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THE UNIVERSITY OF TEXAS SCHOOL OF LAW

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1. E. Ernest Goldstein, *Thank You Fidel! Or How the International Law Society and the* Texas International Law Journal *Were Born*, 30 TEX. INT'L L.J. 223 (1995).

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Indirect Responsibility in Development Lending: Do Multilateral Banks Have an Obligation to Monitor Project Loans?

CIPRIAN N. RADAVOI*

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INTRODUCTION

Multilateral Development Banks ("MDBs") are created with the aim of financing economic development in developing countries. Aside from general loans for states' development, they also finance—usually on a reimbursement basis—large-scale projects like dams and highways,[1] which often have dramatic impact on hundreds of

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1. *E.g.*, Sara Hsu, *How China's Asian Infrastructure Investment Bank Fared Its First Year*, FORBES, (Jan. 14, 2017, 10:00 AM), https://www.forbes.com/sites/sarahsu/2017/01/14/how-chinas-asian-

thousands of inhabitants. Responsibility for providing fair solutions to these people belongs to borrowing states. Lenders are insulated from responsibility in the international sphere since they have no physical presence at the place of the alleged harm.[2] As stated by an academic, "[t]he people may have a terrible problem, but the Bank may not be responsible."[3]

Accordingly, criticism of MDBs' impact on basic human rights usually refers to undermining those rights,[4] and not to breaching them, since the lenders are not directly involved. One exception to this insulation of lenders from direct responsibility may be found in cases of loans used by repressive regimes for fighting against their own people. For example, as Professor Cassese noted almost a half century ago in his discussion of the case of Chile, "the bulk of present economic assistance is instrumental in consolidating and perpetuating the present repression of [civil and political] rights."[5] Another well-known example is Indonesia's use of World Bank funds in intimidating the Timorese who sought independence.[6] Additionally, in another case, relatives of victims of the Argentinean dictatorship brought suits against several foreign banks that financed the regime.[7] These cases are not the subject of this Article since, as the plaintiffs can establish a breach of primary rules of international law, the recourse to the doctrine of complicity is unnecessary.

Instead, this Article is concerned with indirect (or derivative) responsibility, that is, the responsibility of the lender aiding or assisting the borrowing state in the commission of human rights violations. According to the International Law Commission ("ILC") Special Rapporteur Giorgio Gaja, "an international organization could incur responsibility for assisting a State, through financial support or otherwise, in a project that would entail an infringement of human rights of certain affected individuals."[8] Complicity and subsequent responsibility can be established if

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infrastructure-investment-bank-fared-its-first-year/#1ff0dee45a7f [https://perma.cc/679P-GL6G] (describing, among other loans, the $300 million loan for a hydropower project in Pakistan issued by the recently created Asian Infrastructure Investment Bank).

2. Daniel D. Bradlow et al., *The Accountability of International Organizations to Non-State Actors*, 92 AM. SOC'Y. INTL. L. PROC. 359, 361 (1998) (quoting a World Bank representative: "[I]t is not the World Bank staff building the project. It would be difficult to establish the causal link between the Bank financing and the harm that might affect people in the country.").

3. Edith Brown Weiss, *On Being Accountable in a Kaleidoscopic World*, 104 AM. SOC'Y. INTL. L. PROC. 477, 484 (2010).

4. *See, e.g.*, Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 HARV. HUM. RTS. J. 205, 206 (2002) (criticizing the World Bank's "mandate of poverty alleviation" as compromised "when its lending activities undermine respect for human rights. . .").

5. Antonio Cassese (Special Rapporteur on Prevention of Discrimination and Protection of Minorities), *Study of the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in* Chile, vol. IV, para. 495, U.N. Doc. E/CN.4/Sub.2/412 (Aug. 3, 1978).

6. Dawn L. Rothe, *Facilitating Corruption and Human Rights Violations: The Role of International Financial Institutions*, 53 CRIME LAW & SOC. CHANGE 457, 470 (2010) (describing how Indonesia used funds from the World Bank against Timorese civilians).

7. Juan Pablo Bohoslavsky, *Complicity of the Lenders*, *in* THE ECONOMIC ACCOMPLICES TO THE ARGENTINE DICTATORSHIP 115 (Horacio Verbitsky & Juan Pablo Bohoslavsky eds., 2016) (describing legal actions taken against foreign banks by the family of the dictatorship's victims).

8. Giorgio Gaja (Special Rapporteur on Responsibility of International Organizations), *Third Report on Responsibility of International Organizations*, para. 28, U.N. Doc. A/CN.4/553 (May 13, 2005).

the two conditions[9] stipulated by the "ILC" Draft Articles on the Responsibility of International Organizations ("DARIO") are fulfilled. Article 14 of DARIO provides:

> An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:
>
> (a) the organization does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) the act would be internationally wrongful if committed by that organization.[10]

Condition (a) is the main focus of this Article and is discussed in Sections II and III below. Condition (b) boils down to the question of whether international organizations are bound to respect human rights. In a well-known passage, the International Court of Justice ("ICJ") stated that international organizations ("IOs"), as subjects of international law, are bound "by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[11] MDBs are not contracting parties to treaties in fields like human rights, labor, or the environment, and have therefore no direct obligation under these treaties.[12] They are only subject to the legal restraints of their own mandates as established by their constituent instruments—the Articles of Agreement—but these documents do not stipulate human rights obligations. Under these circumstances, among the three sources of obligations mentioned by ICJ, all that can be relied upon is customary international law. Here,

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9. A third condition, not mentioned in the text, is stipulated in the ILC Commentaries: Intent to facilitate the wrongful act. Int'l Law Comm'n, *Draft Articles on the Responsibility of the International Organizations, with* Commentaries, U.N. Doc. A/66/10, at 37 (2011) [hereinafter Int'l Law Comm'n]. This is, however, repudiated by most scholars, based on text interpretation (nothing in the ILC's work on responsibility suggests relevance of the mental element) and text applicability (derivative responsibility would be extremely difficult to demonstrate if conditioned upon intent). *See, e.g.*, Bernhard Graefrath, *Complicity in the Law of International Responsibility*, 29 REVUE BELGE DE DROIT INT'L 370, 375 (1996); ("[s]uch a narrow criterion of intention has set up a very high, perhaps too high threshold to transform assistance into an internationally wrongful act of complicity.") August Reinisch, *Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts*, 7 INT'L. ORG. L. REV. 63, 72 (2010) ("A requirement of intent, and not merely knowledge, would significantly reduce the risk of IFIs to become internationally responsible for human rights violations of their borrowing countries."); Alexandra Boivin, *Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons*, 87 INT'L REV. RED CROSS 467, 471 (2005) ("The intent requirement being introduced here is surprising since the Draft Articles claim to be neutral on the question of "wrongful intent," focusing instead on the objective conduct of states and leaving the mental element to be defined by the primary obligations at issue.").

10. Int'l Law Comm'n, *supra* note 9, at 36.

11. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Egypt v. WHO), Advisory Opinion, 1980 I.C.J. Rep. 73, 89–90 (Dec. 20).

12. *See* MARKUS KALTENBORN, SOCIAL RIGHTS AND INTERNATIONAL DEVELOPMENT 50–59 (2015) (describing the argument that they may have indirect obligations, since most of their member states are likely signatories of the two human rights covenants).

convincing arguments were brought by scholars that the Universal Declaration of Human Rights ("UDHR"), which enshrines civil, economic, social, and cultural human rights, is declaratory of customary law, and therefore binding on IOs.[13]

As for the character of DARIO Article 14, it has long been recognized that the customary international law of state responsibility applies *mutatis mutandis* to IOs.[14] Accordingly, an examination of the parallel Article 16 on state complicity in the 2001 ILC Draft Articles on State Responsibility ("DASR") is necessary. The ICJ considers DASR Article 16 to reflect customary law.[15] ICJ is not alone in this view—a vast array of state practice and official positions[16] indicates the same opinion, which is also shared by academics[17] and by the Special Rapporteur Roberto Ago in the process of the DASR elaboration.[18]

The remainder of this Article is concerned with the condition of prior knowledge. Although DARIO Article 14 and DASR Article 16 only refer to actual, subjective knowledge, commentators agree that in some cases constructive knowledge (i.e. knowledge expected from the exercise of reasonable care) may fulfill this condition.[19] In fact, notoriety of the facts in exigent circumstances, interests of the aiding state or organization, and geographic proximity were relevant factors for constructive knowledge in a variety of ICJ cases.[20] In our example case, notorious human rights abuse in the implementation of a financed project should be known to a reasonably diligent lender. This Article explores a possible expansion of the basis for knowledge construction: the existence of an internationally binding obligation of due diligence regarding the use of the loan. Such an obligation would transform the knowledge condition stipulated in DARIO Article 14(a) into one of objective knowledge—knew or should have known—when the IO concerned is a MDB. Similar to knowledge constructed from the notorious character of the wrongful act to which aid is provided, the existence of binding obligations of due diligence, including monitoring, would invert the burden of proof; it would be the alleged aider who should demonstrate lack

13. Michael W. Reisman, *Comment: Sovereignty and Human Rights in Contemporary International Law*, 84 Am. J. Int'l L. 866, 876 (1990). *See also* International Conference on Human Rights, *Proclamation of Teheran*, ch. 2, para. 2, U.N. Doc. A/CONF.32/41 (May 13, 1968) (showing that respecting human rights "constitutes an obligation for the members of the international community.").

14. *See, e.g.*, HENRY G. SCHERMERS & NIELS BLOKKER, INTERNATIONAL INSTITUTIONAL LAW 1005, 1007 (2003); MARTEN ZWANENBURG, ACCOUNTABILITY OF PEACE SUPPORT OPERATIONS 70 (2005).

15. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 191, para. 420.

16. *See generally* Georg Nolte & Helmut Philipp Aust, *Equivocal Helpers—Complicit States, Mixed Messages and International Law*, 58 INT'L & COMP. L. Q. 1, 6–10 (2009).

17. *See, e.g.*, HELMUT PHILIPP AUST, COMPLICITY AND THE LAW OF STATE RESPONSIBILITY 419 (2011) (concluding that "Article 16 ASR is an expression of customary international law.").

18. Roberto Ago, *Seventh Report on State Responsibility*, 1978 Y.B. INT'L L. COMM'N. 52, U.N. DOC. A/CN.4/307.

19. *See* VLADYSLAV LANOVOY, COMPLICITY AND ITS LIMITS IN THE LAW OF INTERNATIONAL RESPONSIBILITY 9 (2016) (discussing commentator Andreas Felder's arguments that Article 16 should cover constructive knowledge).

20. *See* VLADYSLAV LANOVOY, RESPONSIBILITY FOR COMPLICITY IN AN INTERNATIONALLY WRONGFUL ACT: REVISITING A STRUCTURAL NORM 26 (2011) (suggesting criteria for courts to take into account when "[e]xamining the knowledge of the circumstances of the internationally wrongful act").

of knowledge in such circumstances. This is especially so in our case, given that the wrongful act refers to human rights violations.[21]

Discussion on the possible existence of a post-lending due diligence obligation, including monitoring, is restricted in this Article to project loans since, in cases of general loans such as the budget-supporting ones offered by the International Monetary Fund, it is impossible for the lender to monitor the variety of possible money destinations. Additionally, the causal link is weakened since the borrower could use other money to commit the act,[22] unlike in the case of megaprojects specifically financed by development lenders.

The above delineation of the elements in this Article is important, as otherwise, generally speaking, attempts to employ the constructive, "knew or should have known" standard were explicitly rejected by the ILC.[23] The discussion is therefore strictly confined to MDBs as IOs and to funds provided for identified projects.[24] The discussion is divided into two parts: "bad" projects, which from the outset were not intended to benefit people in borrowing countries, and "good" projects, in which human rights violations only occur at the implementation stage.

I. MDBs LENDING FOR BAD PROJECTS: KNOWLEDGE ASSUMED

In a broad taxonomy, there are two types of human rights breaches that can occur in association with a project financed by a multilateral lender: those closely associated with the loan's existence in the case of "bad" loans, and those only occurring along project implementation in the case of "good" loans. The implications regarding each loan are different because the former presupposes a discussion of *ex ante* knowledge regarding the impact of the financed projects on human rights in the borrowing countries, while the latter is about the existence—or not—of an obligation of *ex post* ongoing monitoring.

The first category does not raise difficulties in applying the "should have known" standard, for the strict case of a MDB being the lender.[25] Had the funds not been destined for development, the loan would have been prohibited by the MDB's

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21. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 639, 660, para. 54 (Nov. 30) (noting that assignment of burden of proof is dependent on circumstances).

22. Reinisch, *supra* note 9, at 70.

23. JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 406 (2013).

24. *See, e.g.*, Jessica Evans, *Abuse-Free Development: How the World Bank Should Safeguard Against Human Rights Violations*, HUMAN RIGHTS WATCH, July 2013, at 1, 36 (discussing the World Bank's $2 billion project supporting education, health, water, sanitation, rural roads, and agricultural extension services in Ethiopia and the subsequent human rights abuses in the Gambella region as illustrative of the difficulty of establishing responsibility in cases of general loans).

25. For EU member states, however, a supervision obligation might already exist, since they "should comply with the Union's general provisions on external action, such as . . . respect for human rights . . . when carrying out their supervision of officially supported export credit activities." Regulation (EU) No. 1233/2011 of the European Parliament and of the Council on the Application of Certain Guidelines in the Field of Officially Supported Export Credits and Repealing Council Decisions 2001/76/EC and 2001/77/EC, Nov. 16, 2011, 2011 OJ (L 326) 45.

constitutive documents[26]—a source of international obligations for the bank.[27] This is operationalized in practice via procedures issued by MDBs to their staff. For example, the World Bank has stipulated that "[t]he Bank evaluates investment projects to ensure that they promote the development goals of the borrower country."[28] An argument that the MDB "should have known" *ex ante* can be also built on its obligation of diligence, owed to its main contributing founders, that the money will be repaid; lending to oppressive regimes or for unnecessary megaprojects, meant only for the enrichment of local elites, will expose the bank and its contributors to the risk of the borrowing state invoking, upon a regime change, the "odious debts" doctrine ("ODD"). As the jurist who first articulated it wrote in 1927:

> If a despotic power contracts a debt not for the needs [of the State] and in the interests of the State, but to strengthen its despotic regime, to repress the population that fights against it, etc., this debt is *odious for the population of the entire State*. This debt is not obligatory for the nation; it is a debt of the regime, a *personal* debt of the power that has contracted it; consequently it falls with the downfall of this power . . . . "Odious" debts, contracted and used for ends which, *to the knowledge of the creditors*, are contrary to the interests of the nation, do not compel the latter . . . except within the limits of the real advantages that it was able to obtain from these debts.[29]

Therefore, the three conditions that must be fulfilled for a state to claim absolution from the obligation to pay its debts are: (1) the despotic character of a regime; (2) the use of money for purposes not benefitting its people; and (3) the creditors' knowledge regarding the real purposes of the loan. The doctrine of complicity as applied to sovereign lending, on which this Article relies, and the ODD rest on similar conceptual foundations, but there are several differences important to point at. The main difference is that odious debts should not be repaid based on moral[30] and economic

26. For example, the World Bank's task according to the Articles of Agreement (Article 1) is "[to] assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes." Int'l Bank of Reconstruction and Development [IBRD], Articles of Agreement art. 1, para. 1 (2012).

27. *See* Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Egypt v. WHO), Advisory Opinion, 1980 I.C.J. Rep. 73, 89–90 (Dec. 20) (noting that international organizations are bound by international law, their constitutions, and international agreement to which they are parties).

28. World Bank, *Operational Procedure* (OP) 10.04—*Economic Evaluation of Investment Operations*, at 55 (September 1994), http://siteresources.worldbank.org/INTOED/Resources/appD.pdf [https://perma.cc/ZSK7-XKCF].

29. ALEXANDER N. SACK, LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIERES 157 (1927). For a more recent reformulation of the doctrine and a review of its evolution, *see generally* Robert Howse, *The Concept of Odious Debt in Public International Law*, 185 UNCTAD (2007). For its applicability to various types of debts and circumstances, *see generally* James V. Feinerman, *Odious Debt, Old and New: The Legal Intellectual History of an Idea*, 70 L. & CONTEMP. PROBS. 193 (2007).

30. In 2006, Norway cancelled debts of five countries from the Global South, taking responsibility for the fact that the loans have not benefitted their peoples. *See* Press Release, Royal Norwegian Ministry of Foreign Affairs, Cancellation of Debts Incurred as a Result of the Norwegian Ship Export Campaign (Oct. 2, 2006), https://www.regjeringen.no/en/dokumenter/Cancellation-of-debts-incurred-as-a-result-of-the-Norwegian-Ship-Export-Campaign-1976-80/id420457/ [https://perma.cc/679P-GL6G] (stating that the

grounds,[31] whereas complicity to human rights violations would bring about compensation to the aggrieved party, jointly owed to the victims by the accomplice lender and the aided or assisted state, who is the main responsibility holder. Also, the discussion in this Article is broader in terms of complicity than an application of the ODD, in that the borrowing regime does not necessarily need to be a despotic one.[32] The discussion is at the same time narrower, in that only economically inefficient projects are considered,[33] and only with MDBs as lenders, which resolves the condition of prior knowledge.[34] Finally, one important difference is that the ODD can only be invoked in cases of transitional justice—political transitions, like decolonization or revolutions, so profound that they establish a clear break with the past, to the extent that the state can be seen as having a new "identity" in its international relations. Otherwise, continuity of identity makes applicable the general rule that governments are bound by debts incurred by their predecessors.[35] This limitation does not apply when the claim of non-repayment is based on an argument of responsibility for aiding the perpetrating state.

With the cognitive condition in Article 14 fulfilled for the case of "bad" loans of MDBs, and with the similarities and differences between "bad" loans and odious debts clarified, a discussion on the types of human rights violations involved is necessary. The "bad" loans finance the so-called "white-elephant" projects for which a state requires financing—that is, "projects with negative social surplus."[36] According to one author:

> White-elephant projects can be found everywhere, buildings are empty and crumbling, roads are not maintained, hospitals are built without medical supplies, schools are built without books, and no government service will be provided unless a bribe is paid . . . . Promises of progress and the alleviation

Norwegian government plans to cancel the remaining debt incurred by Egypt, Ecuador, Peru, Jamaica, and Sierra Leone).

31. The borrowing state needs funds for consolidating its economy and democracy, after having emerged from despotic rule. *See* Tom Ginsburg & Thomas S. Ulen, *Odious Debt, Odious Credit, Economic Development, and Democratization*, 70 L. & CONTEMP. PROBS. 115, 122 (2007).

32. *See* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 329, 336–37 (1985) (noting the requirements for the complicity doctrine, which do not include the need for a despotic regime).

33. In the initial taxonomy proposed in the 1920s, the two categories of odious debts were those used to repress the population fighting against the regime, and those incurred by members of government in their own interest. PATRICIA ADAMS, ODIOUS DEBTS: LOOSE LENDING, CORRUPTION AND THE THIRD WORLD'S ENVIRONMENTAL LEGACY 165 (1991).

34. It should be noted, though, that some private lenders (i.e. those who have adhered to the Equator Principles specifically) voluntarily recognize their role, as financiers, to "fulfill [their] responsibility to respect human rights by undertaking due diligence." THE EQUATOR PRINCIPLES, THE EQUATOR PRINCIPLES 2 (2013), http://www. equator-principles.com/resources/equator_ principles_III.pdf.

35. *See* James V. Feinerman, *Odious Debt, Old and New: The Legal Intellectual History of an Idea*, 70 L. & CONTEMP. PROBS. 193, 195 (2007) (discussing the definition and application of the odious debt doctrine).

36. James A. Robinson & Ragnar Torvik, *White Elephants*, 89 J. PUB. ECON. 197, 198 (2005).

of poverty have been repeatedly broken, while the business of lending money to corrupt and dysfunctional governments continues unabated.[37]

In most cases, white-elephant projects are the result of government corruption.[38] Therefore, the main critique of white-elephant projects is that factors like further increase of corruption in the borrowing country[39] or the unfairness of leaving future generations with debt contracted for frivolous projects, are often meant only to provide contracts for cronies of a government.[40]

Loans for white-elephant projects violate human rights since, generally, institutional corruption leads to non-compliance with human rights obligations.[41] Specifically, an argument may be built on the right not to be displaced, as follows. When the displaced holds a title on the land, a breach of the human right to property may be involved. This human right is stipulated in the UDHR in the following terms, in Article 17: "(1) Everyone has the right to own property alone as well as in association with others; (2) No one shall be arbitrarily deprived of his property."[42] The states' right to expropriate private property for public purpose is recognized only under the conditions that the expropriation is non-discriminatory and follows the due process of law, and that appropriate compensation is paid.[43]

Even when displaced persons do not hold a title, as is often the case with populations affected by dams, mining projects or highway construction in remote areas, the displaced persons are still protected under international human rights laws. The International Covenant for Civil and Political Rights (ICCPR) sets forth in Article 17 that "[n]o one shall be subjected to arbitrary or unlawful interference with his . . . home," thus not associating protection with the displaced persons' title or use.[44] Article 12 of the ICCPR, confirming the right of a person to freely choose residence inside the country, is also relevant here.[45] Rights stipulated in both Articles 12 and 17 of the ICCPR are subject to restrictions.[46] Yet, these restrictions are applicable only

37. STEVE BERKMAN, THE WORLD BANK AND THE GODS OF LENDING 2 (2008).

38. *See* Alberto Alesina & Beatrice Weder, *Do Corrupt Governments Receive Less Foreign Aid?* 92 AM. ECON. REV. 1126, 1126 (2002) (emphasizing the relationship between foreign assistance and domestic corruption).

39. *See id.* (arguing that there are indicators of a "voracity effect"—a positive correlation between the amount of aid and corruption—in the receiving countries).

40. *See* Clark Wolf, *Justice and Intergenerational Debt*, 2 INTERGENERATIONAL J. REV. 13, 15–16 (2008) (detailing the problems and unfairness of intergenerational money and environmental debts).

41. *See* INT'L COUNCIL ON HUM. RTS. POL'Y, CORRUPTION AND HUMAN RIGHTS: MAKING THE CONNECTION 23 (2009) (discussing how "corruption encourages discrimination, deprives vulnerable people of income, and prevents people from fulfilling their political, civil, social, cultural, and economic rights.").

42. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). [hereinafter *UDHR*]

43. *See, e.g.*, Eur. Ct. H. R., The European Convention of Human Rights, Protocol 1, Art. 1 (1952) (making the right to property subject to the "general interest").

44. International Covenant on Civil and Political Rights art. 17(1), Dec. 16, 1966, 999 U.N.T.S. 171.

45. *Id.* at art. 12(1).

46. *See generally* Manfred Nowak, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 206, 221, 302 (1993) (discussing the restrictions on the rights in Articles 12 and 17 of the ICCPR); *See generally* Maria Stavropoulou, *The Question of a Right Not to be Displaced*, 90 ASIL PROCEEDINGS 549, 549 (1996) (discussing the right not to be displaced).

under limited circumstances, such as when the restriction (1) responds to a pressing social need and (2) pursues a legitimate aim.[47]

But a loan provided for a white elephant project does not fulfil the condition of public interest or a pressing social need, which makes any subsequent deprivation of property or home arbitrary, and thus a breach of UDHR Article 17.[48]

Although both the knowledge of the aider and the wrongful act of the primary responsibility holder can be established as aforementioned, a claim of indirect responsibility is still virtually impossible in the case of a "bad" loan for conceptual and practical reasons. Most importantly, one may ask, "knowledge of what?" Other relevant questions about a project could address issues such as the appropriate allocation of funds in a project, general interest, or development. Second, on a practical, more political level, it is hard to imagine that a borrowing state not in a situation of transitional justice would ask the IO in which the state is a member to accept part of the responsibility for financing a project upon the state's own request. It would be even harder to imagine that the MDB would accept responsibility given the associated stigma.

Consequently, the remainder of this Article focuses on "good" projects, where the first of these difficulties is not present, since the "wrong" of the lender—namely a human rights breach in the implementation of a project—is clearly identified. The difficulty is instead related to proof of *ex-post* knowledge by the lender. As for the second, political hurdle, it may be argued that it is also lower in the second scenario, since both the reputational and financial losses are lower for a MDB confronted with such a claim.

II. HUMAN RIGHTS BREACHES DURING "GOOD" PROJECTS: SHOULD THE LENDER HAVE KNOWN?

A. Is Monitoring an Obligation, as a Rule of the MDB?

In the case of "good" projects, human rights violations may occur in project implementation, for example, during relocation.[49] However, it is difficult to show that

47. Am. Ass'n Int'l Comm'n Jurists, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,* 7 HUM. RTS. Q. 3, 6 (1985).

48. Take for instance the Asian Infrastructure Investment Bank ("AIIB"). With the numerous Chinese state-owned enterprises specialized in dams out of work after the whole of China was dammed, it is not a "Sci-Fi scenario" to imagine political arrangements for dam building in Asia with AIIB money by Chinese corporations, regardless of whether those dams are necessary or not. The mechanism of preferential contractor selection was already noticed in the case of the World Bank: "World Bank projects are sometimes covertly shaped by pre-existing agreements for contracts between large companies backed by powerful governments and borrowers." Ngaire Woods, *The Globalizers in Search of a Future: Four Reasons Why the IMF and World Bank Must Change, and Four Ways They Can*, CTR. GLOB. DEV. (Apr. 2006), http://www.cgdev.org/files/7371_file_The_Globalizers_Woods.pdf [https://perma.cc/9528-S5AS]. *See generally* UDHR, *supra* note 42, at art. 17.

49. *See, e.g.*, Fatma E. Marouf, *Holding the World Bank Accountable for the Leakage of Funds from Africa's Health Sector*, 12 HEALTH & HUM. RTS J. 95, 95 (2010) (discussing that, in a broader perspective, development lending can also lead to human rights breaches when funds for broader programs are leaked

the MDB was supposed to have known of the violations. This requires establishing whether the lender was under an obligation to monitor the implementation of the project after it satisfied itself with its quality.

The source of such obligation could be legal or contractual, with "legal" referring to customary law, principles of international law, the borrowing state's laws, or the MDB's own rules and practices[50] and with "contractual" referring to the loan agreement. There is no international customary rule or general principle requiring lenders to monitor the use of their money, although Principle 5 of the Draft Principles of International Law for Multilateral Development Banks proposes that "[m]ultilateral development banks have *the on-going responsibility to monitor* and periodically review the human rights performance of all projects or businesses receiving support."[51] This attempt is legally unpersuasive. The Draft's authors only support it with an "Economic and Social Council" text[52] requiring IOs to undertake continuous efforts to assist governments to act in conformity with their human rights obligations.

The lending agreement also does not stipulate the Bank's obligation to monitor, but does instead require the Borrower "to monitor" the environmental and social impact of a proposed project.[53] Finally, the borrowing state's laws obviously do not establish such obligations for a development lender.[54] Under these circumstances, the only possible sources of an obligation to monitor are the MDB rules, defined in DARIO as "the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization[.]"[55]

Statements referring to monitoring financed projects appear in an MDBs' environmental, social, and governance ("ESG") policies.[56] The question is whether these documents are among the rules referred to above. The answer seems to be affirmative, since the ESGs are, like other Operational Standards (also termed operational policies and procedures), specific instruments mainly consisting of instructions given to development banks' staff, of which some (like Operational Policies and Bank Procedures) are mandatory.[57] However, the ESGs' quality in constructing the cognitive element for indirect responsibility of the lending bank is

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towards governmental pockets).

50. *Draft Articles on the Responsibility of International Organizations, with Commentaries*, 2 Y.B. Int'l L. Comm'n 46, U.N. Doc A/CN.4/SER.A/2011/Add.1 [hereinafter DARIO].

51. Robert T. Coulter, et al., *Principles of International Law for Multilateral Development Banks: The Obligation to Respect Human Rights*. (Indian Law Resource Ctr., Washington, D.C., 2009), available at http://scholar.law.colorado.edu/free-prior-and-informed-consent/2. (emphasis added).

52. *See generally* Y.B. INT'L L. COMM'N (2011) (citing United Nations Economic and Social Council (ECOSOC), *Procedural Decisions*, U.N. Doc. E/1999/22, para. 515 (1999) as the sole support for the draft).

53. World Bank, *Environmental and Social Framework*, at 9, paras. 46–47 (Aug. 4, 2016), documents.worldbank.org/curated/en/383011492423734099/pdf/114278-WP-REVISED-PUBLIC-Environmental-and-Social-Framework.pdf [https://perma.cc/5BKA-2C8N].

54. *Id.* at 16, n.4.

55. DARIO, *supra* note 50, at 49.

56. Laurence Boisson de Chazournes, *Policy Guidance and Compliance: The World Bank Operational Standards*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 281, 285 (Dinah Shelton ed., 2000).

57. *Id.*

weak for two reasons: the specific obligation to monitor projects is flexible, and the normative character is mostly of internal value.[58]

For example, the Environmental and Social Framework of the World Bank (WB-ESF)[59] includes an 'Environmental and Social Policy for Investment Project Financing' section, which provides mandatory requirements that apply to the Bank. The policy stipulates that "[t]he Bank will monitor the environmental and social performance of the project in accordance with the requirements of the legal agreement."[60] Although the ESGs in general were criticized for regulating social matters only to the extent acceptable by member states,[61] and the self-imposed obligation of the World Bank to monitor was criticized for specifically referring to project commitments instead of broader policy compliance,[62] an argument can be made that the bank officers cannot dedicate themselves exclusively to monitoring the standards stipulated in the ESG policies and/or in the specific project, while ignoring other developments, including possible human-rights breaches. This is plausible especially given that, nowadays, information on human-rights breaches is widely available through NGO resources, media outlets, and individual bloggers.[63]

This argument is weakened however by the lack of any reference in the WB-ESF to field monitoring,[64] and by existing practice. The lack of clear references to the World Bank's monitoring role during project implementation has led to an absence of adequate monitoring and supervision, which has become a long-standing problem in its financed projects according to the World Bank's social development department.[65] The International Law Association also pointed to the environmental and social safeguards, and other documents that explicitly allocate the task of monitoring to the borrower, such as letters of intent, as indicative of the lender's lack of a monitoring obligation.[66] At most, participatory monitoring—as opposed to hierarchical

58. *Id.* at 289–92; Boission de Chazournes shows ESGs' relevance to international law by emphasizing "the virtues of operational policies and procedures in promoting the implementation of international law instruments." *Id.* at 300.

59. World Bank, *supra* note 53, at 9.

60. *Id.* at 21.

61. *See* U.N. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Interim Rep. on the Promotion and Protection of Human Rights*, para. 53, U.N. Doc. E/CN.4/2006/97 (February 22, 2002) (illustrating the critics wanted the policies to reflect international human rights standards).

62. *See* Natalie Bugalski, *The Demise of Accountability at the World Bank?*, 31 AM. U. INT'L L. REV. 1, 11 & 28 (2016) (arguing that relying on project commitments and moving away from a policy compliance approach contradicted the stated goals of clarifying responsibilities and strengthening accountability).

63. *See, e.g.*, Ken Roth, *How Twitter Helps Fight Human Rights Abuses*, NEW REPUBLIC (Oct. 27, 2015), https://newrepublic.com/article/123230/how-twitter-helps-fight-human-rights-abuse [https://perma.cc/3WU9-LNAW] (describing an example of how the social media increases access to information on human-rights abuses).

64. World Bank, *supra* note 53, at 9.

65. *See generally* Soc. Dev. Dep't, World Bank Grp. [WBG], *Involuntary Resettlement Portfolio Review: Phase II: Resettlement Implementation* (June 16, 2014), http://pubdocs.worldbank.org/en/967814254831204443/involuntary-resettlement-portfolio-review-phase2.pdf.

66. TIM STEPHENS & DUNCAN FRENCH, ILA STUDY GROUP ON DUE DILIGENCE IN INTERNATIONAL LAW SECOND REPORT 45–46 (2016).

monitoring—was encouraged by development lenders in some projects.[67] The very existence of the World Bank's Inspection Panel, or similar internal accountability mechanisms within other MDBs, speaks to the preference for participatory monitoring over the World Bank's unassisted ongoing monitoring.[68]

Therefore, it is fair to say that for MDBs, their rules do not define an obligation to ongoing project monitoring clearly enough to lead to an assumption of knowledge of human rights violations if they occur. This applies to the World Bank, given the lax wording of its rules referring to monitoring. Other MDBs are more specific in drawing the boundaries of this self-imposed obligation. For instance, the Asian Development Bank ("ADB") makes a significantly clearer commitment in its Safeguard Policy Statement: "ADB assumes the responsibility for conducting due diligence and for reviewing, monitoring, and supervising projects throughout the ADB's project cycle in conformity with the principles and requirements embodied in the [Safeguard Policy Statement]."[69] Moreover, the Bank acknowledges the need to "ensur[e] adequate ADB supervision and compliance monitoring, *especially oversight on the ground*."[70]

This suggests that the multilateral development banks' obligation to monitor their financed projects' implementation, as found in the rules of these international organizations, must be assessed on a case-by-case basis. In some cases, the obligation is defined in a clear enough manner to assume that the respective Bank should know what is going on with its projects on the ground. However, even where a particular MDB's policies suggest stricter commitments, lenders may argue that its internal documents only impose those obligations on bank staff, and that these instruments of internal accountability do not extend to third parties.[71] The remainder of this section shows that this defense of the lenders does not necessarily stand: their policies may be relevant to third parties as well, as Unilateral Declarations of an International Organization.

B. Unilateral Declarations of International Organizations

The ESGs are similar in many ways to corporate social responsibility codes, which lay out voluntarily assumed non-binding standards of behavior. There is, however, one important difference: the ESGs are issued by entities that are subjects of international law, and therefore their commitments—upon fulfilling certain

67. *See* Matthew S. Winter, *Accountability, Participation and Foreign Aid Effectiveness*, 12 INT'L STUD. REV. 218, 234 n.29 (2010) (discussing a World Bank report on Indonesia that describes policies to limit corruption, which lean more towards participatory monitoring than hierarchical monitoring). For more on participatory monitoring generally, *see* Boisson de Chazournes, *supra* note 56, at 301.

68. Inspection Panel, World Bank Grp. [WBG], Operating Procedures April 2014: With Annex 2 Added in February 2016 (Feb. 2016), http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014%20Updated%20Operating%20Procedures.pdf [https://perma.cc/GB5R-BH9F] (describing the independent forum created by the World Bank to provide an avenue for people affected by the financed operations to submit written complaints).

69. ASIAN DEVELOPMENT BANK, SAFEGUARD POLICY STATEMENT 14 (2009), http://www.adb.org/sites/default/files/institutional-document/32056/safeguard-policy-statement-june2009.pdf [https://perma.cc/VUQ3-VTS5].

70. *Id.* at 8 (emphasis added).

71. *See* Enrique R. Carrasco et al., *Governance and Accountability: The Regional Development Banks*, 27 B.U. INT'L L.J. 1, 26–39 (2009) (discussing MDBs' internal accountability procedures).

conditions—can be taken more seriously as Unilateral Declarations ("UDs"). In the case of states, the ILC Guiding Principles provide that UDs are "[d]eclarations publicly made and manifesting the will to be bound."[72] Their binding character is based on good faith.[73] But "[t]here is no reason why an international organization—which, like a State, possesses international legal personality and the competence to accept binding obligations under international law—should not similarly be bound by such unilateral declarations."[74]

This extension is based on the general strategy of assimilating IOs to states, particularly in the field of international law. In the field of responsibility, the DARIO came ten years after the ILC DASR, and drew heavily on them. With regard to treaties, the conventions drafted by ILC were signed in 1969 for states, and in 1986 for IOs. Importantly for this Article, it was shown that the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO) generally assimilates IOs to states for the purposes of determining when an IO has expressed its consent to be bound by an international agreement.[75]

It may be argued that unlike cases of responsibility and of treaty making, principles issued by the ILC for states' unilateral declarations were not followed by a similar instrument applicable to IOs. However, this may be a mere delay, without any significance related to the validity of IOs' declarations. This interpretation—delay in devising specific guidelines by the ILC, rather than a signal that IOs cannot be bound by UDs—is confirmed by the fact that as early as 1971, when concluding its long term program of work, the ILC had stated that "it is difficult if not impossible to separate the notion of the unilateral act of a particular subject of international law from the acts, possibly also unilateral, taken by other subjects."[76] The matter was further clarified by the ILC in 1998, when the report on unilateral acts of states explained why it left outside its scope the unilateral acts of IOs: the two categories of acts should be studied separately[77] because of their differences, especially with regard to means of their formulation.[78]

There is only one invocation of an IO statement as a unilateral declaration so far: the inclusion in a letter from the UN Secretary-General to the International

72. *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, 2 Y.B. Int. L. Comm'n 161, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (Part 2) [hereinafter ILC Guiding Principles].

73. *Id.* at 160, n.867.

74. Dan Sarooshi, *Some Preliminary Remarks on the Conferral by States of Powers on International Organizations* 11 n.18 (N.Y.U., Jean Monnet Working Paper No. 4, 2003).

75. Giorgio Gaja, *A 'New' Vienna Convention on Treaties between States and International Organizations or between International Organizations: A Critical Commentary*, 58 BRIT. Y.B INT'L L. 253, 258 (1988).

76. Int'l Law Comm'n, Doc. of the Twenty-Third Session, U.N. Doc. A/CN.4/SER.A/1971/Add.1 (Part 2), at 61 (1971).

77. Int'l Law Comm'n, Doc. of the Fiftieth Session, U.N. Doc. A/CN.4/SER.A/1998/Add.1 (Part 1), at 324 (1998).

78. *Id.* at 325 n.17 (citing position of Venezuela on the matter).

Committee of the Red Cross of a passage from the UN Force Regulations[79] was viewed as an internationally binding unilateral declaration of that IO.[80] But the writings of reputed scholars strongly support the idea that IOs can issue binding unilateral declarations. For example, Professor Klabbers shows that:

> [W]hether the wrongful act [of an IO] amounts to a breach of a treaty or a breach of a customary rule of international law is, for purposes of assigning responsibility, not terribly relevant: in both cases responsibility will be the result. *So too when the organization does not live up to unilateral promises it may have made*, or when it violates a general principle of law . . . .[81]

Some scholars emphasize good faith as the ground for treating states and IOs similarly when it comes to UDs.[82] Others discuss the features that make a unilateral statement binding for IOs.[83]

This latter point, that is the question of what makes a statement binding upon the issuer, is the main problem to be dealt with once it is accepted that, in principle, IOs can bind themselves unilaterally, just like states. For states, in order to give rise to legal obligations, declarations must be publicly made by competent authorities representing that state.[84] Most importantly, they must "[manifest] the will to be bound."[85] As the ICJ pointed out in the *Frontier Dispute*, "it all depends on the intention of the State in question."[86] Translating the rule into the field of IOs, Professor Virally has shown that when the conditions of clear intention, publicity, and authority to make a statement are fulfilled, unilateral declarations are legally binding on international organizations.[87]

C. Can the Commitment to Monitor Be Seen as a Unilateral Declaration?

The conditions of publicity and authority are fulfilled on their face in the case of ESGs, so the discussion in the present subsection concerns the issue of clear intention to be bound. This issue has proved to be the most thorny in the case of states in the

79. International Committee of the Red Cross, *The United Nations and the Application of the Geneva Conventions*, 10 INT'L REV. RED CROSS 29, 29 (1962) (reading that UN troops "are bound to respect the principles and the spirit of the general international Conventions relative to the conduct of military personnel").

