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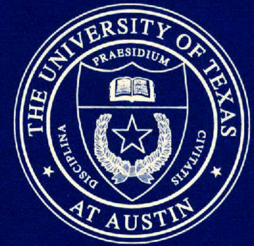

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1. E. Ernest Goldstein, *Thank You Fidel! Or How the International Law Society and the* Texas International Law Journal *Were Born*, 30 TEX. INT'L L.J. 223 (1995).

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Seeking Breaches in the Wall: An International Human Rights Law Challenge to the Texas-Mexico Border Wall

DENISE GILMAN*

SUMMARY

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INTRODUCTION

In the name of immigration control and national security, the U.S. began a massive project in 2006 to build physical barriers along segments of the border between the U.S. and Mexico with a mandate to construct 670 miles of reinforced wall. Opposition to the portions of the wall[1] built along the Texas-Mexico border was particularly fierce and led to a number of efforts to challenge construction of the barrier in Texas. Yet, more than 100 miles of wall were built along the Texas-Mexico border in 2008 and 2009.[2] The construction of the wall along the Texas-Mexico border has destroyed important environmental resources, has involved extensive taking of private lands owned by Latino small property owners along the border and has dramatically impacted the means of subsistence and way of life of persons living in border communities, including the members of several indigenous groups.

This Article will explore the human rights approach adopted by academics at the University of Texas to examine the wall project. This paper focuses on the Texas-Mexico border wall, although wall segments also have been built along the border between Mexico and the states of California, New Mexico and Arizona. Construction in Texas, which took place in the last stage of border wall construction, engendered unique opposition that led to the adoption of the human rights approach analyzed in this article.

This paper will first provide background on the legal framework for border wall construction and describe the manner in which the construction project unfolded. It will then explore the rationale for adoption of a human rights advocacy strategy to address the border wall issue. It will also describe the methodology used and the conclusions reached through the human rights analysis. Finally, it will make an effort to reflect critically on the decision to deploy international human rights law to challenge the border wall and on the effectiveness and limitations of that strategy as it played out.

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1. This Article uses the terms "fence" and "wall" interchangeably to describe the eighteen-foot high barriers built along the Texas-Mexico border wall to halt the passage of pedestrians.

2. It has been astonishingly difficult to obtain exact information about fence mileage constructed. The mileage estimate for the Texas-Mexico border is obtained by extrapolating from several governmental and non-governmental sources because of the dearth of specific information from the government. *See* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 73 Fed. Reg. 19078 (Apr. 8, 2008) [hereinafter DHS Waiver Determination] (laying out approximately 130 miles worth of Texas-Mexico border area as subject to fence construction); Hilary Hylton, *Opponents of the Border Fence Look to Obama*, TIME, Jan. 21, 2009, *available at* http://www.time.com/time/nation/article/0,8599,1872650,00.html (calculating the Texas segment of the wall at approximately 110 miles); Jeremy Schwartz, *A Divided View*, THE AUSTIN AMERICAN STATESMAN, Mar. 7, 2010, at A01 (calculating the Texas segment of the wall at approximately 110 miles); Jackie Leatherman, *Border Wall Construction Slated to Begin by End of July*, BROWNSVILLE HERALD, May 25, 2008 (placing initiation of Texas-Mexico border wall construction at the summer of 2008); Press Release, Dep't of Homeland Sec., Fact Sheet: DHS End-of-Year Accomplishments (Dec. 18, 2008), *available at* http://www.dhs.gov/xnews/releases/pr_1229609413187.shtm [hereinafter DHS 2008 End-of-Year Fact Sheet] (asserting that ninety-three miles of wall were constructed during fiscal year 2008, which was the year in which construction began in Texas); GOV'T ACCOUNTABILITY OFFICE, GAO-09-1013T, SECURE BORDER INITIATIVE: TECHNOLOGY DEPLOYMENT DELAYS PERSIST AND THE IMPACT OF BORDER FENCING HAS NOT BEEN ASSESSED 6 (Sept. 17, 2009) [hereinafter 2009 SECURE BORDER INITIATIVE TESTIMONY] (finding that a total of 264 miles of pedestrian fencing were constructed between 2006 and 2009 in all states covered by the project).

I. BACKGROUND ON THE TEXAS-MEXICO BORDER WALL

A. *History of Border Wall Legislation*

Historically, the U.S. and Mexico have not been separated by a physical wall or other barrier along most of the border.[3] Border bridges and official land crossing points have existed at irregular intervals to control and facilitate cross-border movement.[4] These entry points often include some limited fencing or wall in their immediate vicinity, but there has been no attempt until recent years to wall the border elsewhere.[5] This is not surprising because the border between the U.S. and Mexico is approximately 2,000 miles (3,100 kilometers) long, is irregular in its shape and passes through rough and difficult terrain.[6] From the southeastern point of Texas at the Gulf of Mexico, the border follows the winding course of the Rio Grande River all the way to the crossing point between El Paso in far west Texas and Ciudad Juárez in Chihuahua, Mexico.[7] After El Paso, the border continues west in a largely straight line through broad spans of the Sonoran and Chihuahuan Desert and the Colorado River Delta along the border between New Mexico and Arizona in the U.S. and Mexico.[8] Finally, it goes westward to the San Diego, California and Tijuana, Mexico border area before ending at the Pacific Ocean.[9]

In 1990, the U.S. government began to erect physical barriers along the border but only for a short stretch in the San Diego, California area.[10] In 1996, Congress passed immigration legislation known as the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which included in its provisions a grant of broad authority to the government to construct barriers along the border.[11] This legislation also gives the government the power to take land, through condemnation proceedings if necessary, in the vicinity of the international land border when the government deems the land essential to "control and guard the boundaries and borders of the United States."[12] In 2005, Congress passed the REAL ID Act, which, among other things, authorized the Secretary of the Department of Homeland

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3. BLAS NUÑEZ-NETO & YULE KIM, CONG. RESEARCH SERV., RL33659, BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER 1–2 (2008), [hereinafter CRS BARRIERS REPORT].

4. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-884T, BORDER SECURITY: SECURITY VULNERABILITIES AT UNMANNED AND UNMONITORED U.S. BORDER LOCATIONS 1 (2007) [hereinafter 2007 BORDER SECURITY REPORT] (describing a system of legal ports of entry and illegal crossings through other areas along the border).

5. *See* CRS BARRIERS REPORT, *supra* note 3, at 1 (describing initiation of fence construction efforts, near San Diego, in the 1990s).

6. INT'L BOUNDARY AND WATER COMM'N, U.S. SECTION, THE INTERNATIONAL BOUNDARY AND WATER COMMISSION, ITS MISSION, ORGANIZATION AND PROCEDURES FOR SOLUTION OF BOUNDARY AND WATER PROBLEMS, *available at* http://www.ibwc.gov/About_Us/About_Us.html (last visited Jan. 14, 2010).

7. *Id.*

8. *Id.*

9. *Id.*

10. CRS BARRIERS REPORT, *supra* note 3, at 2.

11. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 102(a)–(c), 110 Stat. 554, 554–55 (1996).

12. *Id.* at § 102(d); 8 U.S.C. § 1102(b).

Security (DHS) to waive all legal requirements to expedite the construction of border barriers.[13]

Despite this legislation, the U.S. government did not build barriers outside of the San Diego area. Congress then passed the Secure Fence Act of 2006, which mandated that DHS construct fencing along five separate and specific stretches of the southern border, including several areas in Texas.[14] The statute gave detailed parameters regarding the locations in which the wall was to be built, although it did not clarify the total mileage to be constructed.[15] The legislation still did not envision a border wall along the entire southwest border, but it did provide new impetus for construction of a wall along significant segments of the border.[16]

Pursuant to the Secure Fence Act of 2006, the government constructed about seventy miles of wall along the Arizona-Mexico border in 2007.[17] By late 2007, the government had turned its attention to the Texas-Mexico border and began plans to construct more than 100 miles of wall along various stretches of that border by the end of 2008.[18]

As DHS began the process of surveying properties along the Texas-Mexico border to determine which land the government would seek to take for construction of the fence, Congress acted again on the border fence issue. In December 2007, Congress amended the statute on construction of the border wall as part of the Consolidated Appropriations Act for 2008.[19] The superseding legislation, in a turnabout, ordered DHS to construct "reinforced fencing" along "not less than 700 miles" of the southwest border of the U.S. but did not dictate where this fencing should be built.[20] Instead, it left decisions regarding locations for the fence up to DHS.[21] The legislation mandated that 370 miles of the required 700 miles of reinforced fencing be constructed by the end of 2008.[22] The revised law also required consultation with those affected by the fence, providing that DHS "*shall* consult with . . . States, local governments, Indian tribes, and property owners in the U.S. to minimize the impact . . . for the communities and residents located near the sites [where] fencing is to be constructed."[23] The law also required that DHS consider

13. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, 302–23 (2005).

14. Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, 2638–39 (2006).

15. *See id.* (listing specific locations for fence construction by reference to particular points of entry along the border).

16. *Id.*; *see also infra* note 49 and accompanying text (noting that the Secure Fence Act required construction along more than 700 miles of the border but the language of the legislation led to differing calculations regarding the exact amount of total mileage mandated).

17. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-131T, SECURED BORDER INITIATIVE: OBSERVATIONS ON SELECTED ASPECTS OF SBINET PROGRAM IMPLEMENTATION 11 (2007) [hereinafter 2007 SECURE BORDER INITIATIVE REPORT] (funding construction of seventy-three miles under the new construction program by the end of September 2007 and referencing construction projects in Arizona); *70 Miles of New Border Fencing Almost Complete*, ASSOCIATED PRESS, Sept. 29, 2007.

18. Ralph Blumenthal, *Weighing Life with a Border Fence*, N.Y. TIMES, Jan. 18, 2008, at A12; *see* Letter from Hyla J. Hend, Real Estate Division Chief, U.S. Army Corps of Engineers, to Dr. Eloisa Tamez (Dec. 7, 2007) (on file with author) (seeking authorization to conduct surveys on her land for the purpose of construction of the border fence) [hereinafter U.S. Army Corps Letter to Dr. Tamez].

19. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 564, 121 Stat. 2090, 2090–91 (2007).

20. *Id.*

21. *Id.*

22. *Id.* at § 564(2)(B)(i).

23. *Id.* at §564(2)(C)(i) (emphasis added).

alternatives to physical fencing.[24] Despite the change in approach mandated by the new legislation and the greater flexibility afforded DHS, the government moved forward with its previously existing plans for construction of the wall in Texas. The government did not make significant changes either in the number of miles to be constructed or in the locations of the wall.[25]

B. *Border Wall Construction Process*

The wall construction process along the Texas-Mexico border has involved various actors and stages. DHS has the responsibility for border wall construction and has assigned that authority specifically to the sub-component of DHS entitled U.S. Customs and Border Protection (CBP).[26] Within CBP, the project was assigned to a unit called the Tactical Infrastructure Program.[27]

At the end of 2007 and beginning of 2008, as plans for wall construction began in Texas, the U.S. government published draft Environmental Impact Assessments pursuant to the laws that normally govern large public infrastructure projects such as this one.[28] These assessments were widely criticized for failing to identify all of the extensive environmental harms likely to be caused by wall construction and for failing to develop and assess alternatives to the wall, as also generally required by law.[29] Then, on April 1, 2008, DHS Secretary Michael Chertoff executed a waiver of

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24. *Id.*

25. 2007 SECURE BORDER INITIATIVE REPORT, *supra* note 17, at 11 (prepared before passage of the Consolidated Appropriations Act for 2008 and reporting that DHS planned to build 370 miles of pedestrian fencing by the end of 2008); U.S. GEN. ACCOUNTABILITY OFFICE, GAO-08-508T, SECURE BORDER INITIATIVE: OBSERVATIONS ON THE IMPORTANCE OF APPLYING LESSONS LEARNED TO FUTURE PROJECTS 6 (Feb. 27, 2008) [hereinafter 2008 SECURE BORDER INITIATIVE REPORT] (prepared after passage of the Consolidated Appropriations Act for 2008 and reporting that DHS would build 370 miles of pedestrian fence by December 31, 2008); *see also* Ariel Dulitzky, Denise Gilman & Leah Nedderman, VIOLATIONS ON THE PART OF THE UNITED STATES GOVERNMENT OF THE RIGHT TO PROPERTY AND NON-DISCRIMINATION HELD BY RESIDENTS OF THE TEXAS RIO GRANDE VALLEY 11 (JUNE 2008); DHS, ENVIRONMENTAL IMPACT STATEMENT FOR CONSTRUCTION, MAINTENANCE, AND OPERATION OF TACTICAL INFRASTRUCTURE: RIO GRANDE VALLEY SECTOR, TEXAS 1–2 (Nov. 2007) [hereinafter RIO GRANDE VALLEY DRAFT ENVIRONMENTAL IMPACT STATEMENT] (including maps of locations for fence before the legislation was amended); DHS WAIVER DETERMINATION, *supra* note 2, at 19078 (showing plans for mileage construction in most of the same locations).

26. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 564, 121 Stat. 2090, 2090–91 (2007); *see generally* U.S. Customs and Border Protection, *Tactical Infrastructure/Border Fence Program: Fence Construction,* http://www.cbp.gov /xp/cgov/border_security/ti/about_ti/where_ti.xml (last visited Jan. 15, 2011).

27. *Id.*

28. *See, e.g.*, RIO GRANDE VALLEY DRAFT ENVIRONMENTAL IMPACT STATEMENT, *supra* note 25. The various draft assessments are archived on the CBP website at http://www.cbp.gov/xp/cgov/ border_security/ti/ti_docs/sector/ (last visited Jan. 25, 2011).

29. *See generally* Lindsay Eriksson & Melinda Taylor, *The Environmental Impacts of the Border Wall Between Texas and Mexico* (2008), *available at* www.utexas.edu/law/academics/centers/ humanrights/borderwall/analysis/briefing-The-Environmental-Impacts-of-the-Border-Wall.pdf (discussing the "detrimental effect" the border wall between Texas and Mexico will have on Texas's wildlife and environment and asserting that the government's environmental study "failed to adequately consider the proposed border wall's indirect or cumulative effects, the effect on wildlife and conservation lands, and meaningful alternatives that could minimize environmental damage."); Letter from Defenders of Wildlife, Comments on Draft Environmental Impact Statement for Construction, Maintenance, and Operation of Tactical Infrastructure (Dec. 31, 2007).

thirty environmental and other laws pursuant to his authority granted by federal law.[30] With a single stroke of a pen, he made it unnecessary for the federal government to fulfill the normal environmental protection requirements. In addition to key environmental laws, such as the National Environmental Policy Act and the Endangered Species Act, Secretary Chertoff waived a myriad of other laws including, for example, the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, and the American Indian Religious Freedom Act.[31] The waiver announcement applied by its terms to numerous specific stretches of land along the Texas border with Mexico.[32] In these areas, the waiver thus allowed construction on the Texas-Mexico border to move forward without compliance with the numerous procedural and substantive requirements that would otherwise apply to such an extensive project.

Also at the end of 2007, DHS began seeking temporary access to property along the Texas-Mexico border for the purpose of creating surveys and maps.[33] Although the access was temporary, it constituted a taking of land, because it required a temporary and partial relinquishment of land ownership rights to DHS.[34] Some property owners voluntarily granted access to their land, although many did so without full knowledge of the consequences to their property or their rights to demand compensation from the U.S. government for this use of their property.[35] Others refused to grant access voluntarily.[36] DHS sued approximately sixty of those property owners in condemnation proceedings beginning in January and February 2008 to obtain the right to take the land for temporary access purposes.[37] Those sued included individual property owners, city governments that owned property, school districts, and The University of Texas at Brownsville/Texas Southmost College.[38]

30. DHS WAIVER DETERMINATION, *supra* note 2, at 19078.

31. *Id.*

32. *Id.* at 19080.

33. *See* U.S. Army Corps Letter to Dr. Tamez, *supra* note 18 (informing Dr. Tamez that CBP would be seeking temporary entry within the following 30 days); 2008 SECURE BORDER INITIATIVE REPORT, *supra* note 25, at 16.

34. U.S. Army Corps Letter to Dr. Tamez, *supra* note 18; Complaint in Condemnation, U.S. v. 1.04 Acres of Land and Eloisa G. Tamez, No. 1:08-cv-00044 (S.D. Tex. May 28, 2008) [hereinafter U.S. v. Tamez Complaint].

35. *See, e.g.*, Interview by The Working Group on Human Rights and the Border Wall with Idalia Benavidez, Farmland Owner (near the U.S.-Mexico border west of Brownsville, Texas) (May 2, 2008) [hereinafter Working Group Interview].

36. *See* U.S. Army Corps Letter to Dr. Tamez, *supra* note 18 (stating that Dr. Tamez had not permitted access to her land by the government and that legal proceedings were imminent); 2008 SECURE BORDER INITIATIVE REPORT, *supra* note 25, at 16 (noting that 148 property owners had not given CBP access to survey their land when the government sought agreement from property owners to obtain this access in 2007).

37. *E.g.*, U.S. v. Tamez Complaint, *supra* note 34; 2008 SECURE BORDER INITIATIVE REPORT, *supra* note 25, at 16. The cited number of complaints was obtained by searching the federal courts' publicly available electronic database, known as PACER, for all temporary condemnation actions filed at the beginning of 2008 by the U.S. in the U.S. District Courts for the Southern and Western Districts of Texas, which are the courts with jurisdiction over the targeted area.

38. *E.g.*, Complaint in Condemnation, U.S. v. 233.0 Acres of Land and the City of Eagle Pass, No. DRO8CA003 (W.D. Tex., Jan. 14, 2008); U.S. v. 37.52 Acres of Land and Texas Southmost College District, et al., No. 1:08-cv-00056 (S.D. Tex. Feb. 8, 2008); U.S. v. 0.35 Acres of Land and Baldomero Muniz, et al., No. 7:08-cv-00023 (S.D. Tex. Jan. 30, 2008); U.S. v. 131.99 Acres of Land and Rio Grande City Consolidated Independent School District, et al., No. 7:08-cv-00052 (S.D. Tex. Feb. 5, 2008).

Once the government obtained access to land, voluntarily or through condemnation suits, CBP worked with the U.S. Army Corps of Engineers to conduct land surveys.[39]

DHS then entered into the next phase of the process. Before it could actually construct border wall segments, it was required to obtain permanent ownership of the property upon which it wished to build. DHS, working with the U.S. Army Corps of Engineers, made offers, mostly in the $4,000–$10,000 range, for the purchase of land.[40] If property owners did not voluntarily agree to sell portions of their land, DHS initiated condemnation lawsuits.[41] For example, DHS filed about fifty such lawsuits in the month of May 2008 alone.[42]

DHS only took ownership of the land upon which it planned to install stretches of the wall, often only a segment of the entire property.[43] Yet, the construction also often deprived owners of effective use of other parts of their property not purchased by DHS, because residents also lost access to their property on the other side of the wall. For example, in the Rio Grande Valley, the wall does not closely follow the curving path of the river. Rather, it has been built in straighter line segments, which roughly follow the path of levees previously built to protect against flooding from the Rio Grande River.[44] As a result, large pieces of land along the river banks are cut off by the wall.[45] Some stretches of fence have been built up to a mile inland from the river.[46] In a few cases, individual homes or even entire plots of property were scheduled to end up completely on the southern side of the wall.[47] In many areas, the

39. CRS BARRIERS REPORT, *supra* note 3, at 20.

40. *See, e.g.*, Working Group Interview, *supra* note 35; Declaration of Taking, U.S. v.0.43 Acres of Land and Estate of Pilar Cabrera, Case 1:08-cv-194 (S.D. Tex. May 28, 2008) [hereinafter U.S. v. Cabrera Declaration].

41. 2008 SECURE BORDER INITIATIVE REPORT, *supra* note 25, at 16; U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-08-1141T, SECURE BORDER INITIATIVE: OBSERVATIONS ON DEPLOYMENT CHALLENGES 16 (Sept. 10, 2008) [hereinafter SECURE BORDER INITIATIVE OBSERVATIONS ON DEPLOYMENT].

42. *E.g.*, U.S. v. Cabrera Declaration, *supra* note 40. The cited number of complaints was obtained by searching the federal courts' publicly available electronic database, known as PACER, for all condemnation actions filed in May 2008 by the U.S. in the U.S. District Court for the Southern District of Texas, which is the court with jurisdiction over the targeted area.

43. DHS generally took possession of the land on which the wall was built an additional thirty to sixty feet on each side. RIO GRANDE VALLEY DRAFT ENVIRONMENTAL IMPACT STATEMENT, *supra* note 25, at 2–7, 44–54.

44. *See* U.S. DEP'T OF HOMELAND SEC., ENVIRONMENTAL STEWARDSHIP PLAN FOR THE CONSTRUCTION, OPERATION, AND MAINTENANCE OF TACTICAL INFRASTRUCTURE, U.S. BORDER PATROL RIO GRANDE VALLEY SECTOR, 1–4 (July 2008) [hereinafter RIO GRANDE VALLEY ENVIRONMENTAL STEWARDSHIP PLAN] (noting that the fence segments roughly follow the Rio Grande levee system); *see also* Blumenthal, *supra* note 18 (stating that the fence runs "north of the levees built decades ago to hold back the Rio Grande").

45. Blumenthal, *supra* note 18; *see also* N.C. Aizenman, *Border Fence Would Slice Through Private Land*, WASH. POST, Feb. 16, 2008, at A01 http://www.washingtonpost.com/wp-dyn/content/article/2008/02/15/AR2008021503303_pf.html (highlighting several examples in which the wall will make large portions of land unavailable on the Mexico side of the fence; for one property, 25 of 80 acres of farmland were to be left on the south side of the wall).

46. *See* Aizenman, *supra* note 45 (noting that stretches of the fence are "located more than a mile inland from the river, cutting off substantial swaths of land"); *see also* Blumenthal, *supra* note 18 (stating that the Rio Grande is "now flowing in many places a mile or more to the south" of the levees, which means that the fence cuts off large areas between the river and the levees).

47. *See* Kevin Sieff, *Behind the Red Line: DHS Leaves Landowners Still Asking Questions About the Future of the Homes*, BROWNSVILLE HERALD, Apr. 26, 2008, http://www.brownsvilleherald.com/news/map-86181-confirmed-pamela.html (quoting a specialist with the U.S. Army Corps of

land is already partially disrupted by the existing levees, which are mostly sloping hills that have enough height to block the passage of flood water but still allow passage to the river by people and animals. However, rather than build on, immediately next to, or on the river side of the existing levees, DHS has built another barrier further inland, away from the river side of the levees.[48] The wall is not passable like the levees.[49] The construction has thus left the levees and additional property on the river side of the wall, and there is no ready access to that land.

To calm angry property owners, DHS promised that it would place gates or doors in the wall at some intervals. However, it has never provided specific plans or explanations regarding access to property on the other side of the wall or for the positioning of gates.[50] Finally, in late 2008, when faced with continued questioning on the access issue from property owners as well as the courts, the government provided a brochure that gave a general explanation of the plans for installation of gates.[51] However, the brochure simply stated that a "workable solution" would be provided to ensure access to property on both sides of the levee and said that access would "generally" be available twenty-four hours a day.[52] It did not provide more detail. It

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Engineers). Some have suggested that the United States is essentially ceding territory to Mexico. *See* Robin Emmott, *Texan Mayors Threaten Court to Stop Border Fence*, REUTERS, Oct. 12, 2007, http://www.reuters.com/article/idUSN1141879320071012 (quoting the mayor of Del Rio, Texas). While this suggestion is probably not technically correct, because the official border between the two countries will remain the same regardless of the placement of the wall, it raises important questions about control and sovereignty of the land on the other side of the wall. A no-man's land of sorts has been created on the other side of the fence.

48. *See* RIO GRANDE VALLEY ENVIRONMENTAL STEWARDSHIP PLAN, *supra* note 44, at 1–4 (stating that fence segments are placed on the side of the levee facing away from the Rio Grande at a distance of about thirty feet from the base of the levee); *see also* Blumenthal, *supra* note 18 (noting that the fence runs north of the levees).

49. *See* BUREAU OF PUBLIC AFFAIRS, *Recovery Act Groundbreaking Ceremony*, U.S. DEP'T OF STATE, *available at* http://www.state.gov/r/pa/ei/pix/recovery/groundbreaking/index.htm (including images of the levees) (last visited Jan. 15. 2011); Interview with Barbara Hines, Co-director of the Immigration Clinic, University of Texas School of Law (June 2, 2010) (confirming as a native of Brownsville, Texas, that, traditionally, residents of the Rio Grande Valley regularly walked on and over the levees and even used them as recreational areas for jogging and other activities).

50. *See* Ildefonso Ortiz, *DHS Moves Forward with Border Fence through Orchard and Man's Heart*, BROWNSVILLE HERALD Nov. 11, 2009, *available* at http://www.brownsvilleherald.com/articles/moves-104925-border-orchard.html (describing repeated changes in the government position regarding the hours when the gates would be open and where the gates would be placed even though fence construction on the property in question was already underway); Sieff, *supra* note 47 (including interviews with several landowners—one with property that will fall completely on the south side of the fence and one with land that will be split in half, leaving the property's farmland on the inaccessible river side of the fence—who sought unsuccessfully for months to obtain assurances from DHS that they would have access to their land after the fence is built); Letter from Gregory L. Giddens, Exec. Dir., Secure Border Initiative, to Rita P. Taylor (Apr. 4, 2008) (on file with author) (stating that roadways through the fence would allow access to her property and attaching a map that shows the roadways but does not show how they will connect with her property); *Brownsville's Bad Lie*, NEWSWEEK, Apr. 26, 2008, *available at* http://www.newsweek.com/2008/04/26/brownsville-s-bad-lie.html (noting that when asked about access to the golf course at the University of Texas at Brownsville, which will be left on the Mexico side of the wall, DHS's response suggested that plans had not been made for access and that "options might include an electronic gate"); Blumenthal, *supra* note 18 (indicating that DHS has told concerned local officials that "there would be some kind of gates through the fence, but what kind and where have yet to be specified").

51. *See* Rio Grande Valley Sector Tactical Infrastructure Information Brochure at Exhibit 4 to Document 10, U.S. v. Tamez, No. 1:08-cv-00351 (S.D. Tex. Sept. 5, 2008).

52. *Id.*

appears that gates have now been installed on some properties.[53] However, the gates are not close to one another, requiring residents to travel lengthy distances outside of their property to enter a gate and to return to their property.[54] In addition, the government has not explained how it made decisions to put gates on certain properties, allowing direct access to the other side of the fence for those particular property owners, but not to install access points on other properties. Obvious questions are also raised about the nature of the gates. DHS has never explained with specificity how the gates will function or whether residents will be required to provide evidence of citizenship to travel around their communities or to enter and exit their own land.

As DHS obtained title to lands along the Texas-Mexico border, construction of the wall began in those areas. The government contracted out the work for the construction of the wall to private companies,[55] which have carried out this major government project for significant profit.[56]

Those property owners who did not agree to give up the rights to their land in negotiations with the government will go to trial in federal court to receive a ruling regarding the compensation they are owed by the government for the taking of their land. Those trials will take place long after the construction of the wall on the land in question.[57]

The change in administration that took place when President George W. Bush left office and President Barack Obama was sworn in as President of the U.S. in January 2009 did not dramatically affect the trajectory of the wall construction project. By the end of the Bush administration, DHS had already indicated that it would not complete construction of the wall by the end of 2008, as required by the relevant statutes, but would instead seek to begin construction *or* enter into contracts for construction by the end of 2008.[58] DHS under the Bush administration met that goal.[59] Construction then continued well into 2009 under the new administration and was still concluding along a few remaining miles of fence into 2010.[60] All of the

53. E-mail from Margo Tamez, (Dec. 21, 2009) (on file with author); Pedestrian Fence 225 U.S. Border Patrol: RGV Sector Project: 0-11, HRL-5014 at Exhibit 3 to Document 10, U.S. v. Tamez, No. 1:08-cv-00351 (S.D. Tex. Sept. 5, 2008) (showing the location of gates on some properties but not others).

54. Email from Margo Tamez, *supra* note 53; *see also* Ortiz, *supra* note 50 (discussing the uncertainties about access points and rules applying to the gates).

55. Christopher Sherman, *Feds Look for Company to Build Border Fence in South Texas*, A.P. ST. & LOC. WIRE, June 3, 2008; *see* 2007 SECURE BORDER INITIATIVE REPORT, *supra* note 17, at 7 (noting extensive use of commercial contracts to build wall segments after 2007); CRS BARRIERS REPORT, *supra* note 3, at 23.

56. *See* 2007 SECURE BORDER INITIATIVE REPORT, *supra* note 17, at 12 (noting that wall construction through commercial contracts cost three times more than construction by government entities); *see, e.g.*, Letter from the U.S. Army Corps of Engineers, Contracting Division, to Keith N. Sasich, Kiewit Texas Construction, L.P. (Sept. 22, 2008) (awarding a contract with a value of more than $30 million for construction of fence in the Rio Grande Valley), *available at*: http://www.utexas.edu/law/academics/centers/humanrights/borderwall/analysis/foia-army-2008-09-22-2.pdf.

57. Christopher Sherman, *Gov't Dismisses Call for More Texas Border Fencing*, A.P. (Oct. 9, 2009); *see e.g.*, Order by Judge Hanen, in U.S. v. Tamez, Docket No. 1:08-cv-00351 (S.D. Tex. Oct. 26, 2009) (setting trial for compensation for April 2010 where property was taken and fence built on the land in April 2009).

58. 2009 SECURE BORDER INITIATIVE TESTIMONY, *supra* note 2, at 2.

59. *Id.*

60. *See Tactical Infrastructure Projects*, U.S. CUSTOMS & BORDER PROTECTION,

remaining wall construction originally planned under the Secure Fence Act and the Consolidated Appropriations Act for 2008 was presumably completed by the end of 2010.[61]

Attempts to make plans for new wall construction have not gained a foothold. In the summer of 2009, some U.S. Congress members sought to mandate new wall construction projects and to appropriate additional monies for that purpose.[62] Those efforts failed.[63] The buildup of the Texas-Mexico border wall has finally ground to a halt.

C. *The Wall*

Now that construction of the portions of the wall planned for the Texas–Mexico border is essentially complete, patches of intermittent wall break up the long border between Texas and Mexico. Yet, it is extremely difficult to obtain concrete information regarding the exact locations of all of the wall segments that have been constructed or even the total mileage that the wall now covers along the Texas–Mexico border. The government has not made clear and specific information available, failing to answer basic questions of where and how much border wall exists.[64]

At every stage of the project, the U.S. government has given differing and diverging numbers for the total length of fence planned or constructed. As noted above, the original Secure Fence Act of 2006 set out specific locations for fencing but did not specify the total mileage of fencing it mandated. Calculations of the total mileage involved varied, but suggested that the law required upward of 700 miles of wall, and at least one government source concluded that the law required 850 miles of wall.[65] The Secure Fence Act required at least 300 miles of wall to be constructed

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http://www.cbp.gov/xp/cgov/border_security/ti/ti_projects/ (last visited Sept. 5, 2010); *Southwest Border Fence Construction Progress*, U.S. CUSTOMS & BORDER PROTECTION, http://www.cbp.gov/xp/cgov/border_security/ti/ti_news/sbi_fence/ (Jan. 6, 2011) (describing fence construction as of Dec. 31, 2010) (last visited Feb. 17, 2011); Jazmine Ulloa, *Border Fence Construction Nears Completion in Hope Park*, BROWNSVILLE HERALD, Dec. 26, 2010, *available at* http://www.brownsvilleherald.com/articles/border-120934-fence-park.html.

61. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-896, SECURE BORDER INITIATIVE: TECHNOLOGY DEPLOYMENT DELAYS PERSIST AND THE IMPACT OF BORDER FENCING HAS NOT BEEN ASSESSED, 1, 4 (2009) [hereinafter 2009 SECURE BORDER INITIATIVE REPORT]; *Fencing Construction Status: Data Current as of 12/25/2009*, U.S. CUSTOMS AND BORDER PROTECTION, http://www.cbp.gov/linkhandler/cgov/newsroom/highlights/fence_map.ctt/fence_map.pdf (showing graphically where fence has been constructed and where construction was underway as of December 2009) (last visited Jan. 15. 2011); *Tactical Infrastructure/Border Fence Program: TI Timeline* (Mar. 5, 2010), U.S. Customs and Border Protection, http://www.cbp.gov/xp/cgov/border_security/ ti/about_ti/ti_timeline.xml [hereinafter CBP TI Timeline]; *Southwest Border Fence Construction Progress*, *supra* note 60.

62. 155 CONG. REC. S7227–28 (daily ed. July 8, 2009) (Senate amendment 1399 to HR 2892 proposed by Sen. DeMint).

63. Christopher Sherman, *Lawmakers Scrap Plan for 300 More Miles of Fencing on Mexican Border*, WASH. POST, Oct. 10, 2009, at A05.

64. *See, e.g.*, Complaint, Gilman v. U.S. Dep't of Homeland Sec. et al., No. 1:09-cv-00468-PLF (D.D.C. Mar. 11, 2009) [hereinafter FOIA Complaint] (bringing Freedom of Information Act claim against CBP and alleging that the government failed to provide adequate information about the fence and locations where it was being built).

65. CRS BARRIERS REPORT, *supra* note 3, at 9; *Brownsville's Bad Lie*, *supra* note 50; Melissa del Bosque, *Holes in the Wall*, THE TEXAS OBSERVER, Feb. 21, 2008; 152 CONG. REC. E1809-02 (daily ed. Sept. 21, 2006) (statement of Rep. Conaway).

in priority areas by the end of 2008.[66] The Consolidated Appropriations Act for 2008 instead required at least 700 total miles of wall and mandated the construction of 370 miles of priority fencing by the end of 2008.[67] In April 2008, DHS Secretary Chertoff authorized a waiver of environmental and other laws to allow for expedited construction which applied to approximately 470–490 miles of the border.[68] Early on in the project, DHS announced that it would build 670 miles of wall by the end of 2008, but DHS subsequently changed its goal.[69] In September 2008, the government set out an alternative goal of having 661 miles either built, under construction, or under contract by the end of 2008.[70]

These varying numbers are further confused by the terminology used by the government to describe the fencing. The legislation—both the Secure Fence Act of 2006 and the Consolidated Appropriations Act for 2008—requires construction of "reinforced" fencing.[71] The term "reinforced fencing" is used to describe both the total miles (700) to be constructed and the priority fencing that was to be completed by the end of 2008.[72] Yet, DHS has eschewed the term "reinforced fencing" and has instead employed the terms "pedestrian fencing" and "vehicle fencing" to describe the types of barriers that it has built.[73] It seems likely that Congress envisioned barriers along the lines of pedestrian fencing when it required construction of "reinforced fencing," since vehicle barriers are not intended to prevent people on foot from walking right through them.[74] DHS appears to have recognized that the statutes would require more than vehicle barriers, because it always claimed an intention to build 370 miles of "pedestrian" fencing by the end of 2008, which matches the statutory mandate of priority construction of 370 miles of "reinforced" fencing by the end of 2008.[75]

While DHS appears to recognize that the statutory mandates for fence construction require pedestrian fencing, rather than a vehicle fence, DHS never committed to building more than 370 miles of pedestrian fencing by the end of 2008 or by any other date, even though the latest version of the statute requires 700 miles of "reinforced" fencing in total.[76] However, DHS counts both vehicle and pedestrian

66. Secure Fence Act of 2006, Pub. L. No. 109-367, §3, 120 Stat. 2638, 2638–9 (2006).

67. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 564, 121 Stat. 1844, 2090 (2007).

68. Press Release, Dept. of Homeland Sec., Statement of Secretary Michael Chertoff Regarding Exercise of Waiver Authority (April 1, 2008).

69. 2009 SECURE BORDER INITIATIVE REPORT, *supra* note 61, at 8; Fact Sheet: U.S. Department of Homeland Security Five-Year Anniversary Progress and Priorities (Mar. 6, 2008), http://www.dhs.gov/xnews/releases/pr_1204819171793.shtm (last visited Feb. 1, 2011) [hereinafter DHS Five-Year Fact Sheet]; CRS BARRIERS REPORT, *supra* note 3, at 10.

70. 2009 SECURE BORDER INITIATIVE REPORT, *supra* note 61, at 9.

71. Secure Fence Act of 2006 § 3, at 2639; Consolidated Appropriations Act, 2008 § 3, at 2090.

72. *See* Secure Fence Act of 2006 § 3, at 2639; Consolidated Appropriations Act, 2008, § 564, at 2090.

73. *See, e.g.*, 2009 SECURE BORDER INITIATIVE REPORT, *supra* note 61, at 8; *Southwest Border Fence Construction Progress*, *supra* note 60.

74. *See* 2009 SECURE BORDER INITIATIVE REPORT, *supra* note 61, at 9.

75. 2007 SECURE BORDER INITIATIVE REPORT, *supra* note 17, at 3; 2009 SECURE BORDER INITIATIVE REPORT, *supra* note 61, at 8–9.

76. *See* Consolidated Appropriations Act, 2008, § 564; CBP, TI TIMELINE, *supra* note 61(noting CBP goal to have constructed, or to have under construction or under contract, 370 miles of pedestrian fence by the end of 2008); 2009 SECURE BORDER INITIATIVE REPORT, *supra* note 61, at 21 (noting CBP goal of 358 miles total construction of pedestrian fencing).

fencing when it claims success in exceeding its construction goals.[77] For example, in December 2008, DHS announced that it had completed more than 520 miles of fencing and made no distinction between vehicle and pedestrian fencing.[78] This announcement made it appear that the agency had met and surpassed the statutory instruction that it construct 370 miles of fencing by the end of 2008 and had started to reach the full 700 miles of fencing mandated without deadline by the statute.[79] Actually, the agency had not constructed anywhere near 370 miles of pedestrian or "reinforced" fencing by the end of 2008. Instead, the 520 claimed miles were a mix of vehicle and pedestrian fencing.[80]

At first glance, it might appear that DHS simply used the authority granted to the agency in the Consolidated Appropriations Act for 2008 to make the determination not to construct the full 700 miles of reinforced fencing and to adopt other, more effective, alternatives instead. As will be discussed further below, a serious analysis of the effects and consequences of wall construction and a study of the alternatives would likely have led to a reduction in wall mileage or a halt in construction. However, the government had in fact declared its intention to construct only 370 miles of pedestrian fencing prior to the passage of the Consolidated Appropriations Act for 2008 and has never modified that mileage construction goal for pedestrian fencing by more than a few miles.[81] In addition, the government never announced that it intended to significantly lower the number of "reinforced" fencing miles that it would construct and certainly never stated an intention to use vehicle barriers instead to meet the statutory mandate for total miles of fence to be built.[82] Instead, the government has consistently claimed almost

77. DHS 2008 End-of-Year Fact Sheet, *supra* note 2.

78. *Id.*

79. Consolidated Appropriations Act, 2008, § 564.

80. *See* 2009 SECURE BORDER INITIATIVE TESTIMONY, *supra* note 2, at 6 (establishing that DHS had constructed only 264 miles of pedestrian fencing through the project by June 2009). It is worth noting that DHS's figures for total fence construction accomplished under the statutes consistently include 143 miles of fence constructed before the adoption of the Secure Fence Act and the amending appropriations legislation. *Id.* In addition, DHS's figures appear to be internally inconsistent in a way that suggests inflation of the mileage actually constructed. For example, DHS stated that it had completed 341 total miles of fencing before August 22, 2008, then announced a few months later that it had completed 520 miles of fencing by December 18, 2008, and some weeks later gave a figure of 578 total fence miles completed by December 31, 2008. SECURE BORDER INITIATIVE OBSERVATIONS ON DEPLOYMENT, *supra* note 41, at 15; DHS 2008 End-of-Year Fact Sheet, *supra* note 2; 2009 SECURE BORDER INITIATIVE REPORT, *supra* note 61, at 9. It is difficult to believe that the increases in mileage reported at each interval reflect actual construction in such short time periods. In all of fiscal year 2007, DHS built about 73 miles of fence, and in fiscal year 2008 it built only 93 miles. 2007 SECURE BORDER INITIATIVE REPORT, *supra* note 17, at 11; DHS 2008 End-of-Year Fact Sheet, *supra* note 2. It seems unlikely that DHS nonetheless constructed almost 200 miles of fence between August and December of 2008 and another 58 miles in just a period of weeks in December 2008, particularly since the Government Accountability Office had concluded that DHS would face greater challenges in constructing fencing in 2008 on the Texas-Mexico border. SECURE BORDER INITIATIVE OBSERVATIONS ON DEPLOYMENT, *supra* note 41, at 15.

81. *See* 2007 SECURE BORDER INITIATIVE REPORT, *supra* note 17, at 11 (setting goal at 370 pedestrian fencing miles); 2009 SECURE BORDER INITIATIVE REPORT, *supra* note 61, at 21 (setting goal at 358 pedestrian fencing miles).

82. DHS did set an explicit goal of fence construction along 660 to 670 miles of the border rather than the 700 miles mandated by statute. However, DHS never stated that it had decided to construct only 370 miles of reinforced fencing rather than the 700 miles mandated by the statute. The agency simply conflated pedestrian and vehicle fencing again to make it appear that it had made only a minor reduction in the number of miles to be constructed under the statute. *See supra* text accompanying notes 67–75.

complete compliance with the statutory mandates regarding fence mileage.[83] The discrepancy is highlighted here to underline the lack of transparency and accountability that has characterized the U.S. government's actions in constructing the border wall and not to suggest that a full 700 miles of reinforced fencing should be built. The mileage already constructed has been damaging and ineffective enough.

Despite this extensive confusion and even obfuscation by U.S. government authorities, the most reliable figures indicate that, by the end of 2010, CBP had completed roughly 350 miles of pedestrian fencing and 299 miles of vehicle fencing for a total of 649 miles of fence.[84] This mileage amount includes more than 140 miles of pedestrian and vehicle fencing built before the passage of the Secure Fence Act and the initiation of the current wall construction project.[85] It is still near impossible to determine how much of the wall was built in Texas. However, it appears that much of the fencing built between 2008 and 2010 was pedestrian fencing, installed in Texas along more than 100 miles of the border.[86]

In addition, despite the obvious importance of this information, it is also impossible to determine the exact locations where DHS has built the fence along the Texas–Mexico border. For most of the duration of the wall construction project, the government did not make available detailed maps of locations for planned construction.[87] Initially, the government made tentative maps available as part of the original draft environmental impact assessments. But those assessments and their maps were never finalized and were withdrawn when DHS Secretary Chertoff waived the applicable environmental laws.[88] DHS subsequently provided new maps

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83. *See* DHS 2008 End-of-Year Fact Sheet, *supra* note 2; Prepared Remarks by Department of Homeland Security Secretary Napolitano on Immigration Reform at the Center for American Progress (Nov. 19, 2009) (claiming that Congressional requirements set out in 2007 had been met through the construction of more than 600 miles of fence, a figure which must include vehicle fencing along with pedestrian fencing).

84. U.S. CUSTOMS & BORDER PROT., *Southwest Border Fence Construction Progress*, *supra* note 60 (describing fence construction as of Dec. 31, 2010).

85. 2009 SECURE BORDER INITIATIVE REPORT, *supra* note 61, at 21 (providing the mileage in place before the implementation of SBI*net*). It seems unlikely that Congress intended to include mileage constructed under previous projects carried out in the 1990s in the total mileage mandated by the Secure Fence Act of 2006 and the Consolidated Appropriations Act for 2008. The legislation says that the government "shall construct" reinforced fencing, making it clear that it refers to future construction. DHS has nonetheless claimed the prior mileage in order to reach the total mileage figures that it has presented to the public. *See* DHS 2008 End-of-Year Fact Sheet, *supra* note 2 (announcing construction of 520 miles of fencing); SECURE BORDER INITIATIVE OBSERVATIONS ON DEPLOYMENT, *supra* note 41 (announcing construction of 341 total miles of fencing by September 2008 but including more than 100 miles of fencing put in place before the current project began in 2006); 2009 SECURE BORDER INITIATIVE TESTIMONY, *supra* note 2, at 6 (announcing completion of 633 miles of fencing as of June 26, 2009 but including more than 100 miles of fencing put in place before the current project began in 2006).

86. Hylton, *supra* note 2; U.S. v. Tamez Complaint, *supra* note 34; AMERICAN BORDER PATROL, *All Sectors*, http://americanpatrol.com/ABP/SURVEYS/BORDER-2009/Border-Main-2009.html (last visited Feb. 2, 2011); Ulloa, *supra* note 60.

87. *See* DENISE GILMAN, OBSTRUCTING HUMAN RIGHTS: THE TEXAS–MEXICO BORDER WALL: BACKGROUND AND CONTEXT 2 (June 2008), http://www.utexas.edu/law/academics/centers/humanrights/borderwall/ analysis/briefing-INTRODUCTION.pdf (stating that the details of project locations were vague).

88. *Id.*

as part of "Environmental Stewardship Plans" issued in July 2008.[89] However, DHS repeatedly insisted that the various maps were tentative and subject to change until fence construction was actually underway.[90] By the time most wall segments were finally built, the maps were many months old, and DHS has not provided information about the extent to which the wall's final path followed the projections on the maps included in the Environmental Stewardship Plans.

In late 2009, a map of border wall construction was made available on a DHS website.[91] The latest version of that map is reproduced below. The map provides a general picture of the areas of the border affected by the wall, although it has not been updated since December 2009. It is difficult to translate the map into an understanding of specific areas in which segments of the wall have been constructed. It does not include geographic information that would help pinpoint the exact areas in which the fence has been built. The scale of the map is such that it does not include anchoring landmarks such as towns or state or local parks or reserves. Nor does it include indicators of the length of any of the segments of fence depicted in the map. In addition, while the map shows those areas of the Texas–Mexico border that now include a wall, it does not show the exact location of the physical barrier in terms of distance from the border itself, which is the Rio Grande River. The fence is not built on the immediate bank of the river, yet the map does not show how far inland from the river it is built. The map does not provide information about the specific properties upon which the border wall has been constructed. As the website containing the map specifically notes, "maps and information regarding specific plots/parcels of land are not available at this site."[92] It is thus extremely difficult to know exactly which property owners and communities are affected and to what degree.[93]

At least the total cost of the fence has now become known. The fencing miles completed cost an average of $3.9 million per mile for pedestrian fencing.[94] The average cost for the fencing mileage completed by private contractors in the final stages of the project increased to $6.5 million per mile.[95] The total cost of fence construction has been approximately $2.4 billion.[96] The U.S. government has also calculated an estimate of the total cost of building and then maintaining the wall over a twenty-year period. That amount comes to $6.5 billion.[97]

89. *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., ENVIRONMENTAL STEWARDSHIP PLAN FOR THE CONSTRUCTION, OPERATION AND MAINTENANCE OF TACTICAL INFRASTRUCTURE, EL PASO, YSLETA, FABENS AND FORT HANCOCK STATIONS AREA OF OPERATION 1–7 (July 2008) [hereinafter EL PASO ENVIRONMENTAL STEWARDSHIP PLAN]; RIO GRANDE VALLEY ENVIRONMENTAL STEWARDSHIP PLAN, *supra* note 44, at 1.

90. FOIA COMPLAINT, *supra* note 64; Blumenthal, *supra* note 18.

91. Southwest Border Fence Construction Progress Map as of December 25, 2009, http://www.cbp.gov/linkhandler/cgov/newsroom/highlights/fence_map.ctt/fence_map.pdf.

92. Tactical Infrastructure/Border Fence Project, TI Projects, http://www.cbp.gov/xp/cgov/border_security/ti/ti_projects/.

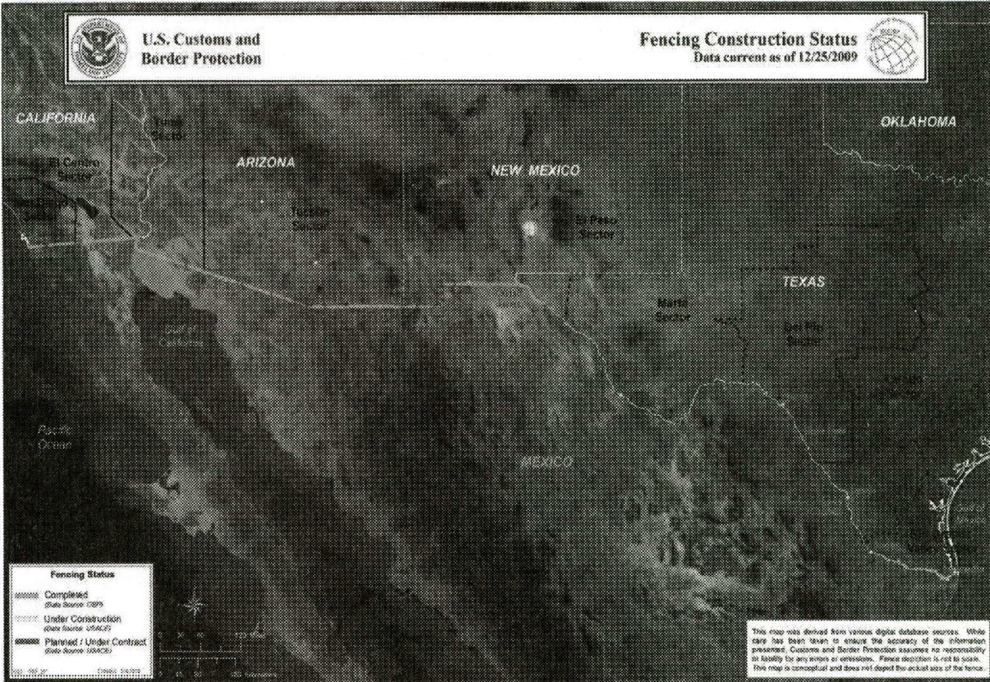
93. In late 2010, shortly before final publication of this article, the U.S. Army Corps of Engineers provided more detailed maps of actual fence construction in response to the Freedom of Information Act requests filed by the Working Group. Those maps are available at: http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/foia-requests.html.

94. 2009 SECURE BORDER INITIATIVE TESTIMONY, *supra* note 2, at 21.

95. *Id.*

96. *Id.* at 29.

97. *Id.* at 19.



D. *Widespread Opposition to the Texas-Mexico Border Wall*

The U.S. government's construction of a border wall in Texas generated widespread opposition. Border residents and politicians largely united in their vocal opposition to the wall.[98] The mayor of Eagle Pass, Texas called the wall "useless, expensive and potentially damaging."[99] The president of the University of Texas at Brownsville, Juliet Garcia, noted that the proposed construction on the university's campus of "an 18-foot high steel barrier between two friendly countries" would "destroy the campus climate."[100] Students and public school teachers announced their opposition to the wall and organized well-attended protest marches.[101]

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98. *See, e.g.*, *Controversial Border Fence Hot Issue in Texas Primary,* AFP, Feb. 25, 2008; Christopher Sherman, *Hostile Reception for Pro-Fence Congressman in Brownsville*, HOUS. CHRON., Apr. 28, 2008; Miguel Bustillo, *A Town Against the Wall*, L.A. TIMES, Dec. 17, 2007, at A40 ("Complaints are heard from El Paso to Brownsville, in river towns only a football field away from sister cities in Mexico, where the prevailing culture has long been bilingual and binational, and where everyone knows someone on the other side.").

99. Jerry Seper, *Texas Cities Join Suit against Mexico Border Fence*, WASH. TIMES, May 29, 2008, at A03.

100. Press Release, UTB/TSC, UTB/TSC Hosts Border Wall Subcommittee Meetings (Apr. 28, 2008), blue.utb.edu/newsandinfo/BorderFence%20Issue/03_19_2008UpdatedBorderFenceInfo.htm.

101. *See, e.g.*, borderwall, *Border Walk*, YOUTUBE (Mar. 9, 2008), http://www.youtube.com/watch?v=h2FuIQNPIes.

Several lawsuits were initiated against the U.S. challenging its actions in constructing the wall. Eloisa Tamez, a vocal property owner who opposed the wall and the taking of her land, initiated class action litigation against DHS. Tamez asserted that the government had failed to properly consult with individuals and communities affected by the wall, to consider alternatives to the wall, or to negotiate regarding the taking of land.[102] A coalition of mayors from border towns and cities initiated parallel litigation raising similar claims.[103] The County of El Paso and additional plaintiffs including the Ysleta del Sur tribe brought another lawsuit to the U.S. Supreme Court challenging the constitutionality of the DHS Secretary's waiver of environmental and other standards.[104] In addition, property owners in Eagle Pass filed litigation against DHS alleging violations of constitutional equal protection rights as well as improper property takings.[105] A large number of property owners, including Eloisa Tamez, also vigorously fought defensively against the condemnation suits filed by the federal government.[106]

The construction of the border wall evoked international ire as well, particularly among otherwise friendly governments in Latin America.[107] Mexico is the country most obviously affected by the construction of the wall. The wall sends a message of antagonism rather than cooperation to Mexico and necessarily creates a negative impact on diplomatic relations between the two countries. In addition, numerous U.S. treaties are affected by the construction of the wall. For example, these treaties govern access to and control of the Rio Grande River, the use of water, and environmental protection along the border.[108]

The Mexican government has made its opposition to the wall clear. Its official position states: "The government of Mexico reiterates its rejection of this [border wall] project, because it does not correspond to the climate of cooperation and joint responsibility that should exist between our countries, nor does it offer a solution to address effectively the problems that we share in the border area."[109] The Mexican

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102. Tamez v. Chertoff, 1:08-CV-0555 (S.D. Tex. filed Feb. 6, 2008); *See* David McLemore, *Owner Blocks Border Fence; Texan sues Homeland Security Over Seizure of Land Near Brownsville*, DALL. MORNING NEWS, Feb. 8, 2008.

103. Texas Border Coalition v. Napolitano, 614 F. Supp. 2d 54 (D.D.C. 2009); Seper, *supra* note 99.

104. County of El Paso v. Chertoff, 2008 U.S. Dist. LEXIS 83045 (W.D. Tex. Aug. 29, 2008), cert. denied, County of El Paso v. Napolitano, 129 S. Ct. 2789; *South Texas Environmental Groups Sue DHS over Chertoff Waivers*, RIO GRANDE GUARDIAN, May 29, 2008.

105. Herrera v. U.S., No. 2:08-CV-00070-AML (W.D. Tex. filed Oct. 8, 2008) (complaint paras. 26–29).

106. *See generally* U.S. v. Tamez, No. 1:08-CV-00351, slip op. (S.D. Tex. Apr. 16, 2009); 2009 SECURE BORDER INITIATIVE REPORT, *supra* note 61.

107. Jefferson Morley, *Tensions in Latin America over a Wall, a U.N. Seat, and a Chunk of Land*, WASH. POST (Oct. 26, 2006, 12:18 PM), http://blog.washingtonpost.com/worldopinionroundup/2006/10/tensions_in_latin_america_over.html. Even President Mikhail Gorbachev, former leader of the Soviet Union, has expressed his opinion questioning the wisdom of the wall. *See* valleynewsline, *Gorbachev on the U.S./Mexico Border Wall*, YOUTUBE (Oct. 12, 2007), http://www.youtube.com/watch?v=qGk2iec8v7Y.

108. *See, e.g.*, Cooperation for the Protection and Improvement of the Environment in the Border Area, U.S.-Mex., Aug. 14, 1983, 35 U.S.T. 2916; Stephen P. Mumme & Oscar Ibanez, U.S.-Mexico Treaty Impediments to Border Security Infrastructure, (to be published in *Natural Resources Journal* forthcoming) (on file with the author); *Marin: 18 Feet Concrete Levee Wall Would Violate Treaty with Mexico*, RIO GRANDE GUARDIAN, April 20, 2008.

109. Press Release, Secretaría de Relaciones Exteriores, El gobierno de México protestó ante autoridades de EUA y gestión la inmediata remoción de un tramo del muro fronterizo que se construyo en territorio Mexicano [The Mexican Government Protested Before Authorities from the United States

government received support for its position from other countries in the Americas. In the fall of 2006, twenty-seven countries voted in favor of a declaration in opposition to the wall presented by the Mexican government at the Organization of American States.[110] Mexico also obtained a resolution at the Summit of the Americas—an important gathering of heads of state from the region—urging the U.S. to reconsider its decision to build a wall.[111] In February 2008, representatives of the legislatures from Canada and Mexico, meeting in an inter-parliamentary session, set forth an agreement in opposition to the border wall.[112] The Chilean legislature, in support of Mexico, sent its own formal protest against the wall to the U.S. government.[113]

II. THE HUMAN RIGHTS RESPONSE TO THE BORDER WALL

A. *The University of Texas Working Group on Human Rights and Border Wall*

However, protests from within the United States or outside the country had no significant effect on the U.S. government's border wall construction project. The inherently international nature of the border wall problem and the serious, multi-faceted and largely unaddressed harms resulting from construction led to the adoption of an international human rights approach as the next strategy for challenging the wall. At the beginning of 2008, a multi-disciplinary collective of faculty and students at the University of Texas at Austin ("UT") formed to analyze the human rights implications of the construction of a border wall on the Texas-Mexico border under international law.[114]

The Working Group on Human Rights and the Border Wall ("the Working Group"), as the collective at UT identified itself, conducted extensive research and interviews to investigate and analyze the human rights impact of the Texas-Mexico border wall.[115] The Working Group collaborated with affected individual property

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and Negotiated the Immediate Removal of the Border Wall That Was Constructed on Mexican Territory] (June 25, 2007), *available at* http://www.sre.gob.mx/csocial/contenido/comunicados/2007/jun/cp_167.html.

110. E. Eduardo Castillo, *Mexican President Criticizes U.S. Fence,* WASH. POST, Oct. 26, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/10/26/AR2006102601784.html.

111. Comunicado Especial de la XVI Cumbre Iberoamericana de Jefes de Estado y de Gobierno Contra la Construcción de un Muro en la Frontera México-Estados Unidos [Special Communiqué of the XVI Summit of the Americas of Heads of State and Government Against the Construction of a Wall on the Mexico-United States Border] (Nov. 2006), *available at* http://www.sre.gob.mx/images/stories/dgomra/com_muro.pdf.

112. Moisés Sánchez Limón, *Interparlamentaria México-Canadá acuerda condena al muro fronterizo* [Mexico-Canada Inter-parliamentary Agrees to Condone Border Wall], LA CRÓNICA DE HOY, Feb. 19, 2008, *available at* http://www.cronica.com.mx/nota.php?id_nota=348290.

113. *Condena el senado de Chile la construcción del muro en la frontera de EU con México* [The Chilean Senate Condemns the Construction of the Wall on US-Mexico Border], PROCESO.COM.MX, Jan. 2, 2008, *available at http://www.proceso.com.mx/rv/modHome/detalleExclusiva/56179.*

114. The project was facilitated through the Rapoport Center for Human Rights and Justice at the University of Texas School of Law and was supported by the University of Texas Office of Thematic Initiatives and Community Engagement. The collective included faculty and students from the Department of Geography, the Department of Anthropology, the Lyndon B. Johnson School of Public Affairs, the Teresa Lozano Long Institute of Latin American Studies, and the Immigration Clinic, Environmental Clinic, and Rapoport Center at the Law School.

115. *See* THE TEXAS-MEXICO BORDER WALL: UT WORKING GROUP HUMAN RIGHTS ANALYSIS,

owners, indigenous communities, environmental groups, Environmental Sciences faculty at the University of Texas at Brownsville, other academics and advocates, in investigating and analyzing the border wall from a human rights perspective.[116] The Working Group visited areas of the border affected by construction and also filed requests with the U.S. government under the Freedom of Information Act to obtain additional information.[117] The Working Group then applied international human rights law to assess the actions of the U.S. government in constructing the border wall and the harm suffered by individuals and communities affected by the border wall.

The Working Group presented its findings in a set of briefing papers submitted to the Inter-American Commission on Human Rights (the "Inter-American Commission") of the Organization of American States in June 2008.[118] The Working Group then requested and obtained a general hearing on the border fence issue during the 133rd period of sessions of the Inter-American Commission, which took place in Washington, D.C. in October of 2008.[119] After presenting its briefing papers and conducting the hearing before the Inter-American Commission, the Working Group worked with the media[120] and also developed a website[121] to make its research and findings known to the public and to policymakers within the U.S. government.

Because of the Commission's central role as a regional human rights body with jurisdiction over all countries in the Americas, including the United States, the Working Group focused on the Inter-American Commission as the principle forum for its human rights challenge to the border wall.[122] The Inter-American Commission is also the only international entity with jurisdiction to accept and decide individual human rights complaints against the United States.[123] The Working Group pursued

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available at http://www.utexas.edu/law/academics/centers/humanrights/borderwall/analysis/ (last visited Feb. 3, 2011); *see also* Gilman, *supra* note 87, at 2.

116. Gilman, *supra* note 87, at 2.

117. *Id.* at 6; *see also Freedom of Information Act Requests and Litigation*, THE TEXAS-MEXICO BORDER WALL, *available at* http://www.utexas.edu/law/academics/centers/humanrights/borderwall/analysis/foia-requests.html (last visited Feb. 3, 2011) [hereinafter Working Group FOIA Requests].

118. THE WORKING GROUP ON HUMAN RIGHTS AND THE BORDER WALL, OBSTRUCTING HUMAN RIGHTS: THE TEXAS-MEXICO BORDER WALL (June 2008), *available at* http://www.utexas.edu/law/academics/centers/humanrights/borderwall/analysis/briefing-FULL-SET-OF-REPORTS.pdf.

119. *See* Letter from Inter-American Commission on Human Rights to author (Sept. 22, 2008), *available at* http://www.utexas.edu/law/academics/centers/humanrights/borderwall/analysis/iac-Grant-of-Hearing.pdf; Video: Working Group Before the Inter-American Commission on Human Rights (Oct. 22, 2008), *available at* http://www.utexas.edu/law/academics/centers/humanrights/borderwall/analysis/inter-american-commision.html.

120. *See, e.g.*, Press Release, The Bernard and Audre Rapoport Center for Human Rights and Justice, University of Texas Working Group to Testify on Human Rights Impacts of the Texas-Mexico Border Wall (Oct. 16, 2008).

121. THE TEXAS-MEXICO BORDER WALL, *available at* http://www.utexas.edu/law/academics/centers/humanrights/borderwall/ (last visited Feb. 3, 2011).

122. Other advocates brought the border wall issue to the attention of additional human rights bodies, such as the United Nations Permanent Forum on Indigenous Issues. *See* Angelique Eaglewoman (Wambdi A. Wastewin), *The Eagle And The Condor Of The Western Hemisphere: Application Of International Indigenous Principles To Halt The United States Border Wall*, 45 IDAHO L. REV. 555 (2009) (detailing other human rights efforts).

123. *See* Caroline Bettinger-Lopez, *The Inter-American Human Rights System: A Primer* 42 Clearinghouse Rev. 581, 583 (2009); Rules of Procedure of the Inter-American Commission on Human Rights, Inter-Am. Comm'n H.R., Basic Documents Pertaining to Human Rights in the Inter-American System, art. 49 (Jan. 2007) (establishing the jurisdiction of the Inter-American Commission to review

the strategy of filing general briefings and requesting a general hearing, rather than filing an individual petition, because domestic remedies had not yet been exhausted as required by human rights law.[124] But the ability of the Commission to eventually entertain an individual petition alleging violations by the United States provides additional weight to the body's consideration of the border wall issue.

B. *Human Rights Impact of the Texas-Mexico Border Wall*

The Working Group concluded that the planned wall along the Texas-Mexico border violated international human rights law in numerous and serious ways.[125] Because the Working Group focused on the Inter-American Commission on Human Rights, it analyzed breaches by the United States of its obligations under the American Declaration of the Rights and Duties of Man (the "American Declaration"), interpreted in light of the American Convention on Human Rights and other relevant international human rights norms.[126] The American Declaration constitutes an international legal obligation for the United States as a member state of the Organization of American States.[127] The human rights violations found are described in the following subsections.

1. Articles II and XXIII of the American Declaration

Article II of the American Declaration guarantees equality before the law without distinction as to race, sex, language, creed, or any other factor.[128] Pursuant to its Article XXIII, the American Declaration guarantees the right to private

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individual petitions filed against states that are not parties to the American Convention on Human Rights).

124. American Convention on Human Rights, art. 46. Nov. 22, 1969. Basic Documents Pertaining to Human Rights in the Inter-American System (updated to Jan. 2007) (requiring exhaustion of domestic remedies before presentation of an individual petition).

125. Gilman, *supra* note 87, at 3. Letter from Denise Gilman, Clinical Professor, The University of Texas School of Law, to Santiago Canton, Executive Secretary of the Inter-American Commission on Human Rights (Oct. 7, 2008).

126. According to the jurisprudence of the inter-American human rights system, the provisions of the American Declaration should be interpreted and applied in the context of ongoing developments in international human rights law, and specifically, in the light of the American Convention on Human Rights and other prevailing international and regional human rights instruments. *See* Garza v. United States, Case 12.243, Inter-Am. Comm'n H.R., Report No. 52/01, paras. 88–89 (2001) (confirming that while the Commission does not apply the American Convention on Human Rights in relation to member states that have yet to ratify that treaty, the Convention's provisions may well be relevant in informing an interpretation of the principles of the Declaration); Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, para. 127 (2002).

127. *See* Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, paras. 35–45 (July 14, 1989); Roach v. United States, Case 9647, Inter-Am. Comm'n H.R., Report No. 3/87, OEA/Ser.L./V/II.71, doc. 9 paras. 46–49 (1987); Workman v. United States, Case 1.2.261, Inter-Am. Comm'n. H.R. Report No. 33/06, para. 70 (2006); *see also* Charter of the Organization of American States art. 3(1), June 15, 1951, 119 U.N.T.S. 3.

128. The American Declaration of the Rights and Duties of Man, art. II, May 2, 1948, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 rev.13 (2010) [hereinafter American Declaration].

property.[129] Under these provisions, distinctions between individuals and taking of property constitute unlawful violations of human rights unless they are necessary for the achievement of a legitimate and lawful governmental goal and are proportional to that goal.[130] Under this standard, if various options are available to achieve a lawful objective, the one that least restricts or impinges on human rights must be selected to ensure necessity and proportionality.[131] The United States has violated these provisions.[132]

To build the wall, the United States took property, such as the land owned by Dr. Eloisa Tamez, which has been held by families for generations; in some cases family ownership dates back to land grants from the Spanish crown issued in the 1700s and 1800s.[133] In addition, as described above, the taking of land and fence construction has resulted in the inability of some property owners to reach large portions of their property that abut the river. Many residents use these portions of their land to graze and water livestock, to irrigate crops, to enter the river for recreation and transportation, and to fulfill other economic purposes.[134] These property takings thus have the potential to destroy their livelihood.

