors.[97] Transaero alleged that, as a result of the interference, opportunities and long-term distribution agreements were lost.[98] The wrongful means element of the claim alleged that Chappell interfered

86. *Id.* (quoting Sidney Frank Importing Co., Inc. v. Beam Inc., No. 13-CV-1391 (N SR), 2014 WL 643696, at 13 (S.D.N.Y. Feb. 14, 2014)).

87. *Id.*

88. *Id.*

89. *Id.* (citing Reed. Constr. Data Inc. v. McGraw-Hill Cos., Inc., 745 F. Supp. 2d 343 (2010)).

90. *Id.* at 12 (citing Carvel Corp. v. Noonan, 350 F.3d 6, 16 (2d Cir. 2003)).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 12.

96. *Id.* at 13 (citing Catskill Dev., L.L.C. v. Park Place Entm't Corp., 547 F.3d 115, 132 (2d Cir. 2008)).

97. *Id.*

98. *Id.*

with Transaero's business relations by committing misappropriation and unfair competition.[99] Thus, the court found there was a plausible claim of tortious interference with business relations against Chappell.[100]

IV. Conclusion

Transaero clearly has established a prima facie case for personal jurisdiction over Chappell. Transaero has long-arm jurisdiction pursuant to Section 302 of the CPLR, because Chappell allegedly made his living by working for a New York-based company for a number of years. This long-arm jurisdiction does not create an unreasonable burden on Chappell to defend himself, especially considering that he purposefully availed himself of the privilege of conducting activities within the state and had often traveled back and forth to New York for business activities, meetings, and training. Judge Bianco conducted an accurate and thorough analysis of each alleged claim and, therefore, properly denied Chappell's motion to dismiss for failure to state a claim upon which relief may be granted, with the exception of the conversion claim. It is clear Chappell relied on New York to make his living, his headquarters was located in New York, and he conducted daily business activities within New York; therefore, he should be subject to New York jurisdiction for the breach of contract, unfair competition, and misappropriation claims.

John I. Coster IV

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99. *Id.*

100. *Id.*

Republic of Argentina v. NML Capital, Ltd.

134 S. Ct. 2250 (2014)

The United States Supreme Court held that the Foreign Sovereign Immunities Act of 1976 does not preclude discovery of Argentina's extraterritorial assets, as long as the discovery is reasonably likely to lead to attachable property.

I. Holding

In the recent case, *Republic of Argentina v. NML Capital, Ltd.*,[1] the Supreme Court held that a judgment creditor may, pursuant to the Foreign Sovereign Immunities Act of 1976 (FSIA),[2] request informational discovery of a judgment debtor's extraterritorial assets. A foreign state's sovereign immunity does not protect the state from a narrow discovery request to enforce a valid judgment.[3]

II. Facts and Procedural History

Beginning in 1998, the Argentine economy began slipping into recession. Although Argentina pegged the peso to the U.S. dollar and privatized corporations to pay down public debt, changes in currency values of the U.S. dollar and the Brazilian real, coupled with domestic inflation and instability, raised concerns regarding Argentina's ability to pay its bills.[4] In 2001, Argentina defaulted on 93 billion USD of Argentina's sovereign debt. Creditors looking for payment have catalyzed judicial analysis and understanding of the limits of foreign sovereign immunity and how far U.S. courts can reach in aiding judgment and enforcement of American creditors of foreign sovereign debtors.