80. DEREK W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY 509–10 (1964).

81. JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 283 (Cambridge Univ. Press, 2nd ed. 2009) (emphasis added) (footnote omitted).

82. *See, e.g.*, Pierre d'Argent, *Jusqu'où y a-t-il du Droit International? Considerations sur le Droit Dérivé des Organisations Internationales et sur le Droit de L'Union Europeenne*, *in* LES LIMITES DU DROIT INTERNATIONAL: ESSAIS EN L'HONNEUR DE JOE VERHOEVEN 237, 240 (Pierre d'Argent, Béatrice Bonafé & Jean Combacau eds., 2015).

83. *See, e.g.*, Michel Virally, *Unilateral Acts of International Organizations*, *in* INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 241, 256–57 (Mohammed Bedjaoui ed., 1991) (a legal act cannot produce the legal effects desired by its originator unless the latter has been vested with the necessary powers).

84. ILC Guiding Principles, *supra* note 72, princ. 1, at 165.

85. *Id.*

86. Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 554, 573, para. 39 (Dec. 22) [hereinafter Frontier Dispute].

87. Virally, *supra* note 83, at 257.

several ICJ cases in which the existence of binding statements was invoked. The court's' solution—which should be applied here as well for reasons of parallelism referred to in the previous subsection—was to see the existence of consent as "a matter not of subjective intent but of external . . . objective justice."[88] In other words, a clear intention to be bound should be extracted from the text itself, regardless of the author's real intent. This approach was used in several high profile cases[89] and is apparent in the wording of the ILC Guiding Principles.[90] The choice of an objective test over a subjective one is so powerful a rule at the ICJ that it led to accepting statements that were obviously made without an intent to be bound as binding, simply by ascertaining the clarity of wording. For instance, in *Nuclear Tests*,[91] the intentions of the French officials were probably opposite to what they proclaimed, yet France was found by the Court to be bound by their statements.[92] Similarly, in the only case involving an IO unilateral declaration, the ICJ chose an objective test over a subjective one:

> UN Force Regulations according to which UN troops "shall observe the principles and spirit of the general international Conventions applicable to the conduct of military personnel," or at least the affirmation of that proposition in a letter of the UN secretary-general to the International Committee of the Red Cross, were viewed as internationally binding unilateral declarations of that organization—*even if serious doubts could be raised as to the clear intention of the organization to be unequivocally bound* vis-à-vis other subjects of international law by virtue of an internal, quasi-disciplinary regulation.[93]

88. MARTTI KOSKKENIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 348 (Cambridge University Press rev. ed 2006).

89. *See, e.g.*, Nuclear Tests Case (Austl. v. Fr.), Advisory Opinion, 1974 I.C.J. Rep. 253, para. (Dec. 20) (showing that "the sole relevant question is whether the language employed in any given declaration does reveal a clear intention."); Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. Rep. 14, para. 261 (June 27) (showing that there is nothing in the content of the declarations "from which it [could] be inferred that any legal undertaking was intended to exist.").

90. *See* ILC Guiding Principles, *supra* note 72, princ. 1, at 165 (discussing the "[d]eclarations publicly made and *manifesting* the will to be bound" (emphasis added), and not of declarations made with the intent to be bound).

91. *See generally* Austl. v. Fr., 1974 I.C.J. Rep. 253.

92. VLADIMIR DEGAN, SOURCES OF INTERNATIONAL Law 55 (1997).

93. August Reinisch, *Securing the Accountability of International Organizations*, 7 GLOBAL GOVERNANCE 131, 136–37 (2001) (emphasis added).

To insure against abuses of the objective test, the doctrine of unilateral declarations stipulates that statements be clear[94] and that interpretation be restrictive in case of doubt,[95] with circumstances being used as an additional interpretive tool.[96]

Equipped with this normative guidance, we should then examine the ESGs to decide whether they show a clear, unambiguous commitment. Like in *Nuclear Tests*, the likelihood is that the drafters had no intent to bind themselves with these statements.[97] But as shown above, this is irrelevant as long as the text is unequivocal.[98] This Article is only interested in the existence of a clear commitment to monitor how the MDB money is used, as this would trigger responsibility by application of DARIO Article 14.[99] As shown above, the World Bank lacks such clear wording, while the ADB displays it. Below are some relevant texts in the ESGs of other regional MDBs.

Similar to the ADB, the Asian Infrastructure Investment Bank ("AIIB") makes a clear commitment: "The Bank monitors the Project on an ongoing basis until Project completion. In supervising and monitoring implementation of the environmental and social aspects of the Project, the Bank . . . [c]onducts periodic site visits if the Project has adverse environmental or social risks and impacts."[100] The African Development Bank "is committed to ensuring that its public and private sector operations comply with the Operational Safeguards (OSs) by . . . providing effective audit, monitoring and supervision of agreed environmental and social management measures during

94. *See* ILC Guiding Principles, *supra* note 72, princ. 11 ("The context in which a unilateral act was formulated by a State, together with the clarity and precision of its terms, shall be given weight in interpreting it."); *see also* Austl. v. Fr., 1974 I.C.J. Rep. 253, para. 43 (stating that legal obligations derived from unilateral statements must be specific); *see also* Armed Activities on the Territory of the Congo (New Application 2002) (Dem. Repub. Congo v. Rwanda) Provisional Measures, 2002 I.C.J. 299, paras. 50, 52 (Sept. 18, 2002) [hereinafter Armed Activities] (declaring in detail the rights Congo is requesting the court to preserve).

95. *See* ILC Guiding Principles, *supra* note 72, princ. 7 ("A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner."). *See also* Austl. v. Fr., 1974 I.C.J. Rep. 253, para. 44 ("When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for."); *Frontier Dispute*, *supra* note 86, para. 39 (cautioning that although the court may find legal obligations in unilateral declarations, it neverthelesshad a duty to interpret such intent with caution, especially when "it is a question of unilateral declaration not directed to any particular recipient.").

96. *See* ILC Guiding Principles, *supra* note 72, princ. 7 ("In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated."); *see also id.* at princ. 1 (stating the importance of circumstances in ascertaining the binding character); *id.* at princ. 3 (asserting the importance of "factual circumstances" when determining the intent of the state that made the declaration); *Armed Activities*, *supra* note 94, para. 53 (requesting that the Court dismiss the case in part because "the current proceedings are really an abuse of the process of court").

97. *See* Tanja A. Börzel & Thomas Risse, *Public-Private Partnerships: Effective and Legitimate Tools of Transnational Governance?*, *in* COMPLEX SOVEREIGNTY: RECONSTITUTING POLITICAL AUTHORITY IN THE TWENTY-FIRST CENTURY 195, 203 (Edgar Grande and Louis W. Pauly eds., 2005) (arguing that one important rationale for powerful actors to adopt self-regulation is avoidance of the external threat of formal regulation. The authors term such self-regulation as "Private Self-Regulation in the Shadow of Hierarchy.").

98. Koskkeniemi, *supra* note 88.

99. ASIAN DEVELOPMENT BANK, *supra* note 69.

100. *Environmental and Social Framework*, ASIAN INFRASTRUCTURE INV. BANK, 1, 23 (Feb. 2016), https://www.aiib.org/en/policies-strategies/_download/environment-framework/20160226043633542.pdf.

implementation."[101] The Inter-American Development Bank "will monitor the executing agency/borrower's compliance with all safeguard requirements stipulated in the loan agreement and project operating or credit regulations."[102] Under the heading, "The EBRD's Commitments" the European Bank of Reconstruction and Development (EBRD) promises that it "will seek within its mandate to ensure through its environmental and social appraisal and monitoring processes that projects are designed, implemented, and operated in compliance with applicable regulatory requirements and good international practice (GIP)."[103]

One may argue that all of these commitments to monitoring, however unambiguously worded, are part of policy papers generally plagued with ambiguity and with denial of responsibility,[104] and therefore should not be taken seriously. I disagree for the following reasons.

First, when a clear commitment stands out in an otherwise vague text, this should make it even more worthy of consideration. For example, in AIIB's safeguards cited above, the unambiguous commitment to monitor is in stark contrast with the general vagueness of the document. Second, even though they are non-binding, the MDBs' environmental and social safeguards belong to Global Administrative Law, an emerging global quasi-regulation matrix consisting of self-regulation understood as administrative action.[105] There is obviously a difference in binding force between commitments aligned with the Global Administrative Law and commitments made in other types of soft-law instruments, like conference declarations; the former should be relied upon, by state and non state actors, more than the latter.[106] Third, circumstances are also relevant, including other statements to the same end made by MDBs. In this light, one relevant circumstance in the case of the World Bank is a background paper

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101. *Integrated Safeguards System Policy Statement and Operational Safeguards*, AFR. DEV. BANK GRP. 1, 16 (Dec. 2013), https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/December_2013_-_AfDB%E2%80%99S_Integrated_Safeguards_System__-_Policy_Statement_and_Operational_Safeguards.pdf [https://perma.cc/8URR-WJHZ].

102. Ricardo Ouiroga & Jospeh Milewski, *Implementation Guidelines for the Environment and Safeguards Compliance Policy*, INTER-AM. DEV. BANK 1, 36 (May 2007), http://webcache.googleusercontent.com/search?q=cache:BE_Rgct2ktMJ:www.focusonland.com/download/52023996a2d1b/+&cd=1&hl=en&ct=clnk&gl=us [https://perma.cc/U74P-G2CM].

103. *Environmental and Social Policy*, EUROPEAN BANK OF RECONSTRUCTION AND DEV. 1, 1 (2014), https://perma.cc/W3LF-MN8B.

104. *See, e.g.*, Christopher Wright, *European Investment Bank: Promoting Sustainable Development "Where Appropriate,"* CEE BANKWATCH NETWORK 1, 26 (Nov. 2007), https://bankwatch.org/sites/default/files/EIB_where_appropriate.pdf [https://perma.cc/QZ99-XMX7] (recognizing that voluntary monitoring initiatives "are often plagued by [a] lack of clarity and accusations of ineffectiveness"); *see also* Stéphanie Fried, *Summary: Weaknesses in Environmental Safeguards of the SPS Consultation Draft, in* SUMMARY OF CONCERNS REGARDING THE ADBS'S DRAFT SAFEGUARD POLICY STATEMENT 1, 10 (Stephanie Fried ed., 2008), https://perma.cc/N7UE-EP27 (noting that the ADB safeguards are extremely vaguely written).

105. *See generally*, Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 DUKE L.J. 15, 16 (2005).

106. *See* Cárdenas Castañeda, Fabián Augusto, "Un llamadopara repensar las Fuentes de derecho Internacional: Soft Law y la otra cara de la monceda," Anuario Mexicano de Derecho Internacional, vol. 13, 4 de Septiembre de 2012, p. *384* (discussing the types of legal and non-legal soft-law and their relevance to international law).

which explained that the WB-ESF pays less attention to pre-approval monitoring in order to allow for "more investment in effective monitoring and supervision" during operationalization.[107] Finally, MDBs' policies are as good a medium for unilaterally-binding commitments as a letter, since the ICJ has repeatedly affirmed that the form in which a commitment is made is insignificant.[108]

D. Who is the MDBs' Unilateral Declaration Addressing?

The ILC does not limit addressees to specific categories. "Unilateral declarations may be addressed to the international community as a whole, to one or several States or to other entities."[109] Although self-regulatory in essence, the ESGs, including the commitment to monitor the projects financed by the MDB, address a message to the international community as a whole, as did for example—in the case of states' UDs—the President of France's commitment to suspend its atmospheric nuclear tests (29 January 2996),[110] or Egypt's Government declaration regarding the blockade of the Suez Canal (24 April 1957).[111]

Similar to these cases, the ESGs as unilateral declarations, while addressed to the international community, are of more concern to some parties than to others. The French declaration was of main concern to Australia, New Zealand and other countries possibly affected by radioactive pollution, while the Egyptian declaration was of relevance mostly to countries that possessed a maritime fleet.[112] Here, the MDB declaration is of interest to non-state entities in the borrowing countries, such as affected communities,[113] civil society, or entire peoples, as well as to international

107. World Bank Group, Review and Update of the World Bank Safeguard Policies: Proposed Environmental and Social Framework Background Paper 1, 7 (Sept. 2, 2014), https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/documents/code_background_paper_september_2014.pdf [https://perma.cc/Q9SP-ASHL].

108. *See* Frontier Dispute, *supra* note 87, para. 45 (noting that the "common intention of Parties" was sufficient for a joint agreement); *see also* Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, 1961 I.C.J. 17, 31 (May 26) (emphasizing the importance of will and deed in the formation of binding commitments rather than the form of the commitment).

109. Int'l Law Comm'n, Rep. of the Working Group, Conclusions of the International Law Commission Relating to Unilateral Acts of States, at 4, U.N. Doc. A/CN.4/L.703 (2006).

110. *See, e.g., France Halts Nuclear Testing,* BBC (1996), news.bbc.co.uk/onthisday/hi/dates/stories/January/29/newsid_4665000/4665676.stm (reporting France ceasing nuclear tests in the face of international pressures).

111. Mahmoud Fawzi, *Declaration on the Suez Canal and the Arrangements for its Operation*, U.N. Doc. A/3576 (April 24, 1957).

112. *See, e.g., France Halts Nuclear Testing*, BBC (1996), *supra* note 110 (reporting France ceasing nuclear tests in the face of international pressures); Majid Khadduri, *Closure of the Suez Canal to Israeli Shipping,* 33 LAW AND CONTEMP. PROBS. 147, 153–54 (1968) (discussing Egypt's right to restrict travel through the Suez Canal).

113. *See* Daniel D. Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEORGETOWN J. INT'L L. 403, 411 (2005) (explaining that "[a]ffected people' refers to non-state actors who have no contractual relationship with [MDBs] but whose living conditions are directly or indirectly affected by the bank-financed operation").

NGOs, who may accept a MDB financed project relying on the guarantee that the bank will closely monitor its implementation.

III. THE EFFECTS OF THE EXISTENCE OF AN OBLIGATION TO MONITOR

If we accept the idea of a binding obligation to monitor financed projects, then two possibilities exist for the MDB if human rights violations occur during the project implementation. First, the MDB could warn the wrongdoing state of the possibility of suspending the loan, or even effectively do so until the borrower ends the violations and makes reparations. The MDB's obligation to refrain from assisting in the commission of an internationally wrongful act would be thus discharged. While there are examples of loan suspension due to human rights and environmental violations,[114] lenders are usually reluctant to take such radical action.[115] Second, the lender turns a blind eye, becoming an accomplice under Article 14 DARIO unless it proves that knowledge was not possible in the circumstances. The problem here, as far as the effects are concerned, is that both DARIO and DASR fall short in clearly regulating the legal consequences of complicity in international law.[116]

In the particular case discussed in this Article, the situation is further complicated by the fact that the victims are not states but individuals, who are accountability holders unable to sanction the power wielder for various reasons: the victims are not subjects of international law, the MDB has immunity in domestic courts, and is not party to any human rights treaty that would allow a claim from aggrieved individuals.[117] But these reasons do not change the reality that the lender, as an IO, has committed an internationally wrongful act by aiding and assisting the perpetrating state. As shown by the ICJ with reference to the UN as an IO:

> [T]he question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United

114. *See* Bruce M. Rich, *The Multilateral Development Banks, Environmental Policy, and the United States*, 12 ECOLOGY L. Q. 681, 696 (1985) (stating that "[i]n March 1985, the [World] Bank suspended disbursements for [a major infrastructure project in the Amazon] because Brazil was not meeting the Bank's conditions for the protection of Indians and the environment"); *see also* Regine Andersen, *How Multilateral Development Assistance Triggered the Conflict in Rwanda*, 21 THIRD WORLD Q. 441, 451 (2000) (asserting that in June 1994, the World Bank interrupted disbursements to Rwanda under a loan agreement due to human rights violations).

115. *See generally* Jakob Svensson, *When is Foreign Aid Credible? Aid Dependence and Conditionality*, 61 J. DEV. ECON. 61 (2000) (explaining that many actors are reluctant to tie foreign aid to human rights conditions).

116. LANOVOY, *supra* note 19, at 8 (arguing that the regulation of complicity in internationally wrongful acts might be more limited in scope than it ought to be).

117. The jurisdictional gaps that bar international tribunals from holding MDBs accountable for infringing human rights violations is well documented. *See, e.g.*, Leonardo A. Crippa, *Multilateral Development Banks and Human Right Responsibility*, 25 AM. U. INT'L L. REV. 531, 533 (2010) (concluding that "there is no mechanism for holding MDBs responsible for human rights violations that have occurred as a result of projects that they financed").

Nations may be required to bear responsibility for the damage arising from such acts.[118]

But state action is needed to require the MDB to bear responsibility for their contribution. The state cannot obviously take up the victims' claims at the time of the wrongful act, since:

> [T]he violation will in all probability have been the act of the authorities of [their] own government. Under the classic concept of international law the individual has no *locus standi,* on the theory that his rights will be championed by his government. But how can his government be his champion, when it is *ex hypothesi* the offender?[119]

The right of the victims to redress and compensation nonetheless exists, even if the relief was ineffective at the moment of the internationally wrongful acts of the state and the MDB, and this may gain practical relevance at a later time if a governmental change creates such an opportunity.[120] When a MDB loan enables the implementation of the mega-project, in which human rights were breached, the injury suffered can be concurrently blamed on the assisting IO and the acting State.[121] A new government willing to admit the state's violation of human rights in the implementation of projects, and to compensate those harmed, would still be unlikely to bring a claim against the aiding MDB. But the aiding MDB's responsibility can be relevant in other ways. In a move inspired from the political action of debtor states under the ODD, the borrowing state may, for example, require the aiding MDB to bear part of the burden in compensating the victims, by waiving part of the debt. While the mechanism would be the same, the underlying rationale would be different: here, the request would be based on shared legal responsibility, unlike in the case of ODD, where there are moral or economic grounds. This difference may be significant, for two reasons. First, in such a scenario, the state would necessarily assume primary responsibility, with the lender's fault limited to improper monitoring by its managers. Fault in monitoring, even though attributable to the MDB, has less corrosive effects on the bank's reputation than a finding of odious debts, where the loan is approved at the bank's highest managerial level and thus can have devastating effects on its image. Second, since the responsibility stays primarily with the state, the financial loss of the lender will be significantly reduced, even in cases with a high number of victims, as is often the case with unlawful relocations.[122] With limited reputational and financial losses, there is some ground to expect that a MDB will not object to such solution.

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118. International Court of Justice [ICJ], *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Rep. 62, 88–89, para. 66 (April 29, 1999) (detailing the distinction between culpability and damages incurred).

119. ARTHUR H. ROBERTSON, HUMAN RIGHTS IN THE WORLD 72–73 (1972).

120. The right of victims to redress and compensation may get immediate practical relevance only if "surrogate" accountability holders, such as international NGOs, decide to take up these cases. *See generally* Jennifer Rubenstein, *Accountability in an Unequal World*, 69 J. OF POL. 616 (2007) (describing what the author terms as "surrogate accountability," and ultimately concluding that standard accountability is superior).

121. Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, at 67, U.N. Doc. A/56/10 (2001).

122. Nearly one million people are resettled involuntarily every year only in World Bank-financed

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Indirect responsibility of MDBs for abuse associated with the megaprojects they fund is an increasingly important matter, at a time when the World Bank intends to renounce its decades-long policy on refraining from financing dam building,[123] and the Chinese dam builders have run out of rivers to dam at home[124] and are now aiming for contracts in other parts of Asia,[125] possibly as contractors under projects loans from the recently created AIIB.[126] This Article argues that existing legal and contractual norms, as well as statements that might be seen—given the lenders' quality of IOs—as binding commitments, impose an obligation on MDBs to monitor financial projects. If such an obligation could be confidently said to exist, then the third level of accountability in the taxonomy proposed by the ILA—the responsibility "arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law (e.g. violations of human rights or humanitarian law, breach of contract)" [127]—could be established. In this case, providing financial assistance in spite of known human rights breaches or failure to properly monitor the projects on the ground would lead to indirect responsibility, unless the MDB could rebut the presumption of the cognitive condition being fulfilled.[128]

The limitations of this Article are related to its rather idealistic stance. The legal argument regarding the binding character of the MDBs commitment to monitor relies on several uncertainties, which makes it a theoretical exercise rather than a practical tool in the actual configuration of norms relevant to the matter at hand. In fact, in the

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projects alone. *See* INDEP. EVALUATION GRP, SAFEGUARDS AND SUSTAINABILITY POLICIES IN A CHANGING WORLD: AN INDEPENDENT EVALUATION OF THE WORLD BANK GROUP EXPERIENCE 20 (2010) (showing IEG estimate that "over 1 million people, two-fifths of them likely to be physically displaced, are affected by involuntary resettlement in active [World] Bank-financed projects.").

123. *See* Howard Schneider, *World Bank Turns to Hydropower to Square Development with Climate Change*, WASH. POST (May 8, 2013), https://www.washingtonpost.com/business/economy/world-bank-turns-to-hydropower-to-square-development-with-climate-change/2013/05/08/b9d60332-b1bd-11e2-9a98-4be1688d7d84_story.html?utm_term=.c3e5720f4a69 [https://perma.cc/N4CS-P6MX] (detailing World Bank's push to develop large-scale hydropower projects in Africa and Asia).

124. *See* Darrin Magee, *Powershed Politics: Yunnan Hydropower under Great Western Development,* 185 CHINA Q. 23, 23 (2006) (describing China's most recent domestic dam projects in China's last "virgin" river).

125. Dozens of dams are proposed on the Mekong's tributaries in Cambodia, Vietnam and Laos between now and 2030. *See* Simon Denyer, *China-built dam in Cambodia set to destroy livelihoods of 45,000*, S. CHINA MORNING POST (Sept. 20, 2015), http://www.scmp.com/magazines/post-magazine/article/1858974/china-built-dam-cambodia-set-destroy-livelihoods-45000 [https://perma.cc/3X9R-2LTS] (describing China's $800 million dam project in Cambodia as a symbol of China's growing influence in Southeast Asia).

126. *See* Woods, *supra* note 48 (discussing similar contracting arrangements already practiced by the World Bank).

127. INT'L L. ASS'N, *Accountability of International Organisations*, 1 INT'L ORG. L. REV. 221, 226 (2004).

128. The breach of the obligation of ongoing monitoring would also represent an internationally wrongful act in itself, leading to direct responsibility. The most recent monograph on complicity in international law raises the question—left unsettled by DARIO and DASR—"[whether] responsibility for complicity have an independent existence parallel to the responsibility that accrues for failure to comply with a specific due diligence obligation." LANOVOY, *supra* note 19, at 12.

absence of any precedent in practice, any theoretical incursion into this important but unclear area of international law inevitably relies, at least partially, on speculative analysis.

For the specific case of MDBs, this inherent limitation is present to an even higher degree. Even if such an obligation, and its breach by the lending MDB, were clearly established, the borrowing country—the primary responsibility bearer—would refrain from bringing this up, even when accepting its own responsibility. The state's position as a MDB member-state, and the fear of not compromising its creditworthiness, would counter-balance whatever motives may push it to require the MDB to accept its own share of responsibility. For the time being, except for cases of peremptory norms violations, accountability of MDBs for human rights breaches rests on solid ground only insofar as internal accountability is concerned, via mechanisms of the Inspection Panel type. This aspect brings about a second limitation of the liability mechanism proposed by this Article: is such a solution normatively, or even morally desirable, given its likely chilling effect on development aid flows? In other words, is overlooking a limited number of human rights abuses that have occurred due to lack of MDBs' oversight an acceptable price to pay for broader economic development?

On the other hand, if the developing lenders' monitoring obligation is more clearly articulated in the future, this specific instance of a subject of international law aiding or assisting another in the commission of an internationally wrongful act may become the "cleanest" case of complicity in international law, in a legal and technical sense. This is because the critique brought in the literature, that any possible instance of complicity would be somehow resolved by application of a primary rule,[129] does not stand at least in cases of lending for "good loans," where no primary norm is breached.

129. *See, e.g.*, Olivier Corten, *La "complicité" dans le droit de la responsabilité internationale: un concept inutile?* 57 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL [A.F.D.I.] 57, 60 (2011) (Fr.) (showing that on the one hand, the cases where DARIO Article 16 were invoked could have been easily resolved by recourse to primary rules, and on the other hand, even if secondary responsibility is accepted in principle for its "didactical or symbolical vocation," its applicability is limited given the controversies surrounding the conditions that trigger it).

When Crises Collide: Reforming Refugee Law to Prevent Environmental Degradation

PAULINA PERLIN*

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INTRODUCTION

In the summer of 2015, a photo of Alan Kurdi's drowned body on a Turkish beach sparked international concern over the Syrian refugee crisis.[1] Face down in the sand with his sneakers still on his feet, the three-year-old symbolized the humanitarian failures of the modern refugee process, which fueled a global conversation on states' closed borders, the shortcomings of the United Nations High Commissioner for Refugees (UNHCR), and the arduous travel refugees and asylum-seekers from Syria undertake to escape the country.[2] This conversation spanned topics from religion to economics to policy reform.[3] Yet amidst the pressing humanitarian concerns, one aspect of the discussion on refugees was forgotten—the toll the refugee crisis was taking on the environment.

Often impoverished and struggling to survive, refugees and asylum-seekers tend to use natural resources in unsustainable ways out of desperation. As a result, their migrations have led to rapid deforestation, contamination of soil and water, wildlife endangerment, water shortages, and more.[4] With the number of refugees, asylum-seekers, and other displaced persons rising,[5] and with many environmental concerns growing more dire,[6] these problems will only become more pressing over time.

Despite the environmental threat that mass refugee and asylum-seeker migrations pose, the issue has remained largely under-studied. In fact, scholars have mostly tackled the opposite causal relationship, claiming that environmental degradation spurs mass migration and thus arguing for the expansion of the refugee definition.[7] The majority of the few scholarly studies addressing refugee-induced environmental degradation were most recently completed in the 1990s,[8] and while

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1. Bryan Walsh, *Alan Kurdi's Story: Behind the Most Heartbreaking Photo of 2015*, TIME (Dec. 29, 2015), http://time.com/4162306/alan-kurdi-syria-drowned-boy-refugee-crisis/ (discussing the circumstances leading to and following the photo).

2. *Id.*; *see also* Patrick Kingsley, *The Death of Alan Kurdi: One Year on, Compassion Towards Refugees Fades*, THE GUARDIAN (Sept. 2, 2016), https://www.theguardian.com/world/2016/sep/01/alan-kurdi-death-one-year-on-compassion-towards-refugees-fades (discussing the international political response to Alan Kurdi's death).

3. *See generally* Kingsley, *supra* note 2.

4. *See* discussion *infra* Part I.

5. UNHCR, FORCED DISPLACEMENT WORLDWIDE AT ITS HIGHEST IN DECADES (2017), http://www.unhcr.org/afr/news/stories/2017/6/5941561f4/forced-displacement-worldwide-its-highest-decades.html.

6. WORLD WILDLIFE FUND, LIVING PLANET REPORT 2016 18-50 (2016), http://awsassets.panda.org/downloads/lpr_living_planet_report_2016_summary.pdf.

7. *See generally* Vikram Kolmannskog (Norwegian Refugee Council), *Climate Change, Disaster, Displacement and Migration: Initial Evidence from Africa*, U.N. High Comm'r for Refugees, ISSN 1020-7473 (Dec. 2009) (exploring how sudden-onset and slow-onset natural disasters, in addition to conflict, can lead to displacement). *See also* David Keane, Note, *The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees,"* 16 GEO. INT'L ENVTL. L. REV. 209, 221-22 (2004) (arguing that the environment is not the sole cause of migration, but neither is migration the sole cause of environmental degradation); Christopher M. Kozoll, *Poisoning the Well: Persecution, the Environment, and Refugee Status*, 15 COLO. J. INT'L ENVTL. L. & POL'Y 271, 280 (2004) (evaluating the extent to which someone migrating due to environmental degradation could qualify as a refugee); Westing, *supra* note 5 at 203-05 (arguing that the increase in refugees over the past few decades is closely associated with an increase in environmental refugees).

8. *See, e.g.*, Asit K. Biswas & H. Cecilia Tortajada-Quiroz, *Environmental Impacts of the Rwandan Refugees on Zaire*, 25 AMBIO 403, 403-08 (1996) (studying the environmental effects of refugees, including deforestation, erosion, and waste-disposal); Karen Jacobsen, *Refugees' Environmental Impact: The Effect of*

some institutions have compiled more recent reports documenting this environmental damage,[9] only a small number have analyzed the issue through an academic lens.

Furthermore, of the few scholars and humanitarian organizations that have written on refugees' environmental impact, most have proposed solutions revolving around the creation of sustainable refugee camps and the provision of education, material supplies, and other forms of aid to refugees.[10] Though such environmental mitigation plans may have merit where enforced, they are often unworkable since they ignore what this Article contends is the core of the problem: the lack of a strong, uniform international legal framework for processing refugees and asylum-seekers.

Thus, this Article argues that to curb the mismanagement of natural resources and environmental degradation caused by the refugee movements, the current legal system requires greater centralization and enforceability to ensure that states admit and resettle refugees as they have pledged. While these goals are ambitious, this Article also contends that technology makes them possible to a degree. The Article proceeds as follows: Part I explores the environmental degradation that has resulted from mass migration of refugees and asylum-seeker and identifies both its consequences and causes. It also discusses previously proposed solutions in more detail and argues that they are not sufficient to address the larger roots of refugee-driven environmental damage. Part II gives a brief overview of refugee law and identifies key issues within its structure. Part III connects these issues to environmental degradation, argues that centralizing the refugee legal structure and introducing enforceability is the key to mitigating these issues, and then offers specific solutions to realize these reforms, which range in their level of ambition and attainability. Finally, Part IV addresses potential criticisms that such solutions may evoke.

I. REFUGEES AND ENVIRONMENTAL DEGRADATION

A. *Examples of Refugees' Environmental Impact*

In multiple regions of the world, refugee and asylum-seeker movements have led to the destruction of forests, soil, water supplies, and wildlife. While UNCHR[11] and

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Patterns of Settlement, 10 J. REFUGEE STUD. 19, 19-36 (1997) (examining how the environmental impact of refugees depends on their form of settlement); Tienlon Ho, *A New UNHCR: Helping the Desperate Choose Sustainability*, 29 ENVTL. POL'Y & L. 164, 166 (1999) (arguing that "the effect of deforestation on the local scale still makes a notable impact."). The findings from these articles and others will be discussed in more detail in Part I of this Article.

9. *See generally* LEBANESE MINISTRY OF ENVIRONMENT ET AL., LEBANON ENVIRONMENTAL ASSESSMENT OF THE SYRIAN CONFLICT & PRIORITY INTERVENTIONS (2014) [hereinafter *The Lebanon Report*], http://www.undp.org/content/dam/lebanon/docs/Energy%20and%20Environment/Publications/EASC-WEB.pdf.

10. *See, e.g.*, Ben Barber, *Feeding Refugees, or War?*, 76 FOREIGN AFF. 8 (July/Aug. 1997) (discussing the strategies, struggles, and solutions to providing aid for refugees); Barbara Zeus, *Exploring Barriers to Higher Education in Protracted Refugee Situations: The Case of Burmese Refugees in Thailand*, 24 J. REFUGEE STUD. 256 (2011) (discussing the primary assumptions theoretically to barriers to higher education in refugee situations as well as looking at the case of the Burmese refugees in Thailand).

11. Eng'g & Envtl. Servs. Section, *Refugees and the Environment*, U.N. HIGH COMM'R FOR REFUGEES (Jan. 1, 2001) [hereinafter *Refugees and the Environment*], http://www.unhcr.org/en-us/protection/environment/3b039f3c4/refugees-environment.html (minimizing the environmental impact of

some scholars[12] have questioned the significance of this impact on the environment compared to more damaging activities, such as logging, the fact that other ecological ills exist does not negate the consequences of refugees' impact on the environment.[13] To draw a simplistic parallel, a person dying of cancer should still treat a broken arm. Moreover, resource degradation at the local level has profound consequences at the global level as well.[14] As UNHCR itself admits in its 1996 *Environmental Guidelines*, some unsustainable refugee activities, such as poaching and firewood collection, "could result in irreversible losses of productivity, the extinction of plant or animal species, the destruction of unique ecosystems, [and] the depletion or long term pollution of ground water supplies . . . ."[15]

Deforestation has been a particularly prominent concern associated with refugees. For example, in the 1990s, Rwandan refugees desolated forests in the Democratic Republic of Congo for firewood, removing 3758 hectares (approximately four hundred million square feet) of forest in only three weeks.[16] Along Zimbabwe's Mazowe River, deforestation tied to five refugee camps in the area resulted in erosion and siltation, as well as exaggerated seasonal temperatures and decreased rainfall due to loss of forest cover.[17] In Kenya, deforestation and erosion concerns led government officials to ban Sudanese refugees from collecting wood for fuel.[18] Deforestation has also occurred in the forests of northern Pakistan following excessive felling and burning by Afghan refugees.[19] More recently, a 2014 United Nations Development Programme report noted that the influx of refugees into Lebanon during the Syrian crisis appreciably harmed and endangered the nation's forests and ecosystems.[20]

Additionally, the *Lebanon Environmental Assessment of Syrian Conflict & Priority Interventions* (Lebanon Report) described another environmental issue often associated with refugees and asylum-seekers: soil and water contamination and water

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refugees on a global scale).

12. *See, e.g.*, Richard Black, *Forced Migration and Environmental Change: The Impact of Refugees on Host Environments*, 42 J. ENVTL. MGMT. 261, 261 (1994) (reviewing research and policies on the environmental impact of refugee settlements and concluding that "environmental change remains limited"); Inge Brees, *Burden or Boon: The Impact of Burmese Refugees on Thailand*, WHITEHEAD J. DIPL. INT'L REL. 35, 40 (Winter/Spring 2010) (suggesting that the environmental impact of refugees in Thailand is "minimal, when compared to commercial agriculture, forestry production and government-enforced restrictions on customary land use and rotational cultivation.").

13. *See* Ho, *supra* note 8, at 166 (arguing that "the effect of deforestation on the local scale still makes a notable impact.").

14. *See, e.g.*, Jonathan A. Foley et al., *Global Consequences of Land Use*, 309 SCI. 570 (2005) (explaining the issues arising from land use and impact on a global scale); David Werth & Roni Avissar, *The Local and Global Effects of Amazon Deforestation*, 107 J. GEOPHYSICAL RES. 55-1 (2002) (relaying data acquired from experiments analyzing the effects of deforestation on local and global climate).

15. U.N. High Comm'r for Refugees, UNHCR Environmental Guidelines 1 (June 1996), http://www.unhcr.org/en-us/protection/environment/3b03b2a04/unhcr-environmental-guidelines.html.

16. *See* Biswas & Tortajada-Quiroz, *supra* note 8, at 404 (assessing the environmental impacts of Rwandan refugees in Zaire).

17. Ho, *supra* note 8, at 167 (citing Refugee Policy Group, *Limiting the Wastelands*, REFUGEES & ENV'T: SPECIAL REP, 9 (1992)).

18. *Id.* at 168.

19. *See* Nigel J.R. Allen, *Impact of Afghan Refugees on the Vegetation Resources of Pakistan's Hindukush-Himalaya*, 7 MOUNTAIN RES. & DEV. 200, 202 (1987) (discussing how Afghan refugees have contributed to deforestation in Pakistan).

20. *See The Lebanon Report*, *supra* note 9, at 102 (stating the risk brought to Lebanon's ecosystem by the influx of refugees).

shortages. Specifically, improper sanitation conditions in refugee camps contaminated soil, surface water, and groundwater,[21] while refugees' water usage increased Lebanon's national water demand by eight to twelve percent.[22] Similarly, Stanford University researchers found that the tide of Syrian refugees entering Jordan severely taxed the nation's already short freshwater supply despite a modest increase in reservoir flow.[23] This immediate need, in turn, hampered Jordan's long-term water conservation planning.[24] Additionally, though the contamination was not as systemic as in Jordan and Lebanon, University of Birmingham researchers found unsafe levels of *E. coli* and *coliform* bacteria in water pipes connected to a large camp of asylum-seekers in Calais, France.[25] Such contamination and shortage issues are not unique to the Syrian crisis; they were also linked in the 1990s to refugees in the Democratic Republic of Congo,[26] Malawi,[27] and Tanzania,[28] among others. In addition to contamination, refugees have also contributed to soil depletion by growing crops and failing to rotate them in camps they view as temporary.[29]

This degradation of forests, soil, and water, as well as some refugees' unsustainable hunting habits, are additional activities that have harmed local wildlife. For instance, due to the deforestation and other environmental destruction mentioned along the Mazowe River in Zimbabwe,[30] many game animals have lost their habitats.[31] More directly, refugees' reliance on poaching for food and income in Tanzania has drastically increased wild game consumption and trade, thereby undermining local conservation efforts.[32] In the Democratic Republic of Congo, deforestation and poaching combined have severely threatened endangered species in the Virunga National Park, among other protected regions.[33]

These are merely a few examples of the environmental degradation associated with refugees and asylum-seekers. Unfortunately, larger-scale data studies on the topic

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21. *Id.* at 43.

22. *Id.* at 60.

23. Jim Yoon, Marc F. Muller & Steven Gorelick et al., *How the Syrian Refugee Crisis Affected Land Use and Shared Transboundary Freshwater Resources,* BROOKINGS INST. (Feb. 13, 2017), https://www.brookings.edu/blog/planetpolicy/2017/02/13/how-the-syrian-refugee-crisis-affected-land-use-and-shared-transboundary-freshwater-resources/.

24. *Id.*

25. S. DHESI ET AL., AN ENVIRONMENTAL HEALTH ASSESSMENT OF THE NEW MIGRANT CAMP IN CALIAS, 11 (2015).

26. *See* Ho, *supra* note 8, at 166 (mentioning that dehydration and cholera were experienced by the refugees in Zaire).

27. *See generally* Les Roberts et al., *Keeping Clean Water Clean in a Malawi Refugee Camp: A Randomized Intervention Trial,* 79(4) BULL. WORLD HEALTH ORG. 280 (2001), http://apps.who.int/iris/handle/10665/58128.

28. *See generally* Jacobsen, *supra* note 8, at 25.

29. *See* Ho, *supra* note 8, at 166 (discussing refugees and their contribution to soil depletion).

30. *See id.* at 167 (describing deforestation along the Mazowe river in northeastern Zimbabwe)his Note.

31. *See id.* (discussing how game animals losing places to live as a result of deforestation caused by refugees).

32. *See id.* at 166 (discussing refugees and their contribution to soil depletion); *see also* George Jambiya, Simon Miledge & Nangena Mtango, *'Night Time Spinach': Conservation and livelihood implications of wild meat use in refugee situations in north-western Tanzania,* TRAFFIC E./S. AFR. (2007) (discussing the implications of unsustainable wild meat exploitation in Tanzanian refugee hosting areas).

33. Biswas & Tortajada-Quiroz, *supra* note 8, at 405–06, 407.

are not yet available due to a dearth of existing scholarship. It is also worthwhile to note that in many of these cases, refugee and asylum-seeker movements did not create new environmental issues but simply exacerbated existing ones. Nevertheless, a positive correlation between these movements and damage to land, water, and wildlife emerges. Before we turn to mitigating this damage, we must assess its likely causes.