In addition, the U.S. treated property owners on the border unequally. A statistical analysis conducted by Professor Jeff Wilson of the Working Group and his colleagues demonstrates that the property owners impacted by the wall are poorer, more often Latino and less educated than those not impacted who also live along the border.[135] Numerous small landowners lost their property to the wall while more lucrative developed properties and resorts were not included in the wall's path.[136]

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129. *Id.* art. XXIII.

130. *See* Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, para. 127 (Nov. 28, 2007); Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 125, paras. 144–45 (June 17, 2005); Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 146, para. 137 (March 29, 2006); Judicial Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, paras. 84–86 (Sept. 17, 2003).

131. Salvador-Chiriboga v. Ecuador, Preliminary Objections and Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 179, para. 73 (May 6, 2008); Yatama v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter. Am. Ct. H.R. (ser. C) No. 127, para. 206 (June 23, 2005).

132. Dulitzky, et al., *supra* note 25, at 11.

133. TEX. GEN. LAND OFFICE, GUIDE TO SPANISH AND MEXICAN LAND GRANTS IN SOUTH TEXAS para. 336 (1988) (describing the history of the San Pedro de Carricitos land grant to which the Tamez family traces its connection to their property).

134. Ildefonso Ortiz, *DHS Moves Forward with Border Fence Through Orchard and Man's Heart*, BROWNSVILLE HERALD, Nov. 11, 2009, *available at* http://www.brownsvilleherald.com/articles/moves-104925-border-orchard.html (describing the difficulties faced by the Loop family in accessing and utilizing parts of their land due to the fence, including their inability to irrigate their orchard); Monica Weisberg-Stewart, Chairman, Tex. Border Coal. Immigr. Comm., Speech at Greater Southwest Region of Hadassah Convention (May 22, 2008) *available at* www.riograndeguardian.com (search "Weisberg-Stewart: Contrasting the fence in Israel with that proposed for Texas") (noting that "[f]armers irrigate from the river, ranchers water their herd in the river, children and kayakers play in the river, and people are baptized in the river").

135. J. GAINES WILSON, ET AL., AN ANALYSIS OF DEMOGRAPHIC DISPARITIES ASSOCIATED WITH THE PROPOSED U.S.-MEXICO BORDER FENCE IN CAMERON COUNTY, TEXAS (2008), *available at* http://www.utb.edu/vpaa/csmt/chemenv/Documents/WILSON_ETAL_2008_REPORT_OAS_WALL_DISPARITIES.pdf.

136. *See, e.g.*, del Bosque, *supra* note 65 (describing construction of the wall on small properties but not on the River Bend Golf Resort or on acreage owned by the wealthy and politically active Hunt family); *see* Herrera, et al. v. United States, et. al. No. 2:08-cv-00070-AML (W.D.Tex. October 8, 2008)

One of the most well known examples of this difference in treatment is found in the handling of border wall construction near the River Bend Golf Resort. The resort is a development located near Brownsville, Texas along the banks of the Rio Grande River, which caters to white golfers generally from other parts of the United States.[137] While the wall has been constructed on numerous small properties around Brownsville, Texas, the resort has not been affected.[138] The government's plans for border wall construction have always included properties just a short distance down the banks of the Rio Grande River from the resort but have never called for construction within the resort itself.[139]

The wall also had a particularly negative impact on Native American communities, including individual landowners who are Lipan Apache and the federally recognized Kickapoo and Ysleta del Sur (Tigua) tribes that live and practice their traditional cultures and religions along the Texas-Mexico border.[140] Indigenous communities enjoy unique and vitally important rights to property and equal protection under international human rights law.[141] These rights were not respected. The U.S. government took property in southern Texas from Lipan Apache families such as the Tamez family to build the wall.[142]

The U.S. government's wall construction also deprived the Kickapoo and the Ysleta del Sur of the ability to observe certain traditions relating to the land and the Rio Grande River, leading to harms against these communities not experienced by other groups.[143] The Kickapoo live near Eagle Pass, Texas and are recognized by the U.S. government.[144] The tribe is one of the more traditional indigenous communities in the entire United States.[145] The Kickapoo have seen the wall affect their access to religious and ceremonial sites along the river.[146] The wall also creates a barrier to the tribe's historic annual migration back and forth between Texas and northern Mexico, which is otherwise specifically guaranteed by federal law in order to respect the

(describing plans for construction of the wall on small properties in the Eagle Pass, Texas area but not on the nearby land belonging to Bill Moody who owns 55,000 acres along the Rio Grande River).

137. *See* RIVER BEND RESORT, http://riverbendresort.us (last visited Oct. 6, 2010).

138. Del Bosque, *supra* note 65.

139. WILSON, ET AL., *supra* note 135; U.S. DEPARTMENT OF HOMELAND SECURITY ET AL., ENVIRONMENTAL STEWARDSHIP PLAN App. F (2008) (showing fence location along the Rio Grande River near Brownsville and showing gap in fence location at the bend in the river that houses the River Bend Resort).

140. MICHELLE GUZMAN & ZACHARY HURWITZ, VIOLATIONS ON THE PART OF THE UNITED STATES GOVERNMENT OF INDIGENOUS RIGHTS HELD BY MEMBERS OF THE LIPAN APACHE, KICKAPOO, AND YSLETA DEL SUR TIGUA TRIBES OF THE TEXAS-MEXICO BORDER 8 (2008), *available at* http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/briefing-papers.html.

141. *See, e.g.*, Yakye Axa v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No 125, paras. 137, 144–45 (June 17, 2005) (discussing importance of property rights enjoyed by indigenous communities given unique connection to the land).

142. GUZMAN & HURWITZ, *supra* note 140, at 3.

143. *See id.* (describing the unique nature of the Kickapoo and Tigua settlements and the wall's harm to the tribes).

144. *See* BILL WRIGHT & E. JOHN GESICK, JR., THE TEXAS KICKAPOO: KEEPERS OF TRADITION (1996) (describing the history and current cultural life of the Kickapoo tribe).

145. *Id.* at 10–11.

146. Statement from Eric Anico on behalf of the Kickapoo Traditional Tribe of Texas (Oct. 13, 2008) (on file with author).

traditions of the tribe.[147] The Ysleta del Sur, also a federally recognized tribe, settled along the banks of the Rio Grande River in the 17th century and has continued to maintain a traditional community there.[148] Border wall construction has taken place on traditional lands of the sovereign Ysleta del Sur tribe, impacting their nearby reservation as well as their access to important cultural and religious sites utilized along an extensive stretch of the river for the last 300 years.[149]

Despite the severe and unequally distributed negative impacts of the wall and the taking of property implicated by its construction, the U.S. government did not properly analyze the need to take property or to build the wall, and did not meaningfully consider other alternatives for controlling the border. As a result, the necessity and proportionality of the government's actions cannot be established.

The U.S. government has never explained the necessity of taking particular properties for construction of the fence or for placing the intermittent fence in certain areas and not others.[150] It is therefore impossible to assess whether particular segments of the fence are necessary or whether the fence might have been placed effectively in other areas without as great a burden on rights.[151]

Furthermore, the U.S. government failed to make a showing, as required by international human rights law, that it was necessary to take property and build a wall in order to meet the government's goals. The stated goal of the border wall statutes is to protect and control the border by preventing unlawful entries by immigrants, terrorists,[152] or drug traffickers.[153] While the goals of impeding unlawful immigration and protecting national security are presumably legitimate, as a matter of international human rights law, the construction of the border wall cannot be considered effective, much less proportional, in achieving these objectives.

Because the evidence suggests that terrorists do not seek to enter the United States through the Texas-Mexico border, the construction of a wall along that border is not effective in preventing terrorism. It has been well established that the 9/11 terrorists entered the country through legal immigration channels, and there have been no credible reports that terrorists have now begun to sneak across land borders.[154] Government studies suggest, in any case, that terrorists attempting to cross a land border illegally to enter the United States would much more likely enter the U.S. from Canada, since there are fewer controls on the Canadian border.[155]

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147. 25 U.S.C. § 1300b–13(d).

148. *See* RANDY LEE EICKHOFF, EXILED: THE TIGUA INDIANS OF YSLETA DEL SUR (1996).

149. GUZMAN & HURWITZ, *supra* note 140, at 13.

150. Dulitzky, et al., *supra* note 25, at 11–13.

151. *See* 2009 SECURE BORDER INITIATIVE REPORT, *supra* note 61, at 29 (noting that CBP never analyzed the impact of deployment of the "costly" fence in the areas in which it was deployed, nor the impact it might have had if deployed in other locations).

152. One Border Patrol official stated that the wall along the Texas-Mexico border was necessary to prevent the arrival of weapons of mass destruction. *Brownsville Protests Border Wall*, YOUTUBE (Dec. 13, 2007), http://www.youtube.com/watch?v=GUMFfV_qbNM&feature=related.

153. *See* Secure Fence Act of 2006, Pub. L. No. 1090-367, § 2, 120 Stat. 2638 (2006).

154. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., ENTRY OF THE 9/11 HIJACKERS IN THE UNITED STATES: STAFF STATEMENT NO. 1 (2004); *see* Olivia Albrecht, *Border Troubles: Drugs, Immigrants Today; Terrorists, Bombs, Tomorrow*, FOX NEWS, Feb 22, 2006, *available at* http://www.foxnews.com/story/0,2933,185760,00.html (arguing that terrorists will someday exploit the southern border but acknowledging that there is no evidence that "the southern border has been breached by terrorists to gain entry into the U.S.").

155. *See* 2007 BORDER SECURITY REPORT, *supra* note 4 (describing unmanned and unmonitored

Nor has the construction of a wall along the Texas-Mexico border been shown to serve as an effective means of preventing or controlling unauthorized immigration. The most recent study by the federal government's General Accountability Office decries the failure of DHS to assess the degree to which the construction of the wall has impeded unlawful immigration. The study notes that DHS has not even developed a strategy or tool for making such an assessment.[156] The government cannot therefore assert that the border wall is an effective means for stemming illegal immigration, much less the only means or a necessary one.

In fact, according to official reports of the U.S. government, prior experiments with the border wall construction have proven ineffective in stemming unauthorized immigration. The original segment of border wall built in the San Diego area "did not have a discernible impact on the influx of unauthorized aliens coming across the border."[157]

These government reports particularly question the effectiveness of physical barriers as long as there are gaps in the border wall, because the physical barriers simply redirect attempted border crossings to areas in which there is no wall.[158] There are no plans to build a solid border wall, and it seems unlikely (and undesirable as a human rights matter) that a solid border wall will ever be built given the length of the border between the United States and Mexico, the rough terrain it covers, and the prohibitive cost. These government studies have further noted that, while fences that channel immigration into more remote and rough terrain do not effectively deter immigration, they do lead to more migrant deaths.[159] These analyses, by the U.S. government itself, suggest that the intermittent border wall built along the Texas-Mexico border will have little impact on overall unauthorized entries into the United States and will instead have a deadly effect on immigrants.

Physical barriers are also extremely susceptible to being breached and therefore are not reliable as a means of immigration control. As the wall was under construction, then DHS Secretary Michael Chertoff acknowledged that tunnels had been built to get around fencing already in place in some areas.[160] A study published in 2009 by the government's General Accountability Office identified 3,300 breaches in the wall.[161]

Perhaps the main failure of the wall as a mechanism of border control, though, is the focus on the southern physical border of the United States. The individual and governmental decisions affecting flows of immigration are actually made inside the United States. For example, many immigrants "become" unlawful once they are within the U.S. Over half of the undocumented immigrants in the United States

roads crossing the border between the United States and Canada, and the ability of government investigators posing as unlawful border crossers to move freely along the Canada-U.S. border).

156. 2009 SECURE BORDER INITIATIVE REPORT, *supra* note 61, at 29.

157. CRS BARRIERS REPORT, *supra* note 3, at 2.

158. *Id.* at 26.

159. *Id.* ("on average 200 migrants died each year in the early 1990s, compared with 472 migrant deaths in 2005").

160. *Late Edition with Wolf Blitzer* (CNN television broadcast July 1, 2007); Randal C. Archibold & Julia Preston, *Homeland Security Stands by Its Fence*, N.Y. TIMES, May 21, 2008, at A18.

161. 2009 SECURE BORDER INITIATIVE REPORT, *supra* note 61, at 23.

arrive legally by entering at an official land border or airport port of entry[162] and only later fall out of status and join the undocumented population.

In addition, it is likely, if not certain, that the economy and interior immigration enforcement actions have a greater impact on levels of unlawful immigration across the border than do physical barriers.[163] Statistical and anecdotal information suggest that unauthorized border crossings decreased along the Texas-Mexico border and elsewhere in recent years as a result of these factors *before* construction of a wall.[164] In fact, government statistics show that unlawful border crossings and apprehensions have traditionally risen and fallen in a cyclical pattern based on economic and other factors, with the lowest numbers coming in 1976 on the tail end of a serious and prolonged recession.[165] This trend suggests that physical barriers miss the target in addressing unauthorized immigration issues.

Finally, levels of unauthorized immigration depend on policy decisions made within the United States regarding what types of immigration are permitted. Currently, many immigrants who wish to come to the United States lawfully to work or to rejoin their families have no route available to them.[166] The few immigrants who are fortunate enough to qualify for lawful status often must wait for decades and are forced through expensive and inefficient immigration processing.[167]

162. PEW HISPANIC CTR., MODES OF ENTRY FOR THE UNAUTHORIZED MIGRANT POPULATION 1 (2006).

163. *See* MICHAEL HOEFER ET AL., DEPT. OF HOMELAND SECURITY, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, 2 (2010) (concluding that the number of unauthorized residents in the United States declined between 2007 and 2009, "coincident with the U.S. economic downturn").

164. Archibold & Preston, *supra* note 160; NANCY RYTINA & JOHN SIMANSKI, DEPT. OF HOMELAND SECURITY, FACT SHEET: APPREHENSIONS BY THE U.S. BORDER PATROL, 2005–2008 (June 2009); *see* Dan Barry, *A Natural Treasure That May End Up Without A Country*, N.Y. TIMES, Apr. 7, 2008, at A14 (quoting the manager of a nature reserve in the Rio Grande Valley as stating that he had seen a notable drop-off in illegal crossings through the reserve in the last decade).

165. *See* RYTINA & SIMANSKI, *supra* note 164, at 1 (showing data that reflects a dependent relationship between economic growth and the number of border apprehensions).

166. *See* STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATON AND REFUGEE LAW AND POLICY 251, 253–55 (5th ed. 2009) (noting that individuals who want to immigrate cannot legally migrate to the United States unless they fit within one of the tightly-defined categories of legal admission established by Congress); Doris Meissner et al., *Immigration and America's Future: A New Chapter* 21–24, 31–43 (2006), *reprinted in* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 464 (6th ed. 2008) (noting that for those without previous ties to the United States, there are "few means of legal entry").

167. *See* LEGOMSKY & RODRIGUEZ, *supra* note 166, at 252–58, 261 (explaining the statutory quota and preference process that leads to lengthy backlogs for immigrant visas; noting that administrative processing can add years to the waiting times caused by the statutory quotas); Meissner, et al., *supra* note 166, at 464 (stating that immigrants who try to immigrate legally are quickly constrained by immigration category and country caps that lead to unreasonable delays); Press Release, Prakash Khatri, President and CEO, KPK Global Solutions, LLC, The Opportunity of Two Lifetimes: U.S. Immigration Process Ensures Disparate Treatment for Mexican Immigrants (May 7, 2010), *available at* http://www.khatrilaw.us/Articles/Family_Based_Migration_of_Mexicans.pdf (calculating that certain family members of immigrants must wait more than 100 years to come legally to the U.S.); Bureau of Consular Affairs, U.S. Dept. of State, Visa Bulletin for April 2011, *available at* http://www.travel.state.gov/visa/bulletin/bulletin_5368.html (containing a government chart showing visa eligibility for individuals in specific categories who filed applications by certain cutoff dates showing, for example, that most adult sons and daughters of U.S. citizens must wait at least six years to immigrate while adult sons and daughters of U.S. citizens from Mexico must wait eighteen years or more).

Individuals who do not see a viable route to immigrate legally may instead arrive unlawfully.[168]

The United States failed in its obligation to further its legitimate goals through the adoption of those proportional measures that are least restrictive of rights. The U.S. government has not shown that the wall is an effective and thus necessary tool for controlling the border and halting unlawful immigration.[169] The United States was therefore obligated to consider and adopt other means of effectuating its objectives that would not have resulted in such grave harm to human rights. Unfortunately, the government did not do so.

2. Article IV of the American Declaration

Article IV of the American Declaration guarantees the right to "freedom of investigation, opinion, expression and dissemination."[170] The United States did not act with transparency regarding its plans to build the border wall and has failed to provide information necessary to allow for full investigation of the wall's impacts and expression of opinion about the wall.

As noted above, the United States has failed to provide specific information regarding the exact locations for the wall or to explain the rationale for those locations. It has been extremely difficult for anybody outside the United States government to determine even how much and what type of wall has been built and where.

A further example of the government's lack of transparency is found in its failure to respond to formal requests for information about the border wall. The U.S. government failed for almost a year to reply to the Freedom of Information Act Request filed by the Working Group in April 2008 although federal law requires U.S. agencies to release information in response to a request under the Freedom of Information Act in a period of twenty days.[171] The request sought information essential to understanding the government's border wall construction project. Among other things, the request sought copies of all maps showing planned locations for the wall along the Texas-Mexico border, documents reflecting the factors used to

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168. Khatri, *supra* note 167; Kevin R. Johnson, *Legal Immigration in the 21st Century*, *in* BLUEPRINTS FOR AN IDEAL LEGAL IMMIGRATION POLICY 37–41(Richard D. Lamm & Alan Simpson eds., 2001) ("When the demand for migration far outstrips the numbers of immigrants who may be lawfully admitted, undocumented migration . . . will flourish.").

169. As noted above, not even the government's analyses suggest any meaningful level of effectiveness. *See* 2009 SECURE BORDER INITIATIVE REPORT, *supra* note 61, at 29 (stating that "despite a $2.4 billion investment in this infrastructure, its contribution to effective control of the border has not been measured because CBP has not evaluated the impact of tactical infrastructure on gains or losses in the level of effective control"); Archibold & Preston, *supra* note 160 (quoting Secretary of Homeland Security Michael Chertoff as acknowledging that the fence is not a "cure-all" and that "[y]es, you can get over it; yes, you can get under it"); Michael Chertoff, *Answers About the Fence*, *in* DEPARTMENT OF HOMELAND SECURITY LEADERSHIP JOURNAL ARCHIVE (March 12, 2008) (including statement by Secretary of Homeland Security Michael Chertoff that the fence is not a "panacea" and would at most temporarily slow immigrants in crossing the border); Weisberg-Stewart, *supra* note 134 (noting that Border Patrol Chief Aguilar has stated that the fence will only delay illegal border crossings by about three minutes).

170. American Declaration, *supra* note 128, art. IV.

171. 5 U.S.C. § 552(a)(6)(A) (2009); FOIA Complaint, *supra* note 64, at 4–12.

determine placement of the wall, and information regarding consultations with indigenous tribes.[172]

The lack of transparency violates the right to freedom of investigation and dissemination protected in the American Declaration as it makes it excessively difficult to obtain and make known information about the wall. Without information, the right to opinion and expression is also hindered. The paucity of information also makes it much more difficult to define the exact contours of other violations of rights and to express an opinion on those violations, since it is not even possible to identify all the victims and impacts of the wall.

In addition, the lack of information negatively affects the ability of impacted individuals to be meaningfully consulted about the border wall. The right of affected individuals and communities to be consulted by the government regarding a massive infrastructure project such as the border wall arises from the right to freedom of information and expression in connection with several other human rights provisions.[173] The obligation to ensure that no less restrictive alternatives exist cannot be met without meaningful exchange of information and consultation.[174] In addition, the American Declaration is read in conjunction with other international human rights norms, particularly International Labor Organization Convention No. 169, which safeguard the rights of indigenous communities and explicitly require consultation through appropriate means.[175] The consultations must be done in good faith with affected indigenous communities before administrative or legislative actions can be taken that will affect them.[176]

Despite these requirements, the "consultations" carried out by the United States regarding the border wall were characterized by the previously-described lack of transparency regarding critical information as well as by a lack of possibility for exchange and discussion of the relevant issues. Attendees at the handful of public meetings organized by U.S. government officials reported that private citizens had no opportunity to enter into any sort of dialogue or question-and-answer discussion with government officials regarding the border wall. Rather, participants listened to prepared statements by officials, which lacked detail, and then were told to record their comments at computer terminals or in writing.[177] The failure of the government

172. Working Group FOIA Requests, *supra* note 117.

173. *See* American Declaration, *supra* note 128, arts. II, XXIII (stating "[e]very person has a right to own such private property as meets the essential needs of decent living"); *see also* Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Inter-Am. Comm'n. H.R., Report No. 40/04, paras. 132, 140, 171 (2004) (stating that the right to property and equality includes right to engagement in effective and informed consultations regarding use of property where government or third parties seek to exploit or take land).

174. *See* American Declaration, *supra* note 127, art. II (stating "[a]ll persons are equal before the law and have the rights and duties established in this Declaration"); *see also supra* note 130 (citing cases that require assessment of alternatives wherever right to equal protection or other human rights are implicated).

175. Int'l Labor Org. Indigenous and Tribal People's Convention art. 6, Sept. 5, 1991, ILO Convention No. 169.

176. *Id.*

177. *See* Letter from Juliet V. Garcia, President of the University of Texas at Brownsville and Texas Southmost College, to the Inter-American Commission of Human Rights (Oct. 22, 2008), *available at* http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/iac-Juliet-Garcia-Statement.pdf (emphasizing that there was only one meeting in 2007 where the DHS sought public input into the proposed plan to build the wall); *see also* Riograndeguardian, *Brownsville Protests Border Wall,* YOUTUBE (Dec. 13, 2007), http://www.youtube.com/watch?v=GUMFfV_qbNM.

to engage in meaningful consultations constitutes yet another violation of human rights.

3. Articles V and XIII of the American Declaration

Article V of the American Declaration provides for the right to legal protection against attacks upon "private and family life."[178] Article XIII of the American Declaration establishes the right to culture.[179] The construction of the border wall has caused great harm to families and cultural traditions in the communities along the Texas-Mexico border.

The wall has irreparably damaged a centuries-old culture in which communities have always viewed themselves as cross-border and transnational in nature. The ties between towns and residents north and south of the Rio Grande River are extremely strong, and residents on the border have traditionally traveled back and forth between Mexico and Texas regularly for social and economic purposes. Many families include both Mexican and United States citizens with family members living on each side of the border and visiting each other regularly.[180] Some border residents even maintain homes in both Mexico and Texas.[181] Others travel back and forth daily to shop and conduct business.[182] Many residents along the Texas-Mexico border see the Rio Grande River "as a meeting point rather than a dividing line," and they see the wall as an affront to the unique border identity and culture that has flourished in communities along both sides of the border.[183] The wall necessarily makes a powerful statement of separation of a cross-border community. There is no doubt that the wall has disrupted the way of life and culture of many families and communities along the border.

In addition, the wall impacts indigenous culture in violation of the norms guaranteeing special protections to the traditions of Native Americans. For example, the U.S. government's own analyses recognize that the wall will impinge upon traditional ceremonies conducted by the Ysleta del Sur tribe along the banks of the Rio Grande River.[184] Yet, neither the government's analyses nor any other studies take steps to identify and ameliorate or avoid the harms caused to the culture of indigenous communities by the border wall. In fact, other than this one mention of the Ysleta del Sur, the government's studies fail altogether to mention or consider the cultural concerns of the affected Lipan Apache, Kickapoo, and Ysleta del Sur.[185]

178. American Declaration, *supra* note 128, art. V.

179. *Id.* art. XIII.

180. *Brownsville's Bad Lie*, *supra* note 50; *see* Schwartz, *supra* note 2, at A01 (noting border citizens' attitudes that the wall separates communities).

181. Greg Harman, *Muro Del Odio: People of the Forgotten River Grapple with the Border Wall*, SAN ANTONIO CURRENT, Feb. 27, 2008.

182. Mexico Travel and Vacations, http://www.mexico.us/travel/business/border/mexico_us_cross_border_shopping/ (last visited Feb. 15, 2011).

183. *Brownsville's Bad Lie*, *supra* note 50.

184. *See* EL PASO ENVIRONMENTAL STEWARDSHIP PLAN, *supra* note 89, at 1–7 (noting that lighting from fence could interrupt tribal rituals).

185. A word search for Apache, Kickapoo, Ysleta del Sur, or Tigua in the lengthy environmental stewardship plans prepared in relation to the border wall project reveals almost no mention of the affected indigenous communities. *See* RIO GRANDE VALLEY ENVIRONMENTAL STEWARDSHIP PLAN, *supra* note 44 (mentioning the Kickapoo Tribe only once in reference to municipal water systems affected by the wall

Finally, the severe harm that the wall has caused to the environment, to wildlife, and to natural parks and preserves results in a violation of the right to culture.[186] The wall negatively impacts vulnerable and precious wildlife, such as the ocelot, jaguarundi, and unique plant species, such as the sabal palm, found along the Texas-Mexico border.[187] It also sunders nature preserves that have been carefully constructed along the border to protect unique species of plants and animals that make their home along the Rio Grande River and migrate back and forth across the Texas-Mexico border.[188] Through its waivers of environmental laws, the United States eschewed its responsibility to consider environmental harm and to take measures to limit likely damage.[189] The residents of the Texas-Mexico border area, including indigenous communities and long-time residents, have traditionally held an important connection to the natural resources along the Rio Grande River and to the river itself. For example, Dr. Eloisa Tamez has described the river itself as "spiritual" and has identified specific use she makes of plants native to the area.[190] A community leader in south Texas has called the Rio Grande "a river of life."[191] Environmental degradation caused by the wall undercuts the culture of residents of the Texas-Mexico border area in a way that violates their human rights.

4. Article XVIII of the American Declaration

Article XVIII of the American Declaration guarantees the right to judicial protection.[192] The United States has not ensured this right. The U.S. courts have not been amenable to hearing the human rights violations implicated in border wall construction. In addition, the legal provisions that normally require the government to follow careful processes and to take precautions to avoid harm when undertaking a project such as border wall construction have been stripped away.

Under U.S. law, a constitutional challenge to border wall construction would be exceedingly difficult to pursue because evidence of *intentional* discrimination based on *race or national origin* would be required.[193] Nor have the courts been open to challenges based on federal statutory law. The Consolidated Appropriations Act for

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construction); DEPT. OF HOMELAND SEC., ENVIRONMENTAL STEWARDSHIP PLAN FOR CONSTRUCTION, OPERATION AND MAINTENANCE OF TACTICAL INFRASTRUCTURE: U.S. BORDER PATROL, MARFA SECTOR, TEXAS (Aug. 2008) (no mention of affected indigenous communities). These plans represent the most in-depth analysis published by the government regarding impacts of the border wall on the environment and communities. *Id.* They should therefore include references to any consideration given to the affected indigenous communities. In addition, the Freedom of Information Act requests filed by the Working Group specifically sought documents including governmental analyses of the potential impact of the border wall on Native American communities. Working Group FOIA Requests, *supra* note 117. The government's responses have not included information about the three affected indigenous communities. *See* FOIA Complaint; Responses to Working Group FOIA Requests (on file with the author).

186. American Declaration, *supra* note 128, art. XIII.

187. Eriksson & Taylor, *supra* note 29.

188. *Id.* at 5; Hylton, *supra* note 2.

189. *See* Maya Indigenous Communities of the Toledo District, Case 12.053, *supra* note 173, para. 147 (discussing how Belize's failure to properly oversee the logging concessions caused environmental damage to Maya lands).

190. GUZMAN & HURWITZ, *supra* note 140, at 15–16.

191. Weisberg-Stewart, *supra* note 169.

192. American Declaration, *supra* note 127, art. XVIII.

193. *See* Washington v. Davis, 426 U.S. 229, 235–239 (1976) (requiring intentional discrimination to establish a constitutional equal protection violation).

FY 2008 required consultation with property owners, Indian tribes, and local governments regarding the impact of the wall. However, the same provision clarified that the consultation mandate creates no enforceable rights.[194] Meanwhile, federal law gave DHS the authority to invoke the importance of border wall construction to overlook a long list of federal statutes that would normally apply to protect indigenous rights and the environment.[195] DHS Secretary Michael Chertoff exercised this authority to waive all applicable environmental laws and several laws guaranteeing indigenous rights.[196] The U.S. Supreme Court has declined requests by indigenous communities and environmental groups to analyze the constitutionality of the broad grant of authority to the Secretary of DHS to issue these waivers.[197] Legal recourse for human rights violations has thus not been available, leading to a violation of the American Declaration.

III. EVALUATING THE HUMAN RIGHTS STRATEGY

It is always extremely difficult to evaluate the merits or level of "success" of a human rights strategy. This is partly because it is not simple to define success in this context in the first place. It is nonetheless valuable to inquire into the human rights strategy deployed against the border wall. An assessment of the strengths and limitations of the human rights approach should foster thinking about future strategies that might be developed for addressing the border wall and possibly immigration and security issues in the United States more generally. At the same time, it may lead to the development of important understandings about international human rights legal advocacy in the United States with the goal of identifying the most feasible and effective means for addressing human rights concerns in this country.

The decision to adopt a human rights approach came largely because of the limitations for effective advocacy under U.S. law. While non-legal strategies, such as marches and rallies, played an important role in making the harms caused by the border wall visible, they alone did not seem to have the muscle necessary to impact the onward march of wall construction. Yet, U.S. law did not seem to provide a better tool. As just discussed, given the strictures and limitations on U.S. statutory constitutional law, it seemed unlikely when the wall project began that litigation strategies in U.S. courts would be successful in challenging the wall.[198] In the end, that expectation proved true. Almost all of the litigation, including both affirmative legal challenges to wall construction and defensive claims against the taking of property, went nowhere or resulted in rulings against those challenging the wall.[199]

194. Consolidated Appropriations Act, Pub. L. No. 110-161, § 564 (2)(B)(ii) (2008).

195. REAL ID ACT of 2005, Pub. L. No. 109-13, § 102.

196. DHS WAIVER DETERMINATION, *supra* note 2.

197. County of El Paso v. Chertoff, No. EP-08-CA-196-FM, 2008 U.S. Dist. LEXIS 83045 (W.D. Tex. 2008), *cert. denied* 129 S. Ct. 2789 (2009); County of El Paso v. Napolitano, 129 S. Ct. 2789 (2009), *cert. denied*; Defenders of Wildlife v. Chertoff, 527 F.Supp. 2d 119 (D.D.C. 2007), *cert. denied*, (2008).

198. *See supra* text accompanying notes 192–96 (noting that lawsuits based on existing laws did not successfully challenge the wall).

199. *See* County of El Paso v. Chertoff, No. EP-08-CA-196-FM, 2008 U.S. Dist. LEXIS 83045 (W.D. Tex. 2008), *cert. denied*, 129 S. Ct. 2789 (2009) (rejecting challenge to DHS waiver authority underpinning border wall construction); Order of Judge Hanen, United States v. Tamez, No. B-08-531 (April 16, 2009) (rejecting the arguments made by Dr. Tamez and granting possession of Dr. Tamez's property to the U.S.

As described above, constitutional claims were extremely difficult to make, the protective statutes normally in place had been stripped of all teeth, and the government's broad power to condemn land was jealously guarded by the courts. Rather than serving as a meaningful mechanism for challenging the wall, the U.S. legal framework became a new source of violations through its failure to protect rights.

In this context, international human rights law provided an alternative legal framework for confronting the harm caused by the border wall. International human rights law provided a set of norms for assessing the impacts of the border wall, making it unnecessary to abandon a legal rights-based analysis altogether. But, international human rights law norms provide more expansive understandings of rights than U.S. law. As one scholar put it, the international norms and pertinent fora allow for "more generous reasoning" regarding the rights violations implicated in the border fence.[200] Thus, for example, under international human rights law, an equal protection violation takes place where the government's actions have a disparate impact or effect on particular categories of people or groups.[201] And discrimination is cognizable when government actions harm certain classes of individuals even if those individuals are not identified by traditional equal protection categorizations such as race, ethnicity or gender.[202] It therefore is not necessary under human rights law to meet the strict standards of U.S. law regarding intentionality and protected categories in order to make out an equal protection claim. International human rights law also permits direct challenges to government actions that violate human rights even when they come in the form of legislation or take place in full compliance with domestic law.[203] This approach stands in contrast

government); Order of Judge Hanen, Tamez v. United States, Case 1:08-CV-0555 (Jan. 27, 2009) (dismissing Dr. Tamez's affirmative class action litigation against the government); Tex. Border Coal. v. Napolitano, 614 F. Supp. 2d 54 (D.D.C. 2009) (dismissing class action litigation against the government filed by border municipalities).

200. Daniel I. Morales, *In Democracy's Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J. C.R. & C.L. 23, 51 (2009).

201. *See* Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, para. 103 (Sept. 17, 2003) ("States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination."); *see also* UN Hum. Rts. Comm., CCPR General Comment No. 18: Non-discrimination, para. 6 (Oct. 11, 1989) (describing discrimination as including both "purpose" and "effect" discrimination).

202. Article II of the American Declaration explicitly protects against discrimination not only the basis of "race, sex, language [and] creed" but also prohibits discrimination on the basis of "any other factor." American Declaration, *supra* note 128, art. II. In addition, the Inter-American Court of Human Rights has made clear that non-discrimination principles extend to categorizations such as class and immigration status. *See, e.g.*, Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H. R. (ser. A) paras. 112–13, 148 (Sept. 17, 2003) (noting that States sometimes engage in prohibited discrimination against migrants, as compared to nationals, and reaffirming that States should uphold human rights regardless of "status as nationals or aliens").

203. *See, e.g.*, Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H. R. (ser. A) para. 103 (Sept. 17, 2003) (noting that states may violate equal protection through the enactment of laws or through the actions of agents in implementing or interpreting the law). The American Convention on Human Rights, used to interpret the obligations of the American Declaration, explicitly requires a state to take legislative action to remove laws that cause violations and to protect human rights. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev.1 at 25 art. 2 (1992). In his analysis of the international human rights approach to the border wall, Daniel I. Morales suggests that international human rights law cannot accept a challenge to democratically adopted

to U.S. law, which insulates legislative action and agency implementation of law from challenge except in special circumstances.[204] The approach is particularly relevant in the context of the border wall given that border wall legislation functioned to disarm other federal laws that would have provided some rights protection. Use of international human rights law thus allowed the harms caused by the border wall to be described as rights where they were felt and seen that way but were not recognized under U.S. law as such.[205]

The international human rights norms, with their more expansive understanding of rights, enjoy credibility as a codification of the expectations of the international legal order regarding human rights.[206] The government's actions in constructing the border wall could be and were measured against these norms and specific violations pointed out. For both the U.S. government and the communities affected by the wall, the analysis that led to concrete and reasoned conclusions regarding legality potentially had a greater impact than general policy or moral arguments.

The use of international human rights law also created an opportunity to highlight important issues that did not otherwise receive significant attention in the debate around the border wall. For example, the waiver of environmental and indigenous laws precluded any serious litigation around indigenous rights or environmental damage in the U.S. courts. Yet, the impact of the border wall on indigenous communities took on a central role in the human rights analysis because of the expansive protections guaranteed to native communities under international human rights law.[207] Similarly, under U.S. law, there was no conceivable way of shoehorning the harm caused by placing a border wall down the middle of a cross-border and cross-cultural community into a cognizable legal right. But, the right to culture protected in international human rights law presents the perfect platform for profiling this important impact of the border wall.[208] The adoption of a human rights approach thus created a previously unavailable legal space in which to raise some of

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legislation any more than U.S. law can. In fact, he suggests that international human rights tribunals would be even less likely to find that legislation violates human rights because of the focus on democratic government in international law. Morales, *supra* note 200, at 51–52. Morales misunderstands or is unfamiliar with international human rights law and practice. International human rights tribunals regularly find that specific legislation violates human rights, and in some cases states have modified legislation on this basis. *See, e.g.*, Press Release, Inter-Am. Ct. H. R., IACHR Praises Repeal of Argentina's Military Justice Code (Aug. 12, 2008) (noting that the Argentine government repealed a federal law after the Inter-American Commission on Human Rights issued an admissibility decision in a case challenging the legislation); *see also* Cal v. Att'y Gen. of Belize, [2007] No. 171 (Belize), *available at* http://www.belizelaw.org//supreme_court/judge_list/civil_judge_2007.html (requiring the government of Belize to abstain from issuing land use permits under national law for the development of traditional Mayan lands, based on a decision by the Inter-American Commission on Human Rights that found violations of rights in the actions of the government of Belize toward these lands).

204. Generally, legislation is constitutional if there is a rational basis for adoption of the statute to meet any possible governmental objective. U.S. v. Carolene Prod. Co., 304 U.S. 144, 152 (1938).

205. Morales argues that the harms caused by the border wall, particularly relating to the discriminatory impact of the wall, are properly conceived of as unjust equal protection violations but asserts that they are not cognizable as such under the law. Morales, *supra* note 200, at 51. The value of the international human rights approach is exactly that it does recognize these harms in their proper light.

206. *See, e.g.*, American Declaration, *supra* note 128 (adopted by the member states of the Organization of American States to set out specific human rights norms for the member states of the inter-governmental alliance).

207. *See supra* notes 140, 176 and accompanying text.

208. American Declaration, *supra* note 128, art. XIII.

the harms that went to the core of the border wall's impact and seemed most important to those affected, yet were otherwise largely invisible, at least in the legal discourse.[209]

The particular human rights approach employed, calling on academic experts from disciplines ranging from law to anthropology and geography, also permitted a more meaningful look at the multi-faceted problems created by the border wall. Construction of the border wall resulted in consequences that called for an analysis that incorporated mapping and statistical measures, an understanding of indigenous and other communities located along the border, knowledge of natural resources along the Texas border and environmental harms as well as other expertise. The human rights framework provided a means for successfully marrying analysis under international human rights law with the work of non-law disciplines to develop a much more comprehensive and clear picture of the impact of the border wall than allowed through other strategies.

The human rights challenge to the border wall attracted international attention and even official condemnation by the Inter-American Commission on Human Rights. The hearing before the Inter-American Commission attracted significant U.S. and international media attention.[210] In addition, the U.S. government saw itself obligated to respond formally to the Working Group's charges of human rights violations before the Inter-American Commission on Human Rights. The U.S. sent several high-level government representatives to respond to the findings of the Working Group at the general hearing held in October 2008.[211] Then, on January 14, 2009, the U.S. government filed a written response with the Commission.[212]

After the general hearing at which the Working Group testified, at the end of its period of sessions, the Commission expressed concern about the "troubling information" it had received about the human rights impact of the Texas-Mexico border wall.[213] The Commission emphasized that the wall project likely involved discrimination because of its disproportionate impact on "people who are poor, with a low level of education, and generally of Mexican descent, as well as indigenous communities on both sides of the border."[214] The validation by an inter-governmental human rights body at the supranational level of the legitimacy of

209. Despite his critique of the international human rights approach, Morales does recognize that the strategy allowed for greater consideration of the more complicated and possibly more profound issues not cognizable in U.S. law. *See* Morales, *supra* note 200, at 48–52.

210. *E.g.*, *Texas Group Opposing Border Fence in Washington*, N.Y. DAILY NEWS, Oct. 21, 2008, http://www.nydailynews.com/latino/2008/10/22/2008-10-22_texas_group_opposing_border_fence_in_was.html; *Texas Group Opposing Border Fence*, HOUS. CHRON., Oct. 22, 2008; *Muro fronterizo viola derechos humanos, acusan* [Border wall violates human rights, they accuse], EL UNIVERSAL, Oct. 22, 2008, *available at* http://www.eluniversal.com.mx/ notas/549355.html.

211. *See* Texas–Mexico Border Wall, Working Group Before the Inter. American Commission on Human Rights (Oct. 16, 2008), http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/ inter-american-commision.html (providing video and documents from the hearing).

212. Letter from David Pagan, Acting Director of Policy and Planning and State and Local Liaison, U.S. Customs and Border Protection, U.S. Dep't of Homeland Sec. to Héctor Morales, Ambassador and Permanent Representative, Permanent Mission of the United States of America to the O.A.S., U.S. Dep't of State (Jan. 14, 2009), *available at* http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/iac-Response-of-United-States-Government.pdf.

213. Press Release, Inter-Am. Comm'n. H.R., IACHR Concludes its 133rd Period of Sessions (Oct. 31, 2008), http://www.cidh.org/Comunicados/English/2008/46.08eng.htm.

214. *Id.*

claims of human rights violations perpetrated by the U.S. government cannot be dismissed.

Despite these "successes" in obtaining a favorable statement from the Commission and focusing attention on the human rights violations involved in wall construction, the human rights approach did not, of course, succeed in halting the taking of property or the construction of the wall.[215] Yet, it likely had a difficult-to-measure effect on more recent handling of the border wall issue by the United States. The Department of Homeland Security has finally taken steps to ensure somewhat greater transparency.[216] As noted above, the agency has now made more maps and information available on its website and has finally begun to provide meaningful responses to Freedom of Information Act requests regarding the border wall.[217] Most importantly, recent efforts to build further segments of wall have failed.[218] Numerous factors undoubtedly influenced these subtle shifts, including the change in administration.[219] But, addressing the border wall issue in terms of international law violations of human rights almost certainly increased the pressure for modification of the approach to the wall.

Most importantly, any future proposals for extension of the border wall will be introduced into a context in which the relevant issues have already been framed as human rights concerns. If President Obama moves forward in pushing immigration reform as promised, it is likely that there will be renewed efforts to mandate additional border wall mileage.[220] The current political environment will probably require that any plan to legalize undocumented immigrants be balanced with new border enforcement measures.[221] However, when the border wall is debated this time around, it will be more difficult to ignore the human rights law concerns since the real, extensive, and multiple impacts that the wall presents have now been documented and described in human rights terms. If meaningful deliberation takes place, policymakers in the U.S. government may well conclude that the political gains

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215. *See supra* notes 59–60 and accompanying text; *see also* Press Release, U.S. Customs and Border Protection, Securing America's Borders: CBP Fiscal Year 2009 in Review Fact Sheet, http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2009_news_releases/nov_09/11242009_5.xml (describing extensive fence construction in fiscal year 2009 after the Working Group's presentations to the Inter-American Commission on Human Rights).

216. *See supra* notes 93–96 and accompanying text (noting that, while there have been issues with transparency related to the physical construction of the wall, the government has provided general information about the cost and the construction of the wall).

217. *Id.*; Responses to Working Group FOIA Requests (on file with the author); *see also* Carol D. Leonnig, *More Than 300 Public-Records Lawsuits Filed in Obama's First Year*, WASH. POST, Jan. 27, 2010, at A3 (noting that the U.S. government was finally sending large volumes of records in response to the Working Group's requests under the Freedom of Information Act).

218. *See supra* notes 62–62 and accompanying text (noting that new plans for fence construction stalled in Congress).

219. Jeffrey Anderson, *Napolitano Shifts Policy on Border Fence*, WASH. TIMES, Mar. 17, 2010, at A5 (discussing changes in D.H.S. funding); Nicole Miller, Comment, *How Property Rights Are Affected by the Texas-Mexico Border Fence: A Failure Due to Insufficient Procedure*, 45 TEX. INT'L L.J. 631, 654 (2010) (analyzing the potential for future administrations to insist on additional procedural safeguards); Hylton, *supra* note 2.

220. Hylton, *supra* note 2.

221. *See id.* (clarifying that reform will include "serious and effective enforcement" along with improved legal flows for immigrants and a way to address undocumented immigrants already in the United States).

of additional border wall construction are outweighed by the cost of potential further embarrassment and condemnation under international human rights law.

Of course, critiques of the international human rights law approach to the border wall have been posed. The critiques often follow two slightly contradictory paths. The first line of critique argues that the human rights law approach is undesirable, because it is ineffective in achieving change in the United States. The critique focuses on the unenforceability in the U.S. of international human rights law and the rulings of human rights bodies.[222] It contrasts that unenforceability with the decisions of U.S. courts, which are binding and almost always respected.[223] The second line of critique asserts, on the other hand, that international human rights law claims are undesirable, because human rights law is not essentially different from U.S. law. Rather than positing human rights law as different from and inferior to U.S. law, this critique suggests that human rights law is too similar to U.S. law. The critique suggests that the use of law and courts to challenge injustices committed by the government fails to force systemic change. As this argument goes, legal systems are inherently biased toward the government and other sources of power, and litigants only reify existing power structures by agreeing to the rules of legal challenges and litigation even at the international level.[224]

In the case of the international human rights challenge to the border wall, the lack of direct enforceability of international human rights law certainly was a significant limitation.[225] It meant that there was never any expectation that the Commission would order the U.S. government to stop border wall construction and that the United States would deem such a decision as binding and follow it.[226] The goal was always one of naming the harms as human rights violations and obtaining official international approval of such naming for the purpose of exercising pressure for change.[227] Of course, U.S. litigation was also unsuccessful in halting wall

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222. The Working Group regularly faced questions from the press and other academics and advocates about the decision to use international human rights law and go before the Inter-American Commission on Human Rights. The queries focused on the lack of enforceability of legal conclusions and decisions in the human rights arena as compared to the immediate effect of decisions of U.S. courts. *See also* ACLU, HUMAN RIGHTS BEGIN AT HOME: CELEBRATING THE 60TH ANNIVERSARY OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 32 (2009), *available at* http://www.aclu.org/files/pdfs/humanrights/udhr60_report_20090410.pdf (noting the ACLU's initial reluctance to move beyond traditional U.S. law litigation in U.S. courts into the international human rights realm).

223. *See, e.g., id.* (noting that U.S. attorneys argue over the utility of international standards and whether international law will be recognized in U.S. courts).

224. *See, e.g.*, Morales, *supra* note 200, at 51–53 ("the structure of the suits only reinforces the existing power relationships that lead to . . . problem[s] in the first instance"); *see also, e.g.*, TIMOTHY J. DUNN, BLOCKADING THE BORDER AND HUMAN RIGHTS 10, 49–50 (2009) (asserting that U.S. litigation on border issues tends to reinforce existing distinctions and marginalize immigrants and Mexican-Americans while human rights analyses of issues relating to immigration and the border do not sufficiently address "bureaucratic power structures").

225. *See* HENKIN, ET AL., HUMAN RIGHTS 617–20 (2d ed. 2009) (describing the debate about the nature of the Inter-American Commission's decisions applying the American Declaration and the U.S. position that such decisions are not binding); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987) (describing the presumption in U.S. law that treaties are not self-executing); Bettinger-Lopez, *supra* note 122, at 581, 585 (describing the self-executing and non-self-executing nature of international agreements).

226. Bettinger-Lopez, *supra* note 123, at 581, 585 (noting the limits on enforceability of the Inter-American Commission on Human Rights and the American Convention).

227. *See id.* at 585, 590 (enumerating strategic justifications for invoking international human rights law in relation to U.S. issues).

construction.[228] The U.S. litigation failed not because of problems of enforceability but because unfavorable decisions were obtained in U.S. courts due to the limitations of U.S. law and legal process.[229] So, it is not the case that a U.S. litigation strategy is always more effective than an international human rights strategy and therefore worthy of more or exclusive attention. In this case it was not. For the individuals and communities affected by the border wall, it was rational to invest effort and time in collaborating with the Working Group to develop a human rights strategy that had the potential to influence border wall construction through means other than a binding court decision. The fact that the effort did not succeed in stopping the wall does not mean that the strategy was misguided.

As for the non-enforceability critique, there is some validity to the critique focused on the lack of transformative capacity of the human rights approach. International human rights do not dramatically differ in their basic shape from rights guaranteed under the U.S. Constitution.[230] And certain concessions must be made to the basic legal order in order to put forward a claim based on law, whether international or domestic. Thus, for example, the human rights analysis accepted traditional definitions of property to assert violations of property rights along the border. The analysis also did not question in any profound way the legitimacy of the governmental goals of controlling migration and protecting national security. As commentators have suggested, the analysis thus accepted basic principles relating to nation-state boundaries. It possibly even countenanced the labeling of some individuals as outsiders who must be excluded and the labeling of others with similar characteristics (such as Mexican roots) as insiders entitled to protection based on U.S. citizenship and residence.[231]

Specifically, as the critique urges, the human rights strategy did focus on the plight of residents living along the Texas-Mexico border. It did not directly address the situation of immigrants facing the border wall in their efforts to enter the United States. The border wall certainly creates great harm to immigrants by forcing them to divert their journey to ever more dangerous crossing points in the desert and mountains.[232] Those adopting the human rights strategy would also agree that the wall creates more subtle harms relating to the negative racialization of Mexicans and fear of outsiders.[233] Wall construction taps into and simultaneously reinforces the belief that only a physical wall can stop hordes of dark-skinned immigrants from

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228. *See supra* notes 190–89 and accompanying text.

229. *See supra* note 198 and accompanying text.

230. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 reporters' note 8 (1987) (noting overlap between provisions of international human rights treaties and the U.S. Constitution); Denise Gilman, *Calling the United States' Bluff: How Sovereign Immunity Undermines the United States' Claim to an Effective Domestic Human Rights System*, 95 GEO. L. J. 591 (2007) (citing sources for the proposition that U.S.-based "civil rights and international human rights standards largely overlap").

231. *See* Morales, *supra* note 200, at 53–55 (stating that the fence only reinforced the negative racialization of Latinos and Latinas).

232. *See* CRS BARRIERS REPORT, *supra* note 3; Spencer Hsu, *Border Deaths are Increasing*, WASH. POST, Sept. 30, 2009, at A9 (stating that while the numbers of individuals seeking to cross the border has dropped in recent years, the number of those who died while trying to cross increased in 2009 and was at its highest since 2006).

233. Morales, *supra* note 200, at 53.

entering the United States.[234] The immigrant side of the coin is by no means irrelevant to the human rights harms caused by the border wall.

However, few challenges to abusive government action address every macro and micro harm that may result. In the case of the border wall, the human rights strategy analysis was initiated at the behest of residents and activists along the border, and was motivated by the threat they faced. It thus focused on the harms to those living on the U.S. side of the border. Those residents along the Texas border also had very strong claims based in international human rights law, given that connection to the land and environment was affected, making the human rights challenge more effective overall. Of course, the human rights briefing papers to the Inter-American Commission did raise the issue of migrant deaths.[235] And, if the challenge had stopped border wall construction or if it has succeeded prospectively in making future construction less likely, that result inures to the benefit of prospective migrants as well as to property owners along the border.

Even without focusing on migrants, the human rights strategy functioned to challenge the racializing and exclusionary aspects of border wall construction. Residents along the Texas-Mexico border are marginalized and treated much like outsider immigrants simply because they are largely Latino and live along the border in a region so closely connected to Mexico. The wall project was supported by politicians and residents who could benefit from alleged border control at the cost of harm only to largely Latino residents and communities along a border that is distant in real and imagined terms. Nothing makes the racialized reality of the border wall clearer than the words of pro-fence Congressman Tom Tancredo. At a Congressional hearing held in the Rio Grande Valley in April 2008, then-Representative for Colorado responded to Brownsville residents who opposed the fence by saying, "[i]f you don't like the fence . . . between the city and Mexico, I suggest that you build the fence around the northern part of the city."[236] Tancredo, other politicians, and constituents around the country see the Latino residents of the border region as undesirable because of their heritage and connections with Mexico. Not only do they seem to be unconcerned about rights violations imposed on border residents, but they apparently would be just as pleased to see these residents pushed into the outsider category through construction of a physical wall.

The Working Group's human rights challenge demanded that attention be paid to this reality of marginalization of residents along the border. In fact, the Working Group's statistical study on the impact of the border wall showed a direct connection between the taking of property for construction of the wall and race, class and immigration background.[237] In this context, the human rights claims asserting violations of the border residents' rights to equal protection, respect for their unique culture, and connection to their property constituted a direct challenge to the racial and exclusionary policies implicated in the border wall.

234. *Id.*

235. *See* Gilman, *supra* note 87, at 10 (noting the "deadly effect" of the border wall on immigrants).

236. Christopher Sherman, *Hostile Reception for Pro-Fence Congressmen in Brownsville*, HOUS. CHRON., April 28, 2008, *available at* http://www.valleymorningstar.com/news/fence-21831-university-government.html (video of the hearing is available at: http://www.utexas.edu/law/academics/centers/humanrights/borderwall/analysis/inter-american-commission.html); Deborah Bonello, *Border Fence Is a "Racist Thing," Says Brownsville Mayor*, L.A. TIMES (May 7, 2008), http://latimesblogs.latimes.com/laplaza/2008/05/border-fence-is.html.

237. WILSON, ET AL., *supra* note 135, at 8.

More broadly, a human rights strategy that seeks a response from an international human rights body will generally not be a radical strategy leading to major shifts in culture, rights, and the legal order. Again, the individuals affected by the border wall had every reason to use all tools at their disposal, including international human rights law, to seek to stop the border wall, and the Working Group was willing and poised to help in that effort. It seems deeply disempowering of individuals and communities suffering government abuse to suggest that they should not deploy human rights or other law-based strategies to seek protection. It may be true that their deployment of human rights law might work against a more transformative long-term change, at least in some minds.[238] But, even if that is true, it seems fundamentally unfair to ask human rights victims to abstain from taking action available to them and insist that they instead wait for the opportunity to join or form a new reality. The choices of academics and other proponents of more radical long-term strategies should not outweigh the decisions made by impacted individuals seeking to develop an immediate response to harm they face.

IV. CONCLUSION

For those who have seen their property taken and their ways of life forever changed by the bulking wall placed along the Texas-Mexico border, there is little solace. Yet the international human rights law challenge to the wall at least provided a tool for viewing and addressing the border wall in all its odiousness. Hopefully, the lessons learned from the efforts to bring international human rights law to bear on the U.S. government's actions in constructing the wall may provide a platform for more meaningful challenges to government abuse in the United States in the future.

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238. *See id.* at 55 (arguing that the decision of Dr. Tamez to pursue U.S. and international human rights legal strategies "limit[ed] whatever cultural destabilization a person like Dr. Tamez might perform").

Residence and Nationality as Determinants of Status in Modern China

HILARY K. JOSEPHS*

SUMMARY

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I. INTRODUCTION

Couple the words "China" and "wall" in the same phrase, and the reader is most likely to think first of the Great Wall of China, perhaps the world's most ambitious military fortification, looping thousands of miles across the mountainous terrain of northern China to the western desert. Indeed, if one uses these words as a search string in the Google search engine, the first search result to appear is a Wikipedia entry for the Great Wall, accompanied by scenic photographs of those sections of the Wall frequented by tourists.[1]

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1. Search results for "China Wall," GOOGLE, http://www.google.com; *Great Wall of China*, WIKIPEDIA, http://en.wikipedia.org/wiki/Great_Wall_of_China (last visited Jan. 19, 2011).

However, if one were to pose the same query to China scholars from various academic disciplines, they may react quite differently. The most important barriers in modern China are socio-legal constructs:[2] the household registration system, which divides urban and rural populations,[3] and the system of ethnic identification, which places every Chinese citizen into one of fifty-six categories of ethnic nationality.[4] These socio-legal constructs do have spatial referents—origins and consequences. For example, a person who has his/her household registration in Beijing is permitted to reside permanently in Beijing, with the associated social and economic perquisites. A person with Tibetan minority nationality is more likely to live in the Tibet Autonomous Region than in other areas of China.[5] As compared with tangible barriers like walls, gates, and fences, these abstract classifications are more consequential and effective than any physical demarcation. It is with good reason that the household registration system has been called a system of "invisible walls."[6]

As the writings of Thomas Hansen[7] and Fernando Lara[8] point out, walls are not *ipso facto* a bad thing. To borrow a phrase from Douglass North, walls provide structure and reduce uncertainty in society.[9] Primitive man sought refuge in caves or on sheltered cliffs. Even today, like generations before them, people in northern China make their homes in caves, carved out of the Loess Plateau.[10] Walls that form the foundation of houses or defenses around human settlements serve the same purposes as caves: they protect inhabitants from the elements, attacks by wild animals, and predation by hostile outside communities. To the extent that walls, physical or otherwise, have a negative reputation in modern discourse, it is because

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2. By socio-legal construct I mean a system that (1) is codified in written law, (2) has a major impact on the daily life of the population, (3) has historical antecedents whether or not codified in law, and (4) is largely self-regulating, i.e., so ingrained that criminal penalties need be resorted to only rarely for enforcement. *See* DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990) (defining institutions as the "rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction .... Institutions reduce uncertainty by providing a structure to everyday life.").

3. *See infra* text accompanying notes 5–6 and discussion.

4. *See infra* text accompanying notes 50–51 and discussion.

5. Neither with respect to these particular examples of household registration nor with respect to ethnic nationality is a person required to actually occupy a particular place continuously. Persons with Beijing household registration may live and work elsewhere in the country, though always with a right of return to Beijing. Substantial ethnic Tibetan populations live permanently in the provinces adjoining Tibet, in areas that were part of pre-modern Tibet. Rob Dickinson, *Twenty-First Century Self-Determination: Implications of the Kosovo Status Settlement for Tibet*, 26 ARIZ. J. INT'L & COMP. LAW 547, 573 & nn.159–160 (2009).

6. *See* KAM WING CHAN, CITIES WITH INVISIBLE WALLS: REINTERPRETING URBANIZATION IN POST-1949 CHINA 76–78 (1994) (describing the registration system's restraints on the freedom of labor and personal mobility). *See generally* Wang Feng, *The Breakdown of the Great Wall: Recent Changes in the Household Registration System in China*, *in* FLOATING POPULATION AND MIGRATION IN CHINA: THE IMPACT OF ECONOMIC REFORMS 149–65 (T. Scharping et al. eds., 1997) (outlining the history of, changes in, and consequences of the registration system from its inception in 1958 through the mid-1990s).

7. *See* Thomas Blom Hansen, *From Culture to Barbed Wire: On Houses and Walls in South Africa*, 46 TEX. INT'L L.J. 345 (describing the role of "cultural walls" in promoting a sense of "comfort and security" among Indian families in South Africa).

8. *See* FERNANDO LARA, THE RISE OF POPULAR MODERNIST ARCHITECTURE IN BRAZIL (2008) (describing how the popularity of modernist architecture in homes constructed by middle-class Brazilians in the 1950s allowed self-expression and the ability to take part in a larger aesthetic and cultural movement).

9. NORTH, *supra* note 2, at 3.

10. Hong-Key Yoon, *Loess Cave-Dwellings in Shaanxi Province*, 21 GEOJOURNAL 95, 95 (1990).

they do not serve these basic, useful functions. Instead, these walls impede upward mobility for those with the talent and determination to better their lives. As such, they violate the commitments made by individual countries and international organizations to foster human development.[11]

II. THE ESTABLISHMENT OF THE HOUSEHOLD REGISTRATION SYSTEM

After the end of the Qing dynasty in 1911, various Chinese leaders sought assistance from abroad to modernize the country both politically and economically.[12] The only major power that provided consistent support, albeit with the self-interested objective of world revolution, was the Soviet Union.[13] With the establishment of the People's Republic of China (PRC) in 1949,[14] it is therefore unsurprising that China relied heavily on the Soviet Union not only for material assistance but also as a model of rapid industrialization, political organization, and legal institutions.[15] Despite China's rupture in relations with the Soviet Union in 1960 and gradual rapprochement with Western democracies since the 1970s,[16] the strong influence of the (now former) Soviet Union on China's legal system continues to this day.[17]

Among the institutions that China borrowed from the Soviet Union in the 1950s was *hukou* or *huji* (household registration system).[18] In effect, every citizen inherits a household registration at birth, which may be altered only under very limited exceptions.[19] The household registration system separates urban from rural populations, and urban populations from one another.[20]

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11. *See* WORLD COMMISSION ON THE SOCIAL DIMENSION OF GLOBALIZATION, A FAIR GLOBALIZATION: CREATING OPPORTUNITIES FOR ALL, ch. 1, para. 18 ("Our vision is of a process of globalization *which puts people first*; *which respects human dignity* and *the equal worth* of *every human being*.") (emphasis added), http://www.ilo.org/public/libdoc/ilo/2004/104B09_19_engl.pdf; *see also* AMARTYA SEN, DEVELOPMENT AS FREEDOM 42–43 (1999) (discussing the efforts the Chinese government has made to "move toward a more open, internationally active, market-oriented economy," while still maintaining "handicaps" because of its lack of democratic freedoms).

12. JOHN KING FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY 255 (Enlarged ed. 1998).

13. *Id.* at 255, 357–59.

14. *Id.* at 343.

15. *Id.* at 357–59.

16. *See* Gary Vause, Perestroika *and Market Socialism: The Effects of Communism's Slow Thaw on East-West Economic Relations*, 213 NW. J. INT'L L. & BUS. 213, 223 (1988) (discussing the break in Sino-Soviet ties and subsequent improvement in U.S.-China relations).

17. For example, the 1982 PRC Constitution, as amended, which is still in effect, was modeled on the 1977 Soviet Constitution. YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 125 (2d. ed. 1999).

18. Kam Wing Chan, *The Chinese* Hukou *System at 50*, EURASIAN GEOGRAPHY & ECON. 197, 198–99 (2009) [hereinafter Chan, *The Chinese* Hukou *System*]; MICHAEL R. DUTTON, POLICING AND PUNISHMENT IN CHINA: FROM PATRIARCHY TO 'THE PEOPLE' 195–214 (1992). The Soviet system of *propiska* (internal passports) served "as a means of providing desirable population dispersion and ethnic concentration, labor and job allocation, housing allocation, and internal security." Simona Pipko & Albert J. Pucciarelli, *The Soviet Internal Passport System*, 19 INT'L LAW. 915, 915 (1985).

19. Chan, *The Chinese* Hukou *System*, *supra* note 18, at 200.

20. *Id.* at 201.

The distinction between agricultural and non-agricultural status defined one's relationship with the state and eligibility for an array for state-provided welfare[21] as "non-agricultural status entitled the bearer to state-provided housing, employment, grain rations, education, and access to medical care as well as other benefits."[22] While the state discontinued some previously allocated benefits, such as grain rationing and job assignment, the fundamental advantages of urban household registration over rural household registration, and the superiority of major metropolitan registration over that of smaller cities, remains unchanged.[23]

The internal passport system was adopted not only by China but also by other communist countries that modernized on the Soviet model.[24] These countries differ from those where an ethnic minority discriminates against an ethnic majority (South Africa under apartheid),[25] those where an ethnic majority discriminates against ethnic minorities (the United States under Jim Crow),[26] or those where discrimination is a function of foreign nationality (legal and illegal immigrants to developed countries from the global South).[27] However, the deprivations experienced by the group suffering discrimination tend to be the same across categories.

Despite its vital importance for the everyday lives of its citizens, the legal basis of the household registration system is the *Hukou Dengji Tiaoli*, a set of "administrative regulations" promulgated by the Standing Committee of the National People's Congress in 1958.[28] According to Article 62(3) of the 1982 Constitution, the National People's Congress (NPC), China's unicameral legislature, is the organ of government properly empowered to enact and amend "*basic statutes* concerning criminal offences, civil affairs, the state organs and other matters."[29] As elaborated upon by the *Lifafa* (Law on Law-making), adopted by the NPC in 2000, the legal hierarchy of authority clearly places administrative regulations in a position subordinate to that of statutes.[30] The NPC has exercised its law-making authority, for

21. *Id.*

22. *Id.*

23. *Id.* at 202, 205.

24. *Id.* at 199.

25. *See* Peter Alexander & Anita Chan, *Does China Have an Apartheid Pass System?*, 30 J. ETHNIC & MIGRATION STUD., 609, 610 (2004) (describing the former system in South Africa in which the white ethnic minority set up institutional barriers to restrict the rights of black South Africans).

26. *See* Richard Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 MICH. L. REV. 2456, 2458–459 (1994) (discussing the legal barriers set up by the white ethnic majority to restrict the rights of African-Americans).

27. *See generally* Kevin C. Wilson, *And Stay Out! The Dangers of Using Anti-Immigrant Sentiment as a Basis for Social Policy*, 24 GA. J. INT'L & COMP. L. 567 (1994) (discussing the history of anti-immigrant legislation in the United States and Great Britain).

28. Chan, *The Chinese* Hukou *System*, *supra* note 18, at 200. These regulations effectively superseded Art. 90 of the 1954 Constitution which provided in pertinent part, "Citizens of the People's Republic of China enjoy freedom of residence and freedom to change their residence." Subsequent constitutions adopted in 1975, 1978, and 1982 eliminated the right of free mobility. In 2003, the Standing Committee of the NPC passed the Identity Card Law, which requires any citizen above the age of sixteen to possess a card indicating, among other information, his/her household registration. *See* Zhonghua Renmin Gongheguo Jumin Shenfenzheng Fa [PRC Identity Card Law], *available at* http://news.xinhuanet.com/overseas/2005-01/18/content_2476920.htm (last visited Nov. 2, 2009).

29. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA art. 62(3) (emphasis added).

30. JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 177–80 (2008) [hereinafter JIANFU CHEN]. Under Article 67(2), the Standing Committee of the NPC is empowered to "enact and amend statutes with the exception of those which should be enacted by the NPC." In fact the Standing Committee is much more active in lawmaking than the NPC, which only meets once a year. *Id.* at 189.

example, with respect to the promulgation of the criminal code, the criminal procedure code, the economic contract law, and the law on property.[31] Thus, the household registration system rests on a rather weak legal foundation.

In terms of China's focus on economic development, the household registration system proved very useful. In order to industrialize without loans or investment from abroad—as to which China had little choice after the break with the Soviet Union—[32]resources for development were extracted from the largely rural population.[33] By tying farmers to the land, where they lived at minimal subsistence levels, the government could subsidize industry and urban living standards.[34] The household registration system was, and remains, defended in official discourse as preventing "blind" mass migration from the countryside to the cities and the proliferation of urban slums so common in developing countries.[35]

After transitioning from a command economy to a "socialist market economy," the vast disparities between standards of living created by the household registration system made possible recruitment of peasants for factory work at very low wages.[36] The rural population found the opportunity to earn cash income so attractive that they endured working conditions intolerable to urban residents.[37] As under the command economy, the rural population generated surplus value essential to economic growth.[38]

The household registration system, though structured along the same lines as that of the Soviet Union, had antecedents in pre-modern society.[39] The early philosophers, such as Confucius and his disciples, were preoccupied with the "rectification of names," the orderly placement of individuals and groups in

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31. *Id.* at 181–82.