When Argentina defaulted on its loans in 2001, NML Capital, Ltd. (NML) was one of the few creditors who did not agree to restructure Argentina's debt.[5] Instead, NML brought 11 successful debt-collection actions in the Southern District of New York (S.D.N.Y.) and received judgments totaling approximately $2.5 billion.[6] Because Argentina had not paid on the judgments, NML sought to execute the judgments on Argentina's extraterritorial property, property belonging to Argentina but located outside of both Argentina and the United States.[7]

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1. 134 S. Ct. 2250 (2014). Also on June 16, 2014, the Supreme Court denied certiorari in two related cases: Exchange Bondholder Group v. NML Capital, Ltd., 134 S. Ct. 2819 (Mem.) and Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2819 (mem.).
2. Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. § 1330.
3. *NML Capital,* 134 S. Ct. at 2253.
4. *See* Jayson J. Falcone, Note, *Argentina's Plight – An Unusual Temporary Solution to a Sovereign Debt Crisis*, 27 SUFFOLK TRANSNAT'L L. REV. 357 (2004).
5. *NML Capital,* 134 S. Ct. at 2253.
6. *Id.*
7. *Id.*; *see also* Joshua Alter, Recent Decision, NML Capital, Ltd. v. Banco Central de la República Argentina, 25 N.Y. INT'L L. REV. 147 (Winter 2012) (discussing the Second Circuit's decision holding foreign central banks immune from attachment).

NML served subpoenas on Bank of America ("BOA") and Banco Nacional de Argentina ("Nacional") to request informational discovery of Argentina's bank accounts.[8] Argentina and Bank of America moved to quash the judgment and NML sought to compel discovery; however, before the district court ruled, NML agreed to limit the scope of the subpoenas.[9] The district court granted NML's motion to compel, concluding that "extraterritorial asset discovery did not offend Argentina's sovereign immunity," and further qualified the order to compel, requiring NML to provide a reasonable definition of the informational discovery requested.[10] NML and Bank of America narrowed the subpoena, and although NML was willing to do the same with Banco Nacional de Argentina, that bank did not comply with the subpoena.[11]

Argentina appealed to the Second Circuit, claiming that the district court violated the FSIA in granting discovery of Argentina's extraterritorial assets.[12] Affirming the district court's holding, the Second Circuit concluded that "because the Discovery Order involves discovery not attachment of sovereign property, and because it is directed at third party banks, not at Argentina itself, Argentina's sovereign immunity is not infringed."[13]

III. Discussion – Court's Analysis

As a threshold matter, the Supreme Court "assumed without deciding" that the district court below would have the authority to order discovery for nonprivileged matters, such as assets outside of the United States, from entities like the third-party banks in question here.[14] The Court then qualified its analysis as answering the "single, narrow question" of whether the FSIA precludes discovery of extraterritorial assets of a foreign government.[15] Justice Scalia delivered the opinion of the Court, with Chief Justice Roberts and Justices Kennedy, Alito, Kagan, Thomas and Breyer joining. Justice Ginsburg dissented from the Court's decision and Justice Sotomayor took no part in the Court's decision.

A. History of the FSIA

Before 1952, in deciding "whether and when" to extend judicial authority over foreign states, it was Supreme Court practice to "defe[r] to the decisions of the political branches."[16] However, in 1952 the State Department adopted the restrictive theory of sovereign immunity, thus recognizing a sovereign's immunity only for "public, noncommercial acts."[17] What

8. *NML Capital,* 134 S. Ct. at 2253

9. *Id.*

10. *Id.* at 2253–54 (describing NML Capital, Ltd. v. Republic of Argentina, No. 03 Civ. 8845 (TPG) (S.D.N.Y. Aug. 30, 2011)).

11. *Id.* at 2254.

12. *Id.*

13. EM Ltd. v. Republic of Argentina, 695 F.3d 201, 210 (2d. Cir. 2012).

14. *NML Capital,* 134 S. Ct. at 2254–55.

15. *Id.*

16. *Id.* at 2255; *see also* Verlinden B.V. v. Central Bank of Nigeria, 462 U.S. 480, 486 (1983).