B. *Causes of Refugees' Environmental Impact*

While other causes may exist,[34] this Article propose three major reasons for why refugees and asylum-seekers often cause environmental damage: (i) the urgency of survival, (ii) displaced persons' generally limited resources, and (iii) the perception of camps and other transitory housing as temporary.

Since, by definition, refugees have left their country of origin based on a "well-founded fear of persecution,"[35] environmental concerns often take a backseat to questions of survival and resettlement. As UNHCR notes, "[a]rriving in an alien situation, refugees face hunger, fatigue, humiliation and grief. Their first concern is to look after themselves, most often to find food and shelter."[36] Accordingly, in the scramble to survive, refugees prioritize short-term concerns over long-term conservation. They thus often use resources unsustainably, resulting, for example, in the deforestation, destruction of wildlife, and water shortages previously described. Moreover, refugees can also seldom spare time and resources for installing proper sanitation and protecting soil and water from contamination. These same principles hold for asylum-seekers, who are usually also fleeing life-threatening situations and struggling to subsist.

Poverty and a lack of material resources exacerbate this focus on survival and its associated environmental impact. Refugees and asylum-seekers often have few or no sources of income and cannot provide for basic needs, such as food. For instance, a World Bank study found that close to nine out of ten Syrian refugees in Jordan and Lebanon were impoverished.[37] Similarly, a 2004 study in Sweden found that refugee immigrants faced the highest levels of poverty in the country.[38] Asylum-seekers fare no better. In many nations, such as the United Kingdom, asylum-seekers receive limited welfare benefits and are not allowed to work, resulting in dire poverty at least until their claims are adjudicated.[39] Poverty, in turn, has long been associated with environmental degradation,[40] often since individuals with limited resources also have

34. For instance, Karen Jacobsen argues that one cause of refugees' environmental impact is refugees' reliance on familiar methods of agriculture, which may not be suitable for the territories they move to. Jacobsen, *supra* note 8, at 30.

35. Ho, *supra* note 8, at 164.

36. *Refugees and the Environment*, supra note 11; *see also* discussion *infra* his NotePart II.

37. PAOLO VERME ET AL., THE WELFARE OF SYRIAN REFUGEES: EVIDENCE FROM JORDAN AND LEBANON 14 (2016).

38. Jorgen Hansen & Roger Wahlberg, *Poverty Persistence in Sweden*, IZA INST. OF LABOR ECON. DISCUSSION PAPER SERIES, 7 (2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=594844.

39. Stephen Crossley & Georgina Fletcher, *Written out of the Picture*, NE. CHILD POVERTY COMM'N & REG'L. REFUGEE FORUM NE, 20–23 (June 2013), http://www.poverty.ac.uk/sites/default/files/attachments/NEP001%20Report%20Web%201.pdf.

40. While in the 1990s the prevailing consensus was that poverty caused or exacerbated environmental degradation, scholars have since argued that this link can be more complex. For an in-depth discussion and literature review, see Anantha K. Duraiappah, *Poverty and Environmental Degradation: A Review and*

limited options. In Ethiopia, for instance, beans were a major food source for Somali refugees[41]; yet, as nutritionist Rita Bhatia noted, without water to soak the beans or pots with lids to steam them, refugees required cooking fires that could last for hours[42]. They thus had no way to cook without collecting large quantities of firewood, which in turn led to significant deforestation in the region.[43]

Not only must refugees and asylum-seekers focus on short-term concerns out of necessity, but they also have little incentive to conserve local resources for the long-term. Since asylum-seekers' and refugees' eventual goal is resettlement, few view camps and other temporary shelters as their permanent communities. Accordingly, many use resources unsustainably and make few efforts to mitigate existing environmental issues. As Tienlon Ho reasons:

> Repairing ecological damage requires a time commitment much greater than it takes to cause the damage. Seedlings require years to grow and contaminants can dwell for centuries in water tables. Refugee movements by nature, however, are temporary. Unfortunately, people more carelessly use resources when they foresee living in a particular place only for a short length of time.[44]

Moreover, communities hosting refugee populations often introduce policies that reinforce the transient nature of refugee movements and the environmental damage that follows. For example, in the Sahel region of Africa, governments allow refugees to plant temporary crops but not trees or perennial crops, seeing these latter, more permanent fixtures as illegitimate claims on land.[45] Not only does this policy fortify the view that refugees have no long-term stake in the community, but as Karen Jacobsen notes, it also undermines sustainable agriculture efforts.[46]

Another time-scale problem further aggravates these three major issues—the long timeframe of the refugee resettlement process. Though many nations laws require asylum claims to be brought within set time periods,[47] and often adjudicate these claims fairly promptly, refugees can wait years for resettlement. For instance, Cambodian refugee camps in Thailand set up in 1979 remained populated for more than a decade.[48] Similarly, in nations like Lebanon and Jordan, UNHCR-referred refugees applying for resettlement in other states are often trapped in limbo for months or years as these states process their claims.[49] Over time, refugees' already limited resources grow

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Analysis of the Nexus, 26.12 WORLD DEV. 2169 (1998).

41. Michael J. Toole & Rita Bhatia, *A Case Study of Somali Refugees in Hartisheik A Camp, Eastern Ethiopia: Health and Nutrition Profile, July 1988 – June 1990*, 5 J. REFUGEE STUD. 313, 319 (1992).

42. Ho, *supra* note 8, at 166 (citing Refugee Policy Group, *Limiting the Wastelands*, REFUGEES & ENV'T: SPECIAL REP, at 4 (1992)).

43. *Id.* (citing REFUGEE POLICY GROUP, LIMITING THE WASTELANDS, REFUGEES AND THE ENVIRONMENT: SPECIAL REPORT, at 5 (1992)).

44. Ho, *supra* note 8, at 167.

45. Jacobsen, *supra* note 8, at 29.

46. Jacobsen, *supra* note 8, at 29.

47. For example, Ethiopia requires asylum claims to be submitted within fifteen days and one year, respectively. *Asylum & the Rights of Refugees*, INT'L JUSTICE RES. CTR., http://www.ijrcenter.org/refugee-law/.

48. Jacobsen, *supra* note 8, at 21–22.

49. Katharina Lenner & Susanne Schmelter, *Syrian Refugees in Jordan and Lebanon: Between Refugee*

scarcer and scarcer. Environmental damage that results in shortages of available water, forest, and land resources compounds this problem, leading to a vicious cycle of degradation and desperation. Part II examines this issue more closely, along with other structural problems in refugee law and its enforcement, that exacerbate the aforementioned causes of refugees' environmental impact.

C. *A Review of Previously Proposed Solutions*

Solutions previously proposed by scholars, NGOs, and the UN itself have focused on sustainable management and policy at the local level. Karen Jacobsen, for example, advocates for smaller, less concentrated refugee settlements and the integration of refugees into local communities.[50] A.K. Biswas and H.C. Tortajada-Quiroz propose a regional study to more comprehensively assess refugees' environmental impact in Africa and develop local policies accordingly.[51] Tienlon Ho comes the closest to offering a solution that changes the refugee legal framework, arguing that UNHCR should develop environmental guidelines and incorporate them into a new refugee protocol.[52] Richard Black catalogs various policy responses to refugee-induced environmental damage, none of which aim to restructure refugee law.[53] Moreover, his proposed solutions also center on assessments of local environments and resource management systems.[54] Similarly, on the institutional side, the Lebanon Report recommends localized policies, such as improved waste management systems within municipalities and improved urban planning,[55] as did the Overseas Development Institute following the Rwanda crisis in the 1990s.[56] Most prominently, UNHCR's 1996 *Environmental Guidelines* also focus on local resource allocation and protection.[57] While they recommend coordination among parties and comprehensive environmental goals in the long-term, the *Guidelines* fall short of suggesting refugee law reform and concede that such coordination faces many operational challenges under the current system.[58]

However, while many of these solutions are vital to avoiding environmental damage, they are not fully viable unless they address the larger structural issues within refugee law. Ultimately, neither public nor private actors can devise effective sustainability plans without accurate information on migrants and their movements. Moreover, as Jacobsen herself notes, these actors often lack the will or political ability

and Ongoing Deprivation?, IEMED MEDITERRANEAN YEARBOOK 2016, 122, 123 (2016), http://www.iemed.org/observatori/arees-danalisi/arxius-adjunts/anuari/med.2016/IEMed_MedYearBook 2016_Refugges%20Jordan%20Lebanon_Lenner_Schmelter.pdf.

50. Jacobsen, *supra* note 8, at 30–33.

51. Biswas & Tortajada-Quiroz, *supra* note 8, at 408.

52. Ho, *supra* note 8, at 168–169.

53. Richard Black, *Environmental Change in Refugee-Affected Areas of the Third World: The Role of Policy and Research*, 18 DISASTERS 107 *passim* (1994).

54. *Id.*

55. *The Lebanon Report*, *supra* note 9.

56. Gill Shepherd, *The Impact of Refugees on the Environment and Appropriate Responses*, HUMA. PRAC. NETWORK (Sept. 1995), http://odihpn.org/magazine/the-impact-of-refugees-on-the-environment-and-appropriate-responses/.

57. *UNHCR Environmental Guidelines*, *supra* note 15.

58. *See generally id.*

to implement these solutions without enforcement mechanisms,[59] or at least greater incentives to comply. Finally, since many aspects of refugee law's design and enforcement exacerbate the potential causes presented in Section B, addressing these structural aspects is key to mitigating environmental degradation. Part III discusses these arguments in more detail, and Part IV provides potential solutions. First, however, Part II offers readers some necessary background on the design and implementation of refugee law.

II. AN OVERVIEW OF REFUGEE LAW AND ITS ENFORCEMENT

A. *Sources of Refugee Law*

The right to seek asylum in other states has been a central tenet of international human rights law since its manifestation in Article 14 of the Universal Declaration of Human Rights, adopted in 1948 in the wake of World War II's humanitarian failures.[60] Modern refugee law takes its definition and authority primarily from the 1951 Convention Relating to the Status of Refugees (1951 Convention) and the accompanying 1967 Protocol Relating to the Status of Refugees (1967 Protocol).[61] Together, these agreements define refugee status and the rights of refugees, imposing legal obligations on States parties to the 1951 Convention and/or the 1967 Protocol to protect these rights in good faith.[62]

Displaced persons who have left their country of residence to pursue sanctuary elsewhere are considered asylum-seekers.[63] Yet according to Article 1 of the 1951 Convention, amended by the 1967 Protocol, an asylum-seeker must meet several criteria to attain refugee status. Specifically, she must show that (1) she has left her country of "habitual residence" due to (2) a "well-founded fear of being persecuted" (3) based on "race, religion, nationality, or membership of a particular social group or political opinion. . ." and (4) is unable or unwilling to return to her country of origin due to this fear.[64] Though regional treaties in Africa and Latin America have since broadened this definition,[65] the conditions that the 1951 Convention establishes remain dominant in refugee law, and UNHCR uses them in its refugee status assessments.[66] Thus, this Note also employs the 1951 Convention definition. Further, it considers environmental degradation from asylum-seekers, since, though technically not yet refugees, their application process is an integral part of refugee law and its enforcement.

59. Jacobsen, *supra* note 8, at 31–32.

60. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art.14 (Dec. 10, 1948).

61. International Justice Resource Center, *supra* note 47, at para. 4.

62. *Id.*

63. *Id.*

64. G.A. Res. 429 (V), Convention and Protocol Relating to the Status of Refugees, art. 1(A)(2) (Dec. 14, 1950) [hereinafter *1951 Convention*].

65. OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa, art. 1(2), Sept. 10, 1969, 1001 U.N.T.S. 45; Cartagena Declaration on Refugees, Inter-Am. C. H. R., OAS/Ser. L/V/II. 66, doc. 10, rev. 190–193, art. III (Nov. 22, 1984).

66. U.N. High Comm'r for Refugees, *What is a Refugee?* http://www.unrefugees.org/what-is-a-refugee/ (last visited May 4, 2017).

In addition to defining status, the 1951 Convention and the 1967 Protocol recognized the rights of both asylum-seekers and refugees.[67] For the former, the Convention affirms the right to seek asylum declared by the Universal Declaration of Human Rights and asserts that States Parties should not punish individuals for breaching immigration laws to seek asylum.[68] However, the Convention stops short of detailing how parties should process asylum claims, though other instruments sometimes fill this gap. For instance, in the European Union, the 2003 Dublin Regulation imposes procedures for examining asylum claims and notably establishes that, in most instances, the first Member State that an asylum-seeker enters bears responsibility for adjudicating the claim.[69] The 1951 Convention provides more protections for those individuals recognized as refugees. Among other rights, it grants refugees freedom of movement within a territory[70] and obliges States Parties to provide refugees with legal assistance, including free access to courts[71] and administrative assistance.[72] Perhaps most importantly, the 1951 Convention also affirms the principle of non-refoulement, prohibiting parties from returning refugees to their countries of origin except in cases where an individual substantially threatens a States Parties national security.[73] Notably, Article 3(1) of the 1967 United Nations Declaration on Territorial Asylum extends this principle to asylum-seekers in general.[74] Thus, states' responsibility not to deport refugees and asylum-seekers is a centrally recognized tenet of refugee law.

Enforcement of these rights depends on good faith efforts from States Parties, as well as on leadership from UNHCR as set forth in Article 35 of the 1951 Convention.[75] Formed in 1950 to handle European displacement resulting from World War II and intended to disband after three years, UNHCR has since ballooned, operating in 128 countries with a budget of $6.54 billion as of 2016.[76] Moreover, UNHCR plays a key role in the documentation, determination, sheltering, and resettlement of refugees, as well as in the general coordination of these endeavors. In States Parties, for example, "[w]hile registration of refugees and asylum seekers remains the responsibility of host states, UNHCR assists them when needed."[77] Additionally, UNHCR also assists states with the construction of camps and settlements for refugees and asylum-seekers.[78]

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67. *1951 Convention*, *supra* note 64, Preamble.

68. *Id.* art. 31.

69. Council Regulation 343/2003 of Feb. 18, 2003, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, 2003 O.J. (L 50) 1, 3 (EC) [hereinafter *Dublin Regulation*].

70. *1951 Convention*, *supra* note 64, at art. 26.

71. *Id.* art. 16.

72. *Id.* art. 25.

73. *Id.* art. 33.

74. G.A. Res. 2312 (XXII) A, Declaration on Territorial Asylum, art. 3(1), (Dec. 14, 1967).

75. 1951 Convention, *supra* note 64, art. 35.

76. History of UNHCR, U.N. HIGH COMM'N ON REFUGEES, http://www.unhcr.org/en-us/history-of-unhcr.html (last visited Oct. 4, 2017).

77. Registration, U.N. HIGH COMM'N ON REFUGEES, http://www.unhcr.org/en-us/registration.html (last visited Oct. 4, 2017).

78. *See* U.N. HIGH COMM'N ON REFUGEES, GLOBAL STRATEGY FOR SETTLEMENT AND SHELTER: A UNHCR STRATEGY 2014-2018 27 (2014) (detailing strategies for improving settlement and shelter operating procedures); *see also*, Patrick Kingsley, *Thousands of Refugees Left in Cold as UN and EU Accused of Mismanagement*, THE GUARDIAN (Dec. 22, 2016, 6:30 EST), http://www.theguardian.com/world/2016/dec/22/thousands-of-refugees-left-in-cold-as-un-and-eu-accused-

More prominently, in states not party to the 1951 Convention and its 1967 Protocol, such as Jordan, Lebanon, and Tanzania, among others,[79] local UNHCR offices fulfill the duties otherwise incorporated into States Parties' domestic asylum laws.[80] For instance, UNHCR makes decisions on refugee status eligibility[81] according to a robust set of procedural standards[82] and then refers those deemed refugees to other states for resettlement.[83] Notably, however, these latter states retain discretion on whether or not to admit the referred refugees.[84]

This deference to states, as well as the lack of specific, binding rules for processing refugees and asylum-seekers, illustrates that duties under refugee law for both parties and non-parties to the 1951 Convention remain loosely defined. States enjoy broad power in determining which refugees to admit,[85] how many,[86] and how much process is due to them.[87] Moreover, states also have great control over the conditions asylum-seekers and refugees live in while awaiting registration, adjudication, and resettlement[88]. This abundant amount of discretion has led to variable outcomes; yet as described in Part I, many state policies have resulted in refugee poverty and mismanagement of natural resources. Consequently, these practices have also led to considerable criticism of the refugee legal system.

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of-mismanagement (critiquing UNHCR's construction of camps for asylum-seekers in Greece).

79. *See* U.N. HIGH COMM'N ON REFUGEES, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL 2-4, http://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html (last visited Oct. 4, 2017) (listing all States Parties to the 1951 Convention and the 1967 Protocol).

80. *See* Intern'l Justice Res. Ctr., *supra* note 47 (outlining the procedure for refugee status determinations in host nations that are not party to the 1951 Convention or 1967 Protocol).

81. *Id.*

82. *See generally* U.N. HIGH COMM'N ON REFUGEES, Procedural Standards for Refugee Status Determination Under UNHCR's Mandate (2003), http://www.unhcr.org/4317223c9.pdf [hereinafter Procedural Standards].

83. U.N. HIGH COMM'N ON REFUGEES, UNHCR RESETTLEMENT HANDBOOK 105 (2011), http://www.unhcr.org/46f7c0ee2.html (outlining reasons and procedures for the resettlement process).

84. *See id.* 121 (stating that UNHCR officers submit a refugee's case to a resettlement country *for their consideration*) (emphasis added).

85. This statement applies to both the adjudication of individual applications and state-imposed limits on certain groups. For example, the U.S. government retains the right to deny entry to "any class of aliens" that the President deems "detrimental" to the national interest. 8 U.S.C. § 1182 (f) (2015). For instance, in 1980, then-U.S. President Jimmy Carter invalidated all visas to Iranian citizens. Gerhard Peters & John T. Woolley, *Sanctions Against Iran Remarks Announcing U.S. Actions*, THE AMERICAN PRESIDENCY PROJECT (Apr. 7, 1980), http://www.presidency.ucsb.edu/ws/?pid=33233. Moreover, U.S. law also recognizes the state's authority to grant a specific number of refugee visas and "[allocate them] among refugees of special humanitarian concern to the United States"). 8 U.S.C. § 1157 (a)(3) (2005). Similarly, nations can indirectly bar certain groups through their determination of which nations of origin are now "safe." For instance, in 2016, Finland declared Afghanistan, Iraq, and Somalia secure enough for asylum-seekers to return to, and announced it would no longer grant residency for asylum-seekers and refugees from those nations. Kayleigh Lewis, *Finland says Afghanistan, Somalia and Iraq are 'safe' for refugees to return to*, THE INDEPENDENT (May 18, 2016, 17:44 BST), http://www.independent.co.uk/news/world/europe/refugee-crisis-finland-refugees-asylum-seekers-afghanistan-somalia-iraq-safe-to-return-a7036501.html.

86. *See, e.g.*, 8 U.S.C. § 1157 (a)(1) (granting the U.S. President discretion over how many refugees to admit annually).

87. *See id.* § 1242 (detailing the processing mechanisms for Iraqi refugees).

88. *See, e.g.*, *id.* § 1522 (describing programs for domestic resettlement of and assistance to refugees).

B. *Relevant Criticisms of Refugee Law and Its Enforcement*

Scholars, humanitarian groups, and journalists alike have long lamented the slowness, disorganization, and unreliability in refugee and asylum processing. Many have also decried the lack of protections for asylum-seekers and refugees awaiting adjudication and resettlement, respectively[89]. Some blame states' reluctance to enact and follow standard principles of refugee law, and UNHCR's inability to enforce them. For instance, in his book *Reconceiving International Refugee Law*, celebrated refugee law scholar James C. Hathaway notes the inefficiencies and injustices caused by states' increasing disregard for refugee law, and advocates moving away from a system of shared responsibility to solve the problem.[90] Sara Ellen Davies also criticizes states' uneven execution of refugee law, writing that "[a]cross the globe, there are significant variations in the way asylum seekers and refugees are treated."[91] She proceeds to argue that in the absence of firm guidance, Southeast Asia failed to adopt standard procedures for refugees and asylum-seekers.[92] This variability, in turn, led to a lack of documentation or support for countless displaced persons, and generally, chaotic migration processes.[93]

Outside the academic world, in 2013, Doctors Without Borders published a report evaluating the humanitarian response to the Syrian refugee crisis in Jordan, which is not a party to the 1951 Convention or 1967 Protocol.[94] While the report generally praises the Jordanian government's response, it notes the "strain" on resources that the influx of migrants imposed.[95] The report suggests that better coordination and planning efforts could have lessened this stress.[96] Moreover, while the report also lauds UNHCR's efforts, it laments the organization's "[in]ability to lead or strategize," relating that "[o]n various crucial points, its advice ha[d] either been ignored or not been incorporated, and it [hadn't seemed] to have been very successful in influencing the course of events."[97] Similarly, in the wake of the Syrian crisis, many UN officials also lambasted the agency for capitulating to states reluctant to take more refugees.[98] For example, Sylvana Foa, a former UNHCR spokeswoman, urged the agency to "start shaming governments" rather than encouraging them.[99]

89. *See, e.g.*, HUMAN RIGHTS WATCH, LIVING ON THE MARGINS: INADEQUATE PROTECTION FOR REFUGEES AND ASYLUM SEEKERS IN JOHANNESBURG (Nov. 16, 2006), https://www.hrw.org/report/2005/11/16/living-margins/inadequate-protection-refugees-and-asylum-seekers-johannesburg (discussing the flaws in the implementation of refugee laws in South Africa).

90. *See generally* JAMES C. HATHAWAY, RECONCEIVING INTERNATIONAL REFUGEE LAW (1997).

91. Sarah Ellen Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* 2 (Anne F. Bayefsky et al. eds., 2008).

92. *Id.* at 4–5.

93. *Id.*

94. Issam Saliba, *Refugee Law and Policy: Jordan*, LIBR. OF CONG. (June 21, 2016), https://www.loc.gov/law/help/refugee-law/jordan.php.

95. Sean Healy & Sandrine Tiller, *A Review of the Humanitarian Response to the Syrian Refugee Crisis in Jordan, 2012-13,* 1 Médecins Sans Frontières (Oct. 2013), https://www.msf.org.uk/sites/uk/files/jordan_case_study_final_external_0.pdf.

96. *See id.* at 20 (noting that the strain is not for a lack of effort but rather attributable to a bureaucratic approach and micro-management in UNHCR's implementation and coordination).

97. *Id.* at 2.

98. Tom Miles, *As Refugee Crisis Grows, U.N. Agency Faces Questions*, REUTERS (Sep. 16, 2015, 4:30 AM), http://www.reuters.com/article/us-europe-migrants-unhcr-insight-idUSKCN0RG13E20150916.

99. *Id.*

Current UNHCR Spokesman William Spindler, on the other hand, blamed the Syrian crisis on "the chaotic way that Europe ha[d] responded."[100] This finger-pointing illustrates some of the issues with shared responsibility that Hathaway identifies.[101] Indeed, in another example, aid groups recently accused UNHCR and the EU of mismanaging funds meant for "winterising" refugee camps in Greece, where months into the process, only half of camps were equipped with proper shelter and heating despite the Greek government and UNHCR receiving 90 million and 14 million Euros, respectively, in funds from the EU to do so.[102]

However, in both the recent Syrian crisis and historically, states, both parties and non-parties to the 1951 Convention, have received far more reproach than UNHCR. Critics have long lambasted states for refusing refugees, such as the United States during the Holocaust,[103] China when Rohingya Muslims fled massacres in Myanmar and Bangladesh,[104] and the Gulf countries during the Syrian crisis.[105] Moreover, critics have also chastised states for failing asylum seekers and refugees administratively; for instance, government authorities neglected to register thousands of displaced persons purposely in Turkey,[106] and caused the now infamous disorganization at the Calais "jungle" in France.[107] The case of Calais also demonstrates another criticism of states the poor conditions asylum seekers and refugees face while awaiting resettlement.[108]

Yet the case of Turkey reveals a more serious problem: parties' attempts to evade their responsibilities under the 1951 Convention. As James Hathaway writes, states are primarily self-interested and often seek to unload their refugee and asylum

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100. *Id.*

101. *See* HATHAWAY, *supra* note 90, at 14 (describing the arbitrariness with which the initial reception responsibility may be imposed, and noting the need to diversify and distribute responsibility on a more principled basis).

102. Kingsley, *supra* note 78.

103. *See* Daniel A. Gross, *The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing That They Were Nazi Spies*, SMITHSONIAN (Nov. 18, 2015), http://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324/ (describing how the State Department, FBI, and FDR himself refused Jewish refugees in the 1940s because they allegedly posed a threat to national security by potential espionage).

104. *See* Liang Pan, *Why China Isn't Hosting Syrian Refugees*, FOREIGN POL'Y (Feb. 26, 2016, 2:47 PM), http://foreignpolicy.com/2016/02/26/china-host-syrian-islam-refugee-crisis-migrant/ (describing China's indifference to the persecution of Rohingya as an example to explain its reluctance to accept refugees because of its narrow and exclusive national identity).

105. *Id.*

106. *See generally EU: Don't Send Syrians Back to Turkey*, HUMAN RIGHTS WATCH (June 20, 2016, 12:01 AM), https://www.hrw.org/news/2016/06/20/eu-dont-send-syrians-back-turkey (discussing difficulties Syrian refugees face with registration in Turkey).

107. *See* May Bulman, *Calais Jungle Closure: Demolition Begins as Registration of Refugees Slows*, INDEP. (Oct. 25, 2016, 20:27 BST), http://www.independent.co.uk/news/world/europe/calais-jungle-demolition-refugees-registrations-a7380101.html (highlighting tension as demolition begins before registration of all refugees).

108. Amelia Gentleman, *The Horror of the Calais Refugee Camp: 'We Feel Like We Are Dying Slowly'*, GUARDIAN (Nov. 3, 2015, 12:26 EST), https://www.theguardian.com/world/2015/nov/03/refugees-horror-calais-jungle-refugee-camp-feel-like-dying-slowly.

burdens on other parties by closing borders[109] or refusing to register refugees.[110] This avoidance is more easily achieved in geographically isolated nations that are far from conflicts.[111] As a result, states bear the brunt of migration regardless of the resources they possess to support population influxes. Often, the states most reachable for refugees and asylum-seekers are in fact the states with the fewest resources to support them.[112] This latter observation will likely intensify as environmental phenomena start to drive migration,[113] since environmental disasters often do not respect borders. Yet even now, the result is an operating system in which refugees and asylum seekers strain resources in places where they are already the most depleted.

This discussion of issues in the refugee legal structure is not exhaustive in any sense; it does not encompass nearly all the causes, criticisms, or consequences of refugee law's failures. However, it does seek to relate key problems in refugee law and its enforcement, such as too much discretion being allowed to states, no clear division of duties and responsibilities, and a lack of uniform, binding authority. These problems, in turn, exacerbate the causes of environmental degradation presented in Part I. Part III, *infra*, solidifies the connection between issues with refugee law and environmental damage before turning to the importance of greater centralization and enforceability for solving these issues.

III. REFUGEE LEGAL STRUCTURE AND ENVIRONMENTAL DEGRADATION

A lack of strong centralized power and enforceability at several points of the refugee resettlement and asylum adjudication processes aggravates many theorized causes of migrant-induced environmental degradation. As discussed in Part II, States Parties to the 1951 Convention must register, shelter, and resettle refugees and asylum-seekers, yet seldom properly do so.[114] This is due to a sense of shared responsibility with UNHCR, difficulties in coordination, and little authority to hold non-conforming states accountable.[115] As conditions in Calais, Greece, and Jordan demonstrate,[116] these

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109. HATHAWAY, *supra* note 90; *see also* Agence France-Presse, *Hungary Closes Border to Refugees as Turkey Questions EU Deal to Stem Crisis*, THE GUARDIAN (Oct. 16, 2015, 22:26 EDT), https://www.theguardian.com/world/2015/oct/17/hungary-closes-border-to-refugees-as-turkey-questions-eu-deal-to-stem-crisis (providing the example of Hungary, which closed its border to Syrian refugees).

110. *Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU Turkey Deal*, AMNESTY INT'L (Apr. 1, 2016, 00:01 UTC) https://www.amnesty.org/en/latest/news/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/.

111. *See* Drew Desilver, *How the U.S. Compares with Other Countries Taking in Refugees*, PEW RES. CTR. (Sept. 24, 2015), http://www.pewresearch.org/fact-tank/2015/09/24/how-the-u-s-compares-with-other-countries-taking-in-refugees/ (analyzing geographical proximity of nations hosting refugees).

112. Joe Myers, *The Richest Countries Take the Fewest Refugees*, WORLD ECON. F. (July 18, 2016), https://www.weforum.org/agenda/2016/07/richest-countries-fewest-refugees-oxfam/ (noting that the states that take in the most refugees also happen to the be the states with the fewest monetary resources to support themhis Note).

113. *See, e.g.*, Westing, *supra* note 5. Migrants fleeing environmental phenomena do not currently qualify as refugees under the 1951 definition. However, many scholars and environmentalists have pushed for their inclusion.

114. *See* HUMAN RIGHTSWATCH, *supra* note 106 (discussing difficulties Syrian refugees face with registration in Turkey).

115. *Id.*

116. *See* HUMAN RIGHTS WATCH, WORLD REPORT 2017, 267 (2017) (discussing the refugee situation

botches, in turn, deprive refugees and asylum-seekers of much-needed resources. Consequently, States Parties' failures—and the refugee legal system's tolerance for these failures—increase refugees' and asylum-seekers' desperation and poverty; two key drivers of environmental degradation. Moreover, incapacity to register refugees—whether purposeful or not—also protracts the resettlement process, increasing the length of time refugees spend in this desperate state, and thus, also the likelihood of environmental damage and natural resource misuse. Many of these issues hold true for non-parties who work with UNHCR as well, though they are not bound by the 1951 Convention.

However, this relationship rests entirely on a government's willingness to cooperate with UNHCR, adding another layer of instability. This instability, in turn, worsens environmental degradation by precluding effective long-term conservation and incentivizing inefficient resource use. Additionally, when UNHCR refers refugees to states that are not parties to the 1951 Convention and/or the 1967 Protocol to States Parties for resettlement, the states retain complete control over the decision to admit or deny.[117] This decision-making process often leads to lengthy and uncertain waiting times, which strain refugees' resources, de-incentivize conservation, and stretch the time period in which environmental degradation can occur.[118]The fact that refugees and asylum-seekers often migrate to territories that are already economically and environmentally vulnerable further aggravates the matter.[119] The disorganization and chaos present in the current refugee legal system thus amplify key causes of environmental degradation: desperation, poverty, and timeframe conflicts.

This Note proposes that a centralized system organized around an authoritative power would solve many of these issues and thus, prevent significant environmental damage. Notably, however, perfect centralization and enforceability are difficult to achieve in international law as it currently exists. Part III will thus also offer a less ambitious solution that would increase the degree of centralization and enforceability without posing significant political challenges.

A. *The Importance of Central Power and Enforceability*

A system structured around a single authority with enforcement power would bring consistency, certainty, and control to a process often characterized by the lack of these traits. Specifically, shifting power to a central organ would alleviate the inefficiencies caused by a structure of voluntary, shared responsibility. As a result, resettlement wait times could decrease; resources could be allocated more economically, which could reduce refugee and asylum-seeker poverty; and, governments could receive better information to plan around refugee movements more sustainably. Since UNHCR is currently the international body most involved in

in Calais); *id.* at 269–72 (discussing the refugee situation in Greece); *id.* at 367–68 (discussing the refugee situation in Jordan).

117. *See supra* note 85 (discussing state adjudication of individual applications and state-imposed limits on certain groups of refugees).

118. *See 1951 Convention*, *supra* note 64, art. 17 (giving refugees the right to work in contracting states).

119. Charlotte Edmond, *84% of Refugees Live in Developing Countries*, World Econ. F. (June 20, 2017), http://www.weforum.org/agenda/2017/06/eighty-four-percent-of-refugees-live-in-developing-countries/.

the refugee and asylum processes, this Note proposes that the UNHCR be the central authority.

The benefits of centralized organization are particularly helpful within the refugee context. Though scholars in organizational economics and political science have long debated the trade-offs between centralization and decentralization,[120] many view centralization as advantageous for careful planning and coordination,[121] and standardization.[122] In the milieu of refugee law and its intersection with environmental issues, the advantages of centralization are needed.

As others have argued, sustainable planning is key to preventing environmental degradation from refugee influxes.[123] Within the literature on organization and bureaucracy, there is a general consensus that decentralized systems are more attuned to local conditions, but competing arguments suggest that centralized systems often promote organizational effectiveness through prompt access to critical information and broader knowledge of situations in their entirety.[124] This difference in advantages is particularly important in the refugee context, where circumstances quickly change[125] and challenges transgress borders, diminishing the value of purely local information. A central agency would be better equipped to erect a comprehensive plan, and also receive input from local actors. Moreover, the widely accepted "social loafing" theory suggests that shared responsibility structures result in less effort by all parties.[126] Thus, a single entity taking full responsibility for tasks, such as registering refugees, could assure that fewer slip through the cracks. This entity could then gather better information, which would lead to more prudent planning, and thus better environmental conservation.

Social loafing also contributes to the misallocation of resources in the implementation of refugee law. As mentioned in Part II, States Parties seek to avoid their duties under the 1951 Convention and, in practice, the result is a system where states with fewer financial and environmental resources receive the largest influxes of refugees and asylum-seekers.[127] Since a central agency could better account for and control resources throughout its subsidiaries, it would then allocate resources more effectively. Alternately, should it have authority to do so, a central agency could also send refugees and asylum-seekers to territories that would support them ecologically.

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120. *See generally* George P. Huber et al., *Developing More Encompassing Theories About Organizations: The Centralization-Effectiveness Relationship as an Example*, 1 ORG. SCI. 11 (1990) (proposing an empirical test to solve the disagreement and noting the many advantages of centralization); Louis Wirth, *Localism, Regionalism, and Centralization*, 42 AM. J. SOC. 493 (1937) (summarizing the debate over centralization and decentralization).

121. *See, e.g.*, *id.*, at 14 (arguing that "a higher degree of centralization may lead to a higher level of effectiveness in large organizations").

122. Timothy Besley & Stephen Coate, *Centralized Versus Decentralized Provision of Local Public Goods: A Political Economy Approach*, 87 J. PUB. ECON. 2611, 2628 (2003) (suggesting that a centralized system of public spending is always preferred with the presence of spillovers and given that the central governments do not have to choose uniform levels of public spending).

123. *See supra* Part I, Section C (discussing proposed sustainable design elements in refugee settlements).

124. *See, e.g.*, Huber et al., *supra* note 119, at 14 (calling into question the view that centralization is ineffective in large organizations).

125. *See id.* at 13–14 (discussing the effectiveness of centralization in "turbulent" conditions).

126. *See generally* Bibb Latané et al., *Many Hands Make Light the Work: The Causes and Consequences of Social Loafing*, 37 J. PERSONALITY & SOC. PSYCHOL. 822 (1979).

127. *See supra* Part II, Section B.

Centralization would thus alleviate the strain on environments that are already nearing their breaking points and reduce refugee desperation and poverty, which consequently would lessen refugees' misuse of natural resources.

Moreover, centralization would decrease state variability in both refugee and environmental policy. However, simply encouraging states to oblige by their 1951 Convention and 1967 Protocol duties would not suffice to implement uniform refugee law. First, not all states are parties. Second, due to factors like social loafing, it is unlikely that all states will cooperate. Finally, guidelines regarding treatment of refugees and asylum-seekers within a state are ambiguous.[128] This last point also intersects with states' differing resources and commitments to environmental sustainability. Since states have leeway on the handling of influxes of migrants and have little oversight, the degree to which their plans protect the environment can diverge wildly. Standardization to help implement comprehensive environmental goals, such as those proposed by UNHCR in the 1990s.[129] As standardization is a key advantage of a centrally organized system, it would therefore be constructive to reform refugee law around that principle.

There are more reasons to prefer centralization as a means of reforming refugee law in order to avoid environmental damage. For instance, Alessandra Arcuri and Giuseppe Dari-Mattiacci have found that, compared to centralization, decentralization leads to more frequent errors at a more local scale.[130] However, as explained in Part I, a conglomeration of local-level problems often becomes global in the environmental context.[131] Therefore, one of decentralization's great advantages (less opportunity for large, global errors) does not apply to this case, tipping the scales even more in favor of centralization. Therefore, while decentralization may be a preferable option in other circumstances, centralizing the refugee legal structure would provide specific environmental advantages that simply strengthening states' domestic refugee policies would not.

Of course, increasing enforceability is vital to realizing the benefits of centralization. Ideally, the refugee system would grant UNHCR the authority to enforce its expanded powers. UNHCR would require such authority to shift resources and refugees, as well as to assure compliance with the comprehensive sustainability plans that it creates. Moreover, expanding UNCHR authority to resettle refugees directly also cuts the time that refugees spend awaiting visa decisions from referral countries and thus limits a temporal problem that aggravates environmental damage. Giving UNHCR the power to hold nations to their refugee admissions promises decreases the amount of refugees who are trapped in camps pending resettlement.

The case of President Donald Trump in the United States illustrates this latter point. Though U.S. President Barack Obama had vowed to admit 110,000 refugees in the 2017 fiscal year,[132] President Trump reduced that number by half among other

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128. *See supra* Part II, Section B.

129. *See* UNHCR Environmental Guidelines, *supra* note 15.

130. Alessandra Arcuri & Giuseppe Dari-Mattiacci, *Centralization Versus Decentralization as a Risk-Return Trade-Off*, 53 J. L. & ECON. 359, 360 (2010).

131. *See supra* Part I, Section A.

132. Alicia Parlapiano, Haeyoun Park & Sergio Peçanha, *How Trump's Executive Order Will Affect the U.S. Refugee Program*, N.Y. TIMES (Jan. 27, 2017), https://www.nytimes.com/interactive/2017/01/25/us/politics/trump-refugee-plan.html.

travel restrictions, leaving thousands of refugees stranded in limbo.[133] While United States federal courts struck down several parts of the Executive Order dictating these limits,[134] the President's power to lower the refugee ceiling—even to zero if he so chooses—is well within the bounds of his authority.[135] This incident demonstrates the extent to which fluctuations in domestic politics create uncertainty in the implementation of unenforceable agreements. Moreover, these fluctuations create inefficiency and exacerbate environmental damage as well. Based on the United States' earlier pledge to set a higher refugee ceiling, UNHCR referred many refugees to the country whose application process takes eighteen to twenty-four months.[136] Many of those referred by UNHCR during President Obama's tenure must now be re-referred to other nations, who process referrals at similar rates.[137] Thus, due to a reversal in U.S. domestic policy, refugees may now wait as many as four years for resettlement—if not longer—during which time resources become more and more strained and further environmental degradation occurs. Therefore, even if nations volunteer to make their domestic refugee programs more robust, these policies can do more harm than good in the absence of enforceability.

Consequently, granting UNHCR central power, and the authority to enforce it, would allow the agency to alleviate many drivers of environmental degradation. UNHCR could better track the size and scope of refugee movements and allocate resources accordingly to reduce asylum-seekers' and refugees' struggle to survive. Moreover, UNHCR could use this information and implement it in comprehensive sustainability plans, as other scholars and agencies have long suggested.[138] Finally, with the ability to send refugees to other states, UNHCR could lower the long periods in which refugees remain in limbo, which exacerbate resource strains and lead to environmental damage. Further, this would likely lessen the impact on already vulnerable territories. Thus, such a restructuring of the refugee legal scheme would reduce refugee poverty, desperation to survive, and waiting times, and in turn, reduce rates of environmental degradation.