32. China's bitter experience in this regard continues to motivate a policy of self-reliance. China's external indebtedness is very low compared with the size of its economy, and its foreign exchange reserves/current account surplus is extremely high. *See* CENT. INTELLIGENCE AGENCY, *China,* THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html (last updated Sept. 25, 2010) [hereinafter THE WORLD FACTBOOK] (providing statistics related to China's economy); *See also* Vause, *supra* note 16 (describing the Sino-Soviet split).

33. BARRY NAUGHTON, THE CHINESE ECONOMY: TRANSITIONS AND GROWTH 115 (2007).

34. *Id.* at 114–16; Chan, *The Chinese* Hukou *System*, *supra* note 18, at 215.

35. Jamil Anderlini, *Losing the Countryside*, FIN. TIMES, Feb. 20, 2008, at 7.

36. Chan, *The Chinese* Hukou *System*, *supra* note 18, at 207 n.21, 215.

37. Of the many studies of migrant labor, *see, e.g.*, CHING KWAN LEE, AGAINST THE LAW: LABOR PROTESTS IN CHINA'S RUSTBELT AND SUNBELT (2007) (discussing the growing trend of labor unrest in China through the personal stories of workers) [hereinafter CHING KWAN LEE] and ANITA CHAN, CHINA'S WORKERS UNDER ASSAULT: THE EXPLOITATION OF LABOR IN A GLOBALIZING ECONOMY (2001) (detailing Chinese violations of workers' rights in various settings and conditions).

38. Chan, *The Chinese* Hukou *System*, *supra* note 18, at 197 (calling the household registration system China's "secret recipe" for economic success); FEI-LING WANG, ORGANIZING THROUGH DIVISION AND EXCLUSION 16–22 (2005) [hereinafter WANG, ORGANIZING] (arguing that managing absorption of surplus labor is essential to economic take-off).

39. *See China's Household Registration (Hukou) System: Discrimination and Reforms, Roundtable before the Congressional-Executive Commission on China* 109th Cong. 28 (2005) (prepared statement of Fei-ling Wang) [hereinafter *Roundtable*] (noting that the hukou system's origins date back more than two thousand years); DUTTON, *supra* note 18, at 189–91 (explaining the transformation from the old *baojia* system of family registration to the modern communist system of hukou). The Soviet system likewise had pre-modern origins in czarist Russia, dating back to the reign of Peter the Great in 1719. Noah Rubins, *The Demise and Resurrection of the* Propiska*: Freedom of Movement in the Russian Federation*, 39 HARV. INT'L L.J. 545, 546 n.4 (1998); *See also* DUTTON, *supra* note 18, at 196–97.

appropriate, clearly defined categories.[40] Scholars, peasants, artisans, and merchants constituted the traditional "estates."[41] The critical difference from the caste system of India is that in China, one could change status through intermarriage or success at the imperial examinations and appointment to the civil service.[42]

During the last imperial dynasty, the Qing, when the ethnically distinct Manchus ruled China, the regime effected physical and social separation of superior and inferior groups.[43] For example, Qing emperors divided Beijing and other major cities into Manchu and Chinese quarters, with the objectives of avoiding friction and conflict, forestalling assimilation, and elevating the ruling minority from its subjects.[44] The Qing instituted a household registration system in the 1720s to identify those military households (or banners) deserving of state support, expelling Chinese military households to lessen the financial burden on the state.[45] In addition, the Qing created and cordoned off a homeland in northeast China with the Willow Palisade, a treed barrier connected to the easternmost part of the Great Wall.[46] For most of the dynasty, Chinese were legally forbidden from settling in the Manchu homeland.[47]

III. THE ETHNIC NATIONALITIES PROJECT

Another organizational tool that China borrowed from the Soviet Union was the system of *minzu shibie* (ethnic classification).[48] Over ninety percent of the population of the PRC is categorized as "Han,"[49] while the remainder is divided among fifty-five other, "minority nationalities."[50] As implemented in the Soviet

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40. Janet E. Ainsworth, *Categories and Culture: On the "Rectification of Names" in Comparative Law*, 82 CORNELL L. REV. 19, 21 (1996).

41. MARK C. ELLIOTT, THE MANCHU WAY: THE EIGHT BANNERS AND ETHNIC IDENTITY IN LATE IMPERIAL CHINA 313 (2001) [hereinafter ELLIOTT, THE MANCHU WAY].

42. Wang Enru & Kam Wing Chan, *Tilting Scoreline: Geographical Inequalities in Admission Scores to Higher Education in China*, *in* THE LABOR MARKET IN CHINA'S TRANSITION 237 (Cai Fang & Zhang Zhanxin, eds., 2005) [hereinafter Wang & Chan] (citing the proverb "by excelling at one's studies, one may achieve an official post"). *See* Cameron Campbell & James Lee, *Kin Networks, Marriage, and Social Mobility in Late Imperial China*, 32 SOC. SCI. HIST. 175, 188 (outlining the historical relationships between family, merit, and status in China) (2008).

43. ELLIOTT, THE MANCHU WAY, *supra* note 41, at 1–3.

44. *Id.* at 89–90.

45. *Id.* at 337–44, 351.

46. *Id.* at 49–50.

47. Mark C. Elliott, *The Limits of Tartary: Manchuria in Imperial and National Geographies*, 59 J. ASIAN STUD. 603, 617–18 (2000). The prohibition proved ineffective because of Chinese population pressure and Manchu lack of interest in agriculture. *Id.* The enforced separation of local and foreign populations continued during the late nineteenth and early twentieth centuries when the European countries, the United States, and Japan established enclaves in Chinese cities primarily along the eastern seaboard, the Yangtze River and the Pearl River. Albert E. Feuerwerker, *The Foreign Presence in China*, *in* 12 THE CAMBRIDGE HISTORY OF CHINA, REPUBLICAN CHINA 1912–1949, Part I, 128–207 (John K. Fairbank & Denis Twitchett eds., 1983).

48. Stevan Harrell, *Introduction: Civilizing Projects and the Reaction to Them*, *in* CULTURAL ENCOUNTERS ON CHINA'S ETHNIC FRONTIERS 22–24 (Stevan Harrell ed., 1996).

49. Space limitations do not permit a more thorough analysis of the rubric "Han," and its broad-brush application to a highly genetically mixed population. For a collection of conference papers on this subject, see *Critical Han Studies Conference & Workshop*, STANFORD, *available at* http://hanstudies.org/Han_Abstracts_Updated.pdf.

50. This is the most common translation of *shaoshu minzu*, although Harrell prefers the term

Union and China, the so-called ethnic identification project differed significantly from previous attempts to assimilate minorities into the dominant group.[51] The minority groups were granted equal citizenship with the majority population, and were given concessions to preserve their indigenous languages and customs.[52] The professed goal under communism was to raise minority groups' living standards and develop the economy of the areas in which they were concentrated.[53] To promote economic development and to nurture a professional class among minority nationalities, higher education accorded preferences to members of these groups.[54]

With the exception of a few "model minorities" such as the ethnic Koreans in northeast China,[55] the material conditions under which minorities live are still far inferior to that of the majority Han population.[56] Disparities in employment opportunities, de facto residential segregation between Han and minority populations, and the use of force against any potential "separatist" movement sparked violence in ethnic areas, particularly Xinjiang and Tibet.[57] By the same token, those minority individuals who receive a mainstream education and are fluent in Mandarin Chinese enjoy a status superior to that of Han migrants from rural areas.[58] The ethnic Tibetans in Lhasa, who have their household registration there and are employed in the government, are socially and economically superior to the Han migrant entrepreneurs, who run small, thinly capitalized businesses.[59]

IV. A HARMONIOUS SOCIETY

Deng Xiaoping, under whose leadership the economic reforms were launched, is often quoted for his pragmatic approach to development. He is credited with the saying that "bu guan bai mao hei mao, hui zhuo laoshu jiushi hao mao" ("it does not matter whether a cat is black or white so long as it catches mice").[60] Another of the

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"peripheral peoples." Harrell, *supra* note 48, at 3 (asserting that what sets these groups apart is their distance from the centers of institutional and economic power).

51. *Id.* at 22–24.

52. *Id.* at 23–24.

53. For example, "autonomous regions," rather than "provinces" were established in Tibet, Guangxi, Inner Mongolia, Xinjiang, and Ningxia. THE WORLD FACTBOOK, *supra* note 32, at 4.

54. Barry Sautman, *Affirmative Action, Ethnic Minorities and China's Universities*, 7 PAC. RIM. L. & POL'Y 77, 81–83 (1998).

55. *See* Emily Hannum, *Educational Stratification by Ethnicity in China: Enrollment and Attainment in the Early Reform Years*, 39 DEMOGRAPHY 95, 109–10 (2002) (stating that the Koreans, Manchus, Kazakhs, Tibetans, and Dai were the only minority groups to avoid declining rates of education).

56. *See, e.g.*, *China: Minority Exclusion, Marginalization and Rising Tensions*, HUMAN RIGHTS IN CHINA, http://hrichina.org/public/contents/article?revision_id=48473&item_id=36055, (last visited May 5, 2010) (stating that despite government rhetoric, several minority groups in China are still facing grave circumstances compared to the rest of the population).

57. *Id.* at 24–25.

58. *Id.* at 21–22.

59. *See* Hu Xiaojiang & Miguel A. Salazar, *Ethnicity, Rurality, and Status:* Hukou *and the Institutional and Cultural Determinants of Social Status in Tibet in* ONE COUNTRY, TWO SOCIETIES: RURAL-URBAN INEQUALITY IN CONTEMPORARY CHINA 298–300 (Martin King Whyte ed., 2010) (stating that the reformation of the traditional Tibetan caste system and an influx of Han migrant workers has placed the ethnic Tibetans in a superior position).

60. ROGER BLANPAIN, ET AL., THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW: CASES AND MATERIALS 477 (2007).

slogans attributed to him is to "let some people get rich first."[61] However, as popularized, this slogan is often quoted only in part: the rest conveys the idea that those who get rich first owe a responsibility to society to raise up those who are less fortunate.[62]

In recent years, recognizing the large and growing disparity between rich and poor,[63] the Party leadership has promoted a policy of "creating a "*hexie shehui*" (harmonious society), which aims to raise living standards on a more egalitarian basis.[64] Among the steps adopted by the government towards this end is the improvement of rural education.[65] On average, in rural areas a person receives 7.33 years of education, equal to about one year of junior high school.[66] In urban areas the average is 10.2 years, equal to one year of senior high school.[67]

In a society with a long tradition of valuing education, perhaps the most pernicious aspects of the household registration system are related to perpetuation of unequal access to educational opportunities at all levels.[68] Few rural migrants to large cities who bring their families with them can provide the extensive documentation or afford the tuition required for their children to attend regular urban schools.[69] The rest enroll in successive tiers of inferior schools: substandard public schools, licensed private schools, and illegal substandard private schools.[70] Those migrants with higher education experience unequal access to employment opportunities.[71] College graduates who populate the slums on the outskirts of Beijing, scrounging whatever casual employment they can find, tend to originate

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61. Barry Naughton, *Deng Xiaoping: The Economist*, 135 CHINA Q. 491, 501 (1993) (quoting "let some people get rich first").

62. In Chinese, "yi bufen diqu, yi bufen ren keyi xian fuqilai, daidong he bangzhu qita diqu, qita de ren, zhubu dadao gongtong fuyu." Deng Xiaoping, Let Some People Get Rich First, *available at* http://cpc.people.com.cn/GB/34136/2569304.html (last visited Apr. 20, 2010).

63. THE WORLD FACTBOOK, *supra* note 32 (China's Gini coefficient grew from 40 in 2001 to 41.5 in 2007); WANG, ORGANIZING, *supra* note 38 at 124–33 (statistics on per capita income gap by regions and rural-urban divide).

64. Nicholas Dynon, *"Four Civilizations" and the Evolution of Post-Mao Chinese Socialist Ideology*, 60 CHINA J. 83, 104 (2006).

65. *State Council Resolutions on Further Strengthening Rural Education*, 38 CHINESE ED. & SOC'Y 46, 46–60 (2005). However, the elimination of the agricultural tax, while benefitting those who earn a livelihood from agriculture, has resulted in a diminution of public funds available for rural education. *See* Xin Nongcun Jianshe Zhong De Qingnian Suzhi Zhuangkuang Yanjiu [A Study of Educational Attainment Among Rural Youth under the New Plan for Rural Reconstruction], http://www.cndua.cn/news_show.asp?id=1522&smalltypeid=17 (last visited Jan. 14, 2010) [hereinafter A Study of Educational Attainment]. *See also* Roundtable, *supra* note 39, at 36 (prepared statement of Chloé Froissart).

66. A Study of Educational Attainment, *supra* note 65.

67. *Id.*

68. Wang & Chan, *supra* note 42; Bai Limin, *Research Report: Graduate Unemployment: Dilemma and Challenges in China's Move to Mass Higher Education*, 185 CHINA Q. 128, 134–36 (2006).

69. *Roundtable*, *supra* note 39, at 39 (prepared statement of Chloé Froissart) (discussing the situation in Chengdu, Sichuan province); Charlotte Goodburn, *Learning from Migrant Education: A Case Study of the Schooling of Rural Migrant Children in Beijing*, 29 INT'L J. EDUC. DEV. 495, 496 (2009). The authorities in Beijing regularly close down schools for migrant children for being substandard, without providing any alternative education. Goodburn, *supra* at 503.

70. *Roundtable*, *supra* note 39, at 40 (prepared statement of Chloé Froissart).

71. Sue Feng & Ian Johnson, *Job Squeeze in China Sends 'Ants' to Fringes*, WALL ST. J., May 4, 2010, at A13; Liu Meng, *Living Among the 'Ants' of Beijing*, http://news.alibaba.com/article/detail/business-in-china/100193572-1-living-among-%2527ants%2527-beijing.html (last visited Jan. 17, 2010); *China's Ant Tribe Searches for Better Future*, PEOPLE'S DAILY ONLINE (Jan. 16, 2010), http://english.people.com.cn/90001/90776/90882/6870551.html [hereinafter *China's Ant Tribe*].

from rural areas.[72] First generation migrants tolerate hardship for the sake of their children's futures.[73] When their hopes are frustrated, disappointment and cynicism become inevitable among parents and children.[74]

Though opportunities for tertiary education have improved vastly since the 1970s, competition for limited spaces at elite universities has only increased.[75] The passing score for admission varies depending on factors such as the household registration of the applicant (one must take the university entrance examination in the place where one is registered, which is not necessarily the actual place of residence), ethnicity (with preferences given to underrepresented groups), and the occupation of the parents (lower passing scores for the children of those employed in certain industries).[76] The result of this jiggered quota system is that an examinee from wealthy Beijing or Shanghai may gain admission to elite education with a lower score than someone from impoverished Anhui.[77] Hence, the truly disadvantaged are Han Chinese from rural areas in densely populated provinces.[78] As a consequence of limited access to elite schools, secondary students and their families seek to circumvent the biased scoring system in various ways. Some choose conversion to a "minority" ethnic identification that receives preferential treatment.[79] Those families with means to purchase an apartment or set up a business "buy" urban residence status.[80] Yet another common but illegal practice is to "relocate" to thinly populated border areas where qualifying scores are very low.[81]

With the rise in living standards over the last thirty years, the current generation of migrant workers are indeed better educated and have arguably higher aspirations than those who took up urban jobs in the 1980s.[82] But with absence from rural life comes a loss of those skills necessary to wring a livelihood from the land, let alone the willingness to engage in intense manual labor with no expectation of upward mobility.[83] The PRC government defends its refusal to privatize agricultural land and allow peasants to sell off land that they lease from the government with the argument that rural migrants always have the economic security of returning to self-sufficient

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72. LIAN SI ET AL., YIZU [ANT PEOPLE] 59 (2009) [hereinafter LIAN SI].

73. Hu & Salazar, *supra* note 59, at 302–03.

74. *See* LIAN SI, *supra* note 72, at 88–89 (discussing levels of satisfaction among educated fringe-dwellers).

75. The discussion that follows is based on Wang & Chan, *supra* note 42. Lian Si's study shows that the vast majority of "ant people" are graduates of non-elite tertiary institutions. LIAN SI, *supra* note 72, at 65.

76. Sautman, *supra* note 54, at 99–101.

77. Wang & Chan, *supra* note 42, at 244 fig.2; WANG, ORGANIZING, *supra* note 38, at 142, tbl.5.9.

78. Wang & Chan, *supra* note 42, at 265; Sautman, *supra* note 54, at 103.

79. Sautman, *supra* note 54, at 104. For a discussion of tentative efforts to use the constitutional right to education as the basis for litigating educational inequality, see RANDALL PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST? 136–37 (2007).

80. Kam Wing Chan & Will Buckingham, *Is China Abolishing the* Hukou *System?*, 195 CHINA Q. 582, 591–92 (2008).

81. Wang & Chan, *supra* note 42, at 254. The phenomenon has become so rife that there is even a special term for it: *gaokao houniao* (migratory examinee).

82. LIAN SI, *supra* note 72, at 65; Hilary K. Josephs, *Youth Chances and China's Urban/Rural Divide*, 73 BULL. COMP. LAB. REL. 97, 102–04 (2010) [hereinafter Josephs, *Youth Chances*]; Leslie T. Chang, *Min's Return: A Migrant Worker Sees Rural Home In a New Light*, WALL ST. J., June 8, 2005, at A1.

83. *See* CHING KWAN LEE, *supra* note 37, at 224 (providing an example of the phenomenon of migrant workers no longer possessing the skills and knowledge necessary for agricultural labor).

agriculture if they become unemployed.[84] Unlike external migrants, they do not have to hazard the crossing of international borders to return home.[85] However, the argument of easy passage is of little practical significance for rural migrants or their children when their absence from the countryside stretches into decades.[86]

V. THE JOINT EDITORIAL

The need to reform the household registration system has been part of official discourse for some time.[87] However, in a bold and controversial step, just before the 2010 annual meetings of the National People's Congress and the Chinese People's Congress and the Chinese People's Consultative Conference,[88] thirteen newspapers jointly published an editorial calling for abolition on a specific timetable.[89]

Aside from the call for concrete measures, the editorial strayed over the line of officially sanctioned public rhetoric in its impassioned language:[90]

> China has long tasted the bitterness of its household registration system! Conceived in the planned economy era, it is an outdated system that has existed for decades and continues to disrupt the people's livelihoods today .... We hope that the one thing that has suffered from many decades of failed administration will end with this generation, our generation, and enable the next one to truly enjoy the sacred rights of freedom, democracy, and equality bestowed by the Constitution.[91]

The co-author of the Joint Editorial, Zhang Hong, who was removed as deputy editor-in-chief of the Economic Observer Online following the editorial's publication, denied that its publication was at the instigation of high levels of government.[92] Given the wide dissemination of the Joint Editorial and the efficiency

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84. Anderlini, *supra* note 35, at 11.

85. Diana Washington Valdez, *Fewer Migrants Head Home*, HOUSTON CHRON., Sept. 8, 2009, at B3. *See* WANG, ORGANIZING, *supra* note 38, at 213 n.94 ("China's hukou-based institutional exclusion is not nearly as exclusive or unfair as the nation-states-based institutional exclusion in a globalized world economy.").

86. Tom Mitchell, *'Invisible Fetters' Cling to Migrants*, FIN. TIMES, Apr. 16, 2010, at 4 (sharing the experience of a restaurateur from Sichuan who has resided in Shenzhen for twenty years).

87. *See, e.g.*, Wen Jiabao, Premier of the State Council, Report on the Work of the Government at the Third Session of the Eleventh National People's Congress (Mar. 5, 2010) (transcript available from the BBC Monitoring Asia Pacific-Political) (stating reform of the household registration system is among China's main tasks for 2010).

88. Nominally the PRC Constitution authorizes political parties separate from the CPC, which are "consulted" by the CPC on important policy issues. There are eight so-called "democratic parties," with a total membership of about half a million. JIANFU CHEN, *supra* note 30, at 107–11.

89. *See Joint Editorial Calling for* Hukou *Reform Removed From Internet Hours After Publication, Co-Author Fired*, CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, Mar. 26, 2010, http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=137617 [hereinafter Joint Editorial] (stating thirteen mainland newspapers jointly published an editorial asking the delegates to demand a clear timetable for household registration reforms).

90. *Chinese Newspaper Editors Punished Over Call for Ending* Hukou *System*, BBC MONITORING ASIA PACIFIC-POLITICAL, Mar. 6, 2010.

91. Donald C. Clarke, *The Famous* Hukou *Editorial*, CHINESE LAW PROF BLOG (Mar. 26, 2010), http://lawprofessors.typepad.com/china_law_prof_blog/2010/03/the-famous-hukou-editorial.html.

92. Zhang Hong, *I Am a Moderate Adviser*, translated in Josh Chin, *I am a Moderate Adviser*, CHINA REAL TIME REPORT, THE WALL ST. J. (Mar. 9, 2010), http://blogs.wsj.com/chinarealtime/2010/03/09/i-am-

of China's system of censorship, it is difficult to believe that the upper echelons of government were taken completely by surprise. If they had advance notice, their motivations for initially allowing publication, however brief, might be quite complex. Allowing publication demonstrates the sincerity of the government's concern—or the concern of a progressive faction within the government—about the inequities of the household registration system. Publication enables open discussion of the subject, so as to vent the frustrations of the underprivileged.[93] Publication may also stimulate empathy and serve to educate the privileged about the inevitability of change.[94] Similarly, the Beijing Municipal Committee approved and encouraged Lian Si's project about the fringe-dwellers of Beijing, and his final report eventually reached Prime Minister Wen Jiabao and the State Council.[95] These facts suggest that although China is not a representative democracy, the leadership is sensitive to public opinion and appreciates that its legitimacy rests on assuaging popular discontent.

VI. PROSPECTS AND SOLUTIONS

Complete abolition of the household registration system in the near term is an unlikely prospect. It has served the government too well for over half a century in achieving the goal of making China a major economic power.[96] The subject of abolition did not even make the agenda of the NPC in 2010 despite the publicity created by the Joint Editorial.[97]

Aside from accelerating the rate of growth, China's economic reforms since the late 1970s have been designed to devolve responsibility and control over growth from the central government to local governments.[98] The central government expects local government to raise its own capital for infrastructure development and social welfare.[99] In the area of education, it is therefore logical that local government will concentrate on the needs of its constituents, the population with permanent household registration.[100] To make its commitment to improving migrant children's access to education meaningful, the central government should both substantially

a-moderate-adviser.

93. *See Roundtable*, *supra* note 39, at 15 (testimony of Fei-ling Wang) ("[O]n the Internet, in cyberspace, you do see some severe criticisms of the *hukou* system occasionally posted, before they were yanked off the Internet by the watchdogs working for the government."). In the case of the Joint Editorial, although it was removed from some websites, it remained accessible through others. Clarke, *supra* note 91.

94. *See Roundtable*, *supra* note 39, at 14 (testimony of Fei-ling Wang) ("[T]he urban people, the privileged Chinese citizens, really do not want to talk too much about the *hukou* system, although they are all aware that the system is very important").

95. LIAN SI, *supra* note 72, at 20–21.

96. Chan, *The Chinese* Hukou *System*, *supra* note 18, at 214–16.

97. *Agenda of Chinese Parliamentary Session Adopted*, BBC MONITORING ASIA PACIFIC-POLITICAL, Mar. 4, 2010. *See Roundtable supra* note 39, at 29 n.5 and accompanying text (prepared statement of Fei-ling Wang) (noting that proposals for hukou reform were made every year from 2001 to 2005).

98. *See* Kai-yuen Tsui & Youqiang Wang, *Between Separate Stoves and a Single Menu: Fiscal Decentralization in China*, 177 CHINA Q. 71, 72–75 (2004) (discussing central-local fiscal reforms).

99. *See id.* at 73–74.

100. *Roundtable*, *supra* note 39, at 35 (prepared statement of Chloé Froissart). *See* Goodburn, *supra* note 69, at 502 (discussing the difference between resource availability in rural versus urban areas).

increase national expenditure on education as well as recentralize education.[101] Otherwise, its exhortations to local governments are only empty rhetoric.

The household registration system in its current form favors a wide spectrum of vested interests. The Ministry of Public Security, the internal police force, finds it useful for maintaining social order, ridding the cities of criminals and migrant homeless beggars, and identifying potential terrorist groups.[102] The permanent residents of major cities, where large demonstrations (such as those that occurred in 1989) pose the most serious threat to government authority, are content with subsidized living standards and preferential access to elite education.[103] The very high thresholds for achieving permanent status limit access to a tiny fraction of migrants with considerable wealth or special qualifications.[104] The officials of the Ministry of Education and administrators at elite universities concentrated in major cities seem to have convinced themselves that graduates of secondary schools in Beijing and Shanghai are inherently superior to graduates from other parts of the country, despite the concrete evidence of examination scores to the contrary.[105]

Yet another roadblock to change is the apathy of those adversely affected.[106] Since the window of opportunity for one's child—one's only child—to obtain a good education and achieve professional success is so short, it is possible that those adults who would otherwise agitate for systemic change are resigned to "gaming the system" and exploiting loopholes in it.[107] Lian Si's study of educated fringe-dwellers shows that very few are actually natives of Beijing and that most of those who obtained household registration in Beijing, by hook or crook, are originally from other places.[108] The young fringe-dwellers themselves also display disinclination to collective action of any kind as a means of improving their life prospects.[109] As a group, they have little faith in the official political process and negligible interest in joining trade unions or similar organizations. They do not even actively express their

101. *See Roundtable*, *supra* note 39, at 40–41 & n.12 (prepared statement of Chloé Froissart ("The Chinese state currently allocates only 2.5 percent of the GDP to education, which represents one of the lowest rates in the world.").

102. *Roundtable*, *supra* note 39, at 29–31 & n.16 (prepared statement of Fei-ling Wang).

103. *Id.* at 34 ("[t]he central government's political stability and power and even the unity of the nation may be at stake"); *Id.* at 34–35 & n.37.

104. *Id.* at 30.

105. Wang & Chan, *supra* note 42, at 253 (discussing host bias); Goodburn, *supra* note 69, at 498 (discussing prejudices against migrants as "uncivilized," "dirty," and "ignorant"). *See* Issac Stone Fish, *School of Hard Knocks: China's Ivy League is no Place for Peasants*, NEWSWEEK, Aug. 21, 2010, *available at* http://www.newsweek.com/2010/08/21/the-rural-poor-are-shut-out-of-china-s-top-schools.html (discussing how China's rural poor are shut out of China's top schools in part due to school's increasing focus on admitting students due to individual qualities rather than Gaokao test scores. "'[F]ocusing on individuals widens the gap between urban and rural, because teachers in rural areas" can't offer their students nearly as well-rounded an education as their urban counterparts can.'").

106. *Roundtable*, *supra* note 39, at 34 (prepared statement of Fei-ling Wang) ("The excluded Chinese peasants still by and large accept their fate under the PRC *hukou* system as it is.").

107. *See supra* notes 79–81 and accompanying text.

108. LIAN SI, *supra* note 72, at 58–59. The percentage of fringe-dwellers with Beijing hukou is, however, very small.

109. *Id.* at 95–103.

views on the internet.[110] The demands of work, commuting, and part-time study leave little time or energy for other pursuits.[111]

The history of China suggests that physical or social barriers eventually give way under population pressure. One example is the efforts of the Manchus to keep ethnic Chinese from migration to their homeland.[112] The proportion of the Chinese population classified as urban has grown steadily since the 1970s, from about 18 percent in 1978 to about 45 percent in 2007.[113] As living standards improve and become more uniform throughout the country, the incentive to migrate may diminish. This phenomenon can already be observed among those who would previously have migrated to the Special Economic Zones for factory work.[114] On the other hand, with improved living standards come ever-rising expectations,[115] which will continue to drive young educated migrants to the big cities.[116]

When the tipping point will occur in regards to reform or abolition of the hukou system is likely a function of numbers. As of yet, the majority of the population is still classified as rural[117] and migrants make up about 10 percent of the population.[118] These groups perceive themselves to be much better off than before, and therefore are generally supportive of the government and tolerant towards current institutional arrangements.[119] Hence, for the overwhelming majority of the population, the present regime still enjoys performance legitimacy.

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110. *Id.* Though reluctant to express their own personal views, a high percentage of those questioned believed that the internet was influential on current events. *Id.* at 103.

111. *See* Josephs, *Youth Chances*, *supra* note 82, at 103–04 (detailing examples of the hardships of migrant workers).

112. *See supra* note 44 and accompanying text.

113. CHINA DATA CENTER, *Population and Its Composition*, CHINA STATISTICAL YEARBOOK 2008, http://chinadataonline.org/member/yearbooksp/ybListDetail.asp?YBID=CHN2008001 [hereinafter CHINA STATISTICAL YEARBOOK 2008].

114. Grace Ng, *Labour Crisis in China's Coastal Hubs; Thousands of Migrants Take Jobs Closer to Home in Western, Central Regions*, STRAITS TIMES (Singapore), Feb. 23, 2010.

115. *See* Li-li Fang & Zhang Xiao-ming, *Higher Education, Employment and the Labour Market in China: A Survey of Graduate Employment in Zhujiang Delta, Guangdong*, 73 BULL. COMP. LAB. REL. 109, 113 (2010) (discussing the improving career expectations of college graduates as a result of economic reforms).

116. *Cf.* Sue Shellenbarger, *The Next Youth-Magnet Cities*, WALL. ST. J., Sept. 30, 2009, at D1 (describing the trend of recent U.S. graduates eschewing smaller cities for larger cities with higher-paying employment opportunities).

117. *See* CHINA STATISTICAL YEARBOOK 2008, *supra* note 113.

118. Josephs, *Youth Chances*, *supra* note 82, at 101; THE WORLD FACTBOOK, *supra* note 32.

119. Wang Feng, *Boundaries of Inequality: Perceptions of Distributive Justice among Urbanites, Migrants, and Peasants*, *in* Whyte, *supra* note 59, at 228.

Legalizing the Barrier: the Legality and Materiality of the Israel/Palestine Separation Barrier

YISHAI BLANK*†

SUMMARY

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INTRODUCTION

Since 2003,[1] the state of Israel has been constructing a barrier snaking through the occupied territories of the West Bank, seldom adhering to Israel's internationally recognized border, often protruding, sometimes very deeply, into the territories.[2] This barrier—also referred to as the separation wall, the security obstacle, the fence, and a multitude of other terms[3]—has attracted international and local (Israeli) interest, attention, and critique. While the barrier is clearly unique—a result of the complexities and anomalies of the Israeli/Palestinian conflict and context—it was immediately read within the backdrop of the global phenomenon of walling, therefore becoming a symbol of the emerging new global regime of separation and segregation, of risk management, and of growing securitization.[4] Thus the local campaign against the barrier was quickly understood—at least by external spectators (mostly academics)—through global theoretical frameworks that were developed in order to analyze the current paradoxical coupling of globalization with segregation, of global openness and renewed national closure, and of decolonization with parochial re-territorialization.

Indeed, it is a great paradox of our times that with the weakening of national borders associated with globalization there seems to appear a growing tendency to erect material walls between states. These walls are usually constructed with the declared purpose of fending off terrorists, traffickers, illegal immigrants, or other undesirable persons and things. Long stretches of physical barriers have been built on the borders of USA/Mexico, Israel/Palestine, Botswana/Zimbabwe, India/Pakistan, and elsewhere.[5] These barriers often use a combination of high- and low-

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1. The Israeli government decided to erect a separation barrier in April 2002 in order to obstruct the entrance of terrorists from the West Bank into Israel. EYAL WEIZMAN, HOLLOW LAND: ISRAEL'S ARCHITECTURE OF OCCUPATION 162 (2007). The decision was articulated by Israeli officials and commonly understood by the Israeli public as a response to Palestinian acts of violence, in particular a suicide bombing which originated in the occupied territories. Daphne Barak-Erez, *Israel: The Security Barrier—Between International Law, Constitutional Law, and Domestic Judicial Review*, 4 INT'L J. CONST. L. 540, 540 (2006). This decision, however, was mostly declaratory, with very few operative consequences. *See* WEIZMAN, *supra*, at 162 (stating that the construction of the barrier began in June 2002 but only incrementally). Real and concrete actions began in late 2003, when the government approved an initial route for the barrier. Oren Yiftachel & Haim Yacobi, *Barriers, Walls, and Dialectics: The Shaping of "Creeping Apartheid" in Israel/Palestine*, *in* AGAINST THE WALL: ISRAEL'S BARRIER TO PEACE (Michael Sorkin ed., 2005) 138, 140. Soon after, the military started issuing land seizure orders and began the actual construction.

2. The Green Line demarcates the internationally recognized border between Israel and the Palestinian occupied territories.

3. *See* WEIZMAN, *supra* note 1, at 171 (describing the terminology used to refer to the many border-synonyms between Israel and Palestine); Dean McCannell, *Primitive Separations*, *in* AGAINST THE WALL, *supra* note 1, at 28 (explaining the different terms used to refer to the wall).

4. *See* Mike Davis, *The Great Wall of Capital*, *in* AGAINST THE WALL, *supra* note 1, at 88, 88–90 (discussing the recent international trend of states constructing border walls).

5. Note that, even among these examples, the case of the Israeli wall is exceptional since Palestine is not an independent, internationally recognized state. Hence, the wall separating it from Israel functions rather differently, both politically and legally, from other walls across the world. This important difference will become clearer later in the article.

end technology reminiscent both of antiquity and of futuristic science-fiction movies. In a way, these walls could be seen as the dark side of globalization: they demarcate its limits and its unwanted consequences, those that need to be met with the utmost response—the wall. What makes the phenomenon of walls unique and new is indeed not a result of a particular attribute, but rather that they have become emblematic of our times; as if they are the monument which represent most clearly and vividly the era in which we live.[6] As such, they are a legal and material manifestation of the idea of sovereign states, but also what makes possible its critique.

The legal campaign against the Israeli barrier was both local, in Israeli courts that had to determine its legality, as well as international, in the International Court of Justice (ICJ), which issued an advisory opinion concerning its legality.[7] In this article I argue that the unique route of the barrier—crawling through the territories and creating bizarre-shaped enclaves in which Palestinian communities are trapped—caused the legal campaign and court rulings on the matter to take a very specific form. The majority of the legal challenges, as well as the legal principles set out by the courts in response, related to the barrier's route and to its impact on the lives of the persons in the territories surrounding it. Left out of the legal battle was an attempt to delegitimize the very establishment of a separation barrier between Israel and the occupied territories, regardless of its route, even if it were erected exactly on the Green Line.

In this article I analyze the role sovereignty has had in masking the hybrid nature of the barrier and in shaping the legal campaign against it. As a founding concept, sovereignty shaped (1) the legal norms in which the litigators and the courts operated; (2) the theoretical approaches—often of extra-legal disciplines—regarding the harm that the barrier caused (or might cause); and (3) the strategic and tactical choices taken by the various NGOs which spearheaded the campaign, often a result of compromises among disagreeing parties.[8]

In Section I of the article, I describe the hybrid nature of the barrier. I analyze the material as well as the legal/ideological aspects of the barrier, and the inseparability of the one from the other. I then turn in Section II to examine the development of the jurisprudence of the barrier, pointing to the different legal concepts which enabled the Israeli Supreme Court to criticize the route of the barrier while upholding its general legitimacy. What is revealed through the analysis of the jurisprudence of the barrier is that no legal argument was made against a barrier which would have been erected on the internationally recognized border of Israel. I offer some suggestions as to the roots of this omission, arguing that it exposes the sovereigntist ideology and commitment of the various legal actors (both national

6. *See* WENDY BROWN, WALLED STATES, WANING SOVEREIGNTY 22–26 (2010) (discussing walls as a reaction to waning state sovereignty caused by globalization).

7. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter *Advisory Opinion*].

8. One of the most difficult dilemmas which anti-wall activists had to address was the question whether to pursue a legal course of action or focus on extra-legal activity such as advertizing and public demonstrations. Another was the following: what legal strategy should be adopted in order to combat the barrier? Should the entire barrier project be challenged altogether or would it be more prudent to question only its current route? And how much weight should be given to expert opinions regarding the harm of the barrier? These debates exposed profound disagreements among professionals and activists and were informed not only by practical considerations, but also by theoretical conflicts surrounding the legitimacy of walls and of separation.

ones and international ones). This ideology obstructs the possibility to delegitimize the entire Israeli barrier project and other barriers which separate between sovereign states throughout the world.

I. THE HYBRID NATURE OF THE BARRIER: MATERIALITY AND LEGALITY

In the various discussions about the barrier, it is often perceived through its two distinct characteristics: the material one and the ideological-legal one. Seen mostly as a *material* object, the barrier is predominantly described as a physical entity, whose material characteristics produce a set of almost-necessary consequences in reality.[9] Viewed as an *ideological-legal* construction, the barrier becomes almost intangible. In this view, the barrier is mostly an idea, a regime, and a set of legal rules—of separation and segregation, of domination and occupation, and of controlling the population and managing risks.[10]

The captivating visual images of tall, fear-inspiring concrete walls and towers bear the danger of overemphasizing the physical-material dimension of the wall and thus underestimating the work that the law and other intangible factors perform in enabling it to have effect in reality. On the other hand, for lawyers, philosophers, and scholars of disciplines with idealist views of reality (as opposed to materialist ones), the opposite happens: the material aspect dissipates into the background and the wall keeps appearing as an idea, a set of rules, or a mere manifestation of ideology.

The barrier, however, is a hybrid creature. It is a mixture of facts and norms, of materiality and legality, of physicality and ideology. A description of the barrier focusing on a single aspect is, therefore, lacking and biased and risks producing negative normative consequences. Realizing that the material aspect of the barrier is indistinguishable from its legal and ideological aspects allows one to fully understand the uniqueness of the barrier (vis-à-vis other periods in history in which barriers existed and vis-à-vis other methods of separation), and to better grasp and describe the way the wall functions in reality, thus offering new avenues for legally challenging it.

Next, I examine the two different aspects of the barrier, demonstrating that focusing on either one of them bears various risks and that some of the legal disagreements surrounding the barrier can be traced back to these conceptual differences. While most commentators are acutely aware of the fact that walls and barriers are hybrid creatures, composed of material and legal/ideological dimensions, they often focus on only one of these dimensions. What cements and stabilizes the relationship—as well as the analytical separation—between materiality and legality is the concept of sovereignty: the idea that a unified entity has ultimate and unlimited control over the entirety of the material and legal universe within a given national territory. What eventually becomes clear in this article is that the current

9. *See* U.N. Secretary-General, *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13*, paras. 23–27, *delivered to the General Assembly*, U.N. Doc. A/ES-10/248 (Nov. 24, 2003) [hereinafter *Report of the Secretary-General*] (describing the barrier's socio-economic consequences on the lives of Palestinians).

10. *See* Yiftachel & Yacobi, *supra* note 1, *at* 139–41 (describing the barrier as part of Israel's system of "'creeping apartheid'" of the Palestinian territory).

understanding of sovereignty as a hermetic and insular container is the reason for the failure to launch a radical critique of the Israeli barrier (indeed of barriers and walls throughout the world). In fact, walls are the embodiment of this common interpretation of sovereignty, and therefore even if the specific route of the Israeli barrier can, and indeed should, be legally challenged, the limitations of such challenge are a reflection of the failure to articulate an effective critique of sovereignty not only in Israel but throughout the world.

A. *The Barrier's Materiality*

What is often emphasized in discussions about the barrier is its material nature: that it is a long and winding physical construction, with concrete parts, barbed wires, gates, and towers. And indeed, the Israeli barrier enterprise is materially impressive. Once completed, it is supposed to provide a solid obstacle between the Palestinian territories and Israel, by stretching along more than 600 kilometers (and cutting through the occupied territories).[11] Parts of it are made of thirty-foot-high ready-made concrete segments;[12] the majority of the barrier is supposed to be made of regular iron fences, lower brick walls, gates, blockades, and other more traditional fencing mechanisms. Watch-towers, surveillance cameras, and barbed wires are scattered along the barrier.[13] The barrier only occasionally tracks the Green Line; it snakes through the occupied territories, creating enclaves in order to capture some of the Jewish settlements.[14]

The original plans for the barrier barely attempted to adhere to the Green Line. The initial October 2003 route, set out in the Israeli government's decision, placed the vast majority of the barrier within the occupied territories.[15] In addition, in various sections, the barrier protrudes deeply into the Palestinian territories in order to include as many Jewish settlements as possible within the western ("Israeli") side

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11. Stephanie Koury, *Why This Wall?*, *in* AGAINST THE WALL, *supra* note 1, at 48, 49.

12. Michael Sorkin, *Introduction: Up Against the Wall*, *in* AGAINST THE WALL, *supra* note 1, at vi. Only about five percent of the wall is made of these high concrete segments. *See Report of the Secretary-General*, *supra* note 9, para. 11 ("Concrete walls cover about 8.5 kilometers of the approximately 180 kilometers of the Barrier completed or under construction."). The vast majority of the barrier is made of a "smart" electronic chain-link fence. Along the external ("Palestinian") side of the barrier passes some sort of an obstacle (a ditch or a pile) and another obstructing road. On its internal ("Israeli") side, there is a smooth dirt road (for the purpose of discovering the tracks of intruders), a service road, a patrol road, and another fence. Its width ranges from thirty-five to seventy meters, depending on the terrain and the topography of the area. *See* HCJ 7957/04 Mara'abe v. Prime Minister of Israel 60(2) PD 477, paras. 3–4 [2005] (Isr.) (describing the components of the separation fence), *available at* http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf.

13. *Report of the Secretary-General*, *supra* note 9, paras. 9–10.

14. *See* YEHEZKEL LEIN & ALON COHEN-LIFSHI, UNDER THE GUISE OF SECURITY: ROUTING THE SEPARATION BARRIER TO ENABLE THE EXPANSION OF ISRAELI SETTLEMENTS IN THE WEST BANK 5 (Zvi Shulman trans., Bimkom: Planner for Planning Rights & B'tselem: The Israeli Info. Ctr. for Human Rights in the Occupied Territories, 2005) (emphasizing that only "twenty percent of the barrier's route will run along the . . . Green Line"); *see also Report of the Secretary-General*, *supra* note 9, para. 8 ("If the full route is completed, another 160,000 Palestinians will live in enclaves . . . .").

15. *See Report of the Secretary-General*, *supra* note 9, paras. 6–8 (emphasizing that the Israeli Cabinet's Decision 883 planned a Barrier route that deviated up to twenty-two kilometers from the Green Line and incorporated large segments of the occupied territories).

of the barrier.[16] In most of these areas, the protrusions (or "loops") necessitated the creation of Palestinian enclaves—walled "islands" where tens of thousands of Palestinians live—locked between the Israeli and Palestinian sides of the barrier.[17] These areas became known as the "seam zone" and were controlled by the "permits regime."[18] According to the permits regime, movement of Palestinians in and out of their enclave is heavily regulated and requires specific permission from the Israeli military.[19] The barrier was erected very tightly around the villages that were captured within the enclaves, cutting off the Palestinians who lived in them from their agricultural lands, schools, health services, extended families, and larger surroundings.[20] Entering and exiting these villages required soldiers to open the gates and passageways, which they did for very limited hours each day.[21]

In the more densely populated areas, such as East Jerusalem, concrete segments were installed, accompanied by watch-towers and surveillance mechanisms. In some areas of East Jerusalem, the wall actually tracked the Green Line.[22] Yet, due to the annexation of East Jerusalem in 1967, the Palestinians of Jerusalem were accustomed to living in a unified space—rather than a separated one—with the Israelis. Now, the barrier suddenly tore the fabric which had been uninterrupted for decades.[23] It imported into the "united Jerusalem" the logic of separation that had, until then, been applied mostly to the West Bank.[24]

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16. *See* Stephanie Koury, *Why this Wall?*, *in* AGAINST THE WALL, *supra* note 1 at 48, 50 (stating that the barrier "weaves extensively into the West Bank . . . in order to accommodate Israeli settlements . . . .").

17. *See Report of the Secretary-General*, *supra* note 9, para. 12 (indicating that initial part of the barrier completed July 31, 2003 put approximately 56,000 Palestinians in enclaves); BIMKOM: PLANNERS FOR PLANNING RIGHTS, BETWEEN FENCES: THE ENCLAVES CREATED BY SEPARATION BARRIER III (2006) ("The Separation Barrier, most of which lies beyond the Green Line, creates enclaves inhabited by some 250,000 Palestinians.").

18. *See* BIMKOM, *supra* note 17, at III (analyzing the seam zone's negative impact on the lives of Palestinians). The seam zone is defined as follows:

> The area between the Security Barrier and the border of Judea and Samaria, in areas that the Barrier is located inside Judea and Samaria defined as 'closed military area'. In this area the permit requirement is implemented—meaning: the entry of those who are not residents is conditional upon permit holding. The definition of the 'seam zone' as a closed military area, whose entry is supervised, controlled, and requires a permit (excluding permanent residents) enables the army to contend with security threats from the region, and particularly penetration by terrorists and people who enter Israel illegally.

Isr. Def. Forces Military Advocate Gen. Corps, *Security and Criminal Law in Judea and Samaria*, http://www.law.idf.il/776-3013-en/Patzar.aspx?SearchText= seam%20zone (last visited Mar. 6, 2011).

19. BIMKOM, *supra* note 17, at III.

20. *Id.*; *Report of the Secretary General*, *supra* note 9, paras. 24–27.

21. *See infra* pp. 317–18.

22. *See Report of the Secretary General*, *supra* note 9, para. 7 ("The part of the Barrier that roughly hews to the Green Line is along the northernmost part of the West Bank.").

23. *See* BIMKOM, *supra* note 17, at VIII (noting the disastrous impact that the barrier has had on the lives of East Jerusalem Palestinians).

24. Clearly, Jerusalem was only partly and de-jure united, while in reality a huge gap between East and West Jerusalem was maintained since the so-called unification of the city in June 1967. The vast majority of the Palestinians of East Jerusalem never accepted Israeli citizenship, do not vote in the municipal elections (though they have the right to do so), and receive poor municipal services as compared to the residents of the western parts of Jerusalem. *See* Menachem Klein, *Old and new walls in Jerusalem*, 24 POLITICAL GEOGRAPHY 53, 61, 64, 71 (2005) (describing nonphysical barriers among Israeli and

The barrier itself, however, was part of a larger spatial-physical restructuring of the West Bank, which began long before the government's decision to construct the barrier, and which far exceeded the barrier itself. Indeed, part of the creation of the barrier was a web of roads and highways connecting the Jewish settlements among themselves and with Israel proper; it also separated the Jewish settlements from the ever-shrinking Palestinian areas and from roads dedicated to the movement of Palestinians (roads which were given the name "fabric of life roads" since they were intended to allow Palestinians to maintain their "fabric of life" despite the fragmentation which the barrier and the enclaves created).[25] This was achieved physically by establishing a system of roads for each of the communities, with the Jewish communities enjoying the majority of the resources.[26] The roads were separated from one another by means of underpasses and overpasses, road blocks, and other physical elements, which made the movement between the road systems not only illegal, but also close to impossible.[27] Additionally, the construction of the roads—both those dedicated to the movement of Jews and those which were built to connect the increasingly-fragmented Palestinian areas—was done on lands confiscated from the Palestinians.[28]

Furthermore, one might draw—as Eyal Weizman and as the ICJ do—a line connecting the Jewish settlement project in the West Bank to the erection of the barrier.[29] According to this narrative, the barrier should not be seen as distinct from the entire architectural and physical project of occupying the Palestinian territories.[30] Step by step, Israel has de-facto annexed Palestinian territories, turning them into a land reservoir for Jews to settle in. Yet this annexation process did not result in spatial integration between the occupying and the occupied. Rather, Israel's occupation took the form of spatial separation between the two groups, and an overwhelming domination of the Jews over the Palestinians, apparent in the superiority of the Jewish infrastructure over the Palestinian one, and in the absolute preference of Jewish free movement over that of the Palestinians.[31] The barrier,

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Palestinian inhabitants of Jerusalem).

25. *See* B'TSELEM: THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, *Restrictions on Movement: Alternative roads for Palestinians,* http://www.btselem.org/english/freedom_of_movement/alternative_roads_for_palestinians.asp (last visited Mar. 5, 2011).

26. *See* NEVE GORDON, ISRAEL'S OCCUPATION 132 (2006) (describing the purposes of the Israel bypass roads); Klein, *supra* note 24, at 59–60 (discussing how Jewish communities in East Jerusalem receive the majority of municipal resources).

27. *See* WEIZMAN, *supra* note 1, at 179–82 (2007) (describing the use of tunnels and bridges to create separate road networks for Israelis and Palestinians in the West Bank); GORDON, *supra* note 26, at 136–38 (stating that Israel has restricted movement along roads by prohibiting Palestinians' use, by requiring Palestinians to own permits, and by using military checkpoints to block traffic flows).

28. *See* GORDON, *supra* note 26, at 131–32 (emphasizing that roads were built in the occupied territories to facilitate Israeli settlement of Palestinian territory).

29. *See* WEIZMAN, *supra* note 1, at 163–64, 167 (noting the influence of West Bank settlers in manipulating the barrier's route to include their property). *See also* Yiftachel & Yacobi, *supra* note 1, at 139–41 (emphasizing that the barrier represents a new method of Israeli control and domination of Palestinian territory).

30. *See* Yiftachel & Yacobi, *supra* note 1, at 139–41 (describing the wall as part of Israel's system of "'creeping apartheid'" of the Palestinian territory).

31. *See* WEIZMAN, *supra* note 1, at 161, 164–67, 170–71 (detailing the physical mechanisms used to control Palestinian movement); *see also* LEIN & COHEN-LIFSHI, *supra* note 14, at 5 (detailing Palestinians' restriction of movement caused by the wall).

according to this story, is merely one more detail, albeit an important one, in the larger picture of "Israel's architecture of occupation," as Weizman calls it.[32]

Profound spatial segregation between Jews and Palestinians, in this rendering, is the deep spatial structure of the occupied territories and it underlies many of Israel's policies since the late 1970s. The establishment of new and separated Jewish settlements—rather than settling Jews in already-existing Palestinian towns—is one clear manifestation of this spatial form. Indeed, what seems to be an apparent fact—that Jews and Arabs live in completely segregated localities—is actually not obvious at all. It was both imaginable and plausible that Jews would move into existing Palestinian towns and spatially, even if not socially or politically, integrate with the local population. In some places in the occupied territories—like Hebron and parts of East Jerusalem—this has been the case, and various settler groups consistently argue that it is their "right" to be able to settle everywhere in the West Bank.[33] Yet these places remain an exception to the general form of spatial segregation, which is the rule in the occupied territories.[34] This separatist spatial form can be seen in the locations of Jewish settlements, in the segregated road system for Jews and for Palestinians, and in the road blocks scattered throughout the West Bank, which have been documented by various scholars.[35]

Perhaps not surprisingly, many (though not all) of these critical assessments are made by architects, planners, and geographers. By focusing on the physical and material dimensions of Israel's policies in the occupied territories, one can observe similarities between various strategies of spatial separation and segregation. It is, I argue, a matter of disciplinary bias (or perspective) which focuses more on the visual and on the spatial. But what remains invisible—perhaps made invisible by the focus on the aesthetics and physicality of the barrier—is the legal regime that is attached to these physical elements: a regime of permits and prohibitions, of confiscations and sanctions. I now turn to examine the legal dimension of the barrier.

B. *The Barrier's Legality*

As physically imposing and materially oppressing as the barrier is, it is nonetheless a legal concept, a legal regime. These legal aspects of the barrier, I claim, are as important to understanding its functioning as are its material

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32. WEIZMAN, *supra* note 1, at 6. Yiftachel and Yacobi describe a similar structural process, which they term "creeping apartheid." *See* Yiftachel & Yacobi, *supra* note 1, at 139.

33. *See* Ulrike Putz, *The Settlements of Hebron: A Stumbling Block for Middle East Peace Talks*, SPIEGEL ONLINE (Sept. 23, 2010), http://www.spiegel.de/international/world/0,1518,719203,00.html (discussing the belief held by Hebron settlers that the land was given to Israel by God).

34. Spatial segregation between Jews and Arabs is also the rule within Israel proper. The vast majority of Jews live in predominantly Jewish localities and the same is true for Israeli-Palestinians. *See* Zvi H. Triger, *The Gendered Racial Formation: Foreign Men, "Our" Women, and the Law*, 30 WOMEN'S RTS. L. REP. 479, 512–13 (2009) ("Israel is a highly segregated country. With the few exceptions of Haifa, Akko (Acre), Jaffa, and Jerusalem, there are no mixed cities in Israel. Even in the mixed cities, there are predominantly Jewish residential neighborhoods, and the interactions between Jews and Arabs take place mostly in the commercial parts of these towns.").

35. *See generally* B'Tselem & Eyal Weizman, *Map of Israeli Settlements in the West Bank*, *in* A CIVILIAN OCCUPATION: THE POLITICS OF ISRAELI ARCHITECTURE 108, 108–19 (Rafi Segal, David Tartakover &Eyal Weizman eds., Babel Publishers 2000) (demonstrating the West Bank settlements' segregation of the territory); GORDON, *supra* note 26, at 136–38 (describing the complex network of segregated roads and the use of checkpoints in the West Bank).

characteristics. First, the barrier is erected on the basis of authorized government decisions, administrative regulations, and military orders. Every piece of land confiscated, each section of erected wall, and every area declared a "special security zone"—these were all done in a highly legalized fashion according to legal chains of authorizations.[36] I am not arguing, of course, that some of the actions were not in violation of international law or contradictory to Israeli constitutional or administrative law. Indeed, even to the admission of the Israeli Supreme Court, some of the actions taken with regard to the barrier were in violation of Israeli administrative and constitutional law.[37] And as already noted, the ICJ determined that the construction of the barrier was entirely in violation of international law.[38] Yet, the state of Israel behaved as if it were bound by law. Every action was done in accordance with administrative procedures, under explicit authorization, and often received the approval of the Israeli courts which reviewed them.[39]

What I emphasize in this section is a different point altogether. When I talk about the legal aspect of the barrier, I refer to the fact that rules, procedures, permits, prohibitions, and sanctions directed at Palestinians and Jews were as important to the function of the barrier as were the purely material elements of it. In this sense the barrier was a *legal barrier*; it erected legal boundaries between the occupied territories and Israel and within the occupied territories. The elaborate set of definitions, rules, procedures, and permits that accompanied the erection of the material barrier legitimized the concrete blocks, iron fences, barbed wires, watch towers, surveillance cameras, and gates.

Due to ambitions to include many Jewish settlements within the "Israeli" side of the barrier, it was clear that many Palestinians would become trapped between the Green Line to their west and the fences separating them from the Jewish settlements to the east, north, and south. Gates were built along the barrier to enable Palestinians trapped in enclaves to move in it out of their villages. It quickly became clear that these gates were heavily regulated and that using them required permits from the Israeli military. Permits were given stingily to Palestinians and only after a

36. *See* HCJ 2056/04 Beit Sourik Village v. The Government of Israel 58(5) PD 807, paras. 3–6, 8 [2005] (Isr.) (discussing the decision-making process to construct the separation barrier and the processes of land seizure), *translated in* 38 ISR. L. REV. 83 (2005), *available at* http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf.

37. The two most well known decisions are: HCJ 2056/04 Beit Sourik Village v. The Government of Israel 58(5) PD 807 [2005] (Isr.); HCJ 7957/04 Mara'abe v. Prime Minister of Israel 60(2) PD 477 [2005] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf. I discuss these and some other decisions in great detail below. *See infra* Section II. *See generally* Daphne Barak-Erez, *Israel: The Security Barrier—Between International Law, Constitutional Law, and Domestic Judicial Review*, 4 INT'L J. CONST. L. 540 (2006) (discussing the Israeli Supreme Court's jurisprudence regarding the barrier).

38. *Advisory Opinion*, *supra* note 7, paras. 149–53. *See generally* Aeyal M. Gross, *The Construction of a Wall between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation*, 19 LEIDEN J. INT'L L. 393, 393–440 (2006) (discussing the *Advisory Opinion* and an argument regarding the wall's illegality).

39. *See* Beit Sourik Village 58(5) PD paras. 20–32 (opinion of the Israeli Court of Justice affirming the legality of the separation barrier). *See generally* Victor Kattan, *The Legality of the West Bank Wall: Israel's High Court of Justice v. the International Court of Justice,* 40 VAND. J. TRANSNAT'L L. 1425 (2007) (comparing the High Court of Justice's repeated affirmation of the barrier's legality to the International Court of Justice's decision that the barrier violated international law).

complicated procedure that categorically classified anyone who wished to use the gates.[40]

According to the initial declaration by the military commander given in October 2003, the seam zone—the area between the Green Line and the wall—was declared a "closed military area," and entry was prohibited.[41] Yet, at the same time, Israeli citizens were exempt from this prohibition. They were allowed to stay and move freely in this area, meaning that Jewish settlers could move between their settlements and the rest of the occupied territories as well as into Israel proper.[42] Palestinians, however, were generally prevented from doing so since their mere presence in the area—even if they lived there for generations or owned lands there—became illegal with the declaration.[43] Hence, even Palestinians who simply wanted to continue living in their own houses needed to ask for permits to remain there.

Michael Sfard, one of the leading litigators in the campaign against the barrier, describes in great detail the elaborated bureaucratic legal mechanism which was erected—alongside the material barrier—in order to regulate the existence and movement of Palestinians in the seam zone.[44] The initial mechanism established four categories of persons, each of which was entitled to a different permit: 1) Israeli citizens, permanent residents, and those who are entitled to become Israeli citizens on the basis of the Law of Return (that is, Jews) were able to move completely freely in and out of the seam zone without any special permit; 2) tourists with Israeli travel visas were nominally prohibited from entering and staying in the zone but were given a general permit that did not require them to ask for a specific entrance permit; 3) Palestinians who worked in Israel proper and in the Jewish settlements in the West Bank were prohibited from leaving the seam zone but were given a general permit that enabled them to move in and out of their village for the purpose of work; 4) the rest of the Palestinians needed to obtain specific permits if they wanted to enter or leave this area.[45]

Though some important changes were made in the permits regime following petitions submitted by human rights groups to the Supreme Court[46]—for example, Jews entitled to become Israeli citizens were omitted from the general permit—the gist of the regime remained in place.[47] Therefore, while the daily lives of Palestinians

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40. *See* SHAUL ARIELI & MICHAEL SFARD, HOMAH U'MEHDAL [THE WALL OF FOLLY] 174–79 (2008) (Isr.) (detailing the horrors of the permits regime).

41. Israel Defense Forces, Declaration Concerning the Closure of Area No. s/2/03 (Seam Area) (5764-2003), *available at* http://domino.un.org/unispal.nsf/0/c6114997e0ba34c885256ddc0077146a?OpenDocument.

42. *See* HCJ 7957/04 Mara'abe v. Prime Minister of Israel 60(2) PD 477, para. 7 [2005] (Isr.) (stating that Israelis could move freely in the seamline area and were not required to hold a permit), *available at* http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf.

43. *See id.* (stating that Palestinian residents' presence in the seamline area would be illegal if they did not possess a written permit from the military commander).

44. ARIELI & SFARD, *supra* note 40, at 174–79.

45. *Id.* at 177–78.

46. The first petition was submitted by HaMoked: Center for the Defense of the Individual in 2003, and the other by ACRI (Association for Civil Rights in Israel) in 2004. While the petitions resulted in the modification of the permits regime, none have been decided by the Court and they are still pending. *See* HCJ 9961/03 HaMoked: Center for the Defense of the Individual v. The Government of Israel (pending), *available at* http://www.hamoked.org/items/6653_eng.pdf; HCJ 639/04 The Association for Civil Rights in Israel v. Commander of the IDF Forces in Judea and Samaria (pending), *available at* http://www.hamoked.org/items/5431_eng.pdf.

47. The amending military orders defined Palestinians who lived in the seam zone as automatic

trapped within the enclaves became somewhat more bearable and less exposed to the most overt ethnic discrimination and to the military's arbitrariness in granting permits, the seam zone became a space where Palestinians were generally prohibited from entering and whose movements were closely monitored. On the other hand, Jews could freely live and move within these enclaves.[48]

The legal walls that separated Palestinians from Jews and that fragmented the Palestinian territory were not entirely new and were not invented with the construction of the barrier. With the construction of the material barrier the legal walls increased in numbers, became more oppressive, exacerbated the internal Palestinian fragmentation process, and extended the legal separation that existed prior to the barrier. But, as I have argued before, since the beginning of the occupation, and with the spread and growth of the Jewish settlements in the West Bank, a regime of legal separation was established, creating distinct legal systems for the two communities, and maintaining their physical-spatial segregation.

This regime rested on several important principles. First, Jews and Palestinians reside in distinct geographical spaces, each of which is legally recognized as a locality with a distinct local government. Though it was often the case that Jews *chose* to live in all-Jewish settlements and Palestinians *chose* to remain in their traditional villages or towns, persons of both groups were legally encouraged and sometimes forced to live in localities that "belonged" to their communities. The following legal rules assisted in obtaining the strict residential segregation: a) many Jewish settlements were managed by cooperative associations with admittance boards, selecting the residents on the basis of their "fit" into the community. These communities obtained the land from the Israeli government and hence were permitted to discriminate legally;[49] b) several Jewish towns in the West Bank were built for the purpose of housing ultra Orthodox Jews in them. From these towns even secular Jews were legally excluded, let alone Palestinians;[50] c) the military commander in the occupied territories can declare certain areas as "closed military areas" and prohibit Jews from entering them.[51] Hence, though Jews can purchase private Palestinian lands

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recipients of permanent permits to stay in the seam zone. It defined Israeli citizens as entitled to a permit rather than completely exempt them from the general prohibition. *See* Declaration in the Matter of Closing Territory Number s/2/03 (seam area) (Judea and Samaria) (Amendment No. 1), 5764-2004; *see also* HCJ 7957/04 Mara'abe v. Prime Minister of Israel 60(2) PD 477, para. 7 [2005] (Isr.) (discussing the amended declaration), *available at* http://elyon1.court.gov.il/files_eng/04/570/079/a14/040795 70.a14.pdf.

48. *See* ARIELI & SFARD, *supra* note 40, at 178–81 (noting that the changes in the permits regime had little effect on the general prohibition and monitoring of Palestinian movement in the seam zone).

49. This legal rule also applies within Israel, where admittance boards often select the residents of small, collectivist localities. The practice is legal despite various attempts to challenge its constitutionality. These boards serve as a mechanism by which ethnic segregation between Arabs and Jews is created and maintained throughout Israel. Yishai Blank, *Brown in Jerusalem: A Comparative Look on Race and Ethnicity in Public Schools*, 38 URB. LAW 367, 388 n.70 (2006).

50. Though in the United States this governmental practice would have been deemed unconstitutional, the Israeli Supreme Court decided that creating localities for ultra-Orthodox Jews is only permitted in order to protect the unique lifestyle of this community. *See* HCJ 4906/98 Am Hofshi v. Ministry of Planning and Bldg. 54(2) PD 503, para. 3 [2000] (Isr.) (noting that previous cases have held that it is not per se illegal to allocate land to build a separate settlement for the Orthodox population to enable it to preserve its way of life if the policy is implemented in a manner consistent with constitutional and administrative law principles regarding equality), *available at* http://elyon1.court.gov.il.

51. B'TSELEM: THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, *Free Reign: Vigilante Settlers and Israel's Non-Enforcement of the Law*, at 20–21 (Oct. 2001) (stating that the military can declare an area closed and prevent anyone from entering or exiting), *available at*

wherever they want, including in Palestinian villages and towns, and then move and live there, there is a chance that such actions would cause the military to declare that Jews are prohibited from entering these areas. These declarations would be needed in order to prevent the clashes between Jews and the local population that would almost undoubtedly ensue.[52]

Second, through the power of the military commander in the area, different legal principles were applied to each type of local government: while Palestinian villages and towns were subject to Jordanian law—the law applicable to them prior to the Israeli occupation—with respect to the Jewish settlements, the army commander adopted local government legislation that was almost identical to Israeli law.[53] This meant that the whole structure of local government law was entirely different for people who lived in Jewish settlements and for Palestinians. As a result, the various municipal services—education, welfare, water, sewage, and more—are provided according to nationality, and according to different funding schemes. It meant that the residential segregation was translated into segregation in schooling and other areas of daily interaction.[54]

Third, Jews and Palestinians were subject to different legal systems not only territorially—as residents of localities which were subordinated to different laws—but also since the military commander applied the entirety of Israeli law to Israeli citizens, while Palestinians were subjected to the law which existed prior to the Israeli occupation (Jordanian law in the West Bank).[55]

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http://btselem.org/Download/200110_Free_Rein_Eng.pdf.

52. Indeed, in areas such as Hebron and East Jerusalem this is precisely the case. Radical right-wing settler groups are purchasing private homes—or producing documents which prove their historical ownership in them—and then settling in them, often causing tensions. These two examples are the exception to the rule, since the military has allowed Jews to settle in these predominantly Palestinian areas, thus causing incessant conflicts and producing a need to insert the practice of separation into these Palestinian areas. The local residents inside Palestinian towns suffer from Jewish settlements because their movement in such areas is gradually limited and prohibited, as the Hebron case demonstrates. The current struggle in the Palestinian neighborhood of Sheikh Jarakh in East Jerusalem is similar as it produces the same problem: once Jewish settlers enter a Palestinian area, protecting their security involves curfews, limitations on movement, and other oppressive measures towards the Palestinian residents of the area. *See* Howard Schneider, *In East Jerusalem, a defining battle over Palestinian ownership in Sheikh Jarrah*, WASH. POST, Feb. 14, 2010, at A19 (discussing fight between Palestinians and Israelis over Sheikh Jarrah), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/02/13/AR2010021303451.html. *See generally* U.N. Office for the Coordination of Humanitarian Affairs Occupied Palestinian Territory, SHEIK JARRAH (Aug. 2009) (discussing the humanitarian issues in Sheik Jarrah and other neighborhoods of East Jerusalem), *available at* http://www.ochaopt.org/documents/ocha_opt_shiekh_jarrah_english _2009_08_15.pdf.

53. *See* DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 19, 61–62 (2002) (stating that the military commanders proclaimed that prevailing law would remain in force in captured areas and that the Israeli government refrained from applying the Israeli legal system in the West Bank and Gaza, allowing the pre-IDF legal system to prevail); *see also Land Expropriation & Settlements*, B'TSELEM: THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, *Land Expropriation & Settlements*, http://www.btselem.org/English/settlements (last visited Mar. 5, 2011) (discussing the application of Jordanian law in the occupied territories).