17. *Verlinden*, 461 U.S. at 487.

ensued, according to Justice Scalia, was nothing short of chaos.[18] Under the restrictive theory, the State Department was suggesting immunity in situations that would not have received immunity previously.[19] And where the State Department was not suggesting immunity, courts were making immunity decisions based on previous State Department decisions.[20] Thus, "sovereign immunity decisions were [being] made in two different branches, subject to a variety of factors," which were "neither clear nor uniformly applied."[21]

Congress sought to remedy the inconsistencies in 1976 by passing the FSIA – a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state."[22] Because the FSIA is the comprehensive regulation regarding foreign immunity in civil suits, it "indisputably governs the determination of whether a foreign state is entitled to sovereign immunity."[23] Accordingly, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall."[24]

The FSIA includes two types of immunity. First, Section 1604 provides that foreign states "shall be immune from the jurisdiction of the courts of the United States and of the States."[25] However, there is a list of exceptions to immunity in Section 1605, including a waiver of immunity, which Argentina has done here.[26] Then, a foreign state will be as liable as a private citizen.[27] Second, Section 1609 provides what the Court calls execution immunity – "property in the United States of a foreign state shall be immune from attachment, arrest, and execution."[28] The FSIA does not, however, "forbid[] or limit[] discovery in aid of execution of a foreign-sovereign judgment debtor's assets."[29] Nor does the FSIA speak on post-judgment discovery.[30]

B. Argentina's Arguments for FSIA Execution Immunity

Argentina advanced two arguments as to why the FSIA does not permit post-judgment discovery. First, Argentina argued that, because the State Department and American courts typically granted "*absolute* execution immunity to foreign-state property" regardless of where the

18. *NML Capital*, 134 S. Ct. at 2256.
19. Republic of Austria v. Altmann, 541 U.S. 677, 690 (2004).
20. *Verlinden*, 461 U.S. at 487.
21. *Id.* at 488.
22. *Id.*
23. Samantar v. Yousuf, 560 U.S. 305, 313 (2010).
24. *NML Capital,* 134 S. Ct. at 2256.
25. 28 U.S.C. § 1604.
26. 28 U.S.C. § 1605(a)(1); *NML Capital,* 134 S. Ct. at 2256.
27. *Id*.
28. 28 U.S.C. § 1609. Except, however, that property used for commercial activities may be subject to attachment, 28 U.S.C. § 1605; *see also* Pamela Albanese, Recent Decision, NML Capital, Ltd. v. Republic of Argentina, 26 N.Y. INT'L L. REV. 115, Winter 2012 (discussing the Second Circuit's decision that Argentine funds in an Argentine bank could be attached, because the funds were used in furtherance of commercial activities in the United States).
29. *NML Capital,* 134 S. Ct. at 2256.
30. *Id.*

property was located, then "absolute immunity from execution necessarily entailed immunity from *discovery in aid of execution*."[31] Second, Argentina argued that, because the FSIA did not indicate that it was expanding the courts' power to issue discovery of foreign state property, then "discovery of assets that do not fall within an exception to execution immunity is forbidden."[32]

The Court disagreed with both of Argentina's arguments. First, the Court noted that American courts typically lack the power to execute against a sovereign's property in other foreign states, and there is an absence of case law holding that a foreign state's extraterritorial assets received absolute execution immunity from American courts before the FSIA.[33] Thus, "even if Argentina were right" that execution immunity under the FSIA "implies coextensive discovery-in-aid-of-execution immunity," the FSIA does not immunize a foreign state from discovery of extraterritorial assets around the world.[34] Second, NML asked only for discovery—not execution—of Argentina's extraterritorial assets, because NML "does not yet know what property Argentina has and where it is, let alone whether it is executable under the relevant jurisdiction's law."[35]

C. Justice Ginsburg's Dissent

Justice Ginsburg argued that, because the Court is not requiring NML to limit its discovery requests to property used in connection with a commercial activity, the majority is "indulg[ing] in the assumption that, outside our country, the sky may be the limit for attaching a foreign sovereign's property."[36] Under the FSIA, Justice Ginsburg argued, a judgment creditor may only attach property used for commercial activities; thus, if only commercial property can be attached, then only commercial property can be subject to a discovery request.[37] Without first showing that a foreign sovereign "would allow unrestrained access to Argentina's assets," NML can request discovery only of commercial property.[38]

However, Justice Ginsburg's emphasis on the commercial nature of a property is misplaced. The Court narrowed its holding to allow NML to request the kind of informational discovery that would indicate whether NML can access Argentina's assets in another state. Whether a judgment creditor may attach property in another state, the majority held, is a secondary question, contingent upon the judgment creditor first receiving informational discovery as to the nature and availability of a foreign sovereign's extraterritorial property.[39]

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31. *Id.* at 2257 (emphasis in original).