However, as previously noted, it is unlikely in the current political climate that states would agree to such an arrangement. With this in mind, this Note proposes some ambitious but concrete methods to implement these changes in the next section, as well as a less aggressive option to increase the degree of centralization and enforcement without directly raising legal standards or granting UNHCR authority over states.

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133. Louisa Loveluck & Zakaria Zakaria, *Trump's Ban and Judge's Stay Leave Syrian Refugee Families Living in Fear and Limbo*, WASH. POST (Feb. 5, 2017), https://www.washingtonpost.com/world/trumps-ban-judges-stay-leaves-syrian-refugee-families-living-in-fear-and-limbo/2017/02/04/938c679a-ea56-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.38754f430d63.

134. Deborah Amos, *For Refugees and Advocates, Trump Immigration Order Stay Leads to Disarray*, NAT'L PUB. RADIO (Feb. 13, 2017, 4:55 PM), http://www.npr.org/sections/parallels/2017/02/13/514966051/for-refugees-and-advocates-trump-immigration-order-stay-leads-to-disarray.

135. *See* 8 U.S.C. § 1157 (a)(2) (2005) (describing the president's power to determine the number of refugees admitted in a fiscal year).

136. Jens Manuel Krogstad & Jynnah Radford, *Key Facts about Refugees to the U.S.*, PEW RES. CTR. (Jan. 30, 2017), http://www.pewresearch.org/fact-tank/2017/01/30/key-facts-about-refugees-to-the-u-s/

137. *See generally* Andrew Caballero-Reynolds, *Trump Administration to Drop Refugee Cap to 45,000, Lowest in Years*, NAT'L PUB. RADIO (Sept. 27, 2017 5:00 PM), http://www.npr.org/2017/09/27/554046980/trump-administration-to-drop-refugee-cap-to-45-000-lowest-in-years.

138. *See, e.g.*, discussion *supra* Part I, Section C.

B. *Specific Solutions*

Various options exist to increase centralization and enforceability of refugee law, ranging in their level of ambition. This Note suggests three specific steps to strengthen UNHCR's authority that are already within the law: (i) fixing floors on the numbers of refugees and asylum-seekers that States Parties can resettle annually; (ii) streamlining the resettlement application to include only a UNHCR evaluation; and (iii) expanding UNHCR field offices to help accomplish these tasks, among others. However, these options may strike many as unrealistic. Thus, though environmental degradation stems from issues within the refugee legal framework, solutions outside the law may offer a more immediately feasible answer. Specifically, the creation of a comprehensive asylum-seeker and environmental resource database, maintained by UNHCR, would increase the degree of centralization and enforcement within refugee law without posing significant political obstacles. This Part briefly expounds on each of these proposed changes. Part VI then tackles concerns about their workability.

Should states be unwilling to adopt stronger legal obligations, a UNHCR-operated electronic global refugee database may indirectly improve centralization and enforceability. While UNHCR already maintains a public database detailing asylum-seeker statistics by nation,[139] this Note proposes creating a private counterpart database available only to UNHCR officials and relevant state government offices, such as the U.S. Department of Homeland Security.[140] Moreover, this Note suggests making this database particularly robust. For instance, while the current UNHCR database simply tracks demographics,[141] its private counterpart should include information on individual asylum-seekers and refugees, such as the nature of their claim, their current location, and findings from any relevant background or security checks. In addition to storing these case files, the database should also consolidate information on states' economic and environmental capacities to host refugees, such as findings by The Lebanon Report cited in Part I.[142] Finally, the database should track funds and other resources sent to host states and log their use.

This arrangement begs the obvious question of who would bear responsibility for collecting and compiling this information. While UNHCR should maintain the database and assume leadership on all its components, soliciting participation from states may increase the database's legitimacy and utilization in the resettlement process. This proposal, in turn, sparks doubts on the level of involvement and accuracy of data from states such as Turkey and China, who may be reticent to allow for an open flow of information. However, solutions exist that may mitigate this problem. First, concurrent data reports by NGOs and UNHCR itself may help verify state-provided information and put pressure on states to be truthful. Second, since UNHCR would ideally use this database to direct resources to states with higher refugee populations, nations like Turkey and perhaps even China may have an incentive to register asylum-seekers and refugees in order to receive more funding. Finally, as the system gains

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139. *Population Statistics*, UNHCR, http://popstats.unhcr.org/en/asylum_seekers (last visited Nov. 30, 2017).

140. Since many non-party states host large refugee populations, membership in the database should not require ratification of the 1951 Convention and 1967 Protocol for maximum efficacy.

141. *Population Statistics*, *supra* note 139.

142. *The Lebanon Report*, *supra* note 9.

momentum through the efforts of UNHCR, NGOs, and refugee-friendly states, norms may emerge that encourage honest and open reporting.

If successful, this database would solve many of the centralization and enforceability problems within refugee law that lead to environmental degradation. In terms of centralization, the database would allow UNHCR and other officials to track asylum-seekers' and refugees' current and planned locations. Thus, UNHCR and state agencies could better plan for population upticks that may otherwise tax natural resources, particularly since the database would also contain environmental metrics. Moreover, the database would give UNHCR a central location to monitor where both natural and monetary resources are being sent and how they are being spent. As a result, UNHCR and states would be able to not only increase accountability, but also to better coordinate and direct resources where they are needed, helping stave off the desperation that leads to environmental destruction.

Additionally, in the absence of formal enforcement mechanisms, a private database could create stronger norms for the fair treatment of refugees and asylum-seekers, and make breaches of those norms more visible. While the database access would be restricted to UNHCR and participating government officials, it would nevertheless add transparency to an often-opaque system. This transparency would, in turn, prevent refugee-induced environmental degradation in several ways. First, with their commitments open and recorded in a central location, states may be more likely to keep their promises, thus bringing more certainty to a chaotic system. Consequently, this certainty would improve environmental planning and also reduce refugee time-frame conflicts that worsen inefficient natural resource use. Moreover, greater transparency may also pressure states to admit more refugees, though it could also have the opposite effect by fostering low standards as a norm.

Second, by openly monitoring funds and how they are being used, this database could prevent corrupt or wasteful spending such as that of the Greek refugee camps.[143] Additionally, states that are otherwise reluctant to participate in the refugee process may be more willing to contribute funds once they are able to track expenditures. Thus, there would be more resources available to lessen the refugee desperation and poverty that leads to environmental damage. Finally, an open flow of data might also decrease resettlement wait times by providing more information on prior security screenings and similar findings. Though states may still choose to conduct their own reviews, better incorporation of information from earlier checks may help verify evidence, trace an individual's history, and otherwise expedite investigation. Accordingly, this added speed would reduce the strain on environments caused by protracted limbos as described earlier in the Note.

Should this system gain momentum, the three changes to the structure of refugee law suggested above may slowly become more realistic as well. First, this Note recommends states sign a new refugee agreement, in which each party determines the minimum number of refugees and asylum-seekers it can promise to resettle annually, and pledges to maintain or increase that goal year-to-year. This set-up mimics the logic of the Paris Agreement on Climate Change, which requires that States Parties choose "ambitious" contributions to the fight against climate change that must "[progress]

143. *See generally* David Howden & Apostilis Fotiadas, *Where did the money go? How Greece fumbled the refugee crisis*, GUARDIAN, (Mar. 9, 2017, 1:00 PM), https://www.theguardian.com/world/2017/mar/09/how-greece-fumbled-refugee-crisis.

over time."[144] Accordingly, nations retain autonomy over their own goals but face international pressure to commit and expand them. Though some states may not reach their minimum bar every year depending on the number of individuals who need resettlement, committing to an ambitious floor would allow UNHCR to accurately choose resettlement destinations for a larger number of migrants and thus limit the time that refugees spend in camps with few resources. This point is especially true in combination with this Note's next proposal, which would give UNHCR full control over where to resettle refugees. By limiting refugee wait times and alleviating refugee poverty, this proposed agreement would also limit environmental degradation.

Second, this Note suggests limiting the refugee[145] resettlement process to include only one round of reviews to be completed by UNHCR. Currently, UNHCR performs screening and interviews examining refugee eligibility, security, and credibility to determine the most vulnerable candidates for resettlement referral.[146] However, resettling nations, such as the United States, often conduct their own screening, in addition to other medical checks and cultural education requirements.[147] While some medical checks and cultural programs could remain in place, repeating the entire process doubles the amount of time refugees' spend in limbo,[148] and also wastes organizational resources that could instead be used to shelter, feed, and clothe refugees, thereby lessening their struggle to survive. Thus, streamlining the process to include only one application round would reduce several drivers of environmental degradation: Poverty, desperation, and timeframe issues. However, as mentioned in Section A, having a specialized central agency make these determinations is more consistent and reliable than deferring to state processes. Thus, UNHCR should complete refugee screening, with input from states on the structure and substance of the application process, as discussed in Part IV, *infra*.

Finally, to better accomplish its task, as well as to house and register more refugees and asylum-seekers, UNHCR should expand its field offices. Since UNHCR already operates in 130 countries,[149] this task should not be administratively difficult to accomplish. Despite the already large network of UNHCR offices, strategically opening new offices in large nations[150] and granting them additional resources would

144. Paris Agreement to the United Nations Framework Convention on Climate Change, art. 3, *adopted on* Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

145. Since asylum-seekers generally apply directly to the first nation they reach, this section is not relevant to them. However, since many environmental degradation arguments for refugees hold true for asylum-seekers as well, another solution would be to write a protocol establishing consistent guidelines for processing asylum claims.

146. *See generally* Procedural Standards, *supra* note 82.

147. U.S. Citizenship and Immigration Services, *Refugee Processing and Security Screening* (Dec. 3, 2015). https://www.uscis.gov/refugeescreening.

148. *See* Hayeoun Park & Larry Buchanan. *Refugees Entering the U.S. Already Face a Rigorous Vetting Process.* N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/interactive/2017/01/29/us/refugee-vetting-process.html (noting that the process can take up to two years).

149. UNHCR, *Where We Work* (2017), http://www.unhcr.org/en-us/where-we-work.html (last visited Dec. 1, 2017).

150. The United States, for instance, only has two UNHCR offices: one in Washington, D.C., and one in New York. UNHCR, *United States of America*, http://www.unhcr.org/united-states-of-america.html (last visited May 5, 2017). Neither of these locations receives the flux of asylum-seekers that, for example, United States territories closer to its southern border do. Jie Zong & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POLICY INST. (June 7, 2017), https://www.migrationpolicy.org/article/refugees-

significantly aid UNHCR in reducing refugee desperation and poverty and in making refugee status decisions more quickly. Growing UNHCR's network would thus eliminate several causes of refugee-wrought environmental damage, as discussed in Part I.

Each of these proposals carries with it concerns about national sovereignty, national security, and funding. The next Part discusses and resolves these challenges.

IV. CRITICISMS AND LIMITATIONS

A. *National Sovereignty*

One of the most salient concerns in affording UNHCR greater power over states is that it infringes on national sovereignty. Many may fear that forcing states to admit certain individuals violates national autonomy, particularly, the rights of citizens in those states. However, in signing agreements such as the Universal Declaration of Human Rights, which recognizes the right to seek asylum, and the 1951 Convention, states have already waived some level of autonomy in the interest of protecting refugee populations.[151] Inherent in these foundational documents of international law is an implicit agreement that human rights weigh heavily against national sovereignty.[152]

Beyond the human rights context, many international treaties and legal bodies require states to yield some of their individual autonomy to receive some benefit. For example, to join the World Trade Organization (WTO), member states must abide by that organization's rules and regulations on international trade.[153] Such rules include applying the same conditions to trade with all WTO nations and publishing domestic trade regulations transparently.[154] Furthermore, the WTO often strikes down domestic policies it deems unsuitable, such as taxes and subsidies.[155] Though these regulations ostensibly violate national sovereignty, states waive their sovereignty to receive the trade benefits under the WTO regime.[156] Similarly, in the case of refugee law, states could waive some national sovereignty in order to accept more refugees and give UNHCR greater power. In return for accepting more refugees, they could receive benefits such as membership to elite trading or political circles[157] or simply saving

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and-asylees-united-states.

151. *See* G.A. Res. 217 (III)A, Universal Declaration of Human Rights (Dec. 10, 1948) (stating that governments commit themselves to the recognition and observance of human right).

152. AMY ELIZABETH ANSELL, RACE AND ETHNICITY: THE KEY CONCEPTS 35–36 (2013).

153. *Memberships, Alliances, and Bureaucracy*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (last visited Oct. 4, 2017).

154. *Principles of the Trading System*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#seebox (last visited Oct. 4, 2017).

155. *See, e.g.*, Dispute Settlement Board, *Canada—Tax Exemptions and Reductions for Wine and Beer*, WTO Doc. WT/DS354/2 (settled Dec. 17, 2008) (demonstrating how the WTO's dispute process limits a nation's ability to subsidize).

156. *See* Daniel J. Ikenson & Robert E. Lighthizer, *Is the WTO Dispute Settlement System Fair?*, COUNCIL ON FOREIGN REL., (Feb. 26, 2007), https://www.cfr.org/article/wto-dispute-settlement-system-fair (debating the merits of the mechanism for adjudicating trade agreements).

157. The case of Turkey during the Syrian crisis illustrates the importance of this incentive. During the crisis, Turkey used its contribution to housing refugees as a bargaining chip for negotiations to join the European Union. Mark Lowen, *Turkey Uses Refugee Crisis to Up the Ante*, BBC NEWS (Feb. 8, 2016), http://www.bbc.com/news/world-europe-35521242.

government money that would otherwise be spent conducting refugee reviews. This Note does not have a specific solution to offer, but since such arrangements have been accomplished in other sectors, there is no doubt that a suitable exchange of benefits could incent parties to accede to an agreement.

Moreover, it is important to note that states would not be entirely excluded from the refugee determination process, nor would they be entirely vulnerable to the whims of UNHCR. For instance, UNHCR's refugee eligibility and security screens could be updated with states' input to create a universally-satisfying review process. Also, if states harbor concern over a particular individual's admission or find they must lower their refugee floor for unexpected reasons, a legal appeals branch or veto system could be created for states to express any disagreements. Thus, while UNHCR would remain the primary authority, states would still retain a voice in the refugee resettlement process.

Notably, while strengthening legal standards to grant UNHCR authority may create a national sovereignty conflict, merely implementing a global refugee database would not give rise to a similar clash. Under the latter system, states would not yield any formal power and would retain control over most aspects of refugee admission. Any national sovereignty issues that arise may stem from conflicts over the right to collect and distribute information on a state's population of asylum seekers and a state's natural resources. However, many NGOs and rival governments[158] already publicly share this type of data, so this conflict should be minor.

B. *National Security*

In addition to national sovereignty, some may feel concern that giving UNHCR the reins to screen refugees and decide their resettlement locations would loosen domestic security standards. However, as stated above, states can participate in the creation of an international security check and also appeal the admission of individuals they view as particularly dangerous. Moreover, statistics show that refugees participate in terrorism and other violent crime at a lower-than-average rate.[159] For instance, the Cato Institute found that "[o]f the 3,252,493 refugees admitted from 1975 to the end of 2015, [twenty] were terrorists, which amounted to 0.00062 percent of the total. In other words, one terrorist entered as a refugee for every 162,625 refugees who were not terrorists."[160] While some may argue that this statistic only proves the success of U.S. security standards, during the same time period, thirty-four tourists and fifty-four lawful permanent residents were arrested for terrorism.[161] Moreover, it is important to note that the stringency of today's refugee screening only came about after The Refugee Act of 1980[162] and other changes post 9/11.[163] However, these statistics show

158. *See, e.g.*, *The World Factbook*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/ (last visited Aug. 7, 2017) (providing public access to data relating to information on a state's asylum-seeker population and natural resources).

159. *See* Alex Nowrasteh. *Terrorism and Immigration: A Risk Analysis*. CATO INST. Policy Analysis No. 798, Sept. 13, 2016, at 13 (comparing data on crime and refugees).

160. *Id.*

161. *Id.* at 4.

162. *Id.* at 13.

163. *See id.* (discussing that "[m]any of the refugees arrested after 9/11 were admitted as children, and

that even prior to heavier regulation, refugee participation in terrorism remained low. Additionally, many scholars and refugee advocates argue that *denying* refugees is more harmful to national security, since it leaves many desperate, bitter, and thus, vulnerable to radicalization.[164] Such potentially radicalized individuals, in turn, target the states that refused them.[165] Though many conservatives reject this view,[166] a system in which states could effectively resettle more refugees may nevertheless improve national security, especially considering states' power to shape UNHCR's security screening process.

Should states reject streamlining and retain their own screening processes, a database storing sensitive information on hundreds of thousands of individuals may also pose security concerns. However, this issue should not dissuade states from pursuing this option for several reasons. First, and perhaps a bit cynically, though any database breach may compromise individual asylum-seekers, it is unlikely that any information vital to national security or a state's citizens would be affected. Second, many similar databases exist in medicine[167] and banking.[168] However, these databases are often heavily secured,[169] and the benefits from installing such registries outweigh the risk of leaking confidential information. This Note argues that the same protections for individuals recognized as refugees applies in this case.

C. *Funding*

Finally, an important question is where UNHCR would acquire the funding to expand its duties or alternatively, run a large database. With its 2016 budget already

in some cases there is doubt over whether their attacks even qualify as terrorism."

164. *See, e.g.*, Josh Hampson, *We risk more in not accepting Syrian refugees into the U.S.* HILL (Oct. 29, 2015), http://thehill.com/blogs/congress-blog/foreign-policy/258440-we-risk-more-in-not-accepting-syrian-refugees-into-the-us ("As the conflict in Syria rages on, refugees would be trapped in countries that they are already hostile towards. And if the host countries are also suspicious of the refugees, this will create further alienation, maximizing the opportunity for radicalization."); Anne Speckhard, *How Dragging Our Feet on Refugees Creates More Terrorists*, N.Y. TIMES (Sept. 29, 2015). https://www.nytimes.com/2015/09/29 /opinion/how-dragging-our-feet-on-refugees-creates-more-terrorists.html ("Experience from many conflict zones teaches us that the longer these refugees are left to languish in despair in camps the more prone they become to radicalization.").

165. *See* Hampson, *supra* note 164 (citing Daniel Milton, Megan Spencer & Michael Findley, *Radicalism of the Hopeless: Refugee Flows and Transnational Terrorism*, 39 INT'L INTERACTIONS 621, 633 (2013) (discussing how denying refugees may leave them in countries that had historic rivalries with their countries of origin, making them vulnerable to extremism).

166. *See* Eric Bradner and Ted Barrett, Republicans to Obama: Keep Syrian Refugees Out, CNN (Nov. 16, 2015), http://www.cnn.com/2015/11/16/politics/republicans-syrian-refugees-2016-elections-obama/index.html (stating that Republicans are stressing the security concerns posed by the potential influx of refugees from war-torn countries, specifically Syria).

167. *See, e.g.*, Ley que Crea el Registro Nacional de Historias Clínicas Electrónicas, Ley N° 30024 (2013), http://www.redipd.es/legislacion/common/legislacion/peru/Ley_30024.pdf (creating a National Electronic Health Registry in Peru).

168. For example, databases of International Bank Account Numbers (IBAN) are widely used in banking transactions. *Whats the Difference Between an IBAN and a Swift Code?*, INVESTOPEDIA, http://www.investopedia.com/ask/answers/100214/whats-difference-between-iban-and-swift-code.asp (last visited Oct. 6, 2017).

169. *See, e.g.*, SANS INSTITUTE, UNDERSTANDING SECURITY REGULATIONS IN THE FINANCIAL SERVICES INDUSTRY (June 2016), https://www.sans.org/reading-room/whitepapers/analyst/understanding-security-regulations-financial-services-industry-37027 for a discussion of mandated database safeguards for companies providing financial services in the United States.

at $6.54 billion,[170] UNHCR has substantial assets to perform its duties. However, additional funding can be found in the money that governments will save by shifting some duties to UNHCR. Examples of these duties include registering, temporarily housing, and determining eligibility for refugees. While states would still have to expend funds for final refugee resettlement within their territories, shifting responsibilities would alleviate a heavy administrative burden. For instance, to process refugee applications, the United States relies on the Department of State, Department of Homeland Security, and the Department of Health and Human Services, and it also funds several offices around the world.[171] Moreover, should UNCHR's electronic database be expanded, existing funds would be better directed and monitored, preserving additional resources that would otherwise be wasted. Thus, states could commit some of the money they save to help fund UNHCR's expanded role.

CONCLUSION

Though often promoted from a human rights perspective, refugee law reform is also critical to protecting the environment. Increasing aspects of centralization and enforceability in the system would address many causes of environmental degradation from refugees and asylum-seekers, such as desperation to survive, poverty, and misaligned time scales. A global refugee and environmental resource database can accomplish this goal without creating significant political obstacles. Moreover, for solutions that are currently less feasible, traction from the database as well as benefits enticing states to participate and granting states the opportunity to be heard might mitigate concerns over workability. Similar treaties and organizations have been established within international trade and environmental law, and accordingly, such frameworks can be mimicked in the refugee legal context.

As the number of displaced persons in the world increases, resultant environmental degradation increases as well. Yet, as the literature has established, when environmental damage worsens, more and more people flee their homes in hopes of escaping natural disasters and resource deprivation.[172] With this vicious cycle revolving more and more rapidly and snowballing in size, stopping the wheel is critical. Strengthening the international framework of refugee law is a drastic, but necessary step, to avoid the environmental consequences that are far more severe.

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170. *See History of UNHCR*, *supra* note 76.

171. BUREAU OF POPULATION, REFUGEES, AND MIGRATION, FACT SHEET: U.S. REFUGEE ADMISSIONS PROGRAM FAQS (2017).

172. *See* INTERNATIONAL ORGANIZATION FOR MIGRATION, ENVIRONMENT AND CLIMATE CHANGE: ASSESSING THE EVIDENCE 43 (2009) (stating that the impact of environmental change has been "predicted to lead to the large-scale displacement of people[—]both internally and internationally[—]with estimates of some 200 million to 1 billion migrants resulting from climate change alone, by 2050.").

Double Sovereignty in Europe? A Critique of Habermas's Defense of the Nation-State

VLAD PERJU*

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INTRODUCTION

European integration is the French Revolution of our time. Just as the French Revolution set the agenda for modern political thought by bringing the people as the constitution-founding subject onto the historical stage, so now European supranational integration transnationalizes democracy and recasts the legitimacy conditions of political action. In his recent work,[1] Jürgen Habermas has put forth one

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1. *See generally* JÜRGEN HABERMAS, THE CRISIS OF THE EUROPEAN UNION: A RESPONSE (2012) [hereinafter HABERMAS, CRISIS OF EU]; JÜRGEN HABERMAS, THE LURE OF TECHNOCRACY (Ciaran Cro-

of the most elaborate and influential theories of supranational constituent power.[2] Habermas argues that the great "innovation" of European integration is the "complementary dependence and interconnection"[3] between the national and the supranational levels of government. Nation-states survive the process of supranational integration and coexist alongside the Union their citizens have created.[4]

According to this conception, the coexistence of member nation-states and the European Union (EU) is reflected in a fundamental split in the identity of the sovereign. Individuals are and see themselves both as peoples of nation-states and as citizens of the EU.[5] In the first capacity, they are committed to their national polities as "guarantors of the already achieved level of justice and freedom" against intrusions and encroachments by an unfamiliar supranational polity.[6] As EU citizens, theirs is a project of transnationalizing democracy as a way of reconnecting the fragmented politics of nation-states with the pressures of an increasingly interdependent world society.[7] Because neither identity is transient nor subordinate to the other, transnationalized democracy is not democracy that has transcended, in the sense of overcoming, the nation-state. Rather, Habermas's dual sovereignty thesis theorizes the national and supranational levels as co-original and co-determinate.[8] A choice between them is neither necessary nor possible.

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nin trans., 2015) (2013) [hereinafter HABERMAS, TECHNOCRACY]; Jürgen Habermas, *Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible*, 21 EUR. L.J. 546 (2015) [hereinafter Habermas, *Democracy in Europe*].

2. Scholars have long called for such an account "understood in the vocabulary of normative political theory." Joseph H.H. Weiler, *Epilogue: The European Court of Justice: Beyond 'Beyond' Doctrine' or the Legitimacy Crisis of European Constitutionalism*, *in* THE EUROPEAN COURTS AND NATIONAL COURTS - DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 365–66 (Anne-Marie Slaughter et al. eds., 1998).

3. HABERMAS, CRISIS OF EU, *supra* note 1, at 27. This approach has been influential. *See, e.g.*, Hauke Brunkhorst, *Europe in Crisis - An Evolutional Genealogy*, *in* LAW AND THE FORMATION OF MODERN EUROPE: PERSPECTIVES FROM THE HISTORICAL SOCIOLOGY OF LAW 308 (Mikael R. Madsen & Chris Thornhill eds., 2014) (discussing the concept of evolution in a societal and constitutional context and relating that framework to the dependence and interconnection between the national and supranational levels of government within the EU).

4. *See* Habermas, *Democracy in Europe*, *supra* note 1, at 556 (analyzing the tension between the supranational polity and its member states, and the gap in democratic legitimization of the EU).

5. *See* HABERMAS, CRISIS OF EU, *supra* note 1, at 35. *See also* Philip Allott, *Epilogue: Europe and the Dream of Reason*, *in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 202, 225 (Joseph H.H. Weiler & Marlene Wind eds., 2003) (mentioning "one person" in the metaphysics of Europe's self-constituting).

6. HABERMAS, TECHNOCRACY, *supra* note 1, at 40.

7. As Habermas puts it, "[t]he globalization of commerce and communication, of economic production and finance, of the spread of technology and weapons, and above all of ecological and military risks, poses problems that can no longer be solved within the framework of nation-states or by the traditional methods of agreement between sovereign states." JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 106 (Ciaran P. Cronin & Pablo De Greiff eds., 1998) [hereinafter HABERMAS, THE INCLUSION OF THE OTHER]. This is a plausible enumeration of the social conditions that might lead to something akin to a "type-switch" in political organization. *See* GIANFRANCO POGGI, THE DEVELOPMENT OF THE MODERN STATE: A SOCIOLOGICAL INTRODUCTION 60 (1978) (studying "type-switch" between different types of states). Habermas is, of course, well aware that globalization does not fit as justification of the early periods of integration, but he argues that "neither of the two original motives for integration [—preventing war and containing Germany—are] a sufficient justification for pushing the European project any further." Jürgen Habermas, *Why Europe Needs a Constitution*, 11 NEW LEFT REV. 5, 7 (2001) [hereinafter Habermas, *Constitution*].

8. A rational reconstruction whereby EU citizens are part of the constituent power already challenges,

My aim here is to challenge, at the meta-level level that dual sovereignty occupies, its specific terms of justifying constituent authority. I argue that it would be irrational for individuals in their supranational capacity to accept the constituent process in the terms laid out by the dual sovereignty thesis. While Habermas deserves credit for reaffirming the importance of the concept of constituent power,[9] and for introducing a distinct account of *supranational* constituent power against the prevailing scholarly view that questions the utility and normative appeal of such an account in the European context,[10] the dual sovereignty thesis does not withstand close scrutiny. This thesis builds on an asymmetry between the national and the supranational identities that violates its own normative premises, specifically the principle that future citizens of the Union and current citizens of the nation-states are equal subjects in their dual role. By assuming that constitutional states are nation-states, the account under review undercuts what Habermas himself identifies as the urgent task of using the republican legacy of nation-states to devise mechanisms of democratic will-formation at the supranational level. The implicit though unmistakable priority of the national versus the supranational perspective ends up legitimizing the myriad ways in which nation-states routinely undermine the project of European unification, in ways inconsistent with dual sovereignty's own normative premises. Finally, the split political identity itself becomes a source of fragmentation and dissonance that subverts the transnationalization of democracy.

Beyond exposing tensions internal to the structure of the dual sovereignty thesis, of particular interest is the claim that this account is reflected in the legal order of the constituted European Union. Habermas advises that "we need only to draw the correct conclusions from the unprecedented development of European law over the

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or, depending on one's perspective, advances, traditional approaches. *See* Joseph H.H. Weiler, *In Defence of the Status Quo: Europe's Constitutional Sonderweg, in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 7, 9 (Joseph H.H. Weiler & Marlene Wind eds., 2003) ("Europe's constitutional architecture has never been validated by a process of constitutional adoption by a European constitutional demos and, hence, as a matter of both normative political principles and empirical social observation the European constitutional discipline does not enjoy the same kind of authority as may be found in federal states where federalism is rooted in a classic constitutional order."). Habermas seems to agree with the latter part of the statement regarding the difference between the European construct and typical federalism, including, prospectively, the imperative of avoiding "normative subordination of states to the federal level." HABERMAS, TECHNOCRACY, *supra* note 1, at 37. However, his dual sovereignty thesis rejects the argument about the absence of a European citizenry (and thus a rationally reconstructed demos) as co-original with the peoples of the nation-states. *See* HABERMAS, CRISIS OF EU, *supra* note 1, at 38 (claiming "[t]he division of the constituent power divides sovereignty at the origin of a political community which is going to be constituted. . . . ").

9. The concept of constituent power, not only its contours but its very usefulness, has been contested as unnecessary to legality-centered approaches. *See, e.g.*, David Dyzenhaus, *Constitutionalism in an Old Key: Legality and Constituent Power*, 1 GLOBAL CONST. 229, 229 (2012) (arguing against the analysis of constituent power in legal and constitutional theory). For helpful recent studies of constituent power, *see generally* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM (Martin Loughlin & Neil Walker eds., 2008).

10. Chris Thornhill, *Contemporary Constitutionalism and the Dialectic of Constituent Power*, 1 GLOBAL CONST. 369, 373 (2012) (noting that "the absence of a traditional constituent power has haunted research on the public legal order of the EU from its inception until today."). *See also* Nico Krisch, *Pouvoir Constituant and Pouvoir Irritant in the Postnational Order*, 14 INT'L J. CONST. L. (I-CON) 657 (noting that international responses to the domestic challenge of theorizing about constituent power have failed to advance visions of a regional or global constituent power that, in the particular European context, might be normatively appealing but would not find support in societal and political practices).

past half-century."[11] While philosophy's turn to law is compelling as ever[12], the question remains which specific interpretation of European constitutionalism is at work here. Habermas's account places municipal and supranational legal orders alongside one another in a relation of heterarchical coordination that is incompatible with hierarchical subordination of (any) one order to the other. I believe that conception of European constitutionalism, while prevalent, has important limitations. The principles of European constitutionalism call for a more nuanced, and at times altogether different, interpretation of European constitutional doctrine than either the dual sovereignty thesis or related constitutional theories are able to offer. Perhaps most regrettable of all is that, having set out to reject the "hopeless alternative"[13] between nation-states and a European federation, the dual sovereignty thesis ill-serves Habermas's vision of a European Union whose peoples are the true masters of the Treaty[14] and whose supranational project answers the need for more abstract forms of social integration of the kind that the political self-constitution of 'higher freedom'[15] requires under an interdependent world society. Habermas rejects a supranational federation for lack of popular support,[16] much like Kant rejected a world state in *Perpetual Peace*.[17] But, unlike Kant's conception, which has the internal resources to overcome the shortcomings of its initial formulation,[18] Habermas's account casts in stone a state of European affairs that is, by his own account, fluid.

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11. HABERMAS, CRISIS OF EU, *supra* note 1, at x.

12. The focus on the European legal system, and especially its constitutional dimension, provides access to the structural features of European integration that the daily ebb and flow of ordinary politics oftentimes obscures. *See generally* Christian Joerges, *Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration*, 2 EUR. L.J. 105 (1996) (exploring legal analysis of European integration needed to supplement political analysis). *See also* JOHN P. MCCORMICK, WEBER, HABERMAS, AND THE TRANSFORMATIONS OF THE EUROPEAN STATE 14 (2007) ("Attention to the law has been the most effective way of grasping the several transformations of state, society, and economy in the modern epoch despite the differences among the discrete eras contained within it."). However, the prominence of the ECJ, as part of the constituted powers, has generally been seen as an obstacle for thinking about constituent power in the EU. As Chris Thornhill puts it, its version of "judicial constituent power" has "revived long-suppressed memories of deep hostility to judicial norm setting, which inhered in the origins of modern European constitution making." Chris Thornhill, *The European Constitution and the Pouvoirs Constituants: No Longer, or Never, Sui Generis?*, *in* SELF-CONSTITUTION OF EUROPEAN SOCIETY: BEYOND EU POLITICS, LAW AND GOVERNANCE 13, 14 (Jiří Přibáň ed., 2016).

13. HABERMAS, CRISIS OF EU, *supra* note 1, at ix.

14. *See generally* HABERMAS, TECHNOCRACY, *supra* note 1.

15. *See* Alexander Somek, *Constituent Power in National and Transnational Contexts*, 3 TRANSNAT'L LEGAL THEORY 31, 33 (2012) (pointing out that constituent power "emerges only in a philosophical context in which questions of legitimacy or authority are ultimately debated as matters of freedom.").

16. *See* Jürgen Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, 23 EUR. J. INT'L L. 335, 338 (2012) ("For a long time, the dense network of supranational organizations has aroused fears that the connection between civil rights and democracy assured by the nation-state is being dissolved and that the democratic sovereign is being dispossessed by executive powers operating independently at the global level.").

17. Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1795), *reprinted in* KANT: POLITICAL WRITINGS (Hans Reiss ed., H. B. Nisbet trans., 1970).

18. By this I mean that the normative principles underlining Kant's account, specifically his conception of republican constitutions, can be used to fill in the gaps of Kant's limited institutional vision for perpetual peace. *See* Vlad Perju, *Cosmopolitanism in Constitutional Law*, 35 CARDOZO L. REV. 711, 741–46 (2013) (arguing that Kant's conception of republican constitutions is used to bolster his limited institutional vision for perpetual peace).

I. DUAL SOVEREIGNTY: SPLIT POLITICAL IDENTITY

The split political identity pulls dual sovereignty in opposing directions: in the particular direction of specific nation-states and in the general direction of the regime-type (*constitutional* state) to which these nation-states belong. The question is this: How does the dual sovereignty thesis straddle this tension?

Recall that Habermas conceptualizes individuals as citizens of the already constituted nation-states and the (same) individuals as citizens of the to-be-constituted European Union as subjects that coexist within the divided identity of individual sovereigns.[19] These two roles are of equal standing and the conflicts between the identities related to each role cannot be resolved through structural rules that would prioritize one identity over the other.[20] Harmonization processes within individual identity must respect and reinforce the equality of the constituent parts, which, in Habermas's view, rules out hierarchy.[21] But, since the political and psychological foundations of democratic self-government require predictable and reliable stability, harmonization cannot result from accidental, and thus essentially fleeting, overlaps of interests; rather, it must rest on rational grounds.[22]

What, then, are the rational grounds for individuals' attachment to their nation-states? Habermas's answer carries all the baggage of the unresolved tensions of this theory of constitutional patriotism,[23] only heightened now by the more fundamental perspective from constituent authority. His answer, in a nutshell, is that nation-states

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19. Habermas, *supra* note 16, at 342–43 ("Article 1(1) of the Treaty Establishing a Constitution for Europe refers to both subjects, the 'citizens' and the 'states' of Europe. Even though this constitution drawn up by a convention in 2004 was never adopted, the Lisbon Treaty currently in effect supports the thesis that sovereignty is 'shared' between citizens and states . . . .") (citations omitted). Thus, the two subjects coexist within the divided identity of individuals who exercise their constituent power. *Id.* at 343 ("Citizens are involved on both sides within the higher-level political community — directly in their role as Union citizens, and indirectly in their role as citizens of the Member States."). This conception shares a family resemblance but is rather different from earlier theories of dual sovereignty, which became prominent in the German constitutional thought as an attempt to theorize the constitutional form of the Holy Roman Empire. Responding to that particular context, the seventeenth century conception distinguished the personal rights of the holders of sovereignty (*maiestas personalis*) from the *maiestas realis*, as the property of the whole state. The Hobbesian/Bodinian conception of sovereignty countered the dualist approaches by emphasizing the unitary nature of sovereignty. *See generally* DANIEL LEE, POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT (2016), for more on this debate.

20. *Id.*

21. Such harmonization poses difficult questions about timing, method and outcome. Habermas says little to clarify these matters other than to point out that "[f]rom the perspective of democratic theory, the agreement by the two sides to cooperate in founding a constitution opens up a *new dimension*." Habermas, *Democracy in Europe*, *supra* note 1, at 556. But, since this new dimension also does not allow for hierarchical prioritization, the conflicts between the constitutive parts and the ensuing need for harmony is simply replicated at that new dimension.

22. While this need not imply the exclusivity of rational grounds, it does mean that, as Jan-Werner Müller has put it, "cognitive elements will predominate." Jan-Werner Müller, *A General Theory of Constitutional Patriotism*, 6 INT'L J. CONST. L. (I-CON) 72, 86 (2008). Furthermore, the need to stabilize split identity requires that the cognitive elements be even more predominant in the case of dual political identity than under Habermas's general account of constitutional pluralism, which posited a unitary self.

23. Habermas formulates that account in multiple works. *See* HABERMAS, THE INCLUSION OF THE OTHER, *supra* note 7, at 105–27; Habermas, *Constitution*, *supra* note 7, at 7. *See generally* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996) [hereinafter, HABERMAS, FACTS AND NORMS].

must be seen as constitutional states, that is, statist political formations that have been the sites for unprecedented normative accomplishments formulating and securing the freedom and equality of their members and whose political practices and institutional structures reflect the entrenched lessons of processes of collective learning that have made those accomplishments possible.[24] The next sections take up the normative makeup of the constitutional state. Here I address the centrality of the regime-type to the dual sovereignty thesis.

Conceptually, it is possible to distinguish between a normative core common to all constitutional states and the particulars of one's own nation-state. But how do individuals, in their capacity as citizens of their nation-states, distinguish between the republican and the particularistic dimensions of their nation-states? Put differently, how do they have access to the normative core of the constitutional state in a way that can be separated from the particular form that normative core takes in the cultural-historical circumstances of their own nation-state? One option is to envisage citizens possessing a version of political literacy whereby they are able to reflect on the historical development of the state as a form of political organization, strive to separate historical contingency from normative principle, and place their attachment with "the"—as opposed to "their"—constitutional state. What complicates this process is the issue of identity *attachment*. Since the preservation of nation-states applies to particular, nationally-bounded political communities, individuals as members of these nation-states have, and presumably share among themselves, a sense of the worth and accomplishments of their specific political community. They can be rationally committed to the deep principles of the constitutional state, as a result of understanding that those normative accomplishments have not been preconditioned by the functional process of securing the foundations of social integration, but rather have resulted from slow and intricate learning process that have been constitutive of one among a number of evolutionarily available types of social integration. Simultaneously, however, individuals are attached to the specific embodiment of those principles in time and space, within each particular political community. As members of nation-states, individuals want to bring to the process of European integration the specific ways in which their cultures and traditions give meaning to the general principles of the constitutional state.[25] They expect European integration not to endanger their polity's ability to live by its specific interpretation, which is part of their national political identity. The dual sovereignty approach seems compatible, indeed premised, on at least a modicum of national specificity.[26]

But Habermas is understandably uneasy with some of the implications of this approach. While the tension between particularism and universalism is built-into the very concept of the nation-state[27], and to that extent unavoidable within its confines,

24. *See* HABERMAS, FACTS AND NORMS, *supra* note 23, at 290–95, for Habermas's discussion of normative models of democracy.