54. The structure was fairly similar to that which operated within Israel proper, where residential segregation between Arabs and Jews was quickly transformed into occupational and societal segregation. *See* Blank, *supra* note 49, at 373–74 (asserting that as a result of the legal background of the Israeli territory, the patterns of residential segregation between Jews and Arabs and the rich and the poor have been translated into structural segregation in the educational system).

55. KRETZMER, *supra* note 53, at 19; *see* GORDON, *supra* note 26, at 23 (noting Jordanian rule in the

These basic legal principles were, I argue, the building blocks of a *legal barrier* which was constructed between Jews and Palestinians, demarcating them and separating them. Initially, this barrier was far from being hermetic. On the contrary, in the early days of the occupation, despite the residential segregation, Palestinians and Jews—West Bank settlers as well as those living in Israel proper—interacted on a daily basis. Tens of thousands of Palestinians were commuting to work in Israel and in the settlements; Jews were commuting into Palestinian towns to shop.[56] With the exponential growth of Jewish settlements in the West Bank (flooding the territories with settlers and the ensuing policies of land confiscations, curfews, etc.), and with the intensification of Palestinian terror, the pressure to separate the Palestinians from the Jews within and outside of the territories increased. As a result, the regime became explicitly directed at separating the two groups not only in residence but also in daily movement. Thus, the legal and material separation between the two communities intensified. Hence, while in the 1980s the movement through the West Bank (and even the Gaza strip) was fairly easy, and the passage from the territories to Israel was almost seamless, during the late 1980s and the 1990s, movement became increasingly harder.[57] More and more closure orders on the territories—even without a material barrier—were issued, road blocks ("Machsomim") were erected, and a legal regime of stricter separation between the two groups gradually appeared.[58] In this sense, the legal barrier, like the material one, should be seen not as the creation of something entirely new, but rather as an extension and intensification of the previously existing Israeli occupation regime.[59]

That the barrier is a legal concept and a regime not exclusive to the security barrier is also evident from the fact that legal principles that developed around the barrier were carried over to other areas of the West Bank, where there was never an intention to construct a material wall. One example is the notion of a "special security zone."[60] This military definition, used in reference to an area outside Jewish settlements closed for the movement of Palestinians, first appeared in the context of the enclaves that the barrier created.[61] Once an area is declared as such, it means that Palestinians are prohibited from approaching a perimeter outside of Jewish settlements, even if they own the lands there and need to use them for agricultural purposes, for instance.[62] Originally, the stated reason for such a declaration was that it was required for security reasons—to distance terrorist activities from Jewish

West Bank prior to Israeli occupation).

56. *See* YEHEZKEL LEIN, B'TSELEM: THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, CIVILIANS UNDER SIEGE: RESTRICTIONS ON FREEDOM OF MOVEMENT AS COLLECTIVE PUNISHMENT 22 (2001) ("In the first half of 2000, 110,000 Palestinians were employed in Israel and the settlements, more than twenty percent of the Palestinian workforce. Eighty-three thousand of them live in the West Bank (not including East Jerusalem) and 27,000 in the Gaza Strip.").

57. *See id.* at 4 (noting that movement of Palestinians in the occupied territories became increasingly more difficult from the start of the intifada).

58. *See id.* at 6–9 (discussing closures, checkpoints, and the implementation of mandatory permits for travel).

59. *See* Yiftachel & Yacobi, *supra* note 1, at 145 (arguing that the barrier is a "tangible manifestation of the ongoing urban policy characterizing Jewish-Palestinian relations in the city since 1967."); WEIZMAN, *supra* note 1, at 163 (describing the barrier as a political tool of Israeli separation and domination).

60. WEIZMAN, *supra* note 1, at 177.

61. *Id.*

62. *See id.* ("The military and the settlements' civil militias may, without warning, shoot-to-kill any Palestinian who happens to stray into these zones.").

settlements—and it was part of the permits regime, since it was given as the reason for why in many areas in the seam zone fences were erected in a way which prevented Palestinians from approaching their lands.[63] Yet over time, this new legal definition was exported to other areas in the West Bank, thus enlarging the de-facto territory of Jewish settlements without legally expropriating Palestinian land, by merely declaring the area as a "special security zone."[64]

This point demonstrates how the legal aspect of the barrier is, like many other spatial policies in the occupied territories, a continuation—albeit an extreme one—of the logic of separation between Palestinians and Jews. Therefore, this logic extends from the barrier to areas in which there is no security barrier through more extreme forms of spatial separation, such as those achieved by defining areas as special security zones. Hence the barrier is not just a material construction nor is it just a set of rules, permits, prohibitions and sanctions. It is, no less, an idea, an ideology. It is the ideology of separation—spatial, legal and political—between the two national communities. As ideology, the barrier is a hybrid creature fusing materiality and legality.

C. *The Barrier's Hybridity: Legality and Materiality, Old and New*

As became clear from the description in the previous sections, the barrier is a material and legal manifestation of a deeply engrained logic that is based on spatial and legal separation between Jews and Palestinians, despite the fact that in reality there is more mixing and friction caused by the massive wave of Jewish settlers moving into the occupied territories.[65] The fact that the barrier is not just a physical construction nor merely a set of legal rules (closures, permits, prohibitions, etc.) but rather a hybrid of these two aspects—which can be traced back to older spatial practices and legal principles in the territories—gives rise to a fundamental question: What, then, is unique about the barrier? Is it worse than many other practices of Israel in the occupied territories? If not, why has it attracted so much attention, and how has it become such an exceptional object of academic contemplation and activist opposition?

In recent years, the construction of separation walls which resemble the Israeli barrier—all physical obstacles that demarcate national boundaries and obstruct the passage of certain persons and various objects from one country into the neighboring one—has become an object of study for scholars in a plethora of disciplines throughout the social sciences and the humanities.[66] Political scientists,[67] architects,[68]

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63. *See id.* at 163, 166 (asserting that the proposed purpose of the barrier was for security concerns but that the wall became a political means of separation and dominance).

64. B'TSELEM: THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, ACCESS DENIED: ISRAELI MEASURES TO DENY PALESTINIANS ACCESS LAND AROUND SETTLEMENTS 7–8 (Sept. 2008).

65. For a similar point *see* Gross, *supra* note 38, at 437–39 (describing the barrier as being a physical structure that also embodies the structure of Israeli occupation).

66. Many scholars discuss internal walls—walls that are built within the same country, and separate various locations within the country—in the same context as inter-state walls. While I understand the impetus to do so, there are crucial differences between internal and external walls, which are especially important in the context of the Israeli barrier. They have to do with the legal regime that regulates them. *See* BROWN, *supra* note 6, at 19 (discussing "walls within walls" in the Southwest United States, Israel, and Morocco).

67. *See generally* BROWN, *supra* note 6 at 7–42 (arguing that the decrease in state sovereignty since

geographers,[69] philosophers,[70] economists,[71] sociologists, anthropologists,[72] cultural critics,[73] and lawyers[74] have turned their gaze with puzzlement to this old-new phenomenon, and have investigated its impact on our world and its meaning. Students of these various disciplines have tried to evaluate the costs and benefits that such walls have on the economy, society, aesthetics, health, environment, and rights of the impacted countries and their inhabitants.

It is crucial to note in this context, that despite the fact that a majority of these cross-disciplinary studies concluded that the barrier was harmful and destructive, there is still an ongoing debate—within each discipline—regarding its benefits and also regarding what exactly is problematic about it. For example, an Israeli landscape architect argued that the challenge that the barrier posed was the need to integrate it into the landscape and to its surroundings as well as to provide solutions to animals whose habitat was destroyed by the barrier.[75] Another Israeli architect argued that the barrier looked "'clumsy and ugly'" since "'no architect [had] been employed on the project of the wall.'"[76] Experts on security matters were also debating whether the barrier was required, and what was the exact problem with it: its route? Its design? In the next chapter I will show how these internal-disciplinary debates as regards the harm of the barrier impact the legal discussion and rulings on the matter.

Attempts to assess the novelty of these walls is no less important than these empirical and consequentialist questions. We must also point to their distinctness vis-à-vis walls that have existed throughout human history, and to interpret them as signs of a radically different politics and as markers of our unique historical age.[77] The Israeli barrier was no exception to this dilemma, albeit somewhat unique, given the fact that it was erected not between two sovereign states, but between a state and a territory it occupies (or, in fact, within the area it occupies).

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the collapse of the Soviet Union has led to an increase in the building of walls); GORDON, *supra* note 26, at 208–09 (arguing that Israel's control of Palestinian movement after Israeli troops withdrew from Palestinian territory represented a break with tradition).

68. *See generally* WEIZMAN, *supra* note 1, at 161–63 (discussing the architectural conception of the Israel-Palestine Wall); Lindsay Bremmer, *Border/Skin*, *in* AGAINST THE WALL, *supra* note 1, at 122–37 (discussing, as a practicing architect, the barriers in Johannesburg, South Africa).

69. *See generally* Yiftachel & Yacobi, *supra* note 1, at 138–56 (discussing the political geography of the separation barrier); Klein, *supra* note 24, at 53–76 (same).

70. *See generally* Ariella Azoulay & Adi Ophir, *The Monster's Tail*, *in* AGAINST THE WALL, *supra* note 1, at 2–27 (criticizing the barrier's construction from a philosophical standpoint).

71. *See generally* Anita Vittulo, *The Long Economic Shadow of the Wall*, *in* AGAINST THE WALL, *supra* note 1, at 100–21 (discussing the economic effects of the barrier).

72. *See generally* Dean MacCannell, *Primitive Separations*, *supra* note 1, at 28–46 (discussing "the wall as a cultural artifact and as symptomatic of specific psychic formations").

73. *See generally* Avner Bornstein, *Military Occupation as Carceral Society: Prisons, Checkpoints, and Walls in the Israeli-Palestinian Struggle*, 52(2) SOCIAL ANALYSIS 106, 124–25 (2008) (discussing how prisons, checkpoints, and walls have formed the identities of both Israelis and Palestinians).

74. *See generally* Gross, *supra* note 38, at 393–440 (discussing the legality of the Israel-Palestine barrier).

75. Margalit Soukoy, *The Seam Line—'Seam' or 'Line'?*, 22 LANDSCAPE ARCHITECTURE 15, 16 (2006) (Hebrew).

76. WEIZMAN, *supra* note 1, at 161 (quoting architect Gideon Harlap's speech at the 2004 annual convention of Israel's Architect Association).

77. *See* BROWN, *supra* note 6, at 19–28 (arguing that walls are a response to states' waning sovereignty caused by globalization).

As the Israeli case demonstrates, the barrier is hardly new or entirely exceptional. First, it resembles other, already existing tactics of occupation, separation and segregation. Azoulay and Ophir argue, for example, that the wall is "one among several instruments used by the Israeli ruling apparatus in the occupied territories whose function must be understood in the context of a structural and historical analysis of the modus operandi of this apparatus."[78] While they place the beginning of this stage in the Israeli occupation in 1991 with the closure imposed on the territories by the Shamir government,[79] other scholars have traced the barrier's beginning to an earlier or a later stage of the occupation.[80] Second, some argue that the barrier is yet another manifestation of the modern principles of national sovereignty—a state is entitled to protect its national borders from security threats, invasion, and other unwanted entry.[81] Therefore, there is nothing novel about contemporary walls since states have always defended their territories, using various means including fences, walls and gates. Obviously, this argument is flawed with respect to the Israeli barrier, since it was not constructed on its borders, but within the occupied territories. Yet, as I shall argue in the next section, the "sovereigntist" idea had far-reaching consequences on the legal campaign against the barrier.[82] Third, the barrier is not new since it's merely an expression of the basic liberal idea of the division into separate spheres: private/public, religious/secular, in/out, and so on. Like fences that demarcate one's home and one's property, today's walls merely reflect the existing political and legal order.[83]

Yet there are new aspects to the barrier, which mark it as a contemporary phenomenon. These aspects include the era of globalization, the increased threats stemming from globalization, and the age of growing surveillance and risk management. First, even if prior to the barrier, states such as Israel, were using various techniques in order to prevent unwanted persons from entering, the barrier is a fencing-out technology that is nearly *a far more perfect enforcement mechanism* of the prohibition. Indeed, one of the most perplexing and unique aspects of the barrier is that it potentially allows for full and complete enforcement of the law. A person can no longer take the risk of crossing the border and being caught by the military or the police; the wall simply prevents him from taking that risk by preventing such an action altogether. Second, the barrier is not passive like more traditional walls, but constantly watches, observes, and surveys. It is equipped with surveillance technologies such as cameras, sensory devices, and smart watch towers which operate according to the logic of the panopticon, giving one the feeling of being constantly

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78. Azoulay & Ophir, *supra* note 1, at 2–3.

79. *Id.* at 12–14.

80. As I already noted, some scholars argue that the entire Israeli occupation of the West Bank is marred with a spatial policy—and an ideology—of separation, segregation and domination. *See, e.g*, WEIZMAN, *supra* note 1, at 161–62 (discussing the barrier as a means to separate Israelis from Palestinians); Yiftachel & Yacobi, *supra* note 1, at 139–40 (mentioning the contradictions between Israel's oppression and Palestine's violence); GORDON, *supra* note 26, at 212 (stating that a barrier in the West Bank was a separation policy).

81. *See* WEIZMAN, *supra* note 1, at 162 (noting that "the very essence and presence of the Wall is the obvious solid, material embodiment of state ideology and its conception of national security").

82. *See infra* note 156 (discussing the ideological framework defining sovereignty).

83. *See* Thomas Hansen's article in this Volume, Thomas Hansen, *From Culture to Barbed Wire: On Houses and Walls in South Africa*, 46 TEX INT'L. L.J. 345 (2011) (discussing the ways in which walls of modern houses produce certain kinds of people and dispositions).

watched and observed, even if in reality there is no one watching.[84] This feeling of being watched all the time, even if not entirely new or unique to the barrier is unique when applied to large populations in a routine fashion. Third, while the barrier is actively watching and monitoring threats, it also hides these threats from the protected population, thus creating an unequal relationship of watching without seeing. Those who are behind the barrier are monitored and surveyed yet not really seen, except as targets.[85] Fourth, the barrier should be seen as part of a global trend of securitization and risk management. Notwithstanding the fact that the barrier was erected against a real threat of ongoing terror attacks against Israel, it is also directed against hypothetical risks. The barrier is part of a global trend of fearing and averting imagined catastrophes at an ever growing price.

The barrier, therefore, is a continuation of past practices, a manifestation of pre-existing ideologies and concepts, but also a novel creature. It is an expression of new ideas about control and a result of new technologies. It is a hybrid entity, comprised of material as well as legal elements. As I argue in the next section, the hybrid nature of the barrier and the debate over what makes it unique, the harm it is causing and its advantages have had an impact on the legal campaign against the barrier and on the outcomes resulting from the campaign. Even more important than these disagreements, however, is the consensus regarding the concept of sovereignty, which holds together the legal and material aspect of the barrier. As I demonstrate below, it is actually the idea of sovereignty which formalizes the inseparability of the legal and the material, and which structures and curbs the arguments that could be taken against the very existence of the barrier.

II. THE JURISPRUDENCE OF THE BARRIER

I now turn to examine the jurisprudence of the barrier, which is still evolving as the campaign against the barrier continues.[86] I focus on the limitations of the local campaign, pointing to some of the reasons it took the specific form it did, and trying to assess some of its unintended consequences. More concretely, I try to answer why the legal campaign against the barrier attacked the route of the barrier and the concrete arrangements of the permit regime, rather than the entire project of the barrier, and the implications of this approach. Before I discuss these questions, I will describe the evolution of the legal challenges raised to the Israeli Supreme Court and the jurisprudence the Court developed in dealing with these challenges.

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84. While the technology of the panopticon was invented by Jeremy Bentham, it was Michel Foucault who identified it as pervasive in contemporary institutions such as militaries, prisons, and schools. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 195–202 (Alan Sheridan trans., Vintage Books 1979) (1977) (discussing the role of the panopticon). For a discussion of the barrier as a panoptic-carceral mechanism *see* Bornstein, *supra* note 73, at 107, 121–23 (discussing Palestinians' suffering caused by the barrier).

85. Ruchama Marton & Dalit Baum, *Transparent Wall, Opaque Gates*, *in* AGAINST THE WALL, *supra* note 1, at 212–23.

86. This is so because the Supreme Court did not hesitate, in a number of cases, to instruct the state to dismantle and remove parts of the wall that were built in violation of the law. *See* discussion *infra* notes 87–90 (discussing cases about the wall and the Supreme Court's hesitation to enforce its removal).

A. *The Evolution of the Legal Challenges Against the Barrier*

Since the barrier impacts so many individuals, the legal challenges against it came from many directions and represented differing and often competing interests. At first the petitioners were mostly Palestinians and a variety of human rights groups.[87] Their main goals were to change or relax the permit regime,[88] to change the arrangements of the gates serving Palestinians living in the enclaves,[89] to minimize land confiscations,[90] and to remain on the "Palestinian" side of the barrier (rather than be trapped within an enclave on the "Israeli" side).[91] As construction of the barrier continued, and as the Court's jurisprudence evolved, petitioners with altogether different agendas filed suit.[92]

The second wave of petitioners included Palestinians who actually requested to be included in the Israeli side of the fence after the proposed track of the barrier was threatening to keep them on the Palestinian side.[93] There was more disagreement about this position among Palestinians since it meant that more Palestinian land—rather than less—was to be de-facto annexed to Israel. The petitions revealed the diverse Palestinian interests and the terrible choice that the construction of the barrier forced many Palestinians to make. While for some Palestinians the most important thing was to maintain their close contacts with the rest of the Palestinian community—their families, their fields, and various services they received in the Palestinian territories—for others it was actually more important to remain on the Israeli side. This was so since some of them had strong economic ties with Israelis (Jews as well as Arabs) and they depended on Israeli clients, Israeli services, and, due to the complicated status of Jerusalem, had a strong interest to maintain linkage

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87. The dominant human rights groups who became involved in the campaign, and who later became repeat players were the following: Association for Civil Rights in Israel (ACRI), HaMoked: Center for the Defense of the Individual, Yesh Din: Volunteers for Human Rights, Bimkom: Planners for Planning Rights, and Physicians for Human Rights (PHR).

88. HCJ 9961/03 HaMoked: Center for the Defense of the Individual v. The Government of Israel [pending] 2 (seeking an interlocutory order whereby declaration and orders requiring Palestinians to own permits would not come into effect), *available at* http://www.hamoked.org/items/6653_eng.pdf; HCJ 639/04 The Association for Civil Rights in Israel v. The Military Commander of Judea and Samaria [pending] 1–3 (petitioning for the court to order respondents to appear and show cause why they have not revoked rules and regulations regarding Palestinian permits in the seam zone), *available at* http://www.hamoked.org/items/5431_eng.pdf.

89. *See* HCJ 11344/03 Fayez Salem v. The IDF Commander in Judea and Samaria para. 7 [2009] (Isr.) (unpublished) (petitioning for the court to order respondents to appear and show cause of why permanent crossing points in the separation fence are not opened twenty-four hours a day), *available at* http://elyon1.court.gov.il/files/03/440/113/n59/03113440.n59.htm.

90. *See* HCJ 2056/04 Beit Sourik Village v. The Government of Israel PD 58(5) 807, paras. 9–11 [2005] (Isr.) (petitioners wishing to minimize the land seizure because it will affect their way of life), *translated in* 38 Isr. L. Rev. 83 (2005), *available at* http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf.

91. *See id.* paras. 9, 30 (petitioners arguing that the barrier should heed the Green Line because the route into Palestinian territory would disproportionately disrupt their lives).

92. The analysis of the various waves of petitions partially tracks Chief Justice Barak's description of the various types of petitions submitted to the Court in HCJ 5488/04 Local Council Al-Ram v. The Government of Israel para. 1 (2006) (Isr.) (unpublished), *available at* http://elyon1.court.gov.il/files/04/880/054/A59/04054880.a59.htm.

93. *See* HCJ 2687/06 Arij Rabi'a v. The IDF Commander in Judea and Samaria paras. 1–2 [2006] (Isr.) (unpublished) (petitioning for the court to order the respondent to correct security fence's planned route so that the petitioner's hotel would be located on the Israeli side), *available at* http://elyon1.court.gov.il/files/06/870/026/A02/06026870.a02.htm.

with the Palestinian areas of Jerusalem which remained on the Israeli side of the barrier.[94]

Next to join were Jewish settlers who wished to change the route of the barrier so it would include their settlements on the Israeli side, since the planned route left them on the Palestinian side, supposedly unprotected by the barrier.[95] Among these were commercial petitioners and real estate firms who wished to develop projects in Jewish settlements and who knew that once included on the Israeli side of the barrier their property values would increase, making their projects far more profitable.[96] Other settlers challenged the path of the barrier since it came too close to their settlements. They wanted it moved further into Palestinian territory.[97] Settlers who were left outside the barrier demanded that special pathways connecting their settlements with Israel be built.[98] As I shall explain later, many of the arguments that were originally designed to assist the Palestinians in challenging the route were used at this stage by settlers. Like the Palestinians, settlers argued that the barrier was destroying their "fabric of life" and that its route should be changed in order to protect the integrity of the communities and their linkage to their greater political unit—Israel.[99]

94. *See* HCJ 2687/06 Arij Rabi'a v. The IDF Commander in Judea and Samaria paras. 1–2 (discussing petitioner's claim that they are reliant on Israeli clients and services for their business); *see also* Rassem Khamaisi, *The Separation Wall around Jerusalem/al-Quds: Truncating the Right to the City of the Palestinians*, 43rd ISOCARP Congress 2007, at 12 (describing the movement of Palestinian-Israelis back into West Jerusalem as a result of the barrier).

95. *See* HCJ 3680/05 The Committee of the Settlement of Tene v. The Prime Minister of Israel paras. 1–2 [2006] (Isr.) (unpublished) (petitioning for the court to order the respondents to change the planned route of the barrier to include the northern part of an Israeli settlement that respondents intended to leave on the Palestinian side of the barrier), *available at* http://elyon1.court.gov.il/files/05/800/036/A13/05036800.a13.htm; HCJ 399/06 Susi'—An Agricultural Cooperative for Community Settlement Ltd. v. The Government of Israel paras. 2–4 [2006] (Isr.) (unpublished) (petitioning to change the route of the barrier to include the northern part of an Israeli settlement on the Israeli side of the barrier), *available at* http://elyon1.court.gov.il/files/06/990/003/A04/06003990.a04.htm.

96. *See* HCJ 2645/04 Fares Ibrahim Nasser v. The Prime Minister of Israel paras. 17–18 [2007] (Isr.) (unpublished) (petitioning for the barrier's planned route to include a settlement on the Israeli side of the barrier in order to secure the settlement's future development), *available at* http://elyon1.court.gov.il/files/04/450/026/N54/04026450.n54.htm; HCJ 1361/08 Filadendrum 12 Ltd. v. The IDF Commander in Judea and Samaria para. 10 [2008] (Isr.) (unpublished) (explaining that the barrier's planned route will harm the economic interests of some property holders if the property holders' land is not on the Israeli side of the barrier), *available at* http://elyon1.court.gov.il/files/08/610/013/n05/08013610.n05.htm.

97. *See* HCJ 426/05 The Council of the Village of Bidou v. The Government of Israel para. 7 [2006] (Isr.) (unpublished) (petitioning for the barrier to go farther into Palestinian territory because the settlement's residents were not given adequate security due to the proximity of the barrier to the settlement), *available at* http://elyon1.court.gov.il/files/05/260/004/A29/05004260.a29.htm; HCJ 11651/05 Beit Aryeh Local Council v. The Government of Israel para. 4 [2006] (unpublished) (petitioning that the route be changed because the proximity of the barrier to a school and a road would endanger school children and commuters to potential terrorist attacks), *available at* http://elyon1.court.gov.il/files/05/510/116/A05/05116510.a05.htm; HCJ 2645/04 Fares Ibrahim Nasser v. The Prime Minister of Israel para. 8 (2007) (Isr.) (unpublished) (explaining that there is a need of several hundred meters between the fence and the houses of a settlement for security purposes).

98. HCJ 6379/07 The Council of the Settlement of Dolev v. The IDF Commander in Judea and Samaria para. 12 [2009] (Isr.) (unpublished) (holding that the Minister of Defense and other respondents' decision not to build an access road for 4,000 settlement residents was reasonable and proportional since the security situation made travel of the road impossible), *available at* http://elyon1.court.gov.il/files/07/790/063/s22/07063790.s22.htm.

99. *See* discussion *infra* notes 130–133 and accompanying text.

Soon after, Israeli-Palestinians—Palestinians who are citizens of Israel who chose to live in the eastern neighborhoods of Jerusalem—joined the waves of petitioners and Palestinians who are Israeli residents requested that their neighborhoods be included in the Israeli side of the barrier, so as not to be cut off from the rest of Israel.[100] These petitions reveal another layer of the complexities (not to say pathologies) of the spatial configuration of the Israeli occupation. In June 1967, East Jerusalem was annexed to Israel—an annexation which did not receive international acknowledgment but which was recognized internally—and its residents were offered Israeli citizenship.[101] While most of the Palestinians have rejected this offer, they are still permanent residents of Israel, they are subject to Israeli law, and they are subordinated to the municipal jurisdiction of Jerusalem.[102] They receive municipal services from Jerusalem—though poorer in quality—and are thus often dependent on access to the western parts of the city.[103] Over time, new Palestinian neighborhoods were constructed to the east of the annexation line, attracting Palestinians from other areas in the West Bank as well as East Jerusalem Palestinians forced to move out of the Jerusalem municipal lines due to the extreme housing shortage in East Jerusalem.[104]

An external viewer could hardly tell which Palestinian neighborhoods are part of Israel and which are part of the occupied territories because they are territorially contiguous and economically and socially tied to each other. Yet they are subordinated to entirely different legal systems, and their residents are divided into "protected persons" (the occupied population living under military command), permanent residents of Israel, and some Israeli citizens (Palestinian-Israelis who chose to live there for various reasons such as marriage).[105] Indeed, the entire Jerusalem area is a liminal zone, partly belonging to the Palestinian territories, partly

100. *See* HCJ 5488/04 Local Council Al-Ram v. The Government of Israel paras. 32, 40, 46 [2006] (Isr.) (unpublished) (questioning the legality of the security barrier, the court notes that the question is complicated by the fact that many Israeli citizens are also "protected persons" that wish to remain on the Israeli side of the barrier in Jerusalem), *available at* http://elyon1.court.gov.il/files/04/880/054/A59/04054880.a59.htm; HCJ 6193/05 The Committee of the Residents of Ras Hamis v. The Authorized Commission According to the Property Seizure Arrangement Act paras. 2, 5 [2008] (Isr.) (unpublished) (petitioning the court to divert the route of the barrier on behalf of over 20,000 Palestinian permanent residents of Israeli, so that their refugee camp, located north of East Jerusalem, is on the Israeli side of the barrier), *available at* http://elyon1.court.gov.il/files/05/930/061/n15/ 05061930.n15.htm.

101. *See* Klein, *supra* note 24, at 54 (discussing Israel's annexation of East Jerusalem in 1967); Elodie Guego, *'Quiet Transfer' in East Jerusalem Nears Completion*, 26 FMR 26, 26 (2006) (stating that "[t]he international community, led by the UN, has continuously denounced [Israel's] unilateral annexation" of East Jerusalem).

102. *See* Klein, *supra* note 24, at 61 ("Israeli citizenship was offered to [Palestinians], but only 2700–5000 accepted."); Guego, *supra* note 101, at 26 (noting that few Palestinians accepted Israeli citizenship).

103. *See* Klein, *supra* note 24, at 64, 66, 70 (discussing East Jerusalem Palestinians' reliance on West Jerusalem for municipal services, such as health and sanitation).

104. The housing shortage in East Jerusalem is a result of, among other things, residential patterns, an ongoing refusal of planning authorities in Jerusalem and Israel to grant building permits in East Jerusalem, and of ownership disputes and problems caused by the fact that many Palestinian property owners left Jerusalem during the 1948 war and therefore their property was confiscated by the state. The Palestinians—often relatives of Palestinian refugees—do not acknowledge the legitimacy of this confiscation and therefore make attempts to build on these contested lands. *See* Klein, *supra* note 24, at 63 (discussing the illegal building of Palestinians in and around East Jerusalem).

105. *See East Jerusalem: Legal Status of East Jerusalem and Its Residents*, B'TSELEM: THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES (discussing the legal status of Palestinians in East Jerusalem), http://www.btselem.org/english/Jerusalem/Legal_Status.asp (last visited Mar. 8, 2011).

to Israel. It represents the difficulty—some would say impossibility—of truly and finally separating Israel from Palestine.

The barrier in Jerusalem was built along a route which sometimes tracked the Green Line, sometimes tracked the municipal line, and sometimes disregarded both. This created a chaotic situation. Some East Jerusalem neighborhoods were on the Israeli side of the barrier while some were left on the Palestinian side.[106] Especially for the residents of these areas, the choice was impossible. In many of those neighborhoods, the residents are divided between Palestinians, Israeli residents, and Israeli citizens. Most of them have ties and interests on both sides of the barrier. Here too, the Court had to decide which interests and which rights were to prevail.

B. *The Jurisprudence of the Barrier*

Over the past seven years the Israeli Supreme Court developed a fairly elaborate jurisprudence regarding the barrier. It is comprised of four main principles, each of which rests on a choice made between two sides of well-known conceptual legal dichotomies. A different choice in each of these dichotomous concepts might have resulted in different concrete conclusions (though not necessarily so). In the following sections I specify these principles.

1. Proportionality/Authority

Probably one of the most important principles that the Israeli Supreme Court established early in the *Beit Sourik* case was that Israel had the legal *authority* to construct a separation barrier.[107] This was so despite the fact that its route passed through the occupied territories and required the confiscation of private Palestinian lands. However, the Court held that some parts of the barrier were *disproportionally* infringing on the rights and interests of the Palestinians affected by it, and therefore had to be removed.[108] The dichotomy between authority and discretion, and the general principle that Israel had the legal authority to construct the barrier regardless of the fact that it passed through the occupied territories set the tone for the entire legal campaign against the barrier. The reason that the military commander has authority to do so, the Court opined, is that his actions were not based on political reasons—i.e., a desire to annex Palestinian lands to Israel—but instead rested on security grounds, and thus undoubtedly within the authority, perhaps even the duty of the military commander of an occupied territory.[109]

Indeed, some critics argue that this basic principle prevented any real chance of combating the barrier effectively.[110] From then on, these critics opined, the legal

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106. *Separation Barrier: Route of the Barrier around East Jerusalem*, B'TSELEM: THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, http://www.btselem.org/english/Separation_Barrier /Jerusalem.asp (last visited Jan. 29, 2011).

107. HCJ 2056/04 Beit Sourik Village v. The Government of Israel 58(5) PD 807, paras. 27–32 [2005] (Isr.), *translated in* 38 ISR. L. REV. 83, 98–102 (2005), *available at* http:// elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf.

108. *Id.* paras. 27, 28, 32.

109. *Id.*

110. *See* Gross, *supra* note 38, at 433 ("[T]he HCJ may rescue thousands of Palestinian villagers from

battle against the barrier was bound to be lost or, at most, the principle would serve tactically as an obstructive mechanism, a rearguard device to slow down the pace of the construction of the barrier.[111] The Israeli Court was never willing to reconsider this principled position. In the *Mara'abe* case,[112] soon after the ICJ published its Advisory Opinion, the Israeli Court made an explicit effort to reject the claim that Israel had no authority to construct the barrier—the opposite conclusion to that of the ICJ.[113] The Court did so even though it was clearer this time—more so than in the *Beit Sourik* case—that the barrier also protected Jewish settlements. The Court did not alter its position even after it was brought to its attention that some parts of the barrier not only defended *existing* settlements but also their *future development* plans.[114] While the Court deemed that route to be politically motivated and therefore illegal, it did not change its basic ruling on the authority question: the military was authorized to construct the barrier since it was generally a security-motivated endeavor.[115]

The wedge that the Court used to delve into the legality of the barrier was, therefore, through the doctrine of proportionality, which requires that the means taken to achieve a legitimate goal be "proportional": rationally related to the goal; minimally infringing on rights of individuals affected by the means; and that the harm inflicted on the individuals be "proportional" to the good stemming from the means.[116] This test enabled the Court to minutely dissect every section of the barrier and examine the ratio between the security it promotes and the burden it puts on the individuals impacted by it.[117] In examining the proportionality of the barrier project,

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the unbearable conditions the barrier has created for them, which is indeed significant, but it also legitimizes the occupation and the place of the barrier within it."). For a favorable analysis of the Court's ruling, *see also* Barry A. Feinstein & Justus Reid Weiner, *Israel's Security Barrier: An International Comparative Analysis and Legal Evaluation*, 37 GEO. WASH. INT'L L. REV. 309, 390–451 (2005).

111. This is the position made by the Head of the Legal Department of ACRI, Adv. Dana Alexander. According to Alexander, once the Court rejected the claim that Israel had no authority to construct the barrier within the occupied territories, the Palestinians and human rights groups that represented them were forced to lead rearguard battles. Interview with Dana Alexander, Head of Legal Department, ACRI (Aug.8, 2010) (on file with author).

112. HCJ 7957/04 Mara'abe v. Prime Minister of Israel 60(2) PD 477, para. 19 [2005] (Isr.) ("Our conclusion is, therefore, that the military commander is authorized to construct a separation fence . . ."), *available at* http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf.

113. *See Advisory Opinion*, *supra* note 7, paras. 120–21. For a comprehensive analysis of the ICJ Opinion *see generally* Gross, *supra* note 38; Ian Scobbie, *Words My Mother Never Told Me: In Defense of the International Court*, 99 AM. J. INT'L L. 76 (2005).

114. *See* HCJ 2732/05 Head of the City Council of Azoun, Abd Elatif Khassin v. The Government of Israel paras. 4–6 [2006] (Isr.) (unpublished) (suspending the declaration of invalidity of the eastern route of the barrier after complaint by petitioner that the boundary was not decided for security reasons but rather to expand the settlement area), *available at* http://elyon1.court.gov.il/files/05/320/027/n18/05027320.n18.htm.

115. *See id.* para. 6 (declaring section of the barrier illegal); *see also* HCJ 2056/04 Beit Sourik Village 58(5) PD, para. 27 (establishing that the military has the authority to build the barrier so long as it is not for political reasons).

116. *See* HCJ 2056/04 Beit Sourik Village 58(5) PD, paras. 36–41 [2005] (Isr.) (establishing doctrine of proportionality), *translated in* 38 ISR. L. REV. 83 (2005), *also available at* http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf; HCJ 7957/04 Mara'abe 60(2) PD, para. 30 (citing proportionality doctrine established in Beit Sourik), *available at* http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf.

117. *See* HCJ 2056/04 Beit Sourik Village 58(5) PD, paras. 48–81 (applying the proportionality test to different segments of the barrier outside East Jerusalem).

the Court measured the harm to the Palestinians using international humanitarian law and their rights as protected persons under the law of belligerent occupation.[118]

Despite the hopes of litigants and commentators that the Israeli Court would declare that the military commander had no authority to construct the barrier, it was somewhat naïve and legally unrealistic to hope that out of all the actions that were taken by Israel over the past twenty years in the occupied territories—closures, road blocks, and, most importantly, the establishment of hundreds of Jewish settlements populated by over 200,000 settlers, all in the name of "security" and all found by courts to be within the authorization of the occupying force—the construction of a barrier would be deemed unauthorized.[119] Such expectations relied on a view of "wall exceptionalism"—as if the barrier was so exceptional that the Court would finally see that Israel was not motivated by security considerations but by a desire to annex Palestinian lands. As I argued earlier, while the barrier is indeed unique in some respects, it is a direct continuation of many past Israeli policies, all approved by the Court over the years. It is no surprise—legally speaking—that the construction of the barrier was also deemed authorized.

I argue that the barrier is in fact much more plausibly connected to security considerations than the settlements, also originally approved as necessitated by military needs and security. Indeed, while the route of the barrier is dubious, and is clearly influenced by political considerations (at least in some locations, as the Court found on numerous occasions), there is little doubt that it is also aimed at obstructing terrorist attacks. The huge settlement enterprise, on the other hand, can hardly be seen this way, yet it is still legally justified, at least formally, by the fiction of its security value, as well as by its "temporary" nature, which I explain in the next subpart.

2. Transiency/Permanence

In the many cases handed out by the Court, the transient nature of the barrier was repeatedly emphasized. The barrier, opined the Court—despite its appearance as a permanent and unmovable object—is actually only a temporary anti-terrorist measure.[120] Indeed, the fiction of the temporal nature of the barrier was necessary to overcome the legal problem facing an occupying force. According to the rules of belligerent occupation, it is prohibited for an occupying power to take any permanent actions.[121] As Ben-Naftali notes, this is one of the major purposes of this

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118. *Id.*

119. The issue of the legality of the Jewish settlements in the occupied territories is one of the most perplexing in the history of the Supreme Court's dealing with the occupation. The first time in which the legality of civilian settlements (rather than military posts) was adjudicated is the famous Elon Moreh case of 1977. The Court ruled that Jewish civilian settlements in the occupied territories were legal only insofar as they met the military commander's security requirements. *See generally* KRETZMER, *supra* note 53, at 77–94 (discussing the legal history of the settlements).

120. *See* HCJ 1361/08 Filadendrum 12 Ltd. v. The IDF Commander in Judea and Samaria para. 10 [2008] (Isr.) (unpublished) (explaining the temporary nature of the barrier), *available at* http://elyon1.court.gov.il/files/08/610/013/n05/08013610.n05.htm; HCJ 8222/08 Corp. "Davka" Ltd. v. The IDF Commander paras. 27–28 [2009] (Isr.) (unpublished) (discussing the temporary nature of the security barrier), *available at* http://elyon1.court.gov.il/files/08/220/082/n15/08082220.n15.htm.

121. *See Advisory Opinion*, *supra* note 7, paras. 117–22.

set of international laws, since they were not created to support prolonged occupations.[122]

This ruling stands in stark opposition to the determination of the ICJ, and many critics of the barrier argue that this fiction is hard to maintain in light of its imposing materiality.[123] And indeed, if one wishes to point to a difference between material objects and legal rules, the stability and permanence of the material seems like an obvious one. Undoubtedly, an enormous physical barrier is more permanent than an easily-removable road block. It is also probably more static and harder to change than opening hours of gates or lifting a curfew. However, material barriers—even huge ones—can be moved, sometimes more easily than ideological ones. In this sense, the barrier could theoretically be viewed as transient. Without the required ideological support, walls and other barriers have crumbled in a matter of days.

As I already argued, the ideology which supports the barrier is the ideology of sovereignty, which deems barriers a legitimate expression of territorial integrity and of the sovereign's right to protect its territory from external invasions and interventions. In this sense, although the Israeli barrier passes mostly within the occupied territories and not on the sovereign's internationally recognized border, the ideology of sovereignty still supports the barrier since the barrier is mostly understood to be protecting the security of Israel. As such, the barrier as a whole is justified as a legitimate sovereign project, even if some of its details—the protrusions into the occupied territories—should be amended.

More realistically, to my mind, and what is truly permanent about the barrier is the fact that it is so heavily entangled with the settlements and the ongoing particular ideology of Israeli occupation. This is an ideology of profound separation between Palestinians and Jews, despite their growing entanglement due to the rapid and massive increase in settlements and Jewish settlers in the West Bank. What highlights the connection between the settlers and the barrier are a number of cases in which the Court was confronted with the fact that the specific route of the barrier was designed on the basis of future settlement expansion plans. In these various cases the Court oscillated between two positions: 1) refusing to acknowledge the legality of such a consideration, since "security" means protecting only settlers that are already there, not those who might wish to move there; and 2) distinguishing between expansion plans that were already submitted and were in the process of approval and those that had not started the formal process.[124] But one has to wonder:

122. *See* Orna Ben-Naftali, *'A La Recherche du Temps Perdu': Rethinking Article 6 of the Fourth Geneva Convention in the Light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, 38 ISR. L. REV. 211, 218–20 (2005) (emphasizing that the Fourth Geneva Convention was not intended for prolonged occupation, i.e., Israel's occupation of Palestine for 37 years).

123. *See generally* Weizman, *supra* note 1, at 237–41 (discussing Israel's policy of using the word "temporary" as a means to justify a prolonged occupation); Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551, 604–05 (questioning Israel's attachment of the word "temporary" to alleged security measures).

124. *See, e.g.*, HCJ 2577/04 Taha El Khawaja v. The Prime Minister of Israel paras. 31, 32, 36, 44 [2007] (Isr.) (unpublished) (holding that harm caused to Palestinians was not balanced by security justifications, though the barrier is within the authority of the military commander), *available at* http://elyon1.court.gov.il/files/04/770/025/N56/04025770.n56.htm; HCJ 143/06 Shalom Achsav v. The Minister of Defense para. 1 [2007] (Isr.) (unpublished) (holding that expansion was justified under the first plan but this justification was exhausted once the second plan was approved), *available at* http://elyon1.court.gov.il/files/06/430/001/C31/06001430.c31.htm; HCJ 8414/05 Ahmed Issa Abdalla Yassin,

if any such consideration is illegal, as the first position suggests, why would it matter if the plan was already submitted or not? This ambivalence of the Court keeps open the possibility either to plan very quickly and extensively or to argue that future expansion is part of the security considerations that a military commander is entitled to take.

While physical barriers may be easily moved, people are far less so, especially if they are economically motivated and ideologically committed to staying put where they are. Some of the petitioners tried to point to the temporary nature of the Jewish settlements—another "temporary" creature who proved to be extremely durable—by claiming that if the military commander cannot ensure the safety of the settlers, he can remove them rather than build a barrier which infringed on the rights of Palestinians.[125] Perhaps not surprisingly, the Court did not even address these claims. It was, indeed, more than a formal legal argument. It was a provocation, an ironic reminder to the Court that what begins as a temporary measure, once involved with real people with vested interests and with strong political power and will, might become permanent.[126]

3. Balancing/Trumping

Another important principle set by the Court is that a military commander, operating in a situation of belligerent occupation, is under the duty to balance the rights and needs of the "protected people" (the occupied population) against the army's security needs.[127] This means that he does not have an absolute duty to protect the rights of the occupied. Indeed, the occupied have no "trumping" rights that could prima facie override security needs.[128] Therefore, each military action—or segment of the barrier—requires careful balancing of a multitude of interests and rights by the military and by the Court. Furthermore, the Court has shown

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Head of the Village Council of Bil'in v. The Government of Israel paras. 2, 9 [2007] (Isr.) (unpublished) (holding that respondent must find an alternative route for the security barrier to reduce the harm caused to Palestinian private landowners since the security interest is not proportional to the harm caused to petitioners), *available at* http://elyon1.court.gov.il/files/05/140/084/n33/05084140.n33.htm. For more on the issue of expansion plans of settlements *see* Gross, *supra* note 38, at 420–23.

125. *See* HCJ 639/04 The Association for Civil Rights in Israel v. The Military Commander of Judea and Samaria paras. 47, 52, 60 (pending) (emphasizing that as a temporary measure the barrier disproportionately infringed on the rights of Palestinians and should be removed, or, alternatively, that the settlements themselves should be removed if they cannot be protected without the construction of a barrier). Adv. Avner Pinchuck of ACRI also emphasized this fact in an interview. Interview with Avner Pinchuck, Counsel for ACRI (Aug. 8, 2010) (on file with author).

126. In fact, this argument was not so far-fetched, since the temporary nature of the settlements in the occupied territories was mentioned by the Court, when the disengagement from the Gaza strip was challenged by Jewish settlers. The Court repeated the principle that settlements, in an area held in belligerent occupation, are only temporary. *See* HCJ 1661/05 Regional Council Hof Aza v. The Knesset of Israel 59(1) PD 481, paras. 8–9 [2005] (Isr.) (emphasizing the temporary nature of the settlements in Gaza).

127. *See* KRETZMER, *supra* note 53, at 60 ("The military must strike a fair balance between military needs and humanitarian considerations.").

128. *See* HCJ 7957/04 Mara'abe v. Prime Minister of Israel 60(2) PD 477, para. 25 [2005] (Isr.) ("Human rights, to which the protected residents in the area are entitled, are not absolute."), *available at* http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf; *see also* KRETZMER, *supra* note 53, at 63, 115–43 (describing that the rights of protected people in an occupied area can be infringed, according to accepted doctrine, when "necessary security needs" or "expedient military needs" arise).

increasing willingness to consider not only the rights and needs of the protected people against the needs of the military, but also the rights and needs of Jewish settlers. This increased willingness was implemented through the general application of Israeli administrative and constitutional law in the occupied territories, which requires the army to protect the human rights of settlers.[129]

The increased recognition of settlers' rights, combined with the Court's agreement to review every section of the barrier and the various arrangements accompanying it, spurred a number of challenges by settlers, demanding that the barrier's route be adjusted to their needs to expand and develop, to remain in touch with Israel, and to have easy access to other Jewish settlements in the territories.[130] Especially interesting was the use of the "fabric of life" concept by settlers and the Court. The concept was originally developed by Palestinian litigants in order to demand that the barrier be re-routed in a manner that would allow them to have access to their fields, to their extended families, to their larger community, and to the rest of their "fabric of life."[131] This concept, which at first seemed to slightly shift the balance between security needs and Palestinian rights and interests in favor of the Palestinians, rather quickly became one more element in the growing number of considerations which the Court was willing to take. The Court ruled that settlers, too, had a legitimate interest in maintaining their fabric of life.[132] Honoring the settlers' fabric of life often meant a direct collision with Palestinians' fabric of life, since letting settlers move more easily meant curbing the movement of Palestinians. However, the Court is still reluctant to give this concept the extreme meaning which settlers tried to give it, which is the creation of full territorial and legal contiguity between distant settlements.[133]

4. Details/Structure

Aharon Barak, the former Chief Justice of the Israeli Supreme Court under whose leadership the principles of the Court's jurisprudence regarding the barrier were developed,[134] explained that the difference between the rulings of the Israeli Court and the ICJ was that the latter viewed the barrier as a whole, while the former looked at the concrete details of each section of the barrier.[135] Indeed, looking at the

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129. *See* HCJ 7957/04 Mara'abe 60(2) PD, para. 19 (ruling that "the military commander is authorized to construct a separation fence ... for the purpose of defending the lives and safety of the Israeli settlers"); *see also* KRETZMER *supra* note 53, at 19–29 (discussing the application of Israeli administrative and constitutional law in the occupied territories).

130. *See* discussion *supra* notes 95–99 and accompanying text.

131. *See* HCJ 2645/04 Fares Ibrahim Nasser v. The Prime Minister of Israel paras. 15, 19 [2007] (Isr.) (unpublished) (settlers demanding that their "fabric of life" be protected by the barrier), *available at* http://elyon1.court.gov.il/files/04/450/026/N54/04026450.n54.htm.

132. *See* HCJ 10309/06 Local Council Alfey Menashe v. The Government of Israel para. 21 [2008] (Isr.) (unpublished) (stating that settlers of Alfey Menashe had a legitimate interest in protecting their fabric of life), *available at* http://elyon1.court.gov.il/files/06/090/103/N05/06103090.n05.htm.

133. *See id.* (stating that the barrier is not meant to protect settlements, but only settlers).

134. Justice Barak served on the bench for nearly thirty years, ten of which as its Chief Justice. During the last years of his term, he heard dozens of barrier litigation cases, and he was part of the panels of every important decision regarding the barrier, often writing for the Court. *See* ARIELI & SFARD, *supra* note 40, at 156–60.

135. HCJ 7957/04 Mara'abe v. Prime Minister of Israel 60(2) PD 477, para. 58 [2005] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf.

specific details of a section might give a better idea as to the real purpose of the barrier and its actual affects on its surroundings. It is also true that the ICJ was rather careless about the facts and about the need to take security interests seriously.[136] It is possible that these omissions on the part of the ICJ were a result of its broad perspective—looking at the entire barrier. On the other hand, looking at the details of each and every section might obscure the many cases where considerations other than security were considered. Had the Court looked at the larger picture, these critics argue, it would have seen the barrier as a political project, not a military one.[137]

I doubt that this is the problem with the Court's ruling. Indeed, the initial plan of October 2003 might have revealed the barrier's political nature. De-facto annexing more than 16 percent of the West Bank and locking within it 320,000 Palestinians, including East Jerusalem residents,[138] might seem contrary to the fiction of a "temporary security measure" even for avowed believers in the good faith of the state. However, the initial plan was soon amended and limited, following international pressure and internal political battles. By January 2004—before the Court issued its first decisions on the matter—the route was already much shorter and closer to the Green Line than before, resulting in less de-facto annexing of Palestinian land and locking fewer people in its loopy enclaves.[139]

What is truly missing from the Court's analysis of the barrier is not looking at the greater picture of the barrier, but, as Gross points out, the form and structure of the occupation and how the barrier fits within it.[140] The "larger picture" is not just the barrier, but the way it is connected to the measures taken before it and to the policies that are still underway. This is true even in areas unrelated to the barrier, such as remote settlements, which are ever expanding and ever demanding of more "security" and more "protection." This limits the movement of Palestinians, obstructing their access to their lands, and fragmenting their habitat.[141]

5. Security/Politics

The almost trivial distinction between security considerations and political ones is another crucial element in the jurisprudence of the barrier. This distinction has enabled the Court to authorize the construction of the barrier despite ample evidence that the barrier was also designed according to the political purpose of protecting settlements, including their future expansion plans. While the Court

136. *See* Gross, *supra* note 38, at 399–400 (discussing the "insufficient analysis of the self-defense question in the Advisory Opinion").

137. *See* ARIELI & SFARD, *supra* note 40, at 158–60 (criticizing the narrow approach of the Israeli Supreme Court in addressing only sections of the barrier rather than the entire project).

138. *Id.* at 44.

139. *Id.* at 44–46. Already in the summer of 2003 the US began exerting pressure on the Sharon government to move the route of the barrier onto the Green Line. It resulted in the abolition of various segments of the barrier, freeing from it more than 100,000 Palestinians and large sections of Palestinian lands. *Id.* at 45.

140. *See* Gross, *supra* note 38, at 438 ("The barrier, however, is not only a physical structure. It is part of the structure of the occupation.").

141. *See* Gross, *supra* note 38, at 437–39 (discussing how the barrier is part of a larger system regulating the movements of Palestinians).

prohibited such considerations when they were explicitly presented, it maintained the basic belief that the barrier is a security-driven endeavor. But what made this distinction even more bizarre is the basic principle, already announced in *Mara'abe*, that it is a legitimate military consideration to protect Jewish settlements, regardless of their legality, since the very presence of the settlements in the occupied territories is a political question not for the Court to second guess or review. Yet, how can security considerations be severed from political ones, if security is defined in relation to the annexational aspirations and practices of settlers?[142]

C. *The Missing Legal Argument: Any Barrier is Illegal*

One legal argument was not made by litigants, nor was it mentioned by Courts (the Israeli one or the ICJ): that a barrier is illegal, even when built within Israel proper. It is possible that this argument is so preposterous that it is unsurprising that no one raised it. Yet, for example, the U.S./Mexican wall is constructed purely *within* U.S. territory, and various arguments regarding its illegality have been raised.[143] Recently a legal challenge against the U.S./Mexican barrier was brought before the Inter-American Court, demonstrating that even walls that are built on international borders might pose serious challenges, legal as well as extra-legal.[144] And indeed I think that such a claim would also have been plausible and desirable in the Israeli context.

In this section I first give some arguments as to why such claims should have been raised in the case of the Israeli barrier. I then offer some tentative suggestions as to why in the Israeli/Palestinian context, such claims were not raised, nor were they even contemplated by lawyers or academics who wrote on the topic.[145] Michael Sfard, for example, specifically argues that "[i]n fact, it would have been possible to build a wall or a fence, even a trench with crocodiles, without raising any legal difficulty, especially not an international one. The simple and legal way would have been to construct the 'separation barrier' right on the Green Line."[146] These statements were repeated in petitions submitted to the Court. Furthermore, I argue that the refusal to attack a border-barrier (that is, a barrier which is erected on an internationally recognized border) is not only Israeli-specific, but is in fact a manifestation of the hold that the idea of sovereignty has on our legal—both international and national—imagination and doctrines.

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142. *See* Gross, *supra* note 38, at 422 ("[W]hen Israel makes the protection of the occupation and the settlements part of its security interests, these interests become indistinguishable from its political-annexational purposes.").

143. *See generally* Marta Tavares, *Fencing Out the Neighbors: Legal Implication of the U.S.-Mexico Border Security Fence*, 14(3) HUM. RTS. BRIEF 33, 33–37 (2007); *see also* Denise Gilman, *Seeking Breaches in the Wall: An International Human Rights Law Challenge to the Texas-Mexico Border Wall*, 46 TEX. INT'L L.J. 257 (2011).

144. *See* THE WORKING GROUP ON HUMAN RIGHTS AND THE BORDER WALL, OBSTRUCTING HUMAN RIGHTS: THE TEXAS-MEXICO BORDER WALL (Submission to the Inter-American Commission on Human Rights) (June 2008), *available at* http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/briefing-FULL-SET-OF-REPORTS.pdf.

145. When I raised this question in interviews I have had with some of the leading lawyers of the anti-wall litigation, they admitted that they did not think about this argument. Indeed, they all shared the thought that a wall on the Green Line was clearly legal.

146. *See* ARIELI & SFARD, *supra* note 40, at 145.

1. Why Are Barriers Undesirable?

Though lawyers might think that a border-barrier is unproblematic, for some planners, architects, immigrant rights activists, and environmentalists, a barrier might seem like a terrible idea *even if built exactly on the Green Line or deep within Israeli territory*. This position could be taken for several *non-legal* reasons. First, if one thinks of borders not only as a *separation* between states and societies but also as fluid areas—as places of meeting, of interacting, of osmosis, and of influence—then a hermetic barrier is a disastrous idea. Borderlands in human history were often places of strife and friction, but also of influence, of inter-penetrability, of integration, and of great creativity that stemmed exactly from these rich and plural human interactions.[147] A hermetic barrier puts an end to this. A barrier between Israel and Palestine will decrease the chances of building bridges between the two societies and will curtail the rich encounters that might still take place, though admittedly they currently happen less and less due to separationist policies.

Second, *any* barrier would have a devastating impact on the large minority of Israeli-Palestinians who live within Israel proper (as well as on the non-Israeli ones). Indeed, Palestinian Israelis and non-Israelis are strongly connected in familial, cultural, economic, and historical bonds. For years, even after the occupation, the connections between the two communities remained strong. The barrier—even if it is built on the Green Line—will likely jeopardize these ties and will have harsh consequences on this community.

Third, as long as the occupation continues, a barrier on the Green Line will bring about further injustice and dispossession to the occupied population. As long as Israel controls and significantly uses the resources of Palestine (water reservoirs, waste dumping sites, excavation sites, and more) and allows its citizens to move freely into and out of the territories, depriving the vast majority of Palestinians of all the goods that Israel has to offer is ostensibly unfair. A border-barrier would exacerbate this situation further and would make it far more difficult for the ordinary Palestinian to take a day off and enjoy the beach of Jaffa, the clubs of Tel Aviv, the theater in Jerusalem, and more. Put differently, what makes occupation a severe form of domination is not only the deprivation of political rights from the occupied. Nor is it merely the fact that resources and goods are being transferred from the occupied territories to the occupying state. What makes occupation patently unjust is the fact that the occupied population is unable to enjoy the most basic goods which the occupiers have. An effective barrier exacerbates this problem as it seriously limits the ability of Palestinians to use goods and services, which although it might not be a right, is nonetheless sometimes available to them, as long as they can enter Israel.

Fourth, a hermetic border-barrier will make economic and commercial transactions between Israel and Palestine far more difficult. This might have negative consequences both in efficiency terms as well as in economic justice terms. The flow of goods and of people will be further limited, producing economic waste

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147. *See, e.g.*, Mansoor Akbar Kundi, *Borderland Interaction: The Case of Pack-Iranian Baloch*, 9 IPRI J. 90 (2009), *available at* http://ipripak.org/journal/summer2009/Article9.pdf (describing the effects of social and cultural interactions between populations along the Iran-Pakistan border).

and inefficiencies. It also prevents Palestinians from realizing the various economic opportunities that exist in Israel.

Fifth, a large-scale barrier of this type—no matter its route—will have devastating impacts on the environment. As various environmental activists already argued, the habitats of animals and plants have been divided by the barrier, and even if the wall moved to the Green Line, it would still create detrimental effects.[148] A related objection, made by both laypeople and professionals, is that a barrier is simply an eyesore, an ugly construction that blocks the horizon.[149]

2. The Reasons Why No Such Legal Argument Was Made or Such Rule Determined

However, these arguments were never translated into legal arguments; they were not articulated in legal terminology and no legal doctrine seemed to have been relevant to them. They were, in fact, almost absent from the public and intellectual discussion of the barrier altogether. In this subpart I offer four main reasons for this omission, and I end by pointing to a few disturbing consequences that this omission might have had.

The first reason is the most trivial and obvious: the barrier was simply not designed on the Green Line. Therefore, there was no point in attacking a hypothetical barrier. Especially for lawyers, and according to acceptable legal doctrines, there is no use in addressing a theoretical policy; one is always required to challenge a concrete and real state action. Since much of the barrier passed well within the occupied territories, this is the route that was challenged. Furthermore, the Green Line served as a rhetorical trope for petitioners as well as for the justices. They could always retort that if the state wanted to construct a security barrier, it could do so as long as it strictly adhered to the Green Line. The location of the actual barrier released them from the need to offer an alternative path (in fact, the Green Line *was* the ready-made alternative path), and it was indeed the position of most of the human rights groups that challenged the route of the barrier.[150]

Second, and related to the first point: the legal arguments against a barrier constructed within the occupied territories are much stronger than the ones that might be raised against a barrier on the Green Line. As I have shown in great length, both the ICJ and the Israeli Supreme Court were highly receptive to the legal

148. RON FRUMKIN & TAMAR AHIRON-FRUMKIN, ECOLOGICAL ASPECTS OF THE SEPARATION FENCE IN THE JUDEA DESERT (2007) (Hebrew), *available at* http://www.teva.org.il/_Uploads/dbsAttachedFiles/AdivGalsOpinion.pdf.

149. *See* Dana Gilerman, "Trying to Make the Wall Transparent," HAARETZ, Jan. 4, 2004, http://www.haaretz.com/culture.arts-leisure/trying-to-make-the-wall-transparent-1.118566 (reporting on the joint protest against the barrier by Israeli and Palestinian artists).

150. An important exception to this position was an NGO called Council for Peace and Security—Association of National Security Experts in Israel, which was founded and run by ex-military officers and security experts. *See* HCJ 2056/04 Beit Sourik Village v. The Government of Israel 58(5) PD 807, para. 16 [2005] (Isr.) (discussing the composition of the Council for Peace and Security). Its position in most of the cases it either joined or filed expert briefs in was that in general the route of the barrier should be changed to fit more closely with the Green Line. *See id.* para. 30. Despite its general deference to the military's expertise on security matters, the Court was often willing to entertain the alternative routes of the Council for Peace and Security due to its prestige and reliability as famous and illustrious former soldiers. *See id.* paras. 61, 71 (giving great weight to the opinions of the Council for Peace and Security in deciding whether to reroute the barrier).

arguments regarding reasonableness and proportionality, due to the limitations that are imposed on an occupying power. The need to demonstrate that *only* security considerations were taken into account and the requirement of temporality do not exist if a state operates within its recognized territory.

The third reason is the fairly consensual status that the two-state solution to the Israeli/Palestinian conflict enjoys among the majority of legal actors. When abstractly presented with the idea of a barrier between Israel and Palestine, many human rights lawyers, politicians, academics and perhaps also judges—Israelis and Palestinians—would actually endorse it, even with a degree of enthusiasm. This is because such a barrier would finally demarcate the borders of Israel, a state which has refused to define its permanent and fixed borders since its inception. The barrier, therefore, presented a sudden opportunity to draw the boundary between Israel and Palestine. In the beginning of the construction of the barrier, the staunchest opposition to the barrier did not come from the political left, but from the settler movement.[151] For the latter, the idea to divide Israel and to even cursorily demarcate the Green Line seemed like an anathema. The political right argued against constructing a barrier through territory that they consider a part of Israel.[152] The political left, however, thought it a good idea, as long as it was constructed on the Green Line.[153] According to this position, the barrier did not have to be emblematic of the occupation and its structure of domination and abuse. It could be a way out of the occupation by finally drawing the political line between Israel and the nascent Palestine.[154]

The fourth and most important reason is the idea of sovereignty. Although the concept of sovereignty is an aspect of the partly-defunct Westphalian paradigm, it is still highly influential and dominates international law and theory as well as political theory throughout the world.[155] I believe that it is impossible to understand the jurisprudence of the barrier without recourse to the underlying ideology of international law and international lawyers: the idea that the world is neatly divided into sovereign states, defined and limited by a bounded territory, each of which is free to act within its territorial boundaries as it pleases.[156] According to this

151. *See* Professor Yeshayahu Folman, former Chief Scientist of the Ministry of Agriculture, Association for National Security Experts in Israel, Address at Seminar entitled Aspects of the Security Fence before Council for Peace and Security: The Political Concept of the Security Fence (Nov. 11, 2007), *available at* http://www.peace-security-council.org/doc/Aspects.of.the.Security.Fence.pdf (emphasizing that the original opposition to the barrier came from the settler movement).

152. *See id.* ("For the settlers, [it] was an ideological break in the belief that the Land of Israel was ours and that the creator gave it to us forever.").

153. *See id.* (describing the political left's fear that the barrier would be constructed beyond the Green Line).

154. *See* Michael Bell, *The West Bank Barrier Debate: Concept, Construction, and Consequence*, 1–2 J. OF INT'L L. & INT'L RELATIONS 293, 294–95 (2005) (describing a leftist General's view that the barrier would allow the Israelis "to pursue their own destiny without the crippling burden of the occupation").

155. *See* Chris Tollefson, *Games without Frontiers: Investor Claims and Citizen Submissions under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 144–46 (2002) (describing Westphalian sovereignty and critiques of the theory). *See, e.g.*, Andeas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG 251, 281–84 (2001) (critiquing the understanding and application of Westphalian theory to specific historical periods).

156. Ben-Naftali et al., *supra* note 123, at 553–54 ("The underlying principle of the international legal order rests on a presumption of sovereign equality between states. Current international law understands sovereignty to be vested in the people, giving expression to the right of self-determination.").

perception, one can actually imagine that each piece of land on the globe belongs to a sovereign state, and that there are invisible barriers erected between those states. Since these legal barriers surround every state and create the metaphor of the "black box," that insulates the state from external critique, intervention, and invasion, it makes no real difference if they are complemented by material barriers.

It is this ideological position which leaves lawyers—international ones as well as domestic ones—out of legal arguments when material barriers suddenly appear all around the world. It is this conception which renders the materiality of the barrier transparent. The material barriers become invisible once they are placed on internationally-recognized borders or within national territories. International law has simply nothing to say about it. The doctrine of self-defense only adds to the absence of international legal arguments against such a barrier since it is a recognized right of a state to defend itself by passive means, including border fences.[157]

It is time, I argue, that we part from this conception. I already named a few reasons why barriers—even when they track national borders—are undesirable. Though it is sometimes possible to articulate the harm they produce in terms of human rights, it is important to develop a radical legal critique of barriers. This will enable those who oppose them to argue against their legality even if they do not infringe on any particular human right. The interest that we have in inter-cultural dialogue, in borderland fluidity, and in living in societies which are permeable to (some) illegal immigration and (some) illegal trafficking should also be articulated in legal terms. I want to make clear that I do not suggest that these considerations should always overcome the need for security or protection. However, we need to be more aware of the price we pay when we equate borders with barriers and when we give up on the idea that we can invent legal rules and principles that would prohibit a state's full insularity.

The barrier is indeed the most overt manifestation of the idea of sovereignty. As such, it offers a unique opportunity to critique it. The fact that the Israeli barrier and other walls throughout the world provoke so much attention and cause such opposition demonstrates most vividly the fact that the concept of sovereignty in its crude form has gone bankrupt both positively and normatively. When material barriers are erected right on international borders, they might become invisible as far as international law goes due to the myth of sovereignty. However, they also expose the dark side of this myth—its undesirable normative consequences and its conceptual incoherence. Even when sovereign states do not invade, interfere, or occupy any other sovereign state's territory, they impact them in varying degrees which might have similar effects to infringing on their sovereignty. Domination and control of one state over the other, as already well known, can be obtained through a wide range of actions, which might not formally be recognized as interference with sovereignty, and hence reveals the incoherence of this concept when used in international legal doctrines. The fact that bordering states can have economic, social, cultural, and political ties with one another and then erect a wall in order to prevent various groups of people from moving in between them can, at least sometimes, be articulated as an act of violence.

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157. Clearly, some legal arguments might still be made as far as national law goes. These depend, however, on the specific legal system and on the specificities of the scheme. If, for example, land was taken from individuals in order to construct a barrier, or if the barrier limits the freedom of movement of citizens within their state, these arguments might work in national courts.

3. Some Possible Consequences of the Legal Omission

Trying to evaluate the successes and failures of the legal campaign and the legal doctrines which were developed in the context of the barrier seems like an impossible task. The main problem with such a question is that the goal of the campaign was not entirely clear. Was it to minimize the harm caused to Palestinians? Was it to maximize the Israel's security? Was it to protect the rule of law and adhere to national and international legal norms? Assessing the success of the legal campaign is not the goal of this article. I would like, however, to address several possible consequences of the legal campaign with special emphasis on the consequences that the failure to critique the barrier in general—and not just its route—might have had.

First, it is important to note that during the legal campaign, the barrier's route was radically transformed, and the permits regime was fundamentally changed. The size of the area de-facto annexed shrunk by almost half, and the number of Palestinians trapped between the fences shrunk by roughly the same percentage.[158] Movement in and out of the various enclaves became easier. Yet, the grip of Israel on the territories did not ease. The changes in the barrier—important and impressive as they might be—did not change the ongoing structure of the occupation: growing entanglement between Jews and Palestinians, followed by new methods of separation, both spatial and legal.

Perhaps this is why many of the lawyers who were active in the campaign felt ambivalent about their successes. On the one hand, it is clear that the achievement was phenomenal in that the barrier's route changed dramatically, and the delay in construction provided more time for local and international political action. On the other hand, the fact that the barrier does not fall strictly on the Green Line has resulted in the ongoing violation of Palestinians' human rights.