32. *Id.*

33. *Id.*

34. *Id.* at 2257.

35. *Id.*

36. *Id.* at 2259.

37. *Id.*; *but see* Joshua Alter, Recent Decision, NML Capital, Ltd. v. Banco Central de la República Argentina, 25 N.Y. INT'L L. REV. 147 (Winter 2012) (arguing that the Second Circuit "respected the [FSIA] in holding central bank funds immune from attachment").

38. *NML Capital,* 134 S. Ct. at 2259.

39. *Id.* at 2258.

IV. Conclusion

The Supreme Court, assuming that district courts had the discretion in the first place, held that the FSIA allows discovery of a foreign sovereign's extraterritorial assets.[40] The FSIA does not preclude discovery of Argentina's extraterritorial assets as long as the discovery is reasonably likely to lead to attachable property.[41] It will be up to the district courts, however, to determine whether the assets discovered can be attached or executed.[42] Not only does the holding depend on federal practice and district court authority to grant discovery, it is narrow enough not to offend traditional notions of foreign sovereignty and immunity. The Court's holding will likely help American creditors execute judgments against debtor nations in the wake of the global recession, without violating a debtor nation's sovereignty, because creditors can now access information about assets previously unavailable. On the other hand, if the district courts decide to allow the type of discovery approved of here, debtor sovereigns like Argentina may start moving their assets back into the country and away from American discovery requests.

However, the question becomes how the Court's ruling here impacted Argentina's default in July 2014. Faced with the choice either to pay corporations like NML or to default again, it seems that Argentina chose to default. Although banks in Argentina "scrambled to put together a proposal to buy out the non-performing debt," the deal collapsed.[43] Some scholars attribute Argentina's default to NML's actions, "ensur[ing] that default was the only option."[44] However, in the days before Argentina's most recent default, President Cristina Fernandez de Kirchner "refused to budge from her stance that Argentina cannot pay out in full to the holdout hedge funds."[45] After negotiations fell through and Argentina officially defaulted, Argentina's Economy Minister Axel Kicillof maintained that there was no middle ground, and that the government would not participate in an agreement that could "jeopardize" Argentines; however, Kicillof did not explain how defaulting would not jeopardize Argentines.[46]

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40. *Id.*

41. *Id.*

42. *Id.*

43. *Argentina Fails to Reach Debt Agreement, Default Imminent*, N.Y. TIMES, July 30, 2014, http://www.nytimes.com/reuters/2014/07/30/business/30reuters-argentina-debt.html.

44. W. Mark C. Weidemaier, *Injunctions in Sovereign Debt Litigation*, 31 YALE J. ON REG. 189, 193 (Winter 2014).

45. *Analysis-Argentine Default in Balance as Government Refuses to Capitulate*, N.Y. TIMES, July 22, 2014, http://www.nytimes.com/reuters/2014/07/22/business/22reuters-argentina-debt-negotiation-analysis.html.

46. *Argentina Heads Into Default as Debt Talks Fail*, N.Y. TIMES, July 30, 2014, http://www.nytimes.com/aponline/2014/07/30/business/ap-argentina-debt.html; *see also* Alexandra Stevenson and Irene Caselli, *Argentina Is in Default, and Also Maybe in Denial*, July 31, 2014, http://dealbook.nytimes.com/2014/07/31/argentina-is-in-default-and-also-maybe-in-denial/.