25. HABERMAS, CRISIS OF EU, *supra* note 1, at 42.

26. This is a compelling interpretation of Habermas's earlier account of constitutional patriotism. *See* Frank Michelman, *Morality, Identity and "Constitutional Patriotism"*, 14 RATIO JURIS 253, 253–55 (2001) (characterizing Habermas's account of constitutional patriotism in the terms of the political community's concrete—rather than abstracted—ethical character).

27. HABERMAS, *The European Nation-State: On the Past and Future of Sovereignty and Citizenship*, in HABERMAS, THE INCLUSION OF THE OTHER, *supra* note 7, at 115 ("The tension between the universalism of an egalitarian legal community and the particularism of a community united by historical destiny is built

the dual sovereignty thesis seeks not to replicate the tension into the internal dynamic of the constituent power at the European level. Individuals are committed to their nation-state *qua* constitutional state.[28] Valuing instead the concrete historical nation-state would be to confuse "the principles of the constitutional state . . . with *one* of its context-bound historical modes of interpretation."[29] One problem with particularism is that it distracts from the emphasis on individuals as ultimate sovereigns.[30] When political identity attaches itself to the preservation of the culture of a particular community, there is a risk of a shift away from the individuals to the collective of that political community. The risk is, of course, greater when social integration is premised, as it has been throughout much of German modern history, on an ethnic conception of political membership. But the risk is present even outside of that context, at least from the perspective of the individuals themselves, concerned as they must be with distinguishing the transcendent, or universalizing, core of the constitutional state from the particular cultural form around which they as citizens have clustered around their collective political community.

It is unclear if dual sovereignty has the capacity to mitigate or even to gauge this risk. The difficulty comes from the preservation of the national political culture, which is part of the territory of preserving the attachment of individuals to their nation-states. In that capacity, individuals are part of political communities that presumably are sufficiently distinct from other political communities. Their continuing attachment to their nation-states signals their justified desire to preserve that difference, as reflected in the normative accomplishments of their particular states. To be sure, people do not lose their individual identity by virtue of belonging to a particular community, or else they could never be the dual sovereigns that Habermas posits them to be. But it is nevertheless true that there can be no guarantee that the lens of constitutional culture, even in forms that are meant to be non-naturalistic, will not be totalizing. And such a lens distracts from constitutional principle. Even when forms of culture develop originally as specific interpretations within a political community of abstract principles of self-government, a focus on the particular nation-states risks obscuring their origins as derivative from those normative principles. From that point on there is only one small step across the Rubicon – itself a rather shallow river – since such identitarian versions of collective-based argument coming perilously close to nationalism. It is the specter of nationalism in its myriad pathological forms that explains Habermas's rejection of particularism. The question, however, is not if the risks posed by nationalism are real but rather if the dual sovereignty thesis has the resources to eliminate or mitigate them.

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into the very concept of the national state.").

28. *See id.* at 254 (explaining Habermas's assertion that national identity derives from the community's attachment to idealized but sometimes counterfactual notions about their constitution).

29. HABERMAS, FACTS AND NORMS, *supra* note 23, at 250 (critiquing Ernst-Wolfgang Böckenförde). This process of abstraction is similar in nature to the process that led to the formation of nation-states. *See* Habermas, *Constitution*, *supra* note 7, at 16 (arguing that the "emergence of national consciousness involved a painful process of abstraction, leading from local and dynastic identities to national and democratic ones . . . .").

30. *See* Bernard Yack, *Popular Sovereignty and Nationalism*, 29 POL. THEORY 517, 530 (2001) (contrasting popular sovereignty as a creature of the people with cultural particularism, which has its roots in community identities).

I have suggested that a particular challenge comes from the particularism lurking behind a core assumption of dual sovereignty, namely the assumption that the constitutional state must be a nation-state. To argue, as Habermas does, that individuals as members of their nation-states want the preservation of their state formations in order to hold onto the normative accomplishments of the constitutional state is to assume that those normative accomplishments are parasitic upon the political form of the nation-state. That "the democratic-constitutional structure [of the nation-state] continue to exist intact in the future Union"[31] becomes the sine qua non condition for attaining the normative goals. The European Union, which is not and will never become a nation-state, cannot by implication be a constitutional state.[32]

It is quite surprising that the dual sovereignty thesis should stipulate that impossibility. In fact, one might have defined the problematique facing individuals qua bearers of constituent authority as whether, and under what conditions, social integration can take place in a politically integrated Europe in ways that can secure and replicate, at unprecedentedly high levels of abstraction, the normative accomplishments of nation-states. Can a united Europe be the functional equivalent of a constitutional state? Does a unified Europe provide the political form in which freedom and equality can be secured under conditions of globalization, just as the nation-state provided the political form for freedom and equality under conditions of industrialization and modernization? These questions take on even greater urgency when the burden on the individuals qua citizens of the EU is defined as setting the conditions under which the Union can become a supranational constitutional state as the only means for preserving the normative accomplishments secured by the nation-state over the past two centuries.

It is telling that Habermas does not discuss, in this context, the possibility of the EU as a supranational constitutional state. One concern is, presumably, that the possibility by itself could undermine dual identity as a core tenet of dual sovereignty. If the normative accomplishments of nation-states qua constitutional states could be protected at the supranational level, then, as far as constituent power is concerned, the task for individuals qua citizens of the EU will be to work out the normative parameters of that protection. Whatever shape they give to those parameters, shifting the center of gravity to the supranational level risks emptying the political identity of citizens as members of their nation-states of an agenda. Bereft of such normative content, the national political identity would be vulnerable to replacement by the "overwhelming"[33] supranational political project.[34] That, of course, is not to imply that,

31. Habermas, Habermas, *Democracy in Europe*, *supra* note 1, at 554.

32. Far from outlandish, this possibility has been part of the long and venerable tradition of theorizing the constitutional nature of the European Union. Many scholars of European integration have argued that the EU is in the process of becoming, and thus has the capacity to become, a state. *See generally* G. Federico Mancini, *Europe: The Case for Statehood*, 4 EUR. L. J. 29 (1998) (detailing scholarly arguments that the EU is in the process of becoming a state). For a more recent and comprehensive argument, *see generally* GLYN MORGAN, THE IDEA OF A EUROPEAN SUPERSTATE: PUBLIC JUSTIFICATION AND EUROPEAN INTEGRATION (2007) (detailing a more recent and comprehensive argument in support of a European superstate). *But see* Neil Walker, *Constitutional Pluralism Revisited*, 22 EUR. L. J. 333, 344 (2016) (arguing that "[p]roponents of the federalist version of the EU have long insisted that the appropriate form of federal compact for the EU is *not* a European federal state.").

33. HABERMAS, TECHNOCRACY, *supra* note 1 at 40.

34. This is an understandable concern, at least so long as one accepts its underlying model of political identity formation. The model, which underpins the German Constitutional Court's *Maastricht* decision,

under such a scenario, national political form itself would disappear. The lesson of history is that higher forms of integration subsume but need not displace lower forms of integration, so here the supranational political form itself would entirely displace national political form. But national political forms would become hierarchically integrated within a vertical structure of authority.

A central concern of Habermas's own thinking about European integration, which dovetails uneasily with his dual sovereignty thesis, is to theorize the conditions for the Union becoming a political space where communicative processes transcend national boundaries and where it can be shown how democracy could discipline the forces of the market by creating a universe of intersubjectively shared meanings.[35] Just as the nation-state created, at its particular moment in history, the conditions of legitimacy for processes of democratic will-formation that reversed social disintegration, so a supranational constitutional state could perform a similar task under the conditions of post-war European integration. If it is possible to conceptualize the task of the individuals qua citizens of the EU at the constitutive moment along these lines, it becomes difficult to defend the assumption the EU cannot be a constitutional state, and its corollary that nation-states must be preserved or else their normative accomplishments would be endangered.

II. DUAL SOVEREIGNTY: NATIONAL VERSUS SUPRANATIONAL

The previous section has identified unresolved tensions around this split political identity with implications for the dual sovereignty thesis. Consider, as an entry point into the next step of the analysis, its temporal implications. According to the dual sovereignty thesis, individuals seek the "conservation of the normative substance that their national democracies already historically embody."[36] One temporal dimension of their judgment is retrospective; it focuses on the preservation of what states have "already achieved."[37] This claim is not historical in nature[38], as it is implausible to refer to nation-states such as Germany or Italy at the EU's constitutive moment as guardians of freedom whose normative accomplishments ought to be preserved.[39] The claim is,

assumes that identity-formation boils down to an all-or-nothing game of allocation of competencies. The aim of the German judges on that occasion was to protect and preserve national political identity. But one could flip the priorities and instead allocate competencies to the supranational level. While Habermas's position on matters of identity formation is characteristically complex, there are indications of his sympathy for this model. See, *e.g.*, JÜRGEN HABERMAS, THE POST-NATIONAL CONSTITUTION AND THE FUTURE OF DEMOCRACY 77 (1998) ("But to remain a source of solidarity, the status of citizenship has to maintain a use-value: it has to pay to be a citizen, in the currency of social, ecological, and cultural rights as well.").

35. HABERMAS, THE INCLUSION OF THE OTHER, *supra* note 7 at 125.

36. *Id.* at 556.

37. *Id.* at 554.

38. For a discussion about the normative and the sociological dimensions of a theory of constituent power, see Mattias Kumm, *Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law*, 14 Int'l J. Const. L. 697 (2016). *See also* Neil Walker, *The Return of Constituent Power: A Reply to Mattias Kumm*, 14 Int'l J. Const. L. 906 (2016),

39. If anyone's memory needs to be refreshed, Friedrich Reck's diary is a good place to start. *See* FRIEDRICH RECK-MALLECZEWEN, DIARY OF A MAN IN DESPAIR (Paul Rubens trans., Duckworth Literary Entm't 2000). And, while at it, consider the following rumination, dated October 1940: "The idea of a united Europe was not always upheld by me, but I know now that we can no longer afford the luxury of considering it a mere idea. Europe must either make any further wars impossible, or this cradle of great

rather, one of rational reconstruction.[40] Individuals as holders of popular sovereignty are rational actors whose motivations are retrospectively reconstructed to demand the preservation of what they, through collective learning processes, know to be within the realm of their nation-states' normative potential.

The temporal dimension of this reconstruction is complex. Judgments about the accomplishments of the nation-state are judgments that, even when rationally reconstructed, occur by definition at the moment in time when political authority is being constituted. The dual sovereignty thesis is about the co-original nature of the double moment of constituting power. However strong the impulse to compress historical duration, the moment at which power is constituted is an inflection in time that cannot be extended indefinitely. Concessions to temporality come with the territory of constituent power.[41] This reveals the dual temporality of the judgment of individuals as citizens of nation-states about the preservation of the constitutional state. In addition to the retrospective embrace of the normative accomplishments of the constitutional state, individuals also prospectively anticipate, first, that those accomplishments could be endangered at the supranational level and, second, that, if protected from such threats, nation-states could remain a site where past accomplishments could be at least preserved, if not even amplified.[42]

The difficulty with this view is not temporality as such.[43] Rather, it is the asymmetry of normative expectations in the construction of dual political identity. The asymmetry is between how individuals as citizens of their nation-states relate to their states, and how individuals *qua* citizens of the EU relate to that political construct. Specifically, in this conception, individuals assume the best about what their states are and will remain—namely, guarantors of the level of justice and freedom, as well as political sites that foster solidarity.[44] At the same time, they assume that the

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ideas will see its cathedrals pulverized, and its landscape turned into a plain." *Id.* at 124.

40. It has been argued that this type of retrospective reconstruction is a common feature of contemporary accounts of constituent power. *See* Krisch, *supra* note 10, at 660 (arguing that constituent power today "operates through the—retroactive—attribution of acts to a socially constructed collective self."). Such is, unsurprisingly, the style of normativist approaches to constituent power. *See* Martin Loughlin, *The Concept of Constituent Power*, 13 EUR. J. POL. THEORY 218, 221–231 (2014) (describing the normativist approach to constituent power, and comparing it to decisionism as well as to the author's preferred approach, relationalism).

41. Hans Lindahl identifies the same feature but embraces the paradox. *See* Lindahl, *The Paradox of Constituent Power: The Ambiguous Self-Constitution of the European Union*, 20 RATIO JURIS 485, 496 (2007) ("The 're' of representation does not refer to what supervenes or follows an original present and presence, a 'now' in which a community constitutes itself as a community in the plenitude of a simple presence to itself. Instead, and paradoxically, an act *originates* a community through the *representation* of its origin.")

42. *See generally* Frank Schimmelfennig, *The Normative Origins of Democracy in the European Union: Towards a Transformationalist Theory of Democratization*, 2 EUR. POL. SCI. REV. 211 (2010).

43. The temporal aspects of constituent power have been the object of scholarly reflection. *See, e.g.*, Somek, *supra* note 15, at 35–36 (discussing the temporality of constituent power: "[a] successful act of constitution is possible only if successive acts engage with one another . . . The intertwinement of acts is possible if those finding themselves confronted with the expectation to act as members of a collective body 'retroactively' come to accept this attribution 'by exercising the powers granted to them by a constitution."). *See also* Markus Patberg, *Constituent Power Beyond the State: An Emerging Debate in International Political Theory*, 42 MILLENNIUM: J. INT'L STUD. 224, 231 (identifying retrospective and prospective ascriptions as part of the normative dimension of constituent power).

44. *See* Habermas, *Democracy in Europe*, *supra* note 1, at 553–54 (discussing European citizens' interest in forming a supranational polity conflicting with interest in having their nation-states remain guarantors

supranational union cannot become a primary site within which any such guarantees could be secured. This reflects a significant asymmetrical preference for nation-states over the supranational Union.[45]

It is not altogether surprising that the dual sovereignty thesis provides no justification for this asymmetry. Facing this tension would raise concerns over how rational it is for individuals as citizens of the EU to participate in the constituent process in the terms laid out by the dual sovereignty thesis. The effect of the asymmetry of normative expectations is to introduce a structural rule of priority that violates the premise of equality between the two sovereigns.[46] But how rational is it for individuals in their supranational capacity to accept that role? Their participation seems rational if the task they set for themselves at the moment of the origin of the political community that is going to be constituted is to work out how the European Union can preserve the accomplishments of the constitutional state. But, as we have already seen, that task conceivably makes the nation-state dispensable and thus undercuts the necessary duality of sovereignty.

Suppose, however, that it is possible to justify the asymmetry of political expectations on prudential, rather than normative, grounds. Those grounds are the "conservation of the normative substance that our national democracies already historically embody."[47] Since it cannot be definitively shown that similar accomplishments can be delivered at the supranational level, and nor can it be doubted that a similar level has not been reached at the supranational level, it is simply prudent to protect the existent accomplishments of the nation-stated.[48] With the hard-fought accomplishments of the constitutional state on the line, risk-aversion demands holding fast to national identity.[49]

Dismantling this claim will require a more thorough investigation of just what Habermas believes are the normative accomplishments of the constitutional state. Before proceeding to that analysis, it is worth pausing over to piece together the internal structure of Habermas's argument. First, a particular historical moment in the development of European integration is selected. Then accomplishments of the nation-state are identified, with comparatively little in-depth analysis of failures and atrocities perpetrated by those state formations both within and outside their sovereign jurisdictions. Further, the normative accomplishments for which the nation-state is given full credit are considered in a context from which everything else is obscured, including the role of supranational integration in securing those accomplishments. The dual sovereignty thesis takes the dynamic of that moment—a

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of the level of justice and freedom already achieved).

45. This is similar to debates about judicial review whose supporters assume the best about courts and the worse about legislatures. For a discussion and critique of asymmetries in that context, *see generally* Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE L.J. 1346 (2006).

46. *See id.* at 552 (explaining the lack of trust between European nations for a European superstate as an insistence of self-conscious citizens on the normative achievements of their respective nation-states).

47. *Id.* at 556.

48. *See id.* at 553 (discussing a well-founded interest of self-conscious citizens in their nation-states not being exposed to the risk of intrusions and encroachments by an unfamiliar supranational polity).

49. *See, e.g.*, ALBERT HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY 89–96 (1991) (discussing the rise of the cult of the British Constitution in response to revolutions in France, especially the general aversion of the educated class to any extension of the franchise in favor of permanent fixture of constitutional order restricting suffrage).

questionable interpretation of a moment that, in world-historical terms, is fleeing—to provide sufficient ground for theorizing the normative dynamic between the national and supranational levels and, through it, the transnationalization of democracy in Europe. Underlying this problematic method is the need for stability, by itself unsurprising given the inherent instabilities of dual identity, and the willingness to meet that need by ascribing stabilizing traits to an artificially depoliticized status quo.[50] The price, however, will be steep. It will come as a reversal of equality between the dual identities on which the dual sovereignty thesis is premised. The reversal takes the form of implicitly prioritizing the attachment to one's national political community over supranational identity, thus undermining the latter's viability and stability. Even more importantly, the reversal fails to acknowledge the new institutional forms that the protection of higher freedom may now require.

III. RIGHTS AND SELF-DETERMINATION IN THE CONSTITUTIONAL STATE

The philosophical core of dual sovereignty aims to protect the normative make-up of the constitutional state. Habermas rejects the hierarchical subordination of the national structure to the European supranational structure as compromising the normative integrity of nation-states, and specifically the political institutions and communicative processes that have been established around a particular kind of collective self-determination.[51] European nation-states are constitutional democracies of a certain type. The European *Sozialstaat* gives institutional expression to a particular understanding of political freedom where "no one is free as long as the freedom of one person must be purchased with another's oppression."[52] Therein rest the normative anchors of practices of mutual recognition and of material redistribution whose cumulative effect is the creation of the social solidarity that allows individuals the benefit of the "fair value" of their rights.[53] Social solidarity is the hard-fought result of protracted and painful learning processes that take place within the institutional and normative framework of nation-states. Those accomplishments—the "free and relatively equitable and socially secure living conditions"[54]—would be at risk of dissolving if the social texture that underpins the constitutional state caved under the pressure of global markets.[55]

50. This is similar to the mistake for which Habermas chastises authors who failed to decouple state sovereignty and popular sovereignty, namely the mistake of "overgeneraliz[ing] a contingent historical constellation and obscur[ing] the artificial, and thus floating, character of the consciousness of national identity constituted in nineteenth-century Europe." HABERMAS, CRISIS OF EU, *supra* note 1, at 16–17.

51. *See id.* (discussing the collective practice of participating in democratic election transforming into decisions of a collective only in a distributively general sense, making popular sovereignty a mirror image of state sovereignty only through a reifying singularization of pluralistic processes of opinion- and will-formation).

52. HABERMAS, FACTS AND NORMS, *supra* note 23, at 418 (emphasis in original).

53. *See* JOHN RAWLS, POLITICAL LIBERALISM 5–6 (1996) (referring to Rawls's first principle of justice: A guarantee that political liberties to all citizens are secured because they are equal in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions).

54. Habermas, *Democracy in Europe*, *supra* note 1, at 553.

55. For a formulation from the perspective of systems theory, see Hauke Brunkhorst, *The European Dual State: The Double Structural Transformation of the Public Sphere and the Need for Re-Politicization*, *in* SELF-CONSTITUTION OF EUROPEAN SOCIETY: BEYOND EU POLITICS, LAW AND GOVERNANCE 239, 244

This approach has two component parts. One part involves the role of rights in a political community's project of democratic self-determination; the other concerns the question of the fair value of those rights. I discuss the first aspect here and take up the question of fair value, with its implications about social solidarity and material redistribution, in the next section.

"Who, if not nation-states, would guarantee equal rights for all citizens on their territories"[56], Habermas asks, marking the irreplaceability of state political formations. Yet, rhetoric should not obscure complexities. Consider first the nature and role of rights, drawing from Habermas's own body of work. Rights are not only shields or swords through which individuals relate with the institutions of their constitutional democracy. They are also repositories of the lessons learned during that democracy's hard-fought struggles for recognition.[57] Consider the transnational aspect to how those repositories come into existence. Habermas, who is not a methodological nationalist, conceptualizes constitutional democracies not as closed to one another but rather as interlocked in a process of mutual co-dependence.[58] Normative forces internal to constitutional states make constitutional developments in each jurisdiction relevant to the experiences of self-government of other jurisdictions. For instance, the duty of responsiveness that constitutional states owe to their individuals as sovereigns requires that political institutions set in place mechanisms that provide clear channels of communication between the state and its citizens.[59] Transjurisdictional mutual co-dependence is part of those constitutional mechanisms of self-correction. Given their common political commitment to the creation of free communities of equals, constitutional orders that stand alongside one another are a repertoire of normative frameworks within which different dimensions of common commitments—equality, autonomy, dignity—are revealed and can be explored. The experiences in self-government of other political communities can reveal dimensions of these values that discrete historical developments oftentimes obscure. In practice, of course, questions of institutional capability and technological prowess, among others, determine the modalities and extent of inter-systemic communication. But, the point is that the openness of constitutional orders to one another is not contingent. It is, rather, anchored in the very normative core of the constitutional state.

As they relate to one another, constitutional orders must account for variations in how each jurisdiction interprets shared normative commitments. The French

(Jiří Přibáň ed., 2016) (discussing the need to prevent the "usurpation of the constituent power by the economic system" at the supranational level (emphasis omitted)). Concerns about how "executive federalism" undermines political self-government are among the primary motivation for Habermas's transnationalization of popular sovereignty. *See* HABERMAS, CRISIS OF EU, *supra* note 1, at viii (identifying the threat that the kind of "executive federalism of a self-authorizing European Council . . . would provide the template for a post-democratic exercise of political authority.").

56. JÜRGEN HABERMAS, EUROPA: VISION UND VOTUM 518 (2007).

57. *See, e.g.*, Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State* (Shierry Weber Nicholsen trans.), *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 107, 108–09 (Amy Gutmann ed., 1994) (pointing to the struggles democratic societies faced in order to gain recognition of their rights and the struggles of minority groups in democratic societies at the present who are fighting to have their own rights recognized as well).

58. Habermas does not develop these matters at great length. What follows in this and the next paragraph is my own account that, while not derived from Habermas's, is perfectly consistent with his views. *See generally* Vlad Perju, *Cosmopolitanism and Constitutional Self-Government*, 8 INT'L J. CONST. L. 326 (2010).

59. *Id.* at 336.

interpretation of freedom of religion or constitutional equality is very different from the Italian interpretation, to take one example.[60] Each system must rationalize for itself that difference if it is to preserve its normative openness toward other constitutional states. Glossing over nuance, assume that the most usual answer explains variation as points on a spectrum of reasonable interpretations. For reasons that could be labeled, in Rawlsian fashion, burdens of (institutional) judgment, and which include particularities of historical development, different legal traditions, and varying cultural backgrounds, each system gives specific—and, at the inter-systemic level, conflicting—meanings to its broad, fundamental rights guarantees.[61] This explanation allows each state to perceive the other interpretations of common guarantees as reasonable, even if different from its own.

Add to this the European supranational dimension and consider how each municipal jurisdiction relates to the interpretation of rights at the supranational level (leaving aside for the moment the problem of hierarchy). Supranational interpretation would be a threat if it fell outside the range of reasonable interpretations. This could not be because the protection of fundamental rights fell outside of the European Union's goals or competencies, since the opposite has long been recognized.[62] More likely, the reason why supranational interpretation falls short has to do with the importance of the task of securing the protection of fundamental rights to its self-governing citizens, through certain procedures that all reasonable persons count as fair, which is so momentous that each jurisdiction understandably seeks to preserve it within its own jurisdiction. In the above example, the meaning of freedom of religion is too important a matter of collective self-government to grant a transfer to the supranational level.

This formulation, particularly the meaning of 'transfer,' might rub the reader as vague. I will tighten it up shortly, but its vagueness helps to make the following point. If the protection of fundamental rights is by definition superior within each national jurisdiction, then national jurisdictions would be entitled to normative closure not only from supranational protection, but also from other national jurisdictions. The spectrum of reasonable interpretative positions would be reduced to the one interpretation reached by the sovereign political community itself. My point is that if citizens have rational grounds to fear the supranational level, those same grounds would suggest that they should be fearful of one another. But a constitutional mindset where each political community can only trust its own judgment is incompatible with the normative openness that each constitutional state must display toward other constitutional states. Conversely, if national jurisdictions within the EU can trust one another, there is no reason to want to maintain the national level as the sole or final

60. *See* Malick W. Ghachem, *Introduction: Symposium: Law, Religion, and Lautsi v. Italy*, 65 ME. L. REV. 755, 756 (2013) (illustrating the differences between the interpretation of freedom of religion of France, with *laïcité*—the French secular state—and Italy, i.e. with official state church); Omar G. Encarnación, *Gay Rights:*
Why Democracy Matters, 25 J. DEM. 90, 91 (2014) (pointing to the differences of the legality of gay marriage in France, where it is legal, and Italy, where it is not).

61. *See* Perju, *supra* note 58, for a more detailed account of my own approach on constitutional traditions and differences in constitutional cultures and doctrines.

62. Even before such protections were codified in the Treaties, both the European institutions and national constitutional courts acknowledged that fundamental rights are parts of the European legal order. *See* BVerfGE 73, 339 2 BvR 197/83 Solange II-decision, Oct. 22, 1986.

guarantor of any kind. For the same reasons they trust one another, they equally trust the supranational level.

But what if a plurality of jurisdictions, by itself, enhances the protection of fundamental rights? This familiar argument can take one of two forms, neither of which is particularly convincing. First, a plurality of jurisdictions might offer an additional safeguard for the protection of rights.[63] In this view, supranational delegation of the protection of fundamental rights leaves individuals vulnerable to the risk of authoritarian abuse. But this argument restates the implicit preference for nation-states that were identified in the previous section. That risk allocation requires an account of why the likelihood of abuse is greater (and the protection from it is more difficult) at the supranational level than at the national level. The argument that European supranational institution, by design, create a form of politics that unleash the forces of the market upon the defenseless citizens of the EU's member states is one that has long defined left critiques of European integration.[64] While sharing a keen awareness of the political stakes, Habermas, to his credit, does not see the Union as impervious to institutional reform. At the same time, it helps to keep in focus the historical reality of European nation-states perpetrating a long string of vicious abuses on their own citizens and any other subjects coming under their jurisdiction during the long twentieth century.[65] My point is that the superiority of nation-states as defenders of rights cannot be taken for granted. As far as risk-gauging is concerned, there are risks on both the national and supranational sides.

Another way of interpreting this argument is that a plurality of jurisdictions is preferable since lateral communication within national constitutional orders leads to improved understanding of the demands of rights. The advantage comes here from the existence of a plurality of jurisdictions, with the implication that, if that plurality is outpaced, as it would be if the supranational level were hierarchically superior, an important correction mechanism becomes unavailable to national constitutional democracies. This argument, I believe, is at best an exaggeration. Even under the current system, where municipal jurisdictions engage in normative lateral communication, final decisions about how to direct the coercive force of public authority are made by municipal institutions. National judges remain the filter for all decisions of authority. Furthermore, if the municipal institutions of the European nation-states were to be united through some form of fusion, legal practice under the newly created institutions could certainly find ways of translating the rich diversity of the past. Arguably, fusion at the EU level would not need to monopolize the task of right-interpretation from political units at the lower level. Structural allocations of decision-making authority would be the object of political bargaining and constitutional interpretation. And, while the plurality of national states would not continue within the European structure, it would continue outside of it. Europe is not

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63. *See generally* François-Xavier Millet, *The Respect for National Constitutional Identity in the European Legal Space: An Approach to Federalism as Constructionism*, *in* THE QUESTION OF COMPETENCE IN THE EUROPEAN UNION 253 (Loïc Azoulai eds., 2014) (discussing the existence of legal pluralism in the European Union between the Union itself and its member states).

64. For a recent, post-Brexit vote, statement of this position, *see* Richard Tuck, A Prize in Reach for the Left (Jul. 17, 2017) (transcript available at https://policyexchange.org.uk/pxevents/brexit-a-prize-in-reach-for-the-left/).

65. *See, e.g.*, WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (2nd ed. 2000) (detailing the abuses committed by European nation-states during the twentieth-century).

the world, and there would be constitutional states in other parts of the world alongside which the newly formed European political structure would coexist and to whose experiences in self-government it would relate.

I have argued that the protection of fundamental rights at the European level is no less out-of-range, at least *a priori*, than the protection afforded within different national constitutional orders. This, one can object, might be true but it is still not convincing as an account of why the members of a political community would endorse and live by those alternative interpretations. Even if each political community interprets the rights it protects in a way itself reasonable, supranational interpretation is not *their* interpretation, that is, an interpretation over which the political community assumes ownership. Democracy means self-government. In the same way that the French are free to reject the German's interpretation of the right to freedom of opinion as reasonable in itself but still different from the French, so the same would be true about how members of a national political community would relate to the European interpretation. What matters, in this view, is not objective reasonableness, but the self-determination of a political community.

This is an important insight. But it is an insight about the importance of self-determination, which should not replicate the normative asymmetry that tacitly positions nation-states above the European Union in Habermas's account. Let me explain. Consider the reconstruction of constitutional patriotism as an attachment to constitutional culture. According to this view, which seeks to mediate between universal norm and particular context, citizens form attachments to the "kinds of conversations, controversies, and disagreements" that constitute the process of mutual justification of the terms of collective self-government, including the interpretation of rights.[66] The abstract norms and principles of a political community become appropriated as the norms of that specific community as they enter a public process of meaning specification. So deep is that process that it ought to be called 'cultural,' and so important it is that the process itself becomes the object of attachment for the members of a political community. Now, this account may or may not be convincing as an account of constitutional patriotism. But its relevance and force as an account of constituent power, especially one that splits the identity of the sovereign, is a separate matter. The difference has to do with taking the state for granted as an existing political unit.[67] This assumption of the state can be built-into the account of constitutional culture as an account of constitutional patriotism, but its role cannot be the same in the dual sovereignty account of constituent power. The task for citizens in their supranational capacity is how to conceive of self-government at the European level. With that question as the agenda for constituent power, failure of the constituent process would be preordained if the process had to proceed from the premise of a thick conception of constitutional culture within the existing political structure of the nation-state. The self-constitution of the EU requires the constituent power to take up the central task, which is the articulation of the normative foundations of the mechanisms of self-determination at the supranational level. At that constitutive moment, and given the task they have set for themselves, individuals ought to be free not to reject placing the protection of rights, which I take to include not only the specific application

66. Jan-Werner Müller, *A General Theory of Constitutional Patriotism*, 6 INT'L J. CONST. L. 72, 82 (2008).

67. *Id.* at 89.

of rights but also the cultural, deliberative processes of rights interpretation, at the supranational level.

IV. REVISITING THE CONSTITUTIONAL STATE: THE *SOZIALSTAAT*

As members of their nation-states, individuals seek to protect the accomplishments of the constitutional state. Securing the living conditions and educational opportunities that are "preconditions for effective democratic participation"[68] is one of the historical accomplishments of European states post-World War II as they created systems of economic redistribution. It is a longstanding critique of European integration that it poses a deadly threat to national welfare projects on this front, which would stand no chance in the face of market forces unleashed by supranational institutions.[69] While, at first glance, it might look as if using redistributive policies to preserve nation-states runs counter to Habermas's post-metaphysical liberalism for pluralist societies,[70] a better reading shows that at issue are the deep foundations of redistribution, specifically the risk that the social bond nurtured by the *Sozialstaat*'s conception of autonomy would unravel once decoupled from the institutional structure of the nation-state. Such a development would lead to the "fragmentation of the care for the common good,"[71] and undermine the conditions that make consideration of the public good a political necessity (and perhaps even an option). The erosion of solidarity undercuts redistributive policies and can lead to the demise of the European model of social integration. Individuals as citizens of their nation-states understand that not any version of European integration is defensible, and, accordingly, see the version that undercuts their states as guarantors of social solidarity as one that should not be defended.[72]

One could, of course, find this development plausible and support the project of European integration, as Hayek did,[73] precisely for its capacity to unravel the thick solidarity that supports material redistribution. But how should one less inimical to redistributive policies relate to the project of European integration?

This is an important—and indeed pressing—question, as recent developments make all-too-clear. Recall only the Irish and Portuguese bail-outs ('voluntary' in the Inquisition sense of the word[74]) or Greece's crucifixion to the altar of austerity, to grasp the magnitude of the risks of governance by "executive federalism."[75] The risk is

68. MCCORMICK, *supra* note 12, at 200 (internal quotations omitted) (citation omitted).

69. *See* Habermas, *Constitution*, *supra* note 7, at 14 (explaining that Europe falls short of what is needed for the kind of supranational decision-making that is already developed within the institutional framework of the union).

70. *See* MORGAN, *supra* note 32, at 85–88 (examining the general argument for a welfare-based European political integration and that there is no reason Europeans *ought* to accept this type of welfare state).

71. ERNST-WOLFGANG BÖCKENFÖRDE, *Which Path is Europe Taking?*, *in* CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 343, 351 (Mirjam Künkler & Tine Stein eds., 2017).

72. *See id.* at 360 (discussing the difficulties of creating a unified European identity out of the European Union).

73. *See generally* Friedrich Hayek, INDIVIDUALISM AND ECONOMIC ORDER 255–72 (1948)

74. *See* GAVIN HEWITT, THE LOST CONTINENT 246 (2013).

75. HABERMAS, CRISIS OF EU, *supra* note 1, at 12 (using the term executive federalism in contrast with transnationalized democracy).

compounded once these policies are interpreted against the background of the remarkable accomplishments of the European postwar order. Social democracy became a model in which society was neither "an adjunct to the market," as Karl Polanyi had warned,[76] nor were the market's liberating social effects stifled by unmovable social structures. The result has been described as "the most successful ideology and movement of the twentieth century: Its principles and policies undergirded the most prosperous and harmonious period in European history by reconciling things that hitherto seemed incompatible – a well-functioning capitalist system, democracy and social stability."[77] The accomplishments of that political model translated into constitutional goods now endangered by European integration.

Now, as far as dual sovereignty is concerned, the risks to social solidarity ought to be assessed from the specific perspective of constituent power. And, it is important not to gloss over nuances in how the social democratic model was supposed to work in theory and how it actually worked in practice. One should especially not exaggerate the levels of solidarity that European postwar nation-states have achieved. In his earlier work, Habermas was rightly critical of nation-states on this front.[78] Yet in moving from the national to the supranational, he succumbs to reductionist tendencies. The resource of his reductionism is not Habermas's propensity to operate with ideal types, but rather the unbalanced idealizations that, I argue, end up imposing unreasonable burdens on the supranational level. The dual sovereignty thesis makes assumptions about redistribution and solidarity that are too demanding even for the traditional nation-state to meet.[79]

Consider Habermas's own account of how social solidarity came about within nation-states. The dual sovereignty thesis describes circularly social solidarity as created by welfare policies that themselves depend on the existence of a strong social bond.[80] This is a vicious circle that Habermas breaks through the formative role of political institutions.[81] Social integration and political integration are distinct processes, and Habermas's work shows how the latter created the former in the context of nation-states.[82] The implication is that one cannot bemoan the lack of social solidarity if the political institutions necessary to bring it about are not in place. Equally important, the existence of social solidarity should not be interpreted as the natural or organic expression of a special society; but rather as the successful outcome

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76. KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 60 (2nd ed. 2001).

77. SHERI BERMAN, THE PRIMACY OF POLITICS: SOCIAL DEMOCRACY AND THE MAKING OF EUROPE'S TWENTIETH CENTURY 6 (2006).

78. *See* MCCORMICK, *supra* note 12, at 200–01 (pointing out Habermas's reliance on Foucault's critique of bureaucratization and normalization in the *Sozialstaat*).

79. *Id.* at 288 ("Notwithstanding Habermas's best intentions and efforts, democracy in a supranational age could never stand up to criteria derived from a democratic past that never existed.").

80. *See* ILSUP AHN, POSITION AND RESPONSIBILITY: JÜRGEN HABERMAS, REINHOLD NIEBUHR, AND THE CO-RECONSTRUCTION OF THE POSITIONAL IMPERATIVE 111 (2009) ("Habermas argues that the sources of social solidarity can only be available through the communicative practices of autonomous citizens: 'The forces of social solidarity can be regenerated in complex societies only in the forms of communicative practices of self-determination.'").

81. *See* HABERMAS, TECHNOCRACY, *supra* note 1, at 38 ("[T]here is a widespread conviction that national citizens owe the fragile resource of free and relatively equitable living conditions to the democratic practices and liberal institutions of their states.").

82. *Id.*

of that society's political institutions' operation over time. Now, what is true at the national level is also true at the supranational level.[83] The establishment of supranational political institutions can precede the creation of the underlying solidaristic social basis (including media of communication),[84] or at least a lack of such basis should not hamper the political institutional project.

More importantly, social welfare reveals another unresolved tension in the dual sovereignty thesis. To see it, assume for now that nation-states have accomplished (idealized) social solidarity within their borders and that this accomplishment together with the related constitutional conception of the self are strong reasons why their citizens wish their preservation, as well as the preservation of their own identity as members, even after creating the EU. Having secured this constitutional good, nation-states find themselves co-existing alongside the European Union. The harmonization of the dual identity of sovereign individuals, who have co-originally created the two levels of government, requires a certain normative continuity between the political and constitutional structures of these two orders. Assume further that Habermas is right about the *Sozialstaat* conception of autonomy within the former context ("*no one* is free as long as the freedom of one person must be purchased with another's oppression"[85]); then a version of the same would have to be the case in the European context. Unless that is the case, harmonization processes between the two parts of one's identity would prove difficult. But autonomy will develop this layer of interdependence at the European level presumably only under conditions of social solidarity that are different but still comparable to those in effect at the national level. So, social solidarity would have to develop at both the national and European levels; the very viability of the project of self-determination at either level would depend on that development.[86]

Now, Habermas is of course intensely well aware that the European supranational project cannot succeed without transnational solidarity—which is to say that European identity, as one dimension of the dual political identity, lacks viability without the mechanisms to structure the supranational polity.[87] His proposals for the creation of a European public sphere attempt to create the institutional structure where that form of solidarity can take root.[88] But the dual sovereignty thesis lacks the insight that the simultaneous development of social solidarity at both levels is conflict-ridden. If the material but, more importantly symbolic, resources from which solidarity grows are limited, the relation between national and European projects is likely to be closer to zero-sum. The point is that the very existence of nation-states (as

83. This assumes, correctly in my view, that solidarity and underlying trust does not depend on small communities. *See generally* AXEL HONNETH, THE IDEA OF SOCIALISM 29 (2017) for a similar view.

84. HABERMAS, TECHNOCRACY, *supra* note 1 at 39 (stating that national media needs to report on issues of common concern to EU citizens, which will develop the current nationally limited civic solidarity trust among EU citizens into one that reaches across national borders).

85. HABERMAS, FACTS AND NORMS, *supra* note 23, at 418.

86. For a discussion, see AXEL HONNETH *supra* note 83, 99–103.

87. HABERMAS, FACTS AND NORMS, *supra* note 23, at 502 (characterizing the present European political sphere as fragmented and discussing the importance and likelihood of creating "an obligation towards the European common good" in order to achieve transnational unification).