In addition to the possible failure of the campaign, I would like to briefly address two of its possible negative consequences: legitimation and de-politicization. First, I will discuss the issue of legitimation. When considering possible legitimation effects, one needs to distinguish between two types: consequential legitimation and structural legitimation. The first refers to the possible impact that an action might have on what people actually think about an institution or an activity.[159] In this respect, the question of legitimation would be the following: did the legal campaign make people think that the barrier is more legitimate? Another version would be: do people think that the occupation is more legitimate than before the construction of the barrier? For others more interested in its effect on the Supreme Court, the question might turn on whether people view the Court as a more just institution after its ruling. These questions require empirical research. To answer these questions, one would need to determine whose thoughts on the matter are worth consideration. This might consist of the Israeli public or the international community. Although it would be fascinating to know people's views on the barrier, the occupation, and the Court, I have not pursued this line of investigation. Therefore, I cannot suggest answers to these pertinent questions.

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158. ARIELI & SFARD, *supra* note 40, at 48–49, 226–27.

159. *See generally* Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 THE ACADEMY OF MGMT. REV. 571, 579–81 (1995) (defining consequential and structural legitimacy).

The second type of legitimation—structural legitimation—is no less important. This type of legitimation is not about statistically measurable consequences of a course of action. At stake is whether various actors actually legitimized a certain policy or course of action. Here, the structure of the legal argument regarding the barrier legitimated the construction of a barrier on the Green Line. Indeed, it is not a hypothetical or an empirical claim. It was precisely this argument that was repeatedly made: that a barrier on the Green Line would be legitimate and legal. In light of what I said before, and in light of my ambivalence towards a barrier on the Green Line, I think that this is a price of the anti-wall litigation. This argument does not mean that the litigation and the jurisprudence of the barrier should have been avoided; it merely means that we should take it into account when considering the costs and benefits of a certain campaign and jurisprudence.

A second possible negative consequence of the litigation is that it might have caused some de-politicization of the anti-barrier struggle. As some activists worried before taking the legal route, whenever a social struggle is taken to courts, there is a possible risk that the energies of the struggle would be exhausted in the courtroom, and the political battle would subside in anticipation of a legal remedy. Here, too, there is a real problem in assessing the effect of the litigation since there is no telling whether, without the legal campaign, there would be more or less social and political activity. Legal campaigns not only drain energy, they also galvanize attention, keep the issue alive in the media, and serve as a tool for politicization. Indeed, the anti-barrier political and social battle is far from over. The weekly demonstrations in Bil'in are a prime example of an ongoing social struggle taking place despite the fact that their cause is also being heard in courts.[160]

There is another aspect of de-politicization, however, which did take place during the legal campaign. It is a result of the involvement of many professional NGOs, dealing with planning, health, security and education. These professional NGOs assisted in submitting expert opinions to the Court.[161] While these expert opinions are part and parcel of how litigation around such matters looks like these days, and these opinions proved to be extremely important and practical—pointing to some of the unbearable consequences of the barrier. The expert opinions also de-politicized the question of the barrier and turned into a conversation among experts: security experts, planners, landscape architects and environmentalists, public health scholars, psychologists, and anthropologists. Clearly, one can still listen to the experts and make a normative decision based on these expert opinions, but there is a risk that the professionals will take over the discussion and turn it into a bureaucratic, technocratic debate.

CONCLUSION

The Israeli barrier oscillates between two ideologies: the general ideology of sovereignty and the particular one of the Israeli occupation. It has been legitimated as an expression of national sovereignty as well as an expression of the occupier's right and duty to protect security. While the latter grounds have been attacked in courts based on the specific route of the barrier, the general legitimation of every

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160. Heather Sharp, *Bilin Marks Five Years of West Bank Barrier Protest*, BBC NEWS (Feb. 19, 2010), http://news.bbc.co.uk/2/hi/8523221.stm.

161. *See supra* note 87 for a list of the primary NGOs involved in the legal campaign.

sovereign's right to erect a border-barrier was not critiqued. In fact, I argue, the focus on the nature of the barrier as an occupation-related project has undermined the ability to critique the ideology of sovereignty and to delegitimize the barrier as a whole. The legal campaign against the barrier in Israel/Palestine is still underway. The barrier—both a material entity and a legal creature which operates through a set of prohibitions, permits, licenses, and sanctions—reflects both the deep structure of the Israeli occupation in the West Bank, and a novel reality, that is a uniquely contemporary phenomenon that is observed in states all over the world. Facing the barrier requires us to look at its hybridity—material *and* legal, old *and* new, local *and* global—and develop legal reasoning that will not only look at it through the familiar lenses of national law and international humanitarian law, but as a new phenomenon that merits a radical critique.

From Culture to Barbed Wire: On Houses and Walls in South Africa

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SUMMARY

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INTRODUCTION

Houses and their walls have played a dual role in South Africa throughout the twentieth century. On the one hand, houses were devices that were supposed to shape, discipline, and transform the people living in them. On the other hand, houses were also regarded as sites of a somewhat defiant, autonomous, and indefatigable social and cultural life. The idea that houses are devices and sites for the production of certain kinds of people and a certain quality of social relationships is very old in anthropology. Some of the luminaries of the discipline such as Claude Levi Strauss and Pierre Bourdieu have produced seminal writing on how the house, as an organic institution and a representation of both a familial and cosmological order, is at the heart of everyday moral orders and cultural reproduction.[1] In this broadly organicist model of the house, the focus was on how the interior order of the house related to the rest of the social order and less on how that domestic interior was created by the walls themselves. Here, I shall try to focus on the latter—how the walls of modern houses tend to produce certain kinds of people and dispositions.

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1. *See* Pierre Bourdieu, *The Berber House or the World Reversed*, SOC. SCI. INFO., Apr. 1970, at 151, 157–60; CLAUDE LEVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP 478–83 (Rodney Needham ed., James H. Bell & John R. von Sturmer trans., Beacon Press 1969) (1949).

MODERNITY AND THE MORALITY OF WALLS

It is fair to suggest that with the emergence of modern physical, legal, and moral protocols concerning how to build a house, walls became less permeable than before. They became clearly conceptualized as legal and moral entities that produce and project privacy, and indeed the modern nuclear family form that emerged as a norm in Europe and North America in the late nineteenth century.[2]

In early modern Europe, only those of a certain standing were supposed to have properly built houses, impermeable and defensible in times of war.[3] Their walls expressed social standing and sovereign possession of lineage and property. The poor, on the contrary, were not supposed to close themselves in, but were expected to be available for labor and other services.[4] The infamous enclosure movement in Britain was in many ways an exercise in the right to build and maintain walls, and to use these walls to produce a new class of rich farmers and landowners.[5] A similar close link between social standing, sovereignty, and the nature of walls was, and remains, ubiquitous in India where the distinction between a *pacca* (hard/permanent) house and a *kaccha* (soft/temporary) house transmits not only different assumptions of wealth and social status, but also different moral positions—different qualities of the houses and their people.[6]

The colonial enterprise and the making of populous settler societies in the Americas, Australia, and South Africa democratized the right to build and maintain walls as expressions of private property. Walls and fences were now manifestations of bourgeois "civilization" in need of defense from intrusions by enemies, and more generally "the wilderness," including its native inhabitants. This should be understood in light of two major anxieties marking the nineteenth century. On the one hand, there were new urban landscapes in Europe and North America teeming with peasants turned workers, and "floating populations" uprooted from a rustic existence; on the other hand, there was the challenge of administering millions of people shaped by radically different cultures and religious traditions within the expanding colonial empires.[7] "Primitive people" and fierce natural climes constantly threatened to overwhelm the thin line of colonists and missionaries. The two forms of wilderness, one at home and one in the tropics, were the objects of civilizing

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2. *See, e.g.*, David I. Kertzer, *Living with Kin*, *in* FAMILY LIFE IN THE LONG NINETEENTH CENTURY 1789–1913, 51–61 (David I. Kertzer & Marzio Barbagli eds., 2002); Mary Jo Maynes, *Class Cultures and Images of Proper Family Life*, *in* FAMILY LIFE IN THE LONG NINETEENTH CENTURY 1789–1913, 195–226 (David I. Kertzer & Marzio Barbagli eds., 2002) (discussing important changes in the nineteenth century that led to the creation of the modern nuclear family and a desire for privacy).

3. *See, e.g.*, Kertzer, *supra* note 2, at 8–16 (describing different types of peasant homes in Europe).

4. *See* Maynes, *supra* note2, at 204–05 (discussing how industrialization produced class-segregated residential neighborhoods).

5. *See* Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 253 (1995) (discussing the prevailing thought in sixteenth-century England that village depopulation was directly attributable to continued consolidation of pasture land by wealthy and "greedy" landowners).

6. *See* Romi Khosla, *Architecture of Rural Housing: Some Issues in India*, 11 SOC. SCIENTIST 56, 56, 60 (1983). In Hindi, *pacca* may also stand for 'cooked,' and *kaccha* for 'raw,' which can carry a literal as well as metaphorical meaning in relation to levels of cultivation both soul and body. *Id.* at 60 n.2.

7. *See, e.g.*, JOHN L. COMAROFF & JEAN COMAROFF, OF REVELATION AND REVOLUTION, VOLUME TWO: THE DIALECTICS OF MODERNITY ON A SOUTH AFRICAN FRONTIER 20–21 (1997) (discussing social issues in the context of the colonial state).

efforts that had the house and the meaning of walls at their heart. In Europe, as in the colonial world, the promoters of the modern household and the modern nuclear family were lower middle class clerks, missionaries, and functionaries, asserting their new-found educated respectability whilst haunted by perpetual status anxieties.[8] Within these strata, the modern family was widely regarded as a necessary antidote to the barbarism of the lower classes and the depravity of the aristocracy.[9] The modern family form was also seen as the only way to produce people attuned to the virtues of thrift, modesty, and industry in the tropics—modern, moral and Christian subjects. This double move which the Comaroffs very precisely have termed "the dialectic of domesticity"[10] was inextricably connected to the building of houses—the row houses in Britain's garden cities, and in the colonial world, the neat and rectangular houses erected in the bush.

On the colonial frontier, zealous missionaries identified the lack of physical and functional differentiation inside dwellings that also lacked light and air as the direct cause of the confusion and infantile stage of the native soul.[11] The round dwellings of the natives were models of their souls, sunk in a morass of unhygienic and immoral habits and an inability to make distinction, which blocked the development of any civilization. The answer was not only windows (inviting light and enlightenment) and cleanliness, but also room-separation, rectangular layouts, and straight lines that in their turn would give rise to a more civilized interior life of the mind, and ultimately facilitate the emergence of nuclear and moral modern families.[12] Similar considerations applied to the making of the colonial bungalow in India. There, the colonizers were detained less by reform of the native dwelling, than by methods to keep an overwhelming and largely opaque native world of peculiar cunning out of European lives. Many of the worries centered on how to maintain separation between domestic servants and European women and children.[13] Much effort went into designing the bungalows in ways that ensured privacy, propriety, and differentiation of functions. As in the working class tenements and apartment blocks in Europe and America at the time, internal walls and geometrical precision were the prime material tools of reform.[14] The latter half of the nineteenth century was an age strongly devoted to a kind of materialist pedagogy, a belief that exposure to the certain material objects and structural orders—such as a well planned city, straight roads, and geometrical patterns—would ultimately produce similar desires and dispositions in the body and mind of those not yet civilized.[15] This materialist pedagogy, whose target exactly was everyday movements and routines of bodies, was

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8. *See id.* at 24 (describing a need felt by the "rising bourgeoisies of Europe" to instill proper values in the lower classes).

9. *See id.* at 275 ("[S]avagery had no fixed abode.").

10. *Id.* at 277.

11. *See id.* at 277–78 ("[T]he gauge of a civilized abode was the degree to which its interior spaces were rendered functionally specific and distinct.").

12. *See id.*

13. *See* WILLIAM GLOVER, MAKING LAHORE MODERN: CONSTRUCTING AND IMAGINING A COLONIAL CITY 176–79 (2008) (reviewing the intersection of architecture and domestic anxieties).

14. *See id.* at 159–62 (arguing that the bungalow was a key site for imposing key domestic values in the colonial context).

15. *See id.* at xx–xxii (discussing this pattern as applied to the city of Lahore under British rule).

indeed central to the late colonial bio-political imagination that constituted apartheid.

DOMESTICITY AND DISCIPLINE

Despite certain pretensions towards presenting itself as a coherent ideological project, apartheid was essentially a project of practical engineering that never pursued any systematic ideological persuasion of people of color.[16] It forced and prohibited, but also enabled bodies of color to behave in certain ways by means of infrastructural engineering and urban planning. These policies forced streams of life and movement into racially separate corridors that only met at a few strategic and highly structured points.[17] Whatever objections a comparison between apartheid and that of the contemporary occupied territories in Palestine may run into at a more general level, their kinship at this level of practical engineering through ingenious and detailed infrastructural regulation is as close as it is undeniable.

The purpose of the new townships was to contain and produce docile and easily controlled labor. Yet township spaces were also geared towards fundamental social reform of social life, habits, and family structures. The idea was to mobilize what was as assumed to be a fundamental social habitus based on race and language that would make people embrace the life they had been given as if it was their choice. There were two kinds of townships. On the one hand, there were the African townships which were declared as a form of temporary housing for transient populations that legally and culturally were natives of their respective rural homelands, or quasi-sovereign Bantustans.[18] The idea was that these homelands would be the home of traditional culture, chiefs, natural authority, and proper family life. The townships were merely containers of labor visiting the white world of modernity. However, these distinctions broke down as many families settled permanently in the large townships. In open defiance of urban regulations and the spirit of apartheid, a distinctly modern African urban culture developed in the townships.[19] As a large scale youth rebellion broke out in Soweto in 1976 and lasted throughout most of the 1980s, the explanations offered by the regime and many others was that the cramped conditions in houses in the townships created new and "unnatural" family situations that upset the traditional order and undermined the traditional authority that was supposed to keep the youngsters in check.[20] This

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16. *See* LESLIE WITZ, APARTHEID'S FESTIVAL: CONTESTING SOUTH AFRICA'S NATIONAL PASTS 12 (2003) (documenting the extent to which apartheid's ideological efforts were directed towards whites rather than people of color); *see generally* A.J. CHRISTOPHER, THE ATLAS OF APARTHEID (1994) (documenting the practical and predominantly spatial regulation of populations during apartheid in compelling detail).

17. *See* CHRISTOPHER, *supra* note 16, at 105 (describing the Group Areas Act which was conceived to effect total urban spatial segregation); *see also* JOHN WESTERN, OUTCAST CAPE TOWN 88 (1981) (describing the Durban City Council's "race-space plan" for achieving a segregated pattern and conforming to the Group Areas Act).

18. *See id.* at 122 (noting that the area set aside for Black townships was small, reflecting the government's intention that the Black population remain temporary).

19. *See* CLIVE GLASER, BO-TSOTSI: THE YOUTH GANGS OF SOWETO, 1935–1976 71 (2000) (describing the *tsotsi* aesthetic among young urban men in Soweto, which was heavily influenced by movies, comics, magazines and novels).

20. *See* ADAM ASHFORTH, WITCHCRAFT, VIOLENCE, AND DEMOCRACY IN SOUTH AFRICA 24

"broken" African family without proper homes continues to this day to be a primary explanation of the high crime rates.[21] Social life still revolves around the house and the kind of people it produces.

The other kinds of townships were built for people who at the time constituted the in-between groups, the descendants of Indian indentured laborers and the "Coloureds," the official category for those of mixed race. These groups were given rights to live in the city, albeit only in the circumscribed and defined areas into which they were forcibly moved[22] and later subjected to intense bio-political interventions in the areas of family life, morality, and physical environment.[23] The new houses in the new Indian townships were designed to provide for smaller nuclear families in order to break the dependence on the extended kinship system of the past, and thereby also the dependence on the cultural weight of tradition. The key target was younger women, who were encouraged to educate themselves and take control of the emotional life of their own families.

The new township houses, where hundreds of thousands of mainly working class Indians were forcibly moved in the 1960s, were indeed designed to produce modern families, proper everyday disciplines, and to lift Indians out of their supposedly "insanitary habits."[24] However, these new prefabricated houses had no history, little

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(2005) (discussing youth riots in Soweto).

21. Clive Glaser explored the history of gangs and criminality in Soweto. *See* GLASER, *supra* note 19, at 2. He also traced the evolution of the same criminal structures and networks of young men during the repressive peak of the apartheid period; *see generally* Clive Glaser, *Whistles and Sjambok: Crimes and Policing in Soweto 1960–1976*, 52 S. AFR. HIST. J. 119 (2005). Adam Ashforth studied the underlying insecurities of domestic lives suffused with petty crimes and violence; *see generally* Adam Ashforth, *State Power, Violence, Everyday Life: Soweto* (Ctr. for Stud. of Soc. Change, Working Paper No. 210, 1995) ("The history of Soweto has been marked by a progressive collapse of a state authority, an often violent struggle against representatives of the state . . . a breakdown of paternal authority within families . . . and the general rise in crime and insecurity."); *see* ASHFORTH, WITCHCRAFT, *supra* note 20, at 28 (describing the fractured family structure found in many communities, high levels of unemployment, and pervasive adult financial dependence). Lloyd Vogelman and Gillian Eagle studied domestic violence and rape during the apartheid era; *see generally* Lloyd Vogelman & Gillian Eagle, *Overcoming Endemic Violence against Women in South Africa,* 18 SOC. JUST. J., nos. 1–2, 1991, at 201 (suggesting that societal, political and economic inequalities, sexism, and culture of violence are the key factors for rape and domestic violence); Ntlanta Moeno, *Illegitimacy in an African Urban Township in South Africa: An Ethnographic Note*, 36 AFR. STUD. 43 (1977) (providing a study of the rise in illegitimacy during the mid-1950s to the late 1960s); Women and Children's Rights in a Violent South Africa Pretoria: Institute for Public Interest, Law and Research 3–13 (Mathole Motshekga & Elize Delport eds., 1993).

22. *See* GAVIN MAASDORP & NESEN PILLAY, URBAN RELOCATION AND RACIAL SEGREGATION: THE CASE OF INDIAN SOUTH AFRICANS 98–115 (1977) (describing the townships); FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, SOUTH AFRICA: A COUNTRY STUDY (Rita M. Byrnes ed., 1997) (offering an idea of the number of people affected).

23. John Western investigated the effects of residential segregation on the Coloured community. *See* WESTERN, *supra* note 17, at 150–52 (1981). Steffen Jensen explored general processes of social exclusion in the Cape Town area and traced the ways in which the Cape Town Coloured community staked their claim to dignity; *see* STEFFEN JENSEN, GANGS, POLITICS AND DIGNITY IN CAPE TOWN 100–45 (2008). For Indian South Africans mostly in Durban, see generally ASHWIN DESAI, ARISE YE COOLIES: APARTHEID AND THE INDIAN, 1960–1995 (1996); THOMAS BLOM HANSEN, MELANCHOLIA OF FREEDOM: SOCIAL LIFE IN AN INDIAN TOWNSHIP IN SOUTH AFRICA (forthcoming, Princeton University Press, 2011). On the forced removals of the 1950s, see MAASDORP & PILLAY, *supra* note 22, at 122–28 (studying the South African Indian population both before and after the implementation of residential racial segregation).

24. *See* COMAROFF &COMAROFF, *supra* note 7, at 277–78 (discussing architecture's role in the production of moral values).

relationship with the land they sat on, and none of the deep organic features and functions that are the assumed ground for most anthropological reflections on "the house," its memories, and so on.[25] These were houses and structures of dwellings that bore the indelible mark of governmental fiat. Young women were now pivotal to the family's emotional economy, and the new house was essentially her domain. This presupposed a break with an older house form, in which the domestic sphere was a site of complex intra-and intergenerational relationships between women, and shared memories among women of different generations.[26] One of the only objects that were passed on between generations was the *almirahs*, the large wardrobes supposed to contain the dowry gifts of the bride, her saris, and jewelry that also retained a symbolic link to her natal home.[27] The forced removals and the subsequent remaking of Indian life in the townships reconfigured social life more decisively than in many other cases of draconian bio-political interventions. The houses in the townships were alienated places that gradually, and sometimes painfully, had to be made into proper dwellings. Everyday living in these houses transformed them from elements of the abstract space of the apartheid urban planner into a mundane but domesticated lived space. The new prefabricated houses were made into testaments to the dedication of the men in a household to build and maintain their own distinctive "Indian home," marked by exterior and highly visible adornments, small outbuildings, and extensions, fancy doors, or windows.[28]

The result was a new form of sociality in which the walls of the houses, their doors, and openings became more permeable and porous than had been imagined by the planners. People in the former Indian townships recall the 1960s and '70s as decades of striving and building, but also a time of warm and intense sociality, where houses were open and where doors rarely were locked.[29] While this in some measure is a sentimentalized fiction, it is undeniable that four decades of township life created a space of experience, predicament, and possibility that was shared by the middle class and the unemployed alike; by Hindus, Christian and Muslims; by Tamil, Gujarati and Hindi speakers. The social horizon of the ordinary person in the township, his/her patterns of movement, and social imagination became deeply affected, often determined, by this socio-spatial regime. One became an Indian because one lived an Indian life—went to Indian schools, shopped in Indian shops, went to Indian cinema halls, Indian beaches, and visited family in other parts of the country who also lived in enclaves designated for Indians.

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25. Of the many writings inspired by Levi-Strauss's ideas of "house societies," see generally JANET CARSTEN & STEPHEN HUGH-JONES, ABOUT THE HOUSE: LEVI-STRAUSS AND BEYOND(1995) and ERIK MUEGGLER, THE AGE OF WILD GHOSTS: MEMORY, VIOLENCE AND PLACE IN SOUTHWEST CHINA (2001).

26. This was admittedly always more true of larger and more affluent societies. Joelle Bahloul recounts the tale of her own extended family's home in colonial Algeria. *See* JOELLE BAHLOUL, THE ARCHITECTURE OF MEMORY: A JEWISH-MUSLIM HOUSEHOLD IN COLONIAL ALGERIA, 1937–1962 41–44 (1996).

27. *See generally* Vinay Kumar, *Ruminations of a Young Man on Marriage and Dowry*, MANUSHI, No. 80, 1994, at 29 (offering a broad reflection on the traditional dowry system), *available at* http://www.manushi-india.org/pdfs_issues/PDF%20files%2080/ruminations_of_a_young_man.pdf.

28. *See* CHRISTOPHER, *supra* note 16, at 140 (discussing the ways in which non-whites adapted their government dwellings to their native cultures).

29. *See* WESTERN, *supra* note 17, at 149, 152, 153, 203 (detailing examples of social interaction and the growth of social pride in different communities in Cape Town).

The notion of the "proper" joint and multigenerational Indian family was, in this process, becoming projected onto the community as such—that is, the multilinguistic Indian community coming into being in the townships. The Indian family was now an enduring mythical structure, hovering over the vast township as a cultural matrix of how families really were: a web of intense, warm, and inclusive ties, whether based on a nuclear or an extended kin structure. Regardless of actual practices, this matrix enabled ordinary families to define their mundane modern practices—shopping in shopping centers, entertaining friends, neighborly commensality, watching television and films, going on outings, etc.—were now all specifically "Indian." Apartheid's spatial regime had indeed succeeded in creating cultural walls around racial enclaves that were as effective, or even more effective, than physical ones. Physical walls were mainly built around wealthier white houses, but the cultural walls around the townships were effective in creating a sense of comfort and security which enabled social and familial life.[30] This was also true to a large extent even in the otherwise under-resourced African townships where violence and crime were becoming endemic features of life.

MELANCHOLIC WALLS[31]

This picture changed in the 1990s. A virtual civil war between the conservative Zulu-dominated Inkatha Freedom Party and the ANC had gone on for years prior to the real transition of power in 1994. This had created a deep fear of more generalized violence spilling over into everyday life.[32] The apartheid strictures on movement and dwelling were now falling apart, and millions of impoverished Africans were flowing into urban areas all over the country.[33] The Indian areas became popular sites for settlement for two reasons: they had good English medium schools, and Indian residents did not organize armed vigilante groups chasing squatters out of their area as it was known to happen in white suburbs.[34]

The result was a rapidly changing population. Today many of the former Indian areas have 30–40 percent African residents.[35] Crime rates climbed, although not as dramatically as local lore would have it.[36] The fear of crime blended with racial

30. *See id.* at 203–04 (describing the community and "sense of affective focus and solidarity "the "White walls" created in Mowbray village).

31. I owe this term to Wendy Brown who proposed it during the discussions at the Walls Symposium in Austin.

32. *See* CHRISTOPHER, *supra* note 16, at 166–70 (discussing the conflict between the ANC and the Inkatha movement).

33. *Id.* at 122–25.

34. *See* Thomas Blom Hansen, *Race, Security, and Spatial Anxieties in the Postapartheid City, in* GENDERING URBAN SPACE IN THE MIDDLE EAST, SOUTH ASIA, AND AFRICA 101, 101–02, 116, 119, 121 (Martina Rieker & Kamran Asdar Ali eds., 2008) (discussing complex relations between Whites, Indians, and Africans and specifically mentioning African enrollment in and quality of Indian schools as well as contrasting the violence directed at Africans in white neighborhoods with more protectionist treatment in Indian neighborhoods).

35. *See* Daniel Schensul and Patrick Heller, *Legacies, Change and Transformation in the Post-Apartheid City: Towards an Urban Sociological Cartography*, 35 INT'L J. OF URB. & REG'L RES. 78, 103–04 (2011).

36. Crime statistics specific to urban Indian areas are difficult to identify. Scholars have called various South African crime statistics into question. *See, e.g.*, Anthony Altbecker, *Puzzling Statistics: Is*

prejudice, anxiety, and sheer discomfort among local residents with the new racially mixed public life. Long-standing apprehensions regarding the immorality, drug use and criminality of "bad," or low-life, residents of the township were now projected onto African squatter communities and were instantly racialized. The result was that the meaning of the wall and the house began to change yet again. House owners and tenants began to build walls around their properties. The slightly better-off sectors of the township began to resemble the formerly white neighborhoods, including ubiquitous watchdogs and private security companies. The walls of the house were no longer productive of the township sociality, however unfree this had been in the first place, but protective of Indian bodies, threatened by the intrusion, or even just unwelcome proximity, of African bodies. The primary function of the walls thus moved from what was enclosed and made inside the house to that which was excluded and kept out. "Proper" Indian families are today less produced by what happens inside the house than by the fact that secure walls separate them from the bush—perhaps the richest metaphor in South African social life. During the centuries of colonial rule, the bush connoted a world of natural and dangerous wildness of which African people and African culture had been seen as integral parts.

As in other parts of the country, there was a general securitization of everyday life after 1994.[37] That which previously had been regarded as merely inappropriate or slightly undesirable was now seen as outright dangerous. Doors were increasingly closed, and social contacts were mediated by cellphones and cars. This has, in turn, produced new and clear social distinctions based on levels of security, and on the height of walls. The township had always seen a measure of co-mingling between those who saw themselves as respectable lower middle class or skilled blue collar families, and those regarded as "bad" or deracinated Indians from non-respectable backgrounds.[38] This interaction is today greatly diminished on security grounds. The non-respectable home is now the home without walls around it, and without burglar bars. These houses are indeed nothing but the permeable houses that dominated a few decades ago. Today their permeability is seen as a moral problem, and the residents as morally suspect because of their assumed openness to the street, which today represents Africans and the supposed immorality of African culture. This openness is locally understood in its full metaphorical sense: morally as physical and sexual promiscuity, and socially as people without the proper interiority and discipline that comes with an organized life, distinct and separated from lesser and threatening forms of life.[39] Securitization of houses and life has, in other words,

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South Africa the World's Crime Capital? S. AFR. CRIME Q., March 2005, at 4 (suggesting that since murder rates in South Africa in the 1990s included conflict-related deaths, those rates are artificially inflated in relation to other countries that disregard such deaths in calculating murder rates); *see also* MARK SHAW, CRIME AND POLICING IN POST-APARTHEID SOUTH AFRICA: TRANSFORMING UNDER FIRE 1 (2002) (pointing out that South Africa's crime rates were already high during the apartheid era).

37. *See* Charlotte Lemanski et al., *Divergent and Similar Experiences of 'Gating' in South Africa: Johannesburg, Durban and Cape Town*, 19 URB. F. 133, 143 (2008). *See also* Charlotte Spinks, *A New Apartheid? Urban Spatiality, (Fear of) Crime, and Segregation in Cape Town, South Africa* 26 (Development Studies Institute, London School of Economics, Working Paper Series, 2001) (explaining the movement toward increasing neighborhood security in South Africa after 1994).

38. *See* BHIKHU C. PAREKH, GURHARPAL SINGH & STEVEN VERTOVEC, CULTURE AND ECONOMY IN THE INDIAN DIASPORA 4 (2003) (noting that "[i]n South Africa . . . caste identities have dissolved because, amongst other reasons, their maintenance was of little value to Indian migrants, drawn as they were from the lower ranks of the caste hierarchy").

39. *See* Lindsay Bremner, *Bounded Spaces: Demographic Anxieties in Post-Apartheid Johannesburg*,

simplified social relations by flattening and homogenizing the outside into a zone of potential threat.

In a strange sense, South Africa has almost come full circle from the anxious settler, overwhelmed by nature and seeking to construct domestic order and personhood for themselves and the colonized subjects through houses and walls. Today, the building and meanings of walls have, indeed, been further democratized as a means to create the proper inside of a house and a family. In the wall of the house, property and propriety meet in an anxious embrace. It seems clear that these walls produce their own ostensible cause: the ubiquitous fear which unfortunately also remains one of the most socially creative forces in existence.

10 SOC. IDENTITIES 455, 464 (2004) ("[The wall] frees the world of strangers, of the Other, of disruptions and intrusions. It stabilises the world, brings peace of mind.").

Is Race Neutrality a Fallacy? A Comparison of the U.S. and French Models of Affirmative Action in Higher Education

DANIELLE LEDFORD*

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INTRODUCTION

For the past several decades, an intense debate has swirled around affirmative action programs, especially those with race-based preferences. Proponents of race-conscious programs have argued that they are needed to correct centuries of racial oppression and discrimination, while many opponents push for class-oriented remedies that will compensate for economic inequalities among both underrepresented minorities and whites. In the United States, as current law stands, race-conscious affirmative action is permissible under certain parameters. In the realm of higher education, *Grutter v. Bollinger* allows universities to use race-conscious preference programs for the goal of increasing diversity as a benefit to the educational experience, so long as each applicant is given an individualized assessment in which race is one of many factors.[1] The recent Supreme Court plurality opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, however, raised a serious question about the permissibility under the Fourteenth Amendment's Equal Protection Clause of *any* race-conscious preference program in the educational context, although it left *Grutter* undisturbed for now.[2]

Within the last decade, France has also begun to try its hand at preference programs similar to what Americans would call affirmative action. The most prominent effort is the one made by Institut d'Études Politiques de Paris, often called "Sciences Po," to increase diversity among its overwhelmingly white, privileged student body.[3] The barrier to any effort directed specifically at including France's growing and increasingly marginalized population of immigrants of color is the French constitutional prohibition of any distinction based on race, religion, or ethnic origin.[4] Nonetheless, the Sciences Po program has succeeded in targeting second-generation immigrant youth and giving them greater access to this elite institution.

This article will examine France's experiment with race-blind, class-oriented affirmative action in higher education, and discuss what we can learn from France for application of such a system in the United States. This article does not endorse or reject a race-neutral system. Instead, it examines a particular race-neutral system, pointing out features that might or might not translate to the United States given our recognition of the "diversity as educational benefit" compelling interest, and concludes that a race-neutral system can be just as complicated as a race-conscious framework. The Sciences Po experiment shows us that it would be extremely

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1. Grutter v. Bollinger, 539 U.S. 306, 334 (2003).
2. *See generally* Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).
3. Daniel Sabbagh, *Affirmative Action at Sciences Po*, *in* RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE 246, 246 (Herrick Chapman & Laura L. Frader, eds., 2004) [hereinafter Sabbagh, *Affirmative Action at Sciences Po*].
4. *Id.* at 249.

difficult, given the history of race relations in the United States and the interrelation of race and class, to construct an affirmative action system that is race neutral and yet effectively addresses inequality of opportunity.

Why look at France? There are certainly differences in history between the two countries. France's dogged adherence, at least in principle, to color blindness stems from the egalitarian language of the Constitution and rhetoric of the Revolution.[5] This adherence is also a response to the country's history of anti-Semitism and the Vichy regime.[6] In contrast, race consciousness has been a constant theme in the United States since the days of slavery.[7] The intersection of race and religion is also a potentially bigger issue in France than in the United States, as many of France's immigrants of color are Muslim. Despite these differences, there are common elements as well. Immigrants of color—namely those of North African, Sub-Saharan African, or Caribbean descent—have in the past experienced, and are currently experiencing, similar marginalization as many underrepresented minorities in the United States.[8] Both countries have a legacy of slavery—France was involved in the slave trade, and had slavery in its colonies until 1848[9]—and of legalized marginalization or subjugation of racial groups.[10] Nonetheless, the key reason we should look at France's system is that it is a living, breathing model of race-neutral affirmative action justified in part by the need to increase diversity as an educational benefit, operationalized in an industrialized Western country. While the United States and France are two different countries, there is still some value in taking a look at this model and seeing what could be applicable to the United States, particularly as recent Supreme Court decisions have pushed toward a "color-blind" reading of the U.S. Constitution.

Part I of this article will discuss the status of the educational achievement gap in the United States and outline the current framework for the use of race-conscious affirmative action, as permitted by the *Grutter* decision. Part II will then turn to an examination of the French program, the factors that led to its inception, and the legal framework under which it operates. Part III will discuss some of the arguments that have been raised for race neutrality, and will look at the *Parents Involved* decision and the questions that case has raised. Finally, Part IV will look closely at the Sciences Po program, in light of the arguments for race neutrality and the plurality decision in *Parents Involved*, to identify the potential challenges raised by a race-neutral system and to discuss whether such a system can comport with the goal of achieving meaningful diversity.

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5. *See* Herrick Chapman & Laura L. Frader, *Introduction* to RACE IN FRANCE, *supra* note 3, at 1–2 (discussing the egalitarian goals of the French Revolution).

6. *See* Julie Chi-Hye Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295, 308–20 (2007) (linking the origins of French antidiscrimination law to anti-Semitism and the Vichy regime).

7. Chapman & Frader, *supra* note 5, at 1.

8. For example, recent rioting in France by youth of immigrant origin has drawn comparisons to the race riots in America's past. Suk, *supra* note 6, at 296.

9. Chapman & Frader, *supra* note 5, at 2.

10. Suk, *supra* note 6, at 320–21. France, like the United States, had a "Black Code" (*Code Noir*) to regulate relations between blacks and whites. Chapman & Frader, *supra* note 5, at 4. Additionally, several French ethnologists were among those promulgating theories of biological differences between the races to argue for the inferiority of blacks and other colonized peoples. *Id.* at 4–5.

I. UNITED STATES—AFFIRMATIVE ACTION IN HIGHER EDUCATION AS PERMITTED BY *GRUTTER*

A. *Race and Education—The Achievement Gap*

Despite the economic[11] and educational[12] gains made by blacks over the past several decades, there remains a considerable achievement gap between black and white students, and between students from low-income families and those from wealthier families.[13] This gap is reflected in disparities in performance on standardized tests like the SAT, and differences in grades, dropout rates, and college graduation rates.[14] For example, in the 2006–2007 school year, black[15] college-bound seniors had an average SAT score of 1287 (433 reading, 429 math, 425 writing), compared to 1579 (527 reading, 534 math, 518 writing) for white students.[16] In 2007, blacks made up 13.1% of students enrolled in degree-granting colleges, while white students counted for 64.4% of students enrolled in such institutions.[17]

A number of reasons have been proposed for the achievement gap, from differences in natural and genetic ability,[18] to socioeconomic factors like lack of access to educational, health, and nutritional resources, to factors with a closer relationship to race like negative stereotyping and biased testing.[19] Most experts have given more credence to the latter two explanations, given that the U.S. Census Bureau has reported that 27% of black children under the age of eighteen live in poverty, as compared with 13% of white children.[20]

Many of the recent education reform efforts, such as the No Child Left Behind Act, have centered on closing the achievement gap, with mixed success.[21] A discussion of these reform efforts and their results is outside of the scope of this article. Instead, the next section will focus on race-based preferences in higher

11. As of 1997, 32% of black men and nearly 60% of black women were employed in middle-class occupations. BRUCE P. LAPENSON, AFFIRMATIVE ACTION AND THE MEANINGS OF MERIT 50 (2009).

12. The achievement gaps between black and white students in reading and mathematics narrowed by more than half in the 1970s and 1980s, before widening again throughout the 1990s. PAMELA RIOS MOBLEY & SABRINA HOLCOMB, NAT'L EDUC. ASS'N, A REPORT ON THE STATUS OF BLACKS IN EDUCATION 31 (2008), *available at* http://www.nea.org/assets/docs/mf_blackstatus08.pdf [hereinafter NEA].

13. *Id.*

14. *Id.*

15. "Black" is defined as any non-Hispanic or Latino person "having origins in any of the Black racial groups of Africa." NAT'L CTR. FOR EDUC. STAT., SUPPLEMENTAL NOTE 1: COMMONLY USED VARIABLES (2005), *available at* http://nces.ed.gov/programs/coe/2005/supnotes/n01.asp.

16. NAT'L CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS, TABLE 141: SAT MEAN SCORES OF COLLEGE-BOUND SENIORS, BY RACE/ETHNICITY (2008), *available at* http://nces.ed.gov/programs/digest/d08/tables/dt08_141.asp. The scores are calculated out of a possible 2400. *FAQs About the SAT*, COLLEGEBOARD, http://sat.collegeboard.com/about-tests/sat/faq (last visited Mar. 24, 2011).

17. NAT'L CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS, TABLE 228: FALL ENROLLMENT IN DEGREE-GRANTING INSTITUTIONS, BY RACE/ETHNICITY OF STUDENT AND BY STATE OR JURISDICTION (2008), *available at* http://nces.ed.gov/programs/digest/d08/tables/dt08_228.asp.

18. *See, e.g.*, RICHARD J. HERNSTEIN & CHARLES MURRAY, THE BELL CURVE 105 (1994) (discussing possible links between intelligence, genetics, and success).

19. NEA, *supra* note 12, at 32.

20. *Id.*

21. *Id.*; No Child Left Behind Act of 2001 (Elementary and Secondary Education Act), Pub. L. No. 107-110, 115 Stat. 1425 (Jan. 8, 2002).

education admissions as a method of increasing the number of students of color at top colleges and universities. These preferences generally allow admission of students in the preferred group whose grade point average and standardized test scores would disqualify them if they were not in the preferred group, either by lowering the cutoff for the GPA and scores, or by using race as a "plus" factor that can compensate for lower scores and grades.[22]

*B. Current Affirmative Action Framework—*Grutter *and Recognition of "Diversity" as an Educational Benefit*

The current framework for affirmative action in higher education was laid out by the U.S. Supreme Court in *Grutter v. Bollinger*, where the University of Michigan Law School's race-conscious admissions policy was challenged as violating the Fourteenth Amendment's Equal Protection Clause.[23] The Law School's program sought to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts" by enrolling a "critical mass" of underrepresented minority students.[24] To achieve this end, the Law School required admissions officials to evaluate each applicant's individual qualifications, but allowed officials to consider race "along with all other factors."[25] According to Admissions Directors Dennis Shields and Erica Munzel, the Law School's purpose in considering race to create a critical mass was to "realize the educational benefits of a diverse student body."[26] It was crucial to enroll enough minority students such that the underrepresented students did not feel isolated and did not feel like spokespersons for their entire race.[27]

Barbara Grutter, a white Michigan resident, applied to the Law School in 1996, with an application boasting a GPA of 3.8 and an LSAT score of 161.[28] After she was placed on a waiting list and later rejected, she filed suit in federal court against the Law School and former Dean Lee Bollinger, among others, alleging that the Law School had violated the Fourteenth Amendment by discriminating against her on the basis of race.[29] Grutter's complaint alleged further that she was denied admission to the Law School because the admissions process used race as a "predominant" factor, and thus gave underrepresented minority students "a significantly greater chance of admission than students with similar credentials from disfavored racial groups."[30] The Law School contested this assertion, with Shields testifying that he did not tell admissions officers to admit a certain number or percentage of minority students, but rather that the race of the applicant should be considered alongside other

22. LAPENSON, *supra* note 11, at 28; RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION 65–66 (1996).

23. *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding the "plus factor" system at the University of Michigan School of Law).

24. *Id.* at 315–16.

25. *Id.* at 318.

26. *Id.*

27. *Id.* at 318–19.

28. *Id.* at 316.

29. *Grutter*, 539 U.S. at 316–17.

30. *Id.* at 317.

qualifications.[31] The Law School also submitted evidence on the educational benefits of diversity, stressing that a critical mass of minority students would encourage non-minority students to question established stereotypes and recognize the variety of viewpoints among minority students.[32] Lastly, an expert for the Law School testified that eliminating consideration of race in the admissions process would have a "'very dramatic' negative effect on underrepresented minority admissions," pointing out that while 35% of minority applicants had been admitted in 2000, only 10% would have been admitted if the University had not used race as a factor.[33]

The U.S. District Court for the Eastern District of Michigan ruled in favor of Grutter, holding that the use of race in admissions decisions was unconstitutional.[34] The court held that the Law School's interest in creating a racially diverse class was not recognized as a compelling interest that would justify the use of race-based classification by the Supreme Court's decision in *Regents of the University of California v. Bakke*,[35] and was not a remedy for past discrimination on the part of the Law School.[36] On appeal, the Court of Appeals for the Sixth Circuit reversed, holding that Justice Powell's opinion in *Bakke* did in fact establish diversity as a compelling state interest.[37] Moreover, the appellate court held that the Law School's use of race was narrowly tailored to the goal of achieving diversity, since race was used only as a "potential 'plus'" factor in admissions decisions, and not the sole determining factor.[38]

Upon grant of certiorari, the Supreme Court delved into *Bakke* and later decisions on race-conscious affirmative action programs to evaluate the permissibility of the University of Michigan admissions policy under the Equal Protection Clause. Justice O'Connor, writing for the majority, noted that Justice Powell's opinion stressed that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[39] Justice Powell had also stated in *Bakke* that when government policies "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest,"[40] calling upon the requirements of strict scrutiny—a requirement carefully examined by the *Grutter* court.[41] Justice O'Connor then turned to other Equal Protection Clause challenges to race-based classifications:

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31. *Id.* at 318.

32. *Id.* at 319–20.

33. *Id.*

34. *Id.* at 321.

35. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (plurality holding that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."). The opinion of Justice Powell, which the *Grutter* court called the "touchstone for constitutional analysis of race-conscious admissions policies," held that race-conscious policies could not be used to remedy societal discrimination, but could be used for "the attainment of a diverse student body." *Id.* at 306–07, 310–11, *quoted in Grutter*, 539 U.S. at 323–24.

36. *Grutter*, 539 U.S. at 321.

37. *Id.*

38. *Id.*

39. *Bakke*, 438 U.S. at 289–90, *quoted in Grutter*, 539 U.S. at 323.

40. *Bakke*, 438 U.S. at 299, *quoted in Grutter*, 539 U.S. at 323.

41. *Grutter*, 539 U.S. at 326.

> Because the Fourteenth Amendment "protect[s] *persons*, not *groups*," all "governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed."[42]

Under this framework, the Equal Protection Clause guarantees each individual the equal protection of the laws; as a result, any race-based classification—regardless of whether it is meant to grant preference to a historically disadvantaged group—is subject to strict scrutiny. As such, the classification will only survive if it "is necessary to further a compelling governmental interest" and if the "narrow-tailoring requirement is also satisfied."[43]

Applying strict scrutiny to the University of Michigan Law School's race-conscious policy, Justice O'Connor agreed with the Court of Appeals in holding that the state did have a compelling interest in assembling a diverse study body at the Law School.[44] After pointing out that the Court has traditionally given institutions of higher education some deference in their academic decisions, Justice O'Connor noted the value in having a variety of viewpoints represented in a university setting, where students are expected to engage in intellectual exercise and are to be prepared for entrance into a diverse workforce and society.[45] Because the Law School had determined in its professional expertise that diversity of viewpoints and experience held important educational benefits, Justice O'Connor held that attaining a diverse student body was a compelling governmental interest.[46]

Justice O'Connor then turned to the actual means of achieving the goal of a diverse student body, and held that the Law School's policy was sufficiently tailored to pass strict scrutiny.[47] Since the Law School did not use a quota system, but instead considered race as a "plus" factor in the admissions decision, the policy was acceptable because it allowed for the *individualized* assessment of each applicant.[48] The crucial point was the consideration of each individual's qualifications; since the Equal Protection Clause guarantees to each individual the equal protection of the laws, each applicant was entitled to an assessment of his or her record based on personal attributes, not simply on identity with a chosen group.[49] A rigid quota does not pass constitutional muster because it does not permit individualized assessment but simply denies or extends opportunities based on racial identity.[50] While the Law School did have somewhat of a target in mind with its "critical mass" goal, Justice O'Connor held this did not amount to a quota because the actual number of students accepted each year fluctuated in such a way that was inconsistent with a rigid quota.[51]

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42. *Id.* (quoting Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995)).
43. *Id.* at 327.
44. *Id.* at 328.
45. *Id.* at 329–30.
46. o *Id.* at 333.
47. *Grutter,* 539 U.S. at 334.
48. *Id.*
49. *Id.* at 326, 334, 337.
50. *Id.* at 335.
51. *Id.* at 336.

Moreover, the Law School's program did not automatically award students a bonus solely because of race and "did not contemplate that any single characteristic [such as race] automatically ensured a specific and identifiable contribution to a university's diversity."[52] For these reasons, the Law School's policy was upheld as narrowly tailored to meet the compelling state interest in creating a diverse student body, and thus did not violate the Fourteenth Amendment.[53] As a result, race-conscious admissions policies are permissible in higher education, provided that the programs consider race as one of many factors in making an individualized assessment of each candidate.

II. FRANCE—THE SCIENCES PO EXPERIMENT IN "CLASS-BASED" AFFIRMATIVE ACTION

A. *The Status of Immigrants of Color in France*

Immigrants make up approximately seven million of France's sixty million inhabitants.[54] Out of these seven million immigrants, approximately five million are Muslims from North Africa, giving France Europe's biggest Muslim population.[55] Many of these immigrants of color—particularly the North Africans, along with Sub-Saharan Africans[56]—have been segregated into *banlieues*, rough suburbs surrounding Paris and other major French cities and filled with housing estates similar to the housing projects in the inner cities of the United States.[57] Much like the underprivileged areas in the United States, the *banlieues* are plagued with "a toxic concentration of social problems: joblessness, poverty, illegal immigration, organised crime, family breakdown and a lack of parental authority."[58] There are also complaints of harassment by the suburban police.[59] Former Prime Minister Dominique de Villepin described the plight of the *banlieue* youth as "in a state of social, family, and educational breakdown."[60]

Most crippling is the lack of social mobility for many second-generation immigrants of color. This is due largely to the high rates of unemployment among

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52. *Id.* at 337 (quoting Gratz v. Bollinger, 539 U.S. 244, 271 (2003), where the Court invalidated the University of Michigan undergraduate school's admissions policy that automatically awarded a set number of "points" to applicants from underrepresented minority groups).

53. *Grutter,* 539 U.S. at 343.

54. Charles Bremner, *'Colour-Blind' France is Failing its Immigrants*, TIMES (LONDON), Nov. 25, 2004.

55. *A Survey of France: Minority Report*, ECONOMIST, Oct. 28, 2006, at 11, 11 [hereinafter *Minority Report*]. Because of the ban on ethnicity-based census taking in France, numbers on the Muslim population cannot be exact. *France's Ethnic Minorities: To Count or not to Count*, ECONOMIST, Mar. 28, 2009, at 62.

56. *Minority Report, supra* note 55, at 11.

57. *Id.*; *see also* Keith Richburg, *The Other France, Separate and Unhappy*, WASH. POST, Nov. 13, 2005, at B01 (describes the separation of minorities in the *banlieues* from central Paris and the similarities of French racial relations to 1960s America). Unlike in the United States, it is the suburbs that are associated with lower-income areas; most of the wealthy live in the inner cities.

58. *Minority Report, supra* note 55, at 11.

59. *Id.*

60. Mark Lander & Craig S. Smith, *French Officials Try to Ease Fear as Crisis Swells*, N.Y. TIMES, Nov. 5, 2005, at A5.

banlieue inhabitants, a condition that has been tied to discrimination in hiring.[61] A University of Paris 1 Panthéon-Sorbonne study found that curricula vitae (CV) with "white-sounding" French names received five times more invitations to interview than CVs with North African names, where the CVs were otherwise identical.[62] The French education model, discussed in further detail below, also presents many barriers to upward mobility. Additionally, the upper echelons of French society are overwhelmingly white, with the exception of sports and pop culture figures,[63] like the soccer star Thierry Henry.[64] As of 2005, there were no members of parliament who were of non-white immigrant origin.[65] When a black Frenchman was selected as the evening news anchor for France's top television station, it made front-page news.[66]

The tension and unrest created by this environment erupted in 2005, and twice again since then, causing riots in the *banlieues*. The first riot in the fall of 2005 lasted several weeks and garnered international attention.[67] Cars were burned, Molotov cocktails were thrown, and property was destroyed.[68] Attacks were made on the police, who retaliated with tear gas.[69] There were some efforts to link the rioting with the spread of radical Islam, but a report by the domestic intelligence-gathering service, Renseignements Généraux, found that Islamic extremism had "no role in setting off the violence or in fanning it."[70] Instead, the report concluded, the riots were the result of the social problems concentrated in the *banlieues*.[71] While many of these problems continue, the rioting helped turn attention on both the national and international levels toward the issues facing France's underprivileged and unintegrated minority youth.[72]

B. *The French Educational System and the* Grandes Écoles

The socioeconomic problems facing immigrants are compounded by France's highly stratified educational system; elite educational opportunities are, for the most part, open only to the socioeconomic elite.[73] Like most of Western Europe, the French school system slots children into one of two tracks, vocational or higher education, at an early age.[74] This restricts the upward mobility of many students,

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61. *Minority Report, supra* note 55, at 12.
62. *Id.*
63. *Id.*
64. Henry, the son of a Caribbean immigrant, grew up in the Paris *banlieue* Les Ulies. Andrew Anthony, *Thierry Henry, You're Having A Laugh*, THE OBSERVER, Oct. 3, 2004, *available at* http://www.guardian.co.uk/football/2004/oct/03/newsstory.sport1.
65. *Minority Report, supra* note 55, at 12.
66. *Id.*
67. Landler & Smith, *supra* note 60; *Minority Report, supra* note 55, at 11.
68. Landler & Smith, *supra* note 60.
69. *Id.*
70. *Minority Report, supra* note 55, at 11.
71. *Id.*; Richburg, *supra* note 57.
72. *Minority Report, supra* note 55, at 11.
73. Craig S. Smith, *Elite French Schools Block the Poor's Path to Power*, N.Y. TIMES, Dec. 18, 2005, at A8.
74. *Id.*; Rana Foroohar, *This Rampart is Rising*, NEWSWEEK, Aug. 21, 2006, *available at* http://www.newsweek.com/2006/08/20/this-rampart-is-rising.html.

particularly as the division tends to fall along class lines.[75] The stratification is even more pronounced when students reach the level of higher education. While France guarantees a place at a university for all students who successfully graduate from high school and pass the *baccalauréat*,[76] the highest echelon of schools is open only to those students who satisfy another set of rigorous criteria.[77] These elite schools, called *grandes écoles*, have produced the overwhelming majority of French business leaders, politicians, and leading scholars.[78] The socioeconomic makeup of the *grandes écoles* is heavily skewed toward the wealthy. In 1998, 81.5% of the students admitted to Sciences Po were upper or upper-middle class: 53.5% had parents who were high-level managers or academics, and 28% had parents who were entrepreneurs or other professionals.[79] Less than one percent of the students were from families of working-class backgrounds.[80] Because the *grande école* admissions process involves an extremely difficult and competitive exam that requires up to two years of specialized preparation, wealthier students have an advantage because their parents can afford elite high schools and private tutors.[81] Since whites make up most of the upper classes, the *grandes écoles* are predominately white.[82] The overall effect is a system that perpetuates the concentration of wealth in the upper echelons of society, with little chance for mobility for those on the bottom.

C. *The Sciences Po Experiment*

There have been recent educational reform efforts aimed at widening access to the *grandes écoles*. One of the most successful—and controversial—was the brainchild of Richard Descoings, the director of Sciences Po. In September of 2001, Sciences Po's board of directors passed several resolutions aimed at recruiting a more diverse student body.[83] Resolutions 2 and 3 of September 3, 2001, authorized

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75. Smith, *supra* note 73.

76. Pascal Riche, *A Talk with Richard Descoings, Head of Sciences Po*, 9 EUR. AFF. 124, 125 (2008). The *baccalauréat* is the qualification given to students who successfully complete high school. Marion Selz and Claude Thélot, *The Returns to Education and Experience: Trends in France over the Last Thirty-Five Years*, 59 POPULATION (ENG. ED.) 9, 26 (2004).

77. Riche, *supra* note 76, at 127.

78. Examples of *grandes écoles* graduates include former President Jacque Chirac, former Prime Minister Dominique de Villepin, and fashion designer Christian Dior. Aisha Labi, *Lessons From—Quelle Horreur!—Les Americains*, CHRON. OF HIGHER EDUC., Sept. 2, 2005, at A66. Current President Nicolas Sarkozy is a graduate of Sciences Po. Biography of Nicolas Sarkozy, *Président de la République française* [The President of the Republic of France], *available at* http://www.elysee.fr/president/la-presidence/le-president-de-la-republique/nicolas-sarkozy.482.html (last visited Mar. 15, 2011). Additionally, half of the chief executives of France's top 200 companies graduated from Sciences Po. Daniel Sabbagh, Affirmative Action *à la Française*: A Color-Blind Option or Subterfuge? 2 (unpublished manuscript) (presented at the annual meeting of the American Political Science Association) (Aug. 27, 2003), *available at* http://convention2.allacademic.com/one/apsa/apsa03/ (follow "search papers" hyperlink; then select "author"; then search "Sabbagh") [hereinafter, Sabbagh, A Color-Blind Option or Subterfuge?].

79. Sabbagh, A Color-Blind Option or Subterfuge?, *supra* note 78, at 2.

80. *Id.*

81. Labi, *supra* note 78.

82. *Id.*

83. Cour administrative d'appel [CAA] [court of administrative appeals] Paris, Nov. 6, 2003, No. 02PA02821, at 2 (not published in Rec. Lebon), *available at* http://www.conseil-etat.fr/cde/fr/base-de-jurisprudence/ (select "Arrêts des cours administratives d'appel"; then search "02PA02821") [hereinafter *National Inter-University Union* case].

Sciences Po to implement (on an experimental basis) a new admissions process,[84] dubbed *Procédure Conventions Education Prioritaire* (hereinafter "CEP procedure").[85] This process would be open to students from high schools in certain underprivileged government-created "educational priority zones" (*zones d'education prioritaire,* or ZEPs) that would form partnerships with Sciences Po,[86] and would allow the admissions committee to assess certain students on an oral examination.[87] Each high school would hold a competition and send the winners to Sciences Po for an all-day interview in front of a panel of faculty and distinguished alumni.[88] The students would still be evaluated based on their academic record and receipt of the *baccaleuréat*, and the assessment of the oral interview would be based on certain criteria established in the resolutions.[89] Once admitted to the university, ZEP students would be subject to the same rigorous requirements as students admitted through the traditional process.[90] To aid in the transition to such an elite institution with its own unique educational environment, the students would be given the option to receive special tutoring, and would be offered financial aid to help defray the cost of this educational experience.[91]

The program has grown substantially in subsequent years, and has been successful at attracting more underprivileged students. In the first year of the program, Sciences Po created agreements with seven high schools,[92] and eighteen students were admitted through the CEP procedure.[93] Currently, Sciences Po is partnered with seventy-four high schools, and has admitted 603 ZEP students since the program began.[94] Four classes of ZEP students have graduated, with academic results "comparable" to students admitted through the regular process.[95] In addition, students at the partner high schools in the underprivileged areas—in some of the very sites of the 2005 riots—now see Sciences Po as a realistic destination: "Sciences Po has spread a new attitude [in the schools], as younger students watch their friends and older siblings go off to a top university."[96]

D. *France's "Race-Blind" Legal Framework and Challenge to the Sciences Po Experiment*

Descoings's program has been criticized as an exercise in affirmative action—or, as the French call it, *discrimination positive*—a policy that has, at best, raised feelings

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84. *Id.* at 2–3.

85. *Procédure Conventions Education Prioritaire*, INSTITUT D'ÉTUDES POLITIQUES DE PARIS (Mar. 24, 2011, 1:43 PM), http://admissions.sciences-po.fr/en/premiercycle-cep.

86. *National Inter-University Union* case, *supra* note 83, at 2.

87. *Id.*

88. Frank Browning, *'Sciences Po' Experiments with Affirmative Action*, NPR (Nov. 22, 2005), http://www.npr.org/templates/story/story.php?storyId=5023185.

89. *National Inter-University Union* case, *supra* note 83, at 2.

90. Labi, *supra* note 78.

91. Sabbagh, A Color-Blind Option or Subterfuge?, *supra* note 78, at 3.

92. INSTITUT D'ÉTUDES POLITIQUES DE PARIS, *supra* note 85.

93. Elise S. Lagan, *Assimilation & Affirmative Action in French Educational Systems*, 40 EUR. EDUC. 49, 55 (2008).

94. INSTITUT D'ÉTUDES POLITIQUES DE PARIS, *supra* note 85.

95. *Id.*

96. Browning, *supra* note 88.

of ambivalence among the French people.[97] Current President Nicolas Sarkozy promised during his 2006 election campaign to institute some affirmative action policies, but has done little to follow through on his word.[98] Resistance to formal affirmative action programs has been heavy, with some critics deriding the policy as "American,"[99] a serious insult to some French. Moreover, affirmative action seemingly contradicts the foundational tenets of the Republic; the motto of the French Republic is "Liberty, Equality, Fraternity,"[100] and the French, at least in theory, take very seriously the value of merit over social hierarchy.[101] In January of 2004, then President Jacques Chirac admitted that he had told his ministers to appoint someone of "immigrant origins" to the position of prefect (head) of one of France's departmental regions, although he had publicly stated months earlier that it would not be "acceptable" to "appoint people based on their origins."[102] Following the selection of Aissa Dermouche, who is of Algerian descent, Chirac and his administration dodged the question of whether they had considered Dermouche's race, saying that the appointments were based on merit, "whatever the origins of the persons involved."[103] At the same time, Sarkozy (who was then Chirac's interior minister) and other ministers suggested that some affirmative measures designed to grant jobs and educational opportunities might be necessary in order to address structural inequalities, though they avoided using the term "positive discrimination."[104]

It is important to note that with the exception of Chirac's comment about finding a prefect of "immigrant origins," much of the conversation around affirmative action does not explicitly mention race or ethnicity, even though it is obviously on everyone's mind. When discussing the Sciences Po experiment, advocates of the program vehemently deny that race is a primary consideration and insist that there is no "uniformed quota system" based on ethnic origin.[105] The reason is that France is officially, legally, a race-blind country. The French Constitution guarantees "equality of all citizens before the law, without distinction of origin, race or religion."[106] This provision has been interpreted as essentially banning all race-

97. *Id.*

98. John Vinocur, *France Fails to Talk About the Real Issue*, N.Y. TIMES, Jan. 18, 2010, *available at* http://www.nytimes.com/2010/01/19/world/europe/19iht-politicus.html?scp=1&sq=France%20Fails%20to%20Talk%20About%20the%20Real%20Issue&st=cse. Sarkozy had also endorsed affirmative action years earlier, stating: "There are parts of France and categories of French citizen who have loaded on their heads so many handicaps that if we do not help them more than we help others, they will never escape." Elaine Sciolino, *France Seems to Try Acting Affirmatively on Muslims*, N.Y. TIMES, Jan. 14, 2004, at A9.

99. Labi, *supra* note 78.

100. 1958 CONST. art. 2 ("La devise de la République est 'Liberté, Égalité, Fraternité.'").

101. *See* Amelia Gentleman, *France Rules on Elite Education for Poorest*, GUARDIAN, Nov. 6, 2003, at 19 (stating that Sciences Po "insists that . . . students are accepted on merit alone").

102. Sciolino, *supra* note 98.

103. *Id.*

104. *Id.* Sarkozy proposed the term "republican voluntarism," suggesting that these measures should be taken in the best interest of the Republic. Then Prime Minister Jean-Pierre Raffarin endorsed the term "positive mobilization" because he did not think there should be some acceptable forms of "discrimination," as distinguished from impermissible forms of discrimination. *Id.*

105. Browning, *supra* note 88. André Today, the principal of one of the ZEP high schools partnered with Science Po, states, "We're not for quotas . . . . If there's a quota, I would refuse. Ten percent for the Arabs, 10 percent for those from Mali, 10 percent for the gays—I am for the recognition of merit of each student, no matter the religious or ethnic heritage. Only merit should count." *Id.*

106. 1958 CONST. Art. 1 ("La France est une République indivisible, laïque, démocratique et sociale.

consciousness—even the French census does not report data by race, religion, or ethnicity.[107] Additionally, secondary legislation has forbidden racial and religious discrimination—in both the public and private sectors[108]—and even imposes criminal sanctions for such discrimination in certain cases.[109]

It is under this framework that the Sciences Po program was challenged in the Paris administrative courts.[110] Soon after the first students were enrolled under the CEP procedure, l'Union Nationale Inter-Universitaire (hereinafter l'UNI), the leading right-wing student group, filed suit against Sciences Po, challenging the program's adherence to the principles of equality guaranteed under the French Constitution.[111] The Paris administrative tribunal dismissed l'UNI's complaint, deciding that the group did not have standing to challenge the Sciences Po admission policy.[112] On appeal, the Paris court of administrative appeals determined that l'UNI did have proper standing, and thus heard the case on its merits.[113] At issue were Resolutions 2 and 3 of September 3, 2001, adopted by the Sciences Po Board of Directors.[114] In July of 2001, the French Constitutional Council introduced a new article to the Education Code, granting Sciences Po the ability to develop, on an experimental basis, a new policy aimed at increasing the diversity of its student body, provided that the measures taken were based on objective criteria that would preserve equal access to education.[115]

Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion.").

107. Sciolino, *supra* note 98.

108. Loi 72-546 du 1 juillet 1972 relative à la lutte contre le racism [Law 72-546 of July 1, 1972 on the Fight against Racism], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 2, 1972, p. 6803 (prohibiting, *inter alia*, racist speech and the denial by public authorities of a benefit or a right on grounds of racial, religious, or ethnic affiliation); *see also* Loi 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe [Law 90-615 of July 13, 1990 for the Suppression of any Racist, Anti-Semitic or Xenophobic Acts], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 14, 1990, p. 8333 (revision of the 1972 law, prohibiting discrimination based on membership or non-membership of an ethnicity, a nation, a race, or a religion) ["Toute discrimination fondée sur l'appartenance ou la non-appartenance à une ethnie, une nation, une race ou une religion est interdite."].

109. *See* CODE PÉNAL [C. PÉN.] arts. 225-1–225-3, *available at* http://195.83.177.9/code/liste.phtml?lang=uk&c=33&r=3716 (imposes a sentence of three years' imprisonment and a fine of 45,000 euros for certain forms of discrimination, including discrimination in employment).

110. *See National Inter-University Union* case, *supra* note 83 (*l'UNI*, an organization responsible for defending both the individual and collective rights, and moral and material interests of students, demanded the repeal of Science Po's resolutions 2 and 3, establishing and implementing the CEP procedure).

111. Sasha Polakow-Suransky, *Crème de la Crème,* LEGAL AFF., July–Aug. 2004, *available at* http://www.legalaffairs.org/issues/July-August-2004/story_suransky_julaug04.msp.

112. *National Inter-University Union* case, *supra* note 83, at 2.

113. *Id.*

114. *Id.*

115. *Id.* at 2; *see also* Loi 2001-624 du 17 juillet 2001 portant diverses dispositions d'ordre social, éducatif et culturel [Law 2001-624 of July 17, 2001 on Various Provisions of Social, Educational and Cultural Order], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 18, 2001, p. 11496 (creating CODE EDUCATION art. L612-3: "[An institution] can adopt admission procedures containing specific provisions aimed at ensuring a diverse recruitment of high school students." ["Il peut adopter des procedures d'admission comportant notamment des modalités particulières destinées à assurer un recrutement diversifié parmi l'ensemble des élèves de l'enseignement du second degré."]).

Pursuant to the new article, the Sciences Po Board of Directors adopted several resolutions. Resolution 2 established the experimental CEP procedure, detailing the selection process within each high school, the formation of a jury to evaluate each student within the high school competition, the oral interview process, and the criteria for assessment of the interview.[116] It also specified that the program would rely on agreements with certain high schools within the ZEPs, as defined by the Minister of Education in 1981.[117] Resolution 3 gave effect to Resolution 2 by authorizing the Director of Sciences Po to create the agreements with ZEP high schools on the basis of the objective criteria for priority status outlined by the Minister of Education.[118] It also provided that the agreements were renewable every five years, and that the program had a predicted lifespan of ten years.[119] The appellate court first evaluated Resolution 2 and held that since the Resolution precisely defined the objective criteria used to select the students in both admissions processes and looked to the government-defined ZEPs to establish the targeted areas, Resolution 2 did not violate any laws.[120] The court, however, invalidated Resolution 3, because it was not specific enough in determining which schools within each ZEP would be partners, whether private schools located in the ZEPs would be eligible for the program, and how the success of the experiment would be evaluated.[121] The court also held that the expected ten-year duration meant that the program was not experimental.[122] In sum, the court upheld the program to the extent that it was based on objective selection criteria that would not foreclose certain schools within the ZEPs from participating.[123] Only minor modifications have been made to comply with the ruling, and today the program stands much as it did in its original form.[124]

III. THE DEBATE OVER RACE-NEUTRAL, CLASS-BASED AFFIRMATIVE ACTION

For well over a decade, U.S. politicians, scholars, and laypersons have debated the merits and failings of affirmative action. One contentious area, even among those who are proponents of some type of redistributive or remedial plan, is what criteria should be used to define the preferential group, particularly whether or not race should be a factor or whether to adopt a race-neutral system. This section will discuss some of the arguments put forth by supporters of a race-neutral, class-based system, using the argument proposed by legal scholar Richard D. Kahlenberg in his 1996 book, *The Remedy: Class, Race, and Affirmative Action*, as an example. It will next discuss the 2007 Supreme Court decision, *Parents Involved in Community Schools v. Seattle School District No. 1*, in which a divided Court called into question the use of race classifications to achieve school diversity. The endorsement by the

116. *National Inter-University Union* case, *supra* note 83, at 2.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *National Inter-University Union* case, *supra* note 83, at 2.
123. *Id.*
124. Polakow-Suransky, *supra* note 111.

majority of the Court of a race-neutral reading of the Equal Protection Clause suggests that a close examination of France's model is in order.

A. *The Argument for Race-Neutral Affirmative Action*

In his 1996 book, Richard Kahlenberg makes the argument for a facially race-neutral, class-based model of affirmative action.[125] Kahlenberg first argues that "class-based affirmative action . . . will help move us from today's inadequate system of formal equal opportunity toward a more genuine system of equal opportunity under which individuals born into very different circumstances can flourish to their full natural potential."[126] While noting that Americans have long believed in the value of a meritocracy, a strict meritocracy—while promising to grant opportunity based on natural ability and talent, rather than social status—is not actually equal because it "fails to correct for 'background unfairness,' which is inherent in class differences."[127] Kahlenberg states that if we are really to reward hard work (usually measured by where one ends up in life), it is morally imperative that everyone start on an equal playing field.[128] Kahlenberg argues that the reason that we do not all start in the same place is because certain individuals are "born with advantages arising from their parents' effort . . . ."[129] Furthermore, these unequal positions are perpetuated because of a lack of true social mobility.[130] Pointing to several studies on intergenerational wealth and income, Kahlenberg points out that while each generation is on average doing better than their parents, within each cohort, those with educated parents are faring better than those with uneducated, low-earning parents, and argues that social mobility in America is no greater than in Europe.[131] He also quotes economist Mancur Olson as noting, "'On average, the more successful families pass on the larger legacies of human and physical capital to their children.'"[132]

Beyond just determining the financial resources available to the family, class status also contributes to a number of environmental factors that affect a child's academic success.[133] Poor children often grow up in violent neighborhoods and are burdened with the psychic costs of witnessing that violence; they also have less access to medical care and proper nutrition.[134] Working-class families are more likely to be affected by domestic violence and alcoholism.[135] In contrast, children from upper and upper-middle class families are more likely to grow up in an intellectually stimulating environment and to have parents who have themselves benefitted from the educational system.[136] Kahlenberg points to SAT scores as an example of how these

125. KAHLENBERG, *supra* note 22, at 83.
126. *Id.*
127. *Id.* at 84.
128. *Id.* at 86.
129. *Id.*
130. *Id.* at 86–90.
131. KAHLENBERG, *supra* note 22, at 89–90.
132. *Id.* at 94.
133. *Id.* at 91–94.
134. *Id.* at 92–93.
135. *Id.* at 94.
136. *Id.*

factors affect scholastic performance, noting that in 1994, children from families in the top twenty percent of the economic ladder scored at the sixty-fifth percentile, while children from the bottom twenty percent scored at the thirty-fifth percentile.[137]

Kahlenberg next argues that a class-based system would "provide a more satisfying means" for compensating for past discrimination, achieving racial integration, and taking us toward a "color-blind future."[138] Since only the latter two goals are recognized under *Grutter*, we will focus our attention on these arguments. Kahlenberg reasons that because "[o]urs is a history of racial discrimination resulting in a concentration of blacks in the lower segments of society," and since "class-based preferences . . . disproportionately benefit minorities, they will also provide more racially integrated universities and workplaces than a system without preferences."[139] Furthermore, class preferences will increase integration "without the increased racial prejudice and hostility associated with racial preferences."[140] Kahlenberg points to national polls showing that more than 80% of whites and 50% of blacks opposed racial preferences in employment or education.[141] Lastly, "using color-conscious[142] means contradicts the very message of color-blindness we are trying to send," and thus we should adopt race-neutral affirmative action measures in order to move "toward a genuinely color-blind future."[143]

B. Parents Involved—*Could the United States Be Moving Toward a Race-Neutral System?*

The prevailing Supreme Court decision on race-based affirmative action in higher education remains *Grutter v. Bollinger*, but the Court recently ruled on the permissibility of race-conscious decision making in elementary school placement in *Parents Involved in Community Schools v. Seattle School District No. 1*.[144] While the Court in *Grutter* noted its deference to the University of Michigan because of the special role of an institution of higher education,[145] it is not outside the realm of possibility that the Court may not be so deferential in the future—particularly because Justice O'Connor, often the deciding vote in controversial cases, has since retired.[146] *Grutter* was in some ways a departure from the Court's trend through the 1980s and 1990s toward striking down race-based distinctions in favor of a "color-blindness" principle allegedly prescribed by the Equal Protection Clause.[147] The

137. KAHLENBERG, *supra* note 22, at 99.

138. *Id.* at 101.

139. *Id.* at 105.

140. *Id.*

141. *Id.* at 109.

142. It is appropriate here to note the difference between a truly color-unconscious system and a facially race-neutral system. Kahlenberg seems to be advocating for the latter, since he clearly thinks that a class-based system can be used for the purpose of achieving racial diversity and compensating for past racial discrimination. *Id.* at 105. This is distinct from the race-unconsciousness—where decisions made with any consideration of a racial result are impermissible—advocated by the Roberts opinion in *Parents Involved*. 551 U.S. 701, 723–48 (2007). This distinction will be discussed further in the following section.

143. KAHLENBERG, *supra* note 22, at 105.

144. *Parents Involved*, 551 U.S. at 709–11, 722–25.

145. Grutter v. Bollinger, 539 U.S. 306, 328–29 (2003).

146. Richard W. Stevenson, *O'Connor to Retire, Touching off Battle Over Court*, N.Y. TIMES, July 2, 2005, at A1.

147. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995) ("[T]he Fifth and Fourteenth

Court returned to this color-blindness principle in *Parents Involved.* The case considered the school assignment policies of two school districts, one in Seattle and the other in Louisville.[148] The districts had voluntarily created school assignment plans that considered race in placing the students within the schools in the district.[149] The Seattle district, which had never engaged in a policy of legal segregation, classified the children as "white" or "nonwhite," and used the race of each child as a tiebreaking factor in allocating students in certain high schools.[150] In contrast, the Louisville system had been legally segregated at one time, and subsequently ordered to desegregate;[151] in 2000, after the judicial supervision of the desegregation order had ended, the school district began classifying students as "black" or "other" in order to assign students to elementary schools within the area.[152] A group of parents from Seattle and the mother of a student in the Kentucky district challenged the systems under the Fourteenth Amendment's Equal Protection Clause, arguing that assigning the children based solely on race was unconstitutional.[153] In both cases, the relevant District Courts held that the programs survived strict scrutiny, because there was a compelling interest in "maintaining racially diverse schools," and that the chosen means were narrowly tailored to achieve that interest.[154] Both the Sixth and Ninth circuits upheld these rulings.[155]

Upon granting certiorari, a majority of the Supreme Court quickly distinguished *Grutter*'s recognition of the compelling interest in student body diversity for two reasons: first, that *Grutter* permitted such an interest "*in the context of higher education*" [emphasis added]; and second, that the interest was not "focused on race alone but encompassed 'all factors that may contribute to student body diversity.'"[156] In the two systems at issue here, the Court found that race was used not to increase "exposure to widely diverse people, cultures, ideas, and viewpoints," but as a determinative factor in placing some students.[157] The Court further condemned the classification of students as "white" versus "nonwhite" and "black" versus "other" as "only a limited notion of diversity."[158] Additionally, the Court challenged the systems as trying to achieve proportionate representation at each school that would reflect the racial makeup of the communities—a practice the Court dubbed "racial

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Amendments to the Constitution protect persons, not groups. It follows from that principle that all governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection . . . ." [citations omitted]); Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.").

148. *Parents Involved*, 551 U.S. at 710.

149. *Id.* at 709–10.

150. *Id.* at 710, 712.

151. *Id.* at 720.

152. *Id.* at 710.

153. *Id.* at 710–11, 717.

154. *Parents Involved*, 551 U.S. at 714, 717–18.

155. *Id.* at 715, 718.

156. *Id.* at 722 (quoting Grutter v. Bollinger, 539 U.S. 306, 328, 337 (2003).

157. *Id.* at 723.

158. *Id.*

balancing"—rather than allocate a number of students of each race to each school purely to ensure the educational benefits of diversity.[159]

The plurality opinion authored by Chief Justice Roberts and joined by Justices Scalia, Thomas, and Alito went further in condemning racial balancing, because allowing balancing as a compelling interest would justify the imposition of racial proportionality throughout American society, contrary to the Court's repeated recognition that "'[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.'"[160] "Allowing racial balancing as a compelling end in itself would effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved."[161]

The opinion also cited the plaintiffs' brief in *Brown v. Board of Education of Topeka, Kansas*[162] as announcing the following cornerstone principle: "'[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.'"[163] Note that Justice Roberts and the plurality have moved beyond merely condemning the use of race classifications; under this view, *any* effort—whether or not the means are facially race-neutral—to achieve proportionate representation in an institution would be unconstitutional as a violation of equal protection. The problem is not the use of race-conscious means, but rather the aim of achieving a race-conscious result.

Justice Kennedy concurred in the result, but differed from the Roberts opinion on the latter point. Justice Kennedy first argued that race could be taken into account under certain circumstances because of "the legitimate interest [that] government has in ensuring all people have equal opportunity regardless of their race."[164] In particular, Justice Kennedy urged that schools did not have to ignore "de facto resegregation" due to residential self-segregation and "accept the status quo of racial isolation in schools . . . ."[165] In his view, schools are authorized to "devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[166] Justice Kennedy went on to suggest such measures as "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race."[167] Each of these methods are race conscious, in that they are defined and operationalized with the race of the students in mind, but they do not "lead to different treatment based on a classification that tells each student he or

159. *Id.* at 727, 730.

160. *Parents Involved*, 551 U.S. at 730 (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995) [citations omitted]).

161. *Id.* at 730 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) [citations omitted]).

162. Brown v. Board of Educ. of Topeka, 349 U.S. 294 (1954) (holding that *de jure* segregation of public schools violated the Fourteenth Amendment).

163. *Parents Involved*, 551 U.S. at 747.

164. *Id.* at 787–88 (Kennedy, J., concurring).

165. *Id.* at 788.

166. *Id.* at 788–89.

167. *Id.* at 789.

she is to be defined by race . . . ."[168] In other words, in Justice Kennedy's view, it is constitutionally permissible for schools to design an admissions policy with parameters chosen to target students of a particular race, so long as the policy does not classify students as one race or another and treat them differently based on their race. Thus, for Justice Kennedy, race-consciousness is acceptable, provided that the parameters are facially race-neutral and do not lead to unequal treatment.

IV. WHAT CAN THE FRENCH MODEL TELL US?

The Sciences Po experiment is an example of the facially race-neutral, class-based system touted by Kahlenberg, and so provides an opportunity to address some of the arguments raised by Kahlenberg as a proponent of the race-neutral system. Additionally, the plurality opinion in *Parents Involved* strongly urges a reading of the Equal Protection Clause that prohibits race classifications—much like the French Constitution, which bans distinctions based on race. While *Grutter* still stands for allowing race classifications as part of an individualized assessment for the goal of achieving a diverse student body in the context of higher education, the majority holding in *Parents Involved* raises questions about what the next generation of preferences will look like. The Roberts opinion calls for an end to race consciousness, and so would seem to endorse a preference program based purely on class, or at least one in which any racial element is purely incidental. But as this article will later discuss, it can be extremely difficult to isolate class from race, just as it may be difficult to show that a given program was chosen because of its racial implications, not merely in spite of them. Justice Kennedy's opinion would allow race-conscious measures where the mechanisms used did not classify students on the basis of race. This proposal would also require careful selection of the mechanisms used to achieve the desired level of diversity. In either case, it is worth examining the Sciences Po experiment as an example of a race-neutral policy that is either aimed at, or has the incidental effect of, increasing the diversity of the student body.

A. *The Difficulty of Setting Parameters*

The first lesson we can learn from the French experiment is the difficulty of selecting the mechanism for creating a preference and setting its parameters. In particular, the Sciences Po program demonstrates the potential pitfalls of the geographically based model suggested by Justice Kennedy.[169] The French system centers around the *zones d'education prioritaire*, Sciences Po's chosen indicator for the socioeconomic status of targeted students.[170] The ZEPs were created by the ruling Socialist Party in 1982 to identify certain schools and geographic areas to receive extra resources, such as additional financial support (for both schools and teachers) and more hours of instruction for students.[171] While the ZEP program was

168. *Id.*

169. *Parents Involved*, 551 U.S. at 789.

170. Sabbagh, A Color-Blind Option or Subterfuge?, *supra* note 78, at 3.

171. Roland Bénabou, Francis Kramarz, & Corrine Prost, *The French Zones d'Education Prioritaire: Much Ado About Nothing?*, 28 ECON. OF EDUC. REV. 345, 345 (2009). The system of evaluating how much and what kind of "extra resources" each school or zone needs is lacking in transparency; nor is it clear exactly how a zone receives priority status. *Id.*

initially intended to be temporary, it has expanded over the past few decades and has become the main policy tool for helping students from underprivileged areas.[172] Most of the students in the ZEP program are from urban areas,[173] but the ZEPs are not defined based on the race or ethnic origin of the inhabitants.[174] The number of families with at least one foreign-born parent in a given zone is one of the factors taken into account in assigning priority status, but the zoning is largely determined by economic data.[175]

But because the Paris court of administrative appeals required Sciences Po to open the CEP program to all schools in ZEP—regardless of whether those schools were public or private, or whether the students selected through the competition process in each school were the children of working-class parents—there have been a number of students admitted who were not personally disadvantaged.[176] Only 16.5% of the students admitted through the CEP program had working-class parents, and 34% of accepted ZEP students had parents who worked in non-managerial office jobs.[177] This also implies that a significant number of the students entering through the CEP procedure are not in fact second-generation immigrants of color.[178] Bruce P. Lapenson argues in his endorsement of an affirmative action scheme that considers both class and race that a class-only program in the United States is likely to yield the same result.[179] While 50% of black college students come from lower-class backgrounds, compared to 22% of white students, whites outnumber blacks by six to one in the general population.[180] As a result, there is a larger pool of lower-class white applicants.[181] This is potentially problematic for the "diversity as educational benefit" interest allowed in *Grutter* and left undisturbed for institutes of higher education in *Parents Involved*, as the benefit is only gained when there is a significant number of minority students, not just a few non-white students in the classroom. While lower-class students of any race certainly add to the diversity of ideas and viewpoints in the classroom, and thus should be granted equal opportunity to attend institutes of higher education, admitting more disadvantaged white students will do nothing to achieve the "critical mass" of minority students that the Supreme Court endorsed in *Grutter*. Just as it is important for wealthy students to hear about the experiences of students who are less well off, it is important for students of different races and cultures to share those experiences—from holidays and religious philosophies, to racial profiling—with one another.

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172. *Id.* at 346.

173. *Id.* at 347.

174. *See id.* (discussing the criteria upon which the ZEPs were selected).

175. *Id.*

176. Sabbagh, A Color-Blind Option or Subterfuge?, *supra* note 78, at 3–4; *National Inter-University* case, *supra* note 82, at 2.

177. *Id.*

178. Since, as noted above, most institutions in France do not keep data based on race, the precise number of immigrant students versus white students admitted cannot be determined. There has been recent discussion about lifting the ban on race statistics, however. *See* Daniel Sabbagh & Shanny Peer, *Introduction* to *French Color Blindness in Perspective: The Controversy over "Statistiques Ethniques,"* 26 FRENCH POL., CULTURE & SOC'Y 1, 1–4 (2008) (describing various proposals regarding race classification).

179. LAPENSON, *supra* note 11, at 49–50.

180. *Id.* at 54.

181. *Id.*

Additionally, the French program shows how difficult it can be to isolate class from race, should we wish to operate within the color-blind mindset advocated by Roberts's opinion in *Parents Involved.* The Sciences Po program is not defined in terms of the race of the students, but since a significant number of ZEP residents are of North African descent,[182] there is undoubtedly a de facto racial element to the Sciences Po program. As French scholar Daniel Sabbagh notes,

> [S]ince one of the main criteria used for delineating a ZEP—the rate of failure in high school—is itself correlated with the proportion of children whose parents are foreign nationals, the Sciences Po program, although officially embodying an area-based and class-based approach of affirmative action, may also be understood as indirectly and implicitly targeting groups that, in the American context, would be considered as "ethnic" or "racial" groups, in particular second-generation North African immigrants.[183]

This points out the potential pitfalls with a group-based remedy—even one that is race-neutral on its face—for which there is no careful, individualized assessment of the precise socioeconomic status of each applicant: the remedy may be overbroad and over-inclusive. But if individualized assessment is required, there still remains the question of choosing an appropriate measure of each individual student's socioeconomic status. Should we use parents' income or net wealth? The problem with this indicator is that it may not account for differences in family size, fluctuations in income from one year to another, variations in cost of living between different areas, or intergenerational wealth (or lack thereof).

Should we consider the geographic area instead? This would seem to be an effective measure given that schools in urban areas in particular have become increasingly "resegregated."[184] While this may identify underrepresented students who are concentrated in underprivileged areas, it would not help those students who may live in a more socioeconomically heterogeneous area; additionally, as the ZEP program points out, there is no guarantee that all of the students in a given area are personally disadvantaged.[185] What about using parents' level of education or occupation as a parameter? Level of education would be hard to generalize because of the disparate quality of schools, both secondary and higher education, across the country. Occupation would also be hard to assess because of differences in job stability, salary, and level of experience or qualifications needed across businesses and geographic regions. The ideal system would probably combine all of the above, but that leads to the question of how much weight should be given to each factor. Once each student's socioeconomic status is determined, does that then entail ranking students based on their level of relative disadvantage? Would there be a cutoff point for when a student became "too privileged" to qualify for the preference? Each of these considerations must be taken into account when designing an appropriate system. Furthermore, there is no guarantee that such a

182. Sabbagh, *Affirmative Action at Sciences Po, supra* note 3, at 249.

183. *Id.* at 250.

184. NEA, *supra* note 12, at 33.

185. Sabbagh, A Color-Blind Option or Subterfuge?, *supra* note 78, at 3.

system would ensure the diversity—including racial diversity—that the *Grutter* court recognized as an educational benefit.

B. *Is a Truly Race-Blind System Possible?*

If we were to adopt the Roberts plurality's aim of moving toward race-blindness, to the extent that even race-neutral but race-conscious programs were impermissible, we would run into the problem of evaluating whether any given preference program was in fact designed with a race-related end in mind. Again, France provides a good example, because its constitution undoubtedly requires color blindness. In looking at the Sciences Po program, however, it is certainly possible to draw the conclusion that the program had a "hidden agenda" to target North African students, given that the ZEP program is tied in some ways to a geographic distribution based on race and thus has a "positive disparate impact" on North Africans.[186] Furthermore, Sciences Po's own administration has named increasing diversity as one of the goals of the program, because "diversity of social and cultural origins . . . can only sharpen the critical mind and intellectual rigor."[187] While this is not an outright admission that Sciences Po was motivated by race or ethnicity, the emphasis on the "cultural origins" of ZEP students displays the awareness that many of these students come from a background different from the traditional white French upbringing.

Because so much of America's history is founded in race consciousness, it is arguable that we might not be able to easily divorce ourselves from considering race, even unconsciously.[188] Even where the decision maker is able to act with no conscious consideration of race, it would then be difficult to evaluate the results of a system and determine whether or not any racial effects were merely incidental. In other words, absent an honest statement from an admissions officer, how would we know whether a school's affirmative action program just happened to increase minority enrollment, or whether it was expressly designed to do so (through the use of race-neutral criteria)? A school that attempted to increase the number of economically disadvantaged students by targeting students from the inner city, but did not specifically intend to increase the number of minority applicants, could find itself under fire if this measure led to any increase in black students. Absent an express admission that the school had considered race in designing the parameters of its program, it would be extremely difficult to show that race was a motivating factor. Even if this decreased the odds that a challenge to affirmative action programs would be successful, schools might decide that the risk of litigation (or poor public opinion) is too high and end preference programs altogether. While an end to preferences would certainly settle the debate over the use of race classifications, most opponents of affirmative action, including Kahlenberg, accept the value of some type of preference system as necessary to correct structural inequalities.

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186. *Id.* at 9–10.

187. *Id.* at 10, 12.

188. *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (arguing that much of racial bias is cognitive, rather than conscious).

C. *Public Opinion and Criticism of the Preference System*

Another point to note is that public opinion has not been kind to the Sciences Po program, and contrary to what Kahlenberg suggests, race remains a part of the dialogue about the preferences. First, the French share the same belief in meritocracy that, as Kahlenberg points out, is held by Americans.[189] Many French people thus object to the idea of any departure from the traditional admissions process as "inherently unfair and contrary to the principle of equal treatment as understood within the French republican conception of citizenship."[190] Additionally, Kahlenberg argues that racial preferences "may send a negative message to both blacks and whites that blacks cannot make it on their own."[191] Observers of the French system have noted this same risk in the Sciences Po preference program:

> Others fear that the existence of this separate admission track will actually prove detrimental to its intended beneficiaries and cast a cloud of suspicion over their academic achievements, leading employers to draw new distinctions among the population of Sciences Po graduates and to dismiss the degrees earned by the ZEP students as a less certain certificate of quality—despite the fact that, in theory, these students would have received exactly the same training and fulfilled the same requirements as their peers.[192]

This shows that there may still be some doubt cast upon the qualifications of students accepted through race-neutral, class-based programs. As most preference programs operate by relaxing the qualifications required of the preferred group, there is the risk that affirmative action beneficiaries will be stigmatized as not being able to measure up. Moreover, it is possible that much of that doubt will be leveled at underrepresented minority students, who will be more readily identifiable as members of the preferred group. If people understand class-based programs to "disproportionately benefit minorities," as Kahlenberg suggests,[193] they may still equate minority status with lesser standards, even if the programs do not in fact lead to major increases in minority enrollment. If this is the case, adopting a race-neutral framework would not cure the belief that minorities are less qualified.

V. CONCLUSION

As the debate about using race-based preferences continues on, and recent developments in U.S. constitutional law urge us toward the color-blind ideal, it is worth looking at France's race-neutral model as an example. It would be a challenge to adopt and structure a race-neutral system, particularly if we continue to embrace the goals of equal opportunity and increasing diversity in higher education. As we can see from the Sciences Po experiment, setting the parameters for such a program requires much consideration about the scope of the preference and how to effectively

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189. Sabbagh, A Color-Blind Option or Subterfuge?, *supra* note 78, at 4.
190. *Id.*
191. KAHLENBERG, *supra* note 22, at 65.
192. Sabbagh, A Color-Blind Option or Subterfuge?, *supra* note 78, at 4–5.
193. KAHLENBERG, *supra* note 22, at 105.

identify members of the preferred group. Additionally, while proponents of a race-neutral system have espoused the belief that race neutrality would help alleviate racial tension and negative attitudes toward preferences, the reaction of the French public shows that this has not been the case in France and may very well not be the case in the United States. This article is not meant to condemn the idea of race-neutral affirmative action as totally infeasible; rather, the point is to demonstrate, using France and its color-blind constitution as an example, that eliminating race from our consciousness can be just as complicated as operating under our current race-aware framework. While some might find a color-blind society to be an attractive ideal, erasing all race-consciousness may not bring us any closer to such a society than strategically using race to help level the playing field.

The Nubian Sandstone Aquifer System: Thoughts on a Multilateral Treaty in Light of the 2008 UN Resolution on the Law of Transboundary Aquifers

NICHOLAS MAXWELL*

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INTRODUCTION

The Nubian Sandstone Aquifer System (NSAS), underlying 2.2 million square kilometers of North African desert,[1] is vital to the survival of the Egyptians, Libyans, Sudanese, and Chadians living above it. Millions of people, though they do not drink Nubian water on a daily basis, also benefit from it.[2] The NSAS's "virtual water"—the water used by farmers to grow crops and produce other goods[3]—reaches beyond the region.[4] At 375,000 cubic kilometers in volume, the NSAS is one of the largest aquifers in the world.[5] Despite its importance, however, no binding multilateral treaty governs usage of the NSAS.[6]

Demand for NSAS water has grown rapidly over the past 30–40 years.[7] Libya's current usage is illustrative: following the takeover by Colonel Muammar al-Gaddafi in 1969, new industrialization put stress on Libya's minimal freshwater resources.[8] As water levels dropped in the small coastal aquifers near Libya's population centers on the Mediterranean coast, salt water from the Mediterranean flowed into the aquifers.[9] Soon, the water from these aquifers was too salty to use for irrigation,[10] much less to drink.[11] Libya's coastal areas, which make up 1.5% of the area of the country but are home to 75% of its people,[12] turned to the NSAS.[13] The Great Man-

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1. Marianne Alker, *The Nubian Sandstone Aquifer System: A Case Study for the Research Project "Transboundary Groundwater Management in Africa," in* CONCEPTUALIZING COOPERATION ON AFRICA'S TRANSBOUNDARY GROUNDWATER RESOURCES 231, 238 (Waltina Scheumann & Elke Herrfahrdt-Pahle eds., 2008), *available at* http://www.die-gdi.de/CMS-Homepage/openwebcms3.nsf/(ynDK_contentByKey)/ANES-7FJFVT/$FILE/Studie%2032.pdf.

2. *See id.* at 245–49 (detailing agricultural use of groundwater in Libya, Egypt, Chad, and Sudan generally and use of the NSAS specifically).

3. *See The Concept of "Virtual Water"—A Critical Review*, FRONTIER ECONOMICS 2 (Jan. 2008), http://www.frontier-economics.com/_library/publications/Frontier%20Australia%20-%20paper-%20%20Virtual%20water.pdf (defining virtual water as the "measure of total water used in producing a good or service").

4. *See, e.g.*, Int'l Atomic Energy Agency [IAEA], *Irrational Use*, THE NUBIAN AQUIFER PROJECT, http://www-naweb.iaea.org/napc/ih/IHS_projects_nubian_irrational.html (last updated Mar. 15, 2010) (noting that NSAS "virtual water" ends up in Austria via exports of Egyptian olives).

5. IAEA/UNITED NATIONS DEVELOPMENT PROGRAMME [UNDP]/GLOBAL ENVIRONMENT FACILITY [GEF], MEDIUM-SIZED PROJECT PROPOSAL: REQUEST FOR GEF FUNDING 3 [hereinafter MEDIUM-SIZED PROPOSAL], *available at* http://www-naweb.iaea.org/napc/ih/documents/Nubian/Nubian_final_MSP_Sandstone.pdf (last visited Feb. 3, 2010).

6. The NSAS *is* governed by a multilateral agreement requiring all overlying nations to regularly exchange scientific information about the aquifer, but it has no usage component and therefore it will not be discussed in this paper. *See* STEFANO BURCHI & KERSTIN MECHLEM, FOOD AND AGRIC. ORG. [FAO] LEGAL OFFICE, FAO LEGISLATIVE STUDY 86, GROUNDWATER IN INTERNATIONAL LAW 4–6 (2005) (describing the Programme for the Development of a Regional Strategy for the Utilisation of the Nubian Sandstone Aquifer System in a survey of legal instruments regulating groundwater in international law).

7. Mohamed Bakhbakhi, *Nubian Sandstone Aquifer System*, *in* NON-RENEWABLE GROUNDWATER RESOURCES: A GUIDEBOOK ON SOCIALLY-SUSTAINABLE MANAGEMENT FOR WATER-POLICY MAKERS 75, 75 (Stephen Foster & Daniel P. Loucks eds., 2006).

8. John Watkins, *Libya's Thirst for "Fossil Water,"* BBC NEWS, Mar. 18, 2006, http://news.bbc.co.uk/2/hi/science/nature/4814988.stm.

9. Alker, *supra* note 1, at 246 box1.

10. FRED PEARCE, WHEN THE RIVERS RUN DRY 48 (2006).

11. Alker, *supra* note 1, at 246 box1.

12. FAO LAND & WATER DEV. DIV., FAO WATER REPORTS 29, IRRIGATION IN AFRICA IN

made River Project (GMRP), a decades-long project funded by the Libyan government, has been piping hundreds of millions of gallons of water from the NSAS north to the coast every day since the first pipeline was completed in 1993.[14] By the time the GMRP is finished, it will move 6 million cubic meters of water per day[15] across 600 miles[16] of desert to booming coastal cities like Tripoli and Benghazi. Libya already has spent $27 billion on the project.[17] The largest of the four basins serving the GMRP is the Kufra Basin,[18] which is home to much of the northwestern NSAS.[19]

As surprising as it initially seems, the fact that Egypt, Libya, Sudan, and Chad (the Nubian states) have not signed a binding agreement for such an important natural resource is typical of international water law.[20] There is no international United Nations Convention in force to govern usage of shared international surface water or groundwater.[21] Ninety-nine percent of the Earth's accessible freshwater is

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FIGURES 316 (Karen Frenken ed., 2005), ftp://ftp.fao.org/agl/aglw/docs/wr29_eng_including_countries.pdf.

13. Alker, *supra* note 1, at 245–46 (including box1).

14. Watkins, *supra* note 8; IAEA, *More People, More Development*, THE NUBIAN AQUIFER PROJECT, http://www-naweb.iaea.org/napc/ih/IHS_projects_nubian_development.html (last visited Feb. 4, 2011).

15. Great Man Made River Auth., THE GREAT MAN MADE RIVER PROJECT, http://www.gmmra.org/en/ (last visited Feb. 4, 2011).

16. PEARCE, *supra* note 10, at 46.

17. *Id.* at 48.

18. *See* Great Man Made River Auth., *The Vision*, THE GREAT MAN MADE RIVER PROJECT, http://www.gmmra.org/en/index.php?option=com_content&view=article&id=73&Itemid=2 (last visited May 17, 2010) (comparing the groundwater storage capacities of the different Libyan basins being exploited by the GMRP).

19. W. Gossel et al., *A Very Large Scale GIS-based Groundwater Flow Model for the Nubian Sandstone Aquifer in Eastern Sahara (Egypt, Northern Sudan, and Eastern Libya)*, 12 HYDROGEOLOGY J. 698, 700 fig.1 (2004).

20. Of some 275 currently identified transboundary aquifers, only two are governed by treaties. *See* Convention relative à la protection, a l'utilisation, à la realimentation et au suivi de la Nappe Souterraine Franco-Suisse du Genevois, Fr.-Switz., Dec. 18, 2007, *available at* http://www.unece.org/env/water/meetings/legal_board/2010/annexes_groundwater_paper/Arrangement_French_Swiss.pdf (unofficial English translation *available at* http://internationalwaterlaw.org/documents/regionaldocs/2008Franko-Swiss-Aquifer-English.pdf) [hereinafter Genevese Aquifer Treaty]; Acordo sobre o Aqüífero Guarani, Aug. 2, 2010, *available at* http://www.itamaraty.gov.br/sala-de-imprensa/notas-a-imprensa/acordo-sobre-o-aquifero-guarani [hereinafter Guarani Treaty]; *see also* INT'L SHARED AQUIFER RES. MGMT. PROGRAMME, UNITED NATIONS EDUC., SCIENTIFIC AND CULTURAL ORG., ATLAS OF TRANSBOUNDARY AQUIFERS 61 (Shaminder Puri & Alice Aureli eds., 2009) [hereinafter ISARM Report] (noting that about 275 transboundary aquifers have been identified); Yoram Eckstein & Gabriel E. Eckstein, *A Hydrogeological Approach to Transboundary Groundwater Resources and International Law*, 19 AM. U. INT'L L. REV. 201, 227 (2003) (identifying, in 2003, the Genevese Aquifer Treaty's predecessor agreement as "the only international agreement that directly addresses a transboundary aquifer"); *Hydraulic Harmony or Water Whimsy? Guarani Aquifer Countries Sign Agreement*, INT'L WATER LAW PROJECT BLOG (Aug. 5, 2010, 11:08 PM), http://www.internationalwaterlaw.org/blog/?p=290 (announcing signing of the Guarani Treaty and critiquing it as merely a "bare-bones agreement that contains less than ideal cooperative mechanisms").

21. *See* Salman M.A. Salman, *The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law*, 23 INT'L J. WATER RESOURCES DEV. 625, 625 (2007) (noting that no universal treaty regulates "non-navigational uses of international watercourses"). Ground water "generally refers to subsurface water that is below the ground water table, *i.e.*, where the porous geologic formations are saturated completely with water, or where water occupies the entire porous space within a porous geologic formation." Eckstein & Eckstein, *supra* note 20, at 209–10. Surface water refers to "a surface body of water, such as river, stream, or lake, and other defined bodies of water on the Earth's surface" and does not include "surface runoff, water percolating into the ground, and other diffused or

stored in aquifers, and nearly two billion people depend exclusively on aquifers for their water needs.[22] Water experts have recognized the importance of legal structures to manage transboundary aquifers (TBAs).[23] Nonetheless, groundwater is "out of sight and, unfortunately, all too often out of mind" to attract the attention of lawmakers.[24]

This paper argues that the Nubian states can and must enact a binding agreement to govern NSAS usage. Fortunately, change has begun to stir, in the form of the U.N. General Assembly's 2008 Resolution on the Law of Transboundary Aquifers.[25] Additionally, several NGO-funded projects on TBAs are underway or recently have been completed.[26] Of particular relevance is the Nubian Aquifer Project (NAP), which was initiated in 2006[27] to "establish a rational and equitable management of the NSAS for sustainable socio-economic development and the protection of biodiversity and land resources."[28] One of the NAP's five components is to create a legal and institutional framework for NSAS management.[29] The Nubian states must build on this momentum at the international and regional level to make the NSAS the first of the vast, politically charged TBAs to be governed by a multilateral treaty.

Section I of this paper catalogs the NSAS's vulnerabilities—geological, climatic, political, and economic—to show that in comparison with other TBAs, the NSAS is in particular need of a treaty. Section II briefly discusses two key sources upon which the Nubian states should draw during the treaty drafting process. Section III offers in-depth advice about several components an NSAS treaty must contain in order to be successful. Finally, Section IV offers a brief conclusion.

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unchanneled waters." Gabriel Eckstein, *A Hydrogeological Perspective of the Status of Ground Water Resources Under the UN Watercourse Convention*, 20 COLUM. J. ENVTL. L. 525, 547 n.96 (2005).

22. ISARM Report, *supra* note 20, at 16.

23. INT'L SHARED AQUIFER RES. MGMT. PROGRAMME, UNITED NATIONS EDUC., SCIENTIFIC AND CULTURAL ORG. [UNESCO], TRANSBOUNDARY AQUIFERS, MANAGING A VITAL RESOURCE 14 (Raya Marina Stephan ed., 2009), *available at* http://unesdoc.unesco.org/images/0018/001824/182431e.pdf.

24. Theresa Grant-Peterkin, *Groundwater Contamination: Approaches to the Regulation and Clean-Up in the UK and EC, in* WATER POLLUTION: LAW AND LIABILITY 335, 337 (Patricia Thomas ed., 1993).

25. G.A. Res. 63/124, U.N. GAOR, 63rd Sess., U.N. Doc. A/RES/63/124 (Dec. 11, 2008) [hereinafter 2008 Resolution].

26. *See, e.g.*, OFFICE FOR SUSTAINABLE DEV. & ENV'T, ORG. OF AMERICAN STATES, WATER PROJECT SERIES NO. 7, GUARANI AQUIFER SYSTEM (2005), *available at* http://www.oas.org/dsd/Events/english/Documents/OSDE_7Guarani.pdf (providing overview of the Environmental Protection and Sustainable Development of the Guarani Aquifer System Project); *Introduction*, MANAGING HYDROLOGICAL RISK IN THE IULLEMEDEN AQUIFER SYSTEM, http://iullemeden.iwlearn.org/ (last visited May 17, 2010) (outlining completed project on the Iullemeden Aquifer in West Africa).

27. IAEA/UNDP/GEF NUBIAN SANDSTONE AQUIFER SYSTEM MEDIUM SIZED PROJECT: PROJECT IMPLEMENTATION PLAN 2 (2006) [hereinafter PROJECT IMPLEMENTATION PLAN], *available at* http://www-naweb.iaea.org/napc/ih/documents/Nubian/Nubian%20PIP%20-%20may1107.pdf.

28. IAEA, *About the Project*, THE NUBIAN AQUIFER PROJECT, http://www-naweb.iaea.org/napc/ih/IHS_projects_nubian.html (last visited May 17, 2010). The NAP is still underway at the time of writing. *Id.* The project is funded by the GEF, IAEA, UNESCO, and the four Nubian states. PROJECT IMPLEMENTATION PLAN, *supra* note 27, at 20–26.

29. PROJECT IMPLEMENTATION PLAN, *supra* note 27, at 20.

I. THE NUBIAN SANDSTONE AQUIFER SYSTEM'S VULNERABILITIES

A. *Geological Vulnerabilities*

While much of what makes the NSAS vulnerable comes from outside the aquifer itself, it is one defining geological feature—that the NSAS is for all intents and purposes a non-recharging aquifer—that most clearly demonstrates the need for a comprehensive treaty.[30] Non-recharging aquifers are non-renewable resources and thus can be completely depleted through artificial consumption.[31] On the other hand, recharging aquifers are recharged to varying extents by rainwater or seepage from overlying rivers and lakes.[32]

An aquifer is "a relatively permeable geologic formation (such as sand or gravel)" through which water can flow.[33] For the NSAS, the permeable geologic formation is mainly sandstone laid down during the Paleozoic and Mesozoic eras.[34] The NSAS was likely filled with water at the end of a more recent geological era when the Sahara was lush and wet.[35] According to recent dating attempts, some Nubian water is 200,000 to 1.5 million years old.[36]

Non-recharging aquifers also have limited flow, the geological process by which water moves laterally from one part of the aquifer to another, caused in recharging aquifers by recharge from surface water sources.[37] However, flow speeds up near artificial extraction points like wells and pipelines.[38] This extraction creates a cone of depression, which causes water from elsewhere to shift toward the extraction point as a result of gravity.[39] As the water flows toward the point of extraction, the ground water table within the "radius of influence" of the cone of depression drops.[40]

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30. Hydrogeologists and other scholars often make reference to the NSAS receiving recharge, which if true would suggest that it is not a non-recharging aquifer. *See* Gossel et al., *supra* note 19 (mentioning recharge that occurs in Sudan and Chad). However, the recharge is so negligible and localized that for purposes of crafting a treaty, the NSAS should be considered a non-recharging aquifer. *See* A.M. Ebraheem et al., *Simulation of Impact of Present and Future Groundwater Extraction from the Non-replenished Nubian Sandstone Aquifer in Southwest Egypt*, 43 ENVTL. GEOLOGY 188, 192 (2002) (explaining that there has been no recharge in southwest Egypt specifically for the last 9,000 years); Alker, *supra* note 1, at 241 (explaining that recharge is so low that NSAS is considered non-renewable).

31. Aquifers receiving little recharge also are often described as "confined" or "fossil." However, there has been an effort of late to avoid using these less exact terms. *See* Int'l Law Comm'n., *Second Report on Shared Natural Resources: Transboundary Groundwaters*, paras. 11–14, U.N. Doc. A/CN.4/539 (Mar. 9, 2004) (citing the NSAS as a demonstration of the confusion that arises from careless use of hydrogeological terms in legal context). For purposes of this article, the distinction between "non-recharging" and "recharging" provides sufficient detail.

32. *See* Eckstein & Eckstein, *supra* note 20, at 214 (describing influent bodies of water).

33. *Id.* at 210.

34. Alker, *supra* note 1, at 239. The Paleozoic era was 570–244 million years ago; the Mesozoic era was 245–65 million years ago. *Id.* at 239 n.48–49.

35. PEARCE, *supra* note 10, at 45.

36. P. Gremillion, *New Light Shed on the Nubian Aquifer*, WATER & ENV'T NEWS (IAEA Isotope Hydrology Section, Vienna Austria), Feb. 2010, at 4, *available at* http://www-naweb.iaea.org/napc/ih/documents/Newsletter/issue_26.pdf.

37. Eckstein & Eckstein, *supra* note 20, at 216–17, 220.

38. *See id.* at 219 (describing the increase in flow around a pumping well).

39. *Id.*

40. *Id.*

Desert lakes in Libya linked to Kufra Basin oases have begun drying up because of groundwater pumping.[41] Scientists hypothesize that Egyptian extraction will soon begin lowering the Sudanese water table.[42] Eastern Sudan's section of the NSAS already contains little water in comparison with most other areas of the NSAS.[43] In addition to having no natural recharge, the NSAS loses water independent of human extraction. In the 5,800 square kilometer Qattara Depression in Egypt water from the NSAS is continually surfacing and evaporating in small but not negligible amounts.[44] Drought and climate change have lowered the water table in Chad, forcing some Chadians to move in order to find sufficient water.[45]

B. *Climatic Vulnerabilities*

The NSAS underlies the extremely arid Sahara Desert. The land above it is largely uninhabited desert.[46] Naturally, surface water above the NSAS is scarce. Libya, for example, has no permanent rivers.[47] Refugees in Chad and Sudan are regularly forced to endure potentially fatal water shortages.[48] Other large TBA regions are not in such dire need of water: the massive Guarani in South America, for example, though important to the people living above it, lies under an area that receives substantial rainfall.[49] The lack of surface water above the NSAS makes the need for a reliable, binding treaty even clearer.

C. *Political Vulnerabilities*

One cannot overstate the political volatility of the NSAS region. After eighteen days of largely peaceful protests in early 2011, Egyptians forced the end of president Hosni Mubarak's thirty-year reign, signaling the end of "the Arab world's original

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41. Alker, *supra* note 1, at 250.

42. Waltina Scheumann & Marianne Alker, *Cooperation on Africa's Transboundary Aquifers—Conceptual Ideas*, 54 HYDROLOGICAL SCI. J. 793, 795 (2009); *see also* Alker, *supra* note 1, at 266 (predicting Egyptian groundwater development projects will negatively impact Sudan).

43. Itzchak E. Kornfeld, *Parched Ground: After the War, Can Sudan Sustainably Develop and Preserve Its Groundwater Resources*, 14 PENN ST. ENVTL. L. REV. 655, 663 (2006).

44. G.W. Murray, *The Water Beneath the Egyptian Western Desert*, 118 GEOGRAPHICAL J. 443, 449–50 (1952).

45. MEDIUM-SIZED PROPOSAL, *supra* note 5, at 7.

46. Elizabeth Burleson, *Middle Eastern and North African Hydropolitics: From Eddies of Indecision to Emerging International Law*, 18 GEO. INT'L ENVTL. L. REV. 385, 421 (2006).

47. *Id.*

48. Martin Plaut, *Chad Refugees Face Water Shortage*, BBC NEWS, Apr. 23, 2005, http://news.bbc.co.uk/2/hi/africa/4477653.stm; Press Release, UNICEF, Darfur Refugees Fueling Tension in Chad (Feb. 1, 2005), *available at* http://www.unicef.org/infobycountry/sudan_25018.html.

49. *See, e.g.*, CENT. INTEL. AGENCY [CIA], *Paraguay, Geography*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/pa.html (last visited Feb. 4, 2011) (stating that eastern Paraguay—the portion of Paraguay under which the Guarani lies—receives "substantial rainfall"); CIA, *Brazil, Geography*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/br.html (last visited Feb. 4, 2011) (stating that Brazil's climate is "mostly tropical"). Despite less immediate need for groundwater in this region, the Guarani states recently passed a binding agreement governing usage of the Guarani. *See generally* Guarani Treaty, *supra* note 20; INT'L WATER LAW PROJECT BLOG, *supra* note 20. Although the new Guarani Treaty is skeletal, the fact that the Guarani states see it as necessary to begin managing the Guarani reinforces the urgent need for a binding management agreement over the vital NSAS.

secular dictatorship."[50] Less than a week later, challenges to the "mercurial" forty-one-year reign of Libyan leader Muammar al-Gaddafi were in full swing.[51] The upheaval may prove to be the most decisive moment in the Middle East since the Six Day War in 1967.[52] Commentators tracking the revolutionary upheaval in the Arab world have begun speculating on the future impact of the regional upheaval on water sources.[53]

With constant political instability, water scarcity issues become even more important. For example, the current fighting in Darfur is largely attributable to water access issues.[54] Armed conflict threatens the rest of Sudan as well. Southern Sudanese overwhelmingly supported secession in a January 2011 referendum.[55] Although the Sudanese government has accepted the results of the referendum,[56] fighting continues in the south.[57]

Another conflict in the region is particularly relevant to the NSAS. Throughout the 1970s and 1980s, Chad and Libya feuded over the Aouzou Strip, a 100 kilometer-wide strip of land running across the northern border of Chad that is said to contain valuable mineral resources.[58] The Aouzou Strip contains another valuable resource as well: groundwater. Chad's portion of the NSAS lies directly under the Aouzou

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50. David D. Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, N.Y. TIMES, Feb. 12, 2011, at A1, *available at* http://www.nytimes.com/2011/02/12/world/middleeast/12egypt.html?_r=2&scp=8&sq=egypt%20revolution&st=cse.

51. Anthony Shadid, *Clashes in Libya Worsen as Army Crushes Dissent*, N.Y. TIMES, Feb. 18, 2011, at A1, *available at* http://www.nytimes.com/2011/02/19/world/africa/19libya.html?scp=2&sq=libya%20protest%20unprecedented&st=cse.

52. Anthony Shadid, *Uncharted Ground After End of Egypt's Regime*, N.Y. TIMES, Feb. 11, 2011, http://www.nytimes.com/2011/02/12/world/middleeast/12revolution.html?scp=14&sq=egypt%20revolution&st=cse.

53. *See, e.g.*, Maurice Picow, *Libyan Revolution Will End Gaddafi's Green Visions*, GREEN PROPHET (Feb. 25, 2011), http://www.greenprophet.com/2011/02/libya-gaddafi-green (suggesting that if Gaddafi falls, funding for the Great Man-made River Project, one of Gaddafi's passions, may be in jeopardy); John Vidal, *What Does the Arab World Do When Its Water Runs Out?*, OBSERVER (Feb. 20, 2011), http://www.guardian.co.uk/environment/2011/feb/20/arab-nations-water-running-out#history-link-box (citing rising food prices linked to a regional water crisis as a "less recognised reason" for the protests in Egypt and throughout the Middle East); Solomon Bekele, *The Egyptian Revolution*, CAPITAL (Feb. 14, 2011), http://www.capitalethiopia.com/index.php?option=com_content&view=article&id=14159:theegyptianrevolution&Itemid=9 (predicting that the regime change in Egypt will not change Egypt's approach to Nile usage).

54. *Water Find May End Darfur War*, BBC NEWS, July 18, 2007, http://news.bbc.co.uk/2/hi/6904318.stm.

55. Josh Kron & Jeffrey Gettleman, *South Sudanese Vote Overwhelmingly for Secession*, N.Y. TIMES, Jan. 21, 2011, http://www.nytimes.com/2011/01/22/world/africa/22sudan.html?_r=1&ref=sudan; *Results for the Referendum of Southern Sudan*, SOUTHERN SUDAN REFERENDUM 2011, http://southernsudan2011.com/ (last visited Mar. 1, 2011).

56. Josh Kron, *Sudan Leader to Accept Secession of South*, N.Y. TIMES, Feb. 7 2011, http://www.nytimes.com/2011/02/08/world/africa/08sudan.html?ref=sudan.

57. *See, e.g.*, Josh Kron, *Southern Sudan Suffers a Blow as Fighting Ends a Truce*, N.Y. TIMES, Feb. 11, 2011, http://www.nytimes.com/2011/02/12/world/africa/12sudan.html?ref=sudan (describing several clashes between the southern Sudanese military and rebel forces).

58. Clyde R. Mark, CONG. RES. SERV. [CRS], CRS ISSUE BRIEF FOR CONGRESS, LIBYA 8 (2002), *available at* http://fpc.state.gov/documents/organization/9577.pdf.

Strip.[59] Section III, *infra*, discusses the importance of the Aouzou Strip to a potential NSAS treaty.[60]

Several hundred miles east of the Aouzou Strip, at the NSAS's eastern edge, there is more evidence of water-related feuding. Egypt and Sudan have had a tense but effective relationship with regard to the Nile River, the primary water source for both countries. Egypt has multiple times threatened to use military force against Sudan, its upstream riparian, over perceived injustices in Sudan's usage of the Nile.[61] Even experts who believe the risk of military conflict over water is exaggerated admit that the Sudan-Egypt relationship has all the variables needed for a water war.[62] As Egypt's population moves westward beyond the edge of the Nile Valley, the NSAS likely will become a pawn in this chess game. As discussed *infra*, recent developments could leave Egypt and Sudan particularly vulnerable to their upstream Nile riparians.[63]

The above is just a sampling of past and present conflicts within and among the Nubian states. Few other TBAs underlie such a politically volatile landscape.[64] Such instability makes a binding treaty governing usage of the NSAS even more important.

D. *Economic Vulnerabilities*

One of the many catalysts of conflict in the NSAS region is the disparity in economic power between the four nations. For example, the gross domestic product (GDP) per capita of Chad is 13% of the GDP per capita of Libya.[65] Though wealthier than Chad, Sudan is quite poor as well: its GDP per capita is 16% of Libya's.[66] This wealth disparity has the potential to directly influence the stability of the NSAS.

Economic disparities between the four Nubian states, when considered alongside deep-seated political instability and disadvantageous natural attributes of the NSAS, demonstrate the pressing need for a multilateral treaty. Usage will only

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59. *See infra* note 224 and accompanying text.

60. *See infra* text accompanying notes 217–226.

61. Biong Kuol Deng, *Cooperation between Egypt and Sudan over the Nile River Waters: The Challenges of Duality*, 11 AFR. SOC. REV. 38, 39–40 (2007).

62. *See* Thomas Homer-Dixon, *The Myth of Global Water Wars*, *in* FORUM: WAR AND WATER 10, 13 (Sarah Fleming ed., 1998) (explaining that several factors—Egypt's dependence on the Nile, its "historically turbulent" relationship with Sudan, and its significantly greater power—make the Nile River basin one of the few places where concerns regarding a water war are not unfounded).

63. *See infra* text accompanying notes 249–260.

64. The most notable exception to this is the Mountain Aquifer, shared by Israel and Palestine. For details on the political tension engendered by usage of the Mountain Aquifer, *see* Burleson, *supra* note 46, at 400.

65. *Compare* CIA, *Chad*, *Economy*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/cd.html (last visited Feb. 5, 2011) (listing Chad's most recent GDP per capita as $1,800), *with* CIA, *Libya*, *Economy*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/ly.html (last visited Feb. 5, 2011) (listing Libya's most recent GDP per capita as $13,800).

66. *Compare* CIA, *Sudan*, *Economy*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/su.html (last visited Feb. 5, 2011) (listing Sudan's most recent GDP per capita as $2,200), *with* CIA, *Libya*, *Economy*, THE WORLD FACTBOOK, *supra* note 65 (listing Libya's most recent GDP per capita as $13,800).

increase, and until the Nubian states have an agreement in place, the likelihood of conflict will increase as well.

II. SOURCES OF INFORMATION

The Nubian states must cast a wide net in their search for relevant treaty-building precedents and principles of international law. Two particularly relevant sources of information are readily apparent.

A. *1997 Convention on the Law of the Non-navigational Uses of International Watercourses*

In 1970, the United Nations General Assembly (UNGA) commissioned the International Law Commission (ILC), a UN body, to study the law of international watercourses.[67] Citing "the increasing and multiplying . . . demands of mankind" for freshwater, the UNGA called for further study of legal problems associated with international freshwater management.[68] After more than two decades of work, the ILC presented the UNGA with a set of 33 Draft Articles in 1994.[69] Three years later, the UNGA converted the Draft Articles into the Convention on the Law of the Non-navigational Uses of International Watercourses (1997 Convention) and opened it for ratification by UN member states.[70]

Groundwater is within the purview of the 1997 Convention only if it is part of "a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole."[71] In other words, only those aquifers hydrologically connected to surface waters,[72] unlike the NSAS, are covered. Prior to the 1997 Convention being enacted, many countries commented that including non-recharging aquifers would be too ambitious, as it would require further study and the incorporation of additional complicating articles.[73] Thus, the ILC left non-recharging aquifers out of the Draft Articles, instead appending a resolution suggesting that the Draft Articles apply equally to non-recharging aquifers.[74] In the process of converting the Draft Articles into the 1997 Convention, the UNGA was "silent on the matter" of non-recharging aquifers and the ILC Resolution was dropped entirely.[75]

67. Salman, *supra* note 21, at 631.

68. G.A. Res. 2669 (XXV), U.N. GAOR, 25th Sess., U.N. Doc. A/RES/2669 (Dec. 8, 1970).

69. Int'l L. Comm'n, *Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Commentaries Thereto*, U.N. Doc. A/CN.4/L.493 (Jul. 12, 1994).

70. G.A. Res. 51/229, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/229 (May 21, 1997) [hereinafter 1997 Convention].

71. *Id.* art. 2(a).

72. In the ILC's report, *infra* note 73, and its appended resolution to the Draft Articles, *infra* note 74, recharging aquifers are referred to as "confined" aquifers.

73. *See, e.g.*, Int'l L. Comm'n, *Report of the International Law Commission on the Work of its Forty-Sixth Session*, paras. 6, 15, 17, 43, U.N. Doc. A/C.6/49/SR.24 (Nov. 29, 1994) (the views of representatives from Gabon, Mexico, France, and Venezuela respectively).

74. *Resolution on Confined Transboundary Groundwater*, [1994] 2 Y.B. Int'l L. Comm'n 135., U.N. Doc. A/CN.4/459.

75. Stephen C. McCaffrey, *An Overview of the U.N. Convention on the Law of the Non-Navigational Uses of International Watercourses*, 20 J. LAND RESOURCES & ENVTL. L. 57, 59 (2000).

More than a decade after being finalized, the 1997 Convention has not attracted enough signatures to come into force.[76] Nonetheless, it represents an important progression in the emerging world of international water law.[77] Some of its fundamental principles are applicable to non-recharging aquifers.[78] Therefore, the 1997 Convention will be helpful to the Nubian states as they begin to craft an NSAS treaty.

B. *2008 Resolution on the Law of Transboundary Aquifers*

In 2002, the ILC acknowledged the need to address shared natural resources, specifically confined groundwater[79] and oil and natural gas.[80] It separated confined groundwater from oil and natural gas and agreed to take up confined groundwater first.[81] Six years later, the UNGA adopted the 2008 Resolution on the Law of Transboundary Aquifers.[82] The UNGA borrowed heavily from the 1997 Convention,[83] but also crafted provisions specifically tailored to the unique circumstances of TBAs.[84] The 2008 Resolution covers non-recharging aquifers like the NSAS.[85]

The future of the 2008 Resolution is uncertain. Unlike Conventions, UNGA resolutions are not binding.[86] During its 2011 session, the UNGA will consider

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76. *Status of the Watercourse Convention*, THE INT'L WATER LAW PROJECT, http://internationalwaterlaw.org/documents/intldocs/watercourse_status.html (last visited Feb. 6, 2011) (showing that as of January 1, 2011, only 21 of the required 35 countries had become parties to the convention).

77. McCaffrey, *supra* note 75, at 70–73.

78. *Id.* at 59.

79. As discussed above, experts are attempting to eliminate the word "confined" from the field in favor of more descriptive words. This article uses the term "non-recharging." *Supra* note 31.

80. Rep. of the Int'l Law Comm'n, 54th sess, Apr. 29–June 7, July 22–Aug. 16, 2002, paras. 518–520, U.N. Doc. A/57/10; GAOR, 57th Sess., Supp. No. 10 (2002).

81. *See id.* para. 520 (establishing ILC's work program, with confined groundwater addressed in 2004, and oil and gas addressed in 2005).

82. 2008 Resolution, *supra* note 25.

83. *Compare* 1997 Convention, *supra* note 70, art. 6 (listing factors to be considered when defining equitable and reasonable utilization), *with* 2008 Resolution, *supra* note 25, art. 5 (borrowing several of the same factors while supplementing the list with factors tailored specifically to groundwater).

84. *See, e.g.*, 2008 Resolution, *supra* note 25, arts. 3, 11, 13, 16 (addressing sovereignty, recharge and discharge zones, joint monitoring, and technical cooperation respectively).

85. *See Rep. of the Int'l Law Comm'n*, 6oth sess, May 5–June 6, July 7–Aug. 8, 2008, U.N. Doc. A/63/10; GAOR, 63d Sess., Supp. No. 10, art. 4 cmt., para. 4 (2008) [hereinafter 2008 ILC Commentary] (noting that the resolution's equitable and reasonable utilization provision aims to "maximize the long-term benefits from the use" of "waters in aquifers, whether recharging or non-recharging"). Citations in support of subsequent discussion of the 2008 Resolution will often be to ILC documents that actually pertain to the Draft Articles, which later became the 2008 Resolution. This is because much of the valuable commentary on the articles in the 2008 Resolution comes from the process of creating the Draft Articles. As a result, sometimes the Draft Article cited to will be numbered differently from the eventual 2008 Resolution article, even though the content is identical. Further clarifications on these inexact sources are offered when necessary.

86. *See Definitions*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml (last visited Mar. 9, 2011) (explaining that the term "convention" is synonymous with "treaty," which "has regularly been used as a generic term embracing all instruments binding at international law"); *The General Assembly*, UNITED NATIONS FOUNDATION, http://www.unfoundation.org/global-issues/united-nations/the-general-assembly.html (last visited Mar. 9, 2011) (explaining that non-budgetary UNGA resolutions are not binding).

whether to convert the 2008 Resolution into a Convention or simply leave it as a non-binding set of guidelines.[87] Opinions differ on which is the proper course of action.[88] Even if the UNGA converts the 2008 Resolution into a Convention, it would require ratification by a certain number of countries to become binding. Without the necessary ratifications, the 2008 Resolution will remain a set of unenforceable guidelines, much like the 1997 Convention is today.[89] That status, however, is not without value. By continually tabling the 2008 Resolution at the UNGA, countries may be less likely to reject it outright and more willing to test its tenets during daily relations with their neighbors.[90] In this way, the recommended principles could gain support in the international community over time.[91] Regardless of the 2008 Resolution's fate, the act of designing it has been a milestone in the process of codifying international groundwater law.[92] The Nubian states must determine how best to let its principles inform an NSAS treaty.

III. TASKS THE NUBIAN STATES MUST COMPLETE

Given the NSAS's many vulnerabilities, anything but a thorough, fair, and all-encompassing multilateral treaty would be of little value. This section discusses several tasks the Nubian states must complete in order to build a robust treaty.

A. *Define Equitable and Reasonable Use*

The requirement of equitable and reasonable use (ERU) is one of the two core principles of international water law.[93] ERU is always a central part of transboundary water negotiations.[94] Therefore, an NSAS treaty must address it. In light of the centrality of ERU, Saudi Arabia, in its commentary on the draft version

87. *See* 2008 Resolution, *supra* note 25, para. 6 (deciding to include in provisional agenda "the question of the form that might be given to the draft articles").

88. *See, e.g.*, U.N. GAOR, 61st Sess., 14th mtg. para. 78, U.N. Doc. A/C.6/61/SR.14 (Oct. 30, 2006) (noting Uruguay's preference that the Draft Articles remain a set of flexible guidelines); U.N. GAOR, 64th Sess., 23d mtg. para. 17, U.N. Doc. A/C.6/64/SR.23 (Nov. 3, 2009) (noting Turkey's opinion that the ILC should reserve further judgment on the final form of the Draft Articles).

89. Although progress has been slow, the 1997 Convention continues to accrue more signatories, most recently Nigeria, which ratified it on September 27, 2010. *Convention on the Law of the Non-Navigational Uses of International Watercourses*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&lang=en (last visited Feb. 6, 2011).

90. Telephone Interview with Gabriel Eckstein, Former Member of Advisory Committee to the United Nations International Law Commission (Oct. 29, 2010) (describing various perspectives on the status of the 2008 Resolution).

91. *Id.*

92. Gabriel Eckstein, *Commentary on the U.N. International Law Commission's Draft Articles on the Law of Transboundary Aquifers*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 537, 542 (2007).

93. *See* Jutta Brunnee, *Law and Politics in the Nile Basin*, 102 AM. SOC'Y INT'L L. PROC. 359, 361 (2008) (discussing the "equitable utilization principle"). The other core principle is the obligation not to cause harm. *Id.* The two principles taken together are an enduring source of controversy. *Id.* Rather than comment on that lengthy debate, this section focuses just on ERU.

94. Gabriel Eckstein, *Examples of the Political Character of International Water Law*, 102 AM. SOC'Y INT'L L. PROC. 364, 364 (2008).

of the 2008 Resolution, pushed for a firm, detailed definition of the principle.[95] Saudi Arabia expressed concern that the 2008 Resolution did not address, among other factors, banning "directional, slant, and horizontal drilling"; differences in the area, extent, and thickness of the aquifer; the direction of the aquifer's flow; population variation; and the climate overlying the aquifer.[96]

Although the 2008 Resolution does delineate several factors to be used when defining ERU, it is not as specific as Saudi Arabia would have preferred.[97] In this respect, the ERU provision in the 2008 Resolution is less a bright-line standard against which to judge past infractions and more a guideline for future joint management of shared waters.[98] The Nubian states should interpret ERU creatively, in order to best suit their particular needs.[99] The underlying goal should be to achieve a degree of sustainability.

Conceptually, sustainability and non-renewable resources like the NSAS are at odds, since by definition a non-recharging aquifer is geologically unsustainable.[100] Sustainability in the context of non-recharging aquifers refers to using the water to "sustain" human life for future generations, even though the water itself cannot be replenished.[101] Over time, the usage of NSAS water must contribute to new economic productivity.[102] That way, when the aquifer is finally depleted, the descendants of the individuals who once relied on it will have the socioeconomic means to find other water sources.[103] In other words, the water itself is eventually depleted, but only after it helps build a socioeconomically sustainable society. Future generations can actually benefit more from the aquifer if some of it is used today rather than saved.[104] The Nubian states should use this socioeconomic definition of sustainability in their ERU clause.

To reach socioeconomic sustainability, wasteful usage of the NSAS must be eradicated.[105] The longer a non-recharging aquifer has been used wastefully, the

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95. Rep. of Int'l L. Comm'n, *Shared Natural Resources: Comments and Observations by Governments on the Draft Articles on the Law of Transboundary Aquifers*, May 5–June 6, July 7–Aug. 2008, para. 108, U.N. Doc. A/CN.4/595, 60th Sess., (Mar. 26, 2008) [hereinafter 2008 Country Commentary].

96. *Id.* para. 53.

97. *See, e.g.*, 2008 Resolution, *supra* note 25, art. 5 (not specifically addressing area, extent, and thickness of the aquifer, direction of flow, and overlying climate).

98. *See* Eckstein, *supra* note 94, at 364 (arguing generally that the ERU provisions in international water law are more likely "devised as tools for negotiating and facilitating cooperation" than as guidelines for adjudicating inequitable use).

99. *See* Rose M. Mukhar, *The Jordan River Basin and the Mountain Aquifer: The Transboundary Freshwater Disputes Between Israel, Jordan, Syria, Lebanon and the Palestinians*, 12 ANN. SURV. INT'L & COMP. L. 59, 85 (2006) (making similar argument for a detailed, responsive agreement regarding equitable and reasonable use of the Jordan River Basin and Mountain Aquifer).

100. *See supra* text accompanying notes 30–44.

101. *See* Mohammed Al-Eryani et al., *Social and Economic Dimensions of Non-Renewable Resources*, *in* NON-RENEWABLE GROUNDWATER RESOURCES: A GUIDEBOOK ON SOCIALLY-SUSTAINABLE MANAGEMENT FOR WATER-POLICY MAKERS 25, 25–26 (Stephen Foster & Daniel P. Loucks eds., 2006) (distinguishing between preservation of non-renewable groundwater resources and socially sustainable use of such resources).

102. *See id.* at 26 (outlining "planned depletion scenarios" for non-renewable groundwater resources with the goal of maximizing "long-term economic and social development of the community").

103. *Id.*

104. *Id.* at 27.

105. *See id.* at 28 (detailing a plan for socioeconomically sustainable mining of groundwater

more difficult it is to institute a socioeconomically sustainable management plan.[106] However, the era of significant, government-supported usage of the NSAS is relatively young, as evidenced by the extreme growth in overall extraction since the 1960s.[107] For example, despite the fanfare surrounding the GMRP and the change it will bring to Libya, it is actually only partially completed.[108] The New Valley Project, Egypt's government-sanctioned westward development, is also a young venture.[109] Although the New Valley Project focuses on moving water from Lake Nasser to irrigate desert areas, it also will draw significantly on the NSAS.[110] Since so much of the NSAS usage is relatively new, the Nubian states should require that these new uses be socioeconomically sustainable by incorporating the doctrine of waste into the NSAS agreement's ERU clause.

The doctrine of waste exists to ensure that all water is put to a beneficial use.[111] "Beneficial use" at first sounds like a requirement that water users "carefully husband the resource, using every drop of water completely and efficiently," but the standard is actually much lower.[112] Beneficial use is defined largely by reference to existing practices, rendering the doctrine of waste largely inoperative whenever there are established patterns of water use.[113] However, the doctrine of waste would not be so limited if adopted by the Nubian states. The doctrine of waste, imported into an NSAS agreement, should operate under the assumption that beneficial use in the context of the new NSAS usage has not yet been established. Since water extracted by the GMRP and the New Valley Project has been in use for only a few years, the Nubian states can craft a progressive definition of beneficial use.

Beneficial use is most important in the agricultural context, since 85%–90% of the Nubian states' general water withdrawal goes to agriculture.[114] Egypt and Sudan already are ranked first and second respectively in Africa for farmland under irrigation.[115] In Egypt, 88.5% of irrigated land uses surface irrigation,[116] which is

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resources).

106. *Id.*

107. Bakhbakhi, *supra* note 7, at 78 fig.2 (showing that extraction from each geological subsystem of the NSAS was roughly twenty times higher in 1995 than in 1965).

108. *See* FAO LAND & WATER DEV. DIV., *supra* note 12, at 323 (outlining five phases of the project). Phase III, which will take from the NSAS's Kufra Basin, was not even complete yet as of 2005. *Id.*

109. *See, e.g.*, *Toshka Project—Mubarak Pumping Station/Sheikh Zayed Canal, Egypt*, WATER-TECHNOLOGY.NET, http://www.water-technology.net/projects/mubarak/ (last visited Feb. 6, 2011) (explaining that the Mubarak Pumping Station, the centerpiece of the New Valley Project (also called the Toshka Project), was completed in 2005).

110. Al-Eryani et al., *supra* note 101, at 32 (explaining that the New Valley Project will take 540 million cubic meters of Nubian water over the next fifty years).