88. His proposals include, but are not limited to, the use of European media, the reform of European institutions, and most importantly by disempowering the European Council and continuing to empower the European Parliament. *See generally id.*

equals to the supranational Europe) is an obstacle to transnational solidarity. For as long as they will exist on equal footing with the supranational level, a state-of-affairs to which dual sovereignty is committed, nation-states will claim license to act in ways that will undermine the creation of sovereignty at the European level. Dual sovereignty downplays and generally glosses over the existential tensions between the two sovereigns because it is a severely depoliticized account.[89] Yet as soon as one replaces this distorting lens with one more attune to latent conflict, the current configuration of the constitutional relations between the Union and its members appears for what it is, namely the outcome of conflict. To take just one example, the EU has failed to create its own budget through direct taxation not because it is a supranational institution, but because nation-states mustered all their political influence to prevent that development.[90] If conflict such as this is inescapable, then choices must be made between the national and supranational levels. To see how they are made, and what they are, we turn to European constitutionalism.

V. THE LESSONS OF EUROPEAN CONSTITUTIONALISM

European law holds the key to understanding the nature of the European project, Habermas claims, as he deploys the principles of European constitutionalism—from limited conferral to the requirement of unanimity in treaty amendments to the protection of national constitutional identity— to shape the philosophical intuitions behind dual sovereignty thesis.[91] He interprets European constitutional doctrine to reflect a heterarchical, not hierarchical, relation between municipal and supranational law, which relate to each other as co-original and co-determinate equals.[92] I argue in this section that the principles on which Habermas relies are more ambiguous than he claims. A more nuanced interpretation of European law provides at best tangential support and, more often than not, undercuts the case for dual sovereignty.

One caveat is in order. While Habermas sees himself as a critic of the German Constitutional Court, at least post-*Maastricht*, the dual sovereignty thesis is influenced, if my interpretation of that thesis is correct, by the German court's theorizing of the normative interface between municipal and European law. What Habermas criticizes in the *Maastricht* decisions are the nationalist, organicist idea of political community that had deep roots in German constitutional thought and which the *Maastricht* Court endorses. That critique is certainly well taken.[93] But at least an equally insidious point of contention concerns the deep normative core of the German judges' jurisprudential vision, which denies the European legal order the autonomy the supranational order has claimed since the constitutionalization of the Treaty of Rome.[94] That

89. *See, e.g.*, Lindahl, *supra* note 41, at 494 (stating that one of the features that distinguishes the EU from the US is that "European integration does not imply a zero-sum game: The presupposition of a European people, as the collective subject of the European legal order, does not exclude the presupposition of European peoples, in the plural, as the collective subjects of national legal orders.")

90. *See generally* LUCA CERIONI, THE EUROPEAN UNION AND DIRECT TAXATION (2015)

91. *See generally*, HABERMAS, FACTS AND NORMS, *supra* note 23.

92. *See generally id.*

93. *See* J. H. H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, Eur. L. J., vol. 1 (3): 219–258 (1995).

94. On the constitutionalization of the Treaty of Rome, *see* J. H. H. Weiler, *The Transformation of Europe* 100 Yale L. J. 2403 (1991).

conceptualization has ushered in a nation-state centered approach to European constitutionalism.[95] It is not by accident that Habermas does not take issue with this conceptualization, which replicates the same kind of asymmetries that favor the nation-state against the European Union as the dual sovereignty thesis itself.[96] My aim in this section is not to offer a comprehensive critique of that approach or to flesh out an alternative account of European constitutionalism. Those are challenges for another day. My study here is limited to select principles of European constitutionalism invoked in connection to the dual sovereignty thesis.[97]

Front and center in Habermas's account is the principle of limited conferral of powers.[98] This principle limits EU legislative action to areas where nation-states explicitly or implicitly authorized EU institutions to act and only for so long as and until those states, either as a bloc or individually, do not withdraw such authority.[99] National constitutional courts, Germany's most prominently among them, have pointed to limited conferral as evidence that nation-states have not given the EU a constitutional blank check.[100] This reading is correct insofar as, formally speaking, the powers of the EU institutions are limited and subject to oversight.[101] But it helps to recall that limited conferral is a principle that structures the relation between the federal center and the constitutive states or provinces in typical federations. The EU is in this sense like all other such structures, which is to say that the principle of limited conferral is consistent with a logic of hierarchy of precisely the type that Habermas rejects in the European constitutional context.[102]

95. *See generally* Julio Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralism Movement*, 14 EUR. L. J. 389 (2008), for an account of the German Constitutional Court's role in establishing the national-constitutional approach to European integration.

96. As late as 2007, Habermas compared the European Union to an international organization. *See generally* Habermas, *supra* note 56, at 518. For an explanation of his views in terms of intellectual biography, *see* STEFAN MULLER-DOOHM, HABERMAS: A BIOGRAPHY 356 (2016) (discussing Habermas's initial approach to European integration as primarily an economic organization). This changes by 2011, when he describes the task at hand as the development of an international community of states into a cosmopolitan community of states and world citizens. *See generally* HABERMAS, CRISIS OF EU, *supra* note 1, *at* xi.

97. This is, however, prolegomena to the larger descriptive case against constitutional pluralism. Neil Walker is, I believe, correct that a frontal challenge to pluralist accounts of European constitutionalism would have to include just such a descriptive dimension. *See generally* Neil Walker, *supra* note 32, at 346.

98. *See generally* HABERMAS, FACTS AND NORMS, *supra* note 23.

99. Consolidated Version of the Treaty on European Union art. 5 (2), Oct. 26, 2012, 2012 O.J. (C 326), 18 [hereinafter TEU] ("Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."). For a recent study, *see generally* THE QUESTION OF COMPETENCE IN THE EUROPEAN UNION (Loïc Azoulai ed., 2014).

100. Limited conferral has been useful at the discursive level as an argument against the autonomy of the European legal order. Theorists have used limited conferral to argue that, formally speaking, European law derives all authority from conferral by its member states. As Kirchhof explains, "[t]he basis for the validity of European law in Germany is the German Assenting Act. European law reaches Germany as an area of application only across the bridge of the national Assenting Act. Where that bridge does not convey this European law, it cannot, in Germany at any rate, develop any degree of legal force." Paul Kirchhof, *The Balance of Powers between National and European Institutions*, 5 EUR. L. J. 225, 226 (1999).

101. *See id.* ("European law becomes binding through the conclusion of the Treaty by the parties to it and by the issue of the command to obey the law through the parliamentary Assenting Act in each Member State.").

102. HABERMAS, FACTS AND NORMS, *supra* note 23, at 168–93.

The interpretation and application of limited conferral are also important in this context. The German Constitutional Court understandably inquired, in the *Maastricht* judgment, whether supranational delegation in the European context is structured in a "manner sufficiently foreseeable to ensure that the principle [of limited conferral] is observed . . . ."[103] Surprising was its conclusion that the EU competencies indeed met that foreseeability threshold.[104] Interpreted against the background of decades of EU constitutional practice, that conclusion reveals how useful a fiction the principle of limited conferral has been. Indeed, one would be hard-pressed to offer a plausible interpretation of European constitutionalism, at least during the pre-*Maastricht* period, in which the application of limited conferral could be qualified as "sufficiently foreseeable."[105] During that period, the European Commission consistently used the Treaty of Rome's open-ended provisions as well as the "necessary powers" grant liberally.[106] The European Court of Justice endorsed that approach and, until well into the 1990s, it turned down just about every invitation to invalidate secondary legislation as *ultra vires*.[107] Far from the neat demarcation one might expect if the application of limited conferral were indeed sufficiently foreseeable, one commentator noted in the mid-1990s that "[t]here is no issue area that was the exclusive domain of national policy in 1950 and that has not somehow and to some degree been incorporated within the authoritative purview of the EC/EU."[108]

Of course, one should not exaggerate this point. The issue here is not an exact tally of the division of competencies as much as the constitutional dynamic of allocation. Consider the well-known case of fundamental rights. Relying on pre-*Maastricht* case-law of the Italian and German Constitutional Courts, Habermas finds support for dual sovereignty in the decisions of national judges to retain jurisdiction over secondary European legislation falling short of the fundamental rights granted by national constitutions.[109] The exercise of residual sovereignty by national courts qualified the European Court's claim to supremacy and, it is said, revealed the "necessarily bi-directional" nature of the doctrine of European supremacy.[110] This

103. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 89 ENTSHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155, 171 (Ger.)

104. *Id.*

105. *Id.*

106. Treaty Establishing the European Community art. 308, Dec. 24, 2002, 2002 O.J. (C 325). *See also* JOSEPH WEILER, THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 55 n. 120 (1999) (discussing how the Community institutions made liberal use of this provision as the legal basis for legislative measures).

107. *See* R. Daniel Kelemen, *On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone*, 23 MAASTRICHT J. EUR. & COMP. L. 136, 140 (2016) (mentioning case-law in the Court of Justice holding that EU law has supremacy over national law).

108. Philippe C. Schmitter, *Imagining the Future of the Euro-Polity with the Help of New Concepts, in* GOVERNANCE IN THE EUROPEAN UNION 121, 124 (Gary Marks et al. eds., 1999). *See also* Koen Lenaerts, *Constitutionalism and the Many Face of Federalism*, 38 AM. J. COMP. L. 205, 220 (1990) (arguing that there is "no nucleus of sovereignty that the Member States can invoke, as such, against the Community.").

109. Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] May 29, 1974, 37 ENTSHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 271, 285 (Ger.) [hereinafter Solange I-Beschluß]; Frontini, Sentenza n. 183, 18th December 1973 (Italian Constitutional Court).

110. Joseph H. H. Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y. B. EUR. L. 267, 275 (1982) ("One dimension [of supremacy] is the elaboration of the parameters of the doctrine by the European Court. But its full reception, the second dimension, depends on its incorporation into the constitutional orders of the Member States and its affirmation by their supreme courts."); *see also* Bruno de

interpretation, however, toes the line of the not-entirely-disinterested national courts, eager to claim before their domestic audiences the power over EU doctrine.[111] Even in the case of German reception, on which Habermas relies, it helps to recall that, under both Solange I and II, the German Constitutional Court acquiesced to the European Court's doctrine that the European legal order is autonomous. Only post-Maastricht did the German constitutional judges reverse their own precedent, denying the claim to special status of the Europe-an legal order and adopting a national constitutional standpoint from which EU supranational law had to be conceptualized within the framework of international law. The German judges sought to hide the radicalism of their reactionary approach by re-writing constitutional history. They claimed, contrary to established European doctrine, that human rights were absent from the genesis of the European legal order and presumably had to be transplanted from elsewhere, such as from municipal law. The implication of the need for such imports was to undercut the normative viability of European constitutionalism standing alone, and to support the view that European constitutionalism cannot threaten the autonomy of national jurisdictions on whose existence it depends.[112]

But, one could argue, whatever the correct interpretation of the human rights saga, doesn't the ultra vires review under the *Maastricht* decision and identity review under the *Lisbon* decision[113] give Habermas sufficient ammunition to make the case about the dual nature of sovereignty as a matter of European constitutional law? What matters, in this view, is not how often national courts used their powers to review European legislation, but rather the fact that they gave themselves these powers in their first place—and that their activation depends on their will. The sword of Damocles does its work while hanging in the air. Perhaps so. But what danger comes from a sword that has, until very recently, never fallen and which often seemed too heavy to hold up in the air indefinitely? It cannot be irrelevant that, in over six decades of the practice of European constitutionalism, only a handful of cases show national courts challenging the authority of the European Union.[114] The point is that, should such challenges become more common, that change would amount to a paradigm shift away from the past version of European constitutionalism and toward another vision. Perhaps dual sovereignty captures the new paradigm. What it does not capture, however, is existing European constitution practice.

Witte, *Direct Effect, Primacy and the Nature of the European Legal Order*, *in* THE EVOLUTION OF EU LAW 323, 351 (Gráinne de Búrca & Paul Craig eds., 2nd ed. 2011) ("There is therefore a second dimension to the [primacy] matter, which is decisive for determining whether the Court's doctrines have an impact on legal reality: the attitude of national courts and other institutions.").

111. *See also* G. Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice*, 57 MOD. L. REV. 157, 187 (1994) ("It would be an exaggeration to say that the European Court was bull-dozed into protecting fundamental rights by rebellious national courts.").

112. For an extended version of this argument, see Vlad Perju, *Uses and Misuses of Human Rights in European Constitutionalism*, *in* HUMAN RIGHTS, DEMOCRACY, AND LEGITIMACY IN A WORLD IN DISORDER (Silja Vöneky & Gerald L. Neuman eds., 2018).

113. BVERFG, JUDGMENT OF THE SECOND SENATE OF 30 JUNE 2009-2 BVE 2/08.

114. *See* Case C-399/09, Marie Landtová v. Česká správa socialního zabezpečení, 2011 E.C.R I-05573 (a European Court of Justice case originating from the Czech Constitutional Court); *see also* Jan Komárek, *Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires*, 8 EUR. CONST. L. REV. 323 (2012) (analyzing the significance of a subsequent judgment by the Czech Constitution Court on February 14, 2012 that declared the previously mentioned European Court of Justice opinion to be an *ultra vires* act).

It is perhaps possible to interpret Habermas's account as evidence that such a shift is underway. Take, for instance, the protection of national identity as evidence of underlying dual sovereignty.[115] At issue here is the explicit commitment that EU institutions have taken, as early as the Treaty of Maastricht but in a fuller form in the Treaty of Lisbon, to commit the national identity of its member states.[116] This provision has been interpreted to show the co-existence as equals of the municipal and European legal orders.[117] An alternative interpretation seems to me more defensible. In this alternative interpretation, constitutional identity is consistent with a hierarchical model of constitutionalism. First, as a matter of constitutional doctrine, national identity receives recognition when—and, arguably, precisely because—it coexists along other doctrines of European constitutionalism that neutralize it. For instance, the values mentioned in Article 2 TEU, which Europeanizes the basic constitutional structures of the EU member states, restrict the reach of national identity.[118] Secondly, the effect of incorporating the protection of constitutional identity into the Treaty is to make that identity a concept of EU law. This opens the door for the ECJ to define the boundaries of national identity, in the same way that the Luxembourg judges have always invoked the effectiveness of EU law to impose a unified meaning over concepts such as goods, persons, workers, disability and the like.[119]

There is pressure for the ECJ to move in that direction. The Hungarian constitutional court, having been captured by the Orbán regime and transformed from a defender of constitutional democracy into an effective political tool in Hungary's authoritarian turn, recently invoked the doctrine of national identity to challenge the supremacy of European law.[120] Given the equally troublesome developments in Poland, one can foresee decisions of national judges invoking the Polish national identity as a limit to the effect of primary or secondary European legislation. Quite apart from how the EU's will answer to such challenges, these examples show how troubling it is to find Habermas's invocation of national identity as constitutional doctrine that supports the normative appeal of the dual sovereignty thesis.

I do not mean to suggest that all invocations of constitutional identity are as malign as those mentioned before. In jurisdictions where the foundations of

115. *See* Habermas, *Democracy in Europe*, *supra* note 1, at 556 (discussing citizens' dual identities as citizens of the EU and citizens of their nation); Solange I-Beschluß, *supra* note 109.

116. TEU, *supra* note 99, art 4(2).

117. *See, e.g.*, Leonard F.M. Besselink, *National and Constitutional Identity Before and After Lisbon*, 6 UTRECHT L. REV. 36, 48 (2010) (remarking that "the provision of Article 4(2) EU forms an important qualification of the rule on the primacy of EU law, and a modification of the case law under *Costa v. ENEL*.").

118. TEU, *supra* note 99, art. 2.

119 But *see* Monica Claes and Jan-Herman Reestman, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the* Gauweiler *Case*, 16 GERMAN L. J. (4): 917-970 (2015) (discussing the tensions between national and constitutional identity at the national and supranational levels in the context of the German Constitutional Court's OMT decision).

120. *See* Alkotmánybíróság (AB) [Constitutional Court], Nov. 11, 2016, AK X/03327/2015 (Hung.) (holding, citing Solange, that it "cannot set aside the ultima ratio protection of human dignity and the essential content of fundamental rights, and it must [ensure that the EU law] not result in violating human dignity or the essential content of fundamental rights."). Under Article E (2) of the Hungarian Constitution, "the joint exercising of a competence shall not violate Hungary's sovereignty (sovereignty control), and on the other hand it shall not lead to the violation of constitutional identity (identity control)." *Id.* para. 54. For an early analysis *see* Gábor Halmai, The Hungarian Constitutional Court and Constitutional Identity, VERFASSUNGSBLOG (Jan. 10, 2017), http://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/.

constitutional democracy are—at least arguably—under attach, national courts, now empowered to protect national identity, have been rather flummoxed by the task of spelling out the elements of their constitutional identity.[121] The elements they have subsumed under the rubric of identity—"inalienable human rights"[122] or "the rule of law"[123]—are trite and strategically articulated at high level of abstraction. The one clear exception from this trend has been the German Constitutional Court. In its *Lisbon* judgment, the Court drew red lines over what areas ought to remain within the exclusive competence of the German *Staat*.[124] It is too soon to tell if the effectiveness of "identity review" will have to be as qualified as that of the *Maastricht*-era "*ultra vires* review."[125] Regardless, the protection of national identity hardly provides support for the dual identity thesis. As the German origins show, the principle makes the European legal order derivative of national law, rather than co-original. And that derivative nature is no accident; it is normatively continuous with the logic of constitutional identity.

Two other doctrines of European constitutionalism should be briefly discussed. The first is the requirement of consensus among member states for changes to the Treaties.[126] Habermas points out that, unlike in the United States, where under the terms of Article V a majority (not unanimity) of states must approve constitutional amendments, all EU member states must ratify constitutional changes.[127] States retain a veto over treaty changes, which Habermas sees as evidence of heterarchy.[128] That interpretation is questionable. What Habermas calls amendments are, formally speaking, new treaties.[129] And, as new treaties, they must be valid under international law, which, details aside[130], grounds obligation in the consent of each state-party. While there remains a difference if one compared that system to the US's, that difference is

121. *See* Armin Von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417, 1440 (2011) (discussing how most domestic constitutional courts' decisions related to constitutional limits are vague).

122. *Id.* at 1436.

123. Ústavní soud České republiky 8.3.2006, (ÚS) [Decision of the Constitutional Court of March 8, 2006], sp.zn. ÚS 50/04; Ústavní soud České republiky 3.5.2006, (ÚS) [Decision of the Constitutional Court of May 3, 2006], sp.zn. U 66/04. For a French example, *see generally* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2006-540, July 27, 2006, (Fr.). In later cases, the Czech court refused to list non-transferable competencies or identify a core of the constitution. *See generally* Ústavní soud České republiky 3.11.2009, (ÚS) [Decision of the Constitutional Court of Nov. 3, 2009], sp.zn. ÚS 29/09.

124. BVERFG, 2 BvE 2/08, June 30, 2009 ("[p]articularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, *inter alia*, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5).").

125. *See* Kelemen, *supra* note 107, at 149 (examining existing and possible future approaches to "identity review" and "*ultra vires* review").

126. Habermas, *supra* note 16, at 340.

127. HABERMAS, CRISIS OF EU, *supra* note 1, at 40.

128. HABERMAS, TECHNOCRACY, *supra* note 1, at 36–40.

129. HABERMAS, CRISIS OF EU, *supra* note 1, at 24.

130. *See generally* Ronald Dworkin, *A New Philosophy of International Law*, 41 PHIL. & PUB. AFF. 2 (2013) for a similar argument.

a function of the particular historical trajectory by which the EU came about as an international organization created by sovereign states under international law.[131]

Similarly, one should be cautious about interpreting Lisbon now-famous Art. 50 TEU, which gives member states the option of exiting the EU, as evidence of dual sovereignty at work.[132] How much residual sovereignty the departing member state must have or be willing to use in the exercise of Article 50 is a matter of constitutional politics and constitutional legal design whose clarification must await the unfolding of the Brexit saga. By unfolding I mean not only the UK's vote in favor of exit but also the negotiations, the exit itself (if it happens) and the impact on the UK of its exit from the European Union. At a general level, however, it helps to separate contingent from necessary structural features. In some federations, secession rules are court-made.[133] In the EU, the masters of the Treaty intervened (noticeably late, in the Constitutional Treaty and then through the Art. 50 of the Reform Treaty) to fill in a space that the ECJ had not claimed for itself.[134] The reason for the ECJ's silence is path-dependent: Historically, the ECJ has been reluctant to use heightened scrutiny in reviewing the grand institutional bargains between Brussels and the member states.[135]

I have interpreted constitutional principles in light of constitutional practice, and it might be argued that principles themselves are important in the articulation of a philosophical project of constituent power such as Habermas's. I do not think this line of argument is strong. First, and ironically, because one of the grand lessons of Habermas's overall body of work is that the theory and the practice should not be hermetically separated.[136] The strength of the theory is that it fits the practice; if it does not, then another theory must be chosen. If the dual sovereignty thesis does not fit the practice of European constitutionalism, then different—and, as it happens, bolder—accounts of supranational constituent power should be sought. It is not a counter-argument to this position that dual sovereignty is a rational reconstruction, which offers an idealized account of European constitutional practice. First, dual sovereignty is not hardly an ideal theory. Second, dual sovereignty is presented as a 'best

131. In addition, qualified majority, not unanimity, is in many areas the voting rule for secondary legislation, some of which can claim quasi-constitutional stature.

132. TEU, *supra* note 99, art. 50.

133. This is the case in federations such as the U.S. and Canada. For an analysis, *see generally* Sujit Choudhry & Nathan Hume, *Federalism, Devolution and Secession: From Classical to Post-Conflict Federalism*, *in* RESEARCH HANDBOOK ON COMPARATIVE CONSTITUTIONAL LAW 356 (Tom Ginsburg & Rosalind Dixon eds., 2011).

134. *See* Mancini & Keeling, *supra* note 111, at 175–87.

135. One recalls in this context the Court's unwillingness to rule on the Luxembourg Compromise (1966), which allowed states to preserve their veto rights in the Council, in violation of the Treaty of Rome. On the Luxembourg Compromise, and Court's relation to it, *see* Mancini & Keeling, *supra* note 111, at 187 (arguing that there was no provision in the Treaty of Rome allowing the states to retain their veto rights). In his account, Andre Donner argues that bringing the Luxembourg compromise to the Court would have brought the Communities to an end. *See* ANDRÉ M. DONNER, THE ROLE OF THE LAWYER IN THE EUROPEAN COMMUNITIES 62–63 (1969) (noting that bringing the compromise "would have been the definite end of the communities as communities . . . ."). More recently, the Court arguably followed a similar approach when ratifying the political deal to create a European Stability Mechanism outside of the formal institutional framework of Treaties. *See generally* Thomas Pringle v. Gov't of Ireland, Ireland and the Att'y Gen. [2012] IESC 47 339/2012 (SC). For commentary, *see generally* Bruno de Witte & T. Beukers, *The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle*, 50 COMMON MKT. L. REV. 805, 805 (2013).

136. For an early statement, see JÜRGEN HABERMAS, THEORY AND PRACTICE (1973)

interpretation' of the normative principles of European constitutionalism. In Habermas's view, distilling the normative theory behind constitutional practice helps to clarify the transnationalization of democracy in the European context and to justify much-needed institutional reforms.[137] But that clarification will not be forthcoming if dual sovereignty downplays, as I have argued that it does, the radicalism of European constitutionalism.

CONCLUSION

"Thought completes action," Hannah Arendt wrote.[138] European integration remains in need of normative models to capture the accomplishments of the European political project and to redirect its future development. Dual sovereignty is a wrong step in the right direction. The direction convincingly identifies constituent power as not only far from obsolete, but in fact indispensable for the project of transnationalizing democracy. That insight, however, is undercut by placing supranational alongside national constituent power. Ultimately, the model it offers caves under its own tensions and, politically, ends up legitimizing projects that undermine European unification.

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137. HABERMAS, CRISIS OF EU, *supra* note 1, at x.
138. HANNAH ARENDT, BETWEEN PAST AND FUTURE 6 (Penguin Books 2006).

After Repeal of El Salvador's Amnesty Law: Next Steps in Justice and Accountability

Nadia Hajji[*]

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INTRODUCTION

On July 13, 2016, the Salvadoran Supreme Court struck down a 23-year-old amnesty law that protected soldiers, paramilitary groups, high-ranking officials, and guerrilla fighters from investigations and prosecutions for human rights violations committed during the Salvadoran Civil War.[1] By declaring the amnesty law unconstitutional, the Supreme Court opened the door to pursuing justice for massacres, forced disappearances, torture, and other abuses that spanned from 1980 to 1992.[2] While human rights groups and many victims celebrated the decision as a landmark in transitional justice for the country's tragic past, reactions to the decision remain mixed.[3] Some members of the public and government fear that revoking the law could destabilize El Salvador's deeply divided political system.[4]

A debate has ensued as to whether El Salvador can or should initiate criminal justice mechanisms for its civil war crimes.[5] This Note argues that El Salvador has an international and domestic obligation to promptly and diligently prosecute these crimes. Moreover, based on the experiences of similarly situated post-conflict countries, prosecution is feasible using a three-pronged approach.

This Note proceeds in two sections. Section I of this Note discusses the history of El Salvador's civil war, peace process (including the General Amnesty Law), truth commission efforts, and the recent repeal of the law. Section II discusses El Salvador's capacity to prosecute, the various mechanisms the country can employ to make prosecutions achievable, and how other post-conflict countries have employed these mechanisms to assist in their accountability efforts. Section II.A details the possibility of consolidating multiple cases and defendants that relate to a single war crime incident. Section II.B addresses the use of prosecutorial discretion to determine which cases and defendants will be prosecuted in an efficient manner while serving individual rights. Section II.C suggests that the right of private prosecution may serve as a check on prosecutorial discretion and may generate momentum for justice in the face of a reluctant state.

I. BACKGROUND

El Salvador has struggled for decades with the daunting question of whether and how to confront the atrocities of its past.[6] With the overturn of the 1993 amnesty law,

1. Marcos Aleman, *El Salvador Scraps Amnesty Law, Opens Door for Prosecutions*, S.D. UNION-TRIBUNE (July 14, 2016, 12:38 PM), http://www.sandiegouniontribune.com/sdut-el-salvador-scraps-amnesty-law-opens-door-for-2016jul14-story.html [https://perma.cc/B5UQ-TH5M].

2. *Id.*; Jion Yi, *El Salvador's 1993 Amnesty Law Overturned: Implications for Colombia*, COUNCIL ON HEMISPHERIC AFF. (July 25, 2016), http://www.coha.org/el-salvadors-1993-amnesty-law-overturned-implications-for-colombia/#_edn1 [https://perma.cc/XCM9-ZREG].

3. *See* Yi, *supra* note 2 (explaining that some government officials believe that the ruling will result in witch hunts, disruptive investigations, and prosecutions, while others believe that this ruling finally allows El Salvador to deal with its tragic past).

4. *See* Lisa Nikolau, *Historic Amnesty Ruling in El Salvador Met with Controversy*, HUMANOSPHERE (July 19, 2016), http://www.humanosphere.org/human-rights/2016/07/historic-amnesty-ruling-el-salvador-met-controversy/ [https://perma.cc/7VUY-4XV4] (quoting President Ceren, who stated that the decision may affect "the fragile coexistence that exists within [El Salvador's] society."). *See generally id.*

5. Edgardo Ayala, *El Salvador Faces Dilemma over the Prosecution of War Criminals*, GLOBAL ISSUES (July 23, 2016), http://www.globalissues.org/news/2016/07/23/22338 [https://perma.cc/6DYJ-QZS5].

6. *Cf. El Salvador Commemorates 25 Years of Peace*, ECONOMIST (Jan. 21, 2017),

the country has a renewed opportunity for justice and reconciliation. Unfortunately, there is no simple prescription or template approach for countries to heal the wounds of violent conflict.[7] Effective post-conflict justice requires an informed understanding of the particular experiences of—and conditions in—the country.[8] As such, this section begins by discussing the history of El Salvador's civil war, the crimes at issue, the peace process, and the 1993 amnesty law. This section then explains the relevant international law and victims' rights that impose a duty on El Salvador to prosecute its civil war crimes. The background that this section provides will inform the subsequent argument that El Salvador should employ certain prosecutorial mechanisms to address its painful past.

A. *The Civil War*

Between 1979 and 1990 El Salvador underwent a civil war that resulted in an estimated 75,000 deaths and 8,000 disappearances, the majority of which were civilians.[9] The war was a conflict between the military-led, right-wing government of El Salvador and the Farabundo Martí National Liberation Front (FMLN), a coalition of five left-wing guerrilla groups.[10] The conflict was rooted in the class and ideological divisions of an economic system in which the state was controlled by a small number of landed elites, supported by a powerful military.[11] Although the country held periodic elections under a formal constitution between 1948 and 1979, it operated under an authoritarian system.[12] The military provided stability and order for the elite, who in turn provided resources and autonomy for the military[13] while many peasants suffered in poverty.[14]

Throughout the 1970s, deteriorating economic conditions fueled unrest and mass mobilization among the working classes.[15] Liberation theology became popular, as

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http://www.economist.com/news/americas/21715065-country-needs-new-peace-accord-el-salvador-commemorates-25-years-peace [https://perma.cc/5UKK-DH62] (discussing the abnormal antagonism between the country's two major political parties, resulting from the fact that they originated from the two sides of the civil war).

7. INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK (David Bloomfield et al. eds., 2003), http://www.un.org/en/peacebuilding/pbso/pdf/Reconciliation-After-Violent-Conflict-A-Handbook-Full-English-PDF.pdf [https://perma.cc/7ZDW-WSKC].

8. *See What is Transitional Justice?*, INT'L. CTR. TRANSITIONAL JUST., https://www.ictj.org/about/transitional-justice [https://perma.cc/C3FP-ZY4G] (last visited Oct. 17, 2017) (stating that "[t]he political, social, and legal conditions in a country will dictate what kinds of things can be done when. It is important to take the time to carry out the necessary analysis, avoid 'check-list' or template documents, and ensure that what is done responds to an informed understanding of the conditions in the country.").

9. Nikolau, *supra* note 4. *See generally* Gregory Jowdy, *Truth Commissions in El Salvador and Guatemala: A Proposal for Truth in Guatemala*, 17 B.C. THIRD WORLD L.J. 285, 294 (1997) (describing El Salvador's civil war timeline and resulting deaths).

10. *El Salvador: 12 Years of Civil War*, CTR. JUST. & ACCOUNTABILITY, http://cja.org/where-we-work/el-salvador/ [https://perma.cc/HMC3-ELS8] (last visited Oct. 17, 2017).

11. Charles T. Call, *Assessing El Salvador's Transition from Civil War to Peace*, *in* ENDING CIVIL WARS: THE IMPLEMENTATION OF PEACE AGREEMENTS 383, 384–85 (Stephen J. Stedman et al. eds., 2002).

12. *Id.*

13. *Id.*

14. Jowdy, *supra* note 9, at 292.

15. JOHN A. BOOTH & THOMAS W. WALKER, UNDERSTANDING CENTRAL AMERICA 39 (1993).

Christian communities began working with the impoverished and using religion to expose the pervasive economic and political oppression.[16] Protests, working class organization, and social pressure for change increased.[17] The government responded with a "wave of terror," whereby right-wing death squads were murdering over a thousand people per month around 1979.[18]

During that period, a bloody revolution took place in nearby Nicaragua, raising fears of a similar violent revolution in El Salvador.[19] Emboldened by the events in Nicaragua and U.S. support for reform, a group of politically reformist junior military officers executed a coup d'état in October 1979.[20] As a result, the Revolutionary Governing Junta (RGJ) came to power and promised social and economic reforms, as well as greater protection of human rights.[21]

Nevertheless, the RGJ experienced internal conflict and struggled to bring the military under control.[22] The El Salvadoran military maintained close ties with death squads and exerted considerable pressure on any government official who attempted to stop their abuses.[23] The death squads targeted suspected FMLN guerrilla sympathizers and even those who supported moderates in the new government.[24] As the military showed its unwillingness to heed the RGJ, death-squad killings and disappearances reached an unprecedented level.[25] Facing death threats from the far-right, leading members of the RGJ resigned, along with 10 of the 11 cabinet ministers.[26] The RGJ was effectively paralyzed and unable to effectuate its intended reforms.[27] A new junta was established, leaving behind the reformist nature of the previous one.[28]

In January 1980, a generalized attack on the government erupted, involving occupations of radio stations, bombings of government-controlled newspapers, abductions and executions of government and military persons, and attacks on military targets.[29] In response, the Salvadoran government mounted a counterinsurgency, including an attack at a massive protest where 22 to 50 people were killed and 600 to 800 were wounded.[30]

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16. *Id.*

17. *Id.*

18. *Id.*

19. Call, *supra* note 11, at 385.

20. *Id.*

21. *Id.*; *see also El Salvador—Chronology*, KELLOGG INST. FOR INT'L STUD., https://kellogg.nd.edu/archbishop -oscar-romero [https://perma.cc/GWB9-GPPE] (last visited Oct. 2, 2016).

22. *El Salvador: Civil War*, ENCYL. BRITANNICA, https://www.britannica.com/place/El-Salvador/Civil-war [https://perma.cc/M62Q-A38F] (last visited Oct. 1, 2017); Call, *supra* note 11, at 385.

23. *See* T. David Mason, *The Civil War in El Salvador: A Retrospective Analysis*, 34 LATIN AM. RES. REV. 179, 193 (1999) ("[The death squads] prevented the reformist junta from consolidating its control over power and building a base of popular support for a politically moderate, reformist center.").

24. *Id.* at 190.

25. *See id.* at 190–91 (detailing the extremes of state-sponsored violence during this period).

26. Comm'n on the Truth for El Salvador, From Madness to Hope: The 12-year War in El Salvador: Report of the Commission on the Truth for El Salvador, U.N. Doc. S/25500, annex, at 20 (1993).

27. *El Salvador—Chronology*, *supra* note 21.

28. Carlos Guillermo Ramos et al.,THE FMLN AND POST-WAR POLITICS IN EL SALVADOR: FROM INCLUDED TO INCLUSIVE ACTOR? 8 (2015), http://ips-project.org/wp-content/uploads/2015/07/Paper-2-El-Salvador-English-final.pdf [https://perma.cc/536Z-U5NU].

29. *El Salvador—Chronology*, *supra* note 21.

30. *Id.*

The assassination of Archbishop Oscar Romero during a public mass on March 24, 1980 marked the conflict's escalation into a civil war.[31] Archbishop Romero was a well-known critic of the military's repression and death squad.[32] Roberto D'Aubuisson, a major in the Salvadoran army who later founded the right-wing political party Nationalist Republican Alliance (ARENA), which still enjoys a plurality in the Legislative Assembly, ordered the assassination.[33]

The next year, on December 11, 1981, in El Mozote, a remote village in the department of Morazan, roughly 1,000 villagers were rounded up, massacred, and dumped into mass graves.[34] Their murders were a military tactic aimed at generating fear in citizens who might collaborate with the guerrillas.[35] The massacre at El Mozote is one of the largest massacres in modern Latin American history.[36]

As the military defended their stance on killing any alleged rebels, the FMLN worked to damage the economy that supported the government by blowing up bridges, cutting power lines, and destroying coffee plantations.[37] The FMLN also murdered and kidnapped government officials.[38] Throughout the war, guerrilla attacks became more sophisticated, evolving from using machetes and small pistols to using grenade launchers and other imported arms for more strategic advances.[39]

On November 16, 1989, in another infamous abuse, the military murdered six Jesuit priests and two female workers at the Universidad Centroamericana.[40] These murders marked a turning point in the war, leading to increased international pressure for a negotiated solution to end it.[41]

Overall, El Salvador's civil war resembled the wars of other Latin American countries around that time; death squads, forced disappearances, torture, and execution were pervasive and committed by all parties.[42] Hundreds of thousands fled the violence of the civil war and divided society.[43]

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31. Liam McGivern, *Justice Denied: Impunity During and After the Salvadoran Civil War*, 10 INTERSECTIONS 169, 170 (2009).

32. *See id.* at 170–71 (stating that the archbishop opposed the oligarchy and worked with the Human Rights Commission of El Salvador to record human rights abuses and murders).

33. Yi, *supra* note 2, at 2.

34. *Id.*

35. *Id.*

36. Mark Danner, *The Truth of El Mozote*, NEW YORKER, Dec. 6, 1993, at 50.

37. *Id.*

37. *El Salvador—Chronology*, *supra* note 21.

39. *Id.*

40. *El Salvador: 12 Years of Civil War*, *supra* note 10.

41. *Id.*

42. Elizabeth B. Ludwin King, *Amnesties in A Time of Transition*, 41 GEO. WASH. INT'L L. REV. 577, 587 (2010).

43. Andrew Bounds, *El Salvador: History*, *in* SOUTH AMERICA, CENTRAL AMERICA AND THE CARIBBEAN 2002, at 383, 384 (Jaqueline West ed., 10th ed. 2001).

B. *Peace Process and Truth Commission*

In 1990, El Salvador began a peace process with the signing of the *Agreement on Human Rights (San Jose Agreement)*, backed by the United Nations.[44] Both the government and the FMLN agreed to respect and guarantee human rights; to assign priority to the investigation of acts against life, integrity, and liberty during the conflict; and to accept an international mission of verification, or truth commission, for those acts.[45]

To verify compliance with the agreements, the United Nations Observer Mission in El Salvador (ONUSAL) was established by Security Council Resolution 693 of May 20, 1991.[46] In the Mexico Agreement of April 27, 1991, the parties also agreed to constitutional and legal reforms to further ensure respect and enjoyment of human rights.[47]

The parties signed a final peace agreement in the Palace of Chapultepec, Mexico, on January 16, 1992.[48] The agreement entailed comprehensive reform of the armed forces, civilian police, judicial system, electoral system, economic and social arrangements, and land and property issues.[49] The agreement also included guarantees for the political participation of the FMLN and for a final ceasefire with the disarmament, demobilization, and reintegration of the warring parties.[50] The Chapultepec Accords did not, however, include any criminal justice reforms.[51]

On January 23, 1992, only seven days after signing the Chapultepec Agreement, El Salvador passed a limited amnesty law: the Law of National Reconciliation.[52] This law excluded from amnesty individuals involved in serious human rights violations.[53] Article 1 granted amnesty "to all persons who participated as direct or indirect perpetrators or as accomplices in committing political crimes, related common crimes or common crimes carried out by at least 20 persons, prior to January 1, 1992,

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44. *See generally* Sec. Council, Note Verbale dated 14 August 1990 from the Charge d'affaires a.i. of the Permanent Mission of El Salvador to the United Nations addressed to the Secretary-General, U.N. Doc. A/44/971 (Aug. 14, 1990).

45. Report on the Situation of Human Rights in El Salvador, Inter-Am. Comm'n H.R., OEA/Ser.L/II.85, doc. 28 rev. chap. I, (1994), http://www.cidh.org/countryrep/ElSalvador94eng/i.Background.htm [https://perma.cc/WF V6-BPPJ] [hereinafter Human Rights Report]; DANIEL CERQUEIRA & LEONOR ARTEAGA, DUE PROCESS LAW FOUND., CHALLENGING THE AMNESTY LAW IN EL SALVADOR: DOMESTIC AND INTERNATIONAL ALTERNATIVES TO BRING AN END TO IMPUNITY 3 (2016), http://www.dplf.org/sites/default/files/amnesty_law-final-24june.pdf [https://perma.cc/XX5A-JMJN].

46. S.C. Res. 693, para. 2 (May 20, 1991); CERQUEIRA & ARTEAGA, *supra* note 45, at 3.

47. Permanent Rep. of El Salvador to the U.N., Letter dated 8 October 1991 from the Permanent Rep. of El Salvador to the United Nations addressed to the Secretary-General, U.N. Doc. A/46/553, annex (Oct. 9, 1991); CERQUEIRA & ARTEAGA, *supra* note 45, at 3.

48. Permanent Rep. of El Salvador to the U.N., Letter dated 27 January 1992 from the Permanent Representative of El Salvador to the United Nations addressed to the Secretary-Genera, U.N. Doc. A/46/864, annex (Ja. 30, 1992).

49. *Id.* chs. I–V.

50. *Id.* chs. VII, IX.

51. U.S. INST. PEACE, EL SALVADOR: IMPLEMENTATION OF THE PEACE ACCORDS 16 (2001), https://www.usip.org/sites/default/files/pwks38.pdf [https://perma.cc/TRM3-EJVR].

52. National Reconciliation Act, D.O. Decree 147, Jan. 23, 1992, (El Sal.), http://www.asamblea.gob.sv/eparlamento/indice-legislativo/buscador-de-documentos-legislativos/ley-de-reconciliacion-nacional [https://perma.cc/3YK3-M8BK].

53. *Id.* at 2.

excepting in all cases the common crime of kidnapping . . . ."[54] Article 6 established an important exception: The protections did not apply to "persons who . . . participated in grave acts of violence committed after January 1, 1980, whose impact on society urgently demands that the public know the truth, regardless of the sector to which they belonged."[55]

The United Nations mandated a Truth Commission to investigate the "serious acts of violence that [] occurred since 1980 and whose impact on society urgently demands that the public should know the truth."[56] From January 1980 to July 1991, the Truth Commission registered more than 22,000 complaints of serious acts of violence during the Salvadoran Civil War.[57] Of the complaints, over 60% concerned extrajudicial executions, over 25% concerned enforced disappearances, and over 20% included complaints of torture.[58] The Truth Commission issued a report on March 15, 1993, entitled De la Locura a la Esperanza (From Madness to Hope).[59] The report covered fifteen representative cases of extra-judicial assassination and disappearance, four massacres by the government, five death squad murder cases, eight murder and kidnapping cases by the FMLN, and two cases in which the commission could not determine responsibility.[60] The report estimated that the government forces committed approximately 85% of all killings in the war, while the FMLN guerrillas committed 5% of the killings.[61] The report listed individuals responsible for carrying out egregious crimes, including the President of the Supreme Court at that time and the founder of ARENA, Roberto D'Aubisson.[62] It called for the dismissal of over 40 high-ranking officials and the disqualification of any other person implicated in wrongdoings from public office for at least 10 years and from public security functions for life.[63] The report also addressed the need for criminal justice reforms.[64]

Unfortunately, the commission's report did not have any real effect on reconciliation or justice in the country.[65] Notably, the Truth Commission did not call for the prosecution of those named within the report, since it viewed the Salvadoran legal system as incapable of executing such prosecutions effectively.[66] The commission felt that trials would only lead to further impunity unless the judiciary was completely

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54. *Id.*

55. CERQUEIRA & ARTEAGA, *supra* note 45, at 6.

56. Comm'n on the Truth for El Salvador, *supra* note 26, at 11.

57. *Id.* at 35.

58. *Id.* at 36.

59. Jo M. Pasqualucci, *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT'L L.J. 321, 340 (1994).

60. *Id.* at 340–41.

61. Comm'n on the Truth for El Salvador, *supra* note 26, at 36.

62. *See id.* at 127 (describing how D'Aubuisson gave members of his security service orders to assassinate an archbishop).

63. Pasqualucci, *supra* note 59, at 351.

64. CERQUEIRA & ARTEAGA, *supra* note 45, at 4.

65. Ludwin King, *supra* note 42, at 588–89 ("[T]he Salvadoran amnesty prevented the com-mission's report from having any real effect on accountability; given the mandatory nature of the commission's recommendations, the country could have held trials with significant U.N. assistance, not unlike the international and hybrid tribunals that exist today.").

66. PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 91 (2001).

overhauled.[67] The report also did not prohibit a blanket amnesty.[68] Commissioner Thomas Buergenthal explained that recommending trials when the judiciary was not in a position to administer them would have been worse for the country.[69] Still, the Truth Commission's report did urge the National Judiciary Council to vet out all judges responsible for impunity and called for the entire Supreme Court to immediately resign.[70] The report also recommended reparations for victims, including memorials and monetary compensation, and a forum to monitor the implementation of all recommendations.[71]

While the commission's mandate required El Salvador to implement the recommendations, enacting these reforms depended on the power equilibrium between the parties to the peace accords, who were uninterested in its implementation.[72] The commission's criticism of the government, the judiciary, and the FLMN resulted in its unpopularity across the board.[73] ONUSAL pushed to implement the recommendations, yet the government rejected the commission's report.[74] No follow-up organization or reparation fund for the victims was established, and judicial reform was not effectuated.[75]

C. Amnesty Law

As an immediate response to the Truth Commission's report and uproar from the military, the president of El Salvador introduced a bill in Parliament to provide much broader amnesty to anyone who committed crimes with a political motive.[76] As a rationale for the law, the government claimed that the report did not further the country's goal of moving forward.[77] On March 20, 1993, five days after the report was released, the Salvadoran Parliament passed this General Amnesty Law for the Consolidation of Peace, which superseded the Law of National Reconciliation.[78] In particular, the General Amnesty Law repealed the Article 6 exception of the Law of National Reconciliation.[79]

67. Emily W. Schabacker, *Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenses*, N.Y. INT'L L. REV. 1, 13 (1999); *see* Pasqualucci, *supra* note 59, at 341 (stating that "[t]hrough its investigation, the Commission found that the judicial system in El Salvador was not willing or capable at that time of judging and sanctioning the perpetrators of the abuses."); *see also* Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 536 (1994) (quoting Comm'n on the Truth for El Salvador, *supra* note 26, at 168, saying, "El Salvador has no system for the administration of justice which meets the minimum requirements of objectivity and impartiality so that justice can be rendered reliably.").

68. Comm'n on the Truth for El Salvador, *supra* note 26, at 4–5.

69. Buergenthal, *supra* note 67, at 536.

70. Comm'n on the Truth for El Salvador, *supra* note 26, at 167.

71. *Id.* at 176–77.

72. *Id.* at 165.

73. Schabacker, *supra* note 67, at 13.

74. Buergenthal, *supra* note 67, at 537–38, 542.

75. *See id.* at 537–38 (discussing the practical effects of the Truth Commission).

76. Ludwin King, *supra* note 42, at 588.

77. Schabacker, *supra* note 67, at 13.

78. Law of General Amnesty for the Consolidation of the Peace, D.O. Decree 486, Mar. 20 1993 (El. Sal).

79. *Id.*

From the time the amnesty law was implemented, El Salvador confronted relentless international pressure, as well as domestic protests, to amend or repeal the amnesty provisions. United Nations human rights bodies, such as the Human Rights Committee, the Working Group on Enforced or Involuntary Disappearances, and the Committee Against Torture, disputed the law for preventing victims from obtaining justice and redress.[80] The Inter-American Commission on Human Rights (IACHR) continually found the amnesty law to be incompatible with the American Convention on Human Rights.[81] Just six days after the enactment of the amnesty law, the IACHR expressed its concern to the Salvadorian president that the amnesty law could "compromise effective implementation of the Truth Commission's recommendations and eventually lead to a failure to comply with the [country's] international obligations . . . ."[82] In 1999, the Inter-American Commission on Human Rights of Organization of American States claimed that the amnesty law violated international law on human rights, particularly the right to truth, as well as the duties to investigate, prosecute, and punish serious human rights violations.[83] In the 2012 case involving the El Mozote massacre, the Inter-American Court of Human Rights examined the application of the amnesty law in relation to the criminal investigation of the massacre.[84] It found the law invalid and ordered the Salvadoran state to ensure that the law did not represent an obstacle to the "identification, prosecution, and punishment of those responsible . . . ."[85] Amnesty International also demanded that the law be repealed; and, in 2011, the Spanish High Court—invoking universal jurisdiction—pressed charges against 20 Salvadorans for gross human rights violations during the civil war.[86]

Nevertheless, El Salvador continually backed amnesty at the national level. On May 20, 1993, the Salvadoran Supreme Court declined to hear a challenge to the amnesty law on the basis that the law was a political question outside its powers of review.[87] Revisiting the issue on September 26, 2000, the Salvadorian Supreme Court declared that the law was not unconstitutional per se, but rather judges should decide on a case-by-case basis whether applying the amnesty law was unconstitutional.[88] The Supreme Court clarified that the law should apply:

80. CERQUEIRA & ARTEAGA, *supra* note 45, at 6. *See generally* Comments of the Human Rights Comm., U.N. Doc. CCPR/C/79/Add.34 (1994); Concluding Observations of the Human Rights Comm.: El Sal., U.N. Doc. CCPR/CO/78/SLV (2003); Rep. of the Working Grp. on Enforced or Involuntary Disappearances, Mission to El Sal., U.N. Doc. A/HRC/7/2/Add.2 (2007); Concluding Observations of the Comm. against Torture, U.N. Doc. CAT/C/SLV/CO/2 (2009).

81. The Massacres of El Mozote and Nearby Places v. El Salvador, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, para. 281 (Oct. 25, 2012).

82. Note to the State of El Salvador, Inter-Am. Comm'n H.R. (Mar. 26, 1993), *quoted in* Inter-Am. Ct. H.R., Report No. 177/10, Case 10.720 Massacres of El Mozote and Neighboring Locales, para. 321. (Nov. 3, 2010).

83. Lucio Parada Cea et al., Case 10.480, Inter-Am. Comm'n H.R., Report No. 1/99, OEA/Ser.L./V/II.102, doc 6 rev. paras. 119–58 (1999).

84. Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, paras. 253–55 (Oct. 25, 2012).

85. *Id.* para. 296.

86. Yi, *supra* note 2, at 3.

87. Ludwin King, *supra* note 42, at 588.

88. Juicio Sobre Constitucionalidad, Sala de lo Constitucional de la Corte Supreme de Justicia [Supreme Court of Justice], No. 24–97 ac 21 –98, Sept. 1 2000 (El Sal.)

> [O]nly in those cases in which the aforementioned pardon does not impede protection in terms of the preservation and defense of the rights of the victims or their relatives, in other words, in those cases involving crimes whose investigation does not aim to redress [the violation of] a fundamental right.[89]

Although this decision legally permitted prosecution of war crimes and crimes against humanity, neither the Attorney General's Office or criminal court judges made serious efforts to investigate and punish these crimes.[90] As of 2016, El Salvador had not made a single indictment, and certainly had not tried or convicted any persons, for acts committed during the armed conflict.[91]

Following the civil war, successive Salvadoran governments, the military, and the private sector disclaimed all responsibility for the crimes committed.[92] Members of the conservative ARENA governed El Salvador during the war and remained in power through the early 2000s.[93] The party consists of landowners, businessmen, and high-ranking military officers or former officers.[94] Despite international pressures, ARENA failed to denounce the amnesty law, to acknowledge State responsibility for war crimes, or to implement reparation measures.[95] It maintained that the amnesty law is a pillar of the peace process and revising it would cause a backlash, jeopardizing national reconciliation.[96]

On March 15, 2009, the presidential office and majority in Congress shifted to a center-left coalition of parties headed by the FMLN, which led to speculation that the government would change its stance on the law.[97] The FMLN showed receptiveness towards justice, campaigning on the need to repeal the amnesty law and provide reparations for the victims.[98] However, after assuming office, President Mauricio Funes dodged the issue by stating that only the legislative and judicial branches had authority to pursue the issue, and he asked the Salvadoran public not to demand repeal of the amnesty law.[99]

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89. *Id.*

90. In spite of the persistence and cooperation of the victims, complaints remained open for years in their initial phases without any type of procedural activity. Often, complaints were dismissed before investigation concluded. Report of the Ombudsman's Office with Respect to Impunity in the Case of the Arbitrary Executions of Ignacio Ellacuría et al., Oct. 30, 2002; *see generally* INTER-AMER. COMM'N. H.R., EL SAL. PRO-HISTORICAL MEMORY COMM'N & CENT. JUSTICE INTERNATIONAL LAW, LA IMPUNIDAD EN EL SALVADOR: TRAGEDIA DEL PASADO Y DEL PRESENTE (2008); *see generally* Contreras et al. v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Amer. Ct. H.R. (ser. C) No. 232, para. 145 (Aug. 31, 2011).

91. CERQUEIRA & ARTEAGA, *supra* note 45, at 9.

92. *Id.* at 11.

93. CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., R43616, EL SALVADOR: BACKGROUND AND U.S. RELATIONS 1 (2016).

94. CERQUEIRA & ARTEAGA, *supra* note 45, at 11.

95. WAYNE SANDHOLTZ & MARIANA RANGEL PADILLA, JUGGLING RIGHTS, JUGGLING POLITICS: AMNESTY LAWS AND THE INTER-AMERICAN COURT 23 (2014), http://web.isanet.org/Web/Conferences/FLACSO-ISA%20BuenosAires%202014/Archive/5211d97f-650e-4bfd-b352-05f6a013929b.pdf [https://perma.cc/H6PU-BGNS].

96. CERQUEIRA & ARTEAGA, *supra* note 45, at 11–12.

97. *Id.* at 14.

98. *Id.*

99. Daniel Valencia Caravantes, *Funes Pide no le Presionen sobre Derogación Ley de Amnistía*, EL FARO (Mar. 24, 2010), www.elfaro.net/es/201003/noticias/1412/ [https://perma.cc/X6C8-9MSY].

D. Repeal of Amnesty Law

In March 2013, a group of human rights organizations filed a lawsuit before the Supreme Court requesting the reexamination of the amnesty law's consistency with the Constitution.[100] During this time, ARENA had recovered the majority position, but the FMLN had won a second presidential term. The case was admitted in September 2013, and on July 13, 2016, the Salvadoran Supreme Court overturned the 1993 General Amnesty Law by a vote of 4 to 1.[101] The court announced that the amnesty law was "contrary to the access of justice" and the "protection of fundamental rights."[102] It held that statutes of limitations do not apply to war crimes and crimes against humanity as a matter of customary law and the rule of *jus cogens*, both of which govern regardless of a country's ratification of specific conventions.[103] For similar reasons, it held that defendants cannot raise claims of settled expectations or ex post facto law to defeat investigations and prosecutions.[104] The ruling was attributed to pressure from protesters, NGO's, and international bodies.[105]

The court's reversal of the amnesty law has evoked mixed responses. Ulises Del Dios Guzmán, former Salvadoran Supreme Court Justice, expressed his concern that "[the court decision] drags us to the past and an unharmonious situation that could cause real confrontation and recriminations."[106] Salvadoran General David Munguía Payés anticipated "witch hunts" once the ruling took effect.[107] Many expect disruptive investigations and prosecutions for several government officials, including Salvador Sánchez Cerén, the former FMLN Commanding General and the current Salvadoran President.[108] Indeed, at a minimum, the overturn of the amnesty law forces the state to make an uncomfortable decision whether to prosecute its own officials.[109] On the other hand, the court ruling was celebrated by victims and human rights groups.[110] Ericka Guevara-Rosas, Americas Director of Amnesty International, expressed relief that El Salvador is "finally dealing with its tragic past."[111] Nevertheless, El Salvador's Attorney General has yet to announce any specific plans to prosecute the war crimes cases.[112] Considering that prosecutions did not transpire in El Salvador after 2000 when

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100. Judgment on Constitutionality, [July 13, 2016] Sala de lo Constitucional de la Corte Suprema de Justicia [Constitutional Chamber of the Supreme Court of Justice of El Salvador], case file 44-2013/145-2013, 1, 1 (El Sal.).

101. *Id.* at 44.

102. Elisabeth Malkin & Gene Palumbo, *Salvadoran Court Overturns Wartime Amnesty, Paving Way for Prosecutions*, N.Y TIMES (July 14, 2016), https://www.nytimes.com/2016/07/15/world/americas/salvadoran-court-overturns-wartime-amnesty-paving-way-for-prosecutions.html?_r=0 [https://perma.cc/H4CJ-7RKV].

103. Judgment on Constitutionality, *supra* note 100, 42–43.

104. *Id.* at 56.

105. Yi, *supra* note 2, at 5.

106. *Id.*

107. *Id.*

108. *Id.*

109. Geoff Dancy & Veronica Michel, *Human Rights Enforcement from Below: Private Actors and Prosecutorial Momentum in Latin America and Europe*, 60 INT'L STUD. Q. 176, 181 (2016).

110. Yi, *supra* note 2, at 5.

111. *Id.*

112. Nikolau, *supra* note 4; *see also* CATH COLLINS, POST-TRANSITIONAL JUSTICE: HUMAN RIGHTS TRIALS IN CHILE AND EL SALVADOR 173–77 (2010) (noting that the attorney general position has

the Supreme Court permitted prosecutions on a case-by-case basis, a great risk remains that perpetrators of crimes related to the civil war will remain unpunished even after the full repeal of amnesty.

E. Obligation to Prosecute

El Salvador is obligated to prosecute crimes related to the civil war because of international law and its duties to victims. El Salvador is party to human rights covenants that govern standards of treatment and enumerate inalienable rights of individuals.[113] The Salvadoran Supreme Court recognized these duties in its decision to repeal the amnesty law.[114] In particular, it recognized El Salvador's obligations to investigate, prosecute, and punish serious human rights violations under the Inter-American Commission and Court on Human Rights (ICCHR), the International Covenant on Civil and Political Rights (ICCPR), the International Criminal Court (ICC), and the Geneva Conventions.[115]

The ICCHR has maintained that Articles 8, 25, and 1(1) of the American Convention on Human Rights require states to effectively prosecute violations of a victim's right to life and personal integrity.[116] Under this Convention, victims and the victims' next of kin and bring suit.[117] Article 1(1) requires countries to prevent, investigate, and punish all violations of the rights granted by the Convention.[118] Articles 8 and 25 of the Convention grant victims the right to have a prompt, impartial, and competent court hear their case and determine appropriate punishments or remedies.[119] The ICCHR interpreted these provisions to impose a legal duty on states to "use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, [and] to impose the appropriate punishment . . . ."[120]

Article 7 of the Rome Statute of the ICC codifies the definition of "crimes against humanity."[121] It includes murder, extermination, rape, persecution, and all other inhumane acts of a similar character committed "as part of a widespread or systematic attack directed against any civilian population."[122] El Salvador's Supreme Court has

historically been characterized as prejudicial to justice and accountability cases.).

113. Comunicado de prensa de la Sala de lo Constitucional [Constitutional Chamber Press Release], Sala Declara Inconstitucional la Ley de Amnistía (July 13, 2016) (El Sal.), http://static.ow.ly/docs/20.%20Comunicado%2013-VII-2016%20Ley%20de%20amnist%C3%ADa_50Yr.pdf [https://perma.cc/7NGH-A6DM].

114. *Id.*

115. *Id.*

116. Barrios Altos v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, para. 39 (Mar. 14, 2001).

117. *Id.* paras. 45–49.

118. Almonacid-Arellano v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, para. 20 (Sept. 26, 2006); *see also* Castillo-Páez v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 43, para. 106 (Nov. 27, 1998) (discussing Article 25 in relation to Article 1(1)).

119. Almonacid-Arellano, Inter-Am. Ct. H.R. (ser. C) No. 154, para. 22; *Castillo Páez,* Inter-Am. Ct. H.R. (ser. C) No. 43, para. 106.

120. Velasquez Rodriguez v. Honduras, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 194 (July 21,1989).

121. Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90.

122. *Id.*

recognized that many crimes associated with El Salvador's civil war fall under this definition.[123] The preamble of the Rome Statute of the ICC obligates states to punish and prosecute crimes against humanity.[124]

The Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 1977 provide the foundation of the term "war crimes."[125] It refers to serious breaches of international humanitarian law committed against civilians or enemy combatants during an international or domestic armed conflict, for which the perpetrators may be held criminally liable on an individual basis.[126] Article 8 of the 1998 Rome Statute for the ICC includes the most recent codification.[127] El Salvador's Supreme Court also recognized that many actions during its civil war would be considered war crimes.[128] The Geneva Conventions and Additional Protocols obligate states to search for individuals responsible for such grave breaches and to prosecute them.[129]

In addition to its international obligations, El Salvador must prosecute its war crimes to protect the rights and dignity of victims. By doing so, El Salvador would (1) decrease the possibility of future repression, (2) increase individual responsibility, (3) provide retributive justice to victims, (4) encourage peace and reconciliation, and (5) promote equal treatment under the law.

First, survivors of human rights violations embrace the idea that only through accountability can states effectively guard against repetition of abuses.[130] The pursuit of prosecutions can impact new generations of military, police officers, and civilian political leaders.[131] The prospect of prosecutions for crimes can make future repression too costly for these actors.[132]

Second, victims view prosecutions as a truth-revealing mechanism not satisfied by truth commissions alone.[133] Although the report of the Commission on the Truth

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123. Comunicado de Prensa de la Sala de lo Constitucional, *supra* note 113.

124. Rome Statue of the International Criminal Court, *supra* note 121, at 91.

125. *See* U.N. High Comm. for Hum. Rights, Democratic Republic of the Congo, 1993-2003, paras. 23–24 (2010), http://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf [https://perma.cc/9LTN-VJLT] (defining "war crimes").

126. *Id.*

127. *Id.* (detailing a recent definition of "war crimes").

128. Comunicado de Prensa de la Sala de lo Constitucional, *supra* note 113, at 2 (detailing the El Salvadorian Supreme Court's statement concerning civil war and war crimes).

129. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6.3 U.S.T. 3114, 75 U.N.T.S. 31; *see also* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135 (explaining state obligations to advocate for prisoners of war); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (detailing state obligations to investigate affronts to human rights).

130. Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State Sponsored Crimes*, 35 VAND. J. OF TRANSNAT'L L. 1399, 1444 (2002) (discussing criminal punishment for accountability).

131. Hun Joon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INT'L STUD. Q. 939, 944 (2010) (discussing the impact of arrests and trials on political leaders).

132. *Id.* (discussing consequences of arrests and trials on political leaders).

133. Aldana-Pindell, *supra* note 130, at 1444 (discussing the victims' perspective on prosecuting war crimes).

for El Salvador was unique in naming some of the individual perpetrators from the cases investigated, from a victim's perspective, the lack of any prosecution undermines justice by eroding individual responsibility.[134] The Inter-American Court has explained that criminal investigations are necessary to determine the circumstances of the crime, corresponding responsibilities of individuals, and the "numerous adverse effects caused to the victims . . . ."[135]

Third, prosecuting human rights violators serves a retributive justice function. In this sense, human rights victims seek punishment as a form of payback for the suffering and loss they experienced.[136] Criminal liability is necessary because civil remedies do not sufficiently compensate victims for their pain.[137]

Fourth, prosecutions serve peace and reconciliation purposes. By individualizing guilt, trials allow victims of atrocities to move beyond collective condemnation of the entire opposing group from which their abusers came, thereby enabling groups of former adversaries to begin to reconcile with one another.[138]

Fifth, victims view prosecutions as an extension of their right to be treated equally under the law.[139] Because countries impose criminal punishment for crimes such as murder and torture, victims also demand criminal prosecution for human rights crimes during the Civil War.[140] Equal treatment concerns arise when a state adopts a policy of intentionally obstructing prosecutions, either because it wishes to protect the accused or because it is not interested in validating certain victims' allegations.[141] Without prosecutions, the country runs the risk that the public will come to view the violence against them as endorsed by the current government.[142]

Therefore, this Note operates on the premise that El Salvador has a duty to prosecute—a duty that cannot be excused by the country's incapacity to prosecute.

II. CAPACITY TO PROSECUTE

A common complaint in countries prosecuting crimes against humanity and war crimes is that the trials will be overly burdensome, impractical, or impossible, given

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134. *Id.* at 1445.

135. Massacres of El Mozote and Nearby Places v. El Salvador, Inter-Am. Ct. H.R. (ser. C) No. 252, para. 315 (Oct. 25, 2012); *see also* Bámaca Velásquez v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 43, para. 85 (2000) (explaining how a military court dismissed a case brought against members of the armed forces and how an appeals court remanded the case because examination of the crimes had not yet concluded and therefore, the dismissal was premature); Barrios Altos v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, paras. 45–49 (2001) (detailing the jurisprudence that emphasizes the necessity of criminal investigations).

136. *See* Jeffrie G. Murphy, *Retributivism, Moral Education, and the Liberal State*, *in* RETRIBUTION RECONSIDERED 15, 15–17 (1992) (discussing retributive justice theoretically).

137. *See generally* Jeffrie G. Murphy, *Why Have Criminal Law at All?*, *in* RETRIBUTION RECONSIDERED 1 (1992).

138. Susan Dwyer, *Reconciliation for Realists*, 13 ETHICS & INT'L. AFF. 81, 89–90 (1999).

139. Aldana-Pindell, *supra* note 130, at 1444 (discussing equal treatment concerns).

140. *Id.* at 1441.

141. *Id.* at 1451.

142. *Id.*; *see also* Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, para. 249 (Oct. 25, 2012) ("[A] trial conducted to its completion and that fulfills its purpose is the clearest signal of zero tolerance for grave human rights violations, contributes to the reparation of the victims, and shows society that justice has been done.").

the overwhelming numbers of potential defendants and victims, and the scant resources of fragile countries emerging from conflict.[143] In El Salvador, such arguments have arisen as legal experts predict an onslaught of new allegations from people beginning to openly seek justice for themselves and their family members.[144] Among cited concerns are inadequacies of the judiciary, which is already strained by the amount of pending cases.[145] Left-wing analyst Salvador Samayoa argues that the country has too many problems to be wasting its energy on prosecuting war crimes.[146] Salvadoran Defense Minister General David Munguía Payés echoes that sentiment, arguing that the country's resources would be better devoted to ongoing crimes at a time when the country is under siege from drug gangs.[147] Another concern is that war crime prosecutions will detract resources and energy from the current government agenda, which boasts of promoting education and health programs to curb poverty and illiteracy.[148]

Concerns about the extensive nature of prosecutions are not unwarranted. "Crimes against humanity are by definition widespread or systematic, so the investigative authorities must find evidence for thousands of individual incidents . . . ."[149] Trying hundreds accused of a large number of crimes against humanity that occurred decades ago in remote areas will be costly, time consuming, and potentially overwhelming to El Salvador's court system.[150] However, through use of mega-trials, prosecutorial discretion, and private prosecution rights, El Salvador can surmount these obstacles to provide justice and accountability for war crimes, thus satisfying its international obligations and fulfilling its duty to victims.

A. *Consolidating Trials into Mega-Trials*

Mega-trials minimize costs and maximize efficiency in prosecuting hundreds of accused persons for long-ago war crimes, while also satisfying the confines of due

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143. Naomi Roht-Arriaza, *After Amnesties Are Gone: Latin American National Courts and the New Contours of the Fight Against Impunity*, 37 HUM. RTS. Q. 341, 363 (2015) (detailing potential difficulties with prosecuting war crimes).

144. Nikolau, *supra* note 4.

145. Edgardo Ayala, *El Salvador Faces Dilemma Over the Prosecution of War Criminals*, GLOBAL ISSUES (July 23, 2016), http://www.globalissues.org/news/2016/07/23/22338.org [https://perma.cc/V8NL-L482].

146. *Id.*

147. Linda Cooper & James Hodge, *Ruling Could Bring Justice, Instability to El Salvador*, NAT'L CATHOLIC REP. (July 28, 2016), https://www.ncronline.org/news/world/ruling-could-bring-justice-instability-el-salvador [https://perma.cc/M75S-ZVPD] (discussing the Defense Minister's statement that the Salvadoran Supreme court's decision striking down amnesty laws and permitting war crimes prosecutions would turn into a "witch hunt" at a time when the country is dealing with drug gang violence).

148. Nikolau, *supra* note 4; *see also* SEELKE, *supra* note 93, at 4 (summarizing president Cerén's goals for his government outlined in his inaugural address).

149. Rupert Skilbeck, *Funding Justice: The Price of War Crimes Trials*, 15 HUM. RTS. BRIEF 6, 6 (2008).

150. *See id.* (discussing how two recent examples of domestic human rights prosecutions, the Extraordinary Chambers in the Courts of Cambodia and the Court of Bosnia and Herzegovina, cost approximately $35 million per year to run one trial court and $16 million per year to run eight trial courts dedicated to war crimes, respectively).

process.[151] Notably, Argentina offers an example of how this system can be successfully utilized to ensure viable and effective prosecution of war crimes.

In Argentina, chaos erupted in the court system after the country's amnesty laws, or "due obedience" laws, were overturned in 2001.[152] Files involving the crimes were spread across the country.[153] Judges and prosecutors did not have a centralized approach to selecting and prioritizing cases.[154] Treating war crime cases like any other common crime, they investigated the complaints that came before them without assessing whether multiple cases involved the same defendants or nucleus of facts.[155] Under this approach, it became apparent that cases would last for decades, victims would repeatedly testify about the same facts, and the trials would result in arbitrary convictions that did not reflect the "systematic nature of the crimes."[156]

Argentina took two important steps in creating a strategy to effectively address these issues. The first step originated with the prosecutors, who in March 2007 formed a Prosecutors' Coordination Unit "and began to develop common goals and methods."[157] They worked to consolidate all the cases involving a single massacre or place of detention into a single trial with all the victims and accused.[158] In 2008, the Chief Prosecutor circulated a strategy document with two directives: First, prosecutors should immediately set for trial cases with sufficient evidence, without waiting to consolidate them.[159] This directive addressed criticism that few of the cases that were fully investigated in the 1980s had actually come to trial.[160] As a second directive, prosecutors were to consolidate the rest of the cases so that all the participants who had played a role in related crimes would be charged together.[161]

The second step resulted in requirements for judges to comply with a coherent strategy. In the Argentinian criminal system, the judge has ultimate control over the scope of cases and the frequency of hearings.[162] Since not all judges were enthusiastic about taking war crime cases, trials were often scheduled for only a few hours per week, resulting in inefficient proceedings that lasted for almost two years in some cases.[163] In response, the Supreme Court issued an "*acordada*," or administrative agreement, in December 2008 to streamline and expedite the trials.[164] The agreement recognized that there had been excessive delays, in part due to a lack of judges and the concentration of cases in federal courts in the capital.[165] While the *acordada* did not require the cases be consolidated, recognizing that in some cases consolidation could

151. *See* Roht-Arriaza, *supra* note 143, at 360 (explaining that consolidation also minimizes due process concerns about joint representation).

152. *Id.* at 357.

153. *Id.*

154. *Id.* at 358.

155. *Id.*

156. *Id.*

157. Roht-Arriaza, *supra* note 143, at 358.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. Roht-Arriaza, *supra* note 143, at 358.

164. *Id.* (citing Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice] 29/12/2008, "Acordada No. 42/08," Expediente No. 6020/08 (Arg.)).

165. *Id.* at 358–59.

worsen delays, it instead asked each judge to work with the prosecutor to take any necessary steps to expedite the cases.[166] It also created a Superintendency of crimes against humanity within the judiciary to monitor progress and distribute cases among judges.[167] In 2012, the Federal Chamber of Criminal Cassation issued another *acordada* putting restrictions on interlocutory challenges and mandating pre-trial scheduling hearings to minimize delays.[168] It also encouraged videotaping all witness testimony under oath for use in future related cases.[169] Since some survivors of detention camps were potential witnesses for hundreds of victims and crimes, if a future party wanted a witness to appear in person, the party had to detail how his or her line of questioning would differ and had to provide other reasons why the appearance was necessary.[170]

Through coordination and consolidation, the number of cases reaching conviction steadily grew, from 39 in 2007 to 378 in 2012, with 44 acquittals.[171] Argentinian mega-trials have included cases involving a detention center at the naval base in Bahia Blanca with 17 defendants and 92 victims; a case in Mar del Plata with 28 defendants accused in 155 crimes; and, cases involving the Naval Mechanics' School (ESMA), where over 5,000 people were secretly detained for years, many of whom survived to testify.[172] The first ESMA trial involved only one defendant.[173] The second trial, which took almost two years, involved 18 defendants in 86 crimes that were investigated in the 1980s.[174] The third trial is still ongoing and involves 68 defendants, 789 victims, and over 800 people expected to testify.[175] "The defendants are not required to attend and are either under house arrest or in jail."[176] To speed up the proceedings, they run three days a week, all day.[177]

In light of the Argentinian experience, El Salvador is not precluded from effective prosecution of its civil war crimes simply because of the intimidating potential caseload. Just as El Salvador now faces the daunting task of processing thousands of

166. *Id.* at 359.

167. *Id.*

168. *Id.* (*citing* Cámara Federal de Casación Penal [C.N.C.P.] [National Court of Appeal on Criminal Matters] 19/3/2012, "Acordada No. 1/12: Reglas Prácticas para Asegurar el Debido Proceso," http://www.iaepenal.com/index.php?option=com_content&view=article&id=506:cfcp&catid=64:cncp&Itemid=124 [https://perma.cc/ST5Q-9WJ6]).

169. Roht-Arriaza, *supra* note 143, at 359.

170. *Id.*

171. *Id.* (citing PROCURACIÓN GENERAL DE LA NACIÓN, *INFORME DE GESTIÓN DE LA UNIDAD FISCAL DE COORDINACIÓN Y SEGUIMIENTO DE LAS CAUSAS POR VIOLACIONES A LOS DERECHOS HUMANOS COMETIDAS DURANTE EL TERRORISMO DE ESTADO* [OPERATIONS REPORT OF THE PROSECUTORS' UNIT FOR COORDINATION AND MONITORING OF THE CASES OF HUMAN RIGHTS VIOLATIONS COMMITTED DURING THE PERIOD OF STATE TERRORISM] 7 (2012)).

172. *Id.* at 360 (*citing* Ed Stocker, *Victims of "Death Flights": Drugged, Dumped by Aircraft—But Not Forgotten*, INDEPENDENT (Jan. 21, 2015), http://www.independent.co.uk/news/world/americas /victims-of-death-flights-drugged-dumped-by-aircraft—but-not-forgotten-8360461.html [https://perma.cc/9ELR-NL23].

173. *Id.*

174. *Argentine ESMA Trials a New Phase for Democracy: Interview with Pablo Parenti*, INT'L. CTR. TRANSITIONAL JUST. (Dec. 1, 2011), https://www.ictj.org/news/argentine-esma-trials-new-phase-democracy-interview-pablo-parenti [https://perma.cc/BTQ9-GHHX].

175. Roht-Arriaza, *supra* note 143, at 360.

176. *Id.*

177. *Id.*

war crimes and hundreds of potential accused, Argentina had to deal with a huge expanse of war crimes from its Dirty War, where at least 13,000, and perhaps as many as 30,000, people disappeared.[178] Further, El Salvador is not in a unique position because of its limited resources or the existence of strong opposition to justice efforts. Immediately before Argentina began prosecuting war crimes, the country had a very poor economy and was experiencing a serious recession that threatened political stability.[179] Likewise, advocacy efforts were consistently threatened in Argentina by military pressure, from early prosecutions in 1986 to renewed efforts in the 2000s.[180]

Like Argentina, El Salvador can minimize its costs and expedite prosecution of these crimes by consolidating its cases according to incident or geographic area, such as trying all defendants in a single case for the crimes related to El Mozote, the defendants in the assassination of Archbishop Oscar Romero, or the defendants in the murder of the Jesuit priests. The Argentinian example shows the pitfalls of treating war crimes as common crimes and failing to develop a centralized approach to prosecutions. However, it also shows that prosecutors and judges can rectify issues of chaos in the judicial system by strategizing and consolidating related trials.

Mega-trials have several advantages in the Salvadorian context. Accumulating evidence for one trial, instead of separate trials for each defendant, increases judicial efficiency.[181] Although there are arguments that the multiplicity of parties may slow down proceedings, significant delays in the Argentinian cases typically arose from efforts to recuse judges or prosecutors and from defendants' appeals, rather than the joinder of multiple victims and defendants.[182] Large consolidated trials appeal to both human rights organizations and the general public for their symbolic potential.[183] They demonstrate that the guilty will be punished, and that law, rather than corrupt individuals in power, will govern the country.[184] This message deepens democracy in the country. The participation of a large network of victim-witnesses allows mega-trials to present a first-hand narrative of the crimes.[185] The narrative is legitimized through the judicial system because of substantial victim participation in the justice pursuit.[186] Mega-trials also take into account the effect on the witnesses' emotional and mental health and the possibility of intimidation or reprisals.[187] Thus, these trials reduce the trauma to witnesses by significantly limiting the number of times they have to testify.[188]

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178. LINDSAY DUBOIS, THE POLITICS OF THE PAST IN AN ARGENTINE WORKING-CLASS NEIGHBOURHOOD 246 (2005); *see also* Margarita K. O'Donnell, *New Dirty War Judgments in Argentina*, 84 N.Y.U. L. Rev. 333, 345 (2009) (discussing difficulties in prosecuting crimes based on international law).

179. *See* Andrew S. Brown, *Adiós Amnesty: Prosecutorial Discretion and Military Trials in Argentina*, 37 TEX. INT'L L.J. 203, 225 (2002) (discussing prosecutorial discretion and the political climate surrounding Dirty War trials in Argentina).

180. O'Donnell, *supra* note 178, at 437.

181. COREEN DAVIS, STATE TERRORISM AND POST-TRANSITIONAL JUSTICE IN ARGENTINA: AN ANALYSIS OF MEGA CAUSE I TRIAL 34 (2013).

182. Roht-Arriaza, *supra* note 143, at 360.

183. DAVIS, *supra* note 181, at 34.

184. *Id.*

185. *See* Carolina L. Davidson, *No Shortcuts on Human Rights: Bail and the International Criminal Trial*, 60 AM. U. L. REV. 1, 58–59 (2010) (contrasting streamlined trials and mega-trials with respect to victim-witness participation).

186. DAVIS, *supra* note 181, at 38.

187. Roht-Arriaza, *supra* note 143, at 359.

188. *See id.* (discussing the consolidation of cases).

Moreover, trying all the defendants together helps the courts to understand patterns of illegal conduct and the extent of any criminal plan.[189] A defendant's sentence only reflects the gravity of the crime if this full scope of his or her activities is presented to the court.[190] Consolidated trials tend to "minimize finger-pointing and conflicts of interest among defendants," since the issue becomes whether "each defendant was a co-perpetrator of the crimes committed" at that place during the relevant period, rather than "who tortured or killed which specific individuals."[191] Accordingly, joint representation is more feasible, which also decreases prosecution costs.[192]

Although there are due process concerns for defendants, the international tribunals for the former Yugoslavia, Rwanda, and Sierra Leone all recognized that joint trials can better serve a defendant's right to trial without undue delay, since separate trials can create a backlog of cases that greatly increases the time between indictment and conviction or acquittal.[193] To better ensure a fair trial, the Special Court for Sierra Leone tried senior leaders of the political coalition Revolutionary United Front (RUF) together, but separate from the joint trial of Armed Forces Revolutionary Council (AFRC) senior leaders. This decision served to promote both efficiency and the defendants' right to individual criminal responsibility.[194] El Salvador can similarly minimize due process concerns by trying members of ARENA and FMLN separately. Moreover, with the 1996 Criminal Procedure Code, El Salvador grants strong due process protections that will protect defendants from unreasonable joinder or actions that violate their rights after joinder.[195]

Because of the benefits of mega-trials for prosecuting numerous war crimes and Argentina's example of its effectiveness in moving prosecutions forward, El Salvador should invoke a similar strategy to insure the feasibility of trials in the face of limits on its existing resources. El Salvador's approach should encourage consolidation when appropriate for judicial economy, without requiring such consolidation to account for situations where it would cause delay or violate defendants' rights. As in Argentina, El Salvador must effectively organize the human and material resources, identify the

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189. *Id.* at 363 (citing M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 19–30 (2011)).