111. Janet Neuman, *Beneficial Use, Waste and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 920 (1998).

112. *Id.* at 922.

113. *See id.* (calling beneficial use an "elastic concept that freezes old customs, allows water users considerable flexibility in the amount and method of use, and leaves line drawing to the courts").

114. FAO LAND & WATER DEV. DIV., *supra* note 12, at 316 tbl.2 (Libya, 83%), 532 tbl.2 (Sudan, 97%), 556 tbl.2 (Chad, 83 %), and 201 tbl.2 (Egypt, 86%) (calculating percentages by dividing amount of annual water withdrawal dedicated to agriculture by overall withdrawal).

115. INTERNATIONAL COMMISSION ON IRRIGATION AND DRAINAGE, IMPORTANT DATA OF ICID MEMBER COUNTRIES, *available at* http://www.icid.org/imp_data.pdf (last visited Feb. 6, 2011).

116. FAO LAND & WATER DEV. DIV., *supra* note 12, at 203 fig.2.

considered to be the least efficient method.[117] Despite this and other troubling statistics, however, Libya has pledged that farms fed by the GMRP will use "state of the art irrigation techniques."[118]

Beyond simply requiring certain types of irrigation systems, beneficial use in an NSAS agreement could require that a certain amount of recycled wastewater be used in every irrigation system.[119] In Libya, for example, only 1% of irrigated agriculture uses treated wastewater.[120] The rest uses water clean enough for domestic consumption. According to Tony Allan, a water specialist credited with devising the "virtual water" concept,[121] "it is madness to use [potable water from the GMRP] for agriculture."[122] Beneficial use in the NSAS treaty could also require that only low-water, high-income crops be grown, as other water-stressed states have begun requiring.[123] Egypt already has begun to reduce water-intensive crops like rice.[124]

To achieve socioeconomic sustainability, Nubian water must be priced—and priced fairly. Libya's usage illustrates the problems with current pricing norms: Libya is currently spending billions to get its Nubian water, in the form of GMRP funding.[125] However, once the GMRP is finished, Libya will be able to bring millions of gallons of water per day to its cities for nothing more than the price of maintaining the pipelines. Citizens of Tripoli currently pay nothing for water, regardless of how much they use.[126] Assuming Libya continues to provide its citizens with water free of charge once the GMRP is completed, neither Libyans nor the Libyan government will have any reason to use Nubian water sustainably. With water in Cairo costing $0.03 per 100 gallons, the same disincentive to use water wisely exists.[127] These examples are evidence that the Nubian states must encourage ERU by including a fair pricing provision.

An NSAS pricing provision should be tailored to the differing circumstances of different Nubian states. For example, a pricing provision should give preference to "vital human needs" by allotting a certain amount of water for each person before

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117. *Sourcebook of Alternative Technologies for Freshwater Augmentation in Small Island Developing States*, UNITED NATIONS ENVIRONMENT PROGRAMME [UNEP], http://www.unep.or.jp/ietc/publications/techpublications/techpub-8d/irrigation.asp (last visited Mar. 8, 2011).

118. Great Man Made River Auth., *Water Usage*, THE GREAT MAN MADE RIVER PROJECT http://www.gmmra.org/en/index.php?option=com_content&view=article&id=75&Itemid=41 (last visited Feb. 6, 2011).

119. *See* Marcella Nanni et al., *Legal and Institutional Considerations*, *in* NON-RENEWABLE GROUNDWATER RESOURCES: A GUIDEBOOK ON SOCIALLY-SUSTAINABLE MANAGEMENT FOR WATER-POLICY MAKERS 49, 51 tbl.7 (Stephen Foster & Daniel P. Loucks eds., 2006) (listing various legal approaches to groundwater resources planning, including "controlled recycling and reuse of wastewater").

120. FAO LAND & WATER DEV. DIV., *supra* note 12, at 320.

121. Press Release, Stockholm International Water Institute, "Virtual Water" Innovator Awarded 2008 Stockholm Water Prize (Mar. 19, 2008), http://www.siwi.org/sa/node.asp?node=25.

122. PEARCE, *supra* note 10, at 48.

123. *See* Al-Eryani et al., *supra* note 101, at 32 (describing Jordan's transformation of its agriculture via technology, training, and investment); *see also* Nanni et al., *supra* note 119, at 50 (explaining that crop regulation and conversion are key ways for less technologically advanced nations to cut back agricultural water use).

124. Dina Zayed, *Egypt Spat Fuels Water Tension in Nile Basin*, REUTERS, Apr. 27, 2010, *available at* http://af.reuters.com/article/topNews/idAFJOE63Q05C20100427.

125. PEARCE, *supra* note 10, at 46–47.

126. *Cost of Water*, NAT'L GEOGRAPHIC, Apr. 2010, at 114 (depicting the price per 100 gallons of water in cities around the world).

127. *Id.*

any pricing mechanism kicks in.[128] As defined by the 1997 Convention, "vital human needs" include sufficient drinking water and water with which to produce a subsistence level of food.[129] Conveniently, a free initial need-based allotment would serve this goal while also functioning as a de minimis exception for subsistence farmers and nomads, thus addressing the fact that the Nubian states do not have the manpower necessary to enforce a price structure on small-scale users. When there are wars being fought over access to the rudimentary desert wells, trying to put meters on them and collect usage fees seems ludicrous. On the other hand, affluent urbanites would be capable of paying for their non-vital water use, and urban pricing structures could be enforced.

Whereas the GMRP is bringing water away from the NSAS, Egypt's New Valley Project is trying to incentivize the cultivation of desert overlying the NSAS.[130] An NSAS treaty's pricing provision could be tailored to address this type of usage as well. Egypt already has pledged tax breaks for companies that move far enough west to get their water from sources outside the Nile Valley.[131] The pricing provision could allow countries to subsidize their citizens' usage under the condition that the countries pay the proper amount in usage fees.

Any pricing provision governing the Nubian states would need to keep in mind Islam's traditional condemnation of the sale of water.[132] However, given the inequities that such a rule can generate in modern society, some predominantly Muslim countries have begun to circumvent it.[133] If a pricing provision is put in place to encourage socioeconomically sustainable use of the NSAS, the biggest question for the Nubian states would become how to use the fees. The options are myriad. For example, the countries already are co-funding 80% of one massive scientific information-gathering project,[134] so the fees could contribute to further research. Or perhaps the fees could be used to address the lack of irrigation and pumping infrastructure throughout the region, particularly in Chad and Sudan.[135]

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128. *See* 2008 Resolution, *supra* note 25, art. 5, para. 2 (asserting that "special regard" be given "vital human needs" in calibrating ERU). Water pricing in Iran does something similar, providing domestic, urban customers with roughly thirty liters of water per day before any pricing mechanism kicks in. Naser I. Faruqui, *Islam and Water Management: Overview and Principles*, *in* WATER MANAGEMENT IN ISLAM 1, 14 (Naser I. Faruqui, Asit K. Biswas & Murad J. Bino eds., 2001), *available at* http://www.idrc.ca/en/ev-93948-201-1-DO_TOPIC.html.

129. Gabriel Eckstein, *Water Scarcity, Conflict, and Security in a Climate Change World: Challenges and Opportunities for International Law and Policy*, 27 WIS. INT'L L.J. 409, 455 (2009).

130. *See* Tarek F. Riad, *The Legal Environment for Investment in Egypt in the New Millennium*, 15 ARAB L.Q. 117, 117 (2000) (noting that the Egyptian government is trying to encourage foreign investment in "[r]eclamation and/or cultivation of barren and desert lands"); Alker, *supra* note 1, at 247 (describing the government's New Valley Project).

131. *Id.* at 118.

132. *See* Faruqui, *supra* note 128, at 12 (noting that the Prophet Muhammad "forbade the sale of excess water" to protect the poor).

133. *See id.* at 12–13 (arguing that current water subsidies run counter to the Prophet's concerns by providing wealthy urban and middle-class populations with free water while forcing the poor to pay high prices in informal markets and noting that Islamic scholars generally sanction the sale of water); *see also* Carl Bruch et al., *Legal Frameworks Governing Water in the Middle East and North Africa*, 23 INT'L J. WATER RESOURCES DEV. 517, 613 (2007) (listing countries that have instituted water pricing schemes, some of which use an increasing block tariff system to charge higher rates as water usage increases).

134. MEDIUM-SIZED PROPOSAL, *supra* note 5, at 20 tbl.1 (dividing combined cofinancing from Nubian states by total amount of financing, including Nubian states and NGOs, to get result of 80%).

135. *See infra* text accompanying notes 152–153, 155 (noting the lowering water tables in Sudan and

B. *Address the Economic Gap Between the Nubian States*

As discussed above, there are significant wealth disparities among the Nubian states.[136] In order to be a success, an NSAS agreement must compensate for the political dynamic created by this disparity. Article 16 of the 2008 Resolution, entitled "Technical cooperation with developing States," lays out eight ways in which developed nations should cooperate with developing nations, either directly or via international organizations, in order to help them better protect and manage their TBAs.[137] By including Article 16, the drafters of the 2008 Resolution indicated that the unique circumstances of TBA management necessitate a "unidirectional track of cooperation" from more developed to less developed states.[138] The 1997 Convention, with its primary focus on surface water, does not include a similar provision.

Other environmentally related international agreements, some of which the Nubian states have signed, also stress scientific and technical cooperation.[139] Neither Egypt nor Libya is considered a developed nation,[140] but both are significantly more capable of providing cross-border support than Sudan or Chad.[141] Therefore, an NSAS treaty should treat them like developed nations for purposes of the agreement's analog to Article 16.

In the case of many TBAs, valuable technical information is limited or non-existent.[142] Even when studies have been performed, they often fail to extend past national borders, because of a lack of cooperation between the affected countries.[143] Since TBAs "extend, a priori, over (or under) the administrative boundaries of nations," research confined within single nations is of limited utility.[144] However, the hundreds of past studies of the NSAS, despite suffering from such limitations, have laid down extensive groundwork.[145] Additionally, in recent years cross-border studies

Chad and lack of efficient irrigation systems).

136. *See supra* text accompanying notes 65–66.

137. 2008 Resolution, *supra* note 25, art. 16.

138. Eckstein, *supra* note 92, at 598 (referencing Draft Article 15, which became Article 16 in the 2008 Resolution).

139. *See* 2008 ILC Commentary, *supra* note 85, art. 16 cmt., paras. 3–4 (2008) (listing several conventions and declarations that call for scientific assistance and technical cooperation); *see also* United Nations Convention on the Law of the Sea [UNCLOS], Dec. 10, 1982, 1833 U.N.T.S. 397 (signed and ratified by Chad, Egypt, and Sudan; signed but not ratified by Libya) and United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification Particularly in Africa, Oct. 14, 1994, 1954 U.N.T.S. 3 [hereinafter Desertification Convention] (signed and ratified by Chad, Egypt, Libya, and Sudan).

140. *See* UNDP, HUMAN DEVELOPMENT REPORT 2010, at 26, 144 tbl.1, *available at* http://hdr.undp.org/en/media/HDR_2010_EN_Complete_reprint.pdf (ranking Egypt and Libya below the Human Development Index category that corresponds to "developed" nations).

141. *Supra* notes 65–66 and accompanying text; *see also* CIA, *Egypt*, *Economy*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html (last visited Mar. 14, 2011) (listing Egypt's most recent GDP per capita as $6,200).

142. Eckstein, *supra* note 92, at 598.

143. *Id.*

144. Waltina Scheumann with contributions from Elke Herrfahrdt-Pähle, *Conceptualizing Cooperation on Africa's Transboundary Aquifer Systems*, *in* CONCEPTUALIZING COOPERATION ON AFRICA'S TRANSBOUNDARY GROUNDWATER RESOURCES 11, 32 (Waltina Scheumann & Elke Herrfahrdt-Pahle eds., 2008), *available at* http://www.die-gdi.de/CMS-Homepage/openwebcms3.nsf/(ynDK_contentByKey)/ANES-7FJFVT/$FILE/Studie%2032.pdf.

145. *See* Gossel et al., *supra* note 19, at 698–99 (reviewing gains from several of these studies while also citing their flaws).

have become more typical.[146] There continues to be extensive focus on hydrogeological modeling,[147] dating NSAS water,[148] and understanding the impacts of the aquifer's deplenishing process, as well as present and future extraction.[149] Much of this research is funded at least in part by NGOs.[150] Libya and Egypt, therefore, should not satisfy their duty to provide technical cooperation simply through contributing to more research.

Article 16 also suggests that developed nations supply developing nations with "necessary equipment."[151] Experts predict that increased Egyptian extraction will further lower the Sudanese water table,[152] requiring Sudan to somehow get equipment capable of pumping water from deeper under the surface. In some areas, the water table already is too low for Sudan to access Nubian water, given the country's lack of capital investment in the relevant technology.[153] Libya already has lowered its own water levels pumping water for the GMRP, and Chad may be beginning to feel the effects.[154] Chad has expressed its need for new technology to reach the dropping water table.[155] A system where Libya and Egypt help Sudan and Chad obtain the equipment they need to access their respective shares of the NSAS would effectively satisfy their duty to provide assistance.

"Necessary equipment" also could refer to irrigation equipment. The most efficient irrigation systems are used infrequently in poor regions because they cost more to purchase and maintain.[156] If an NSAS agreement includes an irrigation standard, Chad's and Sudan's relative lack of ability to purchase efficient irrigation systems must be accommodated. Since Libya already has pledged to employ state-of-the-art irrigation techniques for its GMRP-fueled farms,[157] Libya could help Chad and Sudan access and implement similar technology.

When drafting their version of Article 16, the Nubian states should look beyond the 2008 Resolution. For example, Article 16 has its roots in the United Nations

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146. *E.g.*, *id.*; W. Gossel & A.M. Ebraheem, *A GIS-based Flow Model for Groundwater Resources Management in the Development Areas in the Eastern Sahara, Africa*, *in* APPLIED GROUNDWATER STUDIES IN AFRICA 43, 43 (Segun M.A. Adelana & Alan M. MacDonald eds., 2008).

147. Gossel, *supra* note 19, at 699.

148. N.C. Sturchio et al., *Krypton-81: An Improved Tool for Dating Old Groundwater*, WATER & ENV'T NEWS (IAEA Isotope Hydrology Section, Vienna Austria), Feb. 2010, at 6, *available at* http://www-naweb.iaea.org/napc/ih/documents/Newsletter/issue_26.pdf.

149. A.M. Ebraheem et al., *Simulation of Impact of Present and Future Groundwater Extraction from the Non-replenished Nubian Sandstone Aquifer in Southwest Egypt*, 43 ENVTL. GEOLOGY 188, 188 (2002).

150. *See, e.g.*, MEDIUM-SIZED PROPOSAL, *supra* note 5, at 1 (listing amount of financing to be provided by three NGOs: GEF, IAEA, and UNESCO).

151. 2008 Resolution, *supra* note 25, art. 16.

152. Scheumann & Alker, *supra* note 42, at 795.

153. MEDIUM-SIZED PROPOSAL, *supra* note 5, annex 6.

154. *See* Scheumann & Alker, *supra* note 42, at 795 (noting that lower water levels have been reported in northern Chad, although "there is no indication yet" that Libyan pumping is the cause).

155. MEDIUM-SIZED PROPOSAL, *supra* note 5, at 52.

156. *See, e.g.*, Eric W. Sievers, *Water, Conflict, and Regional Security in Central Asia*, 10 N.Y.U. ENVTL. L.J. 356, 395 (2002) (offering an example of a situation where a surface-based system was significantly cheaper than a drip system); David Lewis, *Can Drip Irrigation Break Africa's Hunger Cycles?*, REUTERS, May 6, 2010, *available at* http://af.reuters.com/article/maliNews/idAFLDE63R1NF20100506?sp=true (describing donors' reluctance to fund expensive but effective drip irrigation systems).

157. *See supra* text accompanying note 118.

Convention on the Law of the Sea (UNCLOS).[158] UNCLOS suggests that more developed nations fulfill their duty to developing nations through training personnel.[159] Effective aquifer utilization tactics and training programs have become a primary missing link in the effort to manage the NSAS. Indeed, NGOs have identified the disintegration of institutional mechanisms as a primary risk for the NSAS.[160]

Libya has supported research that benefits all of the Nubian states, providing co-funding in amounts that correspond to its own booming NSAS usage.[161] Libya also provided the entire 2005 budget for an existing NSAS information-sharing agreement.[162] In drafting an NSAS treaty, the Nubian states should apply this willingness to cooperate to a broader range of potential support tactics, namely the provision of equipment and the training of personnel.

C. Endorse the Principle of Sovereignty over Shared Natural Resources

The most controversial provision of the 2008 Resolution is Article 3, which asserts the "sovereignty" of each state over the part of a transboundary aquifer contained in its territory.[163] Sovereignty is a "politically charged word which changes the dynamics of discussions and negotiations."[164] It has long been the sine qua non of international law.[165] The 1997 Convention, however, which pertains primarily to surface water, does not contain a sovereignty provision.[166] The inference drawn from that absence is that sovereignty over shared aquifers is a more contentious issue than sovereignty over shared surface watercourses. Thus, in light of Article 3, an NSAS treaty must take a position on the question of sovereignty over shared groundwater.

During the process of drafting the 2008 Resolution, various countries commented on the importance of a sovereignty provision. Paraguay,[167] for example, used as precedent the 1962 Resolution on Permanent Sovereignty over Natural Resources (1962 Resolution), which explained that all states have sovereign control over the natural resources existing within their boundaries.[168] Many countries even objected to the use of the word "shared" when listing transboundary groundwater as

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158. 2008 ILC Commentary, *supra* note 85, art. 16, cmt. 3.

159. UNCLOS, *supra* note 139, art. 202.

160. MEDIUM-SIZED PROPOSAL, *supra* note 5, at 22 tbl.2.

161. *See id.* at 20 tbl.1 (listing the amounts of co-financing each of the Nubian states is providing for a current institutional and scientific project, with Libya providing 64% of total co-funding).

162. Alker, *supra* note 1, at 260.

163. 2008 Resolution, *supra* note 25, art. 3.

164. Margaret J. Vick, *International Water Law and Sovereignty: A Discussion of the ILC Draft Articles on the Law of Transboundary Aquifers*, 21 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 191, 206 (2008).

165. Anne C. Dowling, *"Un-Locke-ing" a "Just Right" Environmental Regime: Overcoming the Three Bears of International Environmentalism—Sovereignty, Locke, and Compensation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 891, 891 (2002).

166. Stephen C. McCaffrey, *The International Law Commission Adopts Draft Articles on Transboundary Aquifers*, 103 AM. J. INT'L L. 272, 275 (2009).

167. U.N. GAOR, 59th Sess., 23rd mtg. para. 6, U.N. Doc. A/C.6/59/SR.23 (Nov. 8, 2004).

168. G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp. No 17, U.N. Doc. A/RES/2669 (Dec. 14, 1962).

a topic on the ILC's agenda.[169] The 1962 Resolution would later be noted in the annex to the 2008 Resolution.[170]

Since one of the 2008 Resolution's main objectives is to foster international cooperation, using the first substantive article to reiterate state sovereignty over aquifers seems counterproductive.[171] Beyond inclusion of the topic being counterproductive, the concept of sovereignty over transboundary groundwater is itself scientifically illusory. Unlike the other types of natural resources—mineral resources, for example—transboundary groundwater is not static; it does not "respect political boundaries."[172] Even in non-recharging aquifers, where flow is slow, extraction, depending on its location and extent, will cause groundwater to move across national boundaries.[173]

Despite the fact that Article 3 is arguably both legally counterproductive and scientifically unsound, an NSAS treaty must endorse it. Sovereignty—defined as the ability to self-govern, to be recognized as more than just the territory of another state[174]—is a real, everyday concern for African states. Three of the Nubian states have been sovereign nations for less than sixty years.[175] Christians and Animists in southern Sudan waged a decades-long fight against Muslims in northern Sudan over the right to become their own sovereign nation.[176] Chad and Libya spent years in armed conflict over who could exercise sovereignty over the Aouzou Strip, much of which overlies the NSAS.[177] A provision on sovereignty would help an NSAS treaty acknowledge this culture of struggle within a new context of cooperation.

Most importantly, a sovereignty provision would make a treaty more palatable domestically.[178] Treaty negotiators' hardest job is not fostering agreement with one another, but rather convincing their respective domestic interest groups, bureaucrats, and politicians to agree with them.[179] These domestic actors "negotiate internally

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169. Special Rapporteur on Shared Natural Resources, *Second Rep. on Shared Natural Resources: Transboundary Groundwaters*, Int'l Law Comm'n, paras. 2–4, U.N. Doc. A/CN.4/539 (Mar. 9, 2004) (by Chusei Yamada).

170. 2008 Resolution, *supra* note 25, annex.

171. *Id.* annex ("[a]ffirming the importance of international cooperation"). Articles 1 and 2 discuss the scope of the Resolution and the use of terms within it, respectively, leaving Article 3 on sovereignty as the first substantive article.

172. Vick, *supra* note 164, at 209.

173. *Id.*

174. *Id.* at 208.

175. CIA, *Chad, Government*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/cd.html (last visited Feb. 8, 2011) (listing Chad's date of independence as Aug. 11, 1960); CIA, *Libya, Government*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/ly.html (last visited Feb. 8, 2011) (listing Libya's date of independence as Dec. 24, 1951); CIA, *Sudan, Government*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/su.html (last visited Feb. 8, 2011) (listing Sudan's date of independence as Jan. 1, 1956).

176. The climax of this struggle came in January 2011, when southern Sudanese voted to secede. Though the government accepted the results of the independence referendum, violence continues in the region. *See supra* text accompanying notes 55–57.

177. *See infra* text accompanying notes 217–226.

178. *See* 2008 Country Commentary, *supra* note 95, paras. 89–90, 92, 94 (noting the views of Austria, Brazil, Israel, and Turkey, respectively, emphasizing the importance of the sovereignty provision).

179. Frederick W. Mayer, *Managing Domestic Differences in International Negotiations: The Strategic Use of Internal Side-Payments*, 46 INT'L ORG. 793, 793 (1992).

over what positions will be taken by their party in the external negotiation."[180] While the words of an NSAS treaty themselves will be about groundwater, whether the Nubian states ratify the treaty will depend on any number of "conflicting domestic interests" within each state.[181] For example, much of the fighting in Darfur, which has spilled over into Chad despite Chadian protests,[182] stems from lack of access to water.[183] If Chadian president Idriss Deby Itno were to sign an NSAS treaty without a sovereignty provision, he could be seen as signaling that the collective needs of the Nubian states—including Sudan—outweighed the needs of Chadians under siege from Sudanese rebels. For each of the Nubian states, particularly Egypt and Libya, NSAS access can legitimately be called a matter of national security.[184] A sovereignty provision would allow the various Nubian leaders to ratify an NSAS treaty but still assert that the water needs of their respective citizens take priority.

Commentators differ on the legal significance that Article 3 will come to have, based on the limitations imposed in its second sentence.[185] However, parsing words and applying doctrines is not the province of an NSAS treaty negotiator. From a realpolitik perspective, leaders of the Nubian states must be assured that agreeing to use the NSAS equitably and reasonably does not mean forfeiting natural resources to the neighbors against whom they are constantly struggling, even if the forfeiture would be largely symbolic.

D. *Craft a Flexible Jurisdictional Clause*

Most treaties include a jurisdictional clause (JC).[186] JCs explain how disputes arising under the treaty will be resolved.[187] Unless an NSAS agreement contains a JC with which all four Nubian states would comply, the agreement would be binding in name only. This subsection analyzes the attributes of a successful JC: flexibility and a specified tribunal.

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180. *Id.* at 795.

181. *See id.* at 793 (discussing generally the domestic difficulties faced by negotiators of international agreements).

182. Lydia Polgreen, *Darfur Crisis Draws Chad and Sudan Toward Deeper Conflict*, N.Y. TIMES, Apr. 13, 2008, http://www.nytimes.com/2008/04/13/world/africa/13iht-chad.1.11934808.html.

183. Lydia Polgreen, *A Godsend for Darfur, or a Curse?*, N.Y. TIMES, Jul. 22, 2007, http://www.nytimes.com/2007/07/22/weekinreview/22polgreen.html (explaining that "the heart of the Darfur conflict . . . is the battle for control of resources," including water).

184. Alker, *supra* note 1, at 267.

185. *Compare* Eckstein, *supra* note 92, at 561–62 (arguing that the second sentence of Article 3, which requires states to exercise their right of sovereignty in accordance with the rest of the Draft Articles, tempers states' sovereign rights), *with* Vick, *supra* note 164, at 212 (arguing that it is "equally plausible" that states will treat Article 3 as an unqualified recognition of their sovereign authority).

186. *See Treaties*, INT'L COURT OF JUSTICE, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=4 (last visited Feb. 8, 2011) (explaining that it is "general international practice" to include a jurisdictional clause). *But see* Agreement (with Annexes) for the Full Utilization of the Nile Waters, United Arab Republic-Sudan, Nov. 8, 1959, 6519 U.N.T.S. 63 (providing example of a treaty with no formal jurisdictional clause). The United Arab Republic was a short-lived political union of Egypt and Syria from 1958 to 1961. *United Arab Republic (U.A.R.)*, ENCYCLOPAEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/615447/United-Arab-Republic-UAR (last visited Mar. 14, 2011).

187. *Treaties*, *supra* note 186.

Flexibility: To determine how flexible their JC should be, the Nubian states could look at two opposing examples. The first is the JC in the 1997 Convention.[188] Member states advocated for a broad, flexible JC in the 1997 Convention.[189] What resulted was a multi-step process offering five interrelated options (internal negotiations, third-party mediation, arbitration, submission to the International Court of Justice (ICJ), or impartial fact-finding).[190] The 1997 Convention is not in force and therefore its JC has not been tested.[191] That said, one can infer that its breadth of options would be well-received by countries unable or unwilling to use one or more of them. For example, internal negotiations between transboundary watercourse states that do not recognize one another's existence is not an option—for them, recourse to the ICJ could be more effective.[192] Conversely, certain nations neither accept the ICJ's jurisdiction as compulsory nor have submitted voluntarily to its jurisdiction, meaning it alone would likely be insufficient.[193] Arbitration can be very expensive, suggesting poorer countries would prefer other options.[194]

Another key attribute of the 1997 Convention's JC is that it is residual, meaning it is preempted by any independent dispute resolution mechanisms agreed upon by groups of two or more signatories.[195] Many other UN Conventions have residual JCs.[196] Making a JC residual gives signatories another option: the option to circumvent the JC altogether.

On the opposite end of the spectrum from the 1997 Convention is the Convention on the Protection, Utilization, and Recharge of the Franco-Swiss Genevese Aquifer (Genevese Aquifer Treaty), between France and Switzerland. The Genevese Aquifer Treaty uses a much simpler and more rigid JC. Disputes are first heard by a Franco-Swiss transboundary-cooperation entity.[197] If that fails, the

188. 1997 Convention, *supra* note 70, art. 33.

189. *See, e.g.*, U.N. GAOR, 49th Sess., 24th mtg. paras. 8 and 19, U.N. Doc. A/C.6/49/SR.24 (Nov. 1, 1994) (noting, respectively, Gabon's rejection of a detailed settlement provision and France's critique of the then-draft article as too restrictive).

190. 1997 Convention, *supra* note 70, art. 33.

191. *See* McCaffrey, *supra* note 75, at 70–73 (discussing the 1997 Convention's value, despite its not being in force).

192. *See, e.g.*, *Convention on the Law of the Non-Navigational Uses of International Watercourses*, *supra* note 89 (listing Syria's declaration that its ratification of the 1997 Convention did not amount to recognition of the state of Israel and Israel's objection thereto).

193. *See Basis of the Court's Jurisdiction*, INT'L COURT OF JUSTICE, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2 (last visited Mar. 13, 2011) (explaining the means by which the ICJ gains jurisdiction and noting cases in which the court could not proceed because the opposing party did not recognize its jurisdiction).

194. Aman Mahray McHugh, Comment, *Resolving International Boundary Disputes in Africa: A Case for the International Court of Justice*, 49 HOW. L.J. 209, 237 (2005).

195. 1997 Convention, *supra* note 70, art. 33, para. 1 (explaining that parties shall use the Convention's dispute resolution mechanism only "in the absence of an applicable agreement" between the feuding parties); *Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries Thereto and Resolution on Transboundary Confined Groundwater* [1994] 2 Y.B. Int'l L. Comm'n 134, U.N. Doc. A/CN.4/L.493/add.1/corr.1 (noting Article 33's residual nature, i.e., its applicability only in the absence of dispute settlement agreements between states).

196. *See, e.g.*, UNCLOS, *supra* note 139, art. 280; Desertification Convention, *supra* note 139, art. 28, para. 1; International Convention on the Elimination of All Forms of Racial Discrimination art. 16, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter Racial Discrimination Convention].

197. Genevese Aquifer Treaty, *supra* note 20, art. 20(2).

dispute moves to a higher body of the same entity for resolution.[198] Since any disputes under the Genevese Aquifer Treaty will necessarily be between the same two countries, the JC does not need a broad array of dispute resolution options.

Although there would be only four parties to an NSAS agreement, its JC should strive for flexibility. With more options, countries with tense relationships will more likely find common ground. Most importantly, the JC must be residual. Ideally, a residual JC would encourage countries to integrate bilateral dispute resolution mechanisms into existing structures of cooperation.[199] For example, as Nile River co-riparians, Egypt and Sudan have extensive experience with water governance vis-à-vis one another.[200] In 1959, they reapportioned their respective shares of the Nile and pledged that going forward they would present a unified stance in negotiations with any of the eight other Nile riparians.[201]

The simplicity of the Genevese Aquifer Treaty—currently one of two treaties governing a TBA[202]—is alluring, but the Nubian states must remember how different they are from France and Switzerland. Such a rigid JC is tenable only with two states as wealthy[203] and diplomatically stable[204] as France and Switzerland. The Nubian states should consider any dispute resolution option that could be successful. An NSAS treaty's dispute resolution mechanism should be residual in order to encourage bilateral and trilateral agreements. Moreover, it should include both internal and external resolution approaches, like the 1997 Convention.[205]

Tribunal: All JCs specify a tribunal or forum.[206] An NSAS agreement should most likely use the ICJ, the judicial arm of the United Nations, as its tribunal.

First of all, the reputation of the ICJ internationally, and specifically in Africa, is consistently improving.[207] In its early years the ICJ faced criticism for allegedly being

198. *Id.* art. 20(3).

199. *See, e.g.*, Scheumann & Alker, *supra* note 42, at 794–95 (describing emerging cooperative water-management initiatives in Africa, including the Joint Authority for the Study and Development of the Nubian Sandstone Aquifer System).

200. *See* Fasil Amdetsion, *Scrutinizing the "Scorpion Problematique": Arguments in Favor of the Continued Relevance of International Law and a Multidisciplinary Approach to Resolving the Nile Dispute*, 44 TEX. INT'L L.J. 1, 4 (2009) (explaining that Egypt's and Sudan's utilization of colonial-era treaties to govern the Nile has been the "defining feature of Nile Basin politics").

201. Agreement (with Annexes) for the Full Utilization of the Nile Waters, *supra* note 186, art. 5, para. 1.

202. *Supra* note 20.

203. CIA, *Country Comparison, GDP Per Capita*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html (last visited Feb. 8, 2011) (ranking Switzerland and France 15th and 40th out of 229, respectively, in GDP per capita).

204. *See Bilateral Relations Between Switzerland and France*, SWISS FEDERAL DEPARTMENT OF FOREIGN AFFAIRS, http://www.eda.admin.ch/eda/en/home/reps/eur/vfra/bilfra.html (last visited Feb. 8, 2011) (citing "warm relations in many different areas" between Switzerland and France).

205. Since the 2008 Resolution is not yet a Convention and therefore is not a binding document, no JC is needed. The ILC has made clear that if converting it into a Convention is the chosen route, some type of dispute-settlement provision should be included. Special Rapporteur on Shared Natural Resources, *Fifth Rep. on Share Natural Resources: Transboundary Aquifers*, para. 41, Int'l Law Comm'n, U.N. Doc. A/CN.4/591 (Feb. 21, 2008).

206. *See, e.g.*, Desertification Convention, *supra* note 139, art. 28, para. 2(b); Racial Discrimination Convention, *supra* note 196, art. 22.

207. P. Mweti Munya, *The International Court of Justice and Peaceful Settlement of African Disputes: Problems, Challenges and Prospects*, 7 J. INT'L L. & PRAC. 159, 173–74 (1998).

biased in favor of the West (Europe and North America).[208] The court's initial composition—nine of the original fifteen judges were from the West—certainly lent credence to this concern.[209] In the eyes of many newly sovereign African states, the face of this bias was the court's now infamous 1966 decision in the South West Africa cases.[210] The petitioners in the cases argued that the Republic of South Africa's presence in South West Africa (now Namibia) violated the League of Nations Mandate for South West Africa.[211] South Africa was at the time a British colony.[212] After six years of proceedings, the ICJ, in a "streak of ultra-conservatism," found against South West Africa on purely technical grounds, dodging the substantive issue of the validity of the Republic of South Africa's occupation entirely.[213]

So loud was the international outcry after the 1966 South West Africa cases decision that within four months the UNGA issued a resolution paving the way for South Africa to get out of what would soon become Namibia.[214] In 1971, the ICJ, somewhat reconstituted after elections in 1968, essentially overruled its own decision in the South West Africa cases.[215] Since then, the ICJ has arguably become "the right forum" for African states to resolve their disputes.[216]

Secondly, each of the Nubian states has a positive history with the ICJ. In 1990, Chad and Libya substantiated the ICJ's improved reputation when they voluntarily submitted a border dispute.[217] The disputed area was a 100 kilometer-wide strip of desert stretching across the entire Chad-Libya boundary, called the Aouzou Strip.[218] It was purportedly rich in mineral resources, and had been the site of armed conflict for decades.[219] In 1994, the court found for Chad in a 16–1 decision[220] with all three full status African judges in the majority.[221] Libya abided by the judgment, pulling out all of its troops.[222] However, there reportedly has been intermittent Libyan presence in the Strip in recent years.[223]

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208. *Id.* at 168–69.

209. *Id.* at 177.

210. *Id.* at 171–72.

211. South West Africa, Second Phase (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, 10 (July 18).

212. *See id.* at 10, para. 1 (associating South Africa with "His Brittanic Majesty").

213. Munya, *supra* note 207, at 171–72.

214. G.A. Res. 2145 (XXI), para. 4, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 2 (Oct. 27, 1966).

215. *See* Munya, *supra* note 207, at 183–86 (detailing the reasoning of and response to Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 270, Advisory Opinion, 1971 I.C.J. 16 (June 21)).

216. Munya, *supra* note 207, at 188–89.

217. Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6 (Feb. 3).

218. *Id.* at 36–37, paras. 69–72.

219. MARK, *supra* note 58, at 8.

220. Territorial Dispute, *supra* note 217, at 40, para. 77.

221. In any ICJ case, each state party is permitted to appoint one ad hoc judge if there is no judge of the party's nationality sitting on the court. Statute of the International Court of Justice art. 31, para. 3, June 26, 1945, 33 U.N.T.S. 933, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 [hereinafter ICJ Statute]. This is why the court, normally composed of fifteen members, was able to come to a 16–1 decision. Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6, 40 (Feb. 3). Not surprisingly, the lone dissenter was Judge Jose Sette-Camara, Libya's ad hoc selection. *Id.* at 41; *see also* Public Sitting, Territorial Dispute (Libya v. Chad), at 11 (June 14, 1993), *available at* http://www.icj-cij.org/docket/files/83/5587.pdf (introducing Sette-Camara as Libya's chosen ad hoc judge).

222. Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court*

The Chad-Libya decision is particularly important to the NSAS because much of Chad's section of the NSAS lies directly under the Aouzou Strip.[224] Chadian desert lakes fed by NSAS springs are in danger,[225] and Libya reportedly supported rebels in the Aouzou Strip as recently as 2003.[226] Together, these circumstances suggest that armed struggle over Nubian water in the Aouzou Strip is a possibility. Thus, an NSAS agreement must include recourse to a tribunal competent to handle such a volatile situation. Recent history indicates that the ICJ could be that tribunal.

Sudan and Egypt have endorsed the ICJ as well by recognizing its compulsory jurisdiction.[227] However, they both have taken advantage of the fact that states are permitted to tailor the scope of their recognition, since recognition is optional.[228] To that end, Sudan appended several reservations to its declaration of recognition. The most important reservation states that Sudan will not recognize compulsory jurisdiction when the dispute is "essentially . . . domestic"—as determined by Sudan itself.[229] This is called a subjective reservation, since Sudan reserves the right to decide on its own terms which matters are essentially domestic and therefore out of the ICJ's grasp.[230] Sudan is one of a handful of countries to take this aggressive approach to the reservation process[231] (as contrasted to an objective approach, wherein countries allow the ICJ to determine when matters are essentially domestic).[232] Egypt recognized compulsory jurisdiction with no subjective reservation, but only as applied to disputes over a declaration on the operation of the Suez Canal.[233]

Recognizing the ICJ's compulsory jurisdiction subject to such conditions is not a ringing endorsement of the ICJ. Nonetheless, just 66 of the 192 UN member states currently recognize the compulsory jurisdiction in any form.[234] More importantly for

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of Justice, 18 EUR. J. INT'L L. 815, 830–31 (2007).

223. *Id.* at 831–32.

224. *Compare Aouzou Strip*, LUVENTICUS, http://www.luventicus.org/maps/africa/aouzoustrip.html (identifying the Aouzou Strip in extreme northern Chad with a yellow strip) *with* Bakhbakhi, *supra* note 7, at 76 (demonstrating that the NSAS extends across entire border between Chad and Libya, including the Aouzou Strip).

225. MEDIUM-SIZED PROPOSAL, *supra* note 5, at 11.

226. Llamzon, *supra* note 222, at 832.

227. *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L COURT OF JUSTICE, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3 (last visited Mar. 13, 2011) (listing all countries that have recognized compulsory jurisdiction, including Egypt and Sudan).

228. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 903 reporter's note 2 (2009) (explaining the various types of reservations countries will include in declarations of recognition).

229. *Declarations Recognizing the Jurisdiction of the Court as Compulsory, Sudan*, INT'L COURT OF JUSTICE, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=SD (last visited Feb. 9, 2011).

230. *See* Raj Bhala, *The Myth about Stare Decisis and International Trade Law*, 14 AM. U. INT'L L. REV. 845, 903 (1999) (distinguishing between subjective and objective reservations).

231. *See* INT'L COURT OF JUSTICE, *supra* note 227 (follow the hyperlinks for Liberia, Malawi, Mexico, Philippines, and Sudan to access their expressly subjective reservations).

232. Bhala, *supra* note 232, at 903.

233. *Declarations Recognizing the Jurisdiction of the Court as Compulsory, Egypt*, INT'L COURT OF JUSTICE, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=EG (last visited Mar. 13, 2011).

234. INT'L COURT OF JUSTICE, *supra* note 227 (listing sixty-six states that have deposited declarations); *Member States, Growth in United Nations Membership, 1945–present*, UNITED NATIONS, http://www.un.org/en/members/growth.shtml (showing growth in number of UN member states to current

the Nubian states, the ICJ has decided two cases in which the parties were in dispute as to the meaning of equitable and reasonable use in the context of transboundary water disputes.[235] These cases could give the Nubian states guidance on how to most effectively draft their agreement.

Lastly, recourse to the ICJ is cheaper than certain other modes of dispute resolution, namely arbitration, since the UNGA subsidizes the ICJ's administrative costs.[236] In arbitration, the parties must cover travel expenses for arbitrators, expert testimony costs, and other expenses.[237] Parties before the ICJ pay only their own litigation costs.[238] Theorizing about a treaty governing South America's Guarani Aquifer treaty, in 2005, one analysis identified the ICJ as "too remote or expensive" to be an effective tribunal.[239] However, just one year after that analysis deemed the ICJ a non-option, two of the Guarani states appeared before the ICJ over a surface water dispute.[240]

E. *Encourage Pairs of Nubian States to Enter Bilateral Agreements*

The 2008 Resolution devotes an entire article to encouraging groups of countries to manage certain aspects of their TBA via bilateral or regional agreements.[241] The ILC stressed the importance of integrating the "historical, political, social and economic characteristics" of the TBA.[242] Since the NSAS is so vast, a multilateral treaty should be just the first step toward effective management. The four-country regional agreement should encourage additional bilateral treaties between certain pairs of Nubian states. Bilateral treaties would be most feasible between Sudan and Egypt, Chad and Libya, and Sudan and Chad.

Sudan and Egypt: Egypt's planned NSAS extraction will occur very close to the Egypt-Sudan border, and will likely be accompanied by increased Sudanese extraction in the border region.[243] The past forty years of extraction already have caused water tables to drop so far that nearly all wells have had to be replaced.[244]

The Nile River is a vital water source for both Egypt and Sudan.[245] As downstream riparians, Sudan and Egypt have volatile relationships with other Nile River riparians.[246] As a result, they have experience negotiating over water rights,

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number of 192).

235. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, paras. 77–85 (Sept. 25); Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, paras. 170–77 (Apr. 20, 2010), *available at* http://www.icj-cij.org/docket/files/135/15877.pdf.

236. ICJ Statute, *supra* note 221, art. 33.

237. McHugh, *supra* note 194, at 237.

238. *Id.* at 238.

239. Antonio Herman Benjamín, Cláudia Lima Marques & Catherine Tinker, *The Water Giant Awakes: An Overview of Water Law in Brazil*, 83 TEX. L. REV. 2185, 2239 (2005).

240. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, (Apr. 20, 2010), *available at* http://www.icj-cij.org/docket/files/135/15877.pdf.

241. 2008 Resolution, *supra* note 25, art. 9.

242. 2008 ILC Commentary, *supra* note 85, art. 9 cmt. para. 1.

243. MEDIUM-SIZED PROPOSAL, *supra* note 5, at 11.

244. Bakhbakhi, *supra* note 7, at 78.

245. MEDIUM-SIZED PROPOSAL, *supra* note 5, at 8–9.

246. *See* Zayed, *supra* note 124 (describing an ongoing feud between states upstream of the Nile and Egypt and Sudan after the two countries refused to revise water pacts dating to 1929).

both with each other and with the other Nile riparians. In 1959, Sudan and Egypt pledged to present a unified position in all subsequent Nile negotiations.[247] They later went so far as to sign an expansive treaty integrating not just their position on the Nile, but also their "social, cultural, economic, political and military relations."[248]

Although Egypt is the most economically powerful of the Nubian states, a bilateral treaty with Sudan and a multilateral treaty between all Nubian states are of great importance to Egypt. In recent negotiations between Nile riparians over a new treaty, Egypt could not martial the influence necessary to maintain its traditional power over the upstream Nile riparians (older colonial-era agreements allow Egypt to veto upstream developments in order to maintain its existing uses).[249] The new Cooperative Framework Agreement (CFA) includes an unresolved water security clause,[250] which could unseat the principle that existing uses of the Nile must be protected.[251] Emphasis is instead placed on ensuring that each riparian has the water it needs to achieve water security.[252] This new principle could conceivably mean reduced withdrawals by Egypt and Sudan.[253]

There is other evidence of Egypt's increasing Nile-related vulnerability. First, the remaining riparians (other than Sudan, which shared Egypt's concerns) boldly opened the CFA for signature without first resolving the dispute over the water security clause.[254] Second, rather than responding to encroachments on its share of the Nile with military threats, as it has in the past, Egypt essentially has resorted to paying its upstream riparians to ensure continued Nile access.[255]

This continuing tension over the Nile reiterates that the NSAS is a "strategic water reserve" that will be "an important part of [Egyptian] development for present and future generations."[256] The Nile Valley Project is projected to take 540 million cubic meters of water from the NSAS over the next fifty years.[257] Egypt relies on the Nile for 97% of its surface water,[258] and the combined population of the Nile

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247. Agreement (with Annexes) for the Full Utilization of the Nile Waters, *supra* note 186, art. 5.

248. Charter of Integration Between the Arab Republic of Egypt and the Democratic Republic of the Sudan, Egypt–Sudan, art. 1, Oct. 12, 1982, 1331 U.N.T.S. 329.

249. Evelyn Lirri, *Storm Hovers Over Calm Nile Waters*, DAILY MONITOR, May 2, 2010, http://www.monitor.co.ug/News/Insight/-/688338/910032/-/item/0/-/nk49fr/-/index.html.

250. Agreement on the Nile Basin Cooperative Framework, art. 14(b), annex on art. 14(b), *available at* http://internationalwaterlaw.org/documents/regionaldocs/Nile_River_Basin_Cooperative_Framework_2010.pdf (unofficial copy) [hereinafter CFA]. The CFA defines "water security" as "the right of all Nile Basin States to reliable access to and use of the Nile River system for health, agriculture, livelihoods, production and environment." *Id.* art. 2(f).

251. *See Egypt Reasserts Nile Water Rights*, AL-JAZEERA, Apr. 20, 2010, http://english.aljazeera.net/news/africa/2010/04/2010419194851419735.html (detailing Egypt's insistence that its traditional share of the Nile be maintained in any new water-sharing agreement).

252. CFA, *supra* note 250, art. 14.

253. *See Accord or Discord on the Nile?—Part II*, INT'L WATER LAW PROJECT BLOG (July 26, 2010, 3:35 PM), http://www.internationalwaterlaw.org/blog/?p=271 (indicating that Article 14(b) of the CFA, as drafted, could affect how states withdraw water and detailing Egypt's proposed revision).

254. *Id.*

255. *E.g.*, Argaw Ashine, *Egypt Offers Support to Nile Basin States*, DAILY NATION (July 8, 2010), *available at* http://www.nation.co.ke/News/africa/Egypt%20offers%20support%20to%20Nile%20basin%20states/-/1066/954664/-/format/xhtml/-/13uk4dj/-/index.html.

256. MEDIUM-SIZED PROPOSAL, *supra* note 5, at 8.

257. Al-Eryani et al., *supra* note 101, at 32.

258. Amdetsion, *supra* note 200, at 8.

riparians is on pace to more than triple between 1990 and 2040.[259] Not surprisingly then, Egypt has begun putting more emphasis on groundwater resources in its water policies.[260] Generally, integrating groundwater and surface water management creates a greater incentive to reach a successful resolution.[261] In light of all this, effective governance of the NSAS, through multilateral and bilateral treaties, plays a significant role in Egypt's immediate economic future.

Chad and Libya: Libya's extensive extraction for the GMRP, which has caused the drying up of desert lakes and lowered the Kufra Basin's water level, may adversely affect Chad.[262] Even independent of Libya, Chad's NSAS-fed desert oases have begun to drop because of heightened evaporation, forcing Chadians to move in order to find reliable water.[263]

As discussed above, Chad and Libya peacefully resolved a territorial dispute less than twenty years ago.[264] In 1980, Chad and Libya signed a treaty pledging friendship and alliance, based on the "deep-rooted spiritual, economic, human and cultural ties" created by their common history.[265] Diplomatic relationships between the nations are currently strong enough that the nations recently signed several agreements on various communication and transportation issues, one of which allows Chad to use Benghazi, one of Libya's large coastal cities and a primary beneficiary of the GMRP, as an export point for Chadian goods.[266] While there reportedly has been Libyan military presence in the Aouzou Strip despite the 1994 ICJ decision discussed above, it has not derailed diplomatic relations as it did several decades ago.[267]

The relatively cordial relationship between Libya and Chad suggests that a uniquely tailored bilateral agreement could succeed. In carrying out the GMRP, Libya has gained expertise in developing water extraction infrastructure that could be useful to Chad.[268] Chad could give Libya the right to extract Nubian water in a way that would cause Chadian water tables to drop, in exchange for Libya's promise to provide Chad with the equipment necessary to reach the falling water table. If Libya were required to purchase and install expensive equipment for Chad whenever Libya's drilling causes the Chadian water table to drop, it would incentivize Libya to use Nubian water sparingly. The idea behind socioeconomically sustainable use of

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259. Lisa M. Jacobs, Comment, *Sharing the Gifts of the Nile: Establishment of a Legal Regime for Nile Waters Management*, 7 TEMP. INT'L & COMP. L.J. 95, 117 (1993).

260. MEDIUM-SIZED PROPOSAL, *supra* note 5, at 8.

261. Scheumann & Alker, *supra* note 42, at 794.

262. *See supra* note 154 and accompanying text.

263. MEDIUM-SIZED PROPOSAL, *supra* note 5, at 7–8.

264. *See supra* text accompanying notes 217–226.

265. Treaty of Friendship and Alliance Between the Socialist People's Libyan Arab Jamahiriya and the Republic of Chad, Libya-Chad, June 15, 1980, 1201 U.N.T.S. 405.

266. *Seven Agreement and Two Memo for Cooperation Between Libya and Chad Signed at the End of the Higher Committee Session*, LIBYAONLINE.COM (Aug. 8, 2009), http://www.libyaonline.com/business/details.php?id=10639.

267. *See supra* text accompanying notes 217–226.

268. *See Facts and Figures*, THE GREAT MAN MADE RIVER PROJECT (Oct. 31, 2008), http://www.gmmra.org/en/index.php?option=com_content&view=article&id=76&Itemid=50 (detailing extensive trench excavation and pipe manufacture and installation); *Project Planning of the Great Man-Made River Project*, PROJECT MANAGER TODAY, Apr. 1995, at 18 (chronicling the infrastructure of Phases I and II of the GMRP pipeline and the project's "vast enterprise").

non-recharging aquifers, discussed above, is not to avoid using the aquifer entirely—it is to use the aquifer in a measured way.[269]

Sudan and Chad: In September 2010, U.S. President Barack Obama made clear that unless Sudan ends the conflict in Darfur, the United States will keep existing sanctions in place and will offer Sudan no trade, investment, or development assistance.[270] Any peaceful resolution to the Darfur conflict necessarily implicates Sudan's relationship with Chad, since as of 2007, some 140,000 Chadians had been displaced by the Darfur conflict and other civil strife.[271] Additionally, as of late 2009, there were 250,000 Sudanese refugees living in camps in Chad.[272]

It is widely accepted that water availability plays a significant role in the ongoing conflict in Darfur and eastern Chad.[273] A 2008 study identified 23 camps for internally displaced persons (IDPs),[274] some holding as many as 125,000 people, that could face complete groundwater depletion in a dry year.[275] Militia attacks have destroyed many water infrastructure systems, meaning that even if individuals who fled their villages were able to return home, they would be unable to survive.[276] The years 2004–2007 brought above-average rainfall throughout Darfur, suggesting an even greater risk of water shortages once rainfall returns to normal levels.[277] Therefore, it would be particularly timely for Sudan and Chad to begin demonstrating that they are capable of working together by ratifying a water-management treaty.

It might seem unrealistic to think Sudanese and Chadian leaders would sit down together and negotiate a bilateral treaty over water, since as recently as 2008 the

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269. *See supra* text accompanying notes 101–104.

270. Neil MacFarquhar, *Obama Presses for Peace in Likely Sudan Partition*, N.Y. TIMES, Sept. 24, 2010, at A6, *available at* http://www.nytimes.com/2010/09/25/world/africa/25nations.html?_r=1&scp=1&sq=Obama%20Presses%20for%20Peace%20in%20Likely%20Sudan%20Partition&st=cse. Obama also made lifting the sanctions contingent on successful administration of the January 9, 2011 referendum on southern Sudanese independence. *Id.* Southern Sudanese voted overwhelmingly for independence. *See supra* notes 55–56 and accompanying text. On Feb. 7, 2011, Obama issued a statement indicating he would consider normalizing relations with Sudan and reevaluate the country's designation as a State Sponsor of Terrorism if it ensured a peaceful transition to Southern Sudan's independence. Press Release, White House, Statement by the President on the Intent to Recognize Southern Sudan (Feb. 7, 2011), http://www.whitehouse.gov/the-press-office/2011/02/07/statement-president-intent-recognize-southern-sudan?utm_source=wh.gov&utm_medium=shorturl&utm_campaign=shorturl.

271. INTERNAL DISPLACEMENT MONITORING CENTRE, INTERNALLY DISPLACED IN CHAD: TRAPPED BETWEEN CIVIL CONFLICT AND SUDAN'S DARFUR CRISIS 11, 20 (2007), *available at* http://www.unhcr.org/refworld/docid/4695d8672.html.

272. Annette Rehrl, *Tackling Climate Change in Eastern Chad*, UNITED NATIONS HIGH COMM'R FOR REFUGEES (Dec. 15, 2009), http://www.unhcr.org/4b27b7039.html.

273. *Water Find May End Darfur War, supra* note 54; Didrik Schanche, *Scarce Resources, Ethnic Strife Fuel Darfur Conflict*, NAT'L PUB. RADIO (Oct. 29, 2007), http://www.npr.org/templates/story/story.php?storyId=6425093.

274. IDPs are individuals who are forced from their homes but take refuge elsewhere within their own countries, and are therefore not officially "refugees." *See* Guiding Principles on Internal Displacement, INTERNAL DISPLACEMENT MONITORING CENTRE, http://www.internal-displacement.org/8025708F004D404D/(httpPages)/168DF53B7A5D0A8C802570F800518B64?OpenDocument (last visited Feb. 10, 2011) (distinguishing between IDPs and refugees).

275. UNEP, DARFUR: THE CASE FOR DROUGHT PREPAREDNESS 18, 19 tbl.5 (2008), *available at* http://postconflict.unep.ch/publications/darfur_drought.pdf.

276. Eric Reeves, *Humanitarian Conditions in Darfur: An Overview (Part 2)*, SUDANREEVES.ORG (July 3, 2010), http://www.sudanreeves.org/Article266.html.

277. *See* UNEP, *supra* note 275, at 4 (noting that above-average rainfall could not be relied upon).

countries were accusing each other of giving safe harbor to violent rebel militias.[278] However, there recently has been some degree of rapprochement between the two nations.[279] Chadian president Idriss Deby Itno recently visited Sudanese leadership in Khartoum.[280] Sudanese president Omar al-Bashir returned the favor, traveling to N'Djamena several months later.[281] It was al-Bashir's first trip out of Sudan since being indicted by the International Criminal Court (ICC) for war crimes in 2009.[282] Deby's willingness to allow al-Bashir into and out of Chad was particularly notable since, as an ICC member, Chad was required to arrest him and turn him over to the ICC.[283]

Most of the camps in eastern Chad and Darfur do not lie above the NSAS.[284] However, the NSAS is still relevant to successful resolution of the Darfur conflict for two reasons. First, the NSAS will be vital to supplying water to certain areas that have taken on IDPs and refugees during the conflict.[285] For example, Nyala, a town south of Darfur whose population has grown as a result of the conflict, already plans to begin piping in Nubian water.[286] Second, the NSAS could support agricultural operations, allowing refugees and IDPs to earn livelihoods.[287] Since one of the primary "carrots" being provided by the Obama administration is funding for agricultural development,[288] a water agreement geared toward future agricultural development in Darfur would be a positive development.

At the very least, a bilateral NSAS treaty between Sudan and Chad would further solidify relations between the two countries. It would show that the countries are prepared to proactively move past the Darfur conflict, which could yield new forms of economic support. A bilateral treaty also would likely help lay the groundwork for future efforts to effectively resettle hundreds of thousands of refugees and IDPs.

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278. *See, e.g.*, *Chad Accused Sudan on Rebel Raid*, BBC NEWS, Apr. 2, 2008, http://news.bbc.co.uk/2/hi/7325171.stm (describing one accusation by the Chadian government that Sudanese forces were assisting Chadian insurgents).

279. *See* Jeffrey Gettleman, *Regional Shift Helps Darfur, Amid Doubts*, N.Y. TIMES, Feb. 25, 2010, at A9, *available at* http://www.nytimes.com/2010/02/25/world/africa/25darfur.html?_r=1&ref=chad (noting improvement in Sudan-Chad relations); Sudarsan Raghavan, *U.S. Envoy Pushes for Darfur Peace Deal Before Sudanese Elections*, WASH. POST, Mar. 10, 2010, http://www.washingtonpost.com/wp-dyn/content/article/ 2010/03/10/AR2010031003105.html (noting rapprochement between the two countries); Opheera McDoom, *Sudan, Chad Agree "Definitive End" to Proxy Wars*, REUTERS, Feb. 9, 2010, *available at* http://uk.reuters.com/article/idUKTRE6183EH20100209 (detailing countries' agreement to engage in talks and joint development programs).

280. McDoom, *supra* note 279.

281. *Sudan's President Bashir Defies Arrest Warrant in Chad*, BBC NEWS, July 21, 2010, http://www.bbc.co.uk/news/world-africa-10718399.

282. *Id.*

283. *Id.*

284. TEARFUND, DARFUR: WATER SUPPLY IN A VULNERABLE ENVIRONMENT vii (2007), *available at* http://www.tearfund.org/webdocs/website/Campaigning/Policy%20and%20research/Darfur-%20%20 Water%20supply%20in%20a%20vulnerable%20environment.pdf. *But see* UNEP, *supra* note 275, at 19 tbl.5 (identifying one camp, Kutum Rural, that relies on Nubian water).

285. *See* UNEP, *supra* note 275, at 4 (stating importance of water infrastructure to support areas with large population influxes based on the conflict).

286. TEARFUND, *supra* note 284, at 23.

287. *See id.* at vii (explaining that while piping water all the way from the NSAS to the camps in southern Darfur is not presently viable, the NSAS could be a resource for remote commercial farming).

288. MacFarquhar, *supra* note 270.

Which components of a regional NSAS agreement should the Nubian states allow to be preempted by bilateral agreements? While encouraging bilateral cooperation generally, the Nubian states must ensure that certain aspects of the NSAS are managed at the regional level. The 2008 Resolution allows states to make bilateral agreements with respect to anything that does not "adversely affect[], to a significant extent, the utilization by one or more other aquifer states."[289] Because it is often impossible to understand the impact that a certain activity will have on a TBA until years after the activity takes place,[290] the Nubian states should narrowly construe the bilateral freedoms envisioned by the 2008 Resolution.

As discussed above, an NSAS agreement should include a residual jurisdictional clause, in order to encourage Nubian states to draft their own dispute resolution mechanisms.[291] The Nubian states also could use bilateral means to meet established extraction limits, through specifically tailored combinations of drilling technology and well spacing. Overall, however, the Nubian states must not allow bilateral treaties to depart from the overarching emphasis on encouraging socioeconomically sustainable NSAS usage. The means by which to reach the limits, not the limits themselves, should be the province of the bilateral treaties between Nubian states.

IV. CONCLUSION

Some experts believe that if managed properly, the NSAS will last for centuries.[292] Scientific research suggests a minimal transboundary impact from current and future Nubian extraction.[293] Based on this, some argue that international management of the NSAS is unnecessary.[294] This view is short-sighted, since the longevity of a non-recharging aquifer is not determined simply by its overall volume and flow. If the water table decreases so far that poorer countries cannot afford the technology necessary to reach the aquifer, the overall volume of the aquifer becomes irrelevant. If unregulated future usage causes different sub-basins within the NSAS to become disconnected, leaving certain overlying areas with no access to water whatsoever,[295] the overall volume of the aquifer becomes irrelevant. If the water is polluted by agriculture or wastewater, or if saline intrusion occurs,[296] the overall volume of the aquifer becomes irrelevant. Finally, no matter how well-intentioned and scientifically sound the usage of a TBA may initially seem, there is a significant time lag before the impact of that usage can be fully understood.[297]

Given these many risks, now is the time for the Nubian states to push ahead with a binding regional treaty. The NAP is in the process of laying a framework for multilateral cooperation. In the initial NAP project proposal, the Nubian states

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289. 2008 Resolution, *supra* note 25, art. 9.

290. Scheumann & Alker, *supra* note 42, at 800–01.

291. *See supra* text accompanying notes 195–205.

292. MEDIUM-SIZED PROPOSAL, *supra* note 5, at 11.

293. *See* Gremillion, *supra* note 36, at 5 (discussing modeling technique used to gauge "anticipated transboundary impacts" of pumping on the NSAS and comparing results with current observations).

294. *See, e.g.*, Al-Eryani et al., *supra* note 101, at 32–33 (citing one scholar who argues that the proposed NSAS development schemes are small enough that they can proceed according to domestic laws).

295. MEDIUM-SIZED PROPOSAL, *supra* note 5, at 11.

296. *Id.*

297. Scheumann & Alker, *supra* note 42, at 800–01.

identified the NSAS as a "significant example and global reference for rational management" of non-recharging aquifers.[298] Hopefully, after the NAP concludes, the Nubian states will make good on this pledge to be an example for the rest of the world by ratifying one of the first comprehensive multilateral transboundary aquifer treaties.

298. MEDIUM-SIZED PROPOSAL, *supra* note 5, at 45.

Choice of Law and Islamic Finance

JULIO C. COLÓN*

Abstract

The past decade has seen the rapid growth of Islamic finance on both international and domestic levels. Accompanying that growth is a rise in the number of disputes that implicate Islamic law. This remains true even when the primary law of the contract is that of a common law or civil law country. If judges and lawmakers do not understand the reasoning of Islamic finance professionals in incorporating Shariah law, the result could be precedents and codes that hamper the growth of a multi-trillion dollar industry. This note compares the reasoning of the English court in Shamil Bank v. Beximco Pharmaceuticals *to the practice of forums specializing in Islamic finance dispute resolution. The note then addresses other perceived difficulties in applying Islamic law in common law and civil law courts. The practice of Islamic finance alternative dispute resolution (ADR) forums shows a consistent reliance on the use of national laws coupled with Shariah. Also, there are cases showing that U.S. courts and European arbitrators are willing to use Islamic law. Research indicates that the decision in* Shamil Bank v. Beximco Pharmaceuticals *was not consistent with the intentions of the parties or the commercial goals of Islamic finance. Finally, this note concludes that it is not unreasonable for a Western court to judge a case if the dispute arises out of an Islamic finance agreement.*

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INTRODUCTION

Financial experts estimate the current worth of Shariah-compliant assets at almost one trillion U.S. dollars globally.[1] As measured by these assets, the global market for Islamic financial services has grown ten percent per year since the mid-1990s.[2] The potential market for Islamic financial products could be as high as four trillion U.S. dollars.[3] The bulk of these assets are held by commercial banks, while investment banks, *sukuk*,[4] equity funds, and the assets of *takaful*[5] account for twenty-five percent of Shariah-compliant assets.[6] Strikingly, business activities in the Islamic financial sector are not confined to countries whose legal systems are Shariah-based. The United Kingdom, a common law country, ranks ninth in the world in holdings of Shariah-compliant assets.[7] In the United States, there are approximately nineteen providers of Islamic financial products, including banks, mortgage providers, and investment brokers.[8]

In common law and civil law countries, the Islamic banking phenomenon experiences growth based on two factors. The first is that the sector is profitable for investors.[9] It represents a viable source of growth with an increasingly positive reputation for responsible management. The second factor fueling growth of Shariah-compliant finance is increased demand stimulated by rising numbers of Muslims in common law and civil law countries.[10]

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1. Soraya Permatasari & Suryani Omar, *Shariah-Compliant Hedging Derivatives Start in Malaysia: Islamic Finance*, BLOOMBERG (Dec. 22, 2010), http://www.bloomberg.com/news/2010-12-21/shariah-compliant-hedging-derivatives-start-in-malaysia-islamic-finance.html.

2. Duncan McKenzie, *Islamic Finance*, MONDOVISIONE (Oct. 29, 2008), http://www.mondovisione.com/media-and-resources/news/islamic-finance/.

3. *Id.*

4. *Sukuk* is the Arabic plural form of *sakk*. The word sakk is of Persian origin, and itself comes from the English word check. The term sukuk has come to encompass all Islamic bonds, hedge funds, and shariah-compliant stocks and securities. *See* NATHIF J. ADAM & ABDULKADER THOMAS, ISLAMIC BONDS: YOUR GUIDE TO STRUCTURING, ISSUING AND INVESTING IN SUKUK 42–64 (2004) (providing an extensive explanation of the origin of the term and its role in both historic and modern Islamic finance).

5. "Takaful, similar to mutual insurance, is a risk-sharing entity that allows for the transparent sharing of risk by pooling individual contributions for the benefit of all subscribers." McKenzie, *supra* note 2.

6. *Id.*

7. *Id.*

8. Abdi Shayesteh, *Islamic Banks in the U.S.: Breaking Through Barriers*, NEW HORIZON, Apr.–Jun. 2009, at 1, http://www.kslaw.com/Library/publication/6-09%20New%20Horizon%20Shayesteh.pdf.

9. *Id.* at 2.

10. *Id.* at 1.

The demand for Shariah-compliant services within a non-Shariah legal system creates potential conflict of law issues. Specifically, a conflict of law arises where the choice of some form of Islamic law is incorporated into the terms of the contract. Ambiguity may lie in the terms used within the contract to describe the various types of Shariah-compliant transactions. European and U.S. courts succeed at varying degrees in interpreting such clauses. Contract language affects performance and expectations for parties to financial transactions. Judges evaluating cases subject to Shariah may even have to overcome constitutionally imposed limitations on their ability to interpret laws derived from religious sources.

The practices to date of Islamic finance in alternative dispute resolution should serve as a guide for common law and civil law courts in interpreting the method in which Shariah should be applied to the contract alongside national laws. This note seeks to prove that whenever a reference to Islamic law is made within a contract, it is with the intent that Islamic legal principles be applied in the contract's interpretation when deciding disputes arising from that contract. Choice of law is the element most commonly added to a contract—often directly to the arbitration clause.[11] The inclusion of choice of law clauses that reference Islamic law and a national system is the industry practice in Islamic finance. Local choice of law doctrine and policy concerns should not prevent courts or arbitral tribunals from recognizing the validity of a clause that references both Islamic law and a national system.

I. SHARIAH AS A CHOICE OF LAW

A. *"A Purely Discretional Form of Justice": Islamic Law in Western Tribunals*

Shariah as a choice of law for common law courts and arbitrators is not peculiar to the current era of Islamic finance. Early cases demonstrate that arbitrators denied that Islamic law was sophisticated enough to utilize in complex commercial disputes. In the case of *Petroleum Development (Trucial Coasts) Ltd. v. Sheikh of Abu Dhabi*, Lord Asquith acted as an arbitrator in a dispute arising out of a contract executed in Abu Dhabi.[12] He acknowledged that Abu Dhabi's law, which was based on Islamic law, should be applied.[13] He subsequently refused to apply the law because, according to him, "it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments."[14] He described the ruler of Abu Dhabi as an absolute monarch who administers a "purely discretionary form of justice with some assistance from the Koran."[15] After analyzing the choice of law issue, the arbitrator relied instead on principles of English law.[16]

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11. ALAN SCOTT RAU ET AL., ARBITRATION 363 (3d ed. 2006).

12. *In re* Arbitration Between Petroleum Dev. (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi, 1 INT'L & COMP. L. Q. 247, 250–51 (Sept. 1951).

13. *Id.*

14. *Id.*

15. Arthur J. Gemmell, *Commercial Arbitration in the Islamic Middle East*, 5 SANTA CLARA J. INT'L L. 169, 179 (2006).

16. *Trucial Coast*, 1 INT'L & COMP. L.Q. at 251.

The arbitrator in *Ruler of Qatar v. International Marine Oil Co. Ltd.* arrived at the same conclusion as Lord Asquith in *Trucial Coast*.[17] The arbitrator in *Ruler of Qatar* made a clear statement as to his belief concerning the inadequacy of Islamic law.[18] After acknowledging that Islamic law was the proper law to apply, he stated that it does not "contain any principles which would be sufficient to interpret this particular contract."[19] The arbitrators' opinions in both cases do not attempt to give any principle through which they arrive at the decision not to apply Islamic law, other than very general statements about their disdain for it.[20]

Had the arbitrators attempted to answer the question before them, they would have found that there was expansive literature on Islamic contract law.[21] Recently, a British court was asked to decide whether Shariah is a legitimate choice of law in the United Kingdom. In *Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd and others*, the Court of Appeals was asked to consider whether a particular contract was invalid under Shariah law.[22] In that case, Beximco Pharmaceuticals entered into a *murabaha*[23] agreement with Shamil Bank of Bahrain, a financial institution holding itself out to be a bank that conducts its business within the limits of Shariah law.[24] The agreement was signed by the parties and resulted in the acquisition of nearly forty-seven million dollars in assets.[25] The agreement contained a choice of law clause that read, "[s]ubject to the principles of the Glorious Sharia'a, this agreement shall be governed by and construed in accordance with the laws of England."[26] When Beximco failed to make payments under the agreement, Shamil Bank claimed the amount outstanding under the agreement.[27] Beximco claimed that the agreement was invalid because it contained a hidden form of *riba*.[28] The Appellate Court acknowledged that if the phrase "[s]ubject to the principles of the Glorious Sharia'a" was a valid choice of law clause, then Beximco would succeed under the agreement.[29]

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17. Ruler of Qatar v. International Marine Oil Co. Ltd., 20 I.L.R. 534 (1953).

18. *Id.*

19. *Id.*

20. *Id.*; *Trucial Coast*, 1 INT'L & COMP. L.Q., at 247.

21. Faisal Kutty, *Shari'a Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L & COMP. L. REV. 565, 591 (2006).

22. Shamil Bank of Bahrain EC v. Beximco Pharm. Ltd., [2004] EWCA (Civ) 19, [1], [2004] 1 W.L.R. 1784, 1787 (appeal taken from Eng.).

23. *Murabaha*, often called "cost-plus" by Westerners, is an agreement in which one party acquires an asset with the promise that the other party will purchase it, usually in installments. As in retail transactions, the original purchaser makes a profit by selling the product at a higher price. The difference between this type of transaction and a traditional mortgage is that the original purchaser, most often a bank, acts much like a middleman by retaining an ownership interest in the product until the goods are completely paid for. *See* HANDBOOK OF ISLAMIC BANKING xvii, 52 (H. M. Kabir Hassan & Mervyn K. Lewis, eds., 2007) (defining murabaha).

24. *Shamil Bank*, [2004] EWCA (Civ) 19, [1], [6], [2004] 1 W.L.R. at 1787–89.

25. *Id.* at [15]–[17], 1 W.L.R. at 1790–91.

26. *Id.* at [1], 1 W.L.R. at 1787.

27. *Id.* at [21], 1 W.L.R. at 1791–92.

28. *Id.* at [27], 1 W.L.R. at 1793. *Riba*, often translated as "interest," literally means "an excess" in Arabic. An important fact to consider in *Shamil Bank* is that there was no explicit interest in the agreement, compound or simple. *Riba* often arises due to the way the transaction is carried out, where interest is in effect charged on the borrower. "[Riba] is defined as 'any unjustifiable increase of capital whether in loans or sales.' It is essentially any unlawful or unjustified gain. Any contracts which include an excessive profit margin will also be considered as a form of riba if it is exploitative, oppressive, or unconscionable." Kutty, *supra* note 21, at 604.

29. *Shamil Bank*, [2004] EWCA (Civ) 19, [55], 1 W.L.R. at 1801.

The appellate court found this statement to be invalid, however, because the 1980 Rome Convention on the Law Applicable to Contractual Obligations (Rome Convention) allows only one system of law to govern a contract and also requires that the chosen law be that of a particular country.[30] According to the court, if the intention of the parties was to incorporate Shariah law into the contract, then they did not do so effectively; instead, they would have had to identify a foreign law or code and, more specifically, to which part of the contract the clause applied.[31] The appellate court, in strict application of this principle, stated, "[i]t is plainly insufficient for the defendants to contend that the basic rules of the Sharia applicable *in this case* are not controversial. Such 'basic rules' are neither referred to nor identified."[32]

B. *The Need for Combined-Law Contracts*

Shamil Bank has been positively accepted by commentators in its two main propositions concerning Shariah as a choice of law: (1) the Rome Convention requires that the law of a contract be that of a country; and (2) there can be only one law which governs a contract.[33] This conclusion would likely be the same for other common law jurisdictions.[34] European civil law jurisdictions will also probably require that the law governing a contract be that of a state.[35] These propositions are not present in arbitration forums: it is possible to allow one system of law to govern a contract and still subject the same agreement to Shariah.[36]

The increase in banking transactions correlates with an increase in disputes arising out of these contracts.[37] The result of *Shamil Bank* is problematic for contracting parties who would like to "mix" laws, as Beximco purported was its intention. Before explaining this issue, perhaps it will be useful to explain other choice of law clause options that are available to contractors.

Theoretically, contracting parties to a Shariah-compliant transaction may choose from three options: that the contract be (1) subject exclusively to Islamic law; (2) subject solely to a state legal system, whether or not said system be based on Shariah law; or 3) subject to a combined system that pairs a national legal system with Islamic principles.[38] The third option of a combined system is different than incorporating specific principles of Islamic law into the contract in a manner that

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30. *Id.* at [40], 1 W.L.R. at 1795–96.

31. *Id.* at [52], 1 W.L.R. at 1800.

32. *Id.*

33. Jason Chuah, Recent Case, *Shamil Bank of Bahrain EC v. Beximco*, 10 J. INT'L MAR. L. 125, 126 (2004).

34. *Id.*

35. Council Regulation 593/2008, Rome I, art. 1 (1), 2008 O.J. (L 177) 6, 10 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:EN:PDF.

36. Shaistah Akhtar, *Arbitration in the Islamic Middle East: Challenges and the Way Ahead*, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: INTERNATIONAL ARBITRATION 2008, at 11 (Global Legal Group, 2008), *available at* http://www.iclg.co.uk/khadmin/Publications/pdf/2201.pdf; *see also* Chuah, *supra* note 33, at 126 (suggesting that, in addition to the "applicable or governing law," "general principles" can be taken into account when interpreting a contract in an arbitration).

37. Oliver Agha, *Islamic Finance Dispute Resolution*, LEADING LAWYERS 2009, at 29 (Islamic Finance News, 2009), *available at* http://www.aghashamsi.com/downloads/Article.pdf.

38. Andreas Junius, *Islamic Finance: Issues Surrounding Islamic Law as a Choice of Law Under German Conflict of Laws Principles*, 7 CHI. J. INT'L L. 537, 543 (2007).

specifically identifies to what extent each principle applies. A combined system of a state legal system and general principles of Shariah would be better characterized as cumulative, meaning that the state system of law is subject to Shariah. Disputes under the contract may be analyzed under the state system, and in cases of conflict, Shariah will prevail.[39]

Currently, English law is the most popular choice of law for the governing of disputes arising under agreements purporting to adhere to Islamic principles.[40] Some of these contracts contain no references to Islamic law and may even include a "waiver of Shariah defense," meaning that in case of a dispute the parties agree to waive any argument that the agreement is invalid under Shariah law.[41] Such stipulations attempt to rectify what has become known in the industry as the "Sharia risk," a term associated with the risk that one party will fail under its contact obligations and then state the entire agreement is void for being invalid under Islamic law.[42] This risk exists despite the fact that multinational law firms have created entire divisions dedicated to Shariah-compliant financial transactions.[43] However, the current culture of Islamic finance is liberal, with parties beginning with the assumption that a deal is Shariah-compliant, and contracting parties are not necessarily knowledgeable of Islamic law.[44] Muhammed Al-Jasser, governor of the Saudi Arabian Monetary Agency states:

> We have richness in diversity .... Everything is permissible unless it is shown to contravene Islamic tenets. Someone has to tell me if and how it contravenes explicitly. In fact, most conventional financial products are fine .... Regulators and supervisors are not religious scholars. They are in charge of financial stability. The safety of the institution is paramount.[45]

The state of choice-of-law in Shariah-compliant finance may be described in four key principles: (1) a combined-law clause will likely be found to be repugnant to the laws of common law and civil law countries; 2) Shariah or Islamic law as a choice of law will likely be held to be of ineffective because it does not represent the law of a nation; (3) the law of England is a popular choice of law for contracts involving Islamic financial services; and (4) all deals are permissible unless shown to contravene Islamic principles. Almost all of these contracts contain an arbitration clause, particularly those involving parties from different national jurisdictions.[46] Most arbitration in Islamic finance is done using combined-law, meaning under one

39. *Id.* at 547.

40. KILIAN BÄLZ, ISLAMIC LEGAL STUDIES PROGRAM, HARVARD LAW SCHOOL, SHARIA RISK?: HOW ISLAMIC FINANCE HAS TRANSFORMED ISLAMIC CONTRACT LAW 13 (2008).

41. *Id.* at 23.

42. *Id.*

43. *See, e.g.*, Press Release, White & Case LLP, Law Office of Mohammed Al-Sheikh in Association with White & Case Advises on SAR 7 Billion Sukuk (July 7, 1998) (on file with author) (noting the association of White & Case with a law firm experienced in Islamic finance).

44. BÄLZ, *supra* note 40, at 24; Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 643–44 (2006).

45. Mushtak Parker, *Islamic Finance is Growing at a Phenomenal Pace: Al-Jasser*, ARAB NEWS, Nov. 30, 2009, http://archive.arabnews.com/?page=6§ion=0&article=128946.

46. Muhammed Al-Bashir & Muhammed Al-Amine, *Istisna' and Its Application in Islamic Banking*, 16 ARAB L. Q. 22, 36 (2001).

nation's laws subject to Shariah law.[47] Considering the outcome and publicity of the *Shamil Bank* case, this result seems counterintuitive, and in order to facilitate an understanding of the work of the arbitrators, it will be necessary to enter into some discussion about the role Shariah occupies in today's legal systems.

C. *Shariah in Modern Legal Systems*

Shariah is the name for "all the laws of Islam including Islam's whole religious and liturgical, ethical, and jurisprudential systems."[48] As put by one Saudi scholar speaking at a U.S. university:

> Broadly defined, the Shari'a consists of "everything written by Muslim jurists throughout the centuries" .... Narrowly construed, "the Shari'a is confined to the undoubted principles of the Qur'an, what is true and valid of the Sunna, and the consensus of the community represented by its scholars and learned men during a certain period and regarding a particular problem, provided there was such a consensus."[49]

Shariah decisions are arrived at through consideration of a group of "legal proofs and evidence that . . . will either lead to certain knowledge of a Shari'ah ruling or at least to a reasonable assumption concerning the same" made by those qualified to make such rulings.[50] The primary sources of proof used to arrive at these rulings are the Qur'an and the Sunnah.[51] Jurists may use these sources to arrive at verdicts by referring to precedential authority in the opinions of the Companions[52] along with scholarly consensus, analogous reasoning, and policy-related considerations such as public interest, precautionary measures, and custom.[53]

Within Shariah law, some laws are immutable while others are interpreted according to the particularities of the situation, including the relative good that a specific decision may bring to the community.[54] This grey area is the province of *al-ijtihad*, which is the use of legal reasoning to arrive at a correct opinion when there is no clear text on the issue.[55] In a dispute arising from a financial transaction, the

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47. *Id.* at 90.

48. TAHA JABIR AL-ALWANI, SOURCE METHODOLOGY IN ISLAMIC JURISPRUDENCE 69 n.1 (Yusuf Talal DeLorenzo & Anas S. Al-Shaikh-Ali trans., International Institute of Islamic Thought, 3rd ed. 2003).

49. Ahmed Zaki Yamani, Minister of Petroleum and Mineral Resources, Saudi Arabia, Address at the New York University School of Law (Oct. 24, 1978), *in* George Sayen, *Arbitration, Conciliation, and Islamic Legal Tradition in Saudi Arabia,* 9 U. PA. J. INT'L BUS. L. 211, 239 (1987) (internal citations omitted).

50. AL-ALWANI, *supra* note 48, at 1.

51. IBRAHIM ABDULLA AL-MARZOUQI, HUMAN RIGHTS IN ISLAMIC LAW 10, 30–33 (2d ed. 2001).

52. *Id.* at 70.

53. *Id.* at 38, 47, 58, 61, 65, & 70.

54. Faizal Manjoo, Comment to *Discussion Board: The Islamic Finance Framework*, OPALESQUE: ISLAMIC FINANCE INTELLIGENCE (Aug. 31, 2009), http://www.opalesque.com/OIFI119/Discussion_Islamic_Finance_Framework19.html.

55. AL-MARZOUQI, *supra* note 51, at 44. The term *al-ijtihad* appears quite often in works discussing Islamic finance because many transactions engaged in by Muslims today are innovative when judged against the classical text and thus are not clearly permissible or impermissible to the lay businessperson. The following narration, perhaps, is the most illustrative statement of the purview of al-ijtihad in Islamic jurisprudence:

status of a specific issue will fall within one of the following categories: (1) obligatory; (2) recommended; (3) merely permissible; (4) ill-advised; or (5) unlawful.[56] For purposes of this discussion, the last category is the most important because it is the source of the "Shariah risk" mentioned above.

The term "unlawful" may be roughly equated, in the mind of the western lawyer, as being "unconstitutional."[57] In fact, several Muslim-majority countries adopt Shariah as the primary source of legislation.[58] For example, Saudi Arabia's Basic Law of the Government states that "[t]he Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution . . . ."[59] Likewise, Oman does not have an official constitution, but its Basic Law of the Sultanate proclaims that "[t]he religion of the State is Islam and the Islamic Shariah is the basis of legislation."[60] Other nations incorporate Shariah into their legal systems to varying degrees. The United Arab Emirates (UAE), Sudan, Yemen, Syria, Egypt, Kuwait, Iraq, Pakistan, Iran, and Qatar regard Shariah as the primary source of law.[61] For example, in the UAE, the passage of the UAE Law of Civil Transactions of 1985 was regarded by some as a veritable "virtual return to the Shari'a."[62] In other countries, such as Malaysia, Indonesia, Libya, Algeria, and Morocco, Shariah law is highly influential and remains a source of legislation.[63] For example, the Libyan Civil Code states, "In the absence of an applicable legal provision the judge shall decide in accordance with the principles of the Islamic Shari'a . . . ."[64] Judging from the various levels of incorporation, in the modern legal

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> [Upon commissioning Mu'adh ibn Jabal as the leader of a group of missionaries to the Muslims in Yemen, the Prophet Muhammed] asked: How will you judge when the occasion of deciding a case arises? He replied: I shall judge in accordance with Allah's Book. He asked: (What will you do) if you do not find any guidance in Allah's Book? He replied: (I shall act) in accordance with the Sunnah of the Apostle of Allah . . . . He asked: (What will you do) if you do not find any guidance in the Sunnah of the Apostle of Allah . . . ? He replied: I shall do my best to form an opinion and I shall spare no effort.

Partial Translation Of Sunan Abu-Dawud Book 24, Number 3585, UNIV. OF S. CAL. CTR. FOR MUSLIM-JEWISH ENGAGEMENT, (Ahmad Hasan trans.), http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/abudawud/024.sat.html (last visited Mar. 12, 2011).

56. David R. Vishanoff, *Kitab al-Waraqat fi usul al-fiqh*, A HANDBOOK OF LEGAL THEORY, http://faculty-staff.ou.edu/V/David.R.Vishanoff-1/Translations/Waraqat.htm (last visited Mar. 12, 2011) (translating original Arabic text of *Kitab Al-Waraqat fi usul al-fiqh*, written by Imam Al-Haramayn Al-Juwayni in 1450, and noting legal values that are relevant to a dispute over a financial transaction).

57. *See* William Ballantyne, *Introduction* to ISLAMIC LAW AND FINANCE 1, 3 (Chilbi Mallat ed., 1988), *available at* http://www.soas.ac.uk/cimel/materials/islamic-law-intro.html ("In a jurisdiction where the Shari'a applies, contracts not in accordance with its precepts are quite simply illegal.").

58. This was euphemistically referred to by one Muslim law professor as "what we call the establishment clause." Mohamed Mattar, Address at the Johns Hopkins School of Advanced International Studies Islamic Law Forum: Islamic Law in U.S. Courts: Theory and Practice (Oct. 2, 2005).

59. Basic Law of Government (1992), art. 1, *quoted in* Gemmell, *supra* note 15, at 172.

60. Basic Law of the Sultanate of Oman [Constitution] art. 2, *quoted in* Gemmell, *supra* note 15, at 172.

61. Ashley S. Deeks & Matthew D. Burton, *Iraq's Constitution: A Drafting History*, 40 CORNELL INT'L L.J. 1, 19–21 (2007); Gemmell, *supra* note 15, at 171; Amir H. Khoury, *Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks*, 43 IDEA 151, 201 (2003); Clark Benner Lombari, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State*, 37 COLUM. J. TRANSNAT'L L. 81, 82 n.4 (1998).

62. Kutty, *supra* note 21, at 620.

63. *Id.* at 595, 596 n.16.

64. *Id.*

system Shariah law acts as: (1) an immutable source of constitutional law; (2) a precedential source of common actions and defenses; (3) and a source of treatise for the interpretation of civil codes. To understand this statement, one may consider the Nizam, or supplementary Saudi laws. These regulations are regarded as valid only to the extent that they are consistent with Shariah law,[65] although in practice these laws are rarely challenged or overruled.[66]

It is because of this broad level of applicability that a combined-law clause is used explicitly in Islamic finance transactions, as well as in practice by both courts of law in Muslim-majority countries and the arbitral tribunals that specialize in Islamic finance ADR.

D. *Current Practices in Islamic Finance Dispute Resolution*

The present environment in the law of Shariah-compliant finance is unprecedented in that non-scholars of Shariah are being called upon to interpret Islamic law. Those versed in business and finance laws draft contracts to agree with Shariah principles to the best of their ability. Of course, the realities of life cannot be drafted out of a contract, and disputes do arise.

All of the major players in the sukuk market are parties to the New York Convention.[67] This list includes Malaysia, Qatar, UAE, and Bahrain.[68] The rules and practices of arbitration centers in these countries and others demonstrate a consistent practice of combined-law arbitration.

Islamic banks normally retain a specialized board for approval of financial transactions, and this branch may double as an arbitration body. These panels may judge disputes through a mixture of national law and Shariah principles. For example, the Philippines Monetary Board created the Al-Amanah Islamic Investment Bank of the Philippines (Islamic Bank) on April 28, 1992.[69] Although the Philippines is the world's most populous Catholic nation, its legal system reflects a combination of civil law, common law, and Islamic law.[70] The Monetary Board is an organ of the Bangko Sentral ng Pilipinas, or the Philippines Central Bank, and was created under the Constitution of the Philippines.[71] There is no religious requirement for membership on the bank's Monetary Board;[72] however, in creating the rules and regulations for the Islamic Bank, the Monetary Board was required to follow the

65. Gemmell, *supra* note 15, at 172.

66. *See* Parker, *supra* note 45 (quoting Al-Jasser).

67. Khalil Jarrar, *Lex Islamicus: Preventative and Remedial Measures Protecting Sukuk Investment Account Holders*, OPALESQUE: ISLAMIC FINANCE INTELLIGENCE (Aug. 31, 2009), http://www.opalesque.com/OIFI118/Lex_Remedial_Measures_Protecting_Sukuk_Investment18.html.

68. *Id.*

69. ABDEL AZIZ DIMAPUNONG, ISLAMIC BANKING RESEARCH INST., ISLAMIC BANK ARBITRATION 6 (2006).

70. Milagros Santos-Ong, *Update: Philippine Legal Research*, GLOBALLEX § 4.1 (June 2009), http://www.nyulawglobal.org/globalex/Philippines1.htm.

71. *Creating a Central Bank for the Philippines*, BANGKO SENTRAL NG PILIPINAS, http://www.bsp.gov.ph/about/history.asp (last visited Mar. 10, 2011).

72. *See New Central Bank Act (RA 7653)*, BANGKO SENTRAL NG PILIPINAS, http://www.bsp.gov.ph/about/charter_02.asp (last visited Mar. 10, 2011) (no mention of a religious requirement).

principles of Shariah law.[73] The charter for the Islamic Bank provided for the creation of a board of arbitration with jurisdiction to settle any disputes arising from conflicts between the Islamic Bank and its investors or shareholders.[74] This regulation provided that members of the Islamic Bank's Sharia Advisory Council will also act as the Sharia Arbitration Council and will have authority to adjudicate controversies involving less than $100,000.[75] The Islamic Bank did not have authority to operate except within the authority granted to it by a primarily non-Muslim body,[76] and the Sharia Arbitration Council was bound to act within national limits of due process;[77] however, the Sharia Arbitration Council's primary function was still to aid in "maintaining [the Islamic Bank's] unique Islamic cultures and operating policies that are Sharia' compliant."[78]

In Indonesia, Islamic banking disputes also are decided through a mix of Shariah and civil law. In fact, conflicts that emerged with the rise of Islamic banking have contributed to that country's legal development in what it categorizes as religious and civic law, as well as to the development of the Indonesian commercial arbitration system.[79] Indonesia maintains a dual system of courts: one for civil matters and one for Shariah matters.[80] During the initial growth of Islamic banking in Indonesia, there was confusion as to which court would have competence to hear cases related to Islamic finance.[81] Civic courts were generally not academically qualified to judge financial matters pertaining to Shariah law, but the jurisdiction granted to religious courts was limited to hearing cases relating to marriage, probate, wills, and endowments.[82] Religious scholars took the first step to set up a qualified body to hear such disputes, creating an ad hoc tribunal known as "Basyarnas," or the National Shari'ah Arbitration Body.[83] While the creation of an official Shariah arbitral tribunal enjoyed positive favor from the people of Indonesia, the Basyarnas system was characterized by poor accessibility due to lack of full-time personnel and permanent, wide-spread infrastructure.[84] Despite its known deficiencies, the Basyarnas was able to serve the ends for which it was created in that it used "Islamic law . . . as the basic principle" in settling disputes arising from financial disagreements that also invoked the civic laws.[85] Eventually, the competence of religious courts was increased to hear "any act or business activity which is undertaken in accordance with Islamic principles which consists of Syariah banks, Syariah micro financing institutions, Syariah insurance, Syariah reinsurance, Syariah portfolio management, Syariah bonds and Medium-term security, Syariah security market, Syariah finance, Syariah pawn broking, Syariah retired fund institutions and

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73. DIMAPUNONG, *supra* note 69, at 6.
74. *Id.* at 9.
75. *Id.* at 25.
76. *Id.* at 5.
77. *Id.* at 9.
78. *Id.* at 25.
79. *See* ABDUL RASYID, SETTLEMENT OF ISLAMIC BANKING DISPUTES IN INDONESIA: OPPORTUNITIES AND CHALLENGES 1–2 (2008), *available at* http://www.apmec.unisa.edu.au/apmf/2008/papers/25-abdul%20Rasyid.pdf (giving an overview of the historical role of the settlement of Islamic banking disputes in religious, civic, and arbitral fora).
80. *Id.* at 1.
81. *Id.* at 1–2.
82. *Id.*
83. *Id.* at 1.
84. *Id.* at 5.
85. RASYID, *supra* note 79, at 5.

Syariah business."[86] This new regulation extended the authority of religious courts to non-Muslims, provided that they were involved in a dispute concerning "Islamic economic matters."[87] In such disputes the religious courts, like the Basyarnas, must rely on both the "material law" related to Islamic financial transactions and Shariah law.[88]

It is standard practice for better-established arbitral tribunals to utilize a combined-law approach to hear cases involving Islamic finance. Indeed, acceptance of a mixed choice of law is written into the rules of many of these specialized bodies.

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) houses a specialized department to arbitrate Islamic financial disputes.[89] The Asian-African Legal Consultative Organisation (AALCO) established KLRCA in 1978 to facilitate commerce between its 47 member states.[90] AALCO membership includes preeminent nations in Islamic finance, such as the UAE, Bahrain, Qatar, Saudi Arabia, Malaysia, Brunei Darusalam, and emerging economic power Nigeria.[91] The KLRCA promulgated the Rules for Islamic Banking and Finance Arbitration (KLRCA Rules), a specialized regulation applicable to any "commercial contract, business arrangement or transaction which is based on Shariah principles."[92] The KLRCA Rules suggest a model arbitration clause, to which they add: "Parties may wish to consider adding[:] The law applicable to this agreement/contract shall be that of . . . ."[93] Rule 38 states that "[i]f the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by the law."[94] It is obvious that, as with any modern arbitral tribunal, the KLRCA allows parties to choose the law which shall govern the arbitration. As a forum specialized in Islamic finance, the KLRCA also provides in its rules that "[t]he arbitral tribunal shall apply Shariah principles and the law designated by the parties as applicable to the substance of the dispute."[95] This statement explicitly provides for the application of Shariah law in combination with the chosen law of the parties as necessitated by the terms of the contract and facts surrounding the conflict. However, the KLRCA presupposes that when a Shariah principle is in dispute the arbitrator will not be competent to judge the matter. In such cases where a Shariah principle is in dispute, Rule 33 provides that the arbitrator shall adjourn the proceedings and refer the issue

86. *Id.* at 6. As an aside, English-speaking Muslims are still at odds on the best spelling of the word "Shariah." However, Malay-speakers are more unified in their approach, almost always choosing to use the spelling "Syariah." Peter Tan, *Malay Loan Words Across Different Dialects of English*, 14 ENGLISH TODAY 44, 49 (1998).

87. RASYID, *supra* note 79, at 6–7.

88. *Id.* at 7.

89. *Who We Are*, KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION, http://www.klrca.org.my/Islamic_Banking-@-Arbitration_of_Islamic_Financial_Sector_at_KLRCA.aspx (last visited Apr. 5, 2011).

90. *Id.*

91. *About AALCO*, KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION, http://www.klrca.org.my/about_AALCO.aspx (last visited Mar. 10, 2011).

92. KLRCA RULES FOR ISLAMIC BANKING AND FINANCIAL SERVICES ARBITRATION rule 1(3) (2007), *available at* http://www.klrca.org.my/upload/Islamic_Banking_Rules_for_Islamic_Banking_&_FS_2007.pdf.

93. *Id.* rule 1(1).

94. *Id.* rule 38(10).

95. *Id.* rule 39(1).

to either the Shariah Advisory Council of the Central Bank of Malaysia or a Shariah expert agreed upon by the parties.[96]

The United Arab Emirates houses three main arbitration centers that routinely hear disputes regarding Islamic finance matters. Among its institutions are the Dubai International Arbitration Centre (DIAC), the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC), and the International Islamic Centre for Reconciliation and Commercial Arbitration (IICRCA), the last of which is a specialty forum created by the Islamic Development Bank to cater to the Islamic finance industry.[97] The practices of the ADCCAC are ambiguous; however, its charter does provide for a relaxed requirement of professional experience for one who seeks to apply to the "Conciliator's Panel" if the applicant is a university graduate of "economics, commerce, law or *Islamic law 'Sharia.'*"[98] This may allude to the center being a friendly forum for the combined-law approach. The IICRCA will apply the procedural and substantive laws chosen by the parties, and its rules explicitly state that the center will not apply laws which it judges to be "incompatible with the Shariah."[99] Said rules define Shariah as "the various Islamic schools of thought and the opinions of Fiqh academies and Shariah boards of Islamic financial institutions."[100] The DIAC does not purport to specialize in Islamic financial dispute resolution, but it is housed within the Jebel Ali Free Zone, and in the same city as the Dubai International Financial Centre, both Islamic banking hubs and renowned free-trade zones. The Dubai International Arbitration Centre's Rules and Procedures allow parties to choose the law that governs the arbitration,[101] and the center is staffed with legal scholars widely published in the fields of Shariah and Islamic finance.[102] These characteristics, combined with the center's status as the region's busiest arbitration center, imply that the center would interpret a clause stipulating the arbitration be governed under "the laws of *so-and-so nation*, subject to the principles of the Shariah" as a statement of intent and binding choice of law.

At a more domestic level, the Muslim Arbitral Tribunal (MAT) in the United Kingdom provides yet another example of the principle of choice of law in Islamic dispute resolution. Although most known for family law arbitration, the MAT hears a range of issues, including commercial and debt disputes.[103] According to its procedural rules, the MAT will "[i]n arriving at its decision . . . take into account the Laws of England and Wales and the recognised Schools of Islamic Sacred Law."[104] The MAT states that its overriding objective is to ensure that a judgment is secured "in accordance with Qur'anic Injunctions and Prophetic Practice."[105] True to its

96. *Id.* rule 33.

97. Akhtar, *supra* note 36, at 12.

98. ABU DHABI COMMERCIAL CONCILIATION AND ARBITRATION CENTRE CHARTER art. 13 (emphasis added) (on file with author).

99. Akhtar, *supra* note 36, at 12.

100. *Id.*

101. DUBAI INTERNATIONAL ARBITRATION CENTRE RULES & PROCEDURES art. 33.1 (2007), *available at* http://www.diac.ae/idias/rules/Arb.Rules%202007/4THE%20PROCEEDINGS/.

102. *Why Arbitrate at DIAC?*, DUBAI INT'L ARB. CENTRE, http://www.diac.ae/idias/services/diac (last visited Mar. 30, 2011).

103. *Types of Cases*, MUSLIM ARBITRATION TRIBUNAL, http://www.matribunal.com/cases.html (last visited Mar. 27, 2011).

104. PROCEDURE RULES OF THE MUSLIM ARBITRATION TRIBUNAL rule 8(2), *available at* http://www.matribunal.com/procedure_rules.html.

105. *Id.* rule 1(1).

goals, the MAT's rules stipulate that an arbitral tribunal must consist of at least one "[s]cholar of Islamic Sacred Law" and one "[s]olicitor or [b]arrister of England and Wales."[106] The MAT has had some success in its approach, as indicated by a 15% increase in the use of the MAT by non-Muslims in 2009.[107]

In fact, although the use of Shariah law in commercial arbitration has a mostly negative history, pre-*Shamil Bank* cases show that nothing prevents a Western tribunal from using a combined-law approach.

In *State of Saudi Arabia v. Arabian American Oil Co.*, the arbitrator subjected the law of Saudi Arabia to the general principles of jurisprudence as he knew them.[108] In that case, Onassis, a Greek transport company, was given a quasi-monopoly from Saudi Arabia to transport oil from out of the country.[109] ARAMCO protested, arguing that under its concession agreement it had the right to choose its own method of transporting oil.[110] The case went to arbitration in Geneva, and the tribunal recognized the applicability of Saudi Arabian law.[111] Despite the clear mandate, the arbitrator decided that the rights of ARAMCO could not be "secured in an unquestionable manner by the law in force in Saudi Arabia . . . [and that Saudi laws] must be interpreted or supplemented by the general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence."[112]

In *Sanghi Polyesters Ltd. (India) v. The International Investor KCFC (Kuwait)*, the parties came into a dispute concerning an *istina'a* agreement.[113] The parties agreed to arbitrate the dispute at the ICC, and Mr. Samir Saleh, a qualified attorney and scholar of Shariah, was appointed arbitrator.[114] The contract contained a choice of law clause stipulating that any dispute should be "governed by the Law of England except to the extent it may conflict with Islamic Shari'ah, which shall prevail."[115] The entire dispute in the arbitration proceedings was whether the application of Shariah law would serve to invalidate the contract and prevent the defendant from a return of its investment capital.[116] The losing party challenged the judgment in English court, and the judge recognized that there was no issue regarding the law of England and Wales and that the only issue was whether the contract was "invalidated in the manner claimed . . . under Shari'a law."[117] The judge ruled that there had been no

106. *Id.* rule 10.

107. *Increase in Non-Muslims Opting for Sharia Courts*, CHRISTIAN INST. (Mar. 16, 2010), http://www.christian.org.uk/news/increase-in-non-muslims-opting-for-sharia-courts/.

108. Saudi Arabia v. Arabian Am. Oil Co. (ARAMCO), *reprinted in* 27 I.L.R. 117, 169 (1958).

109. Sayen, *supra* note 49, at 214 n.14.

110. *Id.*

111. *Id.*

112. Gemmell, *supra* note 15, at 179 (quoting Charles N. Brower & Jeremy K. Sharpe, *International Arbitration and the Islamic World: The Third Phase*, 97 AM. J. INT'L L. 643, n.16 (2003)).

113. Sanghi Polyesters Ltd. (India) v. Int'l Investor KCFC (Kuwait), [2000] 1 LLOYD'S REP. 480, 480 (2000). *Istina'a* is a form of contract where one party, paid in advance, is contracted to manufacture something. The practice is widely accepted as valid under Shariah, although there has been and continues to be debate among Muslim scholars on the contract's legality due to the Islamic prohibition of selling items which you either do not yet own or whose possession is uncertain. *See generally* Al-Bashir & Al-Amine, *supra* note 46 (describing the application of *istina'a* in Islamic banking transactions).

114. ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 115 (Sweet & Maxwell 4th ed. 2004) (1986).

115. *Id.*

116. *Sanghi Polyesters Ltd.*, [2000] 1 LLOYD'S REP. at 480.

117. *Id.*

serious irregularity or injustice and that the award would stand.[118] This shows that before *Shamil Bank*, even in Western courts there was no supposition that a contract subject to Shariah principles was governed by two complete and distinct bodies of law; there was not a cognitive hurdle to prevent supplementing and interpreting a contract governed by a national law but applying general principles of a different system.

In conclusion, there is a resistance by some courts, echoed by European legal scholars, to apply Shariah to contracts which invoke another national law. This judgment is based on the principle that only one law can govern a contract and the Rome Convention's requirement that the law of a contract be that of a national system. Scholars also support these conclusions by general precepts of common law and legal reasoning, reflecting what Lord Asquith would have likely called "mere common sense." In spite of these firm statements from courts and scholars, the practice of arbitral tribunals judging matters of Islamic finance has been to apply the principles of Shariah to fulfill the intent of the parties, who used Islamic financial instruments instead of conventional bank products. But, rather than dispensing with one law or the other, arbitral tribunals judge the dispute to the greatest extent possible in accordance with the chosen national law, and only resort to applying Shariah principles as a gap-filler or when Islamic law sources are the basis of the specific issue being raised. To say the least, the actual practice of Islamic financial dispute arbitration demonstrates that the logical barrier that prevents a judge from subjecting a national law to Shariah principles is not absolute, nor is it an excessively complicated process. It is the *lex mercatoria* of Islamic finance and the adopted procedure of all arbitration centers that are accustomed to hearing disputes from Islamic finance.

II. THE FUTURE OF ISLAMIC FINANCE DISPUTE RESOLUTION IN THE WEST

A. Shamil Bank v. Beximco: *A Tragedy for Choice of Law Jurisprudence?*

Several holdings from the case of *Shamil Bank* are worth highlighting. The first is that the English appellate court prohibited the use of a combined-law clause based on the principle that a contract cannot be governed by two systems of law and the statement in the Rome Convention on the Law Applicable to Contractual Obligations that a "contract shall be governed by the law chosen by the parties."[119] The second important holding of the *Shamil Bank* court was that the reference to Shariah in the disputed contract was nothing more than a non-binding statement of intent.[120] In arriving at this conclusion, the appellate court argues that (1) the Rome Convention does not contemplate the choice of a non-state legal system such as Shariah; (2) even if the parties intended to incorporate some aspects of Shariah, they did not stipulate which principles should be applied; and (3) although Muslim

118. *Id.*

119. Rome Convention on the Law Applicable to Contractual Obligations, art. 3, June 19, 1980, 19 I.L.M 1492, 1493 (1980).

120. *Shamil Bank*, [2004] EWCA (Civ) 19, [54], 1 W.L.R. at 1800.

scholars differ on the application of Shariah, it is unlikely that the parties wished that a secular English court would decide principles of Islamic law.[121]

The Rome Convention has since been replaced by Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I).[122] In declaring that the law of a contract must be a national system, the court in *Shamil Bank* relied on Articles 1(1), 3(1), and 3(3) of the Rome Convention.[123] In doing so, the Appellate Court draws attention to the statement in Article 1(1) that "[t]he rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different *countries*" and to the text of Article 3(3), which references "foreign law."[124] The correlating articles in Rome I have been revised, and the reference to the "laws of different countries" no longer appears in Article 1(1).[125] However, the text of Article 3(3) of Rome I still allows for the same construction in *Shamil Bank*, as it currently states:

> Where all other elements relevant to the situation at the time of the choice are located in a country other than *the country whose law has been chosen*, the choice of the parties shall not prejudice the application of provisions of *the law of that other country* which cannot be derogated from by agreement.[126]

Article 3(1) remains unchanged, and still reads, "[a] contract shall be governed by the law chosen by the parties."[127] Thus, the continued use of the singular form of "law" is in tension with clauses that subject a national law to Islamic financial principles. These clauses will be viewed as violative of the rule that only one system of law may govern a contract. Even outside of the European community and without reference to their treaties regarding the law governing contracts, the legal rulings of *Shamil Bank* are likely to appear in other systems. Some commentators believe that other common law and civil law jurisdictions would arrive at the same conclusion as the court in *Shamil Bank* given similar facts.[128] Also, with particular concern to the Rome Convention's apparent prohibition of the use of combined-law clauses, arbitrators who are called on to judge under the law of a European Union country may find themselves compelled to disregard Shariah provisions in a contract. This is problematic because the law of England and Wales is currently the most favored choice of law for international finance, and according to *Shamil Bank*, under English law a murabaha agreement will be treated the same as an interest-bearing loan, barring contrary contractual stipulations.

This result is unnecessary, however. The statement in a contract that a national law shall be subject to Shariah is not in fact equivalent to two laws governing a contract. Indeed, the appellants in *Shamil Bank* argued that the reference to Shariah

121. *Id.*

122. Rome I, *supra* note 35, at 10.

123. *Shamil Bank*, [2004] EWCA (Civ) 19, [40, 48], 1 W.L.R. at 1796, 1798.

124. *Id.* at [48], 1 W.L.R. at 1798 (emphasis added).

125. Rome I, *supra* note 35, at 10.

126. *Id.* (emphasis added).

127. *Id.* art. 3(1).

128. *See, e.g.*, Chuah, *supra* note 34, at 126 (stating that the case decision has generally confirmed commentators' beliefs that the applicable law of contract must be that of a country).

be treated as an inclusion of the lex mercatoria of Islamic finance and that the appellate court apply those principles which relate to murabaha contracts.[129] The appellate court still found this reasoning too much to bear, demanding even greater specificity as to Shariah's scope of applicability.[130] However, industry practice shows that the statement is intended to serve as a gap-filler provision because the contractual arrangements of Islamic business are often not defined within common law jurisprudence or civil regulation. Terms such as riba, murabaha, and *gharar*[131] are still novel items in the jurisprudential and financial systems of many countries, and Islamic law nations have not codified the extent of each financial instrument; this allows parties the freedom of innovation, and Shariah may be kept in mind when disputes do arise. Judges and arbitrators should therefore not consider a Shariah-termed, combined-law contract as one involving two legal systems. This is because, according to the practice of parties involved in Islamic financial transactions, the terms of the contract themselves are inherently Shariah-based. Thus, reference to Islamic law does not stack two systems of law against each other, but states the intention of the parties in realizing the transaction and ensuring that their business relationship continues to be Shariah-compliant.

The argument that Shariah is a comprehensive social code of conduct that applies outside of a state's legal framework should not create so much confusion that application of Shariah becomes untenable. Only such Shariah-related legal issues that are logically related to the terms of the contract need be entertained. Obviously, the judge need not consider principles related to personal behavior inasmuch as these did not affect the free will of parties in forming the agreement. In this respect, a judge can serve as a gatekeeper. In doing so, the judge should apply the chosen law of the parties, and when an issue is raised concerning a Shariah matter, the judge should allow both sides to present their experts or to agree to send the issue to an expert chosen by the parties.

All of this means to say that the reasoning of the court in *Shamil Bank* was hasty. In determining the obligations of parties, courts should look to the intentions of parties and their understanding of the meaning of the contract. A court should do its best to give effect to those intentions without breaching legal principles. In interpreting the intention of the parties, the appellate court in *Shamil Bank* did not look to the prior negotiations between the parties, the common practices of the Islamic financial industry, or the motives of the parties in choosing to use Islamic banking procedures. Instead, the *Shamil Bank* court claimed to interpret the contract in light of the commercial goals that it served to accomplish, as English law requires.[132] In doing so the appellate court explained that the goal of Beximco was but to acquire working capital through an agreement couched in Islamic terms.[133] This construction implies significant insincerity on the part of both parties, while it assumes that Beximco was acquainted with the intricacies of Islamic law. The end

129. *See Shamil Bank*, [2004] EWCA (Civ) 19, [49]–[50], 1 W.L.R. at 1798–99 (". . . Mr Hacker argues that the clause should be read as incorporating simply those specific rules of Sharia which relate to interest and to the nature of Morabaha and Ijarah contracts, thus qualifying the choice of English law as the governing law only to that extent.").

130. *See id.* at [52], 1 W.L.R. at 1800 ("Thus the reference to the 'principles of . . . Sharia' stands unqualified as a reference to the body of Sharia law generally.").

131. *See* HANDBOOK OF ISLAMIC BANKING, *supra* note 23, at 39–40 (defining *gharar* as "speculation").

132. *Shamil Bank*, [2004] EWCA (Civ) 19, [48], 1 W.L.R. at 1798.

133. *Id.* at [60], 1 W.L.R. at 1802.

result was that the words "[s]ubject to the principles of the Glorious Sharia'a" are rendered superfluous, but Shamil Bank is still left to represent itself to its British customers as an "Islamic bank."[134]

Because the appellate court made its decision without reference to the commercial ends of a murabaha contract in Islamic finance, it essentially made its own decision as to what constitutes a murabaha agreement without reference to any Islamic source. If it had inquired otherwise, the appellate court may have found that in practice the reference to Shariah in Islamic financial transactions is not intended to reflect a choice of a separate and distinct system, but that it is a clause commonly employed by the Islamic finance sector to ensure that deals remain Shariah-compliant even throughout the exigencies of litigation. Furthermore, if one party holds itself out to be an Islamic bank, and the other party chooses to conduct business with it rather than a conventional Western financial institution, it would be illogical to conclude, as did the appellate court in *Shamil Bank*, that either party to a Shariah-compliant deal is "indifferent to the form of the agreements . . . or the impact of Sharia law upon their validity."[135] If that were a logical statement, then it raises the question: why not just seek another more traditional, less cumbersome, and widely available form of financing rather than deal with an Islamic bank from the Kingdom of Bahrain?

B. *Judging Under Shariah: The U.S. Experience*

There is concern by U.S. scholars that a choice of law that necessitates looking into Shariah law will run afoul of the First Amendment prohibition of state endorsement of a particular religion.[136] From an arbitration standpoint, the fear is that the recognition of an arbitration award will be attacked on public policy grounds in the enforcing courts.[137]

Use of the First Amendment as a weapon against enforcement of an arbitration award is not an unfounded fear in the case of Islamic finance. The Ann Arbor-based Thomas More Law Center is involved in federal litigation protesting the federal bailout of financial institutions. The Center, self-described as "dedicated to the defense and promotion of the religious freedom of Christians," claims that the federal appropriation of funds to AIG violates the Establishment Clause because the money is used to finance Shariah-compliant products.[138] This "conveys a message of disfavor of and hostility toward Christians, Jews, and those who do not follow or abide by Islamic law."[139] While it is still being litigated in the courts, the Eastern District of Michigan has so far denied a motion to dismiss by defendant Timothy Geithner.[140]

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134. *Id.* at [52], 1 W.L.R. at 1800.

135. *Id.* at [60], 1 W.L.R. at 1802.

136. *See, e.g.*, Trumbull, *supra* note 44, at 615 (stating that judicial enforcement of contracts raises First Amendment concerns).

137. *See, e.g.*, Graham Kozak, *AIG and Sharia Law*, MICH. REV. (Apr. 7, 2009), http://www.michiganreview.com/archives/615 (discussing the constitutional challenge to the government bailing out Sharia-compliant banking institutions).

138. *Id.*

139. *Id.*

140. Murray v. Geithner, 624 F. Supp. 2d 667, 677 (E.D. Mich. 2009) (order denying motion to

Enforcement of an arbitration award is not safe from similar attacks in other jurisdictions. In Canada, for example, the government of Ontario amended their Arbitration Act to make family dispute arbitration decisions based on religious principles unenforceable.[141] This amended legislation, enacted after decades of Canadian enforcement of the arbitral decisions of the Jewish Beit Din,[142] was in reaction to a campaign by the Islamic Institute for Civil Justice to increase the recognition and enforceability of Muslim personal law arbitral decisions in Ontario.[143]

The United States, for the most part, has not reacted with the same fervor against religious arbitration. To the contrary, U.S. courts are rather consistent in enforcing agreements to arbitrate though the agreement may specify that the arbitration take place in a religious court and under religious law. Courts have frequently enforced the validity of agreements to arbitrate before the U.S. Institute for Christian Conciliation; these agreements typically include a clause stating that "the parties agree that any claim or dispute arising from or related to this agreement shall be settled by biblically based mediation."[144] In one case, Encore Productions sued Promise Keepers over a dispute concerning their contract to provide production services for Promise Keepers conferences.[145] The contract contained a clause that stated that arbitration would be conducted "in accordance with the *Rules of Procedure for Christian Conciliation* of the Institute for Christian Conciliation;"[146] these rules in turn require that the "Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process."[147] Encore Productions challenged the arbitral decision claiming that the religious dispute resolution violated the First Amendment.[148] The court in that case held that the arbitration award was a secular contractual right, and that neutral, non-religious principles called for enforcement of the arbitration award because interpretation of the arbitration clause itself did not require inquiry into or a determination of religious doctrine.[149]

Bad publicity of Islamic law in the United States has not prevented even state courts from enforcing agreements to arbitrate before Shariah tribunals even in the controversial family law setting. In *Jabri v. Qaddura*, a Texas Appellate Court enforced an agreement to arbitrate on behalf of a woman in a divorce.[150] The wife, Jabri, was seeking the fulfillment of what is often labeled in Islamic law as a "deferred *mahr*."[151] In such arrangements, a dowry is agreed upon, but a portion of it is deferred from payment unless there is a divorce.[152] Jabri claimed she was owed

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dismiss).

141. Larry Resnick, *Family Dispute Arbitration and Sharia Law*, BC C.L. ASS'N, 2, http://www.bccla.org/othercontent/07Sharialaw.pdf (last visited Mar. 30, 2011).

142. Jehan Aslam, *Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship*, 38 INT'L L. & POL. 841, 843 (2006).

143. *See id.* at 841–42 (discussing how the Islamic Institute of Civil Justice engaged in advocacy, culminating in the passage of the Ontario Arbitration Act, which allowed for Islamic family law arbitration tribunals).

144. Mattar, *supra* note 58, at 11.

145. Encore Prods., Inc. v. Promise Keepers, 53 F. Supp. 2d 1101, 1102 (D. Colo. 1999).

146. *Id.* at 1106 (italics in original).

147. *Id.* at 1111.

148. *Id.* at 1112.

149. *Id.*

150. Jabri v. Qaddura, 108 S.W.3d 404, 413 (Tex. App.—Fort Worth 2003, no pet.).

151. *Id.* at 406–07.

152. *See* Mona Siddiqui, *Mahr: Legal Obligation or Rightful Demand?*, 6 J. Islamic Stud. 14, 20 (1995) (explaining the operation of the deferred mahr).

one-half the value of the couple's home and $40,000 of her dowry.[153] During divorce proceedings, the parties submitted the dispute to the Texas Islamic Court, but during the arbitration, a disagreement arose as to the scope of the arbitrator's authority.[154] The wife motioned the district court to stay proceedings and compel arbitration, which the court denied.[155] The Court of Appeals ruled that the district court abused its discretion by finding that the agreement was not valid, in part because the Court found that arbitration is strongly favored by state and federal law and that doubts should be resolved in favor of arbitration.[156] However, the Court of Appeals did not mention any public policy concerns that would prevent it from enforcing an agreement to arbitrate issues concerning conservatorship of children, child support, division of property, and even a protective order before an Islamic tribunal.[157]

Enforcement of Islamic arbitration awards has proven to be relatively uncontroversial in U.S. courts. More compelling is that the application of Islamic Law is not out of bounds for a U.S. court to apply. In *National Group for Communications & Computers v. Lucent Technologies International*, National Group filed suit against Lucent Technologies in a U.S. district court for breach of contract.[158] National Group, a Saudi Arabia-based company, contracted Lucent Technologies to assist in a multi-million dollar project to design, engineer, and install emergency and pay telephones throughout Saudi Arabia.[159] Lucent Technologies terminated its subcontract, and National Group was forced to liquidate its Project Department, which it had created specifically to implement the telecommunications contract.[160] National Group then brought suit against Lucent Technologies seeking actual and expectation damages.[161]

Both National Group and Lucent Technologies agreed that Saudi Arabian law governed the terms of the dispute.[162] The district court acknowledged that in order to judge the case it would first have to determine how Saudi Arabian law would decide the claim for loss of the plaintiff's Projects Department; in doing so, the court analyzed tenets of Shariah.[163] In its opinion, the district court recited some rules from the "Basic Regulation of the Kingdom of Saudi Arabia," including Article 48, which states that "[t]he courts shall apply in cases brought before them the rules of the Islamic *shari'a* in agreement with the indications in the Book [The Qur'an] and the Sunna and the regulations issued by the ruler that do not contradict the Book or the Sunna."[164] The district court stated its understanding that Shariah is the Islamic

153. *Jabri*, 108 S.W.3d at 406–07.
154. *Id.* at 408.
155. *Id.* at 409.
156. *Id.* at 410, 413.
157. *Id.*
158. Nat'l Grp. for Commc'ns & Computers v. Lucent Techs. Int'l, 331 F. Supp. 2d 290, 292 (D.N.J 2004).
159. *Id.*
160. *Id.*
161. *Id.* at 298.
162. *Id.* at 293.
163. *Id.* at 293–94.
164. *Nat'l Grp.*, 331 F. Supp. 2d at 294 (quoting the BASIC REGULATION OF THE KINGDOM OF SAUDI ARABIA art. 48 (1992)).

"divine law" and that in deciding disputes, a Saudi Arabian judge will turn to the "Qur'an, the Sunnah, and fiqh to guide his legal determination."[165]

Turning to the parties' dispute, the district court began to analyze the issue of whether expectation damages would be allowable against Lucent Technologies under Saudi Arabian law. In doing so, the district court heard expert witnesses from both parties and detailed its own research concerning damages under Islamic law.[166] The district court stated, "[s]everal historical . . . statements of the Prophet Muhammed . . . are instructive on this issue," and then proceeded to quote the Prophet Muhammed's prohibition of gharar transactions:

> Do not buy fish in the sea, for it is gharar. The Prophet forbade sale of what is in the wombs, sales of the contents of the udders, sale of a slave when he is runaway . . . . The Messenger of God forbade the [sale of] the copulation of the stallion. He who purchases food shall not sell it until he weighs it.[167]

The district court then resolved the dispute in favor of the defendants, finding that expectation damages under Saudi Arabian law, and thus Shariah, constitute a form of gharar.[168] The district court went on to say that to award expectation damages based on the plaintiff's valuation of the Projects Department "would be equivalent to placing a value on fish in the sea, or purchasing food that has not yet been weighed."[169] Moreover, "book value is an accounting convention that would not produce an accurate picture of actual losses as defined under Islamic law."[170]

It has been argued that the judge's use of Islamic law violated the First Amendment.[171] Despite the window of opportunity, there was no argument on appeal to this effect.

In conclusion, the use of Shariah in U.S. arbitration has not prevented the enforcement of decisions to arbitrate, nor has it prevented the actual awards on public policy grounds. This is all the more significant because the United States maintains a rigid wall of separation between church and state. Furthermore, as demonstrated by the district court in *National Group*, Shariah is not so diverse or insufficiently codified as to prevent its application through the opinions of experts and learned treatises, and its application does not necessitate an unacceptable intrusion by the judge in pronouncing what is right or wrong in matters of worship.

III. ADVICE FOR SEEKING ARBITRATION IN ISLAMIC FINANCIAL DISPUTES

The choice of law clause could be a shorthand for the parties' expression of intention for all matters not in the contract.[172] Parties to a contract should be able to

165. *Id.* at 295.
166. *Id.* at 297–300.
167. *Id.* at 296.
168. *Id.* at 297, 300.
169. *Id.* at 301.
170. *Nat'l Grp.*, 331 F .Supp. 2d at 301.
171. Trumbull, *supra* note 44136, at 636.
172. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 534 (2006).

completely divorce themselves from a national system.[173] However, in Islamic financial dispute resolution, the choice of law is unique compared to other areas. Parties in Islamic financial transactions are not asking to abandon the law of a particular country, but are putting their confidence in the laws of well-established systems, such as those of the United Kingdom. Because the terms of the contract are Shariah-based, the parties must supplement the choice of law clause to address that fact and cater to the parties' preferences and the spirit of the transaction. Otherwise, the writing of the agreement may become unduly complicated by taking account of situations that may never arise and cannot be properly judged until the after the fact. Shariah-compliant transactions bring about the challenge of churning abstract concepts into actual deals; a major impediment to the growth of Islamic finance is the amount of legal fees associated with the process.[174]

Although arbitral panels with experience in adjudicating disputes arising from Shariah-compliant business transactions have both accommodated and propagated the combined-law contract, it has not been well-received in the United Kingdom. A forum that wishes to judge under a particular form of law should discover how a judge from that state would decide the question.[175] Some judges and arbitrators find themselves unwilling to proceed in this way when asked to make a decision concerning Shariah law, whether because the forum is considered secular or because the arbitrator prefers to refer the question to an expert. For these reasons and others, some Islamic finance professionals conclude that the divergence of industry practice can only be reconciled through the creation of an Islamic ADR forum.[176]

In the world of Shariah-compliant finance, there has never been more of an openness to settle disputes through arbitration. In previous times, and to some extent today, scholars of Islamic law considered the enforcement of the award of an arbitrator to be purely discretionary by the judge.[177] The Medjella is considered the first attempt to codify Islamic law and represents the endeavor of the Ottoman Empire.[178] The Medjella dedicated an entire chapter to arbitration, stating within it that "a decision validly given by the arbitrators in accordance with the rules of law is binding on all parties."[179] Decisions by arbitrators were not enforceable except upon confirmation by the judge, and then only if made "in accordance with law."[180] From the perspective of the current transnational commercial arbitration system, it is even more problematic that an agreement to arbitrate was not binding, and parties could dismiss the arbitrator any time before the award was handed down.[181] The Medjella was highly influential throughout the Muslim world and still forms the basis of the

173. *Id.* at 535.

174. *See* Ahmad Lufti Abdull Mutalip, *Practical Legal Issues in Islamic Banking*, MALAYSIAN ISLAMIC FIN. MONTHLY, Apr. 2008, at 21, 22, http://www.mifmonthly.com/pdf/2008/April.pdf ("One most noted impediment to the growth of Islamic banking is the costs involved, including legal fees . . . .").

175. WEINTRAUB, *supra* note 172, at 536–37.

176. *See* Agha, *supra* note 37, at 30 ("[T]he market has reached a point where an authoritative and specialist Islamic ADR institution is need.").

177. Gemmell, *supra* note 15, at 173–77.

178. *Id.* at 175; AL-MEDJELLA, *available at* http://www.iiu.edu.my/deed/lawbase/al_majalle/al_majalleb16.html.

179. AL-MEDJELLA, ch. 4, art. 1848.

180. *Id.* ch. 4, art. 1849.

181. *See generally id.* ch. 4, art. 1847 ("Either of the parties may dismiss the arbitrator before he has given his decision.").

laws of Jordan and Kuwait.[182] Even in the classical period of Islamic jurisprudence, there were opinions that a freely-chosen arbitrator's decision was binding upon the parties and required judicial enforcement.[183] That opinion has gained much traction in modern times, along with the statement from that particular school of classical jurists that an agreement to arbitrate is binding upon the parties and cannot be revoked.[184]

Arbitration in Islamic financial disputes has improved in recent years. In 2009, for example, Malaysia passed the Bank Negara Malaysia Act 2009, which makes the decisions of the Sharia Advisory Council, a popular Islamic finance ADR forum, binding upon the courts.[185] The KLRCA Rules for Islamic Banking and Finance Arbitration state specifically that the award of the arbitrator is binding, and the tribunal has the power to judge on matters concerning its own jurisdiction ("competence competence").[186] The view that an agreement to arbitrate is binding is almost a consensus among states heavily involved in Islamic finance. This is reflected in Saudi Arabian Law of Arbitration[187] and also in the UAE Civil Procedure Code.[188]

The views of most modern Shariah commentators reflect the nearly global consensus that a valid agreement to arbitrate is binding.[189] However, courts called on to refuse recognition of an arbitration award from a combined-law, Shariah-compliant contract should be wary of arguments that the procedure of the arbitration was not Shariah-compliant. There are still differing opinions concerning the validity of an agreement to arbitrate that is made before the actual dispute arises.[190] Moreover, an unhappy party might opportunistically object to the religion or gender of the arbitrator.[191] These problems should be cause for concern for a lawyer seeking to protect the client's interests, even though the issues have not yet presented themselves. A judge that must entertain such an argument should proceed with the understanding that Shariah law is intended only to apply to the terms of the contract which are Shariah-based and to the legal arguments which apply directly to those concepts.

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182. *See* Andrew Smolik, Comment, *The Effect of Shari'a on the Dispute Resolution Process Set Forth in the Washington Convention*, 2010 J. DISP. RESOL. 151, 157 n.89 (2010) (discussing the influence of the Medjella on the laws of Jordan); Gemmell, *supra* note 15, at 182.

183. *See* Kutty, *supra* note 21, at 597 (stating that the arbitrator's judgment could not have been a "flagrant injustice").

184. Al-Bashir & Al-Amine, *supra* note 46, at 36.

185. Agha, *supra* note 37, at 30.

186. KLRCA RULES FOR ISLAMIC BANKING AND FINANCE ARBITRATION, *supra* note 92, Rules 26 & 38.

187. Royal Decree No. M/46, Saudi Arabia Law of Arbitration, July 3, 1983, *available at* http://www.commerce.gov.sa/english/moci.aspx?Type=8&PageObjectId=748.

188. *See* UAE Civil Procedure Code, Federal Law No. (11) of 1992, ch. 3, art. 203(5), *available at* http://www.diac.ae/idias/rules/uae/chapter3/ ("If the parties to a dispute agree to refer the dispute to arbitration, no suit may be filed before the courts [unless] the other party does not object to such filing at the first hearing.").

189. *See, e.g.*, Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J. L. & RELIGION 379, 388 (2009) (noting that although agreements to arbitrate were historically unenforceable, by the early twentieth century, the business community had pushed such agreements into favor).

190. Al-Bashir & Al-Amine, *supra* note 46, at 36.

191. *See* Agha, *supra* note 37, at 31 (raising the question as to whether non-Muslims may issue binding decisions affecting Islamic parties).

A lawyer working in Islamic finance must constantly inquire as to whether Shariah applies,[192] and this is equally important for procedural matters involving arbitration. Usually, the site of the arbitration will govern the arbitration process, and this determines the likelihood of receiving either help or interference from the local courts.[193] Therefore, the importance of the place of arbitration should not be underestimated. A problem could foreseeably arise in jurisdictions where combined-law contracts would be repugnant to their choice of law doctrine. Nevertheless, the law of the place of arbitration can be evaded by agreeing to make a country with a favorable procedure the place of arbitration, but agreeing to meet in another country.[194]

Enforcement can be refused if the agreement is not valid or if the composition of the arbitral tribunal is not in accordance with the chosen law.[195] As mentioned above, there are opinions derived from Shariah that can be used to attack the arbitral awards because of faulty procedure. For example, Saudi Arabia's Law of Arbitration states that "[a]n arbitrator is required to be experienced and of good conduct and reputation and full legal capacity."[196] Derived from the Islamic legal opinion that an arbitrator should possess *qadi*-like qualities,[197] this requirement could be mischievously employed to attack the composition of the arbitral tribunal. In fact, in *Saudi Basic Industries Corporation v. Mobil Yanbu Petrochemical Company*, the appellants challenged the trial court judge's qualifications to employ Shariah in order to judge under Saudi Arabian law.[198] In denying that the trial court engaged in a standardless determination of Saudi Arabian law, the Delaware supreme court mentioned that the expert of Saudi Basic Industries Corporation (SABIC) stated that no U.S. court possesses the qualifications to engage in legal analysis under Saudi Arabian law.[199] The court pointed out that had the expert's opinion been the true belief of SABIC, then it was quite strange that SABIC did not attack the trial court's competence until after it received an adverse jury verdict.[200] Further highlighting the contradictory behavior of the appellants, the court stated:

> It is remarkable that SABIC, having [purposefully] selected this forum instead of a Saudi Court, knowing the United States legal system is dramatically different than the Saudi legal system, comes forward after a verdict against it to claim that *no* American judge is qualified to interpret and apply Saudi law. This is particularly incredible in light of SABIC's vehement argument that this case should be tried by a U.S. judge.[201]

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192. *See* Ballantyne, *supra* note 57, 4–5 (stating the extent to which Shariah law would apply to a syndicated loan agreement varies by Arab state).

193. RAU ET AL., *supra* note 11, at 363.

194. *Id.* at 399–400.

195. *Id.* at 425.

196. Royal Decree No. M/46, Saudia Arabia Law of Arbitration art. 4, July 3, 1983, *available at* http://www.commerce.gov.sa/english/moci.aspx?Type=8&PageObjectId=748.

197. Al-Bashir & Al-Amine, *supra* note 46, at 37 (a *qadi* is a judge of an Islamic court).

198. Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochem. Co., 866 A.2d 1, 32 (Del. 2005).

199. *Id.*

200. *Id.*

201. *Id.*

Therefore, in light of the potential for tactical use of Shariah-based procedural considerations, parties may want to specify within the contracts that the choice of law be applied only as to its substantive requirements.

Finally, the time is arriving where parties need not leave all to chance. The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) produces important publications relating to financial accounting and Shariah standards.[202] These standards are widely acknowledged in the industry for the criteria that must be met in Islamic financial instruments.[203] The AAOIFI has recently published an arbitration standard that is expected to assist in the development of Islamic finance ADR forums.[204] AAOIFI guidelines cover the standards of Shariah-compliant transactions better than any national system.[205] One solution to the complaint that qualified arbitrators in Islamic finance are too scarce would be to specify in the contract that arbitrators should decide questions relevant to Shariah-compliancy based on AAOIFI standards. However, this would not be a complete substitute for literacy in Islamic law, as the AAOIFI standards "do not provide 'secondary rules' for unforeseen circumstances or non-performance of either party to the transaction."[206]

IV. CONCLUSION

The rapid growth of Islamic finance will require the international legal system to develop an understanding of the foundations of Shariah-compliant business transactions. Judges in countries that do not have a history of dealing with Islamic law must compare the case before them to the general practice of the Islamic financial sector in order to accurately judge the commercial purpose of Shariah-compliant business.

The rules of specialized forums for Islamic finance indicate that statements that give legal effect to Islamic law are more than mere statements of purpose, and such contracts should only be enforceable insofar as they are consistent with Shariah. Reference to both Islamic and a national law together need not violate the principle that there cannot be more than one law that governs a contract. Contracts themselves contain rules other than the law to which the parties bind themselves. Reference to Shariah is similar, and it is necessary in order to codify the parties'

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202. *See AAOIFI Key Publications*, ACCOUNTING & AUDITING ORG. FOR ISLAMIC FIN. INST., http://www.aaoifi.com/keypublications.html (last visited Mar. 9, 2011) (providing a list of relevant publications).

203. BÄLZ, *supra* note 40, at 13–14.

204. Muddassir Siddiqui, *Guest Analysis: A Brief Examination of AAOIFI's New Standards*, WESTLAW BUSINESS CURRENTS (July 27, 2010), http://currents.westlawbusiness.com/Articles/PDF/A%20Brief%20Examination%20of%20AAOIFI%E2%80%99s%20New%20Standards.pdf (summarizing the AAOIFI arbitration standards).

205. *See generally* Bill Maurer, *Anthropological and Accounting Knowledge in Islamic Banking and Finance: Rethinking Critical Accounts*, 8 J. ROYAL ANTHROPOLOGICAL INST. 645 (2002), *available at* http://www.anthro.uci.edu/faculty_bios/maurer/Maurer-JRAI.pdf (discussing the role of the AAOIFI standards in the larger context of Islamic accounting standards); Oxford Analytica, *International Islamic Finance Moves Toward Common Standards*, FORBES.COM (Mar. 9, 2010), http://www.forbes.com/2010/03/08/islam-finance-sharia-business-oxford-analytica.html (describing the breadth and applicability of the AAOIFI standards).

206. BÄLZ, *supra* note 40, at 14.

intentions without bargaining for every unforeseen contingency, which would be unfavorable to industry growth.

Courts in countries that are not legally influenced by Islamic law have had success in judging Shariah issues through the use of experts. Parties continue to request that Shariah-based laws be adjudicated in non-Islamic courts despite the concerns the court in *Shamil Bank* had expressed. Unfortunately, due to the precedent that it creates, a decision in a common law court that does not reference Islamic law risks defining for decades the extent of a Shariah-compliant product while never endeavoring to discover that transaction's basis in Shariah.

Parties who are more comfortable with U.K. or U.S. laws will find a friendlier environment in the several arbitral tribunals that specialize in Islamic finance. Arbitration is preferred in the international business world, but domestic parties may lack the means to exploit such institutions. Consequently, domestic parties may prefer to incorporate the standards published by the AAOIFI or another institution that publishes standards on Shariah-compliant transactions.

TILJ