190. Davidson, *supra* note 185, at 58.

191. Roht-Arriaza, *supra* note 143, at 360.

192. *See id.* at 360 (outlining the benefits afforded by joint representation). Of course, if conflicts do arise among defendants, separate counsel will be required. *Id.*

193. Prosecutor v. Nyiramushuko Case No. SCSL-2003-05-PT: ICTR-97-21-1, ICTR-97-29A and B-1, ICTR-96-15-T, ICTR 96-8-T, Decision on the Prosecutor's Motion for Joinder of Trials, paras. 10–12 (Oct. 5, 1999). *See generally* Prosecutor v. Sesay, Case No. SCSL-2003-05-PT, Decision and Order on Prosecution Motions for Joinder (Jan. 27, 2004), http://www.rscsl.org/Documents/Decisions/AFRC/10-059/SCSL-03-10-PT-059.pdf [https://perma.cc/RN5Z-ZA64].

194. Prosecutor v. Sesay, Case No. SCSL-2003-05-PT, at paras. 40, 46.

195. In El Salvador, "[d]efendants have the right to be present in court, question witnesses, and present witnesses and evidence. The constitution provides for the presumption of innocence, the right to be informed promptly and in detail of charges, the right to a trial without undue delay, protection from self-incrimination, the right to communicate with an attorney of choice, the right to adequate time and facilities to prepare a defense, freedom from coercion, the right to confront adverse witnesses and present one's own witnesses and evidence, the right to appeal, access for defendants and their attorneys to government-held evidence relevant to their cases, and government-provided legal counsel for the indigent." U.S. DEP'T OF STATE, EL SALVADOR 2016 HUMAN RIGHTS REPORT 12 (2016).

problems and obstacles of the existing system when used for war crime cases, and establish the procedures for the protection of witnesses, including a database of victims' testimonies for cross-referencing between different cases.[196] In doing so, consolidated trials can serve the interest of justice for both defendants and victims.

B. *Prioritizing Cases: Prosecutorial Discretion*

Prioritization and selection of cases are inherent to post-conflict justice.[197] The crucial question confronting El Salvador after repeal of its amnesty law is not whether to prosecute, but whom to prosecute and how broadly. Selection is generally inevitable in the post-war context, considering the large number and duration of violations.[198] Accordingly, prosecutors in El Salvador will need to establish appropriate selection and prioritization criteria so that the caseload and justice process is manageable, yet not overly narrow. This section discusses the general use of prosecutorial discretion, an appropriate scope of selection criteria, the possibility of alternative penalties, and risks particular to El Salvador's situation that may guide its selection and prioritization approach.

1. Overview of Prosecutorial Discretion

Prosecutorial discretion is not a new or unusual concept. International courts, including the International Criminal Court, International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda, and Special Court for Sierra Leone, have included language in their founding documents that allow for prosecutorial discretion.[199] Domestic prosecutors also have plenty of experience with screening and gatekeeping common crimes.[200]

In the context of domestic prosecution for war crimes and crimes against humanity, prosecutorial discretion comes into play when the ideals of public interest and justice conflict with the reality of limited time, money, and state-will for justice efforts.[201] It is a compromise amidst concerns that overly extensive efforts at backward-looking criminal justice may prove to be socially disruptive.[202] When faced with thousands of war crimes, the justice system must screen out cases and reach cooperation agreements or other plea-bargains in order to focus on those that best service justice and reconciliation.[203] Otherwise, the immense volume of lower-level

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196. *See* JESSICA ALMQVIST & CARLOS ESPOSITO, THE ROLE OF COURTS IN TRANSITIONAL JUSTICE: VOICES FROM LATIN AMERICA AND SPAIN 80 (2012) (discussing these factors as crucial in Argentina's use of mega-trials).

197. FELIPE GÓMEZ ISA, NORWEGIAN PEACEBUILDING RESOURCE CTR., JUSTICE, TRUTH AND REPARATION IN THE COLOMBIAN PEACE PROCESS 2 (2013).

198. Rodrigo Uprimny, Luz María Sánchez, & Nelson Camilo Sánchez, *Transitional Justice and the Peace Process in Colombia*, APORTES DPLF, Dec. 2013, at 26, 26.

199. Ludwin King, *supra* note 42, at 581.

200. Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic Criminal Procedure Realism*, 59 DUKE L.J. 637, 643 (2010).

201. *Id.* at 680.

202. Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 620–21 (2007).

203. *Id.*

cases will delay or block any justice prospects in the country.[204] However, in order to protect victims' rights, countries must carefully define selection criteria that satisfy expectations of truth, justice, and reparation.[205]

2. Identifying the Most Responsible Actors

A general consensus exists in the international community regarding the need to prioritize prosecution of "those who bear the greatest responsibility" or the "most responsible" for war crimes.[206] As such, it is widely accepted that states may adopt a policy of targeted, highly selective prosecutions, even when such a policy leaves a majority of criminals unpunished.[207] By prosecuting the few most responsible actors, a post-conflict state acknowledges past wrongs, assigns blame, breaks away from impunity, and offers collective justice without jeopardizing the forward-looking goals of reconciliation.[208] The acknowledgment of responsibility by the most senior leaders can also help satisfy victims' rights to truth by clarifying the facts and the structures behind violations.[209]

A long tradition in the prosecution of core international crimes focuses on a limited number of senior leaders. Examples include Istanbul in 1919, the Nuremberg trials in World War I, Cambodia in 1979, Argentina in 1983, Chile in 1998, Sierra Leone in 2002, and Colombia in 2013. While such cases reflect the growing custom to prosecute the most responsible actors, the precise definition of this category has not been clear. Failure to clearly define the category can undermine charging decisions and delay important cases.[210]

A narrow definition of "most responsible" limits the number of cases the state needs to prosecute and can release resources to expedite important trials.[211] The Special Court for Sierra Leone (SCSL) applied a very narrow "greatest responsibility" standard to minimize costs and duration of prosecutions.[212] Prosecutor David Crane suggested that the SCSL reduced his list of suspects from 30,000 to around 20.[213]

However, a too-narrow definition of the most responsible actors raises several issues. A definition overly focused on the triggermen excludes actors in powerful economic or political positions who controlled the decision-making process.[214] On the

204. *Id.*

205. Uprimny, Sánchez, & Sánchez, *supra* note 198, at 26.

206. Xabier Agirre Aranburu, *Prosecuting the Most Responsible for International Crimes: Dilemmas of Definition and Prosecutorial Discretion*, *in* PROTECCIÓN INTERNACIONAL DE DERECHOS HUMANOS Y ESTADO DE DERECHO § 3.3 (Joaquin González Ibáñez ed., 2009); Greenawalt, *supra* note 202, at 628.

207. Greenawalt, *supra* note 202, at 620.

208. *Id* at 621.

209. Roht-Arriaza, *supra* note 143, at 376.

210. Bibas & Burke-White, *supra* note 200, at 680.

211. Aranburu, *supra* note 206, at 402.

212. Stephen J. Rapp, *The Compact Model in International Criminal Justice: The Special Court for Sierra Leone*, 57 DRAKE L. REV. 11, 22 n.78 (2008).

213. Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 MICH. J. INT'L. L. 395, 419 (2011).

214. ELIES VAN SLIEDREGT, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW 87 (2012).

other hand, if most responsible is defined simply in terms of de jure position at the top of a military or civilian hierarchy, those individuals may not actually be the ones making the key operational decisions. The SCSL "greatest responsibility" standard, which focused on "those leaders who . . . have threatened the establishment of and implementation of the peace process in Sierra Leone," led to the indictment of only 13 senior commanders.[215] Such a position-oriented definition drew criticism for its limited impact and for excluding those who committed particularly notorious or atrocious crimes.[216] This exclusion creates legitimacy concerns because, from a victim's perspective, a regional or even local commander is often far more responsible for the crimes than someone farther away with higher rank.[217]

A better selection strategy, like that of Argentina during its 1980s trials, focuses both on high-ranked leaders as well as those who committed notorious and atrocious acts.[218] Similarly, Rwanda limited its number of suspects by defining "Category I" criminals subject to formal national trials and the death penalty as "planners, organizers, instigators, supervisors and leaders," those in positions of authority, and "notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed and persons who committed acts of sexual torture."[219] A definition offered by a senior analyst for the ICC included criteria that senior leaders are presumed most responsible if:

> a) There was a hierarchical structure in place, whether civilian, military, economic or other;
>
> b) That structure was instrumental to the crime as a matter of policy;
>
> c) The particular leader in question had effective control or influence on the structure in the relevant period and area.[220]

Other perpetrators of the crime, regardless of their position, are most responsible if they "effectively led a substantial segment of the direct or indirect perpetrators to commit the crime."[221] Overall, an appropriate definition of "most responsible" actors should combine hierarchical position with the gravity or scale of the crime, consider regional and local dynamics, and address the links between actors.

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215. Statute of the Special Court for Sierra Leone art. 1, Jan. 16, 2002, 2178 U.N.T.S. 145; Jalloh, *supra* note 213, at 420–21.

216. *See, e.g.*, Laura Arriaza & Naomi Roht-Arriaza, *Social Reconstruction as a Local Process*, 2 INT'L J. TRANSITIONAL JUST. 152, 159 (2008) (discussing why a focus on leaders and organizers may be dissatisfying to the victims).

217. *Id.*

218. *See* Paula K. Speck, *The Trial of the Argentine Junta: Responsibilities and Realities*, 18 U. MIAMI INTER-AM. L. REV. 491, 527–28 (1987) (describing the prosecution of commanders and their subordinates whose actions met certain conditions).

219. Organic Law No. 08/96 of August 30, on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed since October 1, 1990, art. 2 (Rwanda).

220. Aranburu, *supra* note 206, at § 3.3.

221. *Id.* § 5.

3. Alternative Punishment

In addition to limiting the number of actors prosecuted, prosecutorial discretion can provide for limited punishment for convicted actors. The decline of amnesty worldwide has incidentally corresponded with increased leniency in post-conviction arrangements.[222] Alternative punishments involve a conditional exchange of lessened punishment for, at minimum, a full and complete declaration of facts, an apology or recognition of harm, and a commitment to permanently demobilize.[223] In this sense, prosecutorial discretion serves as a truth-seeking reparation to victims that offers incentives for actors to provide the most information about their crimes.[224] Alternative punishments can also reflect a sense of diminished blameworthiness and criminal responsibility in the context of periods of nondemocratic rule.[225] For war crimes and crimes against humanity, they may include reductions of sentence, grants of parole or probation, varying the conditions under which sentence is served, or other non-custodial alternatives, such as community services, direct reparation from the perpetrator to the victim, and public acknowledgment of responsibility.[226]

In Rwanda, actors who were not Category I offenders were offered massively reduced sentences in exchange for guilty pleas.[227] For example, murderers who confessed prior to trial faced a prison term of only three-and-a-half years plus an equal term of community service.[228] Because the primary pool of suspects consists of tens of thousands of persons who have already spent significant time in pre-trial detention, the effect of the plea-bargain regime has been that large numbers of confessed genocidal murderers and other violent offenders are reintegrated into their communities at the conclusion of their trial, with only their community service obligation left to undertake.[229]

International law surrounding alternative punishments is much less developed than law surrounding pre-conviction obligations.[230] International law generally concerns obligations to investigate, prosecute, and punish, but it is silent on the duration or conditions of punishment.[231] The Inter-American Court, however, has held that punishment should be "proportional" to the severity of the crime.[232] Also, the

222. Roht-Arriaza, *supra* note 143, at 377.

223. *Id.* at 360.

224. Uprimny, Sánchez, & Camilo Sánchez, *supra* note 198, at 27.

225. Greenawalt, *supra* note 202, at 621.

226. Massacres of El Mozote and Nearby Places v. El Salvador. Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, paras. 30–31 (Oct. 25, 2012) (Diego Garcia-Sayan, J., concurring).

227. Greenawalt, *supra* note 202, at 624–25.

228. *Id.*

229. *Id.*

230. Roht-Arriaza, *supra* note 143, at 375.

231. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4(2), *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) (noting that "[e]ach state party shall make [torture] punishable by appropriate penalties which take into account their grave nature"). The International Convention for the Protection of All Persons from Enforced Disappearance refers to penalties "which take into account its extreme seriousness." International Convention for the Protection of All Persons from Enforced Disappearance art. 7, *adopted* Dec. 20, 2006, 2716 U.N.T.S. 3 (entered into force Dec. 23, 2010).

232. The Rochela Massacre v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R.

reasons for the punishment should be considered when determining an appropriate punishment.[233] Although the Court seems to prohibit outright suspension of sentence, some members of the Inter-American Court have recently signaled openness to alternative sentences. In the Inter-American Court's consideration of the El Mozote case, Judge Diego Garcia-Sayán agreed with the idea of alternative sentences, stating,

> [I]n the difficult exercise of balancing and the complex search for this equilibrium, routes towards alternative or suspended sentences could be designed and implemented; but, without losing sight of the fact that this may vary substantially according to both the degree of responsibility for serious crimes and the extent to which responsibility is acknowledged and information is provided about what happened.[234]

Still, while the imposition of alternative penalties may be allowed for those who are not key perpetrators, there should be a measure of punishment involving effective prison time for those who bear the greatest responsibility.[235] Minimum punishment for those most responsible would meet international standards against impunity, thus enabling the process to withstand international scrutiny.[236] It is also necessary to affirm the values negated by serious human rights violations.[237] Further, for effective use of alternative punishments, states need mechanisms to investigate whether applicants have in fact made full and accurate declarations to receive lesser sentences, which proved difficult for the Colombian court system in its human rights cases.[238] If El Salvador has similar issues with investigations, an ability to retract any benefit conferred if the actor turns out to have been untruthful may be the best option for enforcing conditionality.[239]

4. Risks and Application to El Salvador

Prosecutorial discretion addresses the reality of limited resources, but must be monitored for risks of abuse. Biased use of this discretion can negatively impact defendants' rights and the legitimacy of prosecutions.[240] For example, lack of visibility into why certain leaders were prosecuted instead of others in Sierra Leone drew criticism from victims and the international community.[241] Abuse of prosecutorial

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(ser. C) No. 163, para. 196 (May 11, 2007).

233. *Id.*

234. The Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, para. 30 (Oct. 25, 2012) (Diego Garcia-Sayán, J., concurring).

235. Uprimny, Sánchez, & Sánchez, *supra* note 198, at 27.

236. *Id.*

237. *Id.*

238. *See* Roht-Arriaza, *supra* note 143, at 375 (describing the inability of the Colombian court system to investigate whether applicants made full and truthful declarations).

239. *See id.* (arguing that an ability to retract benefits in cases of untruthfulness may be the best option for alternative punishments in the Colombian context).

240. *See* Greenawalt, *supra* note 202, at 626–33 (discussing the potential criticisms against the abuse of prosecutorial discretion at the ICC resulting from selective prosecution).

241. *See* Jalloh, *supra* note 213, at 419 (arguing that there would have been significant legitimacy gains arising from greater transparency and clear answer to why certain information from investigations was not used had the prosecutor explained to the victims and the international public the reason why certain leaders of each party were prosecuted instead of others).

discretionary powers impacts victims' rights, as consistent neglect or refusal to prosecute certain cases can create or sustain a policy of impunity.[242]

Concerns of abuse are particularly important in El Salvador, where the Attorney General has faced criticism over apparent political bias.[243] Nevertheless, since the overturn of the amnesty law, such concerns have not materialized. Armando Durán, who was kidnapped by the military in 1986, filed the first complaint with the Prosecutor's Office after the amnesty law was repealed.[244] His complaint was politically contentious for accusing President Sánchez Cerén and four ex-members of the FMLN guerrilla command.[245] Still, the Attorney General initiated an investigation and interviewed witnesses regarding the complaint.[246] The Attorney General's actions may be a reflection of the government's growing receptiveness to accountability, marked not only by the president stating that reparation and reconciliation for victims would be a key priority, but also by the inauguration of a Monument to Reconciliation and the creation of a social development commission for victims in El Mozote, all of which took place in January 2017.[247] If concerns of abuse of discretion do arise, judicial review of prosecutorial decisions provides a check, whereby judges can play a role in determining which prosecutions are to be initiated and sustained and can reduce arbitrary decisions made by a public prosecutor.[248] The Attorney General can also receive greater legitimacy in his use of prosecutorial discretion by offering transparency into his decisions. Finally, private prosecution rights, discussed in the following section, serve as an important check against abuse by public prosecutors who use their discretion to perpetuate impunity.

Prosecutorial discretion has long been recognized as a powerful feature in the justice process.[249] In El Salvador's situation, it can be used to maximize application of the country's limited resources to the administration of justice for war crimes by selecting, at least initially, those most responsible for war crimes. Moreover, it can assure accountability for less responsible actors through alternative sentencing options. Overall, prosecutorial discretion in El Salvador makes prosecution of war

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242. *See* Greenawalt, *supra* note 202, at 632 (describing the impunity gap arising from selective prosecution of those who bear the greatest responsibility as opposed to universal prosecution).

243. *See After the Amnesty Law: Pursuing Justice in El Salvador*, COMMITTEE SOLIDARITY WITH THE PEOPLE EL SAL., (Dec. 13, 2016), http://cispes.org/article/after-amnesty-law-pursuing-justice-el-salvador [perma.cc/3P2U-G9MC] (describing criticism over the Attorney General's political bias and close relationship with US embassy amid pressure to investigate FMLN's war crimes).

244. *Id.*

245. *Id.*

246. *See generally* Sergio Arauz, *Armando Durán Denuncia por Secuestro al Presidente*, EL FARO (Oct. 20, 2016), https://elfaro.net/es/201610/el_salvador/19271/Armando-Dur%C3%A1n-denuncia-por-secuestro-al-presidente.htm [https://perma.cc/4E5C-FMAY] (describing in detail Armando Duran's complaint against FMLN including President Ceren and the investigation initiated by the Prosecutor's Office).

247. *See Victims Demand Justice 25 Years After El Salvador Signed Peace*, TELESUR (Jan. 16, 2017) http://www.telesurtv.net/english/news/Victims-Demand-Justice-25-Years-After-El-Salvador-Signed-Peace-20170116-0009.html [https://perma.cc/Y55V-PA58] (noting the 25-year anniversary of the peace accords with the summary of events in El Salvador including the President's announced plan for accords in 2017 and the inauguration of the Monument to Reconciliation) [hereinafter *Victims Demand Justice*].

248. *See* Verónica Michel, *The Role of Prosecutorial Independence and Prosecutorial Accountability in Domestic Human Rights Trials*, 16 J. HUM. RTS., 193, 198 (2017) (arguing that victims' participation rights and judicial review can serve as checks over the risk of arbitrary abuse of prosecutorial powers).

249. *Id.* at 196.

crimes feasible and balances the realities of weaker institutional structures with the country's obligations to victims and the international community.

C. *Private Prosecution*

Although prosecutorial discretion is promising for realizing war crime prosecutions in El Salvador, it can be problematic to give such authority to one body without proper precautions. Prosecutorial discretion makes the public prosecutor the actual gatekeeper to justice, thus a prosecutor unwilling to bring human rights cases to courts may perpetuate a policy of impunity.[250] Therefore, victims in El Salvador need legal resources to challenge or request review of the prosecutor's decision to ensure their access to domestic criminal courts. The Criminal Procedure Code, passed in 1996, enhanced the procedural rights of victims in El Salvador,[251] and victims can actively employ these rights to generate momentum for and ensure effectiveness of prosecution of war crimes and crimes against humanity.

Private prosecution, an often-overlooked institutional feature of some criminal justice systems, allows victims or their surviving relatives to participate in the investigation and prosecution of a criminal case under the legal advice of a lawyer who serves as the private prosecutor.[252] Private prosecution in Latin America is based on German criminal procedural law from the late nineteenth century.[253] The public prosecutor represents the interests of the state, while the private prosecutor represents the interests of the victims or their relatives.[254] Private actors initiate cases during various political contexts, including before, during, and after transition, often with the help of human rights organizations.[255] The private prosecutor's rights include initiating a criminal complaint, requesting investigations, access to the investigation files, participation in hearings and trials, bringing evidence, and questioning witnesses.[256] Additionally, a private prosecutor has the right to appeal dismissals, acquittals, and plea-bargains that could prevent prosecution.[257] Private prosecution does not mean that prosecutions become a purely private right that victims could waive, for example, by asking the state not to prosecute.[258] Instead, victims' rights to prosecutions exist

250. *Id.* at 194.

251. *See* Código Proceso Penal [Code of Penal Procedure] art. 242 (1996) (El Sal.) (providing the right of the accused to request defense counsel and requiring that the accused interview the defense counsel before answering the interrogation.

252. Verónica Michel & Kathryn Sikkink, *Human Rights Prosecutions and the Participation Rights of Victims in Latin America*, 47 LAW & SOC'Y REV. 873, 874, 880 (2013).

253. *Id.* at 880.

254. *Id.*

255. *See id.* (analyzing a database of private prosecutions of human rights crimes in Latin America that occurred before, during, and between democratic transitions using Argentina, Chile, and Uruguay as case studies).

256. *See* Matthew Gillett, *Victim Participation at the International Criminal Court*, 16 AUSTL. INT'L L.J. 29, 43 (2009) (listing the rights of victims through private prosecutions in Austria, Germany, Liechtenstein, and Scandinavia).

257. *See id.* at 46 (noting the importance of including victims in the criminal justice system to ameliorate their previous negative experiences and because they have an interest in the outcome of legal proceedings against an accused).

258. Aldana-Pindell, *supra* note 130, at 1414–15.

alongside the state's duty to prosecute.[259] These rights are intended as a check to ensure that states prosecute and punish crimes.[260]

Private prosecution generates prosecutorial momentum in three ways. First, a claim by a private actor demonstrates to other victims that they can address grievances by bringing a case to the courts.[261] This demonstrative effect is most influential where the initial private prosecution case is successful or receives wide public media exposure.[262] Second, a private prosecution can create a precedent that serves as a legal opening for future cases.[263] For example, private prosecutions can introduce international law into domestic courts.[264] Third, private prosecution creates momentum by pressuring state actors to pursue human rights prosecutions in the future.[265]

Given concerns that the Salvadoran state, and particularly the Attorney General, is opposed to war crime accountability, this third effect of pressuring state actors is particularly relevant in El Salvador's situation.[266] This third type of momentum generally occurs later after democratic transition, so it can likely be effective at this point in time in El Salvador. Justice and accountability activism places El Salvador in the uncomfortable position of deciding whether to prosecute its own agents.[267] Since the Salvadoran war violations involve crimes committed by state officials, the state has a conflict of interest when it comes to prosecutions.[268] Public prosecutors are concerned about prompting threats from state agents and about diminishing the popularity of the judiciary, which is subject to public criticism for pursuing contentious, high-profile cases.[269]

Private prosecutors assist in initiating and in keeping open human rights cases that would not have prospered without their involvement.[270] With private prosecutors leading justice efforts, public officials fear losing favor if they continue to avoid prosecutions.[271] They also become motivated to prosecute due to information obtained through private prosecution cases.[272] Private actors take on more challenging and

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259. *Id.* at 1415.

260. *See* Dancy & Michel, *supra* note 109, at 176 (noting the role of private prosecution serving as a societal check on an unresponsive Public Prosecutor's Office and improve access to justice for victims).

261. *See* KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS 44–45 (2011) (describing how a treason case filed against former Greek dictators by a private lawyer, Alexandros Lykourezos, encouraged other private citizens to bring additional claims against Junta leaders for mutiny, torture, and murder).

262. Dancy & Michel, *supra* note 109, at 176.

263. *Id.* at 177.

264. *See* Michel & Sikkink, *supra*, note 252, at 879 (hypothesizing that participation rights like private prosecution serve as the vehicle through which NGOs introduce international law into domestic courts).

265. Dancy & Michel, *supra* note 109, at 177.

266. Geoff Thale, *Tracking El Salvador's Progress in Historic Human Rights Cases*, WASH. OFFICE ON LATIN AM. (Oct. 27, 2017), https://www.wola.org/analysis/tracking-el-salvadors-progress-historic-human-rights-cases/ [https://perma.cc/2A2X-EUY3].

267. Dancy & Michel, *supra* note 109, at 176.

268. Thale, *supra* note 266.

269. Dancy & Michel *supra* note 109, at 176.

270. *See id.* at 176–77 (describing prosecutorial momentum as being produced by private prosecutors in three ways).

271. *Id.* at 177.

272. *Id.*

ambitious cases, and then, as members of the judiciary become more receptive to and comfortable with prosecuting state agents for human rights violations, private actors pass the prosecutorial burden to public officials.[273] In Argentina, for example, prosecutorial momentum was generated by private actors such as Abuelas de Plaza de Mayo and CELS.[274] These private prosecutions pressured the Argentinian government to establish a Truth Commission in 1983 and to develop a human rights policy by 2003.[275]

The Chilean example also demonstrates the usefulness of private prosecution in the creation of prosecutorial momentum when faced with state opposition. Even while the Chilean dictatorship was still in place between 1973 and 1990, private prosecution opened the door to justice for human rights violations.[276] While the political context opposed justice for the human rights violations, private prosecution maintained the fight through thousands of habeas corpus writs filed by relatives or NGOs.[277] Unfortunately, judges systematically dismissed the majority of such cases, often without investigation.[278] Nonetheless, for decades a handful of private prosecutors fought to keep their human rights cases open.[279] Because of these efforts, around 100 cases that were initiated during the 1970s and 1980s were still active by the end of the dictatorship.[280]

Over a short period of time, Chilean judges became more receptive to criminal accountability for past abuses due to two important changes.[281] First, in 2002 the Ministry of Justice assigned judges to work full time on human rights cases.[282] The Ministry authorized 51 judges to give preference to forced disappearance cases and 20 judges to work exclusively on these cases.[283] Second, in 1998 the Supreme Court accepted the argument of a private prosecutor in the Poblete Cordova case that the 1978 amnesty did not apply to unsolved cases of disappearances, which constituted "continuing crimes."[284] A similar occurrence took place in Argentina[285], where these two factors created an opportunity for human rights cases to advance from investigation to trial. Since then, justice for victims of the Chilean dictatorship has progressed, and as of 2015, only about 25% of the 3,216 victims recognized by Chile did not yet have a case in court.[286] "Today, Chile is one of the countries with the most

273. *Id.*

274. *Id.*

275. Dancy & Michel, *supra* note 109, at 177.

276. Michel, *supra* note 248, at 202.

277. *Id.*

278. *Id.*

279. Michel & Sikkink, *supra* note 252, at 896.

280. *Id.*

281. *Id.* at 898.

282. *Id.*

283. *Id.*

284. *Id.*

285. Dancy & Michel, *supra* note 109, at 186. In Argentina, for example, junta generals tried in the early 1980s were pardoned by Carlos Menemin 1990, ushering in a period of national forgetting. In 1998, however, private prosecutors brought a case against Jorge Videla and others in Federal Criminal Tribunal No.5 for "illegal abductions," using the argument that disappearances constituted ongoing crimes that were not subject to military jurisdiction, and that the accused were not protected by previous amnesties. This case not only inspired future prosecutions, but actually created the legal opening for them to advance. *Id.*

286. *See* Michel, *supra* note 248, at 204 (citing *Cifras Causas DDHH Chile: Latest Human Rights Case Statistics for Chile*, OBSERVATORIO DE DERECHOS HUMANOS, http://www.icso.cl/observatorios/observ

human rights prosecutions for past violations in the region."[287] This progress was attributed in part to private prosecution.[288] Private prosecution rights generated momentum for the justice cause, while human rights lawyers introduced creativity into litigation to circumvent the amnesty law, such as in the Poblete Cordova case.[289]

Based on its successes in other countries and its potential to mobilize justice against an unresponsive state, private prosecution is an important existing right in El Salvador that can and should be used to pursue accountability for war crimes. "In places where the law does not provide the right to private prosecution, it is more difficult for victims to bring cases"[290]—thus, El Salvador is already at an advantage in its accountability efforts. Private prosecution adheres to the idea that "if a tribunal is to be for the victims, it also needs, at least in part, to be by them."[291] By engaging victims in the legal process, El Salvador can acknowledge its commitment to the rule of law, and the legitimacy of the process is better served.[292] Private prosecution not only helps establish an individual's or a regime's guilt or innocence, but also reinforces the trial as the centerpiece in national reconciliation. "It can negate the impression that some groups or crimes are above the law and restore faith in [the country's] commitment to justice."[293] In this regard, private prosecution can serve as a societal check in El Salvador by pressuring for accountability for civil war-related crimes.

El Salvador's victims and human rights organizations are already active in the fight. On September 30, 2016, a judge reopened an investigation into the El Mozote massacre in response to a petition by victims.[294] Importantly, El Salvador cooperates with NGOs, which have operated without government restriction in their investigations and publications on findings for human rights cases.[295] These groups seem eager to participate in prosecution efforts now that the amnesty law has been repealed. In October 2016, the Human Rights Institute at the University of Central America filed five cases with the Prosecutor's Office for investigation: the 1975 murder of Roberto Antonio Miranda López during a student massacre, the 1980 forced disappearance of María Florentina Escobar, the 1983 torture of Rafael Segura; the 1983 forced disappearance of Dr. Alejandro Mira Zetino, and the 1989 murder of teacher and union activist María Cristina Gómez.[296] As of December 2016, the Attorney General had not yet pursued investigations into these cases.[297] However, the energy of victims and organizations, along with El Salvador's general cooperation with

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atorioderechos-humanos/cifras-causas-case-sta tistics/ (last updated Aug. 15, 2017)).

287. Dancy & Michel, *supra* note 109, at 185.

288. *Id.*

289. *Id.* at 186.

290. *Id.*

291. Donald L. Hafner & Elizabeth B.L. King, *Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability Can and Should Work Together*, 30 B.C. INT'L & COMP. L. REV. 91, 94 (2007).

292. *See id.* at 93–94 (discussing the potential benefits of tribunals).

293. Aldana-Pindell, *supra* note 130, at 1498 (describing victims' rights after the Guatemalan Civil War).

294. U.S. DEP'T OF STATE, *supra* note 195.

295. *Id.* at 20.

296. *After the Amnesty Law: Pursuing Justice in El Salvador*, COMM. IN SOLIDARITY WITH PEOPLE EL. SAL. (Dec. 13, 2016), http://eispes.org/article/after-amnesty-law-pursuing-justice-el-salvador [https://perma.ccFC34-3NE7].

297. *Id.*

these organizations, seems to increase the viability of private prosecution in the country.

Although the public distrust in and weaknesses of El Salvador's judicial system are seen as barriers to prosecution, these issues are surmountable. Just as Chile was able to overcome a reluctant judiciary, so too can El Salvador.[298] David Tolbert, President of the International Center for Transitional Justice, maintains that holding trials for crimes against humanity and war crimes strengthens, rather than destabilizes, the judiciary.[299] Arguably, even when prosecutions do not result in convictions, these attempts can restore the confidence of victims and society in the overall judicial system because the attempts reflect the Court's political impartiality.[300] Further, El Salvador has recently taken steps to improve the independence and integrity of its judiciary.[301] In 2015, the Supreme Court resolved 19 cases of judicial misconduct, resulting in 10 sanctions and nine dismissals.[302] Although the judicial conditions are still not ideal, as the Chilean example demonstrates, private prosecutions can push civil war cases to the front of the judicial agenda and build receptiveness. The country can assign more respected judges to these cases to ensure they make it to trial, and when cases begin to make it through the judicial process, they can create legal openings to make it easier for subsequent cases to prevail.

When the government is not willing to push for justice but the right to private prosecution is present, victims can and have used the right of private prosecution to bring cases against human rights violators. This is true even when governments face significant political risks, as in Chile.[303] Although early efforts at private prosecution may move slowly against unresponsive state actors, hard-won legal successes generate positive feedback that encourages other victims to initiate cases, integrates international law into domestic courts for future litigation, and pressures reluctant states to pursue human rights cases.[304]

Overall, based on experiences from around the world and the particular social, political, and economic context in El Salvador, mega-trials, prosecutorial discretion, and private prosecution are all appropriate options for the country to move forward in its civil war accountability efforts.

III. IMPLICATIONS OF PROSECUTION EFFORTS

A monumental opportunity for justice opened with the overturn of El Salvador's amnesty law. While the overturn is a commendable and necessary step for the country to deal with its past and serve victims, El Salvador presently still risks accomplishing only an incomplete justice. Simply overturning the amnesty law, without pursuing

298. Peter DeShazo & Juan Enrique Vargas, *Judicial Reform in Latin America: An Assessment*, XVII POLICY PAPERS ON AMS., Sept. 2006, at 4–5.

299. Meredith Barges, *With Amnesty Law Overturned in El Salvador, Prosecutors Must Work with Victims to Investigate Civil War Atrocities*, INT'L CTR. TRANSITIONAL JUST. (July 21, 2016), https://www.ictj.org/news/amnesty-el-salvador-civil-war [https://perma.cc/2ZTN-K8P9].

300. *See id.* (discussing the benefits of prosecutions for victims and society).

301. *See* U.S. DEP'T OF STATE, EL SALVADOR 2015 HUMAN RIGHTS REPORT 9 (2015) (outlining the recent steps taken by El Salvador to remove corruption from its judiciary).

302. *Id.*

303. *Id.*

304. Michel & Sikkink, *supra* note 252, at 903–04.

prosecutions for the crimes, leaves any gains made in reconciliation and victims' rights vulnerable to reversal.[305] This Note argues for the utilization of three criminal procedure mechanisms to make prosecutions of civil war crimes feasible in El Salvador. Prosecutions are necessary to ensure that the overturn of the amnesty law is more than a symbolic measure and has tangible effects on compensation and dignity for victims and their families, counteracting domestic and international patterns of impunity and ensuring compliance with international law. The opportunity for such prosecutions, however, may be fleeting, as aging victims, witnesses, and defendants can aggravate justice efforts.[306]

As discussed in Section I, El Salvador's decision whether to invoke these realistic mechanisms and prosecute its war crimes will have material effects on the rights and dignity of victims. If El Salvador moves forward with prosecutions, it will fulfill its duty to victims regarding their right to truth and equal protection under the law. Pursuing prosecutions will serve as a guarantee of non-repetition of abuse, while failing to do so may be seen as an endorsement of such violations. Relatedly, since concerns in El Salvador have arisen about human rights violators currently serving in government official positions, including the presidency, taking advantage of the feasibility of prosecutions is necessary to marginalize political leaders and political groups who ordered or condoned the civil war atrocities, but who still retain power or influence over the public.[307] Prosecutions strip the source of power and influence for these responsible actors, which in turn legitimizes the new regime's institutions.[308] Without such legitimacy, the state cannot effectively govern.[309] Reluctance, incompetence, and inaction of states in addressing past crimes is linked to increased violence, shifts in criminal activities, instability, security issues, and sharp reductions in economic growth.[310]

Certainly, the country will face many obstacles as it begins the prosecutorial process. The country will need funds and processes in place for training and allocating personnel for these special cases, as well as ensuring independence of the judiciary and prosecutorial organ. Nevertheless, beginning the discussion on moving forward with prosecutions for human rights violations committed during the war is important in building domestic and international awareness of the need for fundamental reform. Diagnostic efforts can begin to identify obstacles to the independence of judges, key problems in the criminal justice system, sources of delay, and arbitrary actions.[311] Human rights groups in the country will need to continue pressing for accountability, as well as seek support from other sectors, including academia and the international community. For its part, the Salvadoran government will need to promote judicial

305. MARGARET POPKIN, PEACE WITHOUT JUSTICE: OBSTACLES TO BUILDING THE RULE OF LAW IN EL SALVADOR 263 (2000).

306. Allen S. Weiner, *Ending Wars, Doing Justice: Colombia, Transitional Justice, and the International Criminal Court*, 52 STAN. J. INT'L L. 211, 214–17 (2016).

307. Aldana-Pindell, *supra* note 130, at 1445.

308. *Id.* at 1468–69.

309. *Id.*

310. Emilie Hunter, *Strengthening National Capacity to Prosecute Genocide, Crimes Against Humanity and War Crimes within the International Criminal Court System*, *in* INNOVATIONS IN THE RULE OF LAW 29, 30 (Juan C. Botero et al. eds., 2012), https://worldjusticeproject.org/sites/default/files/strengthening_national_capacity_to_prosecute_genocide_hunter.pdf [https://perma.cc/P76C-LY4S].

311. POPKIN, *supra* note 305, at 256.

reforms and create specialized capacities in the criminal justice system and the Attorney General's Office.

International support and pressure may be essential for these domestic prosecutions. Indeed, because pursuing prosecutions run serious political, if not physical risks, it is important that the international community unequivocally support domestic accountability efforts.[312] By clearly and consistently stating that international law calls for prosecution of war crimes, international actors can label any state resistance as an international violation. The international community can also help find solutions to El Salvador's crime problem to lighten the burden on the courts and make room for a focus on prosecuting war crimes. International donors can place conditions on financial aid to El Salvador that demand prosecution. Donors can also provide funding to strengthen El Salvador's institutions, such as the Attorney General's Office or the Public Defenders' Office, and to improve legal education. Doing so would likely increase national demand for reform of the system and justice efforts.[313] International support appears ready and available, as United Nations representative Miroslav Jenka has announced the international body's commitment to support the justice process.[314] With international and domestic efforts combined, accountability is within El Salvador's grasp.

CONCLUSION

Skeptics of pursuing justice in El Salvador tend to make the false assumption that a country must possess conducive political circumstances in order to have successful prosecutions. However, an absence of serious opposition to the advance of justice policies is not necessary, and such a belief fails to account for the process by which accountability can and has been achieved.

This Note argues that three particular mechanisms—mega-trials, prosecutorial discretion, and private prosecutions—are available to El Salvador to assist in making war crime and crimes against humanity prosecutions more feasible economically, institutionally, and politically. These mechanisms have been effective in similarly poised countries. While El Salvador does not necessarily have to employ the same solutions to the struggle for justice, recognizing that options are available and obstacles are surmountable is important to embolden the country to begin its own process of accountability.

For civil war-related prosecutions to contribute fully to justice in the country, it must be understood for what it is—a process. Early efforts may move slowly, yet arguably will catalyze over time as the institutional flaws are worked out, public and political momentum increases, and attention and aid from the international community is offered. The key point to understand is that the overturn of amnesty law is not the successful conclusion to the justice struggle in post-conflict El Salvador, but rather just the beginning.

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312. Navanethem Pillay, *Establishing Effective Accountability Mechanisms for Human Rights Violations*, U.N. CHRON. (Dec. 2012), https://unchronicle.un.org/article/establishing-effective-accountability-mechanisms-human-rights-violations [https://perma.cc/RPH8-CZCS].

313. POPKIN, *supra* note 305, at 255.

314. *Victims Demand Justice*, *supra* note 247.

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